The court ordered that Mr. Charboneau be committed until he was no longer a sexually dangerous person.

In Mr. Charboneau's appeal to the Fourth Circuit Court of Appeals, he posed two questions. First, he asked whether one must be diagnosed with a paraphilic disorder to qualify for civil commitment under the Walsh Act. Second, he asked whether, after review of the record, the factual findings by the district court met the clear error standard of review.

### Ruling and Reasoning

The Fourth Circuit Court reviewed the district court's factual findings for clear error only, preserving the lower court's role as trier of fact. Mr. Charboneau asserted that the district court erred when holding that the "serious mental illness" requirement could be met without a paraphilia diagnosis. He also argued that by so doing, the district court had expanded the reach of the Walsh Act. The circuit court rejected these arguments and noted that the plain language of the Walsh Act did not require a diagnosis of a paraphilic disorder or of any other specific mental illness for the "serious mental illness" element to be satisfied. The court also noted that it had previously held that Congress had left to the courts the task of defining the meaning of "serious mental illness, abnormality, or disorder" as "a legal term of art" (*United States v. Caporale*, 701 F.3d 128 (4th Cir. 2012), p 136).

Furthermore, the circuit court was not swayed by Mr. Charboneau's argument that Dr. Zinik's finding of a mixed personality disorder was any less credible because he was the only expert to arrive at that conclusion. The court noted that Dr. Zinik's diagnostic opinion was similar to those arrived at by Mr. Charboneau's past treatment providers. The court emphasized that the decision as to the credibility of expert witness testimony was best left to the district courts, and that the primary measure of testimonial worth was quality, not quantity.

Finally, Mr. Charboneau argued that the district court did not give sufficient weight to his behavior while incarcerated during the 15 years preceding his civil commitment. The circuit court agreed with the district court's concern that, when previously released to the community, Mr. Charboneau had multiple instances of alcohol abuse and sexually violent offenses. The circuit court again found that Dr. Zinik's report and testimony were particularly convincing in explaining "why Mr. Charboneau comports himself well in a controlled institutional environment but reverts to drinking alcohol, lawbreaking, and sexual violence in the community" (*Charboneau*, p 916).

### Discussion

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Supreme Court clarified that the term "mental illness" is devoid of any "talismanic significance" and that "psychiatrists disagree widely and frequently on what constitutes mental illness" (*Hendricks*, p 359). The *Hendricks* majority also noted that the Court had traditionally left choices, such as whether to use terms like "mental abnormality" instead of "mental illness," to state legislatures, and that "legal definitions which must take into account such issues as individual responsibility and competency need not mirror those advanced by the medical profession" (*Hendricks*, p 359).

The circuit court's opinion in *Charboneau* is consistent with the opinion in *Hendricks*. The circuit court argued that Congress could have drafted the Walsh Act's language so as to follow specific "clinical norms or definitions," but that one would "search in vain" for language within the Walsh Act purporting to restrict the "universe of qualifying mental impairments within clinical or pedagogical parameters" (*Charboneau*, p 913). In *Caporale*, the circuit court had noted that "a serious mental illness, abnormality, or disorder is not limited to those disorders specifically delineated in the Diagnostic and Statistical Manual of Mental Disorders" (*Caporale*, p 136). In *Charboneau*, the Fourth Circuit Court of Appeals reiterated the opinions in their previous cases, holding that it was up to the courts to decide the meaning of "serious mental illness, abnormality, or disorder" for the purposes of civil commitment for sexual offenders.

## Proper Standards for a *Faretta* Inquiry

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## The Florida Supreme Court Considers Minimum Standards for *Pro se* Representation in Light of *Faretta*

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**Key words:** *Faretta*; pro se representation; mental illness; mental competence

In *Hooks v. State*, 286 So. 3d 163 (Fla. 2019), the Florida Supreme Court considered an appellant's claim that a district court had erred by engaging in an incomplete *Faretta* colloquy, thus allowing him to proceed *pro se* incompetently, resulting in his conviction. The state supreme court ruled that the lower court's inquiry under *Faretta v. California*, 422 U.S. 806 (19375), was not inadequate because of its failure to ask certain questions about the defendant's experience and understanding of the criminal code.

### Facts of the Case

Sylvester Hooks was charged with two counts of possession of drugs with intent to distribute, as well as violation of his probation. Prior to jury selection and trial, Mr. Hooks requested to proceed without counsel. The trial judge provided him with a document containing instructional material on self-representation. The judge later inquired as to whether he had read the document. Mr. Hooks affirmed that he had. The judge also warned Mr. Hooks of the dangers of proceeding *pro se* and reminded him that the decision to proceed without legal representation must be made "knowingly and voluntarily." Mr. Hooks reaffirmed his decision and signed and initialed the provided document, which was accepted by the trial judge. Mr. Hooks represented himself during jury selection. At the onset of his trial, four days later, the judge inquired for a third time whether Mr. Hooks wished to proceed *pro se*. At trial, Mr. Hooks was found guilty on all counts. During the sentencing phase of his trial, now represented by counsel, Mr. Hooks was sentenced to 10 years in prison.

Mr. Hooks appealed to a state appellate court, stating that *Faretta* provided factors that the court must consider when determining if the defendant knowingly and voluntarily waived the right to counsel. Mr. Hooks asserted that the trial court did not inquire about his "age, education, mental or physical health, ability to read and write, drug use, or prior self-representation" and that, consequently, the trial court had conducted an inadequate *Faretta* evaluation (*Hooks*, p 165).

