No. 20-701

IN THE
Supreme Court of the United States

JAMES CALVERT,
Petitioner,
v.
TEXAS,
Respondent.

On Petition for a Writ of Certiorari
to the Texas Court of Criminal Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

DOUGLAS H. PARKS
321 Calm Water Lane
Holly Lake Ranch, TX 75765
(214) 799-3772

BINA M. PELTZ
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

DAVID W. DEBRUIN
Counsel of Record
JULIAN P. SPEARCHIEF-MORRIS
ALLISON M. TJEMSLAND
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6015
ddebruin@jenner.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

The Brief in Opposition ("BIO") presents an incomplete and misleading description of the facts and evidence. But what matters is Texas acknowledges—but unpersuasively dismisses as mere "federalism"—there is a conflict among States whether a mentally ill defendant who is incompetent to conduct trial proceedings *must* be afforded counsel and foreclosed from proceeding alone. Nor does the State rebut that other extraordinary aspects of the case warrant review.

I. This Court Should Resolve A Conflict Resulting From *Indiana v. Edwards*.

a. Principles Underlying *Edwards* Require Counsel For Mentally Ill Defendants Incompetent To Conduct Trial Proceedings.

Under *Indiana v. Edwards*, a State may foreclose a defendant's constitutional right to self-representation, established in *Faretta v. California*, 422 U.S. 806 (1975), by requiring counsel for mentally ill defendants incompetent to conduct trial proceedings. *Indiana v. Edwards*, 554 U.S. 164, 174-78 (2008). But courts indulge every reasonable presumption against the loss of constitutional rights, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and may not abrogate a constitutional right simply at their discretion. Rather, as *Edwards* recognized, the *Faretta* right may be foreclosed only because a more fundamental right is at stake. 554 U.S. at 176-78. For those mentally ill defendants incompetent to represent themselves, exercising the *Faretta* right impermissibly impairs "the most basic of the

Constitution's criminal law objectives, providing a fair trial." *Id.* at 176-77.

Edwards was limited by the question presented—"whether the Constitution required the trial court to allow Edwards to represent himself at trial." *Id.* at 170. The Court had no opportunity to address the parallel question presented here: whether a mentally ill defendant incompetent to conduct trial proceedings *must* be afforded counsel and foreclosed from self-representation. The principles underlying *Edwards*, however, necessarily compel an affirmative answer to that question: if exercise of the *Faretta* right would impair "the most basic of the Constitution's criminal law objectives, providing a fair trial," then the defendant *must* be afforded counsel and foreclosed from self-representation—not as a matter of discretion, but of constitutional demand. *Id.* at 176-77. As demonstrated below, the trial court never considered the issue and deemed it barred by *Faretta*.

b. Review Is Necessary To Address The Divergent Application Of *Edwards*.

Edwards has resulted in differing applications across jurisdictions. Pet. 20-23. Texas does not disagree, but dismisses the conflict as mere "federalism." BIO 23. "Federalism" cannot justify courts' struggle to reconcile a mentally ill defendant's right to self-representation when competent to waive counsel, but incompetent to conduct trial proceedings. Texas attempts to defend the *results* in cases illustrating the split. BIO 25-26. But it is immaterial that a court,

after conducting an inquiry of competence to conduct trial proceedings (which was not conducted here), might at times reach the same result and allow the defendant to proceed without counsel. *Edwards*, 554 U.S. at 176-77.

There are two broad categories regarding how States interpret *Edwards*: those that *require* a determination of the defendant's competence to conduct trial proceedings, and those that do not. Pet. 20-23. In fact, however, States fall into four groups.

The first—including Alaska, Iowa, and North Dakota—holds, as a matter of constitutional law, *Edwards* requires courts to determine whether a defendant is competent to conduct trial proceedings without counsel. *State v. Jason*, 779 N.W.2d 66, 76 (Iowa Ct. App. 2009) (remanding under "the standards established in *Edwards* and subsequent cases that have recognized a constitutional violation when a defendant who is not competent to present his own defense without the help of counsel is allowed to do so" (footnote omitted)); *Shorthill v. State*, 354 P.3d 1093, 1110 (Alaska Ct. App. 2015) (under *Edwards*, where a defendant cannot accomplish "basic tasks" necessary for a defense, "the right of self-representation must give way to society's interest in having a fair trial"); *State v. Dahl*, 776 N.W.2d 37, 44, 45 (N.D. 2009) (under *Edwards*, "an additional determination is required" and court "has a continuing responsibility . . . to determine whether a self-represented defendant is competent to present his or her own defense").

