

The Right of Self-Representation Revisited: A Return to the Star Chamber's Disrespect for Defendant Autonomy? [*Indiana v. Edwards*, 128 S. Ct. 2379 (2008)]

Ashley Hawkinson*

I. INTRODUCTION

While Scott Panetti represented himself against charges for slaying his ex-wife's family, he donned a purple cowboy suit, revealed his tattoo to the jurors, and tried to subpoena Jesus, the Pope, and JFK.¹ Panetti is just one example of a pro se defendant whose trial has contributed to a growing societal skepticism of the right of self-representation.² Other highly publicized trials involving seemingly incompetent defendants have reinforced this growing skepticism.³ For example, before pleading guilty, Zacarias Moussaoui, the "20th Hijacker" of the 9/11 terrorist attacks, represented himself after becoming convinced that his defense attorneys were conspiring with the government in a plot to kill him.⁴ Consistent with this belief, he filed a motion for their "immediate eradication," dubbing them the "Jewish Zealot" and the "Right Wing Racist."⁵ Colin Ferguson, the Long Island Railroad Shooter, defended

* B.A. 2006, University of Saint Thomas; J.D. Candidate 2010, Washburn University School of Law. Thank you to Professors Randall Hodgkinson, Michael Kaye, Michael Francis, Jeffrey Jackson, and Mark Kaufman for sharing their knowledge and insight, and to Professor Tonya Kowalski, as well as Mark Lippelmann and Heather Klaassen for their editorial help.

1. Todd J. Gillman & Diane Jennings, *Justices Block Execution of Texas Killer: Death for Schizophrenic Is Cruel and Unusual, Supreme Court Rules*, DALLAS MORNING NEWS, June 29, 2007, at 6A. Panetti, who was claiming insanity, had shaved his head, camouflaged himself, and assumed the personality of a character named "Sarge" prior to committing the murders. Jessica McBride, *How Can an Insane Man Defend Himself?*, MILWAUKEE J. SENTINEL, Feb. 15, 2004, at J1. During the trial proceedings, he tossed a coin to determine whether a particular person should be impeached, and he conversed with jurors about bull-riding. *Id.*

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

3. See *id.*

4. Siobhan Roth, *Frank Dunham's Odyssey: Strange Twists Come with the Territory When You're a Lawyer for the "20th Hijacker"*, LEGAL TIMES, July 22, 2002, at 1. Moussaoui fired his lawyers, who he considered a "horde of blood sucker[s] in disguise," and he condemned one of them for being an evil governmental representative. *Id.* He also accused the judge, his lawyers, and the prosecutor of trying to kill him in order to prevent the "Fascist Bureau of Inquisition" from being revealed for having prior knowledge of the planned 9/11 terrorist attacks. Ann Woolner, *Having a Fool for a Lawyer*, CONN. L. TRIB., Aug. 19, 2002, at 18. Moussaoui's paranoia stemmed, in part, from his unfamiliarity with a criminal justice system arrangement in which the government pays defense attorneys to work zealously on behalf of defendants. See Roth, *supra*.

5. Roth, *supra* note 4. Moussaoui gave his defense lawyers other monikers, including "Wicked

himself against murder charges by arguing that the government had plotted against him, implanted a computer chip in his brain, and charged him with ninety-three counts of murder merely because the year was 1993.⁶ These defendants were all convicted of heinous crimes, and they all invoked their Sixth Amendment right of self-representation.⁷ Their stories illustrate how common symptoms of mental illness—such as regressive thinking, impaired communicative abilities, and paranoia—can create myriad issues, ranging from substantive legal problems to courtroom decorum concerns when such defendants represent themselves at trial.⁸

While high-profile trials, such as those involving Panetti, Moussaoui, and Ferguson, draw into question the scope of the right of self-representation, they are not indicative of all pro se cases. Such colorful cases obscure the valid reasons for which defendants invoke the right to represent themselves.⁹ For example, a defendant's desires to raise an ideological defense or simply to present her own case instead of having it presented by a government agent are reasons to invoke the self-representation right.¹⁰ Dissatisfaction with the quality of representation provided by court-appointed counsel is another common reason defen-

Megaloman," "Idaho Witch," and "undercover crusader." See Matt Stearns, *Moussaoui Tactics Put Terror Trial in Doubt, Muddled Defense Leaves Case in Chaos*, KAN. CITY STAR, June 9, 2003, at A1. The full title of Moussaoui's motion to dismiss his attorneys was: "Motion for the Immediate Eradication of the United States Imposed Appointed Lawyer: Megaloman Dunham, Jewish Zealot Zerkin, Right Wing Racist McMahon." Roth, *supra* note 4, at 1. Another motion he filed was entitled, "DO YOU THINK THAT I AM CRAZY TO SEE YOUR DOCTOR FRANKEINSTEIN." *Id.*

6. Betsy Z. Russell, *Duncan's New Role Seen as Liability: Acting as Attorney Unwise, Experts Say*, THE SPOKESMAN REV., Aug. 3, 2008, at 1A (summarizing noteworthy pro se cases including Ferguson's); Andrew Blum, *LIRR Gunman Goes Pro Se with Perplexing Voir Dire: Strange Behavior Follows a Rejected Insanity Defense*, THE NAT'L L.J., Feb. 6, 1995, at A11. Ferguson also claimed that someone else did the shooting and that he was a "political prisoner" and "scapegoat" of a government conspiracy. *Id.* Ferguson's defense attorneys described the trial as "an obscene spectacle, a cross between bear-baiting and some weird skit in which inmates take over a mental institution and perform a play, the theme of which is a trial." Ronald L. Kuby & William M. Kunstler, *So Crazy He Thinks He Is Sane: The Colin Ferguson Trial and the Competency Standard*, 5 CORNELL J.L. & PUB. POL'Y 19, 19 (1995). While considering prospective jurors, Ferguson talked about hockey and racial issues. See Blum, *supra*. He also argued with the judge over how a bologna sandwich failed to fulfill his dietary requirements. *Id.*

7. See McBride, *supra* note 1. After representing himself at trial, Scott Panetti was convicted for slaying his ex-wife's family and was sentenced to death. *Id.* Zacarias Moussaoui was charged with conspiring in the 9/11 terrorist attacks on the World Trade Center and Pentagon. Christine G. Jennings, *Kaczynski to Moussaoui: Allowing Pro Se Defendants with Mental Illnesses to Represent Themselves*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 365, 366 (2005). Moussaoui represented himself until April 2005 when he pled guilty to all charges against him. *Id.* Colin Ferguson acted as his own lawyer and was eventually convicted of six counts of murder in addition to nineteen counts of attempted murder for shooting commuters on New York's Long Island Railroad. Russell, *supra* note 6.

8. See Brief for the Am. Psychiatric Ass'n and Am. Acad. of Psychiatry and the Law as Amici Curiae in Support of Neither Party at 26, *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208) [hereinafter Brief for APA].

9. See Hashimoto, *supra* note 2, at 460-76 (explaining factors that lead defendants to want to represent themselves).

10. *Id.* at 473, 475.

dants request to represent themselves.¹¹

In *Indiana v. Edwards*,¹² Ahmad Edwards, a criminal defendant who was found competent to stand trial, was dissatisfied with his court-appointed attorney.¹³ Accordingly, Edwards insisted on representing himself, telling the judge “[representing myself at trial is] real important because it deals with my life, Your Honor . . . [E]ither you can give me . . . another attorney or I’ll have to go pro se . . . because . . . the changes that need to be made with the case are going to cause for me to suffer with the lawyer.”¹⁴ As a result of Edwards’ questionable mental competency, however, the trial court did not allow him to represent himself, and the United States Supreme Court affirmed the trial court’s decision to deny his right of self-representation.¹⁵

Pro se cases, such as *Edwards*, involving defendants with questionable mental competency magnify the tension that already exists between the values of the Sixth Amendment right of self-representation and the due process right to a fair trial.¹⁶ In *Edwards*, the Supreme Court grappled with the policies underlying these two provisions, ultimately deciding that the need for a fair trial outweighed the defendant’s interest in self-representation.¹⁷ The Court’s opinion in this case requires an analysis of the self-representation right in light of its history, precedent, and policy. Part II of this Comment describes the facts, background, and procedural history of the case. Part III provides a comprehensive history of self-representation, and Part IV discusses the majority and dissenting opinions of the case. Part V evaluates the majority opinion in *Edwards*, focusing on its inconsistencies with precedent, its impact on defendant autonomy, and some practical problems that will likely result from the Court’s holding. The starting point for such a critique is an

11. *Id.* at 460-63. Ms. Hashimoto includes an illustration showing why a lack of zealous representation and low standards for effective assistance of counsel motivate some defendants to represent themselves. *Id.* Her example begins with a narrative about an indigent defendant charged with a serious crime warranting significant jail time. *Id.* at 464. He is appointed counsel and imprisoned until the trial. *Id.* However, the defendant, who knows he is innocent, wants to go to trial and is unable to reach his court-appointed counsel during the months before the date on which the trial is scheduled to begin. *Id.* The lawyer does not visit the jail to consult with the defendant, and the defendant, who becomes increasingly anxious over his pending fate, is advised by his fellow inmates that this particular lawyer seldom brings a case to trial and is generally not prepared if the case does go to trial. *Id.* After the lawyer finally consults with the defendant for a mere few minutes, the defendant realizes that he has only a few choices. *Id.* Since he does not want to plead guilty and cannot afford his own attorney, he requests that the trial judge appoint him new counsel. *Id.* After the judge denies his request, he finds his options limited. *Id.* at 465. He can go to trial with a lawyer who is unfamiliar with his case and whose ability to put forth a decent defense is questionable, or he can represent himself. *Id.* At this point, the defendant may choose to represent himself, despite the fact that he knows his ability to appear before a jury is limited. *Id.*

12. 128 S. Ct. 2379 (2008).

13. See Brief for Respondent at 6-9, *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208).

14. *Id.* at 6.

15. See *Edwards*, 128 S. Ct. at 2382-83, 2387-88.

16. See *id.* at 2387 (noting the tension between self-representation by a defendant of limited mental capacity and the United States Constitution’s goal of ensuring a fair trial).

17. *Id.* at 2387-88.

overview of the events giving rise to the Court's opinion.

II. CASE DESCRIPTION

In July 1999, a department store security guard caught Ahmad Edwards trying to steal a pair of shoes.¹⁸ When caught, Edwards shot his gun at the guard, missed, and wounded a bystander.¹⁹ He was charged with attempted murder, criminal recklessness, battery with a deadly weapon, and theft.²⁰ Edwards' court-appointed counsel requested a psychiatric evaluation, and over the next five years, Edwards' mental competency was scrutinized in three competency hearings and two requests to proceed pro se.²¹

A. Competency Hearings

In August 2000, after the first psychiatric evaluation, the trial court found that Edwards suffered from schizophrenia and was not competent to stand trial.²² He was subsequently committed to a state hospital.²³ While committed, Edwards did not receive antipsychotic medication, and there was no indication that the hospital provided psychotherapy or counseling.²⁴ Nevertheless, after Edwards' three-month stay, a state hospital psychiatrist declared him competent to stand trial.²⁵

In March 2002, however, the court subjected Edwards to a second competency hearing after his attorney filed a motion implying Edwards may not have undergone treatment.²⁶ Two psychiatrists filed reports,

18. *Id.* at 2382.

19. *Edwards v. State*, 854 N.E.2d 42, 45 (Ind. Ct. App. 2006). After Edwards shot his gun twice at the officer, he aimed his gun at the officer's head and fired another shot, which missed the officer and struck the bystander. *Id.* Upon firing his gun again, Edwards fled the scene. *Id.* An FBI special agent who was driving in the area heard the gunshots and saw Edwards running between vehicles on the street. *Id.* The agent then followed him into a parking garage, where he found him crouched in a corner. *Id.* at 45-46. Once the agent identified himself, Edwards pointed his gun at the agent's face. *Id.* at 46. The agent fired his own gun and struck Edwards in the thigh. *Id.* After falling to the ground, Edwards eventually dropped his gun. *Id.*

20. *Id.*

21. Brief for Respondent, *supra* note 13, at 2-10. A court cannot try a defendant who is incompetent. *See infra* Part III.C. (discussing mental competency standards).

22. *See* Brief for Respondent, *supra* note 13, at 2; *Edwards v. State*, 866 N.W.2d 252, 254 (Ind. 2007). The trial judge's opinion was based, at least in part, on inconsistent psychiatric reports. *See* Brief for Respondent, *supra* note 13, at 2. Trial judges generally rely on and accede to clinical findings regarding a pretrial decision on a defendant's competency. *See* Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 550 (1993). Clinicians therefore have great discretion in the competency determination. *Id.* An appellate court will seldom reverse a decision finding a defendant incompetent to stand trial. *Id.* at 549.

23. Brief for Respondent, *supra* note 13, at 2. Edwards was committed to Logansport State Hospital. *Id.*

24. *Id.* According to a psychiatry professor's testimony, one should not presume that Logansport would necessarily provide treatment. *Id.* at n.1.

25. *Id.* at 2. The hospital psychiatrist described Edwards' thoughts as clear and found him to be mentally normal. *Indiana v. Edwards*, 128 S. Ct. 2379, 2389 (2008) (Scalia, J., dissenting).

26. *Edwards*, 128 S. Ct. at 2382; Brief for Respondent, *supra* note 13, at 3. Edwards' attorney filed his motion in the fall of 2001. Brief for Respondent, *supra*.

and the State introduced expert testimony stating that Edwards could communicate coherently and describing his verbal intelligence, attention, and concentration as average.²⁷ Based on this evidence, the trial judge determined that Edwards was able to assist his defense counsel and was competent to stand trial.²⁸

In April 2003, the trial court held a third competency hearing after Edwards' defense counsel requested another psychiatric evaluation.²⁹ A psychiatrist testified that Edwards suffered from thinking difficulties and delusions associated with his schizophrenia, which made him unable to assist his counsel.³⁰ In November, the trial court concluded that Edwards was not competent to stand trial.³¹ The court ordered his recommitment.³²

In January 2004, Edwards was recommitted to the state hospital.³³ After he had been committed for eight months, the hospital reported that he was competent to stand trial.³⁴ During his hospital stay, he received various therapies, including pharmacotherapy and counseling, and was prescribed an antipsychotic drug.³⁵ One doctor reported that Edwards had no hallucinations, his thoughts and communication were coherent, and he had a thorough comprehension of trial procedures.³⁶

27. Brief for Respondent, *supra* note 13, at 3. The trial court found that Edwards could understand the courtroom proceedings, comprehend the difference between guilt and innocence, and identify the functions of the various players in a courtroom trial. *See id.*

28. *Edwards*, 128 S. Ct. at 2382. A finding that the defendant is able to assist defense counsel is requisite to finding him competent to stand trial. *See infra* Part III.C. (discussing competency requirements). A defendant who lacks capacity to assist his defense counsel could possibly receive an unfair trial because he might not have the ability to share necessary information with his counsel. *Bonnie*, *supra* note 22, at 552.

