No. 07–208

In the Supreme Court of the United States

STATE OF INDIANA,

Petitioner,

v.

AHMAD EDWARDS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana

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BRIEF FOR THE RESPONDENT IN OPPOSITION

MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Suite 411
Washington, DC 20006
(202) 775-4500

MICHAEL R. FISHER*
151 N. Delaware Street
Suite 200
Indianapolis, IN 46204
(317) 327-3404

DANIEL R. ORTIZ
MICHELLE D. MORRIS
University of Virginia School of Law
Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

DAVID T. GOLDBERG
Donahue & Goldberg, LLP
99 Hudson Street
New York, NY 10013
(212) 334-8813

**Counsel of Record*

QUESTION PRESENTED

Does a trial court violate an individual's Sixth Amendment right of self-representation when it finds him competent to stand trial but then forces him to be represented by a lawyer after he has timely, knowingly, and intelligently requested to proceed pro se?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT

On July 15, 1999, the State of Indiana charged respondent Ahmad Edwards with a number of offenses arising from an incident in which he had drawn and fired a gun while trying to avoid being caught after shoplifting a pair of shoes. Pet. App. 18a–19a. Although the State maintained that Edwards, who was suffering from mental illness, was nonetheless competent to stand trial, a court initially found otherwise and committed him to a psychiatric treatment facility. After several years of treatment, doctors reported that Edwards's condition had dramatically improved, and the State highlighted that evidence in persuading the trial court that he was competent to be tried. That court refused, however, to permit Edwards to represent himself at trial, reasoning that he lacked the competence to represent himself even though (1) his waiver of the right to counsel was timely, knowing, and voluntary, and (2) he was competent to be tried. The Indiana Supreme Court reversed, holding that forcing Edwards to accept court-appointed counsel violated his Sixth Amendment right to self-representation.

1. Competency To Stand Trial

Following Edwards's arrest, his counsel filed a motion for a psychiatric examination to determine his competency to stand trial. Ed.App. 128.[1] The trial

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[1] All citations to the record follow the petitioner's convention of Ed.App., which refers to the Appellant's Appendix in the appeal below.

court appointed Dr. Ned P. Masbaum, a forensic psychiatrist, and Dr. Dwight W. Schuster, a neuropsychiatrist, to examine Edwards. *Id.* at 130, 656, 662. Dr. Masbaum concluded that, although Edwards suffered from a delusional disorder, he was nevertheless competent to stand trial. *Id.* at 661. Dr. Schuster similarly concluded that Edwards suffered from a delusional disorder but nonetheless was "competent to stand trial at this time." *Id.* at 657–658. Dr. Lance E. Trexler, a neuropyschologist retained by the defense, also examined Edwards, *id.* at 283, and concluded that his mental illness would cause him "considerable difficulty [in] participating in his legal defense," *id.* at 142. Marion County Superior Court Judge Gary L. Miller then determined that Edwards was not competent to stand trial, *id.* at 168, and committed him to Logansport State Hospital for evaluation and treatment, *id.* at 168, 175.

By spring 2001, Dr. Steven H. Berger, a staff psychiatrist at Logansport, had concluded that Edwards was mentally competent to stand trial. Ed.App. 184–186. Dr. Berger's report to the court described Edwards as "free of psychosis, depression, mania, and confusion" and concluded that he was now "psychiatrically normal." *Id.* at 185. The trial court ordered that Edwards be returned to county jail. *Id.* at 187.

In fall 2001, the trial court again appointed Drs. Masbaum and Schuster to examine Edwards, Ed.App. 229, and both again concluded that he was competent to stand trial, *id.* at 233–234, 285–286. When the trial court directed the parties to tender proposed findings as to Edwards's competence, *id.* at 285, the defense

maintained that he still "lack[ed] the ability to understand the proceedings and assist in the preparation of his defense." *Id.* at 245. The State insisted that he was competent, *id.* at 250, highlighting the recent conclusions of Drs. Schuster and Masbaum, *id.* at 247–248, and noting that Dr. Trexler had found Edwards's attention and concentration functions to fall within normal limits and his cognitive flexibility to be within the average range, *id.* at 248.

After considering these submissions, Judge Hawkins ruled that Edwards could stand trial. Ed.App. 288. He explicitly found that Edwards "underst[ood] the legal concepts of guilt and innocence" and that he understood the criminal proceedings as well as "the roles of Judge, Jury, Witnesses, Prosecutor, and Defense Attorney." *Id.* at 288. The judge also noted that Edwards had "filed his own motions *pro se* since the inception of the case." *Ibid.* In November 2002, weeks before the December trial date set by the court, *id.* at 349, Dr. Phillip Coons, a psychiatrist retained by the defense, examined Edwards and reported that he suffered from a "grandiose delusional system" and "marked thought disturbances." *Id.* at 353. In response to this report, Judge Hawkins yet again appointed Drs. Masbaum and Schuster to examine Edwards, *id.* at 374, and for a third time both concluded that he was competent to stand trial. *Id.* at 403, 408. After considering the conflicting expert reports, Judge Hawkins reversed his prior determination, ruling that Edwards was not yet competent to stand trial and ordered him returned to Logansport for further treatment. *Id.* at 436–439.

In the summer of 2004, Dr. Robert J. Sena, a staff forensic psychiatrist at Logansport, reported to the court that Edwards's mental condition had "greatly improved." Ed.App. 451. In his written report, Dr. Sena stated that Edwards had made "excellent progress in the reduction/elimination of his psychotic symptoms in the past 2 months," *id.* at 453, that he no longer suffered from hallucinations or delusions, and that his thought processes were "no longer disorganized," *id.* at 451. Dr. Sena reported that Edwards "demonstrated an excellent understanding of courtroom procedures," *id.* at 453, and noted that he had passed the final written examination in "Legal Education II," answering 61 out of 75 questions correctly, *id.* at 451–452. Dr. Sena concluded that Edwards now had "good communications skills, cooperative attitude, average intelligence, and good cognitive functioning" and opined that he was now competent to stand trial. *Id.* at 454. On the strength of this report, the court ruled that Edwards was competent to stand trial. Pet. App. 3a.

