

**Sup. Ct. # 88497**

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**IN THE  
SUPREME COURT OF MISSOURI**

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**KENNETH BAUMRUK,**

**Appellant.**

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Appeal to the Missouri Supreme Court  
from the Circuit Court of St. Charles County, Missouri  
11th Judicial Circuit, Division 3  
The Honorable Lucy D. Rauch, Judge

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**APPELLANT'S SUPPLEMENTAL BRIEF**

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## **JURISDICTIONAL STATEMENT**

Baumruk incorporates the Jurisdictional Statement from page 11 of his Opening Brief.

## **STATEMENT OF FACTS**

Baumruk incorporates the Statement of Facts from pages 12-24 of his Opening Brief.

## SUPPLEMENT TO POINT I<sup>1</sup>

**In *Indiana v. Edwards*, 128 S.Ct. 2379, 2388 (2008), the Supreme Court held that trial courts may deny self-representation to defendants who “suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.” *Edwards* is fully distinguishable from the facts of Baumruk’s case. Although Baumruk had been found incompetent to stand trial in 1994, he had recovered significantly by 2007. As the court recognized in its findings on competency and at the second hearing on self-representation, the only concern as to Baumruk’s competence was his lack of memory for the events at issue. Unlike the trial court in *Edwards*, the court here mentioned Baumruk’s competence only as an afterthought and never found that Baumruk suffered from mental illness. Any mental health issues Baumruk had simply did not rise to the level of a “severe mental illness” sufficient to override the constitutionally protected right of self-representation.**

*Faretta v. California*, 422 U.S. 806 (1975);

*Indiana v. Edwards*, 128 S.Ct. 2379 (2008);

*State v. Black*, 223 S.W.3d 149 (Mo. banc 2007);

U.S.Const.,Amends. VI,XIV; and

Mo.Const.,Art.I,Secs. 18(a).

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<sup>1</sup> This Point is intended to supplement, not replace, Point I of Appellant’s initial brief.

## SUPPLEMENT TO ARGUMENT I<sup>2</sup>

**In *Indiana v. Edwards*, 128 S.Ct. 2379, 2388 (2008), the Supreme Court held that trial courts may deny self-representation to defendants who “suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.” *Edwards* is fully distinguishable from the facts of Baumruk’s case. Although Baumruk had been found incompetent to stand trial in 1994, he had recovered significantly by 2007. As the court recognized in its findings on competency and at the second hearing on self-representation, the only concern as to Baumruk’s competence was his lack of memory for the events at issue. Unlike the trial court in *Edwards*, the court here mentioned Baumruk’s competence only as an afterthought and never found that Baumruk suffered from mental illness. Any mental health issues Baumruk had simply did not rise to the level of a “severe mental illness” sufficient to override the constitutionally protected right of self-representation.**

### I. The Defendant in *Indiana v. Edwards* Was Severely Mentally Ill

Ahmad Edwards was a schizophrenic. *Indiana v. Edwards*, 128 S.Ct. 2379, 2382 (2008). After his arrest in 1999, he made bizarre statements to the court, his counsel, and

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<sup>2</sup> This argument is intended to supplement, not replace, Argument I of Appellant’s initial brief. Appellant maintains all the other Points and Arguments set forth in his prior briefs.

the press (Pet. Br. at 2)<sup>3</sup>. He believed there was a FBI conspiracy against him (Pet. Br. at 5).

Doctors found that Edwards suffered from delusional disorder “grandiose type” (Pet. Br. at 4-5). He also had a learning disability which was exhibited by his “pattern of using erroneous and inappropriate sentences both verbally and in writing” (Pet. Br. at 5). Another doctor found that Edwards had a “major thought disorder, decompensated during the course of conversations and experienced hallucinations” (Pet. Br. at 5). He also had a “severely impaired working memory, which causes problems with mental focus and thought regulation.” (Pet. Br. at 5-6). Edwards’ writings, like his speech, were “extraordinarily tangential, disorganized, randomly organized, grandiose and reflective of a thought disorder” (Pet. Br. at 6). He was found incompetent to stand trial in 2000 and was committed to a state mental hospital for evaluation and treatment. *Edwards*, 128 S.Ct. at 2382.

