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SUPREME COURT, U.S.

No. 07-208

In the Supreme Court of the United States

STATE OF INDIANA,

Petitioner,

v.

AHMAD EDWARDS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF OHIO, ALASKA, FLORIDA, HAWAII, ILLINOIS, KANSAS, MAINE, NEVADA, NEW HAMPSHIRE, NEW MEXICO, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

May a state impose a higher standard for determining whether a defendant is competent to proceed pro se than the *Dusky* standard for competency to stand trial?

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STATEMENT OF AMICI INTEREST

The Amici States have a direct interest in this case because it could determine every state's level of autonomy in developing its own standards of competency for criminal defendant self-representation. Additionally, the Amici States possess a strong interest in ensuring that pro se defendants are afforded a fair trial. Indeed, this case will impact all of the participants in the state criminal justice system, including defendants, prosecutors, judges, jurors, crime victims, and the public at large, who all share an interest in the integrity of the system.

SUMMARY OF ARGUMENT

The Amici States urge the Court to grant certiorari in this case because the issue presented is of fundamental importance: do states have the freedom to impose a higher standard for determining if a defendant is competent to proceed pro se than the minimum constitutionally required standard?

The Supreme Court's prior precedent has left open the issue of the states' flexibility in defining pro se competency standards, and lower courts have reached different conclusions. The Court recognized the right to self-representation in *Faretta v. California*, 422 U.S. 806 (1975), but did not provide detailed guidelines to states regarding the enforcement of this newly recognized right. In *Godinez v. Moran*, the Court did suggest in dicta that states have flexibility to ratchet the competency standard upward, but the Court offered no discussion on that point, and the parameters for how much a state may "elaborate" remain unclear. 509 U.S. 389, 402 (1993). Additionally, the guidelines for applying *Faretta's* self-representation right are not intuitive, given the conceptual differences between the right to representation and the right to self-representation.

The question of what competency test a state may impose before permitting a defendant's self-representation is

of fundamental legal and practical significance. The question is recurring, because defendants with mental illnesses will continue to seek to proceed pro se, and the issue is of national significance, because every state court is charged with determining defendant competency and ensuring a fair trial for each defendant. The level of state discretion in fixing pro se competency standards affects the states' ability to control their own courtrooms, which in turn ensures the dignity of the criminal justice system, the rights of the defendant, and the public perception of justice. Eliminating state discretion in this area disrupts all of these goals. It also disrupts the finality of state court judgments, because defendants who received fair trials with competent counsel may appeal on the ground that the state, wisely, refused to permit a pro se defense.

Accordingly, the Court should accept review and resolve this fundamental issue.

REASONS FOR GRANTING THE WRIT

The Court should grant Indiana's petition for certiorari review. The issue presented has been left unresolved by the Court's prior precedent, resulting in dissonant treatment among lower courts. Also, the issue is critically important, implicating the very integrity of the judicial system and the finality of state court judgments.

A. The Court has left the issue open in the past, and lower courts are in conflict.

1. The Court's precedent does not define the scope of a state's discretion to impose heightened competency standards.

Dusky v. United States sets forth the competency standard necessary for a defendant to stand trial, requiring only that a defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual

understanding of the proceedings against him." 362 U.S. 402, 402 (1960). In *Godinez v. Moran*, the Court considered what competency standard applies to defendants waiving the right to counsel and concluded that "while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements." 509 U.S. 389, 402 (1993). Beyond its one sentence on the subject, the Court in *Godinez* did not offer any further explanation on a state's freedom to depart from *Dusky*.

The Court did not, for example, discuss how far a state might "elaborate" on the competency standard without running afoul of the defendant's right to self-representation, or whether the state could increase the threshold competency for pro se defense without also increasing the threshold competency for standing trial, or whether the state would be free to impose higher competency standards only in certain circumstances, such as when presented with indications of a defendant's mental illness or impairment. *Godinez* thus clarifies only the constitutional floor for a state to permit waiver of counsel: States need only examine a defendant's "competence to *waive the right*, not the competence to represent himself." See 509 U.S. at 399.

