

## Competency to Proceed *Pro Se* is Not a Higher Standard than Competency to Stand Trial

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### The South Carolina Supreme Court Reverses the Court's Ruling That a Capital Defendant, Although Competent to Stand Trial, Is Not Competent to Proceed *Pro Se* for Trial and Sentencing

In *State v. Barnes*, 753 S.E.2d 545 (S.C. 2013), the South Carolina Supreme Court reversed a trial court ruling that a defendant was not competent to proceed *pro se* for trial and sentencing. The defendant, Steven Barnes, contended that the trial court erred in permitting his attorney to call a defense psychiatrist to testify regarding his competency to represent himself and in denying his *pro se* request, among other issues that were not addressed in the opinion.

#### Facts of the Case

Mr. Barnes was convicted of kidnapping and murdering Samuel Stirrup. The jury found two aggravating circumstances, kidnapping and physical torture, and Mr. Barnes was sentenced to death. Mr. Barnes moved to be allowed to proceed *pro se* on the Friday before the trial was to commence on Monday. His competency to stand trial had never been in question, and he cited *Faretta v. California*, 422 U.S. 806 (1975), a case in which the U.S. Supreme Court held that criminal defendants have a constitutional right to refuse counsel and represent themselves in state criminal proceedings. Under oath, he stated that he was 32 years old, had an 11th grade education, had been self-employed, and understood the charges against him and the possible sentences. He acknowledged that he understood that he would be held to the same standards as an attorney.

He was questioned by the trial judge under oath about his understanding of several legal principles,

and he answered correctly. He stated that his motivation for proceeding *pro se* was driven by mistrust of his current counsel and that he had other attorneys in mind to use as standby counsel. The judge concluded, "I think you're making a mistake, but you have the right to make a mistake. . . . I would advise you not to do this." The judge announced that he would take Mr. Barnes' *Faretta* motion under advisement until the following Monday.

On that Monday, one of Mr. Barnes' attorneys referred the court to *Indiana v. Edwards*, 554 U.S. 164 (2008), in which the U.S. Supreme Court held that a state may hold a defendant who seeks to represent himself at trial to a higher competency standard than that required to stand trial. A defense-retained psychologist hired as a mitigation witness for the sentencing phase was of the opinion that Mr. Barnes was competent to stand trial, but lacked the competency to represent himself. Mr. Barnes objected to the expert's being allowed to testify, based on the doctor-client relationship and the attendant privilege. He also stated that he talked to the psychologist for mitigation purposes and was unaware that their conversation could be used (in his view) against him. Mr. Barnes distinguished *Edwards* by indicating that the defendant in that case was mentally ill and had had multiple competency hearings before the question of waiver of counsel arose. Mr. Barnes reiterated that his case was not an *Edwards* situation, because there was no indication that he, unlike Mr. Edwards, was mentally ill.

The judge allowed the psychologist to testify regarding Mr. Barnes' competency to proceed *pro se*. On the basis of this testimony, the judge found that "the defendant does not have a clear understanding of the dangers of self-representation" (*Barnes*, p 549). He denied Mr. Barnes' request to proceed *pro se*. He added that he "would not be fulfilling [his] responsibilities under the law to an individual that deserves a fair trial" (*Barnes*, p 549). He added that Mr. Barnes was "prone to ramble," "prone to act extrajudicious," and acted "as if he were conducting his defense on the streets, so to speak, and as we all know, the courtroom is not the place for that kind of decorum or demeanor" (*Barnes*, p 549). The trial proceedings continued with the assistance of counsel, and Mr. Barnes was ultimately convicted and sentenced to death. He appealed to the South Carolina Supreme Court.

*Ruling and Reasoning*

In a 3 to 2 decision, the South Carolina Supreme Court chose not to adopt the higher standard in *Edwards* for competency to represent oneself at trial and reversed the trial court's decision. Citing *Faretta*, it stated that although it may be to the defendant's detriment to be allowed to proceed *pro se*, his knowing, intelligent, and voluntary decision "must be honored out of that respect for the individual which is the lifeblood of the law" (*Faretta*, p 834). Further, the court noted that *Faretta* points out that the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation and that he makes a knowing and intelligent waiver of his right to counsel. It explained that in *Edwards*, the U.S. Supreme Court held 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" (*Edwards*, p 178). It indicated that, in merely agreeing that states could set a higher standard for self-representation at trial without offending the federal constitution, the Court declined to adopt a federal constitutional competency standard for self-representation.

The South Carolina Supreme Court further stated that a defendant who is competent to stand trial is also competent to waive other fundamental rights, such as the right against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. The court held that public policy did not support a distinction between a defendant who wishes to plead guilty and a defendant who voluntarily and intelligently elects to proceed *pro se*.

The dissent stated that defendants "have a constitutional right to representation; however, this right must bow to the competing concern that death is different and trial courts must do everything legitimately within their power to ensure that these trials are fair and that the proceedings are especially reliable" (*Barnes*, p 556).

