THE AFTERMATH OF *INDIANA V. EDWARDS*: RE-EVALUATING THE STANDARD OF COMPETENCY NEEDED FOR PRO SE REPRESENTATION

Todd A. Berger*

*Associate Professor, Syracuse University College of Law. The author would like to thank Professors Lauryn Gouldin, Jason Hoge, Aliza Milner, Gary Pieples and John C. Lore for their thoughtful feedback and suggestions. Additionally, the author would like to thank Beverly Beaver and Dave Wicclair from the Defender Association of Philadelphia and Evan Hannay from the Hiscock Legal Aid Society for the same. The author would also like to thank Cory Schoonmaker, Adam Willman and Robert Swestka for their excellent research support. Additional gratitude is owed to Hedimay Berger for the time spent editing this particular work.

INTRODUCTION

In July of 1999, Ahmad Edwards attempted to steal a pair of shoes.[1] After being discovered, Edwards drew a gun, fired at the store security officer, and in the process wounded a bystander.[2] Edwards was caught and charged under Indiana law with attempted murder, along with numerous other offenses.[3]

It is a basic principle of Anglo-American jurisprudence that a criminal defendant cannot stand trial unless he or she is competent to do so.[4] Ahmad

[1] Indiana v. Edwards, 554 U.S. 164, 167 (2008).

[2] *Id.*

[3] *Id.* In addition to attempted murder, Edwards was also charged with battery with a deadly weapon, criminal recklessness, and theft. *Id.*

[4] *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *24. Blackstone argued that an incompetent defendant should not be forced to stand trial because his incompetence prevents him from mounting an effective defense or pleading to the charges "with [the] advice and caution that

Edwards was not competent to stand trial.[5] After several competency hearings however, and close to six years after he was first charged, Edwards was eventually found competent.[6] Before the trial began, Edwards requested that he be allowed to represent himself, in accordance with the Sixth Amendment right to self-representation.[7] The trial judge noted that Edwards still suffered from schizophrenia and concluded that "*he's competent to stand trial but I'm not going to find he's competent to defend himself*."[8] What followed next had the effect of ushering in a new era of constitutional jurisprudence.

he ought." *Id.* This rule was originally the creation of common law. *See id.* With respect to current constitutional jurisprudence, the due process clause of the Fifth and Fourteenth Amendments prohibits the criminal prosecution of a defendant who is not competent to stand trial. *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (describing the applicable standard of competence needed to satisfy due process concerns). While not stating so explicitly, *Dusky* is based on the due process clause of the Fifth Amendment as applied to the federal government. *See* Bruce v. Estelle, 483 F.2d 1031, 1042 (5th Cir. 1973) (noting that "[t]he *Dusky* standard emanates from and is given vitality by the due process clause of the [F]ifth [A]mendment. Thus, like many other constitutional protections, the standards utilized for a determination of whether these numerous guarantees have been accorded must be national in application."); Medina v. California, 505 U.S. 437, 439 (1992) (holding "[i]t is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial."); *see also* Ashley N. Beck, Comment, Indiana v. Edwards*: The Prospect of a Heightened Competency Standard for* Pro Se *Defendants*, 84 U. COLO. L. REV. 433, 434 n.2 (2013). The text of the due process clauses of the Fifth and Fourteenth Amendments can be found *infra* note 26. A more in-depth discussion regarding the constitutional requirements related to a defendant's competency to stand trial occurs in Part I(A)(1)(a)(2) of this article.

[5] *See Edwards*, 554 U.S. at 167.

[6] Edwards' competency to stand trial was actually the subject of three separate competency hearings. The first hearing occurred in August of 2000, which resulted in Edwards being declared incompetent. The second hearing took place in March of 2002. Edwards was declared competent to stand trial at this proceeding. However, before the trial could take place he was again found incompetent following a third hearing that occurred in April of 2003. Edwards was finally declared competent to stand trial in June of 2005, and almost one year after that finding his first trial took place. At this trial, Edwards requested that he be allowed to represent himself and requested a continuance to prepare for trial. That request was denied by the trial judge. Edwards proceeded to trial, at which time he was convicted of criminal recklessness and theft. The jury was unable to reach a verdict on the charges of attempted murder and battery. *See id.* at 167–69.

[7] While Edwards did request to represent himself at his first trial, the particular request referenced above was actually made prior to the start of his second trial on the charges of attempted murder and criminal battery. *See supra* note 6; *Edwards*, 554 U.S. at 169.

[8] *Edwards*, 554 U.S. at 169 (emphasis added).

Based on the above finding, the trial judge denied Edwards' request to proceed pro se.[9] Instead, Edwards' appointed lawyer continued to represent him at trial, over Edwards' objection.[10] After being convicted, Edwards appealed all the way to the United States Supreme Court, arguing that once he was found competent to stand trial, he had a constitutional right to represent himself.[11]

In *Godinez v. Moran*, the Supreme Court held that the due process clause requires only that a defendant who wishes to waive counsel and represent himself or herself at trial, also be competent to stand trial.[12] In other words, the minimum level of competency that is constitutionally required before a defendant can actually waive counsel and conduct trial proceedings is simply the level of competency that is needed to stand trial in the first place.[13]

Accordingly, Edwards argued, based on *Godinez*, because he was found competent to stand trial, he was de facto competent to conduct the trial proceedings and act as his own lawyer.[14] Indeed, this position was

[9] *Id.* The term "pro se" is a term so familiar to lawyers that it hardly needs to be defined. It simply means, "to represent oneself." Dearybury v. State, 625 S.E.2d 212, 215 (S.C. 2006). A defendant can elect to proceed pro se and then enter a guilty plea or proceed to trial and represent him or herself at trial. This article's use of the term pro se primarily refers to a defendant who elects to waive counsel and subsequently conduct trial proceedings.

[10] *See Edwards*, 554 U.S. at 169.

[11] *See id.* "This case focuses upon a criminal defendant whom a state court found mentally competent to stand trial if represented by counsel but not mentally competent to conduct that trial himself. We must decide whether in these circumstances the Constitution prohibits a State from insisting that the defendant proceed to trial with counsel, the State thereby denying the defendant the right to represent himself." *Id.* at 167 (citing U.S. CONST. amend. VI; Faretta v. California, 422 U.S. 806, 807 (1975)).

[12] 509 U.S. 389, 389–90 (1993). As discussed in Part I(C)(1)(b) of this article, *Godinez* arguably held such by implication. *See infra* Part I(C)(1)(b). However, as further explained in Part I(C)(1)(c), *Godinez* has been interpreted in such a manner by most courts, including the United States Supreme Court in *Edwards* itself. *See infra* note 171, referencing how the *Edwards* Court has interpreted *Godinez*.

[13] *See Godinez*, 509 U.S. at 389–90; *see also* Heather Samantello, *Past, Present and Future: The Legal Standard in Determining the Mental Competency of a Defendant to Represent Pro Per in California*, Comment, 38 W. ST. U. L. REV. 93, 102 (2010) (noting that, "the issue presented in *Godinez* focused on the bare minimum mental competency standard required under the constitution" to effectuate a waiver of the defendant's constitutional rights).

[14] Edwards' argument is articulated by the Indiana Court of Appeals, which in siding with Edwards, believed that the standard of competency needed to stand trial was the same standard of competency needed for a defendant to elect to proceed pro se. *See* Edwards v. State, 854 N.E.2d 42, 48 (Ind. Ct. App. 2006), *aff'd in part, vacated in part*, 866 N.E.2d 252 (Ind. 2007), *vacated*,

embraced by the majority of jurisdictions that had considered the issue.[15] Therefore, Edwards argued, the trial judge's decision to force him to be represented by counsel against his will violated his Sixth Amendment right to self-representation.[16]

The Supreme Court disagreed.[17] The Court held in *Indiana v. Edwards* that the United States Constitution permits a judge to ask not only if a defendant is competent to stand trial, but in instances in which the defendant wishes to represent himself or herself, to ask this additional question: Is the defendant who seeks to conduct his or her own defense mentally competent to do so?[18] In the event that the court concludes the defendant is not, the court is then permitted to require that the defendant

554 U.S. 164 (2008), and *transfer granted, vacated*, 869 N.E.2d 458 (Ind. 2007) ("[O]ne's competency to represent oneself at trial is measured by one's competency to stand trial and that the standard for the former may not be higher than the standard for the latter."). Edwards' argument, as well as the opinion of the Indiana Court of Appeals, that agreed with Edwards, was based on an interpretation of the United States Supreme Court's holding in *Godinez v. Moran*. *Godinez*, 509 U.S. at 389. This particular legal position is discussed in greater length in Part I(C)(1)(c). *See infra* Part I(C)(1)(c).

[15] E. Lea Johnston, *Representational Competence: Defining the Limits of the Right to Self-Representation at Trial*, 86 NOTRE DAME L. REV. 523, 528 (2011) (noting that prior to *Edwards v. Indiana* "most states assumed that the standard for competence to represent oneself . . .was equivalent to the standard for competence to stand trial."). *See also id.* at 528, n.31 (providing several examples of state court decisions to this effect).

[16] *Edwards*, 554 U.S. at 169 (citing *Faretta*, 422 U.S. at 834), *supra* note 11. The Supreme Court held in *Faretta v. California* that the Sixth Amendment of the United States Constitution provides that a criminal defendant has the right to waive the assistance of an attorney and represent himself or herself at trial. 422 U.S. at 834. The Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defen[s]e.

U.S. CONST. amend. VI. Part I(B) of this article contains a more in-depth discussion of the right to self-representation.

[17] *See Edwards*, 554 U.S. at 177–78.

[18] *Id.* ("We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, 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.").

proceed to trial while represented by counsel, over the defendant's objection, without violating the constitutional right to self-representation.[19] (The *Edwards* Court used the term "gray-area defendant" to refer to a defendant who is competent to stand trial but who "lacks the mental capacity to conduct his trial defense unless represented.")[20]

Importantly, *Edwards*, on its face, is simply permissive.[21] Consequently, in a post-*Edwards* world, the minimum standard of competency that is required for a defendant to waive counsel and conduct trial proceedings is still determined by *Godinez*- the defendant need only be competent to stand trial.[22] *Edwards* merely provides that a state may adopt a heightened standard of competence before allowing a defendant to waive the right to counsel and to represent himself or herself at trial (what this article refers to

[19] *Id.* at 178.

[20] *Id.* at 173–74. It is unclear how many defendants may be considered gray-area defendants in that they are competent to stand trial but not competent to adequately conduct trial proceedings. To the extent that such a number can be known, Professor Erica Hashimoto looked at pro se representation in federal felony cases and concluded that, "the vast majority of felony pro se defendants in federal court do not exhibit overt signs of mental illness." Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 428 (2007). Of the over two hundred felony pro se defendants in federal court studied by Professor Hashimoto, competency evaluations were ordered in just over 20% of the cases. *Id.* Professor Hashimoto concluded that:

> This figure is telling because in most cases in which a defendant manifests any sign of mental illness, a federal district court judge will order a competency evaluation. The fact that close to 80% of pro se felony defendants were not ordered to undergo competency evaluations thus strongly suggests that the vast majority of these defendants did not exhibit signs of mental illness.

Id.

[21] *See* Jason R. Marks, *State Competence Standards for Self-Representation in a Criminal Trial: Opportunity and Danger for State Courts After* Indiana v. Edwards, 44 U.S.F. L. REV. 825, 833 (2010); *see also* Beck, *supra* note 4, at 458–59 (stating, "[a]lthough *Edwards* does not *require* state trial courts to employ a particular test or adopt a heightened standard to determine a defendant's competence to represent himself, it does make clear that trial courts retain the discretion to do so.") (footnote omitted).

[22] United States v. DeShazer, 554 F.3d 1281, 1289 (10th Cir. 2009) (stating that in *Edwards*, "the Court reiterated that under *Godinez*, it is constitutional for a state to allow a defendant to conduct trial proceedings on his own behalf when he has been found competent to stand trial. On the other hand, the state may insist on counsel and deny the right of self-representation for defendants who are 'competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.'") (citation omitted).

as representational competence), but does not specifically require that a State do so.[23]

While the specific holding of *Edwards* may not require that trial courts adopt a heightened standard of representational competence,[24] this article suggests that a close inspection of the reasoning employed by the *Edwards* Court leads to the conclusion that a trial court is not only permitted to adopt a heightened standard of representational competence before allowing a defendant to waive the right to counsel and to conduct trial proceedings, doing so is constitutionally mandated.

It is certainly the case that *Edwards* held only that a trial court is permitted to require representation by counsel over the objection of a defendant who is competent to stand trial, but not competent to represent himself or herself, without violating the Sixth Amendment right to self-representation.[25] However, as this article will demonstrate, in reaching this conclusion, the reasoning employed by the *Edwards* Court is grounded far more in substantive due process related concerns, namely the right to a fair trial, than Sixth Amendment jurisprudence.

To that end, when *Edwards*' due process and fair trial related reasoning is taken to its logical conclusion, it becomes apparent that the Constitution compels a heightened standard of representational competence. In this sense, while *Edwards* may not have done so expressly, it effectively, if silently, overruled *Godinez*.

As a result, this article ultimately posits that the due process protections afforded by the Fifth and Fourteenth Amendments of the United States Constitution[26] require that trial courts employ a heightened standard of

[23] *Id.* For a more in-depth discussion concerning the permissive nature of *Edwards*, see Part III(A). In particular, *see supra* note 21, detailing how states have reacted to *Edwards*' permission to adopt a heightened standard of representational competence.

[24] *See Edwards*, 554 U.S. at 177–78; *see supra* note 22.

[25] *See Edwards*, 554 U.S. at 167.