29. Brief for Respondent, *supra* note 13, at 3; *Edwards*, 128 S. Ct. at 2382. Edwards' defense counsel later provided the trial court with an expert report stating that Edwards was not competent to stand trial and he should go back to the state hospital. Brief for Respondent, *supra* note 13, at 3.

30. *Edwards*, 128 S. Ct. at 2382. Of all the mental illnesses, schizophrenia is perhaps one of the most severe and pervasive, affecting many different areas of a person's life. Telephone Interview with Professor Mark Kaufman, M.S.W., J.D., Associate Professor at Washburn University, in Topeka, Kan. (Oct. 26, 2008). While the symptoms of the illness may come and go, at certain times a schizophrenic person's thinking may become extremely disorganized and regressive. *Id.*

31. *Edwards*, 128 S. Ct. at 2382.

32. *Id.*

33. Brief for Respondent, *supra* note 13, at 4.

34. *Edwards*, 128 S. Ct. at 2382. The report was based on Dr. Sena's findings that Edwards had progressed toward overcoming his psychosis. Brief for Respondent, *supra* note 13, at 4-5.

35. Brief for Respondent, *supra* note 13, at 4. The Supreme Court has held that antipsychotic drugs may be involuntarily administered to criminal defendants in order to raise their level of competency and render them able to stand trial. *See Sell v. United States*, 539 U.S. 166, 169 (2003). Nothing indicates that Edwards was administered antipsychotic drugs against his will. *See* Brief for Respondent, *supra* note 13, at 4. During oral argument before the Supreme Court, however, Edwards' appellate attorney noted that Edwards was deemed competent to stand trial only after taking the medication. Transcript of Oral Argument at 43, *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208). For some people, like Edwards, suffering from schizophrenia, medications may alleviate their symptoms for a majority of the time. Interview with Professor Mark Kaufman, *supra* note 30. Despite taking medication, however, schizophrenics may still need hospitalization at various points in their lives. *Id.*

36. Brief for Respondent, *supra* note 13, at 4. Edwards had passed an examination in Legal Education II and was able to recount the precise charges against him, as well as the felony status and the potential sentence for each charge. *Id.* at 4-5. In addition, he understood the roles of each party in a trial, and he was able to challenge adverse witnesses and testify relevantly. *Id.* at 5. He also had

After considering this evidence, the trial court ruled that he was competent to stand trial.³⁷

B. Pro Se Requests

After he was declared competent, but just before going to trial, Edwards requested to represent himself and asked the court for a continuance in order to do so.³⁸ He was dissatisfied with his appointed counsel because he believed that the counsel had not provided him access to discovery materials or spent enough time with him in preparation for trial.³⁹ In response to Edwards' request, the trial judge asked him a series of legal questions regarding the rules of evidence and the process of jury selection.⁴⁰ Edwards told the judge that he would need additional time to prepare his answers to such questions because he had been under the impression that the court would grant him a continuance.⁴¹ The court denied the continuance and appointed counsel to represent Edwards at trial.⁴² The jury convicted Edwards of criminal recklessness and theft, but did not reach a verdict on the attempted murder and battery charges.⁴³

Before the retrial on the remaining charges, Edwards again requested to represent himself.⁴⁴ He disagreed with his attorney on the best theory for his defense.⁴⁵ The trial court determined that Edwards'

a good memory, could communicate well, and was cooperative. *Id.* The doctor opined that Edwards' intelligence was average and his cognitive functions were good. *Id.*

37. *Id.* at 5. This was the last time that the trial court considered Edwards' competency to stand trial. *Id.*

38. *Indiana v. Edwards*, 128 S. Ct. 2379, 2382 (2008).

39. Brief for Respondent, *supra* note 13, at 6. Edwards told the judge he was concerned that he would not have a good case or a good trial. *Id.* He said that in addition to being denied access to trial materials over the past six years, his attorney had not spent much time with him. *Id.* In particular, during the ninety-days they were given to prepare, his attorney had only come to see him three times in the three days just before trial. *Id.* According to Edwards, the lawyer had spent only a total of forty minutes with him, which he believed was not enough time for such a huge case. *Id.* Edwards' situation is similar to the one described in Ms. Hashimoto's hypothetical illustrating why some defendants choose self-representation after they become dissatisfied with their court-appointed counsel. See Hashimoto, *supra* note 2 and accompanying text.

40. Brief for Respondent, *supra* note 13, at 7-8. The trial judge asked Edwards what voir dire was, and he responded that it was the selection of the jury. *Id.* at 7. Asked how voir dire was done, Edwards answered that the parties were each able to strike ten jurors. *Id.* The trial judge also quizzed Edwards on what questions must be asked before a videotape can be admitted. *Id.* at 7-8. Edwards stated that videotapes were considered physical evidence and that on cross-examination he would have to ask questions to determine whether the witness had personal knowledge of the material being viewed. *Id.* at 8.

41. *Id.* at 7. It appears that Edwards planned to present an insanity defense, which may have been one reason why he would have needed a continuance. *Edwards v. State*, 854 N.E.2d 42, 46 n.5 (Ind. Ct. App. 2006).

42. *Edwards*, 128 S. Ct. at 2382.

43. *Id.* at 2382.

44. *Id.* On the first day of the trial, Edwards petitioned the court to proceed pro se. Brief for Respondent, *supra* note 13, at 8.

45. Brief for Respondent, *supra* note 13, at 8-9. Edwards wanted to use a self-defense argument, while his attorney wanted to argue that Edwards lacked intent to kill. *Edwards*, 128 S. Ct. at 2390 (Scalia, J., dissenting). During the hearing, Edwards objected and said to the judge, "My objection is me and my attorney actually had discussed a defense . . . and we are in disagreement with it."

case represented an exception to the right of self-representation and his lack of competency required the court to appoint counsel for him.⁴⁶ Finding that Edwards was competent to stand trial but not competent to represent himself, the trial court denied his request.⁴⁷ The attorney presented his theory of defense, rather than the one Edwards requested, and the jury convicted Edwards of attempted murder and battery.⁴⁸ The trial court sentenced him to thirty years in prison.⁴⁹ Edwards appealed, arguing that the trial court had violated his right to proceed pro se.⁵⁰

The Indiana Court of Appeals overturned the trial court's decision and held that it had wrongfully denied Edwards the right to represent himself.⁵¹ The court referred to *Faretta v. California*,⁵² in which the United States Supreme Court held that a defendant has a constitutional right to represent himself.⁵³ In addition, the court cited *Godinez v. Moran*,⁵⁴ in which the Supreme Court held that while a defendant must knowingly and voluntarily waive his right to counsel, the competency standard for doing so was not higher than the standard required for an individual to stand trial.⁵⁵ Relying on these decisions, the Indiana Court of Appeals held that the trial court should have granted Edwards' request to represent himself because (1) he was competent to stand trial, and (2) his request to waive counsel was knowing and voluntary.⁵⁶

He has a defense and I have a defense that I would like to represent or present to the Judge." Brief for Respondent, *supra* note 13, at 8-9. The judge asked what relevance Edwards' objection had, to which Edwards replied, "I just wanted to make the record with that objection. This is the most present opportunity that I had. Thank you." *Id.* at 9.

46. Brief for Respondent, *supra* note 13, at 9. The trial court concluded from the well-developed record and Edwards' psychiatric reports that he still suffered from schizophrenia and therefore was not competent to represent himself. *Edwards*, 128 S. Ct. at 2382-83. Because Edwards was found competent to stand trial only after having been prescribed antipsychotic medication, the judge's concern was certainly well-founded. See Transcript of Oral Argument, *supra* note 35, at 43. The judge implied, however, that Edwards may have strategically requested to represent himself in order to force the trial to be continued. See Brief for Respondent, *supra* note 13, at 9.

47. *Edwards*, 128 S. Ct. at 2383. The trial judge said that if he was wrong about creating a new exception to the right of self-representation, the case would just have to be tried again. Brief for Respondent, *supra* note 13, at 9. This arguably flippant comment is not truly indicative of the trial judge's perception of the situation. See *Edwards v. State*, 854 N.E.2d 42, 47-48 (Ind. Ct. App. 2006). Indeed, the trial judge really struggled with the issue of whether to let Edwards represent himself. *Id.* at 47. The judge later noted that it would have been easier to allow Edwards to conduct his own defense and not worry about whether the trial had been just. See *id.*

48. Brief for Respondent, *supra* note 13, at 10.

49. *Edwards*, 854 N.E.2d at 46. Edwards was sentenced to serve concurrently a total of thirty years for the attempted murder, four years for the battery, and one and one-half years for the remaining charges of criminal recklessness and theft. *Id.*

50. Brief for Respondent, *supra* note 13, at 10.

51. *Edwards*, 128 S. Ct. at 2383.

52. 422 U.S. 806 (1975).

53. Brief for Respondent, *supra* note 13, at 10.

54. 509 U.S. 389 (1993).

55. *Edwards v. State*, 854 N.E.2d 42, 47 (Ind. Ct. App. 2006). The Indiana Court of Appeals also noted that subsequent Supreme Court opinions had criticized *Faretta* and *Godinez*; however, because neither had been overruled, the court stated that it was bound by their holdings. *Id.* at 48.

56. *Id.* at 48. Upon remand of the case, if Edwards again requested to represent himself, the Indiana Court of Appeals instructed the trial court to make sure the waiver of his right to counsel was knowing and voluntary. *Id.* In addition, the Court of Appeals stated that Edwards must be advised of the importance of the right to counsel and the consequences of foregoing that right. *Id.* If

The State appealed the case to the Indiana Supreme Court.⁵⁷ The State argued that due process and fairness concerns limit the self-representation right, and the trial court properly denied Edwards' request because he was unable to put forth a "meaningful" defense.⁵⁸ Indiana's Supreme Court noted that the trial court's decision was not unreasonable; however, it reiterated that, under United States Supreme Court precedent, the competency standard for self-representation was not higher than that for standing trial.⁵⁹ Because Edwards was competent to stand trial and his waiver of the right to counsel was effective, the court held that the trial court improperly denied his constitutional right to represent himself.⁶⁰

III. BACKGROUND

The contemporary meaning of the right of self-representation is best understood in light of its history, constitutional significance, and the case law that has defined its limits. English and early American law highlight the right's roots, while limitations on, and the role of mental competency in, pro se representation illustrate the nuanced contours of the right.⁶¹ A discussion of the right to assistance of counsel, on the other hand, lays the groundwork for an understanding of the right of self-representation because the Sixth Amendment interconnects the two rights.⁶² In fact, the right to assistance of counsel is of such importance that the Supreme Court gave it official recognition years before it recognized the right of self-representation.⁶³

the trial court determined that Edwards was not able to make a sufficient waiver and understand all that the waiver entailed, then the trial court was to specify the reasons for its determination. *Id.*

57. Brief for Respondent, *supra* note 13, at 11.

58. *Edwards v. State*, 866 N.E.2d 252, 254 (Ind. 2007). The State also repeated its argument that the United States Supreme Court had given reason to question the viability of the self-representation right. *Id.* at 255. The State was referring to the *Faretta* dissents and several of the opinions in *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152 (2000), which implied skepticism of the constitutional basis for the right of self-representation. *See id.* at 259. Not all of the Justices, however, were skeptical of *Faretta's* holding. *Id.*

59. *Id.* at 260. The Indiana Supreme Court noted that the trial court did not deny Edwards' request to represent himself because his waiver was involuntary or because he did not appreciate the consequences of waiver, but because he was not competent to represent himself. *Id.* at 258. In other words, no one argued that Edwards had not properly *invoked* his right to represent himself. *Id.* at 257-58.

60. *Id.* at 260. Just like the Indiana Court of Appeals, the Indiana Supreme Court acknowledged the reasonableness of the trial court's decision to deny Edwards the right of self-representation. *Id.* Moreover, the court noted that trial judges are best situated to determine whether a defendant like Edwards should be allowed to represent himself and should have some discretion in making that determination. *Id.* While the Indiana Supreme Court ultimately concluded that it was bound by *Faretta* and *Godínez*, it tacitly invited the Supreme Court to revisit the holdings of those cases. *Id.*

61. *See infra* Part III.B.1-3. and C.

62. *See infra* Part III.A.

63. *See id.*

A. *Right to Assistance of Counsel*

The constitutional right to assistance of counsel is like the fraternal twin of the right of self-representation—although not identical rights, both emanate from the same constitutional amendment to protect criminal defendants.⁶⁴ In 1932, the right to assistance of counsel garnered constitutional recognition.⁶⁵ In *Powell v. Alabama*,⁶⁶ the Supreme Court held that a trial court violates an indigent capital defendant's due process rights if he is not provided counsel.⁶⁷ The *Powell* Court's conclusion was based, in part, on the "fundamental" nature of the right to counsel.⁶⁸ Several years later, the Court reinforced the right to counsel and extended it to all federal criminal defendants.⁶⁹ The Court held that defendants must be provided counsel unless they are able to retain their own or they choose to waive the right.⁷⁰ In the 1963 case *Gideon v. Wainwright*,⁷¹ the Court overruled one of its prior decisions and extended the right to counsel to defendants facing trial in state courts.⁷²

64. See *Faretta v. California*, 422 U.S. 806, 821 (1975); U.S. CONST. amend. VI (providing that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence"). The right to assistance of counsel protects the criminal defendant's right to a fair trial, and the right of self-representation protects the defendant's autonomy interests. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Faretta*, 422 U.S. at 834 (noting that the defendant must have the liberty to decide whether to accept counsel's assistance).

65. See *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

66. 287 U.S. 45 (1932).

67. *Id.* at 71. In *Powell*, the defendants were young, indigent black men, described as "ignorant and illiterate," who were accused of raping two white girls. *Id.* at 49, 52. Counsel was not appointed to represent them until the morning of their trials. *Id.* at 56. The defendants were convicted and sentenced to death. *Id.* at 50. Similar to the initial analysis in the later case of *Faretta*, the Supreme Court's *Powell* decision began with a review of English and early colonial jurisprudence. *Id.* at 60-61. Prior to the early 1800s, an English defendant charged with a felony or treason was denied assistance of counsel. *Id.* at 60. The American colonies abdicated the English rule, and defendants enjoyed a liberal right to assistance of counsel, which was evidenced in many early state constitutions. See *id.* at 61-65 (collecting examples of early state constitutions recognizing the right to counsel). Justifying the Court's holding, Justice Sutherland made the following statement in dicta, which is frequently invoked in Court opinions and academic commentary to exemplify the problems with self-representation:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. at 69.

