No. 07-208

IN THE
Supreme Court of the United States

STATE OF INDIANA,
Petitioner,

v.

AHMAD EDWARDS,
Respondent.

On Writ of Certiorari to the Supreme Court of Indiana

REPLY BRIEF FOR 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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The trial court required Ahmad Edwards to have counsel at his trial on charges of attempted murder and aggravated battery because Edwards could not communicate with the court or the jury in a reliably coherent way, orally or in writing. Given Edwards's profound and obvious limitations, the court determined that counsel was necessary to ensure a fair and meaningful trial, even if at the expense of Edwards's abstract autonomy interests. In reaching this conclusion, the trial court correctly balanced the competing interests at stake, just as this Court said should happen with self-representation demands in *Martinez v. Court of Appeal*, 528 U.S. 152, 161 (2000) and *McKaskle v. Wiggins*, 465 U.S. 168, 173-74 (1984). The trial court therefore properly employed a competency standard that exceeds the standard required for standing trial articulated in *Dusky v. United States*, 362 U.S. 402, 402 (1960).

Edwards's central thesis in response to this argument is that *Faretta* creates an absolute right of self-representation at trial and that the State is attempting to "parcel" that right based on skills-based classifications. Edwards Br. 14. Listening to Edwards, one might conclude that the State seeks to require criminal defendants to have minimal education or training before allowing them the right of self-representation. Far from drawing any such general classifications, the State seeks only a narrow rule that would permit trial courts to require counsel when a criminal defendant is competent under *Dusky* yet cannot represent himself because he cannot reliably communicate in a coherent way with the court or the jury. Such a limited allowance

would hardly grant "unfettered discretion whether to recognize the right" of self-representation for mentally impaired criminal defendants. Edwards Br. 13.

The Court has never treated the *Faretta* right as absolute. Indeed, members of the Court have questioned the continuing validity of *Faretta* even as far as it goes. Accordingly, whether because *Faretta* already permits it, or whether because *Faretta* must be modified or even overruled, the Sixth Amendment permits state courts to employ a higher standard of competency for representing oneself than for standing trial.

I. Because the Right of Self-Representation is Not Absolute, States May Adopt a Higher Standard of Competence for Self-Representation than for Standing Trial

The Court's precedents amply demonstrate that the right of self-representation, like the right to first-choice trial counsel, may be limited when outweighed by important fair-trial concerns. Edwards superficially concedes that the right is not absolute, Edwards Br. 14, 29, but his central argument nonetheless is that, aside from particular exceptions expressly created therein, *Faretta* recognizes a right that absolutely cannot be overcome by countervailing state interests. Edwards Br. 36-43. The exceptions noted in *Faretta*, however, are not *sui generis*. They are based on a balancing-of-interests principle that applies here.

1. In *Faretta* itself, the Court stated that the right to self-representation is not absolute. *See Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). Among other things, "[t]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Id.* Thus, *Faretta* did not treat the particular exceptions to the right it described (when the defendant disrupts the courtroom, abuses the process, or attempts to manipulate the proceedings such as by causing delay, *id.*) as following from isolated incidents of history. Rather, those exceptions reflect a general principle that important state concerns for fair and dignified trials can override a demand for self-representation. Certainly, nothing in *Faretta* indicates that the limits the Court observed there were the *only* permissible limits on the right of self-representation.

The Court has continued to recognize limits on self-representation after *Faretta*. In *Martinez*, the Court reminded that "the *Faretta* opinion recognized [that] the right to self-representation is not absolute." *Martinez v. Court of Appeal*, 528 U.S. 152, 161 (2000). And while Edwards claims that *Martinez* is irrelevant because it addressed the right to self-representation on appeal rather than at trial, Edwards Br. 30-31, the Court nonetheless observed that "[e]ven 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." *Id.* at 162.

Furthermore, in *McKaskle*, where the Court permitted the imposition of standby counsel, the

Court did not simply rely on *Faretta*'s recognition that standby counsel may be appropriate in some circumstances. *See McKaskle v. Wiggins*, 465 U.S. 168, 178-79 (1984). Instead, the Court expressly examined standby counsel's precise role in the case and balanced the individual defendant's interest in self-representation against the societal and institutional interests in ensuring fair adversarial proceedings. *See id.* at 183-84. The *McKaskle* analysis thereby demonstrates that it is consistent with *Faretta* for a court generally to balance the government's fair-trial interests against the self-representation rights of the accused in determining the proper scope of counsel's role. Logically then, full-blown representation by counsel may be justified where, as here, the defendant has amply demonstrated his inability to conduct a defense *at all*.

