No. 07-208

IN THE
Supreme Court of the United States

STATE OF INDIANA,
Petitioner,
v.
AHMAD EDWARDS,
Respondent.

On Writ of Certiorari
to the Supreme Court of Indiana

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 12,000 attorneys and 28,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practices, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL seeks to promote the proper and constitutional administration of justice, and to that end concerns itself with the protection of individual rights and the improvement of the criminal law, practices, and procedures. NACDL filed an *amicus curiae* brief in *Godinez* v. *Moran*, 509 U.S. 389 (1993), and submits this brief in the hope that it may aid the Court in its consideration of the constitutional mandate that all criminal defendants receive a fair trial.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This case implicates the twin rights of a criminal defendant to a fair trial and to self-representation. The Court's precedents concerning these two rights have developed such that they may conflict when a defendant who is incapable by reason of mental infirmity from representing himself but sufficiently capable of assisting counsel and therefore "competent" wishes to waive counsel and proceed *pro se*. In *Godinez* v. *Moran*, 509 U.S. 389 (1993), a case involving not a trial but a plea of guilty, this Court held that such self-representation is acceptable as a constitutional matter so long as the waiver of counsel was knowing, intelligent, and voluntary. Thus, under *Godinez* a mentally-infirm criminal defendant may be permitted to waive the right to a fair criminal proceeding.

The decision in *Godinez* hinged on a discrepancy between the common law and modern tests for competency. *Godinez* noted both that self-representation was the norm at common law and that requiring competency as a prerequisite to trial dates back at least to Blackstone. The lesson the Court drew from these points, however—that any competent defendant must be permitted to represent himself—ignores a *Gideon*-era shift in the competency test. Historically, courts had focused on defendant's capacity for self-representation, only considering ability to assist counsel if, in fact, counsel was present. But under the modern competency standard, first articulated in *Dusky* v. *United States*, 362 U.S. 402 (1960), the presence of counsel is assumed and the competency standard inquires into defendant's ability to assist counsel.

Under the *Dusky* standard, some self-represented individuals could be deemed competent—because they can assist counsel—even though they may not have been found competent to represent themselves under the common law standard. This class of individuals is left vulnerable by a legal framework which weighs the right to self-representation over the right to a fair trial. Ideally, in the exercise of prosecutorial discretion, States would not bring such defendants to trial. Prosecutors, however, can be expected to face pressure to push forward with criminal proceedings in many such cases. Thus, NACDL believes that resolution of this issue by the Court is necessary.

NACDL proposes that the Court adopt one of two approaches. First, while *Godinez* rejected establishing separate competency standards for represented and *pro se* defendants and concluded that one competency standard should apply to the entire criminal proceeding, this Court could modify the *Dusky* standard to eliminate the presumption that counsel will be present, returning the competency standard to its historic, defendant-centered formulation. Under that standard, the presence of counsel is not assumed: if an unrepresented defendant is not able to present a reasoned defense due to his mental infirmity then he is found not competent. *If*, however, counsel *is* present, application of the standard will take that fact into consideration in determining whether the defendant, as represented, can present a reasoned defense.

Alternatively, if the Court is not inclined to return to the common law competency standard, it should at the very least permit States to appoint an

attorney to represent mentally-infirm defendants whose competency is dependent upon the assistance of counsel. The Sixth Amendment right of self-representation is not absolute, and protecting the right to a fair trial of defendants who would be deemed incompetent under the common law standard is an appropriate reason for recognizing an exception.

ARGUMENT

I. The Court Should Return the Competency Standard to Its Traditional Formulation

1. This case concerns the troubling intersection of two Constitutional rights: the due process right of criminal defendants to be tried only if mentally competent and the Sixth Amendment right of criminal defendants to represent themselves. See *Cooper* v. *Oklahoma*, 517 U.S. 348, 354 (1996) (the Court has "repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process") (internal quotation marks and citation omitted); *Faretta* v. *California*, 422 U.S. 806 (1975) (recognizing a Sixth Amendment right to self-representation).

