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The Spectrum of Competency: Determining a Standard of Competence for Pro Se Representation

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— Note —

The Spectrum of Competency: Determining a Standard of Competence for Pro Se Representation

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INTRODUCTION

On November 5, 2009, United States Army Major Nidal Hasan killed thirteen people and injured at least thirty others in a mass shooting at the Fort Hood Army Post in Texas.[1] Hasan was a military psychiatrist who was trained to counsel troops returning from combat. Some have questioned Hasan's motives.[2] Did terrorism motivate his actions? Religious beliefs? Or was it mental illness? Some psychologists speculate that Hasan suffered from a mental illness exacerbated by his high-pressure occupation, which contorted his religious beliefs and led him to commit this mass murder.[3]

Before Hasan's trial, he was granted the right to represent himself and conduct his own defense. The pretrial proceedings included a hearing about Hasan's mental health to determine whether he was competent to stand trial.[4] The court determined that he was competent not only to stand trial but also to proceed pro se. During the trial, "[Hasan] called no witnesses, offered no testimony and declined to make any statements beyond a brief opening comment in which he took responsibility for the shooting and said he was a soldier who had decided to 'switch sides' in what he believed was a U.S. war against Islam."[5] The jury unanimously decided to impose the death penalty. After conducting his disastrous defense, Hasan was accused of intentionally seeking the death penalty.[6] No matter his actual intent, the situation raises the questions of whether Hasan had a mental illness that impaired his ability to conduct his defense to the point that it cost him his life and whether the court had the proper tools to protect Hasan from himself. Hasan's conviction is now going through the stages of a lengthy appeals process.[7]

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1. *Soldier Opens Fire at Ft. Hood; 13 Dead***,** CBSNEWS (Nov. 5, 2009, 3:33 PM), http://www.cbsnews.com/news/soldier-opens-fire-at-ft-hood-13-dead/.

2. *See, e.g.*, Lauren Cox, *Fort Hood Motive Terrorism or Mental Illness?*, ABC NEWS MEDICAL UNIT (Nov. 9, 2009), http://abcnews.go.com/Health/MindMoodNews/fort-hood-shooters-intentions-mass-murder-terrorism/story?id=9019410&singlePage=true.

3. *See id.*

4. Chelsea J. Carter, *Nidal Hasan Rests Case at Fort Hood Massacre Trial; Calls No Witnesses*, CNN (Aug. 21, 2013, 3:32 PM), http://www.cnn.com/2013/08/21/justice/nidal-hasan-court-martial-wednesday/.

5. Billy Kenber, *Hasan Is Sentenced to Death for Fort Hood Rampage*, WASHINGTON POST, Aug. 28, 2013, at A1 (quoting Hasan).

6. *Id.*

7. Will Weissert, *Before Death, Fort Hood Shooter Nidal Hasan Faces Long Appeals*, WASHINGTON TIMES, Aug. 29, 2013, at A07, *available at* http://www.washingtontimes.com/news/2013/aug/29/death-fort-hood-shooter-nidal-hasan-faces-long-app/?page=all ("If he really wants the death penalty, the appeals process won't let it happen for a very long

Further, consider Joshua Stafford, who attempted to bomb a bridge in Brecksville, Ohio, in April 2012. Stafford suffered with a two decade–long history of mental illness.[8] The court, however, determined that he was competent to stand trial because his history of mental illness did not prevent him from assisting in his defense.[9] He was then allowed to represent himself.[10] Based on the current ambiguous requirements to determine a defendant's competency to self-represent, it was appropriate for the judge to allow Stafford to do so. At trial, Stafford faced many procedural issues acting as his own attorney.[11] He was ultimately convicted of all charges after the jury deliberated for a mere ninety minutes.[12] Stafford has since appealed his conviction.[13]

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time . . . . [The military is] not going to want to let the system kill him, even if that's what he wants.").

8. Thomas Sheeran, *Judge: Ohio Bomb Plot Suspect Is Fit for Trial*, ASSOCIATED PRESS, Apr. 15, 2013, http://seattletimes.com/html/nationworld/2020784632_apusbridgebombplot.html; *See also* Kim Palmer, *"Anarchist" Accused in Cleveland Bridge Bomb Plot Goes on Trial*, BANGOR DAILY NEWS, June 11, 2013, http://bangordailynews.com/2013/06/11/news/nation/anarchist-accused-in-cleveland-bridge-bomb-plot-goes-on-trial/ ("Sandra McPherson, a forensic psychologist hired by the defense said she had diagnosed Stafford as having serious mental health issues including bi-polar disorder, attention deficit disorder and post-traumatic stress syndrome from childhood physical abuse.").

9. United States v. Stafford, No. 1:12 CR 238, 2013 WL 1694033, at *4 (N.D. Ohio Apr. 18, 2013); *See* Sheeran, *supra* note 8 ("While fit to stand trial, Stafford 'doesn't cope very well,' forensic psychologist Sandra McPherson testified. . . . 'He tends to make rather poor decisions,' . . . . She said Stafford has a preoccupation with death and had attempted suicide twice since she met him last year.").

10. Associated Press, *Brecksville Bomb Suspect Allowed to Represent Himself*, NEWSNET5 CLEVELAND (May 22, 2013, 3:42 PM), http://www.newsnet5.com/news/local-news/oh-cuyahoga/brecksville-bomb-suspect-allowed-to-represent-himself.

11. *See* James F. McCarty, *Accused Would-Be Bridge-Bomber Denies He Intended to Blow Up Ohio 82 Span, Rests Case*, CLEVELAND.COM (June 13, 2013, 12:29 PM), http://impact.cleveland.com/metro/print.html?entry=/2013/06/accused_would-be_bridge-bomber_3.html ("Stafford is acting as his own attorney, resulting in an unusual scenario in which he took the witness stand and posed questions to himself as a means of testifying on his own behalf.").

12. James F. McCarty, *Federal Jury Convicts Would-Be Bridge-Bomber on All Counts*, CLEVELAND.COM (June 13, 2013, 8:52 PM), http://www.cleveland.com/metro/index.ssf/2013/06/federal_jury_convicts_would-be.html.

13. *See* Associated Press, *Failed Bomb Plotter Joshua Stafford Appeals Conviction*, NEWSNET5 CLEVELAND (Oct. 10, 2013, 2:59 PM), http://www.newsnet5.com/news/local-news/oh-cuyahoga/failed-bomb-plotter-joshua-stafford-appeals-conviction.

Competence is defined as "[a] basic or minimal ability to do something."[14] While there is a well-established standard to determine whether a criminal defendant is competent to stand trial,[15] our criminal justice system does not currently rely on any well-established standard to determine a defendant's pro se competence (PSC)[16] or the level of competence necessary for self-representation. The Supreme Court has left the decision solely to the discretion of the trial judge.[17] Competency has been defined in different scenarios and at different stages within criminal proceedings. Instead, a specific standard should be created to determine whether a defendant is capable of proceeding through a trial without an attorney. This Note discusses the need for a definitive standard for judges to utilize when determining a defendant's PSC and a method for formulating that standard using the framework of medical decision-making standards.

