

**CAPITAL CASE  
No. 23-953**

---

---

IN THE  
**Supreme Court of the United States**

---

BRANDON MICHAEL COUNCIL,  
*Petitioner,*  
v.

UNITED STATES OF AMERICA,  
*Respondent.*

---

*On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit*

---

**BRIEF OF MENTAL HEALTH PROFESSIONALS  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

---

Trevor S. Cox  
*Counsel of Record*  
Maya M. Eckstein  
Carley Ruival  
HUNTON ANDREWS KURTH LLP  
Riverfront Plaza, East Tower  
951 E. Byrd Street  
Richmond, Virginia 23219  
(804) 788-8200  
tcox@HuntonAK.com  
meckstein@HuntonAK.com  
cruival@HuntonAK.com

*Counsel for Amici Curiae*

---

---

**TABLE OF CONTENTS**

TABLE OF CONTENTS .....	i
TABLE OF APPENDICES .....	ii
TABLE OF AUTHORITIES.....	iii
INTRODUCTION AND INTEREST OF <i>AMICI</i> .....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT .....	5
I.    The work of mental health professionals plays a vital role in informing a district court's determination regarding whether a criminal defendant is competent to stand trial. ....	5
II.   Widely accepted standards govern how mental health professionals should conduct competency evaluations. ....	10
A.   An evaluator must prepare for the assessment.....	10
B.   An evaluator must assess the defendant's competency during an interview based on a number of factors.....	13
C.   An evaluator must provide a report that enables the court to make an independent determination of competency.....	16
III.  The evaluation assessing Mr. Council's competency to stand trial and corresponding hearing fell gravely short of prescribed standards. ....	19
CONCLUSION .....	28

**TABLE OF APPENDICES**

	<b>Page(s)</b>
APPENDIX A — LIST OF <i>AMICI CURIAE</i> .....	1a

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Battle v. United States</i> , 419 F.3d 1292 (11th Cir. 2005).....	19
<i>Cole v. Roper</i> , 579 F. Supp. 2d 1246 (E.D. Mo. 2008).....	12, 13
<i>Droepe v. Missouri</i> , 420 U.S. 162 (1975).....	5, 6
<i>Dusky v. United States</i> , 362 U.S. 402 (1960).....	2, 5, 6, 16, 17
<i>McGregor v. Gibson</i> , 248 F.3d 946 (10th Cir. 2001).....	17
<i>Medina v. California</i> , 505 U.S. 437 (1992).....	2, 3
<i>Odle v. Woodford</i> , 238 F.3d 1084 (9th Cir. 2001).....	17
<i>Pate v. Robinson</i> , 383 U.S. 375 (1966).....	2
<i>Pedrero v. Wainwright</i> , 590 F.2d 1383 (5th Cir. 1979).....	19

## TABLE OF AUTHORITIES–Continued

	Page(s)
<i>United States v. Garza</i> , 751 F.3d 1130 (9th Cir. 2014).....	11, 16
<i>United States v. Lopez-Hodgson</i> , 333 F. App’x 347 (10th Cir. 2009).....	16, 19
<i>United States v. Roof</i> , 10 F.4th 314 (4th Cir. 2021) .....	11
<b>CONSTITUTIONAL PROVISIONS</b>	
U.S. CONST. amend. V .....	1
<b>STATUTES</b>	
18 U.S.C. § 4241 .....	2, 5, 6, 16, 20
18 U.S.C. § 4247 .....	2, 6
<b>OTHER AUTHORITIES</b>	
American Psychological Association, <i>Ethical Principles of Psychologists and Code of Conduct</i> , <a href="https://www.apa.org/ethics/code">https://www.apa.org/ethics/code</a> ....	10, 13
American Psychological Association, <i>Specialty Guidelines for Forensic Psychology</i> , <a href="https://www.apa.org/practice/guidelines/forensic-psychology">https://www.apa.org/practice/guidelines/forensic-psychology</a> .....	12, 17

## TABLE OF AUTHORITIES–Continued

	Page(s)
Barry W. Wall et al., <i>AAPL Practice Resource for the Forensic Psychiatric Evaluation of Competence to Stand Trial</i> , 46 J. AM. ACAD. PSYCH. & L., Issue No. 3 Suppl. (2018) .....	8, 12–15, 18
Daniel C. Murrie & Heather Zelle, <i>Criminal Competencies</i> , American Psychological Association, APA HANDBOOK OF FORENSIC PSYCHOLOGY, VOL. I: INDIVIDUAL AND SITUATIONAL INFLUENCES IN CIVIL AND CRIMINAL CONTEXTS (B.L. Cutler & P.A. Zapf eds., 2015) .....	8, 9, 14, 18
Gary B. Melton et al., <i>PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS</i> (4th ed. 2018) .....	11, 27
Kirk Heilbrun et al., eds., <i>FORENSIC MENTAL HEALTH ASSESSMENT: A CASEBOOK</i> (2d ed. 2014) .....	24, 25, 26, 27
Kirk Heilbrun et al., <i>FOUNDATIONS OF FORENSIC MENTAL HEALTH ASSESSMENT</i> (2009) .....	5, 8, 9, 12, 13
Patricia A. Zapf & Ronald Roesch, <i>EVALUATION OF COMPETENCE TO STAND TRIAL</i> (2008) .....	6–19

