No. 16-1424

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN FOSTER, *Petitioner*

v.

ROBERT L. TATUM, *Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals correctly determined the state wrongly denied the accused his Sixth Amendment right to represent himself when the state's decision rested on the accused's legal knowledge and tenth grade educational level?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Tatum v. Foster,* 847 F.3d 459 (7th Cir. 2017), and included in the petition at Appendix A.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on January 31, 2017. The Seventh Circuit denied the Petition for Rehearing on March 1, 2017. The petition for a writ of certiorari was filed on May 30, 2017 and docketed on May 31, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

A. Trial Court Proceedings

On May 27, 2010, the state charged Mr. Tatum with two counts of first-degree intentional homicide by use of a dangerous weapon. Pet. 5.[1] Three appointed attorneys represented Mr. Tatum in the ten months between his initial appearance and the start of his jury trial. Pet. 6. At Tatum's request, first counsel moved to withdraw six weeks after appointment. Pet. App. 33a. Second counsel moved to withdraw two months after his appointment and before motion resolution. Pet. App. 34a. Three months after her appointment, third counsel requested the trial court order a competency evaluation. Pet. 6. The parties appeared five days later for return of the report. The evaluation was inconclusive, and the evaluator recommended the court send Mr. Tatum to a mental health institution for an evaluation. *Id.* Tatum objected to further delay of the trial, and requested to represent himself. R. 56: SApp. 24. The trial court responded, "[w]e'll see what happens, sir, when we come back." *Id.* The court remanded Tatum to a state mental health facility for an inpatient evaluation. Dkt. 15-16:10.

About a month later a report issued, and over no objection by the state, the court agreed with the report and found Tatum competent to proceed at trial. R. 56: SApp. 30. Mr. Tatum again made clear his desire to self-represent. *Id.* at SApp. 26-42. The trial court acknowledged Mr. Tatum made an unequivocal request to

[1] Citations to the Petition appear as "Pet. _." Citations to the petitioner's Appendix appear as "Pet. App. _." Citations to the Court of Appeals docket appear as "R. (docket number):(page number)." Citations to the district court docket appear as "Dkt. (docket number):(page number).

represent himself, but denied Mr. Tatum based on academic achievement and familiarity with the criminal justice system:

> **The Court:** *Klessig* says I have to have a colloquy 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 or 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?

Id. at SApp. 26-42.

Tatum continued to press the trial judge regarding self-representation, but the court denied the request:

> **Tatum:** 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 has done so far.

Id. at SApp. 40-42.

Mr. Tatum was subsequently convicted of both counts of first-degree homicide at a trial in which he was represented by a lawyer he did not want. The judge sentenced Tatum to life imprisonment. *Id.* at SApp. 18-19.

B. State Post-Conviction Proceedings

Mr. Tatum again requested to represent himself after sentencing, and the

appellate court permitted him to do so. Pet. App. 36a. On appeal, Tatum raised three grounds for relief, including that he had been denied his constitutional right to self-representation. *Id.* The appellate court affirmed the trial court on all grounds. Pet. App. 46a. Regarding Mr. Tatum's self-representation claim, the appeals court reasoned that Wisconsin's higher standard for determining a defendant's competency to represent himself justified the denial. Pet. App. 38-40a. The state court of appeal's concurrence was rooted in the trial court's finding that the respondent failed to prove he understood "legal technicalities." *Id.* The Wisconsin Supreme Court denied review. Pet. App. 30a.

C. Federal Court Proceedings

Tatum next turned to the federal courts and filed a *pro se* petition for writ of habeas corpus under 28 U.S.C. § 2254. Dck. 7. He included his *Faretta* claim as one of four grounds of relief, and the state conceded that Tatum had exhausted and fairly presented the point. Dkt. 15:2. The district court rejected Tatum's claim on the merits, finding that the state courts' approach to the right to self-representation did not violate law clearly established by the Supreme Court. Pet. App. 27-28a.

