

CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE

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Class Twelve - Part One: Mental Health Issues

INTRODUCTION

In the night between the 17th and 18th of October I was seized by the worst fear a man can have, the worst punishment Heaven can inflict – the fear of losing one’s reason. It took so strong a hold of me that consolidation and prayer, defiance and derision, were equally powerless to subdue it. Terror drove me from place to place. My breath failed me as I pictured by brain paralyzed. Ah, Clara! no one knows the suffering, the sickness, the despair, except those so crushed.

- Composer Robert Schumann¹

Madness is its own punishment.

- William Blackstone

One in 17 Americans has a serious mental illness such as schizophrenia, major depression or bipolar or manic-depressive disorder – or a combination of illnesses or such an illnesses accompanied by intellectual limitations or

1. Letter to Clara Weick, 1837, quoted in *Early Letters of Robert Schumann*, May Herbert, trans. (London: George Bell & Sons, 1888); Reprint Mich.: St. Clair Shores, Scholarly Press, 1970) pp. 182-184. In 1854, after a period of great productivity in writing music while struggling with his mental illness, Schumann ran out of his house, sobbing and without an overcoat, and threw himself in the Rhine. He was rescued and placed in an insane asylum, where he died of self-starvation in 1856. See Kay Redfield Jamison, *TOUCHED WITH FIRE* 204-207 (1993).

disabilities – that, on occasion, impairs their normal cognitive, emotional, or behavioral functioning.² On those occasions, they may experience, *inter alia*, illogical thinking, delusions, hallucinations (auditory or visionary or both), or severe mood swings that may affect their perceptions of reality, judgment, impulse control, ability to process information and other mental functioning. These symptoms may be acute or chronic. About one-third of those with mental illness receive treatment of some kind. Many function well in society³; others have more

2. National Alliance on Mental Illness, *MENTAL ILLNESS: FACTS AND NUMBERS* (available at www.nami.org/Template.cfm?Section=About_Mental_Illness&Template=/ContentManagement/ContentDisplay.cfm&ContentID=53155).

3. Professor Elyn R. Saks and her colleagues have written about people with schizophrenia who, despite experiencing symptoms such as as delusions and hallucinations, have significant achievements. See Saks, *Successful and Schizophrenic*, N.Y. TIMES, Jan. 25, 2013, at SR5, available at www.nytimes.com/2013/01/27/opinion/sunday/schizophrenic-not-stupid.html?pagewanted=1&_r=0. See also Saks, *THE CENTER CANNOT HOLD: MY JOURNEY THROUGH MADNESS* (2007), in which Saks, a professor at the University of Southern California Law School, describes her own struggles with schizophrenia. Although she experienced episodes of psychosis and was hospitalized, she has controlled her illness with daily medication and therapy. Kay Redfield Jamison, an accomplished clinical psychologist and professor at the Johns Hopkins University School of Medicine, has written about her experiences with bi-polar disorder in *THE UNQUIET MIND* (1997). And see Benedict Carey, *A High-Profile Executive Job as Defense Against Mental Ills*, N.Y.

difficulty and experience deterioration in their work and social lives. In very rare instances, mental illness may be related to violent and irrational behavior – such as that of Jared L. Loughner, who killed six people and shot and injured 13 others, including Congresswoman Gabrielle Giffords, in 2011 – that results in arrest and prosecution. Once in the legal system, a mental illness may interfere with a person’s ability to understand legal proceedings in a meaningful way, relate to counsel and other members of the defense team, and make rational decisions regarding choices they may have (such as whether to make a statement to law enforcement about the charges, whether to testify at trial and whether to enter a guilty plea or go to trial). These materials deal with the small group of people whose mental illnesses is related to such behavior and/or such difficulty in the system.

There is still a great deal to be learned about the causes of mental illnesses. Scientists have identified and continue to study and debate factors such as genetics, chemical imbalances in the brain, illnesses of or the intake of drugs or alcohol by mothers during pregnancy, adolescent infections such as meningitis or encephalitis, and social factors such as child abuse, stress during adolescence, family dynamics and circumstances regarding housing, physical health and nutrition. Some people have had injuries to the brain resulting from trauma such as automobile accidents, blows to the head, strokes, ruptures of aneurysms in the brain, tumors, exposure to substances – in many cases before birth – such as drugs and alcohol, or deprivation of oxygen to the brain.

These materials do not deal with intellectual disability (referred to in the cases as “mental retardation”) which involves limited intellectual functioning and is dealt with in the Supreme Court’s decision in *Atkins v. Virginia* and the second set of materials for the course.

TIMES, Oct. 22, 2011 at A1 (describing the chief executive of a nonprofit organization, who has a diagnosis of schizoaffective disorder and obsessive-compulsive disorder).

Institutionalization and De-institutionalization of the Mentally Ill

Mentally impaired people were mostly confined to prisons and jails until reform movements in the 1800s led by Rev. Louis Dwight, a Congressional minister in Boston who was shocked by conditions he saw when he distributed Bibles to inmates in prison, and Dorothea Dix, a teacher, who was similarly distressed by what she saw teaching a Sunday school class at the East Cambridge Jail outside Boston.¹ She visited and documented the conditions in 300 jails, 18 prisons and 500 almshouses in the eastern states. In one of many instances in which she revealed the conditions to those on the outside, she told the New Jersey legislature that the mentally impaired in the state’s prison system were confined in “cages, closets, cellars, stalls, pens: naked, beaten with rods, and lashed into obedience”.² Their efforts and others resulted in legislatures building psychiatric hospitals. By 1880, there were 75 public psychiatric hospitals in the United States which housed 41,000 people.

By 1955, there were 559,000 people housed in mental hospitals, thirteen times the number in 1880. (The general population grew slightly more than threefold during this period.) However, many of those institutions, like the earlier ones, were overcrowded and poorly maintained and patients were neglected and abused.³ That treatment and the belief that mental illnesses, particularly schizophrenia, could be effectively treated with medications resulted in state and federal governments moving mentally ill people out of large psychiatric hospitals beginning in the 1950s.

1. E. Fuller Torrey, *OUT OF THE SHADOWS; CONFRONTING AMERICA’S MENTAL HEALTH CRISIS* 26-27 (1997) .

2. *Id.* at 27.

3. *See, e.g., Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971).

The enactment of the Medicaid and Medicare laws in 1965 increased the incentive for states to release people from mental institutions in order to shift the cost of care to the federal government.

By 1994, the number of people in psychiatric hospitals had been reduced to 71,619. (If the same percentage of the population that was in mental hospitals in 1955 had been hospitalized in 1994, there would have been 885,000 in mental hospitals.) Many of those discharged from public hospitals were severely mentally ill. Fifty to 60 percent had been diagnosed with schizophrenia, and 10 to 15 percent were diagnosed with bi-polar illness and severe depression.

Many of those released from mental hospitals have realized the goal defined by President Carter's Commission on Mental Health of "maintaining the greatest degree of freedom, self-determination, autonomy, dignity, and integrity of body, mind, and spirit of the individual while he or she participates in treatment or receives services."

However, many have not. Emptying institutions was supposed to be accompanied by the creation of community-based mental-health programs, treatment centers, and housing and job opportunities. However, by the early 1980s, studies revealed thousands of patients released from state mental hospitals received no follow-up, treatment or assistance. The federal government did not provide funding for community-based programs and many states have been unwilling to fund such programs.

People continue to be released from mental institutions to this day, as states deal with budget crises by closing mental hospitals and releasing the patients. The elimination of in-patient options for the most severely ill has left many of them on the streets, in shelters and in jails and prisons. Some in need of hospitalization are unable to obtain it because a large number of hospital beds

for the mentally ill were permanently eliminated with the closing or reduction in size of many mental hospitals. It is difficult, if not impossible, to obtain out-patient mental health treatment in many communities. Racial and ethnic minorities are less likely to have access to mental health services and often receive a poorer quality of care.

After an investigation in 2007 found that 130 patients at state-run hospitals in Georgia had died under questionable circumstances over the course of seven years, the Department of Justice filed suit to force the state to improve the way it handled patients with mental illnesses.⁴ The suit was resolved in 2010 with a settlement that requires the state to remove 9,000 individuals with mental illness out of hospitals and place them in communities.⁵ However, it was discovered the following year that patients were being discharged and hospitals closed, but the community-based services often did not exist.⁶

Many people who have difficulty due to their mental illness and lack the resources for private care are now in prisons and jails as they were in the 1800s. Twenty-four percent of state prisoners and 21 percent of local jail prisoners have a recent history of a mental health disorder.

4. Russell Nichols, *Georgia Overhauls Its Mental Health System*, *Governing the States and Localities*, www.governing.com/topics/health-human-services/following-patient-reentry-orders-georgia.html, Oct. 2011.

5. *Id.*

6. Alan Judd, *Desperate psychiatric patients wait*, *ATLANTA J.-CONST.*, June 20, 2010 available at www.ajc.com/news/news/local/desperate-psychiatric-patients-wait/nQgyy/.

Mentally Ill People in the Criminal Courts

People whose perceptions and thought processes are affected by mental illnesses or disorders come before the criminal courts charged with offenses ranging from petty crimes like loitering and trespassing to capital offenses. The defendants may have difficulty understanding the legal system, working with a lawyer, and making appropriate choices. For example, a person suffering from schizophrenia may believe that his lawyer is part of a conspiracy to discredit him and refuse to deal with the lawyer. This raises an issue of competency for trial as well as significant disadvantage in dealing with the court. A person with bi-polar disorder who is in a manic episode may reject an offer to plead guilty – which could save his or her life – and instead insist on a trial based upon a false sense of euphoria. On the other hand, a person suffering from severe depression may give up all hope, plead guilty and accept a death sentence and waive further proceedings and agree to be executed.

Courts employ various standards in determining whether to commit people to institutions against their will; sanity or criminal responsibility at the time of the crime; whether a waiver of rights regarding an interrogation or search was knowing, intelligent and voluntary; competence to stand trial; future dangerousness; mitigating circumstances regarding punishment; competence to waive appeals or post-conviction review; and competence to be executed. The case of single defendant may present a number of these issues.

Mental health professionals – such as psychiatrists, who are medical doctors who can prescribe medicine; psychologists, who conduct interviews and give and interpret psychological tests; and social workers who study and document a person's social situation and history, as well as anthropologists and other people who may be

involved on either side of a case – may have very different opinions about whether a person is even suffering from a mental illness and, if so, the appropriate diagnosis, the severity of the illness, and the extent to which it influences behavior. There may be disagreement about whether the person is mentally ill, intellectually disabled, brain damaged, an “antisocial personality,” a “sociopath” or “psychopath,” or not mentally impaired at all. One expert may diagnose a defendant as schizophrenic, his behavior influenced by delusions and in need of antipsychotic medication, while another expert may find that the same person has an antisocial personality disorder, is simply manipulative, has no concern for rules of society, has an unfavorable prognosis for treatment or improvement and has no need for medication.

People often have multiple diagnoses – for example, Morris Mason, executed by Virginia in 1985, was mentally retarded (he had an IQ of 66) and schizophrenic. Or a defendant may have abused alcohol and/or drugs adding questions of addiction and self-medication to the determination of mental health issues.

Determinations of mental health issues may be further complicated because manifestations or symptoms of a person's mental illness may vary widely from day to day. (On the other hand, intellectual disability or mental retardation – subaverage intellectual functioning – is a relatively constant condition.) A person may function well at some times, but experience hallucinations, delusions, mania, or depression at other times. In addition, about a third of those who take psychotropic medications improve markedly (which tends to validate the diagnosis of mental illness), but the lack of response to psychotropics does not mean a person is not mentally ill. A person may respond well to one medication but not another. As a result, psychiatrists may try several different medications before finding one or a combination of

medications that are effective. And medications may be effective for a period of time, but not at all times.

A court presented with evidence that a defendant's behavior has varied greatly from time to time may be required to determine whether the person suffers from a mental illness or is malingering and, if the person is mentally ill, the extent to which the mental illness influenced behavior at the time in question, *e.g.*, the time of the offense or the time of trial.

Many medications have undesirable side effects such as making a person's skin crawl as if ants were scuttling underneath the surface, causing a person to feel dull and bloated as if in "a fog." "Many who are on antipsychotic medication are so sluggish that they are lucky if they can work menial jobs."⁷ Some medications cause significant weight gain. Some people stop taking their medications because of such side effects. Some people whose symptoms are controlled through medication may discontinue it upon feeling better, thinking they no longer need it, and suffer a recurrence of their symptoms without realizing it. There is usually little or no understanding or sympathy for these decisions to discontinue medication.

The picture may be further complicated because some mentally ill people lack insight into their illness and how it affects them. Some strongly deny that they have any mental illness at all. Their assertions that they are not mentally ill or explanations for their bizarre behavior – such as that they were trying to make the police or their lawyers think they were mentally ill when in fact they were not – may be given considerable weight

7. Tanya Marie Luhrmann, *Beyond the Brain*, WILSON QUARTERLY, Summer 2012, available at www.wilsonquarterly.com/article.cfm?aid=2196 and as optional reading in the "Mental Issues" folder on the course website.

by mental health professionals, juries or judges in deciding the issues in their cases.

In some cases, abnormalities of brain function, structure, metabolism, and electrical activity can be documented with magnetic resonance imaging (MRI); a functional MRI (fMRI) done while the client is performing a task or responding to a stimulus; electroencephalograms (EEG); Positron Emission Tomography Scan (PET-scan or PET imaging), a type of nuclear medical imaging; and computerized (axial) tomography (CT or CAT) scans, which use special x-ray equipment to produce multiple images of the brain. Each is designed to look at the brain in a different way to determine organic abnormality of some kind. Such "hard" evidence – similar to an x-ray of a broken bone – may be more impressive to a jury than the opinions of experts or the results of psychological testing (assuming the jury accepts an expert's explanation of the results of the MRI, CT scan or other testing). Such tests may also produce nonspecific information that is outside the norm but not necessarily brain damage. Some abnormalities that are documented by the tests are thought to be related to long term drug or alcohol abuse, but there is not broad agreement with regard to that.

More often diagnoses and legal determinations are made based upon less objective evidence, such as a history of the defendant, usually obtained from interviews with the defendant and others; the accounts of lay witnesses who have observed the defendant; records, such as school, medical, military, employment records; and the results and interpretations of tests such as the Wechsler Adult Intelligence Scale (WAIS), a widely used intelligence test; the Minnesota Multiphasic Personality Inventory (MMPI), a 566-item, true-false test used to assess personality; the Rorschach test, which asks for interpretations of ink blots; tests which require drawings or words used to complete sentences, such as "I often wish _____," and other psychological tests. Some tests are

designed to find certain impairments such as brain damage.

However, the reliability of such tests is subject to debate. Psychologist Kay Redfield Jamison describes her first experience with psychological testing as follows:

At one point in our training we were expected to learn how to administer various psychological tests, including intelligence tests * * * and personality tests such as the Rorschach. My first practice subject was my husband, who, as an artist, not surprisingly scored off the top on the visual performance parts of the WAIS, frequently having to explain to me how to put the block designs together. His Rorschach responses were of a level of originality that I have not seen since. On the Draw-A-Person test I noticed that he seemed to be taking it very seriously, drawing meticulously and slowly what I assumed would be some kind of revealing self-portrait. When he finally showed the picture to me, however, it was a wonderfully elaborated orangutan whose long arms extended along the borders of the page.

I thought it was marvelous and took the results of his WAIS, Rorschach, and Draw-A-Person to my psychological-testing supervisor. She was an entirely humorless and doctrinaire psychoanalyst who spent more than an hour interpreting, in the most fatuous and speculative manner, the primitive and repressed rage of my husband, his intrapsychic conflicts, his ambivalences, his antisocial nature, and his deeply disturbed personality structure. My now former husband, whom I have never, in almost twenty-five years, known to lie, was being labeled a sociopath; a man who was quite singularly straightforward and gentle was interpreted as deeply disturbed, conflicted, and filled with rage. All because he had done

something different on a test. * * *¹

Misinterpretation of a criminal defendant's test scores can have a major impact on legal determinations made in the case. A defendant's scores may be affected by reading ability, language difficulties, cultural differences and other factors.

Even if a person is found to have a mental impairment, there is often disagreement about whether he or she meets legal standards and definitions which may be narrower than those used by mental health professions or generally accepted by society. A person can, for example, be experiencing delusions, hallucinations or severe mood swings so as to be virtually out of touch with reality and still be found "sane" at the time of the crime, "competent" for trial, and "competent" to waive further appeals and be executed.

