NOT YET SCHEDULED FOR ORAL ARGUMENT

22-CM-898

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

RONALD MAZIARZ
Appellant,

v.

UNITED STATES,
Appellee.

On Appeal From The Superior Court
Of The District Of Columbia
Criminal Division

REPLY BRIEF FOR APPELLANT RONALD MAZIARZ

Jason K. Clark (D.C. Bar No. 1000198)
Counsel of Record and Counsel for Oral Argument
THE LAW OFFICE OF JASON K. CLARK
503 D Street, NW, Suite 250
Washington, D.C. 20001
(202) 505-2766
jason@clarkdefense.com

Counsel for Ronald Maziarz

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ARGUMENT

This case is about whether—in the face of mounting evidence that suggested a substantial question of the defendant's sanity at the time of the offense and afterward—the trial court should have conducted an on-the-record *Frendak* inquiry to determine whether the defendant had "voluntarily" and "intelligently" waived his right to assert the insanity defense. There can be no question that the trial court was aware of considerable evidence to question the defendant's mental state at the time of the offense. The offense itself was bizarre and the record demonstrated serious mental health concerns which preexisted the offense and continued throughout the proceedings below.

In responding to Mr. Maziarz's claim that a *Frendak* inquiry was required, the government challenges both the continued validity of *Frendak* itself and the existence of a substantial question of Mr. Maziarz's sanity at the time of the offense.

First, the government argues that this Court should overturn the protections for mentally ill defendants established in *Frendak v. United States* on the basis of scant support: (1) two pre-*Frendak* Supreme Court cases, *Alford* and *Faretta*, that this Court has already determined were consistent with the result in *Frendak*; (2) a non-authoritative decision by the D.C. Circuit in *Marble*, which may or may not be in tension with the holding of *Frendak*; and (3) a more recent Supreme Court case, *Godinez*, which actually supports the holding of *Frendak*.

This is simply not enough to overturn this Court's long-standing precedent that ensures that a mentally ill defendant only waives the right to present an insanity defense knowingly and intelligently, and not by incompetence itself. Moreover, this case is not about, as the government appears to argue, whether an insanity defense would have been likely to succeed. The likelihood of success is not a determinative *Frendak* factor. Rather, this case is fundamentally about whether the trial court should have inquired of the defendant to ensure that he was knowingly and intelligently deciding not to pursue the insanity defense. It should have.

I. *Frendak* Continues to Have Relevance And Should Not Be Overturned By This Court

According to this Court's decision in *Frendak v. United States*, where the evidence suggests a substantial question of the defendant's sanity, a judge may only permit a the defendant to waive the insanity defense after an on-the-record inquiry that ensures the waiver is made "voluntarily and intelligently." 408 A.2d 364, 379 (D.C. 1979). Where the waiver is not voluntary and intelligent, the trial court may exercise "limited" discretion to interpose the defense. *Id*. at 369.

At its core, *Frendak* simply imposes a rule of good order. It ensures that defendants who may have a claim to an insanity defense be apprised and waive it voluntarily. Fundamentally, it protects against an unknowing forfeiture of a potential defense where the circumstances suggest it is at issue. Like the Sup. Ct. Crim. R. 11 plea colloquy made directly of the defendant, the on-the-record *Frendak* inquiry of

the defendant ensures the defendant is making an important personal choice, voluntarily and intelligently.

A. *Frendak's* Underlying Philosophy Has Not Been Undermined.

Frendak was decided in the shadow of two Supreme Court decisions regarding the proper standards for waiver of substantial rights: *North Carolina v. Alford*, 400 U.S. 25 (1975), and *Faretta v. California*, 422 U.S. 806 (1975). As this Court noted in *Frendak*, *Alford* and *Faretta* each support its conclusion that in the face of evidence of the defendant's possible mental insanity, his decision to waive the right to an insanity defense should require that the trial court obtain the same assurance as with other substantial rights these cases require: that the waiver is voluntary and intelligent. *See Frendak*, 408 A.2d at 379.

