Pace Law Review

Volume 30
Issue 4 *Summer 2010*
Showcasing Pace Law School Scholarship

Article 9

June 2010

Is a Mentally Ill Defendant Still Considered Competent to Waive the Right to Counsel in New York After Indiana v. Edwards?

John H. Wilson
Criminal Court, Kings County, New York

Is a Mentally Ill Defendant Still Considered Competent to Waive the Right to Counsel in New York After *Indiana v. Edwards*?

Hon. John H. Wilson*

I. Introduction

All defendants facing criminal charges, whether in federal or state court, are guaranteed the right to counsel under the Sixth Amendment to the United States Constitution. In *Faretta v. California*,[1] the United States Supreme Court found that under the Sixth and Fourteenth Amendments, criminal defendants also have the right to waive counsel and represent themselves. As noted by Justice Brennan in his concurring opinion in *Faretta*, a "knowing and intelligent" waiver of counsel "must be honored out of 'that respect for the individual which is the lifeblood of the law.'"[2]

"Respect for the individual" is the underlying, bedrock concept of the law of self-representation. As noted in the recent U.S. Supreme Court case of *Indiana v. Edwards*,[3] the "constitutional right to proceed *without* counsel when a criminal defendant voluntarily and intelligently elects to do so"[4] descends from "a nearly universal conviction, made manifest in state law, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."[5]

But what if the defendant who wishes to represent herself is mentally ill?

---

* John H. Wilson, a graduate of Fordham College and Pace University School of Law, serves as a Judge in the Criminal Court, Kings County, New York. He acknowledges with gratitude the assistance of Court Attorney Alan Flexer in the preparation of this article.

1. 422 U.S. 806 (1975).

2. *Id.* at 834 (Brennan, J., concurring) (citing Illinois v. Allen, 397 U.S. 337, 350-51 (1970)).

3. 128 S. Ct. 2379 (2008).

4. *Id.* at 2380 (internal citations & quotations omitted).

5. *Id.* at 2383 (internal citations & quotations omitted).

Let us answer this question by use of the following hypothetical.

You are a New York State trial judge. After examination by court-appointed psychiatrists pursuant to Criminal Procedure Law section 730.30, the defendant before you has been found competent to stand trial.[6] She understands the charges, and can assist in her own defense. Yet, defendant and counsel disagree. Defendant wants to show that her actions are in defiance of a conspiracy, which reaches to the highest levels within the Police Department, even to the office of the Commissioner himself. Counsel wants to assert the defense of lack of criminal responsibility due to mental disease or defect pursuant to Penal Law section 40.15.[7]

Defendant petitions you to act *pro se* in a timely and unequivocal manner. Though untrained in law, defendant is a college graduate, highly intelligent, and capable of questioning witnesses without being unduly disruptive. She is able to "carry out the basic tasks needed to present [her] own defense without the help of counsel."[8] According to the psychiatric reports, however, defendant is diagnosed as a paranoid schizophrenic. Though competent to stand trial, she is seriously mentally ill and wishes to present a defense that may guarantee her conviction.

How should you rule? Should you allow the defendant to represent herself, despite her mental illness, or may you force a lawyer upon her, and a defense, contrary to her wishes?

Under long-standing New York State law, the court must allow the defendant to represent herself once she has been found competent to stand trial so long as she makes a "knowing and intelligent" waiver of her right to counsel.[9] New York has traditionally held to one standard for competency; if you are competent to stand trial, you are competent to represent yourself.[10]

Yet, in *Indiana v. Edwards*, the U.S. Supreme Court recently ruled that under certain circumstances, a court has the discretion to deny a defendant's right to represent herself, and impose upon her both counsel and a defense she does not wish, for her own good.[11]

In light of this recent decision, can a New York State trial judge now use his discretion to deny a mentally ill litigant the right to represent herself, even after she has been found competent to stand trial?

---

6. *See* N.Y. CRIM. PROC. LAW § 730.30 (McKinney 1995).
7. *See* N.Y. PENAL LAW § 40.15 (McKinney 2009).
8. *Edwards*, 128 S. Ct. at 2386.
9. People v. McIntyre, 324 N.E.2d 322, 327 (N.Y. 1974).
10. People v. Reason, 334 N.E.2d 572, 574 (N.Y. 1975).
11. *Edwards*, 128 S. Ct. at 2387-88.

