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## Mental Illness and Self-Representation: *Faretta, Godinez and Edwards*

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*Indiana v. Edwards*,<sup>1</sup> which involved a mentally ill defendant who wanted to represent himself, starkly poses the tension between the “inestimable worth of free choice” and the desire for reliable outcomes that appear fair and legitimate. The quoted language comes from *Faretta v. California*,<sup>2</sup> which held that the Sixth Amendment guarantees criminal defendants the right to represent themselves, even if assertion of that right means that a defendant “may conduct his own defense ultimately to his own detriment.”<sup>3</sup> In *Edwards*, however, the Court held that when the defendant is mentally ill he should normally *not* be allowed to conduct his own defense even when competent to make the waiver decision, in large part because doing so might harm his cause.

*Edwards* was a surprise, given the holding in *Godinez v. Moran*,<sup>4</sup> a Rehnquist Court decision that allowed a seriously depressed defendant who had been found competent to stand trial, to waive the right to counsel, plead guilty to capital charges, and represent himself at sentencing. Even though, the *Godinez* Court admitted, the defendant did a poor job of representation, “a criminal defendant’s ability to represent himself has no bearing upon his competence to *choose* self-representation.”<sup>5</sup> And, on the latter score, “there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights,” like the rights to silence or jury trial, which defendants who are competent to stand trial may waive.<sup>6</sup> Thus, Robert Moran lost, his death sentences were upheld, and he has now been executed.

One might think that, under *Godinez*’s reasoning, the state would not be able to force counsel on a defendant who is competent to stand trial and voluntarily and intelligently waives the right to self-representation. But in *Edwards* the Court held that this right may be denied to defendants who meet these criteria if they “still

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<sup>1</sup> 128 S. Ct. 2379 (2008).

<sup>2</sup> 422 U.S. 806, 834 (1975).

<sup>3</sup> *Id.*

<sup>4</sup> 509 U.S. 389 (1993).

<sup>5</sup> *Id.* at 400.

<sup>6</sup> *Id.* at 399.

suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”<sup>7</sup> Thus, on remand, Edwards’ conviction for attempted murder, obtained over his *Faretta* objection, will likely be affirmed.

After *Godinez* and *Edwards*, the trial judge has enormous discretion in deciding whether a person with mental illness who is competent to stand trial may represent herself. These decisions also suggest, intentionally or not, how judges should exercise this discretion, to wit, that the right to self-representation for people with mental illness should depend primarily on whether the defendant wants to plead guilty or not guilty. If a mentally ill defendant who is nonetheless competent to stand trial wants to plead guilty without counsel, *Godinez* suggests, he should be allowed to do so, but if the defendant wants to go to trial on his own, *Edwards* advises, he should usually be forced to accept counsel. One would not be churlish in concluding that the overriding objective of *Godinez* and *Edwards* is to ensure that the state can proceed as efficiently as possible in dealing with mentally ill people.

A less cynical interpretation, at least of *Edwards*, is that it is an attempt to mitigate *Godinez*’s occasionally harsh impact. As applied in the lower courts, the latter decision had sometimes permitted clearly disturbed individuals to make a mockery of the trial process and their own case.<sup>8</sup> *Edwards* assures trial judges they have the authority to prevent that result.

Even if the Court’s motivation in *Edwards* was benign, however, it erred. For there was another path it could have taken that more satisfactorily resolves the tension between the defendant’s interest in autonomy on the one hand and, on the other, society’s interests in reliable and fair outcomes and in avoiding farcical proceedings that bring the criminal justice system into disrepute. First, the Court could have reaffirmed, rather than ignored, *Godinez*’s (and *Faretta*’s) holding that the key issue is competency to choose, not competency to represent oneself. Second, contra to *Godinez*, it could have recognized that one needs greater capacity to choose to waive counsel than to surrender other rights, which would have better protected both the defendant’s autonomy interest and the state’s interest in fair proceedings. Third, it could have further protected those interests by requiring an inquiry that *Godinez* did not consider: an investigation of the *reasons* the defendant wants to proceed *pro se*. If those reasons are delusional or non-existent, then the autonomy that gives rise to a right to self-representation does not exist. But otherwise the defendant who understands the risks of waiving the right to counsel should be allowed to represent himself; no competency-to-represent-oneself test, a la *Edwards*, should be required. If the *pro se* defendant becomes disorderly during trial, the state’s interest in avoiding circus-like

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<sup>7</sup> *Indiana v. Edwards*, 128 S. Ct. 2379, 2388 (2008).

<sup>8</sup> See accounts of *Ferguson*, *infra* at text accompanying notes 62–66, and of *Panetti v. Quarterman*, in Petition for Writ of Certiorari at 20, *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208), 2007 WL 2363244.

proceedings can be accommodated through application of *Illinois v. Allen*,<sup>9</sup> which permits the trial judge to take steps to maintain the decorum of the courtroom.

These prescriptions more properly balance the interests identified in *Faretta*, *Godinez* and *Edwards*. They also achieve another goal that I emphasized in my book *Minding Justice*<sup>10</sup>—the de-stigmatization and dignification of people with mental illness. They assure that people with mental illness are not deprived of rights (in this case, the right to represent oneself) simply because of their condition, but instead require close attention to whether particular symptoms of mental illness impair functioning in a legally relevant way. If no such impairment exists, then people with mental illness should be able to waive rights (and assert them) regardless of any mental aberrations they experience.

### I. FARETTA, GODINEZ AND EDWARDS

*Faretta* is the baseline. Grounded in the text of the Sixth Amendment (which provides that trial rights, including the right to “assistance” of counsel, are granted to the *accused*), a survey of history, and an array of policy considerations, a majority of the Supreme Court held in that case that criminal defendants have the right to represent themselves.<sup>11</sup> Many, including some members of the Court, have argued that *Faretta* is a bad decision, both in its construal of the right to counsel provision and the Sixth Amendment’s history, and in its obliviousness to the disastrous consequences it can cause in the courtroom.<sup>12</sup> But the majority insisted (and this article will assume) that honoring criminal defendants’ autonomy outweighed these concerns:

[W]here the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer’s training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of “that respect for the individual which is the lifeblood

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<sup>9</sup> 397 U.S. 337 (1970).

<sup>10</sup> CHRISTOPHER SLOBGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* 20 (2006).

