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NOTES

Flouting *Faretta*: The Supreme Court's Failure to Adopt a Coherent Communication Standard of Competency and the Threat to Self-Representation After *Indiana v. Edwards*

I. Introduction

It is now axiomatic that a criminal defendant cannot stand trial unless he is competent to do so.¹ This rule is not a recent creation, but grounded in the common law.² In *Dusky v. United States*, the Supreme Court articulated the current standard for determining competency to stand trial: the criminal defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and possess “a rational as well as factual understanding of the proceedings against him.”³ In *Faretta v. California*, the Court held that a criminal defendant in a state proceeding has a constitutional right to knowingly refuse the aid of counsel and proceed pro se.⁴ In *Indiana v. Edwards*, the subject of this note, the Court ruled that states may require a higher level of competency to exercise the *Faretta* right than the level of competency required to stand trial.⁵ Unfortunately, the Court did not specify what this higher standard must entail.⁶ As a result, the case creates a substantial risk that judges may have too much discretion in determining that a criminal defendant is incompetent to represent himself, curtailing the rather broad right of self-representation enunciated in *Faretta*.

This note proceeds in three major steps. Part II examines the key precedents underlying *Indiana v. Edwards*, discussing the case's foundational concepts: the competency required to stand trial, the right to self-representation in a criminal trial, and finally, a hybrid of the first two that concerns the competency required to waive the Sixth Amendment right to counsel. Part III introduces the principal case itself by providing a summary of the relevant facts of the case, followed by an explanation of Justice Breyer's majority opinion and Justice Scalia's dissenting opinion. Part IV argues that

1. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *24. Blackstone argued that an incompetent defendant should not be forced to stand trial because his incompetence prevents him from mounting an effective defense or pleading to the charges “with [the] advice and caution that he ought.” *Id.*

2. See *id.*

3. 362 U.S. 402, 402 (1960) (per curiam).

4. See 422 U.S. 806, 807 (1975).

5. See 128 S. Ct. 2379, 2381 (2008).

6. See *id.* at 2388 (declining to “endor[s] . . . a federal constitutional standard”).

while the *Edwards* majority reached the correct result—that the Constitution permits a state to impose a higher standard of competency to represent oneself—the dissenting opinion also correctly points out that the lack of a clear standard for determining the competency necessary for exercising the self-representation right renders the majority opinion extraordinarily vague and thereby risks trampling the right to self-representation altogether. This section then suggests that the Supreme Court should have adopted a “coherent communication” standard to ensure that the *Faretta* right is curtailed only in the most narrow and necessary of circumstances. Part IV also critiques the *Edwards* majority’s identification of certain additional cognitive abilities as *necessary* for representing oneself, arguing instead that these abilities—which are encompassed by the coherent communication standard—should represent just a few of the factors relevant to competency analysis. This section then argues for a presumption of competence to represent oneself, rooted in the competency to stand trial, and further posits that the coherent communication standard would permit the trial judge to override this presumption and deny a request for self-representation only where the defendant proves unable to communicate a rational defense to the judge and jury. Finally, Part IV also summarizes existing protections that prevent trials from descending into farce when a mentally ill defendant is allowed to defend himself. Part V briefly concludes this note.

II. Law Before the Case

A. Competency to Stand Trial

The question of a criminal defendant’s competency to stand trial is distinct from the question of his mental state at the time the crime occurred.⁷ The fact that a defendant formed, or was capable of forming, the mental state required for a particular crime at the time he allegedly committed it does not mean that he is competent at the time the trial commences.⁸ Similarly, questions about whether the defendant was mentally ill at the time of the crime’s commission have little to no bearing on whether the defendant is incompetent at the time of the trial.⁹ In other words, competency is its own discrete inquiry.¹⁰

7. See Allen P. Wilkinson & Arthur C. Roberts, *Defendant’s Competency to Stand Trial*, 40 AM. JUR. PROOF OF FACTS 2D 171, § 2 (1984).

8. See *id.*

9. See *id.*

10. See *Godinez v. Moran*, 509 U.S. 389, 403 (1993) (Kennedy, J., concurring in part) (“We must leave aside . . . any question whether a defendant is absolved of criminal responsibility due to his mental state at the time he committed criminal acts What is at issue here is whether the defendant has sufficient competence to take part in a criminal

The Supreme Court announced its current test for determining competency to stand trial in *Dusky v. United States*, which held that a defendant must possess both “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.”¹¹ Furthermore, in *Pate v. Robinson*, the Court held that “[w]here the evidence raises a ‘bona fide doubt’ as to a defendant’s competence to stand trial,” a competency hearing must be conducted.¹²

The Court reaffirmed these holdings in *Drope v. Missouri*, reiterating that “a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.”¹³ In *Drope*, the criminal defendant was accused of raping his wife.¹⁴ At trial, his wife testified that the defendant had a history of mental illness and that she had relayed this information to her husband’s attorney before the trial.¹⁵ To illustrate the severity of his mental illness, she described occasions where her husband had thrown himself down a flight of stairs at his home when he did not get something that he wanted.¹⁶ She testified that while she initially did not want to prosecute her husband, she changed her mind after he attempted to choke her the day before the trial was to begin.¹⁷ During the course of the trial, the defendant apparently attempted to commit suicide by shooting himself and was unable to appear at the trial.¹⁸ His attorney moved for a mistrial, but the judge denied the request because the defendant’s absence was due to his own conduct.¹⁹ A jury subsequently convicted the defendant, and the trial court sentenced him to life in prison.²⁰

The Supreme Court overturned the defendant’s conviction, holding that the trial court “must always be alert to circumstances suggesting . . . that . . . the accused [is] unable to meet the standards of competence to stand trial,”

proceeding and to make the decisions throughout its course.”).

11. 362 U.S. 402, 402 (1960) (per curiam). The Court emphasized that it is insufficient for the trial judge to find merely that the defendant is “oriented to time and place” and possesses “some recollection of events.” *Id.*

12. *See* 383 U.S. 375, 385 (1966).

