1 IN THE SUPREME COURT OF THE UNITED STATES

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3 INDIANA, :

4 Petitioner :

5 v. : No. 07-208

6 AHMAD EDWARDS. :

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8 Washington, D.C.

9 Wednesday, March 26, 2008

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11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:03 a.m.

14 APPEARANCES:

15 THOMAS M. FISHER, ESQ., Solicitor General, Indianapolis,

16 Ind.; on behalf of the Petitioner.

17 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

18 Department of Justice, Washington, D.C.; on behalf of

19 the United States, as amicus curiae, supporting the

20 Petitioner.

21 MARK T. STANCIL, ESQ., Washington, D.C.; on behalf of

22 the Respondent.

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1 P R O C E E D I N G S
2 (10:03 a.m.)
3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first today in Case 07-208, Indiana versus Edwards.
5 Mr. Fisher.
6 ORAL ARGUMENT OF THOMAS M. FISHER
7 ON BEHALF OF THE PETITIONER
8 MR. FISHER: Mr. Chief Justice, and may it
9 please the Court:
10 The trial court was justified in requiring a
11 higher level of competency for self-representation in
12 order to prevent the trial of Ahmad Edwards from
13 descending into a farce. Indeed, self-representation
14 where a defendant cannot communicate coherently with the
15 jury or the court would defeat the very autonomy
16 interests that the Court ventured to protect in
17 Faretta --
18 JUSTICE SCALIA: But why is it necessary to
19 have a special rule in order to prevent the trial from
20 descending into a farce? Why couldn't you simply apply
21 the same rule of competency that you apply for whether
22 the defendant can be tried, and then if in fact his
23 self-representation begins to turn the trial into a
24 farce surely the court would have the power to prohibit
25 his further self-representation. I mean, certainly,

1 turning a trial into a farce is -- is a basis for the
2 court's action; no?
3 MR. FISHER: Well, I certainly hope so. And
4 I think on the record we've got here the trial court did
5 not need to wait for that to happen. If the trial had
6 begun with Mr. Edwards representing himself with the
7 jury present, and the trial had then become so unwieldy
8 and so farcical and such a mockery that he had -- his
9 right of self-representation had to be overridden, then
10 I think there would have been a problem, a possible
11 problem of taint with the jury. I think that the court
12 was justified, having seen Mr. Edwards in court --
13 JUSTICE SCALIA: That problem with taint
14 would be his own fault. I can't imagine that he would
15 succeed on appeal claiming he tainted the jury. And the
16 advantage of waiting is that by waiting to see if in
17 fact he -- he will turn the trial into a farce you
18 avoid the risk of depriving him of his right to
19 represent himself, which is certainly a very important
20 constitutional right. Why didn't you wait to see
21 whether he's going to be able to pull it off or not?
22 MR. FISHER: I don't think that
23 Mr. Edwards's sort of waiver by conduct in that context
24 is the only thing to consider. I think that the State's
25 interests in having a proceeding that proceeds smoothly

1 without episodes that render the proceedings potentially
2 a mockery also are strong.
3 JUSTICE KENNEDY: As you understand the
4 Respondent's position -- and perhaps the question is
5 better addressed to the Respondent. But as you
6 understand their position, would they accept
7 Justice Scalia's formulation of what the rule ought to
8 be or the formulation that his question proposed?
9 MR. FISHER: You know, it's not clear to me
10 that they would. It seems to me that their position is
11 much more focused on the metes and bounds of what
12 Faretta specifically recognized, which was requiring the
13 defendant to comply with the rules and if there is a
14 disorderly kind of behavior that would be sufficient.
15 But I don't read their position to be that someone who
16 is lacking in communications skills and coherent
17 communications skills even on the record in the trial
18 would be someone whose right of self-representation
19 could be overridden.
20 CHIEF JUSTICE ROBERTS: What would happen if
21 you started out with the pro se representation and then
22 the trial turned into a farce? Start over again, but
23 he would have to accept counsel at that point?
24 MR. FISHER: Well, it seems to me that we're
25 in a world here where we don't really know what the

1 precise rules would be because of the lack of -- of
2 clarity for the trial courts. So I don't want to tell
3 you exactly what the Indiana courts would do, but I
4 would imagine that a trial judge would be faced with
5 a -- you know -- decision based on how long the trial
6 has gone on, what the level of complexity of the trial
7 is, what the level of farce or taint could be for the
8 jury.
9 JUSTICE SCALIA: Well, there must be
10 precedents. I'm sure under -- under the old rule, if I
11 can call it the old rule, where you have a single
12 standard for both the right to be tried -- the -- the
13 ability to be tried and the right to represent
14 yourself, there must have been instances in which the
15 person who was representing himself was unable to -- to
16 cope and the trial was -- was turning into a farce.
17 There must have been instances. What did they do in
18 those?
19 MR. FISHER: Well, I think in the cases
20 where those happened, whether it's because the trial was
21 turned into a farce or because the defendant was
22 excluded from the courtroom, as in Illinois v. Allen, I
23 think the trial often proceeds.
24 JUSTICE SCALIA: Proceeds, that's what I
25 thought.

1 MR. FISHER: But I -- but I guess what I'm
2 suggesting is that there is always going to be the
3 possibility in terms of a discretionary judgment call,
4 whether it's a systematic rule or whether it's
5 something up to the trial judge, that the court may
6 decide that in interest of fairness, that the -- you
7 know -- all the -- all that's gone on needs to be
8 restarted, particularly if it hasn't gone on very far.
9 I don't mean to suggest a rule in that regard. I'm
10 suggesting --
11 JUSTICE SCALIA: What is your test that
12 you're going to apply ex ante? Whether he's able to
13 coherently --
14 MR. FISHER: Oh, the test. Yes.
15 JUSTICE SCALIA: Yes, what's the test?
16 MR. FISHER: Well, the rule that we are
17 suggesting -- and again let me caution that this is not
18 a rule adopted by the Indiana Supreme Court yet -- is
19 that it is within the State's authority to override this
20 right where the defendant cannot communicate coherently
21 with the court or the jury.
22 JUSTICE SCALIA: Cannot communicate
23 coherently? Gee, I sometimes -- I sometimes think that
24 the lawyers cannot communicate coherently.
25 (Laughter.)

1 JUSTICE SCALIA: It's fairly a vague test,
2 isn't it?
3 MR. FISHER: I don't think it's any worse in
4 terms of vagueness than what we deal with in Dusky.
5 Now, Dusky talks about a reasonable level of
6 understanding and a reasonable ability to assist the
7 lawyer. And --
8 JUSTICE GINSBURG: Let me give you a
9 concrete illustration that was brought up by the other
10 side. If you have this coherent expression test, what
11 happens to the person who has a bad speech impediment?
12 Or someone who needs -- who isn't conversant in the
13 English language? Are they -- automatically the right
14 of self representation is automatically ruled out?
15 MR. FISHER: No. I think that in
16 circumstances such as those, there is another level of
17 analysis, which is whether there's some sort of
18 accommodation that can be made that would allow the --
19 the representation, the self-representation, to proceed
20 by means of -- whether it's an interpreter or another
21 means of communication.
22 But what we're dealing with with Ahmad
23 Edwards is someone whose thought processes so
24 decompensate and become so disorganized that it's not --
25 it's not a matter of having an interpreter to carry out

1 his instructions. It's a matter of having someone who
2 can actually formulate a coherent defense and
3 communicate that to the -- to the court and to the jury.
4 CHIEF JUSTICE ROBERTS: So your standard of
5 coherent communication, you would not require the
6 defendant, for example, to understand the hearsay rule,
7 or other things of that sort?
8 MR. FISHER: No.
9 CHIEF JUSTICE ROBERTS: Well, even if you
10 don't, I mean, how is he going to effectively
11 participate in the trial? Does he have to know, for
12 example, that he has the right and understand that he
13 has the right to cross-examine witnesses?
14 MR. FISHER: We're not asking to get into
15 that kind of level of detailed knowledge. All we're
16 suggesting is that once the defendant has made the
17 choices that are -- that are forced upon him
18 essentially by the trial, i.e., the decision to
19 represent himself and the decision whether to present
20 a defense or not, that he can actually carry that out;
21 whatever it is that he wants to do within the rules of
22 the court, that he has the capability of effectuating
23 that. And that's the problem Ahmad Edwards had.
24 JUSTICE SCALIA: But surely his total
25 ignorance of all of the trial rules, the hearsay rule

