

How Experts Advise Evaluating *Pro Se* Competence 15 Years Post-*Edwards*

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The challenge of achieving an acceptable balance between respecting the autonomy of criminal defendants by allowing them to self-represent, and protecting the integrity of the judicial process by limiting this right when mental illness impedes such efforts, has been longstanding. Although courts have long tended to allow self-representation, a recognized ability of states to limit such rights was articulated by the U.S. Supreme Court in *Indiana v. Edwards* (2008). Because *Edwards* outlined no specific test for representational competence, numerous scholars have proposed criteria over the last 15 years, with variable frameworks and points of emphasis. We synthesized the published literature since *Edwards* on the evaluation of *pro se* competence. A search of electronic databases was conducted using relevant search terms, yielding 31 identified articles after review of titles, abstracts, full-text articles, and reference lists. Overall, in evaluating *pro se* competence, experts advise assessing whether a defendant can demonstrate the cognitive, communicative, and emotional abilities to conduct an adequate defense, engage in constructive social intercourse, provide a rational reason for pursuing self-representation, and willingly work with standby counsel. Using these factors, we propose a representational competence standard that balances defendant autonomy with court paternalism. Implications for future research are discussed.

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The right of a criminal defendant to self-representation has long been considered by the U.S. Supreme Court as closely related to individual autonomy and dignity recognized by the Constitution.^{1,2} For some criminal defendants, symptoms of mental illness can hinder the ability to perform the legal tasks necessary to conduct an adequate defense (i.e., can interfere with *pro se* competence).

In *Faretta v. California*,¹ the U.S. Supreme Court held in 1975 that preserving a defendant's right to self-represent, based on the importance of preserving the defendant's dignity, autonomy, and Sixth Amendment rights to confront one's accusers directly, outweighed the risk of an unjust outcome caused by impaired ability to self-represent competently. Eighteen years later,

in *Godinez v. Moran*,² the Court held that the competence standard for a defendant to waive the right to counsel was no greater than the standard for competence to stand trial. The majority again held that an individual's right to self-represent, even when resulting in an unfavorable outcome, was more important than ensuring a just trial.

In 2008, in *Indiana v. Edwards*,³ the Court shifted from its prior rulings in *Faretta* and *Godinez*, placing greater emphasis on the need to ensure the integrity of the judicial process rather than a defendant's autonomy and dignity. The *Edwards* Court noted that in *Godinez*, the standard for assessing competence to self-represent was felt to align with the standard for assessing competence to stand trial outlined in *Dusky v. U.S.*⁴; that is, that the defendant possessed "sufficient present ability to consult with his lawyer with a reasonable degree of understanding—and whether he has a rational as well as factual understanding of the proceedings against him" (Ref. 4, p 402). The *Edwards* Court stated that at the time of *Godinez*, this finding was considered reasonable because the defendant in *Godinez* merely wanted to represent himself to present a guilty plea, whereas in

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the *Edwards* case, the defendant intended to proceed to trial and conduct his own defense.

The *Edwards* Court noted that although the *Dusky* standard was helpful as a starting point, it was insufficient for testing a defendant's competence to conduct a defense because it required only a passive understanding of one's legal situation and ability to consult with one's attorney, as opposed to the more cognitively and legally demanding tasks involved in representing oneself. Those tasks involve organization of the defense, making motions, arguing points of law, conducting *voir dire*, examining witnesses, and addressing the court and jury. The Court indicated that the decision to grant a defendant's *pro se* request would be at the discretion of the trial judge, who would "often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant" (Ref. 3, p 177).

Although the *Edwards* Court ruled that a state may require a higher competency standard for self-representation, it did not mandate this, and many states have since chosen not to adopt such a higher standard. For example, in *State v. Barnes*,⁵ the Supreme Court of South Carolina held, "We decline to impose a higher competency standard upon an individual who wishes to waive his right to an attorney and represent himself at trial than that required for the waiver of other fundamental constitutional rights afforded a criminal defendant, such as the right against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers" (Ref. 5, p 550). Similarly, in *People v. Davis*,⁶ the Supreme Court of Colorado reversed an appellate court decision prescribing a new, *Edwards*-based standard for evaluating a criminal defendant's competence to waive the right to counsel, noting that the state's "existing two-part framework for determining whether a defendant has validly waived the right to counsel affords trial courts sufficient discretion to consider a defendant's mental illness" (Ref. 6, p 952). This two-part framework included determination that a defendant was competent to waive the right to counsel, as measured by trial competence, and was waiving the right knowingly, intelligently, and voluntarily.

Since *Edwards*, nearly three times as many states have adopted or have indicated a willingness to adopt a higher competency standard for self-representation such as those equating a *pro se* competence standard to a *Dusky* standard.⁷ The *Edwards* Court did not

articulate a specific test to determine a defendant's ability to complete trial-conducting tasks. Many legal and forensic mental health scholars have since proposed criteria to assist judges and forensic practitioners in assessing *pro se* competence. Although potentially helpful, their frameworks have varied and, in some cases, recommendations have been conflicting.^{8,9} This review aims to provide a comprehensive summary of the published literature to date on evaluation of *pro se* competence in the years following the U.S. Supreme Court's decision in *Edwards*.

Methods

A search of the electronic databases PsycINFO, Ovid MEDLINE, PubMed, and Index to Legal Periodicals and Books (with Full Text), from database inception to present, was conducted on February 25, 2023, using the search terms "competency," "competence," "represent," "self," "*pro se*," "evaluation," "assessment," and "Indiana v. Edwards." The initial search revealed 556 citations. After review of titles and abstracts and removal of duplicates, 27 citations remained. After review of full-text articles, 15 citations remained (12 were excluded for not relating to the question of *pro se* competence assessment). An additional 16 articles were identified from review of reference lists, resulting in 31 articles reviewed that were relevant to evaluation of *pro se* competence in the years following the *Edwards* decision.

