

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2007

No. 07 - 053

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**BEAUREGARD DUKE,**

*Petitioner,*

*- against -*

**STATE OF SETONIA,**

*Respondent.*

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ON WRIT OF CERTIORARI TO  
THE SUPREME COURT OF SETONIA

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**BRIEF FOR PETITIONER**

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Aaron Amaral,  
Coreal Riday-White,  
Tracy Sabbah,  
Attorneys for Petitioner  
City University of New York  
(CUNY) Law School  
65-21 Main St.  
Flushing, NY 11361

## QUESTIONS PRESENTED

- I. Whether an arrest that occurs in violation of Setonia law also violate the Fourth Amendment to the United States Constitution, thus triggering the exclusionary rule when (1) the illegal arrest was for a misdemeanor traffic infraction, (2) for which only a summons should have been issued, and (3) in the course of which, no independent probable cause existed.
  
- II. Whether Duke's Sixth Amendment right to proceed *pro se* can be denied by the state when (1) the state has found him competent to stand trial, and (2) declined to asses whether his waiver of assistance of counsel was made knowingly and intelligently.

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## **OPINIONS BELOW**

The opinion of the Supreme Court of Setonia is unreported. The decision can be found in the Record from pages 2 to 13.

## **STATEMENT OF JURISDICTION**

A Formal Statement of Jurisdiction has been omitted in accordance with the rules of the 2008 John J. Gibbons National Criminal Procedure Moot Court Competition.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### Constitutional Provisions:

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend IV.

The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. amend V.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. U.S. Const. amend VI.

The Fourteenth Amendment, Clause 1 of the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws. U.S. Const. amend XIV, § 1.

**Statutes:**

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. 28 U.S.C.A. §1654 (1949)

Whenever a person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city, or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue his unlawful act, the officer may proceed according to the provisions of § 19.2-82. Setonia Code § 19.2-74 (A)(1).

## STATEMENT OF THE CASE

On the afternoon of December 10, 2005, the petitioner, Mr. Beauregard Duke, got into his automobile with the intention of visiting a family member who was working in a neighboring town, only a few miles away, “a straight shot up Route 21.” (Record (herein “R.”) at 2.) Duke left Davenport, Setonia and within a few minutes was in the town of Hazzard, on his way to visiting his cousin. (R. at 2.) In that brief interval, the local Hazzard police received information that another individual, in a car of the same make and model as Duke, was also driving along Route 21, with a suspended license. (R. at 2.) Mistaking Duke’s vehicle for that of the other individual, the Hazzard Police stopped Duke. (R. at 2.) Although Duke was not the man the Chief Deputy of the Hazzard Police had identified (R. at 2) an investigation revealed that Duke also was driving with a suspended license. (R. at 3.)

The police proceeded to arrest Duke. They handcuffed him, read him his *Miranda* warnings, and placed him in a patrol car. (R. at 3.) This despite a Setonia statute which instructs the police that in situations such as were then presented to them, they were, with some inapposite exceptions, (R. at 3) meant “to issue a summons . . . [and] upon the giving by such a person of his written promise to appear at such time and place, the officer shall forthwith release him from custody.” Setonia Code § 19.2-74 (A)(1). At no time subsequent to the arrest was Duke anything less than fully cooperative with the Hazzard Police. (R. at 3.) Despite there being no basis for doing so, the Hazzard Police insisted on seeking consent to search Duke’s motel room, and a waiver of consent was granted. (R. at 3.) So little concern was manifested by the Hazzard Police for any potential physical dangers, that it took them between 45 minutes and an hour to get around to searching Duke’s person. (R. at 3.) Upon doing so they allegedly discovered the evidence the Petitioner here is seeking to be suppressed, a .45 caliber handgun and crack cocaine. (R. at 3.)

At a hearing on April 3, 2006, Duke moved to suppress the evidence found on his person on both statutory and constitutional grounds, arguing that the search was tainted by the illegal arrest that preceded it. (R. at 4.) In opposing the motion to suppress, the Assistant District Attorney had argued that the arrest fell within the exception to Setonia Code § 19.2-74, which permits an arrest when a person fails or refuses to discontinue the unlawful act. (R. at 4.) However, Judge Schoen made no findings that Duke attempted to drive his car again after the initial stop or whether the facts established that Duke failed or refused to discontinue the unlawful act. (R. at 4.) Judge Schoen then held that the arrest of Duke violated neither the Fourth Amendment of the United States Constitution, the Fourth Amendment of the Setonia Constitution, nor Setonia Code § 19.2-74 (A)(1). (R. at 4.)

As a result of suspicions by the defense counsel that Duke was suffering from a psychological ailment, defense counsel requested a proceeding to ascertain whether Duke was competent to stand trial. (R. at 5.) A competency hearing was held in October 2006 in which two disinterested psychiatrists testified that Duke was schizophrenic and suffering from delusions. (R. at 6.) Thus, the court found him incompetent to stand trial at that time. (R. at 6.) After several months of treatment and evaluations, the court ordered a second examination to which two different disinterested psychiatrists testified that Duke was competent to stand trial. (R. at 6.) One of the doctors testified that Duke “acknowledged his need for counsel to effectively communicate a defense and that Duke was capable of planning a defense in cooperation with counsel.” (R. at 6.) After a review of the evidence presented, Judge Foster concluded that Duke was competent to stand trial. (R. at 6.)

On April 9, 2007, Duke moved to proceed *pro se*, and his attorney, Justin Talley moved to withdraw as counsel. (R. at 6.) Relying on the findings from the competency hearing earlier in the month, Judge Foster ruled that although Duke was competent to stand trial, he was not competent to defend himself. (R. at 6.) Judge Foster based this decision on concerns that

Duke's communicative abilities were hampered by his schizophrenia to the extent that he would not be able to present an effective defense. (R. at 6.) Thus, Judge Foster denied both Duke's motion to proceed *pro se* and Justin Talley's motion to withdraw as counsel and proceeded with the trial. (R. at 6.)

The jury returned a unanimous guilty verdict on all counts. (R. at 7.) Duke appealed as a matter of right to the Supreme Court of Setonia arguing that first, the decision admitting the evidence seized from Duke's person violates his Fourth Amendment rights and second, that Duke's Sixth Amendment right of self-representation was violated by Judge Foster's ruling that although he was competent to stand trial, he was not competent to defend himself. (R. at 7.) The Supreme Court of Setonia affirmed on both grounds, holding in regards to the Fourth Amendment issue that although Duke's arrest violated Setonia Code § 19.2-74, the subsequent search did not violate Duke's Fourth Amendment rights under the Constitution (R. at 9) and that Judge Foster's denial of Duke's request to commence with the trial without the assistance of counsel did not violate Duke's Sixth Amendment right (R. at 11). These issues were granted writ of certiorari to the Supreme Court of the United States. (R. at 14.)

