No. _____

In the Supreme Court of the United States

BRIAN FOSTER, PETITIONER,

v.

ROBERT L. TATUM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court's caselaw "clearly establish[ ]," 28 U.S.C. § 2254(d), that a defendant's waiver of counsel is "knowing and voluntary" even if the trial court finds that the defendant does not, in fact, understand the difficulties of self-representation?

2. Does this Court's caselaw "clearly establish[ ]," *id.* § 2254(d), that a trial court must grant a defendant's request to represent himself at trial even if the defendant cannot carry out this representation "competently"?

PARTIES TO THE PROCEEDING

Petitioner is Brian Foster, in his official capacity as Warden of Waupun Correctional Institution, who replaced Gary A. Boughton, in his official capacity as Warden of the Wisconsin Secure Program Facility, as appellee in the proceedings below. Gary A. Boughton replaced Michael Meisner, in his official capacity as Warden of Columbia Correctional Institution, who was the defendant in the proceedings below.

Respondent Robert L. Tatum was the plaintiff and appellant in the proceedings below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

A request by a criminal defendant to represent himself at trial places the trial court in a difficult quandary. If it grants the request and the jury convicts the defendant, the defendant can appeal on the ground that the court improperly allowed him to waive his Sixth Amendment right to counsel. On the other hand, if the court denies the request and the defendant is convicted, the defendant can also appeal, arguing that the court improperly denied him his right to self-representation.

The Wisconsin Supreme Court has addressed this dilemma in two separate ways. Under this Court's caselaw, trial courts conduct two separate inquires when a defendant seeks to waive his right to counsel: (1) deciding whether the waiver is "knowing and voluntary"; and (2) determining whether the defendant is competent to represent himself at trial. With regard to the knowing-and-voluntary-waiver inquiry, the Wisconsin Supreme Court has held that the trial court must engage the defendant in a colloquy to determine, among other things, whether the defendant *actually* understands the "difficulties and disadvantages of self-representation." *See Wisconsin v. Imani*, 786 N.W.2d 40, 52 (Wis. 2010). If the court finds that the defendant does not, in fact, understand these difficulties, the defendant has not validly waived his right to counsel. *Id.* This is consistent with this Court's admonition that a trial court must

"determine whether the defendant *actually does* understand the significance and consequences" of his choice. *Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993) (first emphasis added). And with regard to the separate inquiry into whether the defendant is competent to represent himself at trial, the Wisconsin Supreme Court adopted a heightened competency standard, *see Imani*, 786 N.W.2d at 53–54, which considers, *inter alia*, "the defendant's education, literacy, fluency in English, and any [debilitating] physical or psychological disability," *id.* (citation omitted). This competence analysis is the kind of standard that this Court explicitly permitted States to adopt in *Indiana v. Edwards*, 554 U.S. 164 (2008).

The Seventh Circuit, through its decisions in the present case and in *Imani v. Pollard*, 826 F.3d 939 (7th Cir. 2016)—which the panel here relied upon heavily and incorporated by reference—has now held that the Wisconsin Supreme Court's approach to these two inquiries is not only wrong, but so flawed as to be invalid under AEDPA's deferential standards. The Seventh Circuit held that Wisconsin may not require trial courts to satisfy themselves that a defendant's waiver is actually "knowing and voluntary" before allowing him to waive his right to counsel. App. 21a, 22a.[1] The Seventh Circuit also held that

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[1] Citations to Petitioner's Appendix appear as "App. (page number)." Citations to the Seventh Circuit's docket appear as "R. (docket number):(page number)." Citations to the district court's docket appear as "Dkt. (docket number):(page number)."

Wisconsin courts may not take additional factors, such as a defendant's education, into account when determining whether a defendant is competent to represent himself at trial; the courts may look only to a defendant's "mental functioning." App. 22a.

This has thrown Wisconsin trial courts on the horns of an impossible and quite serious dilemma. If they follow the guidance of the Wisconsin Supreme Court, as they are duty-bound to do under controlling Wisconsin law, the Seventh Circuit has made unmistakably clear in this case and in *Imani* that it will vacate any subsequent convictions on federal habeas review. On the other hand, if they flout Wisconsin precedent and follow the Seventh Circuit's holdings, and thereby permit defendants to waive their right to counsel when that would be impermissible under Wisconsin caselaw, any subsequent convictions will be overturned by Wisconsin appellate courts. And while the Wisconsin Supreme Court could attempt to solve this problem by abandoning its approaches to waiver and competence in the self-representation context, there is no reason to think that it will. Nor should it have to do so: Wisconsin's approach is entirely consistent with this Court's caselaw and the approaches adopted by courts around the country.

Unless this Court intervenes, this recent breakdown of the federal–state criminal justice system in Wisconsin will persist. This Court should grant the Petition as to both Questions Presented, and should reverse.

OPINIONS BELOW

The opinion of the Seventh Circuit, Appendix A, is reported as *Tatum v. Foster,* 847 F.3d 459 (7th Cir. 2017). The Decision and Order of the District Court, Appendix B, is unreported, but is electronically available at 2014 WL 4748901. The decision of the Wisconsin Court of Appeals, Appendix D, is an unpublished disposition, but is electronically available at 2013 WL 322647. The trial court's pretrial oral decision denying waiver of counsel, Appendix E, is unreported.

JURISDICTION

The Seventh Circuit entered its judgment on January 31, 2017. Appendix A; R. 79. The Seventh Circuit entered its order denying Respondent's Petition for Rehearing on March 1, 2017. Appendix F. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides, at § 2254 of Title 28 of the United States Code, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

STATEMENT

A. On May 27, 2010, the State charged Respondent Robert Tatum with two counts of first-degree intentional homicide for shooting and killing two of his roommates. App. 33a. A resident of the home stated that, before the murders took place, one of the roommates had evicted Respondent. App. 33a. Police arrested Respondent after an eyewitness report placed Respondent and his car at the home at the time of the homicides. App. 33a, 35a–36a.

On January 18, 2011, Attorney Dianne Erickson, Respondent's third-appointed public defense attorney,[2] requested an evaluation to determine whether Respondent was competent to stand trial. App. 4a. Dr. Deborah Collins from the Wisconsin Department of Health Services conducted this evaluation. Dkt. 15-16:72–77. In her report, she described Respondent as having "paranoid" ideas that his attorney "was colluding with the prosecutor and attempting to 'filibuster' his case" and that his lawyer had an "ulterior motive" to get him convicted. Dkt. 15-16:75. While Respondent appeared to grasp the nature of the charges, "his remarks raise[d] concerns about his present capacity to rationally appreciate the allegations and reply to them accordingly." Dkt. 15-16:76. Dr. Collins also remained concerned about Respondent's "capacity to use factual knowledge in service of assuming the role of defendant." Dkt. 15-16:76. Dr. Collins did not form an ultimate opinion as to Respondent's competence to stand trial, and suggested that he be evaluated in a mental health facility for a longer period of time. Dkt. 15-16:77. Consistent

[2] On July 12, 2010, Respondent's initial counsel moved to withdraw because Respondent "distrust[ed] him and desire[d] a private attorney not employed by the State"; and because counsel felt he "must ethically withdraw due to [certain] allegations and their implications." Dkt. 15-16:29. On August 12, 2010, the trial court granted the motion and assigned Respondent a new attorney. App. 3a. Respondent's second attorney moved to withdraw after Respondent shared confidential information with his mother, who was a material witness, compromising the defense. App. 3a.

with Dr. Collins' recommendation, the trial court ordered that Respondent be taken to a state mental health facility for a 30-day inpatient evaluation. Dkt. 15-17:39–42.

During this second evaluation, Dr. Laurence Trueman found Respondent competent to stand trial. Dkt. 15-16:83–84. Dr. Trueman observed Respondent to be "cooperative but more difficult than the average patient." Dkt. 15-16:82. Although able to understand legal proceedings and to assist his lawyer, Respondent's "behavior when confronted by a perceived violation of his rights has been predictably hostile and demanding. This is unlikely to change." Dkt. 15-16:83. In his report, Dr. Trueman included the findings of Dr. Schultz, who also examined Respondent, stating that his "suggested" diagnoses included "Bipolar Disorder (Manic Depression), Adjustment Disorder, and Personality Disorder Not Otherwise Specified with Narcissistic features." Dkt. 15-16:81.

On February 24, 2011, the trial court held a hearing to decide whether Respondent was competent to stand trial. App. 47a. The court ultimately concluded that Respondent was, indeed, competent to stand trial. App. 53a. During the hearing, Respondent asked the trial court to dismiss Attorney Erickson, his third court-appointed attorney, for questioning his competence. App. 50a, 53a, 60a. Respondent also stated that he believed that Attorney Erickson and her investigator were not investigating his case in ac-

cordance with his standards, forcing him to investigate on his own. App. 54a–55a. Respondent also voiced his belief that Attorney Erickson was working with the district attorney to conspire against him and that she had disclosed "privileged information" to the prosecutor. App. 58a. Attorney Erickson explained that Respondent was "convinced" that she had falsified records and given those records to the district attorney, which caused her to question Respondent's competence. App. 59a–60a.

The trial court found that there was "a total breakdown of communication" between Attorney Erickson and Respondent, and asked Respondent if he would like a new lawyer or to represent himself. App. 59a–60a. When Respondent replied that he wanted to represent himself, App. 60a, the court engaged Respondent in a colloquy, as required by Wisconsin law, to determine whether Respondent's waiver of counsel was knowing and voluntary. This inquiry requires the trial court to decide whether a defendant had: "(1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him." *Wisconsin v. Klessig*, 564 N.W.2d 716, 721 (Wis. 1997); *see* App. 62a–67a. The trial court here asked Respondent about his "educational background," his knowledge of trial proceedings, what kind of difficulties he would face in

representing himself, especially given that he was incarcerated, and his knowledge of the charges against him and possible penalties. App. 60a–65a.

Through the colloquy, Respondent demonstrated that he did not understand the difficulties of self-representation. *See* App. 65a. Although Respondent showed a rudimentary knowledge of trial proceedings, such as voir dire and opening statements, App. 62a–63a, Respondent conveyed that he believed that the only difficulties he would face in representing himself in a double murder trial would be "[m]ainly the impairment based on the jail circumstances as far as them not providing me with reasonable access to the courts and legal materials." App. 63a–64a. He believed that he could conduct all of the necessary preparation for trial "if I had reasonable . . . access to the telephone, if I was forced to have court resources then I would be able to facilitate those things a lot better as far as presently." App. 64a. Respondent insisted that he "obtained enough evidence to move forward and proceed with [the] case as it is as long as things are fair and unbiased." App. 64a.

Upon completion of the colloquy, the trial court denied Respondent's waiver of counsel, finding that he had not knowingly and intelligently waived his right to counsel. Although Respondent had made a volitional choice to proceed without counsel and was aware of the seriousness of the charges and penalties that may be imposed, he did not understand the diffi-

culties and disadvantages of self-representation, "especially given his circumstances" of incarceration, "and given the fact that he's only got a tenth-grade education." App. 65a.

Respondent refused to state whether he wanted to retain Attorney Erickson or be appointed another lawyer, so the trial court retained Erickson as appointed counsel. App. 66a–67a. After the trial, the jury found Respondent guilty of both counts of first-degree intentional homicide. App. 10a. Respondent was sentenced to life in prison without the possibility of release to extended supervision. App. 36a.

B. On January 29, 2013, the Wisconsin Court of Appeals held that the trial court had correctly concluded that Respondent did not knowingly waive his right to counsel, agreeing that Respondent "did not demonstrate a proper understanding of the challenges and potential consequences of proceeding *pro se*." App. 39a–40a. The court reached this conclusion based on the fact that Respondent "believed that the trial court had the authority to order that he be 'forced to have court resources,'" such that he could undertake preparing a double-homicide defense from custody. App. 39a. This and other comments by Respondent, the Court of Appeals opined, "reflect[ed] his limited understanding of the scope of a proper investigation for the defense of homicide charges." App. 39a. Additionally, Respondent's "behavior," including

frequent outbursts and interruptions during hearings, showed that he "did not understand courtroom decorum and legal technicalities." App. 40a.

The Court of Appeals also rejected Respondent's argument that, because he was found competent to stand trial, the trial court could not deny his waiver of counsel. App. 38a–39a. The court explained that, in Wisconsin, the standard for competence to represent oneself is higher than the standard for competence to stand trial with counsel. App. 38a. Under Wisconsin's self-representation-competency standard, trial courts look to many factors, including "the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." *Klessig*, 564 N.W.2d at 724 (citation omitted). Having determined that Respondent had not knowingly waived his right to counsel, the Court of Appeals had no occasion to reach the question of whether Respondent was competent to represent himself at trial under this "higher" standard in Wisconsin.

