

Sup. Ct. # 88497

**IN THE
SUPREME COURT OF MISSOURI**

STATE OF MISSOURI,

Respondent,

v.

KENNETH BAUMRUK,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of St. Charles County, Missouri
11th Judicial Circuit, Division 3
The Honorable Lucy D. Rauch, Judge

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

ROSEMARY E. PERCIVAL, #45292
Assistant Public Defender
Office of the State Public Defender
818 Grand Boulevard, Suite 200
Kansas City, Missouri 64106
Tel: (816)889-7699
Fax: (816)889-2088
rosemary.percival@mspd.mo.gov
Counsel for Appellant

INDEX

	<u>Page</u>
<u>Table of Authorities</u>	2
<u>Jurisdictional Statement</u>	2
<u>Statement of Facts</u>	2
<u>Supplement to Argument I</u>	3
<u>Conclusion</u>	19
<u>Certificate of Compliance</u>	20

TABLE OF AUTHORITIES

CASELAW:

Dusky v. United States, 362 U.S. 402 (1960).....6

Edwards v. State, 200 S.W.3d 500 (Mo. banc 2006).....5

Faretta v. California, 422 U.S. 806 (1975)10, 14, 16

Florida v. Nixon, 543 U.S. 175 (2004)17

Illinois v. Allen, 397 U.S. 337 (1970)10

Indiana v. Edwards, 128 S.Ct. 2379 (2008)4-6, 16-18

State v. Baumruk, 85 S.W.3d 644 (Mo. banc 2002) 9, 16-17

JURISDICTIONAL STATEMENT

Mr. Baumruk incorporates the Jurisdictional Statement from page 11 of his Opening Brief.

STATEMENT OF FACTS

Mr. Baumruk incorporates the Statement of Facts from pages 12-24 of his Opening Brief.

SUPPLEMENT TO ARGUMENT I

The State's arguments are erroneous for several reasons. First, even though Judge Rauch listed numerous reasons to deny self-representation, she never stated that Mr. Baumruk had a mental illness so severe as to render him incompetent to represent himself. Without a prior court finding, the State's "sufficiency" type of review is inappropriate. Second, while the State lists potential problem areas Mr. Baumruk might face, it fails to identify any severe mental illness that would impede his ability to perform basic trial tasks. Finally, while it is important that trials have an appearance of fairness, the Supreme Court addressed that concern by allowing trial courts to deny severely mentally ill defendants the right to represent themselves. But it did not give trial courts license to deny self-representation any time the defendant has some mental health or personality issues, any time the defendant might be humiliated representing himself, or any time the trial might not appear fair if the defendant represents himself. To deny self-representation on these grounds would eviscerate the constitutionally protected right of self-representation, since these issues could arise any time a defendant chooses to represent himself.

I. The Trial Court Never Found that Mr. Baumruk Was Severely Mentally Ill

The State argues that “the trial court did not abuse its discretion in determining that Appellant was not competent to represent himself at trial” (Resp. Supp. Br. at 4). But the trial court never made any determination that Mr. Baumruk, due to severe mental illness, was not mentally competent to represent himself, so as to serve as a ground for denial of the right of self-representation under *Indiana v. Edwards*, 128 S.Ct. 2379, 2388 (2008). Judge Rauch gave a laundry list of reasons for her denial of Baumruk’s request for self-representation, but she never found that Baumruk was mentally ill or referred to any evidence from the competence hearing relating to mental health problems that could hinder self-representation. It only makes sense that for a court to deny self-representation based on a defendant’s severe mental illness, the court must actually find that the defendant not only has a mental illness, but that the mental illness is severe to the point that the defendant is not competent to represent himself. *Edwards*, 128 S.Ct. at 2388.

