

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 -----

4 August Term, 2011

5 (Argued: April 18, 2012

Decided: September 4, 2012)

6 Docket Nos. 10-3099-cr (Lead) 10-3236-cr (Con)

7 _____
8 UNITED STATES OF AMERICA,

9 Appellee,

10 - v. -
11

12 TUERE BARNES, AKA Rey, AKA Mark,

13 Defendant-Appellant.
14 _____

15 Before: KEARSE, B.D. PARKER, and HALL, Circuit Judges.

16 Appeal from a judgment of the United States District Court for the Southern District
17 of New York, Stephen C. Robinson, Judge, convicting defendant of narcotics, racketeering, and
18 firearm offenses after a trial at which defendant was represented by counsel following defendant's
19 failure to pursue a motion to proceed pro se.

20 Affirmed.

21 DOUGLAS B. BLOOM, Assistant United States Attorney, New York,
22 New York (Preet Bharara, United States Attorney for the Southern
23 District of New York, Andrew L. Fish, Assistant United States
24 Attorney, New York, New York, on the brief), for Appellee.

1 PHILIP R. SCHATZ, New York, New York (Wrobel &
2 Schatz, New York, New York, on the brief), for Defendant-
3 Appellant.

4 KEARSE, Circuit Judge:

5 Defendant Tuere Barnes (or "Barnes") appeals from a judgment entered in the United
6 States District Court for the Southern District of New York in 2010 following a jury trial before
7 Stephen C. Robinson, Judge, convicting him of seven offenses, to wit, racketeering and racketeering
8 conspiracy, in violation of 18 U.S.C. §§ 1962(c) and (d); conspiracy to distribute and possess with
9 intent to distribute narcotics, in violation of 21 U.S.C. § 846; kidnapping in aid of racketeering
10 activity, in violation of 18 U.S.C. §§ 1959(a)(1) and 2; conspiracy to commit kidnapping in aid of
11 racketeering activity, in violation of 18 U.S.C. § 1959(a)(5); conspiracy to commit murder in aid of
12 racketeering activity, in violation of 18 U.S.C. § 1959(a)(5); and using and possessing a firearm in
13 relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2. Barnes was
14 sentenced principally to 300 months' imprisonment. On appeal, Barnes does not challenge the
15 sufficiency of the evidence to convict him or the sentence imposed. His sole contention is that his
16 Sixth Amendment right to represent himself at trial was violated by the district court's failure to grant
17 his request to proceed pro se. We conclude that Barnes abandoned his request to represent himself,
18 and we therefore affirm the judgment of conviction.

19 I. BACKGROUND

20 The present prosecution began in 2004 with a one-count indictment charging Barnes
21 and 13 others--including his brothers Yusuf Barnes, Dawud Barnes, and Khalid Barnes--with

1 participation in a drug conspiracy. In 2006, a 38-count superseding indictment charged Barnes,
2 Dawud, Khalid, and one other codefendant, with, inter alia, participation in a racketeering enterprise
3 referred to as the "Barnes Brothers Organization," and with murder, kidnapping, several attempted
4 murders, and other violent crimes in aid of racketeering. Barnes was charged in 16 counts, including
5 the seven counts on which he was found guilty, described above. At all relevant times during the
6 proceedings in the district court, Barnes was represented by appointed counsel, Alexander E.
7 Eisemann.

8 A. Pretrial Proceedings in 2007-2008

9 In late 2007, the court became aware of tension in the relationship between Barnes and
10 Eisemann. At a November 6, 2007 pretrial conference called to explore the matter, Eisemann
11 informed the court that Barnes was not cooperating with him and was demanding to see such
12 documents as Eisemann's driver's license. (See Hearing Transcript, November 6, 2007 ("November
13 2007 Tr."), at 2-4; see also Hearing Transcript, January 30, 2008 ("January 2008 Tr."), at 23 (court
14 noting that it would not order production of attorneys' personal documentation such as driver's
15 licenses, which reveal their home addresses).)

16 Barnes, addressing the court directly, objected to the entire prosecution, stating that
17 he "ha[d] been violated, kidnapped and forced to participate in this court case as a member of a
18 corporation called United States." (November 2007 Tr. 5.) He added:

19 I do not legally understand and I do not consent to participating in this court
20 proceeding any longer. Nor do I consent to Mr. Eisemann representing me any
21 longer.

22

1 It's not my intention to be rude. But I don't want to participate in
2 anything that's going on. I don't want to participate in him being my lawyer.
3 I know that I cannot be forced into any contract without me giving my consent.
4 I don't give my consent to it.

5 (Id. at 5-7 (emphases added).)

6 The court informed Barnes that "Mr. Eisemann is going to be your attorney through
7 this process. He can perhaps be more effective if you assist him. But if you don't, he's going to
8 represent you at this trial and we're going forward." (Id. at 7-8.) When the court subsequently asked
9 whether Barnes would meet with an appointed defense investigator or whether he "intend[ed] to hold
10 on to [his] position that [he did] not want to participate in any way in this matter," Barnes stated that
11 he "d[id] not wish to participate in any way." (Id. at 13.)