The circumstances inherent to medical treatment decisions are similarly found in legal decision making. In the context of medical decision making, a patient must possess certain abilities in order to be determined competent to make autonomous treatment decisions. A patient is presumed competent unless proven otherwise. If a doctor provides medical care that a competent patient does not want, then the doctor's actions may be found criminal.[18] This concept presents a tension between patient autonomy and a court's or doctor's paternalism.[19] In the same way, a defendant should be required to

14. BLACK'S LAW DICTIONARY 343 (10th ed. 2014).

15. Dusky v. United States, 362 U.S. 402, 402 (1960). Though the standard for competence to stand trial is well established, it is important to point out that judges still struggle with the standard's application. *See, e.g.*, Holmes v. Levenhagen, 600 F.3d 756, 757 (7th Cir. 2010) (holding that the district court had misapplied the standard and that the defendant's schizophrenia and/or other conditions prevented him from engaging in sustained discussion of almost every aspect of his case or from otherwise working with counsel). The interpretation of the standard varies greatly depending on the facts of each case. While a proposed PSC standard would provide guidance to judges, the standard's application should be similarly case specific and attuned to the defendant's circumstances.

16. The term "PSC" was used in James L. Knoll IV et al., *A Pilot Survey of Trial Court Judges' Opinions on* Pro Se *Competence After* Indiana v. Edwards, 38 J. AM. ACAD. PSYCHIATRY L. 536 (2010).

17. *See* Indiana v. Edwards, 554 U.S. 164, 177 (2008) ("[Trial judges] will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant.").

18. Roger C. Jones & Timothy Holden, *A Guide to Assessing Decision-Making Capacity*, 71 CLEV. CLINIC J. MED. 971, 971 (2004).

19. If a doctor is unsure about a patient's decision-making abilities, or if there is a disagreement between the doctor and patient on a proper course of action and the patient has questionable decision-making abilities, a determination of competency is left to a judge. The standard for finding

possess certain abilities in order to make his own legal decisions while conducting a criminal defense. If a judge requires a competent defendant to accept counsel, it may be a violation of the defendant's Sixth Amendment rights.[20] Similarly, this situation creates tension between the defendant's autonomy and the court's or the attorney's paternalism. Another analogy between medical decision-making capacity and PSC is the idea that there is a baseline level of competence required to make *any* decisions. In medical decision making, some patients—for example, those who are in a persistent vegetative state or severely mentally ill—are unable to make any medical decisions for themselves.[21] In the same way, a criminal defendant who does not meet a certain level of competence is not able to stand trial at all.[22]

Because of the analogies between medical decision making and self-representation, the capacities required to make autonomous medical decisions should be used to formulate a PSC standard. This Note describes the formulation and application of such a standard. Part I provides relevant background information that shows the development of competency in the legal system. Part II discusses competence in medical decision making, standards of performance for criminal attorneys, the detriment of mental illness to PSC, and other considerations that are relevant to PSC. Part III discusses the formulation and application of a PSC standard. Finally, Part IV addresses several issues that may arise as side effects of adopting a PSC standard.

I. BACKGROUND

A. Competence to Stand Trial

In 1960, the Supreme Court enunciated the standard for competence to stand trial. In *Dusky v. United States*,[23] the Court held that "the 'test must be 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

a patient incompetent to make medical decisions is that of clear and convincing evidence. Raphael J. Leo, *Competency and the Capacity to Make Treatment Decisions: A Primer for Primary Care Physicians*, 1 Primary Care Companion J. Clin. Psychiatry 131, 131 (1999).

20. *See* Faretta v. California, 422 U.S. 806, 819 (1975) ("The Sixth Amendment . . . grants to the accused personally the right to make his defense."). *But see* Edwards, 554 U.S at 178 ("[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.").

21. Leo, *supra* note 19, at 131.

22. *See* Dusky v. United States, 362 U.S. 402 (1960).

23. *Id.*

understanding of the proceedings against him.'"[24] The *Dusky* standard also applies to competence to waive the right to counsel and plead guilty.[25]

In the Insanity Defense Reform Act of 1984,[26] Congress kept this definition for competency, providing that a defendant is not competent to stand trial if he is "presently 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."[27] The Act requires courts to hold a separate competency hearing to make this determination.[28] This test of competency has existed for many years, and every state has adopted some variation of this standard.[29] For example, the Ohio competency statute provides, in relevant part, the following:

> A defendant is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial . . . .[30]

Similarly, Texas law provides the following:

> (a) A person is incompetent to stand trial if the person does not have:
>
> (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or
>
> (2) a rational as well as factual understanding of the proceedings against the person.

24. *Id.* at 402 (quoting Solicitor General Rankin).

25. *See* Godinez v. Moran, 509 U.S. 389 (1993).

26. 18 U.S.C. § 4241 (2012).

27. 18 U.S.C. § 4241(a).

28. 18 U.S.C. § 4241(c).

29. For a detailed comparison of the specifics of each state's statute, see Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. AM. ACAD. PSYCHIATRY & L. S3, S59–67 tbl.3 (Supp. 2007).

30. OHIO REV. CODE ANN. § 2945.37(G) (LexisNexis Supp. 2014).

> (b) A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence.[31]

While this competency standard is well established and widely adopted, competency in the context of self-representation is less straightforward.

B. The Right to Self-Representation

The American criminal justice system has only recognized the right to self-representation within the last forty years. In 1975, the Supreme Court held, in *Faretta v. California*,[32] that the Sixth Amendment implies the right to self-representation:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment.[33]

In *Faretta*, the Court concluded that the defendant was "literate, competent, and understanding, and that he was voluntarily exercising his informed free will."[34] The Court also determined that the "[defendant's] technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself."[35] This language suggests that it was necessary for the defendant to competently and knowingly exercise his right to defend himself, but it does not elaborate further on the necessary requisites of competence or the mental state that is required to do so.[36] The fundamental principle

31. TEX. CODE CRIM. PROC. ANN. art. 46B.003 (West 2006).

32. 422 U.S. 806 (1975).

33. Faretta v. California, 422 U.S. 806, 819 (1975) (quoting U.S. CONST. amend. VI).

34. *Id.* at 835.

35. *Id.* at 836.

36. *See Id.* at 835 (holding that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open'") (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)).

of this opinion is to preserve the defendant's autonomy,[37] but the holding does not provide sufficient guidance on how to do so.

The recognition of the right to self-representation did not come without controversy. Chief Justice Burger's dissent in *Faretta* addressed one of the initial concerns. The Chief Justice argued that "there is nothing desirable or useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his own defense to criminal charges."[38] Further, he argued that the holding "can only add to the problems of an already malfunctioning criminal justice system."[39] At least one commentator, however, has rebutted this argument, suggesting that a criminal defendant may be just as capable as an "overworked public defender" in conducting the defense.[40] The argument of whether a defendant is most capable of presenting his defense may be never ending, but the issue here is not to determine who would do the best job. The issue is whether the defendant has the basic capability, measured in terms of competency, to provide a defense that satisfies the requirements of the Sixth Amendment.

C. Indiana v. Edwards

For many years after establishing the constitutional right to conduct one's own defense, the Court did not define a standard for PSC. Judges were largely without guidance on whether to respect the right to self-representation based on a defendant's mental abilities. More than thirty years after *Faretta*, the Supreme Court held that there might be a higher standard of competency required for a defendant who wants to self-represent compared with the standard of competency to stand trial. In *Indiana v. Edwards*,[41] the defendant was diagnosed with schizophrenia. After three competency hearings, several hospitalizations, and reviews of a lengthy record of psychiatric reports, the trial court concluded that although it appeared that the defendant was competent to stand trial, he was not competent to represent himself

37. E. Lea Johnston, *Representational Competence: Defining the Limits of the Right to Self-Representation at Trial*, 86 NOTRE DAME L. REV. 523, 533 (2011).

38. 422 U.S. at 837 (Burger, C.J., dissenting).

39. *Id.* at 838.

