No. 07-208

IN THE

Supreme Court of the United States

STATE OF INDIANA,
Petitioner,

v.

AHMAD EDWARDS,
Respondent.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AND AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether a State may adopt a higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial.

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INTEREST OF *AMICI CURIAE*

The American Psychiatric Association (APA), with more than 36,000 members, is the Nation's largest association of physicians who specialize in psychiatry. The American Academy of Psychiatry and the Law (AAPL), with approximately 2000 psychiatrist members, is an organization of psychiatrists dedicated to excellence in practice, teaching, and research in forensic psychiatry, a subspecialty recognized by the Accreditation Council of Graduate Medical Education. The Academy sponsors numerous educational activities and programs and is engaged in the development of professional and ethical standards of practice for forensic psychiatrists

Both organizations have regularly participated as *amici curiae* in this Court. Their members deal frequently with competency issues, in court and elsewhere. They have an interest in ensuring that important legal decisions reflect relevant professional learning and, here, in seeing that a criminal defendant's mental illness not render his trial unreliable.[1]

STATEMENT

The record establishes that Ahmad Edwards has serious psychoses: the examining experts diagnosed schizophrenia or delusional disorders. *See* JA 21a, 25a, 37a, 88a, 163a-64a, 196a, 220a, 232a; *see also* JA 220a (depressive disorder). The charges against Edwards are that, on July 12, 1999, he shoplifted shoes and then, upon being chased in the street, shot

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[1] Letters of consent to the filing of this brief have been filed with the Clerk. Neither counsel for a party nor a party authored this brief even in part or made any contribution to fund its preparation or submission. *See* S. Ct. R. 37.6.

and wounded two people, before being arrested on the spot. Indiana charged him with theft and criminal recklessness, and with battery and attempted murder. Ed. App. 72-73, 494-95.

For several years, Edwards was found incompetent to stand trial (JA 48a, 206a-11a), based not only on expert reports but on testimony, of experts and of court-appointed counsel, about Edwards' disorganized and delusional thinking and inability to focus and to communicate coherently. *See*, *e.g.*, JA 353a-56a, 362a-65a, 407a-14a, 419a, 478a-79a, 500a-05a. In 2004, he began taking medication and getting therapy, and he became competent to stand trial. JA 216-28a, 226a-36a; *see* JA 61a, 86a, 158a, 194a (earlier reports); JA 165a (competence restoration impossible without medication). In June 2005, Edwards stood trial, with counsel representing him.

The jury convicted Edwards of theft and criminal recklessness, but it hung on battery and attempted murder. Ed. App. 535-36. When the retrial on the battery and attempted-murder charges was set, Edwards asked to represent himself. The trial judge initially said yes (*see id.* at 540), then reversed course, concluding that Edwards was not competent to represent himself though he was competent to stand trial if represented. *See* Pet. App. 3a, 36a-37a; JA 526a-27a. The jury found Edwards guilty, and the court sentenced him to 30 years in prison for attempted murder. Ed. App. 69.

On appeal, the Indiana Supreme Court held that this Court's decision in *Godinez v. Moran*, 509 US 389 (1993), barred a State from deeming a defendant competent to stand trial but not to represent himself. The court noted that a State may preclude a defendant from representing himself if he has not

voluntarily and intelligently waived the Sixth Amendment right to counsel, but it understood the trial court not to have found lack of such a waiver on Edwards' part. Pet. App. 9a-10a, 14a. Rather, the Indiana Supreme Court concluded that the trial court had applied, and found that Edwards did not meet, a higher standard for a defendant's competency to represent himself at trial than for competency to be tried while represented. *Id.* at 10a-12a. The Indiana Supreme Court observed that "the trial court's conclusion that Edwards was incapable of adequate self-representation was, at a minimum, reasonable." *Id.* at 14a. Nevertheless, it held that the trial court's decision was prohibited, under *Godinez*, by the Sixth Amendment right of a criminal defendant to represent himself, as recognized in *Faretta v. California*, 422 U.S. 806 (1975). Pet. App. 14a. The court reversed the convictions for attempted murder and battery and remanded. *Id.* at 15a.

This Court granted review on the following question: "May States adopt a higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial?" *Indiana v. Edwards*, 128 S. Ct. 741 (2007).

SUMMARY OF ARGUMENT

The Sixth Amendment right to self-representation—the *Faretta* right—is the only federal constitutional constraint at issue here on whether the State "may" adopt a higher standard for self-representation than for competency to stand trial. In the view of *amici*, a State may permissibly adopt a higher standard without violating that right. That conclusion accords with professional recognition that competency is not a unitary, all-or-nothing concept,

but that individuals may have some competencies and not others.

The *Faretta* right is subject to being overridden to prevent mental illness from destroying the reliability of the adversarial process for testing contested criminal charges. The *Faretta* right is not absolute, and the public interest in this context is a very strong one. This Court's decision in *Godinez* does not resolve this question: the case did not involve the testing of contested criminal charges where the defendant would represent himself.

The public interest involved can permissibly support differentiation of competency to stand trial from competency for self-representation. This Court and jurisdictions nationwide have long concluded that reliability can be protected, in a case with counsel, through a sufficiently careful and robust application of basic requirements of understanding, communication, and decision-making. The required capabilities involve a rational understanding of the proceedings, reasonable ability to communicate with counsel (so as to provide information that counsel may find necessary to carry out the essential task of adversarial testing of the prosecution's case), and ability to make crucial large-scale decisions.

A State may legitimately conclude, however, that more is needed to prevent mental illness from destroying the reliability of the adversarial process if the defendant represents himself, because the defendant personally plays a much greater role. Significant extensions of the capabilities needed to stand trial are required for being one's own lawyer. The defendant must have, and sustain through a tense trial, more extensive decision-making abilities (about numerous issues that arise during trial) and

more extensive abilities to formulate and communicate coherent thoughts (the communications are with sometimes impatient or even hostile judges, juries, witnesses, and adversary counsel, not with a lawyer of one's own who is professionally obliged to assist in the communication). Although the issue is comparatively unexplored, the relevant capabilities are extensions of those already soundly assessed in determining competency to stand trial.

