IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. DEWAYNE ESAW, Appellant.	Arizona Supreme Court Case No. CR-24-0213-PR Arizona Court of Appeals No. 2 CA-CR 2023-0007 Pima County Superior Court No. CR-20194300-001

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLANT

David J. Euchner, No. 021768
Pima County Public Defender's Office
33 N. Stone Ave. #2100
Tucson, Arizona 85701
(520) 724-6800
David.Euchner@pima.gov

Seth Apfel, No. 032225
Apfel Law Group, P.L.L.C.
PO Box 8808
Phoenix, Arizona 85066
(602) 499-8468
seth@apfellawgroup.com

Attorneys for *amicus curiae* Arizona Attorneys for Criminal Justice

TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES

CASES PAGES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

INTEREST OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief to encourage this Court to accept review of this case because the issue presented goes to the core of the adversarial system. Where a trial court is presented with competing rights and potential waiver of rights, the court should not choose the option that leads to a farcical proceeding. When a self-representing criminal defendant fails to appear for trial, if the court failed to appoint standby counsel, the only option is to vacate the trial date and issue a bench warrant for the defendant's arrest. If the defendant must suffer a loss of constitutional rights, the right to be sacrificed was self-representation. Simply leaving the defense table vacant was not a reasonable choice under any circumstances. If this case is allowed to stand, then what occurred here could go from an aberration to normal.

SUMMARY OF ARGUMENT

Among the most paramount issues for the criminally accused, perhaps none is more fundamental, basic, and essential to traditional notions of fairness and justice than the Sixth Amendment right to present a defense, through counsel or self-representation. Constitutional disdain respecting loss of liberty for an unrepresented defendant has become more than just axiomatic – it is a bedrock principle of the criminal justice system. To the extent there ever was any question as to this right, it was erased more than sixty years ago in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Waivers of the right to counsel and/or to present a defense are approached with caution, balancing the right of a defendant to represent him/herself against the right of that defendant to representation if he/she is not competent to represent him/herself. *Faretta v. California*, 422 U.S. 806 (1975); *Indiana v. Edwards*, 554 U.S. 164 (2008). Moreover, the need for confrontation is critical to the adversarial process to test the reliability of the State's evidence through the crucible of cross-examination and presentation of a defense. *State v. Esaw*, -- Ariz. --, -- ¶¶ 33-34, 554 P.3d 14, 23 (App. 2024) (Eckerstrom, J., dissenting).

The trial court and court of appeals postulated a conundrum whereby counsel cannot be foisted upon a defendant who previously waived counsel and demanded the right to represent himself – and thus because Esaw represented himself, when he opted not to appear for trial, the trial could proceed without him as both defendant

and counsel. This holding raises the specter of troubling possibilities, including removal of a self-represented defendant from the courtroom for disruptive behavior while trial proceeds in his/her absence and without defense counsel, or how to address circumstances whereby a defendant represents him/herself and becomes incapacitated before trial.

Still more concerns exist regarding possible waivers by implication. At no point did Esaw waive his right to a trial, which of necessity and by definition involves an adversarial proceeding, not a one-sided, *ex parte* presentation. Esaw also did not waive his rights to confrontation or to present evidence to the jury, as noted by Judge Eckerstrom in his dissent. *Esaw*, 554 P.3d at 23 ¶¶ 37-38 (Eckerstrom, J., dissenting). The notion that the State can advocate for, and/or a trial court determine, that a defendant waived one right by implication of his/her waiver of another right would jeopardize all manner of rights guaranteed a defendant under the federal and state constitutions. While invocation of the proverbial slippery slope may often be disfavored, here the Court created a nearly vertical ice rink.

The injustice in this case is manifest, and concerns about the decision infect the most foundational rights necessary for fairness and justice. *Amicus* submits this brief to protect the rights of defendants across Arizona and to offer best practices for trial courts moving forward.

ARGUMENTS

I. No misconduct or absence by the defendant excuses the trial court's decision to preside over a one-sided trial.

A. Esaw's waivers of his right to counsel and presence at trial cannot be read to implicitly waive his right to confront and cross-examine witnesses, his right to present a defense, or any other trial right not explicitly waived.