40. Mary E. Lewis, Recent Case, *Criminal Procedure—Sixth Amendment—Accused's Right to Defend* Pro Se*—Rights Necessary for Fair Administration of Justice.* Faretta v. California*, 422 U.S. 806 (1975)*, 27 CASE W. RES. L. REV. 412, 434–36 (1976) ("The merits of being assisted by counsel are, in fact, not always overwhelming. It is conceivable that at least as adequate a defense might be mounted by an intelligent defendant whose sole concern is his own circumstance, and who has the time and singular motivation to explore possible defenses.").

41. 554 U.S. 164 (2008).

at the trial.[42] The Supreme Court affirmed this decision, reasoning that allowing the defendant to self-represent, given his uncertain mental state, would lead to a humiliating spectacle and that the defendant's lack of capacity could undercut the basic constitutional objective of providing a fair trial.[43] In affirming *Edwards*, the Court held that "[t]he 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."[44]

The Court recognized that there are "different capacities needed to proceed to trial without counsel" and that "there is little reason to believe that *Dusky* alone is sufficient."[45] But the Court did not enunciate a PSC standard, and instead it simply acknowledged that "the trial judge, particularly one such as the trial judge in this case, who presided over one of [the defendant's] competency hearings and his two trials, will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."[46] The Court declined to give more stringent guidance but acknowledged that the requisite PSC is different than the level of competence required to stand trial.[47] Based on the application of this holding among the lower courts, it is clear that *Edwards*, while a step in the right direction, does not provide sufficient guidance to judges.

1. Applying *Edwards*

Several courts have discussed, interpreted, and applied *Edwards*. Each court essentially created its own interpretation of how to apply the Supreme Court's holding.

The Court of Appeals for the D.C. Circuit elaborated on the discretionary guideline of *Edwards*. The circuit court held that when the issue of PSC is raised, the court must first determine whether the defendant suffers from a severe mental illness to the extent that he is not competent to conduct trial proceedings by himself. After that

42. Indiana v. Edwards, 554 U.S. 164, 169 (2008).

43. *Id.* at 176–77.

44. *Id.* at 178.

45. *Id.* at 177.

46. *Id.*

47. *See id.* at 175 ("[T]he nature of the problem before us cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself.").

determination, the judge may exercise discretion and limit that defendant's right to self-representation.[48]

The Superior Court of New Jersey provides an example of a defendant who was competent to stand trial but not to defend himself at trial.[49] The judge's finding that the defendant was not competent to represent himself was not only supported by a psychiatrist's opinion but also by the defendant's own conduct:

> During extensive pretrial colloquies with the court, defendant explained that the indictment did not apply to him and that he was not subject to the laws or jurisdiction of the State. He claimed immunity bestowed upon him by God and based upon his "foreign neutral status" as a minister by decree of "the Empress" and the President of the United States.[50]

In *United States v. Ferguson*,[51] the Ninth Circuit addressed a defendant's PSC when his behavior was "decidedly bizarre."[52] The defendant repeatedly demanded that his counsel follow his six made-up "duties" and requested that the judge recognize the "public policy" exception to the UCC and dismiss the case "for value."[53] At trial, the defendant did not do anything:

> no *voir dire* questions for the judge to ask, no opening argument, no closing argument, no objections, no cross-examination, no evidence, and no witnesses. At sentencing, he submitted three nonsensical motions, did not object to the PSR, and did not make any legal arguments.[54]

48. United States v. McKinney, 373 F. App'x 74, 75 (D.C. Cir. 2010). This holding limits the application of *Edwards* to cases where the defendant suffers from mental illness. While this Note focuses on the effects of mental illness in determining PSC, it is not unforeseeable that there may be situations where a defendant does not suffer from mental illness but is still incompetent to self-represent. *See, e.g.*, United States v. Carradine, 621 F.3d 575, 577 (6th Cir. 2010) (affirming denial of the defendant's motion for self-representation—even though he did not suffer from mental illness—because when asked if he understood the nature of his charges and his possible sentencing, the defendant was "obstinate and hostile" and answered virtually every question by stating that he did not understand).

49. *See* State v. McNeil, 963 A.2d 358, 362 (N.J. Super. Ct. App. Div. 2009).

50. *Id.* at 366 (quoting the defendant).

51. 560 F.3d 1060 (9th Cir. 2009).

52. *Id.* at 1068.

53. *Id.* at 1068–69.

54. *Id.* at 1069.

The circuit court held that the "[d]efendant's actions suggest that he might have been 'unable to carry out the basic tasks needed to present his own defense without the help of counsel.'"[55]

Some of these courts, such as D.C., have attempted to elaborate on the standard and create a framework for its application. Other courts noted in the aforementioned examples seem to have simply relied on the general principles in *Edwards* to protect incompetent defendants without a deeper analysis. These varying applications of *Edwards* evidence the need for a consistent PSC standard that takes into consideration the defendant's present actions as well as his mental and behavioral history.

2. Criticism and Commentary After *Edwards*

Since *Edwards*, several scholars and commentators have discussed the meaning of its holding and what it means for the self-representing defendant. Some commentators have expressed apprehension about the holding and its possible effects on the criminal justice system as a whole.[56] Several commentators, unsatisfied with the Court's lack of guidance, have proposed their own criteria for PSC. One suggests that the defendant have at least "a *de minimis* understanding of both the

55. *Id.* (quoting Indiana v. Edwards, 554 U.S. 164, 175–76 (2008)).

56. *See, e.g.*, Alexander B. Feinberg, Casenote, *Constitutional Law—Competency and Self-Representation—Constitution Permits States to Limit a Defendant's Self-Representation Right by Insisting Upon Representation by Counsel for Defendant Lacking Mental Competency.* Indiana v. Edwards*, 128 S. Ct. 2379 (2008)*, 39 CUMB. L. REV. 567, 579–80 (2008–2009) ("The criminal justice system faces numerous challenges when dealing with mentally incompetent defendants who seek to represent themselves, such as in *Edwards*. The courts are challenged to preserve respect for the autonomy of mentally ill defendants, preserve the public's perception of the fairness of the proceedings, and achieve justice. In anticipation of such challenges, the Court in *Edwards* did not develop specific, stringent standards for situations concerning mentally incompetent defendants who wish to exercise their Sixth Amendment right to self-representation. Rather, the Court left the door open for judicial discretion in such situations and stated 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.") (citing *Edwards*, 55 U.S. at 177–78); Thomas L. Hafemeister, *Developments in the United States Supreme Court*, 27 DEVELOPMENTS IN MENTAL HEALTH LAW 53, 56 (2008) ("What will be the effect of this ruling? Most likely, this ruling will directly affect the estimated 20% of self-representing defendants who are ordered to undergo competency evaluations. But because the majority did not adopt a clear standard or test for the level of competence required for self-representation, it is difficult to predict exactly when a defendant will be found competent to self-represent.").

substantive and procedural law being applied against him."[57] The Court, however, has made clear that a defendant's technical legal knowledge is "not relevant to the assessment of his knowing exercise of the right to defend himself,"[58] so the "*de minimis* understanding" standard contravenes what little guidance the Court has provided. Another commentator argues that "[s]elf-representation is, at base, an exercise in problem solving" and derived a standard of competence based on social problem-solving theory.[59] The Author notes the balance of the autonomy of the defendant versus the fairness of the proceeding as a reason for implementing such a standard; it is possible, however, that a PSC standard based on problem solving may not account for the implications of self-representation on the defendant's future freedom.[60]

So, what do we do with a mentally ill defendant who is competent to stand trial under *Dusky* but who is "unable to carry out the basic tasks needed to present his own defense without the help of counsel"?[61] The latter issue has not been assigned such a clear-cut standard as the former.[62] If a well-established standard exists to determine if someone

57. Reed Willis, Note, *A Fool for a Client: Competency Standards in Pro Se Cases*, 2010 BYU L. REV. 321, 333.

58. Faretta v. California, 422 U.S. 806, 836 (1975). *See also* Jones v. Norman, 633 F.3d 661, 667 (8th Cir. 2011). In *Jones*, the trial court denied the defendant's request to represent himself because he was not familiar with the Missouri Rules of Criminal Procedure, he was unable to state the exact range of penalties he faced on each count, and he was not able to take trial notes as quickly as a lawyer might have. The court of appeals' holding that these factors were insufficient to bar the defendant from representing himself was inappropriate. *Id.* at 667–68. The court went on to explain that had the defendant "been unable or unwilling to conduct his own defense without disrupting the essence of the trial process, the court would have had the authority to revoke [Defendant's] right to represent himself." *Id.* at 669 (citing Illinois v. Allen, 397 U.S. 337, 343 (1970)).

