No. 17-8528

IN THE
SUPREME COURT OF THE UNITED STATES

PERRY AUSTIN, *Petitioner,*

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE
CORRECTIONAL INSTITUTIONS DIVISION, *Respondent*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY

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REASONS FOR GRANTING THE PETITION

I. The circuit court did not properly apply *Dusky* but instead held that impairments that removed the capacity for rational choice were irrelevant if factual and logical understanding remained

The Fifth Circuit found that as a matter of law[1] the impairments diagnosed and described in the evidence presented by Mr. Austin in his habeas proceeding not only did not establish incompetence but do not "bear on his competency to stand trial." *Austin v. Davis*, 876 F.3d 757, 786 (5th Cir. 2017) ("*Austin*")

A review of the evidence that the circuit court held did not bear on competency to stand trial makes clear that the court accepted Respondent's argument on appeal that rationality only requires that a defendant understand the process and its ramifications and that the constitution does not require rationality in any other sense. *Answer* at 50.

Specifically, the court did not consider Petitioner's expert evidence that he lacked the capacity to make rational choices in respect of critical legal decisions.

Dr. Woods' first affidavit contained, *inter alia*, the following professional opinions:

> Mr. Austin's ability to rationally understand and choose [was] severely impaired [p.4]
>
> ****
>
> Mr. Austin was suffering not only from a mood disorder that manifested itself in suicidal behavior, he was also suffering from organic impairments that precluded him from being able to determine, initially,

[1] The circuit court denied relief even applying *de novo* review and on a summary judgment standard. *Austin* at 762, 779, 781, 782, 784, 785 & 786. Applying the correct competency standard, Mr. Austin clearly survives summary judgment.

the effective manner to weigh and deliberate his circumstances. [p.6]

****

Most importantly, his suicidal ideation impaired his ability to rationally prepare a defense, to accept attorneys that can prepare a defense, and participate in the appellate process [p.16]

****

[Mr. Austin's actions were] in the service of his irrational mood disorder [p.8]

****

Mr. Austin was not able to rationally assist in the preparation of his defense, given his steadfast desire to die by the hands of the state. This suicidal ideation, based upon his mental disease and reinforced by his cognitively derived inability to effectively weigh and deliberate decisions at the time of their presentation, rendered Mr. Austin incompetent to rationally weigh and deliberate his legal decisions at the time of his trial. [p.11]

****

objective testing noted that Mr. Austin has difficulty initiating frontal lobe tasks, particularly being able to initiate weighing and deliberating tasks [p.15]

****

The cognitive disorder that he suffers from predisposes him to severe bouts of depression given his inflexibility of thinking, poor ability to adapt, difficulty with conceptual initiation, mental rigidity, and blunted social sensibility, particularly in environments such as prison, where adaptability is the key to survival. He would have difficulty finding alternative ways of coping or dealing with stressful situations and may become fixed on one method of responding, even though it may not be working. In turn, during times of depression, his cognitive deficits become exacerbated, leading to increased difficulties in attention and concentration, problem solving, and basic ability to function on a day-to-day basis. [p.15]

****

He has a pre-existing and serious mental illness that is . . . the operating

> cause in his decision to kill himself. [p.16]
>
> ****
>
> Diagnoses:
>
> Major depressive disorder, severe, recurrent
>
> Cognitive disorder, not otherwise specified. [p.17]
>
> ****
>
> His suicidal ideation precluded him from making a rational choice among his legal options. [p.18]
>
> ****
>
> It is my opinion that Mr. Austin's actions were the product of severe and long standing mental illness/defects rather than the autonomous decisions of a person with rational understanding. [p.18]

Affidavit of Dr. George Woods,[2] Pet. Ex. 95.[3]

Despite this extensive evidence, the circuit court found that "though Austin details various psychiatric treatments, interactions with mental health professionals, and the opinions of experts hired post-conviction, **nothing suggests he suffered any impairment that would bear on his competency to stand trial.**" *Austin* at 786 (emphasis added). That is, the court found Dr. Woods' sworn testimony – to the effect that Mr. Austin suffered from severe depression and cognitive impairment which together deprived him of the capacity to make rational decisions in his case –

[2] Respondent's claim that Dr. Woods was not applying the constitutional standard is inaccurate and misleading. *Opposition* at p.13. Dr. Woods clearly identified the correct standard. Pet. Ex. 95 at pp.3-4. In the passage cited by Respondent Dr. Woods was responding to Dr. Brown and making the point that just because courts describe the competency standard as minimal, that does not mean that minimalist assessments are always adequate.

