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"I CAN DO IT MYSELF"—AN ANALYSIS OF WHETHER COMPETENCY TO REPRESENT ONESELF AT TRIAL IS A "RESTORABLE RIGHT" WITHIN THE FRAMEWORK OF INDIANA V. EDWARDS

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"I CAN DO IT MYSELF"—AN ANALYSIS OF WHETHER COMPETENCY TO REPRESENT ONESELF AT TRIAL IS A "RESTORABLE RIGHT" WITHIN THE FRAMEWORK OF *INDIANA V. EDWARDS*

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I. INTRODUCTION

For almost fifty years following the Supreme Court decision in *Dusky v. United States*, the legal definition of competency has remained the same.[1] However, in the 2008 decision *Indiana v. Edwards*, the Supreme Court indicated that a distinct standard of competency is required for defendants who wish to proceed as pro se litigants. The *Edwards* Court declined to specifically define what the distinct standard was, or how it should be applied, but the Court altered the legal definition of competency by explicitly indicating that the competency standard for pro se litigants was different from the *Dusky* standard.[2]

Within the criminal justice system, a defendant's mental competency, such as competency to stand trial and competency to plead, can vary depending on the defendant's present mental state. For example, if a defendant is initially deemed incompetent, the defendant's competency to proceed can be restored—and the government actively seeks to restore the defendant's competency. This Comment argues that competency to proceed pro se[3] can and should be a restorable right, especially given that the right to self-representation is a recognized constitutional right grounded in the Sixth Amendment of the United States Constitution.[4]

This Comment's argument is not an easy premise, or one that exists without tension within both the legal and scientific communities. This is especially true because legal scholars, including Supreme Court justices, have called into question whether a right to self-representation in

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

2. Indiana v. Edwards, 128 S. Ct. 2379, 2383 (2008).

3. "Self-representation" will be used interchangeably with "pro se" throughout this Comment. Pro se is defined as "For himself; in his own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court." *See* BLACK'S LAW DICTIONARY 712, 1099 (8th ed. 2004).

4. *Edwards*, 128 S. Ct. at 2383–2384.

criminal proceedings ever existed at common law.[5] These scholars challenge the overall holding in *Faretta v. California*[6]—namely that a constitutional Sixth Amendment right to self-representation in criminal proceedings ever existed. Along the same lines, other legal scholars have actively advocated to overrule *Faretta*.[7] This Comment, however, argues that if a defendant knowingly and voluntarily waives the right to counsel and elects to proceed pro se (i.e. legally waives the right to counsel under the *Zerbst* provisions),[8] then the defendant, regardless of mental disability or defect, should be allowed to proceed pro se.

Part II of this Comment analyzes the Supreme Court's holding in *Faretta v. California* and illustrates how a right to self-representation in criminal proceedings is firmly grounded in the Sixth Amendment. In Part III, this Comment discusses the legal meaning of "competence" and questions what it means to be "competent in a court of law." Part III structures this line of questioning within the framework of relevant Supreme Court "competency" case law—through discussion of *Dusky v. United States*, *Drope v. Missouri*, and the "mental competency standard" as well as through discussion of *Godinez v. Moran* and "competency to plead." Part III then discusses the Supreme Court's recent holding in *Indiana v. Edwards* and applies the standards set forth in *Dusky*, *Drope*, and *Godinez* in order to understand why the Supreme Court progressed from a low threshold for measuring competency, to a distinct standard for determining competency to proceed pro se.

Part IV of this Comment examines in detail the distinct standard for competency to proceed pro se in a criminal proceeding established by *Edwards*, and argues through analogy and other applicable Supreme Court case law that competency to proceed pro se, as a Sixth Amendment constitutional right, can and should be a restorable right. Part IV continues by offering possible safeguards that can be put in place to assure that defendants are permitted to act in a pro se capacity only if they have knowingly and voluntarily waived their right to counsel. These safeguards include special roles for the court, the role of

5. *See* Brief of the Am. Bar Ass'n as Amicus Curiae Supporting Petitioners, Indiana v. Edwards, 128 S. Ct. 2379 (2008) (No. 07-208); *see also* Faretta v. California, 422 U.S. 806 (1975) (Burger, C.J., & Blackmun, J., dissenting); Martinez v. Court of Appeals, 528 U.S. 152, 156, 158 (2000).

6. *Faretta*, 422 U.S. at 806.

7. *See generally* Reply Brief for Petitioner, Indiana v. Edwards, 128 S. Ct. 2379 (2008) (No. 07-208); Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 628 (2005); Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 165 (2000).

8. *See* Johnson v. Zerbst, 304 U.S. 458 (1938).

mental health professionals, and the appointment of standby counsel.

As previously recognized, allowing a defendant to stand trial without the benefit of counsel, especially if the defendant's personal state raises capacity concerns, is highly debated. The Court has recognized in several contexts that "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."[9] However, more importantly, the Court has also recognized that "a knowing and intelligent waiver of counsel must be honored out of 'that respect for the individual which is the lifeblood of the law.'"[10] This Comment argues that it is possible to strike a balance between these two competing interests, and as such, the constitutional right to self-representation should be a restorable right.

II. THE CONSTITUTIONAL RIGHT OF SELF-REPRESENTATION

A. Self-Representation Is a Constitutional Right

The history behind the right of self-representation can be traced back to the Revolutionary Era.[11] In criminal proceedings, the right to self-representation is grounded in an interpretation of the Sixth Amendment.[12] In non-criminal contexts, the right to self-representation has also been traced to the Privileges and Immunities Clause,[13] the First Amendment,[14] the Due Process Clause,[15] and the Equal Protection Clause.[16] In support of the right of self-representation, the United States Court of Appeals for the District of Columbia succinctly stated, "[o]ne

9. *Martinez*, 528 U.S. at 162.