"[P]resuming waiver of a fundamental right from inaction" violates Supreme Court mandates related to waivers of constitutional rights. *Barker v. Wingo*, 407 U.S. 514, 525-26 (1972). Accordingly, "Courts should indulge every reasonable presumption against waiver, and they should not presume acquiescence in the loss of fundamental rights." *Id*. (internal quotes and citations omitted). "Presuming waiver from a silent record is impermissible." *Id*. (quoting *Carnley v. Cochran*, 369 U.S. 506, 516 (1962)); *accord State v. Duffy*, 247 Ariz. 537, 546-48 ¶¶ 24, 27 (App. 2019), *aff'd*, 251 Ariz. 140 (2021). Before the defendant may waive other trial rights, the trial court must conduct a colloquy and personally inform the defendant of those rights and ensure the decision is made knowingly, intelligently, and voluntarily. Ariz. R. Crim. P. 17.7. Judge Eckerstrom's dissent correctly applies this principle to the facts of Esaw's case:

> [U]nder our settled jurisprudence and long-standing rules of criminal procedure, our courts do not accept waivers of substantial constitutional rights ***by implication***—much less, as here, implications built upon implications. Rather, we must "indulge every reasonable presumption against the loss of constitutional rights." And, it is settled law that waivers of core constitutional rights must be express, not implied.

Esaw, 554 P.3d at 24 ¶ 41 (Eckerstrom, J., dissenting) (quoting *Illinois v. Allen*, 397 U.S. 337, 343 (1970)) (collecting cases) (emphasis in original).

Notwithstanding the above long-settled law, the trial court and court of appeals majority inferred implicit waivers of other fundamental rights based on Esaw's waiver of his right to counsel and his failure to appear for trial. The waiver was presumed, contrary to Supreme Court directive, as a direct result of Esaw's inaction, *i.e.*, his failure to appear for trial. Nothing in the record remotely suggests Esaw waived his right to present a case, confront and cross-examine witnesses, object to evidence, contest aggravation, or any other trial right other than his presence and right to self-representation. Esaw did not expressly refuse to participate. The trial court conducted no colloquy to advise Esaw that by choosing to represent himself, if he failed to appear for trial not only would the trial be held in his absence, but also it would be held with no defense whatsoever.

Judge Eckerstrom suggested the possibility that waivers of the kind implied by the trial court may be possible where a defendant has been expressly warned. *Amicus* urges that even such a warning cannot permit a trial to be conducted in the *ex parte* manner of this trial unless a defendant expressly, clearly, and unambiguously refuses to participate in trial and directs that no defense is to be mounted. Rather, such a warning should advise a defendant similarly situated to Esaw that if he/she fails to appear for trial, the trial can go forward in his/her absence,

and counsel would be appointed to represent him/her despite the waiver and desire for self-representation, because a failure to appear will result in a revocation of the right of self-representation.[1] This is the most appropriate way to balance the various rights involved.

Esaw never expressly waived any of his trial rights, and a waiver cannot be inferred or found by implication. Accordingly, the trial court erred in allowing the trial to proceed without appointing counsel to represent him.

B. Esaw's failure to appear constituted a withdrawal of his waiver of counsel and permitted the trial court to revoke his right of self-representation.

"[T]he Sixth Amendment grants the concomitant right to self-representation in a state criminal trial." *State v. Gunches*, 240 Ariz. 198, 201 ¶ 6 (2016). An improper denial of one's right to self-representation constitutes structural error, requiring reversal. *State v. Ring*, 204 Ariz. 534, 552 ¶ 46 (2003). Once a waiver of counsel has been validly accepted by a court, "it is not within the province of the trial judge to thrust counsel upon the defendant." *State v. Martin*, 102 Ariz. 142, 145 (1967).

Nevertheless, courts have repeatedly recognized a defendant who properly

[1] As noted by the Supreme Court, "a State may—even over objection by the accused—appoint a 'standby counsel' 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." *Faretta*, 422 U.S. at 834 n.46.

waives counsel and chooses to represent him/herself may cause that right to be terminated. *See, e.g.*, *Faretta*, 422 U.S. at 834 n.46 (noting "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct"); *State v. Dunbar*, -- Ariz. --, -- ¶ 25, 550 P.3d 142, 149 (2024) (describing circumstances under which a trial judge may reject or terminate self-representation); *State v. Gomez*, 231 Ariz. 219, 222 ¶ 8, 223 ¶ 15 (2012) (clarifying the right to self-representation only persists "so long as the defendant is able and willing to abide by the rules of procedure and courtroom protocol" (internal quotes omitted)).

State v. Hidalgo, 241 Ariz. 543 (2017), is instructive. There, after repeated warnings, the defendant was unwilling to proceed with jury selection on the first day of trial, so the trial court revoked his right to self-representation. *Id*. at 554 ¶ 44. This Court emphasized that revoking self-representation was proper because Hidalgo refused to proceed on the trial date (as opposed to merely being unprepared), thus disrupting the proceedings altogether. *Id*. at 556 ¶ 56. Esaw's failure to appear is susceptible to multiple interpretations and is thus ambiguous; it certainly does not constitute a clear refusal to participate in trial or mount any defense or allow a defense to be presented on his behalf. Thus, the trial court was within its discretion to revoke his right to self-representation and to appoint counsel to represent him.

