IN THE

Indiana Supreme Court

Supreme Court Case No. 20S-LW-260

Zachariah Brian Wright
Appellant (Defendant below)

–v–

State of Indiana
Appellee (Plaintiff below)

Argued: November 5, 2020 | Decided: May 4, 2021

Direct Appeal from the Boone Superior Court,
No. 06D01-1706-MR-1078
The Honorable Matthew C. Kincaid, Judge

Opinion by Justice Goff

Chief Justice Rush and Justice David concur.
Justice Massa concurs in result with separate opinion.
Justice Slaughter dissents with separate opinion.

Goff, Justice.

The Sixth Amendment right to counsel in a criminal trial speaks "an obvious truth." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). It marks the very "foundation for our adversary system," ensures "fundamental human rights of life and liberty," and promotes our "universal sense of justice." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938); *Betts v. Brady*, 316 U.S. 455, 476 (1942) (Black, J., dissenting). But through the looking glass of *Gideon* stands a corollary right—a constitutional paradox—to waive the assistance of counsel and "to conduct one's own defense *in propria persona*." *Faretta v. California*, 422 U.S. 806, 816 (1975). Indeed, despite their common constitutional foundation, the right to counsel and the right to self-representation serve distinct and often conflicting interests—the latter protecting a defendant's personal autonomy, the former guarding the integrity of our criminal justice system. We confront this tension in the case before us today.

The defendant here insists that the trial court erred by denying his request to self-represent. We agree that his waiver of the right to counsel was knowing and voluntary. But because his waiver was neither unequivocal nor intelligent, we hold that the trial court properly denied his request to self-represent. And because neither his character nor the nature of his offenses dictates otherwise, we hold that the defendant's sentence was not inappropriate. Thus, we affirm the trial court's decision on both grounds.

Facts and Procedural History

During the early morning hours of June 18, 2017, Zachariah Wright, a nineteen-year-old on probation for felony burglary, committed a string of offenses in Lebanon, Indiana. The crime spree began with Wright's theft of a bike from the home of Darrin Demaree. From there, Wright broke into the home of Lynnetta Boice and Rick Barnard, where he stole another bike, along with sundry items he found in the garage and in a car parked in the home's driveway.

Meanwhile, an elderly couple, Sonja and Max Foster, lay asleep just a block away in the home they had shared for nearly fifty years. Sometime just after sunrise, Sonja awoke to find a tall, obscure figure—later identified as Wright—standing in the doorway to their bedroom. Before Sonja could react, Wright walked quickly across the room, leaned over the bed, and stabbed Max repeatedly. As Max struggled to deflect the blade, Sonja retaliated, striking Wright on the back with a baseball bat. Wright turned to Sonja in response, slashing her across the face. In shock, Sonja fled downstairs, bleeding profusely and unsure of where to turn. Wright followed Sonja downstairs to confront her. Sonja, having gathered her wits, escaped through the front door after distracting her attacker. But Wright caught up with her once again, pushing her to the ground and attempting to set her clothes on fire with a cigarette lighter. Unsuccessful, Wright fled the scene, disposing of his boots in a nearby pond. Sonja made her way to a neighbor's house to call for help. Max, however, succumbed to his wounds, having been stabbed over thirty times.

The State charged Wright with, among other things, murder, level-3 felony criminal confinement, level-6 felony theft, level-5 felony burglary, and level-2 felony attempted burglary.[1] At his initial hearing in late June 2017, Wright requested and received a court-appointed attorney. When the State sought the death penalty a few months later, the trial court appointed new, capital-qualified counsel. *See* Ind. Crim R. 24(B). Wright initially raised no objection to his newly appointed lawyers. But in November 2017, he wrote several letters and motions to the court demanding a speedy trial, seeking to withdraw a motion for continuance that his attorneys had filed, and asking the court to appoint new counsel. In a pro se "Application for Pauper Counsel," Wright demanded that his "new attorney" visit him immediately and to refrain from filing motions without his permission. The court denied each of these requests.

[1] *See* Ind. Code § 35-42-1-1(1) (2017) (murder); I.C. § 35-42-3-3(a), I.C. § 35-42-3-3(b)(2)(A) (criminal confinement); I.C. § 35-43-4-2(a) (theft); I.C. § 35-43-2-1 (burglary); I.C. § 35-43-2-1, I.C. § 35-43-2-1(3)(A), I.C. § 35-41-5-1 (attempted burglary).

In January 2018, Wright, by counsel, notified the court of his preference to represent himself. At a hearing the following month, the court engaged in an extended colloquy with Wright. When asked to explain his position, Wright expressed having had no problem with his first appointed attorney, with whom he admittedly "got along." Tr. Vol. 4, p. 45. But his new lawyers, he believed, "were [not] acting in [his] best interest." *Id.* According to Wright, they had "refused" to request a "fast and speedy trial." *Id.* at 43. When asked to clarify, Wright stated that any "attorney paid by the court is not going to listen to anything [he had] to say." *Id.* at 45.

The court, in turn, advised Wright that an attorney "is trained by education" and possesses the skills necessary to investigate a criminal case, to "pick a fair and impartial jury," to interrogate witnesses, to file motions, to "properly present substantive defenses," to object to evidence, to preserve the record for appeal, and to offer mitigating arguments at sentencing. *Id.* at 46–49. What's more, the court stated, "death-penalty-qualified attorneys" have special training and experience. *Id.* at 46. The court also warned Wright that the prosecution had its own trained attorneys and that, should Wright decide to represent himself, he would not "receive any special treatment from the court" and would be held "to the same standard" as a practicing attorney. *Id.* at 49, 50. Proceeding without professionally trained counsel, the court emphasized, "to be blunt, can turn out to be a very bad decision in many cases." *Id.* at 50.

Wright responded repeatedly that he understood each of these points. He acknowledged, however, that attorneys "can be of some assistance in negotiating on [his] behalf," can "evaluate the strengths and weaknesses of [his] case," and can even give "expert advice as to whether or not seeking a plea deal might be advantageous." *Id.* at 48. Still, he insisted, he met "all the qualifications for going pro se," and did "not wish to have a State-appointed attorney anymore at this time." *Id.* at 43, 44.

The court then inquired about any "knowledge or skill" Wright thought he could use to represent himself. *Id.* at 51. In response, Wright cited his independent study of law at the county jail and his experience in the criminal and juvenile justice system. *Id.* He admitted, however, to

never having tried a jury trial, never having picked a jury, never having cross-examined a witness, and never having made a closing argument. *Id.* at 51–52. While insisting that his "attorneys ha[d]n't even challenged the death penalty," he agreed that it was "a little bit premature" to conclude "whether the death penalty could be challenged or not in this case." *Id.* at 46–47. At the conclusion of this colloquy, Wright referred to "five motions" he had prepared and asked the court for instructions on how to file them. *Id.* at 53.

The trial court denied the petition, explaining that—based on "his request that the Court appoint him counsel at the beginning of the case" and his "speculation that a private lawyer would be desirable"—Wright equivocated in his desire to self-represent. App. Vol. 2, p. 172. And while acknowledging that Wright's request was "knowingly made," the court concluded that it was "based upon a misapprehended understanding of the law, not an intelligent one." *Id.* at 173. Specifically, the court noted, Wright's preference to self-represent arose "from a misunderstanding of his right to a fast and speedy trial in a capital case" and confusion over his appointed-attorneys' professional responsibilities. *Id.* Finally, the court concluded that Wright's desire to represent himself wasn't voluntary, as "his poverty" precluded him from retaining a private attorney, which he admittedly preferred over court-appointed counsel. *Id.*

The State eventually withdrew its death-penalty request, seeking instead a sentence of life in prison without parole (or LWOP). In support of its LWOP request, the State cited several aggravating factors: (1) Wright's probation status when committing murder, (2) the commission of murder while committing or attempting to commit burglary, and (3) the commission of murder while committing or attempting to commit rape. *See* I.C. § 35-50-2-9(b)(1)(B), (F); I.C. § 35-50-2-9(b)(9)(C).

Wright waived his right to a jury and the trial court found him guilty of the offenses listed above, sentencing him to an aggregate term of LWOP

plus 18 years.[2] In sentencing Wright, the trial court found the State had established each of its proposed aggravating factors. The court also noted the severity of the murder and the number of crimes Wright had committed. And while finding no statutory mitigators, the court acknowledged Wright's "very disadvantaged childhood" and considered his young age and "hard upbringing" as mitigating factors. App. Vol. 5, pp. 196, 205.

Wright, by counsel, sought direct appeal, arguing (1) that the trial court erred by denying his request to proceed pro se, and (2) that his sentence warrants revision under Appellate Rule 7(B).

Standards of Review

The trial court is uniquely situated to assess whether a defendant has waived the right to counsel. *Poynter v. State*, 749 N.E.2d 1122, 1128 (Ind. 2001) (citation omitted). And when that court "has made the proper inquiries and conveyed the proper information," and then "reaches a reasoned conclusion about the defendant's understanding of his rights and voluntariness," an appellate court, after a careful review of the record, "will most likely uphold" the trial court's "decision to honor or deny the defendant's request to represent himself." *Id.* (citation omitted).

A trial court's sentencing decision likewise enjoys general deference on appeal. *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). But this Court may, under Indiana Appellate Rule 7(B), revise a sentence if "compelling evidence" shows that it's "inappropriate in light of the nature of the offense and the character of the offender." *Id.*

[2] The trial court and the parties calculated Wright's aggregate sentence as LWOP plus 20.5 years. App. Vol. 5, p. 208; Appellant's Br. at 5; Appellee's Br. at 5–6. But that result fails to account for the sentencing split in Wright's attempted-burglary conviction, a portion of which the court ordered Wright to serve concurrent with his 2.5-year sentence for burglary. *See* App. Vol. 5, p. 211. We remand to the trial court only to correct this minor oversight.