Many prosecutors, defense lawyers and judges have limited understanding of mental impairments and how they affect a person's behavior and ability to understand and to make rational decisions. As a result, they may fail to look for facts relevant to the mental health issues, may fail to consult the right experts and may disregard opinions that are contrary to their common sense understanding of things.²

Many defense lawyers have no training in

1. Kay Redfield Jamison, *THE UNQUIET MIND* 60-61 (1997).

2. For an bizarre example see *Stevens v. McBride*, 489 F.3d 883, 888 (7th Cir. 2007), where defense counsel retained an expert witness who was among the "one percent minority of [psychiatrists] who believe that mental diseases do not exist" and employed a "trust and bonding therapy" which involved "putting 18-year-olds on his lap and sticking a bottle in their mouth." Counsel were found to be ineffective. *Id.* at 896-97.

detecting symptoms of mental impairments. A lawyer may not realize that a client is schizophrenic and, instead, may view the client as uncooperative, manipulative or even hostile. A lawyer may not realize that a client who always asks the same question, or gives different accounts of what happened each time the lawyer visits him, has retrograde amnesia due to brain damage from a head injury. The brain damage that makes the client appear uncooperative may have interfered with the client's judgment or self-control at the time the crime was committed.

While prosecutors usually have access to as many experts of their choosing as they want, lawyers for indigent defendants may be limited in some jurisdictions to one expert upon court approval and are not entitled to select the expert.³ As a result, they may be unable to get the experts they want, the testing that is required, and any evaluations conducted may be superficial. (A CT scan alone may cost \$2,000 – which is as much or more than some states give lawyers to represent a defendant from start to finish in a capital case.)

For further reading: For a father's description of his a mentally ill son in the criminal justice system, see Steve Earley, *CRAZY: A FATHER'S SEARCH THROUGH AMERICA'S MENTAL HEALTH MADNESS* (Putnam 2006).

Legal Issues Which May be Presented

The following is a brief summary of some of the legal issues that often arise with regard to mental impairments of the accused. It is offered as a reference.

3. See *Ake v. Oklahoma*, 470 U.S. 68 (1985). Defense lawyers are be able to obtain multiple experts in some jurisdictions where funding is controlled by a public defense agency or judges are not as restrictive.

1. Involuntary commitment to a mental institution

People who are mentally ill but have not committed any crime may be confined against their will and treated in a mental institution if it is shown by clear and convincing evidence that they are mentally ill and a danger to themselves or others. See *Addington v. Texas*, 441 U.S. 418 (1979).

The Supreme Court upheld, 5-4, a Kansas law that provided that “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence” is a “sexually violent predator” and that the be committed to a secure institution for an indefinite period of time even after the person has completed a sentence for the crimes. *Kansas v. Hendricks*, 521 U.S. 346 (1997). The prosecution has the burden of proof beyond a reasonable doubt that the person is a “sexually violent predator.” A jury determines whether the prosecution has met this burden.

Justice Thomas, writing for the majority, held such commitment does not violate the Constitution's double jeopardy prohibition or its ban on *ex post facto* lawmaking because the commitment is civil, not criminal, and such involuntary confinement is not punishment. Although *Hendricks* was given no treatment – either because his condition was untreatable or, if treatable, the state did not provide any – the Court held that “under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law.” *Id.* at 365-66.

Justice Breyer, joined by three other members of the Court dissented. The dissent agreed with the majority that the definition of “mental abnormality” satisfies the “substantive” requirements of the Due Process Clause.

However, it expressed the view that the objective of the statute was not to commit Hendricks civilly, but to inflict further punishment upon him after he had served his sentence. Accordingly, the dissent found the statute as applied to Hendricks violated the *ex post facto* clause because Hendricks committed his crimes prior to the statute's enactment.

2. Competency to waive rights

Mental abilities are relevant to whether one makes a knowing, intelligent and voluntary waiver of the right to remain silent during interrogation by law enforcement officers and other rights guaranteed by *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny, and whether one validly consents to a search which otherwise would have violated the Fourth Amendment. Many people with mental illness or limitations relinquish critical rights simply because they do not understand what it means to have a "right," what it means to "waive" one, or the consequences of doing so.

In determining whether a defendant's waiver of *Miranda* rights is valid, courts must look to the "totality of circumstances" surrounding the interrogation, particularly the nature of the interrogation process and those characteristics of the defendant that may increase or reduce his or her understanding. Studies have found that some people who are mentally retarded are incapable of understanding their *Miranda* rights and comprehending the consequences of waiving them.¹

Similarly, consent to a warrantless search must be given voluntarily. Searches are permitted without a warrant, probable cause, or particularized justification if based on the voluntary consent of a person with authority over

1. See, e.g., Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Subjects*, 69 U.Chi.L.Rev. 495 (2002).

the place searched. However, a defendant's mental competence can affect her understanding of her rights to refuse a search, and can render a search unconstitutional. To determine whether consent was voluntarily given, courts again look to the "totality of the circumstances." Mental competence is one factor that is considered in the totality.²

If the accused did not understand the *Miranda* rights or her rights to decline a search, the evidence may be suppressed.³ However, the Supreme Court has held that suppression is not required in the absence of "coercive police activity." *Colorado v. Connelly*, 479 U.S. 157 (1986). Francis Connelly was mentally ill, and approached a police officer in Denver without any prompting to tell him that he had killed someone and wanted to talk to the officer about it. He was then handcuffed and informed of his *Miranda* rights. After stating that he understood his rights, he further elaborated on his initial statement. Connelly was initially found incompetent to stand trial but achieved competency after six months of hospitalization and treatment with antipsychotic and sedative medication. A psychiatrist testified for the defense that Connelly's statements to the police were the result of "command auditory hallucinations," a

2. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

3. See, e.g., *United States v. Fenton*, 1998 WL 356889 (W.D. Pa. May 28, 1998) (suppressing defendant's statements where defendant simultaneously released from mental health commitment because government did not prove knowing and voluntary waiver); *United States v. Hull*, 441 F.2d 1971 (7th Cir. 1971) (confession involuntary when made by defendant with I.Q. of 54, and mental age of an eight or nine year old child); *United States v. Elrod*, 441 F.2d 353 (5th Cir. 1971) (evidence supported trial court's finding that codefendant was mentally incompetent at time he signed consent form for search of hotel room where he suffered from chronic undifferentiated schizophrenia).

symptom of his mental disorder. As a result, the trial court suppressed Connelly's statements as involuntary. The Supreme Court reversed because it found an absence of police overreaching or coercion. The Court could not "justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness.'"

3. Competence to stand trial

Due process prohibits the trial of a person who lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). A defendant who has been found incompetent may later become competent and stand trial. The reverse is also true: a person who has been found competent may later become incompetent, perhaps even during the trial.

A state may place the burden of proof upon the defendant to prove by a preponderance of the evidence that he or she is incompetent to stand trial. *Medina v. California*, 505 U.S. 437 (1992). However, a state may not require the defendant to prove competence by clear and convincing evidence because the trial of a person who more likely than not is incompetent (that is, one who has shown by a preponderance of the evidence – but not by clear and convincing evidence – that he is incompetent) would violate due process. *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

A person who is incompetent for trial may be committed to a mental institution until such time as he or she becomes competent. At that time, he or she may be tried. However, the person cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he or she will become competent. If that is not the case, the State must either institute civil commitment proceeding that

are required to commit indefinitely any other citizen, or release the defendant. *Jackson v. Indiana*, 406 U.S. 715 (1972). The Court also held in *Jackson* that even if it is determined that the defendant probably soon will be able to stand trial, continued commitment must be justified by progress toward that goal.

4. Sanity at the time of the crime or guilty but mentally ill

The defense of "not guilty by reason of insanity" raises the question of whether the defendant is responsible for his or her behavior *at the time of the crime*. The standard for insanity varies in different jurisdictions. Some ask whether the accused knew the "nature and quality" of the criminal act or the difference between right and wrong based on the test adopted by the English courts in *M'Naghten's Case*.⁴ Other states use the standard proposed by the American Law Institute which provides that a person is not responsible for criminal conduct when, as the result of a mental disease or defect, he or she lacks the capacity to appreciate the criminality of his or her conduct or to conform his or her behavior to the requirements of the law.⁵ Some jurisdictions employ the "irresistible impulse test," under which a defendant is legally insane if he or she suffers from a mental condition that creates overwhelming compulsions urging him or her to

4. *M'Naghten's Case*, 10 Cl. And F. 200, 8 Eng. Rep. 718 (H.L. 1843). See, e.g., *State v. Harms*, 643 N.W.2d 359 (Neb. 2002) (applying *M'Naghten* to determine defendant not insane at time of murder); *Taylor v. State*, 795 So.2d 512 (Miss. 2001) (applying *M'Naghten* to affirm jury finding that defendant was sane at time of crime); *Commonwealth v. Chatman*, 538 S.E.2d 304 (Va. 2000) (recognizing that in Virginia, in order to assert an insanity defense, the accused must establish that she did not know the difference between right or wrong).

5. Model Penal Code, § 4.01. See, e.g., Ala. Code. § 13A-3-1 (2002); Ky. Rev. Stat. Ann. § 504.020 (2002); Or. Rev. Stat. § 161.295 (2001).

commit the illegal acts.⁶

People who are found not guilty by reason of insanity may be committed to a mental institution based on that verdict, which establishes mental illness and dangerousness. *Jones v. United States*, 463 U.S. 354, 363 (1983). However, if a person so committed is no longer dangerous or mentally ill, he or she must be released unless the prosecution satisfies the standard for civil commitment by showing by clear and convincing evidence that the individual is mentally ill and dangerous. *Foucha v. Louisiana*, 504 U.S. 71 (1992).

Most states house those found incompetent for trial or not guilty by reason of insanity in secure mental facilities which closely resemble prisons. Studies show that public perception overestimates the prevalence and success rate of insanity defenses, and underestimates the amount of time a defendant found to be insane spends in a mental institution. One eight-state study of criminal cases in the early 1990s concluded that less than one percent of defendants pleaded insanity and, of them, only a quarter were found not guilty by reason of insanity. In approximately 80 percent of the cases where a defendant is found “not guilty by reason of insanity,” it is because the prosecution and defense have agreed on the appropriateness of that finding before trial. Furthermore, studies also show that persons found not guilty by reason of insanity, on average, are held at least as long as – and often longer than – persons found guilty and sent to prison for similar crimes.

Some states also provide for a verdicts of guilty but mentally ill and, in some jurisdictions, guilty

but mentally retarded.⁷ This verdict is for the person who is mentally ill, but does not meet the standard of insanity. However, several states incorporate the Model Penal Code standard into their guilty but mentally ill statutes.⁸ Under a guilty but mentally ill verdict, the defendant is sentenced to a term of years, but may receive some mental health treatment while serving the sentence.

5. Reduction of charge

A defendant’s mental state may be a basis for finding the defendant not guilty of a greater offense but still guilty of a lesser offense. For example, provocation may be a basis for finding a defending not guilty of first degree murder, but guilty of manslaughter. The state may place the burden on the defendant to show provocation or some mental state such as “extreme emotional distress” by a preponderance of the evidence, but most do not categorize emotional disturbance as an affirmative defense.⁹ However, Connecticut law provides an “affirmative defense” to murder where a defendant acted

under the influence of extreme emotional disturbance for which there was a reasonable

6. See, e.g., *Vann v. Commonwealth*, 544 S.E.2d 879 (Va. App. 2001) (Virginia recognizes both the *M’Naghten* rule and the irresistible impulse test; defendant failed to establish insanity defense by reason of an irresistible impulse).

7. See, e.g., Alaska Stat. § 12.47.030 (Michie 2001) (guilty but mentally ill); Del. Code Ann. tit. 11, § 408 (2001) (same); Ind. Code Ann. § 35-36-2-3 (West 2002)(same); Ky. Rev. Stat. Ann. § 504.130 (2002) (same); Pa. Cons. Stat. Ann. § 314 (West 2002)(same); Ga. Code Ann. § 17-7-131(b)(E)(2002) (guilty but mentally retarded).

8. See, e.g., Mich. Comp. Laws § 768.36 (2002); Pa. Cons. Stat. Ann. § 314 (West 2002); S.C. Code. Ann. § 17-24-20 (Law. Co-op. 2001); S.D. Codified Laws § 23A-26-14 (Michie 2002).

9. See, e.g., Del. Code Ann. tit. 11 §§ 641, 632 (2001); N. D. Cent. Code § 12.1-16-01 (2001). Kentucky law also provides for a similar reduction in charges for assaults committed under the influence of extreme emotional disturbance. Ky. Rev. Stat. Ann. § 508.040 (2002).

explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.¹⁰

The statute explicitly holds that defendants who assert this defense may still be convicted for manslaughter in the first degree or any other crime, and disallows the defense with respect to those other charges.¹¹

6. Future dangerousness

Some states, including Texas and Virginia, allow the death penalty to be imposed if the jury finds that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The Supreme Court held this to be a constitutionally acceptable criterion for imposing the death penalty in *Jurek v. Texas*, 428 U.S. 262 (1976). In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Court upheld the admission of opinions of mental health experts about future dangerousness, even when those opinions were based on hypothetical questions to doctors who had not examined the defendant, and despite questions about the reliability of such predictions.

7. Mitigating circumstances

Any aspect of the defendant's life and background may be considered in mitigation of punishment. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Mental impairments are generally recognized as particularly compelling mitigating factors, although in some instances they may be double edged because they may also be a basis for a finding of future dangerousness. Mental health

evidence may be offered in support of an issue such as competency for trial or insanity. Even if the defense is not successful on that issue, the evidence may be offered in mitigation.

Some states provide in their capital sentencing statutes for the consideration of certain mitigating circumstances related to a defendant's mental health in deciding punishment. For example, Fla. Stat. 921.141 (6) set outs the following mitigating circumstances:

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

In light of *Woodson*, *Lockett*, *Eddings* and their progeny, it is questionable whether a state may limit mitigation to "extreme" mental or emotional disturbance or require that the defendant ability to conform his or her conduct be "substantially" impaired.

8. Competence to give up appeals and post-conviction review.

Whether a person convicted of a crime may give up his or her appeals depends upon whether he or she is suffering from a mental disease, disorder, or defect which substantially affects his or her capacity to appreciate his or her position and make a rational choice with respect to continuing or abandoning further litigation. *Rees v. Peyton*, 384 U.S. 312 (1966). If the person lacks the capacity to make his or her own choices, he or she may be represented by a "next friend," defined as someone "truly dedicated to the best interests of

10. Conn. Gen. Stat. § 53a-54a (2002). See also Or. Rev. Stat. §§ 163.115, 163.118 (2001).

11. *Id.* See also Conn. Gen. Stat. § 53a-55 (2002).

the person on whose behalf he seeks to litigate.” *Whitmore v. Arkansas*, 495 U.S. 149 (1990). The burden is on the “next friend” clearly to establish the propriety of his status and thereby justify the jurisdiction of the court. *Id.*

9. Competence to be executed.

The Eighth Amendment prohibits the execution of one who is “insane.” *Ford v. Wainwright*, 477 U.S. 399 (1986). Some courts have applied the standard of competence set out in Justice Powell’s concurring opinion in *Ford*: “I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.” The American Bar Association and some lower courts have added a second element: whether the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or the court.

Treatment of the Mentally Ill in Prison

The scandalous treatment of the mentally ill in South Carolina prisons, which is not that different than in many other states, is described in Andrew Cohen, *When Good People Do Nothing: The Appalling Story of South Carolina’s Prisons*, THE ATLANTIC, Jan. 10, 2014, www.theatlantic.com/national/archive/2014/01/when-good-people-do-nothing-the-appalling-story-of-south-carolinas-prisons/282938/, and Andrew Cohen, *South Carolina Is Still Defending Its Neglectful Prisons*, THE ATLANTIC, Jan. 23, 2014, www.theatlantic.com/national/archive/2014/01/south-carolina-is-still-defending-its-neglectful-prisons/283260/. Efforts by the federal Bureau of Prisons to improve treatment for the mentally ill. See Andrew Cohen, *An Experiment in Atlanta May Transform Care of Mentally Ill Prisoners*, THE ATLANTIC, Feb. 11, 2014,

www.theatlantic.com/national/archive/2014/02/an-experiment-in-atlanta-may-transform-care-of-mentally-ill-prisoners/281228/. The Colorado Department of Corrections announced in December, 2013, that it will no longer place inmates with major mental illness in solitary confinement. See Jennifer Brown, *Colorado stops putting mentally ill prisoners in solitary confinement*, DENVER POST, Dec. 12, 2013, www.denverpost.com/news/ci_24712664/colorado-wont-put-mentally-ill-prisoners-solitary-confinement.

Competency for Trial

Milton R. DUSKY, Petitioner,
v.
UNITED STATES of America.

Supreme Court of the United States
362 U.S. 402, 80 S.Ct. 788 (1960)

PER CURIAM.

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. Upon consideration of the entire record we agree with the Solicitor General that “the record in this case does not sufficiently support the findings of competency to stand trial,” for to support those findings under [the federal competency statute] the district judge “would need more information than this record presents.” We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that “the defendant [is] oriented to time and place and [has] some recollection of events,” but that the “test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him.”

In view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago, we reverse the judgment of the Court of Appeals affirming the judgment of conviction, and remand the case to the District Court for a new hearing to ascertain petitioner's present competency to stand trial, and for a new trial if petitioner is found competent. It is so ordered.

