SUICIDE BY COURT? THE ROLE OF ADVISORY COUNSEL IN ASSISTING COURTS TO DETERMINE A DEFENDANT'S COMPETENCE TO PROCEED PRO SE

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ABSTRACT

The constitutional right to self-representation before courts ("pro se") has challenged the U.S. legal system since its inception. Legal scholars have contributed a great deal in resolving many of these challenges. One extremely vexing issue that remains unresolved by both legal academics and the U.S. Supreme Court is how to determine if a defendant is capable to proceed pro se. The Supreme Court granted courts the right to insist upon representation by counsel for those who are incapable of conducting trial proceedings in Indiana v. Edwards. Nonetheless, the Court never laid down a clear, applicable standard or thorough criteria to determine who is capable to conduct trial proceedings and who is not. While medical experts determine whether a defendant is compromised due to a mental or psychological illness, judges have wide discretionary power and final say in allowing a defendant to proceed pro se. This Article intends to solve this problem by highlighting the potential role of advisory counsel in guiding a court to determine a defendant's capability to proceed pro se under Edwards. Furthermore, this Article discusses the potential constitutional and ethical dilemmas that may arise as a result of exercising that potential role. Finally, we contend that courts' tendency, reflected by statistics, in allowing incapable defendants to proceed pro se even in capital punishment cases is equivalent to suicide assistance. Thus, this Article justifies the call for abolishing the right to proceed pro se in capital punishment cases upon constitutional and human rights grounds.

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I. INTRODUCTION

In a capital punishment case that Becky Briggs handled as advisory counsel before the District Court, Crowley County State of Colorado, the defendant was too far from being competent to conduct trial proceedings pro se. Nevertheless, the court allowed the defendant to exercise his Sixth Amendment right to self-representation, to the detriment of the proceedings, the community, and, most importantly, the accused himself. We will briefly provide you with some alarming signs revealed during pretrial hearings that suggest that the defendant was not mentally capable of representing himself.

During formal court hearings, the defendant appeared far removed from his surroundings.[1] His physical posture was almost always hunched over and meek.[2] He was unable to remain focused, handle logistical details, or stay on topic.[3] His eyes were often overly wide with unusually dilated pupils.[4] During the defendant's second appearance representing himself, the parties clearly observed concerning demeanor on his part. At one point, the Assistant Attorney General interjected that the defendant might be under the influence of hard drugs or that he might not be mentally ready to proceed in trial.[5] The defendant inappropriately smiled throughout proceedings and claimed, inter alia, that he was under the influence of demonic possession.[6] In one communication, the defendant described a future court date as follows: "Come June 2, I will be ready to rock [and] roll to some Pink Floyd's *Dark Side of the Moon*, on THC preferably."[7] The defendant agreed with the prosecution on almost everything, saying at one point, "What do you want me to say or do?"[8] Moreover, the defendant stated in court that he would prefer to be decapitated and dismembered on live television—pay per view.[9]

The defendant went further by justifying why he wanted to be decapitated in court. He explained, "Why do you think I want my head decapitated? Here is one reason: I have a stupid loose wire in there and medication won't fix it neither will talking about it. I believe decapitating is the answer . . . death will solve my issues as to my stupid brain."[10] These are just a few examples of statements by the defendant in a Colorado death penalty case. The defendant's attitude and statements before the court fully revealed his incompetence to represent himself pro se.

Similar events, yet to a lesser extent, took place during the trial of Ted Kaczynski, who waived his right to counsel after learning that his attorney wanted to argue madness as a defense so that he could escape the death penalty.[11] After Kaczynski attempted suicide in his jail cell in 1998, U.S.

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[1] Motion to Appoint Counsel in Order to Preserve Mr. Contreras-Perez's State and Constitutional Rights, People v. Contreras-Perez, No. 12CR60, District Court, Crowley County State of Colorado, ¶¶ 29–59.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Kaczynski Demands to Represent Himself*, WIRED (Jan. 8, 1998, 10:10 AM), https://www.wired.com/1998/01/kaczynski-demands-to-represent-himself; *Ted Kaczynski Pleads Guilty to Bombings, This*

District Court Judge Garland Burrell Jr. referred him to a psychiatrist for a diagnosis.[12] The psychiatrist found that Kaczynski suffered from paranoid schizophrenia and could not represent himself.[13] It is worth noting that this took place years before the U.S. Supreme Court issued the *Edwards* decision, which stipulated a new standard of competence for proceeding pro se that is different from the standard to stand trial.[14]

Sometimes a defendant does not manifest any noticeable signs of mental illness, despite being mentally ill, and decides to proceed pro se. For instance, notorious serial killer Theodore Robert Bundy (known as "Ted Bundy") decided to proceed pro se in his own capital proceeding trial.[15] After agreeing with his attorneys to accept a favorable guilty plea with life-imprisonment instead of a death sentence, the moment he appeared in court, he stated:

> It's my position that my counsel, one, believe that I am guilty. Two, that they have told me they see no way of presenting effective defense, and in no uncertain terms they have told me that. And three, that they see no way of avoiding conviction. Your Honor, if that does not raise itself to the level of ineffectiveness of counsel, I don't know what does.[16]

Although Bundy did not manifest any obvious symptoms of mental illness during his trial, clinical and forensic psychologist Darrel Turner, PhD, opined that Ted Bundy was the exact textbook definition of a "prototypical" psychopath.[17] He stated that "[t]here are certain traits that we tend to see: a lack of empathy and being out for one's own interest even though the interests of other people get trampled under foot . . . . [B]ut with Bundy, we do see a lot of the other traits of psychopathy, like the pathological lying and being very superficially charming."[18] Bundy argued his own death penalty at trial after rejecting and disrupting the assistance of his advisory counsel in every stage of trial.[19]

After reading these examples, the question that readily pops up in one's mind is: how does a court allow such a compromised defendant to proceed pro se in a capital punishment case to his own suicide? It is worth noting that the Court in *Edwards* cited a psychiatrist's criticism of the current state of law asking a similar question: "[H]ow in the world can our legal system allow an insane man to defend himself?"[20] This question remains unanswered, yet we are willing to provide an explanation of courts' attitudes

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Day in History: January 22, 1998, HISTORY, https://www.history.com/this-day-in-history/ted-kaczynski-pleads-guilty-to-bombings (Oct. 4, 2010).

[12] *Id.*

[13] *Id.*

[14] Indiana v. Edwards, 554 U.S. 164, 177–78 (2008).

[15] Gabrielle Bruney, *Ted Bundy Acting As His Own Lawyer Made For a Sadistic Show During His Murder Trials*, ESQUIRE (May 6, 2019), https://www.esquire.com/entertainment/a27375563/ted-bundy-trial-lawyer-true-story.

[16] *Id.*

[17] Marissa Gainsburg, *So, Exactly Which Mental Health Disorders Did Ted Bundy Have, Anyway?*, WOMEN'S HEALTH (May 6. 2019), https://www.womenshealthmag.com/life/a27346043/ted-bundy-mental-health-disorders-antisocial-behavior-personality.

[18] *Id.*

[19] *See* Bruney, *supra* note 15.

[20] Indiana v. Edwards, 554 U.S. 164, 177 (2008).

in misapplying *Edwards*. The short answer is that courts often misapply the *Edwards* test to assess if a defendant is incapable to proceed pro se.[21] Most courts prefer to play it safe by validating defendants' Sixth Amendment rights by allowing incompetent defendants to proceed pro se notwithstanding any signs of incompetency.[22]

We believe that courts, in doing so, largely follow Justice Antonin Scalia's dissent in *Edwards*. In *Edwards*, Justice Scalia argued that courts should respect the Sixth Amendment right of a defendant in *making the choice* to proceed pro se even if the defendant *was incapable of conducting successful proceedings* before the Court.[23] In effect, Justice Scalia's dissent commanded courts to allow any defendant—no matter how incompetent—to exercise their right to represent themself to their detriment, even in capital punishment cases, as long as the defendant made such a choice "knowingly and voluntarily."[24]

Thus, although the majority opinion provided otherwise in *Edwards*, courts are still puzzled by how to apply the *Edwards* standard to a defendant who is mentally "competent" to stand trial but effectively incompetent to conduct proceedings pro se before the court.[25] Consequently, most courts are reluctant to apply the *Edwards* standard in denying a defendant the right to proceed pro se based on incompetency.[26]

In contrast, legal scholars and forensic psychiatrists have not left this important matter unaddressed.[27] Several scholars have suggested workable standards to assess whether a defendant is competent to conduct proceedings pro se before a court.[28] Other scholars have called for abolishing the Sixth Amendment right to self-representation in capital punishment cases, although they have not justified their noble call in equivalent or stronger constitutional grounds.[29] Yet, to our knowledge, no academic article has discussed the role of advisory counsel in aiding courts in applying the *Edwards* standard. Although the standard that determines competency to stand trial considers the ability of a defendant to consult with counsel (among other criteria), the *Edwards* standard does not call for the consultation of advisory counsel regarding their views on a defendant's competence to conduct proceedings independently. We argue that an automatic appointment of standby counsel for pro se defendants will offer a possible solution to this dilemma. Alternatively, we suggest abolishing the right to proceed pro se in

[21] *See* Douglas R. Morris & Richard L. Frierson, *Pro Se Competence in the Aftermath of Indiana v. Edwards*, 36 J. AM. ACAD. PSYCHIATRY L. 551, 555 (2008).

[22] *See* John H. Blume & Morgan J. Clark, *Unwell: Indiana v. Edwards and the Fate of Mentally Ill Pro Se Defendants*, 21 CORNELL J.L. & PUB. POL'Y 151, 164–65 (2011); *See* NORMAN G. POYTHRESS, RICHARD J. BONNIE, JOHN MONAHAN, RANDY OTTO, & STEVEN K. HOGE, ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 50 (Ronald Rosech et al. eds., 2002).

[23] *Edwards*, 554 U.S. at 183–84 (2008) (Scalia, J., dissenting).

[24] *See id.*

[25] *See id.* at 189; Blume & Clark, *supra* note 22, at 173.

[26] *See* Blume & Clark, *supra* note 22.

[27] *See, e.g.*, Todd A. Berger, *The Aftermath of Indiana v. Edwards: Re-evaluating the Standard of Competency Needed for Pro Se Representation*, 68 BAYLOR L. REV. 680 (2016); *see, e.g.*, Morris & Frierson, *supra* note 21; *see, e.g.*, Ellesha LeCluyse, *The Spectrum of Competency: Determining a Standard of Competence for Pro Se Representation*, 65 CASE W. RSRV. L. REV. 1239 (2015).

[28] *See generally* Blume & Clark, *supra* note 22*; see* LeCluyse, *supra* note 27, at 1257–58.

[29] Blume & Clark, *supra* note 22, at 169–71.

capital punishment cases, but at this time our position is directly built on constitutional and human rights arguments.

