In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ANDREW D. JOHNSON,

Defendant and Appellant.

COPY

Case No. S188619

First Appellate District, Division Four, Case No. A124643
Solano County Superior Court, Case No. VCR191129
The Honorable Allan P. Carter, Judge

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ISSUE PRESENTED FOR REVIEW

In granting review, the Court ordered briefs and argument limited to this issue: "Should trial courts apply a higher standard of mental competence for self-representation than for competency to stand trial? (See *Indiana v. Edwards* (2008) 554 U.S. 164.)" (See Cal. Rules of Court, rule 8.520(b)(2)(A).)

INTRODUCTION

"The rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage." (*Medina v. California* (1992) 505 U.S. 437, 445.) Long before English courts provided an opportunity to defend through counsel, "Blackstone acknowledged that a defendant 'who became "mad" after the commission of an offense should not be arraigned for it "because he is not able to plead to it with that advice and caution that he ought,"' and 'if he became "mad" after pleading, he should not be tried, "for how can he make his defense?"'" (*Ibid.*, quoting *Drope v. Missouri* (1975) 420 U.S. 162, 171.) The rule was viewed as "a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom is in reality afforded no opportunity to defendant himself." (*Drope*, *supra*, 420 U.S. at p. 171, internal quotation marks omitted.)

After representation by counsel became common, and shortly before the obligation to provide the accused with counsel was generalized under the federal Constitution (see *Gideon v. Wainwright* (1963) 372 U.S. 335), the United States Supreme Court expressed the standard of competency to require that the defendant have both a rational and a factual understanding of the proceedings, as well as a sufficient present ability to *consult with his or her lawyer* with a reasonable degree of rational understanding. (*Dusky v. United States* (1960) 362 U.S. 402, 402–403 (per curiam) (*Dusky*).)

Still later, the Supreme Court found in the Sixth Amendment guarantee of counsel a correlative right to self-representation. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).) *Faretta* did not define the level of competency needed to exercise the new constitutional right. Not long afterward, Justice Robert Gardner of the Court of Appeal underlined the issue's practical significance: "It would be a trifle embarrassing to get half way through a trial only to discover that a court has determined that a mentally deficient or seriously mentally ill person has been allowed to make a 'knowing and intelligent' decision to represent himself." (*People v. Lopez* (1977) 71 Cal.App.3d 568, 573.)

Eighteen years after *Faretta*, the high court held in *Godinez v. Moran* (1993) 509 U.S. 389 (*Godinez*) that a defendant who was competent to stand trial under the *Dusky* standard was also competent to waive counsel and proceed pro se. California courts, including this one, interpreted *Godinez* to mean "the *Faretta* right 'may be asserted by any defendant competent to stand trial,' making the trial court's use of a higher standard erroneous." (*People v. Taylor* (2009) 47 Cal.4th 850, 876 (*Taylor*), quoting *People v. Halvorsen* (2007) 42 Cal.4th 379, 433.) Yet, *Godinez* had not resolved whether the federal Constitution *obliged* the states to apply the *Dusky* test to *Faretta* requests; because the defendant in *Godinez* had been permitted self-representation and wanted to plead guilty, the case only established that defendants competent to stand trial under *Dusky may* be allowed to represent themselves.

In *Indiana v. Edwards* (2008) 554 U.S. 164 (*Edwards*), the Supreme Court clarified that states were free to adopt more rigorous competency requirements for self-representation: "[T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States

to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (*Id.* at pp. 177–178.)

After *Edwards*, it is not *error* for a trial court to grant self-representation, relying on existing decisions that employ the *Dusky* standard by "equating competence for self-representation with competence to stand trial." (*Taylor*, *supra*, 47 Cal.4th at p. 867 and *id.* at p. 881.) Nevertheless, the *Dusky* standard is far from an optimal measure of a defendant's competence to conduct a criminal trial. After all, *Dusky* was expressly tailored to gauge the competence of *represented* defendants.

In this case, the People urge the acceptance of the high court's invitation in *Edwards* to adopt an elevated standard of competency for self-representation in California. Appellant's trial was a virtual paradigm demonstrating the need for a higher competency standard than *Dusky*. Appellant represented himself for seven months prior to his trial. Due to his mental disabilities and lack of self-control, he was incapable of preparing a trial defense. He produced bizarre pleadings. He was unable to focus at hearings. He repeatedly acted out. He was violent. He refused to meet experts appointed to determine his competency. After a jury found him competent, the trial court found him incapable of representing himself at trial due to mental disease. Appellant later acted out again and attacked several bailiffs. Consequently, the trial court ordered appellant placed in a holding cell for the entire trial—an order that he did not challenge on appeal. This is a case where the accused was incapable of presenting a rational defense, though a jury found him competent. A rule that compels a trial court to grant pro se status to such a defendant is unsound. A trial conducted by such a pro se defendant would amount to mere spectacle.

A borderline competent defendant may lack the ability to conceive a rational defense. Other borderline defendants may lack the ability to communicate a defense to the judge and jury. Some are unable to do either one. And a narrow subset of competent defendants, like appellant, cannot attend trial, let alone conceive and communicate a defense on their own behalf at one.

For all such individuals, an elevated functional competency standard would help to ensure the equality of forces between the accused and the state. As a result of the *Dusky* standard, trials of marginally competent pro se defendants can appear one-sided. Such trials almost invariably present problems freighting the defendant's due process right to a fair trial. (See Cal. Const., art. I, § 15.) Likewise, to the extent that doubts about the legitimacy of the outcome may undermine confidence in the verdict, the People's right to due process—which necessarily must include a fair opportunity to obtain a valid conviction—is burdened by the *Dusky* standard's application to motions of defendants seeking self-representation at trial. To remedy that defect in the *Dusky* standard, and in light of existing case law, the People seek a supervisory rule that provides trial courts with the discretion to deny (and where needed to revoke) self-representation when the court concludes that the accused is incompetent to act as counsel.

STATEMENT OF THE CASE

1. The Offenses

About 2:00 a.m. on June 23, 2007, appellant, age 35, was the last customer in a bar. The 61-year-old bartender, Sheila L. felt afraid of him because she was alone and he was talking "goofy." As she began her closing routine, he grabbed her, pushed her into the men's restroom, and threw her down on the tile floor, fracturing her elbow. He partially inserted

his penis in the victim's vagina, mouth, and anus. After he left, the victim called the police. (3 RT 689–851; 4 RT 946–947, 962–964; Ct. App. Typed Opn., pp. 2–4.)