[26] The Fifth Amendment to the United States Constitution declares that no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. V. The Fourteenth Amendment provides that no state may deprive any person of life, liberty, or property, without due process of law. U.S. CONST. amend. XIV, § 1. The Fifth Amendment applies to the federal government. Ronald A. Parsons, Jr. & Sheila S. Woodward, *The Heart of the Matter: Substantive Due Process in the South Dakota Courts*, 47 S.D. L. REV. 185, 187–88 (2002). Following the Civil War, the Fourteenth Amendment was adopted, making the same basic constitutional language directly applicable to the states. *Id.* This article's reference to due process refers to what may be termed the stand-alone or free-standing due process protections afforded by the Fifth and Fourteenth Amendment due process clauses, as opposed to specific Bill of Rights

competency before allowing a defendant to waive counsel and represent himself or herself at trial.

In reaching the above conclusion, this article fills a void in the scholarly literature addressing the impact of the Supreme Court's decision in *Edwards*. Much of the scholarly literature written in the aftermath of *Edwards* has focused on suggesting the exact standard of representational competence that a trial court should apply if it chooses to assess whether a given defendant is competent to conduct trial proceedings, a question left unanswered by the high Court's decision.[27] Additionally, some scholars

amendments that are incorporated to the states through the due process provision of the Fourteenth Amendment. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 76–87 (5th ed. 2009) (discussing the independent content of the due process). While the Fifth Amendment's due process clause applies specifically to the federal government and the Fourteenth's to the states, the Supreme Court has made clear that the clauses are to be interpreted congruently. *See* Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection."); *see also* Andrew T. Hyman, *The Little Word "Due"*, 38 AKRON L. REV. 1, 5 (2005) (noting "[t]he Due Process Clause in the Fourteenth Amendment mimics the same clause in the Fifth Amendment, and therefore the meaning of that clause in the Fifth controls the meaning in the Fourteenth.").

[27] *See Edwards*, 554 U.S. at 177–78; Marks, *supra* note 21, at 827 (suggesting that after *Edwards*, states could adopt one of three approaches to determining whether a defendant was competent to proceed pro se: "(1) decline the invitation to adopt a higher standard of mental competence for self-representation [than would be required to stand trial]; (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."); *see also* Johnston, *supra* note 15, at 595 (drawing on social problem-solving theory to suggest necessary elements of a representational competence standard); 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. 1605, 1606 (2010) [hereinafter Johnston, *Setting*] (arguing against the construct of adjudicative competence developed by Professor Richard Bonnie and instead applying a normative theory of representational competence to suggest a subset of abilities that may be critical for self-representation at trial); Conor P. Cleary, Note, *Flouting* Faretta*: The Supreme Court's Failure to Adopt a Coherent Communication Standard of Competency and the Threat to Self-Representation After* Indiana v. Edwards, 63 OKLA. L. REV. 145, 146 (2010) (suggesting that the Supreme Court should have adopted a "coherent communication" standard to ensure that the defendant is competent to proceed pro se); Reed Willis, Note, *A Fool for a Client: Competency Standards in Pro Se Cases*, 2010 BYU L. REV. 321, 333 (2010) (positing that the defendant have at least "a de minimis understanding of both the substantive and procedural law being applied against him"); Ellesha LeCluyse, Note, *The Spectrum of Competency: Determining a Standard of Competence for Pro Se Representation*, 65 CASE W. RES. L. REV. 1239, 1242 (2015) (arguing in support of a definitive standard for what the author terms "pro se competence" and suggests that such standard can be formulated using the framework of medical decision-making standards); E.

have suggested that lower federal and state courts may adopt policies and practices that are less severe than requiring full representation when a defendant may not meet a given standard of representational competence.[28] However, this article differs from those scholarly works in that it specifically posits that the substantive due process right to a fair trial mandates that trial courts adopt a heightened standard of representational competence before allowing a defendant to waive the right to counsel and conduct trial proceedings.[29]

Lea Johnston, *Communication and Competence for Self-Representation*, 84 FORDHAM L. REV. 2121, 2169–72 (2016) [hereinafter Johnston, *Communication*] (suggesting that following *Edwards*, states should apply a two-pronged competency test, in which the competence limitation to self-representation is limited to defendants who have a severe mental illness. If the defendant is competent to control the defense, but the court harbors concerns about the defendant's ability to execute it to a minimal degree, the court may then assess the defendant's competence to conduct the defense by focusing on the defendant's ability to communicate in a coherent manner with courtroom actors in the context of trial).

[28] *See* Jona Goldschmidt, *Autonomy and "Gray-Area"* Pro Se *Defendants: Ensuring Competence to Guarantee Freedom*, 6 NW. J.L. & SOC. POL'Y 130, 165–77 (2011) (arguing that respect for the defendant's autonomy can be achieved while simultaneously avoiding the spectacle of a gray-area defendant proceeding pro se by employing measures less draconian than requiring the unwilling defendant to be represented by counsel). Instead, the author suggests that several measures, including but not limited to what the author terms, judicial assistance, duty counsel, hybrid representation, and assistance from a non-lawyer agent can be borrowed from the Canadian and English legal systems to accomplish this end. *Id.*

[29] This is not to suggest that other scholars have completely refrained from calling for a mandatory heightened competency standard to engage in self-representation in the post-*Edwards* era. However, they have not done so along the lines suggested in this article. See, for example, John H. Blume & Morgan J. Clark, *"Unwell":* Indiana v. Edwards *and the Fate of Mentally Ill Pro Se Defendants*, 21 CORNELL J.L. & PUB. POL'Y 151, 168 (2011), in which the authors have argued that mentally ill defendants would be better served if the Supreme Court completely overruled *Faretta v. California*. *See infra* note 74, noting that *Faretta* is the landmark Supreme Court case recognizing the right to self-representation. The authors argue that after its decision in *Faretta*, as reflected in *Edwards*, the Supreme Court has evinced little commitment to the right of self-representation. Nevertheless, accepting that it is unlikely the Supreme Court would completely eliminate the right of every defendant to proceed pro se, the authors call for the more modest approach of eliminating the right to self-representation in capital trials. *Id.* at 169. Blume and Clark have likewise argued that the standard of competency needed to stand trial should be increased as well. *Id.* at 167. *See* Johnston, *supra* note 15, at 582 (positing that the post-*Edwards* competency standard that courts should adopt would require the appointment of standby counsel if a defendant "is decisionally (sic) competent but lacks necessary performance skills"); *see also* Beck, *supra* note 4, at 452–57 (listing several "practical" as opposed to constitutionally mandated reasons why state courts should adopt a heightened standard of competency for pro se defendants after *Edwards*); Thomas C. Sand, *Constitutional Catch-22*, ADVOCATE MAGAZINE, Fall 2014, https://law.lclark.edu/live/news/27512-constitutional-catch-22. Thomas C. Sand, writing in an

This article proceeds in three parts. Part I provides an overview of constitutional jurisprudence in the context of pro se representation prior to *Indiana v. Edwards*. This part explores topics related to a defendant's competency to stand trial, the Sixth Amendment right to self-representation, and the intersection of competency and the right to self-representation prior to the Supreme Court's decision in *Edwards*. Part II explores the *Edwards* decision in greater detail, with particular focus being paid to the Court's substantive due process related reasoning. Part III demonstrates how the reasoning of the *Edwards* Court, when taken to its logical end point, indicates that due process protections afforded by the Fifth and Fourteenth Amendments require that trial courts adopt a heightened standard of competence that a defendant must satisfy in order to represent himself or herself at trial.

I. OVERVIEW OF CONSTITUTIONAL JURISPRUDENCE IN THE CONTEXT OF PRO SE REPRESENTATION

A. Competency to Stand Trial

1. Substantive and Procedural Due Process in the Context of the Competency Requirement

It is well established that the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the criminal prosecution of a defendant who is not competent to stand trial.[30] As legal commentators have noted,

alumni magazine published by Lewis & Clark Law School, does reference due process related concerns as the basis for his argument that states should adopt a competency standard to represent oneself that is higher than the standard needed to stand trial. Nevertheless, in reaching this conclusion, Mr. Sand is primarily focused on Washington state law. Lastly, Professor Jason R. Marks, in an excellent article, also touches on due process related concerns in the context of pro se representation. *See* Marks, *supra* note 21, at 834. However, Professor Marks briefly touches on this issue within the scope of an article primarily related to the appropriate post-*Edwards* standard for representational competence. *Id.* In this regard, this article seeks to address due process concerns and pro se representation in a manner that more fully explicates due process related issues in the context of pro se representation than was accounted for in Professor Marks' work.

[30] *See supra* note 4 for a discussion of the case law prohibiting the prosecution of individuals incompetent to stand trial. The question of the criminal defendant's competence to stand trial is its own discrete inquiry and is distinct from the questions relating to the defendant's state of mind at the time he or she committed the crime in question. In this regard, questions relating to the defendant's mental state at the time he or she committed the crime have no bearing on whether the defendant is competent at the time of trial. *See* Cleary, *supra* note 27, at 146.

American criminal law "has long recognized that competence to participate in the adjudication of one's case is essential to a fair trial and due process."[31]

Due process rights in the context of competency determinations in a criminal trial relate to what may be termed the stand-alone or independent content of the due process clause.[32] Stand-alone or independent due process protections are derived specifically from the due process clauses of the Fifth and Fourteenth Amendments, as opposed to being found within a provision of the Bill of Rights and then being subsequently incorporated to the states through the Fourteenth Amendment.[33]

The prohibition against the trial of an incompetent defendant has both elements of substantive and procedural due process.[34] Substantive due

[31] Beck, *supra* note 4, at 442–43. *See also* State v. Strain, 972 So. 2d 1184, 1187 (La. Ct. App. 2007) (holding "when there is a *bona fide* question raised regarding a defendant's capacity, the failure to observe procedures to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.").

[32] *See* LAFAVE ET AL., *supra* note 26, at 76–87 (describing the independent content of due process in greater detail and noting that, "[c]onstitutional standards governing defendant's competence to stand trial, including the test for competency, the necessity for a competency hearing, and the applicable standard of proof on that issue, also are a product of due process."). *Id.* at 79.

[33] *Id.* at 79.

[34] *See* Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929, 941 (2014). The distinction between the two claims was expressed by the Tenth Circuit in the following manner:

> Competency claims are based either upon substantive due process or procedural due process, although sometimes there is overlap. A competency claim based upon substantive due process involves a defendant's constitutional right not to be tried while incompetent. Competence to stand trial requires that a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him."

Barnett v. Hargett, 174 F.3d 1128, 1133 (10th Cir. 1999) (citing Dusky v. United States, 362 U.S. 402, 402 (1960)) (citations omitted). The Tenth Circuit went on to further note: "[a] competency claim based upon procedural due process involves a defendant's constitutional right, once a bona fide doubt has been raised as to competency, to an adequate state procedure to insure that he is in fact competent to stand trial." *Id.* at 1133–34. *See also* Williams v. Woodford, 384 F.3d 567, 603 (9th Cir. 2004); Beck v. Angelone, 261 F.3d 377, 387 (4th Cir. 2001); Walker v. Attorney General, 167 F.3d 1339, 1343 (10th Cir. 1999); Reynolds v. Norris, 86 F.3d 796, 800 (8th Cir. 1996); James v. Singletary, 957 F.2d 1562, 1571–72 (11th Cir. 1992); United States *ex rel.*

process prevents the government from engaging in conduct that "shocks the conscience"[35] or interferes with certain fundamental constitutional rights.[36] Procedural due process requires that before the government deprives an individual of life, liberty or property (assuming the deprivation in question is otherwise constitutionally permissible), the government must follow certain rules that ensure such action is implemented in a fair manner.[37]

Indeed, substantive and procedural due process claims cannot always be "neatly separated,"[38] and in the context of competency issues in criminal trials, "cases have on occasion blurred the distinctions between the two claims, particularly when both claims are raised together."[39]

Nevertheless, courts have generally held that substantive due process prevents a defendant from being tried, convicted, and sentenced, while, in fact, incompetent.[40] Procedural due process, on the other hand, requires that states provide adequate procedures for determining a defendant's competency in order to ensure that an incompetent defendant is not brought to trial.[41]

a. Substantive Due Process

1. Trying an Incompetent Defendant Violates Substantive Due Process

Prosecuting a defendant who is, in fact, incompetent appears to violate substantive due process guarantees because of the relationship between substantive due process and the right to a fair trial.

Mireles v. Greer, 736 F.2d 1160, 1165 (7th Cir. 1984); Acosta v. Turner, 666 F.2d 949, 954 (5th Cir. 1982).

[35] United States v. Salerno, 481 U.S. 739, 746 (1987).

[36] Jody Marcus, Note, *Constitutional Law- Misapplication of the* Parrat/Hudson *Doctrine to a Traditional Section 1983 Claim-* Holloway v. Walker, *784 F.2d 1287 (5th Cir. 1986)*, 60 TEMP. L.Q. 1071, 1084 (1987).

[37] *Salerno*, 481 U.S. at 746.

[38] Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 848 (2003).

[39] *Walker*, 167 F.3d at 1344.

[40] See cases prohibiting the trial of an incompetent individual, *supra* note 34. *See also* David W. Beaudreau, Comment, *Due Process or "Some Process"? Restoring* Pate v. Robinson*'s Guarantee of Adequate Competency Procedures*, 47 CAL. W. L. REV. 369, 370–71 (2011).

[41] See cases prohibiting the trial of an incompetent individual, *supra* note 34.

To that end, while not always explicit, Supreme Court case law suggests that the right to a fair trial itself falls within the ambit of substantive due process protections.[42] Further, in the context of a criminal defendant's competency to stand trial, courts have recognized that "[a] defendant's *due process right to a fair trial* includes the right not to be tried, convicted or sentenced while incompetent."[43] Consequently, because trying an incompetent defendant violates the due process right to a fair trial,[44] trying an incompetent defendant necessarily represents a violation of substantive due process.

