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No. 07-208

IN THE
Supreme Court of the United States

STATE OF INDIANA,

Petitioner,

v.

AHMAD EDWARDS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF INDIANA

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

"May states adopt a higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial?"

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iii
TABLE OF CITED AUTHORITIES	iv
INTEREST OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
The American Bar Association's Criminal Justice Standards On Mental Health And The Special Functions Of The Trial Judge Provide A Useful Template For Determining Whether A Defendant Has Competently, Knowingly, And Voluntarily Waived The Assistance Of Counsel At Trial.	5
CONCLUSION	10

TABLE OF APPENDICES

Page

Appendix A

Excerpt from American Bar Association, *Criminal Justice Mental Health Standards* (ABA 1989) 1a

Appendix B

Except from American Bar Association, *Standards for Criminal Justice: Special Functions of the Trial Judge* (3d ed. 2000) . . 3a

TABLE OF CITED AUTHORITIES

Page

CASES

Atkins v. Virginia,
536 U.S. 304 (2002) 7

Clark v. Arizona,
126 S. Ct. 2709 (2006) 7

Faretta v. California,
422 U.S. 806 (1975) 6

Godinez v. Moran,
509 U.S. 389 (1993) 4, 5, 6, 9

Johnson v. Zerbst,
304 U.S. 458 (1938) 6

Powell v. Alabama,
287 U.S. 45 (1932) 6

Rompilla v. Beard,
545 U.S. 374 (2005) 2

Smith v. Robbins,
528 U.S. 259 (2000) 7

Strickland v. Washington,
466 U.S. 668 (1984) 2

Wiggins v. Smith,
539 U.S. 510 (2003) 2

Page

OTHER AUTHORITIES

American Bar Association, *ABA Mission and Association Goals*, http://www.abanet.org/about/goals.html. 2

American Bar Association, *ABA Policy and Procedures Handbook, 2007-2008*, http://www.abanet.org/about/goals.html 2

American Bar Association, *Standards for Criminal Justice: Special Functions of the Trial Judge* (3rd Ed. 2000) 3, 4, 7, 8

Standard 6-3.6 ....1, 3, 8, 9

American Bar Association, *Criminal Justice Mental Health Standards* (ABA 1989) .... *passim*

Standard 7-5.3 ....1, 3, 8, 9

Martin Sabelli & Stacy Leyton, *Train Wrecks and Freeway Crashes; An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 Journal of Criminal Law and Criminology 161 (2000) ... 8

INTEREST OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, *amicus curiae* American Bar Association ("ABA") respectfully requests that, in considering the standard for measuring competency to represent oneself at trial, the Court consider the broad-based consensus views embodied in the Mental Health Standard 7-5.3 and Special Functions of the Trial Judge Standard 6-.3.6(b) of the ABA's Criminal Justice Standards.

The ABA is the world's largest voluntary professional membership organization, and the leading association of legal professionals in the United States. The ABA's membership of over 413,000 attorneys spans all 50 States and other jurisdictions, and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and students.[2] The ABA's mission is "to

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1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

2. Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law."[3] Among the ABA's Goals are "to promote improvements in the American system of justice" and "to provide ongoing leadership in improving the law to serve the changing needs of society."[4]

One of the ABA's most prominent efforts to achieve these goals has been its development of the ABA Criminal Justice Standards. The ABA has created, refined, and approved these Standards over the last forty years, through broadly representative task forces made up of prosecutors, judges, defense lawyers, academics and others, and the efforts of the diverse membership of the ABA. These Standards have frequently been referred to, and adopted, by courts, legislatures, and executive branch law enforcement agencies. As this Court recently recognized, "We long have referred to these ABA Standards as guides to determining what is reasonable." *Rompilla* v. *Beard*, 545 U.S. 374, 387 (2005) (quoting *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003) and *Strickland v. Washington*, 466 U.S. 668 (1984)) (internal punctuation and quotation marks omitted).

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3. American Bar Association, *ABA Mission and Association Goals*, http://www.abanet.org/about/goals.html.

4. American Bar Association, *ABA Policy and Procedures Handbook*, *2007–2008*, at 1 (Goals I & III); http://www.abanet.org/about/goals.html.