59. Johnston, *supra* note 37, at 526.

60. *Id.* ("Balancing the competing norms implicated by self-representation, this Article suggests that a defendant capable of autonomous decision-making should be allowed to control his defense, unless a defendant's self-representation poses a grave threat to the reliability or fairness of the proceeding.").

61. Indiana v. Edwards, 544 U.S. 164, 175–76 (2008).

62. *Id.* at 178 (declining to set a more specific standard for the denial of self-representation); *see also id.* at 189 (Scalia, J. dissenting) ("Today's holding is extraordinarily vague. . . . It holds only that lack of mental competence can under some circumstances form a basis for denying the right to proceed *pro se* . . . . We will presumably give some meaning to this holding in the future . . . ."); Douglas Morris & Richard Frierson, Pro Se *Competence in the Aftermath of* Indiana v. Edwards, 36 J. Am. Acad. Psychiatry L. 551, 555 (2008) ("[I]t is unclear what standard would

is competent enough to invoke his constitutional right to a trial by his peers, then a similar type of standard should exist to assist judges in the evaluation of PSC when letting someone invoke their constitutional right to self-representation.

Next, Part II outlines the relevant considerations in forming a PSC standard.

II. CONSIDERATIONS FOR DETERMINING PSC

A. Conducting an Effective Defense

The first consideration is the most obvious: is the defendant capable of conducting an effective defense? The intricacies of trial tactics are vast. An attorney is required to use logical reasoning skills, problem-solving tactics, and creativity to conduct a defense. His client's freedom is at risk. An attorney's actions must reach a certain level of reasonableness in order to protect his client's Sixth Amendment rights. If this standard is not achieved, then a criminal defendant's conviction can be overturned.[63] This takes skill, contemplation, patience, innovation, and diligence. Not even every person with a law degree can present an effective criminal defense.

When the accused is allowed to be his own lawyer, the standard of reasonableness of performance for a defense attorney is not applicable. This is because under *Edwards*, a determination of a criminal defendant's technical knowledge of the law is not relevant to the decision of whether to allow him to defend himself.[64] A standard for PSC, however, should at least consider a defendant's ability to carry out "important tasks such as organizing one's defense, making motions, arguing points of law, participating in *voir dire*, questioning witnesses, and addressing the court and jury."[65]

Though a defendant's technical knowledge is not pertinent to his PSC, his mental incapacities could be. Some attorneys with mental illness may not be fit to represent clients.[66] By the same reasoning, some mentally ill criminal defendants may not be fit to self-represent.

B. The Effects of Mental Illness on PSC

A second consideration is how different mental illnesses may impair a defendant's PSC. Different mental illnesses and their symptoms can

differentiate a defendant who is merely competent to stand trial from one who is competent both to stand trial and to represent himself.").

63. Strickland v. Washington, 466 U.S. 668, 688 (1984) ("[T]he Sixth Amendment accord[s] criminal defendants a right to 'counsel rendering reasonably effective assistance given the totality of the circumstances.'").

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

65. Knoll IV et al., *supra* note 16, at 537.

66. *See* Len Klingen, *The Mentally Ill Attorney*, 27 NOVA L. REV. 157, 159 (2002).

affect a defendant's decision-making process and undermine his ability to conduct a legitimate defense. These disorders may render the defendant competent to stand trial but in a condition in which he should not be allowed to represent himself at the trial. In *Edwards*, the American Psychiatric Association (APA) and the American Academy of Psychiatry and the Law (AAPL) filed a joint amicus brief arguing that "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant."[67] Several examples of mental illnesses in particular may cause such impairment.

The most prevalent and unpredictable disorder that can affect the defendant's decision-making abilities is schizophrenia.[68] Schizophrenia is characterized by a combination of delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, and negative symptoms.[69] This impairment may prevent the accused from being able to think logically about the consequences of his actions and further prevent him from communicating his defense to the court and to the jury.

Depressive disorders may also negatively affect a defendant's self-representation. These disorders encompass a variety of illnesses that include common features such as "the presence of sad, empty, or irritable mood, accompanied by somatic and cognitive changes that significantly affect the individual's capacity to function."[70] When a criminal defendant is depressed, he may not care about the outcome of the trial, may not be interested in conducting an effective defense, and, in death penalty cases, may actually be trying to end his life by conviction.[71] Even if a criminal defendant seems lucid and intelligent,

67. Brief for The American Psychiatric Association and American Academy of Psychiatry & the Law as Amici Curiae in Support of Neither Party at 26, Indiana v. Edwards, 554 U.S. 164 (2008) (No. 07-208) [hereinafter APA & AAPL Brief].

68. *See generally* Yang Tae Kim et al., *Deficit in Decision-Making in Chronic, Stable Schizophrenia: From a Reward and Punishment Perspective*, 6 PSYCHIATRY INVESTIGATION 26 (2009) (discussing the effects of schizophrenia on a patient's decision-making abilities).

69. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5 100 (5th ed. 2013) [hereinafter DSM-5].

70. *Id.* at 155.

71. *See, e.g.*, State v. Berry, 706 N.E.2d 1273, 1273 (Ohio 1999) (indicating that the defendant "had expressed his desire to forgo further review of his convictions and death sentence"); *see also Information on Defendants Who Were Executed Since 1976 and Designated as "Volunteers,"* DEATH PENALTY INFORMATION CENTER (July 29, 2013), http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers (providing a list of execution

his depression may overshadow his abilities to properly advocate for his own liberty.[72]

Even less noticeable than other disorders, an anxiety disorder could affect a defendant's performance in a marked way. Anxiety disorders include a group of disorders characterized by "features of excessive fear and anxiety and related behavioral disturbances."[73] Social Anxiety Disorder includes a "marked fear or anxiety about one or more social situations in which the individual is exposed to possible scrutiny by others."[74] Presenting your own defense at a trial would fall into this category. This condition could case fear, anxiety, or avoidance of the situation where the defendant is exposed to scrutiny.[75] The fear, anxiety, or avoidance can "interfere significantly with the individual's . . . occupational or academic functioning,"[76] which could translate into interference with the ability to conduct his own defense.

There are several other mental illnesses that could significantly impair a defendant's decision-making abilities while still rendering the defendant competent to stand trial, including delirium and dementia,[77] extreme phobia or panic,[78] and obsessive-compulsive disorder.[79] Some eating disorders may even affect a defendant's decision-making

"volunteers," i.e., those who had chosen to waive at least part of their available appeals at their time of execution); John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 940 n.5 (2005) ("'Volunteer' is the term generally used for a death row inmate who waives his or her appeals in the academic literature as well as in the capital defense community.") (citing G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860 (1983)).