2. Proceedings In The Trial Court

Prior to his June 27, 2005 trial, Edwards petitioned the court to proceed pro se. Pet. App. 33a. When the court asked him if he knew what he would be required to do and advised him of the risks of self-representation, Edwards made clear that he understood those responsibilities and the significance of his choice. *Ibid.* The court nonetheless denied the petition on the ground that Edwards intended to present an insanity defense, which would have required a continuance, explaining

that under Indiana law potential for delay is a sufficient reason "for denying the opportunity to proceed *pro se*." *Id*. at 34a. After a two-day trial in which appointed counsel did not raise an insanity defense, see Ed.App. 498–536, the jury found Edwards guilty of theft and criminal recklessness but was unable to reach a verdict on the more serious charges of attempted murder and battery with a deadly weapon. Pet. App. 3a.

Prior to his retrial on those counts, Edwards again petitioned to proceed pro se. Ed.App. 540. The court granted the motion, and Edwards's counsel moved to withdraw. *Ibid*. At some point, however, under circumstances not clear from the record, the trial court once more appointed counsel to represent Edwards. Pet. App. 3a. When Edwards again asked to be allowed to proceed pro se, the trial court summarily denied his motion. *Ibid*.

On December 13, 2005, Edwards, for the fourth time, petitioned to proceed pro se. Pet. App. 3a. At the hearing on the motion, Edwards and his counsel explained that they disagreed about what defense to present. Edwards wanted to argue self-defense, Pet. App. 34a, while his attorney believed "that the defense that would be most in Mr. Edwards' interests * * * would be basically that he didn't intend to kill anybody," *id*. at 35a. Counsel urged that Edwards should be allowed to represent himself. *Ibid*.

The trial court denied the motion. Referencing case law holding that courts may deny self-representation when (1) a defendant's request was untimely or (2) his

waiver of the right to counsel was not "knowing and intelligent," see *Sherwood* v. *State*, 717 N.E.2d 131, 136 (Ind. 1999), the court announced it would "carve out a third exception" to the self-representation right for cases where the defendant is competent to stand trial, but not competent to defend himself. Pet. App. 36a–37a. Without identifying the legal basis for that exception or delineating any standard for that kind of competence determination, the court held that Edwards failed to meet whatever higher level of competence was required. *Id.* at 37a. The court concluded by adverting to the prospect that its novel approach would be held unconstitutional, explaining, "if I'm wrong and there's a conviction, we'll just try this case again." *Id.* at 36a–37a. After a trial at which Edwards was represented by court-imposed counsel, the jury found him guilty of attempted murder and battery with a deadly weapon. Pet. App. 3a.

3. Appeal

Edwards appealed his conviction to the Indiana Court of Appeals, arguing that the trial court had violated his rights under the Sixth Amendment and the Indiana Constitution when it forced him to proceed with counsel. Pet. App. 3a. In response, the State did not argue that the trial court's decision was supportable under existing Sixth Amendment precedent. Instead, it acknowledged that the trial court's action was inconsistent with *Faretta* v. *California*, 422 U.S. 806 (1975), and *Godinez* v. *Moran*, 509 U.S. 389 (1993), which it recognized to have held "that the [standard for] competency to stand trial is the same [as the standard for]

competency for self-representation." State Ind. C.A. Br. 5. The State nonetheless submitted that, even though "the relevant case law d[id] not support [the trial court's] finding," "*Faretta* and its progeny should be reconsidered in the interest of providing Defendant with a fair trial." *Id.* at 9.

The Indiana Court of Appeals rejected the State's invitation and held that the trial court had erred in requiring Edwards to proceed with counsel. Pet. App. 17a. The court explained that "[a]lthough a pro se defendant will lose the advantage of an attorney's training and experience and may conduct his defense to his own detriment, he has the constitutional right to do so." *Id.* at 21a. When a defendant has been "found competent to stand trial" and has "made multiple timely and unequivocal requests to represent himself prior to * * * trial" and "there has been no suggestion that his requests were unknowing or involuntary," the court held, the Sixth Amendment requires that he be allowed to waive counsel and continue pro se. *Id.* at 24a.

On discretionary review, the Indiana Supreme Court held, unanimously, that compelling Edwards to accept unwanted counsel violated the Sixth Amendment.[2] Pet. App. 14a. The court agreed with the court of appeals that "that competency to represent oneself at trial is measured by competency to stand trial" and noted that Edwards had been found competent to stand trial on July 29, 2004, and that no

[2] Although the Indiana Supreme Court opinion suggested that Edwards made no state constitutional argument, Pet. App. 4a n.1, Edwards's counsel did, in fact, raise a state constitutional claim at each stage of the proceedings. See *id.* at 35a; Edwards's Br. in Resp. to Pet. to Transfer 1, 4; Edwards's Ind. C.A. Br. 1, 6–8.

party contended that he was not competent at the time of the December 2005 trial. *Ibid.* Since "Edwards [had] properly asserted his Sixth Amendment right," *id.* at 9a, and the State was not claiming "that Edwards's waiver of counsel was not knowing and voluntary," *id.* at 14a, it was Edwards's "constitutional right to proceed pro se and it was reversible error to deny him that right on the ground that he was incapable of presenting his defense," *ibid.*

REASONS FOR DENYING THE PETITION

In an attempt to draw this Court's attention, the petitioner dramatically overstates any conflict between the decision below and decisions of other courts. Only the Wisconsin Supreme Court has taken a different position, and it is doubtful whether this case would have come out differently even under that court's approach. The decision below correctly applies this Court's precedents, and petitioner gives no valid reason for this Court to revisit them. In any event, this case furnishes an extremely poor vehicle through which to reexamine *Faretta* and *Godinez* even if the Court were inclined to do so. Since petitioner did not raise below the issue it now presses on this Court for review, the Indiana courts had no opportunity to consider it or to develop a record that would guide this Court in deciding the issue in the first instance.