12 In December 2007, Eisemann informed the court that Barnes was not communicating
13 with him. (See Hearing Transcript, December 7, 2007 ("December 2007 Tr."), at 3.) The court noted
14 Eisemann's concerns, and it "strongly urge[d] and strongly suggest[ed] that [Barnes] cooperate fully
15 with his counsel"; but it stated that "[i]f . . . the defendant chooses that he no longer wishes to
16 cooperate with his attorney . . . that's his choice." (Id. at 4.)

17 At this conference Barnes, again addressing the court directly, asked "to see the arrest
18 warrant for my arrest or summons and my complaint." (Id. at 3.) When told there was no criminal
19 complaint in this case because the prosecution had been initiated by an indictment, Barnes asked "[i]s
20 it true that a criminal complaint, a complaint is the first process, the first step of a criminal
21 proceeding[.]" (Id. at 6.) The court advised Barnes that these were issues about which he could
22 consult with his attorney, but it informed him that "the way in which this proceeding has been brought
23 . . . is fully appropriate and according to law." (Id.)

1 At this point, Eisemann stated he believed there was "good reason to believe that Mr.
2 Barnes [wa]s not competent to assist in his defense"; Eisemann requested a competency examination,
3 even though stating that he "expect[ed] . . . that Mr. Barnes w[ould] probably refuse to meet with the
4 psychiatrist." (Id. at 7-8.) The district court stated its impression that Barnes was competent to assist
5 in the defense and was simply engaging in "an obstructionist tactic" but stated that it would order an
6 evaluation (id. at 11).

7 In the ensuing psychiatric evaluation, Barnes refused to cooperate. In a decision and
8 order dated January 25, 2008 ("January 25, 2008 Order"), the district court noted that the report
9 submitted by the psychiatrist assured the court, despite Barnes's refusal to cooperate, of Barnes's
10 competency. The court found Barnes to be "competent to stand trial and capable of assisting in his
11 defense." January 25, 2008 Order at 5.

12 On January 30, 2008, the court held another status conference, during which there was
13 extended discussion of Barnes's representation, in which Barnes objected to, inter alia, being
14 represented by Eisemann but also stated that he did not wish to proceed pro se.

15 THE COURT: Mr. Tuere Barnes, Mr. Eisemann is your counsel.

16 DEFENDANT TUERE BARNES: I object to it.

17 THE COURT: You want to proceed pro se in this matter?

18 DEFENDANT TUERE BARNES: I am myself. I can't represent
19 myself. I am who I am. He's not my counsel. He's being forced on me.

20 (January 2008 Tr. 5 (emphases added).)

21 Barnes also declined to have a different attorney appointed to represent him, and he
22 proceeded to object--as he had on previous occasions (see, e.g., November 2007 Tr. 5-8; December
23 2007 Tr. 6)--to the commencement and pursuit of the prosecution against him:

1 THE COURT: Let me ask you this, Mr. Tuere Barnes, is there
2 someone else that you wish to represent you in this matter?

3 DEFENDANT TUERE BARNES: I'm here because y'all kidnapped
4 me, this is why I'm in court. This is all your corporation, you and everybody
5 else that works here. I don't have nothing else to do with it. Why would I take
6 another one of your corporation employees? Why would I take them? I told
7 you here that I'm not consenting to nothing that's going on. . . .

8

9 I need to see proof, I need to see jurisdiction why I'm in this
10 courtroom. . . .

11

12 THE COURT: Mr. Barnes, let me tell you how we're going to operate
13 going forward. I have heard these issues and complaints from you before. I
14 tried in a previous hearing to explain to you the way in which you come under
15 the jurisdiction of this court. I fully understand and recognize that you don't
16 accept that. Nonetheless, you have been indicted by a grand jury and there is
17 an indictment against you. The way that this process works is that you can
18 hire an attorney, or if you are not able to or willing to, an attorney will be
19 appointed to represent you, or you proceed pro se, which you clearly have
20 indicated you do not wish to do.

21 I would prefer that you have conversation with your attorney to
22 give him as much assistance as you can in his representation of you. However,
23 if you are unable . . . or unwilling to do that, that's fine. Mr. Eisemann will put
24 forth the best defense for you that he can.

25

26 DEFENDANT TUERE BARNES: I'm not finished.

27 THE COURT: No, you are finished.

28 DEFENDANT TUERE BARNES: No, I'm not finished.

29 THE COURT: You are finished.

30 DEFENDANT TUERE BARNES: You're going to make me be
31 finished?

1 THE COURT: Yes. I recognize Mr. Eisemann and I'm asking him to
2 speak.

3 (Counsel confers with his client)

4 MR. EISEMANN: Mr. Barnes has asked me to tell your Honor that I
5 don't represent him.

6 THE COURT: Okay. I understand that that's his statement to this
7 Court. As he's indicated to me, he does not wish to go forward pro se and
8 frankly I don't think I would have appointed him to represent himself pro se
9 after the requisite questioning that would need to be done. And I understand
10 that he does not think this court has jurisdiction over him. He thinks the
11 United States Government is a corporation and that you are a member of that
12 corporation and he sees a conflict of interest in your continued representation
13 of him. But you will remain as Mr. Barnes' attorney in this matter.