In Part II, we briefly set forth the constitutional foundations of the right to self-representation and the evolution of U.S. Supreme Court decisions on exercising that right. In Part III, we critically review standards and solutions suggested by scholars for determining a defendant's capability, or competency, to proceed pro se. In Part IV, this Article discusses in-depth the role of advisory counsel or standby counsel in assisting courts with applying the vague *Edwards* standard to determine if a defendant is incapable of proceeding pro se. We also discuss potential criticisms of our proposal and ethical dilemmas surrounding the role of standby counsel. In Part V, we provide concrete arguments grounded in the U.S. Constitution and human rights treaties to support abolishing the right to self-representation in capital punishment cases.

II. THE CONSTITUTIONAL FOUNDATIONS OF THE RIGHT AND COMPETENCE TO PROCEED PRO SE

A. THE CONSTITUTIONAL RIGHT TO PROCEED PRO SE

The Sixth and Fourteenth Amendments of the U.S. Constitution grant those charged with a criminal offense the right "to have the Assistance of Counsel" for their defense.[30] In *Faretta v. California*, the Supreme Court further interpreted these Amendments as establishing the right of self-representation as long as a defendant has waived their right to counsel knowingly and voluntarily.[31] Nonetheless, a defendant may choose to proceed pro se and seek the assistance of counsel without having the counsel represent them on record.[32] A defendant's right to the assistance of counsel is based on case law of the U.S. Supreme Court and the supreme courts of individual states. For instance, the Supreme Court of Colorado has held that the appointment of advisory counsel is generally a fair and commendable practice while leaving the decision to appoint advisory counsel to the trial judge's sound discretion.[33]

It is worth noting that a trial judge's authority to appoint standby counsel is so broad that a court has the right to appoint standby counsel even upon a defendant's objection.[34] The purpose of this policy is to help, to the minimum extent, a trial run smoothly and relieve a court of the need to explain the basic rules of the courtroom to a defendant.[35] Further, it minimizes the chance that

[30] "[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

[31] Faretta v. California, 422 U.S. 806, 807 (1975).

[32] *See* McKaskle v. Wiggins, 465 U.S. 168, 183 (1984).

[33] Reliford v. People, 579 P.2d 1145, 1148 (Colo. 1978).

[34] *See* McKaskle, 465 U.S. at 184.

[35] *Id.*

a court will be in a legal conundrum by having to assist a struggling self-represented defendant.[36]

Many courts and legal scholars use the terms "standby counsel" and "advisory counsel" interchangeably, as these roles have no universally accepted definition.[37] Meanwhile, court decisions related to this matter suggest that there is a certain boundary between these roles, which is useful to keep in mind while fulfilling the role of the standby counsel as it is defined by a specific court. While purely advisory counsel do not take an active part in a trial and are expected to simply act as a source of legal information for the defendant, standby counsel have a broader role that requires them to prepare for every stage of trial so that they may step in as attorneys at a defendant's request and to the extent allowed by the pro se defendant and the court.[38] In other words, standby counsel are attorneys outside of court record.

Although in *People v. Rice*, the Colorado Court of Appeals defined advisory counsel as the functional equivalent of a "law library or alternative source of legal knowledge,"[39] in *McKaskle v. Wiggins*, the U.S. Supreme Court authorized advisory counsel to assist defendants in complying with procedural requirements while defendants retained control over their defense.[40] Furthermore, in *McKaskle*, the Supreme Court did not bar advisory counsel from participating in proceedings in the presence of a jury.[41]

One of the primary ways to avoid this ambiguity and violation of defendants' right to proceed pro se is to delineate the role of advisory counsel as early and clearly as possible. If, at some stage of the trial process, a defendant chooses to let counsel exceed the preliminarily agreed-upon role—that is, maintain the role of the attorney, draft the motions, select the strategy, plan the objections, or even participate in front of the jury—the defendant may not later assert that their rights to proceed pro se were infringed upon.[42]

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[36] *Id.*

[37] United States v. Twitty, No. 13-cr-0076-WJM, 2013 WL 3851250, at *1 (D. Colo. July 25, 2013).

[38] While the two terms ("standby counsel" and "advisory counsel") are often used interchangeably, the court in People v. Kurbegovic, 138 Cal. Rptr. 268, 284–85 (Cal. Ct. App. 1982) distinguished between them as follows: "[T]he term 'standby' counsel generally relates to an attorney's being present to step in and represent an individual no longer able to represent himself . . . . 'Advisory' counsel, however, generally refers to an attorney who assists a litigant representing himself in a variety of ways." *See McKaskle,* 465 U.S. at 183–84. *See also* People v. Doane, 246 Cal. Rptr. 366, 370 n.2 (Cal. Ct. App. 1988); Chaleff v. Superior Court, 138 Cal. Rptr. 735, 742 nn.6–7 (Cal. Ct. App. 1977) (Hanson, J. concurring) (Justice Hanson construed "'advisory counsel' to mean an attorney who is present in the courtroom at the defendant's side, does not speak for him, and does not participate in the conduct of the trial but only gives him legal advice" and construed "'standby counsel' to mean an attorney who is present in the courtroom and follows the evidence and proceedings but does not give legal advice to the defendant. He 'stands by' in the event it is necessary for the trial court to revoke defendant's in propria persona status or even remove the defendant from the courtroom because of disruptive tactics so the case may proceed in an orderly manner to verdict.").

[39] People v. Rice, 579 P.2d 647, 650 (Colo. App. 1978).

[40] *McKaskle*, 465 U.S. at 183–84.

[41] *Id.* at 185.

[42] We will continue discussing this aspect more thoroughly in the ethical and professional conduct of the advisory counsel section below.

B. THE COMPETENCE OF A DEFENDANT TO PROCEED PRO SE

Before *Edwards*, courts throughout the United States were only concerned with the competence of a defendant to stand trial under *Dusky v. United States*. The Supreme Court opined in *Dusky* that an individual is competent to stand trial if they possess the "present ability to consult with [their] lawyer with a reasonable degree of rational understanding" and had a "rational as well as factual understanding of the proceedings against [them]."[43]

Three decades later, the Supreme Court assessed whether there should be a higher standard of competency to waive the right to counsel or plead guilty, but it did not delve into the question of competency for proceeding pro se.[44] Essentially, the decision in *Godinez v. Moran* assessed what constitutes a knowing and voluntary waiver to the right of counsel.[45] The Supreme Court decided that this assessment shall concern the competence to waive the right to counsel, not the competence to represent oneself.[46] In 2008 in *Edwards*, the Supreme Court faced a rare case in which the defendant fell into a gray area of competence.[47] The Court explored the circumstances in which a defendant can be competent to stand trial (being represented by an attorney), but incompetent to represent themself.[48] In reaching its decision, the Court considered the amicus brief submitted by the American Psychiatric Association. The amicus brief provided that "self-representation involves a substantially expanded role for the defendant and hence requires significantly greater capabilities" than for an ordinary defendant who is represented by counsel.[49]

The Court distinguished *Edwards* from *Godinez* and *Dusky*.[50] Though the Court acknowledged that the defendants in *Edwards* and *Godinez* were similar because they were both borderline competent, it distinguished *Edwards* from *Godinez* on two grounds.[51] First, *Godinez* provides no answer to the question of the defendant's ability to conduct a defense at trial.[52] Second, *Godinez*'s holding that the state may *allow* a borderline-competent (gray area) defendant to proceed pro se does not resolve whether a state may *deny* such a defendant the right to proceed pro se.[53]

The Court distinguished *Edwards* from *Dusky* on the basis that the defendant in *Edwards* had met the *Dusky* standard for competence to stand trial but was seemingly incompetent to proceed pro se.[54] Accordingly, the Court decided that states may limit a defendant's right to proceed pro se by insisting upon representation by counsel at trial for a defendant who "lacks

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[43] *Id.* at 402.
[44] *See* Godinez v. Moran, 509 U.S. 389 (1993).
[45] *Id.* at 400–01.
[46] *Id.*
[47] *See* Indiana v. Edwards, 554 U.S. 164 (2008).
[48] *See id.*
[49] Brief for American Psychiatric Association and American Academy of Psychiatry and the Law as Amici Curiae in Support of Neither Party, at 25–26, Indiana v. Edwards, 554 U.S. 164 (2008) (No. 07-208).
[50] *Edwards*, 554 U.S. at 172–74.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*

the mental capacity to conduct [their] trial defense unless represented."[55] According to the Court, "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."[56] Thus, there is a right to self-representation, but this right became limited by *Edwards* to only those who are competent to represent themselves.[57]

The most flustering aspect of the *Edwards* decision is Justice Scalia's dissent, which Justice Clarence Thomas joined.[58] Justice Scalia argued that by giving discretion to judges to limit the right of self-representation, the Court had undermined the dignity of defendants who decided to represent themselves.[59] Further, he contended that the Court's decision in *Edwards* contradicts the values and purposes provided by the same Court in *Faretta* regarding the right of self-representation. In the words of Justice Scalia,

> [T]here is equally little doubt that the loss of "dignity" the right is designed to prevent is *not* the defendant's making a fool of himself by presenting an amateurish or even incoherent defense. Rather, the dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State—the dignity of individual choice.[60]

The *Faretta* decision explained that the Sixth Amendment's counsel clause should not be invoked to "impair the exercise of [the defendant's] free choice."[61] In addition, Justice Scalia opined that the Court in *Edwards* had substituted the defendant's autonomy with the state's autonomy for the sake of a fair trial.[62] He went further by stating that the state's view of a fair trial was not enough to strip the defendant of his constitutional right to self-representation.[63]

What concerned Justice Scalia was not the fairness of trying an incompetent pro se defendant or the dangers surrounding the trial's outcome, including the defendant's execution; it was the choice of the defendant to represent himself. Astonishingly, it seems as if Justice Scalia was calling states to engage in suicide assistance of mentally ill defendants. In our view, Justice Scalia's dissent defies notions of justice and fairness. The very purpose of the Sixth Amendment right is to ensure a fair trial.[64] However, a trial can never be fair if a mentally ill or incompetent defendant is proceeding pro se to their own detriment or their own death. Justice Scalia's dignity argument based on autonomy is also rather flawed. Although the individual's

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[55] *Id.* at 174.
[56] *Id.* at 178.
[57] Peter S. Martin & Robert L. Weisman, *Competence to Proceed Pro Se*, 41 J. AM. ACAD. PSYCHIATRY L. 310, 311–12 (2013).
[58] *Edwards*, 554 U.S. at 179–90 (Scalia, J., dissenting).
[59] *Id.*
[60] *Id.* at 186–87.
[61] *Id.* (quoting Faretta v. California, 422 U.S. 806, 815 (1975)).
[62] *Id.* at 187–88.
[63] *Id.* at 186–87.
[64] *See, e.g.*, United States v. Farhad, 190 F.3d 1097, 1102 (9th Cir. 1999) (Reinhardt, J., concurring); John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 SETON HALL CONST. L. J. 483 (1996). The Supreme Court has acknowledged these concerns. *See* Martinez v. Ct. of Appeal of Cal., 528 U.S. 152, 161 nn.9–10 (2000).

true autonomy would be upheld against a patronizing state, an ill-minded defendant's autonomy would be impaired.[65] Justice Scalia erred when he treated a mentally ill defendant as an ordinary and sound person who could make "knowing" and "voluntary" decisions.[66] Allowing defendants with serious mental illness to choose to represent themselves without counsel is akin to allowing an insane person to make the decision to jump out of a hospital's fifteenth floor window with the full endorsement of doctors and nurses. Equating a mentally ill defendant with a defendant of sound mind is unjust and unfair. Returning to the Colorado capital punishment case, the defendant asked the court to have him decapitated because there was a wrecked wire in his head. According to Justice Scalia's dissent, the Colorado trial court should allow the defendant to represent himself because he made such a choice, even if he is literally calling for his own decapitation and agreeing with the prosecution on everything to reach that result. This is an unacceptable legal and moral end.