<sup>11</sup> *Faretta v. California*, 422 U.S. 806, 818–32 (1975).

<sup>12</sup> *See id.* at 837–40, 843–45 (Burger, C.J., dissenting); *id.* 846–51 (Blackmun, J., dissenting).

of the law.”<sup>13</sup>

*Faretta* also made clear, however, that there are at least three limitations on the right it created. First, the aforementioned case of *Illinois v. Allen* had already clearly established that a defendant could be removed from the courtroom—and therefore presumably subjected to the lesser imposition of requiring argument through counsel—when he “insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on . . . .”<sup>14</sup> Second, the state may appoint “standby” counsel “to 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.”<sup>15</sup>

Finally, *Faretta* held that, consistent with rules governing other constitutional rights, the waiver of the right to self-representation must be made “knowingly and intelligently.”<sup>16</sup> According to the Court, “[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he 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.’”<sup>17</sup> Implicit in this waiver standard is the requirement that the defendant possess some minimum degree of cognitive capacity that enables comprehension of the “danger and disadvantages of self-representation.”

It was this latter requirement that *Godinez v. Moran* addressed. Based on the reports of two psychiatrists, Moran was found competent to stand trial on three counts of first-degree murder despite signs of serious depression. Moran then indicated his desire to discharge his attorneys, apparently to prevent them from frustrating his plan both to plead guilty and to ensure that no mitigating evidence was presented at sentencing. The trial court advised Moran of the rights a guilty plea relinquishes and of the dangers and disadvantages of self-representation, but Moran insisted on his waiver of counsel, pleaded guilty, did not present any defense at sentencing and, not surprisingly, was sentenced to death on all three murder counts.<sup>18</sup>

Justice Thomas’ opinion in *Godinez* first noted that, if a person is competent to stand trial, then under the standard the Court had established in *Dusky v. United States*,<sup>19</sup> he has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “a rational as well as factual

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<sup>13</sup> *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (Brennan, J., concurring)).

<sup>14</sup> 397 U.S. 337, 343 (1970).

<sup>15</sup> *Faretta*, 422 U.S. at 835 n.46.

<sup>16</sup> *Id.* at 835 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938)).

<sup>17</sup> *Id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

<sup>18</sup> *Godinez v. Moran*, 509 U.S. 389, 391–95 (1993).

<sup>19</sup> 362 U.S. 402, 402 (1960).

understanding of the proceedings against him.”<sup>20</sup> The Ninth Circuit had held that the capacity necessary to plead guilty or waive counsel is more demanding than that required by *Dusky*, given the consequences of those decisions.<sup>21</sup> But Thomas pointed out that a person who is competent to stand trial must have the capacity to understand trial rights such as the right to jury trial, the right to remain silent and the right to confront accusers, and thus will be able to understand what he gives up with a guilty plea.<sup>22</sup> And assuming that capacity, Thomas concluded, a defendant can also grasp what is necessary to waive counsel, because the focus in that situation is on the capacity to choose, not the capacity to do a good job in court; *Faretta*, Thomas pointed out, had “made it clear that the defendant’s ‘technical legal knowledge’ is ‘not relevant’ to the determination whether he is competent to waive his right to counsel, . . . [and] emphasized that although the defendant ‘may conduct his own defense ultimately to his own detriment, his choice must be honored.’”<sup>23</sup> Thus, according to the Court, a defendant who is competent to stand trial is also competent to waive counsel, at least when pleading guilty.

Modifying *Faretta*’s language somewhat, Justice Thomas also reiterated that waiver of the right to counsel must be “knowing and voluntary.”<sup>24</sup> Thus, Thomas stated, being competent is not enough; the trial court must also find that “the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced.”<sup>25</sup> But by dropping the “intelligence” prong from *Faretta*’s formulation (a move that is consistent with other post-Warren Court waiver jurisprudence<sup>26</sup>), *Godinez* emphasized that competency to waive counsel does not require a heightened capacity. The Court went on to hold that, since Moran had been competent to stand trial and had understood the consequences of representing himself, his waiver of the right to counsel was valid, and his three death sentences were not invalid under the federal Constitution.<sup>27</sup>

After *Godinez*, most lower courts held that a defendant who is competent to stand trial and who knowingly and voluntarily waives the right to counsel has a *right* to self-representation.<sup>28</sup> But this is where *Edwards* kicks in. According to that case, “the Constitution permits judges to take realistic account of the particular

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<sup>20</sup> *Id.* at 402.

<sup>21</sup> *Moran v. Godinez*, 972 F.2d 263, 266 (9th Cir. 1992).

<sup>22</sup> *Godinez*, 509 U.S. at 398.

<sup>23</sup> *Id.* at 400 (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 401 n.12 (emphasis in original).

<sup>26</sup> *See, e.g., Connecticut v. Barrett*, 479 U.S. 523, 530 (1987) (“[W]e have never ‘embraced the theory that a defendant’s ignorance of the full consequences of his decisions vitiates their voluntariness.’” (quoting *Oregon v. Elstad*, 470 U.S. 298, 316 (1985))).

<sup>27</sup> *Godinez*, 509 U.S. at 402.

<sup>28</sup> *See, e.g., United States v. Ellerbe*, 372 F.3d 462, 466 (D.C. Cir. 2004); *United States v. Peppers*, 302 F.3d 120, 131 n.9 (3d Cir. 2002); *Lamar v. State*, 598 S.E.2d 488, 491 (Ga. 2004).

defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so.<sup>29</sup> The Constitution allows this judicial intervention, the Court stated, because proceeding without counsel "presents a very different set of circumstances" than proceeding with an attorney, and because "a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel," nor will such a proceeding "appear fair."<sup>30</sup> Thus, if the judge decides a defendant is not mentally competent to conduct his own defense, the right to self-representation may be denied.

When is a defendant who is competent to stand trial not mentally competent to conduct his own defense? The only hint *Edwards* provided about the answer to this question was in its statement that trial courts applying its holding must assess the defendant's ability "to carry out the basic tasks needed to present his own defense without the help of counsel."<sup>31</sup> The majority opinion failed to spell out either the tasks that are "basic" to trial or how well a defendant must be able to carry them out in order to be competent to proceed without counsel.

