YOU HAVE THE RIGHT TO AN ATTORNEY; IF YOU CANNOT AFFORD ONE, THEN THE GOVERNMENT WILL UNDERPAY AN OVERWORKED ATTORNEY WHO MUST ALSO BE AN EXPERT IN PSYCHIATRY AND IMMIGRATION LAW

Joanmarie Ilaria Davoli*

2012 MICH. ST. L. REV. 1149

TABLE OF CONTENTS

INTRODUCTION ......................................................................................... 1149
I. INDIGENT DEFENSE ............................................................................ 1154
II. THE ROLE OF THE DEFENSE ATTORNEY ............................................. 1156
   A. Indiana v. Edwards ......................................................................... 1156
      1. The Dusky Standard .................................................................. 1156
      2. The Edwards Standard ............................................................. 1158
      3. Defending Edwards .................................................................. 1160
      4. The Attorney-Client Relationship ............................................. 1163
      5. Symptoms of Mental Illness .................................................... 1170
   B. Padilla v. Kentucky ....................................................................... 1172
III. SOLUTIONS ........................................................................................ 1183
   A. Solving the Edwards Situation ...................................................... 1183
   B. Solving the Padilla Situation ......................................................... 1184
CONCLUSION ............................................................................................. 1187

INTRODUCTION

Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.¹

Justice Alito expresses an accurate assessment of criminal defense; one that is often unknown in the quiet halls of academia or among the whis-

* Professor of Law, Florida Coastal School of Law. J.D. 1988 Georgetown University Law Center, B.A. Philosophy and History 1985 University of Virginia. The author would like to thank John Blume, Brad Shannon, Sean McCall, Jason Murray, Brandy E. Natalzia, Christopher Roederer, and Lydia Sturgis.

¹ Padilla v. Kentucky, 130 S. Ct. 1473, 1487-88 (2010) (Alito, J., concurring). As this Article points out, defense attorneys are now often required to provide expert advice on matters of psychiatry and immigration law.
pers in pristine appellate courtrooms. The vast majority of criminal defense attorneys defend what is known as “street crime,” and they do so in chaotic hallways, cramped courtrooms, and filthy jails. Defense counsel negotiate in courtroom stairwells, across cafeteria tables, in holding cells, and in hallways. Their knowledge of evidence, constitutional law, criminal law, and procedure must be closer than their fingertips, since time and patience are the luxurious exception, while listening, analyzing, and objecting simultaneously are the required norm. Catching a glimpse of this messy reality from his lofty viewpoint, Justice Alito makes a simple yet important point: criminal defense attorneys are trained to defend accused criminals. In fact, they are trained to resolve the criminal charge, but they are not trained and should not be held responsible for resolving every problem that arises in a defendant’s life. However, recent Supreme Court decisions place heavy burdens on criminal defense attorneys who defend the poor.

While a successful appeal may reverse an unfair conviction and establish important precedents that benefit future defendants, the rights of any individual criminal defendant are most effectively protected at the trial level, with a verdict of not guilty or an acceptable plea bargain. Thus, each case tried by every defense attorney is defended on two levels: making the case (for the jury) while making the record (for appeal). As the Supreme Court has long recognized, the most effective way to produce a fair trial is to ensure that an accused has access to a competent, zealous defense attorney.

In 1963, the United States Supreme Court decided *Gideon v. Wainwright*, requiring that criminal defendants who could not afford to retain an attorney would be provided one by the state. *Gideon* remains the symbolic foundation of indigent defense. Prior to *Gideon*, criminal defendants who could not afford to hire an attorney had no federal constitutional right to appointed counsel, and could possibly have risked prosecution, and even execution, without legal assistance. After *Gideon*, every criminal defendant charged with a felony is defended by an attorney, even those who cannot

2. See Fed. R. Evid. 103(a) (“A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: (1) if the ruling admits evidence, a party, on the record: (A) timely objects or moves to strike; and (B) states the specific ground, unless it was apparent from the context.”).


7. See, e.g., Powell v. Alabama, 287 U.S. 45, 49-50, 58, 73 (1932) (holding that “defendants were not accorded the right of counsel in any substantial sense” and subsequently reversing the convictions of several African-American men who were tried, convicted, and sentenced to death for the rape of two white girls by juries in three separate trials completed in one day).
afford to hire one. In fact, because indigent defendants constitute the majority of all suspects arrested, the government typically finances both attorneys in a modern criminal case: the prosecutor and the defense attorney.

Representing criminal defendants presents wide-ranging challenges. Defending various crimes encompasses diverse areas of skill and expertise: even a simple driving while intoxicated charge necessitates that the defense attorney be cognizant of recent, complicated constitutional law cases, understand the mechanics of laboratory machinery, and be able to effectively

8. Gideon, 372 U.S. at 344; see also Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (holding state must provide indigent defendant access to competent psychiatrist for trial purposes when sanity at time of offense is at issue).


10. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307-11 (2009) (holding that the Confrontation Clause requires that the analyst who performed narcotics analysis testify and be subject to cross-examination); Bullcoming v. New Mexico, 131 S. Ct. 2705, 2709-10, 2716 (2011) (holding that the Confrontation Clause does not allow the introduction of forensic evidence through a testimonial, signed certificate of analysis in a DWI case and that instead the analyst must appear and be subject to cross-examination, or be somehow unavailable).

11. For example, defense attorneys should be aware of blood analysis methods for drug tests:

The preferred method of blood analysis (when looking for alcohol content) is a process called "gas chromatography" or "GC." This testing method utilizes a measuring technique of comparison of a known "standard" to the subject's sample. These standards are typically certified pre-mix solutions, which have been tested and re-tested for being accurate and reliable "markers" for the GC device.

If an officer suspects that drugs are all or part of the impairing substance in your system, most states permit the officer to demand a blood sample, a urine sample, or both blood and urine. When a crime lab checks for drugs (other than alcohol), a different device is used. The internationally accepted "standard" for such testing is a "GC-MS" (gas chromatography, mass spectrophotometry) device. This piece of equipment is capable of isolating and identifying a wide range of drugs, including prescription drugs and illegal (contraband) drugs. It does this by matching the digitally produced peaks appearing on a graph-like sheet of computer paper. The computer tracks the time of the introduction of the sample and the exit of the sample from the device and then identifies the substance based on the retention time (how long it took the substance to pass through a column packed with inert material). Charts and notebooks are kept in the crime lab, which tell the lab scientists how long each substance takes to pass through the column. That way, once the printout of the peaks is finished, the laboratory chemist can compare the time of retention to the lab notebooks showing retention times for drugs or other chemicals.

Furthermore, the laboratory will usually run a quick series of immunoassay tests on a different device before running the time-consuming GC-MS tests. These immunoassay tests are looking for common drugs of abuse, such as opiates, cannabinoids (marijuana), sedatives, pain killers, etc. If these immunoassay tests come back negative, the lab will usually report that the sample did not have any type of
counter expert testimony. The most serious criminal defense cases involve the intricacies of aggravating and mitigating factors in capital murder cases and researching the complicated rules of habeas corpus petitions. For public defenders, those attorneys working full-time representing the poor, the challenges of being an effective criminal defense attorney are increased because of the often crushing caseload and because, unlike privately retained counsel, public defenders must represent every client to whom they are assigned.

In conducting scientific tests, the GC-MS will be set up to look for common drugs in the blood sample. If any class of drugs shows positive, the GC-MS will be set up to look for common drugs in that class (e.g., sedatives) in the blood sample. Blood Test Information, DRUNKDRIVINGDEFENSE.COM, http://www.drunkdrivingdefense.com/general/blood-tests.htm (last visited Jan. 26, 2013) (emphasis and internal quotation marks omitted).


13. Benjamin H. Barton & Stephanos Bibas, Triaging Appointed-Counsel Funding and Pro Se Access to Justice, 160 U. PA. L. REV. 967, 973 n.20 (2012). The complexity of capital cases has an additional consequence for indigent defendants: As a result, few experienced lawyers are willing to take capital cases, and those who do lack the time and tools to do a thorough job. The problem is especially acute because capital cases are among the longest and most complex proceedings in our legal system, and capital defendants have the most at stake. Moreover, capital defense attorneys are often outgunned by prosecutors who enjoy better pay and investigative and expert support as well as more experience and specialization in capital punishment. Id. at 973 (citing Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L.J. 1835, 1844-49 (1993)).

14. Data from the Bureau of Justice Statistics illustrate the heavy caseload handled by public defenders:

In 2007, 22 states had a central administrative office that oversaw the operations and funding of all public defender offices within the state. Data from the 22 state programs are reported at the state-level because within each state, state-based offices often share resources and caseloads, as needed. State public defender programs employed 4,300 (29%) of the nation’s 15,000 public defenders and received 1.5 million (27%) of the nearly 5.6 million cases received by public defenders nationwide in 2007.

. . . Misdemeanors and ordinance violations accounted for more than 40% of the cases received. Felony non-capital cases made up a quarter of the incoming cases. Public defender programs in the 13 states that had the death penalty received 436 death-penalty eligible cases in 2007. Numeric caseload standards recommend that a public defender should carry no more than 150 felony, 400 misdemeanor, 200 juvenile-related, or 25 appellate cases in a year. In 2007, four of the 17 state public defender programs reporting complete caseload data had a sufficient number of attorneys to handle the number of cases received in their office according to this guideline.

Indigent Defense Systems, supra note 9.

Two recent United States Supreme Court cases have further burdened criminal defense attorneys, especially those attorneys who cannot refuse to represent a client.16 In Indiana v. Edwards, the Supreme Court held that courts may appoint defense attorneys to represent those defendants who are competent to stand trial but not competent to proceed pro se, even over the objection of the defendant.17 In Padilla v. Kentucky, the Court held that failing to inform a criminal defendant of the risk of deportation prior to pleading guilty constituted ineffective assistance of counsel.18 Combined, these two cases unfairly burden defense attorneys while failing to significantly improve client representation. In particular, this Article will demonstrate the burden that these cases place on those who defend the poor.19

Although Padilla and Edwards address diverse, unrelated issues, both cases ultimately expand the traditional role of defense counsel. Padilla directly impacts that role by affirmatively requiring an additional duty when immigration issues are present.20 Edwards indirectly impacts defense counsel.21 The defense attorney does not perform a psychiatric evaluation or make a competency decision.22 However, once a trial court rules a defendant incompetent for self-representation, the defense attorney must represent that defendant even if the defendant objects.23 The attorney must thus struggle with an uncooperative, mentally ill client whose illness interferes with reasoning and decision making. In order to represent an Edwards-incompetent defendant, the defense attorney's responsibilities necessarily increase and expand beyond the traditional defense role.

