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Indiana v. Edwards: The Prospect of a Heightened Competency Standard for Pro Se Defendants

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INDIANA V. EDWARDS: THE PROSPECT OF A HEIGHTENED COMPETENCY STANDARD FOR *PRO SE* DEFENDANTS

ASHLEY N. BECK*

The Sixth Amendment to the United States Constitution guarantees a criminal defendant both the right to the assistance of counsel and the right of self-representation. The right of self-representation is deeply ingrained in the Anglo-American system of justice, but so is the requirement that a criminal defendant be tried only if competent to stand trial. In Indiana v. Edwards, *the Supreme Court recognized a "gray area" of competency, noting that competency to stand trial with the assistance of counsel may not equate to competency to proceed* pro se. *In* Edwards, *the Court held that a trial court retains the discretion to appoint and does not violate a defendant's Sixth Amendment right when it appoints counsel over a "gray-area" defendant's objection. The Court, however, did not articulate a standard for assessing competency to proceed* pro se. *This Note demonstrates why a heightened competency standard is necessary and articulates a heightened standard for courts to apply when confronted with a defendant who wishes to proceed* pro se, *but may not be competent to do so.*

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INTRODUCTION

> *"No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court."*[1]

Since our nation's inception, American criminal courts have strived to maintain a balance between safeguarding a defendant's autonomy and preserving a defendant's due process right to a fair trial. The Sixth Amendment expressly guarantees a criminal defendant the right to the assistance of counsel, and impliedly, protects the defendant's autonomy by affording him[†] the right of self-representation. Whether a defendant obtains counsel or exercises his right of self-representation, American criminal law has long recognized as fundamental to due process that a defendant may be tried only if he has sufficient mental capacity to stand trial.[2]

The Supreme Court first articulated a competency

1. Massey v. Moore, 348 U.S. 105, 108 (1954).

† The University of Colorado Law Review advocates the use of gender-neutral language. The author of this Note acknowledges that both men and women can be criminal defendants but has chosen to consistently refer to defendants with masculine pronouns, solely for purposes of clarity and readability. As used in this Note, masculine pronouns should be understood to refer generically to both male and female defendants.

2. The Due Process Clause of the Fifth and Fourteenth Amendments prohibits criminal prosecution of a defendant who is not competent to stand trial. *See* People v. Davis, No. 07CA1955, 2012 Colo. App. LEXIS 13, ¶ 1 (Colo. App. Jan. 5, 2012); *see also* Dusky v. United States, 362 U.S. 402, 402–03 (1960).

standard in *Dusky v. United States*, explaining that for a defendant to stand trial, he must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and have a "rational as well as factual understanding of the proceedings against him."[3] However, consider a defendant who suffers from an extreme speech impediment, who, although able to communicate with an attorney through written notes or non-verbal gestures, cannot communicate coherently to the judge or jury. Or, a defendant who suffers not from any defined mental illness or defect, but rather from obsessive impulses that significantly interfere with daily functioning. Or, a defendant whose behavior in and out of the courtroom is illogical, inexplicably bizarre, and exceptionally distracting. These defendants may be competent to stand trial under the standard articulated in *Dusky,* but are they competent to conduct their own trial *without the assistance of counsel*? Maybe not.

Mental competence is not a unitary concept, and different legal contexts require varying levels of competence.[4] The level of competence necessary to single-handedly execute one's own defense at trial is inherently much higher than that required of represented defendants.[5] Because the competency standard as articulated in *Dusky* only contemplates those defendants who are represented by counsel, it is inadequate as applied to *pro se*[6] defendants.

Nearly fifty years after *Dusky*, the Supreme Court decided *Indiana v. Edwards* and held that in some circumstances, such as when a defendant appears incompetent to proceed *pro se,* the trial court may impose unwanted counsel to assist the defendant.[7] In so holding, the *Edwards* Court acknowledged the existence of a "gray area" of mental competency between

3. *Dusky*, 362 U.S. at 402.

4. Brief for the Am. Psychiatric Ass'n and Am. Acad. of Psychiatry and the Law as Amici Curiae in Support of Neither Party at 18, Indiana v. Edwards, 554 U.S. 164 (2008) (No. 07-208) [hereinafter Brief for the Am. Psychiatric Ass'n].

5. *Id.* at 20.

6. *Pro se* is Latin for "for oneself; on one's own behalf." BLACK'S LAW DICTIONARY 1341 (9th ed. 2009). In the trial court setting, *pro se* usually refers to a defendant who is acting before the court without the assistance of counsel. *See id.*

7. Indiana v. Edwards, 554 U.S. 164, 167, 178 (2008) (holding that "[T]he Constitution permits [s]tates 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 themselves.").

"*Dusky*'s minimal constitutional requirement that measures a defendant's ability to stand trial [with the assistance of counsel] and a somewhat higher standard that measures mental fitness for another legal purpose."[8]

Justice Breyer's description in *Edwards* of this gray area of mental competency has highlighted the issue of the so-called "gray-area defendant,"[9] bringing to bear that the *Dusky* competency standard does not adequately account for defendants who are competent under *Dusky* and want to proceed *pro se*, but who are not competent to execute their own trial and defense without the assistance of counsel.[10] *Edwards* suggests that a competency standard more particularized and context-specific than the generic *Dusky* standard may be necessary to ensure fair and reliable adjudication.[11] Yet, while *Edwards* affirms that a trial court does not exceed its discretion by appointing unwanted counsel, it leaves unanswered the question of whether courts *should* adopt a heightened competency standard—in addition to the *Dusky* standard—for *pro se* defendants.

This Note addresses the inadequacy of the *Dusky* standard for assessing the competency of a defendant to proceed *pro se* in light of the Court's recent decision in *Edwards*. It seeks to answer the question of whether courts should adopt a heightened competency standard, and if so, what that standard should be. Part I provides a general overview of the policy and precedent supporting the right of self-representation. It considers the long-standing requirement that a defendant be competent in order to stand trial and explores the evolving relationship between the Sixth Amendment right of self-representation and the due process requirement that criminal defendants be competent to stand trial. Part II analyzes *Indiana v. Edwards* and the significance of the Court's holding that a trial court may deny a gray-area defendant's request to

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8. *Id.* at 172–73.

9. As used in this Note, the term "gray-area defendant" refers to a defendant whose mental competency falls "between *Dusky*'s minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose." *Id.*

10. *Id.* at 178. Studies estimate that a defendant's mental competency is an issue in about 20 percent of federal cases involving *pro se* defendants. *Id.*; *see, e.g.*, Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the* Pro Se *Felony Defendant*, 85 N.C. L. REV. 423, 428 (2007) (statistical analysis).

11. *See Edwards*, 554 U.S. at 174–75, 177–78.

proceed *pro se* and impose counsel.[12] Part III discusses how *Edwards* has opened the door for the establishment of a heightened competency standard and suggests what a trial court's competency inquiry should be. Ultimately, this Note argues that trial courts should adopt and implement this heightened competency standard to assess gray-area defendants who wish to proceed *pro se* by interpreting their respective states' due process clauses as requiring a heightened standard.

I. THE RELATIONSHIP BETWEEN THE RIGHT OF SELF-REPRESENTATION AND THE COMPETENCY REQUIREMENT

Anglo-American jurisprudence has long recognized a defendant's right to proceed *pro se*.[13] The right of self-representation affirms a defendant's autonomy and dignity, and enforces the defendant's role as master of his defense.[14] At times, however, a defendant's exercise of the right of self-representation raises due process and fair trial concerns.[15] Accordingly, the Supreme Court faces the challenge of maintaining a balance between preserving a defendant's autonomy and safeguarding the adversary system.

This Part traces the historical background and traditional understanding of the right of self-representation as a means to preserve a defendant's autonomy. It then explores the Court's shifting focus regarding the right of self-representation as its emphasis on the importance of preserving a defendant's autonomy gives way to greater concern over ensuring due process and a fair trial. Lastly, it examines the competency requirement and its application to *pro se* defendants.

A. *The Right of Self-Representation as Fundamental to Defendant Autonomy*

The Supreme Court has consistently recognized a defendant's right to represent himself,[16] noting that historical

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12. *Id.* at 167.