In its submission in *Edwards*, Indiana had tried to prod the Court toward a standard that would "deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or a jury."<sup>32</sup> To bolster that proposal, Indiana pointed to the travails of Ahmad Edwards, who it claimed was correctly prevented from representing himself at both of his trials. Edwards was found competent to stand trial by the state hospital about eleven months before his first trial, on attempted murder, battery and associated charges. But by the time of that trial (which resulted in conviction of the minor charges but a hung jury on the attempted murder and battery charges), as well as at his second trial (which resulted in conviction on the attempted murder and battery charges), his written motions were often incoherent.<sup>33</sup> For instance, one such motion began (misspellings, etc., retained):

The appointed motion of permissive intervention filed therein the court superior on, 6-26-01 caused a stay of action and upon its expiration or thereafter three years the plan to establish a youth program to and for the coordination of aspects of law enforcement to prevent and reduce crime among young people in Indiana became a diplomatic act as under the Safe Streets Act of 1967, "A omnibuc considerate agent: I membered clients within the public and others that at/production of the courts

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<sup>29</sup> *Indiana v. Edwards*, 128 S. Ct. 2379, 2387–88 (2008).

<sup>30</sup> *Id.* at 2386–87 (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984)).

<sup>31</sup> *Id.* at 2386.

<sup>32</sup> *Id.* at 2388 (quoting Brief for the Petitioner at 20, *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208), 2008 WL 336303).

<sup>33</sup> *Id.* at 2382.

actions showcased causes.”<sup>34</sup>

Indiana argued that, had Edwards engaged in this “tangential ideation” and “word salad” (as psychiatrists would dub this expressive melange) when talking to a judge and jury, he would have had grave difficulty moving his case forward even though he was able to understand his charges and communicate with his attorney on a one-on-one basis.<sup>35</sup> Thus, Indiana contended, the trial judge’s denial of the right to self-representation should be affirmed.

The Supreme Court, however, refused to adopt Indiana’s proposed inability-to-communicate standard, and declined to declare Edwards incompetent to conduct his own defense.<sup>36</sup> So, as of now, there is no further constitutional definition of the latter standard. All we know for sure is that a person who is competent to stand trial and waives the right to counsel knowingly and voluntarily can still have counsel forced on him under some circumstances associated with being mentally ill and unable to carry out “basic trial tasks.”

Justice Breyer, who wrote the majority opinion in *Edwards*, was correct when he stated that *Edwards* does not directly contradict *Godinez*, since the issue in *Godinez* was when the state may permit self-representation, not when it may force representation.<sup>37</sup> However, the analysis in *Edwards* undercuts virtually every aspect of the latter decision, as well as the foundation of *Faretta*. Most importantly, while *Godinez* stated (and *Faretta* strongly implied) that the competency issue in counsel waiver cases is solely whether the defendant has the capacity to choose, *Edwards* stated that a defendant’s ability to carry out basic trial tasks must also be determined.<sup>38</sup> While *Godinez* held that one who is competent to stand trial is also competent to waive counsel, *Edwards* held that the former competency standard assumes trial will take place with counsel, while going to trial without counsel “presents a very different set of circumstances, which in our view, calls for a different standard.”<sup>39</sup> Finally, whereas *Godinez* (and *Faretta*) focused on the *defendant’s* entitlement under the Sixth Amendment and stated that, once a valid waiver occurs, a poor defense has to be considered an acceptable cost, the majority opinion in *Edwards* stated that an important consideration (if not the most important consideration) is whether trials in which defendants with mental illness represent themselves will “appear fair to all who observe them.”<sup>40</sup>

Note that while they seem to be at loggerheads analytically, *Godinez* and *Edwards* are consistent in one sense: the defendant “lost” in both cases. The

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<sup>34</sup> *Id.* at 2388 (Appendix).

<sup>35</sup> Brief for the Petitioner at 20, *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208), 2008 WL 336303.

<sup>36</sup> *Edwards*, 128 S. Ct. at 2388.

<sup>37</sup> *Id.* at 2385.

<sup>38</sup> *Id.* at 2386.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 2387 (quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988)).



practical impact of that fact is that the right to self-representation for people with mental illness is eminently manipulable. If a depressed individual like Moran wants to plead guilty and abstain from presenting evidence at sentencing, the state need not put obstacles in the way of his self-destruction, because anyone can be mentally competent to do nothing during the proceedings against him. But if a person like Edwards wants to actively defend himself, the state may require him to do it through counsel.

It is the contention of this article that neither of these results is ultimately reconcilable with *Faretta's* paean about the "inestimable worth of free choice." *Godinez* is right in its assertion that the judicial inquiry should be about competency to choose, not competency to represent oneself. *Edwards* is correct in implying that competency to waive counsel requires greater mental capacity than competency to stand trial with counsel. But otherwise both decisions leave much to be desired on a number of points, not the least of which is that the defense, not the state, should have won the argument in both cases.

## II. COMPETENCY TO STAND TRIAL AND WAIVE COUNSEL

To understand the flaws in *Godinez* and *Edwards*, one must start with *Dusky* and the definition of competency to stand trial. The full test laid out in the latter case (a repetition of the Solicitor General's somewhat casual suggested formulation) is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of proceedings against him."<sup>41</sup> This language, which has become the accepted test for competency to proceed with trial and other stages of the process,<sup>42</sup> focuses on two capacities: the capacity to consult with counsel, and the capacity to understand the proceedings.

The barebones *Dusky* test leaves much unanswered. What information does the defendant have to be able to deliver to the attorney? Under what circumstances does such communication demonstrate a "reasonable degree of rational understanding"? What aspects of the proceedings must the defendant have the capacity to understand? When is that understanding "rational"?

As might be imagined, courts and other policymakers have arrived at a wide variety of answers to these questions. But the state of Florida's effort to flesh out the *Dusky* standard captures the basic components of a good competency-to-proceed test. It requires evaluation of the defendant's capacity to:

- (1) appreciate the charges or allegations against [him];
- (2) appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against [him];

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<sup>41</sup> *Dusky v. United States*, 362 U.S. 402, 402 (1960).

<sup>42</sup> See GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 127 (3d ed. 2007).

- (3) understand the adversary nature of the legal process;
- (4) disclose to his attorney facts pertinent to the proceedings at issue;
- (5) manifest appropriate courtroom behavior;
- (6) testify relevantly.<sup>43</sup>

The first three factors relate to the defendant's capacity to understand the proceedings (*Dusky's* second prong) and the latter three relate to the defendant's capacity to communicate (*Dusky's* first prong), with the fifth factor more specifically aimed at evaluating the decorum issue that *Illinois v. Allen* addresses.

