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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

Pursuant to Rule 21.2(b), the National Association for Public Defense (NAPD) respectfully requests leave to submit a brief as amicus curiae in support of the petition for writ of certiorari filed by Brandon Michael Council.

Rule 37.2 requires that amici notify all parties' counsel of their intent to file an amicus brief in support of a petition for certiorari at least ten days before the due date, and further that the due date is thirty days after the case is placed on the docket. The case was placed on the docket on March 1, 2024, making the due date April 1. On March 27, the government requested an extension of its time to respond until May 1.

Counsel for amicus was only very recently retained to prepare this brief, and notified the parties of its intent to file on March 25, 2024, seven days before the April 1 deadline for amicus briefs in support of the Petition. Given the government's request for an extension of time to respond, however, this will not prejudice any party, as the government will have ample time to respond to any point raised herein.

NAPD writes in support of Petitioner here because the questions presented raise significant issues concerning vital constitutional rights of criminal defendants. In this proposed brief, NAPD draws on the extensive experience of its more than 25,000 members, who are practitioners and experts in public defense, to explain the function, structure, and importance of competency hearings, in order to help inform the Court's consideration of the Petition.

Accordingly, NAPD respectfully asks the Court to grant it leave to file this amicus brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The National Association for Public Defense (NAPD) is an organization of more than 25,000 practitioners and experts in public defense that span fifty states and three U.S. territories. Formed in 2013, NAPD works to ensure that criminal defendants receive a fair trial, as mandated by the Due Process Clause of the Constitution. *See Pate v. Robinson*, 383 U.S. 375, 378 (1966). NAPD does so by (among other things) advocating for changes in law and policy related to public defense, training public defenders on criminal-law practice and procedure, and improving the systems through which public defense is delivered.

A crucial element of the right to a fair trial that NAPD helps to deliver is the right to not be tried or convicted while incompetent to stand trial. NAPD and its members, who represent indigent defendants at trial throughout the country, routinely observe the importance of adequate competency proceedings. And while the competency inquiry is often complex and is sometimes fluid, it is an indispensable prerequisite to ensuring fair trials and criminal defendants' ability to fully exercise their other constitutional rights, such as the right to counsel. As a result, NAPD has an interest in safeguarding a defendant's right to an adequate competency hearing, once competency is judged to be in doubt.

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[1] No party has authored this brief in whole or in part, and no one other than amicus and its counsel have paid for the preparation or submission of this brief. Counsel of record for the parties received notice of amicus' intent to file this brief 7 days prior to its due date.

SUMMARY OF THE ARGUMENT

The Fourth Circuit incorrectly determined that the trial court fulfilled its weighty responsibility of ensuring Mr. Council was competent to stand trial—and face the death penalty—when, rather than conducting a proceeding even remotely resembling a competency hearing, it deferred to an expert opinion expressed in a two-paragraph letter.

Trial courts have a duty to make an independent, evidence-based determination of competency. To that end, competency hearings should—and generally do—involve a thorough examination of psychiatric evidence, including live testimony and questioning by expert witnesses, a colloquy with the defendant, and other procedures, to probe and supplement the factual bases of experts' competency determinations.

This standard practice, of a robust judicial inquiry into a defendant's mental state once competency is judged to be in doubt, is mandatory, regardless of defense counsel's position on the matter. And that makes good sense, considering that competency is a crucial right enshrined in our constitutional tradition. The trial court in this case failed to safeguard this right.

ARGUMENT

The Trial Court Abdicated Its Duty to Conduct a Meaningful Competency Hearing and Safeguard a Critical Constitutional Protection.

A. The So-Called "Hearing" In This Case Fell Far Short of a Typical and Adequate Competency Hearing.

The purpose of a competency hearing—mandatory under Section 4241 whenever a court has "reasonable cause to believe" a defendant may be incompetent—is to enable the court to arrive at its own legal conclusion about the defendant's mental competency. 18 U.S.C. § 4241(a). To that end, as the Supreme Court has recognized, a competency hearing is a proceeding in which "psychiatric evidence is brought to bear on the question of the defendant's mental condition[.]" *Medina v. California*, 505 U.S. 437, 450 (1992). A court may not simply defer to the determination in an expert report; it must hold a hearing and reach an independent, "record-based judicial determination of competence[.]" *See United States v. Haywood*, 155 F.3d 674, 680–81 (3d Cir. 1998); *see also United States v. Merriweather*, 921 F. Supp. 2d 1265, 1303 n.57 (N.D. Ala. 2013) (noting competency is a mixed question of law and fact that "must be resolved by the courts and not expert witnesses").

