

work products is in order, as they may vary widely. For example, in California, discovery proceedings in competency hearings are governed by civil procedure rules. Pretrial competency evaluations are subject to the rules of the Civil Discovery Act, and as such, the Fifth Amendment right against self-incrimination does not apply, nor does the Sixth Amendment right to counsel. However, a judicially declared rule of immunity provides that a defendant will not be convicted of a crime by the use of any information obtained from a court-ordered evaluation. It also allows for any party to obtain discovery related to a mental examination. This decision arose in the context of *Baqleh v. Superior Court*, 122 Cal. Rptr.2d 673 (Cal. Ct. App. 2002). In Massachusetts, the Supreme Judicial Court briefly addressed self-incrimination, as it may arise in the context of a competency examination. In contrast to California, the court referred to the rules of criminal procedure to protect a defendant's statements provided in the context of a competency evaluation (*Seng v. Commonwealth*, 839 N.E.2d 283 (Mass. 2005)). They provide that no statements made by the defendant during an examination can be disclosed to the prosecutor unless ordered by a judge and only after the judge has determined that the report contains no incriminating information.

It is likely that that many other jurisdictions will face a dilemma similar to the one in Tennessee. As a result, mental health practitioners conducting these evaluations should be aware of the impact that this question has on their evaluation and report-writing procedures, particularly with respect to a defendant's Fifth Amendment right against self-incrimination. In particular, because competency reports can be made available to the prosecution, either for the competency hearing or during the criminal phase of the trial, it is important to exclude any incriminating information about the defendant in the report. This exclusion is specifically acknowledged in the American Academy of Psychiatry and Law (AAPL) practice guideline for competence to stand trial evaluations (Mossman D, Noffsinger SG, Ash P, *et al*: AAPL practice guideline for the forensic psychiatric evaluation of competence to stand trial. *J Am Acad Psychiatry Law* 35:S1-72, 2007).

Discovery and the subsequent use of forensic evaluation materials also have implications for evaluators asked to simultaneously conduct evaluations of both competency and criminal responsibility. Because

criminal responsibility evaluations necessarily include incriminating information, it is further recommended by AAPL that such information be provided in a separate report (Mossman *et al.*). Overall, forensic evaluators should be as careful as possible when drafting competency reports for the court with respect to the inclusion of incriminating information, as well as researching jurisdictional standards for the discovery of a competency evaluation work product. Finally, it is noteworthy that in this case the court ruled that the defendant had standing to object to the subpoena, even though he was not the direct recipient of it. In jurisdictions in which no clear guidelines for discovery yet exist, forensic evaluators may want to discuss these matters with the retaining attorney and come to an agreement, should their work products be subpoenaed in the context of a pretrial competency hearing.

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Following Edwards, Godinez Revisited

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Defendant Permitted to Defend Himself After Being Found Competent to Stand Trial and Competent to Waive Right to Counsel

In *United States v. deShazar*, 554 F.3d 1281(10th Cir. 2009), the United States Court of Appeals for the Tenth Circuit examined competence to stand trial, competence to waive the right to counsel, and competence to represent oneself in light of *Godinez v. Moran*, 509 U.S. 389 (1993) and the U.S. Supreme Court's recent holding in *Indiana v. Edwards*, 554 U.S. 164 (2008). In this case, the court of appeals upheld the conviction of a defendant charged with stalking, finding there was no duty to deny him the right to represent himself, especially in light of findings that his comportment was related to a personality disorder and that he had been competent to stand

trial and competent to waive his right to counsel at the time of the criminal proceedings.

Facts of the Case

Timothy deShazar was contacted by the victim in this case in 1998. The two had been childhood friends. They engaged in a relationship during which Mr. deShazar spent a month living in her home in Wyoming. When the victim told Mr. deShazar that the relationship would no longer work, he continued to telephone and e-mail her. She pleaded with him to stop. In December he left a note in her mailbox indicating his plan to return to see her. Ultimately, he was charged in a Wyoming state court with attempted kidnapping, aggravated assault and battery, and aggravated burglary following an incident during which he attempted to break through her door, in January 2000, while carrying various firearms, duct tape, and other items. The victim escaped after a confrontation.

Shortly after the state charges, Mr. deShazar was indicted in federal district court on one count of interstate stalking and one count of using or carrying a firearm during and in relation to a crime of violence. He was found guilty on the state charges. Before sentencing, he received a diagnosis of delusional and depressive disorders in Wyoming State Hospital. The hospital informed the state trial court that his delusional disorder was “well controlled by his current medication,” but that he had been legally incompetent during the trial. Mr. deShazar was taken into federal custody for further evaluation to inform the state sentencing proceedings.

