

No. 07-208

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

STATE OF INDIANA,  
*Petitioner,*

v.

AHMAD EDWARDS,  
*Respondent.*

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

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**BRIEF FOR PETITIONER**

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## **QUESTION PRESENTED**

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

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## OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported at *Edwards v. State*, 866 N.E.2d 252 (Ind. 2007). Pet.App. 1a-15a. The opinion of the Indiana Court of Appeals is reported at *Edwards v. State*, 854 N.E.2d 42 (Ind. Ct. App. 2006). Pet.App. 16a-31a. The trial court's decision holding that Respondent Ahmad Edwards was incompetent to represent himself at trial is unreported, but the relevant portion of the transcript is included in the Joint Appendix, J.A. 522a-532a.

## JURISDICTION

The Indiana Supreme Court entered judgment in this case on May 17, 2007. The Petition for Writ of Certiorari was filed August 15, 2007, and granted December 7, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

### U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**U.S. Const. amend. XIV, § 1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**STATEMENT**

1. On July 12, 1999, Respondent Ahmad Edwards was caught shoplifting at a department store in downtown Indianapolis. Pet.App. 2a. An unarmed store security guard chased Edwards onto the sidewalk and tackled him, but Edwards pulled a gun and shot the guard and a bystander (neither fatally) before fleeing to a nearby parking garage, where he, in turn, was shot and subdued by a passing FBI agent. Pet.App. 2a, 18a. The State charged Edwards with theft, criminal recklessness, aggravated battery, and attempted murder. Pet.App. 2a.

Following his arrest, Edwards made bizarre statements to the court, his counsel, and the press, which prompted inquiries as to his mental state. Comp. Tr. 2/02/00 at 17; J.A. 4a-6a, 13a-14a. The resulting tests and interviews by psychiatrists and psychologists ultimately led to findings on two separate occasions over three years apart that

Edwards was incompetent to stand trial. J.A. 48a-49a, 210a-211a, 365a.

Five years later, following four competency hearings, two commitments to the Indiana Department of Mental Health, and extensive therapy and treatment with the psychotropic drug Seroquel, Edwards regained sufficient mental competency to satisfy the standard of *Dusky v. United States*, 362 U.S. 402 (1960). J.A. 226a. Accordingly, Edwards received a two-day trial on June 27-28, 2005. Pet.App. 3a. At the last minute, he asked to proceed *pro se*, but the judge denied the request based “primarily on the fact that [Edwards] wanted to proceed under the defense of insanity and that that request would have caused a continuance.” J.A. 524a. That denial is not at issue here.

The jury found Edwards guilty of theft and criminal recklessness, but hung on the attempted-murder and battery-with-a-deadly-weapon charges. Pet.App. 3a. The court remanded Edwards to the custody of the Marion County Jail and withheld sentencing pending retrial on the other charges, which the court set for December 19, 2005. Ed.App. 53, 59;<sup>1</sup> Trial Tr. 486.

Prior to the second trial, Edwards formally petitioned the court to proceed *pro se*. J.A. 279a-82a, 522a. While the court was satisfied that Edwards was waiving his right to counsel knowingly, voluntarily, and intelligently, it denied Edwards’s motion. J.A. 527a. It found that, while Edwards

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<sup>1</sup> References to “Ed.App.” are to Edwards’s Appendix filed in the Indiana Court of Appeals.

was mentally competent to stand trial and to assist counsel, his delusions, schizophrenia, communication troubles, and related problems with focus rendered him incapable of self-representation. J.A. 526a-27a. The Court relied on Edwards's long history of incompetence and observed that the present "finding of competence was conditioned by the doctors on the assistance of counsel." J.A. 530a. This is the ruling at issue.

Edwards's second trial proceeded as scheduled on December 19, 2005. The jury convicted Edwards of attempted murder and battery with a deadly weapon. Pet.App. 3a. The court sentenced Edwards on all four convictions to the presumptive sentence for each count, running concurrently, for a total executed sentence of 30 years. Pet.App. 3a.

2. The findings and testimony of the mental-health professionals who have examined Edwards shed light on how it is that, while Edwards's mental impairments no longer render him incompetent to stand trial, they do render him incapable of representing himself.

After Edwards's public defender filed a motion for a competency hearing and a notice of intent to assert insanity as a defense, the court appointed Drs. Ned P. Masbaum and Dwight W. Schuster, both neuropsychiatrists, to examine Edwards. J.A. 15a. Drs. Masbaum and Schuster filed their reports in late December 1999 and testified to their findings at a competency hearing on February 2, 2000. J.A. 17a-27a, 347a. Both documented that Edwards suffered from delusional disorder "grandiose type,"

but concluded that, despite Edwards's delusions, he was competent to stand trial. J.A. 20a, 26a, 35a.

Dr. Schuster cited as evidence of Edwards's delusional disorder a news interview Edwards gave shortly after his arrest where he complained of an FBI conspiracy against him. Comp. Tr. 2/2/00 at 17. He further diagnosed Edwards with a learning disability "classified as a developmental and expressive writing disorder and expressive language disorder." J.A. 351a. This learning disability is exhibited "by his pattern of using erroneous and inappropriate sentences both verbally and in writing, but more marked in writing." J.A. 20a. In response to Dr. Schuster's examination questions, Edwards did not give direct answers but "went on and on in considerable detail and in a disconnected fashion" and "did go off on tangents." J.A. 353a. Dr. Masbaum agreed. J.A. 356a. Nonetheless, Dr. Schuster said that Edwards "is able to communicate with his attorney, although his delusional ideas may create some problems at times." J.A. 351a.

Edwards's counsel retained Dr. Lance E. Trexler, a neuropsychologist who serves as the Clinical Director for Neurological Rehabilitation at a network of Indianapolis hospitals. J.A. 108a, 357a. Dr. Trexler submitted a report on February 23, 2000, concluding that Edwards was not competent to stand trial because he displayed signs of a major thought disorder, decompensated during the course of conversations, and experienced hallucinations. J.A. 37a-38a. When the hearing resumed on August 16, 2000, Dr. Trexler explained that testing showed Edwards to have a severely impaired working

memory, which causes problems with mental focus and thought regulation. J.A. 354a.

Dr. Trexler also observed that “[o]n problem solving tasks, [Edwards] would develop the right strategy to solve a problem and then spontaneously forget or lose where it was he was going and end off in a different direction.” J.A. 354a-60a. He said that Edwards was incapable of assisting in his defense because he was unable to “hold together one line of thinking for more than a few minutes.” J.A. 362a. Further, while Edwards could learn and remember factual information, “the way in which he’s able to use that decompensates very rapidly in anything less than a highly structured situation.” J.A. 362a. Dr. Trexler also described Edwards’s writings as “identical to his verbal behavior,” meaning that they were “extraordinarily tangential, disorganized, randomly organized, grandiose and reflective of a thought disorder.” J.A. 362a.

The court found Edwards incompetent to stand trial and committed him to the Indiana Department of Mental Health for evaluation and treatment. J.A. 48a-49a, 365a. Edwards was held at Logansport State Hospital, but there is no evidence that he received therapy or medication of any sort during this stay in that facility. Nonetheless, on March 14, 2001, Logansport State Hospital notified the trial court that Edwards “has attained the ability to understand the proceedings and assist in the preparation of his defense.” J.A. 54-55a. Edwards was returned to Marion County Jail for trial.

On June 26, 2001, however, Edwards filed, without the assistance of his court-appointed

counsel, a document styled “Motion of Permissive Intervention.” J.A. 69a-79a. Part A of this document began by stating, “In the year [“1999”] nineteen hundred and nindy nine. The defendant Mr. Ahmad Edwards applied for a job in the fifth largest shopeing mall in Indiana.” J.A. 69a. The document continued, “To relize the existence of a genuine issue as to an material fact by interrogatories of the county Marion in Indianapolis, Indiana to help cure the vital stictics, in witch negligence was being apoximated as the cause of the exacerbation of the young American citizens of the United States in Indianapolis, Indiana injury.” J.A. 69a-70a.

In light of this “peculiar” motion, and mindful of Dr. Trexler’s previous diagnosis of delusional disorder, on September 12, 2001, Edwards’s counsel moved to release Edwards’s Logansport State Hospital records in order to review the extent of his treatment and rehabilitation. Ed.App. 225-27. That same day, the trial court ordered further psychiatric testing by Drs. Masbaum and Schuster. Ed.App. 229, 284.

In a report filed in October 2001, Dr. Masbaum found that Edwards still suffered from a delusional disorder, but found he understood the charges and could aid his counsel. J.A. 84a-90a. Dr. Schuster found Edwards had shown significant improvement since being diagnosed as delusional in his previous evaluation, was able to understand the charges and proceedings, and was able to assist counsel with his defense. J.A. 107a-108a.

The doctors repeated their findings at a competency hearing on March 20, 2002. J.A. 386a, 396a. Dr. Schuster observed that Edwards's thinking was now much more logical, though still disjointed. J.A. 388a, 390a. Dr. Schuster observed that "Edwards does fluctuate in his presentation." J.A. 391a.

Dr. Trexler testified that Edwards still lacked competency due to his neurological problems, learning disabilities, and schizophrenia. J.A. 408a, 418a. He found Edwards's verbal and written communication to be tangential and disorganized. J.A. 416a. He said that Edwards was "doing his best to hold his thinking together but he has a formal thought disorder and despite his efforts, he therefore is usually incoherent and unable to hang on to one topic for longer than three to five seconds." J.A. 415a. According to Dr. Trexler, Edwards "gives inconsistent reports about what happened on the day of the crime." J.A. 433a.

Dr. Trexler acknowledged that defendants with "disorganized schizophrenia" might nonetheless be competent "to assist his or her counsel," but that "[i]t's a little less likely." J.A. 427a. He also explained how Edwards might respond to medication: "It's not going to go away, the underlying illness or disorder, but he would certainly have a much better chance for him to be able to collaborate with counsel . . . ." J.A. 425a.

Based on the reports and testimony, in April 2002, the trial court deemed Edwards competent and set a jury trial for September 30, 2002, J.A. 106a-

114a, but later continued it until December 2, 2002. Ed.App. 34.