## INTRODUCTION AND INTEREST OF *AMICI*

Criminal defendants must be competent to stand trial—so requires the Due Process Clause of the Fifth Amendment. The work of mental health professionals in evaluating defendants' competency, when properly performed, is instrumental in safeguarding that right. As psychologists and psychiatrists who conduct, study, and teach about competency evaluations, *Amici* have serious concern that the evaluation process followed in this capital case deprived Mr. Council of his constitutional right to be competent to stand trial.<sup>1</sup>

*Amici* are leaders in the areas of forensic psychology and forensic psychiatry.<sup>2</sup> Having engaged in pertinent professional, scholarly, and training activities throughout our careers, we are thoroughly familiar with the critical function played by mental health professionals in the competency determination process, the analytical methods used to assess competency, and the purposes and components of a useful competency report. This specialized experience

---

<sup>1</sup> This brief was not authored in whole or in part by counsel for any party. A party or a party's counsel did not contribute money that was intended to fund preparing or submitting this brief. No person other than *Amici* or their counsel contributed money that was intended to fund preparing or submitting this brief. Counsel of record for all parties were timely notified under Rule 37.2 of *Amici*'s intent to file this brief.

<sup>2</sup> *Amici* are identified in the Appendix to this brief.

informs our perspective on the shortcomings of the competency evaluation process followed here.

The parameters for competency evaluation rest on the foundational principle that a defendant is constitutionally entitled to “an adequate hearing on his competence to stand trial.” *Pate v. Robinson*, 383 U.S. 375, 386 (1966). Trial courts must rely on “psychiatric evidence” in determining a defendant’s competency, *Medina v. California*, 505 U.S. 437, 450 (1992), and that evidence should be “dispositive on the issue,” *Pate*, 383 U.S. at 386. Mental health professionals like *Amici* often are called upon to provide and interpret such evidence. They conduct evaluations and advise courts on whether defendants are competent to stand trial; then, equipped with that necessary information, courts make a final competency determination. See *Dusky v. United States*, 362 U.S. 402, 402 (1960). Federal statutes prescribe the required elements of this process. See 18 U.S.C. § 4241 (codifying the framework for a court’s competency determination); *id.* § 4247(c) (specifying required contents of a psychiatric or psychological report).

For this process to produce reliable results, however, it must be based on reliable practices. Drawing on our professional perspective on competency evaluations and relevant academic literature, *Amici* write to explain why the process followed in the district court (and later blessed by the Fourth Circuit) was insufficient to ensure that Brandon Council was competent to stand trial.

## SUMMARY OF ARGUMENT

The petition in this case properly challenges the failure by Mr. Council’s examiners, and then by the district court, to reliably assess his competency to stand trial—a failure that violated his constitutional rights. To be sure, the Due Process Clause does not mandate the precise format of a competency evaluation, *see Medina*, 505 U.S. at 451, but this case does not involve a minor deviation from best practice, or even accepted practice. *Amici* offer three points to assist the Court in understanding the extent to which Mr. Council’s competency evaluation departed from what is needed, typical, and expected.

*First*, this brief describes the role of mental health professionals in determining competency. It explains how key terms used in the legal definition for competency relate to mental health standards and defendants’ trial-related skills and abilities that mental health professionals have identified to test and measure a defendant’s competency to stand trial.

*Second*, the brief discusses the widely accepted standards developed by mental health professionals for conducting competency evaluations. The process of evaluation, which can be lengthy and iterative, generally consists of three stages: preparation, assessment, and communication of findings. Each stage is critical to providing a court with an accurate psychological evaluation of a defendant’s competency.

*Third*, the brief explains how the evaluation

process that occurred here—and on which the district court’s competency determination depended—fell woefully short of satisfying these standards. The record indicates that Mr. Council’s evaluation consisted solely of a three-hour interview and contains no suggestion that his examiners reviewed or considered any background or biographical information to inform their evaluation. What’s more, Mr. Council’s attorneys provided the district court only a two-paragraph “report” signed by the examiners that simply reflected the examiners’ barebones conclusions about his competency to stand trial, with no bases for the conclusion whatsoever. Because it gave no factual or evidentiary support for that finding, this “report” failed to provide the court with the meaningful information needed to make an informed adjudication of Mr. Council’s competency.

*Amici* conclude, regrettably, that the process through which Mr. Council was determined competent to stand trial did not satisfy the minimum standards accepted in the professional community for evaluating competency. The Court should grant the petition and take this opportunity to clarify that criminal defendants are constitutionally entitled to a more adequate competency evaluation process than the cursory treatment Mr. Council received.

