Survey of Forensic Mental Health Experts on *Pro Se* Competence After *Indiana v. Edwards*

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In *Indiana v. Edwards* (2008) 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), but provided little guidance for the trial court judge. This survey of forensic mental health experts studied potential PSC criteria. Sixty-eight (22.7%) forensic evaluators replied. Three McGarry criteria were reported as requiring a much higher standard for PSC: to appraise the available legal defenses (45.6%), to plan a legal strategy (51.5%), and to question and challenge witnesses (44.1%). Sixty percent agreed that standby counsel should be mandatory. Respondents opined that average abilities were sufficient for intelligence (77.9%), literacy (69.1%), and verbal ability (70.6%) were sufficient. PSC examiners may wish to assess appraisal of available legal defenses, planning a legal strategy, and questioning and challenging witnesses for a higher standard than CST. Evaluators should also assess the defendant's willingness to accept standby counsel (SBC) and the defendant's motivation for attempting a *pro se* defense.

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In the three years since the U.S. Supreme Court's decision in *Indiana v. Edwards*,[1] trial court judges have been charged with making decisions about self-representational competency without a specific test to apply. The Supreme Court reasoned that it is the trial judge who "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), but provided no guidance. Thus, after *Edwards*, the lower courts, legal scholars, and forensic psychiatrists have been left to decide which abilities to use in determinations of *pro se* competency (PSC).

In brief, the U.S. Supreme Court considered in *Edwards* the case of a mentally ill defendant who fell into the gray area of satisfying the *Dusky* standard,[2] but who was "unable to carry out the basic tasks needed to present his own defense without the help of counsel" (Ref. 1, pp 175–6). The Court reasoned that even though a defendant may satisfy the *Dusky* competence standard, this standard does not address the ability to represent oneself. Ultimately, the Court held that it is permissible for states to hold a *pro se* defendant to a higher standard of competency than for CST. The Court and legal scholars[3] have also noted that self-representational competence is to be distinguished from CST, because it involves a set of unique and complex decision-making tasks. In fact, PSC may be said to involve "a decision-making context much more demanding than that faced by represented defendants" (Ref. 3, p 1670).

While it has been asked whether a *pro se* defendant has a fool for a client[4] and opined by the Court that "a pro se defense is usually a bad defense" (Ref. 5, p 161), empirical evidence has shown us that defendants may do at least as well as their represented peers. A study by Hashimoto showed that state felony defendants, in particular, "appear to have achieved higher felony acquittal rates than their represented counterparts in that they were less likely to have been convicted of felonies" (Ref. 6, p 428). Thus, balancing a defendant's Sixth Amendment

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right to counsel versus the "dignity of individual choice" (Ref. 1, p 188) to refuse that right and represent oneself is a difficult task for the trial court judge to address. Thus, the need for further guidance is evident. As Justice Breyer noted in *Martinez v. Court of Appeals*, "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. 5, p 164).

The aftermath of the *Edwards* decision has left a need for empiricists to investigate what might make up a specific standard for PSC that would meet the Constitution's guarantee of fairness. Since the *Dusky* standard was discussed at length in *Edwards*, it seems a reasonable basis from which to develop a new standard for PSC. Furthermore, in our survey of trial court judges, many respondents mentioned specific McGarry domains[7] as being important. In this study, the McGarry[8] criteria, one of several methods of evaluating CST,[9] were used to help distinguish CST from PSC. Other concerns for the *pro se* defendant include verbal and intellectual abilities,[1] the defendant's reason for requesting to represent himself,[10] and the use of standby counsel (SBC).[11] These variables were also addressed.

Methods

A survey of mental health experts was created to delineate differences in specific capacity domains between CST and PSC. The participants were asked to rate whether the level of capacity for 11 of 13 McGarry criteria[8] should be the same, somewhat higher, or much higher for PSC than for CST. The two McGarry criteria relating to the client's relationship with and ability to disclose to their attorney were omitted because of the presumption that the client would not be represented at trial. The participants were also surveyed as to what level of competency (below average, average, or above average) should be required for a potential *pro se* defendant in the following domains: general intelligence, literacy, and verbal communication ability. Subjects were asked whether SBC (defined as an attorney "to assist the defendant when called upon "[12]) should be required and, if SBC were available, should the competency standard for PSC be lower or the same. Free-text fields were provided for all questions to allow for further hypothesis generation by the experts surveyed. Finally, respondents were queried about their professional credentials, number of years in practice, and number of CST evaluations performed.