II. New York State Law—Competency to Stand Trial is Competency to Waive Counsel

The Constitution of the State of New York states that "[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . ."[12]

In *People v. McIntyre*,[13] the New York Court of Appeals noted that "the right to self-representation embodies one of the most cherished ideals of our culture; the right of an individual to determine his own destiny."[14] However, the Court also noted that "we cannot disregard the countervailing interest of society in the equally powerful ideal that our criminal justice system must determine the truth or falsity of the charges in a manner consistent with fundamental fairness."[15]

In an effort to balance these two concepts, the Court of Appeals stated a three-part rule as follows:

> A defendant in a criminal case may invoke the right to defend *pro se* provided:
> (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues.[16]

Thus, New York law recognizes that the right to self representation does have some reasonable limitation. Before allowing a defendant to embark on self defense, a New York Court must conduct a "searching inquiry" of the defendant's abilities.[17] The court must inquire of the defendant regarding her education, her previous experience in legal matters, and whether or not she is aware that no concession will be made to the self-represented defendant.[18] There are instances where a

12. N.Y. CONST. art. I, § 6.
13. *McIntyre*, 324 N.E.2d 322.
14. *Id.* at 325.
15. *Id.*
16. *Id.* at 327. *See also* Johnson v. Zerbst, 304 U.S. 458 (1938).
17. *See* People v. Reason, 334 N.E.2d 572, 576 (N.Y. 1975).
18. *See* People v. Bedard, 696 N.Y.S.2d 745 (App. Div. 1999). The court is not allowed to act as the defendant's lawyer. *See* Antoinette D. v. Christopher M., 387 N.Y.S.2d 19 (App. Div. 1976).

defendant may be incapable to handle her own defense, due to limitations on her education or her ability to conduct herself properly.[19]

New York law also recognizes that there are instances where a defendant cannot meet these standards due to mental illness.[20] By state statute, a court, upon its own motion, can order a psychiatric examination of the defendant to determine her ability to understand the charges and assist in her own defense.[21] A variety of factors is used to determine whether or not a defendant is competent to stand trial, including whether she is oriented to time and space, understands the roles of the Judge, prosecutor, and defense attorney, and has sufficient intelligence and judgment to make decisions.[22]

Naturally, if the defendant is found incompetent, the court "must adjudicate him an incapacitated person, and must issue a final order of observation or an order of commitment."[23] But what happens if the defendant is found competent and then decides she wants to waive the assistance of counsel? After all, "it is settled law that a defendant may be suffering from psychiatric problems, but is nevertheless not necessarily also incapacitated under [A]rticle 730."[24]

In *People v. Reason*,[25] the New York Court of Appeals considered this question, and explicitly rejected the notion "that there are two separate and distinct levels of mental capacity—one to stand trial,

---

19. *See* People v. Krom, 458 N.Y.S.2d 693, 698-99 (App. Div. 1983), *aff'd*, 461 N.E.2d 276 (N.Y. 1984).

20. [A] defendant is presumed competent to proceed . . . unless the court becomes aware of some basis for questioning the defendant's capacity . . . . [N]either a prior history of mental imbalance, nor a finding of mental incompetence . . . standing alone or combined will suffice: there must be something that justifies raising the issue at the time of the proceeding in question.

Peter Preiser, Esq., Commentary, N.Y. CRIM. PROC. LAW § 730.30 (1995) (citations omitted).

21. *See* N.Y. CRIM. PROC. LAW § 730.30 (McKinney 1995).

22. *See* People v. Valentino, 356 N.Y.S.2d 962, 967-68 (Nassau County Ct. 1974).

23. N.Y. CRIM. PROC. LAW § 730.50(1) (McKinney 1995 & Supp. 2010). If the defendant is not charged with a felony, the court "must dismiss the indictment . . . and such dismissal constitutes a bar to any further prosecution of the charge . . . ." *Id.* If the defendant is charged with a felony, then the court "must issue an order of commitment committing the defendant . . . for care and treatment . . . for a period not to exceed one year from the date of such order." *Id.* The custodian of the defendant must apply to the court for a further order of retention if "the defendant continues to be an incapacitated person." *Id.* § 730.50(2). Once the court "is satisfied that the defendant is no longer an incapacitated person, the criminal action against him must proceed." *Id.*

24. People v. Brown, 843 N.Y.S.2d 770, 777-78 (Sup. Ct. 2007).

25. 334 N.E.2d 572 (N.Y. 1975).