68. *Id.* at 68.

69. *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938). The defendants in *Johnson* were two Marines indicted for using counterfeit money, which was a felony. *Id.* at 460. They were unable to afford their own attorneys, and the trial court did not appoint counsel because the state in which they were tried appointed counsel only for capital crimes. *Id.* In answering a court inquiry, however, the defendants said they were ready to be tried. *Id.* The two Marines represented themselves at trial, and the jury convicted both of them. *Id.*

70. *Id.* at 463. One of the arguments before the Supreme Court was that the defendants had waived their right to assistance of counsel. *Id.* at 464. The Court noted that the trial judge is responsible for assessing whether the defendant's waiver is "intelligent and competent," and that the judge must consider the particulars of each case, including the defendant's individual circumstances, to determine whether the waiver was sufficient. *Id.* at 465.

71. 372 U.S. 335 (1963).

72. *Id.* at 342-45 (discussing the Sixth Amendment's application to the states through the Due Process Clause of the Fourteenth Amendment). The *Gideon* Court overruled *Betts v. Brady*. *Id.* at 345. In *Betts*, a Maryland trial court refused to appoint counsel for the defendant who had been

While *Gideon* dealt only with a defendant who had been charged with a felony, the Supreme Court has since held that assistance of counsel must be provided to defendants charged with any crime warranting imprisonment.⁷³

B. Right of Self-Representation

Just as the right to assistance of counsel percolated in Supreme Court opinions before the Court extended it to the states in *Gideon*, the importance of self-representation was recognized before the Supreme Court gave it full force in *Faretta v. California*.⁷⁴ The concept of self-representation predates the United States Constitution, and it played a role in the criminal jurisprudence of England and the American colonies where defendants often represented themselves.⁷⁵ The Court drew from this history when it recognized self-representation as a constitutional right.⁷⁶ Although constitutional rights are of the highest order, they are not absolute; and over time, the Court has outlined the boundaries of self-representation and determined how mental competency affects the exercise of the right.⁷⁷

1. Self-Representation in English and American Colonial Jurisprudence

During the sixteenth and seventeenth centuries, it was commonplace for English defendants charged with serious crimes to represent themselves.⁷⁸ In fact, the Star Chamber was the only tribunal in English

charged with robbery, because in that court counsel was only appointed for defendants charged with rape or murder. *Betts v. Brady*, 316 U.S. 455, 456-57 (1942). A divided Supreme Court held that denying the defendant appointment of counsel under the circumstances of his case did not violate his due process rights because it was not grossly offensive to the notion of fairness. *Id.* at 462. In overruling *Betts*, the *Gideon* Court reiterated that the right to assistance of counsel is fundamental in nature, at least in part, because it is necessary to a fair trial. *Gideon*, 372 U.S. at 344.

73. See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). *Argersinger* was charged with a crime punishable by imprisonment, a \$1,000 fine, or both. *Id.* at 26. He was indigent and not represented by an attorney. *Id.* The trial court sentenced him to serve ninety days in jail, and he filed a habeas corpus action, contending that because he was denied assistance of counsel, he was unable to properly defend himself. *Id.* The Court noted that English common law did not allow defendants charged with felonies to be represented by counsel, but did allow defendants charged with lesser crimes to be represented. *Id.* at 30. After recognizing that counsel's assistance is equally important to defendants charged with misdemeanors as to those charged with felonies, the Court held that the right is applicable to all criminal prosecutions that have a risk of imprisonment, regardless of the crime's classification. *Id.* at 37.

74. See *Indiana v. Edwards*, 128 S. Ct. 2379, 2383 (2008) (describing *Faretta* as the "foundational 'self-representation' case").

75. See, e.g., *Faretta v. California*, 422 U.S. 806, 812, 821-32 (1975) (discussing the history of early British and American colonial criminal jurisprudence).

76. See *id.* at 821 (noting that a common reading of the Sixth Amendment connotes a right of self-representation, and this interpretation is strengthened by the Amendment's foundation in early English jurisprudence).

77. See, e.g., *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 127 S. Ct. 2489, 2493 (2007). For example, the right to free speech, protected by the First Amendment, is not wholly unrestricted. See *id.*; see also *supra* Part III.B.3. and C. (discussing the limitations, including mental competency, on the right of self-representation).

78. See *Faretta*, 422 U.S. at 823. At a certain point in time, each litigant had to personally ap-

criminal jurisprudence that “forc[ed] counsel upon an unwilling defendant.”⁷⁹ In 1641, revolutionary changes instituted by the Long Parliament obliterated the Star Chamber and its requirement of mandatory counsel.⁸⁰ The Treason Act of 1695 further reformed English criminal procedure by providing for the assistance of counsel upon request.⁸¹ Nevertheless, defendants retained the right to represent themselves if they so chose.⁸²

The self-reliant colonists ardently upheld the tradition of self-representation when they came to America.⁸³ They also maintained a general distrust of lawyers.⁸⁴ Even after courts began providing counsel to defendants charged with felonies, the people retained the traditional right to represent themselves.⁸⁵ Throughout the late seventeenth and eighteenth centuries, the colonists provided for the right in their state charters and bills of rights.⁸⁶ This right was held in esteem, not only be-

pear before the tribunal and put forth his own defense. F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD* 211 (2d ed. 1899). Even after defendants secured the right to assistance of counsel for petty criminal offenses and civil cases, defendants charged with a felony or treason were completely barred from obtaining assistance of counsel. *Faretta*, 422 U.S. at 823.

79. *Faretta*, 422 U.S. at 822. The Star Chamber was “[a]n English court having broad civil and criminal jurisdiction at the king’s discretion and noted for its secretive, arbitrary, and oppressive procedures, including compulsory self-incrimination, inquisitorial investigation, and the absence of juries.” BLACK’S LAW DICTIONARY 1442 (8th ed. 2004). The tribunal was infamous for its human rights violations. *Faretta*, 422 U.S. at 821. A defendant appearing before the Star Chamber was truly at the mercy of his counsel. See 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 341 (1883). The Star Chamber’s requirement that counsel sign a criminal pleading gave counsel great discretion over which pleadings to sign so as not to disturb the King. See *id.* If a lawyer became involved with trivial pleadings, he potentially subjected himself to severe punishment. 5 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 179 (1924). This meant that a defendant could not provide his answer or defense unless counsel would assume the burdensome obligation of signing the pleading. STEPHEN, *supra*, at 341. If a defendant was unable to get his answer signed, the Star Chamber considered him to have confessed. *Id.*

80. *Faretta*, 422 U.S. at 823.

81. *Id.* at 824-25. In addition to guaranteeing assistance of counsel, the Treason Act of 1695 also guaranteed, among other things, that a defendant accused of treason would be provided with a copy of the indictment. *Id.* After the Treason Act, the perception was that the new right to counsel merely provided a defendant with an option not previously available to him. See *R. v. Woodward*, (1944) 1 K.B. 118, 119. Apparently, the reforms brought about by the Act did little to erode the concept of self-representation, and the prevailing idea, as stated in the 1944 case, *R. v. Woodward*, was that no defendant “can have counsel forced upon him against his will.” *Id.*

82. *Faretta*, 422 U.S. at 825.

83. *Id.* at 826.

84. See CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 7 (1911). To the early American colonist, lawyers represented the corruption of the King’s Court, a place in which the law was used as a sword against those who disagreed with the King. *Id.*; see also D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 197 (1958) (noting that the colonists institutionalized their skepticism of lawyers).

85. See *Faretta*, 422 U.S. at 827-28. The *Faretta* Court found no case in which an early American court mandated that a criminal defendant be represented by counsel he was unwilling to receive. *Id.*

86. *Id.* at 828 (collecting state charters and bills of rights). For example, one state’s Frame of Government provided “[t]hat, in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves” *Id.* at 828 n.37; see also 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 131 (1971). The Judiciary Act of 1789, enacted one day before the Sixth Amendment was drafted, protected the right of individuals appearing before federal courts to choose either to conduct their own defense or to have an attorney represent them. *Faretta*, 422 U.S. at 831. The Sixth Amend-

cause the populace despised lawyers, but because the right was consistent with the “natural law” philosophy espoused by the leaders of the American Revolution.⁸⁷ Several years after the Revolutionary War, the right was guaranteed by federal statute.⁸⁸

2. Self-Representation as a Constitutional Right

Colonial respect for the right of self-representation surfaced in Supreme Court cases years before the Court decided *Faretta*.⁸⁹ For example, in the 1934 case *Snyder v. Massachusetts*,⁹⁰ the Court stated that fairness required a defendant be present during certain criminal proceedings to ensure his power to advise, make recommendations, or even terminate his lawyer and manage his own defense.⁹¹ Four years later, the Court noted that a defendant may forego his constitutional right to assistance of counsel, as long as his waiver of the right was “intelligent and competent.”⁹² In *Adams v. United States*,⁹³ a 1942 pro se case, the Court had a more direct opportunity to discuss self-representation.⁹⁴ The *Adams* Court held that a pro se defendant may waive his right to a jury.⁹⁵ In remarking that the Constitution does not force a defendant to accept representation, the Court noted that the right to waive counsel

ment’s failure to mention the self-representation right has contributed to judicial skepticism as to whether the Constitution even guarantees the right. *See id.* at 850 (Blackmun, J., dissenting). The *Faretta* majority considered the Sixth Amendment’s lack of explicit protection for self-representation, and noted that it appeared to be the result of a belief that the right was so fundamental that its inclusion in the Amendment was unnecessary. *Id.* On the other hand, in his dissent, Justice Blackmun surmised that the Constitution did not include the right because the framers simply did not consider it when they drafted the Amendment. *Id.*

87. *See* Paul G. Kauper, Lecture on the Bicentennial of the United States in the American Enterprise Institute for Public Policy Research Series on the American Revolution (Nov. 7, 1973), in U. MICH. L. SCH. L. QUADRANGLE NOTES, 1974, at 9 n.2. The founders considered the right to be fundamental to a free people. *Faretta*, 422 U.S. at 830 n.39. For example, in a 1776 debate regarding Pennsylvania’s bill of rights, Thomas Paine declared that it was a natural right to personally plead one’s own case, and counsel was therefore considered ancillary to the self-representation right. *Id.*

88. *Faretta*, 422 U.S. at 831 (noting that Section 35 of the Judiciary Act of 1789 guaranteed the right of all parties to either represent themselves or choose to have counsel represent them). Today the right is codified in 28 U.S.C. § 1654 (2000), providing that in every United States court, a person may defend himself or herself personally or through counsel.

89. *See, e.g.*, *Price v. Johnston*, 334 U.S. 266, 285 (1948); *Adams v. United States*, 317 U.S. 269, 279 (1942); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938); *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934). These cases all discussed the right of self-representation without actually addressing whether it was constitutionally protected.

90. 291 U.S. 97 (1934).

91. *Snyder*, 291 U.S. at 105. *Snyder* was not a self-representation case but was later cited by the *Faretta* Court to show that it had previously recognized self-representation as a constitutional right. *Faretta*, 422 U.S. at 816.

92. *Johnson*, 304 U.S. at 465.

93. 317 U.S. 269 (1942).

94. *See Adams*, 317 U.S. at 271. The defendant in *Adams* was indicted for mail fraud and was adamant about representing himself because he believed that the complex nature of the case and his intimate understanding of its nuances made him his own best representative. *Id.* at 270. He also waived his right to a jury trial. *Id.* at 270-71. The judge convicted the defendant after he represented himself for over two weeks. *Id.* at 271. However, the United States Court of Appeals for the Second Circuit reversed and held that a defendant charged with a felony is not competent to waive his right to a jury trial until after conferring with a lawyer. *Id.* at 272.

95. *Id.* at 275, 281.

was the “correlative right” of the right to assistance of counsel.⁹⁶

While the Supreme Court often discussed the right of self-representation in dicta, the Court managed to avoid ruling on whether it was a constitutional right until *Faretta* forced it to consider the issue directly.⁹⁷ *Faretta*, charged with grand theft, requested to represent himself at trial, in part, because he believed that the public defender was overburdened.⁹⁸ The trial court granted *Faretta*’s request but revoked its decision after probing *Faretta*’s knowledge of hearsay and the jury selection process.⁹⁹ The court appointed counsel for *Faretta*, and the jury convicted him.¹⁰⁰ The California Court of Appeal held that *Faretta* had no constitutional right to represent himself, and the California Supreme Court declined review.¹⁰¹

The United States Supreme Court granted certiorari and held that a state may not force a lawyer upon a defendant who insists upon repre-

96. *Id.* at 279. In reversing the lower court, the Supreme Court held that a pro se defendant may request a bench trial as long as the request is made freely and intelligently. *Id.* at 275. Similarly, a defendant may waive his right to counsel as long as the waiver is sufficient. *Id.* at 279. Six years after *Adams*, the Court held that a defendant has no right to represent himself on appeal. *Price v. Johnston*, 334 U.S. 266, 285 (1948). However, the *Price* Court noted that the concept of self-representation at the appellate level was distinctly different from the right to represent oneself at the trial level. *Id.*

97. *See generally* *Faretta v. California*, 422 U.S. 806 (1975). In *Faretta*, the Court noted that the *Adams* Court’s acknowledgment of a right of self-representation was in dictum, and the *Adams* holding only recognized that the Constitution does not require a defendant to have a lawyer. *See id.* at 814-15. The question in *Faretta*, on the other hand, was whether it was constitutional for a state to haul a defendant into court and compel him to accept, against his wishes, the assistance of counsel. *Id.* at 807.

98. *Id.* at 807. *Faretta* had previously represented himself, had graduated from high school, and did not want the public defender’s assistance because he believed that he was overwhelmed with too much work. *Id.* *Faretta*’s concern was likely legitimate. *See* Hashimoto, *supra* note 2, at 464, 469. According to empirical research, a defendant’s concern over the quality of representation provided by an overworked public defender is not only a typical reason for invoking the right of self-representation, but is a concern legitimized by evidence regarding the quality of counsel for indigents. *See id.*

99. *Faretta*, 422 U.S. at 807, 809-10. The court’s colloquy included questions about the number of exceptions to the hearsay rule, the grounds for juror challenges, and the particular Code sections regarding voir dire. *Id.* at 808 n.3. *Faretta* said that case law included several hearsay exceptions, and he listed reasons to challenge a juror for cause. *Id.* In addition, he described his understanding of peremptory challenges. *Id.* *Faretta* told the court that he had been studying *Witkins Jurisprudence*, but he did not know which Code section dealt with voir dire. *Id.* After this colloquy, the court determined that *Faretta* had not intelligently and knowingly foregone his right to counsel, and the Constitution did not protect a right of self-representation. *Id.* at 809-10.