1 and the other details of conducting a trial, is a great
2 disadvantage. But we allow him to toss that away so
3 long as he knows he's tossing it away. That the judge
4 instructs him: You know, you're ill-advised to proceed
5 on your own; you're not a lawyer; this is, you know, a
6 complicated process; are you sure you want to represent
7 yourself? And if he says yes, we say, well, you know,
8 you've brought it on yourself.
9 Why can't we say the same thing about -- about
10 his supposed inability to communicate effectively, unless
11 and until he turns the trial into a farce?
12 MR. FISHER: Well, we can, but we need not,
13 I think is the point. And it's because there's a world
14 of difference between lack of legal knowledge and the
15 inability to relay a -- the kind of coherent message
16 that any person, lawyer or not, of ordinary kind of
17 mental ability, capacity, would be able to formulate.
18 I mean, I think that there are substantial doubts about
19 whether somebody like Ahmad Edwards could convey to the
20 jury that, in fact, what he wants to present is, for
21 example, self-defense.
22 What we're talking about here is that he may
23 be thinking that and that may be something that Faretta
24 entitles him to want to pursue on his own, but we're
25 concerned that he couldn't in front of a jury

1 communicate that that's what he was trying to --
2 CHIEF JUSTICE ROBERTS: What if he -- what
3 if he wants to communicate not self-defense, but that,
4 you know, Martians did it? Is he -- and he can
5 coherently communicate that. There won't be any doubt
6 on the judge's part or the jury that he thinks Martians
7 did it? Would that qualify?
8 MR. FISHER: Well, I think we're getting
9 hopefully not into an area where there would be
10 legitimate questions about underlying Dusky competency.
11 I mean, it seems to me in that circumstance you could
12 have that level of concern as well. And then, beyond
13 that, if someone is using a sort of insanity
14 demonstration in the context of the trial, it seems to
15 me the court could fall back on not this rule, but on
16 the rule that there has to be a defense that's within
17 the bounds of the rules of the court.
18 CHIEF JUSTICE ROBERTS: Well, I mean, I'm
19 trying to find some level that is above competency. I
20 mean, there are people who believe in Martians, but
21 above competence to stand trial, but also that would
22 still be coherently communicated, but would show that
23 it's a -- it's a ridiculous defense that's not going to
24 be effective in representing himself.
25 MR. FISHER: Well, I do think there's a line

1 that can be drawn between a ridiculous defense that's
2 within the bounds of sort of relevance and possibility,
3 such as, you know, a very ill-advised self-defense
4 theory, and the idea that the Martians did it, which I
5 think raises substantial questions as to Dusky
6 competency as well.
7 Now, I think that even looking at the
8 Court's later cases after Faretta, if we look at
9 Martinez and McKaskle, we see the same sense of
10 balancing that is what we're advocating here. I think
11 that you know, McKaskle, in recognizing that is a role
12 sometimes for standby counsel and that it is to be
13 limited, is something that starts down this road. And
14 we're not talking about a rule here I think that
15 would -- would threaten the underlying decision that
16 Faretta protects. We're talking about a rule that is
17 simply designed to let a trial court ensure that the
18 decisions that the defendant makes are going to
19 effectuate --
20 JUSTICE KENNEDY: Do you think -- there is
21 always a concern in these cases whether or not we're
22 going to be creating more inefficiencies for the
23 judicial system; that is to say, the trial judge was
24 incorrect in ruling that the trial was becoming a farce.
25 I suppose you've weighed that cost against the benefits

1 of the rule. And what are the benefits of the rule,
2 that the trial is quicker, that the appeal is clearer?
3 MR. FISHER: Well, I think the benefits of
4 the rule, first and foremost, is that the State has and
5 the judicial system has greater certainty that there was
6 a fair trial, that the adversarial process played out in
7 a way that gave the jury, you know, a meaningful
8 decision to make, and also that it conveys to the public
9 that this is a reliable system.
10 Now, you're very right. This may introduce
11 inefficiencies, and we don't know what the Indiana
12 Supreme Court would make of that in its role as the
13 supervising court for the Indiana -- for the Indiana
14 courts.
15 But I think that what courts have an
16 impression of, including the Indiana Supreme Court, is
17 that they're not allowed to undertake that balance, that
18 Godinez and Faretta combine to preclude that option, and
19 that's what we want the Court to clear up, to say that
20 they do have that option.
21 JUSTICE STEVENS: Do you think your rule
22 would create an incentive for trial judges in close
23 cases to always deny self-representation? Because
24 certainly most trials proceed more efficiently and less
25 trouble for the judge if you have a lawyer there.

1 MR. FISHER: Well, I think that there --
2 trial -- trial courts are always going to be concerned
3 about going too far and being reversed on those
4 grounds. So it seems to me that the same kinds of
5 concerns that they deal with when -- when they're
6 making an evaluation of Dusky competency and making,
7 you know, evaluation of whether a waiver is known and
8 voluntary, those kinds of incentives would kind of be
9 the same here in terms of not wanting to go too far.
10 JUSTICE SCALIA: What would the standard of
11 review be? I'm a reviewing court. The judge has not
12 allowed this person to represent himself. What's the
13 standard of review? Abuse of discretion or what?
14 MR. FISHER: I think so. I think it would
15 be something very much --
16 JUSTICE SCALIA: Abuse of discretion?
17 MR. FISHER: -- very much akin to what we
18 look at with Dusky. Whether there are factual
19 determinations may be reviewed for clear error, but the
20 overall judgment is essentially an abuse of discretion,
21 a deferential kind of --
22 JUSTICE KENNEDY: But I assume if there is
23 error it would be structural error --
24 MR. FISHER: Yes.
25 JUSTICE KENNEDY: There would be no room for

1 harmless error analysis.
2 MR. FISHER: I agree with that.
3 JUSTICE ALITO: If the State's objective is
4 to make sure that there is a reasonably fair trial or
5 something that resembles a fair trial, isn't that going
6 to result in the denial of self-representation in a
7 great number of cases?
8 MR. FISHER: Well, I think that -- we're not
9 suggesting a rule that is unlimited in that regard. The
10 concern for fair trial is something that I think in a
11 lot of other Sixth Amendment contexts has some leeway,
12 but it also has limits. In the Wheat case, for example,
13 where the Court overrode the choice of -- first choice
14 paid counsel in view of conflicts of interest and the
15 fairness questions those raised, I don't think the Court
16 has been terribly concerned that that interest runs
17 wild and that it overrides that -- that right.
18 JUSTICE ALITO: If it is the case, as a lot
19 of people believe, that it is very -- it's the rare case
20 in which a lay defendant can adequately represent
21 himself or herself, then where do you draw the line?
22 MR. FISHER: Well, again, I think that there
23 is a qualitative, a real -- a sort of realistic line to
24 be drawn between someone who maybe has bad ideas and bad
25 judgments and someone who just cannot communicate what

1 those judgments are. In other words, someone who is
2 unable, particularly in an unstructured, stressful
3 environment, to communicate what it is that their
4 message is to the jury, to the judge --
5 JUSTICE KENNEDY: But in either case,
6 there's a farce.
7 MR. FISHER: Well, I think that there --
8 JUSTICE KENNEDY: A very rational highly
9 competent person might want to make the trial a farce.
10 Why should that case be any different than where the
11 person does so because he's incompetent?
12 MR. FISHER: Because I think that the -- the
13 kinds of decisions that someone would make that would
14 be -- I think even if well-communicated, would
15 demonstrate a farcical trial, would threaten the Dusky
16 competency standard. They would -- they would raise
17 questions in that regard. Now, if someone just had a
18 bad notion of -- of what it is to defend themselves and
19 what idea they're trying to present to the jury, I
20 don't think, if that is communicated coherently, that
21 that presents the same concerns of a farcical trial
22 that we have with Ahmad Edwards.
23 JUSTICE KENNEDY: The State's interests are
24 the same. If -- if the highly competent person
25 deliberately wants to make a shambles out of the

