

# Disorder in the Court: Language Use by “Gray Area” *Pro Per* Defendants

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**Abstract.** *In California, criminal defendants may serve as their own advocates at trial, even in capital cases, if the trial judge deems them mentally competent to do so. Nevertheless, the extent to which some pro per litigants are able to understand and follow the rituals of the courtroom may be seriously affected by mental symptoms.*

*This paper examines courtroom interactions in a small number of cases where such defendants attempted to fulfill a dual role, reviewing their expressions of legal theories, questioning, and attention to guidance by the trial judge – all of which features would be in stark contrast to the prosecution’s expertise, and all of which would be arguably affected by mental illness.*

*While the defendants vary in control of legal lexicon and courtroom formalities, close analysis shows that they tend to share difficulties in self-monitoring, pragmatic perspective and coherence – deficits which may confuse or perplex other courtroom players and doom their efforts at advocating for themselves.*

**Keywords:** *Mental health, competence, trial, pragmatics, defendant.*

**Resumo.** *Na Califórnia, em processos penais as partes podem ser os seus próprios advogados em tribunal, inclusivamente em casos de pena de morte, desde que o juiz as considerem mentalmente capazes para o efeito. Contudo, a capacidade de algumas partes pro per compreenderem e observarem os rituais da sala de audiências pode ser profundamente afetada por sintomas mentais.*

*Este artigo analisa interações em salas de audiências de um pequeno número de casos nos quais esses réus tentaram desempenhar uma dupla função, estudando as suas expressões de teorias jurídicas, questionamento e atenção à orientação do juiz – características essas que se encontram em nítido contraste com os conhecimentos da acusação, e que serão inquestionavelmente afetadas por doença mental.*

*Embora o grau de domínio do vocabulário jurídico e das formalidades da sala de audiências varie de réu para réu, uma análise mais detalhada mostra que aqueles tendem a partilhar dificuldades na auto-monitorização, perspectiva pragmática e coerência – défices que podem confundir ou causar perplexidade aos restantes atores da sala de audiências e condenar os seus esforços de se defenderem a si mesmos.*

**Palavras-chave:** *Saúde mental, competência, julgamento, pragmática, réu.*

## Introduction

This paper examines legal and linguistic issues in cases in which capitally charged defendants, that is, defendants facing a potential death sentence, were allowed to forgo defense counsel and represent themselves at trial despite indications of their mental illness.

Attorneys and linguists may find self-represented defendants' cases intriguing for many reasons, not the least being, in some instances, for how surprisingly good some defendants can be in mimicking the legal language lawyers have spent so many years studying (see Greenlee, 2012).

The manner in which that language is used, however, may be strange indeed and may baffle or alienate the legal professionals in the courtroom as well as the jurors, leading to a death sentence which might have been avoided with competent defense counsel.

Thus, trials of *pro per* defendants in these very serious cases can be shocking and perplexing in the same way that freeway accidents are – the observer is left appalled by a disaster. In many such trials, predictable devastation affects both the integrity of the justice system and the cause of the defendant.<sup>1</sup>

Why do these “wrecks” occur? And how could disastrous outcomes be avoided?<sup>2</sup> As many in the legal and mental health professions have argued, the standards and methods for determining mental competence must be revised, made more rigorous and informed by as complete a picture of the defendant as possible.<sup>3</sup>

Part of that necessary information includes the *language use* of the defendant whose competence is evaluated.<sup>4</sup> A small sample of defendants in California capital trials, discussed below, is in accord with much psychological research showing that very significant clues to mental illness are found in pragmatic aspects of language use.<sup>5</sup> When those clues are given the weight they deserve, in conjunction with a more thorough mental health examination, they can perhaps serve to convince even skeptical judges that mental illness, rather than rational choice, underlies the defendant's behavior as a litigant.<sup>6</sup>

This paper will proceed as follows: it will first give a brief background to the competence standards, describing an important change in those standards brought about by the United States Supreme Court's decision in *Indiana v. Edwards* (2008) 554 U.S. 164, and the group of defendants alleged to be in a “gray area” of the law under that decision.<sup>7</sup>

Then the particular communication skills that self-represented defendants must possess for trial will be examined, especially as these skills were defined in briefing before the High Court in that same case.

Following this background, transcript examples from a small group of *pro per* defendants' language will be presented, as well as the type of feedback that the adjudicator provided and the defendants' attempts to conform to that feedback in their efforts to serve as their own counsel.

In conclusion, the paper will maintain that for these defendants, a closer look at their language – as part of their overall functioning during the proceeding – may have meant they would not have been allowed to continue in a dual role (as defendant and advocate), and they may have been judged mentally unfit for trial at all. A more detailed and probing evaluation would thus serve to reduce the likelihood that in a death penalty trial, the State's prosecution would be opposed solely by a self-represented advocate

“who by reason of [a] mental condition stands helpless and alone before the court...”  
(*Indiana v. Edwards*, 554 U.S. at 177.)

## **Background: Competence Standards**

### **Competence to Stand Trial**

The most basic applicable legal standard is trial competence (CST). Generally defendants are presumed to be mentally competent for an adjudicative trial unless a specific, two-pronged legal test is met.<sup>8</sup> A defendant is considered legally incompetent to stand trial if (as a result of mental disease or disability) the defendant *cannot understand* the nature of the proceedings, or the defendant cannot assist defense counsel in a *rational* way. Defendants must have not only a factual but also a rational understanding of the proceedings in order to satisfy the mandate of due process. (*Dusky v. United States* (1960) 362 U.S. 402.)

When a doubt is expressed, prior to trial, about a defendant’s mental competence to be tried (CST) in California, the trial court will generally appoint mental health experts whose task is to examine the defendant and submit reports to the court. (Penal Code 1369(a)). In some instances, the court will rule on competence based solely on the reports, although there is a right to jury trial on the competence issue. (California Penal Code secs. 1368, 1369.)

