the Justices appeared legitimately concerned about the pre-trial detention aspect of the case at oral argument.[100] This view appears unlikely to sway Justice Alito and Justice Thomas, but could still sway a majority of the Court. Last, it is quite possible that courts will find that no critical stage existed after Rothgery's arrest and prior to his indictment, despite the attachment of the right to counsel during that period. Justice Alito acknowledged this possibility in his concurrence.[101] If this is indeed the outcome, the Court's attachment holding in *Rothgery* would be purely academic and meaningless to the defendant — formalism in true form.

4. Sixth Amendment — Competency Standard for Self-Representation at Trial. — In 1975, the Supreme Court held in *Faretta v. California*[1] that criminal defendants have a constitutional right to conduct their own defense at trial. This right has never been absolute, and *Faretta* itself emphasized that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct"[2] and may appoint "standby counsel" over a defendant's objection.[3] Last Term, in *Indiana v. Edwards*,[4] the Supreme Court held that the Constitution does not forbid a state from establishing a standard of competence for self-representation at trial that is higher than that required to stand trial. In so holding, the Court created a new means of limiting the self-representation right, one that diverges from the Court's previous preference for providing trial courts tools with which to manage pro se defendants rather than facilitating courts' denying self-representation prior to trial. The shift toward a framework that allows for more preemptive denials of self-representation requests indicates not simply a change in how the Court directs lower courts to cabin self-representation, but also a subtle yet fundamental shift in the core values that define the meaning of the underlying right. The self-representation regime permitted under *Edwards* may allow courts to better protect important interests such as trial accuracy, judicial efficiency, and dignity than did the ex post limitations previously used to manage the practical implications of *Faretta*,

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[100] Transcript of Oral Argument at 28–30, *Rothgery*, 128 S. Ct. 2578 (2008) (No. 07-440), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-440.pdf (recording concern expressed by Justices Kennedy, Souter, and Scalia).

[101] *Rothgery*, 128 S. Ct. at 2595 (Alito, J., concurring) ("It follows that defendants in Texas will not necessarily be entitled to the assistance of counsel within some specified period after their magistrations.").

[1] 422 U.S. 806 (1975).

[2] *Id.* at 834 n.46 (citing Illinois v. Allen, 397 U.S. 337 (1970)).

[3] *Id.* at 835 n.46 (quoting United States v. Dougherty, 473 F.2d 1113, 1125 n.18 (D.C. Cir. 1972) (internal quotation marks omitted).

[4] 128 S. Ct. 2379 (2008).

but any advance will come at the expense of defendant autonomy, the value traditionally viewed as the core of the *Faretta* right.[5]

Edwards presented a fact pattern that marked a meeting point between two previously independent strains of Supreme Court precedent: that governing competency to stand trial and that defining the right to self-representation at trial. *Dusky v. United States*[6] announced the standard by which courts evaluate whether criminal defendants are competent to stand trial: the defendant must possess "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."[7] The Court nearly reached the intersection of the *Faretta* right and competency jurisprudence in *Godinez v. Moran*,[8] in which the Court held that the standard for "waiving the right to counsel is [not] higher than the competency standard for standing trial."[9] No precedent prior to *Edwards*, however, squarely addressed the question of what level of competency was required for a criminal defendant to represent himself at trial.

In July 1999, Ahmad Edwards fired three shots after being confronted by a department store security officer who had observed Edwards stealing a pair of shoes.[10] The officer and a bystander were wounded.[11] Edwards was "charged with attempted murder, battery with a deadly weapon, criminal recklessness, and theft."[12]

A series of competency hearings focusing on Edwards's mental state followed. At the initial hearing, the trial court found Edwards incompetent to stand trial, after which he was committed to a state hospital for treatment.[13] Almost two years later, a second competency hearing was held after Edwards's doctors indicated that his condition

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[5] *See* sources cited *infra* note 81.

[6] 362 U.S. 402 (1960) (per curiam).

[7] *Id.* at 402 (internal quotation mark omitted). Despite the inescapable ambiguities raised by any inquiry into mental illness, the *Dusky* test has been described as an example of the Court's ability to create "functional" standards for evaluating the mental capacity of defendants. *See, e.g.*, Tamera Wong, Comment, *Adolescent Minds, Adult Crimes: Assessing a Juvenile's Mental Health and Capacity To Stand Trial*, 6 U.C. DAVIS J. JUV. L. & POL'Y 163, 178 (2002) ("*Dusky* enumerates a functional test that requires the defendant to be evaluated according to present functional ability or impairment to rationally assist legal counsel.").