On August 1, 2013, the Wisconsin Supreme Court denied Respondent's petition for review. Appendix C.

C. Respondent filed *pro se* a petition for writ of habeas corpus in the United States District Court for the Eastern District of Wisconsin, raising a number of claims, including a claim of wrongful denial of his right to self-representation. Dkt. 1. The district court

dismissed the petition, ruling that Respondent failed to establish the Wisconsin Court of Appeals acted contrary to or unreasonably applied clearly established federal law under AEDPA. Appendix B.

D. On January 31, 2017, the Seventh Circuit reversed and ordered the district court to grant Respondent's habeas petition. Appendix A.

With regard to Respondent's knowing and voluntary waiver of his right to counsel, which was the basis for the state court's decision in this case, the Seventh Circuit held that the Wisconsin Court of Appeals violated "clearly established law" under AEDPA. This holding was consistent with the Seventh Circuit's recent decision in *Imani v. Pollard*, 826 F.3d 939 (7th Cir. 2016), a case under AEDPA holding that the Wisconsin Supreme Court's rule requiring the trial court to assure itself that the defendant actually understands, *inter alia*, the "difficulties and disadvantages of self-representation," *Imani*, 786 N.W.2d at 52, was contrary to this Court's decision in *Faretta v. California*, 422 U.S. 806 (1975), because it imposed a "burden on the accused," *Imani*, 826 F.3d at 944–45. Applying its *Imani* decision to the present case, the Seventh Circuit held that the Wisconsin Court of Appeals had violated clearly established law by "plac[ing] the burden on [Respondent] to convince [the trial court] that he understood, and accepted, the challenges of self-representation." App. 20a. Further, the Seventh Circuit held that the state courts' comments on Respondent's "limited understanding of

the scope of a proper investigation for the defense of homicide charges" and his failure "to appreciate courtroom decorum and legal technicalities," were "inconsistent with *Faretta*'s prohibition against resting the determination about the knowing and intelligent nature of the defendant's choice on his technical legal knowledge." App. 21a–22a (citation omitted).

Although the state courts did not decide whether Respondent was competent to represent himself at trial under Wisconsin's heightened self-representation-competency standard, the Seventh Circuit held that applying this heightened standard would not be permissible, even under AEDPA's deferential standards of review. App. 22a. The Seventh Circuit's decision to enter a holding on this issue stemmed from its apparent belief that the state courts had adjudicated the issue of Respondent's competence to represent himself, App. 22a, even though they had not, *see* App. 38a–40a. In any event, the Seventh Circuit unambiguously held that this Court's caselaw limits any competence-to-self-representation standard to questions relating to the defendant's "mental functioning," whereas the Wisconsin standard looks to other considerations as well. App. 13a, 18a.

E. On May 22, 2017, the Seventh Circuit issued an order recalling the mandate and staying this case, pending the disposition of the present Petition. R. 87.

REASONS FOR GRANTING THE PETITION

The Sixth Amendment guarantees criminal defendants the right to counsel at "all critical stages of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 81 (2004). While the right to counsel can be waived in appropriate circumstances, *see Faretta*, 422 U.S. at 835, there is a strong presumption against waiver, especially at the trial stage of the criminal process, *see Patterson v. Illinois*, 487 U.S. 285, 298 (1988).

Before a criminal defendant may constitutionally represent himself, he must make a "knowing, intelligent, and voluntary" waiver of his right to counsel *and* be competent to represent himself. *Tovar*, 541 U.S. at 88; *Edwards*, 554 U.S. at 174–78. These two requirements look to two different considerations: (1) whether the defendant "*actually does* understand the significance and consequences [of his] decision" to waive his right to counsel, *Godinez*, 509 U.S. at 401 n.12 (first emphasis added), and (2) "whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so," *Edwards*, 554 U.S. at 177–78. As to the first determination, the Wisconsin Supreme Court requires trial courts to engage in a colloquy with the defendant and conclude that the defendant is, among other things, actually "aware of the difficulties and disadvantages of self-representation." *Imani*, 786 N.W.2d at 49–50 (citation omitted). With regard to competence, the Wisconsin Supreme Court has held that a defendant who wishes to represent

himself at trial must meet a higher competency standard than competence to stand trial, and that, in making this determination, the trial court should take into account multiple factors, including the defendant's "education, literacy, language fluency, and any physical or psychological disability which may significantly affect his ability to present a defense." *Id.* at 53 (citing *Pickens v. Wisconsin*, 292 N.W.2d 601, 611 (Wis. 1980)).

The Seventh Circuit has now rejected the Wisconsin Supreme Court's approach to both of these inquires, and has held that Wisconsin's highest court's tests are so wrong that they violate this Court's clearly established law, under AEDPA's deferential standards. The Seventh Circuit's position conflicts not only with the Wisconsin Supreme Court, but with federal courts of appeals and state supreme courts around the country. In adopting this erroneous legal interpretation of this Court's caselaw and declaring it "clearly established" under AEDPA, the Seventh Circuit has also placed Wisconsin courts in an impossible position, with no way to rule on many defendants' waivers of counsel without courting reversal by either state appellate courts (for violating the Wisconsin Supreme Court's standards) or federal courts on AEDPA review (under the Seventh Circuit's approach).

I. The Seventh Circuit Created A Division Of Authority By Holding That It Was "Clearly Established" That A Defendant's Waiver Of Counsel Can Be "Knowing And Voluntary" Even If A Defendant Does Not, In Fact, Understand The Difficulties Of Self-Representation

A. Any waiver of the right to counsel "must . . . constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (citation omitted). The right to counsel "invokes, of itself, the protection of a trial court," "impos[ing] the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). "The purpose of the 'knowing and voluntary' inquiry . . . is to determine whether the defendant *actually does* understand the significance and consequences" of self-representation. *Godinez*, 509 U.S. at 401 n.12 (first emphasis added).

B. The Wisconsin Supreme Court has held that a trial court should not permit a waiver of the right to counsel if the court finds that the defendant does not, in fact, understand the difficulties of self-representation.

Before a Wisconsin criminal defendant may waive his right to counsel, the trial court must engage in a colloquy to ensure that the waiver is knowing and voluntary. *Klessig*, 564 N.W. 2d at 721. In particular, the trial court must find that the defendant: "(1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him." *Imani*, 786 N.W.2d at 49–50 (citation omitted). If the court concludes that the defendant does not understand any of these four lines of inquiry, then the court "is required to deny the defendant's waiver of counsel." *Id.* at 52 & n.11.

The Wisconsin Supreme Court's decision in *Imani* and the state courts' rulings in this case illustrate the proper application of this approach. In *Imani*, the trial court "found that Imani did not meet the four conditions required . . . in order to validly waive his right to counsel." *Imani*, 786 N.W.2d at 50. The Wisconsin Supreme Court upheld this conclusion, explaining that Imani was "unaware of the difficulties and disadvantages of self-representation," because, *inter alia*, his requests to waive counsel were conditioned on his erroneous belief that he would retain assistance from his counsel if any issues arose. *Id.* at 52. Similarly, in this case, the Wisconsin Court of Appeals upheld the trial court's conclusion that Respondent was not "aware of the difficulties and disadvantages of self-representation" in a double-

homicide trial. App. 38a–40a. As the Wisconsin Court of Appeals explained, Respondent "did not demonstrate a proper understanding of the challenges and potential consequences of proceeding *pro se*," as indicated by his "belie[f] that the trial court had the authority to order that he be 'forced to have court resources,'" and his "behavior," including frequent outbursts and interruptions during hearings. App. 39a–40a.

C. Federal courts of appeals and state supreme courts around the country have similarly held that a trial court should deny a waiver of the right to counsel where it concludes that the defendant does not, in fact, understand the difficulties of self-representation.

Professor LaFave summarized this consensus approach: a trial court has "authority" "to refuse to permit self-representation when, despite its efforts to explain the consequences of waiver, defendant is unable to reach the level of appreciation needed for a knowing and intelligent waiver." LaFave, et al., *Grounds for denial*, 3 Crim. Proc. § 11.5(d) (4th ed.). Federal courts of appeals follow this rule. *See, e.g.*, *United States v. Peppers*, 302 F.3d 120, 130–32 (3d Cir. 2002) (trial court "must inquire thoroughly to satisfy itself that the defendant understands . . . technical problems that the defendant may encounter, and any other facts important to a general understanding of the risks involved"); *United States v.*

Ductan, 800 F.3d 642, 649 (4th Cir. 2015) ("before allowing a defendant to represent himself, a district court must find that the defendant[ ] . . . understand[s] the advantages and disadvantages of self-representation"); *Miller v. Thaler*, 714 F.3d 897, 903 (5th Cir. 2013) (the trial court "must be satisfied" that the defendant understands "the practical meaning of the right he is waiving" (citation omitted)). State courts are in accord. *See Idaho v. Anderson*, 170 P.3d 886, 889 (Idaho 2007) (trial court "must be satisfied that the defendant understood the inherent risks involved in waiving the right to counsel" (citation omitted)); *North Carolina v. Lane*, 707 S.E.2d 210, 219 (N.C. 2011) (trial court "may grant [a] motion to proceed *pro se* . . . if and only if the trial court is satisfied that [the defendant] has knowingly and voluntarily waived his [ ] right to assistance of counsel"); *New Jersey v. Reddish*, 859 A.2d 1173, 1197 (N.J. 2004) ("trial court must question defendant to ascertain whether he actually understands the nature and consequences of his waiver"); *New York v. Smith*, 705 N.E.2d 1205, 1207 (N.Y. 1998) ("the trial courts should undertake a sufficiently searching inquiry in order to be reasonably certain that a defendant appreciates the dangers and disadvantages of giving up the fundamental right to counsel").

Notably, in conducting this inquiry, both federal courts of appeals and state supreme courts look to factors such as the defendant's education and practical understanding of the legal issues at stake, just as the Wisconsin Court of Appeals did in this case. App.

38a–40a; *see, e.g.*, *United States v. Singleton*, 107 F.3d 1091, 1098 (4th Cir. 1997) ("background capabilities"); *United States v. Stanley*, 739 F.3d 633, 645–46 (11th Cir. 2014) ("age, educational background, and physical and mental health"; "knowledge of the nature of the charges, possible defenses, and penalties'"; "understanding of rules of procedure, evidence and courtroom decorum"; "experience in criminal trials"); *Anderson*, 170 P.3d at 889 ("age, education, and familiarity with the English language and the complexity of the crime involved" (citation omitted)); *Smith*, 705 N.E.2d at 1208 ("age, education, occupation, previous exposure to legal procedures").

And while most courts, in practice, do not set a high bar for finding that a defendant has sufficient understanding of the difficulties of self-representation, LaFave, *supra*, at §11.5(d), this does not change the *legal* point that trial courts have the "authority" to both "make this inquiry" and to deny waivers of counsel when the "defendant is unable to reach the [requisite] level of appreciation," *id.*

D. In *Imani* and the present case, the Seventh Circuit not only rejected the consensus approach to waivers of counsel discussed above, but held that the approach is so wrong that it violates this Court's "clearly established" law under AEDPA. 28 U.S.C. § 2254(d). This has created a division of authority, with the Seventh Circuit taking one view, and other federal courts of appeals and state supreme courts

across the country (including the Wisconsin Supreme Court) taking the other.

In *Imani*, 826 F.3d 939, the Seventh Circuit overruled the Wisconsin Supreme Court's approach of requiring a trial court to decline a waiver of counsel if the court concludes that the defendant does not understand "the difficulties and disadvantages of self-representation." *Imani*, 786 N.W.2d at 50. The Seventh Circuit held that Wisconsin's approach, reaffirmed by the Wisconsin Supreme Court's opinion at issue in that case, is wrong because "the imperative of a knowing and voluntary choice . . . is not a condition that must be fulfilled before an accused may be 'allowed' to exercise his Sixth Amendment right to represent himself." 826 F.3d at 944. The Seventh Circuit believed that this followed from this Court's decision in *Faretta*, which the Seventh Circuit thought imposes a "duty" on trial courts "to warn a defendant about what he is getting himself into." *Id.* The Wisconsin courts, the Seventh Circuit held, had improperly "transformed the requirement of knowing and voluntary waiver from a duty of the trial judge into a burden on the accused." *Id.* at 944–45.

