

Pro Se Competence in the Aftermath of *Indiana v. Edwards*

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The right to represent oneself at trial is well-established, but not absolute. Recently, in *Indiana v. Edwards*, the United States Supreme Court considered whether states may demand a higher standard of competence for criminal defendants seeking to represent themselves at trial than that necessary for standing trial with attorney representation. Ultimately, the Court ruled that the Constitution allows states to employ a higher competency standard for *pro se* defendants. In this analysis of the Court's decision, the authors describe the facts of this case, the legal precedents framing the issues facing the Court, and the Court's rationale for its opinion. The ruling is considered in light of available research involving *pro se* defendants and whether this ruling is consistent with professional guidelines related to forensic psychiatric practice. Implications of the decision for forensic clinicians and limitations of the decision are discussed.

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Among guarantees for the right to a speedy and public trial, an impartial jury in the district of the offense, notice of charges, confrontation of witnesses, and compulsory processes for obtaining witnesses in one's favor, the Sixth Amendment guarantees a criminal defendant the assistance of counsel in making his defense. The United States Supreme Court has further recognized the importance of the assistance of counsel through its subsequent decisions identifying the ability to assist counsel as a necessary component of competence to stand trial^{1,2} and ruling that "lawyers in criminal courts are necessities, not luxuries," obligating states to provide attorneys for indigent defendants.³ However, for a variety of reasons, criminal defendants may seek to forgo the benefits of counsel and represent themselves during their proceedings.

The common adage that one who is his own lawyer has a fool for a client suggests that it is a mistake for a layperson to tread into the legal arena without the assistance of counsel. The Supreme Court has offered such cautions in past decisions^{4,5} and noted, "Our experience has taught us that 'a pro se defense is usually a bad defense, particularly compared with a

defense provided by an experienced criminal defense attorney' " (Ref. 6, p 161). To what degree does this conventional wisdom hold true?

In 1975, the U.S. Supreme Court recognized in *Faretta v. California*, "a near 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" (Ref. 4, p 817). The Court cited federal precedents recognizing a constitutional right to self-representation, the wording of the Sixth Amendment referring to the *assistance* of counsel (emphasis added), and common law and colonial traditions protecting a defendant's right to proceed without counsel were he voluntarily and intelligently to elect to do so. Mr. Faretta's technical legal knowledge was ruled to be irrelevant in the assessment of his knowing exercise of his right to defend himself, but courts should assure themselves that the waiver of counsel was knowing and voluntary, and a defendant should be made aware of the dangers and disadvantages of self-representation so that the record will establish that "he knows what he is doing and his choice is made with eyes open" (Ref. 6, citing *Adams v. U.S. ex rel. McCann*, 317 U.S., 269, 279 (1942)).

While Anthony Faretta's wisdom in seeking to proceed *pro se* was questioned, there were no specific concerns that he had an underlying mental illness or cognitive deficit that may have affected his decision or ability to represent himself. The Supreme Court

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dealt with this question in their 1993 *Godinez v. Moran*⁷ decision.

Richard Moran, charged with three counts of murder and believed to be marginally competent to stand trial, sought to discharge his attorneys and plead guilty. The trial court found that he was “knowingly and intelligently” waiving counsel and that his waiver was “freely and voluntarily” given. His guilty plea was accepted, and he was sentenced to death. Later, following Mr. Moran’s series of federal *habeas* appeals on the grounds that he was incompetent to represent himself, the Supreme Court ruled that the competency standard for pleading guilty or waiving the right to counsel is the same as that for competency to stand trial.⁷ In the majority opinion, Justice Thomas wrote that the decision to plead guilty was no more complicated than the sum of the decisions one must make during a trial. The competence necessary to waive counsel was specifically noted to be that required to waive the right, not that needed to represent oneself.

