

seeks a remedy not available in the IDEA (e.g., compensatory damages for emotional distress).

The Court's holding in *Fry* is based on an interpretation of the text and legislative history of the IDEA. Two landmark cases, *Westchester Cty v. Rowley*, 458 U.S. 176 (1982) and *Irving Independent School District v. Tatro*, 468 U.S. 833 (1984), were also based on the IDEA but significant changes in the landscape of special education law occurred between *Rowley* and *Irving*, and *Fry*.

The HCPA was passed in 1986 in direct response to *Smith v. Robinson*, 468 U.S. 992 (1984), which held that the IDEA (then the Education for all Handicapped Children Act, or EHA) was the "exclusive avenue" for challenging the adequacy of a disabled child's education (*Smith*, p 1009). The HCPA "overturned Smith's preclusion of non-IDEA claims while also adding a carefully defined exhaustion requirement" (*Fry*, p 750).

In *Rowley*, the suit was based on denial of a FAPE and occurred after exhaustion of administrative remedies. The holding in *Rowley* focused on defining a FAPE, but the case highlights the concerns raised by Justice Alito in his concurring opinion in *Fry*. He wrote that the "clues" given by the Court were misleading because they assumed there would be no overlap between the relief available under the IDEA and other federal laws. Applying the *Fry* clues to *Rowley* would yield conflicting results. A similar complaint could have been raised outside of a school or by an adult within a school. However, the case was explicitly about denial of a FAPE and used IDEA's administrative remedies.

In *Irving*, the Court was asked whether clean intermittent catheterization of a child with cerebral palsy was a "related service" under the EHA. The parents in *Irving* had filed suit under the EHA, alleging denial of a FAPE (which included "related services"), and under § 504 for exclusion of a handicapped person from a program receiving federal aid. The Court denied the § 504 claim as inapplicable, citing *Smith*, which was decided the same day.

The Court's holding in *Fry* is narrow: plaintiffs need only exhaust the IDEA's administrative procedures when seeking relief for failure to provide a FAPE. Title II defines service animals to include dogs that are trained to do work or perform tasks for the benefit of persons with psychiatric, intellectual, or other mental disability. It is, therefore, foreseeable that future court decisions will extend the *Fry* hold-

ing beyond cases involving cerebral palsy to those more relevant to forensic psychiatry (e.g., cases involving autism spectrum disorder or posttraumatic stress disorder).

Disclosures of financial or other potential conflicts of interest: None.

## Standard of Appellate Review for Postconviction Relief of Intellectually Disabled Defendant's Competency to Plead

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### Defendant May Receive Postconviction Relief If There Was a Reasonable Probability That He Was Incompetent to Plead

In *Ramirez v. State*, 795 S.E.2d 841 (2017) the Supreme Court of South Carolina reversed the denial of postconviction relief (PCR) for Ruben Ramirez. Mr. Ramirez alleged inadequate assistance of counsel because his attorney had not requested a second competency-to-stand-trial evaluation when evidence surfaced that Mr. Ramirez was likely incompetent as he pleaded guilty but mentally ill to serious felony charges. The PCR (trial) court denied PCR, which was sustained by the South Carolina Court of Appeals. Reversing, the Supreme Court of South Carolina ruled that a defendant need only prove that there was a reasonable probability that he was incompetent at the time of entering his plea to be granted PCR.

#### Facts of the Case

Ruben Ramirez was indicted at age 16 for assault and battery with intent to kill, kidnapping, first-degree criminal sexual conduct with a minor, first-degree burglary, and performing a lewd act upon a child. The trial court requested a competency-to-stand-trial evaluation. During a 90-minute interview, Mr. Ramirez told the evaluating psychiatrist that he had no psychological problems, was only in

eighth grade, and earned C's and D's. Mr. Ramirez exhibited speech difficulties, difficulty reading court-related terms, and could not remember his attorney's name. The psychiatrist did not obtain collateral information, perform psychological testing, or consider a psychological diagnosis. The psychiatrist opined that Mr. Ramirez was competent to stand trial only because Mr. Ramirez had a "sufficient factual and rational understanding of the charges against him" (*Ramirez*, p 843).