Later that day about 1:30 p.m., Ahmed Muse stood in the order line at a sandwich shop. Seated at a table was an elderly couple with two young children who appeared to be a family. Muse saw defendant bothering the family, asking them for money, and using profanity. The family looked distraught. Muse went to their aid by asking appellant if he would please leave. Appellant shouted and used his buttocks several times to push Muse in the groin. Muse became angry and punched appellant several times. Appellant threw metal chairs at Muse, who dodged and deflected them. Appellant left for a few seconds, then reappeared and threw an object at Muse that missed. While Muse was momentarily distracted, appellant hit the back of Muse's head with a chair and Muse collapsed. Straddling the victim, appellant repeatedly punched Muse as he lay motionless on the floor. Muse regained consciousness and kicked appellant away. Appellant picked up Muse's wallet that had fallen from his pocket and fled. Police apprehended appellant a half-hour later. (3 RT 854–875; 4 RT 894–895, 910, 913, 949–958; Ct. App. Typed Opn., pp. 4–5.)

2. Pretrial Proceedings

Judge Allen Carter was assigned for all purposes to this case, which proceeded on two complaints that were later consolidated. At appellant's first appearance in court on June 26, 2007, the court appointed counsel. On July 5, 2007, appellant asked to represent himself. He did so in the preliminary hearing, arraignment, and other pretrial proceedings through January 2008. (Ct. App. Typed Opn., p. 5.)

3. Competency Proceedings

On January 30, 2008, the trial court declared a doubt as to appellant's competency to stand trial. (Pen. Code, § 1368.)[1] It noted appellant's "'unusual' behavior in court and the tone and content of letters written by defendant to the court and others." (Ct. App. Typed Opn., p. 5.) The court appointed counsel, who met with appellant. Counsel reported to the court that "he shared the court's concerns about defendant's legal competency, although he thought it was 'a close call.'" (*Ibid.*) The court suspended proceedings and appointed experts to evaluate the competency issue. Appellant refused to meet with the experts. (*Ibid.*)

At a competency trial, the defense called psychologist Kathleen O'Meara, Ph.D. She gave an opinion, with reservations, that more likely than not appellant was incompetent to stand trial due to some type of delusional thought disorder coupled with conspiracy paranoia. Dr. O'Meara acknowledged that it was "very unusual" for her to offer an opinion when she had not interviewed the defendant. She acknowledged her opinion to be "somewhat speculative." Two psychiatrists called by the prosecution testified that an interview was essential to form an opinion on competency and provided none as to appellant. (Ct. App. Typed Opn., pp. 5-6; see id. at p. 17.) The court gave the standard instruction on the *Dusky* competency standard, but modified it because appellant had been proceeding pro se in the criminal case and wanted to continue to do so.[2] On

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[1] Further statutory references are to the Penal Code unless otherwise indicated.

[2] The court instructed, with the modification in italics, as follows: "You must decide whether the defendant is mentally competent to stand trial. That is the only purpose of this proceeding. Do not consider whether the defendant is guilty or not guilty of any crime or whether he was sane or insane at the time that any alleged crime was committed. [¶] The defendant is mentally competent to stand trial if he can do all of the following: [¶] 1.

(continued...)

October 28, 2008, the jury found appellant competent to stand trial. (Ct. App. Typed Opn., p. 15; 2 RT 567–568.)

"On October 30, 2008, two days after defendant was found competent to stand trial, the court expressed concerns about defendant's ability to represent himself at trial. The court told defendant: 'You may be competent to stand trial, but I'm not convinced that you are competent to represent yourself.' The court noted that the United States Supreme Court, in *Edwards*, *supra*, [554 U.S. at p. 178] held that judges may insist upon representation by counsel for those who are competent to stand trial but who suffer from mental illness to the point where they are not competent to conduct trial proceedings by themselves. The court concluded that defendant fit that description. The court catalogued defendant's "bizarre," noncompliant, and disruptive behavior in court and in jail. The court concluded by finding that defendant 'has disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety and other common symptoms of severe mental illnesses which can impair his ability to play the significantly expanded role required for self-representation, even if he can play the lesser role of a represented defendant.' The court revoked defendant's in propria persona status and

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(...continued)
Understand the nature and purpose of the criminal proceedings against him; [¶] 2. Assist, in a rational manner, his attorney in presenting his defense *or conduct his own defense in a rational manner*; [¶] AND [¶] 3. Understand his own status and condition in the criminal proceedings. [¶] The law presumes that a defendant is mentally competent. In order to overcome this presumption, the defendant must prove that it is more likely than not that the defendant is now mentally incompetent because of a mental disorder." (CALCRIM No. 3451.)

On appeal, the People conceded error in adding the italicized language to the statutory competency standard (§ 1367, subd. (a)). The error was found harmless beyond a reasonable doubt. (Ct. App. Typed Opn., pp. 15-16.)

appointed an attorney to represent him, over defendant's objection." (Ct. App. Typed Opn., pp. 6-7; see 2 RT 573–585.)

4. Trial and Sentencing

The district attorney's consolidated information charged eight counts: assault with intent to commit a felony of Sheila L. (§ 220); sexual penetration (§ 289, subd. (a)(1)); forcible oral copulation (§ 288a, subd. (c)(2)); (4) rape (§ 261, subd. (a)(2)); battery with serious bodily injury on Sheila L. (§ 243, subd. (d)); assault with a deadly weapon (chair) on Muse (§ 245, subd. (a)(1)); battery with serious bodily injury upon Muse (§ 243, subd. (d)); and grand theft from Muse (§ 487, subd. (c)). The information alleged two strikes (§§ 1170.12, subds. (a)–(d), 667, subds. (b)–(i)), and two prior serious felony convictions (§ 667, subd. (a)). (2 CT 515–519.)

Appellant had disrupted court proceedings during the preliminary hearing and competency voir dire, and did so again in the guilt trial voir dire. He fought with bailiffs and broke a bailiff's nose. On December 15, 2008, appellant disrupted the proceedings again at an evidentiary hearing prior to opening statements at trial. The court ordered appellant removed from the courtroom, and he remained in a holding cell throughout the trial. (3 RT 657, 664, 682–683.) Evidence was submitted on December 16 and 17, 2008. On December 17, 2008, after deliberating for one hour, the jury found appellant guilty of all charges. (2 CT 584–596; 4 RT 1048–1050.) After deliberating for half an hour the next day, the jury found the two prior conviction allegations (a 1990 kidnapping and a 1999 criminal threat) true. (3 CT 645–650; 4 RT 1103–1104.)

In April 2009, the trial court sentenced appellant to 10 years plus three consecutive terms of 25 years to life. (3 CT 683–691; 4 RT 1126–1129.)

5. The Court of Appeal's Decision

Defendant appealed and raised numerous claims concerning his competency and guilt trials, but not the court's order removing him from the latter trial. The First District Court of Appeal, Division Four, affirmed the judgment in an unpublished opinion. (Ct. App. Typed Opn., pp. 2, 36.)

Rejecting the claim that appellant was erroneously denied his *Faretta* right, the Court of Appeal concluded "that a trial court does not violate the constitution in denying self-representation at trial to a defendant who meets the minimal standard of competency to stand trial but who suffers from a severe mental illness to the point where he was not competent to conduct trial proceedings by himself." (Ct. App. Typed Opn., p. 2, citing *Edwards, supra,* 554 U.S. at pp. 177–178.)