## ARGUMENT

### I. The work of mental health professionals plays a vital role in informing a district court’s determination regarding whether a criminal defendant is competent to stand trial.

The role of mental health professionals has grown in importance since the field of forensic mental health first developed in the 1960s. *See Kirk Heilbrun et al., FOUNDATIONS OF FORENSIC MENTAL HEALTH ASSESSMENT* 15 (2009) [hereinafter FOUNDATIONS]. That was around the time the Supreme Court first articulated the modern standard for competency to stand trial. *See Dusky*, 362 U.S. at 402; *Drope v. Missouri*, 420 U.S. 162, 172 (1975). When Congress later legislated a procedure for determining a criminal defendant’s competency to stand trial, it contemplated that psychiatrists and psychologists (collectively, “mental health professionals” or “evaluators”) would play a critical role. *See* 18 U.S.C. § 4241.

First, a trial court must determine whether there is “reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent.” 18 U.S.C. § 4241(a). Next, the court may order that “a psychiatric or psychological examination of the defendant be conducted” and that “a psychiatric or psychological report be filed with the court.” *Id.* § 4241(b). When the court orders such a report, the report “shall include” a host of specific data, including “the person’s

history and present symptoms,” “a description of the psychiatric, psychological, and medical tests that were employed and their results,” and “the examiner’s findings.” *Id.* § 4247(b). Finally, the court must conduct a competency hearing at which the defendant is “afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.” *Id.* § 4241(d); *id.* § 4247(d). At that time, the court decides whether, “by a preponderance of the evidence[.] . . . the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.” *Id.* § 4241(d).

Because the competency standard set forth in case law<sup>3</sup> and in § 4241 is a legal one, it does not dictate a method for medically testing whether a defendant is competent. Nor does it provide guidance to mental health professionals about how to define key terms, such as “sufficient,” “present,” “ability,” “reasonable,” “rational understanding,” “factual understanding,” and “assist.” Patricia A. Zapf & Ronald Roesch, EVALUATION OF COMPETENCE TO STAND TRIAL 141–43

---

<sup>3</sup> See *Drope*, 420 U.S. at 172 (stating that the test for competency is “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 factual understanding of the proceedings against him”) (quoting *Dusky*, 362 U.S. at 402).

(2008). To bridge this gap, mental health professionals have translated the legal standards into cognitive and behavioral capacities, enabling them to appraise a defendant's competency-relevant capacities.

First, mental health professionals operationalized the keywords in the competency standard, as summarized below:

- “*Sufficient* ability and *reasonable* understanding specify that CST [competency to stand trial] does not require complete and fully unimpaired functioning.” Zapf & Roesch, *supra* at 7.
- “*Reasonable* also implies relativity in relation to the context. That is, abilities must be better developed for complex cases than for simple cases.” *Ibid.*
- “*Present* ability specifies that CST is explicitly a ‘current mental state question.’ Therefore, by definition, CST is independent of retrospective forensic mental health questions, such as mental state at the time of the offense.” *Ibid.*
- “*Ability* connotes that the test seeks to identify individuals who are unable to function adequately, not those who are unfamiliar with appropriate functioning or

those who choose not to participate adequately.” *Ibid.*

- “The distinction between *factual* and *rational* understanding communicates that more than a concrete, rote understanding is required to possess CST . . . both components are necessary.” *Ibid.*

Second, mental health professionals have been instrumental in pinpointing trial-related skills and abilities—often termed “functional legal capacities”—that can be tested to determine whether a defendant is competent to stand trial. Heilbrun et al., FOUNDATIONS, *supra* at 6. Mental health professionals have articulated a number of abilities that map onto the legal definition of competency:<sup>4</sup>

- *Understanding:* A defendant must grasp the case, charges, range of possible penalties, plea options, and basic rights to which they are entitled. Daniel C. Murrie & Heather Zelle, *Criminal Competencies*, in American Psychological Association, APA HANDBOOK OF FORENSIC PSYCHOLOGY, VOL. I: INDIVIDUAL AND SITUATIONAL INFLUENCES

---

<sup>4</sup> See Barry W. Wall et al., *AAPL Practice Resource for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 46 J. AM. ACAD. PSYCH. & L., Issue No. 3 Suppl., at S48–49 (2018) [hereinafter *AAPL Practice Resource*] (providing a similar description of the relevant skills and abilities).

IN CIVIL AND CRIMINAL CONTEXTS 120–21  
(B.L. Cutler & P.A. Zapf eds., 2015).