Discussion and Decision

Our decision below proceeds in two parts. We first consider Wright's claim that the trial court erred by denying his request to self-represent, ultimately concluding that, because his waiver of the right to counsel was neither unequivocal nor intelligent, the trial court properly denied his request. We then address Wright's claim that his sentence warrants revision under Appellate Rule 7(B). Our analysis of Wright's offenses and his character leads us to conclude that his sentence was not inappropriate.

I. The trial court properly denied Wright's request to represent himself.

In reaching our conclusion on the first issue here, we begin our discussion by analyzing a defendant's Sixth Amendment right to self-representation. *See infra* Section I.A. Here, we survey the history and scope of that right—from its colonial-era origins, to its express recognition by the United States Supreme Court, to its limitations under our modern jurisprudence. *See infra* Sections I.A.1–2. With this context in mind, we then examine the inherent tensions between a defendant's right to self-representation and the state's obligation to ensure a fair and meaningful trial—a tension that often reaches its breaking point when a defendant faces death or life in prison without the possibility of parole. *See infra* Section I.B.1. Recognizing the potential for constitutional impasse, we offer guidance to trial courts on how best to frame the self-representation inquiry—one that acknowledges these competing interests. *See infra* Section I.B.2. Finally, we apply our analytical framework to resolve the issue here, concluding that Wright failed to show that his desire to proceed pro se was either unequivocal or intelligent. *See infra* Section I.C.

A. The right to self-representation, though deeply rooted in our legal system, is not absolute.

Under *Faretta v. California*, the seminal case on the right to self-representation, 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. Respect for individual choice is the "lifeblood of the law," the Court reasoned, and the state must honor that choice, even if the accused "may conduct his own defense ultimately to his own detriment." *Id.* at 834 (quotation marks omitted). Of course, few people would disagree "that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Wallace v. State*, 172 Ind. App. 535, 540, 361 N.E.2d 159, 162 n.3 (1977). But unless the defendant acquiesces to representation, any "advantage of a lawyer's training and experience can be realized, if at all, only imperfectly." *Id.* After all, to "force a lawyer on a defendant can only lead him to believe that the law contrives against him." *Id*.

The right to self-representation, the *Faretta* Court concluded, is a "fundamental" right, implicit in the structure of the Sixth Amendment and supported by a long history of customary practice and legal protections. 422 U.S. at 817, 818, 831–32. But, while deeply rooted in our legal culture, the right to self-representation is not absolute.

1. The historical reasons for recognizing the right to self-representation lack the same force today.

The right to self-representation, as the *Faretta* Court pointed out, emerged from a long line of legal protections dating back to the nation's founding. *Id.* at 812–17. During the colonial period, American settlers "brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers." *Id.* at 826. Independence from England did little to moderate this anti-lawyer sentiment. Rather, "a nearly universal conviction" emerged, "on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself." *Id.* at 817. To preserve this sense of autonomy, lawmakers codified the right to self-represent, "along with other rights basic to the making of a defense," in our nation's earliest laws—from state

statutes and state constitutions, to the federal Judiciary Act of 1789.[3] *Id.* at 828–31.

Of course, the fledgling states would gradually come to realize "the value of counsel in criminal cases," and some courts during the early national period "allowed accused felons the aid of counsel for their defense." *Id.* at 827. But a lawyer's advice remained largely out of reach for most Americans.[4] *Id.* at 827–28 n.35. And so it was for the inhabitants of the Indiana Territory at the turn of the nineteenth century. Indeed, lawyers were so scarce that territorial officials, in 1801, repealed a one-year residency requirement for the practice of law. John D. Barnhart & Dorothy L. Riker, Indiana to 1816: The Colonial Period 323–24 (1971).

Little changed in the years following statehood, prompting efforts at expanding access to the law for ordinary Hoosiers. During the late 1820s, Indiana witnessed growing demands for a concise and uniform system of law, aiming to "render justice plain and accessible to all." H. Journal, 12th Gen. Assemb., Reg. Sess. 415 (1827) (statement of Rep. Stephen Stevens). Delegates to the state constitutional convention at mid-century expressed similar views as they debated the "idea of making every man his own lawyer, by simplifying the rules of practice." 2 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 1754 (Ind. Hist. Coll. Reprint 1935) [hereinafter *Debates*]. Such a proposed reform, of course, wouldn't fully "dispense with the services of the [legal] profession." *Id.* at 1749 (statement of Delegate Borden). But "until the principles of the law" were "collected in a

[3] *See* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (1789) (current version at 28 U.S.C.A. § 1654) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

[4] Citing mid- to late-eighteenth century court records from New Jersey, one legal scholar estimates that lawyers represented criminal defendants in only fifteen to twenty-five percent of cases, suggesting "both a custom of self-representation and an economic reality" that "most citizens could not afford the services of a lawyer and no system existed for the state to pay legal fees for indigent defendants." George C. Thomas, III, *History's Lesson for the Right to Counsel*, 2004 U. Ill. L. Rev. 543, 573.

systematic code" and "rendered in plain language," the delegates insisted, it would remain impossible "for a person of only ordinary intelligence to prepare himself to appear in Court, either as plaintiff or defendant, in his own case." *Id.* at 1748.

On the other side of this debate stood the contemporary legal literati, among whom "there was a feeling of disallowance toward" interference by persons neither "learned in the profession" nor "experienced in the administration of justice." 1 *Debates* at 174 (statement of Mr. Biddle). But this sentiment did little to discourage reformist-minded delegates. The new Indiana Constitution entitled "[e]very person of good moral character, being a voter," to "admission to practice law in all courts of justice."[5] Ind. Const. art. 7, § 21 (repealed 1932). And to further democratize the law, the constitution instructed that "[e]very act and joint resolution shall be plainly worded, avoiding as far as practicable, the use of technical terms." Ind. Const. art. 4, § 20.

While the state's new fundamental law stopped short of expressly guaranteeing a right to self-representation,[6] this Court has long respected a person's preference to proceed pro se. "As in a Court of justice, so in a Legislative committee or assembly," we declared in 1863, "a person may, if permitted, appear by himself or attorney to openly and fairly present the facts and arguments upon which he relies." *Coquillard's Adm'r v. Bearss*, 21 Ind. 479, 481–82 (1863). A party has the right to make a "full appearance *in propria persona*," we acknowledged just over twenty years later. *Pressley v. Lamb*, 105 Ind. 171, 180, 4 N.E. 682, 688 (1886). This Court

[5] The county bar associations decided whether an applicant possessed "good moral character." S. Hugh Dillin, *The Origin and Development of the Indiana Bar Examination*, 30 Ind. L. Rev. 391, 391 (1997). These applicants, however, consisted only of men, as the phrase "being a voter" excluded women from admission to the bar—that is, until this Court decided otherwise in 1893. *See In re Leach*, 134 Ind. 665, 34 N.E. 641 (1893).

[6] Article 1, section 13 of the Indiana Constitution guarantees to a criminal defendant the opportunity "to be heard by himself **and** counsel." Ind. Const. art. 1, § 13 (emphasis added). While recognizing that section 13 as a whole offers "broader rights than the Sixth Amendment," we've concluded that these rights neither "addressed the right of self-representation" nor amounted to an "unlimited right" for a pro se defendant "to conduct all trial proceedings on his own." *Edwards v. State*, 902 N.E.2d 821, 828, 829 (Ind. 2009).

echoed a similar refrain well into the twentieth century. "The services of an attorney appointed by the court may not be forced upon a pauper defendant," we opined nearly thirty years before *Faretta*, "but if the defendant declines such services he must find some way to employ counsel of his own selection or proceed in *propria persona*." *Schuble v. Youngblood*, 225 Ind. 169, 173, 73 N.E.2d 478, 479–80 (1947). Despite "the burden and hazards incident to his position," we noted in yet another opinion, a "defendant may represent himself if he so desires." *Blanton v. State*, 229 Ind. 701, 703, 98 N.E.2d 186, 187 (1951).

The past, then, is replete with affirmations of the right to legal self-representation. But many of the historical reasons for recognizing this right lack the same force today. To begin with, self-representation for many during the nineteenth century (and well into the twentieth) "was the only feasible alternative to asserting no defense at all." *See Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 156–57 (2000). Indeed, few Hoosiers had access to legal counsel—whether competent or not. As one constitutional delegate lamented, lawyers simply did "not become generally known to the people of the State." 2 *Debates* at 1720 (statement of Mr. Dunn). What's more, despite long-standing efforts at rendering "justice plain and accessible to all," the law became progressively more complex, and with more at stake, especially for the criminal defendant—a change due in no small part to the shifting maze of procedural rules and ever-expanding (and often overlapping) body of statutory offenses.[7] *See Wadle v. State*, 151 N.E.3d 227, 238 (Ind. 2020) (discussing this evolution in the law). Finally, the U.S. Supreme Court has since recognized an indigent criminal defendant's constitutional

[7] Perhaps as a result of this increasing complexity, the state's liberal bar admission standards eventually fell into disfavor. But despite numerous attempts at repealing article 7, section 21, the formidable amendment process under article 16, combined with strict judicial interpretation of article 16's ratification clause, prevented repeal until 1932. Ryan T. Schwier, *The Marshall Constitution and the Jurisprudence of Article 16*, 52 Ind. L. Rev. 79, 84, 92 (2019) (citing *In re Todd*, 193 N.E. 865, 875 (Ind. 1935) (upholding the Lawyer's Amendment on grounds that a plurality of votes cast at the general election of 1932 constituted ratification)).

right to the assistance of counsel. *Gideon*, 372 U.S. at 344–45.[8] Today, then, "an individual's decision to represent himself is no longer compelled by the necessity of choosing self-representation over incompetent or nonexistent representation." *Martinez*, 528 U.S. at 158.

