

No. 07-208

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IN THE  
**Supreme Court of the United States**

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STATE OF INDIANA,

*Petitioner,*

*vs.*

AHMAD EDWARDS,

*Respondent.*

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**On Writ of Certiorari to the  
Supreme Court of the State of Indiana**

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**BRIEF AMICUS CURIAE OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF PETITIONER**

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### **QUESTION PRESENTED**

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

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**INTEREST OF *AMICUS CURIAE***

The Criminal Justice Legal Foundation (CJLF)<sup>1</sup> is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case presents the difficult question of how to handle motions for self-representation made by defend-

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

ants of borderline mental competence. The Indiana Supreme Court held that the *minimum* standard of competency at which the trial judge *may* grant the motion is also the standard for deciding when the judge *must* grant the motion. This rule places the trial judge on a constitutional tightrope where an appellate court may find reversible error whichever way the judge rules.

Given the uncertainties inherent in mental evaluations, there should be a range where the trial judge has discretion to allow or not allow self-representation and either ruling will be upheld. Such a rule would promote the fairness and efficiency of trials that CJLF was formed to protect.

### **SUMMARY OF FACTS AND CASE**

On July 12, 1999, Ahmad Edwards stole a pair of shoes from a department store in downtown Indianapolis. App. to Pet. for Cert. 17a-18a. An unarmed store loss prevention officer attempted to detain him. *Id.*, at 18a. Edwards then pulled out a gun and fired three shots, of which one hit the officer and one hit a bystander. *Ibid.*

An FBI agent who happened to be driving by the store apprehended Edwards. *Id.*, at 18a-19a. Three days later, Edwards was charged with attempted murder, felony battery with a deadly weapon, criminal recklessness, and theft. *Id.*, at 19a.

The trial court found Edwards incompetent to stand trial. *Id.*, at 2a. He was committed to a state hospital for evaluation and treatment. Pet. for Cert. 5. In 2001, the hospital notified the trial court that Edwards “has attained the ability to understand the proceedings against him and assist in the preparation of his de-

fense.” *Ibid.* After further court-ordered psychiatric testing, a psychiatrist found “that Edwards still suffered from a delusional disorder, but understood the charges against him and could aid counsel in his defense.” *Id.*, at 6. Trial was set for December 2002. *Ibid.*

In November 2002, a psychiatrist chosen by defense counsel opined that Edwards was unable to assist with his defense due to schizophrenic delusions. *Ibid.* Trial was delayed, and a year later, Edwards was again found to be incompetent to stand trial. *Id.*, at 7. For six months, Edwards received treatment for “symptoms of disorganized thought processes, delusional ideation, hallucinations, and ideas of reference.”<sup>2</sup> *Ibid.* On July 29, 2004, based on an evaluation that he had “greatly improved” and “no longer has hallucinations, delusions, and ideas of reference,” Edwards was again certified as competent to stand trial. *Ibid.*

Prior to this trial, Edwards asked the court to proceed *pro se*. *Id.*, at 8. The trial court denied Edwards’ request because Edwards had expressed an intent to present an insanity defense and the “request would have caused a continuance . . . .” J. A. 524a. Edwards was tried and convicted of theft and criminal recklessness, but the jury hung on the charges of attempted murder and felony battery. App. to Pet. for Cert. 3a. A mistrial was declared, and a second trial was ordered on the counts of attempted murder and felony battery with a deadly weapon. *Ibid.*

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2. “Ideas of reference” refers to “[a] pattern of beliefs that external events have a special significance for the person.” A. Colman, *Oxford Dictionary of Psychology* 352 (paperback ed. 2003). For example, a person who believes that a television newscaster is speaking directly to him is said to have “ideas of reference.” See Noffsinger & Saleh, Letter, *Ideas of Reference About Newscasters*, 51 *Psychiatric Services* 679 (2000).

Before the second trial could commence, Edwards made a motion to proceed *pro se*. *Ibid.* The trial court denied this motion, relying on the psychiatrist reports that found Edwards still suffered from schizophrenia and delusional disorders, and referred to Edwards rambling writings as indicative of his inability to stay focused. *Id.*, at 3a; J. A. 526a-527a. “With these findings, he’s competent to stand trial but I’m not going to find he’s competent to defend himself.” J. A. 527a.