### **SUMMARY OF THE ARGUMENT**

This Court should reverse the ruling of the Supreme Court of Setonia, thereby overturning the conviction of Beauregard Duke as first, in arresting Duke in violation of Setonia state law, the Hazzard Police Department violated the Fourth Amendment of the United States Constitution thus triggering the exclusionary rule and second, the Sixth Amendment was violated when Duke was prohibited from exercising his constitutional right to proceed *pro se* after he was found competent to stand trial.

First, this Court should overturn the conviction of Duke on all felony counts and remand this case to the Supreme Court of Setonia, excluding the evidence obtained during the unconstitutional seizure and search of Duke. The arrest of Duke and his subsequent search by

the Hazzard Police Department was in clear violation of his Fourth Amendment rights. The remedy for this violation is the suppression of all evidence obtained by the police in reliance on these unconstitutional actions. *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1963).

Specifically, the arrest in violation of Setonia state law and the subsequent search of Duke's person cannot be exempt from Fourth Amendment protections as having been incident to his arrest. *See Chimel v. California*, 395 U.S. 752 (1969); *Miller v. United States*, 357 U.S. 301 (1958); *Ker v. California*, 374 U.S. 23 (1963). Even if the legality of the arrest is considered irrelevant for federal constitutional purposes, any other attempt to constitutionally protect the seizure and search must fail as the actions of the police substantially undermined the foundations of Fourth Amendment jurisprudence and are inconsistent with *stare decisis*. *See Knowles v. Iowa*, 525 U.S. 113 (1998); *Terry v. Ohio*, 392 U.S. 1 (1968). Furthermore, no independent basis for establishing probable cause existed by which the Hazzard Police Department might justify their actions. *See Arizona v. Hicks*, 480 U.S. 321 (1987). Thus, as the Fourth Amendment forbids the admission of evidence obtained by unreasonable search and seizure, the crack cocaine and .45 caliber handgun must be found inadmissible. *See Mapp*, 367 U.S. at 654-55.

Second, the Sixth Amendment was violated when Duke was prohibited from exercising his right to self-representation, even though he was found competent to stand trial. Binding precedent from this Court dictates that once a defendant is found competent to stand trial, no higher competency standard should be imposed before a defendant is permitted to exercise his Sixth Amendment right to self-representation. *Godinez v. Moran*, 509 U.S. 389, 399 (1993). The only standard that should be applied to determine whether the defendant should proceed *pro se* is whether he knowingly and intelligently waived his right to the assistance of counsel. *Faretta v. California*, 422 U.S. 806, 835 (1975). This Court has not eroded this standard because it is fundamentally embedded within the purpose of the Sixth Amendment. *Id.* at 817. Finally, due process of law is furthered by the Sixth Amendment right of self-representation. *Godinez*,

509 U.S. at 404. The trial court erroneously applied a higher standard after Duke was found competent to stand trial, thereby prohibiting him from proceeding *pro se*. Thus, the Supreme Court of Setonia should be reversed and this case should be remanded to apply the correct standard.

## **ARGUMENT**

This case is about an illegal act, perpetrated by the police on Mr. Bo Duke, and the series of events that unfold in reliance on this conduct. First, the police arrested Duke in clear violation of Setonia law. As the search incident to arrest exception to the Fourth Amendment's reasonableness requirement applies only to lawful arrest, *see Chimel v. California*, 395 U.S. 752 (1969), it could not be used to justify the Hazzard Police Department's subsequent search of Duke. In addition, whatever rationale a traffic misdemeanor might have provided to the police, to justify their arrest and subsequent seizure of Duke, was insufficient in overcoming Duke's Fourth Amendment protections. *See Knowles v Iowa*, 525 U.S. 113 (1998). Finally, no independent probable cause existed for the police to otherwise justify their seizure and search of Duke. *Arizona v. Hicks*, 480 U.S. 321 (1987). Given the violations of Duke's constitutional rights, the exclusionary rule is the appropriate remedy, and all evidence obtained in reliance on the illegal seizure and search should be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1963).

Second, Duke's Sixth Amendment rights were violated when he was prohibited from proceeding *pro se* after he was found competent to stand trial, thereby ignoring the single standard competency requirement set forth by this Court. *Godinez v. Moran*, 509 U.S. 389, 399 (1993). This Court should reverse the Supreme Court of Setonia decision, and remand this case.

As this Court will be addressing questions of law on both the Fourth and Sixth Amendment issues, the standard of review is *de novo*. *Wright v. West*, 505 U.S. 277, 287 (1992); *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

**I. THE HAZZARD POLICE DEPARTMENT’S ARREST OF MR. DUKE, IN DIRECT VIOLATION OF SETONIA STATE LAW, RESULTED IN A FOURTH AMENDMENT VIOLATION AND THUS ANY EVIDENCE OBTAINED IN RELIANCE ON THAT SEIZURE MUST BE SUPPRESSED.**

The arrest of Duke and his subsequent search by the Hazzard Police Department was in clear violation of his Fourth Amendment rights. The remedy for this violation is the suppression of all evidence obtained by the police in reliance on these unconstitutional actions. The evidence should be suppressed for two reasons. First, the illegal arrest and subsequent search of Duke, absent any independent probable cause, was in violation of Duke’s Fourth Amendment rights. *See Arizona v. Hicks*, 480 U.S. 321 (1987). Second, as the Fourth Amendment forbids the admission of evidence obtained by unreasonable search and seizure, the evidence obtained: the .45 caliber handgun; and the crack cocaine, should be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1963).

**A. The Arrest of Duke Under Setonia State Law, which Required Only that a Mere Traffic Summons Be Issued, Violates the Fourth Amendment.**

The illegality of the arrest of Duke precludes the Hazzard Police Department from claiming the constitutional protection of a search incident to arrest. Additionally, the facts and circumstances within the officers’ knowledge did not give rise to sufficient probable cause to protect their seizure and search of Duke. The Court’s Fourth Amendment jurisprudence requires a holding that Duke’s constitutional right, to be free from unreasonable search and seizure, was violated.

This Court’s Fourth Amendment jurisprudence provides that searches and seizures conducted without judicial oversight are presumptively unreasonable. *Katz v. United States*, 389 U.S. 347 (1967). In fact, “searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause.” *Id.* at 357.