13. *See, e.g.*, Faretta v. California, 422 U.S. 806, 812–13 (1975) (discussing the historical underpinnings of the right of self-representation).

14. *See, e.g.*, *id.* at 820.

15. *See, e.g.*, *id.* at 834–35; McKaskle v. Wiggins, 465 U.S. 168, 183–84 (1984).

16. *See, e.g.*, Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1943); *McKaskle*, 465 U.S. at 173; *Faretta*, 422 U.S. at 817.

practice,[17] wide-ranging statutory recognition of the right of self-representation,[18] and practical concerns regarding the dignity and autonomy of a defendant[19] all support a defendant's right to proceed *pro se*. Centuries of British, colonial, and American legal history suggest that the Framers of the Constitution "selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation."[20] Historically, under both British and colonial criminal jurisprudence, the right of self-representation was not only recognized, but was the general practice.[21] As Justice Jackson once observed, "the mere fact that a path is a beaten one is a persuasive reason for following it."[22] While self-representation may no longer be the general practice for criminal defendants, the Court continues to recognize the right of self-representation, as it has for centuries.

The Supreme Court first held in *Adams v. United States ex*

17. *Faretta*, 422 U.S. at 821–34.

18. The right of a criminal defendant to represent himself before a court of law has been protected by statute since the inception of the United States. Section 35 of the Judiciary Act of 1789 states in pertinent part that "in all courts of the United States, the parties may plead and manage their own causes personally or by assistance of such counsel or attorneys at law." Judiciary Act of 178 § 35, 1 Stat. 73, 92 (1789). The right of self-representation is currently codified in 28 U.S.C. § 1654 (2010), and in at least 37 state constitutions. *See* ALA. CONST. art. I, § 6; ARIZ. CONST. art. II, § 24; ARK. CONST. art. II, § 10; COLO. CONST. art. II, § 16; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 16; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 8; IND. CONST. art. I, § 13; KAN. CONST. Bill of Rights, § 10; KY. CONST. Bill of Rights, § 11; LA. CONST. art. I, § 9; MASS. CONST., pt. 1, art. XII; ME. CONST. art. I, § 6; MISS. CONST. art. III, § 26; MO. CONST. art. I, § 18(a); MONT. CONST. art. II, § 24; NEB. CONST. art. I, § 11; NEV. CONST. art. I, § 8; N.H. CONST., pt. 1, art. XV; N.M. CONST. art. II, § 14; N.Y. CONST. art. I, § 6; N.D. CONST. art. I, § 12; OHIO CONST. art. I, § 10; OKLA. CONST. art. II, § 20; OR. CONST. art. I, § 11; PA. CONST. art. I, § 9; S.C. CONST. art. I, § 14; S.D. CONST. art. VI, § 7; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; UTAH CONST. art. I, § 12; VT. CONST. ch. 1, art. X; WASH. CONST. art. I, § 22; WIS. CONST. art. I, § 7; WYO. CONST. art. 1, §10.

19. The Supreme Court has noted that the right to defend oneself is innately personal because one's liberty is often at stake. *Faretta*, 422 U.S. at 819–20. Accordingly, the Court has remarked that it is proper to give the right to defend directly to the accused because it is "he who suffers the consequences if the defense fails," and not his lawyer or the state. *Id.* at 820.

20. *Id.* at 832.

21. *Id.* at 828.

22. Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution,* 45 COLUM. L. REV. 1, 26 (1945); *see also Faretta*, 422 U.S. at 817. *But see* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

rel McCann that the Sixth Amendment includes an implicit right for a defendant to dispense with a lawyer's assistance and proceed *pro se*.[23] The *Adams* Court explained that the Sixth Amendment right to the assistance of counsel embodies a correlative right to dispense with counsel's assistance.[24] The Court held that so long as a defendant "knows what he is doing and his choice is made with eyes open," he may waive his constitutional right to the assistance of counsel.[25] To hold otherwise, the Court stated, would inappropriately "deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice."[26]

Adams governed only cases brought in the federal courts, but the Supreme Court extended the affirmative right of self-representation to state courts in 1975 with its landmark decision in *Faretta v. California*.[27] In *Faretta*, the Court declared that the right to dispense with counsel inherent in the Sixth Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment.[28] The Court relied on its reasoning in *Adams* and the text of the Sixth and Fourteenth Amendments to support its holding that a state may not "constitutionally hale a person into its criminal courts and there force a lawyer upon him."[29] "Although not stated in the [Sixth] Amendment in so many words," the Court declared, "the right of self-representation—to make one's own defense personally—is . . . necessarily implied by the structure of the Amendment."[30]

As evident in both *Adams* and *Faretta*, the Court historically understood the right of self-representation as a

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23. Adams v. United States *ex rel* McCann, 317 U.S. 269, 279 (1943) (holding that the "Constitution does not force a lawyer upon a defendant.").

24. *Id. But cf.* Singer v. United States, 380 U.S. 24, 34–35 (1965) ("The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.").

25. *Adams*, 317 U.S. at 279. In discussing the validity of the defendant's waiver of counsel, the Court referred to the standard articulated in *Johnson v. Zerbst*, 304 U.S. 458 (1938) (holding that waiver of a constitutional right must be made competently and intelligently), and noted that "the short of the matter is that an accused, in the exercise of a free and intelligent choice . . . may competently and intelligently waive his Constitutional right to assistance of counsel." *Adams*, 317 U.S. at 275.

26. *Id.* at 280.

27. Faretta v. California, 422 U.S. 806, 807 (1975).

28. *Id.*

29. *Id.*

30. *Id.* at 819.

means of preserving a defendant's autonomy.[31] More recently, however, the Court shifted its focus to the potential adverse consequences that self-representation may have on a defendant's due process right to a fair trial. The next section explores some of the fair trial concerns raised by a defendant's exercise of his right of self-representation, and explains how the Court's concern over the fairness of the adjudicative process has begun to erode the Court's traditional focus on preserving defendant autonomy.

B. *Fair Trial Concerns and the Right of Self-Representation*

Although the right of self-representation preserves the dignity and autonomy of the accused, in many circumstances it raises concern as to a defendant's right to a fair trial.[32] Arguably, in the vast majority of criminal cases, a lawyer is necessary to ensure a fair trial.[33] As the *Faretta* dissent contended, "the spirit and logic of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense."[34] Even though concerns regarding the preservation of defendants' autonomy ultimately prevailed over fair trial concerns in *Faretta*, the Court shifted its focus in later decisions to ensuring a fair trial. This section explains the significance of *McKaskle v. Wiggins*,[35] a Supreme Court case that tempered the right of self-representation and echoed many of the fair trial concerns raised by the *Faretta* dissenters.

Whereas the *Faretta* Court emphasized the need to preserve a defendant's dignity and autonomy, the *McKaskle* Court emphasized and exhibited greater concern over a

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31. *See, e.g.*, *id.* *Faretta* makes clear the view that self-representation in most cases will have negative consequences, but that a defendant's right of self-representation is upheld out of respect for individual dignity and autonomy. *See id.* at 834; United States v. Mendez-Sanchez, 563 F.3d 935, 945 (9th Cir. 2009).

32. *See Faretta*, 422 U.S. at 834. Dissenting from the decision, Chief Justice Burger wrote:

> [T]he trial judge is in the best position to determine whether the accused is capable of conducting his defense. True freedom of choice and society's interest in seeing that justice is achieved can be vindicated only if the trial court retains discretion to reject any attempted waiver of counsel and insist that the accused be tried according to the Constitution.

Id. at 840.

33. *Id.* at 834 (majority opinion).

34. *Id.* at 840 (Burger, C.J., dissenting).

35. 465 U.S. 168 (1984).

defendant's right to due process and a fair trial in justifying the imposition of standby counsel.[36] In *McKaskle*, the Court held that imposing standby counsel on the defendant, even over the defendant's objection, does not violate the defendant's right of self-representation.[37] The Court explained that a defendant's Sixth Amendment trial rights are not violated when a trial judge appoints standby counsel "to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals."[38] The imposition of standby counsel does not interfere with, but rather supports, the objectives of the Sixth Amendment "to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense."[39]

The *McKaskle* Court recognized that standby counsel can be not only beneficial to a defendant in assisting him in overcoming "routine procedural or evidentiary obstacles to the completion of some specific task,"[40] but also important to the adjudicative process, in that counsel may "relieve the judge of the need to explain and enforce basic rules of courtroom protocol."[41] In holding that the appointment of standby counsel does not violate a defendant's Sixth Amendment right, the *McKaskle* Court tempered the right of self-representation so as to safeguard the right to a fair trial and preserve standard courtroom protocol.[42] Thus, the focus of the Court moved away from preserving defendant autonomy and toward safeguarding due process and fair adjudication.

