

## Competence to Waive Counsel and Proceed *Pro Se*

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### **Defendant Found Competent to Proceed *Pro Se* and Waive Counsel Voluntarily, Knowingly, and Intelligently Despite Diagnosis of Schizophrenia and Bizarre Questioning**

In the *State v. Dahl*, 776 N.W.2d 37 (N.D. 2009), the North Dakota Supreme Court examined whether the trial court erred in allowing the defendant Darin Wayne Dahl to waive his right to counsel and proceed *pro se* and in not appointing standby counsel. The North Dakota Supreme Court affirmed the finding that Mr. Dahl was competent to waive his right to counsel and represent himself, even though he had a diagnosed mental illness and had inappropriately questioned prospective jurors. In addition, the court affirmed that Mr. Dahl's waiver of counsel was made voluntarily, knowingly, and intelligently and that his behavior did not demonstrate that he was incompetent to waive his right to counsel or was incompetent to represent himself. His convictions were upheld.

#### *Facts of the Case*

In November 2007, Mr. Dahl sought financial compensation for a transmission he believed was damaged by Roger Kerber. In seeking payment for the damages, Mr. Dahl left telephone messages on Mr. Kerber's answering machine. In the first message, Mr. Dahl stated that he was "probably" coming to Mr. Kerber's home to "put your horse down or something. . . ." During the second message, Mr. Dahl stated that he was going to "return fire" on Mr. Kerber's son who had previously shot at Mr. Dahl. As a result, the state charged Mr. Dahl with harassment (two counts).

In April 2008, Mr. Dahl, went to Mr. Kerber's home. An employee of Mr. Kerber's opened the door and stated that Mr. Kerber was not home. According to the employee, Mr. Dahl then fired four shots at Mr. Kerber's home and three at a nearby shop. At the time of the incident, Mr. Kerber was in the home and notified

the police. Subsequently, Mr. Dahl was arrested, and a rifle was found that matched the shell casings and bullets found at Mr. Kerber's home. During the investigation interviews, Mr. Dahl reported that he ". . . was probably being a little reckless . . ." and acknowledged that Mr. Kerber and his employee were in the home at the time of the shootings when he "probably" shot the house. As a result, Mr. Dahl was charged with reckless endangerment.

In May 2008, before trial for the charges of harassment, Mr. Dahl underwent both competence to stand trial and criminal responsibility evaluations at the North Dakota State Hospital. The evaluator opined that, although Mr. Dahl had schizophrenia and a personality disorder not otherwise specified, he was competent to stand trial and "could be held criminally responsible . . . if found guilty." Subsequently, Mr. Dahl was convicted on two counts of harassment.

Before his trial for the charge of reckless endangerment, Mr. Dahl, discontented with his attorney for not subpoenaing the witnesses he requested, asked that the district court to allow him to proceed *pro se*. During a pretrial hearing, the district court judge informed Mr. Dahl that it was "dangerous" and "disadvantageous" for him to represent himself because of the severity of his charges. However, it was the opinion of the court that Mr. Dahl had the competence abilities needed to represent himself after it confirmed that he could "hear and understand" that he was facing criminal charges. Mr. Dahl's choice of witnesses and their relevance was also discussed, including his request to call an officer to testify that one of the proposed witnesses was involved in methamphetamine distribution.

Despite the warnings by the trial court, Mr. Dahl decided to represent himself, and no stand-by counsel was appointed. During selection of potential jurors, Mr. Dahl asked questions such as "How many people here would have fifty thousand dollars to post bail?" and, "How many people here believe David Copperfield made a 747 disappear off the runway?" He also asked questions about whether potential jurors could be fair to a defense and whether they had experience with firearms.

During the trial, Mr. Dahl was again cautioned that his lack of knowledge of the court proceedings was evident. However, the court recognized Mr. Dahl's right to self-representation, even if he was not a good attorney. A motion to dismiss the charge due to insufficient evidence was denied, and he was found guilty. He appealed his convictions, claiming that there was insuffi-

cient evidence to support the findings. In regard to the charge of reckless endangerment, he also argued that he was not competent to waive his right to counsel and that the court should have recognized his incompetence by observing his behavior.

*Ruling and Reasoning*

The Supreme Court of North Dakota affirmed the district court's convictions. Although Mr. Dahl argued that the state did not prove that he intended to harass or threaten Mr. Kerber, the court opined that his messages themselves proved his intent and would be considered by reasonable persons as threats to destroy property and do bodily harm. Thus, the criminal convictions of harassment were upheld.

Regarding Mr. Dahl's waiver of his right to counsel, in a *de novo* review, the North Dakota Supreme Court considered whether he was competent to waive his right and represent himself and whether his behavior at trial supported the judge's finding of competence. In reviewing *Godinez v. Moran* (509 U.S. 389 (1993), p 396), the court recognized that a defendant's waiver of his right to counsel and subsequent guilty plea must be made knowingly, voluntarily, and intelligently and that the *Dusky* standard (*Dusky v. United States*, 362 U.S. 402 (1960)) is used to determine competence to stand trial. The court also relied on prior U.S. Supreme Court decisions, which held that even though a defendant may be competent to stand trial and participate in his defense when represented, he may be incapable of self-representation that would ensure a fair trial (*Indiana v. Edwards*, 554 U.S. 164, (2008); *Wheat v. United States*, 486 U.S. 153 (1988)). A waiver of one's right to counsel can be rejected if the defendant has a mental illness or impairment rendering him incompetent to represent himself (*Edwards*, p 178).