*Discussion*

The right to represent oneself at trial has been well established by the U.S. Supreme Court in *Faretta v. California*. This right is derived from the Sixth Amendment, common law, and long-held traditions. The Court instructed trial judges to make cer-

tain that a defendant waived counsel knowingly and voluntarily and to make defendants aware of the dangers and disadvantages of self-representation. However, the limitations of that right were not well established. In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the Court ruled that judges may appoint standby counsel over a *pro se* defendant's objection. In *Martinez v. Court of Appeals in California*, 528 U.S. 152 (2000), the Court ruled that there was no constitutional right to self-representation during the appeal of a criminal conviction. In that opinion, the Court questioned the historical precedents that were used to form the *Faretta* decision and suggested that they were not relevant in the modern era.

In *Edwards*, the U.S. Supreme Court acknowledged that states could place limitations on self-representation. Multiple organizations, including the American Psychiatric Association (APA) and the American Academy of Psychiatry and the Law (AAPL), submitted *amicus* briefs supporting Indiana in seeking a higher standard of competency for self-representation than is necessary for standing trial, because of the larger role that the defendant would play. The *Edwards* Court further stated that the *Faretta* right to self-representation could be overridden to prevent a defendant from destroying the reliability of the adversarial process due to mental illness. Ultimately, the Court held that the Constitution does not forbid states from insisting on representation for those who are competent to stand trial but are impaired by mental illness to the point that they cannot participate in trial proceedings alone. It stated that allowing such a defendant to proceed *pro se* would not "affirm the dignity" of the defendant and could undermine the ability to receive a fair trial. It did not, however, outline specific standards that defendants must meet to represent themselves.

This decision of the South Carolina Supreme Court equates the standard for self-representation to that of competency to stand trial with the assistance of counsel. The implications of this decision for future trial proceedings in South Carolina courtrooms will become more apparent in the coming years. Mentally ill defendants who require restoration of competency to stand trial may have residual limitations that would impair their ability to represent themselves adequately. From an ethics perspective, evaluators in South Carolina may feel compelled to raise the standard of competency to stand trial in *pro se* defendants to include knowledge of certain legal

principles and processes (e.g., *voir dire*, direct and cross examination, opening and closing arguments) that are usually not assessed in a standard competency evaluation. However, in light of the *Barnes* decision, trial courts may reject the relevance of testimony related to trial ability deficits not generally assessed during standard competency evaluations.

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## Standard for the Denial of an Inmate's Certificate of Appealability and Funding for Investigative and Expert Assistance in an Ineffective Assistance of Counsel Claim

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**A Certificate of Appealability Requires That an Inmate Make a Substantial Showing of the Denial of a Constitutional Right; Funding for Investigative and Expert Assistance in an Effective Assistance of Counsel Claim Requires a Showing of Both Ineffective Habeas Counsel and a Substantial Ineffective Assistance of Counsel Claim**

In *Crutsinger v. Stephens*, 540 F. App'x 310 (5th Cir, 2013), the Fifth Circuit Court of Appeals denied an inmate's request for a certificate of appealability (COA) with regard to his ineffective assistance of counsel (IAC) claim. The IAC claim alleged that counsel failed to investigate "red flags" about his social history in a forensic psychologist's report. The court also upheld the district court's denial of funding for expert assistance in developing the IAC claim.

### *Facts of the Case*

On April 6, 2003, Billy Jack Crutsinger stabbed and killed Pearl Magouirk, age 89, and her daughter, Patricia Syren, age 71. His defense counsel asked for a mitigation specialist to investigate Mr. Crutsinger's social history. The court appointed Dr. Kelly Good-

ness, a forensic psychologist, to complete the evaluation. Dr. Goodness interviewed Mr. Crutsinger for 14 hours, reviewed records, and administered 19 different psychological instruments. Her team interviewed his family and friends. She consulted with his attorneys and then issued a 23-page report. Mr. Crutsinger's counsel decided not to present Dr. Goodness' testimony.

A Tarrant County, Texas jury found Mr. Crutsinger guilty of capital murder. The trial judge sentenced him to death. His verdict and sentence were both upheld on direct appeal, and his application to the Supreme Court for a writ of *certiorari* was denied.

Although his case was pending on direct appeal, Mr. Crutsinger applied for state *habeas corpus*. In 2007, the Texas Court of Criminal Appeals denied relief.

In 2008, Mr. Crutsinger sought funding for "investigative and expert assistance in the development of his claim that his trial counsel was ineffective in failing to timely initiate a social history investigation" (*Crutsinger*, p 312). The district court found that his IAC claim was not exhausted and therefore declined to review the state court's denial of funding.

Mr. Crutsinger filed for federal *habeas* relief alleging that his "trial counsel provided ineffective assistance in failing to timely initiate a social history evaluation, which caused counsel to overlook evidence of his mental impairments caused by alcohol addiction, head trauma, depression and low intelligence" (*Crutsinger*, p 312). The government argued that Mr. Crutsinger was not able to show that counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by counsel's deficient performance. The court rejected his IAC claim, denied his *habeas* petition, and denied his COA.

Mr. Crutsinger then petitioned the United States Court of Appeals for the Fifth Circuit for a COA in his case.

### *Ruling and Reasoning*

After the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, defendants could not file appeals on denials of *habeas* relief without first securing a COA. This required a "substantial showing of the denial of a constitutional right" (*Crutsinger*, p 313). The petitioner would have to show that reasonable jurists could disagree with a district court's denial of his *habeas* petition or that "reasonable jurists