Protect Me From Myself: Determining Competency to Waive the Right to Counsel During Civil-Commitment Proceedings in Washington State

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I. INTRODUCTION

Defendant[1] J.S. was found incompetent to stand trial in a criminal proceeding and detained for seventy-two hours in a mental-health facility for further evaluation.[2] Prior to the end of the detainment period, doctors from the facility treating J.S. filed a petition to require him to be treated involuntarily for up to ninety days.[3] Upon hearing of the civil-commitment[4] petition, J.S. requested to represent himself pro se, expressly stating to the court, "Yes, I would like to [represent myself]."[5] The judge then conducted a brief colloquy[6] with J.S. but asked only questions pertaining to J.S.'s legal experience and training.[7]

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1. Since the proceedings are civil in nature, parties subject to civil commitment are designated as respondents. But because a great deal of law regarding self-representation stems from criminal proceedings, and because the designation "respondent" switches depending on which party appeals a trial-court decision, parties subject to civil-commitment proceedings are herein referred to as "defendants."

2. State v. J.S. (*In re* Det. of J.S.), 159 P.3d 435, 437 (Wash. Ct. App. 2007).

3. *Id.*

4. Civil commitment is a civil proceeding in which involuntary evaluation or treatment is sought for a particular individual. "Commitment" is defined as "the determination by a court that a person should be detained for a period of either evaluation or treatment, or both, in an inpatient or a less-restrictive setting." WASH. REV. CODE § 10.77.010(2) (2012).

5. *Det. of J.S.*, 159 P.3d at 437–38.

6. A "colloquy" is "[a]ny formal discussion, such as an oral exchange between a judge, the prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights." BLACK'S LAW DICTIONARY 300 (9th ed. 2009).

7. *Det. of J.S.*, 159 P.3d at 438.

Upon conclusion of the colloquy, the court found that J.S. was not able to represent himself, but it made no specific holding that J.S. was unable to waive his right to counsel due to incompetency.[8] The court also made no findings as to the reason it determined that J.S. was not able to represent himself.[9] After ruling on J.S.'s request, the trial court received expert testimony that J.S. suffered from antisocial personality disorder and a cognitive disorder, with schizophrenia to be ruled out.[10] The court also was given information about J.S.'s three previous hospitalizations during the preceding three years.[11] In his own testimony, J.S. admitted to suffering from a cognitive disorder, and while he contended that the disorder manifested primarily in the form of physical symptoms, he also admitted that it resulted in memory problems.[12]

On appeal, J.S. claimed that the court's refusal to allow him to waive his right to counsel and represent himself violated his rights under the Washington constitution.[13] The appellate court found that the constitutional right to self-representation applied to defendants in civil-commitment proceedings.[14] The appellate court also recognized that Washington courts had not addressed the standard for determining the competency of a party seeking to exercise the right to self-representation.[15]

After reviewing the standards that other states use to make competency determinations, the court declined to articulate a comprehensive standard to be applied in future cases.[16] The court was reluctant to articulate a standard because it had held that the matter before it was moot; J.S. had completed his involuntary treatment and had been released from the hospital prior to the appellate court's ruling.[17] The appellate court did not further address the procedure for determining competency for two reasons: first, there was no relief the court could provide to J.S., and second, the issue of what procedure to use had not been litigated or resolved during the trial-court proceeding.[18] The court also did not consider the type

8. *Id.*

9. *Id.* at 442. It appeared to the appellate court that the determination was based on the colloquy with J.S., not on J.S.'s prior mental-health treatment or evaluation. *Id.* at 442 n.8.

10. *Id.* at 438.

11. *Id.*

12. *Id.*

13. *Id.* at 440.

14. *Id.*

15. *Id.* at 441.

16. *Id.* at 443 n.12.

17. *Id.* at 439.

18. *Id.* at 443.

of colloquy that should be used to ensure the validity of a party's waiver of the right to counsel.[19]

Articulating a clear standard for determining competency to waive the right to counsel is paramount to the protection of defendants' rights in civil-commitment proceedings. Such proceedings often involve defendants who suffer from mental illnesses, and who are thus particularly susceptible to behavior that is irrational or against their best interests.[20] Without a clear method to ascertain whether a particular defendant is competent to waive counsel, there is an increased likelihood that incompetent defendants will be permitted to conduct their own defense without the aid of counsel. Additionally, defendants like J.S. who later contest a trial court's ruling on competency often will not have any remedy available to them, as they will likely have completed their involuntary treatment well before an appeal is heard.[21] Only if courts have a comprehensive evidentiary procedure to apply when determining the competency of defendants will defendants be assured that their rights will be respected.

Washington State currently lacks a comprehensive standard to determine the competency of civil defendants who seek to waive their right to counsel. Other states have also noted recently that the standard to be applied when determining competency in such situations remains unaddressed.[22]

This Comment argues that an unarticulated, heightened standard of competency to waive counsel, under which Washington currently operates, is the ideal standard to address the unique concerns that exist in civil-commitment proceedings. This Comment clarifies the existing law governing the determination of a party's right to waive counsel, as well as the determination of the validity of such a waiver. This Comment also articulates a comprehensive inquiry standard for trial courts, both within and outside of Washington, to apply when determining the competency

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19. *Id.* at 443 n.12.

20. While many people subject to civil commitment require involuntary treatment due to cognitive disorders that may affect their ability to conduct their defense, some are committed for behavioral and personality disorders that do not necessarily impact cognition. For example, "sexually violent predators" may be involuntarily committed pursuant to section 71.09.060 of the Washington Revised Code, despite the state legislature finding that these individuals may "not have a mental disease or defect that renders them appropriate for . . . short-term treatment [for] individuals with serious mental disorders." WASH. REV. CODE § 71.09.010 (2001). Thus, while there is a greater likelihood in civil-commitment proceedings that mental illness will affect a party's ability to make decisions that are in his or her best interests, such an effect is not assured.

21. *See, e.g.*, *Det. of J.S.*, 159 P.3d at 443 (dismissing appeal because defendant had already completed his ninety-day civil commitment, leaving no available relief).

22. *See* Commonwealth v. DiGiampietro, No. 08-P-1849, 2009 WL 4110807, at *1 n.2 (Mass. App. Ct. Nov. 25, 2009).

of a party and the validity of a waiver. The goal of this express determination standard is to create from existing law a series of questions to be used during a colloquy between the trial judge and the party seeking to waive counsel, thus ensuring an adequate evidentiary record on which the court can base its determination.

Part II of this Comment argues that under federal law, states can and should apply a standard for determining competency to waive counsel in civil-commitment proceedings that is both unarticulated and stricter than the current standard for competency to stand trial. While Part III clarifies Washington State's mandatory two-step determination regarding a defendant's competency to waive counsel, Part IV argues that the determination should be based on a one-step fact-finding inquiry. Lastly, Part V of this Comment outlines the exact manner in which trial courts should conduct their fact-finding inquiries.

II. STANDARD OF COMPETENCY REQUIRED PURSUANT TO U.S. SUPREME COURT RULINGS

The Sixth Amendment provides an accused with both a right to counsel and a right to self-representation.[23] Courts have observed that these two rights are, by their nature, mutually exclusive, as an assertion of one requires a waiver of the other.[24] This tension highlights the importance of ensuring that an assertion or waiver of either right is made by a party that is competent to do so because two substantive constitutional rights are at issue. This Part summarizes the requirements for a waiver of the right to counsel under federal law, as well as the contemporary application of those requirements.

A. Requirements for an Effective Waiver of Counsel Under Federal Law

A criminal defendant cannot waive the right to counsel unless competent to do so.[25] The requirement that defendants be competent in order to waive counsel and proceed pro se has been deemed necessary to protect defendants' right to a fair trial.[26] In addition to the requirement of competency, parties seeking to waive their right to counsel must do so "knowingly and intelligently."[27] Though the Supreme Court in *Faretta v.*

23. Faretta v. California, 422 U.S. 806, 819 (1975).

24. Miller v. C.S. (*In re* Interest of C.S.), 713 N.W.2d 542, 548 (N.D. 2006).

25. Godinez v. Moran, 509 U.S. 389, 396 (1993).

26. Jason R. Marks, *State Competence Standards for Self-Representation in a Criminal Trial: Opportunity and Danger for State Courts After* Indiana v. Edwards, 44 U.S.F. L. REV. 825, 834 (2010).

27. *Faretta*, 422 U.S. at 835.

California only alluded to an additional requirement that the waiver be made voluntarily,[28] state courts have generally included such a requirement when determining the validity of a waiver.[29] The requirement that waiver be made voluntarily, intelligently, and knowingly ensures that when defendants seek to relinquish the numerous benefits associated with the right to counsel, they do so by their own free and reasoned choice, and with a requisite level of knowledge of the rights relinquished.[30]

The standard for mental competency to stand trial was originally articulated in *Dusky v. United States*.[31] This standard requires the trial court to determine "(1) whether the defendant has a rational as well as factual understanding of the proceedings against him and (2) whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."[32] The *Dusky* standard seems well-suited for determining the competency to stand trial, as it requires only that a defendant have some ability to interact with an attorney and to understand the proceedings. But when applied as the standard for determining competency to waive the right to counsel, the *Dusky* standard fails to measure defendants' mental fitness to conduct their own defense in a manner that will not infringe on their right to a fair trial.[33]

In *Godinez v. Moran*, the Court expressly rejected the idea that competency to waive the right to counsel "must be measured by a standard that is higher than (or even different from) the *Dusky* standard."[34] The Court qualified this statement by noting that "[s]tates are free to adopt competency standards that are more elaborate than the *Dusky* formulation, [but] the Due Process Clause does not impose these additional requirements."[35] The Court stressed that the level of competency required of parties seeking to waive the right to counsel "is the competence

28. *Id.*

29. *See In re* Jesse M., 170 P.3d 683, 686 (Ariz. Ct. App. 2007); Interest of C.S., 713 N.W.2d at 547; Lanett v. State, 750 S.W.2d 302, 304 (Tex. App. 1988); State v. J.S. (*In re* Det. of J.S.), 159 P.3d 435, 442 (Wash. Ct. App. 2007); S.Y. v. Eau Claire Cnty. (*In re* S.Y.), 457 N.W.2d 326, 328 (Wis. Ct. App. 1990).