The North Dakota Supreme Court also recognized that trial court judges were in a more appropriate position to observe a defendant's behavior in the courtroom and make a more informed decision about competence for self-representation. Relying on *Edwards*, the court noted that ensuring a fair trial included assigning counsel at any point during the trial process if a *pro se* defendant became incapable of proceeding, as mental illness can vary over time and in degree. Nevertheless, the North Dakota court found no evidence to support Mr. Dahl's arguments that he was not competent to represent himself and that his behavior during trial should have indicated this to the court. Although Mr. Dahl had a diagnosis of schizophrenia and a personality disorder

and the trial record showed that he had asked inappropriate questions of prospective jurors, including those regarding magic tricks, the court opined that there was no record of his exhibiting symptoms of a mental illness during trial that should have led the court to question his competence to represent himself. Thus, the court upheld that although his choice to proceed *pro se* may have been "unwise," he demonstrated having a "trial strategy" by asking relevant questions and was competent to represent himself.

The court also demonstrated that Mr. Dahl's decision to waive his right to counsel was voluntary and was not based on his desire to represent himself to avoid representation by a presumably inadequate attorney. He had reported that his disagreement with his appointed attorney regarding the attorney's course of action resulted in his decision to proceed *pro se*. However, the court held that Mr. Dahl's waiver was requested with his "eyes open" (*State v. Holbach*, 735 N.W.2d 862 (N.D. 2007)), because he was warned several times before and during trial that he was treading on dangerous ground. Despite these warnings and his recognition of the risks, Mr. Dahl chose to continue *pro se* and did so intelligently and knowingly. Furthermore, the Constitution does not guarantee the right to standby counsel (*State v. Ochoa*, 675 N.W.2d 161 (N.D. 2004)) and thus the court did not err in its decision to not appoint one.

*Discussion*

This case highlights prior U.S. Supreme Court decisions regarding criminal competencies. In this case of a *pro se* defendant, the court reviewed whether the defendant's waiver of counsel was related to concerns that his attorney was inadequate, suggesting that a court may view this as a factor in the voluntariness of the decision because the defendant may have thought that he had no other options. The defendant also was assessed regarding his awareness of potential consequences that may result from his own lack of skill as an attorney, which was part of the inquiry to determine whether the defendant's decision was made knowingly and intelligently. After the *Edwards* decision, this case reflects that the court can intervene and prevent a *pro se* defense if the defendant is not mentally able to represent himself at any point during the trial process and may compromise a fair trial. The current case recognizes that competence is not static and that the court must continue to observe a *pro se* defendant's ongoing competence to represent himself. The court notes that the behavior of the defen-

dant in the courtroom is one possible gauge of competence, but asking inappropriate questions of prospective jurors alone may not be enough to find a defendant incompetent. It is also important to remember that the U.S. Constitution requires that trials be fair and that defendants have a right to counsel, but not the right to the best counsel. Similarly, a defendant may fulfill this role as self-determined “counsel” if he is competent, even if he is not the best skilled person to do so.

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## Commitment of Sexually Dangerous Persons by the Federal Government

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### DSM Definitions Not Required for Mental Abnormality Under Sex Offender Civil Commitment

The First Circuit Court of Appeals held in favor of the government and remanded factual issues for further consideration in the case of *United States v. Carta*, 592 F.3d 34 (1st Cir. 2010). At issue was the government’s appeal of the district court decision that the defendant did not have the mental abnormality statutorily required for commitment as a sexually dangerous person. The defendant cross-appealed, claiming that the commitment statute is unconstitutional on its face.

#### *Facts of the Case*

Todd Carta pleaded guilty to federal child pornography charges in October 2002 and was sentenced to five years in prison followed by three years of supervised release. During his incarceration, he participated in an intensive sex offender treatment program for seven months, but withdrew before completion. While enrolled in the treatment program, Mr. Carta revealed details of his sexual and criminal history that later led the government to seek commitment under the Adam Walsh Child Protec-

tion and Safety Act, 18 U.S.C. § 4248 (2006). Among other provisions, this statute creates an avenue for the federal government to civilly commit sexually dangerous persons (hereafter, § 4248).

Mr. Carta’s sexual offending history included sexual acts with minors beginning when he was 11 years of age and lasting until he was 39. In prison, he displayed problematic behavior while enrolled in the treatment program, including reinforcing others’ deviant beliefs, inability to curb his sexual attraction to young treatment participants, and denial that such behavior was inappropriate. In March 2007, two days before Mr. Carta’s scheduled release date, the Bureau of Prisons certified that he was a sexually dangerous person, the first step in the federal commitment proceedings. The Massachusetts Federal District Court denied his motion for dismissal on constitutional grounds.

In February 2009, the district court held a bench trial to determine whether Mr. Carta met commitment criteria under § 4248. In a June 2009 ruling, the district court held that the government had not met its burden of proving that Mr. Carta was a sexually dangerous person. The district court’s finding hinged on the government expert’s reliance on a diagnosis of paraphilia not otherwise specified (hebephilia; paraphilia NOS), concluding that it was not a “serious mental illness, abnormality, or disorder,” as required by § 4248. The ruling also relied in part on Mr. Carta’s expert witness, who testified that hebephilia is not a generally accepted diagnosis among professionals, suffers from problems in its definition, and is further complicated by the fact that “normal adults” may be sexually attracted to adolescents. As such, the court did not reach a conclusion required by the second part of the commitment statute—namely, whether he would have “serious difficulty in refraining from sexually violent conduct or child molestation if released.” The government appealed the district court decision, and the defendant cross-appealed on whether the statute was constitutional.

#### *Ruling and Reasoning*

The First Circuit Court of Appeals held that the § 4248 statute is not unconstitutional on its face and that the district court erred in concluding that the government did not prove that Mr. Carta had a mental abnormality as defined by the statute. The case was remanded to determine the issue of dangerousness consistent with the § 4248 definition.