To serve the interest in preventing mental illness from defeating the reliability of adversarial testing of criminal charges, a State should be permitted to demand more extensive abilities before allowing a criminal defendant to represent himself. To avoid unjustified override of the *Faretta* right, however, it may be important, in determining whether an override is justified in a particular case, to consider the role that can be played by standby counsel—which may diminish the role the defendant will play and hence the required capabilities. Likewise, it may be important to consider whether restoration of self-representation competence is possible, and with what delay, before forcing a defendant to go to trial with counsel. What force and shape such considerations should have would best be addressed in a concrete setting, not at the present stage of the present case, where attention was not focused on such matters.

ARGUMENT

I. THE *FARETTA* RIGHT IS SUBJECT TO AN OVERRIDING PUBLIC INTEREST IN PREVENTING MENTAL INCAPACITIES FROM UNDERMINING RELIABLE ADJUDICATION OF CONTESTED CRIMINAL CHARGES

In various contexts, this Court has long recognized that certain mental incapacities can themselves impair important aspects of autonomy and, under appropriate standards reflecting the importance of the interests involved, justify government override of an individual's decisions. Civil commitment, medically indicated involuntary medication based on dangerousness, and medically indicated involuntary treatment to restore competence to stand trial are familiar examples. *See*, *e.g.*, *Sell v. United States*, 539 U.S. 166 (2003); *Washington v. Harper*, 494 U.S. 210 (1990); *Addington v. Texas*, 441 U.S. 418 (1979). In the *Faretta* context of the present case—which involves a right whose exercise is frequently *against* the defendant's legal interests—strong public interests may likewise override an autonomy interest in self-representation.

A. The *Faretta* Right Is Not Absolute

In *Faretta*, this Court held that the Sixth and Fourteenth Amendments afford a criminal defendant "a right of self-representation" in his own criminal trial. 422 U.S. at 821. It so held in a case where the defendant was "literate, competent, and understanding," *id.* at 835, and it made clear not only that exercise of the right is frequently (perhaps usually)

self-harming,[2] but that the right is not absolute. *Id.* at 834. It may be overridden to prevent "serious and obstructionist misconduct." *Id.* at 834 n.46. Moreover, "a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Id.* Self-representation is also subject to protection of "the dignity of the courtroom" and compliance with "procedural and substantive law." *Id.*

In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the Court rejected a defendant's objection to the role that standby counsel had played. In so ruling, the Court reiterated that a condition of self-representation is that the defendant be "able and willing to abide by rules of procedure and courtroom protocol" (*id.* at 173)—with no accompanying "constitutional right to receive personal instruction from the trial judge on courtroom procedure" (*id.* at 183). *See id.* at 184 (reiterating *Faretta*-noted limits). The Court observed, too, that "the defendant's right to proceed *pro se* exists in the larger context of the criminal trial designed to determine whether or not a defendant is guilty of the offense with which he is charged." *Id.*

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[2] One recent empirical study suggests that *pro se* representation is not always harmful to defendants, but the data are very limited, point to a (plausible) difference between misdemeanor and felony cases, and do not undermine the common-sense conclusion that, at least in felony cases and in the (fairly rare) cases involving mentally ill defendants, self-representation weakens the adversarial testing of the prosecution's case. *See* Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the* Pro Se *Felony Defendant*, 85 N.C. L. Rev. 423 (2007).

at 177 n.8. Reiterating that a defendant choosing self-representation cannot complain of self-inflicted errors, *id.*, the Court affirmed that the State may compel a substantial role for standby counsel to save the defendant from harmful errors. *Id.* at 184-85.

In *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), the Court held that the Constitution does not provide a right to self-representation on appeal of a criminal conviction. As part of its analysis, the Court described the contours of the *Faretta* right even at trial. It observed that "the right to self-representation is not absolute" and, in addition to requiring voluntary, intelligent, and timely election, is subject to the trial court's authority to "terminate self-representation or appoint 'standby counsel'—even over the defendant's objection—if necessary" and, within limits, to permit standby counsel to "participate in the trial proceedings, even without the express consent of the defendant." 528 U.S. at 161, 162. "Even at the trial level, therefore, the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Id.* The Court reiterated "the overriding state interest in the fair and efficient administration of justice." *Id.* at 163.

B. There Is A Strong Public Interest In Preventing Mental Incapacities From Undermining Reliable Testing Of The Prosecution's Charges In A Contested Criminal Case

The Court has recognized the strong public interest, when criminal charges are contested, in the reliability of the adversarial process used to

adjudicate the truth of the charges. *See Jencks v. United States*, 353 U.S. 657, 671 (1957) ("'the Government which prosecutes an accused also has the duty to see that justice is done'"); *Herring v. New York*, 422 U.S. 853, 862 (1975) (a properly functioning adversary process serves "the ultimate objective that the guilty be convicted and the innocent go free"); *Lankford v. Idaho*, 500 U.S. 110, 126-27 (1991) (adversary process critical for ultimate objective of avoiding error); *Kimmelman v. Morrison*, 477 U.S. 365, 379-80 (1986); *United States v. Cronic*, 466 U.S. 648, 655-56 (1984). The reliability interest has long justified limits even on the constitutional right to present evidence, in order to prevent "confusion of the issues" or address a "potential to mislead the jury." *Holmes v. South Carolina*, 126 S. Ct. 1727, 1732 (2006); *see Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (evidentiary exclusion permissible to "serve the interests of fairness and reliability").

