

mental illness. The court disagreed with Ms. Butko's notion that Mr. Dennis chose to waive his appeals based on a mental condition involving "suicidal thinking" and a "chronic depressed state," because to accept this notion would be to argue that "Dennis is incompetent because Dennis's reason for choosing to die is that he wants to die."

The court also remarked that, even when a prisoner's decision is the product of a mental disease, it is not the disease itself that determines competence or lack thereof, but whether the disease affects the capacity to appreciate options and to make a rational choice. The court held that the *Whitmore* standard asks not whether the prisoner is making a rational choice but, rather, whether the capacity for rational understanding is present. Furthermore, the court held that a "rational choice" does not necessarily mean one that is sensible or one with which the next friend is in agreement. Also, citing *Godinez v. Moran*, 509 U.S. 389 (1993), the court observed that "rational choice" does not necessarily connote something different from "rational understanding."

In observing that Mr. Dennis had once filed for a state *habeas* petition before withdrawing it, the court disagreed with Ms. Butko's assertion that Mr. Dennis's decision to waive appeals was of a fixed nature that precluded its being a rational one. The court disagreed with Ms. Butko's suggestion that it is improper for judges to rely on their lay observations in making findings of competency. The court noted, "[J]udges who have an opportunity to observe and question a prisoner are often in the best position to judge competency, especially as in this case, where the judge has had more than one opportunity to observe and interact with the prisoner."

Discussion

This case appears to endorse the concept that, in determinations of competency to waive appeals for execution, the emphasis is on the cognitive rather than the volitional basis of a prisoner's thought process. In endorsing this concept, the court may be expressing its preference for concrete, over nuanced, elements of reasoning. First, for example, the court's reasoning may represent an application of *Godinez*, in which there is no distinction between "rational understanding" and "rational choice." Second, the court may have found it easier to consider concrete elements of reasoning. The court gave greater weight to Mr. Dennis's intellectual grasp of his waiver of

appeals, over Dr. Bittker's nuanced opinion (which the court found confusing) that, even in the face of apparent cognitive awareness, a "fixed decision," while admittedly not meeting criteria for any DSM-IV-TR psychiatric diagnosis, may reflect an impairment in volition. Third, although acknowledging the points in Dr. Bittker's evaluation, the court considered its own courtroom observations of and experiences with Mr. Dennis and ascribed at least equal weight to them.

In conducting evaluations of competency to waive appeals for execution, forensic examiners may thus find that for the sake of clarity, opinions on cognitive capacity are more readily understood and accepted by the court. If opinions on volitional capacity are to be presented, they should be framed in as concrete a manner as possible. One way in which this could be achieved would be for opinions on volitional capacity to be expressed in the context of how specific DSM-IV-TR illnesses and symptoms affect one's decision-making abilities, taking into account that merely the presence of a desire to waive appeals is not indicative of clinical depression.

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Extreme Emotional Disturbance

Judge's Role in Limiting Introduction of Marginally Relevant Evidence Is Upheld

In *Baze v. Parker*, 371 F.3d 310 (6th Cir. 2004), the court examined a decision by the U.S. District Court for the Eastern District of Kentucky that denied an appellant inmate's petition for *habeas corpus* relief from his conviction and death sentence for the shooting of two police officers. Mr. Baze had argued that the trial court interfered with his right to present the defense that he acted under the influence of an "extreme emotional disturbance" (EED), stemming from a feud with his wife's family, thereby denying his due process rights. After the Kentucky Supreme

Court had affirmed that “the trial judge had ruled correctly that the feud was not relevant to the killings and that he had not abused his discretion by limiting evidence of the intra-familial conflict,” Mr. Baze petitioned for federal *habeas* relief.

Facts of the Case

Ralph Baze resided in Powell County, Kentucky, in a mountain hollow known as Little Hardwick’s Creek. He had been convicted twice of felonies and was wanted in Ohio for felonious assault of a police officer, jumping bail, receiving stolen property, and flagrant nonsupport. On January 15, 1992, authorities from the Lucas County Sheriff’s Office in Toledo, Ohio, notified the Powell County authorities that they wished to extradite Mr. Baze on the felony counts. When Deputy Sheriff Briscoe arrived at Mr. Baze’s cabin to arrest him, Mr. Baze escaped through a trapdoor in the bedroom floor, retrieved his SKS assault rifle from behind the cabin, and fled uphill into the woods. Deputy Briscoe left Mr. Baze’s property to recruit additional officers to assist in the arrest. He came back, followed by Sheriff Bennett.

Gunfire ensued. Later, Mr. Baze testified that Deputy Briscoe had shot him first, striking Mr. Baze in the leg. Mr. Baze shot back at the officers. Sheriff Bennett opened the back passenger door of the police cruiser, crossing directly into Mr. Baze’s line of fire. Mr. Baze shot him three times in the back. Mr. Baze then started to walk down the hill toward Deputy Briscoe, who continued to shoot at Mr. Baze over the hood of the cruiser until he ran out of ammunition. Mr. Baze was too close to give him time to reload. Deputy Briscoe attempted to escape. After going about 10 feet, he was shot in the back by Mr. Baze, who then approached the injured officer and shot him in the head at point-blank range.

Mr. Baze then collected the weapons and ammunition and fled on foot to adjoining Estill County. He surrendered without incident at 8 p.m. that day. Mr. Baze was tried in Rowan County, convicted, and sentenced to death in February 1994 for shooting the officers. The Kentucky Supreme Court affirmed the sentence on direct appeal in November 1997. The United States Supreme Court denied *certiorari* in April 1998. Mr. Baze filed a motion to vacate his sentence under Kentucky’s postconviction review procedure. The state trial court denied the motion, a decision that the Kentucky Supreme Court affirmed in April 2000.