But while a state *need* not ask whether a defendant is competent to perform as counsel, a state may nonetheless *wish* to frame its inquiry this way, particularly when a criminal defendant seeking to proceed pro se has a history of mental illness or other impairment. As the Court has recognized, the right to self-representation can sometimes function as a sword as much as a shield by impairing the ability of pro se defendants to raise other constitutional defenses, *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 157 n.4 (2000), and states thus justifiably may take steps to help mentally impaired defendants avoid this danger. Indeed, a state might conclude that "a defendant who is utterly incapable of conducting his

own defense cannot be considered 'competent' to make such a decision, any more than a person who chooses to leap out of a window in the belief that he can fly can be considered 'competent' to make such a choice." See *Godinez*, 509 U.S. at 416 (Blackmun, J., joined by Stevens, J., dissenting). Thus, while establishing the constitutional floor, *Godinez* leaves wide open the question of what constitutional ceiling applies to a state's freedom to impose its own more stringent competency standard.

Furthermore, *Godinez* did not address other systemic problems that arise from a pro se defense, such as inefficiency, lack of decorum, or public perceptions of unfairness. As such, *Godinez* sheds no light upon the states' ability to raise the competency standards to address these more institutional concerns.

Nor does any of the Court's other precedent clarify the constitutionally permissible ceiling on state definitions of pro se competency. The case establishing the right to self-representation, *Faretta v. California*, 422 U.S. 806 (1975), itself does not foreclose the possibility that states may conduct heightened competency inquiries. While *Faretta* makes clear that "technical legal knowledge" is "not relevant" to whether a defendant is competent to proceed pro se, the Court said nothing regarding the relevance of a defendant's objective cognitive limitations, such as mental retardation or mental illness. *Id.* at 836; see also Todd A. Pickles, Note, *People v. Welch: A Missed Opportunity to Establish a Rational Rule of Competency to Waive the Assistance of Counsel*, 34 U.S.F. L. Rev. 603, 607 (2000) (describing *Faretta* as "silent as to the test for competency to choose self-representation").

Nor did *Faretta* present an appropriate opportunity for the Court to consider the proper limits on a severely mentally ill person's right to self-representation; indeed, the colloquy recounted in the Court's opinion indicates that Faretta's

answers to the trial judge's questions were responsive, coherent, and decorous. See *Faretta*, 422 U.S. at 808 n.3. The record in *Faretta* stands in stark contrast to the record in the present case, where the defendant was diagnosed schizophrenic and twice found incompetent to stand trial, see App. 2a–3a, and submitted nonsensical motions resembling random-word-generated spam to the trial court, see App. 42a–45a. Asking whether Edwards had sufficient presence of mind to launch his own defense is a far cry from asking whether a defendant has sufficient legal training.

Indeed, the Court has already signaled that clarifying the scope of the *Faretta* right is of paramount importance. Since *Faretta,* the Court has answered several questions regarding the right to self-representation. Besides clarifying the constitutionally required competency standard in *Godinez*, the Court has determined the absence of a right to self-representation on appeal, *Martinez*, 528 U.S. at 154, and has affirmed a state trial court's discretion to allow limited participation by standby counsel that was unsolicited by the pro se defendant, *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984). And the Court has acknowledged that *Faretta* has left open other questions that have no clear answer and on which circuits have split, such as whether the right to self-representation entails a right to law library access. See *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005). Now, the particular question triggered by *Godinez's* dicta—the extent of a state's discretion to define competency—calls out for the Court's attention and resolution.

Because the Court's prior precedent leaves this important question unanswered, certiorari review is warranted. Whatever its precise scope, it is clear that "the right to self-representation is not absolute." *Martinez*, 528 U.S. at 161. "[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Id.* at 162. Indeed, the entire judicial system, federal and state, has an

interest in fostering ordered and fair legal proceedings. The Amici States here ask the Court to acknowledge their authority to impose a heightened self-representation competency standard to ensure that mentally ill and mentally impaired defendants receive fair trials.

2. Conflicts exist among both state supreme courts and federal circuit courts.

The question is ripe for the Court's review. As the petition for certiorari sets forth in greater detail, the lower federal and state courts have inconsistently interpreted *Godinez*'s dicta.