In the present case, the Seventh Circuit applied and then expanded its *Imani* decision. Citing its decision in *Imani*, the Seventh Circuit held that the state courts erred by "inappropriately plac[ing] the burden on [Respondent] to convince it that he understood, and accepted, the challenges of self-representation." App. 20a. The Seventh Circuit held that

Wisconsin's rule requiring the trial court to assure itself that the defendant understands the difficulties of self-representation is contrary to *Faretta*. App. 20a. The Seventh Circuit explained that the state courts' "concern that [Respondent's] statements in court 'reflect[ed] his limited understanding of the scope of a proper investigation for the defense of homicide charges,'" and "comment that [Respondent] failed to appreciate 'courtroom decorum and legal technicalities'" were inquiries into Respondent's "technical legal knowledge," "inconsistent with *Faretta*[ ]." App. 21a–22a.

E. In *Faretta*, this Court held that a criminal defendant has a right to self-representation, while also explaining that any waiver of the right to counsel must be "knowingly and intelligently" made. 422 U.S. at 835. The Seventh Circuit held that two aspects of *Faretta* "clearly" prohibit a trial court from denying a waiver-of-counsel request based upon its conclusion that a defendant does not understand the consequences of self-representation. The Seventh Circuit is wrong on both points.

First, the Seventh Circuit held that *Faretta*'s alleged imposition of a "duty" on trial courts "to warn a defendant" about the consequences of self-representation precluded a trial court from deciding that the defendant does not, in fact, understand the consequences of self-representation. *See Imani*, 826 F.3d at 944. In the Seventh Circuit's view, "the duty on the trial court [is] to warn the defendant about

what he is getting into, and then leave the defendant free to decide how he wants to proceed." App. 20a (citing *Faretta*, 422 U.S. at 834, and *Imani*, 826 F.3d at 944). But nothing about the trial court's alleged duty to inform the defendant (if such a duty exists at all, *but see Tovar*, 541 U.S. at 92–93), "clearly" prohibits the trial court from *also* deciding that the defendant does not actually understand the consequences of waiver, rendering any waiver not knowing and voluntary. As this Court in *Godinez* explained, "[t]he purpose of the 'knowing and voluntary' *inquiry* . . . is to determine whether the defendant *actually does* understand the significance and consequences of [his] decision." 509 U.S. at 401 n.12 (first and second emphases added).

The Seventh Circuit was similarly wrong to conclude that *Faretta*'s prohibition against denying a waiver of counsel based upon the defendant's lack of "technical legal knowledge" prohibits the approach of the Wisconsin Court of Appeals in this case, including its consideration of Respondent's "understanding of the scope of a proper investigation for the defense of homicide charges" or his "appreciat[ion] [of] courtroom decorum and legal technicalities." App. 21a–22a. In *Faretta*, this Court explained that the defendant's "technical legal knowledge" regarding "the intricacies of the hearsay rule and . . . challenges of potential jurors on voir dire" were "not relevant to an assessment of his knowing exercise of the right to defend himself." 422 U.S. at 835–36. But understanding the scope of the difficulties of investigating a

defense in a double-homicide case and appreciating basic rules of court decorum are not "technical legal knowledge," as *Faretta* used that phrase. Rather, they are precisely the sorts of non-technical factors that federal courts of appeals and state supreme courts look to in determining whether a defendant's waiver of counsel was knowing and voluntary. *See supra* pp. 19–20. At the very least, *Faretta*'s use of the term "technical legal knowledge" is unclear as to the propriety of these sorts of considerations, making relief under AEDPA impermissible. *See Carey v. Musladin*, 549 U.S. 70, 77 (2006).

II. The Seventh Circuit Created A Division Of Authority When It Held That It Was "Clearly Established" That A Trial Court Must Grant A Defendant's Request To Represent Himself Even If The Defendant Cannot Do So "Competently"

A. In order to be permitted to waive trial counsel, a defendant must be competent to represent himself at trial. *Edwards*, 554 U.S. at 174–78. In *Godinez*, this Court held that a defendant who was competent merely to stand trial was also competent to plead guilty *pro se*. 509 U.S. at 397–402. Then, in *Edwards*, this Court held that States have the *option* to hold defendants to a higher competency standard when they wish to represent themselves at trial, which standard could be more demanding than the inquiry into whether the defendant is competent to stand trial. 554 U.S. at 174–78. After all, conducting one's own

trial "presents a very different set of circumstances" than simply assisting one's counsel in preparing a defense, and thus "calls for a different [competency] standard." *Id.* at 174–75. Permitting a defendant who is not competent to conduct his own trial to proceed *pro se* may "threaten[ ] an improper conviction or sentence" and thereby "undercut[ ] the most basic of the Constitution's criminal law objectives, providing a fair trial." *Id.* at 176–77.

B. Decades before *Edwards*, the Wisconsin Supreme Court held that the competence standards to stand trial and to represent oneself are "not the same." *Pickens*, 292 N.W.2d at 610. The court reached this conclusion for many of the same reasons that this Court articulated in *Edwards*. For example, being competent to stand trial, on the one hand, and being competent to represent oneself, on the other, are different because "more is required [of a defendant] where [he] is to actually conduct his own defense" than when he "merely assist[s] in it." *Id.* at 610–11. Additionally, "[n]either the state, nor the defendant, is in any sense served when a wrongful conviction is easily obtained as a result of an incompetent defendant's attempt to defend himself." *Id.* at 611.

Under this long-standing rule, the Wisconsin Supreme Court permits trial courts to consider more than a defendant's mental functioning in making a self-representation-competency determination, including looking to "the defendant's education, literacy, fluency in English, and any physical or

psychological disability which may significantly affect his ability to communicate a possible defense to a jury." *Pickens*, 292 N.W.2d at 611. For example, *Wisconsin v. Marquardt*, 705 N.W.2d 878 (Wis. 2005), held that the defendant's lack of legal knowledge and education, combined with his paranoid delusions that "everything that's going on around him is part of a plot to frame him," rendered him unable "to make any sense out of the charges and to put the state to its burden of proof," and thus not competent to "meaningfully present[ ] his own defense." *Id.* at 892–93.

In this case, the state courts did not make a self-representation-competency determination under Wisconsin's standards, finding instead that Respondent had failed to make a knowing and voluntary waiver of counsel. *See supra* p. 11. However, the Seventh Circuit specifically held that Wisconsin's heightened self-representation-competency standard violates this Court's clearly established law, App. 22a, meaning that applying this standard will not be available to the state courts on remand. If the trial court had been permitted to evaluate Respondent's competence to proceed *pro se* under Wisconsin's rule, the court could well have found him incompetent to represent himself. For example, Respondent had "paranoid" ideas regarding his multiple appointed attorneys and the prosecutor, which raised concern with the evaluating doctors regarding the presence of underlying "psychotic beliefs or thought processes," Dkt. 15-16:76, and he exhibited "hostile" "behavior when confronted by a perceived violation of his rights," Dkt. 15-16:83.

He also had only a tenth-grade education. App. 59a, 63a.

C. Like Wisconsin, many States have taken up this Court's invitation in *Edwards* to continue, or to adopt anew, heightened standards for self-representation competency. *See* E. Lea Johnston, *Communication and Competence for Self-Representation*, 84 Fordham L. Rev. 2121, 2127–28 (2016) (referencing a 50-state survey). For example, the Alaska Supreme Court has long applied a standard to representational competency under which trial courts must decide whether the defendant is "capable of presenting his [case] in a rational and coherent manner." *McCracken v. Alaska*, 518 P.2d 85, 91 (Alaska 1974). Alaska courts have held that this standard is lawful under *Edwards*. *See Falcone v. Alaska*, 227 P.3d 469, 473 (Alaska Ct. App. 2010). Other States have similarly taken advantage of the leeway that *Edwards* affords, applying often varying heightened standards to self-representation competency. *See, e.g.*, *California v. Johnson*, 267 P.3d 1125, 1131–32 (Cal. 2012); *Connecticut v. Connor*, 973 A.2d 627, 654–57 & n.32 (Conn. 2009); *Nebraska v. Lewis*, 785 N.W.2d 834, 840 (Neb. 2010); *Edwards v. Indiana*, 902 N.E.2d 821, 824 (Ind. 2009); *Hernandez-Alberto v. Florida*, 126 So. 3d 193, 208–09 (Fla. 2013); *Missouri v. Baumruk*, 280 S.W.3d 600, 610–11 (Mo. 2009); *but see South Carolina v. Barnes*, 753 S.E.2d 545, 549–50 (S.C. 2014) (declining to adopt a heightened self-representation-competency standard after *Edwards*).

In all, since *Edwards*, States "have adopted differing and often vague standards for representational competence," leading to a "patchwork of competency standards." Johnston, *supra*, at 2127; *accord* LaFave, *supra*, at §11.5(d). Given the leeway that *Edwards* held that States have in this area, these differences among States are not necessarily problematic.

D. So far as Petitioner has been able to determine, the Seventh Circuit—in this case and in *Imani*—is the only federal court of appeals to have held that *any* of the States' varying post-*Edwards* heightened competency standards violates this Court's "clearly established law." In *Imani*, for example, the Seventh Circuit held that the Wisconsin Supreme Court "raised the standard for competence so high that its decision was simply contrary to *Faretta*." 826 F.3d at 946. Similarly, in this case, the Seventh Circuit held that *Edwards* limits trial courts to consideration only of a defendant's "mental functioning," meaning that Wisconsin's broader approach would be contrary to this Court's caselaw. App. 22a.

E. The Seventh Circuit was wrong to hold that the Wisconsin Supreme Court's approach to representational competency is "clearly" contrary to this Court's caselaw for going beyond considerations of the defendant's "mental functioning." App. 22a.

Again, the critical case is this Court's decision in *Edwards*. *Edwards* arose after the Indiana Supreme Court considered itself bound by this Court's decision

in *Godinez* to allow self-representation at trial by a defendant who, although competent to stand trial, appeared to be psychologically incapable of presenting his own defense. 554 U.S. at 167–69. This Court held that Indiana courts could, at their option, prevent this defendant from waiving his right to counsel if those courts found that he lacked "mental capacity to conduct his trial defense" without a lawyer. *Id.* at 174. In reaching this holding, this Court explained that a heightened competency standard was permissible (although not mandatory) because a State could reasonably conclude that "the right to self-representation at trial will not 'affirm the dignity'" of a defendant who could not competently represent himself and could thereby "threaten[ ] an improper conviction or sentence." *Id.* at 176–77. In all, States have the authority to permit their trial courts to take a "realistic account of the particular defendant's mental capacities," in deciding issues of self-representation at trial. *Id.* at 177.

This proper understanding of *Edwards* demonstrates that the Seventh Circuit was wrong to hold that Wisconsin could not adopt a heightened self-representation-competency standard that went beyond looking to the defendant's "mental functioning." App. 22a. Under *Edwards*, States have the authority to craft rules for self-representation competency that take into "realistic account" all of the factors that go into "mental competency" for self-representation. 554 U.S. at 176–77. Put another way, the concerns that

this Court highlighted in *Edwards*—including "affirm[ing] the dignity" of the defendant and avoiding the "threat[ ] [of] an improper conviction or sentence"—are not limited to the Seventh Circuit's narrow conception of the defendant's "mental functioning." The Wisconsin Supreme Court's instruction to trial courts to take into account "the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to a jury," *Pickens*, 292 N.W. 2d at 611, is entirely consistent with *Edwards*' permissive framework. At the very minimum, Wisconsin's approach is not "clearly" foreclosed by *Edwards*, meaning that it may not be invalidated under AEDPA's deferential standards. *See Edwards*, 554 U.S. at 189 (Scalia, J., dissenting) (explaining that the majority's decision on the boundaries of its holding is "extraordinarily vague").

III. Review Of Both Questions Presented Is Necessary To Avoid Placing Wisconsin Trial Courts In An Impossible Position

Wisconsin courts are required to follow the Wisconsin Supreme Court's precedents on issues of federal law unless this Court has spoken to the contrary. *See Wisconsin v. Ward*, 604 N.W.2d 517, 525 (Wis. 2000). Decisions of the federal courts of appeals are not binding on Wisconsin courts. *See id.*; *U.S. ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075–76 (7th Cir.