Depending on the trial court’s resources, mental health experts may have little opportunity to examine the defendant’s mental health history and may be given limited time to examine the defendant. Some competence reports are based on a one-hour mental status examination, with little background information on the examinee, which may mean that the appointed mental health experts come to conflicting conclusions.<sup>9</sup>

A related problem is that some mentally ill defendants are so loath to be labeled as disabled that they will refuse to meet with the mental health experts, or refuse to undergo any formal testing, leaving the experts (and the trial court) with little to go on in their assessment of the defendant’s functioning.<sup>10</sup>

In California, where capital appeals and *habeas* proceedings generally take over two decades<sup>11</sup>, one-hour mental status examinations were seen in many older-case competence determinations, while more recent cases attempt to apply standard metrics, some of which require considerable time and training on the examiner’s part to administer.<sup>12</sup> A brief excerpt from a training video for mental health experts on one of the competence instruments provides a helpful illustration; it can be observed that the examiner’s questions about the legal proceedings are, at least initially, fairly basic: <http://www.youtube.com/watch?v=HOKGS-XuFqk>.

However, even where standardized metrics are administered, experienced examiners have commented that these tests are better at measuring a defendant’s content knowledge (such as their knowledge of the parties’ roles) than they are at evaluating defendants’ ability to rationally assist counsel.<sup>13</sup>

Trial judges in a capital case may be especially skeptical of mental health diagnoses and vigilant for signs of malingering, as the outcome of a competence-to-stand trial examination in a capital case could mean that rather than face the prospect of execution, the defendant is sent to a mental hospital. (See, e.g., *In re Davis* (1973) 8 Cal. 3d 798, 801 [re procedures for commitment of defendants judged mentally incompetent to stand

trial].) Even though such a legal reprieve, in a hospital, could be only until such time as the court determines that a defendant's competence is restored,<sup>14</sup> judges may believe that a wily defendant is faking or exaggerating symptoms to avoid prosecution. Many legal experts argue that the standard for competence is too low in *all cases*, but trial judges may be especially wary of incompetence claims in a capital context, and more likely to err on the side of finding defendants competent to proceed than in the reverse direction.

In general, the competence to stand trial standard (CST) is a very low bar, and one prominent defense attorney expressed the cynical view that standards are so low that if a defendant can "tell the difference between a judge and a grapefruit," he is likely to be deemed competent to stand trial.<sup>15</sup> Mental health diagnoses are no bar to competence findings, with some surveys estimating that "approximately 10-25% of defendants found competent to stand trial have psychotic diagnoses".<sup>16</sup>

Under California law, theoretically, competence is not a one-time decision; if "a doubt is declared" at any point during the trial proceedings, the question of a defendant's mental competence may be revisited during the trial and the proceedings are suspended while the defendant's present mental competence is determined.<sup>17</sup> However, in the sample cases reviewed, where calls for competence examination were made during the trial proceedings, judges generally opted to continue the trial without meaningfully readdressing the issue.

While some defendants will fail both parts of the competence to stand trial (CST) examination, as noted, it is the second prong of the legal test which may be the most problematic. This part of the test asks: Can the defendant assist counsel in a rational manner for his or her own defense? This determination puts the judge in the position of deciding whether the defendant is unable or merely unwilling to cooperate with defense counsel.

Mentally ill defendants may seek to represent themselves precisely because they are *unable* to cooperate with any defense counsel. Defendant 1, samples of whose language are presented below, went through seven trial attorneys. When queried about this client nearly a decade later, one of the seven attorneys commented that Defendant 1 was "one of the most difficult clients I ever dealt with."

Defense counsel may seek to withdraw from representation of a client where the client's mental symptoms so prevent meaningful communication and preparation of an informed defense that counsel feels unable ethically to continue in this role.

Example 1 shows a disagreement between Defendant 1 and his appointed trial counsel. Defendant 1 objected to this attorney on religious grounds. The trial court attempted to resolve the problem, hearing from both the defendant and his lawyer in turn.

### **Example 1:** Defendant's Disagreement with Trial Counsel

*Defense counsel to J:* ...I don't believe any attorney who challenges [Defendant 1]'s preconception of the law or ideas of how the case should be run is going to have any better result than I have had.

*D1:* That's absurd, Your Honor, and it's not true.

J: Just a minute. You're going to get a chance.

*Later, the defendant commented:*

D1: There's just too many places in the Bible, your Honor, pointblank says that you're not going to trust someone who is an atheist, and [defense counsel] Mr. [X] has admitted that he's an atheist.<sup>18</sup>

As it turned out, Defendant 1's difficulties in getting along with defense counsel and in speaking out of turn, contrary to the courtroom procedures, characterized his trial from start to finish, and prompted him, with the trial judge's permission, to at least temporarily serve as his own defense counsel.

### **A higher competence standard for self-representation?**

Assuming that a defendant has passed the very low competence to stand trial (CST) bar, what happens if the defendant then decides to dismiss counsel and serve as defense advocate? Until 2008, the legal standard such a defendant needed to meet was merely to show that this decision – for self-representation – was knowing and voluntary. (*Faretta v. California* (1975) 422 U.S. 806; *Godinez v. Moran* (1993) 509 U.S. 389.)

In *Indiana v. Edwards* (2008) 554 U.S. 164, the United States Supreme Court for the first time recognized a higher competence standard. In *Edwards*, the Court acknowledged that some defendants may fall in a “gray area,” with respect to trial competence. These defendants may pass the very low test for competence to stand trial, but they may not have sufficient mental competence for self-representation.

At least some of the defendants whose language is presented in the next section would arguably fall into that “gray area” group – they had some knowledge of trial proceedings and the players, but they did not possess the mental competence to serve as their own counsel. Other defendants were arguably so impaired that had a rigorous CST test been applied,<sup>19</sup> these defendants' disabilities would have ensured that they failed it. This group would have been accurately described as both unable to assist defense counsel in a rational way (failing the second prong of the CST test) and incapable of serving as their own defense counsel due to handicapping mental illness.

