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.

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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

two roommates. After his first two attorneys withdrew, the trial court appointed a third lawyer, who requested a competency evaluation. The competency evaluator opined that Mr. Tatum "was competent enough to understand the proceedings and assist in his defense, but that Tatum was likely to be 'an extremely challenging defendant'" (*Tatum*, p 462). Mr. Tatum requested to represent himself.

The trial court found Mr. Tatum competent to stand trial and then considered his request to proceed *pro se*. The court asked Mr. Tatum about his educational background and he responded that he had attended public school until the 10th grade, followed by homeschooling. He had the equivalent of a high school equivalency diploma (HSED), but he did not formally obtain it. Mr. Tatum indicated that he had a "good working knowledge of how court proceeding (sic) work" (*Tatum*, p 462).

The court then questioned Mr. Tatum about how a trial works, how a jury is selected, the challenges of self-representation, his charges, and potential penalties. In response, Mr. Tatum stated that a trial begins with opening statements and that a jury is selected via *voir dire*. He discussed seeking jury members who were unbiased and spoke of preemptory strikes and strikes for cause. Regarding difficulties that he might face in self-representation, Mr. Tatum indicated that he was not provided with reasonable access to legal materials while in jail. He said that he would investigate his case by making phone calls and gathering evidence. He stated that he was charged with two counts of first-degree intentional homicide and that he faced a maximum of life in prison.

The trial court then summarized and applied the holding of *State v. Klessig*, 564 N.W.2d 716 (Wis. 1997): that the appellate court must conduct a review to ensure a defendant made a deliberate choice to proceed *pro se*, was aware of difficulties in self-representation, was aware of the seriousness of the charge(s) in the case, and was aware of the range of possible penalties. The court concluded that although Mr. Tatum made the choice (of self-representation) and was aware of the seriousness of his charges and the general range of penalties, he was "not aware of the difficulties and disadvantages of self-representation especially given his circumstances, and given the fact that he's only got a tenth-grade education" (*Tatum*, p 463). The court denied his right to represent himself.

Mr. Tatum then went to trial with counsel, despite his objection. He was convicted of both counts of first-degree homicide in a jury trial and sentenced to life in prison without the possibility of release. Mr. Tatum appealed and was granted a motion to represent himself on appeal. Among the points appealed, Mr. Tatum challenged the trial court's denial of his self-representation as a violation of his constitutional right. The state appellate court affirmed the trial court on all points appealed. The Wisconsin Supreme Court denied review.

Mr. Tatum then filed a petition for a writ of *habeas corpus* in federal court and included the *Faretta* claim as one of the grounds for relief. Under *Faretta*, a criminal defendant has a right to refuse counsel and represent oneself when certain conditions are met. The federal district court rejected his arguments. The Seventh Circuit then agreed to review Mr. Tatum's case, limited to the matter of self-representation.

Ruling and Reasoning

The Seventh Circuit reversed the judgment of the district court and remanded for issuance of the writ of *habeas corpus*, unless the state initiated steps to give Mr. Tatum a new trial. As an initial matter, the Seventh Circuit noted that according to the Antiterrorism and Effective Death Penalty Act, a federal court may issue the writ of *habeas corpus* only if the state court's decision is "contrary to, or involves an unreasonable application of, clearly established federal law" (28 U.S.C. § 2254(d) (1) (1996)) or if it "was based on an unreasonable determination of the facts in light of the evidence" (28 U.S.C. § 2254(d) (2) (1996)). The Seventh Circuit indicated, "The state court decision cannot be merely wrong; it must be so unreasonable that there is no possibility that 'fair-minded jurists could disagree on the correctness' (or lack thereof) of the decision" (*Tatum*, p 464). The court used this "demanding standard" in reviewing Mr. Tatum's arguments.

The Seventh Circuit indicated that the Wisconsin courts in *Tatum* had relied on the Wisconsin Supreme Court decision in *Klessig* for guidance, rather than focusing on the line of U.S. Supreme Court decisions that had addressed the question (e.g., *Faretta*, *Godinez v. Moran*, 509 U.S. 389 (1993), *Indiana v. Edwards*, 554 U.S. 164 (2008)). Further, the Wisconsin courts' application of *Klessig* was inconsistent with *Faretta*.

The Seventh Circuit indicated that the *Klessig* decision "strayed from the 'mental functioning' sense of competence over to educational achievement and familiarity with the criminal justice system" (*Tatum*, p 467). The Wisconsin Supreme Court said that in determining a defendant's competency to represent himself, "the circuit court should consider factors such as defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury" (quoting *Klessig*, p 724).

The Seventh Circuit said that nothing in the colloquy, in Mr. Tatum's case, suggested that Mr. Tatum had "deficient mental functioning, as opposed to a limited education" (*Tatum*, p 467). In fact, Mr. Tatum demonstrated a relatively good knowledge of the criminal process and that "*Faretta* requires no more" (*Tatum*, p 467). The Seventh Circuit also noted that the Wisconsin courts inappropriately placed the burden on Mr. Tatum to show that he "understood and accepted the challenges of self-representation" (*Tatum*, p 468). The court said that *Faretta* places "the duty on the trial court to warn the defendant about what he is getting into, and then leave the defendant free to decide how he wants to proceed" (*Tatum*, p 468). The court concluded by saying, "By failing to recognize that the Supreme Court's *Faretta* line of cases focus only on competence as it relates to mental functioning, and forbids the consideration of competence in the sense of accomplishment, the Wisconsin courts reached a result that is contrary to, as well as an unreasonable application of, the Supreme Court's rulings" (*Tatum*, p 469).

Discussion

The Seventh Circuit's reasoning in this case relied heavily on the U.S. Supreme Court precedent: *Faretta*, *Godinez*, and *Edwards*.

In *Faretta*, the Supreme Court addressed what is required to waive counsel. The Court held that criminal courts cannot constitutionally force a lawyer on an individual who desires to conduct his own defense. The Court said that when a defendant represents himself, he gives up several of the "traditional benefits" associated with the right to an attorney. Therefore, "[i]n order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits" (*Faretta*, p 835). A defendant does not need to have the skill and experience of a lawyer; in fact, technical legal knowledge was not deemed to be "relevant to an assessment of his knowing exercise of the right to defend himself" (*Faretta*, p 836).

In *Godinez*, the Court said that the competency standard for pleading guilty or waiving the right to counsel is not higher than the standard for competency to stand trial, except in the sense that the waiver must be knowing and voluntary. The Seventh Circuit indicated that the *Godinez* opinion showed that the critical question was a defendant's "mental functioning" rather than "any particular knowledge he may have" (*Tatum*, p 465).

The Seventh Circuit said that state courts mistakenly thought that *Edwards* introduced the possibility of considering a defendant's legal knowledge. In *Edwards*, the U.S. Supreme Court held that the state may force counsel upon a defendant in the scenario where the accused is mentally competent to stand trial if represented, but is "not mentally competent to conduct that trial himself" (*Edwards*, p 167). The Seventh Circuit emphasized that the opinion in *Edwards* was focused on mental competence, rather than a particular skill.

In summary, the Seventh Circuit's ruling in *Tatum* emphasizes that the right to represent oneself is a constitutional right that is not to be infringed upon based on a lack of education, skill, or achievement; rather, competence to proceed *pro se* must be considered as it relates to mental functioning.

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Determination of Intellectual Disability in Death Penalty Cases

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