Trying an incompetent defendant is violative of the substantive due process right to a fair trial because the reliable adjudication of a criminal case is largely dependent upon the ability of a competent defendant to participate in his or her own defense.[45] For example, the competence of the defendant arguably increases the accuracy and reliability of a criminal trial because an incompetent defendant cannot meaningfully cooperate with his or her attorney,[46] thus failing to tell the attorney important information that

[42] Marcus, *supra* note 36, at 1089. For a discussion of the substantive due process nature of the right to a fair trial *see id.* at 1086–89, nn.161–201. *See also* 2 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 10:16 (2015) (citing Spencer v. Texas, 385 U.S. 554 (1967) and noting, "the Supreme Court acknowledged that the due process clause gives the defendant a substantive right to a fair trial.").

[43] United States v. Gonzalez-Ramirez, 561 F.3d 22, 28 (1st Cir. 2009) (emphasis added).

[44] *See* IMWINKELRIED, *supra* note 42.

[45] *See* NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 1 (2002) (positing that subsidiary to the promotion of fairness, competent participation of defendants has several distinct purposes, one of which is, "to enhance the factual accuracy of determinations"); *see also* Beck, *supra* note 4, at 442–43. It should be noted that legal scholars have proffered other reasons beyond ensuring the accuracy of the criminal trial as underlying rationales for the due process related prohibition on trying incompetent defendants. *See* POYTHRESS ET AL., *supra* note 45, at 39 (positing that the requirement that a defendant be competent before he or she stands trial also enhances the fairness of the proceedings as it promotes the defendant's exercise of self-determination in making important decisions in his or her defense); *see also* Alaya B. Meyers, *Rejecting the Clear and Convincing Evidence Standard for Proof of Incompetence:* Cooper v. Oklahoma, *116 S. Ct. 1373 (1996)*, 87 J. CRIM. L. & CRIMINOLOGY 1016, 1017 (1997) (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 4.4(a) (2d ed. 1986) and noting that the competency requirement also helps maintain the "dignity" of the trial, in that an incompetent defendant may act out in an offensive or inappropriate manner. The author further argues that a competent defendant's understanding of why he or she is being charged with a crime makes the trial and punishment more just).

[46] *See* Justine A. Dunlap, *What's Competence Got to Do with It: The Right Not to Be Acquitted by Reason of Insanity*, 50 OKLA. L. REV. 495, 499 (1997) (discussing one of the

could aid in his or her defense.[47] Further, the potential inaccuracy of a criminal trial may be increased because an incompetent defendant may not be able to adequately testify on his or her own behalf.[48]

It should be pointed out that ensuring a defendant receives a fair trial also implicates interests beyond that of the defendant. In this regard, the Supreme Court has acknowledged that there are certain circumstances in which an "independent" or "strong societal" interest also exists with respect to the enforcement of constitutional guarantees that are extended to an accused.[49]

Certainly, the due process right to a fair trial belongs to the defendant.[50] However, both the reliability of a trial's outcome and importantly, the appearance of a fair trial, are also related to the "political legitimacy" of the state.[51] If society does not believe that criminal trials produce reliable and accurate results, or that such trials are conducted in a fair manner, it is not difficult to see how the legitimacy of the state that permits such trials may ultimately be rejected.[52] For this reason, the state has its own strong

underlying rationales for requiring the defendant's competence to stand trial and noting that "accurate proceedings require the defendant's full cooperation").

[47] *See* Jennifer W. Corinis, Note, *A Reasoned Standard for Competency to Waive Counsel After* Godinez v. Moran, 80 B.U.L. REV. 265, 270 (2000).

[48] *See* Meyers, *supra* note 45, at 1017 (citing LAFAVE & SCOTT, *supra* note 45).

[49] Gannett Co. v. DePasquale, 443 U.S. 368, 382–83 (1979). While addressing whether the right to a public trial belongs only to the defendant, the Supreme Court noted that there may be an independent societal interest in the enforcement of a constitutional right that is granted to a criminal defendant. The Supreme Court provided several examples. The Supreme Court observed that while the defendant has a Sixth Amendment right to a speedy trial, the public also "has a definite and concrete interest in seeing that justice is swiftly and fairly administered." *Id.* at 383. In another such example, the Court noted "[s]imilarly, the public has an interest in having a criminal case heard by a jury, an interest distinct from the defendant's interest in being tried by a jury of his peers." *Id.*

[50] United States v. Gonzalez-Ramirez, 561 F.3d 22, 28 (1st Cir. 2009) (noting that "[a] defendant's due process right to a fair trial includes the right not to be tried, convicted or sentenced while incompetent.").

[51] United States v. Farhad, 190 F.3d 1097, 1107 (9th Cir. 1999) (positing that the state has a compelling interest, related to its own political legitimacy, "in ensuring both fair procedures and reliable outcomes in criminal trials").

[52] *See* Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 211 (2000) (concluding that the right to a fair trial has a broad public interest because society's legitimacy is examined by measuring "the extent to which it can justify its norms and institutions to all of its members").

independent public interest in enforcing a defendant's substantive due process right to a fair trial.[53]

2. The Standard for Determining Competency to Stand Trial

Recognizing that substantive due process protections prohibit bringing an incompetent defendant to trial, it is of course necessary to articulate what standard of competency a defendant must meet in order to stand trial in a manner that is consistent with constitutional dictates. In *Dusky v. United States*, the Supreme Court first laid out the modern two-part test for determining competency to stand trial.[54] In *Dusky*, the court held that a defendant must have (1) "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and (2) "a rational as well as factual understanding of the proceedings against him."[55]

In *Drope* v. *Missouri*, the Supreme Court reaffirmed the constitutional validity of the *Dusky* test, stating, "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[56] While *Dusky* is the approved

[53] *See Farhad*, 190 F.3d at 1107; Sell v. United States, 539 U.S. 166, 180 (2003) (noting that "[t]he Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one."); *see also* John T. Scott & John E. Graykowski, *Procedural Due Process and the OPS Procedures*, *in* 12 E. MIN. L. FOUND. § 20.06 (citing Marshall v. Jerrico, Inc., 446 U.S. 238, 243 (1980) and noting that "[t]he due process clause protects individuals from the unjustified or mistaken deprivation of their constitutionally protected interests. 'At the same time, it preserves both the appearance and reality of fairness,' which is crucial to preserving the legitimacy of governmental authority.").

[54] 362 U.S. 402, 402 (1960).

[55] *Id.* This test was actually suggested by the Solicitor General in his brief to the Court. *See id.* Interestingly, one commentator has noted that while *Dusky* is recognized as the first Supreme Court case to articulate an authoritative competency standard, the *Dusky* formulation was borrowed from long standing English Common law dating back to 1863. *See* Beck, *supra* note 4, at 443 n.53 (citing R v. Pritchard, [1836] 173 Eng. Rep. 135, 135 (PC) (holding that "fitness to stand trial" consisted of the following elements: "Whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper [defense]—to know that he might challenge [jurors] to whom he may object—and to comprehend the details of the evidence . . . . It is not enough, that he may have a general capacity of communicating on ordinary matters.").

[56] 420 U.S. 162, 171 (1975). *See* Indiana v. Edwards, 554 U.S. 164, 170 (2008) (stating that *Drope* "repeats" the *Dusky* standard and reaffirming the continued validity of these standards).

standard "as to federal cases,"[57] every jurisdiction in the United States has adopted a competency standard that closely follows the one articulated by the Supreme Court in *Dusky* and re-affirmed in *Drope*.[58]

b. Procedural Due Process

While this article will primarily focus on the substantive due process right to a fair trial, three issues in the context of procedural due process are worth briefly mentioning.

First, the importance of ensuring that a defendant is competent to stand trial also requires that the defendant be given access to procedures for determining his competency.[59] As noted above, access to such procedures is mandated by the constitutional requirement of procedural due process.[60]

Examples of such access include statutes that give the defendant the ability to request a competency hearing based on a certain degree of evidence suggesting the defendant's competency may be an issue.[61]

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[57] *See Drope*, 420 U.S. at 172.

[58] *See* Jason R. Marshall, Note, *Two Standards of Competency Are Better Than One: Why Some Defendants Who Are Not Competent to Stand Trial Should Be Permitted to Plead Guilty*, 37 U. MICH. J. L. REFORM 1181, 1188 (2004) ("All jurisdictions in the United States adhere to the two-pronged competency test established by *Dusky* and refined in these subsequent decisions . . . . The *Dusky* test is followed verbatim by a number of state statutes and courts, while others deviate from the exact wording but conform to its constitutional mandates."). Interestingly, legal commentators have expressed concern that the *Dusky* test is insufficiently rigorous to ensure that mentally ill criminal defendants are competent to stand trial. *See* Blume & Clark, *supra* note 29, at 166 (suggesting that the *Dusky* standard is "pro-competency" and commenting, "Sol Wachtler is famous for saying that a prosecutor could get an indictment against a ham sandwich. We do not dispute that. In fact, we would go further and say that the same ham sandwich would also likely be found competent to stand trial. Any practicing criminal defense attorney has a number of stories involving seriously mentally ill defendants who were found competent to stand trial.").

[59] *See* Odle v. Woodford, 238 F.3d 1084, 1087 (9th Cir. 2001) (citations omitted) ("A defendant may not be criminally prosecuted while he is incompetent, and the state must give him access to procedures for determining his competency.").

[60] *See id.*; *see also infra* note 61.

[61] *See* Beaudreau, *supra* note 40, at 377 ("Both the common law and the Supreme Court's interpretation of the United States Constitution compel federal and state governments to refrain from trying incompetent criminal defendants. Accordingly, Congress and state legislatures have established statutory criminal procedures for ensuring that right."). In fact, procedures for raising and determining the issue of a defendant's competency to stand trial have been established by statute in all fifty states. *Id.* at 378. While just one such example, in 18 U.S.C. § 4241, Congress established the procedure for determining a criminal defendant's competency to stand trial in federal prosecutions during the time period between commencement of prosecution and

Additionally, in *Pate v. Robinson*, the Supreme Court held that in order to ensure that the defendant is given a fair trial, a judge must conduct a competency hearing sua sponte,[62] "where the evidence raises a 'bona fide doubt' as to the defendant's competence to stand trial."[63] However, a judge is not constitutionally required to sua sponte evaluate the defendant's competency absent an indication that the defendant may be incompetent.[64]

Second, once the trial court decides to hold a competency hearing, there is no clear answer as to whether the defendant has the burden of proving his or her competency, or the government bears the burden of proving the defendant is in fact competent to stand trial.[65]

For its part, in *Medina v. California*, the United States Supreme Court refused to find a procedural due process violation where a state legislature

determination of sentence. Beyond simply affording the defendant the right to raise competency issues, the statute likewise affords that right to the prosecution and the trial judge. At any time during the prescribed period, if "there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent," the statute requires the court to hold a hearing upon written motion by either party or on the court's motion sua sponte. 18 U.S.C. § 4241 (2012).

[62] *See* Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 248 (2002) (defining the word "sua sponte" in the following manner: "In the legal setting, sua sponte describes a decision or action undertaken by a court on its own motion as opposed to an action or decision done in response to a party's request or argument.").

[63] 383 U.S. 375, 385 (1966). This is referred to as a *Pate* hearing and is required by the procedural due process guarantees of the Fifth and Fourteenth Amendments. Relevant factors for the trial court to consider in deciding whether to conduct such an examination include any evidence of irrational behavior, the defendant's demeanor in court and any medical opinions relating to the defendant's competency to stand trial. Sturgeon v. Chandler, 552 F.3d 604, 612 (7th Cir. 2009).

[64] *See* Rosenthal v. O'Brien, 713 F.3d 676, 684–85 (1st Cir. 2013) (holding that the trial judge did not err in failing to conduct a competency hearing sua sponte because the trial judge had ample opportunity to observe the defendant's demeanor and interaction with counsel during the lengthy trial, none of which suggested competency was an issue). Additionally, the defendant's trial counsel never raised any concerns with the court regarding the defendant's competence to stand trial. *Id.* at 682. *See also* Quail v. Farrell, 550 F. Supp. 2d 470, 478–80 (S.D.N.Y. 2008) (holding that the trial court was not required to raise the issue of competence sua sponte when the trial court's observation of the defendant did not appear to raise any reasonable cause to doubt the defendant's competence to stand trial).

[65] *See* John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207, 229 (2008) ("Procedurally, the question of which party bears the burden of proof on the question of competency varies based on jurisdiction, and in many jurisdictions, there is no clear answer.").

had statutorily imposed on the defendant the burden of proving his or her own incompetency.[66] As a result, federal constitutional jurisprudence provides that "states are free to place the burden of proof on either the prosecution or the defendant,"[67] subject to certain limitations (regarding the standard of proof that will be discussed below), "without violating due process."[68]

Consequently, both state and federal courts have taken differing approaches to the question of which party bears the burden of proof in competency hearings.[69] Some jurisdictions have placed the burden of proof on the defendant to prove that he or she is incompetent, while others have placed the burden of proof on the government to prove the defendant is in fact competent to stand trial.[70]

Lastly, in terms of the applicable standard of proof in competency hearings, the Supreme Court held in *Cooper v. Oklahoma* that when the defendant bears the burden of proving his or her incompetence, due process considerations require that the defendant not be compelled to do so by a

[66] *See* 505 U.S. 437, 452 (1992). The Supreme Court categorized the argument presented in *Medina* as one in which the defendant's procedural due process claim involved a challenge to the validity of state procedural rules that allocated the burden of proof to the defendant in competency hearings. *Id.* at 437.

[67] King, *supra* note 65, at 230 n.96.

[68] *Id.*

[69] *See id.* at 229 nn.94–95.