Mr. deShazar was initially evaluated by doctors at Federal Medical Center in Rochester, Minnesota, and a report was submitted to the district court in December 2001. The report said that he did not suffer from a mental disease or defect that rendered him incompetent to stand trial. He returned to state custody for sentencing and was then returned to federal custody in July 2002 to face the federal charges.

In what ensued, Mr. deShazar went through three competency hearings and two *Faretta* hearings (*Faretta v. California*, 422 U.S. 806 (1975)) concerning his request to represent himself. At the first competency hearing in February 2003, the government expert articulated the view that Mr. deShazar had an obsessive compulsive disorder and not a mental illness, and Mr. deShazar was found competent to stand trial.

At a second competency hearing in 2004, the district court expressed concern about the potential that the expert’s 2001 report might be stale and ordered another evaluation. At Mr. deShazar’s third competency hearing, defense requested further competency evaluation. During the time the evaluations were taking place, defense counsel filed a motion to, among other things, dismiss the charges pursuant to *Jackson v. Indiana*, 406 U.S. 715 (1972). The motion to dismiss was denied. During the course of these proceedings, the court twice alluded to its suspicion that Mr. deShazar was “manipulating the system.”

In August 2005, Dr. Cristina Pietz, a federal examiner, opined that Mr. deShazar had no mental illness or defect and that he could work with counsel if he chose to do so. Subsequently, in July 2006, the district court denied another motion for further evaluation. Mr. deShazar around this time filed a motion under *Faretta*, stating his desire to represent himself.

In August 2006, a third competency hearing took place. Dr. Bruce Kahn testified that Mr. deShazar was delusionally obsessed with the victim, believing that she had used him for the purpose of ruining his life, which left him with the intent to avenge himself by making the “truth” about her known, and that the truth could only be told through her testimony in court that he was a nice person and that she used him and tried to hurt him. This mindset appeared to be the motivation behind Mr. deShazar’s request to represent himself, as he felt he could effectively cross-examine the victim. Dr. Pietz testified, in contrast, that Mr. deShazar was not delusional, that his views about the victim were related to an obsessive-compulsive personality disorder rather than mental illness, and that he could assist in his defense. The district court found Mr. deShazar competent to stand trial, crediting her testimony.

Two *Faretta* hearings took place in September 2006 following the finding that Mr. deShazar was competent to stand trial. During these proceedings, the court urged Mr. deShazar to proceed with counsel and questioned the wisdom of his trial strategy. The court also warned him of the risks in his strategy, including that the jury would be likely to become angry and find him guilty. Despite these warnings, Mr. deShazar affirmed his desire to represent himself, and the court granted his motion to proceed *pro se*, determining that he knowingly and voluntarily waived his right to counsel. The case went to trial in

district court in November 2006, and the jury returned guilty verdicts on both counts.

Mr. deShazar appealed and argued that the district court erroneously found him competent to stand trial; he was not competent to waive his right to an attorney and represent himself; and he was denied treatment during the pendency of his case, which he argued was in violation of *Jackson*.

Ruling and Reasoning

The Tenth Circuit affirmed the convictions, rejecting all three assertions made by Mr. deShazar. First, the appeals court found no indication that the determination of competence had been made based on the trial court's view that Mr. deShazar had been manipulating the court system, which was a point Mr. deShazar had raised in his appeal. Although the district court had voiced these suspicions, the record reflected that the findings were based on a determination that Dr. Pietz's testimony had been more persuasive. In his appeal, Mr. deShazar had also argued that Dr. Pietz had erroneously interpreted that a personality disorder is not a mental illness under the competence statute. The appeals court found, however, that the district court had not relied on Dr. Pietz's interpretation of the law and noted that her reference to *Kansas v. Hendricks* (521 U.S. 346 (1997)) was irrelevant to competence to stand trial.

The Tenth Circuit next examined the waiver of the right to counsel from two standpoints: competence to waive counsel and the knowing and voluntary nature of the waiver. The court found Mr. deShazar's waiver of right to counsel knowing and voluntary on the basis that the district court gave repeated warnings and instructions to inform him of the dangers and disadvantages of such a waiver and that there was no assertion that the decision had been made involuntarily.

Regarding whether Mr. deShazar was competent to waive his right to counsel, the Tenth Circuit noted that *Godinez* rejects the notion that competence to waive right to counsel requires a higher standard than competence to stand trial. Mr. deShazar, however, had argued for "a change in the law," citing *Edwards* in his supplemental and appellate briefs, "at least in cases where the only viable defense is an insanity defense, to require that an accused must show something more than bare minimal competency to stand trial to act as his own attorney in such a case" (*deShazar*, p 1287).