In addition to the foregoing, the trial court's ruling, and the holding of the

court of appeals' majority, appears to create a paradox. If it can be inferred that by failing to appear for trial, Esaw impliedly waived his trial rights because the trial court cannot force counsel upon a defendant, it can similarly be inferred that by failing to appear for trial, Esaw impliedly withdrew his request to represent himself. There is no sound basis to favor the former interpretation over the latter – particularly where the latter preserves a panoply of rights obliterated by the former. As a practical matter, preservation of and respect for a defendant's rights in general should militate heavily towards the latter to ameliorate risks of error inherent in an *ex parte* trial.

The trial court would have been within its discretion in appointing counsel to represent Esaw when he failed to appear. By choosing the more drastic alternative and allowing the trial to occur *ex parte*, the trial court violated numerous rights Esaw never waived.

C. The cases cited in the State's response are distinguishable, and additionally, one is wrongly decided.

In its response to Esaw's petition for review, the State cited to several cases for the notion that the trial court did not err in allowing the trial to proceed in the absence of Esaw and without defense counsel. First, the State cited *People v. Espinoza*, 373 P.3d 456 (Cal. 2016). However, there, the defendant "waged a long campaign of manipulation and delay," by, *inter alia*, going through seven appointed attorneys, repeatedly requesting continuances, and jeopardizing the availability of witnesses. *Id*. Moreover, the defendant, who requested self-representation at the

commencement of trial, was present and represented himself for the beginning of trial, completing jury voir dire and cross-examination of the first prosecution witness but declining to give an opening statement. *Id*. He then failed to appear the following day. *Id*. The defendant also repeatedly refused to go to trial with the attorney in place when trial commenced, a point emphasized by the court. *Id*. at 460-62, 466.

Esaw did not engage in obstructionist behavior to the extent exhibited by the defendant in *Espinoza*. Moreover, the *Espinoza* court relied upon case law that predated *Gideon*, and a California statute that requires, or order for a matter to proceed in absentia, that the defendant be "informed whether or not defense counsel will be present," unless the trial has begun. *Espinoza*, 373 P.3d at 464 (citing *Diaz v. United States*, 223 U.S. 442 (1912); Cal. Penal Code § 1043(f)(1)(F)). The court also relied upon a prior California decision in which the defendant expressly (not implicitly) waived his right to present any evidence or participate in the trial. *Id*.

Next, the State cited *People v. Reisinger*, 435 N.E.2d 860 (Ill. App. 1982), where the defendant expressly waived his right to participate in the trial. The defendant told the trial court he wanted to be taken to jail and refused to stand trial, specifically prohibiting advisory counsel from defending him in any manner. *Id*. at 862-63. Similarly, in *Thomas v. Carroll*, the defendant refused to participate in his trial, and he maintained his refusal even after the trial court gave him multiple

opportunities to return to and participate. 581 F.3d 118, 119 (3d Cir. 2009).[2] Again, in *State v. Worthy*, the defendants refused to remain in the courtroom and expressly refused the assistance of counsel despite the fact they would not be present, even after being cautioned by the trial court. 583 N.W.2d 270, 274 (Minn. 1998).

Esaw never furnished the trial court here with such an express waiver, and never refused to participate in his trial. He was never advised by the trial court the trial would occur without him and without counsel, and he never refused the assistance of counsel in the event he did not participate. In sum, the cases cited by the State involve factual scenarios wholly inapposite.

Espinoza is wrongly decided, and its introductory sentence sets the stage for its erroneous reasoning: "The unusual circumstances of this case present a cautionary tale for defendants who choose to represent themselves, for in the end, this defendant has no one but himself to blame for any failure to present a defense." 373 P.3d at 458. Appellate courts are not in the business of issuing "cautionary tales"—especially when those who should heed the warning will never hear it. Two wrongs do not make a right, and a criminal defendant's gamesmanship does not

[2] *Thomas* was also considered through the lens of federal habeas proceedings, in which reversal only occurs where the State court decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). As conceded by the *Thomas* court, they were addressing a "unique" circumstance for which there was "no precise precedent," such that by definition, there was no clearly established federal law.

authorize a trial court to disregard its duty to conduct a fair trial. The reason why cases such as *Espinoza* and *Esaw* are so anomalous in appellate proceedings is simple: trial judges confronted with this situation likely revoke self-representation or continue the trial.

II. This Court should grant review to provide guidance to trial judges and lawyers who are confronted with unusual scenarios where any error is structural.

