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The United States Constitution Allows a State to Limit the Right of a Criminal Defendant to Represent Himself at Trial on the Ground of a Lack of Mental Competence: *Indiana v. Edwards*

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The United States Constitution Allows a State to Limit the Right of a Criminal Defendant to Represent Himself at Trial on the Ground of a Lack of Mental Competence: *Indiana v. Edwards*

CONSTITUTIONAL LAW — CRIMINAL LAW — MENTAL COMPETENCE — RIGHT OF SELF-REPRESENTATION — The United States Supreme Court held that a criminal defendant who has been determined competent to stand trial is not necessarily competent to represent himself at trial and can therefore be prevented from doing so by the State.

Indiana v. Edwards, 128 S. Ct. 2379 (2008).

Respondent, Ahmad Edwards ("Edwards"), attempted to steal a pair of shoes from a department store in Indiana in July of 1999.[1] A sales associate at the store witnessed Edwards acting suspiciously and called Ryan Martin ("Martin"), a loss prevention officer at the store.[2] Martin, watching Edwards on the store's surveillance system, saw him put a pair of shoes into a bag and exit the store.[3] Martin then followed Edwards out of the store, stopped him on the street, and explained that he was a security officer.[4] A struggle ensued, during which Edwards fired several shots, injuring Martin and a bystander.[5]

Edwards was caught and subsequently charged with attempted murder, battery with a deadly weapon, criminal recklessness, and theft.[6] At trial, Edwards's mental condition was called into question, resulting in three competency hearings and two requests for

1. Indiana v. Edwards, 128 S. Ct. 2379, 2382 (2008) (hereinafter "*Edwards III*").

2. Edwards v. Indiana, 854 N.E.2d 42, 45 (Ind. App. 2006) (hereinafter "*Edwards I*"), *aff'd in part and superseded in part, remanded*, 866 N.E.2d 252 (Ind. 2007), *vacated, remanded*, 128 S. Ct. 2379 (2008). The store in question was the Parisian Department Store in downtown Indianapolis. *Edwards I*, 854 N.E.2d at 45.

3. *Id.*

4. *Id.*

5. *Id.* Edwards was eventually subdued and apprehended by Thomas Flynn, an FBI agent who was coincidentally in the area when the shots were fired. *Id.* at 45-46.

6. *Edwards III*, 128 S. Ct. at 2382. Edwards's charges, all felonies, are more specifically described, under Indiana law, as class A felony murder, class C felony battery with a deadly weapon, class D felony criminal recklessness, and class D felony theft. *Edwards I*, 854 N.E.2d at 45.

self-representation, which formed the backdrop for what eventually became the key issue in the United States Supreme Court opinion arising from this case.[7]

In August of 2000, Edwards's court-appointed legal counsel requested a psychiatric evaluation in order to determine his competency to stand trial.[8] Edwards was found incompetent to stand trial and was committed to a state hospital for evaluation and treatment.[9] Edwards's condition appeared to improve over the next several months and his doctors determined that he was competent to stand trial.[10] However, before trial, Edwards's attorney requested another psychiatric evaluation, which resulted in a second competency hearing wherein Edwards was found competent to stand trial despite suffering from an unspecified mental illness.[11] Edwards's attorney requested yet another psychiatric evaluation several months later, and a third competency hearing was held in April of 2003.[12] The court eventually concluded that Edwards was not competent to stand trial, and he was recommitted to the state hospital.[13]

Several months later, doctors at the hospital determined that Edwards's condition had improved enough that he was again competent to stand trial.[14] On the eve of his trial, Edwards asked to represent himself and requested a continuance in order to prepare to proceed to trial pro se.[15] The court refused to issue the continuance, and Edwards proceeded to trial with his court-appointed counsel.[16] Edwards was subsequently convicted of criminal recklessness and theft.[17] The jury failed to reach a verdict on the attempted murder and battery charges, and a second trial was held on those charges.[18] However, immediately before this second trial,

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7. *Edwards III*, 128 S. Ct. at 2382.

8. *Id.*

9. *Id.* The findings were based on witness testimony from a psychiatrist and a neuropsychologist. *Id.*

10. *Id.*

11. *Id.*

12. *Edwards III*, 128 S. Ct. at 2382.

13. *Id.* This third competency hearing included the testimony of a psychiatrist who stated that, although Edwards could understand the charges against him, his schizophrenia prevented him from being able to cooperate with his counsel. *Id.*

14. *Id.*

15. *Id.* "Pro se" is defined as "[f]or oneself; on one's own behalf; without a lawyer." BLACK'S LAW DICTIONARY 1258 (8th ed. 2004).

16. *Edwards III*, 128 S. Ct. at 2382.

17. *Id.*

18. *Id.*

Edwards again asked to proceed pro se.[19] The court, finding Edwards competent to stand trial but not competent to defend himself, denied this request.[20] Edwards, represented by appointed counsel, was then convicted of the remaining charges.[21]

Edwards appealed to the Indiana Court of Appeals, arguing that the trial court erred in denying his request for self-representation at his second trial and that the error deprived him of his right to self-representation under the Sixth Amendment of the United States Constitution.[22] The appellate court found in Edwards's favor and ordered a new trial.[23] The State of Indiana then appealed to the Indiana Supreme Court, and the appeal was granted.[24]

Although finding the trial court's ruling "reasonable" for purposes of ensuring Edwards a fair trial, the Indiana Supreme Court affirmed the court of appeals' ruling on the basis that precedent from the United States Supreme Court held that the standard for competency to represent oneself at trial is equivalent to that of competency to stand trial.[25] The State then petitioned the United States Supreme Court for a writ of certiorari, which was granted, to consider the constitutional issue of whether the trial court was required to allow Edwards to represent himself at trial.[26] The Court, in a 7-2 decision, vacated the judgment of the Supreme Court of Indiana and remanded the case.[27]

Justice Breyer delivered the majority opinion.[28] The Court explained that, while existing Court precedent helped frame the issue in the case, those prior cases had not yet directly addressed it.[29] Citing *Dusky v. United States*[30] and *Drope v. Missouri*,[31] the

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19. *Id.*
20. *Id.* at 2382-83.
21. *Edwards III*, 128 S. Ct. at 2383.
22. *Id. See also Edwards I*, 854 N.E.2d at 46. The Sixth Amendment states that:
> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.
23. *Edwards III*, 128 S. Ct. at 2383.
24. *Edwards v. Indiana*, 866 N.E.2d 252, 254 (Ind. 2007) (hereinafter "*Edwards II*"), *vacated, remanded* 128 S. Ct. 2379 (2008).
25. *Edwards II*, 866 N.E. 2d at 260.
26. *Edwards III*, 128 S. Ct. at 2283.
27. *Id.* at 2388.
28. *Id.* at 2381.
29. *Id.* at 2383.
30. 362 U.S. 402 (1960) (*per curiam*). In *Dusky*, the Supreme Court, for the first time, set forth the standard for mental competency to stand trial. *Id.* at 402-03. In order to stand trial under this new standard, a defendant must have "sufficient present ability to

