State Competence Standards for Self-Representation in a Criminal Trial: Opportunity and Danger for State Courts after *Indiana v. Edwards*

By JASON R. MARKS*

Introduction

WHEN THE U.S. SUPREME COURT makes a major change in the constitutional law governing criminal trials, state courts often face a problem of response. The difficulty typically involves sharpening substantive lines left blurry in the Supreme Court's opinion or filling in procedural details the Court did not address. When the constitutional issue is one that arises frequently, the problems presented by such a change can be quite urgent, since responding inadequately or incorrectly can lead to a large number of appellate reversals.[1] When the Supreme Court says "jump," state courts jump, even if they have to guess how high.

Much less common, and presenting a unique set of problems for state courts, is a Supreme Court decision that permits or invites, but does not require, states to adopt their own rules for the administra-

* Jason R. Marks is a senior judicial staff attorney at the Supreme Court of California. He received his J.D. in 1987 from the Boalt Hall School of Law, University of California at Berkeley. The views expressed herein are solely those of the author, not those of the court or any of its justices.

1. Recent examples of Supreme Court decisions that create such response pressures begin with Atkins v. Virginia, 536 U.S. 304 (2002), where the Court held the execution of "mentally retarded" defendants to violate the Eighth Amendment's bar on excessive punishment, but did not detail the exact standard or the procedures for determining retardation. Two years later, in Crawford v. Washington, 541 U.S. 36 (2004), the Court revised the Confrontation Clause analysis of hearsay testimony, and barred "testimonial" hearsay absent unavailability and a prior opportunity to cross-examine the declarant, but declined the opportunity to comprehensively define that key term. Most recently, in Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), the Court applied *Crawford* to evidence of laboratory test results, and thereby casted grave doubt on the constitutionality of many state-court practices which allowed such results to be introduced without the testimony of the analyst who actually conducted the test.

tion of a federal constitutional right. In that circumstance, state appellate courts must not merely attempt to determine how much the law has changed, but must decide whether to accept the federal invitation to change state procedures and standards and, if so, in what manner.

The Supreme Court's recent decision in *Indiana v. Edwards* ("*Edwards*")[2] presents this situation with regard to administration of the federal constitutional right to represent oneself in a criminal trial, a right first announced in *Faretta v. California* ("*Faretta*").[3] Against a prevailing understanding that a defendant who is mentally competent to stand trial is, ipso facto, also mentally competent to conduct his defense without assistance of an attorney,[4] the *Edwards* Court held the Constitution "permits"—but does not require—states to employ a higher competence standard for self-representation at trial than for trial with counsel.[5] The Court, however, declined to specify any particular competence standard,[6] leaving a substantial degree of uncertainty as to when denial of self-representation on grounds of mental incompetence might violate a defendant's *Faretta* rights.

The threats to fairness, reliability, and efficiency of trials posed by allowing delusional, severely depressed, or intellectually deficient defendants to represent themselves are outlined in *Edwards* itself[7] and have been discussed by this author and others.[8] State courts might be

2. 128 S. Ct. 2379 (2008).

3. 422 U.S. 806 (1975).

4. As discussed below, this interpretation of *Godinez v. Moran*, 509 U.S. 389 (1993), was held by the vast majority of lower courts prior to the *Edwards* decision.

5. *Edwards*, 128 S. Ct. at 2388.

6. *Id.*

7. *Id.* at 2387–88.

8. *See* John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 SETON HALL CONST. L.J. 483, 522–23 (1996) (discussing the case of Colin Ferguson, who, despite delusional ideation, represented himself in trial for a mass shooting on a Long Island Railroad train); Ashley G. Hawkinson, Comment, *The Right of Self-Representation Revisited: A Return to the Star Chamber's Disrespect for Individual Autonomy?* [Indiana v. Edwards, 128 S. Ct. 2379 (2008)], 48 WASHBURN L.J. 465, 465–66 (2009) (discussing the Ferguson and Zacarias Moussaoui cases, as well as the case of Scott Panetti, a schizophrenic who attempted to defend himself against capital murder charges in Texas); E. Lea Johnston, *Setting the Standard: A Critique of Bonnie's Competency Standard and the Potential of Problem-Solving Theory for Self-Representation at Trial*, 43 U.C. DAVIS L. REV. (forthcoming 2010), *available at* http://ssrn.com/abstract=1468365, at 2–3, 47–50 (discussing the case of Moussaoui—who defended himself against terrorism charges—and concluding Moussaoui, despite a tendency to conspiratorial, insulting, and rambling remarks, may have had sufficient problem-solving abilities to warrant permitting self-representation); Jason R. Marks, *Toward a Separate Standard of Mental Competence for Self-Representation by the Criminal Defendant*, 13 CRIM. JUST. J. 39, 39–40, 40 n.1 (1991) (giving an illustrative hypothetical and several examples from decisions published in the 1970s and 1980s); *see also* People v. Lawley, 38 P.3d 461, 475–77, 485–88 (Cal. 2002) (de-

expected eagerly to take advantage of the opportunity *Edwards* presents to improve the administration of criminal justice. But the potential cost for a state court of raising the standards for self-representation—the possibility of causing numerous unnecessary appellate reversals—is also high. Having held only that states are *free* to jump while not specifying how high is too high; the *Edwards* Court has caused state courts to move hesitantly, or sometimes not at all.[9]

This Article takes a strategic look at potential state court responses to *Edwards*.[10] After a brief historical review of competency issues under *Faretta*, this Article examines three options available for courts, especially state high courts, in the wake of *Edwards*: (1) decline the invitation to adopt a higher standard of mental competence for self-representation; (2) accept the *Edwards* invitation but leave the standard vague; and (3) accept the invitation and articulate a detailed standard for the use of trial courts and expert evaluators.

Taking as given that the goals of state high courts include improving the reliability and efficiency of criminal trials, protecting the autonomy of competent defendants by acknowledging their individual choices, and avoiding unnecessary appellate reversals of criminal convictions, this Article discusses how each of the three alternative responses would serve or threaten those interests. I argue that a state high court can best balance the opportunities and risks presented by *Edwards* by accepting the Supreme Court's invitation to impose a higher competence standard for self-representation, while articulating as a statewide rule a concrete and concise standard to be used by trial

fendant permitted to represent himself on capital murder charges despite presentation of defense theory that he was framed for charged crime because of his announced desire to go down in history as the "Beast in Revelations"); State v. Hawkins, No. 35281, 2009 WL 5125601, at *6–8 (Idaho Ct. App. Dec. 30, 2009) (defendant represented himself on bank robbery charges by presenting duress defense involving covert government agents, the international arms trade, and an explosive vest he was forced to wear).

9. *See* *infra* Part II (noting the response thus far of state courts to the *Edwards* decision).

10. *See* RICHARD A. POSNER, HOW JUDGES THINK 29–31, 140–46 (2008) (describing the theory of judges as strategic actors pursuing both economic and noneconomic interests); *see also* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L REV. 383 (2007); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995). Judicial strategy is often understood as serving economic or professional self interest. *See, e.g.*, Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589 (2009). This term, though, has also been used in reference to judicial interests in policy outcomes. *See, e.g.*, McNollgast, *supra*, at 1633–37. The term has also been employed to reference the fairness and efficiency of litigation procedures. *See, e.g.*, Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867 (2000).

courts and psychiatric evaluators. Imposing a higher competence standard will prevent many defendants with serious mental illness or developmental deficiencies from representing themselves at trial, improving the fairness and efficiency of trials. By carefully crafting a statewide standard consistent with *Faretta* and *Edwards*, and prescribing a set of basic procedures for determining self-representation competence, state high courts will minimize unnecessary reversals on appeal and give the needed recognition to principles of individual choice.

I. Self-Representation Competence from *Faretta* to *Edwards*

While the Sixth Amendment to the U.S. Constitution expressly speaks only of the accused's right to "assistance of counsel" for his or her defense, the Supreme Court, in *Faretta*, held it also "implies a right of self-representation."[11] This implied right is clearly not without limits.[12] The question of whether it is limited to those who are mentally competent to exercise it, however, has proven a difficult one to answer.

