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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 07-208, Indiana versus Edwards.

Mr. Fisher.

ORAL ARGUMENT OF THOMAS M. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

The trial court was justified in requiring a higher level of competency for self-representation in order to prevent the trial of Ahmad Edwards from descending into a farce. Indeed, self-representation where a defendant cannot communicate coherently with the jury or the court would defeat the very autonomy interests that the Court ventured to protect in Faretta.

JUSTICE SCALIA: But why is it necessary to have a special rule in order to prevent the trial from descending into a farce? Why couldn't you simply apply the same rule of competency that you apply for whether the defendant can be tried, and then if in fact his self-representation begins to turn the trial into a farce surely the court would have the power to prohibit his further self-representation. Certainly, turning a trial into a farce is a basis for the court's action;

1 no?

2 MR. FISHER: Well, I certainly hope so. And
3 I think on the record we've got here the trial court did
4 not need to wait for that to happen. If the trial had
5 begun with Mr. Edwards representing himself with the
6 jury present, and the trial had then become so unwieldy
7 and so farcical and such a mockery that he had -- his
8 right of self-representation had to be overridden, I
9 think there would have been a problem, a possible
10 problem of taint with the jury. I think that the court
11 was justified, having seen Mr. Edwards in court --

12 JUSTICE SCALIA: The problem with taint
13 would be his own fault. I can't imagine that he would
14 success on appeal claiming he tainted the jury. And the
15 advantage of waiting is that by waiting to see if in
16 fact he will turn the trial into a farce you avoid the
17 risk of depriving him of his right to represent himself,
18 which is certainly a very important constitutional
19 right. Why didn't you wait to see whether he's going to
20 be able to pull it off or not?

21 MR. FISHER: I don't think that
22 Mr. Edwards's sort of waiver by conduct in that context
23 is the only thing to consider. I think that the State's
24 interests in having a proceeding that proceeds smoothly
25 without episodes that render the proceedings potentially

1 a mockery also are strong.

2 JUSTICE KENNEDY: As you understand the
3 Respondent's position -- and perhaps the question is
4 better addressed to the Respondent. But as you
5 understand their position, would they accept
6 Justice Scalia's formulation of what the rule ought to
7 be or the formulation that his question proposed?

8 MR. FISHER: You know, it's not clear to me
9 that they would. It seems to me that their position is
10 much more focused on the metes and bounds of what
11 Faretta specifically recognized, which was requiring the
12 defendant to comply with the rules and if there is a
13 disorderly kind of behavior that would be sufficient.
14 But I don't read their position to be that someone who
15 is lacking in communications skills and coherent
16 communications skills even on the record in the trial
17 would be someone whose right of self-representation
18 could be overridden.

19 CHIEF JUSTICE ROBERTS: What would happen if
20 you started out with pro se representation and then the
21 trial turned into a farce? Start over again, but he
22 would have to accept counsel at that point?

23 MR. FISHER: Well, it seems to me that we're
24 in a world here where we don't really know what the
25 precise rules would be because of the lack of clarity

1 for the trial courts. So I don't want to tell you
2 exactly what the Indiana courts would do, but I would
3 imagine that a trial judge would be faced with a
4 decision based on how long the trial has gone on, what
5 the level of complexity of the trial is, what the level
6 of farce or taint could be for the jury.

7 JUSTICE SCALIA: Well, there must be
8 precedents. I'm sure under the old rule, if I can
9 recall it the old rule, where you have a single standard
10 for both the right to be tried -- the -- the ability to
11 be tried and the right to represent yourself, there must
12 have been instances in which the person who was
13 representing himself was unable to cope and the trial
14 was -- was turning into a farce. There must have been
15 instances. What did they do?

16 MR. FISHER: Well, I think in the cases
17 where this happened, whether it's because the trial was
18 turned into a farce or because the defendant was
19 excluded from the courtroom, as in Illinois v. Allen, I
20 think the trial often proceeds.

21 JUSTICE SCALIA: Proceeds, that's what I
22 thought.

23 MR. FISHER: But I guess what I'm suggests
24 is that there is always going to be the possibility in
25 terms of a discretionary judgment call, whether it's a

1 systematic rule or whether it's something up to the
2 trial judge, that the court may decide that in interest
3 of fairness, that the -- you know -- all the -- all
4 that's gone on needs to be restarted, particularly if it
5 hasn't gone on very far. I don't mean to suggest a rule
6 in that regard. I'm suggesting --

7 JUSTICE SCALIA: What is your test that
8 you're going to apply ex ante? Whether he's able to
9 coherently --

10 MR. FISHER: Oh, the test.

11 JUSTICE SCALIA: Yes, what's the test?

12 MR. FISHER: Well, the rule that we are
13 suggesting -- and again let it caution that this is not
14 a rule adopted by the Indiana Supreme Court yet -- is
15 That it is within the State's authority to override this
16 right where the defendant cannot communicate coherently
17 with the court or the jury.

18 JUSTICE SCALIA: Cannot communicate
19 coherently? I sometimes -- I sometimes think that the
20 lawyers cannot communicate coherently.

21 (Laughter.)

22 JUSTICE SCALIA: It's really a vague test,
23 isn't it?

24 MR. FISHER: I don't think it's any worse in
25 terms of vagueness than what we deal with in Dusky.

1 Now, Dusky talks about a reasonable level of
2 understanding and a reasonable ability to assist the
3 lawyer.

4 JUSTICE GINSBURG: Let me give you a
5 concrete illustration that was brought up by the other
6 side. If you have this coherent expression test, what
7 happens to the person who has a bad speech impediment?
8 Or someone who needs -- who isn't conversant in the
9 English language? Are they -- automatically the right
10 of self representation is automatically ruled out?

11 MR. FISHER: No. I think that in
12 circumstances such as those, there is another level of
13 analysis, which is whether there's some sort of
14 accommodation that can be made that would allow the
15 representation, self-representation, to proceed by means
16 of -- whether it's an interpreter or another means of
17 communication.

18 But What we're dealing with with Ahmad
19 Edwards is someone whose thought processes so
20 decompensate and become so disorganized that it's not --
21 it's not a matter of having an interpreter to carry out
22 his instructions. It's a matter of having someone who
23 can actually formulate a coherent defense and
24 communicate that to the court and to the jury.

25 CHIEF JUSTICE ROBERTS: So your standard of

1 coherent communication, you would not require the
2 defendant, for example, to understand the hearsay rule,
3 or other things of that sort?

4 MR. FISHER: No.

5 CHIEF JUSTICE ROBERTS: Well, even if you
6 don't, I mean, how is he going to effectively
7 participate in the trial? Does he have to know, for
8 example, that he has the right and understand that he
9 has the right to cross-examine witnesses?

10 MR. FISHER: We're not asking to get into
11 that kind of level of detailed knowledge. All we're
12 suggesting is that once the defendant has made the
13 choices that are forced upon him essentially by the
14 trial, i.e., the decision to represent himself and the
15 decision whether to present a defense or not, that he
16 can actually carry that out; whatever it is that he
17 wants to do within the rules of the court, that he has
18 the capability of effectuating that. And that's the
19 problem Ahmad Edwards had.

20 JUSTICE SCALIA: But surely his total
21 ignorance of all of the trial rules, the hearsay rule
22 and the other details of conducting a trial, is a great
23 disadvantage. But we allow him to toss that away so
24 long as he knows he's tossing it away. That the judge
25 instructs him: You're ill-advised to proceed on your

1 own; you're not a lawyer; this is, you know, a
2 complicated process; are you sure you want to represent
3 yourself? And if he says yes, we say, well, you know,
4 you've brought it on yourself.

5 Why can't we say the same thing about his
6 supposed inability to communicate effectively, unless
7 and until he turns the trial into a farce?