An important consideration in the Supreme Court's (2008) *Edwards* decision was an *amicus curiae* (friend of the court) brief from the American Psychiatric Association highlighting the communication skills a defendant would need for self-advocacy.<sup>20</sup> These skills will be examined in detail below.

Examples 2 and 3 provide excerpts from trial court examinations of defendants proposing to represent themselves. As can be seen, the questioning by trial judges can be brief and may give the defendant little opportunity to display complex language, either in terms of comprehension or language expression.

#### **Example 2: Judge Queries Defendant Seeking to Serve as Own Attorney**

J: I'll ask you, have you ever represented yourself before? D2: Yes, I have. J: And did you end up going to the *joint* over it?<sup>21</sup> D2: Yes.

In Example 2, the judge's questions are all simple yes/no in form, giving the defendant even odds to answer correctly.

In Example 3, although the judge asks the defendant multiple times what the aphorism (concerning “a fool for a client”) means, he does not wait for the response. Nor does the trial court probe deeply to find out whether the defendant truly comprehends the choice he is making. Nevertheless, this defendant also was allowed to serve as his own attorney.

**Example 3: Judge Questions Defendant Seeking to Serve as Own Attorney<sup>22</sup>**

J: Now, the People are deciding if this is a death penalty. [¶] Do you understand...

D2: I understand that.

J: And there is a saying in the law ‘that a lawyer who tries his own case has a fool for a client.’

D2: I have heard that.

J: Do you know what it means? (x2)

D2: I heard that before... Do I know what it means?

J: Yes. What it means is...

The judge’s comments in the next examples show that judicial patience with competence claims may be fairly thin.

**Example 4: Judge’s Concluding Remarks after ‘Examining’ Prospective *Pro per* Defendant**

J: “... [c]learly this court is in no way competent to make a psychological evaluation on its own; however, what I have observed is that [defendant] appears to be abundantly aware of the nature of the proceedings and of the risks that he faces.”

Despite the brevity of the court’s dialogue with the defendant, and a concession that the judge alone cannot make a psychological evaluation, the court nevertheless proceeds to put on the record its impressions of the defendant’s mental state.

The trial court may also encourage arguably incompetent defendants to opt for a nonjury proceeding on the issue of competence, apparently in an effort to expedite the proceeding. The next vignette shows such an exchange between a judge and defendant.

**Example 5: Trial Court Approves Waiver of Jury on Competence Issue**

J to D1: “You waive a jury trial on that issue [competence to stand trial] so we can get on with the show; is that correct ?”

D1: “Yes, Your Honor.”

As illustrated in Examples 2-5, the main concerns on the trial court’s part appeared to be the possibility of defendant malingering, or *pro per* litigants’ manipulation of the proceedings, on the one hand, and judicial efficiency, or moving the proceedings ahead, on the other. Neither of these concerns provides much motivation for a searching inquiry into mental symptoms, which may vary in severity over the course of a trial.<sup>23</sup>

**A sample of *pro per* defendants in California capital transcripts**

In order to examine how the question of competence to represent oneself was determined in cases still in the postconviction process in California, a small sample of capital cases was selected from available transcripts of the approximately 50 *pro per* cases among the California capital appeals monitored by the California Appellate Project.<sup>24</sup> (See Figure 1). The number of defendants who were allowed to represent themselves throughout the proceedings at trial comprises a relatively small proportion of prisoners sentenced to death. In many instances, even if defendants initially convinced the trial court to allow them to defend themselves, later these defendants accepted appointed counsel.

Since there are currently over 700 persons on California’s Death Row, *pro per* prisoners at trial make up less than 10% of those so sentenced. Nevertheless, *pro per* representation is not merely a phenomenon of the past. In a local county, an aged and arguably mentally ill defendant was sentenced to death in November, 2013, after representing himself throughout the trial proceeding.<sup>25</sup>

DEFENDANT	D1	D2	D3 <sup>27</sup>	D4
AGE (trial)	41	50	46	36
EDUCATION	College grad	High school grad	11 <sup>th</sup> grade	Some community college
ETHNICITY	White	African American	White	African American
OFFENSE	Burglary/rob murder	Poison-murder	Murder for hire	Murder of officer
EVALUATION	Paranoia; thought disorder; persecutory delusions OR narcissistic personality disorder	Chronic Psychosis of Schizophrenic Proportion	Paranoid Schizophrenia	Temporal and frontal lobe damage to brain OR Antisocial Personality Disorder

**Figure 1. Defendants in California case examples**

Figure 1<sup>26</sup> shows brief background information on the four defendants whose language was sampled. In all four cases, the defendants were charged with homicide and a “special circumstance” rendering them death-eligible under the California Penal Code. All of them had at least a high school education, and all of them had been evaluated previously as having serious mental disorders. Most of the time, these defendants represented themselves with “advisory counsel” appointed by the trial judge.<sup>27</sup>

The most extreme of the four was Defendant 1. Defendant 1 was permitted not only to serve as his own advocate for part of his capital trial, but he was also permitted to serve as his own lawyer at the pre-trial competence hearing, at which the very objective was to determine his mental competence to stand trial and to represent himself.<sup>28</sup> Needless to say, he was not a very “objective” judge of his own mental state, and the resulting transcript provides for some absurd interchanges.

To be charged capitally in California, a defendant must be accused of murder. But as capital homicides go, the four sample cases in Figure 1 were not the most extreme; these were single victim crimes, and the special circumstances which earned the defendant eligibility for the death penalty were usually murder in the course of another felony, such as robbery or burglary (California Penal Code sec. 190.2(a)(17).)