30. *Faretta*, 422 U.S. at 835.

31. Dusky v. United States, 362 U.S. 402, 402 (1960).

32. Indiana v. Edwards, 554 U.S. 164, 170 (2008) (internal quotation marks and italics omitted) (citing *Dusky*, 362 U.S. at 402).

33. *See id.* at 172 (noting the difference between the minimum constitutional requirement of the *Dusky* standard and a "somewhat higher standard that measures mental fitness for another legal purpose").

34. Godinez v. Moran, 509 U.S. 389, 398 (1993).

35. *Id.* at 402.

to *waive the right,* not the competence to represent [themselves]."[36] Additionally, the Court found that while competency is required whenever the waiver of the right to counsel is asserted, "a competency determination is necessary only when a court has reason to doubt the [party]'s competence."[37]

In *Indiana v. Edwards*, the Court qualified the application of the *Dusky* standard by holding that "the Constitution permits 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."[38] The Court recognized the possibility that a party could satisfy the *Dusky* standard by having the ability to work with counsel at trial, while at the same time being "unable to carry out the basic tasks needed to present his [or her] own defense without the help of counsel."[39] The Court distinguished *Godinez* from *Edwards* based on the fact that *Godinez* addressed the defendant's right to proceed on his own to enter a guilty plea, rather than the more general right to self-representation.[40] The Court also distinguished *Godinez* because that case concerned a state court's ability to permit a defendant to operate without counsel in a particular function, not a state's ability to deny a defendant the ability to waive counsel.[41]

Additionally, the *Edwards* Court held that "the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so."[42] While it is unclear exactly what the Court meant by "realistic account," this holding necessarily permits judges to conduct an inquiry into a party's mental state and look to extrinsic evidence demonstrating that mental state. Without such

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36. *Id.* at 399.

37. *Id.* at 402 n.13.

38. *Edwards*, 554 U.S. at 178 (italics added). While *Edwards* articulated only a "mental-illness-related limitation on the scope of the self-representation right," *id.* at 171, this Comment addresses only defendants in civil-commitment proceedings in which there is a substantial likelihood that defendants suffer from some type of mental illness or disorder for purposes of applying the *Edwards* limitation. *See* Marks, *supra* note 26, at 846 (arguing that the *Edwards* Court addressed only competency with regard to "severe mental illness" or "lack[] [of] mental capacity").

39. *Edwards*, 554 U.S. at 175–76.

40. The defendant in *Godinez* sought to change his pleas himself, not to conduct his own defense. *Id.* at 173. Thus, his ability to conduct a defense at trial was not at issue, leaving the Court to consider the narrow issue of his "competence to waive the right" to counsel only with regard to entry of pleas. *Id.*

41. *Id.* at 173–74.

42. *Id.* at 177–78.

an inquiry, judges would be unaware of the mental capacities that they are to take into realistic account.

Trial courts may now impose a standard of competency to waive counsel that exceeds the *Dusky* standard but only absent an express holding to the contrary by the state supreme court.[43] If a trial court imposes a heightened standard, then that standard must simply comply with the minimal requirements of *Edwards*.[44] Thus, a trial court could find defendants incompetent where they "suffer from severe mental illness to the point when they are not competent to conduct trial proceedings by themselves."[45]

*B. Application of Competency Standards Post-*Edwards

Despite the clarification of the law with regard to competency standards, little has changed in the manner that current standards are applied.[46] As *Dusky* now stands for the minimum constitutional standard,[47] state courts and legislatures can define the standard for competency to waive counsel as either (1) the *Dusky* standard, (2) an unarticulated standard that is greater than the *Dusky* standard, or (3) an articulated standard that is greater than the *Dusky* standard.[48] Prior to *Edwards*, many state courts applied the *Dusky* standard when determining a defendant's right to waive counsel.[49] When a waiver of the right to counsel is sought, these courts are now free to articulate standards that consider a defendant's mental capacity and illnesses.[50] As yet, none have expressly done so.[51] But the California Supreme Court did recently hold that trial

43. *See* People v. Johnson, No. S188619, 2012 WL 254856, at *5 (Cal. Jan. 30, 2012) ("Lower courts may decide questions of first impression, including the effect that subsequent events, such as a United States Supreme Court decision, have on decisions from a higher court, including this one. In this case, that authority includes deciding whether to accept the *Edwards* invitation.").

44. *Id.* at *6.

45. *Edwards*, 554 U.S. at 178.

46. *See* Marks, *supra* note 26, at 843 (noting that no state courts have articulated an express standard for the determination of competency to waive counsel since *Edwards*).

47. *Edwards*, 554 U.S. at 172.

48. Marks, *supra* note 26, at 836–37.

49. *See* Commonwealth v. Simpson, 704 N.E.2d 1131, 1135 (Mass. 1999); *see also* State v. Camacho, 561 N.W.2d 160, 171–72 (Minn. 1997); Commonwealth v. Starr, 664 A.2d 1326, 1336 (Pa. 1995).

50. A standard for competency remains unarticulated when a court or state requires a competency determination but declines "to delineate the components of representational competence." E. Lea Johnson, *Representational Competence: Defining the Limits of the Right to Self-Representation at Trial*, 86 NOTRE DAME L. REV. 523, 531 (2011).

51. *Id.* at 526 (noting that lower courts have yet to provide guidance for competency determinations post-*Edwards*); *see also* Marks, *supra* note 26, at 843 ("[N]o state court in the post-*Edwards* era appears to have articulated a detailed standard of self-representation competence." (italics added)).

courts may apply a heightened, though unarticulated, standard of competency.[52]

The traditional *Dusky* standard does not sufficiently address the concerns expressed by the *Edwards* Court. Continuing to apply only the *Dusky* standard when making competency determinations would minimize the chances of reversible error, as only defendants deemed unable to stand trial would be kept from representing themselves.[53] But although this would be a safe approach for judges seeking to avoid having their rulings reversed, it would not be the best standard for ensuring that defendants are not unfairly deprived of their right to a fair trial.[54] Continuing to apply the *Dusky* standard alone would simply allow judges to play it safe at the risk of permitting incompetent defendants to represent themselves.

Applying a heightened but unarticulated standard for competency would allow courts the greatest amount of discretion, enabling case-by-case determinations based on the particularities of different circumstances and defendants.[55] The *Edwards* Court viewed this discretion as desirable because trial judges "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."[56] But such an unarticulated standard would also increase the chances of reversal on appeal, as appellate courts would have to review the discretionary rulings of the trial courts.[57] Conversely, an articulated standard would serve to diminish the chances of reversible error by providing a clear standard for courts to apply,[58] but

52. People v. Johnson, No. S188619, 2012 WL 254856, at *6 (Cal. Jan. 30, 2012) ("At this point, at least, we also think it best not to adopt a more specific standard [for competency than the requirements of *Edwards*]."). The court notably rejected several articulated competency standards, including those proposed in law review articles by Jason R. Marks and Professor E. Lea Johnson. *Id.* at *5–6. *See generally* Johnson, *supra* note 50; Marks, *supra* note 26. Instead, the court stated:

> [P]ending further guidance from the high court, we believe the standard that trial courts considering exercising their discretion to deny self-representation should apply is simply whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel.

Johnson, 2012 WL 254856, at *6.

53. Marks, *supra* note 26, at 837–38.

54. *Id.* at 838.

55. *Id.* at 838–39.

56. Indiana v. Edwards, 554 U.S. 164, 177 (2008).

57. Marks, *supra* note 26, at 839.

58. An articulated procedure for trial courts to follow in developing the factual record prior to ruling would also serve to diminish the likelihood of reversal. The likelihood of sufficiency would be maximized because by legislating or ordering a particular procedure, the legislature or the court would first engage in a fact-finding process and then find that the procedure will yield a sufficient evidentiary record on which a court could base its determination. Because the court or legislature

trial courts would lose some of their ability to tailor rulings to the specific facts of each case.[59]

Concerns regarding reversible error, while compelling in the criminal context, are less important when applied to civil-commitment proceedings. If reversible error is found on appeal in criminal cases, the conviction is vacated, and the case is either dismissed or remanded for a new trial. Thus, emphasis is placed on strictly adhering to all constitutionally mandated procedures to ensure that convictions are obtained while respecting the defendant's rights, which minimizes the chances of reversal on appeal.

In contrast, the paramount concern of trial courts in civil-commitment proceedings must be to ensure that rulings are justified based on the particular facts of each case. Defendants in civil-commitment proceedings generally have no available remedy on appeal, as their commitment will likely have ended before any appeal is heard.[60] Because there is no remedy available on appeal, courts cannot afford to focus primarily on a mere minimization of reversible errors. Trial courts hearing commitment matters have only one chance to arrive at the correct result, and they cannot afford to sacrifice any accuracy in their rulings just to ensure that their rulings will be upheld on appeal.

An unarticulated standard for determining competency to waive the right to counsel would best meet the concerns of accuracy and fairness that are present in civil-commitment proceedings. Providing trial courts the greatest amount of discretion possible would allow for determinations of competency based on the particularities of each case, and would engender the development of a body of judicial opinions and customs focused on facts instead of rules. While an articulated standard would minimize the chances of reversible error, it would also create a greater chance that defendants will be wrongfully deprived of their right to waive counsel by limiting judicial discretion to make rulings based primarily on the facts of the case at hand.[61] Any benefits of consistency in

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would have already deemed such a record to be sufficient, then subsequent courts replicating that record would likely be affirmed on appeal.

59. *See* Marks, *supra* note 26, at 839.

60. *See, e.g.*, State v. J.S. (*In re* Det. of J.S.), 159 P.3d 435, 443 (Wash. Ct. App. 2007) (dismissing appeal because defendant had already completed his ninety-day civil commitment, leaving no available relief).