After reviewing the psychiatrist's report, Mr. Ramirez's attorney (plea counsel) requested a second psychological examination to address concerns about Mr. Ramirez's understanding of the gravity of his charges. Psychologist Stephen Gedo, PhD, completed five, three-to-four hour interviews of the defendant, reviewed medical records, performed psychological testing, and obtained collateral information from Mr. Ramirez's family. Dr. Gedo learned that Mr. Ramirez had an intellectual disability since birth, did not speak until age seven, was diagnosed with attention deficit hyperactivity disorder at age 9, and had only completed eighth grade by age 16.

Dr. Gedo concluded that Mr. Ramirez had poor judgment and poor impulse control and was highly malleable, confused, and severely limited in language and reading comprehension. He determined that Mr. Ramirez had an IQ between 31 and 44, within the range of severe intellectual disability, and functioned at the intellectual level of a four- to seven-year-old child. Dr. Gedo opined that Mr. Ramirez had "severe mental retardation" and had limitations across the full range of cognitive functions. However, he did not opine about Mr. Ramirez's competency to stand trial.

The reports by the psychiatrist and Dr. Gedo were submitted into evidence regarding the defendant's mental state at the time of the crime (not trial competency); however, no further competency evaluation was requested by plea counsel or the court. Mr. Ramirez pleaded guilty but mentally ill to all charges. The trial court accepted Mr. Ramirez's plea, noting his IQ was as low as any the court had ever seen. He was sentenced to concurrent 20-year prison terms, with an additional 15-year sentence (suspended) imposed for the charge of performing a lewd act on a minor.

Mr. Ramirez sought PCR, alleging inadequate assistance of plea counsel, based on plea counsel's failure to request a second competency to stand trial

examination. At the hearing for the court to consider Mr. Ramirez's motion for PCR, plea counsel testified that Mr. Ramirez was very naïve, and plea counsel had questioned whether Mr. Ramirez fully understood the events before and at the plea hearing. Plea counsel admitted that he should have requested another competency-to-stand-trial evaluation after reading Dr. Gedo's report, but gave no reason for his failure to do so.

However, the PCR court denied Mr. Ramirez's application for PCR, finding insufficient evidence that counsel was deficient and that Mr. Ramirez was not prejudiced by this legal representation. On appeal, the South Carolina Court of Appeals ruled that there was a reasonable probability that Mr. Ramirez was incompetent when he entered his plea, and disagreed with the PCR court's ruling that Mr. Ramirez's plea counsel provided adequate assistance. However, constrained by the "any-evidence" standard of review, the court of appeals affirmed the PCR court's decision because the psychiatrist's competency report constituted probative evidence to support that Mr. Ramirez was competent when he entered his plea.

Mr. Ramirez appealed to the Supreme Court of South Carolina, alleging that the court of appeals erred in applying the any-evidence standard of review in affirming the PCR court's decision that Mr. Ramirez was not prejudiced by plea counsel's failure to request a second competency evaluation. Mr. Ramirez contended that he presented sufficient evidence at the PCR hearing to establish a reasonable probability that he was incompetent at the time of his plea, and that the PCR court erred in denying his application for relief.

#### *Ruling and Reasoning*

The Supreme Court of South Carolina affirmed in part, reversed in part, and remanded for further proceedings. The court affirmed the court of appeals ruling that Mr. Ramirez's plea counsel was deficient in failing to request a second competency to stand trial evaluation. In addition, the court ruled that the court of appeals erred in affirming the PCR court's finding of no prejudice under the any-evidence standard.