The independent public interest in reliable adjudication is reflected in the *Faretta* setting, where common legal experience indicates that self-representation diminishes adversarial testing of the prosecution's case and so often harms the defendant himself. *Martinez* is explicit on this score, as quoted above. Moreover, this interest underlies the *Faretta-McKaskle* recognition that a State may force standby counsel on the defendant, rather than leave the defendant wholly at the mercy of his own lack of expertise in complying with procedural and substantive law—*even though* the defendant could not later complain of self-inflicted errors. *Faretta*, 422 U.S. at 835 n.46; *McKaskle*, 465 U.S. at 177 n.8. Further, if protection of courtroom dignity and protocol are overriding interests, and the *Faretta*

right "exists in the larger context" of seeking an accurate adjudication (as *McKaskle* notes), *see* page 7, *supra*, a genuine threat to the basic reliability of the trial would seem a strong reason for overriding the *Faretta* right. *Cf. United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2563 n.3 (2006) (right to counsel of choice "may be limited by the need for fair trial").

Serious mental illnesses present a genuine threat to the vital public interest in reliable adjudication of contested criminal charges.[3] Such illnesses are often associated with delusional misperceptions of reality, inability to think coherently, and hallucinations. *See* Amer. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition—Text Revision* 298-302,323-25 (2000) ("*DSM-IV-TR*"). The defendant may not be able to recount relevant facts (*e.g.*, where was Edwards aiming when he fired his gun?), may misunderstand courtroom developments, may fail to maintain focus during trial proceedings, and may respond irrationally. Cognitive deficiencies are commonly linked with impaired ability to formulate and to express thoughts in an understandable, coherent manner. *Id.* at 300. Severe anxiety, which is often present in psychotic disorders (*id.* at 304), can impair attentiveness and the ability to function in tense settings. Depression can make decision-making difficult or so diminish motivation as to produce self-destructive decisions. *Id.* at 349-51.

Long tradition specifically recognizes these risks and the importance of addressing them, for the

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[3] For simplicity, and given the facts of this case, we refer to and focus on mental illness, though a closely related analysis would apply to mental retardation, brain injury, and other causes of cognitive impairment.

protection of the defendant himself and of the public interest in reliable adjudication. The law governing competence to stand trial rests centrally, if not exclusively, on this basis. Thus, in *Dusky v. United States*, 362 U.S. 402, 402 (1960), the Court indicated that a defendant must have "'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 *Pate v. Robinson*, 383 U.S. 375 (1966), the Court insisted on adequate procedures to ensure competence at trial. In *Drope v. Missouri*, 420 U.S. 162 (1975), the Court summarized:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.

Id. at 171. The Court noted that, while one basis for the rule might be that a defendant with sufficient mental incapacities "'is in reality afforded no opportunity to defend himself,'" it was sufficient "that the prohibition is *fundamental to an adversary system of justice*." *Id.* at 171-72 (emphasis added).

In *Riggins v. Nevada*, 504 U.S. 127, 139 (1992), Justice Kennedy agreed that "the State has a legitimate interest in attempting to restore the competence of otherwise incompetent defendants," sometimes sufficient to override an autonomy interest in refusing medication. He explained that "conviction of an incompetent defendant violates due process" and that "[c]ompetence to stand trial is rudimentary," partly because essential fair-trial rights—to counsel, to call and confront witnesses, to

testify or remain silent—depend on it. *Id.* at 139-40; *see Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (adopting foregoing analysis). Justice Kennedy added that due process would not even *permit* a State generally to recognize a defendant's competent *waiver* of the right to be competent at trial. 504 U.S. at 140.

This body of law reflects, at the least, the *permissibility* of a State's according overriding importance to the public interest in reliable adversarial testing of contested charges. Even the constitutional *requirement* is commonly stated in terms that flatly bar trial of a defendant who does not meet the standards for competence to stand trial. "A criminal defendant may not be tried unless he is competent." *Godinez*, 509 U.S. at 396 (citing *Pate*). "If a defendant is incompetent, due process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him." *Medina v. California*, 505 U.S. 437, 448 (1992) (citing *Dusky*); *see id.* at 439.

Congress used similar terms in 18 U.S.C. § 4241(a), where it said that a trial court "shall order" a competency hearing, even on its own motion, "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." Congress thus adopted the *Dusky* standard, and the key committee report explained that "it is mandatory that the court order a hearing" on competency if there is reasonable cause to believe that it is lacking. S. Rep. 98-225, at

234 (1983). The same committee report, mirroring *Drope*, explained that the requirement of competency to stand trial serves two functions—not just that "it is fundamentally unfair to convict an accused person, in effect, in absentia," but that

> the accuracy of the factual determination of guilt becomes suspect when the accused lacks the effective opportunity to challenge it by his active involvement at the trial.

S. Rep. 98-225, at 232.[4] Other jurisdictions likewise recognize the *governmental* interest in preventing a defendant's incapacities from making criminal trials unreliable. *E.g.*, *People v. Pokovich*, 39 Cal. 4th 1240, 1245 (2006).

This Court's decision in *Sell*, *supra*, confirms the strength of the public interest in reliable adjudication. The Court in *Sell* held that a recognized autonomy interest—in avoiding involuntary medical treatment—can be overridden in the case of mental illness where, among other preconditions, doing so is necessary for criminal charges to be brought to trial in a proceeding at which the defendant is competent. 539 U.S. at 179. The Court provided no exception to the overriding character of the public interest where a defendant makes a competent choice (say, while on medication in advance of trial) to be tried later while

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[4] Notably, "a mentally impaired defendant might be unfairly convicted if he alone has knowledge of certain facts but does not appreciate the value of such facts, or the propriety of communicating them to his counsel." N. Poythress, R. Bonnie, J. Monahan, R. Otto, S. Hoge, *Adjudicative Competence: The MacArthur Studies* 44 (2002) (internal quotation marks omitted); Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 Behavioral Sci. & L. 291, 295 (1992).

incompetent (by going off his medication). Even if a State is not *forbidden* to accept and proceed under such a waiver, *but cf. Riggins*, 504 U.S. at 140 (Kennedy, J., concurring) (suggesting such a prohibition), the public has an overriding independent interest in choosing to bring a criminal defendant to trial and doing so without reliability-undermining incompetence.