61. Some legal scholars have also raised concerns that the Supreme Court's failure to articulate a competency standard will cause appellate courts to simply defer to the determinations of trial courts, even when there is significant evidence that the defendant suffered from a severe mental impairment. *See generally* John H. Blume & Morgan J. Clark, *"Unwell":* Indiana v. Edwards *and the Fate of Mentally Ill Pro Se Defendants*, 21 CORNELL J.L. & PUB. POL'Y 151 (2011) (reviewing facts of trial-court decisions to demonstrate that convictions were affirmed despite manifest mental

application gained by articulating a competency standard could also be gained by articulating a procedure for building the factual record on which a ruling will be based. By relying on an unarticulated competency standard and a clear procedural standard, courts can maximize their discretion while ensuring that a factual record sufficiently supports the ruling.

III. STANDARD OF COMPETENCY CURRENTLY REQUIRED UNDER WASHINGTON STATE LAW

The right to counsel in civil-commitment proceedings within Washington State is a statutory creation.[62] Section 71.05.360(5)(b) of the Washington Revised Code states:

> [A party subject to civil commitment] has a right to communicate immediately with an attorney; has a right to have an attorney appointed to represent him or her before and at the probable cause hearing if he or she is indigent; and has the right to be told the name and address of the attorney that the mental health professional has designated pursuant to this chapter.

Additionally, the court in *In re Detention of J.S.* expressly held that "the right of self representation should apply in civil commitment proceedings."[63] The formulation of these rights is substantively identical to the rights to counsel and self-representation afforded to defendants in state criminal proceedings.[64]

The Washington State mental-illness statutory scheme states that "[n]o person shall be presumed incompetent as a consequence of receiving an evaluation or voluntary or involuntary treatment for a mental disorder . . . ."[65] The state legislature has also expressly stated that it did not intend to create a presumption that a person found incompetent to stand trial "is gravely disabled or presents a likelihood of serious harm requir-

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illnesses that impaired pro se defendants' abilities to defend themselves). But this concern is less compelling in the civil-commitment context, where it is more important to ensure a just result at the trial-court level than it is to provide remedial tools on appeal. *See supra* Part II.

62. WASH. REV. CODE § 71.05.360(5)(b) (2009).

63. *Det. of J.S.*, 159 P.3d at 440.

64. The Washington State Constitution provides that "[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel." WASH. CONST. art. I, § 22. This clause has been interpreted as unequivocally guaranteeing the constitutional right to represent oneself, though only in criminal proceedings. State v. Silva, 27 P.3d 663, 672 (Wash. Ct. App. 2001).

65. § 71.05.360(1)(b).

ing civil commitment."[66] This statutory bar on presumed incompetence has been interpreted as achieving a comparatively similar result to state laws that expressly recognize a presumption of competency.[67] Implicit in the constructive presumption of competency is the need to make a determination regarding the competency of a defendant seeking to waive counsel that is separate from the determination of whether that defendant meets the standard for involuntary commitment.[68]

The trial court must make three distinct findings with regard to a defendant's attempted waiver of counsel, regardless of whether the proceedings are criminal or civil in nature.[69] As a preliminary matter, the court must find that the defendant unequivocally waived the right to counsel.[70] The trial court must then follow a two-step process: "First, the trial court must determine if the person is competent to decide whether to waive his [or her] right to counsel. Second, if the trial court finds the person competent, then it must determine whether the person is waiving counsel knowingly, voluntarily, and intelligently."[71]

To determine competency to waive counsel in criminal proceedings, Washington courts have traditionally applied a standard similar to the one created by *Dusky* and *Faretta*.[72] The Washington State Supreme Court recently affirmed this approach in *In re Rhome*, holding that courts are only required to determine whether defendants are competent to stand

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66. Act of Feb. 14, 1998, ch. 297, § 1, 1998 Wash. Sess. Laws 1547, 1547 (amending Washington statutes regarding the commitment of mentally ill persons). The Washington State mental-illness statutes were expressly intended to only:

> (1) clarify that it is the nature of a person's current conduct, current mental condition, history, and likelihood of committing future acts that pose a threat to public safety or himself or herself, rather than simple categorization of offenses, that should determine treatment procedures and level; (2) improve and clarify the sharing of information between the mental health and criminal justice systems; and (3) provide additional opportunities for mental health treatment for persons whose conduct threatens himself or herself or threatens public safety and has led to contact with the criminal justice system.

Id.

67. *Det. of J.S.*, 159 P.3d at 442.

68. *Id.*

69. *Id.* at 437.

70. *Id.* at 440.

71. *Id.* at 442.

72. *Compare* State v. McDonald, 979 P.2d 857, 862–63 (Wash. Ct. App. 1999) ("To find a defendant competent, a court must determine whether the defendant (a) understands the nature of the proceedings against him; (b) is able to assist in his own defense; and (c) knowingly and intelligently decided to waive counsel." (citing State v. Hahn, 726 P.2d 25, 30–31 (Wash. 1986))), *with* Dusky v. United States, 362 U.S. 402, 402 (1960) (requiring determination of "(1) whether the defendant has a rational as well as factual understanding of the proceedings against him and (2) whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding"), *and* Faretta v. California, 422 U.S. 806, 835 (1975) (requiring waiver of counsel to be made "knowingly and intelligently").

trial before allowing them to proceed pro se.[73] Although the court considered only the constitutional right to self-representation in criminal proceedings, its holding is likely to apply with equal force to civil-commitment proceedings due to the substantive similarity between the rights to self-representation in criminal and civil-commitment matters.[74]

But there are two indications that the current standard for competency determinations in Washington is more akin to an unarticulated standard that exceeds *Dusky*. First, the Washington legislature has created statutory factors that allow courts to consider evidence when determining competency that is beyond the scope of the *Dusky* standard.[75] The broadest of these statutory factors looks to whether the defendant seeking to waive counsel "does so understanding . . . [a]ll other facts essential to a broad understanding of the whole matter."[76] This factor provides a significant amount of discretion to the court with regard to the type of evidence it chooses to consider because such an inquiry into a defendant's understanding effectively allows courts to make competency determinations based on any and all information available to them. A "broad understanding" is not necessary to satisfy the first prong of the *Dusky* standard, which requires only that the defendant have a rational and factual understanding of the proceeding.[77] But evidence of a defendant's broad understanding would include evidence of that defendant's ability to conduct his or her own defense. Consideration of that ability was one of the primary reasons the Supreme Court held that states can apply a standard for competency that exceeds the *Dusky* standard.[78]

Secondly, although *In re Rhome* affirmed the *Dusky* standard as the only test constitutionally required for the determination of a defendant's competency to waive counsel, it regarded that test as the constitutional minimum.[79] The Washington State Supreme Court recognized that trial

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73. The defendant in *In re Rhome* asked the court "to conclude as a matter of law that a judge must independently determine that a defendant is mentally competent not just to stand trial but to represent himself." *In re* Rhome, 260 P.3d 874, 880 (Wash. 2011). The court rejected this request and held that no new level of competency for self-representation was required above and beyond the competency to stand trial. *Id.* at 881–82.

74. *See supra* notes 14, 64, and accompanying text.

75. *See McDonald*, 979 P.2d at 863 (stating courts "may also review" the statutory factors of section 10.77.020(1) of the Washington Revised Code when inquiring into the competency of a defendant to waive counsel).

76. WASH. REV. CODE § 10.77.020 (2006).

77. Indiana v. Edwards, 554 U.S. 164, 170 (2008) (citing *Dusky*, 362 U.S. at 402).

78. As previously stated, the Supreme Court was concerned that under the *Dusky* standard, some defendants will be found competent to waive counsel while they are, in practice, unable to adequately present their cases due to mental illness. *Id.* at 176–77.

79. *In re* Rhome, 260 P.3d 874, 881 (Wash. 2011) (noting that while the *Dusky* standard is the current standard for competency, *Edwards* allows for a more stringent waiver-of-counsel standard).

courts may "limit the right to self-representation when there is a question about a defendant's competency . . . even if the defendant has been found competent to stand trial."[80] Courts can apply this heightened standard because of their duty to consider the impact that waivers of counsel will have on defendants' countervailing rights, such as the right to a fair trial and due process.[81] "[T]rial courts may consider that a defendant's mental capacity will have serious and negative effects on the ability to conduct a defense."[82] Thus, the Washington State Supreme Court has determined that mental capacity is a factor in the determination of a defendant's competency to waive counsel.[83]

Both the Washington State Supreme Court and the Washington legislature allow courts to consider evidence that is probative of defendants' ability to conduct their defense,[84] and the combination of these allowances has implicitly created an unarticulated standard for competency that is beyond the requirements of *Dusky*. Indeed, although the supreme court declined to require the consideration of a defendant's mental health during competency determinations, it recognized that the current law already allows courts to do so and thus declined to articulate an express, formulated rule.[85] In so holding, the court essentially recognized that Washington applies an unarticulated competency standard that grants courts the discretion to make determinations based on consideration beyond the scope of *Dusky*.[86]

The determination of competency to waive the right to counsel does not depend on the waiver being made knowingly, voluntarily, or intelligently. Under Washington's determination process, a court addresses

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80. *Id.* at 879.

81. *Id.* at 880, 883 ("'[I]f the court determines that [the defendant] does not have the requisite mental competency to intelligently waive the services of counsel nor adequate mental competency to act as his own counsel, then his [fair trial and due process rights are] disregarded if the court permits him to so act in a criminal case.'" (quoting State v. Kolocotronis, 436 P.2d 774, 779–80 (Wash. 1968))).

82. *Id.* at 883. The court noted that "nothing precludes trial courts from inquiring further into a defendant's ability to waive counsel when mental health concerns are present." *Id.*

83. The court actually stated "that a defendant's mental health status is but one factor a trial court may consider in determining whether a defendant has knowingly and intelligently waived his right to counsel." *Id.* at 881. But the court's prior statement that a party can be deemed incompetent despite satisfying the *Dusky* standard, *id.* at 880, when viewed in conjunction with the statutory factors for competency that are considered in addition to the *Dusky* standard, State v. McDonald, 979 P.2d 857, 863 (Wash. Ct. App. 1999), renders it likely that the court meant for this factor to be applied during competency analyses.