Despite the standards of practice increasing, *amicus* has observed a sharp uptick in the number of cases where trial lawyers and judges fail to appreciate the risk of violating constitutional rights that are structural error. This year alone, the court of appeals has published two opinions related to the denial of the Sixth Amendment right to a public trial. In *State v. Dayton*, 257 Ariz. 31, 36 ¶¶ 13-16 (App. 2024), the prosecutor raised the issue mid-witness and defense counsel objected without articulating the public trial guarantee of the Sixth Amendment, and the judge allowed the courtroom closure. In *State v. Trudell*, -- Ariz. --, -- ¶¶ 7-15, 556 P.3d 1231, 1233-34 (App. 2024), there was no objection to excluding spectators, likely because of the pattern of misconduct of all the defendant's supporters, but the trial court failed to follow the required test for excluding spectators.[3] Furthermore,

[3] *Trudell*'s reasoning is flawed, in part because it favorably cites to *Stackhouse v. People*, 386 P.3d 440, 445 (Colo. 2015), for the proposition that a silent record is

Faretta violations are common. *E.g.*, *Dunbar*, *supra*; *State v. Underwood*, 255 Ariz. 86 (App. 2023); *State v. Johnson*, 250 Ariz. 230 (App. 2020). In *State v. MacHardy*, 254 Ariz. 231 (App. 2022), the court upheld convictions over a challenge to the incomplete waiver of jury trial over Judge Eckerstrom's dissent.

By granting review, this Court can do more than hold that trial judges may not allow a one-sided presentation of the case to the jury. It can provide suggestions for best practices in the future. *State v. Luviano*, 255 Ariz. 225, 231 ¶ 21 & n.4 (2023).

The first thing all judges should do in all cases with a self-representing defendant who rejects advisory counsel is appoint the advisory counsel as standby counsel. If the defendant has such disregard for that counsel, the thought of this attorney taking over in the event of failing to appear for trial will provide additional motivation for the defendant to show up. Second, the court should hold periodic status conferences to see how the defendant is doing with meeting deadlines for discovery and filing motions; failure to comply with those rules is cause for revoking self-representation, as occurred in *Gomez*, 231 Ariz. at 223-24 ¶¶ 15-16. Moreover, if the defendant fails to appear for a status conference, the court can issue a bench warrant and appoint standby counsel to take over the defense. The court may also

---

indicative of defense counsel's strategy. This directly contradicts this Court's reasoning in *State v. Escalante*, 245 Ariz. 135, 145 ¶¶ 37-38 (2018). *Trudell*, 556 P.3d at 1236 ¶¶ 22-23. A better path to affirming the result would be to find no error occurred based on the trial court's implicit findings, *see id*. ¶ 26.

consider whether a trial continuance is the better course of action; victims have a constitutional right to a speedy trial, *see* ARIZ. CONST. art. 2, § 2.1(A)(10), but not every case involves a victim and not every victim desires a speedy trial (or the trial, for that matter). If, after all of these precautions, the defendant surprises everyone by failing to appear for trial, then standby counsel can take over the defense.

Such opportunities were available in Esaw's case. One month after allowing self-representation, ROA 104, the prosecutor filed a notice with the court that certified mail to Esaw was returned undeliverable and Esaw had previously informed him that his phone was broken. ROA 105. At a status conference three weeks prior to trial, Esaw did not appear, and the court discussed scheduling "with counsel" and took no other action. ROA 106. Had the court appointed counsel for Esaw, an attorney would have had three weeks to prepare for trial—far from ideal, but certainly preferable to what was allowed to occur. Even an unprepared attorney can ensure a fair and impartial jury is empaneled, cross-examine witnesses on key points, make a motion for a directed verdict, and argue to the jury that the government failed to meet its burden of proof because of weaknesses in its evidence. Only 24 hours ago, standby counsel from the Pima County Public Defender's Office was ordered to take over the defense of a self-representing defendant who did not appear for trial; that attorney had conducted no witness interviews but still convinced the jury to acquit the defendant of felony DUI and convict only on misdemeanors.

Structural errors are self-inflicted wounds by courts that should be easy to avoid. It requires only that trial lawyers and judges pause and consider the consequences of drastic actions. When such an error occurs, appellate courts have no recourse but to reverse. In the event of competing fundamental rights, courts need to take greater care to balance those competing interests. In this case, the answer should have been simple: Esaw forfeited his right to self-representation by not appearing for trial, and he retained his right to challenge the State's case in an adversarial proceeding since it had not been waived knowingly, intelligently, and voluntarily.

CONCLUSION

AACJ requests this Court grant review of Esaw's petition so it can clarify the steps a trial court must take before finding waiver of fundamental constitutional rights.

RESPECTFULLY SUBMITTED this 14th day of November, 2024.

By /s/ David J. Euchner

David J. Euchner & Seth Apfel
Attorneys for *amicus curiae*
Arizona Attorneys for Criminal Justice