After several months, doctors found Edwards competent to stand trial. *Id.* Three months later, however, the court ordered further evaluation after Edwards filed a bizarre and incomprehensible “Motion of Permissive Intervention” *Id.* at Appendix; also Pet. Br. at 6-7.

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<sup>3</sup> This citation is to the brief submitted by the State of Indiana at the Supreme Court (Pet. Br.).

In 2002, the court held another competency hearing. *Edwards*, 128 S.Ct. at 2382. One doctor testified that Edwards was “doing his best to hold his thinking together but he has a formal thought disorder and despite his efforts, he therefore is usually incoherent and unable to hang on to one topic for longer than three to five seconds” (Pet. Br. at 8). Defense counsel introduced a document in which Edwards summarized his planned defense:

Return come to see me for more cash flow because I recently zoomed an eight to six year plan to last. ...

I will not take the stand as an weapon in trial on behalf of a man standing trail with collections of any day caused by madness as to an crowd that included say “Wo” – he imposed us. And told fellows publicly “Hi-Mom”.

(Pet. Br. at 12-13). The court held that although Edwards suffered from a mental illness, he was competent to stand trial. *Edwards*, 128 S.Ct. at 2382.

In 2003, another competency hearing was held. *Id.* The court heard testimony that Edwards was unable to assist counsel due to his schizophrenic delusions. *Id.* It found that Edwards was not competent and again committed him to a state hospital. *Id.* A staff psychiatrist noted that Edwards’ schizophrenia included “symptoms of disorganized thought processes, delusional ideation, hallucinations, and ideas of reference” (Pet. Br. at 10). During his six-month stay, Edwards received extensive therapy and treatments with the anti-psychotic drug Seroquel before he was again deemed competent to stand trial (Pet. Br. at 3, 10).

In June 2005, immediately prior to trial, Edwards asked to represent himself, but he also asked for a continuance. *Edwards*, 128 S.Ct. at 2382. He wrote to the court to ask for a ruling on his motion for self-representation:

Dear Grant Hawkins:

For days I have remained alert for the honor to be released for the execution of a right a 2001 discharge claim drew. Thank you for the moment.

(Pet. Br. at 14-15). He wrote a second letter:

Dear Honorable Judge:

Hopeless! Is there an honest person in court, loyal to law? My court ask for fools to be freed and confidently not near me.

Listen to this case; the foundations of my cause, the Criminal Rule 4. Courts territory acknowledged May 29, 2001 abandon for the young American citizen to bring a permissive intervention. Acting as to the forces! To predict my future disgraced by the court to motion young Americans to gather against crime.

My courts failure humiliated introductions kindly of right reason, and hope.

(Pet. Br. at 15). The court refused the request, and Edwards went to trial represented by counsel. *Edwards*, 128 S.Ct. at 2382. He was convicted of two charges, but the jury hung on two others. *Id.*

In December 2005, after the State indicated it would retry the unresolved charges, Edwards again asked to represent himself. *Id.* The trial court recounted all the psychological reports and held that although Edwards was competent to stand trial, his delusions, schizophrenia, communication troubles, and related problems with focus rendered him incapable of self-representation (Pet. Br. at 4, 17). The court especially stressed Edwards' trouble with focus and concentration (Pet. Br. at 17).

Near the end of the trial, Edwards again asked to represent himself and stated that his decision was based on "a popular vote of class members" (Pet. Br. at 16). He claimed to be "the founder of a faith-based group and director of 60 multimillion-dollar multistate class actions," and "a self-taught scholar of criminal, federal, civil, international, constitutional, family, entertainment, and landlord law measuring 6 years" (Pet. Br. at 16). Edwards was convicted of both counts. *Edwards*, 128 S.Ct. at 2383.