Before the Court articulated a positive right to represent oneself against criminal charges, a defendant's decision to do so was more typically thought of as the *waiver* of a constitutional right, namely the Sixth Amendment right to assistance of counsel.[13] In that context, it was natural to consider only the defendant's *decisional* competence (i.e., the ability to make the waiver decision), and not separately address questions of *functional* competence (i.e., the ability to conduct one's own defense).[14] Nonetheless, as early as 1954 the Supreme Court observed that "[o]ne might not be insane in the sense of being

11. Faretta v. California, 422 U.S. 806, 821 (1975).

12. *See id.* at 834 n.46; *see also* Decker, *supra* note 8, at 523–60.

13. *See* Johnston v. Zerbst, 304 U.S. 458, 465 (1937). Of course, even after *Faretta*, it remains true that the decision to represent oneself involves a waiver of the right to counsel. The existence of a constitutional right on either side of the decision is one of the factors that have made *Faretta* motions especially troubling in the courts. As the Wisconsin Supreme Court observed after *Faretta*, the effect is that "[w]hichever way the trial judge decides, his decision is subject to challenge" as violative of a constitutional right. Pickens v. State, 292 N.W.2d 601, 605 (Wis. 1980).

14. *See* Westbrook v. Arizona, 384 U.S. 150, 150 (1966) (identifying issue as the defendant's "competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense"). The theme of the relationship between the decisional competence to waive counsel and the functional competence to conduct one's own defense runs through the judicial and academic discussion of self-representation competence. *See, e.g.*, Alan R. Felthous, *The Right to Represent Oneself Incompetently: Competency to Waive Counsel and Conduct One's Own Defense Before and After* Godinez, 18 MENTAL HEALTH & PHYSICAL DISABILITY L. REP. 105, 106, 108–10 (1994); Christopher Slobogin, *Mental Illness*

incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel" and that "[n]o trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court."[15]

Faretta itself offered little guidance on competence. The Court noted a defendant "need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation"[16] and that Faretta himself was "literate, competent, and understanding,"[17] but did not address the functional competence question. At the core of the Supreme Court's decision, however, was the premise that individual choice and autonomy prevailed over concerns about the reliability of the trial process. Acknowledging that defendants would generally be better defended by counsel, the Court famously responded that "although he may conduct his own defense ultimately to his own detriment, [the defendant's] choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'"[18]

Most state courts read *Faretta* as conditioning self-representation only on the mental competence to make a knowing and intelligent waiver of counsel, and rejected proposals for a functional competence standard specifically tailored to self-representation.[19] A few courts and commentators, however, took the view that *Faretta* left room for an evaluation of the defendant's functional competence to conduct his or her defense unaided by counsel or at least a heightened or special-

and Self-Representation: Faretta, Godinez *and* Edwards, 7 OHIO ST. J. CRIM. L. 391, 401–07 (2009).

15. Massey v. Moore, 348 U.S. 105, 108 (1954). The Court later explained this language as referring only to the right to counsel and not to any higher competence standard for self-representation. Godinez v. Moran, 509 U.S. 389, 400 n.10 (1993). Lower courts gave some recognition to a functional self-representation competence standard, sometimes linking it to the decisional competence (waiver) question, in *People v. Powers*, 64 Cal. Rptr. 450, 458 (Ct. App. 1967), *Capetta v. State*, 204 So. 2d 913, 918 (Fla. Dist. Ct. App. 1967), and *State v. Koloctronis*, 436 P.2d 774, 781 (Wash. 1968).

16. *Faretta*, 422 U.S. at 835.

17. *Id.* at 836.

18. *Id.* at 834. Noting this emphasis on autonomy, some commentators have justifiably argued *Edwards*' embrace of a functional competence test violates at least the spirit of *Faretta*. Hawkinson, *supra* note 8, at 485–89; Slobogin, *supra* note 14, at 406–07. The *Edwards* dissent made the same argument. Indiana v. Edwards, 128 S. Ct. 2379, 2391, 2393 (2008) (Scalia, J., dissenting).

19. *See* Marks, *supra* note 8, at 46–49. Representative holdings include those in *Curry v. Superior Court*, 141 Cal. Rptr. 884, 887–89 (Ct. App. 1977), *People v. Reason* 334 N.E.2d 572, 574–75 (N.Y. 1975), and *State v. Hahn*, 726 P.2d 25, 29–30 (Wash. 1986).

ized decisional competence standard tailored to the counsel waiver itself.[20]

In *Godinez v. Moran* ("*Godinez*"),[21] the Supreme Court appeared to resolve the issue, ruling definitively against either a functional competence standard or an elevated decisional competence standard. In the case of a medicated and previously suicidal man charged with capital murder, the Court held no mental competence beyond that necessary to stand trial was required for the defendant to discharge his attorneys, plead guilty, and forgo the presentation of mitigating evidence.[22] Although the constitutional standard for trial competence, articulated in *Dusky v. United States* ("*Dusky*"),[23] refers explicitly to the defendant's ability to consult with counsel, the *Godinez* Court thus held it constitutionally adequate to measure a defendant's mental ability to proceed *without* counsel. The Court emphatically rejected any consideration of a specialized functional competence standard, holding "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself"[24] and therefore, "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation."[25]

20. *See* Harding v. Lewis, 834 F.2d 853, 856 (9th Cir. 1982) (counsel waiver requires ability to participate intelligently in the proceedings and make a reasoned choice among alternatives); People v. Burnett, 234 Cal. Rptr. 67, 74–77 (Ct. App. 1987) (articulating a functional standard as part of decisional competence needed for counsel waiver); Pickens v. State, 292 N.W.2d 601, 611 (Wis. 1980) (articulating a functional competence standard separate from competence to stand trial); *see also* Alan R. Felthous, *Competency to Waive Counsel: A Step Beyond Competency to Stand Trial*, 7 J. PSYCHIATRY & L. 471, 474–76 (1979) (articulating a framework for a functional standard); Marks, *supra* note 8, at 50 (discussing cases) and 51–57 (arguing for functional competence standard); Peter R. Silten & Richard Tullis, *Mental Competency in Criminal Proceedings*, 28 HASTINGS L.J. 1053, 1070–71 (1977) (arguing *Faretta* does not preclude a separate competence standard for self-representation).

21. Godinez v. Moran, 509 U.S. 389 (1993).

22. *Id.* at 391–400.

23. 362 U.S. 402 (1960) (adopting statements of the Solicitor General). Under the *Dusky* standard, a defendant is constitutionally competent to stand trial if he or she has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." *Id.* (internal quotation marks omitted). Many states incorporate a variant of the *Dusky* standard into their statutory competence procedures. *See, e.g.*, ALASKA STAT. § 12.47.100 (2009); CAL. PENAL CODE § 1367 (West 2000); FLA. STAT. ANN. § 916.12 (West 2007); KAN. STAT. ANN. § 22-3301(1) (West 2009); TEX. CODE CRIM. PROC. ANN. § 46B.003 (Vernon 2009).

24. *Godinez*, 509 U.S. at 399.

25. *Id.* at 400. In what may or may not have been an invitation to states to adopt functional competence standards for self-representation, the court observed that while the

Not surprisingly given these unqualified statements, state courts tended to read *Godinez* as broadly equating competence to stand trial and competence to represent oneself.[26] This despite two implicit limitations of the decision: it involved a defendant who sought to waive counsel and plead guilty, not to conduct his own defense *at trial*, and it addressed only the necessary level of mental competence courts constitutionally *must* find before granting self-representation, not whether they *may* constitutionally demand greater competence. A notable exception was the Wisconsin Supreme Court, which adhered to its earlier embrace of a higher standard for self-representation competence.[27] The Wisconsin court held its higher standard survived *Godinez* because the U.S. Supreme Court's decision did not prohibit states from adopting higher competence standards than those required under the federal Constitution.[28]

The majority reading of *Godinez*, under which it was federal constitutional error to deny a trial-competent defendant's *Faretta* motion (assuming all other requirements for the motion were met), led to a number of reversals of criminal convictions.[29] Reversals may have been multiplied by the fact that erroneous denial of a *Faretta* motion is

Due Process Clause required nothing beyond competence to stand trial, "[s]tates are free to adopt competency standards that are more elaborate." *Id.* at 402. On the ambiguity of that remark and its likely meaning, see Todd A. Pickles, Note, People v. Welch: *A Missed Opportunity to Establish a Rational Rule of Competency to Waive the Assistance of Counsel*, 34 U.S.F. L. Rev. 603, 622–23 (2000) (reading remark as allowing specialized standard for self-representation competence). *But see* State v. Day, 661 A.2d 539, 548 (Conn. 1995) (reading remark only as allowing trial competence standard higher than *Dusky*).

