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 THE STATE OF INDIANA

BRIEF OF OHIO AND 18 OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

May a State impose a standard for determining whether a defendant is competent to proceed pro se higher than the *Dusky* standard for competency to stand trial?

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STATEMENT OF AMICI INTEREST

The Amici States have a direct interest in this case because it could determine every State's level of autonomy in developing its own standards of competency for criminal defendant self-representation. Additionally, the Amici States possess strong interests in affording pro se defendants a fair trial and maintaining the integrity of the judicial forum. Both of these interests are threatened when incompetent defendants attempt to conduct their own defense. This case will affect the participants in the state criminal justice system—defendants, prosecutors, judges, jurors, crime victims, and the public at large—who share an interest in the integrity of the system. Finally, the ruling of the Indiana Supreme Court undermines the Amici States' strong interest in the finality of their courts' criminal judgments by making unduly vulnerable to appeal all trial court rulings on a motion to proceed pro se.

SUMMARY OF ARGUMENT

The Court has never addressed the general issue in this case: the standard of competency that a criminal defendant must satisfy before exercising his Sixth Amendment right under *Faretta v. California*, 422 U.S. 806 (1975), to represent himself at trial. Nor has it addressed the specific issue: whether the States are free to require such defendants to satisfy a standard higher than the due process competency-to-stand-trial standard announced in *Dusky v. United States*, 362 U.S. 402 (1960). This case presents a rare opportunity to clarify the contours of the *Faretta* right, as well as the scope of the States' powers to

further their important interests in fair, efficient trials and the finality of their courts' criminal judgments.

Under the *Dusky* standard, a criminal defendant is competent to stand trial so long as "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." *Id.* at 402 (internal quotation marks omitted). This standard presupposes that any defendant proceeding to trial will be represented by counsel. But as the Court has long recognized, counsel is not required; instead, a criminal defendant may waive his Sixth Amendment right to counsel, provided that he does so "competently and intelligently." *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938). In *Godinez v. Moran*, 509 U.S. 389 (1993), the Court advanced a unitary theory of competency. Under that theory, a defendant who is competent to stand trial is equally competent to waive the right to counsel and to decide to plead guilty and thereby waive certain other constitutional rights. Importantly, however, *Godinez* did not address a defendant's right to self-represent at trial—a right that, as *Faretta* made clear, is analytically and doctrinally distinct from the right to waive counsel. 422 U.S. at 819, n.15. Accordingly, the unitary theory of competency expressed in *Godinez* does not extend to competency to proceed pro se to trial.

A defendant who opts to self-represent at trial threatens important State interests in ways that a defendant who waives counsel to plead guilty does not. Proceeding pro se at trial threatens the very

underpinnings of the adversary system by creating an insurmountable mismatch in the quality of representation. This asymmetry compromises the judge's neutrality by forcing her to take an active role in managing the proceedings, and—especially in the case of a mentally unstable defendant—undermines the dignity of the courtroom. In this way, a pro se defendant unwittingly jeopardizes his own right to a fair trial. To protect the fairness of criminal proceedings to all sides, States must be free to impose a higher competency standard upon defendants proceeding pro se.

Permitting the States to enact such a higher standard also furthers their important interest in the finality of their criminal judgments. Presently, judges face a Catch-22 every time they rule on a motion to proceed pro se. Regardless of whether they hold that a defendant is competent to self-represent, the defendant may appeal the result, arguing constitutional error in either direction. If the defendant was allowed to proceed pro se, he can argue on appeal that his incompetence to do so deprived him of a fair trial. If he was not allowed to proceed pro se, he can argue a violation of his *Faretta* right to self-represent. Allowing the States to apply an enhanced standard of competency when criminal defendants wish to proceed pro se, however, diminishes defendants' ability to appeal favorable rulings, and thus advances the States' important interest in finality.

For these reasons, Amici States urge the Court to reverse the judgment of the Indiana Supreme Court and to hold that States are free to adopt

standards for self-representation higher than the *Dusky* standard for competency to stand trial.