72. Several depressive orders are associated with symptoms that may have a marked effect on a defendant's decision-making abilities. Major Depressive Disorder can include symptoms such as "[f]eelings of worthlessness or excessive or inappropriate guilt (which may be delusional) nearly every day," or a "[d]iminished ability to think or concentrate, or indecisiveness, nearly every day." DSM-5, *supra* note 69, at 161. Persistent Depressive Disorder, or Dysthymia, can include symptoms of "[p]oor concentration or difficulty making decisions" accompanying a depressed mood that has lasted for at least two years. *Id.* at 168.

73. *Id.* at 189.

74. *Id.* at 202.

75. *See id.* (noting that the social situations "almost always provoke fear or anxiety" and "are avoided or endured with intense fear or anxiety").

76. *Id.*

77. *See id.* at 591.

78. *See id.* at 190.

79. *See id.* at 235–36.

processes and increase symptoms of impulsivity.[80] This list is not exhaustive, and there are many different forms of mental incapacities that can affect a defendant's ability to self-represent. The incapacities of the mentally ill are limitless and complex, and these symptoms can have a varying impact on the accused's behavior throughout the trial. Therefore, it is important to analyze the effects that particular incapacities have on each defendant's abilities.

C. Competence in Different Contexts

Finally, the analysis must consider various standards of competence in related contexts. To formulate a PSC standard, this Note looks specifically to patient competence in medical decision making and attorney competence when defending a client.

1. Medical Decision Making

Competence to make medical decisions is comparable to competence to make your own legal decisions and thus comparable to PSC.[81] In both instances, there is great tension between the court's paternalism and the individual's autonomy. When a medical patient chooses whether to receive or refuse care contrary to a doctor's recommendation, a court may be required to determine the patient's level of competency before it can be sure that the patient's decision was truly autonomous. The court looks at the task that the patient faces, and makes a competence inquiry based on that task alone, as opposed to making a blanket decision about the patient's general competence.[82] In conducting this narrow inquiry, the court assesses a patient's capacity to meet certain standards and then determines whether the patient is competent based on his abilities.[83] There are some instances where an individual is deemed generally incompetent and thus incapable of making any rational treatment decisions.[84]

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80. *See generally* Ignasi Garrido and Susana Subirá, *Decision-Making and Impulsivity in Eating Disorder Patients*, 207 PSYCHIATRIC RES. 107 (2013) (discussing the effects of eating disorders on relevant mental capacities).

81. As discussed above, *Faretta* held that the Sixth Amendment necessarily implied the right to self-representation. *See supra* Part I.B. Analogously, "[p]atients have the fundamental right of self-determination in medical care." Jones & Holden, *supra* note 18, at 971.

82. *See* Leo, *supra* note 19, at 131 ("To ensure that individuals retain as much autonomy or self-determination as is legally possible, the court makes a determination of one's competence in a task-specific manner. For example, one can be determined to be incompetent to execute a will, but may be deemed competent to make treatment decisions.").

83. *See id.* ("[C]ompetency refers to the mental ability and cognitive capabilities required to execute a legally recognized act rationally.").

84. *See id.* (discussing several examples, including "individuals who are in persistent vegetative states" and patients who are "actively psychotic"). This basic level of general incompetence is comparable to a criminal

Although the medical community has not adopted a "single clinically accepted standard of decision-making capacity," there are several abilities that a patient must possess in order to be capable of making his own medical decisions.[85] When a court assesses a medical patient's "capacity to make reasoned decisions regarding treatment," it considers four broad patient abilities[86]: (1) the "[a]bility to communicate a choice"; (2) the "ability to understand relevant information"; (3) the "ability to appreciate the nature of the situation and its likely consequences"; and (4) the "ability to manipulate information rationally."[87]

One group of scholars has analyzed these factors and discussed their application as part of a standard of competence in medical decision making.[88] When drafting a standard of competence from these factors, their discussion notes that it is important to determine what level of "clinically assessed incapacity" will render a patient incompetent.[89] Medical or mental health professionals can assess incapacity, and then a court can determine competency based on possible incapacities.[90]

When assessing these factors in a standard of competence, a patient's decision-making process is considered. A doctor might not agree with a patient's treatment choice, but the choice might still weigh toward a finding of competency if the patient utilized a rational decision-making process. If the patient can show a "logical process" of decision making, then the rationality of the patient's decision may outweigh the reasonableness of the actual choice.[91]

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defendant's incompetence to stand trial. If the defendant is incapable of participating in the trial proceedings, generally, because of some sort of mental defect, then he is surely incapable of doing anything requiring greater ability, such as conducting his own defense.

85. Jones & Holden, *supra* note 18, at 971–72.

86. Leo, *supra* note 19, at 133.

87. Paul S. Appelbaum & Thomas Grisso, *The MacArthur Treatment Competence Study I: Mental Illness and Competence to Consent to Treatment*, 19 L. & HUM. BEHAV. 105, 109–10 (1995).

88. Jessica Berg et al., *Constructing Competence: Formulating Standards of Legal Competence to Make Medical Decisions*, 48 RUTGERS L. REV. 345 (1996).

89. *Id.* at 349.

90. *Id.* at 348–49 (explaining that legislatures may establish the type and degree of "clinically assessed incapacity" that will permit the court to declare legal incompetence).

91. *Id.* at 367 ("Thus, a patient who erroneously believes that treatment would cause him to shrink demonstrates logical decisionmaking when he refuses treatment because he does not want to become microscopically small.").

2. Attorney Competence

Attorneys must "provide competent representation to a client."[92] This "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[93] An attorney does not need to be a master of a particular issue, but rather the attorney needs to possess general skills "such as the analysis of precedent, the evaluation of evidence and legal drafting," and the ability to determine "what kind of legal problems a situation may involve."[94] An attorney does not have to be competent before accepting representation, so long as he can become competent after reasonable preparation.[95] A lawyer must thoroughly and adequately prepare to handle a certain matter and must maintain competence throughout representation.[96]

If an attorney does not provide competent representation when conducting a criminal defense, the representation may violate the defendant's Sixth Amendment right to effective assistance of counsel. In *Strickland v. Washington*,[97] the Supreme Court held that "the proper standard for attorney performance is that of reasonably effective assistance"[98] and that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[99] In order to establish that his counsel's assistance was ineffective, a convicted defendant must make two showings: (1) "that counsel's performance was deficient" and (2) "that the deficient performance prejudiced the defense."[100] To meet the first prong, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[101] To meet the second prong, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[102] The Court has since discussed *Strickland* to provide examples of conduct that may constitute

92. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011).

93. *Id.*

94. *Id.* at cmt. 2.

95. *Id.* at cmt. 4.

96. *Id.* at cmt. 5–6.

97. 466 U.S. 668 (1984).

98. Strickland v. Washington, 466 U.S. 668, 687 (1984).

99. *Id.* at 688. The Sixth Amendment relies "on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Id.*

100. *Id.* at 687.

101. *Id.*

102. *Id.*

ineffective assistance. Examples include failure to present or uncover mitigating evidence[103] and failure to communicate formal plea offers with a client.[104]

This level of competence is relevant to PSC because it reminds us that the underlying principle is to respect the defendant's Sixth Amendment rights. An ideal PSC standard would help judges determine whether a defendant can respect his own Sixth Amendment rights or if a defendant has a mental incapacity that causes him to conduct a defense that undermines his own rights.

Based on all of these relevant considerations, Part III formulates a PSC standard and discusses the standard's application.

