No. 07-208

In the Supreme Court of the United States

STATE OF INDIANA, PETITIONER

v.

AHMAD EDWARDS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

May States adopt a higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial?

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INTEREST OF THE UNITED STATES

Defendants in federal criminal prosecutions may invoke the right to self-representation pursuant to 28 U.S.C. 1654 and *Faretta* v. *California*, 422 U.S. 806 (1975). A substantial portion of the defendants invoking that right may be mentally ill. If federal district courts require such defendants to proceed through counsel rather than pro se, these defendants may later attack their convictions on the ground that they were improperly denied self-representation. If federal courts permit self-representation, the resulting trial may raise serious questions of fairness and the appearance of fairness. The United States accordingly has a substantial interest in the question whether the Constitution permits limitations on the opportunity of a mentally ill defendant, who

meets minimal competence tests, to proceed to trial pro se.

STATEMENT

1. On July 12, 1999, respondent stole a pair of shoes from an Indianapolis department store. Pet. App. 2a, 17a-18a. When an unarmed loss-prevention officer grabbed him outside the store, respondent drew a handgun and fired three shots. The officer was grazed, and a bystander was shot in the leg. *Id.* at 2a, 18a. An FBI agent who happened by chased respondent into a parking garage and apprehended him by shooting him in the thigh after he repeatedly refused to drop his gun. *Id.* at 2a. The State charged respondent with attempted murder, battery with a deadly weapon, criminal recklessness, and theft. *Id.* at 19a.

2. Respondent indisputably suffers from mental illness, and he also may have brain damage as a result of a car accident. J.A. 48a-49a, 113a-114a, 206a-211a. For five and a half years before trial, respondent underwent numerous competency evaluations, the trial court held three separate competency hearings, and respondent was repeatedly committed to the state hospital.

a. In December 1999, respondent's counsel moved for a competency evaluation, which the trial court granted. J.A. 13a-14a. Drs. Ned Masbaum and Dwight Schuster, the two neuropsychiatrists appointed by the trial court to examine respondent, concluded that he was competent to stand trial, although he suffered from "delusional disorder grandiose type." J.A. 21a, 26a-27a. Dr. Lance Trexler, a neuropsychologist retained by the defense, reached the opposite conclusion. He found that respondent had not only a delusional disorder, but also compromised brain functions, consistent with frontal-

lobe injuries; a tendency to "decompensate" in the course of a conversation; and possibly a major thought disorder, such as schizophrenia. J.A. 37a-38a. Dr. Trexler opined that these problems would cause respondent "considerable difficulty participating in his legal defense." J.A. 37a.

In August 2000, following a competency hearing at which the experts testified, J.A. 347a-365a, the trial judge found respondent incompetent to stand trial. J.A. 48a-49a, 365a. The court committed him to Logansport State Hospital for treatment and, if possible, restoration to competency. J.A. 48a-49a.

In March 2001, a psychiatrist at the state hospital found respondent to be "psychiatrically normal" and "free of psychosis, depression, mania, and confusion." J.A. 61a, 63a-64a. Respondent was returned to jail to stand trial.

b. Respondent's counsel again questioned his competency, and the trial court ordered further testing and a second competency hearing. J.A. 110a. Drs. Masbaum and Schuster once again concluded that respondent was competent. J.A. 84a-88a, 107a-108a, 110a-112a, 385a-395a. Dr. Trexler again disagreed. He testified that respondent had trouble "differentiating reality from non-reality," became incoherent after a few seconds, and was probably schizophrenic. J.A. 413a-414a, 415a, 419a. In his opinion, it was "very clear * * * that [respondent was] not able to effectively assist his counsel." J.A. 424a. Dr. Trexler also opined that medication would improve respondent's chances of collaborating with counsel. J.A. 425a. On April 16, 2002, the trial court concluded that although respondent "suffer[ed] from mental illness," he was "competent to assist his attorneys in his defense and stand trial." J.A. 114a.

c. In November 2002, just before the trial date, defense counsel requested that respondent be examined by a new psychiatrist. J.A. 166a-168a. Dr. Philip Coons was appointed and, after examining respondent, concluded that he was schizophrenic based on his "grandiose delusional system" and his "marked thought disturbances." J.A. 164a. Dr. Coons found that respondent could understand the charges, but that "[h]is delusions and his marked difficulties in thinking make it impossible for him to cooperate with his attorney." *Ibid.* The trial court convened a third competency hearing, J.A. 464a-506a, and on November 24, 2003, ordered that respondent be returned to the state hospital, J.A. 206a-211a.

d. During his second hospitalization, respondent received a "full program" of treatment for schizophrenia and depression. J.A. 216a. The treatment was initially unsuccessful: after three months, the hospital concluded that he was still incompetent to stand trial, but might become competent in the future. J.A. 213a, 224a.

Two months later, however, the hospital reported that although respondent was still schizophrenic, he had attained competence. J.A. 230a-231a. In applying the criteria, the hospital noted that respondent "acknowledges his need for counsel," and it specifically qualified its finding on respondent's ability to plan a legal strategy by noting that respondent could formulate such a plan "in cooperation with his attorney." J.A. 232a, 233a (uppercase omitted). Respondent was remanded to custody for trial.

3. On the day trial was to commence, respondent requested to proceed pro se. J.A. 509a. After a colloquy with respondent, the trial court deemed his waiver of counsel "knowing," but stated that respondent had "ab-

solutely no concept of what has to be done to present a defense or to defend himself against the charges brought." J.A. 516a. The court "reserv[ed]" judgment on whether respondent's waiver was "intelligent," however, because respondent stated that he required a continuance in order to proceed pro se, and the trial court denied the continuance. J.A. 517a, 519a-520a.

Respondent was represented by counsel at trial. The jury found respondent guilty of theft and criminal recklessness, but could not reach a verdict on the other two charges.