Mr. Tatum appealed to the Seventh Circuit, and the Court of Appeals granted the request for appealability on the self-representation issue. R. 13. Tatum argued that the denial of his right to proceed without counsel was contrary to *Faretta*, and that the state courts had unreasonably applied governing Sixth Amendment precedent when it denied him based on his education and skill. R. 55. In response, the state argued that the lower courts' denial was justified because Mr.

Tatum did not "clearly choose" to represent himself, because he had a limited education and an "utter inability to capably represent himself from a jail," and because Tatum's mental health impacted his competency to waive counsel. R. 60:30-36.

The Seventh Circuit reversed and remanded for issuance of the writ of habeas corpus. Pet. App. 22a. The court adhered to Supreme Court precedent in holding that a trial court's determination regarding self-representation may not rest on the accused's technical legal knowledge. The court held that the Wisconsin state courts unreasonably applied Supreme Court precedent in denying Mr. Tatum his right to self-represent not on his general competence, but on "his educational level and understanding of the legal system." Pet. App. 2, 18a. The court acknowledged the appropriateness of factoring in a defendant's educational background in self-representation determinations, but concluded denials founded on an accused's legal knowledge or academic achievement were explicitly prohibited by *Faretta* and its progeny. Pet. App. 22a. The court distinguished Mr. Tatum from the defendant in *Jordan v. Hepp*, 831 F.3d 837 (7th Cir. 2016), a case decided by the Seventh Circuit after *Imani v. Pollard*, and five months prior to *Tatum*. Pet. App. 20a. In *Jordan*, the court of appeals agreed the Wisconsin court correctly denied the defendant's self-representation request in the case where the defendant was illiterate, and thus, incapable of using written evidence in his defense. *Id.* The appeals court clarified that where a state denies a defendant, such as it did in *Tatum*, only on his legal expertise or his deficits in higher education, the state does so against this Court's

precedent. Pet. App. 21a-22a. The Seventh Circuit resolved Tatum's case narrowly, stating that the way the Wisconsin courts "implemented the *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." Pet. App. 21-22a. In reversing the state court decision, the court of appeals concluded that the state's focus and reliance on Tatum's technical legal knowledge was clear both from the trial judge's comments and from the state appellate court's opinion that spoke to Tatum's failure to appreciate "courtroom decorum and legal technicalities. *Id.* at 22a.

ARGUMENT

1. The Seventh Circuit Court of Appeals followed the consensus approach to determining the effectiveness of waivers of counsel taken by the United States Supreme Court and courts across the country.

a. Petitioner's effort to present the court of appeals' decision as conflicting with Supreme Court precedent is untenable. Pet. 15. The Seventh Circuit correctly reversed the state court squarely on standards articulated in *Faretta,* 422 U.S. 806, 807, 818-21 (1975), and its progeny. Pet. App. 1a. The court of appeals acknowledged that *Faretta* requires the accused be made aware of the dangers and disadvantages of self-representation so as to establish a knowing waiver, but that a competent waiver does not require the skill and experience of a lawyer. Pet. App. 12-13a. The court also noted that the competence required of the defendant seeking to waive his right to counsel is the competence to waive the right, not the

competence to self-represent. Pet. App. 14a. Additionally, the court made clear that this Court, in *Indiana v. Edwards*, 554 U.S. 164, 178 (2008), permits states to insist upon representation when a defendant is mentally competent to stand trial, but lacking in the mental functioning to conduct the trial himself. Pet App. 15a.