In *Edwards*, the Supreme Court reiterated *Godinez*, noting that it is constitutional for a defendant to conduct trial proceedings on his own behalf when he has been found competent to stand trial. The Tenth Circuit found, however, that nothing in *Edwards* suggests that a particular defense strategy is relevant to the competence determinations related to waiving counsel and self-representation. The Tenth Circuit agreed with Mr. deShazar that, following *Edwards*, a state may deny a criminal defendant the right to represent himself when he has a severe mental illness. However, given that he had been found competent to stand trial, the Tenth Circuit refused to read *Edwards* to mean that the district court was duty bound to deny him that right.

Finally, the Tenth Circuit reviewed the holding in *Jackson* that due process prevents the government from indefinitely confining an incompetent defendant without further proceedings directed at treatment or restoring competence. *Jackson* did not mandate a constitutional right to treatment.

Discussion

In this case, the Tenth Circuit made a distinction between different competencies in the light of Supreme Court's holdings in *Godinez* and in *Edwards*. The Tenth Circuit stated that a court, under *Edwards*, may insist on counsel and deny the right of self-representation to defendants found competent to stand trial, when severe mental illness compromises their capacity to conduct the proceedings themselves. However, the Tenth Circuit seemed to focus on what courts are permitted to do and what they are required to do related to denial of the right of self-representation, finding that a court is not duty bound to deny impaired defendants that right. This interpretation of *Edwards* may leave a defendant whose significant mental illness compromises his capacity to proceed *pro se*, still facing trial as a *pro se* defendant.

This case is a reminder of the potential legal and clinical complexity of competence to waive rights and competence of defendants to represent themselves. As *Edwards* is still relatively recent, it is important to follow how it is being interpreted in cases involving defendants whose mental illnesses raise questions about their capacities. In forensic evaluations, providing details related to the defendant's abilities and deficits, including decision-

making abilities, is one way to assist the court in making the ultimate competence determinations.

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Competency to Waive Postconviction Review for a Death Sentence

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A Court Rules a Defendant Competent to Waive Postconviction Review of a Death Sentence Despite Unanimous Expert Opinions of Incompetence

In *Corcoran v. Buss*, 551 F.3d 703 (7th Cir. 2008), the Seventh Circuit Court of Appeals affirmed the U.S. District Court and Indiana Supreme Court decision ruling that a person with a diagnosis of schizophrenia is competent to waive postconviction review of the death sentence despite unanimous expert opinions to the contrary.

Facts of the Case

On July 26, 1997, Joseph Corcoran shot and killed four men, including his brother and his sister's fiancé. During pretrial negotiations, the state made two offers: a guilty plea for life without parole or no death penalty sentence for waiving a jury trial. The defense counsel advised Mr. Corcoran to take an offer, as the evidence against him (including his own video-taped confession) was overwhelming. Two of three court-ordered psychiatrists found Mr. Corcoran competent to stand trial and to aid in his defense. The defense had initially given notice to the court that an insanity defense would be submitted. However, the defense withdrew the insanity defense after the court-appointed psychiatrists opined that he was

competent to proceed. The defense counsel brought in an experienced Indiana public defender to help convince Mr. Corcoran to accept an offer. He rejected the offers, and stated, "I just feel like I should go to trial." A jury found Mr. Corcoran guilty of first-degree murder, and on August 26, 1999, the trial court sentenced him to death.

Mr. Corcoran filed an appeal to challenge his death sentence but waived his right to appeal the conviction. He contended that the state's offer, requiring him to waive a jury trial and accept a bench trial in exchange for no death penalty, was coercive, forcing him to abandon a constitutional right. The Indiana Supreme Court rejected the appeal, observing that the discretionary power allowed prosecutors in crafting plea bargains is wide. However, the court remanded to re-evaluate aggravating factors. The trial court considered Mr. Corcoran's mental illness, but noted that it did not affect his ability to understand the law and control his behavior. The court also re-examined his cooperation with authorities, his lack of criminal history, and his remorse. However, the court reinstated the death penalty and the Indiana Supreme Court reaffirmed on September 5, 2002.

Mr. Corcoran subsequently changed his mind about appealing his death sentence and refused to sign the petition for postconviction relief. His public defender requested a court hearing in October 2003 to determine whether he was competent to waive postconviction review. Three mental health experts were enlisted, and all three found that Mr. Corcoran had paranoid schizophrenia with delusions. The experts unanimously opined that he was unable to make a rational decision concerning the legal proceedings and that his decision was motivated by a wish to die to obtain relief from his delusions. However, at the competency hearing, he testified, "I think I should be executed for what I have done and not because I am supposedly tortured with ultrasound or whatever. I am guilty of murder. I should be executed. That is all there is to it. That is what I believe. I believe the death penalty is a just punishment for four counts of murder" (*Corcoran*, p 717). The postconviction court ruled that he was competent to waive further appeals to his sentence and execution. It took notice that he had a mental illness but relied heavily on his own testimony for its decision.

The Indiana Supreme Court affirmed the court's finding of competency. It considered multiple fac-