The second group—including Connecticut, D.C., Florida, Michigan, Missouri, and Wisconsin—also requires a further inquiry regarding a mentally ill defendant's competence to conduct trial proceedings, but not on a federal constitutional basis. *State v. Connor*, 973 A.2d 627, 655 & n.28 (Conn. 2009); *Williams v. United States*, 137 A.3d 154, 160 (D.C. 2016); *In re Amendments to Fla. Rule of Crim. Pro. 3.111*, 17 So. 3d 272, 274 (Fla. 2009); *People v. Brooks*, 809 N.W.2d 644, 654 (Mich. Ct. App. 2011), *vacated on other grounds*, 807 N.W.2d 303 (Mich. 2012); *State v. Baumruk*, 280 S.W.3d 600, 610, 612 (Mo. 2009); *State v. Klessig*, 564 N.W.2d 716, 724 (Wis. 1997). Significantly, States in both groups *require* a restriction on the *Faretta* right if the defendant, though competent to waive counsel, is incompetent to conduct trial proceedings.

A third group—including Texas, and California, Georgia, Kentucky, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, and Washington—allows, but does not require, trial courts to determine whether a mentally ill defendant is competent to conduct trial proceedings. As the TCCA ruled here, it is enough that the trial court determined Petitioner "competent *to choose* to represent himself," Pet. App. 45a (emphasis in original); yet Texas courts *may* restrict the *Faretta* right, BIO 24. Other States have adopted a permissive approach. *People v. Johnson*, 267 P.3d 1125, 1132 (Cal. 2012); *Duckett v. State*, 769 S.E.2d 743, 748 (Ga. Ct. App. 2015); *Major v. Commonwealth*, 275 S.W.3d 706, 722 (Ky. 2009); *State v. Lewis*, 785 N.W.2d 834, 840 (Neb. 2010); *State v. Handy*, 73 A.3d 421, 437 (N.J. 2013); *People v. Stone*, 6 N.E.3d 572, 576-77 (N.Y. 2014); *State*

v. Lane, 669 S.E.2d 321, 322 (N.C. 2008); *Commonwealth v. Blakeney*, 108 A.3d 739, 759 (Pa. 2014); *In re Rhome*, 260 P.3d 874, 881 (Wash. 2011).

The federal cases cited by Texas fall into this third category. BIO 18. However, Texas erroneously declares the federal courts all agree. At least one circuit has held *Edwards* requires, and not merely permits, a limitation on *Faretta* in an appropriate case, *United States v. Posadas-Aguilera*, 336 F. App'x 970, 976 n.5 (11th Cir. 2009), while at least two other circuits have left the question open, *United States v. Brugnara*, 856 F.3d 1198, 1213-14 (9th Cir. 2017); *United States v. McKinney*, 737 F.3d 773, 777 (D.C. Cir. 2013).

Significantly, a fourth group—Maryland, Oklahoma, South Carolina, and Utah—hold, notwithstanding *Edwards*, the *only* issue a court may consider under *Faretta* is competency to waive counsel. *State v. Barnes*, 753 S.E.2d 545, 550 (S.C. 2014) (finding error "in applying the *Edwards* competency standard to appellant's request to waive his right of counsel"); *State v. Maestas*, 299 P.3d 892, 962 n.330 (Utah 2012); *Stewart-Bey v. State*, 96 A.3d 825, 839 (Md. Ct. Spec. App. 2014); *Mathis v. State*, 271 P.3d 67, 74 n.21 (Okla. Crim. App. 2012). Defendants in these group-four States have a broader *Faretta* right than defendants in the first three groups; conversely, defendants in the group-four (and potentially group-three) States may waive counsel even when mentally incompetent to conduct trial proceedings—and the standards of due process thus factor differently for those defendants. As one court recognized, "the permissive nature of *Edwards*

apparently creates an anomalous situation in which state courts can determine the level of competency necessary for the exercise of federal constitutional rights such that an individual's right to self-representation under the federal constitution may vary from state to state." *Connor*, 973 A.2d at 650 n.22.

This Court should grant review to resolve this conflict. The right of self-representation cannot trump the guarantee of a fair trial. Therefore, it is not enough that the defendant knowingly and intelligently waives counsel. There is a further inquiry a court must consider when a mentally ill defendant seeks to waive counsel: whether the defendant is competent to conduct his own defense. If, because of mental illness, the defendant cannot "carry out the basic tasks needed to present his own defense without the help of counsel," *Edwards*, 554 U.S. at 175-76, due process compels that the defendant be afforded counsel and foreclosed from self-representation. The trial court must recognize that limitation on *Faretta* and consider it when, as here, the issue is presented.

c. *Edwards* Does Not Define A Requisite Level Of Mental Illness.