13. 420 U.S. 162, 171 (1975).

14. *Id.* at 164.

15. *See id.* at 166.

16. *See id.*

17. *Id.*

18. *See id.* at 166-67.

19. *Id.* at 166.

20. *Id.* at 167.

including circumstances that arise after the trial has begun.²¹ While the Court declined to hold that a suicide attempt during trial “create[s] a reasonable doubt of competence to stand trial as a matter of law,”²² the Court nevertheless concluded that in combination with the defendant’s behavior before the trial and his wife’s testimony at trial, the suicide attempt generated sufficient doubt regarding his competence to stand trial to demand further investigation into the issue.²³

While the trial court must be cognizant of the need to conduct competency evaluations during all stages of the trial, it may also take affirmative measures to ensure that the defendant is competent. In *Sell v. United States*, the Supreme Court held that, under certain conditions, a criminal defendant may be administered medication, even involuntarily, to make him competent to stand trial.²⁴ Charles Sell was a dentist with a history of mental illness.²⁵ He was hospitalized several times and given antipsychotic medication.²⁶ Eventually, he was indicted for mail and Medicare fraud in connection with the filing of false insurance claims and later charged with attempted murder of an FBI agent and a prosecution witness.²⁷

Sell requested that the magistrate evaluate his competency to stand trial.²⁸ The magistrate granted Sell’s request and sent him to a federal medical center, where the staff determined that Sell needed to take antipsychotic medication to maintain his competency.²⁹ When Sell refused to take the medication, medical center staff requested permission to administer it involuntarily.³⁰ The Supreme Court ruled that the administration of antipsychotic medication to ensure competence to stand trial is lawful, “but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and . . . is necessary significantly to further important governmental trial-related interests.”³¹

21. *See id.* at 181, 183.

22. *Id.* at 180.

23. *See id.*

24. 539 U.S. 166, 179 (2003).

25. *Id.* at 169. Sell had a history of delusions, including beliefs that Communists had contaminated the gold he used for fillings at his dental practice and that public officials, including a state governor, were attempting to kill him. *See id.* at 169-70.

26. *See id.*

27. *Id.* at 170.

28. *Id.*

29. *See id.* at 171.

30. *Id.*

31. *Id.* at 179. The Court specified four conditions that must be met before the administration of medication will be appropriate. First, an important governmental interest must be at stake. *Id.* at 180. The Court noted that the government has an interest in ensuring

B. The Right of Self-Representation

The Sixth Amendment to the U.S. Constitution provides, in pertinent part, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . 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 defence.”³²

In *Faretta v. California*, the Court considered the issue of “whether a defendant in a state criminal trial has a constitutional right to proceed without counsel [and represent himself] when he voluntarily and intelligently elects to do so.”³³ Faretta was charged with grand theft in California state court and was initially allowed to waive his right to counsel.³⁴ After conducting a hearing sua sponte, however, the trial judge reversed his original decision and concluded that “Faretta had not made an intelligent and knowing waiver of his right to the assistance of counsel, and . . . had no constitutional right to conduct his own defense.”³⁵ The judge appointed a public defender to the case, but a jury subsequently convicted Faretta, and the California Court of Appeal affirmed the conviction.³⁶

After the California Supreme Court denied review, the Supreme Court granted certiorari and vacated the judgment,³⁷ concluding that the right to counsel embodied in the Sixth Amendment “does not provide merely that a defense shall be made for the accused[, but] grants to the accused personally the right to make his defense.”³⁸ “[T]he right to self-representation,” the Court explained, “is . . . necessarily implied by the structure of the Amendment.”³⁹ The Court reasoned that because the Sixth Amendment provides for *assistance* of counsel, its “language and spirit . . . contemplate that counsel . . . shall be an aid to a willing defendant—not an organ of the State interposed between an

both a timely prosecution and a fair trial for the defendant. *Id.* Second, involuntary medication must “significantly further” the government’s interest. *Id.* at 181. Third, the medication must be necessary to achieve the interest. *Id.* Finally, the medication must be “medically appropriate” for the defendant’s specific medical condition. *Id.*

32. U.S. CONST. amend. VI.

33. 422 U.S. 806, 807 (1975).

34. *Id.* at 807-08.

35. *Id.* at 808-10.

36. *Id.* at 811-12.

37. *Id.* at 812, 836.

38. *Id.* at 819.

39. *Id.*; see also *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942) (noting that “[t]he right to assistance of counsel” is accompanied by a “correlative right to dispense with a lawyer’s help”); *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (stating that a defendant may “supersede his lawyers altogether and conduct the trial himself”).

unwilling defendant and his right to defend himself personally.”⁴⁰ To conclude otherwise, the Court noted, would “violate[] the logic of the Amendment” and risk transforming counsel from an “assistant” into a “master,”⁴¹ robbing the defendant of the opportunity to present not just any defense, but *his own* defense.⁴² In order for the criminal defendant to exercise his right to self-representation, he must knowingly and intelligently do so after being informed of the risks of self-representation.⁴³

Although *Faretta* established the right of self-representation, the opinion also emphasized that the right is not absolute and envisioned circumstances in which the right might be cut off, such as where the defendant “deliberately engages in serious and obstructionist misconduct.”⁴⁴ Since *Faretta*, the Supreme Court has taken several opportunities to further limit the general principle that the Sixth Amendment affords a criminal defendant the right to represent himself.⁴⁵ For example, in *McKaskle v. Wiggins*, the Court ruled that *Faretta* intended “no absolute bar on standby counsel’s unsolicited participation.”⁴⁶ In *Wiggins*, Carl Wiggins requested appointed counsel to assist him during his retrial for robbery charges, but later repudiated his request and sought to proceed *pro se*.⁴⁷ The court insisted that the appointed counsel remain on standby at the trial, ready to provide assistance as needed.⁴⁸ Wiggins willingly consulted with his standby counsel during the trial but ultimately was convicted.⁴⁹ Wiggins subsequently moved for a new trial, contending that his standby counsel had “interfered with his presentation of his defense.”⁵⁰ After the trial court denied the motion, and Wiggins’s state court appeals proved unavailing, Wiggins sought habeas corpus relief in federal court.⁵¹ The district court denied Wiggins’s petition, but the Fifth Circuit later

40. *Faretta*, 422 U.S. at 820.