In the absence of any finding below, why should this Court assume that if there had been a finding, it would have been against the defendant? The evidence presented to Judge Rauch amply supported Mr. Baumruk’s competence to represent himself. The State’s key expert, Dr. Rabun, found in 2000 that Mr. Baumruk had no mental illness under Axis I and no personality defect under Axis II. In 2003, Drs. Kaufman and Harry separately diagnosed only an amnesic

disorder (St.Ex. 32, p.8; D.Ex. Q, p.12). In Missouri, criminal defendants are presumed to be competent to stand trial. *Edwards v. State*, 200 S.W.3d 500, 519 (Mo. banc 2006). They should also be presumed competent to represent themselves.

The State insists that this Court can deny self-representation if there is sufficient evidence in the record to show that Baumruk was not competent to represent himself at trial (Resp. Supp. Br. 5). But this “sufficiency” type of review only is appropriate where the fact-finder has made findings below. For example, it is appropriate to review the jury’s determination that the defendant is guilty; or to review a court’s finding of the sufficiency of evidence to support the denial of a motion to suppress. But here, the court made no finding as to whether Mr. Baumruk actually had a mental illness, and whether that mental illness was so severe that it would interfere with his ability to represent himself. As the Supreme Court recognized, it is the trial judge who is usually “best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant.” *Edwards*, 128 S.Ct. at 2387. If that court did not find Mr. Baumruk severely mentally ill, this Court should not do so.

II. The State Cannot Identify How Mr. Baumruk Was Severely Mentally Ill, and
Its Arguments Omit Vital Facts

The fact that Mr. Baumruk has sustained some brain damage does not automatically render him not competent to represent himself. Although the State refuses to acknowledge it, the defendant must have “severe mental illness” to fall under the ambit of *Edwards*, 128 S.Ct. at 2388. In summing up its holding in *Edwards*, the Supreme Court stressed:

That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky*¹ but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

Edwards, 128 S.Ct. at 2388. The State never names what “severe mental illness” Mr. Baumruk has that would render him not competent to represent himself, but only points to certain alleged problem areas. The State claims that Baumruk was not competent to represent himself due to (1) dementia; (2) his poor visual/spatial skills; (3) a personality disorder; (4) his apathy; (5) his memory loss; and (6) his actions. But for each of these areas, the State omits conflicting evidence to the contrary, or misconstrues the evidence presented.

¹ *Dusky v. United States*, 362 U.S. 402 (1960).

1. Dementia

It is true that Drs. Cuneo, Reynolds and Parwatikar diagnosed Mr. Baumruk with dementia. But three other doctors – Drs. Rabun, Harry, and Kaufman – rejected that diagnosis, and their testimony and/or reports were also presented to the trial court (Comp. Tr. 7-8, 442, 520). State’s expert Dr. Rabun found in 2000 that Mr. Baumruk had no mental illness under Axis I and no personality defect under Axis II (St.Ex. 2, p.55). In 2003, State’s expert Dr. Kaufman diagnosed only an amnesic disorder (St.Ex. 32, p.8). While Dr. Harry had diagnosed dementia in 1994, he changed his diagnosis by 2003, ruling out dementia and concluding that Mr. Baumruk only had an amnesic disorder (D.Ex. Q, p.12).²

It is important to note that the term “dementia” used in the psychiatric field is quite different from its common usage. Dementia can be diagnosed when a person has some damage to his brain from head trauma and displays a problem with his motor functioning, speech, understanding, or memory (Comp. Tr. 98, 269). The primary basis for the diagnoses of dementia here was that Mr. Baumruk suffered a head trauma which caused memory loss for the events at issue and problems with his visual skills (Comp. Tr. 98, 269; D.Ex. M, p.6). No evidence was presented that Mr. Baumruk had trouble with basic understanding. In fact,

² The State incorrectly includes Dr. Harry as one of the doctors who testified in 2005 that Mr. Baumruk had dementia (D.Ex. Q, p.12; Comp. Tr. 521-22).

from at least as early as 1999, both State and defense experts agreed that Mr. Baumruk's flow of thought was logical, sequential and goal directed and that he was able to focus his attention (St.Ex. 1, p. 11, 13; St.Ex. 32, p.3; D.Ex. Q, p.11).