ARGUMENT

The Court should reverse the judgment of the Indiana Supreme Court and hold that when criminal defendants wish to proceed pro se at trial, the States are free to impose a standard of competency higher than the *Dusky* standard for competency to proceed to trial with a lawyer. Since recognizing the right to proceed pro se in *Faretta*, the Court has not addressed this issue and accordingly has not confronted, in this context, the stark and important State interests justifying a higher competency standard. Unlike the scenario in which a criminal defendant wishes to waive counsel and immediately plead guilty, the decision to proceed to trial pro se implicates the States' interest in maintaining the integrity of the judicial system—an interest that the States, their citizens, and individual criminal defendants share. Additionally, permitting the States to erect enhanced competency standards for self-representation at trial advances their important interest in the finality of their courts' judgments. These concerns weigh heavily in favor of recognizing that nothing in *Faretta* or its progeny prevents the States from requiring that defendants who desire to proceed to trial pro se meet a higher competency threshold than those who proceed to trial with a lawyer.

A. The narrow right to proceed to trial pro se is distinct from the right to waive counsel.

1. In *Faretta v. California*, the Court recognized a narrow right to self-representation.

Faretta v. California recognized that the Sixth Amendment provides criminal defendants a limited right to represent themselves at trial. The Court considered the text and structure of the Sixth Amendment, as well as British and colonial legal history, and concluded that criminal defendants have a Sixth Amendment right to conduct their own defense at trial. 422 U.S. at 818-19. This holding was not an endorsement of self-representation. Instead, the Court noted that when a defendant proceeds pro se, he gives up "many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." *Id.* at 835 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)).[1]

Although the Court did not address explicitly the standard of competency a defendant must meet to proceed pro se, it did make clear that the right is narrow. First, the Court stated that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Id.* at 834 n.46 (citing *Illinois v. Allen*, 397 U.S. 337 (1970)). The Court

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[1] Although the *Faretta* Court cited *Zerbst* for the "knowing and intelligent" standard, the *Zerbst* Court actually held that a waiver of counsel must be "intelligent and competent." *Zerbst*, 304 U.S. at 465, 468.

further circumscribed this right by stating that the State may appoint standby counsel for a pro se defendant, even if the defendant objects. *Id.* Finally, the Court explained that the right to self-representation must yield to the States' important interest in maintaining dignity and order in their judicial proceedings: "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with the relevant rules of procedural and substantive law." *Id.*

2. *Faretta*'s progeny confirm that the right to self-representation is narrow.

After *Faretta*, the Court repeatedly confirmed that a defendant's right to represent himself is not absolute. Instead, "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Martinez v. Court of App. of Cal., Fourth App. Dist.*, 528 U.S. 152, 162 (2000). Thus, a court may allow standby counsel to participate at trial, even over the defendant's objection, so long as counsel's actions do not "seriously undermine" the impression that the defendant is representing himself. *McKaskle v. Wiggins*, 465 U.S. 168, 184, 187 (1984). Similarly, States may deny defendants the ability to represent themselves on appeal. *Martinez*, 528 U.S. at 163. This narrow *Faretta* right to proceed pro se, then, does not prevent the States from requiring prospective pro se defendants to demonstrate a higher degree of competency than necessary under *Dusky* to be found competent to stand trial.

3. The right to self-represent differs from the right to waive the assistance of counsel to plead guilty.

As a practical matter, a defendant cannot self-represent without first waiving counsel. But as a legal matter, the right to waive counsel and the right to self-represent are two different things. By the same token, waiving the Sixth Amendment right to counsel to then plead guilty is not the same as exercising the Sixth Amendment *Faretta* right to self-represent at trial.

Faretta establishes that the right to represent oneself at trial is doctrinally distinct from the right to waive counsel. The *Faretta* Court explicitly rejected the notion that the right of self-representation "arises mechanically from a defendant's power to waive the right to the assistance of counsel." 422 U.S. at 819 n.15. Instead, the Court reasoned, "the right [to self-representation at trial] must be independently found in the structure and history of the constitutional text." *Id.* Were this not the case, *Faretta*'s analysis of British and colonial history would have been entirely unnecessary, and *Zerbst* would have been dispositive.

The right to self-representation at trial is also analytically distinct from the right to waive counsel to plead guilty. As explained more thoroughly in Part B below, a defendant who proceeds to trial pro se threatens a core state interest—the interest in ensuring the fair and efficient administration of justice. A defendant who proceeds without counsel only to plead guilty does not threaten the fairness, efficiency, or public perception of the criminal justice

system. Nor does that defendant undermine the integrity of the judicial forum in the way that some mentally unstable pro se defendants do at trial. This difference militates in favor of permitting States to enact higher competency standards for defendants proceeding pro se than for those who are represented at trial.