Court stated that the Constitution does not allow a person who lacks "mental competency" to stand trial.[32] However, as the Court pointed out, neither *Dusky* nor *Drope* examined the relationship between the standard of mental competence to stand trial and the right to represent oneself at trial.[33] In addition, in *Faretta v. California*,[34] the United States Supreme Court held that the Sixth and Fourteenth Amendments of the Constitution guarantee the right to stand trial without counsel so long as a criminal defendant decides to do so both voluntarily and intelligently.[35] As Justice Breyer explained, however, *Faretta* did not provide an answer to the question before the Court in *Edwards III* because *Faretta* did not consider the issue of mental competency, since Faretta was "literate, competent, and understanding," and because the case "made it clear" that the right to represent oneself is not absolute.[36]

The majority explained that only one case existed, *Godinez v. Moran*,[37] in which the Court considered both mental competence and self-representation.[38] In *Godinez*, according to the Court, the criminal defendant, who was "borderline-competent," requested the trial court to allow him to represent himself solely for the purpose of changing his pleas from "not guilty" to "guilty."[39] The trial

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consult with his lawyer with a reasonable degree of rational understanding" and must also have "a rational as well as factual understanding of the proceedings against him." *Id.*

31. 420 U.S. 162 (1975). The Supreme Court, in the *Drope* opinion, altered the *Dusky* standard by holding that a defendant must not only be able to understand the nature an object of the proceedings against him and be able to consult with counsel but also must be able "to assist in preparing his defense" in order to stand trial. *Id.* at 171.

32. *Edwards III*, 128 S. Ct. at 2383. *Dusky* defines the standard of competency as both "(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.'" *Id.* at 2383 (quoting *Dusky*, 362 U.S. at 402.) (emphasis in original).

33. *Edwards III*, 128 S. Ct. at 2383.

34. 422 U.S. 806 (1975).

35. *Edwards III*, 128 S. Ct. at 2383. The Supreme Court implied the constitutional right to voluntarily and intelligently elect to proceed without counsel from:

> (1) a "nearly universal conviction," made manifest in state law, that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so," (2) Sixth Amendment language granting rights to the "accused;" (3) Sixth Amendment structure indicating that the rights it sets forth, related to the "fair administration of American justice," are "persona[l]" to the accused, (4) the absence of historical examples of *forced* representation and (5) "'respect for the individual.'"

Id. (citations omitted, emphasis in original).

36. *Id.* at 2384. Additional cases holding that self-representation is not an absolute right include Martinez v. Cal. Ct. App. 4d, 528 U.S. 152 (2000) and McKaskle v. Wiggins, 465 U.S. 168 (1984).

37. 509 U.S. 389 (1993).

38. *Edwards III*, 128 S. Ct. at 2384.

39. *Id.*

court granted the defendant's request, but a federal appellate court vacated the guilty pleas, holding that the Constitution required the trial court to inquire whether the defendant was competent to waive his right to counsel before granting his request.[40] According to the appellate court, the standard for this determination was higher than the standard of competency to stand trial as set forth in *Dusky*.[41] The United States Supreme Court reversed the court of appeals in *Godinez* on the ground that the decision to waive counsel does not require a different or higher level of mental ability than the decision to waive any other Constitutional right.[42] Furthermore, the decision to waive counsel is no more difficult of a decision than any other decision that a represented defendant would have to make during a trial.[43] In addition, the Court distinguished the level of competence required of a defendant to waive the right to counsel from the level of competence to represent himself.[44]

The Supreme Court, in *Edwards III*, noted the similarities to *Godinez*[45] but nonetheless determined that *Godinez* did not conclusively answer the question before it.[46] The crucial difference between the two cases, the Court held, was that, in *Edwards III*, Edwards sought to actually represent himself throughout the course of a trial, while the defendant in *Godinez* merely sought to change his pleas from "not guilty" to "guilty."[47] In addition, the *Edwards III* Court explained that, in *Godinez*, the State sought to permit the defendant to proceed pro se, while, in *Edwards III*, the State sought to prevent the defendant from representing himself.[48] As a result, the question before the Court remained open.[49]

Justice Breyer then turned to examining the central issue of *Edwards III*, which was whether the United States Constitution

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40. *Id.* (citing *Godinez*, 509 U.S. at 393-94).
41. *Id.* at 2384 (citing *Godinez*, 509 U.S. at 393-94).
42. *Id.* (citing *Godinez*, 509 U.S. at 399).
43. *Edwards III*, 128 S. Ct. at 2384 (citing *Godinez*, 509 U.S. at 398).
44. *Id.* (citing *Godinez*, 509 U.S. at 399).
45. *Id.* at 2385. The Court noted:

> Both [cases] involve mental confidence and self-representation. Both involve a defendant who wants to represent himself. Both involve a mental condition that falls in a gray area between *Dusky's* minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose.

Id. at 2385.
46. *Id.*
47. *Edwards III*, 128 S. Ct. at 2385.
48. *Id.* at 2384.
49. *Id.*

allows a State to limit the right of a criminal defendant, who is competent enough to stand trial and wishes to represent himself at trial, from representing himself on the ground that he lacks the mental capacity to do so.[50] To this question, the majority answered yes.[51]

To support its holding, the Court first determined that, while precedent did not actually answer this question, it pointed toward a positive answer.[52] The Supreme Court cases that had examined the issue of "mental competency," Breyer wrote, established a standard which centered on a defendant's ability to consult presently with counsel.[53] The Court held that the standard assumes representation by legal counsel and therefore suggests that, in a situation where a defendant has decided to proceed without counsel, different circumstances would exist and a different standard would therefore be required.[54] In addition, as the Court noted, the holding in *Faretta* was based in part on the established state law notion that self-representation is subject to a competency limitation, such as in circumstances where the defendant's mental incapacity was so severe or unique that it would deprive him of a fair trial.[55]

The majority went on to state that mental illness varies by degree and by time, as evidenced in part by the history of examinations, commitments, and hearings regarding Edwards's own competency to stand trial.[56] Given this variation in degree, the Court held that it is possible for a defendant to satisfy the *Dusky* standard for competence to stand trial, while failing to maintain the competence to defend himself without the assistance of counsel.[57] This conclusion, the Court explained, is common sense.[58]

Next, the majority determined that the right of self-representation at trial under these circumstances would not affirm the dignity of the defendant but rather could damage it, given

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50. *Id.* at 2385-86.

51. *Id.* at 2386.

52. *Edwards III*, 128 S. Ct. at 2386.

53. *Id.* (citing *Dusky*, 362 U.S. at 402; *Drope*, 420 U.S. at 171).