The government attacks *Frendak* on this very basis. Relying on *United States v. Marble*, 940 F.2d 1543 (D.C. Cir. 1991), an opinion of the U.S. Court of Appeals for the D.C. Circuit, the government argues that despite the text of *Frendak* insisting the opposite, *Alford* and *Faretta* undercut the holding in *Frendak*. Br. 17-18. The government further argues that *Godinez v. Moran*, 509 U.S. 389 (1993), further undercuts *Frendak* because competence to plead guilty or to waive the right to counsel is no higher than the standard of competence to stand trial. Br. 18. But this conclusion does not follow. *Godinez* further supports the basic holding of *Frendak*, that the trial judge must satisfy himself that a defendant's waiver of the right to the insanity defense is "knowing and voluntary." And more recently, in *Indiana v.*

Edwards, 554 U.S. 164 (2008), the Supreme Court confirmed that the District of Columbia was free to set a higher standard for competence to waive the insanity defense than the United States Constitution demands.

1. *Frendak* requires that a trial judge ensure, on the record, that a defendant who wishes to waive the right to present an insanity defense does so intelligently and voluntarily.

In *Frendak*, this Court held that "whenever the evidence suggests a substantial question of the defendant's sanity at the time of the crime, the trial judge must conduct an inquiry designed to assure that the defendant has been fully informed of the alternatives available, comprehends the consequences of failing to assert the [insanity] defense, and freely chooses to raise or waive the defense." 408 A.2d at 380 (emphasis added). A "finding of competency is not, in itself, sufficient to show the defendant is capable of rejecting an insanity defense; the trial judge must make further inquiry into whether the defendant has made an intelligent and voluntary decision." *Id*. at 367 (emphasis added).

The decision in *Frendak* was a "reinterpret[ation]" of an earlier decision by the D.C. Circuit—at the time, authoritatively interpreting D.C. law—in *Whalem v. United States*, 346 F.2d 812 (D.C. Cir. 1965). In *Whalem*, the D.C. Circuit had held that in the District of Columbia, a judge may interpose the insanity defense over the objections of a defendant who wished to forego it. The *Whalem* court held that a

defendant, "if he wishes, [may] refuse to raise the issue of insanity, but he may not, in a proper case, prevent the court from injecting it."[1] *Id*. at 818.

The trial judge in *Whalem* had "advised defense counsel that if there was an insanity issue to be raised, it should be raised." *Id*. at 819. The D.C. Circuit held that after "[d]efense counsel informed the court that both he and his client agreed that the insanity issue should not be raised," and the judge confirmed, on the record, that the defendant did not wish to raise an insanity defense, the judge did not abuse his discretion by failing to interpose the insanity defense over the defendant's wishes. The D.C. Circuit affirmed the conviction. *Id*.

In *Frendak*, this Court clarified that in the District of Columbia, a judge may only interpose the insanity defense where the defendant "did not intelligently and voluntarily reject" it. 408 A.2d at 381. The standard is not whether the defendant is competent to stand trial, but whether he voluntarily and intelligently rejects presentation of an insanity defense. *Id*. *Frendak* reasoned that this requires a more in-depth inquiry than that mandated by *Dusky v. United States*, 362 U.S. 402 (1960), which only requires that a defendant be able to consult with his attorney and have a rational and factual understanding of the proceedings. 408 A.2d at 379.

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[1] *Whalem* also noted that after successful application of the insanity defense by the trial court, a criminal defendant would not be automatically committed. 346 F.2d at 818 (citing *Lynch v. Overholster*, 369 U.S. 705 (1962) (construing D.C. law to mean that a defendant who disclaims the insanity defense shall not face automatic commitment)).

In so holding, this Court explicitly rejected the notion that "a finding of competency to stand trial is, in itself, sufficient indication that the defendant is capable of intelligently waiving an insanity defense." *Id*. at 379. In fact, this Court recognized that "[o]ne factor which could impede a defendant's ability to make an intelligent choice would be the inability of one who is currently mentally ill to recognize his or her present condition." *Id*. at 380 n.29. The Court, therefore, required that a trial judge "conduct in inquiry designed to assure that the defendant has been fully informed of the alternatives available, comprehends the consequences of failing to assert the [insanity] defense, and freely chooses to raise or waive the defense"—"whenever the evidence suggests a substantial question of the defendant's sanity at the time of the crime." *Id*. at 380 (emphasis added).

