No. 20-5379

IN THE

Supreme Court of the United States

KEITH A. DAVIS,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL appears in support of petitioner in this case because the Question Presented is of great importance to NACDL's members and to the fair administration of justice. NACDL has repeatedly emphasized that the ability to cross-examine witnesses in a meaningful way is essential to the adversarial process. See Br. of NACDL as *Amicus Curiae* at 5, *Crawford* v. *Washington*, 541 U.S. 26 (July 24, 2003); Br. of NACDL as *Amicus Curiae* at 8–9, *Melendez-Diaz* v. *Massachusetts*, 577 U.S. 305 (June 23, 2008). Moreover, many of NACDL's members have acted as standby counsel precisely because such a role facilitates competent cross-examination, promotes confi-

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[1] In accordance with Supreme Court Rule 37, amicus curiae states that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the amicus curiae, its members, and its counsel made any monetary contribution to its preparation and submission. Petitioner and Respondents have consented to the filing of this brief.

dence in verdicts and further promotes the public reputation of our courts. Without standby counsel, events such as those occurring here – the absence of any defense party during testimony of prosecution witnesses – will become commonplace.

SUMMARY OF ARGUMENT

Defense cross-examination of witnesses assists fact-finders in effective truth-seeking by highlighting inconsistencies in witness testimony, discouraging deceitful witness behavior, and encouraging prosecutorial preparation. Only under narrow, traditional exceptions can the cross-examination right be limited in a judicial proceeding. Never in 200 years of American jurisprudence has an appellate court found harmless error when a defendant's cross-examination right has been completely precluded. *Cotto* v. *Herbert*, 331 F.3d 217, 251 (2d Cir. 2003). This Court explicitly struck down an instance of complete preclusion of a defendant's right to physically confront his accuser face-to-face in *Coy* v. *Iowa*, 487 U.S. 1012, 1019 (1988). Misbehavior on the part of the accused during trial does not meet the exceedingly high bar this Court has set for an exception to the bedrock guarantee that an accused may cross-examine her accusers. Recent Court decisions make clear that abridgments of the cross-examination right "require[] that the competing interest be closely examined" with extreme caution. *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973).

The "flip-side" of a defendant's right to waive counsel reveals numerous and recurring problems that this Court has noted – including a significant burden on the courts themselves. *Faretta* v. *California*, 422 U.S. 806, 807 (1975); *Martinez* v. *Court of Appeal of Cal. Fourth Appellate Dist.*, 528 U.S. 152, 161 (2000).

Judges must explain complex legal terms and procedural rules to the uninitiated defendant. See *McKaskle* v. *Wiggins*, 465 U.S. 168, 184 (1984) (Standby counsel helps to "relieve" trail courts of the "need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals."). Pro se defendants also tend to make tactical errors which lead to their own demise, resulting in subsequent appellate proceedings challenging the "fairness" of their trial. In such circumstances, the prosecution itself has a legitimate concern that those tactical errors may jeopardize convictions secured against pro se defendants. Finally, this Court has repeatedly articulated the ways in which a pro se defendant's attempt at self-representation may derogate the integrity of both the courtroom and the trial process. Certainly that is true where courts permit prosecution witnesses to testify before a jury and an empty defense table.

The single most effective way to mitigate these integrity concerns is through the appointment of standby counsel by the trial judge. *E.g.*, *Faretta*, 422 U.S. at 807, 811; *Martinez*, 528 U.S. at 161; see also *Johnstone* v. *Kelly*, 808 F.2d 214, 216 (2d Cir. 1986) ("Although the Constitution prohibits courts from requiring criminal defendants to be defended by counsel, it does not foreclose trial courts from using less overbearing means of ensuring that *pro se* defendants have adequate legal representation. In cases in which the trial judge fears that a *pro se* defendant lacks the ability to defend himself adequately, the judge can appoint counsel to assist the defendant in his *pro se* defense.") (citation omitted). Yet the Washington Supreme Court's holding (and the holdings of other

courts, see Pet. 14–15, 17–19) demonstrates that this Court's review is warranted in order to clarify the standard for appointment. To be sure, trial courts have discretion as to whether to appoint standby counsel. But the instant case warrants review and reversal because this case and numerous others like it plainly exceed the outer boundary of that discretion.

I. CROSS-EXAMINATION ENSURES THE INTEGRITY OF THE ADVERSARIAL PROCESS

The accuracy of the truth-determining process is served when the accused is afforded the right to confront all witnesses. The existence of this right has been traced to treason cases and English statute to at least the mid-sixteenth century and, perhaps, as far back as the early thirteenth century. Jeremy A. Blumenthal, Comment, *Reading the Text of the Confrontation Clause: "To Be" or Not "To Be"?*, 3 U. Pa. J. Const. L. 722, 732 (2001). In colonial America, the Maryland Declaration of Rights, among others, afforded the accused the right to "be confronted with" adverse witnesses and the right to examine them. *Id.* at 731. As this Court has noted, "[t]he perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it." *Coy*, 487 U.S. at 1019. This Court recognized the essential function of cross-examination in its first consideration of the Confrontation Clause, observing that the Clause's "primary object" was "to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness. . . ." *Mattox* v. *United States*, 156 U.S. 237, 242 (1895).