54. *Id.*

55. *Id.* at 2386. *See Faretta*, 422 U.S. at 813; Cappetta v. State, 204 So. 2d 913, 917-18 (Fla. Dist. Ct. App. 1967), *rev'd on other grounds* at 216 So.2d 749 (Fla. 1968), Allen v. Commonwealth, 87 N.E.2d 192, 195 (Mass. 1949).

56. *Id.* at 2386.

57. *Edwards III*, 128 S. Ct. at 2387. The Court based this determination, in part, on an amicus brief filed by the American Psychiatric Association, as well as motions and other documents filed by the defendant in the lower courts. *Id.*

58. *Id.*

the "spectacle" that could potentially take place in the courtroom.[59] In addition, because the defendant's incompetence would likely lead to an improper conviction or improper sentence, self-representation in such circumstances would be in direct conflict with the Constitution's fundamental objective of providing a fair trial.[60] The Court stated that it is not only important that the trial be fair, but also that it appear fair to the observer.[61] According to the Court, the task of determining whether allowing a defendant to represent himself would appear fair to observers is best left to the discretion of the trial judge.[62]

In conclusion, the Court held that the Constitution allows trial judges to determine a defendant's mental capacity to conduct his own defense at trial, and that states are constitutionally permitted to insist upon representation for defendants who are competent enough to stand trial but not competent enough to defend themselves.[63] The Court then declined the State of Indiana's request to adopt a more specific standard by which to measure a defendant's incompetence to represent himself, deeming the question both unnecessary and difficult to determine.[64] The State's request to overrule *Faretta*, which Indiana argued had led to unfair trials, was also declined.[65] Pro se defendants in felony cases, the Court explained, were actually less likely to be convicted of felonies than their represented counterparts and concerns about the fairness of pro se trials are concentrated on the small percentage of cases where the mental competence of the defendant is also at issue.[66] The Court stated that the ruling in the case before it would allow judges to deal with such cases and would help curtail concerns about such trials remaining fair.[67] The Court vacated the Indiana Supreme Court's ruling and remanded the case for further proceedings.[68]

Writing in dissent, Justice Scalia, joined by Justice Thomas, argued that a defendant who has been determined to be competent to stand trial and who is competent to waive counsel has a Consti-

59. *Id.*
60. *Id.* at 2387. *See also* U.S. CONST. amend. VI.
61. *Id.* at 2386 (quoting Wheat v. United States, 486 U.S. 153, 160 (1988)).
62. *Edwards III*, 128 S. Ct. at 2386.
63. *Id.* at 2387-88.
64. *Id.* at 2388.
65. *Id.*
66. *Id.* (citing Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423 (2007)).
67. *Edwards III*, 128 S. Ct. at 2388.
68. *Id.*

tutional right to represent himself at trial.[69] In other words, a State, Justice Scalia argued, cannot force a lawyer upon an unwilling defendant.[70]

Justice Scalia reiterated that a defendant who waives his right to counsel must do so both knowingly and intelligently and must make the decision consciously and with an awareness of the dangers and potential consequences of doing so.[71] Although some mentally ill defendants may not be capable of waiving this right knowingly or intelligently, Edwards, the dissent stated, is not such a defendant.[72] Rather, Edwards was warned extensively by the trial judge of the risks of representing himself, and the trial judge found that Edwards's waiver had, in fact, come knowingly and intelligently.[73] Justice Scalia then stated that the Constitution protects the right of an individual like Edwards, a pro se defendant who has voluntarily waived counsel, to represent himself even when doing so may harm his case.[74] A defendant has the right, Justice Scalia explained, to use whatever arguments he sees fit in his defense, regardless of how ineffective they may be.[75]

The dissent declared that a State has no right to deny a constitutional protection based on its own view of what is fair.[76] Justice Scalia argued that the purpose of the rights established by the Sixth Amendment is to ensure a fair trial, but that does not mean that those rights can be ignored in order to ensure a fair trial is achieved.[77] The right of self-representation, the dissent would have held, is a constitutional guarantee to be afforded the same respect and protection as all other such guarantees.[78] The only time a defendant can be deprived of this right is that rare time when other similar rights can also be denied, which is when such a deprival is necessary to allow the trial to proceed in an orderly manner.[79] As the dissent pointed out, however, because Edwards was not allowed to proceed pro se, he obviously could not have exhibited any behavior that could be characterized as obstructionist

69. *Id.* at 2394 (Scalia, J., dissenting).
70. *Id.* at 2390-91.
71. *Id.* at 2391 (citing *Faretta*, 422 U.S. at 835).
72. *Edwards III*, 128 S. Ct. at 2391 (Scalia, J., dissenting).
73. *Id.* at 2391.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Edwards III*, 128 S. Ct. at 2391 (Scalia, J., dissenting) (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 145 (2006)).
78. *Id.*
79. *Id.*

or abusive of the dignity of the courtroom.[80] Even in circumstances where a court has been allowed to appoint standby counsel, the dissent explained, the defendant has still been allowed to control the management of his defense and substantially act as his own attorney.[81]

Justice Scalia reasoned that, even if he did believe in allowing courts to disregard a defendant's right for the purpose of accomplishing the ultimate goal that right was intended to reach, he would still dissent from the majority because, as he believed, the majority's determination of the nature of the goal was incorrect.[82] For Justice Scalia, the loss of dignity, which the right of self-representation seeks to prevent, is not that of a defendant humiliating himself at trial, but rather being denied the freedom of individual choice and the ability to determine one's own fate.[83] In addition, the dissent explained, the Court has never denied a right because it would make the trial appear unfair to observers, and this case did not provide an opportunity to impose such a standard.[84]

Next, the dissent considered the possibility that the majority was unsure that the right of self-representation is actually guaranteed by the Constitution.[85] Justice Scalia wrote that, while the Sixth Amendment does not explicitly mention the right to proceed pro se, it provides the defendant, and not the defendant's counsel, the right to carry out his defense.[86] Of course, attorneys are allowed full authority to manage a criminal trial, and so, in order for the defendant to actually exercise this right in cases where counsel has fully managed a defense, Justice Scalia argued, the defendant must have actually consented to representation.[87] The dissent noted that Edwards did not consent to the appointment of counsel and was therefore prevented from actually defending himself.[88] Justice Scalia supported this contention by noting that Edwards's attorney made different arguments in his defense than those preferred by Edwards.[89]

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80. *Id.*
81. *Id.* *See* McKaskle v. Wiggins, 465 U.S. 168 (1984).
82. *Edwards III*, 128 S. Ct. at 2393 (Scalia, J., dissenting).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 2393-94.
87. *Edwards III*, 128 S. Ct. at 2394 (Scalia, J., dissenting).
88. *Id.*
89. *Id.* Edwards had wanted to argue self-defense but his counsel argued lack of intent. *Id.*