While the right to represent oneself at trial is well established, the Supreme Court has recognized limitations to this right. In *McKaskle v. Wiggins*, the Court ruled that judges may appoint standby counsel over a *pro se* defendant’s objection.⁸ In 2000, the Court unanimously ruled in *Martinez v. Court of Appeals of California* that there was no constitutional right to self-representation during appeal of a criminal conviction.⁶ In this opinion, the Court also questioned whether the historical precedents of self-representation underlying the *Faretta* decision were as pertinent in the modern era when attorneys are more available and are standard participants in legal proceedings. Appellate decisions have further denied or limited defendants’ requests to proceed *pro se* when defendants have disrupted proceedings, have appeared to move for self-representation as a delay tactic, have made a *pro se* request in an untimely manner, or have insisted on hybrid representation (defendant and attorney alternate in conducting different parts of the defense).^{9,10}

Indiana v. Edwards

The question posed in *Indiana v. Edwards* is as follows: May a state adopt a higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial?¹¹

In 1999, Ahmad Edwards fired three shots at a department store officer who had seen him steal a

pair of shoes. The officer was grazed and a bystander was struck in the ankle. An FBI agent in the vicinity pursued Mr. Edwards into a parking garage and shot him in the thigh after several requests that he drop his weapon. Mr. Edwards was subsequently apprehended and charged with several crimes, including attempted murder.

After his arrest, Mr. Edwards received a diagnosis of schizophrenia, was found incompetent to stand trial, and was hospitalized at Indiana’s forensic state hospital for competency restoration. His mental condition eventually became the subject of three competency proceedings and two self-representation hearings. Five years after the offense and following two hospitalizations for competency restoration, Mr. Edwards began trial for his criminal charges. He asked to represent himself at that time, but his request was denied because he claimed to need a continuance to proceed *pro se*. He was convicted of criminal recklessness and theft, but the jury could not reach a verdict on the charges of battery with a deadly weapon and attempted murder.

Indiana sought to retry Mr. Edwards on the remaining charges, and he again asked to represent himself. The trial judge denied his request, appointing counsel to represent him after ruling that Mr. Edwards remained competent to stand trial but was not competent to defend himself. A jury convicted him of the remaining charges, and he was sentenced to 30 years’ imprisonment.

On appeal to Indiana’s appellate court, Mr. Edwards claimed that his Sixth Amendment right to represent himself was improperly violated. The appellate court agreed with him, citing the *Faretta* decision. After Indiana appealed the ruling, the Indiana Supreme Court upheld the appellate court decision. Although this court sympathized with the trial court judge’s reasoning, it believed it was bound by both *Faretta* and *Godinez*. The U.S. Supreme Court granted *certiorari* to consider whether the trial court was constitutionally required to allow Mr. Edwards to represent himself.

Before the Supreme Court hearing on this matter, 19 states, the federal government, the American Bar Association, the American Psychiatric Association (APA), the American Academy of Psychiatry and the Law (AAPL) and others filed *amicus* briefs supporting Indiana in seeking a higher standard of competence for self-representation than is necessary to stand trial with the assistance of counsel. In their

brief, APA and AAPL argued that there was professional recognition that competency was not a unitary concept and that individuals may have some competencies but not others.¹² These organizations noted that more than competence to stand trial is needed when a defendant seeks to proceed *pro se*, because a defendant would be required to play a much larger role in this capacity. The brief further reasons that the *Faretta* right to self-representation is subject to being overridden to prevent a defendant's mental illness from destroying the reliability of the adversarial process and notes that public interest is strong in this context. APA and AAPL further argued that the *Godinez* decision was not applicable to the *Edwards* case, because *Godinez* did not involve contesting criminal charges against which the defendant would actively represent himself. Finally, APA and AAPL argued that the underlying capabilities relevant to self-representation were subject to professional evaluation and were extensions of capabilities already addressed in evaluations of competency to stand trial.

Supreme Court Decision

The Supreme Court ruled that the Constitution does not forbid states from insisting on representation by counsel for those competent enough to stand trial but who are impaired by severe mental illness to the point that they are not competent to conduct trial proceedings by themselves. The Court agreed that its precedents framed, but did not answer the question of whether states may adopt a higher standard of competency to represent oneself than to stand trial with the assistance of counsel. In ruling that the Constitution allows states to set this higher standard, the Court cited its prior insistence in *Dusky v. U.S.*¹ and *Drope v. Missouri*² that, in addition to an understanding of the nature and objectives of the proceedings, sufficient ability to consult with and assist counsel is required for a defendant to be competent to stand trial. The majority believed that this requirement suggests that forgoing counsel presents different circumstances than does the mental competency determination for standing trial with counsel.