An analogy is helpful in considering the strength of the public interest here. If a defendant capably spoke only a language not understood by the judge, prosecutor, witnesses, or jurors—with severely limited if any English—the State would have an overriding interest in refusing to permit the defendant to conduct his own defense personally, without a translator speaking for him, even if the defendant made an informed, eyes-open choice before trial (with the assistance of a translator) to proceed at trial without any intermediary in communication, despite the predictable resulting incomprehensibility. A sufficiently severe deficiency in understanding and communication could make the trial a farce, defeating the strong public interest in a reliable trial. The present context bears an illuminating similarity: the public has a strong interest in insisting that the defendant appear through a lawyer (a kind of translator), if the defendant's mental illness produces sufficiently severe communication, understanding, or decision-making deficiencies.

It may well be possible to describe such deficiencies as rendering a defendant's choice of self-representation not intelligent or knowing, undermining the waiver of the right to counsel, on the theory that a defendant who truly appreciated his deficiencies and their consequences would not make the choice.

See Brooks v. McCaughtry, 380 F.3d 1009, 1011 (7th Cir. 2004).[5] At a minimum, though, that conclusion would be drawn from a premise already established in a logically prior analysis of the defendant's capabilities as they bear on making the trial a reliable one. In addition, the focus on the defendant's *choice* may not take full account of the State's own interest and is in any event at least conceptually distinct from that interest. Regardless, the important point is that a defendant's impaired capabilities may defeat the reliability of the adversarial-testing process if the defendant represents himself, even if a reliable trial is possible with counsel. We therefore focus directly on that point.

C. *Godinez* Did Not Decide The Present Issue

Godinez did not present or focus on the question presented here. It involved only a guilty plea, after which no trial was to take place. Capabilities required to conduct a trial were therefore not at issue. Given the context, the Court in *Godinez* focused on *waiver* of the constitutional right to obtain counsel, which it recognized was a separate matter from *entitlement* under the distinct constitutional right of self-representation. *See* 509 U.S. at 399 &

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[5] "It is one thing for a defendant to have sufficient mentation to be able to follow the trial proceedings with the aid of a lawyer, and another to be able to represent himself; and while Brooks clearly had the former, he seems equally clearly to have lacked the latter, if we may judge from his wild behavior and incomprehensible outbursts during the trial. And if he was incompetent to conduct his own defense, this is evidence that his decision to waive counsel was not 'knowing and intelligent,' as all waivers must be in order to be legally effective." *Brooks*, 380 F.3d at 1011.

n.10 ("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"). *Faretta* itself rested on recognizing and respecting the distinction between waiving the "essential" right to have counsel and claiming a right to proceed without counsel. 422 U.S. at 832-34.

The *Godinez* context, of course, requires that the defendant have certain competencies. The defendant must meet the *Dusky* standard of rational and factual understanding of the proceedings and be able to understand what rights he is waiving and make an intelligent choice. *See* 509 U.S. at 396-97, 401 & n.12. The defendant should also have such competence as is needed for the State to establish the factual basis for the charge to which the defendant is pleading guilty. *E.g.*, *id.* at 393; Fed. R. Crim. P. 11(b) (formerly 11(f)); *Santobello v. New York*, 404 U.S. 257, 261-62 (1971); *North Carolina v. Alford*, 400 U.S. 25, 38 (1970). If a defendant is sufficiently incompetent, his expression of acquiescence to the charges (or an earlier confession) may be both unreliable as a factual matter and not an expression of knowing, intelligent, voluntary choice. *See* Amicus Br. of American Psychiatric Ass'n *et al.*, *Godinez v. Moran*, No. 92-725 (March 5, 1993).

The situation presented in this case is importantly different from the guilty-plea situation in *Godinez*—which did not involve a claimed *Faretta* entitlement to undertake self-representation in a trial on contested criminal charges. The governmental interests differ significantly in the two situations. When the defendant pleads guilty, the charges are not being contested at all, and there is no adversarial testing.

When a defendant insists that he did not commit the crime charged, proof rather than consent must underlie any resulting conviction, and the public has a distinctive interest, given the defendant's denial, in ensuring that the adversarial testing of the proof is not made unreliable by mental incapacities. *Godinez* thus does not resolve the present case.

* * * *

For the foregoing reasons, there is a strong public interest in preventing mental incapacities from undermining the reliability of adversarial testing of contested criminal charges, an interest that may override the *Faretta* right. For the reasons elaborated next, that conclusion supports an affirmative answer to the question stated by this Court—whether a State may adopt a higher standard for self-representation than for competency to stand trial. The capabilities are relevantly different in terms of the overriding public interest.

II. SELF-REPRESENTATION INVOLVES SIGNIFICANT EXTENSIONS OF THE CAPABILITIES REQUIRED FOR COMPETENCY TO STAND TRIAL

The overriding public interest in reliable adversarial testing of contested criminal charges can justify different standards for competency to stand trial with counsel and without counsel. The different roles of the defendant in the two circumstances have different effects on the public interest at issue. And the capacities to perform the two roles are significantly different at least in degree. A State may therefore apply different "standards" and find a defendant incompetent for one purpose but not the other.

A. Mental Competency Is Not A Unitary Concept

An individual can be competent for one purpose and not another. Respect for autonomy supports the widespread legal recognition of such differences. An individual's inability responsibly to make one kind of decision, or to perform one role, is not generally reason enough to override other decisions, or entitlement to perform other roles, for which different relevant capacities are sufficiently intact.

The law widely recognizes differences in capacities. As noted above, this Court in *Godinez* observed that competency to waive a constitutional right (to counsel) was not the same as competency to represent oneself. Competency to stand trial, focusing on "'capacity to consult with counsel and to comprehend the proceedings,'" "'is by no means the same test as those which determine criminal responsibility at the time of the crime,'" even aside from the different time focus of the inquiries. *Medina*, 505 U.S. at 448. Competency to be executed involves still different concepts. *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007). With respect to a litigant's competency to proceed in various kinds and stages of litigation generally, Judge Posner recently wrote for the Seventh Circuit that the determination depends, or should depend, on the particular decisions the litigant is called upon to make. *Holmes v. Buss*, 506 F.3d 576, 579 (7th Cir. 2007).