1 proceeding, the State's interests are the same. Now,
2 there are certain options available. They can exclude
3 him from the courtroom or something, but --
4 MR. FISHER: Well, again, I think that there
5 are limits on what we're arguing, and I think that --
6 that the Wheat case demonstrates how there can be
7 flexibility here in terms of pursuing these -- these
8 fairness interests without overriding completely the
9 self-representation interests -- or, I'm sorry, the
10 Sixth Amendment interests of a larger set of defendants.
11 JUSTICE GINSBURG: Mr. Fisher, are you
12 making essentially a "we know it when we see it"
13 argument? Because you're not talking about some
14 abstract notion of what would be an abuse of discretion,
15 but you have in your brief -- you have at pages 15 and
16 16 -- some examples, concrete examples of this
17 defendant. And you could say when it gets to that
18 level, you don't have to wait to see how it's going to
19 play out. If this is how this man speaks and thinks,
20 how could a jury be exposed to it? It would be
21 gibberish.
22 MR. FISHER: Right. And I think that you
23 don't really have an unwieldy standard here any more
24 than with respect to Dusky when you're looking at
25 evaluations of statements and other things that the

1 defendant might have made.

2 If I may, I'd like to reserve the remainder

3 of my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Mr. Dreeben.

6 ORAL ARGUMENT OF MICHAEL R. DREEBEN

7 ON BEHALF OF THE UNITED STATES,

8 AS AMICUS CURIAE,

9 SUPPORTING THE PETITIONER

10 MR. DREEBEN: Mr. Chief Justice, and may it

11 please the Court:

12 There are instances in the trial courts,

13 particularly with respect to mentally ill defendants,

14 where a defendant may have the degree of rational

15 understanding to satisfy the relatively low standard of

16 competence established in Dusky and reaffirmed

17 thereafter, but not have the capability of carrying out

18 the tasks that are needed to be performed in order to

19 try a case without it degenerating into a farce.

20 And I think, as Justice Scalia pointed out,

21 it would be well within the power of the trial court at

22 the time that that occurred to terminate

23 self-representation in order to further the State's

24 strong and important interest in fairness and the

25 appearance of fairness.

1 The question is whether a judge can also
2 make that decision ex ante before the trial has begun
3 and insist that the defendant be represented through
4 counsel.
5 We think the answer is that a State or the
6 Federal Government would have a sufficient interest in
7 terminating self-representation or in denying a motion
8 for self-representation --
9 JUSTICE SCALIA: And what's your test, the
10 same test: just inability to communicate no matter how
11 idiotic? I mean this man is living in a -- in a
12 fantasy world. He understands that he's on trial, but
13 his whole world is just -- he not only believes in
14 Martians, he thinks we are all Martians, or something
15 like that.
16 I mean --
17 MR. DREEBEN: Well, Justice Scalia --
18 JUSTICE SCALIA: Why pick on just the
19 ability to communicate? It seems to me there are a lot
20 of defects that can turn the trial into a farce.
21 MR. DREEBEN: We agree with that,
22 Justice Scalia. And our view is that the Court should
23 not necessarily resolve this by adopting a specific test
24 that focuses on the ability to communicate, but should,
25 instead, look at whether the State has a sufficient

1 interest that would be served by denying self-
2 representation.
3 The defendant's lack of ability to
4 communicate can certainly serve that interest. There
5 may be instances in which the defendant lacks the memory
6 to be able to remember from day to day what happened in
7 the trial; and if you were called upon to perform all
8 the myriad tasks of trial counsel, he would break down.
9 JUSTICE SCALIA: Do you worry at all that if
10 we adopt a separate test for the ability to represent
11 yourself, that the inevitable effect will be for the
12 test for being able to be tried to become less and less
13 rigorous?
14 MR. DREEBEN: Well, as things --
15 JUSTICE SCALIA: After all, there's no harm
16 done so long as the person can't -- is not allowed to
17 represent himself.
18 I think there may be some value in linking
19 the two, so that -- so that the court knows that if he
20 finds the individual capable of being tried, he may have
21 to begin a trial with this -- with this individual
22 representing himself.
23 MR. DREEBEN: Well, Justice Scalia, I think
24 that the tests serve different purposes. The competency
25 threshold, as the Court has noted, is a minimal

1 threshold. It is designed to ferret out whether the
2 defendant has the minimal degree of rational
3 understanding to assist his counsel and to understand
4 what's happening.
5 And he then, if he wants to waive counsel,
6 has to have a knowing and intelligent waiver, which
7 means he has to understand what he's doing. But those
8 inquiries don't focus on whether he, in fact, could
9 carry out the substantially more demanding task, both
10 mentally and as far as the ability to communicate goes,
11 of presenting a case to the jury during a trial.
12 There are many examples of mentally ill
13 defendants whose world views may be substantially skewed
14 in many respects, but the competency threshold focuses
15 on whether they can understand the case in front of
16 them. For example, if you have a defendant who is on
17 trial for making certain specific threats against
18 identified people, he may have the ability to understand
19 what the charge is and to assist counsel in whether he
20 said those things and what he intended by them, even if
21 his world view in many respects is extremely skewed; he
22 has paranoid delusions; and his ability to communicate
23 coherently on his own is very diminished.
24 And that is why the competency threshold
25 does not fully address the very important interest that

1 a State has in presenting to the world that the trial is
2 a fair one.
3 This has both the dimension of actual
4 fairness as well as perceived fairness because if the
5 public sees the spectacle of a mentally ill defendant,
6 who may well be able to cooperate with counsel and with
7 the assistance of counsel get through a trial, attempt
8 to communicate to the jury on his own in a very
9 delusional way, it really casts the justice system into
10 disrepute.
11 JUSTICE SCALIA: If it gets to be bad, the
12 court can terminate it and say, you know, you can't
13 represent yourself. We're going to bring in counsel.
14 MR. DREEBEN: Well, Justice Scalia, I think
15 under existing law that could not be done if the
16 Respondent's view of Faretta is adopted as an absolute
17 rule.
18 JUSTICE SCALIA: Sure, it could be done if
19 the trial is, indeed, turning into a farce.
20 MR. DREEBEN: Well, I think it depends on
21 what you mean by "turning into a farce." It is
22 well-established now that if the defendant actually
23 obstructs the proceeding, stands up out of order,
24 disregards the judge's procedural rulings and in --
25 violates the decorum of the courtroom,

1 self-representation can be terminated. And that, I
2 think, is an important fact that establishes that the
3 Faretta right is not an absolute right. But here
4 we're talking about turning it into a farce in a
5 different way. For example, in Colin Ferguson's trial
6 for murder in New York, he got up, and he told the jury
7 in his opening statement: I've been charged with 93
8 counts because it is the year 1993. If it were the year
9 1928, I would have been charged with 28 counts.
10 And that doesn't violate the decorum of the
11 courtroom, but it really casts doubt on what is the
12 State doing here: Putting somebody on trial, having
13 them represent themselves with no lawyer, when that's
14 the mental ability that they have to understand what's
15 going on.
16 JUSTICE STEVENS: May I ask this question:
17 Do you think the inability to speak English would be a
18 factor that the judge could take into account in making
19 this judgment?
20 MR. DREEBEN: No, I don't think so,
21 Justice Stevens. I think a translator could deal with a
22 non-English-speaking defendant. I think a defendant
23 with a speech impediment can be assisted in other ways.
24 We actually think that the Court could
25 approach this case by looking at the most acute phase of