The ABA Criminal Justice Standards include Standards on the Special Functions of the Trial Judge and Mental Health Standards.[5] Standard 6-3.6 on the Special Functions of the Trial Judge, which is set out in full in the Appendix, addresses the inquiry the trial court should make in determining whether a criminal defendant has made a knowing and voluntary waiver of his right to counsel. Mental Health Standard 7-5.3, which is also set out in full in the Appendix, offers a test for trial courts to use to determine whether a defendant who suffers from a mental infirmity has a present ability to knowingly, voluntarily, and intelligently waive his or her right to counsel in a criminal proceeding.

As with all of its Standards, the ABA has devoted substantial resources and attention to ensuring that Special Functions of the Trial Judge Standard 6-3.6 and Mental Health Standard 7-5.3 reflect the consensus of prosecutors, defenders, and judges, and represent a realistic and balanced approach to criminal law enforcement.

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5. The ABA Standards for Criminal Justice: Special Functions of the Trial Judge are available at http://www.abanet.org/crimjust/standards/specialfunctions.pdf..

The ABA Standards for Criminal Justice: Mental Health Standards at available at http://www.abanet.org/crimjust/standards/mentalhealth.pdf.

SUMMARY OF ARGUMENT

A criminal defendant has the right to represent himself or herself, but waiver of counsel must be made knowingly and voluntarily. It is particularly difficult for a trial court to determine whether a mentally ill defendant can competently make such a knowing and voluntary waiver. Thus, this Court in *Godinez v. Moran*, 509 U.S. 389, 402 (1993), left room for States to decide whether a searching inquiry is necessary for determining competency to waive counsel.

The ABA submits that state courts should be permitted some latitude in determining the process used to test whether a defendant meets the competence standard to both stand trial and waive his or her right to counsel as set forth in *Godinez.* To assist state courts in performing that function, the ABA's Mental Health Standards and Special Functions of the Trial Judge Standards furnish a useful template that represents a broad consensus of prosecutors, defense counsel, jurists, and mental health experts.

The ABA's standards are consistent with this Court's suggestion in *Godinez* and other cases that courts, in making the competency inquiry, should consider how defendants' impairments bear on their ability to competently, knowingly, and intelligently make certain choices affecting the conduct of their trials.

ARGUMENT

THE AMERICAN BAR ASSOCIATION'S CRIMINAL JUSTICE STANDARDS ON MENTAL HEALTH AND ON THE SPECIAL FUNCTIONS OF THE TRIAL JUDGE PROVIDE A USEFUL TEMPLATE FOR DETERMINING WHETHER A DEFENDANT HAS COMPETENTLY, KNOWINGLY, AND VOLUNTARILY WAIVED THE ASSISTANCE OF COUNSEL AT TRIAL.

In *Godinez v. Moran*, 509 U.S. 389 (1993), this Court held that due process does not demand that a defendant satisfy a higher standard for competence to waive counsel than for establishing competence to stand trial. This Court instead concluded that the mental capacity needed to understand the proceedings and to assist counsel at trial is no greater than the mental capacity needed to comprehend the hazards of self-representation. *Id.* at 399-400.

While holding that the ultimate levels of required mental competence are the same, this Court nonetheless recognized that the inquiry necessary to determine if a defendant is competent to stand trial may be distinct from the inquiry needed to determine if the defendant's waiver of his right to counsel is knowing and voluntary. *Id.* at 401. The Court stated:

> The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings. . . . The purpose of the "knowing and voluntary" inquiry, by contrast, is to

> determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced.

Id. at 401 n.12 (internal citation omitted, emphasis in original). Thus, before any defendant is permitted to proceed pro se, courts are required to determine whether the defendant is fully aware of the hazards of self-representation, *Powell v. Alabama*, 287 U.S. 45, 69 (1932), and, despite understanding those hazards, "knowingly and intelligently" waives the assistance of counsel. *Faretta v. California*, 422 U.S. 806, 835 (1975) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464-465 (1938)). *Godinez* did not adopt a specific methodology for meeting this standard, but instead left to the States the task of developing procedures for determining whether a defendant's waiver of this right was competent, knowing, and voluntary. 509 U.S. at 402.

The Court's approach of requiring States to craft a meaningful inquiry to determine a defendant's competence is consistent with its recognition in other contexts that an individual who is otherwise competent to stand trial may be impaired in significant ways that bear on that person's ability to competently, knowingly, and intelligently make choices affecting the conduct of his or her trial:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and

> process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

Atkins v. Virginia, 536 U.S. 304, 318 (2002). Amicus suggests that mentally ill defendants might share some of the same challenges as this Court has noted concerning mentally retarded defendants: "Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 320-21.