1970). So, Wisconsin courts must follow the Wisconsin Supreme Court's holdings regarding the knowing-and-voluntary-waiver and competence determinations. However, as the Seventh Circuit has made clear through its decision here and in *Imani*, if Wisconsin trial courts follow these state law holdings, they will be overturned on federal habeas review, even under AEDPA's deferential standards.

Accordingly, unless this Court grants this Petition, state trial courts in Wisconsin will face an impossible situation when dealing with a waiver of the right to counsel. If these state courts follow the Wisconsin Supreme Court's guidance, as they are bound to do, they will deny a waiver of counsel if the defendant does not, in fact, understand the difficulties of self-representation, or does not meet Wisconsin's heightened self-representation-competency standard. *See supra* pp. 1–2. If the defendant is thereafter convicted, the result will be obvious. The defendant would follow the lead of the defendant in this case and the defendant in *Imani*: file a federal habeas petition. In light of the present case and *Imani*, such a petition would be granted in many circumstances and the conviction would be vacated. If, instead, Wisconsin trial courts follow the Seventh Circuit's lead in this case and *Imani*, and grant the defendant's waiver request where such a grant would be contrary to the Wisconsin Supreme Court's guidance, the result would be similar. If the defendant is convicted (which would be likely, given that the defendant would be representing himself where he either did not understand the

difficulties of self-representation, could not carry out that self-representation competently, or both), he would surely appeal. Such an appeal would often lead to vacatur of the conviction by the Wisconsin Court of Appeals, after a straightforward application of binding caselaw from the Wisconsin Supreme Court.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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May 2017

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

- -

No. 14-3343

ROBERT L. TATUM,

Petitioner-Appellant,

v.

BRIAN FOSTER,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 13-C-1348 — **Rudolph T. Randa**, *Judge*.

ARGUED SEPTEMBER 8, 2016
DECIDED JANUARY 31, 2017

Before WOOD, *Chief Judge*, and KANNE and HAMILTON, *Circuit Judges*.

WOOD, Chief Judge. Although the Sixth Amendment to the U.S. Constitution gives every criminal defendant the right "to have the Assistance of Counsel for his defence," the Supreme Court has

recognized for more than 40 years that this does not mean that counsel can be shoved down an unwilling defendant's throat. At least since the Court decided *Faretta v. California*, 422 U.S. 806 (1975), the constitutional language has been understood as a personal right to decide how to defend oneself. "[T]he right to self-representation," *Faretta* proclaimed, "is thus necessarily implied by the structure of the Amendment." 422 U.S. at 819. This is true despite the fact that it is generally foolish for a person defending serious criminal charges to proceed without counsel. Trial judges are entitled—indeed encouraged—to warn defendants of the risks that attend self-representation. In the end, however, *Faretta* requires them to honor the defendant's wishes, assuming that the defendant is generally competent.

The present case raises the question whether the Wisconsin courts unreasonably applied *Faretta* when they refused to allow Robert Tatum to represent himself. The state trial court took this step after questioning Tatum not about his general competence, but about his educational level and understanding of the legal system. Tatum's conviction was upheld in the state court system, and the district court denied his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. We reverse. Try as we might, we cannot reconcile the test the Wisconsin state courts used in assessing Tatum's right to self-representation with the Supreme Court's holding in *Faretta*.

I

Tatum faced the most serious charges possible: two counts of first-degree intentional homicide by use of a dangerous weapon, stemming from the shooting deaths of two of his roommates, Kyle Ippoliti and Ruhim Abdella. The details of the crimes can be found in the decision of the Wisconsin Court of Appeals, *State v. Tatum,* 2013 WL 322647, No. 2011AP2439-CR (Wis. Ct. App. Jan. 29, 2013), whose findings of fact are presumed to be correct, 28 U.S.C. § 2254(e)(1). For present purposes, however, the critical facts relate to the course of proceedings at trial.

BACKGROUND

After his arrest for the crimes, Tatum was arraigned. On July 20, 2010, represented by his first attorney, he demanded a speedy trial, and the case was set for a jury trial on November 29, 2010. On August 12, at Tatum's request, counsel moved to withdraw. The court granted the motion and vacated the speedy trial demand because Tatum wanted a new lawyer. His wish for a new attorney was granted. On September 23, the second lawyer filed a motion to suppress evidence based on the fact that Tatum's car had been searched, and evidence seized, without a warrant. Before the court was able to rule on the motion, Lawyer 2 moved to withdraw, on the ground that Tatum had shared confidential information with Tatum's mother, a material witness, and had thereby compromised the lawyer's position. Again the trial

court granted the motion; the trial date remained November 29, 2010.

The court next appointed a third lawyer, Dianne Erickson, for Tatum. Erickson informed the court that she could not be prepared for a November 29 trial, and so the court reset the date for January 31, 2011. On January 18, Erickson requested a competence evaluation for Tatum. The next day the court held a hearing, at which it ordered that Tatum be evaluated by the Department of Health Services. Evidently this was done quickly; the parties returned to court on January 24 for the return of the evaluation. The report was inconclusive, because the examining psychologist was unable to form an opinion about Tatum's competence. The court then sent Tatum to a state mental-health facility for an inpatient evaluation. Tatum protested mildly, saying that he would "rather just represent myself if [Erickson] finds that my competency is not up to her standards." The court responded with a "we'll see."

On February 24, inpatient evaluation in hand, the parties returned to court. Dr. Laurence Trueman, the examining professional, found that Tatum was competent enough to understand the proceedings and assist in his defense, but that Tatum was likely to be "an extremely challenging defendant." The state court described what happened next:

> At the same hearing, Tatum asked the trial court to dismiss Attorney Erickson, stating

> that she was working with the State and not investigating his case in accordance with his standards, forcing him (Tatum) to investigate his case on his own. Tatum also acknowledged that he refused to meet with Attorney Erickson out of frustration with counsel's competence challenge. The trial court asked Tatum whether he was requesting a new attorney or asking the trial court to allow him to represent himself. Tatum stated that he wished to represent himself. The trial court found Tatum competent to stand trial; however, after engaging in a colloquy with Tatum, denied his request to represent himself. The trial court stated that Tatum's limited education would make it difficult for him to understand the difficulties and disadvantages of self-representation. The trial court also refused to dismiss Attorney Erickson. The trial was then calendared for a jury trial on April 4, 2011.

We need to look in greater detail at the colloquy to which the state court referred. The critical part occurred at the conclusion of the February 24 hearing. Initially, the court said "Okay. I think he's competent. I've got a report that says he is. I'm satisfied based on my colloquy that he is knowingly, voluntarily and intelligently giving up his right to a hearing. …" But the court made it clear that this was a finding that Tatum was competent to stand trial. It then went on to discuss Tatum's request to dismiss counsel.

> **The Court**: … Mr. Tatum, do you want a new lawyer or do you want to represent yourself?

Tatum: I want to represent myself, Your Honor.

After further discussion, during which the judge expressed the concern that there was a total breakdown in communication between Tatum and Erickson, he returned to the topic of self-representation:

> **The Court**: I understand he wants to represent himself. What's your educational background, sir?
>
> **Tatum**: I'm self-educated. I went to public school up until the tenth grade after which time I attended home school and—
>
> **The Court**: Have you got a GED or HSED?
>
> **Tatum**: I would say I have the equivalent of an HSED.
>
> **The Court**: Do you have one?
>
> **Tatum**: No, sir.
>
> **The Court**: A formal one?
>
> **Tatum**: No, sir. I can easily obtain it. That hasn't been my main goal. My main goal when it comes down to getting paper to prove it, I mean that's less of a goal for me at least at this point in my life, but I've been studying as far as the statutes, Wisconsin statute, studying

representation for court proceedings. I have a good working knowledge of how court proceeding work.

The Court: Tell me about that. How does a trial work, sir?

Tatum: I mean, basically like I say, there's opening statements. You mean as far as proceedings before trial?

The Court: During trial.

Tatum: At the trial beginning?

The Court: Yeah.

Tatum: Basically opening statements.

The Court: What happens right before opening statements?

Tatum: I guess both parties states their appearance and things like that.

The Court: How do we get a jury?

Tatum: You do voir dire.

The Court: How does that work?

Tatum: You question—you question jurors, potential jurors—

The Court: About what?

Tatum: About various things.

The Court: What are we looking for in jurors?

Tatum: Fair people who are giving a fair determination as far as hearing evidence, not making biased decisions, make decisions based on the evidence that's presented, not their own personal beliefs as far as, you know, bias and things like that.

You have a certain amount of strikes, preemptory and strikes for cause. You got strikes for cause and if I had—I wasn't incarcerated at the facility where I had proper legal access I would be more prepared, I could prepare adequately. If I wasn't harassed in the jail I could prepare a lot better that way.

The judge asked Tatum how he would go about representing himself.

The Court: What kind of difficulties would you imagine that you would have in self-representation?

Tatum: You mean like my present circumstances?

The Court: In your present circumstances.

> **Tatum:** Mainly the impairment based on the jail circumstances as far as them not providing me with reasonable access to the courts and legal materials.

Tatum and the judge then discussed how Tatum would go about investigating the case. Tatum said he would continue doing "what I've been doing all along," by making phone calls and gathering evidence. The colloquy then continued:

> **The Court**: What are you charged with, sir?
>
> **Tatum**: Two counts of first-degree intentional homicide.
>
> **The Court**: What's the penalty—and two counts of what?
>
> **Tatum**: Use of a dangerous weapon.
>
> **The Court**: What's the penalty?
>
> **Tatum**: Class A felonies carry the maximum of life in prison.

Finally, the court summarized the holding of *State v. Klessig*, 564 N.W.2d 716 (Wis. 1997), and concluded:

> **The Court**: … He's made the choice, there's no question about it. He's aware of the seriousness of the charges. He's aware of the general range

> of penalties but he is not aware of the difficulties and disadvantages of self-representation especially given his circumstances, and given the fact that he's only got a tenth-grade education therefore I deny his right to represent himself.

Tatum protested this decision and continued to press his objection to Erickson. The court overruled him, ordered Erickson to serve as trial counsel, and proceeded to the trial. The jury found him guilty of both counts of first-degree homicide and he was sentenced to life in prison without the possibility of release.

In state post-conviction proceedings (which in Wisconsin can occur simultaneously with a direct appeal, see Wis. Stat. § 974.06; *Socha v. Pollard*, 621 F.3d 667, 668 (7th Cir. 2010)), Tatum once again filed a motion to represent himself on appeal. The appellate court permitted him to do so. On direct appeal, he raised three grounds for relief, including that he had been denied his constitutional right to self-representation. The appellate court affirmed the trial court on all grounds. With respect to the self-representation claim, it ruled that Wisconsin law requires the use of a higher standard for self-representation than it does for competence to stand trial. The Wisconsin Supreme Court denied review.

Tatum then turned to the federal court and filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. He included his *Faretta* claim as one of four

grounds for relief, and the state conceded that he had exhausted and fairly presented this point. The district court rejected his argument on the merits, however, finding that the Wisconsin courts' approach to the right to self-representation did not violate law clearly established by the Supreme Court of the United States. This court granted Tatum's request for a certificate of appealability, limited to the self-representation issue.

II

Our consideration of this case is governed by the standards of the Antiterrorism and Effective Death Penalty Act (AEDPA), under which a federal court may issue the writ of habeas corpus only if the state court's decision is "contrary to, or involves an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), or if it "was based on an unreasonable determination of the facts in light of the evidence," *id.* § 2254(d)(2). A decision is "contrary to" established precedent "if it applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases, or if it confronts a set of facts that is materially indistinguishable from a decision of [the Supreme Court] but reaches a different result." *Brown v. Payton*, 544 U.S. 133, 141 (2005). A state court's decision "involves an unreasonable application of [the Supreme Court's] clearly established precedents if the state court applies [the Supreme Court's] precedents to the facts in an objectively unreasonable manner." *Id.* This creates a high bar. The state court decision cannot be merely wrong; it

must be so unreasonable that there is no possibility that "fairminded jurists could disagree on the correctness" (or lack thereof) of the decision. *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotations omitted). We turn to Tatum's arguments with this demanding standard in mind.

Faretta established the basic principle that is at issue in this case. Acknowledging that the question was not an easy one, the Supreme Court held in 1975 that a state may not constitutionally "hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." 422 U.S. at 807. The Court also addressed the question before us: what does it take for a waiver of counsel to be effective? This is what it had to say:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made 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.