1 this problem, in our view and experience, which is a
2 defendant who is mentally ill. Because then you have a
3 concrete connection, particularly with serious mental
4 illness, between the defendant's diagnosed state and the
5 abilities and capacities that he may have when he takes
6 the floor as his own lawyer.
7 JUSTICE KENNEDY: Could we have a rule that
8 even if you are highly competent, if you make the trial
9 into a farce, you forfeit your Faretta right?
10 MR. DREEBEN: Yes, you certainly could,
11 Justice Kennedy. And I think that that would be an
12 important step in the right direction.
13 I think in cases where the judge has, as he
14 did in this case, a very firm foundation for
15 understanding that this defendant could not present a
16 coherent defense to the jury and, if allowed to
17 represent himself, would create a potential shambles --
18 not that the trial couldn't go forward in the sense
19 there would be no courtroom decorum, but in the sense
20 that what the defendant would say to the jury would make
21 no sense.
22 JUSTICE SCALIA: Why not just change the
23 rule about -- about what you can do, once the trial is
24 underway? You say sometimes it's not a farce. It's
25 just that this person is obviously incapable of making

1 a coherent defense. Why not wait to see?
2 What I object to in the proposal is making
3 these judgments ex ante on the basis of -- I don't know
4 -- psychological testing or past behavior or anything
5 else.
6 Give it a try. The person wants to
7 represent himself. It's his constitutional right. If,
8 indeed, it turns out that this is turning into a sham,
9 fine, bring in a lawyer to represent him.
10 But doing it beforehand on the basis of your
11 prediction as to what the trial is going to turn into
12 seems to me not to give enough respect to -- to an
13 individual's desire to represent himself.
14 MR. DREEBEN: I think to force the State to
15 have the train wreck occur, when the evidence is very
16 firm and reliable that it will occur, infringes the
17 State's interests in starting the trial from the
18 beginning in a coherent and orderly way and not
19 basically subjecting the defendant to the risk of an
20 unfair trial based on the defendant's own incompetence.
21 And this record is about as good as you are
22 going to get on that. The defendant's communications,
23 which are in the jury -- and which -- which are in the
24 joint appendix and which Justice Ginsburg has mentioned
25 and are reproduced in the Petitioner's brief, show that

1 although the psychiatrists ultimately concluded that he
2 could work with his lawyer, when you put him on his own
3 and ask him to articulate anything to the judge, which
4 he did in great extent, it made no sense whatsoever.
5 JUSTICE KENNEDY: And these were
6 communications made to the judge before the trial
7 started?
8 MR. DREEBEN: That's correct. And this
9 judge had also seen the defendant firsthand during the
10 first trial. There had been years of competency
11 proceedings. With the aid of medication, the defendant
12 was brought to an extent where he was competent to
13 assist his counsel. But that in no way gave him the
14 competencies to actually carry out the trial. And this
15 judge, I think, did the responsible thing. Rather than
16 allow the defendant to sort of allow himself to commit
17 State-assisted suicide by going before a trial in a way
18 that had no capacity of producing a result that would
19 truly be regarded as fair, the judge said: I'm not
20 going to do it; I'm going to terminate
21 self-representation because I think that's in the best
22 interest of justice.
23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Dreeben.
25 MR. DREEBEN: Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Stancil.

2 ORAL ARGUMENT OF MARK T. STANCIL

3 ON BEHALF OF THE RESPONDENT

4 MR. STANCIL: Mr. Chief Justice, and may it

5 please the Court:

6 The expressed premise of the Sixth Amendment

7 and of our adversarial system generally is that the

8 defense belongs to the accused and not to the State.

9 The defendant has the choice whether to exercise a

10 particular constitutional right or, as in Godinez, to

11 present no defense whatsoever. Eliminating the right of

12 self-representation based on concerns about a

13 defendant's courtroom ability violates that fundamental

14 principle. And importantly, the accused does not

15 surrender that control over his defense simply because

16 the State's judgment is that he'd be better served by

17 proceeding through counsel.

18 To the contrary, a lawyer may speak for his

19 client, not because he needs counsel, but only because

20 he has consented to the representation. And the

21 proposals that the State and the United States have

22 offered here are fundamentally inconsistent with that

23 bedrock principle of the Sixth Amendment.

24 CHIEF JUSTICE ROBERTS: Do you -- do you

25 argue that the State has no interest to be considered

1 in this calculus? In other words, it is solely the
2 interest of the defendant in representing himself and
3 that the State has no interest in ensuring a credible
4 process?
5 MR. STANCIL: No, Your Honor. Faretta
6 expressly contemplated that in footnote 46. The Court
7 recognized the limitations on the right of
8 self-representation, to include the rules of courtroom
9 procedure, decorum, and standby counsel. Those are
10 perfectly adequate and indeed, when correctly enforced,
11 more than adequate to protect against the kind
12 of concern --
13 CHIEF JUSTICE ROBERTS: Well, but an
14 individual doesn't have to know and appreciate the rules
15 of courtroom procedure to be judged competent to stand
16 trial.
17 MR. STANCIL: Correct. But he's held to
18 them if he makes the decision to proceed. And that's
19 the fundamental premise of this case, is that a
20 defendant who --
21 CHIEF JUSTICE ROBERTS: Well, but that's
22 suggesting to me that you give no weight to the State
23 interest. In other words, so long as he's held to those
24 rules, that's basing your determination solely on -- on
25 his interest and no weight given to the State's

1 interest ensuring that you have a trial where people
2 are observing the rules.
3 MR. STANCIL: Two responses, Your Honor.
4 First, the State's interest in fairness is -- I think
5 is -- assumes the question, if you will, or begs the
6 question, what is fair. Under the Sixth Amendment a
7 trial is fair if you have the choice whether to pursue a
8 certain right.
9 So in Godinez, for example, this Court
10 concluded that it was fundamentally fair for the
11 defendant to sit silent and to -- not to be held to any
12 higher competency determination for waiving his right to
13 counsel and proceeding pro se. This was in a capital
14 case no less. So, I think the State's concern that it
15 doesn't appear to be fair if the defendant isn't somehow
16 held to a higher standard of competency is -- is wrong.
17 The --
18 CHIEF JUSTICE ROBERTS: Can I ask the
19 -- it's really the flip side of the question
20 Justice Scalia asked. Why shouldn't we be concerned
21 that if you have the same standard that trial courts are
22 going to elevate the competency showing beyond what
23 really is required?
24 In other words, if they have to have the
25 same standard, they don't want a proceeding where you've

1 got someone who is -- you know, whatever the standard
2 is -- is not going to be as competent or reasonably
3 represented as he would by a lawyer, so they're more
4 likely to find the person incompetent to stand trial in
5 the first place?
6 These are addressed to two different --
7 entirely different questions. And rather than having a
8 problem with merging the standards which results in one
9 of them being cheated, why don't we have two different
10 standards?
11 MR. STANCIL: Well, I assume you're speaking
12 about competency to stand trial under Dusky?
13 CHIEF JUSTICE ROBERTS: Yes.
14 MR. STANCIL: Well, first of all, the States
15 have that option. That's -- that's clear. So, if the
16 States are concerned about -- about the effects of this
17 rule, that's always been their choice. And it's
18 certainly -- they're free to do so.
19 JUSTICE GINSBURG: I thought in your
20 argument is it's not a choice, that there is only one
21 standard, either you're competent or you're not
22 competent? That is, I thought your position is
23 competency is a unitary notion and your opponent's
24 position is, no, there are shades of competency.
25 MR. STANCIL: Justice Ginsburg, we're