Just before trial, in November 2002, defense counsel requested another competency examination, this time by Dr. Phillip Coons. J.A. 166a-68a. In a report dated November 26, 2002, Dr. Coons diagnosed Edwards as schizophrenic and noted Edwards's history of dyslexia and substance abuse. J.A. 157a-65a. Dr. Coons opined that Edwards could understand the charges, but was unable to assist with his defense due to schizophrenic delusions. J.A. 164a. Based on this report, on November 27, 2002, Edwards's counsel submitted a "Suggestion of Incompetency," claiming that Edwards was incapable of effective communication with counsel and that he lacked "an adequate understanding of the role of the parties to proceed to trial." J.A. 166a-68a.

The trial court vacated the December 2, 2002, trial. At a competency hearing on April 29, 2003, Drs. Schuster and Masbaum reiterated their findings that Edwards was competent to stand trial. J.A. 465a-66a; Comp. Tr. 4/29/03 at 21-23. Dr. Coons testified that Edwards suffered from schizophrenia and needed treatment through medication. J.A. 476a-484a. Dr. Trexler agreed with the schizophrenia diagnosis and noted that Edwards has a family history of schizophrenia. J.A. 492a. The court heard from Edwards's prior counsel that he failed to communicate effectively with Edwards regarding the case despite 15 attempts. J.A. 501a-02a. Edwards himself testified that he had trouble communicating and that he was willing to try medication. J.A. 505a-06a. Ultimately, the trial

court again found Edwards incompetent to stand trial and ordered him returned to the custody of the Indiana Department of Mental Health for evaluation and treatment. J.A. 206a-11a.

During Edwards's ensuing six-month stay at the Logansport State Hospital, the staff forensic psychiatrist observed that Edwards's schizophrenia included "symptoms of disorganized thought processes, delusional ideation, hallucinations, and ideas of reference." J.A. 223a. Edwards was treated for schizophrenia and a depressive disorder with individual and group psychotherapy, counseling, and 300 mg/day of Seroquel, an antipsychosis medication. J.A. 216a-17a, 229a-31a.

As a result of this treatment, on July 29, 2004, the Logansport State Hospital once again certified to the court that Edwards was competent to stand trial. J.A. 226a-27a. The Hospital found that Edwards "has attained the ability to understand the proceedings and assist in the preparation of his defense." J.A. 226a. The supporting report, by staff forensic psychiatrist Dr. Robert Sena, stated that Edwards's mental symptoms "have greatly improved" and that he "no longer has hallucinations, delusions, and ideas of reference." J.A. 231a. The doctor further observed, "His thought processes are no longer disorganized." J.A. 231a.

Edwards's trials proceeded without any further competency hearings.

3. Throughout this case, Edwards has provided attempts at oral communication along with prolific body of written work, both before and after Dr. Sena

declared him competent in July 2004, that demonstrate his profound lack of ability to communicate coherently or relevantly.

a. Edwards began creating this record shortly after he was arrested when he gave a television news interview in which he suggested he was the victim of an FBI conspiracy. Comp. Tr. 2/2/00 at 17. Dr. Schuster later characterized the interview as exemplary of “paranoid, delusional type of thinking.” *Id.*

From jail, Edwards sent numerous writings to the trial court. His early correspondence includes a criticism of how people value money, complaints about services available for young people, plans for a “community based operation, that works for young disadvantage Americans under the age of twenty,” and plans to be “a campaign supporter of governmental relations association.” J.A. 4a-6a, 10a, 40a-47a.

At the August 16, 2000, competency hearing, Edwards brought into court a pile of “a couple thousand pages” which he wanted to read into the record. Comp. Tr. 8/16/00 at 32. His counsel referred to these documents as Edwards’s “manifesto.” J.A. 365a. According to Edwards, the document was “a concept for a program for the urban community.” Comp. Tr. 8/16/00 at 32. Edwards explained, “Because of my dyslexia problem and the shocking, revealing information behind the psychoanalyzation I have taken to heart to want to help people in society that have this problem, that are not as verbally as complex as me.” Comp. Tr. 8/16/00 at 32.

After his first commitment to the Logansport State Hospital, Edwards resumed his correspondence with the court. A purposeful “Motion to Dismiss and Discharge” was followed by a less coherent “Motion for Permissive Intervention,” wherein Edwards appears to ask for his discharge as part of a class-action suit on behalf of a youth foundation of which he is president. J.A. 65a-83a. That later motion is accompanied by a letter to “Collective traditional class,” wherein Edwards writes about his “own state-of-the art design aircraft,” of being a “professor of class” at Harvard, and the success of his organization aimed at educating judges. J.A. 80a-83a.

At the competency hearing on March 20, 2002, Edwards repeatedly interrupted the proceedings, despite a warning that he must allow his counsel to speak for him. Comp. Tr. 3/20/02 at 19, 22, 32, 40, 43; J.A. 388a-89a, 397a-98a, 417a-18a. At one point, Edwards interrupted his counsel’s examination of Dr. Schuster to inquire whether his counsel had a medical degree. J.A. 389a-90a.

Also at that hearing, the defense presented a document where Edwards attempted to write out his planned defense to the present charges. J.A. 416a, 452a-53a. The document stated, in part:

Return come to see me for more cash flow because I recently zoomed an eight to six year plan to last.

...

I will not take the stand as an weapon in trial on behalf of a man standing trail with

collections of any day caused by madness as to an crowd that included say “Wo”—He imposed us. And told fellows publicly “Hi-Mom”.

J.A. 452a-53a.

Dr. Trexler also introduced a document where “Edwards was writing his thoughts about his circumstances.” J.A. 440a. That 19-page document was titled “Instinctive Method for Glandular” and begins as follows:

When an adequate supply of oxygen is not ensuring a particular regulation of blood pressure in the circulation of support, many billions of interconnecting cells of the brains larger more dominating general cerebral;

J.A. 455a. Dr. Trexler testified that this document showed Edwards’s thought disorder, his inability to communicate, and the rambling nature of his thoughts. J.A. 441a.

Within days of the court’s April 16, 2002, finding of competency to stand trial, Edwards sent numerous petitions and orders to the court regarding the propriety of the proceeding, a dress code, a request for continued treatment, and requests for documents from the clerk. J.A. 91a-105a, 115a-19a. In the following months, Edwards sent additional correspondence with equally inscrutable language. J.A. 120a-56a. Then, at the next competency hearing, on April 29, 2003, Edwards testified:

I guess I, it’s hard for me to communicate with anybody. I just, I’m not, I can’t concentrate, I

come out of concentration so easy. It's just not, nothing makes sense when I do, you know.

J.A. 505a. Edwards's former counsel, Mark Jones, described Edwards's oral communication skills as "tangential" and worse than his written communication where "he at least stays on task a little bit." J.A. 504a.

b. Dr. Sena submitted his report in July 2004, declaring Edwards competent. In that report, Dr. Sena said, "[Edwards's] thought processes are no longer disorganized." J.A. 231a. "He is demonstrating the abilities necessary to assist his attorney in his own defense, including good communication skills, cooperative attitude, average intelligence, and good cognitive functioning." J.A. 235a. During an interview on July 27, 2004, Dr. Sena observed that Edwards "shows good attention. His memory is good in all spheres (immediate, recent, and remote) . . . He communicates well . . . His speech is easy to understand . . . His thought processes are coherent . . . There is no evidence of present or recent hallucinations." J.A. 231a-32a.

After Edwards returned to the Marion County Jail, he filed two more requests for discharge pursuant to Indiana Criminal Rule 4(c), and two requests for hearings. J.A. 237a-40a, 246a-51a. On September 22, 2004, Edwards wrote two letters to the trial judge to inquire about the status of his motions. J.A. 241a-43a. One letter was a brief reminder that Edwards was awaiting a ruling:

Dear Grant Hawkins:

For days I have remained alert for the honor to be released for the execution of a right a 2001 discharge claim drew. Thank you for the moment.

J.A. 241a.

The second letter, however, is more tangential:

Dear Honorable Judge:

Hopeless! Is there an honest person in court, loyal to law? My court ask for fools to be freed and confidently not near me.

Listen to this case; the foundations of my cause, the Criminal Rule 4. Courts territory acknowledged May 29, 2001 abandon for the young American citizen to bring a permissive intervention. Acting as the forces! To predict my future disgraced by the court to motion young Americans to gather against crime.

My courts failure humiliated introductions kindly of right reason, and hope.

J.A. 242a. Edwards filed a handwritten copy of this second letter again a week later. J.A. 249a.

In a "Petition for Hearing," dated November 1, 2004, Edwards urged the court to:

Consult, the best position to advise the groups of any, recourse that may be available established and to be action of law, certain of the rules admissions not to fail responsibilities

of other officials, counterproductive resolved in the court system therein any action that might be construed as interference.

J.A. 250a-51a.

After his first trial, Edwards wrote a letter to the judge making confusing observations of the legal system, suggesting his trial attorney was intoxicated, and telling old jokes. J.A. 261a-62a. He also filed additional petitions for hearings, dismissal, and to proceed *pro se*. J.A. 263a-66a, 268a-300a, 326a-33a. In a “Motion to Dismiss,” dated December 19, 2005, he wrote:

Defendant moves the grounds of this court to dismiss this cause: if any notation of grand avoids a bill immunity proceeding at criminal information true-bill grounds. Defendant prays Psalm 15.5 for innocent of court property to be dismissed wherefore, so shall it be done.

J.A. 295a.

In a motion dated December 21, 2005, the final day of his second trial, Edwards again petitioned the Court for permission to proceed *pro se*. J.A. 300a-04a. In support of his request, Edwards claimed his decision was based on “a popular vote of class members.” J.A. 301a. He also claimed to be “the founder of a faith-based group and director of 60 multimillion-dollar multistate class actions,” and “a self-taught scholar of criminal, federal, civil, international constitutional, family, entertainment, and landlord law measuring 6 years.” J.A. 301a. Edwards signed the petition as “Leading Publisher

of Ethnically Diverse Art, Director of Religious Faith Base Groups.” J.A. 302a.