26. *See, e.g.*, People v. Welch, 976 P.2d 754, 774 (Cal. 1999); *Day*, 661 A.2d at 547–49; State v. Bowen, 698 So. 2d 248, 251–52 (Fla. 1997); Lamar v. State, 598 S.E.2d 488, 491 (Ga. 2004); State v. Thornblad, 513 N.W.2d 260, 262–63 (Minn. Ct. App. 1994); State v. Shafer, 969 S.W.2d 719, 728–29 (Mo. 1998); State v. Tribble 892 A.2d 232, 240 n.2 (Vt. 2005). *See also* Decker, *supra* note 8, at 519 ("Simply, after *Godinez* a defendant judged competent to stand trial is, ipso facto, competent to proceed pro se . . . .").

27. Pickens v. State, 292 N.W.2d 601, 610–11 (Wis. 1980).

28. State v. Klessig, 564 N.W.2d 716, 723–24 (Wis. 1997); *see also* Felthous, *supra* note 14, at 110 ("The *Godinez* decision does not prevent courts and law makers from developing a more rational standard, including a functional component for making one's own defense. . . . [T]he Court stated that, although the Due Process Clause is satisfied by the Dusky criteria alone, 'States are free to adopt competency standards that are more elaborate than the Dusky formulation.' Elaborations would logically incorporate a functional component in addition to the decisional component already well covered by the Dusky standard.").

29. *See, e.g.*, State v. Hampton, No. 2 CA-CR 2008-0196, 2009 WL 3051490, at *2–4 (Ariz. Ct. App. Sept. 24, 2009) (nonprecedential decision); People v. Halvorsen, 165 P.2d 512, 550 (Cal. 2007); People v. Hightower, 49 Cal. Rptr. 2d 40, 43–45 (Ct. App. 1996); Hartman v. State, 918 A.2d 1138, 1142–44 (Del. Super. Ct. 2007); Fleck v. State, 956 So. 2d 548, 549–50 (Fla. Ct. App. 2007); Reddick v. State, 937 So. 2d 1279, 1283–84 (Fla. Ct. App. 2006); *Lamar*, 598 S.E.2d at 490–92; *Thornblad*, 513 N.W.2d at 261.

reversible per se; that is, it is not subject to harmless error analysis.[30] Such reversals can be particularly frustrating to the sense of substantive justice for two reasons. First, the denial of a defendant's *Faretta* motion usually results in objectively better representation than the defendant could have provided himself, and hence in a more reliable trial. Thus, the "error" generally *increases* fairness to the defendant (except, of course, in respect to his right of self-representation). Second, on appeal the defendant is ordinarily represented by counsel, and there is nothing to prevent him from accepting counsel in any retrial following reversal. The retrial is thus not likely to differ in any essential respect from the trial that led to the original conviction, making it seem at best a waste of time and resources. State courts' experience with *Godinez*, then, gave them a powerful signal to avoid formulating rules that would lead to unnecessary reversals on *Faretta* grounds.

One such state court reversal led to the Supreme Court's decision in *Edwards*. In an Indiana trial court, Edwards was initially found incompetent to stand trial on attempted murder and related charges because his delusional schizophrenia prevented him from cooperating with his attorneys, but after hospitalization he was returned to court as competent. The trial court, finding that while competent to stand trial he was still not competent to defend without an attorney, denied his pretrial requests for self-representation. The Indiana appellate courts reversed the convictions for erroneous denial of Edwards' motion to represent himself, concluding *Faretta* and *Godinez* required the state to permit Edwards, who was trial competent, to represent himself.[31]

The Supreme Court held reversal of the convictions was not constitutionally required because "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."[32] *Godinez* was distinguishable, the Supreme Court explained, both because the defendant in that case wanted to plead guilty and because *Godinez* involved the *grant* of a *Faretta* motion, not its *denial* on grounds of incompetence.[33]

30. McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984).

31. Indiana v. Edwards, 128 S. Ct. 2379, 2382–83 (2008).

32. *Id.* at 2388.

33. *Id.* at 2385.

The *Edwards* court addressed at some length whether self-representation should require mental competence beyond that needed to stand trial.[34] Since the *Dusky* test assumes the defendant will be defending through counsel, the Court observed, that standard does not completely predict whether the defendant will be able "to carry out the basic tasks needed to present his own defense without the help of counsel."[35] The *Edwards* Court also acknowledged that a trial in which a mentally incompetent defendant represents himself is unlikely to be or to appear fair.[36] "The application of *Dusky*'s basic mental competence standard can help in part to avoid this result. But given the different capacities needed to proceed to trial without counsel, there is little reason to believe that *Dusky* alone is sufficient."[37]

Edwards clearly did not overrule *Godinez*; the Supreme Court did not hold a state court errs in finding a defendant who has been found competent to stand trial is also mentally competent to represent himself. The *Edwards* decision, on its face, is purely permissive: it holds only that state courts do not necessarily violate *Faretta* by imposing a higher standard of mental competence for self-representation than for trial with counsel. The decision nevertheless marks a major change in perspective by the Supreme Court; there are three aspects of the decision that provide reasons to doubt the stability of the *Godinez-Edwards* dyad.

First, *Edwards* embraces a concept of functional competence expressly rejected in *Godinez*. In contrast to the *Godinez* majority's unqualified assertion that "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation,"[38] the *Edwards* Court expressly authorizes trial courts to "take realistic account of the particular defendant's mental capacities" and to deny the defendant the choice of representing himself when he is not "mentally competent to do so."[39] In giving weight to the very different capacities needed to assist defense counsel and to act as one's own counsel, the *Edwards* Court echoes the *Godinez* dissent's critique of equating competence to stand trial with competence to represent one-

34. *Id.* at 2386–88.

35. *Id.* at 2386. These basic tasks, the Court noted, include "organization of defense, making motions, arguing points of law, participating in *voir dire*, questioning witnesses, and addressing the court and jury." *Id.* at 2387.

36. *Id.* at 2387.

37. *Id.*

38. Godinez v. Moran, 509 U.S. 389, 400 (1993).

39. *Edwards*, 128 S. Ct. at 2387–88.

self: "A person who is 'competent' to play basketball is not thereby 'competent' to play the violin."[40]

Second, as the Connecticut Supreme Court has observed, "the permissive nature of *Edwards* apparently creates an anomalous situation in which state courts can determine the level of competency necessary for the exercise of federal constitutional rights such that an individual's right to self-representation under the federal Constitution may vary from state to state."[41] It is hard to believe such a doctrinal arrangement, in which states may set their own standards for when one federal constitutional right (the right to counsel) may be waived and another (the right to represent oneself) exercised, can be permanent.

Finally, *Edwards* reasoned in part that allowing an incompetent defendant to represent himself "undercuts the most basic of the Constitution's criminal law objectives," the guarantee of a fair trial, and that "given the different capacities needed to proceed to trial without counsel" *Dusky*'s trial competence standard is inadequate to ensure a fair trial.[42] These statements raise a troubling question: how can the use of an inappropriate competence standard for self-representation be consistent with due process and the Sixth Amendment right to counsel? The logic of *Edwards*, if followed further, could eventually lead the court to hold that competence to represent oneself at trial *must* constitutionally be determined on a standard better tailored to that determination than is the trial competence standard enunciated in *Dusky*.

Beyond the majority's expressed concern with guaranteeing defendants a fair trial, *Edwards* could reflect a high court strategy of expanding the range of acceptable outcomes under its *Faretta* doctrine, in order that it might obtain better compliance with that doctrine without making greater efforts to police lower court decisions.[43] On this reading, one might expect the Court to follow *Edwards* with decisions loosening the binds of *Faretta* in other areas that have proven troublesome to administer in the trial courts, such as timeliness of the self-representation motion, the appointment of advisory and standby counsel, or the problem of disruptive behavior outside the court-

40. *Godinez*, 509 U.S. at 413 (Blackmun, J., dissenting).