14

15 I sincerely doubt he's capable of going pro se. You were so
16 concerned about that that we sent him out for psychiatric testing. So it is hard
17 to say that a person who the Court has that level of concern about is capable
18 of representing himself pro se. Plus he has shown a lack of the minimal
19 understanding about our processes and procedures that could possibly make
20 him effective representing himself.

21

22 He said that there is no one that this court could appoint to
23 represent him that he would feel comfortable or work with. If he had someone
24 he wants for hire to represent him, I'm happy to do that. And I asked him: Do
25 you have an attorney that you want to represent you? He said no. I won't go
26 through the whole explanation of what he said but he said no. I asked him if
27 he wanted to represent himself pro se. I won't go through his whole
28 explanation but he said no. And then he also said that since we are a part of
29 this corporation, there's no one who is a part of that corporation in his mind
30 that he would want to represent him. And so I don't see what that leaves us,
31 Mr. Eisemann.

32 (January 2008 Tr. 6-13 (emphases added).) The court entertained a suggestion from Eisemann that
33 it ask Barnes whether he would be amenable to getting a second opinion from a different attorney on
34 how best to proceed, but Barnes resisted even answering that question:

1 THE COURT [to Eisemann]: Tell me exactly the question you
2 want me to ask him.

3 MR. EISEMANN: Whether he would be willing to meet with another
4 member of the CJA Panel to discuss what he should be doing going forward
5 with respect to representation. . . .

6 THE COURT: Okay. Mr. Tuere Barnes, are you willing to meet with
7 another member of the CJA Panel to discuss what should happen in your case
8 and what you should do going forward? Are you willing to meet with another
9 member of the CJA Panel for that purpose? I'm happy to assign someone.

10 DEFENDANT TUERE BARNES: I'll answer your questions, but are
11 you going to answer my questions when you're done?

12 THE COURT: First you'll answer my question.

13 DEFENDANT TUERE BARNES: And then will you answer mine?

14 THE COURT: You will answer my question first.

15 DEFENDANT TUERE BARNES: It seems that I'm being threatened.

16 THE COURT: I[']m making no threat.

17 DEFENDANT TUERE BARNES: This is your rules. This is the
18 conduct of the judge, the code of conduct of United States judges, and I'm
19 reading in the code of conduct and it's not coinciding with the way that I'm
20 being treated inside of this place. It's not coinciding with this. And that's what
21 I don't understand. So that's what I'm saying. I don't mind. I'll be respectful,
22 no matter what people do to me. I'm going to show you respect. But will you
23 show me respect?

24 THE COURT: My question to you Mr. Barnes, is are you willing to
25 meet with another member of the CJA Panel to have a discussion as to whether
26 or not in your case someone else can better represent you or how you should
27 move in your case going forward?

28 DEFENDANT TUERE BARNES: I understand your question. I have
29 no problem answering it. Are you going to answer mine?

30 MR. EISEMANN: With respect to the issue of representation, I do
31 think Mr. Barnes has a right to be heard, and certainly in that realm could pose

1 a question to your Honor which your Honor could decide whether to answer
2 or not if you think it's an appropriate question to answer.

3 THE COURT: All right. Let me tell you something, Mr. Eisemann.
4 I'm the judge here, I decide how it works. Here's how it works in my
5 courtroom. Listen up so you can hear this, Mr. Tuere Barnes. I decide how
6 matters proceed. The first thing we will do here is he will either answer my
7 question or he will not. At that point, I will decide what it is I do and don't do
8 going forward. You don't decide that. He doesn't decide that.

9

10 [T]his has to proceed in an orderly fashion. What we don't have
11 is everybody standing up making speeches whenever they want, posing
12 questions whenever they want. . . .

13 [W]hat we don't have are defendants standing up in cases making
14 speeches, we don't have defendants who stand up in cases and talk about their
15 theories about the corporation of the United States, making speeches about
16 their theories of the criminal justice system. That's not the way it works in
17 court. . . . So what we're going to do is I'm going to ask him the question. He's
18 either going to answer it or he won't. I will then see if there need[] to be
19 follow-up questions based on his answer. He will either answer them or he
20 won't. And then I will decide. But I don't sit here and make deals with
21 defendants that if they do this then they get to ask me whatever they want to
22 ask me

23 So, Mr. Tuere Barnes, you'll either decide to answer the question or
24 you won't.

25 DEFENDANT TUERE BARNES: I'm going to be a big person. If you
26 can find a CJA whoever, whatever you call these people, they show me
27 credentials, I'll talk to them. And a speech? All these things are the
28 Constitution. I'm not saying no speech. I'm talking about the Constitution, my
29 Fourth Amendment rights[,] that states I should be arrested with a warrant. No
30 person should be arrested without a warrant. How am I here without a
31 warrant? You're telling me that you don't want me making speeches, but this
32 man to my right can arrest me without a warrant? He doesn't have a warrant.
33 He's not even under oath. It's okay for him to do that? If I get up and talk and
34 say anything, it's a requirement of the Constitution.

