

No.

IN THE

SUPREME COURT OF THE UNITED STATES

RAMAL HAMMOND,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Ramal Hammond respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Ohio refusing to hear an appeal of the decision of the Ohio Court of Appeals, Eighth Appellate District, affirming conviction.

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QUESTION PRESENTED

When the evidence of guilt is far from overwhelming but cannot be rebutted without information that only the defendant would know, but due to amnesia the defendant cannot recall or report – to counsel or at trial - what actually happened, must the defendant be found incompetent to stand trial even if he otherwise meets the standards of competency set forth in *Dusky v. United States*, 362 U.S. 402 (1960)?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

AND RULE 29.6 STATEMENT

All parties appear in the caption of the case on the cover page. None of the parties thereon have a corporate interest in the outcome of this case.

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OPINIONS BELOW

The decision of the Ohio Court of Appeals, Eighth Appellate District, affirming petitioner's conviction was entered on November 3, 2016. *State v. Hammond*, No. No. 105297, 2017-Ohio-8574, 2017 Ohio App. LEXIS 4999 (Nov. 16, 2017); it is not print published (Pet. App. A 1-5). The Supreme Court of Ohio refused jurisdiction, 152 Ohio St.3d 1462, 2018-Ohio-1795, 97 N.E.3d 500 (2018) (Pet. App. A 6).

JURISDICTION

Petitioner seeks review from the May 9, 2018 decision of the Supreme Court of Ohio refusing to hear an appeal from the Ohio Court of Appeals, Eighth Appellate District decision affirming his conviction. *State v. Hammond*, No. No. 105297, 2017-Ohio-8574, 2017 Ohio App. LEXIS 4999 (Nov. 16, 2017), jurisdiction refused, 152 Ohio St.3d 1462, 2018-Ohio-1795, 97 N.E.3d 500 (2018) (Pet. App. A 6).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

This is a case about a criminal defendant who is unable, and indisputably so, to assist counsel in his own defense, in a case where his assistance would have mattered. The inability was neither a result of personal choice such as drug or alcohol abuse, nor was it a result of the mere passage of time. It was, rather, a consequence of amnesia due to traumatic brain injury caused by having been shot hours *after* the events at issue in the case.

The trial court found all of that essentially irrelevant because at the time of trial the defendant was both rational and aware of what was going on. Nothing else, the court held, mattered. The court was wrong, as was the appellate court that affirmed the decision.

As a result, petitioner Ramal Hammond's due process rights to fair trial and to present a defense were violated. And he was convicted of murder and sentenced to prison for an indefinite term of 18 years to life although he may well not be guilty.

STATEMENT OF THE CASE

Jamal Rolling and his friend Ramal Hammond were both shot on April 14, 2014. Rolling was shot not long after midnight. Hammond was shot later that day. Rolling died from his gunshot. Hammond suffered traumatic brain injury from his.

Testimony indicated that Rolling was getting dressed after taking a shower at the apartment of his girlfriend, India Borden, when Hammond came to the window. He asked Rolling to come outside, and the two went off together, apparently to smoke marijuana. Perhaps 15 or 20 minutes later, people heard a gunshot.

Rolling came running and stumbling back toward Borden's apartment, moving as if he was drunk. Borden came out and got to him shortly after he fell to the ground bleeding. As she tried to stanch the blood pouring from his wound, she testified in response to no question at all, that he said "Ramal" two or three times.

While Borden was with Rolling and before the EMT's arrived, she said that she saw Hammond at the rear of a gathering crowd. He looked like he wanted to go toward her, though he did not. He'd changed his clothes. Perhaps he had a hand in his pocket.

Later that day, Hammond asked for a ride to Xavier Ferguson's house. Xavier wasn't there, but Hammond got out of the car to wait for him in his driveway. He said something was "fishy." Not long afterward, he was shot. As a result of the shooting, he lost all memory of the events surrounding both shootings, Rolling's and his own.

Hammond was charged by indictment with killing Rolling and related offenses. The court determined that he was competent to stand trial despite not having any memory of the events at issue in the case. The case was then tried to the bench which found him guilty of murder, having a weapon under a disability, and firearm specifications. He was sentenced to a total of 18 years to life in prison.

On appeal to Ohio's intermediate appellate court, the Eighth District Court of Appeals, Hammond raised four assigned errors including, as relevant here, that his Sixth Amendment rights were violated when the trial court found him competent to stand trial despite his traumatic-brain-injury-caused amnesia. The court of appeals overruled all of Hammond's assigned errors and affirmed his conviction and sentence. *State v. Hammond*, No. No. 105297, 2017-Ohio-8574, 2017 Ohio App. LEXIS 4999 (Nov. 16, 2017). Hammond then sought discretionary appeal to the Supreme Court of Ohio raising as his first Proposition of Law:

A trial court in a murder case resting entirely on speculation, inference and circumstantial evidence, and in which the evidence of guilt is far from overwhelming, commits error when it finds that a defendant who, as a result of traumatic brain injury, has no recollection of the events at issue, is nevertheless competent to stand trial.