The Court has articulated the standard for competency to stand trial as "whether the defendant has 'sufficient present ability *to consult with his lawyer* with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" *Godinez* v. *Moran*, 509 U.S. 389, 396 (1993) (quoting *Dusky* v. *United States*, 362 U.S. 402 (1960)) (emphasis added). At the same time, however, the Court has stated that "a criminal defendant's ability

to represent himself has no bearing upon his competence to *choose* self-representation," all that matters is that he makes that choice "competently and intelligently." *Id*. at 400 (internal quotation marks and citation omitted) (emphasis in original). These formulations of the competency requirement and the right to waive counsel, both of them intended to protect criminal defendants' interests, in fact deny due process to an identifiable subset of defendants: self-represented individuals such as Respondent who have the ability to "consult with counsel" and thus are competent to stand trial, yet by reason of mental infirmity are not themselves capable of presenting a reasoned defense. See Pet. App. at 14a (Supreme Court of Indiana holding "because Edwards was found competent to stand trial he had a constitutional right to proceed pro se and it was reversible error to deny him that right on the ground that he was incapable of presenting his defense").

2. The problem presented by defendants such as Respondent came before the Court fifteen years ago in *Godinez*. There, in response to an effort by an arguably mentally-infirm defendant to waive counsel and plead guilty to a capital offense, the Ninth Circuit held that competency to waive constitutional rights "'requires a higher level of mental functioning than that required to stand trial.'" *Godinez*, 509 U.S. at 394 (quoting *Moran* v. *Godinez*, 972 F.2d 263, 266 (9th Cir. 1992)). This Court reversed, explaining that "[r]equiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." *Id.* at 402. The Court therefore "reject[ed] the notion that competence to plead guilty or to waive the right to counsel must be

measured by a standard that is higher than (or even different from) the *Dusky* standard." *Id*. at 398.

In reaching this conclusion, both the Court and a concurring opinion noted that, at common law, "competent" defendants routinely represented themselves at all stages of criminal proceedings, including trial. The Court stated:

> We note also that the prohibition against the trial of incompetent defendants dates back at least to the time of Blackstone. * * * It would therefore be difficult to say that a [competency] standard which was designed to determine whether a defendant was capable of defending himself is inadequate when he chooses to conduct his own defense.

Godinez, 509 U.S. at 400, n.11 (internal quotation marks and citation omitted). Likewise, the concurrence reasoned:

> The Due Process Clause does not mandate different standards of competency at various stages of or for different decisions made during the criminal proceedings. That was never the rule at common law * * * . A number of 19th-century American cases also referred to insanity in a manner that suggested there was a single standard by which competency was to be assessed throughout legal proceedings.

Id. at 404–405 (Kennedy and Scalia, JJ., concurring).

This reliance on the historical fact of competent individuals representing themselves during trial at common law was misplaced for the simple reason that the competency standard at common law was *not* the same competency standard later adopted in

Dusky. The difference between the common law and *Dusky* standards explains why individuals, including arguably Respondent, may fall through the cracks.

3. Unlike the *Dusky* standard, which inquires into defendant's "ability to consult with his lawyer" in order to "assist counsel," *Godinez*, 509 U.S. at 396, 402, the competency standard at common law focused entirely on defendant's capacity to present his *own* defense. It was long the rule at British common law that "if, after he has pleaded, [a] prisoner becomes mad, he shall not be tried; for how can he make his defence?" 4 Blackstone, Commentaries *24; see also 1 Hale, The History of the Pleas of the Crown *34–*35 (1736) (same). As explained by New York's high court:

> [T]he humanity of the law of England had prescribed that no man should be called upon to make his defense at a time when his mind was in such a situation that he appeared incapable of doing so; that however guilty he might be, the trial must be postponed to a time when, by collecting together his intellects, and having them entire, he should be able so to model his defense, if he had one, as to ward off the punishment of the law * * *.

Freeman v. *People*, 4 Denio 9, 27 (N.Y. Sup. Ct. 1847); see also *Youtsey* v. *United States*, 97 F. 937, 943 (6th Cir. 1899) (noting that the test at British common law was "whether the accused [could] make a rational defense") (citing 2 Bish. Cr. Proc. § 666; *Rex* v. *Frith*, 22 How. St. Tr. 307; *Reg.* v. *Berry*, 1 Q.B. Div. 447; *Rex* v. *Pritchard*, 7 Car. & P. 303). Thus, as recounted by this Court:

> Beginning with the earliest cases, the issue at a sanity or competency hearing has been "whether the prisoner has sufficient understanding to comprehend the nature of this trial, *so as to make a proper defence to the charge.*"

Cooper, 517 U.S. at 357 n.8 (quoting *King* v. *Pritchard*, 7 Car. & P. 303, 304, 173 Eng. Rep. 135 (1836)) (emphasis added).