Following his second trial, Edwards wrote a statement regarding his version of the offense for inclusion in the pre-sentence investigation report, which begins as follows:

The appointed motion of permissive intervention filed therein the court superior on, 6-26-01 caused a stay of action and upon its expiration or thereafter three years are the plan to establish a youth program to and for the coordination of aspects of law enforcement to prevent and reduce crime among young people in Indiana became a diplomatic act as under the Safe Streets Act of 1967, “A Omnibus considerate agent: I membered clients within the public and other that at/production of the courts actions showcased causes.

J.A. 324a-25a. Both the Indiana Court of Appeals and the Indiana Supreme Court reproduced that written statement in their opinions as evidence of Edwards’s communication problems. Pet.App. 10a-11a, 23a.

4. As noted, despite Edwards’s competency to stand trial, the trial court rejected Edwards’s motion to represent himself based on Edwards’s remaining trouble with focus and communication. J.A. 527a. At the *pro se* hearing, after recounting all the psychological testing reports, the judge noted that “[s]everal of the reports refer to rambling writings as an indication of an inability to stay focused.” J.A. 527a. He specifically observed that “[t]he report

upon which we relied in finding that Mr. Edwards was competent was the report of Doctor Robert Sena from July 27, 2004, from Logansport, still found that there was schizophrenia of an undifferentiated type; found that Mr. Edwards acknowledged his need for counsel; found that Mr. Edwards was able to plan a legal strategy in cooperation with his attorney.” J.A. 527a.

The trial court thus thought it necessary to go beyond the knowing-and-voluntary waiver inquiry to rule on Edwards’ motion to proceed *pro se*: “So I’m going to carve out a third exception and if I’m wrong we’ll just—if I’m wrong and there’s a conviction, we’ll just try this case again but I think it requires more than just an understanding of *Sherwood* fifteen points; requires more than just a plan that doesn’t cause a continuance. I think it requires abilities that exclude the doctors’ findings, if you will.” J.A. 527a. Concluding, the court held that, “[w]ith these findings, he’s competent to stand trial but I’m not going to find he’s competent to defend himself. So the request to proceed *pro se* will be denied.” J.A. 527a.

On appeal, the Indiana Court of Appeals reversed, concluding that *Godinez v. Moran*, 509 U.S. 389, 391 (1993), precludes going beyond the strict requirements of the Due Process Clause to override a defendant’s request to represent himself. Pet.App. 17a, 24a. The Court of Appeals, however, stated, “We are entirely sympathetic to the conclusion reached by the trial court and appreciate that it was simply trying to ensure that Edwards received a fair trial.” Pet.App. 24a.

On discretionary review, the Indiana Supreme Court likewise reversed Edwards's attempted-murder and aggravated-assault convictions because Edwards had the right to represent himself. Echoing the Court of Appeals, however, it too recognized that it was "at a minimum, reasonable" for the trial court to have found Edwards "incapable of adequate self-representation" and that the State's argument to deny that right in this case had "some force." Pet.App. 14a. In particular, the court acknowledged that *Martinez v. Court of Appeal*, 528 U.S. 152, 156 (2000), cast some doubt on *Faretta's* rationale for the right to self-representation. Pet.App. 12a-13a (citing the concurring opinions of Justices Kennedy, Breyer, and Scalia). Regardless, it concluded that, because "neither *Martinez* nor any other Supreme Court decision has overruled *Faretta* or *Godinez*," the standard for competency to represent oneself can be nothing more than competency to stand trial. Pet.App. 13a.

## SUMMARY OF THE ARGUMENT

It took over six years for Ahmad Edwards to achieve minimal competency to stand trial, and during that time he repeatedly demonstrated that he could not communicate with the court, orally or in writing, in a sustained coherent way. On that record, the trial court denied Edwards the right to represent himself at trial because providing him with a fair trial—one that actually offered a coherent defense—was more important than respecting his far more abstract demand for autonomy in the proceedings. In denying Edwards’s motion to proceed *pro se*, the trial court required more competence for self-representation than for standing trial under *Dusky v. United States*, 362 U.S. 402, 402 (1960). The Court should hold that doing so was permissible under the circumstances.

The State respectfully proposes that the Sixth Amendment permits state trial courts to impose a higher standard of competency for self-representation than for standing trial, at least in the following limited way: *a trial court may deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or a jury*. This rule fits Sixth Amendment doctrine, which allows some balancing of interests when defendants attempt self-representation. If the Court concludes otherwise, it should reconsider that doctrine.

1. Refusing to allow a defendant who cannot communicate coherently to represent himself at trial does not violate the Sixth Amendment right found by *Faretta v. California*, 422 U.S. 806, 835 (1975),

because such a defendant cannot do what the right presumes he can, which is to communicate a defense to a court or jury. When a defendant chooses to stand trial rather than to plead guilty, that defendant is making the decision to persuade the court or jury of something, even if it is nothing more than the government's failure to make its case. Persuasion requires communication. If a mental or physical trait disables a defendant from communicating, the entire point of the trial is lost unless counsel speaks for the defendant. This is true regardless of the defendant's motive for choosing to represent himself at trial, whether it is because he believes he can present the best defense himself or because he is suspicious of government-provided counsel.

For a defendant who cannot communicate, in other words, waiving trial counsel is tantamount to waiving a fair trial in a way that it is not for a defendant who *can* communicate, but who may otherwise do a poor job of representing himself. In the latter case, the wisdom of the decision to undertake self-representation comes down to the quality of the defendant's own judgment, which is what *Faretta* requires courts to respect, rather than the ability to actuate that judgment, which is what the State's rule urged here is designed to address.

Furthermore, *Faretta* and its progeny allow courts to counterbalance the demand for self-representation with the need to preserve a fair trial and the court's institutional integrity. It is clear, for example, that a court may impose counsel on a defendant who is disruptive, and may impose standby counsel who takes an active role in the

proceedings on *any* defendant who demands self-representation. Even when it comes to the bedrock right of first-choice paid counsel, trial courts may disqualify counsel with a conflict of interest, even where the defendant objects, to protect the integrity of the proceedings. The rule urged by the State here fits within this line of cases.

The State's coherent-communication rule would also supplement in a critical way the requirement of *Dusky* that a defendant be able to consult with trial counsel. With respect to a defendant who will be represented by counsel, that inquiry from *Dusky* performs two functions. First, it is a proxy for measuring mental capacity to stand trial. Second, the requirement that the defendant be able to communicate with counsel also has the practical effect of ensuring that the trial will function properly as an adversarial test of the government's case (at least to a reasonable degree). To be sure, where a defendant demands self-representation, *Dusky* still serves as a proxy for minimal competence to stand trial. But it does not have a salutary practical impact on the conduct of the trial itself. The State's proposed coherent-communication rule provides a necessary alternative mode of assurance.

2. If the Court concludes that the rule proposed by the State is inconsistent with *Faretta*, it should consider overruling *Faretta*. As the dissenting opinions of Chief Justice Burger and Justice Blackmun in *Faretta* make clear, a right to self-representation is without solid textual, structural, or historical foundation. The despotic imposition of self-representation at common law that the Framers were determined to prevent, and the preservation of

the right to self-representation in the Judiciary Act of 1789, imply that the Sixth Amendment itself included no such right. Furthermore, cases from the United States that the Court relied on in *Faretta* hold only that the *Constitution* does not deprive the right of self-representation. They say nothing about whether trial courts may insist that defendants be represented by counsel.

Since *Faretta*, opinions of the Court and individual Justices have called it into question or eroded the underlying rationale of the holding that self-representation is a Sixth Amendment right. *See, e.g., Martinez v. Court of Appeal*, 528 U.S. 152, 163 (2000); *id.* at 164 (Kennedy, J., concurring); *id.* (Breyer, J., concurring); *id.* at 165 (Scalia, J., concurring in the judgment); *McKaskle v. Wiggins*, 465 U.S. 168, 187 (1984).

Finally, the development of ineffective-assistance-of-counsel doctrine since *Faretta* demonstrates that the essence of the Sixth Amendment guarantees lies in the *actual* provision of a defense at trial. *Faretta's* focus on the abstract autonomy rights of the individual cannot be squared with the Court's current approach to the Sixth Amendment.

## ARGUMENT

**I. States Should Be Able to Deny Self-Representation to Otherwise Competent Defendants who Cannot Communicate with the Court Themselves**

The law has long prohibited trying mentally and physically incompetent defendants, a rule that “is fundamental to an adversary system of justice.” *Drope v. Missouri*, 420 U.S. 162, 172 (1975). Since *Dusky v. United States*, 362 U.S. 402, 402 (1960), competency to stand trial has meant only that a defendant 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.” In *Faretta v. California*, 422 U.S. 806, 835 (1975), the Court held, in the case of a defendant who was “literate, competent, and understanding,” that criminal defendants generally may insist on representing themselves at trial as long as their decisions are knowing and voluntary.

Later, in *Godinez v. Moran*, 509 U.S. 389 (1993), the Court “reject[ed] the notion that competence to . . . waive the right to counsel *must* be measured by a standard that is higher than (or even different from) the *Dusky* standard.” *Id.* at 398 (emphasis added). The reason is that competence under *Dusky* has always been sufficient to waive constitutional criminal-procedure rights, and “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.” *Id.* at 398-99. Thus, “a criminal defendant’s ability to represent

himself has no bearing upon his competence to *choose* self-representation.” *Id.* at 400.

The result is that courts may, consistent with the Due Process Clause, hold defendants found competent under *Dusky* to their waivers of counsel. But that does not mean that trial courts *must* respect those waivers in the first instance, irrespective of a defendant’s actual competency for self-representation. Indeed, in *Godinez*, the Court observed, “States are free to adopt competency standards that are more elaborate than the *Dusky* formulation.” *Id.* at 402. This freedom perforce includes the ability to adopt a “more elaborate” competency standard for waiver of counsel and, hence, self-representation. That is, a State can bring a defendant to trial, but require that he be represented by counsel, subject only to the reach of *Faretta*.