To ensure the court has a sufficient basis to make that determination, competency hearings typically involve extensive live witness testimony and questioning. The starting point for any hearing is at least one—and often several—robust competency reports from experts who have evaluated the defendant. These experts also generally review

medical records and administer psychiatric tests to the defendant, and these records and test results add to the body of documentary evidence before the court.

Those experts then testify at the hearing, and are subject to questioning by counsel and by the court to probe the bases of their conclusions and fill in gaps. *See, e.g.*, *United States v. Bumagin*, 98 F. Supp. 3d 597, 597–98 (E.D.N.Y. 2015) (citing "three separate competency evaluations" and testimony from several experts at two-day competency hearing). ABA Guidelines confirm that at a competency hearing, "the evaluators . . . should be subject to examination." ABA Criminal Justice Standards on Mental Health § 7-4.9(b) (2016). Live testimony and questioning are particularly important given that competency experts administer specialized tests, synthesize a wide array of information, and rely on technical expertise to reach their conclusions. *See* Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment ("The importance of presenting live testimony in court cannot be forgotten."); *Thompson v. Keohane*, 516 U.S. 99, 111 (1995) (recognizing competency is a fact issue that "depends heavily on the trial court's appraisal of witness credibility and demeanor").

In addition to expert witnesses, lay witnesses also regularly participate and provide additional insight into a defendant's psychiatric and medical history. This may include family members, corrections officers, or attorneys who have interacted with the defendant. *See, e.g.*, *Merriweather*, 921 F. Supp. 2d at 1276, 1296–97 (discussing competency hearing testimony of corrections officers as well as defendant's sister and former girlfriend); *United States v. Talbot*, No. 21-111, 2023 WL 8090857, at *3 (E.D. La. Nov. 21,

2023) (similar); *United States v. Diehl Armstrong*, No. 1:07-cr-26, 2008 WL 2963056, at *18–25 (W.D. Pa. July 29, 2008) (similar). Hearing from a broad tableau of witnesses with different vantage points into the defendant's competence provides the foundation for the court to make an informed determination.

Finally, a key part of a competency hearing is often the testimony of the defendant and/or a colloquy between the court and defendant. Through direct questioning and observation of the defendant, the court can probe the defendant's understanding of the proceedings, as well as their relationship with and ability to assist their counsel, in order to gain further insight into their mental competence. Indeed, courts assessing competency often rely on direct assessments of the defendant's demeanor, answers to questions, and interactions with counsel in reaching their conclusions. *See, e.g.*, *United States v. Roof*, 10 F.4th 314, 338, 340 (4th Cir. 2021) (relying on defendant's answers to questioning and demeanor during the competency hearing); *United States v. Mitchell*, 706 F. Supp. 2d 1148, 1223–24 (D. Utah 2010) (noting defendant "showed the capacity to cooperate with counsel" in interactions during competency hearing); *see also United States v. David*, 511 F.2d 355, 360 (D.C. Cir. 1975) (noting the trial judge "would . . . have been well-advised . . . to conduct further inquiry of defense counsel and of [the defendant] himself").

In a capital case, these robust procedures are particularly important. *See United States v. Weston*, 36 F. Supp. 2d 7, 15 (D.D.C. 1999) (noting the court would be "especially cautious in assessing" the competency issue given that government could seek the death penalty). Accordingly, competency hearings

in cases where the defendant faces the possibility of a death sentence must be particularly thorough.

The competency hearings during the capital murder trial in *Roof*, for example, included many of the features outlined above. Before the hearing, a court-appointed psychiatrist evaluated the defendant over the course of a cumulative eight hours of interviews, in addition to speaking with the defense team at length. 10 F.4th at 335. The expert submitted a lengthy report on the defendant's competence, and then also testified at the hearing. Four experts testified, and three additional experts submitted affidavits to the court. *Id.* at 335–36. Each testifying witness discussed their opinions on the defendant's mental health, and answered questions addressing gaps in their reports. *Id.* at 335–37. Several disagreed about the defendant's competency to stand trial and mental health diagnoses. *Id.*

In addition to the experts, the defendant testified. *Id.* at 337. The court asked him a series of questions, including his understanding of the possibility that he would be executed, as well as his communication with his lawyers. *Id.* at 337–38. The competency hearing stretched over two days. In its final decision on competency, the court relied on the expert reports, testimony at the hearing, and the defendant's statements and demeanor at the hearing. *Id.* at 338.