I. IN HOLDING THAT A TRIAL COURT CANNOT FORCE AN INDIVIDUAL FOUND COMPETENT TO STAND TRIAL TO ACCEPT A LAWYER'S REPRESENTATION, THE INDIANA SUPREME COURT FOLLOWED EVERY FEDERAL COURT OF APPEALS AND STATE COURT OF LAST RESORT THAT HAS DECIDED THE ISSUE BUT ONE

The Court should deny certiorari because there is no important or serious conflict between the decision below and those of state and lower federal appellate courts as to whether the Sixth Amendment permits States to deny defendants they deem competent to be tried the right to waive counsel and represent themselves. The Indiana Supreme Court's unanimous decision correctly applied this Court's precedents. Indeed, at every level of the proceedings below, Indiana itself "recognize[d] that the United [States] Supreme Court has found that the required competency to stand trial is the same required competency for self-representation," State Ind. C.A. Br. 5, but urged those courts to "reconside[r]" this Court's precedents, *id*. at 9.

For the first time in its petition for certiorari, petitioner seizes on dictum in *Godinez* v. *Moran*, 509 U.S. 389 (1993), that it says supports the trial court's ruling. Pet. 11–12. Petitioner further claims that there is "conflict" and "judicial disarray" on the question. *Ibid*. Contrary to those late-breaking assertions, however, only a single jurisdiction—Wisconsin, in a decision that has not persuaded any other state or federal court—has actually upheld a rule that sets a standard for "competence for self-representation" that is more demanding than the State's standard for competence to stand trial. Other state decisions that petitioner relies on for

evidence of a conflict have denied self-representation to defendants not because they were incompetent but because they did not knowingly and intelligently waive their right to counsel. These decisions, therefore, in no way conflict with the decision below. Nor do the few decisions that have held open the theoretical possibility of applying different competency standards *even as they adhered to a single standard* establish a conflict warranting this Court's review.

A. The Overwhelming Majority Of Courts Understand *Godinez* To Mean That A Person Competent To Stand Trial May Not Be Denied The Right To Proceed Pro Se Because Of A Purported Lack Of "Competence" To Defend Himself

Since *Godinez*, at least ten federal courts of appeals have held that "the standard of competence for waiving counsel is identical to the standard of competence for standing trial." *United States* v. *Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000). Indeed, petitioner itself concedes that "the Third, Fourth, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits * * * mandate use of the same standard." Pet. 15. And, although not cited by petitioner, the Sixth and Eleventh Circuits (and the First Circuit, in an unpublished opinion) have reached the same conclusion. See *Coleman* v. *Mitchell*, 244 F.3d 533, 545 (6th Cir. 2001) ("*Godinez* clarified that the level of competence needed to waive counsel is the same as that needed to stand trial."); *United States* v. *Cash*, 47 F.3d 1083, 1089 n.3 (11th Cir. 1995) ("Competency to waive the right to counsel is judged by the same standard as competency to stand trial"); *Gallant* v. *Corr., Me. Warden*, No. 96–105, 1996 WL 374971, at *1 (1st Cir.

July 5, 1996) (*per curiam*) ("The competency standard for waiving the right to counsel is identical to that for standing trial,").

Petitioner further concedes that the vast majority of state courts of last resort that have considered the issue either (i) have concluded that the Due Process Clause requires "a single standard for *both* competence to stand trial *and* competence to waive counsel," Pet. 16 (listing Connecticut, Georgia, Iowa, Minnesota, Missouri, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, and Washington), or (ii) have, in practice, employed a unified standard, Pet. 14 (listing California, Maryland, Utah, and Wyoming); accord *ibid.* (listing state intermediate appellate courts reaching same conclusion).

B. Only One State Court Of Last Resort Has Upheld A Different Standard Of Competency For Self-Representation Than For Standing Trial, And It Is Not Clear That Even That Court Would Have Ruled Differently Than The Indiana Supreme Court On The Facts Of This Case

1. Contrary to petitioner's assertions of "judicial disarray," Pet. 12, in the nearly 15 years since *Godinez* only the Wisconsin Supreme Court has held that a defendant competent to stand trial might nonetheless be held incompetent to represent himself. In *State* v. *Marquardt*, 705 N.W.2d 878, 891 (Wis. 2005), the Wisconsin Supreme Court reaffirmed the State's pre-*Godinez* case law imposing a higher competence standard.[3] It is unclear, however, if even the Wisconsin courts

[3] In fact, *State* v. *Klessig*, 564 N.W.2d 716 (Wis. 1997), the decision petitioners cite as "conflicting" with the one below, rejected only a *prosecution* argument that *Godinez* extinguished the state law claim of a defendant who *had been* allowed to represent himself that

would deny Edwards his right to represent himself. *Marquardt*, the leading Wisconsin case, "set forth standards by which the [trial] court should measure a defendant's competence to proceed pro se." *Id.* at 891. The Indiana trial court, by contrast, proceeded ad hoc. See pp. 15–17, *infra*.

In *none* of the many other cases petitioner collects did a court hold that a defendant who was competent to stand trial (and had knowingly and intelligently waived his right to counsel) was not competent to exercise the constitutional right to self-representation—as a matter of either state or federal law. The only decision that even comes close is *Brooks* v. *McCaughtry*, 380 F.3d 1009 (7th Cir. 2004), which denied federal habeas relief to a petitioner who claimed that Wisconsin's disparate standards of competency violated the defendant's right to self-representation. The Seventh Circuit suggested that a higher standard under state law would not be unconstitutional but ultimately based its decision on the ground that Wisconsin's approach was not sufficiently "contrary to clearly established federal law" to

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he should not have been. Interpreting *Godinez* to have left room for States to adhere to "higher standards for measuring a defendant's competency to represent himself," in this situation, the court held that its earlier decision in *Pickens* v. *State*, 292 N.W.2d 601 (Wis. 1980), remained good law. *Klessig*, 564 N.W.2d at 723, 724; see *id*. at 728–729 (Abrahamson, C.J., concurring) ("In the present case, the defendant * * * argues that his right to counsel was violated because the circuit court failed to determine his competency for self-representation. Because the case at bar does not present a *Faretta* challenge but the opposite inquiry, the court properly does not decide the question whether *Pickens,* in light of *Godinez,* violates *Faretta*."). *Marquart*, however, resolved the issue in favor of different standards. 705 N.W.2d 878 (Wis. 2005).

warrant habeas relief under 28 U.S.C. § 2254 (2000 & Supp. IV). *Brooks*, 380 F.3d at 1013.[4]

Petitioner's effort to present decisions from Rhode Island and Illinois as "in conflict" with the Indiana decision below is untenable. See Pet. 13–14. As petitioner concedes, the cited cases did *not* hold that a competent defendant's voluntary waiver of his right to counsel could be denied based on his lack of competence to conduct his defense. *Ibid*. They held simply that the waivers at issue were not knowing and voluntary, an inquiry that this Court has repeatedly emphasized is distinct from the question of competence. See *Godinez*, 509 U.S. at 400–401 ("In addition to determining that a defendant who seeks to * * * waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary * * *. In that sense, there *is* a 'heightened' standard * * * for waiving the right to counsel, but it is not a heightened standard of *competence*.") (citations omitted); *id*. at 401 n.12 (contrasting the different purposes served by the two inquiries).[5] In this case, there was never any dispute that Edwards's waiver satisfied both the federal and state standards.