The Hazzard Police Department, in the instant case, has failed to meet the reasonableness standard established by *Katz*. First, the one established exception, by which the Hazzard Police

Department attempts to justify their search of Duke, was as a ‘search incident to his arrest’. (R. at 5.) However, the requisite lawful arrest, needed to justify such a search, per state law, is not present. *See Chimel v. California*, 395 U.S. 752 (1969). Second, even assuming *arguendo*, that the act of driving with a suspended license provided some basis to justify the Hazzard Police Department’s seizure and search of Duke, this Court has explicitly rejected any search incident to the issuance of a citation, *see Knowles v Iowa*, 525 U.S. 113 (1998), thus placing limits on the constitutionality of seizure and search even where some probable cause exists. This Court has imposed similar limitations on police conduct even when using the less burdensome ‘reasonableness’ standard. *See Terry v. Ohio*, 392 U.S. 1 (1968). On that basis, both precedence and policy lead to the conclusion that Duke’s Fourth Amendment rights, regardless of the legality of the arrest, were violated. Finally, no other independent basis for probable cause existed that would have allowed the Hazzard Police Department to even seek a warrant or to have constitutionally justified their arrest and subsequent search of Duke. Resultantly, the seizure and search of Duke were both in violation of the Fourth Amendment.

**1. The ‘search incident to arrest’ exception does not apply to an unlawful arrest under state law and therefore cannot constitutionally justify the seizure of Duke and the subsequent search.**

This Court should affirm, as a matter of law, that the search incident to arrest exception to the warrant requirement of the Fourth Amendment requires that there be a lawful arrest, pursuant to state law. As it is uncontested that the arrest was in violation of state law this exception cannot legitimize the seizure of Duke, and the subsequent search of his person, as reasonable or constitutional.

A search incident to a ‘lawful arrest’ is one of the well-established exceptions to the warrant requirement of the Fourth Amendment. *See Chimel*, 395 U.S. 752 (1969); *See also United State v. Rabinowitz*, 339 U.S. 56 (1950); *Weeks v. United States*, 232 U.S. 383 (1914).

The lawfulness of [an] arrest without warrant is to be determined by state law insofar as it is not violative of the federal Constitution. *Miller v. United States*, 357 U.S. 301 (1958). *A fortiori*, the lawfulness of these arrests by state officers for state offences is to be determined by [state] law. *Ker v. California*, 374 U.S. 23 (1963).

The language used by the Court in these, and many other cases, all refer to a search incident to a *lawful* arrest, or some variant thereof. The Court in *Rabinowitz*, writes of an “incident to a lawful arrest”. *Rabinowitz*, 339 U.S. at 63. The Court in *Weeks*, writes of the exception as being applicable to those “legally arrested.” *Weeks*, 232 U.S. at 392; *see also Agnello v. United States*, 269 U.S. 20, 30 (1925) (stating “persons lawfully arrested”); *Carroll v. United States*, 267 U.S. 132,158 (1925) (stating “when a man is legally arrested”).

Elsewhere, the Court has explicitly held that a search incident to an unlawful arrest is itself unlawful. *See United States v. di Re*, 332 U.S. 581 (1948) (holding that government’s attempt to justify a search of suspect incident to his presence in an automobile, where automobiles are subject to lesser Fourth Amendment protections than a home, was found to be an attempt to elide the unconstitutionality of the search incident to unlawful arrest, and in turn held unconstitutional.)

The Court in *Miller*, extended the *di Re* holding that even where the arrest by state or District of Columbia peace officers is for violation of federal law, the lawfulness of arrest without warrant is to be determined by reference to state law or District of Columbia law. *Miller* 357 U.S. at 305, 306. Referencing the holding in *Mapp v. Ohio*, 367 U.S. 643 (providing for the exclusion of evidence found to be taken in the course of an unreasonable search or seizure), the Court in *Ker* (holding that, in a challenge to an arrest for marijuana trafficking, the state statute must be used to assess its legality), explicates the basis for using state law to establish the lawfulness of an arrest. The Court held that the threat of exclusion should not prevent states from “developing workable rules governing arrests, searches and seizures to meet the practical

demands of effective criminal investigation and law enforcement,” so long as the rules themselves are constitutional. *Ker*, 374 U.S. 23 at 34.

It is uncontested that the arrest was in violation of the law. The majority, in the Setonia Supreme Court decision, acknowledged this fact: “[t]he parties in this case do not dispute that the statute was violated by Duke’s arrest” (R. at 8) and “we hold that although the arrest violated Setonia Code § 19.2-74, the subsequent search did not violate Duke’s Fourth Amendment rights under the Constitution.” (R. at 9.) So while the majority below correctly argues, following *California v. Greenwood*, that establishing whether a search is reasonable does not depend on state law, establishing the validity of a search incident to arrest, i.e. one of the exceptions to the reasonableness requirement, does depend on the existence of a legal arrest. *California v. Greenwood*, 486 U.S. 35 (1988); *see Chimel*, 395 U.S. 752; *see also Cooper v. California*, 386 U.S. 58 (1967).

There is an important reason for states, which bear the great majority of the burden of criminal enforcement, to develop “workable rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement.” *Ker*, 374 U.S. 23 at 34. No doubt the State of Setonia had these concerns in mind when they passed Code § 19.2-74. There are no claims presented that this state statute violates the constitution. Despite the lower court’s conflation of the reasonableness/ probable cause standard for warrant-less arrests with the standard for assessing a search incident to arrest, there is no overt claim that the lawfulness of the arrest itself should be assessed by anything other than the state standard.

This Court should affirm, as a matter of law, that the search incident to arrest exception to the warrant requirement of the Fourth Amendment requires that there be a lawful arrest and that the lawfulness of this arrest must be established by looking to state law. It is undisputed that the arrest of Duke by the Hazzard Police Department was in violation of Setonia law. Therefore, there could be no constitutional search incident to Duke’s illegal arrest.

**2. Assuming *arguendo*, either that the act of driving with a suspended license provided some rationale for the Hazzard Police Department’s seizure and search of Duke, or that the arrest was not illegal for federal constitutional purposes, the Fourth Amendment was still violated.**

The Hazzard Police Department had an insufficient basis to overcome Duke’s Fourth Amendment protections even were the arrest, for federal purposes, not presumptively illegal. *Knowles v. Iowa* held that a search incident to a citation is unconstitutional under the Fourth Amendment. *Knowles v. Iowa*, 525 U.S. 113, 116 (1998). Justice Rehnquist explained that, “the two historical rationales for the search incident to arrest exception: (1) the need to disarm the subject in order to take him into custody, and (2) the need to preserve evidence for later use at trial, were simply not applicable when a citizen is issued a citation.” *Id.* See also *West v. Commonwealth*, 549 S.E.2d 605 (2001) (applying same logic to issuing of summons). Despite some probable cause evidenced by a traffic violation, overriding constitutional concerns limited any subsequent search.