Early American courts followed this British common law precedent, holding that a defendant may only be tried if he "is so far sane as to be competent in mind to *make his defense*, if he has one; for, unless his faculties are equal to that task, he is not in a fit condition to be put on his trial." *Freeman*, 4 Denio at 28 (emphasis added); see also American Bar Association Criminal Justice Mental Health Standards 161 (1989) ("The British common law rules preventing trial of mentally incompetent defendants were transposed virtually intact into early nineteenth-century United States jurisprudence"); Weihofen, Mental Disorder as a Criminal Defense 428-29, 431 & n.8 (1954) (collecting cases) ("It has long been the rule of the common law that a person cannot be required to plead to an indictment or be tried for a crime while he is so mentally disordered as to be incapable of making a rational defense").

The common law test for competency, allowing a defendant to be tried only if he is capable of presenting a rational defense, continued to be applied by courts well into the middle of the 20th century. See, *e.g., Moss* v. *Hunter*, 167 F.2d 683, 685 (10th Cir. 1948) (describing standard in habeas proceeding as "whether an accused has the mental

capacity to comprehend his own condition with reference to the accusation pending against him and *is capable of rationally conducting his defense*") (emphasis added); *Hunt* v. *State*, 27 So.2d 186, 191 (Ala. 1946) (describing standard as "whether the defendant is capable of understanding the proceedings and of making his defense [such that] he may have a full, fair and impartial trial"); *State ex rel. Townsend* v. *Bushong*, 65 N.E.2d 407, 408 (Ohio 1946) (describing the "well-settled common-law rule" as "whether the accused has sufficient soundness of mind to comprehend his position, to appreciate the charges against him and the proceedings thereon, and to enable him to make a proper and rational defense"); *State* v. *Seminary*, 115 So. 370, 372 (La. 1928) (describing standard as "whether the accused was sufficiently sane * * * during the course of the trial to understand the nature and object of the proceeding against him, to comprehend his own condition in reference thereto, and was capable of conducting his defense in a rational manner").

Indeed, as late as 1954 this Court acknowledged the ongoing vitality of the common law test for competency. In *Massey* v. *Moore*, 348 U.S. 105 (1954), the Court considered a defendant's claim that he was "insane and unable to defend himself" during his trial in Texas state court. *Id.* at 106–107. In granting the defendant's habeas petition, this Court explained that "evidence to support the finding that petitioner was competent to stand trial with a lawyer" was not necessarily "sufficient to sustain the conclusion that he was competent to stand trial without a lawyer." *Id.* at 108. Thus, the Court reaffirmed in *Massey* that competency requires the ability to represent oneself at trial.

4. The focus of the common law competency standard on defendant's ability to represent himself flowed naturally from the unavailability of counsel for most defendants at common law, when a right to counsel did not exist. See, *e.g.*, *Godinez*, 509 U.S. at 400 n.11; 4 Blackstone, Commentaries *349 (citing 2 Hawk. P.C. 400) (describing "a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial * * * unless some point of law shall arise proper to be debated"); *Betts* v. *Brady*, 316 U.S. 455, 471 (1942) ("[I]n the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right essential to trial."); *Faretta,* 422 U.S. at 850 (Blackmun, J., dissenting) (recognizing that "self-representation was common, if not required, in 18th century English and American prosecutions").

Although many defendants remained unrepresented during the first half of the 20th century, an increasing number of defendants were receiving assistance of counsel. But even in those cases the courts continued to describe the basic test for competency as the ability to present a rational defense. See, *e.g.*, *State* v. *Severns*, 336 P.2d 447, 452 (Kan. 1959) (in case involving represented defendant, describing standard as whether a defendant is capable of "comprehend[ing] his position, understand[ing] the nature and object of the proceedings against him and [conducting] his defense in a rational manner"); see also, *e.g., Jordan* v. *State*, 135 S.W. 327, 329 (Tenn. 1911); *Youtsey*, 97 F. at 943–44.