41. State v. Connor, 973 A.2d 627, 650 n.22 (Conn. 2009).

42. *Edwards*, 128 S. Ct. at 2387.

43. *See* McNollgast, *supra* note 10, at 1641–47 (hypothesizing that the Supreme Court adjusts its doctrinal range in order, among other goals, to obtain maximum lower court compliance with its policy preferences).

room.[44] But given the high cost in reversals for a state court that guesses wrong about the future of the *Faretta* doctrine, this *possibility* offers no realistic opportunity for state courts to push, by their decisions, for further expansion of lower court discretion in the area of self-representation.

II. State Court Choices After *Edwards*

The Supreme Court decision in *Edwards* provides state appellate courts, especially high courts, an opportunity to improve trial justice by mandating provision of counsel for mentally ill or deficient defendants who, under the majority reading of *Godinez*, would instead have been permitted to represent themselves.[45] With its invitation to states to apply a functional standard, *Edwards* has "paved the way" to improvements in fairness for the mentally ill criminal defendant.[46]

Yet the way remains unclear, in part because the Supreme Court in *Edwards* failed to articulate a concrete standard of competence to represent oneself, leaving uncertainty as to what will ultimately pass constitutional muster and what will not. The Court rejected Indiana's proposal for a standard centering on communication ability, but did so only because it was unsure "how that particular standard would work in practice."[47] This lack of guidance means the Supreme Court's invitation may be something of a trap for the unwary, for a state court

44. *See* People v. Butler, 219 P.3d 982, 986–91 (Cal. 2009) (noting defendant's assaultive conduct outside courtroom necessitated security measures that would have hampered trial preparation had he represented himself); Decker, *supra* note 8, at 530–50 (discussing appointment and role of advisory and standby counsel as well as timeliness).

45. The *Edwards* Court consistently referred to *states* imposing counsel on trial-competent but mentally disordered defendants. *Edwards*, 128 S. Ct. at 2381, 2385, 2388. Yet, some federal courts have applied the decision to federal criminal trials as well. *See* United States v. Berry, 565 F.3d 385, 391–92 (7th Cir. 2009) (discussing question and concluding *Edwards* applies to federal as well as state courts); United States v. Ferguson, 560 F.3d 1060, 1068–70 (9th Cir. 2009) (remanding for district court to decide under *Edwards* whether defendant, tried before *Edwards* was decided, should have been denied self-representation on competence grounds). In this Article, I discuss only the possible responses of state courts to the Supreme Court's permissive decision and do not address its possible application in federal criminal trials.

46. Alan R. Felthous & Lauren E. Flynn, *From Competence to Waive Counsel to Competence to Represent Oneself: The Supreme Court Advances Fairness in* Edwards, 33 MENTAL & PHYSICAL DISABILITY L. REP. 14, 16 (2009). Slobogin disputes this assessment, arguing *Edwards*' references to trial "fairness" actually refer to accuracy or reliability of the trial. Slobogin, *supra* note 14, at 407–08. Yet, a trial at which the defendant's mental illness or deficits completely prevent him from putting the government's case to an adversarial test is, in at least one sense of the word, less "fair" than one in which trained counsel undertakes a vigorous defense.

47. *Edwards*, 128 S. Ct. at 2388.

that uses either too strict or too lax a competence standard risks reversal.

Applying too *high* a mental competence standard to a *Faretta* motion could lead a trial court to erroneously deny the motion. As noted earlier, this federal constitutional error is reversible per se.[48] In theory, too *low* a standard could lead to an erroneous *Faretta* grant. But so long as the standard used met the elements of *Dusky*'s trial competence test, there would be no federal constitutional error, at least under the Supreme Court's present competence jurisprudence.[49] The only possible error would be one of state law: allowing self-representation by a defendant whom a state decision, statute, or court rule deems incompetent to represent himself.[50] Most state law errors are subject to harmless error analysis, which often employs a prejudice test easier to satisfy than the harmless-beyond-a-reasonable-doubt test applicable to nonstructural federal constitutional errors.[51] The greater danger of reversal clearly lies with a decision to *deny* self-representation on competence grounds.[52]

In the wake of *Edwards*, states have three choices in stating a competence standard for future cases.[53] First, a state appellate court could decline *Edwards*' invitation and adhere to the rule most courts took

48. McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984).

49. As noted earlier, the current state of the law appears somewhat unstable, raising the question whether the Supreme Court will, at some point, adopt a *constitutional* self-representation competence standard higher than the trial-competence standard of *Dusky*.

50. Failure to follow a state procedural rule for the determination of self-representation competence could also constitute state law error.

51. Chapman v. California, 386 U.S. 18, 24 (1967); *see, e.g.*, People v. Watson, 299 P.2d 243, 254 (Cal. 1956) (error of California law reversible only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"); State v. Snelgrove, 954 A.2d 165, 175 (Conn. 2008) ("'A nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict.'") (quoting State v. Sawyer, 904 A.2d 101, 117 (Conn. 2006)); People v. Ayala, 553 N.E.2d 960, 964 (N.Y. 1990) (nonconstitutional error reversible only if "there is a 'significant probability . . . that the jury would have acquitted the defendant had it not been for the error or errors which occurred'"); Johnson v. State, 967 S.W.2d 410, 417 (Tex. 1998) (nonconstitutional error not reversible "if the appellate court, after examining the record as whole, has fair assurance that the error did not influence the jury, or had but a slight effect").

52. In theory, many reversals for erroneous denial of self-representation could be avoided by obtaining pretrial review of the ruling via a petition for writ of mandate. However, in practice, few, if any, such petitions are likely to be brought, since a defendant whose mental competence is doubtful would probably not have the wherewithal to write and file a petition in *propria persona*, and appointed counsel generally regard self-representation as contrary to the client's best interests.

53. How self-representation competence issues arising in pre-*Edwards* trials should be resolved is beyond the scope of this discussion.

from *Godinez*—that *Dusky* states both a constitutional minimum and a maximum standard for self-representation competence. Second, the court could accept the invitation, holding that state law requires the defendant seeking self-representation to satisfy a functional test of mental competence, but, like the Supreme Court in *Edwards*, leave the test itself vague. Finally, the court—especially a state high court—could accept *Edwards*' invitation and go beyond the Supreme Court's decision to articulate, as a statewide standard, a relatively detailed and concrete test of functional mental competence to represent oneself. The following subsections examine each alternative's strategic advantages and disadvantages. This analysis, again, assumes state courts are interested in ensuring fair, reliable, and efficient criminal trials[54] and in avoiding unnecessary reversals of criminal convictions.[55]

A. Declining *Edwards*' Invitation

Making no change from the law prevailing under the majority interpretation of *Godinez* appears to be the safest course for a state high court concerned with the possibility of reversible error. State trial courts would continue to be *free* to grant self-representation to any trial-competent defendant who seeks it, regardless of the defendant's functional competence to represent him or herself. An appellate claim that self-representation should have been denied on competence grounds would depend on showing the defendant lacked competence to stand trial, a claim that will succeed only very rarely given the ease of meeting *Dusky*'s standard, the well-established procedures for determining trial competence, and the possibility of restoring trial competence through treatment. Moreover, since trial courts would continue to be *required* to grant self-representation to any trial-compe-

54. Even those in the judiciary and academia who decry *Faretta*'s holding as inherently destructive of justice for the defendant and efficiency of the criminal trial system have an interest in seeing it administered in a way that minimizes these negative effects. "*Faretta* might be overruled some day, but until it is, we should try in good faith to implement it. And we should not take our displeasure out on the poor wretch who unwisely chooses to exercise a right bestowed on him by a Court we disagree with." Myron Moskovitz, *Advising the Pro Se Defendant: The Trial Court's Duties Under* Faretta, 42 BRANDEIS L.J. 329, 340 (2004).

55. A solution that serves the interest in avoiding reversals will generally also serve the courts' interest in according the proper respect to defendants' individual choices, as reversal will generally come from erroneously *denying* a defendant's *Faretta* motion. *See supra* text accompanying notes 45–46. Since the Supreme Court has, in *Faretta* and *Godinez*, shown its zeal to protect the freedom of autonomous choice in this context, a state court might reasonably view its goal as achieving the best result it can vis-à-vis a competing value—improving the fairness and reliability of criminal trials—without running afoul of the Supreme Court's protection of autonomy.

tent defendant who seeks it, no claim could be made that the trial court erroneously failed to exercise its discretion to find a trial-competent defendant incompetent to represent himself.[56] Since only those defendants found incompetent to stand trial would be considered incompetent to represent themselves, there would be no occasion for a claim the defendant was erroneously, due to mental incompetence, forced to go to trial with the assistance of counsel.