35

1 No warrant? What am I doing here?

2 THE COURT: This is where we're going to get in trouble real quick,
3 Mr. Barnes.

4 DEFENDANT TUERE BARNES: It's a question.

5 THE COURT: Sit down, Mr. Barnes.

6 DEFENDANT TUERE BARNES: You're going to threaten me to sit
7 down?

8 THE COURT: I'm going to threaten you that either you'll sit down or
9 you'll be removed.

10

11 Back to my question, Mr. Tuere Barnes. Do you wish to meet with
12 another member of the CJA Panel to discuss both Mr. Eisemann's
13 representation of you and what you might think about going forward? Do you
14 want that to happen?

15 DEFENDANT TUERE BARNES: You said without a warrant.
16 Without a warrant you're asking this question?

17 THE COURT: Yes, there is no warrant in this case.

18 DEFENDANT TUERE BARNES: Do I have the wrong Constitution?
19 Do you have a copy of the Constitution? Does anybody have a copy?

20 (January 2008 Tr. 14-19, 26.) Given Barnes's responses--including his explicit statements that he did
21 not wish to be represented by Eisemann, did not wish to be represented by (or even meet with) a
22 different appointed attorney, and did not wish to proceed pro se--the court declined to enter an order
23 that would be "futile." (Id. at 27.)

24 In a Decision and Order dated March 11, 2008 ("March 2008 Order"), the district court
25 described Barnes's conduct at pretrial conferences as "disruptive," March 2008 Order at 1-2, 4,
26 "disorderly," id. at 5, and "tactic[al]," id. The court reiterated its prior rulings as to why Barnes's

1 arguments as to constitutional principles and proper criminal procedure were "baseless" and indeed
2 "frivolous." Id. at 2-4. And it stated that the fact that Barnes "continually disregards this Court's
3 rulings that there is jurisdiction over this matter makes clear that at least part of [Barnes's] motivation
4 for raising such challenges is to obstruct his prosecution and manipulate the proceedings." Id. at 4-5.

5 At a status conference held on June 17, 2008, the government asked that the record
6 reflect "that it appears based on what's happened today in the courtroom that the nature of the
7 relationship between Mr. Tuere Barnes and Mr. Eisemann has not improved, at least not visibly so."
8 (Hearing Transcript, June 17, 2008 ("June 2008 Tr."), at 11.) The court agreed and noted that "there
9 has been no discussion or contact or exchange of ideas between them. And I take it that is the way
10 Mr. Tuere Barnes wants it and that's fine." (Id.) The court also noted that it had received a letter from
11 Barnes that, inter alia, asked for disclosure of the judge's religion and a copy of the judge's passport
12 or driver's license. (See id. at 3.)

13 B. Barnes's Request To Represent Himself

14 On July 17, 2008, at the next status conference, the court announced that it had
15 received a letter from Barnes asking to proceed pro se:

16 THE COURT: Good afternoon. We're back together. The first issue
17 I wanted to address is the Court has received an undated letter from Mr. Tuere
18 Barnes in which he indicates that he has determined that he would like to
19 represent himself at trial. Is that right, Mr. Barnes?

20 DEFENDANT TUERE BARNES: Yes, your Honor.

21 THE COURT: Mr. Barnes, let me ask you a couple of questions. I
22 received your letter and so has counsel. . . . You think you're capable of
23 representing yourself at trial?

1 DEFENDANT TUERE BARNES: Yes, your Honor.

2 (Hearing Transcript, July 17, 2008 ("July 17, 2008 Tr."), at 2.)

3 The court proceeded to question Barnes as to his educational background,
4 understanding of the law, and plans for his defense. Barnes indicated that he had earned a general
5 equivalency high school diploma, had completed a semester of college, and had studied the Federal
6 Rules of Criminal Procedure. (See id. at 2-3.) He also explained that he disagreed with Eisemann's
7 plans to call only one defense expert witness and to wait to prepare for trial until immediately before
8 trial. (See id. at 3-5.) After asking Barnes his reasons for requesting to represent himself at trial, the
9 court commented on the difficulties of proceeding pro se:

10 THE COURT: Let me make sure I understand what you're saying.
11 You think that you should represent yourself and act as your attorney in this
12 trial?

13 DEFENDANT TUERE BARNES: Yes.

14 THE COURT: I'm going to ask for Mr. Eisemann's response and the
15 government's response. I would start by saying separate and apart from you
16 for a moment, I have never seen where that was a good idea. Because people
17 think they understand how this works. They think they understand the Rules
18 of Evidence. You, I don't think, in any way could understand the Rules of
19 Evidence, since you never took a law class and never practiced in any way.
20 But it's never a good idea in my personal opinion. . . . I don't think I'm going
21 to convince you

22 But let me say we've set a October 27th trial date and that's the date
23 we're going to move forward on. So you think you could be prepared to try
24 this case? We'll have to have a hearing about this. You think you'll be
25 prepared to try this case?