- *Appreciating*: A defendant must be able to rationally abstract information to apply it to his or her case and grasp the important implications. *Ibid.*
- *Reasoning*: A defendant must also be able to manipulate and weigh that information to make reasonable (but not perfect) decisions. *Ibid.*
- *Assisting*: With adequate understanding, appreciating, and reasoning, a defendant should be capable and motivated enough to help counsel mount a vigorous defense. *Ibid.*
- *Decision Making*: The defendant must be able to consider alternatives and make rational decisions (i.e., those based in reality). *Ibid.*

Third, mental health professionals created specialized measures to test whether defendants adequately demonstrate these skills and abilities. *See* Heilbrun et al., FOUNDATIONS, *supra* at 35. These specialized measures have been developed and refined through rigorous testing and analysis, so mental professionals now have highly reliable tools for evaluating competency. *Ibid.*; Zapf & Roesch, *supra* at 61–73.

**II. Widely accepted standards govern how mental health professionals should conduct competency evaluations.**

While there is no one-size-fits-all method for conducting evaluations to determine if a defendant is competent, at minimum, proper evaluations involve three steps: preparing for the assessment, assessing the defendant during an interview, and drafting a report for the court's use. Regardless of which specific tools evaluators use, mental health evaluations must provide detailed observations and conclusions. They require thorough preparation and careful reporting. For example, psychologists must "base the opinions contained in their reports . . . on information and techniques sufficient to substantiate their findings." American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, § 9.01(a) ("Bases for Assessments"), <https://www.apa.org/ethics/code> (last visited Apr. 1, 2024) [hereinafter *Ethical Principles of Psychologists*]. If evaluators fail to "show their work" or neglect to include in their reports the basis for their opinions, those reports necessarily are of limited value to a court that must legally (and independently) determine whether a defendant is competent to stand trial.

**A. An evaluator must prepare for the assessment.**

Proper competency evaluations begin with proper preparation. *See generally* Zapf & Roesch, *supra* at

81–110. Before ever interacting with a defendant, a mental health professional gathers a variety of information to understand the defendant’s background. Evaluators collect information from a variety of sources about the examinee’s family and development history, educational history, marital history, employment history, mental health history (including history of treatment), medical history, history of substance use, and criminal history. *Id.* at 114–15; see *United States v. Roof*, 10 F.4th 314, 343–44 (4th Cir. 2021) (referencing psychiatrist’s review of the defendant’s childhood, developmental history, and transcripts of court proceedings related to the defendant); *United States v. Garza*, 751 F.3d 1130, 1137 n.5 (9th Cir. 2014) (describing how evaluator reviewed defendant’s medical records). “Court documents are one important source for this type of information.” Gary B. Melton et al., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 152 (4th ed. 2018). But assuming the defense attorney has had meaningful contact with the defendant and is willing to share relevant information, the attorney is “often the most important third-party data source for a competence evaluation.” *Ibid.* Evaluations can be performed efficiently, and in some cases even in a compressed period, but the ability to conduct evaluations quickly depends on accurately determining ahead of time the “most relevant pieces of data to obtain.” See Zapf & Roesch, *supra* at 111–12.

But the preparation stage is about more than simply streamlining the assessment and making the process more efficient. Preparation before the assessment is vital in ensuring the accuracy of the data the evaluator collects from the defendant during the assessment. *See id.* at 113 (explaining that preparation enables evaluators to “confront the defendant regarding any discrepancies during the clinical interview.”). To this end, evaluators must collect and corroborate information from multiple sources. *See* American Psychological Association, *Specialty Guidelines for Forensic Psychology* § 9.02 (“Use of Multiple Sources of Information”), <https://www.apa.org/practice/guidelines/forensic-psychology> (last visited Apr. 1, 2024) [hereinafter *Specialty Guidelines for Forensic Psychology*]. Some parties in criminal proceedings may have an incentive to distort the truth, so “any single informant may simply offer an inaccurate or biased perspective.” Heilbrun et al., FOUNDATIONS, *supra* at 107. Indeed, it is common that “defendants’ accounts of symptoms, past treatment, and other relevant events differ substantially from the reports of witnesses or other informants.” AAPL *Practice Resource* at S39. Thus, evaluators must corroborate information self-reported by the defendant using other sources. Zapf & Roesch, *supra* at 135.

For the same reason, the evaluator cannot merely rely on opinions or summaries provided by a defendant’s attorney—although the attorney may be an important source of information. Mental health professionals are cautioned never to accept “attorney

condensation, summary, or conclusions” as the only working materials. Heilbrun et al., FOUNDATIONS, *supra* at 119. They must instead corroborate such data using multiple sources. *See, e.g., Cole v. Roper*, 579 F. Supp. 2d 1246, 1277 (E.D. Mo. 2008) (describing how evaluator considered “multiple sources in completing his evaluation, including: interviews with Petitioner, police reports, a personality test, a medical examiner report, an investigative memo, some of Petitioner’s employment records, and . . . statements to police”).

**B. An evaluator must assess the defendant’s competency during an interview based on a number of factors.**

After adequate preparation, the evaluator must assess the defendant using thorough methods “adequate to support [his] statements or conclusions.” *Ethical Principles of Psychologists* § 9.01(b). The assessment should last “for enough time and with enough thoroughness to permit assessment of the functional characteristics relevant to the jurisdiction’s legal criteria . . .” *AAPL Practice Resource* at S33. Anything less prevents the evaluator from reaching a sound conclusion about the defendant’s competency.