The survey was voluntary and anonymous. Thus, the Institutional Review Board of the State University of New York at Upstate Medical University determined that it was exempt from review. In January, 2010, an email invitation to the survey was sent to 300 forensic mental health experts. These 300 were identified, and all correspondence information was extracted from public websites. SurveyMonkey.com was used to administer the survey, and responses were collected from January 25, 2010, through March 8, 2010. The survey application did not capture IP (Internet provider) addresses.

SPSS (IBM) statistical software was used to analyze the data. In addition to descriptive statistics, Pearson's correlation coefficients (r) were calculated. Finally, a varimax-rotated principal component analysis was performed for the 11 McGarry criteria. Eigenvalues >1.0 were utilized in the factor analysis, and variables with salient loadings $>.70$ were considered significant.

Results

A total of 68 responses were received from the 300 invited recipients, yielding a response rate of 22.7 percent. Sixty (88.3%) of the respondents were forensic psychiatrists, 7 (10.3%) were PhD level forensic psychologists, and one was a psychologist who did not specify his/her educational credentials. The mean years of forensic practice was 16.6 (range, <1–45) and the mean number of CST evaluations performed was 263 (three replied that they had performed no evaluations and one replied 3,000, which was the highest value). For the purpose of analysis, responses were coded as follows: a reply of "many" was excluded from the analysis, "scores" were recorded as 40, and "hundreds" were recorded as 200.

Of the 11 McGarry criteria assessed, the following 3 had the highest frequency of warranting a much higher level of competency (Fig. 1): to plan a legal strategy" (51.5%), to appraise the available legal defenses (45.6%), and to question and challenge witnesses (44.1%). Five criteria were reported most often as requiring the same level of competency as CST: the ability to appraise the roles of court personnel (69.1%), an understanding of the charges (61.8%), a self-serving versus self-defeating motivation (52.9%), an appreciation of the range/nature of