Pate v. Robinson and Drope v. Missouri

In *Pate v. Robinson*, 383 U.S. 375 (1966), the Court held that due process required that a trial court must hold a hearing when evidence raises a "bona fide doubt" as to the defendant's competency to stand trial. The Court found that the "uncontradicted testimony of Robinson's history of pronounced irrational behavior" raised a "bona fide" doubt about his competency and the failure of the trial judge to hold such a hearing denied Robinson due process.

The Court reiterated its holdings in *Dusky* and *Pate* in *Drope v. Missouri*, 420 U.S. 162 (1975). Writing for a unanimous Court, Chief Justice Burger found that the trial judge should have conducted an evidentiary hearing on competency due to information which raised a doubt about competency.

The Court observed:

* * * It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. Thus, Blackstone wrote that one who became "mad" after the commission of an offense should not be arraigned for it "because he is not able to plead to it with that advice and caution that he ought." Similarly, if he became "mad" after

pleading, he should not be tried, "for how can he make his defense?" 4 W. Blackstone Commentaries, 24. See *Youtsey v. United States*, 97 F. 937, 940-946 (CA6 1899). Some have viewed the commonlaw prohibition "as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself."

With regard to the test to be applied to determine competency, the Court stated:

* * * [W]e have approved a test of incompetence which seeks to ascertain whether a criminal defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*.

Waiver of the rights to counsel and trial

The Supreme Court has held that a defendant choosing to represent himself must do so "competently and intelligently," but that the defendant's "technical legal knowledge" is "not relevant" to the determination whether he is competent to waive his right to counsel. *Faretta v. California*, 422 U.S. 806, 836 (1975). The Court emphasized that although the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* at 834.

When a defendant decides to enter a plea of guilty instead of going to trial, the judge is to engage in a sufficient colloquy with the defendant to ascertain that there is a factual basis for the charges and that the decision to waive the rights to trial, the assistance of counsel, the privilege against self-incrimination, a jury trial, to confront one's accusers, to appeal and other rights and the decision to plead guilty has been made intelligently and voluntarily with a full

understanding of the consequences. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

Salvador GODINEZ, Warden
v.
Richard Allan MORAN.

United States Supreme Court
509 U.S. 389, 113 S.Ct. 2680 (1993).

Thomas, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, O'Connor, and Souter, JJ., joined, and in Parts I, II-B, and III of which Scalia and Kennedy, JJ., joined. Kennedy, J., filed an opinion concurring in part and concurring in the judgment, in which Scalia, J., joined. Blackmun, J., filed a dissenting opinion, in which STEVENS, J., joined.

Justice THOMAS delivered the opinion of the Court.

This case presents the question whether the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial. We hold that it is not.

I

On August 2, 1984, in the early hours of the morning, respondent entered the Red Pearl Saloon in Carson City, Nevada, and shot the bartender and a patron four times each with an automatic pistol. He then walked behind the bar and removed the cash register. Nine days later, respondent arrived at the apartment of his former wife and opened fire on her; five of his seven shots hit their target. Respondent then shot himself in the abdomen and attempted, without success, to slit his wrists. Of the four victims of respondent's gunshots, only respondent himself survived. On August 13, respondent summoned police to his hospital bed and confessed to the killings.

After respondent pleaded not guilty to three counts of first-degree murder, the trial court ordered that he be examined by a pair of

psychiatrists, both of whom concluded that he was competent to stand trial.¹ The State thereafter announced its intention to seek the death penalty. On November 28, 1984, two and a half months after the psychiatric evaluations, respondent again appeared before the trial court. At this time respondent informed the court that he wished to discharge his attorneys and change his pleas to guilty. The reason for the request, according to respondent, was to prevent the presentation of mitigating evidence at his sentencing.

On the basis of the psychiatric reports, the trial court found that respondent "is competent in that he knew the nature and quality of his acts, had the capacity to determine right from wrong; that he understands the nature of the criminal charges against him and is able to assist in his defense of such charges, or against the pronouncement of the judgment thereafter; that he knows the consequences of entering a plea of guilty to the charges; and that he can intelligently and knowingly waive his constitutional right to assistance of an attorney." The court advised respondent 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 respondent's waiver of counsel. The court also accepted respondent's guilty pleas, but not before it had determined that respondent 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

1. One of the psychiatrists stated that there was "not the slightest doubt" that respondent was "in full control of his faculties" insofar as he had the "ability to aid counsel, assist in his own defense, recall evidence and . . . give testimony if called upon to do so." The other psychiatrist believed that respondent was "knowledgeable of the charges being made against him"; that he had the ability to "assist his attorney, in his own defense, if he so desire[d]"; and that he was "fully cognizant of the penalties if convicted."

giving up, and that there was a factual basis for the pleas. The trial court explicitly found that respondent was “knowingly and intelligently” waiving his right to the assistance of counsel, and that his guilty pleas were “freely and voluntarily” given.²

On January 21, 1985, a three-judge court sentenced respondent to death for each of the murders. * * *

* * *

* * * [In federal habeas corpus proceedings] [t]he Court of Appeals concluded that the “record in this case” should have led the trial court to “entertai[n] a good faith doubt about [respondent’s] competency to make a voluntary, knowing, and intelligent waiver of constitutional rights,” and that the Due Process Clause therefore “required the court to hold a hearing to evaluate and determine [respondent’s] competency . . . before it accepted his decision to discharge counsel and change his pleas.” * * *

II

A criminal defendant may not be tried unless he is competent. *Pate v. Robinson*, 383 U.S. 375, 378, (1966), and he may not waive his right to counsel or plead guilty unless he does so “competently and intelligently,” *Johnson v. Zerbst*, 304 U.S. 458, 468, (1938) * * * In *Dusky v. United States*, 362 U.S. 402 (1960), we held that the standard for competence to stand trial is whether the defendant has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and has “a rational as well as factual understanding of the proceedings against him.” * * * While we have described the standard for competence to

2. During the course of this lengthy exchange, the trial court asked respondent whether he was under the influence of drugs or alcohol, and respondent answered as follows: “Just what they give me in, you know, medications.” The court made no further inquiry. The “medications” to which respondent referred had been prescribed to control his seizures, which were a by-product of his cocaine use.

stand trial, however, we have never expressly articulated a standard for competence to plead guilty or to waive the right to the assistance of counsel.

* * *

A

* * * [W]e reject the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard.

We begin with the guilty plea. A defendant who stands trial is likely to be presented with choices that entail relinquishment of the same rights that are relinquished by a defendant who pleads guilty: He will ordinarily have to decide whether to waive his “privilege against compulsory self-incrimination,” by taking the witness stand; if the option is available, he may have to decide whether to waive his “right to trial by jury,” and, in consultation with counsel, he may have to decide whether to waive his “right to confront [his] accusers,” by declining to cross-examine witnesses for the prosecution. A defendant who pleads not guilty, moreover, faces still other strategic choices: In consultation with his attorney, he may be called upon to decide, among other things, whether (and how) to put on a defense and whether to raise one or more affirmative defenses. In sum, all criminal defendants – not merely those who plead guilty – may be required to make important decisions once criminal proceedings have been initiated. And while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial. (The decision to plead guilty is also made over a shorter period of time, without the distraction and burden of a trial.) This being so, we can conceive of no basis for demanding a higher level of competence for those defendants who choose to plead guilty. If the *Dusky* standard is adequate for defendants who plead not guilty, it is necessarily adequate for those who plead guilty.

Nor do we think that a defendant who waives

his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights. * * *

B

* * * 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. * * * In this sense there is a “heightened” standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of competence.

* * *

III

* * * While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements. * * *

Justice KENNEDY, with whom Justice SCALIA joins, concurring in part and concurring in the judgment.

* * *

The Court compares the types of decisions made by one who goes to trial with the decisions required to plead guilty and waive the right to counsel. This comparison seems to suggest that there may have been a heightened standard of competency required by the Due Process Clause if the decisions were not equivalent. I have serious doubts about that proposition. In discussing the standard for a criminal defendant’s competency to make decisions affecting his case, we should not confuse the content of the standard with the occasions for its application.

* * *

A single standard of competency to be applied throughout criminal proceedings does not offend any “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” * * *

I would avoid the difficult comparisons engaged in by the Court. In my view, due process does not preclude Nevada’s use of a single competency standard for all aspects of the criminal proceeding. * * *

Justice BLACKMUN, with whom Justice STEVENS joins, dissenting.

* * * I believe the majority’s analysis is contrary to both common sense and longstanding case law. Therefore, I dissent.

I

As a preliminary matter, the circumstances under which respondent Richard Allan Moran waived his right to an attorney and pleaded guilty to capital murder bear elaboration. * * *

* * *

The two psychiatrists who examined him * * * focused solely upon his capacity to stand trial with the assistance of counsel. * * * Dr. Jurasky, however, did express some reservations, observing: “Psychologically, and perhaps legally speaking, this man, because he is expressing and feeling considerable remorse and guilt, may be inclined to exert less effort towards his own defense.” * * * Dr. William D. O’Gorman also characterized Moran as “very depressed,” * * * [b]ut Dr. O’Gorman ultimately concluded that Moran “is knowledgeable of the charges being made against him” and “can assist his attorney, in his own defense, if he so desires.”

In November 1984, just three months after his suicide attempt, Moran appeared in court seeking to discharge his public defender, waive his right to counsel, and plead guilty to all three charges of capital murder. When asked to explain the dramatic change in his chosen course of action, Moran responded that he wished to represent

himself because he opposed all efforts to mount a defense. His purpose, specifically, was to prevent the presentation of any mitigating evidence on his behalf at the sentencing phase of the proceeding. The trial judge inquired whether Moran was “presently under the influence of any drug or alcohol,” and Moran replied: “Just what they give me in, you know, medications.” Despite Moran’s affirmative answer, the trial judge failed to question him further regarding the type, dosage, or effect of the “medications” to which he referred. Had the trial judge done so, he would have discovered that Moran was being administered simultaneously four different prescription drugs—phenobarbital, dilantin, inderal, and vistaril. * * *

[T]he trial judge accepted Moran’s waiver of counsel and guilty pleas after posing a series of routine questions regarding his understanding of his legal rights and the offenses, to which Moran gave largely monosyllabic answers. * * * One part of this exchange, however, highlights the mechanical character of Moran’s answers to the questions. When the trial judge asked him whether he killed his ex-wife “deliberately, with premeditation and malice aforethought,” Moran unexpectedly responded: “No. I didn’t do it – I mean, I wasn’t looking to kill her, but she ended up dead.” Instead of probing further, the trial judge simply repeated the question, inquiring again whether Moran had acted deliberately. Once again, Moran replied: “I don’t know. I mean, I don’t know what you mean by deliberately. I mean, I pulled the trigger on purpose, but I didn’t plan on doing it; you know what I mean?” Ignoring the ambiguity of Moran’s responses, the trial judge reframed the question to elicit an

12. Moran’s medical records, read in conjunction with the Physician’s Desk Reference (46 ed. 1992), corroborate his testimony concerning the medications he received and their impact upon him. The records show that Moran was administered dilantin, an anti-epileptic medication that may cause confusion; inderal, a beta-blocker anti-arrhythmic that may cause light-headedness, mental depression, hallucinations, disorientation, and short-term memory loss; and vistaril, a depressant that may cause drowsiness, tremors, and convulsions.

affirmative answer, stating: “Well, I’ve previously explained to you what is meant by deliberation and premeditation. Deliberate means that you arrived at or determined as a result of careful thought and weighing the consideration for and against the proposed action. Did you do that?” This time, Moran responded: “Yes.”

It was only after prodding Moran through the plea colloquy in this manner that the trial judge concluded that he was competent to stand trial and that he voluntarily and intelligently had waived his right to counsel. * * *

II

* * *

* * * [T]he standard for competence to stand trial is specifically designed to measure a defendant’s ability to “consult with counsel” and to “assist in preparing his defense.” A finding that a defendant is competent to stand trial establishes only that he is capable of aiding his attorney in making the critical decisions required at trial or in plea negotiations. The reliability or even relevance of such a finding vanishes when its basic premise – that counsel will be present – ceases to exist. The question is no longer whether the defendant can proceed with an attorney, but whether he can proceed alone and uncounselled. * * *

* * * [T]he majority cannot isolate the term “competent” and apply it in a vacuum, divorced from its specific context. A person who is “competent” to play basketball is not thereby “competent” to play the violin. * * *

* * *

* * * It is obvious that a defendant who waives counsel must represent himself. * * * And a defendant who is utterly incapable of conducting his own defense cannot be considered “competent” to make such a decision, any more than a person who chooses to leap out of a window in the belief that he can fly can be considered “competent” to make such a choice.

* * * The psychiatrists' reports supplied one explanation for Moran's self-destructive behavior: his deep depression. And Moran's own testimony suggested another: the fact that he was being administered simultaneously four different prescription medications. * * *

* * * I cannot condone the decision to accept, without further inquiry, the self-destructive "choice" of a person who was so deeply medicated and who might well have been severely mentally ill. I dissent.

Richard Allen Moran executed by lethal injection by Nevada on March 30, 1996.

INDIANA, Petitioner,
v.
Ahmad EDWARDS.

Supreme Court of the United States
554 U.S. 164 (2008).

Breyer, J., delivered the opinion of the Court, in which Roberts, C. J., and Stevens, Kennedy, Souter, Ginsburg, and Alito, JJ., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined.

Justice BREYER delivered the opinion of the Court.

This case focuses upon a criminal defendant whom a state court found mentally competent to stand trial if represented by counsel but not mentally competent to conduct that trial himself. We must decide whether in these circumstances the Constitution forbids a State from insisting that the defendant proceed to trial with counsel, the State thereby denying the defendant the right to represent himself. We conclude that the Constitution does not forbid a State so to insist.

I

In July 1999 Ahmad Edwards, the respondent, tried to steal a pair of shoes from an Indiana department store. After he was discovered, he drew a gun, fired at a store security officer, and

wounded a bystander. He was caught and then charged with attempted murder, battery with a deadly weapon, criminal recklessness, and theft. His mental condition subsequently became the subject of three competency proceedings and two self-representation requests, mostly before the same trial judge:

1. *First Competency Hearing: August 2000.* * * *
* After hearing psychiatrist and neuropsychologist witnesses (in February 2000 and again in August 2000), the court found Edwards incompetent to stand trial, and committed him to Logansport State Hospital for evaluation and treatment.

2. *Second Competency Hearing: March 2002.*
Seven months after his commitment, doctors found that Edwards' condition had improved to the point where he could stand trial. Several months later, however, but still before trial, Edwards' counsel asked for another psychiatric evaluation. In March 2002, the judge held a competency hearing, considered additional psychiatric evidence, and (in April) found that Edwards, while "suffer[ing] from mental illness," was "competent to assist his attorneys in his defense and stand trial for the charged crimes."

3. *Third Competency Hearing: April 2003.* * * *
* [I]n April 2003, the court held yet another competency hearing. Edwards' counsel presented further psychiatric and neuropsychological evidence showing that Edwards was suffering from serious thinking difficulties and delusions. A testifying psychiatrist reported that Edwards could understand the charges against him, but he was "unable to cooperate with his attorney in his defense because of his schizophrenic illness"; "[h]is delusions and his marked difficulties in thinking make it impossible for him to cooperate with his attorney." In November 2003, the court concluded that Edwards was not then competent to stand trial and ordered his recommitment to the state hospital.

4. *First Self-Representation Request and First Trial: June 2005.* About eight months after his commitment, the hospital reported that Edwards'

condition had again improved to the point that he had again become competent to stand trial. And almost one year after that Edwards' trial began. Just before trial, Edwards asked to represent himself. He also asked for a continuance, which, he said, he needed in order to proceed *pro se*. The court refused the continuance. Edwards then proceeded to trial represented by counsel. The jury convicted him of criminal recklessness and theft but failed to reach a verdict on the charges of attempted murder and battery.

5. *Second Self-Representation Request and Second Trial: December 2005*. The State decided to retry Edwards on the attempted murder and battery charges. Just before the retrial, Edwards again asked the court to permit him to represent himself. Referring to the lengthy record of psychiatric reports, the trial court noted that Edwards still suffered from schizophrenia and concluded that “[w]ith these findings, he’s competent to stand trial but I’m not going to find he’s competent to defend himself.” The court denied Edwards’ self-representation request. Edwards was represented by appointed counsel at his retrial. The jury convicted Edwards on both of the remaining counts.