Here, in the respondent's case, the Wisconsin courts did not base the denial on Tatum's mental state, nor does the record bear out any premise that Tatum had a mental illness that made his incompetence self-evident. Instead, the state court rested the Sixth Amendment determination on the accused's technical legal knowledge and education level, and it did so against *Faretta*, *Indiana* and *Godinez*, all of which expressly state a defendant's legal knowledge is not relevant to the assessment of a knowing exercise of the right to defend oneself. *Faretta*, 422 U.S. at 834; *Godinez v. Moran*, 509 U.S. 389, 400 (1993); *Indiana*, 554 U.S. at 172. The court of appeals' decision, therefore, in no way conflicts with this Court's precedent.

b. Contrary to the petitioner's assertion, the court of appeals' decision did not conflict with the Wisconsin Supreme Courts' approach to Sixth Amendment determinations. Pet. 15. The Seventh Circuit did not object to the heightened state standard, but rather to the way in which the Tatum trial court applied that standard. Pet. App. 21-22a. Also, the court did not hold as petitioner alleges, that "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." Pet. 3. The court of appeals' decision in *Tatum*, and its decisions in two recent cases, *Imani v. Pollard,* 826 F.3d 939 (7th Cir. 2016) and *Jordan v. Hepp*,

831 F.3d 837 (7th Cir. 2016), make clear that the court of appeals agrees that educational background is appropriately factored into Sixth Amendment determinations. These cases do not challenge the state standard as the petitioner suggests, but rather, reveal deference to the state courts' application of its heightened standard in Sixth Amendment determinations. In each case, the court of appeals acknowledged the state courts' power to apply a heightened standard, and to deny a defendant's waiver subsequent to the application of the state test. *Imani*, *Jordan*, and *Tatum*, all deal with habeas corpus petitions that questioned the Wisconsin trial court's rejection of the accused's waiver of counsel following application of the *Klessig* test. In each decision, the court of appeals narrowly resolved the waiver of counsel issue, and each decision turned on the facts in the record.

The earliest decision, *Imani,* involves a defendant with similar circumstances as the respondent. The appeals court, in both *Imani* and *Tatum*, applying this Court's precedent and recognizing the state's power to implement its own standard, held that a trial court could not require a defendant to validate his waiver of counsel with evidence of lawyerly skill. The holding was consistent with this Court's precedent and the state supreme court's, because *Klessig* does not require defendants prove courtroom acumen. In *Imani,* the defendant unquestionably invoked his right to self-represent, and competently and intelligently waived his right to counsel according to this Court's precedent and the state's. *Imani,* 826 F.3d at 943. Even so, the trial judge denied the defendant after requiring the defendant

prove he was a skilled litigator in order to competently waive counsel. *Id* at 946. Though Imani had worked on the case for over a year, had a tenth-grade education, a college-level reading ability, and experience in five prior criminal cases, the trial court found he failed to establish a "sufficiently rational basis" to justify self-representation. *Id.* at 942. The Wisconsin supreme court concurred, but the 7th Circuit reversed because "the state court imposed a competency standard that was 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. The court of appeals determination relied on this Court's precedent, was fact-specific, and *Klessig* was not over-ruled. In reversing the state court, the appeals court correctly concluded "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 court of appeals decided *Jordan v. Hepp* after *Imani*. *Jordan* nullifies petitioner's claims that "the Seventh Circuit has made unmistakingly clear in [Tatum] and in *Imani* that it will vacate any subsequent convictions on federal habeas review," relating to self-representation requests, and that "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." Pet. 3. The *Jordan* trial court denied the defendant his request to self-represent, because it believed Jordan's education would prevent him from presenting a meaningful

defense because his illiteracy would likely prevent him from making use of written evidence such as police reports and his signed confession. *Jordan,* 831 F.3d at 842. The Seventh Circuit agreed. The appeals court observed that Jordan's problems "went well beyond the lack of knowledge of court procedure or an ability to make strategic judgments," and that as a result, the trial court's decision did not stray from Supreme Court's precedent so as to warrant issuance of the writ. *Id*. at 843-845. The court of appeals decision in *Jordan* made clear the Seventh Circuit's agreement with precedent, that state courts may factor in a defendant's education when determining self-representation requests.