another to waive the right to be represented by counsel and to act as one's own attorney."[26] Finding that only one standard applied, the Court held that after a defendant has been found competent, "[t]raditional inquiry by the court demonstrating that the defendant 'was cognizant of the dangers of waiving counsel' and yet did so 'competently and intelligently' should suffice."[27]

In fact, in language most relevant to our inquiry here, the Court of Appeals issued the following warning: "[f]rom a practical viewpoint it would be even more difficult to formulate a workable, and presumably higher, standard of competency which would not infringe on the defendant's constitutional right 'to appear and defend in person.'"[28]

New York law, then, provides for a two-step analysis. If there is a question as to a defendant's mental competency, then N.Y. Criminal Procedure Law section 730.30 is invoked, and a psychiatric examination of the defendant is conducted.[29] If the defendant is found competent, then an analysis is made as to whether or not the defendant is capable of defending herself in a "knowing and intelligent" fashion.[30] This second step is the same process used whether or not there was any question as to a defendant's competency in the first place.[31]

Naturally, there has been criticism of this approach, and even outright statements that the New York standard is wrong.[32] Nonetheless, the "one standard" for competency has remained the law in New York for more than thirty years.[33]

Perhaps the best known example of the "one standard" in action is the trial of the Long Island Rail Road Shooter, Colin Ferguson.

---

26. *Id.* at 574 (citations omitted).

27. *Id.* (citations omitted).

28. *Id.* at 574 (quoting N.Y. CONST. art. I, § 6). It should be noted that the dissent in *Reason* did not take issue with this aspect of the majority's holding. Instead, the dissent believed that "[t]he trial court's warnings and questions fell far short of a 'searching inquiry.'" *Id.* at 578 (Jasen, J., dissenting).

29. *See supra* notes 12-15 & accompanying text.

30. *See Reason*, 334 N.E.2d. at 575.

31. *Id.* at 574.

32. *See, e.g.*, 40 AM. JUR. POF. 2D 171, § 21 (2009).

33. *See* People v. Anderson, 836 N.Y.S.2d 876 (App. Div. 2007) (trial court erred when it denied defendant's request to represent self on basis defendant had insufficient memory); People v. Soto, 806 N.Y.S.2d 612 (App. Div. 2005) ("Defendant's refusal to pursue an insanity defense did not, by itself, render defendant incompetent); People v. Forney, 757 N.Y.S.2d 455 (App. Div. 2003) (trial court improperly denied defendant's request for self-representation without proper inquiry); People v. Wilkerson, 742 N.Y.S.2d 537 (App. Div. 2002) (once defendant found fit to proceed to trial, a further psychiatric examination to determine if defendant is fit to represent himself is unnecessary).

On December 7, 1993, Colin Ferguson, a mentally ill individual, opened fire with a hand gun on a commuter train traveling through New York's Long Island. By the time he was wrestled to the floor by three passengers, Ferguson had killed six people and wounded another nineteen.[34]

From the beginning, Ferguson's attorneys wanted to pursue an insanity defense.[35] However, Ferguson was adamant that such a defense not be used.[36] After an extensive hearing as to his capacity to represent himself, Ferguson was found competent to stand trial and allowed to proceed to trial *pro se* and present his chosen defense to the jury.[37]

The resulting hearings and trial were a microcosm of the difficulties attendant to allowing a paranoid schizophrenic to handle his own defense.[38]

Mr. Ferguson asked to subpoena former U.S. President Clinton, and former New York Governor Cuomo, to question them about statements they made to the press about the case.[39] His jury selection techniques were described as "confused and disorganized."[40] In his opening statement, Ferguson stated that the eyewitness accounts of the shooting were "motivated by racism," and that in fact, "his gun was stolen by the

34. Francis X. Clines, *Death on the L.I.R.R.: The Rampage; Gunman in a Train Aisle Passes Out Death*, N.Y. TIMES, Dec. 9, 1993, at A1, *available at* http://www.nytimes.com/1993/12/09/nyregion/death-on-the-lirr-the-rampage-gunman-in-a-train-aisle-passes-out-death.html.

35. Jonathan Rabinovitz, *Death on the L.I.R.R.: Lawyer Seeks Sanity Inquiry in L.I. Killings*, N.Y. TIMES, Dec. 11, 1993, § 1, at 1, *available at* http://www.nytimes.com/1993/12/11/nyregion/death-on-the-lirr-lawyer-seeks-sanity-inquiry-in-li-killings.html. .