Edwards’ second trial resulted in a conviction for attempted murder and battery with a deadly weapon. *Id.*, at 3a. Edwards appealed, claiming his Sixth Amendment right to self-representation had been denied at the second trial. *Ibid.* The Court of Appeals of Indiana agreed and reversed Edwards’ conviction with instructions to retry Edwards for attempted murder and battery. *Ibid.*

The Indiana Supreme Court granted discretionary review. *Id.*, at 3a. Despite the trial judge’s finding “that Edwards was incapable of adequate self-representation,” the court found this Court’s precedent bound it to hold that “because Edwards was found competent to stand trial he had a constitutional right to proceed pro se and it was reversible error to deny him that right on the ground that he was incapable of presenting his own defense.” *Id.*, at 14a.

This Court granted certiorari.

## SUMMARY OF ARGUMENT

The Sixth Amendment right to self-representation recognized by this Court in *Faretta* was grounded in a consensus of court decisions and state policies that implied a right to self-representation. This consensus did not support the conclusion that the right to self-

representation was absolute and trumped all other considerations. Many courts had held that this right could be limited when necessary to protect the fairness of the trial and courtroom order. The consensus on which *Faretta* was based should mark the boundary of the constitutional rule, and it does not mandate granting self-representation every time a marginally competent defendant knowingly waives his right to counsel.

Rights that are implicit in the Constitution are not absolute, and they may yield in some cases to other essential interests. This Court's decisions in *Illinois v. Allen* and *Sell v. United States* illustrate that at times the "dignity, order, and decorum" of a criminal trial proceeding require that a criminal defendant's constitutional right be limited. Similarly, the Constitution permits States to place limits on self-representation when the evidence before a trial judge demonstrates the defendant's behavior may frustrate the fair administration of justice.

Fair administration of justice is the ultimate goal of the criminal justice system. Fairness can best be achieved by allowing courts to decide that while a defendant is competent to waive counsel, he may not have a right to represent himself if doing so would be contrary to the State's own interest in a fair and orderly trial. *Godinez v. Moran* set the floor on when a State *may* allow a defendant to waive counsel, but it did not establish the ceiling at which the State *must* allow self-representation. Instead, *Godinez* left room for States to develop "more elaborate" standards if they so choose.

## ARGUMENT

### **I. The scope of the *Faretta* right should be limited to the scope of the consensus on which it was based.**

#### *A. The Faretta Consensus.*

“There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature.” *Wade v. Mayo*, 334 U. S. 672, 684 (1948). This has long been understood, and *Faretta v. California*, 422 U. S. 806 (1975), did not change this understanding. Instead, *Faretta* found a national “consensus” implying a Sixth Amendment right of self-representation. See *id.*, at 817-818. The right, although not expressed within the text of the Amendment, was found to be part of the “fundamental nature” of the Sixth Amendment because “forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.” *Id.*, at 817.

However, *Faretta* did not resolve whether a defendant’s right to elect self-representation extended to every case where a defendant validly waived the right to counsel. The right to counsel and the right to self-representation are distinct, and *Faretta* rejected the notion that one arises from the other. “We do not suggest that this right arises mechanically from a defendant’s power to waive the right to assistance of counsel. See *supra*, at 814-815. On the contrary, the right must be independently found in the structure and history of the constitutional text.” *Id.*, at 820, n. 15 (citations omitted). Therefore, when the Court stated that to choose self-representation, and relinquish the benefits of counsel, a defendant must “competently and intelligently” choose self-representation, and the record must establish “that ‘he knows what he is doing and his

choice is made with eyes open,' ” *id.*, at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U. S. 269, 279 (1942)), the Court did not establish that the right to proceed *pro se* arose concurrently with the determination that a defendant had validly waived counsel. *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U. S. 152, 161 (2000), noted that under *Faretta* “the right to self-representation is not absolute.” Also, “the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.” *Id.*, at 162.

Instead, the *Faretta* Court established a right to proceed *pro se* without defining what level of mental functioning a defendant needed to have before a state court must allow him to do so. The Court noted that *Faretta* was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. See *Faretta*, 422 U. S., at 835. The problem of the marginally competent defendant was not before the Court. There were, however, pre-*Faretta* cases that distinguished between a defendant’s ability to waive counsel and his ability to represent himself.

The *Faretta* right to self-representation was premised on the Court’s finding of a “consensus” among federal and state courts which “accords a defendant the right to represent himself in any criminal case.” *Id.*, at 813, 817. The cases that made up this consensus are therefore worth a close look. Footnote 9 in the *Faretta* opinion cites 16 state cases and 2 secondary authorities for the proposition that nearly all states recognized a right of self-representation. A survey of the legal landscape, cf. *Graham v. Collins*, 506 U. S. 461, 468 (1993), to determine the extent of this commonly recognized right requires a look at the authorities cited

by the *Faretta* Court as well as other cases cited and discussed in those authorities.