Contrary to Texas's claim, BIO 18-19, *Edwards* did not define a severity of mental illness needed to restrict the *Faretta* right. *Edwards* emphasized "[m]ental illness itself is not a unitary concept," and accepted that disorganized thinking, deficits in attention and concentration, impaired expressive abilities, and anxiety

all could impair an ability to conduct trial proceedings. 554 U.S. at 175, 176.

Courts applying *Edwards* have interpreted the disability standard in different ways. *Connor*, 973 A.2d at 633 ("If the court finds that the defendant was not competent, due to mental illness or other mental incapacity, to try the case himself, then the defendant must be granted a new trial in the criminal case."); *Shorthill*, 354 P.3d at 1111 (holding *Edwards* was not "hinged on the fact that the defendant was diagnosed as suffering from severe mental illness"); *State v. Jackson*, 867 N.W.2d 814, 822 (Wis. Ct. App. 2015) ("Nothing in *Edwards* establishes severe mental illness as the only circumstance in which a trial judge may deny the right of self-representation."). Impact on the trial, rather than specifics of the disability, is critical. To be sure, *pro se* litigants typically will be less effective than those with counsel. But the issue in *Edwards* is different, focused on a defendant's competence "to carry out the basic tasks needed to present his own defense without the help of counsel." 554 U.S. at 175-76.

Texas argues "[t]rial courts are in the best position to assess a defendant's mental health and any impact it may have on his trial." BIO 20. Petitioner agrees, but the court here never *made* any such assessment. Although the State suggests the court found Petitioner mentally competent to present his own defense, BIO 19-20, that is simply false. The order appointing an expert used words whether Petitioner "is competent to waive his right to counsel and represent himself in a case where he is indicted for capital murder," Supp.CR 2:119, but it

is clear that "represent himself" simply was the consequence of being competent to waive counsel, and not a further inquiry into Petitioner's mental competence to conduct trial proceedings. The court made clear it was appointing an expert to consider *only* Petitioner's competence to waive counsel. RR-12:5 ("What I would be appointing an expert to do is to make an examination of you, to talk to you for the purpose of preparing a report for the Court to determine whether or not in the expert's opinion you have the ability to knowingly and intelligently and competently waive your right to counsel."); RR-12:5-12 (same). And that is all the expert found. Supp.CR 2:128 ("It is my opinion that [Petitioner] is capable of knowingly and intelligently waiving the traditional benefits associated with the right to counsel."). The court also asserted competency to waive counsel was the *only* inquiry it could make. RR-12:6-7 (recognizing obligation to ensure Petitioner could "knowingly and intelligently waive your right to counsel" and "[t]hat's all I can do"); RR-13:23, 30-32, 47-48; RR-14:7, 44-45, 57, 64-65, 71. In its decision, the TCCA never suggested the court had *made* a further inquiry; the TCCA simply ruled no further inquiry was *required*. Pet. App. 45a.[1]

Moreover, there is little doubt the court's failure to consider the issue here might well have mattered. Petitioner challenged the very identity of witnesses at

[1] Later, during trial, counsel raised an issue of Petitioner's competence to *stand trial*, BIO 13-14; the court found him competent and denied that, in terminating Petitioner's *Faretta* right, it had made any finding Petitioner was not competent, RR-160:111-15.

trial, RR-132:99-101, RR-140:174-75, and attempted to make objections using code words and "any letters of the alphabet that would compose words," RR-150:36-37, 40, RR-129:60-61. In such a case, the Constitution requires the trial court to assess the defendant's competence to conduct trial proceedings. That did not happen here.

II. This Court Should Review The Logan Evidence And Argument.

Texas does not (and cannot) dispute the State introduced graphic evidence of a prison assault having nothing to do with Petitioner, and argued Petitioner should be executed because of it. Pet. 10-12. Nor does the State dispute a jury must "render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006). The State's principal argument is this Eighth Amendment principle is implicated only by *exclusion* of mitigating evidence concerning the defendant, and never by *inclusion* of evidence and argument having nothing to do with the defendant's record, personal characteristics, or crime. BIO 28. The State offers no logical reason, however, why the Eighth Amendment would operate only as a one-way ratchet in this regard.

Texas also contends this Court has ruled the Eighth Amendment does not establish a federal code of evidence and only due process may provide relief if evidence and argument rendered Petitioner's sentencing hearing "fundamentally unfair." BIO 28-30.