2. Poor Visual/Spatial Skills

The State stresses that Mr. Baumruk would not have been competent to represent himself because his ability to process visual information was impaired (Resp. Supp. Br. 6). It argues that Mr. Baumruk could not process visual evidence or information like photographs or diagrams as effectively as other people (Resp. Supp. Br. 6).

Any *pro se* defendant – or any attorney for that matter – has strengths and weaknesses. It is true that IQ testing showed that Mr. Baumruk had problems with his visual/spatial skills (St.Ex. 1, p.10). However, as State's expert Dr. Rabun explained, "because most of the processes of a legal proceeding are discussed verbally (even if also presented visually), Mr. Baumruk's strength in learning and retaining meaningful verbal information will compensate for any weakness in retaining visual data" (St.Ex.1, at 11). Mr. Baumruk's visual/spatial weakness was countered by his well above average scores for auditory memory and learning (scoring 82%, 82%, and 92%) (St.Ex. 1, p.9-10).

Defense expert Dr. Harry agreed with Dr. Rabun. If given an auditory explanation of a photograph or chart, Mr. Baumruk can understand it (Comp. Tr.

563-64). Any item of evidence in the courtroom will come with an auditory explanation, which would alleviate the problem (Comp. Tr. 567-68).

Also, Dr. Rabun demonstrated that Mr. Baumruk did not have a problem processing photographs. Dr. Rabun showed Mr. Baumruk three crime scene photographs and asked him to describe what was depicted (St.Ex. 2, p.50-51). Mr. Baumruk was able to do so without difficulty (St.Ex. 2, p.50-51). Two defense experts – Dr. Cuneo and Dr. Harry – agreed that this showed that Mr. Baumruk could extract information from photographs (Comp. Tr. 467-68, 568-69).

Finally, Mr. Baumruk had already been through one trial. *State v. Baumruk*, 85 S.W.3d 644 (Mo. banc 2002). Witnesses had described and discussed all the State's photographs and the two crime scene diagrams (1st Tr. 7-9). Mr. Baumruk could review the transcript of the prior trial to understand those exhibits, if need be. This slight visual handicap cannot be used to justify a denial of self-representation.

3. Personality Disorder

The State notes that an expert thought Mr. Baumruk had a personality disorder (Resp. Supp. Br. 7).³ But other than saying that the personality issue

³ The expert recognized that Mr. Baumruk probably had this personality disorder well before the shooting (Comp. Tr. 106-108). While another doctor, Dr. Parwatikar, had given a diagnosis of organic personality disorder in 1993, by 2003

could affect how Mr. Baumruk related to other people (Resp. Supp. Br. 7), the State fails to show that it affected his competence to represent himself.

A personality disorder does not constitute a mental illness. Rather, it is an Axis II, “behavioral type of diagnosis,” “simply a personality issue,” “a very ... subjective... diagnosis” (Comp. Tr. 97, 107). The State cannot bar self-representation just because someone is a narcissist or is difficult to get along with. If, during the trial, these traits somehow disrupted the trial, such that the defendant was deliberately engaging in serious and obstructionist misconduct, the court may terminate self-representation. *Faretta v. California*, 422 U.S. 806, 843, fn.46 (1975), citing *Illinois v. Allen*, 397 U.S. 337, 343 (1970). But the court cannot deny self-representation merely because the defendant has a “bad” personality or outlook on life.

4. Apathy

The State argues that Mr. Baumruk was apathetic about his case and discounted the evidence against him, but the State relies largely on reports from early on (Resp. Supp. Br. 7). Although Mr. Baumruk initially was apathetic about the case, he became more concerned and fervent as his condition improved. The State’s claim is directly refuted by the trial court’s finding that during his

he changed the diagnosis to personality change due to a head trauma (D.Ex. H, p.2). Mr. Baumruk had improved, but had residual symptoms (D.Ex. H, p.2).

videotaped interview with Dr. Parwatikar in 2005, Mr. Baumruk, “does not show the apathy complained of by his prior counsel ... and explains that he does not wish to get the death penalty. He explains that he was frustrated by a lack of communication with [prior counsel]...” (2d Supp. L.F. 14).