This Court has given States some latitude in defining mental retardation and considerable latitude in implementing that definition procedurally. *Id.* at 317. This Court has also accorded States latitude, for example, in devising standards for determining whether forms of mental illness constitute insanity. *Clark v. Arizona*, 126 S. Ct. 2709, 2722 (2006). Outside of prophylactic measures that provide minimum constitutional protection, this Court has allowed States to adopt different procedures as long as the procedures protect those minimum constitutional standards. *Smith v. Robbins*, 528 U.S. 259, 265 (2000).

In light of these precedents, *Amicus* respectfully submits that this Court afford the States similar latitude here to craft an inquiry to assess competence to knowingly and voluntarily waive the right to counsel. To assist States in performing that function, Amicus submits that the ABA's Mental Health Standards and Special Functions of the Trial Judge Standards furnish a useful template.

ABA Special Functions of the Trial Judge, Standard 6-3.6 recommends that, before allowing a defendant to proceed without the assistance of counsel, trial judges determine that the defendant:

> (i) has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when the defendant is so entitled;
>
> (ii) is capable of understanding the proceedings; and
>
> (iii) has made an intelligent and voluntary waiver of the right to counsel.

American Bar Association, *Standards for Criminal Justice: Special Functions of the Trial Judge* (3d ed. 2000).[6]

If the court possesses "a good faith doubt of the mental competence of the defendant to waive counsel or to represent himself or herself," ABA Standard for Mental Health 7-5.3 recommends that the trial judge

6. The ABA standards recognize that the court's obligation is not just to the accused, but also to protect the integrity of the system as a whole. *Trial Judge Standard 6-3.6*, Commentary at 59; *see also*, Martin Sabelli & Stacy Leyton, *Train Wrecks and Freeway Crashes; An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. Crim. L. & Criminology 161 (2000) (contending that any court procedure must be adequate to preserve the public's confidence in the fairness of the criminal justice system and the ability of both parties meaningfully to present their case.).

order a pretrial mental evaluation.[7] Based on the results of that evaluation, the judge should determine whether the defendant has:

> the present ability to knowingly, voluntarily, and intelligently waive the constitutional right to counsel, to appreciate the consequences of the decision to proceed without representation by counsel, to comprehend the nature of the charge and proceedings, the range of applicable punishments, and any additional matters essential to a general understanding of the case.

Standard 7-5.3(b). If the defendant lacks these abilities, Standard 7-5.3(a) provides that the court should not permit the defendant to proceed without the assistance of counsel.

Based upon the broad consensus of individuals who participated in the development of the ABA Standards, Amicus respectfully submits that the approach outlined above is appropriately tailored to assist a court in determining whether a defendant's waiver of counsel is knowing and voluntary. It thus provides a useful template for States to adopt, consistent with this Court's suggestion in *Godinez*, for the determination of whether a waiver of the right to counsel is knowing and voluntary.

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7. ABA, *Criminal Justice Mental Health Standards* at 274 (1989). Additionally, the Commentary to *Trial Judge Standard 6-3.6* suggests that the court should advise the defendant, of, among other things, "the right to counsel and the importance of having counsel" and "the dangers and disadvantages of self-representation." *Trial Judge Standard 6-3.6*, Commentary at 60.

CONCLUSION

For the foregoing reasons, the American Bar Association requests that the Court reverse the decision below.

Respectfully submitted,

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APPENDIX A

Excerpt from
American Bar Association
***Standards for Criminal Justice: Special Functions of the Trial Judge* (3rd Ed. 2000)**

Part III
Maintaining the Decorum of the Courtroom

Standard 6-3.6. The defendant's election to represent himself or herself at trial

(a) A defendant should be permitted at the defendant's election to proceed in the trial of his or her case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

(i) has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when the defendant is so entitled;

(ii) is capable of understanding the proceedings; and

(iii) has made an intelligent and voluntary waiver of the right to counsel.

(b) When a defendant undertakes to represent himself or herself, the court should take whatever measures may be reasonable and necessary to ensure a fair trial.