Mr. Baze then filed a petition for a writ of *habeas corpus* in the U.S. District Court for the Eastern District of Kentucky in April 2001. The district court denied a motion for an evidentiary hearing on September 23, 2002, and denied a motion to alter or amend the judgment on December 23, 2002.

The district court, however, acting “in an abundance of caution” issued a certificate of appealability on all the issues that Baze had raised. Among these issues was Mr. Baze’s claim that the trial court had denied his due process rights by interfering with his defense. Mr. Baze had wanted to present evidence of a feud with his wife’s family as part of a defense of extreme emotional disturbance. He claimed that previously his wife’s relatives had harassed him by filing false reports with the police, which made him paranoid. Mr. Baze argued that because of his paranoia, he believed that at the time of the index offense, the officers’ attempt to arrest him on an outstanding Ohio warrant was just another dirty trick set up by his relatives, and that he therefore had to defend himself. The trial judge ruled that the feud was not relevant to the killings because the officers were not involved in the family altercation and therefore limited the evidence of the intrafamilial conflict.

Ruling and Reasoning

The U.S. Court of Appeals for the Sixth Circuit held that the U.S. District Court for the Eastern District of Kentucky appropriately denied the defendant’s petition for *habeas corpus* relief on his claim (among others) that he acted “under the influence of extreme emotional disturbance.”

The court acknowledged that a fair opportunity to present a defense is a constitutional right, citing *Crane v. Kentucky*, 476 U.S. 683 (1986). Presenting relevant evidence is integral to that right, as held in *Taylor v. Illinois*, 484 U.S. 400 (1988). However, this right is not unconditional. The defendant “must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence” (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)). Only if “an evidentiary ruling is so egregious that it results in a denial of fundamental fairness [does] it violate due process and thus warrant *habeas corpus* relief” (quoting *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003)).

Under Kentucky law, to qualify for an EED the defendant must show “some definitive, non-specula-

tive evidence” that the onset of EED resulted from a “triggering event.” At trial, Mr. Baze had to point to a “triggering event,” prompting a reaction that was so “enraged,” “inflamed,” or “disturbed” as to be uncontrollable, before he could present a defense under that theory. Mr. Baze may have been distraught at the ongoing feud with his wife’s family, but he could not point to a dramatic, isolated event in that conflict that could have caused him to lose temporary control of his sense of right and wrong, thereby qualifying him for mitigation under an EED theory. Therefore, limiting his ability to present evidence on this issue neither undermined the fundamental fairness of Mr. Baze’s trial nor deprived him of any “weighty interest,” and accordingly he could not establish any grounds for *habeas* relief on this question.

Dissent

The dissent argued that the Kentucky EED law measures whether the source of the defendant’s alleged EED “is reasonable under the circumstances as he believed them to be,” as held in *McClellan v. Commonwealth*, 715 S.W.2d (Ky. 1986). The dissent argued that although “we (or most people, for that matter) would have perceived certain events differently does not mean that Baze’s defense fails as a matter of law.” Taking that in consideration, Mr. Baze would qualify for an EED defense, and denying it would constitute a violation of his constitutional right to present a complete defense.

Discussion

An “extreme emotional disturbance” is a “*temporary* state of mind so enraged, inflamed, or disturbed as to overcome one’s judgment, and to cause one to act uncontrollably from the impelling force of the EED rather than from evil or malicious purposes.” Evidence of mere anger or hurt is not sufficient. To qualify for an EED instruction under Kentucky law, the defendant must show “some definitive, non-speculative evidence” that the onset of the EED was caused by a “triggering event” that must have a “sudden” onset that may extend over a length of time, and its effects must be “uninterrupted.”

Although the dissent argued that in an EED defense, it is the jury’s role to measure the defendant’s emotions as the defendant himself reasonably experienced them, the Constitution leaves judges “wide latitude” to exclude evidence that is only “marginally relevant,” and states have broad authority to promulgate rules that exclude evidence so long as they are

not “arbitrary” or “disproportionate to the purposes they are designed to serve.” Forensic examiners would be advised to examine the standard for extreme emotional disturbance for the jurisdictions in which they are working to provide relevant opinions that will assist triers-of-fact.

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Extreme Mental and Emotional Disturbance

Failure to Call a Defense Expert Regarding a Mitigating Factor in a Capital Case Is Ruled Ineffective Assistance of Counsel

In *State v. Chew*, 844 A.2d 487 (N.J. 2002), the New Jersey Supreme Court ruled that, in the sentencing phase of a capital case, defense counsel’s failure to conduct an adequate investigation before deciding not to call a defense psychologist to testify about mitigating factors, based on the belief that such testimony would be more harmful than helpful, constituted ineffective assistance of counsel. The court reversed the trial court’s denial of the petition for postconviction relief (PCR) and remanded the case for a new penalty-phase trial.

Facts of the Case

On January 13, 1993, police found the body of Theresa Bowman in the car of John Chew, which was parked in the rear of the Woodbridge Hilton Hotel parking lot. Ms. Bowman’s throat had been slashed; she was determined to have been dead for about 10 hours; and on her body was found a piece of paper with the name of “Joe Martin” and a phone number. Police interviewed a chef at the Hilton, Alejandro Mecalco, who recalled seeing a man who looked like “Kenny Rogers” struggling in the car on the night of January 12, 1993. Police met Mr. Chew, who looked nothing like Kenny Rogers, at his home, where he gave a statement. Mr. Chew said he had last seen Ms. Bowman on the evening of January 12, 1993, when they drove together to the home of his sister, Crystal Charette, and that Bowman had later departed alone