1 speaking about the competency to stand trial. And I
2 think that was judge -- the Chief Justice's question.
3 JUSTICE SCALIA: When you say they have
4 their choice, you meant they have the choice of
5 elevating the standard that applies to the competency to
6 stand trial if they wish?
7 MR. STANCIL: Correct.
8 CHIEF JUSTICE ROBERTS: Well then, why don't
9 they have the choice of elevating the standard for
10 ability to represent themselves in a coherent way at
11 trial?
12 MR. STANCIL: Because --
13 CHIEF JUSTICE ROBERTS: That's what
14 understood Godinez to say, that you certainly don't have
15 to elevate your standard, but I didn't understand it to
16 say you can't.
17 MR. STANCIL: Because the Sixth Amendment
18 says once you get to the adversarial proceeding in
19 court, the State cannot cross to the other side of the
20 courtroom and second guess the defendant's decision.
21 CHIEF JUSTICE ROBERTS: Well, it actually
22 doesn't say that.
23 MR. STANCIL: Well, with respect, Your
24 Honor, every Sixth Amendment decision that I'm aware of
25 does not let the court, in the name of second guessing

1 the defendant's -- whether a decision would benefit the
2 defendant come in and say: Well, for example, you may
3 not want to take the stand in your own defense, because,
4 well, look at you; you've got unsightly tattoos that
5 this jury may find offensive. The State cannot come in
6 and say: Well, this trial would be a farce if you take
7 the stand and so you're not competent to exercise that
8 right.
9 CHIEF JUSTICE ROBERTS: It seems to me that
10 both -- both sides are kind of raising these, taking
11 the arguments to extreme and they don't have to do
12 that. If you -- if you accept the fact that there can
13 be a higher standard than competency to stand trial,
14 that doesn't mean that the judge can say you can't make
15 the decision if you have tattoos.
16 MR. STANCIL: The logic I believe is the
17 same. They say the appearance of this is so unsightly
18 that we wouldn't -- that we can't allow it to go
19 forward. And I just don't think that logic has any
20 place in the Sixth Amendment.
21 And to come back, if I may, to the
22 statement in Godinez, in Roman III of Godinez, it
23 doesn't mean that States are free to sever competency
24 to stand trial from the right of self-representation
25 and raise one and not the other. What it says is that

1 States are free to elaborate upon the standards for --
2 elaborate on the Dusky standard, and it cites Medina,
3 which is a case about competency to stand trial. I
4 think what it contemplates, and quite sensibly, is if
5 somebody comes in and wants to self-represent and there
6 are indicia that that's a particularly bad decision,
7 that you may want to ask more questions to determine is
8 he Dusky competent, because that's what Dusky is about.
9 It is about decision-making.
10 JUSTICE GINSBURG: But this is a trial judge
11 who has a very practical, immediate concern. And he's
12 not looking at Dusky, not looking at Peretz. He says:
13 I have found that Mr. Edwards is able to stand trial
14 with the assistance of an attorney. I never made any
15 finding that he was -- that he was competent if he
16 didn't have that aid. I did -- I never found that he
17 was competent to defend himself. He's competent, but
18 only if he has a lawyer who is running the show.
19 That was the finding that the trial judge
20 made: That's my finding. Are you telling me to make
21 that finding I have to say that he's not competent to
22 stand trial?
23 MR. STANCIL: No, Your Honor. That is --
24 that finding is the essence of his legal error. He
25 says: You are Dusky competent, you have the decision-

1 making capacity to stand trial and in particular to
2 exercise your other rights, to plead guilty, to waive
3 a trial by jury, to take the stand in your own defense.
4 But he says: Because you lack these courtroom
5 abilities, you're not -- you're not competent somehow
6 to exercise this additional right.
7 JUSTICE ALITO: Do you disagree with the
8 point that's made by the American Psychiatric
9 Association that competency is not a unitary concept,
10 that a person can be competent to assist an attorney at
11 trial but not competent to make all of the decisions and
12 perform in some minimally reasonable way the various
13 tasks that have to be performed during the course of a
14 trial?
15 MR. STANCIL: As a legal matter, yes. As a
16 medical matter, I'm in no position to challenge their
17 judgment --
18 JUSTICE BREYER: Why shouldn't the law track
19 medicine? I mean, we're not -- we're interested in a
20 person having a fair trial.
21 MR. STANCIL: That might have been a fair
22 argument before Godinez, where the APA and other medical
23 organizations advanced this exact argument, and the
24 Court said -- and if you'll indulge me, I'd like to
25 quote -- it says that: "While it is undeniable that in

1 most criminal prosecutions defendants could be
2 better" -- "could better defend with counsel's guidance
3 than by their own unskilled efforts, a criminal
4 defendant's ability to represent himself has no bearing
5 upon his competence to choose self-representation" --
6 JUSTICE BREYER: Well, I didn't think this
7 case has been decided by prior precedent. I thought
8 there was some opening here. And I -- going back to
9 what I think I said in Martinez and Justice Kennedy
10 said, we were -- I was interested in, and perhaps he
11 was, in a few empirical facts, because we'd heard lots
12 of complaints from trial judges who said this makes no
13 sense at all. Very disturbed people are being deprived
14 and end up in prison because they're disturbed rather
15 than because they're guilty.
16 Now, I wanted to know the facts. And it
17 seemed to me we have a excellent, really fabulous --
18 that this has happened, and Professor Hashimoto seems to
19 have gone and written, done some research, which we
20 have in front of us. As I read that research, I first
21 learn that actually the pro se defendants don't do a
22 bad job of defending themselves. And by and large,
23 they do surprisingly well. And so perhaps that
24 eliminates some of the concern.
25 But the other thing that it tells me is that

1 there is a small subclass of pro se defendants who may
2 in fact do badly. And we have in front of us one of
3 those individuals and that, therefore, a rule which
4 permitted a State to deal with this subclass of
5 disturbed people who want to represent themselves, who
6 could communicate with counsel, but can't communicate
7 with anybody else, that if we focus on that subclass and
8 accept the State's argument here, interestingly enough,
9 we've gone a long way to deal with a serious practical
10 problem, and we've advanced the cause of seeing that
11 individuals have a fair trial.
12 So I'd like you to comment on that, and that
13 was my reaction after reading that study.
14 MR. STANCIL: I'm not sure where to start,
15 Your Honor, but if I could, I'll start with the
16 practical problem.
17 It's been suggested here that there are --
18 there are no ways for trial judges to deal with trials
19 that may descend into farce, for example. I think
20 that's incorrect. Take for example the rules of
21 courtroom procedure. If a defendant stands up, a pro se
22 defendant, stands up and says something that's
23 irrelevant or prejudicial or argumentative in some way
24 that violates the very strict rules of courtroom
25 procedure, the State need only stand up and say,

1 objection; objection sustained; inquiry terminated. So
2 the idea that we're going to be listening to 20 or 30
3 minutes or hours of rants is I think overblown. Courts
4 have that tool.
5 Moreover, there's the additional tool of
6 standby counsel. So we're not talking about a road that
7 you have -- once you're committed to you're stuck with.
8 The court --
9 CHIEF JUSTICE ROBERTS: Well, but you're
10 putting a heavy burden on the State to say, all right,
11 now -- and the prosecution -- to say, now we've got to
12 look out for what this guy is going to say, and now
13 we've got to appoint standby counsel. And I'm not sure
14 how your response deals with the guy who says: I was
15 indicted for 93 counts because it's 1993. I mean, is
16 the prosecutor supposed to stand up then and say:
17 Objection, that's ridiculous?
18 MR. STANCIL: Well, one, certainly the
19 State's rule has nothing to say about that either. I
20 mean, that's a perfectly lucid communication. Two, I
21 think the answer is yes. If he -- if he makes any
22 opening statement that the evidence will not support --
23 CHIEF JUSTICE ROBERTS: Yes, that the State
24 has to incur these extra burdens?
25 MR. STANCIL: I don't think that's much more