On appeal, the Indiana Supreme Court reversed and ordered a new trial. *Id.* The State then filed a petition for certiorari, which the Supreme Court granted. *Id.*

The Supreme Court reversed, holding that, "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky*<sup>4</sup> but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Id.* at 2388. The Court stressed a statement by the American Psychiatric Association (APA) from its amicus brief that:

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<sup>4</sup> *Dusky v. United States*, 362 U.S. 402 (1960).

Disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant.

*Id.* at 2387. The Court also recognized that, “[m]ental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual’s functioning at different times in different ways.” *Id.* at 2386.

## II. Baumruk Does Not Come Within the Ambit of *Edwards*

In *Edwards*, the Court held that the State may deny self-representation to those defendants who “suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.” *Id.* at 2388. Baumruk, unlike *Edwards*, does not suffer from *any* mental illness that would interfere with self-representation, let alone any *severe* mental illness.

As Judge Rauch herself acknowledged, Baumruk was intelligent and educated (11/27/06 Tr. 21). He had an Associates’ Degree in applied science and a Bachelor of Science Degree in Business Administration (St.Ex.1, p.4; D.Ex.G, p.9). He had taken a business law class (1/16/07 Tr. 45). Baumruk was honorably discharged from the Coast Guard after four years of active duty and two years of reserve duty (Tr. 2943-44). For over twenty years, Baumruk had worked as an aircraft electronics engineer and technical

planner at McDonnell Douglas and Boeing Aircraft (Tr. 2345; St.Ex.3, p.2). At the age of 55, Baumruk had never received any prior psychiatric treatment or counseling (D.Ex.G, p.8; St.Ex. 31, p.5).

After the shooting, Baumruk suffered brain damage from being shot twice in the head and undergoing surgeries on those wounds (Comp.Tr.267). In 1994, he was deemed incompetent to stand trial. *State ex rel. Baumruk v. Belt*, 964 S.W.2d 443, 444 (Mo. banc 1998). At that time, he drooled, had trouble walking, a severe speech impediment, could not recall words after a few minutes, was unable to concentrate, and was unable to take of his personal needs (D.Ex.G, p.11-12, 15-16; 1<sup>st</sup> Comp. Vol. IV½, p.18). Both his short and long term memory were impaired, and he had no memory for the events at issue (D.Ex. J, p.2). Baumruk did not appreciate the seriousness of the charges against him; when told that witnesses would testify against him, he responded, “Goody, goody! Let them prove it” (D.Ex.G, p.14). While his IQ before the shooting was somewhere from 103 to 108, his IQ then was 86 (D.Ex.J, p.2). It was believed that he would never improve (D.Ex.P, p.7-8).

But Baumruk did improve. By 2003, his IQ had returned to 107, where it had been prior to the shooting (St.Ex. 32, p.3). His speech was “clear, coherent, intelligible, and consistently goal-directed” (St.Ex. 32, p.3). He walked unaided with “no gait disturbance” (St.Ex. 32, p.2; 1<sup>st</sup> Comp. Tr. 937). He had the ability to read, learn new material, and discuss it (1<sup>st</sup> Comp. Tr. 938). While his visual memory skills were well below average, he scored well above average on tests for auditory memory (82%, 82%,

and 92%) (St.Ex.1, p.9-10). His general memory, attention/concentration and delayed recall were all average (St.Ex.1, p.9). In the 15 years from the shooting to his second trial, Baumruk was never given psychotropic medication (Tr. 2012).

In 2005, Judge Rauch found that Baumruk had “the mental capabilities to review all the facts of this incident, including any facts, which may give rise to a defense, in order to accurately reconstruct his actions in this case where his memory may be lacking” (2d Supp.L.F. 18). He was able to “read and retain information that is presented to him and ... refers to things he has read in depositions, reports and documents” (2d Supp. L.F. 13-14). He was able to give details about his criminal case from its inception through each stage of commitments to state hospitals, court hearings and trial, and appeals (2d Supp. L.F. 14). Baumruk “clearly shows that he understands the charges against him and is able to read and retain information” (2d Supp.L.F. 14). He had no mental defect that would keep him from assisting in his defense (2d Supp.L.F. 18).