### **An Interloper New Yorker for contrast**

Along with data from these rather more mundane California cases, one may contrast information contained in a brief illustrative videoclip from the trial of Colin Ferguson, a notorious *pro per* defendant in a New York mass shooting incident, who was allowed to represent himself despite very serious mental health problems.<sup>29</sup>

Mr. Ferguson did not face a death sentence but is now serving what is effectively a life sentence in the New York prison system. Mr. Ferguson's trial was seen as a theatre of the absurd by many commentators; it provoked voluminous legal discussions and calls for revision of the competence evaluation methods and standards among psychological researchers as well.<sup>30</sup>

### **The next step: proceeding to trial: requisite communication skills**

Once the California defendants (and the notorious Mr. Ferguson) have taken on the advocate's role and are representing themselves in these homicide cases, what are some of the identified communication skills they must display? The brief of the American Psychiatric Association in *Indiana v. Edwards* provides a useful, but nonexclusive list.

In the advocate's role, the *pro per* defendants will have to command the linguistic and pragmatic skills, as well as the knowledge of courtroom protocol, to (1) pose questions to jurors, (2) express a coherent case theory in opening statement, (3) question and cross-examine the state's witnesses, (4) choose and question their own defense witnesses, and (5) persuade jurors in closing argument.

The next section provides illustrative examples, from the capital case transcripts of these four defendants, analyzing how well the defendant/advocates managed these necessary skills.

### **Questions to prospective members of the Jury:**

Defendant 3 had peculiar requirements for jurors for his capital trial. In the *voir dire* session (the questioning process in which individual jurors are selected), Defendant 3 spent a great deal of time quizzing prospective jurors about a Biblical character, the Beast of Revelations. A representative exchange is shown in Example 6.

#### **Example 6: Defendant 3's Questions to Prospective Jurors**

*D3:* If somebody...told you that the Beast in Revelations...is supposed to be evil, would it convince you that my interpretation is that he cannot have society at heart, that he must be evil, that you would not be convinced by somebody that...read the Bible that I would have to be evil?

*Juror:* No.

*D3:* Would my attempting to go down in history as this individual cause you to view the evidence that if [the prosecutor] shows a different outlook?

Although Defendant 3's obsession with the Biblical character may have seemed relevant to him, his questions could only have left the prospective jurors baffled, wondering what on earth the Beast had to do with defendant's guilt or innocence of the charged crime.



### Opening arguments:

After the jurors are seated, the defendant's next task is to present an opening argument in which a defense theory is set forth. From the outset, the defendant must come up with a coherent story, an explanation of what the trial is about, and reasons why the jury should doubt the prosecution's case and reject the charges. Ideally, this theory of defense should not only make sense to the defendant, but also to the judge and jury. It should be a defense he can support factually, or at least use to attack the prosecution evidence.

In the small California sample, some of the defendants were forceful and articulate in this initial presentation. An opening argument by Defendant 2 is shown in Example 7.

### Example 7: Opening Argument & Defense Theory: Reasonable Doubt

*D2*: Now, the defense contends that what happened in the case is not the way the prosecutor has described it. On the contrary, defense contends and *knows vigorously* that the facts will show an entirely different version of what occurred and that the – and the facts will show that the defendant did not do what the prosecution contends he did.

Defendant 2's opening argument was forceful, but contains a semantic oddity: One might wonder how someone "*knows [facts] vigorously*" as he claims the defense does, as the verb "to know" does not describe physical activity.

Defense theories among the California sample and in Mr. Ferguson's case are shown in Example 8.

### Example 8: Defense Theories in Sample Cases of Self-Representation

- Mistaken Identity: (Ferguson, NY) Defendant fell asleep on the commuter train while carrying the murder weapon (a gun) in a bag; another man took the gun and shot victims; Defendant was accused out of societal racism; the number of murder counts matches the year.
- Third Party Culpability, Defendant Wrongfully Accused
  - Framed: (D3) Prosecution witness was not reliable; Defendant was falsely accused because persons are angry at his emulation of the Beast of Revelations
  - Alibi: (D1) Defendant was in court on another matter [M1] on the day of charged homicide; transcripts of that day's (i.e., M1's) court proceeding were falsified through a conspiracy of court actors

As Example 8 shows, these defense theories were not, in themselves, unusual at all. The theories advanced by these *pro per* litigants were common ones, and viable defenses if presented by a competent advocate. Third party culpability (false accusation or wrong identification), Ferguson's defense, is used daily in courtrooms. Third party culpability

was also the defense theory in the case of Defendants 2 and 3. Defendant 3 sought to establish reasonable doubt also about the reliability of the state's witnesses.

Defendant 1 relied on an alibi, and a seemingly very solid one: What better alibi could there be than for a defendant to have been in court [for something else] on the day he allegedly killed the victim?

When these apparently viable theories are examined closely, however, many problems emerge; the defendants' rationale for these defense theories in all three instances was untenable or bizarre. For example, although Mr. Ferguson insisted that another (white) person had done the shooting of which he had been accused, there were numerous eyewitnesses at the scene (including surviving victims) as well as forensic evidence which contradicted him. His firmly held, yet false, belief in this mystery shooter was an apparent delusion contradicted by voluminous evidence.

Defendant 3's theory of wrongful prosecution was in fact, a very strong defense, as the main prosecution witness was an unreliable drug addict. Unfortunately his expression of this defense theory was muddled, and his rationale for why someone might want to falsely accuse him did not make sense to jurors. He had claimed he always wanted to emulate the Beast of Revelations, and persons opposed to this idea would try to kill him.<sup>31</sup>

Defendant 1 sought to rationalize ambiguities in the record of his alibi court proceeding (M1) by claiming that his defense attorney, the judge and many other court personnel were engaged in a grand conspiracy to falsify the transcript of that proceeding. The difficulty with his alibi in fact had to do with vague information on the time the conflicting court session (M1) had ended, and whether he could have committed the homicide after it ended. These facts were disputed by the parties. Although Defendant 1's notion of a conspiracy to falsify the M1 transcript had no support in the evidence, it was one to which he appeared strongly committed.