The issue, then, is whether *Faretta* permits a higher competency standard that precludes self-representation for a defendant who satisfies *Dusky*, but who cannot present a lucid defense. Indiana respectfully urges that the answer is “yes,” at least according to the following rule: a *trial court may deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or a jury.*<sup>2</sup>

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<sup>2</sup> This test is substantially similar to that articulated by the Supreme Court of Wisconsin in *State v. Klessig*, 564 N.W.2d 716 (Wis. 1997), which held that denial of self-representation is permissible where “the defendant’s education, literacy, fluency in English, and any physical or psychological disability . . . may significantly affect his

This proposed standard gets at the heart of what makes self-representation problematic for many (if not most) mentally impaired defendants: the inability to convey exculpatory evidence or theories to the court or a jury. At the same time, it does not depend on any formal medical or psychological diagnosis of the defendant. What counts are observations of the defendant, not, strictly speaking, the defendant's mental or physical diagnosis (though that diagnosis may well inform a court's determination). It therefore addresses the most problematic instances of self-representation—where a defendant's incoherence renders the trial farcical—yet protects the rights of competent defendants who, even if formally diagnosed with mental impairments, function at a sufficiently high level of coherence that their actions at trial, even if unskillful, will not patently undermine the fairness of the proceedings.

**A. Permitting Competent but Mentally Impaired Defendants to Represent Themselves Often is Fundamentally Unfair and Threatens Societal Interests in Safeguarding Valid Verdicts**

The criminal justice system, at a minimum, is supposed to be fair. *See Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring) (“[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process

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ability to communicate a possible defense to the jury.” *Id.* at 724 (citation omitted). However, Indiana does not endorse any requirement that a defendant's inability to communicate be the result, strictly speaking, of “education, literacy, fluency in English, and any physical or psychological disability.” *Id.*

Clause.”). The right to fair and impartial judicial proceedings belongs not only to defendants, but also to society as a whole. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979) (recognizing society’s “definite and concrete interest in seeing that justice is swiftly and fairly administered”). The guarantee of a fair trial “lie[s] at the base of all our civil and political institutions,” *Malinski v. New York*, 324 U.S. 401, 414 (1945) (citation omitted), such that there is an “institutional interest in the rendition of just verdicts in criminal cases.” *Wheat v. United States*, 486 U.S. 153, 160 (1988).

There is general agreement as to the fundamental components of a fair criminal trial, beginning with the textual guarantees of the Fifth and Sixth Amendments: the right against self-incrimination; the right to a speedy and public trial; the right to an impartial jury; the right to be tried locally; the right to notice of the accusation; the right to confront unfavorable witnesses (including through cross-examination); the right to compel favorable witnesses; and the right to assistance of counsel. U.S. Const. amend. V, VI.

In addition, several other rights and traditions have become fundamental to the overall fairness of the modern criminal trial “as we know it.” *Faretta*, 422 U.S. at 818. These include telling one’s side of the story through opening statements and closing arguments and objecting to the admissibility of the government’s evidence. *See, e.g., Herring v. New York*, 422 U.S. 853, 858 (1975) (“[I]t has universally been held that counsel for the defense has a right to make a closing summation to the jury . . . .”); *California v. Green*, 399 U.S. 149, 158 (1970)

("[C]ross-examination [is] the greatest legal engine ever invented for the discovery of truth . . . .") (internal quotation omitted); *McNabb v. United States*, 318 U.S. 332, 346 (1943) ("[W]here . . . it appears that evidence has been obtained in . . . violation of legal rights . . . it is the duty of the trial court to entertain a motion for the exclusion of such evidence . . . ."); *United States v. Hershenow*, 680 F.2d 847, 858 (1st Cir. 1982) ("[P]rovided he confines himself to a discussion of what he hopes to show, a defendant in a criminal case has a right to make an opening [statement] . . . ."); *United States v. Wilson*, 488 F.2d 688, 691 (5th Cir. 1973) ("[A] defendant has a perfect right to object to testimony or evidence which he feels is inadmissible . . . ."); *see also Patterson v. Illinois*, 487 U.S. 285, 300 n.13 (1988) ("[A]t trial, counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire*, examine and cross-examine witnesses effectively (including the accused), object to improper prosecution questions, and much more.").

When trials feature these actions on the part of the defense, the public and the defendant alike have some assurance that the resulting verdict is fair and legitimate. When the defense does not utilize these tools, or does so only incoherently, such assurance is lacking and the validity and accuracy of the verdict become questionable. *See, e.g., Gardner v. Ozmint*, No. 06-28, \_\_ F.3d \_\_, 2007 WL 4414821, at \*8 (4th Cir. Dec. 19, 2007) (holding that counsel's performance was constitutionally deficient for allowing introduction of co-defendant's pre-trial statements that related to potential racial motivation for the crime); *Miller v. Martin*, 481 F.3d

468, 473 (7th Cir. 2007) (holding counsel's performance at sentencing was constitutionally ineffective where counsel did not "offer a shred of mitigating evidence, object to . . . errors in the PSR, or even lobby for a sentence lower than the one urged by the State"); *Higgins v. Renico*, 470 F.3d 624, 632-33 (6th Cir. 2006) (counsel's failure to cross-examine prosecution's only eye witness was constitutionally deficient performance); *United States v. Theodore*, 468 F.3d 52, 55-57 (1st Cir. 2006) (holding performance constitutionally deficient where counsel failed to make a coherent opening statement and closing argument and struggled to examine witnesses and admit evidence); *Martin v. Grosshans*, 424 F.3d 588, 591-92 (7th Cir. 2005) (holding that counsel was constitutionally ineffective for failing to object to irrelevant and prejudicial testimony of prosecution witness and for failing to move for a mistrial based on inflammatory closing argument made by prosecutor); *Groseclose v. Bell*, 130 F.3d 1161, 1169 (6th Cir. 1997) (finding counsel's representation constitutionally ineffective due, in part, to "his failure to conduct any meaningful adversarial challenge, as shown by his failure to cross-examine more than half of the prosecution's witnesses, to object to any evidence, to put on any defense witnesses, to make a closing argument, and, at sentencing, to put on any meaningful mitigation evidence").

*Pro se* criminal trials often lack the hallmarks of fundamental fairness and generally "disrupt the criminal justice system to some degree." John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years after Faretta*, 6

Seton Hall Const. L.J. 483, 487 (1996). The Court has itself acknowledged that “[o]ur experience has taught us that ‘a pro se defense is usually a bad defense.’” *Martinez v. Court of Appeal*, 528 U.S. 152, 161 (2000) (quoting Decker, 6 Seton Hall Const. L.J. at 598). In particular, where *pro se* defendants are unable to make relevant opening statements or closing arguments, to formulate coherent cross-examination questions, to compel the testimony of relevant and readily identifiable supporting witnesses, or to interpose lucid objections to government evidence, the fairness of the proceedings suffers dramatically.

Several trials featuring *pro se* defendants who obviously suffered mental impairments impacting their communication skills, or were otherwise unable to communicate effectively, demonstrate this point vividly:

- *Panetti v. Quarterman*, \_\_ U.S. \_\_, 127 S. Ct. 2842 (2007). After being found competent to stand trial for capital murder, Scott Panetti requested and was allowed to represent himself. *See Panetti*, Brief for Petitioner at 10-11. Among the other absurdities at the trial, Panetti asked the court “for over 200 subpoenas, including John F. Kennedy, the Pope, and Jesus.” *Id.* at 11. Panetti also questioned prospective witnesses about nonsensical things such as belt buckles and assumed an alternate personality named “Sarge” when testifying. *See id.* at 13-14. He received the death penalty, but last term the Court vacated his sentence because it appeared an insane man was about to be executed. *See Panetti*, 127 S. Ct. at 2848.

- *O'Dell v. Thompson*, 502 U.S. 995 (1991) (Blackmun, J., statement respecting denial of certiorari). “Several times during the trial, the judge commented on O’Dell’s inability to ‘emotionally control’ himself . . . and on one occasion informed O’Dell that his outbursts ‘concern me as to whether you are in fact in need of a reevaluation.’” *Id.* at 996 (internal citations omitted). Despite this concern and the entreaties of standby counsel, the judge ultimately refused to order a reevaluation. *See id.* O’Dell was convicted of murder and sentenced to death. *See id.*

- *United States v. Gomez-Rosario*, 418 F.3d 90 (1st Cir. 2005). Before the trial began, while the defendant was represented by counsel, he filed dozens of *pro se* motions, “many of them long, confusing, contradictory, and devoid of merit.” *Id.* at 96. He began the trial *pro se*, but when he was unable to make an opening statement, he allowed standby counsel to take over his representation for the remainder of the trial. *See id.* at 97-98.

- *United States v. Farhad*, 190 F.3d 1097 (9th Cir. 1999). Kashani Farhad was charged with mail fraud and false use of social-security numbers, *see id.* at 1098, and chose to represent himself at trial because he could, in his own words, “make a more glorious kind of defense.” *Id.* at 1102 (Reinhardt, J., concurring). At trial, Farhad’s poor command of the English language led him virtually to admit his own guilt during his opening statement. *See id.* at 1102. Farhad insisted on taking his own direct testimony, leading to questions that were “entirely unintelligible, irrelevant, or prejudicial to his own case.” *Id.* at 1103. Farhad also failed to object at

critical points during the trial and ultimately asked the jury to find him guilty by returning “a true verdict, a just verdict, that the prosecution has proved its allegation.” *Id.* at 1104-05.

- *People v. Houston*, No. A113505, 2007 WL 1519548 (Cal. Ct. App. May 25, 2007): After undergoing two competency evaluations, Houston, charged with possession of illegal substances in a prison facility, was permitted to proceed *pro se*. *See id.* at \*1, \*4. During his preliminary hearing, Houston accused the judge of violating his rights because the court had not filed his *pro se* documents, stating nonsensically, “But he doesn’t want to hear my documents. I’ve presented myself by special invitation as a secured party/creditor. He’s failing to answer these documents.” *Id.* at \*4. After the prosecution rested its case, Houston stated that he would “like to call the People of the State of California to the stand.” *Id.* at \*5. The court terminated Houston’s self-representation after he refused to enter a plea. *See id.*

- *State v. Khaimov*, No. C4-97-2035, 1998 WL 747138 (Minn. Ct. App. Oct. 27, 1998): Defendant Khaim Khaimov was charged with aggravated robbery and burglary. *See id.* at \*1. Various court-appointed psychiatrists reported that Khaimov was psychotic and suffered from a paranoid personality and possible mixed personality disorder, but that he was competent to stand trial. *See id.* Khaimov was permitted to proceed *pro se* with standby counsel. *See id.* At trial, Khaimov was “argumentative, asserted that he was the victim of a broad conspiracy, and insulted witnesses who gave unfavorable testimony (including his own

witnesses).” *Id.* His opening and closing statements rambled to the point where the court was forced to terminate them. *See id.* Khaimov was convicted on all counts. *See id.* at \*2.