10. Indiana v. Edwards, 128 S. Ct. 2379, 2384 (2008) (citing Illinois v. Allen, 397 U.S. 337, 350–51 (1970)).

11. *See* JONA GOLDSCHMIDT ET AL., AM. JUDICATURE SOC'Y, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 22 (1998) [hereinafter MEETING THE CHALLENGE]. Arguing in support of the 1776 Pennsylvania Declaration of Rights, Thomas Paine said, "either party . . . has a natural right to plead his own case; this right is consistent with safety, therefore, it is retained; but the parties may not be able . . . therefore the civil right of pleading by proxy, that is, by counsel, is an appendage to the natural right of self-representation." *Id*. (citing *Faretta*, 422 U.S. at 830).

12. *Faretta*, 422 U.S. at 806.

13. U.S. CONST. art. IV, § 2. *See also* Corfield v. Coryell, 6 F. Cas. 546, 551–52, No. 3, 230 (C.C.E.D. Pa. 1823) (No. 3230); Chambers v. Baltimore & Ohio Ry. Co., 207 U.S. 142 (1907).

14. U.S. CONST. amend. I. See specifically the First Amendment right to petition the government for redress of grievances. *Id. See also* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

15. U.S. CONST. amend. V, XIV.

16. U.S. CONST. amend. XIV. *See also* Boddie v. Connecticut, 401 U.S. 371 (1971) (Douglas, J., & Brennan, J., concurring). For a detailed discussion of the constitutional origins of the right to self-representation, see MEETING THE CHALLENGE, *supra* note 11, at 19–24.

of the basic principles, one of the glories, of the American system of justice is that the courthouse door is open to everyone—the humblest citizen, the indigent, the convicted felon, the illegal alien."[17]

The Sixth Amendment does not explicitly recognize a constitutional right to self–representation in criminal proceedings;[18] however, in the leading self-representation case, *Faretta v. California*, the Supreme Court recognized that the Sixth Amendment encompasses a constitutional right to self-representation.[19] Acknowledging that the right to self-representation is not explicitly stated within the text of the Sixth Amendment, the *Faretta* Court found that the right to self-representation—and the right to make one's own defense—is necessarily implied by the plain language structure of the Sixth Amendment.[20] Citing the specific verbiage of the Sixth Amendment, the Court found that the right to defend is given directly to the accused "for it is he who suffers the consequences if the defense fails."[21] Subpart II(B) analyzes the *Faretta* holding and the Supreme Court's rationale behind recognizing a constitutional right to self-representation.

B. Faretta v. California—*Recognizing a Constitutional Right of Self–Representation*

In *Faretta*, the Supreme Court addressed the question of whether a state may force counsel upon defendants who insist upon conducting their own defense.[22] Recognizing the complexity of this question, the *Faretta* Court built upon several preceding cases and recognized a constitutional right to self-representation in a narrow and highly contested 5–4 decision.[23]

In analyzing the issue, the *Faretta* Court found a "nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to

17. Nat'l Ass'n for the Advancement of Colored People v. Meese, 615 F. Supp. 200, 205–06 (D.D.C. 1985).

18. U.S. CONST. amend. VI.

19. Faretta v. California, 422 U.S. 806, 807 (1975). Subpart II(C) discusses the basis for and implications of the *Faretta* holding.

20. *Id.* at 819.

21. *Id.* at 819–20. The Court continued with the affirmation that "an unwanted counsel represents the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." *Id.* at 821.

22. *Id.* at 806, 807.

23. *See generally id.*

defend himself if he truly wants to do so."[24] Finding support for self-representation in prior case law, the structure of the Sixth Amendment, English jurisprudence, and colonial jurisprudence,[25] the Court recognized a constitutional right to self-representation if the defendant voluntarily and intelligently elects to proceed without counsel.[26] The Court grounded its decision by recognizing that "[t]he right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction."[27]

Although the majority affirmatively recognized a constitutional right to self-representation, the 5–4 decision spawned two lengthy dissents.[28] The dissenters espoused their disagreement with the majority stating that "there is nothing desirable or useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his own defense to criminal charges."[29] The dissenters also found the majority's claim that self-representation is a constitutional right was unfounded.[30] Perhaps prophetically, in his dissent, Justice Blackmun posed a series of questions regarding the procedural aspects of a right of self-representation.[31] Justice Blackmun asserted that "[t]he procedural problems spawned by an absolute right to self-representation will far outweigh whatever tactical advantage the defendant may feel he has gained by electing to represent himself."[32] Part IV of this Comment will address some of the procedural problems posed by Justice Blackmun in *Faretta* and will offer counterarguments to his dissent. Additionally, it will offer safeguards that can be put in place to assure that self-representation, while not an absolute right, can be a restorable right in many instances.

III. WHAT DOES IT MEAN TO BE LEGALLY COMPETENT?

To maintain the validity and integrity of the criminal justice system, a defendant must be competent at every stage of the criminal justice process.[33] An accused person's competency is an issue at various stages of a criminal proceeding, including for example: (1) competency to

24. *Id.* at 817.
25. *Id.* at 818.
26. *Id.* at 818–36.
27. *Id.* at 834.
28. *Id.* at 836–52 (Burger, C.J., & Blackmun, J., dissenting).
29. *Id.* at 836 (Burger, C.J., dissenting).
30. *Id.* at 843.
31. *Id.* at 846–52 (Blackmun, J., dissenting).
32. *Id.* at 852.
33. RALPH SLOVENKO, PSYCHIATRY IN LAW/ LAW IN PSYCHIATRY 171 (2d ed. 2009).

stand trial; (2) competency to plead guilty; and (3) competency to proceed as a pro se litigant. The issue of an accused person's competency to stand trial—also known as trial fitness—has become one of the more controversial issues in criminal law.[34] An estimated 60,000 competency evaluations are carried out annually.[35] Part III of this Comment addresses the Supreme Court's definition of competency through a discussion of the Court's mental competency standard, competency to plead standard, and competency to proceed as a pro se litigant standard.