Appendix A

Special Functions of the Trial Judge

Commentary

Judicial proceedings must be conducted with dignity and composure. Outbursts, disruption, and histrionics cannot be allowed to infect the proceedings and influence the fact-finder, thereby undermining respect for the criminal justice process. The trial judge must use his or her judicial authority to maintain control of the proceedings. Normally, the judge should use the least severe measures available to maintain order and decorum in the courtroom. Usually, order can be maintained by discussion, recess, or admonitions and warnings, if necessary. Judges are encouraged to use these devices instead of the more onerous sanctions of fines and contempt, which require a hearing, and which should be reserved for the truly serious cases.[1] A contempt citation may prevent a future admission *pro hac vice*, as is indicated in Standard 6-3.11.

Subsection (b) is the former last sentence of Standard 6-3.4 which has been expanded into two sentences by adding and suggesting a preference that any judicial comment or reprimand take place outside the presence of the jury. The subsection also instructs the trial judge, when issuing reprimands or warnings, to avoid arguments with participants in the proceedings

1. *See* Louis E. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Contempt Power*, 65 Wash. U. L. Rev. 477 (1990) (suggesting that the contempt power should be used in only the most severe cases).

and to avoid unnecessary criticism of those who are before him or her. Especially when commenting on the conduct of witnesses or spectators who may be unfamiliar with courtroom procedures, a reprimand should be delivered in a courteous manner.[2] When it becomes imperative, the judge is empowered to take further steps by use of the sanctions discussed in Part IV.

2. *See* Standard 6-3.10 and commentary.

APPENDIX B

Excerpt from
American Bar Association
Criminal Justice Mental Health Standards
(ABA 1989)

Part V
Competence on Other Issues

Standard 7-5.3. Competence to waive counsel and to proceed without assistance of counsel

(a) A defendant who is mentally incompetent to waive counsel or to defend himself or herself at trial without the assistance of counsel should not be permitted to stand trial without the assistance of counsel.

(b) The test for determining the competence to waive counsel and to represent oneself at trial should be whether the defendant has the present ability to knowingly, voluntarily, and intelligently waive the constitutional right to counsel, to appreciate the consequences of the decision to proceed without representation by counsel, to comprehend the nature of the charge and proceedings, the range of applicable punishments, and any additional matters essential to a general understanding of the case.

(c) If, after explaining the availability of a lawyer and making sufficient inquiry of a defendant professing a desire to waive counsel and represent himself or herself, the trial judge has a good faith doubt of the mental competence of the defendant to waive counsel or

to represent himself or herself the judge should order a pretrial mental evaluation of the defendant according to the procedures set forth in part IV of this chapter.

(d) After obtaining the report of the evaluators, the court should hold a hearing on the issues raised according to the procedures set forth in part IV of this chapter.

(i) If, after hearing, the court determines that the defendant is competent to waive counsel and to represent himself or herself, the court should proceed with the case. The court in any such case should consider the appointment of standby counsel in accordance with standard 6-3.7 to assist the defendant or, if it should prove necessary, to assume representation of the defendant.

(ii) If, after hearing, the court should determine that the defendant is incompetent to waive counsel and is incompetent to stand trial or to plead, the court should proceed to issues of treatment and habilitation in accordance with part IV of this chapter.

(iii) If, after hearing, the court should determine that the defendant is competent to stand trial but is incompetent to waive counsel and to proceed without assistance of counsel, the court should appoint counsel to represent the defendant and should proceed to trial of the case.

Commentary Introduction

Standard 7-5.3 incorporates a special criterion for determining a defendant's mental competence to relinquish the sixth amendment right to counsel and to exercise the correlative constitutional right of self-representation. It incorporates a judgment that the criterion governing these important rights must be more stringent than that governing triability, because defendants must be able to recognize the dangers of self-representation and to select intelligently between self-representation and representation by counsel. It also reflects the judgment that a defendant incompetent to waive counsel but otherwise competent to undergo trial must be represented by retained or appointed counsel.

Related Standards

ABA, Standards for Criminal Justice 5-7.2, 6-3.6, 7-4.1 to 7-4.15

Commentary

The sixth amendment right to counsel is perhaps the single most important constitutional right for the protection of state and federal criminal defendants.[1] That right,

1. The leading case is Gideon v. Wainwright, 372 U.S. 335 (1963), which established the right to assigned counsel as fundamental to a fair trial. Earlier decisions include Johnson v. Zerbst, 304 U.S. 458 (1938), which provided for mandatory appointment of counsel for indigent defendants in federal criminal cases, and Chandler v. Fretag, 348 U.S. 3 (1954), in which

(Cont'd)

however, has two dimensions: (1) counsel must be provided for financially unable criminal defendants who desire representation; and (2) competent defendants who wish to represent themselves, and who meet minimum criteria for lay understanding of criminal pretrial and trial procedure, must be allowed to represent themselves.[2] The choice must be a defendant's, not a choice made ostensibly on a defendant's behalf by someone else.[3] The selection of one of these rights, however, clearly constitutes a relinquishment of the other.