The Court reasoned that neither the *Faretta* nor the *Godinez* decisions defined the scope of the self-representation right. It noted that the conclusion in *Faretta* was, in part, based on previous state cases either consistent with or specifically adopting competency limitations on the self-representation right

and that subsequent self-representation decisions "made clear that the right of self representation is not absolute" (Ref. 11, p 5). The *Godinez* decision did not deal with a defendant's ability to conduct a defense, only his competence to *wave the right*" (Ref. 11, p 7), and this case's holding that a state may permit a borderline competent defendant to proceed *pro se* did not answer whether a state "may deny a gray-area defendant the right to represent himself" (emphases in original; Ref. 11, p 8).

The Court recognized that mental illness varies in degree, can vary over time, and may affect an individual's functioning at different times in different ways, thus cautioning against a single competency standard for standing trial with the assistance of counsel and standing trial *pro se*. Finally, the majority believed that allowing a mentally incompetent defendant to represent himself, who hasn't adequate ability to do so, would not "affirm the dignity" of the defendant, and could undermine the Constitution's overriding insistence that an individual receive a fair criminal trial. Trial judges were often believed to be best able to evaluate an individual's specific competencies and make more fine-tuned competency determinations. Thus, the Indiana Supreme Court decision was vacated and remanded.

Analysis

There are several reasons that a criminal defendant might choose to represent himself: little trust in the fairness of the legal system (belief that public defenders are overworked or concern that they are employees of the state), too much trust in the system (faith that their innocence will result in a not guilty verdict), a desire to promote a political agenda, a belief that one can explain one's defense better than an attorney, or the desire to avoid attorney fees (nonindigent defendants).¹³ There are also potential strategic advantages to representing oneself, including the opportunity to speak to a jury without undergoing cross-examination and the possible belief that one is more apt to win a jury's sympathy without an attorney. Additional potential advantages of *pro se* representation include the defendant's ability to confront and cross-examine accusers directly, the potential to establish better rapport with jurors, and the possibility of receiving greater latitude in allowed behavior and questioning than would be given a defense attorney.¹⁴

Twenty years after *Faretta*, in his criticism of the “chaos,” “mockery of justice,” and “disrupt[ion of] courtroom procedure” he believed resulted from this decision, Decker⁹ cited more subversive and misguided motives behind defendants’ requests to proceed *pro se*. He argued, “Some defendants may proceed *pro se* to symbolize their lack of respect for any kind of authority, . . . or because they are unable to get their way and so represent themselves as an act of defiance” (Ref. 9, p 485). He noted that *pro se* defendants may “have committed such heinous atrocities that life imprisonment or the death penalty is the most likely result,” “may be cleverly manipulating the criminal justice system for their own secret agenda,” or “to proceed *pro se* may be the means to a radical political scheme that the defendant wants to advance” (Ref. 9, pp 486–7). Decker also opined that “[w]hile some *pro se* defendants may not harbor a hidden motive behind the request, they are so totally out of touch with reality that they believe they can do it all themselves” (Ref. 9, p 487).

Research on Pro Se Defendants

While the legal literature contains numerous articles and appellate cases regarding criminal defendants who choose to represent themselves, there is little empirical research that might indicate whether these defendants are mentally ill or merely foolish.^{10,15} Justice Breyer bemoaned this lack of empirical evidence in his *Martinez* concurrence, noting, “I have found no empirical research, however, that might help determine whether, in general, the right to represent oneself furthers, or inhibits, the Constitution’s basic guarantee of fairness” (Ref. 6, Breyer J., concurring, p 164).

To better identify the reasons why individuals seek to discharge their attorneys, Miller and Kaplan¹⁶ evaluated 100 consecutive individuals admitted to a Wisconsin forensic hospital for evaluation of or treatment to regain competence to stand trial (CST). Twenty-four of these defendants sought to discharge their attorneys, 11 expressed a desire to waive counsel and represent themselves, and the other 13 wished merely to fire their current attorneys, but not to represent themselves. All 11 of the individuals who sought to represent themselves were found incompetent to stand trial (ICST). The authors noted, however, that the findings were based not on the defendants’ desire to represent themselves, but on the individuals’ multiple competency-related deficits. Of

the 13 individuals who wished merely to fire their current attorneys, 11 were judged CST, a higher competency rate than that among both those seeking to waive counsel and those accepting their current attorneys. The reasons the individuals sought to waive counsel tended to be egocentric, such as “I’m better than any lawyer,” and “It’s my constitutional right.” Individuals sought to fire their current attorneys for more self-protective and practical reasons, such as concerns that the defendant’s attorney was not spending enough time with him, would not listen to the defendant or verify his story, or wanted the defendant to plead guilty or not guilty by reason of insanity against the defendant’s wishes. Higher rates of competence in those defendants seeking a different attorney for practical or strategic reasons are consistent with a study of public defenders’ perceptions of their clients’ competence and participation in their defense, where the defenders reported that among their clients whose competence was doubted, the defendants were less involved in decision-making and, overall, were passive participants in their cases.¹⁷