As in *Edwards*, the Court of Appeal found "pivotal" to this claim distinctions between the rights to waive counsel and to represent oneself at trial after a waiver, and between granting a defendant the right of self-representation and denying that right. (Ct. App. Typed Opn., p. 19.) The state appellate court observed that "the California Supreme Court has yet to say [following *Edwards*] whether trial courts should, or may, employ a higher competency standard for defendants conducting trials. (Cf. *United States v. Ferguson* (9th Cir. 2009) 560 F.3d 1060, 1066–1070 [adopting *Edwards* standard for federal trials and remanding for discretionary determination as to whether self-representation should have been denied].)" (Ct. App. Typed Opn., p. 21.) Answering a question not addressed in *Taylor, supra*, 47 Cal.4th 850, the Court of Appeal declared that "a trial court's denial of self-representation to a trial-competent yet mentally impaired defendant does not violate the United States Constitution where, as here, the record establishes that the defendant "suffer[s] from severe mental illness to the point where [he is] not competent to conduct trial proceedings" by himself, which is the standard articulated in *Edwards*."

(Ct. App. Typed Opn., p. 22.) Viewing the decision on the policy question as one for this Court, the Court of Appeal expressly withheld its opinion "on whether trial courts in the future *should* employ the *Edwards* standard." (*Id.* at pp. 22–23, fn omitted.)

Reviewing the record in this case, the Court of Appeal found that it "supports the trial court's conclusion that defendant, although competent to stand trial, was not competent to conduct trial proceedings by himself." (Ct. App. Typed Opn., p. 23.) The court rejected appellant's argument that self-representation could be revoked, once granted, only for misconduct by the accused, and not for mental illness. (*Id.* at p. 23.)

SUMMARY OF ARGUMENT

Godinez, *supra*, 509 U.S. 389, held that a defendant who understands the nature of the proceedings and can assist counsel is necessarily competent to proceed pro se. However, *Edwards*, *supra*, 554 U.S. 164, clarified that the higher standard of competency urged in *Godinez* sought to measure the defendant's ability to plead guilty; the defendant "did not seek to conduct trial proceedings, and his ability to conduct a defense at trial was expressly not at issue." (554 U.S. at p. 173.) *Edwards* held the federal Constitution permits states "to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [because they understand the proceedings and are able to assist counsel rationally,] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (554 U.S. at p. 178.)

Edwards' invitation to adopt a higher competency standard for self-representation should be accepted using both prior California law and this court's supervisory power over criminal procedure. A higher competency standard under *Edwards* will help to ensure that defendants who are competent to assist counsel, but who are functionally unable to conduct a

defense at trial on their own behalf due to mental impairment or disorder, receive the representation envisioned by the counsel clause of the Sixth Amendment. Moreover, such a standard superintends the equality of forces between the parties, which in turn promotes both fair trials and the appearance of fairness.

The minimal competence demanded of defendants in order to plead guilty (or to assist counsel at trial) often may be insufficient for self-representation. A defendant who understands the nature of the proceedings and who is capable of rationally consulting an attorney may nevertheless suffer a severe mental disorder depriving that defendant of the ability to conceive a rational defense, or to convey the defense to the factfinder, or to do either one. Self-representation at trial lacks justification in such cases because the defendant, though competent in the *Dusky* sense, has a mental disorder that poses a grave threat to the reliability, fairness, or integrity of the adjudication. Therefore, this Court should authorize trial courts to apply a competency standard for self-representation higher than that of competency to stand trial.

ARGUMENT

TO ENSURE A FAIR TRIAL, COURTS SHOULD HAVE DISCRETION TO DENY OR TO REVOKE SELF-REPRESENTATION BY MENTALLY DISORDERED DEFENDANTS UNDER THE *EDWARDS* STANDARD

A defendant is mentally incompetent to stand trial if he "is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a); *Dusky*, *supra*, 362 U.S. 402.) As discussed in *Taylor*, *supra*, 47 Cal.4th 850, California courts had assumed from *Faretta*, *supra*, 422 U.S. 806 and *Godinez*, *supra*, 509 U.S. 389, that the Sixth Amendment precluded a higher competency standard than *Dusky* for defendants who waive counsel

and wished to proceed to trial pro se. (See, e.g., *People v. Halvorsen* (2007) 42 Cal.4th 379, 433; *People v. Welch* (1999) 20 Cal.4th 701, 732–734; *id.* at p. 732 ["the United States Supreme Court has made clear[] the two standards of competence are the same."]; *id.* at p. 734 ["*Godinez* 'explicitly forbids any attempt to measure a defendant's competency to waive the right to counsel by evaluating his ability to represent himself.'"]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364; *People v. Dunkle* (2005) 36 Cal.4th 861, 907–909 [trial court erroneously denied defendant's *Faretta* motion based on the defendant's "education and his language"], overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421; see *Taylor, supra*, 47 Cal.4th at p. 874 ["The United States Supreme Court's 1993 decision addressing competence, *Godinez* . . . appeared to resolve any dispute by denying the existence of a separate competence standard for self-representation as a matter of federal law"]; *id.* at p. 880 [citing California Court of Appeal cases that interpreted *Godinez* to prohibit a higher standard for competence to represent oneself]; *People v. Poplawski* (1994) 25 Cal.App.4th 881, 893.)

In *Edwards, supra*, 554 U.S. 164, the Supreme Court explained that the higher standard in *Godinez* "sought to measure the defendant's ability to proceed on his own to enter a guilty plea, not to measure the defendant's ability to conduct a trial proceeding." (*Id.* at p. 173.) Further, the state in *Godinez* "sought to *permit* a gray-area defendant to represent himself." (*Ibid.*). *Edwards* held that the Sixth Amendment permits a court to impose a higher competence standard than *Dusky* for a gray-area defendant who insists on representing himself at trial. (*Id.* at pp. 177–178.) The court sought to "assur[e] trial judges the authority to deal appropriately with [*Faretta*] cases" involving mental competence issues, which "may well alleviate . . . fair trial concerns." (*Id.* at p. 179.)

Edwards did not define the contents of a permissible representational competence standard, but it indicated that a trial court's findings of incompetence for self-representation at trial due to severe mental illness would withstand constitutional scrutiny. (See *Edwards*, 554 U.S. at pp. 174–177.) More specifically, it observed that "the trial judge, particularly one such as the trial judge in this case, who presided over one of Edwards' competency hearings and his two trials, will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." (*Id.* at p. 177.) In cases like this one, *Edwards* allows states to "take realistic account of the particular defendant's mental capacities" and to deny the defendant the choice of representing himself when he is not "mentally competent to do so." (554 U.S. at pp. 177–178.)