- Colin Ferguson, the Long Island Railroad killer, fired his lawyers for questioning his competence, and later told the jury that there was a 93-count indictment against him only because the crimes had occurred in 1993. *See Decker*, 6 Seton Hall Const. L.J. at 487 n.7. Ferguson’s tactics at trial included proposing conspiracy theories, aggressively cross-examining the very victims he shot, insisting groups were “out to get him,” and attempting to call former President Clinton and former New York Governor Mario Cuomo as witnesses. *See Todd A. Pickles, People v. Welch: A Missed Opportunity to Establish a Rational Rule of Competency to Waive the Assistance of Counsel*, 34 U.S.F. L. Rev. 603, 627-28 (2000).

\* \* \* \*

Defendants who cannot communicate coherently with the court or a jury effectively (but unintentionally) waive a *fair trial* when they demand a *counsel-free* trial. *See Martinez*, 528 U.S. at 161 n.9 (acknowledging this criticism of *Faretta*). The actions of such defendants defeat the point of having a trial at all, which is to subject the government’s case to meaningful adversarial testing. A defendant who cannot communicate coherently over the course of a trial cannot accomplish this fundamental objective and is left only with the unlikely prospect that the government will unilaterally fail to prove its case—and that the court

will take note and dismiss the charges. *See Green*, 399 U.S. at 176 (Harlan, J., concurring) (The Sixth Amendment “constitutionalize[s] the right to a defense as we know it, a right not always enjoyed by the accused, whose only defense prior to the late 17th century was to argue that the prosecution had not completely proved its case.”).

What is more, affording self-representation to those who cannot communicate often undermines the values of individual autonomy and dignity that supposedly underlie the right. *See McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984). Self-representation in such circumstances often results in a *loss* of dignity for the defendant, not to mention for the criminal-justice system as a whole. A defendant who cannot meaningfully communicate with the court is hardly capable of presenting his “best possible defense.” *Id.* at 177. Thus, “[t]o try, convict, and punish one so helpless to defend himself” may well “contravene[] fundamental principles of fairness and impugn[] the integrity of our criminal justice system,” *Godinez*, 509 U.S. at 417 (Blackmun, J., dissenting), even though it does not violate the Due Process Clause.

**B. Requiring Minimal Communication Skills Would Be Consistent with *Faretta*, Workable in Practice, and Effective at Screening the Most Problematic Self-Representation Demands**

At least under the limited test Indiana proposes here, the adoption by a State of a higher standard for measuring competency to represent oneself than for measuring competency to stand trial would not run

afoul of the Sixth Amendment right found in *Faretta*. As described above, Indiana proposes that courts may deny the right of self-representation for defendants who cannot communicate coherently with the court or a jury. This test would be fundamentally consistent with *Faretta*, which implicitly presumes some ability to convey a defense to the fact finder, as well as practical and effective at preserving fair trials for mentally impaired defendants.

**1. Denying self-representation to defendants who cannot communicate is consistent with *Faretta***

In *Faretta*, the Court held that a defendant has a right to self-representation and can waive counsel if he does so knowingly and voluntarily. *See Faretta*, 422 U.S. at 835. Although the Court acknowledged that “in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts,” it held that the “right to defend is personal” and, therefore, the defendant “must be free personally to decide whether in his particular case counsel is to his advantage.” *Id.* at 834. The Court explained that, although a defendant’s choice of self-representation may be to his “detriment,” a defendant must be free to “present his case” and “to make what statements he like[s].” *Id.* at 825, 834. Again, the Court described *Faretta* himself as “literate, competent, and understanding.” *Id.* at 835.

The right to self-representation, however, like the right to counsel of one’s choice, is not absolute. To begin with the latter, in *Wheat*, the Court held that

trial courts have broad discretion to refuse a defendant's waiver of conflict-free counsel when such waiver would "invite[] disrespect for the integrity of the court," or is "detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver." *Wheat*, 486 U.S. at 162; *cf. Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (holding that first-choice counsel may be denied based on calendar conflicts).

Recently, in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 2565-66 (2006), the Court reaffirmed this broad discretion to reject first-choice paid counsel notwithstanding its holding that a concededly erroneous deprivation of first-choice counsel requires a new trial even without a showing of prejudice. The Court's reaffirmation of limits on the right to first-choice counsel supports the State's point here: "We have recognized a trial court's wide latitude in *balancing the right to counsel of choice against the needs of fairness . . .*" *Id.* (emphasis added). Thus, while the Sixth Amendment's guarantee of the right to counsel precludes any need for a defendant to show that its improper deprivation actually caused an unfair trial, that does not mean that a trial judge's concerns for overall fairness are irrelevant. "It is one thing to conclude that the right to counsel of choice may be limited by the need for fair trial, but quite another to say that the right does not exist unless its denial renders the trial unfair." *Id.* at 2563 n.3.

Here, the trial judge reasonably applied the former precept: that the right to self-representation may be limited by the need for a fair trial. This is consistent not only with cases applying the right to first-choice counsel, but also with *Faretta* and other self-representation cases. In *Faretta*, the Court stated that a “trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.” *Faretta*, 422 U.S. at 834 n.46. The Court also cautioned that “[t]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.” *Id.* Accordingly, “the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.” *Martinez*, 528 U.S. at 162.

Furthermore, none of the cases that *Faretta* relied on to find a right of self-representation featured a defendant who could not communicate coherently.<sup>3</sup> Indeed, in *Massey v. Moore*, 348 U.S.

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<sup>3</sup> See *Moore v. Michigan*, 355 U.S. 155, 158-59 (1957); *Price v. Johnston*, 334 U.S. 266, 272-73 (1948); *Carter v. Illinois*, 329 U.S. 173, 177 (1946); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 270-71 (1942); *Snyder v. Massachusetts*, 291 U.S. 97, 109 (1934); *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965); *United States v. Plattner*, 330 F.2d 271, 277 (2d Cir. 1964); *MacKenna v. Ellis*, 263 F.2d 35, 37-38 (5th Cir. 1959); *United States v. Sternman*, 415 F.2d 1165, 1167 (6th Cir. 1969); *Lowe v. United States*, 418 F.2d 100, 102 n.4 (7th Cir. 1969); *United States v. Warner*, 428 F.2d 730, 733-34 (8th Cir. 1970); *Haslam v. United States*, 431 F.2d 362, 365 (9th Cir. 1970); *United States v. Dougherty*,

105, 108 (1954), the Court expressly observed that “[w]e have not allowed convictions to stand if the accused stood trial without benefit of counsel and yet was so unskilled, so ignorant, or so mentally deficient as not to be able to comprehend the legal issues involved in his defense.”

Consistent with these countervailing judicial interests, the Court has already delineated limits on the right of self-representation. Even before *Faretta*, in *Illinois v. Allen*, 397 U.S. 337, 343 (1970), the Court upheld a trial court’s decision to eject a self-represented defendant from the courtroom when he

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473 F.2d 1113, 1118 (D.C. Cir. 1972); *Lockard v. State*, 451 P.2d 1014, 1019-20 (Idaho 1969); *People v. Nelson*, 268 N.E.2d 2, 4 (Ill. 1971); *Blanton v. State*, 98 N.E.2d 186, 187 (Ind. 1951); *Westberry v. State*, 254 A.2d 44, 44 (Me. 1969); *Allen v. Commonwealth*, 87 N.E.2d 192, 193 (Mass. 1949); *People v. Haddad*, 11 N.W.2d 240, 243 (Mich. 1943); *State v. McGhee*, 167 N.W.2d 765, 768 (Neb. 1969); *Zasada v. State*, 89 A.2d 45, 46 (N.J. 1952); *People v. McLaughlin*, 53 N.E.2d 356, 357 (N.Y. 1944); *State v. Mems*, 190 S.E.2d 164, 172 (N.C. 1972); *State v. Pritchard*, 41 S.E.2d 287, 287 (N.C. 1947); *State v. Hollman*, 102 S.E.2d 873, 875 (S.C. 1958), *overruled on other grounds by Stevenson v. State*, 516 S.E.2d 434 (S.C. 1999); *State v. Thomlinson*, 100 N.W.2d 121, 122 (S.D. 1960); *State v. Penderville*, 272 P.2d 195, 198-99 (Utah 1954); *Mackreth v. Wilson*, 15 So.2d 112, 113 (Ala. Ct. App. 1943); *Cappetta v. State*, 204 So.2d 913, 916 (Fla. Dist. Ct. App. 1967), *rev’d on other grounds*, 216 So.2d 749 (Fla. 1968); *State v. Verna*, 498 P.2d 793, 796 n.1 (Or. Ct. App. 1972); *State v. Woodall*, 491 P.2d 680, 682 (Wash. Ct. App. 1971); *Rex v. Woodward*, 170 L.T.R. (n.s.) 296, 296 (Ct. Crim. App. 1944); *R. v. Maybury*, 11 L.T.R. (n.s.) 566, 566 (Q.B. 1865); *The Trial of William Penn and William Mead*, 6 How. St. Tr. 951, 955 (1670).

“insist[ed] on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.” In doing so, the Court stressed that “[i]t 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.*; see also *Mayberry v. Pennsylvania*, 400 U.S. 455, 468 (1971) (Burger, C.J., concurring) (“In every trial there is more at stake than just the interests of the accused; the integrity of the process warrants a trial judge’s exercising his discretion to have counsel participate in the defense even when rejected.”). *Faretta* cited *Allen* with approval, so there is no reason to believe that its holding and reasoning do not survive. See *Faretta*, 422 U.S. at 834 n.46.