The Court has never addressed the general issue that this case presents—the standard of competency applicable to self-representation at trial. The Indiana Supreme Court reasoned that the Court addressed this issue in *Godinez v. Moran*, 509 U.S. 389 (1993). See *Edwards v. Indiana*, 866 N.E.2d 252, 259 (Ind. 2007). But *Godinez* involved a defendant who sought to waive his right to counsel only to plead guilty, not to represent himself at trial. *Godinez*, 509 U.S. at 392-93. Thus, the defendant in *Godinez* invoked his *Zerbst* right to waive counsel, but not his *Faretta* right to represent himself at trial.

In *Godinez*, the Court concluded that the *Dusky* standard determines not only the defendant's competency to stand trial, but also his competency to waive counsel and plead guilty. 509 U.S. at 398-99. The Court reasoned that a defendant who pleads guilty waives a trio of associated rights—to avoid self-incrimination, to trial by jury, and to confront adverse witnesses. *Id.* at 398. The decision to waive these rights, the Court held, is no more difficult or weighty than the series of decisions a defendant must make if he proceeds to trial—e.g., whether to exercise his confrontation right, whether to seek a jury trial or a bench trial (if available), and whether to take the stand. *Id.* Accordingly, the Court held that if a defendant satisfies the *Dusky* standard for

competency to stand trial, then he is competent to choose to plead guilty. *Id.* at 399. And because the Court found "no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights," it concluded that the *Dusky* standard also applies to the decision to waive counsel. *Id.*

Notably, the *Godinez* Court did not address the standard of competency that would have applied had the defendant desired to represent himself at trial. The Court recognized as much, emphasizing that the competence at issue was "the competence to *waive the right*, not the competence [of the defendant] to represent himself." *Id.* at 399. And in this respect, the *Godinez* Court distinguished the competency to waive counsel and plead guilty from other, more complex decisions that might arise if the matter proceeded to trial—decisions in which the Court assumed an attorney would assist: "*In consultation with his attorney*, [a defendant who pleads not guilty] may be called upon to decide, among other things, whether (and how) to put on a defense and whether to raise one or more affirmative defenses." *Id.* at 398 (emphasis added).

Thus, the right to self-representation is different from the right to waive counsel, and the two should not be conflated. Moreover, as explained more thoroughly below, the prospect of a defendant who wishes to represent himself at trial pro se also implicates the State's ability to administer justice. These concerns do not arise in the scenario in *Godinez*—when a defendant wishes to waive counsel only to plead guilty. For these reasons, the Court

should acknowledge that the competency to represent oneself at trial is not the same as the competency to waive counsel and then plead guilty.

B. Prohibiting States from applying an enhanced competency standard for self-representation undermines the fair and efficient administration of justice.

Individuals and States alike have the right to a fair judicial system. Integrity in the judicial system allows justice to be administered fairly and properly. Such administration, in turn, instills confidence in the judicial system and its institutions. As a nation, we are committed to a government of laws, requiring constitutional safeguards to attend every stage of a criminal proceeding. *Cox v. Louisiana*, 379 U.S. 559, 562 (1965). Justice may be done, however, only if judges retain the power to maintain order and dignity in their courtrooms. See *Allen* 397 U.S. at 343 ("It is essential to the proper administration of justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country."). Forcing States to allow a defendant who suffers from a severe mental impairment to represent himself risks the dignity of the States' courtrooms and, accordingly, the public's estimation of the criminal justice system. Thus, prohibiting States from employing a heightened standard of competency for self-representation frustrates the administration of justice and violates both the individual's right to a fair trial and the State's duty to administer justice.

1. The right to self-representation must at times yield to the right to fair and impartial judicial proceedings.

Acknowledging the importance of the fair and impartial administration of justice, the Court has recognized both the individual's right and the State's right to fair and impartial judicial proceedings. This shared right favors the States' ability to apply an enhanced standard of competency.

For the individual, the right to a fair trial requires judges to maintain courtroom decorum and conduct proceedings in an impartial manner. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (holding that "[t]he carnival atmosphere" of defendant's trial violated his due process rights). The Court in *Sheppard* explained that the trial court's "fundamental error" was "compounded by the holding that it lacked power to control the publicity," leading to the violation of the defendant's rights. *Id.* at 358. The court must ensure that "the accused receive[s] a trial by an impartial jury free from outside influences." *Id.* at 362. A judge must, therefore, guarantee that a defendant's trial, in the aggregate, is fair.