Part I of this Article will describe the state of indigent defense today, in which large numbers of criminal defendants receive court-appointed counsel. Part II will analyze Edwards and Padilla and further explore their impact on the defense bar. Part III will offer solutions, including that the Court reformulate the competency standard and also assign to the trial court judge, the prosecutor, or an administrative body the responsibility of fully informing criminal defendants of the potential results of a criminal conviction.

---

17. 554 U.S. at 177-78.
18. 130 S. Ct. at 1486.
19. See infra Part I.
20. See 130 S. Ct. at 1482.
22. Id. at 177-78.
23. Id.
I. INDIGENT DEFENSE

While *Gideon* ensured that no criminal defendant faced a felony conviction without legal assistance, and *Strickland v. Washington* required that all attorneys perform to a minimum level of competency, the reality of effective, zealous representation often fails to live up to these promises. Limited funding, insufficient training, and lack of supervision permeate the indigent defense system. Additionally, constitutional law decisions, along with the complexity of criminal cases, require that the defense attorney master complicated and voluminous case law.

When a criminal defendant cannot afford to hire an attorney, the trial court judge either assigns a court-appointed attorney or a public defender. However assigned, the *Padilla* and *Edwards* cases impact the defense attorney in the same manner. This Article specifically assesses the impact of *Padilla* and *Edwards* on those who defend indigents, whether assigned, court-appointed, or public defenders, and uses these terms interchangeably.

*Padilla* will impact retained attorneys to a lesser degree. Retained attorneys are those hired by solvent criminal defendants. Since the client is solvent, the retained criminal defense attorney can simply consult with an immigration expert and bill the client. Without access to funds for an immigration attorney, indigent defenders will now have an additional, unfunded responsibility.

*Edwards* will likewise have less impact on retained attorneys because a criminal defendant requesting self-representation is unlikely to have retained an attorney. Additionally, retained attorneys may withdraw if the client does not wish representation. Therefore, an *Edwards* incompetent defendant will be represented by an assigned attorney, not a retained one. The only attorneys who have no choice about whom they represent are the attorneys for the poor: public defenders and court-appointed attorneys.

---

27. This is especially true for death penalty defense attorneys. See generally Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 Mo. L. Rev. 683 (2010).
28. See infra Part II.
Defense attorneys for the indigent receive compensation rates vastly below retained attorneys. While funding for indigent defense varies among the states, and sometimes within one state, the administrative goal of public defender’s offices is to defend as many cases for as little possible cost. Indeed, some indigent defense counsel actively promote the amount of money they can save a jurisdiction. In an election campaign, one public defender “also emphasized his record of financial responsibility, returning roughly $1 million to the state from his budget during his tenure.” Although there are some well-funded indigent defense systems, they are the exception.

Indigent defense attorneys receive insufficient training prior to being abandoned into the courtroom to represent some of the most vulnerable clients: “It’s not shocking to learn that many of the 218 DNA exonerees were represented by public defenders at trial. They were all innocent, but they all lost. In some cases, overburdened, inexperienced and underfunded public defenders were simply not equipped to stand up against the state.”

Lack of training prior to first representing a criminal before a jury trial is not unusual. One public defender explained, “It was pretty traumatic[. My boss] told me the best way to learn was sink or swim.”

Low salaries for indigent defense attorneys often coexist with crushing caseloads. The focus in the modern criminal justice system values effi-

31. See generally Barton & Bibas, supra note 13. Another dramatic example is Attorney Parker, who went from an associate in a private law firm in New York City to becoming an assistant public defender in Louisiana. See, e.g., David Winkler-Schmit, The Life of a New Orleans Public Defender, GAMBIT (Feb. 21, 2009), http://www.bestofneworleans.com/gambit/the-life-of-a-new-orleans-public-defender/Content?oid=1255673 (“By accepting a position in New Orleans, Parker’s salary went from $170,000 per year to $40,000.”).


35. “Other felony and misdemeanor defendants likewise have overworked, underfunded lawyers who quickly press them to plead guilty. The result is an epidemic of ineffective assistance of counsel.” Barton & Bibas, supra note 13, at 972. The top assistant defender in one Virginia office explained that “the low salaries and high caseloads make it hard to recruit and retain attorneys.” Bill Frechling, Poor Defendants Get Shortchanged, Public
ciency over justice. Criminal defense attorneys sometimes act as mere cogs in the conviction machine. "We wax poetically about justice for all[,] . . . . [a]nd yet you go into courthouses all over the country, and what you see is not at all what is being celebrated. What you see is people being processed like widgets on an assembly line." 36 The crushing caseload somewhat explains the lack of individualized attention to a client's case. One chief public defender explained, "'We had an attorney [last year] who blew through 500 cases in a year, most of them felonies. . . . You can't confidently represent these folks [with that kind of caseload].'" 37 Two recent Supreme Court cases further complicate the job of the street-crime level defense attorney, requiring that the defense attorney role expand to include legal matters involving psychiatry and immigration law. 38

II. THE ROLE OF THE DEFENSE ATTORNEY

Criminal defense attorneys must have the flexibility to address multiple complex subjects. Competent defense attorneys must further exhibit proficiency in evidence, constitutional law, criminal law, and criminal procedure so as to effectively defend the client. Such representation may include consultation with professionals from other areas, such as psychiatry and immigration law. However, consultation differs from expertise. The Court now requires that criminal defense attorneys master areas far beyond criminal defense.

A. Indiana v. Edwards

1. The Dusky Standard

For many years, the Supreme Court equated competency to stand trial with competency to waive the Sixth Amendment right to counsel. Dusky v. United States defined competency to stand trial as "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." 39 In 1993, the Supreme Court reemphasized the Dusky standard and found that "there is no

---

39. 362 U.S. 402, 402 (1960); see also Drope v. Missouri, 420 U.S. 162, 172 (1975) (quoting id.).
reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights." Following the Faretta v. California holding that a criminal defendant has a Sixth Amendment right of self-representation, the Supreme Court seemingly held that as long as a criminal defendant was Dusky competent, he was also competent to waive his right to counsel and assert his right to represent himself.

Thus, the law seemed settled until the Supreme Court developed an exception to the right of self-representation in Indiana v. Edwards. The trial court judge refused to allow Edwards to represent himself. On appeal, the Indiana courts ruled that such refusal deprived him of his Sixth Amendment right to represent himself. The Supreme Court reversed that ruling, finding that the trial court did not violate the Sixth Amendment when it forced Edwards to be represented by a defense attorney over his objection. In Edwards, the Court announced an exception to the right of self-representation for the mentally ill, holding that "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." Essentially, two competency standards for counsel waiver currently exist: one for those who suffer from a mental illness and one for those who do not.

Scholars have responded to the Supreme Court's ruling in Edwards. Criticisms include objections to the disparate treatment of the mentally ill and to the argument that the Edwards Court failed to address the weaknesses in the Dusky standard. These criticisms point to weaknesses that, if cor-

41. 422 U.S. 806, 807, 844-45 (1975).
44. Id. at 169.
45. Id.
46. Id. at 169, 179.
47. Id. at 178.
rected, would obviate the need for disparate competency standards. This Article focuses on the fact that Edwards primarily burdens the defense attorney while doing nothing to ensure the defendant's rights to a fair trial and a vigorous defense are observed.

2. The Edwards Standard

The Edwards decision requires that, if a trial court finds a Dusky-competent defendant incompetent to proceed pro se, a defense attorney must be appointed against the defendant's will and over his objection. The court-imposed defense attorney will then have the right, and perhaps even the duty, to overrule any decisions that the defendant wishes to make in his own defense, including what defense to raise, what witnesses to call, and what trial strategy to take.

The Court justifies this decision by creating a non-legal and non-medical description of the Dusky-competent defendant who is nevertheless incompetent to represent himself. The Court likened the situation in Edwards to Godinez v. Moran, where the Court found that the competency standard to proceed was identical to the competency standard to stand trial, explaining that "[b]oth involve a mental condition that falls in a gray area between Dusky's minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose." After this description, the Court continues to refer to the "gray-area defendant" throughout the decision, as if the term conveyed a meaningful legal or psychiatric concept. For example, the Court misleadingly references the earlier Godinez case analysis as if the Court had invoked this terminology previously: "One

49. Such analysis is beyond the scope of this Article. For a detailed analysis with suggestions for fixing the Dusky standard, see generally Davoli, supra note 48.
50. See infra Subsections II.A.3-5.
51. 554 U.S. at 177-78 ("We consequently conclude 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. 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.").
52. "But the problem of the Colin Ferguson trial was not that Mr. Ferguson was representing himself; that was only a symptom of the problem. The problem was that Ferguson was psychotic and should not have been tried in the first place." Ronald L. Kuby & William M. Kunstler, So Crazy He Thinks He Is Sane: The Colin Ferguson Trial and the Competency Standard, 5 CORNELL J.L. & PUB. POL'Y 19, 20 (1995).
55. 554 U.S. at 172.
56. The term "gray-area" is used four more times in the opinion. Id. at 173-74.
might argue that Godinez’s grant (to a State) of permission to allow a gray-area defendant self-representation must implicitly include permission to deny self-representation.” The problem with any argument about Godinez’s reference to “gray-area defendants” is that such a concept was simply never considered by the Godinez decision because such a concept had never existed prior to its invention in Edwards.

Perhaps to justify its decision in Edwards, the Court needed to develop a concept that expressed its belief that a Dusky-competent defendant could somehow not be a Godinez-competent defendant. Unfortunately, the Court continues to exhibit a lack of sophistication concerning serious mental illnesses. Because the Court does not understand the link between mental illness and incompetency, it invented the concept of a “gray-area defendant.” This new term ignores the reality that the Dusky competency standard sometimes results in mentally ill individuals who are psychotic and delusional nevertheless being found competent to stand trial.

Instead of honestly confronting the failings of the Dusky standard, the Court attempts to solve the problem of incompetent defendants asserting their right to self-representation by pretending that “gray-area defendants” constitute a legitimate, easily defined, and already recognized category.