[8] 509 U.S. 389 (1993).

[9] *Id.* at 391. The *Edwards* Court, describing *Godinez*, noted that "technical legal knowledge" was not an appropriate consideration in determining if a defendant should be permitted to proceed pro se. *Edwards*, 128 S. Ct. at 2385 (quoting *Godinez*, 509 U.S. at 400 (quoting Faretta v. California, 422 U.S. 806, 836 (1975))) (internal quotation marks omitted). The defendant in *Godinez* wished to waive his right to counsel and then enter a guilty plea, so the case did not present the question of competency to conduct trial proceedings. *Id.*

[10] Edwards v. State, 866 N.E.2d 252, 253 (Ind. 2007).

[11] *Id.*

[12] *Edwards*, 128 S. Ct. at 2382.

[13] *Id.*

had improved sufficiently to render him competent to stand trial.[14] At this second hearing, the judge found that although Edwards was "suffer[ing] from mental illness,"[15] he was nonetheless competent to stand trial and "assist his attorneys in his defense."[16] Edwards's lawyer subsequently requested a third psychiatric evaluation.[17] Following presentation of evidence from psychiatrists indicating that Edwards suffered from schizophrenia and had the capacity to understand the charges against him but not to cooperate with his attorneys, the court concluded that Edwards was not competent to stand trial.[18] Edwards was then recommitted to the state hospital.[19] Several months later, the hospital indicated that Edwards's condition had again improved enough to render him competent to stand trial.[20] Edwards's trial did not commence until nearly a year later.[21]

Prior to trial, Edwards requested to represent himself.[22] The trial court denied the motion, noting Edwards's intention to pursue a defense that would have delayed the start of the trial.[23] Edwards then went to trial with counsel.[24] The jury convicted Edwards on the criminal recklessness and theft charges but "failed to reach a verdict" on the other two charges, and "[t]he State decided to retry Edwards on the attempted murder and battery charges."[25] Edwards renewed his self-representation request prior to the second trial, but the court again denied it.[26] Noting that psychiatric reports indicated that he suffered from schizophrenia, the court concluded that although Edwards was competent to stand trial, he was not competent to present his own defense.[27] With the assistance of court-appointed counsel, Edwards proceeded to trial and was convicted on the remaining counts.[28]

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14 *Id.*

15 *Id.* (alteration in original) (quoting Joint Appendix at 114a, *Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208), 2008 WL 906153) (internal quotation marks omitted).

16 *Id.* (quoting Joint Appendix, *supra* note 15, at 114a).

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 Edwards v. State, 854 N.E.2d 42, 46 n.5 (Ind. Ct. App. 2006) ("[A]t the hearing prior to Edwards's second jury trial, the trial court commented that it had denied [the first pro se] motion because Edwards intended to raise the defense of insanity, which would have required a continuance.").

24 *Edwards*, 128 S. Ct. at 2382.

25 *Id.*

26 *Id.* at 2382–83.

27 *Id.*

28 *Id.* at 2383.

Edwards appealed, arguing that the trial court's refusal of his self-representation request deprived him of a Sixth Amendment right.[29] The Indiana Court of Appeals affirmed in part, reversed in part, and ordered a new trial on the attempted murder and battery charges.[30] The court expressed its sympathy with the trial court's decision to deny Edwards's request to proceed pro se; the trial court "tr[ied] to ensure that Edwards received a fair trial."[31] Although the court pointed out a substantial body of criticism leveled at *Faretta* and *Godinez*, it nonetheless reasoned that since those holdings had never been overruled, the standard of competence to represent oneself at trial could not be higher than the standard used to measure competency to stand trial.[32] The court thus concluded that Edwards should have been allowed to represent himself.[33]

The Indiana Supreme Court, agreeing with the Court of Appeals, reversed the convictions and remanded on the murder and battery charges.[34] The court held that the self-representation right requires that a defendant who is found competent to stand trial must be allowed to conduct his own defense.[35] The court deemed reasonable the trial court's determination that Edwards was incompetent to proceed pro se and recognized that the lower court's concerns about underlying fair trial issues motivated its decision.[36] The Indiana Supreme Court nonetheless agreed with the Court of Appeals's conclusion that U.S. Supreme Court precedent required that the competency standard to proceed pro se be the same as that to stand trial.[37] In reaching this conclusion, however, the court emphasized that the case presented an opportunity for the Supreme Court to reevaluate whether the *Faretta* and *Godinez* standards required modification.[38]

