

Court said that the Necessary and Proper Clause was reasonably adapted to effectuating an enumerated power of the U.S. Constitution.

Using a rationale that echoed *Comstock*, the court of appeals found that the Necessary and Proper Clause permits regulation of intrastate registration requirements of federal sex offenders because it is a rational adaptation that upholds the validity of SORNA.

Competence to Proceed *Pro Se*

Peter S. Martin, MD, MPH

Fellow in Forensic Psychiatry

Robert L. Weisman, DO

Associate Professor of Psychiatry

Director of Education

Psychiatry and Law Program

University of Rochester Medical Center

Rochester, NY

Competency to Waive Counsel Should Be Based on the Traditional Standard of *Dusky v. United States* for Those Who Are Clearly Competent, Reserving the Standard of *Indiana v. Edwards* for Those Defendants Proceeding *Pro Se*, Who Are Borderline Competent

In *State v. Lane*, 707 S.E.2d 210 (N.C. 2011), the Supreme Court of North Carolina held that a defendant may waive his constitutional right to counsel if the defendant does so knowingly and voluntarily.

Facts of the Case

In May 2002, a five-year-old girl, Precious Ebony Whitfield, while at her step-grandmother's house, went with a friend, Michael, for a bicycle ride in the neighborhood. They visited Mr. Eric Glenn Lane, an adult who lived nearby, to play on his swing set and to see various pets inside his home.

The children left Mr. Lane's house and returned to Michael's home. Several hours later, Precious left to return to her step-grandmother's home. When Precious did not return home, the family filed a report with the police. A police search commenced that included, over a period of three days, interviewing Mr. Lane on four separate occasions. During each of these interviews, Mr. Lane denied any contact with Precious after the children's initial visit to his home. During the fifth interview, Mr. Lane ultimately confessed to murdering Precious.

Mr. Lane revealed that he had been drinking beer all afternoon when Precious and Michael first visited him. Precious then returned without Michael to Mr. Lane's home to look at his pets. They began playing on the floor, which included Mr. Lane's tickling Precious. The next recollection Mr. Lane reported was waking up on top of Precious with his underpants down and finding Precious with her shorts down. Believing that she was dead, he placed her body in a trash bag, wrapped the bag with duct tape, covered it with a tarp, and then carried it on his scooter to a river where he placed it at the water's edge.

In March 2004, before the start of Mr. Lane's capital trial, there was a motion by his defense counsel to assess his competency to stand trial. Mr. Lane was subsequently sent to Dorothea Dix Hospital for three months and was found competent to stand trial. In October 2004, shortly before the trial was to begin, Mr. Lane's counsel indicated that he was planning to use a "mental retardation" defense. At approximately the same time, Mr. Lane sent a letter to the trial judge expressing his unhappiness with his attorneys and his desire to proceed *pro se*; a week later, Mr. Lane changed his mind about proceeding *pro se*. Because of the judge's concern regarding Mr. Lane's competence, he ordered Mr. Lane to return to Dorothea Dix Hospital for a second evaluation. On October 13, 2004, following the second evaluation, the court again found Mr. Lane competent to stand trial.

In November 2004, Mr. Lane once again informed the judge that he wished to proceed *pro se*. As a result of this request, the judge had Mr. Lane return to Dorothea Dix Hospital for a third competency evaluation. During his *pro se* competency hearing, expert witnesses differed in their opinion of Mr. Lane's competence to proceed *pro se*. One expert witness (Dr. Robert Rollins) found Mr. Lane competent to proceed *pro se*. He noted that even if "it was questionable that [defendant] is acting with a reasonable degree of rational understanding" and the decision to proceed *pro se* was not "reasonable or rational," due to Mr. Lane's "understanding and appreciating the consequences of the decision, comprehending the nature of the charges and proceedings and range of permissible punishments, in my opinion he's competent" (*Lane*, p 221). The other expert (Dr. Claudia Coleman) opined that Mr. Lane was incompetent to proceed *pro se*. It was noted that she had limited contact with him during the evaluation. The judge

ultimately ruled that Mr. Lane was competent to proceed *pro se*, finding Dr. Rollins' testimony "more impressive and controlling." Despite this conclusion, the judge appointed two attorneys as standby counsel.

Soon thereafter, Mr. Lane requested to be represented by standby counsel. He was subsequently found guilty of murder in the first degree, statutory rape in the first degree, statutory sex offense in the first degree, indecent liberties, and kidnapping in the first degree.

During the penalty phase of his trial, Mr. Lane instructed his defense counsel not to take part in the proceedings. Because the prosecution was concerned that Mr. Lane was proceeding *pro se*, they asked the court to repeat that it had found Mr. Lane "aware of, and competent to waive" his right to counsel and represent himself in his defense.