100. *Id.* at 811. *Faretta* unsuccessfully requested recognition as co-counsel during his trial, and the trial court rejected the motions he personally submitted. *Id.* at 810-11. Moreover, the court did not allow him to conduct any portion of his own defense. *Id.* at 811. Some courts might have allowed *Faretta* to play a more expansive role in the trial. *See* Joshua L. Howard, *Hybrid Representation and Standby Counsel: Let’s Clear the Air for the Attorneys of South Carolina*, 52 S.C. L. REV. 851, 857 (2001). For example, some courts recognize and use hybrid representation, which enables a defendant to control and present his defense but retain the relationship with his attorney in case he needs help during the trial. *Id.* Under this framework, both the attorney and the defendant represent the defendant. *Id.* The court, however, ultimately decides whether to allow hybrid representation. *Id.*

101. *Faretta*, 422 U.S. at 811-12. The California Court of Appeal based its decision on *People v. Sharp*, a recent opinion by the California Supreme Court. *Id.* at 812. In *Sharp*, the California Supreme Court rejected one of its prior decisions interpreting its state constitution and held that neither the federal constitution nor the state constitution provide a criminal defendant the right to represent himself at his trial. *See* *People v. Sharp*, 499 P.2d 489, 496 (Cal. 1972).

senting himself.¹⁰² This holding was based on the Sixth Amendment's text, structure, and background.¹⁰³ Because the Amendment guarantees rights "personally" to the defendant—not to the defense counsel—the Court concluded that the text of the Amendment implies a right of self-representation.¹⁰⁴ The Court also noted that its interpretation of the Sixth Amendment was justified by the long-standing tradition of self-representation that was present in English and Colonial American history.¹⁰⁵ Furthermore, the Court concluded that while representing oneself often proves perilous, knowledge or skill are irrelevant to the ability to *choose* self-representation, and courts must protect the defendant's freedom to make that choice.¹⁰⁶ Because Faretta voluntarily waived his right to counsel, the Court held that by requiring counsel to be appointed, the trial court unconstitutionally robbed him of his Sixth Amendment right.¹⁰⁷

3. Limitations on the Self-Representation Right

Although *Faretta* broadly protected a defendant's right to represent himself, the Court has recognized problems with the right and has

102. *Faretta*, 422 U.S. at 807.

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

104. *Faretta*, 422 U.S. at 819-20. The Court noted that when a defendant consents to representation, he acquiesces to the lawyer's presentation of the defense and to his authority to make binding tactical decisions. *Id.* at 820. The defendant's relinquishment of power is justified by his consent to representation. *Id.* at 820-21. According to the Court, the representation put forth by an attorney that is forced upon an unwilling defendant is therefore a "tenuous and unacceptable legal fiction." *Id.* at 821. If the defendant does not agree to be represented, then the defense delivered by counsel is not what is provided for in the Sixth Amendment because it is not actually his defense. *Id.* *But see Faretta*, 422 U.S. at 837-38 (Burger, J., dissenting). In his dissent, Justice Burger argued that the *Faretta* majority was wrong to conclude from the fact that the Sixth Amendment rights are personal to the defendant that a defendant has a right to waive counsel if he wishes. *Id.* at 838. Justice Burger noted that the Sixth Amendment rights are personal to the defendant only because the defendant is the one being tried. *Id.* at 837. Moreover, he asserted that precedent had always considered the right to counsel as an implicit and essential part of the package that comprises a defense as a whole. *Id.* at 838.

105. *See supra* Part III.B.1. (discussing self-representation in English and early American jurisprudence).

106. *See Faretta*, 422 U.S. at 833-36. The Court also noted that its prior decisions on the right to assistance of counsel were premised on the notion that counsel's assistance is "essential" to a fair trial. *Id.* at 832-33. According to the Court, it is undeniable that a defense is better with the help of counsel. *Id.* at 834. This proposition seems obvious, but evidence indicates that pro se defendants may not be as bad off as conventional wisdom suggests. Hashimoto, *supra* note 2, at 447. According to one study's evidence taken over the years 1998-2003, approximately fifty percent of pro se defendants in state courts were not convicted of anything. *Id.* at 447-48. A little over half of the pro se defendants who were found guilty were convicted of felonies. *Id.* at 448. On the other hand, approximately three-quarters of represented defendants in state courts were convicted of some charge either at trial or through guilty pleas. *Id.* Of the represented defendants who were convicted, approximately eighty-five percent were convicted of felonies. *Id.*

107. *Faretta*, 422 U.S. at 835. According to the Court's findings, Faretta's request to represent himself was unequivocal, and he had competently and voluntarily exercised his free will. *Id.* In addition, the trial court advised Faretta that he was making a mistake and that he would have to comply with the relevant rules. *Id.* at 835-36. As such, the Court found that Faretta understood what he was doing, made his decision with open eyes, and therefore adequately waived his right to counsel. *Id.* at 835-36; *see Adams v. United States*, 317 U.S. 269, 279 (1942) (explaining that the record should show that the defendant's "choice is made with eyes open").

held that it is not unconditional.¹⁰⁸ Some ordinary problems plague the pro se trial. For example, self-representation often results in decreased trial efficiency, and judges frequently encounter difficulty remaining impartial.¹⁰⁹ In addition, pro se defendants often have trouble filing the requisite forms and meeting court deadlines.¹¹⁰ Other problems have resulted in a more pressing need for limitations on the right of self-representation. For example, some pro se defendants may use the right of self-representation to disrupt the trial proceeding.¹¹¹ Even the *Faretta* Court recognized this problem and thus limited the right by holding that a defendant whose misconduct threatens the order of the court proceeding may lose his right to represent himself.¹¹²

More problematic perhaps, is the fact that pro se defendants lack expertise in the substantive law and generally have no experience in courtroom procedure or knowledge of evidentiary rules.¹¹³ Nonetheless, a pro se defendant must adhere to the governing rules of procedure and substantive law.¹¹⁴ Thus, the right is limited to those defendants who are able to follow the rules of the court.¹¹⁵ Other limitations further outline the boundaries of the right. Under certain circumstances, a court has the constitutional authority to appoint standby counsel to represent a pro se defendant, despite his wishes to the contrary.¹¹⁶ The Court has also held that *Faretta* did not give a criminal defendant the

108. *Indiana v. Edwards*, 128 S. Ct. 2379, 2384 (2008) (noting that the self-representation right is not absolute).

109. See Nina Ingwer VanWormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 984, 993-96 (2007).

110. *Id.* at 993.

111. *Faretta*, 422 U.S. at 834 n.46.

112. See *id.* (citing *Illinois v. Allen*, 397 U.S. 337, 343 (1970)). The defendant in *Allen* demanded to represent himself, and the trial court reluctantly acquiesced but had court-appointed counsel stand by for assistance. *Allen*, 397 U.S. at 339. After the defendant disrespected the trial judge during voir dire, the judge requested that the court-appointed counsel take over the defense. *Id.* at 339-40. Just before destroying his attorney's file folder and emptying its contents on the courtroom floor, the defendant told the judge, "When I go out for lunchtime, you're [the judge] going to be a corpse here." *Id.* at 340. The defendant's disruptive behavior continued until the judge ordered his removal from the courtroom (although he was later allowed to return under the condition that he behave himself). *Id.* at 341. The *Allen* Court held that a defendant may lose his right to be present during the trial if he so disrupts the proceeding that it cannot be carried on in his presence. *Id.* at 343.

113. See Howard, *supra* note 100, at 855. State Amici described the mentally infirm pro se defendant's lack of trial expertise as a lack of ability to appreciate the decorum and procedures of a courtroom. See Brief of Ohio et al. as Amici Curiae in Support of Petitioner at 13, *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208).

114. *Faretta*, 422 U.S. at 834 n.46.

115. See *id.*

116. *McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984). In *McKaskle*, the pro se defendant initially challenged the court's decision to have counsel stand by during his trial. *Id.* at 171. However, during various points of the trial, the defendant conferred with standby counsel and even agreed to have counsel conduct voir dire and make an opening statement. *Id.* at 172. After he was convicted, the defendant filed for habeas corpus relief, arguing that standby counsel had unduly intervened in his defense. *Id.* at 173. While the Court held that the defendant's Sixth Amendment right was not violated by standby counsel's presence at or participation in the trial, the Court noted that there are limits to standby counsel's unrequested assistance. *Id.* at 177. The defendant has the right to maintain actual authority over the presentation of his case to the jury. *Id.* at 178. In addition, the Court stated that standby counsel's assistance should not eviscerate the jury's perception that the defendant is representing himself. *Id.*

right to represent himself on appeal, and thus the right of self-representation is confined to the trial court level.¹¹⁷

C. Mental Competency Standards

Not only has the Court articulated certain limits to the self-representation right, but it has delineated a relationship between a defendant's mental competency and both his ability to stand trial and his right to waive counsel. In the 1960 case *Dusky v. United States*,¹¹⁸ the Court announced the test for determining whether a defendant was competent to stand trial: (1) "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding"; and (2) "whether he has a rational as well as factual understanding of the proceedings against him."¹¹⁹ Fifteen years later, in *Drope v. Missouri*,¹²⁰ the Court repeated the *Dusky* standard and added that a court may not subject a defendant to trial if he is unable to "consult with counsel, and to assist in preparing his defense."¹²¹ In *Godinez v. Moran*,¹²² the Court considered the *Dusky* standard in the context of self-representation.¹²³ In that case, Moran sought to discharge his defense counsel and plead guilty to murder.¹²⁴ After conviction, Moran claimed that he had not been competent to represent himself, and the United States Court of Appeals for the Ninth Circuit reversed, holding that the standard to waive counsel or plead guilty was higher than the *Dusky* standard required for a defendant to stand trial.¹²⁵

117. *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 154 (2000).

118. 362 U.S. 402 (1960).

119. *Id.* at 402. In putting forth the test for competency to stand trial, the *Dusky* Court rejected the lower court's competency test, which was to determine whether the defendant understood time and place and could remember particular events. *Id.* A trial court deprives a defendant of his right to a fair trial if it does not take sufficient measures to ensure that he is not tried while incompetent. *See Pate v. Robinson*, 383 U.S. 375, 385 (1966). The notion that a court may not try an incompetent defendant is not new. *See Drope v. Missouri*, 420 U.S. 162, 171 (1975). Blackstone stated that if a defendant became crazy after perpetrating the crime, he would not be able to competently plead and therefore should not be arraigned. *Id.* In addition, according to Blackstone, if the defendant became crazy after pleading, he should not be subjected to a trial because he would not be able to put forth a defense. *Id.*

120. 420 U.S. 162 (1975).

121. *Id.* at 171.

122. 509 U.S. 387 (1993).

123. *Indiana v. Edwards*, 128 S. Ct. 2379, 2384 (2008) (noting that *Godinez* involved mental competency and the self-representation right).

124. *Godinez*, 509 U.S. at 392. Moran was charged with shooting a bartender, a bar patron, and his ex-wife. *Id.* at 391. After shooting his ex-wife five times, he shot himself in the stomach and tried to slit his wrists. *Id.* He confessed eleven days later while still hospitalized. *Id.* At the request of the court, two psychiatrists examined Moran after he later pled not guilty to murder. *Id.* Both psychiatrists found him competent to stand trial. *Id.* Thereafter, Moran said that he wanted to represent himself and change his plea to guilty to prevent the presentation of exculpatory evidence at his sentencing. *Id.* at 392. After the trial court apprised Moran of his rights, advised him of the drawbacks of self-representation, and probed his knowledge regarding the proceedings and his individual rights, the court found that he knowingly and intelligently waived his right to counsel. *Id.* at 392-93. The court also found that he voluntarily pled guilty because he had not been coerced, and he was aware of the consequences of his pleas and the rights he was relinquishing. *Id.* at 392-93.

125. *See id.* at 393-94. The trial court had sentenced the defendant to death, but the Nevada Su-

The United States Supreme Court rejected the Ninth Circuit's approach, which had imposed a higher standard based on the belief that a pro se defendant needed better judgment and reason than his represented counterparts.¹²⁶ Dismissing this approach, the United States Supreme Court stated that the competence at issue was the competence to waive the right to counsel, not the competence for self-representation.¹²⁷ In other words, a defendant who waives the right to counsel need not be more competent than a defendant who does not waive this right.¹²⁸ Although a defendant who relinquishes his right to counsel must do so intelligently and competently, the Court held that relinquishing this right does not necessitate a standard higher than the *Dusky* standard, defining the competence required to stand trial.¹²⁹

IV. COURT'S DECISION

Dusky resurfaced in *Indiana v. Edwards* as Justice Breyer, writing for seven Justices, surveyed precedent and concluded that the question before the Court had not been previously answered.¹³⁰ The question before the Court was whether the Constitution permitted a court to deny a defendant's self-representation right if the court found him competent to stand trial but incompetent to present his own defense.¹³¹ With only two Justices dissenting, the Court held that the Constitution allows a

preme Court later reversed that sentence for one of the murders and remanded for a sentence of life without parole. *Id.* at 393. After conviction, Moran filed a petition for post-conviction relief and later filed a habeas petition, which the District Court denied. *Id.* In reversing the District Court, the Ninth Circuit held that the standard for waiving the right to counsel or pleading guilty was whether the defendant had "the capacity for 'reasoned choice' among the alternatives available to him." *Id.* at 394.

126. *Id.* at 399. The Court addressed Moran's waiver of counsel separate from his guilty plea. *Id.* at 398-400. Considering the latter, the Court reasoned that the choice to plead guilty was no more complex than any other choice a defendant might have to make during trial. *Id.* at 398-99. As such, the Court concluded that the *Dusky* standard was sufficient for both defendants who plead not guilty and those who plead guilty. *Id.* at 399.

127. *Id.* at 399. The Court invoked *Faretta* for this proposition, noting that the defendant's knowledge or capability to conduct his own defense has no bearing on his competence to waive his right to counsel. *Id.* at 399-400.

128. *Id.* at 399.