Mossman and Dunseith¹⁴ attempted to better characterize *pro se* defendants by surveying the print media portrayals from 1997 to 1999 of 49 *pro se* criminal defendants. Media accounts of these proceedings allowed the authors to characterize defendants’ reasons for representing themselves into three broad categories: eccentric, the decision to proceed without representation was one of many behavioral or emotional peculiarities reported; ideological, the alleged offenses reflected a defendant’s feelings about larger ideological concerns (e.g., Dr. Jack Kevorkian and his advocacy of assisted suicide); and personal, the defendants desired to exercise more control over their cases. The authors noted that these *pro se* defendants had a broad range of educational backgrounds and when compared with the population at large, men, attorneys, persons with other advanced degrees, and unemployed persons were disproportionately represented in the sample. *Pro se* defendants also faced a wide range of charges, although homicide was the most common. Many of these individuals had reasonable motives for seeking self-representation, such as dissatisfaction with their attorneys or the belief that they could do just as well without representation. While print media accounts of these defendants often contained reports of the defendants’ having significant mental problems or displaying bizarre courtroom behavior, in some cases, *pro se* de-

defendants were skillful and successful in representing themselves.

A recent novel study sought to evaluate *pro se* defendants empirically to test the validity of the commonly held assumption that these defendants are either foolish or mentally ill.¹⁵ The author evaluated existing federal and state databases, documenting trial outcomes and type of counsel at case termination, and created an additional database (the Federal Docketing Database) using data contained in federal court docket sheets maintained by clerks of the court for each federal jurisdiction. These docket sheets documented written filings and oral motions made in court, and, from them, data were collected on 208 federal defendants who chose *pro se* representation at case disposition.

The outcomes of *pro se* defendants in state courts were at least as good as those for represented defendants with 50 percent of *pro se* defendants convicted of a charge, compared with a 75 percent conviction rate for represented defendants. Eventual felony convictions for *pro se* defendants were also less frequent than for represented defendants (26% versus 63%). While *pro se* federal felony defendants did not fare as well as their state court counterparts, acquittal rates for *pro se* and represented federal felony defendants were nearly identical (.64% and .61%, respectively). Thus, *pro se* federal felony defendants did not seem to fare significantly worse than did the represented defendants. Finally, based on federal docketing sheets and with a court-ordered competency evaluation used as a proxy for the presence of outward signs of mental illness, 80 percent of *pro se* defendants were not believed to have displayed signs of mental illness, as only 20 percent of this sample were ordered to undergo competency evaluation. Furthermore, dissatisfaction with current counsel appeared to be a prominent reason that defendants in the Federal Docketing Database chose self-representation, as more than half of them requested new counsel before invoking their right to self-representation.

These studies of *pro se* defendants, though few in number, indicate that many such defendants seek to represent themselves for legitimate reasons. Voicing dissatisfaction with counsel was a rationale for seeking to dismiss counsel noted in all of these studies, and voicing displeasure about counsel perceived as ineffective may be viewed as an appropriate self-protective behavior for defendants facing serious le-

gal charges. These studies cast doubt on the view that all *pro se* defendants are either mentally ill or foolish.

Competency to Stand Trial *Pro Se*

While the Court held that states may demand a higher standard of competence for *pro se* defendants, it did not articulate specific standards that defendants must meet to represent themselves at trial. Because the Court was unsure how a standard based on a defendant's ability to communicate would work in practice, it also rejected Indiana's proposal that a defendant not be allowed to proceed *pro se* if he cannot communicate effectively with a court or a jury. Although the Indiana Supreme Court had previously held that trial courts should generally hold a pretrial hearing to evaluate a defendant's competency to proceed *pro se* and to establish a record of the defendant's waiver of counsel,¹⁸ 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.

