

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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**Failure to Investigate Fetal Alcohol Syndrome as Mitigating Evidence in a Capital Case Constitutes Ineffective Assistance**

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In *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019), the Fourth Circuit Court of Appeals considered whether counsel's failure to collect evidence that Mr. Williams had fetal alcohol syndrome (FAS) or to consider its resulting import as part of the mitigation strategy constituted ineffective assistance of counsel. The Fourth Circuit ruled that known diseases causing permanent neurological damage, such as FAS, have the potential to constitute mitigating evidence and that failure of counsel to investigate such diseases, when evidence is reasonably available, constitutes ineffective assistance.

**Facts of the Case**

On September 3, 2003, Charles Williams forced his former girlfriend into a store office and held her at gunpoint for approximately 90 minutes. She managed to call the police, who attempted, unsuccessfully, to negotiate her release. As she tried to escape, Mr. Williams shot her four times and killed her. He was subsequently arrested and confessed to the crimes. A South Carolina jury convicted him of kidnapping, murder, and possession of a firearm during a violent crime.

During trial, Mr. Williams was represented by two attorneys with experience in capital cases. In preparation of mitigation, his legal team assembled mental health experts including a social worker, a neuropsychologist, a psychiatrist, a neurologist, and a forensic psychiatrist. The mental health experts obtained reports of observed alcohol use of unknown quantities by Mr. Williams' mother during pregnancy. They concluded that Mr. Williams had frontal lobe damage, bipolar disorder, and obsessive-compulsive disorder. They recommended magnetic

resonance imaging and additional medical records, which were obtained one week prior to trial.

The defense counsel presented mitigating evidence of Mr. Williams' frontal lobe damage, learning difficulties, "untreated attention deficit disorder," troubled childhood, mental illnesses, difficulties in school, and his mother's alcoholism. The state alleged one aggravating factor, that the murder was committed during a kidnapping. On the second day of deliberations, the jury was initially deadlocked on whether to impose the death penalty, nine to three in favor of death, but after further instruction from the court returned a unanimous decision of death.

In November 2010, Mr. Williams filed a petition for postconviction relief (PCR) in the Greenville County, South Carolina Circuit Court (the PCR court). The PCR court held an evidentiary hearing where three experts in FAS testified that Mr. Williams had deficits consistent with FAS and that FAS was a diagnosable condition during the time of the trial in 2005. This information included testimony that Mr. Williams' executive functioning, including "self-regulation" and "behavior control," were impaired as a result of FAS. The original trial defense attorneys testified that "neither could recall a mitigation investigation into FAS, or why such an investigation was not conducted" (*Williams*, p 308).

The PCR court rejected Mr. Williams' petition, concluding that counsel made a "strategic decision not to present to the jury evidence of brain damage or a diagnosis" of FAS (*Williams*, p 310). The PCR court further observed that evidence of FAS would have been unlikely to persuade the jury to return a different sentence. Following this rejection, Mr. Williams filed petitions for writs of *certiorari* with the South Carolina Supreme Court and U.S. Supreme Court, both of which were dismissed.

Having exhausted state remedies, Mr. Williams petitioned the U.S. District Court for the District of South Carolina, asserting 15 grounds for relief. The district court granted Mr. Williams' petition only on the "claim of ineffective assistance of counsel resulting from the trial counsel's failure to investigate potentially mitigating evidence" related to FAS (*Williams*, p 306). The district court concluded "that the PCR court's finding that trial counsel 'made a strategic decision' was unreasonable given that this finding was directly contradicted by trial counsel's PCR testimony" and that "the jury was deprived of

powerful [mitigating evidence]” (*Williams*, p 310). The district court vacated the death sentence and recommended a trial for resentencing. The state appealed and the matter was brought to the U.S. Court of Appeals for the Fourth Circuit.

#### Ruling and Reasoning

The Fourth Circuit agreed with the district court that Mr. Williams established deficient performance of counsel by demonstrating that counsel’s representation “fell below an objective standard of reasonableness” (*Williams*, p 313). Relying on *Strickland v. Washington*, 466 U.S. 668 (1984), the Fourth Circuit noted, “*Strickland* does not require investigation of every conceivable line of mitigating evidence but does impose ‘a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary’” (*Williams*, p 313). It was further noted that the American Bar Association Guidelines at the time of trial explained that “the permanent neurological damage caused by fetal alcohol syndrome’ could lessen the defendant’s moral culpability for the offense or otherwise support a sentence less than death” (*Williams*, p 313). The Fourth Circuit further quoted the American Bar Association guidelines suggesting that “the defense team should include at least one person qualified to screen for mental or psychological defects so as to ‘detect the array of conditions (e.g., posttraumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that could be of critical importance’” (*Williams*, p 313).

The Fourth Circuit concluded that evidence of FAS was reasonably available because there was sufficient evidence of prenatal alcohol abuse and brain damage correlated with a diagnosis of FAS, including frontal lobe impairment and decreased head circumference at birth. The court further concluded that counsel “failed to connect the indicators suggesting further investigation” and that “FAS evidence was widely acknowledged to be a significant mitigating factor that reasonable counsel should have at least explored” (*Williams*, p 315). They placed emphasis on the notion that a diagnosis of FAS could have established both cause and effect for Mr. Williams’ criminal acts as opposed to the evidence presented of other mental health concerns, which related more to effects on behavior.

#### Discussion

In this ruling, the Fourth Circuit ruled that known diseases causing permanent neurological damage, such as FAS, have the potential to constitute mitigating evidence. Additionally, they held that failure of counsel to investigate such diseases when evidence is reasonably available constitutes ineffective assistance of counsel. Although counsel presented mitigating evidence of a history and multiple symptoms consistent with FAS, the Fourth Circuit indicated that failure to establish the specific diagnosis of FAS fell below an objective standard. This conclusion suggests that courts sometimes value a definitive diagnosis more than a description of symptoms and, furthermore, may value one diagnosis over another. Even though the distinction made by the court between FAS and other mental diagnoses may represent a false dichotomy (i.e., that a diagnosis of FAS presents more persuasive mitigating evidence for a crime than a diagnosis of bipolar disorder), it is important for psychiatric experts to explore, consider, and define carefully all potentially relevant information when formulating diagnostic impressions for the court while also keeping in mind how the court may weigh the merits of diagnoses differently. In this case, the view of FAS as an “overarching neurological defect” was deemed by the court to be substantively different from diagnoses such as attention deficit hyperactivity disorder, bipolar disorder, or the less specific determination of frontal lobe damage.

Underlying the Fourth Circuit’s order to vacate Mr. Williams’ death penalty sentence is the historical influence of the movement away from the death penalty in intellectually disabled individuals since *Atkins v. Virginia*, 536 U.S. 304 (2002). Mr. Williams was not diagnosed with intellectual disability, yet, given the association of intellectual disability in individuals with FAS, one could infer from this decision that evolving standards of decency strongly suggest that courts should give more weight to neurological conditions related to intellectual disability as mitigating factors. In addition to addressing ineffective assistance of counsel, the decision in *Williams* also potentially corrects what might be interpreted as an unjust death penalty sentence for a neurologically impaired individual. This notion is contradicted, however, by the Fifth Circuit’s recent ruling in *In re Soliz*, 938 F.3d 200 (5th Cir. 2019), that a diagnosis of FAS, without more, is insufficient to bar the death penalty.