If a defendant has the mental capacity to understand and carry out these various aspects of the process, is he or she also competent to waive counsel? *Godinez*, of course, answered this question affirmatively on the assumption that if one is capable of understanding the charges, the penalties, and the "adversary process," including the constitutional rights to which an accused is entitled during that process, then one can understand the nature of self-representation.<sup>44</sup> That assumption is egregiously wrong. As I have written elsewhere, this premise is inconsistent with *Faretta*.

Although that case stated that a defendant need not understand technical legal rules, it also made clear that judges must ensure that defendants who wish to waive the right to counsel are "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.'"<sup>45</sup> To the extent *Godinez* is interpreted to equate the mental capacity to stand trial with the mental capacity to waive counsel, defendants might be allowed to waive counsel even when, in effect, their eyes are "closed" to the effects of their decision, in which case it may as well be random. Such an interpretation is similar to saying that a person who can understand the significance and consequences of undergoing surgery also understands the significance and consequences of conducting that surgery oneself. Yet it is far easier to comprehend the risk and benefits of properly conducted medical procedures (for example, "I know there is a 1 in 10,000 chance I could die from the surgery, but the only option is to go blind") than to comprehend how difficult it would be to choose, without the benefit of medical training, the precise procedures to use and how to carry them out.<sup>46</sup>

Myron Moskowitz has argued that, at a minimum, a person who is contemplating waiver of the right to counsel should have the capacity to

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<sup>43</sup> FLA. R. CRIM. P. 3.211(a)(2).

<sup>44</sup> *Godinez v. Moran*, 509 U.S. 389, 399 (1993).

<sup>45</sup> *Faretta v. California*, 422 U.S. 806, 835 (1975).

<sup>46</sup> SLOBOGIN, *supra* note 10, at 189-90.

understand: (1) the right to pretrial discovery; (2) the right to jury trial; (3) the right to ask questions to prospective jurors; (4) the right to exercise challenges for cause and a specified number of peremptory challenges; (5) the right to present an opening statement; (6) the right to object to prosecution evidence, based on rules of evidence; (7) the right to cross-examine prosecution witnesses, in compliance with the rules of evidence; (8) the right to subpoena witnesses for the defenses; (9) the right not to testify; (10) the right to testify and that the prosecution will have the right to cross-examine; (11) the right to present a closing argument; and (12) the right to appeal.<sup>47</sup> While competency to stand trial clearly encompasses the capacity to grasp the right to jury trial, the right to (refuse to) testify, and perhaps the right to appeal, it does not contemplate inquiry into one's ability to fathom the operation of the discovery process or jury selection, the concept of opening and closing statements, or the impact of the rules of evidence.

The Supreme Court has indirectly, albeit unwittingly, agreed with this stance. As the Court stated in *McKaskle v. Wiggins*,<sup>48</sup> even when standby counsel is present, "[t]he *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial."<sup>49</sup> It follows that, in order to waive counsel with his "eyes open," the defendant must have the capacity to understand that he, not an attorney, will be responsible for all of these tasks (unless he asks standby counsel for help) as well as the possible consequences of not having an attorney take the lead.<sup>50</sup>

In this sense, competency to waive the right to counsel will often require significantly more mental capacity than competency to proceed with the aid of counsel. *Godinez* is wrong to the extent it holds to the contrary. And *Edwards* is deficient because it did not explicitly correct this aspect of *Godinez*. Moreover, *Godinez* and *Edwards* are deficient in still one other way: they both fail to take on the difficult issue of decisional competency.

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<sup>47</sup> Myron Moskowitz, *Advising the Pro Se Defendant: The Trial Court's Duties Under Faretta*, 42 BRANDEIS L.J. 329, 341-42 (2004).

<sup>48</sup> 465 U.S. 168 (1984).

<sup>49</sup> *Id.* at 174.

<sup>50</sup> The Court's decision in *Iowa v. Tovar*, 541 U.S. 77 (2004), is not to the contrary. In rejecting a requirement that the defendant who wants to proceed *pro se* be told that an attorney may be able to identify defenses of which the defendant is unaware, the Court stated, "We have not . . . prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel." *Id.* at 88. But the Court also stated that "[t]he information a defendant must possess in order to make an intelligent election . . . will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Id.*

## III. DECISIONAL COMPETENCY

If *Faretta* is the governing law, then the interest both the individual and society have in honoring autonomy trumps concerns about defendants' amateurism and the appearance of the trial process. At the same time, this allegiance to the autonomy value is undermined if society permits *non*-autonomous individuals to make decisions about pleading guilty, testifying, or waiving the right to counsel. As already noted, a person who does not understand the relevant risks and consequences of a decision cannot be said to be competent to make that decision. But even a person who possesses that understanding might not be sufficiently autonomous to trigger *Faretta's* right.

Suppose, for instance, an otherwise competent individual insists that the reason he wants to proceed *pro se* is that if he does not, the world will end or his head will explode. Apparently, it was concern about defendants acting for such irrational reasons that led the Ninth Circuit to reverse Moran's convictions and sentences and order that he receive a new trial, with counsel. According to the Ninth Circuit, defendants wishing to waive constitutional rights must not only be competent to stand trial, which it assumed Moran was, but also have "the capacity for 'reasoned choice' among the alternatives available to him."<sup>51</sup> Since Moran's decision to waive counsel and plead guilty had not been evaluated under the latter standard, the Due Process Clause was violated.<sup>52</sup>

The Ninth Circuit called its reasoned-choice test a "higher" standard than is required for competency to stand trial.<sup>53</sup> But its test is more accurately conceptualized as an attempt to address an entirely different issue than the competency to stand trial test. Richard Bonnie has helpfully divided competency into two categories: *adjudicative competence*, or the ability to understand the criminal process and communicate relevant information, and *decisional competence*, or the ability to make decisions about rights and other legal matters.<sup>54</sup> Both types of competence are required when a defendant waives the right to counsel.

The discussion to this point in the article has focused on adjudicative competence—the competence to participate in the adjudicative process, with or without counsel. The focus here is instead on decisional competence, the defendant's competency to make particular decisions, in this case the decision to waive counsel. If a defendant is not decisionally competent, he is lacking in the autonomy that is the foundation for waivers under *Faretta*, even if he or she meets the enhanced adjudicative competence standard described above.