26 DEFENDANT TUERE BARNES: Yes. With the help of an
27 investigator, we'd be prepared to try the case October 27th.

28 (July 17, 2008 Tr. 6-7 (emphasis added).) Eisemann voiced concerns about the strained attorney-

1 client relationship, but recommended that the court order another psychiatric assessment to determine
2 whether Barnes was competent to represent himself at trial, citing the then-recently decided Indiana
3 v. Edwards, 554 U.S. 164 (2008). The court expressed skepticism toward this suggestion, given
4 Barnes's previous refusal to meet with the psychiatrist for assessment of whether he was competent
5 to stand trial. Eisemann suggested, however, that the court could condition a hearing, on the motion
6 to proceed pro se, on Barnes's cooperation with a psychiatrist and that such a meeting "might actually
7 change his mind about whether he would like a lawyer." (July 17, 2008 Tr. 11.) The court, after
8 reiterating its advice against self-representation, asked Barnes whether he would cooperate:

9 [THE COURT:] You want me to send you up for an examination the
10 likes of which Mr. Eisemann has suggested? You're willing to do that, you
11 will cooperate? Last time you went through you were unwilling to
12 cooperate. . . .

13 DEFENDANT TUERE BARNES: Yes, your Honor. . . .

14 (Id. at 13.) The government took no position on whether Barnes should proceed pro se (see id. at 14),
15 and at the end of the hearing, the court asked the parties to submit the names of recommended
16 psychiatrists. The court ordered that the time needed for the evaluation would be excluded from
17 Speedy Trial Act calculations, in order to allow the court to "rule on [Barnes's] application to
18 represent himself." (Id. at 33-34.)

19 At a July 28, 2008 status conference, the court and counsel discussed the selection of
20 a psychiatrist for the evaluation and estimated that the evaluation could be done within two to three
21 weeks. (See Hearing Transcript, July 28, 2008 ("July 28, 2008 Tr."), at 2-5.) Because of various
22 delays in the parties' forensic preparations for trial, the court postponed the start of trial from October
23 2008 to March 2009. The court also noted that this postponement would allow "time to sort through

1 all of the other issues, [including] the psychiatric examination." (Id. at 16.)

2 [THE COURT:] We will, at some point after [the examination], have
3 to have a hearing, because Mr. Tuere Barnes has indicated he wants to
4 represent himself in this matter. I'm willing to go through that. I am. As I
5 said last time, I'm not coming to that issue with a blank slate, because there is
6 a long history of this case and particularly of letters and comments made by
7 Mr. Tuere Barnes that the Court will consider in the course of his application.

8 I have great hesitancy, as I sit here now, to have him represent himself
9 when he maintained for most of the proceeding that he was not subject to the
10 jurisdiction of this Court, and other claims. It's hard for me now, with that
11 level of understanding about this judicial process and procedures, to see how
12 someone could then be in a position to represent themselves in a very serious
13 criminal matter that has very serious implications.

14 And so I'm willing to go through the process, allow him to be
15 examined, engage in a hearing ourselves to determine that. But I just wanted
16 to be absolutely clear that we're not coming at this with a blank slate. The
17 history of Mr. Tuere Barnes's interactions and letters to this Court will factor
18 into this Court's decision.

19 (Id. at 16-17 (emphases added).) Barnes did not address the court during the July 28 conference; but
20 Eisemann, after conferring with him, stated that there was nothing Barnes wanted to say through
21 Eisemann with respect to postponing the start of trial (see id. at 11-12).

22 The court again noted that time would be excluded from the Speedy Trial Act
23 calculation for, inter alia, "the Court to have an appropriate opportunity to . . . have an expert
24 appointed to perform a competency examination of Mr. Tuere Barnes, . . . and for the Court to then
25 conduct a hearing on that matter, so that the Court may determine whether Mr. Eisemann proceeds
26 as counsel or as shadow counsel in this case with respect to Mr. Tuere Barnes." (Id. at 19.)

1 C. Subsequent Pretrial Proceedings, Trial, and Sentencing

2 The record in the district court does not indicate that, after July 28, 2008, the issue of
3 Barnes's desire to proceed pro se was ever mentioned again. Although the parties agree that Barnes
4 was evaluated in August 2008 and that the psychiatrist opined that Barnes was competent to represent
5 himself at trial, and although, as summarized in Part II below, there were many subsequent
6 communications with the court by Eisemann and court conferences attended by both Eisemann and
7 Barnes, neither Eisemann nor Barnes ever asked the district court to rule on Barnes's request to
8 proceed pro se. (See Barnes brief on appeal at 2 ("[T]he issue was never discussed on the record
9 again Defendant . . . never reasserted his request to represent himself.").)