1 of a burden than they do when they're facing a defense
2 lawyer.
3 JUSTICE KENNEDY: Well, you've presumed in
4 your answer to Justice Breyer -- I don't know if you've
5 fully answered all of the questions he raised -- that
6 this defendant would immediately obey the objection.
7 That doesn't happen.
8 MR. STANCIL: And that --
9 JUSTICE KENNEDY: It -- they don't
10 communicate. It's two ships passing in the night or in
11 the case of some defendants about five ships passing in
12 the night.
13 (Laughter.)
14 JUSTICE KENNEDY: So -- so you're presuming
15 something that that's just -- that just is inconsistent
16 with the reality. And you answered Justice Alito's
17 question to say well, it's a legal matter; if it's a
18 medical matter I don't comment. But it's a practical
19 matter; it's a commonsense matter. We know what goes
20 on, and what goes on is very costly to the State and to
21 the fairness of the trial.
22 MR. STANCIL: Justice Kennedy, the tool is
23 right in front of the Court in Illinois versus Allen.
24 If the defendant does not obey your direction, you have
25 to warn him; and if he continues in his disruptive

1 behavior or disobeying the court, you can take away his
2 Sixth Amendment right. And Illinois versus Allen, I
3 think is -- is very crucial --
4 JUSTICE BREYER: Your response to that, as
5 it was to me, I take it to be: Well, focusing on this
6 subclass, the judge has other ways of dealing with the
7 problem. My thought about that is, first, I don't know.
8 Maybe the damage is done by that point before the jury
9 or elsewhere.
10 And my second thought is, because I'm not
11 certain about whether your answer is right or wrong, nor
12 are any of us really, this is a perfect instance where
13 the States should experiment.
14 MR. STANCIL: Except that, Your Honor, it
15 undermines the fundamental premise of the Sixth
16 Amendment, which is it's his defense. So, for
17 example --
18 JUSTICE SCALIA: Are there any psychiatric
19 studies that show how accurate psychiatric studies are?
20 (Laughter.)
21 MR. STANCIL: Well --
22 JUSTICE SCALIA: That -- that estimate, for
23 example, how accurately one can predict whether a
24 particular defendant will indeed be able to defend
25 himself?

1 MR. STANCIL: Not to my knowledge,
2 Justice Scalia.
3 JUSTICE SCALIA: I didn't think so.
4 MR. STANCIL: I believe the APA acknowledges
5 in its brief that there's not a lot of literature about
6 these additional --
7 JUSTICE BREYER: There isn't on this, but of
8 course part of the job of being a psychiatrist or a
9 psychologist or a doctor is continuously to evaluate the
10 accuracy of studies. So if it's a general question, I
11 guess the question is of course there are.
12 MR. STANCIL: But. Well -- but -- but the
13 path to -- to a resolution that doesn't offend the Sixth
14 Amendment is to make the record. So, for example --
15 JUSTICE SOUTER: But Mr. Stancil, I mean,
16 you say make the record. You said a moment ago, have
17 standby counsel who can take over. It seems to me that
18 the -- that the trouble with these proposals is that by
19 the time the record is made, if by that you mean
20 courtroom performance, or by the time standby counsel is
21 required to take over, the damage is done.
22 And it -- it seems to me that a trial judge
23 in those situations who says, okay, I declare at this
24 point that the trial has become so farcical it cannot go
25 on like this, the trial judge at that point is -- has

1 got a damaged product in the part of the trial that has
2 already taken place. And the tough question, I think,
3 is not whether he can simply tell standby counsel to
4 take over, but whether anyone can take over without
5 declaring a mistrial at that point. And the cost of
6 mistrial is a cost in addition to the cost that the
7 State has been arguing for, that it should not be
8 regarded in the public eye as the sponsor of farces.
9 What do you say to the problem of -- of the
10 likelihood that a mistrial is going to be the cost of
11 correcting or switching over once the -- once the damage
12 has been proven?
13 MR. STANCIL: Extraordinarily remote, for
14 two reasons. First, I think what trial courts probably
15 need is encouragement to enforce these rules against pro
16 se defendants that are -- that are at their disposal.
17 So an opinion from this Court that says, reaffirms,
18 you've got Illinois versus Allen and you don't have to
19 let it go on for 30 minutes. You can, you know, nip it
20 in the bud and you've got the rules of evidence and
21 rules of -- of procedure.
22 JUSTICE GINSBURG: Well -- suppose
23 the judge, the trial judge, says: Mr. Stancil, please
24 turn to page 15 of the blue brief. I have had
25 considerable communication with this defendant. Read

1 what it says there. Do I have to wait for this to be
2 repeated in the courtroom? "Listen to this case, the
3 foundations of my cause. The Criminal Rule 4. Court's
4 territory, acknowledged May 29, 2001, abandoned for the
5 young American citizen to bring a permissive
6 intervention acting as the forces to predict my future
7 disgrace by the court to motion young Americans to
8 gather against crime."
9 Now, that's not an isolated incident. This
10 record is full of that kind of statement coming from
11 this defendant.
12 MR. STANCIL: Justice Ginsburg, I'm very
13 glad you brought that up, because it illustrates two
14 problems with this -- with armchair psychiatry that the
15 State is urging here.
16 First, this letter actually follows on the
17 heel of a motion that Ahmad Edwards filed under Indiana
18 Rule 4(c) that says under 4(c) you have to try me
19 within a year of charging, and I have been tried, I've
20 been sitting in confinement.
21 So when he says "Listen to this case, the
22 foundations of my cause, the Criminal Rule 4," that came
23 to the judge. I bet good money the judge knew what that
24 meant. Now, there are other things around it that I
25 grant you are problematic.

1 JUSTICE GINSBURG: Well, take the rest of
2 the paragraph.
3 MR. STANCIL: Yes, but -- and if I may --
4 JUSTICE GINSBURG: And you'd have to stop.
5 I mean, you have given a reason that this might make
6 sense.
7 MR. STANCIL: Yes.
8 JUSTICE GINSBURG: But the judge says: Does
9 that means I have to sit here and every time he makes a
10 statement like that explain to the jury what he meant?
11 Then I'm becoming involved myself in a -- in a
12 consulting role, not as an impartial judge of this case
13 anymore, but as a kind of a facilitator of the
14 defendant.
15 MR. STANCIL: No, Your Honor. And if I
16 may, two points. First, to back up a step, we have no
17 idea, because the record is silent on this, whether
18 when Mr. Edwards wrote this he was continuing to take
19 his medication and receive therapy.
20 JUSTICE SOUTER: What difference does it
21 make?
22 MR. STANCIL: Because that's the reason --
23 JUSTICE SOUTER: Because the trial judge has
24 got a problem, and it doesn't matter whether he was on
25 medication or not on medication. He was saying things

1 like the things Justice Ginsburg has just read.
2 MR. STANCIL: Justice Souter, this defendant
3 was rendered competent to stand trial only by
4 psychiatric medication; and before taking away the right
5 that is -- that is inherent in the Sixth Amendment, the
6 judge has to make a record: Is he still competent to
7 stand trial or did he not take his medication this week
8 and that's why -- that's why he slipped into
9 incoherence?
10 If you try to square these communications
11 with Dr. Sena's report, the report that rendered him
12 competent to stand trial, they're irreconcilable. Dr.
13 Sena --
14 JUSTICE SOUTER: Well, a great -- frankly, a
15 great deal of psychiatric testimony is irreconcilable
16 with the facts. Psychiatric testimony can be found for
17 either side of any issue in cases like this.
18 MR. STANCIL: If that's -- if that's the
19 case, Justice Souter, then there may be an error in the
20 application of Dusky. But -- but once you're over the
21 Dusky hurdle that says he's lucid enough to understand
22 what's going on and to make these fundamental --
23 JUSTICE STEVENS: Mr. Stancil, can I ask
24 this question: Do you agree that at a certain point in
25 the trial it could become a farce and the judge could

1 declare a mistrial for this reason?

2 MR. STANCIL: Yes, Your Honor.

3 JUSTICE STEVENS: And if he did so, he's

4 going to have a second trial. Could he decide before

5 the second trial starts that the man has to have a

6 lawyer or could the man still demand the right to

7 self-represent? He's had to proceed -- he's proved it

8 on one -- you know, one mistrial. It seems to me that

9 under your position he'd have the right to a second

10 bite at the apple.

11 MR. STANCIL: No, Your Honor. There would

12 be a record in open court of his --

13 JUSTICE STEVENS: Well, you've got a record

14 in open court here.