The court found the defendant competent to stand trial. *Id*. Later in the proceedings, however, after the trial was already underway and the guilt phase had concluded, the issue of defendant's competency arose again. *Id.* at 338–39. Despite the fact that the court had already held a robust competency hearing earlier in the case, the court ordered a second psychiatric

evaluation and second hearing. *Id.* Several witnesses gave live testimony at the second hearing, including the court-appointed psychiatrist, additional experts, and a lay witness. *Id.* Again, the defendant testified and was questioned by the court. *Id.* at 340.

Competency hearings in other capital cases follow a similar template: extensive live testimony from several experts, often with differing viewpoints, along with other witnesses and defendant testimony. *See, e.g.*, *Merriweather*, 921 F. Supp. 2d at 1276 (competency hearing involved testimony from at least 15 witnesses, including mental health experts, nurses, corrections officers, and family members); *Battle v. United States*, 419 F.3d 1292, 1299 (11th Cir. 2005) (noting capital defendant received a "fair and thorough" competency hearing that "lasted about twelve days and involved many witnesses, five of whom were either psychiatrists or psychologists who had evaluated" the defendant).

The proceedings in Mr. Council's case were profoundly deficient in comparison to these standard competency hearing procedures, and particularly in comparison to other capital cases. At the so-called "hearing," which took up a single transcript page, there were no witnesses, no experts testifying, no colloquy with Mr. Council, and no colloquy with his counsel beyond them representing that Mr. Council was competent. This was not a proceeding where "psychiatric evidence [wa]s brought to bear on the question of the defendant's mental condition," *see Medina*, 505 U.S. at 450; rather, it amounted to a rubber-stamping of a cursory expert report. Worse still, the expert report was unusually thin and conclusory, comprising a two-paragraph letter that

asserted Mr. Council was competent without providing any specific bases for that conclusion. *See* Pet. App. 58a. Live testimony therefore would have been particularly important for the court to learn the medical bases for the expert opinion—the only possible way it could have obtained sufficient information to make an independent, informed decision on Mr. Council's mental competency. As the comparison to other capital case competency hearings shows, that falls far short of both the norm and the constitutional floor.

That questions about Mr. Council's competency arose most forcefully while his trial was already underway should have no bearing on the requirement that he receive a meaningful competency hearing. The competency standard "is applicable from the time of arraignment through the return of a verdict." *See Godinez v. Moran*, 509 U.S. 389, 403 (1993) (Kennedy, J., concurring); *Drope v. Missouri*, 420 U.S. 162, 181 (1975) (noting court must "always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial"). Courts have a "statutory obligation to be vigilant" for issues of incompetence through the entire course of a criminal proceeding. *United States v. Arenburg*, 605 F.3d 164, 170–71 (2d Cir. 2010) (court's failure to hold competency hearing mid-trial was reversible error in light of court's ongoing "statutory obligation to be vigilant" for signs of incompetence throughout entire proceedings). So even where the issue arises mid-trial, courts have the same duty to diligently address it—indeed, that was the posture of *Roof*. Nor does it matter that defense counsel apparently changed their position on Mr. Council's mental competency—the court's duty, once

competency is judged to be in doubt, is absolute, and independent of counsel's position, particularly where counsel does not adequately explain the factual basis for their reversal. And any apparent concern about disruption must yield to the bedrock constitutional principle that an incompetent criminal defendant may not face trial.

B. The History and Tradition of the Competency Right Confirms the Need for Robust Procedures.

The history and tradition of the competency right in our legal system also confirms that any judicial competency inquiry must be meaningful and robust: common-law authorities emphasize that factfinders must "diligently inquire" into mental competency. *See Cooper v. Oklahoma*, 517 U.S. 348, 356–57 (1996) (collecting sources).

"The rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage." *Medina*, 505 U.S. at 446. Indeed, "[t]he prohibition against trying the incompetent defendant was well established by the time Hale and Blackstone wrote their famous commentaries." *Cooper*, 517 U.S. at 356. *See also Medina*, 505 U.S. at 446 (citing and discussing Blackstone and Hale on the issue).[2] Over a century

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[2] *See also Regina v. Southey,* 4 Fos. & Fin. 864, 872, n. a (N.P.1865) ("Assuming the prisoner to be insane at the time of arraignment, he cannot be tried *at all* . . . as he cannot understand the evidence, nor the proceedings, and so is unable to instruct counsel, or to withdraw his authority if he acts improperly . . ."); *id.* at 877, n. a ("[I]f [the defendant] be so insane as not to understand the nature of the proceedings, he cannot plead"); John Hawles, *Remarks on Mr. Bateman's Tryal, in*

ago, this Court cited Blackstone's position along with Hale's as indicative of the common-law rule on incompetence. *See Nobles v. Georgia*, 168 U.S. 398, 406–07 (1897).