2. *Faretta* and its progeny expressly limit the right to self-representation.

Aside from the shifting historical precedent on which the right to self-representation stands, *Faretta* and its progeny "have made clear" that this right "is not absolute." *Indiana v. Edwards*, 554 U.S. 164, 171 (2008).

To begin with, a trial court need not inform a defendant of his right to self-represent. *Russell v. State*, 270 Ind. 55, 60, 383 N.E.2d 309, 313 (1978). Whereas the right to counsel implements "the other constitutional rights of the accused" and ensures "the accuracy of trial outcome in our adversary system," the right to self-represent "may actually hinder such interests." *Id.* For this reason, the constitutional standards governing waiver of the right to counsel find no counterpart governing a defendant's waiver of the right of self-representation. *Id.* at 59, 383 N.E.2d at 312–13. If a defendant proceeds to trial with counsel "without ever having properly asserted the right to self-representation," a court will deem the defendant to have voluntarily waived that right. *Id.* at 61, 383 N.E.2d at 313.

[8] Of course, more than a century before *Gideon*, this Court recognized an indigent criminal defendant's right to counsel at public expense. *See Webb v. Baird*, 6 Ind. 13, 18 (1854) ("It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid."). But the basis on which this decision stood was less than clear. The Court cited section 21 of the Indiana Bill of Rights, but only as grounds to compensate the attorney for his services. *Id.* at 15. Subsequent case law clarified that, while a defendant may have a **statutory** right to counsel at public expense, he "has no [such] right guarant[e]ed to him by the constitution." *Houk v. Bd. of Comm'rs of Montgomery Cty.*, 14 Ind. App. 662, 663, 41 N.E. 1068, 1068 (1895). And even a statutory right to counsel may have been limited, depending on the court in which a defendant found himself. *See id.* at 663–64, 41 N.E. at 1068–69 (construing statute to exclude justice-of-the-peace courts from appointing pauper counsel at public expense).

Once a defendant invokes the right to self-represent, that assertion triggers strict procedural requirements for the trial court to ensure compliance with basic constitutional guarantees of fairness. Prior to *Faretta*, Indiana courts found it "reasonable to presume" that a pro se defendant himself had weighed "the implications and consequences" of his decision before making "a conscious election to assume the risks incident to a trial conducted without benefit of counsel." *Placencia v. State*, 256 Ind. 314, 317, 268 N.E.2d 613, 614 (1971). Today, by contrast, a trial court must ensure the defendant "knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835. This requires an admonishment of "the dangers and disadvantages of self-representation." *Hopper v. State*, 957 N.E.2d 613, 618 (Ind. 2011). And, once informed of these risks, a pro se defendant's waiver of the right to counsel "must be knowing, voluntary, and intelligent." *Iowa v. Tovar*, 541 U.S. 77, 88 (2004) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

In addition to these requirements, this Court (as with most others) recognizes an untimely request for self-representation as "a proper limitation of the right." *Russell*, 270 Ind. at 61, 383 N.E.2d at 314. *See also Martinez*, 528 U.S. at 162 (observing that "most courts" require a timely request). By requiring a defendant to assert his right "within a reasonable time prior to the day on which the trial begins," a trial court can avoid a "rushed procedure," thereby decreasing "the chances that the case should be reversed because some vital interest of the defendant was not adequately protected." *Russell*, 270 Ind. at 62, 383 N.E.2d at 314.

Indiana courts also require an "unequivocal" assertion of the right to self-representation. An "unequivocal" assertion is one that's "sufficiently clear" in that, when granted, "the defendant should not be able to turn about and urge that he was improperly denied counsel." *Id.* at 61, 383 N.E.2d at 313. "Half-hearted expressions of dissatisfaction with counsel and general references by the defendant to self-representation" ultimately "fail to meet this requisite." *Id.* Absent this condition, trial courts subject themselves to potential manipulation "by defendants clever enough to record an equivocal request to proceed without counsel in the expectation of a guaranteed error." *Id.* at 61, 383 N.E.2d at 313–14.

Beyond these limitations, there are case-specific circumstances in which "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Martinez*, 528 U.S. at 162. To begin with, the *Faretta* Court itself recognized that the "right of self-representation is not a license to abuse the dignity of the courtroom," to engage in "serious and obstructionist misconduct," or to avoid compliance with "relevant rules of procedural and substantive law." 422 U.S. at 834–35 n.46. States may also insist on representation by counsel for persons who, though competent to stand trial, "suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Edwards*, 554 U.S. at 178. Trial courts may also appoint stand-by counsel over a pro se defendant's objection, so long as counsel's intrusions aren't "substantial or frequent enough to have seriously undermined" the appearance of self-representation. *McKaskle v. Wiggins*, 465 U.S. 168, 187 (1984).[9] What's more, a criminal defendant enjoys no right to self-representation on direct appeal. *Martinez*, 528 U.S. at 163. In that context, the reasoning goes, the "autonomy interests that survive" a conviction at trial are "less compelling" than a state's continued "interest in the fair and efficient administration of justice." *Id.*

In short, while a defendant enjoys a right to self-represent, it "does not inevitably follow" that such right precludes the appointment of counsel over the defendant's objection "to protect the public interest in the fairness and integrity of the proceedings." *United States v. Taylor*, 569 F.2d 448, 452 (7th Cir. 1978). And this public interest, we believe, expands or contracts in direct correlation with the severity of a potential punishment a defendant faces at trial.

[9] The *McKaskle* Court added that a pro se defendant "must generally accept any unsolicited help or hindrance that may come from the judge who chooses to call and question witnesses, from the prosecutor who faithfully exercises his duty to present evidence favorable to the defense," from counsel representing co-defendants, "or from an amicus counsel appointed to assist the court." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.7 (1984).

B. Death-penalty and LWOP cases heighten the state's interest in ensuring compliance with constitutional guarantees of fairness.

As the preceding discussion makes clear, a defendant's right to self-representation often stands in tension with the state's obligation to ensure a fair and meaningful trial. *See Sherwood v. State*, 717 N.E.2d 131, 137 (Ind. 1999) (Selby, J., concurring). *See also Martinez*, 528 U.S. at 164 (Breyer, J., concurring) (observing that the right to self-representation often, "though not always, conflicts squarely and inherently with the right to a fair trial"). And this tension reaches its breaking point when a defendant faces death or life in prison without the possibility of parole.

1. Few procedural safeguards protect the state's heightened-reliability interest against an ineffective pro se defendant.

In 1972, the U.S. Supreme Court declared several state death-penalty statutes unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972). With no clear sentencing standards, the Court concluded, the arbitrary manner in which the states imposed the death penalty amounted to "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[10] *Id.* at 240. Four years later, the high court endorsed "a system that provides for a bifurcated proceeding" in which a defendant, after having been found guilty, "is accorded substantial latitude as to the types of evidence that he may introduce" at sentencing. *Gregg v. Georgia*, 428 U.S. 153, 164, 195 (1976).

Indiana's Death Penalty Act, adopted in its current form in 1976, is a product of the General Assembly's response to these cases. *See* Frank

[10] Although "Indiana's statute was not among those challenged," one of our former colleagues on the bench has noted, "it was sufficiently similar to those invalidated that there was no question but that it was unconstitutional." Frank Sullivan, Jr., *Selected Developments in Indiana Criminal Sentencing and Death Penalty Law (1993-2012)*, 49 Ind. L. Rev. 1349, 1366 & n.147 (2016) (citing *Adams v. State*, 284 N.E.2d 757, 758 (1972)).

Sullivan, Jr., *Selected Developments in Indiana Criminal Sentencing and Death Penalty Law (1993-2012)*, 49 Ind. L. Rev. 1349, 1366 (2016). Under the Act, a capital-murder trial proceeds in two distinct stages: a guilt phase (to determine innocence or guilt) and, if necessary, a penalty phase (to determine the appropriate punishment). I.C. § 35-50-2-9(d). Should the trial reach the penalty phase of this bifurcated proceeding, the judge (in a bench trial) or the jury (in a jury trial) must, before imposing a death sentence, find that at least one aggravating circumstance outweighs any mitigating circumstances. I.C. § 35-50-2-9(l).

As a further safeguard against the arbitrary imposition of punishment, we've held that, whether or not a defendant challenges her underlying conviction, the Death Penalty Act "precludes any waiver of a review of the *sentencing* in a death penalty case." *Vandiver v. State*, 480 N.E.2d 910, 911 (Ind. 1985). This mandatory review, we've observed, reflects the state's interest in assuring "consistency, fairness, and rationality in the evenhanded operation of the death penalty statute." *Judy v. State*, 275 Ind. 145, 169, 416 N.E.2d 95, 108 (1981) (citations and quotation marks omitted).