Under Fourth Amendment jurisprudence, it has never been held as a matter of law that probable cause was *per se* sufficient to establish the constitutionality of any search or seizure. Under the *Katz* test, the intervention of a magistrate was expected to conduct a factual finding of the nature of the probable cause to assess whether a warrant should be issued. *Katz v. United States*, 389 U.S. 347, 357 (1967). The evolution of the exceptions to the probable cause standard (*e.g.*, *search* incident to arrest, exigencies, plain view doctrine etc.) speak to this truth, and were meant to establish when such a fact finding was unnecessary such as when probable cause was sufficient. In the case of search incident to arrest, sufficiency was historically premised on the need to preserve evidence and the need to disarm the subject. See *Knowles*, 525 U.S. at 116.

Even under the seemingly less stringent reasonableness standard, introduced in *Terry v. Ohio*, (requiring that the police only possess ‘articulable reasonable suspicion’ to justify a

search), not every expectation of criminal behavior gives rise to a constitutional blanket for police search and seizure. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The *Terry* search is premised on protecting the police from possible danger and as such is limited, acting to bar speculative searches. *Terry*, 392 U.S. at 1.

Numerous cases demonstrate the gap between nominally criminal behaviour and sufficient probable cause needed to justify a constitutional search or seizure. Just as the ‘probable cause’ of Mr. Knowles driving at speeds excessive of the speed limit did not authorize the full search of his vehicle, *see Knowles*, 525 U.S. 113, the court in *Minnesota v. Dickerson* held that the seemingly evasive actions of the suspect, when approached by police officers, after having just left a building known for cocaine traffic, did not authorize a speculative search of his person for drugs once a *Terry* frisk had discovered no weapons. *See Minnesota v. Dickerson*, 508 U.S. 366, 382 (1993). Even in a context in which a legitimate arrest has been made, the Court makes a profound point, “[n]o consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search [incident to arrest] is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items.” *Chimel*, 395 U.S. at 766. To justify a search incident to citations and summons, absent independent exigencies or probable cause, would be to destroy the rational limitation that currently circumscribe, and give meaning to, Fourth Amendment jurisprudence. *See United States v. Robinson*, 414 U.S. 218 (1973) (Marshall, J., dissenting).

None of the rationales underlying the search incident to arrest exception to the warrant requirement of the Fourth Amendment can be found in the instant case. The Hazzard Police Department demonstrated no concern regarding the possible destruction of evidence, potential dangers to the arresting officers, or the prospect of Duke escaping from their custody. There was so little concern about the potential danger that Duke might pose to the police officers that the

search of his person was not undertaken until nearly an hour after the illegal arrest was effectuated.

Despite the claim by Deputy Cletus that the Hazzard Police did not give Duke a summons because “we were in the middle of the investigation . . . pursuant to the traffic stop we were also conducting a narcotics investigation,” (R. at 5), there is absolutely nothing in the record to indicate that there was any basis for this claim. In fact, the statement is so baseless it would not even rise to the lower *Terry* standard of articulable reasonable suspicion.

In these circumstances, the *Knowles* logic is clearly demonstrable. There is no concern that the evidence of Duke’s driving with a suspended license might be destroyed. The police already secured any evidence of Duke having driven with a suspended license at the time of his being stopped and questioned. There was no threat that this evidence could be destroyed. Furthermore, the nature of the violations or misdemeanors, for which an individual might be given a traffic summons or citation, are such as to minimize the threats to the officers issuing the summons or citation. In addition, the exception to the Setonia statute provided a basis for legally arresting Duke, on the misdemeanor traffic charge, if he had “failed or refused to discontinue the unlawful act.” Setonia Code § 19.2-74 (A)(1) (2006).

Whatever reasonable suspicion the Hazzard Police might have articulated, viz. Duke having been caught driving with a suspended license, is entirely insufficient when weighed against precedence and the broader constitutional concerns this Court has articulated in limiting both ‘probable cause’ and ‘reasonable’ searches. Assuming *arguendo* that the arrest of Duke was not illegal, for this Court to allow a search would render meaningless the basis of the search incident to arrest exception and would encourage officers to arrest suspects on any conceivable violation prompting speculative searches. The foundation of Fourth Amendment jurisprudence would be broken. Thus the Court should extend its holding in *Knowles* and rule that a search incident to the issuing of a traffic summons is unconstitutional.

**3. The Hazzard Police Department acted without any independent probable cause in arresting Mr. Duke and therefore, the search and seizure violated the Fourth Amendment.**

The Hazzard Police Department had no other rationale in stopping and searching Duke other than his driving with a suspended license. As both state law and constitutional concerns, prevented the police from arresting and searching Duke, their seizure and search of Duke violated his Fourth Amendment rights.

In order to justify a seizure and search, the police are required to show probable cause as it is the ‘traditional standard’ by which the Fourth Amendment requirement of reasonableness is assessed. *Arizona v. Hicks*, 480 U.S. 321, 329 (1987). Probable cause exists where the facts and circumstances within the officers’ knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162 (1925). The subjective intent of the police officer is irrelevant in assessing whether there was probable cause. *Whren v. United States*, 517 U.S. 806, 813 (1996).

Instead of presenting evidence of probable cause, the lower court argued in the negative when it wrote, “a violation of state law does not automatically trigger a violation of the Fourth Amendment.” (R. at 8.) Yet the case upon which it relied are cases in which either substantial probable cause, independent of the circumstances surrounding the violations of state law exists, or they are readily distinguishable state cases. *See United States v. Van Metre*, 150 F.3d 339 (4th Cir. 1998) (holding that failure to obtain a ‘fugitive of justice’ warrant was outweighed by probable cause of multiple felonies, including rape, murder and kidnapping); *United State v. Bell* 54 F.3d 502 (8th Cir. 1995) (holding that unlawful arrest for riding a bicycle without a headlight was outweighed by probable cause based on known gang membership, history of drug trafficking, and an awareness of local drug trafficking using bicycles); *New Hampshire v. Smith*,

908 A.2d 786 (2006) ( holding that the alleged statutory breach itself was legal, that local police operating outside of their local jurisdictions could, by both state and federal law, legally effectuate a stop of defendant’s vehicle); *State of Ohio v. Droste*, 697 N.E.2d 620, 623 (1998) (holding that despite a state statutory violation, “absent a violation of a constitutional right, the violation of a statute does not invoke the exclusionary rule”).