While the precise methodology may vary from evaluator to evaluator, all methods must allow the evaluator to “develop[] a comprehensive understanding and assessment of the defendant’s current clinical functioning.” Zapf & Roesch, *supra* at 117. Evaluators are clinically trained to pay attention

to many factors during an interview, including the defendant's orientation to time and place; general appearance, attitude, and demeanor; attention and ability to concentrate; mood and affect; and intellectual functioning. *Ibid.* Along with the background information collected during the preparation phase, those factors are crucial in interpreting the defendant's responses, including whether the defendant is masking (attempting to appear competent) or malingering (attempting to appear incompetent). *See generally id.* at 123–24.

Mental health professionals have developed strategies for eliciting information from defendants during competency assessments. Evaluators often focus the initial portion of the interview on gathering background information from the defendant, “including personal and family history, current living arrangements, academic history, and occupational history.” *AAPL Practice Resource* at S34. Typically, evaluators have gathered some of this information from other sources during the preparation stage, which allows them to corroborate the defendant’s responses. Next, evaluators assess whether the defendant has the skills and abilities necessary to stand trial. *Id.* at S35. This typically involves asking questions designed to gauge the defendant’s understanding of the legal process and the roles of courtroom personnel. *Murrie & Zelle, supra* at 140. Specifically, evaluators test the defendant’s:

- “awareness of being charged with a crime and facing prosecution”;

- “knowledge of specific charges, the meaning of those charges, and potential penalties if convicted”;
- “knowledge about the roles of principal courtroom personnel (the judge, jury, witness, defense attorney and prosecutor) and of the evaluatee’s role as defendant”;
- “capacity to appraise the [effect] of evidence (e.g., adverse witness testimony) that could be adduced” at trial;
- “understanding of available pleas and their implications, including plea bargaining”;
- “perceptions of expectations of defense counsel”; and
- “ability to behave properly during court proceedings and at trial.”

*AAPL Practice Resource* at S35.

During competency assessments, evaluators ask open-ended questions to appraisee the defendant’s capacity to communicate offense-relevant information, which establishes the defendant’s ability to “provide a rational, consistent, and coherent account of the offense to his attorney.” *Id.* at S37. Evaluators “also ask defendants to describe how their activities have been or will be described by victims or witnesses and (especially) the police.” *Ibid.* Moreover, the “interaction between the defendant and

defense counsel is an important consideration in any competency evaluation.” Zapf & Roesch, *supra* at 122. “Direct observation [allows] the evaluator to make an informed judgment about the ability of the defendant to work with her defense attorney.” *Ibid.*

In addition to an open-ended question-and-answer session probing defendant’s capacities, evaluators may use a variety of psychological tests or specialized measures to appraise whether the defendant has the requisite knowledge, skills, and abilities to stand trial. *Id.* at 59–73; *see also United States v. Garza*, 751 F.3d, at 1132 (discussing evaluator’s reports of defendant’s performance on various aptitude tests); *United States v. Lopez-Hodgson*, 333 F. App’x 347, 354 (10th Cir. 2009) (stating that “[t]o form his competency opinion,” the evaluator “conducted his own psychological testing”). The results of these tests can provide useful data points in reaching a conclusion regarding a defendant’s competency.

**C. An evaluator must provide a report that enables the court to make an independent determination of competency.**

Finally, evaluators must synthesize their findings into a report that provides the court with sufficient information to render a legal determination regarding the defendant’s competency. The court, not the evaluator, ultimately makes the legal competency decision. *See Dusky*, 362 U.S. at 402; 18 U.S.C. § 4241(d). In fact, in *Dusky*, the Court remanded the

case because the district judge lacked sufficient information to determine whether the defendant was competent. 362 U.S. at 402. To avoid this result, the evaluator's report must "outline the bases for any opinions or conclusions in the report to court." Zapf & Roesch, *supra* at 146.

A report merely containing an evaluator's conclusion unaccompanied by findings and reasoning fails to provide the judge with information on which to base her independent determination regarding if a defendant is competent to stand trial. *See, e.g., Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001) (stating that a factfinder must be provided with sufficient information upon which to base a reasonable decision regarding a defendant's competency); *McGregor v. Gibson*, 248 F.3d 946, 963 (10th Cir. 2001) (describing as "disturbing" the "lack of contemporaneous medical evidence regarding [defendant's] competency at the competency proceeding"). For that reason, a mental health professional's report cannot merely recite the legal standard for competency or assert the evaluator's bald conclusions. *See Specialty Guidelines for Forensic Psychology* § 10.06 (stating that forensic psychologists "recognize the importance of documenting all data they consider with enough detail and quality to allow for reasonable judicial scrutiny"). In other words, an evaluator must show her work.

