

No. 07-053

IN THE
United States Supreme Court

BEAUREGARD DUKE,

Petitioner,

v.

STATE OF SETONIA,

Respondent.

**On Writ Of Certiorari
To The Supreme Court of Setonia**

BRIEF OF THE RESPONDENT

March 13, 2008

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Representing the State of Setonia

QUESTIONS PRESENTED

1. Whether the Fourth Amendment to the United States Constitution mandates exclusion of evidence obtained pursuant to a probable cause arrest, but in violation of state statute.
2. Whether the Sixth Amendment to the United States Constitution allows States to adopt competency standards for self-representation stricter than those required to stand trial.

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The opinion of *Duke v. State of Setonia* is unreported. This decision may be found in the Record from pages 1-13.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Setonia was issued on January 3, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a), stating final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment of the Constitution of the United States, U.S. CONST. amend. IV, provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment of the Constitution of the United States, U.S. CONST. amend. VI, provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Setonia Code § 19.2-74 (2006) provides, in pertinent part:

A. 1. Whenever a person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city, or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor for which he may receive a jail sentence, except as otherwise

provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging any offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue his unlawful act, the officer may proceed according to the provisions of § 19.2-82.

Setonia Code § 46.2-301(C) (2006) provides, in pertinent part, "Driving while one's license is suspended is a Class 1 misdemeanor."

STATEMENT OF THE CASE

On December 10, 2005, Deputies Strate and Cletus stopped and arrested defendant Beuregard Duke for driving up Route 21 in Hazzard, Setonia on a suspended license in violation of Setonia Code § 46.2-301(C)¹. Duke and his hotel room were searched incident to his arrest². Although the search of the hotel room revealed no contraband, the search of his person revealed crack cocaine and a .45 caliber handgun. Duke was taken to the Hazzard Police Station and charged with driving with a suspended license, a Class 1 misdemeanor; possession of crack cocaine with intent to distribute; and possession of a firearm while possessing certain controlled substances, each Class 6 felonies. On December 11, 2005, Duke was arraigned before the Honorable Judge Dipasquale, who assigned Duke an attorney – Justin Talley – and set bail at \$10,000. Duke’s cousin posted bail and he was released on December 12, 2005.

However, Duke was again arrested on January 3, 2006, when investigation revealed the .45 caliber handgun found during his December 10 arrest was also used in an attempted murder in Hazzard. Duke’s January 3 arrest followed his identification in a photo lineup made by a witness to the attempted murder. Duke, with his attorney present, was arraigned and charged with attempted murder; bail was denied.

Duke, through his attorney, moved to suppress evidence of the crack cocaine and the firearm found on his person on both statutory and constitutional grounds, arguing the arrest, in failing to issue a summons as per Setonia Code, was illegal and any evidence seized pursuant to

¹ The deputies stopped Duke pursuant to a radio transmission made by Chief Deputy Rosco, who intended the deputies to stop a man he knew as “Slim” after hearing via police radio that “Slim” – recently released from prison and known by Chief Deputy Rosco to be driving on a suspended license – was driving a Dodge Charger up Route 21 in Hazzard, Setonia. R.A. at 2. Duke does not dispute the probable cause for his initial stop based on these facts. R.A. at 4, n. 13.

² Due to a miscommunication between the deputies, the search of Duke’s person occurred at the hotel, not on Route 21. R.A. at 3.

a statutorily invalid arrest is a violation of his Fourth Amendment rights. At the suppression hearing on April 3, 2006, the Honorable Judge Schoen denied Duke's motion, relying on *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) and finding the arrest violated neither the Fourth Amendment to the United States Constitution, nor the Setonia Constitution, nor Setonia law.

At the request of appointed counsel Talley, a competency hearing was held on October 16, 2006 before the Honorable Judge Foster, who concluded Duke was incompetent to stand trial³. In a second competency hearing held on April 2, 2007, Dr. Anthony testified that Duke had acknowledged his need for counsel in presenting his defense and that Duke suffered from grandiosity, an inability to stay focused, and schizophrenia. Dr. Anthony nevertheless determined, and Judge Foster agreed, that Duke was competent to stand trial.

Judge Foster denied Duke's April 9 motion to proceed *pro se*, however, determining that while he was competent to stand trial, he was not competent to defend himself in the manner required under the doctrines of fundamental fairness and due process, noting his schizophrenia and inability to effectively communicate would prevent his presenting an effective *pro se* defense.

Duke's jury trial in the Superior Court of Setonia commenced that day with Judge Foster presiding. Appointed Counsel Talley represented Duke, who did not testify on his own behalf, and was subsequently and unanimously found guilty on all counts after renewed motions to suppress were again denied.