In sum, *Frendak* (1) establishes that in the District of Columbia, the standard for a voluntary and intelligent waiver of the right to present an insanity defense is higher than the *Dusky* standard for competence to stand trial, and (2) sets forth procedures for trial courts to follow to ensure, on the record, that any waiver of the right to present an insanity defense is made voluntarily and intelligently.

2. In *Frendak*, this Court affirmatively determined that its holding was supported by the Supreme Court decisions in *Alford* and *Faretta*.

Despite this Court's insistence that its decision in *Frendak* squares with the Supreme Court's decisions in *Alford* and *Faretta*, the government now argues that the cases undermine it because they "recognize[] the primacy of a defendant's

tactical choices . . . .” Br. 18. This argument remains unsupported, as a review of the cases in question—including the text of *Frendak* itself—confirms that the primary concern of *Frendak* is that the important tactical decision to forgo the insanity defense be voluntary and intelligent.

i) North Carolina v. Alford.

In *North Carolina v. Alford*, the Supreme Court held that it is not unconstitutional for a trial judge to accept a guilty plea from a defendant who maintains his innocence. 400 U.S. at 38. The defendant in Alford, facing a death sentence, had stated that he “pleaded guilty because they said if I didn’t they would gas me for it, and that is all.” *Id*. at 28 n.2. Although the trial court found that the plea was made “willingly, knowingly, and understandingly,” the court of appeals had reversed the trial court, holding that the plea was made involuntarily. *Id*. at 29-30.

The Supreme Court, rejecting the decision by the court of appeals, held that the standard for a decision to enter into a guilty plea “was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action.” *Id*. at 31 (emphasis added); *see also id*. at 37 (“An individual accused of a crime may voluntarily, knowingly, and understandingly” waive trial rights and plead guilty, even if he maintains his innocence.).

Notably, *Alford* did not hold that a state was constitutionally prohibited from precluding a guilty plea by a defendant who claimed innocence. *Id*. at 38-39. In fact, it admitted that the “[s]tates in their wisdom . . . by statute or otherwise” may

prohibit defendants who claim innocence from pleading guilty. *Id*. at 38. Rather, it held that the Constitution demands only that pleas be entered into "voluntarily, knowingly, and understandingly." *Id*. at 39.

ii) Faretta v. California.

In *Faretta v. Californi*a, the Supreme Court held that a defendant must be permitted to waive his right to counsel and represent himself—on the condition that he do so "knowingly and intelligently." 422 U.S. at 835. The defendant in *Faretta*, who had a high school education and had previously represented himself in a criminal prosecution, explained that he believed the public defender's office was "very loaded down with . . . a heavy case load." *Id*. at 808 (omission in original). The trial judge, however, determined that the defendant had no right to conduct his own defense. *Id*. at 810. Represented by a public defender, the defendant was convicted, and the California Court of Appeals affirmed the conviction. *Id*. at 810.

The Supreme Court, rejecting that decision, held that a criminal defendant may waive the right to counsel; but it also held that to be permitted to do so, the defendant "should be made aware"—by the trial judge—"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." *Id*. at 835 (internal quotation marks omitted). The Supreme Court held that the judge must ensure, on the record, that the defendant has waived the right to counsel "knowingly and intelligently." *Id*. at 835.

In *Frendak*, this Court's determination of the significance of *Alford* could not have been more plain: "*Alford* does not imply a constitutional right to forego the insanity defense." 408 A.2d at 375. As this Court explained, "[i]n *Alford*, the [Supreme] Court expressly stated that a defendant does not have an absolute, constitutional right to have the trial court accept a guilty plea." *Id*. Moreover, *Alford* itself made clear that a defendant who claims innocence may plead guilty, on the condition that the waiver of trial rights is "voluntary and intelligent." 400 U.S. at 31. It also made clear that the District, "by statute or otherwise," may impose a higher standard. *Id*. *Frendak* does no more.

