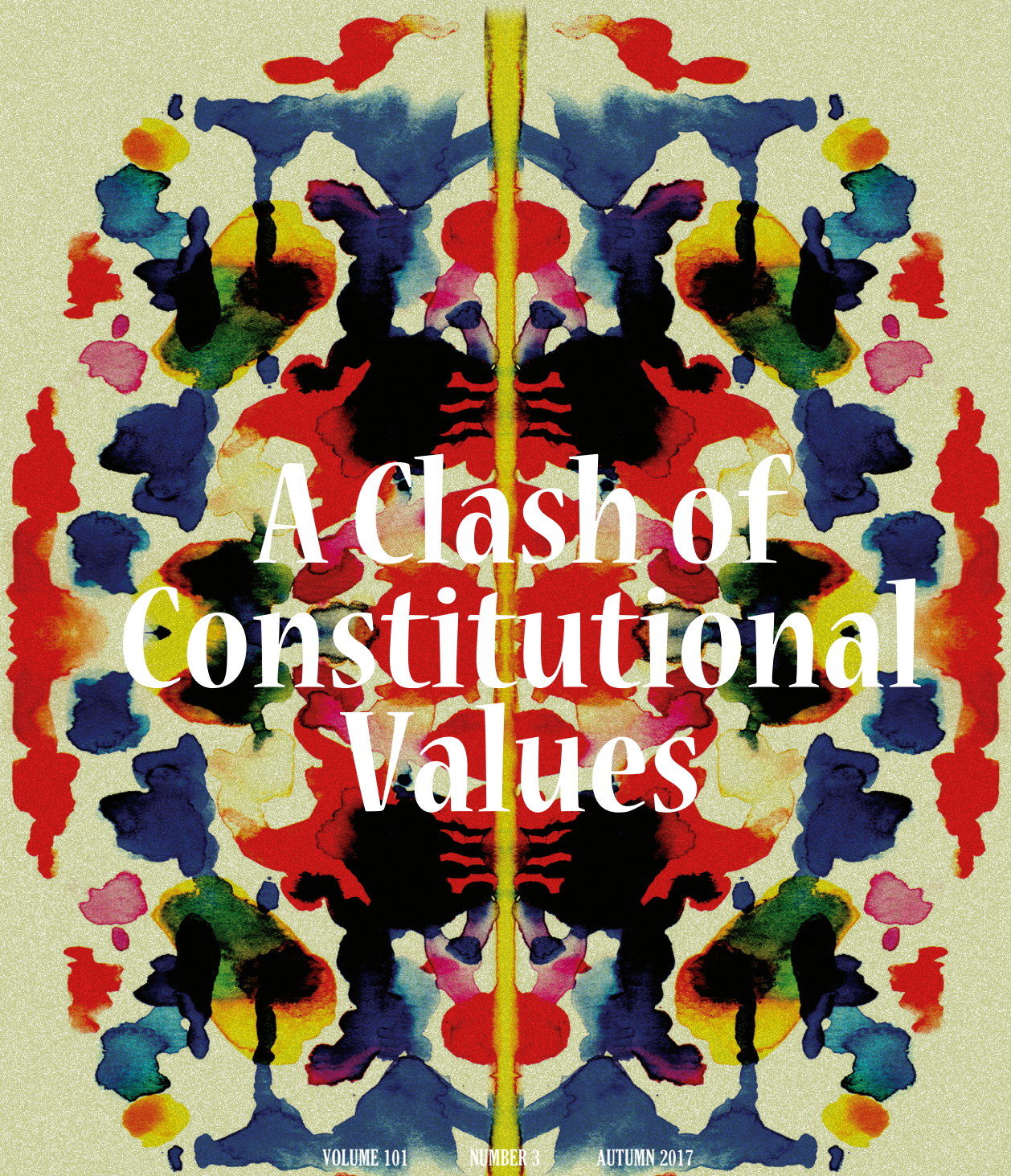

A Clash of Constitutional Values

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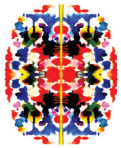
When Should Trial Judges Consider Constraining a Defendant's Right to Self-Representation?



BY STEPHEN C. LECKAR

The defendant is accused of serious felony offenses but insists on exercising the right of self-representation. The defendant seems oriented as to time and place. Yet the charged offenses' nature and the defendant's in-court speech and conduct and written submissions suggest an ideation far removed from the mainstream. Nor will the defendant cooperate with court-appointed counsel, an experienced and skilled practitioner. For aught that appears, the proposed defense theory and strategy seem outlandish.

Many contemporary readers may be thinking of Dylann Roof, accused of murdering nine Charleston, S.C., church members, who insisted on defending himself and was convicted of 33 federal crimes.[1] Following an unorthodox defense before a jury, in which he neither testified nor presented evidence, Mr. Roof was condemned to death by a jury.[2] While his fate and the issue of whether he was competent to represent himself may yet be adjudicated on appeal or in post-conviction proceedings, the scenario presented here is hardly unusual. Although it is impossible to quantify the number of defendants whose competency to self-represent is determined, the empirical data suggests that number is not modest.

The federal courts track the number of mental competency hearings conducted annually by magistrate judges. To be sure, being competent to stand trial is a legal step removed from being competent to represent oneself — the latter being this article's focus. Even so, the numbers are illuminating. The most recent reports show that magistrate judges conducted 510 mental competency hearings nationally in the 12 months that ended on Sept. 30, 2016,[3] a number higher than in the prior year, when they presided over 439 such hearings.[4]

Forty years ago, the Supreme Court in *Faretta v. California*[5] declared that the Sixth Amendment allows defendants to knowingly and intelligently waive their right to be represented by counsel and to instead defend themselves in criminal cases.[6] *Faretta* derived this right from history, the Sixth Amendment's text, and "[the] respect for the individual which is the lifeblood of the law."[7]

The *Faretta* majority concluded that forcing a defendant to accept counsel "can only lead him to believe that the law contrives against him."[8] Speaking for the Court majority, Justice Potter Stewart

wrote that while "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts[,] where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. . . ."[9] "Moreover," Justice Stewart stated, "it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages."[10]

In 2008, the Supreme Court in *Indiana v. Edwards*[11] modified *Faretta*'s expansive right to self-representation. In an opinion authored by Justice Stephen Breyer, the Court held that if there is "reasonable cause" to believe that a defendant who seeks to represent himself suffers from a severe mental illness and cannot conduct the trial proceedings rationally, a trial judge may conduct a hearing to make an informed judgment over whether to permit or deny self-representation.[12]

How should a trial judge respond when a defendant whose speech, deportment, or writings suggest seriously disturbed ideation requests to proceed *pro se?* To date, the Supreme Court has not "prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel."[13]

Federal trial courts frequently use the *Benchbook for U.S. District Judges* to caution defendants about the pitfalls of self-representation.[14] Indeed, the *Benchbook*'s warnings somewhat mirror the course followed in the Roof prosecution.[15] However, the *Benchbook* lacks any protocols to help assess the competency of an apparently severely troubled individual who demands to self-represent.

