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

BRIEF FOR THE RESPONDENT

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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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STATEMENT

In July 1999, respondent Ahmad Edwards was criminally charged following an incident in which it was alleged that, when resisting apprehension by a security guard for shoplifting a pair of shoes, he drew and fired a gun, injuring an onlooker. Pet. App. 18a-19a.

Edwards's mental status was the subject of a series of inquiries over the next five years. Although petitioner acknowledged that Edwards suffered from mental illness, it consistently urged that he was competent to stand trial—repeatedly pointing to psychiatric reports describing his condition as improving (though it became clear Edwards was receiving little, if any, psychiatric treatment).

In 2004, the trial court, after rebuffing petitioner's third effort to have Edwards declared competent, remanded him to the care of a state hospital, where, for the first time, he received anti-psychotic medication and other psychiatric care. After that treatment, doctors reported that Edwards's thought processes were "coherent" and that he "communicate[d] very well." J.A. 232a.

Edwards then sought to exercise his right of self-representation, citing fundamental disagreements with his court-appointed counsel. J.A. 532a. It is not disputed that Edwards's decision to waive counsel and proceed *pro se* was timely, knowing, and voluntary. Pet. App. 14a, 24a; Pet. Br. 3. The court nonetheless refused Edwards's request, indicating that he lacked unspecified "abilities" needed for self-representation. J.A. 527a. The Supreme Court of Indiana reversed, holding that denying Edwards self-

representation on that basis violated the Sixth Amendment. Pet. App. 14a.

A. Edwards's Mental Condition And Competency To Stand Trial

1. The First Three Competency Determinations

Following his arrest, Edwards's court-appointed counsel filed a motion requesting a psychiatric examination. J.A. 13a-14a. After considering conflicting psychiatric reports, the trial judge determined in August 2000 that Edwards was not competent to stand trial, J.A. 365a, and committed him to Logansport State Hospital for further evaluation, J.A. 48a-50a.

Edwards remained at Logansport for three months, during which time he received little, if any, medical care. J.A. 56a, 110a. Although Edwards was given Benadryl on an as-needed basis for insomnia, he was not given anti-psychotic medication, J.A. 61a, or any other drugs "routinely given by mental health professionals to treat thought disorders," J.A. 420a, nor is there evidence that he received psychotherapy or counseling.[1] Nonetheless, in spring 2001, Dr. Steven Berger, a staff psychiatrist at the state hospital, pronounced Edwards "free of psychosis, depression, mania, and confusion," and competent to stand trial. J.A. 61a, 64a.

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[1] At a later hearing, Dr. Phillip Coons, a professor of psychiatry at Indiana University Hospital, testified that it was not "valid * * * [to] assume" that a person had received treatment merely because he had been admitted to Logansport. J.A. 475a.

In fall 2001, defense counsel again raised concerns about Edwards's competency, filing a motion expressing doubt that Edwards had actually been treated at Logansport and seeking release of his medical records. Ed.App. 225-227. Two court-appointed psychiatrists filed reports concluding that Edwards was competent to stand trial. J.A. 110a-112a. The trial court convened a hearing, at which the State argued that Edwards was competent to be tried and elicited expert testimony to that effect. J.A. 386a; see also J.A. 393a-394a, 400a (testimony that Edwards possessed the ability to communicate coherently). The State also highlighted the defense expert's conclusions that Edwards's verbal intelligence was in the average range, J.A. 429a-430a, as were his attention and concentration abilities, Ed.App. 248.

After the hearing, the trial judge to whom the case had been reassigned ruled that Edwards was competent to stand trial. J.A. 114a. He found, among other things, that Edwards could comprehend the proceedings and "underst[ood] the legal concepts of guilt and innocence" and "the roles of Judge, Jury, Witnesses, Prosecutor, and Defense Attorney," noting that he had "filed his own motions, *pro se*, since the inception of the case." *Ibid.*

The court agreed to revisit that decision after the defense submitted an expert report concluding that Edwards was incompetent to stand trial and recommending that he be "hospitalized at Logansport." J.A. 164a-165a. At an April 2003 hearing, that conclusion was resisted by the State and by the psychiatrists who had twice earlier opined that Edwards was competent to stand trial. J.A.

186a-189a, 190a-196a, 464a. In November of that year, the trial court vacated its earlier determination that Edwards could be tried and ordered his commitment to Logansport for inpatient treatment. J.A. 206a-211a.

2. Treatment And Restoration Of Competency

Edwards was readmitted to Logansport in January 2004. J.A. 214a. During his six-month stay, he received a "full program of pharmacotherapy, individual and group psychotherapy, counseling from the professional staff of the various disciplines, milieu therapy, and educational classes in Legal Education, Coping Skills, Anger Management, Social Skills, ICST Groups, Men's Issues, and Recreational Therapy." J.A. 216a. Doctors administered Seroquel, an anti-psychotic drug, which Dr. Robert Sena, a staff psychiatrist at Logansport, reported "achieve[d] optimal symptom improvement." J.A. 230a.

Dr. Sena opined that this treatment had "greatly improved" Edwards's mental condition, J.A. 231a, and that Edwards was competent to stand trial, J.A. 235a. In a written report, Dr. Sena concluded that Edwards had made "excellent progress in the reduction/elimination of his psychotic symptoms," J.A. 234a; that he no longer suffered from hallucinations or delusions, J.A. 231a; and that his "thought processes [we]re coherent," J.A. 232a. Dr. Sena specifically stated that Edwards "communicates very well" and that "[h]is speech is easy to understand." *Ibid.*

Dr. Sena also highlighted Edwards's "excellent understanding of courtroom procedures," J.A. 233a, reporting that he had passed the final written

examination in "Legal Education II" by answering 61 out of 75 questions correctly, J.A. 231a; that Edwards could recite the exact charges against him, their felony levels, and the range of possible sentences each carried, J.A. 233a; that he could "appraise the roles of the participants in the courtroom proceedings," *ibid.*; and that he had the capacity to challenge prosecution witnesses realistically and testify relevantly, J.A. 234a. Dr. Sena stated that Edwards's "memory is good in all spheres (immediate, recent, and remote)," J.A. 231a, and he concluded that Edwards had "good communications skills, cooperative attitude, average intelligence, and good cognitive functioning," J.A. 235a.

On the basis of Dr. Sena's report, the trial court ruled Edwards competent to be tried. Pet. App. 3a. His competency to stand trial was not subsequently challenged.[2]

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[2] As petitioner notes (Br. 10-11), Edwards made a number of *pro se* submissions after this final competency determination, some of which were enigmatic or hard to follow. But as even petitioner acknowledges, numerous others show that Edwards was capable of making "coherent" and "logical" written arguments. *Id.* at 47 (so characterizing *pro se* motions for dismissal under Indiana Rule of Criminal Procedure 4(c)); see J.A. 238a, 246a; see also J.A. 270a, 273a (motion to proceed *pro se* arguing that he should "not be required to demonstrate competence for self-representation: *Godinez* v. *Moran*, 509 U.S. 389"); J.A. 288a (seeking dismissal under Indiana's statutory double jeopardy prohibition, Ind. Code Ann. § 35-41-4-3 (West 2004)).

B. Trial Court Proceedings

1. First Pro Se *Hearing*

On the day his June 2005 trial was to commence, Edwards petitioned the court to proceed *pro se*, J.A. 509a, expressing concern that his court-appointed attorney had not spent sufficient time reviewing the case with him and had restricted his access to trial materials:

> 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.

Ibid. Edwards was particularly troubled that his appointed counsel had not spent sufficient time with him to prepare the case properly:

> Well, Your Honor, it's been, we've had a 90-day period to prepare but I've only had three visits from Mr. Cushing in the past, in the past three days. * * * All of the meetings together were about 20 minutes long so we're looking, I'm looking at about 40 to maybe a little bit more, maybe 50 minutes with him with such a large case, and this case is, it's just too enormous for 40 minutes to go forth with a trial today.

J.A. 510a. The trial court acknowledged that Edwards "ha[d] the right to waive counsel and appear pro se" and that his waiver was "knowing[] and voluntar[]y." J.A. 512a.

The trial judge then proceeded to quiz Edwards on various points of law, including his understanding of particular rules of evidence. J.A. 514a-515a. Edwards told the court that he "honestly would need a little bit of time to study [the rules of evidence]" and that he was not prepared because he had expected the court to grant him a continuance to prepare his *pro se* defense. J.A. 515a.

The trial judge then questioned Edwards on the rules of jury selection:

> THE COURT**:** How do, how do you do voir dire?
>
> MR. EDWARDS: Beg your pardon?
>
> THE COURT: What's voir dire, what is voir dire?
>
> MR. EDWARDS: Voir dire is the selection of jury.
>
> THE COURT: And how do we do that?
>
> MR. EDWARDS: Well, there's, it's a striking process. We select the jurors by ten strikes apiece.

J.A. 517a-518a.[3] The trial judge also asked Edwards to identify "the predicate questions that have to be

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[3] Indiana Jury Rule 18(a)(2) provides: "In criminal cases, the defendant and prosecution each may challenge peremptorily * * * ten (10) jurors."

asked before a video tape's admissible." J.A. 519a. Edwards answered:

> Well, video tapes would be under physical evidence and cross examining one of State's witnesses, I would actually have to ask some of the basic essentials of who, what, where, why and when to see if the individual was actually there or if they have any knowledge of the material that they are seeing.

Ibid.

Edwards continued to assert that he wanted to represent himself, but acknowledged that he would need more time to prepare. J.A. 520a. If the court would not grant a continuance, Edwards stated, he would need a lawyer. *Ibid.* The court denied his request for a continuance. *Ibid.* After a two-day trial, the jury found Edwards guilty of theft and criminal recklessness but could not reach a verdict on the more serious charges of attempted murder and battery with a deadly weapon. Pet. App. 3a, 19a.

2. Second Pro Se *Hearing*

Before his December 2005 retrial on those charges, Edwards again petitioned to proceed *pro se*. J.A. 279a-282a. At a hearing on the first day of trial, Edwards explained that he and his attorney disagreed about which of two competing defenses to present:

> MR. EDWARDS: Objection, Your Honor. Objection, Your Honor.
>
> THE COURT: What's your objection?
>
> MR. EDWARDS: My objection is me and my attorney actually had discussed a defense, I

> think prosecution had mentioned that, and we are in disagreement with it. He has a defense and I have a defense that I would like to represent or present to the Judge.
>
> THE COURT: What does that have to do with what I've been saying so far?
>
> MR. EDWARDS: I just wanted to make the record with that objection. This is the most present opportunity that I had. Thank you.
>
> THE COURT: All right.
>
> MR. EDWARDS: Thank you, Your Honor.