Without explanation, the court denied jurisdiction, declining to hear the appeal. 152 Ohio St.3d 1462, 2018-Ohio-1795, 97 N.E.3d 500 (2018).

REASONS FOR GRANTING THE PETITION

Introduction

Ramal Hammond was convicted at trial and is serving a prison term of 18 years to life for a murder he very well might not have committed. Even he does not know.

There are three plausible explanations for the evidence in this case.

1. Ramal Hammond murdered his long-time friend Jamal Rolling for reasons unknown and disposed of the gun so that nobody has ever been able to find it.
2. Jamal Rolling was about to shoot and kill his long-time friend Ramal Hammond for reasons unknown but Hammond got hold of a gun and shot him first, in self-defense, and then disposed of the gun so that nobody has ever been able to find it.
3. Some unknown person shot and killed Jamal Rolling for reasons unknown and would have shot Ramal Hammond but he ran away only to be later shot by the same person.

The state chose the first as its explanation and argued that Hammond's change of clothes and allegedly evasive behavior, along with a dying declaration, provided proof beyond a reasonable doubt. Key to that choice, and the only evidence actually implicating Hammond, was Rolling's supposed dying declaration that Ramal Hammond shot him. "Ramal, Ramal," he said two or three times as his head was cradled in his girlfriend's lap.

But the statement is at best ambiguous. Rolling's girlfriend had not questioned him. Neither had anyone else. Certainly it is *possible* that he was trying to finger his friend as the one who shot him. Alternatively, and perhaps

more plausibly, he was expressing concern for his friend. Not "Ramal shot me," but "Is Ramal okay? Did Ramal get away?"

The trial court held a hearing and determined that Hammond was competent to stand trial. He could reason, the court said. He could understand and make rational decisions regarding his case. It simply didn't matter that he couldn't remember what happened.

The Problem

The basic rule is well-established. Failing "to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Droe v. Missouri*, 420 U.S. 162, 172 (1975), citing *Pate v. Robinson*, 383 U.S. 375 (1966).

In *Dusky v. United States*, 362 U.S. 402 (1960), this court set forth the basic test of competency to stand trial. "[T]he test must be whether [the 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 a factual understanding of the proceedings against him." *Id.* at 402. Where a court fails to conduct sufficient inquiry to determine competence, any ensuing trial violates the Sixth and Fourteenth Amendments.

The question in this case is what it means to have "sufficient present ability to consult with his lawyer." While the answer is necessarily case specific, the particulars of this case demonstrate the need for this Court to provide some meaningful guidance.

The immediate problem is peculiar to petitioner Hammond's case because, as the state acknowledged and the trial court recognized, for reasons beyond his control Hammond has no idea what actually happened. His amnesia regarding the events at issue is total and real. In the words of the trial court, and agreed to by the prosecutor,

So this is unique in the sense that this is not a self-induced sort of psychosis or amnesia, this is a traumatic brain injury as a result of being shot some 12 to 14 hours after the alleged incident takes place in the indictment.

What of that? Hammond agrees that it would be unreasonable to establish a rule that whenever a defendant has no memory of the events at issue the court must find the defendant incompetent to stand trial. Such a rule is too broad, would cover too many cases where it would serve no discernible purpose. But rejecting one possible rule leaves open the question of what rule should be adopted.

The Proposed Resolution

The problem with the amnesia-is-always-sufficient rule is that it sweeps in too many cases where lack of memory is either to be expected (*e.g.*, decades old cases brought against repeat offenders on the basis of newly obtained DNA evidence) or is essentially irrelevant (*e.g.*, robbery at a convenience store caught in detail on surveillance camera). The cases finding that a defendant had amnesia but was nevertheless competent to stand trial are frequently such cases, cases where the evidence of guilt is truly overwhelming.

In *Morrow v. State*, 47 Md.App. 296 (1980), for instance, the defendant was convicted of "manslaughter by automobile" for a drunk-driving accident that led to

the death of his passenger. Quoting *United States v. Swanson*, 572 F.2d 523, 526 (5th Cir. 1978), the court recognized that “the fundamental fairness” of allowing the trial of a defendant who cannot recall the events at issue “may vary depending on the crime and the circumstances.” *Morrow* at 303. Then after reviewing the specifics of the case, the court explained its conclusion.

In the instant case, we find nothing to indicate that the appellant's amnesia precluded a fair trial. As noted above, defendants are often tried under circumstances where less than all of the relevant facts are available. Witnesses die, witnesses forget, documents are destroyed or lost; nevertheless the courts must administer justice based on that evidence which is available. The evidence in this case is overwhelming. This is not an instance where the facts suggest the possibility of an alibi or other defense which has been locked away by the appellant's loss of memory. The appellant was provided with a list of witnesses to the collision; he had the same opportunity as did the State to interview, examine and cross-examine these witnesses. We find that, under these circumstances, the appellant's amnesia did not preclude him from receiving a fair trial.

Id. at 304.