84. *See* WASH. REV. CODE § 10.77.020 (2006); *In re Rhome*, 260 P.3d at 883.

85. *In re Rhome*, 260 P.3d at 881 ("The existing law already provides for judges to be sensitive to mental health issues when considering whether to grant a waiver.").

86. *See id.* at 883 (recognizing that courts have discretion to "consider [whether] a defendant's mental capacity will have serious and negative effects on the ability to conduct a defense").

whether a defendant's waiver is made knowingly, voluntarily, and intelligently only after it first determines a defendant's competency.[87] Thus, Washington's articulation of a two-step process seemingly rejects a standard for determining competency that depends on whether a defendant was, at that time, capable of knowingly, voluntarily, and intelligently waiving counsel. The two-step process also treats competency as a mere prerequisite for knowing, voluntary, and intelligent waiver. Since a court must consider the second step only if a defendant is found to be competent, it is implied that a finding of competency is not dispositive of the issue of whether a waiver is made knowingly, voluntarily, and intelligently.

IV. ONE- OR TWO-STEP PROCESS FOR THE DETERMINATION OF COMPETENCY DURING CIVIL-COMMITMENT PROCEEDINGS

While *In re Detention of J.S.* recognized a distinct two-step process for competency determinations in civil-commitment proceedings, such a division of the determination is not easy to apply, nor has it historically been applied consistently. The Washington State Supreme Court has previously stated:

> [I]f the court determines that [a defendant] does not have the requisite mental competency to intelligently waive the services of counsel nor adequate mental competency to act as his own counsel, then his right to a fair trial and his constitutional right to due process of law, is disregarded if the court permits him to so act in a criminal case.[88]

This statement, which other Washington courts have relied upon,[89] demonstrates a natural tendency to blur the determinations of whether a

87. See State v. Kolocotronis, 436 P.2d 774, 779–80 (Wash. 1968), which stated the following:

> [I]f the court determines that [the defendant] does not have the requisite mental competency to intelligently waive the services of counsel nor adequate mental competency to act as his own counsel, then his right to a fair trial and his constitutional right to due process of law, is disregarded if the court permits him to so act in a criminal case.

This passage demonstrates that an intelligent waiver can occur only when the party is first found to be competent. *See In re Rhome*, 260 P.3d at 881 (noting that prior case law found knowing and intelligent waiver subsequent to a competency determination). While the court in *In re Rhome* stated that "an independent determination of competency for self-representation is [not] constitutional[ly] mandate[d]," the passage refers only to the court's refusal to impose a level of competency that exceeds what is required under the *Dusky* standard. *Id.*

88. *Kolocotronis*, 436 P.2d at 779–80.

89. *See, e.g.*, *In re Rhome*, 260 P.3d at 879; *In re* Meade, 693 P.2d 713, 717 (Wash. 1985); State v. Imus, 679 P.2d 376, 388 (Wash. Ct. App. 1984).

party is competent to waive counsel and whether the waiver is made knowingly, voluntarily, and intelligently.[90]

Other state courts also frequently blur the requirement that a defendant be competent to waive counsel with the requirement that a defendant's waiver be made knowingly, voluntarily, and intelligently.[91] This tendency seems to arise from the inherent interrelatedness of a defendant's competency and ability to act knowingly, voluntarily, and intelligently. This interrelatedness can potentially frustrate courts' attempts to consider a defendant's competency to make decisions about legal rights without simultaneously considering whether that defendant knows the nature and effect of those decisions, understands the gravity of the situation, and acts willfully without basing such decisions on illogical thinking or compulsions caused by mental illness. Even courts that clearly divide competency determinations into two distinct analyses struggle with this interconnectedness.[92] As one court noted, "[I]t appears inherently contradictory to find a respondent severely mentally ill, yet able to knowingly and intelligently 'waive' his right to counsel."[93]

Despite the inherent difficulty with segmented application, many states apply Washington's two-step procedure.[94] The Wisconsin Supreme Court requires that in civil cases trial courts conduct two inquiries to determine whether a defendant's waiver of the right to counsel is valid.[95] The first inquiry is whether the waiver is "knowing, intelligent and voluntary," and the second is whether the defendant is competent to proceed pro se.[96] Similarly, the North Dakota Supreme Court has also articulated the following requirements:

> Our trial courts must recognize a distinction between what are two separate and independent determinations in mental health proceed-

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90. In the above passage, the court conflated the requirement of competency with the separate requirement of intelligent waiver by calling for the determination of a defendant's "competency to intelligently waive" counsel. *See Kolocotronis*, 436 P.2d at 779.

91. *See, e.g.*, *In re* Jesse M., 170 P.3d 683, 688–90 (Ariz. Ct. App. 2007) (setting forth two separate steps for competency determination and then merging their consideration); State v. Arguelles, 63 P.3d 731, 751 (Utah 2003) (treating knowing and voluntary waiver as requirements of competency).

92. *See, e.g.*, T.Z. v. R.Z. (*In re* Interest of R.Z.), 415 N.W.2d 486, 488 (N.D. 1987).

93. *Id.* (noting the awkwardness of applying to mental-health proceedings principles of competency originally developed for criminal proceedings).

94. Indeed, Washington's two-step approach is itself based on the standards first applied by other states. State v. J.S. (*In re* Det. of J.S.), 159 P.3d 435, 441–42 (Wash. Ct. App. 2007) (analyzing determination of competency to waive counsel under Illinois, North Dakota, and Wisconsin state law).

95. S.Y. v. Eau Claire Cnty. (*In re* S.Y.), 457 N.W.2d 326, 328 (Wis. Ct. App. 1990).

96. *Id.*

> ings. First, the trial court determines competence for the limited purpose of assessing the [party]'s ability to knowingly, intelligently, and voluntarily waive counsel. This determination must occur at the beginning of the proceeding . . . . Assuming nothing overcomes the presumption that respondent is competent, the trial court proceeds to determine if the respondent's waiver of counsel is knowing, intelligent, and voluntary.[97]

But even these examples of nearly identical two-step processes demonstrate confusion over which requirement is to be addressed first: the competency of the party or the validity of the waiver. While a party must be competent in order to effect a valid waiver of the right to counsel, an inquiry into one will necessarily overlap with an inquiry into the other due to the interrelatedness of the two concepts.

Although the two-step process to determine competency to waive the right to counsel seems to be conceptually warranted, use of a segmented, two-step inquiry is both impractical and counter-intuitive. A person does not act knowingly if incapable of understanding what is occurring. A person does not necessarily act voluntarily when under the influence of a psychological compulsion. And a person does not act intelligently if his or her sincerely held beliefs are irrational or the result of delusion. All of these issues pertain directly to competency, and an inquiry into one will necessarily entail inquiry into the other. Courts should thus view the inquiry into a proposed waiver of counsel as a single step, where the colloquy conducted and extrinsic evidence considered will provide the information required to make two separate determinations regarding a party's competency to waive the right to counsel and the validity of such a waiver.

V. INQUIRY INTO COMPETENCY AND VALIDITY

In order for a trial court to enter findings regarding a defendant's competency to waive the right to counsel and the validity of such a waiver, there is a clear requirement that the record support the court's decision.[98] Even when a trial court has neglected to inquire into the defend-

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97. Miller v. C.S. (*In re* Interest of C.S.), 713 N.W.2d 542, 547 (N.D. 2006). The inquiries are substantively similar to those required in Wisconsin, though they are addressed in a reverse order. *Compare id.*, *with In re S.Y.*, 457 N.W.2d at 328.

98. *See, e.g.*, *In re* Jesse M., 170 P.3d 683, 688 (Ariz. Ct. App. 2007) ("[A] person with a mental health diagnosis can waive his right to counsel so long as he is competent to make the decision and the record supports the trial court's decision."); Interest of R.Z., 415 N.W.2d at 488 ("[A] respondent in a mental health proceeding may waive counsel and assert the right to self-representation, only if the waiver is knowing and intelligent and voluntary and only if it appears on the record. Ab-

ant's competency to waive counsel, appellate courts can uphold the denial of that right based on the "totality of the record" supporting such a denial.[99] Thus, it is important to ensure that the evidentiary record contains information an appellate court can "hang its hat on," if need be. By creating a strong evidentiary record prior to determining the defendant's competency and the validity of the waiver, the trial court can help minimize the chance that the denial of the waiver of counsel will lead to a reversal on appeal. A strong evidentiary record also protects the defendant's rights by helping ensure that the court's determination is based on a sufficient amount of facts,[100] rather than on presumptions made about a defendant who faces civil commitment or who was previously found incompetent to stand trial. Additionally, the more voluminous the evidentiary record, the more fair the proceedings will be viewed by third-parties, which is a concern the Supreme Court has deemed important in the realm of involuntary commitment.[101]

Trial courts have a great deal of discretion when conducting inquiries into the competency of the parties that appear before them. Such determinations of a person's competency to waive the right to counsel "must rest to a large extent upon the judgment and experience of the trial judge."[102] But trial courts are to approach issues of waiver of counsel with a strong presumption against finding that a waiver has validly occurred.[103] Given the strong presumption against waiver articulated by the Washington State Supreme Court, trial courts should take great steps to ensure that evidentiary records heavily support their determinations regarding competency and validity of waiver, regardless of the level of discretion afforded them.

Trial courts could best assure an evidentiary record sufficient to support their determinations by articulating a comprehensive, step-by-step process for building that record. If a trial court designs its fact-finding process to ensure a well-developed evidentiary record, there will be a greater chance that appellate courts will find the record to be suffi-

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sent evidence of a knowing, intelligent and voluntary waiver of counsel, a respondent in an involuntary commitment proceeding may not represent himself.").

99. *See In re Jesse M.*, 170 P.3d at 690 (two petitions and two affidavits regarding appellant's mental health were sufficient to support a denial of his request to waive counsel, despite a lack of findings on the matter by the trial court).

100. *See* Marks, *supra* note 26, at 841.