J.A. 523a. Without any further inquiry—and without affording Edwards an opportunity to address the court further—the trial court rejected his request. J.A. 527a.

The court did not dispute that Edwards's waiver was timely, knowing, and intelligent. J.A. 527a; see *Sherwood* v. *State*, 717 N.E.2d 131, 136 (Ind. 1999). The trial judge, however, decided to "carve out a third exception" to the self-representation right. J.A. 527a. In his view, self-representation required "more than just an understanding of *Sherwood* fifteen points" and "more than just a plan that doesn't cause a continuance." *Ibid.* Counsel could be imposed, he concluded, based on a defendant's lack of other (unspecified) self-representation "abilities." *Ibid.*

Referencing various psychiatric reports (some dating back to February 2000, J.A. 526a), the court held that Edwards fell within this newly announced "third exception" to the Sixth Amendment right of self-representation. J.A. 527a. "If I'm wrong," the trial judge remarked, "we'll just try this case again." *Ibid.*

At retrial, Edwards was represented by court-imposed counsel, who pursued the line of defense that he—not Edwards—had preferred. 12/19/05 Tr. 75-76. Edwards was convicted on the remaining two counts and sentenced to thirty years' imprisonment. Pet. App. 3a.

C. Appeal

Edwards appealed, arguing that the trial court's refusal to permit him to proceed *pro se* violated the Sixth Amendment. Pet. App. 17a. The State conceded "that the United State's [sic] Supreme Court has specifically held that the same standard of competency applies both to the ability to stand trial, and the ability to represent oneself. *Godinez v. Moran*, 509 U.S. 389, 397-99 (1993)." State C.A. Br. 6. "[U]nder *Faretta*," the State explained, "a trial court's only proper consideration is the defendant's ability to make a knowing, intelligent, and voluntary waiver of counsel, not his ability to competently represent himself." *Id*. at 6-7. Nonetheless, the State urged the court to uphold the trial court's ruling because Edwards's "problematic disconnects with reality, even after being found competent to stand trial, support[ed] this result." *Id*. at 9.

The Indiana Court of Appeals reversed, holding that the trial court erred in refusing Edwards's knowing and voluntary waiver of counsel. Pet. App. 24a. The court explained that *Faretta* gives a defendant "the constitutional right" to proceed *pro se* even though he "will lose the advantage of an attorney's training and experience and may conduct his defense to his own detriment." *Id.* at 21a. The court observed that Edwards had made "multiple timely and

unequivocal requests to represent himself prior to his second trial," and that it was therefore "incumbent upon the trial court to grant his request." *Id.* at 24a.

The State sought review in the Supreme Court of Indiana, again acknowledging that "the United States Supreme Court has recognized a broad right for self-representation and specifically held that the same standard of competency applies both to the ability to stand trial and the ability to represent oneself. *See Godinez v. Moran*, 509 U.S. 389, 397-99 (1993)." Pet. to Transfer 4. The State again argued, however, that "a defendant's constitutional right to a fair trial may require a trial judge to deny a request for self-representation" because "there are some instances * * * in which a defendant is capable of assisting counsel but is not capable of presenting his own defense." *Id*. at 6.

The Supreme Court of Indiana unanimously affirmed, holding that compelling Edwards to accept unwanted counsel violated the Sixth Amendment. Pet. App. 14a. *Faretta*, the court explained, recognized that, although "most criminal defendants would be better defended by counsel * * *[,] forc[ing] unwanted counsel on a defendant violates the logic of the Sixth Amendment." *Id.* at 5a (internal quotation marks omitted). The court rejected the suggestion that the right of self-representation could be conditioned on a showing of heightened competency. *Id*. at 14a. Because "Edwards [had] properly asserted his Sixth Amendment right," *id.* at 9a, and because there was no finding that "Edwards's waiver of counsel was not knowing and voluntary," *id.* at 14a, he had the "constitutional right to proceed pro se," *ibid.*

SUMMARY OF ARGUMENT

Citing a fundamental strategic disagreement with his court-appointed counsel, Ahmad Edwards sought to exercise his Sixth Amendment right of self-representation. Although it is not disputed that Edwards's request was timely, knowing, and intelligent, the trial court flatly rejected it. The trial court's evident basis for doing so was that Edwards suffered from mental illness and lacked unspecified "abilities" that would permit him to do an effective job as his own lawyer. That decision offends the fundamental nature of the right of self-representation. As this Court made clear in *Faretta* v. *California* and has reaffirmed without exception in the decades since, the Sixth Amendment protects the defendant's *choice* to proceed *pro se*. Here, Edwards made that choice "with his eyes open," and the trial court was bound to respect it. The unanimous judgment of the Supreme Court of Indiana should be affirmed.

I. Contrary to petitioner's assertions, denying Edwards any measure of self-representation is flatly contrary to this Court's settled understanding of the Sixth Amendment. In *Faretta*, this Court held that the structure, logic, and history of the Sixth Amendment guarantee the accused the right to refuse the assistance of counsel and represent himself at trial so long as his decision to do so is knowing and voluntary. In so holding, the Court did not slight the dangers of pro se representation. To the contrary, *Faretta* candidly recognized that even the most "intelligent and educated" non-lawyers run a very real risk of wrongful conviction by refusing assistance of counsel. And, particularly significant for present

purposes, the Court further acknowledged that the perils of self-representation would be especially high for "the ignorant and illiterate, or those of feeble intellect." In the face of those risks, the Court squarely held that, because the Sixth Amendment right to defend is personal, a defendant's choice to proceed without counsel must be honored.

Petitioner's contention that *Faretta* nonetheless allows States to "limit" this Sixth Amendment right to those defendants who meet some "minimum" standard of "competence" is refuted by the logic and language of this Court's decision. There is no hint in *Faretta* that the right is one that only certain classes of defendants are guaranteed. Indeed, *Faretta* expressly pronounced a defendant's ability "not relevant." The Court recognized that, although trials without counsel are almost always detrimental to defendants' interests, their autonomy to choose that path must be protected. And, as noted above, *Faretta* specifically contemplated the challenges the right entailed for "intelligent" and "feeble-minded" defendants alike.

Although Petitioner and its *amici* seek to soften the blow by suggesting that defendants' "interests" will factor in the balance against government concerns, *Faretta* protects the personal *right* to make this fundamental decision. And after *Godinez* v. *Moran* held that States are not *obligated* to insist on a special showing before accepting a competent but impaired defendant's waiver of counsel, the rule petitioner seeks here would grant States unfettered discretion whether to recognize the right for this class of defendants. Vesting *States* with the power to

choose whether a defendant may proceed *pro se* turns the essential rationale of *Faretta* on its head.

Petitioner labors to show that this Court's post-*Faretta* decisions support state power to parcel out self-representation rights, but those efforts fall flat. This Court's opinion in *Godinez* specifically confirmed that "a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation." Petitioner and its *amici* chant the constant refrain that *Godinez* did not decide the question presented here, but they fail entirely to confront the clear import of the Court's reasoning.

Petitioner clings tightly to this Court's decision in *McKaskle* v. *Wiggins*, but that case offers little comfort. The fact that the right of self-representation is not "absolute" cannot possibly support the inference that complete elimination of the right is warranted when the State chooses to advance certain "interests." Indeed, *McKaskle* confirmed *Faretta*'s fundamental premises and held that the trial court must preserve both the defendant's "actual control" over his case *and* "the jury's perception that the defendant is representing himself." Here, Edwards enjoyed neither.

Petitioner's reliance on *Martinez* v. *Court of Appeal* fares no better, because that case did not even directly concern the Sixth Amendment. Nor can petitioner derive authority to foreclose preemptively the right of self-representation from *Faretta*'s recognition that courts may revoke *pro se* status if a defendant abuses it. The rule petitioner urges has nothing to do with abuse, and Edwards was denied *any* opportunity to appear *pro se*. Finally, this Court's holding in *Wheat* v. *United States* that a

defendant's choice of *counsel* may be subject to courts' traditional authority to regulate lawyers' ethical obligations is unhelpful to petitioner's cause. Choosing among lawyers implicates a qualitatively different Sixth Amendment interest than does choosing whether to proceed *pro se*. In the former instance, there are any number of acceptable alternatives; in the latter, there is no "second choice" through which to vindicate the uniquely personal dimension of self-representation.

II. Petitioner's argument that generic interests in "fairness" and "adversarial" testing can support the wholesale elimination of self-representation is fundamentally mistaken. It is one thing to say that society has an interest in promoting fairness in the criminal justice system and that many rights conferred on defendants promote that objective. But it is another thing altogether to say that such concerns support *forcing* defendants to exercise certain constitutional rights and abandon others. Petitioner claims that, when a defendant "elects" to stand trial, the "whole point" (read: the *only* point) is to "persuade" a jury of his innocence. But as this Court has recognized repeatedly (and specifically concluded in *Godinez*), there is nothing "fundamentally unfair" about a verdict rendered after a defendant knowingly and voluntarily forgoes one or more of the "tools" the Constitution provides for challenging the government's case.

Petitioner's effort to assemble a parade of horribles as evidence of States' overwhelming "need" to deny certain defendants' self-representation rights fails utterly. Several of its anecdotal examples would be unaffected by applying the "coherent

communication" rule petitioner proposes. Indeed, limited experience with a communication-based threshold suggests that such a rule would only invite the very discrimination against the mentally ill that the law fights to contain in other areas.

Moreover, the broad authority petitioner seeks is entirely unnecessary. Courts possess—and, even under trying circumstances, skillfully employ—numerous less-restrictive alternatives to the complete elimination of self-representation. Most obviously, the appointment of standby counsel offers courts a ready and flexible tool to preserve the autonomy principles that *Faretta* and its progeny recognize.