36. Peter Marks, *Ferguson Collapses in Court after Scorning Insanity Plea*, N.Y. TIMES, Aug. 20, 1994, § 1, at 28, *available at* http://www.nytimes.com/1994/08/20/nyregion/ferguson-collapses-in-court-after-scorning-insanity-plea.html.

37. John T. McQuiston, *Suspect in L.I.R.R. Killings Ruled Competent for Trial*, N.Y. TIMES, Dec. 10, 1994, § 1, at 28, *available at* http://www.nytimes.com/1994/12/10/nyregion/suspect-in-lirr-killings-ruled-competent-for-trial.html.

38. For a comprehensive study of the Ferguson trial, see MARK C. BARDWELL & BRUCE A. ARRIGO, CRIMINAL COMPETENCY ON TRIAL: THE CASE OF COLIN FERGUSON (2002).

39. John T. McQuiston, *Defendant in Rail Killings Wants to Question Clinton*, N.Y. TIMES, Jan. 18, 1995, at B5, *available at* http://www.nytimes.com/1995/01/18/nyregion/defendant-in-rail-killings-wants-to-question-clinton.html.

40. John T. McQuiston, *Suspect Helps Pick 4 Jurors in Rail Deaths*, N.Y. TIMES, Jan. 20, 1995, § 1, at 29, *available at* http://www.nytimes.com/1995/01/20/nyregion/suspect-helps-pick-4-jurors-in-rail-deaths.html.

real murderer after he had fallen asleep on the train."[41]

During trial, Ferguson often referred to himself in the third person. At one point, he told the court that he would have asked that a witness, one of his victims, be "punished for perjury," except "that he's injured, so my sympathy goes out to him."[42]

Nonetheless, after Ferguson was found guilty and sentenced, his appeal, on the basis that he was incompetent to stand trial and represent himself, was denied.[43] Citing *Reason*, the Second Department held that "a defendant who is competent to stand trial is necessarily competent to waive his right to counsel and proceed pro se."[44]

There has been much criticism of the trial court's decision to allow Ferguson to act as his own counsel. However, Congresswoman Carolyn McCarthy, who lost her husband to Colin Ferguson's rage, should have the last word on this issue—"the news media often referred to the Ferguson trial as a circus. I feel I speak for most of the families who survived when I say that in the end we felt the integrity of the court was preserved throughout the trial . . . our justice system worked in the Ferguson trial."[45]

III. Historic Standards Under Federal Case Law—Competency to Stand Trial is Competency to Waive Counsel

As noted in the Introduction, the Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the

41. John T. McQuiston, *Suspect in L.I.R.R. Shootings Says Eyewitnesses Are Racist*, N.Y. TIMES, Jan. 27, 1995, at B1, *available at* http://www.nytimes.com/1995/01/27/nyregion/suspect-in-lirr-shootings-says-eyewitnesses-are-racist.html.

42. Evelyn Nieves, *Our Towns; An Anguished Audience in a Theater of the Absurd*, N.Y. TIMES, Jan. 31, 1995, at B5, *available at* http://www.nytimes.com/1995/01/31/nyregion/our-towns-an-anguished-audience-in-a-theater-of-the-absurd.html.

43. *See* People v. Ferguson, 670 N.Y.S.2d 327 (App. Div. 1998), *appeal denied*, 706 N.E.2d 750 (N.Y. 1998).

44. *Id.* at 328. In a very interesting article, Ronald L. Kuby and William M. Kunstler discuss the *Ferguson* case. *See So Crazy He Thinks He is Sane: The Colin Ferguson Trial and the Competency Standard*, 5 CORNELL J.L. & PUB. POL'Y 19 (1995). These attorneys, who had represented Ferguson before he decided to proceed with his own defense, do not call for the abolition of the "one standard." *Id.* at 21. In fact, their opinion is that "any proposal to force counsel on an otherwise competent defendant . . . would be ineffective, unwise, and unconstitutional." *Id.* Instead, Kuby and Kunstler call for an "overhaul[ ]" of "the present definition of competency." *Id.* at 24.