The state appeals court rejected Mr. Hooks' claim of an improper *Faretta* colloquy because the Florida Rule of Criminal Procedure 3.111(d) (3) (2019) did not require specific questions to be asked to ensure that a *Faretta* inquiry was adequate. The appeals court stated that, to satisfy *Faretta*, the trial court is only required to ensure that the "defendant is competent to waive counsel" and that the defendant "understands its advice regarding the dangers and disadvantages of self-representation" (*Hooks v. State*, 236 So. 3d 1122 (Fla. Dist. Ct. App. 2017), p 1127). Because the trial judge had repeatedly cautioned Mr. Hooks about the potential disadvantage of proceeding *pro se*, and his legal competence was not in question, the appellate court concluded that, at least per rule 3.111(d) (3), the *Faretta* examination was adequate.

The state appellate court was concerned about a group of Florida Supreme Court cases that might conflict with the most recent versions of rule 3.111 (d) (3). In *Aguirre-Jarquin v. State*, 9 So. 3d 593 (Fla. 2009)), and later in *McGirth v. State*, 209 So. 3d 1146 (2017)), the state supreme court concluded that certain factors should be reviewed to inform a court's decision as to whether to allow a defendant to proceed without legal representation. The *Aguirre-Jarquin* and *McGirth* courts identified factors such as a defendant's age, experience, and understanding of criminal procedure, which they held must be considered to render a request to proceed *pro se* as knowing and voluntary. The appellate court concluded that the *Aguirre-Jarquin* and *McGirth* decisions might have been misinterpreted and did not necessarily contradict rule 3.111(d) (3) or *Faretta*. The appellate court reasoned that the *Aguirre-Jarquin* court found the *Faretta* inquiry to be satisfactory even when the trial court had not catalogued the questions that supported the court's conclusion. But, to address possible issues raised by the appellate court's review of *Aguirre-Jarquin*, they certified a question to the Florida

Supreme Court, inquiring as to whether the *Faretta* inquiry in *Hooks* was adequate, without review of the specific factors mentioned in *Aguirre-Jarquin*.

### Ruling and Reasoning

The Florida Supreme Court affirmed the lower court's decision, holding that a *Faretta* colloquy is not rendered inadequate when the trial court accepted a request for a defendant to proceed *pro se* and did not ascertain the defendant's age, experience, and understanding of the rules of criminal procedure, including the ability to prepare a defense and technical legal knowledge.

The state supreme court detailed the history of rule 3.111(d) (3), noting that the original version was promulgated three years prior to the *Faretta* decision. In the pre-*Faretta* edition of rule 3.111(d) (3), a waiver of legal representation would not be accepted if the defendant was unable to make an "intelligent and understanding choice" due to his "mental condition, age, education, experience, the nature and complexity of the case, or other factors" (Fla. R. Crim. P. 3.111(d) (3) (Fla. 1972)). But the U.S. Supreme Court held in *Faretta* that a defendant has a constitutional right to self-representation if "knowingly and intelligently" deciding to proceed *pro se*. The Court stated that the reasoning supporting the petitioner's decision could be imperfect, but the petitioner should be informed of the risks of waiving counsel. The courts in Florida continued to rely on the pre-*Faretta* version of rule 3.111(d) (3). After *Faretta*, the Florida Supreme Court aligned with and reflected the decision in *Faretta* when it reversed a trial court's decision to deny a defendant's right to waive legal counsel because of his educational history in *State v. Bowen*, 698 So. 2d 248 (Fla. 1997). In 1998, in response to *Bowen*, rule 3.111(d) (3) was revised to reflect the defendant's right to represent himself if the court determines that the defendant made a "knowing and intelligent waiver" of the right to counsel. Following *Bowen* and the revision of rule 3.111(d) (3), the state supreme court emphasized that defendants' understanding of their legal rights, not their legal or technical knowledge or the identification of specific factors, was relevant when trial courts review petitioners' right to waive counsel.

The Florida Supreme Court noted that *Aguirre-Jarquin* suggested consideration of factors that influence a decision as to whether a defendant knowingly and voluntarily waived the right to counsel. These factors were drawn from its own opinion in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), but *Porter* only stated that those factors may be considered. *Porter* held that even if the factors were not considered, this did not necessarily suggest an inadequate *Faretta* inquiry. The Florida Supreme Court held that trial courts did not err by mere failure to consider factors outlined in *Aguirre-Jarquin*. The court concluded that a defendant should be permitted to waive the assistance of counsel following a thorough inquiry into the defendant's comprehension of the request.

### Discussion

In both *Faretta* and *Hooks*, the adjudicating courts were faced with a *pro se* request from a defendant with no apparent history of mental illness. Thus the decision to approve the request was one focused essentially on the cognitive capacity of the defendant to apprehend the complexities of mounting a criminal court defense. The dissenters in *Faretta* had concerns about the relatively broad protection the majority had provided to those wishing to proceed *pro se*. One of the dissenters wrote that the majority had bestowed "a constitutional right on one to make a fool of himself" (*Faretta*, p 852).

Since *Faretta*, a competent defendant has had a protected right to proceed *pro se*. Concerns have been raised, however, about *pro se* defenses by defendants with a history of mental illness or who have evidence of mental disturbance. In *Indiana v. Edwards*, 554 U.S. 164 (2008), the majority opinion noted that the issue of "mental competence" distinguished the *pro se* request in *Edwards* from that detailed in *Faretta*. Ahmad Edwards had a prior diagnosis of schizophrenia; Anthony Faretta did not. Thus, in *Edwards*, the Court carved out a *Faretta* exception based on the confounding effect of mental illness in self-representation cases.

## Counsel's Obligation to Investigate a Developmental Disorder as Mitigating Evidence

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