Applying *Sheppard*'s reasoning to other contexts, Justice Souter explained that a trial judge has an "affirmative obligation" to control her courtroom and guard it from "improper influences." *Carey v. Musladin*, 127 S. Ct. 649, 657 (2006) (Souter, J., concurring). Among these influences, judges must consider all elements open to jurors' observation and ask "whether the practice or condition presents 'an unacceptable risk . . . of impermissible factors coming into play' in the jury's

consideration of the case." *Id.* at 657 (citing *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)). Among those factors that could influence the jury is, obviously, the defendant's behavior.

The constitutional interest in protecting the integrity of the judicial system belongs both to the individual and to the State. The State has an "*important* government interest[] . . . in bringing to trial an individual accused of a serious crime" and a "concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one." *Sell v. United States*, 539 U.S. 166, 180 (2003). Thus, the State's interest in fairly administering justice dovetails with the individual defendant's interest in receiving a fair trial. See *Allen*, 397 U.S. at 343 (recognizing the State's interest in preserving the dignity, order, and decorum of the criminal justice system); see also *Wheat v. United States*, 486 U.S. 153, 160 (1988) ("[C]ourts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.").

Courts often must weigh this right to fair and impartial judicial proceedings against other constitutional rights. For instance, the Court concluded that the administration-of-justice interest trumps a criminal defendant's Sixth Amendment right to confront opposing witnesses by remaining in the courtroom during trial. The Court explained that the "Sixth Amendment . . . [cannot] so handicap a trial judge in conducting a criminal trial" that "it is exceedingly difficult or wholly impossible to carry on the trial." *Allen*, 397 U.S. at 338; see also *id.* at 347

("[O]ur courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. Nor can the accused be permitted by his disruptive conduct [to] thwart[] and obstruct[] . . . justice."). Similarly, a defendant's constitutional right to remain free of visible physical restraints may be overcome by "essential state interests such as . . . courtroom decorum." *Deck v. Missouri*, 544 U.S. 622, 628 (2005).

Like these other rights, the Sixth Amendment right to self-representation is not absolute, and the Court must weigh a defendant's Sixth Amendment interests against the right to the fair and impartial administration of justice. As noted above, the *Faretta* Court acknowledged the need for such balancing by recognizing that the right to self-representation at trial yields to the State's interest in preserving integrity in the judicial system. *Faretta,* 422 U.S. at 834 n.46 ("The right of self-representation is not a license to abuse the dignity of the courtroom."); see also *Martinez v. Court of Appeal*, 528 U.S. 152, 161-62 (2000) ("As the *Faretta* opinion recognized, the right to self-representation is not absolute. . . . [T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.").

The right to self-representation, like the rights at issue in *Allen* and *Deck*, must at times give way to the need for the fair and impartial administration of justice. Such a time arises when a defendant, perhaps suffering from a mental impairment, lacks the competency to understand and respect courtroom decorum and procedures.

2. Prohibiting Indiana and other States from employing an enhanced standard of competency undermines the efficacy and efficiency of the judicial system and weakens public confidence in judicial institutions.

In the present case, the trial court, taking account of Edwards's schizophrenia and history of erratic behavior, determined that Edwards was incapable of self-representation. (App. 36a-37a). Edwards's doctors described his thought processes as "extremely tangential," and they concluded that he was competent to stand trial *only if* he received "assistance of counsel." (Ed. App. 149, 39a). The trial court also had first-hand knowledge of Edwards's mental state through the incoherent motions and correspondence that Edwards had submitted to the Court, including a motion to dismiss where he "pray[ed] [upon] psalm 15.5 for innocent of court property to be dismissed wherefore, so shall it be done." (Ed. App. 624).[2] It is highly likely that Edwards would have created an "environment so raucous that calm deliberation by the judge or jury [would have been] compromised in a serious way." *Carey*, 127 S. Ct. at 656 (Kennedy, J., concurring) (explaining why the trial of Dr. Sheppard denied him due process).