101. *See* Indiana v. Edwards, 554 U.S. 164, 177 (2008) ("[P]roceedings must not only be fair, they must appear fair to all who observe them." (internal quotation marks omitted)).

102. State v. Klessig, 564 N.W.2d 716, 724 (Wis. 1997).

103. "[Trial] 'courts should indulge every reasonable presumption against finding that a defendant has waived the right to counsel.'" State v. J.S. (*In re* Det. of J.S.), 159 P.3d 435, 440 (Wash. Ct. App. 2007) (quoting State v. Vermillion, 51 P.3d 188, 192 (Wash. Ct. App. 2002)).

cient. Trial courts consistently following a uniform process will also minimize variations in the records on which their findings are based. If trial courts followed a fact-finding process detailed by the legislature or the state supreme court, then they could maximize the likelihood that the records they generate are sufficient.[104] Since the Washington State Supreme Court and legislature have yet to address this issue, this Part proposes a process that trial courts should use when determining a defendant's competency to waive counsel in a civil-commitment proceeding. That procedure should consist of a detailed and standardized colloquy between the judge and the defendant, as well as a limited consideration of extrinsic evidence.

A. Colloquy with the Party Seeking to Waive the Right to Counsel

Washington law does not currently require a colloquy to be performed when a defendant seeks to waive the right to counsel.[105] In *In re Detention of J.S.*, Division II of the Washington Court of Appeals declined to consider whether a colloquy was required to determine the competency of a party to waive the right to counsel or the validity of such a waiver.[106] But several courts,[107] including the Washington State Supreme Court,[108] have recognized that a colloquy between the judge and the defendant is the most efficient way to build an evidentiary record on which to base a competency determination.

While some states have been hesitant to mandate that trial courts conduct a colloquy prior to ruling on a party's competency,[109] others have expressly created such a requirement. In Wisconsin, whenever a defendant seeks to waive the right to counsel, a trial court is required to engage in a colloquy to determine whether the waiver is valid.[110] Similar-

104. *See supra* note 58.

105. *See* City of Bellevue v. Acrey, 691 P.2d 957, 962 (Wash. 1984) (declining to require courts to perform a colloquy when a defendant requests to waive counsel).

106. *Det. of J.S.*, 159 P.3d at 443 n.12.

107. *See, e.g.*, *Klessig*, 564 N.W.2d at 721 ("Conducting such an examination of the defendant is the clearest and most efficient means of insuring that the defendant has validly waived his right to the assistance of counsel, and of preserving and documenting that valid waiver for purposes of appeal and postconviction motions.").

108. *See Acrey*, 691 P.2d at 962 ("[A] colloquy on the record is the preferred means of assuring that defendants understand the risks of self-representation. We strongly recommend such a colloquy as the most efficient means of limiting appeals.").

109. This hesitancy may result from the fact that determinations of competency are subject to the deferential abuse-of-discretion standard of review. *See In re* Rhome, 260 P.3d 874, 881 (Wash. 2011). Given that appellate courts attempt to rule narrowly, such a deferential analysis likely discourages them from setting forth new standards of conduct to govern the actions of future trial courts.

110. *Klessig*, 564 N.W.2d at 721.

ly, the North Dakota Supreme Court has stated that "in a mental health proceeding where the respondent wishes to represent himself, the trial court [is expected to] engage in a colloquy with the respondent before allowing respondent to proceed pro se."[111]

The use of colloquies is an effective way to build a sufficient evidentiary record on which courts may base their determinations of competency. A colloquy between the judge and a would-be pro se defendant serves three important functions: (1) the colloquy answers provide substantive information on which the judge can base a ruling; (2) the colloquy allows the judge to ensure for the record that the defendant is informed of his or her rights, as well as the benefits being waived;[112] and (3) the colloquy gives the judge an opportunity to gauge how the defendant might behave during the proceedings, should the waiver be granted. No other type of procedure can provide so much information regarding a defendant's abilities or understanding.[113] Colloquies also have the benefit of malleability, as the questions can be altered or supplemented based on the peculiarities of the circumstances.

An express list of colloquy questions would provide substantial direction to trial courts while serving numerous public interests. Use of a predetermined series of questions would help ensure the uniformity of evidentiary records, as all courts would seek to uncover roughly the same information. Court proceedings would also be rendered more efficient because the judge would already have a series of topics and questions to utilize.[114] Additionally, use of an express list of questions would allow courts to further fine-tune the fact-finding process by drawing the attention of litigators and legal scholars to the conventions for colloquies, which would increase the subject's treatment in legal arguments, legal scholarship, and court orders.[115] Improving the uniformity, efficiency,

111. Miller v. C.S. (*In re* Interest of C.S.), 713 N.W.2d 542, 548 (N.D. 2006).

112. *See* State v. Chavis, 644 P.2d 1202, 1205 (Wash. Ct. App. 1982) (noting that the requirements of *Faretta* can be addressed during a colloquy).

113. *See id.* (noting that a judge "must make a penetrating and comprehensive examination in order to properly assess" a party's waiver of counsel). No other procedure is as malleable or quickly adaptable as a colloquy, which allows judges to address the specific questions they may have that are particular to a specific case, arise during a hearing or trial, and are not addressed by documents filed by the parties.

114. Federal courts already use a similar shortcut for the determination of competency to waive counsel in criminal proceedings. *See* FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 6–7 (5th ed. 2007) [hereinafter BENCHBOOK], *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Benchbk5.pdf/$file/Benchbk5.pdf.

115. In *In re Detention of J.S.*, the court declined to review the sufficiency of the colloquy between the judge and the defendant because the issue was not litigated at the trial-court level. State v. J.S. (*In re* Det. of J.S.), 159 P.3d 435, 443 n.12 (Wash. Ct. App. 2007).

litigation, and responsiveness of the fact-finding process would increase the transparency of competency determinations, which would also increase the public's perception that the proceedings were fair.[116]

Courts should create an express list of colloquy questions to realize the numerous benefits of such established procedures for building the evidentiary record. Despite those benefits, most courts have resisted the creation of or declined to create an express list of questions for trial courts to ask during colloquies.[117] But since the Supreme Court now permits state courts to formulate requirements for competency that are stricter than the *Dusky* requirements,[118] courts are free to seek and consider information that does not simply pertain to a defendant's factual understanding of the proceedings or ability to consult with an attorney. Thus, courts can seek information regarding any issues that they feel may pertain to the competency of defendants.

This section proposes a comprehensive series of topics that trial courts both in and outside of Washington State can use to frame their fact-finding processes during civil-commitment proceedings. The series is based on considerations of colloquy standards employed in different proceedings and by different jurisdictions, as well as statutory considerations that are unique to Washington.

1. Applicability of Colloquy Requirements Used in Criminal Proceedings

Courts frequently look to the standards used in criminal proceedings for guidance in determining a civil defendant's competency. The procedures adhered to in a mental-health proceeding, including the procedures that govern a defendant's right to counsel, "generally are comparable and similar to [tests] followed in criminal cases."[119] Division II of the Washington Court of Appeals has similarly looked to the state criminal statute[120] regarding the determination of competency for guidance in making such a determination in civil matters.[121] But the court explicitly

116. *See* Indiana v. Edwards, 554 U.S. 164, 177 (2008) ("[P]roceedings must not only be fair, they must appear fair to all who observe them." (citations omitted)).

117. *Compare Det. of J.S.*, 159 P.3d at 443 n.12 *and* State v. Klessig, 564 N.W.2d 716, 721 (Wis. 1997), *with In re* Jesse M., 170 P.3d 683, 689 (Ariz. Ct. App. 2007). Again, this may be a product of the highly deferential standard of review that is applied to issues of competency determination. *See supra* note 109.

118. *Edwards*, 554 U.S. at 178.

119. Schmidt v. Ebertz (*In re* Interest of Ebertz), 333 N.W.2d 786, 788 (N.D. 1983); *see also In re Jesse M.*, 170 P.3d at 687 ("Although a civil commitment proceeding cannot 'be equated to a criminal prosecution,' the standards in criminal cases have been examined to determine when waiver can occur." (citations omitted)).

120. WASH. REV. CODE § 10.77.020(1) (2006).

121. *Det. of J.S.*, 159 P.3d at 442.

declined to address whether the statute should control the colloquy used to determine whether a defendant's waiver of counsel is valid.[122]

Washington's statutory requirements addressing the determination of competency to waive counsel in criminal cases seem a likely source of considerations to be included in colloquies made in the civil-commitment context. The Washington statute identifies five statutory factors[123] that require courts to consider whether criminal defendants understand "(a) [t]he nature of the charges; (b) [t]he statutory offense included within them; (c) [t]he range of allowable punishments thereunder; (d) [p]ossible defenses to the charges and circumstances in mitigation thereof; and (e) [a]ll other facts essential to a broad understanding of the whole matter."[124]

Unfortunately, the factors in the Washington statute are largely inapplicable to civil-commitment cases and are thus uninformative for any colloquy conducted. First, defendants do not need to be informed of any charges because they face no charges in civil-commitment proceedings. The government instead seeks to commit defendants based on the concerns of health professionals, family, or friends that the defendant may pose a danger to others or to himself or herself.[125]

Second, the absence of charges made against the defendant also means that there are no statutory offenses for the defendant to understand, which renders discussion of statutory offenses and allowable punishments unnecessary. The only "negative" consequence of involuntary commitment is the commitment itself, which entails a loss of freedom and subjection to involuntary treatment,[126] as well as a temporary curtailment of the defendant's right to possess firearms.[127] Since the commitment sought must be for an express and finite amount of time,[128] informing the defendant of that timeframe would have some value in establishing a record of the defendant's knowledge. But if defendants do not understand the ultimate consequences of involuntary commitment, then they would be less likely to contest the proceedings because they would

122. *Id.* at 443 n.12.

123. § 10.77.020(1).

124. *Id.*

125. *See generally* WASH. REV. CODE § 71.05.153 (2011).

126. *See* WASH. REV. CODE § 71.05.215 (2008) (allowing for the possibility of involuntary medication).