4. Shortly before his retrial before the same trial judge, respondent again petitioned to proceed pro se. J.A. 279a-282a. At a hearing on the first day of trial, the trial court denied the request. J.A. 522a, 527a. The court concluded, based on the extensive medical evidence and respondent's own "voluminous" pro se filings, that while respondent was competent to stand trial, he was not competent to defend himself. J.A. 527a, 529a. The court noted that the state hospital's most recent finding of competence had been "conditioned by the doctors on the assistance of counsel," and respondent's ability to plan a legal strategy likewise depended on the assistance of counsel. J.A. 527a, 530a. The court also noted respondent's extensive history of mental illness, including schizophrenia and delusions; observed that respondent's "rambling writings" were "an indication of an inability to stay focused"; and found that the pro se filings that the court had personally reviewed "key[ed] into what some of the doctors were saying." J.A. 526a-527a, 529a-530a.

Respondent was convicted on the remaining two counts. The trial court sentenced respondent to 30 years of imprisonment. Pet. App. 3a.

5. The Indiana Court of Appeals reversed, holding that this Court's precedent required that respondent be allowed to represent himself at trial. The court recognized that the trial court's conclusion that respondent was not competent to do so was "[s]upport[ed] * * * [by] the reports of the doctors who examined [respondent] and the voluminous pages of pro se correspondence" from respondent. Pet. App. 23a. And the court "appreciat[ed] that [the trial court] was simply trying to ensure that [respondent] received a fair trial." *Id.* at 24a. But the court concluded that "*Faretta* and *Godinez* [v. *Moran*, 509 U.S. 389 (1993),] have never been overruled, and the rules announced therein * * * leave little wiggle room." *Ibid.* In its view, these cases established "that one's competency to represent oneself at trial is measured by one's competency to stand trial and that the standard for the former may not be higher than the standard for the latter." *Ibid.* Because respondent was found competent to be tried and had unequivocally asked to proceed pro se at the second trial, the court reversed the convictions obtained at that stage and remanded for retrial. *Ibid.*

6. The Supreme Court of Indiana affirmed. Pet. App. 1a-15a. The court concluded that the "determination by an experienced trial judge that [respondent] was incapable of presenting a defense" was, "at a minimum, reasonable" and had a "substantial basis" in the record. *Id.* at 14a. Nonetheless, the court held that "*Faretta* and *Godinez* bind[] us" to the rule "that competency to represent oneself at trial is measured by competency to stand trial." *Id.* at 13a-14a. As had the court of appeals, the supreme court expressed "sympathy for the view that a trial [court] should be afforded [some] discretion to make that call," and suggested that this case would

give the Supreme Court "an opportunity to revisit" *Faretta* and *Godinez*. *Id*. at 14a. But because respondent was found competent to stand trial, the court concluded that "it was reversible error to deny him [the right to proceed pro se] on the ground that he was incapable of presenting his defense." *Ibid*.

SUMMARY OF ARGUMENT

The state supreme court held that, if a defendant is competent to stand trial and knowingly, intelligently, and voluntarily requests to proceed to trial pro se, a trial court is powerless to reject the request even if the defendant is mentally ill and incapable of presenting a defense without assistance. The Constitution does not compel that result. "[T]he right to self-representation is not absolute. * * * [T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Martinez* v. *Court of Appeal*, 528 U.S. 152, 161-162 (2000). Under the correct approach, a mentally ill defendant who is competent to stand trial may be denied the right to proceed pro se, if the trial court determines through an appropriately particularized analysis that his conduct of the trial would frustrate important governmental interests.

Most notably, the government has a compelling interest in ensuring that the process of criminal adjudication is not only fair, but seen and believed to be fair. This Court has held that this interest justifies reasonable prophylactic restrictions on defendants' exercise of procedural rights. See *Wheat* v. *United States*, 486 U.S. 153, 160, 162-163 (1988). The condition of some mentally ill defendants may severely and irremediably affect their ability to perform basic skills necessary for self-

representation—*e.g.*, to communicate, to absorb and comprehend the State's evidence, and to formulate questions and affirmative theories of the case. Their behavior may also be delusional or nonsensical. When such defendants act pro se, the trial may verge on a farce. When an individual is competent to stand trial, but not sufficiently competent to mount a serious defense without assistance, the government should not face a choice of either declining to prosecute a competent defendant or unleashing a spectacle that may risk fundamental unfairness and serious damage to public confidence in the fairness of the trial process.

These important governmental interests may, in appropriate circumstances, justify precluding a mentally ill defendant from self-representation at trial. This Court's decision in *Godinez* v. *Moran*, 509 U.S. 389 (1993), is not to the contrary. *Godinez* establishes that nothing in the Due Process Clause *invalidates* a defendant's knowing, intelligent, and voluntary waiver of the right to counsel if the defendant is competent to stand trial. But nothing in the Due Process Clause, or in *Godinez*, compels acceptance of such a waiver by the trial court. Indeed, *Godinez* established that a defendant meeting these standards is competent to plead guilty, yet he clearly has no constitutional *right* to plead guilty. Accordingly, a further competency requirement for self-representation is valid if it reasonably furthers an important governmental interest that, in the individual case, "outweighs the defendant's interest in acting as his own lawyer." *Martinez*, 528 U.S. at 162.

The trial court's findings in this case meet that standard. The court reasonably relied on medical evidence that respondent was competent to stand trial, but only with the assistance of counsel. The psychiatric evidence

and the trial judge's own experience with respondent's efforts at oral and written communication gave the court a firm basis to conclude that respondent lacked the basic competencies necessary to act as his own lawyer. That finding validly furthered the important state interest in the integrity of respondent's criminal adjudication.

The trial court's approach is not the only permissible one. With the assistance of psychological and psychiatric evidence, States may balance these competing interests in different ways. The Constitution, however, does not convert the competency floor announced in *Godinez* into a ceiling on the State's power to regulate pro se representation. Rather, although States *may* equate competency to stand trial and competency to self-represent, States (and the federal government) should remain free to respond to individuals whose limitations make the need for assistance by counsel particularly acute. The Constitution properly leaves the elaboration of the appropriate standards to each jurisdiction, subject to this Court's review. Cf. *Medina* v. *California*, 505 U.S. 437, 445-446 (1992).