129. *Id.* at 402. In *Westbrook v. Arizona*, 384 U.S. 150 (1966), a two-paragraph per curiam opinion, the Court distinguished the competence required to stand trial from the competence required to waive the right to counsel. *Godinez*, 509 U.S. at 397, 401-02. The *Westbrook* Court remanded the case for a determination of whether the defendant had been competent to waive his right to counsel. *Westbrook*, 384 U.S. at 150. According to the *Godinez* Court, *Westbrook's* discussion of the competence to waive the right to counsel meant that the waiver must be intelligent and competent. *Godinez*, 509 U.S. at 401-02. In other words, the Court never endorsed a heightened standard. *See id.* *Westbrook*, therefore, required only that a defendant's waiver of counsel be sufficient before the trial court accepted it. *Id.* As such, the Court concluded that the Ninth Circuit incorrectly reasoned that *Westbrook* implied that *Dusky* was not a high enough standard for a defendant to waive his right to counsel. *Id.* at 397, 402. Despite *Godinez's* seemingly clear holding, the opinion ended ambiguously by suggesting that states were allowed to employ standards more complex than *Dusky*. *See id.* at 402.

130. *Indiana v. Edwards*, 128 S. Ct. 2379, 2383 (2008). While *Dusky* and *Drope* framed the mental competence requirement to stand trial, neither case considered the requirement's relationship to a defendant's request to represent himself. *Id.*

131. *Id.* at 2381.

court to require representation in such a case.¹³²

Justice Breyer, writing for the majority, reasoned that the Court's precedent favored limiting the self-representation right when a defendant lacked sufficient capacity to conduct his own trial.¹³³ The Court reached this conclusion after deciding that *Dusky* and *Drope* assumed a defendant would have a lawyer, and therefore, those cases did not extend to situations in which the defendant sought to proceed pro se.¹³⁴ The Court noted that the *Faretta* decision was based in part on state laws that limited the right of self-representation if the defendant did not meet certain standards of competence.¹³⁵ Justice Breyer next contemplated the specific nature of mental illness, noting that because mental illness was so variable, the Court was unwilling to adopt a single standard for both standing trial and representing oneself.¹³⁶ Thus, he concluded that a defendant may be sufficiently competent to consult with counsel and yet lack the necessary competence to conduct his own defense without counsel.¹³⁷

In articulating the reasons for the Court's holding, Justice Breyer expressed concern over the policy problems that Edwards' situation presented.¹³⁸ Allowing a defendant like Edwards to represent himself

132. *Id.*

133. *Id.* at 2386. Initially, Justice Breyer noted that the competency-to-stand-trial line of cases provided insufficient guidance, as did *Faretta*, which the Court found unhelpful because *Faretta* had been a competent defendant. *Id.* at 2383, 2384. Likewise, the Court noted that *Godinez* was of little precedential value to the Court because that case involved a defendant who sought only to plead guilty and not to represent himself at trial. *Id.* at 2385. Justice Breyer also pointed out that *Godinez* did not contradict *Massey v. Moore*, which held that a defendant may have the sanity necessary to stand trial, but insufficient capacity to stand trial without counsel. *Id.* (citing *Godinez*, which noted that the *Massey* question, whether a defendant had the competency to represent himself at trial, was different than the question before it in *Godinez*). Furthermore, he clarified that the holding in *Godinez* was that a state may allow a defendant with dubious mental competency to represent himself. *Id.* Accordingly, he concluded that *Godinez* did not consider whether a state may refuse to allow that same defendant to represent himself. *Id.*

134. *Id.* at 2386. This contention is arguable. In the *Godinez* concurring opinion, Justice Kennedy remarked that the critical language of the *Dusky* formulation was not the part about consulting with counsel, but the part that required the defendant to have "a reasonable degree of rational understanding." *Godinez v. Moran*, 509 U.S. 389, 403-04 (1993) (Kennedy, J., concurring). According to Justice Kennedy, the capacity to consult with a lawyer was merely a substitute for a certain level of capacity. *See id.* at 404. As such, the potential that a defendant would actually interact with a lawyer was not necessary for the *Dusky* standard to fulfill its objective. *Id.* Justice Kennedy therefore asserted that if a defendant opted to go to trial and "take the foolish course" of representing himself, then the law did not as a result of that choice, demand a higher level of competence than the *Dusky* standard. *Id.*

135. *Edwards*, 128 S. Ct. at 2386. For this assertion, Justice Breyer referenced cases cited by *Faretta* that limited the self-representation right. *Id.* (citing *Capetta v. State*, 204 So. 2d 913, 918 (Fla. Dist. Ct. App. 1967) (noting that a defendant has a right to represent himself as long as he is not mentally deranged); *Allen v. Commonwealth*, 87 N.E.2d 192, 195 (Mass. 1949)).

136. *See id.* at 2386. Justice Breyer stated that the record in Edwards' case demonstrated that a defendant may meet the *Dusky* standard to stand trial but may not be able to present his own defense without assistance. *Id.*

137. *Id.* In support of this conclusion, Justice Breyer cited the American Psychiatric Association's amicus brief, which stated that a mentally ill defendant is plagued by problems, such as unorganized reasoning, that hinder his ability to conduct his own defense even if he otherwise is able to stand trial with counsel. *Id.* at 2387. The Court surmised that the materials that Edwards prepared in his case conveyed to a layperson the reasonableness of the Court's conclusion. *Id.*

138. *See id.* at 2387-88. For one thing, in the Court's perspective, ensuring the right of self-

would likely result in humiliation and quite possibly imperil the defendant's chance of receiving a fair trial.¹³⁹ Moreover, in order to ensure public confidence in the criminal justice system, a trial must *look* fair to outside observers.¹⁴⁰ Because a trial court is well-suited to consider a defendant's individual situation, the Court decided that a judge is constitutionally permitted to decide whether a defendant who is competent to stand trial is also competent to represent himself.¹⁴¹ The *Edwards* decision ended with the Court's rejection of Indiana's proposed competency standard requiring that a defendant be able to "communicate coherently with the court or a jury."¹⁴² Not knowing the practical application of the proposed standard, the Court was not moved to adopt it.¹⁴³

Justice Scalia, with whom Justice Thomas joined, dissented on the basis that a defendant who is competent to stand trial and who knowingly and voluntarily waives his right to counsel, has a constitutional right to represent himself.¹⁴⁴ Justice Scalia emphasized how the *Faretta* decision reflected a sweeping sentiment that forcing counsel on a defendant contradicted his basic right of self-representation.¹⁴⁵ He also pointed out that the Star Chamber was the only tribunal in English history that used mandatory counsel.¹⁴⁶ The United States Constitution, on the other hand, requires that a defendant be allowed to contest the state's case using the defense that *she* believes is best.¹⁴⁷ In recognizing that a defendant is permitted to plead guilty, Justice Scalia noted that

representation for a defendant whose mental capacity impedes his ability to present a defense would not affirm his dignity. *Id.* at 2387.

139. *Id.*

140. *Id.*

141. *Id.* at 2387-88.

142. *Id.* at 2388. Justice Scalia was particularly unimpressed by the proposed standard. See Transcript of Oral Argument, *supra* note 35, at 7. During oral argument, he generated laughter when he rebuffed the State's proposal by stating that he believed "that the lawyers cannot communicate coherently." *Id.* He also thought that the test was very vague. See *id.* Justice Ginsburg, on the other hand, seemed to be concerned that the test might preclude self-representation for individuals with speech impediments or other communication impairments. See *id.* at 8. Indiana's attorney seemed to think that the coherent-communication test would not keep such defendants from representing themselves, because those situations would require a subsequent level of analysis to determine if the defendant could be accommodated. *Id.* The Court also rejected Indiana's request to overrule *Faretta*. *Edwards*, 128 S. Ct. at 2388. The Court noted that *Faretta* may have resulted in unfair trials, but empirical study indicated that unfair trials were infrequent. *Id.* Even if *Faretta* may have resulted in unfair trials, the Court concluded that its holding in *Edwards* might counteract the *Faretta* problems. *Id.*

143. *Id.*

144. *Id.* at 2394 (Scalia, J., dissenting). The dissent began by chronicling the events involving Edwards' mental illness, his requests to represent himself, and the trials. *Id.* at 2389-90. While the majority relied upon Edwards' unintelligible writings, Justice Scalia noted that Edwards also presented several intelligible pleadings and courtroom arguments. *Id.* at 2389.

145. *Id.* at 2390 ("The right reflects '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 defend himself if he truly wants to do so.'). Justice Scalia explained that the self-representation right could be premised on the Sixth Amendment or the Due Process Clause. *Id.* Regardless of its source, he concluded that the constitutional right of self-representation prohibited a state from requiring a defendant to be represented unwillingly. *Id.* at 2390-91.

146. *Id.* at 2390.

147. *Id.*

the Constitution does not require a defendant to contest the state's case at all.¹⁴⁸

Turning to *Godínez*, Justice Scalia asserted that the Court had refused to create a heightened standard for waiving the right to counsel.¹⁴⁹ According to Justice Scalia, the Court's rejection of a heightened standard was founded on *Faretta's* recognition that the Constitution ensured a defendant the right to represent himself, even to his disadvantage.¹⁵⁰ Even though *Edwards* presented a question not addressed in *Godínez*, Justice Scalia nonetheless concluded that the Constitution did not enable a state to deny rights based on its own perception of fairness.¹⁵¹ Furthermore, he rejected the characterization of the purpose underlying the right of self-representation.¹⁵² While the majority was concerned that a pro se defendant's dignity might be undermined by his humiliating defense, Justice Scalia was concerned that the dignity of free choice be upheld.¹⁵³ He criticized the majority for the importance it placed on maintaining the facade of a fair trial.¹⁵⁴

In conclusion, Justice Scalia surmised that the majority's decision resulted from its skepticism of the constitutional basis for the right of self-representation.¹⁵⁵ He acknowledged that the Sixth Amendment made no mention of self-representation, but reiterated that the Amendment provided the defendant—and only the defendant—with the rights it enumerated.¹⁵⁶ In addition, Justice Scalia noted that a lawyer has nearly plenary control over the presentation of a defense, and a defendant must accept his lawyer's strategic decisions.¹⁵⁷ Because of the

148. *Id.* at 2391 (“[A]fter all, [the Constitution] permits a defendant to eliminate *all* adversarial testing by pleading guilty.” (emphasis in original)).

149. *Id.* In support of this statement, Justice Scalia cited Justice Kennedy's concurrence in *Godínez*, noting that there was never a common law rule providing that a defendant could be competent to stand trial but not competent to waive certain rights. *Id.*

150. *Id.*

151. *Id.* at 2391-92 (citing *United States v. Gonzalez-Lopez* for the proposition that while the rights protected by the Sixth Amendment exist to protect the fairness of a trial, the rights cannot be neglected so long as the fairness of the trial in its entirety is ensured). While Justice Scalia admitted that a state may terminate the right of self-representation when a defendant is disruptive or disrespectful, he found that this circumstance did not apply to *Edwards*, who had not even been allowed to represent himself. *Id.* at 2392.

152. *Id.* at 2392-93.

153. *Id.* at 2393. Justice Scalia cited *Faretta*, which clarified that the Sixth Amendment protected the defendant's freedom to make his own choice to forego the right to counsel. *Id.* He also noted that the Court had previously decided that the right of self-representation served a defendant's dignity and autonomy. *Id.* Additionally, prior Court opinions explained that everyone has a “right to his say in court,” and that even standby counsel may not be allowed to interfere with a pro se defendant's management over his own case. *Id.*

154. *See id.* Justice Scalia wrote that even if he adopted the majority's position, he would not deny the right in order to uphold the appearance of a fair trial when the defendant knowingly and voluntarily waived counsel. *Id.* For Justice Scalia, it was both actually and apparently unfair for the trial judge to say that he acknowledged *Edwards'* request to represent himself, but having denied that request, would require counsel to speak on *Edwards'* behalf for the remainder of the proceedings. *Id.*

155. *Id.*

156. *Id.* at 2393-94.

157. *Id.* at 2394 (noting that the American legal system gives an attorney great authority to con-

attorney's unmatched control, a defendant must consent to the representation in order for the defense really to be his own.¹⁵⁸ Justice Scalia also admonished the majority for its differential treatment of mentally ill defendants.¹⁵⁹ He ended his dissent by criticizing the vagueness of the Court's holding and suggested that it would give trial courts the power to deny the self-representation right so as to avoid the potential annoyance of dealing with a pro se defendant.¹⁶⁰

V. COMMENTARY

The dissent had valid reason to criticize the *Edwards* decision. To begin with, the decision is inconsistent with the values and rationale underlying its precedent.¹⁶¹ Although precedent provides for limitations on self-representation, the core of *Faretta* and *Godinez* was the protection of defendant autonomy.¹⁶² Consistent with this value, the Supreme Court sought to protect the right to choose self-representation for defendants who were found competent to stand trial—regardless of their ability to present a courtroom defense.¹⁶³ In making ability constitutionally relevant, *Edwards* strays from its precedent and marks a fundamental change in self-representation jurisprudence.

The inarticulate holding of *Edwards* also has the potential to provide trial courts with too much discretion in applying the decision.¹⁶⁴ Pro se trials create myriad problems—ranging from procedural inefficiencies to difficulty maintaining judicial impartiality—for trial courts.¹⁶⁵ Mentally ill pro se defendants merely magnify these problems.¹⁶⁶ Regardless of why the *Edwards* Court did not define a competency standard for self-representation, the holding's lack of clarity has the potential to give lower courts the authority to more readily deny the right.¹⁶⁷

Edwards delineates a jurisprudential shift from a preference for defined limitations on self-representation to a more paternalistic approach

control the presentation of the defense, and this authority is required for the adversarial system to function properly). A defendant must live with the results of his lawyer's choice not to cross-examine a witness, not to call particular witnesses, or not to reveal a witness's identity prior to trial. *Id.*

158. *Id.*

159. *Id.* Justice Scalia noted that the majority's differential treatment of the mentally ill conflicted with the societal goal to "mainstream" such individuals. *Id.* He also suggested that such treatment was based on paternalism. *See id.* ("[T]he Court permits [the mentally ill] to be deprived of a basic constitutional right—for their own good.")

160. *Id.*

161. *See infra* Part V.A.1-2.

162. *See* Brian R. Boch, *Fourteenth Amendment—The Standard of Mental Competency to Waive Constitutional Rights Versus the Competency Standard to Stand Trial*, 84 CRIM. L. & CRIMINOLOGY 883, 910-11 (1993) (discussing how *Godinez* was consistent with *Faretta*'s emphasis on a defendant's autonomy in trial proceedings).

163. *See* Brief for Respondent, *supra* note 13, at 20.

164. *See infra* Part V.B.

165. *See supra* note 109 and accompanying text (discussing problems that arise in pro se trials).

166. *See* Brief for APA, *supra* note 8, at 26.

167. *Indiana v. Edwards*, 128 S. Ct. 2379, 2394 (2008) (Scalia, J., dissenting).

which condones preemptive denial of the self-representation right.¹⁶⁸ This shift raises questions about the scope of the right of self-representation and the standard of review that appellate courts will use when a defendant claims he has been improperly denied the right. Regardless of the merit a preemptive denial of the *Faretta* right of self-representation may have, *Edwards* significantly reduces defendant autonomy.