Nonetheless, the court's opinion in *Edwards* was imperfect not because of Justice Scalia's arguments, but because it did not provide any criteria for determining whether a defendant is incompetent to proceed pro se.[67] The purpose behind leaving the decision to lower courts was to individualize the determination of each defendant's competency to represent themself.[68] Notwithstanding the wisdom behind such purpose, the opinion did not provide any guidelines for determining a defendant's competency. As a result, most courts are reluctant to deny a defendant's right to proceed pro se.[69] Until 2016, only one court had denied a defendant the right to proceed pro se by applying *Edwards*.[70] Most courts blindly allow defendants to proceed pro se to avoid repeal of their decisions by higher courts.[71] This is the core of the vexing issue we are trying to solve in this Article.

In the next Section, we provide some guidelines that courts can follow to determine whether the defendant's psychological or mental illness deprives him or her of the autonomy to make a voluntary and knowing choice to proceed pro se. Moreover, we highlight the potential role of advisory counsel in guiding courts in determining the competence of the defendant to proceed pro se.

III. A CRITICAL REVIEW OF THE SUGGESTED SOLUTIONS AND STANDARDS OF PRO SE COMPETENCY

Scholars have proposed solutions and standards to the pro se competency dilemma.[72] Currently, there are three solutions to the current vague competency standard of proceeding pro se: first, using the *Dusky* standard to determine whether a defendant is capable of proceeding pro se; second, adopting a blanket diagnostic approach that would exclude defendants with

[65] *See* LeCluyse, *supra* note 27, at 1257–58.
[66] *Edwards*, 554 U.S. at 179–90 (Scalia, J., dissenting).
[67] Blume & Clark, *supra* note 22, at 163.
[68] *Edwards*, 554 U.S. at 177–78.
[69] Blume & Clark, *supra* note 22, at 164.
[70] *Id.*
[71] *Id.*
[72] *See generally id.*; *see generally* LeCluyse, *supra* note 27.

certain mental or psychological diseases from proceeding pro se; and hird, calling for the Supreme Court to simply overrule *Faretta* to evade that problem altogether and maximize the fairness of courts' proceedings. We will critically engage with each of these solutions in the following paragraphs.

First, the clarity of the *Dusky* standard might indeed aid courts in determining the competency of pro se defendants to represent themselves.[73] The *Dusky* standard gives courts several guidelines to assess a defendant's competency to stand trial.[74] Among these criteria are the ability to understand and appreciate the criminal proceedings against them, whether they can reasonably assist their counsel in preparing for trial, and their ability to communicate rationally with the court.[75] Nevertheless, scholars suggested changing the wording of the standard from "sufficient" to "significant" so that the standard offers the most protection for mentally ill defendants.[76] On a different note, some lower courts have employed the *Ford v. Wainwright*[77] standard in assessing the defendant's competence to be sentenced.[78] This standard requires that the defendant understand what sentence is being imposed on them and why.[79] Otherwise, a defendant would lack a basic understanding of the sentence and their own crime, rendering the court order inconsistent with both the offender's dignity and autonomy.[80] By way of analogy, courts may apply *Ford* to assess whether a defendant is competent to proceed pro se. If a defendant can grasp the allegations, the general court proceedings, and the sentence that might be imposed on them, there is a greater probability that the defendant is making the decision to proceed pro se voluntarily and knowingly. In contrast, if the defendant cannot understand the sentence or court proceedings, courts should be more careful in allowing self-representation. Nevertheless, these two solutions are incompatible with *Edwards*, which specifically stated that the standard of competency for self-representation is not equivalent to the standard of competency to stand trial (being represented by counsel).[81] Furthermore, a defendant who decides to proceed pro se does not have counsel (if the court did not appoint counsel) to assist in preparing for trial. Regardless, following *Ford* might be beneficial to judges in their assessment of a defendant's capability to proceed pro se. This is because a judge must clearly notice a defendant's understanding of the court proceedings and sentencing. Moreover, the *Ford* standard does not require a judge to look into the relationship between a defendant and their attorney, which might be nonexistent in cases with pro se defendants.

The second solution is to adopt a blanket diagnostic approach that could exclude certain categories of defendants who suffer mental and

[73] Blume & Clark, *supra* note 22, at 166–67.
[74] *Id.*
[75] *Id.*
[76] "[I]f a defendant does not have a 'significant [as opposed to sufficient] present ability to consult with counsel with a significant degree of rational understanding,' the defendant would not be deemed competent to stand trial." *Id.* at 167.
[77] Ford v. Wainwright, 477 US 399 (1986).
[78] Stephen J. Morse, *Involuntary Competence in United States Criminal Law*, *in* FITNESS TO PLEAD: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 207, 211 (Ronnie McKay & Warren Brookbanks eds., 2018).
[79] *Id.*
[80] *Id.*
[81] *See* Indiana v. Edwards, 554 U.S. 164, 166 (2008).

psychological illness from representing themselves.[82] Under this solution, defendants who suffer from schizophrenia, severe bipolar disorder, or intellectual disabilities should be denied the right to self-representation.[83] Scholars based their selection of these specific mental disorders on their severity of preventing defendants from adequately representing themselves.[84] For instance, schizophrenia is a condition characterized by, among other things, a combination of delusions, hallucinations, disorganized speech, and grossly disorganized behavior.[85] These symptoms impair defendants from proceeding pro se due to the inconsistent illogical thinking and communication.[86] Further, depressive disorders may prevent defendants from adequately proceeding pro se due to irritable moods accompanied by somatic and cognitive challenges that adversely affect an individual's capacity to function.[87] This might lead a defendant to become careless about the outcome of a trial or even want to end their life by conviction.[88] Finally, delirium and dementia may significantly impact a defendant's ability to understand and communicate with the judge and prosecution during trial.[89] A homicide trial, particularly a death penalty trial, requires consistent—if not *constant*—conferral with opposing counsel. An imbalanced defendant or one with mood disorders is likely not capable of complying with this requirement.

The America Psychiatric Association ("APA") and the American Academy of Psychiatry and the Law ("AAPL") adopted that position.[90] They jointly filed an amicus brief stating 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."[91] Yet adopting a blanket diagnostic approach undermines the Supreme Court's wisdom in *Edwards*.[92] The Court left the determination of a defendant's competency to proceed pro se to trial courts so that they can conduct an individualized assessment of each defendant.[93] Accordingly, adopting a blanket diagnostic approach strips courts of the ability to conduct this individualized assessment.[94] Moreover, mental disorders are not always dispositive of a defendant's ability to proceed pro se. Placing a blanket diagnostic approach does not consider the extreme variation existent in mental diseases. While it is true that some people who suffer from bipolar disorder or schizophrenia cannot represent themselves adequately, others

[82] Blume & Clark, *supra* note 22, at 167–68.
[83] *Id.*
[84] *Id.*
[85] Jennifer Casarella, *Schizophrenia Symptoms*, WEBMD (Dec. 13, 2020), https://www.webmd.com/schizophrenia/schizophrenia-symptoms.
[86] *See* Morse, *supra* note 78, at 211; LeCluyse, *supra* note 27, at 1252.
[87] LeCluyse, *supra* note 27, at 1252–53.
[88] *Id.*
[89] *Id.* at 1253–54.
[90] *Id.* at 1252.
[91] *Id.*
[92] *See id.*
[93] *See* Indiana v. Edwards, 554 U.S. 164, 166 (2008).
[94] *Id.*

become celebrities, lawyers, politicians, and prime ministers.[95] Thus, a blanket diagnostic approach may not be accurate in many cases. Nonetheless, judges should seriously consider mental disorders—reflected by the symptoms they notice during trial—and their impact on defendants when determining their competency for self-representation, even if they passed the psychiatric evaluation.

The third solution is to overrule *Faretta*.[96] Scholars who call for this solution have a noble purpose in mind, which is to promote smooth and fair court proceedings and demolish the competency dilemma of pro se altogether.[97] However, adopting such a solution would abolish the protections that the Supreme Court granted defendants under *Faretta*. One of these protections is not to have a lawyer or a public defender forced on a litigant, even in a lawyer-driven justice system.[98] Overruling *Faretta* to overcome the challenges faced by courts in managing cases of pro se defendants is not a solution but an escape from the problem. Undermining the Sixth Amendment right of self-representation for the sake of a fair and smooth trial is on the other extreme from Justice Scalia's dissent regarding upholding the right against the fairness or the smoothness of the trial proceedings.

On a different note, other commentators suggested adopting a standard for self-representation competency similar to the standard of competence in making medical decisions.[99] They argued that the same analysis should apply in both cases, because a balance must be struck between the individual's autonomy and the state's paternalism.[100] These commentators have scrutinized the competency standard in making medical decisions and have come up with a four-prong test that could be applied to determine a defendant's competency to proceed pro se.[101] The first prong concerns the defendant's ability to communicate a choice clearly and coherently.[102] If a defendant cannot communicate ideas effectively, their ability or competency to represent themself will be compromised. Although the first prong is the most important, courts should not rely solely on the first prong in determining that a defendant lacks the competency to proceed pro se. The second and third prongs consider the ability to understand and process relevant information.[103] If a defendant is incapable of understanding the dangers surrounding proceeding pro se in trial, the charges pressed against them, the general court proceedings, and potential penalties, they are not

[95] *See, e.g.,* Debra Cassens Weiss, *Schizophrenics may be doctors, lawyers and other professionals, law prof says*, ABA JOURNAL (Jan. 29, 2013), https://www.abajournal.com/news/article/schizophrenics_may_be_doctors_lawyers_and_other_professionals_law_prof_says; Smitha Bhandari, *Faces of Schizophrenia You May Know*, WEBMED (Jan. 24, 2020), https://www.webmd.com/schizophrenia/ss/slideshow-schizophrenia-famous-names; Kristeen Cherney, *6 Celebrities with Schizophrenia*, HEALTHLINE (July 5, 2019), https://www.healthline.com/health/faces-of-schizophren ia#6.-Skip-Spence; *Are There Successful People Who Live with Bipolar?*, MENTAL HEALTH AMERICA, https://screening.mhanational.org/content/are-there-successful-people-who-live-bipolar.

