

QUESTIONS PRESENTED

1. Does an arrest that occurs in violation of Setonia law also violate the Fourth Amendment to the United States Constitution, thus triggering the exclusionary rule?
2. Does the Sixth Amendment permit a state to deny a defendant, who is competent to stand trial, the right to proceed *pro se* in that trial?

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CONSTITUTIONAL PROVISIONS

1. “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 probable 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.

2. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public 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 defence.” U.S. CONST. amend. VI.

3. “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 or 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 to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

STATUTORY PROVISIONS

1. “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) (2006).

2. “A person arrested without a warrant shall be brought forthwith before a magistrate or other issuing authority having jurisdiction who shall proceed to examine the officer making the arrest under oath. If the magistrate or other issuing authority having jurisdiction has lawful probable cause upon which to believe that a criminal offense has been committed, and that the person arrested has committed such offense, he shall issue either a warrant under the provisions of § 19.2-72 or a summons under the provisions of § 19.2-73.” Setonia Code § 19.2-82(A) (2006).

3. “Driving while one’s license is suspended is a Class 1 misdemeanor.” Setonia Code § 46.2-301(C) (2006).

STATEMENT OF THE CASE

I. THE ARREST AND SEARCH

On the afternoon of December 10, 2005, Beauregard Duke was driving his Dodge Charger on Route 21 near Hazzard, Setonia. (R. at 2). Deputies Strate and Cletus, having heard over the police radio that a man nicknamed “Slim” was allegedly driving a Dodge Charger on Route 21 with a suspended license, stopped Mr. Duke under the mistaken belief that Mr. Duke was “Slim.” (R. at 2). The deputies requested Mr. Duke’s license and registration, and Mr. Duke complied. (R. at 2). Mr. Duke was not the person the deputies were originally looking for, but it coincidentally turned out that Mr. Duke’s license was suspended. (R. at 2-3). Although Setonia Code § 19.2-74 generally requires that deputies issue a summons and then release a person from custody for such violations unless the person continues unlawful activity, the deputies arrested Mr. Duke, handcuffed him, read him his *Miranda* warnings, and placed him in the patrol car. (R. at 3).

Deputy Cletus then asked Mr. Duke whether he had any narcotics on his person and whether Mr. Duke would consent to a search of his motel room. (R. at 3). Mr. Duke gave consent to allow the motel room search but did not respond to questioning concerning narcotics. (R. at 3). Approximately forty-five minutes later, after animal control arrived on the scene to take possession of Mr. Duke’s dog, Deputies Strate and Cletus drove Mr. Duke to his motel. (R. at 3).

At the motel, Deputies Strate and Cletus searched Mr. Duke’s person and found a controlled substance in his jacket pocket, a handgun in his waistband, and approximately \$600.00 in cash in his pants pocket. (R. at 3). The deputies did not find anything when they

searched Mr. Duke's motel room. (R. at 3). Mr. Duke was transported to the Hazzard Police Station; charged with driving with a suspended license, possession of crack cocaine with intent to distribute, and possession of a firearm while in possession of certain controlled substances; and released after posting bail. (R. at 3).

The handgun was later linked through ballistics analysis to a shooting incident that took place on October 31, 2005. (R. at 4). On December 26, 2005, a witness to the shooting incident was shown a photo array and identified Mr. Duke as the shooter. (R. at 4). Mr. Duke was then arraigned on the charge of attempted murder. (R. at 4).

II. THE PROCEEDINGS

On April 3, 2006, at a suppression hearing, Mr. Duke moved to suppress the evidence found on his person because the search violated Setonia Code § 19.2-74 and the Fourth Amendment of the United States Constitution. (R. at 4, 4 n.12). Mr. Duke argued that the illegal arrest tainted the search. (R. at 4). Mr. Duke further argued that the arrest was illegal because the deputies should have released him on a summons, as required by Setonia Code § 19.2-74, instead of arresting him. (R. at 4).

The State argued that the arrest was valid under the exception to Setonia Code § 19.2-74, which permits an arrest when a person fails or refuses to discontinue an unlawful act. (R. at 4). The State further argued that driving with a suspended license would have continued because no one was available to take Mr. Duke from the scene. (R. at 4). When asked why Mr. Duke was not given a summons, Deputy Cletus testified, "Well, we were still in the middle of the investigation. We were, pursuant to the traffic stop, also conducting a narcotics investigation," and "[The arrest was in] our discretion. We chose to make an arrest." (R. at 5). The trial judge made no finding that Mr. 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 5). The trial judge denied the motion to suppress and held that the arrest violated neither the Fourth Amendment of the United States Constitution, nor Setonia law. (R. at 5). The trial judge relied upon *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), in support of his decision. (R. at 5).

Prior to trial, defense counsel requested a proceeding to ascertain whether Mr. Duke was competent to stand trial. (R. at 5). On October 16, 2006, at a competency hearing, two disinterested psychiatrists testified that Mr. Duke was schizophrenic and suffering from delusions. (R. at 6). Accordingly, the trial court found Mr. Duke incompetent to stand trial. (R. at 6).

After several months of treatment, two new psychiatrists performed a second examination, and there was a second competency hearing on April 2, 2007. (R. at 6). The new psychiatrists testified that Mr. Duke suffered from grandiosity, schizophrenia of an undifferentiated type, and an inability to stay focused for long periods of time. (R. at 6). The new psychiatrists further testified that Mr. Duke acknowledged his need for counsel to effectively communicate a defense, and that Mr. Duke was capable of planning a defense in cooperation with counsel. (R. at 6). The new psychiatrists then opined that Mr. Duke was competent to stand trial. (R. at 6). The trial judge found that Mr. Duke was competent to stand trial. (R. at 6).