Likewise, this Court's determination of the significance of *Faretta* was just as plain: "[T]he [Supreme] Court's decision in *Faretta* . . . did not make it unconstitutional for a trial court to interpose an insanity defense." *Frendak*, 408 A.2d at 376. Indeed, like *Frendak*, *Faretta* permitted a defendant to waive the right to counsel on the condition that the judge make an on-the-record advisement of the "dangers and disadvantages" of waiving the right to counsel, which would only then be permitted if the waiver was made "knowingly and intelligently." *Faretta*, 422 U.S. at 835.

As this Court explained in *Frendak*, "[i]n *Faretta* and *Alford*, the Supreme Court permitted the defendants to waive constitutional rights only after the trial judge had assured himself that the accused was capable of making a voluntary and intelligent choice." *Id*. at 378 (emphasis added). "We conclude that a trial judge must

seek the same type of assurance when a defendant chooses to reject an insanity defense. The court must ensure that the defendant understands the consequences of his or her choice and makes the decision voluntarily. . . . [and] is capable of intelligently refusing to make the defense." *Id*. (emphasis added).

3. The D.C. Circuit's decision in *Marble* is not binding on this Court and is not necessarily in conflict with *Frendak*.

In *United States v. Marble*, the D.C. Circuit—albeit no longer authoritatively interpreting D.C. law[2]—also revisited *Whalem* in light of *Alford* and *Faretta*. The D.C. Circuit stated in *Marble* that it could "no longer distinguish the decision not to plead insanity from other aspects of a defendant's right, established in *Faretta*, to direct his own defense." *Id*. at 1547. Whether this was intended to produce a different result than *Frendak*, however, remains unclear.

As the D.C. Circuit explained in *Marble*, "[w]hen a defendant can make no clear choice for or against raising the [insanity] defense, and the evidence suggests that the defense is viable, it might then be appropriate for the court to exercise its discretion to instruct the jury *sua sponte*." *Id*. at 1548. In fact, as support for that proposition, the D.C. Circuit cited the statement in *Frendak* that a "trial court 'has discretion to raise an insanity defense *sua sponte* only if the defendant is not capable of making, and has not made, and intelligent and voluntary decision.'" *Id*. (citing

[2] *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971) (this Court is not bound by decisions of the D.C. Circuit rendered after February 1, 1971).

Frendak, 408 A.2d at 379). Concluding that further inquiry into Marble's competence was not required, the D.C. Circuit withheld judgment on whether any further inquiry may be required, explaining that it "need not . . . speculate about what to do when the defendant cannot make a choice." *Id*. at 1548. *Marble* is, at best, ambiguous.

4. The Supreme Court's decisions in *Godinez* and *Edwards* support this Court's reasoning in *Frendak* and undermine the government's reliance on *Marble*.

Since *Frendak* and *Marble*, the Supreme Court has decided two additional cases that bear on this analysis: *Godinez v. Moran* and *Indiana v. Edwards*. In these two cases, the Supreme Court explained that although the Constitution does not require differing standards for competence to stand trial or other trial-related decisions, waiver of such rights must be "knowing and voluntary," and states are free to set higher standards for competence. These cases lend *Frendak* further support.

i) Godinez v. Moran.

In *Godinez v. Moran*, the Supreme Court held that under the Due Process Clause of the U.S. Constitution, the standard for competence to stand trial is no different than the standard for competence to plead guilty or waive the right to counsel. 509 U.S. 389, 395; *id*. at 402. The defendant in *Godinez* had initially pleaded not guilty to a triple murder, but he later told the trial court that he wished to discharge his attorneys and change his pleas to guilty. *Id*. at 391-92. Although the defendant had already been determined to be competent to stand trial by two

psychiatrists, *id*. at 391, the trial court conducted an extensive inquiry into his decision:

> The court advised [the defendant] that he had a right both to the assistance of counsel and to self-representation, warned him of the "dangers and disadvantages" of self-representation, inquired into his understanding of the proceedings and his awareness of his rights, and asked why he had chosen to represent himself. It then accepted [his] waiver of counsel . . . [and his] guilty pleas, but not before it had determined that [he] was not pleading guilty in response to threats or promises, that he understood the nature of the charges against him and the consequences of pleading guilty, that he was aware of the rights he was giving up, and that there was a factual basis for the pleas. The trial court explicitly found that [the defendant] was "knowingly and intelligently" waiving his right to the assistance of counsel and that his guilty pleas were "freely and voluntarily" given.