Inclusion criteria for this review consisted of the following: published in English, published after June 2008 (the date of the *Edwards* decision), pertained to the topic of evaluation of *pro se* competence in criminal defendants, and peer-reviewed (or at least editor-reviewed and submitted by faculty or trainees in an accredited law or forensic psychiatry training program) in the author's field of practice (e.g., law, forensic mental health). Citations not meeting all the above criteria were excluded from review.

Results

The 31 identified articles fell into one of three categories: articles highlighting a legal (most often appellate or state supreme court) case related to *pro se* competence assessment; articles articulating general opinions or recommendations related to the assessment of *pro se* competence; and articles offering specific recommendations for criteria or guidelines to be

used by forensic or legal professionals in the assessment of *pro se* competence.

Cases Related to Pro Se Competence

We identified eight such publications,^{10–17} five of them referencing federal circuit court appellate cases^{10,12,14–16} and three of them state supreme court decisions.^{11,13,17} These articles are presented in Table 1.

One common theme from our review of the cited cases is that competence to waive the right to counsel is given considerable weight by trial and higher courts in considering *pro se* competence.^{10–14,17} In many cases, the deciding courts discussed competence to waive counsel exclusively, or at least more emphatically than competence to represent oneself, supported by a *Godinez* interpretation that competence to waive the right to counsel requires no higher standard than competence to stand trial, and is the relevant legal inquiry in cases where representational competence is questioned.² In these cases, trial or appellate courts held that defendants were appropriately deemed competent to self-represent if their waivers of the right to the assistance of counsel were “knowing, intelligent, and voluntary” (Ref. 2, pp 401–402). In at least three cases,^{11,13,14} courts held that a defendant’s competent waiver of counsel obviated the need to assess separately representational competence.

Other points variably highlighted by these authors include that an unusual defense strategy,¹⁵ voluntary uncooperativeness,¹⁴ lack of educational achievement,^{16,17} and lack of technical knowledge¹⁷ do not necessarily reflect *pro se* incompetence; that representational competence should be assessed as related to mental functioning (including understanding of the *pro se* request)¹⁶; and that representational competence does not require perfect competence.¹¹

General Opinions on Pro Se Competence

Authors in this category offered general opinions or recommendations about representational competence. We identified nine such publications (see Table 2).^{18–26}

Overall, these authors pointed out the need for a higher standard than the *Dusky* trial competence standard in evaluating a defendant’s *pro se* competence,^{20,22–25} given the different demands of each task as noted in *Edwards*. These authors asserted the need for clarity in the types of tasks a *pro se* defendant needs to be able to complete to conduct an adequate defense^{20,25} and in

what mental (e.g., cognitive, emotional) capacities are needed to prepare a defense and conduct a trial.²² Some explicitly advised the use of mental health professionals to assist courts in determining a defendant’s *pro se* competence,^{20,22,23,25} whereas others appeared to express opinions and recommendations targeting legal professionals or courts.^{19,24,26} Regarding the latter, one author argued that a higher standard than *Dusky* for competence to waive the right to counsel would preserve both the interests in dignity and autonomy of the defendant with mental illness and the interests of the court in a fair and just legal process and would make unnecessary a standard for competence to represent oneself.¹⁹

Some scholars emphasized the importance of a defendant’s right to self-representation by virtue of constitutional provision²³ and consideration of the psychological motivations for self-representing.^{18,26} Barth²³ argued that the right to self-representation is a constitutional right grounded in the Sixth Amendment, and therefore competence to proceed *pro se* should be a restorable right, meaning that defendants deemed incompetent to self-represent because of a mental illness should be provided an opportunity to be treated to restore *pro se* competence, rather than have counsel forced on them. She likened this suggestion to how defendants deemed incompetent to stand trial or incompetent to plead guilty can be treated to restore competence in these respective spheres. She advised that a mental health professional should be appointed to assess whether a defendant is competent to proceed *pro se*, and if not, whether the defendant could be restored to *pro se* competence by being permitted to elect to take medication. Morris and Frierson¹⁸ asserted that, contrary to common perception, *pro se* defendants in most cases are not experiencing mental illness or displaying foolishness and have legitimate reasons for seeking to represent themselves. In a similar vein, Cabell²⁶ noted that among a variety of psychological motivations, ideological interests (e.g., based on religious or political beliefs) and dissatisfaction with quality of appointed counsel often generate concerns about mental illness but do not necessarily imply incompetence to self-represent.

Other authors highlighted significant drawbacks and risks associated with *pro se* representation. For example, a survey of 986 state court judges by the American Bar Association Coalition for Justice²¹ showed that 62 percent of judges felt case outcomes were worse with self-representation, with the most common reasons for these outcomes being failure to present necessary evidence (94%), procedural errors

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Table 1 Case-Based Publications Illustrating Questions Related to *Pro Se* Competence