41. *Id.*

42. *See id.* at 820-21.

43. *Id.* at 835. The Court noted that *Faretta*’s “technical legal knowledge” was irrelevant in determining whether he knowingly exercised the right to defend himself. *Id.* at 836.

44. *Id.* at 834 n.46.

45. *See, e.g.*, *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152 (2000); *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

46. 465 U.S. at 176.

47. *See id.* at 171-72.

48. *Id.* at 172.

49. *Id.* at 172-73. For example, although Wiggins conducted cross-examination of witnesses, he interrupted his questioning often to ask questions of standby counsel and allowed counsel to make the opening statement and conduct voir dire of a witness. *Id.* at 172.

50. *Id.* at 173. Wiggins argued that “his *Faretta* right to present his defense *pro se* was impaired by the distracting, intrusive, and unsolicited participation of counsel throughout the trial.” *Id.* at 176.

51. *See id.* at 173.

ruled that his *Faretta* rights had been violated by the interference of standby counsel.⁵²

The Supreme Court reversed.⁵³ The Court held that the Sixth Amendment is not violated by the appointment of standby counsel and also explained that “[p]articipation by [standby] counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the *pro se* defendant’s appearance of control over his own defense.”⁵⁴ The Court circumscribed this allowance, however, by stating that standby counsel’s participation may not rob the defendant of “actual control” of his defense and “should not be allowed to destroy the jury’s perception that the defendant is representing himself.”⁵⁵

The Court created another exception to the right of self-representation in *Martinez v. Court of Appeal of California, Fourth Appellate District*, a case in which a defendant wished to represent himself at the appellate level after being convicted of embezzlement.⁵⁶ There, the Court ruled that “neither the holding nor the reasoning in *Faretta* requires [a state] to recognize a constitutional right to self-representation on direct appeal from a criminal conviction.”⁵⁷ The Court reasoned that “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,”⁵⁸ especially in the appellate context where the defendant is no longer trying to rebut criminal charges but is instead attempting to reverse his conviction.⁵⁹ Unlike in the trial phase, where the defendant has been haled into court against his will to respond to the charges of the prosecutor, “it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State’s prosecutor but rather to overturn a finding of guilt made by a judge or a jury below.”⁶⁰ In other words, it is the autonomy afforded by the decision to present one’s own defense, and to decide on the best strategy for doing so, that is the hallmark of the self-representation right. Such autonomy is less important at the appellate phase, where review is typically confined to the record below and the

52. *Id.*

53. *Id.*

54. *Id.* at 184.

55. *Id.* at 178.

56. *See* 528 U.S. 152, 155 (2000).

57. *Id.* at 163.

58. *Id.* at 162.

59. *See id.* at 162-63.

60. *Id.* (quoting *Ross v. Moffitt*, 417 U.S. 600, 610 (1974)).

reviewing court most often is searching only for significant constitutional error.⁶¹

C. Competency and Self-Representation

While the Court clearly articulated the standard for competency to stand trial in *Dusky* and *Drope*,⁶² and affirmed the right to waive the assistance of counsel and proceed pro se in a criminal trial in *Faretta*,⁶³ the Court did not determine the competency standard for exercising the right to waive counsel until *Godinez v. Moran*.⁶⁴ In *Godinez*, the Court considered “whether the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial.”⁶⁵

Richard Moran pleaded not guilty to three counts of first-degree murder and was found competent to stand trial.⁶⁶ Moran later informed the trial court that he desired to waive his right to counsel and change his plea to guilty.⁶⁷ After advising Moran of the hazards of proceeding pro se and ensuring that he was not pleading guilty for any improper reason, the court found that Moran knowingly and intelligently waived his right to counsel, and accepted his guilty plea.⁶⁸ The court then sentenced Moran to death, and he petitioned for post-conviction relief claiming that he had not been competent to plead guilty; the court denied Moran’s petition on the basis that he had been found competent to stand trial.⁶⁹ After the Nevada Supreme Court dismissed his appeal, Moran filed a federal habeas corpus petition, which the district court denied.⁷⁰ The Ninth Circuit Court of Appeals reversed the district court’s

61. See, e.g., *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). Although a reviewing court must determine “whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt[,] . . . this inquiry does not require a court to ‘ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.’ Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* (footnote and citation omitted) (quoting *Woodby v. INS*, 385 U.S. 276, 282 (1966)). In other words, the freedom of the criminal defendant to “conduct his own cause in his own words,” *Martinez*, 528 U.S. at 158 (quoting *Faretta v. California*, 422 U.S. 806, 823 (1975)), is less compelling at the appellate level, where the court does not accept new evidence but merely tests the sufficiency of evidence produced at trial.

62. See discussion *supra* Part II.A.

63. See discussion *supra* Part II.B.

64. See 509 U.S. 389, 395 (1993).

65. *Id.* at 391.

66. *Id.*

67. *Id.* at 392.

68. *Id.* at 392-93.

69. *Id.* at 393.