10 Barnes's trial was eventually held during several weeks in April and May 2009. Barnes
11 testified on his own behalf. He was found guilty on seven of the 12 counts that were submitted to the
12 jury and was found not guilty on five. On July 30, 2010, he was sentenced principally to 300 months'
13 imprisonment. With no objection from Barnes after July 2008, Eisemann had represented Barnes
14 throughout the ensuing pretrial proceedings, the trial, and sentencing.

15 II. DISCUSSION

16 Represented by new counsel on this appeal, Barnes challenges only the district court's
17 failure to grant his request to represent himself at trial. He argues that he "clearly and unequivocally
18 asserted th[e] right [to proceed pro se] many months before trial, and never withdrew" that request,
19 that "[t]he trial court promised to hold a hearing, but did not," and that Barnes is entitled to a new trial
20 due to the trial court's pocket veto of his Sixth Amendment right to represent himself. Failure to rule
21 on the request was the equivalent of its denial. (Barnes brief on appeal at 4.) We disagree.

1 The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall
2 enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This
3 language "does not provide merely that a defense shall be made for the accused; it grants to the
4 accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975).
5 "[T]he right to self-representation--to make one's own defense personally--is . . . necessarily implied
6 by the structure of the Amendment." Id. "The determination of whether there has been an intelligent
7 waiver of the right to counsel"--i.e., "an intentional relinquishment or abandonment of" that known
8 right--"must depend, in each case, upon the particular facts and circumstances surrounding that case,
9 including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458,
10 464 (1938).

11 The matter of whether a defendant must be allowed to represent himself at trial requires
12 answers to two principal questions: whether the defendant is competent to represent himself at trial,
13 see Indiana v. Edwards, 554 U.S. 164, 170, 177-78 (2008) ("Edwards"), and whether the request to
14 proceed pro se is genuine, see, e.g., Faretta, 422 U.S. at 817 (it is the defendant's "basic right to defend
15 himself if he truly wants to do so" (emphasis added)). First, there is necessarily "a competency
16 limitation on the self-representation right." Edwards, 554 U.S. at 175. Just as "the Constitution does
17 not permit trial of an individual who lacks mental competency," id. at 170 (internal quotation marks
18 omitted), it does not permit a defendant to represent himself at trial unless he has a "rational as well
19 as factual understanding of the proceedings against him," id. (quoting Dusky v. United States, 362
20 U.S. 402, 402 (1960)); see, e.g., Drope v. Missouri, 420 U.S. 162, 172 (1975). Thus, the trial court
21 should refuse to accept a waiver of the right to counsel unless and until the court "is satisfied that the

1 defendant fully understands the consequences of such an election and is competent to make it."
2 United States v. Purnett, 910 F.2d 51, 52 (2d Cir. 1990); see id. at 55 ("trial court should not accept
3 a waiver of counsel unless and until it is persuaded that the waiver is knowing and intelligent").

4 The fact that a defendant has been found competent to assist his attorney in the conduct
5 of his defense does not necessarily mean that the defendant is competent to conduct his own defense:

6 The American Psychiatric Association (APA) tells us (without dispute)
7 in its amicus brief filed in support of neither party that "[d]isorganized
8 thinking, deficits in sustaining attention and concentration, impaired
9 expressive abilities, anxiety, and other common symptoms of severe mental
10 illnesses can impair the defendant's ability to play the significantly expanded
11 role required for self-representation even if he can play the lesser role of
12 represented defendant."

13 Edwards, 554 U.S. at 176.

14 Second, because self-representation "relinquishes . . . many of the traditional benefits
15 associated with the right to counsel," Faretta, 422 U.S. at 835, the right to self-representation does not
16 attach unless it is asserted "clearly and unequivocally," Wilson v. Walker, 204 F.3d 33, 37 (2d Cir.
17 2000) ("Wilson") (quoting Faretta, 422 U.S. at 835), cert. denied, 531 U.S. 892 (2000).
18 "Equivocation, which sometimes refers only to speech, is broader in the context of the Sixth
19 Amendment, and takes into account conduct as well as other expressions of intent." Williams v.
20 Bartlett, 44 F.3d 95, 100 (2d Cir. 1994) ("Williams").

21 The purpose of requiring that a criminal defendant make an
22 "unequivocal" request to waive counsel is twofold. First, unless the request is
23 unambiguous and unequivocal, a convicted defendant could have a colorable
24 Sixth Amendment appeal regardless of how the trial judge rules: if his request
25 is denied, he will assert the denial of his right to self-representation; if it is
26 granted, he will assert the denial of his right to counsel. . . . Second, the
27 requirement of an unambiguous and unequivocal request inhibits any
28 deliberate plot to manipulate the court by alternatively requesting, then
29 waiving counsel.