ARGUMENT

I. MENTALLY ILL DEFENDANTS MAY LEGITIMATELY BE RESTRICTED FROM SELF-REPRESENTATION AT TRIAL

Since its initial holding that a criminal defendant has a right of self-representation, this Court has consistently acknowledged that the right, like other constitutionally protected trial rights, is not absolute. To the contrary, as the Court has regularly recognized, trial courts must have latitude to impose reasonable limitations on that practice. Restricting defendants with severe mental illness from proceeding to trial pro se, when

that self-representation would jeopardize important governmental interests, is entirely consistent with this Court's analysis of the right of self-representation.

A. The Substantial Governmental Interest In The Fairness Of Criminal Proceedings May, In Appropriate Circumstances, Outweigh A Defendant's Request To Proceed Pro Se

1. In *Faretta* v. *California*, 422 U.S. 806 (1975), this Court held that the Sixth Amendment guarantees a criminal defendant the right to refuse the assistance of counsel and represent himself at trial. Relying on history, structural inference, and principles of individual autonomy, *id.* at 818-834, the Court concluded that a defendant could choose to manage his own defense as long as he was first "made aware of the dangers and disadvantages of self-representation," and "'knowingly and intelligently' [chose to] forgo [counsel]." *Id.* at 835.

Faretta and subsequent cases made clear, however, that "the right to self-representation is not absolute." *Martinez* v. *Court of Appeal*, 528 U.S. 152, 161 (2000). In particular, the right established in *Faretta* "is not a license to abuse the dignity of the courtroom" or "a license not to comply with relevant rules of procedural and substantive law." *Faretta*, 422 U.S. at 835 n.46. Accordingly, "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Id.* at 834 n.46 (citing *Illinois* v. *Allen*, 397 U.S. 337 (1970)); see *United States* v. *West*, 877 F.2d 281, 287 (4th Cir.) (affirming termination of self-representation), cert. denied, 493 U.S. 869, 493 U.S. 959 (1989), and 493 U.S. 1070 (1990); cf. *United States* v. *Mack*, 362 F.3d 597, 601 (9th Cir. 2004) (termination of self-representation was justified,

but nonetheless impermissible because no standby counsel was available to continue the trial).

Similarly, *Faretta* noted that the trial court may appoint standby counsel for the defendant, "even over objection." 422 U.S. at 835 n.46. The Court subsequently held that a court may impose standby counsel on an unwilling defendant. *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984). Requiring standby counsel does not violate the Constitution if it remains within "reasonable limits," the Court held, even if it "somewhat undermines the *pro se* defendant's appearance of control over his own defense." *Id.* at 184, 188.

The Court did not purport in *Faretta* to determine categorically which other interests could legitimately justify limitations on self-representation. Significantly, Faretta himself was "literate, competent and understanding." 422 U.S. at 835. Thus, the Court's decision did not address whether the right of self-representation may be limited if the defendant, although competent to stand trial, suffers from a mental illness that significantly impairs the cognitive ability necessary to act as his or her own attorney and threatens to make a mockery of the trial proceedings.

Rather, this Court simply cautioned that a lay defendant may not be barred from representing himself merely because he lacks the "technical legal knowledge" of a trained attorney. *Faretta*, 422 U.S. at 836. The trial court had precluded Faretta from proceeding pro se after questioning him on points of law, such as the exceptions to the hearsay rule and the grounds for objecting to potential jurors. See *id.* at 808 n.3. This Court held that such a legal examination is improper. The Court recognized that "in most criminal prosecutions defendants could better defend with counsel's guidance

than by their own unskilled efforts," although it believed that "in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense." *Id.* at 834; see also *Martinez*, 528 U.S. at 161 ("No one * * * attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient."). Nonetheless, the Court concluded that because "[t]he right to defend is personal" and because "[t]he defendant * * * will bear the personal consequences of a conviction," the likelihood of failure is not a sufficient reason to bar the defendant from choosing to proceed without counsel. *Faretta,* 422 U.S. at 834.

Thus, *Faretta* stated, and the cases applying it confirm, that a valid state interest can overcome the right to self-representation in particular cases. For example, "most courts" have concluded that the governmental interest in the orderly conduct of criminal proceedings justifies denying requests to proceed pro se on the eve of trial. *Martinez*, 528 U.S. at 162 & n.11 (citing John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 Seton Hall Const. L.J. 483, 544-550 (1996)); accord, *e.g.*, *Parton* v. *Wyrick*, 704 F.2d 415, 417 (8th Cir. 1983) (per curiam).

Whether the right to proceed pro se comes from the Sixth Amendment, see *Faretta*, 422 U.S. at 818, or the Due Process Clause, see *Martinez*, 528 U.S. at 165 (Scalia, J., concurring in the judgment), there is nothing incongruous about weighing this particular trial right against legitimate, countervailing governmental interests. This Court has regularly concluded that a defendant's procedural rights may yield in limited circumstances where the contrary interest is sufficiently

strong. See, *e.g.*, *Michigan* v. *Lucas*, 500 U.S. 145, 149-151 (1991) ("legitimate state interests" justified reasonable limitations on the defendant's Sixth Amendment right to present particular evidence); accord *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather * * * may * * * bow to accommodate other legitimate interests in the criminal trial process.") (citations omitted); see also, *e.g.*, *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 60-61 (1987) (right to compulsory process); *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983) (right to counsel).

2. The State's interest in ensuring the integrity and fairness of its own criminal proceedings—both real and perceived—is precisely the type of interest that may, in a particular case, justify denying a defendant's request for self-representation. "Even at the trial level, * * * the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Martinez*, 528 U.S. at 162; see also *id.* at 163 (concluding that "the overriding state interest in the fair and efficient administration of justice" may justify denying a criminal defendant permission to proceed pro se on appeal).