The Supreme Court vacated and remanded. Writing for the Court, Justice Breyer[39] first concluded that the Court's "precedents frame[d] the question presented, but they d[id] not answer it."[40] *Faretta* and its progeny allowed for limitations on defendants' self-representation

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[29] *See* Edwards v. State, 854 N.E.2d 42, 46 (Ind. Ct. App. 2006).

[30] *Id.* at 52.

[31] *Id.* at 48.

[32] *Id.*

[33] *Id.* at 45.

[34] Edwards v. State, 866 N.E.2d 252, 260 (Ind. 2007). The Supreme Court of Indiana affirmed the appeals court on all matters not discussed in its opinion. *Id.*

[35] *Id.* at 253.

[36] *Id.* at 260.

[37] *Id.*

[38] *Id.*

[39] Justice Breyer was joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Alito.

[40] *Edwards*, 128 S. Ct. at 2383.

right.[41] The Court distinguished *Godinez* on the grounds that it dealt with a defendant who had sought to waive counsel to enter a guilty plea, so the *Godinez* Court never addressed the level of competency required for self-representation *at trial*, which was the issue presented in *Edwards*.[42] Additionally, in *Godinez* a state sought to permit a defendant of borderline competence to waive counsel, whereas *Edwards* questioned whether the Constitution *requires* states to allow defendants competent to stand trial to represent themselves.[43]

The Court recognized that "[m]ental illness itself is not a unitary concept," a factor that cautioned against adopting a single competency standard to govern varied circumstances that demand different types of functionality from defendants.[44] Addressing the "dignity" interest that had been advanced in support of the self-representation right in the past, the Court emphasized its conviction 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."[45] The Court went on to suggest that a defendant suffering from mental illness might create a "spectacle" in the courtroom that could prove "humiliating."[46] Because self-representation could lead to an improper conviction, it might threaten a defendant's basic right to a fair trial.[47] Noting that trial judges are best situated to evaluate the competency of defendants,[48] the Court concluded that the Constitution allows states to insist on counsel for those defendants who meet *Dusky*'s standard for competence to stand trial but "still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."[49]

The Court declined to adopt Indiana's proposed standard, which based competency on the defendant's ability to "communicate coherently with the court or a jury."[50] It expressed doubts about how such a

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[41] *Id.* at 2384. The Court cited several examples of limitations that have been placed upon the exercise of the right. *See id.* (citing Martinez v. Court of Appeal of Cal., 528 U.S. 152, 163 (2000) (no right to self-representation on direct appeal in criminal case); McKaskle v. Wiggins, 465 U.S. 168, 178–79 (1984) (appointment of standby counsel over objection of defendant permissible); Faretta v. California, 422 U.S. 806, 835 n.46 (1975) (no right to "abuse the dignity of the courtroom")). The Court categorized the competency question as another in this line of possible limitations. *See id.*

[42] *Id.* at 2385.

[43] *Id.*

[44] *Id.* at 2386.

[45] *Id.* at 2387 (quoting *Wiggins*, 465 U.S. at 176–77).

[46] *Id.*

[47] *Id.* Additionally, the Court noted the importance of ensuring not only that court proceedings are fair, but also that they *appear* so. *Id.*

[48] *Id.*

[49] *Id.* at 2388.

[50] *Id.* (quoting Brief for Petitioner at 20, *Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208), 2008 WL 336303 (emphasis omitted)) (internal quotation mark omitted).

standard would operate in practice and avoided adopting any particular formulation.[51] The Court further explicitly declined to overrule *Faretta*, stating that its decision in *Edwards* would likely alleviate the "fair trial concerns" associated with pro se defendants in the past.[52]