Indeed, chaos often ensues when defendants who suffer from severe mental impairments are permitted to proceed pro se. For example, in a Texas murder case, *State v. Panetti*, the mentally ill defendant paraded around the courtroom wearing an

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[2] References to "Ed. App." are to Edwards's Appendix filed in the Indiana Court of Appeals.

old-style Western purple cowboy costume and flipped coins to make decisions. See Jessica McBride, *How Can an Insane Man Defend Himself?*, Milwaukee J. Sentinel, Feb. 15, 2004, at J1. Such antics made it difficult for the jurors to focus on the gravity of the proceedings. *Id.* Similarly, Colin Ferguson, a mentally impaired pro se litigant accused of killing six and wounding nineteen passengers on a Long Island commuter train, told the jury: "There are 93 counts in the indictment only because it matches the year 1993. . . . Had it been 1925, it would have been 25 counts." Stanley S. Arkin & Katherine E. Hargrove, *Justice Mocked When Madman Defends Himself*, L.A. Times, Feb. 12, 1995, at M1. To administer justice fairly and impartially, States must be able to give their trial courts the discretion to refuse these defendants'—and Edwards's—requests to proceed pro se so that they may put on a meaningful defense. Prohibiting Indiana and other States from employing an enhanced standard of competency undermines the efficacy and efficiency of the judicial system and weakens public confidence in judicial institutions.

a. Prohibiting States from applying an enhanced competency standard undercuts the ability of the adversary system to reach fair and accurate results by fostering a gross and insurmountable asymmetry in the quality of representation between prosecution and defense.

The American judicial system can function only when two adversarial parties interact before a

neutral arbiter to reveal the truth. See Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 Ind. L.J. 301, 301 (1989) ("The hallmark of American adjudication is the adversary system."). Time and again, the Court has recognized the important role the adversary system plays in the search for truth. See, e.g., *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (recognizing the special role of the prosecutor in the "search for truth"); *McKaskle*, 465 U.S. at 177 n.8 ("the defendant's right to proceed *pro se* exists in the larger context of the criminal trial designed to determine whether or not a defendant is guilty of the offense with which he is charged."); *Williams v. Florida*, 399 U.S. 78, 82 (1970) (upholding Florida rule designed to enhance the "search for truth" in criminal trials).

When a trained prosecutor advocates on behalf of the State while a defendant suffering from a mental impairment represents himself, the administration of justice breaks down. The judge finds herself in the precarious position of needing to keep order in her courtroom, while attempting to convey the elements of legal procedure to someone whose thought processes are "extremely tangential." See Ed.App. 149. Similarly, the jury, charged with searching for truth, is distracted by a defendant whose incoherence and bizarre antics become the focus of the trial. See, e.g., Jessica McBride, *supra*, at J1 (describing how the defendant's outrageous behavior scared and distracted jurors). Such an arrangement undermines the impartiality, efficiency, and confidence that our judicial system demands and deserves.

The American adversary system requires all parties to have advocates who will "zealously present [each] side of the dispute" and who will "'put his best foot forward.'" Roberta K. Flowers, *Updating the Ethics Code to Include the Non-Adversarial Roles of Prosecutors*, 37 B.C. L. Rev. 923, 940 (1996). Put another way, "[t]he adversary system presupposes that each side bears the obligation not only to present evidence supporting its case, but also to ferret out all evidence that supports his case and contradicts the opponent's case." *Id.* In choosing to represent himself, a non-competent defendant may, in actuality, be choosing to proceed without an advocate. In effect, a skilled prosecutor will be adverse to a mentally impaired defendant who has no one representing his case, making the search for truth exceedingly difficult, if not impossible.

While it may seem that a prosecutor would enjoy such an easy win, a prosecutor acts not only as an advocate for the State, but also as a seeker of justice. See Suzanne Roe Neely, Note*, Preserving Justice and Preventing Prejudice: Requiring Disclosure of Substantial Exculpatory Evidence to the Grand Jury*, 39 Am. Crim. L. Rev. 171, 177-178 (2002); see also *Berger v. United States*, 295 U.S. 78, 88 (1935) (describing the role of the United States Attorney as an advocate for justice, not simply as an advocate for an ordinary party). In this dual role, prosecutors seek not just to win, but to win fairly and to protect the integrity of the judicial system. See generally Christopher G. Frey, *Essay: The State v. the Self-Represented: A Florida Prosecutor's Concerns When Litigating Against Pro Se Defendant in a Criminal Trial*, 29 Stetson L. Rev. 181 (1999). A pro se defendant with severe mental impairments only

complicates the prosecutor's duties to advocate for the government and to search for justice. Forcing States to mismatch skilled prosecutors with defendants like Edwards, Panetti, or Ferguson cripples the adversary system. Without the option to apply an enhanced competency standard, States lose the ability to protect the adversary system and to ensure that their courtrooms facilitate the search for truth.

b. Prohibiting States from applying an enhanced competency standard for self-representation compromises the judge's role as a neutral arbiter, as the judge is caught between her duties to remain and appear to be neutral and to ensure that proper courtroom protocols are followed.