2. Edwards argues that *Faretta* must necessarily bestow an inviolable right of self-representation on a defendant who cannot communicate coherently because "the history surveyed by the Court in *Faretta* yielded *no* examples of imposing unwanted counsel on the ground that the defendants' abilities were limited." Edwards Br. 21. It is equally true, however, that *Faretta* cited *no* historical examples where a defendant was entitled to self-representation despite the availability of counsel. *See Faretta*, 422 U.S. at 815-17; *see also Martinez*, 528 U.S. 156-57 & n.4. Given that *Faretta* premised the right of self-representation on the historical practice of *denying* counsel in the first place, it is wholly unremarkable that there would be no cases where the court *imposed* counsel in this particular situation.

What *is* noteworthy, however, is that, in the era when the right to counsel depended on individualized determinations of need, the Court required benefit of counsel for legally competent defendants of dubious mental capacity. In *Massey v. Moore*, 348 U.S. 105, 108 (1954), where the Court questioned whether a convicted *pro se* defendant was competent at trial, the Court allowed that "[o]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." It also expressly observed that "[w]e have not allowed convictions to stand if the accused stood trial without benefit of counsel and yet was so unskilled, so ignorant, or so mentally deficient as not to be able to comprehend the legal issues involved in his defense." *Id.*

Cases such as *Massey*, which is undeniably part of the historical tradition giving rise to the right of self-representation, are relevant for determining the scope of that right. Accordingly, a defendant's competence beyond the bare competence to stand trial must at some level be a legitimate (even though not compulsory, *see Godinez v. Moran*, 509 U.S. 389, 402 (1993)) consideration for state courts. *See*, *e.g.*, *Cappetta v. State*, 204 So.2d 913, 918 (Fla. Dist. Ct. App. 1967), *rev'd on other grounds*, 216 So.2d 749 (Fla. 1968) (cited in *Faretta*, 422 U.S. at 813 n.9, and evaluating denial of self-representation in part according to whether "unusual circumstances" such as "mental derangement" exist); *see also* CJLF Br. 7-14 (describing how, in lower court cases comprising the "consensus" view—and upon which *Faretta* relied—courts had broad discretion for rejecting self-representation demands).

3. Nor does the holding or the logic of *Godinez* foreclose the ability of States to impose a higher standard of competence on the exercise of the right of self-representation. Edwards acknowledges that "*Godinez* held that due process does not *mandate* a higher competency standard to plead guilty or waive counsel than it does to stand trial." Edwards Br. 24. But he then insists that "the Court's reasoning in reaching that conclusion makes clear that the Sixth Amendment likewise does not *permit* a higher standard for waiving counsel." Edwards Br. 24. This is not so.

In *Godinez*, the Court was speaking of "competency" only in the sense required by the Due Process Clause. *See Godinez*, 509 U.S. at 402. For that purpose, the Court said, a defendant that is competent to stand trial is competent to waive counsel and plead guilty. The Court did not hold, however, that the Due Process Clause either (1) requires the State to accept such a waiver and plea or (2) forbids a State from imposing a higher standard for accepting them. *See id.* The Court made it clear that nothing in its holding even implied an answer to those two issues when it pointedly instructed that "States are free to adopt competency standards that are more elaborate than the *Dusky* formulation." *Id.*

The lesson that Edwards erroneously ascribes to *Godinez* is that the right of self-representation is absolute except insofar as it conflicts with the guarantees of the Due Process Clause. *Godinez* nowhere says that, however, and generally speaking, the government's ability to regulate constitutionally protected rights (to which Edwards draws his own

analogy, Edwards Br. 36) is not limited to circumstances where other, conflicting rights of the individuals being regulated have higher priority. Rather, the State's other important and compelling countervailing interests are often sufficient to override exercise of a protected right. *See*, *e.g.*, *Deck v. Missouri*, 544 U.S. 622, 624 (2005) (due-process right not to be shackled may be overcome by government interest in security); *Sell v. United States*, 539 U.S. 166, 179-80 (2003) (due-process right to refuse medication must give way to the government's interest in restoring the defendant's competence to stand trial in certain circumstances).

This is no less true concerning Sixth Amendment rights. *See* U.S. Br. 12-13 (citing *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Michigan v. Lucas*, 500 U.S. 145, 149-51 (1991); *Pennsylvania v. Ritchie*, 480 U.S. 39, 60-61 (1987); *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)). With respect to the right of self-representation itself, courts may require counsel when the defendant is disruptive in order to protect the integrity of the trial, or when acceding to the demand would delay the trial. *See Faretta*, 422 U.S. at 835 n.46 (explaining that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct"); *see also McKaskle*, 465 U.S. at 173 (finding that the trial court can revoke a defendant's right of self-representation if he is unable "to abide by rules of procedure and courtroom protocol").