70. *Id.*

denial of the petition, concluding that “[c]ompetency to waive constitutional rights . . . requires a higher level of mental functioning than that required to stand trial.”⁷¹

The Supreme Court reversed the Ninth Circuit, “reject[ing] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than . . . the *Dusky* standard.”⁷² Justice Thomas, writing for the majority, could “conceive of no basis for demanding a higher level of competence for those defendants who choose to plead guilty,” because “the decision to plead guilty is . . . no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial.”⁷³ In other words, the Court determined that if *Dusky*’s competency standard is sufficient for the purposes of pleading not guilty and proceeding to trial, “it is necessarily adequate for those who plead guilty.”⁷⁴

The Court further concluded that waiving the right to counsel does not require more competence than electing not to do so, because this decision does not “require[] an appreciably higher level of mental functioning than the decision to waive other constitutional rights.”⁷⁵ The Court dodged the argument that representing oneself at trial requires a different set of mental capabilities than those required when standing trial with counsel by confining its analysis merely to “the competence to *waive the right*, not the competence to represent [one]self.”⁷⁶ Finally, Justice Thomas concluded by noting that “while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements.”⁷⁷

III. *Indiana v. Edwards*

A. *Facts of the Case*

In *Indiana v. Edwards*, the State of Indiana accepted the invitation extended by Justice Thomas in *Godinez* to adopt a heightened standard of competency for self-representation.⁷⁸ Ahmad Edwards was charged with several criminal offenses, including attempted murder, battery with a deadly weapon, and

71. *Id.* at 393-94 (quoting *Moran v. Godinez*, 972 F.2d 263, 266 (9th Cir. 1992)).

72. *Id.* at 398.

73. *Id.* at 398-99.

74. *Id.* at 399.

75. *Id.*

76. *Id.*

77. *Id.* at 402.

78. *See* 128 S. Ct. 2379 (2008).

theft.⁷⁹ Initially, Edwards was found incompetent to stand trial, but later his condition improved and he was deemed competent to stand trial.⁸⁰ Immediately before trial, Edwards sought to represent himself and requested a continuance to prepare to proceed pro se.⁸¹ His request for a continuance was denied, so Edwards proceeded to trial with counsel.⁸² A jury convicted Edwards of theft but did not reach a verdict on the attempted murder and battery charges.⁸³

The State of Indiana sought to retry Edwards for attempted murder and battery, and Edwards again requested permission to represent himself.⁸⁴ The court denied this request, finding that although Edwards was competent to stand trial, he was not competent to defend himself.⁸⁵ Notably, the court arrived at this finding “without explaining precisely what abilities Edwards lacked.”⁸⁶ Edwards was subsequently convicted.⁸⁷ Indiana’s intermediate appellate court determined that “the trial court’s refusal to permit [Edwards] to represent himself at his retrial deprived him of his constitutional right of self-representation” and ordered a new trial.⁸⁸

Citing *Faretta* and *Godinez*, the Indiana Supreme Court affirmed the intermediate court’s decision, although it expressed ambivalence about doing so.⁸⁹ The court noted that Edwards had been found competent to stand trial; therefore, “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.”⁹⁰ The State of Indiana appealed, and the Supreme Court granted certiorari.⁹¹

79. *Id.* at 2382.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 2382-83.

86. *Id.* at 2390 (Scalia, J., dissenting).

87. *Id.* at 2383 (majority opinion).

88. *Id.*

89. *Edwards v. State*, 866 N.E.2d 252, 260 (Ind. 2007) (“The record in this case presents a substantial basis to agree with the trial court and thus presents an opportunity to revisit the holdings of *Faretta* and *Godinez*, if the Supreme Court of the United States decides that is to be done. However, as it stands today, we are bound by these authorities as Supreme Court precedent.”), *vacated*, 128 S. Ct. 2379 (2008).

90. *Id.* Curiously, the Indiana Supreme Court arrived at this conclusion without even mentioning *Godinez*’s authorization of a higher standard of competency to represent oneself beyond that required to stand trial. See *Godinez v. Moran*, 509 U.S. 389, 402 (1993); see also *supra* text accompanying notes 76-77.

91. See *Edwards*, 128 S. Ct. at 2383.

B. The Supreme Court's Decision

The issue the Court considered in *Edwards* was whether a state may constitutionally insist upon representation at a criminal defendant's trial if the defendant's diminished mental capacity renders him unable to conduct his own defense.⁹² The Court began its discussion by noting that the Court's precedents "frame[d] the question presented, but they [did] not answer it."⁹³ The Court then summarized the holdings in *Dusky* and *Drope* but pointed out that "[n]either case considered . . . the relation of the mental competence standard to the right of self-representation."⁹⁴ The Court also reviewed *Faretta* but noted that the self-representation right is not absolute and that *Faretta* "did not consider the problem of mental competency."⁹⁵ The Court then considered *Godinez* and, while acknowledging similarities, concluded that it did not answer the question before the Court, because *Godinez* concerned whether a higher competency standard is required to plead guilty, not whether a higher competency standard is necessary in "seek[ing] to measure the defendant's ability to conduct trial proceedings."⁹⁶

The Court answered the issue presented in the affirmative for three reasons. First, the Court reasoned that its own existing precedent pointed toward an affirmative answer.⁹⁷ Because the *Dusky* and *Drope* standard for competency to stand trial requires that the defendant be able to consult with counsel and assist in his defense, the Court concluded that competency to exercise the *Faretta* right necessarily must be different because it assumes a situation in which there is no attorney to consult and assist.⁹⁸

Second, the Court recognized that "[m]ental illness itself is not a unitary concept" and that this fact militated against the use of a single mental competency standard.⁹⁹ The Court acknowledged that there are many kinds and degrees of mental illnesses, and they can "interfere[] with an individual's functioning at different times in different ways."¹⁰⁰ Thus, while a particular mental illness may not prevent a defendant from being competent to stand

92. *Id.* at 2385-86.

93. *Id.* at 2383.

94. *See id.*

95. *See id.* at 2383-84.

96. *See id.* at 2384-85.

97. *Id.* at 2386.