So when is a defendant competent in the decisional sense? This is a large

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<sup>51</sup> Moran v. Godinez, 972 F.2d 263, 266 (9th Cir. 1992).

<sup>52</sup> *Id.* at 268.

<sup>53</sup> *Id.* at 266.

<sup>54</sup> Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 554–60 (1993).

issue, which I have addressed at length elsewhere.<sup>55</sup> For now I will simply contrast Professor Bonnie's answer to this question with my own. Bonnie argues that the test for decisional competency should vary with the extent to which the defendant's choice is in accord with the attorney's recommendation and the nature of the decision. Thus, if a defendant's decision is consistent with counsel's advice, Bonnie would only require that the defendant understand the risks and benefits of the decision (in other words, simply be competent in the adjudicative sense), except when he is pleading guilty.<sup>56</sup> In the latter case, to assure the "moral dignity" of the process, Bonnie would require the defendant to meet what he calls the "basic rationality" test, which requires the ability to give reasons for the decision that have a plausible grounding in reality (i.e., are non-delusional).<sup>57</sup> In contrast, for decisions that run counter to counsel's recommendation—and thus when the defendant pleads guilty despite counsel's desire to go to trial or when the defendant waives counsel—Bonnie would require that the defendant meet either a more demanding "appreciation test" (requiring the absence of *any* significant pathological symptoms) or the Ninth Circuit's even more onerous reasoned choice or reasonableness test, on the theory that decisions made against the advice of counsel are likely to produce less reliable outcomes.<sup>58</sup>

It is because Professor Bonnie allows reliability concerns to influence his analysis that I have disagreed with his approach, instead arguing that the decisional competency standard should *not* vary, regardless of context or whether the decision is congruent with the attorney's. To be consistent with *Faretta*, a defendant's competency to waive the right to counsel should usually depend solely on whether he or she is an autonomous actor.<sup>59</sup> That status does not vary with the decision to be made or depend on whether an attorney (or anyone else) happens to agree with it.

Thus, I have proposed that decisional competency be measured in terms of a single standard, and that this standard should be the "basic rationality and self-regard" test.<sup>60</sup> The first part of this test is identical to Bonnie's test for determining decisional competency to plead guilty with counsel, and involves an inquiry into whether the defendant gives non-delusional reasons for the decision. The second part of the test (basic self-regard) requires a willingness to exercise the autonomy one has, which can usually be demonstrated by a willingness to consider alternative scenarios. As I have discussed in other work,<sup>61</sup> the "basic rationality

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<sup>55</sup> SLOBOGIN, *supra* note 10, at 192–205.

<sup>56</sup> Bonnie, *supra* note 54, at 571–76.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 578–79.

<sup>59</sup> In *Minding Justice* I recognized two exceptions: the *Allen* exception, and the very rare situation where the defendant "is clearly 'innocent' and is taking a position that will lead to a clearly less desirable disposition." SLOBOGIN, *supra* note 10, at 216.

<sup>60</sup> *Id.* at 195.

<sup>61</sup> *Id.* at 195–200.

and self-regard” test, when combined with the adjudicative competence requirement, is both necessary and sufficient to assure autonomous decision-making. It requires an understanding of the risks and benefits of the decision, the absence of clearly erroneous beliefs about those risks and benefits, and the willingness to act on what is known. At the same time it avoids infecting the decisional competency standard with uninformed stereotypes about the deficits of someone who exhibits “pathology” (which is the problem with the appreciation standard) or with comparisons to the decision “reasonable” people would make (the problem with the reasoned choice standard).

The basic rationality and self-regard test would be easier to meet than the reasoned choice test that both the Ninth Circuit and Professor Bonnie would impose in the waiver-of-counsel setting. But it still would nullify some waiver decisions. Three examples of its application should suffice to demonstrate its implications.

The first example is the case of Colin Ferguson, which never got to the Supreme Court but occasioned so much press coverage and controversy that many of the briefs filed in *Edwards* made reference to it.<sup>62</sup> Ferguson, who had a history of mental illness, was charged with several counts of murder based on allegations that he killed six passengers and wounded another nineteen on a Long Island commuter train. Because a very large number of witnesses identified Ferguson as the culprit and ballistics matched his gun to the shooting, his attorneys were willing to admit factual guilt and instead proposed a “black rage” insanity defense, to the effect that Ferguson, who was from Jamaica, had been driven into psychosis by an oppressive white society. But Ferguson insisted that a white man stole his gun and committed the offense and, when his attorneys refused to make that claim, he fired them. Ferguson was allowed to represent himself because, following *Godinez*, he was clearly competent to stand trial (he had a very high IQ and understood the legal process).<sup>63</sup> During the trial he claimed that there were ninety-three counts against him because the year was 1993, that a government agent had planted a microchip in his brain, and that the bullet fragments in the case suffered from substance abuse.<sup>64</sup>

The *Edwards* brief filed by Indiana suggested that Ferguson was precisely the type of defendant who was competent to stand trial but should not be allowed to represent himself because of his inability to communicate coherently with the judge and jury.<sup>65</sup> I agree that Ferguson should not have been allowed to represent

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<sup>62</sup> See, e.g., Petition for Writ of Certiorari, *supra* note 8, at 21; Brief for the Respondent at 44, *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208), 2008 WL 649230.

<sup>63</sup> John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 SETON HALL CONST. L.J. 483, 522-23 (1996).

<sup>64</sup> Tanya Schevitz, *In Self-Defense, Literally Some “Fools” Ignore Lincoln’s Maxim and Represent Themselves in Court*, S.F. EXAMINER, Feb. 20, 1995, at A4.

<sup>65</sup> Petition for Writ of Certiorari, *supra* note 8, at 21.

himself, even assuming he had the heightened adjudicative competence necessary to choose self-representation and that his behavior was not sufficiently bizarre that it was disruptive or disorderly under *Allen*. But my reason for that position is not based on an assessment that Ferguson was unable to “communicate” (Indiana’s test) nor on the conclusion that his reasons were the result of pathology or unreasonable (Bonnie’s tests), although all three tests would undoubtedly have also designated him incompetent. Rather, Ferguson should have been prevented from firing his attorneys because he did so to pursue his argument that someone else committed the crimes, a patently false claim given the overwhelming evidence to the contrary. Thus, he lacked decisional competency under the more parsimonious basic rationality standard.