The jury subsequently sentenced Mr. Lane to death. The case was appealed. Bypassing the North Carolina Court of Appeals, it went directly to the North Carolina Supreme Court, where it was remanded to the trial court because of concerns raised in *Indiana v. Edwards*, 554 U.S. 164 (2008). In *Edwards*, the U.S. Supreme Court ruled that an individual could be deemed competent if represented by counsel but incompetent if he represented himself. The trial court, upon further review, acknowledged that although Mr. Lane had a "complex mental health picture," there were no concerns that he fell into the "borderline competent" or "gray area" (*Lane*, p 217). Borderline competent defendants are those who are deemed competent to stand trial with the assistance of counsel, but lack the ability to conduct trial proceedings on their own. The trial court found Mr. Lane both competent to stand trial and to proceed *pro se*. The defense appealed that decision to the North Carolina Supreme Court.

Ruling and Reasoning

The North Carolina Supreme Court ruled that there was "no error" in the decision allowing Mr. Lane to proceed *pro se* during the trial. Mr. Lane argued that he was in the "gray area" or "borderline competent" as described in *Indiana v. Edwards* and therefore should not have been allowed to proceed *pro se*. The court disagreed, stating that Mr. Lane was permitted his constitutional right to proceed *pro se*. It should be noted that each time the concern for his competency arose, either a competency evaluation

was ordered or a discussion with the court occurred during the trial.

The North Carolina Supreme Court summarized its findings by stating that a defendant during a competency to stand trial hearing may "enjoy the constitutional right to self-representation, but that is not an absolute right" (*Lane*, p 219). It ruled that if a defendant is found competent to stand trial and desires to represent himself, this leaves the court with two choices: it may grant the motion to proceed *pro se* if the defendant has satisfied the requirements that he knowingly and voluntarily waived his right to assistance of counsel; or it may deny the motion to proceed *pro se*, thereby denying his constitutional right to self-representation, because the defendant falls into the "gray area" and therefore is subject to the "competency limitation" described in *Edwards*.

Discussion

The basic standard for competency to stand trial was established in *Dusky v. United States*, 362 U.S. 402 (1960), where an individual was competent to stand trial if he had the "present ability to consult with his lawyer with a reasonable degree of rational understanding" and had a "rational as well as factual understanding of the proceedings against him" (*Dusky*, p 402).

It was not until *Faretta v. California*, 422 U.S. 806 (1975), that the U.S. Supreme Court first examined a defendant's constitutional right to proceed *pro se*. The Court held that the Sixth and Fourteenth Amendments guarantee the right to the assistance of counsel and that a defendant has a constitutional right to proceed without counsel when he does so "competently and intelligently." They acknowledged, however, that the right to self-representation is not an absolute right.

In *Godinez v. Moran*, 509 U.S. 389 (1993), the Court explored whether a higher standard of competency than the standard enunciated in *Dusky* is necessary to waive the right to counsel or plead guilty. The Court stated that while it is necessary to have an additional level of inquiry to determine whether a defendant has "knowingly and voluntarily" waived his right to counsel, it is not imperative that a higher (or different) level of competency be demonstrated. The Court concluded that the competence required of a defendant seeking to waive his right to counsel is

the competence to waive the right, not competence to represent himself.

In *Indiana v. Edwards*, 554 U.S. 164 (2008), the Court explored the circumstance in which an individual could be deemed competent if represented by counsel, but incompetent if he represented himself. In the American Psychiatric Association's *amicus* brief in *Edwards*, the APA noted that "self-representation involves a substantially expanded role for the defendant and hence requires significantly greater capabilities" than for the defendant who is represented by counsel (Brief for American Psychiatric Association, as Amici Curiae Supporting Petitioner, *Indiana v. Edwards*, 554 U.S. 164 (2008) (No. 07-208) pp 25–6). In its decision, the Court assumed that the defendant had met the *Dusky* standard for competence. As such, the Court focused on whether the State could deny the defendant's constitutional right to proceed *pro se*. The Court ruled that the Constitution does allow a state "to limit the defendant's self-representation right by insisting upon representation by counsel at trial" for the defendant who "lacks the mental ca-

capacity to conduct his trial defense unless represented" (*Edwards*, p 174).

In *Lane*, the North Carolina Supreme Court emphasized that Mr. Lane was consistently given the opportunity to exercise his constitutional right to self-representation. The question for the appellate court centered on whether Mr. Lane was in the "gray area" in his ability to proceed *pro se*. The trial court had been diligent in determining that Mr. Lane had knowingly and voluntarily waived his right. The only error would have occurred if the trial court had allowed Mr. Lane to proceed without making a determination; the court did not make such an error. Therefore, the rationale used in *Edwards* that would allow for the denial of Mr. Lane's right to proceed *pro se* does not apply. Furthermore, North Carolina had statutes similar to that found in *Edwards* to help guide the court in *Lane*, demonstrating how states' rights may provide liberties in addition to, but not less than, those found in the Constitution. There is a right to self-representation for all, but this right is not absolute, as highlighted in both *Godinez* and *Edwards*.