Generally, a report of a competency evaluation must answer three principal questions:

- (1) “What symptoms does the defendant have and what is the defendant’s psychiatric diagnosis?”<sup>5</sup> *AAPL Practice Resource* at S46.
- (2) “What is the relationship, if any, between the symptoms or diagnosis and the mental capabilities required under the jurisdiction’s standard for competence to stand trial?” *Id.*
- (3) “If the defendant appears incompetent to proceed with adjudication, how likely is it that appropriate restoration services would restore his competence?” *Id.*

Reports must “go beyond describing signs and symptoms of mental impairment and should discuss how those signs and symptoms affect functional abilities relevant to the legal construct of competence.” *Id.* at S52. Evaluators must “generally state their opinions with a ‘reasonable degree of medical [or psychological] certainty.’” *Ibid.* The report should include any “limitations of an opinion,” *AAPL Practice Resource* at S29, and “the evaluator should indicate in the report which records or information sources were requested but not received by the time of writing[.]” Zapf & Roesch, *supra* at 92.

---

<sup>5</sup> Almost all jurisdictions require a mental disorder to find a defendant incompetent. Thus, a mental disorder is usually a necessary, but never sufficient, prerequisite to incompetence. Murrie & Zelle, *supra* at 118.

This “serves the purpose of acknowledging that some important information may not have been taken into consideration in rendering the opinions set forth in the report.” *Ibid.*

After rendering their report, it is not uncommon for evaluators to testify at a defendant’s competency hearing regarding their clinical findings to further inform the court’s determination of competency. *See, e.g., Battle v. United States*, 419 F.3d 1292, 1299 (11th Cir. 2005) (describing a “fair and thorough” competency hearing that “involved many witnesses, five of whom were either psychiatrists or psychologists who had evaluated” the defendant); *Lopez-Hodgson*, 333 F. App’x at 349 (describing how the forensic psychologist who evaluated the defendant “testified at the competency hearing”). This helps ensure that criminal defendants are afforded an “adequate or ‘meaningful’ hearing.” *See Pedrero v. Wainwright*, 590 F.2d 1383, 1389 (5th Cir. 1979) (internal citation omitted).

**III. The evaluation assessing Mr. Council’s competency to stand trial and corresponding hearing fell gravely short of prescribed standards.**

As described above, an evaluation to determine whether an individual is competent to stand trial involves significant preparation, one or more thorough interviews, and a detailed report including both the evaluator’s conclusions and the data upon which the evaluator based these conclusions. Mr.

Council's competency evaluation involved none of these things.

As the petition well describes, this case involves long-running concerns about Mr. Council's competency based on multiple episodes of delusional behavior. Pet. 5–6. These delusions surfaced at trial when Mr. Council informed the district court that God was responsible for the deaths of the victims and that God should be subpoenaed. Pet. 6. The next day—Friday, September 20, 2019—the trial court ruled that there was reasonable cause to order a competency evaluation. Pet. App. 56a. Two evaluators were quickly recruited to examine Mr. Council, which they hastily did in a single, brief interview two days later. Pet. App. 58a.

Later that afternoon, the attorneys submitted to the court as a “report” a two-paragraph statement signed by the evaluators:

Based on a three-hour interview with Brandon Michael Council on Sunday, September 22, 2019, we believe, to a reasonable degree of medical certainty, that Brandon Michael Council is competent to stand trial as defined in 18 U.S.C. Section 4241(a), to wit: Brandon Michael Council is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, if he chooses to do so.

As the Court is well aware, competency is a fluid issue. As of this date, the undersigned find that he is competent to proceed. Mr. Council is experiencing extreme anxiety and some sleep deprivation. As of this date, the undersigned find he is competent to proceed. Nevertheless, the possibility of decompensation as the trial proceeds cannot be ruled out. We recommend that counsel monitor his status and advise the court should there be a change. If Mr. Council exhibits signs of stress, a short break in the proceedings could be beneficial.

*Ibid.* No documents, test results, interview notes, or further explanation accompanied their statement. The next morning, relying on that statement—and without questioning Mr. Council directly or otherwise investigating or evaluating the matter—the district court very quickly pronounced him competent and resumed trial.<sup>6</sup>

All three of the key elements of competency evaluations discussed above were absent from Mr. Council's evaluation process. *First*, there is no indication that his evaluators undertook any of the necessary preparation to conduct a competency evaluation. Nor is there any suggestion in the record that any background information about his social,

---

<sup>6</sup> The record does not reveal that the evaluators participated in—or were asked to participate in or even attend—the cursory hearing at which the trial court considered Mr. Council's competency.

drug-use, criminal, or educational history was collected or analyzed. Likewise, there is no evidence that the examiners gathered his family, medical, or psychiatric history, including any past medical or psychiatric diagnoses, or interviewed any third parties familiar with the defendant and his recent behavior and symptoms. The record is similarly silent regarding what, if any, relevant information was conveyed to the evaluators by Mr. Council's defense attorneys. That background information is not only relevant to consider in its own right, but it is critical to collect as a reference point because it enables the evaluator to assess whether the defendant is being consistent and truthful. *See Part II.A supra.* While it would be highly unusual for an evaluator to fail to consider such information, the record here does not indicate that it even was collected.