Id. at 835 (internal citations and quotation marks omitted). It went on to hold that *Faretta* had "clearly and unequivocally declared … that he wanted to represent himself and did not want counsel." *Id.* Moreover, "[t]he record affirmatively show[ed] that *Faretta* was literate, competent, and understanding, and that he was voluntarily exercising his informed free will." *Id*. The Court found no need to assess "how well or poorly *Faretta* had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire," because "his technical legal knowledge, as such, *was not relevant to an assessment of his knowing exercise of the right to defend himself*." *Id.* at 836 (emphasis added).

The Court returned to the problem of self-representation in *Godinez v. Moran*, 509 U.S. 389 (1993). The question there was "whether the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial." 509 U.S. at 391. The Court answered with a flat "no." Its opinion shows that the critical question relates to the defendant's mental functioning, not to any particular knowledge he may have:

> Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since 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. Respondent suggests that a higher competency standard is necessary because a defendant who represents himself must have greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney. … But this argument has a flawed premise; the 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. at 399 (internal quotation marks and citations omitted). The Court wrapped up its opinion by reaffirming that the trial court must always satisfy itself that the waiver is knowing and voluntary. Only in this sense, it said, was more needed to waive the right to counsel than is necessary for a finding of basic competence to stand trial. See *Westbrook v. Arizona*, 384 U.S. 150 (1966).

In *Iowa v. Tovar*, 541 U.S. 77 (2004), the Court reiterated that the critical point that must be established is that the waiver of the right to counsel is the product of a "knowing, intelligent act done with sufficient awareness of the relevant circumstances." *Id.* at 80 (internal quotation marks and alterations omitted). But *Tovar* holds that the Sixth Amendment does not compel a trial court specifically to warn a defendant about the substantive consequences of his waiver, including the risk that a potential defense might be overlooked and the loss of the chance to

obtain an attorney's independent opinion on the wisdom of a guilty plea. *Id.* at 81.

The state courts thought that *Indiana v. Edwards*, 554 U.S. 164 (2008), introduced the possibility of taking into account the defendant's legal knowledge, but that is not what the case holds. In *Edwards*, the Court faced the problem of "a criminal defendant whom a state court found mentally competent to stand trial if represented by counsel but not mentally competent to conduct that trial himself." *Id.* at 167. In that situation, it held, the state may insist that the defendant proceed to trial with counsel.

Mental competence, or mental functioning (as *Faretta* called it), the Court said, presents a distinct problem for self-representation. It acknowledged that *Godinez* had rejected the idea of a two-tier standard for competence in the circumstances presented there. "To put the matter more specifically, the *Godinez* defendant sought only to change his pleas to guilty, he did not seek to conduct trial proceedings, and his ability to conduct a defense at trial was expressly not at issue." *Id.* at 173. In addition, *Godinez* "involved a State that sought to *permit* a gray-area defendant to represent himself"—a decision the Court held was permissible. *Id.*

With respect to the case before it, the Court began by "assum[ing] that a criminal defendant has sufficient mental competence to stand trial … and that the defendant insists on representing himself during that trial. We ask whether the Constitution

permits a State to limit that defendant's self-representation right by insisting upon representation by counsel at trial—on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." *Id.* at 174. It answered that question affirmatively, stressing throughout its explanation that it was focusing on mental *competence*. Some people, states may conclude, are competent enough to stand trial with the assistance of counsel, but lack sufficient competence to conduct their own defense. One example the Court gave of such a person was someone suffering from mental derangement serious enough to deprive the person of a fair trial if he were to conduct his own defense. *Id.* at 175. It concluded with this statement: "[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky [v. United States*, 362 U.S. 402 (1960)] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Id.* at 178.

Throughout the opinion, the emphasis is on competence, not on particular skill. The Court declined to accept Indiana's invitation to adopt a more specific standard under which a defendant would not have the right to self-representation if he could not communicate coherently with the court or a jury. *Id.* It also rejected Indiana's request to overrule *Faretta*. *Id*.

Rather than focusing on this line of U.S. Supreme Court decisions, the Wisconsin courts in Tatum's case

relied on the state supreme court's decision in *State v. Klessig*, *supra* at 8, for guidance. *Klessig* announced that "[j]ust as the right to the assistance of counsel is identical under the Wisconsin and United States Constitutions, the right to represent oneself also does not differ." 564 N.W.2d at 720. As a matter of state-court administration, it established a mandatory colloquy for cases in which the defendant wants to waive counsel:

> To prove such a valid waiver of counsel, the circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him. … If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel.

Id. at 206 (internal citation omitted). It then discussed the standards for competence to stand trial and, citing *Godinez*, distinguished this from competence to represent oneself. *Id.* at 208–09.

Although we have some question about the fourth item on the *Klessig* list, which seems to address detailed knowledge rather than competence, the

greater problem is that the state court, applying *Klessig*, strayed from the "mental functioning" sense of competence over to educational achievement and familiarity with the criminal justice system. As the Wisconsin Supreme Court put it, "[i]n making a determination on a defendant's competency to represent himself, the circuit court should consider factors such as the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." *Id.* at 212 (internal quotation marks omitted). It is a short step from those factors to the state trial judge's concern about the level of education Tatum had achieved (tenth grade) and his apparent lack of awareness of the difficulties of self-representation.

This is the third time in recent months that we have had to consider a habeas corpus petition based on *Faretta* and the application of Wisconsin's *Klessig* decision. Although this court's decisions are not authoritative for purposes of AEDPA, they can present useful examples. In that spirit, we find the decision in *Imani v. Pollard*, 826 F.3d 939 (7th Cir. 2016), helpful, as *Imani* also involved the compatibility of Wisconsin's *Klessig* approach with the decisions of the U.S. Supreme Court. In *Imani*, the petitioner tried to exercise his right to self-representation in a Wisconsin trial court, but the judge prevented him from doing so. The judge dismissed as irrelevant and unconvincing Imani's statement that he had been working on the case for 13 months. Instead, after learning that Imani had a

tenth-grade education, that he read at a college level, and that he had appeared in at least five prior criminal cases, the judge announced that Imani did not have a "sufficiently rational basis" to justify self-representation. *Id.* at 942. The Wisconsin Supreme Court found that the trial court's determination that Imani was not competent to proceed pro se was supported by the record, despite the absence of any evidence of mental illness or disability.

We reversed, finding that the state supreme court's decision "was flatly contrary to *Faretta* and its progeny in three distinct ways." *Id.* at 943. The first two dealt with burdens of proof, but the third is directly relevant here: "the state court imposed a competence standard much more demanding than *Faretta* and its progeny allow, as if the issue were whether Imani was an experienced criminal defense lawyer." *Id.* at 944. We continued with the observation that "Imani's education and communication abilities are materially indistinguishable from those in *Faretta*, and the Wisconsin courts identified no mental illness or impairment that might have rendered Imani incompetent as allowed by *Indiana v. Edwards* … ." *Id.*

The same problem arose in Tatum's case. Nothing in the colloquy, most of which we have reproduced above, suggests that Tatum suffered from deficient mental functioning, as opposed to a limited education. In fact, he displayed relatively good knowledge of the criminal process: he gave a reasonable description of

voir dire (which he correctly called by name), strikes for cause and peremptory strikes, opening statements, the nature of the charges against him, and the general range of penalties he faced. *Faretta* requires no more. The court's failure to recognize this was compounded when it inappropriately placed the burden on Tatum to convince it that he understood, and accepted, the challenges of self-representation. This, too, was inconsistent with *Faretta*, which places the duty on the trial court to warn the defendant about what he is getting into, and then leave the defendant free to decide how he wants to proceed. *Faretta*, 422 U.S. at 834 (the right to defend is personal, and so "[i]t is the defendant … who must be free personally to decide whether in his particular case counsel is to his advantage"); see also *Imani*, 826 F.3d at 944.

Jordan v. Hepp, 831 F.3d 837 (7th Cir. 2016), which raised a similar self-representation argument, provides a useful contrast to this case. The defendant, Jordan, was charged with reckless homicide and related charges that stemmed from a shooting death. *Id*. at 841. The Wisconsin court denied Jordan's request to represent himself because Jordan was nearly illiterate and had limited education. The court believed Jordan's education would prevent him from making a meaningful defense because he would be unable to use written documents including police reports and a signed confession. *Id*. at 842.

In denying Jordan's petition for a writ of habeas corpus, we recognized that the Supreme Court has not precluded state courts altogether from inquiring

about a defendant's ability to represent himself. *Id*. at 844 (citing *Godinez* and *Edwards*). We observed that "the Wisconsin court came close to making an unreasonable application of the *Faretta* line of cases," but we concluded that the state court's decision did not stray so far from Supreme Court precedent to warrant issuance of the writ. *Id*. at 843, 845.

It was possible in *Jordan* to view the state court's inquiry as one into the defendant's mental functioning, as permitted by the *Faretta* line of cases. By contrast, nothing cast doubt on Tatum's competence in this sense of the term. Tatum's education was not so limited that he would have been unable to defend himself. He told the judge that he attended public school until the tenth grade, after which he attended home school. He had been able to study court procedures and the Wisconsin statutes. That was enough. We note parenthetically that requiring defendants to have a high school diploma or its equivalent would preclude a great number of people from representing themselves and leave little left of *Faretta*. One recent study of adults in state and federal prisons estimated that some 30 percent of prisoners lack high school credentials. U.S. DEP'T OF EDUC., NAT'L CENTER FOR EDUC. STATISTICS, NCES 2016-040, U.S. PROGRAM FOR THE INT'L ASSESSMENT OF ADULT COMPETENCIES, U.S. NAT'L SUPPLEMENT: PRISON STUDY 2014, Table 1.1, https://nces.ed.gov/pubs2016/2016040.pdf.

We conclude that the way in which the Wisconsin courts implemented their *Klessig* test here was

inconsistent with *Faretta*'s prohibition against resting the determination about the knowing and intelligent nature of the defendant's choice on his "technical legal knowledge." *Faretta*, 422 U.S. at 835–36. This is apparent both from the state trial judge's comments and from the Wisconsin appellate court's concern that Tatum's statements in court "reflect his limited understanding of the scope of a proper investigation for the defense of homicide charges" and its comment that he failed to appreciate "courtroom decorum and legal technicalities."

None of this is to say that Tatum was making a wise choice when he tried so hard to win his right to self-representation. *Faretta* recognizes that "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Id.* at 834. But *Faretta* protects the right of a criminal defendant to make this (usually) self-defeating choice. By failing to recognize that the Supreme Court's *Faretta* line of cases focus only on competence as it relates to mental functioning, and forbids the consideration of competence in the sense of accomplishment, the Wisconsin courts reached a result that is contrary to, as well as an unreasonable application of, the Supreme Court's rulings.

III

The judgment of the district court is REVERSED and the case is REMANDED for issuance of the writ of habeas corpus, unless the state within 90 days of

issuance of this court's mandate initiates steps to give Tatum a new trial.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

- -

ROBERT L. TATUM,

Petitioner,

v. Case No. 13-C-1348

MICHAEL MEISNER, Warden Columbia Correctional Institution,

Respondent.

- -

After a jury trial, Robert L. Tatum was found guilty of two counts of first-degree intentional homicide and sentenced to life in prison without the possibility of parole. Tatum now petitions for relief under 28 U.S.C. § 2254.

A writ of habeas corpus will not issue unless the state-court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts" in light of the evidence before the state court. § 2254(d)(1)-(2). The standard set forth in § 2254(d)(1) "is a strict one." *Taylor v. Grounds*, 721 F.3d 809, 817 (7th Cir. 2013).

"[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (emphasis in original). Tatum must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, --- U.S. ---, 131 S. Ct. 770, 786-87 (2011). Under § 2254(d)(2), a decision "involves an unreasonable determination of the facts if it rests upon fact-finding that ignores the clear and convincing weight of the evidence." *Goudy v. Basinger*, 604 F.3d 394, 399-400 (7th Cir. 2010). The Court presumes that the state courts' factual determinations are correct unless rebutted by clear and convincing evidence. § 2254(e)(1).

First, Tatum complains that the trial court denied his constitutional right to self-representation. As the court of appeals explained, Tatum "fails to recognize the difference between the trial court's determination that Tatum was competent to stand trial, but not able to represent himself." ECF No. 15-2, at 7, *State of Wisconsin v. Tatum*, No. 2011AP2439-CR (Wis. Ct. App. Jan. 29, 2013). In Wisconsin, "there is a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand trial." *State v. Klessig*, 564 N.W. 2d 716 (Wis. 1997). Here, the trial court determined that Tatum "did not demonstrate an understanding as to the implications

of self-representation." ECF No. 15-2, at 7. Such an approach, according to the Seventh Circuit, does not violate clearly established federal law as declared by the Supreme Court. *Brooks v. McCaughtry*, 380 F.3d 1009, 1012-13 (7th Cir. 2004) ("Because being competent to stand trial and having waived the right to counsel do not require the same information, and because the former competence does not imply an effective waiver in all cases, we do not think that Wisconsin's approach violates the rule of *Godinez* [*v. Moran*, 509 U.S. 389 (1993)]").