Regardless of the lower court’s argument that a violation of state law does not automatically trigger a Fourth Amendment violation, its existence does not contribute to the provision of a ‘reasonable’ basis. The state law violation should, at least, qualify as one of the totality of circumstances subject to a ‘reasonableness’ analysis. Additionally, the facts are entirely absent of any other basis for probable cause despite the blanket assertion by the lower court. (R. at 9.) The police claimed to be engaged in an ongoing drug investigation, but there are no facts to support this and their subjective intent in this matter is irrelevant in assessing whether there was probable cause. *See Whren*, 517 U.S. at 813.

The burden is on the state to prove that a reasonable basis, by Fourth Amendment standards, does exist for the Hazzard Police Department’s seizure and subsequent search of Duke and they fail to meet this burden. What are “the facts and circumstances within the officers’ knowledge and of which they have reasonably trustworthy information . . . sufficient in themselves to warrant a man of reasonable caution in the belief that an offence has been or is being committed?” *Carroll*, 267 U.S. at 161. The officers stopped Duke’s car thinking it belonged to someone named ‘Slim’. (R. at 2.) Upon discovering that Duke’s license was suspended they arrested him, despite the requirement of state law that they merely issue him with a summons. (R. at 3.) Between his having been stopped by the Hazzard police up through the moments when his motel was searched, Duke was entirely cooperative with the police. (R. at 3.) Admittedly, he chose to exercise his *Miranda* rights when it came time to answering questions regarding possible drug possession. (R. at 3.) However, it is an impermissible inference for the

police to use a person's exercise of the *Miranda* right to infer guilt or probable cause. *See Terry*, 392 U.S. at 34.

There are no facts, independent of the arrest for driving with a suspended license, to provide the police probable cause that an offence has been or is being committed. In light of the illegality and unconstitutionality of the arrest of Duke, there existed no independent probable cause to justify his seizure and the subsequent search of his person.

**B. The Fourth Amendment Violation of Duke's Rights Requires the Application of the Federal Exclusionary Rule and Any Evidence Acquired as a Result of the Constitutional Violation Must be Suppressed.**

The remedy for the violations of Duke's Fourth Amendment rights is the suppression of all evidence obtained in reliance on his unconstitutional arrest and the subsequent unconstitutional search of his person. In a prosecution in a federal or state court, the Fourth Amendment (incorporated to the states through the Fourteenth Amendment) forbids the admission of evidence obtained by an unreasonable search and seizure. *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1963).

This Court in *Weeks v. United States*, eloquently spoke to the history of the Fourth Amendment and the demands it places on law enforcement in ensuring that its protections not be forfeit. The responsibility of defending the Fourth Amendment "is obligatory upon all entrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgement of the courts." *Weeks v. United States*, 232 U.S. 383 at 391-393 (1914).

While this Court has put the exclusionary rule at the heart of the meaning of the Fourth Amendment, the majority below asserts the claim that Setonia law "does not expressly require suppression of evidence discovered in violation of the law; that absent a state statutory requirement of suppression, which is absent in this case, the federal exclusionary rule is not an

appropriate remedy for a violation of a state law.” (R. at 8.) Yet the only authority to which they cite, is an appellate level state court case, *Penn v. Commonwealth*, 412 S.E.2d 189, 194 (1991). In *Penn*, cocaine seized during a search incident to warrant-less misdemeanor arrest for littering, which occurred outside the presence of the arresting officer, was held admissible even though the arrest violated state statute. *Id.* This was held not to deprive the defendant of constitutional rights since probable cause for arrest existed based on witnessing officer's radio message. *Id.*

There are three problems with the lower court’s argument and reliance on *Penn*. First, as discussed earlier, the arrest of Duke, in violation of Setonia law, was also violative of the Fourth Amendment. This case is being heard in a federal court pursuant to a federal constitutional issue. A violation of the federal Constitution is subject to a federal constitutional remedy, irrespective of any state law. *See Mapp v. Ohio*, 367 U.S. 643 (1963).

Second, the lower court’s reliance on such weak authority is undermined by the explicit rejection of the *Penn* holding in other states. *See State v. Ringo*, 634 A.2d 392 (1993) (holding that suppression of evidence is mandated when the detention of the defendant had been found invalid under state law); *see also State v. Boatman*, 901 So.2d 222 (2005) (granting applicability of exclusionary rule in the context of state law violation while holding that state law had not, in fact, been violated).

Third, the facts in *Penn*, are distinguishable from those in the instant case. Whereas in *Penn*, there was no claim by the defendant to any constitutional violation, despite the presence of an illegal arrest per state law, such a claim has been maintained by Duke throughout this case. Whereas in *Penn*, the Virginia Supreme Court refused to adopt a state exclusionary rule for evidence obtained during an illegal detention under state statute, there is no comparable precedent in Setonia state law, perhaps explaining the reliance on the *Penn* case.

Even if this Court were to decide both that there was no Fourth Amendment violation and that the holding in *Penn* as opposed to *Ringo* should be followed, a decision about evidentiary suppression based solely on a state law violation should be remanded to the Supreme Court of Setonia as neither state statute nor case law provides the basis for a ruling as in *Penn*. However, such a decision would be strongly against the weight of the evidence and this court should find that the federal exclusionary rule is entirely applicable to the facts in this case.

The Court should hold that all evidence obtained by the Hazzard Police Department, as a result of their unconstitutional seizure and search of Duke, must be suppressed. In doing so, the Court is respectfully requested to remand this case for findings consistent with this holding.

**II. THE SIXTH AMENDMENT WAS VIOLATED WHEN DUKE WAS PROHIBITED FROM EXERCISING HIS CONSTITUTIONAL RIGHT TO PROCEED *PRO SE* AFTER HE WAS FOUND COMPETENT TO STAND TRIAL, THEREBY IGNORING THE SINGLE STANDARD COMPETENCY REQUIREMENT AS ASSERTED BY THIS COURT.**

This Court should reverse the Supreme Court of Setonia as Judge Foster violated Duke's Sixth Amendment right when she prohibited Duke from proceeding *pro se* after finding him competent to stand trial, thus ignoring the single competency standard set by this Court. First, binding precedent from this Court dictates that once a defendant is competent to stand trial, no higher competency standard should be imposed to determine whether a defendant is competent to proceed *pro se*. *Godinez v. Moran*, 509 U.S. 389, 399 (1993). The only standard that is applied once a defendant is found competent to stand trial is whether he knowingly and intelligently waived his right to counsel. *Faretta v. California*, 422 U.S. 806, 835 (1975). Second, the trial court erroneously applied a higher competency standard, thereby prohibiting the defendant from exercising his right to proceed *pro se* at trial. Third, this Court should remand this case to the Supreme Court of Setonia with instructions to apply the appropriate waiver inquiry.