Author(s)/Year	Case Referenced	Facts of Case	Ruling/Relevant Points
Saleh & Pinals (2010) ¹⁰	<i>United States v. deShazar</i> , 554 F.3d 1281 (10th Cir. 2009)	Def indicted on stalking, carrying firearm charges. He insisted on proceeding <i>pro se</i> despite ct warning; ct granted request, finding he knowingly and voluntarily waived right to counsel. Convicted on both counts, he appealed, arguing district court erred in finding him CST, CWRC, CSR.	Tenth Circuit affirmed conviction, reiterated <i>Godinez</i> ² : defendant can conduct own defense if CST; interpreted <i>Edwards</i> as permitting but not requiring courts to deny defendant right to represent self, especially because in this case was found CST and CWRC.
Lee & Pinals (2011) ¹¹	<i>State v. Dahl</i> , 776 N.W.2d 37 (N.D. 2009)	Def charged with reckless endangerment (fired shotgun at victim's home); requested self-rep because atty didn't subpoena proposed witnesses; district ct warned him about risks of self-rep, granted request despite schizophrenia dx and asking bizarre questions to jurors. At trial, found guilty; he appealed, claiming he was not CWRC, which ct should have detected by his conduct.	North Dakota Supreme Ct affirmed convictions; def had asked odd questions during jury selection, but no evidence at trial of mental illness symptoms impairing CSR. Although self-rep may have been unwise, he showed trial strategy, and waiver of right to counsel was knowing, intelligent, voluntary.
Beaman and Noffsinger (2013) ¹²	<i>United States v. Turner</i> , 644 F.3d 713 (Eighth Cir. 2011)	Def charged with felony poss of firearm; he requested self-rep, which ct granted; at trial, he cross-examined witnesses, gave religious speech for closing argument. Found guilty; he argued ct failed to question him about CSR, require higher level for CSR than CST, and hold competency hearing in response to bizarre behavior.	Eighth Circuit rejected all claims, holding district ct had adequately warned def of dangers of self-rep, that his waiver of counsel was knowing and voluntary, and that no parties (including def) had at any point during trial raised concern about his CSR.
Martin and Weisman (2013) ¹³	<i>State v. Lane</i> , 707 S.E.2d 210 (N.C. 2011)	Def confessed to murdering five-year-old female neighbor; chose to self-represent during legal process. Found guilty of first-degree murder, multiple sex offenses; jury sentenced to death; he appealed; case bypassed appellate ct, went directly to North Carolina Sup Ct.	North Carolina Sup Ct held def could waive right to counsel if did so knowingly and voluntarily; held <i>Edwards</i> did not apply, because trial ct determined that def had waived right to counsel knowingly and voluntarily.
Boudreaux & Kelly (2014) ¹⁴	<i>United States v. Morris</i> , 489 F. App'x 407 (11th Cir. 2012)	Def indicted after making false statement in passport app, was convicted; before sentencing, had psych eval given odd behavior (sent child pornography to ct). Trial ct found incompetent for sentencing, ordered tx; he was restored; he moved to dismiss counsel, with whom he repeatedly refused to cooperate; ct warned him of risks of self-rep, made appointed atty standby counsel. Sentenced to 10 years prison; he argued he was not CSR, that trial ct erred in making him self-rep at sentencing.	Eleventh Circuit affirmed def was CWRC and proceed to sentencing; CWRC shown by objections and arguments made to ct, final psych report opined competent to proceed, and by uncooperative conduct he knowingly and voluntarily waived right to counsel. Authors noted that after thorough eval, if a def is opined to be voluntarily uncooperative, this should not be labeled incompetence.
Wiita & Simpson (2017) ¹⁵	<i>United States v. Dubrule</i> , 822 F.3d 866 (Sixth Cir. 2016)	Def charged with conspiracy to distribute and delivery of controlled substances; proceeded to trial <i>pro se</i> , was convicted on all counts. He appealed, arguing he should have had competency hearing before trial, that he was given ineffective stand-by counsel, and that expert who opined he was CST and CSR provided testimony not "peer-reviewed."	Sixth Circuit rejected all claims, stating trial ct had spent much time with def who showed working knowledge of relevant law, rational and factual understanding of proceedings, and ability to consult with standby counsel. Authors noted that an unorthodox defense strategy not sufficient to render a def IST.
Saxton and Resnick (2017) ¹⁶	<i>Tatum v. Foster</i> , 847 F.3d 459 (Seventh Cir. 2017)	Def charged with homicide; had trial competence eval, was opined CST; def requested self-rep. Ct found def CST, but	Seventh Circuit ultimately reversed judgment of district ct and held that right to represent oneself is constitutional right not to

Table 1 Continued

Author(s)/Year	Case Referenced	Facts of Case	Ruling/Relevant Points
		denied his <i>pro se</i> request, partly because of his achieving only 10th grade education. Was convicted; on appeal, state appellate ct affirmed, Wisc Sup Ct denied review, district ct rejected claims, Seventh Circuit agreed to hear case.	be infringed on based on lack of education, skill, or achievement; rather, CSR must be considered as it relates to mental functioning.
Chandarana & Kelly (2020) ¹⁷	<i>Hooks v. State</i> , 286 So. 3d 163 (Fla. 2019)	Def charged with drug possession, probation violation; requested self-rep; trial judge gave him written material and warned him of risks regarding self-rep. At trial, found guilty; def appealed, arguing trial ct did not inquire about his age, legal understanding and experience, or other factors related to knowing and voluntary waiver of right to counsel; state appeals ct rejected claim, but certified question to Florida Sup Ct regarding relevant factors in <i>pro se</i> competence inquiries.	Florida Sup Ct held trial ct did not err in granting def's <i>pro se</i> request despite not inquiring about his age, experience, and understanding of criminal procedure, including ability to prepare a defense and legal knowledge. Ct held a def should be allowed to waive right to counsel following thorough inquiry into def's comprehension of the request.

Note. app, application; atty, attorney; CSR, competent to self-represent; CST, competent to stand trial; ct, court; CWRC, competent to waive right to counsel; def, defendant; dx, diagnosis; eval, evaluation; IST, incompetent to stand trial; poss, possession; psych, psychiatric; self-rep, self-representation; Sup, Supreme; tx, treatment.

(89%), ineffective witness examination (85%), failure to object properly to evidence (81%), and ineffective arguments (77%). In addition, 78 percent of judges noted that courts were negatively affected by *pro se* representation, most commonly via slowed procedures (90%), lack of fair presentation of relevant facts (56%), and even the impartiality of the court being compromised to avoid injustice (42%) when judges must act in place of an attorney to ensure justice was served. Similarly, Dillard²⁴ argued that in capital cases, “borderline-competent defendants” (i.e., those competent to stand trial with the assistance of counsel but not competent to proceed *pro se*) pose a special risk that the death penalty will be imposed despite mitigating factors that would call for a less harsh penalty (e.g., presence of severe mental illness). Referencing the U.S. Supreme Court’s decision in *Atkins v. Virginia*,²⁷ in which the Court ruled that executing people with intellectual disabilities violates the Eighth Amendment’s ban on cruel and unusual punishment, Dillard asserted that forcing marginally competent defendants with severe mental illness to face the death penalty similarly violated the moral dignity of criminal proceedings. She advised that such defendants be categorically exempted from the death penalty by being found incompetent to stand trial when death is a possible sentence and competent to stand trial when life in prison without the possibility of parole is a possible sentence.