A. The Supreme Court Defines "Competency"

The Supreme Court has held that criminal defendants may not be tried in court unless they are competent.[36] The word competent derives from the Latin "*competere*," meaning "be fit or proper."[37] "Competent" has three common definitions: (1) having the necessary skill or knowledge to do something successfully; (2) satisfactory or adequate, though not outstanding; and (3) having legal authority to deal with a particular matter.[38] The Supreme Court, however, has never specifically defined how "competency" is to be assessed. Rather, the Supreme Court established standards of competency through case law. Three of these decisions are instrumental in understanding the Court's holding in *Indiana v. Edwards*, as well as in determining whether competency to proceed pro se is a restorable right. These decisions are discussed in turn below in subparts III(B–C). The *Indiana v. Edwards* decision and the standard for competency to proceed pro se is discussed in subpart III(D).

B. The Mental Competency Standard—Dusky *and* Drope

The Supreme Court illustrated the Constitution's "mental competence" standard[39] in *Dusky v. United States*[40] and *Drope v.*

34. *Id.* at 171.

35. *See* MacArthur Research Network on Mental Health & the Law, The McArthur Adjudicative Competence Study, *available at* http://macarthur.virginia.edu/adjudicate.html#N_1_ (last visited Nov. 15, 2010).

36. Pate v. Robinson, 383 U.S. 375, 378 (1966).

37. Oxford Dictionaries, Competent, *available at* http://www.oxforddictionaries.com/view/entry/m_en_us1234931#m_en_us1234931 (last visited Nov. 15, 2010).

38. *Id.*

39. Indiana v. Edwards, 128 S. Ct. 2379, 2383 (2008).

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

Missouri.[41]

In *Dusky*, the Supreme Court found the previous standard for evaluating a defendant's competency to stand trial insufficient, and therefore established a new two-prong standard.[42] Under this new *Dusky* standard, a defendant is deemed competent to stand trial if the defendant: (1) "has sufficient present ability to consult with [her] lawyer with a reasonable degree of rational understanding," *and* (2) "has a rational *as well as* factual understanding of the proceedings against her."[43]

The *Dusky* standard established a minimal constitutional standard regarding competency. However, the *Dusky* standard is vague in how its two prongs are to be practically applied in court proceedings. The *Dusky* standard is even vaguer in that it fails to spell out the exact meaning of "incompetent." Fifteen years later, the Court attempted to clarify the *Dusky* standard in its decision in *Drope v. Missouri*.

In a unanimous decision written by Chief Justice Burger, the *Drope* Court held that it is a violation of due process to require a person to stand trial while incompetent.[44] Building upon its earlier decision in *Dusky*, the Court again declined to provide a specific definition of incompetency. The *Drope* Court affirmed the standard established in *Dusky*, and bolstered the *Dusky* standard by holding that even when a defendant is competent at the commencement of the trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.[45]

However, neither the *Dusky* nor the *Drope* Court considered the relation of the mental competence standard to the right of self-representation. This distinction played an important part in the Court's analysis in deciding *Indiana v. Edwards*,[46] which is discussed in Part IV of this Comment.

C. Godinez v. Moran*—Competency to Plead*

In *Godinez v. Moran*, the Supreme Court revisited the standard of competency for pleading guilty and the standard for waiving the right to

41. Drope v. Missouri, 420 U.S. 162 (1975).

42. *Id.* at 402–03.

43. *Id.* at 402 (emphasis added). The *Dusky* standard is codified at 18 U.S.C. § 4244 (2006).

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

45. *Id.* at 181.

46. Indiana v. Edwards, 128 S. Ct. 2379, 2383 (2008).

counsel.[47] The *Godinez* Court addressed the unanswered question regarding whether the *Dusky* competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial.[48] The Supreme Court rejected the "reasoned choice" standard adopted by the Ninth Circuit,[49] and held that competence to plead guilty and competence to waive the right to counsel is the exact same standard for competency to stand trial previously outlined in *Dusky*.[50]

The Court premised its holding on two concepts: (1) defendants are required to make a variety of important decisions in the course of criminal proceedings, and (2) competency to waive counsel is different than the competency to proceed pro se.[51] The *Godinez* Court recognized that defendants who stand trial are likely to be presented with a myriad of choices that require the relinquishment of the same rights as a defendant who pleads guilty.[52] Noting that "while the decision to plead guilty is undeniably a profound one," the Court ultimately determined that the decision to plead guilty "is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of trial."[53] Additionally, the *Godinez* Court found that there was no reason to believe that the decision to waive counsel requires a higher level of mental functioning than the decision to waive other constitutional rights.[54] Also, while there is a "heightened" standard for pleading guilty and waiving the right to counsel, as the waiver must be knowing and voluntarily made, "it is not a heightened standard of *competence*."[55] The *Godinez* Court concluded that requiring

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

48. *Id.* at 391.