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[4] In refusing to disturb the conviction in *Brooks*, the Seventh Circuit also noted that the facts of that case suggested an alternative, uncontroversial ground for refusing self-representation—*i.e.*, that petitioner's ostensible waiver might not have been knowing and voluntary. See 380 F.3d at 1012–1013.

[5] The Court explained that "[t]he focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings[,]" while "[t]he purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine 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 (citation omitted).

The Rhode Island decision petitioner cites, *State* v. *Thomas*, 794 A.2d 990 (2002) (cited at Pet. 13), moreover, did not even involve the issue of competency to proceed pro se. The defendant was represented by counsel without objection. The only competency question at issue was the defendant's claimed incompetency to plead *nolo contendere*, see *id*. at 991, and the opinion mentions *Godinez* only in relation to that claim (and does so in a manner consistent with the decision below), see *id*. at 994 ("The Supreme Court * * * has held that to plead guilty, a defendant must demonstrate the same level of competence as is necessary to stand trial.") (citing *Godinez*, 509 U.S. at 398–399).

People v. *Lego,* 660 N.E.2d 971 (Ill. 1995), likewise poses no conflict with the Indiana Supreme Court's decision. *Lego* concerned the standards for knowing and intelligent waiver of the right to counsel, not general competency. Throughout its opinion, the *Lego* court made clear that it was concerned with the "fundamental principles associated with waiver," *id.* at 979, and focused on the requirement that any waiver be "knowing and voluntary," *id*. at 973. Its conclusion underscores this focus. After reviewing the psychiatric evidence in detail, the Illinois Supreme Court held that "the manifest weight of the evidence shows that under the particular facts and circumstances here defendant's waiver of his right to the assistance of counsel was not knowing and intelligent. *As such*, it was, therefore, invalid. *Accordingly*, we reverse the judgment." *Id*. at 979–980 (emphasis added). That decision simply offers petitioner no support.

Petitioner is also mistaken in claiming a significant conflict between the decision below and the handful of cases that have read *dicta* in *Godinez* to leave some theoretical room for States to limit self-representation to some subset of defendants whom the State treats as competent to be tried. See Pet. 14. The reading these decisions appear to give *Godinez* is doubtful, see pp. 21–22, *infra*, but any "conflict" with the decision below is on an entirely hypothetical plane. None of these decisions did what the trial court did here—*i.e.*, *actually apply* a higher competency standard to invalidate a competent defendant's timely and voluntary waiver. On the contrary, *each and every one reaffirms the vitality of a uniform standard*. See *People* v. *Welch*, 976 P.2d 754, 777 (Cal. 1999); *Hauck* v. *State*, 36 P.3d 597, 602 (Wyo. 2001); *Gregg* v. *State*, 833 A.2d 1040, 1060 (Md. 2003); see also *People* v. *Woods*, 931 P.2d 530, 534 (Colo. Ct. App. 1996). Thus, even the few jurisdictions that petitioner claims take the reading of *Godinez* it now urges have declined to restrict self-representation rights. There is simply no "dissonant treatment [of competency] among lower courts," as Indiana and its amici contend. Ohio et al. Amici Br. 2.

2. In sum, petitioner can point to only one jurisdiction in which this case could even arguably have come out differently. There are strong reasons to doubt, moreover, whether even the Wisconsin courts would have upheld the sort of ad hoc rejection of a defendant's Sixth Amendment waiver that actually occurred here.

The trial court, while presumably acting in what it sincerely believed to be Edwards's best interests, took a remarkably casual approach to the constitutional interests at stake in this case. The court did not bother to identify the source of its legal authority to impose counsel; it did not articulate the substantive standard of "competence" it was applying; it did not identify the allocation or standard of proof; and it did not make any finding about particular ways in which Edwards was insufficiently competent. Although petitioner invokes generic concerns about the integrity of the proceedings, the court here did not conclude that allowing Edwards to proceed pro se would compromise the proceedings. Nor did its decision imposing counsel indicate any consideration of whether legitimate interests in fairness or decorum could be accomplished through less restrictive means, see pp. 31–33, *infra*.

Nor does the record bear out petitioner's and amici's premise that this is a case where the defendant's mental illness made his "incompetence" self-evident. In fact, the trial judge had recently *permitted* Edwards to proceed pro se, reflecting an at least implicit judgment that he possessed the necessary competence to do so. Pet. App. 3a. When changing his mind, the trial judge did not mention that decision, let alone identify any intervening event that supported his conclusion that Edwards lacked the "abilities * * * to defend himself." *Id.* at 36a–37a. It should be noted, moreover, that the medical evaluations that led to Edwards's being put on trial did not rest on the conclusion that he had regained some bare minimum of competence. The recent reports had declared "that Edwards's mental symptoms have greatly

improved and that he no longer has hallucinations, delusions, and ideas of reference [and that h]is thought processes are no longer disorganized." Pet. 7. As petitioner concedes, see p. 4, *supra*, Dr. Sena's report of July 29, 2004, concluded that Edwards had good comprehension of the charges, of the possible sentences, and of the legal proceedings; good communication skills; average intelligence; and good cognitive functioning—conclusions the State emphatically endorsed when seeking to persuade the court to try him. Thus, notwithstanding references to Edwards's past difficulties, the only professional evidence in the record at the time his self-representation right was denied indicated that Edwards had the same mental status as any other defendant who is required to answer to criminal charges.