57. Id. at 173.
59. “Any practicing criminal defense attorney has a number of stories involving seriously mentally ill defendants who were found competent to stand trial.” Blume & Clark, supra note 48, at 166; see also Davoli, supra note 48, at 315; Davis v. Woodford, 333 F.3d 982, 999-1000 (9th Cir. 2003) (finding defendant competent under Dusky despite having a hysterical conversion disorder during penalty phase because psychologist gave no indication defendant was incompetent at time of trial and defendant’s behavior did not indicate incompetence); United States v. Morrison, 153 F.3d 34, 39-40, 46 (2d Cir. 1998) (finding defendant competent under Dusky despite psychologist’s inability to rule out “grandiose or paranoid delusions” because psychologist found “no clear evidence” of need for care and testified defendant understood charges and could assist counsel (internal quotation marks omitted)).
60. The Court goes so far as to attach a pleading to the Edwards appendix that demonstrates how grueling it would be for a court to try a case involving an annoying, delusional pro se defendant. 554 U.S. at 176, 179. Rather than demonstrating Edwards’ inability to represent himself, however, the pleading merely demonstrates that the Dusky standard has failed to prevent a finding of competency with an obviously mentally ill and delusional defendant. See Brief for Respondent at 2-5, 24-29, Edwards, 554 U.S. 164 (2008) (No. 07-208).
They do not. There is no such psychiatric or psychological term.\textsuperscript{61} Prior to the Court's invention in \textit{Edwards}, there was likewise no such legal term. Once the Court announced the concept of the "gray-area defendant," the Court eliminated the distressing spectacle of hallucinating and delusional defendants representing themselves.\textsuperscript{62} This absolves the trial court judge from having to maintain courtroom decorum through the disruptions of the untreated mentally ill defendant.\textsuperscript{63} While there is no resolution of the failures of the \textit{Dusky} standard, the Court has nevertheless successfully reassigned the role of psychiatrist, or perhaps even social worker, to the defense attorney.

Of course, not every criminal defense attorney will be forced to represent a client who objects to the representation. The Court has specifically reassigned the role of forced-attorney to the defenders of the indigent who cannot refuse appointment: public defenders and court-appointed attorneys. Attorneys who are privately retained have the luxury of refusing to accept cases for which they choose not to enter an appearance.\textsuperscript{64} Those who are court appointed or work for a public defender service do not have such a choice.\textsuperscript{65} Taking this reality into account, the \textit{Edwards} decision seems written by individuals who lack any insight into attorney-client relationships and trial practice.

3. \textit{Defending Edwards}

The facts of the \textit{Edwards} case demonstrate the difficulty of representing both the incompetent and the uncooperative. Defense counsel made numerous requests that his client be found incompetent.\textsuperscript{66} While the record is silent on the client's reaction, the Court failed to acknowledge that request-

\begin{flushleft}
\textsuperscript{61} See generally \textit{The Diagnostic and Statistical Manual of Mental Disorders}, § 309.81 (Am. Psychiatric Ass'n 4th ed.) (1994).

\textsuperscript{62} Indeed, that seems to be the goal of the \textit{Edwards} decision: "[G]iven the defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling." 554 U.S. at 176.

\textsuperscript{63} "Once the right of self-representation for the mentally ill is a sometime thing, trial judges will have every incentive to make their lives easier—to avoid the painful necessity of deciphering occasional pleadings of the sort contained in the Appendix to today's opinion—by appointing knowledgeable and literate counsel." \textit{Id.} at 189 (Scalia, J., dissenting).

\textsuperscript{64} Private attorneys are under no obligation to accept court-appointed clients either. See Freehling, \textit{supra} note 35 ("The rest are done by court-appointed attorneys. . . . [M]any lawyers won't do court-appointed work because of the unwaiveable fee caps that Virginia places on non-capital cases.").

\textsuperscript{65} \textit{WICE}, \textit{supra} note 15, at x-xi, 13.

\textsuperscript{66} 554 U.S. at 167-68.
\end{flushleft}
ing a competency hearing or raising an insanity defense often produces a tense, if not hostile, attorney–client standoff.\textsuperscript{67}

In August 2000, five months after arrest, Edwards’s court-appointed counsel asked for a psychiatric evaluation.\textsuperscript{68} The court found Edwards incompetent at that hearing and sent him to the state hospital for evaluation and treatment.\textsuperscript{69} After Edwards’s doctors determined him to be competent seven months later, his attorney again requested a psychiatric evaluation.\textsuperscript{70} The trial court held another hearing in March 2002, but at that time found Edwards to be \textit{Dusky} competent.\textsuperscript{71} In November 2002, Edwards’s attorney requested another competency hearing and at that time presented expert testimony “showing that Edwards was suffering from serious thinking difficulties and delusions.”\textsuperscript{72} Specifically, one expert testified that Edwards was “unable to cooperate with his attorney in his defense because of his schizophrenic illness; [h]is delusions and his marked difficulties in thinking make it impossible for him to cooperate with his attorney.”\textsuperscript{73} He was again found incompetent.\textsuperscript{74}

Absent from the Supreme Court’s \textit{Edwards} analysis is any recognition of the difficulties of this situation from the defense attorney’s perspective. Three times prior to trial, the defense attorney made motions for expert psychiatric assistance and twice the trial court specifically found that Edwards’s illness interfered with his ability to cooperate with his attorney.\textsuperscript{75} Yet nowhere did the trial court analyze the impact on the attorney–client relationship of the attorney having to draw the court’s attention to the fact that he could not communicate with his client, likely while that client was sitting in the courtroom beside the attorney.\textsuperscript{76} The Supreme Court likewise

\begin{flushleft}
\textsuperscript{67}. See generally id. at 166-79. See also Mark C. Bardwell & Bruce A. Arrigo, \textit{Criminal Competency on Trial: The Case of Colin Ferguson} 338-39 (2002) (“Questions surfaced regarding [the Unabomber Ted] Kaczynski’s mental health and his relationship with defense counsel. These matters soon became one and the same as a profound conflict developed between Kaczynski and his attorneys over a mental defect defense. Kaczynski wanted to avoid being portrayed as a ‘sickie’ while his defense team intimated that a mental status defense would either be the case in chief or implemented during the penalty phase.” (citations omitted)).

\textsuperscript{68}. \textit{Edwards}, 554 U.S. at 167. Thus, from the very beginning of the case, Edwards did not have the means or ability to retain his own attorney and was assigned one by the trial court. See id.

\textsuperscript{69}. \textit{Id.}

\textsuperscript{70}. \textit{Id.} at 168.

\textsuperscript{71}. \textit{Id.}

\textsuperscript{72}. \textit{Id.}

\textsuperscript{73}. \textit{Id.} (internal quotations and citations omitted).

\textsuperscript{74}. \textit{Id.}

\textsuperscript{75}. See supra text accompanying notes 66-74.

\textsuperscript{76}. See \textit{Edwards}, 554 U.S. at 167-69. Capital murder defendant Juan Carlos Chavez’s claim of ineffective assistance of counsel during the penalty phase was not compelling because Chavez’s refusal to cooperate negatively impacted counsel’s performance.
\end{flushleft}
failed to acknowledge the difference between a client who cannot cooperate with counsel and one who cannot communicate with the attorney.

The Dusky standard does not mention the client’s need to cooperate, a term which indicates that the defendant is acting with some willfulness in refusing to do so. Instead, Dusky requires that the defendant be able “to consult with his lawyer with a reasonable degree of rational understanding.” These terms have distinct meanings. To consult with indicates an equal or perhaps even a subservient role for the attorney. The client consults with the attorney on a multitude of issues from arrest to final verdict, yet the client retains the autonomy to make final decisions. To cooperate with inverts the relationship and indicates that it is somehow the client’s job to “be cooperative,” instead of the attorney’s role to assist the defendant.

This subtle shift in the attorney–client relationship strips the defendant of power and autonomy, relegating the defendant to a minor role in his own case. The Edwards case clearly demonstrates this phenomenon. As part of his motion to proceed pro se at his first trial, Edwards “complained in detail that the attorney representing him had not spent adequate time preparing and was not sharing legal materials for use in his defense.” Despite his display of an understanding of the legal process and his ability to answer questions concerning trial procedure, the trial court denied his motion.

[Edwards] explained that he and his attorney disagreed about which defense to present to the attempted murder charge. Edwards’ counsel favored lack of intent to kill; Edwards, self-defense. As the defendant put it: “My objection is me and my

Chavez v. State, 12 So. 3d 199, 209-10 (Fla. 2009). “Here, limitations were imposed on counsel due to Chavez’s refusal to provide certain facts with regard to his background.” Id. at 209. The “Long Island Railroad Shooter,” Colin Ferguson, objected to the presentation of any psychiatric evidence for his defense by his defense attorneys. See BARDWELL & ARRIGO, supra note 67, at 162-63 (“From the outset of the direct examination, Mr. Ferguson proved to [be] a combative defendant. For example, when Mr. Kuby [defense attorney] attempted to enter several items into evidence used by Dr. Dudley to render his medical opinion, Ferguson passionately objected, raising legal issues about attorney–client confidentiality.”).

77. See also supra Subsection II.A.1.
78. 362 U.S. 402, 402 (1960) (emphasis added) (quoting the solicitor general).
79. Professor Thomas H. Shaffer has written extensively about the attorney–client relationship:
The lawyer as godfather wants client victory, the lawyer as hired gun wants client autonomy, the lawyer as guru wants client rectitude, and the lawyer as friend wants client goodness. Each of the lawyers has a different combination of answers to two questions: (1) Who controls the representation? and (2) Do the interests of those other than the client matter?

THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 88 (2d ed. 2009).
80. Edwards, 554 U.S. at 181 (Scalia, J., dissenting).
attorney actually had discussed a defense, . . . and we are in disagreement with it.\textsuperscript{81}

Although Edwards was the only individual who would suffer a consequence if he was convicted, and despite the fact that Edwards clearly and coherently articulated a significant disagreement in how his case would be defended while simultaneously displaying an understanding of trial procedure, the Supreme Court found he lacked the competency to proceed.\textsuperscript{82}

Yet Edwards did not appear to be exhibiting a “gray-area” lack of competence between \textit{Dusky} competence and a competency level commensurate with waiving counsel. Rather, he was apparently disagreeing with or being “uncooperative” with his attorney. While rejecting an attorney’s advice may not be advisable or prudent, there is nothing inherently irrational about that decision. Attorneys are not fortunetellers. They cannot predict a future that is somehow unknown by everyone else. Rather, attorneys are experts in the law and legal procedure and give advice based on their perception of the strength of the prosecution’s case, the viability of a defense, and numerous other factors. Prior to \textit{Edwards}, one important factor had always been the wishes of the client.\textsuperscript{83}

\textbf{4. The Attorney–Client Relationship}

Not only did the Court punish Edwards by stripping him of both his right to proceed and the right to choose his defense because he was apparently uncooperative, but the Court also brushed over the deterioration of the attorney–client relationship while exhibiting a startlingly naivete about interpersonal relationships in general. The Court never addressed the fact that moving to have a client declared incompetent often severely damages the attorney–client relationship.\textsuperscript{84} An attorney who makes a competency motion

\begin{itemize}
\item \textsuperscript{81} \textit{Id.} (citation omitted).
\item \textsuperscript{82} Christopher Slobogin, \textit{Mental Illness and Self-Representation: Faretta, Godinez and Edwards}, 7 \textit{OHIO ST. J. CRIM. L.} 391, 392 (2009).
\item \textsuperscript{83} In each of Professor Thomas L. Shaffer’s attorney–client relationship types, the attorney consults and determines the client’s wishes. \textit{See Shaffer & Cochran, Jr., supra} note 79, at 3-4.
\item \textsuperscript{84} \textit{See Edwards}, 554 \textit{U.S.} at 167-79. The notorious Unabomber case of Ted Kaczynski illustrates the breakdown of the attorney–client relationship when the client rejects the representation of defense counsel. Kaczynski’s attorneys were court-appointed, and intended to raise a defense that included evidence concerning his mental illness. \textit{Bardwell & Arrigo, supra} note 67, at 339-40 (“While the attorneys advanced their ‘impaired capacity’ defense plan, the tension between Kaczynski and his counselors grew and eventually erupted when the accused rejected in open court any form of an impaired mental status defense. These very volatile and contentious psycholegal matters consumed much of the pretrial phase of the case. Interposing requests for new counsel and imploring the judge to rule on who ultimately controlled the mental status defense, the unabomber endeavored to identify options to resolve the obvious and deep conflict involving the defense team and Kaczynski on
may do so over the objection of the client, and clients typically resent the attorney who is supposed to be advocating for their defense, instead “telling on” the client to the court.85

While some clients may return from being restored to competency with a more “cooperative” attitude toward the defense attorney,86 many return still resentful of the attorney’s role in subjecting the client to involuntary psychiatric treatment.87 After Edwards, a client who is Dusky competent but rejects his attorney’s advice has no right of self-representation. This decision not only unfairly singles out the mentally ill, but it particularly treats the indigent as having fewer rights than those of financial means.88 Criminal defendants with the means to hire an attorney still retain the autonomy of whom to hire if the trial court finds that defendant to be Edwards-incompetent. However, indigent criminal defendants have no such choice. An indigent defendant denied the right to self-representation must the issue of the mental health evidence. Judge Garland Burrell who presided over the Kaczynski matter denied the defendant’s request for new counsel, suggesting that it was ‘untimely’ and further ruled that his lawyers were entrusted with determining whether or not a mental status defense was warranted in the case. As a result of the Judge’s ruling and to escape the impending presentation of a mental status defense, Kaczynski (evidently that very evening) attempted suicide.” (citations omitted)).

85. Colin Ferguson, the “Long Island Railroad Shooter,” demonstrated this phenomenon by firing attorneys who attempted to notify the court of his incompetency and insanity. Id. at 248-49 (“Well we see Anthony Falanga, the first attorney.... No cooperation from Mr. Ferguson. And again, Mr. Ferguson makes up a wild series of allegations about Mr. Falanga, none of which are true. Mr. Falanga gets discharged, and Mr. Ferguson calls us up and asks us if we would take the case. We agree to do so. And after a very short honeymoon we too become the people who are conspiring against him.... We are accused of making him go blind and accused of conspiring with you [Judge Belfi] and ultimately accused of being part of a murder plot with the D.A. and Nassau County Sheriffs’ Department and the Court.”) (citation omitted)).

86. Cf. Lori H. Colwell & Julie Giansini, Demographic, Criminogenic, and Psychiatric Factors That Predict Competency Restoration, 39 J. Am. Acad. Psychiatry & L. 297, 304 (2011) (“Likewise, some patients who required special observation were those who had significant behavior problems. This inability to control their behavior may serve as a marker of their inability to work with or assist counsel or to maintain appropriate courtroom behavior.”).

87. In Colin Ferguson’s pretrial hearing to dismiss his attorneys and proceed pro se, the prosecutor comments on this complete breakdown in the attorney–client relationship, using the breakdown as evidence of the defendant’s rationality. BARDWELL & ARRIGO, supra note 67, at 252-55 (“Now, in this court of law for the first time I believe Mr. Kuby [defense counsel] has called him [Mr. Ferguson] insane.... You can see from the tone of the letters and the history of this particular case that what Mr. Ferguson is most annoyed with, and he asked you [Judge Belfi] on numerous occasions to shut them up by means of a restraining order, what he is most annoyed with is Mr. Kunstler [defense counsel] and Mr. Kuby making public statements which are disseminated in the media telling the world that he is crazy; that he is insane.”) (citation omitted)).

88. See Davoli, supra note 48, at 321.
also accept whichever attorney is forced on him against his will—and all decisions made by that attorney. \textsuperscript{89}

In so deciding, the Court neglects to consider the issue from the defense attorney’s perspective, and particularly the perspective of the attorney who cannot refuse a case: the indigent client’s defender. Typically, even if a client disagrees with some decisions, at least the client has requested the representation. \textsuperscript{90} After \textit{Edwards}, the indigent defender will now be representing the unwilling.

In \textit{Edwards}, the Court never once mentions, apparently because the issue never occurs to them, the difficulties of forcing an attorney upon an objecting client. A client who does not wish to be represented by an attorney may simply choose not to meet with the attorney or with any defense experts hired by the attorney, whether or not the client is incarcerated. \textsuperscript{91} Thus, basic issues of representation will simply never be discussed. Such issues include: discovering whether or not there is a potential defense to the charge and if so, which defense to select; how to locate potential defense witnesses; whether or not to accept a plea offer; and whether or not any suppression or other pretrial issues exist. If a case then proceeds to trial, the Court likewise fails to imagine a trial in which the client and the attorney are estranged, but are forced to sit next to one another. \textsuperscript{92} An attorney repre-

\textsuperscript{89} Id. at 327-28.

\textsuperscript{90} “Thus, in order for the defendant’s right to call his own witnesses, to cross-examine witnesses, and to put on a defense to be anything more than ‘a tenuous and unacceptable legal fiction,’ a defendant must have consented to the representation of counsel.” \textit{Indiana v. Edwards}, 554 U.S. 164, 188 (Scalia, J., dissenting) (quoting \textit{Faretta v. California}, 422 U.S. 806, 821 (1975)).

\textsuperscript{91} In a death penalty prosecution, defendant Chavez undermined his own defense by his lack of cooperation:

In addition, counsel was not deficient for failing to present mitigation testimony based on the client’s self-imposed limitations. Lead counsel testified that it was necessary to mislead Chavez to convince him to even confer with Dr. Quintana because Chavez did not want to present penalty-phase mitigation. At first, lead counsel informed Chavez that Dr. Quintana was only going to evaluate him as it related to the guilt phase. When the time to conduct a follow-up interview arrived, lead counsel testified that Chavez refused to participate.

\textit{Chavez v. State}, 12 So. 3d 199, 210 (Fla. 2009). In another case, defendant Colin Ferguson objected to any sort of psychiatric evaluation. According to [defense attorneys], the only reason Mr. Ferguson met with the defense psychiatrist at all was because he presumed Dr. Dudley was the eye doctor whom he had requested to see. After the initial visit, Ferguson refused all forms of follow-up meetings, precluding a complete psychiatric examination.

\textit{Bardwell & Arrigo, supra} note 67, at 162 (citations omitted).

\textsuperscript{92} See id. at 244, 246. While arguing that his client, Colin Ferguson, was incompetent to stand trial, defense counsel emphasized that Ferguson “suffers from delusional disorder persecutory type. He has firm and fixed and unshakeable delusions of persecution. He is incapable of forming any relationship on the basis of trust. He is incapable of trusting another attorney, any attorney, enough to rationally evaluate the advice that attorney provides.” \textit{Id.}
senting a client over that client’s objection can only be said to be representing that client through the absurd reasoning of the Edwards decision. From the client’s perspective, that attorney is hostile to the client and is colluding with the government in forcing the client to accept the representation.\(^{93}\)

Most significantly, as noted by Justice Scalia in his Edwards dissent, the forced indigent defender is now making decisions over the defendant’s objection but for which the defendant alone remains responsible.\(^{94}\) The Sixth Amendment reserves trials rights to the defendant, not the defense attorney:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.\(^{95}\)

Even though the Sixth Amendment clearly states that the accused enjoys all these trial rights, Justice Scalia explains that it is the defense attorney who typically asserts such rights:

Our trial system, however, allows the attorney representing a defendant “full authority to manage the conduct of the trial”—an authority without which “[t]he adversary process could not function effectively.” We have held that “the client must accept the consequences of the lawyer’s decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial.” Thus, in order for the defendant’s right to call his own witnesses, to cross-examine witnesses, and to put on a defense to be anything more than “a tenuous and unacceptable legal fiction,” a defendant must have consented to the representation of counsel.\(^{96}\)

Justice Scalia demonstrates that the legitimacy of the attorney’s role stems from the consent of the accused.\(^{97}\) Yet, an Edwards indigent defendant is a “client” who specifically has not consented and has objected to the representation of the attorney sitting next to him and arguing on his behalf.\(^{98}\)

A forced indigent client’s defense attorney must somehow zealously represent a client who does not want him there. Likely conversations at counsel table will include the defense attorney attempting to control a client who actively objects—probably in a hissing and distracting voice in the

\(^{93}\) The Court noted that “[b]ut to hold that a defendant may be deprived of the right to make legal arguments for acquittal simply because a state-selected agent has made different arguments on his behalf is, as Justice Frankfurter wrote in Adams . . . to ‘imprison a man in his privileges and call it the Constitution.’” Edwards, 554 U.S. at 189 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 280 (1942)).

\(^{94}\) Id. at 188.

\(^{95}\) U.S. CONST. amend. VI.

\(^{96}\) Edwards, 554 U.S. at 188 (quoting Taylor v. Illinois, 484 U.S. 400, 418 (1988); Faretta, 422 U.S. at 821).

\(^{97}\) Id.

\(^{98}\) Id. at 188-89.
attorney’s ear—to the attorney’s every decision. Such situations are not uncommon even when the defendant has requested counsel.