A. Inconsistencies Abound: Edwards Departs From Self-Representation Precedent

In concluding that precedent allows a state to deny the *Faretta* right based on mental competency, the *Edwards* Court turned a blind eye to its inconsistency with *Faretta* and *Godinez*.¹⁶⁹ Although strict stare decisis does not apply to Supreme Court jurisprudence, a centuries-long historical understanding of the concept of self-representation supported and contributed to the strength of the *Faretta* and *Godinez* decisions.¹⁷⁰ *Edwards* demarcates a sharp shift in the Court's understanding of the right, and the Court's unsatisfactory explanation of its justification for the shift contributes to the overall weakness of the *Edwards* decision. In only two paragraphs, the Court explained how precedent supported its holding, while dismissing *Faretta* and *Godinez* as inapplicable to the problem before it.¹⁷¹ Admittedly, neither *Faretta* nor *Godinez* involved a defendant with limited mental capacity who insisted on representing himself at trial.¹⁷² Nonetheless, *Edwards* is not easily reconciled with the values and rationale undergirding these cases.

1. *Faretta*

Edwards is at odds with the heart of *Faretta*.¹⁷³ The *Edwards* Court was correct that *Faretta* did not specifically answer the question

168. See *id.* at 2387-88 (majority opinion).

169. See *id.* at 2386. The Court framed the question presented as whether a state may *limit* the right of self-representation by requiring counsel. *Id.* at 2385-86. While the Court's precedent certainly indicates that the right is not absolute, allowing courts to apply limitations is something entirely different than allowing courts to deny the right to certain defendants outright. See Brief for Respondent, *supra* note 13, at 29; *supra* Part III.B.3.

170. See *Faretta v. California*, 422 U.S. 806, 821-32 (1975) (discussing the American colonial and early English understanding of the right of self-representation).

171. *Edwards*, 128 S. Ct. at 2386. The Court reasoned that its cases regarding the competency standard hinged upon a defendant's capacity to interact with his lawyer, and therefore the application of the standards they espoused presumed representation. See *id.* However, Justice Kennedy's concurrence in *Godinez* asserted that the crucial part of the *Dusky* standard was the language requiring a defendant to have a requisite level of understanding, not the language about a defendant's interaction with counsel. *Supra* note 134.

172. See *Faretta*, 422 U.S. at 835; *Godinez*, 509 U.S. at 392 (noting that Moran pled guilty).

173. See Brief for Respondent, *supra* note 13, at 20 (arguing that giving states the authority to deny the right of self-representation based on ability conflicts with the reasoning and text of *Faretta*).

presented in *Edwards* because Faretta was literate and competent.¹⁷⁴ However, the *Edwards* opinion makes factors constitutionally relevant which the *Faretta* Court had explicitly refused to consider: a defendant's skill, experience, or knowledge.¹⁷⁵ The crux of *Edwards* focuses on what a defendant is or is not able to do *competently* in the courtroom.¹⁷⁶ Literacy and competency will now likely be specific factors used to determine whether a defendant may proceed pro se, and indeed, a trial court may deny a defendant his right of self-representation if it predicts that he will not be *able* to put forth a competent defense.¹⁷⁷ The *Edwards* decision now allows a trial court to cherry-pick the defendants it deems fit for self-representation, and selectively deny the *Faretta* right based on its own perception of fairness.¹⁷⁸

Moreover, *Faretta* did not circumscribe the right's application to a particular class. Thus, limiting the right before trial based on a prediction of how poorly the defendant *might* represent himself is at odds with the values underlying *Faretta*.¹⁷⁹ The Sixth Amendment right of self-representation was granted to the *defendant*, not to a particular group of defendants that the Court deems fit to exercise the right.¹⁸⁰ While the *Faretta* Court specifically acknowledged that the ignorant and illiterate

174. *Faretta*, 422 U.S. at 835. Faretta was "literate, competent, and understanding." *Id.* As Edwards' appellate attorneys argued, this description of Faretta, when read in context, does not provide for limiting the right of self-representation based on competence. See Brief for Respondent, *supra* note 13, at 22-23. In the *Faretta* decision, the Court acknowledged that the right of self-representation encompassed both intelligent and unintelligent defendants. See *id.* Furthermore, the Court discussed Faretta's literacy and competency in assessing whether he had made a knowing and intelligent waiver. See *id.* at 23.

175. See *Faretta*, 422 U.S. at 835-36. The *Faretta* Court might have misinterpreted the history of self-representation. See Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae at 7, *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208) [hereinafter Brief of NACDL]. According to the National Association of Criminal Defense Lawyers (NACDL), at common law, a defendant's ability to conduct his *own* defense played a large role in a court's determination of whether he would be tried. See *id.* Unlike the *Dusky* standard, the common law competency standard allowed a court to try a defendant only if he had the ability to put forth a rational defense. See *id.*

176. See *Edwards*, 128 S. Ct. at 2386 (noting that the Court's conclusion was partially based on the understanding that some defendants might not be *able* to engage in certain activities necessary to present their defense).

177. See *id.* at 2387-88. This conclusion would not likely conflict with *Faretta* if the *Edwards* Court had opted to redefine the standard to stand trial. See Brief of NACDL, *supra* note 175, at 7. For example, the Court could have adopted a new standard more reflective of the one used at common law. See *id.* The NACDL argued that *Dusky's* presumption of the presence of counsel had been corroded by *Faretta's* grant of the right to waive counsel. See *id.* at 14. As such, the NACDL proposed that the Court adopt a standard to stand trial requiring that a defendant be able to present a rational defense. See *id.* at 15-17. If the *Edwards* Court had changed the standard to stand trial, it would have changed the entire competency framework. See *id.* Therefore, the *Edwards* decision would not have conflicted with *Faretta* because the interpretation of *Faretta* would necessarily have been changed by the adoption of a new standard to stand trial. See *id.*

178. See *Edwards*, 128 S. Ct. at 2387-88 (majority opinion), 2391-92 (Scalia, J., dissenting).

179. See *id.* The Sixth Amendment right to defend is granted to the "accused,"—i.e., all criminal defendants. Brief for Respondent, *supra* note 13, at 20. But see Brief of NACDL, *supra* note 175, at 7 (discussing the *Faretta* Court's possible misinterpretation of the history of the right of self-representation). The underlying value of *Faretta* has been understood as defendant autonomy. See *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984).

180. See *Faretta*, 422 U.S. at 819; see also Brief for Respondent, *supra* note 13, at 20 (arguing that the right was not merely granted to a "subset" of individuals).

are even more in need of lawyers than the intelligent, it did not cabin its holding to “men of intelligence.”¹⁸¹ In *Faretta*, the Court understood that in cases in which a defendant does not willingly accept counsel’s representation, “the potential advantage of a lawyer’s training and experience [could] be realized, if at all, only imperfectly.”¹⁸² Thus, for defendants both with and without full mental capacity, having counsel forced upon them puts them at an equal disadvantage. Finally, the lack of concrete historical examples, other than the Star Chamber, of courts forcing counsel upon a defendant suggests both that the right of self-representation has been widely respected and that there exists “a nearly universal conviction” that forcing counsel upon a defendant violates her basic human rights.¹⁸³

The *Faretta* Court was also more concerned with protecting a defendant’s autonomy than it was with ensuring that he did not disadvantage himself or interfere with the decorum of the courtroom proceeding.¹⁸⁴ After all, *Faretta* explicitly stated that a court must honor a defendant’s right to represent himself, even to his own detriment.¹⁸⁵ Yet, in *Edwards*, the Court cited the humiliating “spectacle” a pro se defendant may make of his trial as a reason for denying the self-representation right.¹⁸⁶ Furthermore, the *Edwards* Court was concerned

181. See *Faretta*, 422 U.S. at 833 n.43 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)); Brief for Respondent, *supra* note 13, at 21. Because the Court did not explicitly limit its holding, it is not clear which defendants will be restricted from exercising their right of self-representation based on *Edwards*. See *Edwards*, 128 S. Ct. at 2394 (Scalia, J., dissenting). Even if the holding is limited to the mentally ill, the various gradations of illness falling under the large umbrella of mental illness make it difficult to determine which defendants *Edwards* encompasses. Interview with Professor Mark Kaufman, *supra* note 30. For example, a person with Obsessive Compulsive Disorder (OCD) has a mental illness and might manifest symptoms that raise red flags for a trial court. *Id.* Yet, a person with OCD would very likely be able to represent himself. *Id.*

182. *Faretta*, 422 U.S. at 834.

183. See *Edwards*, 128 S. Ct. at 2390 (Scalia, J., dissenting); Brief for Respondent, *supra* note 13, at 21. The Star Chamber was the only tribunal that forced counsel upon an unwilling defendant. *Faretta*, 422 U.S. at 821.

184. See *Faretta*, 422 U.S. at 834. The *Faretta* Court did not deny that a defendant is generally better off represented by counsel. See *id.* The Court cited Justice Sutherland’s *Powell* opinion stating that a lawyer may even be necessary to ensure constitutional due process. *Id.* at 833 n.43. Nonetheless, these considerations were of less importance to the Court than protecting the defendant’s ability to choose to represent himself. See *id.* at 834.

185. *Id.* at 834; see also 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, 498 (1996) (noting that *Faretta* protected the right to “bury oneself”). Decker was noting this aspect of *Faretta* to support his argument that the practical effect of *Faretta* had made a mess of the criminal justice system and its ability to ensure just trials. See *id.* Nonetheless, his argument illustrates how broadly the scope of the *Faretta* right has been interpreted. See *id.* Interestingly, State Amici argued the opposite and concluded that the right of self-representation is narrow. Brief of Ohio, *supra* note 113, at 5-6.

186. See *Edwards*, 128 S. Ct. at 2387. “Spectacle” might have been an inappropriate word choice, as the Court was likely referring not only to its concern for upholding the decorum of the proceedings but also to upholding the public’s interest in the reliability of the criminal justice system. See Bonnie, *supra* note 22, at 551-52. Commentators have noted that a defendant’s competence is related to the concepts of dignity, reliability, and autonomy. See *id.* at 551-54; Brief for APA, *supra* note 8, at 15. A farcical trial might undermine society’s interest in accurate trial outcomes that are reliable. See Brief for APA, *supra* note 8, at 14. Obviously, the concepts of dignity, reliability, and autonomy might collide in the context of self-representation. See Bonnie, *supra* note 22, at 552.

that a mentally infirm pro se defendant's self-representation might result in a wrongly decided conviction or a trial that did not appear fair to the public.¹⁸⁷ Although this is a serious concern, using it to justify denying pro se requests marks a sharp divergence from *Faretta*, which acknowledged the potential perils of self-representation and yet upheld defendants' freedom of choice in spite of such perils.¹⁸⁸

2. Godinez

The *Edwards* holding is even more at odds with the logic of *Godinez* than with the logic of *Faretta*.¹⁸⁹ To be sure, *Godinez* did not answer the question presented in *Edwards*.¹⁹⁰ The holding in *Godinez* was that a state *may* allow a defendant with questionable mental capacity to represent himself.¹⁹¹ The question presented in *Edwards* was whether a state *must* allow a defendant with questionable mental capacity to represent himself.¹⁹² Despite the nuanced differences between the two opinions, *Edwards* is not in accord with the reasoning of *Godinez* and may effectively overrule it.¹⁹³

Although *Edwards* limited the application of *Godinez* to situations in which a defendant waives counsel and pleads guilty, the *Godinez* Court did not differentiate between pleading guilty and proceeding to trial.¹⁹⁴ The *Godinez* Court implicitly extended its holding to defen-

187. See *Edwards*, 128 S. Ct. at 2387. Justice Scalia pointed out that the fairness argument cuts both ways: "How fair does a trial seem to the public where the defendant stands up and says, . . . I do not want this attorney. I want to defend myself. And the judge [says], sit down, we have a psychological evaluation of you. You can't represent yourself." See Transcript of Oral Argument, *supra* note 35, at 57.

188. See *Faretta*, 422 U.S. at 834. The *Faretta* Court discussed how severely limited a defendant without an attorney is at mounting his defense and noted that it is beyond doubt that a defendant puts forth a better defense when represented by an attorney. See *id.* Nonetheless, the *Faretta* Court concluded that such considerations must yield to the defendant's choice to represent himself. *Id.* But see Brief for APA, *supra* note 8, at 9-10 (arguing that *Faretta* is superseded by the public's interest in reliable trials).

189. See Brief for Respondent, *supra* note 13, at 28 (arguing that the rationale underlying *Godinez* conflicts with granting states the authority to consider a defendant's capabilities in denying him the right of self-representation).

190. See *Edwards*, 128 S. Ct. at 2385.

191. See *Godinez v. Moran*, 509 U.S. 389, 391 (1993) (holding that pleading guilty or waiving the right to counsel does not *require* a higher standard of competence than that for standing trial).

192. See *Edwards*, 128 S. Ct. at 2381 (stating that the Court must answer the question of whether a state is constitutionally *forbidden* from requiring a defendant to be represented by counsel).

193. See Brief for Respondent, *supra* note 13, at 28.

194. *Edwards*, 128 S. Ct. at 2385; Brief for Respondent, *supra* note 13, at 27; *Godinez*, 509 U.S. at 398-400. One arguable limitation of *Godinez* is that it applied only to federal courts. See *Godinez*, 509 U.S. at 402. The opinion also ended with the statement that "[s]tates are free to adopt competency standards that are more elaborate than the *Dusky* formulation." *Id.* This statement is ambiguous. See Karl Evan Strauss, *Between the Defendant's Scylla and Charybdis*: Brooks v. McCaughtry and the Right to a Fair Trial and the Right to Self-Representation, 37 U. TOL. L. REV. 235, 255-56 (2005). For example, some state courts have interpreted it to mean that they may use a standard to waive counsel that is different from and higher than *Dusky*. See *id.* The other interpretation is that a state court that opts to use a higher standard must also raise its standard for competency to stand trial. See *id.* The *Edwards* Court referenced this statement as providing a plausible argument that *Godinez* gave a state the power to deny the self-representation right to a defendant with questionable mental capacity. *Edwards*, 128 S. Ct. at 2385. However, as *Edwards*' appellate attorneys argued, this

dants who waive counsel and represent themselves at trial.¹⁹⁵ Justice Thomas, the author of the decision, treated the competence to plead guilty and the competence to waive the right to counsel as two separate matters, thereby acknowledging that not all defendants affected by *Godínez*—who choose to waive their right to counsel—would plead guilty.¹⁹⁶ Furthermore, the *Godínez* Court rejected the argument that a pro se defendant must have a greater ability to understand, discern, and analyze than his represented counterparts.¹⁹⁷ The Court rebuffed this contention, not because it limited its decision to defendants who plead guilty, but because “the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.”¹⁹⁸

Justice Thomas’ use of *Faretta* to support the assertion that a waiver of counsel merely requires the competence to waive the right suggests that the *Godínez* decision extended to pro se defendants who go to trial.¹⁹⁹ For example, he cited *Faretta* for the proposition that a defendant’s command of legal rules or ability to conduct a defense are irrelevant to a determination of whether she can waive the right to counsel.²⁰⁰ In addition, he quoted *Faretta*’s acknowledgment that a defendant “may conduct his defense to his own detriment,” but that his

interpretation is contrary to the rationale of *Godínez*, which rejected a heightened standard for waiving counsel. See Brief for Respondent, *supra* note 13, at 28. Accordingly, it seems more likely that the ambiguous *Godínez* statement referred to a state’s ability to change the competency standard for standing trial (thereby changing the standard for waiving the right to counsel).