*** [T]he Indiana Supreme Court [believed] *
* * that this Court’s precedents, namely, *Faretta*
[v. *California*] and *Godinez v. Moran* required the
State to allow Edwards to represent himself. ***

II

* * * *Dusky* [v. *United States*] defines the competency standard as including both (1) “whether” the defendant has “a rational as well as factual understanding of the proceedings against him” and (2) whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.” * * *

The Court’s foundational “self-representation” case, *Faretta*, held that the Sixth and Fourteenth Amendments include a “constitutional right to proceed without counsel when” a criminal defendant “voluntarily and intelligently elects to

do so.” The Court implied that right from: (1) a “nearly universal conviction,” made manifest in state law, that “forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so,” (2) Sixth Amendment language granting rights to the “accused;” (3) Sixth Amendment structure indicating that the rights it sets forth, related to the “fair administration of American justice,” are “persona[.]” to the accused, (4) the absence of historical examples of *forced* representation, and (5) ““respect for the individual[.]” * * *

Faretta does not answer the question before us both because it did not consider the problem of mental competency and because *Faretta* itself and later cases have made clear that the right of self-representation is not absolute. * * *

* * * *Godinez*[.] presents a question closer to that at issue here. The case focused upon a borderline-competent criminal defendant who had asked a state trial court to permit him to represent himself and to change his pleas from not guilty to guilty. The state trial court had found that the defendant met *Dusky*’s mental competence standard, that he “knowingly and intelligently” waived his right to assistance of counsel, and that he “freely and voluntarily” chose to plead guilty. And the state trial court had consequently granted the defendant’s self-representation and change-of-plea requests. * * *

* * *

We concede that *Godinez* bears certain similarities with the present case. * * *

We nonetheless conclude that *Godinez* does not answer the question before us now. * * * In *Godinez*, the higher standard sought to measure the defendant’s ability to proceed on his own to enter a guilty plea; here the higher standard seeks to measure the defendant’s ability to conduct trial proceedings. * * *

For another thing, *Godinez* involved a State that sought to *permit* a gray-area defendant to

represent himself. *Godinez's* constitutional holding is that a State may do so. But that holding simply does not tell a State whether it may *deny* a gray-area defendant the right to represent himself – the matter at issue here. * * * The upshot is that, in our view, the question before us is an open one.

III

* * * We ask whether the Constitution permits a State to limit that defendant's self-representation right by insisting upon representation by counsel at trial – on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented.

Several considerations taken together lead us to conclude that the answer to this question is yes. First, the Court's precedent, while not answering the question, points slightly in the direction of our affirmative answer. * * * [T]he Court's "mental competency" cases set forth a standard that focuses directly upon a defendant's "present ability to consult with his lawyer," a "capacity ... to consult with counsel," and an ability "to assist [counsel] in preparing his defense[.]" These standards assume representation by counsel and emphasize the importance of counsel. They thus suggest (though do not hold) that an instance in which a defendant who would choose to forgo counsel at trial presents a very different set of circumstances, which in our view, calls for a different standard.

* * *

Second, the nature of the problem before us cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself. Mental illness itself 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. * * * In certain instances an individual may well be able to satisfy *Dusky's* mental competence standard, for he will be able to work with counsel

at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel. * * *

The American Psychiatric Association (APA) tells us (without dispute) in its *amicus* brief filed in support of neither party that "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant." Motions and other documents that the defendant prepared in this case (one of which we include in the Appendix, *infra*) suggest to a layperson the common sense of this general conclusion.

Third, in our view, a right of self-representation at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial. * * *

Further, proceedings must not only be fair, they must "appear fair to all who observe them." An *amicus* brief reports one psychiatrist's reaction to having observed a patient (a patient who had satisfied *Dusky*) try to conduct his own defense: "[H]ow in the world can our legal system allow an insane man to defend himself?" * * * [T]he trial judge, particularly one such as the trial judge in this case, who presided over one of Edwards' competency hearings and his two trials, will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant.

* * *

APPENDIX

Excerpt from respondent's filing entitled "Defendant's Version of the Instant Offense," which he had attached to his presentence investigation report:

"The appointed motion of permissive intervention filed therein the court superior on, 6-26-01 caused a stay of action and epon it's expiration or thereafter three years the plan to establish a youth program to and for the coordination of aspects of law enforcement to prevent and reduce crime among young people in Indiana became a diplomatic act as under the Safe Streets Act of 1967, "A omnibuc considerate agent: I membered clients within the public and others that at/production of the courts actions showcased causes. The costs of the stay (Trial Rule 60) has a derivative property that is: my knowledged events as not unexpended to contract the membered clients is the commission of finding a facilitie for this plan or project to become organization of administrative recommendations conditioned by governors.'" 866 N.E.2d, at 258, n. 4 (alterations omitted).

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

* * * In my view the Constitution does not permit a State to substitute its own perception of fairness for the defendant's right to make his own case before the jury – a specific right long understood as essential to a fair trial.

I

* * *

Edwards seems to have been treated with antipsychotic medication for the first time in 2004. He was found competent to stand trial the same year. * * *

Over the course of what became two separate criminal trials, Edwards sought to act as his own lawyer. * * *

Edwards made arguments in the courtroom that were more coherent than his written pleadings. In seeking to represent himself at his first trial, Edwards complained in detail that the attorney representing him had not spent adequate time preparing and was not sharing legal materials for use in his defense. * * *

At his second trial, Edwards again asked the judge to be allowed to proceed *pro se*. He explained that he and his attorney disagreed about which defense to present to the attempted murder charge. Edwards' counsel favored lack of intent to kill; Edwards, self-defense. As the defendant put it: "My objection is me and my attorney actually had discussed a defense, I think prosecution had mentioned that, and we are in disagreement with it. He has a defense and I have a defense that I would like to represent or present to the Judge."

The court again rejected Edwards' request to proceed *pro se*[.] * * * Edwards' court-appointed attorney pursued the defense the attorney judged best – lack of intent, not self-defense – and Edwards was convicted of both attempted murder and battery. * * *

II

A

The Constitution guarantees to every criminal defendant the "right to proceed *without* counsel when he voluntarily and intelligently elects to do so." The right reflects "a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." * * * The right of self-representation could also be seen as a part of the traditional meaning of the Due Process Clause. * * *

* * * Edwards was warned extensively of the risks of proceeding *pro se*. * * *

When a defendant appreciates the risks of forgoing counsel and chooses to do so voluntarily, the Constitution protects his ability to present his own defense even when that harms his case. * * * What the Constitution requires is not that a State's case be subject to the most rigorous adversarial testing possible – after all, it permits a defendant to eliminate *all* adversarial testing by pleading guilty. What the Constitution requires is that a defendant be given the right to challenge the State's case against him using the arguments *he* sees fit.

* * *

B

* * *

* * * While there is little doubt that preserving individual “dignity” (to which the Court refers), is paramount among those purposes, there is equally little doubt that the loss of “dignity” the right is designed to prevent is *not* the defendant's making a fool of himself by presenting an amateurish or even incoherent defense. Rather, the dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State – the dignity of individual choice. * * *

* * *

* * * To my knowledge we have never denied a defendant a right simply on the ground that it would make his trial appear less “fair” to outside observers, and I would not inaugurate that principle here. * * * When Edwards stood to say that “I have a defense that I would like to represent or present to the Judge,” it seems to me the epitome of both actual and apparent unfairness for the judge to say, I have heard “your desire to proceed by yourself and I've denied your request, so your attorney will speak for you from now on.”

III

* * *

* * * Edwards wished to take a self-defense case to the jury. His counsel preferred a defense

that focused on lack of intent. Having been denied the right to conduct his own defense, Edwards was convicted without having had the opportunity to present to the jury the grounds he believed supported his innocence. * * * [T]o hold that a defendant may be deprived of the right to make legal arguments for acquittal simply because a state-selected agent has made different arguments on his behalf is, as Justice Frankfurter wrote to “imprison a man in his privileges and call it the Constitution.” * * * At a time when all society is trying to mainstream the mentally impaired, the Court permits them to be deprived of a basic constitutional right – for their own good.

* * *

* * * [T]rial judges will have every incentive to make their lives easier – to avoid the painful necessity of deciphering occasional pleadings of the sort contained in the Appendix to today's opinion – by appointing knowledgeable and literate counsel.

* * *

Other Issues Regarding Competency for Trial

Burden of proof

The Supreme Court has held that a state may place the burden of proof upon the defendant to prove by a preponderance of the evidence that he or she is incompetent to stand trial. *Medina v. California*, 505 U.S. 437 (1992). However, a state may not require the defendant to prove competence by clear and convincing evidence because the trial of a person who more likely than not is incompetent (that is, one who has shown by a preponderance of the evidence – but not by clear and convincing evidence – that he is incompetent) would violate due process. *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

Commitment of an incompetent defendant to a mental institution

In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Supreme Court, based on equal protection and due

process principles, held that a person found incompetent to stand trial and committed to a mental institution solely on that basis cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain competency in the foreseeable future.

If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal. In light of differing state facilities and procedures and a lack of evidence in this record, the Court held it was not appropriate for it to prescribe arbitrary time limits. It noted, however, that in the case before it, Jackson had been confined for three and one-half years on a record that sufficiently establishes the lack of a substantial probability that he will ever be able to participate fully in a trial.

Forced administration of anti-psychotic drugs - *Riggins v. Nevada*

The Supreme Court reversed the case of David Riggins, holding that the Nevada courts failed to make sufficient findings to support forced administration of antipsychotic drug upon him during his trial. *Riggins v. Nevada*, 504 U.S. 127 (1992). Riggins had been convicted of murder and robbery and sentenced to death.

After being taken into custody, Riggins told a psychiatrist that he heard voices and was having trouble sleeping. Riggins informed the doctor that he had been successfully treated in the past with Mellaril, the trade name for thioridazine, an anti-psychotic drug. The doctor prescribed Mellaril at a level of 100 milligrams per day. Because Riggins continued to complain of voices and sleep problems in the following months, the Mellaril prescription was eventually increased to 800 milligrams per day. Riggins also received a prescription for Dilantin, an antiepileptic drug.

Antipsychotic drugs such as Mellaril can cause one to be restless and unable to sit still or have a sedative effect that in severe cases may affect thought processes. Riggins was on a very high dose of Mellaril. One doctor testified at his trial, “you can tranquilize an elephant with 800 milligrams.” The doctor described the side effects of large doses of Mellaril: “Drowsiness, constipation, perhaps lack of alertness, changes in blood pressure. . . . Depression of the psychomotor functions. If you take a lot of it you become stoned for all practical purposes and can barely function.”

The trial court denied Riggins’ motion to terminate medication and Riggins continued to receive 800 milligrams of Mellaril each day through the completion of his trial.

Before trial, three psychiatrists performed competency examinations on Riggins at a time when he was taking 450 milligrams of Mellaril a day. Two concluded that he was competent and one found him incompetent. After a hearing, the trial court found him competent.

Before trial, the defense moved for an order suspending administration of Mellaril and Dilantin until the end of Riggins’ trial. The defense asserted, pursuant to the Fourteenth Amendment and the Nevada Constitution, that continued administration of the drugs infringed upon his freedom and that the drugs’ effect on his demeanor and mental state during trial would deny him due process. Riggins also asserted that, because he would offer an insanity defense at trial, he had a right to show jurors his “true mental state.” In response, the State argued that the court had authority to compel Riggins to take medication necessary to ensure his competence.

At a hearing on the motion, two psychiatrists testified that Riggins would not be rendered incompetent if taken off the drugs. The doctor who had previously concluded that Riggins was incompetent for trial opined that if taken off the drugs Riggins “would most likely regress to a manifest psychosis and become extremely difficult to manage.” A fourth doctor was unable

to predict how Riggins might behave if taken off antipsychotic medication, but said “the dosage administered to Riggins was within the toxic range” and questioned the need to give Riggins the high dose he was receiving.

In an opinion by Justice O’Connor, the Supreme Court, held that the forcible medication of a person on trial involved a “substantial interference with that person’s liberty” protected by the due process clause of the Fourteenth Amendment. The Court had recognized such a liberty interest in *Washington v. Harper*, 494 U.S. 210 (1990), a case involving the forcible medication to an inmate at prison. In *Harper*, the Court held that forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification – the inmate is a danger to himself or others – and a determination of medical appropriateness. In *Riggins*, the Court concluded that the Fourteenth Amendment affords at least as much protection a person on trial and, therefore, the state is obligated to establish the need for the drug and the medical appropriateness of the drug.

Justice O’Connor’s opinion did not reach the question of whether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial, and refused to address an Eighth Amendment claim because it had not been presented to the Nevada Supreme Court or in the petition for certiorari.

Justice Kennedy, concurring, expressed the view that “serious due process concerns are implicated” when the State has the power to manipulate the appearance and capabilities of the defendant during trial.

Based on the documented probability of side effects, Justice Kennedy found the involuntary administration of the drugs “unacceptable absent a showing by the State that the side effects will not alter the defendant’s reactions or diminish his capacity to assist counsel.” He observed:

* * * As any trial attorney will attest, serious prejudice could result if medication inhibits the

defendant’s capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.

In addition, Justice Kennedy wrote:

Concerns about medication extend also to the issue of cooperation with counsel. We have held that a defendant’s right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. * * * The defendant must be able to provide needed information to his lawyer, and to participate in the making of decisions on his own behalf. The side effects of antipsychotic drugs can hamper the attorney-client relation, preventing effective communication and rendering the defendant less able or willing to take part in his defense. The State interferes with this relation when it administers a drug to dull cognition.

It is well established that the defendant has the right to testify on his own behalf, a right we have found essential to our adversary system * * * We have found the right implicit as well in the Compulsory Process Clause of the Sixth Amendment. * * *

If the State cannot render the defendant competent without involuntary medication, then it must resort to civil commitment, if appropriate, unless the defendant becomes competent through other means. If the defendant cannot be tried without his behavior and demeanor

being affected in this substantial way by involuntary treatment, in my view the Constitution requires that society bear this cost in order to preserve the integrity of the trial process. * * *

Justice Thomas wrote a dissent, joined by Justice Scalia, expressing the view that because Riggins received a fundamentally fair criminal trial there was no constitutional violation.

In *Sell v. United States*, 539 U.S. 166 (2003), the Court reviewed a pretrial order requiring the forced administration of antipsychotic on the defendant, a dentist, who had a long history of mental illness. Dr. Sell was found incompetent for trial and committed to a mental health facility for treatment. Doctors there recommended antipsychotic drugs, which Sell refused to take, and ultimately the Court ordered forced administration of the drugs. The Supreme Court held that Dr. Sell could immediately appeal the order before trial under “collateral order” doctrine, *id.* at 175-77, and reversed. Justice Breyer, with the concurrence of five other members of the Court, wrote:

The Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

539 U.S. at 179. The opinion emphasized that lower courts must consider the facts of each individual case in determining whether forced medication is constitutional, noting several factors that might diminish a government’s interest in prosecuting a case. For example, if a defendant’s refusal to voluntarily take the drugs would result in a lengthy confinement in a mental health facility, such confinement reduces the risk that a person who has committed a serious crime would

go free.

Justices Scalia, O’Connor and Thomas dissented on the basis that the Court lacked jurisdiction to hear the pretrial order and the issue should be reviewed after trial. *Id.* at 186-193.

Sanity and Mitigation

James Eugene BIGBY, Appellant,
v.
The STATE of Texas, Appellee.

Texas Court of Criminal Appeals
892 S.W.2d 864 (1994).

Before the Court *en banc*, CAMPBELL, J., not participating.

MEYERS, Judge.

Appellant was found guilty of capital murder on March 12, 1991, for the murder of a father and his infant son. The jury affirmatively answered the submitted special issues, and the trial court sentenced appellant to death. Appeal to this court is automatic. We will affirm.

I. SUFFICIENCY OF THE INSANITY DEFENSE

In the first point of error, appellant contends the jury’s rejection of his insanity defense at trial was so against the great weight and preponderance of the evidence as to be manifestly unjust. At trial a criminal defendant has the burden to prove his insanity by a preponderance of the evidence and, in this case, appellant mounted a considerable insanity defense. * * *

* * *

B. FACTUAL REVIEW

In conducting a factual review of an affirmative defense, the proper standard for review is, whether after considering all the evidence relevant to appellant’s affirmative defense of insanity, “the judgment is so against the great weight and preponderance of the

evidence so as to be manifestly unjust.” At trial appellant had both the burden of production of evidence and the burden of persuasion for his affirmative defense of insanity. We begin with a brief narrative of the facts of the case.

Appellant killed his friend, Mike Trekell, and his friend’s sixteen month-old son, Jayson, sometime after 6:00 p.m. on December 23, 1987. On December 26th appellant was apprehended at a motel in Tarrant County. * * * Detective Ansley contacted appellant through the door of appellant’s room. * * * Appellant said to the detective, “I know I am guilty and so do you.” * * * After further negotiations, appellant surrendered and was arrested. Subsequent to his arrest, appellant confessed:

for the past 14 months I have felt that Mike [Trekell] has been conspiring against me and trying to discredit me concerning a lawsuit I have against Frito Lay. I had been thinking about getting back at him for a while and it has been on my mind when I – and it was on my mind when I came to his house that night. While Mike was fixing the steaks I went over by him, and the next thing I knew I shot Mike with a Ruger .357 Magnum, with 158 grain silver tips. When I shot Mike he was sitting at the kitchen table. He never saw the gun and didn’t know I was going to shoot him.

I don’t know why, but after I shot Mike I took some cellophane from the refrigerator and went into Jayson’s room. I wrapped the cellophane around Jayson’s head and suffocated him. I then filled the sink up with water and placed Jayson face down into the water. I just left him there.