Finally, Justice Scalia criticized the majority's holding as vague because it held only that a lack of mental competence may allow for the denial of the right of self-representation.[90] Although admitting that the holding would likely gain substantial meaning in the future, he argued that its present indeterminacy could lead to judges avoiding the hassles of dealing with the pleadings and arguments of borderline mentally ill patients by simply finding them incompetent to proceed pro se and appointing them counsel.[91]

As a case of first impression for the Supreme Court, existing precedent helped frame the case's central question but failed to provide an answer to the question before it.[92] There were two distinct and major issues in the case: the Constitution's "mental competence" standard and the scope of the right to self-representation.[93] The Supreme Court looked to case law on those issues in order to resolve *Edwards III*.[94]

It is a longstanding belief of American jurisprudence that a person who does not meet at least a basic level of mental competence may not be subjected to stand trial.[95] While the notion of competency to stand trial was carried over to the American courts from British common law, the issue appears to have been first formally considered at the federal appellate level in *Youtsey v. United States*[96] in 1899.[97] In *Youtsey*, the United States Court of Appeals for the Sixth Circuit, having examined in detail the common law of Britain and the American States, held that it is a fundamental truth that an insane person cannot enter a plea, be subject to trial, receive judgment, or be sentenced.[98] In *Youtsey*, the criminal defendant had petitioned for a continuance on the grounds that he was suffering from both epilepsy and a "nonsane mind and memory."[99] The petition was denied by the trial court and the defendant appealed.[100] The Court of Appeals for the Sixth Circuit considered the dual issues of whether or not the court erred in denying the petition, given the defendant's epilepsy and mental compe-

90. *Id.*
91. *Id.*
92. *Edwards III*, 128 S. Ct. at 2383 (majority opinion).
93. *Id.* at 2394.
94. *Id.*
95. Drope v. Missouri, 420 U.S. 162, 171 (1975).
96. 97 F. 937 (6th Cir. 1899).
97. *Id.* at 940-48.
98. *Id.* at 940.
99. *Id.* at 939-40. The opinion does not clearly state with what crime the defendant was charged. *See id.*
100. *Id.*

tency, without first taking steps to determine whether the defendant was mentally fit to stand trial.[101]

While characterizing the defendant's epilepsy as a physical condition that may have made conducting the trial difficult, the court quickly determined that the trial court's decision to proceed was within its discretion.[102] The circuit court then turned to the second issue of mental competence, stating that, because no statutory law existed on point, it must look to the common law.[103] The court examined a number of British cases, state cases, and other sources to determine the proper procedure for dealing with potentially mentally incompetent defendants.[104] Applying the common law majority view that the issue of a defendant's sanity should be examined by the trial court before proceeding to trial, the court determined it was error to have denied the continuance without first taking steps to determine whether the defendant was competent to stand trial.[105]

While *Youtsey* may have merely restated the traditional common law view of competency to stand trial, the modern standard of mental competence was created and fine-tuned by two United States Supreme Court cases, *Dusky v. United States*[106] and *Drope v. Missouri*.[107] In a very short opinion that did not delve into the facts of the case, the Supreme Court of the United States first established the standard for mental competency to stand trial in *Dusky*.[108] The Court, agreeing with the opinion of the Solicitor General, held that mere orientation to time and place and the ability to recall some events is insufficient to establish the necessary competency.[109] Rather, in order to be competent to stand trial, a criminal defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and must also have "a rational as well as factual understanding of the proceedings against him."[110] The Supreme Court elabo-

101. *Youtsey*, 97 F. at 940.
102. *Id.*
103. *Id.*
104. *Id.* at 940-44. These sources included, but were not limited to: 1 Hale, P.C. 35; Reg. v. Berry, 1 Q.B. 447; 2 Bish. Cr. Proc. § 666; Frith's Case, 22 How. St. Tr. 307; State v. Reed, 7 So. 231 (La. 1889); *Youtsey*, 97 F. at 940-44.
105. *Youtsey*, 97 F. at 947.
106. 362 U.S. 402 (1960) (per curiam).
107. 420 U.S. 162 (1975).
108. *Dusky*, 362 U.S. at 402-03.
109. *Id.* at 402.
110. *Id.*

rated on this standard in *Pate v. Robinson*,[111] in which it held that failing to protect a defendant from being tried or convicted while incompetent to stand trial is a deprivation of the due process right to a fair trial.[112] The *Dusky* standard remained otherwise unaltered for nearly fifteen years, until *Drope* reached the Supreme Court in 1975.[113]

In *Drope*, the defendant-petitioner had been convicted of raping his wife and sentenced to life imprisonment.[114] The defendant appealed on the grounds that his constitutional rights had been violated by the state trial court's failure to order a psychiatric examination before trial[115] and for conducting part of the trial in the defendant's absence.[116] The Missouri Supreme Court affirmed the trial court's ruling on both issues, subsequently prompting the defendant-petitioner to file a motion to vacate the judgment and sentence, pursuant to a State procedural rule.[117] A hearing was held on the motion and, despite the testimony of two psychiatrist witnesses that the petitioner was likely not competent to stand trial, the motion was denied.[118] The ruling was affirmed on appeal by the Missouri Court of Appeals.[119] The Supreme Court of

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111. 383 U.S. 375 (1966).

112. *Pate*, 383 U.S. at 385. In *Pate*, the State argued that, although the defendant was incompetent, he had "waived" the competency defense by failing to request a competency hearing prior to trial. *Pate*, 383 U.S. at 384. However, the Court held that it was contradictory to argue that an incompetent person could knowingly waive a right to a competency hearing. *Id.*

113. *Drope*, 420 U.S. at 162.

114. *Id.*

115. *Id.* at 168-69. After being indicted, defendant's attorney filed a motion for continuance in order to secure a psychiatric examination and treatment. *Id.* at 164. Although the prosecution did not oppose the motion, no action was taken by the court, and the case proceeded to trial. *Id.* at 164-65. As trial began, defendant's counsel objected, in part on the grounds that he was not prepared for trial (having expected a substantial continuance to be granted) and that his client, who was not "of sound mind," should be given further psychiatric examination before going forward with the trial. *Drope*, 420 U.S. at 165. The trial judge explained that the defendant's motion for continuance had been submitted in an improper form and, with the defendant having failed to file a proper second motion as promised, the first motion would be therefore overruled and the case would proceed to trial. *Id.*

116. *Id.* The defendant failed to appear for the second day of the trial because he had shot himself earlier that morning in an apparent attempted suicide. *Id.* at 166. Defendant's counsel moved for a mistrial, but the trial judge denied the motion, stating that any difficulties in proceeding with trial were of the defendant's own making. *Id.* at 167. Defendant's motion for a new trial was denied after the court found that the defendant's absence from trial was voluntary and that the shooting was done purposely in order to avoid trial. *Drope*, 420 U.S. at 167.

117. *Id.* at 168-69. The relevant rule is Missouri Supreme Court Rule 27.26.

118. *Drope*, 420 U.S. at 169.