Second, Tatum argues that he was denied his right to a speedy trial, but as the court of appeals observed, Tatum "[did] not argue a violation of his constitutional rights, . . ." ECF No. 15-2, at 8. Instead, Tatum focused his argument on Wis. Stat. § 971.10. Such a claim is not cognizable in federal habeas corpus. *Lechner v. Frank*, 341 F.3d 635, 642 (7th Cir. 2003). Even if Tatum had asserted a constitutional claim, it likely would have failed because much of the delay was caused by Tatum's own intransigence—e.g., firing multiple attorneys, and the need for a competency examination. *United States v. White*, 443 F.3d 582, 589 (7th Cir. 2006) (courts examine "whether the government or the criminal defendant is more to blame for [the] delay").

Third, Tatum argues that his trial counsel rendered ineffective assistance. Tatum failed to raise this claim in state court. *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004) (discussing related doctrines

of exhaustion and procedural default). Tatum's claims about his attorney's performance lack merit in any event. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"). The same can be said for Tatum's final claim, that he was denied his constitutional right to an impartial decision-maker: Tatum failed to exhaust the claim, resulting in a likely procedural default, and it is frivolous even if it were necessary to consider it. The Court agrees with the following characterization in the respondent's answer: "[Tatum's] argument can be summarized as follows: because the state courts ruled against me, it follows that they were constitutionally unfair and biased against me.'"

In connection with this Order, the Court must determine whether to issue or deny a certificate of appealability. Rule 11(a), Rules Governing Section 2254 Cases. Tatum failed to make a "substantial showing" that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Tatum's emergency motion for a hearing [ECF No. 14] is **DENIED**;

2. Tatum's motion for judgment on the pleadings [ECF No. 18] is **DENIED**;

3. Tatum's motion for sanctions [ECF No. 22] is **DENIED**;

4. Tatum's motion to appoint counsel [ECF No. 24] is **DENIED**;

and

5. Tatum's petition for a writ of habeas corpus is **DENIED**. The Court will not issue a certificate of appealability. The Clerk of Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 24th day of September, 2014.

BY THE COURT:

HON. RUDOLPH T. RANDA U.S. District Judge

APPENDIX C

OFFICE OF THE CLERK

SUPREME COURT OF WISCONSIN

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640

August 1, 2013

To:
Hon. Rebecca F. Dallet,
Milwaukee County Circuit Court Judge
821 W. State Street, Branch 40
Milwaukee, WI 53233

Nancy A. Noet,
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821 W. State Street
Milwaukee, WI 53233

Robert L. Tatum 574254
Columbia Corr. Inst.
P.O. Box 900
Portage, WI 53901-0900

You are hereby notified that the Court has entered the following order:

No. 2011AP2439-CR State v. Tatum
L.C. #2010CF2660

A petition for review pursuant to Wis. Stat. and a motion to strike the state's response having been filed on behalf of the defendant-appellant-petitioner, Robert L. Tatum, and considered by this court;

IT IS ORDERED that the motion to strike is denied.

IT IS FURTHER ORDERED that the petition for review is denied, without costs.

Diane M. Fremgen
Clerk of Supreme Court

APPENDIX D

COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2439-CR **Cir. Ct. No. 2010CF2660**

STATE OF WISCONSIN **IN COURT OFAPPEALS DISTRICT I**

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

- -

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT L. TATUM,

DEFENDANT-APPELLANT.

- -

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Robert L. Tatum, *pro se*, appeals from an order denying his postconviction motion for a new trial. Tatum contends that the trial court erroneously: denied his right to self-representation, violated his statutory right to a speedy trial pursuant to WIS. STAT. § 971.10 (2009-10),[1] and denied his motion to suppress evidence. We affirm the trial court on all grounds.

---

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

BACKGROUND

¶2 On May 27, 2010, Tatum was charged with two counts of first-degree intentional homicide, by use of a dangerous weapon, stemming from the shooting deaths of two of his roommates, Kyle Ippoliti and Ruhim Abdella. According to the criminal complaint, on the night of May 22, 2010, police were dispatched to a home at 2517 North Richards Street, Milwaukee, where they found the bodies of the victims. One of the residents of the home told police that she, along with the victims, Tatum, and a few others, all resided at the Richards Street home together. She further stated that on May 20, 2010, Tatum was evicted from the home by Ippoliti and later had an argument with Abdella. The resident also told police that when she came home on the night of May 22, 2010, she learned that Ippoliti and Abdella had been murdered. A neighbor of the victims told police that she heard gunshots coming from the victims' home on the night of the murders. The complaint also contains statements from another witness, who told police that in the hours before the shooting he saw Tatum at the Richards Street home.

¶3 Tatum was subsequently arrested and charged. On July 20, 2010, Tatum, by counsel, made a speedy trial demand and the case was calendared for a jury trial on November 29, 2010. However, on August 12, 2010, by Tatum's request, Tatum's counsel moved to withdraw. The trial court allowed the withdrawal and vacated Tatum's speedy trial demand because Tatum requested a new attorney.

¶4 On September 23, 2010, successor counsel filed a motion to suppress evidence based on the warrantless search and seizure of Tatum's car. Before the trial court decided the motion, however, successor counsel moved to withdraw. Successor counsel told the trial court that Tatum shared confidential information with his (Tatum's) mother, a material witness, thereby compromising successor counsel's position. The trial court granted successor counsel's motion. Although the trial court again vacated Tatum's speedy trial demand, the case remained calendared for November 29, 2010.

¶5 Tatum's third, and final, attorney informed the trial court that she could not be prepared for trial on the calendared date. A new date was set for January 31, 2011. On January 18, 2011, Tatum's counsel, Attorney Dianne Erickson, requested a competency evaluation of Tatum. A hearing was held the following day, during which the trial court ordered Tatum evaluated by the Department of Health Services. The parties appeared before the trial court again on January 24, 2011, for the return of Tatum's competency evaluation. The evaluation report stated that the examining psychologist was unable to form an opinion as to Tatum's competency. The trial court remanded Tatum to a state mental health facility for an inpatient evaluation. To avoid delaying his trial, Tatum told the trial court that he would " rather just represent myself if [my trial counsel] finds that my competency is not up to her standards." The trial court responded: " [w]e'll see what happens."

¶6 The parties returned to the trial court again on February 24, 2011, following the return of Tatum's inpatient evaluation. The evaluation, conducted by Dr. Laurence Trueman, found that Tatum was competent to understand the proceedings and assist in his defense, but stated that Tatum would " in all likelihood continue to be an extremely challenging defendant." At the same hearing, Tatum asked the trial court to dismiss Attorney Erickson, stating that she was working with the State and not investigating his case in accordance with his standards, forcing him (Tatum) to investigate his case on his own. Tatum also acknowledged that he refused to meet with Attorney Erickson out of frustration with counsel's competency challenge. The trial court asked Tatum whether he was requesting a new attorney or asking the trial court to allow him to represent himself. Tatum stated that he wished to represent himself. The trial court found Tatum competent to stand trial; however, after engaging in a colloquy with Tatum, denied his request to represent himself. The trial court stated that Tatum's limited education would make it difficult for him to understand the difficulties and disadvantages of self-representation. The trial court also refused to dismiss Attorney Erickson. The trial was then calendared for a jury trial on April 4, 2011.

¶7 On April 4, 2011, the trial court addressed Tatum's previously-filed motion to suppress evidence. The State called one witness, Detective Erik Gulbrandson, to establish the basis for the search and seizure of Tatum's car. Detective Gulbrandson

testified that prior to the search and seizure, two witnesses had placed Tatum at the scene of the crime hours before the shooting, one of whom stated that Tatum's car was also at the scene. Detective Gulbrandson also stated that a witness reported hearing gun fire come from the Richards Street house on the night of the shooting, while another witness told police that Tatum had been evicted by one victim and was heard arguing with the other. Based on that information, police began looking for Tatum. Detective Gulbrandson also stated that another witness told police that on the morning following the murders, he (the witness) saw Tatum's car parked behind an abandoned home and covered by bushes. The vehicle was later found at Tatum's mother's house, where it was towed by police. Based on Detective Gulbrandson's testimony, the trial court denied the motion to suppress.

¶8 Tatum was found guilty of both counts of first-degree intentional homicide by the jury. He was sentenced to life in prison without the possibility of release to extended supervision. Tatum filed a number of *pro se* motions, despite being represented by postconviction counsel, including a motion for postconviction relief and a new trial. The motion was denied. Tatum's postconviction counsel filed a motion to withdraw and Tatum continued to file a series of *pro se* motions. We granted Tatum's postconviction counsel's motion to withdraw and allowed Tatum to proceed *pro se*. On appeal, Tatum argues that he was denied the rights to self-representation and to a speedy trial, and that the trial court erroneously

denied his motion to suppress evidence.[2] Additional facts are included as relevant to the discussion.

DISCUSSION

I. Self-Representation.

¶9 Tatum argues first that the trial court improperly denied him his right to self-representation. We disagree.

¶10 " The right to the assistance of counsel is necessary to ensure that a criminal defendant receives a fair trial, that all defendants stand equal before the law, and ultimately that justice is served." ***State v. Klessig***, 211 Wis. 2d 194, 201, 564 N.W.2d 716 (1997). " The Sixth Amendment and Article I, § 7 [of the Wisconsin Constitution] also give a defendant the right to conduct his [or her] own defense." ***Id.*** at 203. A defendant must " clearly and unequivocally" invoke his or her right to self-representation. ***State v. Darby***, 2009 WI App 50, ¶24, 317 Wis. 2d 478, 766 N.W.2d 770. When a defendant seeks to proceed *pro se*, the trial court must insure that the defendant (1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed *pro se*. ***Id.***, ¶17. " Whether a defendant was denied his or her constitutional right to self-representation

[2] Although Tatum's arguments on appeal are unrelated to the order he appeals from, we nonetheless address his arguments because all were raised during the course of his trial.

presents a question of constitutional fact, which this court determines independently." ***State v. Imani***, 2010 WI 66, ¶19, 326 Wis. 2d 179, 786 N.W.2d 40.

¶11 " In Wisconsin, there is a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand trial." ***Klessig***, 211 Wis. 2d at 212. " To prove such a valid waiver of counsel, the [trial] court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him [or her]." ***Id.*** at 206. " In making a determination on a defendant's competency to represent himself, the [trial] court should consider factors such as 'the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury.'" ***Id.*** at 212 (citation omitted).

¶12 Tatum argues repeatedly that, in accordance with Dr. Trueman's evaluation, the trial court found Tatum competent and therefore should have allowed him to proceed *pro se*. Tatum fails to recognize the difference between the trial court's determination that Tatum was competent to stand trial, but not able to represent himself. The trial court conducted a colloquy with Tatum, during which it established that

Tatum had a tenth-grade education. The trial court then questioned Tatum about his knowledge of court procedures, the charges against him and his awareness of the general range of penalties that could be imposed on him. The trial court determined that while Tatum understood the seriousness of the charges against him and the general range of penalties for those charges, he lacked an adequate understanding of the difficulties and disadvantages of self-representation.

¶13 We agree with the trial court that Tatum did not demonstrate an understanding as to the implications of self-representation. Tatum's request to represent himself was a result of his frustration with his counsel for challenging his competency. Up until that point, Tatum had accepted representation from three attorneys. Tatum's request that the trial court dismiss Attorney Erickson and allow him to represent himself stemmed from his frustration over the competency request, his belief that Attorney Erickson was really working with the State, and his belief that Attorney Erickson and her investigator were not obtaining proper information. Tatum told the trial court that he independently conducted investigations from his jail cell, was prepared to move forward with his case based on information obtained from his independent investigations, and believed that the trial court had the authority to order that he be " forced to have court resources." Tatum's beliefs and remarks, as reflected by the record, reflect his limited understanding of the scope of a proper investigation for the defense of homicide charges.