A second example of how the basic rationality and self-regard test would work comes from *Godinez*. Even if, as all the courts in that case agreed, Robert Moran was competent in the adjudicative sense, the Supreme Court was probably wrong to conclude that his waiver of counsel was valid. Moran’s reason for firing his attorney and foregoing a defense at sentencing was not delusional—he felt he deserved the death penalty, a belief that, assuming the validity of the murder charges and the prosecution’s case in aggravation, could not be considered absurd.<sup>66</sup> But there is still a strong argument that he did not meet the separate basic self-regard standard, because he was unwilling even to *consider* the alternatives of going to trial and presenting evidence at sentencing. As he subsequently stated in explaining his thought process at the time of adjudication, “I guess I really didn’t care about anything . . . . I wasn’t very concerned about anything that was going on . . . as far as the proceedings and everything were going.”<sup>67</sup> In other words, Moran was seriously depressed, a condition that unfortunately affects a sizeable number of defendants, especially in capital cases.<sup>68</sup>

In contrast to both Ferguson and Moran, Edwards may have been decisionally competent. Edwards clearly met the basic self-regard test, because he was motivated to defend himself. And he probably also met the basic rationality test. The reason Edwards wanted to represent himself at his second trial was because he thought a self-defense theory would work better than the attorney’s lack-of-intent theory.<sup>69</sup> While, as discussed below, Edwards’ theory was a long shot, his strategy was not based on patently false reasoning, as far as the record reveals. Assuming so—assuming he did not want to go it alone because, for example, the attorney refused to assert that the guard was intent on killing Edwards with thought rays—he was decisionally competent as I would define it, even though he exhibited pathology that impaired his “appreciation” of his situation and even though his

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<sup>66</sup> *Godinez v. Moran*, 509 U.S. 389, 392 (1993).

<sup>67</sup> *Id.* at 410–11 (Blackmun, J., dissenting).

<sup>68</sup> John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 962–63 (2005). See Terry A. Maroney, *Emotional Competence, “Rational Understanding,” and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375 (2006).

<sup>69</sup> *Indiana v. Edwards*, 128 S. Ct. 2379, 2390 (2008) (Scalia, J., dissenting).

choice might not be considered “reasoned.”

#### IV. WHY THERE SHOULD BE NO COMPETENCY-TO-REPRESENT-ONESELF REQUIREMENT

Assume now a defendant who is competent to waive counsel, in both the adjudicative and decisional senses. *Edwards* holds that even this defendant is not entitled to represent himself if he is not “mentally competent” to carry out basic trial tasks. The Court provided no content to this standard, but Indiana’s proposal that it be defined in terms of whether the defendant can “communicate coherently with the court or a jury” is a good start on this score.<sup>70</sup> This additional competency requirement is necessary, the Supreme Court stated in *Edwards*, because allowing a person who does not meet it to represent himself would undermine both his dignity and the perceived fairness and legitimacy of the trial process.

There are both descriptive and prescriptive reasons why this position should not prevail. First, a person who is competent to waive counsel as I have defined it is very unlikely to speak in the word salad attributed to Ahmad Edwards. Recall that to be competent not only must the defendant have the capacity to understand the role of an attorney in the courtroom and the consequences of not having one, but he must also be able to “disclose to the attorney facts pertinent to the proceedings at issue,” “manifest appropriate courtroom behavior,” and “testify relevantly.”<sup>71</sup> Assuming this construction of *Dusky*’s adjudicative competence standard, the defendant who is competent to proceed—who is able to communicate with his attorney, who is capable of responding adequately to the judge’s questions inquiring into his understanding of the attorney’s role, and who has demonstrated to evaluators a capacity to testify relevantly in court—will rarely be unable to communicate “coherently” with the jury.

Contrary to Indiana’s assertion, Ahmad Edwards is not a good counterexample, based on what can be gleaned from the record. Ignored by the *Edwards* majority was the fact that Edwards’ first trial occurred almost *one year* after the hospital found him competent, when his medication may no longer have been properly titrated.<sup>72</sup> In other words, he may not have been competent to stand trial (and thus was not competent to waive counsel) at the time of his first trial, much less the second one. Alternatively, Indiana may have mischaracterized the extent of Edwards’ impairment. As Justice Scalia pointed out in dissent, Edwards

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<sup>70</sup> Wisconsin, which requires “more” competency to waive counsel, has devised the following test, similar to Indiana’s: “Factors to consider . . . include the defendant’s education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury.” *State v. Marquardt*, 705 N.W.2d 878, 891 (Wis. 2005).

<sup>71</sup> A special situation might arise if the defendant’s testimony is “crazy” and the defense being raised is insanity. In the latter case, the delusional testimony, although normally ground for a finding of incompetency, might be very relevant to the defense strategy. See *infra* notes 81–83 and accompanying text.

<sup>72</sup> Petition for Writ of Certiorari, *supra* note 8, at 7–8.



was able to make comprehensible oral motions in court, despite his rambling pleadings.<sup>73</sup> In any event, whether a defendant like Edwards will be incoherent in court can only be known after he demonstrates at trial (or at a pretrial hearing close to the time of trial) that he cannot testify relevantly or manifest appropriate courtroom behavior. Until then, the trial judge must usually guess what will happen.

In short, as a descriptive matter, most defendants who are “incompetent to communicate” will also be incompetent to stand trial and thus not triable with or without counsel. Conversely, few defendants who are competent to waive counsel as defined above will clearly be “mentally incompetent” to represent themselves during an upcoming trial. Defendants who can meet the adjudicative competence standard, are free of delusions about why they choose to waive counsel, and actively want to represent themselves will usually be able to carry out basic trial tasks in a minimally adequate way.