A similar lack of clarity also is reflected in the state courts. One commentator's exhaustive recent analysis of post-*Edwards* state decisions concluded that "vague" and "constitutionally suspect" standards were being used to assess whether to permit gray-area defendants to represent themselves.[16]

This article first addresses the intersection between the constitutional principles governing competency in general: the right of the defendant to self-represent and the countervailing right of the state to limit that freedom in those circumstances where a defendant's competency to self-represent is dubious. Afterwards, it suggests guidelines that can be used by trial courts adjudicating these delicate situations and by appellate courts reviewing trial judges' decisions.

IN LIGHT OF *EDWARDS*, JUDGES MAY "REQUIRE A HIGHER LEVEL OF COMPETENCE FOR SELF-REPRESENTATION" THAN WOULD BE THE CASE IF THE ISSUE SOLELY FOCUSED ON THE DEFENDANT'S COMPETENCY TO STAND TRIAL.

PRECLUDING DEFENDANTS FROM SELF-REPRESENTATION

Mental health issues present an inherent conflict between the Fifth and Sixth Amendments. The Fifth Amendment may give rise to a procedural due process claim (where a court failed to hold a competency hearing despite a "bona fide doubt" about the defendant's competence) and a substantive due process claim (where an "actually" incompetent defendant was convicted or sentenced).[17] At the same time, *Faretta* endorses the right to self-represent following a "knowing, voluntary, and intelligent" waiver of the right to counsel.[18] Absent a serious mental condition, defendants possess the "right to represent themselves and go down in flames if they wish[], a right the district court [is] required to respect."[19] The difficulty comes in identifying when the self-representation right may be constrained.

Background

In *Edwards*, the Supreme Court recognized that two of its cases had set forth a mental competency standard. The first case, *Dusky v. United States*,[20] defines the competency standard as including "(1) whether the defendant has a rational as well as factual understanding of the proceedings against him and (2) whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."[21] The second case, *Drope v. Missouri*,[22] "repeats that standard," for "it has long been accepted that 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."[23]

Ultimately *Edwards* disavowed "the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself."[24] In light of *Edwards,* judges may "require a higher level of competence for self-representation" than would be the case if the issue solely focused on the defendant's competency to stand trial.[25]

Upon a proper showing, the Constitution permits trial judges to limit the right of severely mentally ill defendants from representing themselves.

Edwards recognized that "[m]ental illness itself is not a unitary concept. . . . In certain instances an individual . . . 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."[26] The Court referenced this dichotomy as 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."[27]

In characterizing the former benchmark as being "the higher standard at issue here," *Edwards* described Respondent Ahmad Edwards, a schizophrenic, as a "gray-area defendant." This term, Justice Stephen Breyer wrote, meant an individual more or less mentally competent to stand trial, but seemingly lacking the mental competence to self-represent.[28]

Edwards explained that society's interest in a fair trial is two-fold: making sure that the trial is fair in fact, but also making sure that the public will perceive that the trial is fair. The Court pointed out that "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."[29] Thus "the Constitution permits [courts] to insist upon representation by counsel for those [defendants] 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."[30]

Continuing, the Court observed that while the *Dusky* standard for competence to stand trial could help in making this determination, "given the different capacities needed to proceed to trial without counsel, there is little reason to believe that *Dusky* alone is sufficient."[31] In explaining the need for imposing "a mental-illness-related limitation on the scope of the self-representation right,"[32] the Court majority reasoned:

> 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.[33]

Thus understood, "'*Edwards* does not *compel* a trial court to deny a defendant the exercise of his or her right to self-representation; it simply *permits* a trial court to require representation for a defendant who lacks mental competency to conduct trial proceedings.'"[34]

In its ruling, the *Edwards* Court declined to adopt a "specific standard" for determining representational incompetence.[35] It left that to the discretion of the "trial judge . . . who . . . will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."[36] Predictably the "states have generated a patchwork of competency standards for self-representation," yielding "an odd and uncomfortable arrangement because state thresholds for the exercise of federal constitutional rights typically should not vary."[37]

FEW GUIDELINES AVAILABLE TO HELP TRIAL JUDGES

The federal courts regularly confront seemingly irrational defendants who wish to represent themselves.[38] As would be expected, the same problem appears in the state courts.[39]

Nor are the severe mental illnesses foreseen by *Edwards* limited to those exhibiting palpable indicia of impaired thought — say, paranoid delusional expressions. A wide array of mental diseases can affect the ability to self-represent. Schizophrenia and related disorders, depressive disorders, anxiety disorders — even delirium and dementia, extreme phobia or panic, obsessive-compulsive disorders, or Asperger's Syndrome may well affect a defendant's cognitive ability to self-represent.[40]

Since *Edwards* the law has developed on a case-by-case basis.[41] Because the concerns identified by *Edwards* likely will continue to require large expenditures of judicial resources, this article draws from the cases and suggests protocols to assist trial judges in exercising the discretion granted by *Edwards* as well as appellate courts in reviewing those decisions.

Trial judges have a continuing duty to monitor gray-area defendants who defend themselves.

When a "gray-area" defendant's competence to self-represent is not evaluated, or is done so in at best a perfunctory way, a potential issue will lurk of whether that defendant was constructively denied the assistance of counsel. An invalid waiver of counsel is tantamount to the denial of counsel, which is a structural error, *i.e.,* an error that is presumptively prejudicial.[42] Accordingly, trial judges must carefully assess requests to self-represent at the outset and should continue monitoring such situations through sentencing.[43]

A Ninth Circuit decision, *United States v. Ferguson*,[44] is a representative *Edwards* issue that permeated a case. In addressing an *Edwards* claim raised on direct appeal, the *Ferguson* court "note[d] that [d]efendant's behavior was decidedly bizarre;" he had repeatedly made irresponsible demands of his counsel, including an "attempt[] to file a motion of 'dishonor' against his lawyers," and advanced highly unorthodox legal theories — such as requesting the judge to recognize a "'public policy' exception in the UCC and dismiss the case 'for value.'" Moreover, "once the jury convicted [Ferguson], there was far less reason for continuing his odd behavior at sentencing. Yet Defendant continued his bizarre and wholly ineffective behavior."[45] Even then, faced with the strong possibility of a statutory maximum sentence, and with "almost nothing to gain and everything to lose" by aberrant behavior, Ferguson's bizarre actions continued.[46]

The confluence of three circumstances led the *Ferguson* panel to remand the case to the district court. First, "Defendant's actions suggest that he might have been 'unable to carry out the basic tasks needed to present his own defense without the help of counsel.'"[47] Second, "Defendant's complete failure to defend himself seriously jeopardized the fairness of the trial and sentencing hearing and, at the very least, seriously jeopardized the *appearance* of fairness."[48] Third, "[p]erhaps most importantly, the record suggests that the district court might have forced counsel

upon Defendant, had the court had the benefit of reading *Edwards*."[49] Pointing out that "[e]ven the government's lawyer was extremely keen to have Defendant represented, because he was concerned that self-representation in this case would be error,"[50] the panel remanded the case to the trial court.

The views of counsel are helpful but not dispositive.

The perspective of defense counsel normally "should be considered" in the context of competency issues.[51] Indeed, during the appeals process following the conviction of the serial killer Theodore Bundy, the Court of Appeals for the Eleventh Circuit opined that a defense lawyer who believes that the client is irrationally thwarting the presentation of potential grounds for reversible error "'cannot blindly accept his client's demand that competency not be challenged'" and may have a duty to seek the court's instructions.[52]

While the law in this area is developing, the ethical implications identified by *Bundy* cannot be passed by lightly.[53]

Nonetheless, the deference given to statements made — or not made — by counsel is not dispositive of the sensitive question that must be answered. "[A] lawyer is not a trained mental health professional capable of accurately assessing the effects of paranoid delusions [or other conditions] on the client's mental processes,"[54] and counsel's "failure to raise petitioner's competence does not establish that petitioner was competent."[55] The fact of the matter is that "[m]any lawyers are simply lost dealing with the issue. . . ."[56]

Appointing a "standby" or a "hybrid" counsel is a limited step.

Although "[t]here is no federal constitutional right to appointment of standby counsel where a defendant has knowingly and voluntarily . . . elected to exercise his right to self-representation,"[57] judges have frequently appointed standby counsel with the proviso that counsel will not unduly impinge on the defendant's self-representation.[58]

Appointing standby counsel invites other concerns, for the law has not clearly defined the duties of standby counsel.[59] For example, standby counsel's duty to question the defendant's competence to self-represent is murky.[60]

A line of appellate cases that have considered the issue of competency adapted the "meaningful adversarial testing" standard of *United States v. Cronic*,[61] a seminal decision on evaluating ineffective assistance of counsel claims, to require a similar obligation of standby counsel in the context of a competency hearing."[62] Even then, "[i]t is not clear that standby counsel has an obligation to address limitations that may impair the defendant's ability to represent herself."[63]

Seeking an alternative remedy, some courts have appointed "hybrid" counsel to "essentially function as 'co-counsel.'"[64] However, there is no constitutional right to hybrid representation.[65] Also, it is only permissible with the defendant's consent, whereas standby counsel may be provided over the defendant's objection.[66] Nor is hybrid representation available in all jurisdictions; some disfavor such arrangements.[67]

Defining meaningful guidelines to assess the gray-area defendant's demand to self-represent.

In the post-*Edwards* landscape, after setting aside cases where the defendant's seemingly nonsensical effort to self-represent was rejected after being found a contrivance intended to delay the trial,[68] one can readily find decisions on both sides of the self-representation spectrum. For instance, a court may justifiably deny self-representation to a defendant whose personal history, mental evaluation, communications with the court, or demeanor reflects delusional or irrational thoughts that appear likely to impair the defendant's cognitive functioning. That occurred in *United States v. Lewis,*[69] which affirmed a trial judge's insistence on the defendant being represented by counsel, where the defendant's "disordered thinking prevented him from personally managing the large amount of documentary evidence in this case."[70]

Likewise the Court of Appeals for the Fourth Circuit upheld an unsuccessful request to self-represent where the defendant, who was diagnosed as suffering from delusional disorder and personality disorders, maintained that his cross-examination skills were superior to his counsel's, leaving the trial judge "'unconvinced' that Barefoot could 'understand[] fully his role and duties at trial were he to represent himself.'"[71]

Other courts have recognized the right to self-represent where the defendant possessed a basic understanding of the necessary steps. In *United States v. Stafford,* the district judge explored the defendant's apparent understanding of jury selection and trial procedures and considered psychological experts' testimony.[72]

In the absence of nationally-promulgated standards to assess requests to self-represent where *Edwards* concerns may be present, unless a self-representation competence standard is agreed on through the appellate process, both psychiatrists and trial courts likely will use differing formulations. Trial judges' decisions may in the mine-run of cases yield satisfactory results, although there is reason to suspect otherwise.[73] As appeals follow, the legal questions raised may ultimately be answered, but only after some, perhaps many, unnecessary reversals.

In some jurisdictions, the courts of appeals could use their "supervisory power" to issue baseline procedures, as has been done in other situations.[74] There is precedent under *Edwards* for following this step where the state's highest court has that authority.[75]

An analysis of *Edwards*, post-*Edwards* cases, and related commentary gives insight into what constitutionally acceptable standards might entail. *Edwards* itself characterized representational competence as a function of one's ability to demonstrate "powers of understanding, reasoning, and appreciation."[76] It looked to the joint amicus brief filed by the American Psychiatric Association (APA) and the American Academy of Psychiatry and the Law, which examined the "decision-making and cognitive/

communication capabilities" needed by a defendant representing himself.[77]

The APA amicus urged that a *pro se* defendant must understand, among other issues, "the exact elements of the crimes charged," how the prosecution's evidence relates to these elements, and "what is important to highlight, throughout trial and in closing."[78] Further, the APA urged that the defendant must be able, in both oral and written communications, to articulate essential points of his defense, stay focused on relevant matters, and to communicate with multiple audiences (the judge, witnesses, jurors, and the prosecutor), adding that "if a defendant lacks these decisional capacities — and, by implication, only such capacities — he will be 'unable to carry out the basic tasks needed to present his own defense without the help of counsel.'"[79] Using these as an influential starting point, we can derive from the cases a series of checkpoints.

The Trial Judge should hold an on-the-record hearing. Above all else, an on-the-record hearing should be held to assess whether the defendant possesses "basic rationality," which will require that the court "inquire into whether the defendant has non-delusional reasons" to self-represent.[80] The views of the defendant and all counsel should be solicited.[81]

(A) A rational defense strategy. The presiding judge should ensure that the defendant understands his *Faretta* rights and is seeking to knowingly and intelligently waive them. The court should caution the defendant of the pitfalls and potential adverse implications of defending a case by oneself, the need to understand basic principles of courtroom procedure and the rules of evidence, and to recognize the trial judge cannot assist the defendant in trying the case.[82]

In addition the judge should determine whether the defendant can articulate "a rational defense strategy," and confirm that the defendant understands "at least on a basic level, the legal elements of the charged offenses, means of defense if they exist, and the probative value of the prosecution evidence and whatever evidence may be available in defense, as well as have a sufficient understanding of court procedures to make at least rudimentary use of this understanding."[83] An appreciation of the potential penalties upon a conviction also should be ascertained.[84]

EDWARDS ITSELF CHARACTERIZED REPRESENTATIONAL COMPETENCE AS A FUNCTION OF ONE'S ABILITY TO DEMONSTRATE "POWERS OF UNDERSTANDING, REASONING, AND APPRECIATION."

And while the defendant's literacy is not, strictly speaking, an issue addressed in *Edwards,* it is at least a factor worth considering in deciding whether to allow self-representation: A judge fairly could ask whether a mentally impaired person with a limited education would encounter undue difficulty presenting a defense.[85]

(B) The defendant's deportment. The defendant's speech and affect are important and in order to make an informed decision, the trial judge should be particularly alert to and address whether the defendant's speech was disordered. "Given the established relationship between disorganized speech and thought disorders, disorganized speech may be a strong indicator of cognitive impairment and, possibly, an impaired means of recognizing and advancing one's best interests."[86]

At the same time, courts must be alert to the possibility that some speech defects may be simple speech impediments, tics, or attributable to noncognitive causes such as Parkinson's disease.[87] It is also important to assess the clarity and firmness of the defendant's demand to self-represent, for a court may be justified in overruling a request to self-represent where the defendant is vacillating.[88]

The Trial Judge should appoint a forensic examiner. While a defendant's bizarre or seemingly irrational verbal communications or written submissions may not render the defendant incompetent to self-represent, such signals should cause a trial court to appoint a qualified forensic examiner to conduct a thorough competency assessment of the defendant.[89] Put simply "[a] determination that the defendant is stricken with delusional or irrational thoughts . . . should lead the court to some level of suspicion as to the defendant's competency to represent himself."[90]

If the court opts to appoint a forensic examiner, it should explain why. The resulting process should include recognized testing, interviews of counsel and those who evaluated the defendant previously, and a review of the defendant's *pro se* filings, if any.[91] An examination report should include the examiner's assessment of the foregoing information, with opinions as to diagnosis and prognosis, and if the defendant suffers from a severe mental illness, an opinion as to whether he or she can conduct trial proceedings rationally.[92]

It also is important to obtain the examiner's views as to whether the defendant is malingering or seeking to manipulate the criminal justice system.[93]

The Trial Judge should appoint counsel for the defendant and define the lawyer's role. A court also should appoint counsel for purposes of an *Edwards* proceeding and delineate the role to be played by counsel: full representation, standby or hybrid. Militating in favor of appointing full-time counsel for this purpose is the unassailable logic that if competency is at issue, then it stands to reason "that the court cannot predetermine that the same person is capable of representing himself in his own competency hearing. If the person truly lacks competency, who would be there to voice the concern?"[94]

At the least, not merely for the defendant's protection but to guard against

ambiguity and subsequent appeals in an area already complicated by uncertainties, a trial judge who chooses to appoint a standby counsel should provide standards to define counsel's participation in the case. These instructions should include actively seeking and providing medical information to medical examiners, coupled with counsel's independent, candid and objective observations, arranging meetings with knowledgeable witnesses, analyzing the forensic report, deciding whether good faith reasons exist to contest it, and, if appropriate, challenging the findings — in short, duties that oblige standby counsel to play a meaningful role in helping the court make the right call.[95]

In all events a written decision should explain the trial judge's reasoning.

Suggesting a standard of review

There remains the issue of ensuring an effective review process. Some courts of appeals have applied a deferential standard of review to matters of competency to self-represent, namely asking whether the decision was "clearly arbitrary or erroneous."[96] However, this situation also can be fairly analogized to one involving whether *Faretta* rights were violated, which would call for a *de novo* standard of review.[97] It may be said that decisions of this sensitive nature, which involve waivers of constitutional rights, call for a nondeferential standard of review in order that appellate courts may maintain control of and clarify the legal principles, "unify precedent," and provide a defined set of rules.[98]

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CONCLUSION

In *Wade v. Mayo*,[99] a case decided 15 years before the Supreme Court recognized a right to counsel in criminal cases[100] and 40 years before *Edwards*, the Court recognized that mental condition can affect a defendant's capability of self-representation. *Wade* involved an 18-year-old burglary defendant who was forced to represent himself when his motion for counsel was denied. The Court found that impermissible and held that:

> [T]hough not wholly a stranger to the Court Room, having been convicted of prior offenses, [the defendant] was still an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself.
>
> . . . .There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.[101]

Edwards flowed logically from *Wade*. Notwithstanding *Faretta*'s holding, there are some individuals who by reason of a lack of mental capacity are incapable of defending themselves in any case, simple or complex. The task of the courts is to recognize when to say "no" to those persons while recognizing that there are others who must be accorded their requests to exercise that right. This article has sought to identify ways to bring structure to that process. ◆

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[1] Alan Blinder & Kevin Sack, *Dylann Roof Found Guilty in Charleston Church Massacre,* N.Y. Times, Dec. 15, 2016, at A1.

[2] Alan Blinder & Kevin Sack, *Dylann Roof is Sentenced to Death in Charleston Church Massacre,* N.Y. Times, Jan. 10, 2017, at A1.

[3] Table M4, *U.S. District Courts – Criminal Pretrial Matters Handled by U.S. Magistrate Judges Under 28 U.S.C. Section 636(b) During the 12-Month Period Ending September 30, 2016,* United States Courts: Judicial Business, *available at* http://www.uscourts.gov/sites/default/files/data_tables/jb_m4_0930.2016.pdf (last accessed June 28, 2017). The Administrative Office of the U.S. Courts does not track competency hearings administered by district court judges.

[4] *Id.*

[5] *Faretta v. California*, 422 U.S. 806 (1976).

[6] *Id.* at 819–20 (giving the Sixth Amendment's literal terms "the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails").

[7] *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)). *See also McKaskle v. Wiggins,* 465 U.S. 168, 178 (1984).

[8] *Id.* at 834. Three dissenting justices found no independent constitutional basis for the right to self-representation in a criminal trial. *Id.* at 836–46 (Burger, C.J., joined by Blackmun and Rehnquist, JJ., dissenting), 846–52 (Blackmun, J, joined by Burger, C.J., and Rehnquist, J., dissenting).

[9] *Faretta,* 422 U.S. at 834.

[10] *Id. See also McKaskle,* 465 U.S. at 176–77 (explaining that *Faretta* right "exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense").

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

[12] *Id.* at 173–78. *See, e.g., Panetti v. Stephens,* 727 F.3d 398, 414 (5th Cir. 2013); *United States v. Ferguson,* 560 F.3d 1060, 1070 n.6 (9th Cir. 2009); *United States v. Berry,* 565 F.3d 385, 391 (7th Cir. 2009); *United States v. DeShazer*, 554 F.3d 1281, 1290 (10th Cir. 2009).

[13] *Iowa v. Tovar*, 541 U.S. 77, 88 (2004).

[14] Benchbook for U.S. District Court Judges §§ 1.02C at 6–7, 1.12 at 51–57 (6th ed. 2013). *See also United States v. O'Neal,* 2016 U.S. App. LEXIS 23273, *19–*21 (D.C. Cir. Dec. 29, 2016) (noting Bench Book's use but stressing review on "the colloquy conducted on the record"); *United States v. Ross*, 703 F.3d 856, 867 (6th Cir. 2012) (requiring use of "questions drawn from, or substantially similar to, the model inquiry set forth in the Bench Book. . . .").

[15] Memorandum Op. Under Seal at 7, *United States v. Roof,* Cr. 2:15-472-RMD (D.S.C., filed Nov. 30, 2016), *available at* https://mgtvwcbd.files.wordpress.com/2016/11/wcbd-competency-hearing-info.pdf (last accessed January 17, 2017).

[16] E. Lea Johnston, *Communication and Competence for Self-Representation*, 84 Fordham L. Rev. 2121, 2122 (2016) (contending that "existing state competency standards are constitutionally suspect") [hereinafter "Johnston"]. *See also id.* at 2124 (characterizing *Edwards*' language as "vague").

[17] *Pate v. Robinson,* 383 U.S. 375, 385 (1966) (finding error in failing to order competency hearing despite petitioner's self-inflicted wounds, medicated

demeanor and monosyllabic responses); *Davis v. Woodford*, 384 F.3d 628, 646–47 (9th Cir. 2004) (holding that conviction of incompetent defendant violates due process); *Williams v. Woodford*, 384 F.3d 567, 603–04, 608 (9th Cir. 2004); *Smith v. Jones*, 2015 U.S. Dist. LEXIS 15420, *17–*18 (N.D. Fla. Jan. 13, 2015).

[18] *Tovar*, 541 U.S. at 87–88 (citations and internal quotation marks omitted).

[19] *United States v. Johnson,* 610 F.3d 1138, 1139 (9th Cir. 2010).

[20] *Dusky v. United States*, 362 U.S. 402 (1960).

[21] *Edwards*, 554 U.S. at 170 (citing *Dusky*, 362 U.S. at 402).

[22] *Drope v. Missouri*, 420 U.S. 162 (1975).

[23] *Edwards*, 554 U.S. at 170 (emphasis original). *See also Douglas v. Woodford*, 316 F.3d 1079, 1094 (9th Cir. 2003) (holding that competence to stand trial requires defendant's ability 'to consult with his lawyer with a reasonable degree of rational understanding' and a 'rational as well as factual understanding of the proceedings against him.') (citation omitted).

[24] *Edwards,* 554 U.S. at 175.

[25] *Id*. at 176–77; *United States v. Thompson,* 587 F.3d 1165, 1172 (9th Cir. 2009).

[26] *Edwards,* 554 U.S. at 175 (citing and quoting N. Poythress, R. Bonnie, J. Monahan, R. Otto, & S. Hoge, Adjudicative Competence: The MacArthur Studies 103 (2002) ("Within each domain of adjudicative competence (competence to assist counsel; decisional competence) the data indicate that understanding, reasoning, and appreciation [of the charges against a defendant] are separable and somewhat independent aspects of functional legal ability.")).

[27] *Edwards,* 554 U.S. at 176 (citation omitted).

[28] *Id.* at 172–74. *Edwards* also referred to "mental derangement," *id.* at 175, "borderline-competent," *id.* at 171, and "severe mental illness," *id.* at 176, 177.

[29] *Edwards,* 554 U.S. at 173. In addition, *Edwards* observed that allowing borderline-competent defendants to represent themselves would not be respectful of their autonomy and could result in a "humiliating" spectacle. *Id.* at 176. As Blackstone observed, a court could not try a defendant who became "mad" after pleading, "for how can he make his defense?" 4 William Blackstone, Commentaries, at*24.

[30] *Id.* at 178. Although *Edwards* arose in the state courts, its holding extends to federal courts. *United States v. Berry,* 565 F.3d 385, 392 (7th Cir. 2009).

[31] *Edwards,* 554 U.S. at 177. *Edwards* moved away from precedent which had "reject[ed] 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." *Godinez v. Moran*, 509 U.S. 389, 398 (1993).

[32] *Edwards,* 554 U.S. at 171.

[33] *Id.* at 177–78. A vigorous dissent in *Edwards* asserted that "[w]hile one constitutional requirement must yield to another in case of conflict, nothing permits a State, because of *its* view of what is fair, to deny a constitutional protection" personal to the accused. Although 'the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial,' it 'does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.'" *Id.* at 184–85 (Scalia, J., joined by Thomas, J., dissenting) (emphasis in original).

[34] *United States v. Ferguson,* 560 F.3d 1060, 1070 n.6 (9th Cir. 2009) (quoting *United States v. DeShazar*, 554 F.3d 1281, 1290 (10th Cir. 2009) (emphasis in original)).

[35] *Edwards,* 554 U.S. at 178.

[36] *Id.* at 177.

[37] Johnston, *supra* note 16, at 2127.

[38] *See, e.g., United States v. Duncan,* 643 F.3d 1242, 148–49 (9th Cir. 2011) (competency to waive capital appeal); *United States v. Arenburg*, 605 F.3d 164, 168–69 (2d Cir. 2010) (defendant repeatedly referred to "a conspiracy involving MGM Studios and the government with the object of publicly broadcasting his thoughts"); *United States v. Ruston*, 565 F.3d 892, 901–03 (5th Cir. 2009) (defendant asserted that "law enforcement organizations and others," including Katie Couric, were attempting to murder him); *United States v. Ghane,* 490 F.3d 1036, 1040–41 (2d Cir. 2007) (defendant's understanding "was not rational because it was premised on his delusion of a government conspiracy working against him"); *United States v. Jones,* 336 F.3d 245, 255–60 (7th Cir. 2003) (sentencing); *United States v. Boigegrain*, 155 F.3d 1181, 1189–90 (10th Cir. 1998) (defendant "believe[d] that his lawyer was participating in a conspiracy, along with the prosecutor and the judge"); *Nicks v. United States,* 955 F.2d 161, 166–69 (2d Cir. 1992) (granting coram nobis); *United States v. Auen*, 846 F.2d 872, 874–78 (2d Cir. 1988) (severe paranoid delusional ideation).

[39] *See generally* Johnston, *supra* note 16, at 2128–2139 & nn. 44–125 (citing cases).

[40] Johnston at 2136 & nn. 91–99, 2140 & nn. 128–32 (citations omitted); Ellesha Lecluyse, Note, *The Spectrum of Competency: Determining a Standard of Competence for* Pro Se *Representation*, 65 Case W. Res. L. Rev. 1239, 1253–54 (2015) [hereafter "Lecluyse"]. Professor Johnston suggests that the impact of certain mental illnesses, "particularly those that do not carry symptoms of psychosis, is uncertain" and argues that "it is unclear whether personality disorders can ever qualify as severe mental illnesses." Johnston, *supra* note 16, at 2160.

[41] *See generally* Johnston, *supra* note 16.

[42] *McKaskle*, 465 U.S. at 177 n.8. *See also United States v. Davila*, 133 S. Ct. 2139, 2149 (2013) and *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006).

[43] A trial judge may "terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Faretta,* 422 U.S. at 834 n.46 (citing *Illinois v. Allen,* 397 U.S. 337 (1970)); *see also United States v. Weast*, 811 F.3d 743, 749 (5th Cir. 2016). "Admittedly, neither [*Faretta* nor *Allen*] involved someone with a mental illness. Nevertheless, the same logic applies to situations involving a mentally ill defendant." Conor Cleary, *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, 165 (2010).

[44] 560 F.3d 1060 (9th Cir. 2009).

[45] *Id.* at 1068–69.

[46] *Id*.

[47] *Id*. at 1069 (quoting *Edwards,* 554 U.S. at 175–76).

[48] *Id*. (citing *Edwards,* 554 U.S. at 177) (emphasis in original).

[49] *Id*.

[50] *Id*.

[51] *Drope,* 420 U.S. at 178 n.13. *See also United States v. Stafford,* 782 F.3d 786, 790, 791 (8th Cir. 2015); *United States v. VanHoesen*, 450 Fed. Appx 57, 62 (2d Cir. 2011) (counsel's failure to alert the court to concerns regarding VanHoesen's competence to self-represent "provides substantial evidence of defendant's competence"); *United States v. Savage*, 505 F.3d 754, 760 (7th Cir. 2007) ("Significant weight given to counsel's representations and failure to raise the competency issue"); *Boyde v. Brown*, 404 F.3d 1159, 1167 (9th Cir. 2005); *Klat,* 213 F.3d at 703; *Lay v. Trammell*, 2015 U.S. Dist. LEXIS 136793, *55 & n.7 (N.D. Okl. Oct. 7, 2015) (capital case), *aff'd,* 622 Fed. Appx. 772 (10th Cir. 2015). Courts should also be alert to the prosecution signaling concerns with the defendant's mental health. *E.g., Ross,* 703 F.3d at 867–68.

[52] *Bundy v. Dugger,* 816 F.2d 564, 566 n.2 (11th Cir. 1987) (quoting *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986) (counsel cannot "'blindly follow'" defendant's instructions . . . particularly if counsel has reason to believe defendant's judgment impaired by "'mental difficulties'").

[53] *See, e.g., Blakeney v. United States,* 77 A.3d 328, 344–49 (D.C. 2013) ("counsel should not lightly disregard credible medical opinion of incompetency"); Sarah Hur, *An Attorney's Dilemma: Representing A Mentally Incompetent Client Who Does Not Wish To Raise Mental Illness Issues In Court*, 27 Geo. J. Legal Ethics 555 (2014); Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 Fordham L. Rev. 1581, 1621–27 (2000) (contending that counsel must seek appropriate treatment where client believed to suffer from mental issues). An example of how judges sitting on the same case may hold widely varying views of counsel's duties in these delicate situations is reflected in one of the "Unabomber" appeals. *Compare United States v. Kaczynski,* 239 F.3d 1108, 1118–19 (9th Cir. 2012) (majority) *with id.,* 239 F.3d at 1122–28 (Reinhardt, J., dissenting).

[54] *United States v. Salley,* 246 F.Supp.2d 970, 976 (N.D. Ill. 2003) (delusional onset disorder).

[55] *Odle v. Woodford,* 238 F.3d 1084, 1088–89 (9th Cir. 2001) (reversing denial of habeas writ). *See also United States v. Jones,* 336 F.3d 245, 259 (3d Cir. 2003) ("[W]e cannot afford appreciable weight to defense counsel's silence … [absent] any evidence in the record that might explain why he chose not to raise the issue.").

[56] John Wesley Hall, Jr., Professional Responsibility in Criminal Defense Practice 455, 457 (2005).

[57] *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir. 1997).

[58] *See McKaskle,* 465 U.S. at 176–79; *Faretta,* 422 U.S. at 834 n.46; *United States v. Anzaldi*, 800 F.3d 872, 876 (7th Cir. 2015).

[59] *McKaskle* itself "logically implies that standby counsel is not the equivalent of 'counsel' within the meaning of the Sixth Amendment. . . ." *Robinson v. Ignacio,* 360 F.3d 1044, 1060 n.10 (9th Cir. 2004).

[60] Nicholas Smit, *The Right to Counsel? A Heightened Standard of Competence for Standby Counsel in Competency Hearings*, 2014 Fed. Cts. L. Rev. 163 [hereinafter "Smit"] (noting "confusion surrounding the role of standby counsel" in competency proceedings).

[61] *United States v. Cronic*, 466 U.S. 648, 656 (1984) ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.").

[62] *See, e.g.*, *United States v. Kowalczyk,* 805 F.3d 847, 858–59 (9th Cir. 2015) (quoting *Ross,* 703 F.3d at 872; *Wise v. Bowersox*, 136 F.3d 1197, 1203 (8th Cir. 1998); *United States v. Purnett,* 910 F.2d 51, 55–56 (2d Cir. 1990)).

[63] Anne Bowen Poulin, *Ethical Guidance for Standby Counsel In Criminal Cases: A Far Cry From Counsel,* 50 Am. Crim. L. Rev. 211, 243–44 (2013).

[64] Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 Wake Forest L. Rev. 55, 56–57 (2003) [hereinafter "Colquitt"].

[65] *Randolph v. Cain*, 412 F. Appx 654, 658 (5th Cir. 2010); *Wilson v. Hurt*, 39 Fed. Appx 324, 327 (6th Cir. 2002).

[66] Colquitt, *supra* note 64, at 70 & n.77 (citing *McKaskle*, 465 U.S. at 183).

[67] *See Clemons v. Pfister*, 845 F.3d 816, 820 (7th Cir. 2017) (discussing Illinois's rule disfavoring hybrid representation).

[68] *United States v. Weast,* 811 F.3d 743, 749 (5th Cir. 2016)).

[69] 612 Fed. Appx. 172 (4th Cir. 2015).

[70] *Id.,*. at 176. *See also United States v. Cox,* 2015 U.S. Dist. LEXIS 137297, *2 (W.D. Ky. Oct. 8, 2015) ("[D]efense theories . . . little more than gibberish").

[71] *United States v. Barefoot*, 754 F.3d 226, 231–32, 234–35 (4th Cir. 2014). *See also Smith v. Warden*, 2016 U.S. Dist. LEXIS 34227, *28–*34 (C.D. Cal, Feb. 8, 2016) ("Petitioner's mental illness, as well as his demonstrated behavioral and misconduct issues when in court, would interfere with his competency to represent himself and could result in trial disruption"); *Shorthill v. State,* 354 P.3d 1093, 1098, 1110–11 (Alaska Ct. App. 2015) (defendant "was unable to organize his defense, he was unable to focus on meaningful motions or relevant points of law, and his questioning of witnesses and his arguments to the court were largely ineffectual"); *People v. Johnson,* 267 P.3d at 1135–36 (delusional thought disorder and conspiracy paranoia); *State v. Jason*, 779 N.W.2d 66, 74 (Iowa Ct. App. 2009) (Asperger's syndrome).

[72] 782 F.3d at 789–90. *See also VanHoesen*, 450 Fed. Appx at 62 (rejecting claim that *pro se* defense was a "travesty" reflecting "awful judgment;" trial judge considered competency evaluations); *United States v. Saba,* 837 F.Supp.2d 702, 702-11 (W.D. Mich. 2011) (granting self-representation after extensive analysis); *Dixon v. Ryan*, 2016 U.S. Dist. LEXIS 33999, *32-*33 (D. Ariz. Mar. 16, 2016) (citing petitioner's "appropriate and logical conduct" in proceedings below); *Williams v. United States*, 137 A.3d 154, 157–59, 160–62 (D.C. 2016) ("trial court noted that appellant had filed and argued his *pro se* motions and was able to form his defense theories . . . demonstrated appellant's knowledge of the law and his ability to participate in the legal proceedings"); *State v. Bird*, 858 N.W.2d 642, 646–49 (N.D. 2015) (two competency examinations; defendant impeached witnesses at trial and had coherent strategy).

[73] *See generally* Johnston, *supra* note 16, at 2128–40.

[74] *See, e.g.*, *United States v. McDowell*, 814 F.2d 245, 249–50 (6th Cir. 1987). *See also United States v. Cicero*, 22 F.3d 1156, 1160–61 & n.5 (D.C. Cir. 1994) (citing *McNabb v. United States,* 318 U.S. 332, 341 (1943)). *See generally* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Federal Courts*, 84 Colum. L. Rev. 1433 (1984); L. Douglas Harris, *Supervisory Power in the United States Courts of Appeals*, 63 Cornell L. Rev. 641 (1978).

[75] Jason Marks, *State Competence Standards for Self-Representation in a Criminal Trial: Opportunity and Danger for State Courts after* Indiana v. Edwards, 44 Univ. San Francisco L. Rev. 825, 841 n.72 (2010) [hereinafter "Marks"]. *See, e.g.*, *State v. Jackson*, 363 Wis. 2d 484, 498–99, 503–04, 867 N.W.2d 814, 821 (2015); *State v. Connor,* 292 Conn. 483, 973 A.2d 627, 650–51 (2009); *In re Amendments to Florida Rule of Criminal Procedure 3.111,* 17 So. 3d 272, 275 (Fla. 2009).

[76] Johnston, *supra* note 16, at 2127 & n.29 (citing *Edwards*, 554 U.S. at 176) (internal citations omitted).

[77] *Edwards,* 554 U.S. at 176 (citing Brief for Am. Psychiatric Ass'n et al. as Amici Curiae Supporting Neither Party, *Indiana v. Edwards,* 128 S. Ct. 2379 (2008) (No. 07-208), *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_07_208_NeutralAmCuAPAAAPL.authcheckdam.pdf (last accessed June 28, 2017)) [hereinafter "APA Amicus"]. *See also United States v. Ross*, 619 Fed. Appx. 453, 456–57 (6th Cir. 2015) (referring to APA Amicus).

[78] APA Amicus, *supra* note 77 at 24.

[79] Johnston, *supra* note 16, at 2155 & n.254 (quoting *Edwards*, 554 U.S. at 175–76).

[80] Christopher Slobogin, *Mental Illness and Self-Representation*: Faretta, Godinez *and* Edwards, 7 Ohio St. J. Crim. L. 391, 401–07 (2009).

[81] *See Medina v. California,* 505 U.S. 437, 450 (1992). *See also* Lecluyse, *supra* note 40, at 1262.

[82] Benchbook for U.S. District Court Judges, at §§ 1.02C at 6–7, 1.12 at 51–57, provides useful questions on the *Faretta* issue but, again, does not address *Edwards. Available at* http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf/$file/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf (last accessed June 28, 2017).

[83] Marks, *supra* note 75, at 846. *See also* LeCluyse, *supra* note 40, at 1251–67 ("defendant [must] show the logic behind [the] decision-making process in order to assess the defendant's 'reasoning capacity or ability to employ logical thought processes to compare the risks and benefits' of [the] different option"); Ashley Beck, Indiana v. Edwards: *The Prospect of a Heightened Competency Standard for* Pro Se *Defendants,* 84 U. Colo. L. Rev. 434, 458 (2013) (defendants "who . . . suffer[] from delusions and exhibit[] extreme and bizarre behavior . . . would likely be incapable of adequately and competently executing their own defenses without the assistance of counsel").

[84] *Klessig*, 211 Wis. 2d at 206, 564 N.W.2d at 721–22.

[85] *Jordan v. Hepp,* 831 F.3d 837, 845–46 (7th Cir. 2016).

[86] Johnston at 2140–41 & n. 134. *See also Valdez v. State*, 2015 WL 302272, at 3–4, 9–11, 2015 Ind. App. Unpub. LEXIS 52, *7–*8 (Ind. Ct. App. Jan. 22, 2015) [(paranoid delusional disorder; "The Defendant's . . . assertion that there is 'totempole' hearsay is incomprehensible.")], *aff'd,* 28 N.E.3d 246 (Ind. 2015)).

[87] Johnston, *supra* note 16, at 2163 & nn. 295–96.

[88] *See, e.g.*, *Letell v. LeBlanc,* 2016 U.S. Dist. LEXIS 81841, *31–*32, *43 (E.D. La. June 8, 2016) (applying *Edwards*; record reflected that petitioner's requests to exercise *Faretta* right were equivocal). *See also Miller v. Prelesnik*, 2016 U.S. Dist. LEXIS 158476, *25–*27 W.D. Mich. Nov. 16, 2016) (upholding state court determination that petitioner's request was equivocal).

[89] *Berry*, 565 F.3d at 387. Of course, federal courts can rely upon 18 U.S.C. § 4241 when a defendant's competency to stand trial is at issue. That statute calls for a defendant who has been adjudged incompetent to stand trial to be committed "to the custody of the Attorney General" for hospitalization and treatment. 18 U.S.C. § 4241(d) (2012). Although hospitalization may be appropriate if a defendant is obviously delusional or is unable to demonstrate even basic competency to stand trial, such commitment is an extreme step that is often inappropriate for defendants who present closer questions of competency. In those cases, appointment of an independent examiner would seem a far more proportional and appropriate step to take before ordering a defendant to be hospitalized in a government-run clinic.

[90] E. Lea Johnston, *Representational Competence: Defining the Limits of the Right to Self-Representation at Trial,* 86 Notre Dame L. Rev. 523, 595 (2011) ("A determination that the defendant is stricken with delusional or irrational thoughts . . . should lead the court to some level of suspicion as to the defendant's competency to represent himself"). Court appointment of forensic examiners to evaluate competency is not novel. Courts have on occasion used forensic examiners to assess litigant competency in civil cases while considering guardian ad litem appointment pursuant to Rule 17(c)(2). *See*, e.g., *Scannavino v. Florida Dep't of Corr.*, 242 F.R.D. 662, 663 (M.D. Fla. 2007) (discussing the findings of a "Forensic Psychiatric Evaluation" of the plaintiff's competency); *see also Krain v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989) ("The preferred procedure when a substantial question exists regarding the mental competence of a

party proceeding pro se is for the district court to conduct a hearing to determine whether or not the party is competent, so that a representative may be appointed if needed."). This is possible because nothing in that Rule "prevents a district court from exercising its discretion to consider sua sponte the appropriateness of appointing a guardian ad litem for a litigant whose behavior raises a significant question regarding his or her mental competency." *Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 203 (2d Cir. 2003).

[91] *See, e.g., United States v. Hernandez-Vasquez,* 2016 U.S. Dist. LEXIS 125821,*6–*7 (S.D. Cal. Sept. 24, 2016) (court ordered two psychiatric evaluations and concluded defendant could self-represent notwithstanding "Defendants low average intellectual functioning, anxiety and general fearfulness, poor reasoning and insight"); *United States v. Belion*, 2016 U.S. Dist. LEXIS 110340, *2–*3 (N.D. Fla. Aug 16, 2016) (following two competency examinations, "nonsensical" pleadings and inability to answer "straightforward questions" court denied self-representation); *Hughes v. Biter,* 2016 U.S. Dist. LEXIS 83910, *50 (E.D. Cal. June 28, 2016) ("two of the experts opined that Petitioner was not competent to represent himself, providing detailed explanations for their conclusions"); *United States v. Mabie,* 2014 U.S. Dist. LEXIS 99863, *3 (S.D. Ill., July 22, 2014) (appointing independent psychiatric/psychological examiner; setting forth topics to address); *Saba,* 837 F. Supp.2d at 706–09 (describing forensic psychiatric evaluation, considering defendant's prior diagnosis of delusional disorder and intense preoccupation with religion); *Williams,* 137 A.3d at 157–161 (defendant's competency evaluated twice); APA Amicus, *supra* note 77, at 28–29 (identifying forensic assessment instruments). *See also Wright v. Bowersox,* 720 F.3d 979, 984–85 (8th Cir. 2013) (four psychiatric experts had testified in state proceedings and trial judge explained its observations).

[92] *Mabie,* 2014 U.S. Dist. LEXIS 99863, at *4–*5 (specifying topics to be discussed); *Saba,* 837 F. Supp.2d at 706–07 (appointing board-certified forensic psychiatrist); Ronald Roesch & Patricia Zapf, Forensic Assessments in Criminal and Civil Law: A Handbook for Lawyers 28 (2013).

[93] *See, e.g., Kowalczyk,* 805 F.3d at 852–56 (discussing extended proceedings); *Williams,* 137 A.3d at 161 & n.8 (no evidence of malingering).

[94] Smit, *supra* note 60, at 174 (footnotes and internal citations omitted). As pointed out in *Ross,* it is "contradictory to conclude that a defendant whose competency is reasonably in question could nevertheless knowingly and intelligently waive her Sixth Amendment right to counsel. Such a defendant may not proceed *pro se* until the question of her competency to stand trial has been resolved." *Ross,* 706 F.3d at 870 (citation omitted). *See also United States v. Purnett,* 910 F.2d 51, 55 (2d Cir. 1990) ("[T]he trial court cannot simultaneously question a defendant's mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel.").

[95] *See, e.g., Kowalczyk*, 805 F.3d at 859 (amicus "advocated for the same incompetency position" as defendant, filed a 69-page brief, cross-examined government expert and called Kowalczyk's parents and another expert as friendly witnesses; district court characterized service as "truly masterful"); *United States v. Ross,* 619 Fed. Appx. 453 (6th Cir. 2015) (post-remand decision).

[96] *See, e.g., United States v. McKinney*, 737 F.3d 773, 777 (D.C. Cir. 2013); *United States v. Johnson*, 610 F.3d 1138, 1145 (9th Cir. 2010); *United States v. Berry*, 565 F.3d 385, 389–90 (7th Cir. 2009); *Chadwick v. State*, 309 S.W.3d 558, 561 (Tex. Crim. App. 2010).

[97] *See, e.g., United States v. Smith,* 830 F.3d 803, 809 (8th Cir. 2016) (applying de novo standard); *United States v. Gerritsen,* 571 F.3d 1001, 1006 (9th Cir. 2009); *United States v. Gewin,* 471 F.3d 197, 199 (D.C. Cir. 2006); *State v. Bird*, 858 N.W.2d at 646; *State v. Jackson*, 63 Wis. 2d at 497–98, 867 N.W.2d at 821.

[98] *Ornelas v. United States*, 517 U.S. 690, 696–97 (1996).

[99] *Wade v. Mayo*, 334 U.S. 672 (1948).

[100] *Gideon v. Wainright*, 372 U.S. 335 (1963).

[101] *Wade,* 334 U.S. at 683–84.