III. A PSC STANDARD

A. Why We Need a Standard

Conducting your own criminal defense is complicated.[105] As argued by the APA & AAPL, "self-representation involves a substantially expanded role for the defendant and hence requires significantly greater capabilities than those required for a sound trial of charges against a represented defendant."[106] While it is surely important to respect a person's autonomy when deciding how to proceed with his criminal defense, the performance of a self-representing defendant raises the question of whether the risk to his liberty outweighs the importance of his autonomy if he does not understand and appreciate the gravity of the situation. Some defendants have been successful and epitomize the importance of the right to self-representation.[107] Others, however, have lost their freedom in the courtroom.[108] While it is important to respect *Faretta*, it is similarly important to respect a defendant's liberty.

A mentally ill defendant may not know that what he is saying throughout his self-representation is nonsensical, unintelligent, and even dangerous. A defendant with mental illness may be incapable of appreciating the severity of the consequences that accompany each and

103. *See* Porter v. McCullom, 530 U.S. 30, 39 (2009) ("Counsel thus failed to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service. The decision not to investigate did not reflect reasonable professional judgment."); Wiggins v. Smith, 539 U.S. 510 (2003).

104. *See* Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) ("When defense counsel allowed the [plea] offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.").

105. *See supra* Part II.A.

106. APA & AAPL Brief, *supra* note 67, at 25–26.

107. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352 (1983).

108. *See, e.g.*, *supra* notes 1–13 and accompanying text.

every decision made during a trial. It is not important that the accused have the tenacity and competence of a skilled trial attorney, but it is important that the defendant be in a mental state where he can have the opportunity to conduct an adequate defense.

Additionally, there are accepted standards of performance required for an attorney to perform at a level that respects a defendant's Sixth Amendment rights.[109] If an attorney must meet certain "reasonableness" standards, then it follows that a defendant should also have to meet certain standards to respect his own Sixth Amendment rights. It is not enough to say that a defendant's exercise of autonomy is equivalent to the exercise of his rights. The fundamental principle of *Faretta* was to respect a defendant's autonomy.[110] However, a defendant cannot make an autonomous decision without the competence to do so. A clear standard of competence is necessary to protect the defendant's Sixth Amendment rights to a fair trial and to give judges a clear and concise roadmap to follow in order to protect the defendant's liberty interests while still respecting the court's efficiency interests.[111]

B. Applying Medical Decision-Making Criteria to PSC

Formulating a standard of competence for PSC presents the same challenges that arise in formulating a standard of competence to make medical decisions. The standard must balance the paternalism of limiting a person's choice without unnecessarily burdening that person's autonomy.[112] Additionally, a governing standard for decision-making competence of any kind can be vague and confusing when "developed through case law or statutes."[113] Looking at case-law precedent presents a special challenge because any standard that a court creates is "highly

109. *See supra* Part II.C.2.

110. Johnston, *supra* note 37, at 533.

111. *See* Conor P. Cleary, Note, *Flouting* Faretta*: The Supreme Court's Failure to Adopt a Coherent Communication Standard of Competency and the Threat to Self-Representation after* Indiana v. Edwards, 63 OKLA. L. REV. 145 (2010).

112. *See, e.g.*, Berg et al., *supra* note 88, at 377 ("[T]he choice between standards involves balancing the extent to which a failure to demonstrate the ability measured by a component [of the standard] indicates impaired autonomy in decision making against whether such a failure is sufficient basis for limiting a patient's decisionmaking authority. Although seriously impaired people should be protected, the right to make decisions for oneself should not be burdened more than is absolutely necessary."); Dennis *ex rel.* Butko v. Budge, 378 F.3d 880, 901 (9th Cir. 2004) ("Legal competence inquiries necessarily place emphasis on honoring the autonomy of an individual who has expressed desire for a recognized treatment within the system, while at the same time assuring that the individual retains sufficient autonomy as to the decision at issue that his choice should be respected.").

113. Berg et al., *supra* note 88, at 375.

sensitive to the fact situation of the case on which they are based, leaving residual uncertainty as to whether other standards might be applied by the same court in other circumstances."[114] Because of this challenge, it is important that a proposed standard be specific enough to provide proper guidance to judges yet general enough that the judge may still exercise broad discretion based on the factual circumstances. Applying the same four elements that compose the criteria to make autonomous medical decisions will allow a court to do exactly this.[115]

1. Ability to Communicate a Choice

The first element of the standard will be to look at the defendant's ability to communicate a choice. A criminal defendant needs to be able to clearly and coherently demonstrate that he wishes to waive his right to counsel and proceed to trial as his own attorney. Additionally, a defendant must be able to reach and communicate a decision about essential elements of his self-representation. If there is evidence that he will be unable to do this, then he should not be allowed to represent himself.[116] The defendant must also be able to "maintain and communicate stable choices long enough for them to be implemented."[117] The element of communication should be the basic threshold element to determine competency, but the court should not look at communication ability alone to determine competence. If the court looked at communication alone, then no weight would be given to the decision-making process that led to the defendant's communicated choice.[118]

114. *Id.* It then follows why the Court in *Edwards* may have declined to accept Indiana's proposed standard of PSC requiring that a defendant have the ability to "communicate coherently with the court or a jury" in order to proceed pro se. Indiana v. Edwards, 554 U.S. 164, 178 (2008) (quoting Brief for Petitioner at 20). While the issue in *Edwards* may have been related to the defendant's ability to communicate, communication may not be the issue in every case of PSC.

115. For a list of these four criteria, see *supra* note 87 and accompanying text.

116. Essential elements of self-representation would include things like the choice of whether or not to testify, the choice to respect the Federal Rules of Criminal Procedure, and the choice to participate in all elements of the trial, such as voir dire, opening statements, and cross-examination.

117. Leo, *supra* note 19, at 133. Leo provides examples of individuals that would be unable to communicate a choice: "an individual who rapidly changes his or her decision from moment to moment and a psychotic patient who is mute are deemed unable to evidence a choice." *Id.* The same situations would deem a criminal defendant unable to communicate a choice.

118. *See generally* Berg et al., *supra* note 88, at 353 ("Used alone, this standard would offer the greatest protection for individual decision making rights because it focuses simply on communication and disregards the

2. Ability to Understand Relevant Information

The second element looks at the defendant's ability to understand relevant information. This is the most common ability required by courts and legislatures in competence evaluations for medical decision making, and it "focuses on the patient's comprehension of information related to the particular decision at hand."[119] In the same way, a criminal defendant must be able to comprehend the information related to his representation, the nature of his charges, and the courtroom proceedings. This element does not require the defendant be able to "comprehend the situation as a whole" but simply "the concepts involved."[120] A defendant's understanding can be gauged by asking him to explain his understanding of the different elements of self-representation during pretrial proceedings.[121] While this basic element of understanding is important in determining whether a defendant is giving informed consent to the nature and consequences of his actions, it does not take into account the defendant's ability to actually *appreciate* the nature and consequences of his choices.[122] Therefore, the third element is essential to a PSC determination.

3. Ability to Appreciate the Situation and Its Likely Consequences

The third—and arguably most important—element of the standard looks at the defendant's ability to appreciate the nature of self-representation and the likely consequences of undertaking self-representation. This requires the defendant be able to "apply information that is understood in a content-neutral sense to his or her own situation."[123] The defendant must be able to understand not only the elements of self-representation but also how these elements apply to his particular case. The element of appreciation "is a rather individualized component of the capacity assessment."[124] The defendant must prove that he weighed the options of proceeding with and without counsel in his particular situation and show that he appreciates the risks of his choice and nevertheless wishes to make the choice to self-

decisionmaking process. It would, however, allow a number of patients with poor decisionmaking capacity to make decisions.").