45. Carolyn McCarthy, Op-Ed., *Order in the Court*, N.Y. TIMES, Jan. 12, 1998, at A21, *available at* http://www.nytimes.com/1998/01/12/opinion/order-in-the-court.html.

accused shall . . . have the Assistance of Counsel for his defense."[46]

In *Dusky v. United States*,[47] the Supreme Court held that the standard for competency to stand trial is "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."[48]

In *Westbrook v. Arizona*,[49] the Supreme Court reversed a murder conviction, holding that a defendant was entitled to two proceedings: first, a hearing to determine his competency to stand trial, and then, a separate hearing "or inquiry" to determine whether or not the defendant was competent "to waive his constitutional right to the assistance of counsel and proceed . . . to conduct his own defense."[50] This second procedure was necessary to "determin[e] whether there is an intelligent and competent waiver by the accused" of his right to counsel.[51]

A disagreement then arose between the circuit courts over their varied interpretations of *Westbrook*. In particular, in *Godinez v. Moran*,[52] the Supreme Court explained that the "Ninth Circuit adheres to the view that the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial."[53]

The Court held, in no uncertain terms, that there is no higher standard, explaining that,

> [w]hile 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 . . . . This being so, we can conceive of no basis for demanding a higher level of

46. U.S. CONST. amend. VI.

47. 362 U.S. 402 (1960).

48. *Id*.

49. 384 U.S. 150 (1966).

50. *Id.* at 150.

51. *Id. Westbrook* discusses two separate hearings, one for competency to stand trial, and another to assess competency to waive counsel. This is no different than the procedure utilized by New York State, which was discussed in the preceding section. Initially, a defendant is examined for mental competency to stand trial pursuant to Criminal Procedure Law section 730.30, and then, once found competent, she is questioned extensively regarding her ability to represent herself. *See* N.Y. CRIM. PROC. LAW § 730.30 (McKinney 1995).

52. 509 U.S. 389 (1993).

53. *Id.* at 396.

> competence for those defendants who choose to plead guilty.[54]

Further, the Court stated, "[n]or 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 . . . ."[55]

Thus, like New York, as of 1993, the Court agreed that there was only one standard for competence, and once a defendant was found competent, that same standard applied to the defendant's ability to waive counsel and proceed *pro se*.[56]

The *Godinez* decision did not have its intended effect because disagreement over this issue was not quelled. A harbinger of the continuing dispute is found in the dissent to *Godinez*—"[c]ompetency for one purpose does not necessarily translate to competency for another purpose."[57]

In language which reveals the dissent's discomfort with the simplicity of the majority view, Justice Blackmun states "[t]o try, convict, and punish one so helpless to defend himself contravenes fundamental principles of fairness and impugns the integrity of our criminal justice system."[58]

At no point does the dissent indicate exactly what standard should apply. All that is called for is a vague "another standard—the one for assessing a defendant's competence to waive counsel and represent himself."[59]

Nowhere is the unwillingness to accept the *Godinez* ruling made more clear than in *United States v. Kaczynski*.[60] Known as the Unabomber, Ted Kaczynski was a highly intelligent, but mentally ill individual.[61] Like Colin Ferguson, Kaczynski did not want his attorneys to present a defense of "impaired mental state" at trial.[62] However, unlike Ferguson, the trial court denied Kaczynski's motion to proceed *pro se*, concluding that his request was untimely, and "not consistent

54. *Id.* at 398-99.
55. *Id.* at 399.
56. *See generally id.* at 396-402.
57. *Id.* at 413 (Blackmun, J., dissenting) (citations omitted).
58. *Id.* at 417 (Blackmun, J., dissenting).
59. *Id.* at 412 (Blackmun, J., dissenting).
60. 239 F.3d 1108 (9th Cir. 2001).
61. *See id.* at 1113.
62. *Id.*

with a good faith assertion of his right to represent himself."[63]

Although the Ninth Circuit agreed that "the propriety of denying Kaczynski's request necessarily follows from the district court's finding that he asserted the right to represent himself as a tactic to delay trial proceedings,"[64] and denied Kaczynski's appeal, the dissent by Circuit Judge Reinhardt is most revealing.

Initially, Judge Reinhardt finds unpersuasive the majority's stated reason for the denial of Kaczynski's motion to proceed *pro se*, opining that "[t]here is simply no basis for the district court's assertion that the request was made in bad faith or for purpose of delay."[65] Kaczynski's lawyers had made it clear that the Unabomber was not seeking any delay in the proceedings, and that he was prepared to proceed *pro se* immediately.[66]

Pulling down the edifice constructed by the majority, Judge Reinhardt gives us valuable insight into the mind of the trial judge, in an effort to reveal the true foundation for the District Court's denial of Kaczynski's motion to proceed *pro se.*