127. WASH. REV. CODE §§ 9.41.040(2)(a)(ii) (2011); 71.05.360(1)(a) (2009).

128. Involuntary detentions can be for an initial three-day evaluation period or for 14, 90, or 180 days. *See* §§ 71.05.150, 71.05.230, 71.05.290.

not understand, or necessarily be concerned with, the possibility of a temporary loss of their freedom or ability to forego treatment.[129]

The final two statutory factors, that defendants understand both the possible defenses available to them and "other facts essential to a broad understanding of the whole matter," are relevant to determinations of competency in civil-commitment cases but do not provide much meaningful direction. A defendant's understanding of available defenses with regard to involuntary commitment bears directly on whether that defendant is competent to waive the right to counsel because such knowledge (or lack thereof) would presumably affect his or her decision to proceed pro se.[130] The Supreme Court has deemed technical legal knowledge irrelevant to the determination of whether a party has knowingly waived the right to counsel.[131] But courts frequently seek information regarding a party's legal experience when determining whether a waiver is valid.[132] The *Benchbook for U.S. District Court Judges* (*Benchbook*)[133] also suggests including questions regarding a defendant's legal experience and education when conducting a colloquy with the defendant.[134] Given the frequency with which competency determinations are at least in part based on questions regarding the legal experience of a party, it is likely that such questions will be expected to be included in any colloquy in a civil-commitment proceeding.

The final statutory factor provides the court with wide discretion to consider evidence regarding whether a defendant understands facts "essential to a broad understanding of the whole matter."[135] But the statutory language provides no meaningful direction with regard to what evidence would or should be deemed "essential." This provision could be viewed as simply providing judges with express discretion to consider extrinsic evidence they deem relevant to their determinations of competency.[136] Yet, the factor does not provide any line of questioning for use by civil courts in conducting a colloquy with a party seeking to waive the right to counsel.

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129. *See* Marks, *supra* note 26, at 848 (noting that mental illness may operate to "remove the defendant's will to defend").

130. *See id.* at 849 (noting mental illness may affect a defendant's formation of defenses).

131. Faretta v. California, 422 U.S. 806, 836 (1975).

132. *See, e.g.*, *In re* Jesse M., 170 P.3d 683, 689 (Ariz. Ct. App. 2007); State v. J.S. (*In re* Det. of J.S.), 159 P.3d 435, 438 (Wash. Ct. App. 2007).

133. The *Benchbook* is created by a panel of experienced federal district court judges appointed by the Chief Justice of the Supreme Court, and is intended to serve as a practice guide for use in educating incoming or current trial-court judges. BENCHBOOK, *supra* note 114, at ii.

134. *Id.* at 6–7.

135. WASH. REV. CODE § 10.77.020(1)(e) (2006).

136. *See infra* Part V.B.

Questions of applicability also arise when considering the requirements for colloquies employed in other states between judges and criminal defendants. Common requirements in other states include that defendants be made aware of the seriousness of the charges made against them, as well as the general range of punishments they may be subject to.[137] These requirements provide no more help than the Washington State statutory requirements in demonstrating either the competency of a party to waive counsel or the validity of such a waiver. Discussion of the seriousness of the charges is functionally equivalent to, and no more applicable than, an understanding of "the nature of the charges,"[138] and discussion of the range of punishments available is nearly identical to the Washington statutory language.[139] These inquiries do not have any relevance in civil-commitment proceedings and would not help demonstrate whether a party is competent to waive counsel or whether a party's waiver is valid.

Consideration of the questions enumerated in the *Benchbook* also raises similar issues of inapplicability to the civil context. The *Benchbook* lists fourteen questions or statements to direct toward a criminal defendant when determining the validity of a waiver for the purpose of "mak[ing] clear on the record that [the] defendant is fully aware of the hazards and disadvantages of self-representation."[140] The questions re-

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137. *See, e.g.*, Commonwealth v. Simpson, 704 N.E.2d 1131, 1135 n.5 (Mass. 1999) (citing Commonwealth v. Jackson, 383 N.E.2d 835, 839 (Mass. 1978)); State v. Klessig, 564 N.W.2d 716, 721 (Wis. 1997); *see also* State v. Woods, 23 P.3d 1046, 1062 (Wash. 2001).

138. *Compare Klessig*, 564 N.W.2d at 721 (requiring discussion of seriousness of the charges against defendant), *with* § 10.77.020(1) (requiring discussion of the nature of the charges against defendant).

139. *Compare Klessig*, 564 N.W.2d at 721 (requiring a defendant be made aware of "the general range of penalties that could have been imposed on him"), *with* § 10.77.020(1)(c) (requiring a defendant be informed of "the range of allowable punishments" available under the statutory offense at issue).

140. If the defendant states that he or she wishes to represent himself or herself, you should ask questions similar to the following:

1. Have you ever studied law?
2. Have you ever represented yourself in a criminal action?
3. Do you understand that you are charged with these crimes: [state the crimes with which the defendant is charged]?
4. Do you understand that if you are found guilty of the crime charged in Count I, the court must impose an assessment of $100 and could sentence you to as many as ___ years in prison, impose a term of supervised release that follows imprisonment, fine you as much as $____, and direct you to pay restitution? [Ask the defendant a similar question for each crime charged in the indictment or information.].
5. Do you understand that if you are found guilty of more than one of these crimes, this court can order that the sentences be served consecutively, that is, one after another?
6. Do you understand that there are advisory Sentencing Guidelines that may have an effect on your sentence if you are found guilty?

garding a party's legal experience and education are detailed[141] but are also likely unnecessary in light of the *Faretta* decision, which cast doubt on the value of such questions.[142] But even *Faretta* placed some importance on the education of a party seeking to waive counsel, as the Court found it significant that the defendant was literate.[143] While the Court expressly stated that a defendant "need not himself have the skill and experience of a lawyer" to be competent to waive counsel,[144] this language seemingly allows courts to consider the presence of legal skill and experience as a relevant factor for the determination of competency.[145]

The *Benchbook* questions do raise two meaningful issues that a judge should address in a colloquy when a civil party seeks to waive counsel. The first is an express question regarding whether the waiver is being made voluntarily.[146] This question is similar to the requirement in Wisconsin that colloquies ensure a party seeking to waive counsel "made

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7. Do you understand that if you represent yourself, you are on your own? I cannot tell you or even advise you how you should try your case.

8. Are you familiar with the Federal Rules of Evidence?

9. Do you understand that the rules of evidence govern what evidence may or may not be introduced at trial, that in representing yourself, you must abide by those very technical rules, and that they will not be relaxed for your benefit?

10. Are you familiar with the Federal Rules of Criminal Procedure?

11. Do you understand that those rules govern the way a criminal action is tried in federal court, that you are bound by those rules, and that they will not be relaxed for your benefit?

[Then say to the defendant something to this effect:]

12. I must advise you that in my opinion, a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.

13. Now, in light of the penalty that you might suffer if you are found guilty, and in light of all of the difficulties of representing yourself, do you still desire to represent yourself and to give up your right to be represented by a lawyer?

14. Is your decision entirely voluntary?

BENCHBOOK, *supra* note 114, at 4–5; *see also* State v. Christensen, 698 P.2d 1069, 1073 n.2 (Wash. Ct. App. 1985) (discussing the questions outlined in the *Benchbook*).

141. Inquiries about the party's legal experience and education account for seven of the fourteen total suggested questions. BENCHBOOK, *supra* note 114, at 4–5.

142. *See* Faretta v. California, 422 U.S. 806, 833 n.43 (1975) ("'Even the intelligent and educated layman has small and sometimes no skill in the science of law.'" (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932))).

143. *Id.* at 835.

144. *Id.*

145. The Court's formulation expressly bars the requirement of such skill and experience, but it is silent as to the ability of courts to consider a particular defendant's skill and experience. *Id.*

146. BENCHBOOK, *supra* note 114, at 7.

a deliberate choice to proceed without counsel."[147] The answer does not prove that a party's waiver is actually voluntary, especially when the case involves mental illness. But it does help to establish an evidentiary record to that effect by providing some evidence of voluntariness.[148]

The second issue raised by the *Benchbook* is the series of questions and statements designed to ensure that the defendant is cognizant of the benefits waived by the refusal of counsel. In particular, question twelve addresses the party's lack of familiarity with evidentiary rules and court procedures, as well as the party's inability to self-represent relative to a trained attorney.[149] Questioning that highlights the benefits lost as a result of waiving counsel is essentially the same as informing the defendant of the dangers of self-representation.[150]

There is a nearly unanimous requirement that a party be made aware of the perils associated with self-representation prior to a trial court finding the party has validly waived the right to counsel. The Supreme Court has expressed that a party "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'"[151] Moreover, state courts also consistently require that colloquies between trial judges and defendants must ensure that parties are informed of the dangers and disadvantages of waiving their right to counsel.[152] Given the frequency with which such questioning is required, as well as the importance that the Supreme Court has attributed to informing a defendant of the perils of waiving counsel, it is likely that a series of questions detailing the perils that a pro se defendant will face is required.

147. State v. Klessig, 564 N.W.2d 716, 721 (Wis. 1997).

148. *See id.* at 719, 721 (requiring that a colloquy be used to ascertain on the record whether a defendant's waiver of counsel is made voluntarily).

149. BENCHBOOK, *supra* note 114, at 7.

150. In addition to lacking legal expertise, defendants may act in a manner in front of a judge that undermines their case. *See generally* Blume & Clark, *supra* note 61 (discussing trial-court proceedings in which mentally ill defendants openly acted in a bizarre or disturbing manner).

151. Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)).

152. *See, e.g.*, Miller v. C.S. (*In re* Interest of C.S.), 713 N.W.2d 542, 548 (N.D. 2006) (stating that a "colloquy must ensure that the respondent is advised of the dangers and disadvantages of self-representation"); *Klessig*, 564 N.W.2d at 721 (stating that a colloquy must ensure the defendant "was aware of the difficulties and disadvantages of self-representation").