Nevertheless, the Court reiterated that a *pro se* defendant is entitled to maintain actual control over his case, and that standby counsel assisting a *pro se* defendant may not make, or

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36. *Id.* at 177–78.

37. *Id.* at 184. In *Faretta*, the Court briefly addressed the matter of standby counsel in a footnote, noting that "a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." 422 U.S. at 835 n.46.

38. *McKaskle*, 465 U.S. at 184.

39. *Id.* at 176–77.

40. *Id.* at 183.

41. *Id.* at 184.

42. *Id.* The Court noted that "participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the *pro se* defendant's appearance of control over his own defense." *Id.*

substantially interfere with, any significant tactical decisions regarding the defendant's case.[43] The Court explained that standby counsel's participation, to the extent practicable, should be outside the presence of the jury and should not "destroy the jury's perception that the defendant is representing himself."[44] Accordingly, *McKaskle* reaffirmed the holdings of *Adams* and *Faretta* by recognizing a defendant's Sixth Amendment right of self-representation. However, it tempered this right by holding that trial courts may exercise discretion and appoint standby counsel where necessary to achieve a fair trial and effective adjudication.[45]

McKaskle made clear that the right of self-representation is not absolute.[46] Although decided two decades prior to *Edwards*, it helped lay the foundation for the Court's declaration in *Edwards* that there are circumstances in which trial courts may impose unwanted counsel on a defendant. One such circumstance, according to *Edwards*, is when there is a question as to the defendant's competence to proceed *pro se*.[47] As the next section demonstrates, American jurisprudence has long required that a defendant be deemed competent in order to stand trial.[48] The following section explains the reasons for this requirement, explores the Court's standard for assessing a defendant's competence to stand trial as articulated in *Dusky v. United States*, and evaluates the *Dusky* standard's prior application to *pro se* defendants.

C. *The Competency Requirement*

Reliable adjudication rests largely on the participation of a competent defendant.[49] The requirement that a defendant be competent to stand trial is fundamental to our adversarial justice system.[50] American common law has long recognized that competence to participate in the adjudication of one's case

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43. *Id.* at 178.
44. *Id.*
45. *Id.* at 184.
46. *Id.* at 178–79; *see also* Indiana v. Edwards, 554 U.S. 164, 171 (2008).
47. *See Edwards*, 554 U.S. at 167.
48. NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 39–40 (2002); *see also* R v. Pritchard, [1836] 173 Eng. Rep. 135 (P.C.) 135.
49. POYTHRESS ET AL., *supra* note 48, at 44.
50. *Id.* at 1; *see also* Drope v. Missouri, 420 U.S. 162, 171 (1975); *Pritchard*, 173 Eng. Rep. at 135.

is essential to a fair trial and due process.[51] The primary purpose of the competency requirement is to promote fairness in the criminal justice system.[52] Such a requirement helps preserve the dignity of the criminal process, and perhaps most importantly, "promote[s] the defendant's exercise of self-determination in making important decisions in his defense."[53]

While the competency requirement has existed in Anglo-American jurisprudence for centuries, the Supreme Court first articulated a competency standard in *Dusky v. United States*.[54] The *Dusky* competency standard contains a two-part analysis that first considers "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and second, "whether [the defendant] has a rational as well as factual understanding of the proceedings against him."[55] Under *Dusky*, the core conceptualization of competence to stand trial pertains to the defendant's ability "to understand the charges, the nature and purpose of criminal prosecution, [and] the roles of prosecutors, attorneys and judges."[56]

The Court has since explained that, "[I]t 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."[57] Although the question of a defendant's competency "is often a difficult one in which a wide range of manifestations and subtle

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51. POYTHRESS ET AL., *supra* note 48, at 39. "At least since the [fourteenth] century, common-law courts have declined to proceed against criminal defendants who are 'incompetent' to be brought before the court for adjudication." *Id.*

52. *Id.* at 1.

53. *Id.* (citation omitted). Although *Dusky* is recognized as the first Supreme Court case to articulate an authoritative competency standard, it largely echoes the description of the elements of "fitness to stand trial" as articulated in *Pritchard*, 173 Eng. Rep. at 135 ("[W]hether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper [defense]—to know that he might challenge [jurors] to whom he may object—and to comprehend the details of the evidence. . . . It is not enough, that he may have a general capacity of communicating on ordinary matters.").

54. 362 U.S. 402 (1960).

55. *Id.* at 402. Since *Dusky*, nearly all fifty states have adopted statutes addressing adjudicative competency; while the statutes vary, the two prongs of *Dusky* largely remain consistent throughout. *See, e.g.*, COLO. REV. STAT. § 16-8.5-101(4) (2011).

56. POYTHRESS ET AL., *supra* note 48, at 8.

57. Drope v. Missouri, 420 U.S. 162, 171 (1975).

nuances are implicated,"[58] the prohibition against trying incompetent defendants is absolute and fundamental to the American adversary system.[59]

Even prior to the Court's articulation of the *Dusky* competency standard, the Court recognized that the question of competence raised due process concerns, especially for *pro se* defendants.[60] In *Massey v. Moore*, the Court suggested that a finding of competence to stand trial with the assistance of counsel would not necessarily equate to a finding of competence to stand trial *without* the assistance of counsel.[61]

In *Massey*, the Court declared that the Fourteenth Amendment requires that a defendant receive a fair trial.[62] The question before the *Massey* Court was whether the defendant, allegedly of unsound mind at the time of trial, was entitled to a hearing on the issue of competency.[63] After being tried without the assistance of counsel, convicted of robbery by assault, and sentenced to life imprisonment,[64] the defendant appealed his conviction on the grounds that "he was insane [at the time of trial] and unable to defend himself."[65] The Court held that in accordance with the Due Process Clause of the Fourteenth Amendment, the defendant was entitled to a

58. *Id.* at 180.

59. *Id.* at 171. The basis of the Court's observation originates with a passage in WILLIAM BLACKSTONE, COMMENTARIES 4:24 (1765–1769), in which Blackstone wrote:

> If a man in his sound memory commits a capital offense, 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 had pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? 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.

POYTHRESS ET AL., *supra* note 48, at 44.

60. *See* Massey v. Moore, 348 U.S. 105, 108 (1954).

61. *Id.* at 108. The Court remarked, "[O]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." *Id.*

62. *Id.* In pertinent part, the Fourteenth Amendment reads: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

63. *Massey*, 348 U.S. at 106.

64. The defendant suffered two previous convictions for other felonies, and accordingly, upon the robbery by assault conviction, the court imposed a compulsory life sentence in the Texas State Penitentiary. *See* Massey v. Moore, 205 F.2d 665, 665 (5th Cir. 1953), *rev'd*, 348 U.S. 105 (1954).

65. *Massey*, 348 U.S. at 106–07.

competency hearing.[66] The Court explained that "no trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court."[67]

Despite the Court's early awareness of the challenges faced by *pro se* defendants, it was not until thirty-nine years after *Massey* that the Supreme Court first applied the *Dusky* competency standard to a *pro se* defendant.[68] In *Godinez v. Moran*, the Court addressed whether the competency standard for pleading guilty or waiving the right to counsel was, or should be, higher than the *Dusky* competency standard for standing trial.[69] The Court began its analysis by noting that a criminal defendant may not be tried unless he is competent; and that under *Johnson v. Zerbst*,[70] a case setting forth the requirements for a valid waiver, he may not waive his right to the assistance of counsel unless he does so competently and intelligently.[71] Ultimately, the Court determined that the competency standard is the same regardless of whether a defendant is pleading guilty, waiving counsel, or going to trial.[72] It explained, "[I]f the *Dusky* standard is adequate for defendants who plead not guilty, it is necessarily adequate for those who plead guilty."[73]

The *Godinez* Court rejected the contention that waiver of constitutional rights (such as the Sixth Amendment right to counsel) requires a higher level of mental functioning than that required to stand trial.[74] The court of appeals reasoned:

> [W]hile a defendant is competent to stand trial if he has a rational and factual understanding of the proceedings and is capable of assisting his counsel, 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.[75]

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66. *Id.* at 108.
67. *Id.*
68. *See* Godinez v. Moran, 509 U.S. 389, 399–400 (1993).
69. *Id.* at 391.
70. 304 U.S. at 456.
71. *Godinez*, 509 U.S. at 396.
72. *Id.* at 399.
73. *Id.*
74. *Id.* at 394–402.
75. *Id.* at 394 (citations omitted). It is important to note that the Supreme Court addressed competency as it pertained to *waiving* counsel; it did not consider or address the competency standard in the context of self-representation.