In a variety of contexts, this Court has repeatedly recognized the legitimacy and importance of the governmental interest in ensuring that trials are fair and are perceived to be fair. In *Sell* v. *United States*, 539 U.S. 166 (2003), for example, the Court held that "the Government has a * * * constitutionally essential interest in assuring that the defendant's trial is a fair one," an interest sufficiently strong that in appropriate circumstances it can justify the forcible administration of anti-

psychotic drugs over the defendant's objection. *Id.* at 180. Similarly, in *Wheat* v. *United States*, 486 U.S. 153 (1988), the Court held that preserving the apparent integrity of judicial proceedings can justify denying a criminal defendant permission to waive his right to conflict-free counsel. When the defendant seeks to be represented by counsel who has a potential conflict of interest (in *Wheat*, an attorney who was already representing a co-defendant with distinct legal interests), the court *may* permit the defendant to waive the conflict, but it may also deny the defendant his counsel of choice. "Federal courts have an independent interest in ensuring that * * * legal proceedings appear fair to all who observe them." *Id.* at 160. This interest in preserving confidence in the justice system may override the defendant's demand that he be permitted to retain his preferred counsel, and trial courts have "substantial latitude" to make this determination even before any actual conflict arises. *Id.* at 163; cf. *Offutt* v. *United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

B. The Important Interest In Preserving The Integrity And Fairness Of Criminal Proceedings Justifies Reasonable Limitations On Self-Representation At Trial By Mentally Ill Defendants

Mental illness poses unique challenges to the pro se litigant, to prosecuting authorities, and to trial courts. Lengthy experience with mentally ill pro se litigants confirms that self-representation under these circumstances can undermine public confidence in the fairness and impartiality of criminal trials. Indeed, this problem contributes to the "dismay about the practical consequences of [the *Faretta*] holding" expressed by "judges

close[] to the firing line." *Martinez*, 528 U.S. at 164 (Breyer, J., concurring).

1. Since *Faretta*, state and federal courts have had considerable exposure to pro se representation by mentally ill defendants. One recent analysis of federal district court docket sheets estimated that over 20% of pro se federal defendants exhibited signs of mental illness sufficient to cause the court to order a competency examination—in some cases, even before the defendant demanded to proceed pro se. Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. Rev. 423, 456 (2007). A smaller-scale but more intensive study of defendants referred for initial psychiatric assessments found that the pro se defendants' "desires to represent themselves were *clearly related to their psychoses*." Robert D. Miller & Leonard V. Kaplan, *Representation by Counsel: Right or Obligation?*, 10 Behav. Sci. & L. 395, 404 (1992) (emphasis added). Indeed, all 11 of the referred defendants who wanted to represent themselves "were suffering from [major] psychiatric disorders which raised major concerns about their competency." *Ibid.;* see also Douglas Mossman & Neal W. Dunseith, Jr., *"A Fool for a Client": Print Portrayals of 49* Pro Se *Criminal Defendants*, 29 J. Am. Acad. Psychiatry & L. 408, 412 (2001) (based on media coverage, 13 of 49 pro se defendants exhibited "statements or actions [that] appeared to be symptoms of a serious Axis I mental disorder or indicated possible incompetence to stand trial").

Many of these mentally ill defendants are competent to stand trial with the assistance of counsel. A criminal defendant may constitutionally be brought to trial if he has both "sufficient present ability to consult with his

lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." *Dusky* v. *United States*, 362 U.S. 402, 402 (1960) (per curiam); see also *Drope* v. *Missouri*, 420 U.S. 162, 171 (1975) (competency requires capacity "to consult with counsel, and to assist in preparing his defense").

Individuals who are competent to stand trial under the *Dusky* standard, however, may nonetheless suffer from significant mental illnesses that directly and materially impair their ability to proceed pro se. See, *e.g.*, *State* v. *Marquardt*, 705 N.W.2d 878, 892-893 (Wis. 2005) (upholding denial of self-representation based on expert testimony that the defendant's "delusional symptom" prevented him from "appreciat[ing] the evidence" or "plan[ning] a defense strategy that is realistic") (citation omitted), cert. denied, 127 S. Ct. 495 (2006); see also Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. Am. Acad. Psychiatry & L. S3, S44 (Supp. 2007) (citing studies showing that significant percentages of defendants with schizophrenia, other psychotic illnesses, affective disorders, or mental retardation are found competent to stand trial); Jason Marks, *Toward a Separate Standard of Mental Competence for Self-Representation by the Criminal Defendant*, 13 Crim. Just. J. 39, 39-40 & n.1, 48-49 & n.40 (1991-1992) (citing examples of pro se defendants whose paranoia, delusions, hallucinations, incoherence, or "nearly complete inability to organize [their] thinking and gather information" affected their pro se defense). The *Dusky* standard does not take these impairments into account if the defendant has the requisite understanding and ability to assist counsel.

Some such defendants will not be able to make the additional showing of a "knowing, intelligent, and voluntary" waiver of counsel. See, *e.g.*, *People* v. *Lego*, 660 N.E.2d 971, 979 (Ill. 1995); *United States* v. *Cash*, 47 F.3d 1083, 1089-1090 (11th Cir. 1995). But just as a finding of competency to stand trial does not guarantee an ability to make a valid waiver, the Constitution should not be interpreted to tether the State's views of competency for self-representation to the standard for competency to stand trial. The waiver and competency to stand trial inquiries are different. The ability to make such a waiver turns on the defendant's comprehension of a right and his making an uncoerced choice. *Godinez* v. *Moran*, 509 U.S. 389, 400-401 & n.12 (1993). But neither competency to stand trial nor a valid waiver guarantees that a defendant can perform the tasks of self-representation without turning the courtroom into a theater for absurd behavior that vitiates any coherent defense, any more than a valid waiver guarantees that a defendant will not be disruptive or noncompliant with a court's rules. States should have room to act to prevent both spectacles.[1]

2. Pro se representation by mentally defendants whose performance is seriously affected by their illness may impinge on the State's vital interest in the integrity