8 MR. FISHER: Well, we can, but we need not,
9 I think is the point. And it's because there's a world
10 of difference between lack of legal knowledge and the
11 inability to relay a kind of coherent message that any
12 person, lawyer or not, of ordinary kind of mental
13 ability, capacity, would be able to formulate. I think
14 that there are substantial doubts about whether somebody
15 like Ahmad Edwards could convey to the jury that, in
16 fact, what he wants to present is, for example,
17 self-defense.

18 What we're talking about here is that he may
19 be thinking that and that may be something that Faretta
20 entitles him to want to pursue on his own, but we're
21 concerned that he couldn't in front of a jury
22 communicate that that's what he was trying to --

23 CHIEF JUSTICE ROBERTS: What if he -- what
24 if he wants to communicate not self-defense, but that,
25 you know, Martians did it? Is he -- and he can

1 coherently communicate that. There won't be any doubt
2 on the judge's part or the jury that he thinks Martians
3 did it? Would that qualify?

4 MR. FISHER: Well, I think we're getting
5 hopefully not into an area where there would be
6 legitimate questions about underlying Dusky competency.
7 I mean, it seems to me in that circumstance you could
8 have that level of concern as well. And then, beyond
9 that, if someone is using a sort of insanity
10 demonstration in the context of the trial, it seems to
11 me the court could fall back on not this rule, but on
12 the rule that there has to be a defense that's within
13 the bounds of the rules of the court.

14 CHIEF JUSTICE ROBERTS: Well, I mean, I'm
15 trying to find some level that is above competency. I
16 mean, there are people who believe in Martians, but
17 above competence to stand trial, but also that would
18 still be coherently communicated, but would show that
19 it's a ridiculous defense that's not going to be
20 effective in representing himself.

21 MR. FISHER: Well, I do think there's a line
22 that can be drawn between a ridiculous defense that's
23 within the bounds of sort of relevance and possibility,
24 such as, you know, a very ill-advised self-defense
25 theory, and the idea that the Martians did it, which I

1 think raises substantial questions as to Dusky
2 competency as well.

3 Now, I think that even looking at the
4 Court's later cases after Faretta, if we look at
5 Martinez and McKaskle, we see the same sense of
6 balancing that is what we're advocating here. I think
7 that McKaskle, recognizing that is a role sometimes for
8 standby counsel and that it is to be limited, is
9 something that starts down this road. And we're not
10 talking about a rule here I think that would threaten
11 the underlying decision that Faretta protects. We're
12 talking about a rule that is simply designed to let a
13 trial court ensure that the decisions that the defendant
14 makes are going to effectuate --

15 JUSTICE KENNEDY: Do you think -- there is
16 always a concern in these cases whether or not we're
17 going to be creating more inefficiencies for the
18 judicial system; that is to say, the trial judge was
19 incorrect in ruling that the trial was becoming a farce.
20 I suppose you've weighed that cost against the benefits
21 of the rule. And what are the benefits of the rule,
22 that the trial is quicker, that the appeal is clearer?

23 MR. FISHER: Well, I think the benefits of
24 the rule, first and foremost, is that the State has and
25 the judicial system has greater certainty that there was

1 a fair trial, that the adversarial process played out in
2 a way that gave the jury, you know, a meaningful
3 decision to make, and also that it conveys to the public
4 that this is a reliable system.

5 Now, you're very right. This may introduce
6 inefficiencies, and we don't know what the Indiana
7 Supreme Court would make of that in its role as the
8 supervising court for the Indiana -- for the Indiana
9 courts.

10 But I think that what courts have an
11 impression of, including the Indiana Supreme Court, is
12 that they're not allowed to undertake that balance, that
13 Godinez and Faretta combine to preclude that option, and
14 that's what we want the Court to clear up, to say that
15 they do have that option.

16 JUSTICE STEVENS: Do you think your rule
17 would create an incentive for trial judges in close
18 cases to always deny self-representation? Because
19 certainly most trials proceed more efficiently and less
20 trouble for the judge if you have a lawyer there.

21 MR. FISHER: Well, I think that they're --
22 trial courts are always going to be concerned about
23 going too far and being reversed on those grounds. So
24 it seems to me that the same kinds of concerns that they
25 deal with when they're making an evaluation of Dusky

1 competency and making, you know, evaluation of whether a
2 waiver is known and voluntary, those kinds of incentives
3 would kind of be the same here in terms of not wanting
4 to go too far.

5 JUSTICE SCALIA: What would the standard of
6 review be? I'm a reviewing court. The judge has not
7 allowed this person to represent himself. What's the
8 standard of review? Abuse of discretion or what?

9 MR. FISHER: I think so. I think it would
10 be something very --

11 JUSTICE SCALIA: Abuse of discretion?

12 MR. FISHER: -- very much akin to what we
13 look at with Dusky. Whether there are factual
14 determinations may be reviewed for clear error, but the
15 overall judgment is essentially an abuse of discretion,
16 a deferential kind of --

17 JUSTICE KENNEDY: But I assume if there is
18 error it would be structural error --

19 MR. FISHER: Yes.

20 JUSTICE KENNEDY: There would be no room for
21 harmless error analysis.

22 MR. FISHER: I agree with that.

23 JUSTICE ALITO: If the State's objective is
24 to make sure that there is a reasonably fair trial or
25 something that resembles a fair trial, isn't that going

1 to result in the denial of self-representation in a
2 great number of cases?

3 MR. FISHER: Well, I think that -- we're not
4 suggesting a rule that is unlimited in that regard. The
5 concern for fair trial is something that I think in a
6 lot of other Sixth Amendment contexts has some leeway,
7 but it also has limits. In the Wheat case, for example,
8 where the Court overrode the choice of -- first choice
9 paid counsel in view of conflicts of interest and the
10 fairness questions those raised, I don't think the Court
11 has been terribly concerned that interest runs wild and
12 that it overrides that right.

13 JUSTICE ALITO: If it is the case, as a lot
14 of people believe, that it is very -- it's the rare case
15 in which a lay defendant can adequately represent
16 himself or herself, then where do you draw the line?

17 MR. FISHER: Well, again, I think that there
18 is a qualitative, a real -- a sort of realistic line to
19 be drawn between someone who maybe has bad ideas and bad
20 judgments and someone who just cannot communicate what
21 those judgments are. In other words, someone who is
22 unable, particularly in an unstructured, stressful
23 environment, to communicate what it is that their
24 message is to the jury, to the judge --

25 JUSTICE KENNEDY: But in either case,

1 there's a farce.

2 MR. FISHER: Well, I think that there --

3 JUSTICE KENNEDY: A very rational highly
4 competent person might want to make the trial a farce.
5 Why should that case be any different than where the
6 person does so because he's incompetent?

7 MR. FISHER: Because I think that the -- the
8 kinds of decisions that someone would make that would
9 be -- I think even if well-communicated, would
10 demonstrating a farcical trial, would threaten the Dusky
11 competency standard. They would -- they would raise
12 questions in that regard. Now, if someone just had a
13 bad notion of what it is to defend themselves and what
14 idea they're trying to present to the jury, I don't
15 think, if that is communicated coherently, that that
16 presents the same concerns of a farcical trial that we
17 have with Ahmad Edwards.

18 JUSTICE KENNEDY: The State's interests are
19 the same. If the highly competent person deliberately
20 wants to make a shambles out of the proceeding, the
21 State's interests are the same. Now, there are certain
22 options available. They can exclude him from the
23 courtroom or something, but --

24 MR. FISHER: Well, again, I think that there
25 are limits on what we're arguing, and I think that --

1 that the Wheat case demonstrates how there can be
2 flexibility here in terms of pursuing these fairness
3 interests without overriding completely the
4 self-representation interests -- or, I'm sorry, the
5 Sixth Amendment interests of a larger set of defendants.