III. Even if the Sixth Amendment permitted a heightened "competency" standard for self-representation, Edwards's rights were undoubtedly violated in this case. The trial court did not even articulate an actual legal standard, much less apply one of the rules retrospectively offered by petitioner and various *amici*. Moreover, the experts who evaluated Edwards were not asked—and therefore did not answer—whether Edwards possessed the additional "abilities" deemed necessary to proceed *pro* se. Even if inferences could be drawn from those reports, surely it is impermissible to rely (as the trial court did here) on assessments performed *before* Edwards received the extensive psychiatric treatment that rendered him competent to stand trial in the first place.

In any event, even a casual review of the relevant record confirms that Edwards bears little resemblance to the "incoherent" individual selectively portrayed in petitioner's brief. The trial court had no difficulty understanding Edwards's statements in

open court, including his perfectly lucid (and, for that matter, largely correct) answers to the judge's questioning. More revealing still, the staff psychiatrist who interviewed and evaluated Edwards *after* he received meaningful psychiatric care extolled his "communication" skills, comprehension, and thorough understanding of his legal situation.

IV. Petitioner concludes by proposing the radical alternative of simply overruling *Faretta*. That suggestion deserves this Court's swift rejection, both because it is not properly presented here, and because petitioner cannot show that *Faretta* was wrong. Nor, in any event, can petitioner adduce the substantial "special justification" required to overturn such a longstanding decision. *Faretta* is not only settled precedent, it also has become part of the warp and woof of the law, and the practical importance of the right goes far beyond cases in which it is actually invoked. Although individual, highly-publicized instances of self-representation may cause some dismay, empirical experience teaches that the regime is entirely workable. Indeed, it is telling that none of petitioner's *amici*—including 19 States and the United States—have joined its call to discard the decision.

ARGUMENT

I. THE SIXTH AMENDMENT RIGHT OF SELF-REPRESENTATION MAY NOT BE DENIED BASED ON ABILITY

A. The Sixth Amendment Requires States To Respect The Knowing And Voluntary Self-Representation Choices Of Those It Puts On Trial

1. In *Faretta* v. *California*, 422 U.S. 806, 807 (1975), this Court held that a State may not "hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense."

The right of self-representation, *Faretta* concluded, flows from the structure, logic, and history of the Sixth Amendment, which "does not provide merely that a defense shall be made for the accused; [but] * * * grants to the accused *personally* the right to make his defense," 422 U.S. at 819 (emphasis added). Because the right is personal—and because "[t]he defendant, and not his lawyer or the State, will bear the personal consequences of a conviction"—"[i]t is *the defendant* * * * who must be free personally to decide whether in his particular case counsel is to his advantage." *Id.* at 834 (emphasis added). And when the State "thrust[s] counsel upon the accused, against his considered wish, * * * the right to make a defense is stripped of the personal character upon which the [Sixth] Amendment insists." *Id.* at 820.

As the Court recognized, those "who wrote the Bill of Rights" understood not only "the inestimable worth of free choice" generally, but also the particular

importance of being able to proceed *pro se*. 422 U.S. at 833-834. The Court noted that, "[i]n the long history of British criminal jurisprudence, [the only] tribunal that ever adopted a practice of forcing counsel on an unwilling defendant * * * was the Star Chamber." *Id.* at 821. And in colonial America, where "insistence upon a right to self-representation was, if anything, more fervent than in England," *id.* at 826, the Court was unable to locate a single "instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer," *id.* at 828.

The Court did not flinch from the recognition that a defendant's choice of *pro se* representation would seldom be a wise one. "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." 422 U.S. at 834.

Nor did the Court underestimate the magnitude of the "detriment." Describing "the help of a lawyer [as] *essential* to assure the defendant a fair trial," 422 U.S. at 832-833 (emphasis added), the Court observed:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his

> defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him. *Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.*"

Id. at 833 n.43 (emphasis added) (quoting *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932)).

Significantly, the Court then specifically observed that, if that risk is present for "men of intelligence, *how much more true is it of the ignorant and illiterate, or those of feeble intellect.*" 422 U.S. at 833 n.43 (emphasis added). Nonetheless, the Court concluded, the defendant's choice to proceed *pro se* "must be honored, out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* at 834 (quoting *Illinois* v. *Allen*, 397 U.S. 337, 350-351 (1970) (Brennan, J., concurring)).

2. Petitioner fails utterly in its effort (Br. 34-41) to suggest that it is "entirely consistent" with *Faretta* to allow States to deny self-representation to certain (otherwise competent) defendants. On the contrary, the core premise of petitioner's argument—that States are free to take account of defendants' "abilities" to represent themselves and to deny self-representation to those less "able"—is at war with both the logic and the explicit language of this Court's decision.

For starters, the fundamental right enforced in *Faretta* belongs to "the accused" in a criminal trial, U.S. Const. Amend. VI, not some subset of the individuals whom the State undertakes to deprive of their liberty. Nor is the concern that a defendant will "believe that the law contrives against him," 422 U.S.

at 834, in any way particular to those whom the State deems able. And the history surveyed by the Court in *Faretta* yielded *no* examples of imposing unwanted counsel on the ground that the defendants' abilities were limited.

Equally important, petitioner's effort to argue for an ability-based limitation was expressly foreclosed in *Faretta*. The Court repeatedly emphasized that a defendant's abilities in the courtroom are simply "not relevant to an assessment of his knowing exercise of the right to defend himself." 422 U.S. at 836; see U.S. *Amicus* Br. at 16, *Godinez* v. *Moran*, 509 U.S. 389 (1993) (No. 92-725) (reading *Faretta* as "declin[ing] to condition the validity of such a waiver on the trial court's assessment of the defendant's ability to conduct his own defense"). Indeed, as noted above, *Faretta* explicitly recognized that the Sixth Amendment protects "intelligent and educated" defendants and those "of feeble intellect" alike. 422 U.S. at 833 n.43 (quoting *Powell*, 287 U.S. at 69). The inescapable import of that passage is that the Court was well aware when deciding *Faretta* that the right would apply equally to defendants with limited abilities who are competent to stand trial.

Finally, *Faretta* recognized a right of choice, *personal to the defendant*, not an "autonomy interest" that States may extinguish at their discretion by "balancing" it against ostensibly countervailing government concerns, Pet. Br. 20. Petitioner pays lip service (Br. 35) to the fundamental autonomy principles upon which *Faretta* is premised, but it fails to apprehend how substituting the State's choice for the defendant's choice is flatly inconsistent with those principles. See U.S. *Amicus* Br. at 9, *Godinez*,

supra ("To hold that a defendant is competent to be tried but incompetent to perform the tasks essential to the conduct of his defense would deprive the defendant of some of the very choices that the Constitution was designed to protect.").[4]

3. Thus, *Faretta* could not have been clearer in holding that the defendant's *ability* to perform the tasks required of counsel is constitutionally irrelevant. All that matters—at least insofar as the mental status of a defendant competent to stand trial is concerned—is that he is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his *choice* is made with eyes open.'" 422 U.S. at 835 (emphasis added) (quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

The centerpiece of petitioner's claim of "consistency" with *Faretta* is a sentence in that opinion describing the defendant as "literate, competent, and understanding." 422 U.S. at 835; see Pet. Br. 24, 35; see also APA Br. 6; CJLF Br. 7; U.S. Br. 11. But this sentence, read with even the

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[4] The United States even more recently observed (correctly) that "[a]n individual who desires self-representation but is nonetheless forced to proceed to trial with counsel appointed by the court suffers an affront to his autonomy and dignity." U.S. Reply Br. at 14, *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557 (2006) (No. 05-352) (citation omitted); see also U.S. Br. at 10, *Gonzalez-Lopez*, *supra* ("A defendant's unique right to speak to the court and the jury in his own voice honors his desire to be free from *any* representation."); *id.* at 28 ("The right to *self*-representation has a direct and unique link to autonomy.").

slightest attention to context, cannot possibly be taken as opening the door to competency-based restrictions on self-representation. Most obviously, the Court had already explicitly referenced the parity between the Sixth Amendment rights of the "illiterate" and the "educated layman," recognizing that the risks borne by the former are much greater. *Faretta*, 422 U.S. at 833 n.43 (internal quotation marks omitted).

Moreover, that statement appears in the section of the *Faretta* opinion that concerned whether the decision to proceed *pro se* had been made "knowingly and intelligently." 422 U.S. at 835 (citing *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938)). More particularly, it immediately followed the observation that "Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel." 422 U.S. at 835. Under these circumstances, the reference must be understood as describing the sufficiency of his waiver, not as vesting States with power to deny knowing and voluntary invocations of the self-representation right based on a judgment about the defendant's ability to do a good job.

B. This Court's Subsequent Decisions Do Not Allow States To Impose Skill-Based Exclusions On Who May Exercise Sixth Amendment Rights

As explained above, both the language and the underlying logic of the decision overwhelmingly refute petitioner's claim that *Faretta* recognized (or even left room for) state authority to "protect" individuals with modest cognitive abilities by

refusing to allow their knowing and voluntary assertions of Sixth Amendment rights.

Petitioner's fall-back position—that post-*Faretta* decisions have given States such a license—is equally wrong. To the contrary, this Court's reasoning in *Godinez* reaffirmed *Faretta*'s central teaching that the defendant's choice alone, not skill, is what obliges the State to respect an invocation of the right of self-representation. And none of the decisions petitioner and *amici* seek to enlist in support of state power to parcel out self-representation rights has departed from *Faretta*'s core holding: The Sixth Amendment provides every defendant whom the government puts on trial the right to choose self-representation.

1. Godinez *Makes Clear That Self-Representation Requires Only The Competency To Choose With Eyes Open*

a. This Court's opinion in *Godinez* v. *Moran*, 509 U.S. 389 (1993), confirms that the right recognized in *Faretta* protects a defendant's knowing and voluntary choice to represent himself, even when the State believes that choice to be unwise and against his best interests. To be sure, *Godinez* held that due process does not *mandate* a higher competency standard to plead guilty or waive counsel than it does to stand trial. *Id.* at 391. But the Court's reasoning in reaching that conclusion makes clear that the Sixth Amendment likewise does not *permit* a higher standard for waiving counsel. Petitioner's cursory analysis (Br. 24-25) fails entirely to confront that logic.