195. See Brief for Respondent, *supra* note 13, at 27. But see Brief for APA, *supra* note 8, at 15 (asserting that *Godínez* considered waiving the right to counsel as something different than “entitlement” under the separate constitutional right of self-representation).

196. See *Godínez*, 509 U.S. at 395-96. The *Godínez* Court used the disjunctive “or” to refer to its consideration of pleading guilty and of waiving the right to counsel. *Id.* (noting that the question presented was whether the competency standard to plead guilty *or* waive the right to assistance of counsel was higher than that for standing trial).

197. *Id.* at 399. Justice Thomas also noted that historically, a defendant’s competence to stand trial had been the equivalent of his competence to represent himself. See *id.* at 400 n.11. When the *Dusky* standard was established, defendants accused of serious crimes generally represented themselves. Brief for Respondent, *supra* note 13, at 25. As such, the *Godínez* Court concluded that a standard created to assess whether a defendant could represent himself—i.e., *Dusky*—was surely adequate when he actually made the choice to represent himself. See *Godínez*, 509 U.S. at 400 n.11 (quoting *People v. Reason*, 334 N.E.2d 572, 574 (N.Y. 1975)).

198. *Godínez*, 509 U.S. at 399. In *Faretta*, the Court had noted that the right of self-representation does not come into existence automatically from a defendant’s waiver of the right to counsel. See *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975). However, the *Faretta* Court’s concern with keeping the two rights separate arose from its perceived need to find an independent Sixth Amendment foundation for the right of self-representation. See *id.* When a defendant waives his right to counsel, he implicitly invokes his right to represent himself. See *Godínez*, 509 U.S. at 416 (Blackmun, J., dissenting).

199. See *Godínez*, 509 U.S. at 399 (majority opinion). Even State Amicus, Ohio, has previously acknowledged that *Godínez* encompasses defendants who waive their right to counsel and proceed to represent themselves at trial. Brief for Appellee at 18, *State v. Jordan*, 804 N.E.2d 1 (Ohio 2004) (No. 00-1833). The defendant in *State v. Jordan* represented himself at trial. *Id.* at 7.

200. See *Godínez*, 509 U.S. at 400; see also Brief for United States as Amicus Curiae at 16, *Godínez v. Moran*, 509 U.S. 389 (1993) (No. 92-725) (interpreting *Faretta* as rejecting the concept that the sufficiency of a defendant’s waiver of counsel is conditioned on a court’s determination of his ability to present his own defense).

choice to do so must be respected.²⁰¹ Justice Thomas' citation to *Faretta* language involving self-representation *at trial* contradicts the *Edwards* Court's effort to confine *Godinez* to situations in which a pro se defendant pleads guilty.²⁰²

From a practical standpoint, the Court's decision to use *Dusky*—the competency standard for standing trial—for defendants who plead guilty but not for defendants who actually go to trial is a poorly reasoned choice.²⁰³ The Constitution allows a defendant to plead guilty and completely forego challenging the state's case.²⁰⁴ At times, it may be in the defendant's best interest to plead guilty and accept the prosecutor's plea bargain. Nonetheless, when a defendant pleads guilty, she gives up more constitutional rights than the defendant who waives her right to counsel and represents herself at trial.²⁰⁵ For instance, the defendant who pleads guilty waives her right to a trial by jury, to confront her accusers, to present her own witnesses, to remain silent, and to be convicted only after proof of guilt beyond all reasonable doubt has been established.²⁰⁶ A defendant who exercises the right of self-representation, on the other hand, waives only the right to assistance of counsel.²⁰⁷

No matter how incompetently a pro se defendant may represent himself, he puts forth more of a challenge to the state than the defendant who pleads guilty.²⁰⁸ However, the *Edwards* Court was comfort-

201. *Godinez*, 509 U.S. at 400. In citing this language in the section of *Godinez* analyzing the waiver of counsel only, Justice Thomas must have contemplated the situation in which a defendant waives counsel and conducts his own defense at trial. *See id.*

202. *See* *Indiana v. Edwards*, 128 S. Ct. 2379, 2385 (2008). The *Godinez* Court's analysis of *Westbrook* additionally suggests that it at least contemplated the situation in which a waiver of the right to counsel resulted in a defendant conducting his own defense at trial. *See Godinez*, 509 U.S. at 401-02. In the *Godinez* opinion, the Court rejected the Ninth Circuit's contention that *Westbrook* implicitly required a standard higher than *Dusky* for determining whether a defendant is competent to waive his right to counsel. *See id.* at 396, 401-02. According to the *Godinez* Court, the difference in competence required to stand trial and waive the right to counsel referenced in *Westbrook* meant only that the defendant who waives his right to counsel must do so intelligently and competently. *Id.* at 401. The defendant in *Westbrook*, however, did not plead guilty, thus representing himself at trial. *See Westbrook v. Arizona*, 384 U.S. 150, 150 (1966). This is further evidence that the *Godinez* Court was aware that its single competency standard applied to both the defendant who pleads guilty and the defendant who pleads not guilty and conducts his own defense at trial. *See Godinez*, 509 U.S. at 401. Because the *Godinez* Court at least considered this situation, the *Edwards* Court was incorrect to state that the standard at issue in *Godinez* was critically distinct from the standard at issue in *Edwards*. *See Edwards*, 128 S. Ct. at 2385.

203. *See Edwards*, 128 S. Ct. at 2386 (noting that the Court was concerned about the use of a single standard for standing trial and representing oneself).

204. *Id.* at 2391 (Scalia, J., dissenting).

205. *See Santobello v. New York*, 404 U.S. 257, 264 (1971).

206. *Id.*

207. *See Godinez*, 509 U.S. at 416 (Blackmun, J., dissenting).

208. *See* Brief for APA, *supra* note 8, at 16 (noting that a defendant who pleads guilty does not contest the state's charges at all). Indeed defendants who plead guilty might be the most in need of counsel's assistance. Posting of Michael M. O'Hear to Marquette University Law School Faculty Blog, <http://law.marquette.edu/facultyblog/2008/09/07/edwards-and-erosion-of-the-defendants-right-to-self-represent/> (Sept. 7, 2008). One law school professor has remarked that during a trial, a judge at least has the opportunity to prevent a grossly unjust result. *See id.* However, a judge overseeing a case in which the defendant pleads guilty has little opportunity to hear a state's evidence against the

able concluding that *Dusky* was sufficient for a pro se defendant who pleads guilty, but not for a pro se defendant who “knowingly and voluntarily” chooses to represent himself.²⁰⁹ This reasoning collapses on itself, and it raises the question of whether the Court was motivated by fair trial concerns or only by maintaining courtroom decorum—after all, if a defendant pleads guilty, a court does not have to deal with the spectacle she may make of the trial.²¹⁰

Even if *Godinez* did not reach the issue presented in *Edwards*, the practical consequence of a defendant’s choice to waive his right to counsel—the choice discussed in *Godinez*—is that he will have to represent himself in some capacity.²¹¹ As already discussed, under *Godinez* the standard for pleading guilty or for waiving the right to counsel is no higher than the standard for standing trial.²¹² Because not all defendants who waive the right to counsel ultimately plead guilty, the *Godinez* Court must have acknowledged that its decision would apply to defendants who represent themselves at trial.²¹³ In fact, all federal courts of appeals interpreted *Godinez* as applying to defendants who conducted their own defense at trial.²¹⁴ In other words, the practical application of *Godinez* resulted in the use of the *Dusky* standard for pro se defendants who go to trial.²¹⁵

The *Edwards* majority, on the other hand, was skeptical of using *Dusky* to determine whether a defendant may represent himself.²¹⁶ If at least a few defendants who waive their right to counsel ultimately proceed to trial, then *Godinez* really stood for the proposition that the competency standard for self-representation, just like that for waiving

defendant. *Id.* The judge in a guilty plea case therefore has much less reason to inquire into the defendant’s choice to plead guilty no matter how irrational that choice might be. *Id.*

209. See *Edwards*, 128 S. Ct. at 2385, 2386 (majority opinion), 2391 (Scalia, J., dissenting). The Court was clear to emphasize that the *Dusky* standard was used in *Godinez* because the defendant pled guilty and did not opt to defend himself at trial. See *id.* at 2385.

210. See Posting of Scott Henson to Grits for Breakfast, <http://gritsforbreakfast.blogspot.com/2008/06/scotus-worried-about-wrong-spectacle.html> (June 27, 2008, 07:17 CST). One commentator who closely follows the criminal justice system and Supreme Court decisions noted that *Edwards* was “an activist decision by judges for judges to make their jobs and lives easier.” *Id.* Justice Scalia cynically concluded his dissent by noting that the Court’s opinion may provide trial judges with the latitude to forego the potentially arduous process of working with a pro se defendant and trying to translate and understand the defense of an inarticulate layperson. See *Edwards*, 128 S. Ct. at 2394 (Scalia, J., dissenting).

211. See *Godinez*, 509 U.S. at 416 (Blackmun, J., dissenting).

212. See *id.* at 391 (majority opinion).

213. See *id.* at 416 (Blackmun, J., dissenting). Justice Blackmun noted that even after waiving the right to assistance of counsel and pleading guilty, Moran still had to represent himself during the penalty proceedings. *Id.*

214. Brief for Respondent, *supra* note 13, at 27 (citing decisions from every federal court of appeals); see, e.g., *United States v. Bush*, 404 F.3d 263, 271 (4th Cir. 2005); *Dunn v. Johnson*, 162 F.3d 302, 307-08 (5th Cir. 1998); *United States v. Schmidt*, 105 F.3d 82, 88 (2d Cir. 1997).

215. See Brief for Respondent, *supra* note 13, at 27. Even the State of Ohio conceded in its amicus curiae brief that a defendant cannot represent himself without having waived his right to counsel. See Brief for Appellee at 18, *State v. Jordan*, 804 N.E.2d 1 (Ohio 2004) (No. 00-1833).

216. *Indiana v. Edwards*, 128 S. Ct. 2379, 2386 (2008).

the right to counsel, is no higher than the *Dusky* standard.²¹⁷ Under the single-standard approach of *Godinez*, Edwards would likely have been able to represent himself because he satisfied the *Dusky* standard and his waiver of counsel was effective.²¹⁸ Therefore, the *Edwards* Court's disapproval of the single-standard approach implicitly rejected the logic and practical effect of *Godinez*, and in so doing, may have effectively overruled it—*sub silentio* of course.

B. Defending Decorum: Edwards May Unduly Broaden Trial Court Discretion

For good reason, trial courts do not welcome pro se requests.²¹⁹ Picture yourself as the judge in the trial for Scott Panetti or Colin Ferguson.²²⁰ In a Ferguson-type hypothetical, the defendant might argue with you over the nutritional value of a bologna sandwich and request to subpoena President Clinton who had publicly commented on the murders the defendant allegedly committed.²²¹ You have yet to get to the merits of the case. Despite the compelling eyewitness evidence corroborating the state's case, you might be forced to listen to the defendant argue that the ninety-three counts against him are the result of the year being 1993, and his arrest was motivated by a government conspiracy.²²² As the judge presiding over a trial with this type of defendant, would you welcome his request to represent himself?

Aside from this extreme example, a pro se defendant's lack of experience in courtroom procedure or knowledge of evidentiary rules poses a more ordinary problem for a trial judge.²²³ Because violations of procedure or rules of evidence should not occur even though a pro se defendant fails to object, the trial court is responsible for preventing the prosecutor from taking advantage of the pro se defendant's inexperience.²²⁴ Even though there is no explicit duty to help a pro se defendant

217. See *Godinez*, 509 U.S. at 416 (Blackmun, J., dissenting).

218. See *Edwards v. State*, 854 N.E.2d 42, 48 (Ind. Ct. App. 2006).

219. See *Decker*, *supra* note 185, at 485 (noting that pro se trials “make a mockery of justice and disrupt courtroom procedure”). The Director of the University of Maryland's Center on Health and Homeland Security noted that basically every pro se defendant makes shambles of his defense. See Matt Stearns, *Moussaoui Tactics Put Terror Trial in Doubt: Muddled Defense Leaves Case in Chaos*, KAN. CITY STAR, June 9, 2003, at A1.

