No. 16-1424

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONER

The Seventh Circuit has created a serious division of authority over how courts must traverse the sensitive relationship between a defendant's right to counsel and right to self-representation. In *Wisconsin v. Imani*, 786 N.W.2d 40 (Wis. 2010), the Wisconsin Supreme Court held that before granting a self-representation motion, the trial court must assure itself that the criminal defendant both understands the consequences of self-representation *and* is competent to conduct that self-representation, while spelling out standards and factors that a Wisconsin trial court must apply in conducting these two inquiries. *Id.* at 49–54. In *Imani v. Pollard*, 826 F.3d 939 (7th Cir. 2016), and again in the present case, the Seventh Circuit held that the standards and factors the Wisconsin Supreme Court instructed its trial courts to apply are "clearly" "contrary to" *Faretta v. California*, 422 U.S. 806 (1975). *See Imani*, 826 F.3d at 941–42 (citing 28 U.S.C. § 2254(d)(1)); App. 21a–22a. The Seventh Circuit's erroneous decisions have created a split of authority with other federal courts of appeals and state supreme courts, warranting this Court's review.

Even more immediately, by holding that the Wisconsin Supreme Court's standards for knowing-and-voluntary waiver and competence to represent oneself are unlawful, the Seventh Circuit has forced Wisconsin trial courts to make impossible decisions: either ignore the precedents of the Wisconsin Supreme Court, thus courting reversal of a criminal conviction

on direct appeal for violation of the right to counsel, or follow those precedents, thus courting reversal on federal habeas review for violation of the right to self-representation. As this Court explained after the Petition in this case had been filed, "spar[ing] [state] courts from having to confront [a] legal quagmire" of conflicting federal- and state-court precedent justifies this Court's intervention. *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729–30 (2017) (per curiam). The federalism-based dilemma here is *more* serious than the one Virginia trial courts faced in *LeBlanc*, given the peculiar interaction between a defendant's rights to counsel and to self-representation. In that doctrinal area, an error in *either* direction—granting the self-representation motion erroneously, or denying that motion erroneously—can lead to vacatur of the criminal conviction.

Respondent offers no reason for denying the Petition. Respondent has no persuasive answer to the argument that the Seventh Circuit's decision as to both knowing-and-voluntary waiver and self-representation competence conflicts with the decisions of federal courts of appeals and state supreme courts around the country. And with regard to the conflict between the Seventh Circuit and the Wisconsin Supreme Court in particular, Respondent fails to recognize that the Wisconsin Supreme Court's decision in *Imani* is mandatory statewide precedent in Wisconsin, and that by rejecting that decision on habeas review the Seventh Circuit necessarily created a conflict between itself and the State's highest court. By doubling down on

its *Imani* decision in this case, the Seventh Circuit has made clear that it will overturn state court decisions that faithfully apply the standards articulated by the Wisconsin Supreme Court.

The Petition should be granted.

I. Respondent Fails To Address Meaningfully The Division Of Authority Over The Two Questions Presented

A. Knowing And Voluntary Waiver

The Wisconsin Supreme Court has held that when a criminal defendant requests to represent himself, the trial court must engage in a colloquy to assure itself that, among other things, the defendant *actually* understands the "difficulties and disadvantages of self-representation." *Imani*, 786 N.W.2d at 49–50 (citation omitted). If after that colloquy the trial court is not satisfied that the defendant understands these considerable difficulties, the court must deny the motion to honor the defendant's right to counsel. *Id.* at 50, 52 & n.11. This is an entirely lawful regime under this Court's caselaw. As this Court has 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 waiver. *Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993). The Seventh Circuit's decision misunderstands the law in holding that denying a self-representation motion on the grounds that