It's clear, then, that when society—by way of its elected officials in office—seeks to impose the ultimate form of punishment, it's not simply the defendant's interests at stake. Rather, the state has a vested interest in—indeed, a constitutional **duty** to ensure—the reliability and integrity of a capital-murder trial. *See id.* at 157–58, 416 N.E.2d at 102 (emphasizing that a death sentence must comport with "principles of our state and federal constitutions"); *Lowrimore v. State*, 728 N.E.2d 860, 864 (Ind. 2000) (observing that the death penalty "maximize[s]" the state's already "strong interest in the proper conduct of every trial"); *Smith v. State*, 686 N.E.2d 1264, 1275 (Ind. 1997) ("Society does have an interest in executing only those who meet the statutory requirements and in not allowing the death penalty statute to be used as a means of state-assisted suicide.").

Today, this heightened-reliability interest extends to LWOP sentences.[11] *See* Pub. L. 158-1994, § 7, 1994 Ind. Acts 1849, 1854 (amending the Death Penalty Act to authorize an LWOP sentence in lieu of capital punishment) (codified at I.C. § 35-50-2-9(e)). At trial, these sentences are subject to the same statutory standards and the same evidentiary requirements as death sentences.[12] *Conley v. State*, 972 N.E.2d 864, 871 (Ind. 2012). And, as with capital punishment, this Court exercises mandatory and exclusive jurisdiction over all criminal appeals from an LWOP sentence. App. R. 4(A)(1)(a).

The effectiveness of these legal safeguards depends largely—if not entirely—on meaningful adversarial testing by professionally trained counsel. The appearance of a pro se defendant—potentially unwilling or unable to investigate, let alone present, the mitigating evidence necessary to ensure an appropriate punishment—threatens to undermine the state's heightened-reliability interests.[13] *See Mills v. Maryland*, 486 U.S. 367, 375 (1988) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 117 n. (1982)) (O'Connor, J., concurring) (the "[sentencer's] failure to consider **all** of the mitigating evidence risks erroneous imposition of the death sentence") (emphasis added). And this destabilization, in turn, threatens to diminish

[11] Although often deemed "qualitatively different from the death penalty, the punishment of life imprisonment without hope of release has been regarded by many as equally severe." *Smith v. State*, 686 N.E.2d 1264, 1273 (Ind. 1997) (citations and quotation marks omitted). Indeed, when "a person is doomed to spend his final years imprisoned, with no (or few) prospects of release," one may reasonably "argue that the oppressive confines of a prison constitute as great an infringement of his basic human rights as a death sentence." *Id.* (citations and quotation marks omitted).

[12] While these standards apply to both the death penalty and LWOP, only the death penalty triggers the appointment of specially qualified counsel, along with "adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase." Ind. Crim. Rule 24(B), (C)(2).

[13] The investigation of mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence," including, among other things, "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (cleaned up).

public confidence in the integrity of the judicial system. After all, criminal "proceedings must not only be fair, they must appear fair to all who observe them." *Edwards*, 554 U.S. at 177 (citation and quotation marks omitted). *Accord Crider v. State*, 984 N.E.2d 618, 624 (Ind. 2013) (acknowledging that, to permit defendants "to waive appeal of any and every sentence imposed in violation of law would invite disrespect for the integrity of the courts") (cleaned up).

To be sure, this Court has consistently acknowledged a defendant's right to self-represent, "even in a capital case." *Sherwood*, 717 N.E.2d at 135. *See also Hopper*, 957 N.E.2d at 618 (recognizing a defendant's right to proceed pro se in a trial for capital murder). And the public interest in these cases, we've noted, "need not vitiate the defendant's personal rights to represent himself and determine the objectives of his representation." *Smith*, 686 N.E.2d at 1275. But if "experience has taught us that a pro se defense is usually a bad defense," *Martinez*, 528 U.S. at 161 (quotation marks omitted), how do we protect the heightened standards of reliability when deciding whether someone is worthy of death or prison with no possibility of parole?

Of course, the bifurcation of proceedings ensures that the "penalty issue is not presented to the jury until after they have found the defendant guilty of the charged crime or crimes." *Judy*, 275 Ind. at 164, 416 N.E.2d at 105–06. But the Death Penalty Act imposes **no** mandatory obligation on the defendant to produce mitigating evidence at trial; it merely gives him "the *opportunity* to offer such additional evidence." *Smith*, 686 N.E.2d at 1276. What's more, a pro se defendant's lackluster performance at the guilt phase of trial may very well undermine any mitigation strategy at the penalty phase. The judge or jury, after all, may consider at the sentencing hearing "all the evidence introduced at the trial stage of the proceedings." I.C. § 35-50-2-9(d). And this evidence alone may suffice in proving the existence of an aggravating circumstance in support of death or LWOP. *See Smith v. State*, 475 N.E.2d 1139, 1141–42 (Ind. 1985); *Judy*, 275 Ind. at 164, 416 N.E.2d at 106 (noting that the "prosecution may stand on the evidence presented at the trial phase" to prove an aggravating factor).

A pre-sentence investigation report (or PSI report), prepared for the trial court by the probation department, may reveal certain mitigating circumstances when a pro se defendant proves unwilling or unable to present them independently. *See Smith*, 686 N.E.2d at 1276. Among other data, a PSI report includes information on the defendant's "history of delinquency or criminality, social history, employment history, family situation, economic status, education, and personal habits." I.C. § 35-38-1-9(b)(2). But whatever mitigating benefit this information imparts, relying on these sources alone to ensure heightened reliability in sentencing presents several problems. To begin with, a PSI report lacks the adversarial acumen of defense counsel and may even include information harmful to the defendant. After all, the probation officer who compiles a PSI report enjoys "wide discretion to include any matters he or she deems relevant to a determination of a sentence." *Allen v. State*, 720 N.E.2d 707, 714 (Ind. 1999). What's more, a PSI report, while available to the trial court judge, "may not be introduced into evidence and given to the jury." *Jarrett v. State*, 580 N.E.2d 245, 254 (Ind. Ct. App. 1991). *See* I.C. § 35-38-1-13 (governing confidentiality of PSI reports). This restriction "divorces mitigation from the trial context, rather than structuring the presentation in light of the nature of the crime and the conduct of the accused." Jules Epstein, *Mandatory Mitigation: An Eighth Amendment Mandate to Require Presentation of Mitigation Evidence, Even When the Sentencing Trial Defendant Wishes to Die*, 21 Temp. Pol. & Civ. Rts. L. Rev. 1, 34 (2011). Finally, we've held that a deficient PSI report—*i.e.*, one that fails to "fully address the social history of the defendant, his employment history, his family situation, his economic status, and his personal habits"—violates no constitutional right to due process, absent the defendant's objections and absent his offer of supplemental evidence at trial. *Woodcox v. State*, 591 N.E.2d 1019, 1024 (Ind. 1992).

In short, without meaningful adversarial testing by professionally trained counsel, there are few, if any, safeguards to protect the state's heightened-reliability interest when a pro se defendant proves unwilling or unable to present the necessary mitigating evidence at trial. And for this reason, a trial court exercising jurisdiction over LWOP and death-penalty cases must tailor its self-representation inquiry to reflect "the

state's interest in preserving the orderly processes of criminal justice." *Russell*, 270 Ind. at 59, 383 N.E.2d at 312. *Accord Latta v. State*, 743 N.E.2d 1121, 1130 (Ind. 2001) (concluding that trial courts, when deciding whether to reject a defendant's waiver of the Sixth Amendment right to conflict-free counsel in the joint-representation context, may consider the "institutional interest in a fair proceeding" to justify overriding the defendant's right to counsel of her choice). What this inquiry looks like is a question we turn to next.

2. In capital cases and LWOP cases, a trial court should frame its waiver inquiry with the state's heightened-reliability interests in mind.

A "defendant who is competent to stand trial and who knowingly, intelligently and voluntarily makes a timely and unequivocal waiver of counsel is entitled to exercise the right of self-representation, even in a capital case." *Sherwood*, 717 N.E.2d at 135. When deciding whether a defendant meets these standards, a trial court should inquire, on the record, whether the defendant clearly understands (1) the nature of the charges against her, including any possible defenses; (2) the dangers and disadvantages of proceeding pro se and the fact that she's held to the same standards as a professional attorney; and (3) that a trained attorney possesses the necessary skills for preparing for and presenting a defense. *Jones v. State*, 783 N.E.2d 1132, 1138 (Ind. 2003).

We emphasize that, among these general directives, no single guideline controls. In fact, when deciding whether a defendant properly waives the right to counsel, both this Court and the U.S. Supreme Court "have deliberately eschewed any attempt to formulate a rigid list of required warnings, talismanic language, or formulaic checklist." *Hopper*, 957 N.E.2d at 619 (citing *Tovar*, 541 U.S. at 88). Rather, "the extent and depth" of a trial court's warnings will often "depend upon an array of case-specific factors." *Id.* The severity of a potential punishment, we believe, presents one such factor. So, when a defendant asks to proceed without counsel in a death-penalty or LWOP case, the court—while mindful of the state's heightened-reliability interest—should focus its inquiry on

- whether and to what extent the defendant has prior experience with the legal system;
- the scope of the defendant's knowledge of criminal law, legal procedures, rules of evidence, and sentencing; and
- whether and to what extent the defendant can articulate and present any possible defenses, including lesser-included offenses and mitigating evidence.

See Von Moltke v. Gillies, 332 U.S. 708, 724 (1948); *Kubsch v. State*, 866 N.E.2d 726, 737–38 (Ind. 2007); *Jones*, 783 N.E.2d at 1138; *Sherwood*, 717 N.E.2d. at 134.