*Second*, there is no evidence that the evaluators' assessment of Mr. Council was anything more than cursory. Although their statement references a three-hour interview, the record gives no indication of how that time was spent. Typically, a competency report details what assessment instruments were used, the results and their significance, and any caveats to the ultimate determination. None of that explanation was provided here. Evaluators typically use such information to consider whether defendants exhibit the essential skills and abilities to competently participate in or understand a legal proceeding and, based on that informed conclusion, they then make a recommendation to the court. Mr. Council's evaluators did not mention any of the specific

competencies that he demonstrated during the evaluation that would help him participate in the trial, nor did they describe any of his answers, mannerisms, or actions. Because the examiners failed to even minimally describe their interview, it is not known whether they had any information beyond what they heard in that single interview; they did not report whether they conducted any other assessments, considered any other information, or conducted any collateral interviews.

*Third*, and most glaringly, the doctors failed to present an adequate report, thereby depriving the district court of essential information. The court needed the evaluators to conduct a thorough assessment, supplying relevant background information and findings that would allow it to ultimately make the competency determination. Yet, despite stating three times their ultimate conclusion that Mr. Council was “competent,” the evaluators provided no factual support for that conclusion. Their short “report”—with no contemporaneous notes from or explanation of the interview—omits both information on how the process was conducted and the findings that it yielded. The missing information is critical to a thorough, accurate, and meaningful competency evaluation.

The sparseness of the information provided by the evaluators left the trial court with no basis to rely on the ultimate conclusion in the report. For instance, the evaluators referred to “the possibility of

decompensation.” Pet. App. 58a. That term is typically applied to disorders of severe mental illness that can fluctuate between asymptomatic behavior and behavior marked by psychotic symptoms that grossly interfere with the individual’s ability to function. That term is not typically applied to sleep deprivation or anxiety. The evaluators do not describe the symptoms that gave rise to their conclusion that there was a “possibility of decompensation.” *Amici* cannot speculate as to what Mr. Council’s symptoms were, but the evaluators’ statement raises a central question about his competency—namely, does he suffer from a severe mental illness that might affect his ability to participate in his defense?—without giving the district court the necessary underlying information to answer that question. The fact that decompensation might be an issue should have served as a red flag for evaluators to check Mr. Council’s relevant history (which, again, there is no evidence that they did).

The two-paragraph statement submitted by Mr. Council’s evaluators contrasts sharply with the competency reports submitted in other proceedings and cited as examples in academic literature. For instance, in a pre-trial competency report of “Janet S. Smith,” the evaluator submitted a report describing the multiple evaluations, the evaluator’s clinical findings, and the defendant’s competency-related abilities. Kirk Heilbrun et al., eds., FORENSIC MENTAL HEALTH ASSESSMENT: A CASEBOOK 36–37 (2d ed. 2014) [hereinafter CASEBOOK]. It identified the 11 documents

the evaluator reviewed in preparation for the evaluation, including mental health records, records of the defendant's marital history, and educational records. *Id.* at 37. The evaluator's report listed and described over half a dozen "standardized measures for evaluating (a) diagnosis and impairment, (b) malingering and other response styles, and (c) competency-related abilities." *Ibid.* The evaluator then explained in great detail the multiple psychological diagnoses that he ascribed to the defendant as well as his analysis regarding the defendant's "factual and rational understanding of the [legal] proceedings." *Id.* at 38–42. The report ended with a summary of the evaluator's findings and his clinical conclusion that the defendant is likely competent to stand trial. *Id.* at 43 ("Competency to stand trial is a legal determination. However, the clinical-forensic data provide strong and consistent findings that [defendant] probably has sufficient abilities for consulting with counsel and a factual as well as rational understanding [of] the proceedings against her.").

The "report" in this case included none of that information. Mr. Council's evaluators provided no background information about him. His evaluators' statement contained no earlier-obtained observations of Mr. Council's mental state—even though that information was available.<sup>7</sup> Finally, Mr. Council's

---

<sup>7</sup> According to the unsealed documents, *e.g.*, Decl. of William F. Nettles IV, Dist. Ct. Dkt. 115, Mr. Council had previously undergone a competency evaluation in April 2018.

evaluators gave their ultimate conclusion, but not an in-depth discussion of a diagnosis, and the information they did provide appears to be inconsistent with their diagnosis. In contrast, Ms. Smith’s competency report provided ample detail to enable the court to reach its own conclusion. The “report” here fell far short of that target.