An Edwards-incompetent defendant may not only disagree with the attorney’s strategy, defense, and questions, but may object to that attorney’s entire presence. The Supreme Court has previously outlined the duties of defense counsel:

Representation of a criminal defendant entails certain basic duties. Counsel’s function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel’s function as assistant to the defendant derive the overarching duty to advocate the defendant’s cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

The defense attorney representing the objecting Edwards-competent client will struggle with each of these duties. The defense attorney will not know how to be loyal to someone who is asking him to go away and not sharing any of his thoughts with the attorney. The attorney can hardly avoid a conflict of interest when the entire relationship is based upon the obvious conflict that the attorney’s interest (forced upon him by the court) is to represent the client, and the client’s interest is the exact opposite. Counsel is required to assist the defendant who wants no assistance, to advocate for the client by rejecting what the client wants advocated (such as the self-defense claim in Edwards), to consult with the client on important decisions that the client does not get to make anyway, and to keep the defendant who wants nothing to do with the attorney informed of important developments. Such a situation is not only absurd, but also actually impossible. Counsel’s duty to bring “skill and knowledge as will render the trial a reliable adversarial testing process” seems the only duty listed by the Court in Strickland that an attorney might be able to fulfill even when the client does not want representation.

Perhaps Edwards himself inadvertently deceived the Supreme Court into believing that such a relationship is possible by his behavior at trial.

99. Similarly, in the effective assistance of counsel area, the Supreme Court has recognized that merely standing beside a client does not make an attorney effective. See Strickland v. Washington, 466 U.S. 668, 685 (1984).


101. Strickland, 466 U.S. at 688.

102. “The result will be what may well have occurred in Edwards: a competent, autonomous defendant will be prevented from telling his own story and forced, instead, to listen to a lawyer tell an entirely different one.” Slobogin, supra note 75 at 411.

103. Strickland, 466 U.S. at 688.
"Edwards was not even allowed to begin to represent himself, and because he was respectful and compliant and did not provide a basis to conclude a trial could not have gone forward had he been allowed to press his own claims." Thus, despite disagreeing with the entire manner in which he was being defended, Edwards sat still and didn’t disrupt the proceedings, somehow validating the Court’s perspective that cooperation equates with Dusky competence.

Seasoned trial attorneys are only too familiar with the clients who aren’t cooperative and have to be reasoned, persuaded, and sometimes even coerced into agreeing to certain decisions. At least in those instances, the attorney acts with the conviction that the client desired the representation. A forced indigent defense attorney acts with no authority from the client whatsoever, and perhaps without even a client with whom to consult.

Mentally ill clients who object to representation often lack the cooperative nature assumed by the Supreme Court. One dramatic example occurred during a competency hearing in August 2012, for defendant Rashad Riddick. Accused of a triple murder and facing a potential death sentence, the defendant’s personal objection to court-appointed counsel completely disrupted his hearing. “From the start, Riddick was visibly agitated, screaming out whenever the judge attempted to question defense attorneys about the outcome of his recent mental assessment at Central State Hospital in Petersburg.” When his attorney tried to speak, Riddick interrupted with his own objection. “I am objecting to anything he says,” Riddick called out. “I don’t give a shit what he says.” The hearing ended when the defendant “exploded into an apparent fit of rage” and “repeatedly punched court-appointed attorney Joseph Flood, of Fairfax, in the face about 15 minutes into the hearing.”

Despite the assault, the defense attorney continued to vigorously represent his now absent client. “Flood attributed the explosive incident to the preceding testimony about ‘the touchy issue’ of Riddick’s mental health. ‘It

105. See id.
106. See SHAFFER & COCHRAN, JR., supra note 79, at 9 (“Lawyers manipulated clients to settle by exaggerating the risks of loss. They maintained control of cases by portraying law as an ‘insider’s game’ where they had the necessary connections with public authorities. The lawyers portrayed even simple concepts of law in complex, unclear terms that clients could not understand. When trying to persuade clients, ‘[t]hey construct[ed] meanings in the service of [their] own power.’” (citations omitted)).
108. Id.
109. Id.
110. Id.
111. Id.
has been our position he has serious mental health issues,' Flood said.\textsuperscript{112} Riddick’s case demonstrates the difficulty of raising issues of competency or insanity over the objections of the defendant. “The defense attorney said Riddick is ‘extremely uncomfortable’ discussing anything to do with his mental health issues.”\textsuperscript{113} Thus, the defense attorney must attempt to develop a defense to which his client is literally violently opposed to asserting.

Under such circumstances, a defense attorney may struggle to provide a competent defense, and this ultimately harms the defendant. While defending a case on insufficiency of the evidence grounds may be possible without the client’s involvement, there is little else that can be accomplished over a client’s objection and without the client’s approval.\textsuperscript{114} The attorney is limited to challenging the prosecution’s case without information and assistance typically gleaned through client interaction that enables the attorney to counter the damaging evidence.

Motions to suppress involuntary confessions would lack the powerful testimony of the defendant. Additionally:

[A defendant] who is forced to accept a lawyer and a defense not of his choosing, could take the witness stand and proclaim his sanity, while condemning the insanity defense as a trick cooked up by his lawyer and the court. Defense counsel would be powerless in these circumstances and the prosecution, during cross-examination of the defendant, would be able to further undermine the defense that neither the prosecutor nor the defendant wanted in the first place.\textsuperscript{115}

Images such as these may be hard to discern from the viewpoint of the Supreme Court bench, but indigent defense attorneys can typically relate similar scenarios.\textsuperscript{116}

Remarkable in its absence from the Court’s discussion is the impact of the \textit{Edwards} decision on the most routine issue facing criminal defendants: whether or not to accept a plea offer. The majority of modern criminal cases

\begin{itemize}
  \item \textsuperscript{112} Ibid.
  \item \textsuperscript{113} Ibid.
  \item \textsuperscript{114} “But as a practical matter, it is impossible to force a psychiatric defense on an unwilling defendant. A defendant cannot be compelled, by his own counsel, to consult with, confide in, or even meet with a psychiatrist.” Kuby & Kunstler, \textit{supra} note 52, at 21 (citing N.Y. CRIM. PROC. LAW § 730.30 (McKinney 1994)).
  \item \textsuperscript{115} Ibid. at 22.
  \item \textsuperscript{116} “How will one make the fine distinction between a defendant’s lack of competence to represent himself (given all the complex tasks involved) and his mere bad judgment? Will we be able to distinguish a mentally ill defendant’s decision to put forth a poorly conceived or disadvantageous defense from an illogical defense that flows from his mental illness? Will more serious charges require a higher level of competence for the defendant who represents himself \textit{pro se}?" James L. Knoll IV, \textit{Dignity in the Gray Zone}, Indiana v. Edwards, 25 PSYCHIATRIC TIMES 13 (2008) (discussing how difficult the new \textit{Edwards} standard is to apply).
\end{itemize}
are resolved, not through trial, but through guilty pleas. Criminal defense attorneys and prosecutors typically plea bargain, thereby expediting case resolutions. An Edwards-incompetent client who refuses to meet with the attorney whom he has already rejected will not be a party to the plea bargain process, yet the attorney may feel as though the plea bargain is the best possible result for the client.

5. Symptoms of Mental Illness

The Supreme Court fails to explain how a defense attorney will proceed without the client’s cooperation, over the client’s objection, and with the belief that the client is actually incompetent. It is hard to imagine how the defense attorney will investigate the case or what witnesses the attorney should question from the defense perspective. In the Edwards case, the defense attorney rejected the client’s requested defense and lost the case anyway.

Yet, it is impossible to ascertain from the Supreme Court ruling in Edwards whether the defendant rejected his attorney’s advice because that advice was mediocre (as demonstrated by his conviction), or whether the defendant acted irrationally by rejecting brilliant advice (which then weakened his defense). The “difficult client” is not unique to criminal law. Psychiatry and psychological studies have observed this phenomenon. “If a patient is purposely difficult, does that mean that he or she is not ill? Should other standards be applied when the patient is not ill? Or is this particular behavior proof of a very serious disease that gravely affects the free will of the patient?” Essentially, because mental illness itself impacts the way an individual’s brain functions, the mental illness likely interferes with the defendant’s ability to make rational decisions.

117. “But in many jurisdictions bench trials far outnumber jury trials, and in virtually all jurisdictions resolution by guilty pleas overwhelmingly outnumbers any sort of trial—pleas being the resolution technique of choice in at least 90 percent of cases.” Andrew E. Taslitz, The Guilty Plea State, 23 CRIM. JUST. 3, 3 (2008).

118. Although he dissents, Justice Scalia seems convinced that the outcome would have been the same either way.

The facts of this case illustrate this point with the utmost clarity. Edwards wished to take a self-defense case to the jury. His counsel preferred a defense that focused on lack of intent. Having been denied the right to conduct his own defense, Edwards was convicted without having had the opportunity to present to the jury the grounds he believed supported his innocence. I do not doubt that he likely would have been convicted anyway.


Serious mental illnesses\textsuperscript{120} manifest themselves in symptoms that include hallucinations, delusions, thought disorder, disorganized behavior, magical thinking, and irrational behavior.\textsuperscript{121} Thus, the criminal defendant who suffers from a serious mental illness often acts hostilely as a result of the illness interfering with brain function, not because he rationally rejects legal assistance. Additionally, while mentally ill individuals may also fail to cooperate with their psychiatrists, “the nuances of the attorney-defendant relationship differ from those of the therapeutic relationship and are not always apparent.”\textsuperscript{122} The mentally ill criminal defendant whose symptoms include delusions or paranoia may honestly believe that the defense attorney is conspiring against him. “For instance, many defendants have the capacity to form a collaborative relationship with others, but nonetheless harbor suspicions regarding attorneys assigned by the state to represent them, perceiving these public defenders as colluding with the prosecution through their link as state employees.”\textsuperscript{123} The Supreme Court seems unaware that by forcing an attorney on a mentally ill individual whose delusions make him believe that the attorney is cooperating with the government fulfills rather than contradicts that delusion.

The Supreme Court’s complete lack of insight into interpersonal relationships might actually signify something more insidious: a lack of concern. The Court has solved the problem of court disruption by mentally ill individuals who are \textit{Dusky} competent by developing a meaningless term (gray-area), assigning defense counsel a phantom role, and by silencing the client’s voice and ignoring the voices only the mentally ill defendant can hear. As Professor Christopher Slobogin notes:

\begin{quote}
After \textit{Godinez} and \textit{Edwards}, the trial judge has enormous discretion in deciding whether a person with mental illness who is competent to stand trial may represent herself. These decisions also suggest, intentionally or not, how judges should exercise this discretion, to wit, that the right to self-representation for people with mental illness should depend primarily on whether the defendant wants to plead guilty or not guilty. If a mentally ill defendant who is nonetheless competent to stand trial wants to plead guilty without counsel, \textit{Godinez} suggests, he should be allowed to do so, but if the defendant wants to go to trial on his own, \textit{Edwards} advises, he should usually be forced to accept counsel. One would not be churlish in conclud-
\end{quote}


\textsuperscript{122.} Colwell & Gianesini, \textit{supra} note 86, at 305.