As outlined in the "AAPL Practice Guideline for Evaluation of Competency to Stand Trial," some jurisdictions have set forth specific factors to consider when evaluating a proposed waiver of counsel.¹⁰ The Rhode Island Supreme Court asks trial courts to consider a defendant's age, education, experience, background, behavior at the hearing, mental and physical health, contact with lawyers before the hearing, and knowledge of the proceedings and possible sentence that may be imposed.¹⁹ That court also viewed as important considerations of whether mistreatment or coercion had taken place and whether the defendant may be attempting to manipulate the proceedings. The Wisconsin Court of Appeals ruled that trial courts should consider a defendant's education, literacy, fluency in English, and physical or psychological disabilities that may significantly affect communication.²⁰

These considerations are consistent with inquiries into a defendant's background, mental health, knowledge of the nature of the proceedings against him, and ability to assist counsel that are routinely evaluated in CST examinations. As the APA and AAPL argued in their *amicus* brief, competency to proceed *pro se* evaluations based on these factors would extend the evaluation of defendant abilities commonly examined in CST evaluations.¹² With general criteria such as these, forensic evaluators could provide useful information to courts regarding

defendants' abilities to communicate, process information, maintain attention and concentration, and behave appropriately in the courtroom. However, in both *Faretta* and *Edwards*, the trial judges questioned the defendants extensively about specific legal points, including *voir dire* and evidentiary rules. Defendants who represent themselves face numerous potential challenges: jury selection, evidentiary pretrial hearings, opening and closing arguments, direct and cross examination of witnesses, and planning trial strategy. Knowledge of these points of law lie outside of the training and expertise of most forensic clinicians, and it is questionable whether forensic clinicians could ethically testify to such matters.

Many defendants choose to represent themselves because they view the public defender system as inadequate. Others have had prior undesired outcomes in criminal cases in which they had legal representation. In both situations, the motive for self-representation lies in the defendant's value judgment regarding legal representation. However, forensic evaluators may find it difficult at times to distinguish such value judgments from thinking rooted in mental illness, especially illnesses that are manifested by delusions and/or paranoia.

Protection of Defendants' Rights

Writing in dissent, Justice Scalia criticized the majority's decision because he believed it would permit "a State to substitute its own perception of fairness for the defendant's right to make his own case before the jury—a specific right long understood as essential to a fair trial" (Ref. 11, Scalia, J., dissenting, p 1). While the *Edwards* decision hinges on these competing constitutional principles—namely, the defendant's autonomy interest in making his own defense against government charges versus the state's interest in maintaining the dignity and reliability of its proceedings—Justice Scalia raises an important question regarding whether Mr. Edwards was improperly denied the right to choose, rather than merely conduct, his defense. Mr. Edwards sought to claim self-defense. His counsel preferred a defense focusing on lack of intent. With counsel appointed to speak for him, Mr. Edwards was denied not only the opportunity to conduct his defense, but also the autonomy to decide what basic type of defense would be used to answer the charges against him. As the *Faretta* Court cautioned, "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable

legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense" (Ref. 4, p 821). Forcing a criminal defendant to accept his attorney's defense strategy also appears inconsistent with the past precedent that a trial judge may not force an insanity defense on a competent defendant who intelligently and voluntarily elects to decline this defense.²¹

Professional Guidelines

The "AAPL Ethics Guidelines for the Practice of Forensic Psychiatry" note that forensic psychiatrists are "called upon to practice in a manner that balances competing duties to the individual and to society" (Ref. 22, p 1). In doing so, they are to be "bound by underlying ethical principles of respect for persons, honesty, justice, and social responsibility" (Ref. 22, p 1). *Edwards v. Indiana* involves all of these principles. The central conflict in this case weighed whether respecting a defendant's right to proceed *pro se* might render his trial unfair, usurping a basic principle of justice. Likewise, it is foreseeable that courts will increasingly call on forensic clinicians as they attempt to discern whether a given defendant has the capacity to proceed *pro se*. In lending their expertise to courts in these matters, psychiatrists may demonstrate social responsibility by objectively aiding the courts' search for justice while educating courts on an individual's unique abilities and limitations. In doing so, clinicians must be cautious and claim expertise "only in areas of actual knowledge, skills, training, and experience" (Ref. 22, p 4) as an individual's competency to proceed *pro se* may hinge on legal abilities or points of law outside the scope of experience of most forensic psychiatrists.

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