The Court has continued to recognize limits on self-representation after *Faretta*. See *Martinez*, 528 U.S. at 163 (holding that there is no right to self-representation on direct appeal); *McKaskle*, 465 U.S. at 187-88 (holding that a trial court may appoint standby counsel over a self-represented defendant’s objection). *McKaskle* is particularly noteworthy because the Court expressly balanced the individual defendant’s interest in self-representation against the societal and institutional interest in ensuring fair adversarial proceedings. See *McKaskle*, 465 U.S. at 182-87. Standby counsel could be imposed as long as the defendant was not deprived of his right to have his voice heard and was “allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.” *Id.* at 174.

With respect to this latter point, it is significant that each of the actions that *McKaskle* said a *pro se* defendant is entitled to perform requires some minimal ability to communicate with the court and jury. For defendants lacking this ability, self-representation will result in the loss of fundamental fairness, regardless of the presence of standby counsel. See *Farhad*, 190 F.3d at 1102-05 (Reinhardt, J., concurring) (describing a *pro se* defendant's refusal to allow standby counsel to assist, even as he struggled with conducting voir dire, questioning witnesses, making motions, and arguing his theory of the case).

The basis for denying self-representation in this case—that Edwards's inability to communicate coherently would deprive him of a fair trial—fits comfortably within the legitimate interests the Court has used to counterbalance Sixth Amendment representational rights in the past. The Court in *Wheat* balanced the fair-trial impact of proceeding without *conflict-free* counsel against the right to counsel for a defendant who could afford his own lawyer. The Court in *McKaskle* balanced the fair-trial impact of proceeding without *standby* counsel against the right of self-representation for a defendant who could communicate coherently. In this case, it should balance the fair-trial impact of going forward without *full-blown* defense counsel against the right of self-representation for a defendant who *cannot* communicate coherently. The State's profound interests in providing a fair trial dramatically outweigh an incoherent (but legally competent) defendant's far more limited and personal interest in acting as his own lawyer.

This counterbalance remains notwithstanding any suspicions a defendant may have about the loyalties of state-appointed defense counsel. The Court in *Faretta* worried that, “where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer’s training and experience can be realized, if at all, only imperfectly.” *Faretta*, 422 U.S. at 834. The reason for such imperfect realization, the Court said, is that “[t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him.” *Id.*

Just as this concern does not preclude denying self-representation to a defendant who does not communicate *peacefully*, so it should not prevent it here, where the defendant does not communicate *coherently*. More fundamentally, in this circumstance, a “lawyer’s training and experience” cannot be characterized as merely a “potential advantage.” It is in fact the *only* way to “realize” a defense, even if it does so “imperfectly” because of the defendant’s suspicions. Besides, the Sixth Amendment is now understood to ensure minimally skillful state-provided representation, a rule that did not exist when *Faretta* was decided. *See Strickland v. Washington*, 466 U.S. 668, 683 (1984).

**2. A communication-skills rule echoes *Dusky*, and can be implemented readily without threatening core Sixth Amendment rights**

The rule proposed by the State is not only consistent with *Faretta*, but also echoes the low, yet meaningful, threshold of bare competency to stand trial with assistance of counsel. *Dusky* focuses in part on the defendant’s “ability to consult with his

lawyer.” *Dusky*, 362 U.S. at 402. This inquiry requires that the defendant possess only minimal ability to communicate with his lawyer; critically, it presumes that the lawyer will, in turn, communicate with the court on the defendant’s behalf. *See Godinez*, 509 U.S. at 412-13 (Blackmun, J., dissenting) (“A finding that a defendant is competent to stand trial establishes only that he is capable of aiding his attorney in making the critical decisions required at trial or in plea negotiations. The reliability or even relevance of such a finding vanishes when its basic premise—that counsel will be present—ceases to exist.”); *see also* J.A. 530a (holding in this case that the “finding of competence was conditioned by the doctors on the assistance of counsel”).

It follows that if a defendant chooses to dispense with his lawyer and elects self-representation, a proper concern may be whether the defendant himself has the ability to communicate with the court. The communication skills required are not exceptional. This standard does not contravene *Faretta* by requiring a defendant to “have the skill and experience of a lawyer” in order to choose self-representation. *See Faretta*, 422 U.S. at 835. But it does require that the defendant be able to ask relevant questions of witnesses and string together coherent and relevant statements regarding his innocence or the government’s failure to prove its case.

Courts should have no trouble deciding whether criminal defendants can communicate coherently with the court or the jury. *Faretta* already requires that a defendant’s clear and unequivocal assertion of

a desire to represent himself be followed by a hearing where the judge warns of the dangers of self-representation. *See Faretta*, 422 U.S. at 835. A *Faretta* hearing could also serve as an opportunity—if one has not already arisen—for the judge to determine if the defendant has the minimal skills to communicate coherently with the court and the jury in a narrative fashion. The judge could base a determination on evidence adduced at the hearing as well as on the defendant’s previous on-the-record communications (oral or written) with the court. Appellate courts will have no less ability to review this sort of record than they ordinarily do to review a waiver of counsel.

Nor would the proposed rule duplicate the knowing-voluntary-and-intelligent-waiver inquiry already required. This inquiry does not suffice because in *Godinez* the Court observed that it is directed simply at “determin[ing] whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced.” *Godinez*, 509 U.S. at 401 n.12. It is readily apparent that a defendant can satisfy that test, yet still be unable to communicate a defense coherently to the court and jury.

**C. Edwards Repeatedly Demonstrated that He Could Not Communicate with the Court in any Sustained, Cogent Manner**

Throughout his nearly six years in state custody awaiting trial—either in the Marion County Jail or at Logansport State Hospital—Edwards demonstrated a fundamental inability to

communicate lucidly with the court—and, at times, even with his lawyer. His communication deficiencies twice scuttled his trial under the minimal *Dusky* competency standard. J.A. 48a-49a, 206a-09a. Edwards regained enough cognition to consult with his lawyer, but not nearly enough to communicate coherently with the court or a jury. In rejecting Edwards’s motion to proceed *pro se*, the trial court was concerned in particular that “[s]everal of the reports refer to rambling writings as an indication of an inability to stay focused.” J.A. 527a.

Edwards has been consistently diagnosed with an expressive writing disorder and an expressive language disorder, which demonstrate his inability to convey his thoughts. His privately retained doctor, Dr. Trexler, found “severely impaired . . . working memory, meaning keeping focused and regulating what it is that you are thinking about.” J.A. 359a. The doctor explained, “he’s doing his best to hold his thinking together but he has a formal thought disorder and despite his efforts, he therefore is usually incoherent and unable to hang on to one topic for longer than three to five seconds.” J.A. 415a. “On problem solving tasks, [Edwards] would develop the right strategy to solve a problem and then spontaneously forget or lose where it was he was going and end off in a different direction.” J.A. 359a-60a.

This inability to retain and carry through a thought process was clearly demonstrated when Dr. Trexler asked Edwards to write “what his plan for defense was and how that would be successful.” J.A. 416a. Defendant’s response began as follows:

Return come to see me for more cash flow because I recently zoomed an eight to six year plan last.

Rather state such factors I group for the largest mixed complaint; to become an observer of a free agent of series where he can raise my hand as support for a team with absolutely no Indiana-in's but myself to blame for the winds.

J.A. 452a.

Edwards's inability to communicate coherently did not change even with Dr. Sena's observation that his "thought processes are no longer disorganized." J.A. 231a. Edwards's correspondence and pleadings to the court following that report still demonstrated confusion, delusions, and an inability to present cogent thoughts. J.A. 246a-51a, 258a-62a, 268a-78a.<sup>4</sup> On December 15, 2005, only four days prior to

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<sup>4</sup> Petitioner's Reply in Support of the Petition quoted a paragraph of Edwards's confused writing filed on August 30, 2005. *See* Pet. Reply Br. at 12. This submission appeared in Edwards's own state-court appendix. However, it now appears the quoted language was on the back of Edwards's filing and relates to another case, though it nonetheless demonstrates Edwards's disjointed thought process. Other filings that same day also demonstrate his inability to communicate even after being declared competent by Dr. Sena:

Defendant could not violate contracts a petition groups at all instances was merged. Then the set defendant achieved to become stronger at the trial courts post trial rules yet could not offer habilitation or attribute to the courts request for petitioners relief there of its veil of trust.

the trial, Edwards wrote an incomprehensible letter to the judge, which stated, in part:

Try to do your best old man to isolate the young boy in me at this. The defence helps me face my lodge for our 35th degree we call it the passing of the hands to the thumb. And it is very important to me to work again for my family lodge.

You looked good doing it your-self when the state starts offsetting the courts and you show then to keep the rule and thereby the record their heads-up.

...

Thank you for your pursued degrees affects,  
The Defendant Ahmad Edwards

J.A. 283a. At the second trial, Edwards raised several objections despite representation by counsel and admonishments by the court. J.A. 523a, 525a, 527a, 528a, 530a; Trial Tr. 62. Then, in a written request to proceed *pro se* filed at the conclusion of the second trial, Edwards claimed his request was based on “a popular vote of class members” and claimed to have vast legal education and experience. J.A. 301a.

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Petitioner requested no such order be to defendant the method defendant’s corporate defendant is obviously frivolous and or absurd. Vexation was caused on the petitioner after defendant’s therapeutic treatment.

J.A. 258a-59a.

However, other filings and statements during this time illustrate that Edwards had at least a basic understanding of the proceedings and could assist his counsel. J.A. 238a-40a, 244a-45a, 270a-74a, 279a. For example, he filed two coherent requests for discharge pursuant to Indiana Criminal Rule 4(c), a request for a hearing, and requests for documents from the clerk. J.A. 244a-48a, 250a. The first request for discharge was rough, but logical:

Mr. Ahmad Edwards the accused must be brought to trial under subdivision c of the criminal procedure in one year or so held be discharged. A charge against him filed July 15, 1999[.] A period of two years passed befor he filed a motion to dismiss criminal charges and discharge the defendant by criminal rule 4.c on May 29, 2001[.] Now he is requesting the court to take notice of his motion to dismiss and discharge, three years later.