\textsuperscript{123.} \textit{Id.}

ing that the overriding objective of *Godinez* and *Edwards* is to ensure that the state can proceed as efficiently as possible in dealing with mentally ill people.\(^{124}\)

Thus the *Edwards* decision indicates that the Supreme Court values maintaining courtroom decorum and ensuring judicial efficiency more than upholding the Sixth Amendment rights of mentally ill criminal defendants.

B. *Padilla v. Kentucky*

*Padilla v. Kentucky* similarly offers an illusory solution to a compelling problem, and once again unfairly burdens the criminal defense attorney while doing nothing to improve the criminal defendant’s situation.\(^{125}\) In concluding that Padilla’s trial counsel was ineffective for failure to inform Padilla of the deportation risk accompanying a guilty plea, the Supreme Court began its discussion by noting that Jose Padilla was a very sympathetic defendant. Jose Padilla “has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U.S. Armed Forces during the Vietnam War.”\(^{126}\) Despite his military and other personal accomplishments, Padilla apparently became a courier of illegal narcotics and was convicted of transporting a large quantity of marijuana in Kentucky, a crime to which he pled guilty.\(^{127}\)

*Padilla* is significant because it created an additional duty under “effective assistance” when immigration issues are present. In *Strickland v. Washington*, the Supreme Court held that the Sixth Amendment guarantees an effective defense attorney.\(^{128}\) In order to demonstrate that defendant was harmed by the attorney’s performance below the minimum standard of competency:

> The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.\(^{129}\)

Additionally, the Court held in *McMann v. Richardson* that criminal defendants are entitled to effective assistance of counsel before deciding whether or not to plead guilty.\(^{130}\) Effective assistance of counsel prior to accepting a guilty plea includes advice concerning consequences of a guilty plea, such as waiver of rights and impact on other sentences. In *Padilla*, the

\(^{124}\) Slobogin, *supra* note 82, at 392.


\(^{126}\) *Id* at 1477 (majority opinion).

\(^{127}\) *Id*.


\(^{129}\) *Id*. at 694.

Court identified another aspect of effectiveness as requiring that "counsel must inform her client whether his plea carries a risk of deportation."\textsuperscript{131}

The Court concluded Padilla's defense counsel "not only failed to advise him of this consequence prior to his entering the plea, but also told him that he 'did not have to worry about immigration status since he had been in the country so long.'\textsuperscript{132} Yet, Padilla did not allege that he was innocent of the charges against him. Nor did he claim that he would have been acquitted had he forced the government to prove the case against him. Instead, he merely asserted that "he would have insisted on going to trial if he had not received incorrect advice from his attorney."\textsuperscript{133} The problem the Court believes it is solving—saving a deserving Vietnam War veteran from deportation—is merely illusory. If Padilla had been convicted at trial, he nevertheless would have been subject to deportation.\textsuperscript{134} The only way Padilla could have avoided deportation would have been to not traffic in narcotics or to not get caught doing so.

In placing the burden of warning criminal defendants when convictions may result in deportation on the defense attorney, the Court announces that "deportation is nevertheless intimately related to the criminal process."\textsuperscript{135} Yet, what the Court should have said is that deportation is intimately related to the criminal process—except in the majority of criminal cases, because the majority of criminal defendants are citizens of the United States and are therefore not subject to deportation.\textsuperscript{136} The United States does not deport its own citizen when one is convicted of a crime. The risk of deportation only applies to individuals who are convicted of a crime and are citizens of another country.

Even accepting the Court's erroneous premise underlying the Padilla opinion, that criminal defense attorneys must be exposed to immigration issues in the vast majority of cases, the Court still confuses information known to the client with information the defense attorney should be able to provide. While ""alien defendants considering whether to enter into a plea

\begin{itemize}
  \item \textsuperscript{131} 130 S. Ct. at 1486.
  \item \textsuperscript{132} Id. at 1478 (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008)).
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Darryl K. Brown, \textit{Why Padilla Doesn't Matter (Much)}, 58 UCLA L. Rev. 1393, 1399 (2011) ("Immigration law's increasingly punitive severity in recent decades has left many fewer offenses that do not trigger mandatory deportation, and the facts of a routine case like Mr. Padilla's may provide no realistic options for avoiding immigration law's harsh mandates.").
  \item \textsuperscript{135} Padilla, 130 S. Ct. at 1478, 1481.
\end{itemize}
agreement are acutely aware of the immigration consequences of their convictions,\textsuperscript{137} there is simply no reason to believe that criminal defense attorneys should be at all aware of such consequences, nor any reason to believe that criminal defense attorneys are even aware the client is an illegal alien.

The United States is a country of immigrants from all over the world. Some immigrants, such as Padilla, choose to live in the United States for many years without applying for citizenship.\textsuperscript{138} Some individuals who speak with accented English and have names unfamiliar to defense counsel have nonetheless been citizens for several decades.\textsuperscript{139} Finally, there are individuals who have names that are not exotic or hard to spell, who speak faultless English with no foreign accent, who nonetheless are noncitizens, and who may in fact face deportation consequences if convicted.\textsuperscript{140} Criminal defense attorneys are not uniquely qualified to discern a citizen from a noncitizen. Nor has inquiring into a criminal defendant's immigration status ever been considered an aspect of effective assistance of counsel for a criminal defense attorney.\textsuperscript{141}

\textsuperscript{137}Padilla, 130 S. Ct. at 1481-82 (majority opinion) (quoting I.N.S. v. St. Cyr., 533 U.S. 289, 322 (2001)).

\textsuperscript{138}See id. at 1477. Many noncitizens came to the United States as children and are sometimes unaware of their citizenship status. See, e.g., World War II Vet Finds Out He Is Not a U.S. Citizen, FOXNEWS.COM (Mar. 23, 2011), http://www.foxnews.com/us/2011/03/23/world-war-ii-vet-finds-citizen/ (“World War II veteran Leeland Davidson has been living in America for nearly 100 years, but he only just learned he is not in fact a U.S. citizen. The 95-year-old’s parents were born in the U.S., but they had him while in Canada. And the proper paperwork apparently was never filed to report Davidson as being born to Americans living abroad. . . [H]e had assumed that he already had been granted American citizenship as a child and was surprised to find out otherwise.”).


\textsuperscript{141}“The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.” Padilla, 130 S. Ct. at 1482 (citing NAT’L LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL REPRESENTATION 6.2 (1995); G. NICHOLAS HERMAN, PLEA BARGAINING § 3.03 (1997); Gabriel J. Chin & Richard W. Holmes, Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 CORNELL L. REV. 697, 713-718 (2002); ARTHUR W. CAMPBELL, LAW OF SENTENCING § 13:23 (3d ed. 2004); U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS: STANDARDS FOR ATTORNEY PERFORMANCE H-J (2000); AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-5.1(a) (3d ed. 1993); ABA, ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY, 14-3.2(f) (3d ed. 1999)).
Defense attorneys believe that the effective assistance of counsel standard was set forth in *Strickland v. Washington*; despite the Court's current dicta to the contrary or their reliance upon various ineffective assistance of counsel guidelines. In fact, none of the resources cited by the Court have any authority or control over the standards of criminal defense. They are merely advisory, and many suggestions or advice in each of those cited resources contain other suggestions that are equally non-binding on the defense bar. To define a constitutional rule by what amounts to best practices suggestions demeans the Constitution and diminishes the Supreme Court's role of expressing constitutional standards.

Additionally, the *Padilla* decision seems unaware that the majority of criminal convictions occur in state courts, and state governments have absolutely no power to deport illegal aliens. Therefore, even if a state defendant is concerned about the immigration consequences of accepting a plea bargain, there is nothing that the state government can do to alleviate those concerns. The state government does not enforce federal immigration laws. Prosecutors, judges, and defense counsel on the state level typically do not discuss the immigration status of the defendant during the plea bargain process, trial, or sentencing. Since state government has no power to impact immigration consequences, there is nothing for the state prosecutor and the defense attorney to negotiate. Nor can a state judge order deportation as part of a sentence.

The Court also ignores the reality of modern criminal defense. As discussed in Part I, the majority of criminal defendants are both indigent and are prosecuted in state court. Thus, the majority of defense attorneys are

---

144. See id.
145. Id. at 1482-83; id. at 1488 (Alito, J., concurring).
146. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492 (2012). “Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.” Id. at 2510. In Arizona:

The Court threw out three such provisions in the Arizona law. It said the state cannot make it a misdemeanor for immigrants to not carry registration documents; criminalize the act of an illegal immigrant seeking employment; or authorize state officers to arrest someone on the belief that the person has committed an offense that makes him deportable.

149. See *supra* notes 26–30 and accompanying text.
either court-appointed or public defenders. The funding, training, and supervision of such attorneys does vary, but such attorneys tend to be the least experienced and lowest paid of all attorneys. Yet, similar to the Edwards decision unfairly expecting defense attorneys to solve systemic problems within the criminal justice process, the Court requires that the lowest paid, least experienced, and least likely to have ever appeared in immigration court or even read a federal immigration statute must bear the responsibility of warning the criminal defendant of immigration consequences—consequences that the Court acknowledges noncitizen defendants themselves are already acutely aware of, but that may be unknown to the attorney.

The Supreme Court requires that criminal defendants must be warned of clear immigration consequences, regardless of whether the defendant is convicted in state or federal court and regardless of whether or not an immigration warrant has been served. The Court explained in Padilla:

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Such an expectation reveals a profound misunderstanding of the role of state defense counsel. Additionally, the Court overestimates access to resources for many practicing criminal defense attorneys as well as the difficulty in discovering which law to interpret when the defendant is not currently charged with a violation of that law.

For example, the Court claims that “Padilla’s counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute.” The Court’s decision ignores the fact that Padilla was not charged under the immigration statute at the time of defense counsel’s representation. Additionally, the Court misleadingly refers to the “statute” without revealing that they are referring to a statute that Padilla had not yet been charged with violating.