In fact, the court's explanation of its decision illustrates the other problems with leaving Sixth Amendment rights to trial courts' discretion. The transcript leaves little doubt that the trial judge found his dealings with Edwards exasperating and did not relish the prospect of the sustained direct interactions that self-representation would have entailed. Thus, the court was quite brusque in denying Edwards's request to be heard on the matter, and when counsel indicated that he wanted to confer with Edwards, the court stated, "[g]ood luck with that." Pet. App. 41a.

No Wisconsin court has upheld a decision like the one below. Wisconsin requires courts to consider several particular factors before denying a defendant the right to represent himself. See *Marquardt*, 705 N.W.2d at 891–893. In *Marquardt*,

for example, the Wisconsin Supreme Court upheld the trial court's decision to force the defendant to accept representation only because the trial court took into account "a number of specific problems that could have prevented Marquardt from meaningfully presenting his own defense," all of which were supported by "medical and psychological opinions." *Id.* at 893.

In these circumstances, the illusory conflict with the Supreme Court of Wisconsin in no way calls out for this Court's review.

II. THE INDIANA SUPREME COURT CORRECTLY APPLIED THIS COURT'S PRECEDENTS

The decision of the Indiana Supreme Court was correct both in its reading of precedent and as a matter of Sixth Amendment principle. As petitioner acknowledged in both the Indiana Court of Appeals and the Indiana Supreme Court, the trial court's decision violated this Court's holdings in *Faretta* v. *California*, 422 U.S. 806 (1975), and *Godinez* v. *Moran*, 509 U.S. 389 (1993): "The State recognizes that the United States Supreme Court has specifically held that the same standard for competency applies both to the ability to stand tria[l] and [to] the ability to represent oneself." State Ind. C.A. Br. 6. The State never argued that those decisions justified the trial court's refusal to allow Edwards to represent himself—only that "the federal precedent * * * is ripe for reconsideration." State Pet. to Transfer 1. Petitioner now attempts to back away from that understanding of this Court's cases, arguing instead that Edwards's conviction may be affirmed *without* "reconsidering" precedent. This revisionist account is wrong on its own

terms, and petitioner cites no good reason for revisiting—let alone substantially curtailing—*Faretta* and *Godinez*. See pp. 25–32, *infra*.

Faretta itself forecloses the claim that the Constitution allows States broad authority to limit the class of defendants entitled to refuse the assistance of unwanted counsel. The decision in that case did not rest on a misperception about the abilities of laypersons to conduct their own defense. Rather, recognizing that the choice to waive counsel is usually unwise—and that the issue would arise in cases where judges sincerely believed appointing counsel to be in the defendant's interests—the Court held that the decision is one the Constitution reserves to the person standing trial. Surveying the text, structure, and history of the Sixth Amendment, *Faretta* held that the Constitution "does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." 422 U.S. at 819. The assistance-of-counsel provision, it concluded, "supplements this design." *Id.* at 820. "To thrust counsel upon the accused, against his considered wish," the Court continued, "violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master." *Ibid.* That understanding was rooted in "[t]he [English] common-law rule, [which] has evidently always been that no person charged with a criminal offense can have counsel forced upon him against his will." *Id.* at 826 (citations omitted). And, "[i]n the American Colonies, the insistence upon a right of self-representation was, if anything, more fervent than in England." *Ibid.*

Acknowledging that lay people typically lack the knowledge and skills that enable expert attorneys to obtain acquittals, *Faretta* held that the risk of an individual's "conduct[ing] his own defense ultimately to his own detriment" could not support forcing counsel upon him. 422 U.S. at 834. Compulsory counsel, the Court explained, is not only "utterly foreign" to the Sixth Amendment, it ignores the "inestimable worth of free choice." *Id*. at 833–834. "The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." *Id*. at 834; see also *Martinez* v. *Court of Appeal*, 518 U.S. 152, 165 (2000) (Scalia, J., concurring in the judgment) (noting that the Framers "would not have found acceptable the compulsory assignment of counsel *by the government* to plead a criminal defendant's case"). Although courts have the power and responsibility to determine that waivers of the right to counsel are knowing and intelligent—and that the defendant is competent to make *the waiver decision—Faretta* held that the Sixth Amendment does not authorize them to deny (or accept) waivers based on judgments about the accused's ability to mount an effective defense.[6]

Petitioner's belated claim that *Godinez* should be read as *supporting* the trial court's action in this case is implausible. In both courts below, Indiana explicitly

[6] *Faretta* also recognized that the assumed benefits of appointing counsel will often prove illusory. In situations like Edwards's, where the client actively opposes the lawyer's involvement, "the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly." 422 U.S. at 834.

identified that precedent as the primary *obstacle* to the trial court's decision, not a font of authority to force counsel on a defendant who makes a timely and voluntary waiver of his right to counsel. See p. 18, *supra*. And with good reason. As numerous courts have recognized, see pp. 10–11, *supra*, *Godinez* rejected the notion that representing oneself requires a higher threshold of competency and affirmed that the proper focus of the Sixth Amendment inquiry is on "the [defendant's] competence to *waive the right*, not the competence to represent himself." 509 U.S. at 399. Inconsistency with *Faretta* aside, the *Godinez* Court explained, the premise that waivers of counsel should be reserved to some subset of especially competent defendants ignores the complexity and importance of the numerous other rights that ordinarily competent defendants must exercise (or waive) in the course of a criminal trial. "[T]here is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights." *Ibid.*

Although petitioner and its amici treat the concluding observation in *Godinez* that the Constitution does not disable States from "adopt[ing] competency standards that are more elaborate than the *Dusky* formulation," 509 U.S. at 402 (citing *Dusky* v. *United States*, 362 U.S. 402 (1960) (setting the *minimum* constitutional standard for competency to stand trial)), as granting them carte blanche to limit the self-representation rights of competent defendants, such claims are mistaken. First, the natural reading of the Court's words is that States may

judge competency *to stand trial and to make all other trial decisions* by a higher or "more elaborate" standard—that is, that they need not *try* defendants who they believe lack sufficient ability to exercise the numerous and varied personal rights and responsibilities that trial entails. The contrary notion—that this language in *Godinez* licensed States to constrict the self-representation rights of those whom they find competent to try by raising the bar to proceed pro se—is difficult to sustain. That Sixth Amendment issue not only was not presented in *Godinez,* but such a rule would be inconsistent with the entire thrust of the Court's opinion—and with *Faretta*—which unambiguously held that the Sixth Amendment (as incorporated by the Fourteenth) does not leave courts "free to adopt" competency tests for self-representation.