A hallmark of our judicial system is the impartial judge. As one commentator has explained:

> This impartiality is important for several reasons. It is important that the jury see the impartial nature of justice, in which they are being asked to participate. It is important that the judge avoid the conflicts of interest that may arise if he is supposed to make decisions neutrally while simultaneously informing the defendant of the law. And finally, it is important that the defendant and the prosecuting attorney both have an impartial tribunal before which they can present their cases.

Marie Higgins Williams, Comment, *The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. Colo. L. Rev. 789, 806 (2000). A judge faced with a mentally impaired pro se defendant may feel obliged to walk a defendant through the presentation of his case in order to prevent a trial's progress from derailing entirely. See *Taylor v. Hopper*, 596 F.2d 1284, 1291–92 (5th Cir. 1979) (stating that "the trial court announced in Taylor's presence that it would relax the usual rules and would give Taylor as much leeway 'as I can' and would probably allow him to violate some rules in instances which would not be permitted if he were represented by counsel"). A judge may even feel obliged to call and question witnesses herself. See *McKaskle*, 465 U.S. at 177 n.7.

Pro se defendants, especially those suffering from severe mental impairments, may often tempt a judge to abandon her role as impartial arbiter. To comply with their judicial duty to ensure a fair trial, judges may assist pro se defendants. See *Wheat v. United States*, 486 U.S. 153, 160 (1988) (stating trial courts possess responsibility to ensure fairness within trials). Indeed, such involvement may even provide a minimal degree of efficiency and order to avoid an otherwise chaotic courtroom. But a judge's active participation in the development of a pro se defendant's case compromises her role as impartial jurist—a linchpin in our adversary system. By bending procedural rules to allow the defendant to present his case, the judge runs the risk of offending other rights or privileges afforded to both the prosecution and the defense, or even giving the jury the impression that she favors the defense. Judge

Beverly Skukals, with her co-author Glen Sturtavant, explained this conundrum:

> Judges also have ethical duties they must comply with when presiding over cases involving pro se litigants. . . . [T]he Canons of Judicial Conduct require[] judges to perform the duties of their office impartially. Judges, however, must balance considerations of fairness to represented parties with due process requirements mandating that pro se litigants receive meaningful hearings. This balancing act requires judges to make difficult decisions, such as determining how much guidance to give a pro se litigant on substantive law or how to treat a meritorious case when the pro se litigant has failed to comply with court procedures, while remaining impartial to both the represented and pro se parties.

Beverly W. Snukals & Glen H. Sturtevant, Jr., *Pro Se Litigation: Best Practices from the Judge's Perspective*, 42 U. Rich. L. Rev. 93, 98 (2007). To ensure that judges maintain their proper role, States must have the power to require a higher degree of competency from defendants who wish to proceed pro se.

c. Prohibiting States from employing an enhanced standard of competency threatens jurors' ability to remain impartial and focused.

A jury's impartiality may also be compromised by the prejudicial effect of a mentally impaired defendant's incoherent defense and erratic behavior. A jury may easily become confused by or even biased against a pro se defendant attempting to convey his defense. For example, in *State v. Panetti*, the jurors became skeptical and fearful of the mentally ill defendant, who paraded around the courtroom wearing an old-style Western purple cowboy costume and flipped coins to make decisions. See McBride, *supra*, at J1. Thus, in such cases, although mental illness is typically considered a mitigating factor, it may become an aggravating factor because the jury views the mentally incompetent defendant as dangerous. *Id.*

Even when a mentally impaired pro se defendant is not threatening, his defense may be compromised if the jurors think he is "putting on a show" instead of actually partaking in a serious legal proceeding. See Ralph Blumenthal, *Insanity Issue Lingers as Texas Execution Is Set*, N.Y. Times, Feb. 4, 2004, at A12. This concern is especially acute when a pro se defendant opts to defend his case by arguing—and attempting to demonstrate to the jury—that he is insane. Not only can jurors become confused regarding the actual legal arguments presented by a pro se defendant who acts in an incoherent and extremely bizarre manner, but they

may also lose sight of the seriousness of the proceedings.