I then left the trailer and got into my car and drove around for a while. I threw the cellophane out but I am not sure where. After I got to the motel room I couldn’t sleep. I took a lot of medication trying to force sleep on myself. I was disturbed and kept thinking about what I had done to the baby. It bothered me a lot. I regret killing the baby but not the other. I thought the police would come in the apartment

and shoot me.

There is no disagreement by the parties at trial that appellant was suffering from a delusion concerning his former employer, Frito Lay, and its worker’s compensation insurance company. The nature and effects of this delusion and whether appellant knew his conduct on Christmas was wrong were contested issues in the trial.

In 1985, appellant began working for the Frito Lay Company. He assisted in the maintenance of their fleet of delivery trucks. After a year on the job appellant injured his back. Because of the incapacitating effects of the injury, he filed a worker’s compensation claim with Frito Lay. This claim eventually erupted into a lawsuit between the parties.

Appellant became convinced that Frito Lay and its worker’s compensation insurance company were conspiring against him to prevent any collection on his claim. Appellant believed that he had gathered enough data on the insurance company to have the company suspended from operating in Texas, and as a result, the insurance company was prepared to “take him out.” The number of “conspirators” grew slowly eventually including some close friends and family members. The defensive theory of insanity was that appellant killed Trekell to protect himself from these conspirators.

As time progressed after his accident so did appellant’s paranoia. Appellant informed his father, a former postal worker, that the conspirators were trying to kill him by infusing through the air conditioning vent of his apartment a poisonous “green gas.” He also told his father that his apartment was “bugged,” or electronically monitored. His father testified that the alleged recording device was actually a connecting block for a modular telephone. Despite all the evidence of paranoia, appellant’s father believed appellant knew the difference between right and wrong.

Both of appellant’s civil worker’s compensation attorneys testified at trial. His first attorney withdrew. * * *

Appellant's second attorney had also been informed by appellant of his beliefs that certain Frito-Lay people were following him, trying to poison him through the emission of a poisonous green gas, and recording his conversations. During the attorney's representation of appellant, appellant rammed his car into the automobile of one of the insurance investigators who had been following him. Criminal mischief charges were filed against appellant on this basis, and he plead guilty. * * *

There was considerable psychiatric evidence introduced at trial. Five different psychiatric professionals testified during the trial concerning appellant's past and present mental condition. Appellant's psychiatric treatment began in 1986 when he first was referred to a psychiatrist, Dr. Eudaly, Jr., by his medical doctor, Dr. Saifee. In September of 1986, appellant was admitted for severe depression to the psychiatric floor of Saint Joseph Hospital. This was the first of appellant's three separate hospitalizations for psychiatric care prior to the commission of the crime at issue today.

At St. Joseph appellant was diagnosed as having a schizoaffective disorder.⁶ This diagnosis was ruled out after appellant's second hospitalization. Appellant was released in October, and Dr. Eudaly continued to meet with appellant every three to four weeks. Appellant also began seeing Dr. Koechel once a week.

Appellant was admitted in July of 1987 to Oak Bend Hospital. He remained there until mid-October of 1987. * * *

In December of 1987, appellant was re-admitted to Saint Joseph where he undertook a series of electro-shock therapy. * * * Some time

6. Dr. Eudaly testified that "schizoaffective disorder" is a "term that is used to designate a condition which has some mixed features. Primarily it's in the category of emotional disturbance such as depression, but it's also used to indicate that there probably is some element of thinking disturbance associated with their present condition."

after appellant's third and final electro-shock treatment, appellant left the hospital and returned to his home. * * *

Later that month appellant killed his friend Trezell and Trezell's infant son. Dr. Eudaly testified that appellant did not "suffer from a severe mental disease or defect such that he could not tell or did not know his conduct was wrong."

Appellant's three other expert witnesses, doctors Griffith, Grigson, and Finn, all testified to the contrary. Each said that appellant was suffering from a severe disease or defect such that he could not or did not know his conduct was wrong. The State also had an expert, Dr. Coons, who testified that appellant was legally sane. Much of the "battle of the experts" involved disputes concerning the prescription of certain drugs and whether, as Dr. Coons testified, appellant's hallucinations were in fact the result of amphetamine abuse. Appellant had a past history of amphetamine abuse, although the extent of this abuse was uncertain.

While several of appellant's experts testified that appellant could not or did not know his conduct was wrong, several did testify that appellant knew his conduct was illegal. This is also supported by appellant's first statements to Detective Ansley at his apprehension. Appellant stated, "I know I am guilty and so do you." This evinces an understanding by appellant that he knew his conduct was illegal, whether or not he believed it to be or would have characterized it as "wrong."

C. LAW OF INSANITY

Section 8.01 of the Penal Code provides for the affirmative defense of insanity:

(a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.

The issue of insanity is not strictly medical; it also invokes both legal and ethical considerations.

In deciding the ultimate issue of sanity, only the jury can join the non-medical components that must be considered in deciding the ultimate issue. Otherwise the issue of sanity would be decided in the hospitals and not the courtrooms. * * *

* * *

In the instant cause both the State and the defense produced medical experts who testified concerning appellant's sanity at the time he committed the crime. Appellant's father testified that he believed appellant knew the difference between right and wrong when he committed the multiple murders. This evidence of sanity is also buttressed by appellant's own statements upon his arrest at the motel. Appellant informed the officer that he knew he was guilty. There is no question that appellant's evidence of his delusions was extensive. However, this does not resolve the question of appellant's "legal" sanity. The jury's determination of the fact issue of sanity does not appear to be resolved or undisputed to one end of the spectrum, nor does that determination appear to be beyond the realm of discretion afforded to the jury.

Several expert witnesses testified appellant knew his conduct was illegal, however, these experts contended that appellant did not know the act was "morally" wrong. In other words, appellant believed that regardless of society's views about this illegal act and his understanding it was illegal, under his "moral" code it was permissible. This focus upon appellant's morality is misplaced. The question of insanity should focus on whether a defendant understood the nature and quality of his action and whether it was an act he ought to do. By accepting and acknowledging his action was "illegal" by societal standards, he understood that others believed his conduct was "wrong."

Therefore, upon our review we do not believe the evidence preponderates to such an extent in favor of appellant that the jury's implicit finding was so against the great weight and preponderance of the evidence that it was manifestly unjust. * * *

* * *

James Eugene BIGBY,
Petitioner-Appellant,
v.
Doug DRETKE, Director, Texas Department
of Criminal Justice, Institutional Division,
Respondent, Appellee.

United States Court of Appeals
for the Fifth Circuit.
402 F.3d 551 (2005).

Before HIGGINBOTHAM, DeMOSS and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

Petitioner-Appellant, James Eugene Bigby ("Bigby"), appeals the district court's denial of his Petition for Writ of Habeas Corpus * * *. Prominent among [the] claims raised by Bigby is his * * * claim that punishment phase jury instructions prevented the jury from acting upon mitigating evidence submitted in his behalf. * * *

* * *

* * * Bigby further argues that the district court's jury instruction gave the jurors an option of nullifying mitigating circumstances and thus impinged his right to have an individualized assessment of the appropriateness of the death penalty in his case. According to Bigby, this violated *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*). * * * Bigby * * * claim[s] that there is an "element of capriciousness in making the jurors' power to avoid the death penalty dependant on their willingness to accept [an] invitation" to render a false verdict.

A State's capital punishment scheme must do two things to meet the requirements of the Eighth Amendment. First, it must "channel the discretion of judges and juries to ensure that death sentences are not meted out wantonly or freakishly." Second, it must confer sufficient discretion on the sentencing body to consider the character and record of the individual offender. Thus, the

relevant mitigating evidence cannot be placed beyond the effective reach of the jury. “To grant relief on a *Penry* claim, we must determine (1) whether the mitigating evidence has met the ‘low threshold for relevance’ “ *Tennard v. Dretke*, 542 U.S. 274, 285 (2004), and, if so, (2) that the evidence was beyond the effective scope of the jury.

* * *

1) Relevant Mitigating Evidence

The Supreme Court recently held that “a State cannot preclude the sentencer from considering ‘any relevant mitigating evidence’ that the defendant proffers in support of a sentence less than death . . . [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.” The Court defined relevant mitigating evidence as “evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.” Furthermore, the Court added that “a State cannot bar ‘the consideration of . . . evidence if the sentencer could reasonably find it warrants a sentence less than death.’” In view of the Supreme Court’s clarification of the relevant evidence standard applicable in death penalty cases, we now consider the evidence of record in this case.

During Bigby’s trial, Dr. James Grigson (“Dr. Grigson”), psychiatrist, was called to testify on Bigby’s behalf. Dr. Grigson stated that in his opinion, Bigby suffers from chronic paranoid schizophrenia. He testified that paranoid schizophrenia is one of the more serious and severe forms of mental illnesses. When asked to explain to the jury the effects of this disease, Dr. Grigson stated that usually individuals suffering from this mental condition “feel [] that people are plotting against them or doing things to hurt them.” He continued to clarify that schizophrenia means “that the individual is suffering from a psychosis where there is gross impairment in terms of interpersonal relationships . . . and reality testing, meaning that they misperceive what is going on around them.” As a result, Dr. Grigson

stated that this paranoid disorder manifests itself in psychotic delusional beliefs.

Bigby’s trial counsel asked Dr. Grigson if Bigby had suffered from any delusions or psychotic beliefs. The physician responded in the affirmative. Specifically, he stated that at the time the murders occurred, Bigby suffered from delusions that Michael Trezell was involved in a conspiracy against him. In his opinion, Dr. Grigson testified that “at the time of the offense . . . Bigby was suffering from [this] serious severe mental illness and was not aware of the difference between right and wrong.” Dr. Grigson concluded that there is no other explanation for Bigby’s actions other than the fact that he suffers from a mental illness. At the sentencing phase, Dr. Grigson reiterated his belief that Bigby suffers from chronic paranoid schizophrenia. Further, evidence was adduced that Bigby’s condition could not be adequately controlled with medication.

[Dr. Grigson’s testimony, quoted in footnote 6 of the opinion:]

Q. As a result of [the psychiatric] examinations, were you able to form an opinion as to whether or not Mr. Bigby suffered from mental illness or mental defect.

A. Yes, sir, I was.

Q. And what is that?

A. Yes, in my opinion he is suffering from a mental illness, that being chronic paranoid schizophrenia.

* * *

Q. During the examinations that you did of Mr. Bigby, did you discuss with him the basis of the charges against him here, the killings of the infant, Jayson [Trell], and his father, Mike Trezell?

A. Yes, sir, I did.

Q. And as a result of your conversations regarding these murders with Mr. Bigby, were you able to form an opinion as regards to his sanity at the time of the offense.

A. Yes, sir, I was.

Q. And what is that opinion, Doctor?

A. It is my opinion at the time of the offense Mr. Bigby was suffering from a severe mental illness and was not aware of the difference between right and wrong. He could not appreciate it.

* * *

Q. Is it your opinion that . . . in connection with this schizophrenic illness that he suffers from, does Mr. Bigby have any type of delusions or delusional system that he suffers from.

A. Oh, yes, sir, he certainly does.

Q. What is the nature of that?

A. Well, this goes back to the injury that he had while working for Frito Lay. He was awarded – in his mind – \$26,000, which Frito Lay refused to pay. He felt that they were sending people out to follow him, look at him. He felt that they were plotting against him. And this slowly spread to include other people, his friends, that they, too, were plotting against him.

Q. Essentially, the individual Mike Trezell, the person that he killed in connection with this case, was that a person that he felt like was involved in the conspiracy?

A. Oh, yes, sir, it certainly was. He felt that he was a part of the conspiracy.

Q. Did that belief have anything to do with the actual murder itself?

A. Absolutely, without the delusional state,

without his schizophrenia, he would not have killed that person. There was no reason for it.

Q. What about the infant; did Mr. Bigby ever express any reason to you or any explanation as to why he killed the baby, Jason [Trekell]?

A. No. He was – the baby was there. Actually he had been fond of the baby prior to that time and this was part of an irrational act that occurred. It was very tragic, but still an irrational act on his part.

Q. Essentially there is no other explanation for it other than his illness.

A. Right, that's true.]

Applying the low threshold as articulated in *Tennard*, it is clear that the evidence submitted by Bigby constitutes relevant mitigating evidence. Paranoid Schizophrenia is a severe mental illness. Bigby has adduced evidence to show that he was suffering from this illness at the time of the murders. It is not required that he show that his condition be somehow linked to his conduct, only that it existed, and that it could lead a jury to find that a sentence other than death is warranted. Thus, we find that Bigby's paranoid schizophrenia is relevant mitigating evidence that he must be allowed to present to the jury.

2) Jury Instructions

* * * Bigby argues that the jury instructions impermissibly restricted the jury's consideration of mitigating circumstances in violation of the Supreme Court's decisions in *Penry I* and *Penry II*. In *Penry I*, the Court held * * * that none of [the three questions asked of juries under the Texas statute] were broad enough to allow the jury to consider and give effect to the mitigating evidence offered by Penry that he was mentally retarded and had been severely abused as a child.

* * *

On remand, Penry was again found guilty, and

the state court instructed the jury to answer the same three special issues given at his first trial. * * * In addition, the court also provided a “supplemental instruction” indicating that when the jury deliberated on the special issues, it was to consider mitigating issues, if any, presented by the evidence. The instruction provided as follows:

If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant’s personal culpability *at the time you answer the special issue*. If you determine, when giving effect to the mitigation evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration*, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the special issues*.

The verdict form contained only the text of the three special issues, however, and gave the jury the choice of only answering “yes” or “no.” The jury again answered all of the special issues “yes” and Penry was given the death penalty.

In *Penry II*, the Supreme Court ruled that this supplemental instruction provided “an inadequate vehicle for the jury to make a reasoned moral response to Penry’s mitigating evidence.” The Court stated that because Penry’s mitigating evidence did not fit within the scope of the special issues, answering the special issue questions in the manner prescribed on the verdict form was both logically and ethically impossible. * * * [I]f the jury desired to answer one or more of the special issues untruthfully to give credence to the mitigating evidence presented by Penry, they would have had to violate their oath to render a “true verdict.” * * *

* * *

The [Supreme] Court has found a supplemental instruction, like the one present in Bigby’s trial, to

be unconstitutional only where the special issue questions themselves are not broad enough to provide a vehicle for the jury to give effect to the defendant’s mitigation evidence. When the jury is able to consider and give effect to the mitigation evidence in imposing sentence, the special issue questions are constitutionally adequate. Thus, in considering a *Penry II* claim, the court must ask whether the evidence is beyond the effective reach of the jury.

* * * Although Bigby’s history of mental illness was relevant to whether he acted deliberately, it also spoke to his moral culpability. Importantly, Bigby’s evidence indicated that his schizophrenia was chronic and severe, caused him to suffer delusions with respect to the actions and motivations of the people around him, could not be adequately treated, and significantly impacted his interpersonal relationship abilities. Inquiry into whether Bigby acted deliberately fails to fully account for the potential impact such a debilitating condition may have upon the jury’s perception of Bigby’s moral responsibility for his crimes. Thus, as in *Penry I*, the first interrogatory did not adequately allow the jury to consider the effect of this evidence upon Bigby’s personal culpability.

Furthermore, although this Circuit has previously held that mitigation evidence of mental illness could be considered within the context of the second special issue, future dangerousness, if the illness can be controlled or go into remission, Bigby’s mitigation evidence indicated that his condition cannot be adequately controlled or treated. Bigby averred that his mental condition prevented him from being able to conform his behavior. Even after being in the controlled environment of jail for some time, Bigby irrationally tried to take the trial court judge hostage in the presence of armed bailiffs. His behavior also required him having to be restrained during trial. The defense psychiatrist testified that the outburst was not unexpected because medication was not sufficient to control his behavior and thinking. In short, Bigby’s evidence that his mental disorders made it difficult for him to avoid criminal behavior has the same

“double-edged sword” quality as Penry’s evidence that he was unable to conform his conduct to the law.

* * * Bigby’s jury was given the following supplemental instruction:

If you find that there are an mitigating circumstances, you must decide how much weight they deserve and give them that effect you believe to be appropriate when you answer the Special Issues. If you decide, in consideration of the evidence, if any, that a life sentence, rather than a death sentence, is a more appropriate response to the personal moral culpability of the defendant, or if you have a reasonable doubt thereof, you are instructed then to answer any special issues, to which such mitigating circumstances apply, and under consideration “no.”

* * * [T]hese issues failed to allow the jury to give effect to Bigby’s mitigating evidence. Further, even if the jury understood the instruction as directing them to “nullify” their answers to the special issues, they still would have faced the ethical dilemma of violating their oath to render a “true verdict” by providing false answers to the special issues in order to give effect to Bigby’s mitigating evidence and comply with the supplemental instruction. * * *

* * * [W]e find that Bigby has demonstrated that the contested jury instructions stripped the jury of a vehicle for expressing its “reasoned moral response” to the appropriateness of the death penalty. * * *

Optional reading: For a discussion of the case of Andre Thomas, a profoundly mentally ill man who killed his wife and children, cutting out their hearts, and later gouged out his right eye after reading in the Bible “If the right eye offends thee, pluck it out,” and later gouged out his left eye and ate it, by Judge Cochran of the Texas Court of Criminal Appeals, see *Ex Parte Andre Lee Thomas*, 2009 WL 693606 (March 18, 2009), available as optional reading in the “Mental

Illness” folder, and Marc Bookman, *How Crazy Is Too Crazy to Be Executed?* MOTHER JONES, Feb. 12, 2013, www.motherjones.com/politics/2013/02/andre-thomas-death-penalty-mental-illness-texas.