In considering these factors, a court should "indulge in every reasonable presumption **against** waiver" of the right to counsel. *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (emphasis added). If, however, after carefully assessing the factors outlined above, a court permits a pro se defense, we strongly urge that court to appoint stand-by counsel to assist the defendant in reaching his "clearly indicated goals." *McKaskle*, 465 U.S. at 184. *See also Leonard v. State*, 579 N.E.2d 1294, 1295 (Ind. 1991); *German v. State*, 268 Ind. 67, 73, 373 N.E.2d 880, 883 (1978). And when a pro se defendant fails to present mitigating evidence, a trial court may appoint amicus counsel to compile and argue that evidence.[14] *See McKaskle*, 465 U.S. at 177 n.7. So long as appointed counsel doesn't interfere with the defendant's personal defense, nothing in *Faretta* prohibits such a course of

[14] In *Smith*, this Court interpreted *Faretta* as establishing a defendant's right to waive the presentation of mitigating evidence in a capital case and to enter a guilty plea agreeing to the death penalty. 686 N.E.2d at 1274–76. We question, though, the accuracy of that interpretation, as *Faretta* recognized a defendant's constitutional "right to make his defense," not to relinquish one. *See* 422 U.S. at 819. *See also McKaskle*, 465 U.S. at 177 (observing that *Faretta* "dealt with the defendant's **affirmative right to participate**" at trial) (emphasis added). In any case, nothing in *Faretta*, or *Smith* for that matter, precludes the presentation of mitigating evidence at trial by parties other than the defendant. *See id.* at 176, 177 n.7 (noting that *Faretta* imposed "no absolute bar on standby counsel's unsolicited participation" and observing that a "*pro se* defendant must generally accept any unsolicited help" from, among others, "amicus counsel appointed to assist the court"); *Smith*, 686 N.E.2d at 1276 (recognizing, without rejecting, argument by amicus curiae "that special counsel should have been appointed [at trial] to argue mitigating evidence in lieu of Smith").

action. *See id.* at 187. *See also McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018) (observing that the Sixth Amendment guarantees "the defendant's prerogative, not counsel's, to decide on the objective of his defense").

With this analytical framework in mind, we now turn to Wright's claim that the trial court erred by denying his request to self-represent.

C. Wright's waiver of the right to counsel—while knowing and voluntary—was made neither unequivocally nor intelligently.

Because Wright "answered affirmatively that he understood all of the questions asked by the court," he insists that "he has shown that his desire to represent himself is unequivocal, knowing, intelligent, and voluntary." Appellant's Br. at 21.

We agree with Wright that his decision was knowing. The trial court informed Wright that, unlike a pro se defendant, an attorney "is trained by education" and possesses the skills necessary to investigate a criminal case, to "pick a fair and impartial jury," to interrogate witnesses, to file motions, to "properly present substantive defenses," to object to evidence, to preserve the record for appeal, and to offer mitigating arguments at sentencing. Tr. Vol. 4, pp. 46–49. And, after pointing out that "death-penalty-qualified attorneys" have special training and experience, the court warned Wright that the prosecution had its own experienced lawyers and that, should Wright decide to proceed without counsel, he would not "receive any special treatment from the court" and would be held "to the same standard" as a practicing attorney. *Id.* at 46, 49–50. Wright consistently responded that he understood each of these points. We have no doubt that Wright knowingly waived his right to counsel.

We likewise agree with Wright that his decision was voluntary. The trial court concluded otherwise, reasoning that Wright's poverty forced him into accepting a court-appointed attorney. To be sure, Wright opined that "an attorney paid by the court" was "not going to listen to anything [he had] to say" and wasn't going to give him "what [he] want[ed]" since he did "not pay them." *Id.* at 45. But Wright also stated that his "first

attorney," who was court-appointed, "wanted to give [him] what [he] want[ed]" and he made no intimation that a private attorney would necessarily fare any better. *Id.* at 53.

At this point in our waiver analysis, we part ways with Wright's conclusion.

To begin with, we find that Wright equivocated in his decision at trial. His shift in preference for counsel between his initial hearing and the appointment of capital-qualified attorneys five months later reveals his early wavering on the issue. In a self-described "motion" to the trial court in early December 2017, Wright insisted that he had "declared several times" his status as a "pro se" defendant. App. Vol. 2, p. 126. But in an accompanying "lawsuit" against the court for "deny[ing him] the right to go pro se," Wright expressly "motion[ed] for new coun[s]el." *Id.* at 128. This clear request for representation directly conflicts with any autonomy interest Wright may have held before trial.[15]

To be sure, at the time of his *Faretta* hearing, Wright seems to have abandoned his desire for court-appointed counsel. During the colloquy, he insisted more than once that he did "not wish to have a State-appointed attorney anymore at this time." Tr. Vol. 4, pp. 43, 44. Still, Wright seems to have wavered between dissatisfaction with his capital-qualified counsel

[15] A trial court need not focus its waiver inquiry only on the colloquy conducted at the *Faretta* hearing. This Court has emphasized more than once that, when deciding whether a defendant has properly waived the right to counsel, a court must consider "**other evidence in the record** that establishes whether the defendant understood the dangers and disadvantages of self-representation," "the **background and experience** of the defendant," as well as "the **context of the defendant's decision** to proceed pro se." *Hopper v. State*, 957 N.E.2d 613, 618 (Ind. 2011) (citing *United States v. Hoskins*, 243 F.3d 407 (7th Cir. 2001)) (emphasis added). *See also Kubsch v. State*, 866 N.E.2d 726, 736 (Ind. 2007) (same). To be sure, these analytical factors apply to the question of whether a defendant waived counsel "voluntarily and intelligently." *Hopper*, 957 N.E.2d at 618. But, in our view, it makes little sense to limit the trial court to testimony presented at the *Faretta* hearing when assessing one factor (equivocalness) while permitting the trial court to look beyond the *Faretta* hearing when assessing other factors (voluntariness and intelligence). And, so far as our research has uncovered, the U.S. Supreme Court has never imposed such a limitation. What's more, this Court has broadly stated that "waiver must be viewed in light of all facts and circumstances," *Kubsch*, 866 N.E.2d at 737, suggesting that the inquiry as a whole may focus on evidence outside the *Faretta* hearing.

and court-appointed counsel in general. While acknowledging that he "got along" with his first lawyer, he repeatedly expressed dissatisfaction with his current attorneys. *Id.* at 45. And an expression of discontent with court-appointed counsel is **not** an unequivocal assertion of the right to self-representation. *Dobbins v. State*, 721 N.E.2d 867, 872 (Ind. 1999) ("Defendant's declaration that he could not afford an attorney, when already represented by a court-appointed attorney, does not constitute a clear assertion of his right to self-representation."). What's more, Wright's acknowledged preference for either private counsel or his original attorney indicates no strong autonomy interest, leading us to conclude that there's little risk of violating his Sixth Amendment right to self-represent.

Even if we were to conclude that Wright unequivocally waived the right to counsel, his decision was not made intelligently. The "information a defendant must have to waive counsel intelligently will depend, in each case, upon the particular facts and circumstances surrounding that case." *Tovar*, 541 U.S. at 92 (quotation marks omitted). Case-specific factors we may consider include "the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Id.* at 88.

Here, the frustrations Wright held toward his current lawyers clearly seem to have rested on a mistaken understanding of their professional obligations. *See Lowrimore*, 728 N.E.2d at 865 (noting that "the tighter Criminal Rule 4 schedules must yield to the exigencies created by the injection of the death penalty"). And while Wright represented to the court that he possessed the requisite "knowledge or skill" and "all the qualifications" to represent himself, Tr. Vol. 4, pp. 43, 51, this clearly was not the case.

First, while Wright had some prior experience with the legal system, he conceded to never having tried a jury trial, never having picked a jury, never having cross-examined a witness, and never having made a closing argument. *Cf. Kubsch*, 866 N.E.2d at 738 (finding adequate waiver where defendant "obviously knew from his own experience of his right to call witnesses, present other evidence, and propose mitigating factors"). And

while Wright had allegedly represented himself in a prior juvenile case, a delinquency proceeding simply doesn't implicate the same "formalities, procedural complexities, and inflexible aspects" as a criminal trial. *A.M. v. State*, 134 N.E.3d 361, 366 (Ind. 2019) (citations and quotations omitted).

Second, despite his independent studies while incarcerated, the scope of Wright's knowledge of the criminal law, legal procedures, rules of evidence, and sentencing appears limited at best. While insisting that his "attorneys ha[d]n't even challenged the death penalty," he conceded, when prompted by the trial court, that it was "premature" to conclude "whether the death penalty could be challenged or not in this case." Tr. Vol. 4, pp. 46–47. What's more, at the conclusion of the colloquy, Wright informed the court of "five motions" he wanted to file, and then proceeded to ask the court how to go about filing them, demonstrating a lack of knowledge of the most basic procedural rules. *Id.* at 53. *See* Ind. Trial Rule 5(F) (enumerating several methods by which a party may file "pleadings, motions, and other papers with the court"). To be sure, a pro se "defendant need not possess technical legal knowledge" when exercising her right to self-represent. *Sherwood*, 717 N.E.2d at 134 (citing *Faretta*, 422 U.S. at 836). But even with incomplete knowledge of the law, a defendant should demonstrate at least some "familiarity with legal procedures and rules of evidence" as well as a basic "understanding of the sentencing process." *Jones*, 783 N.E.2d at 1138; *Kubsch*, 866 N.E.2d at 738. Wright, for his part, failed to show a rudimentary understanding of either. *Cf. United States v. Steele*, 2000 WL 796191, at *3, 221 F.3d 1340 (7th Cir. 2000) (unpublished) (finding a knowing and intelligent waiver where defendant had taken "three paralegal courses and received certificates in legal research and civil procedure," successfully "obtained a settlement from the State of Indiana" in an previous pro se suit, and explained that his choice to self-represent was "a matter of trial strategy").