Tatum's behavior during the hearing, reflected in the record by constant interruptions, shows also that Tatum did not understand courtroom decorum and legal technicalities. Because the record reflects that Tatum did not demonstrate a proper understanding of the challenges and potential consequences of proceeding *pro se*, the trial court properly denied his request to represent himself.

II. Speedy Trial.

¶14 Tatum also contends that the trial court violated his right to a speedy trial pursuant to WIS. STAT. § 971.10. The statute provides, in relevant part:

> **(2)**(a) The trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on the record. If the demand is made in writing, a copy shall be served upon the opposing party. The demand may not be made until after the filing of the information or indictment.
>
> (b) If the court is unable to schedule a trial pursuant to par. (a), the court shall request assignment of another judge pursuant to s. 751.03.

¶15 Here, Tatum was charged on May 27, 2010. He made a speedy trial demand on July 20, 2010, and the case was calendared for trial on November 29, 2010. Tatum was tried on April 4, 2011. Nonetheless, we reject Tatum's contention.

¶16 Our supreme court noted in ***Day v. State***, 60 Wis. 2d 742, 744, 211 N.W.2d 466 (1973), that the purpose of WIS. STAT. § 971.10 " was to provide an orderly and flexible manner of court administration which the state or an accused might make use of to expedite a trial." However, " '[t]he constitutional requirements of a speedy trial are in no way modified by this section.'" ***Day***, 60 Wis. 2d at 744 (citation omitted). Because Tatum does not argue a violation of his constitutional rights, we focus solely on his statutory argument, keeping in mind that § 971.10 " does not provide the standard by which speedy trial violations are measured." *See* ***State v. Lemay***, 155 Wis. 2d 202, 213 n.3, 455 N.W.2d 233 (1990).

¶17 Here, multiple delays were caused by attorney withdrawals— Tatum requested the dismissal of his first attorney, and his second attorney moved to withdraw based on Tatum's disclosure of confidential information to a material witness. Tatum's third attorney, Attorney Erickson, appeared before the trial court for the first time on November 5, 2010, and told the trial court on November 8, 2010, that she would not be prepared to try the case by the original November 29, 2010 trial date. The withdrawal of Tatum's first two attorneys was a result of Tatum's own conduct— he requested the dismissal of his first

attorney and revealed confidential information which compromised his second attorney. " The law is that a defendant 'cannot be heard to complain about delay caused by his own conduct[.]'" ***State v. Miller***, 2003 WI App 74, ¶14, 261 Wis. 2d 866, 661 N.W.2d 466 (citation omitted).

¶18 Attorney Erickson's competency evaluation request, along with the subsequent examinations, further delayed the case. As our supreme court held in

Norwood v. State, 74 Wis. 2d 343, 355, 246 N.W.2d 801 (1976), delays related to questions of competency are " justifiable and valid" because " [n]othing could be more intrinsic to a criminal case than a determination of the defendant's competency to participate in his own defense." We conclude that the months of competence-related delays[3] were intrinsic to the case and the counsel-related delays[4]

---

[3] Tatum's trial counsel requested a competency evaluation on January 18, 2011. Because the initial evaluation was inconclusive as to Tatum's competency, another evaluation was conducted. Tatum was determined to be competent by the trial court, following the latter evaluation, on February 24, 2011.

[4] Tatum requested the withdrawal of his first counsel, which was granted by the trial court on August 12, 2010. Tatum's second counsel was dismissed on October 25, 2010. Attorney Erickson appeared before the trial court for the first time on November 5, 2010, and told the trial court on November 8, 2010, that she could not be prepared for a November 29, 2010 trial date. The trial date was reset for January 31, 2011.

were occasioned by Tatum himself. Therefore, no statutory violation occurred. As such, we do not address Tatum's argument that the statutory violation somehow deprived the trial court of its competency to hear Tatum's case.

III. Motion to Suppress.

¶19 Tatum contends that the trial court erroneously denied his motions to suppress evidence obtained from the warrantless search and seizure of his vehicle and certain statements.[5]

¶20 We review motions to suppress under a two-prong analysis. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. " First, we review the [trial] court's findings of historical fact, and will uphold them unless they are clearly erroneous. Second, we review the application of constitutional principles to those facts *de novo*." ***Id.*** (internal citations omitted). " Whether police conduct violated a defendant's constitutional rights under Article I, Section 11 of the Wisconsin Constitution and the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures presents a question of constitutional fact that this

[5] We do not address Tatum's argument that the trial court erroneously denied his motion to suppress certain statements—no such motion was decided by the trial court. Further, the statements Tatum complains of were not made to law enforcement.

court independently reviews." ***State v. Felix***, 2012 WI 36, ¶22, 339 Wis. 2d 670, 811 N.W.2d 775.

¶21 To determine whether the warrantless search and seizure violated Tatum's constitutional rights, " we must consider (1) whether there was probable cause to search [Tatum's] vehicle; and (2) whether the vehicle was readily mobile." *See* ***State v. Marquardt***, 2001 WI App 219, ¶¶31, 33, 247 Wis. 2d 765, 635 N.W.2d 188.

A. Probable Cause.

¶22 Whether probable cause exists depends on the totality of the circumstances, and is a flexible, commonsense standard. *See* ***State v. Tompkins***, 144 Wis. 2d 116, 123-25, 423 N.W.2d 823 (1988). Probable cause requires only that there is a " 'fair probability'" that evidence of a crime will be found. ***State v. Hughes***, 2000 WI 24, ¶21, 233 Wis. 2d 280, 607 N.W.2d 621 (citation omitted). The test is what a reasonable police officer would reasonably believe under the circumstances. ***State v. Erickson***, 2003 WI App 43, ¶14, 260 Wis. 2d 279, 659 N.W.2d 407.

¶23 Here, according to the testimony of Detective Gulbrandson, police had witness statements related to Tatum's eviction and his presence at the Richards Street home on the night of the shooting. Detective Gulbrandson also testified that a neighbor of the victims told police that on the morning after the shooting he discovered Tatum's car parked behind an abandoned house, hidden by bushes. The same

neighbor later took Tatum's brother to the vehicle, still parked behind an abandoned house, where they found Tatum sitting in the front seat. Detective Gulbrandson further stated that when police went to Tatum's mother's home later that same day, Tatum's car was parked outside of the residence. When the police arrived at Tatum's mother's home, Tatum's brother told police that he (Tatum's brother) had been in possession of Tatum's car from the day of the homicide onward, though police knew that to be false. Given all of the information police had regarding Tatum's eviction, his argument with a victim, his whereabouts, and his brother's attempted cover-up, police reasonably concluded that there was a fair probability of locating evidence related to the homicides in Tatum's car.

B. Readily Mobile.

¶24 A vehicle is readily mobile even if the driver and occupants have been arrested because, although their arrest makes the vehicle less accessible to those individuals, it would not prevent other unknown individuals from moving the vehicle. *See* ***Marquardt***, 247 Wis. 2d 765, ¶42. The record reflects that from the time of the homicide until Tatum's arrest, Tatum's car was at three known locations— the homicide scene, behind an abandoned house, and at Tatum's mother's house. Clearly the vehicle was operational and readily mobile.

¶25 Despite Tatum's contention that his car was his primary residence and he was therefore entitled

to greater privacy, the fact remains that Tatum's car was indeed a vehicle subject to Wisconsin's automobile exception. *See* ***id.***, ¶¶32-33. Police had probable cause to believe that evidence of the homicides could be located in Tatum's operational and readily mobile car. Therefore, it was not unreasonable for police to search the vehicle for evidence of a crime.

¶26 For all the foregoing reasons, we affirm the trial court.

By the Court.— Order affirmed.

Not recommended for publication in the official reports.

APPENDIX E

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

BRANCH 19

- -

STATE OF WISCONSIN,

Plaintiff,

-vs- Case No. 10CF002660

ROBERT L. TATUM,

Defendant.

- -

DOCTOR'S REPORT RETURN

- -

February 24, 2011 Dennis R. Cimpl
Circuit Judge Presiding

CHARGE: First-degree intentional homicide, two counts, use of a dangerous weapon

APPEARANCES:

Mark S. Williams, Assistant District Attorney, appeared on behalf of the State.

Dianne M. Erickson, Attorney at law, appeared on behalf of the defendant.

Defendant appeared in person.

Leposava Munns, Official Court Reporter

PROCEEDINGS:

THE CLERK: Case Number 10CF2660, State of Wisconsin versus Robert Tatum. Please state your appearances.

MR. WILLIAMS: the State is here by Mark Williams.

MS. ERICKSON: Robert Tatum is here in person with Attorney Dianne Erickson.

THE DEFENDANT: Last hearing --

THE COURT: --And I said that she couldn't -- that she didn't dismiss her. That was my decision, Mr. Tatum.

THE DEFENDANT: So I don't have a right to representation?

THE COURT: I made that determination last time, I'll make it again, but we're going to do these things the way I want them done. Do you understand me?

THE DEFENDANT: We're not going the law court.

THE COURT: According to the law, sir, we're here for return on a doctor's report. The report from Dr.

Truman from Mendota dated February 14 opine that Mr. Tatum is competent to stand trial.

Will the State allow me to make that finding based upon this letter?

MR. WILLIAMS: Yes, sir.

THE COURT: Miss Erickson?

[2]

MS. ERICKSON: Personally I don't think he's competent and I did drop this report off for him and he wouldn't come out and see me today so I have no idea what his position is.

THE COURT: Mr. Tatum?

THE DEFENDANT: Yes, Your Honor.

THE COURT: At this point if you want a hearing I can get Dr. Truman to appear by video and we can have testimony taken and he can tell me what is in this report and then I can hear from you and then I can make the decision as to whether or not you're competent to proceed. The other way we can do it, sir, is if you allow me to make this finding based upon this report that you're competent. I can do that. What would you like to do?

THE DEFENDANT: Yeah, I would like to find I'm competent because I wasn't incompetent. She had no reason to challenge my competency. I stated that on the record last time I appeared.

THE COURT: I understand what you said, sir, but I had a doctor's report that says you weren't, that's why we sent you up to Mendota, but based upon the stipulation -- let me ask you this, sir: Did anybody tell you or make you tell me that you feel that you're competent and that I can use this report? Did they threaten you to get you to tell me that in any way?

[3]

THE DEFENDANT: No.

THE COURT: Did they -- did they promise you anything if you told me that?

THE DEFENDANT: No. I haven't read the report so no way.

THE COURT: Did Miss Erickson give you the report?

THE DEFENDANT: No. I don't want to meet with Miss Erickson. I don't want her as my attorney.

THE COURT: She's your attorney until I say she's not your attorney.

THE DEFENDANT: Can you please dismiss her from my case?

THE COURT: Well, sir, at this point I can't do that, sir, until you read the report, so I have an extra copy here. Miss Erickson, will you give it to him. Take him in the back, he will read the report, then I will continue my colloquy with him.

THE DEFENDANT: Thank you, Your Honor.

(Off the record)

THE CLERK: Case Number 10CF2660, recalling the State of Wisconsin versus Robert Tatum. Appearances are the same.

THE COURT: Mr. Tatum, have you had a chance to review that report?

THE DEFENDANT: Yes, I have, Your Honor.

[4]

THE COURT: Do you want me to make the findings that you're competent based upon that report or do you want to have a hearing before I make those findings?

THE DEFENDANT: No, I would like to have you make your decision based on the report that I'm competent.

THE COURT: Did anybody threaten you in any way to get you to tell me that?

THE DEFENDANT: No.

THE COURT: Did anybody promise you anything to get you to tell me that?

THE DEFENDANT: No.

THE COURT: Have you used any drugs -- illegal drugs or alcohol in the last 24 hours?

THE DEFENDANT: No, Your Honor.

THE COURT: Are you taking any prescription medication?

THE DEFENDANT: No, Your Honor.

THE COURT: Miss Erickson, did you get a chance to talk to him about this decision?

MS. ERICKSON: I must confess, Your Honor, as best as I could.

THE COURT: Are you in a position to tell me whether or not it's your belief that he is knowingly, voluntarily and intelligently giving up his right to a hearing?

MS. ERICKSON: I mean no disrespect, Your Honor, but the way that he's behaving I just don't think he's competent and I don't see how that's possible.

THE COURT: Okay. I think he's competent. I've got a report that says he is. I'm satisfied based upon my colloquy that he is knowingly, voluntarily, and intelligently giving up his right to a hearing, and I will find based upon the report of February 14 of this year from Dr. Laurence, L-A-U-R-E-N-C-E Truman, T-R-U-M-A-N of Mendota that he is competent. I will reinstate these proceedings, reinstate the cash bond of $500,000 that Commissioner Sweet set way back on June 6th of this year.