The defendant in *Godinez* (Moran) had waived his right to counsel and pleaded guilty to capital murder

in state court. On federal collateral review, Moran argued that, even if he possessed the "rational as well as factual understanding of the proceedings against him" and "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" required for competency to stand trial under *Dusky* v. *United States*, 362 U.S. 402, 402 (1960) (per curiam), his mental illness had nevertheless rendered him incompetent to waive counsel. See Resp. Br. at 41, *Godinez* v. *Moran*, 509 U.S. 389 (1993) (No. 92-725). Echoing *Faretta*, the Court rejected that argument and explained that "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." 509 U.S. at 399. Accordingly, "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation." *Id.* at 400. Thus, *Godinez* confirmed what *Faretta* made clear: The right of self-representation is the right to make a *choice*; competency is relevant only insofar as it bears on the defendant's capacity to *choose* one path over the other.

The Court also noted that—"dat[ing] back at least to the time of Blackstone," *Godinez*, 509 U.S. at 400 n.11—competency to stand trial has meant competency to represent oneself. The Court explained that the *Dusky* standard arose while self-representation was still commonplace for serious crimes, making it "'difficult to say that a standard which was designed to determine whether a defendant was capable of defending himself' is 'inadequate when he chooses to conduct his own defense.'" *Ibid.* (quoting *People* v. *Reason*, 334 N.E.2d

572, 574 (N.Y. 1975)). Thus, *Godinez* recognized that those who are competent to stand trial necessarily possess the essential level of mental capacity relevant to adequate self-representation.[5]

Moreover, *Godinez* explicitly invoked *Faretta* in rejecting Moran's claim that waiving counsel requires a higher standard of competency. The Court noted that "the defendant's 'technical legal knowledge' is 'not relevant'" to that inquiry, 509 U.S. at 400 (quoting *Faretta*, 422 U.S. at 836), and that, "although the defendant 'may conduct his own defense ultimately to his own detriment, his choice must be honored,'" *ibid.* (quoting *Faretta*, 422 U.S. at 834). That extensive reliance on *Faretta* in rejecting Moran's claim would make little sense (and, indeed, would leave *Godinez*'s logic incomplete) if he were

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[5] As Justice Kennedy observed, "[a]lthough the *Dusky* standard refers to 'ability to consult with [a] lawyer,' the crucial component of the inquiry is the defendant's possession of 'a reasonable degree of rational understanding.'" 509 U.S. at 403-404 (Kennedy, J., concurring in part and concurring in the judgment) (alteration in original). That is, *Dusky* ensures that the defendant possesses the mental capacity to choose whether to proceed *pro se*, and, "[i]f a defendant elects to stand trial and to take the foolish course of acting as his own counsel, the law does not for that reason require any added degree of competence." *Id.* at 404.

Notably, although the United States largely abandons that view here, its brief in *Godinez* echoed Justice Kennedy's point: "A decision that a defendant is competent to stand trial should establish that he is competent to participate fully in his trial by making each of the various decisions that he may be called upon to make in the course of his defense." U.S. *Amicus* Br. at 8-9, *Godinez*, *supra*.

not, by virtue of having met *Dusky*'s threshold for standing trial, entitled to elect self-representation under *Faretta*.

The state *amici* concede that *Godinez* espouses a single competency standard, but they argue that its holding applies only where the defendant waives counsel and then pleads guilty. Ohio *et al.* Br. 7-10; see also APA Br. 16-17. *Godinez*, however, drew no such distinction, see 509 U.S. at 399-400, and every federal court of appeals has understood *Godinez* to apply to a defendant who has gone to trial without counsel (or attempted to do so).[6] Indeed, the State authoring that brief has itself argued (successfully) that *Godinez* applies to defendants who waive counsel and proceed to trial. See Appellee Br. at 18, *State* v. *Jordan*, 804 N.E.2d 1 (Ohio 2004) (No. 00-1833).

b. Petitioner and the United States attempt (Pet. Br. 25; U.S. Br. 26) to read dicta in *Godinez* stating that "States are free to adopt competency standards that are more elaborate than the *Dusky* formulation,"

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[6] See, *e.g.*, *Gallant* v. *Corrections, Me. Warden*, No. 96-1005, 1996 WL 374971, at *1 (1st Cir. July 5, 1996); *United States* v. *Schmidt*, 105 F.3d 82, 88 (2d Cir. 1997); *United States* v. *Peppers*, 302 F.3d 120, 131 n.9 (3d Cir. 2002); *United States* v. *Bush*, 404 F.3d 263, 271 (4th Cir. 2005); *Dunn* v. *Johnson*, 162 F.3d 302, 307-308 (5th Cir. 1998); *Gall* v. *Parker*, 231 F.3d 265, 284 (6th Cir. 2000), superseded on other grounds as recognized in *Bowling* v. *Parker*, 344 F.3d 487, 501 n.3 (6th Cir. 2003); *United States* v. *Egwaoje*, 335 F.3d 579, 586-587 (7th Cir. 2003); *Wise* v. *Bowersox*, 136 F.3d 1197, 1202 (8th Cir. 1998); *United States* v. *Hernandez*, 203 F.3d 614, 620 n.8 (9th Cir. 2000); *United States* v. *McKinley*, 58 F.3d 1475, 1481 (10th Cir. 1995); *United States* v. *Cash*, 47 F.3d 1083, 1089 n.3 (11th Cir. 1995); *United States* v. *Ellerbe*, 372 F.3d 462, 466 (D.C. Cir. 2004).

509 U.S. at 402, as conferring authority to put individuals on trial, but require them to proceed through counsel. That is wrong.

As the United States acknowledges (Br. 27), a State could shift or redefine its standard for competency to stand trial without in any way departing from *Faretta*'s rule that those who are accused must be entitled to choose to proceed *pro se*. Indeed, as support for its statement, the Court cited *Medina* v. *California*, 505 U.S. 437 (1992), which confirmed a State's ability to "elaborate" on the standard for competency to *stand trial*. And finally, as we have explained above, the reasoning of *Godinez* is fundamentally at odds with affording States the power to deny self-representation based on a defendant's perceived inability to carry out an effective defense. It would be passing strange to think that the Court's opinion closed with a perfunctory invitation to do exactly that.

2. This Court Has Repeatedly Reaffirmed Faretta*'s Core Holding That Every Competent Defendant Has A Right To Choose Self-Representation, Which States Are Bound To Respect*

Describing this Court's decisions in *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984), *Martinez* v. *Court of Appeal*, 528 U.S. 152 (2000), *Wheat* v. *United States*, 486 U.S. 153 (1988), and *Faretta* itself as establishing the principle that Sixth Amendment rights are not "absolute," Pet. Br. 35; U.S. Br. 10, petitioner and *amici* reason that States should therefore have the power to "regulate," U.S. Br. 9, or "limit," Pet. Br. 57, *pro se* representation. But the cited decisions hardly support the sweeping power they claim.

First, it is a long leap from acknowledging that a right is not "absolute" to holding that it may be completely denied at the government's discretion. What petitioner seeks here is not state power to "regulate" or "limit" a defendant's exercise of his rights, but rather authority to extinguish altogether the Sixth Amendment rights of a class of defendants. And *Faretta* did not recognize an autonomy *interest*, for States to "weigh" against their competing preferences, but an autonomy *right*, which States are bound to respect.[7] But even more odd, only one of the decisions petitioner claims has undermined *Faretta* even *involved* the Sixth Amendment right *Faretta* recognized—and that decision, *McKaskle* v. *Wiggins*,

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[7] The United States makes the extraordinary claim (Br. 17 n.1) that the autonomy "interest" upheld in *Faretta* is adequately protected by the requirement that counsel "consult with the client regarding 'important decisions,' including questions of overarching defense strategy," *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) (citation omitted). But the extreme nature of that claim is breathtaking: It suggests not merely that there are good reasons for limiting or denying the right, but that there is not even a meaningful difference *to the defendant* between self-representation and attorney representation, a claim even the *Faretta* dissenters did not embrace.

Indeed, the proceedings in this case illustrate why attorney representation and self-representation are not equivalents. Here, Edwards sought to proceed *pro se* because he disagreed with appointed counsel about which of two competing theories of defense—lack of intent or self-defense—to argue to the jury. J.A. 525a. After invocation of his *Faretta* right was rebuffed, trial counsel proceeded to trial with the defense that Edwards opposed, 12/19/05 Tr. 75-76, and Edwards was convicted.

supra, emphatically reaffirmed the holding and reasoning of *Faretta*.

a. Although the Court in *McKaskle* held that appointment of standby counsel (a possibility specifically contemplated in *Faretta*, 422 U.S. at 834 n.46) did not violate the defendant's Sixth Amendment right, it did so only *after* determining that the essential right guaranteed by *Faretta* had been respected. Standby counsel is constitutionally permissible, *McKaskle* held, *only* in cases where the *pro se* defendant retains "actual control" over his case *and* the standby lawyer's actions do not "destroy the jury's perception that the defendant is representing himself." 465 U.S. at 178. Indeed, *McKaskle* is an odd decision from which to argue for an unraveling of *Faretta*. The Court referred to "the longstanding recognition of a right of self-representation," rooted in the "language, structure, and spirit of the Sixth Amendment," guaranteeing a defendant the right "to have *his* voice heard." *Id.* at 174 (emphasis added). And of course, the power upheld in that case—to allow a standby lawyer to perform functions that compromised neither the defendant's actual control nor the jury's perception that he was his own lawyer—is a far cry from what petitioner defends here.

b. *Martinez* did not even directly concern the Sixth Amendment. On the contrary, in holding that the petitioner did not have a constitutional right to proceed *pro se* on *appeal*, the Court explained that the Sixth Amendment right to defend simply does not apply to appeals. 528 U.S. at 160. The Court also noted the absence of any tradition of protecting appellate self-representation even remotely

comparable to the history of self-representation at trial described in *Faretta*. *Id.* at 159-160. Accordingly, the decision in *Martinez* does not impose a "limit[] on self-representation," Pet. Br. 38; rather, it simply refuses to "extend[]" the *Faretta* right in a novel and unprecedented way, 528 U.S. at 160.

c. Petitioner's effort (Br. 38-39) to disqualify a class of defendants from exercising their right of self-representation based on courts' power to terminate self-representation in cases of *abuse* is simply baffling. The rule that a defendant may forfeit his right by "serious and obstructionist misconduct" was announced in *Faretta* itself. 422 U.S. at 834 n.46 (citing *Illinois* v. *Allen*, *supra*). It is one thing to acknowledge that judges' traditional power to preserve courtroom decorum and punish contumacious *behavior* may be applied to *pro se* and represented defendants alike. It is another thing entirely to say that States may exclude a class of defendants from enjoying the Sixth Amendment guarantee at all.[8]