On appeal, the Supreme Court of Setonia affirmed the holdings of the Superior Court. The majority, per Associate Justice Price, held neither the denial of the motion to suppress nor

³ Judge Foster's October determination rests on testimony from two disinterested psychiatrists – Dr. Ferges and Dr. Tulp – who concluded Duke suffers from schizophrenia and delusions. R.A. at 6. Psychiatric treatment and evaluation followed this determination. *Id.*

the denial of Duke's right to proceed *pro se* violated the United States Constitution. The Court based its Fourth Amendment holding on the constitutional probable cause standard, the presence of which is undisputed by Duke. The Court based its Sixth Amendment determination on the right of the courts to balance the right to self-representation against the tenets of fundamental fairness and proper administration of justice.

On those constitutional issues, this Court granted certiorari, and now considers (1) whether the Fourth Amendment mandates exclusion of evidence obtained pursuant to a probable-cause arrest, but in violation of state statute; and (2) whether the Sixth Amendment allows States to adopt competency standards for self-representation stricter than those required to stand trial.

SUMMARY OF THE ARGUMENT

The arrest, search and subsequent conviction of Beauregard Duke rests on well-established precedent as regards the Fourth Amendment to the United States Constitution, and on concerns of fundamental fairness and proper administration of justice as regards the Sixth Amendment. Duke, whose unanimous conviction in Setonia Superior Court was affirmed by the Setonia Supreme Court, now challenges that conviction on constitutional grounds. He argues, firstly, that an arrest in violation of Setonia law equates to a Fourth Amendment violation, thus triggering the Federal exclusionary rule; and, secondly, that the denial of his motion to proceed *pro se* after a determination of his competence to stand trial violates his Sixth Amendment rights. However, neither well-established Fourth nor Sixth Amendment precedent supports these arguments.

This Court has long held that the constitutional requirement for a valid arrest and subsequent search and/or seizure is that of probable cause, the presence of which is undisputed in this case. This Court, in consistently recognizing probable cause as the only relevant constitutional standard for a reasonable arrest, has logically refused to invalidate a constitutional, probable-cause arrest based on violations of state law. While holding individual states are free to draft arrest requirements exceeding the scope of constitutional requirements, this Court has never held that a violation of these state requirements equates to a violation of the constitutional requirement of probable cause. To hold as much would invite confusion and endless litigation into an area of law long-settled, and would muddle the clarity of the Fourth Amendment's requirements, thus imposing on state and federal law enforcement the impossible task of deciphering the Fourth Amendment's requirements as they relate to a given state's particularized laws in any given arrest. We therefore ask this Court to honor its own well-established and well-founded precedent: that probable cause is the only standard relevant to the determination of an arrest's constitutional validity, regardless of related state law violations.

As regards the Sixth Amendment, this Court has held that the right of a defendant to proceed *pro se* is not absolute, especially in circumstances where the tenets of fundamental fairness and the proper administration of justice are at stake. In situations threatening these tenets of our judicial system, this Court and the lower courts have repeatedly carved out exceptions by which the rights of the defendant to proceed *pro se* are balanced against the threats such a right pose to justice and fairness in a given situation. The *pro se* motion of a defendant with serious mental impairments and communicative inabilities, such as the one now before this Court, is an instance when the defendant's right to proceed *pro se* must be weighed against the

cost it imposes on fundamental fairness and the proper administration of justice. Allowing the States to utilize this balance is therefore essential if Sixth Amendment analyses are to adhere to the essence of the constitutional rights they seek to uphold.

ARGUMENT

I. An Arrest And Subsequent Search Are Constitutionally Valid If Based On Probable Cause, Regardless Of Corresponding Violations Of State Law.

The State of Setonia asks this Court to stand on well-established precedent in affirming the decisions of the courts below: that an arrest and subsequent search are constitutionally valid if based on probable cause, regardless of corresponding violations of state law. This Court has never held, and should not now hold, that state law determines the constitutionality of an arrest, nor that a search made pursuant to an arrest in violation of state law, but in accordance with constitutional law, is invalid. Nor should this Court extend the constitutional exclusionary rule to apply to such state law violations. Acknowledging the right of the States to enact their own arrest requirements, the State of Setonia asks this Court to affirm that such requirements are the creations of each state, and that the only relevant constitutional requirement determinative of a valid arrest, as held in this Court's well-established precedent, is the principle of probable cause.

A. Probable Cause Determines The Validity Of An Arrest And Subsequent Search Under The Fourth Amendment.

The Fourth Amendment to the United States Constitution provides, “The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause[.]” U.S. Const. amend. IV. This Court has consistently held that “a warrantless arrest by a law officer is reasonable under the Fourth Amendment if, given the facts known to the officer, there is probable cause to believe that a crime has been or is being committed.” *Devenpeck v. Alford*, 543 U.S. 146, 148 (2004). While the reasonableness of an arrest involves balancing many factors, a bright line must be drawn to allow for a predictable and efficient means of determining when an arrest is constitutional⁴. This Court draws that line at probable cause.