Within its decision, the court of appeals distinguished the respondent from Jordan based on the trial court record. Unlike the *Jordan* trial court, the state had denied Tatum not on his mental functioning, but only on his tenth-grade education and legal knowledge. Pet. App. 21-22a. The court of appeals' decision in *Tatum*, like its decisions in *Jordan*, and *Imani,* conflicts neither with the Supreme Court approach to waiver determinations, nor Wisconsin's. Instead, it highlights difficulties some trial courts experience in administering *Faretta*, undoubtedly because in invoking the right to self-represent, the accused simultaneously exercises his right to represent himself and waives his right to counsel. 422 U.S. at 834-836. The court of appeals correctly reversed the state in the respondent's case based on Supreme Court precedent. The fact-bound decision did not conflict with the state's *Klessig* approach to Sixth Amendment determinations. As such, the petition presents no issue warranting further review. None of the decisions

invalidate the state supreme court's approach to Sixth Amendment determinations, and as such, petitioner's argument is without merit. Pet. 13.

c. Petitioner similarly errs in asserting the court of appeals decision conflicts with and creates a division of authority between itself and other courts across the country. First, the petitioner mischaracterizes the Seventh Circuit's holding. The Seventh Circuit neither attempts to preclude the state from applying the state standard, nor does the court prohibit consideration of educational background. Pet. 3, 18. Instead, in keeping with this Court's precedent, the court of appeals held that the state court's denial of the respondent's request to represent himself was contrary to and an unreasonable application of established Supreme Court precedent because the lower court denied the request based only on the respondent's legal skills and education. Pet. App. 22a. None of the cases petitioner cites conflict with the basic principle at issue in this case, that a court may not impose a standard that is more demanding than *Faretta* and its progeny allow, such as requiring the accused prove technical or legal knowledge before establishing a valid waiver of counsel. As such, there exists no conflict warranting review.

The petitioner also wrongly alleges the Seventh Circuit precludes the state from considering a defendant's education in Sixth Amendment determinations. *Tatum*, *Jordan*, and *Imani*, make clear the Seventh Circuit accords with this Court's precedent, as well as other federal and state courts - - - that a defendant's educational background is an appropriate factor to weigh in, as long as a denial of a defendant's wavier of counsel does not rest on a defendant's technical and legal

knowledge. As such, there exists no conflict warranting review.

Simply, none of the decisions cited by petitioner offer petitioner support. A number of the decisions cited to are not aptly compared to *Tatum*. Nonetheless, to the extent there's any relatedness, the cases align with the Seventh Circuit's opinion. *United States v. Peppers*, 302 F.3d 120, 130-32, presents the most similar circumstances to the respondent's, and the Third Circuit's opinion is inline with the court of appeals' in *Tatum*. In *Peppers*, the Third Circuit vacated the lower court's denial of the defendant's request to proceed *pro se*, and remanded the case for a new trial based on the lower court's focus on the defendant's educational level. *Peppers,* 302 F.3d at 129. The *Peppers* trial court had denied the defendant's request after concluding that allowing a defendant with no legal training and expertise to represent himself would be akin to "allowing him to stand trial with no representation at all." *Id.* The Third Circuit emphasized that a defendant who chooses to represent himself must be allowed to make that choice even if it works to his detriment. *Id.* at 130. Tellingly, before vacating the decision, the Third Circuit found the trial court's focus on the defendant's skill and legal competency missed the mark, and maintained that, "federal courts have stated repeatedly that a court must not evaluate whether the defendant is competent to represent himself as part of its determination of whether he is knowingly asserting the right to self-representatio[n]." *Id.* at 134, citing to *Faretta*, 422 U.S. at 835-36; and *Lopez v. Thompson*, 202 F.3d 1110, 1119 (9th Cir. 2000) ("In assessing waiver of counsel, the trial judge is required to focus on the defendant's understanding of the importance

of counsel, not the understanding of the substantive law or the procedural details.")