In summary, authors providing general opinions or recommendations regarding *pro se* competence have

argued that standards for waiving the assistance of counsel or for representing oneself should be higher than the *Dusky* standard for competence to stand trial, in disagreement and agreement, respectively, with the U.S. Supreme Court rulings in *Godinez* and *Edwards*. These authors advocate for a more stringent set of criteria to assess representational competence, in contrast to holdings in the previously cited federal circuit and state supreme court cases in which heavy reliance is placed on a *Godinez* approach of foregoing further consideration of criteria for representational competence in the context of a knowing, intelligent, and voluntary waiver of the right to counsel.

Criteria for Assessing Pro Se Competence

This category comprised legal and forensic scholars who provided specific recommendations for criteria to assess a criminal defendant’s *pro se* competence. As shown in Table 3, we identified 14 such publications,^{7-9,28-38} nine of them written in a legal framework and addressed to judges or courts,^{8,9,28,29,33,34,36-38} three from a mental health framework mainly addressing forensic evaluators,^{7,31,35} and two from both a legal and mental health framework with courts and forensic evaluators as the target audience.^{30,32}

Overall, these authors recommended criteria for assessing *pro se* competence that include whether a defendant has the cognitive,^{7,8,28-38}

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Table 2 General Opinions and Recommendations Related to Assessment of *Pro Se* Competence

Author(s)/Year	Framework	Opinion/Analysis	Recommendations
Morris & Frierson (2008) ¹⁸	Legal and Mental Health	<i>Pro se</i> defs, in most cases, not experiencing mental illness or being foolish, have legitimate reasons for seeking self-rep. <i>Edwards</i> will lead cts to increasingly request forensic consultation to assess defs' CSR.	Forensic evaluators must be cautious and claim expertise only in areas in which they have actual knowledge, skills, training, and experience.
Slobogin (2009) ¹⁹	Legal	<i>Godinez</i> ct should have required higher standard for CWRC, and <i>Edwards</i> ct should have affirmed findings in <i>Faretta</i> and <i>Godinez</i> that central concern was CWRC, not CSR. By requiring higher standard for CWRC, interests of mentally ill def in autonomy and dignity and interests of ct in ensuring fair and just process both preserved.	Cts evaluating CWRC should ensure def has capacity to communicate facts to an atty and testify relevantly, understand all consequences of self-rep, and give non-delusional, self-regarding reasons for waiver. Higher standard for CWRC averts need for standard for CSR, preserves dignity of defs with mental illness by avoiding "circus-like" hearings.
Moore and Ramsland (2011) ²⁰	Legal	There is need to assess representational competence, in line with <i>Edwards</i> decision that standard for trial competence should be distinct from that for <i>pro se</i> competence based on different demands of each task.	Ct guidance needed in terms of types of tasks a <i>pro se</i> def needs to be able to conduct to adequately self-represent; given complexity of abilities involved, mental health professionals should provide input, with judge as final arbiter.
American Bar Association Coalition for Justice (2010) ²¹	Legal	Most judges reported an increase in parties representing themselves, worse outcomes with self-rep, and negative impacts on cts with self-rep (e.g., inefficiency, unfair presentation of facts).	Eighty-six percent of judges felt cts would be more efficient if both parties were represented; 73% felt legal services funding should be increased; 68% supported increases in <i>pro bono</i> attys to enhance def representation to improve justness and efficiency of judicial process.
White & Gutheil (2011) ²²	Legal and Mental Health	Worse outcomes for many <i>pro se</i> defs. More defs wishing self-rep, likely owing to less financial support for public defenders, inability to afford private attys. <i>Edwards</i> supported but did not specify test for higher standard than <i>Dusky</i> for CSR eval.	Generally worse outcomes with self-rep, increasing numbers of defs requesting self-rep, and lack of clarity in <i>Edwards</i> ruling make development of operationalized schemata for cts, attys, and forensic mental health experts for assessing CSR important.
Barth (2011) ²³	Legal	CSR can and should be restorable right, given right to self-rep grounded in the Sixth Amendment. Although <i>Edwards</i> did not provide specific standard for CSR, it did provide "floor and ceiling;" standard higher than <i>Dusky</i> , lower than Indiana's proposed "communicate coherently with the court or jury" standard.	Mental health professional should be appointed to assess whether potential <i>pro se</i> def is CSR and if not, whether can be restored to CSR via medication. Standby counsel should be mandatorily appointed as safeguard to ensure integrity of judicial process. Counsel should be appointed against def wishes only if def unable to have CSR restored.
Dillard (2012) ²⁴	Legal	"Borderline-competent" defs (those CST but not CSR), like intellectually disabled defs, pose special risk that death penalty will be imposed despite mitigating factors that would call for less severe penalty.	In capital cases, allowing a "borderline-competent" def to proceed <i>pro se</i> with standby counsel violates due process. Defs not CSR should be exempted from death penalty.
Mackin (2013) ²⁵	Mental Health	Surveyed 111 forensic psychologists on CSR. More experienced evaluators more likely to consider legal consequences of <i>pro se</i> def and less likely to be swayed by personal opinion of def, def's crime, or overall fairness of hearings.	Future research should examine what elements are necessary and sufficient to determine threshold for higher level of competence in evaluating defs requesting self-rep.
Cabell (2013) ²⁶	Legal and Mental Health	<i>Pro se</i> defendants have various psychological motivations for self-rep, including dissatisfaction with counsel and perceiving fairness because of being able to present arguments to a listening authority. Two types of dissatisfaction with counsel: concern about effort from or communication with counsel, and ideological differences with counsel based on religious, political, or other beliefs about role of government.	In cases of def dissatisfaction with effort of or communication with counsel, choice to proceed <i>pro se</i> is fueled by self-preservation and perceived lack of other options. In cases of ideologically based motivations to self-represent, while often generating mental illness accusations, these motivations do not necessarily imply incompetence to self-represent, particularly when viewed from a nonoutcome-oriented legal perspective.