> Judge Burrell became more and more appalled at the grotesque and one-sided spectacle over which he would be forced to preside were Kaczynski to conduct his own defense. He understandably developed a strong desire to avoid the chaos, legal and otherwise, that would have ensued had Kaczynski been allowed to present his twisted theories to a jury . . . .[67]

One cannot help but think of the Colin Ferguson trial. "Not only would such a trial have had a circus atmosphere,"[68] Judge Reinhardt states, but "[t]he government had been spared the awkwardness of pitting three experienced prosecutors against an untrained, and mentally unsound, defendant."[69] Thus, "'the judicial system breathed a collective sigh of relief when the Unabomber pled guilty.'"[70]

---

63. *Id.* at 1114.
64. *Id.* at 1116.
65. *Id.* at 1120 (Reinhardt, J., dissenting).
66. *Id.* at 1124 (Reinhardt, J., dissenting).
67. *Id.* at 1126 (Reinhardt, J., dissenting).
68. *Id.* (Reinhardt, J., dissenting).
69. *Id.* at 1128.
70. *Id.* at 1127 (quoting Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 444 (2000)).

The dissent goes on to note that "[t]he problem with this 'happy' solution, of course, is that it violates the core principle of *Faretta v. California*—that a defendant who objects to his counsel's strategic choices has the option of going to trial alone."[71]

The dissent asks "[w]hat should the response be when [a criminal defendant] insists on serving as his own lawyer, not for the purpose of pursuing a proper legal defense, but in order to ensure that no evidence will be presented that exposes the nature and extent of his mental problem?"[72] In no uncertain terms, the dissent answers this question in two words—let him.[73] "[I]n denying Kaczynski's request to represent himself, the district court unquestionably failed to follow [the rule of *Faretta*]."[74]

Unlike Ferguson, Kaczynski was facing imposition of the death penalty if he was convicted after trial, an option which would not be exercised after his guilty plea. While the majority opinion ignores this fact, the dissent asserts that this concern underlies the majority ruling. In essence, "Judge Burrell[ ] . . . prevent[ed] Kaczynski from pursuing a strategy that would almost certainly result in his execution . . . ."[75]

While this course of action may result in an unfair trial, nonetheless, Circuit Judge Reinhardt's dissent states the rationale for the New York "one standard" very clearly. "[T]he right of self-representation *should* in some instances yield to the more fundamental constitutional guarantee of a fair trial."[76] "However, in this instance, . . . there was no legitimate basis for denying Kaczynski the right to be his own lawyer."[77]

Thus, the Ninth Circuit's ruling in the Kaczynski case has paved the way to the federal law as it stands today.

IV. Current Federal Standards—Competency to Stand Trial is Not Always Competency to Waive Counsel

In *Indiana v. Edwards*,[78] the United States Supreme Court made a renewed effort to address the issues discussed in *Godinez*.

---

71. *Id.* at 1128 (citation omitted).
72. *Id.* at 1119.
73. *Id.* at 1120, 1125.
74. *Id.* at 1119.
75. *Id.* at 1126.
76. *Id.* at 1128.
77. *Id.*
78. 128 S. Ct. 2379 (2008).

Defendant Edwards was arrested after he tried to steal a pair of shoes from a department store, and fired a gun at a store security guard, wounding a bystander.[79] He was found "competent to stand trial," though he suffered from a mental illness.[80] When the defendant asked to represent himself, however, the lower court denied the request, citing Edwards's psychiatric history.[81]

The United States Supreme Court formed the question before it as follows: "whether the [U.S.] Constitution required the trial court to allow Edwards to represent himself at trial."[82] Beginning with a reference to the *Dusky* standard, that is, "the Constitution does not permit trial of an individual who lacks 'mental competency,'"[83] the Court distinguished its precedents on this issue, and ruled that a trial court has the discretion to deny a mentally ill defendant the right to represent herself.[84]

While discussing *Faretta*, which had established "a 'constitutional right to proceed *without* counsel when' a criminal defendant 'voluntarily and intelligently elects to do so,'"[85] the *Edwards* court states that "*Faretta* . . . did not consider the problem of mental competency."[86]

Turning to *Godinez*, the *Edwards* court conceded that "*Godinez* bears certain similarities with the present case[,]" however, "*Godinez* does not answer the question before us now."[87] Creating what can only be described as an artificial distinction, the majority stated, "[i]n *Godinez*, the [lower court] sought to measure the defendant's ability to proceed on his own to enter a guilty plea; here [the lower court] seeks to measure the defendant's ability to conduct trial proceedings."[88]