Needless to say, none of these irrational defense theories were successful as a foundation for reasonable doubt about the defendant's culpability. Nevertheless, they were central features in the *pro per* defendants' presentation. The reaction of the audience – jurors and spectators – is telling. In the case of Mr. Ferguson, a defense theory so clearly in conflict with the eyewitness testimony of injured victims met with vehement outrage. The press reported that spectators at his trial broke out in cheers at the verdict.<sup>32</sup>

In the California cases, the audience would likely have found the defense (as the prosecutor in Defendant 3's case argued), "a farce," or incomprehensible.<sup>33</sup> All four California defendants were convicted, as well as sentenced to death.

### **Questioning Witnesses**

Having seen that these legal defense theories were viable, but flawed in pragmatic support, we may examine a seemingly more ordinary task – questioning witnesses. A survey of the transcripts showed that both the form of questions and their content were problematic. *Pro Per* defendants had trouble with the prohibitions on hearsay and on compound or repetitive questioning, drawing warning comments from the trial judge.

#### **Example 9: Defendants' Questions to Witnesses**

D2: You have said that you heard that somebody said that he was going to get [the deceased V] and you. Where was this at? Where did you hear it?

*W to J*: What is he saying?

...

*D3*: [I]f our governments are spending this money on space, if they put a large enough volume of people in space, are these people going to want to form a government of their own?

*W*: I haven't got the foggiest idea....

In the first exchange in Example 9, Defendant 2's question concerns vague *hearsay* – something that the witness heard “somebody” say in a context other than the courtroom. Presentation of hearsay evidence is generally barred by the rules of evidence. In addition, the defendant's utterance includes several questions, and is subject to further objection as compound. It is little wonder the witness was confused, and so remarked to the judge.

In the second exchange in Example 9, it is the content of the question, as well as its length that appears to baffle the witness. In questioning the witness, a mental health expert, Defendant 3 asked him an apparently irrelevant question about space colonies.

Other examples show that in terms of courtroom protocol, the *pro per* defendants' mental symptoms led to long, convoluted and rapid-fire delivery. Defendant 1's questions often displayed such characteristics, which made him very hard to follow.

#### **Example 10:** D1's Long and Involved 'Question'<sup>34</sup>

*D1*: You said that I was rambling to the point where the court reporter had to ask me to slow down. Now, is there a *distinguish* between talking too fast for her recording what I'm saying as per somebody else could still at least understand what I was saying but my forgetting about the fact that she was having to work so hard? ...

*W*: I'm having difficulty with that question.

Another feature which marred Defendant 1's courtroom talk and made him hard to follow was his varied manner of referring to himself, as seen in Example 11.

#### **Example 11:** Varied Self-Reference

*D1 to J*: ...I would like to ask the court to enforce the granting of the Brady...material. And if I can't ask the court, I'm asking my attorney at this time to ask the court to enforce my right to a complete copy. The defendant knows this case, he was at the preliminary examination, not [defense attorney]. He [=counsel] can read the transcript but Mr. L also knows...

Defendant 1 used both first and third person pronouns (“I” and “he”) to refer to himself as well as “the defendant” and his own name, Mr. L. This aspect of his argument, whether delivered to the judge or the jury, made his presentation confusing. Part of his referential problem had to do with his dual role, but wavering between the different forms wreaked havoc with the notion of linguistic cohesion.

Thus far, it has been shown from these few examples that in all of the cases, the *pro per* defendants had difficulties with some of the most basic trial communication

skills which marred their case presentation and defense. While on the surface, their defense theories were common ones, and their speech attempted to adhere to the question/answer form of the courtroom, in actual practice, both the form and the content of their courtroom performance was seriously impaired.

### **Attention to guidance by the trial court**

Although the trial court allowed these litigants to proceed solo with “advisory” counsel, at various points, the trial judges tried to steer them toward appropriate courtroom language and protocol.

In nearly every one of the California case vignettes, there are examples of the judge administering lengthy scoldings to the defendants on the record, usually in front of the jurors. Much of the time the judges’ remarks are expressions of exasperation for what the court perceived as defendants wasting judicial time on irrelevant matters.

Example 12 presents representative comments by judges in the individual cases; although spoken by different judges, the four samples show an escalating scale of annoyance.

### **Example 12: Judges’ Admonitions to *Pro Per* Defendants**

J: I’m sorry to interrupt. But some of what you’re saying is not helpful to the issue that’s in front of me.

J: Your argument is rambling, your argument makes no sense.

J:... you’ve got about two minutes to tell me the answer to that question

J: You are not going to argue with this lady [=W]. You are going to ask her questions. And we are going to get through this. If you are not going to do that, then we are going to have a discussion.

Nevertheless, what prompted the judges’ scolding in Example 12 is less likely to be willful defiance of the courtroom protocol than a matter of defendant’s unfamiliarity with courtroom rules. These lapses also may well be a symptom of mental illness, manifesting an inability to self-monitor and make necessary corrections.

These defendants were apparently unable to match their speech to the metalinguistic descriptions of their own talk. For example, when the judge ordered a defendant to *confine your remarks to the scope of the case*, the defendant asked what the scope was.<sup>35</sup> When another defendant attempted an explanation of his question to a witness who had answered negatively, the defendant apparently did not realize he was “arguing” with the witness.

Clearly, if the defendant does not recognize his speech as fitting what the judge is describing or proscribing, he or she will be unable to alter it. Yet often the arbiter in these proceedings appeared to treat the bafflement of the defendants, or inability to conform, as an instance of willful defiance.

Another persistent problem in interaction with the judge and jury arose from the defendants’ apparent inability to think through the consequences of their arguments, or to gauge the effect of their remarks on the listener, which resulted in ill-considered remarks to the legal powerbrokers, such as those seen in the next example.