The Supreme Court, not persuaded, explained "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation."[76] Although rejecting the court of appeals's assertion that waiver necessitates a different standard of competence, the Court clarified that:

> A finding that a defendant is competent to stand trial . . . 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.*[77]

Relying heavily on its rationale in *Faretta,* its landmark right of self-representation case, the *Godinez* Court reiterated that "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."[78] Nevertheless, in distinguishing between "the competence to waive the right" and "the competence to represent [oneself]," the Court left open the question of whether there *should* be a different competency standard to assess a defendant's competence to proceed *pro se.*

Until *Indiana v. Edwards,* the Court's jurisprudence consistently held that the *Dusky* competency standard was adequate to assess the competence of criminal defendants—those represented by counsel and *pro se* defendants alike—at the varying stages of the criminal process. But as the Supreme Court recognized in *Edwards,* it is sometimes hard to completely separate competence to stand trial from the ability to participate competently in one's own defense. In *Edwards,* the Court revisited its earlier competence jurisprudence, and explored the inadequacies of the *Dusky* competency standard.

76. *Id.* at 400.

77. *Id.* at 400–01 (citations omitted). *Godinez* left it to the individual states to develop procedures for determining whether a defendant's waiver of counsel is competent, knowing, and voluntary. *Id.* at 402; *see also* Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *6.

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

Part II of this Note examines in-depth the procedural history of *Edwards* and explains the Court's holding.

II. *INDIANA V. EDWARDS*: RECOGNIZING THE NEED FOR A NEW COMPETENCY STANDARD FOR THE *PRO SE* DEFENDANT

In 2008, the Supreme Court decided *Indiana v. Edwards*,[79] a case that pitted the right of self-representation against the due process and fair trial guarantees. In holding that the Constitution permits a state to limit a defendant's right of self-representation by imposing unwanted counsel, the *Edwards* Court emphasized that "the most basic of the Constitution's criminal law objectives [is] providing a fair trial."[80] This section traces the factual basis and holding of *Edwards*, and explains why the Court's prior competence jurisprudence proved inadequate in addressing the question of the appropriate standard necessary to ensure *pro se* defendants are in fact competent to execute their own defense.

In *Edwards*, the defendant was charged with attempted murder and a number of other charges in connection with a shooting at a department store.[81] Before trial, the defendant was the subject of three competency hearings over a period of three years, and two self-representation requests.[82] The defendant's first competency hearing occurred five months after his arrest at the request of his court-appointed counsel.[83] At the conclusion of the hearing, the trial court found the defendant incompetent to stand trial, and committed him to a state hospital for treatment.[84] Seven months after his commitment, doctors found that the defendant's condition had improved, and suggested that he was fit to stand trial.[85] A few months later, defense counsel requested a second competency evaluation.[86] After the second competency hearing, the trial court found the defendant competent to stand trial.[87] Seven

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79. 554 U.S. 164 (2008).
80. *Id.* at 176–77.
81. *Id.* at 167. Specifically, the defendant faced four charges: attempted murder, battery with a deadly weapon, criminal recklessness, and theft. *Id.*
82. *Id.* at 167–69.
83. *Id.* at 167.
84. *Id.*
85. *Id.* at 168.
86. *Id.*
87. *Id.* The Court acknowledged that the defendant was "suffer[ing] from mental illness," but found that he was "competent to assist his attorneys in his defense and stand trial for the charged crimes." *Id.* (citation omitted).

months later, defense counsel requested a third psychiatric evaluation for the defendant.[88] At the end of the third hearing, the trial court found the defendant incompetent, and ordered his recommitment to the state hospital.[89]

Months later, the defendant's condition again improved and the trial court found him competent to stand trial.[90] Just before trial, the defendant requested permission to proceed *pro se* and moved for a continuance to allow him to sufficiently prepare to represent himself.[91] The court denied both requests, and the defendant went to trial with his court-appointed counsel.[92] The jury convicted the defendant on two of the four charges, but failed to reach a verdict on the charges of attempted murder and battery.[93] The State sought to retry the defendant on the attempted murder and battery charges.[94] Prior to the second trial, the defendant again requested permission to proceed *pro se*.[95] The court denied the defendant's request, finding that he was not "competent to defend himself."[96] The defendant went to trial with counsel, and the jury convicted him of the remaining counts.[97]

The defendant subsequently appealed his conviction, claiming that the court had unconstitutionally deprived him of his right of self-representation under *Faretta*.[98] The Indiana Court of Appeals agreed with the defendant, reversed the conviction, and ordered a new trial.[99] The Supreme Court of

88. *Id.* At the third hearing, defense counsel presented evidence showing that the defendant suffered from serious thinking difficulties and delusions that "[made] it impossible for him to cooperate with his attorney" and assist in his defense. *Id.* (citation omitted).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 168–69.

93. The defendant was convicted of criminal recklessness and theft. *Id.* at 169.

94. *Id.*

95. *Id.*

96. *Id.* In denying the defendant's request to proceed *pro se*, the trial court noted his lengthy record of psychiatric reports, his diagnosis of schizophrenia, and his inability to competently defend himself. *Id. But cf.* Faretta v. California, 422 U.S. 806, 836 (1975) (noting that a defendant's legal knowledge is not relevant to the determination of whether he is competent to waive his right to counsel); Godinez v. Moran, 509 U.S. 389, 399 (1993) (declaring that "[T]he 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.").

97. *Edwards*, 554 U.S. at 169.

98. *Id.*

99. *Id.*

Indiana affirmed, citing both *Faretta* and *Godinez* in its decision.[100] Conversely, the United States Supreme Court held that its decisions in *Faretta* and *Godinez* did not, in fact, require the state to allow the defendant to represent himself, and accordingly, vacated the judgment of the Supreme Court of Indiana.[101]

The United States Supreme Court acknowledged that its jurisprudence, while helpful in framing the issue before the Court, was far from dispositive because the Court had never before explicitly considered the relationship between the mental competence standard and the right of self-representation.[102] The Court explained that even *Faretta*, its "foundational self-representation case," could not answer the question presented in *Edwards* because "it did not consider the problem of mental competency," and "*Faretta* itself and later cases . . . made clear that the right of self-representation is not absolute."[103]

The sole case in which the Court considered mental competence and self-representation together was *Godinez.*[104] However, *Godinez* proved to be of minimal assistance to the Court despite the fact that, like *Edwards, Godinez* involved "a mental condition that falls in a gray area between *Dusky's* minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose."[105] The Court distinguished *Godinez* on two fundamental points. First, *Godinez* involved a defendant who

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100. *Id.*

101. *Id.* at 179.

102. *Id.* at 169–70. The Court spoke explicitly of *Dusky v. United States*, 362 U.S. 402 (1960), and *Drope v. Missouri*, 420 U.S. 162 (1975), the two cases that set forth the Constitution's "mental competence" standard. *Id.* at 170.

103. *Edwards*, 554 U.S. at 170–71. In *Edwards*, the Court cited to *McKaskle v. Wiggins*, 465 U.S. 168, 178–79 (1984), noting that appointment of standby counsel over a *pro se* defendant's objection is permissible, and to *Faretta v. California*, 422 U.S. 806, 834–35 n.46 (1975), to explain that defendants do not have the right "to abuse the dignity of the courtroom," to avoid compliance "with relevant rules of procedural and substantive law," or to "engag[e] in serious and obstructionist misconduct." *Id.* at 171 (alteration in original).