[96] Blume & Clark, *supra* note 22, at 168–69.

[97] *Id.*

[98] Faretta v. California, 422 U.S. 806, 836 (1975).

[99] LeCluyse, *supra* note 27, at 1254.

[100] *Id.*

[101] *Id.* at 1255.

[102] *Id.*

[103] *Id.*

capable of proceeding pro se.[104] Allowing such a defendant to proceed pro se would not only undermine the fairness of trial, but it would also lead to disastrous results such as an inevitable death penalty conviction in a capital punishment case.[105] The fourth prong assesses a defendant's ability to manipulate information rationally.[106] This was defined as the "'reasoning capacity or ability to employ logical thought processes to compare the risks and benefits' of [their] different options."[107] This prong measures the reasoning behind a defendant's decision rather than the outcome of the decision itself.[108] Scholars suggesting this four-prong test argue that it is sufficiently broad to not undermine a judge's discretionary power in individualizing the competency determination on a case-by-case basis.[109] Lastly, they argue that a judge should apply this four-prong test in a separate pretrial hearing to determine competency to stand trial.[110] In such a pretrial hearing, the judge would listen to the testimony of mental health experts, family of the accused, and any other witness who can evaluate the defendant's capacity to proceed pro se, including doctors, teachers, employers, coworkers, and friends.[111]

Despite agreeing with this four-prong test and its application in a pre-trial hearing, we suggest a different solution to the problem in the next section of this Article. This solution, in our opinion, will reap more benefits if applied in conjunction with the four-prong standard suggested.

IV. APPOINTING STANDBY COUNSEL IN ALL CRIMINAL PROCEEDINGS AND STANDBY COUNSEL'S ROLE IN ASSISTING THE TRIAL JUDGE IN DETERMINING THE COMPETENCY OF THE DEFENDANT TO PROCEED PRO SE

The solution we suggest to the current pro se competency dilemma is twofold. First, we recommend that standby counsel be appointed in all pro se criminal cases. Second, we recommend promoting the role of advisory standby counsel in guiding a trial judge towards determining whether a defendant is competent for self-representation or compromised due to mental illness to the extent that they cannot proceed pro se.

A. APPOINTING STANDBY COUNSEL IN ALL CRIMINAL CASES

As we mentioned before, standby counsel have a broader role than mere advisory counsel, as they are able to step in and act as an attorney on record if, at any point, the defendant becomes unable to continue defending themself pro se. The solution we are suggesting is similar to appointing a surrogate to make medical decisions for a compromised patient.

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[104] *Id.* at 1260–61.
[105] *See id.*
[106] *Id.* at 1261–62.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 1262.
[110] *Id.*
[111] *Id.*

Since courts statistically tend to grant the right to proceed pro se even to incapable defendants, supporting a pro se defendant with an automatic appointment of standby counsel would guarantee fairness of court proceedings to some extent.[112] This is because an incapable defendant will find assistance—even though incomplete—from standby counsel throughout the trial and in particularly difficult matters.

In fact, one scholar has also argued for the appointment of standby counsel in criminal cases to ensure effective "assistance" of counsel for pro se defendants.[113] The role of standby counsel is not to be taken lightly. Interestingly, one court has defined the standby counsel role broad enough to ensure the right of a fair trial without breaching *McKassle*'s two conditions.[114] The *Norman* court provided the following guidelines to the appointed standby counsel:

> (1) To assist the Accused in the exercise of his [or her] right to self-representation;
>
> (2) To assist the Accused in the preparation and presentation of his [or her] case during the trial phase, whenever requested to do so by the Accused;
>
> (3) To actively guide the Accused through the procedures of the trial in accordance with the Statute and the Rules;
>
> (4) To investigate relevant facts and law, identify possible defenses and suggest steps to be taken by the Accused;
>
> (5) To receive all Court documents, filings and disclosed materials that are received by or sent to the Accused;
>
> (6) To be present in the courtroom during the proceedings;
>
> (7) To offer legal advice to the Accused;
>
> (8) To address the Court whenever requested to do so by the Accused or by the Trial Chamber;
>
> (9) To put questions to witnesses on behalf of the Accused if called upon to do so by the Trial Chamber, in particular to sensitive or protected witnesses, or in the event of abusive conduct by the Accused, without depriving the Accused of his right to control the content of the examination;
>
> (10) To be actively engaged in the substantive preparation of the case and to participate in the proceedings, and to be prepared to take over representation of the Accused should the Accused engage in disruptive conduct or conduct requiring his removal from the courtroom . . . ;
>
> (11) To assemble and present information relevant to all the stages of the proceedings; [and]

[112] *See* POYTHRESS ET AL., *supra* note 22, at 50.

[113] *See generally* Jona Goldschmidt, *Judging the Effectiveness of Standby Counsel: Are They Phone Psychics? Theatrical Understudies? Or Both*, 24 S. CAL. REV. L. & SOC. JUST. 133 (2015).

[114] Prosecutor v. Norman, Case No. SCSL-04-14-PT, Consequential Order on Assignment and Role of Standby Counsel, ¶¶ 27–38 (June 14, 2004).

> (12) To refrain from conduct that may directly or indirectly impact adversely on the exercise of the Accused's right of self-representation."[115]

In conclusion, appointing standby counsel to a pro se defendant ensures that their trial is adequate and fair.[116] However, most of the guidelines suggested by the *Norman* court are contingent upon a pro se defendant's request for the assistance and involvement of counsel. A mentally ill, incompetent defendant is very unlikely to request such a level of involvement from appointed standby counsel, again hindering the defendant's only chance of having a fair trial. Thus, appointing standby counsel in all criminal cases, by itself, is not a solution to the dilemma of mentally ill defendants representing themselves at trial.

B. THE ROLE OF ADVISORY COUNSEL IN GUIDING A COURT TO ASSESS A DEFENDANT'S CAPABILITY TO PROCEED PRO SE

The second part of our twofold test is to promote the role of standby counsel to reveal to a court—at any point during the proceedings—that a defendant's ability to proceed pro se is compromised and for the court to give high credibility and weight to standby counsel's opinion. While the first part of our twofold test cannot stand scrutiny due to the reason we provided above, the second part renders our approach complete. Indeed, the standby counsel will have the most communication with the defendant and therefore the most knowledge regarding the defendant's character attributes and mental abilities. This is due to the frequent communication that takes place between the defendant and the standby counsel regarding the options available at every stage of trial, including selecting witnesses, formulating a theory of defense, what motions to file, and so forth. This allows the standby counsel to shape a comprehensive, holistic view of the defendant's capability to proceed pro se.

Moreover, by applying the previously suggested four-prong test to the relationship between standby counsel and a pro se defendant, we find that the relationship between them is closer than the relationship between a pro se defendant and a judge. While a trial judge has the final say in determining the competency of a defendant to proceed pro se under *Edwards*, the judge benefits from the standby counsel's thorough knowledge of the defendant's mental capability to representing themself. By suggesting that, we are not dismissing the importance of the mental health experts' evaluation of the defendant or testimony from witnesses that might prove useful in providing insight regarding the mental capacity of the defendant. Instead, we are supplementing these sources of information by giving extra weight to the standby counsel's opinion, since it is grounded in a close relationship with the defendant.

Returning to the Colorado death penalty case, although the defendant had revealed on multiple occasions his incompetency to proceed pro se before the court by making chaotic illogical comments, Briggs had more in-

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[115] *Id.*
[116] LeCluyse, *supra* note 27, at 1265–66.

depth knowledge of the defendant's mental status due to her frequent communication with the defendant during prison visits and through exchanged letters. Thus, if courts gave sufficient weight to the assessment of disinterested advisory or standby counsel, the pro se competency dilemma wold decrease drastically in size and importance.

This twofold solution is compatible with the Supreme Court holdings in *Faretta*, *Edwards*, and *McKaskle*. Although one scholar criticized appointing standby counsel as incompatible with *Faretta*, there is a clear distinction between waiving the right to counsel and the right to legal assistance.[117] Further, in *McKaskle*, the court found that standby counsel did not infringe upon the defendant's *Faretta* rights.[118] The *Edwards* court opined that "a right of self-representation trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel, and may undercut the most basic of the Constitution's criminal law objectives, providing a fair trial."[119] Our twofold solution also complies with a court's authority, under *McKaskle,* to appoint an attorney if the court finds it necessary in order to achieve a fair trial, regardless of the defendant's objection.[120]

Finally, our twofold proposition was indirectly supported by courts in both Florida and New Jersey.[121] Both states' courts have held that standby counsel may offer mitigating evidence after a capital conviction over a pro se defendant's objection.[122] Prior to New Jersey's abolition of the death penalty, New Jersey courts required standby counsel to present mitigating evidence in capital punishment cases.[123] In *State v. Reddish*, the New Jersey Supreme Court based its opinion on the fact that capital proceedings are extremely difficult for even well-trained attorneys, which makes it almost impossible for a pro se defendant to have a fair trial without the assistance of standby counsel.[124] Not surprisingly, the court relied on Justice Blackmun's dissent in *Faretta* to support this argument in capital punishment cases. The court opined that "[t]he most 'solemn business' of executing a human being cannot be 'subordinate[d] . . . to the whimsical—albeit voluntary—caprice of every accused who wishes' unwisely to represent himself."[125] The court found that if self-representation was allowed in capital trials without any assistance of standby counsel, the court's decision may amount to state-aided suicide.[126] The court brilliantly opined that although the defendant's autonomy to proceed pro se must be respected, the defendant's autonomy is outweighed by the law's "heightened obligation to ensure 'consistency and reliability in the administration of capital punishment.'" [127]

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[117] *See* Goldschmidt, *supra* note 113, at 180.
[118] McKaskle v. Wiggins, 465 U.S. 168, 186 (1984).
[119] *Id.* at 182.
[120] *See id.* at 193.
[121] *See* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1157 (2010).
[122] *Id.*
[123] *See* State v. Reddish, 859 A.2d 1173, 1203–04 (N.J. 2004).
[124] *See id.* at 1200.
[125] *Id.* at 1201 (Blackmun, J., dissenting) (quoting Faretta v. California, 422 U.S. 806, 849 (1975)).
[126] *Id.* (quoting Massie v. Sumner, 624 F.2d 72, 74 (1980)).
[127] *Id.* (quoting State v. Ramseur, 524 A.2d 188, 221 (1987)).