Alternatively, the jury may become biased in the other direction: The prospect of "try[ing], convict[ing], and punish[ing] one so helpless to defend himself," see *Godinez*, 509 U.S. at 417 (Blackmun, J., dissenting), may play upon the jurors' sympathies to such a degree that they become inclined to acquit without regard for the real question of guilt. In either scenario, the defendant's performance improperly influences the jury's decision and compromises the prospect of a fair verdict.

d. Prohibiting judges from applying an enhanced test for competency is inefficient and wastes judicial resources.

The Amici States recognize it is improper to deny a defendant his right to self-representation simply to advance a State's interest in efficient judicial proceedings. "[A] measure of unorthodoxy, confusion and delay is likely, perhaps inevitable, in pro se cases." *United States v. Dougherty*, 473 F.2d 1113, 1124–26 (D.C. Cir. 1972); see also Tiffany Buxton, Note*, Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 Case W. Res. J. Int'l L. 103, 114-17 (2002) ("Pro se litigants are more likely to neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and substantive law pertaining to their claim."). However, pro se defendants suffering from mental impairments—with their inability to follow legal procedure and their bizarre antics—may halt trials,

not simply delay them, making the administration of justice impracticable.

Additionally, when a defendant is incompetent to represent himself before the trial begins, a judge must risk overseeing a trial that violates the right to the fair and impartial administration of justice. Once a judge has helped a defendant to the extent that she is no longer impartial or it is clear that the jury cannot focus on its truth-finding mission, what is the next appropriate step? Should the judge require representation for the defendant at that point and proceed with the trial? Should the judge empanel a new jury? Does the process repeat itself? Prohibiting States from raising the competency standard for self-representation thus threatens to undermine judicial efficiency by producing a series of "do-overs."

e. Prohibiting judges from applying an enhanced test for competency undermines public confidence in the judicial system.

Finally, "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988); see also *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."). When a pro se defendant suffers from a serious mental impairment, a trial can quickly transform into a circus, undermining the public's confidence in judicial institutions.

When a defendant with a severe mental impairment is permitted to proceed pro se, instead of the public viewing the allowance as an affirmation of the defendant's right to self-representation, people may perceive the trial as an abomination of the defendant's right to a fair trial. Victims' families may also watch in dismay at the no-longer-impartial judge who appears to be assisting the accused. Or the public may see a skilled prosecutor mismatched with a mentally impaired defendant and question how such a disparity comports with justice. Often, national media attention focuses on the most egregious cases of the mentally impaired representing themselves, shattering the public's confidence in its own justice system. See Howard Witt, *Inmate Granted Stay*, Chi. Trib., Feb. 5, 2004, at 16. For example, the press quoted Dr. F.E. Seale, a psychiatrist who treated a schizophrenic, bipolar patient and then later observed part of his patient's pro se defense, as asking, "[H]ow in the world can our legal system allow an insane man to defend himself?" See *id.* In the interest of maintaining both the appearance and reality of a fair trial, states must be free to exercise their discretion to raise the competency test for pro se criminal defendants.

C. Prohibiting States from applying an enhanced competency standard for self-representation at trial undermines the States' interest in ensuring finality of their criminal judgments.

1. A unitary competency standard inevitably leads to appeals, even when a lower court decides in the defendant's favor.

A unitary competency standard threatens the States' strong interest in the finality of their judgments. In many cases, a defendant succeeds in persuading a trial court to allow him to proceed without counsel against his better interests, only to challenge his conviction on appeal on the basis of deprivation of counsel. See, e.g., *United States v. Ellerbe*, 372 F.3d 462, 466 (D.C. Cir. 2004); *Dunn v. Johnson*, 162 F.3d 302, 307-08 (5th Cir. 1998); *United States v. Herrera-Martinez*, 985 F.2d 298 (6th Cir. 1993); *United States v. Mitchell*, 788 F.2d 1232 (7th Cir. 1986); *State v. Jordan*, 804 N.E.2d 1, 7-9 (Ohio 2004). For example, in *Wood v. Quarterman*, 491 F.3d 196 (5th Cir. 2007), the defendant was convicted of murder. Explaining that he did not wish to present evidence or cross examine witnesses at his sentencing, Wood asked the court to dismiss his attorneys for sentencing. *Id.* at 198. The court denied his request. *Id.* Throughout sentencing, the defendant "clearly and repeatedly instructed his attorney to sit idly," and the attorney obliged. *Id*. at 204. On appeal, Wood claimed that he was denied his right to self-representation and that his attorney committed ineffective assistance of counsel. *Id*. at 197. Although Wood's efforts to have it both ways