The decision below, for example, conflicts squarely with the Supreme Court of Wisconsin's reading of *Godinez* as affirming the state's authority to set a higher competency standard for self-representation than for standing trial. Wisconsin prevents a defendant who falls short of that heightened standard from proceeding pro se even if he has knowingly waived counsel. See *State v. Klessig*, 564 N.W.2d 716, 722–24 (Wis. 1997). Wisconsin trial judges look to factors that may affect a defendant's actual ability to defend himself, see *id.* at 724, as opposed to merely the defendant's "competence to *choose* self-representation," see *Godinez*, 509 U.S. at 399–400. The factors Wisconsin courts consider include the defendant's literacy and fluency in English, as well as physical or psychological disabilities. See *Klessig*, 564 N.W.2d at 724. In the present case, the trial court employed a similar definition of competency and looked to similar factors, asking whether Edwards was capable of "conducting a defense," and taking account of his schizophrenia and "rambling writings." But the Indiana Supreme Court found the trial court's formulation of competency and its consideration of such factors to be disallowed by *Faretta* and *Godinez*. App. 9a–14a. See also Pet. at 12–14, 16 (surveying other state cases); compare also *State v. Day*, 661 A.2d 539, 547 (Conn. 1995) (noting

Connecticut Supreme Court's prior holding that waiver standards higher than the constitutional minimum infringe on the defendant's right to self-representation) with *State v. Hartford*, 636 P.2d 1204, 1206 (Ariz. 1981) ("The standard of competence to waive the right to counsel is higher than that required to stand trial.").

Federal circuit courts are in similar tension. The Seventh Circuit reads *Godinez* to allow heightened competency tests for counsel waiver. See *Brooks v. McCaughtry*, 380 F.3d 1009 (7th Cir. 2004). The Ninth Circuit, in contrast, has opined that *Godinez* mandates a single competency test, and therefore a finding of competence to waive counsel necessarily entails competence for all other purposes. See *United States v. Hernandez*, 203 F.3d 614, 620 n.8 (9th Cir. 2000). See also Pet. at 13, 15–16 (surveying other federal cases).

The Court should grant certiorari review to resolve the confusion in the lower courts.

B. Whether states have the freedom to enhance the competency standard required for defendants requesting to proceed pro se is of great importance.

1. The issue confronts a frequently recurring problem of national scope.

The question of the constitutional limits on states' control over competency standards is necessarily a question that affects every state. Moreover, the question of how to treat pro se defendants, and, in particular, mentally ill pro se defendants, arises with some frequency. The Court should take up the issue to resolve this question that will continue to resurface across the country.

The number of pro se criminal litigants has increased in the past years. "Once mostly the practice of political dissidents or lawyer haters, self-representation in court has gone mainstream." Laura Parker & Gary Fields, *Do-It-*

Yourself Law Hits Courts, USA Today, Jan. 22, 1999, at 3A; accord Marie Higgins Williams, Comment, *The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. Colo. L. Rev. 789, 815 (2000). Although self-representation is more common in the civil context, recent years have seen a rise in pro se criminal defendants as well. See Sarah Livingston Allen, Note, *Faretta: Self-Representation, or Legal-Misrepresentation?*, 90 Iowa L. Rev. 1553, 1572 n.122 (2005). In one study of pro se defendants that analyzed the Federal Court Database, State Court Database, and Federal Docketing Database, an estimated .3 % to .5 % of felony defendants choose self-representation. See Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. Rev. 423, 447 (2007).

Criminal defendants seeking to proceed pro se will often suffer from mental illness. To be sure, some pro se defendants are simply eccentric. See *id.* at 455, 473 (citing reasons people choose to proceed pro se, such as to use the trial to make a political point). But the case law is replete with examples of defendants with serious mental illness requesting permission to represent themselves. See, e.g., *Godinez v. Moran*, 509 U.S. 389, 409–10 (Blackmun, J., joined by Stevens, J., dissenting) (noting psychiatric evaluation of defendant as severely depressed and defendant's own affirmation that he was on psychiatric medication); *United States v. Frazier-El*, 204 F.3d 553, 556–57 (4th Cir. 2000) (describing paranoid schizophrenia of defendant seeking to dismiss counsel); *People v. Lego*, 660 N.E.2d 971, 979 (Ill. 1995). And the National Mental Health Association estimates that up to 10 % of the more than 3500 death row inmates nationwide suffer from mental illness. See Howard Witt, *Inmate Granted Stay*, Chi. Trib., Feb. 5, 2004, at 16.