Or consider the competency report of “Mr. J.C.” who was charged with possession of cocaine. Heilbrun et al., CASEBOOK, *supra* at 36–45. Despite the less serious charges against Mr. J.C. than those against Mr. Council, the report evaluating Mr. J.C.’s competency was far longer and more thorough. First, the report listed the data sources the evaluator used in evaluating the competency, including the defendant’s mental health records and crime report. *Id.* at 46. In stark contrast, Mr. Council’s evaluators identified only their single interview as the source of information. Mr. J.C.’s report next described the defendant’s background—which the report on Mr. Council’s competency entirely failed to do—noting that it was “extremely difficult” to obtain information from the defendant himself. *Ibid.* The report described Mr. J.C.’s cognitive function, mood and affect, response style, and orientation to time and place. *Ibid.* The report also explained a standardized

---

That would not excuse the evaluators from conducting a full evaluation a year and a half later in September 2019, because much could have changed in the interim. But the evaluators should have requested and reviewed any resulting report as part of their preparation. There is no indication that they did so.

psychological assessment tool that the evaluator utilized to structure the forensic interview. *Id.* at 47. The report ended with a detailed summary of the evaluator's clinical findings and her ultimate conclusion that the defendant was not competent to stand trial. *Id.* at 48. By contrast, Mr. Council's evaluators provided only an ultimate conclusion.

*Amici* do not suggest that all competency reports must mimic those discussed in the preceding paragraphs or any other specific models. *See generally* Gary B. Melton et al., *supra* at 607–704 (providing and analyzing a number of sample competency reports). But these examples highlight the deficiencies in the assessment conducted here. The information that Mr. Council's evaluators provided about him could not have adequately informed the district court in making the ultimate determination of his competency to stand trial. Their short statement did not address Mr. Council's circumstances and history, identified no support for the conclusion that he was competent to stand trial, and provided no information to enable the district court to arrive at an informed legal conclusion. As a result, there is no reliable basis on which to conclude that Mr. Council was, at the time of evaluation, competent to stand trial.

## CONCLUSION

The competency evaluation process followed in the trial court failed to satisfy the minimum standards established by Congress's enactments, this Court's precedents, and the practice of mental health professionals. The summary conclusion presented to the district court by Mr. Council's evaluators had no adequate basis apparent from the record, nor did it provide sufficient information to enable the court to independently determine Mr. Council competency to stand trial. This process violated Mr. Council's constitutional rights. Accordingly, the Court should grant the petition for certiorari and reverse.

Respectfully submitted,

Trevor S. Cox  
*Counsel of Record*  
Maya M. Eckstein  
Carley Ruival  
HUNTON ANDREWS KURTH LLP  
Riverfront Plaza, East Tower  
951 E. Byrd Street  
Richmond, Virginia 23219  
(804) 788-8200  
[tcox@HuntonAK.com](mailto:tcox@HuntonAK.com)  
[meckstein@HuntonAK.com](mailto:meckstein@HuntonAK.com)  
[cruival@HuntonAK.com](mailto:cruival@HuntonAK.com)

*Counsel for Amici Curiae*

APRIL 1, 2024

## **APPENDIX**

**TABLE OF APPENDICES**

	<b>Page(s)</b>
APPENDIX A — LIST OF <i>AMICI CURIAE</i> .....	1a

## APPENDIX A — LIST OF *AMICI CURIAE*

*Amici* are listed alphabetically by last name. Institutional affiliations are provided for identification purposes only.

<b>Name / Degree(s)</b>	<b>Title(s) / Institutional Affiliation(s)</b>
Elisha Agee, Psy.D.	Assistant Professor of Psychiatry and Neurobehavioral Sciences, Institute of Law, Psychiatry and Public Policy; Department of Psychiatry & Neurobehavioral Sciences; University of Virginia School of Medicine
Neil Gowensmith, Ph.D.	Director, Denver FIRST (Forensic Institute for Research, Service, and Training); Associate Professor, University of Denver
Kirk Heilbrun, Ph.D.	Professor, Department of Psychological and Brain Sciences, Drexel University
Sharon Kelley, J.D., Ph.D.	Assistant Professor of Psychiatry & Neurobehavioral Sciences, Institute of Law, Psychiatry, & Public Policy; Department of Psychiatry & Neurobehavioral Sciences; University of Virginia School of Medicine

*Appendix A*

<b>Name / Degree(s)</b>	<b>Title(s) / Institutional Affiliation(s)</b>
Daniel Murrie, Ph.D.	Director, Institute of Law, Psychiatry, & Public Policy, University of Virginia; Professor of Psychiatry, University of Virginia School of Medicine
Ira K. Packer, Ph.D.	Diplomate in Forensic Psychology, American Board of Professional Psychology; Professor Emeritus of Psychiatry, University of Massachusetts Medical School
Ronald Roesch, Ph.D.	Professor Emeritus, Department of Psychology, Simon Fraser University
Patricia A. Zapf, Ph.D.	Vice President, Business Innovation & Strategic Advancement, Palo Alto University