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[8] The United States insists that its position here does not conflict with its position in the prosecution of the terrorist Zacarias Moussaoui, asserting that "there was no basis at all to believe Moussaoui was suffering from any mental disease or defect." Br. 25 n.4. But his court-appointed counsel informed the court that Moussaoui labored under the delusion that the Federal Public Defenders were in a conspiracy to kill him (apparently in order to keep him from revealing secrets in open court), Def.'s Reply to Gov't Position on Competency & Def.'s Self-Representation at 6 n.5, *United States* v. *Moussaoui*, Crim. No. 01-455-A (E.D. Va. June 11, 2002). Moreover, experts retained by the defense expressed "serious reservations" about his competency to stand trial. *Id.* at 5. It was against this backdrop that the United States

Relatedly, it is clear that the Court's references in *Faretta* to "*deliberate* disruption" and "*serious* and obstructionist *misconduct*," 422 U.S. at 834 n.46 (emphasis added), were not mere surplusage. *Illinois* v. *Allen*, *supra*, on which *Faretta* relied for this proposition, emphasized States' obligation to respect the Sixth Amendment right to the maximum possible extent even under challenging circumstances. *Allen* held that a trial court may remove a defendant from the courtroom—and thereby abridge his Sixth Amendment right to confront his accusers—*after* he has "insist[ed] on conducting himself in a manner so

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argued that the "[t]he standard for competency to stand trial is the same as the standard for competency to waive counsel," Gov't Position on Competency & Def.'s Self-Representation at 4, *Moussaoui*, *supra* (June 7, 2002), and urged that a defendant's request to proceed *pro se* "should not be denied because of limitations in the defendant's education, legal training *or language abilities*," *id.* at 16-17 (emphasis added).

The *Moussaoui* case also demonstrates the adequacy of the recognized rule allowing courts to terminate self-representation by defendants who refuse to conform to the rules of courtroom decorum. In such a highly publicized trial—one in which the government's interest in "the public's perception of the fairness of the judicial system," U.S. Br. 19, could hardly be greater—Judge Brinkema upheld Moussaoui's choice to represent himself for seventeen months before his continued filing of abusive and frivolous pleadings led her to terminate self-representation and appoint standby counsel to take over his defense. Order, *Moussaoui*, *supra* (Nov. 14, 2003). That measured approach—which did not compromise the fairness or perceived fairness of the proceedings—is a far cry from the authority petitioner seeks to deny prospectively any measure of self-representation to a broad (and ill-defined) class of defendants.

disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom," 397 U.S. at 343, and *after* he has been "repeatedly warned" that he will be removed, *id.* at 346. Even then, the defendant must be "constantly informed" that he is free to return after giving up his disruptive behavior. *Ibid.*

d. Petitioner's attempt (Br. 35-36) to derive support from *Wheat* fares no better.

Wheat did not involve the *Faretta* right at all, but rather whether the distinct Sixth Amendment right to the assistance of counsel required a trial court to accept a defendant's decision to proceed through a lawyer whose representation of a co-defendant raised a potential ethical conflict. See 486 U.S. at 163; U.S. Br. at 12 n.5, *Wheat*, *supra* ("*Faretta* * * * has nothing to do with the choice of counsel.").

Moreover, the "limitation" petitioner urges the Court to endorse bears no resemblance to the one upheld in *Wheat*. The trial court did not hold that Wheat (or some class of defendants of which he was a part) was categorically disabled from exercising the right to proceed through chosen counsel, but rather that representation by the particular attorney selected would raise ethical concerns. 486 U.S. at 163-164. Arguably, this was not an abridgment of the Sixth Amendment right at all—the right to choose counsel is always limited to those attorneys who are entitled to practice before the court. In any event, the defendant's *Faretta* right (to choose whether to proceed with second-choice counsel or *pro se*) remained wholly intact. Here, by contrast, the "*independent* interest in" enforcing "the ethical standards of the [legal] profession," *id.* at 160

(emphasis added), is not implicated, and the right to self-represent was not "limited"; it was *eliminated*. And Wheat was not forced to proceed through government-selected counsel, whereas Edwards was required to proceed through court-*imposed* counsel, *i.e.*, the precise evil against which the right is meant to protect. See *Faretta*, 422 U.S. at 834.

In any event, in *United States* v. *Gonzalez-Lopez,* 126 S. Ct. 2557 (2006), the Court reaffirmed that *Wheat* does not confer open-ended discretion to interfere with a defendant's selection between his two top-choice attorneys. The Court treated as self-evident that the Sixth Amendment (and *Wheat*) would not permit a court, in the interest of "fairness," to require a defendant to be represented at trial by a second-choice attorney who was "better" than his first choice: "[T]he right to counsel of choice * * * is the right to a particular lawyer *regardless of comparative effectiveness*." 126 S. Ct. at 2563 (emphasis added); *ibid.* ("Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.").

II. LIMITING THE RIGHT OF SELF-REPRESENTATION TO THOSE WHO COMMUNICATE EFFECTIVELY IS NEITHER NECESSARY NOR CONSTITUTIONALLY PERMISSIBLE

Petitioner proposes that mentally competent individuals who, for a variety of reasons, are unable to communicate effectively should not have a Sixth Amendment right to refuse representation by counsel, even where their waiver of assistance is

knowing and voluntary. In support of that novel proposal, petitioner cites considerations of "fundamental fairness," Br. 29, 40, and relies heavily on anecdotal evidence from notorious instances of self-representation, *id.* at 30-33. Imposing representation, petitioner insists, is justified, because communication ability is necessary to "persua[sion]," *id.* at 21—which it claims is "the entire point of [a] trial," *ibid.*—and to the effective exercise of constitutional fair trial rights, see *id.* at 28.

As explained above (pp. 18-34, *supra*) the linchpin of that argument—that, under *Faretta* and its progeny, a defendant's inability to mount an effective *pro se* defense is grounds for eliminating that right altogether—is untenable. And, as explained below (pp. 49-54, *infra*), the trial court here did not even purport to apply petitioner's proposed rule; to the contrary, its rejection of Edwards's waiver of counsel was entirely conclusory. But even on an abstract plane, petitioner's suggested reinterpretation of the Sixth Amendment must be rejected.

Petitioner's proposal cannot be redeemed by appeals to the States' interest in avoiding "spectacles," U.S. Br. 17, or by professing concern for fairness and reliability. A regime that sought genuinely to further those interests would look nothing like the one petitioner and its *amici* urge here, whereby concern for "fairness" to a "helpless" defendant, Pet. Br. 34, grants States unchecked discretion to conduct proceedings that, for present purposes, they have labeled "farcical" and "fundamentally unfair," *id.* at 26. And whatever public interest there may be in "testing," *id.* at 33, the prosecution's case, it is the essence of our system of

criminal justice that decisions whether to exercise trial rights that advance fairness and reliability belong exclusively to the defense and that the defendant is free to put on no case at all. In any event, even where genuine public interests are at stake, wholesale deprivations of constitutional rights like the one defended here are tolerated only when the government's purposes are compelling and cannot be achieved by less restrictive means.

A. The Government May Not Promote Reliability And Fairness By Requiring Competent, But Disabled, Defendants To Exercise Certain Constitutional Rights And Relinquish Others

Petitioner's argument rests on an extraordinary chain of reasoning: (1) because society has an interest in accurate and reliable verdicts; and (2) because this Court has recognized that many of the rights conferred on criminal defendants advance that interest; it follows (3) that a State may compel a defendant to exercise or forgo constitutional rights (like the *Faretta* right here) when the State believes (or asserts) that doing so would render a verdict more credible, reliable, or "fair."

But whatever may be the perception of a verdict rendered where a defendant does not avail himself of the "tools" conferred by the Constitution, the government may not *require* him to deploy them. That is no less true when a mentally competent person who has difficulty communicating elects to proceed *pro se*, knowing fully that his problem will limit his ability to make effective use of some (or many) of these rights. And petitioner is entirely

wrong to claim that generic interests in the pursuit of "fair and legitimate" verdicts, Br. 28, demand that a defendant put on (what a State believes to be) a more effective—or even minimally effective—defense. As *Godinez* made clear, the trial of a defendant who elects to proceed *pro se* but cannot meet a heightened competency test is not fundamentally unfair.

1. When the Court stated in *Faretta* that "defense tools guaranteed by the [Sixth] Amendment shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally," 422 U.S. at 820, it was not breaking new ground. Rather, it was affirming a constitutional first principle: Our adversarial system of justice presupposes that justice, reliability, and legitimacy are best served by providing the accused with a full and fair opportunity to test the prosecution's case and the autonomy to decide how and whether to do so. Our system is not an inquisitorial one, in which "rights" afforded the accused are subsidiary to the societal interest in convicting the guilty and acquitting the innocent.

As this Court has held repeatedly, criminal defendants may entirely forgo their rights to challenge the evidence against them (so long as their waiver is voluntary and intelligent). See, *e.g.*, *Boykin* v. *Alabama*, 395 U.S. 238, 242-243 & n.4 (1969). Likewise, when a defendant does not plead guilty, all he is obliged to do is be a party to a trial, at which the State is compelled to persuade the finder of fact of his guilt. Contrary to petitioner's assertion, a defendant does not—by deciding "to stand trial rather than to plead guilty"—undertake to "persuade the court or jury of [anything]," Pet. Br. 21. Nor is the "entire

point of the trial * * * lost," *ibid.*, when the defendant elects to put the government to its proof. Compare *id.* at 33 (impugning trial where defendant has "only * * * the unlikely prospect that the government will unilaterally fail to prove its case") with *Florida* v. *Nixon*, 543 U.S. 175 (2004) (upholding verdict where counsel effectively conceded guilt in capital case).