6 JUSTICE GINSBURG: Mr. Fisher, are you
7 making essentially a "we know it when we see it"
8 argument? Because you're not talking about some
9 abstract notion of what would be an abuse of discretion,
10 but you have in your brief -- you have at pages 15 and
11 16 -- some examples, concrete examples of this
12 defendant. And you could say when it gets to that
13 level, you don't have to wait to see how it's going to
14 play out. If this is how this man speaks and thinks,
15 how could a jury be exposed to it? It would be
16 gibberish.

17 MR. FISHER: Right. And I think that you
18 don't really have an unwieldy standard here any more
19 than with respect to Dusky when you're looking at
20 evaluations of statements and other things that the
21 defendant might have made.

22 If I may, I'd like to reserve the remainder
23 of my time.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Mr. Dreeben.

1 ORAL ARGUMENT OF MICHAEL R. DREEBEN
2 ON BEHALF OF THE UNITED STATES,
3 AS AMICUS CURIAE,
4 SUPPORTING THE PETITIONER

5 MR. DREEBEN: Mr. Chief Justice, and may it
6 please the Court:

7 There are instances in the trial courts,
8 particularly with respect to mentally ill defendants,
9 where a defendant may have the degree of rational
10 understanding to satisfy the relatively low standard of
11 competence established in Dusky and reaffirmed
12 thereafter, but not have the capability of carrying out
13 the tasks that are needed to be performed in order to
14 try a case without it degenerating into a farce.

15 And I think, as Justice Scalia pointed out,
16 it would be well within the power of the trial court at
17 the time that that occurred to terminate
18 self-representation in order to further the State's
19 strong and important interest in fairness and the
20 appearance of fairness.

21 The question is whether a judge can also
22 make that decision ex ante before the trial has begun
23 and insist that the defendant be represented through
24 counsel.

25 We think the answer is that a State or the

1 Federal Government would have a sufficient interest in
2 terminating self- representation or in denying a motion
3 for self-representation --

4 JUSTICE SCALIA: And what's your test, the
5 same test: Inability to communicate no matter how
6 idiotic? I mean this man is living in a fantasy world.
7 He understands that he's on trial, but his whole world
8 is just -- he not only believes in Martians, he thinks
9 we are all Martians, or something like that.

10 I mean --

11 MR. DREEBEN: Well, Justice Scalia --

12 JUSTICE SCALIA: Why pick on just the
13 ability to communicate? It seems to me there are a lot
14 of defects that can turn the trial into a farce.

15 MR. DREEBEN: We agree with that,
16 Justice Scalia. And our view is that the Court should
17 not necessarily resolve this by adopting a specific test
18 that focuses on the ability to communicate, but should,
19 instead, look at whether the State has a sufficient
20 interest that would be served by denying self-
21 representation.

22 The defendant's lack of ability to
23 communicate can certainly serve that interest. There
24 may be instances in which the defendant lacks the memory
25 to be able to remember from day to day what happened in

1 the trial; and if you were called upon to perform all
2 the myriad tasks of trial counsel, he would break down.

3 JUSTICE SCALIA: Do you worry at all that if
4 we adopt a separate test for the ability to represent
5 yourself, that the inevitable effect will be for the
6 test for being able to be tried to become less and less
7 rigorous?

8 MR. DREEBEN: Well, I think --

9 JUSTICE SCALIA: After all, there's no harm
10 done so long as the person can't -- is not allowed to
11 represent himself.

12 I think there may be some value in linking
13 the two, so that -- so that the court knows that if he
14 finds the individual capable of being tried, he may have
15 to begin a trial with this individual representing
16 himself.

17 MR. DREEBEN: Well, Justice Scalia, I think
18 that the tests serve different purposes. The competency
19 threshold, as the Court has noted, is a minimal
20 threshold. It is designed to ferret out whether the
21 defendant has the minimal degree of rational
22 understanding to assist his counsel and to understand
23 what's happening.

24 And he then, if he wants to waive counsel,
25 has to have a knowing and intelligent waiver, which

1 means he has to understand what he's doing. But those
2 inquiries don't focus on whether he, in fact, could
3 carry out the substantially more demanding task, both
4 mentally and as far as the ability to communicate goes,
5 of presenting a case to the jury during a trial.

6 There are many examples of mentally ill
7 defendants whose world views may be substantially skewed
8 in many respects, but the competency threshold focuses
9 on whether they can understand the case in front of
10 them. For example, if you have a defendant who is on
11 trial for making certain specific threats against
12 identified people, he may have the ability to understand
13 what the charge is and to assist counsel in whether he
14 said those things and what he intended by them, even if
15 his world view in many respects is extremely skewed; he
16 has paranoid delusions; and his ability to communicate
17 coherently on his own is very diminished.

18 And that is why the competency threshold
19 does not fully address the very important interest that
20 a State has in presenting to the world that the trial is
21 a fair one.

22 This has both the dimension of actual
23 fairness as well as perceived fairness because if the
24 public sees the spectacle of a mentally ill defendant,
25 who may well be able to cooperate with counsel and with

1 the assistance of counsel get through a trial, attempt
2 to communicate to the jury on his own in a very
3 delusional way, it really casts the justice system into
4 disrepute.

5 JUSTICE SCALIA: If it gets to be bad, the
6 court can terminate it and say, you know, you can't
7 represent yourself. We're going to bring in counsel.

8 MR. DREEBEN: Well, Justice Scalia, I think
9 under existing law that could not be done if the
10 Respondent's view of Faretta is adopted as an absolute
11 rule.

12 JUSTICE SCALIA: Sure, it could be done if
13 the trial is, indeed, turning into a farce.

14 MR. DREEBEN: Well, I think it depends on
15 what you mean by "turning into a farce." It is
16 well-established now that if the defendant actually
17 obstructs the proceeding, stands up out of order,
18 disregards the judge's procedural rulings and in --
19 violates the decorum of the courtroom,
20 self-representation can be terminated. And that, I
21 think, is an important fact that establishes that the
22 Faretta right is not an absolute right. But here
23 we're talking about turning it into a farce in a
24 different way. For example, in Colin Ferguson's trial
25 for murder in New York, he got up, and he told the jury

1 in his opening statement: I've been charged with 93
2 counts because it is the year 1993. If it were the year
3 1928, I would have been charged with 28 counts.

4 And that doesn't violate the decorum of the
5 room, but it really casts doubt on what is the State
6 doing here: Putting somebody on trial, having them
7 represent themselves with no lawyer, when that's the
8 mental ability that they have to understand what's going
9 on.

10 JUSTICE STEVENS: May I ask this question:
11 Do you think the inability to speak English would be a
12 factor that the judge could take into account in making
13 this judgment?

14 MR. DREEBEN: No, I don't think so,
15 Justice Stevens. I think a translator could deal with a
16 non-English-speaking defendant. I think a defendant
17 with a speech impediment can be assisted in other ways.

18 We actually think that the Court could
19 approach this case by looking at the most acute phase of
20 this problem, in our view and experience, which is a
21 defendant who is mentally ill. Because then you have a
22 concrete connection, particularly with serious mental
23 illness, between the defendant's diagnosed state and the
24 abilities and capacities that he may have when he takes
25 the floor as his own lawyer.

1 JUSTICE KENNEDY: Could we have a rule that
2 even if you are highly competent, if you make the trial
3 into a farce, you forfeit your Faretta right?

4 MR. DREEBEN: Yes, you certainly could,
5 Justice Kennedy. And I think that that would be an
6 important step in the right direction.

7 I think in cases where the judge has, as he
8 did in this case, a very firm foundation for
9 understanding that this defendant could not present a
10 coherent defense to the jury and, if allowed to
11 represent himself, would create a potential shambles --
12 not that the trial couldn't go forward in the sense
13 there would nobody courtroom decorum, but in the sense
14 that what the defendant would say to the jury would make
15 no sense.