Now, the next thing that I have to take up is Mr. Tatum's request that Miss Erickson withdraw as his lawyer. Are you making that request also, Miss Erickson?

MS. ERICKSON: I am. I'm going to defer to the court. I'm -- I'm willing to represent difficult defendants but I do have some concerns and one of them would be if he gets up there on that stand and testifies that I falsified a bunch of reports and I wrote them all, I've lined up these people, what am I going to do?

THE COURT: That would be my problem if that happens.

MR. WILLIAMS: He did it with everybody. This is the third lawyer.

[6]

THE COURT: I understand. I understand. How's your communication, Miss Erickson?

MS. ERICKSON: I try really hard and my investigator comes, too. This morning he wouldn't come out at all for me and I begged and said you know I've got this report for you. I think he's not going to come out for us ever again, but we do try really, really hard, both of us to communicate with Mr. Tatum, but if he doesn't come out for me I don't know that anybody can make him come talk to me.

THE DEFENDANT: Your Honor, if she was trying too hard I wouldn't have to do my own investigation from within the jail facilities.

THE COURT: Mr. Tatum, she's hired an investigator to help her do that. All you got to do is talk to them.

THE DEFENDANT: I've talked to them.

THE COURT: Why don't you talk to them?

THE DEFENDANT: I've talked to them. I've asked them to investigate things. They make excuses saying it will take eight weeks or twelve weeks to

obtain the information whereas I would obtain the information within a week with no resources and no time.

THE COURT: Have you told them how you do that?

THE DEFENDANT: Yeah. I've given them information. They would deny or not research it.

THE COURT: Miss Erickson, has he told you how he

[7]

would do that?

MS. ERICKSON: What happened is there were some phone records the corporation told my investigator they had destroyed them which was not true from what we found, and you know we wanted -- if Mr. Tatum had the ability to get his own phone records what we asked him to do is then give them to us. He will not give them to us and that was part of my reason for raising competence despite our saying we're having trouble.

THE COURT: Have you got the phone records Mr. Tatum?

THE DEFENDANT: Yes, I do have those.

THE COURT: Why won't you give them to your lawyer and investigator?

THE DEFENDANT: Man, because I feel other information, other evidence as far as recantation of statements made by -- to the -- to the prosecution.

THE COURT: I don't understand, sir. Why won't you give them these records?

THE DEFENDANT: Because I brought them that information, now it's lost. I didn't get my copies back, the only copies I had.

THE COURT: Did he give you any information he lost, Miss Erickson?

MS. ERICKSON: I don't believe Miss Papka has lost

[8]

them. She's got those statements to go interview those witnesses.

THE COURT: Can you give him those copies back?

THE DEFENDANT: I don't know.

MS. ERICKSON: I don't know if she did. I don't know if we understood we had to copy them. I know she's got them.

THE COURT: You know that now?

MS. ERICKSON: We know that.

THE COURT: Mr. Tatum, are you willing to let Miss Papka and Miss Erickson do their job with you as a team?

THE DEFENDANT: I've already attempted that.

THE COURT: You haven't. You haven't. In my opinion you haven't.

THE DEFENDANT: I understand you. I dealt with these people. He's trying to contact them and I'm not getting results as far as contacting them, making phone calls, the contacts we've had.

THE COURT: One of the reasons you're not getting results and one of the reasons that you didn't get results from Mr. Wasserman and Mr. Goldberg is because of the fact that you have to work as a team with your lawyer, not at cross purposes, and because you haven't been working as a team that caused her to question your competency.

THE DEFENDANT: I don't think that's what it was.

[9]

THE COURT: Yeah, it was.

THE DEFENDANT: It was more a filibuster attempt. She been working more with the district attorney rather than working on my side of the fence.

THE COURT: You've been working with the district attorney, Miss Erickson?

MS. ERICKSON: Only to what a reasonable attorney might do which is get information that may be useful, but I am not working against Mr. Tatum to convict him. We are trying to help him.

THE COURT: You concur with that, Mr. Williams? She has been working with you?

MR. WILLIAMS: Yes. I know she's been working very hard because she's asked for information. I've supplied her with information that she wanted in Mr. Tatum's defense and I know she knows the case very well. She probably knows it better than I do at this point.

THE DEFENDANT: Disclosing information is not working on my behalf.

THE COURT: Disclosure of what, sir?

THE DEFENDANT: Privileged information.

THE COURT: Have you disclosed any privileged information to Mr. Williams, Miss Erickson?

MS. ERICKSON: Mr. Tatum has an idea I falsified records and come up with various statements and I never

[10]

heard – I never heard any of these things that he said that I disclosed to him in my life but it's one of the reasons I raised competence is because he's convinced that I have somehow or another created evidence that I don't even understand that myself.

THE COURT: All right, all right, hold it, hold it.

MR. WILLIAMS: I could tell you what happened there.

THE COURT: Go ahead.

MR. WILLIAMS: There are people in the jail that have come forward indicated Mr. Tatum's made statements to them. I turned that evidence over to counsel. I think counsel gave that to Mr. Tatum. I don't think Mr. Tatum's saying that she, counsel, is working with me. I think --

THE DEFENDANT: -- Yes I am.

THE COURT: He is, so here's -- and I just read the Boyd case. Mr. Tatum, do you want a new lawyer or do you want to represent yourself?

THE DEFENDANT: I want to represent myself, Your Honor.

MR. WILLIAMS: Judge, no one's going to do better than what she's doing.

THE COURT: I understand, Mr. Williams, but my problem here is there is a total breakdown of communication

[11]

between Mr. Erickson -- Miss Erickson, rather -- and Mr. Tatum, and part of it has to do with the fact that Miss Erickson did her job and questioned competency and it was clear from the hearings that I've had in this matter that Mr. Tatum said and felt he was competent all along. Now that we've come back from Mendota I have an expert that says that, so I do feel under Boyd there is total breakdown of communication.

MR. WILLIAMS: But they're talking to each other. She goes and sees him. They talk to each other. They exchange information. This isn't fair to the victim. This has been going on for a year.

THE COURT: I understand that he wants to represent himself.

What's your educational background, sir?

THE DEFENDANT: I'm self-educated. I went to public school up until the tenth grade after which time I attended home school and --

THE COURT: Have you got a GED or HSED?

THE DEFENDANT: I would say the equivalent of an HSED.

THE COURT: Do you have one?

THE DEFENDANT: No, sir.

THE COURT: A formal one?

THE DEFENDANT: No, sir. I can easily obtain it.

[12]

That hasn't been my main goal. My main goal when it comes down to getting paper to prove it, I mean that's less of a goal for me at least at this point in my life, but I've been studying as far as the statutes, Wisconsin statute, studying representation for court proceedings. I have a good working knowledge of how court proceeding work.

THE COURT: Tell me about that.

THE DEFENDANT: In what capacity? Just anything?

THE COURT: How does a trial work? How does a trial work, sir?

THE DEFENDANT: I mean, basically like I say there's opening statements. You mean as far as proceedings before trial?

THE COURT: During trial.

THE DEFENDANT: At the trial beginning?

THE COURT: Yeah.

THE DEFENDANT: Basically opening statements.

THE COURT: What happens right before opening statements?

THE DEFENDANT: I guess both parties states their appearance and things like that.

THE COURT: How do we get a jury?

THE DEFENDANT: You do voir dire.

THE COURT: How does that work?

THE DEFENDANT: You question -- you question

jurors, potential jurors and --

THE COURT: About what?

THE DEFENDANT: About various things.

THE COURT: What are we looking for in jurors?

THE DEFENDANT: Fair people who are giving a fair determination as far as hearing evidence, not make biased decisions, make decisions based on the evidence that's presented, not their own personal beliefs as far as, you know, bias and things like that.

You have certain amount of strikes, preemptory and strikes for cause. You got strikes for cause and if I had -- I wasn't incarcerated at the facility where I had proper legal access I would be more prepared. I could prepare adequately. If I wasn't harassed in the jail I could prepare a lot better that way.

THE COURT: What kinds of difficulties would you imagine that you would have in self-representation?

THE DEFENDANT: You mean like my present circumstances?

THE COURT: In your present circumstances.

THE DEFENDANT: Mainly the impairment based on the jail circumstances as far as them not

providing me with reasonable access to the courts and legal materials.

THE COURT: How would you investigate this case, sir, if you were in custody?

[14]

THE DEFENDANT: That's what I've been doing all along by making calls. If I had, like I said, reasonable access to the telephone, if I was forced to have court resources then I would be able to facilitate those things a lot better as far as presently. I think I obtained enough evidence to move forward and proceed with my case as it is as long as things are fair and unbiased and things will be said to where it was before this competency hearing which means the district attorney just basically got a 30-day continuance, so if things were set --

THE COURT: The district attorney, believe me, didn't want this continuance. Did you Mr. Williams?

MR. WILLIAMS: No.

THE DEFENDANT: I mean that could be argued especially in hindsight.

THE COURT: What are you charged with, sir?

THE DEFENDANT: Two counts of first-degree intentional homicide.

THE COURT: What's the penalty -- and two counts of what?

THE DEFENDANT: Use of a dangerous weapon.

THE COURT: What's the penalty?

THE DEFENDANT: Class A felonies carry the maximum of life in prison.

THE COURT: Klessig says I have to have a colloquy

[15]

with him. I have to consider whether he's making a deliberate choice to proceed without counsel, whether he's aware of the difficulties and disadvantages of self-representation, whether he's aware of the seriousness of the charges against him and whether he's aware of the general range of penalties applicable.

He's made the choice, there's no question about it. He's aware of the seriousness of the charges. He's aware of the general range of penalties but he is not aware of the difficulties and disadvantages of self-representation especially given his circumstances, and given the fact that he's only got a tenth-grade education therefore I deny his right to represent himself.

I deny his right to represent himself, so at this point, sir, given your difficulties with Miss Erickson, if you want, against my better judgment I will give you one more lawyer from the Public Defender's office or Miss Erickson. What's it to be?

MR. WILLIAMS: I don't think the Public Defender will give him another lawyer. He's already gotten three.

THE COURT: Mr. Williams, they will if I ask them, and given the fact that we've had and there's no question that I believe there was a breakdown in communication, I'm asking him, sir, you've got two choices, Miss Erickson or another lawyer from the Public Defender's Office. What's it

[16]

to be?

THE DEFENDANT: They gave me competency evaluation over there. I got tested out of 12.7.

THE COURT: Sir, I've made my ruling. You're not going to represent yourself. I don't believe that you understand the difficulties and disadvantages based upon my colloquy, so my question is you're going to have a lawyer. Is it going to be Miss Erickson or are we going to try for number four out of the Public Defender's office?

THE DEFENDANT: I have a right to represent myself.

THE COURT: I have denied you that right, sir. If I'm wrong and you are convicted the court of appeals can tell me I'm wrong. We're past that. It's now Miss Erickson and the work that she's done so far.

THE DEFENDANT: She's done nothing.

THE COURT: Or a new lawyer. Your choice.

THE DEFENDANT: I'm not about to have my speedy trial demand tolled.

THE COURT: Okay. Then Miss Erickson, you're still his lawyer because he won't make the choice. Can we get a date for a trial?

THE DEFENDANT: Stop talking to me. I don't want to talk to you.

THE COURT: Sir, you will have to talk with her

[17]

because I'm not going to entertain another motion for you to withdraw. I have now decided that I've given you that chance. Based upon the breakdown of communications you have chosen not to make the decision so I've made it for you and now we're going to live with it.

April 2nd -- April 4th, 10:00 for jury. This case is over. My advice is cooperate with your lawyer.

THE DEFENDANT: That's not my lawyer.

THE COURT: Yes, she is.

MS. ERICKSON: You said 8:30, Your Honor?

THE COURT: 10:00. I'm sorry.

(Proceedings concluded.)

[18]

APPENDIX F

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

March 1, 2017

Before

DIANE P. WOOD, *Chief Judge*

MICHAEL S. KANNE, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 14-3343

ROBERT L. TATUM,

Petitioner-Appellant,

v.

BRIAN FOSTER,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 13-C-1348

Rudolph T. Randa, *Judge*.

O R D E R

On consideration of the motion filed by Petitioner-Appellant on February 10, 2017, and construed as a petition for rehearing, all members of the original panel have voted to deny the petition.

Accordingly, the petition for rehearing is hereby DENIED.