(Cont'd)

the Court referred to the right to retained counsel as "unqualified." *Id.* at 9. The right extends to misdemeanor cases in which a defendant actually is imprisoned. Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972) (even relatively minor cases "often require the presence of counsel to ensure the accused a fair trial").

2. Faretta v. California, 422 U.S. 806 (1975). *See also* McKaskle v. Wiggins, 465 U.S. 168, *reh'g denied*, 465 U.S. 1112 (1984) (proper functions of standby counsel); Singer v. United States, 380 U.S. 24 (1965) (a defendant who waived the right to trial by jury did not have the right to insist on a bench trial); United States v. Powers, 622 F.2d 317 (8th Cir.), *cert. denied*, 449 U.S. 837 (1980) (the right to a public trial does not accord an unqualified right to insist that the public be excluded). Some courts have held that an improper denial of the right of self-representation is reversible error without a need to show prejudice. *See*, *e.g.*, United States v. Price, 474 F.2d 1223, *reh'g denied*, 484 F.2d 485 (9th Cir. 1973); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).

3. *See* Faretta v. California, 422 U.S. at 834 ("It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage.").

Defendants must be mentally competent to exercise an election between self-representation and representation by counsel. Arguably, a decision to exercise the right of self-representation requires a greater degree of mental competency than a decision to seek trial representation by counsel; much more is at stake in the former decision,[4] even though some courts have been content to apply a single competency criterion to both decisions.[5] In this context, a focused test for competency comprises three elements: (1) competence to stand trial, (2) competence to comprehend the

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4. In *Faretta*, for example, the Supreme Court pointed out that many of the "traditional benefits" associated with representation by counsel are lost through self-representation. Therefore, a defendant must make a "free choice" "knowingly and intelligently" to forgo those benefits. Faretta v. California, 422 U.S. at 836 (*citing* Johnson v. Zerbst, 304 U.S. at 464-465). The trial court record must establish that a defendant " 'knows what he is doing and his choice is made with eyes open.' " *Ibid.* (*citing* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942), *reh'g denied*, 317 U.S. 713 (1943)). In Westbrook v. Arizona, 384 U.S. 150 (1966), the Court noted that a trial court is under a special "protecting duty" to ensure "an intelligent and competent waiver by the accused" of assistance by counsel. *Id.* at 150 (*citing* Johnson v. Zerbst, 304 U.S. at 465). These decisions support a higher measure of competence to exercise the right of pro se representation than to stand trial with the assistance of counsel.

5. *See* United States v. Odom, 423 F.2d 875 (9th Cir. 1970); People v. Reason, 37 N.Y.2d 351, 334 N.E.2d 572, 372 N.Y.S.2d 614 (1975); Silten & Tullis, *Mental Competency in Criminal Proceedings*, 28 Hastings L.J. 1053 (1977) [hereinafter cited as Silten & Tullis]. *See generally* Weiner, *Mental Disability and the Criminal Law*, in THE MENTALLY DISABLED AND THE LAW 693, 697 (S. Brakel, J. Parry & B. Weiner eds., 3d ed. 1985).

proceedings, and (3) competence knowingly and voluntarily to waive a constitutional right.

The first element, competence to stand trial with the assistance of counsel,[6] does not suffice for self-representation, although it is the threshold to a proper determination of the second element of competency. Defendants must be able to appreciate the consequences of a decision to conduct their own defense, and courts are responsible under *Faretta v. California*[7] to determine that defendants are competent to do so.[8] This

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6. *See* standard 6-3.6 and commentary; standard 7-4.1 and related commentary for a discussion of the criteria governing competence to stand trial.

7. 422 U.S. 806 (1975).