J.A. 238a. He was also able to explain to his counsel that he would present a theory of self-defense. J.A. 524a-25a.

Thus, while Edwards amply demonstrated that he *could not* communicate coherently with the court (or conform to courtroom rules and procedures), he also demonstrated that he understood the proceedings and *could* assist his lawyer, as *Dusky* requires for legal competence. Indiana's suggested rule would allow States to insist on a fair trial for defendants such as Edwards where justice could be thwarted by a *pro se* defendant's inability to communicate.

## II. If *Faretta* Precludes Denial of Self-Representation to Competent but Unintelligible Defendants, the Court Should Overrule *Faretta*

Allowing criminal courts to override demands for self-representation by defendants who cannot communicate effectively with the court or jury should provide a workable method for protecting fair trials that is consistent with *Faretta*. If, however, the Court views *Faretta* as being sufficiently broad or absolute that it precludes denying self-representation to defendants such as Edwards, the Court should reconsider *Faretta* itself. Doing so would fit within the Court's established criteria for revisiting its precedents: *Faretta* has never rested on doctrinally solid footing, its central rationale has slowly eroded over the years, and self-representation is not a right that citizens use to structure their lives based on settled expectations about the law. *Cf. Dickerson v. United States*, 530 U.S. 428, 442 (2000).

### A. *Faretta* is Textually and Historically Unsound

1. *Faretta* is a profoundly fractured 6-3 decision that rests a non-textual Sixth Amendment right to self-representation on grounds that appear increasingly shaky.

a. Nearly a decade before *Faretta*, in *Singer v. United States*, 380 U.S. 24, 34-35 (1965), the Court *rejected* a non-textual Sixth Amendment right to waive a jury trial because “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.”

Thus, while a defendant may waive the rights to be confronted with witnesses against him, to be tried in the district where the offense was committed, to have a speedy and public trial, or to have a trial at all, for example, there is no correlative right to *avoid* being confronted with witnesses, to demand a change in venue, to be tried in private several years hence, or even to plead guilty. *See id.* at 35; *see also North Carolina v. Alford*, 400 U.S. 25, 38 n.11 (1970) (“A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . .”).

b. The Court in *Faretta* ostensibly acknowledged and accepted this principle from *Singer*. *See Faretta v. California*, 422 U.S. 806, 820 (1975). Thus lacking a textual source for the right to waive counsel, either express or implied, the Court looked to history and the structure of the Sixth Amendment for guidance. *See id.* at 818-32. It inferred an affirmative right of self-representation from a supposed historical aversion to compulsory counsel, from the right to self-representation provided by the Judiciary Act of 1789 and state codes of the period, from the personal nature of Sixth Amendment rights generally, and from its understanding of what it more broadly means to “enjoy the right . . . to have Assistance of Counsel.” *See id.*

c. In dissent, Chief Justice Burger, joined by Justices Blackmun and Rehnquist, argued that the decision contradicted the text of the Sixth Amendment, was inconsistent with settled precedent, and, ultimately, was “another example of the judicial tendency to constitutionalize what is

thought ‘good.’” *Id.* at 836 (Burger, C.J., dissenting). He observed that this desire to do good “fails on its own terms . . . because there is nothing desirable or useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his own defense to criminal charges.” *Id.* The risk of fundamental unfairness multiplies where a defendant is “‘ignorant and illiterate,’” of “‘feeble intellect,’” or suffers from severe thought and language disorders that make it impossible to communicate a defense to a jury. *See id.* at 839. The resulting inequity ultimately undermines “the integrity of and public confidence in the system.” *Id.*

Moreover, said the Chief Justice, the majority’s originalist argument got the historical lessons wrong. *See id.* at 843-45. While Section 35 of the Judiciary Act of 1789 “provided a statutory right to self-representation in federal criminal trials,” that fact cut *against* the majority’s conclusion. *See id.* at 844. That is because “[t]he text of the Sixth Amendment, which expressly provides only for a right to counsel, was proposed the day after the Judiciary Act was signed,” and “inclusion of the right in the Judiciary Act and its omission from the constitutional amendment drafted at the same time by many of the same men, supports the conclusion that the omission was intentional.” *Id.*

d. In a separate dissent, Justice Blackmun voiced similar concerns over the accuracy of the Court’s inferences from the Judiciary Act of 1789. *See id.* at 850-51 (Blackmun, J., dissenting). He also pointed out two obvious flaws in the Court’s use of English history. *See id.* at 846-51. First, the abuses of counsel at the Star Chamber, where a defendant

could make no pleading without signature of counsel, who himself was accountable to the crown (often on pain of imprisonment) for inaccurate averments of the defendant, *see id.* at 422 U.S. at 822 n.18 (majority opinion), are shielded by the textual right to counsel insofar as it guarantees a right to *effective* assistance of counsel. *See id.* at 848 (Blackmun, J., dissenting). “For . . . overbearing conduct by counsel, there is a remedy.” *Id.* (citing *Brookhart v. Janis*, 384 U.S. 1 (1966)). For example, in *Brookhart*, the Court reversed three guilty-plea convictions where counsel overrode the defendant’s expressed desire to plead not guilty. *See Brookhart*, 384 U.S. at 7-8.

Second, the “common law shuddered at the idea of any person testifying who had the least interest.” *Ferguson v. Georgia*, 365 U.S. 570, 574 (1961); *see also Faretta*, 422 U.S. at 850-51 (Blackmun, J., dissenting). Accordingly, “until the middle of the 19th century, the defendant in a criminal proceeding in this country was almost always disqualified from testifying as a witness because of his ‘interest’ in the outcome.” *Id.* at 850-51 (citing *Ferguson*, 365 U.S. at 575-77). This is significant because “the ability to defend ‘in person’ was frequently the defendant’s only chance to present his side of the case to the judge or jury.” *Faretta*, 422 U.S. at 851 (Blackmun, J., dissenting). Accordingly, “[w]ith the abolition of the common-law disqualification, the right to appear ‘in person’ . . . lost most, if not all, of its original importance.” *Id.* at 851.

2. The Court’s reliance on common law was fundamentally flawed also because, outside the Star Chamber (where defense counsel was essentially a

tool of the crown), defendants had no right to counsel whatever in many English trials. *See* Timothy P. O’Neil, *Vindicating the Defendant’s Constitutional Right to Testify at Criminal Trial: The Need for an On-the-Record Waiver*, 51 U. Pitt. L. Rev. 809, 811 (1990). Defendants appeared before the court and personally responded to accusations without the benefit of counsel, or even evidence. *See Faretta*, 422 U.S. at 823-24. Self-representation was, therefore, a burdensome necessity—a crippling disadvantage imposed by a dictatorial regime committed to convictions rather than justice. The right to present a defense with evidence and counsel was not generally recognized in England until the Treason Act of 1695. *See id.* at 824. Counsel was not allowed in *all* felony prosecutions in England until 1836. *See id.* at 825.<sup>5</sup>

The Court has recognized that injustices arise when criminal defendants fend for themselves, and has, accordingly, applied the Sixth Amendment’s right to counsel ever more expansively. *See id.* at 851 (Blackmun, J., dissenting). In *Powell v. Alabama*, 287 U.S. 45, 71-73 (1932), the Court held that defendants in capital cases were entitled to the assistance of paid counsel. In *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963), the Court ruled that defendants in felony cases who cannot afford paid counsel have a right to state-appointed counsel. In *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972), the Court ruled that *all* defendants facing a term of

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<sup>5</sup> For a more detailed discussion of the historical evolution of the right to counsel, and its significance for the right to self-representation, *see Faretta*, Brief of Respondent at 17-25, *available at* 1974 WL 186114.

imprisonment must be provided counsel, regardless of the severity of the charges. Just recently, in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 2563-65 (2006), the Court buttressed the right to first-choice paid counsel by reaffirming that improper denial constitutes structural error. *See also Massey v. Moore*, 348 U.S. 105, 108 (1954) (“We have not allowed convictions to stand if the accused stood trial without benefit of counsel and yet was so unskilled, so ignorant, or so mentally deficient as not to be able to comprehend the legal issues involved in his defense.”).

As constitutionally mandated access to counsel has expanded, any rationale for guaranteed self-representation has vanished. The despotic tradition of leaving defendants to their own devices before the oppressive crown cannot logically be twisted into a self-abnegating constitutional *right* to a similar procedure in the United States.

3. *Faretta* also lacks support from American judicial precedent. The Court in *Faretta* purported to trace the protection of self-representation backward through case law, *Faretta*, 422 U.S. at 814-17, but not one Supreme Court case it cited involved a defendant who requested, but was denied, self-representation. *See id.* The leading prior Supreme Court decision merely analyzed a defendant’s competence to waive a jury trial without counsel and held only that “[t]here is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer.” *Adams v. United States ex rel.*

*McCann*, 317 U.S. 269, 275 (1942). But just because the *Constitution* permits such a waiver, that does not mean that a State must do the same.<sup>6</sup> *Compare id.* at 276 (“The Constitution does not compel an accused who admits his guilt to stand trial against his own wishes.”) *with Alford*, 400 U.S. at 38 n.11 (finding no absolute right to plead guilty).

*Adams* did include the dictum that “to deny [a criminal defendant] in the exercise of his free choice the right to dispense with some [Sixth Amendment] safeguards . . . and to base such denial on an arbitrary rule . . . is to imprison a man in his privileges and call it the Constitution.” *Adams*, 317 U.S. at 280. But if this was intended to mean that each Sixth Amendment right includes a corollary right to its opposite, that principle was later rejected in *Singer*, which *Faretta* itself purported to uphold. *See Faretta*, 422 U.S. at 820.

In two other cases, similarly, the Court acknowledged that the Constitution does not require a defendant to have counsel, but it said nothing about a State’s ability to require it. *See Moore v. Michigan*, 355 U.S. 155, 161 (1957) (overturning *pro se* defendant’s conviction); *Carter v. Illinois*, 329 U.S.

