

A Pilot Survey of Trial Court Judges' Opinions on *Pro Se* Competence After *Indiana v. Edwards*

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In *Indiana v. Edwards*, the U.S. Supreme Court held that a higher standard may be required for *pro se* competence (PSC) than for competence to stand trial (CST). However, the Court refrained from elaborating a specific standard. The trial judge is in the best position to make more fine-tuned mental capacity decisions. This pilot study surveyed trial judges' opinions about PSC to help forensic evaluators structure their assessments. Eighteen of 400 New York State trial judges surveyed replied. Trial judges regarded disorders of cognitive impairment ($n = 10$) and psychosis ($n = 4$) to be potentially limiting for PSC. Responses relating to which domains should be assessed were heterogeneous, but the most common were intellectual and analytic abilities ($n = 10$), legal knowledge/experience ($n = 9$), and language abilities ($n = 8$). Several judges listed factors that are not traditionally part of CST evaluations, such as having a rational reason for proceeding *pro se* and a willingness to accept the assistance of standby counsel.

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The U.S. Supreme Court's decision in *Indiana v. Edwards*¹ has arguably left trial court judges and forensic evaluators in a position of uncertainty about how a defendant's *pro se* competence (PSC) should be evaluated. In *Edwards*, the U.S. Supreme Court considered the case of a mentally ill defendant who fell into the gray area of satisfying the *Dusky* standard, but who was "unable to carry out the basic tasks needed to present his own defense without the help of counsel" (Ref. 1, pp 175–176). Mr. Edwards attempted to steal a pair of shoes and in the process fired a gun at a security guard and wounded a bystander. He was charged with attempted murder, battery with a deadly weapon, criminal recklessness, and theft. Before Mr. Edwards went to trial on these charges, he was found incompetent to stand trial

twice and made two requests to represent himself. Both requests were denied by the trial judge.

Mr. Edwards was ultimately convicted, at two different trials, on all charges. He then appealed his convictions, arguing that he was deprived of his constitutional right (per the 6th and 14th amendments) to represent himself at trial. The appellate court agreed, and the matter went to the Indiana Supreme Court, which affirmed. The U.S. Supreme Court agreed to consider Mr. Edwards' case because the precise question presented had never been posed to them. The American Psychiatric Association and the American Academy of Psychiatry and the Law (AAPL) jointly filed an *amicus* brief pointing out how disorganized thinking and other symptoms of serious mental illness can impair a defendant's ability to "play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant."²

The Supreme Court reasoned that "the nature of the problem" cautioned against using a single standard for both competence to proceed to trial with representation and competence to represent oneself.

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Even though a defendant may satisfy the *Dusky* competence standard, this standard did not address the ability to represent oneself, which required important tasks such as organizing one's defense, making motions, arguing points of law, participating in *voire dire*, questioning witnesses, and addressing the court and jury. In particular, the majority was concerned that:

[A] right of self-representation at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. . . . Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial [Ref. 1, pp 176–177].

Indeed, *Edwards* appears to exemplify the "tension in mental health law between autonomy . . . and paternalism. . ." (Ref. 3, p 1098).

The Court's holding, by a seven-to-two majority, was that "The Constitution does not forbid States from insisting upon representation by counsel for those competent enough to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." Having established that PSC may require a higher standard, the Court refrained from articulating a test, or even from offering much in the way of guidelines for how a defendant's PSC would be evaluated. Instead, the Court left trial judges with substantial latitude, concluding that they "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant" (Ref. 1, p 177). The majority's reluctance to craft a test for PSC did not escape the criticism of the dissent, which found the holding "extraordinarily vague," and predicted that the Court will have to "give some meaning to this holding in the future. . ." (Ref. 1, p 189).

Many instruments have been developed to assist forensic mental health professionals in their evaluations of CST, such as the McGarry criteria and the MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA).^{4–7} AAPL has published the comprehensive "Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial."⁸ Yet the research on *pro se* capacities is quite limited. Before *Edwards*, what trial courts did when a defendant asked to proceed *pro se* appeared to "vary between and even within jurisdictions" (Ref. 8, p S18). After *Edwards*, it may be argued that this

continues to be the case, and it is "unclear what standard would differentiate a defendant who is merely competent to stand trial from one who is competent both to stand trial and to represent himself" (Ref. 9, p 555).

Further, the abilities about which the trial judges will be making fine-tuned decisions may involve a defendant's knowledge and decision-making capacity on such matters as jury selection, conducting cross-examination, and raising appropriate objections. Thus, the defendant's *pro se* competence may "hinge on legal abilities or points of law outside the scope of experience" of most forensic evaluators (Ref. 9, p 556). Therefore, this study sought to obtain a preliminary survey of trial judge's opinions about PSC so that forensic evaluators may begin to approach and structure their analyses in a way that will be most helpful to the courts.

Methods

A voluntary and anonymous survey was granted an exemption from review by the SUNY Upstate Medical University Institutional Review Board. The survey was mailed to 400 judges listed in the New York State Office of Court Administration as presiding over a trial court. Excluded from the survey were those judges listed in any appellate division, court of claims, civil court, family court, surrogate court, or those listed as administrative judges.

The anonymous survey contained the following questions:

What type of court do you primarily preside over?

Each year, approximately how many evaluations of competence to stand trial do you order?

Do you agree with the U.S. Supreme Court's decision in *Indiana v. Edwards*, that the standard for competence to represent oneself should be higher than the standard for competence to stand trial?

In your opinion, what impairments might distinguish a mentally ill defendant who is competent to stand trial from one who is not competent to represent himself?