the defendant does not actually understand the difficulties of self-representation conflicts with *Faretta*'s "technical legal knowledge" language and imposes an unlawful "burden" on the defendant. App. 20a–22a. Just as the trial court here looked to Respondent's lack of understanding of the difficulties of self-representation—such as his insistence that "the trial court had the authority to order that he be 'forced to have court resources,'" and his failure to understand basic courtroom decorum, App. 39a–40a—so courts around the country mandate that each trial court determine whether a defendant "understands . . . technical problems that [he] may encounter," *United States v. Peppers*, 302 F.3d 120, 130–32 (3d Cir. 2002); *accord United States v. Ductan*, 800 F.3d 642, 649 (4th Cir. 2015); *Miller v. Thaler*, 714 F.3d 897, 903 (5th Cir. 2013); *North Carolina v. Lane*, 707 S.E.2d 210, 219 (N.C. 2011); *Idaho v. Anderson*, 170 P.3d 886, 889 (Idaho 2007); *New Jersey v. Reddish*, 859 A.2d 1173, 1197 (N.J. 2004); *New York v. Smith*, 705 N.E.2d 1205, 1207 (N.Y. 1998); *see generally* LaFave, et al., *Grounds for denial*, 3 Crim. Proc. § 11.5(d) (4th ed.). The Seventh Circuit stands in conflict with all of these decisions. Pet. 16–24.

Respondent's claim that the Seventh Circuit created no division of authority on the knowing-and-voluntary-waiver issue, Br. in Opp. 11–15, is simply wrong.

Most obviously, the Seventh Circuit in its AEDPA decision in *Imani* rejected the Wisconsin Supreme

Court's approach to the knowing-and-voluntary inquiry, as articulated and applied in the Wisconsin Supreme Court's decision in *Imani*. *See* Pet. 17–18. Petitioner does not even attempt to address this federal-state split, focusing his discussion of the conflict between the Seventh Circuit and the Wisconsin Supreme Court only on the separate self-representation competency issue, relating to the second Question Presented. *See infra* pp. 8–10.

Respondent's argument that the Seventh Circuit's decisions here and in *Imani* are consistent with the decisions of the Third, Fourth, and Fifth Circuits fails. Respondent argues that the Seventh Circuit's approach is consistent with the Third Circuit's decision in *Peppers* because *Peppers* made clear that trial courts must not conflate the separate knowing-and-voluntary and self-representation competency inquiries. Br. in Opp. 12–13. But that is unresponsive to the Petitioner's argument. Both the Wisconsin Supreme Court and the Third Circuit agree about what *is* required under the knowing-and-voluntary inquiry: determining whether the defendant understands the difficulties of self-representation. *See Imani*, 786 N.W. 2d at 49–54; *Peppers*, 302 F.3d at 130–32. The Seventh Circuit, on the other hand, has held that such an inquiry conflicts with *Faretta*, at least when used as a basis for denying a self-representation request, because that puts a "burden" on the defendant. *See* App. 20a; *Imani*, 826 F.3d at 944–45. Respondent's effort to distinguish the Fourth and Fifth Circuits' decisions on their facts is similarly unresponsive. Br. in

Opp. 13–14. In *Ductan*, the Fourth Circuit assumed for the sake of argument that a valid waiver had occurred and then discussed the requirements of the knowing-and-voluntary-waiver inquiry, explaining that this includes determining whether the defendant actually "understand[s] . . . the dangers of proceeding pro se." 800 F.3d at 649, 652–63. And the facts of the Fifth Circuit's decision in *Miller* are beside the point because the *legal* point, based upon the Fifth Circuit's generally applicable, longstanding caselaw, is that the trial court "must be satisfied that the accused understands . . . the practical meaning of the right he is waiving." *Miller*, 714 F.3d at 903 (quoting *McQueen v. Blackburn*, 775 F.2d 1174, 1177 (5th Cir. 1985)).