119. *Id.*

the United States then granted certiorari to examine whether or not the defendant's due process rights had been violated.[120]

In examining the issue of competency to stand trial and tracing the history of the concept through the American court system, the *Drope* Court held that, not only must a defendant be able to understand the nature and object of the proceedings against him and consult with counsel, but he must also be able "to assist in preparing his defense" before being tried.[121] This last phrase was an important addition to the language in *Dusky*, which only required a defendant to be able to *consult* with his attorney, rather than actually *assist* in his own defense.[122] The Court added that, even when a defendant is competent to stand trial when the proceedings begin, a change in his condition may occur and render him incompetent to stand trial even after trial has already begun.[123] In such a situation, the court must be alert to such changes and, if necessary and despite the difficulties that may result, suspend the trial until the defendant's condition can be properly examined.[124]

Applying these rules, the Court held that, regardless of whether the defendant should have been given a competency hearing prior to the start of trial, the compounding effect of the evidence that came to light before and during trial, including his attempted suicide, created enough doubt as to his competency to require further investigation of the issue.[125] As a result, the judgment was reversed and the case remanded.[126]

While it is a violation of a defendant's constitutional right to due process of law to try him while mentally incompetent to stand trial, it is also a constitutional violation to force a lawyer upon a defendant when he desires to conduct his own defense in a state criminal trial.[127] Like the issue of mental competence, the right to self-representation has a long history in American jurisprudence, with the right to represent oneself in the federal courts being statutorily established almost contemporaneously with the Consti-

120. *Id.* at 171.
121. *Id.*
122. *Dusky*, 362 U.S. at 402-03.
123. *Drope*, 420 U.S. at 181.
124. *Id.* at 181-82.
125. *Id.* at 180.
126. *Id.* at 183.
127. Faretta v. California, 422 U.S. 806 (1975).

tution.[128] Likewise, the vast majority of States have preserved the same right within their own courts or constitutions.[129]

In *Adams v. United States ex rel. McCann*,[130] the United States Supreme Court examined the narrow issue of whether a defendant accused of a felony can waive a trial by jury without the assistance of legal counsel.[131] The Court noted that nothing in the Constitution prevents a self-represented defendant from choosing a bench trial in favor of a jury trial.[132] While the Constitution, the Court stated, essentially requires that a defendant be able to exercise informed judgment before pleading guilty or waiving certain rights, it does not assume that a defendant is automatically incompetent to exercise this judgment unless he is represented by counsel.[133] Because the Constitution does not explicitly or implicitly recognize a relevant exception, the same must therefore be true in relation to waiving the right to a jury trial.[134] The Court held that, broadly stated, the Constitution does not force counsel on a defendant, and a defendant may waive the right to counsel as long as he does so with an awareness of what he is doing.[135]

While *Adams* may have answered the question of whether the Constitution forces a lawyer on a defendant, it did not, according to the United States Supreme Court, answer the question of whether the Constitution *prevents* a State from doing the same.[136] That question was the central issue before the Supreme Court in

128. *Faretta*, 422 U.S. at 812. The right was included in the Judiciary Act of 1789, which stated that, "in all courts in the United States, the parties may plead and manage their own causes personally . . . ." *Id.* at 806. The right to federal representation was later codified in 28 U.S.C. § 1654 (1948) (Appearance personally or by counsel), which reads, "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

129. *Faretta*, 422 U.S. at 813-14.

130. 317 U.S. 269 (1942).

131. *Adams*, 317 U.S. at 272. In *Adams*, the defendant, indicted on six counts of mail fraud, waived the right to counsel at trial. *Id.* at 270. He then waived the right to a trial by jury and moved for a bench trial. *Id.* at 270-71. The defendant was convicted and sentenced, and during the appeal process, eventually acquired the assistance of an attorney. *Id.* at 271. At that point, and on the advice of the Circuit Court of Appeals, defendant and his counsel filed a writ of habeas corpus to ask the question whether a client representing himself may waive the right to a jury trial. *Id.* at 271-72. The Circuit Court of Appeals answered the question negatively and reversed the defendant's conviction. *Adams*, 317 U.S. at 217-72. The United States Supreme Court then granted certiorari to examine the question. *Id.* at 272.

132. *Id.* at 275.

133. *Id.* at 277.

134. *Id.* at 278-79.

135. *Id.* at 279. As a result, the Circuit Court of Appeals' decision was reversed and the cause remanded. *Id.* at 287.

136. *Faretta*, 422 U.S. at 814-15.

Faretta v. California.[137] In attempting to resolve the issue, the Court looked to certain dicta in *Adams*, which asserted an affirmative right to represent oneself.[138] The Court looked to other cases as well, including *Snyder v. Massachusetts*,[139] which held that the right of an accused to be present at all stages of the proceedings against him, as embodied in the Confrontation Clause of the Sixth Amendment, was based on the notion that a defense would be easier if the defendant was not only allowed to be present but also allowed to give advice to or even supersede his counsel in order to defend himself.[140] Likewise, in *Price v. Johnston*,[141] the United States Supreme Court recognized that, in holding that a convicted defendant did not have an absolute right to argue his own appeal, it was standing in direct contrast to the recognized right of a defendant to conduct his own defense at trial.[142] The *Faretta* Court also looked to decisions of the United States Courts

137. *Id.* In *Faretta*, the defendant had been charged with grand theft in a California state court. *Id.* at 807. Counsel was appointed by the court but then reluctantly removed by the trial judge after being waived by the defendant. *Id.* at 807-08. Shortly before trial, however, the judge conducted a hearing to determine if the defendant was able to adequately conduct his own defense. *Id.* at 808. Finding that he was not, the judge then reassigned counsel, holding also that the defendant had no constitutional right to represent himself in his own defense. *Faretta*, 422 U.S. at 808-10. The defendant, at trial, was found guilty and sentenced to prison. *Id.* at 810-11. The California Court of Appeal affirmed the conviction, and the United States Supreme Court granted certiorari. *Id.* at 811-12.

138. *Id.* at 815. The relevant passages from *Adams* state:

> The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law . . . .
>
> . . . What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms
>
> . . . .
>
> . . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.

Faretta, 422 U.S. at 815-16 (quoting *Adams*, 317 U.S. at 279-80).

139. Snyder v. Massachusetts, 291 U.S. 97 (1934), *overruled in part on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964).

140. *Faretta*, 422 U.S. at 816 (citing *Snyder*, 291 U.S. 97). The Sixth Amendment states:

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

U.S. CONST. amend. VI.

141. 334 U.S. 266 (1948).