Equally significant, trial courts have *discretion* whether to deny defendants' demands in such circumstances. For example, in *Wheat*, the trial

court was permitted to impose, in the name of fairness, a procedural rule that due process does not require, even though a Sixth Amendment right was implicated. *See Wheat v. United States*, 486 U.S. 153, 163 (1988) (stressing that trial courts have wide-ranging discretion whether to accept conflict waivers by criminal defendants); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 2565-66 (2006) ("We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness . . . .").

Accordingly, the logic of *Godinez* does not foreclose States from applying, for the purpose of promoting a fair trial, a higher standard of competency for self-representation than for standing trial.

4. Edwards also argues that, if the State is going to raise the competence bar for self-representation, it must also raise the bar for standing trial. Edwards Br. 46. Since all defendants are entitled to counsel, however, there is no justification for compelling the State to forfeit its right to pursue prosecution in many cases (by raising the standard for competence to stand trial to the *pro se* representation level) in order to prevent some trials from descending into farces simply because some incoherent defendants insist on representing themselves.

Moreover, this alternative ultimately might prove entirely self-defeating for a defendant who cannot meet the higher standard and whose trial is therefore deferred. Such a defendant, particularly one charged with violent crimes, may ultimately be the subject of civil-commitment proceedings

resulting in indeterminate confinement. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972). At such a proceeding, the defendant would not be protected by the Sixth Amendment at all. *See Vitek v. Jones*, 445 U.S. 480, 494-97 (1980) (listing minimal due-process rights required at civil-commitment proceedings).

II. The State's Proposed Rule is a Permissible Higher Competency Standard Because Coherent Communication is Necessary for Exercising the Right of Self-Representation

The rule proposed by the State would enable trial courts to protect an incoherent defendant's primary decision to have a trial from being undermined by that defendant's secondary decision to represent himself at that trial. It is designed to ensure that *pro se* defendants have the most basic skills necessary to effectuate their decision to try their own cases. Edwards protests that the State's proposed rule would impermissibly prohibit the right of self-representation "completely" to a "class of defendants." Edwards Br. 29. The coherent-communication rule, however, has its roots in pre-*Gideon* cases requiring fact-sensitive, individualized determinations of need, not in broad classifications based on assumptions or stereotypes. It represents a narrowly tailored exception to the right of self-representation for circumstances where the defendant cannot, in the most basic functional terms, actually do what self-representation presumes he can do.

1. Edwards asserts that, in general, a trial is better than a guilty plea for arriving at the truth, and thus for serving the ends of justice and fairness. Edwards Br. 37. This is surely true if there is adversarial testing of the evidence, either as to its legitimacy or sufficiency. *See Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding."). Yet all that matters for Edwards is that the defendant has an "*opportunity* to test the prosecution's case." Edwards Br. 38. He says that the State has no legitimate interest in whether the defendant has "*actually exercised* his various defense rights." Edwards Br. 38. And he describes a system where an incoherent defendant's self-representation demand is denied out of concern for achieving just results as "inquisitorial." Edwards Br. 37.

Given that the roots of the right at stake here lie in the inquisitorial practice of imposing self-representation, *see Faretta*, 422 U.S. at 823-24, the criticism that denying self-representation in limited circumstances is itself "inquisitorial" is particularly difficult to follow. After all, the entire point of the adversarial system is to "convict[] the guilty and acquit[] the innocent." Edwards Br. 37; *see Herring v. New York*, 422 U.S. 853, 862 (1975). Since *Gideon*, the Court has understood competent defense counsel to be a necessary component of preventing trial by inquisition. *See Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). The Court has held to this principle even in the wake of *Faretta*. *See*, *e.g.*, *Martinez v. Court of Appeal*, 528 U.S. 152, 162 (2000). It would be no more "inquisitorial" to deny self-representation

here than it was to deny first-choice counsel (based on an overriding concern for fairness) in *Wheat*.

Edwards essentially argues that an incoherent defendant's decision to proceed *pro se* must be treated as if the defendant has, after weighing the competing values, opted to purchase the benefits of self-representation at the cost of his right to be heard at trial. There is, however, no reason to compel courts to infer such an extreme impulse on the part of all incoherent criminal defendants who wish to proceed *pro se*. Certainly that does not appear to have been Edwards's own prevailing view at the time of trial. He amply demonstrated his desire to advance his cause by means of communicating with the court, notwithstanding his inability to do so in a reliably coherent way.