These authorities agreed that criminal proceedings at every stage—from arraignment to execution date, and every point in between—should be halted if the accused is incompetent. *See, e.g.*, *King v. Frith*, 22 How. St. Tr. 307, 311 (1790) ("[S]uch is the humanity of the law of England, that in all stages both when the act is committed, at the time when the prisoner makes his defence, and even at the day of execution, it is important to settle what his state of mind is[.]"); *Underwood v. People*, 32 Mich. 1, 3 (1875) ("[I]nsanity, when discovered, was held at common law to bar any further steps against a prisoner, at whatever stage of the proceedings"). In the same vein, Justice Frankfurter, dissenting from the Court's rejection of a due process claim by an allegedly incompetent individual set to be executed, *see Solesbee*

Remarks upon the Tryals (1689), *reprinted in* 11 How. St. Tr. 473, 476 (1811) ("[N]othing is more certain law, than that a person who falls mad after a crime supposed to be committed, shall not be tried for it . . ."); 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 35 (Lawbook Exchange 2003) (1736) ("[I]f [a] person after his plea, and before his trial, become of *non sane memory,* he shall not be tried . . .").

Early American cases and other authority discuss the right in similar terms. *See*, *e.g., Crocker v. State,* 60 Wis. 553, 556 (1884) (similar); *State v. Reed,* 41 La. Ann. 581, 582 (1889) ("It is elementary that a man cannot plead, or be tried, or convicted, or sentenced, while in a state of insanity"). *See* also 2 J. BISHOP, COMMENTARIES ON LAW OF CRIMINAL PROCEDURE §§ 664, 667 (2d ed. 1872) ("[A] prisoner cannot be tried, sentenced, or punished" unless he is "mentally competent to make a rational defense").

v. Balkcom, 339 U.S. 9 (1950), abrogated by *Ford v. Wainwright*, 477 U.S. 399 (1986), referred to the principle that "one under sentence of death ought not, by becoming non compos, be denied the means to 'allege somewhat' that might free him" as "the unbroken command of English law for centuries preceding the separation of the Colonies." 339 U.S. at 19–20 (Frankfurter, J., dissenting) (quoting 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 35 (Lawbook Exchange 2003) (1736)).

The force of this rule has not lessened with time. In recent years, this Court has "repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'" *Cooper*, 517 U.S. at 354 (quoting *Medina*, 505 U.S. at 453). This makes sense; competence is the gatekeeper for a host of other constitutional rights: "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Cooper*, 517 U.S. at 354 (internal quotation marks and citations omitted). *See also id.* at 364 ("For the defendant, the consequences of an erroneous determination of competence are dire. Because he lacks the ability to communicate effectively with counsel, he may be unable to exercise other 'rights deemed essential to a fair trial.'") (citation omitted).

But this fundamental right is rendered an empty one in the absence of adequate process and safeguards for assessing competency. That is no doubt why the

requirement that the competency inquiry be a meaningful one also finds support in the common law; early British cases routinely instructed juries that they had to "diligently inquire" into a defendant's competency. *King v. Frith*, 22 How. St. Tr. 307 (1790) (emphasis added); *Queen v. Goode*, 7 Ad. & E. 536, 112 Eng. Rep. 572 (K.B.1837).

As discussed above and by Petitioner, no such inquiry occurred here. A "hearing" without any live testimony from experts, lay witnesses, or the accused—indeed, without even a colloquy with the accused—and without any probing of the bases for the rushed expert opinion offered as to competency hardly amounts to an inquiry at all, much less the diligent one required by centuries of authority and confirmed by this Court's more recent precedent. Likewise, a competency determination that rests on a two-paragraph written statement from defense counsel falls far short of the court's duty to "'jealously guard[]" "an incompetent criminal defendant's fundamental right not to stand trial." *Cooper*, 517 U.S. at 363 (quoting *Jacob v. New York City*, 315 U.S. 752, 752–53 (1942)).

CONCLUSION

For the foregoing reasons, and those in the petitioner's brief, the Court should grant the petition for a writ of certiorari to review the Fourth Circuit's erroneous decision, which failed to adequately protect the crucial competency right.

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