

Enhancing the Value of Expert Assistance in *Pro Se* Competence Determinations

W. Lawrence Fitch, JD

Forensic mental health practitioners are comfortable assessing criminal defendants' competence to stand trial. They have a long history of making such assessments and a large body of research and scholarship to guide them. In recent years, however, the courts have drawn a distinction between general trial competence (i.e., competence while represented by counsel) and competence to proceed *pro se* (i.e., competence without counsel). The seminal case on point is *Indiana v. Edwards* (554 U.S. 164 (2008)). In *Edwards*, the Court found that general trial competence may provide an inadequate measure of *pro se* competence. Recognizing the profession's need for direction in making the more particularized assessment called for in *pro se* cases, White and Gutheil offer a new "Model for Assessing Defendant Competence to Self-Represent." Neatly tied to the elements of *pro se* competence, discussed in *Edwards*, and envisioning a fresh new role for experts, consistent with the Court's reasoning, the model provides a valuable resource for forensic practitioners.

J Am Acad Psychiatry Law 44:437–41, 2016

The U.S. Supreme Court, in its 2008 opinion in *Indiana v. Edwards*,¹ ruled that a criminal defendant who is competent to stand trial while represented by counsel may not be competent to proceed *pro se*: "[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves" (Ref. 1, p 178). A defendant, the Court reasoned, may be "able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel" (Ref. 1, p 175). Among these basic tasks, the Court cited "organization of defense, making motions, arguing points of law, participating in *voir dire*, questioning witnesses, and addressing the court and jury" (Ref. 1, p 176). The ability to

perform these tasks, the Court observed, may be significantly compromised by "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses" (Ref. 1, p 176, Ref. 2, p 26). The Court, however, declined to offer a legal standard for *pro se* competence, rejecting Indiana's suggestion of "[ability to] communicate coherently with the court or a jury" (Ref. 1, p 178). In a tacit recognition that competence is context dependent and may vary depending on the demands of a case, the Court declared that "the trial judge . . . will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant" (Ref. 1, p 177).

Some have criticized the *Edwards* opinion for "failing" to define *pro se* competence:

The *Edwards* Court's failure to articulate a standard has made it virtually impossible for trial and appellate courts to distinguish between defendants competent to stand trial and proceed *pro se*, on the one hand, and defendants competent to stand trial but not competent to represent themselves at trial, on the other hand. . . . [W]ithout more concrete guidelines as to the difference between the two

Mr. Fitch is Adjunct Professor of Law at the University of Maryland Law School, Baltimore, MD and Affiliated Faculty, Institute of Law, Psychiatry, and Public Policy, University of Virginia, Charlottesville, VA. Address correspondence to: W. Lawrence Fitch, JD, 24375 Widgeon Place, Unit 40, St. Michaels, MD 21663. E-mail: fitchwillard@gmail.com.

Disclosures of financial or other potential conflicts of interest: None.

standards, the psychiatrists will be guessing too. The blind will be leading the blind” (Ref. 3, p 166).

I disagree. In *Edwards*, the Court finally acknowledged what most thoughtful scholars have been saying for years: competence depends on the circumstances.⁴ What is required for one defendant may not be required for another. No one size fits all. So long as the relevant functional abilities are clear (what a criminal defendant must be able to do to ensure that his participation is meaningful and the proceedings fair), both the court’s and the expert’s tasks are straightforward: the expert describes difficulties that a defendant’s mental disorder may present here for doing what is required for self representation), and the court uses this information to make an informed decision—whether, given the circumstances, the defendant’s deficits are so great as to require a finding of incompetence.

The *Edwards* opinion does a nice job of identifying the tasks *pro se* defendants may have to perform and, informed by the APA’s *amicus* brief, suggests the kinds of functional impairments that may be relevant. Thus, in effect, the court offers a kind of legal standard: given the circumstances of a case (what will be required of the defendant in the case) and considering deficits the defendant may have, as described by an expert, can a just proceeding be conducted?

The American Bar Association Criminal Justice/Mental Health Standards

The American Bar Association recently completed a four-year project to update Chapter 7 of its *Standards for Criminal Justice*, the chapter devoted to mental health (hereinafter the Criminal Justice/Mental Health Standards).⁵

Standard 7-5.3 addresses two distinct competence considerations in cases involving defendants wishing to represent themselves: first whether the defendant is competent to elect to proceed without representation (i.e., competent to waive the right to counsel); then, if competent to make this election, whether the defendant is, in fact, competent to proceed without counsel (i.e., able to conduct trial proceedings).

