provides an impetus for widespread updates to correctional housing policy.

Notably, the court repeatedly cited its own opinion in Grimm v. Gloucester County School Board, 972 F.3d 586 (4th Cir. 2020), which mandated accommodations for transgender individuals in a public school setting. Taken together, these rulings mark continued progress toward equal protections for transgender individuals in public institutions.

While the dissent argued that the court should not allow societal attitudes or medical organizations to influence interpretation of statutes, the majority’s arguments about gender dysphoria and its physical basis raise questions about whether the gender identity disorder exemption to ADA protections is ever legally applicable, even if this exemption was retained by Congress in 2008. This result highlights how scientific positions and the law can collide.

Psychiatric Evaluation to Assess Competency for Self-Representation

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Psychiatric Evaluation to Assess Competency for Self-Representation Is Not Mandatory Before a Defendant Proceeds Pro Se

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Key words: Sixth Amendment; pro se; competency evaluation; Faretta; Edwards

In United States v. Garrett, 42 F.4th 114 (2d Cir. 2022), the Second Circuit Court of Appeals held that the district court did not err when, after a Faretta hearing, it allowed Paul Rivera (a.k.a. Michael Garrett) to proceed pro se without first ordering a psychiatric evaluation to assess his competency for self-representation.

Facts of the Case

Paul Rivera was arrested in January 2012 after a traffic stop in Pennsylvania when approximately 170 grams of cocaine and 7.5 grams of heroin were seized. During his 14-month incarceration in Pennsylvania, the Federal Bureau of Investigation began investigating Mr. Rivera and the activities of a criminal organization known as “Together Forever” (TF), which he co-founded in the 1980s. TF engaged in drug trafficking, forced prostitution, and gang violence. On March 11, 2013, a federal grand jury indicted and charged Mr. Rivera and a co-defendant with narcotics trafficking, sex trafficking, money laundering, witness tampering, and murder.

During the federal proceedings, Mr. Rivera cycled through seven attorneys before requesting to proceed pro se. The district court disqualified Mr. Rivera’s first attorney, Steve Zissou, over a nonwaivable conflict of interest. Mr. Zissou objected, predicting that this would make it “extremely difficult for successor counsel” because Mr. Rivera was a “very difficult and sophisticated client . . . extremely distrusting of courts and lawyers . . . and likely suffering from some form of undiagnosed psychological instability” (Garrett, p 116).

Within two weeks of the district court appointing new counsel, Mr. Rivera replaced him with a privately retained attorney. After just over one month, the attorney withdrew because of a conflict, and the court appointed Martin Goldberg. Approximately four months later, the court appointed new counsel again after Mr. Rivera and Mr. Goldberg expressed concerns about their relationship. Mr. Goldberg explained that part of the problem stemmed from Mr. Rivera being “enamored” with prior counsel, Mr. Zissou.

In October 2013, the grand jury returned a superseding indictment with additional charges, including murder in aid of racketeering, a death-penalty-eligible offense. The court appointed an additional attorney, David Stern, to assist with the capital charge. After the government dropped the death penalty, the court determined that Mr. Rivera required only one lawyer, and he proceeded with Mr. Stern. Mr. Rivera requested to replace him after one month. The court granted this request in July 2014, appointing Donald DuBoulay and warning Mr. Rivera that he would be the last counsel appointed for him.

In April 2015, Mr. Rivera requested to proceed pro se because of disagreement with Mr. DuBoulay’s legal strategy. Subsequently, the district court held a
hearing pursuant to *Faretta v. California*, 422 U.S. 806 (1975). During the hearing, the judge inquired about Mr. Rivera’s clarity of mind and understanding of his charges. She informed him that his prior *pro se* submissions contained harmful evidentiary submissions. The judge repeatedly articulated the risks of Mr. Rivera’s self-representation, including that he faced a mandatory life sentence and might inadvertently trigger admission of his proffer statement, during which he admitted his involvement in the murder. Mr. Rivera “insisted that he understood the risks and stated that he was familiarizing himself with the Federal Rules of Evidence” (*Garrett*, p 117). The judge noted that in two years of presiding over the case, Mr. Rivera did not display problems with his conduct. She granted his *pro se* request, and Mr. DuBoulay continued as standby counsel.

Mr. Rivera’s co-defendant subsequently moved to separate their cases, asserting that Mr. Rivera had “mental illness and was acting wacky” (*Garrett*, p 117). The prosecutor also expressed concern that Mr. Rivera’s decisions were not entirely rational. The judge disagreed with both, stating that she did not doubt that Mr. Rivera’s choice to proceed *pro se* was made “knowingly and voluntarily and rationally, with full understanding of the risks” (*Garrett*, p 117).

At his trial, Mr. Rivera insisted on wearing his prison uniform. Despite the court’s prior warnings, during his opening statement, he proclaimed being factually innocent of the murder, thereby prompting the admission of his incriminating proffer statement to the government. His co-defendant’s counsel described Mr. Rivera’s cross-examinations as “painful” and “cringe-worthy.” While cross-examining a cooperating witness, Mr. Rivera requested that Mr. DuBoulay take over, which the court permitted. On June 25, 2015, the jury found Mr. Rivera guilty on all counts. Mr. Rivera received a mandatory life sentence for murder in aid of racketeering, a consecutive 20-year sentence for the gun charge, and concurrent sentences for the remaining counts.