Id. at 392-93 (internal citations omitted).

In *Godinez*, the Supreme Court determined that "when a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted. *Id*. at 402. "In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary." *Id*. at 400. The Court also explained that although the Due Process Clause does not impose heightened competency standards, "[s]tates are free to adopt competency standards that are more elaborate than the *Dusky* formulation." *Id*. at 402.

ii) Indiana v. Edwards.

In *Indiana v. Edwards*, the Supreme Court confirmed what *Alford* and *Godinez* offered and *Frendak* had already implemented: that states (or D.C.) may require a defendant to meet a competency standard higher than *Dusky* to waive substantial rights. 554 U.S. 164, 167 (2008); *id*. at 172. In *Edwards*, an Indiana state court had determined that the defendant was competent to stand trial but not competent to defend himself, and it therefore denied his request to waive the right to counsel. *Id*. at 169.

The Supreme Court, affirming the trial court's ruling, held that a criminal defendant who is sufficiently competent to stand trial may still not be sufficiently competent to represent himself. *Id*. at 174. It explained that "the Constitution permits judges to take realistic account of the particular defendant's mental capacities . . . and permits [s]tates to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still . . . are not competent to conduct trial proceedings." *Id*. at 177-78.

The Court explained: "Mental illness is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Id*. at 175. Noting that an individual who can "satisfy *Dusky's* mental competence standard . . . [and is] able to work with counsel at trial" may not be able to handle other decisions in the course of his own defense,

the Court stated that "the nature of the problem . . . cautions against the use of a single mental competency standard." *Id*.

In *Alford*, *Faretta*, and *Godinez*, the Supreme Court used various formulations that amount to the same requirement stated in *Frendak*: The defendant's waiver of his right to an insanity defense must be made "voluntarily" and "intelligently." 408 A.2d at 378; *see also Alford*, 400 U.S. at 31 ("voluntary and intelligent choice"); *id*. at 37 ("voluntarily, knowingly, and understandingly"); *Faretta*, 422 U.S. at 835 ("knowingly and intelligently"); *Godinez*, 509 U.S. at 400 ("knowing and voluntary."). Indeed, the *Frendak* opinion notes a number of cases that require "a defendant knowingly and intelligently waive a right or privilege." 408 A.2d at 378 n.26 (citing cases). And *Edwards* explicitly holds that though the Constitution does not demand a higher competency standard for more complex decisions or waivers of substantial rights, the District is free to require a higher standard. 554 U.S. at 167. That is exactly what this Court did in *Frendak*. At its core, *Frendak* has not been undermined. It remains a rule of good order ensuring fundamental protection for an important personal choice.

II. The Trial Court Abused Its Discretion When It Failed to Conduct a *Frendak* Inquiry, Despite A Substantial Question of The Defendant's Sanity.

The government suggests that because Mr. Maziarz—in their estimation—would not have succeeded in an insanity defense, the trial court did not abuse its discretion in failing to conduct a *Frendak* inquiry. The government's argument

confuses the standard for an insanity defense with the standard for a *Frendak* inquiry, and ignores procedural realities to draw negative inferences unsupported by the record.

The government makes much of Judge Okun's finding that Mr. Maziarz told police on scene that he attacked Mr. Alemu "because he was depressed." Br. 23. The government argues that because Judge Okun discredited[3] Mr. Maziarz's claim that demons made him hit Mr. Alemu, Judge Okun did not abuse his discretion in failing to conduct a *Frendak* inquiry. The government argues that based upon Judge Okun's findings, Mr. Maziarz likely would not have succeeded in presenting the insanity defense. The government's argument is faulty for at least two reasons.