142. *Id.* (citing Price v. Johnston, 334 U.S. 266 (1948)).

of Appeals for guidance and found that they had, on numerous occasions, found the right of self-representation to be protected within the Bill of Rights.[143]

After considering all of the relevant decisions, the Court, in *Faretta*, found an almost total consensus that a defendant's basic right to defend himself would be violated by forcing a lawyer upon him.[144] The Court then turned its eye to the Sixth Amendment, holding that the amendment does not simply provide that a defense will be made for a defendant, but that a defendant, himself, has the right to make that defense.[145] The Court noted that, although not explicitly stated in the Sixth Amendment, the right to self-representation is implied by its structure.[146] While an attorney may be appointed or acquired by the defendant, the Court went on to explain, he may only represent the accused at the accused's consent, because if the defense presented by the attorney is not the same as that desired by the accused, then it is logically not the accused's defense.[147] Therefore, the defense is not, in reality, the defense constitutionally guaranteed to him.[148]

The *Faretta* Court also traced the history of self-representation throughout the British and American court systems.[149] The Court pointed out that, in British history, the oft-criticized Star Chamber of the sixteenth and seventeenth centuries was the only court that ever forced attorneys upon unwilling criminal defendants.[150]

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143. *Faretta*, 422 U.S. at 816 (citing United States v. Plattner, 330 F.2d 271 (2d Cir. 1964); United States ex rel. Maldonado v. Denno, 348 F.2d 12 (2d Cir 1965); MacKenna v. Ellis, 263 F.2d 35 (5th Cir. 1959); United States v. Sternman, 415 F.2d 1165 (6th Cir. 1969); Lowe v. United States, 418 F.2d 100 (7th Cir. 1969); United States v. Warner, 428 F.2d 730 (8th Cir. 1970); Haslam v. United States, 431 F.2d 362 (9th Cir. 1970); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); Brown v. United States, 264 F.2d 363 (D.C. Cir. 1959)).

144. *Faretta*, 422 U.S. at 817.

145. *Id.* at 819. *See* also U.S. CONST. amend. VI.

146. *Faretta*, 422 U.S. at 819.

147. *Id.* at 820-21.

148. *Id.*

149. *Id.* at 821-832.

150. *Id.* at 821. The Faretta Court described the Star Chamber as follows:

> That curious institution, which flourished in the late 16th and early 17th centuries, was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons, and because it specialized in trying "political" offenses, the Star Chamber has for centuries symbolized disregard of basic individual rights. The Star Chamber not merely allowed but required defendants to have counsel. The defendant's answer to an indictment was not accepted unless it was signed by counsel. When counsel refused to sign the answer, for whatever reason, the defendant was considered to have confessed . . . . The Star Chamber was swept away in 1641 by the revolutionary fervor of the Long Parliament.

Id.

By the late seventeenth century, British law had developed the right to counsel, as well as the corresponding right to self-representation.[151] The Court also explained that, in the early years of the American Colonies, the right to defend oneself was closely guarded, aided in part by a general distrust of lawyers.[152] This trend began to reverse itself over time, but even so, as the Court noted, many early colonial charters and declarations of rights guaranteed the right of self-representation.[153] After the Declaration of Independence, as the Court explained, this right was incorporated into many state constitutions and statutes, in part because it was thought to go hand-in-hand with the right to counsel.[154] The Judiciary Act of 1789, as previously mentioned, also preserved the right, and it was against this backdrop that the Sixth Amendment was first proposed.[155] The Court stressed that, at the time the Sixth Amendment was proposed, no State or colony had forced an attorney on a defendant, and the Court presumed that, had the Sixth Amendment proposed to do away with the right of self-representation, some controversy or debate would have arisen, although there is none of record.[156]

Furthermore, the Court explained that, although there is undoubtedly some value in proceeding to trial with state-appointed counsel, there remains the invaluable right to free choice in the matter.[157] Forcing an attorney on a defendant, the Court stated, only leads the defendant to believe that the law is working against him, especially since the defendant is the one who has to shoulder the consequences of unsuccessful representation.[158] Although it may be obvious, at times, that serving in one's own defense will only be to the defendant's disadvantage, the choice to do so must still be given out of respect for the defendant as an individual.[159]

Having resolved, in *Faretta*, that the right of self-representation is constitutionally guaranteed, the Court applied the law to the facts of the case and found that, in forcing the defendant to accept an attorney, the California courts had violated his constitutional

151. *Faretta*, 422 U.S. at 824-26 (citing the Treason Act of 1695, 7 Will. 3, c. 3, s 1).
152. *Faretta*, 422 U.S. at 826-27.
153. *Id.* at 828.
154. *Id.* at 828-30.
155. *Id.* at 831.
156. *Id.* at 832.
157. *Faretta*, 422 U.S. at 833-34.
158. *Id.* at 834.
159. *Id.*

right to conduct his own defense.[160] The judgment of the lower court was therefore vacated and the case remanded.[161]

Faretta was a 6-3 decision.[162] In the first of two dissenting opinions, Justice Burger, joined by Justice Blackmun and Justice Rehnquist, argued that no constitutional basis existed for the majority's holding and that the decision was merely an attempt to constitutionalize what the majority thought was "good."[163] The dissenters found nothing in the Sixth Amendment guaranteeing the right of self-representation.[164] Instead, the minority explained that the Sixth Amendment was meant to ensure that criminal defendants receive the best possible defense, and that, in many cases, this intent can only be realized by the representation of counsel.[165] A trial judge, the dissent stated, is the best person to determine whether a defendant is capable of serving in his own defense and may, therefore, determine that a defendant must accept appointed counsel.[166] The minority disagreed with the majority's use of dicta from other cases and its employment of British and American court history.[167] Justice Burger also expressed his concern that allowing a defendant to proceed pro se would prevent judicial economy because it would cause congestion in the court system and encourage more appeals from convicted pro se defendants.[168]

A second dissent, echoing the first, was written by Justice Blackmun,[169] who argued that the Sixth Amendment contained no language supporting a right to self-representation.[170] Additionally, Justice Blackmun argued that the judicial history cited by the majority was unpersuasive, and he found that the procedural confusion caused by self-represented defendants would outweigh any potential advantages.[171]

The two issues of competency to stand trial and a right to self-representation collided, at least somewhat, in *Godinez v. Moran*,[172]

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160. *Id.* at 835.
161. *Id.* at 836.
162. *Faretta*, 422 U.S. at 807, 836.
163. *Id.* at 836 (Burger, C.J., dissenting).
164. *Id.* at 837-38.
165. *Id.* at 840.
166. *Id.*
167. *Faretta*, 422 U.S. at 840-45 (Burger, C.J., dissenting).
168. *Id.* at 845-46.
169. *Id.* at 846 (Blackmun, J., dissenting).
170. *Id.*
171. *Id.*
172. 509 U.S. 389, 113 S. Ct. 2680 (1993).

in which the United States Supreme Court was presented with the issue of whether the standard of competency for standing trial is the same as the standard of competency for waiving counsel or pleading guilty.[173] In *Godinez*, the United States Court of Appeals for the Ninth Circuit had held that the standard of competency to waive constitutional rights, including that of self-representation, was higher than that of the standard of competency to stand trial.[174] The United States Supreme Court, noting that the question had divided the federal courts of appeals, granted certiorari to examine the issue and resolve the conflict.[175]

The Court, in *Godinez*, reasoned that all criminal defendants, whether they plead guilty or not, may have to make difficult and important decisions once proceedings have been initiated against them.[176] Although the decision to plead guilty may be a complicated one, it is, according to the Court, no more complicated than any of the decisions that may need to be made by a defendant who proceeds to trial.[177] As a result, the Court held, there is no reason to require a higher level of competence for defendants who plead guilty than for those who do not.[178] The Court, however, clearly pointed out the distinction between a defendant waiving the right to appointed counsel and actually representing himself at trial, a distinction that would be repeated in *Edwards III*.[179]

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173. *Godinez*, 509 U.S. at 391.