The only concern regarding Baumruk’s competence was his amnesia for the events at issue (2d Supp.L.F. 13-14). None of the common symptoms of mental illness mentioned by the Court in the *Edwards* opinion were present here. Those symptoms were disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, and anxiety. *Edwards*, 128 S.Ct. at 2387. While Baumruk had no specific memory for the events at issue, neither would any attorney representing him. His amnesia was not a bar to self-representation.

### III. The Court Denied Self-Representation on Other Grounds, with the Competence Issue as an Afterthought

In *Edwards*, the trial court justified the denial of self-representation by demonstrating how Edwards' psychological problems prevented him from being able to represent himself. *Edwards*, 128 S.Ct. at 2382-83. The court recounted all the psychological testing reports. *Id.*; also Pet. Br. at 17-18. It noted Edwards' inability to stay focused and his rambling writings (Pet. Br. at 17-18). The court stressed Edwards' schizophrenia and his self-acknowledged need for counsel (Pet. Br. at 17-18).

In the instant case, in contrast, the trial court did not even mention Baumruk's mental health at the first hearing on self-representation. When Baumruk requested self-representation on November 27, 2006, Judge Rauch stressed, "I do not advise you to appear in a trial of this magnitude without counsel" (11/27/06 Tr. 21). She continued:

[I]t's my understanding you have no legal training. I realize that you are an intelligent gentleman and you have education, but that's a very different thing from being an experienced trial attorney in a capital murder case.

(11/27/06 Tr. 21-22). The issue of Baumruk's mental health never arose.

When Baumruk again requested self-representation in court on January 17, 2007, the court only discussed the competence issue as an afterthought. The court questioned Baumruk's ability to represent himself "in an area as complicated as this where the stakes are as high as they are" (1/17/07 Tr. 47). The court noted that there would be no one to help Baumruk if he had trouble asking questions properly (1/17/07 Tr. 47). The court

then commented that Baumruk's request was not timely (1/17/07 Tr. 48-49). The court only mentioned competence when Baumruk complained that counsel made mistakes at the competency hearing. Even then, the court again recognized that the competency issue related solely to Baumruk's amnesia regarding the shooting (1/17/07 Tr. 50). She commented that it was inconsistent to claim incompetence while asking for self-representation (1/17/07 Tr. 50-51). The court was not convinced that Baumruk could question venire members or witnesses, prepare an opening statement or closing argument, and decide whether to testify and call witnesses (1/17/07 Tr. 50-51).

The court then listed the reasons for her denial of the right of self-representation:

[I]n view of the nature of the proceedings, of the extensive proceedings in advance of this date, the quality of the representation that this Court has witnessed that you have received, and the complexity of this case, the Court finds – and defendant's clinging to his stance that he is incompetent to proceed, the Court will find that the Court should not grant this request to proceed pro se. And that because of the size and complexity of this case that this request is untimely even though it was made in December.

(1/17/07 Tr. 50-51). The court continued:

I think it's very important to note that there's a huge difference here between a situation where someone may be saddled with counsel that are uninformed, don't appear for court, don't prepare themselves, don't know the

law, are not assiduous in their representation, that may be grounds to discharge counsel.

I realize that the law says the defendant does not need to state grounds, but I cannot see any legal argument for allowing this defendant to set himself adrift in the sea of a capital murder case of this complexity and size, and especially in his clinging to his argument that he is incompetent to proceed.

The Court finds the motion is untimely, among these other reasons, and the Court will deny the request for leave to proceed pro se.

(1/17/07-Tr.52).

The court never actually found that Baumruk had any mental illness, let alone any mental illness that was “severe” enough to render him not competent to represent himself. The court never even decided whether Baumruk suffered from amnesia; instead, the court dodged the issue by concluding that even if he had amnesia, it was irrelevant for competency purposes (2d Supp. L.F. 16-17). The court never mentioned any specific mental illness or even mental health concern that could affect Baumruk’s ability to represent himself. She merely stressed that Baumruk held antagonistic positions – he claimed he was not competent even to assist counsel but also stated he could be his own counsel. Considering the entirety of the court’s reasoning, it is clear that Judge Rauch merely believed that Baumruk was better off defending a capital case with counsel, not that his amnesia made it impossible for him to conduct basic trial tasks.