49. *Id.* at 394 (holding that "the state court's postconviction ruling was premised on the wrong legal standard of competency" (quoting Moran v. Godinez, 972 F.2d 263, 266 (9th Cir. 1992))). The Ninth Circuit continued:

> "Competency to waive constitutional rights . . . requires a higher level of mental functioning than that required to stand trial"; while a defendant is competent to stand trial if he has "a rational and factual understanding of the proceedings and is capable of assisting his counsel," a defendant is competent to waive counsel or plead guilty only if he has "the capacity for 'reasoned choice' among the alternatives available to him."

Id.

50. *Id.* at 397–98.

51. *Id.* at 398–401.

52. *Id.* at 398. The Court specifically mentioned the privilege against compulsory self-incrimination, the right to confront a defendant's accusers, how to put on a defense, and whether to raise one or more affirmative defenses. *Id.*

53. *Id.*

54. *Id.* at 399.

55. *Id.* at 400–01.

competency of criminal defendants has a "modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel[;] . . . the Due Process Clause does not impose . . . additional requirements."[56]

Although the *Godinez* Court determined that a heightened standard of competency was unnecessary for defendants entering guilty pleas, the Court adopted a distinct competency standard in *Indiana v. Edwards*.

D. Indiana v. Edwards—*Adopting a Distinct Definition of Competency for Pro Se Litigants*

Indiana v. Edwards involved a criminal defendant whom a state court found mentally competent to stand trial if represented by counsel, but not mentally competent to proceed as a pro se litigant. The Supreme Court considered whether the Constitution forbids a state from insisting that the defendant proceed to trial with counsel, which implies that the state could deny the defendant the right to represent him or herself.[57]

Ahmad Edwards tried to steal a pair of shoes from a department store.[58] When a store security officer approached Edwards, Edwards drew a gun and fired, wounding a bystander.[59] Edwards was subsequently apprehended and charged with attempted murder, battery with a deadly weapon, criminal recklessness, and theft.[60] Edwards suffered from schizophrenia.[61] Edwards's mental condition, and whether he was competent to proceed to trial, became the focus of three competency proceedings and two self-representation requests, spanning an almost six year period.[62]

Almost a year after his indictment, the hospital determined that Edwards's condition had improved to the point where he was competent to stand trial.[63] The trial began almost a year after this determination.[64] Immediately before his trial commenced, Edwards requested to represent himself as a pro se litigant[65] because his attorney had not spent adequate time preparing the case and because his attorney was not

56. *Id.* at 402.

57. Indiana v. Edwards, 128 S. Ct. 2379, 2381 (2008).

58. *Id.* at 2382.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 2382–83.

63. *Id.* at 2382. This competency determination was made about eight months after Edwards's recommitment. *Id.*

64. *Id.*

65. *Id.*

sharing legal materials with him.[66] Edwards also requested a continuance in order to prepare his pro se defense.[67] In addition, Edwards filed a number of incoherent written pleadings, but he also filed several "intelligible" pleadings, such as a motion to dismiss counsel, a motion to dismiss charges under the state speedy trial provision, and a motion seeking a trial transcript.[68] The trial judge concluded that Edwards had knowingly and voluntarily waived his right to counsel and then questioned Edwards about matters of state law.[69] Edwards correctly answered questions about voir dire, and described the basic framework for admitting videotape evidence at trial.[70] However, Edwards was unable to answer questions regarding state evidentiary rules, which the judge only identified by the rule number while questioning Edwards.[71] Edwards continued to request to proceed pro se, but because the court refused Edwards's request for a continuance, Edwards subsequently proceeded to trial represented by appointed counsel.[72] Edwards was convicted of criminal recklessness and theft, but the jury could not reach a verdict on the attempted murder and battery with a deadly weapon charges.[73]

The State retried Edwards on the attempted murder and battery charges. Edwards again petitioned the trial court to proceed pro se.[74] Edwards explained to the court that he wished to proceed pro se because he and his attorney disagreed about the proper defense for the attempted murder charge.[75] Edwards wished to assert self-defense, while his attorney wanted to present a lack of intent defense.[76] Edwards explained, "my objection is me and my attorney actually had discussed a defense, I think prosecution had mentioned that, and we are in disagreement with it. He has a defense and I have a defense that I would like to represent or present to the Judge."[77] The court denied his request.[78] Citing Edwards's psychiatric reports, the court determined Edwards still suffered from schizophrenia and held "[w]ith these

66. *Id.* at 2389 (Scalia, J., dissenting).
67. *Id.* 2382 (majority opinion).
68. *Id.* at 2389 (Scalia, J., dissenting).
69. *Id.*
70. *Id.*
71. *Id.* at 2389–90.
72. *Id.* at 2382 (majority opinion).
73. *Id.*
74. *Id.*
75. *Id.* at 2390 (Scalia, J., dissenting).
76. *Id.*
77. *Id.*
78. *Id.*

findings, he's competent to stand trial but I'm not going to find he's competent to defend himself."[79] Edwards was represented by appointed counsel and was convicted on both the attempted murder and battery charges.[80]

Edwards appealed the trial court decisions, arguing that the trial court's refusal to allow him to proceed as a pro se litigant deprived him of his constitutional right of self-representation.[81] The state appellate court agreed and ordered a new trial. The Indiana Supreme Court then held that the U.S. Supreme Court's precedents, namely *Faretta* and *Godinez*, required the court to allow Edwards to proceed as a pro se litigant.[82]

On appeal to the United States Supreme Court, the Court acknowledged that its precedents, namely the opinions in *Faretta*, *Dusky*, *Drope*, and especially *Godinez*, framed the issue presented, but did not directly answer the question posed by the Indiana Supreme Court.[83] In an opinion by Justice Breyer, the Supreme Court answered the question regarding whether the Constitution permits a state to limit a defendant's self-representation right by insisting upon representation by counsel at trial—"on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented"[84]—assuming that (1) a criminal defendant has sufficient mental competence to stand trial (i.e., the defendant meets the *Dusky* standard), and that (2) the defendant insists on representing himself during the trial.[85] The *Edwards* Court ultimately held that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves," thus creating a distinct competency standard.[86]

The *Edwards* Court premised its holding on three separate factors: (1) Supreme Court precedent in regard to mental competency, (2) the premise that mental illness is not a unitary concept, and (3) the necessity to "'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel."[87] Each of these three separate rationales is briefly discussed below.