Of course, under *Edwards*, a state may retain the *Dusky* standard of competence for a waiver of counsel. We acknowledge that option has virtues of simplicity and familiarity. In view of *Taylor*, *supra*, 47 Cal.4th at pages 867 and 881, that standard also would avoid potential retrials if *Faretta* motions were denied under too strict a standard of functional trial competency. But the sound option is not to retain the *Dusky* standard for competence to waive counsel. As we argue *post*, it is to promulgate the competency standard for self-representation as near to its original form as California law permits. That would ensure defendants who meet the minimum constitutional standard for competence under *Dusky* are brought to trial. It would provide greater assurance that both the People and defendants will receive a fair trial. And it would demonstrate that the state meets its obligation to supply the counsel envisioned by the Sixth Amendment when mental disorder or disease leaves the accused in the gray-zone—competent to assist counsel but functionally incompetent to act as one.

The California Constitution guarantees defendants the rights to due process and a fair trial. (Cal. Const., art 1, §§ 7, 15, art. 6, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 835.) Likewise, the state has a strong institutional interest in trials that are fair and that appear fair. (See *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1075 [federal constitutional requires states to provide a fair trial]; *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [states have the power to apply rules of evidence that serve the interests of fairness]; *Wheat v. United States* (1988) 486 U.S. 153, 160 [trials should appear fair to all]; *Sell v. United States* (2003) 539 U. S. 166, 180 [government has an important interest "in bringing to trial an individual accused of a serious crime" and a "a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one."].)

It is relatively rare that a defendant who is unable to conduct a rational defense or who is unable to communicate one nevertheless wants to waive counsel. (See *Edwards*, supra, 554 U.S. p. 178 [reciting a study showing that roughly 0.3 to 0.5 percent of defendants proceed pro se and about 20 percent of federal pro se defendants undergo competency examinations].) The present case aptly demonstrates why trial courts should have discretion to deny *Faretta* motions in such situations. Appellant was permitted to represent himself for seven months before trial and the only thing he produced was unintelligible pleadings and confusion in the courtroom. At the competency hearing, appellant's own psychological expert testified that he was incapable of representing himself in court. Due to his violent and verbal outbursts, appellant spent the trial in a holding cell. Appellant has never claimed his right to presence was violated at the trial. Under any conceivable functional standard of competency, his mental disorder rendered him incapable of representing himself at trial. He was not there.

Even if appellant had been capable of attending his trial, his mental disease deprived him of the ability to formulate a defense or to present a defense to a judge and jury. Granting self-representation at trial in such a case serves no true dignitary interest of the accused. It invites a spectacle that mocks justice. Therefore, the trial court properly revoked appellant's pro se status to ensure a fair trial.

A. Prior to the Modern Presumption That Criminal Defendants Would Be Represented by Counsel, a Defendant Was Competent to Stand Trial Only If He Was Personally Capable of Presenting a Rational Defense

In *Dusky*, *supra*, 362 U.S. 402, the Supreme Court said the test for competency to stand trial is whether the defendant "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" (*Ibid.*) The question is whether the defendant's competence to stand trial should continue to establish competency for self-representation, assuming the accused otherwise offers a voluntary and knowing waiver of counsel through a timely and unequivocal *Faretta* motion. Our answer is no. It is unsound to compel trial courts to ask if the defendant has the rational capacity to *consult with his lawyer* to determine whether the defendant can act *without* a lawyer. (See *ibid.*; see also *Godinez*, *supra*, 509 U.S. at p. 402 [test is whether defendant can "assist counsel"].)

The *Dusky* competency standard was framed in these terms because representation by counsel at trial was virtually presumed by 1960. The later recognition of the right to proceed *without* counsel in *Faretta* tended to obscure the original competency requirement that pro se defendants be capable of personally making a rational defense, a necessity when self-representation was the rule. (See *Drope v. Missouri* (1975) 420 U.S. 162,

171.) As a result, courts honing to *Faretta* and *Godinez* focus on the competence to *waive counsel*, but what is actually at issue is the defendant's basic competence to act *as counsel*.

It was common in 18th century English and American prosecutions for defendants to have no access to counsel; and the competence that was required was "'whether a defendant was capable of defending himself.'" (*Godinez*, *supra*, 509 U.S. at p. 400, fn. 11.) "An even more explicit recitation of this common-law principle is . . . 'that if at any time while criminal proceedings are pending against a person accused of a crime, the trial court either from observation or upon suggestion of counsel has facts brought to his attention which raise a doubt of the sanity of defendant, the question should be settled . . . whether the defendant is capable of understanding the proceedings and of *making his defense*, and whether he may have a full, fair and impartial trial.'" (*Id.* at p. 406 (conc. opn. of Kennedy, J.), italics added.)

Indeed, the competency standard at common law focused entirely on the defendant's capacity to comprehend and present his own defense. The Supreme Court explained: "Courts often referred to the prisoner's insanity (or present insanity) rather than incompetence, even when the proceeding concerned the defendant's competence to stand trial. Beginning with the earliest cases, the issue at a sanity or competency hearing has been 'whether the prisoner has sufficient understanding to comprehend the nature of this trial, *so as to make a proper defence to the charge*.'" (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 357, fn. 8, italics added, quoting *King v. Pritchard* (1836) 7 Car. & P. 303, 304, 173 Eng. Rep. 135.)

New York's high court explained that the common law of England:

> had prescribed that no man should be called upon to make his defense at a time when his mind was in such a situation that he appeared incapable of doing so; that however guilty he might be, the trial must be postponed to a time when, by collecting

> together his intellects, and having them entire, he should be able so to model his defense, if he had one, as to ward off the punishment of the law . . . . [¶] At the same time it would be well to impress distinctly on the minds of jurors, that they are to gauge the mental capacity of the prisoner, in order to determine whether he is so far sane as to be *competent in mind to make his defense*, if he has one; for, *unless his faculties are equal to that task, he is not in a fit condition to be put on his trial.*

(*Freeman v. People* (N.Y. Sup. 1847) 4 Denio 9, 27–28, italics added.) Blackstone asked, "if he became 'mad' after pleading, he should not be tried, 'for how can he make his defense?'" (*Drope v. Missouri*, supra, 420 U.S. at p. 171, quoting 4 Blackstone, Commentaries.)

A federal court of appeals observed over a hundred years ago: "The American authorities support this view ... [that t]he issue to be tried, when the objection is urged as a bar to a trial, is whether the accused can make a rational defense." (*Youtsey v. United States* (6th Cir. 1899) 97 F. 937, 943; see also American Bar Association Criminal Justice Mental Health Standards 161 (1989) ["The British common law rules preventing trial of mentally incompetent defendants were transposed virtually intact into early nineteenth-century United States jurisprudence"]; *Godinez, supra*, 509 U.S. at p. 407 ["'It has long been the rule of the common law that a person cannot be required to plead to an indictment or be tried for a crime while he is so mentally disordered as to be incapable of making a rational defense'"], quoting Weihofen, Mental Disorder as a Criminal Defense (1954) pp. 428–429, 431 & fn. 8.)