But this course sacrifices other important judicial interests to that of safety from reversals. By declining *Edwards*' invitation, a state would lose the opportunity provided by the Supreme Court to improve the fairness, reliability, and efficiency of criminal trials. Trial courts would continue to be required to grant self-representation to those who, while satisfying the *Dusky* test of being aware of the charges against them and the nature of the proceedings and able to communicate to some extent with their attorneys, are, due to mental disorder or disability, largely or completely incapable of undertaking the much more complex and difficult tasks involved in defending themselves at trial.

No state appellate court appears to have expressly declined *Edwards*' invitation, though some courts, by rejecting claims that *Edwards* itself mandates use of a higher standard without saying whether future state trials should employ any higher standard, have apparently left the question open.[57]

B. Accepting *Edwards*' Invitation, but Leaving the Standard Vague

State appellate courts can provide far greater power to their trial courts to exclude the mentally disordered from self-representation by accepting *Edwards*' suggestion of a functional standard while leaving the standard otherwise unarticulated. In a sense, this option takes greatest advantage of the *Edwards* opportunity, since it frees trial courts to use their discretion in judging the defendant's mental competence. Trial judges can be expected to take full advantage of the

56. Since *Edwards* can be read to permit *trial* courts to conduct their own self-representation competence inquiries even absent a previously articulated state standard, a state that has not decided whether to adopt a higher standard or adhere to the majority *Godinez* view remains susceptible to claims that its trial court failed to exercise the discretion provided by *Edwards* to deny self-representation. Indiana v. Edwards, 128 S. Ct. 2379, 2387–88 (2008) (referring to trial court as best placed to make individualized mental competence assessments).

57. People v. Taylor, 220 P.3d 872, 883 (Cal. 2009); State v. McQueen, No. 09AP-195, 2009 WL 4308654, at *6 (Ohio Ct. App. Dec. 1, 2009); *see also* People v. Tatum, 906 N.E.2d 695, 709 (Ill. App. Ct. 2009) (concluding defendant in pre-*Edwards* trial was not incompetent to represent himself and that *Edwards* required no special inquiry on the subject, but not indicating what law would apply in future trials).

discretion, not only to "make their lives easier," as Justice Scalia predicted in his *Edwards* dissent,[58] but also to avoid the likely unfairness and unreliability of a trial in which a mentally disordered or disabled defendant represents himself.

The trade-off is greater risk that many convictions will be reversed for erroneous denial of self-representation.[59] Until a self-representation competence standard is agreed on through the appellate process, both psychiatric experts and trial courts will use a variety of formulations in articulating why a particular defendant is not permitted to represent himself. On each appeal, the appellate court will then be called on to decide if the expert and/or court used too high a functional competence standard, one encompassing a broader range of impairments than contemplated by *Edwards* or inconsistent with *Faretta*'s continuing mandate that defendants be permitted to represent themselves even if they lack the skills and education to perform well in the courtroom. The language used by appellate courts will be, in turn, picked up by trial courts, though it may or may not be well-tailored to the particular case at trial. The legal questions raised in this process may ultimately be answered by the state's high court, but only after some, perhaps many, unnecessary reversals.

Three state high courts have nevertheless taken this course. In *State v. Connor*,[60] the Connecticut Supreme Court exercised its "supervisory authority over the administration of justice" to direct its state's trial courts that, "upon a finding that a mentally ill or mentally incapacitated defendant is competent to stand trial and to waive his right to counsel at that trial, the trial court must make another determination, that is, whether the defendant also is competent to conduct the trial proceedings without counsel."[61] The state high court did not articulate a detailed standard, though in its remand for a new competence determination in the case before it the court gave trial courts a certain amount of guidance, warning that the defendant's technical

58. *Edwards*, 128 S. Ct. at 2394 (Scalia, J., dissenting).

59. Reversal for an erroneous grant of self-representation is also possible, but is, as discussed earlier, less of a danger. An erroneous denial would be a violation of the defendant's Sixth Amendment rights, and automatically reversible. An erroneous grant would, assuming the defendant was trial-competent, only violate a state competence standard and would generally be subject to harmless error analysis. On direct appeal, at least, a defendant would usually have difficulty demonstrating prejudice, since the appellate record would not contain the defense counsel would have presented had he or she not been relieved.

60. 973 A.2d 627 (Conn. 2009).

61. *Id.* at 650–51. The court expressly noted this new procedure was not constitutionally mandated. *Id.* at 655 n.28.

legal skill and knowledge was not at issue in a competence determination[62] and suggesting the trial court consider how well the defendant, who had represented himself at the first trial, had "grasped the issues pertinent to those proceedings, along with his ability to communicate coherently with the court and the jury."[63]

The Florida Supreme Court chose to proceed by amendment of a formal court rule rather than exercise of its general supervisory authority. In light of *Edwards*, the court recently amended a provision of the Florida Rules of Criminal Procedure to add the following italicized language:

> Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel, *and does not suffer from severe mental illness to the point where the defendant is not competent to conduct trial proceedings by his or her self.*[64]

In approving the rule change, the court observed the amendment implemented the "narrow limitation" on *Faretta* rights allowed under *Edwards* and declined to go beyond *Edwards* to refine the standard further.[65]

Finally, the Indiana Supreme Court, considering Edwards' case anew on remand from the U.S. Supreme Court, seems to have implicitly adopted a functional competence standard of the type outlined in the U.S. Supreme Court's *Edwards* decision, while expressly declining to make "any attempt to refine the *Edwards* language."[66] After determining the trial court's earlier finding that Edwards was incompetent to represent himself and the evidence supporting that finding were sufficient under *Edwards*,[67] the Indiana Supreme Court held the *state* constitution gave Edwards no broader right of self-representation than he enjoyed under the federal Constitution as interpreted by the U.S. Supreme Court in *Edwards*.[68] While it did not expressly direct Indiana trial courts to deny self-representation to those functionally incompetent to conduct their own defense, the Indiana Supreme Court observed that "the Indiana Constitution assumes and demands

62. *Id.* at 657.
63. *Id.*
64. *In re* Amendments to Florida Rule of Criminal Procedure 3.111, 17 So. 2d 272, 272–73 (Fla. 2009).
65. *Id.* at 274.
66. Edwards v. State, 902 N.E.2d 821, 829 (Ind. 2009).
67. *Id.* at 824–28.
68. *Id.* at 828–29.

fundamental fairness in all judicial proceedings" and declared itself "persuaded that a defendant's mental illness may preclude competent self-representation in the interest of a fair trial."[69] The strong implication is that Indiana trial courts are required, under the state constitution, to apply a higher competence standard.[70]

It is too early to tell how these rules will play out in the Connecticut, Florida, and Indiana courts. Trial courts may act conservatively and deny self-representation only when strong evidence, including expert psychiatric evaluations, supports a finding of functional incompetence, or they may push the envelope somewhat and use the rules aggressively to protect the reliability and efficiency of trials. Appellate courts may accord great deference to the trial courts' decisions on self-representation competence and affirm those decisions whenever there is evidence to support them, regardless of the exact language used by the trial courts and expert evaluators; or they may examine that language closely and critically in an effort to ensure trial courts do not go too far and infringe on the constitutional right guaranteed under *Faretta*. Judicial opinion in each of these states may coalesce rapidly around a single concrete standard, or the courts may continue to generate multiple standards resulting in "the unfairness of diverse, unequal application of legal procedures"[71] and, perhaps, a high level of reversals.

C. Accepting *Edwards*' Invitation and Articulating a Detailed Standard

A state that accepts *Edwards*' invitation to employ a higher standard of mental competence for self-representation than for trial with counsel, whether by rule announced by the state high court in the exercise of its supervisory powers[72] or by formally promulgated rule of

69. *Id.*

70. North Carolina may also be in the category of states adopting, but not further articulating, *Edwards*' rule permitting denial of self-representation to some trial-competent defendants. *See* State v. Lane, 669 S.E.2d 321, 322 (N.C. 2008) (remanding for trial court to decide whether it would have denied self-representation to the defendant "pursuant to *Indiana v. Edwards*").