The State's proposed rule relates directly to the basic functional demands that having a trial necessarily places on the defendant. Even from a defendant's perspective, there is no legitimate point in having a trial if there is no desire or intention to be acquitted. Thus, it cannot be the case, as Edwards suggests, that the only party to a trial inherently interested in persuading the court or jury of something is the government. Edwards Br. 37. The purpose of a trial is for *both* sides to attempt to persuade the factfinder that they are entitled to win. For a defendant, that is true even if it means only taking the position that the government has not met its burden. But the point of the trial is lost—or at least a trial court may decide as much—if evidence suggests that the defendant may be functionally incapable of taking even that minimal position. State's Br. 33-34; *cf. United States v. Farhad*, 190

F.3d 1097, 1105 (9th Cir. 1999) (Reinhardt, J., concurring) (*pro se* defendant asks jury to find that the government *had* met is burden).[1]

Edwards argues that, assuming the jury is properly instructed, the very existence of the reasonable-doubt standard ensures a meaningful trial even for a *pro se* defendant incapable of arguing coherently that the government has failed to meet its burden. Edwards Br. 41. That is certainly true for purposes of meeting the Due Process Clause threshold, but it is hard to see why the abstract notion of a defendant's personal autonomy is so powerful that it precludes the State from insisting that the defense be functionally capable—at least minimally so—of actuating the defendant's other (far more likely) basic trial choices, such as whether to cross-examine witnesses and to make arguments to the jury.[2]

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[1] Contrary to Edwards's suggestion, Edwards Br. 37-38, this observation is not undermined by *Florida v. Nixon*, 543 U.S. 175, 190-92 (2004), where counsel was deemed constitutionally effective even though he conceded guilt at trial in the hope of creating a more sympathetic audience for his penalty-phase arguments. The trial was not rendered useless by counsel's tactics. Rather, those tactics laid the groundwork for a reasonable penalty-phase strategy that ultimately required substantial advocacy to the jury.

[2] In fact, Edwards stresses that court-appointed counsel, who argued lack of intent to kill, thwarted his ambition to argue self-defense, a strategy that would have required actual communication to the jury, not simple reliance on a reasonable-doubt jury instruction. Edwards Br. 29 n.7; J.A. 525a. Edwards's autonomy interest in pursing this

The worst that can be said is that under the State's proposed rule there may be a few cases where the trial court unnecessarily precludes self-representation by an incoherent defendant who would choose to depend entirely on a reasonable-doubt instruction for his defense. Even that may never occur, however, given the fact-intensive inquiry that the State advocates. Regardless, trial courts should be allowed to ensure that there is a point to having a trial for those (surely far more numerous) incoherent defendants whose *pro se* defense would include actually speaking or writing to the court or jury. At the very least, a trial court should be permitted to err on the side of insisting on counsel to ensure more concrete, functional protection for the defendant at trial, rather than err on the side of vindicating the far more abstract notion of individual autonomy embodied in the right to self-representation.

2. The coherent-communication principle is also highly limited. It would not, for example, justify a trial court's denial of self-representation to a defendant who happens to suffer a mental impairment but who can nonetheless reliably communicate in a coherent way. Further, it would not justify a trial court's insistence that a *pro se* defendant make an opening statement, examine or cross-examine witnesses, assert objections, or make a closing argument. Assuming a defendant can communicate coherently, each of those decisions depends entirely on the defendant's individual

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defense would have been nullified by his patent inability to communicate it to a jury in any coherent way.

judgment, which is what *Faretta* protects. The State is not proposing a standard that turns on "feeble intellect." *See Faretta*, 422 U.S. at 833-34 & n.43 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). Where the defendant demonstrably cannot actuate his judgment to exercise those rights at trial, however, the trial court is justified in insisting that the defendant be represented by someone who can, regardless of what trial rights the defense ultimately exercises.

Furthermore, the State's coherent-communication test would not, as suggested by Edwards, permit trial courts to deny self-representation to defendants with "speech impediments, physical disabilities, and limited English proficiency or educational attainment" if their competency is not otherwise at issue. Edwards Br. 47-48. The State is merely urging a standard similar to, and therefore no more open to discriminatory abuse than, the *Dusky* standard, where courts inquire whether the defendant can communicate with counsel.

3. The coherent-communication standard, while not a constitutionally guaranteed component of due process, has roots in the historical understanding of "competency" when self-representation was commonly required. In his *Godinez* concurrence, Justice Kennedy, joined by Justice Scalia, cited two such pre-*Gideon* cases (and a treatise) suggesting that the common-law competency standard asked whether the defendant could actually carry out his defense. *See Godinez*, 509 U.S. at 406-07 (Kennedy, J., concurring) (citing *Hunt v. State*, 27 So.2d 186, 191 (Ala. 1946) ("The broad question to be

determined then is whether the defendant is capable of understanding the proceedings *and of making his defense*, and whether he may have a full, fair and impartial trial.") (internal citations omitted) (emphasis added); *Freeman v. People*, 4 Denio 2, 24-25 (N.Y. 1847) ("If . . . a person arraigned for a crime, is capable of understanding the nature and object of the proceedings going on against him; if he rightly comprehends his own condition in reference to such proceedings, *and can conduct his defence in a rational manner*, he is, for the purpose of being tried, to be deemed sane."). Accordingly, the State's proposed standard arises from the same tradition that justified the right of self-representation in the first place.