Note. atty, attorney; CSR, competent to self-represent; CST, competent to stand trial; ct, court; CWRC, competent to waive right to counsel; def, defendant; eval, evaluation; self-rep, self-representation.

Table 3 Criteria Proposed over the Last 15 Years for Evaluating *Pro Se* Competence

Author(s)/Year	Framework	Approach	Target Audience	Recommended Criteria
Willis (2010) ²⁸	Legal	Theoretical	Judges	Whether def can communicate with ct, witnesses, and jury, and has <i>de minimis</i> understanding of substantive and procedural law, as well as factual and rational understanding of proceedings.
Johnston (2010) ⁸	Legal	Theoretical	Judges	Consider def’s willingness to address a problem (e.g., willingness to defend against being prosecuted) and abilities to define a problem, generate possible solutions, make decisions, and execute decisions.
Marks (2010) ²⁹	Legal	Theoretical	Judges	Def not CSR if mental disorder or disability prevents def from understanding charges, law, and evidence, formulating simple defense strategies, and communicating with witnesses, ct, prosecutor, and jury in manner calculated to implement those strategies in rudimentary fashion.
Knoll et al. (2010) ³⁰	Legal and Mental Health	Empirical	Forensic Evaluators and Judges	Assess intellectual and analytic abilities, legal knowledge and experience, language abilities, presence of severe mental illness sx, behavioral control, rational reason for proceeding <i>pro se</i> , and willingness to accept standby counsel.
Kaufman et al. (2011) ³¹	Mental Health	Empirical	Forensic Evaluators	Assess whether def can appraise available legal defenses, plan legal strategy, question and challenge witnesses, provide rational reason for requesting self-rep, and willingly work with standby counsel.
Blume & Clark (2011) ³²	Legal and Mental Health	Empirical	Judges and Forensic Evaluators	Replace words “reasonable” and “sufficient” with “significant” in current <i>Dusky</i> trial competence standard to protect defs with severe mental illness from being deemed CST and thus, in some cases, CSR. Meaningfully consider opinions of defense attys regarding competence of defs. Prohibit <i>pro se</i> defense for defs diagnosed with certain psychiatric conditions and in capital cases.
Johnston (2011) ³³	Legal	Theoretical	Judges	Assess def’s ability to perceive problematic situations, generate alternative courses of action, maintain mental organization, communicate decisions to ct functionary, identify an alternative, plausible explanation for circumstances leading to prosecution, attend to prosecution, withstand stress of trial, and justify a defense decision with a plausible reason.
Beck (2013) ³⁴	Legal	Theoretical	Judges	Three-part analysis, including whether def is CST, has voluntarily, knowingly, and intelligently waived right to counsel, and is mentally CSR without counsel. For CSR, ct should consider facts of case, in-person interaction with def, and def’s ability to carry out basic defense tasks without help of counsel (e.g., make rational choices, communicate coherently, make objections and closing arguments).
White & Gutheil (2016) ³⁵	Mental Health, Legal	Theoretical	Forensic Evaluators	Five-part model assessing whether def can engage in goal-directed behaviors, has sufficient oral and written communication skills, can engage in constructive social intercourse, can control emotions in adversarial arena, and has cognitive abilities to argue case adequately.
LeCluyse (2015) ⁹	Legal	Theoretical	Judges	Use approach analogous to assessing tx decision-making capacity, including assessment of ability to communicate a choice, understand relevant information, appreciate legal situation and its likely consequences, and manipulate information rationally.
Johnston (2016) ³⁶	Legal	Empirical	Judges	Use two-pronged standard that includes assessment of competence to “control” and “conduct” a defense; potential <i>pro se</i> def could thus be allowed to control defense but could have assistance of interpreter or other personnel if coherent communication a problem.
Leckar (2017) ³⁷	Legal	Empirical	Judges	Perspectives of defense counsel should be considered but are not dispositive. Trial judge should hold hearing to determine whether def can articulate rational defense strategy, noting speech and communication abilities. Judge should order forensic eval to offer opinions on def dx, px, whether can conduct trial proceedings rationally, and if malingering. Judge should appoint counsel for <i>Edwards</i> hearing and explain and define atty’s role.
Patton (2019) ⁷	Mental Health, Legal	Empirical	Forensic Evaluators	Be aware of relevant standards in one’s state; assess def’s basic understanding of trial process, rationale for proceeding <i>pro se</i> , mental state (sxs that could impede defense tasks), cognitive ability to carry out defense, beliefs about case or atty; request guidance from cts regarding capacities needed for self-rep and if nonmental illness-related impairments considered.

Table 3 Continued

Author(s)/Year	Framework	Approach	Target Audience	Recommended Criteria
Yacoub & Briggs (2022) ³⁸	Legal	Theoretical	Judges	Adopt four-prong test proposed by LeCluyse ⁹ based on similar capacities used to assess medical decision-making competence. Appoint standby counsel in all criminal cases, as judge then benefits from counsel's knowledge of def's mental capability to self-represent. Abolish right for defs to proceed <i>pro se</i> in capital cases on constitutional and human rights grounds.