71. Felthous & Flynn, *supra* note 46, at 16.

72. In addition to Connecticut, *see supra* note 61, the state high court has the supervisory authority to instruct the lower courts on non-constitutional procedures in several states. *See* State v. Dumaine, 783 P.2d 1184, 1195 (Ariz. 1989); People v. Kelly, 146 P.3d 547, 558 (Cal. 2006); State v. Pattioay, 896 P.2d 911, 925 (Haw. 1995); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994); State v. Molina, 902 A.2d 200, 208 (N.J. 2006); State v. Bennett, 165 P.3d 1241, 1249 (Wash. 2007).

court,[73] could choose to go beyond acceptance and articulate a relatively detailed standard of competence to be used by lower courts and psychiatric examiners. Unlike the first strategic choice, maintaining the equation of competence to represent oneself with competence to stand trial,[74] this course would take advantage of the *Edwards* opportunity to improve fairness, reliability, and efficiency by reducing the number of mentally disordered or disabled defendants representing themselves. At the same time, it would avoid the doctrinal confusion and accompanying unnecessary reversals risked under the second strategic choice, announcing that competence to represent oneself is measured by a higher standard but leaving the actual standard vague.[75]

To avoid unnecessary reversals, the standard articulated should be as consistent with *Edwards* as possible. While the Supreme Court may yet go beyond *Edwards* to announce a constitutionally *mandated* self-representation competence standard, there is little reason to expect the court will retreat from *Edwards*' main holding: that the Constitution *permits* state courts to adopt functional competence standards aimed at ensuring a self-representing defendant is mentally capable of performing "the basic tasks needed to present his own defense."[76]

In his recent article on *Faretta*, *Godinez*, and *Edwards*, Christopher Slobogin advocates, instead of the functional competence standard suggested by *Edwards*, a decisional competence standard more demanding than that embraced in *Godinez*.[77] He would require a defendant seeking to waive counsel and represent himself at trial possess "basic rationality," which "involves an inquiry into whether the defendant gives non-delusional reasons for the decision," and "basic self-regard," which would preclude self-representation by, for example, defendants whose depression makes them indifferent to the outcome of their cases.[78] Other types of functional deficits that might impair performance of common self-representation tasks should not be disqualifying, Slobogin argues, as "impairments in the domains of concentration, reasoning and communication do not render a defendant

73. A state legislature could also adopt a competence standard for self-representation, but given the permissive character of *Edwards*' holding and the resulting lack of urgency, legislative action seems unlikely.

74. *See supra* Part II.A.

75. *See supra* Part II.B.

76. Indiana v. Edwards, 128 S. Ct. 2379, 2386 (2008).

77. Slobogin, *supra* note 14.

78. *Id.* at 402–04.

who is competent in the adjudicative and decisional senses non-autonomous."[79]

Slobogin may be correct that a focus on autonomous choice, and hence on decisional competence,[80] adheres more closely than a functional competence test to the core rationale of *Faretta*; though it is worth noting the *Faretta* court described the defendant there as "literate"[81] as well as competent, and disapproved only a functional test that would demand defendants have the "skill and experience of a lawyer."[82] However that may be, the Supreme Court in *Edwards* clearly moved beyond decisional competence concerns to embrace a functional competence test, and state courts should adjust their own strategic choices accordingly. By articulating and directing the use of a standard that asks whether the mental disorder or disability precludes the defendant from performing basic tasks of self-representation, state courts will achieve greater improvements in the fairness, reliability, and efficiency of criminal trials[83] while generating no greater risk of unnecessary reversals than would be created by a decisional competence test going beyond the Supreme Court's discussion in *Godinez* and *Edwards*.

At this time, no state court in the post-*Edwards* era appears to have articulated a detailed standard of self-representation competence.[84]

III. Standard and Procedures

The case law and commentary on self-representation contain several partial or complete statements of functional competence standards. The Wisconsin Supreme Court has listed factors to consider in deciding whether a defendant has "the minimal competence necessary to conduct his own defense," including "the defendant's education, literacy, fluency in English, and any physical or psychological

79. *Id.* at 406.

80. *Id.* at 393–94, 401.

81. Faretta v. California, 422 U.S. 806, 835 (1975).

82. *Id.*

83. *See* Johnston, *supra* note 8, at 16 (arguing decisional competence tests are insufficient to address reliability and fairness concerns: "When a defendant rejects counsel's assistance and proceeds to trial alone, the reliability of the judicial outcome will depend on the defendant's ability and willingness to challenge the State and function, to some minimal degree, as the State's adversary").

84. *But see* People v. Esang, 920 N.E.2d 565, 572 (Ill. Ct. App. 2009) (suggesting *Edwards* permits resurrection of the standard used in a 1984 Illinois appellate decision, prohibiting self-representation where there is a "bona fide doubt" regarding trial competence).

disability which may significantly affect his ability to communicate a possible defense to the jury."[85] A California appellate court, writing prior to the *Godinez* decision, opined a defendant is competent only if he or she:

> (1) possesses a reasonably accurate awareness of his situation, including not simply an appreciation of the charges against him and the range and nature of possible penalties, but also his own physical or mental infirmities, if any; (2) is able to understand and use relevant information rationally in order to fashion a response to the charges; and (3) can coherently communicate that response to the trier of fact.[86]

Alan R. Felthous would look to "the capacity 'to formulate and present one's defense with an appropriate awareness of courtroom proceedings and decorum' and to cooperate with the 'principle [functionaries] of the court,' not just with the defendant's own counsel."[87]

Two in-depth examinations of self-representation competence are also useful, though neither attempted to distill the requirements of functional competence into a concise standard. In their brief as amicus curiae in *Edwards*, the American Psychiatric Association and American Academy of Psychiatry and the Law examined in detail the types of "decision-making and cognitive/communication capabilities" needed by a defendant representing himself.[88] Decisions facing the pro se defendant include all the basic strategic and tactical choices of trial, such as what motions to make, what witnesses to call, and what arguments to make to the jury. As the brief points out, the pro se defendant must sometimes make these decisions quickly and under pressure.[89] Cognitively, the defendant without counsel must be able to understand "the exact elements of the crimes charged," how the prosecution evidence relates to these elements, and "to grasp what is important to highlight, throughout trial and in closing."[90] Further, the defendant must be able, in both oral and written communication, to articulate essential points of his defense, stay focused on relevant matter, and must be able to communicate with multiple audiences (the

85. Pickens v. State, 292 N.W.2d 601, 611 (Wis. 1980).

86. People v. Burnett, 234 Cal. Rptr. 67, 76 (Ct. App. 1987).

87. Felthous, *supra* note 14, at 110 (quoting Felthous, *supra* note 20).

88. Brief for Am. Psychiatric Ass'n et al. as Amici Curiae Supporting Neither Party at 22, Indiana v. Edwards, 128 S. Ct. 2379 (2008) (No. 07-208).

89. *Id.* at 22–23.

90. *Id.* at 24.

judge, witnesses, jurors, and the prosecutor).[91] Various mental disorders can severely impair these abilities.[92]

E. Lea Johnston draws on the psychological theory of social problem solving to describe the capabilities required of a self-representing defendant.[93] In light of the centrality of defendants' autonomy to the right of self-representation, Johnston would deny self-representation on competence grounds only when a grant "poses a *grave* threat to the reliability, fairness, or integrity of the adjudication."[94] Within this framework, she tentatively identifies three classes of ability essential to self-representation: (1) "a defendant must be capable of comprehending the elements of the offense, gathering information on the government's likely prosecution theory, following the introduction of evidence at trial, and assessing the legal significance of that evidence;"[95] (2) a defendant must "[not be completely unwilling] to contest charges because of depression or another disabling mental condition;"[96] and (3) a defendant must possess "the abilities necessary to make (and, to some degree, execute) decisions within the real-life context of a criminal trial."[97]

Broadly common to all these descriptions are two main elements: the defendant's ability to understand his or her own situation and fashion a response to it, whether that involves pleading to charges or defending against them at trial, and the defendant's ability to execute the responsive course decided on, including the ability to communicate and interact coherently and relevantly in the courtroom. This dual emphasis on cognition and communication is also consistent with the *Edwards* Court's observation that a pro se defendant faces diverse tasks ranging from "organization of [the] defense" to "addressing the court and jury."[98]

As to both understanding and communication, the tasks facing a pro se defendant at trial go well beyond those required of one who defends through counsel. While the defendant with an attorney is called on only to have a "'rational as well as factual understanding of

91. *Id.* at 24–25.