[1] Requiring a defendant to proceed through counsel, rather than pro se, still preserves a substantial role for the "individual autonomy" interests supporting *Faretta*. *Martinez*, 528 U.S. at 160. First, the defendant can personally present his case by exercising the right to testify, which is "[e]ven more fundamental to a personal defense than the right of self-representation." *Rock* v. *Arkansas*, 483 U.S. 44, 52 (1987). Second, a represented defendant plays a vital role in trial strategy, because counsel must "consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) (citation omitted).

of its justice system. Pro se representation by the mentally ill can seriously impair the integrity of the judicial process as a search for truth through fair proceedings. While "a measure of unorthodoxy, confusion and delay is likely, perhaps inevitable, in [all] *pro se* cases," *United States* v. *Dougherty*, 473 F.2d 1113, 1124 (D.C. Cir. 1972), self-representation by some mentally ill defendants may cross the line into delusional or incoherent behavior. For example, as petitioner notes, pro se defendant Scott Panetti attempted to subpoena "John F. Kennedy, the Pope, and Jesus," assumed an alternative personality named "Sarge" when testifying, and asked various nonsensical questions. Pet. Br. 30 (citing Pet. Br. at 10-14, *Panetti* v. *Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407)); see also *id.* at 32-33 (providing additional examples). Pro se representation by mentally ill defendants who are incapable of proceeding coherently without assistance may damage "the institutional interest in the rendition of just verdicts in criminal cases." *Wheat*, 486 U.S. at 160.

Relatedly, such trials threaten to undermine public trust in the fairness of the justice system. "[T]he integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel." *Faretta*, 422 U.S. at 839 (Burger, C.J., dissenting). This consequence of self-representation is immeasurably magnified when a mentally ill defendant fails to present any coherent defense, effectively forfeits critical procedural safeguards, or antagonizes the witnesses or the jury. See, *e.g.,* Pet. Br. 31-32 (noting that pro se defendant Kashani Farhad "virtually * * * admit[ted] his own guilt during his opening statement," offered testimony and closing argument that were prejudicial to his

case, and failed to object at critical points) (citing *United States* v. *Farshad*, 190 F.3d 1097, 1102-1105 (9th Cir. 1999) (Reinhardt, J., concurring specially)). Criminal convictions after such trials are "deeply disturbing," and inevitably erode the public's perception of the fairness of the judicial system. *Virgin Islands* v. *Charles*, 72 F.3d 401, 413 (3d Cir. 1995) (Lewis, J., concurring) (describing trial at which a "paranoid, delusional" defendant elected to represent himself); see also Michael L. Perlin, *"Dignity Was the First to Leave":* Godinez v. Moran*, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 Behav. Sci. & L. 61, 64, 72-74 (1996) (describing public reactions to defendant's bizarre pro se defense); Decker, 6 Seton Hall Const. L.J. at 523 (same).

The sheer spectacle of the defendant's presentation may be impossible to divorce in the public mind from the guilty verdict. Observers of jury trials know that "[a]t all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial." *Riggins* v. *Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring in the judgment). Not only the jury, but the public at large may recoil from a trial marred by a defendant's mental illness that leads him to reject assistance necessary to permit him to mount a meaningful defense. Such an impression can sap public confidence in the accuracy or legitimacy of the verdict.[2]

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[2] Other considerations may independently justify denial of self-representation by particular mentally ill defendants who are competent to stand trial. Some such defendants may decompensate under the stress of personally conducting the trial, possibly losing their compe-

These recurring, foreseeable consequences of self-representation at trial by some mentally ill defendants significantly impinge on important governmental interests. Accordingly, although the Constitution does not require it, the State may reasonably conclude that "there is a point of incompetency, short of complete incapacity, where a defendant is able to understand the nature of the charges against him and to assist in the preparation of his defense, yet does not have the capacity to waive counsel and undertake representation of himself." *Dougherty*, 473 F.2d at 1123 n.13.

4. Respondent suggests (Br. in Opp. 31-33) that these governmental interests should be accommodated by means short of denying self-representation before the trial begins. In at least some circumstances, however, the State can conclude that protection of these interests requires that a mentally ill defendant be denied permission to try his case pro se.

a. For example, the court's power to revoke pro se representation when the defendant's conduct disrupts the proceedings, see *Faretta*, 422 U.S. at 834 n.46, does not adequately substitute for a pre-trial determination focused on the capacity for self-representation. First,

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tency to stand trial at all. See, *e.g.*, Pet. Br. at 8, *Panetti*, *supra* (No. 06-6407) (detailing a forensic psychiatrist's testimony that Panetti, a schizophrenic, "decompensates when under stress, causing his thinking to become tangential, circumstantial, and inefficient"); *State* v. *Davis*, 85 P.3d 1164, 1170 (Kan. 2004) (defendant deemed competent but "unlikely [to] be able to maintain his * * * capacity to stand trial through the stress of court proceedings."). Federal and state governments have an "important" and "substantial" interest in bringing competent defendants to trial, *Sell*, 539 U.S. at 180, and in considering whether to permit self-representation, trial courts may legitimately consider the anticipated risk of proceeding pro se to the defendant's own mental state.

the State's legitimate interests are not limited to preventing out-and-out disruptions. The prejudicial impact of the defendant's mental illness on his conduct of a trial may manifest itself in behavior that undermines the proceeding's perceived fairness, without being conventionally disruptive in a way that would justify terminating self-representation. See, *e.g.*, Mossman & Dunseith, 29 J. Am. Acad. Psychiatry & L. at 413 tbl. 5 (collecting reports of unusual behavior by pro se defendants who variously wore a bulletproof vest or a veil to court; "[s]haved hair on his head into a patchwork of tufts"; and snored or sobbed in the courtroom). In fact, the perceived unfairness of trying a mentally ill, pro se defendant often arises from the defendant's *inaction*, or inability to act. See, *e.g.*, Decker, 6 Seton Hall Const. L.J. at 552-554.