In conclusion, a balance shall be struck between a defendant's autonomy to proceed pro se and the state's interest in achieving collective interests through the criminal justice system, which must be both fair and just. Our proposition, supported by the position adopted by New Jersey courts, offers exactly this balance between the autonomy of a defendant and society's interests in fairness and justice, while taking a stance against states' suicide-aiding approach of letting pro se defendants receive absolute autonomy to represent themselves in capital punishment trials. Although we propose this twofold approach mainly to serve mentally ill defendants who wish to proceed pro se in non-capital proceedings, we propose abolishing self-representation altogether for mentally ill pro se defendants in capital punishment cases. This is simply because the dignifying autonomy aspect of choosing to represent oneself is absent in cases of defendants who suffer from severe mentall illness, as they lack the mental capacity to be fully autonomous.[128] Possible Criticism to Appointing Standby Counsel and an Alternative Solution

We acknowledge the criticism that might hinder the role of standby counsel. Standby counsel's role has been said to infringe upon a defendant's *Faretta* rights.[129] Moreover, standby counsel are subject to two limitations under *McKaskle* that may undermine their role in aiding a compromised defendant.[130] The first limitation is not to interfere with the defendant's actual control over the defense.[131] The second is not to destroy the jury's perception that the defendant is representing themself.[132]

At first glance, both limitations might defeat the purpose of appointing standby counsel. This is because a defendant who suffers from severe mentall ilnness may "choose" not to challenge a prosecution's motion on the ground that they desire their own execution (or decapitation) or hinder the standby counsel's attempts to preserve the defendant's life—preventing the standby counsel from pursuing the savior role. Although standby counsel participation will guarantee a higher probability of fair court proceedings, their participation is contingent upon the pro se defendant's decision to cooperate.[133] In addition, if courts listen to standby or advisory counsel regarding their assessment of a defendant's competency to proceed pro se, our solution still holds up to an acceptable extent.

Nonetheless, if a pro se defendant decides not to cooperate, the counsel's forced assistance to a pro se defendant will raise innumerable ethical and professional concerns for the standby counsel. Further, the counsel's suggestion to the court that the defendant is incompetent to represent themself will also be questionable. Theoretically, standby counsel come to the rescue of the defendant and appear on record to clear the mess caused by the pro se defendant. Practically, many attorneys may be reluctant to accept the role of standby counsel for a seemingly hopeless case. Furthermore, the

[128] This will be discussed thoroughly in the last section of this Article.

[129] *See* Brittaney N. Eshbach, *The Interplay of Pro Se Defendants, Standby Counsel, and Ineffective Assistance of Standby Counsel Claims: An Examination of Current Law and a Suggestion for Reform in Pennsylvania*, 121 PENN. ST. L. REV. 875, 884 (2017).

[130] *See* McKaskle v. Wiggins, 465 US 168, 193 (1984).

[131] *Id.* at 178.

[132] *Id.*

[133] LeCluyse, *supra* note 27, at 1266.

few who might consider accepting the role of standby counsel would forego such a role to preserve their career as lawyers; otherwise, they may be subject to possible discipline for ineffective counsel in the case.[134] Seasoned defense attorneys—for the most part—refuse advisory counsel appointments on moral grounds, in that they do not wish to partake a suicide mission. This leaves mentally compromised defendants who want to represent themselves in an even more vulnerable position.

This encourages us to propose another alternative solution. Academic research findings suggest that most defendants who choose to represent themselves do so, inter alia, because they dislike the attorney or the public defender forced upon them by a court order.[135] Based on the validity of these findings, courts may allow indigent defendants to select one from a list of several lawyers to represent them. Although this suggestion does not directly solve the competency dilemma, it may significantly reduce the number of pro se defendants appearing before courts. This, by the same token, will reduce the chances of a mentally ill defendant proceeding pro se. In our view, this suggestion is constitutionally sound. First, it complies with defendants' right to the assistance of counsel under the Sixth Amendment. Second, it does not infringe upon *Faretta*'s main purpose of not having an attorney forced on a defendant. As our suggestion grants a defendant the choice to select from a few attorneys rather than having no choice in the selection process, it promotes *Faretta*'s purpose by giving the defendant more autonomy in the administration of justice.

C. ETHICAL AND MISCONDUCT DILEMMAS SURROUNDING THE ROLE OF ADVISORY COUNSEL

The first question raised by attorneys faced with the choice to act as advisory counsel for a pro se defendant is whether they have any ethical or professional obligations to the pro se defendant or the tribunal. While court-appointed attorneys representing an indigent defendant fully understand the professional responsibility rules governing the relationship between them and the defendant, advisory counsel or standby counsel do not. In *McKaskle,* the Supreme Court opined that "[t]he pro se defendant must be allowed to control the organization and content of [their] own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial."[136] If a pro se defendant acts as their own lawyer in all trial aspects, what is left for an appointed standby counsel to do? If a pro se defendant represents themself, is there a relationship between a pro se defendant and standby counsel to qualify for attorney-client privilege or confidentiality? If standby counsel is

[134] *See, e.g.*, United States. v. Schmidt, 105 F.3d 82, 90 (2d Cir. 1997) (holding that a defendant may raise an ineffective assistance of counsel claim against standby counsel if the standby counsel acted as the defendant's lawyer throughout the proceedings).

[135] Federal Docketing Data base compiled by Erica J. Hashimoto revealed that 55% of defendants (102 defendants out of 186) requested new counsel before they opted for proceeding pro se. Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look At the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 423–24 (2007); Micah Schwartzbach, *Does Self-Representation in a Criminal Case Ever Make Sense?*, NOLO, https://www.nolo.com/legal-encyclopedia/does-self-representation-criminal-case-29971.html.

[136] McKaskle v. Wiggins, 465 US 168, 174 (1984).

on notice that a pro se defendant intends to commit a crime in the future or cause substantial bodily injury to someone, does the advisory counsel's duty of candor to the tribunal oblige them to report such plan to the court? All of these questions are worth answering, yet the current guidelines or answers to these questions are vague and discretionary.

The New York State Bar Association ("NYSBA") opined that these are more legal questions than ethical questions.[137] The advisory counsel's role is not clearly defined in case law: it varies from case to case, jurisdiction to jurisdiction, and by the extent of the standby counsel's involvement in the trial.[138] Regardless, the extent of the standby counsel's role is decided by both the pro se defendant and the court.[139] The NYSBA opinion referred to the Supreme Court's discussion in *Faretta* to elaborate that the standby counsel role may "range from inactivated bystander (if the *pro se* party does not request help) to a full-fledged counsel (if self-representation is terminated[by the defendant or the court])."[140] Thus, the pro se defendant determines the scope of the advisory counsel's involvement in the trial proceedings.[141] One pro se defendant may request the assistance of the standby counsel to the greatest possible extent, and another may limit standby counsel to the role of law library.[142] Yet, even if the pro se defendant asked for the full assistance of the standby counsel, the standby counsel cannot defy the two conditions of *McKaskle* by interfering with the pro se defendant's control over the case or appearing to control the case before the jury.[143] One piece of advice to lawyers who are to be appointed as standby counsel is to clarify their role on the court's record at the time they are appointed, which may prove beneficial to them and the defendant.[144]

The defense counsel acting as standby counsel should give the pro se defendant ample discretionary power to decide the strategy and tactical matters in the proceedings.[145] In addition, standby counsel should not not actively participate in the conduct of the proceedings unless requested, and to the extent accepted, by the defendant, or as far as directed by the court. In

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[137] *See* Comm. on Pro. Ethics, *Ethics Opinion 949*, N.Y. STATE BAR ASS'N (Dec. 17, 2012), https://nysba.org/ethics-opinion-949.

[138] *See id.*

[139] *Id.*

[140] *Id.* According to the ABA,"when standby counsel is appointed to provide assistance to the pro se accused only when requested, the trial judge should ensure that counsel not actively participate in the conduct of the defense unless requested by the accused or directed to do so by the court. When standby counsel is appointed to actively assist the pro se accused, the trial judge should ensure that the accused is permitted to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case." CRIM. JUST. STANDARDS: SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-3.7(c) (AM. BAR ASS'N 1999).

[141] *See* Comm. on Pro. Ethics, *supra* note 137; CRIM. JUST. STANDARDS, *supra* note 140.

[142] *See* Comm. on Pro. Ethics, *supra* note 137; CRIM. JUST. STANDARDS, *supra* note 140.

[143] "First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury . . . If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded . . . . 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." McKaskle v. Wiggins, 465 U.S. 165, 178 (1984) (italics in original).

[144] Paul K. Sun, Jr. & Ellis & Winters LLP, *Your Role as Standby Counsel*, FED. PUB. DEF. E. DIST. N.C., https://nce.fd.org/sites/nce.fd.org/files/publications/YOUR_ROLE_AS_STANDBY_COUNSEL.pdf.

[145] *Id.*

other words, a lawyer who is appointed as standby counsel for a pro se defendant is stuck between two wills: the pro se defendant's and the court's.[146] Further, some district courts expect standby counsel to play an investigative role for an incarcerated pro se defendant.[147] On the other hand, standby counsel may contribute legal research and motions to be filed by a pro se defendant.[148] Although it is widely accepted among district courts to allow standby counsel to assist pro se defendants with procedural matters, some district courts limit standby counsel from passing questions to the pro se defendant in the jury's presence.[149] If both the court and the pro se defendant allow standby counsel to have an active role in trial, the standby counsel may participate in voir dire, the opening statement, witness examinations, cross examinations, objections to testimony and evidence, and the closing argument, as long as their involvement does not undermine the pro se defendant's appearance of control.[150] The Fourth Circuit ruled that standby counsel are also required to prepare for trial and keep track of all proceedings so that if the defendant or the court requests the standby counsel's assistance at any stage, the standby counsel will be able to sufficiently assist the defendant.[151] Finally, standby counsel may also play a vital role in the sentencing phase of trial.[152] The NYSBA specifically advises judges—upon exercising their discretion in determining the extent of the advisory counsel's involvement—to clarify the roles and duties of standby counsel and the pro se defendant on the record in a criminal proceeding.[153]

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[146] *See id.* The district court has "broad discretion to guide what, if any, assistance standby, or advisory, counsel may provide to a defendant conducting his own defense." United States v. Lawrence, 161 F.3d 250, 253 (4th Cir. 1998). The district court may "place reasonable limitations on the standby counsel's actions and the defendant's use of such counsel." United States v. Brown, No. 91-5088, 1993 WL 998, at *3 (4th Cir. 1993).

[147] *See, e.g.*, United States v. Moussaoui, 591 F.3d 263, 269 (4th Cir. 2010) (district court advised defendant that standby counsel "was available to help him 'locate witnesses and evidence'"); *id.* at 270 (standby counsel could "help [defendant] obtain experts, locate witnesses, and even provide the paper supplies he needs to mount his defense").