The purpose of cross-examination is to assist the factfinder in reaching the truth. A defendant may be

accused by a witness having "biases, prejudices, or ulterior motives" that lead the witness to distort the truth. *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974). Cross-examination has a tendency to dissuade untruthful witnesses. When a witness confronts the accused face-to-face, in a public forum, the witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." *Coy*, 487 U.S. at 1019 (quoting *Jay* v. *Boyd,* 351 U.S. 345, 375–376 (1956)). Having to defend one's statement before a jury and a defendant makes lies and malicious omissions less likely, because it taps into "something deep in human nature" that makes lying about the deeds of another more difficult when said "'to his face' than 'behind his back.'" *Id.* Thus, the Confrontation Clause is violated when a defendant is "prohibited from engaging in otherwise appropriate cross-examination designed . . . 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680 (1980).

While the right to confront and cross-examine "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests . . . its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." *Chambers*, 410 U.S. at 295 (quoting *Berger* v. *California*, 393 U.S. 314, 315 (1969)). Even in cases where a defendant's behavior rises to the intimidation of witnesses, courts have not precluded the accused's right of cross-examination entirely. For example, where a state court applied forfeiture-by-misconduct doctrine to permit complete preclusion of

the accused's right to cross-examine a witness he had intimidated, although the witness actually took the stand at trial, the Second Circuit held that the preclusion was objectively unreasonable and violated the accused's right of confrontation. *Cotto*, 331 F.3d at 247–48.

The *Cotto* court cautioned that "[w]hile there might be a circumstance where a complete preclusion of cross-examination could be justified, this would be exceedingly rare." *Id* at 252. The court concluded that "[t]o deprive the jury of the powerful tool of cross-examination, when the witness was literally available, harmed the truth-seeking process as much as it did [the accused]" and, therefore, violated the Sixth Amendment. *Id.* Yet the *Cotto* court's emphasis on a high threshold for the complete preclusion of cross-examination is by no means uniformly the rule. Instead there exist divergent approaches to preclusion on cross-examination that put at risk both the integrity of the Sixth Amendment and the reputation of the criminal judicial system for dealing fairly and squarely with defendants, even those who engage in misconduct.

This Court has not yet weighed in on the complete preclusion of an accused's right to conduct cross-examination. In this case, it has an excellent opportunity to do so. The Court *has*, however, rejected a State's attempt to completely preclude a criminal defendant from exercising another right conferred by the Confrontation Clause: a criminal defendant's "right physically to face those who testify against him." *Coy*, 487 U.S. at 1017. In *Coy*, a State statute allowed an opaque screen to be erected in front of the witness stand from which minor sexual assault victims testified. The screen precluded face-to-face confrontation, and this Court held that this practice vio-

lated the Confrontation Clause. The Clause provides provides the defendant a right to confront the prosecution's witnesses face-to-face by its words, serves the perception that confrontation is essential to fairness, and ensures the integrity of the factfinding process by making it more difficult for witnesses to lie. *Id.* at 1014–20, 1022.

Because the same Confrontation Clause concerns that guided this Court's preservation of face-to-face confrontations in *Coy* also animate the cross-examination guarantee. It is a short step to extend *Coy's* protections to pro se criminal defendants who have no opportunity for cross-examination because their behavior during trial is deemed to be a waiver of the right to be present.

II. THE APPOINTMENT OF STANDBY COUNSEL IS THE MOST APPROPRIATE MEANS TO SOLVE THE PROBLEMS THAT THIS COURT HAS ACKNOWLEDGED WITH PRO SE REPRESENTATION IN CRIMINAL COURTROOMS

As this Court has observed on numerous occasions, the choice of a defendant to proceed pro se may put at risk the courts' reputation for fairness. Even where all parties act magnanimously, a pro se defendant's efforts to engage in the adversarial process against experienced opponents in a public courtroom may appear as an unfair and imbalanced exercise of state force. "A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself." *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 468 (1971) (Burger, C.J., concurring). Accordingly, "[i]n every trial there is more at stake than just the interests of the accused; the integrity of the process war-

rants a trial judge's exercising his discretion to have counsel participate in the defense even when rejected.") *Id.* at 506; see also *Faretta*, 422 U.S. at 839 (Burger, C.J., dissenting) (observing that justice through the adversarial process "is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel.). Here, the trial court's continuance of a trial whilst the defense table remained empty constitutes an error which may "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); see also *McKaskle*, 465 U.S. at 178 ("The defendant's appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear pro se exists to affirm the accused's individual dignity and autonomy."). Here, the defendant was absent for prosecution testimony and thereby deprived of the critical right of cross-examination.