Many of the cases cited by *Faretta* contain no more than a passing reference to a right of self-representation on the way to a holding that a defendant's waiver of counsel was valid. See, e.g., *Mackreth v. Wilson*, 31 Ala. App. 191, 193, 15 So. 2d 112, 113 (1943). Such references tell us little about the scope of the right. A more extended discussion can be found in *Cappetta v. State*, 204 So. 2d 913 (Fla. App. 1967), rev'd on other grounds, 216 So. 2d 749 (Fla. 1968), a case in which the trial court denied the motion for self-representation. *Cappetta* notes the split of authority regarding whether there are limitations on a defendant's right to proceed *pro se* where it is invoked prior to the start of trial.

“Using the principles obtained from the above cited cases, this court holds to the general rule that in the absence of unusual circumstances an accused who is mentally competent and sui juris has the right to conduct his own defense without the aid of counsel.<sup>1</sup>

“To invoke this right the criminal defendant must make an unequivocal request to act as his own lawyer. Such request must be made prior to the commencement of the trial. The defendant having complied with these requirements, the trial judge must then determine if the defendant has intelligently and competently waived his right to counsel *and that no unusual circumstances exist* which would preclude the defendant from representing himself without assistance of counsel.

\* \* \*

“In determining *unusual circumstances*, included but not limited thereto is whether *the accused by reason of age, mental derangement*, lack of

knowledge, or education, or inexperience in criminal procedures *would be deprived of a fair trial if allowed to conduct his own defense*, or in any case, where the complexity of the crime was such that in the interest of justice legal representation was necessary. The right of an accused to represent himself without assistance of counsel is *not so absolute* that it must be recognized when to do so would jeopardize a fair trial on the issues.

“The determination of whether unusual circumstances are evident is a matter resting in *the sound discretion granted to the trial judge* in conducting the trial in a cause and will not be disturbed unless an abuse is shown. *Ellard v. Godwin*, Fla. 1955, 77 So. 2d 617.

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“1. For an excellent annotation dealing with this subject, see 77 A. L. R. 2d 1233. Also see 21 Am. Jur. 2d, Criminal Law, § 310, and 23 C. J. S. Criminal Law § 979(4).” *Id.*, at 917 (emphasis added).

Significantly, *Cappetta* recognizes that both a valid waiver *and* absence of unusual circumstances are required. Further, the defendant’s mental abilities are among the factors considered under “unusual circumstances.” Finally, the appellate court recognized that a range of discretion for the trial judge is necessary. The court logically recognized there may be defendants whose mental state would allow the trial judge to deny self-representation even though they are able to make a valid waiver of their right to counsel.

*Faretta* also cited *State v. Woodall*, 5 Wn. App. 901, 491 P. 2d 680 (1971). That case held, “Whether a defendant should be allowed to act as his own counsel lies within the sound discretion of the trial judge.” *Id.*,

at 903, 491 P. 2d, at 682. The defendant's mental capacity was central to the exercise of that discretion. Distinguishing an earlier case, the court held that Woodall was "mentally competent, alert and capable of framing questions in an intelligent manner" and therefore properly allowed to represent himself. *Id.*, at 904, 491 P. 2d, at 682.

*Faretta*, *Cappetta*, and *Woodall* all cite Annot., Right of Defendant to Conduct Defense in Person, or to Participate with Counsel, 77 A. L. R. 2d 1233 (1961). That annotation notes cases holding that some discretion is allowed to the trial court in order to maintain order and insure a fair trial. See *id.*, at 1239. Among the cases cited is *People v. Burson*, 11 Ill. 2d 360, 143 N. E. 2d 239 (1957), where the Illinois Supreme Court explains the limitations on the right of self-representation under Illinois law.

"If then sane [at the time of trial], the defendant, upon the waiver of counsel, had the right to defend himself, *subject to the constant duty of the court to protect the judicial process from deterioration* occasioned by improper or inadequate conduct of the defense. In such situation the court possesses *broad discretion* in relation to the appointment of counsel for advisory or other limited purposes, or *to supersede the defendant* in the conduct of the defense. Continuous supervision of the trial is required in order to maintain proper judicial decorum, to the end that defendant may receive a fair trial." *Id.*, at 373, 143 N. E. 2d, at 247 (emphasis added).