16 JUSTICE SCALIA: Well, why not just change
17 the rule about what you can do, once the trial is under
18 way? You say sometimes it's not a farce. It's just
19 that this person is obviously incapable of making a
20 coherent defense. Why not wait to see?

21 What I object to in the proposal is making
22 these judgments ex ante on the basis of -- I don't know
23 -- psychological testing or past behavior or anything
24 else.

25 Give it a try. The person wants to

1 represent himself. It's his constitutional right. If,
2 indeed, it turns out that this is turning into a sham,
3 fine, bring in a lawyer to represent him.

4 But doing it beforehand on the basis of your
5 prediction as to what the trial is going to turn into
6 seems to me not to give enough respect to an
7 individual's desire to represent himself.

8 MR. DREEBEN: I think to force the State to
9 have the train wreck occur, when the evidence is very
10 firm and reliable that it will occur, infringes the
11 State's interests in starting the trial from the
12 beginning in a coherent and orderly way and not
13 basically subjecting the defendant to the risk of an
14 unfair trial based on the defendant's own incompetence.

15 And this record is about as good as you are
16 going to get on that. The defendant's communications,
17 which are in the jury -- which are in the joint appendix
18 and which Justice Ginsburg has mentioned and they are
19 reproduced in the Petitioner's brief, show that although
20 the psychiatrists ultimately concluded that he could
21 work with his lawyer, when you put him on his own and
22 ask him to articulate anything to the judge, which he
23 did in great extent, it made no sense whatsoever.

24 JUSTICE KENNEDY: And these were
25 communications made to the judge before the trial

1 started?

2 MR. DREEBEN: That's correct. And this
3 judge had also seen the defendant firsthand during the
4 first trial. There had been years of competency
5 proceedings. With the aid of medication, the defendant
6 was brought to an extent where he was competent to
7 assist his counsel. But that in no way gave him the
8 competency to actually carry out the trial. And this
9 judge, I think, did the responsible thing. Rather than
10 allow the defendant to sort of allow himself to commit
11 State-assisted suicide by going before a trial in a way
12 that had no capacity of producing a result that would
13 truly be regarded as fair, the judge said: I'm not
14 going to do it; I'm going to terminate
15 self-representation because I think that's in the best
16 interest of justice.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Mr. Dreeben.

19 MR. DREEBEN: Thank you.

20 CHIEF JUSTICE ROBERTS: Mr. Stancil.

21 ORAL ARGUMENT OF MARK T. STANCIL

22 ON BEHALF OF THE RESPONDENT

23 MR. STANCIL: Mr. Chief Justice, and may it
24 please the Court:

25 The expressed premise of the Sixth Amendment

1 and of our adversarial system generally is that the
2 defense belongs to the accused and not to the State.
3 The defendant has the choice whether to exercise a
4 particular constitutional right or, as in *Godinez*, to
5 present no defense whatsoever. Eliminating the right of
6 self-representation based on concerns about a
7 defendant's courtroom ability violates that fundamental
8 principle. And importantly, the accused does not
9 surrender that control over his defense simply because
10 the State's judgment is that he'd be better served by
11 proceeding through counsel.

12 To the contrary, a lawyer may speak for his
13 client, not because he needs counsel, but only because
14 he has consented to the representation. And the
15 proposals that the State and the United States have
16 offered here are fundamentally inconsistent with that
17 bedrock principle of the Sixth Amendment.

18 CHIEF JUSTICE ROBERTS: Do you argue that
19 the State has no interest to be considered in this
20 calculus? In other words, it is solely the interest of
21 the defendant in representing himself and that the State
22 has no interest in ensuring a credible process?

23 MR. STANCIL: No, Your Honor. *Faretta*
24 expressly contemplated that in footnote 46. The Court
25 recognized the limitations on the right of

1 self-representation, to include the rules of courtroom
2 procedure, decorum, and standby counsel. Those are
3 perfectly adequate and indeed, when correctly enforced,
4 more than adequate to protect against the kind
5 of concern --

6 CHIEF JUSTICE ROBERTS: Well, but an
7 individual doesn't have to know and appreciate the rules
8 of courtroom procedure to be judged competent to stand
9 trial.

10 MR. STANCIL: Correct. But he's held to
11 them if he makes the decision to proceed. And that's
12 the fundamental premise of this case, is that a
13 defendant who --

14 CHIEF JUSTICE ROBERTS: Well, but that's
15 suggesting to me that you give no weight to the State
16 interest. In other words, so long as he's held to those
17 rules, that's basing your determination solely on his
18 interest and no weight given to the State's interest in
19 ensuring that you have a trial where people are
20 observing the rules.

21 MR. STANCIL: Two responses, Your Honor.
22 First, the State's interest in fairness is -- I think
23 is -- assumes the question, if you will, or begs the
24 question, what is fair. Under the Sixth Amendment a
25 trial is fair if you have the choice whether to pursue a

1 certain right.

2 So in Godinez, for example, this Court
3 concluded that it was fundamentally fair for the
4 defendant to sit silent and to -- not to be held to any
5 higher competency determination for waiving his right to
6 counsel and proceeding pro se. This was in a capital
7 case no less. So, I think the State's concern that it
8 doesn't appear to be fair if the defendant isn't somehow
9 held to a higher standard of competency is -- is wrong.

10 The --

11 CHIEF JUSTICE ROBERTS: Can I ask the
12 -- it's really the flip side of the question
13 Justice Scalia asked. Why shouldn't we be concerned
14 that if you have the same standard that trial courts are
15 going to elevate the competency showing beyond what
16 really is required?

17 In other words, if they have to have the
18 same standard, they don't want a proceeding where you've
19 got someone who -- you know, whatever the standard is --
20 is not going to be as competent or reasonably
21 represented as he would by a lawyer, so they're more
22 likely to find the person incompetent to stand trial in
23 the first place?

24 These are addressed to two different,
25 entirely different questions. And rather than having a

1 problem with merging the standards which results in one
2 of them being cheated, why don't we have two different
3 standards?

4 MR. STANCIL: Well, I assume you're speaking
5 about competency to stand trial under Dusky?

6 CHIEF JUSTICE ROBERTS: Yes.

7 MR. STANCIL: Well, first of all, the States
8 have that option. That's clear. So, if the States are
9 concerned about the effects of this rule, that's always
10 been their choice. Certainly they're free to do so.

11 JUSTICE GINSBURG: I thought your argument
12 is it's not a choice, that there is only one standard,
13 either you're competent or you're not competent? That
14 is, I thought your position is competency is a unitary
15 notion and your opponent's position is, no, there are
16 shades of competency.

17 MR. STANCIL: Justice Ginsburg, we're
18 speaking about the competency to stand trial. And I
19 think that was judge -- the Chief Justice's question.

20 JUSTICE SCALIA: When you say they have
21 their choice, you meant they have the choice of
22 elevating the standard that applies to the competency to
23 stand trial if they wish?

24 MR. STANCIL: Correct.

25 CHIEF JUSTICE ROBERTS: Well then, why don't

1 they have the choice of elevating the standard for
2 ability to represent themselves in a coherent way at
3 trial?

4 MR. STANCIL: Because --

5 CHIEF JUSTICE ROBERTS: That's what
6 understood Godinez to say, that you certainly don't have
7 to elevate your standard, but I didn't understand it to
8 say you can't.

9 MR. STANCIL: Because the Sixth Amendment
10 says once you get to the adversarial proceeding in
11 court, the State cannot cross to the other side of the
12 courtroom and second guess the defendant's decision.