79. *Id.* at 2382–83 (majority opinion).
80. *Id.* at 2383.
81. *Id.*
82. *Id.*
83. *Id.* at 2382–85.
84. *Id.* at 2385–86.
85. *Id.* at 2385.
86. *Id.* at 2388.
87. *Id.* at 2386–87.

The first rationale in support of the Court's holding is that, although the Court's precedent does not directly answer the question presented, the Court's precedent tends to support the *Edwards* decision.[88] The Court reasoned that its prior mental competence standards developed in *Dusky*, *Drope*, and *Godinez* assume the necessity of representation by counsel and emphasize the importance of counsel.[89] The *Edwards* Court further reasoned these prior decisions suggest, although do not hold, that "an instance in which a defendant who would choose to forgo counsel at trial presents a very different set of circumstances, [and therefore] calls for a different standard."[90]

The second rationale in support of the *Edwards* Court's distinct standard is the Court's belief that mental illness is not a "unitary concept," i.e. assessing the competency of offenders with a mental illness is not a unitary concept.[91] The *Edwards* Court acknowledged that in certain circumstances a defendant may be able to satisfy the *Dusky* mental competency standard, yet at the same time the defendant may be unable to carry out the basic tasks necessary to present a defense without the assistance of counsel.[92] The Court reasoned that because mental illness is not a unitary concept and varies in degree, a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself, was unworkable.[93]

The *Edwards* Court's third rationale was that 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.[94] Finding support from its holding in *McKaskle v. Wiggins*,[95] the Court reasoned that "dignity" and "autonomy" of the individual underlie the self-representation right.[96] Drawing on its second rationale, the Court stated that given a defendant's uncertain mental state, "the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling."[97] The Court further reasoned that insofar as a defendant's

88. *Id.* at 2386.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 2387.
95. McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984).
96. *Edwards*, 128 S. Ct. at 2387.
97. *Id.* at 2387.

lack of capacity threatens an improper conviction or sentence, self-representation "undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial."[98]

Ultimately, the *Edwards* Court determined that the *Dusky* basic mental competence standard, which was also applied in *Godinez*, was insufficient to address a defendant's competency to proceed pro se.[99]

IV. THE STANDARD ESTABLISHED IN *INDIANA V. EDWARDS*

Although the Supreme Court held that a distinct standard of competency applies for determining a defendant's competency to proceed pro se, the *Edwards* Court declined to provide clear guidelines regarding what the distinct standard is, or how the distinct standard should be applied.[100] The American Bar Association, Standard 6–3.6, entitled "The Defendant's Election to Represent Himself or Herself at Trial," sets forth three factors that the trial judge should consider in determining whether a defendant should be allowed to proceed without the assistance of counsel: (1) the defendant has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when the defendant is so entitled; (2) the defendant is capable of understanding the proceedings; and (3) the defendant has made an intelligent and voluntary waiver of the right to counsel.[101]

Part IV of this Comment explores the distinct pro se competency standard established in *Edwards*, and argues that regardless of whether a distinct standard exists, competency to proceed pro se should and can be a restorable right.

A. After Edwards*, What Is the Standard for Competency to Represent Oneself?*

In *Edwards*, the Supreme Court held that the Constitution supports a higher competency standard for proceeding pro se than for proceeding to trial with counsel—thus creating a distinct competency standard. However, the *Edwards* Court did not endorse Indiana's proposed standard for self-representation competency, and, as previously mentioned, the *Edwards* Court did not set forth its own standard for self-

98. *Id.*

99. *Id.* at 2387–88.

100. *See generally id.* at 2379.

101. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-3.6 (3d ed. 2000).

representation competency.[102]

1. The Supreme Court's Floor and Ceiling

In *Edwards*, the Supreme Court effectively offered a floor and a ceiling for creating a standard of self-representation competency. The *Edwards* Court's holding reflected the "floor" for a standard of self-representation competency—the standard for self-representation competency is higher than the *Dusky* standard—as the *Edwards* Court held that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."[103]

By striking down Indiana's proposed standard, the *Edwards* Court also created the "ceiling" for a standard of self-representation competency. Indiana asked the Court to adopt a more specific 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."[104] The *Edwards* Court declined to adopt Indiana's "communicate coherently" standard for evaluating self-representation competency as the *Edwards* Court was uncertain how the standard would work in practice.[105]

Therefore, although the *Edwards* Court declined to provide a specific standard for evaluating self-representation competency, the *Edwards* Court did provide a floor and a ceiling. The Court's standard for self-representation competency is higher than the *Dusky* standard, but lower than (or different from) Indiana's proposed "communicate coherently" standard.