Illinois is one of the states cited by *Faretta* for the consensus. See 422 U. S., at 813, n. 9. The consensus was not for an absolute right whenever the defendant was competent to waive counsel but rather for a right subject to limitation when needed to protect the judicial process.

The “consensus” footnote of *Faretta* also cites R. Anderson, Wharton’s Criminal Law and Procedure § 2016 (1957). The 1974 supplement to that work, the one current at the time of *Faretta*, states at page 100, “Thus the court may appoint counsel for the defendant when the mental deficiency or ignorance of the defendant makes it clear that he will not be able to conduct his own defense adequately and the punishment for his offense is severe.” Among the cases cited for this proposition are *McCann v. Maxwell*, 174 Ohio St. 282, 189 N. E. 2d 143 (1963), and *United States v. Davis*, 260 F. Supp. 1009 (ED Tenn. 1966).

In *Davis*, defendant moved for a new trial claiming the trial court erred in denying him the right to conduct his own defense and in forcing him to be represented by court-appointed counsel. 260 F. Supp., at 1011. Davis had been tried for bank robbery and kidnapping and had been appointed counsel at his request. *Id.*, at 1017. Shortly after this appointment, Davis was found incapable of assisting counsel in his defense and was committed for treatment until he was found competent to stand trial. *Ibid.* Six days before trial, Davis made a motion to have his counsel dismissed and to have another attorney appointed. *Ibid.* The court denied the motion. *Ibid.* On the day of trial, Davis made it clear he would not participate with his appointed attorneys at trial, and was subsequently found incapable of assisting counsel and standing trial. *Id.*, at 1018. When Davis was finally found competent to stand trial, he again moved to dismiss his attorneys so he could proceed as his own counsel. *Ibid.* The trial court denied the motion, and the case proceeded to trial. *Ibid.*

The district court found Davis’ claim to be without merit, *id.*, at 1022, reasoning that while the Constitution and state statutes have recognized the right to self-

representation, the right is “not absolute, but is qualified, and may be denied under some circumstances.” *Id.*, at 1020. Thus, where the defendant’s conduct during trial had resulted in speeches that “delved into subject matter whose relevance to the proceeding was often obscure and irrelevant[,]” the defendant’s right to self-representation could be limited. *Id.*, at 1021. A right to self-representation could be denied because “[t]he right to defend *pro se* cannot be isolated from other elements of fair orderly administration of justice.” *Id.*, at 1019.

The district court also rejected the argument that if Davis was not mentally competent to defend himself he should not have been found mentally competent to stand trial. *Id.*, at 1021. The *Davis* court found that the mental abilities required of the defendant to stand trial differed substantially from the abilities required of a defendant proceeding *pro se*. *Ibid.* Whereas a defendant standing trial only had to possess the mental ability to “render his counsel such assistance as to make possible a proper defense[,]” a defendant proceeding *pro se* was required to “be able to recognize proper defenses and evidence to support them and to be able to discard the irrelevant.” *Ibid.*

The defendant in *McCann v. Maxwell*, 174 Ohio St. 282, 189 N. E. 2d 143 (1963), had been tried with the assistance of counsel in a first trial which resulted in the discharge of a jury for failure to reach a verdict. *Id.*, at 282, 189 N. E. 2d, at 144. His behavior in the first case had led the court to determine the petitioner required assistance of counsel at his second trial. *Id.*, at 286, 189 N. E. 2d, at 145-146. After his conviction, the defendant filed a petition for habeas corpus relief asserting that the trial court’s refusal to allow him to represent himself at the second trial violated his constitutional rights. *Id.*, at 282, 285, 189 N. E. 2d, at

143, 145. The court denied relief. *Id.*, at 286, 189 N. E. 2d, at 146.

While the Ohio Supreme Court recognized that under ordinary circumstances the Constitution forbids a court from forcing counsel on the accused:

“there must necessarily repose in the trial court a certain discretion in these matters. If the mental condition of an accused is such, either by mental derangement or by lack of knowledge, that the court feels that the accused would be incompetent to conduct his own defense and thus be deprived of a fair trial, or the gravity of the offense is such that it carries a severe penalty, the court may, in the interest of justice or if it feels it necessary in order to protect the judicial process from deterioration, appoint counsel to represent the accused.” *Id.* at 285, 189 N. E. 2d, at 145.