Citing the *Dusky* standard with approval, the *Edwards* court specifically does not overrule *Godinez*, and continues to reject the argument that competency for self-representation requires a *higher* standard than that required to stand trial.[89] Nonetheless, the *Edwards* court distinguishes *Godinez*, and finds that "the Constitution permits a State to limit that defendant's self-representation right by insisting upon

79. *Id.* at 2382.
80. *Id.* at 2382-83.
81. *Id.* at 2383.
82. *Id.*
83. *Id.*
84. *Id.* at 2388.
85. *Id.* at 2383 (emphasis omitted) (quoting Faretta v. California, 422 U.S. 806, 807 (1975)).
86. *Id.* at 2384.
87. *Id.* at 2385.
88. *Id.*
89. *Id.* at 2384.

representation by counsel at trial."[90]

The mental gymnastics required to come to this conclusion are impressive. While not quite rejecting the "one standard" of New York, the Supreme Court simultaneously rejects the Ninth Circuit's "higher standard."[91] Instead, the Court states "a defendant who would choose to forgo counsel at trial presents a very *different* set of circumstances, which in our view, calls for a *different* standard."[92] Noting that "the problem before us cautions against the use of a single mental competency standard,"[93] at no time does the majority opinion define this different standard.[94] It is not higher. It is not the same. Yet, it is somehow "different."

How is the court to apply this "different" standard? Here, the Supreme Court is very unclear. Throwing this matter to the discretion of the trial court, the Supreme Court states that "the trial judge . . . will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."[95]

At one point, the court does reference a defendant's ability "to work with counsel at trial, yet . . . be unable to carry out the basic tasks needed to present his own defense without the help of counsel."[96] In the end, the only guidance the *Edwards* court gives is to conclude "that the Constitution permits judges to take realistic account of the particular defendant's mental capacities," and to repeat that "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."[97]

Thus, the *Edwards* decision gives a trial judge, whether state or federal, the discretion to deny a defendant's motion to proceed without counsel, and to impose counsel on the defendant, as well as a defense not of the defendant's choosing, without giving the trial court any guidance or any quantifiable standards to apply in its decision-making.

The true rationale for the decision in *Edwards* can be found here: "in our view, a right of self-representation at trial will not 'affirm the

90. *Id.* at 2385.
91. *Id.*
92. *Id.* at 2386 (emphasis added).
93. *Id.*
94. *See id.* at 2388.
95. *Id.* at 2387.
96. *Id.* at 2386.
97. *Id.* at 2387-88.

dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel." Further, "given [the] 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."[98]

Thus, by allowing trial judges to force counsel upon a mentally impaired defendant, the *Edwards* court declines to overrule *Faretta*, but hopes to alleviate the perception that "*Faretta*, contrary to its intent, has led to trials that are unfair."[99]

V. Does *Edwards* Overrule New York State's "One Standard"?

So where does this leave our New York State trial judge with a defendant before him who has been found competent to stand trial, and who wishes to waive counsel and subpoena the file she knows the Police Commissioner keeps on her daily activities? If the judge were to follow the *Edwards* opinion, the court may cite the "different" standard applicable to the defendant's right to self-representation, and force an attorney upon the defendant, who would then assert the defense of diminished mental capacity.

That would be the easy thing to do. It, however, would not be the proper legal procedure to follow in New York State. Under *Reason*, the court must apply the "one standard," confirm that the defendant has waived counsel "knowingly and intelligently," and proceed to trial with the *pro se* defendant.[100]

So how can *Reason* still be good law after *Edwards*, if the United States Supreme Court gives state courts the discretion to "take realistic account of the particular defendant's mental capabilities" and to force counsel upon the defendant?[101]

To answer this question, we must remember that the bedrock, the very basis for the right to self-representation discussed by the United States Supreme Court in *Faretta*, and by the New York State Court of Appeals in *McIntyre*, is respect for the individual. Since this is a right found in both New York State's Constitution and New York State case law, New York may continue to provide criminal defendants with greater protection than the federal courts to insure that a criminal defendant

98. *Id.* at 2387.
99. *Id.* at 2388.
100. People v. McIntyre, 324 N.E.2d 322, 327 (N.Y. 1974).
101. *Edwards*, 128 S. Ct. at 2387-88.

receives a fair trial.[102]

Further, as in our analysis of the Ninth Circuit opinion in *Kacynski*, let us review Justice Scalia's dissent in *Edwards*, and pull back the curtain to reveal the flaws in the majority view.