It must also be admitted, however, that *some* of these defendants will, because of mental illness, have problems concentrating, reasoning logically, and communicating effectively, and thus be very poor at carrying out such tasks. Of course these impairments often afflict defendants who are not mentally ill. Thus, one wonders why *Edwards* is limited to people with “mental illness.” *Edwards* is one of a long line of decisions in which courts have adopted special rules for people who are so categorized, instead of taking the time to identify the specific types of impairments that are legally relevant (and that might afflict both those with and without a psychiatric diagnosis).<sup>74</sup>

More importantly, impairments in the domains of concentration, reasoning and communication do not render a defendant who is competent in the adjudicative and decisional senses non-autonomous. Under *Faretta*, the autonomy inquiry is the dispositive one. The *Edwards* Court’s rationales for imposing an additional trial competency requirement—protection of the defendant’s dignity and of the criminal justice system’s legitimacy—misconstrue or ignore this all-important premise underlying *Faretta*.

With respect to the majority’s concerns about the dignity of the accused, Justice Scalia’s dissent in *Edwards* made the pertinent point:

While there is little doubt that preserving individual “dignity” . . . is paramount among [the purposes of the right to self-representation], there is equally little doubt that the loss of “dignity” the right is designed to prevent is *not* the defendant’s making a fool of himself by presenting an amateurish or even incoherent defense. Rather, the dignity at issue is the

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<sup>73</sup> *Indiana v. Edwards*, 128 S. Ct. 2379, 2389 (2008) (Scalia, J., dissenting).

<sup>74</sup> See SLOBOGIN, *supra* note 10, at 249–71. Indeed, one could make the case that *Edwards*’ focus on people with mental illness violates anti-discrimination principles. See generally Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992 (2008) (arguing for an expansive reading of the anti-discrimination principles embedded in the ADA).

supreme human dignity of being master of one's fate rather than a ward of the State—the dignity of individual choice.<sup>75</sup>

So long as the defendant is an autonomous actor—so long as the defendant is adjudicatively and decisionally competent—then a failure to honor the waiver decision undermines the defendant's dignity far more than a trial at which the defendant is given a chance to persuade a jury, however disjointedly and illogically, that his story is the right one.

As to the fairness/legitimacy rationale, Scalia noted that even if one accepted the dubious proposition that defendants' rights should depend on how fair their implementation makes a trial look to others:

When [as actually happened in the case] Edwards stood to say that "I have a defense that I would like to represent or present to the Judge," . . . it [was] the epitome of both actual and apparent unfairness for the judge to say, I have heard "your desire to proceed by yourself and I've denied your request, so your attorney will speak for you from now on. . . ." <sup>76</sup>

The only scenario in which "fairness" concerns by themselves should lead to a denial of the right to self-representation is when the defendant's behavior becomes so disorderly or disruptive, as contemplated by *Illinois v. Allen*, that the state is seriously compromised in its ability to make its case. If the defendant continually interrupts the process or speaks (or shouts) out of turn, threatens witnesses, or blatantly ignores court rules, then the judge has grounds to impose counsel. As *Faretta* stated, "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law."<sup>77</sup> But these fairness considerations come into play only once trial has started, not *before* it gets underway.

*Edwards'* discussion of "fairness" is in any event disingenuous, since the Court's real concern, a close reading of the case reveals, was the effect of a mentally ill defendant's behavior on the accuracy of the verdict, not its effect on society's perception of the conduct of the trial (which is likely to be independent of the trial's outcome, since the general public will usually not be aware of the precise facts of the case). Of course the majority could not explicitly admit to its concern about accuracy, because *Faretta* specifically held that recognition of the defendant's autonomy requires a right to self-representation regardless of its effect on the verdict. Instead, Justice Breyer pointed to a study conducted by Erica Hashimoto finding that defendants who represent themselves achieve a higher

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<sup>75</sup> *Edwards*, 128 S. Ct. at 2393 (Scalia, J., dissenting).

<sup>76</sup> *Id.*

<sup>77</sup> 422 U.S. 806, 835 n.46 (1975).

acquittal rate than defendants represented by counsel,<sup>78</sup> and then, using the word “fairness” when he really meant “reliability,” speculated that “instances in which the trial’s fairness is in doubt may well be concentrated in the twenty percent or so of self-representation cases where the mental competence of the defendant is also at issue.”<sup>79</sup>

Let us assume that, contrary to *Faretta*’s holding, the damage a self-represented defendant does to his case is relevant. Since the Hashimoto study did not report information about the mental status of the defendants in its sample, it provides no evidence to support Breyer’s speculation that defendants with mental illness are less likely than other defendants to secure acquittals when they represent themselves.<sup>80</sup> And there is good reason to believe Breyer’s speculation is incorrect. For instance, if the defense is insanity, having one’s mental illness constantly on display in front of the jury as the defendant argues the case may be a much more effective strategy than having it described by an expert while the defendant sits mutely next to counsel, which is the usual means of presenting such a claim.<sup>81</sup> Indeed, defense attorneys who raise the insanity defense often argue (usually unsuccessfully) against forcible medication of their clients because they fear a symptom-less defendant will undercut the credibility of the offense.<sup>82</sup>

And even if the defense theory does not explicitly rely on mental impairment, a defendant with mental illness who is competent to waive counsel will not inevitably fare worse without a lawyer, even leaving aside the fact that courts may require standby counsel if they consider it advisable.<sup>83</sup> Consider what happened at Edwards’ second trial. The attempted murder charge that was the focus of that trial stemmed from his shooting at a security guard and wounding a bystander as he tried to steal a pair of shoes from a department store. As noted earlier, Edwards wanted to plead self-defense, but the attorney the court forced on him instead

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<sup>78</sup> 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).

<sup>79</sup> *Edwards*, 128 S. Ct. at 2388.

<sup>80</sup> In fact, Hashimoto stated: “Far from establishing that pro se defendants represent themselves because of mental illness, the data instead suggest that felony defendants choose to represent themselves because of legitimate concerns about, or dissatisfaction with, appointed counsel.” Hashimoto, *supra* note 78, at 428–29.

<sup>81</sup> It is worth noting in this regard that, at his first trial, Edwards wanted to assert an insanity defense but was prevented from doing so by the court and his court-appointed lawyer. Petition for Writ of Certiorari, *supra* note 8, at 8.

<sup>82</sup> See, e.g., descriptions of defense argument in *Riggins v. Nevada*, 504 U.S. 127, 131 (1992) and *State v. Hayes*, 389 A.2d 1379, 1381 (1978). See generally Linda C. Fentiman, *Whose Right Is It Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant*, 40 U. MIAMI L. REV. 1109, 1127 (1986) (“[To stress] that the terrible act with which the defendant is charged was a product of an abnormal and diseased mind, it is essential that the defendant be able to present to the jury a courtroom demeanor which is as close as possible to that which existed at the time of the offense.”).