2. Can a Workable Standard Be Reached?—Subjective vs. Objective Application

There seems to be a prevalent distaste for defendants, especially criminal defendants, who elect to proceed pro se. This distaste is reflected in both Justice Blackmun's *Faretta* dissent and in the old adage, "[o]ne who is his own lawyer has a fool for a client."[106] However, empirical data has shown that pro se defendants fair no worse

102. *Edwards*, 128 S. Ct. at 2387–88.
103. *Id.* at 2388.
104. *Id.* (emphasis added).
105. *Id.*
106. Faretta v. California, 422 U.S. 806, 852 (1975).

than defendants represented by counsel, and in some cases actually fair better.[107] This data lends itself to support the notion that a workable restorable right model can be achieved for defendants with a mental illness that elect to proceed pro se—especially if the restorable right model is implemented on a case-by-case basis. A subjective application of the restorable right model would also adhere to the *Edwards* Court's observation that evaluating the competency of defendants with a mental illness is not a "unitary concept."[108] Additionally, a subjective case-by-case review of defendants with mental illness who wish to proceed pro se would not overburden the court as the rate of self-represented litigants is roughly 0.3 to 0.5%.[109]

B. Can Competency to Represent Oneself Be Restored?

When a defendant is found incompetent to stand trial or incompetent to plea,[110] the court actively tries to restore the defendant's competency so that the pending criminal process can proceed. However, under *Edwards*, when a defendant is found incompetent to proceed as a pro se litigant, instead of attempting to restore the defendant to an active state of competency, the court instead forces counsel upon the defendant—ostracizing the defendant from conducting his or her own defense. In the subpart below, this Comment argues that the holding in *Sell v. United States*[111] should also apply in seeking to restore competency in defendants that desire to proceed pro se.

1. Restoring a Defendant's Competency to Proceed Pro Se Through Medication

The liberty interest grounded in the Fifth and Fourteenth Amendments of the Constitution extends defendants the right to refuse psychotropic medications.[112] However, this liberty interest is not

107. Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 447–55 (2007). For a concise breakdown of the data on felony pro se defendants in state and federal court, see Table 1 and Table 2, located within Ms. Hashimoto's article. *Id.*

108. *Edwards*, 128 S. Ct. at 2386.

109. *See* Hashimoto, *supra* note 107, at 447. These percentages reflect felony pro se defendants pulled from the Federal Court Database and the State Court Database at the time of the study. *Id.*

110. Both of these competency standards are the same; the applicable standard is the *Dusky* standard.

111. Sell v. United States, 539 U.S. 166 (2003).

112. *Id. See also* Vinneth Carvalho, *Involuntary Medication Administration Standards for Restoring Competency to Stand Trial*, J. AM. ACAD. PSYCHIATRY & LAW, Mar. 2006.

absolute. In *Sell v. United States*, the Supreme Court developed the four-factor "*Sell* Test."[113] Involuntary administration of drugs, solely for trial competency purposes, is permitted if the four specific criteria laid out in the *Sell* Test are met: (1) that "important governmental interests are at stake" in trying the defendant; (2) that involuntary medication will "significantly further" this interest; (3) that involuntary medication is "necessary" to further the government's interests; and (4) that the administration of the medication is "medically appropriate," or that it is in the defendant's "best interest in light of his medical problems."[114]

In the case of defendants who desire to proceed pro se, but are found by the court to be incompetent to do so, then arguably the spirit of the *Sell* Test should also apply to those defendants. Under the holding in *Sell*, defendants should be permitted to elect to take psychotropic medication in order to be restored to competency to proceed pro se, just as defendants are involuntarily forced to take medication in order to be restored to trial competency.

For example, if a defendant in a criminal proceeding elected to proceed pro se, but under the *Edwards* standard was found incompetent to do so, instead of automatically having counsel forced upon her, the defendant could choose to take medication in an attempt to restore her competency to proceed pro se. Applying the *Sell* Test with the defendant's interests at the center of the analysis—instead of the government's interests—a defendant may be permitted to take medication to restore her competency to proceed pro se if the four factors are met. Therefore, the first *Sell* factor is met because the defendant's liberty interest and interest in presenting her own defense meets the "important interests at stake" analysis. The second factor, that medication will "significantly further" this interest, is most likely met upon a determination and medical evaluation by a psychiatrist or other mental health professional that the medication is appropriate for treating the defendant's mental illness or defect, and will most likely restore the defendant to a state of competency if the medication is taken as prescribed. The third factor, that medication is "necessary" to further the defendant's interests, is met if, as a reflection of the second factor, the mental health professional finds as a result of the evaluation that the defendant cannot be restored to competency without the assistance of psychotropic medications in order to be restored to competency to proceed as a pro se litigant. And finally, the fourth factor, the

113. *Sell*, 539 U.S. at 180–82.

114. *Id. See also* Carvalho, *supra* note 112.

administration of the medication is "medically appropriate," or that the medication is in the defendant's "best interest in light of his medical problems," is again a reflection of the result of the mental health professional's evaluation of the defendant—if the defendant is found to have a treatable mental illness, such as schizophrenia or a delusional disorder, then medication is most likely medically appropriate to restore the defendant to a state of competency to proceed pro se. If on the other hand, the defendant is found to suffer from serious mental retardation, which under any amount or type of medication is not treatable, then medication is not appropriate or in the best interests of the defendant because medication is unlikely to restore the defendant to a state of competency to proceed pro se.[115]

2. How Much Time Should the Defendant Be Allotted to Be Restored to Competency to Proceed Pro Se—Drawing Analogies from Competency in Other Criminal Justice Proceedings

In other legal realms of competency evaluations, there is typically a standard, statutorily imposed time limit in which the defendant must be restored to the required level of competency. As an example, competency to stand trial (CST) imposes such a limit.[116] If the defendant is not restored to CST within this time limit, then the defendant is usually civilly committed.[117] Under a restorable right model, this Comment offers that a similar statutorily constructed time limit may be imposed for self-representation competency to be restored. If at the end of the statutorily imposed time limit the defendant remained incompetent to proceed pro se, the defendant would have counsel appointed to assist in her defense (assuming that the defendant is competent to stand trial).