This Court drew the line at probable cause in *United States v. Robinson*, 414 U.S. 218 (1973). In *Robinson*, an officer pulled over the defendant believing him to be driving with a suspended license. *Id.* at 220. The officer arrested the defendant and searched him, finding a crumpled cigarette packet containing heroine capsules. *Id.* at 221-223. The defendant claimed the search violated the Fourth Amendment and the evidence should have been excluded. *Id.* at 220. This Court held, “A custodial arrest of a suspect based on probable cause is a reasonable

⁴ See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (“A responsible Fourth Amendment balance is not well-served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.”); see also *Whren v. U.S.*, 517 U.S. 806, 817 (1996) (holding that while the reasonableness requirement of the Fourth Amendment involves balancing relevant factors, “the result of the balancing is not in doubt where the search or seizure is based on probable cause.”)

intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to that arrest requires no additional justification.” *Id.* at 235.

In *United States v. Watson*, 423 U.S. 411 (1976) this Court affirmed this principle. In *Watson*, officers arrested the defendant based on a signal given by an informant who believed the defendant to possess stolen credit cards. *Id.* at 413. A search of the defendant revealed nothing, but a consensual search of defendant’s nearby car revealed the stolen cards. *Id.* Addressing the legality of the warrantless arrest, this Court stated, “The necessary inquiry ... is not whether there was a warrant or whether there was time to get one, but whether there was probable cause for the arrest.” *Id.* at 417.

In *Whren v. United States*, 517 U.S. 806, 817 (1996) this Court rejected the use of a balancing approach to the Fourth Amendment where probable cause exists, save for rare exceptions. In *Whren*, officers pulled over and subsequently searched a suspicious looking automobile after it sped away and turned without signaling. *Id.* at 808. The search revealed two bags of crack cocaine and other illegal drugs. *Id.* at 808-809. The defendants challenged the arrest and search alleging there was no probable cause to believe there were drugs in the car, and therefore no right to search the car. *Id.* at 809. Rejecting this argument, this Court held, “the officers had probable cause to believe that the defendants had violated the traffic code. The traffic violation rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions ... correct.” *Id.* at 819. In drawing a bright line between a reasonableness balancing and probable cause, this Court stated, “Where probable cause has existed, the only cases in which we have found it necessary to actually

perform the ‘balancing’ analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual’s privacy[.]” *Id.* at 818.

This Court’s precedent therefore affirms probable cause as the appropriate standard by which to measure the constitutionality of an arrest and subsequent search. It is clear based on this precedent that where probable cause exists, neither a balancing test nor the presence of a warrant is a necessary consideration. The presence of probable cause in the case at bar is undisputed, and that being so, the subsequent arrest and search of Duke are also constitutionally valid under the Fourth Amendment.

B. Precedent Clearly Holds That States May Impose More Stringent Arrest Standards Than The Constitution’s; However, The Constitutionality Of An Arrest Is Not Determined By State Law.

While “individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution,” this Court has never held “that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs.” *California v. Greenwood*, 486 U.S. 35, 43 (1988). *Greenwood’s* holding strikes an important balance between state and federal power, allowing States – as sovereigns – to make laws enlarging the scope of federal laws, while holding that a violation of these state laws does not equate to a constitutional violation. “Just as a search authorized by state law may be an unreasonable one under that

amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one.” *Cooper v. California*, 386 U.S. 58, 87 (1967).

In *Greenwood*, for example, a warrantless search and seizure of the defendant’s trash, in violation of the California Constitution, revealed narcotics paraphernalia and led to felony narcotics convictions. *Greenwood*, 486 U.S. at 38. The defendant argued “his expectation of privacy in his garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of California law.” *Id.* at 43. This Court rejected this contention, holding, “The reasonableness of a search for Fourth Amendment purposes does not depend upon privacy concepts embodied in the law of the particular State in which the search occurred.” *Id.*

In *United States v. Bell*, 54 F.3d. 502 (8th Cir. 1995) this Court reiterated this holding where the defendant was arrested for riding a bicycle at night without a headlight, in violation of state law. The defendant was questioned, arrested, and searched incident to that arrest. *Id.* at 503. A search of defendant’s shoe revealed 14.8 grams of cocaine base, and he was charged with violating federal drug laws. *Id.* The defendant moved to suppress claiming the arrest violated state law in that it was a citation-only offense, and therefore also violated his Fourth Amendment rights. *Id.* The Court reversed the district court’s grant of suppression, holding, “[T]he appropriate inquiry is whether the arrest, search, or seizure violated the Federal Constitution, not whether the arrest, search, or seizure violated state law.” *Id.* at 504⁵.

⁵ See also *Penn v. Virginia*, 412 S.E.2d 189, 193-194 (Va.Ct.App. 1991) (“There is no constitutional violation where state police officers make a warrantless arrest for misdemeanors not committed in their presence [in violation of state law.]”); *New Hampshire v. Smith*, 908 A.2d 786 (N.H. 2006) (holding an arrest by officers made outside their jurisdiction did not *per se* violate the Fourth Amendment); *Ohio v. Droste*, 697 N.E.2d 620 (Ohio 1998) (holding an arrest by officers acting outside their authority in violation of state law did not *per se* violate the Fourth Amendment).