**A. The Supreme Court of Setonia Erred Because Once a Defendant is Competent to Stand Trial, No Higher Competency Standard Should Be Imposed to Determine Whether a Defendant is Competent to Exercise His Sixth Amendment Right to Proceed Pro Se.**

This Court should reverse the decision of the Supreme Court of Setonia because it failed to adhere to binding precedent when it applied multiple standards of competency and refused to let the defendant represent himself. There are three reasons why this Court should affirm the single competency standard. First, this Court has unequivocally stated that once a defendant is found competent to stand trial, no higher competency standard should be applied to determine whether the defendant has the right to proceed *pro se*. *Godinez v. Moran*, 509 U.S. 389, 399 (1993). Second, this Court has consistently recognized the importance of the right to self-representation, as embodied in the Sixth Amendment. *Faretta v. California*, 422 U.S. 806, 807 (1975). Third, due process of law is best served by acknowledging the Sixth Amendment guarantee to self-representation. *See Godinez*, 509 U.S. at 404.

**1. Once a defendant is found competent to stand trial, any further competency hearing is erroneous.**

Duke was found competent to stand trial after an evaluation by two disinterested psychiatrists and further assessment of his competence was a constitutional violation. Once a defendant is found competent to stand trial, no higher competency standard should be applied to determine whether the defendant can proceed *pro se*. *Godinez v. Moran*, 509 U.S. 389, 391 (1993). A defendant is found competent to stand trial when he “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and [when] he has a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402, 402 (1960). Once a defendant is found competent to stand trial, the standard by which competency is assessed does not change. *Godinez*, 509 U.S. at 391. “It has traditionally been presumed that competency to stand trial means competency to participate in all phases of the trial process, including such pretrial activities as deciding how to plead,

participating in plea bargaining, and deciding whether to assert or waive the right to counsel.” *Id.* at 407 (Kennedy, J., concurring in part and concurring in the judgment).

In *Godinez*, where a suicidal defendant attempted to waive his right to counsel, the trial court accepted the defendant’s waiver on a finding that he “knowingly and intelligently” chose to do so. *Id.* at 391–93. Upon an order by the court, two psychiatrists examined the defendant and concluded that he was competent to stand trial because he possessed the ability to assist in his own defense. *Id.* at 392. Following the defendant’s motion to proceed *pro se*, the court inquired into his understanding of the proceedings, his awareness of his rights, and finally warned the defendant of the “dangers and disadvantages” of self-representation. *Id.* After the court explicitly found that the defendant “knowingly and intelligently” waived his right to counsel, it accepted the defendant’s waiver. *Id.* at 393.

The *Godinez* Court rejects a two competency standard and rearticulates the single competency standard through the Court’s clarification of *Westbrook v. Arizona*, 384 U.S. 150 (1966) (*per curiam*). In the two-paragraph *per curiam* opinion, the *Westbrook* Court vacated the lower court’s judgment affirming the petitioner’s conviction because although there was a hearing on the petitioner’s competence to stand trial, there was no inquiry into his competence to waive his right to the assistance of counsel. *Id.* at 150. The *Godinez* Court asserted that any understanding of *Westbrook* that concludes that there are two different competency standards would be “read[ing] too much into *Westbrook*.” *Godinez*, 509 U.S. at 397.

When the Court distinguished between “competence to stand trial” and “competence to waive [the] constitutional right to the assistance of counsel,” *Westbrook*, 384 U.S. at 150, the Court was using “competence to waive” as a shorthand for the “intelligent and competent waiver” requirement set forth in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and upheld in *Faretta v. California*, 422 U.S. 806, 807 (1975). *Godinez*, 509 U.S. at 401. The exact language from *Zerbst* is quoted immediately following the line in question in *Westbrook*, making this

distinction clear. *Id.* Therefore, “*Westbrook* stands only for the unremarkable proposition that when a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted.” *Id.* at 401-02. As this principle is exactly what *Godinez* affirms, any reliance on *Westbrook* for a second competency standard is out of place. *See id.* at 402. Thus, *Godinez* affirms: once a defendant is found competent to stand trial, no second competency standard should be applied before allowing the defendant to proceed *pro se*. *Id.* at 391. Therefore, Duke should not have been assessed a second competency standard.

**2. The Sixth Amendment right to proceed *pro se* as recognized by this Court in *Faretta* has continuously been reaffirmed.**

This Court has found self-representation fundamentally embedded in the Sixth Amendment. *Faretta v. California*, 422 U.S. 806, 817 (1975). While this Court has clearly continued to recognize this right, it has provided certain safeguards to ensure that the criminal defendant is clear in waiving his constitutional right and that judicial administration will proceed without further complication. *Id.* at 835. As such, there are two clear principles to emerge from *Faretta* and its progeny. First, a criminal defendant may waive his right to the assistance of counsel so long as he knowingly and intelligently chooses to do so. *Id.* Second, this Court has continued to affirm *Faretta* while using the decisions of subsequent cases to create an efficient workable framework for *pro se* defendants. *See, e.g., Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000); *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

**a. A criminal defendant has the right to proceed *pro se* when the defendant knowingly and intelligently waives the right to have the assistance of counsel.**

Duke knowingly and intelligently attempted to waive his right to counsel but was denied his Sixth Amendment right to proceed *pro se* when the court below applied an alternative standard for waiver. The defendant may waive his right to the assistance of counsel so long as he knowingly and intelligently chooses to do so. *Faretta v. California*, 422 U.S. 806, 835 (1975). The Sixth and the Fourteenth Amendments of the Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to assistance of counsel before he can be validly convicted and punished by imprisonment. *Id.* at 807. This Court recognized that the Sixth Amendment right to counsel implicitly embodies a correlative right to dispense with a lawyers help. *Id.* at 814 (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). This right is codified in 28 U.S.C.A. §1654 (1949), stating that “[i]n 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.”