Justice Scalia dissented,[53] emphasizing that a defendant who voluntarily and intelligently waives his right to counsel receives a fair trial under the Fourteenth Amendment, even if he suffers from mental illness.[54] In Justice Scalia's view, "the Constitution does not permit a State to substitute its own perception of fairness for the defendant's right to make his own case before the jury."[55] The trial judge found that Edwards had "knowingly and voluntarily"[56] waived counsel; at Edwards's second trial, the judge explicitly stated that he was "'carv[ing] out' a new 'exception'" to the self-representation right.[57] Even if waiver of counsel harms a defendant's case, Justice Scalia argued, the Constitution guarantees this option to criminal defendants.[58] *Godinez* made clear that a defendant's "competence to represent himself" is not relevant to the inquiry about his competence to waive counsel.[59] This reasoning drew directly on *Faretta*, which included a "candid acknowledgment that the Sixth Amendment protected the defendant's right to conduct a defense to his disadvantage."[60]

Justice Scalia recognized that there are circumstances in which a limitation on the Sixth Amendment right is appropriate, but noted that, because Edwards never commenced self-representation, his performance could not be measured against the *Faretta* limitations for those who "abuse the dignity of the courtroom" or "deliberately en-

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[51] *Id.*

[52] *Id.* The Court, in reaching this part of its decision, relied on empirical evidence suggesting that the trials of defendants who proceed pro se are not, on the whole, less fair than those of defendants who go to trial with counsel. *See id.*

[53] Justice Scalia was joined by Justice Thomas.

[54] *Edwards*, 128 S. Ct. at 2389 (Scalia, J., dissenting) (citing Godinez v. Moran, 509 U.S. 389 (1993)).

[55] *Id.*

[56] *Id.* at 2391 (quoting Joint Appendix, *supra* note 15, at 512a) (internal quotation marks omitted).

[57] *Id.* (alteration in original) (quoting Joint Appendix, *supra* note 15, at 527a). This "new exception" created a third requirement above and beyond the "knowing" and "voluntary" standards for waiver already in place. *See id.*

[58] *Id.* There was a dispute between the opinions as to whether defendants who proceed pro se generally face worse outcomes at trial than do their counterparts who are assisted by counsel; although Justice Scalia stated that they do, *id.*, the majority opinion cited a recent empirical study suggesting that they in fact do not, *id.* at 2388 (majority opinion).

[59] *Id.* at 2391 (Scalia, J., dissenting) (quoting *Godinez*, 509 U.S. at 399) (internal quotation mark omitted).

[60] *Id.*

gage[] in serious and obstructionist misconduct."[61] Even where the Court had held that standby counsel may be appointed over a defendant's objection, it had ensured that the defendant retained control over the course of his defense.[62] Addressing the "dignity" argument raised by the majority, Justice Scalia embraced a competing vision of "dignity," one better respected by protecting a defendant's autonomy, not by preventing him from "making a fool of himself."[63] The dissent bemoaned the "extraordinarily vague" quality of the Court's holding, voicing the concern that once self-representation can be limited by a competency inquiry, trial judges will be inclined to appoint counsel whenever possible to maximize efficiency in trial management.[64]

Faretta recognized the necessity of balancing competing interests against one another[65] — ensuring a fair trial, respecting the defendant's autonomy and dignity, and allowing for some concessions to promote judicial efficiency all have been factors that influenced the Court's self-representation jurisprudence. The Court understood that this balancing required placing limitations on the exercise of the self-representation right in some situations. Responding to the fear that "criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials,"[66] *Faretta* emphasized the trial judge's prerogative to "terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."[67] *Faretta* also noted that trial courts may appoint standby counsel to assist defendants electing to represent themselves, even where a defendant objects.[68] In *McKaskle v. Wiggins*,[69] the Court elaborated on the management mechanisms available to trial courts where a pro se defendant threatens the integrity of the trial process,[70] but the Court did so with a mind to the other values that weighed in favor of preserving a robust self-representation right. The *Wiggins* Court held that the Sixth Amendment right to self-representation was not violated when standby counsel's involvement at trial remained "within reasonable limits."[71] The limitations on self-representation outlined in *Faretta* and refined in *Wiggins* focus on management techniques triggered by a

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[61] *Id.* at 2392 (quoting Faretta v. California, 422 U.S. 806, 834 n.46 (1975)) (internal quotation marks omitted).

[62] *Id.*

[63] *Id.* at 2393.

[64] *See id.* at 2394.

[65] *See Faretta*, 422 U.S. at 834 n.46.

[66] *Id.*

[67] *Id.* (citing Illinois v. Allen, 397 U.S. 337 (1970)).