In accord with the U.S. Supreme Court’s decision in *Godinez v. Moran* (509 U.S. 389 (1993)),⁶ the ABA Standard for competence to elect self-representation largely mirrors the general trial competence standard, though focusing attention on aspects of decisional competence, necessary for general trial competence, that have particular significance for the

decision to waive counsel, notably “a rational and factual understanding of the possible consequences of proceeding without legal representation, including difficulties the defendant may experience due to his or her mental or emotional condition or lack of knowledge about the legal process.”⁶ (Note that this standard does not require knowledge of legal process, only that the defendant have a rational and factual understanding of difficulties that a lack of such knowledge may present for defendant.)

The ABA Standard for competence to proceed *pro se* requires both general trial competence and competence to elect self-representation. Such a defendant, the Standard provides:

... may represent him or herself at trial unless the court finds that, as a result of mental disorder, (i) the defendant lacks the capacity to carry out the minimum tasks required for self-representation at trial to such a substantial extent as to compromise the dignity or fairness of the proceeding, or (ii) the defendant will significantly disrupt the decorum of the proceeding.⁷

This standard recognizes that the decision about competence requires a social values judgment (whether the defendant’s deficits are too great for the demands of justice) and suggests, consistent with *Edwards*, that this is a judgment the trial court is best equipped to make.⁷ (This approach has been recommended for use in determining trial competence in juvenile delinquency proceedings, where, as here, the legal threshold is unclear or may be variable: “A child is incompetent to proceed in a delinquency matter in juvenile court if his or her ability to understand the proceedings and assist in the defense is so substantially impaired that, even with accommodations provided by the court, a fair proceeding cannot be conducted.”⁷) Thus, mental health professionals who evaluate a defendant’s competence to proceed *pro se* (under the ABA Standard, at least) should not expect to provide an ultimate issue opinion (i.e., competent or not competent).

The Expert’s Role in Pro Se Competence Determinations

So, do mental health professionals have a role in these cases? Are they competent to proceed? Absolutely! Even when evaluating general trial competence, where ultimate issue opinions are common place, properly trained experts know to assess a defendant’s abilities against what will be expected of the defendant. The only difference here is that the expect-

tations are greater. Without an attorney, more is required of the defendant. Different abilities matter.

Before the 1960s, mental health professionals evaluating a defendant's competence to stand trial had little guidance. Only with the appearance of Robey's competency checklist in 1965,⁸ McGarry's competency screening instrument in 1971,⁹ and all the various assessment protocols that have appeared since have mental health professionals had useful direction in assessing a defendant's competence for trial. I would argue that it is not the presence of a stated legal standard (in *Dusky*¹⁰ and *Drope*¹¹) that makes reliable assessments of general trial competence possible, but the efforts of researchers and scholars who have provided these roadmaps.

So it is with competence to represent oneself. The Court in *Edwards* had much to say about the abilities that matter for self-representation competence, but their language is embedded in Constitutional analysis. What is needed is a distillation of the Court's thinking, framed for consumption by those who would advise the courts as experts in these cases. This is where White and Gutheil step in, with their very nice, [Proposed] Model for Assessing Defendant Competence to Self-Represent."¹² Others have broached the subject before them, including Morris and Frierson in their excellent article, "Pro Se Competence in the Aftermath of *Indiana v. Edwards*," published in the *Journal* just months after the *Edwards* opinion was announced¹³; but the model White and Gutheil present may be the first to provide studied guidance for forensic practitioners.

White and Gutheil's Model

White and Gutheil do not propose a standard or rule for *pro se* competence, nor do they consider their model an assessment instrument, *per se*. Rather, they offer a "conceptual framework," a "heuristic device," that describes:

[the] types of capacities that should be reviewed by forensic practitioners [in order most effectively to] aid judges in making more equitable determinations about whether to grant a defendant's request by showing judges specifically how and where a defendant's deficits will impact his ability to self-represent" [Ref. 12, p xxx].

