

Legal Update

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Indiana v Edwards (2008)

Question: May a criminal defendant be
CST with counsel but IST without?

Background

- Sixth Amendment (1791): Right to counsel
- Powell (1932), Zerbst(1938), Gideon(1963): At state expense if indigent
- Faretta v California (1975): Right to represent self if competent to waive right to counsel (“intelligent and voluntary” waiver)

- Godinez v Moran (1993): Defendant who is CST is competent to waive counsel-- So are defendants who are CST with counsel necessarily CST without?
- Colin Ferguson (1994): Moran in action (Faretta or worse)

Edwards: Trial and State Appeals

- Shoplifting gone awry: attempted murder, theft, etc.
- IST restored to CST (though “still suffering from MI”)
- Request to represent self rejected (though CST, not “competent to defend himself”)

- Trial with counsel results in conviction; Edwards appeals
- State appeals court reverses: Violation of right to self representation
- Indiana Supreme Court finds “substantial basis to agree with the trial court’s decision to require counsel” but affirms Appeals Court, citing Faretta and Godinez

The Supremes Weigh In

- Faretta didn’t address Q of competency to represent self-- Faretta “literate, competent, and understanding”

- Other courts have restricted the right to self representation where “special circumstances” exist, including “mental derangement; “ even Faretta recognized limits (“obstructionist behavior”)
- Godinez distinguished: only dealt with competency to waive-- no need to consider competency to “conduct trial proceedings” b/c defendant intended to plead guilty
- “For another thing:” Godinez abt state’s authority to “permit” self representation; Edwards abt state’s authority to deny it-- that it might permit self representation doesn’t mean it must

- So, may be defendant be CST with counsel but incompetent to present case at trial? Supremes say “Yes,” siding with trial judge
- CST standard refers to defendant’s capacity to “consult with counsel” and “assist counsel in preparing the defense” -- standard assumes representation, thus inadequate to resolve question of competency to represent self
- Citing MacArthur Adjudicative Competence studies and APA brief, Court observes that MI can impair ability to “play significantly expanded role required for self representation even if he can play the lesser role of represented defendant “

- Question about dignity of the defendant: Right to self representation “will not affirm the dignity of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel”
- Proceedings must not only be fair, “must appear to be fair to all who observe them”
- **IMPORTANT NOTE:** Court doesn’t say judges must require counsel for CST defendant’s who are incompetent to represent self, only that they may without violating defendant’s pro se rights-- though dicta suggests trial of such a defendant without representation may be suspect; another remedy, one which affirms the defendant’s pro se rights: find the defendant IST

Standard for Competency to Represent Self (or to stand Trial without Counsel)

- Court declines to establish standard, though indicates incompetency must be due to “severe mental illness” – generalized difficulties as might make self representation difficult for ordinary defendants not enough
- Court rejects Indiana’s suggestion: “cannot communicate coherently with the judge or jury”
- Trial judge’s call, considering the circumstances and of the case and exercising sound discretion

Scalia and Thomas Dissent

- Pro se right “reflects nearly universal conviction ... that forcing a lawyer on an unwilling defendant is contrary to his basic right to defend himself”
- Agreed that court may limit pro se right if defendant disrespectful or obstructionistic, but Edwards wasn't
- Defendant's reasons for rejecting attorney not irrational-- disagreement whether to present intent defense (attorney) or self defense (Edwards)
- “In singling out mentally ill defendants for this treatment, the Court's opinion does not even have the questionable virtue of being politically correct”

My Recommendation for Evaluators

- Give CST opinion based on defendant's competency with counsel
- If CST with counsel, describe difficulties defendant would have as a consequence of serious MI in proceeding without counsel (deciding strategy, conducting trial proceedings, etc)
- Avoid ultimate issue opinion

Survey of the States

Missouri (Rick Gowdy): Revels v Sanders (8th Cir, 2008)

- Def found NGRI in 1992 for murder of 3 family members— diagnosis apparently psychosis secondary to substance use
- Cond'l releases in 1993 and 1995 revoked-- broke window, tested positive for painkillers, missed ANA meetings
- Request for uncond'l release in 1997 denied

- Missouri Ct Apps affirms, saying def did not meet burden to show that he was (1) not currently MI, (ii) not currently dangerous, (iii) not likely to suffer a MI in the future, and (iv) not likely to become dangerous in the future (perhaps a misstatement of MO law)
- US Ct Apps 8th Cir (looking solely at the MO Ct Apps application of Foucha) reverses: Foucha requires present MI-- dangerous alone not enough, MI in the future not enough
- Suppose req for release had been that def show that he “is not now and is not likely in the foreseeable future to commit another crime... b/c of his MI?”