On April 9, 2007, Mr. Duke moved to proceed *pro se*, and Mr. Duke's attorney moved to withdraw as counsel. (R. at 6). The trial judge ruled that, although Mr. Duke was competent to stand trial, he was not competent to defend himself. (R. at 6). The trial judge expressed concern that "fundamental fairness and due process would be adversely affected because, while Duke would be able to contribute to a learned counsel's presentation of an effective defense, his

communicative abilities were sufficiently hampered by his schizophrenia so that he would not be able to present an effective defense.” (R. at 6). The trial judge denied both motions and began the trial accordingly. (R. at 6).

At the close of the state’s case, and again after closing arguments, defense counsel renewed the motion to suppress the admitted evidence as a violation of Setonia law and the Fourth Amendment. (R. at 6). The trial judge denied defendant’s motion on both occasions. (R. at 6).

On April 18, 2007, after two days of deliberation, the jury returned a guilty verdict on all counts. (R. at 7). After the verdict, as permitted under Setonia law, defense counsel briefly spoke with two of the jurors. (R. at 7). The jurors indirectly suggested that their decision regarding the attempted murder charge rested on the ballistics testimony. (R. at 7).

Mr. Duke appealed as a matter of right to the Supreme Court of Setonia. *Duke v. Setonia*, 007-0503 (Sup. Ct. Set. 2007). The Supreme Court of Setonia affirmed the convictions. (R. at 11).

SUMMARY OF THE ARGUMENT

This case is about whether discretionary police powers will be extended at the expense of individual privacy interests and whether the State may deny the right of self-representation to a person found competent to stand trial. In the decision below, the Supreme Court of Setonia held that police officers may search individuals that have been “seized” in violation of state law as long as the arrest is based on probable cause. The Supreme Court of Setonia also held that courts may apply one standard of competency for determining whether a defendant is competent to stand trial and apply a higher standard for determining whether a defendant may represent

himself *pro se* at trial. This Court should reverse the decision below because it provides too much discretionary power for officers to invade the privacy interests of an individual and because it denies a defendant who is competent to stand trial the autonomy to defend himself as he chooses.

The warrantless search of Mr. Duke's person was unreasonable and violated the Fourth Amendment of the United States Constitution because it was incident to an arrest that was illegal under state law. States define crimes and determine which crimes justify arrest. *Ker v. California*, 374 U.S. 23, 37 (1963). Searches are reasonable only if: (1) the officer has the power to arrest enabled by state authority; and (2) the officer exercises the authority by making an arrest. *United States v. Di Re*, 332 U.S. 581, 587 (1948). In this case, the officer did not have the authority to make a legal arrest, so the arrest was illegal. The "search incident to lawful arrest" warrantless search exception is not applicable to illegal searches because the rationales justifying the exception are not present. *United States v. Robinson*, 414 U.S. 218, 224 (1973). Because the search was unreasonable, the exclusionary rule must be applied, and the evidence from the unreasonable search must be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

The trial court violated Mr. Duke's Sixth Amendment right to manage his own defense when it found him competent to stand trial, but incompetent to proceed *pro se*. See *Faretta v. California*, 422 U.S. 806 (1975); see also U.S. CONST. amend. VI. When a trial court finds a defendant competent to stand trial, it may not apply a higher standard to determine whether that defendant is competent to waive the right to counsel. *Godinez v. Moran*, 509 U.S. 389 (1993). A competent defendant has a constitutional right to waive the right of assistance of counsel if she does so "voluntarily and intelligently." *Faretta*, 422 U.S. at 807. The Supreme

Court of Setonia has set a dangerous precedent that would create a new class of defendants who can be brought to trial, but can exercise constitutional rights only at the discretion of the trial court.

Mr. Duke respectfully requests that this Court reverse and, at the very least, remand the judgment of the Supreme Court of Setonia for the following two reasons. First, the officer's search of Mr. Duke violated his Fourth Amendment right to be free from unreasonable search and seizure. Second, the trial court's ruling denying Mr. Duke the right to proceed at trial *pro se* violated his Sixth Amendment right to represent himself. Accordingly, this Court should reverse the lower court's decision.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED MR. DUKE'S MOTION TO SUPPRESS BECAUSE THE SEARCH WAS INCIDENT TO AN ILLEGAL ARREST AND VIOLATED THE 4TH AMENDMENT.

The warrantless search of Mr. Duke's person was unreasonable and violated the Fourth Amendment of the United States Constitution because it was incident to an arrest that was illegal under state law. The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures:

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 probable 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. Searches conducted without a warrant are presumed to be unreasonable intrusions of privacy. This Court has continually reaffirmed Constitutional protection against unreasonable searches, and requires a warrant in all but the narrowest of circumstances:

‘Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes’ . . . and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions.

Katz v. United States, 389 U.S. 347, 357 (1967) (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)). Although a search conducted without a warrant is generally unreasonable under the Fourth Amendment, this Court has recognized a few exceptions to the search warrant requirement. Because none of those exceptions apply in this case, the search of Mr. Duke was unreasonable. The exclusionary rule should apply to the evidence obtained from the improper search.

In this case, the search of Mr. Duke was unreasonable because the officer was not authorized by the State to legally arrest Mr. Duke. Further, the exclusionary rule is the only effective deterrent to protect 4th Amendment violations. For these reasons, Petitioner respectfully requests that this Court reverse the lower court’s decision.

A. The search of Mr. Duke was unreasonable because the officer was not authorized by the State to legally arrest Mr. Duke.