I am tempted to set in bold (for emphasis) the quoted language in this sentence, as it perfectly describes the proper role of mental health experts, generally. Some questions experts are asked to address are rooted in legal standards that employ language like "lacks sub-

stantial capacity to. . . ." Who, though, is to say what "substantial capacity" requires? The question, I would argue (whether an individual's deficits are so substantial as to cross a legal threshold, into untriability, for example, or nonresponsibility) is outside the realm of specialized mental health expertise. Yet standards so worded invite experts to provide their opinions, sometimes at the court's insistence. A good expert, however, whether providing an ultimate issue opinion or not, will assess all the functional abilities that are relevant and will couch his opinion in terms that help the judge (or jury) understand the degree to which a defendant may be impaired. Yet, rarely are these functional abilities plainly stated in the legal standard in play. The expert knows to address these abilities, not because the law is clear but because of the research and scholarship that have come before. Now, with the model White and Gutheil have proposed, experts addressing *pro se* competence can proceed with the same authority, confident that their efforts will assist, in just the way the authors so insightfully suggest they should.

White and Gutheil discuss the rising incidence of *pro se* requests in criminal cases and the challenges courts face when a defendant proceeds without counsel, underscoring the importance of getting it right when the competence question arises. They note the conflicting legal values at stake (that is, individual autonomy versus fair and impartial justice and the risk of miscarriage), and they analyze the cases on point. Their discussion of the *Godinez* case, however, may be misleading.

The defendant in *Godinez*,⁶ Richard Moran, asked the trial court to allow him to discharge his counsel and enter a plea of guilty (to capital murder charges). The court granted Moran's request, finding that he was competent to stand trial and that his waiver of rights (to counsel and not to plead guilty) was knowing and intelligent. Moran was convicted and sentenced to death. In a postconviction proceeding, Moran argued that, although he may have been competent for trial, generally, he was not competent to waive his rights and represent himself. The court rejected Moran's argument, ruling in effect, that his decision to waive required no greater competence than that required for general trial competence. On review, the U.S. Supreme Court agreed, reasoning that the decision to waive was "no more complicated than the sum total of decisions" (Ref. 6, p 398) a defendant must be able to make to be competent to

stand trial. The Court, importantly, did not address Moran's competence to try his case without counsel, only his decision to forgo representation, although, as Justice Blackmun suggested in his dissent, a person's decision-making, to be competent, must reflect an awareness of its consequences:

A defendant who is utterly incapable of conducting his own defense cannot be considered "competent" to make such a decision, any more than a person who chooses to leap out of a window in the belief that he can fly can be considered "competent" to make such a choice [Ref. 6, p 416].

In any event, because Moran pleaded guilty, the question of his competence to proceed to trial without representation never presented itself. Yet, many have read *Godinez* for the proposition that *pro se* competence is subsumed by general trial competence and that any defendant who is competent to stand trial is therefore competent to proceed *pro se*. Such a (mis)reading may explain the debacle in Colin Ferguson's case, a case widely discussed among forensic practitioners. Ferguson was charged with six counts of homicide (among 93 charges in all) arising out of shootings on the Long Island Railroad in 1993. When his case came to trial, he asked to discharge his counsel (including the renowned William Kunstler) and represent himself. Having found Ferguson competent to stand trial, the court granted his request, reportedly explaining that *Godinez* left it no choice. The resulting trial, broadcast live on Court TV (for all who could bear to watch), featured a defense steeped in psychosis, with Ferguson arguing, for example, that the reason he faced 93 counts was that the year was 1993, and had it been 1925 he would have been charged with only 25 counts. He was convicted and sentenced to 315 years and eight months to life.

White and Gutheil cite *Godinez* as an example of the Court's valuing autonomy over justice. They offer a quote from Justice Blackmun's dissent, in which he suggests that the majority's decision would allow the trial of a defendant who is "helpless to defend himself." They conclude that the Court's subsequent opinion in *Edwards* represents a shift in emphasis from "preserving an individual's autonomy and dignity to protecting the integrity of the judicial process." It is important to recognize, however, that nothing in *Edwards* in any way affects the Court's decision in *Godinez*. Defendants who are competent to stand trial generally still may be permitted to waive counsel and

plead guilty, regardless of deficits they may have that would compromise their ability to stand trial unrepresented. Hence, the ABA's presented a two-part Standard, disaggregating competence to waive and competence to proceed *pro se*.⁵

White and Gutheil do a good job of distilling and augmenting for forensic practitioners the language in *Edwards* that suggests the parameters of *pro se* competence. In a table titled "Functional Legal Capacities Needed to Self-Represent," the authors take the Court's list of tasks that a *pro se* defendant may have to perform and flesh it out. Using this table as a reference, any good forensic practitioner will understand the functional abilities *pro se* defendants must possess. Recognizing, though, that a defendant's acumen in performing particular legal tasks (e.g., making motions, conducting cross-examinations, delivering the closing argument) is beyond the scope of psychiatric assessment, the authors smartly turn next to a series of pertinent questions about the defendant's mental condition (cognitive and behavioral qualities "that may impact his ability to self-represent"), identifying five "key questions" that every assessment should include:

Can the defendant engage in goal-directed behaviors? Does the defendant have sufficient oral and written communication skills? Does the defendant have the ability to conform his behavior to accepted social norms? Is the defendant able to control his emotions in an adversarial arena? Is the defendant able to perform the basic cognitive functions needed to construct a legally logical defense and to make arguments in support of his position? (Ref. 12, p xxx).