The common law test for competency continued to be applied by American courts into the middle of the 20th century. (See, e.g., *Hunt v. State* (Ala. 1946) 27 So.2d 186, 191 ["The rule at common law . . . is that if at any time while criminal proceedings are pending against a person accused of a crime, the trial court either from observation or upon suggestion of counsel has facts brought to his attention which raise a doubt

of the sanity of defendant, the question should be settled before further steps are taken . . . . The broad question to be determined then is whether the defendant is capable of understanding the proceedings and of making his defense . . . ."]; *State ex rel. Townsend v. Bushong* (Ohio 1946) 65 N.E.2d 407, 408 ["the well-settled common-law rule [is] that a person while insane cannot be tried, sentenced or punished for an alleged crime, and that the only issue presented at a preliminary trial of present insanity is whether the accused has sufficient soundness of mind to comprehend his position, to appreciate the charges against him and the proceedings thereon, and to enable him to make a proper and rational defense."]; *Moss v. Hunter* (10th Cir. 1948) 167 F.2d 683, 685 ["It is rightly said that the applicable test in these circumstances is whether an accused has the mental capacity to comprehend his own condition . . . and is capable of rationally conducting his defense . . . . [On]e mentally capable of committing an offense may nevertheless become incapable of providing a defense to the charge . . . ."].)

With reference to the common law competency test, *Massey v. Moore* (1954) 348 U.S. 105 observed: "One might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." (*Id.* at p. 108.) "Even the sane layman may have difficulty discovering in a particular case the defenses which the law allows. [Citation.] Yet problems difficult for him are impossible for the insane." (*Id.* at pp. 108–109.) Thus, in *Massey*, the court recognized the obvious fact that a defendant who is competent to stand trial with an attorney's assistance is not necessarily competent to present his own defense. (*Ibid.*)

The common law competency standard necessarily included the defendant's ability to represent himself because defendants lacked access to counsel. (See, e.g., *Godinez*, *supra*, 509 U.S. at p. 400, fn. 11 [self-representation was the norm during the time of Blackstone]; *Faretta*, *supra*,

422 U.S. at p. 850 (Blackmun, J., dissenting) ["self-representation was common, if not required, in 18th century English and American prosecutions"].)

As the right to counsel became more firmly established, however, the defendant's ability to represent himself became less imperative. Thus, *Johnson v. Zerbst* (1938) 304 U.S. 458, held that the Sixth Amendment prohibited the imprisonment of federal defendants unless they had the assistance of counsel or had waived that right. (*Id.* at p. 463.) In *Gideon v. Wainwright*, *supra*, 372 U.S. 335, the Supreme Court held that the right to counsel applied to the states through the Fourteenth Amendment. (*Id.* at pp. 342–345.) By the time of *Dusky*, the defendants' right to counsel, if not fully constitutionally established, was the new norm. Understandably, *Dusky* restated the test for competency on an assumption that self-representation is ordinarily not involved. (See 362 U.S. at p. 402 [to be competent to stand trial, a defendant must have a "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . and . . . a rational as well as factual understanding of the proceedings against him.'"].)

Fifteen years later, the presumption that defendants would be represented was so strong that the Supreme Court had to reaffirm defendants' right to proceed pro se. In *Faretta*, *supra*, 422 U.S. 806, the Supreme Court held, "The Sixth Amendment, when naturally read, . . . implies a right of self-representation." (*Id.* at p. 821.) "[W]here the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him . . . . The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who

must be free personally to decide whether in his particular case counsel is to his advantage." (*Id.* at p. 834.)

Further, the court abandoned the earlier emphasis on the ability to make a defense and focused instead on the ability to intelligently waive counsel. "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" (*Faretta, supra*, 422 U.S. at p. 835.) Because the record showed that Faretta was literate and competent, and he knowingly waived his right to counsel, forcing him to accept counsel violated his Sixth Amendment right to conduct his own defense. (*Id.* at p. 836; see *id.* at p. 817 [right to conduct own defense also implicit in the Fifth Amendment].)

In *Godinez, supra*, 509 U.S. 389, the prosecution sought the death penalty for three murders. (*Id.* at p. 391.) After the defendant was found competent to stand trial, he moved to dismiss counsel and plead guilty. (*Id.* at p. 392.) The trial court granted the motion and accepted the defendant's guilty pleas. (*Id.* at pp. 392–393.) After the defendant was sentenced to death, he filed a habeas petition in federal district court claiming he was incompetent to represent himself. (*Id.* at p. 393.) The district court denied the petition, but the Ninth Circuit reversed. (*Id.* at p. 394.) It held that the competency standard for pleading guilty or waiving the right to counsel was higher than the competency standard for standing trial. (*Id.* at p. 396.) The Supreme Court reversed, holding all that was required to plead guilty or to waive counsel was for the defendant to be competent to stand trial and to make his waivers knowingly and voluntarily. (*Id.* at pp. 400–401.)

In sum, when defendants lacked access to counsel, it was understood that they were not competent to stand trial unless they could make a

rational defense. When representation became the norm, the competency test (*Dusky*) was reformulated to reflect the fact that the defendant would most likely have the assistance of counsel. In *Faretta* and *Godinez*, the Supreme Court inferred a constitutional basis for self-representation, but declined to resuscitate the common law competency standard that had previously protected unrepresented defendants. Instead of testing whether the defendant was competent to make a rational defense, the court focused solely on the defendant's ability to intelligently waive counsel.

This chronology shows how the establishment of the right to counsel had the effect of lowering the competency standard for unrepresented defendants. While the counsel right contains an implicit right to waive counsel, it does not follow that competency to waive counsel eliminates the relevance, in terms of this court's supervisory responsibility over criminal procedure, of a defendant's actual incompetence to defend himself. That lack of capacity, after all, must be relevant to whether the defendant can receive a fair trial in which representation by counsel is waived. (Cal. Const., art 1, §§ 7, 15, art. 6, § 13; *People v. Watson*, *supra*, 46 Cal.2d at p. 835 [the California Constitution guarantees defendants the rights to due process and a fair trial].)

B. *Indiana v. Edwards* Permits States to Deny Self-Representation to Defendants Who Would Not Receive a Fair Trial if Counsel Were Waived

Godinez held that the *Dusky* standard satisfies the federal due process requirements for competence to stand trial and to waive counsel. (509 U.S. at p. 402.) And while it added that "States are free to adopt competency standards that are more elaborate than the *Dusky* formulation" (*ibid.*), most courts still interpreted *Godinez* to preclude a higher standard of competence for self-representation itself. However, *Edwards* clarified that a defendant could be competent to *waive* counsel, and still not be capable of acting *as*

counsel. (554 U.S. at pp. 177–178; see *People v. Taylor*, *supra*, 47 Cal.4th at p. 878.)

In *Edwards*, *supra*, 554 U.S. 164, the defendant had a long history of psychological problems and was twice found incompetent to stand trial. (*Id.* at pp. 167–168.) Immediately prior to trial, the defendant sought to represent himself, but the trial court denied the request because it was accompanied by a request for a continuance. (*Id.* at p. 168.) On retrial for charges unresolved by the first trial, the defendant again asked to represent himself. (*Id.* at p. 169.) The trial court denied the request because his psychiatric history showed he was competent to stand trial, but not competent to defend himself. (*Ibid.*) The Indiana appellate court and its supreme court found that the defendant was deprived of his Sixth Amendment right to represent himself. The United States Supreme Court reversed. (*Id.* at pp. 169, 174.)