Relatedly, because mental illness that undermines effective self-representation takes many forms beyond mere obstreperousness, the "wait and see if the defendant is obstreperous" approach misses the mark. While the competency evaluation can consider the defendant's ability to behave, it can focus on other relevant variables as well. See, *e.g.*, Mossman et al., 35 J. Am. Acad. Psychiatry & L. at S34 ("Areas that the psychiatrist typically assesses during an interview include the defendant's * * * ability to behave properly during court proceedings and at trial.").

Finally, remedies after the trial begins are unlikely to vindicate the government's interests. Removing a defendant from the courtroom for "extreme and aggravated" misconduct is an extraordinary remedy, *Allen*, 397 U.S. at 346, and it may not be justified in any event by merely bizarre behavior. Even when it is, the consequences of using this disciplinary authority for a pro se

defendant are severe. If standby counsel is not available to step in, a mistrial may result.[3] Even if standby counsel has been appointed and is available to take over the defense, the change may produce an incoherent or shifting defense. (This case illustrates that potential: respondent's attorney proceeded at trial on the theory that respondent had not acted with the intent to kill, whereas respondent had intended to argue the very different theory that he shot the loss-prevention officer in self-defense. See J.A. 525a.)

b. Even if the trial court appoints standby counsel, counsel's limited role will rarely be able to prevent the pro se defendant from undermining the perceived fairness of the judicial process. Standby counsel serve primarily to relieve the court of some of the burdens of dealing with a pro se litigant. *McKaskle*, 465 U.S. at 184. But even if the court appoints standby counsel, "the pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury." *Id.* at 178. Indeed, the trial court cannot permit too much involvement by standby counsel—particularly in the jury's presence—without committing reversible error. See *id.* at 177 & n.8, 181. And the defendant is most likely to damage both his own cause and the integrity of the proceedings during the very stages when standby

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[3] In some instances, criminal defendants first assert their desire to represent themselves too close to trial for the appointment of standby counsel to be practicable. See, *e.g.*, *Smith* v. *Doyle*, No. 93-1222, 1993 WL 475399, at *2 (7th Cir. Nov. 17, 1993) (public defender declined to serve as standby counsel on the eve of trial). In others, defendants refuse to accept standby counsel. *Mack*, 362 F.3d at 599. While a court may override a defendant's objections to standby counsel, *McKaskle*, 465 U.S. at 184, it is not required to do so.

counsel is least able to intervene—*e.g.*, opening statements, questioning of witnesses, and closing argument.

Accordingly, standby counsel can ordinarily do little to prevent the mentally ill defendant from engaging in conduct that is delusional, irrational, or self-destructive. The appointment of standby counsel, therefore, does not automatically protect the State's important interest in safeguarding the integrity of the trial.

C. This Court's Decision In *Godinez* Does Not Restrict Courts And Legislatures From Defining Distinct Limits On Competency To Proceed To Trial Pro Se

Respondent relies extensively (Br. in Opp. 18-22) on this Court's decision in *Godinez* v. *Moran*, 509 U.S. 389 (1993), which held that *allowing* a competent defendant to proceed pro se does not violate due process so long as the defendant's waiver of his right to counsel is knowing, voluntary, and intelligent. Respondent misreads *Godinez*: this Court did not hold that the constitutional floor for electing self-representation—competency to stand trial plus an effective waiver—is also the constitutional ceiling on what limitations a State can impose on that election.

1. In *Godinez*, Moran had waived his right to counsel and thereafter pleaded guilty in state court. On habeas corpus review, the Ninth Circuit found a due process violation because the trial court had not established that Moran had acted with a sufficient degree of competence. The Ninth Circuit held that courts *must* find a different, and "higher," standard of competency to waive constitutional rights, including the right to counsel, than simply to stand trial. *Moran* v. *Godinez*, 972 F.2d 263, 268 (9th Cir. 1992), rev'd, 509 U.S. 389 (1993). The Ninth Circuit held that the Constitution permits waiver

of such rights only if the defendant has "the capacity for 'reasoned choice' among the alternatives available to him." *Id.* at 266.

This Court reversed. The Court "reject[ed] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard." 509 U.S. at 398. Once deemed competent, Moran could permissibly waive these (or other) constitutional rights if he could satisfy the trial court that his waiver was "knowing and voluntary." *Id.* at 400.

The Court noted that a defendant who seeks to waive the right to counsel must show "the competence to *waive the right*, not the competence to represent himself." *Godinez*, 509 U.S. at 399. The Court therefore rejected Moran's suggestion that the Constitution requires a trial court to establish that a defendant has adequate "powers of comprehension, judgment, and reason" before allowing that defendant to proceed pro se. *Ibid.* (citations omitted); see Resp. Br. at 26, 32, *Godinez*, *supra* (No. 92-725). The Court did not dispute the accuracy of Moran's argument that successfully litigating a case pro se requires greater ability than is demonstrated by satisfying the *Dusky* standard; rather, the Court held that point irrelevant for purposes of the waiver analysis, because "the *decision* to waive counsel" requires no such "higher level of mental functioning." 509 U.S. at 399 (emphasis added).[4]

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[4] The United States argued in *Godinez* that "nothing in the principles of due process or any of this Court's cases *requires* that trial courts" demand of defendants a higher level of competency before pleading guilty or waiving counsel. U.S. Br. at 24, *Godinez*, *supra* (No. 92-725) (emphasis added); see *id.* at 15-16. Because Moran had pleaded guilty and not contested his sentence, the United States ar-

The Court noted in closing that the constitutional competency standard is simple by design. "[P]sychiatrists and scholars may find it useful to classify the various kinds and degrees of competence," and "States are free to adopt competency standards that are more elaborate than the *Dusky* formulation." 509 U.S. at 402. "[T]he Due Process Clause does not impose these additional requirements," however. *Ibid.*; accord *id.* at 404 (Kennedy, J., concurring in part and concurring in the

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gued, no higher standard should apply "even assuming that the ability to conduct a defense at trial requires some higher level of functioning than the ability to provide meaningful assistance to counsel." *Id.* at 16. The government suggested that requiring a higher constitutional standard to proceed pro se at trial would be "arguably impermissible" under *Faretta*, *id.* at 17, but did not address that question in any depth. And although the government criticized the Ninth Circuit's ill-defined multiplicity of competency standards, it focused primarily on the pitfalls of treating *waivers* of the right to stand trial or to counsel differently from waivers of other rights. See *id.* at 17-19. There is, of course, no question after *Godinez* that a State may adopt a single standard for competency to stand trial and competency for self-representation, since the single-standard approach will be the easiest to administer. But the question whether a State may have a single competency standard and the question whether it must are very different questions, and *Godinez* does not answer the latter.