[68] *Id.* at 835 n.46; *see also* McKaskle v. Wiggins, 465 U.S. 168, 188 (1984).

[69] 465 U.S. 168.

[70] *See, e.g.*, *id.* at 176–78 (discussing the proper role of standby counsel).

[71] *Id.* at 188.

pro se defendant's concrete behavior *at trial*. They allow the defendant to present his defense unless and until his courtroom behavior indicates an inability to comply with the rules of the courtroom.[72]

The *Edwards* approach to limiting *Faretta*, terminating a defendant's self-representation right before he has an opportunity to proceed pro se,[73] exists in significant tension with the vision of *Faretta* described by the Court in *Wiggins*. The *Wiggins* Court stated that "[i]n determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way."[74] None of the pre-*Edwards* limitations denied the self-representation right to an otherwise competent defendant prior to commencing trial.[75] Such an approach might often prove more efficient and perhaps produce fairer and more accurate trials, but it also unquestionably would be less protective of defendant autonomy.[76] Seeking to retain a meaningful role for all of these competing interests, the Court, prior to *Edwards*, never permitted the use of pretrial screening devices to limit self-representation at trial.

Edwards not only allowed courts to preemptively deny self-representation requests, it specifically permitted courts to employ competency determinations, which have proven notoriously difficult to administer, to evaluate prospective pro se defendants. Competency is implicitly — and sometimes explicitly — tied to the ambiguous concept of "mental illness," which proves difficult to define or to quantify. Replicating this imprecision by allowing states to create a second competency determination for would-be pro se defendants injects more ambiguity into the criminal trial process for defendants seeking to exercise their constitutional *Faretta* right. Although the competency limitation may, as the Court hoped, remedy some of the past fair trial concerns connected with *Faretta* and its remedial limitations, it also

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[72] *See, e.g.*, Julian A. Cook, III, *Crumbs from the Master's Table: The Supreme Court, Pro Se Defendants and the Federal Guilty Plea Process*, 81 NOTRE DAME L. REV. 1895, 1924–25 (2006) ("[T]he rules respecting a defendant's constitutional right to self-representation in the trial context serve, at the very least, a dual purpose: they enable defendants to proceed in a pro se capacity, while affording them the opportunity to draw upon an attorney's expertise, and they preserve a structure through which the criminal trial process can efficiently proceed. Nevertheless, the crafting of these rules comes at a cost, for it disables, to a certain extent, a defendant from freely exercising his constitutional right to self-representation. . . . By empowering the courts to impose standby counsel or to terminate a litigant's pro se status altogether, this constitutional right seems to resemble more of a constitutional privilege." (emphasis omitted) (footnote omitted)).

[73] *See Edwards*, 128 S. Ct. at 2392 (Scalia, J., dissenting).

[74] *Wiggins*, 465 U.S. at 177.

[75] *See Edwards*, 128 S. Ct. at 2392 (Scalia, J., dissenting).

[76] This move is significant given the centrality of defendant autonomy to the self-representation right. *See, e.g.*, State v. Reddish, 859 A.2d 1173, 1188 (N.J. 2004) ("The personal autonomy of the defendant — 'that respect for the individual which is the lifeblood of the law' — outweighs any competing interests that would compel representation." (quoting Faretta v. California, 422 U.S. 806, 834 (1975))).

creates a new cluster of problems for defendants and the trial courts before which they appear.

In particular, the Court's assumption that trial judges will make "fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant,"[77] misapprehends the nature of the process through which most courts determine competency. Because mental illness is complex and difficult to evaluate, judges almost always defer to the expertise of mental health professionals.[78] This often produces decisions based largely or even wholly on medical conclusions about a defendant's *capabilities*; distinctly legal values such as autonomy may be left out of the inquiry altogether.[79] Competency determinations may be an appropriate tool for balancing the other values underlying the self-representation right — trial accuracy, judicial efficiency, and dignity — but they necessarily minimize the role of autonomy, which the Court itself has recognized as distinct from observable measures of defendant functionality in the courtroom.[80]

Individual autonomy, however, has been interpreted by many to be the core value underlying the *Faretta* right.[81] As Justice Scalia argued

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[77] *Edwards*, 128 S. Ct. at 2387 (majority opinion).