Searches are reasonable only if (1) the officer has the power to arrest enabled by state authority; and (2) the officer exercises the authority by making an arrest. The Setonia Code under which Mr. Duke was arrested prohibited the deputies from making a custodial arrest absent specific circumstances. Setonia Code § 19.2-74.A.1. The deputies relied on the Setonia Code to authorize the driving on suspended license charge, and they had to equally rely on the

Setonia Code to authorize their enforcement process. *Ker v. California*, 374 U.S. 23, 37 (1963) (State law determines the lawfulness of an arrest and the method of enforcement officers must follow). Because the statute is clearly written, it must be strictly construed. *See United States v. Miller*, 146 F.3d 274, 280 (5th Cir. 1998). Therefore, the seizure of Mr. Duke is valid only if the deputies can show that statutory language supported their actions. Setonia Code § 19.2-74.A.1; (R. at 5). Because the action of the deputies is not supported by the statute, the arrest of Mr. Duke was unlawful.

The “search incident to lawful arrest” warrantless search exception is not applicable to the unlawful arrest of Mr. Duke. The “established and well-delineated exceptions” to the Fourth Amendment’s warrant requirement included searches incident to lawful arrest, searches made with probable cause in exigent circumstances, and consensual searches. *See Katz*, 389 U.S. at 357-58. Under limited circumstances, a warrantless search may be reasonable if there are strong reasons to allow the intrusion into individual privacy. *Id.*

A warrantless search incident to a lawful arrest is an established exception to the general prohibition against warrantless searches based on rationales that supercede individual privacy interests. *United States v. Robinson*, 414 U.S. 218, 224 (1973). It is the lawfulness of the arrest that supports the search. *Id.* The exception is justified by the need to disarm the arrestee as well as the need to preserve evidence. *Id.* at 234. Respondent relies upon the search incident to lawful arrest exception to justify the warrantless search of Mr. Duke. (R. at 3). Because Mr. Duke should have been released rather than arrested, the justifications for disarming the arrestee and preserving the evidence were attenuated, and therefore the exception to the warrant requirement was not justified. *See Setonia Code § 19.2-74.A.1* (2006); *see also Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998).

1. Only when an officer is authorized by law to make an arrest and actually makes an arrest is a search incident to legal arrest reasonable.

State actors derive the authority to make arrests based on state law. *Ker v. California*, 374 U.S. 23 (1963). If the officer has the authority to make the arrest, and actually makes an arrest, the arrest is valid. Therefore, the subsequent search is valid because it is pursuant to a lawful arrest.

First, this Court recognizes that arrests supported by state law are reasonable under the Fourth Amendment. In *United States v. Robinson*, officers arrested defendant for driving on a revoked license. *Robinson*, 414 U.S. 218, 220 (1973). State law defined this as a crime, and under this statutory authority the officers arrested the defendant. *Id.* at 20. The Court found the arrest to be reasonable because it was pursuant to statutory authority. *Id.* at 224. Further, because the arrest was lawful, the subsequent search incident to the arrest was also reasonable. *Id.*

In *United States v. Watson*, federal agents made a warrantless arrest of defendant for possession of stolen credit cards pursuant to express statutory authority. *Watson*, 423 U.S. 411, 415 (1976). Because there was statutory authority to make the arrest, this Court held the arrest did not violate the Fourth Amendment. *Id.* at 424. Further, because the arrest comported with the Fourth Amendment, the subsequent search was not the product of an illegal arrest, and it was therefore a reasonable search. *Id.*

Also, even a minor offense can justify arrest and incarceration. In *Atwater v. City of Lago Vista*, defendant was arrested for a misdemeanor charge of driving without a seatbelt. *Atwater*, 532 U.S. 318 (2001). Under state law, the officer exercised his authority to make an arrest, even though he was also authorized to issue a citation. *Id.* at 323. In affirming the conviction, this Court held the arrest to be valid because it was pursuant to state law. *Id.* at 354.

2. *The officers did not have the authority to arrest Mr. Duke.*

States define crimes and which crimes justify arrest. In *United States v. Di Re*, this Court explained that examination of the circumstances and the law of arrest was necessary because “[i]f he was lawfully arrested, it is not questioned that the ensuing search was permissible.” *Di Re*, 332 U.S. 581, 587 (1948). In *Di Re*, the defendant was a passenger in a vehicle where a different occupant was arrested for possession of counterfeit gas coupons. *Id.* at 583. The defendant was arrested, brought to the police station, booked, searched, and found to be in possession of counterfeit gas coupons. *Id.* The Court held that defendant’s arrest was unreasonable because it violated state law; specifically, that the officer needed probable cause that the defendant had committed a misdemeanor or a felony, of which the officer could do neither. *Id.* at 586. The Court also held that because there was no granting state authority for the search, it was also unreasonable. *Id.* at 595. The Court dismissed the conviction and suppressed the evidence. *Id.* Therefore, because the arrest violated state law and was found to be unreasonable, there was no authority for the search incident to that arrest and it was unconstitutional.

In *Johnson v. United States*, this Court explained that the “alleged ground of validity [of the warrantless search under an incident to arrest exception] required examination of the facts to determine whether the arrest itself was lawful.” *Johnson*, 333 U.S. 10, 15 (1948). In *Johnson*, police entered defendant’s home without a warrant to investigate possible opium use. *Id.* at 16. However, the police could not articulate how the arrest met state requirements for either misdemeanor or felony charges. *Id.* Rather, the officers were trying to use the evidence found after their entry as the justification for the entry. Observing that “state law determines the validity of arrests without warrant,” the Court held that because the arrest violated state law, it

was unreasonable. *Id.* at 15 (citing *Di Re*, 332 U.S. 581 (1948)). Therefore, the conviction was reversed because the arrest was unreasonable without constitutional authority for the warrantless search. *Id.* at 17.