104. *Edwards*, 554 U.S. at 171.

105. *Id.* at 172. The Court also noted, however, that there was a critical difference between the issue in *Godinez* and in *Edwards*. In *Godinez*, the higher standard sought to measure the defendant's ability to proceed on his own to enter a guilty plea; whereas in *Edwards*, "the higher standard seeks to measure the defendant's ability to conduct trial proceedings" and focuses explicitly on the defendant's ability to conduct his own defense. *Id.* at 173.

sought only to enter a guilty plea without counsel, and not to represent himself at trial.[106] Second, the trial court in *Godinez* sought to *permit* the defendant to represent himself, whereas in *Edwards*, the trial court sought to *deny* the defendant the right of self-representation.[107] Accordingly, the *Edwards* Court faced an open question as to what should be the proper standard for determining a *pro se* defendant's competence to conduct trial proceedings.[108]

In *Edwards,* the Court appears to have realized the impact that an improper or misguided determination of competence could have on a *pro se* defendant's right to a fair trial.[109] It cautioned against the use of a single mental competency standard to determine both whether a defendant represented by counsel could proceed to trial and whether a defendant who goes to trial must be permitted to represent himself.[110] The Court noted that there are many instances where "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."[111] Quintessentially, *Edwards* suggests that fair adjudication is of greater concern and more fundamental to the adversary process than is the absolute preservation of a defendant's autonomy and dignity.[112]

The Court distinguished the issue presented in *Edwards* from prior cases by noting that its mental competence jurisprudence and the standard set forth in *Dusky* assume representation by counsel.[113] The Court remarked that "an instance in which a defendant who would choose to forego counsel at trial presents a very different set of circumstances" than an instance in which a defendant is represented by

106. *Id.*

107. *Id.*

108. *Id.* at 174; *see also* State v. Connor, 973 A.2d 627, 649 (Conn. 2009) (noting that the *Edwards* court "turned to the open question of the proper standard for determining a mentally ill defendant's competence to conduct trial proceedings").

109. 554 U.S. at 175.

110. *Id.* The Court explained that "[m]ental 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." *Id.*

111. *Id.* at 176 (quoting McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984)).

112. *Id.* at 177. It is important to note that *Edwards* did not overrule *Faretta,* or any of the other Sixth Amendment right of self-representation cases. Arguably, however, it did significantly weaken such cases.

113. *Id.* at 174.

counsel, and accordingly calls for a different standard.[114] *Edwards* makes clear "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."[115] However, *Edwards* does not define what constitutes "mentally competent to conduct one's own defense." Thus, the appropriate standard for assessing the mental competence of *pro se* defendants remains ambiguous. Part III of this Note attempts to provide guidance to trial courts and articulate an appropriate standard for assessing a *pro se* defendant's competence to execute his own defense.

III. A HEIGHTENED COMPETENCY STANDARD FOR *PRO SE* DEFENDANTS

The issue of the gray-area defendant[116] raises doubt as to the adequacy of the *Dusky* competency standard when applied to *pro se* defendants. This is largely because a finding of competency to stand trial with the assistance of counsel does not necessarily equate to a finding that the defendant is competent to exercise the right of self-representation and to autonomously execute his own defense.[117] There can be little dispute that the criminal justice system can be confusing and difficult to navigate—especially for laypersons unfamiliar with criminal law and procedure. As the Court recognized and eloquently stated in a passage from *Powell v. Alabama*:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted

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114. *Id.* at 174–75.

115. *Id.* at 177–78. It is worth clarifying that *Edwards* suggests that a trial court's inquiry into a defendant's competence to engage in self-representation be narrowly tailored to an assessment of *mental* competence. *Id.* at 178. *Edwards* does not grant a trial court unfettered discretion to conduct a searching inquiry into a defendant's ability to *successfully* represent himself before allowing him to proceed *pro se*, just to inquire into his competence to do so. *See* Jones v. Norman, 633 F.3d 661, 669 (8th Cir. 2011).

116. *See supra* text accompanying note 9.

117. *See* POYTHRESS ET AL., *supra* note 48, at 103–04.

> upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[118]

When the right of self-representation is exercised by a defendant who lacks the competence and intellect to put on his own defense, the adversary system is no longer adversarial; it has failed.[119] The challenges of self-representation, if difficult for the average layperson, are certainly exacerbated for the gray-area defendant. There exists an inherent tension between a defendant's autonomy and the right of self-representation, on the one hand, and the due process right to a fair trial, on the other. The gray-area defendant exemplifies this tension—sufficiently competent to stand trial, but not to defend himself.

Using *Edwards* as guidance, this Part identifies the inadequacies of the *Dusky* competency standard as applied to *pro se* defendants, and in turn, attempts to articulate a more appropriate standard for assessing the competence of *pro se* defendants. Section A considers three practical reasons that strongly suggest the need for trial courts to adopt a heightened competency standard. Section B explains that because *Edwards* does not mandate trial courts to employ any particular test or adopt a heightened standard, trial courts retain discretion as to what standard to apply, if any. Accordingly, Section B articulates an appropriate standard that trial courts can employ to determine whether a defendant is competent to proceed *pro se*.

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118. 287 U.S. 45, 69 (1932).

119. "[T]he accuracy of the factual determination of guilt becomes suspect when the accused lacks the effective opportunity to challenge it by his active involvement at the trial." Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *13 (citing S. REP. NO. 98-225 at 232 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3414).

A. Practical Reasons Requiring a Heightened Standard

Currently, our system lacks adequate safeguards to ensure gray-area defendants are able to meaningfully participate in the adversarial process and receive fair trials. The gray-area defendant who wishes to exercise the right of self-representation presents a special case that warrants a particularized competency standard. This section explains that the competency standard, as articulated in *Dusky*, is inadequate as applied to *pro se* defendants because it only contemplates those defendants who are represented by counsel.

In *Edwards*, the Court recognized for the first time the predicament of the gray-area defendant. Although *Godinez* "reject[ed] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard,"[120] *Godinez* did not address whether a higher competency standard should apply to *pro se* defendants.[121] Contrary to the general outlook expressed in *Godinez, Edwards* declared that "given the different capacities needed to proceed to trial without counsel, there is little reason to believe that [the] *Dusky* [competency standard] alone is sufficient."[122] In so holding, the Court recognized the possibility that there is a difference between a defendant's mental competence to stand trial with counsel and mental competence to proceed *pro se*.[123]

As a result of constitutional and statutory provisions prohibiting the adjudication of an incompetent defendant,[124] competency evaluations within both the state and federal systems are done routinely upon any indication of mental illness.[125] Accordingly, trial courts may deem it unnecessary to inquire into a defendant's competence to proceed *pro se* after they have already determined that the defendant is competent under *Dusky*[126] and that his waiver of the right to counsel was

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120. Indiana v. Edwards, 554 U.S. 164, 172 (2008) (alteration in original) (quoting Godinez v. Moran, 509 U.S. 389, 398 (1993)).

121. *Edwards*, 554 U.S. at 174.

122. *Id.* at 177.

123. *Id.*

124. *See supra* text accompanying note 55; *see also* U.S. CONST. amend. XIV, § 1.

125. *See* Hashimoto, *supra* note 10, at 457 n.130 (citing Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 924 (1985) ("Virtually every criminal defendant who appears to be mentally ill at any time within the criminal trial process is examined for competency.")).

126. Dusky v. United States, 362 U.S. 402 (1960).

knowing, voluntary, and intelligent as required by *Zerbst*.[127] However, the failure to adopt a heightened competency standard to evaluate defendants who wish to proceed *pro se* and exhibit signs of mental illness or incompetence may cast serious doubt on the fairness of the defendant's trial.

In addition to fair trial concerns, a number of practical considerations encourage courts to adopt a heightened competency standard for defendants wishing to represent themselves. First, mental competence is not a unitary concept, and accordingly, warrants a more particularized, context-based standard.[128] Second, more extensive capabilities are required in order to effectuate self-representation than are needed to stand trial with counsel, and a competency determination should reflect the *pro se* defendant's heightened burden.[129] Third, a heightened competency standard is essential to ensure reliable adjudication and a fair trial.