Similarly, in *United States v. Van Metre*, 150 F.3d 339 (4th Cir. 1998) officers failed to obtain the proper type of warrant before transporting Van Metre across state lines. *Id.* at 347. However, this Court held, “[T]he general rule ... is that evidence admissible under federal law cannot be excluded because it would be inadmissible under state law.” *Id.* at 347 (quoting *United States v. Clyburn*, 24 F.3d 613 (4th Cir.1994)). This Court therefore upheld that portion of the lower court’s holding, stating that any violation of state law regarding the procuring of proper warrants was irrelevant in a constitutional analysis. *Id.* at 347.

Therefore, precedent clearly holds that while States are free to enact more stringent arrest standards, a violation of these standards does not render an arrest unconstitutional for Fourth Amendment purposes. In the case at bar, the State does not dispute that Duke’s arrest violated *Setonia Code* § 19.2-74; however, the aforementioned precedent of this Court and of the lower courts renders this violation irrelevant to the determination of the arrest’s constitutional validity. *R.A.* at 8. In so doing, precedent also maintains the balance between state and federal power. The determinative factor in assessing the constitutional validity of Duke’s arrest, therefore, remains the standard of probable cause, the existence of which is undisputed in Duke’s case.

C. Extension Of The Federal Exclusionary Rule To Violations Of State Statute Is Improper.

The exclusionary rule applies to constitutional violations and it is improper and without precedent to extend the rule to violations of state law and evidence thereafter procured.

Precedent holds “absent a violation of a constitutional right, the violation of a statute does not invoke the exclusionary rule⁶.” *Ohio v. Droste*, 697 N.E.2d 620 (Ohio 1998) (quoting *Hillard v. Elfrink*, 672 N.E.2d 166,169 (Ohio 1996))

In *Penn v. Virginia*, 412 S.E.2d 189 (1991) the Virginia Supreme Court clarified the line between an arrest violating a state statute and one violating the Constitution, holding that the exclusionary rule, “does not operate to exclude evidence where the defendant claims that rights provided to him under state statute have been violated, but fails to allege a deprivation of constitutional rights.” *Id.* at 191. In *Penn*, officers arrested the defendant for littering committed outside their immediate presence, in violation of state statute. *Id.* at 190. However, since the arrest and search were based on probable cause and therefore constitutional, the court held that suppression by extension of the exclusionary rule was improper. *Id.* at 193.

New Hampshire v. Smith, 908 A.2d 786 (2006) held likewise. In *Smith*, officers arrested the defendant outside the limits of their jurisdiction for drunk driving. *Id.* at 787. A subsequent search revealed controlled substances. *Id.* The defendant filed a motion to suppress claiming the violation of state statute should trigger the exclusionary rule. *Id.* The court found suppression inappropriate absent a constitutional violation. *Id.* at 788. In holding that the officers made a constitutionally valid traffic stop, the court found that the exclusionary rule applies only to constitutional violations and should not be used to suppress evidence obtained in the course of state law violations. *Id.* at 790.

In the case at bar, probable cause is undisputed, therefore Duke’s arrest is constitutionally valid under the Fourth Amendment. This being so, the search of Duke incident to that arrest is

⁶ See also *United States v. Walker*, 960 F.2d 409, 415 (5th Cir. 1992) (holding the exclusionary rule was meant to discourage Fourth Amendment violations, not those of state law)

also constitutionally valid. The exclusionary rule is wholly inapplicable where there is a constitutionally valid arrest and subsequent search, as with Duke, and any claim that evidence should be suppressed due to a violation of a state statute is clearly thwarted by precedent.

D. Neither *Atwater* Nor *Knowles* Thwarts The Aforementioned Principles.

The guiding principle in determining the legitimacy of a defendant's Fourth Amendment claim is whether the initial arrest is based upon probable cause; once that is established, considerations of state law become constitutionally irrelevant. This principle overcomes the argument of the dissent, which rests on the differences between the state statutory provisions of *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) and the case at bar. The dissent argues firstly that the Setonia Code did not authorize Deputies Strate and Cletus to arrest Duke, whereas officers in *Atwater* were statutorily authorized to arrest the defendant⁷. While this claim's validity is not at issue before this Court, even its truth would not distinguish *Atwater's* ultimate holding from the facts of this case because such distinctions of state laws are constitutionally irrelevant to the larger constitutional issue. *Atwater*, in addressing the same Fourth Amendment issue present here, held, "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Id.* at 354. Therefore, the holding in *Atwater*, being based on the same Fourth Amendment claim as is Duke's, and being therefore subject to the

⁷ *Setonia Code* § 19.2-74 authorizes an arrest in lieu of citation where the arrestee "shall fail or refuse to discontinue the lawful act..." R.A. 3, n. 4, whereas the state statute in *Atwater* more broadly authorized an arrest in lieu of a citation, regardless of the continuance of the act. *Atwater*, 532 U.S. at 323.

same test of probable cause as is Duke's, is immediately and indistinguishably applicable to the case at bar. As probable cause is undisputedly present in both *Atwater* and the present case, the result is therefore also the same: both the arrest and subsequent search of Duke are constitutionally valid.