<sup>83</sup> See *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

argued lack-of-intent.<sup>84</sup> The latter claim was not easy to reconcile with the facts, given the undisputed testimony that Edwards first shot when the guard caught him in a "bear hug" and then shot again (hitting the bystander) after first walking away from the guard and then turning back to fire while the guard lay prone on the sidewalk with one hand in the air (to show he was unarmed);<sup>85</sup> in any event, a lack-of-intent claim would at most reduce the charge to aggravated battery. Admittedly, a self-defense claim was also a stretch on these facts. Nonetheless, Edwards might have been able to convince the jury that, although he intentionally shot at the guard, he believed the guard was trying to harm him and perhaps shoot him, given the bear hug, the likelihood that a guard would have a gun, and the fact that, at the time of the second shot, one of the guard's arms was still on the ground obscured from view.<sup>86</sup> That argument might have been enhanced by the constant reminder of Edwards' illness that only self-representation could bring, because under those circumstances the jury might more easily believe that, whatever the objective facts, Edwards' mental condition could have led him to believe he was being unjustifiably attacked.

Note too that reliability is not entirely irrelevant under the approach proposed here. Most obviously, the basic rationality requirement prohibits self-representation if the defendant's decisions have no basis in reality. Moreover, adjudicative competence requires a capacity to understand the process, recount pertinent information, and testify. These requirements assure that the defendant will be able to contest inaccurate facts if he or she is so disposed, which will usually be the case if the basic self-regard requirement is met. Thus, reliability concerns are not ignored under this approach. But they influence the self-representation determination *only* to the extent necessary to make the competency assessment. They are not given independent status.

The best (and to my mind only possible) case for a contrary result is the extremely rare situation where the defendant is identical to Richard Moran except that he is not depressed. In other words, the defendant makes a non-delusional decision that he deserves the death penalty and, after considering the alternatives, pleads guilty to the capital charge and does not contest the state's case at sentencing, stating on the record the reasons for this conduct. This surrender does not, of course, relieve the state of its obligation to prove a factual basis for the plea and to establish the case in aggravation at sentencing.<sup>87</sup> But there is always the possibility that a wrong verdict could be reached in such a case. If so, note first the

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<sup>84</sup> Petition for Writ of Certiorari, *supra* note 8, at 9.

<sup>85</sup> *Edwards v. State*, 854 N.E.2d 42, 45 (Ind. Ct. App. 2006).

<sup>86</sup> *Id.*

<sup>87</sup> See FED. R. CRIM. P. 11(b)(3) (requiring a factual basis for a guilty plea); *Zant v. Stephens*, 462 U.S. 862, 876 (1983) (noting that the Court's death penalty cases require proof of "at least one valid statutory aggravating circumstance" and appellate review of whether a death sentence is "arbitrary or disproportionate."); *North Carolina v. Alford*, 400 U.S. 25, 38 (1970) (requiring a strong factual basis as a matter of constitutional law, at least when the pleading defendant insists on his innocence).

irony: the same Court that evinced so much concern about systemic legitimacy in *Edwards* would, under *Godinez*, allow such an individual to go to his execution because, unlike Ahmad Edwards, he does not want to present a case. In contrast, under the approach proffered in this article the individual would not only have to be competent to proceed, as *Godinez* held, but also would have to be decisionally competent (which is unlikely, since an individual who fails to contest the state's claims in a capital case will often lack, at the least, basic self-regard).<sup>88</sup>

Let us continue to assume, however, that the defendant does have the capacities necessary to waive counsel. Should we nonetheless conclude that, at least in the special context of the death penalty, where the Court has sometimes required "super-reliability,"<sup>89</sup> counsel can be forced on an unwilling defendant? Not necessarily. Recall the case of Theodore Kaczynski, a.k.a. the Unabomber, who was ultimately allowed to plead guilty to several capital charges.<sup>90</sup> Had he instead gone to trial he probably would have fired his attorneys, because he disagreed with their decision to assert a defense based on mental disability.<sup>91</sup> Indeed, he declared in his Manifesto that he would rather die than be labeled "mentally ill."<sup>92</sup> Assuming he was competent in the adjudicative and decisional senses, it is not at all clear that the state should be able to impose counsel and strategy on such an individual, even in the high stakes context of a capital case.

## V. CONCLUSION

The Supreme Court's jurisprudence regarding waiver of counsel needs to be revamped. The standard announced in *Godinez* for competency to understand matters relevant to waivers of counsel is too low, while the standard announced in *Edwards* for competency to conduct one's own defense is too high (because the latter requirement should not exist at all, except, perhaps, in the death sentence context). Courts evaluating a waiver of counsel decision should ensure that the defendant has the capacity to communicate facts to an attorney and testify relevantly, understand *all* the consequences of proceeding *pro se*, and be able to give non-delusional, self-regarding reasons for the waiver. But trial judges should not be able to foreclose self-representation on the extremely vague ground that a defendant is not "mentally competent to conduct his own defense" or to carry out "basic trial tasks." Almost all laypeople, even those with no symptoms of mental illness, find such tasks difficult. After *Edwards*, trial judges will be sorely tempted

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<sup>88</sup> See generally Blume, *supra* note 68; Maroney, *supra* note 68.

<sup>89</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1550 (2008) (Stevens, J., concurring) (noting that many Court decisions rely "on the premise that 'death is different' from every other form of punishment to justify rules minimizing the risk of error in capital cases," although also noting that "more recent cases have endorsed procedures that provide less protections to capital defendants than to ordinary offenders.").

<sup>90</sup> This case is described and analyzed in SLOBOGIN, *supra* note 10, at 182–83, 200–02.

<sup>91</sup> *Id.* at 183.

<sup>92</sup> *Id.* at 201.

to take advantage of this vacuous standard to prevent any defendant with a diagnosis from exercising the right to self-representation, if only to avoid having to deal directly with a mentally unstable person. The result will be what may well have occurred in *Edwards*: a competent, autonomous defendant will be prevented from telling his own story and forced, instead, to listen to a lawyer tell an entirely different one.<sup>93</sup>

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<sup>93</sup> Cf. *Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (arguably constitutionalizing a defendant's right to "[present] her version of the events for which she is on trial.").