13 CHIEF JUSTICE ROBERTS: Well, it actually
14 doesn't say that.

15 MR. STANCIL: Well, with respect, Your
16 Honor, every Sixth Amendment decision that I'm aware of
17 does not let the court, in the name of second guessing
18 the defendant, whether a decision would benefit the
19 defendant come in and say: Well, for example, you may
20 not want to take the stand in your own defense, because,
21 well, look at you; you've got unsightly tattoos that
22 this jury may find offensive. The State cannot come in
23 and say: Well, this trial would be a farce if you take
24 the stand and so you're not competent to exercise that
25 right.

1 CHIEF JUSTICE ROBERTS: It seems to me that
2 both sides are kind of raising these, taking the
3 arguments to extremes and they don't have to do that.
4 If you -- if you accept the fact that there can be a
5 higher standard than competency to stand trial, that
6 doesn't mean that the judge can say you can't make the
7 decision if you have tattoos.

8 MR. STANCIL: The logic I believe is the
9 same. They say the appearance of this is so unsightly
10 that we wouldn't -- that we can't allow it to go
11 forward. And I just don't think that logic has any
12 place in the Sixth Amendment.

13 To come back, if I may, to the statement in
14 *Godinez*, in *Roman III of Godinez*, it doesn't mean that
15 States are free to sever competency to stand trial from
16 the right of self-representation and raise one and not
17 the other. What it says is that States are free to
18 elaborate upon the standards for -- elaborate on the
19 *Dusky* standard, and it cites *Medina*, which is a case
20 about competency to stand trial. I think what it
21 contemplates, and quite sensibly, is if somebody comes
22 in and wants to self-represent and there are indicia
23 that that's a particularly bad decision, that you may
24 want to ask more questions to determine is he *Dusky*
25 competent, because that's what *Dusky* is about. It is

1 about decision-making.

2 JUSTICE GINSBURG: But this is a trial judge
3 who has a very practical, immediate concern. And he's
4 not looking at Dusky, not looking at Peretz. He says:
5 I have found that Mr. Edwards is able to stand trial
6 with the assistance of an attorney. I never made any
7 finding that he was -- that he was competent if he
8 didn't have that aid. I never found that he was
9 competent to defend himself. He's competent, but only
10 if he has a lawyer who is running the show.

11 That was the finding that the trial judge
12 made: That's my finding. Are you tell me to make that
13 finding I have to say that he's not competent to stand
14 trial?

15 MR. STANCIL: No, Your Honor. That finding
16 is the essence of his legal error. He says: You are
17 Dusky competent, you have the decision-making capacity
18 to stand trial and in particular to exercise your other
19 rights, to plead guilty, to waive a trial by jury, to
20 take the stand in your own defense. But he says:
21 Because you lack these courtroom abilities, you're not
22 -- you're not competent somehow to exercise this
23 additional right.

24 JUSTICE ALITO: Do you disagree with the
25 point that's made by the American Psychiatric

1 Association that competency is not a unitary concept,
2 that a person can be competent to assist an attorney at
3 trial but not competent to make all of the decisions and
4 perform in some minimally reasonable way the various
5 tasks that have to be performed during the course of a
6 trial?

7 MR. STANCIL: As a legal matter, yes. As a
8 medical matter, I'm in no position to challenge --

9 JUSTICE BREYER: Why shouldn't the law track
10 medicine? I mean, we're not -- we're interested in a
11 person having a fair trial.

12 MR. STANCIL: That might have been a fair
13 argument before Godinez, where the APA and other medical
14 organizations advanced this exact argument, and the
15 Court said -- and if you'll indulge me, I'd like to
16 quote -- it said that: "While it is undeniable that in
17 most criminal prosecutions defendants could be
18 better" -- "could better defend with counsel's guidance
19 than by their own unskilled efforts, a criminal
20 defendant's ability to represent himself has no bearing
21 upon his competence to choose self" --

22 JUSTICE BREYER: Well, I didn't think this
23 case has been decided by prior precedent. I thought
24 there was some opening here. Going back to what I think
25 I said in Martinez and Justice Kennedy said, we were --

1 I was interested in, and perhaps he was, in a few
2 empirical facts, because we'd heard lots of complaints
3 from trial judges who said this makes no sense at all.
4 Very disturbed people are being deprived and end up in
5 prison because they're disturbed rather than because
6 there guilty.

7 Now, I wanted to know the facts. And it
8 seemed to me we have a excellent, really fabulous --
9 that this has happened, and Professor Hashimoto seems to
10 have gone and written, done research, which we have in
11 front of us. As I read that research, I first learned
12 that actually the pro se defendants don't do a bad job
13 of defending themselves. And by and large, they do
14 surprisingly well. And so perhaps that eliminates some
15 of the concern.

16 But the other thing that it tells me is that
17 there is a small subclass of pro se defendants who may
18 in fact do badly. And we have in front of us one of
19 those individuals and that, therefore, a rule which
20 permitted a State to deal with this subclass of
21 disturbed people who want to represent themselves, who
22 could communicate with counsel, but can't communicate
23 with anybody else, that if we focus on that subclass and
24 accept the State's argument here, interestingly enough,
25 we've gone a long way to deal with a serious practical

1 problem, and we've advanced the cause of seeing that
2 individuals have a fair trial.

3 So I'd like you to comment on that, and that
4 was my reaction after reading that study.

5 MR. STANCIL: I'm not sure where to start,
6 Your Honor, but if I could, I'll start with the
7 practical problem.

8 It's been suggested here that there are --
9 there are no ways for trial judges to deal with trials
10 that may descend into farce, for example. I think
11 that's incorrect. Take for example the rules of
12 courtroom procedure. If a defendant stands up, a pro se
13 defendant, stands up and says something that's
14 irrelevant or prejudicial or argumentative in some way
15 that violates the very strict rules of courtroom
16 procedure, the State need only stand up and say,
17 objection; objection sustained; inquiry terminated. So
18 the idea that we're going to be listening to 20 or 30
19 minutes or hours of rants is I think overblown. Courts
20 have that tool.

21 Moreover, there's the additional tool of
22 standby counsel. So we're not talking about a road that
23 you have -- once you're committed to you're stuck with.
24 The court --

25 CHIEF JUSTICE ROBERTS: Well, but you're

1 putting a heavy burden on the State to say, all right,
2 now -- and the prosecution -- to say, now we've got to
3 look out for what this guy is going to say, and now
4 we've got to appoint standby counsel. And I'm not sure
5 how your response deals with the guy who says: I was
6 indicted for 93 counts because it's 1993. I mean, is
7 the prosecutor supposed to stand up then and say:
8 Objection, that's ridiculous?

9 MR. STANCIL: Well, one, certainly the
10 State's rule has nothing to say about that either. I
11 mean, that's a perfectly lucid communication. Two, I
12 think the answer is yes. If he -- if he makes any
13 opening statement that the evidence will not support --

14 CHIEF JUSTICE ROBERTS: Yes, that the State
15 has to incur these extra burdens?

16 MR. STANCIL: I don't think that's much more
17 of a burden than they do when they're facing a defense
18 lawyer.

19 JUSTICE KENNEDY: Well, you've presumed in
20 your answer to Justice Breyer -- I don't know if you
21 fully answered all of the questions he raised -- that
22 this defendant would immediately obey the objection.
23 That doesn't happen.

24 MR. STANCIL: And that --

25 JUSTICE KENNEDY: They don't communicate.

1 It's two ships passing in the night or in the case of
2 some defendants about five ships passing in the night.

3 (Laughter.)

4 JUSTICE KENNEDY: So -- so you're presuming
5 something that that's -- that's just inconsistent with
6 the reality. And you answered Justice Alito's question
7 to say well, it's a legal matter; if it's a medical
8 matter I don't comment. But it's a practical matter;
9 it's a commonsense matter. We know what goes on, and
10 what goes on is very costly to the State and to the
11 fairness of the trial.