[3] Respondent correctly notes that the exhibits to the original federal petition are not included in the electronic record. The initial filings in this case occurred before the Southern District of Texas transferred to electronic files and have been maintained in paper form.

irrelevant to its competency determination. The court, rather, limited its analysis to Mr. Austin's factual understanding of the charges against him and their consequences, *Austin* at 780, and his general ability to reason logically and act in a goal-directed fashion. *Id.* at 782. The court found these capacities sufficient to demonstrate competence. These capacities, however (which were conceded by the Petitioner) do not establish the capacity for rational choice in a mentally ill individual, and therefore do not answer the question of competence in this case.

Dr. Woods' opinion was well supported by reference to the scientific literature. His second affidavit contained specific citations to a bibliography of twenty-five studies and learned articles.[4] In it he explained that Mr. Austin

> clearly understood the charges he was facing, since he was trying to undermine that very process. The forensic literature is clear, however, that a defendant suffering from certain mental illnesses may demonstrate competence in basic cognitive tasks, but still be unable to exercise rationality in decision making. This may be the case even though the defendant's understanding of his options is not impaired by mental illness; defendants may see and understand their options and the attendant consequences but be unable to rationally act on that information due to the imposition of mental illness and cognitive impairment. (Maroney 2006; Freedman 2009) This is exactly the type of impaired decision making seen in cognitive deficits like frontal lobe dysfunction.(Bechara, Damasio et al. 1998; Murphy, Rubinstein et al. 2001)

ROA.2171.

Legal commentators, have identified that severe depression and cognitive impairments, such as those suffered by Mr. Austin, can render a defendant incompetent by depriving him of the capacity for rational choice. Maroney, T. A.,

[4] ROA.2181-3.

Emotional Competence, "Rational Understanding," And the Criminal Defendant, 43 Am. Crim. L. Rev. 1375. *See also Bonga v. State*, 765 N.W.2d 639, 643-5 (Minn. 2009)(Meyer J. concurring)(highlighting "the serious implications that clinical depression can have on a defendant's competency.") The medical community recognizes that both cognitive and affective symptoms of major depression, can impair an individual's capacity for rational decision-making, including as to their own medical treatment. *See, e.g.,* Hindmarch, Thomas et al, Depression and decision-making capacity for treatment or research: a systematic review, *BMC Medical Ethics* 2013, 14:54.[5]

In a civilian context, suicide is a major public health concern, taking 126 lives per day in 2016 and though suicide is considered a preventable tragedy, it is the tenth leading cause of death in the United States.[6] All fifty states and the District of Columbia have enacted and enforced statutes permitting the civil commitment of those who exhibit suicidal behavior.[7] Even when individuals do not appear suicidal,

[5] The article emphasizes that the reasoning of depressed individuals often masks as more rational and reality-based than it really is. See, e.g., Hindmarch, 6 ("[A]lthough a person in this state can engage in apparent deliberation, these thought processes are overwhelmingly characterized by the rigid conviction of their current belief as perceived from their fixed emotional view. True deliberation and *appreciation* requires that an individual '*think[s] through alternatives*, and this thinking through alternatives needs to be *responsive to evidence*'. " (quoting Halpern, J, When concretized emotion-belief complexes derail decision-making capacity, Bioethics 2012, 26(2): 108-116)(Authors' italics))

[6] American Foundation for Suicide Prevention, *Suicide Statistics* (2016), https://afsp.org/about-suicide/suicide-statistics/ (last visited May 24, 2018).

[7] National Center for State Courts, *Guidelines for Involuntary Civil Commitment* (1986), https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/12/ (last visited May 24, 2018).

courts have approved civil commitment for mentally ill individuals with affective disorders who are engaged in self-harming behaviors.[8]

In a civilian setting it is well understood that the fact that suicide is a volitional act does not make it rational[9] and that when mental health patients present plans to commit suicide, doctors have an obligation to prevent them from following through with those plans.[10]

Petitioner does not ask this court to hold that criminal defendants must always be prevented from committing judicial suicide, merely that they not be found competent to commit judicial suicide if they suffer from a mental illness that substantially impairs their capacity for rational choice in this respect.

II. The Fifth Circuit's decision conflicts with relevant decisions of this court

A. This Court's cases stand for the proposition that reasoned or rational choice forms a part of the Dusky *test for trial competency and the circuit opinion is to the contrary*

Respondent and the circuit court misread *Godinez*. This Court in *Godinez* did not hold that "reasoned choice" or "rational choice" did not form a part of the *Dusky*

[8] *Matter of Todd*, 767 S.W.2d 589, 591 (Mo. Ct. App. 1988) (upholding commitment of patient who had bipolar affective disorder resulting in mood swings, hypergraphia, excessive talking and writing, sleeplessness, and appetite loss); *In re J.C.N.*, No. 1021, 2017 WL 3634282, at *4 (Md. Ct. Spec. App., August 24, 2017) (committing a bipolar patient who refused to take her medication and whose delusions of grandeur would be disastrous for her professional life and finances).