8. One commentator has suggested a greater functional ability is required to represent one's self than to undergo trial while represented, entailing not merely a selection from alternatives posed by counsel, but the necessity of conceiving, developing, and implementing defense strategies. Note, *The Identification of Incompetent Defendants: Separating Those Unfit for Adversary Combat from Those Who Are*, 66 Ky. L.J. 666 (1978). Other writers have suggested that unrepresented defendants need the mental capacity to make tactical decisions during trial unaided by counsel, and that "... the higher standard of *Westbrook* necessarily involves an assessment of the defendant's ability to conduct his own defense." Silten & Tullis, *supra* note 5, at 1068. The Supreme Court, however, has never imposed such a requirement. Other courts consider the issue one of competence to make a valid choice, not competence to function in the capacity of a lawyer: "The significant issue, then, is the (Cont'd)

in turn requires that judges adequately warn defendants about the dangers of self-representation and reassure themselves that defendants understand and appreciate those dangers sufficiently to make a reasoned choice between constitutional alternatives.[9] The third element

(Cont'd)
sufficiency of the trial court's inquiry into petitioner's capacity to make an intelligent choice." United States *ex rel.* Konigsberg v. Vincent, 388 F. Supp. 221, 226 (S.D.N.Y.), *aff'd* 526 F.2d 131 (2d Cir. 1975), *cert. denied*, 426 U.S. 937 (1976). *See also* United States v. Spencer, 439 F.2d 1047 (2d Cir. 1971); Minor v. United States, 375 F.2d 170, *cert. denied*, 389 U.S. 882 (1967); People v. Teron, 23 Cal. 3d 103, 588 P.2d 733, 151 Cal. Rptr. 633 (1979), *and see* People v. Wolozon, 138 Cal. App. 3d 456, 188 Cal. Rptr. 35 (1982). Accordingly, trial courts should not substitute their views of the wisdom of self-representation for those of defendants; the latter must accept the unpleasant consequences of their bad decisions. Minor v. United States, 375 F.2d 170 (1967); People v. Teron, 23 Cal. 3d 103, 588 P.2d 733, 151 Cal. Rptr. 633 (1979); Goode v. State, 403 So. 2d 931 (F1a. 1979). On the other hand, the capacity for pro se representation is not to be determined on the basis of a given defendant's technical knowledge or strategic disadvantages flowing from a decision to forgo representation by counsel.

9. The exact limits of what trial courts must ascertain are unclear. The plurality opinion in Von Moltke v. Gillies, 332 U.S. 708 (1948), indicates that courts must determine that a defendant understands:

1. the nature of the charges,
2. the statutory offenses included within those charges,
3. the range of allowable punishments if convicted,
4. possible defenses to the charge, and circumstances in mitigation thereof,

(Cont'd)

relates to a defendant's ability "knowingly and intelligently" to relinquish the sixth amendment right to representation by counsel.[10]

(Cont'd)

5. all other facts essential to a broad understanding of the matter.

Id. at 724.

However, the litigation concerned the validity of a guilty plea from an uncounseled defendant, so that the decision may have melded concerns over waiver of counsel for purposes of a plea hearing with exercise of the right of self-representation at trial. For example, the plurality opinion in *Von Moltke* suggested that a court should familiarize itself with the facts of the case, including all defenses to the pending charges, in order to advise a defendant. That would be proper for purposes of considering a tendered guilty plea but most inappropriate if a defendant will undergo trial. Clearly, however, a court should advise a defendant about the dangers of pro se representation and satisfy itself that the defendant has the understanding delineated in standard 6-3.6(a).

10. Edwards v. Arizona, 451 U.S. 477, *reh'g denied*, 452 U.S. 973 (1981) (a "reasoned judgment and a deliberate choice based upon adequate knowledge of what that fundamental right encompasses"); Johnson v. Zerbst, 304 U.S. 458 (1938) (an "intentional relinquishment or abandonment of a known right or privilege"); *see also* United States *ex rel.* Brown v. Fay, 242 F. Supp. 273 (S.D.N.Y. 1965). *See W*estbrook v. Arizona, 384 U.S. 150 (1966): "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Id.* at 150 (*citing* Johnson v. Zerbst, 304 U.S. 458, 465 (1983)). *See also* United States *ex rel.* Konigsberg v. Vincent, 388 F. Supp. 221

(Cont'd)