*Faretta* addressed and rejected the argument that lack of technical legal knowledge could preclude a defendant from representing himself if he chose. See 422 U. S., at 836. To the extent *McCann*, *Cappetta*, and other pre-*Faretta* cases hold to the contrary, they are no longer good law. There is an important difference, though, between the awkwardness of a layman who does not know the ground rules of procedure and the incoherence of a mentally disturbed person who cannot tell what evidence and argument are relevant to the case. See *infra*, at 21. *Faretta* did not address that situation.

Prior to the *Faretta* decision, there was a national consensus that a right to self-representation existed. But see *People v. Sharp*, 7 Cal. 3d 448, 463-464, 499 P. 2d 489, 499 (1972) (legislative repudiation due to “heavy burden upon the administration of criminal justice without any advantages accruing to those

persons who desire to represent themselves”). The scope of that consensus, however, was limited to cases where the defendant had sufficient mental competence to exercise that choice without reducing the trial to a farce. For defendants in the mental twilight zone, there was no consensus for a rigid rule requiring trial judges to permit this self-destructive choice, and the better-reasoned decisions vested discretion in the trial court to deny the motion. The question now is whether the scope of the *Faretta* rule should extend beyond the consensus on which it was based.

*B. The Scope of Consensus-Based Rules.*

Whenever this Court confers federal constitutional status on a rule that is not stated in the text of the Constitution, it deprives the people of the several States of the power to decide that question themselves. Such a step is not always wrong, but it always calls for the greatest of caution. The power to decide at the state level all questions that the Constitution does not federalize is itself a constitutional right guaranteed in the Bill of Rights, specifically in the Tenth Amendment. When a court wrongly federalizes a question of policy that the Constitution actually leaves to the States, the court is violating one constitutional right on the pretense of protecting another one.

A number of rules have been found to be implicit in the Constitution on the basis of having been adopted universally or nearly so by the states. Guilt in a criminal case must be proved beyond a reasonable doubt. See *In re Winship*, 397 U. S. 358, 361-362 (1970). The penalty of death must not be imposed for the crime of rape, at least where the victim is an adult. See *Coker v. Georgia*, 433 U. S. 584, 594 (1977).

Too often, though, a rule that is constitutionalized on the basis of consensus becomes a device for federal

judicial micromanagement of questions of policy around the periphery of the rule, questions on which there was no consensus. See, e.g., *Harris v. Alabama*, 513 U. S. 504, 512 (1995) (rejecting such an argument on one aspect of capital sentencing). While the core rule in *Winship* was universally agreed, the implementation of that rule in jury instructions varied, and the constitutionalization of the rule made this Court the editor-in-chief of jury instructions, with dubious results. *Cage v. Louisiana*, 498 U. S. 39, 41 (1990) (*per curiam*), struck down a jury instruction, but *Cage* was subsequently found to have applied the wrong standard, see *Victor v. Nebraska*, 511 U. S. 1, 5-6 (1994), and to this day we do not know if *Cage* was correct.

*Atkins v. Virginia*, 536 U. S. 304, 313-317 (2002), found a national consensus in statutes prohibiting the execution of mentally retarded murderers. *Atkins* was promptly followed by attacks on the very statutes that had formed the consensus. See, e.g., *Ferrell v. Head*, 398 F. Supp. 2d 1273, 1295 (ND Ga. 2005). In *Pruitt v. State*, 834 N. E. 2d 90, 99, 103 (Ind. 2005), such an attack actually succeeded. The fact that such a claim can even be credibly made, much less succeed, points out the need to clarify a principle.

The Constitution protects *fundamental* rights. It should not be “a detailed code of criminal procedure.” Cf. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L. Rev. 929, 954 (1965). If a rule is deemed constitutional not because it is in the text but because its nearly universal adoption by states indicates that it is part of the process of law that is due, then the constitutional limitation should be limited to the core principle that is so agreed upon. The federal constitutional rule should extend no further, and the questions that inevitably arise around the periphery should be considered matters of state law.

**II. In some contexts, an essential interest of the State may justify a limitation on the defendant's constitutional rights.**

“All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.” *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355 (1908) (Holmes, J.).

The notion that the *Faretta* right of self-representation must be given controlling effect in every case where the Sixth Amendment right to counsel has been validly waived, without regard to the State's interest in a fair and orderly trial, is a prime example of carrying a right to its logical extreme. This Court has, in other contexts, recognized that certain rights of defendants are not absolute and need not be carried to their logical extremes. Instead, defendants' rights may occasionally yield to the overriding need to conduct a trial and to conduct it fairly.