In *applying* this standard to represented defendants, however, courts began to consider

whether, as a factual matter, a defendant receiving the assistance of counsel might be able to "conduct his defense rationally" if he has "sufficient mental capacity to give advice to his counsel concerning his defense." *Jordan*, 135 S.W. at 328-29; see also *Severns*, 336 P.2d at 454 (concluding that represented defendant "was capable, with the assistance of his attorneys, to conduct his defense in a rational manner"); *Youtsey*, 97 F. at 946 (describing relevant consideration for a represented defendant as "whether the accused was in truth incapable of understanding the proceedings, and intelligently advising with his counsel as to his defense"). Nevertheless, the relevant *standard*—the *defendant's* ability to present a rational defense—remained the same.

5. Just six years after *Massey* applied the common law test for determining competency, see *supra* at 9, the Court issued a two paragraph, *per curiam* decision in *Dusky* that restated the test for competency based on an *assumption* that counsel would be present.

Dusky itself concerned only the scope of a recently-enacted federal statute governing competency in federal cases, 18 U.S.C. § 4244 (1949) (current version at 18 U.S.C. § 4241 (2006)). *Dusky*, 362 U.S. at 402. Under this statute, a defendant could not be tried in federal court if he was "unable to understand the proceedings against him or *properly to assist in his own defense*." 18 U.S.C. § 4244 (1949) (current version at 18 U.S.C. § 4241(a)) (emphasis added).

That Congress would focus the competency inquiry on defendant's ability to "assist" another in his defense—an important change from the common

law standard—is not surprising because, at the time the statutory language in question was enacted, all federal defendants had a Sixth Amendment right to counsel. See *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).[2] Congress likely assumed that criminal defendants would exercise this right to counsel in conditioning competency on one's ability to "*assist* properly in his defense," rather than on the common law test asking whether a defendant could "*make* a rational defense."

In any event, the Court in *Dusky* interpreted the statute to require federal courts to consider whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." 362 U.S. at 402. The Court found insufficient evidence in the record to support the lower court's finding of Mr. Dusky's competency under the statute, and hence it did not address whether the Constitution might require some greater showing. Moreover, because an attorney had "admirably represented [Mr. Dusky] in the trial court," *Dusky* v. *United States*, 271 F.2d 385, 387 (8th Cir. 1959), *rev'd*, 362 U.S. 402 (1960), the Court had no occasion to consider whether some different showing would be required—either under the statute or by the Constitution—for an unrepresented defendant. See *Brooks* v. *McCaughtry*, 380 F.3d 1009, 1012 (7th Cir. 2004) (Posner, J.) (recognizing that "[s]elf representation was not the issue in *Dusky*" and that the holding in *Dusky* was based

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[2] The right to counsel was extended to state court defendants in 1963 by *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

upon "an assumption that the defendant has a lawyer—that he is not trying to represent himself").

6. All told, an important underlying assumption of *Godinez*—that criminal defendants meeting the *Dusky* standard, with its focus on ability to assist counsel, would have been deemed competent to represent themselves at common law—appears to have been based on an invalid premise. As we have seen, the common law standard inquired into a defendant's ability to represent *himself* and examined his ability to assist counsel only in those cases where there was, in fact, counsel present. It is this variance between the common law and *Dusky* standards which has given rise to the problem confronting the Court in this case: an unrepresented defendant such as Respondent who arguably lacks the ability *himself* to present a defense at trial, yet who has been deemed competent under the *Dusky* standard.

Given the root of the problem in the *Dusky* standard's flawed assumption that counsel is present and defendant need only assist him, NACDL urges a return to the common law standard for determining competency. Under that standard, unrepresented defendants whose mental infirmity renders them unable to mount a defense simply will not be tried while, at the same time, represented defendants who are capable of mounting a defense through counsel (and may be eager to do so) will have their day in court.[3] Application of the common law standard will

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[3] Petitioner suggests casting the test for a defendant unable to represent himself as "whether the defendant cannot communicate coherently with the court or a jury." Petitioners Brief at 20. NACDL agrees than this could be one factor

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fully protect both the due process right to be tried only if competent and the Sixth Amendment right to choose whether or not to waive counsel. The *Dusky* standard's assumption that counsel is present and that defendant need only assist him, conversely, should be abandoned because it has been wholly undermined by *Faretta*'s recognition of the Sixth Amendment right to waive counsel.