2. The same goes for petitioner's list of individual "components of a fair criminal trial," Br. 27. There is no disagreement that the Constitution requires that criminal defendants be provided, among other things, the opportunity to confront witnesses, to make opening and closing statements, and to object to the admissibility of evidence—or that those "tools" advance both fairness and accuracy. But petitioner's claim that "the validity and accuracy of the verdict become questionable" "[w]hen the defense does not utilize these tools, or does so only incoherently," Br. 28, is wrong. Under our system, the "overall fairness of the modern criminal trial," Pet. Br. 27, depends on whether a defendant is afforded the *opportunity* to test the prosecution's case, not whether he has *actually exercised* his various defense rights. See, *e.g.*, *Herring* v. *New York*, 422 U.S. 853, 862 (1975) (highlighting importance of the "opportunity" to make closing statement); *David* v. *Alaska*, 415 U.S. 308, 315-316 (1974) (main purpose of the Confrontation Clause "is to secure for the opponent the *opportunity* of cross-examination") (emphasis added) (citation omitted); see also U.S. Br. at 14-15, *United States* v. *Crosby*, 506 U.S. 255 (1993) (No. 91-6194) (arguing that the Sixth Amendment "ensures that the defendant has the right to confront witnesses if he

chooses; it does not require that he exercise that right").

That is why this Court has repeatedly upheld verdicts where defendants knowingly and voluntarily waived rights that promote fairness and accuracy. See *United States* v. *Mezzanatto*, 513 U.S. 196, 212 (1995) (Souter, J., dissenting) (explaining that the right to counsel typifies the "personal rights, including constitutional ones, that have been accepted time out of mind as being freely waivable"); *Godinez*, 509 U.S. at 392 (permitting defendant to "discharge his attorneys and change his pleas to guilty" so as to "prevent the presentation of mitigating evidence at his [capital] sentencing"); *Peretz* v. *United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are * * * subject to waiver.").

The only support petitioner offers for the claim that the failure to utilize available trial "tools" casts doubt on a verdict's validity are, strangely enough, cases reversing convictions based on a *lawyer's* failure to exercise his client's trial rights. See Pet Br. 28-29. The verdicts at issue were overturned not out of generic concern for public legitimacy (indeed, in each one, reversal was resisted strenuously by the government), but rather because the *defendant's* distinct right to effective assistance of counsel was violated. That right, of course, is one that self-representing defendants knowingly and voluntarily surrender. See *Faretta*, 422 U.S. at 834 n.46. Tellingly, in cases where the defendant was involved in the choice to forgo a right, courts are extraordinarily reluctant to second-guess the outcome and find a constitutional violation—even where the

"failure" might have substantially affected the outcome. See, *e.g.*, *Schriro* v. *Landrigan*, 127 S. Ct. 1933, 1941 (2007) (because capital defendant instructed counsel not to offer any mitigating evidence, "counsel's failure to investigate further could not have been prejudicial under *Strickland*").

Because petitioner ignores the basic rule that States' interest in "valid" verdicts does not authorize them to force defendants to use particular tools, it makes little effort to explain why a fundamentally different rule is permissible for disabled individuals. But the one explanation it does suggest is irretrievably flawed. Where communication limitations are involved, the State posits, the defendant who represents himself is "unintentionally" waiving his right to a fair trial, Br. 33, and the government has an interest in protecting against this. But that contradicts the premise of this case: that Edwards is mentally competent, and that his decision was knowing and voluntary. See Pet. Br. 3.[9]

3. Generic invocations of "fundamental fairness" as a basis for denying the right of self-representation (Pet. Br. 29, 40; U.S. Br. 8) fare no better. First, that assertion is flatly inconsistent with this Court's decision in *Godinez*, which held that due process is

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[9] Carried to its logical conclusion, petitioner's reasoning would equally justify overruling a defendant's improvident decisions concerning whether to cross-examine, to make a closing statement, or take the stand. See *Riggins* v. *Nevada*, 504 U.S. 127, 139-140 (1992) (Kennedy, J., concurring in judgment) ("Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including * * * the right to testify on one's own behalf.").

not offended by allowing a defendant who knowingly and voluntarily waives assistance of counsel to proceed *pro se*, so long as he satisfies the *Dusky* competence standard. See *Godinez*, 509 U.S. at 399-402. As this Court has repeatedly explained, "due process" and "fundamental fairness" are synonymous. See *Reno* v. *Koray*, 515 U.S. 50, 65 (1995) (Ginsburg, J., concurring); *California* v. *Trombetta*, 467 U.S. 479, 485 (1984). But *Godinez* held that it is not "fundamentally unfair" to convict a (hypothetical) *pro se* defendant unable to mount a "lucid defense," Pet Br. 25, and petitioner has *not* asked the Court to overrule *Godinez*.[10]

Moreover, under almost any circumstances, a guilty verdict rendered at trial under a "proof beyond a reasonable doubt" standard will ensure fairness to the defendant at least as well as one reached by agreement. See *Nixon*, 543 U.S. at 188; *Santosky* v. *Kramer*, 455 U.S. 745, 755 (1982) (explaining that the "beyond a reasonable doubt" standard minimizes risk of "erroneous convictions"). If the conviction and death sentence imposed on the defendant in *Godinez* without any consideration of mitigating evidence does not offend "fundamental fairness," it cannot seriously be argued that such an interest supports imposing unwanted counsel on a defendant who rejects a plea offer and elects to proceed to trial.[11]

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[10] As the United States has recently recognized, the fact that self-representation is respected even though it "usually harms the defense" illustrates "that it reflects autonomy concerns *above* trial-fairness interests." U.S. Br. at 10, *Gonzalez-Lopez*, *supra* (emphasis added).

[11] To the extent the United States (Br. 13) reads *Sell* v. *United States*, 539 U.S. 166 (2003), as recognizing a free-

Indeed, it is telling that, as noted above (p. 27, *supra*), the lead state *amicus* sought to affirm the capital sentence of a defendant who had represented himself at trial and refused to offer any mitigating evidence by urging the opposite position from the one it advances here out of supposed "fairness" to Edwards. See Appellee Br. at 18, *State* v. *Jordan*, *supra* (citing *Godinez* for the proposition that "[t]he standard of competence to waive the right to counsel is the same as the standard for competency to stand trial"). Similarly, petitioner and the state *amici* have argued for admitting the confessions of mentally ill

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standing governmental "fairness" interest that could warrant depriving a defendant of his Sixth Amendment rights, it seriously errs. *Sell* involved the government's power to involuntarily medicate incompetent defendants; the fairness "interest" it referenced was in fact a limitation on the acknowledged governmental interest in bringing defendants to trial. *Id.* at 180. Because it is "unfair"—*i.e.*, unconstitutional—to try a defendant who is not competent, see *Dusky* (or one seriously impaired by drug side effects, see *Riggins*, 504 U.S. at 142-145), *Sell* explained, the prospect that medication might not work as intended was a "circumstance" that could "lessen" the government's interest in overriding a defendant's refusal of medication. 539 U.S. at 180.

Moreover, *Sell* emphasized the importance of exhausting less-restrictive alternatives before a defendant's constitutionally protected interest may be impinged upon, 539 U.S. at 181, and required detailed, relevant findings on both the defendant's present mental state, *id.* at 184-186, and the government's actual interests. Such a measured response highlights the deficiencies of the trial court's casual deprivation of Edwards's Sixth Amendment rights here. See pp. 49-54, *infra*.

defendants;[12] insisted on the validity of mentally ill individuals' consent to searches and seizures;[13] and vigorously resisted claims of ineffective assistance of counsel from mentally ill defendants in cases where the representation afforded was decidedly inadequate.[14] Thus, States' desire to elevate "fairness" for mentally ill defendants rings hollow where, as here, their professed concern coincides neatly with their ever-present interest in upholding a conviction.[15]

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[12] See, *e.g.*, *Jackson* v. *State*, 735 N.E.2d 1146, 1154 (Ind. 2000) ("defendant's borderline retardation and mental illness [does not] render [his] confession involuntary" under Indiana law); *State* v. *Downing*, No. 22012, 2004 WL 2535422, at *12 (Ohio Ct. App. Nov. 10, 2004) (admitting "confession [obtained] with trick questions and the illusory promise of mental treatment in lieu of prison").

[13] See, *e.g.*, *United States* v. *Grap*, 403 F.3d 439, 442-445 (7th Cir. 2005) (upholding Illinois's position that consent of mentally ill individual was valid).

[14] See, *e.g.*, *State* v. *McNeal*, No. 82793, 2004 WL 35762, at *2-*3 (Ohio Ct. App. Jan. 8, 2004) (rejecting claim of ineffective assistance on procedural grounds).

[15] The impression that petitioner seeks a "railroad ticket, good for this day and train only," *Washington County* v. *Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting) (internal quotation marks and citation omitted), is reinforced by the absence of an affirmative state policy favoring imposing counsel in cases like this one. Cf. *People* v. *Welch*, 976 P.2d 754, 777 (Cal. 1999) (applying unitary standard absent contrary instruction from State legislature). Petitioner's preference for a rule that does not require expert testimony, see Br. 26, 43, likewise seems tailor-made to pursue affirmance of a conviction where no such testimony was presented to the trial court. Cf. APA Br. 30-33.

B. Petitioner's Supposed Parade Of Horribles Proves Only That The Rule It Urges Is Unworkable

Petitioner has culled the Federal Reporters for cases that supposedly "demonstrate * * * vividly," Br. 30, the "need" for the power it seeks. *Id.* at 30-33. Leaving aside the obvious problems with relying on anecdotal evidence to shape fundamental rights, the examples petitioner selects hardly make its case.

Notably, many of the hand-picked "problematic" cases would be unaffected by petitioner's proposed rule. For example, events that petitioner identifies as deplorable in the Colin Ferguson case—the defendant's "propos[ed] conspiracy theories" and his desire to "aggressively cross-examine[]" his victims, Pet. Br. 33—do not concern incoherent communication. Likewise, petitioner's rule would not directly have restrained the "argumentative" defendant in *State* v. *Khaimov*, No. C4-97-2035, 1998 WL 747138, at *1 (Minn. Ct. App. Oct. 27, 1998), who "insult[ed] witnesses." See Pet Br. 32-33. Indeed, that defendant was "able to independently construct a reasonably compelling defense." *Khaimov*, 1998 WL 747138, at *4 (Davies, J., dissenting). And in *United States* v. *Gómez-Rosario*, 418 F.3d 90, 102 (1st Cir. 2005) (Pet. Br. 31), it was the defendant's proclivity to file frivolous motions—not his communication ability—that challenged the trial court.