1 Id. at 100-01 (other internal quotation marks omitted). A defendant has "no right to 'engag[e] in
2 serious and obstructionist misconduct," Edwards, 554 U.S. at 171 (quoting Faretta, 422 U.S. at 834
3 n.46), and "a court may deny a defendant's request to proceed pro se if it finds that the request is
4 manipulative or abusive in some other way," Wilson, 204 F.3d at 38 n.4 (internal quotation marks
5 omitted).

6 Further, even after the right to proceed pro se has been clearly and unequivocally
7 asserted, the right "'may be waived through conduct indicating that one is vacillating on the issue or
8 has abandoned one's request altogether.'" Id. at 37 (quoting Williams, 44 F.3d at 100). Although, in
9 order to preserve the right, a defendant who has made a clear and unequivocal request to represent
10 himself need not repeat his request after it has been "clear[ly]" and "conclusively denied by the trial
11 court," Wilson, 204 F.3d at 37 (quoting Brown v. Wainwright, 665 F.2d 607, 612 (Former 5th Cir.
12 1982) (en banc) ("Brown") (emphasis ours)), relinquishment of the right to proceed pro se "'may be
13 found if it reasonably appears to the court that defendant has abandoned his initial request to represent
14 himself," Wilson, 204 F.3d at 37 (quoting Brown, 665 F.2d at 611); see, e.g., Williams, 44 F.3d
15 at 100 (to preserve the right to proceed pro se, the defendant "must demonstrate" not only "that his
16 . . . application to discharge counsel and act pro se was clear and unequivocal," but also "that he did
17 not thereafter waive his right to self-representation by abandonment").

18 Where there has been no clear denial of the request to proceed pro se "and the question
19 of self-representation [i]s left open for possible further discussion," the defendant's "failure to reassert
20 his desire to proceed pro se" and his "apparent cooperation with" his appointed counsel, who conducts
21 the remaining pretrial and trial proceedings, "constitute[s] a waiver of his previously asserted Sixth
22 Amendment right" to proceed pro se. Wilson, 204 F.3d at 38-39; cf. McKaskle v. Wiggins, 465 U.S.

1 168, 182 (1984) ("Even when [a defendant] insists that he is not waiving his Faretta rights, a pro
2 se defendant's solicitation of or acquiescence in certain types of participation by [standby] counsel
3 substantially undermines later protestations that counsel interfered unacceptably."). This is especially
4 so where defendant's later "silence stands in stark contrast to [his] willingness to assert his perceived
5 rights at other points during the proceedings." Wilson, 204 F.3d at 39.

6 In the present case, Barnes's contention that he was deprived of the right of self-
7 representation must be rejected because the district court did not clearly deny his request and Barnes
8 did not in any way pursue it. After receiving Barnes's request, the district court properly began by
9 pointing out the need for a hearing to determine whether Barnes possessed the capacity to represent
10 himself and indicating that the court would have Barnes meet with a psychiatrist to advise the court
11 as to that capacity. (See July 17, 2008 Tr. 7, 11-14.) Although it is undisputed that the ensuing
12 psychiatric report stated that Barnes was competent to represent himself, the court did not again
13 address the issue of self-representation and Barnes did not pursue his request.

14 Barnes argues that there was a "pocket veto" of his request; but this concept--reflecting
15 a constitutionally imposed time limitation on certain interactions between the Executive and
16 Legislative Branches of the government, see U.S. Const. art. 1, § 7, cl. 2 ("[i]f any Bill shall not be
17 returned by the President within ten Days (Sundays excepted) after it shall have been presented to
18 him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their
19 Adjournment prevent its Return, in which Case it shall not be a Law")--is inapplicable to this judicial
20 proceeding. The controlling principle here is that when a defendant in a criminal case has moved to
21 represent himself and the court has not entered a "clear" and "conclusive[]" denial, it is incumbent on
22 the defendant "to reassert his desire to proceed pro se"; his failure to do so, especially where he

1 proceeds to cooperate with his appointed counsel, "constitute[s] a waiver of his previously asserted
2 Sixth Amendment right" to proceed pro se. Wilson, 204 F.3d at 37-38 (internal quotation marks
3 omitted).

4 In the present case, there was no ruling on Barnes's request to proceed pro se, much
5 less one that constituted a clear and conclusive denial. At the outset, the court made abundantly clear
6 that the question of whether Barnes would be allowed to represent himself was a matter to be decided
7 in the future. As indicated above, at the first pretrial conference following the court's receipt of
8 Barnes's request to proceed pro se, the court stated, "We'll have to have a hearing about this." (July
9 17, 2008 Tr. 7.) Later in the same conference, the court stated that the time needed for Barnes's
10 competency evaluation would be excluded from the Speedy Trial Act calculation "so [the Court] can
11 rule on [Barnes's] application to represent himself." (Id. at 33-34 (emphasis added).) And at the next
12 conference, the court again noted that the time needed for the evaluation would be excluded in order
13 for the court to "conduct a hearing on th[e] matter, so that the Court may determine whether Mr.
14 Eisemann proceeds as counsel or as shadow counsel in this case with respect to Mr. Tuere Barnes."
15 (July 28, 2008 Tr. 19 (emphasis added).) Although the court had expressed skepticism as to Barnes's
16 capacity to represent himself, there plainly was no ruling by the court on Barnes's request prior to the
17 competency evaluation.