Edwards gave four reasons for holding that states could have a higher competency standard for self-representation than for competency to stand trial. First, previous Supreme Court cases discussing the standard for competence to stand trial assumed the defendant would be represented by counsel and implied that an unrepresented defendant would present a very different set of circumstances. (554 U.S. at pp. 174–175.) Moreover, "*Faretta*, the foundational self-representation case, rested its conclusion in part upon pre-existing state law set forth in cases all of which are consistent with, and at least two of which expressly adopt, a competency limitation on the self-representation right." (*Id.* at p. 175.)

Second, the high court said, mental illness is variable between defendants, and in the same defendant over time. (554 U.S. at p. 175.) "In certain instances an individual may well be able to satisfy *Dusky*'s mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to

present his own defense without the help of counsel." (*Id.* at pp. 175–176.) "'[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.'" (*Id.* at p. 176.)

Third, *Edwards* noted 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 . . . . Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." (554 U.S. at pp. 176–177.)

Fourth, *Edwards* noted that proceedings must not only be fair but appear fair. (554 U.S. at p. 177.) It observed that "given the different capacities needed to proceed to trial without counsel, there is little reason to believe that *Dusky* alone is sufficient." (*Ibid.*) The trial judge "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." (*Ibid.*)

Edwards recognized that "*Faretta* itself and later cases have made clear that the right of self-representation is not absolute. *See Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 163 (2000) (no right of self-representation on direct appeal in a criminal case); *McKaskle v. Wiggins*, 465 U.S. 168, 178–179 (1984) (appointment of standby counsel over self-represented defendant's objection is permissible); *Faretta*, 422 U.S., at 835, n. 46, 95 S.Ct. 2525 (no right 'to abuse the dignity of the courtroom'); *ibid.* (no right to avoid compliance with 'relevant rules of procedural and substantive law'); *id.*, at 834, n. 46 (no right to 'engag[e] in serious and obstructionist misconduct,' referring to

Illinois v. Allen [(1970) 397 U.S. 337])." (*Edwards*, *supra*, 554 U.S. at p. 171; see also *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152, 161–162 [trial court could deny an untimely *Faretta* motion].) Thus, because the right of self-representation is conditional, it is sometimes subject to other more fundamental considerations.

Edwards concluded: "[T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, 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." (*Edwards*, *supra*, 554 U.S. at pp. 177–178.)

C. To Ensure a Fair Trial, California Should Deny *Faretta* Motions by Defendants Found by the Trial Court to be Incompetent to Act as Counsel

At one time, California law recognized competency to stand trial was not coextensive with competency to act as counsel. In *People v. Welch*, this court noted that in 1988 "the decisional law in this state held that mental competence to stand trial is not equated with competence to waive the assistance of counsel." (20 Cal.4th at p. 740.) *Welch* cited *People v. Burnett* (1987) 188 Cal.App.3d 1314, 1321 (abrogated by *People v. Hightower* (1996) 41 Cal.App.4th 1108, 1115[3]) for the proposition that "'the standard for determining competence to stand trial is lower than the standard for determining competence to waive counsel . . . .'" (*Welch,* p.

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[3] Respondent cites several cases that were overruled or abrogated by decisions that interpreted *Godinez* to preclude a higher competence standard for self-representation. As shown *ante*, *Edwards* subsequently rejected that interpretation of *Godinez*.

740; also citing *People v. Powell* (1986) 180 Cal.App.3d 469, 482–483; *People v. Leever* (1985) 173 Cal.App.3d 853, 864, overruled on another ground in *People v. Ervin* (2000) 22 Cal.4th 48, 91; *People v. Zatko* (1978) 80 Cal.App.3d 534, 541–543, abrogated by *Hightower*, *supra*, 41 Cal.App.4th at p. 1115.)

In addition, even if the defendant could intelligently and knowingly waive counsel, the trial court could not accept that waiver unless it determined the defendant could actually defend himself. (*People v. Rhinehart* (1973) 9 Cal.3d 139, 147 ["Before a defendant may be permitted to waive his right to counsel, the trial court must determine that he is competent to represent himself . . . ."], overruled on another ground in *People v. Bolton* (1979) 23 Cal.3d 208, 213–214; *People v. Williams* (1970) 2 Cal.3d 894, 908 [same]; see *People v. Carter* (1967) 66 Cal.2d 666, 672 [same]; *People v. Taylor*, *supra*, 47 Cal.4th at p. 871.)

Before *Faretta*, the United States Supreme Court conceived a defendant representing himself without the requisite skills as a violation of due process: "There are some individuals who, by reason of age, ignorance or mental capacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment." (*Wade v. Mayo* (1948) 334 U.S. 672, 684.) In *Edwards*, the court again recognized that "insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal objectives, providing a fair trial." (554 U.S. at pp. 176–177.)

Given *Edwards*' invitation of a higher standard of competency for self-representation, there is no impediment to reinstatement of California's

elevated competency standard for self-representation before *Faretta* and *Godinez* led state law astray. (See *People v. Taylor*, *supra*, 47 Cal.4th at pp. 872–876, 880 [discussing how the California Supreme Court interpreted those cases to foreclose any consideration of whether the defendant was actually competent to represent himself].) This court's earlier common sense observation is sound: "Before the waiver of counsel may be accepted the trial court must determine the defendant's competency to represent himself." (*People v. Williams*, *supra*, 2 Cal.3d at p. 908; see *People v. Rhinehart*, *supra*, 9 Cal.3d at p. 147; *People v. Carter*, *supra*, 66 Cal.2d at p. 672; *People v. Burnett*, *supra*, 188 Cal.App.3d at p. 1321 ["the fact that a person has been found mentally competent to stand trial with the assistance of counsel . . . does not necessarily mean he or she is competent to . . . proceed to trial unassisted."], fn. omitted.) A defendant should not be permitted self-representation if he is incompetent to act without counsel. Otherwise, the result is likely to be an unfair trial or the appearance of one.

"*Faretta* itself and later cases have made clear that the right of self-representation is not absolute." (*Edwards*, *supra*, 554 U.S. at pp. 171, 175.) There is no right to be free of standby counsel; no right to use self-representation as a means to disrupt the court or skirt procedural and substantive law; no right to delay a trial in order to exercise the right of self-representation; and no right to self-representation on appeal. (*Ibid.*) Ultimately, "the defendant's right to proceed *pro se* exists in the larger context of the criminal trial designed to determine whether or not a defendant is guilty of the offense with which he is charged." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8.) When there is a conflict between the circumscribed right of self-representation and the defendant's and the People's interest in a fair trial that upholds the dignity of the state's judicial system, fair trials should be the priority. (See *People v. Chadd* (1981) 28 Cal.3d 739, 752 ["'a defendant's waiver or attempted waiver of a right is

ineffective where it would involve also the renunciation of a correlative duty imposed upon the court.'"].)