Note. atty, attorney; CSR, competent to self-represent; CST, competent to stand trial; ct, court; def, defendant; dx, diagnosis; eval, evaluation; px, prognosis; self-rep, self-representation; sxs, symptoms; tx, treatment.

communicative,^{7,9,28–31,33–38} and emotional^{27,30,32,33,35} abilities to conduct an adequate defense; can engage in constructive social intercourse^{28,29,31,33–35,37,38}; can provide a rationale reason for pursuing self-representation^{7,30,31}; and is willing to work with standby counsel.^{7,30–32,36} Cognitive abilities include the capacities to engage in goal-directed behavior,^{8,29,31,33,35,36} understand and appreciate the legal process and how it applies to the defendant's case,^{7–9,28–35,37,38} and make reasoned choices about defense strategies.^{7–9,29,31,33,34,36–38}

Although versions of these criteria were proposed by a near consensus of the authors identified, scholars had varying points of emphasis in their recommendations. For example, Johnston⁸ proposed that assessment of *pro se* competence be guided by a problem-solving theory framework that considers a defendant's willingness to address a problem (e.g., willingness to defend against being criminally prosecuted) and abilities to define a problem (e.g., review the prosecution's case), generate possible solutions (e.g., come up with defense strategies), make decisions (e.g., decide among various defense strategies, choose among plea options), and execute decisions (e.g., present arguments to the judge or jury, examine witnesses, enter pleas to the court).

Knoll *et al.*³⁰ took a more empirical approach, eliciting New York state trial judges' opinions regarding *pro se* competence to help forensic evaluators structure their assessments. These authors found that among the 18 judges who responded to the survey, disorders of cognitive impairment (such as dementia) and psychosis were viewed as most potentially hindering *pro se* competence. In terms of which domains of functioning should be assessed, judges recommended intellectual and analytic abilities ($n = 10$), legal knowledge and experience ($n = 9$), language abilities ($n = 8$), presence of severe mental illness symptoms ($n = 5$), and behavioral control ($n = 4$). Several judges advised assessing for a rational reason for proceeding *pro se* and a willingness to accept the help of standby counsel. Limitations of the Knoll

*et al.*³⁰ study included the small number of respondents, precluding definitive conclusions, and the fact that judges from only one geographic region were surveyed, limiting reliability and generalizability of the results.

Following these findings, the researchers surveyed 68 forensic mental health experts to ascertain potential criteria for *pro se* competence.³¹ They found that appraisal of available legal defenses, planning a legal strategy, and questioning and challenging witnesses were cited by forensic mental health experts as McGarry³⁹ criteria items requiring a higher standard for *pro se* competence than for competence to stand trial. Respondents also opined that average abilities for intelligence, literacy, and verbal ability were sufficient for *pro se* competence purposes and that assessment of a defendant's motivation or rationale for requesting *pro se* representation and willingness to work with standby counsel would also be important facets of the evaluation. A potential limitation of this study was the predominance of forensic psychiatrists among the respondents, with no analysis performed to correlate responses by profession. This study and that of Knoll *et al.*³⁰ supplement Johnston's⁸ cognitive and problem-solving focus with attention to communication abilities, presence of a rational reason for a *pro se* request, and willingness to work with standby counsel as other pertinent factors to consider in assessing representational competence.

White and Gutheil³⁵ further expanded on these contributions by proposing a five-part model to clarify the types of deficits that could hinder a defendant's effective execution of trial-conducting tasks, with implications for potential defendant assistance. This model included assessment of whether a defendant can engage in goal-directed behaviors, has sufficient oral and written communication skills, can engage in constructive social intercourse, can control emotions in an adversarial arena, and has the cognitive abilities to argue the case adequately. The authors

noted that this model enables identification of specific areas in which assisting defendants may, in some cases, preserve effective self-representation (e.g., a defendant with difficulty engaging in goal-directed behavior could be provided an administrative assistant to ensure completion of pretrial tasks; a defendant lacking oral and written communication skills could be appointed counsel to help with proper legal modes of communication to present arguments and defenses; a defendant with marked social behavior deficits could be assisted by coaches or mental health practitioners).

Blume and Clark³² reviewed 39 appellate court decisions, most of which affirmed trial court decisions to approve defendant *pro se* requests, even in cases involving defendants with severe mental illness and in capital cases. These authors, concluding that the *Dusky* trial competence standard is too low a bar for assessing representational competence, advised considering input from defense attorneys in assessing *pro se* competence, categorically prohibiting defendants diagnosed with certain psychiatric conditions (e.g., schizophrenia, intellectual disability) from proceeding *pro se*, and forbidding *pro se* representation in capital cases.

LeCluyse⁹ proposed a standard analogous to considerations used by the medical community in assessing a patient's treatment decision-making capacity, including the ability to communicate a choice, the ability to understand relevant information, the ability to appreciate the legal situation and its likely consequences, and the ability to manipulate information rationally. She argued that such a standard provides courts with a competence guideline requiring abilities higher than trial competence while giving the trial judge broad discretion in the standard's application, thus balancing the court's paternalism in potentially denying the request for *pro se* representation and the autonomy of the defendant in being allowed to conduct the defense.

Johnston³⁶ similarly proposed a *pro se* competence standard intended to better balance court paternalism with defendant autonomy. She noted that since the *Edwards* decision, seven states had adopted communication components to their *pro se* competence standards and 20 states had established vague, "capacious" standards that may consider communication skills. Johnston proposed a two-pronged competence to self-represent standard that includes assessment of competence to control one's defense (manifested in problem-solving and decision-making capacities) and competence to

conduct one's defense (manifested in the ability to communicate coherently to courtroom actors). She argued that by using this two-pronged standard, a potential *pro se* defendant could still be allowed to control the defense but could have the assistance of an interpreter or other personnel if coherent communication is a problem (e.g., defendants with speech impediments, tic disorders, soft speech, or thick accents). Johnston further argued that this approach would be more likely to pass constitutional muster.