Notably, the Court initially adopted this reasoning in a case decided just six years after *Dusky*, *Westbrook* v. *Arizona*, 384 U.S. 150 (1966). In that case, the defendant had been convicted after being found competent to proceed to trial with the assistance of counsel. After the competency hearing, the defendant waived counsel and proceeded to trial *pro se*. This Court ruled that, "[a]lthough petitioner received a hearing on the issue of his competence to stand trial," his conviction could not stand unless there was also an inquiry into his competence to "proceed, as he did, to conduct his own defense." *Id.* at 150. Thus, the Court recognized then that a defendant could only be found competent to proceed *pro se* where he is sufficiently able to "conduct his own defense." *Id.*[4]

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considered by the courts, but believes that courts more broadly should take into consideration any manifestation of a criminal defendant's mental infirmity which prevents him from presenting his own defense.

[4] Despite this clear formulation, the Court in *Godinez* distinguished *Westbrook* by suggesting that the "competence" referenced in *Westbrook* referred only to the question of whether defendant's waiver of counsel was "intelligent and voluntary." *Godinez*, 509 U.S. at 401-02. However, this reading of *Westbrook* ignores the plain language of the decision, which was focused specifically on the defendant's "competence to

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A return to the common law standard for determining competency also would be most consistent with the overarching approach to competency taken by the Court in *Godinez*. As an initial matter, and as discussed above, both the majority and the concurring opinions in *Godinez* relied upon an assumption that the modern approach to determining competency was consistent with the common-law approach. See *supra* at 6. It seems unlikely that the Court would have ruled as it did had it fully considered the differences between the common law and *Dusky* standards for competency—footnote 11 in the majority opinion, for example, would have been wholly out of place. See *supra* at 6.

Likewise, as the concurrence in *Godinez* explained, "ability to consult with [a] lawyer" is not the touchstone of the competency standard:

> Although the *Dusky* standard refers to "ability to consult with [a] lawyer," the crucial component of the inquiry is the defendant's possession of a "reasonable degree of rational understanding." In other words, the focus of the *Dusky* formulation is on a particular level of mental functioning, which the ability to consult counsel helps identify. The possibility that consultation will occur is not required for the standard to serve its purpose.

Godinez, 509 U.S. at 403–04 (Kennedy and Scalia, JJ., concurring) (quoting *Dusky*, 362 U.S. at 402). If the standard is properly understood as focusing on

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waive his constitutional right to the assistance of counsel *and* proceed, as he did, *to conduct his own defense*." *Westbrook*, 384 U.S. at 150 (emphases added).

defendant's "rational understanding," an issue as to which ability to consult with counsel is only one factor for consideration, the articulation of the standard in *Dusky* is misleading. Stating the standard as it was expressed at common law—whether the defendant is able to present a reasoned defense—would clarify for trial judges the proper focus of their inquiry.[5]

Finally, both the majority and concurring opinions stressed the undesirability of having separate competency standards applicable to specific stages of a criminal proceeding, such as pleading, trial, and so on. See *Godinez*, 509 U.S. at 398; *id*. at 404 (Kennedy and Scalia, JJ. concurring) ("The Due Process Clause does not mandate different standards of competency at various stages of or for different decisions made during the criminal proceedings."). Application of the common law standard for determining competency would avoid the necessity of multiple competency standards in a way the solution anticipated by the question presented—having two competency determinations in a given criminal proceeding, one for ability to be subjected to criminal

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[5] The concurrence went on to state: "If a defendant elects to stand trial and to take the foolish course of acting as his own counsel, the law does not for that reason require any added degree of competence." *Godinez*, 509 U.S. at 404 (Kennedy and Scalia, JJ., concurring). As a statement of the law, this can only be true if one assumes that application of the *Dusky* standard ensures that the mentally-infirm defendant possesses sufficient competency to represent himself at trial, such that the due process requirement of a fair trial is satisfied. As presently articulated, the *Dusky* standard provides no such assurance.

proceedings and another for ability to actually go to trial unassisted by counsel—does not.[6]

7. One might fear that returning to the common law standard would encourage mentally-infirm defendants to waive counsel in hopes that they would be found not competent to represent themselves, thereby stalling or even derailing criminal proceedings. Such a concern, however, should not long detain the Court.