98. *See id.*

99. *See id.*

100. *Id.*

trial, it may nevertheless “impair the defendant’s ability to play the significantly expanded role required for self-representation.”¹⁰¹

Third, the Court determined that allowing a defendant who does not possess the requisite mental capacity to represent himself fails to “affirm the dignity” of that defendant.¹⁰² The defendant may be deprived of his dignity, not only because his self-representation could result in a “spectacle,” but also because his “lack of capacity threatens an improper conviction or sentence,” undermining “the most basic of the Constitution’s criminal law objectives—providing a fair trial.”¹⁰³ For all of these reasons, the Court concluded that while the Constitution does not *require* a higher standard of competency to represent oneself, it does “*permit*[] States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”¹⁰⁴

Although the Court found that states may require a higher standard of competency for self-representation, it refused to adopt Indiana’s suggested standard for denying the *Faretta* right—that a criminal defendant’s right to represent himself may be denied “where the defendant cannot communicate coherently with the court or a jury.”¹⁰⁵ The Court rejected the standard because it was “uncertain . . . as to how that particular standard would work in practice.”¹⁰⁶ The State of Indiana also requested that the Court, if it declined to adopt the coherent communication standard as a limitation on *Faretta*, consider overruling *Faretta* entirely.¹⁰⁷ The Court also declined this request, however, noting that while some members of the Court previously had called its wisdom into question, recent empirical research indicates that *Faretta* does

101. *See id.* at 2386-87 (quoting, inter alia, Brief for the American Psychiatric Ass’n and American Academy of Psychiatry & the Law as Amici Curiae in Support of Neither Party at 26, *Edwards*, 128 S. Ct. 2379 (No. 07-208), 2008 WL 405546, at *26 [hereinafter APA Amicus Brief]).

102. *Id.* at 2387 (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984)).

103. *Id.*

104. *See id.* at 2387-88 (emphasis added).

105. *Id.* at 2388 (quoting Brief for Petitioner at 20, *Edwards*, 128 S. Ct. 2379 (No. 07-208), 2008 WL 336303, at *20 (emphasis omitted)).

106. *Id.* The Court appears to have declined to adopt the coherent communication competency standard as an act of judicial restraint, but it failed to recognize that such restraint often produces nothing more than “judicial obfuscation.” *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 498 n.7 (2007) (Scalia, J., concurring in part and concurring in the judgment). As Justice Scalia makes clear in his dissenting opinion, the failure to adopt the coherent communication standard risks allowing trial judges to dispense with a *Faretta* competency evaluation altogether—by simply referencing the majority’s allowance of a heightened competency standard. *See* discussion *infra* Part III.C.

107. *See Edwards*, 128 S. Ct. at 2388.

not commonly produce unfair trial proceedings and that pro se state felony defendants, compared to their “represented counterparts[,] . . . [are] less likely to [be] convicted of felonies.”¹⁰⁸

C. *The Dissenting Opinion*

Justice Scalia saw the issue in more clear-cut terms. In his view, at the trial phase, “a State simply may not force a lawyer upon a criminal defendant who wishes to conduct his own defense.”¹⁰⁹ Justice Scalia conceded that the Court had allowed for such an imposition in the case of obstructionist misconduct, but argued that *Edwards* did not fall within the reach of that exception.¹¹⁰ He also recognized that the Court had limited the *Faretta* right by allowing the appointment of standby counsel but argued that these exceptions “never constrained the ability of a defendant to retain ‘actual control over the case he chooses to present to the jury.’”¹¹¹

Justice Scalia also attacked the rationale given in Justice Breyer’s majority opinion that guaranteeing the fairness of the trial enhanced the defendant’s dignity.¹¹² arguing that while dignity underlies the self-representation right, the loss of dignity comes not from the spectacle that results from a defendant representing himself poorly,¹¹³ but from robbing the defendant of an opportunity to be the “master of [his] fate rather than a ward of the State.”¹¹⁴ To Justice Scalia, the fundamental basis of *Faretta*’s holding was that although the Sixth Amendment seeks to ensure a fair trial by guaranteeing assistance of counsel, this guarantee should not be used to denigrate the right of self-representation provided by the Sixth Amendment.¹¹⁵ Justice Scalia viewed the dignity of the defendant as inextricably intertwined with the autonomy to

108. See *id.* (quoting Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 428 (2007)).

109. *Id.* at 2390-91 (Scalia, J., dissenting).

110. See *id.* at 2392. Scalia observed that “Edwards . . . was respectful and compliant and did not provide a basis to conclude a trial could not have gone forward had he been allowed to press his own claims.” *Id.*

111. See *id.* (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984)). Recall that although standby counsel may be appointed to assist the pro se defendant, this appointment must not “destroy the jury’s perception that the defendant is representing himself.” *Wiggins*, 465 U.S. at 178. It is also worth noting that while Scalia did not mention the *Martinez* holding, his reasoning appears consistent with the appointment of counsel, over a defendant’s objection, in the context of appellate proceedings, as such proceedings do not involve the presentation of the case to the jury. See *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152 (2000); see also *supra* text accompanying notes 56-61.

112. See *Edwards*, 128 S. Ct. at 2392-93 (Scalia, J., dissenting).

113. See *id.* at 2387 (majority opinion); see also *supra* text accompanying note 103.

114. See *Edwards*, 128 S. Ct. at 2393 (Scalia, J., dissenting).

115. See *id.* at 2392-93.

choose to reject the assistance of counsel and proceed pro se.¹¹⁶ Using the ideas of fairness and dignity to deny the right of self-representation turned the basis of the right on its head. The majority's result could be obtained only by "abstract[ing]" to the *purpose* of the Sixth Amendment to ensure a fair trial, then using this purpose to eliminate a *right* for which the Sixth Amendment provides.¹¹⁷

Finally, Justice Scalia attacked the vagueness of the majority opinion. He condemned the majority for refusing to adopt Indiana's coherent communication standard for denying self-representation.¹¹⁸ This "indeterminacy," he argued, "makes a bad holding worse" by converting the right of self-representation for the mentally ill into a "sometime thing."¹¹⁹ Specifically, he was concerned that the majority opinion would create a dangerous incentive for trial judges to avoid the "painful necessity" of managing how a questionably competent pro se defendant conducts his defense by simply "appointing knowledgeable and literate counsel."¹²⁰

IV. In Defense of the Coherent Communication Standard

The Supreme Court missed an opportunity to issue a clear standard for determining competency to proceed pro se by refusing to adopt the coherent communication standard offered by the State of Indiana. Accordingly, the Court should revisit its decision, sooner rather than later, to prevent trial courts from relying on a patchwork of vague justifications to support denial of the self-representation right. In the interim, lower courts, when accepting the Court's invitation to require a higher level of competence for self-representation, should utilize the coherent communication standard.