Patton *et al.*⁷ also reviewed state responses to the *Edwards* decision using both statutory provisions and state court rulings to comment that a patchwork of responses in terms of state *pro se* competence standards has followed the *Edwards* ruling, with 10 states simply adopting the *Dusky* standard for competence to stand trial, 28 states adopting or expressing a willingness to adopt a higher standard than *Dusky* for *pro se* competence, and 12 states not addressing the question of *pro se* competence. The authors proposed recommendations for assessing *pro se* competence that included being aware of the relevant standards in one's state, assessing a defendant's basic understanding of the elements of the adjudicatory process and how they apply to the defendant's case, and assessing for the presence of any mental health symptoms that could impede defense-related tasks. Other recommendations included assessing whether a defendant has the cognitive ability to carry out a defense, discerning whether a defendant's beliefs about the case or the defense attorney are likely inaccurate but not delusional in nature, and requesting guidance from courts regarding which capacities a defendant should have for self-representation and whether impairments unrelated to a severe mental illness should be considered.

Discussion

The arguments posed by some authors^{32,37} for experts to consider deliberately input from defense counsel in assessing *pro se* competence merit further exploration. Advantages to this practice would include: defense attorneys are most likely to have regular, direct contact with defendants and thus could provide information on observed demeanor, thought process, speech coherence, behavioral control, and other variables relevant to representational competence; defense attorneys possess a keen awareness of the legal tasks necessary for a defendant to conduct a trial effectively; and forensic evaluators commonly consult with defense counsel while conducting other competence

assessments (such as competence to stand trial), and therefore such an approach would fall in line with related forensic mental health practice.

Regarding Dillard's²⁴ argument that "borderline competent" capital defendants should be categorically exempted from the death penalty, it is interesting to consider the potential ramifications of such a practice. On the one hand, one might expect many defense attorneys to encourage their capital defendants to be evaluated for trial and *pro se* competence in hopes of avoiding a death penalty sentence based on a finding of "borderline competence." On the other hand, the success of such a strategy would depend on assessment by a mental health professional that the defendant is experiencing mental illness symptoms of such a severity as to render that individual not competent to self-represent. This assessment implies a level of impairment from mental illness that may not apply to most capital defendants. Other authors have proposed abolishment of the right to self-represent in capital cases on constitutional and human rights grounds,³⁸ characterizing the trying of a capital defendant who is incompetent to self-represent as "equivalent to suicide assistance" (Ref. 38, p 245).

Summarizing the literature since *Edwards* on assessing *pro se* competence is of practical importance, as the number of criminal defendants requesting self-representation has been increasing.^{21,35,40} Reasons for self-representation include dissatisfaction with court-appointed attorneys whose caseloads, greatly increased owing to cuts in funding support for public defender offices, render them less consistently available for legal support; and many defendants' inability to afford the fees associated with private criminal defense attorneys.³⁵ Increases in *pro se* requests may also reflect greater access of defendants to self-help resources online and the portrayal of *pro se* legal procedures in popular media.⁴¹

In states that allow for a higher competency standard for self-representation, a failure to assess a defendant's *pro se* competence may have adverse consequences for the defendant. Such consequences might occur if a competent *pro se* defendant is wrongly denied the opportunity to self-represent and is forced to accept the assistance of ineffective counsel, or if a defendant not competent to self-represent is wrongly allowed to do so, resulting in an unjust judicial outcome. A failure to assess representational competence may also have adverse impacts for the court system, such as significant slowing of court proceedings (related to *pro se* defendants making procedural errors, displaying disruptive behavior, or

having difficulty organizing legal strategies) or the appearance of an unfair trial. With increasing numbers of *pro se* requests by criminal defendants, courts would benefit from guidance from forensic and legal experts regarding which defendants are more likely to carry out their own defense effectively and which ones are not, to lower the risk of overbooked court dockets, unproductive use of increasingly limited court resources, or, conversely, erroneous deprivation of a defendant's right to self-represent.

Based on our review, eight areas appear to be highlighted by legal and forensic scholars as important in evaluating *pro se* competence, including assessing a defendant's ability to:

- engage in goal-directed behavior;^{8,29,31,33,35,36}
- understand and appreciate the legal process and how it applies to the defendant's particular case;^{7-9,28-35,37,38}
- make reasoned choices about a defense;^{7-9,29,31,33,34,36-38}
- communicate adequately;^{7,9,28-31,33-38}
- engage in constructive social intercourse;^{28,29,31,33-35,37,38}
- control emotions and behavior in the courtroom setting;^{27,30,32,33,35}
- articulate a rational basis for wanting to self-represent;^{7,30,31}
- and work with standby counsel.^{7,30-32,36}

Building on these eight factors, we consider the development of a *pro se* competence standard that is concise, easy to apply, and properly balances individual autonomy and court paternalism. For those states choosing to require a higher standard than *Dusky* for *pro se* competence, it seems practical to base this standard on a modification of the *Dusky* standard for competence to stand trial, for ease of recall and to highlight the important differences between the two standards. The eight factors highlighted in our review as important in assessing *pro se* competence are encapsulated in the following proposed representational competence standard:

A defendant to a criminal charge shall be considered competent to self-represent if the defendant possesses sufficient present ability to conduct trial-related tasks with a reasonable degree of rational understanding, has a rational and factual understanding of the proceedings against the defendant, has a rational basis for requesting self-representation, and is willing to accept the assistance of standby counsel.

Our interpretation of the elements of this proposed standard is presented in Table 4. Regarding willingness to accept the assistance of standby counsel, multiple experts^{7,32,35,36} and the U.S. Supreme Court⁴² have asserted that use of standby counsel can support the autonomy of the defendant while ensuring an orderly, fair, and reliable court process.