Competency for Federal Habeas Corpus Proceedings

The Supreme Court has held that, unlike trials, litigation in habeas corpus proceedings may continue even if the petitioner is incompetent. In *Ryan v. Gonzales*, 133 S.Ct. 696 (2013), the Court reversed decisions of the Sixth and Ninth Circuits which had stayed habeas corpus cases because the petitioners were incompetent. Each Circuit had relied on a different statute to reach the conclusion that litigation could not continue if the petitioner was incompetent.

The Court rejected the Ninth Circuit’s reliance on 18 U.S.C. § 3599, which provides death-sentenced state inmates with counsel for federal habeas proceedings, The Ninth Circuit had reasoned that a petitioner’s mental incompetency could “eviscerate the statutory right to counsel” in federal habeas proceedings, but the Supreme Court in an opinion by Justice Thomas for a unanimous Court concluded:

Given the backward-looking, record-based nature of most federal habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner’s competence. Indeed, where a claim is “adjudicated on the merits in State court proceedings,” counsel should, in most circumstances, be able to identify whether the “adjudication . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” without any evidence outside the record. See *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011) (“[R]eview under

[28 U.S.C.] § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. . . . * * * It follows that the record under review is limited to the record in existence at that same time – *i.e.*, the record before the state court”). Attorneys are quite capable of reviewing the state-court record, identifying legal errors, and marshaling relevant arguments, even without their clients’ assistance.

Id. at 704-05.

The Court distinguished *Rees v. Peyton*, 384 U.S. 312 (1966), *after remand*, 386 U.S. 989 (1967), in which the Court remanded the case of a petitioner who sought to withdraw his petition for *certiorari* for a determination of the petitioner’s competence and then, upon a finding of incompetency, stayed the proceedings. In *Gonzalez*, the Court held that *Rees* was about whether an incompetent habeas petitioner may withdraw his *certiorari* petition. *Id.* at 705. It also noted that after the finding of incompetency on remand, the Court entered a one-sentence order staying the proceedings, but provided no rationale for doing so.

The Sixth Circuit, relying on *Rees*, concluded that competency in habeas cases was required by 18 U.S.C. § 4241, which provides for competency determinations in federal cases at trials, proceedings prior to sentencing, and “at any time after the commencement of probation or supervised release.” The Supreme Court, having already decided that *Rees* did not recognize a right to competence in federal habeas corpus proceedings, concluded that the statute, which applies to defendants and probationers in federal cases, did not apply to a state petitioner seeking federal habeas corpus relief.

The Court, while recognizing that district courts have equitable powers to grant stays in the exercise of their discretion where the circumstances warrant, such as in cases where the petitioner’s participation is necessary, held that the exercise of such equitable powers was not

appropriate in either case before it. In *Gonzales*’ case, the claims were record based and resolvable as a matter of law. With regard to the Sixth Circuit case, the Court found that three claims were adjudicated on the merits in state post-conviction proceedings and resolvable as a matter of law. *Id.* at 709. It was unclear whether the fourth claim – that appellate counsel was ineffective for failing to raise the issue of the petitioner’s competency at trial – had been exhausted. Nevertheless, the Court held that even if the petitioner could show that the claim was both unexhausted and not procedurally defaulted, an indefinite stay would be inappropriate because of the interest in finality and allowing the state to carry out its judgement. *Id.* The Court expressed its concern that “capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death. Without time limits [on stays], petitioners could frustrate AEDPA’s goal of finality by dragging out indefinitely their federal habeas review.” *Id.* (quoting *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005))

Although the Court found it “unnecessary to determine the precise contours of the district court’s discretion to issue stays,” *id.* at 708, it advised:

If a district court concludes that the petitioner’s claim could substantially benefit from the petitioner’s assistance, the district court should take into account the likelihood that the petitioner will regain competence in the foreseeable future. Where there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State’s attempts to defend its presumptively valid judgment.

Id. at 709.

Competency to Waive Post-conviction Review

Suicide is a closed world with its own irresistible logic. . . . Once a man decides to take his own life he enters a shut-off, impregnable but wholly convincing world where every detail fits and each incidence reinforces his decision.

- A. L. Alvarez, *THE SAVAGE
GOD: A STUDY OF SUICIDE* (1974)

**REES
v.
PEYTON.**

Supreme Court of the United States
384 U.S. 312, 86 S.Ct. 1505 (1966)

PER CURIAM.

Following a related federal conviction and life sentences for kidnapping, Melvin Davis Rees, Jr., was convicted of murder and sentenced to death by a state court in Virginia, and the judgment was affirmed on appeal in 1962. Thereafter, a habeas corpus petition was filed in the United States District Court for the Eastern District of Virginia, alleging that the state court conviction had violated federal constitutional rights of Rees. The District Court rejected these claims, and the Court of Appeals for the Fourth Circuit affirmed. With Rees' consent, his counsel then filed in this Court on June 23, 1965, the present petition for certiorari to review the Court of Appeals' decision, and the petition is therefore properly before us for disposition.

Nearly one month after this petition had been filed, Rees directed his counsel to withdraw the petition and forgo any further legal proceedings. Counsel advised this Court that he could not conscientiously accede to these instructions without a psychiatric evaluation of Rees because evidence cast doubt on Rees' mental competency. After further letters from Rees to his counsel and to this Court maintaining his position, counsel had

Rees examined by a psychiatrist who filed a detailed report concluding that Rees was mentally incompetent. Psychiatrists selected by the State who sought to examine Rees at the state prison found themselves thwarted by his lack of cooperation, but expressed doubts that he was insane.

Whether or not Rees shall be allowed in these circumstances to withdraw his certiorari petition is a question which it is ultimately the responsibility of this Court to determine, in the resolution of which Rees' mental competence is of prime importance. We have therefore determined that, in aid of the proper exercise of this Court's certiorari jurisdiction, the Federal District Court in which this proceeding commenced should upon due notice to the State and all other interested parties make a judicial determination as to Rees' mental competence and render a report on the matter to us. * * *

Accordingly, we shall retain jurisdiction over the cause in this Court and direct the District Court to determine Rees' mental competence in the present posture of things, that is, whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises. To that end, it will be appropriate for the District Court to subject Rees to psychiatric and other appropriate medical examinations and, so far as necessary, to temporary federal hospitalization for this purpose. If the State wishes to obtain additional evidence for the federal inquiry by examining Rees in its own facilities, we do not foreclose such a supplemental course of action. The District Court will hold such hearings as it deems suitable, allowing the State and all other interested parties to participate should they so desire, and will report its findings and conclusions to this Court with all convenient speed.

Rees After the Court's Decision

Following the remand, the District Court ordered Rees evaluated at the federal medical center in Springfield, Missouri. Four doctors concluded that Rees was suffering from schizophrenia and not competent to make a decision with regard to withdrawing his petition for certiorari. After a hearing before the District Court, the state asked that Rees be examined at the state's Central State Hospital. The Court granted the request. The two doctors there who examined Rees found he was "not fully competent to make a rational choice with respect to continuing or abandoning further litigation in his behalf."

The District Court reported to the Supreme Court that Rees could not make a rational choice regarding withdrawing the petition for certiorari, and that he suffered from "a major mental disorder, schizophrenic reaction, chronic undifferentiated type, affecting his capacity in the premises." In briefing to the Court, both counsel for Rees and for Virginia agreed that the petition should not be withdrawn. The state argued that the Court should decide whether to grant or deny the petition; while counsel for Rees urged the Court to stay the proceedings. However, the Court took no action.

When a new Clerk of the Court took office in 1971, he raised the possibility of removing *Rees* from the Court's docket. However, the Court decided not to take any action on the case at its conference on April 2, 1971. The death sentence imposed on Rees became invalid as a result of *Furman v. Georgia*, 408 U.S. 238 (1972). Virginia commuted the sentences of 12 people on its death row at the time to life imprisonment, but not Rees.

It was not until 1988 that the Governor of Virginia commuted the sentence to life imprisonment. The U.S. Supreme Court did not dismiss the case from its docket until 1995 – 30 years after the petition for certiorari was filed. By then, Rees had died of natural causes.

For further discussion of *Rees*, see Phyllis L. Crocker, *Not to Decide is to Decide: The U.S. Supreme Court's Thirty-year Struggle with one Case about Competency to Waive Death Penalty Appeals*, 49 WAYNE ST. L. REV. 885 (2004).

Jonas H. WHITMORE,
Individually and as Next Friend of
RONALD GENE SIMMONS, Petitioner
v.
ARKANSAS et al.

United States Supreme Court
495 U.S. 149, 110 S.Ct. 1717 (1990)

Chief Justice REHNQUIST delivered the opinion of the Court.

This case presents the question whether a third party has standing to challenge the validity of a death sentence imposed on a capital defendant who has elected to forgo his right of appeal to the State Supreme Court. Petitioner Jonas Whitmore contends that the Eighth and Fourteenth Amendments prevent the State of Arkansas from carrying out the death sentence imposed on Ronald Gene Simmons without first conducting a mandatory appellate review of Simmons' conviction and sentence. We hold that petitioner lacks standing, and therefore dismiss the writ of certiorari.

I

On December 28, 1987, Ronald Gene Simmons shot and killed two people and wounded three others in the course of a rampage through the town of Russellville, Arkansas. After police apprehended Simmons, they searched his home in nearby Dover, Arkansas, and discovered the bodies of 14 members of Simmons' family, all of whom had been murdered. The State filed two sets of criminal charges against Simmons, one based on the two Russellville murders and the other covering the deaths of his family members.

Simmons was first tried for the Russellville crimes, and a jury convicted him of capital murder and sentenced him to death. After being

sentenced, Simmons made this statement under oath: “I, Ronald Gene Simmons, Sr., want it to be known that it is my wish and my desire that absolutely no action by anybody be taken to appeal or in any way change this sentence. It is further respectfully requested that this sentence be carried out expeditiously.” The trial court conducted a hearing concerning Simmons’ competence to waive further proceedings, and concluded that his decision was knowing and intelligent.

* * *

The State subsequently tried Simmons for the murder of his 14 family members, and on February 10, 1989, a jury convicted him of capital murder and imposed a sentence of death by lethal injection. Simmons again notified the trial court of his desire to waive his right to direct appeal, and after a hearing, the court found Simmons competent to do so. The Supreme Court of Arkansas * * * reviewed the competency determination and affirmed the trial court’s decision that Simmons had knowingly and intelligently waived his right to appeal. * * *

Three days later, petitioner Jonas Whitmore, another death row inmate in Arkansas, sought permission from the Supreme Court of Arkansas to intervene in Simmons’ proceeding both individually and “as next friend of Ronald Gene Simmons.” The court concluded that Whitmore had failed to show he had standing to intervene, and it denied the motion. Whitmore then asked this Court to stay Simmons’ execution, which was scheduled for March 16, 1989. We granted a stay pending the filing and disposition of a petition for certiorari, and later granted Whitmore’s petition for certiorari.

II
A

* * *

* * * It well established * * * that before a federal court can consider the merits of a legal claim, the person seeking to invoke the

jurisdiction of the court must establish the requisite standing to sue. Article III, of course, gives the federal courts jurisdiction over only “cases and controversies,” and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process. * * * Our threshold inquiry into standing “in no way depends on the merits of the [petitioner’s] contention that particular conduct is illegal,” and we thus put aside for now Whitmore’s Eighth Amendment challenge and consider whether he has established the existence of a “case or controversy.”

Although we have acknowledged before that “the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it,” certain basic principles have been distilled from our decisions. To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an “injury in fact.” That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is “distinct and palpable,” as opposed to merely “[a]bstract,” and the alleged harm must be actual or imminent, not “conjectural” or “hypothetical.” Further, the litigant must satisfy the “causation” and “redressability” prongs of the Art. III minima by showing that the injury “fairly can be traced to the challenged action” and “is likely to be redressed by a favorable decision.” * * * The litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.

B

As we understand Whitmore’s claim of standing in his individual capacity, he alleges that the State has infringed rights that the Eighth Amendment grants to him personally and to the subject of the impending execution, Simmons. He therefore rests his claim to relief both on his own asserted legal right to a system of mandatory appellate review and on Simmons’ similar right.

Under either theory, Whitmore must establish Art. III standing, * * * and we find that his allegations fall short of doing so.

Whitmore's principal claim of injury in fact is that Arkansas has established a system of comparative review in death penalty cases, and that he has "a direct and substantial interest in having the data base against which his crime is compared to be complete and to not be arbitrarily skewed by the omission of any other capital case." Although he has already been convicted of murder and sentenced to death, has exhausted his direct appellate review, and has been denied state postconviction relief, petitioner suggests that he might in the future obtain federal habeas corpus relief that would entitle him to a new trial. If, in that new trial, Whitmore is again convicted and sentenced to death, he would once more seek review of the sentence by the Supreme Court of Arkansas; that court would compare Whitmore's case with other capital cases to insure that the death penalty is not freakishly or arbitrarily applied in Arkansas. Petitioner asserts that he would ultimately be injured by the State Supreme Court's failure to review Simmons' death sentence, because the heinous crimes committed by Simmons would not be included in the data base employed for Whitmore's comparative review. The injury would be redressed by an order from this Court that the Eighth Amendment requires mandatory appellate review.

Petitioner's alleged injury is too speculative to invoke the jurisdiction of an Art. III court. Whitmore's conviction and death sentence are final, and his claim that he may eventually secure federal habeas relief from his conviction is obviously problematic. * * *

* * *

Whitmore also contends that as a citizen of Arkansas, he is "entitled to the public interest protections of the Eighth Amendment," and has a right to invoke this Court's jurisdiction to insure that an execution is not carried out in Arkansas without appellate review. This allegation raises only the "generalized interest of all citizens in

constitutional governance," and is an inadequate basis on which to grant petitioner standing to proceed. To dispose of this claim, we need do no more than quote our decision in *Allen v. Wright*, 468 U.S. 737, 754, (1984): "This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."

Perhaps recognizing the weakness of his claim for standing, petitioner argues next that the Court should create an exception to traditional standing doctrine for this case. The uniqueness of the death penalty and society's interest in its proper imposition, he maintains, justify a relaxed application of standing principles. The short answer to this suggestion is that the requirement of an Art. III "case or controversy" is not merely a traditional "rule of practice," but rather is imposed directly by the Constitution. It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case. * * * We hold that Whitmore does not have standing in his individual capacity to press an Eighth Amendment objection to Simmons' conviction and sentence.

C

As an alternative basis for standing to maintain this action, petitioner purports to proceed as "next friend of Ronald Gene Simmons." * * * Most frequently, "next friends" appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves. *E.g.*, *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13, n. 3 (1955) (prisoner's sister brought habeas corpus proceeding while he was being held in Korea). As early as the 17th century, the English Habeas Corpus Act of 1679 authorized complaints to be filed by "any one on . . . behalf" of detained persons, * * *

A "next friend" does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest. * * * Most important for

present purposes, “next friend” standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another. Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for “next friend” standing. First, a “next friend” must provide an adequate explanation – such as inaccessibility, mental incompetence, or other disability – why the real party in interest cannot appear on his own behalf to prosecute the action. * * * Second, the “next friend” must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, * * * and it has been further suggested that a “next friend” must have some significant relationship with the real party in interest. *Davis v. Austin*, 492 F.Supp. 273, 275-276 (ND Ga.1980) (minister and first cousin of prisoner denied “next friend” standing). The burden is on the “next friend” clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.

These limitations on the “next friend” doctrine are driven by the recognition that “[i]t was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends.” * * * Indeed, if there were no restriction on “next friend” standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of “next friend.”

* * *

Simmons was questioned by counsel and the trial court concerning his choice to accept the death sentence, and his answers demonstrate that he appreciated the consequences of that decision. He indicated that he understood several possible grounds for appeal, which had been explained to him by counsel, but informed the court that he was “not seeking any technicalities.” In a psychiatric interview, Simmons stated that he would consider it ““a terrible miscarriage of justice for a person to kill people and not be executed,”” and there was no meaningful evidence that he was suffering from a mental disease,

disorder, or defect that substantially affected his capacity to make an intelligent decision. We therefore hold that Whitmore, having failed to establish that Simmons is unable to proceed on his own behalf, does not have standing to proceed as “next friend” of Ronald Gene Simmons.

* * *

Jonas Whitmore lacks standing to proceed in this Court, and the writ of certiorari is dismissed for want of jurisdiction.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

The Court today allows a State to execute a man even though no appellate court has reviewed the validity of his conviction or sentence. * * * If petitioner’s constitutional claim is meritorious, however, Simmons’ execution violates the Eighth Amendment. The Court would thus permit an unconstitutional execution on the basis of a common-law doctrine that the Court has the power to amend.