15 MR. STANCIL: No, Your Honor, with respect,

16 we do not. We have inconsistent pleadings.

17 JUSTICE STEVENS: Well, assume he had a

18 record in open court before the trial started that was

19 just as persuasive as events going sour during a trial.

20 MR. STANCIL: Well, again, I respectfully

21 submit that is not this case. But if you did have it, I

22 think you still have to give him the chance, assuming

23 he's Dusky-competent and he makes this waiver knowingly

24 and intelligently, to stand up in court and --

25 JUSTICE SCALIA: You don't just have a

1 record in open court. You have the experience of a
2 trial in the past.
3 MR. STANCIL: Correct.
4 JUSTICE SCALIA: That's more than just the
5 stuff that was on the record. You've had the experience
6 of a trial.
7 MR. STANCIL: As Justice Brennan's
8 concurring opinion in Illinois versus Allen explained,
9 that sort of misconduct is -- can't --
10 JUSTICE KENNEDY: Well, Allen was a
11 disruptive conduct case, where he was yelling and he was
12 put out of the court.
13 That's quite different from a defendant who
14 pretends to comply with the order of the court and then
15 repeatedly takes everything off track time after time.
16 That was not Allen and I don't think you can cite Allen
17 for the problem that most of these cases present.
18 MR. STANCIL: I respectfully disagree,
19 Justice Kennedy. Something is disrespectful toward the
20 court if it's a repeated violation of the court's
21 direction to keep it on track. And at the same time the
22 defendant is the one, I think it's not to be lost, that
23 suffers the prejudice -- from these -- from these
24 concerns.
25 JUSTICE KENNEDY: Well, there's a difference

1 between disrespectful and disruptive. And the Allen
2 case was disruptive. I mean, he was shouting, he was
3 yelling. Everything had to stop. That just doesn't
4 apply to the case we have here. It's inapplicable.
5 MR. STANCIL: Well, I agree that Mr. Edwards
6 -- the record is clear that -- that he's been -- he was
7 certainly respectful toward the court. But I think a
8 far more limited intrusion on the Sixth Amendment would
9 to be say, if you can't -- if you can't get something
10 out that is comprehensible, that's akin to an Illinois
11 versus Allen disruption; and after a certain record, it
12 can be revoked like the Sixth Amendment right at issue
13 in Allen.
14 JUSTICE KENNEDY: Did the trial judge in
15 this case cite the findings and the observations he made
16 during the competency hearing in open court as -- for
17 the support of the ruling?
18 MR. STANCIL: He referred seriatim to a list
19 of reports that he had considered.
20 JUSTICE KENNEDY: What about the competency
21 hearing that was held in open court with the defendant?
22 MR. STANCIL: The -- it's my understanding
23 that the most recent, the actual hearing where he was
24 rendered competent, did not have a hearing with it.
25 There was a report from Dr. Sena dated July, '04, and on

1 that basis he was -- I believe there was an
2 order rendering --
3 JUSTICE STEVENS: May I ask this other
4 question: Do you think the Faretta right includes a
5 right to have no standby counsel?
6 MR. STANCIL: No, Your Honor. McKaskle made
7 that clear, and it was -- and in fact Faretta makes that
8 clear, as well, that the State can protect its interests
9 by having somebody right behind ready to stand in. And
10 I think --
11 JUSTICE SCALIA: Why do you concede that if
12 the trial is not disruptive, the mere fact that this
13 fellow is making an incompetent defense or, indeed, may
14 be making no sense is justification for terminating the
15 trial? I mean, this person can plead guilty if he
16 wishes and that's perfectly okay. Can he not take the
17 lesser step of putting forward an incompetent defense?
18 The State is still going to have to plead --
19 to prove beyond a reasonable doubt before the case goes
20 to the jury that he committed the crime that he's
21 accused of, beyond a reasonable doubt. And I don't --
22 I don't know why the mere fact that his defense is
23 incompetent or even is making no sense would justify --
24 if that's what he wants to do instead of pleading
25 guilty, that's, it seems to me, what the right of an

1 individual consists of.

2 MR. STANCIL: Justice Scalia, let me make it

3 clear that -- I don't know if I've made a concession

4 here. My response was in --was in response to Justice

5 Kennedy's question about whether Allen is a fit here.

6 I suggested and -- and I do believe that at least

7 expanding Allen to encompass "incoherence" to mean

8 "disrespect" would be a lesser offense than throwing

9 the baby out with the bathwater.

10 JUSTICE SCALIA: Right.

11 MR. STANCIL: But if I may just return to

12 this fundamental --

13 JUSTICE SCALIA: Your position is it has to

14 be disruptive. If it's not disruptive, even if he's

15 making no sense, that's his choice, right?

16 MR. STANCIL: Yes. However, to be clear,

17 the court can cut him off. So if I -- if a pro se

18 defendant stands up and says, the men from Mars -- you

19 know, in his opening argument says, the men from Mars

20 told me to do this, objection sustained. The court may

21 do it sua sponte and cut it off. So, we're talking

22 about seconds, not minutes --

23 JUSTICE KENNEDY: Of course, one way to

24 control these defendants is to say: Mr. Defendant, if

25 you persist in this irrelevant line of inquiry, the

1 court is going to consider whether or not you are
2 competent under the Indiana standard to conduct your
3 self-defense. That would get his attention.
4 MR. STANCIL: It would certainly be
5 preferable to what happened here, although I think it
6 still -- I think it still has the problem analytically
7 of being inconsistent with the nature of the Sixth
8 Amendment. But --
9 JUSTICE SOUTER: Mr. Stancil, I'm not sure
10 that I'm following your argument, Because if I
11 understand your most recent answers to these questions,
12 it is no longer your position that an individual who is
13 not disruptive, but merely incoherent and making the
14 trial farcical by his incoherent responses or actions --
15 it is no longer your position that an individual who is
16 merely incoherent could be forced in the midst a trial,
17 after this has been demonstrated, to accept standby
18 counsel to manage the trial. And, yet a moment ago I
19 thought that was one of the fail-safe devices that you
20 were arguing for.
21 MR. STANCIL: I think -- let me be perfectly
22 precise. I think it has to get to the Illinois versus
23 Allen point of being --
24 JUSTICE SOUTER: So -- which is the
25 disruptive point?

1 MR. STANCIL: No. If I may, Your Honor,
2 this is what Illinois versus Allen says, and I think
3 this will elucidate the distinction: "It has to be so
4 disorderly, disruptive, and disrespectful to the court
5 that his trial cannot go forward." So what Illinois
6 versus Allen says, we can't have somebody sitting here
7 that --
8 JUSTICE SOUTER: Somebody who is totally
9 polite to the Court, who does not scream and yell, who
10 talks only when he is allowed to talk, but talks total
11 and complete nonsense, can never be replaced, in your
12 view, by standby counsel in the middle of the trial
13 after this has been shown to be the way he's acting;
14 isn't that correct?
15 MR. STANCIL: I believe we're dealing with
16 -- two responses. I believe --
17 JUSTICE SOUTER: No, how about "yes" or
18 "no"?
19 (Laughter.)
20 MR. STANCIL: No, Your Honor. But I believe
21 we are dealing with a null set, because somebody who
22 can't say these things isn't Dusky-competent and hasn't
23 made a knowing and intelligent waiver. If he can't get
24 two words out to the jury -- and here Mr. Edwards, if
25 you read the oral colloquy --

1 JUSTICE KENNEDY: Well, now you're falling
2 back on the very psychiatric evaluation in the first
3 part of the trial that you disparage in the second.
4 MR. STANCIL: No, Justice Kennedy. The
5 Dusky analysis is well settled, and there's a lot of --
6 there's a lot of research that goes into that. He was
7 rendered Dusky-competent to make these decisions. But
8 the idea that there's a defendant out there who has this
9 rational understanding and enough decision-making
10 capacity under Dusky to plead guilty and to waive any
11 number of his constitutional rights is the same
12 defendant who turns and says complete gibberish to --
13 JUSTICE SOUTER: Alright, in your judgment,
14 was the Dusky determination in this case erroneous?
15 Should he have been held incompetent to
16 stand trial because of the nonsensical things that
17 Justice Ginsburg just read?
18 MR. STANCIL: I think the record -- on the
19 current state of the record, yes, because his --
20 JUSTICE SOUTER: He should have been found
21 incompetent.
22 JUSTICE SCALIA: Except, as you say, we
23 don't know whether he was on his medication or not.
24 MR. STANCIL: Correct. This defendant was
25 rendered competent after, I think, four and a half years