Respondent's attempt to distinguish the Petitioner's state supreme court decisions fares no better. Respondent's discussion of the New York Court of Appeals' decision in *Smith supports* granting the Petition because it departs from the Seventh Circuit's decision here, as *Smith* held that barebones judicial entreaties are not enough to satisfy the knowing-and-voluntary-waiver standard. Br. in Opp. 14; *Smith*, 705 N.E.2d at 1207–08. And it is not the case that the North Carolina Supreme Court in *Lane* held that a defendant's lack of higher education cannot be considered in the mandatory knowing-and-voluntary inquiry. Br. in Opp. 15. Indeed, the court found that it was proper for the trial court to consider the defendant's limited education in determining whether the defendant understood the gravity of his waiver. *Lane*, 707 S.E.2d at 221–22. While the Idaho Supreme

Court's decision in *Anderson*, Br. in Opp. 14–15, correctly explained that "technical legal knowledge" is not part of the knowing-and-voluntary evaluation, 170 P.3d at 889, its conclusion is consistent with the Wisconsin Supreme Court's rule that the trial court "must be satisfied that the defendant understood the inherent risks involved in waiving the right to counsel," *id.* (citation omitted). And the fact that *New Jersey v. Reddish*, 859 A.2d 1173 (N.J. 2004), was a capital case is irrelevant because the New Jersey Supreme Court has long held that trial courts must "engage in a penetrating examination of the knowingness and intelligence of a defendant's attempted waiver." *Id.* at 1197 (citing *New Jersey v. Crisafi*, 608 A.2d 317 (N.J. 1992)).

Finally, on the merits, Respondent is wrong to argue that the Seventh Circuit's decision was mandated by *Faretta*, Br. in Opp. 6–7, especially when viewed through the lens of AEDPA deference. While *Faretta* held that the defendant's "technical legal knowledge" "was not relevant to an assessment of his knowing exercise of the right to defend himself," 422 U.S. at 836, it is in no way "clear[ ]," 28 U.S.C. § 2254(d)(1), that this statement forecloses the specific factors that the Wisconsin courts relied upon in the present case and in *Imani*. The trial court here based its holding on the fact that Respondent lacked understanding about the difficulties of conducting a double-homicide investigation while incarcerated and the basics of courtroom decorum, not on Respondent's "technical legal knowledge," as *Faretta* uses that phrase. Instead, the

trial court's entirely reasonable decision was that Respondent did not "actually [ ] understand the significance and consequences" of his waiver. *Godinez*, 509 U.S. at 401 n.12.

B. Competence To Represent Oneself

Consistent with this Court's decision in *Indiana v. Edwards*, 554 U.S. 164 (2008), the Wisconsin Supreme Court has adopted a heightened standard for competence to represent oneself at trial. Under that standard, the trial court must evaluate the defendant's self-representation competence by looking to his "education, literacy, language fluency, and any physical or psychological disability which may significantly affect his ability to present a defense." *Imani*, 786 N.W.2d at 53. The Seventh Circuit erred in holding that this standard is unlawful and that any self-representation-incompetence finding must be based upon the defendant's lacking sufficient "mental functioning." App. 22a. By reaching that conclusion in this case and in *Imani*, the Seventh Circuit became the only federal court to hold that a State's heightened self-representation-competence standard exceeds the considerable leeway that States have under *Edwards*. *See* Pet. 27–28; E. Lea Johnston, *Communication and Competence for Self-Representation*, 84 Fordham L. Rev. 2121, 2124, 2127 (2016) (explaining that since *Edwards*, States "have adopted differing and often vague standards for representational competence," leading to a "patchwork of competency

standards"). This holding was particularly inappropriate given that this case and *Imani* were before the Seventh Circuit on AEDPA review. Pet. 28–30.

Respondent fails to grapple with the fact that the Seventh Circuit is now the only court to hold that any State's heightened standard violates "clearly established" federal law. Instead, Respondent limits his argument to erroneously claiming that the Seventh Circuit's decisions in this case and in *Imani* were fact-bound and thus do not undermine Wisconsin's heightened competency standard as articulated in *Wisconsin v. Klessig*, 564 N.W.2d 716, 720–21 (Wis. 1997). Br. in Opp. 8–9. Respondent overlooks the critical fact that *Imani* is a decision from the Wisconsin Supreme Court, the latest word from that court on this issue. Accordingly, Respondent does not (and could not possibly) dispute that the Seventh Circuit's decisions in this case and in *Imani* conflict with the Wisconsin Supreme Court. This establishes a recurring conflict between the Seventh Circuit and the Wisconsin Supreme Court, which only this Court can resolve.