Nor does *Martinez*, the only decision of this Court petitioner cited below as supporting "reconsider[ation]" of *Faretta* and *Godinez*, offer any authority for petitioner's position. In that case, this Court held that the Constitution does not grant a right to self-representation in criminal appeals but contrasted the "abundant support for the proposition that a right to self-representation [at trial] has been recognized for centuries" with "[t]he scant historical evidence [supporting] self-representation on appeal." *Martinez*, 528 U.S. at 158.

III. BECAUSE PETITIONER NEVER MADE BELOW THE CENTRAL ARGUMENT IT PRESSES IN THIS COURT, THIS CASE WOULD BE AN UNSUITABLE VEHICLE FOR CONSIDERING THE CONSTITUTIONALITY OF STATE RESTRICTIONS ON COMPETENT DEFENDANTS' RIGHTS OF SELF-REPRESENTATION

In any event, this case presents an inappropriate vehicle for addressing the issue presented. As noted above, see p. 18, *supra*, petitioner never made below the central argument it presses on this Court—that dicta in *Godinez* allows it to impose a higher standard of competency for self-representation. Indeed, its briefs to the two Indiana appellate courts took the *opposite* position—that *Godinez* denied States any discretion to set the standard of competency for proceeding pro se higher than the standard of competency to stand trial. Petitioner's brief in the intermediate appellate court, for example, declared that, "[t]he State recognizes that the United State's [sic] Supreme Court has specifically held that the same standard of competency applies both to the ability to stand trial, and [to] the ability to represent oneself." State Ind. C.A. Br. 6. "In *Godinez*," it admitted,

> the Court found that there is no requirement that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.

Ibid. The State's consistent argument below was not that *Faretta* and *Godinez* allowed different standards of competency. It admitted they did not. Rather, it argued simply that "*Faretta* and its progeny should be reconsidered in the interest of providing Defendant with a fair trial." *Id.* at 7.

Indiana's petition seeking discretionary review in the Indiana Supreme Court made a similar argument. It admitted that *Faretta* and *Godinez* foreclosed the position it now argues for the first time: "Based on *Faretta*, the United States Supreme Court has recognized a broad right for self-representation and *specifically held that the same standard of competency applies both to the ability to stand trial and the ability to represent oneself*." State Pet. to Transfer 4 (citing *Godinez*, 509 U.S. at 397–399) (emphasis added). Notwithstanding that realization, the State asked the Indiana Supreme Court to take the case because "*Faretta* and its progeny should be reconsidered in the interest of providing mentally impaired defendants with a fair trial." *Id*. at 7. Indiana never once argued that *Godinez*'s "free to adopt" language meant that the trial judge could force unwanted representation on Edwards. Because the parties never litigated this issue, the state courts never interpreted this language in *Godinez* or considered the merits of separate standards of competency.[7]

Likewise, although petitioner attempted to defend the trial court's novel, ad hoc exception to the right of competent defendants to proceed pro se, it never proposed a standard for determining competency to represent oneself (*e.g.*, whether courts should be empowered to overrule the choices of only defendants with mental

[7] Likewise, petitioner never argued that Edwards's pro se petitions were not knowing, voluntary, timely, or unequivocal. See Pet. App. 24a ("He made multiple timely and unequivocal requests to represent himself * * * and there has been no suggestion that his requests were unknowing or involuntary.") Instead, Indiana confined its claim to the proposition that Edwards's mental history rendered him unable to present a "coherent defense" and therefore that due process and fundamental fairness outweighed his constitutional right to self-representation.

illnesses or also those with limited reading and language abilities or developmental disabilities); it did not propose a standard of proof or even who should bear it (*e.g.*, whether the State must prove incompetence by clear and convincing evidence); it never argued whether the focus should be on the "fairness" to the defendant of a trial in which he is his own lawyer or the need for decorum and the appearance of regularity in the courtroom and, if the latter, how to measure that; and it failed to address whether a trial court should be required to consider less restrictive alternatives, such as appointment of standby counsel, before denying a defendant the right to represent himself. And, because petitioner never made any of those arguments, which would be critically relevant to adopting any separate standard, the Indiana courts never had any opportunity to consider them.[8]

Thus, the claim petitioner advances for the first time in this Court is necessarily abstract—that there is some (undefined) group of competent defendants who may have counsel forced upon them—and it comes without a record that would aid this Court in considering the necessary subsidiary and practical issues it entails. Even if the Court were to decide this question in petitioner's favor, it is exceedingly unlikely that the trial court's casual denial of Edwards's constitutional rights could be upheld. Indeed, though petitioner's counsel advanced arguments

[8] The trial court did not make up for these deficiencies. Its decision was remarkably casual, asserting some undefined inherent authority to deny Edwards his choice and alluding to his history of mental illness, without making any specific factual findings about limitations that would render Edwards incompetent or even ultimate findings that a trial in which Edwards defended himself (even with standby counsel) would be fundamentally unfair or irreconcilable with the order and integrity of the courtroom.

aimed at avoiding reversal of the conviction in *this* case, there is no sign that Indiana would favor or even permit a higher standard of competency for self-representation, let alone what that standard would be.[9]

To the extent that "the parameters for how much a State may elaborate [competency standards] remain unclear," Ohio et al. Amici Br. 1, reviewing *this case* will bring no clarity. Since Indiana recognized that the Constitution mandates the same competency standard for standing trial and for representing oneself, it never even claimed the *power* to elaborate, let alone attempted to articulate, an actual standard specifying when unwanted counsel may be forced upon a defendant competent to stand trial. Review of this case thus has no realistic potential to settle "what constitutional ceiling applies to a state's freedom to impose its own more stringent competency standard." *Id.* at 4. If, as petitioner's amici claim, the issue "frequently recur[s]" across the nation, *id.* at 7, this Court will have no shortage of much better vehicles for its consideration.