More broadly, where a specific event demonstrates a need for standby counsel, without whom the defendant's due process rights and confrontation rights will likely be violated, the court should be required to appoint standby counsel. See, *e.g.,* American Psychiatric Association, *Criminal Justice*, https://www.psychiatry.org/psychiatrists/advocacy/federal-affairs/criminal-justice (last visited Sept. 29, 2020) ("According to the Bureau of Justice Statistics, more than half of those in the criminal justice system suffer from a mental illness."); see also *Indiana* v. *Edwards*, 554 U.S. 164, 167 (2008) (States may impose a higher standard of competency for criminal defendants who wish to proceed pro se). That is especially true where the defendant has requested such

assistance, even if it also is true that a request alone is not sufficient to require appointment. But certainly in cases like this one, where a trial court removes a defendant, or he is otherwise absent, the trial court must appoint standby counsel to act in his place if the court decides to proceed with his trial. See generally *Illinois* v. *Allen*, 397 U.S. 337 (1970) (discussing the vitality of defendants' presence in the courtroom, the lengths trial judges must go to in order to ensure they are able to be present even where they cause ongoing disruptions, and the permissiveness of appointing counsel against defendants' objections where defendant refuses to behave). Accordingly, in numerous courts appointment of standby counsel in the defendant's absence is mandatory if proceedings continue. *Clark* v. *Perez*, 450 F. Supp. 2d 396, 401 (S.D.N.Y. 2006 ("if a defendant is absent from the courtroom due to an inability or unwillingness to abide by the rules of procedure and courtroom protocol, standby counsel must be appointed"), *rev'd on other grounds*, 510 F.3d 382 (2d Cir. 2008). The Supreme Court of Pennsylvania considers misbehavior to be a waiver of the right to self-representation. "If the defendant misbehaves, he should be warned that he will be removed from the court, his right to represent himself will be considered waived, and the trial will continue in his absence with standby counsel conducting the defense." *Commonwealth* v. *Africa*, 353 A.2d 855, 864 (1976). See also *Alkebulanyahh* v. *Byars*, No. 6:13-cv-00918-TLW, 2015 WL 2381353, at *13 (D.S.C. May 18, 2015) (approving of a trial judge's decision to move disruptive defendant to the back of the courtroom and allow standby counsel to assume his representation from the counsel table); see also *Lamon* v. *Adams*, No. 1:09-cv-00514-OWW-SMS (HC), 2009 U.S. Dist. LEXIS 107058, at *29 (E.D. Cal. Nov. 17, 2009) (trial judge adequately explained to the de-

fendant that his right to self-representation would be contingent on good behavior and if he needed to be removed, standby counsel would be made available to represent him in his absence); see also *United States* v. *Cork*, No. 1:07-CR-183-WSD, 2008 U.S. Dist. LEXIS 16336, at *12 (N.D. Ga. Mar. 4, 2008) (dismissing defendant's motions in part based on approval of the lower court's appointment of standby counsel who had "been present at all proceedings since his appointment" and was "directed to represent Defendant in his absence.").

While such a rule may seem like a reward for a defendant's misbehavior, there is more at stake than punishing a defendant's recalcitrance. See Pet. App., App. A nn. 5–6. Continuation of the trial in the defendant's absence would result in ex parte examinations that the Confrontation Clause was intended to, and does, prohibit. See *Crawford* v. *Washington*, 541 U.S. 36, 50 (2004) ("the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused"). It is no answer that the defendant caused the absence or that transcripts of the prosecution's direct examination of the witness might be provided (assuming they might be available in short order)[2] because, again, more is at stake. Standby counsel's role serves the interests of all parties. It is for this reason that a trial judge may appoint standby coun-

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[2] In this case, as in the vast bulk of cases, the defendant did not receive transcripts before the end of trial. Therefore, Mr. Davis had to prepare his closing argument having no idea what the testimony of key prosecution witnesses even was, and no access even to notes and observations of standby counsel. *See* Pet. App., App. B. ¶ 36.

sel "even over the defendant's objection." *McKaskle*, 465 U.S. at 184.

For the trial court, the procedural assistance offered by standby counsel helps "relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals." *Id*. Whether or not the pro se defendant is capable of presenting his substantive arguments, his inexperience with the law will undoubtedly hinder his ability to present those arguments in compliance with mandated procedures, including specific "chambers' rules" that apply in many courts around the country. See U.S. Dist. Court for the S. Dist. of Cal., *Chambers Rules*,
https://www.casd.uscourts.gov/judges/chambers-rules.aspx (last visited Sept. 29, 2020). The prosecutor also benefits because the appointment of standby counsel means that the verdict is more likely to withstand appeal. *Faretta*, 422 U.S. at 834 n.46.

CONCLUSION

For the foregoing reasons, as well as those stated in Petitioner's brief, the judgment below should be reversed.

Respectfully submitted,

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