[9] *Brandvain v. Ridgeview Institute, Inc.*, 372 S.E.2d 265, 275 (Ga. Ct. App. 1988)

[10] *Bramlette v.Charter-Medical-Columbia*, 393 S.E.2d 914, 917 (S.C. 1990)

standard, rather, this Court held that the *Dusky* standard necessarily included the capacity for reasoned or rational choice. *See Petition* at pp.31-2.[11]

Turning to the other cases relied upon by respondent:

- this Court's decision in *Drope* recognizes suicidal conduct as an indicia of incompetence without determining whether it is sufficient to raise a reasonable doubt when standing alone. *Id.* at 180. Here, just as in *Drope*, Mr. Austin's self-destructive behavior is far from the only indicia of incompetence, all of which must be viewed in the aggregate. *Id*.
- *Gilmore v. Utah*, 429 U.S. 1012 (1976) was a case in which a "next friend" was not permitted to intervene on behalf of a man who did not have a mental illness. If *Gilmore* has anything to add here it is only to affirm that in cases where there is no mental illness, a desire to be executed does not render a defendant incompetent.
- *Maggio v Fulford*, 462 U.S. 111 (1983) does not define the competency standard but instead addresses the standard for pre-AEDPA deference, particularly, the "fairly supported" language in then 28 U.S.C. §2254(d)(8).

[11] Further, at oral argument in *Godinez*, the parties and amici explicitly agreed that the *Dusky* standard of necessity incorporated the capacity for reasoned choice. *Godinez v. Moran*, 92-725 (April 21, 1993) at pp.5, 6-7, 18, 20, 30.

B. Contrary to Godinez's insistence on a single standard, the effect of the Fifth Circuit's decision is to create separate competency standards for trial and waiver of collateral review

While the circuit court in the present case eschewed consideration of Mr. Austin's capacity for rational choice at the time of trial as not bearing on competency, the Fifth Circuit requires that the *Rees* rational choice standard be applied to a capital defendant seeking to waive collateral review. *Rumbaugh v. Procunier*, 753 F.2d 395, 398 (5th Cir. 1985)(a defendant is incompetent where "even if the mental illness does not prevent him from understanding his legal position and the options available to him, it nevertheless prevents him from making a rational choice among his options.")

Application of the *Rees/Rumbaugh* standard involves a detailed analysis of the defendant's capacity for rational choice, his "secret motivations" (*Opposition* at 19) and whether his decision to seek death was the product of a rational choice among his options. See, for example, the detailed analysis in *In re Cockrum*, 867 F. Supp. 484, 493 (E.D. Tex. 1994)(Mr. Cockrum was "able to understand his situation and the consequences of his actions" but "the applicant's history and actions indicate that his belief that he deserves the death penalty stems from a mental disease -- post-traumatic stress disorder -- which resulted from his killing his father. For this reason, it must be rejected as a rational basis for waiver of legal review.")

Ironically, while the circuit court found Mr. Austin's impairments of rational choice irrelevant to *trial* competency, when it remanded for a determination of Mr. Austin's competence to abandon his appeal it did so on the same body of evidence and

under the *Rees'* rational choice standard. *Austin v. Stephens*, 596 F. App'x 277, 281 (5th Cir. 2015).[12]

III. There is a division of opinion among circuit courts and among state courts of last resort as to the role of the capacity for rational choice in the competency standard

A. Chapman and Hooper apply federal constitutional standards to the state court proceedings

Respondent errs in seeking to reclassify *Chapman v. Commonwealth*, 265 S.W.3d 156 Ky. (2007) and *Hooper v. State*, 142 P.3d 463 (2006) as decisions of state law. *Opposition* at 24-6. Both courts are clearly relying on this court's constitutional standard for competency in *Rees*. *Chapman* at n.69-71 & 182; *Hooper* at 466.

Respondent also errs in suggesting that this Court should only consider the question presented if the State of Kentucky were to complain about the "outlier standard" applied in that state. *Opposition* at p.26.

B. Other circuits require more than factual and logical understanding

Respondent's attempt to dismiss the circuit cases cited by Petitioner is not well taken. *Opposition*, p.23. The cases cited by Petitioner are examples of other circuit courts conducting an assessment of rational understanding and rational choice that is qualitatively different from the circuit court's narrow application of rational understanding in the present case.

[12] Mr. Austin subsequently withdrew his request to abandon his appeal before any action was taken on the remand and the appellate process continued.

For example, in *Lafferty*, the Tenth Circuit held that the state court applied the wrong legal standard in failing to do more than pay "lip service" to "*Dusky's* requirement that competency requires a rational understanding which is different from, and more than, factual understanding." *Lafferty v. Cook*, 949 F.2d 1546, 1556 (10th Cir. 1991). The Tenth Circuit emphasized that it is possible to outwardly act "logically and consistently" but to nonetheless, due to mental illness, be "unable to make decisions on the basis of a realistic evaluation of [one's] own best interests." Id.