First, the government argument ignores that if Mr. Maziarz had decided to proceed with a full fledge insanity defense, he would likely have presented different and additional evidence at trial. Mr. Maziarz might have chosen to undergo a productivity examination and present expert testimony as to his sanity at the time of the offense. He may have also called additional witnesses, like his long-time care giver and social worker, Mr. Ateh, who could have testified concerning the defendant's mental health and condition around the time of the offense. Essentially, the government's argument presumes that Mr. Maziarz was unlikely to succeed

[3] Judge Okun's credibility finding was largely based upon Gov. Ex. 4 (body worn camera video from a responding officer), which was played at trial, but never received into evidence.

because he presented little evidence of something he did not actually attempt to prove at trial.

Second, the government argument is faulty because it conflates success on the insanity defense, with what is required to trigger a *Frendak* inquiry. Under *Frendak*, to trigger an inquiry, the evidence must merely "suggest a substantial question of the defendant's sanity," 408 A.2d at 380, not prove an insanity defense. So, while Mr. Maziarz could debate whether the record supported a finding that he was insane, that only relevant inquiry is whether there was a substantial question of his sanity. And, of course, there was.

The trial court was certainly aware that the insanity defense was at issue. Before trial began, the first issue raised by government counsel was that the defense apparently "intends to raise a diminished capacity claim. And we haven't received any kind of notice of a not guilty by reason of insanity plea. And there's Court of Appeals cases demonstrating that diminished capacity isn't permissible in the District. So we're just moving in limine to exclude that from the Court." Tr. 5:9-17. This was the first red flag for the trial court and alone should have triggered a *Frendak* inquiry before proceeding further.

Defense counsel then informed Judge Okun that Mr. Maziarz was undergoing psychiatric care and asked the court to take judicial notice of the November 10 status report, while assuring Judge Okun that, at least as of September 5, 2022, the Department of Behavioral Health (DBH) had determined Mr. Maziarz was

competent. Tr. 7-8. This disclosure of on-going mental health and competence issues was a second red flag which should have triggered the inquiry.

The record is overflowing with ample evidence which should have triggered the trial court to conduct a *Frendak* inquiry. The DBH reports documented that Mr. Maziarz bizarre behavior started well before the incident and continued after his arrest. One report explains that it was not until Mr. Maziarz received an injection of antipsychotic medication that he seemed to improve and regain competency. A.9. The government discounts the early competency findings saying that "competency and sanity [are] separate issues . . . ." Br. 21. While certainly true, Mr. Maziarz's incompetency just after the incident, and his pre-existing psychiatric symptoms are sufficiently close in time so as to raise a substantial question of his sanity the day of the offense. It does not, alone, prove that he was insane, but it raises a substantial question of his sanity. Competency and sanity are separate legal issues, but they can often stem from the same underlying cause.

The government suggests that the court did not have a substantial question of Mr. Maziarz's sanity because he did not tell the court demons made him do it until the August 4, 2022, plea hearing. This argument ignores procedural reality. Mr. Maziarz did not have the opportunity to explain his conduct or address the court concerning the factual underpinnings of the offense until the plea colloquy. Prior to that time, any competent defense attorney would advise their client not to discuss the

facts of the case outside of the defense team.[4] That Mr. Maziarz did not previously state demons made him do it, does not negate the fact that his statements, both during the plea colloquy and at trial, raised a substantial question of his sanity. Given that he was not previously called upon to explain his actions, it certainly does not follow that the court was free to ignore the statements when made.

III. Because The Trial Court Failed to Recognize Its Discretion, Or Compile a Record to Explain Its Action, The Court Abused Its Discretion.

Citing *Patton v. United States*, 782 A.2d 305, 312 (D.C. 2001), the government argues, Br. at 19, that the trial court did not "abuse its discretion in failing to conduct a *Frendak* inquiry. However, fundamentally, the court did not even seem to recognize the *Frendak* issue. The court never discussed the *Frendak* case by name or made any mention of the issue of whether an on-the-record inquiry—to see if Mr. Maziarz would knowingly and voluntarily waive the insanity defense—was warranted. Rather, the court just seems to have simply missed the issue.