First, because mental competence is not a unitary concept, trial courts should scrutinize more closely questions pertaining to a defendant's competency to proceed *pro se*. As the Court in *Edwards* noted, "there is little reason to believe that [the] *Dusky* [competency standard] alone is sufficient" to measure a defendant's competence to represent himself.[130] Generally, defendants are presumed to be competent unless and until their competency is challenged.[131] However, it is important to recognize that "[a]n individual can be competent for one purpose and not another."[132] For this reason, various legal competencies are generally treated as independent and discrete from one another.[133] An "adjudication of incompetence for one legal purpose usually does not render a person legally incompetent in another context."[134]

The ability of a defendant to comprehend and perform one set of tasks, such as those required to assist counsel, is not necessarily indicative of the ability of the defendant to perform

127. Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

128. *See* Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *18.

129. *Id.* at *20.

130. *See* Indiana v. Edwards, 554 U.S. 164, 177 (2008).

131. POYTHRESS ET AL., *supra* note 48, at 104. Studies suggest that attorneys have some doubt as to the mental capacity of their clients in approximately 8 to 15 percent of felony cases, but seek mental health evaluations in less than half of those cases. *Id.* at 37.

132. Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *18; *see also* POYTHRESS ET AL., *supra* note 48, at 104.

133. POYTHRESS ET AL., *supra* note 48, at 104.

134. *Id.*

other tasks.[135] A defendant who is found competent to assist counsel may be incompetent to make specific decisions that arise regarding his defense.[136] Because competence is not a unitary concept, a heightened competence standard to assess *pro se* defendants would help to ensure that *pro se* defendants are competent not solely to stand trial, but to actively and meaningfully execute their own defenses.

Second, a heightened competency standard is warranted because self-representation requires a significantly higher level of competence and more extensive capabilities than those required of a represented defendant. Because the *Dusky* standard evaluates a defendant's competence only through his cognitive and communicative abilities to provide information to and interact with counsel, such a standard is inadequate for assessing the competence of a *pro se* defendant who must additionally be able to communicate coherently with all players in the criminal justice system and single-handedly create and control the organization of his own defense.[137]

A defendant represented by counsel need only be able to consult with his lawyer and have a rational and factual understanding of the criminal proceedings against him.[138] A represented defendant does not need to fully understand all of the elements of the crime with which he has been charged, nor does the defendant need to be competent to make proper evidentiary objections or identify weaknesses or strengths in the prosecution's case.[139] Additionally, a represented defendant does not need to be able to effectively communicate or engage

135. *Id.* at 47. For example, "[s]ome mentally disabled defendants who understand the process and their own situations are unable to assist counsel; and, conversely, a delusional defendant may be able to understand counsel's role and to relate relevant information" and thus effectively assist counsel in formulating a defense. *Id.*

136. *Id.*

137. *Id.* at 22. In a series of studies that examined attorney-client interactions, attorneys' perception of their clients' competency, and the defendant's decision-making prerogatives and participation in the defense, more than half of the defendants studied were considered "passive participants in the overall defense." *Id.* at 37. The studies also found that the prevalence of reported client passivity was substantially higher among clients whose competence was doubted by their representing attorneys. *Id.* Consequently, a represented defendant, who suffers from mental or cognitive impairments, but who is found competent to stand trial under *Dusky*, to a large extent need not exert himself or actively participate to avail himself of a viable defense—for counsel will serve as his advocate. His unrepresented counterpart, however, may not sit idly by, and must actively participate in his defense, for he has no other advocate than himself. *See id.* at 38.

138. *See* Dusky v. United States, 362 U.S. 402, 402–03 (1960).

139. *See* Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *24.

with anyone other than defense counsel.

Conversely, a *pro se* defendant must be able to understand, substantively and procedurally, everything going on at trial so that he can construct a defense, an ability that goes far beyond that required of a represented defendant. When a defendant represents himself, he alone must have the cognitive and communicative abilities to effectuate a defense.[140] To put on a defense, a *pro se* defendant must be able to do more than merely understand, appreciate, and reason.[141] A *pro se* defendant must be able to effectuate such understanding by controlling the organization and content of his own defense, and do so throughout the trial by presenting and arguing motions and points of law before the court, participating in *voir dire*, questioning witnesses, and addressing the judge and jury at appropriate points.[142]

Moreover, a *pro se* defendant must possess written and oral communication skills and be able to convey relevant points to all the players in the trial.[143] A *pro se* defendant must be able to effectively communicate relevant matters to the judge, jury, opposing counsel, and witnesses. "From the jury's perspective, the message conveyed by the defense may depend as much on the messenger as on the message itself."[144] Therefore, if a jury perceives a *pro se* defendant as incompetent, any viable defense he presents may be of questionable credibility.

A defendant who suffers from "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illness" may well be able to play the role of represented defendant, but such symptoms may impair the defendant's ability to play the significantly expanded role required for self-representation.[145]

Third, mental illnesses pose a genuine threat to reliable adjudication and to the constitutional right to a fair trial.[146] Accordingly, policy considerations support the adoption of a heightened competency standard not only to further the likelihood of a fair trial within the confines of the adversary

140. Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938).
141. *See, e.g.*, POYTHRESS ET AL., *supra* note 48, at 46–47.
142. McKaskle v. Wiggins, 465 U.S. 168, 174 (1984).
143. *See* Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *23–24.
144. *McKaskle*, 465 U.S. at 179.
145. Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *26.
146. POYTHRESS ET AL., *supra* note 48, at 40.

system, but also to preserve the dignity of the gray-area defendant.[147] As the *Edwards* Court noted, "the spectacle that could well result [from permitting a gray-area defendant to represent himself] . . . is at least as likely to prove humiliating as ennobling."[148] Thus, trial courts confronted with a gray-area defendant who seeks to proceed *pro se*, should inquire into the defendant's competence by evaluating his ability to carry out the basic tasks needed to present a defense, make decisions, weigh advantages and disadvantages, and communicate coherently with others.

B. Edwards: *A Matter of Discretion and a Chance for an Expanded Competency Inquiry*

Edwards held that the Constitution *permits* a state to force representation upon a defendant who falls within the so-called gray area of mental competence. It neither adopted nor advocated the adoption of any particularized competency test for *pro se* defendants.[149] The Court left open to the states the option and task of establishing a heightened competency standard, suggesting only that the competency inquiry need not be confined to an analysis under *Dusky*.[150] In doing so, the Court provided very little guidance as to what additional competency inquiry, if any, trial courts should employ.

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147. Indiana v. Edwards, 554 U.S. 164, 176 (2008); People v. Davis, No. 07CA1955, 2012 Colo. App. LEXIS 13, at *16 (Colo. App. Jan. 5, 2012).

148. *Edwards*, 554 U.S. at 176. This is not to say that being denied the right of self-representation because one is deemed incompetent to proceed *pro se* may not be equally or even more humiliating than performing incompetently and poorly in trial. However, the Constitution requires that defendants receive due process and a fair trial, and prohibiting the gray-area defendant from proceeding *pro se* may be the only way to ensure such constitutional guarantees are met. *See* U.S. CONST. amend. XIV, § 1.

149. *Edwards*, 554 U.S. at 178. The *Edwards* Court declined to adopt Indiana's proposed standard. In its brief to the Supreme Court, the State of Indiana advocated that the Court adopt a "coherent-communication rule" that would permit the court to "deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or a jury." *Id.* (quoting Brief for Petitioner at 20, Indiana v. Edwards, 554 U.S. 164 (2008) (No. 07-208)). The State argued that the proposed rule was narrowly tailored and would "ensure that *pro se* defendants have the most basic skills necessary to effectuate their decision to try their own cases." Reply Brief for Petitioner at 9, *Edwards*, 554 U.S. 164 (No. 07-208). The rule would not have allowed a trial court to deny the right of self-representation to a defendant who happened to suffer a mental impairment of some kind, but who, nonetheless, was still able to communicate in a reliable and coherent manner. *Id.* at 13.

150. *Edwards*, 554 U.S. at 178.