[78] *See, e.g.*, Grant H. Morris et al., *Competency To Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL'Y 193, 199–200 (2004) ("[T]rial judges appear to have little interest in carefully weighing all the evidence, and in making their own independent assessment of the defendant's competence. Rather, they simply prefer to adopt as their own the conclusion reached by the psychiatrist or psychologist who evaluated the defendant. As Justice Blackmun observed, 'a competency determination is primarily a medical and psychiatric determination. Competency determinations by and large turn on the testimony of psychiatric experts, not lawyers.' One recent study reported that courts agreed with the forensic evaluator's judgment in 327 out of the 328 cases studied — a 99.7% rate of agreement." (footnotes omitted)).

[79] *Cf. id.* at 212–15 (demonstrating deficiencies in psychiatrists' and psychologists' understandings of the legal standards for competence found in statutes and announced by the Supreme Court in *Dusky*).

[80] *See Faretta*, 422 U.S. at 834; *see also* Godinez v. Moran, 509 U.S. 389, 399–400 (1993). Justice Scalia noted in his dissent that the Court's precedents emphasized this distinction. *See Edwards*, 128 S. Ct. at 2391 (Scalia, J., dissenting).

[81] The centrality of the autonomy value to *Faretta* has been recognized by both lower courts and legal scholars. The Fifth Circuit, for example, has made the point explicitly:

> [W]e recognize the defendant's right to defend pro se not primarily out of the belief that he thereby stands a better chance of winning his case, but rather out of deference to the axiomatic notion that each person is ultimately responsible for choosing his own fate, including his position before the law. A defendant has the moral right to stand alone in his hour of trial and to embrace the consequences of that course of action. . . . [E]ven a defendant doomed to lose has the right to the knowledge that it was the claim that he put forward that was considered and rejected, and to the knowledge that in our free society, devoted to the ideal of individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case.

Chapman v. United States, 553 F.2d 886, 891–92 (5th Cir. 1977). Commentators have also suggested that the *Faretta* decision was motivated by a concern for protecting defendants' autonomy. *See, e.g.*, 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, 495–96 (1996) ("[T]he *Faretta* majority felt compelled, perhaps out of respect for personal

in *Edwards*, *Faretta* protects "the supreme human dignity of being master of one's fate rather than a ward of the State — the dignity of individual choice."[82] The majority did recognize "dignity" as a key interest, but decoupled it from autonomy and never addressed the distinct autonomy implications of its holding. Although Justice Breyer referenced *Wiggins*'s focus on "'dignity' and 'autonomy,'" he concluded only that the dignity interest was best protected by preventing defendants from making fools of themselves in the courtroom;[83] what this analysis will mean for the protection of a defendant's autonomy interest remains unclear.

Edwards himself never had the opportunity to commence self-representation at trial, although he had not behaved disruptively before the court.[84] For criminal defendants who, like Edwards, will be judged incompetent to represent themselves under the heightened standard permitted by *Edwards*, the decision will no doubt significantly curtail their ability to control the course of their defense[85] — even if it produces more accurate or less embarrassing trials for some defendants. *Edwards* may provide an appropriate or even necessary response to some of the problems with *Faretta*,[86] but only at the expense of the value that was *Faretta*'s foundation: defendant autonomy.

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autonomy, to constitutionalize the individual's 'moral right to stand alone in his hour of trial.'" (footnote omitted)). At least one commentator has gone so far as to suggest that *Faretta* not only elevated autonomy in the self-representation context, but also "establish[ed] defendant autonomy as an independent constitutional value" that has affected how courts interpret substantive law as well. Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 628 (2005).

[82] *Edwards*, 128 S. Ct. at 2393 (Scalia, J., dissenting).

[83] *Id.* at 2387 (majority opinion). One might posit that the Court's decision does not really impact any autonomous decisionmaking; it only affects mentally ill defendants, and they may be considered incapable of making autonomous decisions. *See* Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self-Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 196 (2000) ("[T]he autonomy viewpoint fails to account for the fact that mental illness itself may render an individual's decisions unfree."). Even were the Court convinced that its decision was so insulated from autonomy concerns, its failure to engage the autonomy issue at all, while discussing other values underlying the self-representation right, would be odd given the amount of attention given to autonomy in the post-*Faretta* scholarship and case law. Further, the imprecision of competency determinations, discussed above, renders such compartmentalized reasoning troubling, if it is indeed going on. Such a rationale would assume that there is either no imprecision at the margins or that the undervalued autonomy interests of those defendants capable of autonomous decisionmaking but deemed incompetent to represent themselves at trial are of little consequence in shaping the Court's self-representation jurisprudence.