By the time Mr. Baumruk requested self-representation, it cannot possibly be argued that he was apathetic about his case. Aside from filing multiple motions for self-representation, Mr. Baumruk filed two *pro se* motions to endorse additional witnesses; a *pro se* motion to suppress his interview with Officer Glenn; and a *pro se* “Motion (Notice) to Depose F. Rottner M.D” (L.F. 488, 496, 511-12, 522). He recognized that the competency issue was vitally important and was upset that his attorneys had not handled the competency hearing properly (1/17/07 Tr. 49). He insisted that his attorneys had failed in their duty of diligence, failed to communicate with him sufficiently, failed to provide him discovery timely, and “failed in the scope of representation” in that he ardently believed that he should determine the witnesses to be called and the defense to be presented (1/17/07 Tr. 39-41, 49). Mr. Baumruk spoke up in court to express his discontent (11/27/06 Tr. 20-22; 1/17/07 Tr. 5). These are not the actions of a man who is apathetic.

5. Memory Loss

The State points to testimony that Mr. Baumruk’s memory loss rendered him unable to confront or cross-examine witnesses (Resp. Supp. Br. 8). It argues

that the memory loss would make it difficult for Mr. Baumruk to devise and carry out a trial strategy (Resp. Supp. Br. 8).

The State's position at the competency hearing was that Mr. Baumruk had no memory loss, was merely faking it, and was competent to stand trial (St.Ex. 1, 2, 25). But now the State contends that Mr. Baumruk was not faking it and does have a memory loss, so he is not competent to represent himself. The State cannot have it both ways.

The issue of Mr. Baumruk's potential memory loss, as concerns self-representation, is a red herring. If Mr. Baumruk did not have a memory loss, he would not be hindered in developing his defense. If he did have a memory loss, he would not be hindered in developing his defense any more than an attorney would. If Mr. Baumruk truly has a memory loss, then those memories are gone. Neither Mr. Baumruk alone, nor Mr. Baumruk with his attorneys, can get them back. Either way, Mr. Baumruk would have to put together a defense by piecing together the events from reviewing the police reports and transcripts of the depositions and prior trial.

Mr. Baumruk was able to do so. Judge Rauch found that Mr. Baumruk had "the mental capabilities to review all the facts of this incident, including any facts, which may give rise to a defense, in order to accurately reconstruct his actions in this case where his memory may be lacking" (2d Supp. L.F. 18). She found that he was able to "read and retain information that is presented to him and ... refers

to things he has read in depositions, reports and documents” (2d Supp. L.F. 13-14).

The State cites to testimony that the memory loss would make Mr. Baumruk unable to confront or cross-examine the witnesses (Resp. Supp. Br. 8). When Dr. Cuneo stated that Mr. Baumruk could not confront witnesses, he was not stating that Mr. Baumruk personally could not be present in court to confront the witnesses (D.Ex. L, p.6). He was stating that, because of Baumruk’s lack of memory for the key events, the defense team could not receive information from Baumruk to dispute the testimony of the State witnesses. The same is true for Dr. Parwatikar’s testimony that Mr. Baumruk would have limited ability to cross-examine State witnesses (D.Ex. G, p.16). Because Mr. Baumruk does not remember the key events, he could not provide information to rebut the testimony of the State’s witnesses. But this is true whether he is represented by counsel or not. It does not go to his mental competence to represent himself. Mr. Baumruk can use the same material his attorneys would be using to piece together a defense.

6. Mr. Baumruk’s Actions

The State posits that the court had the opportunity to view Mr. Baumruk in court and review his various *pro se* pleadings (Resp. Supp. Br. 8). Although Mr. Baumruk did not always use the correct legal terminology in his motions or follow the proper procedure, he was able to make his points. In fact, prior to the November 27th hearing on self-representation, the court allowed Mr. Baumruk to

personally argue a *pro se* motion to endorse witnesses (11/27/06 Tr. 15-19). The court sustained it in large part, stating that she would allow the endorsement but might not allow the testimony of witnesses if their testimony was not relevant (11/27/06 Tr. 15-19). Mr. Baumruk behaved appropriately.