Apart from this historical link, the proposed coherent-communication rule fits with the context in which it would be used. The question of competency naturally entails the question, "competency to do what?" *See* APA Br. 17-33; *cf. Panetti v. Quarterman*, __ U.S. __, 127 S. Ct. 2842 (2007); *Medina v. California*, 505 U.S. 437, 448 (1992). In *Dusky*, the Court asked the question in the context where making a defense meant making critical decisions and consulting with counsel. *See Dusky v. United States*, 362 U.S. 402, 402 (1960). In *Godinez*, the Court abjured a higher due-process standard for waiving counsel because making that choice required nothing more than the mental ability *Dusky* already ensured. *See Godinez*, 509 U.S. at 399. However, if the State may go beyond the due-process minimum and employ a heightened standard of competency for self-representation, it must also be permitted to calibrate that standard based on the actual demands

of exercising the right—as the common-law authorities themselves contemplated.

In this regard, it is important to note that, notwithstanding the premise that the *Dusky* standard is a proxy for pure mental capacity, the Court itself recognizes that *Dusky* is significant in part because it provides assurance that a defendant will have some functional ability to confer with counsel—an act necessary to vindicate any number of other rights. *See*, *e.g.*, *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996) ("For the defendant, the consequences of an erroneous determination of competence are dire. Because he lacks the ability to communicate effectively with counsel, he may be unable to exercise other 'rights deemed essential to a fair trial.'"). The State merely seeks the flexibility to create a standard ensuring the same type of minimally functional competency for *pro se* trials.

4. Edwards suggests that, rather than denying self-representation, trial courts confronted with incoherent defendants should merely impose standby counsel as a supposedly more narrowly tailored alternative. Edwards Br. 47. Standby counsel would hardly be workable in a situation such as this. Among other problems, as the United States has observed, the intervention of standby counsel may well cause an incoherent shift in defense strategy mid-trial. U.S. Br. 22. Indeed, given the obvious inconsistencies between Edwards's preferred self-defense theory and his counsel's lack-of-intent theory, J.A. 525a, this might have been a serious problem in this case had Edwards's counsel initially been relegated to a standby role, only to intervene as the trial progressed.

More fundamentally, even as understood in *McKaskle*, court-imposed standby counsel can play only a limited role if the defendant's right of self-representation is to remain intact. *See McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984). That is, the *pro se* defendant must still be permitted to control the organization and content of the defense, make motions, argue points of law, participate in voir dire, question witnesses, and address the court and jury at appropriate points in the trial. *See id.* Indeed, a trial court that allows too much substantive involvement by standby counsel—particularly in the jury's presence—commits reversible error. *See id.* at 177 n.8, 181. As the Court stated in *McKaskle*, "the objectives underlying the right to proceed *pro se* may be undermined by unsolicited and excessively intrusive participation by standby counsel." *Id.* at 177.

All of the functions that a *pro se* defendant must be permitted to perform on his own require some minimal ability to communicate with the court and jury. Edwards's inability to maintain focus and communicate coherently would likely have rendered him unable to perform any of these functions in a comprehensible manner. *See* U.S. Br. 22-23. Therefore, appointment of standby counsel would not have improved the situation in this case, much less would it have been able "to assure that trial proceedings are fair and orderly and that verdicts are accurate" given Edwards's problems with focus and incoherence. Edwards Br. 46. Standby counsel could have achieved that goal only by taking such an active and substantive role in the defense that the very right of self-representation that Edwards seeks to preserve would have been defeated.

III. The Evidence is Overwhelming that Edwards Could Not Communicate Coherently

A. Edwards demonstrated his incoherence throughout the proceedings

Edwards suffered severe communication deficiencies that existed both before and after he was declared competent to stand trial. According to the doctors who examined him, Edwards's communication problems existed somewhat independently from his schizophrenia and delusions, which were the psychoses that rendered him incompetent for trial. In light of Edwards's precarious baseline competence for trial, the physicians' independent diagnoses of Edwards's expressive language disorder, and the trial court's extensive opportunities to evaluate Edwards in court, evidence of Edwards's communication difficulties prior to treatment was surely relevant to the judge's evaluation of whether Edwards could communicate coherently with the jury.