More generally, reflecting considerable professional learning, "[t]he modern trend in the law is to treat various legal competencies as independent and discrete from one another. . . . [A]djudication of incompetence for one legal purpose usually does not render a person legally incompetent in another

context." *Adjudicative Competence* at 104 (citation omitted). For example, guardianship statutes often prefer "*limited* guardianship . . . to preserve individual autonomy and self-determination wherever possible. Similarly, statutes governing involuntary hospitalization (civil commitment) often require separate determinations of competence to admit oneself for voluntary treatment and competence to make treatment decisions (e.g., to accept or refuse psychotropic medications) once in the hospital (whether admitted on a voluntary or involuntary basis)." *Id.* (footnotes omitted). In particular, research indicates that incompetence to make treatment decisions does not coincide with incompetence to stand trial. *Id.* at 109-10 (also noting that "treatment competence" has been found "a poor proxy for capacity for voluntary admission to psychiatric treatment").

Legal standards thus recognize that "[n]o single legal criterion or test applies across all legal competencies. Each legal competence refers to somewhat different abilities related to various ordinary or extraordinary situations in the lives of defendants, patients, children and the elderly, or persons with no particular legal, developmental, or psychiatric status. The law, therefore, does not presume that legal incompetence in any of these areas renders an individual incompetent in any other area of legal competence." T. Grisso, *Evaluating Competencies: Forensic Assessments and Instruments* 9 (2d ed. 2003); *see* T. Grisso & P. Appelbaum, *Assessing Competence to Consent to Treatment*: *A Guide for Physicians and Other Health Professionals* 21 (1998). And that recognition reflects an extensive professional literature that accords separate treatment to the wide range of competencies—which, moreover,

"may change or fluctuate" over time for a particular individual (*id.* at 26)—that are regularly subject to legal inquiry.[6]

B. Self-Representation Requires More Extensive Capabilities Than Those Needed To Stand Trial

Greater capabilities are generally required to play the role of lawyer than of represented defendant. A defendant may, of course, either have or lack relevant capabilities for both purposes. But a *pro se* defendant is generally called on to do significantly more than a represented defendant. "The *pro se* defendant must be 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." *McKaskle*, 465 U.S. at 174. The relevant abilities—judged by whether reliable adversarial testing of the prosecution's case is unduly threatened—are commensurately greater.

1. The courts throughout the Nation widely follow the *Dusky*-based requirements for competency to stand trial, without demanding more. *See* Mossman *et al.*, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. Amer. Acad. Psychiatry & L. No. 4 Suppl. S59-S67 (2007) (table surveying state and federal

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[6] *See*, *e.g.*, Grisso at 69-460 (competence topics: standing trial; waiving rights to remain silent and to obtain counsel; insanity; parenting; guardianship and conservatorship; consent to treatment); G. Melton, J. Petrila, N. Poythress, & C. Slobogin, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* (3d ed. 2007) (similar); *Adjudicative Competence*, *supra*.

statutes).[7] The prevailing approach requires both certain decision-making capabilities and certain cognitive/communication capabilities.[8]

Thus, the defendant must have the capacity to decide whether to waive certain rights: the right to trial (*Godinez*, 509 U.S. at 391); the right not to testify (*Rock v. Arkansas*, 483 U.S. 44, 52-53 (1987); the right to a jury (*Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942)). *See* Bonnie at 296; *Cooper*, 517 U.S. at 364. He may also need the capacity, "in consultation with counsel," to decide "whether to waive his 'right to confront [his] accusers.'" *Id.*; *see id.* ("With the assistance of counsel, the defendant also is called upon to make myriad smaller decisions concerning the course of his defense."). Moreover, at least as a matter of legal ethics, lower courts now widely hold, where the defendant is competent to make the relevant decision, "that defense attorneys are obligated to adhere to client wishes on basic issues relating to defense or disposition of the case, including" whether to raise the insanity defense, although such wishes may often not be solicited from or expressed by the defendant in practice. *Adjudicative Competence* at 34-35; *see id.* at 26; Bonnie at 296.

Certain cognitive/communication abilities are required indirectly in order to make the decisions

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[7] The interest in bringing charges to trial is thus broadly treated as strong enough to warrant keeping the standard for compentency to stand trial at or near the constitutional minimum.

[8] It is useful to group cognitive and communication capabilities together, for present purposes. It is *communicated* thoughts that generally matter for a defendant's role, whether the defendant is represented or proceeding *pro se*.

committed to the defendant.[9] Moreover, certain cognitive/communicative abilities are directly required by the basic *Dusky* demand for competence *to assist counsel*. The defendant must have "the capacity to (1) understand the charges and the basic elements of the adversary system (understanding), (2) appreciate one's situation as a defendant in a criminal prosecution (appreciation), and (3) relate pertinent information to counsel concerning the facts of the case (reasoning)." *Adjudicative Competence* at 46-47; *see* Bonnie at 297. These cognitive/communication abilities are limited to what is needed to provide enough information to counsel so that counsel, not the defendant, can carry out the many tasks required to assure reliable adversarial testing of the prosecution's case.

2. When a defendant plays the role of lawyer, the defendant himself must have the wider range of decision-making and cognitive/communication capabilities that ordinarily only counsel need have. He must be able to sustain such capabilities, and the focus and concentration they require, while playing an active role over the course of a high-pressure trial.