92. *Edwards*, 128 S. Ct. at 2387 (citing the amicus curiae brief).

93. Johnston, *supra* note 8, at 27.

94. *Id.* at 41 (italics omitted).

95. *Id.* at 44.

96. *Id.* at 45.

97. *Id.* at 47.

98. Indiana v. Edwards, 128 S. Ct. 2379, 2387 (2008) (quoting McKaskle v. Wiggins, 465 U.S. 168, 174 (1984)).

the proceedings against him,' "[99] the self-representing defendant, if he is to have any chance to formulate and implement a rational defense strategy, must understand, at least on a basic level, the legal elements of the charged offenses, means of defense if they exist, and the probative value of the prosecution evidence and whatever evidence may be available in defense, as well as have sufficient understanding of court procedures to make at least rudimentary use of this understanding. With regard to interaction and communication, instead of the ability to "consult with his lawyer,"[100] the self-representing defendant needs the capacity to communicate defense arguments and positions coherently to the court and jury and to question witnesses and prospective jurors in a manner that might reasonably elicit relevant information.

Beyond intellectual and communicative capacity, a self-representing defendant needs the *will* to defend himself or herself, i.e., the capability for deciding on and attempting solutions Slobogin calls "basic self-regard"[101] and Johnston addresses under the rubric of "problem orientation."[102] Mental disorders causing overwhelming depression or anxiety could prevent the defendant from addressing the problem posed by the charges against him or her.

In formulating a competence standard for self-representation, one must not lose sight of the meaning, in this context, of mental competence and incompetence. The inquiry should focus not on actual courtroom performance but on the defendant's *ability* to understand and communicate.[103] Moreover, we are concerned here only with a lack of ability arising from a particular type of cause: mental disorder or disability. The *Edwards* Court, in suggesting application of a functional competence standard, referred consistently to incompetence arising from "severe mental illness" or "lack[ ] [of] mental capacity."[104] It would be foolhardy in the extreme for a state court to infer from *Edwards* that *Faretta* motions may be denied because the defendant lacks the education, experience, or skills to effectively represent himself.

Low intelligence (even if still in the normal range), bad memory, slowness at reading and writing, lack of practice at planning and organization, a restricted vocabulary, poor spoken grammar, and per-

99. Dusky v. United States, 362 U.S. 402, 402 (1960).
100. *Id.* (internal quotation marks omitted).
101. Slobogin, *supra* note 14, at 402, 404.
102. Johnston, *supra* note 8, at 44–45.
103. *See* Godinez v. Moran, 509 U.S. 389, 401 n.12. (1993).
104. Indiana v. Edwards, 128 S. Ct. 2379, 2385, 2387–88 (2008).

sonality traits such as stubbornness, impatience, and arrogance can all prevent a defendant from effectively representing himself,[105] but the Supreme Court has not endorsed the possibility of exceptions to *Faretta* on such bases and there is little reason to think it would accept such extensions of *Edwards*' narrowly permissive holding.[106] Thus, a defendant is incompetent to represent himself only if *prevented, by mental disorder or disability*, from formulating and communicating a rudimentary response to the charges.[107] Because a defendant may fail to appreciate an aspect of the case against him or to effectively question a witness or communicate his argument for reasons other than mental impairment, such an error in understanding or communication does not itself mean the defendant was mentally incompetent to represent himself. The challenge is to know when the failure to perform is caused by mental incompetence.[108]

Attempting to distill from these ideas a concise, concrete standard that can be used by trial courts and psychological experts, this Article proposes the following formulation:

> *A criminal defendant is mentally incompetent to represent himself or herself at trial if and only if a mental disorder or disability would prevent the defendant from achieving a basic understanding of the charges, law, and evidence, from formulating simple defense strategies and tactics, or from communicating with the witnesses, the court, the prosecutor, and the jury in a manner calculated to implement those strategies and tactics in at least a rudimentary manner.*

While Johnston's suggestion that to constitute incompetence the mental impairment must have such a severe effect as to "pose[ ] a *grave threat* to the reliability, fairness, or integrity of the adjudication,"

105. *See, e.g.*, United States v. Berry, 565 F.3d 385, 392 (7th Cir. 2009) (fraud defendant's performance representing himself at trial reflected only "a case of extreme overconfidence," not a mental disorder); State v. Mott, 784 P.2d 278, 285–86 (Ariz. Ct. App. 1990) (defendant's "obstinate and disrespectful" behavior at trial did not require trial court to find him incompetent to represent himself).

106. On the other hand, I take *Edwards*' references to lack of "mental capacity" to include developmental disabilities or, if they are sufficiently severe, other organic deficits in intelligence. *See Edwards*, 128 S. Ct. at 2385, 2387. A defendant with mild mental retardation might be competent to stand trial under *Dusky*, but not to defend himself.

107. *See* Pickens v. State, 292 N.W.2d 601, 611 (Wis. 1980) ("[S]ince *Faretta* indicates that persons of average ability and intelligence are entitled to represent themselves, a timely and proper request should be denied only where a specific problem or disability can be identified which may prevent a meaningful defense from being offered, should one exist.").

108. As a corollary, on appeal from a conviction following a trial at which the defendant was permitted to represent himself, the fact he performed poorly would not, by itself, show he was mentally incompetent to represent himself.

may be correct,[109] I do not propose including that proviso in the standard itself, which should be suitable for the use of experts as well as courts. Trial courts, being familiar with the course of criminal trials and in a position to best predict how a pro se defendant's condition might affect the trial, might use the test of a grave threat as a guideline, but it would be less useful for an expert psychological evaluator.

A functional competence standard of this type[110] would allow the appointment of counsel for those whose mental disorders or disabilities are likely to deprive them of the capacity to choose and implement basic defense strategies and tactics. A psychiatric catalogue of such disorders and disabilities and the circumstances in which they operate to seriously impair mental capacity to defend oneself is beyond the scope of this Article, but some possible circumstances include developmental disabilities preventing the defendant from understanding the charges and evidence, delusional beliefs affecting the formation of a defense, extreme narcissism or paranoia severely impairing judgment and communication, and depression operating to remove the defendant's will to defend.[111] The standard, however, would not permit self-representation to be denied because of impairments proceeding from causes other than mental disorder or disability, such as lack of education, low-normal intelligence, or personality flaws.[112]

A state high court adopting such a standard for self-representation competence might also desire to provide its trial courts guidance on a few procedural points, perhaps using the state's procedures for determining competence to stand trial as a model. Such guidance

109. Johnston, *supra* note 8, at 42.

110. I refer to the standard as one of *functional* competence because it includes the ability to perform the basic functions of a criminal defender, not merely the *decisional* competence to choose self-representation over representation by counsel. The standard nonetheless includes the decisional capacity to make choices such as what basic defense to pursue and whether to testify.

111. As in evaluating competence to stand trial, "[a] psychiatric diagnosis is a standard part of the process, as such a diagnosis is highly relevant though by no means dispositive. The goal is to learn whether and how mental symptoms impair competence-related abilities, bearing in mind that '[t]he relevance of even severe symptoms to the question of competence varies from case to case.'" Brief for Am. Psychiatric Ass'n et al. as Amici Curiae Supporting Neither Party, *supra* note 88, at 27 (internal citation omitted).

112. Constitutionally, illiteracy may be a special case of educational deficit, as the Supreme Court expressly premised Faretta's right to represent himself on his being "literate." Faretta v. California, 422 U.S. 806, 835 (1975). As to physical disabilities, which, like mental disorders, might prevent a defendant from understanding the prosecution's case or communicating his defense, whether *Edwards* should or will be extended to cover such circumstances is beyond the present discussion.

could reduce even further the number of appellate claims and reversals accompanying application of a new state standard. Some general suggestions follow.