In a subsequent proceeding involving a pro se defendant, the United States contended (and the court agreed) that Zacarias Moussaoui was competent to plead guilty and appear pro se at his capital sentencing; that case did not involve the issue presented here, however, because there was no basis at all to believe that Moussaoui was suffering from any mental disease or defect. Gov't Position on Competency & Def.'s Self-Representation at 8, *United States* v. *Moussaoui*, Crim. No. 01-455-A (E.D. Va. June 7, 2002). That example demonstrates, however, that a distinct standard for competency to self-represent does not undermine *Faretta*, because in cases of defendants with unquestioned competency, the right to self-representation is in no way affected by Indiana's position.

judgment) ("The Due Process Clause does not *mandate* different standards of competency at various stages of or for different decisions made during the criminal proceedings.") (emphasis added).

2. In *Godinez* this Court held that the trial court had not violated the Due Process Clause by *accepting* Moran's plea and his waiver of counsel. The Court did not consider or decide whether Moran's rights under *Faretta* would have been violated if his waiver had been rejected. Competency to waive a constitutional right does not create a correlative constitutional right to have that waiver accepted. *Singer* v. *United States*, 380 U.S. 24, 34-35 (1965). Compare *Godinez,* 509 U.S. at 397 n.7, 402 (holding that the Constitution permits a competent defendant, acting knowingly and voluntarily, to plead guilty and thereby waive the right to a jury trial), and *Parke* v. *Raley*, 506 U.S. 20, 28-29 (1992) (same), with *North Carolina* v. *Alford*, 400 U.S. 25, 38 n.11 (1970) (stating that "[a] criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court"), and *Singer*, 380 U.S. at 36 (finding "no constitutional impediment to conditioning a waiver of [the jury trial] right on the consent of the prosecuting attorney and the trial judge").

If there were any doubt on this point, the Court's closing words in *Godinez* eliminate it: "States are free to adopt competency standards that are more elaborate than the *Dusky* formulation." 509 U.S. at 402. And the Court cited *Medina* v. *California*, 505 U.S. 437 (1992), in which it had declined to read the Due Process Clause to preclude allocation of the burden of proving in competence to the defendant. As the Court noted in *Medina*, "[t]raditionally, due process has required that only the most basic procedural safeguards be observed; more

subtle balancing of society's interests against those of the accused ha[s] been left to the legislative branch." *Id.* at 453 (quoting *Patterson* v. *New York*, 432 U.S. 197, 210 (1977)). The Court did not engage in that "subtle balancing" in *Godinez*, nor did it foreclose state courts from doing so in a case like this one.

Godinez leaves open at least one way in which States can respond to the problems created by mentally ill defendants proceeding pro se: increasing the *overall* threshold for competency to stand trial above the constitutional floor. That course, however, would force the State to forgo the prosecution of defendants who are competent to stand trial under *Dusky*, whether or not they request self-representation. The question here is whether States must incur that significant cost or whether instead they may pursue a more targeted course of adopting a standard of competency for self-representation higher than the constitutional minimum. Nothing in *Godinez* forbids that more targeted approach.

Thus, *Godinez* is entirely consistent with this Court's repeated conclusion that the Constitution permits different jurisdictions to adjudicate issues of competency and insanity using varying substantive and procedural standards, so long as the basic procedure is "constitutionally adequate." *Medina*, 505 U.S. at 453 (citation omitted). For example, the Court has held that criminal defendants may be constitutionally entitled to a re-evaluation of competency, but the Court "did not hold that [a particular] procedure * * * was constitutionally mandated," and "the Court [did not] prescribe a general standard with respect to the nature or quantum of evidence necessary to require" judicial inquiry into competency. *Drope*, 420 U.S. at 172 (citing *Pate* v. *Robinson*, 383 U.S. 375 (1966)). See also *Panetti*, 127 S. Ct. at 2862

("[W]e do not attempt to set down a rule governing all competency determinations."); *McKaskle*, 465 U.S. at 183 (*Faretta* allows but "does not require" trial judges to permit hybrid representation, with the pro se defendant and his standby counsel jointly participating in the defense).

It is this Court's "established practice [to] permit[] the States, within the broad bounds of the Constitution, to experiment with solutions to difficult questions of policy." *Smith* v. *Robbins,* 528 U.S. 259, 272 (2000). By declining in *Godinez* to constitutionalize the difficult question of competency any further, the Court left open avenues for this healthy experimentation.

3. Respondent argues (Br. in Opp. 21-22) that *Godinez*'s endorsement of "more elaborate" state competency requirements *forbids* States from denying anyone competent to stand trial the right to represent himself. These "more elaborate" standards for waiving the right to counsel, respondent argues, may be adopted only alongside identical "more elaborate" standards for evaluating competency to stand trial. But nothing in *Godinez* supports the notion that the Court intended to impose such a sweeping requirement of parity. Such a holding would be inconsistent with the "modest aim" of the *Dusky* competency standard, 509 U.S. at 402. Rather, the Court considered only the constitutional standard for sustaining a waiver of Sixth Amendment rights; it did not consider the constitutional validity of rejecting such a waiver by a mentally ill defendant.