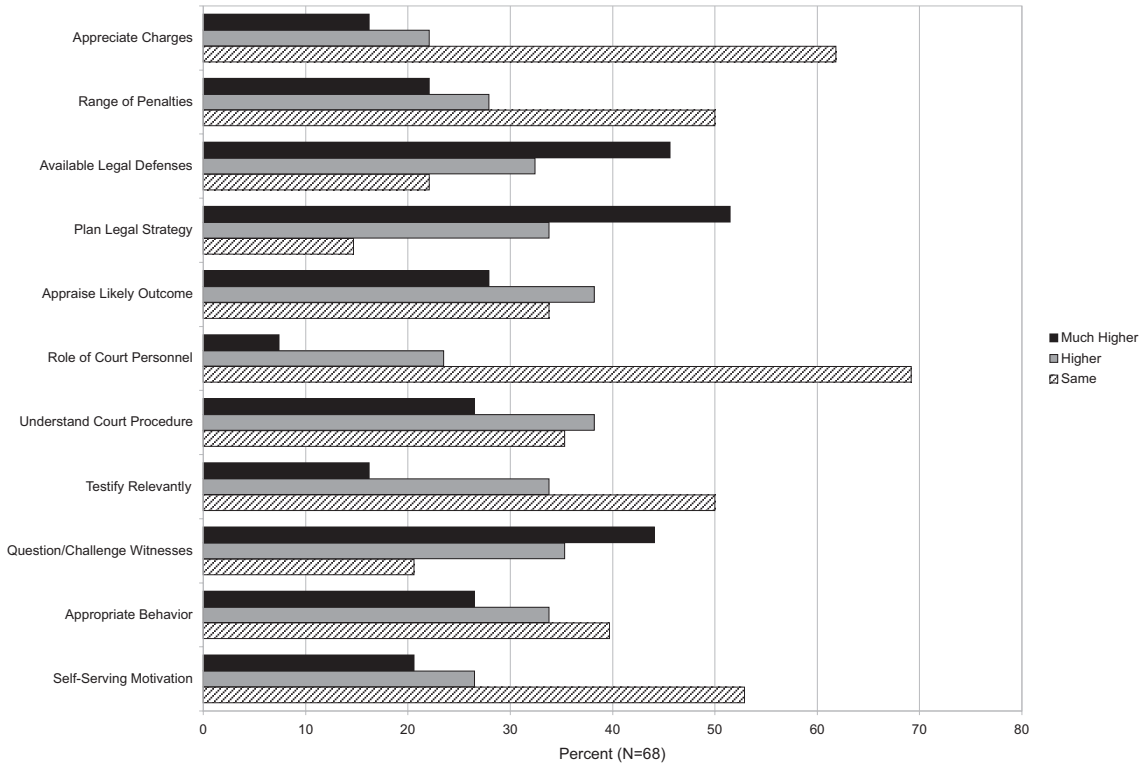

Figure 1. McGarry capacities for *pro se* competencies.

possible penalties (50.0%), and the ability to testify relevantly (50.0%).

When asked about SBC, the majority of experts surveyed (60.3%) agreed that an attorney should be appointed for this purpose on a mandatory basis. Only 22.1 percent ($n = 15$) disagreed, and 17.6 percent ($n = 12$) had no opinion on mandatory SBC. Agreement with mandatory SBC correlated significantly only with the three McGarry criteria reported as necessitating a much higher standard for PSC ($r =$ 0.315, 0.356, and 0.322, and $p = .009$, .003, and .007, respectively). Survey participants overwhelmingly reported (83.8%) that if SBC were mandatory, it would not lower the level of competency required for PSC.

A principal component analysis identified two salient factors (Table 1). The first factor comprised variables that the experts believed required the same level of capacity for CST as for PSC, which explained 50.5 percent of the variance. This component, termed defendant capacity for descriptive purposes, consisted of the following capacity domains: appreciation of the charges, appreciation of the range of possible penalties, appraisal of the roles of court personnel, and appropriate courtroom behavior. The second factor, termed lawyering capacity, comprised the same three McGarry capacities that the experts thought required a much higher ability, representing 13.2 percent of the variance. This analysis used a higher than average standard for significance of >.70

Table 1 Varimax-Rotated Principal Component Analysis of the McGarry Capacities for *Pro Se* Competency*

	Component	
	Defendant Capacity†	Lawyering Capacity†
Appreciate charges	**.850**	.118
Range of penalties	**.816**	.281
Available legal defenses	.280	**.813**
Plan legal strategy	.140	**.926**
Appraise likely outcome	.568	.474
Role of court personnel	**.700**	.157
Understand court procedure	.454	.554
Testify relevantly	.505	.466
Question/challenge witnesses	.172	**.843**
Appropriate behavior	**.733**	.211
Self-serving motivation	.689	.262
Variance explained	50.53%	13.20%

$n = 68$. Salient loadings >.70 are in bold.
* All reported Components have eigenvalues >1.0.
† Descriptive names given to component 1 and 2.

for the identification of salient loadings of the components.

Respondents opined that average abilities were sufficient for PSC defendants in the cognitive domains of intelligence (77.9%), literacy (69.1%), and verbal ability (70.6%). A small minority reported that these attributes should not be assessed in a PSC evaluation (7.4%, 4.4%, and 4.4%, respectively). A few respondents commented specifically that IQ should not be tested, because half of the population has a below-average score. The intention of this survey item was to assess a general level of intelligence, not to establish a cutoff value for IQ testing. Other respondents also pointed out that literacy is not a criterion for voting, which is a constitutional right, as is the right to represent oneself at trial.[13]

As the majority of participants were forensic psychiatrists, no analysis was performed to correlate responses by profession. However, the number of career CST examinations performed correlated inversely with necessitating a higher standard for appreciation of charges ($r = -0.269$, $p = .027$) and capacity to testify relevantly ($r = -0.259$, $p = .033$). The number of years of experience did not correlate significantly with any of the McGarry, SBC, or cognitive ability variables.