*A. Illinois v. Allen and Deck v. Missouri.*

The defendant's right to due process of law generally includes the right to be present at trial. See *Snyder v. Massachusetts*, 291 U. S. 97, 105-106 (1934). However, in *Illinois v. Allen*, 397 U. S. 337, 347 (1970), this Court found no legal error when a trial judge excluded an obstreperous defendant from his own trial. The right to be present could be denied to a threatening and verbally abusive defendant when his speech at trial was so “disruptive that it is exceedingly difficult or wholly impossible to carry on the trial.” *Id.*, at 338. This Court recognized that “trial judges confronted with disruptive, contumacious, stubbornly defiant defen-

dants must be given sufficient discretion to meet the circumstances of each case.” *Id.*, at 343. The available alternatives include the authority to “(1) bind and gag [a defendant], thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.” *Id.*, at 344.

*Allen* did not give the trial judge unlimited authority to exclude the defendant. Instead, a trial judge’s ability to limit the right is conditioned on the need to prevent defendants from thwarting and obstructing orderly progress at trial. See *id.*, at 346. “It is essential to the proper administration of criminal justice that dignity, order and decorum be the hallmarks of all court proceedings in our country.” *Id.*, at 343. Under *Allen*, a criminal defendant’s behavior may require limitation of his constitutional right to be present at trial, and the trial judge has the authority to do so.

The *Allen* principle was applied to shackling in *Deck v. Missouri*, 544 U. S. 622, 624 (2005). “We hold that the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* the use is ‘justified by an essential state interest’—such as the interest in courtroom security—specific to the defendant on trial.” *Id.*, at 624 (emphasis in original). Even though the right not to be shackled in front of the jury “has a constitutional dimension; . . . the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum.” *Id.*, at 628; see also *id.*, at 633 (“not absolute”).

#### B. *Sell v. United States*.

The Fourteenth Amendment protects a defendant’s liberty “interest in freedom from unwanted antipsychotic drugs.” *Riggins v. Nevada*, 504 U. S. 127, 136 (1992). Even so, this Court has found that the federal

Constitution may, under some circumstances, permit the government to administer antipsychotic drugs against a defendant's will so that the defendant is competent to stand trial. At times, a defendant's constitutional rights may be subordinated to the "Government's interest in bringing to trial an individual accused of a serious crime . . . ." *Sell v. United States*, 539 U. S. 166, 180 (2003).

In *Sell*, the petitioner had a long history of mental illness. *Id.*, at 169. When charges were brought against him for submitting fictitious insurance claims for payment, a Magistrate found Sell incompetent to stand trial. *Id.*, at 170-171. Sell was hospitalized, and within two months of his hospitalization, it was recommended that Sell take antipsychotic medication. *Id.*, at 171. When Sell refused, the staff sought permission from the Magistrate to administer the drugs against Sell's will. *Ibid.* The District Court affirmed the Magistrate's decision to allow administration because forced medication was " 'medically appropriate' " and " 'the only viable hope of rendering the defendant competent to stand trial.' " *Id.*, at 174.

This Court found that while the defendant has a constitutional right of privacy, "the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial . . . ." *Id.*, at 179. The limit came with certain conditions: "if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account less intrusive alternatives, is necessary significantly to further important trial-related interests." *Ibid.* A defendant's constitutional rights could be limited because of the Government's "substantial interest in timely prosecution," and

because “the Government has a concomitant, constitutionally essential interest in assuring the defendant’s trial is a fair one.” *Id.*, at 180. While this Court found the record did not support forced medication in Sell’s case, the limit articulated by its decision is important to the present case. It stands as another example of an important right that the Court has limited when the defendant’s exercise of the right would undermine the government interest in fair and orderly justice.

When necessary to ensure fairness and security in our criminal justice system, this Court has endorsed more drastic limits on defendants’ rights than the limit at issue in the present case. Exclusion from trial, binding and gagging or shackling in view of the jury, and involuntary medication are all more drastic measures. This case only requires the Court to recognize that under federal law, States are not prohibited from placing their own limits on a defendant who is competent to stand trial but not capable of representing himself. Because a defendant’s right to proceed *pro se* does not flow from a determination that he is competent to waive counsel, States may place limits on self-representation when evidence in the record demonstrates the defendant’s behavior may frustrate the fair administration of justice.