2. Additional Colloquy Requirements Used by Other States in Civil Proceedings

Many jurisdictions have created additional standards for colloquies in the civil context, designating specific topics that must be addressed during a judge's discussion with a defendant who wishes to waive the right to counsel.[153] Most notably, Arizona has created an express list of five topics that trial court judges should address with a party seeking to waive the right to counsel in an involuntary-commitment hearing.[154] Division I of the Arizona Court of Appeals formulated the list based on a detailed review of cases from other jurisdictions.[155] Under Arizona law, when a party seeks to waive the right to counsel, the trial court should first inform the party of the right to counsel, and then advise the party of the consequences of waiving counsel.[156] When discussing the consequences, the trial court should specifically state that the party will be responsible for all aspects of presenting his or her case, which includes conducting cross-examinations, calling witnesses, presenting evidence, and making closing arguments.[157] Similar to the *Benchbook*'s suggested colloquy,[158] these lines of questioning first inform the party of the right and then emphasize the importance and possible impact of the decision to waive counsel.[159] Expressly informing a party of the specific aspects of self-representation impresses upon the person the complexity of a pro se defense thus strengthening the record that the waiver is made knowingly and intelligently.

Under the Arizona standard, the trial court is supposed to then "seek to discover why the [party] wants to represent himself [or herself], which may involve a dialogue with counsel or others."[160] This question serves as a novel approach to gathering evidence related to the validity of a party's waiver, as learning the thought process behind the party's decision will help demonstrate that a waiver is made knowingly and intelligently by revealing whether the waiver is based on sound reasoning or

153. *See, e.g.*, Commonwealth v. Simpson, 704 N.E.2d 1131, 1135 n.5 (Mass. 1999) (citing Commonwealth v. Jackson, 383 N.E.2d 835, 839 (Mass. 1978)); *Klessig*, 564 N.W.2d at 721.

154. *In re* Jesse M., 170 P.3d 683, 689 (Ariz. Ct. App. 2007). These colloquy requirements were recently noted with approval by the North Carolina Court of Appeals. *In re* Watson, 706 S.E.2d 296, 305 (N.C. Ct. App. 2011).

155. *In re Jesse M.*, 170 P.3d at 687–89.

156. *Id.* at 689.

157. *Id.*

158. BENCHBOOK, *supra* note 114, at 6–7.

159. *In re Jesse M.*, 170 P.3d at 689.

160. *Id.*

correct information.[161] The question also directly addresses the party's competency by requiring an articulation of the party's motivations, which may demonstrate an irrational thought process or basis indicative of the presence of mental illness.[162]

The final two topics under the Arizona standard are the defendant's education, skill level, and training, as well as the defendant's level of understanding of the legal proceedings and procedures.[163] Both of these lines of inquiry have been previously considered with regard to current recommended inquiries in criminal cases. But the Arizona standard differs because it expressly links these questions to specific aspects of the determination of the competency of a defendant seeking to waive counsel and the validity of the waiver. Inquiries regarding the defendant's education, skill level, and training are deemed to pertain to the defendant's competency to waive the right, while the defendant's understanding of legal proceedings and procedure expressly pertain to the defendant's understanding of the waived right.[164] Should a court or legislature deem that these express indications of intentional focus are desirable to include, the added intent would provide valuable guidelines for courts to use when tailoring their questioning to seek specific information in the diverse factual circumstances they encounter.

3. Availability of Standby or Advisory Counsel

In order to better ensure that a pro se party's rights are upheld, courts will sometimes appoint standby or advisory counsel to sit with the party during hearings.[165] Standby counsel are able to field legal questions

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161. Though this approach is novel because the question was expressly required, Washington has previously articulated that its trial courts should also seek this information. *See* State v. Chavis, 644 P.2d 1202, 1206 (Wash. Ct. App. 1982) ("[T]rial courts should attempt to determine the subjective reasons for the defendant's refusal [of counsel].").

162. *See generally* Blume & Clark, *supra* note 61 (discussing trial-court proceedings in which mentally ill defendants openly acted in a bizarre or disturbing manner).

163. In determining the competency of a defendant to waive counsel and the validity of that waiver, a court should "learn whether the patient has any education, skill or training that may be important to deciding whether he has the competence to make the decision . . . [and] determine whether the patient has some rudimentary understanding of the proceedings and procedures to show he understands the right he is waiving . . . ." *In re Jesse M.*, 170 P.3d at 689. The Wisconsin Supreme Court has stated that trial courts should use the express, though more narrow, factors of "the defendant's education, literacy, [and] fluency in English" to determine a party's competency to waive counsel in civil contexts. State v. Klessig, 564 N.W.2d 716, 724 (Wis. 1997) (citing Pickens v. State, 292 N.W.2d 601, 611 (Wis. 1980)).

164. *In re Jesse M.*, 170 P.3d at 689.

165. *See* State v. Watkins, 857 P.2d 300, 305–06 (Wash. Ct. App. 1993) (upholding appointment of standby counsel where the trial court deemed such an appointment necessary and appropriate).

from the party during the case, and they are also able to step in immediately if the party later decides against self-representation.[166] While there is no federal constitutional right to standby counsel,[167] trial courts have discretion to appoint standby counsel without the consent of the defendant.[168] As part of the colloquy, some courts require that judges disclose the availability of advisory counsel to a party seeking to waive counsel.[169] Additionally, the *Benchbook* states that "[i]t is probably advisable to appoint standby counsel, who can assist the defendant or can replace the defendant if the court determines during trial that the defendant can no longer be permitted to proceed pro se."[170] Because judges are encouraged to appoint advisory counsel where available, a court should at least disclose to a party prior to a waiver of counsel that such services are available.

B. Extrinsic Evidence Regarding the Mental State of a Defendant Seeking to Waive the Right to Counsel

The current Washington statute governing criminal competency determinations, which has been considered in the civil-commitment context,[171] appears to allow courts to consider extrinsic evidence when determining a defendant's competency to waive counsel. The statute enumerates several factors for the court to consider, one of which is the defendant's understanding of "[a]ll other facts essential to a broad understanding of the whole matter."[172] This factor provides judges with broad discretion to consider evidence they deem relevant to the determinations at issue, which would seemingly allow for extrinsic evidence to be offered to demonstrate a party's competency or incompetency to waive counsel.[173] Other state courts have articulated similar standards that seem to implicitly provide for the consideration of any evidence a judge deems

166. Faretta v. California, 422 U.S. 806, 834 n.46 (1975) (finding that standby counsel may "aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary").

167. State v. Silva, 27 P.3d 663, 676 (Wash. Ct. App. 2001).

168. *Watkins*, 857 P.2d at 305.

169. Commonwealth v. Simpson, 704 N.E.2d 1131, 1135 n.5 (Mass. 1999) (citing Commonwealth v. Jackson, 383 N.E.2d 835, 839 (Mass. 1978)).

170. BENCHBOOK, *supra* note 114, at 6–8; *see also* State v. Christensen, 689 P.2d 1069, 1073 n.2 (Wash. Ct. App. 1985).

171. State v. J.S. (*In re* Det. of J.S.), 159 P.3d 435, 442–43 (Wash. Ct. App. 2007); *see also In re* Jesse M., 170 P.3d 683, 687 (Ariz. Ct. App. 2007) ("Although a civil commitment proceeding cannot 'be equated to a criminal prosecution,' the standards in criminal cases have been examined to determine when waiver can occur." (citations omitted)).

172. WASH. REV. CODE § 10.77.020(1) (2006).

173. For example, a defendant's psychiatric evaluation could be probative of his or her ability to understand key facts in the case.

relevant to the determination of the competency of a party or the validity of a waiver.[174] For example, the Wisconsin Supreme Court has stated that when making determinations regarding a party's waiver of the right to counsel, trial courts should consider "any physical or psychological disability which may significantly affect [a defendant's] ability to communicate a possible defense to the jury."[175] This factor would likely require extrinsic evidence to be considered, as the court would need access to expert diagnoses or medical records to be able to make a full, informed, and unbiased determination based on physical or psychological disabilities.

Although this allowance of extrinsic evidence appears expansive, it is limited in two important ways. First, the process for determining the competency of the defendant is subject to the court's discretion.[176] Thus, trial courts can, and presumably will, cut off the consideration of extrinsic evidence when they deem the evidentiary record sufficient. It is unlikely that courts will entertain an endless parade of evidence to determine the competency of defendants to waive their right to counsel in a civil-commitment proceeding. To do so would effectively require defendants to litigate the issue of their mental health twice: once for the competency determination and again for the civil-commitment petition. Expressly allowing courts to consider extrinsic evidence would provide them with the necessary information on which to base their determinations while deferring to their judgment about the amount of evidence to entertain.[177]

Second, prior determinations of competency and mental illness will often be irrelevant to current commitment proceedings. A frequent characteristic of mental illness is that the symptoms do not remain static, and a person may be affected in varying degrees depending on the day, minute, or hour.[178] Such volatility of state serves to render prior mental health diagnoses and court rulings largely irrelevant to a determination that is to be made with regard to the defendant's current mental capaci-

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174. *See In re Jesse M.*, 170 P.3d at 689 (Trial courts should "consider whether there are any other facts relevant to resolving the issue."); State v. Klessig, 564 N.W.2d 716, 724 (Wis. 1997).

175. *Klessig*, 564 N.W.2d at 724 (citing Pickens v. State, 292 N.W.2d 601, 611 (Wis. 1980)).

176. *Id.*

177. Alternatively, state legislatures can define the scope of extrinsic evidence to be considered. For example, in matters involving the defendant's competence, California requires a psychological evaluation of the defendant and permits both parties to offer evidence, rebut each other's evidence, and provide closing arguments. CAL. PENAL CODE § 1369(a)–(e) (West 2007).

178. *See* Indiana v. Edwards, 554 U.S. 164, 175 (2008) (noting that mental illnesses vary both in degree and over time, affecting a person's functioning "at different times and in different ways").

ty.[179] Additionally, Washington's lack of a presumption of incompetency[180] further renders such prior determinations moot, thereby serving to limit the evidence that trial courts should consider when determining if a defendant is competent to waive counsel.