Connecticut (Mike Norko): CT v Jenkins (Ct S Ct 2008)

- CT law allows 18 mos (or max sentence if < 18 mos) for restoring an IST def to CST
- Def committed as IST 3 times over 21 mo period (8 mos, 8 mos, and 5 mos)-- restored to CST each time but became IST awaiting trial first two times
- Court: Time committed is cumulative-- 18 mos exceeded, therefore def must be civilly committed or released, not just from hosp but from prosecution (even though CST now)
- Ct suggests Jackson v Indiana reflects concerns abt speedy trial-- duty to try def once becomes CST; can't allow "multiple pretrial placements ... over an indefinite pd, so long as each is < 18 mos"
- Or is the concern in Jackson hospitalization for purposes of restoration when def is unrestorable?

Virginia (Jim Morris): Legislation

- Major revision of civil commitment law in wake of VA Tech shootings– “imminent risk of harm” replaced by “substantial likelihood that , as a result of MI, the def will, in the near future, cause serious harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm....”
- Anyone involuntarily committed or *voluntarily* admitted after commencement of invol commitment proceedings prohibited from purchasing, possessing, or transporting gun– also anyone found IST and ordered for restoration
- CST restoration capped at 45 days for certain non-violent misdemeanors (Jim says, “Thanks, Rich”)

Wisconsin (Rod Miller): CST Restoration

- New legislation provides that def's found IST and restorable are committed to MH Dept for treatment in location the Dept decides
- Choices: inpatient institution designated by Dept, locked unit of tx facility in the community, outpatient in the community as condition of bail, or in jail (though jail OK only until other arrangements made)
- Max period of restoration: lesser of 12 mos or max sentence

Georgia (Karen Bailey-Smith): More Jackson Frustration

- Legislation that would have restricted courts' jurisdiction over def's found unrestorably IST failed– “courts don't want to give cases over to the civil side”

New Jersey (John Main): Sex Offender Registration

- NJ state appeals court (in various cases) struck down local ordinances restricting where registered sex offenders may live (2,500' zone)-- state pre-emption, “patchquilt “ muddles the law; subsequent legislation would grant localities this authority, though one bill would forbid absolute banishment from a town

Nevada (Betsy Neighbors): 2 Items

- Legislation changed sex offender registration requirements so that level of restriction based on offense rather than determination of risk (in keeping w/ Adam Walsh Act)-- would increase #'s in Tier 3 from 160 to > 2,500-- but federal D Ct ruled law not enforceable retroactively-- rationale akin to double jeopardy
- Specialty CST court established to deal w/ bed congestion/ waiting lists— has reduced lengths of stay (orders and transport more efficient), but other problems, including a blurring of the attys' roles, resulting in many appeals
- In *Ferguson v NV*, NV S Ct ruled that, while all initial CST determinations may be made by the CST court, subsequent Q's abt a def's CST (after restoration) must be decided by the assigned trial court; also def entitled to a hearing when returned to court as "restored" (so can challenge the finding)

Tennessee (Jeff Feix): Juvenile Forensic Evals

- TN MH Dept for years has provided juv forensic evals for the courts, inpatient (in state facilities) and outpatient (w/ providers on contract), at no charge-- > 800 evals in 2007
- TN Ct Apps ruled recently that the cost of these evals is (and always has been) the resp of the counties (or the child's parent or guardian if able to pay)-- state is not responsible; state's contracts w/ providers "invalid" now-- evaluators must bill the courts

Hawaii (Neil Gowensmith): Cond'l Release, Other

- Legislation allows MH Dept to petition for cond'l release review hearings (PD's busy, have not always requested review, leading to longer periods of CR than necessary)
- Time def must spend in hosp when CR revoked reduced from 90 days to 60 days
- Patient records law revised to ease restrictions on sharing info between providers, hospitals, and jail health care staff
- Court evaluation fees doubled from \$500 to \$1,000

Open Discussion