failed, sometimes defendants like Wood succeed in obtaining reversal. See, e.g., *Schafer v. Bowersox*, 329 F.3d 637, 650 (8th Cir. 2003); *People v. Lego*, 660 N.E.2d 971, 979 (Ill. 1995). Such appeals reveal the vulnerability of the trial judge's competency determination, which defendants may appeal even when they receive exactly what they requested.

All too often, trial judges find themselves in a Catch- 22: no matter whether they grant or deny the defendant's request for self-representation, an appeal is inevitable. *United States v. Treff*, 924 F.2d 975, 979 (10th Cir. 1991) ("It follows that if a defendant in a criminal proceeding makes an *equivocal* demand on the question of self-representation, he has a potential ground for appellate reversal no matter how the district court rules."). Defendants' requests to self-represent present a "peculiar problem" for trial court judges, who must "'traverse . . . a thin line' between improperly allowing a defendant to proceed pro se, thereby violating his right to counsel, and improperly allowing the defendant to proceed with counsel, thereby violating his right to self-representation." *Fields v. Murray*, 49 F.3d 1024, 1028-29 (4th Cir. 1995) (citing *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990)). Recognizing this problem, one trial judge told a defendant that his motion to self-represent was denied because the judge was unwilling "to put the Court in the position whereby you defend yourself and then it's reversed if there is a conviction, just because there was no attorney present." *Spencer v. Ault*, 941 F. Supp. 832, 837 (N.D. Iowa 1996). Under a unitary competency standard for standing trial and self-representing, a defendant is able to pin the trial judge between a rock and a hard place—appealing under his right to

counsel if his request for self-representation is granted, and appealing under his right to self-representation if his request is denied. *Fields*, 49 F.3d at 1029 (citing *Cross*, 893 F.2d at 1290). "A skillful defendant could manipulate this dilemma to create reversible error." *Id.* (citing *Cross*, 893 F.2d at 1290). Such appeals undermine the finality of competency determinations and the resulting criminal judgments.

2. If States are permitted to apply a heightened standard for competency of self-representation determinations, their decisions will be less vulnerable to appeal.

Reversing the Indiana Supreme Court's judgment and permitting States to implement a heightened standard will enhance the stability of trial courts' competency determinations because a defendant will no longer be able to appeal so easily a favorable lower court decision. The earlier-described Catch-22 is possible only when a defendant can file a potentially meritorious appeal regardless of the trial court's ruling on his motion to proceed pro se.

Allowing the States to apply an enhanced competency standard negates this dilemma by diminishing a defendant's ability to appeal a favorable competency determination. If courts apply a unitary competency standard, the competency to self-represent is equivalent to the constitutionally minimum mental functioning necessary to stand trial. Hence, a defendant asserts a constitutional challenge when, after proceeding pro se and being convicted, he challenges the court's ruling allowing

him to proceed pro se by arguing that he was not competent to do so.

Under a divided competency regime, by contrast, space exists between the competency necessary to represent oneself and the minimum competency necessary to stand trial. When the trial court applies a heightened competency standard, a challenge to a favorable competency ruling is not automatically a constitutional claim, so defendants who represent themselves unsuccessfully cannot automatically appeal the court's competency determination. The only way such a defendant could successfully appeal would be to establish that he was not just incompetent to represent himself, but also incompetent to stand trial. Such a showing, of course, would be difficult to make in the wake of a trial court decision that he satisfied a higher competency standard. In this sense, an enhanced competency standard for self-representation insulates from attack favorable rulings on defense motions to proceed pro se and thereby advances the State's important interest in finality.

CONCLUSION

For the above reasons, the Court should reverse the Indiana Supreme Court's judgment and hold that States are free to adopt competency standards for pro se defendants that are higher than the *Dusky* standard for competency to stand trial with counsel.

Respectfully submitted,

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