Without a recognition of the court's discretionary power, the court cannot be

[4] The government argues that Mr. Maziarz did not tell the doctors during his competency evaluation that demons made him do it. Br. 21. Defense counsel's advice not to speak on the factual underpinnings of a case would extend to these types of court ordered competency examinations. Moreover, the doctors in performing the examinations routinely inform examinees that their statements are not confidential and will be shared with the government and the court. *See, e.g.*, A.9 ("Prior to initiating the interview, Mr. Maziarz was informed that the purpose of the evaluation was to assist the Court in establishing his competency to proceed with his criminal case. He was also informed that anything discussed during this evaluation was not confidential and could be presented to the court.").

said to have exercised discretion. In *Johnson v. United States*, this Court explained, the "[f]ailure to exercise choice in a situation calling for choice is an abuse of discretion—whether the cause is ignorance of the right to exercise choice or mere intransigence . . . ." 398 A.2d 354, 363 (D.C. 1979) (citations omitted). That error is, in all cases, fatal: "An outright failure or refusal to exercise that judgment is wholly defeating." *Id*. Because the trial court simply missed without any attempt to exercise discretion, it abused its discretion.

Moreover, because the trial court does not seem to have recognized the issue, the court failed to compile a record to reveal a firm factual basis for the failure to conduct a *Frendak* inquiry. That firm factual foundation requires both valid reasons and supporting facts. "Just as a trial court's action is an abuse of discretion if no valid reason is given or can be discerned for it, so also it is an abuse if the stated reasons do not rest upon a specific factual predicate." *Johnson*, 398 A.2d at 364; *see also Punch v. United States*, 377 A.2d 1353, 1359 (D.C. 1977) ("Since no principled basis for the refusal by the trial judge to accept the plea of guilty is shown, we conclude the trial judge abused his discretion . . . ."). As this Court has explained, "Our standard of review thus reflects that although we accord the trial court substantial latitude in its exercise of discretion, this latitude comes with conditions: that the court . . . take no shortcuts, that it exercise its discretion with reference to all the necessary criteria, and that it explain its reasoning in sufficient detail to permit appellate review. *Cruz v. United States*, 165 A.3d 290, 294 (D.C. 2017) (internal

quotations omitted) (quoting *Ibn-Tamas v. United States*, 407 A.2d 626, 635 (D.C. 1979)). As a result, when exercising its discretion, the trial court is required to "compile a record" to ensure that "the facts of the case do not escape [the court's] attention." *Johnson*, 398 A.2d at 364.

Here, the trial court appears to have wholly missed the issue. In simply not engaging in the *Frendak* inquiry without discussion, the trial court cited nothing in the record. This alone was an abuse of discretion and warrants reversal. Nothing about the record below can assure this court that the exercise of discretion was proper.

CONCLUSION

This Court should uphold *Frendak*, vacate Mr. Maziarz's convictions and remand to the trial court for further proceedings to determine if Mr. Maziarz would intelligently and voluntarily reject an insanity defense as to any remaining count. This Court should also reverse Mr. Maziarz's convictions for Possession of a Prohibited Weapon because there was no valid jury waiver.

November 13, 2023

Respectfully submitted,

s/ Jason K. Clark
Jason K. Clark (Bar No. 1000198)
THE LAW OFFICE OF JASON K. CLARK
503 D Street, NW, Suite 250
Washington, D.C. 20001
(202) 505-2766
Counsel for Ronald Maziarz

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2023, I caused the foregoing to be served via the Court's electronic filing and service system, upon all counsel of record.

s/ Jason K. Clark

Jason K. Clark (Bar No. 1000198)
THE LAW OFFICE OF JASON K. CLARK
503 D Street, NW, Suite 250
Washington, D.C. 20001

District of Columbia
Court of Appeals

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Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

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A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

/s/ Jason K. Clark	22-CM-898
Signature	Case Number(s)
Jason K. Clark	11/13/2023
Name	Date
jason@clarkdefense.com	
Email Address	