As Justice Scalia forcefully argued, the lack of a definitive standard to which states must adhere when deciding to require a demonstration of elevated competency risks eliminating the *Faretta* right for an entire subsection of the population.¹²¹ "[C]ourts must indulge every reasonable presumption against the loss of constitutional rights,"¹²² and the right to self-representation is no different—it should be eliminated only upon the clearest showing that the defendant lacks the competence necessary to present a coherent defense. An unambiguous standard would assist courts in ensuring that their refusals to

116. *See id.* at 2393.

117. *Id.* at 2392 (quoting *United States v. Gonzales-Lopez*, 548 U.S. 140, 145 (2006)).

118. *See id.* at 2394.

119. *See id.*

120. *See id.*

121. *See id.*

122. *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

allow defendants to represent themselves are supported by sufficient evidence of incompetence to overcome the presumption against the loss of constitutional rights.

This Part begins with a brief description of the coherent communication standard. It then proceeds to discuss the majority's justification for requiring a higher level of competency to represent oneself, with particular emphasis on the so-called "functional abilities" required to conduct trial proceedings. It argues that requiring many of these functional abilities contradicts existing Supreme Court precedent that rejects the possession of technical legal knowledge and skills as a prerequisite to exercising the right of self-representation. Additionally, recognizing that some of the functional abilities may be necessary to represent oneself, this part explains how the coherent communication standard accounts for the truly requisite functional abilities and thus why utilizing the standard would necessarily include consideration of them. Next, this Part argues that the inclusion of these functional abilities in the coherent communication standard should establish, at a minimum, a presumption of competency to represent oneself and that the transparency of using a clear standard would ensure that trial judges engage in a particularized examination of each defendant and do not deny the right of self-representation based on a monolithic conception of mental illness. To the extent that some still harbor fears that some defendants will be unable to adequately represent themselves, this Part also summarizes additional protections like the availability of standby counsel and the prohibition on the disruption of court proceedings that can prevent trials from becoming farcical.

A. The Coherent Communication Standard Remains Faithful to Faretta

The coherent communication standard posits that "a trial court may deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or a jury."¹²³ Indiana derived this standard from the Wisconsin Supreme Court case of *State v. Klessig*.¹²⁴ In *Klessig*, the defendant was charged with jumping bail and participating in a burglary.¹²⁵ The defendant informed the court of his intention to proceed pro se, but the trial court failed to conduct a separate hearing regarding Klessig's competence to represent himself.¹²⁶ The Supreme Court of Wisconsin ruled that the trial court must conduct a separate inquiry because the competence necessary to stand trial is not the same as that required to proceed without

123. Brief for Petitioner, *supra* note 105, at 25 (emphasis omitted).

124. 564 N.W.2d 716 (Wis. 1997).

125. *Id.* at 718.

126. *See id.*

counsel.¹²⁷ Further, the Wisconsin Supreme Court ruled that the trial court should determine if any “psychological disability . . . may significantly affect [the defendant’s] ability to communicate a possible defense to the jury.”¹²⁸ The court noted that its coherence standard “should not prevent persons of average ability and intelligence from representing themselves unless a specific problem or disability can be identified which may prevent a meaningful defense from being offered.”¹²⁹ The coherent communication standard adopted by Wisconsin thus remains faithful to *Faretta* by allowing defendants, even those without legal knowledge or formal education, to represent themselves as long as no mental illness or defect prevents them from articulating a defense to the jury.

B. The Court’s Justifications for an Elevated Level of Competency Lack Precedential Support

The majority opinion in *Edwards* isolated a few additional skills necessary for self-representation, over and above those required to stand trial. The Court distinguished these additional “functional” abilities from the “decisional” abilities reflected in the *Dusky* standard.¹³⁰ Decisional abilities include the ability to consult with an attorney about the best strategy to employ during trial,¹³¹ as well as the ability to waive counsel and plead guilty.¹³² By contrast, functional abilities include “organization of defense, making motions, arguing points of law, participating in *voir dire*, questioning witnesses, and addressing the court and jury.”¹³³ This is how the Court was able to distinguish *Godinez* from *Edwards*. *Godinez* concerned only the defendant’s competence to decide to plead to guilty without the aid of counsel, while *Edwards* involved the defendant’s “ability to conduct trial proceedings.”¹³⁴ Justice Breyer’s opinion accepted the argument that common symptoms of mental illnesses, such as

127. *See id.* at 723-24; *see also* *Pickens v. State*, 292 N.W.2d 601, 610 (Wis. 1980) (“[M]ore is required where the defendant is to actually conduct his own defense and not merely assist in it.”), *overruled on other grounds by Klessig*, 564 N.W.2d at 721.

128. *Klessig*, 564 N.W.2d at 724; *accord Pickens*, 292 N.W.2d at 611 (“Surely a defendant who, while mentally competent to be tried, is simply incapable of effective communication . . . is not to be allowed ‘to go to jail under his own banner.’” (quoting *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965))).

129. *Klessig*, 564 N.W.2d at 724 (internal quotation marks omitted) (quoting *Pickens*, 292 N.W.2d at 611).

130. *See Indiana v. Edwards*, 128 S. Ct. 2379, 2386-87 (quoting NORMAN G. POYTHRESS ET AL., *ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES* 103 (2002)).