Finally, in *Michigan v. DeFillippo*, the arrest of a subject for failing to identify himself led to the discovery of illegal drugs in the subsequent search incident to arrest. *DeFillippo*, 443 U.S. 31, 34 (1979). The state law that originally authorized the arrest was later held to be unconstitutional. *Id.* at 33. The Court once again observed that “(w)hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law.” *Id.* at 35 (citing *Ker v. California*, 374 U.S. 23, 37 (1963); *Johnson v. United States*, 333 U.S. 10, 15 & n.5 (1948)). This Court held the arrest was valid because it was made in reliance of a law was valid at that at the time of the arrest. *Id.* Therefore, the warrantless search incident to arrest was valid because the arrest did not violate state law. *Id.* at 40.

In this case, Mr. Duke’s arrest was not valid. Valid arrests are those that comport with state law, and arrests that violate state law do not authorize searches incident to arrest because the arrest must be lawful. *United States v. Robinson*, 414 U.S. 218, 224. (1973). Setonia Code § 19.2-74.A.1 provides that an officer shall issue a summons and forthwith release from custody a subject arrested on a Class 1 misdemeanor, unless the person fails or refuses to discontinue the unlawful act, at which time the officer may keep the person in custody. § 19.2-74.A.1; (R. at i). Mr. Duke was arrested for driving on a suspended license, a Class 1 misdemeanor under Setonia Code § 46.2-301(C) (2006); (R. at 3). However, Respondent failed to show how Mr. Duke’s arrest met the statutory exception for failing or refusing to discontinue his unlawful act under Setonia Code § 19.2-82 (2006). Therefore, because Respondent did not issue a summons and release Mr. Duke, the arrest of Mr. Duke violated Setonia state law. Accordingly, it was a

violation of the Fourth Amendment. Further, because there was no authority for the subsequent warrantless search, it was also invalid.

3. If an officer does not exercise the authority to arrest, the underlying rationales for the “search incident to lawful arrest” are attenuated and the search is unreasonable.

When an officer does not exercise this authority to arrest provided by state law, there is no lawful foundation for a search incident to lawful arrest. The search incident to lawful arrest was recognized in *United States v. Robinson*. *Robinson*, 414 U.S. 218 (1973). Also identified were the historical rationales that justify the privacy intrusion. *Id.* at 234. First, the search protects the officer by acknowledging the need to disarm the suspect to take him into custody. *Id.* Second, the search allows for the collection and preservation of evidence for later use at trial. *Id.* Therefore, there are established requirements necessary to make a warrantless search reasonable under the Fourth Amendment.

In *Knowles v. Iowa*, this Court recognized that, while traffic stops do pose danger to police officers, there are other alternatives to an unjustified search. *Knowles*, 525 U.S. 113, 117-18 (1998) (suggesting ordering drivers from their vehicles, and performing pat-downs upon reasonable suspicion). Ultimately, this Court found the traffic stop in *Knowles* to be a “relatively brief” encounter that absent further facts did not justify a warrantless search. *Id.* Also, there was no evidence to preserve because all necessary evidence for the speeding charge was present at the time of the stop. *Id.* at 118. The search in *Knowles* was invalid because the officer did not exercise the authority to effect an arrest, and issued the driver a citation instead. *Id.* Because the underlying rationales were not met, this Court unanimously held that a search incident to citation was unconstitutional. *Id.*

Following the decision in *Knowles*, this Court granted certiorari on the issue of whether a warrantless search incident to the issuance of a citation was consistent with the Fourth Amendment. In *Lovelace v. Virginia*, this Court vacated the judgment of the Virginia Supreme Court and remanded the case for further consideration in light of *Knowles*. *Lovelace v. Virginia*, 526 U.S. 1108 (1999). In *Lovelace*, the defendant was detained for drinking in public, and police searched him (prior to the issuance of a citation) and found illegal drugs in his pocket. *Lovelace v. Commonwealth*, 522 S.E.2d 856, 857 (Va. 1999). In dismissing the charges on remand, the Virginia Supreme Court concluded that *Knowles* was applicable; that an arrest effected by a citation does not by itself justify a warrantless search; and because the rationales for a search incident to arrest were not met, the search violated the Fourth Amendment. *Id.* at 860.

In a more recent case, the Virginia Supreme Court dismissed the indictment where police stopped a motorist and, prior to issuing a citation, searched him, and found illegal drugs in his pocket. *Moore v. Commonwealth*, 636 S.E.2d 395 (Va. 2006). The court relied on the earlier mandate from this Court to review *Lovelace* in light of *Knowles*. *Id.* at 397. The facts of *Moore* were so similar to those of *Lovelace* that the court noted, “Our statement in *Lovelace* could have equally been written using *Moore* and his charged offense: ‘The fact that the officers could have issued only a summons for the [driving on suspended license] offense also negates the Commonwealth’s argument that the existence of probable cause to charge [*Moore*] with [driving on suspended license] allowed [the officer] to search him.’” *Id.* at 399-400. The Virginia Supreme Court concluded that under the facts and per state code, the officers were authorized to issue only a summons. Thus, with *Knowles* and *Lovelace* controlling, the search violated the Fourth Amendment. *Id.*

In *People v. McKay*, the California Supreme Court held that a custodial arrest for a fine-only offense did not “inherently” violate the Fourth Amendment. *McKay*, 41 P.3d 59 (Cal. 2002). Because it was a matter of first impression, the *McKay* court wrestled with authorities, and finally settled on the “more persuasive” argument to conclude “that so long as the officer has probable cause to believe that an individual has committed a criminal offense, a custodial arrest—even one effected in violation of state arrest procedures—does not violate the Fourth Amendment.” *Id.* at 71. However, *McKay* is distinguished by the court’s reliance on the federal Constitution as the barometer for a valid state arrest. *Id.* at 64. An additional distinction is that the arrest in *McKay* met the statutory exception to allow a custodial arrest for the misdemeanor offense of riding a bicycle on the wrong side of the road. *Id.* at 72. The decisions in *Lovelace* and *Moore* follow this Court’s holding in *Knowles*. The *McKay* decision not only contradicted the holding in *Knowles*, it also invited the very misconduct this Court sought to bar in *Mapp*. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