Finally, Wright articulated no specific defenses to his crimes (let alone any lesser-included offenses) or potentially useful mitigating evidence. To the contrary, he simply insisted that it was best that he was "just in control of [his] case," with no indication of proceeding pro se as a matter of trial strategy. While never inquiring about a specific defense, the trial judge offered Wright ample opportunity to inform the court of "anything else"

he had in mind. Tr. Vol. 4, pp. 53, 54. And when Wright declined, the court made sure that he had "fully expressed [his] views on this subject." *Id.* at 54. With limited experience navigating the legal system, with deficient knowledge of criminal law and procedure, and with no apparent defenses or trial strategy, Wright's waiver of the right to counsel, we conclude, was not an intelligent one.[16] And while these factors may not have led us to the same conclusion in a case with less at stake, the state has a much stronger interest in ensuring a fair trial in this capital-turned-LWOP case.

At the end of the day, the trial court here, after making "the proper inquiries" of Wright and conveying to him "the proper information," made "a reasoned conclusion" about Wright's understanding of his rights, ultimately denying his request for self-representation. *See Poynter*, 749 N.E.2d at 1128. After a careful review of the record on direct appeal, we affirm that ruling by holding that Wright equivocated in his decision to proceed pro se and that he lacked the requisite intelligence to properly waive the right to counsel.

---

[16] According to the dissent (with which the concurrence-in-result ostensibly agrees), "whether a waiver of counsel is 'intelligent'" turns simply on the question of "whether 'the defendant knows what he is doing and his choice is made with eyes open.'" *Post*, at 3 (quoting *Iowa v. Tovar*, 541 U.S. 77, 88 (2004)). We acknowledge that the U.S. Supreme Court has been less than clear in distinguishing "intelligent" from "knowing." *See, e.g.*, *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (suggesting that the "law ordinarily considers a waiver **knowing, intelligent, and sufficiently aware** if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances") (emphasis added). But even if those two terms—intelligent and knowing—go hand in hand, it's clear to us that the courts have required something more than just asking whether a defendant "knew the dangers and disadvantages" of self-representation. *See, e.g.*, *Tovar*, 541 U.S. at 88 (citing "the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding" as non-exclusive factors for deciding whether a defendant intelligently waived the right to counsel); *United States v. Sandles*, 23 F.3d 1121, 1128 (7th Cir. 1994) (whether a defendant waived his right to counsel depends in part on his "background and experience," which "includes educational achievements, prior experience with the legal system (including prior pro se representation), and performance at trial in the case at bar"); *Kubsch*, 866 N.E.2d at 737 (citing *Sandles* for the same proposition).

II. Wright's LWOP sentence was not inappropriate.

Under Indiana Appellate Rule 7(B), this "Court may revise a sentence authorized by statute, if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Sentencing review turns on "the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). In the end, "the length of the aggregate sentence and how it is to be served are the issues that matter." *Id.*

A. The nature of Wright's offenses justifies his sentence.

Wright argues that he's "not the worst of the worst for whom the maximum sentence of life without the possibility of parole is appropriate." Appellant's Br. at 21. But, while insisting that the goal of Rule 7(B) is "'to impose similar sentences on perpetrators committing the same acts who have similar background,'" *id.* at 22 (quoting *Serino v. State*, 752 N.E.2d 852, 856 (Ind. 2003)), Wright offers no precedent for this Court to make such a determination. And, even if he had, Wright did **not** receive the maximum sentence for murder with aggravating circumstances, which—as the State originally proposed—would have been the death penalty. *See* I.C. § 35-50-2-9.

Wright also contends that the murder he committed "was not premeditated," and that there's "no evidence" he intended "to commit any offense other than burglary or theft." Appellant's Br. at 28. But even if Wright had no plans to kill Max until after he arrived at the Fosters' home, his conduct, once inside, supports an inference of premeditation. Indeed, Wright stood in the doorway of the Fosters' bedroom eyeing his victims with knife in hand. At that point, he could have turned around and walked away. He chose not to. Instead, he entered the room, walked toward the bed, leaned over Sonja, and stabbed Max repeatedly to death. Whether at the moment he entered the Fosters' home, or when he paused at the bedroom door, however briefly, the "time span between formation

of an intent to kill and the killing itself need not be appreciable to constitute premeditation."[17] *Currin v. State*, 497 N.E.2d 1045, 1047 (Ind. 1986). *See also Knapp v. State*, 9 N.E.3d 1274, 1292 (Ind. 2014) (finding LWOP appropriate where the "nature of the offense was calculated, premeditated, and brutal").

Finally, Wright didn't just commit a single crime against a single victim at a single location. Rather, he committed multiple offenses—murder, criminal confinement, theft, burglary—as part of a larger crime spree that involved multiple victims and multiple locations. And by disposing of his boots after fleeing the crime scene, Wright attempted to conceal evidence of his crime. *See Rogers v. State*, 878 N.E.2d 269, 275 (Ind. Ct. App. 2007) (citing defendant's "attempt to conceal evidence" as one factor for concluding that the sentence was not inappropriate).

For these reasons, the nature of Wright's offenses justifies his sentence.

B. Wright's character likewise offers no relief.

Having been exposed to alcohol, drugs, and domestic violence, "repeatedly neglected, abandoned and mentally and physically abused," "sexually molested by relatives," and constantly subjected to poverty and instability, Wright argues that his "childhood was horrific beyond belief." Appellant's Br. at 28. And while acknowledging that the "crimes for which [he] was convicted were heinous," he faults the trial court for giving "little or no weight to the horrendous environment in which [he] had to survive since early childhood." *Id.* at 22.

[17] Some of our earliest precedent follows this understanding of premeditation. *See, e.g.*, *Koerner v. State*, 98 Ind. 7, 10 (1884) ("It is as much premeditation, if it be entered into the mind of the guilty agent a moment before the act, as if it entered ten years before.") There are, to be sure, some cases that come to the contrary conclusion. *See, e.g.*, *Barker v. State*, 238 Ind. 271, 279, 150 N.E.2d 680, 684 (1958) (finding it "difficult to conceive" that "premeditation may be practically simultaneous with the act of killing") (citing cases). In any event, our murder statute no longer requires premeditation. *Compare* I.C. § 35-13-4-1 (Burns 1975) (repealed 1976) (defining murder as a killing done "purposely and with premeditated malice"), *with* I.C. 35-42-1-1 (defining murder as the knowing or intentional killing of another human being).

On occasion, this Court has considered a defendant's traumatic youth in reducing a sentence. *See, e.g.*, *Mullins v. State*, 148 N.E.3d 986, 987–88 (Ind. 2020) (per curiam) (citing defendant's "relatively young" age of 21 years, along with a "difficult" childhood of drug exposure and physical and sexual abuse, in support of reducing her 24.5-year aggregate term for two felony meth dealing convictions to an aggregate sentence of 18 years). But more often than not, we have "held that evidence of a difficult childhood is entitled to little, if any, mitigating weight." *Bethea v. State*, 983 N.E.2d 1134, 1141 (Ind. 2013) (citing cases). And we see no reason to do otherwise here.

While Wright's troubled childhood certainly elicits some sympathy, his own delinquent behavior disrupted any potentially positive change in his youth. *See* Appellant's Br. at 28 (acknowledging that his theft from his foster parents landed him back in youth-detention center). What's more, the "horrendous environment" of his childhood didn't stop him from attempting to better himself as a young adult (nor did it compel his siblings, who presumably experienced a similar childhood, to commit heinous crimes). After graduating high school, Wright enrolled in an on-line university and, at the time of his arrest, he worked full time at a restaurant. The mitigation specialist's report also noted that Wright dreamed of majoring in business and becoming an entrepreneur. And during his placement at the IU Methodist Children's Home between 2013 and 2015, Wright apparently made several good friends and was "very respectful" to the adults there. App. Vol. 3, p. 219. In short, to the extent Wright's childhood warranted consideration at sentencing, his own self-improvement as a young adult undermines his argument here.

Still, while admitting to his criminal record, Wright emphasizes that it consists only of four misdemeanors (two thefts, institutional criminal mischief, and public intoxication) and a single felony (burglary)—all of which occurred within a two-year period. But even if these crimes amounted to low-level offenses, several of them (theft and burglary, if not criminal mischief) involved the same conduct that escalated to murder here. *See Rice v. State*, 6 N.E.3d 940, 947 (Ind. 2014) (noting that defendant's two previous misdemeanor convictions involved "the same criminal conduct that in this case escalated to felony murder"). What's more,

Wright was on probation for his earlier crimes at the time he embarked on his crime spree in June 2017, giving us even less of a reason to find his sentence inappropriate. *See Knapp*, 9 N.E.3d at 1292 (citing defendant's probation status at the time he committed the crimes as one factor in declining to find LWOP inappropriate).

In short, Wright's character, as with the nature of his offenses, warrants no revision of his sentence. *See Houser v. State*, 823 N.E.2d 693, 700 (Ind. 2005) (holding LWOP sentence was not inappropriate where the aggravating circumstance of committing burglary during the commission of murder outweighed the mitigating circumstance of defendant's emotionally abusive childhood).