Inapplicable, however, is the dissent's reliance on *Knowles v. Iowa*, 525 U.S. 113 (1998). In *Knowles*, a full search of an automobile was conducted after a citation was issued for a traffic stop. *Id.* at 486. This Court refused to extend the right of an officer to search incident to a probable-cause arrest to situations where no arrest took place, and instead rested only on the issuance of a citation. *Id.* at 118-119. In so holding, this Court made clear that there is no exception to the rules governing a search incident to an arrest (*e.g.*, there is no constitutional validity to a search incident only to a citation). *Id.* However, *Knowles's* reliance on *United States v. Robinson*, 414 U.S. 218, *supra*, makes clear that had the officers in *Knowles* chosen to arrest Knowles, and provided that arrest was based on probable cause, the ensuing search would have been constitutionally valid. *Knowles*, 525 U.S. at 118. Therefore, *Knowles* would only be applicable to the case at bar if Duke had been issued only a citation without any arrest. However, it is undisputed that the officers chose to arrest Duke and that the arrest was based on probable cause. R.A. at 4, n. 13. Therefore, the dissent's reliance on *Knowles* is inappropriate and has no relevant bearing on the arguments *supra*.

II. The Sixth Amendment Allows States To Protect The Interests Of Defendants Who Are Mentally Incompetent To Present A Defense By Denying Them The Right Of Self-Representation.

This Court has established that a defendant's competency to stand trial is determined by whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). This Court later held in *Faretta v. California*, 422 U.S. 806, 818 (1975), that a defendant has the right to waive counsel and self-representation implicitly through the structure of the Sixth Amendment and through historical jurisprudence from which the Amendment evolved. However, "in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits" that are traditionally guaranteed with the right to counsel. *Id.* at 835 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464-465, (1938)). The issue arising from the convergence of these two holdings is whether States are free to create standards of competency higher than the *Dusky* standard when a defendant chooses to waive certain constitutional rights.

In *Godinez v. Moran*, 509 U.S. 389 (1993), this Court addressed the standard of competency required to waive the right to counsel in order to plead guilty. This Court held the standard for competence to waive counsel and plead guilty was the same as the competence to stand trial found in *Dusky*. *Id.* at 392-393. However, in *Godinez*, this Court limited its opinion, holding "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Id.* at 399. Thus, this Court specifically separated the standard of competency to waive the right of counsel from the as-yet-determined standard of competency for a defendant to represent himself.

As a result, the issue before this Court is whether *Faretta* allows States to deny a defendant, who is competent to stand trial, the right to proceed *pro se* based on a higher standard

of competency. The State of Setonia urges this Court to agree with the Supreme Court of Setonia and conclude that states may require a higher level of competence for defendants to exercise their right to self-representation, especially in instances where a defendant's mental capacity limits his ability to effectively argue before a court. This standard follows this Court's established precedent in *Faretta* and *Godinez* and cures the distinct conflict between a defendant's right to self-representation and a judge's duty to ensure fundamental fairness and due process in court proceedings. However, if this Court does find that a higher standard of competency for self-representation violates the holding of *Faretta*, then this Court should overturn *Faretta* and *Godinez* because *Faretta* directly conflicts with this Court's ruling in *Strickland v. Washington*, 466 U.S. 668, 683 (1968)⁸, while the holding in *Godinez* contradicts the purpose behind the *Dusky* standard of competency.

A. Controlling Precedent Supports States' Use Of A Higher Standard Of Competency To Determine A Defendant's Rights To Proceed *Pro Se*.

In *Faretta v. California*, 422 U.S. 806, 819 (1975), this Court found that the Sixth Amendment provides an implicit right for defendants to represent themselves. This right does not arise "mechanically from a defendant's power to waive the right to the assistance of counsel," rather, the defendant's right to self-representation is an independent right and is not absolute. *Id.* *Faretta* and later judicial opinions limit and modify the right, allowing the States to deny self-representation to defendants who are competent to stand trial, but lack competence to effectively present a defense.

⁸ *Strickland* holds a criminal defendant has the right to effective counsel.

1. Precedent Holds The Right To Self Representation Is Not Absolute.

This Court's declaration in *Faretta* – that self-representation is an independent right guaranteed by the Sixth Amendment – was immediately restricted in specific circumstances. *Id.* at 834. According to this Court, “the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.” *Id.* (citing *Illinois v. Allen*, 397 U.S. 337 (1970)). Also, the States may provide standby counsel for a defendant representing himself, even over the defendant's objections. *Id.* Limitations to self-representation further expanded in *McKaskle v. Wiggins*, 465 U.S. 168, 188 (1984) where this Court determined that stand-by counsel may participate in the trial process as long as such participation is held within “reasonable limits.” Finally, *Martinez v. Court of Appeals*, 528 U.S. 152, 163 (2000) held that States are able to deny a defendant's request to represent himself on appeal because neither *Faretta* nor the Constitution recognizes such a right.