12 MR. STANCIL: Justice Kennedy, the tool is
13 right in front of the Court in Illinois versus Allen.
14 If the defendant does not obey your direction, you have
15 to warn him; and if he continues in his disruptive
16 behavior or disobeying the court, you can take away his
17 Sixth Amendment right. In Illinois versus Allen, I
18 think it is very crucial --

19 JUSTICE BREYER: Your response to that, as
20 it was to me, I take it to be: Well, focusing on this
21 subclass, the judge has other ways of dealing with the
22 problem. My thought about that is, first, I don't know.
23 Maybe the damage is done by that point before the jury
24 or elsewhere.

25 And my second thought is, because I'm not

1 certain about whether your answer is right or wrong, nor
2 are any of us really, this is a perfect instance where
3 the States should experiment.

4 MR. STANCIL: Except that, Your Honor, it
5 undermines the fundamental premise of the Sixth
6 Amendment, which is it's his defense. So, for
7 example --

8 JUSTICE SCALIA: Are there any psychiatric
9 studies that show how accurate psychiatric studies are?

10 (Laughter.)

11 MR. STANCIL: Well --

12 JUSTICE SCALIA: That -- that estimate, for
13 example, how accurately one can predict whether a
14 particular defendant will indeed be able to defend
15 himself?

16 MR. STANCIL: Not to my knowledge,
17 Justice Scalia.

18 JUSTICE SCALIA: I didn't think so.

19 MR. STANCIL: I believe the APA acknowledges
20 in its brief that there's not a lot of literature about
21 --

22 JUSTICE BREYER: There isn't on this, but of
23 course part of the job of being a psychiatrist or a
24 psychologist or a doctor is continuously to evaluate the
25 accuracy of studies. So if it's a general question, I

1 guess the question is of course there are.

2 MR. STANCIL: But. Well -- but -- but the
3 path to -- to a resolution that doesn't offend the Sixth
4 Amendment is to make the record. So, for example --

5 JUSTICE SOUTER: But Mr. Stancil, I mean,
6 you say make the record. You said a moment ago, have
7 standby counsel who can take over. It seems to me that
8 the -- that the trouble with these proposals is that by
9 the time the record is made, if by that you mean
10 courtroom performance, or by the time standby counsel is
11 required to take over, the damage is done.

12 And it -- it seems to me that a trial judge
13 in those situations who says, okay, I declare at this
14 point that the trial has become so farcical it cannot go
15 on like this, the trial judge at that point is -- has
16 got a damaged product in the part of the trial that has
17 already taken place. And the tough question, I think,
18 is not whether he can simply tell standby counsel to
19 take over, but whether anyone can take over without
20 declaring a mistrial at that point. And the cost of
21 mistrial is a cost in addition to the cost that the
22 State has been arguing for, that it should not be
23 regarded in the public eye as the sponsor of farces.

24 What do you say to the problem of the
25 likelihood that a mistrial is going to be the cost of

1 correcting or switching over once the -- once the damage
2 has been proven?

3 MR. STANCIL: Extraordinarily remote, for
4 two reasons. First, I think what trial courts probably
5 need is encouragement to enforce these rules against pro
6 se defendants that are -- that are at their disposal.
7 So an opinion from this Court that says, reaffirms,
8 you've got Illinois versus Allen and you don't have to
9 let it go on for 30 minutes. You can, you know, nip it
10 in the bud and you've got the rules of evidence and
11 rules of the procedure.

12 JUSTICE GINSBURG: Well -- suppose
13 the judge, the trial judge, says: Mr. Stancil, please
14 turn to page 15 of the blue brief. I have had
15 considerable communication with this defendant. Read
16 what it says there. Do I have to wait for this to be
17 repeated in the courtroom? "Listen to this case, the
18 foundations of my cause. The Criminal Rule 4. Court's
19 territory, acknowledged May 29, 2001, abandoned for the
20 young American citizen to bring a permissive
21 intervention acting as the forces to predict my future
22 disgrace by the court to motion young Americans to
23 gather against crime."

24 Now, that's not an isolated incident. This
25 record is full of that kind of statement coming from

1 this defendant.

2 MR. STANCIL: Justice Ginsburg, I'm very
3 glad you brought that up, because it illustrates two
4 problems with this -- with the armchair psychiatry that
5 the State is urging here.

6 First, this letter actually follows on the
7 heels of a motion that Ahmad Edwards filed under Indiana
8 Rule 4(c) that says under 4(c) you have to try him
9 within a year of charging, and I have been tried, I've
10 been sitting in confinement.

11 So when he says "Listen to this case, the
12 foundations of my cause, the Criminal Rule 4," that came
13 to the judge. I bet good money the judge knew what that
14 meant. Now, there are other things around it that I
15 grant you are problematic.

16 JUSTICE GINSBURG: Well, take the rest of
17 the paragraph.

18 MR. STANCIL: Yes, but -- and if I may --

19 JUSTICE GINSBURG: You have to stop. I
20 mean, you have given a reason that this might make
21 sense.

22 MR. STANCIL: Yes.

23 JUSTICE GINSBURG: But the judge says: Does
24 that mean I have to sit here and every time he makes a
25 statement like that explain to the jury what he meant?

1 Then I'm becoming involved myself in a -- in a
2 consulting role, not as an impartial judge of this case
3 anymore, but as a kind of a facilitator of the
4 defendant.

5 MR. STANCIL: No, Your Honor. If I may, two
6 points. First, to back up a step, we have no idea,
7 because the record is silent on this, whether when
8 Mr. Edwards wrote this he was continuing to take his
9 medication and receive therapy.

10 JUSTICE SOUTER: What difference does it
11 make?

12 MR. STANCIL: Because that's the reason --

13 JUSTICE SOUTER: Because the trial judge has
14 got a problem, and it doesn't matter whether he was on
15 medication or not on medication. He was saying things
16 like the things Justice Ginsburg has just read.

17 MR. STANCIL: Justice Souter, this defendant
18 was rendered competent to stand trial only by
19 psychiatric medication; and before taking away the right
20 that is -- that is inherent in the Sixth Amendment, the
21 judge has to make a record: Is he still competent to
22 stand trial or did he not take his medication this week
23 and that's why, that's why he slipped into incoherence?

24 If you try to square these communications
25 with Dr. Sena's report, the report that rendered him

1 competent to stand trial, it's irreconcilable. Dr.
2 Sena --

3 JUSTICE SOUTER: Well, a great -- frankly, a
4 great deal of psychiatric testimony is irreconcilable
5 with the facts. Psychiatric testimony can be found for
6 either side of any issue in cases like this.

7 MR. STANCIL: If that's -- if that's the
8 case, Justice Souter, then there may be an error in the
9 application of Dusky. But -- but once you're over the
10 Dusky hurdle that says he's lucid enough to understand
11 what's going on and to make the fundamental --

12 JUSTICE STEVENS: Mr. Stancil, can I ask
13 this question: Do you agree that at a certain point in
14 the trial it could become a farce and the judge could
15 declare a mistrial for this reason?

16 MR. STANCIL: Yes, Your Honor.

17 JUSTICE STEVENS: If he did so, he's going
18 to have a second trial. Could he decide before the
19 second trial starts that the man has to have a lawyer or
20 could the man still demand the right to self-represent?
21 He's had to proceed -- he spoke to the one -- you know,
22 one mistrial. It seems to me that under your position
23 he'd have the right to a second bite at the apple.

24 MR. STANCIL: No, Your Honor. There would
25 be a record in open court of his --

1 JUSTICE KENNEDY: Well, you've got a record
2 in open court here.

3 MR. STANCIL: No, Your Honor, with respect,
4 we do not. We have inconsistent pleadings.

5 JUSTICE STEVENS: Well, assume he had a
6 record in open court before the trial started that was
7 just as persuasive as events going sour during a trial.