Similarly, in *Commonwealth v. Barky*, 476 Pa. 602 (1978), a murder case following which the defendant claimed that because of his amnesia he “was unable to . . . offer a defense,” the court recited the evidence demonstrating that his memory would have been, essentially, irrelevant.

When appellant was arrested and the victim's body discovered, appellant's house was completely locked. Further, the police testified that only the garage door could have been locked from the outside. When appellant was arrested, he was armed with a shotgun. A neurosurgeon testified that appellant's head wound was caused by a shotgun from close range. Further, appellant's left forearm and right hand suffered injuries consistent with having beaten the victim. The evidence, particularly of appellant's injuries, his presence at the murder scene and the reasonable inferences therefrom, is sufficient to sustain his conviction for murder of the third degree.

Id. at 606-607.

Again, in *People v. Stolze*, 100 Mich.App. 511 (1980), the court noted that both the state and the defense acknowledged that Stolze, having been shot in the head by his victim, had no memory of the events at issue “nor the events of several months before and after that date.” *Id.* at 513. “Perhaps,” the court said, there would be a case where a defendant was “seriously prejudice[d]” by his amnesia. But this wasn’t the case.

Defendant's memory would have been of questionable help to defense counsel because of the number of witnesses and the substantial amount of extrinsic evidence implicating defendant in the assault. Here, the defendant was able to consult with and assist his lawyer subject to the limitation imposed by the amnesia. Further, the prosecution's case was extremely strong. Four witnesses in the store identified defendant and testified to his pulling out a gun. Under these circumstances, had defendant been able to recall the incident his testimony would have been largely cumulative.

Id. at 515-516.

What those cases, and there are literally dozens like them,¹ have in common is that the evidence of guilt was overwhelming. Moreover, and importantly, there was really nothing in that case that the defendant's memory – lost not because of the mere passage of time or because of, say, drug or alcohol blackout – could have meaningfully added to his defense. The evidence precluded the possibility that the defendant was mistakenly identified. The evidence precluded the possibility of the actual culprit being an unidentified third party. It precluded the possibility of self-defense.

¹ See *Amnesia as Affecting Defendant's Competency to Stand Trial*, 100 ALR 6th 535 (2017).

But where there is undisputed and total amnesia regarding the events of the crime, and where the evidence of guilt is far from overwhelming, and where alternative scenarios (*e.g.*, a third party committed the crime or self-defense) cannot be ruled out but the only direct evidence for them would be the defendant's testimony, a determination that the defendant was competent will violate the due process rights to a fair trial and to present a defense. Sixth and Fourteenth Amendments. This Court recognized as much in *Drope* when it explained 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." 420 U.S. at 171 (emphasis added).

It was that recognition that led Judge Wright to identify six factors a court should consider in determining whether a defendant's amnesia made him incompetent to stand trial.

- (1) The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.
- (2) The extent to which the amnesia affected the defendant's ability to testify in his own behalf.
- (3) The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonably possible alibi.
- (4) The extent to which the Government assisted the defendant and his counsel in that reconstruction.
- (5) The strength of the prosecution's case. Most important here will be whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.
- (6) Any other facts and circumstances which would indicate whether or not

the defendant had a fair trial.

Wilson v. United States, 391 F.2d 460, 463-464 (D.C.Cir. 1968)(footnote omitted).

That Standard Applied

The evidence against Hammond is far from compelling. He and his good friend James Rolling walked off together from an apartment complex. Some fifteen or twenty minutes later, Rolling staggered back, having been shot. Rolling perhaps, and without either prompting or explanation, said Hammond's name two or three times before he died. Hammond may have changed clothes. Hammond did not approach the body. Rolling's gun was later found on the ground at the presumptive scene of the shooting. It was loaded but had not been fired. Hours later, Hammond was shot.

On that basis, and only on that basis, Hammond was convicted of the murder of his good friend. And perhaps he is guilty. But perhaps not. Perhaps the killer was a third person.

- Perhaps that third person later shot Hammond in the effort to eliminate a witness.
- Perhaps that third person shot Hammond to complete the job of killing both Hammond and his friend Rolling.
- Perhaps, for reasons unknown, Rolling was preparing to shoot Hammond but Hammond shot him in self defense.

Each of those possibilities is, frankly, as likely or nearly so as that Hammond is guilty of killing his friend. But the only person who could have known, the only person who could present testimony regarding what actually happened, the only person who could have provided the exculpatory information could not do so because he cannot remember. And he cannot remember because he was a victim of a later

crime. He cannot remember because he suffered traumatic brain injury as a consequence of having been himself shot mere hours after his friend was shot and killed.

Ramal Hammond may have had the ability “to consult with his lawyer with a reasonable degree of rational understanding” and may have had “a rational as well as a factual understanding of the proceedings against him.” *Dusky, supra*, at 402. What he did not have was the ability “to assist in preparing his defense.” *Drope, supra* at 171.

On these facts, Hammond’s Sixth and Fourteenth Amendment rights were violated and as these facts demonstrate, this Court needs to clarify exactly what the standards for competence mean and how they are to be applied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX