Competence for Criminal Adjudication: Client Autonomy and the Significance of Decisional Competence

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ABSTRACT

The practice of assessing and adjudicating competence for criminal adjudication in the United States developed largely without assistance from the U.S. Supreme Court or other state and federal courts of appeal for most of the nineteenth and twentieth centuries. However, the need for appellate guidance became evident in the 1980s, especially regarding the significance of mental or emotional conditions that can impair capacity for rational decision-making of persons accused of criminal behavior. During the past thirty years, some governing principles have come into view, but important issues remain unresolved. After a brief review of the historical and conceptual foundations of the competence requirement, this article focuses on two decisions in which the Supreme Court has addressed decisional competence. In Godinez v. Moran *(1993), the Court ruled that a pretrial finding that a defendant was competent to stand trial established that he was competent to waive representation by counsel and plead guilty because the test for competence is the same in the two contexts. However, in* Indiana v. Edwards *(2007), the Court held that a defendant who was found competent to stand trial while being represented by counsel may nonetheless be found to be incompetent to represent himself at trial. Although these decisions are not strictly contradictory, they are in deep tension with one another. This article attempts to set the law on a coherent path by highlighting the significance of doubts about decisional competence in both cases and formulating a coherent approach to guide state and federal courts in the future. In so doing, it builds on the influential empirical contributions of the MacArthur Foundation Research Network on Mental Health and the Law and integrates the author's writing on this subject that was grounded in the MacArthur Network's deliberations and has evolved over three decades.*

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Supreme Court or other federal courts of appeal for most of the nineteenth and twentieth centuries. However, the need for appellate guidance became evident in the 1980s, especially regarding the significance of mental or emotional conditions that can impair a defendant's capacity for rational decision-making. During the past thirty years, some governing principles have come into view, but important issues remain unresolved. After a brief review of the historical and conceptual foundations of the competence requirement, this article focuses on the only two decisions in which the Supreme Court has addressed the meaning of decisional competence in depth. In *Godinez v. Moran* (1993), the Court ruled that a pretrial finding that a defendant was competent to stand trial established that he was competent to waive representation by counsel and plead guilty because the test for competence is the same in the two contexts. However, in *Indiana v. Edwards* (2007), the Court held that a defendant who was found to be competent to stand trial while being represented by counsel may nonetheless be found to be incompetent to represent himself at trial. Although these decisions are not strictly contradictory, they are in deep tension with one another. This article attempts to set the law on a coherent path by highlighting the significance of doubts about decisional competence found in both cases, reconciling the tensions between them. In so doing, it builds on the influential empirical contributions of the MacArthur Foundation Research Network on Mental Health and the Law and integrates the author's writing on this subject. That work was grounded in the MacArthur Network's deliberations and has evolved over three decades.

The argument will proceed as follows: A summary of the constitutional rules governing determination of a defendant's competence for criminal adjudication and the values it serves (Part I) is followed by critiques of *Godinez v. Moran* (Part II) and *Edwards v. Indiana* (Part III). The final section summarizes the principles that should govern rulings about decisional competence after *Godinez* and *Edwards* (Part IV).

I. OVERVIEW OF THE COMPETENCE REQUIREMENT IN CRIMINAL ADJUDICATION

At least since the fourteenth century, common-law courts have declined to proceed against criminal defendants who are "unfit" or "incompetent" to be brought before the court for adjudication.[1] The evolution of common-law doctrine is apparent in courts' descriptions of the elements of "fitness to stand trial," and particularly in *Rex* v. *Pritchard*,[2] a famous British case involving a defendant who was unable to hear or speak:

> First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient

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[1] DON GRUBIN, FITNESS TO PLEAD IN ENGLAND AND WALES 9 (David P. Goldberg *et al*. eds., 38th ed. 1996).

[2] Rex v. Pritchard, 7 Car. and P. 303, 303–307 (1836).

> 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 in ordinary matters.[3]

Although the medieval interest in whether a defendant remained "mute by malice" no longer has any legal importance, the two other key components of the *Pritchard* formulation (ability to understand the proceedings and to interact with the court in a meaningful way) have continuing significance in applying the "incompetency plea." These two ideas are reflected in the "test" for competence to stand trial enunciated by the U.S. Supreme Court for use by the federal courts in *Dusky v. United States*[4] in 1960: "whether [the 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."[5] It is worth noting that by the time *Dusky* was decided, it was generally recognized that indigent criminal defendants charged with felonies were entitled to representation by counsel, a right later extended to misdemeanors under most circumstances.[6] This fundamental change in the adversary system of justice explains the shift of emphasis from communication with the court to communication with counsel.

Fifteen years after *Dusky*, the Supreme Court held in *Drope v. Missouri*[7] that the incompetence doctrine was so "fundamental to an adversary system of justice" that conviction of an incompetent defendant, or failure to adhere to procedures designed to assess a defendant's competence when doubt has been raised, violates the Due Process Clause of the federal Constitution. According to the Court in *Drope*: "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."[8] And, it should be added, such a defendant is not competent to enter a plea of guilty in lieu of a trial.[9] Thus, incompetence bars adjudication, whether by plea or trial, including any pre-trial proceedings that may be adverse to the defendant's

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[3] *Id.* at 304.

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

[5] *Id.*

[6] *See* Argersinger v. Hamlin, 407 U.S. 25, 30–31 (1972); Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Powell v. Alabama, 287 U.S. 45, 65 (1932).

[7] 420 U.S. 162, 172 (1975).

[8] *Id.* at 171.

[9] Godinez v. Moran, 509 U.S. 389, 398 (1993).

interests. For the sake of brevity, the term "adjudicative competence" will be used to refer to this requirement.[10]

The concept of adjudicative competence thus far described conveys a fairly passive view of the defendant's role in contemporary criminal proceedings. A prosecution cannot proceed unless the defendant understands his jeopardy and is able to consult with and advise the lawyer who is representing him. In the picture that emerges, the defendant responds, consults, and assists, but the active adversaries in the litigation are the prosecutor and the defense attorney. This may be an accurate picture of many—if not most—criminal proceedings, but it is an incomplete picture of the rights accorded to the defendant under the United States Constitution, and of the values embedded in the requirement of adjudicative competence. Under the United States system of criminal justice, a criminal defendant may decline representation by counsel and represent himself, even in a full-fledged criminal trial presenting the most extreme legal jeopardy. In *Faretta* v. *California*,[11] the Supreme Court ruled that the Sixth Amendment to the Constitution, which assures the right to assistance of counsel, also confers a right to *decline* assistance of counsel and to represent oneself.

Very few defendants choose to represent themselves under *Faretta,* but important questions sometimes arise regarding the allocation of authority between the client and the attorney representing them. Clearly, the law accords the defendant personal control over some aspects of the case, even when represented by counsel. The most important of these is whether to plead guilty instead of proceeding to trial. In the United States criminal justice system, where more than ninety percent of cases are resolved by negotiated pleas, the decision whether to plead guilty to one or more charges is highly consequential. Other decisions that must be made personally by the defendant are whether to be tried before a jury, or to testify if the case goes to trial. The basis for these rules is self-evident, as each entails a waiver of a basic constitutional right: the right to a trial by jury,[12] the right not incriminate oneself,[13] and the right not to be convicted unless the state proves one's guilt beyond a reasonable doubt.[14] The scope of a represented defendant's authority to direct or

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[10] Vocabulary bearing on fitness for adjudication varies not only among English-speaking nations, but also within the United States. [In]competence and [in]capacity tend to be used interchangeably in both legal and scientific discourse. In this article, "capacity" is generally used to refer to specific legally relevant abilities (e.g., capacity to understand the proceedings), while "competence" is used to refer to the legal and/or moral judgment that the defendant is or is not "fit" to proceed.

[11] *See* Faretta v. California, 422 U.S. 806, 835–836 (1975). It is noteworthy that three Justices dissented.

[12] *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[13] *See* Palko v. Connecticut, 302 U.S. 319, 323–324 (1937).

[14] *See* In re Winship, 397 U.S. 358, 363–364 (1970).

control the defense of the case is unclear and will be discussed later.[15] For present purposes, however, it is enough to point out that disputes sometimes arise between clients and counsel about key decisions in the case (I refer to these disagreements as "autonomy fights"), and many of these disputes also raise questions about whether the defendant has the mental capacity to make the requisite decision (assuming that the responsibility for making the decision lies with the defendant in the first place). Over the past thirty years, a considerable proportion of appellate opinions in the United States bearing on adjudicative competence relates to the resolution of disputes between criminal defendants and their attorneys over control of the defense.

A. *Values Served by the Competence Requirement*[16]

When viewed from a contemporary perspective, the requirement of adjudicative competence in criminal proceedings serves three conceptually independent social purposes: preserving the dignity or integrity of the criminal process, reducing the risk of erroneous convictions, and respecting defendants' decision-making autonomy. The dignity of the criminal process is undermined if the defendant lacks a basic moral understanding of the nature and purpose of the proceedings against him or her. The accuracy or reliability of the adjudication is threatened if the defendant is unable to assist in the development and presentation of a defense. Finally, to the extent that decisions about the course of adjudication must be made personally by the defendant, they must have the abilities needed to exercise decision-making autonomy.

1. Dignity

A person who lacks a rudimentary understanding of the nature and purpose of the proceedings against them is a not a "fit" subject for criminal prosecution and punishment. To proceed against such a person offends the moral dignity of the process because it treats the defendant not as an accountable person, but as an object of the state's effort to carry out its promises. Cases involving defendants who lack a meaningful moral understanding of wrongdoing and punishment, or the nature of the jeopardy to which they are exposed in a criminal prosecution, implicate not only the defendant's interest in avoiding unfair or unjust punishment, but also—and perhaps even more importantly—society's independent interest in the moral integrity of the criminal process. To make the point plainly, suppose a defendant,

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[15] See *infra,* text at notes 25–26*. See generally* Erica J. Hashimoto*, Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147 (2010); H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 RUTGERS L. REV. 719 (2000).

[16] The account of the values served by the competence requirement summarized in this section was initially presented in Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 UNIV. MIAMI L. REV. 539 (1993); and Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & THE L. 291 (1992).

while competent, signs a witnessed document authorizing the state to try him and, if warranted by the evidence, to convict him, even if he were to become unaware of the nature of the proceeding due to unconsciousness or delusion. This advance directive would not be honored. Pronouncing an unconscious or insane defendant "guilty" offends human dignity and the integrity of the judicial process, even if the evidence leaves no doubt about his guilt.[17] Similarly, a court should not allow a deluded defendant, proceeding pro se, to question a witness about the defendant's own behavior at the crime scene while referring to himself in the third person.[18]

2. Accuracy

Beyond the minimal demands of the dignity rationale, the bar against adverse adjudication in cases involving incompetent defendants serves as a critically important prophylactic protection against erroneous convictions. Just as the assistance of competent counsel is regarded as a prerequisite to reliable adjudication, so too is the participation of a competent defendant. As stated by Henry Weihofen in 1954,[19] a mentally impaired defendant might be unfairly convicted if he "alone has knowledge" of certain facts but does "not appreciate the value of such facts, or the propriety of communicating them to his counsel."[20] To proceed against a defendant who lacks the capacity to recognize and communicate relevant information to his attorney and to the court would be fundamentally unfair to the defendant and would undermine society's independent interest in the reliability of its criminal process. This basic intuition provides the basis for the Supreme Court's

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[17] Lists of purposes served by the incompetence doctrine typically include the need to preserve the decorum of the courtroom and the dignity of the trial process. *See, e.g.*, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454 (1967). However, courtroom decorum is not, standing alone, a viable rationale for a bar against adjudication. If necessary, a disruptive defendant can be removed from the courtroom and an otherwise competent defendant can waive their right to be present. Moreover, judges should be very tolerant of "disturbing" behavior in the courtroom during plea proceedings and bench trials.

[18] In a 1995 trial for killing six people on a Long Island Railroad train, a demonstrably delusional Colin Ferguson was allowed to represent himself. *See* Bruce A. Arrigo and Mark C. Bardwell, *Law, Psychology and Competency to Stand Trial: Problems with and Implications for High-Profile Cases*, 11 CRIM. JUST. & POL'Y REV. 16 (2000); Richard J. Bonnie, Ferguson *Spectacle Demeaned System*, 17 NAT'L. L. J. Mar. 13, 1995 at A23-24.

[19] HENRY WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 429–30 (1954).

[20] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *24. In his Commentaries, William Blackstone described the rationale for the incompetence plea as follows:

> "[I]f a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed…"

statement in *Drope* v. *Missouri* that the bar against trying the incompetent defendant "is fundamental to an adversary system of justice."[21]

3. Autonomy

A third feature of the competence construct, conceptually independent of the two aspects thus far mentioned, derives from legal rules that establish that the defendant has the prerogative to make certain decisions regarding the defense or disposition of the case. As mentioned above, a construct of "decisional competence" is an inherent, though derivative, feature of any legal doctrine that prescribes a norm of client autonomy. One could imagine a system of criminal adjudication that leaves no room for client self-determination—one that bars self-representation, does not permit guilty pleas, and commits all decisions regarding defense of the case to counsel rather than to the defendant.[22] Under these legal arrangements, a defendant's decisional competence would not be relevant. But this does not describe our system.

Our law commits some decisions regarding the defense or disposition of the case to the defendant and not to the attorney. According to all authorities, these decisions include whether to plead guilty or not guilty; if the case is to be tried, whether it should be tried before a jury; whether the defendant attends the proceedings in person or remotely; and whether the defendant testifies.[23] For some of these decisions (i.e., those involving waivers of constitutional rights) there is an obligation imposed on courts to conduct a formal colloquy with the defendant—to ensure the defendant's decision has been made knowingly, intelligently, and voluntarily—which reinforces the principle of self-determination.[24] Not

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[21] 420 U.S. at 171 ("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."). Social scientists should note that courts use reliability in constitutional adjudication as a synonym for "validity" or accuracy of outcome. The system's commitment to a fair "balance" in the adversary system underlies the right to counsel, the protections of the Fifth Amendment, and the principle of proof beyond a reasonable doubt. As a practical matter, the functional meaning of competence must be operationalized in the context of the attorney-client relationship. Thus, to the extent that the meaning of incompetence derives from its instrumental function, it refers to the capacity to provide whatever assistance counsel requires in order to explore and present an adequate defense, as the idea has evolved in progressive understanding of fairness.

[22] *But cf.* Faretta v. California, 422 U.S. 806 (1975) (holding that a defendant is constitutionally entitled to waive assistance of counsel and to represent himself). Such a system is therefore constitutionally implausible, but it is noteworthy that three Justices dissented.

[23] *See, e.g.*, Rock v. Arkansas, 483 U.S. 44, 52–53 (1987) (regarding whether to testify); Brookhart v. Janis, 384 U.S. 1, 7–8 (1966) (regarding whether to plead guilty); Adams v. United States ex rel. McCann, 317 U.S. 269, 275 (1942) (regarding waiver of jury trial). *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION 4-5.2(A) (AM. BAR ASS'N, 4th ed. 2015); MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2021).

[24] Boykin v. Alabama, 395 U.S. 238, 242 (1969); Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938).

surprisingly, judicial scrutiny is likely to be most intensive when the defendant decides to represent himself.[25]

There is a considerable realm of uncertainty regarding allocation of authority between attorney and client in criminal defense. Ethical canons often declare that the lawyer shall abide by a client's decisions concerning the "objectives" of representation, while the lawyer controls decisions about the "means" by which these objectives are to be pursued, including technical or tactical issues such as whether to call or cross-examine a particular witness.[26] But, some issues are not easy to classify: what about the basic theory of defense (e.g., whether to contest the state's prima facie case or raise a claim of justification or excuse)? Or what about issues with a highly personal valence, such as whether or not to ask the defendant's mother to testify? The larger the space that client autonomy is understood to occupy, the greater the likelihood that autonomy fights will arise, and that the defendant's decisional competence will be called into question.

B. *Abilities Required for Adjudicative Competence*

Keeping in mind these three rationales for barring criminal adjudication in cases involving "incompetent" defendants, and drawing on the language of *Dusky v. United States* and other appellate decisions that interpret and apply *Dusky*, it is possible to specify the competence-related abilities required for adjudicative competence. It is helpful to conceptualize adjudicative competence as encompassing two related but separable components: first, "competence to assist counsel", and second, "decisional competence."[27]

C. *Competence to Assist Counsel*

The first component is a foundational requirement, relating generally to understanding one's legal jeopardy, and it becomes legally relevant from the moment a person is criminally accused. I use the phrase "competence to assist counsel" because the traditional label for the competence requirement (competence to stand trial) diverts attention from the pre-trial interactions with counsel and the court that most directly implicate the fairness of the process and the reliability of its

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[25] *See, e.g.*, United States v. Mooney, 123 F. Supp. 2d 442, 443–445 (N.D. Ill. 2000); People v. Welch, 976 P.2d. 754, 776 (Cal. 1999).

[26] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 20). *See also* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION 4-5.2(D) (AM. BAR ASS'N, 4th ed. 2015) ("Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. Such decisions include how to pursue plea negotiations, how to craft and respond to motions and, at hearing or trial, what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what motions and objections should be made, what stipulations if any to agree to, and what and how evidence should be introduced.").

[27] *See* Bonnie, *Beyond Dusky and Drope*, *supra* note 16; Bonnie, *A Theoretical Reformulation*, *supra* note 16.

outcome. This observation also highlights another key feature of the competence requirement—it is a highly contextualized inquiry under which the clinical-legal judgment about whether the defendant is legally "competent" depends on the demands of the particular case.[28] In general, the "foundational" requirement of competence to assist counsel entails capacities (a) to understand the charges and the basic elements of the adversary system (understanding), (b) to appreciate one's situation as a defendant in a criminal prosecution (appreciation), and (c) to relate pertinent information to counsel concerning the facts of the case (reasoning). These three psycho-legal abilities, taken together, operationalize *Dusky*'s stated requirements that the defendant must have a "rational as well as factual understanding of the proceedings" and that he or she be able "to consult with his lawyer with a reasonable degree of rational understanding."[29] The "competence to assist counsel" component of adjudicative competence, summarized in this way, serves the dignity and accuracy rationales mentioned above, and the law clearly precludes any adjudication adverse to a defendant who lacks the abilities required to assist in his or her own defense.

D. *Decisional Competence*

In most cases, questions about "competence to assist counsel" arise at the outset of the adjudicative process, before significant interactions with counsel have occurred and before strategic decisions regarding defense of the case have been encountered or considered. However, in other cases, questions about the defendant's competence are not formally raised until late in the process when doubts are raised, typically by the defense attorney, regarding whether the defendant is competent to make specific decisions regarding defense of the case that are encountered as the process of criminal adjudication has unfolded. These cases implicate the second component of adjudicative competence, which I have labeled "decisional competence."

Decision-making involves cognitive tasks in addition to those required for assisting counsel, but the particular abilities required to establish "decisional competence" have not yet been definitively established. The Supreme Court's formulation of the competence requirement in *Dusky* does not mention decision-making at all, and courts often seem uncertain about how to apply the *Dusky* formula to cases in which the defendant's capacity to make particular decisions is being

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[28] I have referred to this foundational construct as "competence to assist counsel" to emphasize that the ability to interact rationally with counsel in presenting a defense is the determinative functional consideration in pre-trial competence determinations and to distinguish it conceptually from the defendant's role in decision making. However, no consensus has emerged among commentators or courts regarding a phrase to denote the aspects of "competence" or fitness that do not relate to decision making. The ABA Task Force that recently revised the ABA Standards on Mental Health and Criminal Justice, on which I served, concluded that the phrase "competence to proceed" (at any stage of the proceedings) is a more useful phrase for denoting this foundational requirement.

[29] *Dusky*, 362 U.S. at 402.

questioned, often by defense counsel (e.g., when a client, against the advice of counsel, pleads guilty, refuses to plead insanity, or chooses to testify). In a series of articles in the 1990s, I suggested that decisional competence had not received adequate theoretical attention and sought to initiate a scholarly conversation about possible criteria for decisional competence in the context of criminal adjudication, drawing on the then-developing literature of competence to make medical decisions. My ideas were also shaped by the scholarly collaboration nurtured by the MacArthur Foundation Research Network on Mental Health Law initiated in 1988.

I will not rehearse my full argument here, but three points are pertinent to the claims I am making in this article. First, the core value served by the requirement of decisional competence is assuring that the defendant has the capacities necessary to make rational, self-interested decisions on those matters that the law places within the prerogative of the defendant, rather than counsel. Secondly, questions about decisional competence are not likely to be brought to judicial attention unless an "autonomy fight" has developed between the defendant and counsel, or unless the attorney has profound doubts about the defendant's capacity to understand the nature and consequences of decisions that the defendant is expected to make, especially those involving waivers of constitutional rights.[30] This implies that specific evaluation of the defendant's competence to make a particular decision is unlikely to occur early in the case and the need for such an assessment will come to the fore only after a crisis in the in the representation has emerged.

In light of these theoretical and practical differences between decisional competence and competence to assist counsel under the *Dusky* formulation (factual and rational understanding of the proceedings), it might be sensible to regard them as legally separate constructs rather than as two component parts of a single legal test of adjudicative competence requiring highly contextualized application. That was the view I propounded in 1993, thinking that viewing them as separate constructs would facilitate greater conceptual clarity and clinical precision. As I saw the matter then, the capacities needed for decision-making might differ in important respects, at least in some cases, from those needed to assist counsel, and a higher level of capacity might be needed, normatively speaking, for some type of decisions than for others. Indeed, state and federal appellate courts were divided in the 1980s over whether certain decisions—such as pleas of guilty or waiver of counsel—required a "higher" level of decisional capacity than the level implicitly embedded

[30] Attorneys are not likely to seek clinical or judicial assistance in resolving the "autonomy fight" unless the stakes are high, and the attorney strongly disagrees with the defendant's decision and doubts his or her decisional competence. This empirical observation underlies my view, articulated in Bonnie, *Beyond Dusky and Drope*, *supra* note 27, at 577–82, that attorneys should be prepared to take a "closer look" in cases involving these high-stake autonomy fights than in cases involving routine decisions where the attorney is vouching for the defendant's competence rather than contesting it. Some have questioned this claim, but I stand by it both on ethical grounds and as a prediction of judicial outcomes.

in the *Dusky* standard, assuming that *Dusky* required decisional capacity at all.[31] Although they used different phrases, most state and federal decisions embraced the view that, unlike guilty pleas, waivers of counsel do require a higher level of competence.[32]

Just as I was formulating and disseminating my views on this long-neglected issue, however, the Supreme Court agreed to grant certiorari in *Godinez* v. *Moran,*[33] on appeal from the Ninth Circuit—a case that I discussed at length in an article then in press at the *Miami Law Review*. As discussed in detail below, Richard Moran dismissed counsel and pled guilty to a capital offense fourteen weeks after his arrest and was subsequently sentenced to death. His post-conviction claims of incompetence to waive counsel and plead guilty were rejected by the Supreme Court on the ground that he had been found competent to stand trial under *Dusky* during a pre-trial evaluation. The good news was that the Court acknowledged the significance of decisional competence (capacity to make rational decisions) as a component of competence for criminal adjudication. However, the Court mistakenly held that "the *Dusky* test" prescribes the applicable test of competence in all cases, even if the defendant wants to waive counsel and plead guilty.

II. A CRITIQUE OF *GODINEZ V. MORAN*

The Supreme Court's decision in *Godinez* merits detailed analysis. This section describes the context in which the case arose, analyzes the Court's ruling and the dissenting opinion, and discusses the issues that remain unresolved. As noted above, before the Court decided *Godinez*, federal circuit courts were divided on what I regard as an easy issue—the standard for competence to plead guilty. Some circuits, including the federal courts of appeal for the Ninth and D.C. Circuits, had ruled that the standard for competence to plead guilty was "higher than" the *Dusky* standard. Under this approach, the defendant had to have the capacity not only to understand the nature and consequences of the plea, but also to make a "reasoned choice" about whether or not to enter it. As I had written in several articles beginning in 1990,[34] requiring capacity to make a "reasoned choice"—i.e., taking into account the advantages and disadvantages of each option in light of the probability of conviction at trial—would be too demanding a standard; it would be out of alignment with the

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[31] *Compare* Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973) *and* Allard v. Helgemoe, 572 F.2d 1 (1st Cir. 1978). The cases are summarized in Godinez v. Moran, 509 U.S. 389 (1993).

[32] In 1993, I endorsed the view that, while guilty pleas should not ordinarily require a higher level of decisional capacity, waiver of counsel should not be permitted if the defendant's decision is substantially affected by psychopathological factors. Under this approach, the higher standard would also have to be met if the defendant sought to make a decision over counsel's objection (such as refusing to plead insanity or refusing to introduce mitigating evidence in a capital case).

[33] *Godinez*, 509 U.S. at 396.

[34] Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419, 444 (1990); Bonnie, *A Theoretical Reformulation*, *supra* note 16; Bonnie, *Beyond Dusky and Drope*, *supra* note 16.

fairly thin constitutional requirements for a valid plea, and it would tend to deny the advantages of plea bargaining to defendants with intellectual deficits. In my opinion, the test for pleading guilty should be essentially the same as the *Dusky* standard, adapted for application to a decision-making context—i.e., the competent defendant must have a rational understanding of the nature and consequences of the plea. Unfortunately, the Ninth Circuit ruled otherwise in *Godinez.* When the Supreme Court agreed to hear the state's appeal in *Godinez,* it was immediately clear to me that the Court had done so for the specific purpose of reversing the Ninth Circuit's ruling that the standard for "competence to plead guilty" was "higher than" the standard for "competence to stand trial."

If the ruling in *Godinez* had been clearly and specifically focused on the meaning of competence to plead guilty, it would have been a helpful clarification of the law. The problem, however, is that *Godinez* was not a simple guilty plea case. It involved a defendant (Richard Moran) who had waived his right to counsel in order to plead guilty four and a half months following his arrest for capital homicide, and who had declared that he had no intention of introducing mitigating evidence at his sentencing proceeding. He had attempted suicide, was highly remorseful and depressed, and wanted to die. In my view, the right answer in this case was for the Court to extend the *Dusky* standard (rational understanding of the nature and consequences of the plea) to ordinary guilty pleas while applying a distinct and specific requirement of decisional competence when the defendant has waived counsel (and, I would suggest, also in other contexts where a defendant seeks to make highly consequential decisions against the advice of counsel).

A. *Facts and Context*

Richard Moran had been charged with three counts of capital murder in Nevada for killing two people in a bar on August 2, 1984, and for shooting his former wife in a separate incident seven days later. Immediately after shooting his wife, Moran attempted suicide by shooting himself in the abdomen and slashing his wrists. While in the hospital recovering from his wounds, he summoned the police and confessed to all three homicides. Soon after discharge from the hospital, he was referred for forensic assessment of his competence to stand trial, and two examining psychiatrists interviewed him separately on September 12 and September 17. Each psychiatrist concluded that Moran understood the charges and was able to assist his attorney. Taking note of his depression and remorse, however, one of the psychiatrists observed that "Moran may not make the effort necessary to assist counsel in his own defense." The other psychiatrist also found Moran to be "in full control of his faculties insofar as his ability to aid counsel, assist in his own defense, recall evidence and to give testimony if called upon to do so." However, he, too, expressed reservations, observing: "Psychologically, and perhaps legally speaking, [Moran], because he is expressing and feeling considerable remorse and guilt, may be inclined to exert less effort towards his own defense."

In November 1984, just three months after his suicide attempt, Moran appeared in court seeking to discharge his public defender, waive his right to counsel, and plead guilty to all three charges of capital murder. The trial judge accepted Moran's waiver of counsel and his guilty pleas after posing a series of routine questions regarding his understanding of his legal rights, to which Moran gave largely monosyllabic answers. In a string of affirmative responses, Moran acknowledged that he knew the import of waiving his constitutional rights, that he understood the charges against him, and that he was, in fact, guilty of those charges. The trial judge concluded that he was competent to stand trial and that he voluntarily and intelligently had waived his right to counsel. Accordingly, Moran was allowed to plead guilty and appear without counsel at his sentencing hearing. Moran presented no defense, called no witness, and offered no mitigating evidence on his own behalf. Not surprisingly, he was sentenced to death.

Wholesale capitulation by remorseful capital defendants is not unusual.[35] Such defendants typically insist on pleading guilty against counsel's advice and instruct counsel to refrain from introducing any evidence in mitigation, or like Richard Moran, they discharge their attorneys and plead guilty while unrepresented. These defendants also frequently request sentences of death. This behavior presents puzzling and controversial questions regarding the ethical and legal obligations of defense attorneys and trial judges.[36]

Capital defendants who have failed to defend themselves or seek leniency at trial and who subsequently receive death sentences often regret their behavior thereafter. They then file appeals or habeas petitions seeking to nullify the convictions and death sentences they had so ardently sought. The possibility of strategic behavior in such cases cannot be altogether ruled out, but the most likely explanation is that medication, counseling, and the passage of time have alleviated the prisoners' acute distress and that they eventually come to prefer life, even with suffering and guilt, over being executed.[37] Moran filed his state habeas petition in July of 1987. Among other claims, he alleged that he had not been competent to waive counsel, or to enter valid guilty pleas in November of 1984 and that, in any event, the trial court had not undertaken a constitutionally adequate inquiry regarding his competence to do so.

B. *Lower Court Ruling and Critique*

After an evidentiary hearing, the state habeas court concluded that Moran had been competent to waive counsel and to enter his guilty pleas, relying exclusively on the reports of the two psychiatrists who had found Moran competent to stand trial in September of 1984. The Nevada Supreme Court affirmed, and Moran then filed

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[35] Richard J. Bonnie, *Dignity of the Condemned*, 74 VA. L. REV. 1363, 1380 (1988).

[36] *Id.*

[37] See, e.g., Richard J. Bonnie, Mental Illness, Severe Emotional Distress and the Death Penalty: Reflections on the Tragic Case of Joe Giarratano, 73 WASH.& LEE. REV. 1445, 1460 (2016).

his federal habeas petition. After relief was denied in the federal district court, the Ninth Circuit reversed, ruling that the state habeas court's finding that Moran had been competent at the time of his plea was not binding because both the examiners and the judge had applied an incorrect legal standard of competence. According to the Ninth Circuit, the legal standard used to determine a defendant's competency to stand trial is different from, and lower than, the standard used to determine competency to waive constitutional rights. A defendant is competent to waive counsel or plead guilty only if he has the capacity for "reasoned choice" among the alternatives available to him. By contrast, a defendant is competent to stand trial if he merely has a rational and factual understanding of the proceedings and is capable of assisting his counsel. Competency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial. The court went on to examine the record and concluded that it could not "support a finding that Moran was mentally capable of the reasoned choice required for a valid waiver of constitutional rights" at the time of his guilty pleas. The state of Nevada asked the Supreme Court to review the case and the Supreme Court agreed to do so in late 1992.

I was not pleased when the Supreme Court chose to review the Ninth Circuit's decision in *Godinez*. It seemed clear to me, as noted above, that the Court had agreed to review the case for the purpose of reversing the Ninth Circuit's decision. As a scholar who had become interested in adjudicative competence only recently (in 1989), I was convinced that the topic was ripe for theoretical exploration as well as empirical investigation, but I also realized that the few decisions in the lower courts on decisional competence had not positioned the case well for Supreme Court review. In addition, the MacArthur Foundation Research Network on Mental Health and the Law—on which I was serving—had just begun an ambitious empirical research program aiming to ascertain how competence inquiries were being conducted in practice and to develop a structured instrument for assessing and measuring competence-related abilities, including decisional capacity. For the Supreme Court to wade into this area was unfortunately premature.

When the Court decided to hear the case, I was working on an article, still in press in *Miami Law Review,* criticizing the Ninth Circuit's decision in *Moran v. Godinez* and pointing the way toward what I still regard as the proper resolution of that case:

> On the facts of this case, the Ninth Circuit's analysis is sound. First, even if Moran was competent to assist counsel (in both September and November), this finding does not suffice to establish that he was competent to waive counsel and plead guilty in November. The latter finding pertains to Moran's decisional competence, a distinct issue. Second, in this context—when a capital defendant waives counsel and enters a guilty plea without (or against) counsel's advice—the criteria for decisional competence must be especially demanding. "Capacity for

reasoned choice among alternatives" provides a sensible formulation of the competence standard in this context.

On the first point, the Supreme Court should explicitly endorse the proposition that "competence" in criminal defense is not a unitary construct. The *Dusky/Drope* test does not encompass the abilities required for competent decision making, and it would be unwise to reformulate the *Dusky/Drope* test so that decision-making abilities are encompassed within a single competence formula. Any criterion of decisional competence used in the unitary test would be too demanding in some contexts and not demanding enough in others.

Efficiency and finality provide the only possible advantages of a unitary test. Yet even these advantages will not likely result because sequential assessment and repeated judicial inquiries would be required under even a unitary test. An analysis of the facts of Moran illustrates the need for sequential assessment. At the time that the doctors evaluated Moran, he and his lawyer had not yet had extensive interactions, and it would have been premature and speculative for these examiners to address Moran's possible competence to waive counsel, to plead guilty, or to make any other decision that might be anticipated. The initial evaluation, which was properly focused on competence to assist counsel, could not have definitively resolved any doubts that might—and in fact did—subsequently arise regarding Moran's competence to make particular decisions regarding his defense or the disposition of the case. This is why decisional competence must be sequentially evaluated, regardless of how the standard is defined. In sum, little would be gained, and much would be lost, by a ruling that "competence" is a single construct, encompassing abilities required to make decisions and waive constitutional rights, as well as the foundational abilities required to assist counsel.

Assuming that decisional competence and competence to assist counsel *are* understood as separate constructs, the further question is whether the criteria for competence to waive counsel and plead guilty (without or against counsel's advice) should be as demanding as the Ninth Circuit has required. If the Supreme Court addresses this question at all, it need only decide that the "reasoned choice" formula applies to the following situations: (a) waiver of counsel and a decision to represent oneself at trial under *Faretta*; (b) waiver of counsel and a decision to enter a guilty plea without advice of counsel; and (c) entry of a guilty plea against advice of counsel. In these situations, the obligations of the trial court and counsel can be clearly stated. Moreover, incompetence does not bar adjudication because default rules are available—if the defendant is not competent to waive counsel, counsel can be provided; if defendant's

> competence to make a "reasoned choice" to plead guilty without or against counsel's advice is doubted, the case can be tried.[38]

The manuscript of this article was quoted in Moran's brief and formally submitted to the Court in support of affirmance.[39] The approach taken in the article was also embraced in amicus briefs filed by the American Psychiatric Association and the American Civil Liberties Union.[40]

C. *Supreme Court Ruling*

Unfortunately, only two Justices (Justices Blackmun and Stevens) agreed with the analysis set forth in my article and in the amicus briefs. Instead, the majority in an opinion by Justice Thomas declared that:

> Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel. While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and 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.[41]

Godinez held that *Dusky* establishes a single standard for assessing competence to plead guilty, waive counsel, or waive other constitutional rights. So, if a defendant (like Moran) has been found to meet the *Dusky* standard, he has already been found to have the requisite competence to waive constitutional rights. To the extent that Moran's argument was that the standard for competence to waive constitutional rights should be "higher" than the *Dusky* standard, the Court said it could see no difference between the requirement of "rational understanding" in *Dusky* and the "reasoned choice" standard articulated by the Ninth Circuit. And even if there is a difference, the Court said, it could see no persuasive reasons why the standard for these decisions should be higher than for other decisions involving exercising or

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[38] *See generally* Bonnie, *A Theoretical Reformulation*, *supra* note 16 (a 1992 article sketching my conceptual approach to adjudicative competence, but not discussing *Moran*. This was also before the Court and was referenced by Justice Blackmun's opinion, *Godinez*, 509 U.S. at 413 (Blackmun, J., dissenting)).

[39] Brief for Respondent at 39, *Godinez v. Moran*, 509 U.S. 389 (1993) (No. 92-725).

[40] Brief for Am. Psychiatric Ass'n as *Amicus Curiae* Supporting Appellee at 16-17, *Godinez v. Moran*, 509 U.S. 389 (1993) (No. 92-725); Brief for Am. Civil Liberties Union as *Amicus Curiae* Supporting Appellee at 20, 33, Godinez v. Moran, 509 U.S. 389 (1993) (No. 92-725).

[41] *Godinez*, 509 U.S. at 402. Justices Kennedy and Scalia were even more emphatic in a separate concurring opinion: "The Due Process Clause does not mandate different standards of competency at various stages of or for different decisions made during criminal proceedings." *Id.* at 404.

waiving constitutional rights that criminal defendants are expected to make in the course of a criminal trial:

> [E]ven assuming that there is some meaningful distinction between the capacity for "reasoned choice" and a "rational understanding" of the proceedings, we reject 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.

The Court continued:

> We begin with the guilty plea. A defendant who stands trial is likely to be presented with choices that entail relinquishment of the same rights that are relinquished by a defendant who pleads guilty: He will ordinarily have to decide whether to waive his "privilege against compulsory self-incrimination," by taking the witness stand; if the option is available, he may have to decide whether to waive his "right to trial by jury," and, in consultation with counsel, he may have to decide whether to waive his "right to confront [his] accusers," by declining to cross-examine witnesses for the prosecution. A defendant who pleads not guilty, moreover, faces still other strategic choices: In consultation with his attorney, he may be called upon to decide, among other things, whether (and how) to put on a defense and whether to raise one or more affirmative defenses. In sum, all criminal defendants—not merely those who plead guilty—may be required to make important decisions once criminal proceedings have been initiated. And while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial. (The decision to plead guilty is also made over a shorter period of time, without the distraction and burden of a trial.) This being so, we can conceive of no basis for demanding a higher level of competence for those defendants who choose to plead guilty. If the *Dusky* standard is adequate for defendants who plead not guilty, it is necessarily adequate for those who plead guilty.[42]

This strikes me as the crucial part of the *Godinez* opinion in that it seems to say that "rational understanding" of the decisions that a defendant may be called on to make is a *Dusky* requirement. In this respect, the Court declared in *Godinez*—for the first time—that decisional competence is already part of the *Dusky* formula.

The Court's reasoning is sound and, in retrospect, I have accordingly retreated from the position that decisional competence should be regarded as an altogether independent construct rather than one that is folded into the *Dusky* formula. I say

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[42] *Id.* at 398-99.

this primarily because encompassing decisional competence within the *Dusky* formula improves routine forensic practice and thereby furthers the values protected by the competence requirement. Specifically, it has invited forensic researchers to operationalize the relevant capacities and develop instruments for measuring them,[43] and has become an accepted component of clinical guidelines for forensic assessment.[44] It has also highlighted the longitudinal dimension of competence assessment, thereby increasing the likelihood that decisional competence is specifically addressed by forensic examiners when it has been become clinically pertinent in a particular case.

That said, folding decisional competence into the *Dusky* formula will not satisfy the demands of due process in all situations. In some cases, a heightened standard of decisional competence should be required. As explained above, one of these situations is when a mentally disturbed defendant waives assistance of counsel and seeks to represent himself and plead guilty. On this aspect of Richard Moran's case, the Supreme Court reached the wrong decision. Immediately following the excerpt quoted above regarding common decision-making tasks in criminal cases, including guilty pleas by defendants represented by counsel, Justice Thomas stated:

> Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights. Respondent suggests that a higher competency standard is necessary because a defendant who represents himself "must have greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney." But this argument has a flawed premise; 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…Thus, while "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation.[45]

Conceptually, this is a very important passage. Justice Thomas is correct in saying that the key question in Moran's case was whether he was competent to choose self-representation, a decision that was inextricably bound up with his decisions to plead guilty and seek a death sentence. In answering that question, was

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[43] NORMAN G. POYTHRESS *ET AL.,* ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES (2002).

[44] Douglas Mossman *et al*., *AAPL Guidelines on Assessment of Competence to Stand Trial*, THE J. OF THE AM. ACAD. OF PSYCH. AND THE L. (2007).

[45] *Godinez*, 509 U.S. at 399–400 (1993) (citation omitted).

it sufficient to find that he had the capacity to understand the legal significance and consequences of his decisions, and that he in fact understood them—i.e., was it sufficient to find that his waiver of his rights was "knowing and intelligent?"[46] If so, folding "competence to understand and waive his rights" into the *Dusky* formula would be an efficient and sensible approach—as long as the defendant's understanding is specifically evaluated at a time within reasonable proximity to the entry of the plea and waiver. However, the Court's reasoning rests on a mistaken premise: Mere understanding is not sufficient to establish decisional competence in this context or, indeed, under *Dusky* itself. Altogether missing from the Court's analysis is any mention of Richard Moran's reasons or motivations for the decisions he was making and whether they were affected by mental illness. In relation to the *Dusky* language, were his decisions grounded in "rational' thinking"? Where, if at all, does the Court's analysis of competence and waiver take into account claims that the defendant's reasons or motivations for the decision to waive the right were grounded in mental illness? Of what legal significance is proof that a defendant lacked a rational understanding of the consequence of his plea (hypothetically due, for example, to a delusional belief that he would be reunited with his deceased mother after serving his time) or that his spiraling depression precluded rational consideration of alternative courses of action?

The evidence in Richard Moran's case suggests that his *decisions were driven by profound despair and were not rooted in reasoned choice*. The waiver colloquy is designed to assure that the defendant understands the consequences of his choices when waiving constitutional rights. But the waiver colloquy does not, by its terms, cover the defendant's *reasons* for making the choice(s) he made. In Moran's case, however, he specifically explained to the judge his remorseful motivation and his desire to receive a death sentence—factors not relevant to the legal test for a valid waiver. However, these factors are possibly relevant to his "competence" to make the decisions he made, especially if they were rooted in severe mental illness (delusional thinking) or a profound suicidal depression. In this respect, a court might

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[46] The court in *Godinez* properly emphasizes that the validity of the waiver of constitutional rights is an independent inquiry—i.e., separate from the competence inquiry:

> A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. In this sense there *is* a "heightened" standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of *competence*…[W]hen a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted.

Id. at 400–02 (citation omitted). As discussed in the text, the waiver inquiry is important because it focuses on the defendant's actual understanding of the nature and consequences of his decisions, but it does not address the reasons for his decisions except insofar as those reasons suggest such coercion or other external influence that should render the waiver involuntary. However, reasons or motivations grounded in mental illness do not negate the voluntariness of the waiver. *See generally*, Colorado v. Connelly, 479 U.S. 157 (1986). They must be considered, if at all, in connection with the "competence" inquiry—which, under *Godinez*, is governed by the *Dusky* test.

sensibly rule that he lacked capacity to make a reasoned choice (or even a "rational" one)—especially if the defendant's mental illness were treatable. The problem in Moran's case was that he was permitted to waive all his constitutional protections, including representation by counsel, during the throes of acute emotional distress four months after his arrest.[47]

D. *Summary*

In *Godinez,* the Court declared that adjudicative competence, as defined in the *Dusky* formula, is a unitary construct that encompasses abilities required for assisting counsel and for making decisions. Once it is clear that decision-making is included in the formula, it is necessary to understand *Dusky*'s requirement of a "rational understanding" of the proceedings to mean a "rational understanding" of the nature and consequences of the decisions the defendant is expected to make during the course of the proceedings. When the Court decided *Godinez*, the MacArthur Research Network on Mental Health Law was in the process of conceptualizing the abilities required for adjudicative competence and developing measures for assessing them. In the wake of the decision in *Godinez*, the Network decided to use a hypothetical guilty plea as the context for assessing the cognitive abilities needed to understand the legal effects of a guilty plea and to rationally decide ("reason about") whether or not to plead guilty.[48] Presumably, if these cognitive abilities are unimpaired in a forensic interview focused on a hypothetical guilty plea, the defendant is likely to have the requisite capacity to make most decisions that he will be called on to make in the criminal proceeding.

However, a general assessment of cognitive decision-making abilities in a routine pretrial competence examination will not be sufficient in cases where a defendant's generally intact cognitive understanding and logical reasoning abilities are distorted by delusional beliefs or affective factors that impair their ability to

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[47] It is not possible to say, based on the existing record, whether Moran was able to make a "reasoned choice among alternatives" in November of 1984. Even if the right questions had been asked at that time, the trial court might have concluded that he had rational, coherent reasons for deciding not to contest his guilt or seek leniency (he felt guilty and remorseful); that he was able, notwithstanding his acute depressive symptoms, to understand the possible consequences of these decisions and the arguments against them (including the possibility of later regret); and that he was able to weigh these considerations in a reasoned manner. Obviously, the mere fact that Moran regretted his decision three years later does not demonstrate that he lacked competence to make a reasoned choice in November of 1984. On the other hand, a contemporaneous clinical investigation of his mental and emotional state conceivably could have raised a reasonable suspicion that his decision to capitulate was anchored in transient emotional distress and unresolved conflict. Under these circumstances, therapeutic intervention might have helped to resolve the problem relatively quickly. Years later, there is simply no way of knowing. This further indicates why the decisional competence of a defendant who insists on waiving counsel and pleading guilty—and in a death penalty case, foregoing presentation of a case in mitigation—should be fully explored as early as possible in the trial court. If the issue is ignored in the trial court, it is likely to receive—and should receive—critical attention in federal habeas proceedings.

[48] *See, e.g.*, POYTHRESS *ET AL.*, *supra* note 43 at 103

"appreciate" the meaning or consequences of the decision, or its risks and benefits, in their own situation. Some impairments of "appreciation" may infect the defendant's global understanding of the nature and seriousness of the jeopardy to which he is exposed, or the defendant's relationship with counsel. In those cases, the problems will be apparent early in the process and the defendant will likely be found incompetent to stand trial, lacking a "rational" understanding of the process or of his legal jeopardy. In other contexts, however, the deficit may not manifest itself until it affects a particular decision that arises as the case unfolds, precipitating an "autonomy fight" between the client and counsel and leading the defense attorney to seek a competence assessment much later in the proceedings. In many such situations, the defendant's decisional competence may be the only ground for the competence assessment and adjudication. In these cases, the defendant's "appreciation" of the nature and consequences of a particular decision—or his "rational understanding" of it, to use the *Dusky* language—has to be assessed in the context of the specific decision in which the question actually arises, as it did in Richard Moran's case.

By broadening the *Dusky* formula to encompass decisional capacity, *Godinez* made a valuable contribution to the development of legal principles governing competence assessment and adjudication, both conceptually and in the practice of forensic assessment. While the Court assumed, without evidence, that decision-making abilities are encompassed within routine forensic assessment, that assumption was probably not an accurate description of routine practice at the time. However, forensic practice has changed since 1993, largely in response to the path-breaking work of the MacArthur Foundation Research Network on Mental Health and the Law, which was grounded in the *Godinez* Court's reinterpretation of the meaning of *Dusky*. Unfortunately, the Supreme Court never specifically addressed the motivational and affective dimensions of Moran's decision-making and ruled, mistakenly, that the *Dusky* formula is legally sufficient in all contexts. Correcting this mistake by the *Godinez* majority remains unfinished business in the law of adjudicative competence.

Specifically, the Court's decision in *Godinez* v. *Moran* left many questions unresolved about decisional competence and the legal sufficiency of the *Dusky* test. First, *Godinez* does not, by its terms, apply to a case where a defendant seeks to exercise his right under *Faretta* to represent himself at trial. Indeed, as discussed in Section IV below, the Court subsequently ruled, in *Indiana v. Edwards* (2008), that a defendant who is competent under *Dusky* and *Godinez* to waive his right to counsel may nonetheless be found incompetent to represent himself at trial. In those cases, at least, the competence standard is more demanding than the test set forth in *Dusky*.[49]

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[49] The recently promulgated 2016 Criminal Justice Mental Health Standards of the American Bar Association reflect this general point of view. CRIM. JUST. STANDARDS ON MENTAL HEALTH 7-5.2 (AM. BAR ASS'N 2016), discussed at *infra* notes 74–82.

Second, the *Godinez* decision stated clearly that the *Dusky* test sets a constitutional floor, and that states are free to adopt a more demanding standard of competence for making certain decisions, especially waiver of counsel. However, *Godinez* by its own terms does not identify or address other decisions that lie within the defendant's sphere of control, such as deciding whether to plead insanity[50] or whether to introduce mitigating evidence in a capital case.[51] As the law continues to develop, I expect an increasing number of state courts to rule that the *Dusky* test is not sufficient for a finding of decisional competence when the defendant chooses to waive counsel, represent himself at trial, or otherwise override or sabotage counsel's fundamental strategic decisions about defense of the case.

III. A CRITIQUE OF *EDWARDS V. INDIANA*

In July 1999, Ahmad Edwards tried to steal a pair of shoes from an Indiana department store. After he was discovered, he drew a gun, fired at a store security officer, and wounded a bystander. He was charged with attempted murder, battery with a deadly weapon, criminal recklessness, and theft. Due to ongoing concerns about his competence, he did not come to trial until June 2005, six years after his arrest.

Just before trial, Edwards requested the court to allow him to proceed pro se. The trial judge, it seems, found that Edwards knowingly and intelligently waived his right to counsel. However, Edwards withdrew his request after he was denied a continuance, and he was then tried while represented by counsel. The jury convicted him of criminal recklessness and theft but failed to reach a verdict on the charges of attempted murder and battery. The state subsequently retried him on the attempted murder and battery charges. On August 3, Edwards again asked the court to permit him to represent himself, and his attorney moved to withdraw. The trial court granted counsel's motion to withdraw and appointed new counsel. However, on August 31, Edwards moved once again to proceed pro se. The trial court referred to the substantial record of psychiatric reports and observed that Edwards still suffered from schizophrenia. The court concluded that "[w]ith these findings, he's competent to stand trial but I'm not going to find he's competent to defend himself," and accordingly denied Edwards' request for self-representation.[52] At the retrial, the jury convicted him on both of the remaining counts.

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[50] *See* Bonnie, *A Theoretical Reformulation*, *supra* note 16, at 308–10. *See* particularly, Frendak v. United States, 408 A.2d 364 (D.C. 1979) (a defendant who is competent to plead guilty and competent to be tried on a not guilty plea may not be competent to decide not to invoke the insanity defense).

[51] Richard J. Bonnie, *Dignity of the Condemned*, 74 VA. L. REV. 1363, 1380 (1988).

[52] Indiana v. Edwards, 554 U.S. 164, 170 (2008). The court implicitly found that Edwards knowingly and voluntarily waived his right to counsel before denying his *Faretta* motion.

Edwards appealed to Indiana's intermediate appellate court, arguing that the trial court's refusal to permit him to represent himself at his retrial deprived him of his constitutional right of self-representation under *Faretta*. The court of appeals agreed and ordered a new trial. The Indiana Supreme Court reluctantly affirmed this ruling, holding that *Faretta* and *Godinez*, taken together, left them no choice. Under the ruling in *Godinez*, the court reasoned, if Edwards was competent to stand trial under *Dusky*, he was also competent to waive his right to counsel and to invoke his right under *Faretta* to represent himself. In a 7–2 decision in *Indiana v. Edwards*, the U.S. Supreme Court reversed, holding that Edwards did not have a constitutional right to represent himself at trial.

Justice Breyer's majority opinion and Justice Scalia's dissenting opinion provide a rich opportunity to explore the logic of autonomy in criminal adjudication and its implications for the competence requirement. Two questions warrant attention:

1. Does either of these precedents (*Godinez* and *Faretta*) control the outcome in *Edwards*, thereby vindicating his right to represent himself, as the Indiana courts and Justice Scalia thought? The answer is that the Supreme Court's ruling—that Edwards was *not* entitled to represent himself—is consistent with the holdings and reasoning of both *Godinez* and *Faretta*.

2. What is the proper test for competence for self-representation at trial? The answer is that the Court specifically declined to prescribe one and left the matter open for further judicial development in case-by-case adjudication.

A. *What Does* Godinez *Require or Permit?*

The hornbook summary of the law after *Godinez* seemed to be that "competence" for criminal adjudication is governed solely by the *Dusky* test. One could read *Godinez* to declare that the *Dusky* test applies to all stages of a criminal proceeding and to all decisions. However, as Justice Breyer correctly observed in *Edwards*, the standard for competence to represent oneself at trial was not before the Court in *Godinez*. Richard Moran did not want to represent himself at trial. Instead, he waived representation by counsel in order to plead guilty. Indeed, his sole objective in waiving his right to counsel was to waive his right to a trial—on proof of guilt as well as proof of the facts necessary to justify a death sentence.

It is also important to remember that Justice Thomas's opinion for the Court in *Godinez* acknowledged the states' prerogative to adopt a more demanding standard than *Dusky* for particular purposes (e.g., guilty pleas or waivers of counsel), thereby allowing the states to provide greater protection than is required by the Due Process Clause to defendants with deficits related to mental disorder.[53] If this is so, why does the state of Indiana not have the authority to make the standard of competence for self-representation as high as it wants? The answer is that allowing a state to raise the bar too high would nullify the *Faretta* right itself. This principle is not contested

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[53] *Godinez*, 509 U.S. at 391–402.

by anyone who accepts *Faretta*.[54] The question raised in *Edwards* is simply what "competence" means in this particular context. The argument put forth on behalf of Ahmad Edwards is that *Dusky* (as explicated in *Godinez*) sets the correct threshold for establishing competence for self-representation under *Faretta*. Justice Breyer's majority opinion correctly rejected this argument, while Justice Scalia's dissent embraced it.

B. *Does Self-Representation at Trial Require a Different Competence Standard?*

Self-representation at trial clearly poses different, and more substantial, challenges for criminal defendants than proceeding to trial while represented by counsel or pleading guilty without counsel. But the question is whether self-representation is sufficiently different to warrant a different (and possibly "higher") standard of competence in the face of the Court's preference, stated so clearly in *Godinez,* for a single competence standard. Why is a standard different from *Dusky* warranted in the context of self-representation?

The efficiency argument against proliferation of competence tests—which a majority of the Court had found so persuasive in *Godinez*—does not seem persuasive in the context of self-representation. The rate of requests for self-representation is low, especially in felony cases.[55] So the question is whether any of the values at stake in either *Dusky* or *Faretta* would be served by allowing Edwards to represent himself. Writing for a substantial majority of the Court in *Edwards,* Justice Breyer correctly concluded that allowing self-representation by marginally competent defendants who satisfy the *Dusky* standard would undermine both the accuracy and integrity of the judicial process.

The *Dusky* formula, in its modern context, focuses on the capacities needed by the defendant to enable counsel to provide effective representation. Self-representation at trial is an entirely different legal context requiring different capabilities. With that point established, Justice Breyer goes on, quite properly, to point out that standards of competence for legal purposes are meant to be functional

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[54] In its effort to defend the trial judge's ruling denying Edwards' request to proceed to trial *pro se*, Indiana asked the Court to overrule *Faretta*. The Court declined to do so:

> We recognize that judges have sometimes expressed concern that *Faretta*, contrary to its intent, has led to trials that are unfair. But recent empirical research suggests that such instances are not common…At the same time, instances in which the trial's fairness is in doubt may well be concentrated in the 20 percent or so of self-representation cases where the mental competence of the defendant is also at issue. If so, today's opinion, assuring trial judges the authority to deal appropriately with cases in the latter category, may well alleviate those fair trial concerns.

Edwards, 554 U.S. at 178 (citation omitted). Like every autonomy-affirming right, the right to represent oneself is subject to a competence limitation. The ruling in *Indiana* v. *Edwards* is nothing more than a tentative refinement of what it means for a severely mentally ill defendant to be competent in this specific context.

[55] *See* Erica J. Hashimoto, *Defending the Right of Self Representation: An Empirical Look at the Pro Se Defendant*, 85 N.C. L. REV. 423 (2007).

and are highly dependent on the nature of the tasks that are required in particular legal contexts:

> [T]he nature of the problem before us cautions against 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. Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways. The history of this case . . . illustrates the complexity of the problem. In certain instances 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.[56]

Here Justice Breyer refers to the MacArthur Research Network's studies and the Network's effort to operationalize and measure the relevant abilities, specifically referring to the distinction drawn by this author and the MacArthur Research Network between competence to assist counsel and decisional competence.[57] Based on this reasoning, Justice Breyer continued:

> [We] . . . 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.[58]

The fundamental intuition underlying the majority opinion in *Edwards* is that the fairness and integrity of the proceedings are threatened by allowing defendants with serious mental illness to represent themselves based simply on a finding that they are competent to assist counsel under the *Dusky* standard:

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[56] *Edwards*, 554 U.S. at 174–76 (citation omitted).

[57] *See, e.g.*, POYTHRESS *ET AL.*, *supra* note 43, at 103 ("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…").

[58] *Edwards*, 554 U.S. at 177–78 (citation omitted).

> [I]nsofar 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 . . . .
> Further, proceedings must not only be fair, they must "appear fair to all who observe them." . . . The application of *Dusky's* basic mental competence standard can help in part to avoid this result. But given the different capacities needed to proceed to trial without counsel, there is little reason to believe that *Dusky* alone is sufficient.[59]

In short, Justice Breyer says, allowing pro se representation by a defendant who is marginally competent to stand trial would present a substantial risk of undermining the accuracy and integrity of the criminal process.[60] Surely the defendant who is unable to carry out these tasks is running a higher risk of a legally erroneous outcome than one who is able to carry them out. The proceedings are less likely to be fair—and, as Justice Breyer observed, they are less likely to be perceived as fair—because they would lack even the minimum requirements of procedural regularity and orderly deliberation that *Dusky* itself seeks to assure through effective representation by counsel for a client capable of providing assistance. Accordingly, the trial court's finding that Edwards was competent to stand trial while represented by counsel was not sufficient to demonstrate that he was competent to represent himself at trial.

How could anyone think otherwise? Importantly, Justice Scalia doesn't seem to contest or dispute Justice Breyer's concerns about fairness and integrity of the process. Instead, his answer is, quite baldly, that respect for the defendant's autonomy overrides these otherwise compelling concerns about fairness that the competence requirement aims to protect. It is up to the admittedly mentally ill defendant to decide what is "fair" (to him) when he decides to invoke *Faretta*.

C. *What Does* Faretta *Require?*

Does Justice Scalia's account of "autonomy" in *Edwards* reflect a proper understanding of *Faretta*? Justice Stewart's opinion for a closely divided Court in *Faretta* explicitly privileges autonomy—"the lifeblood of the law"—over the "objective" fairness of the proceedings or the reliability of the outcome.[61] The Court acknowledges that a defendant who chooses to go it alone runs a greater risk of an

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[59] *Id.* at 176–77 (citation omitted).

[60] To illustrate these concerns about the accuracy and integrity of the judicial process, Justice Breyer referred to incoherent and confused motions and documents that Edwards had prepared in the case and appended one of them to the Court's opinion. *Id.* at 176, 179. Justice Scalia observed, in response, that Edwards' condition fluctuated over the course of the proceedings and that he also filed several intelligible pleadings and motions. *Id.* at 181.

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

unfair conviction simply because he lacks the technical skill and knowledge of a lawyer:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts…When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."[62]

Faretta stands clearly and unambiguously for the ennobling proposition that the well-informed and mentally competent defendant is entitled to stand up against the power of the state, whatever the risk to life or liberty, if they choose to do so:

> To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, 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. The right to defend is personal. The defendant, and not his lawyer or the state, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."[63]

Let us assume that Ahmad Edwards, though properly diagnosed with a serious mental illness (a "gray area" or borderline case under *Dusky* in Justice Breyer's words), nonetheless had the ability to understand the risks of self-representation. Let us further assume that he chose, after rational deliberation, to proceed pro se, and was therefore competent to waive his right to counsel, as the trial court appears to

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[62] *Id*. at 834–35 (citations omitted).

[63] *Id*. at 834 (citing *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970)). I assume here that Edwards was properly found to be competent to waive counsel. However, I argue below that the heightened stakes of self-representation should require a more exacting inquiry regarding the defendant's decisional capacity to waive representation by counsel than the Court required in *Godinez*. But even if *Godinez*'s waiver holding is thought to govern, a state may require a more demanding test for waiver than the Court required in *Godinez* and, in any case, a specific finding of a valid waiver was never made.

have found. Justice Scalia insists that trial judges who deny *Faretta* motions in such cases would be substituting their own perceptions about what is "fair" for the defendant's own judgment. He says that the defendant has the right not only to make a fool of himself but also to make an "incoherent defense." What is at stake, Scalia insists, is the "supreme human dignity of being master of one's fate rather than a ward of the state—the dignity of individual choice."[64]

Justice Scalia's stirring endorsement of autonomy begs the underlying question. What are the capacities that are prerequisite to genuine "autonomy"? I presume that even Justice Scalia would admit that there is *some* floor of minimum performance capacity needed to exercise one's *Faretta* right. The only question is where that minimum level of capacity should be set, and the answer to that question should take into account all the interests at stake, not only the right to be master of one's fate. Why assume that *Dusky* draws the proper line in *this* context?

Specifically, does a legally valid waiver of counsel by a *Dusky*-competent defendant erase all valid concerns about the defendant's appreciation of the consequences of his choice? What if a defendant fully understands the risks of self-representation in the abstract but does not appreciate the incoherence of his own advocacy, as may have been true of Ahmad Edwards? What if his reality testing is intact at the time of the waiver colloquy, but frays and deteriorates under the stress of the trial? The waiver colloquy provides only a snapshot of the defendant's capacities and does not take into account the longitudinal demands of self-representation. In short, the defendant may not be the best judge of what is "fair" to him *due to the symptoms of his mental illness.*

Another important consideration is the society's independent interest in the integrity of the judicial process. Perhaps the most disturbing scenario is self-representation by a defendant whose defense is demonstrably grounded in delusional thinking. One vivid example is Colin Ferguson, whose cross-examination of witnesses and direct examination of himself in his trial for killings of passengers on the Long Island Railroad in 1994 was a bizarre spectacle that surely brought tears to the blindfolded eyes of the Maiden of Justice.[65] Is the society's independent interest in the integrity and reliability of the adjudication process no longer relevant at all once a defendant "intelligently" waives his right to counsel? Even a fully competent defendant is not permitted to plead guilty without a factual foundation for the plea. Nor may a fully competent defendant convicted of a capital crime stipulate to the

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[64] *Edwards*, 554 U.S. at 186–87. Justice Breyer argued:

> [I]n our view, a right of 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…To the contrary, 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.

Id. at 176 (citation omitted). I agree. *Faretta* affirms the dignity of choice and control but respecting the choice of a seriously mentally incapacitated person is an affront to human dignity, not an affirmation of it.

[65] Richard J. Bonnie, Ferguson *Spectacle Demeaned System*, 17 NAT'L L. J., March 13, 1995 at A23-24.

existence of the statutory predicates for a death sentence or waive the right to appellate review of the validity of a death sentence. All of these rules show that even though "autonomy is the lifeblood of the law," it is not absolute and does not trump the basic integrity of the criminal process.

The decision in *Edwards* does not invite trial judges to eviscerate *Faretta*. Nor does it liberate them to override the prerogative of headstrong and misguided defendants who are in a tug of war with counsel or the court and foolishly exercise their *Faretta* rights to show who is in charge. There is no slippery slope here. *Edwards* does not represent a retreat from *Faretta* any more than treatment of a grossly psychotic person over their objection represents disrespect for a competent person's right to refuse unwanted medical treatment.

Justice Scalia chastises the Court for "singling out mentally ill defendants" for the special treatment of being denied their right to stand up for themselves, noting somewhat snidely that doing so lacks "the questionable virtue of being politically correct." He claims that the majority's holding in *Edwards* discriminates against people with mental illness. Admittedly, mental health law may occasionally lean too heavily toward paternalism. I would argue most emphatically, however, that *Edwards* is not such a case. The narrow issue raised in *Edwards* is what competence for self-representation in a judicial proceeding means in the context of a severely mentally ill person who is marginally competent to stand trial at all, even with assistance of counsel. The nub of the matter is that Ahmad Edwards is, in Justice Breyer's phrase, a "gray-area" defendant. He is severely mentally ill, and the authority of trial judges recognized in *Edwards* is narrowly focused on defendants who are marginally competent for adjudication to begin with.

Faretta itself embraces the overriding importance of respecting human dignity—the prerogative of a free person to stand up to the state, with all of its power, insisting that justice be done. But allowing a severely mentally ill person who is confused, disorganized, and possibly delusional to represent himself in a criminal trial where his liberty, and maybe even his life, may be in jeopardy is an affront to the dignity of the defendant himself and to the integrity of the criminal process.

D. *What Does Competence for Self-Representation Mean?*

What, then, does the Court mean by "competence to represent oneself at trial"? The tasks that a pro se defendant is expected to perform at a trial are more demanding than the tasks required of a defendant who is observing, and perhaps assisting, an attorney performing these tasks. What capacities are required to carry out these tasks in a manner that respects the defendant's autonomy without compromising the integrity of the judicial process? The Court declines to address this question in any depth, leaving further elaboration to forensic witnesses and the lower courts:

> Indiana has also asked us to adopt, as a measure of a defendant's ability to conduct a trial, a more specific standard that would "deny a criminal defendant the right to represent himself at trial where the defendant cannot

> communicate coherently with the court or a jury." We are sufficiently uncertain, however, as to how that particular standard would work in practice to refrain from endorsing it as a federal constitutional standard here. We need not now, and we do not, adopt it.[66]

Although the Court declined to try to develop competence criteria for self-representation at trial, some essential factors seem self-evident. Competence for self-representation is rooted in attentional and decisional capacities needed to formulate and present the defense, tasks that otherwise would be carried out by counsel. At a minimum, the defendant needs cognitive capacities to sustain attention and to maintain mental coherence (including the capacity for logical thinking) over the course of a trial, not only at a given moment.[67] The capacity to sustain attention and mental coherence bears on all the moment-to-moment decisions that the defendant needs to make, as well on the capacity to present arguments in support of their positions. This would be especially difficult for many marginally competent defendants (in the "gray zone") like Edwards, under the stresses of a trial, when the accompanying anxiety can be expected to make it more difficult for such a defendant to sustain attention and to maintain mental and emotional equilibrium (i.e., to "hold it together").

I want to emphasize that I am referring to cognitive and emotional capacities, not knowledge or technical sophistication. *Faretta* made it clear that the defendant is entitled to represent himself despite the lack of technical knowledge and skill as long as he understands that he lacks technical knowledge and skill. However, at a minimum, the defendant needs the capacity to pay ongoing attention to what is happening in the courtroom and to maintain orderly mental operations. This longitudinal feature distinguishes the task of self-representation at trial from the tasks needed to assist counsel before trial (counsel can postpone important conversations if the defendant is confused, distracted, or distraught). A defendant proceeding pro se at trial must be "on alert" continuously in order "to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury…"[68] all of which he is entitled to do under *Faretta*. None of this is necessary for the represented defendant, whose active consultation or participation in decision making may not be needed most of the time.

It is also important to emphasize that the core abilities needed for self-representation relate to formulating and controlling the defense, not necessarily to

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

[67] *See* Brief for the Am. Psychiatric Ass'n and Am. Academy of Psychiatry & the Law as *Amici Curiae* in Support of Neither Party at 26, Indiana v. Edwards, 554 U.S. 164 (2008) (No. 07-208) (observing that "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses 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.").

[68] McKaskle v. Wiggins, 465 U.S. 168, 174 (1984).

conducting the defense. As Professor Lea Johnston has shown, Indiana's proposed focus on the ability to communicate coherently is a bit off the mark because many defendants with communication disabilities can make the decisions needed to instruct stand-by counsel or hybrid counsel. The pro se defendant requires sufficient communication abilities to communicate with the court or with standby or hybrid counsel, to enable that person to communicate the defendant's wishes or positions to the court.[69]

E. *The Missing Piece: Decisional Competence*

One of the problems underlying counsel's repeated requests for competence assessment of Ahmad Edwards appears to have been a disagreement about the basic theory of defense to the attempted murder charge. The attorney's proposed line of defense was that Edwards lacked the intent to kill required for attempted murder, while Edwards apparently preferred to raise a defense that would avoid criminal conviction and imprisonment altogether. When Edwards sought unsuccessfully to proceed *pro se* in his first trial, he apparently wanted to raise an insanity defense. In his second trial, he wanted to claim self-defense. Who controls the defense in these situations—the client or the attorney?

Some professional canons aiming to provide ethical guidance in allocating authority between client and counsel in criminal defense proclaim that decisions about the "objectives of representation" are reserved for the client.[70] If that had been the governing rule in Indiana, the trial court's ruling that Edwards was competent to stand trial would have bound the defense attorney to follow Edwards' instructions at trial, whether or not it was a plausible defense.[71] However, because the decision is apparently counsel's to make under Indiana ethics rules, Edwards decided to take the only course then remaining to him to assert his autonomy—waiving counsel and seeking to represent himself. When the case is seen in that light, the underlying controversy in *Edwards* relates to the limits of client autonomy in criminal defense.

It has become clear in recent years that an attorney is not permitted to raise an insanity defense over a competent defendant's objection.[72] However, attorneys are probably not obligated to pursue an insanity defense simply because the defendant

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[69] *See, e.g.*, E. Lea Johnston, *Communication and Competence for Self-Representation*, 84 FORDHAM L. REV. 2121 (2016); E. Lea Johnston, *Representational Competence: Defining the Limits of the Right to Self-Representation at Trial*, 86 NOTRE DAME L. REV. 523 (2011).

[70] MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2017).

[71] One can rightly wonder whether the trial court would have found Edwards to be competent if this had been the legal effect of doing so.

[72] If the defendant is not *Dusk*y-competent, the case cannot proceed. If the defendant is competent (however defined), then the defense may not be raised over his objection. Possible important issues are what "competent" means in this context, and whether a *Dusky*-competent defendant is necessarily competent to preclude what the attorney believes to be a valid insanity plea. Most courts would probably rule, citing *Godinez*, that a *Dusky*-competent defendant may preclude an insanity defense.

wants to do so. If, as in *Edwards*, the attorney is not willing to raise what she regards as an unsupported or imprudent defense, the dissatisfied defendant's only option is to invoke *Faretta*. In sum, if the defendant wants to go to trial, the attorney is in charge except for a few decisions that must be made personally by the defendant—e.g., whether or not to plead guilty, waive a jury trial, testify, or concede commission of a material element of the offense charged.[73] Setting those decisions to one side, a defendant who wants to be in charge of trial strategy and tactics must yield to the attorney unless he represents himself. *Faretta* is the defendant's trump card in resolving autonomy fights in criminal defense.

Against this backdrop, the practical significance of *Edwards* comes into clearer view. One way of understanding the legal effect of the Supreme Court's ruling is that it shifts the default rule in client-counsel autonomy fights from the defendant to the attorney in a small class of cases involving defendants with substantial mental or emotional impairments who are nonetheless *Dusky*-competent. If the trial court finds that the defendant is not "competent to proceed pro se to trial," the defense attorney will have the firm legal prerogative to make all decisions that are not by law reserved to the defendant. From this perspective, an implicit consideration in "competence" for self-representation is whether the defendant has the capacity to make rational, self-interested decisions in defending the case. In other words, concerns about decisional competence are likely to be a key consideration in the assessment of competence for self-representation. *Edwards* is a case in point.[74]

IV. BEYOND *GODINEZ* AND *EDWARDS*: THE 2016 AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS OF MENTAL HEALTH

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[73] *See* McCoy v. Louisiana, 138 S. Ct. 1500 (2018) (conviction of capital murder and accompanying death sentence set aside because defense attorney acknowledged defendant's guilt of killing victims over defendant's persistent objections). McCoy and his lawyer were in a tug of war about whether to concede commission of the killings, leading the attorney to repeatedly claim that his client was mentally disturbed. However, McCoy had been found competent to stand trial and, when push came to shove on the eve of trial, the trial judge rejected McCoy's request to represent himself.

[74] An alternative rationale for the result reached in *Indiana v. Edwards* is that he lacked capacity to make a reasoned choice or was unable to appreciate the consequences of the decision to waive counsel and proceed on the basis of self-defense. As the case was framed by the trial court ruling, Edwards was found to be *Dusky*-competent and to have understood the consequences of waiving his right to counsel. However, the trial court did not inquire into his reasons for waiving counsel, and particularly the basis for the disagreement about the main line of defense, presumably because *Godinez* does not require such an inquiry. As argued above, *Godinez* was wrongly decided on this point. Waiver of counsel to plead guilty or to go it alone at trial should not be allowed by the courts unless the defendant is capable of making a reasoned, self-interested decision unimpaired by serious psychopathology. Although the record is not clear about Edwards' decisional capacity, it does seem possible that his motivation for pursuing a self-defense claim was rooted in delusional or magical thinking and that he may have lacked the requisite decisional competence under the proper standard. *See* Christopher Slobogin, *Mental Illness and Self-Representation: Faretta, Godinez and Edwards*, 7 OHIO STATE J. CRIM. L. 391 (2009). It is noteworthy that Professor Slobogin sided with Justice Scalia rather than Justice Breyer and the majority on the issue that was actually decided in *Edwards*.

The law governing adjudicative competence in the United States remains somewhat unsettled—and in transition—in the wake of the Supreme Court's decisions in *Godinez v. Moran* and *Indiana v. Edwards*. It is important to recognize that each of these decisions left the state courts wide latitude to develop principles and procedures governing assessment and adjudication of fitness to proceed, and particularly relating to decisional competence. While holding in *Godinez* that the federal Constitution did not require states to apply an elevated standard for pleas of guilty or waiver of counsel, the Supreme Court left states free to do so. Similarly, *Edwards* allowed states to raise the bar beyond *Dusky* for establishing competence for self-representation at trial, but did not require them to do so. In areas where such flexibility is allowed, "expert" professional bodies play an important role in formulating authoritative guidelines and standards for courts, prosecutors, law enforcement agencies, and the defense bar. One such non-judicial standard-setting body is the American Bar Association (ABA), acting through its highly influential Standards for Criminal Justice.

The first edition of ABA Criminal Justice Mental Health Standards, approved by the ABA in 1984, was drafted by seven multi-disciplinary task forces with funding from the MacArthur Foundation.[75] These Standards, now called the Criminal Justice Standards on Mental Health, were recently revised and updated by a twelve-member interdisciplinary task force and were officially approved by the ABA in August 2016.[76] One important contribution of the revised Standards is to specify criteria and procedures relating to assessment and adjudication of decisional competence. The Standards codify the *Dusky* criteria for "competence to proceed" when the defendant is represented by counsel[77] and specify a contextualized version of *Dusky* for guilty pleas.[78] However, the Standards recognize explicitly that "special competence issues arise when defense counsel has good faith doubts about the defendant's ability to make significant decisions" in the case and when "the defendant wants to proceed *pro se*."[79] Standard 7-5.2(c) provides:

> If the defense attorney has a good faith doubt concerning the defendant's competence to make decisions within the defendant's sphere of control . . . the defense attorney may make a motion to determine the defendant's competence to proceed . . . even if the defendant has previously been found competent to proceed in the case. Upon such motion, the court should order a mental health evaluation, if necessary . . . and indicate the specific decisional issue in question. If, after a hearing, the court finds the

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[75] ABA CRIM. JUST. MENTAL HEALTH STANDARDS (AM. BAR ASS'N, 1986). The author was a member of the executive advisory committee for the development of the Standards.

[76] CRIM. JUST. STANDARDS ON MENTAL HEALTH (AM. BAR ASS'N 2016). The author served on the Task Force.

[77] *Id.* Standard 7-4.1(b).

[78] *Id.* Standard 7-4.2(a)(ii).

[79] *Id.* Standard 7-5.1(a).

> defendant competent to proceed, defense counsel should follow the defendant's direction on matters within the defendant's sphere of control. If the defendant is found incompetent, the court should order treatment . . . .[80]

Decisions within the defendant's sphere of control include decisions to plead guilty; assert an insanity defense; and waive the rights to jury trial, testify, and appeal, but may include others that governing legal rules or ethical principles allocate to the defendant. The test for determining whether the defendant is competent to make a decision regarding control and direction of the case is "whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the nature and consequences of the decision or decisions under consideration." As discussed above, "rational understanding" of the consequences of a decision should be understood to encompass deficits in weighing the benefits and risks or pros and cons of a decision attributable to either cognitive or affective impairments.

Standard 7-5.3 addresses the two facets of the problem that were intertwined in *Edwards*—competence to decide whether to waive counsel and proceed pro se; and, assuming the defendant is decisionally competent, competence to carry out the tasks of self-representation.[81] First, under subsection 7-5.3(b), the test for determining competence to elect to proceed without representation by counsel includes three elements—(i) being competent to proceed under the general *Dusky* standard; (ii) understanding the consequences of doing so ("has a rational and factual understanding of the possible consequences of proceeding without legal representation, including difficulties the defendant may experience due to his or her mental or emotional condition or lack of knowledge about the legal process") and (iii) being able to make a rational choice ("the ability to make a voluntary, knowing, and rational decision to waive representation by counsel").[82] Taken together, components (ii) and (iii) establish an elevated standard of decisional competence. As noted above, Ahmad Edwards may not have been competent to elect to proceed pro se under this standard.

Secondly, subsection 7-5.3(d) addresses the issue actually decided in *Edwards*—competence to represent oneself. Even if the defendant is "competent to elect to proceed without representation by counsel," the court may deny his or her request for self-representation upon finding that, as a result of mental disorder, "the defendant lacks the capacity to carry out the minimum tasks required for self-representation at trial to such a substantial extent as to compromise the dignity or fairness of the proceeding."[83] Following the lead of the Supreme Court, the drafters

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[80] *Id.* Standard 7-5.2(c).

[81] *Id.* Standard 7-5.3.

[82] *Id.* Standard 7-5.3(b).

[83] *Id.* Standard 7-5.3(d).

of the ABA Standards decided not to attempt to formulate criteria for competence for self-representation.

The ABA Criminal Justice Standards on Mental Health have made an important contribution by clarifying the independent significance of decisional competence and providing a conceptual roadmap of the intersecting issues of competence to proceed, waiver, and decisional competence. The Standards take the law on a sound path beyond the decisions in *Godinez* and *Edwards*, while being fully compatible with them. The Supreme Court should follow this path.

APPENDIX
ELEMENTS OF COMPETENCE FOR CRIMINAL ADJUDICATION

Competence-Related Ability	**Original *Dusky* Language* (Competence to proceed and assist counsel)**	**Implications of *Godinez* v. *Moran*** when Capacity for Decision- Making is in Doubt**
Understanding	"Factual understanding of proceedings"	Capacity to understand nature and consequences of a specific decision [within defendant's prerogative]
Appreciation	"Rational understanding of proceedings"	Rational understanding (appreciation) of the nature and consequences of a specific decision
Reasoning	Capacity to "consult with lawyer with reasonable degree of rational understanding" [logically]	Capacity to reason logically about required decisions [and ability to make a choice]

* Refers explicitly to competence to proceed or assist counsel (the foundational component of adjudicative competence) in the Bonnie/MacArthur Network vocabulary.

** Refers to decisional competence in the Bonnie/McArthur Network vocabulary.

EXPLANATORY COMMENT

The *Dusky* test is universally regarded as the foundation for defining the abilities or capacities required for competence for criminal adjudication. Although *Dusky* itself is silent about capacity for decision-making, the Supreme Court properly recognized in *Godinez* that capacity for rational decision-making is an element of "competence" for criminal adjudication, noting that this requirement was already embedded in the *Dusky* formula. It follows that decisional competence needs to be specifically assessed when the defendant's capacity to make rational decisions is in doubt. With that clarification, I fully accept the proposition that "competence for criminal adjudication" is a single legal construct, not two. Moreover, the MacArthur Competence Assessment Tool for Criminal Adjudication (MacCAT-CA) also embodies the idea that adjudicative competence is a "single construct."

Although the Supreme Court has not identified which abilities are required for decisional competence under *Dusky* and *Godinez*, the most plausible extrapolation of the *Dusky* standard to cover decision-making entails the following abilities: (a) capacity to understand information relevant to the specific decision at issue (understanding), (b) capacity to appreciate the significance of the decision as applied to one's own situation (appreciation), (c) capacity to think rationally (logically) about the alternative courses of action (reasoning), and (d) capacity to express a choice among alternatives (choice). Taken together, these four criteria operationalize the "capacity for rational decision-making" implied by the *Dusky* formula.