[70] In terms of federal courts, 18 U.S.C. § 4241 and text accompanying note 61, *supra*, is the federal statute in which Congress established the procedure for determining a criminal defendant's competency to stand trial. This statute does not explicitly allocate a burden of proof on the issue of competency. As a result, federal circuits are split on the question of whether it is the defendant or the government that bears the burden of proof in competency hearings. *See* Steven R. Marino, Comment, *Are You Sufficiently Competent to Prove Your Incompetence? An Analysis of the Paradox in the Federal Courts*, 6 SETON HALL CIR. REV. 165, 179 (2009) (noting that the Third, Fifth, and Ninth Circuits have placed the burden of proof on the government to demonstrate the defendant's competence, while the Fourth and Eleventh Circuits place the burden of proof on the defendant to prove his incompetence). Moreover, states are also divided on this issue. For example, Texas places the burden of proof on the defendant to prove that he or she is incompetent. *See* TEX. CODE CRIM. PROC. ANN. art. 46.02 (West 1979); Martin v. State, 714 S.W.2d 356, 357 (Tex. App.—Corpus Christi 1986, no writ). Other states, such as Massachusetts, place the burden on the state to prove that the defendant is competent to stand trial. Commonwealth v. Crowley, 471 N.E.2d 353, 357 (Mass. 1984) ("[T]he prosecution bears the burden of proof of competency once the issue has been raised by the parties or by the judge on his own motion.").

standard of proof higher than a preponderance of the evidence.[71] The Supreme Court reasoned that a standard which presumes a defendant to be competent to stand trial unless he or she proves his or her incompetence by clear and convincing evidence allows a defendant to be put to trial even though it is more likely than not that he or she is incompetent.[72] For this reason, such a standard violates the defendant's due process rights under the Fourteenth Amendment.[73]

B. The Constitutional Right to Self-Representation

1. *Faretta v. California*

The United States Supreme Court's 1975 landmark decision in *Faretta v. California*, recognized the constitutional right to self-representation.[74] Prior to *Faretta*, the Supreme Court had recognized that the Sixth and Fourteenth Amendments guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he or she can be validly convicted and punished by imprisonment.[75]

[71] 517 U.S. 348, 358–62 (1996). *See also* S. Christopher Thomason, Note, *Criminal Procedure—Crazy as I Need to Be: The United States Supreme Court's Latest Addition to the Incompetency Doctrine.* Cooper v. Oklahoma, *517 U.S. 348 (1996)*, 20 U. ARK. LITTLE ROCK L.J. 349, 358 (1998) (positing that "[t]he central issue in *Cooper* involved a question of procedural due process.").

[72] *See Cooper*, 517 U.S. at 356–61.

[73] *Id.* It is worth noting that in addition to the procedural due process issues addressed above, a court may take affirmative measures to ensure the defendant's competence. *See* Sell v. United States, 539 U.S. 166, 167 (2003). In *Sell*, the Supreme Court held that a defendant, under certain circumstances, could be forced against his or her will to take antipsychotic drugs in order to make the defendant competent to stand trial. *Id.* at 177–79. While holding such, the *Sell* Court noted that an individual has a constitutionally protected "liberty 'interest in avoiding involuntary administration of antipsychotic drugs.'" *Id.* at 178. In light of this recognition, the Court found that the Constitution permits the government to involuntarily administer antipsychotic drugs to a mentally ill criminal defendant in order to render that defendant competent to stand trial, "but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." *Id.* at 179.

[74] *See* 422 U.S. 806, 806 (1975); Indiana v. Edwards, 554 U.S. 164, 170 (2008) (referring to *Faretta* as "the Court's foundational 'self-representation' case").

[75] *See Faretta*, 422 U.S. at 807. While the constitutional right to counsel has been defined through a series of cases, it suffices to say that at the time that *Faretta* was decided in 1975, the Sixth Amendment right to counsel was largely defined by the Supreme Court's holding in Johnson v. Zerbst, 304 U.S. 458, 467–68 (1938) (finding that an indigent defendant has the right to counsel

The issue presented in *Faretta* was therefore not whether a defendant in a criminal trial had a constitutional right to the assistance of counsel, but rather whether a defendant could refuse such assistance and could proceed without counsel if he or she so desired.[76]

In *Faretta*, the defendant, who was charged in a California state court with grand theft, requested well in advance of trial that he be allowed to represent himself.[77] Faretta's demand for self-representation stemmed from his belief that the public defender had too large a caseload to provide adequate representation.[78] The trial judge denied this request after holding a hearing on the defendant's ability to conduct his own defense.[79] At the hearing, the trial judge asked specific questions about both the hearsay rule and the state law governing the challenge of potential jurors.[80] The trial court then required that Faretta proceed to trial while represented by an appointed public defender.[81] The jury found Faretta guilty as charged, and the judge sentenced him to prison.[82] On appeal, the state appellate court upheld the trial judge's denial of Faretta's request to represent himself, contending as did the trial judge, that a criminal defendant had no such constitutional right.[83]

The Supreme Court reversed, holding that the Sixth Amendment of the United States Constitution provides a criminal defendant charged in state court with the right to proceed without counsel when he or she voluntarily and intelligently elects to do so.[84] In reaching this conclusion, the *Faretta*

in all federal felony prosecutions), Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (finding that an indigent defendant has the right to counsel in all state felony prosecutions), and Argersinger v. Hamlin, 407 U.S. 25, 42 (1972) (requiring appointment of counsel in misdemeanor cases whenever imprisonment is actually imposed).

[76] *See Faretta*, 422 U.S. at 807.

[77] *Id.*

[78] *Id.*

[79] *See id.* at 808–10.

[80] *Id.* at 808. Initially, the trial judge had granted Faretta's request based on the fact that he had a high school education and had previously represented himself in a criminal trial. *See id.* at 807–08. However, after initially granting this request, the Court reversed course after holding the hearing referenced above. *See id.* at 810.

[81] *See id.*

[82] *See id.* at 811.

[83] *See id.* at 811–12.

[84] *See id.* at 807–46. *Faretta* specifically addresses the Sixth Amendment right to represent oneself as it applies to state criminal defendants. While the Court's opinion itself does not specifically indicate that this Sixth Amendment right applies to the states via the due process

Court reasoned that even though the Sixth Amendment did not explicitly state that a criminal defendant has a right to self-representation, this right was implied by the structure and language of the Amendment and reinforced by the history of English and colonial jurisprudence from which the Sixth Amendment emerged.[85]

In turning to the language of the Sixth Amendment, the Court recognized that the text of the Amendment, while not specifically referencing the right to self-representation, states that it is "the accused" as opposed to counsel, who is provided with certain rights under the Sixth Amendment.[86] These rights include the right to confrontation, compulsory process, and notice of the charges.[87] According to the *Faretta* Court, the implication of this wording is that these rights are personal rights that belong to the defendant, which he or she can choose to exercise when presenting his or her own defense.[88]

The right to counsel provision in the Sixth Amendment was intended to "supplement[ ] this design" by referring to the defendant's right to the

clause of the Fourteenth Amendment, that is certainly what the *Faretta* Court intended. In fact, this has been clearly noted in subsequent Supreme Court cases. Indiana v. Edwards, 554 U.S. 164, 170 (2008) ("The Court's foundational 'self-representation' case [was] *Faretta* . . . [which] held that the Sixth and Fourteenth Amendments include a 'constitutional right to proceed without counsel when' a criminal defendant 'voluntarily and intelligently elects to do so.'") (citation omitted). Further, while the right to self-representation in federal criminal prosecutions was not the precise subject of the *Faretta* Court's holding, it stands to reason that the right to self-representation contained in the Sixth Amendment not only applies to the states, but would also apply to federal criminal prosecutions as well. This is because the Sixth Amendment is contained in the Bill of Rights and the Bill of Rights was intended to clearly apply to the federal government. *See* Beauregard v. Wingard, 230 F. Supp. 167, 178 (S.D. Cal. 1964) (noting that "[i]t is axiomatic that the first Eight Amendments comprising the Bill of Rights were intended as restrictions upon the Federal Government"). In this regard, the *Faretta* Court cited approvingly to lower federal appeals court decisions that had routinely embraced the position that the Sixth Amendment right to self-representation applied to federal criminal prosecutions. *See Faretta*, 422 U.S. at 816 ("The United States Courts of Appeals have repeatedly held that the right of self-representation is protected by the Bill of Rights.").

[85] *See Faretta*, 422 U.S. at 818.

[86] *Id.* at 819. For the exact text of the Sixth Amendment, *see supra* note 16.

[87] *Id.* For the exact text of the Sixth Amendment, *see supra* note 16.

[88] *Id.* at 819–20 (observing the rights provided to the accused under the Sixth Amendment and stating: "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.") The Court then concluded, "[a]lthough not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment." *Id.*

"assistance" of counsel.[89] Writing for the majority, Justice Stewart concluded that, "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."[90]

Further, in looking to the history of the right to self-representation, the *Faretta* Court noted that in the long history of British criminal jurisprudence, only one tribunal, the Star Chamber, which flourished in the late sixteenth and early seventeenth centuries, had ever adopted the practice of forcing counsel upon an unwilling defendant.[91] When the Star Chamber disappeared, so too did the notion of obligatory counsel.[92]

In the American colonies, the right to represent oneself was even more ardently supported than in England.[93] Indeed, the right to self-representation was specifically provided for in various colonial charters, as well as state statutes and constitutional provisions adopted after the Declaration of Independence.[94] Accordingly, the *Faretta* Court noted, "there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel."[95]

The *Faretta* majority certainly acknowledged that a defendant who chooses to represent himself or herself at trial may do so to his or her own detriment.[96] Nevertheless, in light of the language of the Sixth Amendment and its accompanying history, the *Faretta* Court concluded, "[t]he Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation. That conclusion is supported by centuries of consistent history."[97] Therefore, according to the Court, a criminal defendant clearly has a Sixth Amendment right to proceed pro se.[98]

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[89] *See id.* at 820.

[90] *Id.*

[91] *See id.* at 821.

[92] *See id.* at 823.

[93] *See id.* at 826.

[94] *See id.* at 828–30.

[95] *Id.* at 832.

[96] *See id.* at 834.

[97] *Id.* at 832.

[98] *See id.* at 819–20. This is not to suggest that the right to self-representation is absolute. The *Faretta* Court also held that the trial judge may terminate self-representation by a defendant who

The *Faretta* Court did note, however, that, while there is a constitutional right to proceed pro se, the defendant's decision to do so must be done "knowingly and intelligently."[99] In this regard, the Court held that although a defendant need not have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, he or she should be apprised by the trial judge of the "dangers and disadvantages" [100] of such a decision in order to ensure that the choice to represent oneself '"is made with eyes open.'"[101]

a. The Right to Autonomy v. The Right to a Fair Trial

An analysis of the Court's decision in *Faretta* evidences a deep-seeded respect for the value of individual autonomy.[102] Indeed, legal commenters have opined, "[i]t is evident from a review of *Faretta* that the primary normative value driving the Court's decision was autonomy: the defendant's right to be the master of his own fate."[103]

While the *Faretta* majority may have been motivated to protect the defendant's autonomy rights, as indicated above, the Court also surmised that in most criminal prosecutions a defendant would be better represented by trained legal counsel than by acting as his or her own lawyer.[104] The *Faretta* Court further observed that a constitutional right to proceed pro se "seems to cut against the grain" of the Court's decisions in several cases that recognized the right to the assistance of counsel.[105] As the Court noted

deliberately engages in serious and obstructionist misconduct, who abuses the dignity of the courtroom, or refuses to comply with relevant procedural or substantive law. *See id.* at 834–35, n.46. Further, a trial court may also over objection by the accused—appoint a "standby counsel." *Id. See also* McKaskle v. Wiggins, 465 U.S. 168, 176 (1984) (holding the same).

[99] *Faretta*, 422 U.S. at 835.

[100] *Id.* (citing Adams v. United States *ex rel*. McCann, 317 U. S. 269, 279 (1942)).

[101] *Id.*

[102] 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 65 (4th ed. 2014) (stating "[t]he essence of *Faretta* is that a defendant has a protectable right of autonomy").

[103] Blume & Clark, *supra* note 29, at 156.

[104] *Faretta*, 422 U.S. at 834. *But see* Indiana v. Edwards, 554 U.S. 164, 178 (2008) (indicating that recent empirical analysis has called this assumption into question). *See also infra* text accompanying note 169.

[105] *Faretta*, 422 U.S. at 832 (citing Powell v. Alabama, 287 U.S. 45 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972)).

of these cases, "it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial."[106]

In fact, this argument was advanced by the *Faretta* dissenters who posited that the state's interest in providing a fair trial permitted the Court to insist that a defendant be represented by counsel, even against his or her will.[107] In dissent, Justice Blackmun went so far as to quote the proverb that, "one who is his own lawyer has a fool for a client"[108] and in Blackmun's words, "the Court by its opinion today now bestows a *constitutional* right on one to make a fool of himself."[109]

In finding these arguments unpersuasive, Justice Stewart responded to the dissenters by arguing that, "[p]ersonal liberties are not rooted in the law of averages"[110] and that it is not inconceivable that in any given instance a defendant might present his or her case more effectively than an attorney.[111] Ultimately, the *Faretta* majority concluded that while a criminal defendant may conduct his or her own defense to his or her detriment, the defendant's choice must be honored out of "'that respect for the individual which is the lifeblood of the law.'"[112]

To that end, the essence of the Supreme Court's decision in *Faretta* is best expressed in the words of legal scholars who noted that while the *Faretta* Court understood that "[t]he framers of the Sixth Amendment were

[106] *Faretta*, 422 U.S. at 832–33.

[107] *Faretta* features two dissenting opinions. The first dissenting opinion was written by Chief Justice Burger and joined by Justices Blackmun and Rehnquist. In this dissenting opinion, Chief Justice Burger wrote, "[t]rue freedom of choice and society's interest in seeing that justice is achieved can be vindicated only if the trial court retains discretion to reject any attempted waiver of counsel and insist that the accused be tried according to the Constitution. This discretion is as critical an element of basic fairness as a trial judge's discretion to decline to accept a plea of guilty." *Id.* at 840 (Burger, C.J., dissenting). The second dissenting opinion was authored by Justice Blackmun, who dissented separately but was again joined by Chief Justice Burger and Justice Rehnquist. In this opinion, Justice Blackmun wrote, "[f]or my part, I do not believe that any amount of *pro se* pleading can cure the injury to society of an unjust result, but I do believe that a just result should prove to be an effective balm for almost any frustrated *pro se* defendant." *Id.* at 849 (Blackmun, J., dissenting).