Paragraph (a) of the standard establishes unequivocally that defendants who are mentally incompetent either to waive representation by counsel or to represent themselves during a criminal trial should not be allowed to undergo trial without retained or assigned counsel. If defense counsel, the prosecuting attorney, or the court has a good faith doubt about the defendant's competency to undergo trial while represented, the appropriate measures should be taken under part IV. Paragraph (b) sets out the more precise criteria to ascertain competency to waive counsel, based on a present ability: (1) knowingly, voluntarily, and intelligently to relinquish the right to representation by an attorney; (2) to understand and appreciate the consequences of a decision to represent one's self; and (3) to understand and comprehend the nature of the charge, criminal proceedings, applicable sanctions, and anything else essential to a general understanding of the case. By intent, the criteria are phrased broadly so that ad hoc evaluations can be made of defendants' mental capacity to perform the functions to be expected of them at trial.

(Cont'd)

(S.D.N.Y.), *aff'd*, 526 F.2d 131 (2d Cir. 1975), *cert. denied*, 426 U.S. 937 (1976). A court, therefore, must consider directly whether a tendered waiver of representation by counsel is submitted intelligently and competently, an issue that cannot be resolved incidentally to a decision concerning competence to undergo trial while represented by counsel. Westbrook v. Arizona, 384 U.S. 150 (1966).

As provided elsewhere in the standards,[11] a court faced with a defendant desirous of exercising the right of self-representation is obliged to apprise the defendant of the right to representation by and assignment of counsel. The court also must ascertain that the defendant has the intelligence and capacity to understand the consequences of a decision to relinquish representation by counsel, the nature of the charges and proceedings, the range of permissible punishments, and anything else requisite to a broad understanding of the criminal case. If in the course of that colloquy, the court generates a good faith doubt about the defendant's present mental competence as delineated in paragraph (b), it should order a pretrial mental evaluation under paragraph (c), under the same procedures that govern mental evaluations to determine competency to undergo trial while represented by counsel.[12]

After evaluation reports have been transmitted to the court, it should conduct a hearing in the usual form[13] to ascertain the defendant's competence. One of three alternative determinations of the matter may ensue. The first, covered by subparagraph (d)(i), is a finding that the defendant is competent according to the criteria in paragraph (b). In that event, trial may proceed,[14]

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11. *See* standard 6-3.6(a) and commentary.

12. *See* standards 7-4.4 through 7-4.6 and commentary.

13. *See* standards 7-4.7 through 7-4.9 and commentary.

14. *See* standard 6-3.6(b): "When a litigant undertakes to represent himself or herself, the court should take whatever measures may be reasonable and necessary to ensure a fair trial."

although the court should consider appointment of standby counsel[15] to assist the defendant or to take over the conduct of the case if the defendant proves incapable of conducting a defense personally.

A second finding would be that the defendant is both incompetent to elect self-representation and to stand trial or plead guilty or nolo contendere. In that event, according to subparagraph (d)(ii), the court should determine the need for treatment or habilitation and enter an appropriate order.[16]

A third finding would be that the defendant is incompetent to waive representation by counsel, but otherwise is competent to undergo trial while represented by an attorney. In that event, under subparagraph (d)(iii),

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15. *See* standard 6-3.7; McKaskle v. Wiggins, 465 U.S. 168, *reh'g denied*, 465 U.S. 1112 (1984).

16. *See* standards 7-4.9 through 7-4.11 and commentary. The same special procedures and dispositional measures under standards 7-4.12 and 7-4.13 should be available in this context as in cases of nontriable defendants. It may be proper to use psychotropic medications in treating defendants incompetent to waive counsel, if the procedural safeguards described in standard 7-4.14 are observed. *See* Bennett, *A Guide Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 Geo. Wash. L. Rev. 375, 408-412 (1985). Credit against sentence for periods of involuntary commitment must be given. *See* standard 7-4.15 and commentary.

the court should see that the defendant has retained counsel or, if financially unable, receives appointed counsel.[17]

Although the approach embodied in standard 7-5.3 is not duplicated precisely in any jurisdiction at the present time, it clarifies for legislative consideration the procedures mandated by *Faretta v. California* and the appropriate system responses to mental incompetency in its several forms.

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17. Although standards 5-6.1 and 5-6.2 assume that counsel should be provided only for defendants wholly or partially unable to afford counsel, implementation of subparagraph (d)(iii) may require appointment of counsel for funded defendants who refuse to retain counsel. In that event, reimbursement of the government for the cost of assigned counsel might be achieved through a liberal application of standard 5-6.2.