150. See generally WICE, supra note 15.
151. Padilla, 130 S. Ct. at 1483.
152. Id.
153. Id.
154. Id.
155. Id.
Attorneys for the Indigent: Psychiatry & Immigration Law

1177

Trial counsel is likely surprised and confused as to what statute the Court is referring. Surely defense counsel read the statues under which Padilla was charged with the following crimes: possession of marijuana,156 possession of drug paraphernalia,157 and trafficking in marijuana, greater

156. KY. REV. STAT. ANN. § 218A.1422 (West 2002) ("Possession of marijuana; penalty—maximum term of incarceration. (1) A person is guilty of possession of marijuana when he or she knowingly and unlawfully possesses marijuana. (2) Possession of marijuana is a Class B misdemeanor, except that, KRS Chapter 532 to the contrary notwithstanding, the maximum term of incarceration shall be no greater than forty-five (45) days.").

157. Id. § 218A.500:

Definitions for KRS 218A.500 and 218A.510—Unlawful practices—Penalties. As used in this section and KRS 218A.510:

(1) 'Drug paraphernalia' means all equipment, products and materials of any kind which are used, intended for use or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. It includes but is not limited to: (a) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived; (b) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances; (c) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance; (d) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances; (e) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances; (f) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances; (g) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining marijuana; (h) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances; (i) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances; (j) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances; (k) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body; and (l) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as: metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls; water pipes; carburetion tubes and devices; smoking and carburetion masks; roach clips which mean objects used to hold burning material, such as marijuana cigarettes, that have become too small or too short to be held in the hand; miniature cocaine spoons, and cocaine vials; chamber pipes; carburetor pipes; electric pipes; air-driven pipes; chillums; bongs; ice pipes or chillers.

(2) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, test-
than five pounds. Yet those statutes did not list deportation as a possible punishment because the Commonwealth of Kentucky does not have any authority, power, or mechanism to deport anyone. Padilla was convicted in state court for violating state statutes. The Court's requirement that a defense attorney simply "read the text of the statute" and discover the obvious deportation punishment is confusing and misleading.

The statute that Padilla's defense attorney was ineffective for not reading was not any of the statutes under which Padilla was actually charged. Nor was it a statute that would ever be mentioned by either the prosecutor or the judge in Padilla's case. Nor would it likely be referenced during a guilty plea or a jury trial on his pending charges, nor litigated anywhere ing, analyzing, packing, repacking, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter.

(3) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

(4) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(5) Any person who violates any provision of this section shall be guilty of a Class A misdemeanor.

Id.

158. Id. § 218A.1421:
   Trafficking in marijuana—Penalties:
   (1) A person is guilty of trafficking in marijuana when he knowingly and unlawful
   ly traffics in marijuana.
   (2) Trafficking in less than eight (8) ounces of marijuana is: (a) For a first offense a
       Class A misdemeanor. (b) For a second or subsequent offense a Class D felony.
   (3) Trafficking in eight (8) or more ounces but less than five (5) pounds of mariju-
       ana is: (a) For a first offense a Class D felony. (b) For a second or subsequent of-
       fense a Class C felony.
   (4) Trafficking in five (5) or more pounds of marijuana is: (a) For a first offense a
       Class C felony. (b) For a second or subsequent offense a Class B felony.
   (5) The unlawful possession by any person of eight (8) or more ounces of marijua-
       na shall be prima facie evidence that the person possessed the marijuana with the
       intent to sell or transfer it.

Id.

159. The relevant available penalties are: (1) a maximum of forty-five days for pos-
   session of marijuana; (2) a maximum of a Class A misdemeanor for paraphernalia; and (3) a
   Class C felony for a first offense trafficking in marijuana. Id. §§ 218A.1422, 218A.500, § 218A.1421; see supra note 158 and accompanying text.

160. Padilla, 130 S. Ct. at 1483.

161. See supra notes 141–42 and accompanying text.
within the courthouse where Padilla was prosecuted. 162 Instead, the statute that Padilla’s attorney was ineffective for not reading was a federal immigration statute. 163

The Court referenced the statute as if Padilla had been charged with its violation instead of the state level narcotics violations. Then, the Court criticized defense counsel for not referencing and accurately analyzing the statute even though the attorney had not been retained or appointed to defend Padilla on an immigration violation.

Indeed, the Court in Padilla misleadingly referred to the defense attorney’s failure to read the statute but did not acknowledge that the statutes under which Padilla was convicted did not reference the federal immigration statute. 164 The statute that defense counsel apparently should have read “addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses.” 165 Although that may be true, it is also true that since the defendant did not have a pending immigration case at that time, defense counsel would not have known which statute applied. 166

At the time of defense counsel’s representation, Padilla was charged with state offenses and had a detainer lodged against him by the Immigration and Naturalization Service (IRS), stating that ‘\textit{investigation has been}...

162. There are two court orders outlining what information was discussed at conviction and sentencing. Kentucky v. Padilla, No. 01-CR-00517, 2002 WL 34506930 (Ky. Cir. Ct., Sept. 4, 2002) (“Defendant was interrogated by the Court, and the Court finds that the Defendant understands the charges against him, that the Defendant knowingly, intelligently, and voluntarily waives his right to a trial by jury, the privilege against self-incrimination, the right of confrontation of witnesses, and that there is a factual basis for the Defendant’s plea.”); Kentucky v. Padilla, No. 01-CR-00517, 2002 WL 34507077 (Ky. Cir. Ct., Oct. 4, 2002) (“The Court inquired of the Defendant and his attorney whether they had any legal cause to show why judgment should not be pronounced, and afforded the Defendant and his attorney the opportunity to make statements in the Defendant’s behalf and to present any information in mitigation of punishment, and the Court having informed the Defendant of the factual contents and conclusions contained in the written report of the pre-sentence investigation prepared by the Divisions of Probation and Parole and provided Defendants’ attorney with a copy of the report although not the sources of confidential information, the Defendant agreed with the factual contents of the report.”).

163. “In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla’s conviction.” Padilla, 130 S. Ct. at 1483 (citing 8 U.S.C. § 1227(a)(2)(B)(i) (2006) (“Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . ., other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.”)). It is worth noting that despite the Court’s claim that this statute is “succinct, clear, and explicit,” it is likely also subject to interpretation and debate. Id.

164. See supra text accompanying notes 143-47.

165. Padilla, 130 S. Ct. at 1483.

166. Defense counsel would merely be guessing, and may guess incorrectly.
initiated to determine whether this person is subject to removal from the United States." 167 While defense counsel likely knew of that detainer since it impacted Padilla’s bond, the detainer did not refer to the “statute” that the Supreme Court believed defense counsel should have read. 168

Significantly, almost two years passed between Padilla’s final judgment on the Kentucky charges and his motion for post-conviction relief concerning the deportation. 169 This likely indicates that there was no immigration charge for some time after conviction in the state court. Thus, Padilla’s defense counsel would not only be unaware of what federal charges might be brought against the defendant at the time of trial, he also would have been unaware for some time after Padilla’s conviction for the narcotics offenses.

Most startlingly, the Court does not even require that a post-Padilla attorney inquire whether or not a client is an immigrant. Instead, the Court announced a general requirement, as if every criminal defendant risks possible deportation. “It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the ‘mercies of incompetent counsel.’ To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation.” 170 This does not indicate that the defense attorney must inquire into a client’s citizenship status. Rather, the holding requires that defense counsel must always inform the client of immigration consequences of a guilty plea—whether or not any are possible. Certainly, even a defense attorney with limitless resources and time would find it ludicrous to inform a client of deportation risks of a guilty plea when such information is irrelevant. Yet the broad language of Padilla indicates that such an attorney is required to do so. 171

168. Id.
171. Many commenters on the Padilla decision are embracing this image of the defense attorney as the one who solves all of the problems. See Mathew Millen & Phoebe P. Liu, Supreme Court Sends a Message to Criminal Defense Attorneys Whose Clients Are Not Citizens: Do Not Ignore the Defendant’s Immigration Status, FED. LAW., July 2010, at 20, 22 (“As a practical matter, defense counsel should (1) be sufficiently familiar with immigration law to be able to render correct advice on the immigration consequences of various criminal charges; (2) consult with an immigration attorney when provided with a plea offer from which immigration consequences are, or may be, unclear; or (3) advise the client that a plea may have immigration consequences and refer the client to an immigration attorney for direct consultation about the immigration consequences of the plea. A criminal defense attor-
Instead of using such broad, all-encompassing language for a narrow problem, and instead of assigning defense counsel to resolve all inequities in the criminal justice system, the Court could have ruled on the narrow case presented by Padilla. Had the Court simply found that Padilla's defense attorney provided ineffective assistance of counsel on the facts of the case, the Court's ruling would have accurately reflected the procedural history of the case and fairly addressed Padilla's specific situation. Padilla's defense attorney gave him incorrect advice:

Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he "did not have to worry about immigration status since he had been in the country so long." Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory.172

Requiring that defense counsel simply refrain from giving incorrect advice would have resolved Padilla's complaint and given clear guidance to the defense bar.

Such a resolution found support among the Supreme Court Justices. In his concurrence, Justice Alito suggested an alternative standard that does not require defense attorneys to master immigration law:

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of Strickland . . . , if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt to explain what those consequences may be.173

Additionally, Justice Scalia acknowledged in his dissent that "[i]n the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised."174 Here is one aspect of Padilla that none of the Justices dispute: defense counsel should refrain from giving incorrect advice. Such a standard should have been the one adopted by the Padilla Court. This would also avoid the concern expressed by the dissent in the Kentucky Supreme Court that "[c]ounsel who gives erroneous advice

---

172. Padilla, 130 S. Ct. at 1478 (citation omitted).
173. Id. at 1487 (Alito, J., concurring).
174. Id. at 1494 (Scalia, J., dissenting).
to a client which influences a felony conviction is worse than no lawyer at all. 175

The Padilla Court believes that it has rectified an injustice. The Court seems confident that defense attorneys will be able to notify defendants of possible collateral consequences of a guilty plea, including immigration consequences. However, the Court fails to recognize that there is not much the defense counsel can do to otherwise impact that consequence or to improve the defendant’s situation. As Professor Darryl K. Brown notes, there was not anything that the defense attorney or even the prosecutor in the Padilla case itself could have done to alter the reality that Padilla was likely to be convicted of something, and that conviction would almost certainly result in deportation:

Even if Mr. Padilla’s attorney and the Hardin County prosecutor had been bargaining with an awareness of the deportation provisions of federal immigration law—and even if the prosecutor had been inclined to agree to a disposition that reduced Mr. Padilla’s odds for deportation—no options for doing so existed, because no option would prevent deportation except politically impossible ones—nonprosecution or charging only with misdemeanor possession. 176

There was no possibility of avoiding deportation because of the facts of the case: Padilla was stopped at a weigh station in Kentucky, consented to a search of his truck, and was discovered to be transporting 1,000 pounds (about 453 kilograms) of marijuana. 177