[9] Additionally, if the Court were to review and remand this case on the theory that States could adopt a heightened competency standard for proceeding pro se as compared to standing trial, it is possible that the state court would reach the same judgment again on the basis of Article 1, Section 13 of the Indiana Constitution. Edwards's counsel argued in each state court proceeding that the trial court violated Edwards's right to self-representation under both the Indiana Constitution and the Sixth Amendment. See Pet. App. 35a; Edwards's Br. in Resp. to Pet. to Transfer 1, 4; Edwards's Ind. C.A. Br. 1, 6–8. And although it attempts to avoid defining it, see State Pet. to Transfer 4 n.1, petitioner also acknowledges this state constitutional right, see *id.* at 4; State Ind. C.A. Br. 6. Hence, it is possible that the state constitutional right would be dispositive if this case were remanded, arguably rendering any decision by this Court on the Sixth Amendment issue advisory.

IV. PETITIONER GIVES NO VALID REASONS FOR THIS COURT TO RECONSIDER *FARETTA* AND *GODINEZ*

Having failed to demonstrate that the decision below creates any serious conflict or that it furnishes a suitable vehicle for considering competency standards for self-representation, petitioner might be read to be renewing its call that *Faretta* and its progeny * * * be reconsidered." State Ind. C.A. Br. 4. Indeed, its amici expressly argue that this Court should review the decision below in order to partially "reexamine," *i.e.* overrule, *Faretta* and *Godinez*. Ohio et al. Amici Br. 9. In particular, petitioner and its amici argue that other interests of the State, particularly providing a fair trial and preserving the integrity of its proceedings, warrant truncating *Faretta* and *Godinez* as the trial court did here. Citing anecdotes about cases of self-representation that have given the judicial system a "black eye," Pet. 19, petitioner insists that Edwards's case is a paradigmatic example of why *Faretta*'s protection against forced representation should be reconsidered. These atomistic arguments not only fail to warrant reexamination of settled precedent, but they also rest on a basic misunderstanding of the law this Court has established.

First, States' undeniably legitimate interests in maintaining the "integrity of the criminal-justice system," Pet. 22, do not support—let alone necessitate—limiting the Sixth Amendment right to the subset of defendants courts believe will do a competent job of self-defense. To begin with, although outward appearances may be improved, the "integrity of the criminal-justice system" is also surely

implicated when a court forces an unwanted lawyer on a defendant and "lead[s] him to believe that the law contrives against him." *Faretta*, 422 U.S. at 834.

Moreover, to the extent petitioner and its amici believe that allowing legally competent, but mentally ill, persons to represent themselves is fundamentally unfair, their quarrel is not with the Indiana Supreme Court's *reading* of *Godinez*, but rather with this Court's *holding* in that case. They are, in fact, actually arguing for the reversal of *Godinez*. If, as they maintain, there are cases where applying the *Dusky* standard, which establishes the minimum level of competency necessary to stand trial, see *Dusky* v. *United States*, *supra*, to the Sixth Amendment right to represent oneself truly "make[s] a mockery of justice," Pet. 19 (citation omitted), there is no reason why state and federal courts should have discretion to do so.

Indeed, the notion that a State's concern for "fairness" to a defendant should trump that individual's knowing, voluntary, and competent request to represent himself is far from evident. The right to a fair trial is one that is personal to the defendant, and this Court has refused to allow even parties whose interests are substantially aligned with defendants to assert their rights. See, *e.g.*, *Kowalski* v. *Tesmer*, 543 U.S. 125 (2004) (holding that attorneys lack third-party standing to assert rights of future clients). But the reasons for not allowing an attorney to assert a client's rights pale in comparison to the dangers implicated when his courtroom *adversary* seeks to. As this case and many others illustrate, moreover, States are rarely consistent in advancing "fairness" concerns. Thus, Indiana's

concerns about Edwards's disabilities were, to say the least, far more muted when it was seeking to put him on trial than when it sought to sustain his conviction.

Similarly, petitioner's lead amicus did not advert to the "uncertainty" about the proper standard of competence to proceed pro se when arguing in its own courts that a mentally ill capital defendant had *validly* invoked his right to represent himself. *State* v. *Jordan*, 804 N.E.2d 1 (Ohio 2004). In *Jordan*, the State of Ohio insisted both that "[t]he standard for competence to waive the right of counsel is the same as the standard for competency to stand trial" and that this standard was the one articulated in *Dusky*. Appellee Br. at 18, *State* v. *Jordan*, 804 N.E.2d 1 (Ohio 2004) (No. 2000–1833), available at 2001 WL 34556032, at *18. Nor has Indiana itself been consistent in other cases. See *Corcoran* v. *State*, 820 N.E.2d 655, 658–660 (Ind. 2005) (noting Indiana's contention that capital defendant who suffered from paranoid schizophrenia and, in the opinion of mental health experts, "was unable to make a rational decision concerning the legal proceedings confronting him" was competent to waive all post-conviction review).

But there are more basic problems with anecdotal indictment of *Faretta*. For all petitioner's assertions that self-representation is "disastrous," Pet. 22, and threatens to make "a mockery of justice," Pet. 19 (citation omitted), the available empirical evidence is to the contrary. What is more, this Court's existing Sixth Amendment case law provides courts with ample means—short of snuffing out the

Faretta rights of broad classes of defendants—of promoting institutional interests in dignity and fairness.

First, the empirical evidence calls into question the bald assertion that notorious high-profile examples represent the tip of a much larger iceberg. As petitioner notes, the one study that examined courts' actual experience with the *Faretta* rule found reality to belie widely held negative assumptions. Taking up Justice Breyer's plea for empirical research on the subject, see *Martinez*, 528 U.S. at 164–165 (Breyer, J., concurring), Professor Hashimoto studied self-representation in databases including more than 200,000 cases and determined that "pro se defendants do not fare significantly worse in terms of outcomes than do their represented counterparts." Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. Rev. 425, 428 (2007). She further found that many defendants choose to represent themselves after becoming dissatisfied with what they perceive to be inadequate representation from appointed counsel, see *id.* at 460–467, or because they believe any appointed counsel would hinder a plan to offer an ideological defense, see *id.* at 473–477—precisely the kinds of autonomy concerns *Faretta* sought to vindicate. Whatever its limitations,[10] Professor Hashimoto's study supplies broad confirmation