Just as common law competency to stand trial required the ability to make a defense (*Cooper v. Oklahoma*, *supra*, 517 U.S. at p. 357, fn. 8), California law before *Faretta* dictated that "the court cannot accept a waiver of counsel from any one accused of a serious public offense without first determining that he 'understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the punishments which may be exacted.'" (*In re Johnson* (1965) 62 Cal.2d 325, 335; see also *People v. Carter*, *supra*, 66 Cal.2d at p. 672.) *People v. Taylor* recognized: "Before *Faretta*, . . . we had referred to self-representation competence, but had not articulated any standard under California law for its assessment." (47 Cal.4th at p. 872.) *Taylor* did, however, quote this from *People v. Burnett*: "[T]he 'cognitive and communicative skills' involved in competently representing oneself . . . 'are present where the accused: (1) possesses a reasonably accurate awareness of his situation, including not simply an appreciation of the charges against him and the range and nature of possible penalties, but also his own physical or mental infirmities, if any; (2) is able to understand and use relevant information rationally in order to fashion a response to the charges; and (3) can coherently communicate that response to the trier of fact.'" (*Id.* at p. 873, quoting *People v. Burnett*, *supra*, 188 Cal.App.3d at p. 1327.)

We recognize as stated in *Taylor* "that *Burnett* did not attempt to articulate a distinct California standard of competence for self-representation" and that it relied on federal authority that was overruled in *Godinez*. (*Id.* at pp. 874, 880–881.) Nor does the question presented call for us to endorse that standard or any other. *Burnett* did not draw on any California constitutional or statutory standard because none exists.

Nevertheless, the very fact that it expresses easily assessable common sense notions of what is required to proceed pro se in the absence of normative guidance from those sources suggests that the formulation of an appropriate standard is not exactly labor that inspires myth as some might argue.

Burnett's element that the defendant must understand the nature of the trial is already protected by *Dusky* and section 1367. Therefore, a functional competency standard to proceed pro se should focus on those abilities beyond *Dusky* that are necessary to affirmatively make a rational defense. (See *Edwards*, *supra*, 554 U.S. at pp. 175–176 ["In certain instances an individual may well be able to satisfy *Dusky's* mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel."].) The standard could be as simple as determining whether the defendant can conceive of a defense and coherently communicate it to the judge and jury.

D. Trial Courts Should Have Discretion to Determine Whether Defendants Are Incompetent to Represent Themselves

Prior to *Godinez*, California law afforded trial courts broad discretion to decide whether a defendant was competent to proceed without counsel. (See, e.g., *People v. Teron* (1979) 23 Cal.3d 103, 114, overruled on another ground in *People v. Chadd*, *supra*, 28 Cal.3d at p. 750, fn. 7; *People v. Rhinehart*, *supra*, 9 Cal.3d at pp. 147–148; *In re Johnson*, *supra*, 62 Cal.2d at p. 335 [whether to accept a defendant's waiver of counsel is the "'serious and weighty responsibility' of the trial judge"]; *People v. Robles* (1970) 2 Cal.3d 205, 218 ["The determination of the trial judge as to the defendant's competence to waive counsel involves an exercise of discretion by the trial judge which in the absence of an abuse of discretion will not be disturbed on appeal."].) Denial of *Faretta* motions on the basis

of a defendants' incompetence to represent themselves should not require a formal hearing or expert testimony. So long as the trial court states its reasons for denying the *Faretta* motion on the record, appellate courts will have an adequate record to review the trial court's use of discretion.

Trial courts often have several opportunities to observe defendants before ruling on a *Faretta* motion. But whether or not defendants elect self-representation in the first instance or only later, trial courts should have the discretion to terminate self-representation—as is currently the law for disruptive behavior—when the defendant's incompetency to act as counsel due to mental disease or disorder is manifested in the record. We expect that judges can make their evaluations through simple observations. It is not hard for judges (who after all were lawyers themselves) to determine whether a defendant's baseline ability includes functioning as counsel. The level of incompetence that would disqualify a defendant from representing himself would show itself quickly. In some cases, judges may choose to ask defendants some questions to evaluate their cognitive and communication abilities. But the procedure need not necessarily be much more elaborate than the typical hearing of a *Faretta* motion.

The high court in *Edwards* held "that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." (554 U.S. at pp. 177–178.) It noted that the trial judge "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." (*Id.* at p. 177; see *Godinez*, *supra*, 509 U.S. at p. 401, fn. 13 ["a competency determination is necessary only when a court has reason to doubt the defendant's competence."].) Finally, *Edwards* concluded that its "opinion, *assuring trial judges the authority* to deal appropriately with cases in" which there are doubts about the pro se

defendants' trial competency evaluations "may well alleviate those fair trial concerns." (554 U.S. at p. 179, italics added.) The Supreme Court clearly envisions competency determinations that could and would incorporate practical, case-by-case adjudications of *Faretta* motions by trial courts.

Likewise, in *People v. Welch*, *supra*, 20 Cal.4th 701, this Court observed, "one reason for according deference to the trial court [in determining whether the defendant is too disruptive to represent himself] is that it is in the best position to judge defendant's demeanor." (*Id.* at p. 735.) Since trial courts already have discretion to deny *Faretta* motions on various bases—including unknowing or involuntary waivers, timeliness, and disruptive behavior—there is good reason for them to have discretion to deny such motions for lack of competence. Therefore, trial courts should have broad discretion to deny self-representation on competency grounds.

II. THE JUDGMENT SHOULD BE AFFIRMED

Under any conceivable elevated standard for competence to represent oneself, the trial court did not abuse its discretion by terminating appellant's self-representation right and appointing counsel for trial.

Appellant represented himself for seven months prior to trial and accomplished nothing. (See, e.g., 1 RT 6–9, 78, 109–110, 117, 121, 129, 133, 135, 138, 155; 7/20/07 RT 16–33; 12/15/08 RT 26–27.) Much like the example appended by the high court to the *Edwards* opinion, appellant produced largely incomprehensible pleadings. (554 U.S. at p. 179; see, e.g., 2 CT 351–423.) At the competency hearing, appellant's own psychological expert testified that he was incapable of representing himself in court. (2 RT 419–420.) Due to violent and verbal outbursts, appellant spent the trial in a holding cell. (1 RT 28, 33, 49; 3 RT 683; 2 CT 574.)

The record shows appellant lacked even the most rudimentary ability to formulate a defense. (See *People v. Burnett*, *supra*, 188 Cal.App.3d at p. 1327; see *Godinez*, *supra*, 509 U.S. at p. 400, fn. 11 [common law

competency included ability to make a defense].) He also was wholly incapable of communicating a defense to the judge and jury because he was not present at trial at all. His absence was due entirely to the behavior manifesting his severe mental disorder. (See *Burnett*, *supra*, at p. 1327.)