The frequency with which criminal defendants pursue their own defenses, and the recent evidence that truly mentally impaired defendants are blundering through their own trials unaided, should prompt the Court to re-examine and to clarify the practical limits that constitutionally may be imposed upon the right recognized in *Faretta*. *Cf. Martinez*, 528 U.S. at 164 (Breyer, J., concurring) (noting the need for "empirical research . . . [to] help determine whether, in general, the right to represent oneself furthers, or inhibits, the Constitution's basic guarantee of fairness.").

2. The issue directly affects the integrity of the judicial system.

To protect the integrity of the criminal justice system, the states must have flexibility to shape competency standards that respond to the very real practical concerns that arise in many pro se defendants' trials. "[D]efendants who choose to represent themselves may be inept to do so, may intend only to delay their trial, or may make a mockery of the legal system." Williams, *supra*, at 792. Permitting mentally ill defendants to launch their own defenses threatens the rights of defendants, the efficiency and decorum of the courtroom, the impartiality of the judge and jury, and the public perception of fairness.

Defining the self-representation competency standard not only affects the right to self-representation, but also reaches other rights of equal importance. When a petitioner invokes his constitutional right to self-representation, he necessarily waives his constitutional right to counsel. See *King v. Bobby*, 433 F.3d 483, 490 (6th Cir. 2006). But the right to counsel is considered of paramount importance because "it affects [the defendant's] ability to assert any other rights he may have." *Fields v. Murray*, 49 F.3d 1024, 1028 (4th Cir. 1995) (citing *Penson v. Ohio*, 488 U.S. 75, 84 (1988)). Indeed, the Court has recognized that the "right" to self-representation can sometimes function as a sword rather

than a shield, when cited as a "predicate for upholding the waiver of an[other] important right." See *Martinez*, 528 U.S. at 157 & n.4. If the right to self-representation is defined too robustly, it threatens the meaningful exercise of the right to counsel, to a fair trial, to cross-examine witnesses, and to remain silent, see *Taylor v. Hopper*, 596 F.2d 1284, 1291 (5th Cir. 1979), and general concerns regarding substantive and procedural due process arise, see *Lagway v. Dallman*, 806 F. Supp. 1322 (N.D. Ohio 1992).

In light of the pitfalls that await a pro se defendant, the skills needed to launch a meaningful pro se defense are far greater than the skills needed to communicate meaningfully with counsel. Just because a defendant can communicate his story to a trained lawyer with whom he enjoys a privilege of confidentiality does not mean the defendant can communicate with a judge or jury. And stepping into the shoes of his counsel requires tactical decision-making that may be beyond the defendant's mental capacity. A defendant may be able to explain to counsel his perception of events, but may be incapable of identifying or raising constitutional objections or understanding how to best further his legal positions. In short, "[c]ompetency for one purpose does not necessarily translate to competency for another purpose." *Godinez*, 509 U.S. at 413 (Blackmun, J., joined by Stevens, J., dissenting).

Because of these reasons, states may wish to ensure that pro se defendants possess not merely the competence to interact with an attorney, but rather the minimal competence to present their own coherent defense. The ordinary test for competence, asking whether a defendant is capable of consulting with counsel to assist in preparing his defense, see *Dusky*, 362 U.S. at 402, is an imperfect tool for testing the competence of one who plans to proceed *without* counsel. As Justice Blackmun noted, "[t]he reliability or even relevance of such a finding vanishes when its basic premise—that counsel will be present—ceases to exist." See *Godinez*, 509

U.S. at 413 (Blackmun, J., joined by Stevens, J., dissenting). Accordingly, although the *Dusky* test may be all that the constitution requires, see *Godinez*, 509 U.S. at 402, a state may reasonably conclude that prudence requires more.