Courts have long had a duty to ensure that the adjudication of a criminal defendant proceed only if the defendant is competent.[151] A trial court may *sua sponte* request a defendant to undergo a competency evaluation at any time after the commencement of a prosecution for an offense.[152] Pursuant to 18 U.S.C. § 4241(a), for example, a federal trial court *must* order a competency hearing "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."[153] Regardless of whether a defendant is represented by counsel or *pro se*, a trial court will generally order a competency evaluation where a defendant manifests any sign of mental illness.[154]

Where a trial court suspects that a defendant falls within the gray area of mental competency "between *Dusky's* minimal constitutional requirement . . . and a somewhat higher standard,"[155] the court ought to expand its competency inquiry. Consider, for example, a defendant who is deemed competent under *Dusky*, but who suffers from cognitive disabilities and is illiterate. Or imagine a defendant who, although able to communicate and understand the proceedings against him, suffers from delusions and exhibits extreme and bizarre behavior. Although likely competent under *Dusky*, such defendants would likely be incapable of adequately and competently executing their own defenses without the assistance of counsel.

Although *Edwards* does not *require* state trial courts to employ a particular test or adopt a heightened standard to determine a defendant's competence to represent himself,[156] it

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151. *See, e.g.*, Dusky v. United States, 362 U.S. 402, 402 (1960).

152. 18 U.S.C. § 4241 (2006). In federal criminal prosecutions, 18 U.S.C. § 4241 protects a defendant's procedural due process rights. District courts possess the authority to order the psychiatric or physical examination of a defendant, as well as to order competency hearings. *Id.* The Due Process Clause of the Fourteenth Amendment provides a procedural right to a competency hearing in state prosecutions. *See* Pate v. Robinson, 383 U.S. 375, 384–85 (1966).

153. 18 U.S.C. § 4241 (2006). Note that even this federal statute couches the competency analysis in terms of the *Dusky* standard; the phrase "assist properly in his defense" implies that the defendant is in fact assisting in—not executing single-handedly—his defense.

154. *See* Hashimoto, *supra* note 10, at 428.

155. *Edwards*, 554 U.S. at 172.

156. *See* United States v. DeShazer, 554 F.3d 1281, 1290 (10th Cir. 2009)

does make clear that trial courts retain the discretion to do so. *Edwards* explains that judges are permitted "to take realistic account of [a] 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."[157] The Court noted that trial judges are often in the best position to make "fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."[158]

Accordingly, trial courts can, and should, engage in an additional competency inquiry. This Note proposes that courts adopt a three-part analysis to assess a defendant's competence to proceed *pro se* by evaluating: (1) whether the defendant is competent to stand trial under *Dusky*; (2) whether the defendant has voluntarily, knowingly, and intelligently waived the right to counsel under *Johnson v. Zerbst*;[159] and (3) whether the defendant is mentally competent to defend himself without the assistance of counsel.[160] The first two prongs of the suggested analysis are already mandated by law and have been employed by criminal trial courts for decades.[161] They warrant no further explanation. As *Edwards* just recently opened the door for trial courts to employ a third, additional prong, the following subsections will focus on, and further develop, this

(stating that *Edwards* "reaffirmed that a court may constitutionally permit a defendant to represent himself so long as he is competent to stand trial"); United States v. Turner, 644 F.3d 713, 724 (8th Cir. 2011) (citation omitted) (explaining "*Edwards* clarified that district court judges have discretion to force counsel upon the discrete set of defendants competent to stand trial but incompetent to represent themselves. It does not mandate two separate competency findings for every defendant who seeks to proceed pro se."); United States v. VanHoesen, No. 10-0713-cr, 2011 U.S. App. LEXIS 24557, at *8–9 (2d Cir. Dec. 9, 2011) (noting that "since [*Edwards*], of course, the issue [of determining competency] is a little bit different, and the issue is now whether or not you're capable of representing yourself."); People v. Davis, No. 07CA1955, 2012 Colo. App. LEXIS 13, at *2 (Colo. App. Jan. 5, 2012).

157. *Edwards*, 554 U.S. at 177–78.

158. *Id.* at 177. "[C]ompetence assessment and adjudication tends to be a low-visibility, highly discretionary feature of the criminal process, rarely coming to public attention, and rarely generating appealable error. . . . Operationally, the salient truth about the law of adjudicative competence is that asking the question is more important than getting the 'right' answer." POYTHRESS ET AL., *supra* note 48, at 42.

159. 304 U.S. 458, 465 (1938).

160. *See, e.g.*, *Edwards*, 554 U.S. at 177–78; *see also* POYTHRESS ET AL., *supra* note 48, at 40 (noting that "[t]he concept of adjudicative competence [under *Dusky*] conveys a fairly passive view of the defendant's role in criminal proceedings").

161. *See* Dusky v. United States, 362 U.S. 402, 402 (1960); *Zerbst*, 304 U.S. at 465.

inquiry.

In determining whether a defendant who seeks to proceed *pro se* at trial is mentally competent to do so, the trial court should consider: (1) the facts of the case and the record before the court; (2) the court's in-person interaction with the particular defendant;[162] and (3) the defendant's ability to "carry out the basic tasks needed to present his own defense without the help of counsel."[163] If the trial court finds that a defendant lacks the competence to advocate on his own behalf and conduct his defense without the assistance of counsel, the trial court has the discretion, under *Edwards*, to deny the defendant's request to proceed *pro se*.[164] Each of the aforementioned factors will be addressed in turn.

1. The Facts of the Case and Record

The determination of competence is fundamentally a normative judgment and one that is necessarily highly contextual.[165] When a court is faced with a defendant who has expressed a desire to proceed to trial *pro se*, the court's competency inquiry should start with a review of the record and an evaluation of the particular facts of the defendant's case.[166]

The court should consider whether the facts of the case or record indicate any prior medical or psychiatric examinations or any past diagnosis of mental illness or defect.[167] Where a

162. *See* United States v. Brown, No. 1:09-CR-30-GZS, 2009 U.S. Dist. LEXIS 130246, at *2 (D.N.H. June 2, 2009).

163. *See* United States v. Thompson, 587 F.3d 1165, 1172 (9th Cir. 2009) (quoting *Edwards*, 554 U.S. at 175–76).

164. *See Thompson*, 587 F.3d at 1171; People v. Davis, No. 07CA1955, 2012 Colo. App. LEXIS 13, at *14–15 (Colo. App. Jan. 5, 2012); People v. Wilson, No. 09CA1073, 2011 Colo. App. LEXIS 2172, at *15 (Colo. App. June 23, 2011). In the event the trial court deems the defendant incompetent to proceed *pro se*, the trial court has two options: (1) it may appoint standby counsel, McKaskle v. Wiggins, 465 U.S. 168, 170 (1984), or (2) it may appoint counsel to represent the defendant, *see Edwards*, 554 U.S. at 164.

165. POYTHRESS ET AL., *supra* note 48, at 41.

166. Note that a trial court's inquiry into the facts of the defendant's case should not entail an investigation into the facts as they pertain to the crime(s) for which the defendant is charged, but rather an inquiry into the more general facts demonstrative of the defendant's interaction with the criminal justice system and potentially relevant to the defendant's competence (i.e., the number of times the defendant has appeared before a criminal court, whether in connection to a prior case or the present case and whether the defendant was represented by counsel or proceeded *pro se* at the time of those appearances).

167. *See* United States v. Turner, 644 F.3d 713, 722–23 (8th Cir. 2011); United

defendant's record contains reference to psychiatric history, medical opinions, or notes regarding the defendant's competence to stand trial or his competence to proceed *pro se*, the court should consider such opinions with care.[168]

The court should also review the record to determine whether it has previously warned the defendant—and whether the defendant exhibits an understanding—of the dangers and disadvantages of self-representation.[169] Where a review of the documentary record demonstrates that a defendant has been warned of the dangers of self-representation yet has chosen to continue *pro se*, and where the record demonstrates that the defendant has made a substantial number of filings on the docket and submitted reasonable and substantively valid motions, the court may be inclined to find that the defendant rationally understands the process and is competent to conduct his own defense. Conversely, the court may be hesitant to presume competency where the defendant has not made any filings, or has made only nonsensical filings that indicate a lack of decisional competence,[170] and where the record is silent on whether the defendant has been warned about the dangers of self-representation.