[108] *Id.* at 852 (Blackmun, J., dissenting).

[109] *Id.*

[110] *Id.* at 834 (majority opinion).

[111] *See id.*

[112] *Id.* (citing Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).

well aware of the value of counsel in obtaining a fair trial,"[113] the framers nevertheless "placed on a higher plane the 'inestimable worth of free choice.'"[114]

C. Competency to Waive Counsel and Represent Oneself Prior to Indiana v. Edwards

1. *Godinez v. Moran*

Thus far, this article has addressed the due process requirement that one must be competent to stand trial and has further detailed what exactly that standard consists of.[115] This article has also demonstrated that a criminal defendant does indeed have a Sixth Amendment right to self-representation.[116]

However, while the *Faretta* Court concluded that a right to self-representation exists, *Faretta* did not raise a mental competency question because Faretta was "literate, competent, and understanding."[117] Hence, the *Faretta* Court did not consider the standard of competency to be applied when a defendant wishes to proceed pro se.[118] Consequently, following *Faretta*, the question remained, what standard of competency does the Constitution demand for a defendant to exercise his or her right to self-representation and conduct trial proceedings?

The Supreme Court appears to have answered that question in the 1993 case of *Godinez v. Moran*.[119] After *Godinez*, it was widely believed that the level of competency one needed to represent oneself at trial was simply the same level of competence one needed to stand trial, as articulated in the Court's *Dusky* opinion,[120] i.e., the defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational

[113] WAYNE R. LAFAVE ET AL., PRINCIPLES OF CRIMINAL PROCEDURE: POST-INVESTIGATION § 3.5(a) (2d ed. 2009).

[114] *Id.*

[115] *See supra* Part I(A)(1)(a).

[116] *See supra* Part I(B).

[117] Indiana v. Edwards, 554 U.S. 164, 171 (2008).

[118] *See id.*; *see also* Samantello, *supra* note 13, at 98.

[119] 509 U.S. 389, 389 (1993).

[120] *See* Johnston, *supra* note 15, at 528; *see also supra* notes 14–16; *infra* note 145.

understanding" and "a rational as well as factual understanding of the proceedings against him."[121]

a. Godinez*: Facts and Reasoning*

In *Godinez*, the defendant, Richard Moran, was charged with three counts of first degree murder and was facing the death penalty.[122] Moran wished to not only plead guilty, but he also did not want his attorneys to present mitigating evidence during the penalty phase of the proceeding.[123] In order to prevent his lawyers from doing so, Moran waived the right to counsel and then entered a guilty plea.[124]

The trial judge found that Moran was competent to stand trial and after conducting the appropriate colloquy; the judge also found that Moran knowingly and intelligently waived his right to counsel.[125] The trial court then accepted his guilty plea and sentenced him to death.[126]

On appeal, Moran argued that his due process rights were violated because he was not competent to represent himself.[127] The Ninth Circuit Court of Appeals, finding in favor of Moran, specifically held that due process considerations require that the competency needed to represent oneself must be higher than the level of mental functioning required to stand trial.[128] The Supreme Court disagreed.[129] In a majority opinion authored by Justice Thomas, the *Godinez* Court rejected the "notion that competence to plead guilty *or* to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard."[130]

In finding that the level of competency needed to plead guilty was the same level of competency needed to stand trial, the Court reasoned that the decision to plead guilty was no more complicated than the sum total of

[121] *Id.*

[122] 509 U.S. at 391–92.

[123] *Id.* at 392.

[124] *Id.*

[125] *Id.*

[126] *See id.* at 392–93.

[127] *See id.* at 393.

[128] *See id.* at 394.

[129] *See id.* at 398.

[130] *Id.* (emphasis added).

decisions a defendant may be called on to make during the course of a trial.[131]

Additionally, the Court found that the decision to waive the right to counsel did not require a higher level of mental functioning than the decision to waive other constitutional rights.[132] In this regard, the Court specifically rejected Moran's argument that a defendant who chooses to represent himself or herself "must have greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney."[133]

b. Godinez *Implicitly Addresses the Level of Competency Needed for Pro Se Defendants to Conduct Trial Proceedings*

Importantly, while *Godinez* only addressed the level of competency that is constitutionally required when a defendant sought to waive counsel and subsequently enter a guilty plea, most courts and commentators have interpreted *Godinez* as implicitly extending its holding to defendants who waive counsel and represent themselves at trial.[134]

In reaching the above conclusion, it is important to note that the *Godinez* Court treated the competence to plead guilty and the competence to waive the right to counsel as two separate issues.[135] As the above quote from *Godinez* indicates,[136] the Court chose to use the word "or" when analyzing the level of competence needed to do two different things, (1) plead guilty, or (2) waive the right to counsel.[137] Indeed, "[b]ecause not all defendants who waive the right to counsel ultimately plead guilty" the *Godinez* Court must have acknowledged that its holding that a defendant

[131] *Id.*

[132] *Id.* at 399.

[133] *Id.* (citation omitted).

[134] *See* Ashley G. Hawkinson, Comment, *The Right to Self-Representation Revisited: A Return to the Star Chamber's Disrespect for Defendant Autonomy?*, 48 WASHBURN L.J. 465, 489–90 (2009); *see also id.* at 492 (stating that all Federal Appellate Courts interpreted *Godinez* as extending to defendants who wish to represent themselves at trial); *see also* Johnston, *supra* note 15, at 528 n.31 (providing an example of a state court decision to this effect).

[135] *See* Hawkinson, *supra* note 134, at 489–90.

[136] *See supra* text accompanying note 130.

[137] *See Godinez*, 509 U.S. at 394, 398.

need only satisfy the *Dusky* standard to waive counsel would also "apply to defendants who represent themselves at trial."[138]

Moreover, when addressing the level of competence needed to waive the right to counsel, Justice Thomas, citing to *Faretta*, wrote: "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"[139] and therefore, "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation."[140] Justice Thomas' reliance on *Faretta*, the foundational self-representation case, in support of the above positon also suggests that the *Godinez* decision was intended to apply to defendants who not only waive counsel and plead guilty, but also to those defendants who waive counsel and conduct trial proceedings.[141]

In light of the above analysis, lower courts, not surprisingly, tended to read *Godinez* as broadly equating competence to stand trial and competence to represent oneself at trial itself.[142] Hence, in order to meet the level of competency needed to waive counsel and represent oneself, a defendant need only demonstrate that he or she was competent to stand trial under *Dusky*.[143]

[138] *See* Hawkinson, *supra* note 134, at 492.

[139] *Godinez*, 509 U.S. at 399 (citation omitted).

[140] *Id.* at 400.

[141] *See* Hawkinson, *supra* note 134, at 489–90.

[142] *See* Christopher Slobogin, *Mental Illness and Self-Representation:* Faretta, Godinez *and* Edwards, 7 OHIO ST. J. CRIM. L. 391, 395 (2009) ("After *Godinez*, most lower courts held that a defendant who is competent to stand trial and who knowingly and voluntarily waives the right to counsel has a *right* to self-representation."); *see also* United States v. Ferguson, 560 F.3d 1060, 1066–67 (9th Cir. 2009) (citing to *Godinez* and positing and then answering the following hypothetical: "where . . . a defendant meets the *Dusky* standard for mental competence (despite irrational and nonsensical behavior) and, additionally, insists on representing himself during trial and sentencing . . . [m]ust the trial court permit Defendant to represent himself? Until recently, [referencing the Supreme Court's decision in *Edwards*] the Supreme Court's guidance had indicated that the answer was 'yes.'").

[143] *See Ferguson*, 560 F.3d at 1066–67.

*c. The Post-*Godinez *Belief That the Level of Competency Needed for Self-Representation Could Not Be Higher Than the Level of Competency Needed to Stand Trial*

Interestingly, the *Godinez* Court did state, "while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements."[144] The vast majority of jurisdictions, believing that the Court had equated competency to stand trial with competency to represent oneself, interpreted this invitation to mean that while states were free to adopt a higher competency standard to stand trial than the *Dusky* formulation, that same competency standard would then need to be applied to the decision to waive counsel and proceed pro se.[145]

[144] *Godinez*, 509 U.S. at 402.

[145] Indeed, legal scholars have noted the ambiguity of the *Godinez* Court's assertion "while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements." *Id.* (citation omitted). Some commenters have read this remark as allowing for a state to impose a higher standard of competency needed to proceed pro se than to stand trial. *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. L. REV. 603, 622–23 (2000); *see also* State v. Klessig, 564 N.W.2d 716, 723 (Wis. 1997) (positing that while a state may adopt the *Dusky* standard to determine competency to stand trial, pursuant to *Godinez*, states are free to adopt a separate, and higher standard, for measuring a defendant's competency to represent himself or herself). However, this position clearly represented the minority view. For example, in *State v. Day*, the Supreme Court of Connecticut interpreted the above language from *Godinez* as meaning that, while states were free to adopt a higher competency standard to stand trial than the *Dusky* formulation, the same competency standard would then need to be applied to the decision to waive counsel and represent oneself. *See* 661 A.2d 539, 548 (Conn. 1995) ("A state does not, therefore, impermissibly burden the exercise of the right to self-representation by adopting a competency standard more protective than the *Dusky* formulation. Whatever standard is employed, however, it must be applied equally at the various stages of a trial to pass constitutional muster."). Otherwise, "[a]pplication of a stricter competency test in the latter analysis than was used in the former would place an unconstitutional burden on the exercise of the defendant's federal constitutional right to self-representation." *Id.* Prior to *Indiana v. Edwards*, the position embraced by the vast majority of jurisdictions that considered the issue of what standard of competency was needed to represent oneself concluded, as did the Connecticut Supreme Court in *Day*, that whatever standard of competency was needed to stand trial must not be higher than the standard of competency needed to proceed pro se. *See* State v. Connor, 973 A.2d 627, 647–48 n.19 (Conn. 2009); *see also Ferguson*, 560 F.3d at 1066–67 (observing that, prior to *Indiana v. Edwards*, most federal circuit courts of appeals had construed *Godinez* as equating competency to stand trial and competency to waive right to counsel at trial).

As a result, courts held that if a state were to adopt "a stricter competency test"[146] to waive counsel and conduct trial proceedings than was required to simply stand trial, doing so "would place an unconstitutional burden on the exercise of the defendant's federal constitutional right to self-representation."[147] Consequently, following *Godinez*, most states assumed that the standard for competence to represent oneself *must* be equivalent to the standard for competence to stand trial and may not be higher.[148]

As previously noted, almost every jurisdiction in the country has adopted the *Dusky* standard as the applicable standard of competency to stand trial.[149] Therefore, following *Godinez*, in most jurisdictions a defendant who was competent to stand trial, utilizing the standard as set forth in *Dusky*, was "*ipso facto*, competent to proceed pro se."[150] Hence, denying a competent defendant the right to proceed pro se would violate a defendant's Sixth Amendment right to self-representation.[151]

It was not until *Indiana v. Edwards* that the Supreme Court addressed whether states may employ a higher standard of competency needed for self-representation than that required to stand trial, without violating the defendant's right to self-representation.[152]

II. *INDIANA V. EDWARDS*

A. The Constitutionality of a Heightened Competency Standard to Proceed Pro Se

In its 2008 opinion in *Indiana v. Edwards*, the Supreme Court finally addressed the following question: Is the Sixth Amendment right to self-

[146] *See Day*, 661 A.2d at 548.

[147] *Id.*

[148] *See id.*; *see also supra* text accompanying note 145.

[149] *See supra* text accompanying note 145.

[150] 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, 519 (1996).

[151] *See* People v. Halvorsen, 165 P.3d 512, 550 (Cal. 2007); People v. Hightower, 49 Cal. Rptr. 2d 40, 45 (Ct. App. 1996); Hartman v. State, 918 A.2d 1138, 1142–43 (Del. Super. Ct. 2007); Fleck v. State, 956 So. 2d 548, 549 (Fla. Ct. App. 2007); Reddick v. State, 937 So. 2d 1279, 1283 (Fla. Ct. App. 2006); Lamar v. State, 598 S.E.2d 488, 491 (Ga. 2004); State v. Thornblad, 513 N.W.2d 260, 262 (Minn. Ct. App. 1994).

[152] Indiana v. Edwards, 554 U.S. 164, 164 (2008).

representation violated when a state requires that a defendant satisfy a competency standard higher than the *Dusky* standard when a defendant wishes to waive counsel and conduct trial proceedings himself or herself?[153]

As noted in this article's introduction, the Indiana trial court in *Edwards* refused to let the defendant represent himself, finding that while Edwards was competent to stand trial under *Dusky*, he was not competent to act as his own attorney.[154] Therefore, the trial court denied Edwards' request to represent himself and required that he proceed to trial represented by an attorney.[155] Edwards claimed on appeal that creating a higher standard of competence to represent himself than what was needed to stand trial violated his Sixth Amendment right to self-representation.[156]

In a seven justice majority opinion authored by Justice Breyer, the *Edwards* Court affirmed that its holding in *Godinez* provided that the minimum level of competence demanded by the due process clause when a defendant wishes to proceed pro se is the competence to stand trial enunciated in *Dusky*.[157] To that end, the *Edwards* Court stated "[f]or another thing, *Godinez* involved a State that sought to *permit* a gray-area defendant to represent himself. *Godinez*'s constitutional holding is that a State may do so. But that holding simply does not tell a State whether it may *deny* a gray-area defendant the right to represent himself—the matter at issue here."[158]

This passage has been interpreted by courts as standing for the proposition that "*Edwards* itself reaffirmed that a court may constitutionally permit a defendant to represent himself so long as he is competent to stand trial."[159] Said another way, in the words of the Fourth Circuit Court of Appeals, "the [*Edwards*] Court reiterated that under *Godinez*, it is constitutional for a state to allow a defendant to conduct trial proceedings on his own behalf when he has been found competent to stand trial."[160]

However, the *Edwards* Court rejected the contention that so long as a defendant is competent to stand trial, the defendant is automatically

[153] *Id.* at 167; *see also id.* at 177.