Nor does the Seventh Circuit's decision in *Jordan v. Hepp*, 831 F.3d 837 (7th Cir. 2016), Br. in Opp. 9–11, dispel this entrenched federal-state conflict. The Seventh Circuit in *Jordan* merely permitted Wisconsin courts to take limited account of the Wisconsin Supreme Court's *literacy* factor in Wisconsin's heightened competency analysis, holding that "near-illiteracy" could be included in the definition of "mental capacity." 831 F.3d at 844–45 (citation omitted).

The important point is that the Wisconsin Supreme Court has adopted a more rigorous understanding of self-representation competency than just its literacy factor or the Seventh Circuit's narrow "mental functioning" approach, as cases like the Wisconsin Supreme Court's decisions in *Imani* and *Wisconsin v. Marquardt*, 705 N.W.2d 878, 891–92 (Wis. 2005), conclusively demonstrate. It is that more demanding inquiry that the Seventh Circuit erroneously rejected, creating a split of authority.

II. This Court's Recent Decision In *Virginia v. LeBlanc* Demonstrates Why Relief In This Case Is Necessary To Avoid Placing Wisconsin Courts In An Impossible Position

Less than two weeks after the filing of the Petition in this case, this Court decided *Virginia v. LeBlanc*, 137 S. Ct. 1726, reversing a Fourth Circuit decision for many of the same reasons that Petitioner seeks reversal of the Seventh Circuit's decision here. In *LeBlanc*, the Fourth Circuit granted habeas relief because it believed that the Virginia court had unreasonably applied this Court's Eighth Amendment caselaw by employing a "geriatric release program" for juvenile, nonhomicide offenders. *Id.* at 1727–28. This Court reversed, finding that the Fourth Circuit had "fail[ed] to accord the state court's decision the deference owed under AEDPA," and that, while the Fourth Circuit may have had "reasonable arguments" for believing Virginia's program unconstitutional,

those "arguments cannot be resolved on federal habeas review." *Id.* at 1728–29. Of particular significance to the present Petition, this Court explained that "[t]he federalism interest implicated in AEDPA cases [was] of central relevance." *Id.* at 1729. The Fourth Circuit's decision would have created "significant discord" since, after the decision, "Virginia courts were . . . required to affirm [ ] a sentence like [LeBlanc's], while federal courts presented with the same fact pattern were required to grant habeas relief." *Id.* To "spare[ ] Virginia courts from having to confront this legal quagmire," this Court reversed the Fourth Circuit's decision. *Id.* at 1729–30.

Even more so than the Fourth Circuit's decision in *LeBlanc*, the Seventh Circuit's decisions in this case and *Imani* have created a "legal quagmire" for state courts, which only this Court can remedy. Wisconsin Supreme Court precedent requires trial courts to deny a request for self-representation where the defendant does not actually understand the consequences of his waiver or where the defendant fails to meet Wisconsin's heightened self-representation-competency standard. *See Imani*, 786 N.W.2d at 52–54 & n.11. Failure to follow either of these rules will lead to vacatur of the conviction of an unrepresented defendant by the Wisconsin Court of Appeals for violating the defendant's right to counsel. Pet. 31–32. However, if Wisconsin trial courts follow the Wisconsin Supreme Court's rule—as they are duty-bound to do, *see Wisconsin v. Ward*, 604 N.W.2d 517, 525 (Wis. 2000)—this will lead to vacatur under AEDPA of a

conviction obtained despite assistance of counsel for violating the defendant's right to self-representation, just as happened here and in *Imani*. *See* App. 19a–22a; *Imani*, 826 F.3d at 944–46. This is an even *more* serious dilemma than that at issue in *LeBlanc* because, due to the special relationship between the right to counsel and the right to self-representation, the defendant can obtain relief from a criminal conviction regardless of how the trial court might rule on the self-representation motion.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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