Indeed, courts and scholars alike have expressed concern over the lack of protection for mentally ill defendants who elect to proceed pro se. "Some critics argue that the right to proceed pro se at trial in certain cases is akin to allowing the defendant to waive his right to a fair trial." *Martinez*, 528 U.S. at 161 n.9 (citing concurring opinion in *United States v. Farhad*, 190 F.3d 1097, 1106–07 (9th Cir. 1999)). One author has suggested that the "misguided unitary standard of competency . . . ignores the reality of criminal defendants with deeply impaired mental capabilities." See Pickles, supra, at 631. Another has concluded that "[f]or a mentally impaired defendant who seeks to act as his own attorney, . . . the current competency evaluation system is inadequate to protect his rights." Jennifer W. Corinis, Note, *A Reasoned Standard for Competency to Waive Counsel after* Godinez v. Moran, 80 B.U. L. Rev. 265, 267 (2000).

Moreover, a state's ability to ensure the fairness and orderliness of criminal trials benefits not only the defendant himself. Rather, by ensuring pro se defendants have at least a minimal capacity to present their own defense, state courts preserve integrity within the courtroom and the impartiality of the judge and jury, and thus serve the interests of all participants in the criminal justice system, including the prosecutor, judge, jury, victim's family, and public at large.

A judge faced with a mentally impaired pro se defendant may feel obliged to walk a defendant through the presentation of his case in order to prevent a trial's progress from derailing entirely. See *Taylor v. Hopper*, 596 F.2d 1284, 1291–92 (5th Cir. 1979) (stating that "the trial court announced in Taylor's presence that it would relax the usual rules and would give Taylor as much leeway 'as I can' and

would probably allow him to violate some rules in instances which would not be permitted if he were represented by counsel"). A judge may even feel obliged to call and question witnesses herself. See *McKaskle*, 465 U.S. at 177 n.7; cf. *Wheat v. United States*, 486 U.S. 153, 160 (1988) (stating trial courts possess responsibility to ensure fairness within trials).

While such involvement may ensure a minimal degree of efficiency and order to an otherwise chaotic courtroom, a judge's active participation in the development of a pro se defendant's case compromises her role as impartial jurist—a linchpin in our adversary system. As one commentator has explained:

> This impartiality is important for several reasons. It is important that the jury see the impartial nature of justice, in which they are being asked to participate. It is important that the judge avoid the conflicts of interest that may arise if he is supposed to make decisions neutrally while simultaneously informing the defendant of the law. And finally, it is important that the defendant and the prosecuting attorney both have an impartial tribunal before which they can present their cases.

Williams, *supra*, at 806. By bending procedural rules to allow the defendant to present his case, the judge runs the risk of offending other rights or privileges afforded to both the prosecution and the defense, or even giving the jury the impression that she is in favor of the defense.

A jury's impartiality may also often be compromised by the prejudicial effect of a mentally ill defendant's incoherent defense. A jury may easily become confused by or even biased against a pro se defendant attempting to convey his defense. For example, in a Texas murder case, *State v. Panetti*, the jurors became skeptical and fearful of the

mentally ill defendant, who paraded around the courtroom wearing an old-style Western purple cowboy costume and flipped coins to make decisions. See Jessica McBride, *How Can an Insane Man Defend Himself?*, Milwaukee J. Sentinel, Feb. 15, 2004, at J1. Thus, in such cases, although mental illness is typically considered a mitigating factor, it may become an aggravating factor because the jury views the mentally incompetent defendant as dangerous. *Id.* Even when a mentally ill defendant is not threatening, his defense may be compromised when he proceeds pro se. The jurors may think that the defendant is "putting on a show" instead of actually partaking in a serious legal proceeding. See Ralph Blumenthal, *Insanity Issue Lingers as Texas Execution Is Set*, N.Y. Times, Feb. 4, 2004, at A12. Thus, not only can jurors become confused regarding the actual legal arguments presented by a pro se defendant who acts in an incoherent and extremely bizarre manner, but they can also lose sight of the seriousness of the proceedings. Alternatively, the jury may become biased in the other direction: The prospect of "try[ing], convict[ing], and punish[ing] one so helpless to defend himself," see *Godinez*, 509 U.S. at 417 (Blackmun, J., joined by Stevens, J., dissenting), may play upon the jurors' sympathies to such a degree that they become inclined to acquit without regard for the real question of guilt. In either scenario, the defendant's performance becomes a form of improper extraneous evidence influencing the jury's decision, and a fair verdict is compromised.