These limitations demonstrate the existence of a significant degree of discretion on the part of the state trial judge to determine the scope of self-representation in the course of a trial. Thus, the right to self-representation is not absolute. *Martinez*, 528 U.S. at 161. More significantly, this discretion reveals that a standard of competency beyond that to stand trial is necessary to prevent violations of the courts' “dignity” by those defendants not competent enough to present an effective defense. *Faretta*, 422 U.S. at 819. A defendant's inability to communicate a defense should therefore be a permissible factor in a judge's determination that the defendant has not “knowingly and intelligently” waived his right to counsel, thus justifying the denial of a motion to proceed *pro se*. *Id.* at 835. Such a balancing is consistent with the

limitations established in *Faretta* and subsequent holdings.

This type of balancing formed the basis of the decision of both courts below, which held Duke incompetent to present an effective defense if allowed to proceed *pro se*, thus making denial of that right permissible under the circumstances. Those holdings also remained consistent with this Court’s own holding in *Godinez*: that States may impose higher standards of competence to proceed *pro se* than those used to determine competency to stand trial. *Godinez*, 509 U.S. 389. Duke’s schizophrenia, “disturbing” communications with counsel, grandiosity, “inability to stay focused,” and confessed need for assistance of counsel render unassisted attempts by Duke and others like him nearly impossible, thus also rendering any trial in which he attempts to do so fundamentally unfair. R.A. at 6. That being so, the balancing adopted by the Supreme Court of Setonia and by the courts listed above, which are based on a higher level of competence than *Dusky*, should be approved by this Court.

2. Holdings Of This Court Allow States To Create Higher Levels Of Competency In Determining The Right To Self-Representation.

Godinez v. Moran, 509 U.S. 389 (1993) held that the competency standard for a defendant to waive his right to trial or to plead guilty is the same as the competency to stand trial. The significance of *Godinez* is this Court’s rejection of “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 (emphasis added). As a result, a higher competency standard is “not necessary to ensure that a defendant is competent to represent

himself, because the ability to do so has no bearing upon his competence to *choose* self-representation.” *Id.* at 390 (citing *Faretta v. California*, 422 U.S. 806, 836 (1975)). However, this does not mean that States are limited to the competency standard of *Dusky* for self-representation because, “States are free to adopt competency standards that are *more elaborate* than the *Dusky* formulation.” *Id.* at 402 (emphasis added). Thus, any waiver of a constitutional right, including self-representation, requires only, at a minimum, the competency to stand trial and may be expanded to larger competency requirements as the States see fit.

States have chosen many different approaches to determine competency to waive counsel and proceed *pro se*. For example, the California Court of Appeals held that a waiver of counsel to proceed *pro se* is considered valid if the defendant voluntarily and knowingly waves his rights, without considering mental competency. *People v. Wilder*, 35 Cal.App.4th 489 (1995). The Supreme Court of Minnesota used the *Dusky* standard and found that a defendant charged with murder, who had an I.Q. of approximately 80, was competent to waive counsel to proceed *pro se* because he was competent to stand trial. *State v. Camacho*, 561 N.W.2d 160 (Minn. 1997). Finally, the Wisconsin Supreme Court determined that a defendant who is competent to stand trial is not likely to be competent to represent himself if a disability prevented him from offering a meaningful defense. *State v. Klessig*, 564 N.W.2d 716 (Wis. 1997) It is clear from the States’ array of standards for competency to represent oneself that *Godinez* has been interpreted to mean that the States are free to choose a standard that merely meets the minimum of competency to stand trial and may be raised as the State sees fit.

Furthermore, the approach taken in *Klessig*, *supra*, was upheld by the Seventh Circuit Court of Appeals in *Brooks v. McCaughtry*, 380 F.3d 1009, 1010 (2004), evidencing federal

approval of state adoption of stricter competency standards regarding the right of self-representation. In *Brooks*, the defendant was convicted of first degree murder. *Id.* During trial the defendant fired his first two attorneys, and the judge informed him that if he fired the third attorney he would have to proceed *pro se*. *Id.* The defendant then immediately “punched [his] lawyer in the face” and moved to dismiss the third attorney, choosing to proceed *pro se*. *Id.* However, after quizzing the defendant on his educational background, the judge determined the defendant was not competent to represent himself. *Id.* The defendant sought federal *habeas corpus* relief after being convicted at trial. *Id.* The Seventh Circuit Court of Appeals found that “[i]t is one thing for a defendant to have sufficient mentation to be able to follow the trial proceeding with the aid of a lawyer, and another to be able to represent himself.” *Id.* at 1011. The court asserted that the defendant clearly lacked the competence to represent himself and “if he was incompetent to conduct his own defense, this is evidence that his decision to waive counsel was not ‘knowing and intelligent,’ as all waivers must be in order to be legally effective.” *Id.*

It is clear that the Seventh Circuit Court of Appeals interpreted the decision in *Godinez* to allow the States to create higher standards of competency than that to stand trial in order to deny a defendant the right to represent himself. The court directly linked the lack of mental capacity to effectively present a defense to the test found in *Faretta*: that a defendant must make his waiver of counsel “knowingly and intelligently.” *Faretta*, 422 U.S. at 835. Therefore, a state-imposed standard of competency to determine whether a defendant may proceed *pro se* is justified by *Godinez* and fits within *Faretta*’s requirements for effective waiver of counsel.