[148] *See, e.g.*, United States v. Moussaoui, 382 F.3d 453, 458–59 (4th Cir. 2004) (standby counsel filed motions, and at court's direction court briefed question of appropriate sanction for Government's failure to comply with court's order); United States v. Chatman, 584 F.2d 1358, 1360 (4th Cir. 1978) (no error for district court to deny motion to continue defendant filed claiming denial of access to law library, where defendant had declined assistance of counsel); United States v. Neely, No. 02-4704, 2003 WL 1984490, at *1 (4th Cir. Apr. 30, 2003) (per curiam) ("Where a defendant has elected to proceed pro se in a criminal case, he can be required to rely on standby counsel to overcome any research handicaps due to incarceration.").

[149] *Lawrence*, 161 F.3d at 253 (the district court may limit standby counsel from passing unsolicited questions to the defendant in the jury's presence). *See Brown*, 1993 WL 998, at *3.

[150] The Fourth Circuit has affirmed in cases where the district court allowed standby counsel to act when the defendant was not in the courtroom; *Lawrence*, 161 F.3d at 252–53 (defendant allowed to leave courtroom during jury selection and presentation of evidence). United States v. Bailes, No. 88-5172, 88-5674, 1991 WL 101582, at *2 (4th Cir. June 14, 1991) (with defendant not in courtroom, standby counsel discusses court's response to jury question; no error).

[151] *See* United States v. Hagen, No. 09-5096, 2012 WL 764429, at *5 (4th Cir. Mar. 12, 2012) (appointing as standby counsel attorney who had been representing defendant and ordering counsel "to 'continue preparing for trial as if he were trying the case' and to . . . 'assist defendant if and when and to the extent called upon by defendant'"); United States v. West, 877 F.2d 281, 286–87 (4th Cir. 1989) (no error for district court to deny motion to continue after court replaced pro se defendant with his standby counsel, who had been appointed only eleven days before trial).

[152] *E.g.,* United States v. Johnson, No. 01-4648, 2002 WL 1343472, at *1 (4th Cir. June 20, 2002) (per curiam) (standby counsel "actively participated at the sentencing hearing, challenging provisions in the presentence investigation report, and playing a significant role in obtaining a lower offense level than that recommended in the report").

[153] *See* CRIM. JUST. STANDARDS: SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-3.7(b) (AM. BAR ASS'N 1999) (trial judge "should clearly notify both the defendant and standby counsel of their respective roles and duties").

The various roles that standby counsel play raise the following question: Can standby counsel be subject to ineffective assistance of counsel claims? Fortunately, the majority of courts have held that pro se defendants may not bring ineffective assistance of counsel claims against standby counsel for their action in or abstention from a trial proceeding.[154] The courts based their opinion on the fact that the right to standby counsel is not a constitutional right of the pro se defendant.[155] However, few courts have opined otherwise and held that standby counsel are subject to ineffective assistance of counsel claims when engaging in every step of a trial.[156] The extent of standby counsel's participation and involvement in trial proceedings is guided by the defendant's request, and its extent is subject to the court's discretion as long as the pro se defendant has the final word in the trial tactics and strategy.[157] Nevertheless, standby counsel must be ready to continue the pro se defendant's representation if they decide to aforego their self-representation.[158]

Regarding the advisory counsel's duty of candor to the tribunal, is the advisory counsel liable for knowing that the pro se defendant intends to lie on the stand in case they did not report that to the court? The NYSBA opined that standby counsel's duty of candor to the tribunal is not triggered unless they take action in the proceeding.[159] In case standby counsel do not participate in the proceedings, no duty of candor is in place because the pro se defendant is in control of the proceedings.[160] In our view, no duty of candor applies to standy counsel simply because a pro se defendant maintains full managerial control of the case, thereby restricting the standby counsel's role. A breach of the duty of candor can occur only in a case with a court-appointed attorney, not standby counsel. While the former has control over the case, including strategy and tactics, the latter does not. Thus, it does not comply with sound logic to hold advisory counsel to their duty of candor when a defendant controls the case. Accordingly, court-appointed standby counsel faced with a pro se defendant offering perjured evidence or planning to commit a crime or cause substantial bodily injury cannot prevent such action, as they are not under a direct duty of candor to the tribunal. Yet the advisory counsel may try to persuade the pro se defendant to abstain from offering perjured evidence or from committing a crime that causes death or serious bodily injury. If such efforts of persuasion fall short, the advisory counsel may request permission to withdraw from the case, similarly to when a defense attorney asks a court for permission to withdraw when having a

[154] *See, e.g.*, United States v. Oliver, 630 F.3d 397, 413–14 (5th Cir. 2011); United States v. Morrison, 153 F.3d 34, 55 (2d Cir. 1998).

[155] *Oliver*, 630 F.3d at 413–14; *See also Morrison*, 153 F.3d at 55.

[156] *See, e.g.*, United States. v. Schmidt, 105 F.3d 82, 90 (2d Cir. 1997) (holding that a defendant may raise an ineffective assistance of counsel claim against standby counsel if the standby counsel acted as the defendant's lawyer throughout the proceedings).

[157] Comm. on Pro. Ethics, *supra* note 137.

[158] *See* Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676, 704 (2000) (stating that some courts expect standby counsel to be "prepared to assume representation of the defendant" if he or she abandons pro se representation).

[159] Comm. on Pro. Ethics, *supra* note 137.

[160] *Id.*

conflict with the client regarding the presentation of false evidence.[161] Nevertheless, if standby counsel fails to take the suggested steps, they will not be held in breach of their duty of candor to the tribunal.

Finally, does the relationship between standby counsel and a pro se defendant amount to an attorney-client relationship? The answer to this question is particularly important because if there is no attorney-client relationship, the analysis would end here and standby counsel would have no ethical or legal obligations to pro se defendants.[162] The NYSBA provides different opinions about this issue depending on the degree of standby counsel's involvement in a case.[163] The New Hampshire Bar Association ordered that standby counsel shall maintain the duty of confidentiality, attorney-client privilege, and the duty to avoid conflicts of interest.[164]

In conclusion, despite the confusion surrounding standby counsel's role in assisting pro se defendants, there are some general principles that clarify their role. Nonetheless, it is advisable for lawyers who are appointed as standby counsel to file a motion for instruction to the court to clarify their role on a case-by-case basis.

V. ABOLISHING SELF-REPRESENTATION IN CAPITAL PUNISHMENT CASES REGARDLESS OF A DEFENDANT'S COMPETENCE FOR SELF-REPRESENTATION

Since *Edwards*, countable courts have applied *Edwards* to reject the right of a defendant to proceed pro se.[165] We contend that courts' statistical tendency towards allowing incapable defendants to proceed pro se even in capital punishment cases is equivalent to suicide assistance.[166] Thus, this Article justifies the call for abolishing the right to proceed pro se in capital punishment cases upon constitutional and human rights grounds.

A. CONSTITUTIONAL ARGUMENTS SUPPORTING ABOLISHING SELF-REPRESENTATION IN CAPITAL PUNISHMENT CASES

In capital punishment cases, courts should not respect the autonomy of defendants who suffer from severe mental illness since that very same illness

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[161] *See* People v. Schultheis, 638 P.2d 8 (Colo. 1981); COLO. RULES PRO. CONDUCT 3.3(a)(3) (COLO. BAR ASS'N Apr. 12, 2018); The Rules of Professional Conduct further stipulate that if the defendant offers evidence which the lawyer knows to be false, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

[162] Michael B. Frisch, *Standing By: The Ethics Of Standby Counsel*, LEGAL PRO. BLOG (Dec. 5, 2016), https://lawprofessors.typepad.com/legal_profession/2016/12/standing-by-the-ethics-of-standby-counsel.html.

[163] *See* ABA Comm. on Ethics & Pro. Resp., Formal Opinion 07-488 (2007) (when pro se party "turns to appointed counsel and seeks advice or representation, the defendant may be found to have consented to and thereby to have created a client-lawyer relationship under the Rules"); At the inactive extreme of standby representation, Rule 3.3 ("Conduct Before a Tribunal") is typically not triggered because (i) standby counsel is not the one taking action in the proceedings and (ii) an attorney-client relationship has not been formed. MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 1983). *See* MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 1 (AM. BAR ASS'N 1983) ("This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal."). Of course, as discussed in ¶17 below, once standby counsel takes actions in the proceedings, those actions will be governed by Rule 3.3.

[164] *See* N.H. RULES PRO. CONDUCT r. 1.6 (N.H. Jud. Branch 2016); H. RULES PRO. CONDUCT r. 1.7 (N.H. Jud. Branch 2016).

[165] *See* POYTHRESS ET AL., *supra* note 22, at 50.

[166] *Id.*

undermines their ability to "knowingly" and "voluntarily" waive their rights to counsel.[167] Consider the following hypothesis of Mr. Brooks and his right to self-representation in a death penalty case. Mr. Brooks suffered from severe schizophrenia. He had visual and auditory hallucinations of evil spirits speaking to him. The evil spirits told him that he was not worthy of living after what he had done. Mr. Brooks was arrested and charged with first-degree murder. In fact, Mr. Brooks did kill the victim, but it was the voice in his head that ordered him to watch the victim from a distance and then murder him brutally. The voice, alongside visual hallucinations, convinced Mr. Brooks that he was under a deadly threat: that the victim was going to kill him. The deadly threat only existed in his mind, it was well-articulated by the voices, and, in fact, the victim never intended to touch Mr. Brooks. Mr. Brooks appeared before a court for first-degree murder. The voice told Mr. Brooks that the court-appointed attorney hated him and wanted him dead. Again, in reality, this was not true. Still, Mr. Brooks decided to waive the assistance of counsel and filed to proceed pro se. Mr. Brooks was found to be capable of standing trial under *Dusky* because he understood some of what the judge said to him and could communicate with his attorney to some extent. The court also determined that Mr. Brooks could represent himself in trial. The voice told Mr. Brooks, "We are going to win this case!" but let him down every step of the way. When the prosecution presented photos of the murdered victim, the voice told Mr. Brooks, "Crazy people like you should not live. You should ask them to have you decapitated. You have a wrecked wire in your head, and the only way to fix it is to be decapitated. Write this down to the judge; ask him to have you decapitated." Mr. Brooks did write this to the judge, who proceeded with administering the trial without regard for Mr. Brooks's request. Both the judge and the prosecution were surprised by Mr. Brooks's behavior. The judge referred Mr. Brooks to a medical expert to characterize his mental condition. Although the medical expert reported that Mr. Brooks suffered from severe schizophrenia, the judge decided that Mr. Brooks was competent enough to represent himself in a capital punishment proceeding. Thus, Mr. Brooks did represent himself, to the worst of his abilities, aiming to be decapitated. The judge instructed the jury that Mr. Brooks could stand trial, and to take all evidence into account while rendering its verdict. Yet it was one-sided evidence—the prosecution's evidence. The jury deliberated for half an hour and found Mr. Brooks guilty of first-degree murder. Mr. Brooks was sentenced to death, and he was content with the result, as he finally reached the end the voices asked him to reach: to be decapitated. Mr. Brooks was executed a week later.