1. From the first evaluation, Dr. Schuster diagnosed Edwards separately with delusions and with expressive language disorders. J.A. 26a. This latter disability was exhibited "by his patterns of using erroneous and inappropriate sentences both verbally and in writing, but more marked in writing." J.A. 26a. Dr. Masbaum initially found an inability to communicate, but not delusions. J.A. 356a. "He would answer my initial questions that I would ask him. And then I follow up with questions of clarification. He would then ramble and avoid

answering the questions." J.A. 356a. Dr. Trexler similarly made a separate finding that Edwards decompensated during the course of conversations. J.A. 37a. In his testimony, he explained that, apart from Edwards's schizophrenia and delusions, testing showed Edwards to have a "severely impaired" "working memory," which causes problems with mental focus and thought regulation. J.A. 359a-60a.

After Edwards was treated for schizophrenia, Dr. Robert Sena pronounced Edwards competent to stand trial because the schizophrenia and delusions had abated. J.A. 234a-35a. With those particular disorders under control, Edwards had the capacity to understand the factual basis for the charges against him and to assist counsel with the defense. J.A. 234a-35a. It is also true that Dr. Sena found that Edwards's "thought processes are no longer disorganized" and that he could indeed communicate coherently. J.A. 231a. Significantly, however, Dr. Sena made those comments in the narrow context of evaluating how Edwards might communicate with counsel, not how Edwards might fare over an extended period in an unstructured setting. J.A. 228a-29a.

It was not long before Edwards demonstrated once again that he could not communicate coherently. A few months after his return from treatment, Edwards wrote two letters to the trial judge inquiring into the status of pending motions. J.A. 241a-42a. The first letter briefly stated, "For days I have remained alert for the honor to be released for the execution of a right a 2001 discharge claim drew. Thank you for the moment." J.A. 241a. The second letter included a statement saying,

"predict my future disgraced by the court to motion young Americans to gather against crime." J.A. 242a. Subsequent writings provide numerous additional examples of incoherent communication following treatment. State's Br. 15-17, 45-46.

Edwards's writings around the time of the trials—11 and 17 months following Dr. Sena's report, respectively—are particularly relevant. They show that Edwards's thought processes, or at least his attempts to communicate those thoughts, became especially disorganized when Edwards attempted to present compound statements and arguments. J.A. 246a-51a, 258a-62a, 268a-78a, 283a, 300a-04a, 452a-53a. For example, Edwards attempted to explain his motivation for proceeding *pro se*:

> Petitioner has debated forthright, in fiery only one task, of the goal driven work movements with over, 33 strokes, communications needed for coordinating trial, as petitioners defence is not seen eye to eye particularly by equaled attorney not prominent to international law sustenance to this cause.

J.A. 301a.

Edwards's inability to convey his thoughts in writing underscore his general inability to impart cogent thoughts. J.A. 527a (trial court observing that "[s]everal of the reports refer to rambling writings as an indication of an inability to stay focused"). Furthermore, in representing himself at trial Edwards may well have needed to engage in written communication with the court, even if only

to proffer jury instructions. He certainly engaged in voluminous written advocacy prior to trial.

2. Edwards's oral statements to the Court following the Sena report also show disorganized thought processes, an impairment repeatedly observed during the prior forensic interviews. J.A. 20a, 37a, 219a, 351a-60a, 388a-90a, 415a-16a. During the June 27, 2005, hearing regarding his first request to proceed *pro se*, Edwards had profound difficulty expressing the nature of his dissatisfaction with his attorney:

> **MR. CUSHING:** Your Honor, I spoke with my client and my client wishes to address the court with regard to proceeding pro se.
>
> **THE COURT:** Is that what you were trying to interrupt about?
>
> **MR. EDWARDS:** Yes sir, yes sir. I just, I wanted to get it off, get it off of on the record, actually.
>
> **THE COURT:** Make your record.
>
> **MR. EDWARDS:** Your Honor, I actually do have a statement. Your Honor, the, determining the value of the property of the discovery that I received, a general judgment has come across for me to make and it's actually needing to be made upon the court, the court needs to make the decision. The specific findings and the control of the discovery is, is able for me to handle but there's an exception, it's a noble one and it applies to the review of

> the information and however it may seem, it is a standard to me. It's real important because it deals with my life, Your Honor, and it, it seems as if for the past six years preparing for this case, attorneys have isolated me from the material or from the discovery and it troubles me to think that I won't make a good case or I won't have a good trial of this. Your Honor, basically it's, it's, either you can give me a, another attorney or I'll have to go pro se with this because I'm, I'm believing that the changes that need to be made with the case are going to cause for me to suffer with the lawyer, Dirk Cushing.
>
> **THE COURT:** What is he not doing?
>
> **MR. EDWARDS:** Well, we, we've only had strict tests with the discovery for about 40 minutes. Now, that's, that's –
>
> **THE COURT:** What do you mean by strict tests?
>
> **MR. EDWARDS:** Well, the tests to, to review the, the, some of the laws, memorandum (sic) warnings, some of the evidence, some, the difference forms of evidence, the, the contradicting statements, the cross examinations, the affidavits, some of the, the –

J.A. 508a-09a.