131. *See id.* at 2386.

132. *See id.* at 2385.

133. *See id.* at 2387 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984)).

134. *Id.* at 2385.

disorganized thinking, difficulty maintaining focus and concentration, and anxiety, can preclude the defendant from adequately exercising these functional abilities.¹³⁵

The central problem with using the distinction between decisional and functional abilities—at least as they are articulated in the majority opinion—as the basis for requiring a higher level of competency to represent oneself is that some of the functional abilities enumerated by the majority are without any precedential support and contradict the reasoning of *Faretta* and its progeny. Many of these “abilities” would be more appropriately classified as examples of legal knowledge—knowledge of the sort that the *Faretta* opinion explicitly contemplated and rejected as prerequisite to exercising the self-representation right.¹³⁶ For example, implicit in the ability to argue points of law is an assumption that the defendant possesses an adequate foundation of legal knowledge from which to argue those points. Moreover, the ability to effectively participate in voir dire requires that the defendant possess certain legal expertise *explicitly* rejected by the Court in *Faretta*.¹³⁷ By requiring these functional abilities, the majority in *Edwards* risks overruling key portions of *Faretta* sub silentio by repackaging these so-called abilities, freighted as they are with certain legal knowledge requirements, as necessary conditions for adequate competence.

The majority opinion thus imposes a unique requirement on the mentally ill that is expressly forbidden with respect to those assumed to be competent. As Justice Scalia noted in his dissent in *Edwards*, “[T]he Court’s opinion does not even have the questionable virtue of being politically correct. At a time when all society is trying to mainstream the mentally impaired, the Court permits them to be deprived of a basic constitutional right,” unlike any other subsection of the population.¹³⁸

C. The Coherent Communication Standard Encompasses the Functional Abilities Identified by the Edwards Majority and Should Establish a Presumption of Competency to Exercise the Right of Self-Representation

Admittedly, not all of the functional abilities specified by the Court require legal knowledge. For example, the ability to organize a defense, make

135. *See id.* at 2387 (quoting APA Amicus Brief, *supra* note 101, at 26).

136. *See Faretta v. California*, 422 U.S. 806, 836 (1975) (“[T]echnical legal knowledge . . . [is] not relevant to an assessment of [a defendant’s] knowing exercise of the right to defend himself.”).

137. *See id.* (“We need make no assessment of how well or poorly [a defendant] ha[s] mastered the intricacies of the . . . provisions that govern challenges of potential jurors on *voir dire*.”).

138. 128 S. Ct. at 2394 (Scalia, J., dissenting).

motions, and argue the case to the judge or jury do not demand sophisticated legal skills. Nevertheless, the coherent communication standard should have allayed the fear expressed by the majority—that it would be unworkable in practice—because most, if not all, of the functional requirements posited by the Court necessitate coherent communication. For instance, making motions, arguing points of law, questioning witnesses and potential jurors, and speaking to a judge or jury all require logical communication, whether written or oral. In other words, the coherent communication standard ensures that the denial of the right of self-representation occurs in “circumstances where the defendant cannot, in the most basic functional terms, actually do what self-representation presumes he can do.”¹³⁹

At a minimum, rather than allowing trial judges to require a standardless, heightened level of competency, there should be a presumption that the defendant, having been found competent to stand trial, possesses the communication skills necessary to present a coherent argument to the court or jury. After all, there is significant overlap between the coherent communication standard and the *Dusky* standard of competency to stand trial: both assume that the defendant possesses the ability to communicate.¹⁴⁰ As far as the fact of communication is concerned, the difference lies merely in who is the immediate recipient of the defendant’s communication: the competency to stand trial requires communication between the defendant and counsel, while the competency to represent oneself would require communication with the trier of fact. This crucial similarity suggests the need for a presumption that a defendant is competent to represent himself, and the coherent communication standard would allow the trial judge to override this presumption only by referencing particularized examples that prove that the defendant is entirely unable to defend himself. Judges could not simply make reference to the defendant’s history of mental illness, using that history as a blanket excuse to deny a constitutionally-protected right.

139. See Reply Brief for Petitioner at 9, *Edwards*, 128 S. Ct. 2379 (No. 07-208), 2008 WL 727811, at *9.

140. Compare Brief for Petitioner, *supra* note 105, at 25 (proposing denial of self-representation “where the defendant cannot communicate coherently with the court or jury”), with *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (identifying the competency standard for a defendant to stand trial as “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”); see also *supra* text accompanying notes 11, 123.

D. The Coherent Communication Standard Would Guarantee a Particularized Inquiry, Requiring the Clearest Evidence to Justify Any Judicial Override of the Competency Presumption

The coherent communication standard would strike an appropriate balance between the sometimes competing purposes of the Sixth Amendment: protecting the autonomy of the individual on the one hand and ensuring the fairness of the trial proceeding on the other. It would do so by guaranteeing a particularized inquiry into the defendant's abilities and permit denial of the right to self-representation only when observable behavior of the defendant suggests that she can no longer present a coherent defense.¹⁴¹ In this way, the standard ensures that a trial court cannot eliminate the constitutional right to self-representation merely by invoking the defendant's mental illness, instead requiring empirical proof that the mental illness actually precludes the defendant from communicating coherently to the court or a jury.

The *Edwards* case itself reveals the legitimate need for such a requirement, as the trial judge apparently denied Edwards the right to represent himself "without explaining precisely what abilities Edwards lacked"¹⁴²—referring at most to psychiatric reports that presented contradictory data on the question of Edwards' competency to represent himself.¹⁴³ Mental competency is not unitary, as the majority opinion pointed out,¹⁴⁴ and medication can restore competency, as recognized in *Sell v. United States*.¹⁴⁵ Simply citing a history of mental illness may fail to take account of a defendant's rehabilitation through medication and also risks jettisoning the requirement that competency be measured at the time of trial rather than at some point in the past.¹⁴⁶ Allowing the trial judge to assume that the defendant is competent to stand trial but incompetent to represent himself reinstates a monolithic notion of

141. As the State of Indiana noted in its brief in *Edwards*, the coherent communication standard

therefore addresses the most problematic instances of self-representation—where a defendant's incoherence renders the trial farcical—yet protects the rights of competent defendants who, even if formally diagnosed with mental impairments, function at a sufficiently high level of coherence that their actions at trial, even if unskillful, will not patently undermine the fairness of the proceedings.