#### IV. If the Court Uses *Edwards* to Deny the Fundamental Right of Self-Representation, It Must Make a Record

The right of a criminal defendant to represent himself is protected by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution. *Faretta v. California*, 422 U.S. 806, 814 (1975); *State v. Black*, 223 S.W.3d 149, 153 (Mo. banc 2007). While it is not an absolute right, there are few limitations, *Edwards*, 128 S.Ct. at 2384, and courts indulge every reasonable presumption against the loss of constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

If a trial court determines that a defendant has such a severe mental illness that he is not competent to represent himself, the court should be required to make findings specifying the mental illness and how it would affect the defendant's ability to represent himself. Just as trial courts make findings regarding a defendant's competence to stand trial, when it is challenged, so too the court should make findings regarding a defendant's competence to represent himself, when it is challenged. Without a record as to why the constitutionally protected right of self-representation has been denied, reversal is warranted. After all, when the defendant gives up his right to counsel, the court must make a record. *Black*, 223 S.W.3d at 155 ("a thorough evidentiary hearing must support the trial court's ruling"). If a defendant requests self-representation and the court denies him that right without making a record of why his waiver of counsel was invalid, reversal is warranted. *Id.* at 154-55. The same should be true when the court takes away the right

of self-representation under *Edwards*. Otherwise, appellate courts would be forced to speculate about the trial court's basis for its ruling, and appellate review would be impossible.

The denial of the right of self-representation is analogous to situations where the defendant is denied the right to appear before the jury free of visible restraints. When a trial court determines that it must take away the defendant's right to be free of visible restraints in the courtroom, it must make a record setting forth the specific reason for doing so. *Deck v. Missouri*, 544 U.S. 622, 627-28 (2005). It must state why, in that particular case, the denial of the right – to be free from the forced use of visible restraints – is justified. *Id.* So, too, here, the court should have made a record of the specifics: of what severe mental illness prohibited self-representation and how it did so.

Without such a record, the denial of self-representation based on *Edwards* cannot be justified. It is not enough to say that because the defendant or his counsel challenged the defendant's competency, he can be denied self-representation as a matter of course. The court does not have a "free pass" to deny self-representation just because the defendant may have some mental health issue.

The trial court also cannot deny self-representation, under the guise of *Edwards*, merely because the court believes that the defendant is unable to perform certain trial tasks. Under *Edwards*, the inability must be related to the defendant's mental illness. After all, the court may believe that any *pro se* defendant would be unable to perform those tasks competently. As the Supreme Court acknowledged in *Faretta*, 422 U.S. at

834, *pro se* defendants are typically not going to do as good a job as trained, experienced lawyers. But that is not sufficient reason to deny the right of self-representation. *Id.*, citing *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (“although [the defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of ‘that respect for the individual which is the lifeblood of the law’”).

This Court must ensure that trial courts do not use *Edwards* as an easy out in denying defendants their constitutionally protected right of self-representation. The trial court never found that Baumruk had any mental illness, let alone a severe mental illness. This Court should require that trial courts that wish to deny self-representation under *Edwards* make a record as to the nature of the defendant’s severe mental illness and how it would prohibit him from conducting his own defense. Without such a record, the right of self-representation cannot be denied. Reversal is mandated.

**CONCLUSION**

Based on Arguments I-VII, Mr. Baumruk respectfully requests that the Court remand for a new trial. As to Argument VIII, he asks that the Court reverse his conviction, vacate the sentence, and remand for a grand jury determination of whether he should be indicted for “aggravated” first-degree murder.

Respectfully submitted,

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**CERTIFICATE OF MAILING**

I hereby certify that two copies of the foregoing were mailed, postage prepaid, along with a floppy disk containing the brief and two copies of Appellant’s Appendix, to: Dan McPherson, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; on the 7th day of August, 2008.

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Rosemary E. Percival

## Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 3,730 words.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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