In this case, neither rationale for a search incident to a lawful arrest was met. Mr. Duke was not in the back of the deputies’ vehicle on his way to the police station. (R. at 3). Rather, Mr. Duke was being driven to his motel room after he consented to have it searched. *Id.* Had Mr. Duke simply refused to allow the deputies to search his room, the encounter would have no doubt ended on Route 21. (R. at 2). No further investigation was necessary to establish Mr. Duke’s crime of driving on a suspended license. Therefore, this was a mere traffic stop that the deputies impermissibly extended. Detention cannot be extended without reasonable justification. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (holding that a “seizure that is justified solely by the interest in issuing a ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission”). The overly zealous deputies violated the

Fourth Amendment when, instead of issuing a citation at the conclusion of the vehicle stop, they sought to use Mr. Duke's silence and acquiescence to impermissibly extend his seizure in the hopes of bolstering their unsubstantiated hunches with an otherwise unrelated search. Because the action of the deputies violated the Fourth Amendment's protection of both searches and seizures, as well as case law express in the decisions of this Court, Mr. Duke's conviction must be overturned, and the illegally gathered evidence must be suppressed.

B. The exclusionary rule is the only effective deterrent to protect 4th Amendment violations.

Evidence seized in violation of the Fourth Amendment is subject to the exclusionary rule, which is the only remedy appropriate in this case. In *Weeks v. United States*, this Court first articulated the rule of excluding illegally-obtained evidence as applied to federal prosecutions. *Weeks*, 232 U.S. 383, 398 (1914). This Court, in an apparent attempt to allow for state autonomy, then held in *Wolf v. Colorado* that, while the Fourth Amendment was applicable to the states through the Fourteenth Amendment, the states were nonetheless able to use alternative sanctions to the exclusionary rule. *Wolf*, 338 U.S. 25, 33 (1949). However, a dozen years later, after it became clear that measures other than the exclusionary rule were ineffective at deterring violations of the Fourth Amendment, this Court held in *Mapp v. Ohio*, that states were required to apply the exclusionary rule to illegally obtained evidence. *Mapp*, 367 U.S. 643, 660 (1961). The facts of this case further amplify the need for this Court to once again remind the states that illegally obtained evidence cannot be used for prosecution, and therefore the illegally obtained evidence in this case must be suppressed.

The purpose of the exclusionary rule is to deter police misconduct. *Mapp*, 367 U.S. at 656; *see also Elkins v. United States*, 364 U.S. 206, 217 (1960) (explaining that respect for the

Fourth Amendment can only effectively be compelled by “removing the incentive to disregard it”). In this case, Deputy Cletus conducted an illegal search of Mr. Duke. The exclusionary rule calls for the suppression of any evidence found as a result of an unreasonable search. *Mapp*, 367 U.S. at 656. If this Court allows the illegally obtained evidence to be used, law enforcement officers will have an incentive to perform unreasonable searches and seizures in violation of the Fourth Amendment in pursuit of incriminating evidence. The record indicates that both Deputies Cletus and Strate were assigned to the Narcotics Division at the time of Mr. Duke’s arrest. (R. at 2 footnote 2). It follows that their interest was in making a narcotics arrest. Deputy Cletus asked whether Mr. Duke had any “narcotics on his person?” in an fishing expedition for incriminating evidence. (*See* R. at 3).

The deputies knew only that the driver of a Dodge Charger might be driving on a suspended license. (R. at 2). That the deputies made the leap to question Mr. Duke about narcotics is beyond reason, given that the record is devoid of any justification for this line of questioning. (*See* R. at 2, 3, 4). Therefore, it is likely that absent an express rule, zealous law enforcement officers across the United States will remain undeterred in their focus to discover evidence of their crime of choice, relegating the text of the Fourth Amendment to mere words on a page. This Court must re-focus the nations’ law enforcement officers and remind them that illegally-obtained evidence will not be admissible. *See Mapp*, 367 U.S. 643. Because the search of Mr. Duke resulted in illegally-obtained evidence, the evidence must be suppressed, and the decision of the Supreme Court of Setonia must be reversed.

II. THE TRIAL COURT ERRED AND VIOLATED THE 6TH AMENDMENT WHEN IT DENIED MR. DUKE HIS RIGHT TO PROCEED PRO SE WHEN HE WAS COMPETANT TO STAND TRIAL.

The trial court violated Mr. Duke's right to manage his own defense when it found him competent to stand trial, but incompetent to proceed *pro se*. (See R. at 6). The Sixth Amendment guarantees the freedoms of accused persons to protect them from the otherwise overwhelming power of the state:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public 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. These freedoms included the right of a competent defendant to manage his own defense by waiving the right to assistance of counsel. See *Faretta v. California*, 422 U.S. 806 (1975); see also U.S. CONST. amend. VI. If there is any reasonable doubt as to the competence of a defendant to understand the proceedings and assist counsel in defense, the trial court must decide whether the defendant is competent to stand trial. *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975). When a trial court finds a defendant competent to stand trial, it may not apply a higher standard to determine whether that defendant is competent to waive the right to counsel. *Godinez v. Moran*, 509 U.S. 389 (1993). Finally, a competent defendant has a constitutional right to waive the right of assistance of counsel if she does so "voluntarily and intelligently." *Faretta*, 422 U.S. at 807. In this case, the Mr. Duke was found competent to stand trial and submitted a motion to proceed *pro se*. (R. at 6). The trial court applied a test for a higher level of competence and denied his motion to proceed *pro se*. *Id.* This Court should

reverse the holding of the Supreme Court of Setonia that it was allowable to deny Mr. Duke right to defend himself *pro se* and that it was allowable to foist an unwanted attorney upon Mr. Duke.