**Example 13:** Defendants' Remarks Alienating the Adjudicator

D3: The D.A., the D.A. wants the death penalty, and I can't see that I'm much concerned. You want to put me away for natural life or death. Neither way is too much to look forward to. If you want – I am disappointed in you as jurors.  
D1: I think there's going to be improper appointing of counsel if the Judge does it and protecting his own people who walk among his intimate footing himself. And so far you've [=J] made nothing but bad decisions.

These utterances were very likely to insult or annoy the hearers, to the defendants' detriment. It is not prudent for a speaker to insult the jury who will later be making a life or death decision about that speaker's punishment. Similarly, telling the judge that all of the judge's decisions have been "nothing but bad" is unlikely to draw much sympathy from the court who will later be pronouncing a sentence.

**Language features are consistent with those symptomatic of mental illness**

As observed, many features of the language used by defendants in this small sample would make them difficult to follow and far from ideal advocates in their own cause. In fact, a survey of the psychological literature confirms that many features of these *pro per* advocates' language are listed among symptoms of mental illness, such as the fast, *pressured speech* of Defendant 1 which vexed the court reporters, and his problems in *consistently clear reference*. A great many pages in this defendant's case transcript contain admonitions to, "slow down!" from the court reporter, judge or other trial players.

Like the defendants observed by LaVigne and Van Rybroek, the *pro per* defendants in the California sample had difficulties taking others' perspectives into account. Two additional features were also telling – Word Approximations and Circumstantiality – commonly observed in the communications of schizophrenics, although they are not limited to that diagnosis.<sup>36</sup>

Samples of the defendants' word approximations are shown in Example 14. Their courtroom talk could sometimes display rather subtle lexical problems – either in invented words or novel usage.

**Example 14:** Defendants' Word Approximations

D1: This is not me, Your Honor. I'm not a *pre-child*

D3: You may not *speed the rate* of my, as long as I keep covering new ground.

D4: And you indicate you've got an opportunity to *review me*, or did you?

W: To examine you, yes.

Defendant 1's utterance in Example 14 was given in response to the notion that he lacked understanding, to rebut the notion that he was naïve or had the comprehension ability of a baby.

Defendant 3's expression "speed the rate" protested the judge's trying to hurry him along in his presentation.

And finally, Defendant 4 used a verb which often takes an inanimate object (“review a book”) and substituted it for the verb which appropriately described a psychological assessment (“examine”).

Two defendants showed a general pragmatic aberrance which marked their expression as strange. As shown in previous examples, Defendants 1 and 3 were preoccupied with certain topics and regardless of their relevance, the defendants raised these issues frequently, such as the notion of the forged transcripts (Defendant 1) and the Beast of Revelations (Defendant 3).

Both defendants tended to be long-winded on topics of only slight relevance to the question or issue at hand, which exasperated the court. Defendant 1’s speech in his advocate role showed particular circumstantiality, giving long-winded responses to questions which were only tangentially related to the query. A sample is shown in Example 15, where, in response to the court’s question about why he wanted to represent himself, he veered off topic.

#### **Example 15:** D1’s rationale for self-representation

... Been brought up competitive swimming all my life. It [a]ffected everything about my life. It’s been a real pleasure to have the parents I had to support those things when I was a child.

If Defendant 1 had said, “I want to represent myself because I enjoy competition and was raised in a competitive way,” perhaps his rationale would have been more intelligible. Instead he careened off the path into a discussion of his family. During his self-representation, many transcript pages were taken up with such oblique and tangential remarks.

#### **Summary and limitations**

The examples of language in these four California cases were taken from court transcripts, but had the defendant/advocates been observed live in court or on video, as Mr. Ferguson was, they would likely have appeared even more impaired, as the written transcript does not record their demeanor, facial expressions, or prosodic oddities (of volume, rate, or tone) except to the extent that others in the courtroom reacted to them, remarking, e.g., “Slow down!”, “Could you repeat that? I didn’t understand,” or as in the case of Defendant 3, commenting to the judge, “I don’t know what he is trying to prove.”

While the four defendants varied in how well they could follow the courtroom protocol, Defendant 1 appeared to be the least able to follow the court’s admonitions to slow down and to refrain from talking out of turn. At his sentencing hearing, after the jury had rendered its death verdict, a news photographer’s documentation revealed that the trial judge had ordered him to be bound and gagged for that court session.<sup>37</sup>

Although Defendant 1 was the most extreme, all four of the cases of self-represented defendants presented some of these same basic pragmatic problems in communication. They had difficulties in self-monitoring, maintaining pragmatic perspective and coherence – deficits which may confuse or perplex other courtroom players and doom their efforts at advocating for themselves.<sup>38</sup>

In contrast to Mr. Ferguson, whose courtroom presence and presentation were remarkably articulate and measured (albeit espousing delusional and irrational views), the pressured speech, circumstantiality and other features of Defendant 1's speech, which he clearly could not control, marked him as a particularly impaired advocate. Yet both men, for a time at least, were evaluated as proper advocates in a *pro per* role.

## Conclusion

Although the balance between a defendant's right to self-representation and the integrity of the judicial system is a delicate one, it is evident that in none of the instances discussed and illustrated above was either the justice system or the defendant very well served. Whether the defendants would be assessed as being in the "gray area" between competence to stand trial and competence to represent themselves is debatable. Nevertheless, if the trial-competence standard were made more rigorous, as many have advocated, defendants with such serious symptoms probably would have been sent to a mental hospital rather than subjected to a capital trial.

Among the most tragic cases are those in which a viable defense and strong doubt about the defendant's guilt was obscured in the muddle created by defendant's mental symptoms, as in Defendant 3's case.

The features of the four defendants' language and discourse, along with the other players' reaction to them, thus played an important role in determining whether such a trial "proves [as] humiliating as ennobling" for defendants who sought to serve as their own lawyers (*Indiana v. Edwards* (2008) 554 U.S. 164, 176.)