8 MR. STANCIL: Well, again, I respectfully
9 submit that is not this case. But if you did have it, I
10 think you still have to give him the chance, assuming
11 he's Dusky-competent and he makes this waiver knowingly
12 and intelligently, to stand up in court and --

13 JUSTICE SCALIA: You don't just have a
14 record in open court. You have the experience of a
15 trial in the past.

16 MR. STANCIL: Correct.

17 JUSTICE SCALIA: That's more than just the
18 stuff that was on the record. You've had the experience
19 of a trial.

20 MR. STANCIL: As Justice Brennan's
21 concurring opinion in Illinois versus Allen explains,
22 that sort of misconduct can't --

23 JUSTICE KENNEDY: Well, Allen was a
24 disruptive conduct case, where he was yelling and he was
25 put out of the court.

1 That's quite different from a defendant who
2 pretends to comply with the order of the court and then
3 repeatedly takes everything off track time after time.
4 That was not Allen and I don't think you can cite Allen
5 for the problem that most of these cases present.

6 MR. STANCIL: I respectfully disagree,
7 Justice Kennedy. Something is disrespectful toward the
8 court if it's a repeated violation of the court's
9 direction to keep it on track. And at the same time the
10 defendant is the one, I think it's not to be lost, that
11 suffers the prejudice from these concerns.

12 JUSTICE KENNEDY: Well, there's a difference
13 between disrespectful and disruptive. And the Allen
14 case was disruptive. I mean, he was shouting, he was
15 yelling. Everything had to stop. That just doesn't
16 apply to the case we have here. It's inapplicable.

17 MR. STANCIL: Well, I agree that Mr. Edwards
18 -- the record is clear that he was certainly respectful
19 toward the court. But I think a far more limited
20 intrusion on the Sixth Amendment would to be say, if you
21 can't -- if you can't get something out that is
22 comprehensible, that's akin to an Illinois versus Allen
23 disruption; and after a certain record, it can be
24 revoked like the Sixth Amendment right at issue in
25 Allen.

1 JUSTICE KENNEDY: Did the trial judge in
2 this case cite the findings and the observations he made
3 during the competency hearing in open court as -- for
4 the support of the ruling?

5 MR. STANCIL: He referred seriatim to a list
6 of reports that he had considered.

7 JUSTICE KENNEDY: What about the competency
8 hearing that was held in open court with the defendant?

9 MR. STANCIL: The -- it's my understanding
10 that the most recent, the actual hearing where he was
11 rendered competent, did not have a hearing with it.
12 There was a report from Dr. Sena dated July, '04, and on
13 that basis he was -- I believe there was an
14 order rendering --

15 JUSTICE STEVENS: May I ask this one other
16 question: Do you think the Faretta right includes a
17 right to have no standby counsel?

18 MR. STANCIL: No, Your Honor. McKaskle made
19 that clear, and it was -- and in fact Faretta makes that
20 clear, as well, that the State can protect its interests
21 by having somebody right behind ready to stand in. And
22 I think --

23 JUSTICE SCALIA: Why do you concede that if
24 the trial is not disruptive, the mere fact that this
25 fellow is making an incompetent defense or, indeed, may

1 be making no sense is justification for terminating the
2 trial? I mean, this person can plead guilty if he
3 wishes and that's perfectly okay. Can he not take the
4 lesser step of putting forward an incompetent defense?

5 The State is still going to have to plead --
6 to prove beyond a reasonable doubt before the case goes
7 to the jury that he committed the crime that he's
8 accused of, beyond a reasonable doubt. And I don't know
9 why the mere fact that his defense is incompetent or
10 even is making no sense would justify -- if that's what
11 he wants to do instead of pleading guilty, that's, it
12 seems to me, what the right of an individual consists
13 of.

14 MR. STANCIL: Justice Scalia, let me make it
15 clear that -- I don't know if I've made a concession
16 here. My response was in response to Justice Kennedy's
17 question about whether Allen is a fit here. I suggested
18 and -- and I do believe that at least expanding Allen to
19 encompass "incoherence" to mean "disrespect" would be a
20 lesser offense than throwing the baby out with the
21 bathwater.

22 JUSTICE SCALIA: Right.

23 MR. STANCIL: But if I may just return to
24 this fundamental --

25 JUSTICE SCALIA: Your position is it has to

1 be disruptive. If it's not disruptive, even if he's
2 making no sense, that's his choice, right?

3 MR. STANCIL: Yes. However, to be clear,
4 the court can cut him off. So if I -- if a pro se
5 defendant stands up and says, the men from Mar -- you
6 know, in his opening argument says, the men from Mars
7 told me to do this, objection sustained. The court may
8 do it sua sponte and cut it off. Here we're talking
9 about seconds, not minutes --

10 JUSTICE KENNEDY: Of course, one way to
11 control these defendants is to say: Mr. Defendant, if
12 you persist in this irrelevant line of inquiry, the
13 court is going to consider whether or not you are
14 competent under the Indiana standard to conduct your
15 self-defense. That would get his attention.

16 MR. STANCIL: It would certainly be
17 preferable to what happened here, although I think it
18 still -- I think it still has the problem analytically
19 of being inconsistent with the nature of the Sixth
20 Amendment. But --

21 JUSTICE SOUTER: Mr. Stancil, I'm not sure
22 that I'm following your argument, Because if I
23 understand your most recent answers to these questions,
24 it is no longer your position that an individual who is
25 not disruptive, but merely incoherent and making the

1 trial farcical by his incoherent responses or actions --
2 it is no longer your position that an individual who is
3 merely incoherent could be forced in the midst a trial,
4 after this has been demonstrated, to accept standby
5 counsel to manage the trial. And, yet a moment ago I
6 thought that was one of the fail-safe devices that you
7 were arguing for.

8 MR. STANCIL: I think -- let me be perfectly
9 precise. I think it has to get to the Illinois versus
10 Allen point of being --

11 JUSTICE SOUTER: So to the disruptive point?

12 MR. STANCIL: No. If I may, Your Honor,
13 this is what Illinois versus Allen says, and I think
14 this will elucidate the distinction: "It has to be so
15 disorderly, disruptive, and disrespectful to the court
16 that his trial cannot go forward." So what Illinois
17 versus Allen says, we can't have somebody sitting here
18 that --

19 JUSTICE SOUTER: Somebody who is totally
20 polite to the Court, who does not scream and yell, who
21 talks only when he is allowed to talk, but talks total
22 and complete nonsense, can never be replaced, in your
23 view, by a standby counsel in the middle of the trial
24 after this has been shown to be the way he's acting;
25 isn't that correct?

1 MR. STANCIL: I believe we're dealing with
2 -- two responses.

3 JUSTICE SOUTER: How about "yes" or "no"?

4 (Laughter.)

5 MR. STANCIL: No, Your Honor. But I believe
6 we are dealing with a null set, because somebody who
7 can't say these things isn't Dusky-competent and hasn't
8 made a knowing and intelligent waiver. If he can't get
9 two words out to the jury -- and here Mr. Edwards, if
10 you read the oral colloquy --

11 JUSTICE KENNEDY: Well, now you're falling
12 back on the very psychiatric evaluation in the first
13 part of the trial that you disparage in the second.

14 MR. STANCIL: No, Justice Kennedy. The
15 Dusky analysis is well settled, and there's a lot of --
16 there's a lot of research that goes into that. He was
17 rendered Dusky-competent to make these decisions. But
18 the idea that there's a defendant out there who has this
19 rational understanding and enough decision-making
20 capacity under Dusky to plead guilty and to waive any
21 number of his constitutional rights is the same
22 defendant who turns and says complete gibberish to --

23 JUSTICE SOUTER: In your judgment, was the
24 Dusky determination in this case erroneous?

25 Should he have been held incompetent to

1 stand trial because of the nonsensical things that
2 Justice Ginsburg just read?