[154] *See id.* at 169; *see also supra* text accompanying note 8.

[155] *See Edwards*, 554 U.S. at 169; *see also supra* text accompanying note 9.

[156] *See Edwards*, 554 U.S. at 169; *see also supra* text accompanying note 11.

[157] *See* United States v. Bernard, 708 F.3d 583, 590 (4th Cir. 2013); *see also* United States v. DeShazer, 554 F.3d 1281, 1289 (internal citations omitted) (10th Cir. 2009); *see also supra* text accompanying note 22. Justice Scalia and Thomas were the only dissenting justices in *Edwards*.

[158] *Edwards*, 554 U.S. at 173.

[159] *Bernard*, 708 F.3d at 590 (citing the above passage from *Edwards*).

[160] *Id.* at 589; *supra* text accompanying note 22; *see also DeShazer*, 554 F.3d at 1289.

competent to conduct trial proceedings and therefore must be allowed to exercise his or her Sixth Amendment right to self-representation.[161]

In this regard, the *Edwards* Court stated:

> We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, 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.[162]

The above passage indicates that the *Edwards* Court held a state is permitted to require that a defendant meet a competence standard higher than that needed to stand trial under *Dusky* in order to represent himself or herself at trial.[163]

Of course, while states are not required to adopt a heightened standard of competence for pro se representation, if a state so chooses, those who can satisfy this heightened standard have a Sixth Amendment right to self-representation.[164] Regardless of whether the defendant would have fared better with counsel, those defendants like Faretta, who presumably could have satisfied such a heightened standard, must be allowed to exercise their right to self-representation.[165] (As noted in this article's introduction, this work takes no position on what the standard of competence for pro se

[161] *See Edwards*, 554 U.S. at 177–78.

[162] *Id.*

[163] *See id.*

[164] *See* United States v. Berry, 565 F.3d 385, 391 (7th Cir. 2009) (citing *Faretta v. California*, 422 U.S. 806, 835 n.46 (1975)) (suggesting that "[c]ertainly, the right to self-representation cannot be denied merely because a defendant lacks legal knowledge or otherwise makes for a poor advocate."). Further, assuming a court were to adopt a heightened standard of representational competency, it would seem that a defendant should have the right to proceed pro se, unless he was deemed incompetent by virtue of severe mental illness. *See id.* (noting under *Edwards*, severe mental illness is a condition precedent for denying self-representation).

[165] *See id.*; *see also Faretta*, 422 U.S. at 835 (noting that the issue of mental competency was not raised in *Faretta* because the defendant was "literate, competent, and understanding"); *see also Edwards*, 554 U.S. at 178; *see also infra* text accompanying note 169 (noting that the *Edwards* Court's suggestion that recent empirical data indicates that many defendants might not fare any better when represented by counsel than when proceeding pro se).

representation should be, as other legal scholars have devoted a significant amount of attention to this particular issue.)[166]

However, after *Edwards*, a jurisdiction can choose to adopt a heightened standard of competency for pro se representation and if the defendant cannot meet this heightened standard, then he or she can be required to proceed to trial with counsel.[167] Hence, if a defendant suffers from "severe mental illness"[168] and cannot satisfy the higher competency standard that is needed to conduct trial proceedings, a court can require that he or she be represented by an attorney without infringing upon the Sixth Amendment right to self-representation.[169]

B. The Constitutional Basis of the Edwards *Court's Decision*

1. *Edwards'* Rationales

In reaching its decision, the *Edwards* Court advanced several different rationales. First, the Court began by acknowledging that neither *Faretta*, nor *Godinez*, answered the question of whether a State could insist that a gray-area criminal defendant proceed to trial with counsel when the defendant wished to represent himself or herself.[170]

The Court recognized that *Faretta* did not consider the question of mental competency in the context of self-representation.[171] Further,

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[166] *See supra* text accompanying note 27 (detailing numerous suggestions made by legal scholars with respect to the appropriate standard of representational competence).

[167] *See Edwards*, 554 U.S. at 177–78.

[168] *See id.* at 178. *Edwards* does appear to suggest that a defendant cannot be denied the right to self-representation, even if a jurisdiction adopts a heightened standard for representational competence unless the defendant's inability to satisfy that standard stems from a "severe mental illness." *See Berry*, 565 F.3d at 391 (stating that "*Edwards* does seem to cap a trial court's ability to foist counsel upon the unwilling. 'Severe mental illness' appears to be a condition precedent.").

[169] *See Edwards*, 554 U.S. at 178. *Edwards* also declined to overrule *Faretta*, finding that recent empirical data suggests that pro se representation has not produced unfair trials. *Id.* (citing Hashimoto, *supra* note 20, at 428, 447) ("Noting that of the small number of defendants who chose to proceed *pro se*—'roughly 0.3% to 0.5%' of the total, state felony defendants in particular 'appear to have achieved higher felony acquittal rates than their represented counterparts in that they were less likely to have been convicted of felonies.'"). To the extent that pro se representation may result in an unfair trial, the *Edwards* Court found that its opinion giving trial judges the ability to limit the right to self-representation in appropriate cases, "may well alleviate those fair trial concerns." *Id.* at 179.

[170] *See id.* at 171–74.

[171] *See id.* at 171.

Edwards also explained that the higher standard at issue in *Godinez* addressed only the level of competency needed to enter a guilty plea, while the higher standard in *Edwards* sought to measure the defendant's ability to conduct trial proceedings.[172]

Additionally, the Court held that *Godinez* involved a state that sought to permit a gray-area defendant to represent himself.[173] However, *Godinez* did not address the question of whether the Constitution requires self-representation by a gray-area defendant in circumstances where the State seeks to prevent it.[174] In light of these observations, the *Edwards* Court concluded that Supreme Court precedent framed the issue presented in *Edwards*, but it did not answer it.[175]

After recognizing that the question of whether the Constitution permits a state to limit a gray defendant's right to self-representation was indeed an "open one,"[176] the Court observed that the mental competency standards set forth in *Dusky* and *Drope*, with their focus on the defendant's ability to consult with his or her lawyer, "assume representation by counsel and

[172] *See id.* at 173. This particular contention does indeed appear at loggerheads with the conclusion drawn by the majority of lower courts that *Godinez* did indeed address the level of competency needed to waive counsel and conduct trial proceedings, even if it did so implicitly. *See infra* Part III*; see also infra* text accompanying note 236. As one commentator has noted, "[b]ecause the *Godinez* Court at least considered this situation, the *Edwards* Court was incorrect to state that the standard at issue in *Godinez* was critically distinct from the standard at issue in *Edwards*. *Godinez v. Moran*, 509 U.S. 389, 491 n.400 (1993). Moreover, the *Edwards* Court's contention that *Godinez* did not consider the issue of mental competency to conduct trial proceedings appears to contradict statements made by the *Edwards* Court itself. To that end, as noted in Part II(A), the *Edwards* Court wrote, "For another thing, *Godinez* involved a State that sought to *permit* a gray-area defendant to represent himself. *Godinez* 's constitutional holding is that a State may do so. But that holding simply does not tell a State whether it may *deny* a gray-area defendant the right to represent himself—the matter at issue here." *Edwards*, 554 U.S. at 173. As further noted in Part II(A), the Fourth Circuit Court of Appeals has interpreted this passage to mean that the *Edwards* Court "reiterated that under *Godinez*, it is constitutional for a state to allow a defendant to conduct trial proceedings on his own behalf when he has been found competent to stand trial." United States v. Bernard, 708 F.3d 583, 589 (4th Cir. 2013). Hence, *Edwards*' suggestion that the Supreme Court had not considered the question of the minimum level of competency needed to waive counsel and conduct trial proceedings appears to contradict not just the finding of most other courts – but once suggested, appears to have even been abandoned by the *Edwards* Court itself.

[173] *See Edwards*, 554 U.S. at 173.

[174] *See id.* at 174.

[175] *See id.* at 169.

[176] *Id.* at 174.

emphasize the importance of counsel."[177] An instance in which a defendant chooses to forgo counsel at trial is, however, certainly different than one in which the defendant proceeds to trial with an attorney.[178] Therefore, because the circumstances in which the trial is taking place are different, in the view of the *Edwards* Court, this "very different set of circumstances . . . calls for a different [competency] standard."[179]

To that end, a key component of the *Edwards* Court's reasoning was its recognition that "[m]ental illness is not a unitary concept."[180] The Court went on to note that an "individual may well be able to satisfy *Dusky's* mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel."[181] The Court identified these tasks as organizing a defense, making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury.[182]

Importantly, the *Edwards* Court further reasoned that a defendant's inability to adequately represent himself or herself has the specific effect of undermining the right to a fair trial.[183] The Court stated, "insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial."[184] To that end, the Court also observed that the State has an important interest in ensuring that a criminal defendant receives a fair trial.[185]

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[177] *Id.*

[178] *See id.* at 174–75.

[179] *Id.* at 175.

[180] *Id.*

[181] *Id.* at 175–76. Further, the Court appeared to be heavily persuaded by an amicus brief filed by The American Psychiatric Association, in support of neither party, which mirrored the Court's conclusion that "severe mental illness can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant." *Id.* at 176.

[182] *See id.* at 175–76.

[183] *See id.* at 176–77.

[184] *Id.*

[185] *See id.* at 177. "The Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes." *Id.* (quoting Justice Brennan's concurrence in Illinois v. Allen, 397 U.S. 337, 350 (1970)). "Even at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *See id.* (quoting Martinez v. Court of Appeal

Additionally, the Court noted that "proceedings must not only be fair, they must 'appear fair to all who observe them.'"[186] Indeed, *Edwards* acknowledged that the application of *Dusky*'s basic mental competence standard might help avoid the appearance of an unfair trial, but given the different capacities needed to proceed to trial without counsel, the Court posited that "there is little reason to believe that *Dusky* alone is sufficient."[187]

Moreover, the Court observed that *Faretta*, the foundational Sixth Amendment self-representation case, rested its conclusion in part on pre-existing state law that adopted a competency limitation on the self-representation right.[188] Therefore, the conclusion that the Sixth Amendment right to self-representation may be curtailed in instances in which a defendant is not competent to represent himself or herself at trial is consistent with long held Sixth Amendment precedent.

The *Edwards* Court also concluded that requiring a gray-area criminal defendant to be represented by counsel does not undermine the values of "'[d]ignity' and 'autonomy' of [the] individual" that "underlie [the] self-representation right."[189] In the view of the *Edwards* majority, a right to self-representation at trial will not "'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel."[190] In this sense, requiring a gray-area criminal defendant to be represented by counsel preserves the defendant's dignity by avoiding the humiliating "spectacle" that could result from his or her self-representation.[191]

With respect to this last point, the *Edwards* majority appears to have advanced this particular argument in order to ensure that its decision was

of Cal., Fourth Appellate Dist. 528 U.S. 152, 162 (2000)). "[T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one." *See also id.* (quoting Sell v. United States, 539 U.S. 166, 180 (2003)).

[186] *Id.* (citing Wheat v. United States, 486 U.S. 153, 160 (1988)).

[187] *Id.*

[188] *See id.* at 175 (citing Cappetta v. State, 204 So. 2d 913, 917–18 (Fla. App. 1967), *rev'd on other grounds*, 216 So. 2d 749 (Fla. 1968)); Allen v. Commonwealth, 87 N.E.2d 192, 195 (Mass. 1949).

[189] *Id.* at 176.

[190] *Id.*

[191] *Id.* (stating of the gray-area criminal defendant, "given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling.").

consistent with the values underlying the core of the Supreme Court's holding in *Faretta*. In this sense, this article earlier indicated that the value of autonomy formed the basis of the Court's *Faretta* opinion.[192]

Yet, in addition to autonomy, as noted above, the *Edwards* Court also addressed the value of dignity.[193] Indeed, the value of autonomy and dignity are closely related to one another when addressing the defendant's right to self-representation.[194] The relationship between the values of autonomy and dignity are related to each other in that there is an inherent dignity in the exercise of autonomy itself.[195] In this sense, "the dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State – the dignity of individual choice."[196]

However, the *Edwards* majority addressed the values underlying the Sixth Amendment right to self-representation not by speaking to the dignity that comes with the exercise of free will.[197] Rather, the *Edwards* majority re-framed the dignity interest involved in a case of self-representation as avoiding the humiliating "spectacle" that could result from the defendant proceeding pro se.[198] Of course, it is not clear that the defendant's avoiding humiliation was much of a concern for the *Farretta* majority and in fact, it appears as though the *Faretta* Court was actually willing to accept a good deal of it.[199] As noted previously, Justice Blackmun ,in his *Faretta* dissent, opinioned that the majority's opinion in *Faretta* "bestows a *constitutional* right on one to make a fool of himself."[200]

Nevertheless, the *Edwards* Court's reference to preserving the defendant's dignity can best be understood as an attempt to claim that its decision was consistent with the values underlying its earlier grant of the right to self-representation, even if that meant re-casting the dignity interest

[192] *See supra* Part I(B)(1)(a).

[193] *See Edwards*, 554 U.S. at 187 (noting that the "'[d]ignity and autonomy of the accused' . . . . underlie[] the self-representation right") (Scalia, J., dissenting).

[194] *See id.* at 176 (citing McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984)).

[195] *See id.* at 187 (noting that "if the Court is to honor the particular conception of 'dignity' that underlies the self-representation right, it should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made.") (Scalia, J., dissenting).

[196] *Id.* at 186–87 (Scalia, J., dissenting).

[197] *See id.* at 176.

[198] *Id.*

[199] *See* Faretta v. California, 422 U.S. 806, 836 (1975).

[200] *Id.* at 852 (Blackmun, J., dissenting).

implicated by the right to self-representation away from autonomy and instead to avoiding humiliation.