A *pro se* defendant must make many more decisions—including the many decisions generally committed to counsel in a normal case. Common decisions, reflected in the above-quoted *McKaskle* summary, include what motions to make before or at

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[9] Such decision-making has been said to require the capacity to "(1) understand information relevant to the specific decision at issue (understanding), (2) appreciate the significance of the decisions as applied to one's own situation (appreciation), (3) think rationally (logically) about the alternative courses of action (reasoning), and (4) express a choice among alternatives (choice)." *Adjudicative Competence* at 48; *see* Grisso & Appelbaum at 31.

trial (for suppression of evidence or otherwise); what questions to ask in voir dire; what to say in opening; whether to object to prosecution questions or statements; what questions to ask in cross-examining the prosecution's witnesses; what witnesses to call and what questions to ask of them; what to say in closing.[10] And many of these decisions must be made quickly, without much if any advance warning or chance to prepare, in a public courtroom, under the pressure of knowing that the consequences may be irreversible and the prosecution ready to exploit errors.

A *pro se* defendant not only must make this wider range of decisions, but must have the significantly greater cognition/communication capabilities required to play the roles that executing such decisions entails. To begin with, unless standby counsel shoulders the load of motions and other paper submissions (*see* page 34, *infra*), a *pro se* defendant requires written-communication abilities: he must be able to get a point across and to stay focused on relevant points. Questions about such capabilities in this case (and, indirectly, about oral-communication and basic cognitive abilities) are raised by Edwards' extensive written communications to the trial court,

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[10] Counsel generally makes decisions, in consultation with the defendant where feasible, on "what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced." ABA Standards for Criminal Justice § 4-5.2(b) (3d ed. 1993); *see* Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 Cardozo L. Rev. 1213, 1236, 1239 (2006) ("courts hold that counsel controls all but a few decisions," including "what motions to file, what witnesses to call, what objections to raise and what arguments to make").

including on topics unrelated to the criminal charges. *See*, *e.g.*, Pet. Br. 11-13.

Much more pervasive is the need for oral communication capabilities—in the public, pressured setting of the trial courtroom (rather than in quiet private conversations with counsel). The *pro se* defendant's speaking role commonly includes voir dire, opening argument, objections, cross-examination of prosecution witnesses, direct (and re-direct) examination of defense witnesses, and closing argument. Cognitive or communication deficiencies can severely impair the essential functions of getting legitimate points across at all those stages. The abilities to understand and articulate the exact elements of the crimes charged and sound objections to admission of prosecution evidence (which may be unreliable or irrelevant or prejudicial); to define and then pursue lines of cross-examination that show genuine weaknesses or gaps in particular prosecution witnesses' testimony; to see difficulties in the prosecution's evidence and then ask the right questions of defense witnesses to identify such difficulties and to present contrary evidence; to grasp what is important to highlight, throughout trial and in closing, and then to speak so that the essential points are actually conveyed and are not lost among other details—these are abilities a *pro se* defendant must have that go well beyond those required of a represented defendant.

Not only does a *pro se* defendant have more to say than a represented defendant, and in a different setting, but there is an important difference in the audience. A represented defendant must be able to "relate pertinent information *to counsel* concerning the facts" (*Adjudicative Competence* at 46 (emphasis

added)), and counsel is under a professional obligation to listen sympathetically and patiently, to ask questions to elicit and clarify statements, to *help* the defendant communicate. A *pro se* defendant speaking in the courtroom has additional, quite different audiences: the judge (wanting to move things along, given the likely burdens of a busy docket and the imposition on citizens as jurors); witnesses who may be impatient, nervous, in need of focusing, uncooperative, or hostile; jurors with no obligation to be sympathetic and already doing a public service that interrupts their normal lives; and prosecutors ready to exploit deficiencies, given their unavoidable adversarial posture even with all possible good faith. The capacity for coherent communication before such audiences may well be lacking even for a defendant who can communicate coherently with his own lawyer.

A *pro se* defendant with sufficiently impaired cognitive or communication capabilities also may affirmatively, but unreliably, harm his own case. When speaking, over and over, in the role of lawyer, he will almost inevitably be giving "testimony" (in the eyes of the jury), and he may unwittingly contradict himself or make unreliable admissions through statements whose meaning he does not truly appreciate, whether because of cognitive or communication deficiencies. Such harmful "testimony" may, however, be distinctly unreliable because of mental illness. The greater the opportunities for the defendant to speak, the greater is that risk. Yet it may be difficult for the judge, or the prosecutor, to control the jury's drawing of improper inferences from such "testimony."

In short, self-representation involves a substantially expanded role for the defendant and hence

requires significantly greater capabilities than those required for a sound trial of charges against a represented defendant. Disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant.

C. The Required Capabilities Are Extensions Of The Capabilities That Are Routinely And Soundly Assessed In Judging Competency To Stand Trial

The legal relevance of particular capabilities (in any context) is a matter for legal decision-makers, not mental-health professionals, to determine—including, here and in determining competency to stand trial itself, by deciding when the reliability of adjudication is unduly threatened. *See* Grisso at 15; Melton at 135. Even for mental-health professionals, moreover, assessing capacities requires judgments specific to the individual and relevant circumstances, not just running through a checklist or toting up a score. *See Adjudicative Competence* at 41; Grisso at 22-23. Further, while there is a considerable professional literature on techniques for assessing the competency to stand trial and all sorts of other competencies (*see* note 6, *supra*), no comparable professional attention has focused on the relatively rare phenomenon of mentally ill defendants asserting *Faretta* rights.

Nevertheless, the underlying capabilities relevant to self-representation are, in general, subject to

sound professional evaluation. Indeed, the needed assessments are generally extensions of assessments already embraced within the inquiries typically made for assessing competency to stand trial. The latter assessments, after intense scrutiny, have been characterized as having "high reliability and validity." Melton at 144; *id.* at 145. Evaluations of the related, but significantly extended, capabilities bearing on self-representation should be sound as well.