The State suggests that Mr. Baumruk was nonsensical in attempting to endorse a doctor's laptop computer (Resp. Supp. Br. 8). But the prosecutor himself recognized that Mr. Baumruk was probably just trying to get access to information from that computer (11/27/06 Tr. 18). The prosecutor commented that, "I don't know that you can endorse a computer, per se" and suggested that Mr. Baumruk instead endorse the custodian of the computer (11/6/06 Tr. 18). Although Mr. Baumruk went about this the wrong way, his lack of technical legal knowledge is not a bar to self-representation. *Faretta*, 422 U.S. at 836.

The State cannot use the fact that Mr. Baumruk had trouble getting along with his attorneys as evidence of mental illness stemming from his brain damage (Resp. Supp. Br. 8-9). Mr. Baumruk had problems with his first divorce attorney, and obviously, his second divorce attorney (Tr. 1161-62, 1177-79). The problems he had with his defense attorneys in 2006 were nothing new. His dislike and distrust for attorneys was an aspect of his personality that predated the shooting and cannot be attributed to his brain damage.

The State notes that on January 17, 2007, Mr. Baumruk "continually" tried to interrupt as the attorneys argued a motion and later gave "angry,"

“unresponsive,” and “irrelevant” answers (Resp. Supp. Br. 9). Well before January 17th, Mr. Baumruk had made very clear that he wanted to represent himself (L.F. 492-95, 498-99, 501, 510, 527; 11/27/06 Tr. 20-22). When the court asked the attorneys on the 17th if they planned to present evidence at trial dealing with Mr. Baumruk’s competence at the time of the shooting, Mr. Baumruk interrupted twice, both times stating, “I am” (1/17/07 Tr. 4-5). But after the court told Mr. Baumruk he was out of order, he did not interrupt again (1/17/07 Tr. 5-6). Later, when the court was questioning Mr. Baumruk, he gave two responses that challenged the court’s impartiality and insulted the court (1/17/07 Tr. 46). But when Judge Rauch warned him that he could not speak that way, Mr. Baumruk stated he understood, and there were no further incidents (1/17/07 Tr. 47). Again, while these isolated incidents of rudeness were an unfortunate aspect of Mr. Baumruk’s personality, they were not the product of his brain damage and did not constitute mental illness. The court specifically noted that Mr. Baumruk behaved appropriately during the two-day competency hearing (2d Supp. L.F. 13). His isolated comments on one day were not a proper basis for barring self-representation.

It is true that Mr. Baumruk put a lot of emphasis on the competency proceedings (1/17/07 Tr. 49). But this was logical. Mr. Baumruk reasonably concluded that his best chance to avoid the death penalty was to be found permanently incompetent, as he had been once before.

III. Mr. Baumruk Had the Ability to Perform Basic Trial Tasks, So It Is Irrelevant

Whether He Could Conduct an NGRI Defense

The State argues that the only possible defense was for Mr. Baumruk to admit to the shooting but claim to be not guilty by reason of insanity (NGRI) (Resp. Supp. Br. 11-12). It argues that because Mr. Baumruk would not have the ability to present such a defense, he was not mentally competent to represent himself (Resp. Supp. Br. 11-12).

But the mere fact that the defendant might pursue a defense that is difficult is not a bar to self-representation. Rather, self-representation can only be denied when the defendant has a severe mental illness to the point where he is not competent to perform basic trial tasks such as organizing a defense, “making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury.” *Edwards*, 128 S.Ct at 2386-88. No experts stated that Mr. Baumruk would have trouble with these basic tasks. *Edwards* did not change *Faretta*’s holding that the defendant’s technical legal knowledge of how the defense must be pled and pursued is not relevant to whether he can choose to represent himself. *Faretta*, 422 U.S. at 836.