Citing *Suber v. State*, 640 S.E.2d 884 (2007), the Supreme Court of South Carolina affirmed that when reviewing a PCR court's decision, the appellate court should uphold the PCR court's findings if

there is “any evidence” of probative value to support the findings. However, *Edwards v. State*, 710 S.E.2d 60 (2011), requires that, if the PCR court’s conclusions were controlled by an error of law, or unsupported by the evidence, the appellate court must reverse the decision.

When alleging ineffective assistance of counsel, a PCR applicant must satisfy the two-prong test from *Strickland v. Washington*, 466 U.S. 668 (1984): (1) plea counsel did not adequately assist in their case, and (2) because of plea counsel’s inadequate assistance, the applicant was prejudiced during the proceedings. “Prejudiced” means that, had it not been for the inadequate assistance of plea counsel, the outcome of the proceedings would have been different.

When a PCR applicant alleges ineffective assistance of counsel in the context of competency to enter a plea, the applicant need only prove that there was a “reasonable probability” that he was incompetent at the time of entering a plea to satisfy both prongs of the *Strickland* test to obtain PCR.

Mr. Ramirez asserted that he presented sufficient evidence at the PCR hearing to show that there was a “reasonable probability” that he was incompetent at the time of entering his plea. The Supreme Court of South Carolina agreed, finding that Dr. Gedo’s opinions and plea counsel’s testimony at the PCR hearing that plea counsel was aware of Mr. Ramirez’s deficits in communication and understanding demonstrated a reasonable probability that he was incompetent at the time he pleaded guilty but mentally ill. The court of appeals should have reversed the decision as a matter of law instead of using the any-evidence standard. Therefore, since Mr. Ramirez satisfied both prongs of the *Strickland* test, he was entitled to PCR.

*Discussion*

*Ramirez* is noteworthy from a legal perspective because the Supreme Court of South Carolina ruled that the court of appeals erred in applying the any-evidence standard when reviewing the PCR court’s decision. Although *Suber* allows the appellate court to use the any-evidence standard when reviewing PCR court decisions, *Edwards* indicates that the PCR court decision must be overturned if the PCR court’s ruling is based on an error of law.

The Supreme Court of South Carolina found that Mr. Ramirez’s denial of PCR was, in fact, based on an error of law. A PCR applicant claiming ineffective

assistance of counsel ordinarily must satisfy both prongs of the *Strickland* test. However, when the claim of ineffective assistance of counsel involves competence to enter a plea, the applicant need only show that there was a “reasonable probability” that they were incompetent at the time of entering the plea.

The state supreme court found that the PCR court did not correctly apply the *Strickland* test to Mr. Ramirez’s case. Because of that error, the appeals court should have reversed the decision as a matter of law according to *Edwards* instead of applying the any-evidence standard of *Suber*.

*Ramirez* serves as a caution to forensic examiners to perform a thorough, good faith, evaluation. The initial psychiatrist examiner noted that Mr. Ramirez had deficits in speech, reading, and memory. Yet, the psychiatrist did not further investigate these deficits, failing to obtain collateral information or perform psychological testing. Furthermore, the examiner did not offer a diagnosis for Mr. Ramirez, and ignored critical data that indicated Ramirez’s likely incompetence.

Disclosures of financial or other potential conflicts of interest: None.

## Competence to Proceed Pro Se

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### The Seventh Circuit Holds That the Denial of a Defendant’s Right to Represent Himself Based on Limited Education Is Contrary to and an Unreasonable Application of Established Supreme Court Precedent

In *Tatum v. Foster*, 847 F.3d 459 (7th Cir. 2017), the United States Court of Appeals for the Seventh Circuit considered whether the Wisconsin courts unreasonably applied *Faretta v. California*, 422 U.S. 806 (1975), when they refused to allow Mr. Robert Tatum to represent himself.

*Facts of the Case*

Robert Tatum was charged with two counts of first-degree homicide for the shooting deaths of his