The issue of mental competence to represent oneself need not be addressed in every trial or even in every *Faretta* motion proceeding. The issue should be considered to arise in a manner parallel to trial competence; typically, only on motion of counsel or when the court itself entertains a doubt as to the defendant's competence.[113] When the issue is presented, the trial court (unless it denies the *Faretta* motion on other grounds) should order a psychological or psychiatric examination and should expressly address mental competence in granting or denying the motion.[114] Because denial of self-representation on grounds of incompetence is likely to be reversible error if the defendant's cognitive or communication impairments are *not* caused by mental disorder or disability, trial courts should be cautious about making an incompetence finding without benefit of an expert evaluation, though the judge's own observations of the defendant's in-court behavior will also provide key support for an incompetence finding and should be expressly placed on the record. To avoid the need for repeated psychiatric examinations, a court ordering a trial-competence examination might choose to include in its order the question of self-representation competence, even if the defendant has not made a *Faretta* motion.[115]

It should not be necessary, however, for the trial court to hear expert *legal* testimony on what could or should be done in defense or what capabilities are required to defend the particular case. Because the functional competence standard demands only the ability to formulate simple defense strategies and tactics, and to communicate with others so as to implement those strategies and tactics in a rudimentary manner, the legal complexity of a given case, or the availability of a legally sophisticated defense to the charges, is of marginal relevance to the competence determination. Trial courts are sufficiently familiar

113. Felthous & Flynn, *supra* note 46, at 15. On the comparable issue of trial competence, see ALASKA STAT. § 12.47.100 (2009); CAL. PENAL CODE § 1368 (West 2000); FLA. RULES CRIM. PRO. RULE 3.216(a) (West 2007); KAN. STAT. ANN. § 22-3302(1) (West 2009); MASS. GEN. LAWS ch. 123, § 15 (2003); N.J. STAT. ANN. § 2C:4-5 (West 2005); N.Y. CRIM. PROC. LAW § 730.30 (McKinney 1995); OHIO REV. CODE ANN. § 2945.37 (LexisNexis 2009). *See also* State v. Connor, 973 A.2d 627, 653 (Conn. 2009).

114. Regarding expert evaluation of trial competence, see, e.g., CAL. PENAL CODE § 1369 (West 2000); FLA. STAT. ANN. § 916.12 (West 2007); N.J. STAT. ANN. § 2C:4-5 (West 2005); N.Y. CRIM. PROC. LAW § 730.30 (McKinney 1995); OHIO REV. CODE ANN. § 2945.371 (LexisNexis 2009); TEX. CODE CRIM. PROC. ANN. art. 46B.021 (Vernon 2009).

115. *See* Felthous & Flynn, *supra* note 46, at 15–16.

with the basic tasks of criminal defense to apply the mental competence standard without expert legal assistance.[116]

In many instances, the adverse functional effects of a defendant's disorders or deficits will become fully apparent only under the pressure of trial. Trial courts should consider revoking self-representation whenever a substantial doubt arises regarding the defendant's competence to continue defending himself,[117] though the threshold for requiring reevaluation might be higher in cases where the issue has already been addressed, and the defendant found competent to represent himself, at a hearing on pretrial *Faretta* motion.[118] Unlike the duty to monitor trial competence, moreover, the trial court's responsibility to monitor the defendant's self-representation competence during trial is not a command of due process[119] but would derive only from state procedural rules. Because a defendant's incompetence to represent himself may become fully apparent only in the midst of trial, a court granting a pretrial *Faretta* motion may wish, as a precaution, to appoint standby counsel for defendants with evident mental disorders or disabilities.[120]

116. *Cf. id.* at 17 (clinical assessment of competence to represent oneself does not require involvement of an attorney, though clinicians might find useful a written outline of the tasks expected of a pro se defendant).

117. *See* State v. Hawkins, No. 35281, 2009 WL 5125601, at *10 (Idaho Ct. App. Dec. 30, 2009) (defendant's testimony should have caused trial court to entertain a reasonable doubt about his competence to stand trial or to represent himself); State v. Dahl, 776 N.W.2d 37, 45 (N.D. 2009) (trial court has "continuing responsibility" during trial to ensure self-representation competence).

118. *Cf.* Atwell v. State, 354 So. 2d 30, 36 (Ala. Crim. App. 1977) (absent change in defendant's mental condition or new facts creating doubt as to competence, trial court may rely on prior determination of trial competence); People v. Kelly, 822 P.2d 385, 412 (Cal. 1992) (trial competence only need be reevaluated if circumstances change substantially or significant new evidence on competence becomes known); Commonwealth v. Martin, 616 N.E.2d 814, 816 (Mass. App. Ct. 1993) (trial competence issue requires further inquiry, despite early finding of competence, if subsequent events or testimony raise doubt); Miles v. State, 688 S.W.2d 219, 224 (Tex. Ct. App. 1985) (second hearing on trial competence only required if there is evidence of change in competence or newly discovered evidence on the issue).

119. Godinez v. Moran, 509 U.S. 389, 402 (1993).

120. Even without the defendant's agreement, standby counsel may be appointed and may participate to a limited extent in the trial. McKaskle v. Wiggins, 465 U.S. 168, 178 (1984). With the consent of the defendant, various forms of hybrid or mixed representation are within the discretion of the trial court, but are in limited use because of their inherent difficulties. *See* Decker, *supra* note 8, at 537–44. The difficulties may well be magnified in the case of a mentally disordered defendant who is likely to clash with counsel over how to organize and present the defense. Trial courts would probably do better to appoint counsel only in a purely standby, nonparticipatory role, whereby they are available to step in if the defendant's psychiatric symptoms begin to pose a grave threat to the fairness of the proceedings.

As with determinations of competence to stand trial, a trial court's determination as to competence to represent oneself should be reviewed deferentially and upheld if supported by substantial evidence.[121] The trial court's finding deserves particular deference to the extent it is based on the defendant's courtroom conduct, which the trial court is in a better position to evaluate than the appellate court.[122]

Conclusion

In 2008, the Supreme Court in *Edwards* surprised many observers by declaring state courts free, so far as the Sixth Amendment is concerned, to apply higher standards of mental competence to self-representation at trial than to trial with counsel. State courts have hesitated to take up the invitation; only two state high courts, those in Connecticut and Florida, have expressly directed that such a standard should be applied,[123] and no court has articulated a new state standard for self-representation competence. One likely reason for this reluctance is the fear of causing unnecessary reversals if the state competence standard is later found to be set too high, resulting in improper denial of *Faretta* motions, an error that is reversible per se.

This Article demonstrates that accepting *Edwards*' invitation to articulate a somewhat detailed standard for self-representation competence would be a better option for state courts than either declining to adopt a higher standard at all or directing that a higher standard be used, without providing trial courts any guidance on the details of the standard and procedures for administering it, as a few states have done. Adopting and articulating a state functional competence standard more demanding than *Dusky*'s trial competence standard, but consistent with *Edwards*' language and rationale, would allow state

121. *See* Edwards v. State, 902 N.E.2d 821, 824 (Ind. 2009) ("Although it is now clear that the *Dusky* competency determination is separate and distinct from the *Edwards* competency determination, both involve a fact-sensitive evaluation of the defendant's capabilities that the trial court is best-situated to make. . . . We conclude that the trial court's determination of competence to act pro se is best reviewed under the clearly erroneous standard."); *cf.* People v. Lawley, 38 P.3d 461, 482 (Cal. 2002) (trial competence determination reviewed under substantial evidence standard); People v. Windham, 560 P.2d 1187, 1191 (Cal. 1977) (midtrial self-representation motion not within constitutional *Faretta* right; subject to sound discretion of trial court); State v. Flores, 124 P.3d 1175, 1181 (N.M. Ct. App. 2005) (denial of motion for trial competence evaluation reviewed for abuse of discretion); Miles v. State, 688 S.W.2d 219, 224 (Tex. Ct. App. 1985) (same).

122. State v. Mott, 784 P.2d 278, 286 (Ariz. Ct. App. 1989).

123. In addition, Indiana has impliedly done so, and Wisconsin, which already applied a higher standard before *Edwards*, has not retreated from that position.

courts to protect the fairness, reliability, and efficiency of trials while minimizing the potential for unnecessary reversals of criminal convictions. That is a jump worth making.