Furthermore, NGRI was not the only possible defense strategy. The first attorneys on the case chose to pursue the defense that Mr. Baumruk did not deliberate so was guilty of second degree murder (1st Tr. 2009-10). Although Mr. Baumruk was convicted, this Court held that the trial was not fair. *Baumruk*, 85

S.W.3d at 649-51. Alternatively, Mr. Baumruk could choose to plead guilty; could pursue a diminished capacity defense; or could present no guilt phase defense, but still make the State prove its case, and then try to obtain a sentence of life without parole in the penalty phase. These strategies have been followed by attorneys in capital cases in the past. See, e.g., *Florida v. Nixon*, 543 U.S. 175, 188-89 (2004). Mr. Baumruk does not need to disclose his defense strategy ahead of time, nor does he need the State's stamp of approval for his defense strategy.

IV. The Appearance of Fairness is Achieved by Barring “Insane” Defendants from Self-Representation, but Mr. Baumruk was Not Insane

The State stresses that trials must appear to be fair (Resp. Supp. Br. 12-13). And the Supreme Court limited the constitutionally protected right of self-representation in *Edwards*, in part, so that trials will appear fair. 128 S.Ct. at 2387. A trial would not appear fair if an “insane” defendant were allowed to represent himself. *Id.* In the interest of fairness, the Court allowed trial courts to deny self-representation where the defendant has a severe mental illness to the point where he is not competent to conduct the trial proceedings. *Id.* at 2387-88.

But the Supreme Court did not hold that anytime the trial court believes the trial might not appear fair, it can deny the right of self-representation. It can only deny self-representation under *Edwards* where the defendant has a severe mental illness to the point where he is not competent to conduct the trial proceedings. 128

S.Ct at 2388. Otherwise, the right of self-representation would be eviscerated. Trial courts could deny self-representation willy-nilly, since any *pro se* defendant might have some mental health or personality issue, might be humiliated representing himself, or the trial might appear unfair.

Mr. Baumruk is not “insane” or severely mentally ill. He has never hallucinated and in the fifteen years he was in custody, had never been prescribed any psychotropic medications (Tr. 2012). Mr. Baumruk has brain damage, but brain damage alone does not constitute mental illness, let alone severe mental illness. Mr. Baumruk had regained his prior IQ level and scored well above average on tests for auditory memory (82%, 82%, and 92%) and average for general memory, attention/concentration and delayed recall (St.Ex.1, p.9-10). His speech was “clear, coherent, intelligible, and consistently goal-directed” (St. Ex. 32, p.3). The trial court found that Mr. Baumruk “clearly shows that he understands the charges against him and is able to read and retain information” (2d Supp. L.F. 14). It found that he has “a rational as well as factual understanding of the proceedings” (2d Supp. L.F. 18).

Edwards provides no basis for denying Mr. Baumruk’s constitutionally protected right of self-representation.

CONCLUSION

Based on Arguments I-VII, Mr. Baumruk respectfully requests that the Court remand for a new trial. As to Argument VIII, he asks that the Court reverse his conviction, vacate the sentence, and remand for a grand jury determination of whether he should be indicted for “aggravated” first-degree murder.

Respectfully submitted,

ROSEMARY E. PERCIVAL, #45292
ASSISTANT APPELLATE DEFENDER
Office of the State Public Defender
Western Appellate Division
818 Grand Boulevard, Suite 200
Kansas City, Missouri 64106-1910
Tel: (816) 889-7699
Counsel for Appellant

Certificate of Compliance and Service

I, Rosemary E. Percival, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. This brief contains 3,893 words, which does not exceed the 7,750 words allowed for a reply brief.
- ✓ The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan Enterprise 7.1.0 program, which was updated on June 20, 2008. According to that program, the disks provided to this Court and to the Attorney General are virus-free.
- ✓ A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 8th day of September, 2008, to Dan McPherson, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Rosemary E. Percival, #45292
ASSISTANT PUBLIC DEFENDER
Office of the State Public Defender
818 Grand Boulevard, Suite 200
Kansas City, MO 64106-1910
816-889-7699
Counsel for Appellant