**B. Judicial Promotion Of Fundamental Fairness Necessitates A Higher Standard
Of Competence In Determining The Right Of The Defendant To Proceed *Pro Se*.**

The Constitution does not compel Federal and State governments to absolutely guarantee rights found in its text. This Court’s decisions establish that there must be a balance between the “the liberty of the individual” and “the demands of organized society.” *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). As a result, there are instances where the courts must measure, limit, or expand rights based on considerations that reflect the necessities of society, specifically the principles of fundamental fairness and due process.

**1. The States’ Duty To Protect The Principles Of Fundamental Fairness
And Due Process Requires Limiting Certain Constitutional Rights.**

The principle of due process requires fundamental fairness in criminal trials. *Argersinger v. Hamlin*, 407 U.S. 25, 47 (1972) This Court holds that the concept of a fair trial means “that no one be punished for a crime without a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.” *Sheppard v. Maxwell*, 384 U.S. 333 (1966). “It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country.” *Illinois v. Allen*, 397 U.S. 337, 343 (1970). The duty to ensure these hallmarks falls on the States as they have the “constitutionally essential interest in assuring that the defendant’s trial is a fair

one.” *Sell v. United States*, 539 U.S. 166, 10 (2003).

As a result, the courts have weighed fundamental fairness and judicial efficiency against the constitutional rights of the defendant. For example, in *Illinois v. Allen*, 397 U.S. 337, 338 (1970), this Court explained that a defendant can lose his right to be present at trial if he continuously conducts himself “in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.” Furthermore, this Court has found that a defendant’s right to remain free of visible restraints during trial may be overridden by the state’s interest to maintain the courtroom’s safety and respectability. *Deck v. Missouri*, 544 U.S. 622, 629 (2005). As mentioned above, this Court has also held that the right to self-representation is not violated by the presence of standby counsel to ensure the proper procedure and fairness in the courtroom. *McKaskle*, 465 U.S. at 188.

Thus, similar to the rights mentioned above, the right of a defendant to proceed *pro se* must be measured against the States’ charge to conduct fair trials upholding due process and fundamental fairness. As this Court has stated, “the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.” *Martinez v. Court of Appeals*, 528 U.S. 152, 162 (2000). Specifically, the States should be able to limit the right of self-representation if the defendant is competent to stand trial, but lacks the mental capacity to understand and respect the court. In cases where the court has failed to provide for a fair trial and allowed a defendant suffering from a mental impairment to represent himself, the results have had disastrous effects on the integrity of the courtroom to produce fair trials.

2. Unfair Trials Result From States' Failure To Balance Fundamental Fairness Against A Defendant's Sixth Amendment Rights.

In *Panetti v. Quaterman*, 127 S.Ct. 2842 (2007), the trial court determined defendant to be competent to stand trial and was allowed to represent himself. However, in a psychiatric evaluation the defendant was found to have “fragmented personality, delusions, and hallucinations.” *Id.* at 2848. During the trial, the defendant’s behavior was characterized as “bizarre, scary, and trance-like.” *Id.* at 2849. The “net effect of this dynamic was to render the trial truly a judicial farce, and a mockery of self-representation.” *Id.* Nevertheless, the defendant was allowed to proceed with his defense and he was found guilty and sentenced to death. *Id.* This Court however, overturned his sentence because the “federal appellate court employed an improperly restrictive test when it considered petitioner’s claim of incompetence on the merits.” *Id.* at 2848.

The Minnesota Court of Appeals in *State v. Khaimov*, No. C4-97-2035, 1998 WL 747138 (Minn. Ct. App. Oct. 27, 1998) affirmed the trial court’s decision that the defendant that was mentally ill but competent to stand trial, and thus also competent to represent himself. The defendant was likely suffering from a “mixed personality disorder.” *Id.* at 1. During trial, the defendant asserted that he “was a victim of a broad conspiracy, and insulted witnesses who gave unfavorable statements (including his own witnesses).” *Id.* However, despite constant interruptions caused by the defendant’s behavior, the trial was allowed to proceed and the defendant was found guilty on all counts. *Id.* In his dissent, Judge Davies points out that the defendant’s self-representation “quickly demonstrated that he was incapable of constructing and

executing a plausible defense.” *Id.* at 4. Judge Davies concluded that the defendant’s “limited freedom to reject the assistance of counsel does not terminate that defendant’s right to a meaningful trial. This paranoid and delusional criminal defendant did not have a meaningful trial.” *Id.*

As this Court has stated, “[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts.” *Faretta*, 422 U.S. at 834. But more importantly, in circumstances where a defendant’s ability to adequately defend himself is diminished by mental impairment, the guidance of counsel is meant to ensure that the decorum and impartiality associated with a fair trial persists. As demonstrated by the cases above, where the court bases its decision on whether a defendant is competent to represent himself solely on whether the defendant is competent to stand trial, the possibility of a fair trial and integrity in the court proceedings are dramatically weakened. State judges, therefore, should have the authority to deny a defendant’s request to represent himself where such a decision is done in preservation of justice and fairness at trial.

