

mental illness, violence, and stigma. *Psychiatr Serv.* 2004 May; 55(5): 577-80). Recent media coverage of high-profile shootings by persons postulated to have mental illness reinforces stereotypes of people with mental illness as dangerous and may embolden prejudice and aggression toward these individuals. In addition, restricting access to guns for individuals with mental illness helps to satisfy the political push for additional gun control measures. This may, in turn, further bolster stigma surrounding mental illness. Forensic psychiatrists are well positioned to shape public perception about gun violence, mental illness, and mental health firearm laws through patient care, education, research, and advocacy. Gun regulations also have important implications for psychiatrists' day-to-day practice. Given the prevalence of gun ownership in the United States, clinical implications of firearm-related mental health disqualifiers are an extra consideration when treating patients.

Concurrent Motions for Competency to Waive Counsel and Competency to Stand Trial

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Trial Court Erred in Finding a Defendant to Be Competent to Self-Represent While Motions regarding His Competency to Stand Trial Were Unresolved

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Key words: competency to waive counsel; competency to stand trial; *Faretta* hearings; invited error; abuse of discretion

In *People v. Waldon*, 522 P.3d 1059 (Cal. 2023), the California Supreme Court overturned a conviction and death sentence on the basis that Billy Ray Waldon was inappropriately allowed to represent himself at trial. They also found that Mr. Waldon's motions to represent himself did not constitute invited error for the purposes of appeal.

Facts of the Case

In 1985, Billy Ray Waldon was accused of murder, rape, robbery, and other offenses related to events occurring over a two-week period in San Diego, California. Mr. Waldon asserted that he had been framed by federal agents who wanted to intercept his efforts to advance Cherokee autonomy and spread "Poliespo," a new language he created.

Prior to the trial, Mr. Waldon petitioned to dismiss his lawyers and represent himself under *Faretta v. California*, 422 U.S. 806 (1975). Judge Zumwalt, who was presiding at the time, initially denied this motion based on expert testimony by the court's expert, Dr. Kalish, that Mr. Waldon had a delusional thought disorder that impaired his rational perception of his circumstances, his ability to appreciate the risks and consequences of self-representation, and his ability to formulate and present a defense in an appropriate manner. Dr. Kalish also opined that he was unsure if Mr. Waldon rationally understood the court proceedings or if he had the ability to assist counsel. This opinion prompted Judge Zumwalt to suspend the *pro se* hearings and order an evaluation of Mr. Waldon's competence to stand trial.

During Mr. Waldon's competence to stand trial hearings, which were heard before a different judge, Dr. Kalish testified that Mr. Waldon had a mood disorder, paranoia, and a thought disorder that caused him to be unable to relate to his attorney, think clearly, or focus on the pertinent matters. Two prosecution experts disputed the significance of Mr. Waldon's psychiatric history and opined that Mr. Waldon was feigning mental illness. The jury found Mr. Waldon to be competent to stand trial. Defense counsel filed a petition for writ of mandate in challenge of this competency verdict, which was denied by the court of appeal. In response to this denial, the defense counsel petitioned for California Supreme Court review, based on assertions of several errors and requesting a new competency trial. The California Supreme Court granted this review and ordered the court of appeals to address these claims.

In February 1988, in the midst of proceedings regarding Mr. Waldon's competence to stand trial, Judge Zumwalt resumed hearings as to Mr. Waldon's motion to represent himself. Judge Zumwalt appointed an advisory attorney to assist Mr. Waldon. In March 1988, Judge Zumwalt ultimately denied Mr. Waldon's request to represent himself, on the basis of multiple experts who opined that Mr. Waldon

had a mental disease that impaired his ability to waive counsel knowingly and intelligently. Among some of the reasons presented were that he was deeply disturbed, paranoid, and unable to “rationally perceive” his situation, which impaired his understanding of the consequences of waiving counsel and his ability to mount a rational defense.

Mr. Waldon’s representation for his competence hearings and his criminal trial changed numerous times, sometimes at the request of his attorneys and sometimes at Mr. Waldon’s request, who continued to request to waive counsel. In June 1989, Mr. Waldon filed another *Faretta* motion, this time requesting that he be appointed two counsels required to “follow the directions of the defendant,” and, if this were denied, that Mr. Waldon be named “lead counsel” with an appointed “second chair counsel” who would follow his directions and assist (*Waldon*, p 1067). Judge Langford, to whom this *Faretta* motion was initially assigned, declined the first request but agreed to proceed with the *Faretta* hearings, although he noted that it was problematic to address Mr. Waldon’s ability to self-represent while there were unresolved motions regarding his competence to stand trial.

The *Faretta* motions were then assigned to Judge Boyle. Judge Boyle acknowledged the ongoing competence hearings but agreed to proceed with the *Faretta* hearings anyway. When the prosecutor alerted the new judge to the “voluminous” prior materials on competence proceedings and the first *Faretta* motion, Mr. Waldon requested, via his advisory attorney, “that the court limit its review to the pending motion,” as review of prior materials could “possibly be prejudicial” (*Waldon*, p 1068). Judge Boyle agreed and did not review materials from the previous *Faretta* motion.

During the second *Faretta* hearings, Mr. Waldon again called lay witnesses and two expert witnesses. Neither expert had reviewed background material about Mr. Waldon or his case. Both experts testified that they believed he was competent to waive counsel, although one expert noted that Mr. Waldon had not shared many pertinent details with her, and so her opinion was based on limited information. Judge Boyle granted Mr. Waldon’s request to waive counsel, after advising Mr. Waldon of some of the disadvantages of *pro se* representation.