To be sure, *Faretta* places some limits on the State's ability to increase the requirements for waiving the right to counsel above the constitutional floor. For some constitutional rights, there is no little or no countervailing and strong interest, so the State could, in theory,

rule out the possibility of waiver altogether. *Faretta* obviously precludes that course with respect to the right to counsel. However, both before and after *Godinez*, the proper analysis of a restriction on self-representation turns on whether it furthers a sufficiently weighty state interest to overcome the defendant's interest in proceeding pro se. As shown above, the particular problem of mentally ill defendants defending themselves at trial pro se is one with which individual jurisdictions may grapple. In holding that the Constitution does not provide a single answer, this Court did not demonstrate any intent to "pretermit other responsible solutions." *Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment). The court below therefore was incorrect in concluding that *Godinez* rules out any competency-based limits on self-representation.

II. THE STATE'S IMPORTANT INTERESTS ADEQUATELY JUSTIFIED DENYING SELF-REPRESENTATION IN THIS CASE

The foregoing discussion establishes that the Constitution does not categorically forbid individual jurisdictions from establishing a separate test for competency to proceed pro se. Even in circumstances in which a defendant satisfies the constitutional minimum for waiver, an important government interest may justify a further showing. Here Indiana has identified a valid government interest, and the trial court's findings sufficiently demonstrate that in the circumstances of this case the State's interest may overcome respondent's right to self-representation.

1. A State's standard for evaluating self-representation at trial by a mentally ill defendant satisfies the Constitution if it is based on a close fit between the defen-

dant's mental illness and the State's interest in ensuring the fairness and perceived fairness of trials. This Court held in *Faretta* that no defendant may be denied self-representation simply because he lacks legal knowledge or the skills of an attorney, so long as he undertakes to comply with the relevant rules. See 422 U.S. at 834 & n.46.[5] A standard based on the quality of the defendant's legal advocacy or the depth of his knowledge of the hearsay rule would be inconsistent with this principle. By contrast, a standard would plainly be valid if it permits denial of self-representation only when the trial court finds that the defendant's mental illness impairs one or more of the basic competencies that are necessary to act as an advocate at trial without causing the proceedings to degenerate into farce.

Indiana focuses on the basic competency of communication with the jury. Courtroom conduct is another example. As discussed above, in some instances mental illness will predictably and materially impair the defendant's ability to control his demeanor in the courtroom. Conduct in the courtroom plainly implicates the valid governmental interest in the "dignity, order, and decorum" of judicial proceedings. *Allen*, 397 U.S. at 353. A finding, based on credible expert evidence (or the court's own experience), that the defendant, while otherwise competent, lacks the capability to control highly disrup-

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[5] The trial court's colloquy with respondent after his first request to proceed pro se appears inconsistent with this principle. See J.A. 514a-518a. That colloquy, however, is not relevant here. The trial court denied respondent's request to represent himself at his first trial based on the untimeliness of the request, see p. 5, *supra*, and the Indiana appellate courts reversed only respondent's convictions obtained at the *second* trial. See Pet. App. 15a, 31a.

tive outbursts could be an adequate basis to deny self-representation.

Similarly, a mentally ill defendant's profound inability to concentrate, or to react to events unfolding during a trial, could justify denying permission to represent himself. The essence of the jury trial is the adversarial testing of the State's case, and a pro se defendant's transparent inability to grasp or grapple with the details of the State's evidence could cause reasonable observers to doubt the fairness of the proceedings.

2. The findings made by the trial court in this case (in which the Supreme Court of Indiana concurred, see Pet. App. 14a) adequately identified aspects of respondent's mental condition that would call into question the fairness of a pro se trial. Only after an extended hospitalization did respondent's examining physicians finally determine that he was competent to stand trial—and only *with* the assistance of counsel. See J.A. 232a-233a. And the trial court reasonably understood respondent's underlying mental conditions to lead to conduct that posed a danger to the integrity of the proceedings.

In particular, respondent's lack of focus understandably gave the trial court cause for concern about his ability to respond to the State's evidence or to present a defense. See, *e.g.*, J.A. 221a, 353a, 354a, 362a, 363a, 365a. Respondent's final evaluation by the state hospital suggested that "[h]is thought processes are no longer disorganized," or at least were sufficiently comprehensible that respondent was capable of planning a defense with the assistance of counsel. J.A. 231a; see J.A. 232a-233a. The trial court noted, however, that respondent's own oral and written submissions could be evidence of an inability to focus attributable to respondent's schizophrenia and other mental conditions. See J.A. 527a,

529a. And over the months since respondent's discharge from the state hospital, the trial court had received and reviewed numerous pro se filings from respondent, see J.A. 237a-250a, and thus had a substantial basis to conclude that respondent was not capable of presenting a coherent defense.

3. Other States may formulate standards different from that proposed by Indiana or applied by the trial court in this case. This Court's practice has been to "evaluate state procedures, one at a time, as they come before [it], * * * while leaving 'the more challenging task of crafting appropriate procedures * * * to the laboratory of the States in the first instance.'" *Smith*, 528 U.S. at 758 (quoting *Cruzan* v. *Director, Mo. Dep't of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring)).

That the standard applied in this case was formulated in the first instance by a state trial court does not in any way undermine its legitimacy. Reasonable limitations on the *Faretta* right, such as the imposition of standby counsel or the rejection of "hybrid" representation, have often been imposed as an exercise of a court's supervisory power rather than through prospective legislation or rulemaking. See *McKaskle*, 465 U.S. at 183, 184; cf. *Smith*, 528 U.S. at 278-279 (upholding California's judicially developed procedure for handling criminal appeals that the appellant's counsel considers frivolous).

It is true that the trial court does not have the last word on the standard to be employed in Indiana. The Supreme Court of Indiana did not speak to that issue, because it thought the trial court had erred as a matter of *federal* law by applying any standard other than *Dusky*. If the state supreme court wishes to refine what

standards for self-representation are permissible as a matter of *state* law, it can do so in a future case, or (to the extent it deems the issue properly preserved) on remand. But this Court could take an important step by making clear to state courts and legislatures that the federal Constitution does not preclude States from treating capacity for self-representation separately from capacity to stand trial.

CONCLUSION

The judgment of the Supreme Court of Indiana should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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