A. The trial court found Mr. Duke competent to stand trial.

A criminal defendant must be competent to stand trial as a pre-condition to a fair trial. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975)). The question regarding a defendant's competence may be brought up by the prosecution, the defendant, or by the trial court on its own motion. *Reynolds v. Norris*, 86 F.3d 796, 800 (8th Cir. 1996). The test applied to determine competence to stand trial has two prongs: (1) The defendant must have a present ability to reasonably and rationally consult with an attorney, and (2) The defendant must have a rational and factual understanding of the proceedings. *Dusky v. United States*, 362 U.S. 402 (1960). Trying an incompetent defendant violates the due process clause of the Fourteenth Amendment because such a defendant is not able to adequately participate in the adversarial system. *Medina v. California*, 505 U.S. 437, 439 (1992) (Citing *Drope v. Missouri*, 420 U.S. 162 (1975)).

The trial court must address the issue of the defendant's competence whenever a bona fide issue is raised because otherwise the appellate court faces the extremely difficult task of determining competence retroactively. In *Dusky v. United States*, this Court reversed an improper conviction because the trial court failed to apply the correct test to establish the defendant's state of competence to stand trial at the time. *Dusky*, 362 U.S. 402. Similarly, this Court noted that determining competence after the fact is not sufficient. *Drope*, 420 U.S. at 183. If a trial court fails to evaluate the defendant's competence to stand trial, when faced with some

reasonable evidence to question competence, the court has violated the defendant's due process rights. *Id.*

The first prong of the test for competence requires the defendant to have a sufficient present ability to reasonably and with rational understanding take advantage of counsel in managing a legal defense. *Dusky*, 362 U.S. at 402. This requirement is intended to establish that the defendant is capable of communicating with his attorney and make decisions relevant to mounting a defense. *Drope*, 420 U.S. at 171. This Court has found that this test does not require a presumption that assistance from counsel will, in fact, be utilized at trial. *Godinez v. Moran*, 509 U.S. 389, 399 (1993). Expert testimony from psychiatrists can be used as evidence of competence to assist counsel. *Id.* at 392. This test helps to demonstrate the defendant's ability to mount a reasonable defense which is foundational to the adversarial system. *Medina v. California*, 505 U.S. 437, 439 (1992).

The second prong of the test for competence requires the defendant to have a rational and factual understanding of the proceedings. A defendant also must be able to understand the consequences of trial-related decisions, such as a decision to plead guilty. *Godinez*, 509 U.S. at 400-401. Prosecuting an incompetent defendant has been compared to conducting a trial in violation of the confrontation clause because the defendant lacks sufficient "presence" and understanding of the proceedings to recognize his accusers. *See Faretta v. California*, 422 U.S. 806, 816 (1975); *see also* U.S. CONST. amend. VI. Unless the defendant has a rational and factual understanding of the proceedings, he is not equipped to make reasoned decisions related to a legal defense.

In this case, Mr. Duke was examined by two disinterested psychiatrists who both testified he suffered from schizophrenia of an undifferentiated type, but was "capable of planning a

defense in cooperation with counsel.” (R. at 6). Although not specifically documented in the record, presumably the court also found Mr. Duke to have a rational and factual understanding of the proceedings because otherwise the trial court would have found him incompetent to stand trial. Beyond the request by defense counsel for a competency hearing, the record holds no challenges by Respondent that Mr. Duke was not fully competent to stand trial. Based on the testimony in the record, the trial court found Mr. Duke competent to stand trial. (R. at 6)

B. The trial court erred by applying a higher standard of competence for Mr. Duke to proceed pro se than the standard it used to find him competent to stand trial.

A person accused of a criminal offense faces many decisions related to his defense. The competence required to make a decision whether to accept counsel or proceed to trial *pro se* is the same level of competence required to be brought to trial. *Godinez*, 509 U.S. at 399. The Sixth Amendment explicitly states that all criminal defendants have a right to the assistance of counsel in planning their defense. U.S. CONST. amend. VI. The waiver of a constitutional right may have additional procedural protections, but the substantive competence standard to make such a decision is not higher than the standard for competence to stand trial. *Godinez*, 509 U.S. at 398. A state may set a competence standard more elaborate than the one articulated in *Dusky* for finding a defendant competent to stand trial and to waive the right of self representation, but the two standards must be coterminous. *Id.* at 402.

Judge Foster incorrectly reasoned that she could deny Mr. Duke’s right to represent himself because in Judge Foster’s opinion, Mr. Duke lacked the requisite legal knowledge and communication skills to effectively defend himself. (R. at 10). The trial court came to this conclusion after finding that Mr. Duke was capable of rationally contributing to his defense and understanding the proceedings against him. *Id.* There was no significant lapse of time between

the finding of competence to stand trial and Mr. Duke's request to dismiss his counsel. *Id.* Therefore, if the trial court applied the correct standard, it should have found that Mr. Duke was competent to dismiss his counsel and allowed him to proceed *pro se*.

1. The trial court misinterpreted the higher procedural standard described by this Court in Godinez when it adopted a higher standard for competence.

Constitutional rights are jealously guarded and generally waiver of those rights is only accomplished through a competent and intelligent effort by the individual; any procedural protections are separate and distinct from the determination whether an individual is able to make such a waiver. A court must take additional procedural steps when a defendant expresses a desire to proceed *pro se*. The waiver of the right to counsel must be made competently and intelligently. *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). The competence element is identical to the standard applied to determine if a defendant is competent to stand trial. *Godinez*, 509 U.S. at 389. The "intelligently" element involves evaluating whether the defendant is exercising an informed decision about proceeding *pro se* and understands the dangers involved. However any additional procedural steps for protecting constitutional protections through the test demonstrating an intelligent choice do not include applying a higher standard for competence. Even though the procedural steps are not identical for establishing competence to stand trial and establishing that a defendant has competently and intelligently waived the right to assistance from counsel, the standard for establishing competence is still derived from this Court's decision in *Dusky*. *Id.* at 389.