**III. In cases of marginally competent defendants, there should be a window in which the trial judge has discretion to allow or deny self-representation.**

A state may find a defendant has competently waived his right to counsel, but a valid waiver does not necessarily give the defendant the constitutional right to defend himself. The Indiana Supreme Court was incorrect to find reversible error as a matter of federal

constitutional law when the defendant was denied self-representation because he was incapable of presenting his own defense.

A. *The Need for Limits.*

In his dissent in *Faretta v. California*, 422 U. S. 806 (1975), Justice Blackmun chastised the Court for “bestow[ing] a *constitutional* right on one to make a fool of himself.” *Id.*, at 852 (emphasis in original); see also *Godinez v. Moran*, 509 U. S. 389, 404 (1993) (Kennedy, J., concurring in part and concurring in the judgment). While Justice Blackmun may have been only using the old proverb “that ‘one who is his own lawyer has a fool for a client,’ ”<sup>3</sup> to make a point, trial courts have often been forced to suffer such fools. Such trials have undermined public confidence in the judicial system, a result that could be avoided if a trial court is able to limit the marginally competent defendant’s right to proceed *pro se*.

The trial of Scott Panetti is one such example. In 1995, Panetti was tried and convicted for killing his wife’s parents. See *Panetti v. Quarterman*, 551 U. S. \_\_\_, 127 S. Ct. 2842, 2848, 168 L. Ed. 2d 662, 671 (2007). Following a jury trial on the question of competence, Panetti moved to dismiss his lawyers and represent himself. *Ibid.* The trial judge expressed reservations, but granted the motion. See *Panetti v. State*, No. 72,230 (Tex. Crim. App., Dec. 3, 1997), pp. 26-27, available at <http://www.cjlf.org/briefs/Panetti/PanettiDirectAppeal.pdf>. Texas takes the same view that the Indiana court did in the present case, *i.e.*, that a defendant who is competent to *choose* to represent himself *must* be allowed to do so, even if he is not

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3. This proverb goes back at least to 1809. See F. Shapiro, *Oxford Dictionary of American Legal Quotations* 44 (1993).

competent to actually do so. See *id.*, at 27. The trial that ensued illustrates how a *Faretta* motion by a marginally competent defendant places the trial court in an impossible position. See Erickson, Book Review: *Mind Over Morality*, 54 *Buffalo L. Rev.* 1555, 1564 (2007).

On the first day of trial, Panetti arrived in a “Tom Mix’ style costume like an old TV Western.” Joint Appendix in *Panetti v. Quarterman*, No. 06-6407 (“*Panetti J. A.*”), p. 23. He wore a cowboy hat in court along with suede leather pants which he tucked into his cowboy boots. *Ibid.* During the trial, he insisted on using “old west vernacular in his speech[]” using phrases like “‘run away mule” and “shoe the bosses’ hosses.’ ” *Id.*, at 23-24. His opening statement was incoherent. *Id.*, at 342-343. He discussed Medicaid, jurors that had not been chosen during voir dire, and made repeated references to religiosity. *Ibid.* And the displays did not end there. Panetti also appeared to fall asleep during trial, *id.*, at 23, and attempted to give the jury a full account of his life beginning “with his birth” during his direct testimony. *Id.*, at 343. Throughout his testimony, “Panetti’s dialogue was circumstantial, tangential, and full of looseness of associations.” *Ibid.*

Panetti’s standby counsel later stated that “his trial was truly a judicial farce, and a mockery of self-representation.” *Id.*, at 26. The resulting guilty verdict and death sentence led to wide criticism of Texas’ criminal justice system. See Blumenthal, *Insanity Issue Lingers as Texas Execution is Set*, *N. Y. Times*, Feb. 4, 2004, p. A12. The executive director of the Texas Defender Service stated, “Allowing a schizophrenic in a cowboy costume to represent himself in a death penalty case gives new meaning to the term ‘frontier justice,’ . . . . Given the Texas Court of Criminal Appeals’ history of tolerance for defense lawyers who sleep or use drugs

and alcohol throughout death penalty trials, however, its laissez-faire approach is hardly surprising.” *Ibid.* That criticism of the Texas courts, however, was misdirected. The Texas Legislature has codified the same view of the *Faretta* rule that the Indiana Supreme Court took in the present case. See Tex. Code Crim. Proc., Art. 1.051(g). That codification is understandable given the constitutional uncertainty of any other rule, and only this Court can remove the doubt. In President Truman’s famous words, “the buck stops here.”