Given the extraordinary circumstances of this case, then, consideration of whether federal common law precludes Jonas Whitmore’s standing as Ronald Simmons’ next friend should be informed by a consideration of the merits of Whitmore’s claim. * * * To prevent Simmons’ unconstitutional execution, the Court should relax the common-law restriction on next-friend standing and permit Whitmore to present the merits question on Simmons’ behalf. By refusing to address that question, the Court needlessly abdicates its grave responsibility to ensure that no person is wrongly executed. I dissent.

* * *

II

* * *

* * * When a capital defendant seeks to circumvent procedures necessary to ensure the propriety of his conviction and sentence, he does not ask the State to permit him to take his own

life. Rather, he invites the State to violate two of the most basic norms of a civilized society – that the State’s penal authority be invoked only where necessary to serve the ends of justice, not the ends of a particular individual, and that punishment be imposed only where the State has adequate assurance that the punishment is justified. The Constitution forbids the State to accept that invitation.

Appellate review is necessary not only to safeguard a defendant’s right not to suffer cruel and unusual punishment but also to protect society’s fundamental interest in ensuring that the coercive power of the State is not employed in a manner that shocks the community’s conscience or undermines the integrity of our criminal justice system. * * * Because a wrongful execution is an affront to society as a whole, a person may not consent to being executed without appellate review. * * *

* * *

III

* * *

Assuming for the sake of argument that Simmons was competent to forgo petitioning this Court for review and that Whitmore is only minimally interested in Simmons’ welfare, I would nevertheless permit Whitmore to proceed as Simmons’ next friend. The requirements for next-friend standing are creations of common law, not of the Constitution. Thus, no constitutional considerations impede the Court’s deciding this case on the merits. The Court certainly has the authority to expand or contract a common-law doctrine where necessary to serve an important judicial or societal interest. * * *

* * *

More fundamentally, however, the interest in preventing a suit by an “uninvited meddler” pales in comparison to society’s interest in preventing an illegal execution. When, as here, allowing the “meddler” to press the condemned man’s interests is the only means by which the Court can prevent an unconstitutional execution, the Court should

sacrifice the common-law restrictions rather than the defendant’s life.

* * *

**Harvey and Rebecca RUMBAUGH,
Individually and as Next Friends
Acting on Behalf of Charles Rumbaugh,
Plaintiffs-Appellants,**

v.

**Raymond K. PROCUNIER, Director,
Texas Department of Corrections,
Defendant-Appellee.**

United States Court of Appeals
for the Fifth Circuit
753 F.2d 395 (5th Cir. 1985)

POLITZ, Circuit Judge:

* * * We now consider the appeal of Harvey and Rebecca Rumbaugh from the decision of the district court, denying their request to present a next friend petition for writ of habeas corpus on behalf of their son, Charles Rumbaugh, a death-sentenced state prisoner. Charles Rumbaugh continues to refuse to seek collateral review of his conviction and sentence and continues to resist the efforts of his parents to secure that review. Harvey and Rebecca Rumbaugh maintain that their son lacks the mental capacity to waive or forgo his rights to collaterally attack his death sentence. * * *

Facts and Procedural Background

Charles Rumbaugh was first convicted of capital murder and sentenced to death by a Texas state court on April 4, 1975. This conviction was reversed on appeal[.] * * * At the retrial Rumbaugh was again convicted of capital murder and sentenced to death. * * * Following affirmance of the second conviction Rumbaugh asked his court-appointed counsel to take no further steps to attack his conviction and sentence. When counsel ignored this request and moved for a rehearing, Rumbaugh wrote the Clerk of Court for the Texas Court of Criminal Appeals and requested that all motions filed by his counsel be withdrawn and that a mandate of affirmance issue

forthwith. The court obliged and the mandate issued. Rumbaugh then wrote the state trial judge requesting that his execution be set without further delay.

Rumbaugh's execution was set for July 23, 1982. Rumbaugh refused to authorize anyone to file a petition for writ of certiorari or to seek a stay of execution. On July 16, 1982, Harvey and Rebecca Rumbaugh filed a next friend application for state habeas relief. Their petition was denied without hearing or written reasons on July 19, 1982. Later that same day, the Texas Court of Criminal Appeals denied the senior Rumbaugh's motion for stay of execution and application for habeas relief. No reasons were assigned. On July 20, 1982, the district court for the Southern District of Texas granted Harvey and Rebecca Rumbaugh's motion for stay of execution[.] [Counsel was appointed and a hearing was held] Upon conclusion of that hearing the district court ordered Charles Rumbaugh transferred to the United States Medical Center, Springfield, Missouri, to be examined for the specific purpose of determining his mental competence to waive further review of his conviction and sentence.

Charles Rumbaugh was taken to Springfield and there examined by a team of psychiatrists and psychologists. The written reports of Drs. Logan and Reuterfors were presented to the court and the parties. * * * [After receiving conflicting testimony based on the Springfield reports on February 4, 1983] the district court continued the hearing so that Dr. Logan could personally appear and explain his diagnosis and prognosis.

The hearing resumed on February 24, 1983, with Dr. Logan present. After Dr. Logan finished his testimony, Charles Rumbaugh voluntarily took the stand and advised the court of his position in the matter:

Well, I don't feel I'm depressed right now. I haven't been taking any medication for approximately thirty days. I was taking medication, an antipsychotic drug, and I haven't experienced any problem since I quit taking it. And I think I understand my situation

very well and I believe my decision is a logical and rational one. And it doesn't really matter to me what this Court decides today because I've already made the decision to take matters into my own hands. So it doesn't make any difference.

* * *

All I really wanted to say is that it doesn't matter to me; that I've already picked my own executioner and I'll just make them kill me. If they don't want to do it . . . if they don't want to take me down there and execute me, I'll make them shoot me.

* * *

I think I'll make them shoot me right now.

Charles Rumbaugh then pulled a homemade knife-like weapon from his pocket and advanced on the deputy U.S. Marshal, shouting "Shoot!" The Marshal was forced to shoot Rumbaugh. After life-saving measures were taken, over Charles Rumbaugh's demands that no attempts be made to save his life, and he was removed by ambulance to the hospital, the hearing continued. Dr. Logan, who had witnessed the entire episode, was recalled to the stand. He testified that the bizarre occurrence did not shake his opinion but actually reinforced his conclusions that Rumbaugh was acting knowingly and intentionally with full knowledge and appreciation of the situation in which he found himself.

The district court sifted and weighed the evidence and concluded that Charles Rumbaugh was mentally competent to make the decision to forgo further judicial proceedings. This finding resulted in a preemption of his parents' next friend petition and it was dismissed.

Rumbaugh's parents appealed the finding of competence. * * *

Discussion

If Charles Rumbaugh lacks the mental competence to waive his rights to further judicial

review of his conviction and sentence, his parents have standing to bring an action for habeas relief as next friends. If he has that competence, his parents have no standing to bring the present action. *Gilmore v. Utah*, 429 U.S. 1012 (1976).

**The Standard for Competency
to Waive the Right to Attack
a Conviction and Sentence**

The Supreme Court announced the standard to be used in deciding whether a person is mentally competent to choose to forgo further appeals and collateral attack upon his conviction and sentence in *Rees v. Peyton*, 384 U.S. 312 (1966). The test is whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises. This test requires the answer to three questions:

(1) Is the person suffering from a mental disease or defect?

(2) If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him?

(3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options?

If the answer to the first question is no, the court need go no further, the person is competent. If both the first and second questions are answered in the affirmative, the person is incompetent and the third question need not be addressed. If the first question is answered yes and the second is answered no, the third question is determinative; if yes, the person is incompetent, if no, the person is competent. We find no reported case applying the *Rees* standard to a defendant's decision to forgo further appeals and collateral proceedings which decides how a court should treat a mental

disease which does not impair the cognitive function but impacts only on the volitional, the person's ability to make a rational choice among available options. We must now address that issue. We find it to be essentially a factual question. The district court's finding is thus protected by the shield and buckler of Fed.R.Civ.P. 52(a), and must be accepted unless shown to be clearly erroneous.

The Evidence

During the court-ordered stay at Springfield, Charles Rumbaugh was tested and observed by a team of psychiatrists and psychologists who were charged by the court to determine his competence consistent with the teachings of *Rees*. * * * Dr. Logan's final opinion advised:

This examiner feels that Mr. Rumbaugh is currently profoundly depressed. Mr. Rumbaugh, despite this depression, does have the capacity to appreciate his position and his choice regarding continuing to decline further litigation is rational in light of his past experience and presuming one can rationally make a decision to die. It must be emphasized, however, the extent of Mr. Rumbaugh's depression does substantially affect his capacity in the premises. Mr. Rumbaugh's perception of his current situation as hopeless, although realistic in light his past experience is a reflection of this depression.

Dr. Reuterfors' report reflected a similar apparent anomaly:

(1) it is the opinion of the undersigned examiner that Mr. Rumbaugh is currently capable of appreciating his position and making a substantially and sufficiently rational choice with respect to continuing or abandoning further litigation.

(2) it is the opinion of the undersigned examiner that Mr. Charles Rumbaugh is presently suffering from a major mental illness which may substantially affect his capacity in the premises.

The district court was understandably puzzled by these seemingly self-contradictory responses to the *Rees*-directed question it had posed. [A]t the hearing after the Springfield evaluation, one psychiatrist and two psychologists who had not examined Rumbaugh, offered their interpretation of the Springfield reports. After reviewing the reports and Rumbaugh's answers to the battery of questions, these medical experts expressed the opinion that Rumbaugh was not capable of making a rational choice about further litigation. Based on these same reports, another medical expert called by the state opined that Rumbaugh was capable of making a rational decision to forgo further judicial proceedings.

* * * At the continued hearing, Dr. Logan testified at length, including this colloquy:

Q. And what was your determination?

A. My determination was that he had a very rational understanding of his current legal position. He had an excellent knowledge of past events that had happened in his case; he had a very good understanding of his current situation, both legally and in terms of his own mental health. However, the second part of the question asked whether he had any mental illness that could . . . that may affect him in the premises. And I answered yes to that. I said I believe he was suffering from a severe depression and that, indeed, did have some influence on his decision.

Q. Now, of course, under the standard of competency to stand trial test, you would have found that he was competent to stand trial and to confer with his lawyers and so on?

A. Yes.

Q. Explain, if you can, Doctor, the conflict . . . or apparent conflict in your determination? It may not be a conflict. It appears so to me.

A. Okay. The fact that someone has a mental illness in all cases does not preclude their ability to have a rational understanding of their

current situation or logical understanding of their current situation. The majority of the time, I believe, Mr. Rumbaugh is functioning at a level where he does have a rational understanding of what's going on in his case and his current situation. The way in which his depression could influence him is that it may act as a coercive force and impairing his ability to exercise free will to make a decision, perhaps a way to explain it would be to use an analogy that comes from a different realm. Many patients that are dying with terminal cancer are very depressed. Their cognitive abilities are not necessarily impaired. They have a very rational understanding of their situation. They realize that they are due to die within, perhaps, a short period of time, that the treatment with chemotherapy or radiation therapy may be painful and uncomfortable and it may impair what little life they have left and in some cases they may decline any further treatment and essentially choose to die. Their depression in that case, however, although realistic, does influence their decision.

* * *

Q. And that that mental illness affects his competency in the premise?

A. In the way I have so stated. In fact, I don't think it impairs him for the majority of the time. There are periods when he has brief paranoid psychoses where he has auditory hallucinations but that's not all the time. Those are circumscribed episodes. I feel like underlining that. The majority of the time, he is depressed and the way that affects him is that it may act . . . his own psychological pain may act as a coercive force that influences him not to want to say, live in his current condition for an additional, say, six years to exhaust his further appeals that are open to him.

* * *

Q. . . . I think what we're all trying to understand is to what extent; for example, the depression constituted a coercive force.

A. To the extent, if he were not so depressed, if he did not suffer from frequent bouts of paranoia or auditory hallucinations, he probably would decide to continue with appeals.

Q. Could you repeat that again for me, please?

A. Yes. It affects him to the extent that were his depression not present, were his periods of paranoia not present, were his periods of auditory hallucinations on occasion not present, were he not so hopeless about his position, he might be able to better mentally cope with spending an additional eight years on death row in Huntsville and continue with the appeals. But his mental condition is not that would permit him to do so.

* * *

Q. Would you also believe his hopelessness is based on the realistic appreciation of what those circumstances are? Is that correct?

A. Unfortunately, I think to a large extent, it is realistic.

* * *

Q. I believe that you testified a little bit ago that it was . . . that it was questionable . . . or that Mr. Rumbaugh was probably not acting out of free will in deciding that he's going to waive his further appeals?

A. Diminished. Okay. Free will is on a continuum, I believe.

* * *

A. But the question . . . the second part of the question was very . . . was worded in such a way that it said, is he suffering from a mental disease that may substantially affect. It was very broad.

Q. Okay. By may, do you . . . is it also possible that it may not; is that what you're saying?

A. No. I think in his case, it has to be a factor that has to be looked at and addressed by the Court. I think it does influence him to a certain degree, maybe even a substantial degree.

* * *

Q. Do you think that . . . do you think that a terminal cancer patient experiencing pretty severe depression can make a rational choice to end his own life?

A. Yes, I believe he can. I don't think the fact that someone is depressed or they're facing overwhelming life circumstances means that they're irrational about any choice to either live or die necessarily. Some people may be. Like if Mr. Rumbaugh was in a psychotic state where his perception of the world was grossly distorted and one would certainly argue then that perhaps his decision in any regard, either to continue with appeals or not to continue appeals was not based on rational reason. But at least the reasons he gave to me during this course of evaluation seemed to be pretty rational reasons for pursuing his course of action. And I think there was a list of questions we submitted to him, I think it's very important for all parties concerned to review his answers to those because I think they were very cogent answers for the most part.

Q. So I believe in your report and in your testimony, it's your professional opinion that any depression that Mr. Rumbaugh may be experiencing at the present time does not impair his ability to make a rational choice about what to do, to understand the situation that he's in and to realistically assess the options available to him, is that correct?

A. His assessment of his options, his current legal situation was very factual, it was very logical.

* * *

Q. He then basically in your opinion does recognize the . . . his mental condition as

deteriorating where he's at?

A. Yes, he does.

Q. And that that in effect is partially or at least has some influence on his desire to waive his appeals?

A. Yes. Not only his current conditions influence him but also he's fairly pessimistic, realistically so, unfortunately, about his future prospects, even if the appeals were successful.

* * *

THE COURT: Doctor, let [me] tell you what I'm hearing you say and you tell me if I'm hearing you correctly. * * * What I'm hearing you say is that Mr. Rumbaugh has been miserable for a very long time.

THE WITNESS: That's true.

THE COURT: That he's miserable now.

THE WITNESS: Yes.

THE COURT: And he expects to be miserable in the future.

THE WITNESS: Yes.

THE COURT: That based on the personality that he has and based on the circumstances in which he's now placed, that that assessment that he will be miserable in the future is realistic.

THE WITNESS: Yes, it is.

THE COURT: And that he has . . . he is able to think coherently.

THE WITNESS: Yes.

THE COURT: He's able to understand what's going on.

THE WITNESS: Yes.

THE COURT: And his decision is rational based on what he presently faces.

THE WITNESS: Yes, it is. Based on his past experience and what he presently faces, I believe it's rational, or logical, at least.

THE COURT: All right. Do you want to elaborate on what I'm . . . is there something I'm not hearing that you're trying to say?

THE WITNESS: No, I think you're hearing it very well.

As we appreciate Dr. Logan's reports and testimony, and considering Rumbaugh's written answers to the extensive questions posed, it appears that Charles Rumbaugh is able to feed relevant facts into a rational decision-making process and come to a reasoned decision; that one of the facts fed into the process is that Rumbaugh is mentally ill, he has severe depression, with no hope of successful treatment which would reduce his current mental discomfort to a tolerable level or enable him to exist in the general prison population or the outside world if his appeals were successful; that Rumbaugh's assessment of his legal and medical situations, and the options available to him, are reasonable; but that if the medical situation vis-a-vis treatment were different, Rumbaugh might reach a different decision about continuing judicial proceedings.

In other words, Rumbaugh's disease influences his decision because it is the source of mental pain which contributes to his invitation of death. * * * Rumbaugh indicates adequate awareness of this reality. He understands his situation and his options. His ability to make the life/death choice is apparent from his comments to Dr. Logan that if he thought that meaningful treatment were available and if it were offered, he would probably change his decision not to appeal. We find that decision to be the product of a reasonable assessment of the legal and medical facts and a reasoned thought process, albeit one that we would disagree with.

Our conclusion that the evidence supports the

district court's finding of competency is reinforced by Rumbaugh's actions after the district court's decision and while the appeal was under advisement. He filed an extremely coherent and well-reasoned pro se state habeas corpus petition. That petition states substantial grounds for attacking his conviction and sentence. When it became apparent that this appeal would not be dismissed because of the state petition, he withdrew his pro se petition, stating in his motion to dismiss that he believed the grounds substantial and well-founded but that he was making the choice not to appeal.