Similarly, when review of the defendant's record shows that the defendant has had previous encounters with the law and the criminal adjudicative process, it may suggest that the defendant is at least versed in the procedural and substantive rules of criminal law.[171] While the defendant's prior court experience is by no means determinative of competency, when viewed in conjunction with other factors, it may help inform

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States v. DeShazer, 554 F.3d 1281, 1286 (10th Cir. 2009).

168. *See Turner*, 644 F.3d at 721.

169. *See id.* at 722.

170. Understood under the Court's competence jurisprudence, decisional competence is "the capacity to: (1) understand information relevant to the specific decision at issue (understanding), (2) appreciate the significance of the decision as applied to one's own situation (appreciation), (3) think rationally (logically) about the alternative courses of action (reasoning), and (4) express a choice among alternatives (choice)." POYTHRESS ET AL., *supra* note 48, at 48.

171. *See* United States v. Brown, No. 1:09-CR-30-GZS, 2009 U.S. Dist. LEXIS 130246, at *2–3 (D.N.H. June 2, 2009). Note that a defendant's "technical legal knowledge" is not relevant to an assessment of his knowing exercise of his right to defend himself or of his competence to do so. *See* Faretta v. California, 422 U.S. 806, 836 (1975). However, in determining the defendant's competence to proceed *pro se*, the court may consider the nature and extent of the defendant's past interaction with the adjudicative process. If he has previously navigated the system without the assistance of counsel, that may perhaps demonstrate his understanding and competence to proceed *pro se* in the present matter.

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2. The Court's Interaction with the Defendant

As *Edwards* made clear, a trial judge is often in the best position to evaluate a defendant and determine the defendant's competence to proceed *pro se.*[172] Because a trial judge usually has the opportunity to interact with and observe the defendant on numerous occasions and at various stages prior to trial, the trial court should use such opportunities to carefully examine the defendant with an eye toward assessing the defendant's competency.

In evaluating whether a defendant is competent to represent himself at trial, the court should consider its own observations of the defendant's behavior and demeanor in the courtroom.[173] The defendant's demeanor when appearing before the court may be indicative of the defendant's competency to represent himself.[174] Where the defendant's interactions with the court have been sporadic, inconsistent, or bizarre, or where his responses to court inquiries have been irrational and absurd, the trial court may be justified in doubting the defendant's competence to proceed *pro se* and, at minimum, in ordering a competency evaluation.[175]

However, where the trial court's interaction with and observation of the defendant suggest that the defendant has an active interest in proceeding *pro se*, and where his responses to court inquiries have been rational and suggest that the defendant has independently performed legal research, the defendant may be sufficiently competent to defend himself.[176]

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172. Indiana v. Edwards, 554 U.S. 164, 177 (2008).

173. *See* United States v. DeShazer, 554 F.3d 1281 (10th Cir. 2009); *Turner*, 644 F.3d at 721; *see also* Griffin v. Lockhart, 935 F.2d 926, 930 (8th Cir. 1991).

174. *See, e.g.*, *DeShazer*, 554 F.3d at 1286; United States v. Berry, 565 F.3d 385, 387 (7th Cir. 2009); United States v. Thompson, 587 F.3d 1165, 1173 (9th Cir. 2009); Brooks v. McCaughtry, 380 F.3d 1009, 1011 (7th Cir. 2004); United States v. Saba, 837 F. Supp. 2d 702, 711 (W.D. Mich. 2011).

175. Bizarre behavior alone may not render the defendant incompetent to proceed *pro se*. However, it may, and perhaps properly should, cause the trial court to consider ordering a competency evaluation of the defendant. *See Berry*, 565 F.3d at 387.

176. *See* United States v. VanHoesen, No. 10-0713-cr, 2011 U.S. App. LEXIS 24557, at *8–9 (2d Cir. Dec. 9, 2011).

3. The Defendant's Ability to Present His Defense

After reviewing the record and critically observing the defendant, the court should be able to move on to a "totality" analysis and evaluate the defendant's ability to "carry out the basic tasks needed to present his defense in counsel's absence."[177] When presented with a defendant who, for one reason or another, the court deems incompetent to carry out even the most elementary tasks necessary to conduct a defense, the trial court should deny the defendant's request to proceed *pro se*. To grant the request under such circumstances would effectively deny the defendant a fair trial.

Here, the court should rely largely on its knowledge of the defendant's record and the court's observations of the defendant, in addition to any other pertinent information that may inform the court's judgment as to the defendant's ability to make rational decisions, weigh advantages and disadvantages, and communicate coherently.[178] A determination that the defendant is able to make decisions in a self-interested manner supports the presumption that the defendant is competent and able to carry out his own defense.[179] Similarly, the defendant's decision-making abilities may be apparent where the defendant is "able to articulate a defense strategy and [a] readiness to attempt it."[180] To find the defendant competent to proceed *pro se*, the court need not find the defendant's choice or strategy to be the "best legal approach," only that it is rational.[181] A determination that the defendant is stricken with delusional or irrational thoughts, however, should lead the court to some level of suspicion as to the defendant's competency to represent himself.

The ability to communicate coherently is one of the most basic and fundamental tasks required to present a defense.[182] To be able to defend himself, a *pro se* defendant must possess written communication capabilities, as he must: file motions; prepare and submit other written materials, such as proposed

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177. *See* People v. Davis, No. 07CA1955, 2012 Colo. App. LEXIS 13, at *23 (Colo. App. Jan. 5, 2012).

178. *Saba*, 837 F. Supp. 2d at 710–11. Other pertinent information may include any clinical or psychiatric reports prepared to assist in evaluating the defendant's competency to proceed *pro se*. *Id.*

179. Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *30.

180. *Saba*, 837 F. Supp. 2d at 709.

181. *Id.*

182. Brief for the Am. Psychiatric Ass'n, *supra* note 4, at *22.

jury instructions, evidentiary exhibits, and affidavits; and be able to read and understand written materials as provided.[183] In addition, the *pro se* defendant must have oral communication skills.[184] "The *pro se* defendant's speaking role commonly includes *voir dire*, opening statement, objections, cross-examination of prosecution witnesses, direct examination of defense witnesses, and closing argument."[185] Absent the capability to make rational decisions and communicate coherently, the court should be hesitant to find the defendant competent to proceed *pro se*.

Once the court has taken into consideration the facts and record of the defendant's case and the court's in-person interaction with the particular defendant, the court should be in a position to critically assess whether the defendant is able to carry out the basic tasks needed to present a defense without the help of counsel. Where the court finds, after this three-part analysis, that the defendant is not competent to represent himself, the court may, in its discretion, appoint counsel to assist the defendant.

CONCLUSION

The right of self-representation is deeply ingrained in the Anglo-American system of justice, but so is the requirement that a criminal defendant be tried only if competent to participate in the adjudication of his case. Neither should be tread on lightly.

The Supreme Court's holding in *Indiana v. Edwards* is not novel in the sense that American courts have historically recognized and adhered to the requirement that defendants be tried only if found competent to stand trial. *Edwards* is remarkable, however, in that it recognizes for the first time that competence to stand trial may not equate to competence to proceed *pro se*. The level of mental competence necessary to single-handedly execute one's own defense at trial is much higher than that required of represented defendants. *Edwards* provides courts with the authority and discretion to determine whether a particular defendant is competent not only to stand trial *with* the assistance of counsel, but also whether that defendant is competent to stand trial *without* the assistance of

183. *Id.* at *23.
184. *Id.* at *24.
185. *Id.*

counsel.

In many circumstances, the right of self-representation does not conflict with or impede due process. By and large, defendants who choose to represent themselves are able to competently and effectively exercise the right of self-representation, affirm their autonomy while retaining their dignity, and play the role of master of their own defense—and destiny. But a heightened competency standard is necessary to aid trial courts in determining which defendants fall within the gray area between the minimal level of competence as required under *Dusky* and the mental competence required to execute one's defense without the assistance of counsel.

The heightened competency standard proposed in this Note establishes a foundation that facilitates courts' recognition of gray-area defendants so that they are better able to determine when to appoint counsel to assist in a defendant's defense, and thereby preserve fairness in the adversary system and safeguard the gray-area defendant's due process rights. States should adopt and implement this heightened standard to assess those defendants who wish to proceed *pro se* by interpreting their respective state due process clauses to require the heightened standard.