This hypothetical case depicts the severity of the current practice of ill-minded defendants representing themselves in capital punishment proceedings. Despite being only a hypothetical, specially created to offer a glimpse at the process of an ill-minded defendant during trial, it aligns with reality as many defendants have been allowed to proceed pro se in capital punishment trials despite their obvious mental illness. Again, courts are reluctant to decide that defendants are incapable of proceeding pro se to

[167] *See* Godinez v. Moran, 509 U.S. 389, 400–01 (1993).

avoid repeal of their decisions by higher courts under *Edwards*. Yet this practice resembles an assisted suicide program sponsored by courts (and states) for ill-minded defendants. In the following paragraph, we will dismantle whatever is left of the constitutional arguments that courts raise in order to justify allowing extremely ill-minded defendants to proceed pro se in capital punishment cases. This leads us to the conclusion that no ill-minded or psychologically unstable defendant should ever represent themself in a capital punishment proceeding.

Fortunately, there are other scholars who also call for abolishing self-representation in capital punishment proceedings.[168] One scholar positioned that "[b]y enabling a defendant to proceed pro se in a capital proceeding, the Court not only compromises the safeguards it sought to observe when a defendant's life is at stake, but it jeopardizes the integrity of a trial's adversarial process."[169]

While the Supreme Court's stances on self-representation, the right to a fair trial, competency to stand trial, and competency to proceed pro se seem unproblematic, the first problem appears when a trial judge attempts to apply the *Edwards* standard to reject a defendant's right of self-representation.[170] We are not arguing that *Edwards* was wrong, but that the vagueness of the standard of competence to proceed pro se has led to disastrous results. This vagueness has also led to what looks like state-assisted suicide for ill-minded defendants through courts. Statistics reveal that most ill-minded defendants pass the competence test with flying colors despite their mental illness. One study provided that only 10% to 30% of defendants referred for evaluations are found to be incompetent and that only 1.5% of felony defendants fail the competency evaluation test.[171] Another statistical study revealed that 56% of state prison inmates exhibited symptoms of mental illness.[172] Moreover, 15% of prison inmates and 24% of jail inmates report experiencing delusions and hallucinations consistent with psychotic disorders.[173] In light of these figures, it seems that most mentally ill defendants have been found competent to proceed in trial.[174] These findings are a corollary of the *Edwards* vague standard of competence to proceed pro se. Thus, what we are dismantling in this Section is the incorrect interpretation and application of *Edwards*, which is often based on an autonomy argument based in *Faretta*.

Due to the current frequent misapplication of *Edwards*, we predict that the Supreme Court may reconcile *Faretta* and *Edwards* if faced with a defendant who wants to proceed pro se in a capital punishment case. This is foreseeable because the conflict between a defendant's autonomy and the right to a fair trial remains inadequately resolved when a defendant decides

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[168] Max S. Meckstroth, *The Case Against Self-Representation in Capital Proceedings*, 99 MINN. L. REV. 1935, 1937 (2015).

[169] *Id.*

[170] *Id.*

[171] *See* POYTHRESS ET AL., *supra* note 22, at 50.

[172] *See* Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, BUREAU JUST. STAT. 1 (2016), https://bjs.ojp.gov/content/pub/pdf/mhppji.pdf. These figures exclude defendants who have been found to be incompetent to stand trial. See *id.* at 3 n.1.

[173] *See id.* at 1–2 ("An estimated 15% of State prisoners and 24% of jail inmates reported symptoms that met the criteria for a psychotic disorder."). Because these numbers measure only prison and jail inmates, however, they do not include the incidence of mental illness among those defendants who either are not convicted or are convicted but not sentenced to imprisonment.

[174] Hashimoto, *supra* note 121, at 1185–86.

to proceed pro se in a capital punishment case. A defendant who opts for self-representation in a capital proceeding disadvantages themself against prosecution to the worst possible extent.[175] Thus, acting autonomously is not always dignifying, but rather becomes debasing in certain circumstances. There is a fundamental constitutional right to interstate travel, however, no court would ever allow unlicensed travelers to fly an airplane to exercise their constitutional right to interstate travel. Similarly, there is a right to a fair trial under the Sixth Amendment, which requires the assistance of counsel due to the adversarial nature of the U.S. court system. Yet the Supreme Court in *Faretta* surprisingly allowed laypeople to navigate the court system by representing themselves. In fact, the dissenting opinion in *Faretta* argued that the framers of the Bill of Rights deliberately left the right to self-representation unmentioned in the Sixth Amendment.[176] They contended that the Judiciary Act of 1789, which included the right of self-representation, was passed a day before the Sixth Amendment was proposed, yet the Sixth Amendment was free of any mention of the right to self-representation.[177] If the drafters wanted to include such an important right of self-representation, per the *Faretta* dissents, they would have explicitly mentioned it in the Sixth Amendment.[178] In Chief Justice Burger's words, "Under traditional canons of construction, inclusion of the right in the Judiciary Act and its omission from the [Sixth Amendment] drafted at the same time by many of the same men, supports the conclusion that the omission was intentional."[179]

Furthermore, in the U.S. adversarial system, which is based on competing arguments between the defense counsel and the prosecutor, an ill-minded defendant who decides to proceed pro se in a capital proceeding is unconsciously signing his death sentence. Self-representation, even for defendants of sound mind who lack legal knowledge, compromises the fairness and legitimacy of a trial. By adding mental illness to the equation, the path of self-representation becomes disastrous. Again, the autonomy argument based on dignity does not justify a court's stance on allowing any defendant to proceed pro se. This is because, in our view, a person's life is more precious than a person's dignity in making a self-harming choice. How can any court claim to respect a defendant's dignity when it decides to jeopardize their life? Would a court have a similar stance against a medical doctor who assists a mentally ill patient in suicide? No, it would not. Yet courts grant themselves this right on the principle that they are upholding defendants' autonomy and dignity in choosing to represent themselves. The Supreme Court established that criminal trials, to be constitutional, must serve the "clearly defined purpose to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously

[175] People v. Bloom, 774 P.2d 698, 726 (Cal. 1989) (Mosk, J., concurring in part, dissenting in part). The dissent in *Bloom* found that a capital defendant's ability to affirmatively seek death "subvert[ed] the process and thereby undermine[d] the reliability of its result." *Id.* According to the dissenting justice, *Faretta* was not intended to be a sword for use by the pro se defendant but rather a shield to defend himself and the integrity of the judicial system. *Id.* According to the dissent, the majority, by granting the defendant's request, dismantled the reliability of the system and allowed a defendant effectively to prosecute himself. *Id.*

[176] Faretta v. California, 422 U.S. 806, 850 (1975).

[177] *Id.* at 813.

[178] *Id.* at 844.

[179] *Id.*

threatens to divert it from that purpose can be tolerated."[180] How is it possible to achieve this in a one-sided trial against a mentally compromised defendant in an adversarial system?

Although *Faretta* sets forth the main argument behind supporting self-representation pursuant to the Sixth and Fourteenth Amendments, the Supreme Court pointed out that self-representation is not a license to abuse the dignity of the courtroom.[181] Furthermore, in *Edwards*, the Court granted states the right to insist upon representation by counsel even for defendants who are competent to stand trial but incompetent to represent themselves.[182] One very vivid argument presented in *Edwards*, derived from *McKaskle*, was 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."[183] Although dignity, as understood by moral philosophers, is composed of two contesting halves—autonomy and objective morality (justice, fairness, and so forth)—the Court explicitly emphasized the dignity of the representation itself.[184] In other words, the Court prioritized the half of dignity comprising fairness and justice rather than autonomy.[185] This is made clear by the Court of Appeals of Texas, Seventh District, which opined that "[s]tates are clearly within their discretion to conclude that the government's interests [in the fair and efficient administration of justice] outweigh an invasion of the appellant's interest in self-representation."[186]

Moreover, the Supreme Court supported the position that a trial court may appoint standby counsel, even over the defendant's objection, to relieve the judge's need to "explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals."[187] Attorneys who are appointed as standby counsel are often puzzled as to their exact role as standby counsel for defendants who proceed pro se. Nonetheless, the Supreme Court made clear that so long as the defendant's general control over their defense remains intact, the presence of standby counsel will not violate a defendant's Sixth Amendment rights.[188] In fact, it is permissible for standby counsel "to steer a defendant through the basic procedures of trial" even if it "undermines the *pro se* defendant's appearance of control over [their] own defense."[189] Yet any practicing attorney who has worked with a pro se defendant would agree that standby counsel enter a "treacherous zone of representation" where they must be careful not to undermine the defendant's control of the defense or the appearance thereof. At the same time, an attorney must aid the defendant in every pleading and

[180] United States v. Farhad, 190 F.3d 1097, 1106 (9th Cir. 1999) (Reinhardt, J., concurring) (quoting Estes v. Texas, 381 U.S. 532, 564 (1965)).
[181] Faretta v. California, 422 U.S. 806, 835 n.46 (1975).
[182] Indiana v. Edwards, 554 U.S. 164, 176 (2008) (quoting McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984)).
[183] *Id.*
[184] *Id.* at 178–79.
[185] *See id.*
[186] Bibbs v. State, 371 S.W.3d 564 (Tex. App. 2012) (quoting Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152, 163 (2000).
[187] McKaskle v. Wiggins, 465 U. S. 168, 184 (1984).
[188] *See id.*
[189] *Id.* (italics in original).

handle trial proceedings in general to avoid liability for ineffective assistance of counsel. This challenges attorneys, as they must be extra cautious in assisting pro se defendants so as not to appear to undermine their control. Fortunately, courts have found that it is exceedingly difficult to "destroy [a] jury's perception that the defendant is representing [them]self."[190] The courts' high standard for finding standby counsel to be in control of a pro se defendant's case, coupled with courts' reluctance to find standby counsel to be ineffective counsel, supports our proposition to appoint standby counsel for all compromised defendants who have decided to proceed pro se under *Edwards*.