Finally, "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988). Courts have noted the unavoidable problems with trial efficiency and respect for the courtroom when defendants decide to represent themselves. One district court, in holding that it is improper to deny a defendant the right of self-representation solely to ensure an orderly and

efficient trial, observed that "a measure of unorthodoxy, confusion and delay is likely, perhaps inevitable, in pro se cases." *United States v. Dougherty*, 473 F.2d 1113, 1124–26 (D.C. Cir. 1972). But when a pro se defendant suffers from a serious mental illness, mere unorthodoxy and confusion can quickly transform into chaos. Allowing states to screen out truly mentally unstable defendants from proceeding pro se permits states to maintain dignity in their courts of law.

When a defendant with a severe mental illness is permitted to proceed pro se, instead of the public viewing the allowance as a strengthened affirmation of the defendant's right to self-representation, people may perceive the trial as an abomination of the defendant's rights, most offensively of a citizen's right to a fair trial. Oftentimes national media attention focuses on the most egregious cases of the mentally ill representing themselves, shattering the public's confidence in its own justice system. See Witt, *supra*, at 16. For example, a few years ago, the press quoted Dr. F.E. Seale, a psychiatrist who treated a schizophrenic, bipolar patient and then later observed part of his patient's pro se defense, as asking, "[H]ow in the world can our legal system allow an insane man to defend himself?" See *id.* In the interest of maintaining the appearance of a fair trial, states must be free to exercise their discretion to raise the competency test for pro se criminal defendants.

3. The issue affects states' important interest in protecting the finality of their judgments.

States also have a strong interest in the finality of their judgments, and this interest is threatened in the absence of the Court recognizing a state's clear right to impose its own competency standard.

In many cases, a defendant succeeds in persuading a trial court to allow him to proceed without counsel against his better interests, only to challenge his conviction on appeal

on the basis of deprivation of counsel. See, e.g., *United States v. Ellerbe*, 372 F.3d 462, 466 (D.C. Cir. 2004); *United States v. Mitchell*, 788 F.2d 1232, 1234–35 (7th Cir. 1986); *Dunn v. Johnson,* 162 F.3d 302, 307–08 (5th Cir. 1998); *State v. Jordan*, 804 N.E.2d 1, 6–9 (Ohio 2004). Sometimes the defendant meets with success in obtaining a reversal. See, e.g., *Schafer v. Bowersox*, 329 F.3d 637, 650–51 (8th Cir. 2003); *Lego*, 660 N.E.2d at 979.

To avoid such a result, and to preserve the finality of its judgments, a state court might reasonably seek to err on the side of safeguarding a defendant's right to counsel. But when states are given no flexibility to impose a higher standard than the *Godinez* baseline, convictions become vulnerable to attack from the other direction: Mentally ill defendants, such as the Respondent, might successfully overturn their convictions upon a state trial court's *refusal* to allow waiver of the defendant's fundamental right to counsel.

A trial judge ruling on a defendant's request for self-representation thus faces a "peculiar problem." *Fields*, 49 F.3d at 1028. A judge evaluating a defendant's request to proceed pro se must "'traverse . . . a thin line' between improperly allowing the defendant to proceed pro se, thereby violating his right to counsel, and improperly having the defendant proceed with counsel, thereby violating his right to self-representation." *Id.* at 1029 (citing *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990)). The Tenth Circuit has noted the "'cat and mouse' game" played by the defendant who can appeal under his right to counsel if his request for self-representation is granted at the trial, and can appeal under his right to self-representation if his request is denied. *United States v. Treff*, 924 F.2d 975, 979 (10th Cir. 1991).

Of course, the tension between a defendant's right to counsel and a defendant's right to self-representation will be present in any case. But when a pro se defendant suffers from

a serious mental impairment, the delicate balance becomes even more difficult for a judge to strike. And a mentally impaired pro se defendant, in electing to proceed pro se, is far more likely to unwittingly sabotage her other procedural rights as well. The states legitimately protect the finality of their judgments when they err on the side of ensuring defendants receive proper assistance of counsel. The Court should permit states this breathing room to protect their defendants' rights.

CONCLUSION

For all of the above reasons, the Court should grant Indiana's petition and reverse the Indiana Supreme Court's decision.

Respectfully submitted,

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