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<sup>6</sup> Many of the lower federal-court cases cited in *Faretta* similarly relied on *Adams* to find a constitutional right to self-representation. *See United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2nd Cir. 1965); *MacKenna v. Ellis*, 263 F.2d 35, 41 & n.4 (5th Cir. 1959); *United States v. Sternman*, 415 F.2d 1165, 1169-70 (6th Cir. 1969); *United State v. Warner*, 428 F.2d 730, 733 (8th Cir. 1970). Only one contained any kind of historical analysis. *See United States v. Plattner*, 330 F.2d 271, 274 (2nd Cir. 1964).

173, 177-80 (1946) (affirming *pro se* defendant's conviction). And in *Price v. Johnston*, 334 U.S. 266, 285 (1948), *overruled by McClesky v. Zant*, 499 U.S. 467 (1991), the Court merely contrasted the absence of any right to argue one's own appeal with the "constitutional prerogative of being present in person at each significant stage of a felony prosecution." What is more, while the Court in *Price* referred to a "constitutional prerogative to be present" at one's trial, it pointedly referred to "conducting [one's] own defense at the trial" as merely being a "recognized privilege." *Price*, 334 U.S. at 285.

As for the 17 state cases that the Court cited, only six actually found a right of self-representation in the Constitution.<sup>7</sup> *See Faretta*, 422 U.S. at 813-14 nn.9 & 11 (footnote added). Two even seemed to *disclaim* a right to self-representation, stating that whether a defendant could act as his own counsel "lies within the sound discretion of the trial judge." *State v. Woodall*, 491 P.2d 680, 681 (Wash. Ct. App. 1971); *Cappetta v. State*, 204 So.2d 913, 918 (Fla.

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<sup>7</sup> In the others, the right was explicitly granted by statute, *see, e.g., Westberry v. State*, 254 A.2d 44, 46 & n.4 (Me. 1969); *State v. Thomlinson*, 100 N.W.2d 121, 122 (S.D. 1960); *State v. Hollman*, 102 S.E.2d 873, 878 (S.C. 1958), *overruled on other grounds by Stevenson v. State*, 516 S.E.2d 434 (S.C. 1999); *State v. Pritchard*, 41 S.E.2d 287, 287 (N.C. 1947), or recognized in the state constitution, *see, e.g., State v. Penderville*, 272 P.2d 195, 199 (Utah 1954); *Cappetta v. State*, 204 So.2d 913, 916 (Fla. Dist. Ct. App. 1967), *rev'd on other grounds*, 216 So.2d 749 (Fla. 1968); *State v. Woodall*, 491 P.2d 680, 681 (Wash. Ct. App. 1971).

Dist. Ct. App. 1967), *rev'd on other grounds*, 216 So.2d 749 (Fla. 1968).

**B. Opinions of the Court and Various Justices Have Eroded *Faretta's* Underlying Rationale**

Over the years, the Court has incrementally trimmed *Faretta's* application and cast doubt upon its underlying rationale. For example, while *Faretta* found a “constitutional right to proceed without counsel,” *id.* at 807, in *McKaskle v. Wiggins*, 465 U.S. 168, 187 (1984) (permitting imposition of standby counsel), the Court recast that right as merely the defendant’s “constitutional right to appear on stage at his trial.” It also stressed that “the defendant’s right to proceed *pro se* exists in the larger context of the criminal trial,” which is designed to determine guilt or innocence, not to provide a platform for self-actuation. *See id.* at 177 n.8.

In *Martinez v. Court of Appeal*, 528 U.S. 152, 163 (2000) the Court rejected self-representation on appeal and criticized *Faretta's* “nontextual” and historical analysis by observing that “the original reasons for protecting that right do not have the same force” now when every defendant can have competent counsel appointed. *See id.* at 158, 160. *Martinez* also cast doubt upon *Faretta's* “autonomy” rationale, reasoning that autonomy is sufficiently respected with appointed counsel that is loyal and competent. *See id.* at 160-61. Finally, citing *McKaskle*, the Court in *Martinez* said that “the defendant’s interest in acting as his own lawyer” is at times outweighed by “the government’s interest in

ensuring the integrity and efficiency of the trial.” *Id.* at 162. The Court thus suggested that future cases could further limit or even abrogate the right to self-representation where its invocation squarely conflicts with fundamental fairness. *See id.*

Opinions of individual Justices also have eroded the foundations of *Faretta*. In his concurring opinion in *Martinez*, Justice Kennedy observed that the Court’s opinion “cast[s] doubt upon the rationale of *Faretta*.” *Id.* at 164 (Kennedy, J., concurring). Justice Breyer expressed his sympathy for judges who regard the right to self-representation as “conflict[ing] squarely and inherently with the right to a fair trial.” *Id.* at 164 (Breyer, J., concurring). He also suggested the Court would be in a position to reconsider *Faretta* if it were presented with empirical data addressing whether “the right to represent oneself . . . inhibits the Constitution’s basic guarantee of fairness.” *Id.* In *Godinez*, Justice Blackmun, joined by Justice Stevens, argued that it “contravenes fundamental principles of fairness” to try without counsel a defendant who, due to mental illness or medication, is “utterly incapable of conducting his own defense.” *Godinez v. Moran*, 509 U.S. 389, 416-17 (1993) (Blackmun, J., dissenting).

Justice Scalia, while supporting a right of self-representation, has questioned whether *Faretta* correctly grounded the right in the Sixth Amendment rather than the Due Process Clause. *See Martinez*, 528 U.S. at 165 (Scalia, J., concurring in the judgment). Presumably, a right to self-representation grounded in the Due Process Clause rather than the Sixth Amendment would not be structural and, therefore, would even more clearly be

subject to judicial balancing. *Cf. Gonzalez-Lopez*, 126 S. Ct. at 2562; *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

**C. The Post-*Faretta* Development of a Skills-Based Ineffective-Assistance-of-Counsel Doctrine also Undermines *Faretta***

It is now established that a conviction is invalid when defense counsel at trial performs below minimal standards of competence. *See* Part I.A, *supra*. When *Faretta* was decided, however, the Court had not yet announced that a fair trial required counsel to conduct the defense with minimally competent skill. To be sure, in *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970), the Court acknowledged that a defendant has the right to minimally competent advice when deciding whether to plead guilty. But not until *Strickland v. Washington*, 466 U.S. 668, 683 (1984), did the Court apply that standard to counsel's actual performance *at trial*. Prior to that, application of the ineffective-assistance standard was derived from the Due Process Clause, *see Gonzalez-Lopez*, 126 S. Ct. at 2562-63, and was limited to "claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability to render effective assistance to the accused." *Strickland*, 466 U.S. at 683.<sup>8</sup>

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<sup>8</sup> *See Chambers v. Maroney*, 399 U.S. 42, 53-54 (1970) (indicating State might violate right to effective assistance of counsel by appointing an attorney too late for adequate preparation); *Reece v. Georgia*, 350 U.S. 85, 90 (1955) (observing that it is a violation of right to assistance of counsel where assignment of counsel takes

The development of ineffective-assistance-of-counsel doctrine since *Faretta* is significant because it demonstrates how the Court has come to view the *actual* provision of a defense at trial, and not merely literal, yet entirely theoretical, compliance with textual rights, as essential to the preservation of Sixth Amendment guarantees. That is, while providing the defendant with “counsel” who could “assist” only insofar as he could show the way to the courthouse might *theoretically* carry out the structural trial safeguards represented by the Sixth Amendment, the Court has now decided that the Sixth Amendment requires more. After *Strickland*, sufficiently effective *performance* at trial is necessary to vindicate the structural guarantee of the assistance of trial counsel.<sup>9</sup> *See id.* As the Court observed recently, “our recognition of the right to effective counsel within the Sixth Amendment was a

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place “at such time and under such circumstances as to preclude the giving of effective aid in the preparation and trial of a capital case”); *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (addressing timing of appointment of counsel and fact that effective assistance of counsel required more than just formal appointment); *Powell v. Alabama*, 287 U.S. 45, 70-73 (1932) (holding that trial court’s failure to allow sufficient time for defendants to obtain counsel and failure to appoint counsel for defendants in capital case violates right to assistance of counsel).

<sup>9</sup> Furthermore, counsel who does not undertake minimal communication with the court or jury is so completely ineffective, and so structurally injurious to the process, that a defendant who is convicted in that circumstance need not prove prejudice to win a new trial. *See United States v. Cronin*, 466 U.S. 648, 658-61 (1984).

consequence of our perception that representation by counsel ‘is critical to the ability of the adversarial system to produce just results.’” *Gonzalez-Lopez*, 126 S. Ct. at 2563 (quoting *Strickland*, 466 U.S. at 685).

This post-*Faretta* “perception” is so critical that the same minimal-competency standards apply even where the performance at issue is that of the defendant’s first-choice *paid* counsel. *See Miller v. Martin*, 481 F.3d 468, 470 (7th Cir. 2007) (finding paid counsel’s performance constitutionally ineffective at sentencing). In fact, a trial court is well within its authority to disqualify, *before* trial, first-choice counsel who patently cannot provide minimally effective assistance. *See Wheat v. United States*, 486 U.S. 153, 162-64 (1988).

*Faretta* cannot be squared with this “just results” view of the right to counsel. *Faretta* tangentially adverted to the implausible theory that self-representation might yield the best possible defense. *See Faretta*, 422 U.S. at 834. By now, however, there can be no romantic illusion that proceeding *pro se* may provide a better chance at a favorable result. In any event, much more central to *Faretta*’s holding was the entirely theoretical notion that the Sixth Amendment protects a defendant’s right to self-actualization and autonomy. *See id.* at 820-21, 834. Whether self-representation really protects such nebulous values is unknowable—and entirely unrelated to achieving a just resolution of criminal charges in any event. Concern for actual justice, as produced by a meaningfully adversarial trial, has since overwhelmed the purely abstract rationale of *Faretta*. The Court should, if necessary to enable

states to ensure that defendants such as Edwards proceed to trial represented by counsel, sweep *Faretta* aside.

**CONCLUSION**

The decision below should be reversed.

Respectfully submitted,

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