First, a determination that a defendant is not competent is hardly the equivalent of a "get out of jail free" card. An individual found incompetent will nevertheless be detained for a "reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972); see also 18 U.S.C. § 4241(d)(2) (permitting detention for a reasonable period until either the defendant's mental condition is improved so trial may proceed or the charges are

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[6] In applying the common-law standard, to be sure, an additional competency hearing could be required if the defendant, for example, waived counsel after the initial competency determination had been made. This would not entail a different standard, however, simply application of the same standard—ability to present a reasoned defense—to a new set of facts—the defendant's change in status from represented to unrepresented. This is no different than the need for a new competency determination should a defendant's mental state change in the course of the criminal proceeding. See *Godinez*, 509 U.S. at 408 (Kennedy and Scalia, JJ., concurring) ("Trial courts have the obligation of conducting a hearing whenever there is sufficient doubt concerning a defendant's competence").

dropped); Mickelson, "Unspeakable Justice": The Oswaldo Martinez Case and the Failure of the Legal System To Adequately Provide for Incompetent Defendants, 48 Wm. & Mary L. Rev. 2075, 2089–92 & nn. 102–04 (2007) (surveying state law and finding that the competency and civil commitment laws of almost all states mirror federal law with only minor variations). If the accused is found to pose a danger to society, detention also can extend until a finding that the accused no longer poses a risk of harm. 18 U.S.C. § 4246(d); see, *e.g.*, *United States* v. *Sahhar*, 56 F.3d 1026, 1028–30 (9th Cir. 1995) (upholding indefinite detention of a mentally-infirm defendant who was found to pose a danger to society for a period of time that exceeded the maximum sentence for the crime with which he was charged). Indeed, even if a subsequent review finds no substantial probability of regaining the capacity to proceed to trial and no dangerousness, an accused still faces potentially longer-term civil confinement. See 18 U.S.C. § 4246; Mickelson, *supra*, at 2089–92 & nn. 102–104.

Second, and more importantly, whatever the number (which is likely to be quite small) of criminal defendants who would be found capable of assisting counsel but incapable of representing themselves, these defendants' due process rights to a fair trial are at stake. Accordingly, even if application of the common law standard does require States, in some instances, to satisfy themselves with pretrial and civil confinement rather than a criminal prosecution, governments have been accepting that trade-off since Blackstone. It is a small price to pay in order to avoid the spectacle of a trial against an individual

incapable by reason of mental-infirmity of defending himself.

II. Alternatively, the Court Should Require Counsel for Unrepresented Defendants Not Capable, by Reason of Mental Infirmity, of Presenting Their Own Defense

If the Court elects to retain the competency standard as articulated in *Dusky*, then NACDL would agree with Petitioner that States should be given the option of requiring counsel for those unrepresented defendants who are competent under the *Dusky* standard yet, due to their mental infirmity, are not capable of defending themselves. Indeed, NACDL believes that States (and the federal government) not only should be permitted to require counsel for such defendants, but that due process requires them to do so. In such circumstances, the due process right to a fair trial should trump the right to self-representation.

1. Whether a State should be permitted to require counsel for unrepresented defendants who, by reason of their mental infirmity, are not capable of mounting a defense without assistance of counsel, requires consideration and weighing of the due process right to a fair trial and the right to self-representation.[7]

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[7] One might think that a determination that a defendant's waiver of counsel was knowing and intelligent might also establish his competency to stand trial unassisted by counsel, but *Godinez* suggested otherwise in distinguishing the competency to stand trial determination from the knowing and intelligent determination: "[T]he competence that is required of a defendant seeking to waive his right to counsel is the

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This Court has "repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'" *Cooper*, 517 U.S. at 354 (quoting *Medina* v. *California*, 505 U.S. 437, 453 (1992)); see also *Pate* v. *Robinson*, 383 U.S. 375, 378, 385 (1966). As the Court stated in *Massey*,

> [n]o trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and *who by reason of his mental condition* stands helpless and alone before the court.

Massey, 348 U.S. at 108 (emphasis added). Or, as more recently stated:

> [I]t would be * * * a reproach to justice and our institutions, if a human being * * * were compelled to go to trial at a time when he is not sufficiently in possession of his mental faculties to enable him to make a rational and proper defense.