Petitioner's eagerness to highlight these examples when championing a supposedly "limited" exception illustrates how readily a "coherent communication" standard would become a roving license for courts to deny self-representation to almost any defendant they would prefer not to hear from directly. Indeed,

the thread uniting these cases is not that defendants had difficulty communicating, but that they suffered from some form of mental illness, which remains poorly understood and induces discomfort. See *Olmstead* v. *L.C.*, 527 U.S. 581, 608 (1999) (Kennedy, J., concurring in judgment). The mere fact that "the public at large may *recoil*" from manifestations of a defendant's mental illness, U.S. Br. 19 (emphasis added), does not give governments a legitimate interest in concealing from scrutiny the illnesses affecting defendants they have elected to put on trial. See *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring) (criticizing tendency to find manifestations of "mental or physical illness * * * unsettling"). And history teaches that courts are not immune from that tendency to hide mental illness from public view. See *Tennessee* v. *Lane*, 541 U.S. 509, 535 (2004) (Souter, J., concurring) (noting judicial approval of excluding child with cerebral palsy from public school "lest he 'produc[e] a depressing and nauseating effect' upon others") (quoting *State* v. *Board of Educ.*, 172 N.W. 153 (Wis. 1919)). The rule petitioner urges here would invite such discrimination.

C. Petitioner's Proposed Rule Would Work A Drastic—And Wholly Unnecessary—Restriction of Sixth Amendment Rights

1. Although petitioner and its *amici* repeatedly describe this case as concerning "limits" and "restrictions" on the constitutional right of self-representation, Pet. Br. 36, 38, 39; U.S. Br. 7, 29, the procedure followed below must be recognized for what it is: a complete deprivation of the right recognized in

Faretta. Indeed, it might fairly be said that, were petitioner to prevail, the class of persons encompassed by such a broad, imprecisely formulated rule—those who, by reason of mental illness, physical disability, limited education, illiteracy, or diminished English-language proficiency, lack "ability" to "communicate effectively," Pet. Br. 30—would have *no* Sixth Amendment right of self-representation.

This extraordinary, wholesale elimination of a constitutional right is entirely unnecessary to achieve any substantial state interest. If the prospect of trying an impaired defendant offends a particular State's sense of "fairness," it may raise its standard for competency to stand trial above the *Dusky* minimum. See NACDL Br. 3. Petitioner's effort to depict its proposal as a mere "supplement" to *Dusky*, Br. 22, glosses over the fundamental difference between restraining the government's power to try a defendant, as *Dusky* does, and empowering the government to deny a constitutional right.

Moreover, when States decide to try individuals electing to represent themselves, courts have ample means at their disposal—short of forcing unwelcome representation—to assure that trial proceedings are fair and orderly and that verdicts are accurate. *Faretta* itself recognized the authority to terminate self-representation when a defendant "abuse[s] the dignity of the courtroom." 422 U.S. at 835 n.46. Likewise, *Faretta* highlighted (and *McKaskle* reaffirmed) States' power to "appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Ibid.*

By helping to "explain and enforce basic rules of courtroom protocol," *McKaskle*, 465 U.S. at 184, standby counsel helps advance the public interest in efficiency and procedural regularity, while preserving the core of the *Faretta* right: the defendant's "actual control over the case" and "the jury's perception that the defendant is representing himself," *id.* at 178.

2. Indeed, there are numerous examples of courts employing far less restrictive means when addressing concerns raised by the fundamental right at issue here. In *Gómez-Rosario*, for example, the trial court, troubled by the defendant's filing of repetitive and frivolous motions, cut off the defendant's *pro se* rights only with respect to motions practice and ordered "standby" counsel to review and approve future filings. 418 F.3d at 97-101. Notably, the defendant was allowed to participate in jury selection and address the court.

And, as *Godinez* recognized, States may express their concerns about defendants with disabilities proceeding *pro se* by taking special care at the waiver stage to ensure that such individuals fully appreciate the value of effective communication and the disadvantages under which they might labor at trial. See 509 U.S. at 400-401. Such an approach assures that defendants will not "unintentionally" forfeit fair-trial rights, Pet. Br. 33—and might dissuade some defendants from undertaking especially difficult *pro se* defenses—but it does so without compromising the principle that all defendants have Sixth Amendment rights.

3. Petitioner's assurances notwithstanding, its proposal is no "limited" exception targeted at cases where self-representation is "most problematic." To

the contrary, petitioner specifically endorses denying self-representation to defendants with speech impediments, physical disabilities, and limited English proficiency or educational attainment. Br. at 25-26 & n.2. Such conditions have nothing to do with *competence* as this Court has historically understood it. See *Godinez*, 509 U.S. at 401 n.12. And, as noted above, there is reason to fear that petitioner's rule lends itself to broad and discriminatory application. Indeed, Edwards himself, whose ordered thought processes and intelligible speech the State championed when pursuing his competence to stand trial, is hardly an obvious candidate for a limited rule disqualifying the "incoherent." Remarkably, the closest the State comes to fleshing out its "proposal" is a brief footnote that references the exceedingly broad standard applied in Wisconsin's courts and then urges that the rule should be broader still. Br. 25 n.2 (citing *State* v. *Klessig*, 564 N.W.2d 716 (Wis. 1997)).

4. Indeed, experience under the Wisconsin rule is what one might expect: Trial judges, who (understandably) prefer trials with attorneys to those with *pro se* defendants—and whose rulings denying self-representation receive highly sympathetic review on appeal—take an unduly narrow view of what it means to communicate effectively. For example, Wisconsin courts have held that a 25-year-old high school graduate—who had never been treated for any mental illness and who was specifically found to be "able to understand criminal proceedings, understood legal terminology and trial procedures, was not delusional and was of normal intelligence," *Gomez* v. *Berge*, No. 04-C-17-C, 2004 WL 1852978, at *3 (W.D.

Wis. Aug. 18, 2004)—was incompetent to represent himself. His problem? As described by the federal habeas court, "[b]ased on the way Gomez was conducting his defense, the [Wisconsin trial] court found that Gomez had 'no conception' of the difference between fact and expert testimony." *Id.* at *4.

Other jurisdictions applying some variant of a coherent-communication standard have denied self-representation to defendants who read poorly, speak English with a heavy accent, or stutter. In *People* v. *Manago*, 269 Cal. Rptr. 819, 821 (Ct. App. 1990), for example, the court upheld a trial court's decision to force counsel on a defendant with a seventh-grade education and ninth-grade reading level. The belief that the defendant could not "effectively communicate his thoughts," *id.* at 823, apparently rested entirely on the trial court's summary statement that the defendant "has rather low verbal skills, [is] not an articulate gentleman and it would * * * be very, very difficult for [him] to question witnesses, to be able to intelligently question the jurors, to challenge the jurors for cause or to exercise peremptory challenges," *id.* at 821.

III. UNDER ANY PLAUSIBLE UNDERSTANDING OF THE SIXTH AMENDMENT—INCLUDING PETITIONER'S—EDWARDS'S RIGHTS WERE VIOLATED

Even if the Constitution permitted States to impose a heightened competency threshold—indeed, even if it allowed Indiana's peculiar proposed exception—the judgment below must be affirmed. That is because (i) the trial court did not even

articulate the "coherent communication" (or any other) standard; (ii) the trial court made no particularized findings regarding Edwards's capacity for self-representation, nor did any of the expert reports or testimony opine on that subject; (iii) the trial court relied expressly on evidence concerning Edwards's *pre-treatment* mental condition; and (iv) in any event, Edwards was manifestly capable of "coherent" communication at trial.

First, the trial court did not even purport to apply petitioner's "coherent communication" standard. Rather, it alluded only to an undefined "third exception" to the Sixth Amendment right, one that entitled the State to deny effect to waivers based on unspecified "abilities," at least where defendants with mental illness are concerned. J.A. 527a. Thus, regardless of whether a "coherent communication" exception would be constitutional, the trial court's denial of Edwards's self-representation right remains invalid.

Second, the trial court did not make a single finding regarding Edwards's abilities as of his December 2005 retrial. There was no determination that Edwards could not "communicate coherently," or that "fairness" required overruling his choice, nor did the trial court undertake a "particularized analysis" of whether Edwards's "conduct of the trial would frustrate important governmental interests," U.S. Br. 7. In extinguishing Edwards's constitutional right, the trial court engaged in no "particularized analysis" whatsoever—it merely referenced Edwards's history of psychiatric illness and the importance of the "abilit[y]" to self-represent. J.A. 527a.

Indeed, none of the expert reports submitted during the protracted pre-trial proceedings specifically examined Edwards's ability to meet a particular standard of competence for self-representation. While we disagree strongly with *amici* American Psychiatric Association, *et al.* that ability-based denials are constitutional, there is no disputing that any such analysis would require determinations "significantly" beyond those made in assessing competency to stand trial. APA Br. 27. As the APA *amici* observe, none of the experts who opined on Edwards's competency to stand trial "[]ever focused on the[se] additional specific capabilities." *Id.* at 30.

Third, the trial court plainly erred in relying on evidence bearing on Edwards's condition and abilities before receiving treatment. As the APA *amici* correctly note, "anti-psychotic medications often eliminate the kinds of cognitive and communication incapacities that bear on self-representation capacity." APA Br. 35 n.15. Yet, in requiring Edwards to proceed through counsel, the trial court expressly relied on reports dating back to February 2000—more than *four years* before Edwards's condition-improving treatment. Petitioner commits that same error, claiming that expert testimony from 2000 to 2003 establishes that Edwards was unable to communicate in 2005. Br. 43-45. Just as it is a defendant's *present* mental state that determines competency to stand trial, *Drope* v. *Missouri*, 420 U.S. 162, 181 (1975), it would be obviously impermissible to assess "competency" for self-representation based on *past* difficulties.

Finally, and in any event, the record here does not show that Edwards was incapable of "coherent communication." That much is clear from his colloquies with the trial court when invoking his right of self-representation. As set forth above (pp. 6-9, *supra*), Edwards clearly explained his concern that appointed counsel had spent insufficient time with him preparing for the first trial. J.A. 509a-510a. Before retrial, he was likewise lucid in explaining his conflict with counsel over which defense theory to advance. J.A. 523a.