[84] *Edwards*, 128 S. Ct. at 2392 (Scalia, J., dissenting).

[85] In fact, although the trial court, in denying Edwards's first self-representation request, focused on the delay that would have resulted had it been granted, this decision frustrated Edwards's intent to raise the defense of insanity. *See* Edwards v. State, 854 N.E.2d 42, 46 n.5 (Ind. Ct. App. 2006). Edwards's case thus suggests the potential strategic implications of placing additional preemptive limitations on self-representation at trial.

[86] *See, e.g.*, Faretta v. California, 422 U.S. 806, 836 (1975) (Burger, J., dissenting) ("[T]here is nothing desirable or useful in permitting every accused person, even the most uneducated and

5. Sixth Amendment — Federal Sentencing Guidelines — Deviation Based on Policy Disagreements. — In *United States v. Booker*,[1] the Supreme Court remedied a Sixth Amendment violation by making advisory the Sentencing Guidelines that had shaped federal sentences since 1987.[2] The Court, however, instructed judges to continue calculating the appropriate Guidelines range and also to consider "other statutory concerns."[3] The Court subsequently held that sentences within the recommended Guidelines range were to be accorded a "presumption of reasonableness" on appeal.[4] Last Term, in *Kimbrough v. United States*,[5] the Supreme Court addressed for the first time how appellate courts should review sentences that vary from the Guidelines recommendations based solely on policy disagreements.[6] The Court upheld a below-Guidelines sentence that a district court judge imposed based on his disagreement with the fact that much harsher sentences were imposed on crack cocaine dealers than on powder cocaine dealers, in the famous 100-to-1 ratio.[7] Some of the *Kimbrough* language suggested that the case was merely a natural outcome of *Booker* and

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inexperienced, to insist upon conducting his own defense to criminal charges."); *id.* at 849 (Blackmun, J., dissenting) ("I cannot agree that there is anything in the Due Process Clause or the Sixth Amendment that requires the States to subordinate the solemn business of conducting a criminal prosecution to the whimsical — albeit voluntary — caprice of every accused who wishes to use his trial as a vehicle for personal or political self-gratification."); *see also* Martinez v. Court of Appeal of Cal., 528 U.S. 152, 161 (2000) ("No one, including Martinez and the *Faretta* majority, attempts to argue that as a rule pro se representation is wise, desirable, or efficient."); Decker, *supra* note 81; Sabelli & Leyton, *supra* note 83. The Indiana Court of Appeals specifically acknowledged the existence of such criticism in reaching its decision. *Edwards*, 854 N.E.2d at 48 ("We . . . acknowledge the authority cited by the State — including more recent separate opinions of a number of Justices on the United States Supreme Court — that criticizes the holdings of *Faretta* and *Godinez*.").

[1] 543 U.S. 220 (2005).

[2] The Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.), established the Sentencing Commission, which promulgated guidelines in part to achieve uniformity in federal sentencing. *See, e.g.*, U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1–2 (2007), *available at* www.ussc.gov/general/USSC_Overview_Dec07.pdf.

[3] *Booker*, 543 U.S. at 246.

[4] Rita v. United States, 127 S. Ct. 2456, 2459 (2007).

[5] 128 S. Ct. 558 (2007).

[6] Decided the same day as *Kimbrough*, *Gall v. United States*, 128 S. Ct. 586 (2007), held that an appellate court could not require that sentences outside the applicable Guidelines range be justified by "'extraordinary' circumstances." *Id.* at 595. All sentences, regardless of their relationship to the Guidelines, are to be subject to "a deferential abuse-of-discretion standard." *Id.* at 591.

[7] At the time Derrick Kimbrough was sentenced, a defendant who dealt one gram of crack cocaine was subject to the same period of incarceration as one who dealt 100 grams of powder cocaine. *Cf. Kimbrough*, 128 S. Ct. at 575 (discussing the sentencing judge's concern about the disparity resulting from the 100-to-1 ratio). Although the disparity between crack and powder cocaine sentencing has been decreased by a recent amendment to the Sentencing Guidelines, the 100-to-1 ratio still exists in statutory minimums. *Id.* at 569 & n.10.