Rumbaugh has striven mightily to prove his mental competence to make his legal decisions. He convinced the district court who presided over the dramatic hearings. We cannot tag that finding as clearly erroneous. Nor can we conclude as a matter of law that a person who finds his life situation intolerable and who welcomes an end to the life experience is necessarily legally incompetent to forgo further legal proceedings which might extend that experience. AFFIRMED.

GOLDBERG, Circuit Judge, dissenting.

* * * Despite the existence of substantial questions regarding the constitutionality of [Rumbaugh's] sentence, we are told that no one will be allowed to press these issues on his behalf because the district court's pronouncement of competency was not clearly erroneous. We are told not only that we cannot scrutinize the validity of an admittedly hair's-breadth call by a single judge but also that this man is not necessarily competent – he has merely not been proved incompetent. We are told that four out of five doctors surveyed think he suffers from a mental disorder affecting his moods, his attitudes, his self-conception, and his processes of logical thought, but that these effects are insufficient to prove him “irrational.” We are not told whose definition of rationality applies to this mind, but we are told nonetheless to invoke some nebulous normative concept imbued with an aura of systemic legal perfection. As a result of these borderline reflections of subjective impression, no

one will be permitted to argue that we punish him unconstitutionally.

With all due respect to my brethren, I am incredulous that anyone could fairly read the record as establishing this person's competency to waive next-friend collateral review of his conviction and sentence. In my view, the trial court misapplied the standard of competency enunciated in *Rees v. Peyton*. Even under its cryptic interpretation of *Rees*, the court below clearly erred on the factual question of whether this defendant is competent. Further, I do not view the determination of competency under *Rees* to be a pure question of fact warranting appellate abdication under the clearly erroneous rule. Whether a defendant is competent to waive federal habeas review in a death case presents a mixed question of fact and law whose resolution turns primarily on the application of a legal standard. The law in this circuit requires that we review de novo a district court's resolution of such hybrid issues. * * *

I
* * *

The structure of the *Rees* standard suggests that “rational choice” comprises two elements. First, the notion requires that a person choose means that relate logically to his ends. If a person's ability to reason logically is seriously impaired, he is incapable of rational choice. Second, rational choice requires that the ends of his actions are his ends. That is, rational choice embraces “autonomous” choice. If a person takes logical steps toward a goal that is substantially the product of a mental illness, the decision in a fundamental sense is not his: He is incompetent.

This two-pronged concept of rationality follows from the structure of the *Rees* standard. Under *Rees*, a person either is capable of rational choice or has a mental disease that “substantially affects his capacity in the premises,” but he cannot have both conditions. If *Rees* were read to require only an inquiry into the person's ability to reason logically, without an inquiry into the person's autonomy, then both conditions would be

possible. Yet a person can be both logical and have a mental disease that “substantially affects his capacity in the premises,” *i.e.*, that affects what the person in an ultimate sense desires. Indeed, this is precisely the situation in the present case, where the doctors testified that although Rumbaugh is capable of logical thought, his depressive condition substantially affects his capacity in the premises.

II

[B]y equating “rational” with “logical,” the court below disregarded substantial, uncontroverted testimony that Rumbaugh’s state of depression diminishes his capacity for free, autonomous choice.³ * * * Viewing the record as a whole, I am firmly convinced that a serious injustice has been committed. If we are willing to say “clearly erroneous” in battles over dollars and cents, surely the rule is more than a rubber stamp when rigor-mortis becomes the order of the court. [A]lmost every item of expert testimony points to the inability of this man to decide how to exercise his rights for his own benefit. In plainer language, Charles Rumbaugh does not know where his best interests lie, and the district court’s determination of competency is clearly erroneous.

Rees compels a finding of incompetency upon the mere possibility that an individual’s mental impairment substantially affects his decisionmaking capacity. * * * When the question of Rumbaugh’s competency first arose, a

3. The trial court’s misunderstanding is evident in its principal finding of fact, which implicitly linked Rumbaugh’s “realistic understanding of his present position and of the choices available to him” with the conclusion that Rumbaugh “is mentally competent to make a rational choice with respect to continuing or abandoning further litigation.” Further, the district court stated a version of testimony to the effect that Rumbaugh’s “decision to appeal is rational or at least logical in light of the options which are presently available to him.” The court thus failed to recognize the difference between a logical, cognitive capacity, which can be reflected in a realistic appreciation of one’s legal and psychological status, and a rational decision, which by definition contemplates a goal that is the product of one’s free will.

preliminary psychological test was conducted at the Ellis Unit of the Texas Department of Correction. The report concluded that “Rumbaugh is most probably or in all reasonable medical probability unable at the present time to exercise his legal and constitutional rights as a result of the large compressive component and schizophrenic illness which he is currently suffering from,” and the examining physician recommended further in-depth testing at the United States Medical Center for Federal Prison in Springfield, Missouri.

* * *

The Logan and Reuterfors reports [from Springfield] spawned an apparent dilemma. *Rees* dictates that an individual can either be rational or can suffer from a mental impairment that might substantially affect his capacity in the premises. The Springfield reports suggested either that both characterizations applied to Rumbaugh – an apparent impossibility under *Rees* – or that the doctors had applied *Rees*’s operative language differently from what the *Rees* Court had contemplated.

Faced with these ambiguities, the district court heard testimony from one psychiatrist and two psychologists. Although one of the doctors had himself previously examined Rumbaugh, the three doctors’ testimony was based chiefly on the Logan and Reuterfors reports as well as on Rumbaugh’s written responses to a questionnaire that had been administered by Logan. The first of the three, Dr. Kaufman, testified unequivocally that, as he read the Springfield evaluations, Rumbaugh has a disease that affects his ability to choose rationally whether to appeal. In Kaufman’s view, Logan and Reuterfors attributed Rumbaugh’s desire to commit suicide to his depression. In response to the seemingly persuasive argument that Rumbaugh had written cogent and logical responses to a series of questions submitted by Logan, Kaufman explained that such reasoned analysis is inherent in any diagnosis of a major depressive disorder. If Rumbaugh’s responses had evidenced looseness of association, Kaufman explained, the diagnosis would most likely have shifted from one of

depression to schizophrenia. In essence, Rumbaugh's decision to abandon appeal was an effort to secure the state's assistance in committing suicide, and the decision to commit suicide was the direct product of severe depression.

Significantly, Kaufman refuted even the most favorable reading of Reuterfors's enigmatic conclusion. The Attorney General confronted Kaufman with the theory that Reuterfors's primary opinion was that Rumbaugh was rational, and that Reuterfors subsequently modified this diagnosis because there was "some reason to doubt the certainty of the conclusion." Kaufman responded that the qualification was made because there was great reason to doubt Rumbaugh's competency. The examining doctors addressed whether Rumbaugh's capacity was substantially affected. On Kaufman's unrelenting view, even the state's attorney was forced to concede that "the depression . . . is what underlies the fact that [Rumbaugh] is affected or substantially [a]ffected."

The next witness was Dr. Dickerson, a psychologist who had in the past pronounced at least one other inmate in Rumbaugh's precarious legal position competent to waive his right to appeal. Dickerson nonetheless testified that Rumbaugh's depression was of such a serious magnitude that it colored all of the prisoner's thought processes. Noting that both Logan and Reuterfors had significant reservations about Rumbaugh's competency, Dickerson observed that the defendant's history of self-destructive behavior supported the belief that the decision necessarily reflected his disease – even though Rumbaugh was able to articulate logical and coherent bases for his chosen inaction:

A. [W]hatever it is that we want, we usually find a way to logically explain it or justify it With Mr. Rumbaugh, I think that he has a very long history of intended kinds of self-destructive activity[,] and it's clear, to me at least, that that pattern is still very much in operation.

Q. Would you describe those as suicidal tendencies?

A. Some of them are suicidal attempts; some of them are attempts at self-mutilation. I mean how upset do you have to be in life to take sharp objects and tear your arms up and to rip yourself from shoulder to hip; how upset do you have to be with yourself and with your life to take and start hacking on your neck with various things to try to make yourself bleed to death [?] But even those kinds of things can be quite logically described as being acts of purification, as being acts of self-cleansing and described as "feeling good."⁷

7. The referenced acts appear in the Springfield psychiatric evaluation. On one occasion, Rumbaugh had "cut himself from his collarbone to his right hip; another time, he had inflicted wounds on his abdomen, chest, and arms. In addition, he indicated that he had made numerous suicide attempts and had slit his wrists several times. Rumbaugh's written response to an item on the Logan questionnaire limns the most vivid portrait:

15. "I have seriously attempted suicide on only a few occasions. At other times I have lacerated or mutilated myself to experience the pain and be cleansed by it. The pain is beautiful in that it helps to atone for my transgressions and leaves me feeling cleansed in body and spirit. It is a form of self-flagellation not unlike that which was practiced by an ancient religious sect I recall reading about and being fascinated by. They practiced self-flagellation and self-mutilation in atonement for their misdeeds and I am sure they rejoiced in the cleansing pain as I do. I can look at the scars that crisscross my body and feel good in the knowledge that I have suffered extreme pain in atonement for my many transgressions against what I know to be right and proper conduct. I occasionally feel the need to cleanse myself by subjecting myself to pain through self-mutilation. Also, the more pain I experience the higher my threshold to pain becomes and I become more and more able to easily withstand great pain. My scars may seem obscene to people who do not realize what they symbolize, but to me they are beautiful. They are like tatoos. I can look at them and touch them and remember. Shortly after my arrest in 1975, I was sitting in my cell and I heard a voice

Insofar as Rumbaugh's logical articulations might be construed as undermining the other, more compulsive manifestations of his depressive disorder, Dickerson identified the relevant question as being whether Rumbaugh's logic operates in service of his irrationality. The witness concluded without qualification that it does.

The second psychologist was called to testify by the state. Relying almost solely on Rumbaugh's written answers to the questionnaire, Dr. Parker stated that the cogency of Rumbaugh's responses indicated his rationality. Two factors, however, throw Parker's testimony into a questionable light. First, he equated logical thought with rational choice. * * * I think we would all agree that Rumbaugh was not capable of rational choice during his bouts of auditory hallucinations, drug involvement, paranoia, self-mutilation, and attempted suicide. The Springfield reports and the expert testimony reveal that none of these symptoms or conditions, any more than the depression itself, diminished Rumbaugh's ability to express himself. Consequently, Rumbaugh's ability to respond logically to questions does not demonstrate his rationality.

speaking clearly to me and commanding "If thy right hand offends thee, cut it off". It made me feel very good because I believed a supreme being was commanding me. My right hand had indeed offended me because it was my right hand that took a man's life, perhaps a good man who was able to cope with life and had never hurt or harmed anyone in any way although he made me kill him. So, in response to the command, I took a razorblade and began trying to cut my right hand off at the wrist, but I became frustrated and angry because it would not cut through the bone. I went into a frenzy and began slashing the flesh of my arm from the wrist to the elbow. There was dark red blood everywhere and I gloried in the extreme pain I was experiencing. When the guards found me they took me to the hospital where doctors sewed me up and then I was taken back to jail and thrown into the dark solitary cell, but I felt very good about it for several days thereafter."

Second, Parker's testimony on direct examination relied in part on the results of a Minnesota Multiphasic Personality Inventory ("MMPI") test that was administered to Rumbaugh at Springfield. Although the administering and other testifying doctors all questioned the validity of the results due to the extremity of Rumbaugh's score, and although under cross examination he finally relented in his emphasis on the test, Parker never explained how the discrediting of the MMPI results affected his diagnosis.

The final witness, Dr. Logan, was called on the trial court's initiative. Although Logan's testimony cannot be viewed in isolation from the preceding experts', as the author of the Springfield psychiatric evaluation, Logan was in the best position to clarify the meaning of his apparently inconsistent conclusion that Rumbaugh both is rational and has a mental disease that substantially affects his capacity in the premises.

While the district court and the majority properly recognize Logan's significance, each misinterprets either his statements or the *Rees* standard itself. * * * The opinion merely recapitulates Logan's testimony that Rumbaugh's depression is based on a realistic assessment of his mental problem and the circumstances facing him, that he thinks coherently, and that "his decision not to appeal is rational or at least logical in light of the options which are presently available to him."

Read in context, these observations do not convincingly support Rumbaugh's competency under *Rees*. Logan maintained throughout his testimony that accuracy of perception and apparent rationality in light of present circumstances and future expectations is not inconsistent with the existence and substantial effects of Rumbaugh's mental illness. He stated, for example:

* * * The way in which his depression could influence him is that it may act as a coercive force and impairing [sic] his ability to exercise free will to the extent a normal individual

might be able to use free will to make a decision. . . . His judgment is effected [sic] in some degree by his depression even though it's realistic. . . . [I]f he were not so depressed, if he did not suffer from frequent bouts of paranoia or auditory hallucinations, he probably would decide to continue with appeals. . . . [Rumbaugh's mental disease] has to be a factor that has to be looked at and addressed by the Court. I think it does influence him to a certain degree, maybe even a substantial degree. . . .

* * * [I]t's not just the depression that I'm talking about, but there are things that go along with the depression, the sleep, the appetite loss, living in a constant of emotional turmoil, periodic bouts of psychosis, acts as a coercive force that may be indicating . . . be causing him to decline any further appeals at this time and * * * ending his own life; whereas, if he were not so depressed, if his mental state were not as it is, if he were, perhaps, not quite so severely depressed, if he didn't have these recurrent bouts of paranoia, he might, indeed, opt to continue with appeals with the hope that he could receive a different type of care in the future that might change his condition.

Q. So, in your opinion, it may substantially effect [sic] his competency to make that decision; that's what you said in your narrative, isn't it?

A. Yes.

Q. And that's still your opinion?

A. Yes. . . .

[Q.] What I'm trying to do is figure out where on [some] scale Mr. Rumbaugh falls with regard to the depression effecting [sic] his mental state or his decision[.]

A. I think you would have to say it's substantial, because if it were not present to the degree it is, his course of action would conceivably be different.

If Logan's testimony is to be deemed largely dispositive on the issue of Rumbaugh's competency, I cannot countenance a finding other than that his defect may substantially affect his capacity in the premises.

* * * The record reveals that every statement suggesting Rumbaugh can rationally digest his own psychological and legal status is emphatically qualified by a subsequent discussion of how – to adopt Dr. Dickerson's phrasing – Rumbaugh's logic almost certainly operates in service of his mental disorder.

As *Rees* would have us bridge the synapses, Logan's testimony supports rather than refutes the theory that Rumbaugh is incapable of rationally choosing whether to assert his legal rights. * * * [T]he psychiatric and psychological evaluations themselves speak in unison to the substantial effects of Rumbaugh's illness on his actions and his thoughts – effects which have plagued him for an entire life.

If we must adopt the metaphysics of *Rees*, we must also accept that an individual can espouse a rational view of his situation – in other words, that his decision to die may reflect what to us seems a potentially rational weighing of options – yet the rationality of perception may only cloak a more basic component of mental disease. A blue coat lit yellow seems green, but the garment retains its primary hue.

III

* * *

IV

Few cases can be decided with absolute certainty. For that reason, the presumptions we apply to resolve uncertainty often go far toward determining the outcome of a case. By placing the burden of proof on one party or the other, we establish a threshold, below which uncertainty is resolved against the party on whom the burden is imposed.

* * * The effect of the majority's decision * * * is anything but unclear: it condemns Rumbaugh

to certain death. * * * In capital cases * * * the defendant's is not the only interest at stake – the state as well has an interest in ensuring that the death penalty is not imposed unconstitutionally. * * *

by lethal injection on September 11, 1985. Rumbaugh would not be eligible for the death penalty today because he was 17 at the time of the crime.

* * * I believe that, given the state interest in imposing the death penalty only in accordance with the Constitution, the uncertainty inhering in any competency determination should be resolved in favor of allowing federal collateral review of the defendant's conviction and sentence. An otherwise qualified next-friend petitioner should not bear the burden of proving the defendant's incompetency under *Rees*. * * * Before casting these individuals voluntarily down the corridor of death, we should require no less than convincing proof that they have the capacity to invite the journey.

* * *

The troubled life of Charles Rumbaugh presents an abundance of moral questions that people of thought have debated without satisfactory resolve since antiquity. If it invites hubris to dictate death, on this we cannot pass. But we must at least acknowledge in ourselves the inability to understand in full the workings of the human mind. Where we must pretend to such capacity, however, we should grant ourselves and those who suffer most from our mistakes the benefit of an admittedly grave doubt. To look askance when a next-friend could tell us how a condemned's conviction or sentence falls outside the precious safeguards of the Constitution is to place the burdens of our own flawed knowledge on the one we choose to kill. The failure to rise to this self-appointed level of responsibility is resplendent with neither truth nor justice. It seems, unfortunately, to be the American way.

The U.S. Supreme Court denied certiorari. 473 U.S. 919 (1985). Justice Marshall, joined by Justice Brennan, dissented, arguing that "the Court should not allow the erosion of the standard set in Rees, and it should certainly prevent such erosion in the context of capital punishment." Texas executed Charles Rumbaugh