119. *Id.* at 353.

120. *Id.* at 354.

121. *Cf.* Leo, *supra* note 19, at 133 ("The ability to understand relevant information can be best assessed by asking patients to disclose their understanding of the proposed treatment intervention or diagnostic procedure. It is best to ask them to paraphrase it.").

122. *See generally* Berg et al., *supra* note 88, at 354 (distinguishing between understanding and appreciating).

123. *Id.* at 355.

124. Leo, *supra* note 19, at 133.

self-represent.[125] This element accounts for delusional symptoms that a defendant may have as a result of a mental illness.[126] In addition to delusional beliefs, this element may also take into account flaws in the defendant's decision-making process as a result of mental illness. The appreciation element would require a defendant show comprehension of his consequences, and flawed logic behind this comprehension could be clear evidence that the defendant does not really appreciate the nature and consequences of self-representation. For this reason, it is important to look at the decision-making process that led to the defendant's appreciation. This brings the proposed standard to the fourth and final element.

4. Ability to Manipulate Information Rationally

The fourth element looks at the defendant's "ability to manipulate information rationally."[127] This requires that a defendant show the logic behind his decision-making process in order to assess the defendant's "reasoning capacity or ability to employ logical thought processes to compare the risks and benefits" of his different options.[128] This element must be part of a compound standard of competence, as it relies on the defendant's reasoning behind his decisions.[129] It is important, however, to evaluate the logic of the decision-making *process* and not the *outcome* of the decision itself.[130] Similar to the third element, the rational manipulation element provides an opportunity to weigh the symptoms of a defendant's mental illness on his ability to self-represent.[131]

125. *See generally id.* at 134 ("The assessment of the individual's capacity to appreciate is, therefore, based upon an examination of the ability of the individual to weigh various treatment benefits and risks against personal values and choices.").

126. Berg et al., *supra* note 88, at 356 ("The appreciation criterion recognizes that delusional beliefs properly affect competence determinations only to the extent that they affect the patient's ability to appreciate the relevance of information to his or her own circumstances.").

127. *Id.* at 357.

128. *Id.*

129. *Id.* at 357–58.

130. *See generally id.* at 358 ("Inclusion of rational manipulation in a legal standard of competence may seem troublesome because it could lead to incompetence adjudications based simply on the unconventionality of a patient's decision."); *see also* Leo, *supra* note 19, at 134 ("This component does not focus on the ultimate decision that the patient makes, but rather the process with which he or she arrives at decisions.").

131. *See* Leo, *supra* note 19, at 134. Leo lists many cognitive features that are important to an individual's ability to manipulate information. "These include disturbances in thought form (i.e., circumstantial or tangential thought process), delusions, and illusions or hallucinations. The behavior of the patient, relevant mood states, stability and appropriateness of

All four of these elements, combined into a compound PSC standard, will guide courts in determining whether a criminal defendant is competent to represent himself without violating his own Sixth Amendment rights. The elements take into account the implications of mental illness in a defendant's ability without requiring mental illness for a determination of incompetency. This leaves a judge with a broad standard that can be applied subjectively on a careful, case-specific basis that focuses solely on PSC instead of a defendant's blanket level of competence. This standard will prevent a criminal defendant from "humiliating" himself or making a "spectacle" of his self-representation, which concern arose in *Edwards*.[132]

C. Pretrial Hearing

A determination of PSC should require an additional competency hearing—separate from the hearing for competency to stand trial. During this hearing, the court should take into account testimony from mental health experts, family of the accused, and any other witness who may have experience with the defendant's abilities. This includes, but is not limited to, doctors, teachers, employers, coworkers, and friends. Of these witnesses, the most weight should be given to testimony from mental health experts, but it is up to the judge to make the final decision about what other factors to incorporate and weigh in the determination.[133] The judge should further consider the defendant's own testimony, attitude, and conduct in making the determination.

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affective states, thought form and content, and perceptual disturbances must be carefully documented when a capacity assessment is conducted." *Id.* All of these features are important to determining PSC. If a defendant exhibits any of these cognitive deficits, then his ability to make an autonomous decision to self-represent may be faulty and thus render him incompetent.

132. The *Edwards* Court held that "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." Indiana v. Edwards, 554 U.S. 164, 176 (2008) (internal citation omitted). The Court was concerned that letting an incompetent defendant represent himself could not serve to protect the defendant's Constitutional rights. *See id.* at 176–77 ("[G]iven th[e] 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. Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial.").

133. Requiring a judge to have the final word has also been supported by other commentators. *See* Jennifer L. Moore & Katherine Ramsland, *Competence Assessment, Diverse Abilities, and a Pro Se Standard*, 39 J. PSYCHIATRY & L. 297, 317 (2011). ("[M]ental health experts should be part of the evaluation team. However, to protect the defendant's autonomy, the judge would remain the final arbiter.").

D. Applying the PSC Standard

Because a criminal defendant's autonomy and liberty are both at risk, the court must reach a delicate balance in deciding whether to allow self-representation. A specific PSC standard should require greater abilities than those necessary to stand trial. The standard should be subjective and applied on a fact-specific, case-by-case basis. When applying the standard, the judge should take into account the defendant's mental health history and the specific symptoms that come with particular mental illnesses. The judge should evaluate whether any of the symptoms could greatly impair the defendant's decision-making ability and should limit or deny self-representation if the answer to that inquiry is in the affirmative.[134] While a mental illness is not dispositive of incompetence, consideration should be given to the effects of the illness when applying every factor of the standard.[135] In some medical decision-making cases, however, a medical patient's denial that he has a mental illness can render him incompetent to make medical treatment decisions.[136] In the same way, a criminal defendant's denial that he has a mental illness, in light of strong evidence to the contrary, may be compelling evidence in itself that he is incompetent to represent himself based on the reasoning behind this incorrect belief.

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134. Essentially, the judge should consider the effects of mental illness on a defendant's "decisional competence." For an in-depth discussion of the elements of a person's decisional competence, see Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539, 573–75 (1993).

135. This is not to say, however, that a defendant will only be found incompetent to represent himself if he suffers from a mental illness. *See* Berg et al., *supra* note 88, at 368–69 ("[M]ental illness is not a homogenous category; many different types of disorders can be thought of as mental illnesses and cognitive functioning can vary across and within diagnostic categories. Thus, . . . competence determinations must always be made on an individual basis. . . . Mental illness is not equivalent to incompetence; many people who suffer from mental illness, even the most severe forms, are competent to make . . . decisions.").

136. Elyn R. Saks, *Competency to Refuse Medication: Revisiting the Role of Denial of Mental Illness in Capacity Determinations*, 22 S. CAL. REV. L. & SOC. JUST. 167, 170–71 (2013) ("At least fourteen courts have considered a patient's denial that he or she has a mental illness (in other words, lack of insight, or failing to perceive one's mental illness) to lead to a finding of incapacity. In some of these cases, the patient's denial is clearly the basis of the incapacity finding. In others, denial is one factor among many that the courts look to, or at least mention, in deciding capacity. And in at least one case, the court did not permit the patient's doctor to introduce evidence of denial because the state statute referred solely to the nature, risks, and benefits of the treatment. That court used, in part, a patently false belief standard, and perhaps was influenced by my earlier work that stated a denial should not be a basis for finding incompetency.").