174. *Id.* at 394. The *Godinez* defendant had entered a Las Vegas bar and shot and killed two people before stealing the cash register. *Id.* at 391. Less than two weeks later, he went to his ex-wife's apartment and shot and killed her. *Id.* He then attempted suicide by shooting himself in the abdomen and slitting his wrists, but he failed to take his own life. *Id.* While recovering at the hospital, he confessed his crimes to the police. *Id.* Later, the defendant, along with counsel, pleaded not guilty to three counts of first-degree murder. *Godinez*, 509 U.S. at 391. The trial court conducted a competency hearing, at which the defendant was found competent to stand trial. *Id.* The State then decided to pursue the death penalty. *Id.* at 391-92. The defendant appeared in court soon afterward and requested to discharge his counsel and enter a guilty plea on his own in order to prevent the appearance of mitigating evidence at his sentencing hearing. *Id.* at 392. The court granted his request after finding that he had waived his right to counsel "knowingly and intelligently." *Id.* The defendant was sentenced to death for each of the three murders. *Godinez*, 509 U.S. at 393. Two of the death sentences were affirmed by the Nevada Supreme Court, while one was reversed and a life sentence imposed. *Id.* The defendant filed a petition for post-conviction relief on the grounds that he was not competent to represent himself. *Id.* This petition was denied. *Id.* He then filed a habeas corpus petition in United States District Court for the District of Nevada, which was denied but then reversed by the Ninth Circuit Court of Appeals. *Id.*

175. *Id.* at 395-96.

176. *Id.* at 398.

177. *Id.*

178. *Godinez*, 509 U.S. at 399.

179. *Id. See also Edwards III*, 128 S. Ct. at 2392.

The Court, in *Godinez*, explained that, in addition to finding a defendant competent to stand trial before allowing him to plead guilty or waive his right to counsel, a trial court must also determine whether the waiver of such constitutional rights is both knowing and voluntary.[180] Although this additional determination must be made before any waiver is granted, it is not related to *competence*, but is rather a procedural requirement for pleading guilty.[181] As a result, the Court determined that the competency standard for either pleading guilty or waiving the constitutional right to counsel is the same as the competency standard for standing trial.[182] The Court therefore reversed the judgment below and remanded the case for further proceedings.[183]

Justice Kennedy, joined by Justice Scalia, wrote an opinion concurring in part and concurring in the judgment in *Godinez*.[184] In addition, a dissenting opinion was written by Justice Blackmun and joined by Justice Stevens.[185] The dissenters argued that the majority opinion was in contrast to both common sense and precedent.[186] According to the dissent, the standard for competence to stand trial was designed with the intention of ensuring that a defendant could consult with counsel and assist in preparing a defense.[187] When counsel for the defendant is waived and no longer exists, the relevancy of competency to stand trial is therefore, the dissent argued, no longer of any relevance.[188] Competency for one purpose is not necessarily competency for another, and therefore, a separate determination is required to answer the question of competency to waive counsel.[189]

The dissenters also argued that prior case law from the Supreme Court has required competency hearings and a determination to be tailored with specificity to the context and purpose of the given proceeding.[190] Several cases, the dissenters stated, have even required separate hearings on the issue of competence to

180. *Godinez*, 509 U.S. at 400.
181. *Id.* at 400-01.
182. *Id.* at 391.
183. *Id.* at 402.
184. *Id.* at 402 (Kennedy, J., concurring in part and concurring in the judgment).
185. *Godinez*, 509 U.S. at 409 (Blackmun, J., dissenting).
186. *Id.*
187. *Id.* at 412.
188. *Id.* at 412-13.
189. *Id.* at 413.
190. *Godinez*, 509 U.S. at 413 (citing Reese v. Peyton, 384 U.S. 312, 314 (1966)).

waive constitutional rights.[191] Moreover, the dissenters pointed out that the Court's decision in *Faretta*, while preserving the right for a competent defendant to conduct his own defense, did not give an incompetent defendant that same right.[192] *Faretta*, the dissenters explained, required the defendant to make the decision to represent himself knowingly and intelligently, something a mentally incompetent or borderline mentally incompetent defendant may not be able to do.[193] Finally, the dissent took issue with the majority's attempt to draw a line between competence to waive the right to counsel and competence to actually represent oneself, arguing that the former necessarily entails the latter.[194] This particular point foreshadowed the seemingly inevitable question raised fifteen years later in *Edwards III*.[195]

The issue in *Edwards III* was undoubtedly a complex one, involving not one but two constitutional issues. While compelling arguments were framed by both the majority and the minority, the Supreme Court's final holding on the issue was, as a general principle, correct. The Constitution does not forbid a State from insisting that a criminal defendant, adjudged competent to stand trial but not competent to represent himself, proceed to trial with counsel.[196] However, when specifically applied to Edwards, the criminal defendant in this case, the Court's ruling was incorrect.

The Court properly held that the *Dusky* standard of mental competence is, on its face, inapplicable to a situation like that presented in *Edwards III*. The *Dusky* standard, as one of its foundational elements, requires that the defendant have "sufficient present ability to *consult with his lawyer* with a reasonable degree of rational understanding."[197] This requirement automatically precluded applying the standard to a pro se criminal defendant, who has no lawyer.[198]

The Court also found its ruling in *Faretta* inapplicable.[199] It appears, though, that the Court actually could have, and should have, applied *Faretta* to reach the same result and resolved the

191. *Id.* (citing Massey v. Moore, 348 U.S. 105 (1954); Westbrook v. Arizona, 384 U.S. 150 (1966); Medina v. California, 505 U.S. 437 (1992); Riggins v. Nevada, 504 U.S. 127 (2002)).

192. *Godinez*, 509 U.S. at 415-16 (citing *Faretta*, 422 U.S. at 835).

193. *Godinez*, 509 U.S. at 416.

194. *Id.*

195. *Edwards III*, 128 S. Ct. at 2384.

196. *Id.* at 2381.

197. *Id.* at 2383 (citing *Dusky*, 362 U.S. at 402) (emphasis in original).

198. *Edwards III*, 128 S. Ct. at 2386.