1 of intense -- after he finally got --
2 JUSTICE KENNEDY: I still don't know your
3 "yes" or "no" answer. Do you say he should have been
4 found incompetent or that he should have been competent
5 based on your present assessment of the record?
6 MR. STANCIL: I believe it comes and goes.
7 There were times where he was and times where he was
8 not.
9 JUSTICE KENNEDY: Was he competent to stand
10 trial, in your view as you now understand this record?
11 MR. STANCIL: At the time of trial, yes, he
12 was. He made, I think, lucid statements to the judge.
13 If I may, he's -- the judge asked him at his first
14 trial, well, what about voir dire? He says, voir dire,
15 that's how you screen out jurors. It takes ten -- you
16 get ten charges apiece or ten strikes apiece. That's
17 perfectly correct. He is asked how you admit a
18 videotape into evidence.
19 JUSTICE KENNEDY: There are all kinds of
20 nuts who could get 90 percent on the bar exam.
21 (Laughter.)
22 JUSTICE GINSBURG: Mr. Stancil, you do agree
23 that the basic precedent on which you rely, Faretta, you
24 would be -- you are asking for an extension of it
25 because that case starts out with a defendant who is

1 described as literate, competent, understanding.
2 MR. STANCIL: No, Justice Ginsburg. And, if
3 I may explain, that selection from Faretta refers to
4 whether his waiver of counsel was knowing and
5 intelligent. It does not refer to whether he is
6 competent to exercise the right.
7 To the contrary, Faretta specifically
8 contemplates that unskilled, illiterate and those of
9 -- and I quote -- "feeble intellect" will exercise this
10 right.
11 JUSTICE GINSBURG: But was there anything in
12 the record showing that he had -- that Faretta had, mental
13 delusions, mental disease?
14 MR. STANCIL: Not that I'm aware of, but in
15 Godinez there was. This was a defendant who essentially
16 volunteered out of depression -- volunteered for the
17 death penalty. He waived counsel, pled guilty, and sat
18 silent at the defense table, refusing to put on any
19 mitigating evidence while the State sought the death
20 penalty.
21 And this Court held that is not
22 fundamentally unfair because he had had the choice --
23 JUSTICE GINSBURG: But the judicial posture
24 there was a little different. It was a question of what
25 the State had to do, not what the State could do.

1 MR. STANCIL: Correct, Justice Ginsburg.
2 But the reasoning that the State urges here is precisely
3 the reason -- reasoning that was rejected in Godinez.
4 They said, well, he's not able enough to perform -- this
5 is what the defendant said -- I'm not able enough to
6 perform these tasks, so you shouldn't have let me do it.
7 And this Court said -- again if I -- pardon for
8 repeating myself. If I may --
9 CHIEF JUSTICE ROBERTS: Finish your thought.
10 MR. STANCIL: A criminal defendant's ability
11 to represent himself has no bearing upon his competence
12 for self-representation.
13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Stancil.
15 Mr. Fisher, you have four minutes remaining.
16 JUSTICE SCALIA: Mr. Fisher, what if the
17 defendant here promised to sit silent during the trial
18 as the defendant did in Godinez? Would that be -- would
19 that render everything okay?
20 REBUTTAL ARGUMENT OF THOMAS M. FISHER
21 ON BEHALF OF THE PETITIONER
22 MR. FISHER: Well, I think the defendant in
23 Godinez was -- was pleading guilty. I think here if
24 you have a defendant where it might create a different
25 question if there was some reliable evidence that that

1 might be true. But it would be hard to imagine that if
2 a trial court would have to take the defendant's word
3 for it entirely, that he would sit silent.
4 JUSTICE SCALIA: But, he could certainly sit
5 silent. Having decided to represent himself, he could,
6 if he wished, just sit silent.
7 MR. FISHER: I think it does present a
8 different situation if the defendant sits silent and
9 relies only on the reasonable doubt instruction than to
10 have a defendant who is going to present an actual
11 defense.
12 And here I think you have got a defendant
13 who, while competent at the time of trial, the day
14 before, a few days before trial wrote a letter to the
15 court saying: "Dear Judge Hawkins, I want to expend
16 the court power for training for this enormously wide
17 defense I've to exercise also U.S. constament five as
18 it becomes more advanced parts differently to structure
19 First Amendment. Try to do your best old man to us
20 isolate the young boy in me at this.
21 So I think we have got a clear example of
22 someone who could communicate with counsel as the Sena
23 report indicated."
24 JUSTICE SCALIA: Maybe he writes badly.
25 MR. FISHER: Well, no. I think even in the

1 statements in open court you have got a lack of
2 coherence and lack of understanding. And counsel was
3 there, I think, to usher through some of those
4 statements that made them somewhat comprehensible. But
5 there's, I think, every reason for the court to look at
6 these writings and to also fall back on what he had
7 seen in open court to -- to come to the conclusion that
8 this was somebody who couldn't be relied upon to
9 communicate coherently.
10 I think relying on the Allen standard is a
11 mistake for the additional reason in addition to not
12 specifically covering this kind of scenario, it also
13 might then lead to circumstances where trial courts are
14 tightening up the Allen standard for all defendants
15 who wish to represent themselves.
16 So even when you don't have concerns about
17 this kind of competency, the courts are going to be in a
18 position where they look at this Court's precedent and
19 say, oh, we're supposed to enforce Allen strictly and we
20 have got a rules violation, so therefore, we have to
21 override the self-representation request. And I think
22 that that's probably not what the Court would want to do
23 just to provide that as a vehicle for dealing with
24 defendants such as Ahmad Edwards.
25 Now, I think it is also important to bear in

1 mind that -- that we can speak about fairness in trials
2 and the appearance of fairness in trial and not be
3 speaking, strictly speaking about due process -- about
4 the Due Process Clause. And that's the point of the
5 Wheat case. We don't have to think that the State's
6 concerns for fairness are limited by the Due Process
7 Clause. We can acknowledge that there are other
8 circumstances that courts -- that trial courts in
9 states can take into account when they are dealing with
10 Sixth Amendment rights. And there, of course, it was
11 the Sixth Amendment right --
12 JUSTICE SCALIA: How fair does a trial seem
13 to the public where the defendant stands up and says,
14 Your Honor, I want to represent myself? I do not want
15 this attorney. I want to defend myself. And the judge
16 said, sit down, we have a psychological evaluation of
17 you. You can't represent yourself.
18 How fair does that seem to the public?
19 MR. FISHER: Well, I think it -- I think
20 many in the public would think that that was fair.
21 That, in fact, the court is taking care of a defendant
22 in those circumstances.
23 Now, that is counterbalanced by the Faretta
24 right. But I think courts -- State courts and State
25 systems should be in the position of taking into

1 consideration what they think appears fair in that kind
2 of circumstance.
3 JUSTICE KENNEDY: I take it standard
4 competency principles laid down by this Court require
5 that the defendant be present and that he testify if
6 requested. And the trial judge must question that
7 defendant when competency comes up in the presence of
8 the court.
9 MR. FISHER: Right. And I think there are
10 opportunities, then, to be concerned about competency
11 based on these -- based on psychiatric reports that
12 could lead to a Dusky a determination in addition to
13 determination that we're seeking.
14 CHIEF JUSTICE ROBERTS: Thank you,
15 Mr. Fisher. The case is submitted.
16 (Whereupon, at 11:04 a.m. , the case in the
17 above-entitled matter was submitted.)

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