IV. OTHER ISSUES THAT MAY ARISE

A. Ineffective Assistance—of Yourself?

When an attorney represents a client in a criminal matter, the attorney's performance must reach a minimum level of reasonableness to amount to effective assistance in accordance with the defendant's Sixth Amendment right to counsel.[137] *Faretta* held that a defendant could not claim the same type of ineffective assistance after deciding to serve as his own counsel.[138] In a scenario where the defendant later claims that he should not have been allowed to represent himself, the inquiry will rest on whether the court properly applied the PSC standard and not on the negative outcomes of self-representation. This would essentially be an "abuse of discretion" review. The Second Circuit has conducted a similar review.

In *United States v. VanHoesen*,[139] the Second Circuit upheld the district court's determination that the defendant was competent to represent himself. The defendant requested to represent himself at the trial but afterward appealed, claiming that his self-representation was a "travesty" demonstrating "awful judgment."[140] Essentially, the defendant claimed ineffective assistance of himself in violation of his Sixth Amendment right as a result of the trial court's abuse of discretion.[141] The court determined that there was ample support for the district court to allow self-representation, including the defendant's "written submissions to the district court demonstrating his active interest in his own defense, and his testimony and responses to court inquiries indicating that he had performed his own legal research and had a detailed understanding of how a trial works."[142] The court concluded that the defendant's failure to effectively represent himself "does not demonstrate that he was incompetent to do so under *Edwards*, and cannot justify denying him his right to proceed *pro se.*"[143] The consequences of self-representation were self-inflicted and therefore

137. *See supra* Part II.C.2 (discussing ineffective assistance of counsel).

138. Faretta v. California, 422 U.S. 806, 852 (1975) ("[T]he Court indicates that a *pro se* defendant necessarily waives any claim he might otherwise make of ineffective assistance of counsel . . . .").

139. 450 F. App'x 57 (2d Cir. 2011).

140. *Id.* at 62 (quoting Appellant's Brief).

141. *See id.* at 62 ("VanHoesen argues *pro se* that the district court violated the Sixth Amendment when it failed to appoint [] counsel and forced him to represent himself by giving him the impression that if he proceeded with assigned counsel he would be stripped of his right to assist in his own defense.").

142. *Id.*

143. *Id.*

did not amount to a violation of the defendant's Sixth Amendment rights.[144]

Therefore, it is the court's duty to apply the PSC standard diligently to protect the defendant's Sixth Amendment rights. If the defendant's self-representation appears to have violated the defendant's rights, then the question is not whether the defendant's actions on their own violated the Sixth Amendment but, instead, whether the court gave the defendant an inappropriate amount of authority that resulted in such a violation.

B. Standby Counsel

Similar to appointing a surrogate to make medical decisions for a patient,[145] a court may appoint "standby counsel" to assist a self-representing defendant with his defense, even against the defendant's wishes.[146] This type of representation creates an issue about the extent to which the standby counsel may participate in the trial without infringing on a defendant's *Faretta* rights. *McKaskle v. Wiggins*[147] held that standby counsel's participation need not be excluded altogether, "especially when the participation is outside the presence of the jury or is with the defendant's express or tacit consent."[148] *McKaskle* imposed two limitations on the extent that standby counsel's unsolicited participation is allowed. First, the defendant must be able to preserve actual control over the defense that he chooses to present to the jury.

144. *Id.* at 63 ("[A] court does not deprive a defendant of the Sixth Amendment right to counsel when it is the defendant himself who creates the conflicts that result in a breakdown of attorney-client communication.").

145. *See* Leo, *supra* note 19, at 132; *see also White Paper on Surrogate Decision-Making and Advance Care Planning in Long-Term Care: The Hierarchy of Medical Decision-Making for Incapacitated Nursing Home Residents*, AMDA, http://www.amda.com/governance/whitepapers/surrogate/decisionmaking_hierarchy.cfm (last visited Sept. 28, 2014).

146. *See* McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984) ("In our view, both *Faretta*'s logic and its citation of the *Dougherty* case indicate that no absolute bar on standby counsel's unsolicited participation is appropriate or was intended. The right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. Both of these objectives can be achieved without categorically silencing standby counsel."); United States v. Walsh, 742 F.2d 1006, 1007 (6th Cir. 1984) (discussing "two limitations on advisory counsel participation. 'First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury.' . . . 'Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself.'" (quoting *McKaskle*, 456 U.S. at 178)).

147. 465 U.S. 168 (1984).

148. *Id.* at 188.

Second, counsel's participation should not be allowed to destroy the jury's perception that the defendant is representing himself.[149] Standby counsel may assist the defendant with procedural matters in an effort to preserve the integrity of the proceedings.[150] If a defendant elects to proceed with standby counsel, some of the efficiency issues presented in self-representation may be eliminated while still respecting the defendant's autonomy.[151]

C. Restoration of PSC

Competence to stand trial can be restored after a period of time if the defendant's mental state has improved.[152] Should the same be true for PSC? Consider the issue of the right to a speedy trial. If a defendant is competent to proceed with trial but is incompetent to represent himself at trial, then waiting for restoration of PSC creates a conflict between the right to a speedy trial and the right to self-representation. If, at the present, the defendant is incompetent to self-represent, he may also be incompetent to waive his right to a speedy trial in order to wait for PSC to be restored.[153] One commentator believes that the right should be restorable, "especially given that the right to self-representation is a recognized constitutional right grounded in the Sixth Amendment of the United States Constitution."[154] This rationale places importance on the right to self-representation with less consideration for other constitutional rights that may be burdened in the process. However, that reasoning may be proper if the defendant values his right to self-representation above other constitutional rights.

149. *Id.* at 177–78.

150. *Id.* at 183.

151. This issue raises the question of whether an intermediate level of competence could be sufficient for a defendant to conduct his own defense with the help of standby counsel, as opposed to completely on his own. That is a topic, however, for another day.

152. 18 U.S.C. § 4241(d) (2012).

153. This tension epitomizes the "spectrum" of competency and could give rise to a substandard of competency to make certain choices on the path to self-representation. *See, e.g.*, Emily L. Barth, Comment, *"I Can Do It Myself"—An Analysis of Whether Competency to Represent Oneself at Trial as a "Restorable Right" Within the Framework of* Indiana v. Edwards, 79 U. CIN. L. REV. 1139, 1139 (2011). ("Within the criminal justice system, a defendant's mental competency, such as competency to stand trial and competency to plead, can vary depending on the defendant's present mental state. For example, if a defendant is initially deemed incompetent, the defendant's competency to proceed can be restored—and the government actively seeks to restore the defendant's competency.").

154. *Id.*

There are some mental illnesses, however, that are permanent. In this case, the defendant's competency may never be restorable, and he may never be able to proceed with self-representation. This would create another situation in which a court would have to weigh the importance of the right to self-representation against the defendant's other constitutional rights.

In *Edwards*, the Court recognized 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."[155] Because of these variations, it is possible that PSC can be restored as long as the defendant has the capacity to understand that he may be waiving other rights in order to pursue self-representation.

CONCLUSION

Because of the similarities between competence to make autonomous medical decisions and PSC, a PSC standard should be developed based on the same competence considerations used by the medical community to evaluate a patient's treatment decision-making abilities. Creating a standard based on these elements will provide courts with a competence guideline that requires abilities higher than those required for competence to stand trial while still giving the trial judge broad discretion in the PSC standard's application. The elements used to determine a medical patient's capacities and level of competence balance paternalism and autonomy. The elements provide guidance when considering a person's mental illness in his ability to make autonomous decisions. These are all important considerations in determining PSC, and a similarly applied standard of competence would protect a criminal defendant's Sixth Amendment rights without compromising the integrity of the legal proceedings.

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155. Indiana v. Edwards, 554 U.S. 164, 175 (2008).

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