It is to be hoped that a more interdisciplinary approach to trial competence evaluation, with full attention to the language as symptomatic of mental illness, will aid in making more valid and dynamic assessments both for the so-called "Gray Area" defendants, and for defendants in general.<sup>39</sup>

Many commentators have pointed out that for every notorious case like Mr. Ferguson's, or the serious capital homicide cases presented here, there are many lower-stakes everyday court proceedings where the mental competence of the defendant is at issue,<sup>40</sup> yet only rarely is the defendant determined to be incompetent to proceed to trial.<sup>41</sup> While the rate of mental illness among incarcerated persons is estimated to be three times that of the general population, less than 2% of the felony defendants are determined to be incompetent to stand trial.<sup>42</sup>

These statistics strongly suggest that improvement is in order, and those whose field of study is language and pragmatics would be very helpful adjuncts to the mental health professionals who make these critical evaluations, and to the judges whose decision may lead to either a fair trial or (as suggested in the cases sampled above) a devastating wreck.

## Notes

<sup>1</sup>The balance between a defendant's autonomy – or right to defend him or herself under the Sixth Amendment to the United States Constitution – and the government's expectation and protection of fairness in an adversary proceeding has been much debated, especially in those instances in which the defendant appears to suffer from mental illness. See, e.g., Sabelli and Leyton (2000), who argue the protection interest may be strongest, in contrast to Wilson (2010), who argues that defendant autonomy must be the strongest consideration. Slobogin (2006) also is a strong voice for self-determination for mentally ill defendants. See also Frigenti (2012).

<sup>2</sup>Bardwell and Arrigo (2002) argue that a lack of rigor and consistent standards in competency assessments must be corrected.

<sup>3</sup>Davoli (2009: 313) maintains that current competence standards inappropriately focus on the diagnosis, or the “cause” of incompetency, rather than the resulting symptoms of disability. Colin Ferguson’s former lawyers focus on the leniency of the competence bar (Kuby and Kunstler, 1995). The “outmoded” nature of the competence standards has been the subject of much scientific and legal commentary as well (see Davoli, 2002).

Hashimoto (2010: 1147–1187) suggests that current proposals for limiting self-representation would infringe all defendants’ Sixth Amendment rights (to choose self-representation) to protect a few. Instead, the author advocates making the test for mental competence to stand trial more rigorous, noting that only a very small percentage of criminal defendants receive competency examinations and only a tiny percentage are found incompetent to stand trial, despite demographic surveys of prisoners indicating a large population with serious mental health symptoms, such as delusions or psychosis. Based on Hashimoto’s statistics, it is possible that the proportion of capital charged defendants whose competency is in question may be higher than among simple felony defendants, but the percentage of capital defendants found incompetent is likely to be similarly very low.

<sup>4</sup>LaVigne and Rybroek (2011, 2014) have surveyed communication problems impairing defendants’ abilities to assist their defense counsel, including deficits in pragmatic competence, a “lack of social cognition, an inability to take the perspective of the other person, and a failure to appropriately adapt in interactions.” (LaVigne and Rybroek, 2014: 75).

<sup>5</sup>Covington *et al.* (2005) identified pragmatic deficits as an extremely common problem among schizophrenics.

<sup>6</sup>LaVigne and Rybroek (2014: 105) have observed that communication deficits may be misconstrued as obstructionism by legal professionals. The authors have made a strong case for more searching examination of mental competence in conjunction with greater attention to language impairments, as well as more training for lawyers in effective representation of clients manifesting these problems.

<sup>7</sup>The notion of a “gray area” comes from law review examinations of the *Indiana v. Edwards* decision (see, e.g., Appelbaum, 2008; Goldschmidt, 2011), as well as from the *Edwards* decision itself.

<sup>8</sup>The defense bears the burden of bringing forth evidence to rebut the legal presumption of mental competence, and of establishing incompetence by a preponderance of the evidence. *People v. Marks* (2003) 31 Cal. 4th 197.

<sup>9</sup>Where opportunity for assessment is limited, such conflicts are hardly surprising. Further critiques of competence examinations allege a lack of uniform standards and subjectivity in reaching judgments of mental fitness. Davoli (2009: 330) observes “three major flaws” in the assessment of CST: “vagueness, lack of uniformity in diagnostic criteria and failure to consider the etiology of serious mental diseases.”

<sup>10</sup>For example, Defendant 1, whose language is discussed in the next section, refused to undergo testing as he insisted there was nothing wrong with his mental abilities. Lack of insight into one’s own mental symptoms is itself a recognized symptom of mental illness. See, e.g., Amador (2007), Amador and Shiva (2000), 10 Civil Rights J. 401.

<sup>11</sup>See, e.g., Alarcon and Mitchell, 2011.

<sup>12</sup>See, e.g., Rogers *et al.*, 2004.

<sup>13</sup>See, e.g., Testimony of Dr. George Woods, a forensic psychiatrist, in *U.S. v. Duncan*, USCA NO. 08-9903122, RT 5923. Dr. Woods stated that such tests “do relatively well when you are looking at issues of factual: do [defendants] know who their attorney is, do they know the rules of an officer of the court. They do not do as well when you look at issues of rational assistance.”

<sup>14</sup>California Penal Code § 1372, which sets forth procedures after restoration of competence.

<sup>15</sup>Defense attorney Ronald Kuby, in “The Long Island Railroad Massacre (Dark Documentaries)” available at: <http://www.youtube.com/watch?v=8MPoz5DioPE>

<sup>16</sup>Bardwell and Arrigo (2002: 119)

<sup>17</sup>*Drope v. Missouri* (1975) 420 U.S. 162, 181 (“Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence. . . .”) California Penal Code § 1368 provides that when



doubts about defendant's competence are raised by either counsel or the trial judge, proceedings may be suspended.