These five questions form the basis of the authors' "Model for Assessing Defendant Competence to Self-Represent."

Conclusion

White and Gutheil's proposed framework for conducting *pro se* competence assessments represents a wonderful contribution to the literature. Every forensic practitioner should be aware of this valuable resource. I would simply remind practitioners that the level of ability the courts require for a defendant's participation in a case, while represented or not, is rarely high. Most defendants will have serious deficits in their capacity to self-represent. Yet, their *pro se* right is protected by the Constitution.¹⁵ *Edwards* provides a narrow exception: where a defendant is unable to perform the basic tasks necessary for self-representation because of the effects of severe mental illness. Defendants may be incompetent to stand trial, generally, whether or

not their deficits are related to mental illness; not so, the Court suggests, with *pro se* competence. Most of the deficits White and Gutheil discuss in illustrating their model reflect the symptoms of severe mental disorder. Some, however, suggest lesser conditions. Does it matter? At the risk of sounding heretical, I would suggest maybe not, at least not for the experts, given the role they are to play under *Edwards*.

Edwards made much of the judge's responsibility to "fine-tune" the "mental capacity decision," tailoring it to the "individualized circumstances" of the defendant." Accordingly, White and Gutheil advise against ultimate issue opinions by experts. Rather, they call for "a more nuanced analysis of a defendant's capacities, in order that court systems can respond to defendant's needs in more constructive ways" (Ref. 12, p xxx) (e.g., by accommodating these needs in appropriate cases, with interventions that may assist self-representation). Such an approach opens the door to a much broader role than usual for experts, one unencumbered by strict legal standards. Any information the expert can provide on the defendant's capacity for self-representation, including recommendations to enhance that capacity, should be welcomed. The attorneys may argue which deficits should count and which should not, and where the courts should strike the balance, but the expert's offerings, guided by the wisdom of White and

Gutheil, can and should be pure. Forensic practitioners everywhere should be grateful.

References

1. *Indiana v. Edwards*, 554 U.S. 164 (2008)
2. Taranto R: Brief For The American Psychiatric Association and American Academy of Psychiatry and the Law as Amici Curiae in Support of Neither Party, February 11, 2008. Washington, DC: American Psychiatric Association. Available at: http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_07_208_NeutralAmCuAPAAAPL.authcheckdam.pdf. Accessed October 24, 2016
3. Blume JH, Clark MJ: "Unwell": *Indiana v. Edwards* and the fate of mentally ill *pro se* defendants. *Cornell J L Pub Pol'y* 1:151-72, 2011
4. Bonnie RJ: The competence of criminal defendants: a theoretical reformulation. *Behav Sci & L* 10:291-316, 1992
5. American Bar Association: Criminal Justice Standards. Available at: http://www.americanbar.org/groups/criminal_justice/standards.html. Accessed October 24, 2016
6. *Godinez v. Moran*, 509 U.S. 389 (1993)
7. Fitch WL: AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial: an American legal perspective. *J Am Acad Psychiatry Law* 35:4:509-13, 2007
8. Robey A: Criteria for competency to stand trial: a checklist for psychiatrists. *Am J Psychiatry* 122:616-23, 1965
9. Lipsitt PD, Lelos D, and McGarry AL: Competency for trial: a screening instrument. *Am J Psychiatry* 128:105-9, 1971
10. *Dusky v. United States*, 362 U.S. 402 (1960)
11. *Drope v. Missouri*, 420 U.S. 162 (1975)
12. White MMS, Gutheil TG: A proposed model for assessing defendant competence to self-represent. *J Am Acad Psychiatry Law* 44:000-000, 2016
13. Morris DR, Frierson RL: Pro se competence in the aftermath of *Indiana v. Edwards*. *J Am Acad Psychiatry Law* 36:4:551-7, 2008
14. *Faretta v. California*, 422 United States 806 (1975)