Similarly, in *United States v. Timmins*, 82 F. App'x 553, 554-5, n.1 (9 Cir. 2003) the Ninth Circuit held that even though the defendant could understand the nature and consequences of the proceedings, the district court had failed to properly consider his ability to assist counsel when it ignored uncontradicted evidence from mental health professionals that Timmins' mental illness "prevented him from being able rationally to weigh the evidence against him and to decide whether to accept a plea bargain."

In *Smith v. Armontrout*, 812 F.2d 1050, 1057-58 (8th Cir. 1987), applying *Rees*, the court agreed that it was necessary to determine: factual understanding; whether the defendant's choice was a product of a process of reason; and, whether he or she was reasoning from premises our society accepts as rational. As the court stated, "[l]ogic employed in the service of irrational premises does not produce a rational decision." *Id.*

C. Circuit cases cited by Respondent do not support her argument

Respondent relies upon a handful of other circuit cases to argue that there is no split among lower courts for this Court to resolve. Opposition, p.19. The cases cited do not support this conclusion.

In *Dennis v. Budge*, 378 F.3d 880 (9th Cir. 2004), a next friend case, the majority specifically declined to consider "whether the *Rees* standard for competence to waive appeals in a capital case differs from the test for competence to stand trial as articulated in *Dusky*" concluding that no difference in outcome could result in Dennis' case. *Id.* at n.6. There, the defendant had not experienced suicidal thoughts since being placed on medication almost ten years earlier[13] and the psychiatrist "did *not* find that *any* problem substantially affected Dennis's capacity to appreciate his position or make rational choices. *Id.* at 892-3 (emphasis in original).

As for the other cases cited by Respondent: in *Deere v. Cullen*, 718 F.3d 1124 99th Cir. 2013) the court found that there had been no evidence offered that the prisoner had a mental illness that affected his capacity to make rational choices; in *Taylor v. Horn*, 504 F.3d 416 (3d Cir. 2007) the court did not address the present controversy and, in any event, the defendant's suicidal phase had passed by the relevant time. *Id.* at n.15; in *Hunter v. Bowersox*, 172 F.3d 1016 (8th Cir. 1999) the language relied upon by Respondent, was addressed not to competence but to whether the guilty plea was voluntary and intelligent under *North Carolina v. Alford*, 400 U.S. 25 (1970).

[13] Respondent errs in conflating the findings of the court and the evidence of the psychiatrist: evidence that was not accepted in full in state or federal court. See *Dennis*, 378 F.3d at 897, n.3, 906.

IV. Respondent's procedural claims are without merit

Contrary to Respondent's relatively recent claim,[14] the circuit court correctly held that 28 U.S.C. 2254(d) does not apply to this case. *Austin* at 776.

Respondent is wrong in suggesting that the medical records, prison records, and expert opinions relied upon in the habeas petition were "never produced in state court." *Opposition*, p.27. The claims and supporting material filed in the initial federal habeas petition and the state habeas petition were identical.[15] The only material of substance in the federal record not produced in state court are the second affidavits of Drs. Woods and McGarrahan, properly filed in the federal proceeding in rebuttal of the expert affidavits offered with Respondents Answer.

Finally, Respondent's argument that Mr. Austin defaulted his federal competency claim by failing to advance it on his own behalf prior to trial is foreclosed by this Court's precedent. *Pate v. Robinson*, 383 U.S. 375, 384 (1966)

CONCLUSION

Mr. Austin's case is a bookend to this Court's recent decision in *McCoy v. Louisiana*, 584 U. S. ____ (2018), confirming our constitution's commitment to the autonomous choices of criminal defendants.

However, while autonomous choices must be respected, fundamental fairness demands that a defendant, armed with the right to choose his objectives, his plea,

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[14] Throughout the habeas proceedings and until the certificate of appealability was granted, Respondent agreed that §2254(d) did not apply.

[15] The Court of Criminal Appeal recognizes the filing of the state petition in its order, though it ultimately rejects the filing as untimely. *Ex parte Perry Allen Austin*, 59,527-01 (Tex. Crim. App. July 6, 2004), p.2.

whether to be represented and whether to testify, not be tried at a time when mental illness deprives him of the capacity to make a rational choice among his options. Such a defendant is not able to plead or defend "with that advice and caution that he ought." 4 W. Blackstone, Commentaries *24 quoted in *Godinez*, at 404 (Kennedy J., concurring).

Petitioner respectfully pleads that this Court grant his writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,

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RICHARD BOURKE, *Counsel of Record*
Attorney for Petitioner

Dated: May 24, 2018