The procedures for establishing competence to stand trial in accordance with the due process clause of the Fourteenth Amendment and the procedure for recognizing a valid waiver of the Sixth Amendment right to assistance from counsel have been described by this Court.

Whenever there is a doubt regarding the competence of a defendant to stand trial, the court will hold a hearing to determine whether the defendant is competent. *Drope v. Missouri*, 420 U.S. 162, 183 (1975). When there is some doubt as to whether a defendant desires to waive his right to assistance of counsel, a separate determination whether the defendant has in fact expressed a competent and intelligent waiver of his rights is necessary. *Zerbst*, 304 U.S. at 459. When a defendant has been admonished about the potential pitfalls of proceeding *pro se*, but competently and intelligently makes the choice in the face of those admonitions, the trial court has satisfied the procedural requirements. *Adams v. McCann*, 317 U.S. 269 (1942). These additional steps may be considered a higher procedural standard to ensure a constitutional right is not lightly waived, but do not create a higher standard for evaluating competence.

2. The trial court's erroneous pro se decision foreclosed Mr. Duke's Constitutional right to present his own defense.

The reason for requiring a defendant to be competent to stand trial is founded on the principle that the defendant must have the capacity to make decisions and exercise rights in an effort to present a defense. Support for this position is derived from historical precedent from English common law as well as a long tradition of American cases in which the sanity of defendants was evaluated at various stages of legal proceedings. *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899); 4 W. Blackstone, *Commentaries* 24 (1783); 1 M. Hale, *Pleas of the Crown* 34-35 (1736). Justice Thomas explicitly stated the rule that the standard for competence is the same to stand trial or waive the right to counsel when he wrote the majority opinion in *Godinez*, “This case presents the question whether the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial. We hold that it is not.” *Godinez v. Moran*, 509

U.S. 389, 391 (1993). Additionally, applying a different standard as suggested by the Supreme Court of Setonia is specifically not required. *Id.* at 402; (R. at 10). Due process is satisfied if a defendant is found competent by the same standard articulated in *Dusky* to proceed to trial with or without the assistance of counsel. *Godinez*, 509 U.S. at 402.

Historically, before the right to an attorney was established, English common law did not allow a defendant who was determined to be incompetent to be brought to trial because the defendant would be unable to mount a defense. *Id.* at 404-05 (citing 4 W. Blackstone, *Commentaries* 24 (1783); accord, 1 M. Hale, *Pleas of the Crown* 34-35 (1736) (Kennedy, J. concurring). The same standard was applied at arraignment because an incompetent defendant would not be able to plead to the charges with the “advice and caution that he ought.” *Id.* The decisions to be made by a defendant during trial may be different, but do not require a greater understanding of the proceedings and consequences than the decision to waive the right to counsel. *Id.* at 399. This Court recognized that the competence required to stand trial was the same as that to plead guilty or waive the right to counsel. *Id.*

In this case, Mr. Duke was found competent to stand trial, but within a week was found incompetent to waive his right to assistance of counsel. (R at 6). The trial court applied a higher standard of competence in rejecting Mr. Duke’s request to proceed *pro se*. (R at 6). Because applying a higher standard violates *Godinez*, which states that the standard for competence is the same, this Court should reverse the decision of the Supreme Court of Setonia and provide instruction on the correct test for competence for a defendant to make a decision to proceed *pro se*.

3. ***If the state has unfettered freedom to find a defendant competent to stand trial, but incompetent to self-represent, then the state would be able to try borderline defendants who were unable to effectively contribute to their defense.***

By setting the same standard for competence (to stand trial and proceed *pro se*) in *Godinez*, this Court established the binding precedent that states may not establish disparate standards for competence to stand trial compared to competence to exercise other constitutional rights before or during trial. *Godinez*, 509 U.S. at 391. This Court also established that the aim of determining competence is modest. *Id.* at 402 (referring to the *Dusky* standard). By finding a defendant competent to stand trial, a trial court is deciding that the defendant is capable of making decisions related to his constitutional rights. *Id.* at 399. This ability cannot later be usurped by the trial court by arbitrarily deciding which decisions the defendant is allowed to make. *Godinez* is still binding precedent on the question of whether states may apply a higher standard of competence to proceed *pro se* than competence to stand trial. They may not. *Id.* at 391.

The Supreme Court of Setonia has set a dangerous precedent that would create a new class of defendants who can be brought to trial, but can exercise constitutional rights only at the discretion of the trial court. (*See R at 10-11*). In the name of fundamental fairness, that court would substitute the decision-making power of the trial court for the decision-making power of a competent defendant. (*See R at 10*). This Court should reverse the Supreme Court of Setonia because the powers of the state are intended to be constrained by the Constitution and the rights of individuals must be jealously guarded.

C. Mr. Duke was forced to have an attorney represent him, violating his Sixth Amendment right to self representation.

This Court held in *Faretta v. California* that a state may not hale a defendant into court and foist an unwanted attorney upon him. *Faretta*, 422 U.S. 806, 807 (1975). Although the right of a criminal defendant to proceed to trial *pro se* is not completely unconditional, the limitations are narrowly tailored to protect all of the rights of the defendant. Strict observance of a defendant's Sixth Amendment rights is critical to allow the defendant to make autonomous decisions because he is the only one facing the consequences of conviction. *Faretta*, 422 U.S. at 819-20. Contrary to the Supreme Court of Setonia's position that "since *Faretta*, courts have often balanced the implicit right to represent oneself at trial with other tenets of our legal system," which cited to a case that preceded *Faretta* by 5 years,¹ the overwhelming majority of jurisdictions (at least 36 of 50 states' highest appellate courts) have taken the position that *Faretta* clearly recognizes the constitutional right of a criminal defendant to waive the right to counsel at trial. (R at 9-10). This Court should overrule the decision of the Supreme Court of Setonia that allows Setonia to deny defendants their constitutional right to self-representation when it is unable to show an applicable exception.