Mr. Rivera appealed. He argued that the district court committed reversible error and denied his right to a fair trial by allowing him to proceed *pro se* without further psychiatric evaluation of his competence for self-representation. Specifically, Mr. Rivera argued that he had a prolonged addiction to heroin and cocaine and showed signs of mental illness throughout the record. He contended that the district court’s decision “violated the principles” set forth by the U.S. Supreme Court in *Indiana v. Edwards*, 554 U.S. 164 (2008). He argued that under *Edwards*, the court had an affirmative duty to obtain a competency evaluation before allowing him to proceed *pro se*.

**Ruling and Reasoning**

The U.S. Court of Appeals for the Second Circuit affirmed the district court’s ruling, holding that “where a defendant has been found competent to stand trial, *Edwards* does not require a court to conduct a further competency hearing or order psychiatric evaluations before permitting a defendant to proceed *pro se*” (*Garrett*, p 120).

The court noted that, in *Faretta*, the U.S. Supreme Court identified the importance of the constitutional right to self-representation and that when invoking this right, a defendant relinquishes several traditional benefits associated with the right to counsel. Further, the court noted that defendants must “knowingly and intelligently” relinquish these benefits when electing to represent themselves. The court noted that the district court must ensure that the defendant is “aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open’” (*Faretta*, p 835, citing *Adams v. U.S. ex rel. McCann*, 317 U.S. 269 (1942), p 279).

The court noted that in *Edwards*, the U.S. Supreme Court carved out a narrow exception to the right to self-representation: when a person is competent to proceed but is not competent to conduct trial proceedings because of severe mental illness. The court rejected Mr. Rivera’s argument that the district court had an affirmative duty to obtain a psychiatric evaluation to eliminate him from that category of defendants to whom this exception applies.

The court elaborated that the district court did not abuse its discretion by not ordering a psychiatric evaluation *sua sponte* before determining that Mr. Rivera knowingly and intelligently waived his right to counsel. The court listed all the measures taken by the district court judge to ensure she had no doubts that Mr. Rivera understood his decision. The court also noted that the district court judge reported having no problems with Mr. Rivera’s conduct during the two years of proceedings. The court explained that although Mr. Rivera subsequently insisted that deciding to represent himself was irrational and self-destructive, this argument did not undermine the district court’s findings that he knowingly waived his
right to counsel or suggest that he had a severe mental illness which rendered him not competent to conduct trial proceedings by himself. The court also cited *Faretta*, stating that defendants’ choice to represent themselves must be honored, “although [Mr. Rivera] may conduct his own defense ultimately to his own detriment” (*Faretta*, p 834). The court, thus, concluded that the district court did not err by allowing Mr. Rivera to represent himself.

Discussion

In *Garrett*, the Second Circuit addressed whether, under *Edwards*, district courts are required to obtain a competency evaluation in addition to a *Faretta* hearing before allowing a defendant to proceed *pro se*. Mr. Rivera’s case differs from *Edwards* in that Mr. Edwards had schizophrenia and underwent competency restoration on three prior occasions before requesting to represent himself. There was reason to believe that Mr. Edwards was not capable of conducting his own trial proceedings despite being found competent to proceed. In contrast, in the present case, no concerns had been raised about Mr. Garrett’s competency and the district court, on the basis of its own observations, did not believe a psychiatric evaluation to assess his ability to represent himself was required.

The *Garrett* case underscores that the purpose of psychiatric evaluations is to assist district courts only when needed but that these evaluations are neither mandatory nor determinative. The final determination is left to the discretion of the trial judge, who is the final arbiter of facts.

**Authority to Determine Competence to Proceed**

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**Finder of Fact Possesses Ultimate Authority in Determining Competency to Proceed Based on Perceived Weight of the Evidence**

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**Key words:** competency to proceed; incompetent; sufficient ability; expert opinion

In *State v. Surber*, 972 N.W.2d 64 (Neb. 2022), the Nebraska Supreme Court ruled the finder of fact is responsible for weighing and considering all evidence related to trial competence to proceed. Furthermore, the power to rule whether an individual is competent rests with the finder of fact regardless of an expert’s opinion, provided the determination is based on sufficient evidence. The court must find an individual has a “sufficient” ability to consult with counsel with a “reasonable degree” of understanding.

**Facts of the Case**

On November 2, 2016, police conducted a welfare check on Kraig Kubik after his son reported Mr. Kubik was dead. At the residence, Mr. Kubik’s girlfriend showed the officer what appeared to be a blood patch, drag marks, and surveillance footage of Andres Surber and Brayan Galvan leaving with Mr. Kubik the previous evening. When police arrived at Mr. Galvan’s residence, he attempted to flee, was apprehended, and permitted officers to search the residence; they found Mr. Surber and blood-stained clothing. Police were notified that Mr. Surber was at the Surber family farm earlier that day, obtained consent to search the property, and located blood, possible human flesh, a burn barrel, bloody knife, and other items. After obtaining a warrant to search a vehicle located on the property, a human leg and arm were found in the trunk. On November 5, 2016, additional remains of Mr. Kubik were found nearby. It was determined he died of a gunshot to the head, with postmortem dismemberment. Additional evidence suggested Mr. Surber was responsible, and he was charged with murder. Mr. Surber moved to suppress evidence obtained from the residence and vehicle searches. The trial court held the contested evidence was admissible.

In March 2017, Mr. Surber’s competence to proceed was evaluated. The psychiatric evaluator from the Lincoln Regional Center (LRC), Dr. Klaus Hartmann, opined Mr. Surber was incompetent but noted a “reasonable likelihood” of restorability was