Table 2 Proposed *Pro Se* Competency Standard

There is a presumption of competence; mental disease or defect must be present to render a defendant incompetent.
If CST is in question, the defendant must first be adjudicated as CST according to *the Dusky*[2] standard.
The defendant must meet a higher standard of competence than for CST in the following areas:
Appraisal of available legal defenses
Planning a legal strategy
Questioning and challenging witnesses
The defendant must be within the general average range of cognitive abilities in the following domains:
General intelligence
Verbal ability
Literacy
The defendant must be willing to accept an SBC, who will be appointed by mandate. The SBC appointee has the right and responsibility to request a new evaluation for CST or PSC at any time during the course of the trial proceedings.
The defendant must possess a rational reason for proceeding *pro se*. The defendant's rationality should be assessed by the expert witness but ruled on by the presiding judge.

Discussion

We used empirical research methods to attempt to identify which competency domains should be required for an individual defendant whose competence is in question to be permitted to carry out a *pro se* defense. The data were interpreted to propose a novel standard for PSC (Table 2), which has yet to be defined specifically by the courts and is described in this section. The basis for this proposed standard, as in other criminal and civil competency determinations, is that a finding of incompetence is predicated on the presence of a mental disease or defect. PSC determinations should be no different in this regard.

The forensic mental health experts surveyed clearly delineated three McGarry domains as being the most important for assessing in greater depth for a PSC than for a CST examination. These three domains (appraisal of available legal defenses, planning a legal strategy, and ability to question and challenge witnesses) were apparent on descriptive analysis, were highly correlated with mandating SBC and, most important, segregated with a high degree of significance as the lawyering capacity component of the factor analysis. These three capacities are, thus, the most important factors of the McGarry criteria in differentiating PSC from CST.

The survey elucidated overwhelming support for mandatory SBC to assist the *pro se* defendant. However, participants did not agree that the presence of SBC should lower the standard for the defendant's competency. Further, when a defendant proceeds *pro se*, the SBC appointee should be able to request, at any time during the trial proceedings, that the defendant be reevaluated, not only for PSC, but also CST. It is recommended that this change be made in ABA guidelines for SBC. This responsibility comports with the concern that defendants may have a change in their mental status during the course of the trial. This could be a result of the stress of courtroom demands, poor compliance with treatment, the desire to demonstrate their insanity to the court (if that is part of their legal strategy), or other reasons. Furthermore, SBC could assist the *pro se* defendant in raising objections when potential reversible error occurs. This ability would preserve the options for appeal should the verdict be unfavorable for the defendant. Overall, the mandatory SBC provision would allow the court to preserve the dignity of individual choice without undercutting the objective of providing a fair trial.[1]

Results from both this survey of forensic mental health experts and the prior pilot survey of New York State judges[7] raised the question of the intellectual

abilities of the *pro se* defendant. Judges expressed their concerns that *pro se* defendants should have sufficient legal knowledge, as well as language ability. However, this survey's respondents believed only average general intelligence, verbal abilities, and literacy to be necessary. Since the Supreme Court has supported *pro se* defense as a constitutional right,[14] allowing only those with superior cognitive abilities would violate that right as well as contradict the reasonable person standard. Furthermore, legal knowledge may be acquired through study and assistance of SBC. As long as defendants have abilities within the broad range of average in these areas, they should be allowed to represent themselves.

An additional consideration that arose from this survey was the nature of an individual's request to proceed *pro se*. Several New York State judges,[7] as well as at least five respondents to this survey, were of the opinion that the reason for the defendant's wish to proceed *pro se* is important to assess. The greatest concern was that the reason be rational, rather than reactionary or driven by a psychotic thought process. Thus, it is recommended that the rationale of the defendant's choice of self-representation should be examined carefully by the forensic mental health expert.

Consider the following hypothetical scenario. A defendant who is charged with stalking, related to a fixed erotomanic delusion, requests a *pro se* defense. When asked why, he replies that if he is given the opportunity to cross-examine the object of his delusion, he will prove to the court that she loves him and the charges will be dropped. This type of delusional reasoning should proscribe one's right to represent oneself. Consider this alternative scenario. A woman with schizophrenia, primarily manifested by delusions of religious preoccupation, which are somewhat controlled by treatment, is charged with prostitution for the third time. Her reason for requesting a *pro se* defense is that her court-appointed attorneys had not returned her phone calls regularly and, in one case, did not show up for a court date. She also said that she has learned through these experiences how to negotiate a plea bargain. This rationale would unquestionably support her request to carry out her own defense.