Both the Superior and Supreme Courts of Setonia adhered to this principle in denying Duke – a defendant with severe mental impairments including schizophrenia, the inability to communicate, grandiosity, and “disturbing” communications with counsel – to proceed *pro se*. R.A. at 6. In so doing, Setonia upheld its constitutional charge to preserve the fairness of Duke’s trial and to prevent the unfortunate instances detailed above. Setonia requests this Court approve this prudent choice and hold it proper for state courts to adopt and enforce standards for self-representation stricter than those of the Constitution.

**C. The Dissent's Interpretation Of *Faretta* Lacks Foundation In The Constitution
And Is Effectively Overturned By Subsequent Precedent.**

If this Court finds that the ruling in *Faretta* does not allow States to deny defendants the right to proceed *pro se*, then this Court should reconsider its rulings in *Faretta* and *Godinez*. This Court has criticized the decision in *Faretta*, stating “the right to proceed *pro se* at trial in certain cases is akin to allowing the defendant to waive his right to a fair trial.” *Martinez*, 528 U.S. at 691 (citing *United States v. Farhad*, 190 F.3d 1097, 1106-1107 (9th Cir. 1999)). In this context, there are two main reasons this Court should reevaluate the holdings of *Faretta* and *Godinez*: first, because the right to self-representation’s requirement of a “knowingly and willingly” waiving counsel is contradictory to the right to effective counsel; and second, because the standard of competency sufficient to waive counsel in *Godinez* violates the reasoning of *Dusky*.

**1. The Right To Receive Effective Counsel Requires That States Maintain
The Right To Deny A Motion To Proceed *Pro Se*.**

In *Strickland v. Washington*, this Court ruled that “the right to counsel is the right to effective assistance to counsel. *Id.* 466 U.S. 668, 687 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). “The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances.” *Id.* However, in *Faretta* this Court ensured that the defendant had the option to choose to “conduct his own defense ultimately

to his own detriment” and “his choice must be honored.” *Faretta*, 422 U.S. at 834. Yet this reasoning in *Faretta* directly contradicts this Court’s finding that the “Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.” *Strickland*, 466 U.S. at 685. In fact, in many instances this Court has recognized that “[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts.” *Faretta*, 422 U.S. at 834. Thus, *Strickland* requires State courts to protect the defendant’s right to effective counsel while *Faretta* provides a right that allows the defendant to throw away effective counsel and replace it with what is usually a very limited understanding of the law.

There has been no indication by this Court that the right to effective counsel is waivable. Nevertheless, the current interpretation of the right of self-representation allows the defendant to waive the most important tool he has in providing effective counsel. If effective representation is fundamental to a just trial, then in many cases self-representation violates the rule in *Strickland*. It is therefore necessary that States be allowed to prevent defendants from proceeding *pro se* if it is apparent they will be unable to represent themselves in a capacity deemed to “produce just results.” *Strickland*, 466 U.S. at 685. A standard of competency for self-representation stricter than that of competency to stand trial is consequently justified because it protects an established right in *Strickland*. The States implementing dual standards guarantee the defendant is always represented by either an effective attorney or effective self-representation. As a result, this Court should either limit the right of self-representation or find that the right to effective counsel in *Strickland* overrules the reasoning in *Faretta*.

2. The *Dusky* Standard Should Be Held Inapplicable To Instances Where Counsel Is Absent.

In *Dusky v. United States*, the court found that competency to stand trial requires that the defendant have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.” *Dusky*, 362 U.S. 402, 402 (1960). In *Godinez*, this Court found that this level of competency was all that was necessary to waive the right to counsel and proceed *pro se*. *Godinez*, 509 U.S. at 389. However, the *Dusky* standard specifically states that competency to stand trial assumes the defendant is able to “consult with his lawyer.” *Dusky*, 362 U.S. at 402. Therefore, there exists a contradiction: a standard that asks whether a defendant can stand trial with his lawyer’s help is also being used to determine if the defendant can be tried without a lawyer. Jennifer W. Cornnis, *A Reasoned Standard for Competency to Waive Counsel After Godinez v. Moran*, 80 B.U. L. Rev. 265, 280 (2000). This conflict demonstrates that the *Dusky* standard intended to provide the defendant with the representation of counsel and that the waiver of such counsel would leave the minimally competent without an expert in the law to consult, as *Dusky* requires. Therefore, the standard of competency to stand trial contemplates a scenario that does not exist when the defendant elects self-representation. Supplemental standards concerning competence for self-representation are accordingly crucial to providing a test that applies to a situation where the defendant has elected to dismiss legal assistance. Thus, the States should be allowed to create their own standards of competency for a defendant to proceed *pro se* and in cases where the defendant lacks such competency, justly deny them the right of self-representation.

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Setonia should be **AFFIRMED.**

Respectfully Submitted,

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