1. The methods for evaluating competency to stand trial have been described several places, *e.g.*, *id.* at 157-64, including in the recently issued *AAPL Guideline*, *supra*. Evaluations involve reviewing relevant background information, including both medical records and court records; interviewing the defendant, using a number of structured approaches to questioning; and, sometimes, employing "assessment instruments" and conducting further interviews, such as with the defendant's attorney. *AAPL Guideline* at S31-S43. A psychiatric diagnosis is a standard part of the process, as such a diagnosis is highly relevant though by no means dispositive. *Id.* at S32.[11] "The goal is to learn whether and how mental symptoms impair competence-related abilities," bearing in mind that "[t]he relevance of even severe symptoms to the question of competence varies from case to case." *Id.* at S32.

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[11] Incompetency to stand trial is commonly associated with diagnoses of serious psychotic disorders or symptoms. *Id.* at S44; *see Adjudicative Competence* at 91-92, 98 ("psychotic symptoms regardless of diagnosis," such as conceptual disorganization and unusual thoughts, "and a diagnosis of schizophrenia more so than other diagnoses[,] are significantly associated with impaired competence"); Melton at 144; Grisso at 12, 24.

The interview of the defendant is at the center of this process. The interviewer elicits personal and family background information; systematically examines current mental status and abilities (*e.g.*, relating to delusions, memory, information processing, concentration, perception, reasoning, elementary knowledge, mood); explores the defendant's understanding of and ability to grasp and reason about the criminal charges, evidence, and process that he faces and the options he has available; and (commonly) asks the defendant to recount his version of the facts—or reasons for refusing to do so (*e.g.*, advice of counsel)—and how he understands witnesses, victims, and the police will view the facts. *Id.* at S32-S36. Sometimes, but by no means always, administration of conventional psychological tests (*e.g.*, for intelligence or personality) is useful, especially if there is a question of neuropsychological impairment or mental retardation or malingering. *Id.* at S36-S37.

"Over the past four decades several instruments for assessing adjudicative competence have been developed, including structured interviews with standardized instructions for scoring and interpreting a defendant's responses." *Id.* at S37. These instruments have strengths and weaknesses, and they are not designed to decide the competency question, but to supply "one source of information," requiring interpretation "in light of the full clinical interview and other available data." *Id.* at S37. Among the instruments are the Competency to Stand Trial Screening Test (CST) and related Competency to Stand Trial Assessment (CAI), the widely used Georgia Court Competency Test (GCCT) and its modification by the Mississippi State Hospital (GCCT-MSH), the Interdisciplinary Fitness Interview (IFI) and IFI-Revised (IFI-R), and the Computer-

Assisted Determination of Competency to Stand Trial (CADCOMP). *Id.* at S39-S41. Starting in 1989, the MacArthur Research Network on Mental Health and the Law undertook extensive studies on competency issues and ultimately developed the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA). *Id.* at S42-43; *see* Melton at 150 (table showing MacCAT-CA structure).[12] And 2005 saw release of a new comprehensive-assessment instrument, the Evaluation of Competency to Stand Trial-Revised (ECST-R). *AAPL Guidelines* at S43. *See generally* Grisso at 89-139 (reviewing "forensic assessment instruments"); Melton at 145-54 (similar).

2. The capabilities for decision-making and thinking and expression relevant to proceeding *pro se*, as described above, are extensions of capabilities that already are the subject of inquiry—though with a more limited focus—in assessments of competency to stand trial (and other competency inquiries, for that matter). Thus, the diagnostic component of the inquiry commonly addresses both disorganization of thought and impaired "expressive capacities" in determining whether the defendant has a "[m]ajor mental disorder," a "commonly recognized legal bas[i]s for incompetence to proceed to adjudication." *Adjudicative Competence* at 62; *see* note 11, *supra*. Indeed, "clinical judgments of incompetency have been closely associated with particular symptoms–most prominently symptoms of thought disorder, delusional beliefs, paranoia, disorientation, and hallucinations." Melton at 144.

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[12] *Adjudicative Competence*, *supra*, is one important result of this extended project. Another part of the project led to analyses of and tools for assessing competency to make treatment decisions. *See* Grisso at 391-460; Grisso & Appelbaum, *supra*.

Capabilities to make decisions are directly explored in assessments of competency to stand trial. Such assessments attempt "to discern a defendant's capacity to make relevant decisions in a self-interested manner, or to uncover delusional thoughts or other symptoms of mental disorder that impair the capacity to evaluate rationally the choice that one may face." *Adjudicative Competence* at 67. Cognitive and communication capabilities are also directly explored in assessing competency to stand trial. Examiners assess the ability to think clearly and to relate information (*id.* at 46, 63, 100; *see* Melton at 150; Grisso at 84) and look for "faulty reasoning secondary to irrational (delusional) beliefs" (*Adjudicative Competence* at 136). Closely related inquiries into the ability to reason coherently and make decisions—though with a much smaller role for communicative abilities—are a mainstay of other competency inquiries, *e.g.*, into competency to consent to treatment. *See* Grisso at 394-460; Grisso & Appelbaum at 31-60.

3. Inquiries along these lines were made by the professionals who examined Edwards. Their examinations focused entirely on assessing whether Edwards had the capabilities required to stand trial while represented; they never focused on the additional specific capabilities required for self-representation. *Amici* do not address what consequences that fact should have for the proper disposition of this case.

The examination reports display some of the familiar structured techniques for assessing various capabilities. JA 17a-39a, 56a-64a, 84a-90a, 157a-65a, 186a-96a, 212a-36a. They contain diagnoses of schizophrenia or delusional disorder (*see* page 1, *supra*), which are characterized by cognitive defi-

ciencies and sometimes disorganized communication. *DSM-IV-TR* at 298-302, 323-25. They repeatedly show direct inquiry into certain cognitive and communication abilities. And they reflect the familiar facts that an individual with significant mental illness can vary markedly in functioning from day to day, particularly if unmedicated, and even in a single conversation can start off functioning well but deteriorate rapidly after a short time, particularly if challenged.

In February 2000, Dr. Trexler reported that Edwards "appears to be consistently confused"; "he is quite tangential, expansive, and disorganized in his verbal output"; he "starts off with some structure, but then quickly decompensates"; and he "has written extensive and disorganized letters to a variety of people which are delusional in nature and as previously diagnosed certainly grandiose." JA 28a, 30a. He was given a battery of psychological tests. JA 34a-36a.