[10] Rather than grapple with its findings, petitioner instead strains to discredit Professor Hashimoto's study by mischaracterizing her forthright disclosure of her dataset's limitations as an acknowledgment that the study was "flawed." Pet. 22. In reality, the passage petitioner seizes upon comes to the conclusion that the data, although not "perfectly tailored" to producing a "definitive[] answer," "certainly are sufficient to call into question the prevailing assumptions"

that self-representation protects important interests and that real-world experience with it bears no resemblance to the "disaster" scenarios petitioner depicts.[11]

More important, the Sixth Amendment right does not leave courts or States powerless to prevent the circumstances that they claim give the judicial system a "black eye." As a threshold matter, petitioner obviously could have avoided any difficulties posed by self-representation in this case simply by declining to try a defendant who, as petitioner (now) maintains, Pet. 25, possessed only "borderline legal competency." To be sure, *Dusky* allows a State to try any defendant who meets its relatively modest competency test, but no decision of this Court has suggested that *Dusky* is a ceiling and that States concerned about integrity and avoiding "black eyes" could not refrain from trying defendants until they have more solidly recrossed the "borderline" back into competency. The record here is to the

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that pro se representation is overwhelmingly a product of mental illness and is necessarily prejudicial to the defendant's interest. Hashimoto, 85 N.C. L. Rev. at 446.

[11] Above and beyond the generic dangers of making (or re-making) constitutional law by anecdote and surmise, there is a special oddity in petitioner's efforts to make use of this Court's recent decision in *Panetti* v. *Quarterman*, 127 S. Ct. 2842 (2007). First, petitioner's assertion that "the entire quagmire over Panetti's punishment might have been avoided had Panetti not been allowed to represent himself," Pet. 21, is incorrect. At the outset, it is surprising to read a State's assertion that Panetti—who was convicted of breaking into his estranged wife's parents' house and shooting and killing them in front of his former wife and daughter, *Panetti* 127 S. Ct. at 2848—would not have received a capital sentence if he had been represented by appointed counsel. Worse still, the rule petitioner urges would *not* have prevented any *Panetti* "spectacle" because it would have only allowed, but not required, a State to deny self-representation based on a more stringent definition of "competence." In the *Panetti* case, Texas took the position that the standard for self-representation was no higher than the standard for competence to stand trial—and nothing the Court could do in this case (short of overruling *Godinez*) would have changed that. And, of course, the more recent proceedings in that case have little, if anything, to do with his self-representation at trial. They involve instead the distinct legal issue of his competency to be executed. See *Ford* v. *Wainwright*, 477 U.S. 399 (1986).

contrary—the State aggressively sought to bring Edwards to trial, becoming concerned about his vulnerabilities only after it had persuaded the court to try him (at the very juncture when medical professionals raised the fewest concerns about his mental status). See pp. 16–17, *supra*.

Nor is this power to postpone trial of those whose mental illnesses place them at the borderline of legal competence the States' only means of protecting the integrity of their proceedings (or protecting vulnerable defendants). First, a State can advance those aims by appointing standby counsel to "aid the accused if and when the accused requests help" and be "available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Faretta*, 422 U.S. at 834 n.46. *Faretta* itself recognized that "a State may [do so] even over objection by the accused." *Ibid.* And *McKaskle* v. *Wiggins*, 465 U.S. 168, 178 (1984), went further still, holding that standby counsel's unsolicited participation in a pro se defendant's trial does not violate his right to self-representation so long as the defendant retains "actual control over the case" and counsel's participation does not "destroy the jury's perception that the defendant is representing himself."

This Court's existing Sixth Amendment case law, moreover, *already* recognizes that "the right to self-representation is not absolute." *Martinez*, 528 U.S. at 161. The Court in *Faretta* recognized that even a defendant whose timely,[12]

[12] There is substantial authority supporting a court's power to deny a defendant's motion to represent himself on the ground that it is untimely. See, *e.g.*, *United States* v. *Washington*, 353 F.3d 42, 46 (D.C. Cir. 2004) ("A person accused of a crime has an absolute right * * * to

knowing, and voluntary waiver of his right to counsel is accepted by a court may still forfeit his right to self-representation if he seeks to disrupt the proceedings, rather than mount a legitimate defense. "[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." 422 U.S. at 834 n.46 (citing *Illinois* v. *Allen*, 397 U.S. 337 (1970)). In *German* v. *State*, for example, the Indiana Supreme Court upheld the defendant's conviction over a claim that the trial court had violated his Sixth Amendment right by directing counsel to take over his defense. 373 N.E.2d 880, 883 (1978). The court explained that the defendant had forfeited his right by refusing to participate in further proceedings and by engaging in hostile conduct toward a witness and the court. *Ibid.* This exception might well have covered the bizarre behavior of Scott Panetti and Colin Ferguson, whose stories petitioner recounts despite their tangential relevance to this case. See Pet. 19–21.

Finally, vulnerable defendants (and systemic interests) derive substantial protection from the requirement that any waiver of the right to assistance of counsel must be "knowing and voluntary." *Godinez*, 509 U.S. at 400. This rule requires a distinct, and in some sense "heightened," level of protection, and there is

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represent himself only if he asserts that right before trial."); *United States* v. *Bishop*, 291 F.3d 1100, 1114 (9th Cir. 2002) ("A demand for self-representation is timely if made before meaningful trial proceedings have begun."). This rule serves to prevent a defendant from strategically invoking his right to represent himself in order to manipulate or delay trial proceedings. In fact, the trial court relied on that rule in this case when it denied Edwards's motion to represent himself in his first trial on the ground that allowing him to do so would have necessitated a continuance. Pet. App. 34a.

some precedent for States' applying this requirement stringently. *Id.* at 401 & n.12. Here, however, as the Indiana Supreme Court noted, the trial court *did not* find that respondent's "decision was involuntary or that he was unaware of the risks of self-representation." Pet. App. 10a. Indeed, the State never argued that respondent's request to represent himself was involuntary or unknowing. *Id.* at 24a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Michael R. Fisher
Counsel of Record

MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Suite 411
Washington, DC 20006
(202) 775-4500

MICHAEL R. FISHER*
151 N. Delaware Street, Suite 200
Indianapolis, IN 46204
(317) 327-3404

DANIEL R. ORTIZ
MICHELLE D. MORRIS
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

DAVID T. GOLDBERG
Donahue & Goldberg, LLP
99 Hudson Street
New York, NY 10013
(212) 334-8813