2. Substantive Due Process Is the Basis of *Edwards*

An analysis of the above rationales advanced by the *Edwards* Court indicates that, while the Court does address concerns that are specific to the Sixth Amendment right to self-representation, the cornerstone of the Court's reasoning is related to the substantive due process right to a fair trial.

Certainly, the Court's reasoning addresses why, in its view, the Sixth Amendment right to self-representation is not violated when a gray-area defendant is required to proceed to trial while represented by counsel against his or her wishes. For example, the rationale of the *Edwards* Court as described above reflects two arguments that are related to the Sixth Amendment right to self-representation. Specifically, the Court identified prior precedent that limited the right to self-representation to those mentally competent to conduct trial proceedings[201] and further posited that denying self-representation to a gray-area criminal defendant was not an affront to an individual's dignity.[202]

Nevertheless, despite the Court's reference to the Sixth Amendment, the *Edwards* Court's emphasis on "the fundamental fairness of the proceeding suggests that its holding was motivated by due process concerns."[203] Indeed, this is clearly reflected in the Court's focus on the relationship between the competency needed to represent oneself and the due process right to a fair trial.[204]

In this regard, the Due Process Clause mandates that a defendant must be competent to stand trial (as determined by the *Dusky* standard) in order to ensure that the outcome of the trial is accurate and as a result, that the trial was fair.[205] Again, the right to a fair trial is related to substantive due

[201] *See Edwards*, 554 U.S. at 175.

[202] *See supra* text accompanying note 191; *see also supra* text accompanying note 193 (describing the relationship between the value of dignity and autonomy that formed the basis of the Supreme Court's opinion in *Faretta*).

[203] Johnston, *Setting*, *supra* note 27, at 1618 n.87.

[204] *See Edwards*, 554 U.S. at 176–77; *see also supra* Part I(A)(1)(a)(1) (describing the relationship between substantive due process and the right to a fair trial).

[205] *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam); *see also* United States v. Gonzalez-Ramirez, 561 F.3d 22, 28 (1st Cir. 2009); *see also supra* Part I(A)(1)(a)(1).

process.[206] Accordingly, courts have held that trying an incompetent defendant violates substantive due process.[207]

As noted above, the *Edwards* Court's justification for allowing the imposition of a higher standard of competency needed to proceed pro se is based on the exact same fairness and due process-related concern – that allowing a gray-area defendant to represent himself or herself may adversely impact the trial's reliability and hence, the trial's fairness.[208] Accordingly, just as trying an incompetent defendant violates the defendant's substantive due process right to a fair trial, for the exact same reasons, allowing a defendant who is not competent to conduct trial proceedings pro se would also implicate substantive due process concerns. Hence, the reasoning of the *Edwards* Court appears not just related to due process in general, but to substantive due process in particular.

Despite the fact that a key component of the *Edwards* Court's reasoning rests on the relationship between competency and a fair trial, an area of constitutional jurisprudence traditionally regulated by the Due Process Clause,[209] the Court's decision never references the Due Process Clause itself. In light of this observation, it can be argued that the *Edwards* majority identifies only the Sixth Amendment as the constitutional basis for its decision.[210]

Nevertheless, reasoned analysis of the Court's decision has led one legal commentator to rightly conclude that the *Edwards* "Court attempted to extend the due process protection afforded by the resources of an assisting counsel to those defendants who were subjected to the rigors of a trial but had made the choice to endure th[o]se rigors alone."[211] This article would

[206] *See supra* Part I(A)(1)(a)(1).

[207] *Gonzalez-Ramirez*, 561 F.3d at 28; *see supra* text accompanying note 43.

[208] *Edwards*, 554 U.S. at 176–77.

[209] *See supra* Part I(A)(1)(a)(1).

[210] Johnston, *Setting*, *supra* note 27, at 1618 n.87 (suggesting that "[t]he majority identifies the Sixth Amendment as the constitutional basis for its decision in *Indiana v. Edwards*").

[211] William L. Nichol V, *Criminal Law – Mental Competence and Right to Self-Representation – A State May Insist on Representation of Counsel for Defendant Who Is Mentally Fit to Stand Trial but Lacks Sufficient Competence to Represent Himself at Trial*, 78 MISS. L.J. 227, 238 (2008); *see also* Johnston, *Setting*, *supra* note 27, at 1618 n.87 (positing that while the majority identifies the Sixth Amendment as the constitutional basis for its decision in *Edwards*, its reasoning suggests it was motivated by due process concerns); *see also* United States v. Johnson, 610 F.3d 1138, 1145 (9th Cir. 2010) (summarizing the Supreme Court's decision in *Edwards* in the following manner, "[t]he Court concluded that the constitutional guarantee of a fair trial

add to this point by simply observing that the due process protection at issue in *Edwards* relates to substantive due process specifically.

3. The State's Independent Interest in Promoting Fair Trials

Lastly, it should be noted that Edwards himself wished to proceed pro se despite questions related to his ability to adequately represent himself.[212] In this sense, *Edwards* represents a conflict between the defendant's right to self-representation and the defendant's right to a fair trial.[213] As legal scholars have long noted, "[t]here exists an inherent tension between a defendant's autonomy and the right of self-representation on the one hand, and the due process right to a fair trial, on the other."[214]

Interestingly, the basis of the Court's opinion appears to focus on the substantive due process right to a fair trial – despite the fact that the defendant was willing to choose self-representation, regardless of the consequences.[215] In this sense, the due process rationale at the heart of *Edwards* appears principally related to the state's independent interest in enforcing the defendant's due process rights to a fair trial, even though the defendant himself preferred the right of self-representation.[216] Indeed, as one commentator observed, the *Edwards* Court appears to favor the "state's sense of fairness over an individual's freedom of choice."[217]

III. DUE PROCESS CONSIDERATIONS REQUIRE LIMITING THE SELF-REPRESENTATION RIGHTS OF GRAY-AREA DEFENDANTS

A. Overruling Godinez

Indiana v. Edwards holds that a state may create a higher competency standard to waive counsel and conduct trial proceedings than that required

permits a district court to override a *Faretta* request for defendants whose mental disorder prevented them from presenting any meaningful defense").

[212] *Edwards*, 554 U.S. at 168.

[213] Legal scholars have posited that there is a general assumption that self-representation undercuts the right to a fair trial. *See* Hawkinson, *supra* note 134, at 494; *see also* Beck, *supra* note 4, at 452.

[214] *See* Beck, *supra* note 4, at 452.

[215] *See Edwards*, 554 U.S. at 177 (citing Wheat v. United States, 486 U.S. 153, 160 (1988)).

[216] *See id.*; *see also supra* text accompanying note 52 (noting the state's independent interest in fair trial proceedings).

[217] Nichol V, *supra* note 211, at 239.

to simply stand trial. Accordingly, a state may deny a defendant who is competent to stand trial, but not competent to conduct trial proceedings, the right to self-representation.[218] However, while *Edwards* may allow a state to adopt a heightened standard of representational competence and to mandate representation by counsel for gray-area defendants, does the Constitution require such?

At first blush, in the aftermath of *Edwards*, it would appear as though there is little constitutional ground on which to stake such a claim. In this sense, it should be acknowledged that *Edwards* did not explicitly overrule *Godinez*.[219] Certainly, "[t]he *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."[220]

[218] *See Edwards*, 554 U.S. at 177–78; *see also* United States v. Berry, 565 F.3d 385, 391–92 (7th Cir. 2009) (explaining that while the Edwards Court spoke in terms of what "states" may do, its holding is equally applicable to federal criminal prosecutions).

[219] *See* United States v. Bernard, 708 F.3d 583, 589 (4th Cir. 2013) (citing *Edwards*, 554 U.S. at 178) ("The Court reiterated that under *Godinez*, it is constitutional for a state to allow a defendant to conduct trial proceedings on his own behalf when he has been found competent to stand trial. On the other hand, the state may insist on counsel and deny the right of self-representation for defendants who are 'competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.'"); *see also* State v. Jason, 779 N.W.2d 66, 73 n.1 (2009).

[220] Marks, *supra* note 21, at 833. Interestingly, because *Edwards* dealt with state court proceedings, one may question whether its holding applies to federal criminal trials. As one federal court noted of *Edwards*, "the Supreme Court articulated its holding as a matter of what state courts may do, while remaining silent as to the powers of federal courts." *Berry*, 565 F.3d at 392 (citing *Edwards*, 554 U.S. at 178). Indeed, "[g]iving the case a literal reading, one would conclude that *Edwards* simply left the law undisturbed for purposes of federal criminal trials." *Id.* at 392. However, this same federal court rejected that position for the following reasons: "[f]irst, there is the matter of doctrinal consistency. Because both state and federal courts are bound to uphold the right to a fair trial (nixing trial of the mentally incompetent), it follows that *Edwards* applies to the federal courts equally. Second, there is the fact that every court to consider *Edwards* in the context of a federal criminal trial has thus far taken it for granted that its holding controls." *Id.* (internal citations omitted) (citing to numerous federal cases). Accordingly, following *Edwards*, both state and federal courts have taken several different approaches when deciding whether or not to accept its invitation to adopt a heighted standard of competency for pro se defendants. These approaches are as follows: **(1)** Finding that *Edwards* is simply permissive some courts have left to the discretion of the trial judge the option of limiting a gray-area defendant's right to self-representation. *See* State v. Lane, 707 S.E.2d 210, 219 (N.C. 2011) (internal citations omitted) (holding that if a "defendant, after being found competent, seeks to represent himself, the trial court has two choices: (1) it may grant the motion to proceed pro se, allowing the defendant

Hence, after *Edwards*, the current landscape of constitutional jurisprudence with the respect to the level of competency needed for pro se representation is that (1) under *Godinez,* due process considerations provide

to exercise his constitutional right to self-representation, if and only if the trial court is satisfied that he has knowingly and voluntarily waived his corresponding right to assistance of counsel, pursuant to *Moran*; or (2) it may deny the motion, thereby denying the defendant's constitutional right to self-representation because the defendant falls into the 'gray area' and is therefore subject to the 'competency limitation' described in *Edwards*."); *see also* Duckett v. State, 769 S.E.2d 743, 748 n.5 (Ga. 2015) (observing that federal courts that have considered *Edwards* have left the question of whether to impose counsel on gray-area defendants to the discretion of the trial judge). **(2)** Other courts have held that their jurisdiction's competency standard for pro se representation remains the same as the standard of competency needed to stand trial under *Dusky.* In such jurisdictions, a defendant who is competent to stand trial must be allowed to proceed pro se. *See* Johnston, *Communication*, *supra* note 27, at 2127 (citing Stewart-Bey v. State, 96 A.3d 825, 839 (Md. Ct. Spec. App. 2014); State v. Foss, No. A09-2152, 2010 WL 4068708, at *4 (Minn. App. Oct. 19, 2010) (unpublished opinion); Mathis v. State, 271 P.3d 67, 74 n.21 (Okla. Crim. App. 2012); State v. Barnes, 753 S.E.2d 545, 550 (S.C. 2014); State v. Maestas, 299 P.3d 892, 962 n.330 (Utah 2012). **(3)** A significant number of states have accepted, or indicated a willingness to accept, the option of creating a heightened standard of representational competence, but have not indicated whether doing so is mandatory, or left to the discretion of the trial judge. *See* Johnston, *Communication, supra* note 27, at 2128 (noting that as of May 2015, 31 states fell into this category); *see also* 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 879 (4th ed. 2012) (observing that "[m]any others [states] have adopted the *Edwards*-standard for denying self-representation in a context that does not clearly indicate whether it is discretionary or imposes a mandatory duty to inquire in appropriate cases and to deny self-representation if that standard applies."). **(4)** A small number of jurisdictions, while influenced by the reasoning of *Edwards*, have chosen through state based authority, as opposed to federal constitutional grounds, to require that trial judges conduct an inquiry into a pro se defendant's ability to represent himself or herself and to reject pro se representation when appropriate. *See* State v. Connor, 973 A.2d 627, 650–51 (Conn. 2009) ("[I]n accordance with the reasoning of *Edwards*, we do not believe that a mentally ill or mentally incapacitated defendant who is competent to stand trial *necessarily* also is competent to represent himself at that trial. Accordingly, in the exercise of our supervisory authority over the administration of justice, we conclude 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."); *see also* State v. Leahy, No. 13-0522, 2014 WL 3511766, at *9 n.8 (Iowa Ct. App. July 16, 2014) (noting that Iowa Courts require a trial judge to ascertain whether a defendant who wishes to proceed pro se is competent to do so and grounding this requirement within the Iowa and not the Federal Constitution); Fla. R. Crim. Proc. Rule 3.111(d)(3) (West 1973). **(5)** Some jurisdictions have not yet addressed the question of whether they will require a heightened standard of representational competence following *Edwards*; *see* Johnston, *Communication*, supra note 27, at 2127–28 (noting that as of May 2015 there were fourteen such states. These are, Arkansas, Delaware, Georgia, Hawaii, Louisiana, Maine, Montana, New Hampshire, New Mexico, Oregon, South Dakota, Vermont, Virginia and West Virginia).

that a defendant who is competent to stand trial, but not competent to represent himself or herself, may nevertheless waive counsel and proceed to trial, but (2) under *Edwards*, a State is permitted to adopt a heightened standard of competency for pro se representation if it so chooses, without violating the Sixth Amendment right to self-representation.[221]

Therefore, if a defendant were to claim that the Constitution requires that a state adopt a heightened standard of representational competence and that a defendant must satisfy that standard in order to proceed pro se, the defendant would have to argue that *Godinez* should be overruled. After all, it is *Godinez* that holds that under the Due Process Clause the minimum standard of competency for pro se representation need only be the *Dusky* standard.[222] *Edwards* dealt only with the denial of the right to self-representation and did not involve a complaint that the state committed a constitutional violation by allowing a gray-area defendant to proceed pro se.[223] In fact, in the words of one court, that particular scenario is actually "the converse of the facts in *Edwards*."[224]

Of course, one may suggest that it seems unlikely that a reviewing court would overrule *Godinez*, especially in light of the fact that *Edwards* cited to

[221] *See* United States v. DeShazer, 554 F.3d 1281, 1289 (10th Cir. 2009) (stating that, "under *Godinez*, it is constitutional for a state to allow a defendant to conduct trial proceedings on his own behalf when he has been found competent to stand trial. On the other hand, the state may insist on counsel and deny the right of self-representation for defendants who are 'competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.'") (internal citations omitted); *see also* State v. Cureton, 734 S.E.2d 572, 584 (N.C. Ct. App. 2012) ("Even if defendant could successfully argue that his diminished mental capacity places him in the 'gray-area,' *Indiana v. Edwards* and *Godinez* make it clear that the constitution does not prohibit the self-representation of a 'gray-area' defendant.").