Brief for Petitioner, *supra* note 105, at 26.

142. *Edwards*, 128 S. Ct. at 2390 (Scalia, J., concurring); *see also supra* text accompanying note 86.

143. *Compare* Brief for Petitioner, *supra* note 105, at 43-47, with Brief for Respondent at 49-54, *Edwards*, 128 S. Ct. 2379 (No. 07-208), 2008 WL 649230, at *49-54.

144. *Edwards*, 128 S. Ct. at 2386; *see also supra* text accompanying notes 99-101.

145. *See* 539 U.S. 166, 169 (2003); *see also supra* notes 24-31 and accompanying text.

146. *See supra* notes 7-10 and accompanying text.

mental illness that the majority in *Edwards* ostensibly rejected.¹⁴⁷ Without a standard to which to refer, the trial judge may ignore the particularities of a defendant's mental condition and simply deny the self-representation right. The need to understand and appreciate the complexities of each defendant's mental condition is all the more important in cases like *Edwards* where the defendant's competence is in dispute because of conflicting evidence.

Some may argue that the process suggested above jeopardizes the efficiency of judicial proceedings. There is likely some truth to such fears, but the interest in judicial efficiency must be weighed against the autonomy of the defendant who wishes to represent herself—a right guaranteed to her by the Constitution of the United States.

E. Existing Protections Minimize the Dangers of Incompetent Self-Representation

Other safeguards already in place prevent the denigration of dignity and frustration of fairness hypothesized in the *Edwards* majority opinion.¹⁴⁸ As *McKaskle v. Wiggins* makes clear, courts may require the presence of standby counsel to assist a pro se defendant.¹⁴⁹ Instead of wholly denying a defendant an opportunity to demonstrate that she can adequately represent herself, as the majority opinion in effect allows, a court could simply appoint standby counsel to assist the defendant if she encounters problems during voir dire or the questioning of witnesses. Although those with mental illnesses may experience problems focusing or concentrating while representing themselves, the first instance of such a problem should not be automatic grounds for cutting off the self-representation right when standby counsel could easily provide the defendant with guidance concerning the matter she is having difficulty coherently explaining.

If the defendant continues to suffer problems focusing or communicating coherently, prohibitions on disruptive behavior that courts have already established could be expanded to encompass disruptions caused by a defendant's mental illness. Recall that *Faretta* recognized the authority of the trial judge to terminate self-representation by defendants who deliberately engage in obstructionist misconduct.¹⁵⁰ Moreover, in *Illinois v. Allen*, the Court held that the right to remain in the courtroom and confront witnesses

147. *Edwards*, 128 S. Ct. at 2386; see also *supra* text accompanying notes 99-101.

148. See *Edwards*, 128 S. Ct. at 2387; see also *supra* text accompanying notes 102-03.

149. See 465 U.S. 168, 176-77 (1984); see also *supra* text accompanying notes 46-55.

150. *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975); see also *supra* text accompanying note 44.

could be forfeited if a defendant repeatedly engages in disruptive behavior, making it impossible for trial to continue.¹⁵¹

Admittedly, neither of these cases involved someone with a mental illness, but rather someone who willfully ignored a judge's order to cease being disruptive. Nevertheless, the same logic applies to situations involving a mentally ill defendant. Initial missteps by the pro se defendant should not automatically mean that she is no longer able to represent herself; instead, standby counsel should step in to assist her in maintaining coherence. If that assistance fails, however, and the defendant continues to exhibit difficulties expressing herself clearly to the judge or jury, or asks inappropriate questions of a witness, this behavior would be akin to a willful disruption and deliberate obstruction because it would preclude the trial from continuing. In such a scenario, it would be appropriate for the trial judge to appoint counsel to take over so that the trial could continue.

V. Conclusion

The requirement that a defendant be competent to stand trial and the right of self-representation reflect sometimes-conflicting goals of the judicial system. On the one hand, competency evaluations ensure that the judicial process is fair, while on the other, the right of self-representation affords autonomy to the individual to be the master of his destiny. When a potentially incompetent defendant seeks to represent himself, courts must determine how to ensure a fair trial for that defendant without robbing him of his Sixth Amendment rights. This dilemma calls for a careful approach by the courts to make sure that they deny a defendant his *Faretta* right of self-representation only when absolutely necessary to ensure fairness.

Indiana v. Edwards affords judges the power to require a heightened level of competency for self-representation, but its failure to issue a concrete standard for determining that higher level of competency risks weakening the self-representation right. Justice Scalia rightly noted in his dissent that trial judges may avoid the burdensome task of determining the defendant's level of competency by simply referencing the defendant's history of mental illness and asserting that the indeterminate higher standard has not been met. While courts must surely prevent truly incompetent defendants from representing themselves, they should do so only after sufficiently explaining why a defendant's level of competency is high enough for him to stand trial but not high enough for him to represent himself. A clear standard requiring that the defendant be able to coherently communicate would help in this regard.

151. See 397 U.S. 337, 338, 343 (1970).

The coherent communication standard alleviates many of the problems associated with self-representation by potentially incompetent defendants. While conducting trial proceedings does require additional faculties above those needed to stand trial, all of them can be distilled into a common requirement that the defendant be able to communicate logical thoughts and arguments to the court. Only at the point when the defendant demonstrates his incapacity to mount a coherent defense should he be denied his right of self-representation.

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