Cooper, 517 U.S. at 366 (quoting *United States* v. *Chisholm*, 149 F. 284, 288 (S.D. Ala. 1906)); see also *Riggins* v. *Nevada*, 504 U.S. 127, 139 (1992) (Kennedy, J., concurring) ("Competence to stand trial

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competence to *waive the right,* not the competence to represent himself." 509 U.S. at 399 (emphasis in original). That statement and one following soon thereafter—"a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self representation," *id.* at 400 (emphasis in original)—may contribute to confusion in this area, and are best understood as simply reaffirming the ruling in *Faretta* that the extent of a criminal defendant's "'technical legal knowledge,'" *id*. (quoting *Faretta*, 422 U.S. at 836), has no bearing on his competence to waive counsel.

is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial").

Given its fundamental nature, the right to be competent when tried has been accorded the utmost protection by this Court. "[T]he right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination." *Cooper*, 517 U.S. at 354 n.4 (citing *Pate*, 383 U.S. at 384). Moreover, a defendant likely would not be permitted to affirmatively waive his right to be tried while competent, even if he is able to do so knowingly and voluntarily. See *Riggins*, 504 U.S. at 140 (Kennedy, J., concurring in judgment).

2. While the due process right not to be tried while incompetent dates back to British common law and has been vigorously protected by the courts, the right to self-representation is far from absolute. This Court did not even recognize a constitutional right to self-representation until its 1975 decision in *Faretta*. Previously, the right to self-representation in federal courts had been recognized only by statute. See *Faretta*, 422 U.S. at 812–13. Moreover, even in *Faretta* the Court cautioned that the right to self-representation can be terminated if a defendant "deliberately engages in serious and obstructionist misconduct." *Id.* at 834 n.46 (citing *Illinois v. Allen*, 397 U.S. 337 (1970)). More recently, the Court also has stated that the right to self-representation is afforded only to those defendants who are "*able* and willing to abide by rules of procedure and courtroom protocol." *McKaskle* v. *Wiggins*, 465 U.S. 168, 173 (1984) (emphasis added). In other words, if a defendant fails to engage in the conduct necessary to represent himself at trial—either because he is

unwilling to do so, *or because he is unable*—counsel may be appointed over his objection.

3. Prior to *Godinez*, this Court had not hesitated to resolve conflicts between a defendant's Sixth Amendment representational rights and his right to a fair trial in favor of the latter. In *Wheat* v. *United States*, 486 U.S. 153 (1988), the Court was asked to overturn a conviction because the district court did not permit the defendant to waive a conflict of interest so that he could be represented by a lawyer who also represented his co-defendants in a drug conspiracy case. The Court weighed the defendant's Sixth Amendment right to counsel of his choice against the right to a fair trial and held that "a district court may override a defendant's waiver of his attorney's conflict of interest" whenever necessary to ensure the fairness of his trial. *Id.* at 158. The Court explained that the Sixth Amendment right to counsel is not absolute and that "[f]ederal 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." *Id.* at 160; see also *id*. at 166 (Marshall, J., dissenting on other grounds) ("When a defendant's selection of counsel, under the particular facts and circumstances of a case, gravely imperils the prospect of a fair trial, a trial court may justifiably refuse to accede to the choice").

The issue raised by this case is virtually identical to the issue in *Wheat*. Like the Sixth Amendment right to counsel of one's choice, "the right to self-representation is not absolute." *Martinez* v. *Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 161 (2000) (citing *Faretta*, 422 U.S. at 834 n.6,

835). As the Court explained in *Wheat*, the purpose of the Sixth Amendment right to counsel is "simply to ensure that criminal defendants *receive a fair trial*." 486 U.S. at 159 (quoting *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984) (emphasis added). Accordingly, just as *Wheat* held that the fundamental right to a fair trial outweighs the right to counsel of one's choice, this case requires that the right to a fair trial trump the already-qualified right to self-representation.

CONCLUSION

This Court should hold either that the due process right to a fair trial bars criminal proceedings against pro se criminal defendants presently incapable, by reason of mental infirmity, from presenting a defense themselves, or that States should be required to provide counsel for such defendants notwithstanding their waiver of counsel.

Respectfully submitted,

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