This study had a relatively low response rate, but is similar to other studies in the literature. Of nine Internet-based surveys of health professionals reported by Braithwaite and colleagues,[13] three had lower response rates than ours. In their own survey, they were able to boost response rates from 30 percent to 52.4 percent by sending five email reminders. In the present study, we sent only three and may have benefitted from additional reminders. Other surveys have been shown to augment their response rate by enticing participants with incentives, financial and otherwise (e.g., CME credits).[15] As this research was conducted without outside funding, incentives were not feasible. However, despite the relatively low response rate of 22.7 percent, the 68 participants provided sufficient data for quantitative analysis, which led to meaningful conclusions.

This study was based on the opinions of forensic mental health experts, who have an interest in testifying in such matters. As with many other forensic-legal evaluations, the evidence for this proposed standard needs to be tested for validity and reliability. Some respondents suggested the use of standardized tests, such as those administered in trial law courses in law schools, to assess legal knowledge. Others suggested that mini mock trials be conducted by the presiding judge to facilitate a determination of PSC. However, these measures would place additional time and resource burdens on the courts, which are already overwhelmed with large caseloads and budgetary constraints.

Conclusions

The approach to assessing PSC after *Edwards* remains somewhat unclear. While the Supreme Court left this complex task to the lower courts, it did indicate that it considered decision-making abilities to be an important element. Rather than leave the entire burden on the trial judges, researchers and scholars have begun to approach the problem within the framework of various disciplines. Thus far, we have conducted a pilot survey of trial judges, followed by this quantitative survey of forensic mental health experts, intended to preliminarily clarify which factors distinguish PSC from CST.

The findings from this second survey suggest that mental health professionals may consider it important to assess certain traditional CST capacities, but at a higher standard than that ordinarily used for CST evaluations. These capacities were appraisal of available legal defenses, planning a legal strategy, and questioning and challenging witnesses. The authors suggest considering these three capacities in greater detail for evaluations of PSC in addition to assessing

for average intellectual abilities, a rational reason for self-representation, and the need for SBC. These factors appear to comport well with the representational competence standards articulated in the legal literature. As such, the authors are in the process of drafting a new article to compare and integrate the legal scholar's construct of PSC with the standard proposed by this empirical study.

References

1. Indiana v. Edwards, 554 U.S. 164 (2008)
2. Dusky v. United States, 362 U.S. 402 (1960)
3. Johnston EL: Setting the standard: a critique of Bonnie's competency standard and the potential of problem-solving theory for self-representation at trial. UC Davis L Rev 43:1605–73, 2010
4. Appelbaum P: A fool for a client?—mental illness and the right of self-representation. Psychiatr Serv 59:1096–8, 2008
5. Martinez v. Court of Appeals, 528 U.S. 152, 164 (2000)
6. Hashimoto E: Defending the right to self representation: an empirical look at the pro se felony defendant. NC L Rev 85:423–87, 2007
7. Knoll JL, Leonard C, Kaufman AR, *et al*: A pilot survey of trial court judges' opinions on *pro se* competence after *Indiana v. Edwards*. J Am Acad Psychiatry Law 38:536–9, 2010
8. McGarry A, Curran W: Competency to Stand Trial and Mental Illness. Rockville, MD: National Institute of Mental Health, 1973
9. 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(Suppl):S3–72, 2007
10. Morris D, Frierson R: *Pro se* competence in the aftermath of *Indiana v. Edwards*. J Am Acad Psychiatry Law, 36:551–57, 2008
11. USSC Indiana v. Edwards: Brief for the American Psychiatric Association and American Association of Psychiatry and the Law as in Support of Neither Party. Washington, DC: American Psychiatric Association, 2008
12. American Bar Association (ABA). Criminal Justice Section Standards, Standard 6-3.7. Standby counsel for pro se defendant. Washington, DC: ABA. Available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_trialjudge.html#6-3.7. Accessed October 21, 2011
13. Braithwaite D, Emery J, de Lusignan, *et al*: Using the Internet to conduct surveys of health professionals: a valid alternative? Fam Pract 20:545–51, 2003
14. Faretta v. California, 422 U.S. 806 (1975)
15. Kellerman SE, Herold J: Physician response to surveys: a review of the literature. Am J Prev Med 21:61–7, 2001