IN THE SUPREME COURT OF THE UNITED STATES

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INDIANA, :

Petitioner :

v. : No. 07-208

AHMAD EDWARDS. :

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Washington, D.C.

Wednesday, March 26, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

THOMAS M. FISHER, ESQ., Solicitor General, Indianapolis, Ind.; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

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

C O N T E N T S

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;

no?

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

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

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

a mockery also are strong.

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

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

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

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

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

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

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

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

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

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

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

MR. FISHER: Oh, the test.

JUSTICE SCALIA: Yes, what's the test?

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

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

(Laughter.)

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: So your standard of

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

MR. FISHER: No.

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

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

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

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

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

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

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

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

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

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

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

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

think raises substantial questions as to Dusky competency as well.

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Abuse of discretion?

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

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

MR. FISHER: Yes.

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

MR. FISHER: I agree with that.

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

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

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

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

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

JUSTICE KENNEDY: But in either case,

there's a farce.

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Dreeben.

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

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

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

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

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

We think the answer is that a State or the

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

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

I mean --

MR. DREEBEN: Well, Justice Scalia --

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

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

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

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

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

MR. DREEBEN: Well, I think --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Give it a try. The person wants to

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

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

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

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

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

started?

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Dreeben.

MR. DREEBEN: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Stancil.

ORAL ARGUMENT OF MARK T. STANCIL

ON BEHALF OF THE RESPONDENT

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

The expressed premise of the Sixth Amendment

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

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

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

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

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

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

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

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

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

certain right.

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

The --

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Yes.

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

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

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

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

MR. STANCIL: Correct.

CHIEF JUSTICE ROBERTS: Well then, why don't

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

MR. STANCIL: Because --

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

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

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

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

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

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

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

about decision-making.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Well, but you're

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

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

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

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

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

MR. STANCIL: And that --

JUSTICE KENNEDY: They don't communicate.

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

(Laughter.)

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

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

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

And my second thought is, because I'm not

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

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

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

(Laughter.)

MR. STANCIL: Well --

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

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

JUSTICE SCALIA: I didn't think so.

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

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

guess the question is of course there are.

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

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

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

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

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

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

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

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

this defendant.

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

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

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

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

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

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

MR. STANCIL: Yes.

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

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

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

JUSTICE SOUTER: What difference does it make?

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

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

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

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

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

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

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

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

MR. STANCIL: Yes, Your Honor.

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

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

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

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

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

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

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

MR. STANCIL: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Right.

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

JUSTICE SCALIA: Your position is it has to

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

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

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

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

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

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

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

JUSTICE SOUTER: So to the disruptive point?

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

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

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

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

(Laughter.)

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

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

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

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

Should he have been held incompetent to

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

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

JUSTICE SOUTER: He should have been found incompetent.

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

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

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

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

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

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

asked how you admit a videotape into evidence.

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

(Laughter.)

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Finish your thought.

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Stancil.

Mr. Fisher, you have four minutes remaining.

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

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

REBUTTAL ARGUMENT OF THOMAS M. FISHER

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

JUSTICE SCALIA: Maybe he writes badly.

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

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

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

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

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

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

How fair does that seem to the public?

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

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

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

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

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

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