At trial, Mr. Waldon represented himself. He was found guilty on all counts and sentenced to death.

On an automatic appeal to the California Supreme Court, Mr. Waldon argued that the second judge had erred in finding him competent to represent himself. The Attorney General responded that Mr. Waldon waived his claim by inviting error when he petitioned that the second *Faretta* hearing be based on an intentionally abridged fund of evidence.

Ruling and Reasoning

The court reviewed the standard for competence to waive counsel, as established in *Godinez v. Moran*, 509 U.S. 389 (1993): the defendant must be competent to stand trial, and the defendant must make the waiver knowingly and voluntarily. If a defendant’s mental ability to waive this right is questioned, a court should conduct a full review of the defendant’s competence which should include an evaluation of relevant psychiatric evidence. The court opined that Judge Boyle’s decision to not review information from the first *Faretta* hearing, which included relevant mental health testimony, was an abuse of discretion. Additionally, they found that this error was not harmless; it amounted to a “total deprivation of the right to counsel at trial” (*Waldon*, p 1073).

The court considered the state’s argument that Mr. Waldon invited error by asking the judge to ignore material evidence from the first *Faretta* motion. The doctrine of invited error prohibits a defendant from seeking relief on appeal for a trial court’s error if that error was purposefully and tactically caused (i.e., invited) by the defendant. But, the court noted that Mr. Waldon did not invite error, because his efforts to overturn the prior *Faretta* denial occurred while his competency to stand trial was still in question. “When the ‘evidence indicates that the defendant may be [mentally ill] it should be assumed that he is unable to act in his own best interests’” (*Waldon*, p 1070, citing *People v. Lightsey*, 279 P.3d 1072 (Cal. 2012). p 1096).

Discussion

This case highlights the relationship between two criminal competencies, reiterating the precedent that competence to stand trial is necessary (but may not be sufficient) to establish competence to waive counsel. Defendants must be competent to stand trial to represent themselves (*Faretta*, *Godinez*, and *Indiana v. Edwards*, 554 U.S. 164 (2008)). In *Edwards*, the U.S. Supreme

Court held that states may constitutionally require a higher standard of competency for self-representation than for competence to stand trial, although this higher standard is not mandated, and the Court did not establish a specific test.

In *Waldon*, although Mr. Waldon had initially been found to be competent to stand trial, unresolved appeals pertaining to his competence precluded his determination of competence to represent himself. Thus, experts evaluating a defendant's ability to waive counsel must ensure that the defendant is also competent to stand trial, and they should signal their concern to the court if competence to stand trial is in question.

Competence to Be Executed

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Oklahoma State Court Satisfied Due Process Standards for Competence to Be Executed

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In *Cole v. Farris*, 54 F. 4th 1174 (10th Cir. 2022), the U.S. Court of Appeals for the Tenth Circuit declined to consider the appeal of Benjamin Cole, an inmate in Oklahoma, who was seeking a stay of his execution. Mr. Cole claimed that Oklahoma's procedures for determining competence to be executed violated the Fourteenth Amendment, and that Oklahoma's execution protocol violated the Eighth Amendment for not providing safeguards for inmates who may be incompetent.

Facts of the Case

In 2004, Benjamin Cole was convicted and sentenced to death for the first-degree child abuse murder of his infant daughter. In 2015, Mr. Cole filed a 28 U.S.C. § 2254 *habeas* application in the Northern District of Oklahoma, claiming that he was incompetent to be executed, and that his

execution would violate the Eighth and Fourteenth Amendments, as interpreted in *Ford v. Wainwright*, 477 U.S. 399 (1986) and *Panetti v. Quarterman*, 551 U.S. 930 (2007). Mr. Cole's execution was stayed from 2015 until 2022 after the Western District of Oklahoma entered judgment against Mr. Cole and other Oklahoma death-row inmates in a case challenging Oklahoma's method of execution. Given the stay, the district court administratively closed Mr. Cole's *habeas* proceeding; it later granted Mr. Cole's motion to reopen the matter and reinstate his original *habeas* application.

In June 2022, the district court approved a mental health evaluation, which was conducted by Dr. Scott Orth. Dr. Orth opined that Mr. Cole was competent to be executed and noted that Mr. Cole had a rational understanding of the reason he was being executed and that his execution was imminent. Mr. Cole argued that the "large quantum" of evidence he presented concerning his severe mental illness and incompetence for execution provided good reason to believe that he was not competent to be executed.

After Mr. Cole's execution date was rescheduled for October 20, 2022, he continued to assert his incompetence to be executed. Mr. Cole argued that Okla. Stat. tit. 22, § 1005 (2021) violated the U.S. Constitution, as interpreted by *Ford*, by making the prison warden, who is an executive officer and the executioner, the gatekeeper who decides whether to seek a competence trial. Mr. Cole asked prison warden Jim Farris to refer him for competence proceedings, citing that there was "good reason" to believe that he had become incompetent to be executed. The warden declined to make the referral, stating that upon careful consideration of the materials Mr. Cole provided, he had not become insane since his delivery to the Oklahoma State Penitentiary for execution.

Mr. Cole then sought *mandamus* relief from the Oklahoma courts to override the warden's decision and obtain a jury trial concerning his competence. After holding an evidentiary hearing, the state district court denied relief. The Oklahoma Court of Criminal Appeals (OCCA) subsequently also denied *mandamus* relief, finding that the state district court did not abuse its discretion when it determined that Mr. Cole did not meet the required substantial threshold showing of insanity, and that the warden therefore did not abuse his discretion by refusing to make the referral for competence to be executed proceedings.