What questions would you ask of a mentally ill defendant to determine whether he is competent to represent himself?

In your opinion, what mental deficits or impairments would clearly exclude a defendant from proceeding *pro se*?

How can forensic psychiatrists best assist the court in determining a defendant's *pro se* competence?

Results

A total of 18 responses were received from the 400 surveys mailed. The judges who did respond were very articulate and provided helpful, detailed discussion on the questions. In five cases, the respondents provided several extra pages of typed discussion. One judge referred to New York's *Bench Book for Trial Judges*, and another supplied a copy of the section on pretrial proceedings (Criminal Law) in the 2006 publication of this text.¹⁰

Of the 18 respondents, 9 were from supreme courts, 5 were from city courts, and 4 were from county courts. Of all respondents, the city court judges ordered an average of 10.3 CST evaluations compared with 2.4 and 1.9 by supreme and county court judges, respectively. The average number of CST evaluations ordered by all judges over the past year was 4.5 (range, 0–30). The majority of the responding judges ($n = 16$) indicated that they agreed with the ruling of the Supreme Court in *Indiana v. Edwards*. Only one judge disagreed, and one chose to abstain.

The last 4 items in the list contained free text response fields. Responses were placed into the following categories: mental illness, legal knowledge and experience, analytical and intellectual ability, language ability, courtroom behavior, and other.

The judges were asked to differentiate CST and PSC and to generate a list of questions that they might ask a *pro se* defendant. Ten judges listed intellectual ability as an important domain. Of the specific intellectual abilities mentioned, the most common, level of education, was reported by four judges. Eight respondents indicated language ability, and four listed courtroom behavior in their responses. Nine judges reported legal knowledge and experience as relevant for determination of PSC. In this domain, five judges reported knowledge of judicial procedure, evidentiary rules, and relevant case law. Three judges wrote that understanding the roles of court personnel was important, and two judges wrote that understanding court proceedings was relevant. Four judges

wrote that the rationale for pursuing a *pro se* defense was important. Two judges reported that prior experience in representing oneself, even in a traffic matter, may be relevant. Finally, one judge reported that he would ask a defendant if he would accept standby counsel. It is noteworthy that 12 distinct responses from six judges mentioned specific McGarry criteria.

In the penultimate question, the judges were asked which specific mental impairments would preclude PSC. Ten reported a variety of cognitive impairments, including dementia, memory deficits, and low IQ. Four judges reported psychotic symptoms or schizophrenia, one reported bipolar illness, and two reported depression and anxiety. One specifically mentioned panic disorder. Other responses included prior hospitalizations, disruptive behavior, impairment due to psychotropic medication, and an inability to communicate.

In the final question, the judges were asked to opine how forensic psychiatrists might assist the court in PSC determinations. Six judges mentioned components of a thorough mental health evaluation, including mental status examination, review of history, collateral information, and record review. Three judges proposed the use of psychological testing (for example, IQ testing). Two judges suggested testing the defendant's legal knowledge, and one suggested simply performing a thorough CST evaluation. Finally, two judges proposed that a novel assessment instrument be developed to assess PSC.

Discussion

This pilot study was limited by a very low response rate and, consequently, a small sample size. This limitation precludes drawing definitive conclusions. However, the results are useful for generating hypotheses that could be applied to future research. There are several possible explanations for the poor response. Requests for a *pro se* defense appear to be rare in the daily practice of trial court judges.¹¹ Another interesting possibility to consider is judicial bias against permitting a *pro se* defense. One judge wrote that he would ask a potential *pro se* defendant "a host of questions to guarantee [that] the defendant realizes the complexity of the legal process, and how unprepared they are to appreciate and knowingly waive [their right to counsel]." Finally, there was no incentive, financial or otherwise, offered to the judges for their participation.

Despite the limited number of responses, an attempt was made to categorize and quantify the data. It appeared that intellectual and analytic ability, legal knowledge and experience, language ability, severe mental illness, and behavioral control were considered important factors by the trial judges who responded. However, most of these items could be argued as overlapping with the basic elements of CST. What was helpful in distinguishing the two different competencies were the responses stressing the importance of having a rational reason for proceeding *pro se*, prior experience in representing oneself, and the willingness to accept the assistance of standby counsel.

The judges' responses appeared to demonstrate an eagerness to have the assistance of forensic mental health experts for PSC determinations. Some respondents suggested that a more structured assessment tool be designed to standardize PSC evaluations. Two judges cited the *Bench Book for Trial Judges*¹⁰; it may be a worthwhile reference source for forensic evaluators.

Conclusions

The U.S. Supreme Court's decision in *Indiana v. Edwards* left trial judges with the task of making fine-tuned mental capacity decisions about a defendant's PSC. However, the Court gave no specific standard for determining PSC. It seems likely that trial courts will look to forensic evaluators for assistance in making such determinations.⁹ There may be additional areas beyond the domains of CST that forensic experts should assess to assist the court in determining PSC. Working collaboratively with trial court judges may facilitate this process.

Taking into account the difficult task that *Edwards* has given the trial judge, we sought in this study to obtain a preliminary survey of trial judge's

opinions about PSC so that forensic evaluators can begin to clarify what abilities the trial judges may be looking for and how these abilities blend with the forensic evaluator's examination for CST. Toward this end, a second survey was developed that has been administered to forensic mental health professionals. This second survey relies heavily on the McGarry criteria, since many of them were cited by judges in this pilot study. The judges' suggestions from this study were incorporated into the follow-up survey. In particular, the subsequent research was designed to distinguish which particular factors of CST, including the McGarry criteria, may require a higher standard for PSC.

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