“When an accused manages his own defense, he relinquishes many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must knowingly and intelligently forgo these relinquished benefits.” *Faretta*, 422 U.S. at 835. To be valid, a waiver must be “an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In order to fulfill this standard and choose self-representation, a defendant need not himself have the skill and experience of a lawyer. *Faretta*, 422 U.S. at 835. However, “[h]e should be made aware of the dangers and disadvantages of self-representation so that the record will establish that he knows what he is doing and his choice is made with eyes open.” *Id.*

The Supreme Court has held that a “criminal defendant’s ability to represent himself has no bearing on his competence to *choose* to represent himself.” *Godinez*, 509 U.S. at 400. In *Faretta*, the trial judge warned Faretta that he thought it was a mistake not to accept the assistance of counsel and that Faretta would be required to follow all the ground rules of trial procedure. *Id.* at 835–836. Faretta still “clearly and unequivocally” declared to the trial judge that he wanted to represent himself. *Id.* at 835. The record reflected that Faretta was literate and competent, and was voluntarily exercising his informed free will. *Id.* Notably, the Court declined to require an assessment of the defendant’s “technical legal knowledge” while holding that the defendant knowingly and intelligently waived the assistance of counsel. *Id.* at 835.

Even when there is a presence of mental disorder in a defendant, he or she is not necessarily found unable to give a knowing and intelligent waiver to the right to counsel. *Miles v. Dorsey*, 61 F.3d 1459 (10th Cir. 1995); *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988); *Boag v. Raines*, 769 F.2d 1341 (9th Cir. 1985). In *Miles*, the Tenth Circuit held that the defendant’s history of mental problems, low intelligence, psychotropic medication, and substance abuse did not establish that he was incompetent to plead after the District Court found that the defendant had sufficient ability to consult with his attorney with a reasonable degree of rational understanding, and that the defendant had a rational and factual understanding of the charges and proceedings against him. *Id.* at 1473-74. Clearly, when lack of legal knowledge or the presence of mental disorder have not prompted courts to deprive a defendant of his right to proceed *pro se*, a defendant of average intelligence found to be of sound mind should be able to utilize this right.

The *Faretta* Court further acknowledged that the right of the defendant to proceed *pro se* was embedded in the Sixth Amendment. *Faretta*, 422 U.S. at 817. Forcing a lawyer on an unwilling defendant is contrary to the basic right of the accused to defend himself if he truly wants to do so. *Id.* The Sixth Amendment grants to the accused personally the right to make his

defense. *Id.* at 819. It is the accused, not counsel, who must be informed of the nature and cause of the accusation, who must be confronted with the witnesses against him, and who must be accorded compulsory process for obtaining witnesses in his favor. *Id.* It is the defendant who will bear the personal consequence of a conviction. *Id.* at 834. “Unless the accused has acquiesced in [representation through counsel], the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.” *Id.* at 821. Therefore, it is the defendant who must be free to decide whether in his particular case counsel is to his advantage. *Id.*

*Faretta*’s holding is based on the longstanding recognition of the right to self-representation and on the “language, structure, and spirit of the Sixth Amendment.” *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984). There is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right must be considered inferior to the right of assistance of counsel. *Faretta*, 422 U.S. at 832. To the contrary, the colonists and the Framers always conceived the function of counsel as assistance to the defense, not the master of the defense. *Id.* In fact, the right to proceed *pro se* has statutory roots as far back as 1789. *Id.* at 812. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, which provided that “in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel,” was enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed. *Faretta*, 422 U.S. at 812-13. The historical roots of this right as well as recent precedences from this Court demonstrate that the right to self-representation can only be denied when the defendant fails to knowingly and intelligently waive the assistance of counsel. *Id.* at 835.

**b. In the four decades since *Faretta*, this Court has not eroded the fundamental principle of the defendant's right to proceed *pro se*.**

A criminal defendant's right to self-representation has not diminished since *Faretta* and it never should have been denied to Duke. In the thirty-three years since *Faretta*, several cases pertaining to the Sixth Amendment's right to self-representation have been tried by this Court. *See, e.g., Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000); *McKaskle v. Wiggins*, 465 U.S. 168 (1984). In each case, this Court has affirmed the rights recognized by *Faretta*, though not extending them to issues outside of the Sixth Amendment, *Martinez*, 528 U.S. at 163 (affirming a criminal defendant's Sixth Amendment right to represent himself at the trial level but failing to extend that right to the appellate level, which is not guaranteed in the Sixth Amendment). This Court has used these cases to provide an efficient judicial framework for *pro se* defendants. *See McKaskle v. Wiggins*, 465 U.S. 168 (1984).

When a defendant is represented by counsel, the assistance must be effective in order to produce just results in the adversarial system. *Strickland v. Washington*, 104 U.S. 668, 685 (1984). However, this important holding does not diminish the *Faretta* principle that a defendant who knowingly and intelligently waives that assistance still may obtain a fair trial. *Faretta*, 422 U.S. at 835. “[I]t is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another [to hold] that a State may compel a defendant to accept a lawyer he does not want.” *Id.* at 833.

As discussed in *Faretta*, in some circumstances, the defendant may be in the best position to conduct his own defense, which will function more adequately in the adversarial process. *Faretta*, 422 U.S. at 833. Justice demands that a defendant be given the choice to personally defend, for it is he who suffers the consequences of a conviction. *Faretta*, 422 U.S. at 819. Further, both fundamental principles of effective counsel and self-representation are embedded in that language of the Sixth Amendment. *See, e.g., Strickland*, 466 U.S. at 685; *Faretta*, 422

U.S. at 817. Although it is “undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance,” *Faretta*, 422 U.S. at 834, the *Strickland* opinion does not cast doubt on the *Faretta* standard, as it simply says that when a defendant is represented by counsel, that representation must be effective. *Strickland*, 466 U.S. at 686.

Similarly, the Supreme Court of Setonia cited *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), as an example of the court “essentially overruling” *Faretta*. (R. at 10.) However, the holding and reasoning in *Martinez* did nothing to overrule *Faretta*. To the contrary, this Court found “significant distinctions” between the reasoning of *Faretta* and the reasoning applicable to the issues of *Martinez*. *Martinez*, 528 U.S. at 152. In its “narrow holding,” *Martinez* simply declined to extend the *Faretta* right to self-representation to those seeking an appeal in an appellate court. *Id.* at 163. Such a holding is not to come as a surprise, much less indicate a shift from *Faretta*. Plainly put, the Sixth Amendment guarantees several rights for criminal defendants, but it does not guarantee an appeal.