Equally important, the lone expert report prepared *after* Edwards had received the medical care that "greatly improved" his mental condition, J.A. 231a, stands starkly against efforts to depict him as incapable of "coherent communication" in 2005. After detailing the extensive treatment Edwards received during his sixth-month inpatient stay at Logansport, Dr. Sena's July 27, 2004, report described his "Present Condition" as follows:

- [Edwards] shows good attention. His memory is good in all spheres (immediate, recent, and remote). * * *
- He communicates very well. His speech is easy to understand.
- His thought processes are coherent.
- There is no evidence of present or recent hallucinations or delusions.

J.A. 231a-232a. Dr. Sena further noted that Edwards "passed the final written examination in Legal Education II" by "answering 61 questions correctly out of 75," J.A. 231a, and described Edwards as able

"to appraise the legal defenses available to him," J.A. 232a; presenting "no[]" level of "unmanageable behavior," *ibid.*; "demonstrat[ing] an excellent understanding of courtroom procedures," J.A. 233a; able "to appraise the likely outcome of the charges against him," J.A. 234a; and having "the capacity to challenge prosecution witnesses realistically" and "to testify relevantly," *ibid.* Dr. Sena concluded that Edwards possessed "good communication skills, cooperative attitude, average intelligence, and good cognitive functioning." J.A. 235a. Those findings, made by a state psychiatrist after a detailed assessment of Edwards's medical history and several hours of interviews with Edwards, would preclude a court from denying Edwards's self-representation under petitioner's proposed standard—or any other.

Rather than reckon with Dr. Sena's conclusions (on which the State relied in putting Edwards on trial), petitioner lards its brief with quotations from some of Edwards's written submissions to the trial court. Many of these, of course, significantly predate Edwards's 2004 treatment—*i.e.*, before he was competent *to be tried*. And the State makes no effort to explain why difficulty in *written* expression would support extinguishing self-representation *in toto* for a defendant who the record shows had no difficulty making himself understood when *in the courtroom*. See APA Br. 23 (noting possibility of having standby counsel draft or review written submissions).[16] If the

[16] Even with respect to written filings, there is far less to the State's claims of "inability to communicate" than meets the eye. The State, by describing Edwards's motion to dismiss as "coherent" and "logical," Br. 47, concedes that he did not

Constitution in fact permits a "communication" exception and if Indiana has embraced it, the *trial judge* made no attempt to appraise Edwards's abilities in this area, let alone address any limitations in a manner respectful of his Sixth Amendment rights.

IV. PETITIONER'S REQUEST TO OVERRULE *FARETTA* IS BOTH UNTIMELY AND UNSOUND

Petitioner's alternative suggestion (Br. 48-61) that *Faretta* should be overruled need not detain the Court for long. That extraordinary request—to repudiate a firmly established and nationally significant decision—is not properly before the Court here. In any event, petitioner fails to make a minimally persuasive argument that *Faretta* was wrongly decided, let alone the special showing the Court requires before discarding settled precedent. Notably, not a single *amicus* participating in this case (including 19 States and the federal government) has joined petitioner's suggestion. This Court should likewise reject it.

A. *Faretta*'s Correctness Is Not Properly Presented

This Court's Rule 14.1(a) expressly states that "[o]nly the questions set out in the petition or fairly included therein, will be considered by the Court." The State's petition nowhere asks this Court to overrule *Faretta*. To the contrary, the petition stated

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completely lack the ability to communicate coherently in writing.

that "[t]his case asks whether *the right* to self-representation recognized in *Faretta* * * * *extends* to a defendant whose mental impairments render him wholly incapable of presenting a coherent and meaningful defense." Pet. 2 (emphasis added). Nor did the State's initial (tendentious) Question Presented suggest an attack on *Faretta*'s validity. See *id.* at i ("May a criminal defendant who, despite being legally competent, is schizophrenic, delusional, and mentally decompensatory in the course of a simple conversation, be denied *the right* to represent himself at trial when the trial court reasonably concludes that permitting self-representation would deny the defendant a fair trial?") (emphasis added). Likewise, this Court's reformulation did not call *Faretta* into question. See Order List, Dec. 7, 2007, 128 S. Ct. 741 ("May States adopt a higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial?").

As numerous decisions of this Court make clear, the reasons for not deciding questions "smuggle[d] * * * into a case * * * after the grant of certiorari," *Norfolk Southern Ry.* v. *Sorrell*, 127 S. Ct. 799, 805 (2007), apply with special vigor when the request at issue is to reconsider a precedent of this Court. See, *e.g.*, *Alabama* v. *Shelton*, 535 U.S. 645, 661 n.3 (2002); *South Cent. Bell Tel.* v. *Alabama*, 526 U.S. 160, 171 (1999).

What is more, until petitioner's merits brief, this case had focused on whether a discrete class of criminal defendants (*i.e.*, those with particular manifestations of mental illness) enjoy *Faretta* rights. See APA Br. 26 (cases are "relatively rare"); Erica J. Hashimoto, *Defending the Right of Self-*

Representation: An Empirical Look at the Pro Se Felony Defendant, 85 N.C. L. Rev. 423, 428 (2007) ("[T]he vast majority of felony pro se defendants * * * do not exhibit overt signs of mental illness."). Even on that sub-issue, petitioner has marshaled only the most meager evidence (indeed, the record as to this particular defendant's abilities is seriously deficient, see pp. 50-54, *supra*). On the broader issue of *Faretta*'s operation in the "vast majority" of cases, petitioner presents nothing that would support such a drastic response. Cf. *Martinez*, 528 U.S. at 164 (Breyer, J., concurring) (any reconsideration of *Faretta* should await "empirical research" providing a "strong factual basis for believing" that the self-representation right is "counterproductive," "in general"). And it is telling that the parties having direct experience with this right—including those *amici* filing briefs in this case—have not joined petitioner's request.

B. There Is No Reason, Let Alone Any Special Justification, To Reconsider *Faretta*

In any event, there is no merit to the State's assertion that *Faretta* should be overruled. First and foremost, the decision is correct. As we have explained (pp. 18-20, *supra*), Justice Stewart's opinion for the Court exhaustively canvassed the structural and historical foundations of the right. See 422 U.S. at 812-832. And *Faretta* considered—but rejected—the very same historical arguments petitioner now advances. Indeed, far from unearthing fresh evidence disproving *Faretta*'s "historical" premises, cf. *Erie R.R.* v. *Tompkins*, 304

U.S. 64, 72-73 (1938) (overruling *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), in part because of intervening historical research), the State literally asks the Court here to re-read California's (unsuccessful) 1974 brief, see Pet. Br. 52 n.5, in the apparent hope that those same arguments will get a sympathetic hearing now.

Nor has the *Faretta* decision been gathering dust in the intervening decades. As detailed above, its core holding has been explored and reaffirmed repeatedly in this Court's self-representation cases, and its understanding of the Sixth Amendment has been integrated into the Court's analysis of distinct, but related questions. See, *e.g.*, *United States* v. *Vonn*, 535 U.S. 55, 73 n.10 (2002); *Rock* v. *Arkansas*, 483 U.S. 44, 52 (1987); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 382 n.10 (1979). Likewise, the autonomy postulates on which it rests have hardly been overtaken with time, cf. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 174 (1989) (noting that courts sometimes revisit questions in light of changes in the "prevailing sense of justice"). If anything, society's commitment to protecting the dignity and autonomy of individuals with mental illness has burgeoned. See *Olmstead*, 527 U.S. at 608 (Kennedy, J. concurring in judgment); *Garrett*, 531 U.S. at 375-376 (Kennedy, J., concurring).

Moreover, the *practical significance* of the federal constitutional right upheld in *Faretta* should not be overlooked. Although the share of defendants who *invoke* the right is relatively modest, the number who benefit from and "rely on" it is incalculably larger. As even this case illustrates, this Court's recognition that every defendant has a *right* to proceed *pro se* exerts force in relationships between defendants and

the attorneys (often court-appointed) representing them, helping reinforce norms of client control. See *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). Thus, even defendants who do not seriously contemplate self-representation derive important benefits from the principle that the defense is theirs to make.

And while there have been expressions of "dismay" about the right of self-representation in general, see *Martinez*, 528 U.S. at 164 (Breyer, J., concurring), some recent "empirical research," *id.*, gives reason to believe that the right works better "in practice" than has been supposed, see generally Hashimoto, *supra*. And it should not be forgotten that trials involving mentally troubled defendants are likely to arouse concern under any set of legal rules. See *Riggins* v. *Nevada*, 504 U.S. 127, 142-144 (1992) (Kennedy, J., concurring in judgment). The lack of support for petitioner's call to overrule *Faretta* belies any suggestion that this longstanding regime works an undue burden on prosecutors, courts, or the general public, and it is highly doubtful that whatever rule were to emerge in *Faretta*'s place would be *more* workable. See U.S. Br. 25 n.4.

Petitioner's only attempt to carry its "special justification" burden is to claim (Br. 56) that *Faretta*'s foundations have been "eroded" by intervening decisions. As explained above (pp. 28-34, *supra*), the cited decisions have *reaffirmed Faretta*'s core rationale and its continued vitality, and the Court has looked to *Faretta* when related issues have come before it.

Although petitioner relies (Br. 58-61) on dicta in *Martinez* to posit that the right to counsel undermines the right of self-representation, *Faretta*

post-dated *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), by more than a decade. And though this Court did not decide *Strickland* v. *Washington*, 466 U.S. 668 (1984), until after *Faretta*, the former decision was no watershed: The right to effective assistance of counsel had been upheld by numerous courts of appeals before *Faretta*, see, *e.g.*, *Moore* v. *United States*, 432 F.2d 730 (3d Cir. 1970); *Peyton* v. *Coles*, 389 F.2d 224 (4th Cir. 1968); *MacKenna* v. *Ellis*, 280 F.2d 592 (5th Cir. 1960), and had been foreshadowed in this Court's pre-*Faretta* decisions, see *McMann* v. *Richardson*, 397 U.S. 759 (1970); see also *Gonzalez-Lopez*, 126 S. Ct. at 2561-2563 (rejecting argument that recognition of the right to effective representation limited or supplanted the Sixth Amendment right to "counsel of choice").

CONCLUSION

The judgment of the Supreme Court of Indiana should be affirmed.

Respectfully submitted.

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