220. See *supra* Part I. (discussing Panetti and Ferguson's trials).

221. See Blum, *supra* note 6. Moussaoui's trial makes Ferguson's look like a cakewalk for the court. See *supra* notes 4, 5 and accompanying text. If you were the judge presiding over Moussaoui's trial, you would receive pleadings in which he accuses you of trying to kill him. See Stearns, *supra* note 219, at A1. You would also be given nasty monikers and be forced to sift through voluminous court filings from the pro se defendant. See *id.* Moussaoui called the judge, Leonie Brinkema, “Lie-onie,” and frequently filed vitriolic hand-scrawled motions such as one in which he wrote, “Lie-onie is a vicious girl under seal, but in open court she play [sic] the afraid nanny.” *Id.*

222. See Blum, *supra* note 6.

223. See Howard, *supra* note 100, at 855.

224. See *Decker*, *supra* note 185, at 553 (citing *People v. Hudson*, 408 N.E.2d 325 (Ill. App. Ct. 1980), for the proposition that a trial court may be responsible for preventing the prosecution from abusing its power). In *Hudson*, the trial court admitted into evidence prior consistent statements that

present his defense, the court has a custodial duty to prevent violations of the relevant rules.²²⁵ Therefore, the court in a pro se case is required to assume a much more active role than in a case with attorneys representing both sides.²²⁶

The increased judicial responsibility required for pro se trials and the general assumption that self-representation undercuts the right to a fair trial are strong incentives for trial courts to deny the *Faretta* right.²²⁷ The *Edwards* decision might provide the authority to increase such denials.²²⁸ Although the Court rejected Indiana's proposed competency standard, it did not circumscribe trial court discretion by articulating a standard of its own.²²⁹ In addition, it is unclear to what extent the *Edwards* decision might apply to defendants who are not mentally ill. On the one hand, the facts of *Edwards* clearly involved a defendant who suffered from schizophrenia and manifested obvious signs of mental illness.²³⁰ On the other hand, it is arguable that the Court did not constrain its holding to defendants who are mentally ill, but rather held that a court may deny the *Faretta* right to defendants who merely lack the "mental capacities" necessary to conduct a defense at trial.²³¹

If the Court's holding is not limited to the mentally ill, then trial courts may use the *Edwards* decision to deny the right of self-

were unsworn and given to the police. *Hudson*, 408 N.E.2d at 329. The statements implicated the defendant. *See id.* at 328-29. The defendant appealed, and the State agreed that the evidence was improperly offered, but argued that the defendant had waived the error by failing to object to the admission of the evidence at trial. *Id.* at 328. The appellate court found that the prosecution likely knew that offering the statements was wrongful and bridged on prosecutorial misbehavior and abuse of authority. *Id.* at 329. The statements' admission was reversible error. *Id.*

225. Howard, *supra* note 100, at 856. In addition, the State of Ohio in its amici curiae brief noted that a court must uphold its decorum and ensure that the proceedings are conducted fairly. Brief of Ohio, *supra* note 113, at 11. As such, the State argued that a judge has the responsibility of ensuring that a defendant's trial, in its entirety, is fair. *Id.*

226. *See* Brief of Ohio, *supra* note 113, at 19 (noting that a judge may need to become actively involved in a pro se trial in order to maintain efficiency and order); Howard, *supra* note 100, at 856.

227. *See* Howard, *supra* note 100, at 856; Hashimoto, *supra* note 2, at 435. Although there is a sense that the *Faretta* right of self-representation results in an unfair trial, some people within the legal community believe that forcing counsel on an unwilling defendant results in an unfair trial. *See, e.g.*, Posting of Daniel Thomas to SCOTUS Blog, <http://www.scotusblog.com/wp/analysis-competency-and-the-criminal-trial/> (Mar. 27, 2008, 13:24 EST). Consider the following argument posted on a legal blog. The United States government has the authority to arrest, prosecute, and adjudicate. *Id.* "The only right . . . is the right to defend yourself." *Id.* Eradicating the right of self-representation results in a farcical criminal justice system because the government manages everything from the beginning to the end. *Id.* Therefore, the definition of an unfair trial is one in which the government controls the entire process. *Id.*

228. *See* *Indiana v. Edwards*, 128 S. Ct. 2379, 2394 (2008) (Scalia, J., dissenting).

229. *See id.* Commentators have criticized the Court in *Faretta* for failing to offer trial courts guidance in how to apply the *Faretta* right. *See* Decker, *supra* note 185, at 488. Some commentators have argued that the broadness of the *Faretta* decision led to a multitude of inconsistent trial court decisions that attempted to define the boundaries of the right. *See id.* An inconsistent application of the self-representation right is contrary to the Sixth Amendment's purpose. *See id.* at 488-89. Similarly, the *Edwards* Court's failure to delineate a clear framework under which trial courts may use competence to deny a defendant's self-representation right will likely result in myriad inconsistent trial court decisions, the consequence of which is contrary to the intention underlying the Sixth Amendment.

230. *Edwards*, 128 S. Ct. at 2382-83 (majority opinion).

231. *See id.* at 2387-88.

representation to defendants who simply lack intelligence, have poor reasoning skills, or are unable to communicate effectively.²³² Regardless of the Court's reason for not providing a clear standard, the application of the imprecise holding in *Edwards* may give courts too much latitude in denying pro se requests.²³³ Consequently, courts that simply do not want to deal with pro se problems may deny defendants the right to represent themselves under the pretense of finding that their mental capacity was insufficient for self-representation.²³⁴

C. Courtroom Rules, Standby Counsel, and a Loss of Defendant Autonomy

The *Edwards* decision deviates from prior Supreme Court jurisprudence that sought to preserve defendant autonomy by focusing on mechanisms courts could use to weigh trial fairness, efficiency, and decorum against concern for the defendant's rights.²³⁵ In *Faretta*, the Court acknowledged that a pro se defendant does not have the right to disobey procedural rules or substantive law.²³⁶ *Faretta* and its progeny did not mitigate trial courts' inherent authority to revoke a defendant's right if necessary to maintain the decorum of the courtroom and prevent the humiliating spectacle with which the *Edwards* majority was so concerned.²³⁷ Moreover, a court did not have to lose control of the trial before revoking a defendant's right of self-representation.²³⁸ If a pro se defendant made an argument that was irrelevant or argumentative, his behavior could be properly countered by the state's objection and the trial court's ruling to sustain the objection.²³⁹

232. See *id.*

233. See *id.* at 2394 (Scalia, J., dissenting). The nuances of mental illness and the desire to defer to trial court experimentation might have led to the Court's apprehension in defining a standard. See *id.*; Transcript of Oral Argument, *supra* note 35, at 39.

234. See *Edwards*, 128 S. Ct. at 2394 (Scalia, J., dissenting). One commentator illustrated the hypothetical extreme of this potential problem: "What is to stop the government from declaring a person who is sane insane, appointing him a corrupt defense attorney, and then sending him off to death row[?]" Thomas, *supra* note 227.

235. See, e.g., *McKaskle v. Wiggins*, 465 U.S. 168, 177-84 (1984) (discussing the permissible role standby counsel may play in a pro se defendant's trial).

236. See *Faretta v. California*, 422 U.S. 806, 834, n.46 (1975).

237. See *id.*; see also *McKaskle*, 465 U.S. at 176-77; Transcript of Oral Argument, *supra* note 35, at 22. During oral argument, Indiana's Solicitor General argued that the trial court should not have to wait for the trial to turn farcical if it has indication prior to trial that a farce might result from the defendant's self-representation. Transcript of Oral Argument, *supra* note 35, at 4-5. The State was also concerned that the defendant's self-representation might negatively affect the jury prior to the court revoking the right. *Id.* at 4. Justice Ginsburg seemed to agree with Indiana's Solicitor General that a jury should not be exposed to a pro se defendant's "gibberish" when the court has concrete knowledge of the defendant's limitations before trial. See *id.* at 17. In addition, Justices Breyer and Souter noted that the damage might already be done before the court is able to revoke a pro se defendant's right based on his inability to comply with the rules. *Id.* at 38, 40.

238. See Transcript of Oral Argument, *supra* note 35, at 36. Although Moussaoui was allowed to represent himself for more than a year and a half, the court eventually appointed counsel because of his incessant violations of court orders. Philip Shenon, *Judge Bars 9/11 Suspect From Being Own Lawyer*, N.Y. TIMES, Nov. 15, 2003, at A8.

239. Transcript of Oral Argument, *supra* note 35, at 36. While some of the Justices seemed to

More importantly, if the defendant continued to violate the rules or engage in other misconduct, a court could appoint counsel.²⁴⁰ In *McKaskle v. Wiggins*,²⁴¹ the Court recognized the authority of a court to appoint standby counsel for a pro se defendant who was unwilling or unable to conduct himself in a manner suitable to his defense.²⁴² However, the *McKaskle* Court noted that even after the appointment of standby counsel, the “pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury.”²⁴³ Thus, even when the Court emphasized the authority of trial courts to protect their interests in fairness, efficiency, and decorum, the Court did so in light of the emphasis *Faretta* placed on defendant autonomy.²⁴⁴

After *Edwards*, it is unclear what standard of review will govern trial court error in appointing standby counsel or denying the *Faretta* right. Under the *McKaskle* framework, appointing standby counsel violated a defendant’s *Faretta* right if the court did not give him “a fair chance to present his case in his own way.”²⁴⁵ That Court noted that an appellate court cannot hold the denial of the right of self-representation to be harmless error.²⁴⁶ Because *Edwards* grants broad authority to trial

believe that the jury might be tainted by the time the defendant’s conduct necessitates the revocation of his self-representation right, the high burden of proof in a criminal proceeding continues to safeguard the fairness of the trial. *See id.* at 48. Regardless of what the pro se defendant does or does not do, the state must still prove its case beyond any reasonable doubt. *Id.*

240. *See Faretta*, 422 U.S. at 834 n.46.

241. 465 U.S. 1668 (1984).

242. *See id.* at 184. While not completely analogous, the power of a court to revoke a defendant’s self-representation right for disorderly conduct is similar to a court’s power to hold an attorney in contempt. An attorney may be punished for, among other things, failing to file court documents on time, persisting in an improper argument, or questioning a witness improperly. *See, e.g., State v. Zoppi*, 178 A.2d 632, 633-34 (N.J. Super. Ct. App. Div. 1962) (noting that an attorney who continues to persist with argument after the judge rules that no further argument will be allowed may be held in contempt of court). The comparison between revoking the self-representation right based on failure to comply with the rules and holding a lawyer in contempt of court is obviously an imperfect analogy. Behavior which permits the court to use its contempt power must usually be egregious, so as to obstruct the administration of justice. *See, e.g., In re McConnell*, 370 U.S. 230, 233-34 (1962). For example, mistakes generally do not constitute contempt. *See, e.g., Cooper v. Superior Court*, 359 P.2d 274, 280 (Cal. 1961) (noting that an attorney cannot be held in contempt for a mistaken act, and that he may properly put forth even an untenable argument if it is made in good faith). Nonetheless, the basic principle—i.e., improper behavior results in the loss of courtroom privileges or rights—is the same in each case. *See, e.g., Williams v. State*, 970 S.W.2d 267, 267 (Ark. 1998) (holding attorney in contempt of court for not filing his client’s brief on time); *Faber v. State*, 152 P.2d 671, 674 (Ariz. 1944) (noting that counsel had a right to ask questions that were legal and proper, but if he continued to ask certain improper questions of the trial court, he would be held in contempt of court).

243. *McKaskle*, 465 U.S. at 177.

244. *Id.* at 176-77 (recognizing that a defendant’s right to represent herself protects her dignity and autonomy).

245. *Id.* at 177.

246. *Id.* at 177 n.8. Because standby counsel’s responsibility is so ambiguous, a court’s decision to appoint standby counsel previously put a potential conviction at risk. *See People v. Williams*, 661 N.E.2d 1186, 1191 (Ill. App. Ct. 1996). Under *McKaskle*, a court that appointed standby counsel gave a convicted defendant the chance to claim on appeal that the counsel intruded upon his right to represent himself. *Id.* On the other hand, trial courts generally did not risk reversal if they opted *not* to appoint standby counsel. *See id.* The court in *Williams* noted that not one trial court decision in its state had ever been reversed for its failure to appoint standby counsel. *Id.* at 1192. The issue seldom even arose on appeal. *See id.* How *Edwards* might change the standard of review for appointing standby counsel remains to be seen.

courts to deny the *Faretta* right based on an ex ante prediction of how the defendant will present her defense, it is now questionable whether a trial court's decision to deny the right based on competency will ever be reversed.²⁴⁷ Aside from being a clear departure from prior decisions indicating a preference for preserving defendant autonomy, *Edwards* could have the effect of making appellate enforcement of the right a fiction. If this is the case, the decision might effectively eviscerate the "right" of self-representation as it has been historically understood in this nation.

Despite the *Edwards* opinion, courts should continue to use their inherent power during trials to protect the fairness and orderliness of the proceedings instead of denying the *Faretta* right before a defendant has the opportunity to exercise it.²⁴⁸ With this approach, revocation of the right occurs—if at all—not because a court speculated that the defendant's incapacity would impair his defense, but because the court held him to the same standard as it holds any lawyer.²⁴⁹ A court retains the same authority as it always held to control the trial proceedings, and if necessary, appoint standby counsel to take over the defense if the defendant's right of self-representation must be terminated.²⁵⁰ The transition of control from the defendant to standby counsel might impede the efficiency of the trial, but this inefficiency is a minor sacrifice to safeguard a defendant's ability to exercise his constitutional rights.²⁵¹ More importantly, by not preemptively denying a mentally ill defendant the opportunity to exercise his rights, this approach respects his autonomy and treats him with the same dignity as any other defendant.²⁵²

VI. CONCLUSION

The right of self-representation is engrained in American legal jurisprudence. Over time, and with good reason, the Supreme Court has articulated limits to the right, thereby defining an outer boundary within which trial courts were to determine whether and to what extent a criminal defendant may represent himself. Regardless of whether one

247. See Transcript of Oral Argument, *supra* note 35, at 14 (discussing the applicable standard of review).

248. *Id.* at 24-25. Justice Scalia questioned the reason for not letting an Edwards-type defendant at least try to conduct his own defense. *Id.*

249. See *Faretta v. California*, 422 U.S. 806, 808 n.2 (1975). For example, in response to Faretta's request to represent himself the trial judge advised him that he would have to comply with the same ground rules with which anyone else coming before the court must comply. *Id.* In addition, the judge told him that the court would respect him, but that he would have to abide by procedures and ask questions properly. *Id.*

250. See *McKaskle*, 465 U.S. at 184.

251. See Transcript of Oral Argument, *supra* note 35, at 36-37. Chief Justice Roberts referred to the appointment of standby counsel as a weighty burden on trial courts. *Id.*

252. See *Indiana v. Edwards*, 128 S. Ct. 2379, 2394 (2008) (Scalia, J., dissenting) (asserting that the Court's decision to limit the constitutional rights of only the mentally ill lacked political correctness).

believes that the status quo under this framework adequately balanced the competing rights to a fair trial and to self-representation, *Indiana v. Edwards* redefined the boundary and disrupted the status quo by giving trial courts new authority to deny the *Faretta* right.²⁵³

More critically, however, *Edwards* has the potential to provide trial courts with too much power. We hold courts in esteem for their role in preserving justice and ensuring fair trials. However, we also expect that courts will uphold the constitutional rights of any individual appearing before them. Mentally ill pro se defendants in purple cowboy suits are likely to raise fair trial concerns when they are allowed to exercise the right of self-representation.²⁵⁴ The holding in *Edwards* lacks just enough clarity to potentially result in widespread denials of the self-representation right. To what extent this holding might be applied to defendants who are not mentally ill remains to be seen. As Justice Scalia surmised, until the Court fleshes out the contours of *Edwards*, the *Faretta* right will remain “a sometime thing” that a court may preemptively deny whenever it speculates the defendant will put forth a poor defense.²⁵⁵

253. *See id.*, 128 S. Ct. at 2387-88.

254. *See supra* note 1 and accompanying text (illustrating the situation in Scott Panetti’s trial).

255. *See Edwards*, 128 S. Ct. at 2394.