Table 4 Interpretation of Elements in Proposed *Pro Se* Competence Standard

Element of <i>Pro Se</i> Competence Standard	Abilities Included
Ability to conduct trial-related tasks	Ability to engage in trial-relevant goal-directed behavior (such as organizing defense strategies); make reasoned choices about defense; communicate adequately (either alone or with assistance of interpreter or standby counsel) with judge, jury, and other courtroom actors (e.g., when making motions or arguing points of law); and engage in constructive social intercourse (e.g., when examining or cross-examining witnesses).
Conducting trial-related tasks with a reasonable degree of rational understanding	Ability to control one’s emotions and behavior in a courtroom setting.
Having a rational and factual understanding of the proceedings	Understanding and appreciating the legal process and how it applies to the defendant’s particular case.
Having a rational basis for requesting self-representation	Includes dissatisfaction with counsel for plausible reasons (e.g., counsel is unavailable or too passive, or ideological disagreements about defense approach), but excludes dissatisfaction for irrational or delusional reasons (e.g., that counsel is trying to kill defendant or is part of conspiracy to imprison defendant).
Being willing to accept the assistance of standby counsel	Appreciation that standby counsel can help defendant carry out defense-related tasks as needed (e.g., by helping navigate complex courtroom procedures or by coherently communicating to courtroom actors in cases of defendant physical disability or illiteracy) while not compromising defendant’s ability to conduct defense.

Although the above proposed standard is concise and incorporates recommendations from legal and forensic scholars identified in this review, an important question is how to determine practically whether the elements in the standard are satisfied. One could argue that until a defendant actually attempts to engage in the tasks required to conduct a trial, it is difficult to ascertain with accuracy whether these efforts will be effective, and waiting until a defendant has already started conducting a trial has drawbacks (e.g., if the defendant is ultimately deemed incompetent to self-represent, the court may need to declare a mistrial or appoint potentially ill-prepared counsel).³² This conundrum is in line with the stated reason of the *Edwards* Court in choosing not to provide a specific standard for *pro se* competence: that mental illness is “not a unitary concept” (Ref. 3, p 10), varying in nature, degree, and timing of impact on an individual’s functioning and thus not lending itself to the application of a single standard.

Three considerations are worth noting. First, competence to self-represent, like any other competence, is time-specific and can vary over time depending on the evaluatee’s condition. Second, although mental illness may not be a unitary concept, certain mental illnesses at high states of severity, such as psychotic disorders and severely untreated bipolar disorder, would reasonably be expected to hinder a defendant’s ability to conduct a defense. Third, the difficulty directly observing a defendant’s attempts to conduct a defense to assess *pro se* competence may be addressed by eliciting input from the defendant’s

attorney, who may have valuable information regarding the defendant’s ability to self-represent.^{32,37}

If the above standard is not met, a defendant will typically be required to proceed to trial with counsel, which, per *Edwards*, is constitutionally permitted. Alternatively, the court could order the defendant to undergo treatment to restore *pro se* competence, in line with Barth’s²³ proposal. A defendant may not regain representational competence, however, if medication has already been optimized to restore trial competence (likely for many *pro se* defendants with mental illness). Hope for a restorable right model of *pro se* competence might be preserved by use of non-pharmacologic interventions to promote such competence, such as cognitive remediation therapy,⁴³ but this possibility would require available clinicians trained in such treatments and could delay the court process because of time needed for *pro se* competence restoration and re-evaluation.

The above representational competence standard balances the desire to protect defendant autonomy and dignity with the need to ensure the integrity, fairness, and efficiency of the judicial process. Autonomy is protected by the fact that the standard requires sufficient, not perfect, ability to conduct trial-related tasks;¹¹ assesses whether a defendant can conduct a defense, even if assistance is needed because of speech impediments, tic disorders, thick accents, or other communication-impairing conditions³⁶; and recognizes that a defendant may have plausible reasons to request self-representation, even

if at times these reasons are inaccurate (e.g., mischaracterizing but not harboring overt delusions about counsel).⁷ At the same time, the standard protects the integrity of the judicial process by requiring the defendant to conduct trial-related tasks in a manner that suggests understanding and appreciation of the legal situation at hand,^{28,29} control of one's emotions and behavior in the adversarial setting of the court,³⁵ and acceptance of standby counsel as safeguard to ensure the trial process is completed in a fair and efficient manner.^{7,30–32,35,36}

Limitations of our review include the fact that a fair number of identified publications were not peer reviewed; however, we reviewed all such articles to extract independently the main points relevant to our analysis. Another limitation is that although specifying collective and most-agreed-on relevant factors in assessing *pro se* competence is helpful in broadly approaching clarity in terms of a *pro se* competence standard, it remains unclear whether the satisfaction of all, most, or some of the proposed factors is pivotal to an adequate self-defense, and which criteria or combination thereof, when met, may allow a self-representing defendant to perform adequately, even if imperfectly.

Looking ahead, given the tasks associated with conducting a trial that are more demanding than standing trial with counsel, neurobiological studies aimed at identifying biomarkers for representational competence based on measures of intact versus deficient executive function (as assessed, for example, by functional neuroimaging) would be a potentially fruitful direction to, in the future, supplement data derived from forensic evaluation and court observation. This possibility is supported, for instance, by the fact that increased activation in the prefrontal cortex, anterior cingulate, and temporal and parietal cortices has been observed in individuals with schizophrenia following cognitive remediation therapy.⁴³ Future research should also examine how judges and forensic evaluators respond to the increasing legal and forensic literature on *pro se* competence assessment, to determine any need for education to minimize the risk of an over-polarized judicial process in the direction of either defendant autonomy or court integrity.

Conclusions

Our review of the published literature since *Indiana v. Edwards*³ shows that numerous attempts

have been made by legal and forensic scholars to propose criteria for assessing *pro se* competence to guide forensic evaluators and courts on how best to approach this question to achieve the most acceptable outcomes for both defendants and the judicial process. In our synthesis of this varying and sometimes conflicting literature, we identified relevant factors for assessing *pro se* competence to develop a concise competence standard that properly balances individual autonomy and court paternalism. We hope that such a standard can be of practical value to forensic evaluators and courts moving forward.

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