Because of the natural limitations placed on the use of extrinsic evidence, trial courts should consider evidence that is necessary to create a sufficient record on which to base determinations of a defendant's competency to waive counsel. Consideration of such evidence will maximize a trial judge's ability to accurately gauge a defendant's competency at a particular moment by deferring to the court's judgment as to what evidence will better inform its opinion, which will help ensure just and fair rulings.

C. Summary of Recommended Comprehensive Standard for Determination of Competency

Based on the above discussion, trial courts, and particularly those within Washington State, should use the following colloquy to create a sufficient evidentiary record on which to base determinations of the competency of defendants to waive their right to counsel. Such a colloquy should be used in conjunction with a limited consideration of extrinsic evidence the court deems relevant to its determination of competency. A summary of this colloquy is also included for quick reference.[181]

(1) Verification of the Defendant's English Fluency and Literacy. The trial court should first seek to verify that the defendant is fluent in English by asking, "Can you hear and understand me?"[182] This question will demonstrate for the record that the court's subsequent questions are likely to be understood by the defendant. The court should then ask, "Are you able to read and write English?"[183] These questions are solely to ver-

179. See Miller v. C.S. (*In re* Interest of C.S.), 713 N.W.2d 542, 549 (N.D. 2006), in which the court stated:

> [T]he capacity and competence of a respondent in mental health cases can potentially vary from one proceeding to the next. A respondent incapable of waiving counsel at one hearing may, due to treatment or other factors, gain that capacity by the next hearing. This, in part, is why [state law] forbids a presumption against a respondent's legal capacity from arising simply due to previous mental health treatment. Similarly, a respondent who one time had the capacity to proceed pro se can, by the time of the next hearing, no longer possess this capacity. For this reason, the trial court must assess the validity of a waiver of counsel and competence to make that waiver before each proceeding during which the respondent wishes to represent himself.

180. WASH. REV. CODE § 71.05.360(1)(b) (2009).

181. *See infra* Appendix A.

182. *See In re* Watson, 706 S.E.2d 296, 304 (N.C. Ct. App. 2011).

183. *See, e.g.*, State v. Klessig, 564 N.W.2d 716, 724 (Wis. 1997).

ify for the record that the defendant understands the subsequent questioning. Courts cannot use defendants' lack of fluency in English as a direct determiner of competency because they have a right to a qualified interpreter, if necessary.[184]

(2) Description of the Defendant's Rights. The court should verify that defendants understand that they have the right to effective counsel. Additionally, the court should ask if defendants understand that they may waive that right and exercise the right to self-representation if determined to be competent to do so, and if the waiver is determined to have been made knowingly, intelligently, and voluntarily. These disclosures will demonstrate for the record that defendants were apprised of their rights prior to waiver of counsel.

(3) Description of Benefits Being Waived. The court should explain to defendants that if they decide to waive counsel and proceed pro se, they will be unable to receive direction or advice from the court regarding how to try their cases.[185] Each defendant should be reminded that the current proceeding is legally binding, and that it is the judge's opinion as an attorney that a decision to waive the right to counsel is unwise. When outlining these hazards, courts should use language similar to that contained within questions seven, nine, eleven, and twelve of the *Benchbook*'s recommended colloquy.[186] Courts should also inform defendants that they will be responsible for all aspects of presenting their

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184. WASH. REV. CODE § 2.43.010 (1989).

185. *See* WASH. REV. CODE § 4.12.040(1) (2009) ("No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding [if] that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause.").

186. BENCHBOOK, *supra* note 114, at 6–7. The four questions from the *Benchbook* are as follows:

> 7. Do you understand that if you represent yourself, you are on your own? I cannot tell you or even advise you how you should try your case.
>
> . . . .
>
> 9. Do you understand that the rules of evidence govern what evidence may or may not be introduced at trial, that in representing yourself, you must abide by those very technical rules, and that they will not be relaxed for your benefit?
>
> . . . .
>
> 11. Do you understand that [the] rules [of civil procedure] govern the way a [civil commitment] action is tried . . . , that you are bound by those rules, and that they will not be relaxed for your benefit?
>
> . . . .
>
> 12. I must advise you that in my opinion, a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.

Id.

cases, which includes conducting cross-examinations, calling witnesses, presenting evidence, and making closing arguments.[187]

(4) Verification of the Defendant's Understanding of the Proceedings. The court should explain to the defendant the nature of the current proceedings and the length of commitment being sought by the state. This explanation serves as a substitute for standard questioning regarding the nature of the charges and the punishments faced in criminal proceedings,[188] and will demonstrate for the record that defendants were informed of the types of proceedings that they face.

(5) Determination of the Defendant's Education Level. The trial court should ask the defendant, "What is your current level of education?"[189] While this question may not be allowed as a direct determiner of competency under *Faretta*,[190] it does verify for the record that defendants understand the proceedings and can communicate their cases.[191] This question will also demonstrate for the record that defendants have received a level of education that renders them likely to understand both the language used in court and the contents of legal documents.

(6) Determination of the Defendant's Legal Education and Experience. The court should then ask the defendant, "Do you have any prior legal education or experience that you wish to disclose to the court at this time?" This question places the decision to divulge legal expertise on the defendant, as an answer of "no" will not inform the court that the defendant lacks such expertise.[192] Because defendants are seeking to be found competent in order to waive counsel, they will likely divulge any legal expertise in support of their waivers.

(7) Verification of the Voluntariness of Waiver. The court should then ask the defendant, "Is your decision to waive your right to counsel completely voluntary?"[193] This question will provide some evidence for

187. *See In re* Jesse M., 170 P.3d 683, 689 (Ariz. Ct. App. 2007).

188. *See, e.g.*, WASH. REV. CODE § 10.77.020(1) (2006).

189. *See, e.g.*, State v. Klessig, 564 N.W.2d 716, 724 (Wis. 1997).

190. *See* Faretta v. California, 422 U.S. 806, 833 n.43 (1975) ("'Even the intelligent and educated layman has small and sometimes no skill in the science of law.'" (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932))). *But see* City of Bellevue v. Acrey, 691 P.2d 957, 962 (Wash. 1984) (noting that educational level is relevant but not dispositive when considering whether a valid waiver occurred).

191. *See Klessig*, 564 N.W.2d at 724 (noting that the defendant's educational level and literacy should be addressed on the record when determining the validity of a waiver of counsel).

192. This phrasing seeks to avoid the concerns raised by *Faretta* regarding the requirement of legal education to be competent to represent oneself by (1) making disclosure voluntary and (2) considering only affirmative answers. *See Faretta*, 422 U.S. at 836 (proclaiming technical legal knowledge as "not relevant to an assessment of [a defendant's] knowing exercise of the right to defend himself").

193. *See* BENCHBOOK, *supra* note 114, at 7.

the record that defendants are making voluntary waivers of their right to counsel.

(8) Determination of the Defendant's Reasons and Motivations for the Waiver. The court should ask the defendant, "What are your reasons and motivations for seeking to waive your right to counsel?"[194] Courts should indulge detailed responses by defendants for the purpose of developing full evidentiary records that accurately reflect defendants' mental states at the time their waivers are sought. However, courts should not permit defendants to make incriminating statements unnecessarily or to otherwise undermine their cases.[195]

(9) Description of the Availability of Standby Counsel. The court should explain to defendants that it has discretion to appoint standby counsel to provide legal advice to them. Defendants should be encouraged to request the appointment of standby counsel if they so desire.

VI. CONCLUSION

Washington State currently operates under a heightened—albeit unarticulated—standard of competency to waive counsel that is in excess of traditional constitutional requirements.[196] The Supreme Court's holding in *Edwards* made it possible for state courts to employ standards for the determination of competency to waive counsel that are stronger than the traditional *Dusky* standard.[197] Washington employs a two-step process when making competency determinations,[198] which is best served by using a single-step fact-finding inquiry that is based on an articulated and standardized colloquy. The fact-finding inquiry should also include a limited consideration of extrinsic evidence that the trial court deems relevant to its determination of a defendant's competency. Such a detailed fact-finding process will safeguard defendants' rights while minimizing any chances of reversible error.

194. *See In re* Jesse M., 170 P.3d 683, 689 (Ariz. Ct. App. 2007); *see also* State v. Chavis, 644 P.2d 1202, 1206 (Wash. Ct. App. 1982) ("[T]rial courts should attempt to determine the subjective reasons for the defendant's refusal [of counsel].").

195. *See generally* Blume & Clark, *supra* note 61 (discussing trial court proceedings in which mentally ill defendants openly acted in a bizarre or disturbing manner).

196. *See supra* Part III.

197. Indiana v. Edwards, 554 U.S. 164, 178 (2008).

198. *See supra* Part IV.

APPENDIX A: JUDICIAL COLLOQUY FOR COMPETENCY DETERMINATIONS DURING CIVIL-COMMITMENT PROCEEDINGS

1. Can you hear and understand me?

2. Are you able to read and write English?

3. Do you understand that you have the right to counsel?

4. Do you understand that you may waive that right, but only if I determine that you are competent to do so and that your waiver is made knowingly, intelligently, and voluntarily?

5. Do you understand that if you represent yourself, you are on your own? I cannot tell you or even advise you how you should try your case.

6. Do you understand that the rules of evidence govern what evidence may or may not be introduced at trial, that in representing yourself, you must abide by those very technical rules, and that they will not be relaxed for your benefit?

7. Do you understand that the rules of civil procedure govern the way a civil commitment action is tried, that you are bound by those rules, and that they will not be relaxed for your benefit?

8. I must advise you that in my opinion, a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.

9. Do you understand that you will be responsible for all aspects of your case, including presenting your case, conducting cross-examinations, calling witnesses, presenting evidence, and making closing arguments?

10. Do you understand that this proceeding is based on a petition for you to receive involuntary treatment for up to _____ days?

11. What is your current level of education?

12. Do you have any prior legal education or experience that you wish to disclose to the court at this time?

13. Is your decision to waive your right to counsel completely voluntary?

14. What are your reasons and motivations for seeking to waive your right to counsel?

15. Do you understand that the court has the discretion to appoint standby counsel to provide you with legal advice, and that you may request that the court appoint standby counsel if you so desire?