Edwards contends these statements, or at least selected portions of them, are "lucid," Edwards Br. 52, but the only thing clear is that the trial court

would have had no idea what Edwards was talking about had Edwards's counsel not introduced the statement as being on the subject of proceeding *pro se*. Nor would a jury listening to Edwards in real time, rather than reviewing a cold transcript, have understood whatever point Edwards was trying to make. To be sure, Edwards does manage to incant the words "*pro se*" late in his speech, but this at most demonstrates that Edwards was able to weave brief coherent statements with lengthier incoherent ones. It does not overcome the overwhelming evidence that Edwards was incapable of sustained coherent communication.

Thus, while Dr. Sena's report indicates that Edwards's treatment for schizophrenia lessened his oral-communication difficulties, these problems in fact persisted, or at least recurred in very short order.

3. Edwards complains that the State's coherent-communication test omits any requirement for expert testimony. Edwards Br. 51. The trial judge in this case, however, actually did rely on expert reports concerning Edwards's neurological examinations, including Dr. Sena's conclusions that Edwards still suffered from schizophrenia and "that Mr. Edwards acknowledged his need for counsel[.]" J.A. 527a. Another expert opinion validating the trial court's judgment as to Edwards's capacity for coherent communication was unnecessary. The Court has never said that expert testimony is critical for making a competency determination under *Dusky*. Trial judges may easily, through simple observations, evaluate whether a defendant has a baseline ability to communicate in a coherent way

with the jury or the court itself. Where, as here, the evidence amply demonstrates a defendant's inability to communicate with the jury in a reliably coherent way, expert testimony is not necessary to validate the obvious.

B. The trial court in effect employed the coherent-communication rule

The trial court's denial of self-representation can only be understood as employing essentially the test the State now formally proposes. The court found that each medical report indicated delusions or schizophrenia and "[s]everal of the reports [also] refer to rambling writings as an indication of an inability to stay focused." J.A. 527a. It concluded, "I think [self-representation] requires abilities that exclude the doctors' findings, if you will." J.A. 527a. Based on these observations, the trial judge stated, "I'm going to carve out a third exception [to *Faretta*] and if I'm wrong . . . and there's a conviction, we'll just try this case again." J.A. 527a.

The import of the judge's finding is that Edwards has mental problems that do not preclude him from meeting the minimal *Dusky* standard, but that disable him from presenting a defense on his own. The court relied on the doctors' reports documenting Edwards's continuing disorganized thought process and "the voluminous writings shared with the Court by [Edwards]" that "key[] into what some of the doctors were saying[.]" J.A. 526a-27a, 529a-30a. Accordingly, there can be little doubt that, had it expressly invoked the standard the State advocates here as a formal legal test, the trial court would have

reached the same conclusion and made substantially the same factual findings that it did. The evidence before the trial court amply justified the decision requiring Edwards to have counsel on the grounds that Edwards could not communicate with the court or jury in a reliably coherent way.

IV. Alternatively, *Faretta* Should Be Overruled

1. Supreme Court Rule 14.1(a) says that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." The issue whether *Faretta* should be overruled is fairly presented by the question presented in this case.

The question presented here—which the Court formulated itself—is whether States may adopt a higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial. *Faretta*'s continued validity is "fairly included" in that question because one reason that the answer might be "yes" is that *Faretta* should be overruled. That is, if criminal defendants have no Sixth Amendment right to self-representation, then certainly States may adopt a higher standard for determining when defendants may represent themselves. *Cf. Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 56 (2006) ("[T]here can be little doubt that granting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says.").

Furthermore, this is not a case like *Alabama v. Shelton*, 535 U.S. 654, 660 n.3 (2002), where the invitation to overrule two cases did not arise until the respondent's brief. The harm there was that, because the respondent did not speak up at the certiorari stage, the petitioner had only its reply brief to respond to the argument—and amici supporting the petitioner were precluded from addressing the *stare decisis* issues altogether. *See Shelton*, 535 U.S. at 660 n.3. That problem is not present here, where the State urged in the very first merits-stage brief that the question presented may be answered affirmatively by overruling precedent.