18 Nor was there any such ruling following the evaluation. Following that evaluation,
19 given the court's failure to enter a "clear" and "conclusive[]" denial, it was incumbent upon Barnes
20 to "reassert his desire to proceed pro se." Wilson, 204 F.3d at 38 (internal quotation marks omitted).
21 But the issue of self-representation "was never discussed on the record again." (Barnes brief on
22 appeal at 2.) Rather, Barnes's conduct thereafter plainly indicated his abandonment of his request and

1 his acceptance of continued representation by Eisemann. For example, on February 4, 2009,
2 Eisemann sent the district court a letter noting that the court "ha[d] scheduled a conference at 2:00
3 p.m. today to address [the government's] request to reopen the suppression of evidence obtained from
4 my client, Tuere Barnes." (Eisemann Letter to the district court dated February 4, 2009, at 1.)
5 Eisemann also itemized for discussion with the court 11 other matters, including "[m]y client's intent
6 to raise an alibi defense with respect to some of the charges" (*id.* at 2). Thereafter, at least five pretrial
7 conferences were held at which Barnes was in attendance. At these conferences, Eisemann, on behalf
8 of Barnes, made arguments to the court about discovery matters, the scheduling of trial, the conduct
9 of voir dire, and the enforceability of a limited proposed plea agreement that had been offered--and
10 withdrawn--by the government years earlier. At each conference it was clearly indicated by
11 Eisemann, without objection by Barnes, that Barnes would continue to be represented by Eisemann.
12 (See, e.g., Hearing Transcript, February 4, 2009, at 35 (Eisemann stating that the cross-examination
13 of a certain witness would not be a problem "if I have the materials and I want to ask [Barnes] about
14 them"); Hearing Transcript, March 20, 2009 ("March 20, 2009 Tr."), at 39-43 (Eisemann requesting
15 adjustments in the trial schedule to accommodate obligations in his schedule); Hearing Transcript,
16 March 23, 2009, at 4 (Eisemann complaining that a certain ruling by the court would make it difficult
17 "for me" to cross-examine a certain witness effectively); Hearing Transcript, March 24, 2009, at 2
18 (Eisemann stating "I've discussed [attendance at sidebar discussions] with my client," and "[h]e's
19 electing not to participate at the sidebar . . . if the marshals have to accompany him for that"); Hearing
20 Transcript, April 6, 2009, at 2 (Eisemann stating "we're unable to reach an agreement with the
21 government" on a plea "[d]espite a morning spent with my client"); *id.* at 3-5 (Eisemann requesting
22 a stay of jury selection in order "to let me go to the Second Circuit to do a writ of mandamus," for

1 which he said "I'll put the papers together tonight," otherwise "I'll have to challenge something which
2 will make me lose credibility in the eyes of the jury".) Eisemann at times privately conferred with
3 Barnes during these conferences (see, e.g., March 20, 2009 Tr. 15-16, 65); and none of the transcripts
4 suggests that Barnes himself made any attempt to address the court in any manner on any issue.

5 At trial, Eisemann, inter alia, conducted the direct examination of Barnes, cross-
6 examined government witnesses, and made objections. At no point in the trial proceedings did Barnes
7 state, or give any other indication, that he did not wish Eisemann to represent him or that he wanted
8 to proceed pro se. Thereafter, Eisemann, inter alia, filed a motion for a new trial for Barnes and
9 represented Barnes throughout the sentencing proceedings. After July 2008, Barnes simply "never
10 reasserted his request to represent himself." (Barnes brief on appeal at 2.) Moreover, Barnes's
11 silence, in stark contrast to his adamant assertions of his perceived rights at other points during the
12 proceedings, ultimately raises doubt as to the genuineness of Barnes's request to proceed pro se, i.e.,
13 whether Barnes "truly" wanted to represent himself at trial, Faretta, 422 U.S. at 817. Barnes had
14 displayed abundant willingness to express his personal views and to take issue with the views of
15 others earlier in the proceedings. (See, e.g., July 17, 2008 Tr. 12; November 2007 Tr. 5-7; December
16 2007 Tr. 3-6; January 2008 Tr. 5, 6-9, 14-19, 24-26.) Against this background, the record evinces
17 vacillation by Barnes in his self-representation request when, at the July 17 conference discussing that
18 request, he voiced no objection whatever to Eisemann's statement that after the competency evaluation
19 "[Barnes] might actually change his mind about whether he would like a lawyer" (July 17, 2008 Tr.
20 11; see id. at 11-34). Both Barnes's silence in response to that pre-evaluation statement and his post-
21 evaluation conduct in allowing Eisemann to represent him, with no further mention of the self-
22 representation request, are unsurprising given that, in the proceedings leading up to this request to
23 proceed pro se, Barnes had expressed a clear desire not to represent himself (see January 2008 Tr. 5).