However, trial counsel's invocation of the Eighth Amendment "individualized sentencing" requirement rather than more generalized notions of due process cannot change that the Logan evidence and argument *did* deprive Petitioner of fundamental fairness concerning the ultimate issue of whether he should be executed given *his* record, personal characteristics, and crime—rather than because of a horrible assault having nothing to do with Petitioner. Texas contends there were many other witnesses who *did* focus on Petitioner. BIO 27. But the existence of other witnesses does not change that the State repeatedly brought the jury back to the Logan incident and urged it to return a verdict of death based on *that* evidence. RR-171:127-28 ("Would [Petitioner] probably commit criminal acts of violence that would be a threat to society? Do you think they can be controlled in the pen, these inmates? Then you tell me why David Logan got a pencil stabbed into his brain."); RR-171:37 ("Do you remember David Logan?"); RR-171:132 ("[r]emember the testimony from David Logan").

This Court has found *constitutional* error in connection with evidentiary rulings in a criminal trial. *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973); *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006); *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988). This Court should grant review and rule it was error for the TCCA not to apply a *constitutional* harmless error standard with regard to the Logan evidence and argument. Given the TCCA was forced to acknowledge that the Logan testimony, "focusing on a horrific injury inflicted by an inmate who had no connection to

[Petitioner], was likely to impress the jury in some irrational, yet indelible way," Pet. App. at 151a, Petitioner was entitled to a new sentencing hearing under a proper constitutional error standard.

III. Use Of A Shock Device To Enforce An Unnecessary Rule Of Decorum Is Structural Error.

The State attempts to obfuscate the electric shock incident by focusing on Petitioner's conduct at other times. BIO 9-12. But it remains undisputed the trial court directed activation of a 50,000-volt electric shock device simply because Petitioner failed to stand when addressing the court. The TCCA so found, Pet. App. 21a n.19, and the record is clear. RR-155:77 ("I'm not talking a security threat."). The State contended below Petitioner "invited" the shock incident, but the TCCA did not so find, recognizing instead a constitutional (albeit "harmless") violation.

The State argues "[t]he harmless error standard applies seamlessly here" and there was no "effect on Calvert's conviction." BIO 32, 34. But certain errors require reversal *regardless* of their effect. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) ("No matter what the evidence was against him, he had the right to have an impartial judge."); *Neder v. United States*, 527 U.S. 1, 7 (1999) (structural errors require reversal "without regard to their effect on the outcome"); *id.* at 34 (Scalia, J., concurring in part and dissenting in part) ("The very premise of structural-error review is that even convictions reflecting the 'right' result are reversed for

the sake of protecting a basic right."); *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) ("harm is irrelevant").[2]

Reversal is required here to protect a basic right. What occurred is extraordinary. The judge enforced a non-essential rule of decorum by directing deputies to electric-shock the defendant during trial. RR-155:178 ("Let's get it over with."). The rule required Petitioner to sit at times and stand at others, and could be confusing. RR-155:148 ("I don't know who you're talking to. If you're talking to the Court, stand up."); *id.* (Petitioner immediately responding, "I will stand up. I will."). To electric-shock a defendant in these circumstances undermines the "public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936).

There were ready alternatives. The court could have allowed Petitioner to sit at *all* times, given his security constraints. There was nothing so sacrosanct about the court's rule that made it essential for a defendant with known mental health issues, trying to represent himself in a capital case, to stand without fail when addressing the court. Petitioner did not violate decorum by shouting, being belligerent, or obstructing court proceedings. Indeed, even if he *was* obstructive, he could be removed from the courtroom, *Illinois v.*

---

[2] Petitioner disputes there was no effect. The jury had just left, and the court acknowledged it "cannot say how far up the hall . . . the jury went." RR-157:24. Counsel sought to diffuse the incident during the penalty phase, RR-163:26-27, and the State made it part of its case for death, RR-164:211-16.

Allen, 397 U.S. 337, 342-43 (1970), or lose his ability to proceed *pro se*, *Faretta*, 422 U.S. at 834 n.46. There were obvious alternatives to electrocution with a shock device *if* Petitioner's conduct required a response.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DOUGLAS H. PARKS
321 Calm Water Lane
Holly Lake Ranch, TX 75765
(214) 799-3772

BINA M. PELTZ
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

DAVID W. DEBRUIN
Counsel of Record
JULIAN P. SPEARCHIEF-MORRIS
ALLISON M. TJEMSLAND
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6015
ddebruin@jenner.com