C. Procedural Safeguards and Determinations

This subpart suggests various procedural safeguards and determinations from third party professionals that can be put in place to dissuade the notion that "[n]o trial can be fair that leaves the defense to a

115. However, medication may be appropriate for other purposes.

116. *See generally* Jackson v. Indiana, 406 U.S. 715, 738 (1972). *Jackson* enforced a reasonableness limit: due process dictates that commitment for competence restoration treatment last no longer than "the *reasonable* period of time" needed to determine whether there exists a substantial probability of attaining competence in the foreseeable future. *Id.*

117. *Id.* Once a court finds that restoration is not substantially probable, the "[s]tate must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant." *Id.*

man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court,"[118] and to work to ensure that competency to proceed pro se can be a restorable right of the defendant in many instances.

1. Involvement of the Court

The *Edwards* Court proffered that the trial judge "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."[119] However, especially in the case of Edwards, in which the same trial judge presided over one of his competency hearings and his two trials,[120] the risk of prejudice and bias on behalf of the trial judge in evaluating the competency of a defendant to proceed pro se is fairly substantial. Although the trial judge may be intimately familiar with the facts of the case and the legal proceedings, the trial judge may not be the best person to objectively and fairly evaluate the defendant's competency to proceed in a pro se capacity, especially because in most instances the trial judge will have little to no mental health or medical training.

In order to reach a workable standard for evaluating self-representation competency and for self-representation to be recognized as a restorable right, it is important to look to other legal competency evaluations for insight. The subpart below discusses the role mental health professionals should play in creating a workable standard for self-representation competency.

2. Involvement of Mental Health Professionals

Drawing analogies from other legal competency evaluations, such as CST evaluations and competency to plead evaluations, this Comment argues that mental health professionals should play a more involved role in creating a workable standard for competency to self-representation, and in evaluating self-representation as a restorable right. Instead of the trial judge as the primary evaluator of the defendant's competency, as suggested by the *Edwards* Court, a neutral third party mental health provider may be in a better position to objectively evaluate the defendant's competency to proceed pro se as well as to make

118. Indiana v. Edwards, 128 S. Ct. 2379, 2387 (2008) (quoting Massey v. Moore, 348 U.S. 105, 108 (1954)).

119. *Id.*

120. *Id.*

recommendations regarding whether the defendant has the potential to be restored to competency through medication or other means.

The concept of a third party mental health professional evaluating the competency of defendants is not a new concept—it is the practice followed in CST and competency to plead evaluations.[121] For example, if a defendant files a motion with the court to proceed pro se, but after questioning, the trial judge elects not to accept the defendant's waiver of counsel, under a restorable right standard of self-representation competency, the trial judge would then refer the defendant to a third party mental health professional for a competency evaluation. The mental health professional would evaluate the defendant and would offer recommendations to the court regarding whether the defendant was competent to proceed pro se. If the mental health professional determined that the defendant was incompetent to proceed pro se, the defendant could choose to have counsel appointed. Alternatively, under a restorable right model, the defendant could attempt to be restored to competency to proceed pro se by taking medication, and after a set period of time, undergo another evaluation by the mental health professional to determine if the defendant had been restored to competency to proceed pro se. The mental health professionals would thus play a more pivotal role than the *Edwards* Court originally suggested. This increased role would provide a more objective and fair medical evaluation of the defendant in determining competency to proceed pro se.

3. Appointment of Standby Counsel

The Supreme Court has recognized that "[o]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel."[122] However, in *McKaskle v. Wiggins*,[123] the Supreme Court reached a workable compromise with the concept of appointment of standby counsel. The concept of standby counsel is highly applicable and is a viable safeguard option for the court in permitting a defendant to proceed pro se. This is especially true for a defendant whose competency to proceed pro se has been challenged, or whose competency to proceed pro se has been restored through medication or other methods.

121. *See generally* THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS (2d ed. 2003).

122. Massey v. Moore, 348 U.S. 105, 108 (1954).

123. McKaskle v. Wiggins, 465 U.S. 168 (1984).

In *Wiggins*, the Court recognized that:

> A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The 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.[124]

Recognizing that the right to appear pro se exists to affirm the dignity and autonomy of the accused, and to allow the presentation of what may, at least occasionally, be the accused defendant's best possible defense, the *Wiggins* Court held that a defendant's Sixth Amendment rights are not violated through the appointment of standby counsel.[125] Standby counsel may be necessary to "relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals."[126] The *Wiggins* Court further held that standby counsel's participation in the basic procedures of the trial was permissible even if it somewhat undermined the pro se defendant's appearance of control over the proceedings.[127]

The *Wiggins* Court emphasized that the primary focus of the permissibility of standby counsel must be "on whether the defendant had a fair chance to present his case in his own way."[128] In the case of a defendant who has been restored to competency to proceed pro se, requiring mandatory appointment of standby counsel to assist the pro se defendant is a viable and workable safeguard to assure the dignity of the defendant and to assure that the decorum of the trial proceedings are observed. Although the mandatory appointment of standby counsel for such defendants would incur additional costs for the court and the community, overall, it seems a small price to pay in order to uphold the constitutional rights of the defendant.