Conclusion

Because Wright's request to self-represent was neither unequivocal nor intelligent, we hold that the trial court properly denied his request to self-represent. And because neither the nature of Wright's offenses nor his character dictate otherwise, we hold that Wright's sentence was not inappropriate. We thus affirm the decision of the trial court on both grounds, remanding only for the court to correct a minor oversight in its sentencing order. *See supra*, n.2.

Rush, C.J., and David, J., concur.
Massa, J., concurs in result with separate opinion.
Slaughter, J., dissents with separate opinion.

ATTORNEY FOR APPELLANT
Michael D. Gross
Lebanon, Indiana

ATTORNEYS FOR APPELLEE
Theodore E. Rokita
Attorney General of Indiana

Caroline G. Templeton
Deputy Attorney General
Indianapolis, Indiana

Massa, J., concurring in result.

It is hard to quarrel with much of the dissenting opinion. The Court today tills new constitutional soil in suggesting the standard for waiving the right to counsel varies depending on the seriousness of the case. And it weighs Zachariah Wright's legal skills in assessing the knowing and intelligent nature of his waiver in a way explicitly rejected by the Supreme Court of the United States in its seminal decision, *Faretta v. California*, 422 U.S. 806, 835–36 (1975). I thus cannot join much of the Court's opinion for reasons sufficiently explained by the dissent.

However, I am convinced that the trial court sifted through all of Wright's various assertions—both written and oral—on more than one occasion, and concluded that what he ultimately wanted was to hire his own private counsel, or at least have his old counsel back. His waiver, therefore, was not unequivocal, and the trial court should be affirmed.

Slaughter, J., dissenting.

The Sixth Amendment's right to counsel includes the right to proceed without counsel. Here, Zachariah Wright faced the death penalty after being charged with multiple felonies, including murder. He initially sought, and was given, court-appointed counsel. But almost two years before trial, he told the court he wanted to represent himself. The court held a hearing on Wright's request and explained the advantages of having a lawyer and the disadvantages of representing himself. Wright, though, persisted in wanting to lead his own defense. The court denied his request and, after a bench trial, found him guilty. Wright now claims the trial court violated his constitutional right to represent himself. Despite the horrific nature of Wright's crimes, I am constrained by the record below and Supreme Court precedent to conclude that Wright was denied his right of self-representation and thus is entitled to a new trial.

* * *

The Sixth Amendment protects a defendant's right to the assistance of counsel in "all criminal prosecutions". U.S. Const. amend VI. This right, along with other Sixth Amendment rights, is essential to a fair trial and includes the right to proceed without counsel. "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975).

The right to proceed without counsel derives from several values, including (1) "respect for the individual" and (2) the "nearly universal conviction . . . that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so". *Indiana v. Edwards*, 554 U.S. 164, 170 (2008) (cleaned up). When properly invoked, the right of self-representation means the State cannot, consistent with the Constitution, "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." *Faretta*, 422 U.S. at 807. This right would mean little if a defendant had to "accept a lawyer he does not want." *Id.* at 833. The right thus serves as "an aid to a willing defendant—not an organ of the State

interposed between an unwilling defendant and his right to defend himself personally." *Id.* at 820.

Invoking the right of self-representation requires waiving the assistance of counsel. For the waiver to be valid, the defendant must "be made aware of the dangers and disadvantages of self-representation", and the record must "establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). Once the defendant understands the consequences of waiving counsel and representing himself, the court must allow him to proceed pro se. Here, after initially seeking the appointment of counsel, which the trial court granted, Wright had a change of heart and sought to represent himself. In a detailed colloquy almost two years before trial, the judge asked extensive questions probing whether Wright understood the "dangers and disadvantages" of representing himself. The court ultimately found he did not and denied his request.

On appeal, Wright argues that the trial court erred in denying his request to proceed pro se. The Court agrees that Wright's waiver was both knowing and voluntary. But it holds his waiver was neither intelligent nor unequivocal and thus not sufficient to invoke his right of self-representation. I part ways with the Court on two grounds. First, the controlling *Faretta* test and its state-law supplement compel the opposite result of today's holding—they show that Wright's waiver of counsel was intelligent and that he invoked his right to self-representation unequivocally. Second, the Constitution does not allow states to use a "tailoring" approach to erect a higher bar for defendants who want to represent themselves.

I

For two reasons, I cannot join the Court's conclusion that Wright's waiver of counsel was insufficient. First, under governing law, a waiver is intelligent if the defendant is aware of the risks of proceeding pro se, *Faretta*, 422 U.S. at 835—i.e., "the defendant 'knows what he is doing and his choice is made with eyes open.'" *Iowa v. Tovar*, 541 U.S. 77, 88 (2004) (quoting *Adams*, 317 U.S. at 279). I would find that the trial court's lengthy colloquy detailing the risks of proceeding pro se "opened" Wright's eyes

and made his waiver intelligent. Second, I would find that Wright's repeated requests to proceed without counsel underscore that his invocation of the right of self-representation was unequivocal. Given these conclusions, there is but one suitable remedy: Wright is entitled to a new trial. "The right [of self-representation] is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984).

A

Under Supreme Court precedent, whether a waiver of counsel is "intelligent" does not turn on the defendant's IQ but on whether "the defendant 'knows what he is doing and his choice is made with eyes open.'" *Tovar*, 541 U.S. at 88 (quoting *Adams*, 317 U.S. at 279). Essentially, the defendant "should be made aware of the dangers and disadvantages of self-representation". *Faretta*, 422 U.S. at 835. We consider a waiver intelligent when the defendant "fully understands the nature of the right and how it would likely apply in general in the circumstances—even though the defendant may not know the specific detailed consequences of invoking it." *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (emphasis omitted). Based on these considerations, the record establishes that Wright's waiver was intelligent. And, consistent with *Faretta*, the relevant time for determining waiver is during the waiver hearing. See, e.g., *Faretta*, 422 U.S. at 835 (focusing on defendant's words and deeds during waiver hearing).

The record shows that the trial court made Wright aware of the dangers and disadvantages of self-representation during the waiver hearing. The court's thorough colloquy raised both the benefits of having a lawyer and the detriments of going it alone. One set of advisements explained that Wright was then (during the *Faretta* hearing) facing the death penalty if convicted. [Tr. Vol. 4, p. 46.] The court explained the myriad ways a lawyer can assist a criminal defendant before trial. Lawyers, it explained, are trained in:

- investigating criminal cases, finding favorable witnesses, and securing their testimony [*id.* at 47];

- gathering evidence, including documents, and using them to the defendant's advantage [*ibid.*];
- preparing and filing motions, framing issues, and responding to motions filed by the State [*id.* at 47–48];
- evaluating the strengths and weaknesses of the State's case, advising whether seeking a plea might be advantageous, and assisting in negotiating a plea [*id.* at 48].

In addition, the court explained that if the case goes to trial, lawyers know how to:

- pick a fair and impartial jury [*id.* at 49];
- make a favorable opening statement and closing argument [*ibid.*];
- object to inadmissible evidence [*id.* at 48];
- examine witnesses—eliciting favorable testimony from defense witnesses and cross-examining the State's witnesses [*id.* at 47].

Also, after the guilt phase, lawyers can:

- represent a capital defendant at the sentencing phase, make arguments in mitigation, which might help to spare the defendant's life [*id.* at 49];
- preserve a record for appeal and prosecute an appeal [*id.* at 48–49].

The court further emphasized that if Wright were to proceed without counsel:

- he would be held to the same standards and would have to follow the same rules as a licensed lawyer [*id.* at 49–50];
- the court could not advise or assist him [*id.* at 50];
- he would forfeit an ineffective-counsel claim [*ibid.*];
- he would be on an uneven field, as the State would be represented by an attorney and have all the advantages of a trained attorney [*ibid.*].

The court also opined that going pro se is a "very bad decision in many cases", and that it is almost always a good idea to be represented by

counsel in a criminal case. [*Ibid.*] And the court noted that even lawyers charged with crimes often get other lawyers to represent them. [*Id.* at 51.]

After each advisement, the court asked if Wright understood what a lawyer could do for him and his defense. Wright responded that he did. [*Id.* at 46–51.] Taken together, these advisements informed Wright of the risks of going pro se and underscored he was making his decision with eyes open.

Despite Wright's multiple, repeated statements that he wished to proceed on his own behalf, the trial court pressed on—undeterred by Wright's insistence that he wanted to represent himself—and changed its line of questioning. It went from asking Wright if he understood the risks of representing himself to whether he had the legal ability to do so. It asked Wright:

- what knowledge or skill he thought he had that he could use to represent himself;
- whether he had any experience in the study of law, in particular criminal law;
- whether he had ever tried a jury trial, picked a jury, cross-examined a witness, or made a closing argument.

[*Id.* at 51.] Wright acknowledged no formal training in the law but explained that he had "been charged with a number of crimes" and been "through this [legal] process many times". [*Ibid.*] And he answered "no" to the set of questions about his experience trying a case. [*Ibid.*]

The Court focuses on three aspects of Wright's responses in concluding that his waiver was not intelligent: his "limited experience navigating the legal system", his "deficient knowledge of criminal law and procedure", and his lack of "apparent defenses or trial strategy". *Ante*, at 25–26. But *Faretta* rejects such an approach and holds that an "intelligent" waiver focuses only on whether the defendant knows the dangers and disadvantages of representing himself: "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation". 422 U.S. at 835. Any inquiry into a defendant's legal know-how, *Faretta* holds, is unwarranted.