[222] *See supra* Part I(C)(1); *see also Edwards*, 554 U.S. at 173–74.

[223] *See* People v. Stone, 951 N.Y.S.2d 145 (App. Div. 2012), *aff'd*, 6 N.E.3d 572 (N.Y. 2014). In *Stone*, the defendant cited *Edwards* for the proposition that he should not have been allowed to proceed pro se. *See* People v. Stone, 6 N.E.3d 572, 574 (2014). In finding that *Edwards* did not address alleged constitutional violations resulting from actually being allowed to represent oneself, the New York Supreme Court, Appellate Division, First Department stated, "[t]he holding in Edwards, however, was expressly limited to circumstances in which a court denies a trial-competent defendant's application to proceed pro se on the ground that mental illness nevertheless renders the defendant incapable of self-representation. We need not determine whether there are circumstances in which a court is required to insist upon representation by counsel for such a defendant."). *Stone*, 951 N.Y.S.2d at 146 (finding that the particular defendant did not exhibit signs of mental illness).

[224] Stinnet v. Commonwealth, 364 S.W.3d 70, 82 (Ky. 2011).

Godinez as still having precedential authority.[225] However, a deeper inspection of *Edwards* reveals that while the *Edwards* Court appears to have accepted the continued legality of *Godinez* in the context of a defendant who represents himself or herself at trial,[226] the due process based rationale at the core of *Edwards* has sowed the seeds of *Godinez*'s destruction. As the preceding section demonstrates, if *Edwards*' due process rationale is taken to its logical conclusion, it necessarily compels trial courts to both adopt a heightened standard of competence for those defendants who wish to proceed pro se and to limit the right to self-representation accordingly.

B. The Reasoning of Edwards *Logically Compels Trial Courts to Adopt a Heightened Standard of Representational Competence*

In turning back to the reasoning of the *Edwards* Court, it is important to recall once again that the central rationale underlying the Court's decision relates to the due process right to a fair trial.[227] Importantly, the *Edwards* Court fully acknowledged that because mental illness was not a unitary concept, some defendants may be competent to stand trial, yet lack the mental ability to conduct the numerous tasks that are important components of conducting trial proceedings.[228]

As such, the Court concluded that *Dusky*'s competency standard alone may inadequately protect the gray-area defendant's right to fair trial.[229] Consequently, in the view of the *Edwards* Court, requiring that a gray-area defendants proceed to trial while represented by counsel was justified in large part because representation by counsel helps to protect the reliability of the trial verdict and the appearance of fairness.[230] Concerns that this article earlier pointed out relate specifically to the substantive due process right to a fair trial.[231]

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[225] *See Edwards*, 554 U.S. at 173; *see also* United States v. Bernard, 708 F.3d 583, 589 (4th Cir. 2013) (quoting *Edwards*).

[226] *See Edwards*, 554 U.S. at 173.

[227] *See supra* text accompanying note 44.

[228] *See Edwards*, 554 U.S. at 175.

[229] *See id.* at 178.

[230] *See id.* at 177.

[231] *See supra* Part I(A)(1)(a) (describing the substantive due process right to a fair trial generally); *see supra* Part II(B)(2) (describing the substantive due process reasoning at the core of *Edwards*).

Keeping the above in mind, assume that a defendant who is competent to stand trial, but not competent to conduct trial proceedings, is allowed to waive the right to counsel and proceed pro se. The *Edwards* Court's concern that the fairness of the trial may be undermined when a gray-area defendant elects self-representation is obviously still present. After all, as the *Edwards* Court acknowledged, while the *Dusky* standard may in some respects protect the fairness of the proceedings, "given the different capacities needed to proceed to trial without counsel, there is little reason to believe that *Dusky* alone is sufficient."[232]

After noting the above, it is difficult to see how the Supreme Court, nor any court for that matter, can continue to hold that the Due Process Clause requires only that a defendant satisfy the *Dusky* standard before waiving counsel and proceeding pro se – because the Supreme Court acknowledged that the *Dusky* standard does not sufficiently protect the right to a fair trial for certain defendants.[233]

Indeed, if the logic of *Edwards* is followed further, it is not difficult to see why a court should hold that the Constitution requires that the standard of competence to represent oneself at trial must be determined by a standard better tailored to pro se representation than the standard for trial competence articulated in *Dusky*.[234]

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[232] *Edwards*, 554 U.S. at 177.

[233] *See* Marks, *supra* note 21, at 833; *see also Edwards*, 554 U.S. at 177.

[234] Marks, *supra* note 21, at 833 (noting that, the logic of *Edwards* dictates this particular result); *see also* JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES 996 (5th ed. 2012). It should be noted that as of this writing no state or federal court has yet adopted this position. Some state courts have been persuaded by the fair trial rationale articulated in *Edwards* and have required a higher standard of representational competence and the imposition of counsel on gray-area defendants. *Supra* note 220. However, this has been done through state based authority. To that end, the Connecticut Supreme Court adopted the above requirement, but did so through the Court's supervisory powers. *See* State v. Connor, 973 A.2d 627, 655 (Conn. 2009) ("[I]n accordance with the reasoning of *Edwards*, we do not believe that a mentally ill or mentally incapacitated defendant who is competent to stand trial *necessarily* also is competent to represent himself at that trial. Accordingly, in the exercise of our supervisory authority over the administration of justice, we conclude 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."). The Court of Appeals of Iowa did so through provisions within its own constitution. State v. Leahy, No. 13-0522, 2014 WL 3511766, at *9 n.8 (Iowa Ct. App. July 16, 2014) (unpublished opinion). Importantly, adopting these respective approaches did not require these courts to carve out a new position with respect to federal constitutional jurisprudence, a

In this sense, while *Godinez* may have held that the *Dusky* standard is the minimum level of competence needed to conduct trial proceedings,[235] the *Edwards* Court's acknowledgment that such a standard may not adequately protect the right to a fair trial suggests that *Edwards* "rejected the logic and practical effect of *Godinez*, and in so doing, may have effectively overruled it- *sub silentio* of course."[236]

As the above makes clear, while the *Edwards* Court may not have explicitly stated such, a logical extension of its holding makes plain that a heightened standard of representational competence is necessary to protect the criminal defendant's substantive due process right to a fair trial.[237]

position that could be subject to an appeal to the United States Supreme Court. In this sense the approach adopted by both the Connecticut and Iowa appellate courts represents a strategically unassailable means of accomplishing their respective objectives.

[235] Godinez v. Moran, 509 U.S. 389 (1993).

[236] Hawkinson, *supra* note 134, at 493. *See* King, *supra* note 64, at 228–29 (noting that the Court's decision in *Edwards*, "refers approvingly to the existence of differing degrees of 'adjudicative competence' and certainly seems to undercut the holding of Godinez"). It should be noted that *Edwards* appears to have overruled *Godinez* only with respect to the level of competency needed to conduct trial proceedings. Nothing about the reasoning employed by the *Edwards* Court suggests that it disapproved of the *Dusky* standard for those defendants who wish to waive counsel and simply enter a guilty plea.

[237] This article has addressed how the guarantee of substantive due process requires the adoption of a heightened standard of representational competence. Assuming that a court was to hold such, the next set of questions that would need to be answered relate to what procedural due process protections must accompany this substantive right. In this regard, it seems clear that just as states are required to put procedures in place to prevent the trial of an incompetent defendant, states would also have to adopt procedures in order to ensure that a gray-area defendant was not conducting trial proceedings. *See supra* Part III. Further, questions related to procedural due process concern whether a trial court would automatically be required to inquire into a defendant's competence to conduct trial proceedings or would only be required to do so if there was some question concerning the defendant's competency to adequately represent himself or herself. See *supra* Part I(A)(1)(b), noting that a trial judge is required to sua sponte raise the issue of a defendant's competence to stand trial, but only when there is a "bona fide" doubt regarding the defendant's competence to stand trial. Additional questions would concern which party had the burden of proving the defendant's competency or incompetency to represent himself or herself at trial as well as what burden of proof would be constitutionally permissible. *See supra* Part I(A)(1)(b). Lastly, once establishing that a heightened standard of representational competence is dictated by the substantive due process guarantee of a fair trial, a question becomes whether a defendant, after being apprised of the fact that he or she was not representationally competent, could in fact waive the right to a fair trial by electing to nonetheless proceed pro se. *See* United States v. Farhad, 190 F.3d 1097, 1107 (9th Cir. 1999) (asking, "may a defendant waive his right to a fair trial? In other words, may he agree to a process that is likely to result in an unfair proceeding? To put it more bluntly, may he agree to an *unfair* trial?"). However, such questions

In relation this point, it is important to note that representation by counsel is the default position in the American legal system.[238] Accordingly, the adoption of heighted standard of representational competence would operate as the level of competence needed to waive the right to the assistance of counsel and proceed pro se. If a defendant can meet this level of competence, then as stated previously, such a defendant would have a constitutional right to waive counsel and choose self-representation.[239] However, if such a defendant could not meet this level of

are beyond the scope of this particular article, as these topics deserve a fuller explication than is possible in the current space.

One additional argument, apart from the reasoning of *Edwards* and the right to a fair trial, also militates in favor of the adoption of a heightened standard of competency for pro se representation. This relates to the importance of uniformity in the exercising of a federal constitutional right. With respect to this point, commentators and courts have observed that "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." *See* State v. Connor, 973 A2d. 627, 650 n.22 (Conn. 2009); *see also* Marks, *supra* note 21, at 834; *see also* Johnston, *Communication*, *supra* note 27, at 2124. This is troubling because as one legal scholar noted, "state thresholds for exercise of federal constitutional rights generally should not vary." Johnston, *Communication*, *supra* note 27, at 2124. Currently, defendants in some states can exercise the Sixth Amendment right to self-representation by simply satisfying the *Dusky* Standard. *See* Stewart-Bey v. State, 96 A.3d 825, 839 (Md. Ct. Spec. App. 2014). For additional cases holding the same, *see supra* note 220,. Other states have opted to adopt a heightened standard of competence for pro se representation uniformly across the state. *See Connor*, 973 A2d. at 650 n.22. *See also Leahy*, 2014 WL 3511766, at *9 n.8. And still others have even left the decision of what level of competency to apply before allowing self-representation to the trial judge. *See* State v. Lane, 707 S.E.2d 210, 219 (N.C. 2011). For additional cases holding the same, *see supra* note 220. While individual state and lower federal courts cannot remedy the nationwide problem of the varying competency standards that must be met before a defendant can elect self-representation, the Supreme Court can in fact address this problem. The Supreme Court can accomplish this task by recognizing that the unwaivable substantive due process right to a fair trial that exists pursuant to the Fifth and Fourteenth Amendments of the federal Constitutional requires that states adopt a heightened standard of representational competence beyond that enunciated in *Dusky*. If the Supreme Court were to do so, its decision would have the effect of creating uniformity in that all defendants would need to be representationally competent if they were to conduct trial proceedings, regardless of where the prosecution takes place. *See supra* text accompanying notes 83 and 26 (noting that the Due Process Clause of the Fifth Amendment applies to the federal government and the due process clause of the Fourteenth Amendment applies to the states, yet they are to be interpreted congruently with each other).

[238] Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 Wake Forest L. Rev. 55, 109 (2003).

[239] *See supra* text accompanying note 165.

competence, then he or she would not be deemed competent to waive counsel (although he or she was otherwise competent to stand trial) and would be required to be represented by an attorney.[240]

CONCLUSION

In *Godinez v. Moran*, the Supreme Court held that a state may allow a defendant who is competent to stand trial, but may not be competent to conduct trial proceedings, to represent himself or herself at trial.[241] In *Indiana v. Edwards*, the Supreme Court held that a state is also permitted to require that a defendant satisfy a competency standard higher than what is needed to stand trial in order for that defendant to waive counsel and conduct trial proceedings.[242]

While the above may represent the current state of constitutional jurisprudence in the context of pro se representation, this article has argued that the due process based reasoning at the heart of *Edwards*, when taken to its logical conclusion, has effectively overruled *Godinez.* Accordingly, the substantive due process right to a fair trial requires the adoption of a heightened standard of representational competence.

Such an approach is indeed consistent with "the most basic of the Constitution's criminal law objectives, providing a fair trial."[243]

[240] In this regard, it should be noted that inarguing a defendant's substantive due process right to a fair trial mandates that the defendant satisfy of a heighted standard of representational competence before being allowed to waive counsel, the natural corollary to this point is that allowing a gray-area defendant to waive counsel in the absence of such a standard represents a violation of that same due process right. This was in fact the argument advanced in *Godinez*. *See* 509 U.S. at 394, 402. However, the argument that a gray-area defendant should not have been allowed to waive his or her right to counsel utilizing only the *Dusky* standard has also been presented as a denial of the right to the assistance of counsel under the Sixth and Fourteenth Amendments of the United States Constitution as well as the right to counsel found in state constitutional provisions. *See Connor*, 973 A.2d at 643; *see also supra* text accompanying note 221.

[241] *See supra* Part I(C)(1).

[242] *See* Indiana v. Edwards, 554 U.S. 164, 178 (2008); *see also supra* text accompanying note 169.

[243] *Edwards*, 554 U.S. at 176–77.