Furthermore, as of the Court's decision in *Martinez*, several Justices were openly questioning the continued vitality of *Faretta*. *See* Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. Rev. 621, 665 (March 2005) (calling it "encouraging that a majority of the current justices appear ready to overturn *Faretta*"). Consequently, it can hardly come as a surprise that a case presenting a question about the right of self-representation might be an occasion to reconsider whether such a right even exists. *Cf. Procunier v. Narvarette*, 434 U.S. 555, 559 n.6 (1978) ("[O]ur power to decide is not limited by the precise terms of the question presented.").

If the Court concludes that, as it stands, *Faretta* requires answering the question presented in the negative, its analysis will not be complete unless it also answers the question that implicitly remains—whether *Faretta* ought to be overruled.

2. Edwards argues that there is no reason to overturn *Faretta* because there is no new historical evidence demonstrating that the right of self-representation does not exist. Edwards Br. 56-57. The reasons for overturning *Faretta*, however, have nothing to do with finding new historical evidence and everything to do with drawing the proper lessons from the evidence already on the record. State's Br. 51-53. *See Faretta*, 422 U.S. at 843-45 (Burger, C.J., dissenting); *id.* at 846 (Blackmun, J., dissenting); *see also* 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, 596 (1996).

In addition, *Faretta* has indeed not "been gathering dust" since it was decided. Edwards Br. 57. Instead, it has drawn substantial criticism and questions not only from commentators but also from several Justices. *See Martinez v. Court of Appeal*, 528 U.S. 152, 156-57 (2000); *id.* at 164 (Kennedy, J., concurring) (explaining that the majority opinion "cast[s] doubt upon the rationale of *Faretta*"); *id.* (Breyer, J., concurring) (expressing sympathy for trial judges confronted with the issue of self-representation when it "conflicts squarely and inherently with the right to a fair trial"); *Godinez v. Moran*, 509 U.S. 389, 416-17 (1993) (Blackmun, J., dissenting) (criticizing *Faretta* because it "contravenes fundamental principles of fairness" to try without counsel a defendant who is "utterly incapable of conducting his own defense").

Accordingly, there are ample bases for questioning whether *Faretta* was correctly decided.

3. Finally, far from building on *Faretta*, the development of Sixth Amendment doctrine over the past 30 years only undermines it. First, Edwards fails to identify any other Sixth Amendment doctrines founded on the holding of *Faretta*. Edwards Br. 57. The Court cited *Faretta* in *United States v. Vonn*, 535 U.S. 55, 73 n.10 (2002)—where the defendant was represented by counsel—only in a passing reference to the implications of *Faretta* for an uncounseled defendant who pleads guilty. It cited *Faretta* in *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979), only to explain (again in passing) how *Faretta* was not contrary to *Singer v. United States*, 380 U.S. 24, 34-35 (1965). And the Court's recognition of the Sixth Amendment right to testify, which the Court in *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), said is "more fundamental to a personal defense than the right of self-representation," preceded *Faretta*, so the Court cannot be said to have used *Faretta* in building this doctrine. *See Faretta*, 422 U.S. at 819 n.15 (citing *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972); *Harris v. New York*, 401 U.S. 222, 225 (1971); *Ferguson v. Georgia*, 365 U.S. 570 (1961)).

Second, the growth of right-to-counsel doctrine since *Faretta* has destabilized the basis of the right to self-representation. In particular, the advent, in *Strickland v. Washington*, 466 U.S. 668 (1984), of a just-results effective-assistance-of-counsel standard has eaten away *Faretta*'s defendant-autonomy rationale. State's Br. 58-61. In fact, *Strickland*'s guarantee that criminal defendants will be represented by counsel who demonstrate some minimum level of competency at trial substantially undermines any concern that self-representation is

necessary to avoid utterly inept counsel. State's Br. 41; 58-61.

Edwards counters that, even though the Court did not recognize a right to minimally skilled counsel until well after *Faretta*, the development of that right was well underway when *Faretta* was decided, and the right to minimally effective assistance of the type required by *Strickland* was in fact already the norm. Edwards Br. 58-59. Anthony Faretta, however, demanded self-representation precisely because court-appointed counsel in California was held to a meaningless standard of performance. *See Faretta*, Brief for Petitioner at 23-24, *available* at 1974 WL 174861. Hence, a prevailing formalistic standard for effective assistance of trial counsel was squarely before the Court as a rationale for finding a right of self-representation. *Strickland* negates that rationale, and the Court's premise that the Sixth Amendment is about achieving "just results," *Strickland*, 466 U.S. at 685, is fundamentally at odds with a Sixth Amendment right that supposedly vindicates abstract concerns for defendant "autonomy" rather than substantial justice.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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