3 MR. STANCIL: I think the record -- on the
4 current state of the record, yes, because his --

5 JUSTICE SOUTER: He should have been found
6 incompetent.

7 JUSTICE SCALIA: Except, as you say, we
8 don't know whether he was on his medication or not.

9 MR. STANCIL: Correct. This defendant was
10 rendered competent after, I think, four and a half years
11 of intense -- after a finding of --

12 JUSTICE KENNEDY: I still don't know your
13 "yes" or "no" answer. Do you say he should have been
14 found incompetent or that he should have been competent
15 based on your present assessment of the record?

16 MR. STANCIL: I believe it comes and goes.
17 There were times when he was and times when he was not.

18 JUSTICE KENNEDY: Was he competent to stand
19 trial, in your view as you now understand this record?

20 MR. STANCIL: At the time of trial, yes, he
21 was. He made, I think, lucid statements to the judge.
22 If I may, the judge asked him at his first trial, well,
23 what about voir dire? He says, voir dire, that's how
24 you screen out jurors. You get ten charges apiece or
25 ten strikes apiece. That's perfectly correct. He is

1 asked how you admit a videotape into evidence.

2 JUSTICE KENNEDY: There are all kinds of
3 nuts who could get 90 percent on the bar exam.

4 (Laughter.)

5 JUSTICE GINSBURG: Mr. Stancil, you do agree
6 that the basic precedent on which you rely, Faretta, you
7 would be -- you are asking for an extension of it
8 because that case starts out with a defendant who is
9 described as literate, competent, understanding.

10 MR. STANCIL: No, Justice Ginsburg. And, if
11 I may explain, that selection from Faretta refers to
12 whether his waiver of counsel was knowing and
13 intelligent. It does not refer to whether he is
14 competent to exercise the right.

15 To the contrary, Faretta specifically
16 contemplates that unskilled, illiterate and those of
17 -- and I quote -- "feeble intellect" will exercise this
18 right.

19 JUSTICE GINSBURG: And was there anything in
20 the record showing that he had, that Faretta had, mental
21 delusions, mental disease?

22 MR. STANCIL: Not that I'm aware of, but in
23 Godinez there was. This was a defendant who essentially
24 volunteered out of depression -- volunteered for the
25 death penalty. He waived counsel, pled guilty, and sat

1 silent at the defense table, refusing to put on any
2 mitigating evidence while the State sought the death
3 penalty.

4 And this Court held that is not
5 fundamentally unfair because he had had the choice --

6 JUSTICE GINSBURG: But the judicial posture
7 there was a little different. It was a question of what
8 the State had to do, not what the State could do.

9 MR. STANCIL: Correct, Justice Ginsburg.
10 But the reasoning that the State urges here is precisely
11 the reason -- reasoning that was rejected in Godinez.
12 They said, well, he's not able enough to perform -- this
13 is what the defendant said -- I'm not able enough to
14 perform these tasks, so you shouldn't have let me do it.
15 And this Court said -- again if I -- pardon for
16 repeating myself. If I may --

17 CHIEF JUSTICE ROBERTS: Finish your thought.

18 MR. STANCIL: A criminal defendant's ability
19 to represent himself has no bearing upon his competence
20 for self-representation.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Stancil.

23 Mr. Fisher, you have four minutes remaining.

24 JUSTICE SCALIA: Mr. Fisher, what if the
25 defendant here promised to sit silent during the trial

1 as the defendant did in Godinez? Would that be -- would
2 that render everything okay?

3 REBUTTAL ARGUMENT OF THOMAS M. FISHER

4 ON BEHALF OF THE PETITIONER

5 MR. FISHER: Well, I think the defendant in
6 Godinez was pleading guilty. I think here if you have a
7 defendant where it might create a different question if
8 there was some reliable that evidence that that might be
9 true. But it would be hard to imagine that if a trial
10 court would have to take the defendant's word for it
11 entirely, that he would sit silent.

12 JUSTICE SCALIA: But, he could certainly sit
13 silent. Having decided to represent himself, he could,
14 if he wished, just sit silent.

15 MR. FISHER: I think it does present a
16 different situation if the defendant sits silent and
17 relies only on the reasonable doubt instruction than to
18 have a defendant who is going to present an actual
19 defense.

20 Here I think you have got a defendant who,
21 while competent at the time of trial, the day before, a
22 few days before trial wrote a letter to the court
23 saying: Dear Judge Hawkins, I want to extend the court
24 power for training for this enormously wide defense to
25 exercise also U.S. continent five as it becomes more

1 advanced parts differently to structure First Amendment.
2 Trial to do your best old man to isolate the young boy
3 in me at this.

4 So I think we have got a clear example of
5 someone who could communicate with counsel as the Sena
6 report indicated.

7 JUSTICE SCALIA: Maybe he writes badly.

8 MR. FISHER: Well, no. I think even in the
9 statements in open court you have got a lack of
10 coherence and lack of understanding. And counsel was
11 there, I think, to usher through some of those
12 statements that made system somewhat comprehensible.
13 But there's, I think, every reason for the court to look
14 at these writings and to also fall back on what he had
15 seen in open court to come to the conclusion that this
16 was somebody who couldn't be relied phenomenon
17 communicate coherently.

18 I think relying on the Allen standard is a
19 mistake for the additional reason in addition to not
20 specifically covering this kind of scenario, it also
21 might then lead to circumstances where trial courts are
22 tightening up the Allen standard for all defendants
23 whose wish to represent themselves.

24 So even when you don't have concerns about
25 this kind of competency, the courts are going to be in a

1 position where they look at this Court's precedent and
2 say, oh, we're supposed to enforce Allen strictly and we
3 have got a rules violation, so therefore, we have to
4 override the self-representation request. And I think
5 that that's probably not what the Court would want to do
6 just to provide that as a vehicle for dealing with
7 dependents such as Ahmad Edwards.

8 Now, I think it is also important to bear in
9 mind that -- that we can speak about fairness in trial
10 and the appearance of fairness in trial and not be
11 speaking, strictly speaking about due process, about the
12 Due Process Clause. And that's the point of the wheat
13 case. We don't have to think that the State's concerns
14 for fairness are limited by the Due Process Clause. We
15 can acknowledge that there are other circumstances that
16 courts -- that trial courts in states can take into
17 account when they are dealing with Sixth Amendment
18 rights. And there, of course, it was the Sixth
19 Amendment right --

20 JUSTICE SCALIA: How fair does a trial seem
21 to the public where the defendant stands up and says,
22 Your Honor, I want to represent myself? I do not want
23 this attorney. I want to defend myself. And the judge
24 said, sit down, we have a psychological evaluation of
25 you. You can't represent yourself.

1 How fair does that seem to the public?

2 MR. FISHER: I think it -- I think many in
3 the public would think that that was fair. That, in
4 fact, the court is taking care of a defendant in those
5 circumstances.

6 Now, that is counterbalanced by the Faretta
7 right. But I think courts -- State courts and State
8 systems should be in the position of taking into
9 consideration what they think appears fair in that kind
10 of circumstance.

11 JUSTICE KENNEDY: I take it standard
12 competency principles laid down by this Court require
13 that the defendant be present and that he testify if
14 requested. And the trial judge must question that
15 defendant when competency comes up in the presence of
16 the court.

17 MR. FISHER: Right. And I think there are
18 opportunities, then, to be concerned about competency
19 based on psychiatric reports that could lead to a Dusky
20 determination in addition to determination that we're
21 seeking.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 Mr. Fisher. The case is submitted.

24 (Whereupon, at 11:04 a.m. , the case in the
25 above-entitled matter was submitted.)

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