<sup>18</sup>In fact, hyper-religiosity, and injection of the theme of religion into contexts where it was arguably irrelevant, was typical of this defendant's remarks to the court. A preoccupation with religious themes and religious delusions may go along with psychotic disorders. (Brewerton, 1994).

<sup>19</sup>For example, distinctions among symptoms (as advocated by Davoli) may have precluded trial for actively delusional clients, such as Defendant 2, or other defendants manifesting psychotic symptoms.

<sup>20</sup>Brief for the American Psychiatric Association and American Academy of Psychiatry and the Law, *Indiana v. Edwards*, 2/11/08.

<sup>21</sup>"Joint" is a common slang term for a place of incarceration.

<sup>22</sup>Example 3 is a continuation of the talk between the judge and same defendant as in Example 2.

<sup>23</sup>In California as in most states, defendants in such serious cases are incarcerated throughout their capital trials; thus, their mental symptoms may also be exacerbated by conditions of confinement, warranting a re-assessment of competence during the course of trial proceedings. See e.g., <http://www.latimes.com/local/lanow/la-me-ln-jails-20140606-story.html>

<sup>24</sup>This number is an extremely rough estimate, as of December, 2013. More recent transcript data for additional *pro per* defendants is not yet available.

<sup>25</sup><http://www.sfgate.com/news/article/Serial-killer-Naso-sentenced-to-death-5002487.php>

<sup>26</sup>Among the group of defendants in Figure 1, defendant 3 is one whose trial performance was discussed in an earlier paper on narrative to the IAFL in 2006. See Greenlee (2007).

<sup>27</sup>However, the role of advisory counsel is a limited one (*People v. Hamilton* (1989)48 Cal.3d 1142, 1165). While a *pro per* defendant may confer with advisory counsel and advisory counsel may question the defendant if the defendant testifies, most other advocacy tasks are left to the defendant.

<sup>28</sup>On appeal, the California Supreme Court determined that allowing the defendant to serve as his own counsel for the competence hearing was an error and remanded the case to the trial court. In a bizarre development, a retrospective competency hearing was then held in the lower court to determine the defendant's CST some 20 years earlier; he was held competent, and the prior conviction and sentence reinstated. Nevertheless, as acknowledged by the High Court, such retrospective determinations present special problems (*Pate v. Robinson* (1966) 383 U.S. 375, 387.) Press accounts of the retrospective competence hearing for D1 noted that because the defendant could not stop speaking out of turn, he was absent for much of the latter proceeding.

<sup>29</sup>Mr. Ferguson was determined to have a delusional disorder, persecutory type by a defense psychiatrist, Dr. Dudley, while more cursory examinations by two other mental health experts labeled him as merely having a paranoid personality (Bardwell and Arrigo, 2002: Chapter 5). Excerpts of Mr. Ferguson's trial, including his opening and closing statements are found in "The Long Island Railroad Massacre (Dark Documentaries)" available at: <http://www.youtube.com/watch?v=8MPoz5DioPE>.

<sup>30</sup>Bardwell and Arrigo (2002) summarize varied responses to the Ferguson case.

<sup>31</sup>See Greenlee (2007: 168): "A press summary of Lowry's defense at trial characterized it accurately and succinctly as 'some ill-defined conspiracy by police and others to frame him because he aspired to emulate the Beast of Revelations in order to rid the world of homosexuals and restore religious faith to humanity in the future.' "

<sup>32</sup>*Railroad Killer Gets Life Term as Cheers Erupt*, Los Angeles Times, 3/25/95. [http://articles.latimes.com/1995-03-23/news/mn-46266\\_1\\_colin-ferguson](http://articles.latimes.com/1995-03-23/news/mn-46266_1_colin-ferguson). Mr. Ferguson was sentenced to 6 consecutive terms of 25 years to life in prison. He was also sentenced to 50 years on additional counts, including multiple counts of attempted murder, *People v. Ferguson* (1998) 670 N.Y.S.2d 327 (App. Div. 1998), appeal denied, 706 N.E.2d 750 (N.Y. 1998).

<sup>33</sup>Greenlee (2007: 169).

<sup>34</sup>This example also shows odd use of the word "distinguish" as a noun, apparently intending the word "distinction."

<sup>35</sup>Greenlee (2007: 167)

<sup>36</sup>Inadvertent lexical slips are of course not limited to the mentally ill. However, inventions of novel words whose meaning is idiosyncratic to the speaker is more symptomatic.

<sup>37</sup>See note 28; Defendant 1 was ordered removed from the courtroom in his subsequent retrospective competence hearing, as well.

<sup>38</sup>These deficits are well-known features of mental illness. See Andreasen, 1979; Covington *et al.*, 2005. Research with mentally ill patients found that patients whose diagnosis was schizophrenia demonstrated considerable impairment in understanding legal rights and waivers. (Roessch and Zapf, 2002).

<sup>39</sup>The work of LaVigne and Van Rybroek with juvenile and adult defendants has emphasized and highlighted the need for consideration of communication and language deficits along with assessments of mental competence in an interdisciplinary approach (see LaVigne and Rybroek, 2011, 2014.)

<sup>40</sup>Davoli (2009: 316)

<sup>41</sup>Even those who are psychotic may also be considered competent to stand trial. Davoli (2009: 316) (see also note 22) observed that even “evidence that the defendant suffers from a mental illness and is currently psychotic, delusional or hallucinating is no bar to a judicial determination of competence.”

<sup>42</sup>These figures suggest that many defendants are in fact, adjudicated while suffering from serious symptoms of mental illness. Hashimoto (2010: 1186) reviewed survey data showing that over half of state prison inmates disclosed “recent history or symptoms of mental illness” and “approximately 15% of state prison inmates reported experiencing symptoms within the preceding twelve months that met the criteria for a psychotic disorder, including hallucinations or delusions.”

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