In March 2001, Dr. Berger reported that Edwards "appears able to think clearly" and "to carry on a normal conversation and answer questions appropriately." JA 61a-62a. In October 2001, Dr. Masbaum reported that Edwards' "speech was not disorganized," and he lacked delusions and hallucinations. JA 87a.[13] In November 2002, Dr. Coons reported that Edwards' "thought process is markedly impaired with loose associations, illogic, irrelevance, and marked incoherence," with a "grandiose delusional system,"

[13] Earlier, Dr. Masbaum had reported that Edwards "was loquacious providing rambling intellectual responses to questions" and "when questions of clarification or specifics were asked he avoid[ed] providing the requested information." JA 20a.

which his writings exemplify. JA 164a. In December 2002, Dr. Masbaum reported that Edwards "had no disorganized speech" or hallucinations. JA 194a-95a.

Later in December 2002, Dr. Schuster reported that Edwards was "alert, coherent and cooperative" and "spoke easily and in great detail," without "unusual verbalizations." JA 187a. Dr. Schuster's "observations of . . . his ability to communicate and verbalize his thoughts and feelings did not suggest any gross impairment of his nervous system." JA 188a. Dr. Schuster found "no indication of delusional ideation or psychotic thinking." JA 189a.[14]

In June 2004, Dr. Sena reported that Edwards was "manifesting psychotic symptoms of hallucinations and disorganized thought processes." JA 216a. Edwards' speech, though "easy to hear and understand," revealed "disorganized thought processes of a mild to low-moderate degree," and he was "talkative, and will elaborate extensively (if permitted to do so) when answering questions, becoming circumstantial and tangential." JA 218a-19a. "[D]ue to his present impairments of disorganized thought processes, delusional ideation, and bothersome hallucinations, his ability to discuss important and necessary matters with his attorney, and to remain focused on those matters, will likely be compromised to a significant degree." JA 221a. Those impairments also affected his likely ability to testify or to challenge prosecution witnesses. JA 222a-23a. *See also* JA 224a ("disorganized thought processes . . . impair his ability to communicate verbally").

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[14] Earlier, Dr. Schuster had reported that Edwards had grandiose delusions ("of inflated worth, power and knowledge"), which "may make it difficult . . . to communicate satisfactorily with his attorney." JA 26a

Late in July 2004, Dr. Sena opined that Edwards was competent to stand trial. He reported that Edwards' "thought processes are no longer disorganized" (JA 231a), but are now "coherent" (JA 232a), with no evident hallucinations or delusions (*id.*). Edwards "acknowledges his need for counsel" and could "plan a legal strategy . . . in cooperation with his attorney." JA232-33a (capitalization removed). "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." JA 235a.

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In short, inquiries into decision-making and cognitive/communication capabilities are already part of the reliable assessment of competency to stand trial. Such inquiries, however, must be specific to the tasks involved, and those tasks are substantially expanded for a *pro se* defendant. What is required in this context, therefore, is a significant extension of inquiries already being made (albeit with a narrower focus) for the threshold assessment of competency to stand trial.

III. THE AVAILABILITY OF STANDBY COUNSEL AND THE POSSIBILITY OF COMPETENCY RESTORATION ARE RELEVANT TO JUSTIFYING AN OVERRIDE OF THE *FARETTA* RIGHT

This Court's question does not call for elaboration of precisely when a State may permissibly conduct a trial with unwanted counsel representing the defendant. But if, as argued above, a State may justify application of a higher standard for self-

representation than for competency to stand trial, respect for the *Faretta* right suggests two aspects of the inquiry into whether a State has justified denial of self-representation in a particular case.

First, the inquiry should take into account the availability of standby counsel to advise and assist a self-representing defendant. *Faretta, McKaskle*, and *Martinez* all make clear that a State *may* supply standby counsel to aid the defendant. If a State makes standby counsel available, the role that will be played by such counsel may diminish at least the decision-making demands placed on the self-representing defendant. On the other hand, a choice to undertake self-representation does not generally carry a right to have counsel divide the in-court tasks; the defendant must carry the main load. *McKaskle*, 465 U.S. at 183 ("*Faretta* does not require a trial judge to permit 'hybrid' representation of the type Wiggins was actually allowed."). And in any event standby counsel must broadly respect the defendant's choices about limiting his role. *Id.* at 188.

Given the limits on standby counsel, the ultimate assessment of competency for self-representation may generally be unaltered by the availability of standby counsel. As a logical matter, though, a court deciding whether to deny self-representation for competency reasons should be deciding whether the defendant is competent to represent himself with standby counsel playing the role expected and permitted by law and the defendant.

Second, if a court finds a defendant incompetent to proceed *pro se*, the court must decide what to do. The answer logically should involve consideration of whether available treatment would likely render the defendant competent to represent himself and

whether the needed delay of proceedings would be prejudicial or warranted. At least theoretically, a short, non-prejudicial delay for treatment that promises to work may enable the defendant to represent himself competently, thereby eliminating the justification for overriding the *Faretta* right.[15]

We do not suggest here what standard should apply to such considerations. How to evaluate that possibility and a State's obligation to consider it would benefit from focused consideration after presentation of evidence on the matter in a concrete case, perhaps even on a remand in this case.

CONCLUSION

This Court should give an affirmative answer to the question presented.

Respectfully submitted,

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February 11, 2008

[15] In the context of competency to stand trial, "research on competence restoration shows that most individuals referred for treatment after being found incompetent do in fact become competent to stand trial," usually following treatment with anti-psychotic medication. *AAPL Guideline* at S47; *see* Melton at 162-63. No comparable body of research focuses on the much smaller group of mentally ill defendants that assert *Faretta* rights, but anti-psychotic medications often eliminate the kinds of cognitive and communication incapacities that bear on self-representation capacity. Likely restorability ultimately requires a clinical, case-specific judgment.