Appellant contends that he had the right to represent himself because the jury determined he was competent to do so. (AOB 22–23.) But as the Court of Appeal found, appellant's competency jury should have been asked if he could assist counsel (§ 1367, subd. (a)), not whether he could "assist in a rational manner his attorney in presenting his defense *or conduct his own defense in a rational manner* . . . ." (2 RT 525, italics added; CT 479, 508; Ct App. Typed Opn., pp. 15–16.) In court, a person can "assist" their own defense more easily than they can "conduct" it. Since the erroneous instruction presented those options in the alternative, there is no way to tell whether the jury found that appellant could only assist counsel, or found that he could assist counsel *and* conduct his own defense. (See Appellant's Opening Br., No A124643 AOB 28 [appellant complained that "the court offered the jury two distinct ways of finding appellant competent . . . ."].) Therefore, the jury did not necessarily believe appellant was competent to represent himself.

Moreover, the high court noted in *Edwards* that "[m]ental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." (*Edwards*, *supra*, 554 U.S. at p. 175.) Therefore, even if the jury had found appellant competent to represent himself, the trial court could still find him incompetent two days later.

Appellant argues, as he did in the Court of Appeal, that the trial court was bound by this court's previous cases holding that a unitary competence standard applied to *Faretta* motions. He contends that any higher standard

of competence for the right of self-representation should not apply retroactively. (AOB 21.)

In *People v. Taylor*, *supra*, 47 Cal.4th 850, the defendant claimed the trial court erred by permitting him to proceed pro se because it "should have exercised its discretion, later recognized in *Edwards*, to apply a higher standard than mere competence to stand trial." (*Id.* at p. 879.) This court rejected the claim "because, at the time of defendant's trial, state law provided the trial court with no test of mental competence to apply other than the *Dusky* standard of competence to stand trial (see [*Dusky*]), under which defendant had already been found competent." (*Ibid.*) This court concluded that "the court did not err in relying on federal and state case law equating competence for self-representation with competence to stand trial." (*Id.* at pp. 866–867.)

The present trial took place *after Edwards*, and the trial court explicitly relied on *Edwards* when it revoked appellant's pro se status for lack of mental competency. (2 RT 573–585.) In this case, there is no issue of retroactivity because *Edwards* expressly held that *Faretta* is not violated by elevated standards of mental competence for self-representation. (554 U.S. at p. 178.) California precedents holding otherwise could no longer be considered binding on the trial court once *Edwards*, as higher and more specific authority, had clarified *Faretta* and *Godinez*. As the Court of Appeal noted below, "We express no opinion on whether trial courts in the future *should* employ the *Edwards* standard. This is a matter for our high court to decide. We find only that trial courts may employ the *Edwards* standard without offending the United States Constitution." (Ct. App. Typed Opn., pp. 22–23.)

Finally, even if this Court rejected an elevated competency standard under state law and held that defendants who are competent to stand trial are necessarily competent to represent themselves, the judgment should still

be affirmed. The trial court and Court of Appeal relied on *Edwards* to justify appointing counsel for appellant. However, this court "review[s] the ruling, not the court's reasoning and, if the ruling was correct on any ground, [it] affirm[s]." (*People v. Rogers* (2009) 46 Cal.4th 1136, 1162, fn. 14, quoting *People v. Zamudio* (2008) 43 Cal.4th 327, 351, fn. 11.)

In *People v. Welch*, *supra*, 20 Cal.4th 701, the trial court denied the defendant's request to proceed pro se, in part, because he lacked "some minimal ability to present a personal, competent defense." (*Id.* at p. 730.) This Court found *Godinez* did not support that ruling. (*Id.* at p. 734.) "Nonetheless, the trial court based its ruling upon the additional ground that defendant was disruptive . . . . [T]he trial court also relied extensively upon the circumstance that defendant repeatedly had been disruptive during the course of the *Faretta* proceedings and during hearings on prior motions in the present case." (*Ibid.*)

Welch concluded that "the trial court did not abuse its discretion in denying defendant's *Faretta* motion based on the disruptive behavior he had exhibited in the courtroom prior to making that motion." (20 Cal.4th at p. 735.) The defendant had falsely denied awareness of a calendar date, turned his back on the judge, interrupted the judge several times to argue a settled point and prevented the judge from speaking, accused the judge of misleading him, and disobeyed several admonitions to be silent. (*Ibid.*)

Similarly, here, the trial court stated, "I took away your pro per status because it was my opinion—and it is still my opinion, and I think it has been confirmed—that you cannot represent yourself *based on your conduct in court.*" (3 RT 879, italics added.) Appellant's disruptive conduct was far more serious than that described in *Welch*. He not only interrupted the court several times and accused the trial court, prosecutor, and police of framing him, he engaged in physical violence in front of the jury and seriously injured a bailiff. Accordingly, even if *Edwards* does not apply,

the trial court still properly revoked appellant's pro se status for disruptive conduct. (See *Welch*, *supra*, 20 Cal.4th at p. 735; *Faretta*, *supra*, 422 U.S. at p. 835, fn. 46 ["the trial court may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."].)

Therefore, even if the trial court's reliance upon *Edwards* was deficient legal authority, the ruling should be upheld because serious disruptive conduct caused the trial court to revoke appellant's pro se status. (See *People v. Zapien* (1993) 4 Cal.4th 929, 976 [""""No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion."""].)

CONCLUSION

Respondent respectfully requests that the judgment of the Court of Appeal be affirmed.

Dated: June 27, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
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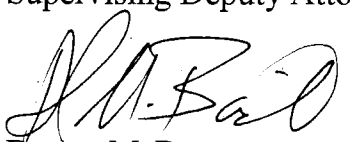

DAVID M. BASKIND
Deputy Attorney General
Attorneys for Respondent

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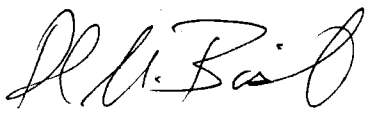
CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 10,836 words.

Dated: June 27, 2011

KAMALA D. HARRIS
Attorney General of California



DAVID M. BASKIND
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Andrew D. Johnson**

No.: **S188619**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 28, 2011, I served the attached

ANSWER BRIEF ON THE MERITS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Barry M. Karl
Attorney at Law
620 Jefferson Avenue
Redwood City, CA 94063

First District Appellate Project
Attention: Executive Director
730 Harrison St., Room 201
San Francisco, CA 94107

The Honorable Donald A. du Bain
District Attorney
Solano County District Attorney's Office
675 Texas Street, Suite 4500
Fairfield CA 94533-6340

County of Solano
Hall of Justice
Superior Court of California
600 Union Avenue
Fairfield, CA 94533

Court of Appeal of the State of California
First Appellate District
Division Four
350 McAllister Street
San Francisco, CA 94102-3600

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 28, 2011, at San Francisco, California.

M. Argarin
Declarant

Signature

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