In *Faretta*, the Supreme Court ruled that "the Constitution guaranteed to every criminal defendant the right to proceed to trial without counsel when he voluntarily and intelligently elected to do so."[103] This means "that a state simply may not force a lawyer upon a criminal defendant who wishes to conduct his own defense."[104] In *Godinez*, the same court determined that "it was never the rule at common law that a defendant could be competent to stand trial and yet incompetent to either exercise or give up some of the rights provided for his defense."[105]

Based upon these precedents, the *Edwards* dissent concludes that "nothing permits a State, because of *its* view of what is fair, to deny a constitutional protection."[106] Addressing the majority's concern for the "spectacle" of a mentally ill defendant "humiliating himself" at trial, the dissent frames the issue as follows:

> [T]here is . . . little doubt that the loss of 'dignity' the right [of self-representation] is designed to prevent is *not* the defendant's making a fool of himself by presenting an amateurish or even incoherent defense. Rather, the dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State—the dignity of individual choice.[107]

Thus, the dissent notes the overall effect of the majority opinion—"[a]t a time when all society is trying to mainstream the mentally impaired, the Court permits them to be deprived of a basic constitutional right—for their own good."[108]

---

102. *See* California v. Ramos, 463 U.S. 992, 1013-14 (1983) ("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."). *See also* People v. Caban, 833 N.E.2d 213 (N.Y. 2005); People v. Stultz, 810 N.E.2d 883 (N.Y. 2004); People v. Ramos, 851 N.Y.S.2d 724 (App. Div. 2008).

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

104. *Edwards*, 128 S. Ct. at 2390.

105. *Id.* at 2391 (citations omitted).

106. *Id.* at 2392.

107. *Id.* at 2393.

108. *Id.* at 2394. Recently, defense counsel for Aafia Siddiqui, currently on trial in

Calling the majority opinion "extraordinarily vague," the dissent encapsulates the dilemma for the trial court. By following the majority view in *Edwards*, "trial judges will have every incentive to make their lives easier . . . by appointing knowledgeable and literate counsel" to represent the defendant—as the court did in *Kaczynski*—in violation of a defendant's right of self-representation.[109]

It is appropriate at this point to remember the warning of the New York Court of Appeals in *Reason*—"[f]rom a practical viewpoint, it would be even more difficult to formulate a workable, and presumably higher, standard of competency which would not infringe on the defendant's constitutional right 'to appear and defend in person.'"[110]

VI. Conclusion

The New York Court of Appeals decision in *Reason*, as well as article I, section 6 of the New York State Constitution, afford a mentally ill defendant greater protection for her right to waive counsel than that provided by the U.S. Supreme Court in the *Edwards* decision.

Yes, in allowing the defendant to proceed to trial *pro se*, the trial court may end up with another *Ferguson* trial—a defendant who makes every effort to embarrass herself with her attempts at cross-examination. There is no doubt that such a "spectacle" will be hard to watch, and even harder to preside over. At the same time, however, judges will be following the basic intent of the Constitutions of both New York State and the United States of America—recognition of the defendant's rights as an autonomous individual, capable of acting as master of her own fate, and making her own decisions as to what defense to pursue.

---

the Southern District of New York for attempted murder, petitioned the Federal Court to prevent their client from testifying at her trial. Citing *Edwards*, counsel for the defendant argued that the defendant was mentally ill, and "that the right to testify should be withheld where criminal defendants 'will turn their trials into spectacles rather than solemn proceedings.'" Mark Hamblett, *Defense Lawyers Try to Keep Client from Taking Stand in Federal Trial*, N.Y. L.J., Jan. 27, 2010, at 1. This put the Federal prosecutor in the unusual position of advocating for the defendant's right to testify at her own trial. Mark Hamblett, *Prosecutors Oppose Bid to Block Siddiqui from Stand*, N.Y. L.J., Jan. 28, 2010, at 1. The trial court ruled that though Ms. Siddiqui had been disruptive during her trial, she had not waived her right to testify, nor forfeited that fundamental right by her conduct. Mark Hamblett, *Siddiqui Takes Stand in Her Own Defense in Federal Trial*, N.Y. L.J., Jan. 29, 2010, at 1.

109. *Edwards*, 128 S. Ct. at 2394.

110. People v. Reason, 334 N.E.2d 572, 616 (N.Y. 1975).