199. *Id.* at 2384.

issue more easily. *Faretta* established that the Constitution guarantees to a criminal defendant the right of self-representation when that defendant voluntarily and intelligently elects to proceed without counsel.[200] *Faretta* and its progeny also advanced the rule that the right of self-representation is not absolute in all cases.[201] As the Court correctly stated, mental illness varies by degree, meaning that an individual who may be competent in some respects can be incompetent in others.[202] Thus, it stands to reason that a defendant found mentally competent to stand trial could still be found incapable of "voluntarily or intelligently" electing to represent himself at trial.

Justice Scalia, in his dissent, argued that Edwards made the decision to represent himself both voluntarily and intelligently.[203] Edwards, according to Justice Scalia, was able to answer many of the trial judge's questions on legal procedure and, on more than one occasion, made coherent courtroom arguments.[204] In addition, Edwards represented that his desire for self-representation was motivated by a disagreement with counsel over his defense strategy.[205] While his attorney wanted to pursue a defense of lack of intent to kill, Edwards favored arguing self-defense.[206] This difference, at least on its face, represented a reasonable disagreement over two legitimate and recognized criminal defenses, rather than Edwards's desire to establish an unorthodox defense based on some insane delusion. Moreover, the trial judge determined that Edwards had "knowingly and voluntarily" waived his right to counsel at his first trial and was only prevented from waiving this right at his second trial because of a new "exception" carved out by the judge.[207] Therefore, considering the facts, it was likely proper for the trial judge and for Justice Scalia to determine that Edwards's election to waive counsel was done voluntarily and intelligently. As a result, Edwards, under *Faretta*, had the constitutional right to represent himself at trial. To deny him that right was error.

However, although the ruling in *Edwards III* was incorrect as to Edwards, it was correct as a broader rule of law. As the amicus

200. *Faretta*, 422 U.S. at 807.
201. *Edwards III*, 128 S. Ct. at 2384 (citations omitted).
202. *Edwards III*, 128 S. Ct. at 2386.
203. *Id.* at 2389-91 (Scalia, J., dissenting).
204. *Id.* at 2389-90.
205. *Id.* at 2390.
206. *Id.*
207. *Edwards III*, 128 S. Ct. at 2390.

brief filed with the Court by the American Psychiatric Association pointed out, symptoms of mental illness such as unorganized thought processes, attention and concentration deficits, anxiety, and impaired capacity for self-expression "can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant."[208] Accordingly, although a criminal defendant may meet the *Dusky* standard and be found competent to stand trial, he may not have the mental capability to represent himself.[209] Standing trial can be, if the defendant so desires, a relatively passive activity, because the defendant can defer to counsel on any number of decisions or matters of strategy.[210] On the other hand, self-representation puts the defendant in a much more active position, requiring close attention and an ability to comprehend, in much greater detail, what occurs during trial.[211] Whether an individual may be able to *consult* with counsel and *assist in* his defense and whether he may be able to serve as counsel and wholly manage his own defense are therefore two very different questions.[212]

In asking the Supreme Court to consider whether the Constitution required that Edwards to be allowed to represent himself at trial, the State of Indiana also requested that the Court adopt a more specific standard to deny the right of self-representation and that the Court overrule *Faretta*.[213] Somewhat ironically, however, it seems as though *Faretta* could actually serve as this "more specific standard." While there will undoubtedly be a great deal of legal debate as to how to correctly interpret "voluntarily and knowingly" or "voluntarily and intelligently" in the context of mental illness, simply carrying over the existing *Faretta* rule into cases involving borderline mental competence will allow the Court to reach its desired result with less reliance on history, tradition, or psychiatric theory and more reliance on existing precedent. Courts are routinely asked to apply tests such as these in a variety of settings, and moreover, should already be somewhat familiar with applying the *Faretta* test in its more traditional context.

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208. *Id.* at 2387 (quoting Brief for APA et al. as Amici Curiae Supporting Neither Party at 26, Indiana v. Edwards, 128 S. Ct. 2379 (2008) (No. 07-208)).

209. *Edwards III*, 128 S. Ct. at 2386.

210. *See* Brief for APA et al. as Amici Curiae Supporting Neither Party at 20, Indiana v. Edwards, 128 S. Ct. 2379 (2008) (No. 07-208).

211. *See id.*

212. *See id.*

213. *Edwards III*, 128 S. Ct. at 2388.

It is difficult to predict how *Edwards III* will fare in the future. The issue is a narrow one and will likely arise again, if at all, only on rare occasions. First, very few felony criminal defendants actually choose to represent themselves.[214] Of this small number, even fewer are likely to be found "borderline competent" to stand trial, as evidenced by the fact that *Edwards III*, in 2008, was a case of first impression for the Supreme Court.[215] Of course, the fact that an issue will rarely be raised does not make it unimportant, especially when it involves constitutional rights. Therefore, it is necessary to examine the breadth of the potential impact or consequences of the ruling in *Edwards III*.

The effect of *Edwards III* on lower courts and legislatures remains yet unclear. State legislatures may draft their own statutes or procedural rules in an attempt to establish a specific standard of competence to represent oneself. Of course, it is highly likely that, upon its first attempted implementation, any such standard would face a challenge to its constitutionality under *Edwards III*, putting the issue again before the Supreme Court. Trial judges operating under *Edwards III* may struggle because the Court provided little guidance in determining when they may or should impose counsel on such a defendant. The scientific and psychological nuances of mental illness are still not wholly understood, particularly by those outside the field of psychiatry, and trial judges cannot therefore be expected to be fully proficient in this area. Reasonable people could easily disagree on whether a borderline-competent defendant is capable of representing himself, and as a result, it is almost impossible for a trial judge to know exactly where the line stands when it comes to an abuse of judicial discretion. Trial judges are, it is conceded, often asked to become "temporary experts" in a variety of fields by higher court decisions. Moreover, it is also admittedly unlikely that cases with *Edwards III*-like fact patterns will ever arise for most trial judges. Still, however, the ambiguity inherent in the Court's holding in *Edwards III* can be expected to create an unwelcome burden on trial judges throughout the legal system.

There is no easy resolution to the central question in *Edwards III*. The case represents a rare collision of multiple constitutional issues and a field of medicine and science yet to be fully explored

214. *Id.* (citing Erica Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 427, 428, 447 (2007) (noting that only about .3% to .5% of all felony defendants choose to represent themselves at trial)).

215. *Edwards III*, 128 S. Ct. at 2383.

and understood. Advances in research may eventually make it easier to establish at least a moderately reliable standard for mental competence to represent oneself at trial. In the meantime, however, the Court has left the legal community with a general answer that is, although correct, nearly impossible to apply with any precision. While perhaps not the perfect solution to the problem presented in *Edwards III*, simply applying the *Faretta* standard to the facts of the case would have allowed the Court not only to protect Edwards's rights but also to establish at least a more specific and workable stopgap standard to be used in any similar cases going forward.

Patrick Manning