1. None of the narrow exceptions to the right of self representation applied to Mr. Duke's request to proceed pro se.

Some courts have found limited exceptions where the right to self-representation is not absolute; however, this Court has held that every reasonable presumption should be provided to protect fundamental constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Some of these exceptions include: (1) when the defendant is attempting to manipulate court proceedings,

¹ The decision in *Illinois v. Allen*, 397 U.S. 337 (1970), preceded *Faretta* by five years.

(2) when a trial court assigns standby counsel, or (3) during appellate proceedings. *E.g.*, *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (Trial court may assign standby counsel over the objection of the defendant); *Illinois v. Allen*, 397 U.S. 337 (1970) (no violation of Sixth Amendment rights when unruly defendant was removed from the courtroom during the trial); *Martinez v. California*, 528 U.S. 152 (2000) (no right to self representation on direct criminal appeal). In each case where these exceptions have occurred post-*Faretta*, this Court has recognized a constitutional right to self-representation at trial. *Wiggins*, 465 U.S. 168; *Martinez*, 528 U.S. 152. Thereby, this Court has recognized that the state may infringe upon the right of self-representation only in limited circumstances.

For example, a defendant will not be allowed by the trial court to disrupt trial proceedings or create some sort of legal error through the right to self-representation. A defendant who wishes to exercise the right of self representation must request to do so before the start of the trial to preserve an otherwise unqualified right. *United States v. Washington*, 353 F.3d 42, 46 (D.C. Cir. 2004). A defendant who is exercising the right of self-representation can have the right impaired when the judge is forced to have the defendant removed for unruly behavior. *Illinois v. Allen*, 397 U.S. 337, 346 (1970) (courts may not be “bullied, intimidated and humiliated” in an attempt to obstruct the pursuit of justice). Therefore, a defendant’s own misconduct may limit the right of self-representation.

Similarly, a trial court may, at its discretion, assign standby counsel to assist a defendant exercising the right to self representation. *McKaskle v. Wiggins*, 465 U.S. 168 (1984); *Illinois v. Allen*, 397 U.S. 337 (1970). Standby counsel is assigned to aid the accused if and when the accused requests help, and to be available “to represent the accused in the event that termination of the defendant's self representation is necessary.” *Wiggins*, 465 U.S. at 176. In *Wiggins*, this

Court clarified that the defendant must be allowed to maintain control of defense-related decisions and lead the defense in front of the jury. *Id.* at 177. Within those limits, standby counsel is expected to act in the defendant's interest in connection with routine procedural issues and to preserve objections for possible appeal. *Id.* at 169. This limited infringement on the right of self representation is not intended to interfere with the defendant's actual and apparent control of the defense. *Id.* at 174.

Finally, this Court has specifically ruled that convicted criminals do not have a constitutional right to self-representation on appeal. *Martinez v. California*, 528 U.S. 152 (2000). The Sixth Amendment is specifically applicable to all criminal trial prosecutions and does not extend to appellate proceedings. *Id.*; U.S. CONST. amend. VI. This Court in *Martinez* recognized its ruling as narrow and applicable only to "direct appeal from a criminal conviction." *Martinez*, 528 U.S. at 163. Therefore *Martinez* has no direct bearing in this case or on the precedent value of *Faretta*. *Id.* at 164-65 (separate concurring opinions by Kennedy, J. and Scalia, J.).

In this case, none of the limitations to the right of self-representation are present. Mr. Duke requested to exercise his right of self-representation before the start of the trial. (R at 6). There is no indication in the record that he exhibited any misconduct in the court or that he was intentionally seeking to delay the trial. The trial court failed to consider the option of assigning standby counsel to assist. Lastly, and most importantly, Mr. Duke was denied the right to control his own defense and represent himself during trial.

2. *Mr. Duke, who personally faces the consequences of conviction, was prevented from exercising his right of self representation.*

Requiring a defendant to submit to an assigned attorney when “he reasonably deems himself the best advisor for his own needs, is to imprison a man in his privileges and call it the Constitution.” *Adams v. McCann*, 317 U.S. 269, 280 (1942). The Sixth Amendment specifically confers rights to the defendant, not to counsel, to present a defense. *Faretta v. California*, 422 U.S. 806, 819 (1975). These rights include the right to self representation for the very purpose that it is the defendant who faces the consequences of a failed defense. *Id.* at 819-20. The plain language construction of the Sixth Amendment refers to “assistance of counsel,” which puts into perspective the role of the attorney. *Id.* at 820. This Court wrote about “a nearly universal conviction, 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 if he truly wants to do so.” *Id.* at 817.

The trial court in this case forced Mr. Duke to subordinate his desires to those of the trial court when it denied his motion to proceed *pro se*. (R at 6). This decision violated Mr. Duke’s rights and obstructed his ability to present his own defense to the jury. *Id.* This Court should reverse the decision by the Supreme Court of Setonia because Mr. Duke alone faced the consequences of conviction and therefore he must be allowed to protect his own self interest.

CONCLUSION

Petitioner respectfully requests that this Court reverse and, at the very least, remand the judgment of the Supreme Court of Setonia for the following two reasons. First, the officer's search of Mr. Duke violated his Fourth Amendment right to be free from unreasonable search and seizure. Second, the trial court's ruling denying Mr. Duke the right to proceed at trial *pro se* violated his Sixth Amendment right to represent himself. Accordingly, this Court should reverse the lower court's decision.