Not only are the deportation consequences of a guilty plea likely beyond the power of the defense attorney’s control, they are likely often beyond the prosecutor’s ability to control. The majority of street crimes are prosecuted on the state level by state prosecutors. 178 State level prosecutors have virtually no power to impact immigration consequences, since immigration law is federal law, prosecuted and decided by federal immigration attorneys and judges. 179

Nor do state prosecutors have any incentive to extend a plea offer to a noncitizen that will remove deportation risks. 180 In fact, prosecutors typically have exactly the opposite motivation: the consequence of deportation adds to the incentive to have the defendant convicted of a deportable crime. 181 Some scholars have optimistically predicted that Padilla will improve the plea bargaining process. Padilla “gives defenders new tools with

175. Padilla, 253 S.W.3d at 485 (Cunningham, J., dissenting).
177. Id. at 1400.
181. Id. at 1406-07.
which to advocate for their clients, and introduces greater transparency and fairness into the plea process. 182 Such a view rests on the mistaken premise that prosecutors breathlessly wait for good reasons to sweeten a plea offer, rather than the reality: prosecutors offer the minimum reduction in charges or sentences that they believe a defendant will accept. 183 Prosecutors are motivated to some degree by expediency, but rarely are they more influenced by what would be in the best interest of the defendant. 184

III. SOLUTIONS

Instead of requiring that defense attorneys resolve all inequities in the criminal justice system—duties that do nothing to assist in defending the pending criminal charge—the Supreme Court should have addressed the underlying problems. The problem underlying the Edwards case is an obvious one: instead of pretending that a psychotic, delusional, or hallucinating mentally ill individual is somehow incapable of self-representation, the Court should recognize that such an individual is likely incompetent despite the application of the Dusky competency standard. The problem underlying the Padilla case is that committing crimes as a noncitizen results in almost automatic deportation, and nothing the state defense attorney can do will alter that result. If an individual is entitled to immigration defense, then appoint him an immigration defense attorney. If the defendant should be aware of this consequence, then notify him of that at arraignment or guilty plea.

A. Solving the Edwards Situation

Underlying the Court’s Edwards decision that a “gray-area” defendant is incompetent for self-representation even though the defendant is competent to stand trial is the failure of the Dusky competency standard. Profoundly mentally ill individuals, including those who are currently psychotic, are found competent to stand trial. 185 The Dusky competency to stand trial standard is simply inadequate. When competency is an issue, the trial court must determine “(1) ‘whether’ the defendant has ‘a rational as well as factual understanding of the proceedings against him’ and (2) whether the defendant ‘has sufficient present ability to consult with his lawyer with a rea-

185. See Davoli, supra note 48, at 317.
sonable degree of rational understanding." The flaw in the Dusky standard is that an individual may meet the standard while he nevertheless is hallucinating, delusional, or psychotic.

The Supreme Court could easily improve the competency to stand trial standard by adding a third component that specifically addresses the Edwards-type defendant: "Whether the defendant suffers from a serious mental illness and is currently psychotic, delusional, or hallucinating." This third component addresses the majority, if not all, of the "gray-area" defendants described by the Edwards Court. Such a defendant is found competent under Dusky, but his mental illness prevents him from representing himself, almost always precisely because he is psychotic, delusional, or hallucinating. The Court could require that restoration to competency include treatment to reduce the symptoms of mental illness and clear the defendant's mind so that he can function rationally.

Currently, restoration to competency does not require that the symptoms of mental illness be under treatment. While "the prototypical incompetent defendant may be described as someone with a history of psychiatric symptoms, particularly severe psychosis, poor functional abilities and community resources, and poor psychosocial abilities," restoration to competency does not require that such symptoms be eradicated. Rather, restoration only requires that the minimum Dusky standard be met. Adding the proposed third component ensuring that the defendant is not psychotic, delusional, or hallucinating would obviate the need to force a defense attorney on an objecting, Dusky-competent defendant.

B. Solving the Padilla Situation

An alternative to requiring that defense attorneys give a "Padilla-warning" might require judges to bear the burden on the immigration status issue. Judges currently ensure that a defendant knowingly and voluntarily waives his constitutional right to a jury trial prior to pleading guilty. Likewise, presiding trial judges also inquire whether or not a defendant wishes to waive his Fifth Amendment right to remain silent and testify during a

---

187. See supra Subsection II.A.5.
188. See Davoli, supra note 48, at 317.
189. See supra note 189, at S44.
190. See Douglas Mossman et al., AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial, 35 J. AM. ACAD. PSYCHIATRY & L. S3, S44 (Supp. 2007) (citing studies showing that significant percentages of defendants with schizophrenia, other psychotic illnesses, affective disorders, or mental retardation are found competent to stand trial).
191. Mossman et al., supra note 189, at S44.
criminal trial.\textsuperscript{192} Obviously, defense attorneys must advise clients of such rights before the guilty plea or trial; yet, judges still determine whether or not such decisions are made freely and voluntarily.\textsuperscript{193}

An additional advantage to requiring that the judge warn the defendant of immigration consequences during the plea colloquy would be that a clear, unequivocal record of that warning is created. Thus, there would be no ability to appeal the issue on an ineffectiveness assistance of counsel claim if the responsibility lay with the trial court judge instead of the defense attorney. In \textit{Padilla}, the substance of the attorney's advice was not litigated on the Supreme Court level.\textsuperscript{194} However, throughout the state proceedings, the substance of the attorney's advice was in dispute.\textsuperscript{195} Placing the burden of the duty to warn on the defense attorney undoubtedly creates an additional appellate claim that will necessitate an evidentiary hearing for resolution. In contrast, a simple review of the record would suffice if the responsibility lay with the trial court judge.

Furthermore, requiring the judge to warn the defendant at the time of a guilty plea means that if a defendant opts to request a trial instead of a guilty plea, the witnesses remain readily available. As in Padilla's case, such claims might arise years after the original trial date. If the appellate court reverses a guilty plea and remands the case for a new trial, the prosecution will have a much more difficult time reconstructing the evidence and locating the witnesses after the passage of many years.

Another possibility for ensuring that a defendant is warned of potential immigration consequences of a guilty plea would be to place the burden on the prosecutor. Even a state prosecutor would have better opportunities and contacts with federal authorities than an indigent client's defense attorney. The prosecutor could obtain definitive information about which federal statute applied and what impact it would have in a particular case. Additionally, the prosecutor would have a vested interest in ensuring that a plea offer is not reversible on appeal. Since the prosecution makes the plea offer, the prosecutor should be the one to investigate the immigration impact as part of the resolution of the case.

Finally, the Supreme Court could have required that states establish procedural or administrative procedures to ensure that a defendant was aware of the specific immigration consequences of a guilty plea. In his dissent, Justice Scalia outlines a variety of options that could have solved Padilla's problem without burdening defense counsel:

\begin{itemize}
\item \textsuperscript{192} \textit{Id.} at S7.
\item \textsuperscript{193} \textit{Id.} at S11.
\item \textsuperscript{194} \textit{Padilla v. Kentucky}, 130 S. Ct. 1473, 1478 (2010).
\end{itemize}
The Court’s holding prevents legislation that could solve the problems addressed by today’s opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant’s attention, and what warnings must be given. Moreover, legislation could provide consequences for the misadvice, nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel’s misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today’s sledge hammer.\(^{196}\)

In his concurrence, Justice Alito also suggested alternatives to ensure a defendant is warned of immigration consequences without additionally burdening defense counsel.\(^{197}\) Justice Alito joined in the judgment of Padilla precisely because Padilla’s defense attorney specifically told him that there would be no deportation. While not acknowledging a duty to warn, Justice Alito agreed that giving misadvice does constitute ineffective assistance of counsel under Strickland.\(^{198}\) Justice Alito’s concurrence should have been the Court’s ruling: affirmative misadvice constitutes ineffective assistance of counsel. Such a ruling would have resulted in a reversal of Padilla’s conviction while also directing criminal defense attorneys to refrain from giving immigration advice.

Of course, proper funding could somewhat ameliorate the negative impact of these decisions. Because the Supreme Court requires that defense attorneys accept these new responsibilities, the Court has necessarily expanded the rulings in both Gideon and Ake v. Oklahoma.\(^{199}\) Read together, Gideon and Padilla indicate that the right to counsel now necessarily includes the right to an immigration attorney as well as a criminal defense attorney. Under Ake, the criminal defendant has a right to a psychiatric expert whenever mental health becomes an issue.\(^{200}\) It necessarily follows from this that the Edwards-competent defendant should be given a right to a defense expert to help the defense attorney communicate effectively with the defendant, even in situations in which mental health will never be addressed during a guilty plea or a trial.\(^{201}\)

---


\(^{197}\) Id. at 1487 (Alito, J., concurring).

\(^{198}\) Id.

\(^{199}\) 372 U.S. 335 (1963); 470 U.S. 68, 83 (1985) (allowing funds for a defense psychiatric expert once the defendant demonstrates that his mental health will be an issue at trial).

\(^{200}\) 470 U.S. at 83.

\(^{201}\) “We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant’s mental capacities by asking whether a defendant who
attorneys mandates that additional funding be made available to ensure that the defense attorneys can fulfill these duties.

CONCLUSION

The Sixth Amendment right to counsel guarantees more than simply an attorney standing next to the defendant during the trial or guilty plea. As the Supreme Court has repeatedly and consistently held, the language in the Sixth Amendment that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence" ensures that the criminal defendant is represented by competent, zealous defense counsel. The presence of a defense attorney contributes to the fairness of the trial and the integrity of the verdict:

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Defense counsel's role is not to become a mere cog in a conviction machine. Instead, defense counsel stands between the client and injustice, protecting the client's liberty against governmental power.

Yet the Padilla and Edwards decisions do nothing to ensure that guarantee of justice. Instead, the Court acknowledges systemic problems in the current criminal justice system and then assigns defense counsel as the solution. In particular, these decisions impact the indigent client defenders who are among the least experienced and the most burdened by the current system. The Supreme Court's recent decisions further burden defense counsel while doing absolutely nothing to improve representation or ensure trial fairness. The Supreme Court should refrain from attempting to solve every systemic problem in criminal justice by assigning defense counsel as the solution.

seeks to conduct his own defense at trial is mentally competent to do so." Indiana v. Edwards, 554 U.S. 164, 176-78 (2008). By requiring the trial judge to inquire into a defendant's mental capacities, the defendant's mental state now becomes an issue during trial which would trigger the requirement of the state to provide a mental health expert to the defendant.

202. U.S. CONST. amend. VI.