With the threat of reversal for *Faretta* error hanging over them, trial courts have been forced to tolerate proceedings that result in a mockery of justice. See Erickson, 54 Buffalo L. Rev., at 1564. For this reason, States should be permitted to place limits on a defendant’s right to proceed *pro se*. A trial court must not be caught in the position where denying a *Faretta* motion will lead to reversal, and granting the motion will allow the “trial to become a farce.” *Ibid.*

#### *B. Competence to Waive Counsel Standard.*

In *Godinez v. Moran*, 509 U. S. 389 (1993), this Court rejected the notion that a defendant’s competency to waive his constitutional right to counsel required a higher level mental functioning than the level required for the defendant to stand trial. *Id.*, at 398. A criminal defendant is competent to waive his right to counsel if he has “ ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding’ and has ‘a rational as well as factual understanding of the proceedings against him.’ ” *Id.*, at 396 (quoting *Dusky v. United States*, 362 U. S. 402 (1960) (*per curiam*)). In so ruling, this Court articulated that a criminal defendant’s competence to waive his right to counsel is distinct from, and inde-

pendent of, the criminal defendant's competence to represent himself. *Id.*, at 399.

*Godinez* did not resolve whether the defendant's ability to choose self-representation necessarily gave the defendant the right to proceed *pro se*. Instead, *Godinez* only articulated the constitutionally permitted minimum standard of competency necessary to waive counsel. The defendant must be competent to stand trial and to make a knowing and voluntary waiver of his right to counsel. See *id.*, 401-402. However, this constitutional floor on when a State *may* permit defendant to waive counsel is not a ceiling on when it *must*. "[W]hile States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these requirements." *Id.*, at 402; see also *id.*, at 408 (Kennedy, J., concurring in part and concurring in the judgment) ("due process does not preclude Nevada's use of a single competency standard"). In other words, *Godinez* implies that there is a window between the minimal *Dusky* competence at which a State *may* allow a defendant to waive counsel and some higher, "more elaborate" standard above which it *must* do so under *Faretta*. A state may wish to adopt such a permitted, higher standard to protect its own interests in fair and orderly proceedings, see *supra*, at 7, 19, even when the defendant has waived his own rights.

*Godinez* is based on the capacity to waive a right, not the capacity to exercise a related but distinct right. If a defendant has validly waived his Sixth Amendment right to counsel, he has no claim of reversible error when the trial court permits him to represent himself. On the other hand, if the defendant's mental capacity is such that the State may deny self-representation to protect *its own* interests in courtroom order, a functioning adversary system, and public confidence in the

fairness of the proceedings, then there has been no violation of *Faretta* if the trial court denies self-representation. The space between competency to waive counsel and the ability to represent oneself creates a window of discretion within which no constitutional right of the defendant is violated whichever way the trial court rules.

*C. The State's Independent Interest in a Fair Trial.*

Cases such as *Panetti* are clear examples of where a state's independent interest in a fair trial may outweigh the defendant's interest in proceeding *pro se*. See *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 162 (2000) (noting other examples). While courts have recognized that a person has a right to defend himself, there are circumstances where the state should not have to permit the exercise of this right. The minimal competency required of a defendant to make this choice does not guarantee that the defendant will exercise his right to self-representation in a manner that results in a fair and orderly trial.

Once the trial judge finds that the defendant has knowingly and intelligently chosen to waive his Sixth Amendment right to counsel, that right is no longer an obstacle to self-representation. However, the trial judge should also determine if the state's interest in a fair trial will be hindered by a marginally competent defendant's self-representation. If the state's interest will be hindered, the judge should be allowed to limit the defendant's right to self-representation by imposing counsel.

The *Faretta* right to self-representation, like the rights at issue in *Allen*, *Deck*, and *Sell*, should be interpreted to allow States to protect their own essential interests. Reversible error must not be found every time a state court finds its own interest in justice

requires it to limit the defendant's right to represent himself. Courts must not be compelled, as the Indiana Supreme Court believed it was in this case, to hold "that because [a defendant is] found competent to stand trial he ha[s] a constitutional right to proceed pro se . . . ." App. to Pet. for Cert. 14a. The Sixth Amendment does not require such a result, and Indiana may employ a "more elaborate" standard as a matter of state law.

### CONCLUSION

The decision of the Supreme Court of Indiana should be vacated and the case remanded.

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Respectfully submitted,

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