*Martinez* states that *Faretta* is correct in concluding that there is “abundant support” for the proposition that a right to self-representation has been recognized for centuries. *Id.* at 158. The fact that *Martinez* declined to extend the right, but specifically did not overrule *Faretta*, demonstrated this Court’s belief that *Faretta* is still a workable and important precedent. All three concurrences in *Martinez* specifically emphasize the continued recognition of *Faretta*: “[t]o resolve this case it is unnecessary to cast doubt upon the rationale of *Faretta*,” *id.* at 164 (Kennedy, J., concurring); “without some strong factual basis for believing that *Faretta*’s holding has proved counterproductive in practice, we are not in a position to reconsider the constitutional assumptions that underlie that case,” *id.* at 164-65 (Breyer, J., concurring); “[a]ny other approach is unworthy of a free people.” *Id.* at 165 (Scalia, J., concurring in judgment).

In *McKaskle v. Wiggins*, this Court successfully addressed a specific tenet of the *Faretta* decision: a defendant choosing self-representation will not receive personal instruction from the

trial judge. 465 U.S. 168, 183-184 (1984) (citing *Faretta*, 422 U.S. at 834 n. 46). Because a *pro se* defendant will not receive guidance or any “extra” attention from the judge, a standby counsel can be appointed to the *pro se* defendant. *Id.* at 184. The appointment of standby counsel is then primarily 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.* Noteworthy in this definition of the standby counsel’s role is the explicit emphasis on the defendant’s goals. *See id.*

The core of the *Faretta* right entitles the *pro se* defendant to preserve absolute control over the case he chooses to present. *Id.* at 177. While standby counsel can be ordered to assist the *pro se* defendant, the *Faretta* right imposes limits on the extent of standby counsel’s unsolicited participation. *Id.* Specifically, the appointed counsel cannot interfere with any significant tactical decisions, nor can she destroy the jury’s perception of the defendant’s self-representation. *Id.* at 178. Any disagreements between the appointed counsel and the *pro se* defendant involving matters usually left to the discretion of counsel are settled in favor of the defendant. *Id.* at 179. By providing narrow, finite limits on the role of standby counsel and in ensuring that basic, non-personalized procedural aspects of a criminal case are adhered to without causing distraction to the judge or jury, the *Wiggins* holding has furthered efficient judicial administration. *See generally Wiggins*, 465 U.S. 168. While doing so, this Court was unequivocal in defining these boundaries to ensure that the *Faretta* right was not “eroded.” *Id.* at 178.

The right expressed in *Faretta* is still precedent relied upon in this Court when faced in issues involving self-representation. Thus, so long as a defendant knowingly and intelligently waives his right to assistance of counsel, he may exercise his Sixth Amendment right to proceed *pro se*. *Faretta*, 422 U.S. at 835.

**3. Due Process of law is best served by the single competency standard and furthered by the Sixth Amendment guarantee to self-representation.**

Judge Foster erred in applying a multiple competency standard because such a standard is not in accord with the Due Process Clause. The due process guarantees of the Fifth and Fourteenth Amendments, as applicable in the judicial process, are best served by the single competency standard. *See generally Godinez v. Moran*, 509 U.S. 389, 404 (1993) (stating “[t]he Due Process Clause does not mandate different standards of competency at various stages of or for different decisions made during the criminal proceedings.”) *Id.* In the face of liberty deprivations, persons whose interests may be affected adversely by government decisions should be allowed to participate in those decisions. *See Block v. Rutherford*, 468 U.S. 576, 605 (1984) (Blackmun, J., concurring). The purpose within the guarantee to self-representation is that a criminal defendant tried “in our free society, devoted to the ideal of individual worth, [is] not deprived of his free will to make his own choice, in his hour of trial, to handle his own case.” *United States v. Dougherty*, 473 F.2d 1113, 1128 (D.C. Cir. 1972).

The stated principles from *Block* and *Dougherty* together demonstrate the constitutional guarantee to not “be deprived of...liberty...without due process of law.” *See, e.g., United States v. Gaudin*, 515 U.S. 506, 509–10 (1995); Const. amend XIV. These principles are not meant to license paternalistic judgments by the State, even when a defendant declines to exercise all of the rights afforded him. Allowing a man deemed competent to stand trial the right to dictate his defense is to allow him the full arsenal of tools provided by our constitution. Conversely, it is a violation of due process to deprive Duke of his constitutionally recognized right to choose his means of defense.

The principles expressed in the Due Process Clause are aligned with the guarantees of the Sixth Amendment. *See generally Godinez v. Moran*, 509 U.S. 389 (1993). Furthermore, Justice Scalia has gone as far as to state that while the right to self-representation is correctly found in

the Sixth Amendment, it could also be found in the Due Process Clause alone. *Martinez v. Court of Appeal of California*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in judgment). “While I might have rested the decision on the Due Process Clause rather than the Sixth Amendment, I believe it was correct.” *Id.* As a whole, these cases stand for the proposition that the due process inquiry examines the omission of constitutional rights. Therefore, to ensure that every competent criminal defendant is receiving his due process guarantees, he must be allowed to exercise his right to self-representation when he knowingly and intelligently chooses to do so.

**B. Judge Foster Erred When She Applied a Higher Competency Standard to Duke, Preventing Him From Proceeding *Pro Se*.**

Upon motion of the defendant to proceed *pro se*, Judge Foster ruled that although Duke was competent to stand trial, he was not competent to defend himself. (R. at 6.) Citing Duke’s lack of communicative abilities due to his schizophrenia, Judge Foster doubted Duke’s capacity to present an effective defense. (R. at 6.) As dictated by this Court, after Duke was found competent to stand trial, the Judge should have inquired as to whether Duke waived his right to the assistance of counsel knowingly and intelligently. Judge Foster instead cut this inquiry short by applying an erroneous standard. This Court has specifically rejected analyzing the adequacy to which one would present his own defense when determining if a defendant may exercise his right to proceed *pro se*. Here, Judge Foster used this analysis as the definitive factor in denying Duke’s motion to proceed *pro se*. In doing so, she applied an erroneous standard in disaccord with the precedent and policy of this Court.

**C. The Lower Court’s Decision Must Be Overturned and The Appropriate Single Competency Standard Must be Applied.**

Here, the trial court did not inquire as to whether the waiver was made knowingly and intelligently. Because this Court mandates a single competency standard coupled with a clear showing that a waiver of assistance of counsel be made voluntarily, knowingly, and intelligently,

and the court below failed to apply this standard, this Court should remand this case to the Supreme Court of Setonia with instructions to apply the appropriate standard

### **CONCLUSION**

For the foregoing reasons and the legal authorities set forth in this Brief, the Petitioner respectfully requests that this Court reverse the decision of the Supreme Court of Setonia and remand for a trial consistent with the constitutional protections that are due.

Respectfully Submitted,

Attorneys for Mr. Beauregard Duke.