The petitioner's reliance on *Ductan* is misplaced, not only because there is no evident conflict with the Seventh Circuit, but also because the case is not on point. Pet. 19. The issue in *Ductan* was whether a defendant can forfeit the right to counsel by his misconduct in courtroom proceedings. *United States v. Ductan*, 800 F.3d 642, 649 (4th Cir. 2015). There, the defendant did not attempt to waive counsel, but instead made clear he did not want to represent himself, and repeatedly stressed, "[he] could not properly represent [him]self;" that he was not "prepared right now to move forward with any proceedings;" that "I do not want to represent myself;" and that he would like to seek counsel. *Id.* at 646. Despite the defendant's unequivocally stated preference for counsel, the trial court, seemingly out of annoyance, concluded Ductan forfeited his right to counsel, and had him proceed at trial, *pro se. Id.* In so much as the decision is relevant here, the Fourth Circuit reversed and remanded because the defendant had not chosen self-representation. *Id.* at 653. Similarly, the petitioner's position finds no support in *Miller v. Thaler*. The reviewing court in *Miller* dealt with a defendant who'd not competently waived counsel due to the nature of the request. *Miller v. Thaler*,714 F.3d 897, 903 (5th Cir. 2013). The Fifth Circuit affirmed the lower court's denial of the defendant's self-representation request because the record showed the defendant had not unequivocally requested to proceed *pro se,* because shortly after terminating counsel, the defendant asked the same counsel to negotiate a plea agreement. *Miller,* 714 F.3d at 904. The *Miller* decision did not conflict with the Seventh Circuit

in any respect, and in fact, like the *Tatum* decision, made clear the Circuit allegiance with the Seventh Circuit's interpretation of this Court's case law. *Id.* at 903. The state court of appeals in *New York v. Smith*, similarly does not conflict with, but rather supports, the Seventh Circuit opinion. *New York v. Smith,*705 N.E.2d 1205 (N.Y. 1998). There, the reviewing court made clear that a trial court's inquiry regarding waiver is not satisfied by repeated judicial entreaties that a defendant should persevere with assigned counsel because the defendant's interests will be better served through a lawyer's representation. *Id. at* 1207-1209. Petitioner's reliance on *New Jersey v. Reddish* is equally erroneous, not only because there's no disagreement between the Seventh Circuit and the state supreme court opinion, but also because the case is not on point. *Reddish* dealt with the scope of a capital defendant's right to proceed *pro se*. *New Jersey v. Reddish,* 859 A.2d 1173, 1198 (N.J. 2004). In so much as the case is relevant to the respondent, like the Seventh Circuit in *Tatum*, before reversing and remanding for a new trial, the New Jersey supreme court declared *Faretta* the controlling law, stressing that defendants need not have the skill of a lawyer, nor technical legal knowledge, before competently and intelligently choosing self-representation, thus evincing a relatedness to the reasoning in the Seventh Circuit's Tatum decision. *Id.* at 1198.

In *Idaho v. Anderson*, the state supreme court, in a decision that resembles Seventh Circuit determinations, noted that a trial court is to consider the "totality of the circumstances" in determining the validity of a defendant's waiver of counsel, and that factors such as a person's age, education, and familiarity with the English

language would be appropriate, but that consideration of the defendant's "technical legal knowledge is not relevant" to the determination. *Idaho v. Anderson*, 170 P.3d 886, 889 (Idaho 2007). The supreme court in *North Carolina v. Lane* affirmed the lower court's finding that the defendant had effectively waived his right to counsel even where the defendant had been evaluated multiple times in terms of his competency to stand trial, and had found that the defendant's "illiteracy level at best would be found to be in the third grade level…but is more likely in the range of kindergarten through second grade." *North Carolina v. Lane*, 707 S.E.2d 210, 216 (N.C. 2011). Like the Seventh Circuit, the state court concluded that the defendant's lack of higher education could not stand in the way of the defendant's decision to waive counsel. *Id.*

CONCLUSION

Petitioner has not demonstrated that the Seventh Circuit has created any conflict with the Court, the state, or other appellate and state courts across the country. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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