> We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of prospective jurors on voir dire. For 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 (footnote omitted).

For these reasons, I would find that Wright's waiver of counsel was intelligent.

B

The Court also holds that Wright did not unequivocally invoke his right of self-representation. I cannot join this holding because our case law and the record below show that Wright's invocation was unequivocal. As discussed above, *Faretta* is the foundational case on the right of self-representation. The Supreme Court has not said what a defendant must do to trigger this right, but we have. In *Anderson v. State*, we announced "what is necessary to constitute an assertion", 267 Ind. 289, 294, 370 N.E.2d 318, 320 (1977), of the right of self-representation: a defendant must make a "clear and unequivocal request"—one "sufficiently clear that if it is granted the defendant should not be able to turn about and urge that he was improperly denied counsel." *Id.* (cleaned up); *Hopper v. State*, 957 N.E.2d 613, 621 (Ind. 2011) (cleaned up).

In determining what constitutes an unequivocal request, we have two guideposts: *Anderson* stakes out what does not constitute a clear and unequivocal request, 370 N.E.2d at 321; and *Russell v. State* stakes out what does. 270 Ind. 55, 61, 383 N.E.2d 309, 314 (1978). Comparing the colloquies in *Anderson* and *Russell* to Wright's, we see that Wright's repeated assertions that he wanted to proceed pro se go well beyond what we have found unequivocal.

In *Anderson*, we held that the defendant had not clearly and unequivocally asserted the right to proceed pro se, and we did so by focusing on the back-and-forth between the court and the defendant. 370

N.E.2d at 319–21. There, the defendant said in passing that he wanted a private lawyer but would rather go pro se if he "can't get no lawyer." *Id.* at 320. Observing that this was the "only mention of self-representation" and that the matter "was never raised again", *id.*, we rejected the defendant's *Faretta* argument and held that this bare statement did not amount to a clear and unequivocal assertion of the right to proceed pro se. *Id.* at 321.

In *Russell*, we again focused on the colloquy between the court and the defendant and found that the defendant's statements "met the *Anderson* standard of a clear and unequivocal assertion of the self-representation right." 383 N.E.2d at 314. There, the defendant's lawyer, on the day of trial, informed the court that the defendant wanted to conduct his own defense. *Id.* at 311. The defendant pushed for pro se representation, stating:

- "Your Honor, I feel that, under the circumstances of the case, I have more knowledge of the case, that I would be more competent in my behalf to conduct the trial myself."
- "If a person is competent, I believe I am competent to take and defend myself."

Id. On appeal, we rejected the defendant's day-of-trial attempt to invoke his right of self-representation because it was untimely—not because it was unclear or equivocal. *Id.* at 314–15.

Here, Wright's statements to the trial judge are even more emphatic than those in *Russell*, which we held were unequivocal, and more decisive than the defendant's lone, wishy-washy statement in *Anderson*. Wright, during his colloquy, repeatedly emphasized his desire to proceed pro se:

> A. I asked both my attorneys to filed [sic] for a fast and speedy trial and both attorneys refused, which is a violation of my constitutional rights. And I've asked many times and both attorneys have both told me no and they refused. And I qualify for all the qualifications for going pro se.
> Q. Say it again, sir?
> A. I qualify for all the qualifications for going pro se.

* * *

Q. Okay. So I guess I'm trying to understand what your position is here. Are you asking to act as your own attorney or –

A. - yes –

Q. - or is it something in the nature that you just would like –

A. - I do not wish to have a State-appointed attorney anymore at this time.

Q. Is it these attorneys in particular or that you just would like any other attorneys?

A. I would like no attorney.

Q. Okay. And so at the beginning of this case, you got a full advisement of your rights and I explained to you the right to an attorney.

A. Uh-huh, that's correct.

Q. That if you couldn't afford one, one would be provided for you. I concluded you couldn't afford an attorney. I presume you can't afford an attorney, you don't have the means; is that correct, to hire an attorney?

A. That's correct.

Q. So at that time you asked me to appoint an attorney for you, and I did. I appointed Mr. Reid. Do you remember Mr. Reid?

A. Yes.

Q. You got along okay with Mr. Reid didn't you?

A. Yes.

Q. Okay. So what's changed, then, since then? At one point it seemed like you wanted to have an attorney and then now it seems something seems to be different.

A. What's changed is I believe the attorneys' [sic] believed they were acting in my best interest, which wasn't my best interest because my only interest was

for a fast and speedy. And if I have an attorney that refuses to give me what I want and is violating my constitutional rights, I do not believe, you know, I should have a State-appointed attorney anymore. I was satisfied with Allan Reid's work, but you charged me with the death penalty, so he could not be on my case anymore.

Q. So it's not that you don't want some other attorney, because you understand –

A. - Well, I believe any attorney paid by the court is not going to listen to anything I have to say and is not going to give me what I want, because I do not pay them.

Q. And what sort of information have you developed since I had an attorney appointed for you and have had attorneys appointed for you that's caused you to have this difference of conclusion? What's, what's changed?

A. They refuse to give me access to my rights.

Q. Okay. And so do you want me to get you somebody else or you –

A. - I wish to go pro se –

Q. - to handle it yourself?

A. Uh-huh.

[Tr. Vol. 4, p. 43–45.]

These assertions amply satisfy *Anderson*'s standard of an unequivocal request. And if these clear statements were somehow not enough, here is another exchange showing that Wright wanted to "control" his case:

Q. It's just puzzling to me where this comes from, because at the beginning of the case you wanted an attorney, had an attorney, were happy with your attorney, and then the circumstances change. Now, all of a sudden, you don't think you want an attorney. Help me understand.

A. Uh-huh. Well, as I said, I experienced, you know, having an attorney and I realize that I am better off without an attorney, because, like I said, an attorney is not going to give me what I want. My first attorney wanted to give me what I want, but these new attorneys do no [sic]. I think it's better if I'm just in control of the—of my case.

[*Id.* at 53.] These statements underscore that Wright invoked his right of self-representation clearly and unequivocally. Thus, I cannot join today's opinion holding otherwise.

II

The other reason for my dissent is that today's opinion creates a new test for analyzing a defendant's assertion of the right to proceed pro se—a *Faretta*-plus test. The Court adds the need to "tailor" an application of *Faretta*'s factors based on the State's interest in ensuring a fair and reliable criminal process in a capital case. *Ante*, at 19–20. Based on its enhanced test, the Court holds that the defendant's right of self-representation yields to the State's competing interest in ensuring a criminal trial's integrity and efficiency. But Supreme Court precedent does not support such "tailoring" of competing interests when the defendant timely asserts the right to proceed pro se. The only issues here should be whether Wright invoked his right to self-representation unequivocally and waived his right to counsel knowingly, intelligently, and voluntarily. See *Anderson*, 370 N.E.2d at 320; *Tovar*, 541 U.S. at 88. Either he did, or he did not. These are binary questions not subject to tailoring.

No Supreme Court precedent holds that the *Faretta* analysis changes when a defendant's decision could be a matter of life or death. Indeed, the Supreme Court has not once espoused today's approach—despite addressing *Faretta* in the context of capital cases a number of times. See, e.g., *Godinez v. Moran*, 509 U.S. 389, 400–01 (1993) (not mentioning the state's interests and reasoning that the only "heightened standard" necessary in a death-penalty case was to find that the waiver of counsel was "knowing and voluntary"); *Patterson v. Illinois*, 487 U.S. 285, 297–98 (1988) (not mentioning the state's interests and explaining that waiving

right to counsel under Sixth Amendment in a death-penalty case is not categorically "more difficult" than waiving the right under the Fifth Amendment). Today's test instead is based on an overly broad reading of a few discrete cases and narrow holdings where the Supreme Court merely recognized that a defendant's right of self-representation is not absolute. For instance, a trial court can curtail the right if a pro se defendant obstructs proceedings. See *Illinois v. Allen*, 397 U.S. 337, 346–47 (1970). Courts also may insist on a timely assertion of the right to proceed pro se, *Martinez v. Court of Appeal of California*, 528 U.S. 152, 162 (2000), and a defendant must be competent to execute a valid waiver. *Godinez*, 509 U.S. at 396. These examples show that this right, even if validly invoked, can later be curtailed.

To be sure, a defendant's waiver may be ill-advised. But, as the Supreme Court observes, "[p]ersonal liberties are not rooted in the law of averages", but in the law's "respect for the individual". *Faretta*, 422 U.S. at 834 (cleaned up). A right premised on respect for individual freedom must include the freedom to make mistakes—even those with dire consequences. It is when the stakes for the criminal defendant are most grave that the law's "respect for the individual" should be at its highest. Yet today's opinion finds that the facts here "may not have led us to the same conclusion in a case with less at stake". *Ante*, at 26. That is because, the Court holds, "the state has a much stronger interest in ensuring fair trial in this capital-turned-LWOP case." *Ibid.* But the Supreme Court does not require that a valid waiver of counsel turns on the severity of the State's sanction. An intelligent waiver is no less intelligent when the stakes are grave. Indeed, our own precedent permits a capital defendant to plead guilty under a plea agreement calling for the death penalty. *Smith v. State*, 686 N.E.2d 1264, 1265 (Ind. 1997).

Because Supreme Court precedent does not permit today's "tailoring" test, "the severity of a potential punishment" cannot authorize the State's interests to eclipse the defendant's. *Ante*, at 14. Thus, *Faretta* does not allow us to ignore Wright's waiver.

* * *

For these reasons, I respectfully dissent.