Additionally, given that self-representation in criminal proceedings is a constitutional right under the Sixth Amendment, the "tools" necessary to restore that right, i.e. medication and appointment of standby counsel, may fall within the purview of the *Ake v. Oklahoma* holding, especially if the defendant is an indigent defendant.[129] In *Ake*, the Court held that

124. *Id.* at 174.

125. *Id.* at 184.

126. *Id.*

127. *Id.*

128. *Id.* at 174.

129. Ake v. Oklahoma, 470 U.S. 68 (1985). The discussion in this Comment focuses exclusively

"meaningful access to justice" for indigent clients is important in ensuring the fairness of trial proceedings.[130] To implement this principle, the Court in *Ake* and other past cases focused on identifying the "basic tools of an adequate defense or appeal."[131]

Although *Ake* specifically addressed psychiatric evaluations as a "basic tool," the *Ake* analysis could possibly be extended to other contexts, including self-representation as a restorable right, in order to cover the costs of medication and standby counsel for indigent clients who elected to attempt to be restored to competency so that they could proceed pro se. *Ake* identified three factors to be considered in determining whether something was a "basic tool of an adequate defense or appeal": (1) the private interest that will be affected by the action of the state; (2) the governmental interest that will be affected if the safeguard is to be provided; and (3) the probable value of the additional or substitute procedural safeguards that are sought, along with the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.[132]

Applying the *Ake* analysis to whether medication and standby counsel are "basic tools" for the prospective restorable right pro se litigant model, one reaches the following conclusions: (1) The defendant's liberty interest and interest in presenting his or her own defense are compelling interests. (2) Providing medication to the defendant is unlikely to place an additional burden on the state. If the defendant could be restored to competency for self-representation with medication, then most likely the defendant will also need to take medication to meet the CST standard, or at the very least will need medication to improve her daily quality of life. Additionally, standby counsel is often assigned by the court when a competent defendant elects to proceed pro se, so the recommendation of mandatory standby counsel is unlikely to create an additional burden on the state. (3) Following the rationale of the second factor, providing the defendant with medication and standby counsel is unlikely to place additional financial burdens on the state. Additionally, as self-representation is a constitutional right, denying the defendant the right to present his or her own defense presents a great risk of erroneous constitutional deprivation to the defendant if the safeguards are not provided by the state.[133]

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on indigent clients. Presumably, if a defendant is not indigent, the defendant would bear the burden of costs of medication and standby counsel as in other legal settings where the defendant is not indigent.

130. *Id.* at 77.

131. *Id.* (quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)).

132. *Id.*

133. See Appendix A, *Examples of Trial Scenarios*, for a more detailed evaluation of the estorable

V. CONCLUSION

> Lest the citizenry lose faith in the substance of the system and the procedures we use to administer it, we can ill afford to confront them with a government dominated by forms and mysterious rituals and then tell them they lose because they did not know how to play the game or should not have taken us at our word.[134]

Self-representation in criminal proceedings is a defendant's fundamental, constitutional right. Instead of asking "[H]ow in the world can our legal system allow an insane man to defend himself?,"[135] this Comment argued that the Court should adopt a workable standard that acknowledges competency to proceed pro se as a restorable right of the defendant. This Comment demonstrated that a workable standard can be reached, in which defendants who elect to proceed pro se and who also have mental capacity concerns, are evaluated on a case-by-case basis by a third party mental health professional. This process, along with the additional procedural safeguard of mandatory appointment of standby counsel, will ensure the dignity of the defendant and the decorum of the trial proceedings will be honored. Additionally, this process will strike a workable balance between the fundamental liberty interests of defendants in presenting their own defense, and the government's interest in assuring the fairness of the trial proceedings. Anything less would be unconstitutional.

right model.

134. Moore v. Price, 914 S.W.2d 318, 323 (Ark. 1996) (Mayfield, J., dissenting) (quoting Teegarden v. Dir., Ark. Emp't Sec. Div. (Ark. Ct. App. 1980) (Newbern, J., dissenting)).

135. Indiana v. Edwards, 128 S. Ct. 2379, 2387 (2008) (quoting the Brief of Ohio et al. as Amici Curiae in Support of Petitioner at 24, *Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208) (internal quotation marks omitted)).

Appendix A: *Examples of Trial Scenarios*

Pro Se Defendant Without Mental Capacity Concerns	***Edwards* Court Pro Se Model**	**Restorable Right Model**
◦Defendant files motion to proceed pro se. ◦Defendant knowingly and voluntarily waives the right to counsel. ◦Court accepts the waiver. ◦Defendant is CST. ◦Defendant proceeds pro se.	◦Defendant files motion to proceed pro se. ◦Defendant knowingly and voluntarily waives the right to counsel. ◦Court declines the waiver. ◦Defendant is CST, but is found incompetent to proceed pro se. ◦The trial judge rejects the defendant's motion to proceed pro se and appoints counsel to represent the defendant.	◦Defendant files motion to proceed pro se. ◦Court orders CST evaluation. ◦Defendant is found CST. ◦However, court rejects defendant's motion to proceed pro se, finding defendant has not knowingly and voluntarily waived the right to counsel because of the presence of a mental illness/defect. ◦Defendant undergoes separate evaluation by third party mental health (MH) professional. ◦MH professional finds defendant competent to proceed pro se. ◦Defendant elects to take medication to restore self-representation competency. ◦Defendant is re-evaluated after a period of time.

		◦MH professional finds defendant competent to conduct his or her own defense. ◦Trial judge accepts recommendation of MH professional and accepts the defendant's waiver of counsel as satisfying the *Zerbst* standard. ◦Court issues mandatory appointment of standby counsel. ◦Defendant proceeds pro se and conducts his or her own defense with the assistance of standby counsel.