B. HUMAN RIGHTS TREATIES SUPPORTING ABOLISHING SELF-REPRESENTATION IN CAPITAL PUNISHMENT CASES

1. The Right to Self-Determination and Autonomy in International Law

The right to self-determination and autonomy is stipulated by human right treaties such as the International Covenant of Civil and Political Rights ("ICCPR") and International Covenant of Civil and Economic Rights ("ICESCR").[191] The Human Rights Committee ("the Committee"), the international body administering the application of the ICCPR, has stressed that the right of self-determination is of particular importance because its realization is the first basis upon which all the other human rights can be granted.[192] The Committee further states that the right of self-determination is stipulated by Article 1 of the two covenants.[193]

Autonomy as an important component of human dignity was discussed in a dwarf-tossing case that started before the French *Conseil d'Etat* and ended before the Committee.[194] In this case, the plaintiff, a dwarf, willingly and autonomously participated in the bar sport of dwarf-tossing in order to make a living.[195] Later, the French government banned dwarf-tossing for violating Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits torture, and inhuman or degrading treatment or punishment.[196] The plaintiff filed a lawsuit before the administrative court to annul the ban.[197] The administrative court of Marseille reviewed the mayor's decision and ruled that dwarf-tossing did not constitute an affront to human dignity because the plaintiff had exercised his autonomy, which is at the core of the human dignity.[198] The mayor appealed before the *Conseil d'Etat*—the highest administrative court.[199] The *Conseil*

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[190] *Id.* at 178.

[191] *Self-determination*, UNREPRESENTED NATIONS & PEOPLES ORG. (Sept. 21, 2017), https://unpo.org/article/4957.

[192] *Fact Sheet No.2 (Rev.1), The International Human Rights Bill*, UNITED NATIONS HUM. RTS., https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf.

[193] *Id.*

[194] Wackenheim v. France, Commc'n No. 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002).

[195] *Id*. Dwarf-tossing is "when someone throws a person of a short stature onto a mattress or a wall of fabric fastener." *State introduces bill to ban dwarf tossing contests*, ABC13 NEWS (Feb. 1, 2019), https://abc13.com/dwarf-tossing-ban-midget-us-news/5117112/.

[196] Wackenheim, Commc'n No. 854/1999.

[197] *Id.*

[198] *See id.*

[199] *See id.*

d'Etat overruled the administrative court decision and decided that dwarf-tossing constitutes an affront to human dignity due to its humiliation effect.[200] In its decision, the *Conseil d'Etat* opined that any affront to high human values such as inhumane treatment is an affront to human dignity and rejected the autonomy argument.[201] As a result of the *Conseil d'Etat*'s overruling the court's decision, the plaintiff was left jobless, as all dwarf-tossing events were canceled.[202]

In this case, the *Conseil d'Etat* and, later, the Human Rights Committee prioritized objective dignity-encompassing fairness, nondiscrimination, and humane treatment over the plaintiff's autonomy argument.[203] This reveals the extreme importance of sacrificing autonomy when there is a higher moral value in sight. In most cases of mentally ill defendants proceeding pro se, defendants lack the capacity to employ complete autonomy, yet U.S. courts apply *Edwards* in a way that reflects a strong bias towards autonomy at the expense of trial fairness. Astonishingly, judges believe that a trial may remain fair—to some extent—even though they allow ill-minded defendants to represent themselves. Consequently, it is necessary to discuss the right to a fair trial in international law in the next Section before we reach our conclusion regarding abolishing the right to self-representation in capital proceedings.

2. The Right to a Fair Trial in International Law

The roots of the basic principle of the right to fair trial may be traced back to the *Lex Duodecim Tabularum* (the law of the Twelve Tables) that was written in the Roman Republic around 455 B.C.[204] Likewise, the right to a fair trial is stipulated by the Universal Declaration of Human Rights ("UDHR"). The main provision that provides for the right to fair trial is Article 10, which states that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."[205]

Furthermore, the right to a fair trial was defined in detail by Article 14 of the ICCPR. Article 14 Section 1 establishes the fundamental right to a fair trial; it states that "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[206]

In addition, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides an accused with the right to a fair trial and public hearing within a reasonable time period, to prompt information on the trial in a language which they understand, to

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[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *See id.*
[204] J. Patrick Robinson, *The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, 3 BERKELEY J. INT'L L. PUBLICIST, 1 (2009).
[205] G.A. Res. 217, Universal Declaration of Human Rights, art. 10 (Dec. 10, 1948).
[206] International Covenant of Civil and Political Rights art. 14 (Dec. 16, 1969).

confront witnesses testifying on behalf of the prosecution, to order witnesses testimony on their behalf, and to legal assistance.[207]

It is very important to understand what constitutes a "fair trial" under international law. One international legal scholar has defined "fair" as just and equitable, without the need to be perfect.[208] This meaning of fairness was also supported by the renowned Judge Mohamed Shahabuddeen of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), who provided in his opinion in the trial of Slobodan Milošević that "the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him."[209] Taking his point of view into account, we move forward to explain why we argue for abolishing the right to self-representation in capital proceedings.

3. Striking a Balance Between the Right to Self-Determination and the Right to a Fair Trial Suggests Abolishing Self-Representation in Capital Punishment Cases

In the case *State v. Reddish*, the Supreme Court of New Jersey held that "[t]he most 'solemn business' of executing a human being cannot be 'subordinate[d] . . . to the whimsical—albeit voluntary—caprice of every accused who wishes' unwisely to represent himself."[210] The court reached its decision by striking a balance between autonomy and trial fairness. As a result, the New Jersey court brilliantly found that, although the defendant's autonomy to proceed pro se must be respected, the defendant's autonomy is outweighed by the law's "heightened obligation to ensure 'consistency and reliability in the administration of capital punishment.'"[211]

When both rights are in conflict and the defendant is faced with the death penalty, there is no place for autonomy to supersede in our view. What is more important for the dignity of any human: their autonomy or their own life? Giving priority to self-autonomy at the expense of trial fairness that might cost the defendant's own life is assisting the defendant in committing suicide. This—by all standards—cannot approach even the lowest standard of trial fairness. Jeopardizing a life to promote the right to make a self-injurious decision is rebutted by both the constitutional and human rights arguments we provided in this Section.

As we have proposed, appointing standby counsel in all criminal cases—indirectly supported by courts in New Jersey—would offer exactly this

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[207] Eur. Conv. on H.R., art. 6 (2021).

[208] Robinson, *supra* note 204, at 5.

[209] Prosecutor v. Milošević, Case No. IT-02-54-AR 73.4, Separate Opinion of Judge Mohammed Shahabuddeen Appended to the Appeals Chamber Decision on Admissibility of Evidence-in-Chief in the form of Written Statements, ¶ 16 (Sept. 30, 2003); *see also* Prosecutor v. Nyiramasuhuko, Decision in the Matter of Proceedings under Rule 15bis (D), Joint Case No. ICTR-98-42-A15bis, Dissenting Opinion of Judge David Hunt, ¶ 16 (Sept. 24, 2003). There may be many difficulties placed in the way of an accused in the course of applying an interests of justice test in various situations, so that the trial is not a perfect one (such as the need to protect victims and witnesses) but the absence of perfection does not mean that the trial will not be a fair one. However, the interests of justice cannot be served where the accused is denied a fair trial.

[210] State v. Reddish, 859 A.2d 1173, 1201 (N.J. 2004) (Blackmun, J., dissenting) (quoting Faretta v. California, 422 U.S. 806, 849 (1975)).

[211] *Id.* (quoting State v. Ramseur, 524 A.2d 188 (1987)).

balance between defendants' autonomy and society's interests in fairness and justice. At the same time, our proposal refutes the illogical stance of state courts in aiding suicide by allowing incompetent defendants to proceed pro se in capital punishment trials. Further, in cases where courts are faced with ill-minded defendants, this conflict becomes especially pronounced and warrants the abolition of the right to self-representation altogether in capital punishment cases. This is because treating an ill-minded defendant who meets the vague *Edwards* standard as if they possess the capacity to make autonomous decisions defies the key argument of the Supreme Court in *Faretta*. However, because courts favor the right to autonomy over the right to a fair trial by allowing most ill-minded defendants to proceed pro se under *Edwards*, it is safer to abolish the right to self-representation altogether for all defendants, competent or not. Since courts might err by allowing incompetent defendants represent themselves, abolishing self-representation in capital punishment cases will cure these mistakes and save lives. Again, this proposal complies with the Sixth Amendment, *Faretta*, and *Edwards*, and it also protects human life and dignity over autonomy when favoring the latter would endanger life, fairness, or other high human values.

VI. CONCLUSION

It is disastrous to let severely mentally ill defendants represent themselves, yet in the U.S. legal system, mentally ill defendants represent themselves in courts every day. While the Supreme Court decided *Faretta* to open the doors of justice to those who do not want to be represented by a lawyer, the decision has complicated the judicial system more than it stands to benefit. To resolve these complexities, the Supreme Court decided, among other cases, *Edwards* to allow courts to deny self-representation when a defendant is incompetent to conduct court proceedings. Again, by leaving the *Edwards* standard broad enough for each court to apply as it sees fit to individual defendants, the Supreme Court left little guidance to courts about how to apply the *Edwards* standard. This has led to a higher probability of severely mentally ill defendants being allowed to represent themselves even in capital punishment cases.

In this Article, we relied on existing legal scholarship to suggest our own solution. We acknowledge and adopt a four-prong standard to assess a defendant's competency to proceed pro se, the best solution proposed thus far, in our opinion. We proposed an additional solution of appointing standby counsel in all criminal cases and promoting the role of standby counsel in guiding courts to assess defendants' competency. Applying our solution while also employing the suggested four-prong competency standard will yield the most benefits in the current pro se competency chaos. Many attorneys are reluctant to participate in a capital proceeding with a mentally ill pro se defendant, and this Article encourages attorneys to assume such a noble pursuit. Attorneys should not fear being subject to ethical or professional misconduct claims in assisting such defendants as advisory or standby counsel, as long as they prepare for trial as much as they do for their other clients. Further, attorneys should not fear being subject to ineffective assistance of counsel allegations because effective assistance of counsel is

not a constitutional right of pro se defendants, and, therefore, most courts in the United States do not accept these claims against standby counsel.

Finally, this research calls for abolishing self-representation altogether in capital punishment cases upon constitutional and human rights grounds. Although some scholars have argued for abolishing the right to proceed pro se in capital proceedings before us, we found their scholarship lacking sufficient constitutional and human rights foundation. We grounded our constitutional argument in a clear understanding of the notion of human dignity, which both encompasses the right to self-determination or autonomy and the right to a fair trial. We referred to the Human Rights Committee dwarf-tossing case to reveal that objective dignity—in terms of high moral values such as nondiscrimination and fairness—should have priority over an individual's subjective dignity or autonomy. We call upon the U.S. Supreme Court to realize that a fair trial is far more important than autonomy, even under the Sixth Amendment right itself, and especially in capital proceedings; otherwise, the Supreme Court would be aiding mentally ill or even mentally sound defendants in suicide. Lastly, all human rights treaties emphasize the importance of the right to a fair trial, but none has ever mentioned the right to self-representation. Accordingly, the Supreme Court should note that what comes first to the international community as a whole, in terms of human rights, is the right to a fair trial, not the right to autonomy or self-representation. These constitutional and human rights arguments support our contention that there is no right to self-representation for *any* defendant in capital punishment proceedings.