

**Responses of Robert N. Chatigny
Nominee to be U.S. Circuit Judge for the Second Circuit
to the Supplemental Written Questions of Senator Cornyn**

- 1) In my previous Question 1, I asked whether you “believe the Sentencing Guidelines are too harsh on child sex crimes.” I appreciate your statement that you have faithfully applied the Guidelines and will continue doing so, but you did not answer the question. Please do so now.**

Response: As a district judge, my role is to faithfully apply the guidelines, rather than evaluate them from a policy standpoint. I would note, however, that the Sentencing Commission has observed an increase in below-guidelines sentences in child pornography cases and, as a result, has undertaken a review of the child pornography guidelines. See U.S. Sentencing Commission, *The History of the Child Pornography Guidelines* 54 (October 2009).

- 2) In answering Question 2(a), you noted that the standards of § 5K2.13 require you to consider whether the defendant had a “significantly reduced mental capacity” that “contributed substantially to the commission of the offense.” But in answering Question 2(c) you stated that you merely concluded that “the defendants had a reduced capacity to appreciate the wrongfulness of their conduct or to control their conduct.” How do you square these answers? Didn’t you need to conclude that the defendants to whom you gave reduced sentences had a “*significantly* reduced mental capacity” that “contributed *substantially* to the commission of the offense”?**

Response: Yes, § 5K2.13 requires findings that the defendant had a significantly reduced mental capacity that substantially contributed to the commission of the offense. Throughout my 15 years as a district judge, it has been my practice to faithfully apply the sentencing statutes and guidelines, including the requirements of § 5K2.13, and I believe I did so in each of these cases.

- 3) In responding to Question 9, you stated that you thought “the best course of action was to urge Ross’s lawyer to speak with his expert witness, Dr. Norko, concerning the new evidence” and you noted that you “did not consider issuing another stay.”**
- a) Where in the transcript of your January 28, 2005 conference call with Ross’s attorney, T.R. Paulding, did you ask him to talk with Dr. Norko about the “new evidence”?**

Response: Please see pages 7-8 and 25 of the transcript.

- b) Wasn’t Dr. Norko the court’s expert—not Mr. Paulding’s?**

Response: Like the state courts, Mr. Paulding was relying on Dr. Norko.

- c) Given that the “new evidence” was powerful enough to lead you to conclude that Ross “might be the least culpable” person on death row and declare that “I see this**

happening and I can't live with it myself," why did you not even consider issuing another stay?

Response: The new evidence prompted me to urge Mr. Paulding to reassess his position. The new evidence did not prompt me to think in terms of issuing another stay.

i) On January 28, 2005, was there a legal claim before you on which you could have issued another stay?

Response: There was no motion pending before me on that date. I did not consider whether there were other grounds for issuing a stay at that time.

ii) If not, what was the basis for your calling of the teleconference on January 28, 2005?

Response: I convened the telephone conference to discuss unresolved issues in the case pursuant to my authority under Fed. R. Civ. P. 16(a).

4) In answering Question 10(a), you stated that you denied the State's motion to dismiss "primarily because the issue of Ross's volitional capacity had not been adequately addressed by the state courts and no particularized finding had been made concerning his volitional capacity as required by *Rees v. Payton*, 384 U.S. 312 (1966)." But in staying Ross's execution, you wrote: "[T]he state court did not adequately inquire into the volitional capacity prong of the *Rees* standard, as implemented in *Rumbaugh* and *Smith*." *Ross v. Rell*, 392 F.Supp.2d 236, 240 (D.Conn. 2005). *Rumbaugh v. Procunier*, 753 F.2d 395, 398 (5th Cir. 1985), and *Smith ex rel. Mo. Pub. Defender Comm'n v. Armontrout*, 812 F.2d 1050, 1057 (8th Cir. 1987), are not decisions of the Supreme Court of the United States, nor are they binding on Connecticut courts in any way. Accordingly, how was Connecticut court's determination of Ross's competency "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"?

Response: I recognize that under 28 U.S.C. § 2254(d)(1) habeas relief is not available for any claim adjudicated on the merits in state court unless the state court decision is "contrary to, or involve[s] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," rather than by a circuit court. In the Ross case, I considered whether the Connecticut Supreme Court's adjudication of the issue of next friend standing was contrary to or involved an unreasonable application of *Demosthenes*. In considering the state court's treatment of the issue of next friend standing under *Demosthenes*, I did observe that the state court did not adequately inquire into the volitional capacity prong of the *Rees* standard, as implemented in *Rumbaugh* and *Smith*. I believe it was appropriate to refer to *Rumbaugh* and *Smith* in this manner. The limitations imposed by § 2254(d)(1) did not apply because I was not adjudicating the petitioner's challenge to the state courts' ultimate determination that Ross was competent under *Rees*. Moreover, even when § 2254(d)(1) does apply, circuit court decisions may be referred to in assessing the reasonableness of the state court's application of Supreme Court precedent.

- 5) During your teleconference with Mr. Paulding, you said: “I would urge you to say, Michael, I can bring you in off this limb that we’re both out on. I can bring you in. . . . In fact, I’m saying that what you’re doing is a mistake. You don’t have to cause any victims’ families any pain. . . . I cannot be a party to this anymore. And, in fact, I object. I won’t let you do it. . . . You say, I’m not letting you. I’m standing next to you on the bridge and I’m holding you and I’m preventing you from jumping”
- a) Why did you encourage Paulding to plea and reason with Ross if you believed, based on the new evidence discussed during the teleconference, that Ross lacked the capacity to make rational choices regarding his litigation strategy?

Response: I believed that if Ross’s volitional capacity was significantly impaired, a plea along the lines I suggested might encourage him to agree to a stay.

- b) Do you think that it would have been appropriate for Paulding to address Ross in the manner you recommended?

Response: Yes, given the circumstances that existed at the time.

- 6) One day before you stayed Michael Ross’s execution in *Ross v. Rell*, 392 F.Supp.2d 236, 240 (D.Conn. 2005), Judge Droney of the District Court for the District of Connecticut denied a similar motion made by Ross’s father. Unlike you, Judge Droney had the benefit of interacting with Michael Ross and observing him in court. Judge Droney concluded that “[t]he plaintiff has provided no affirmative evidence of incompetence, incapacity, or other disability suffered by Michael Ross.” *Ross v. Rell*, 392 F.Supp.2d 224, 227 (D.Conn. 2005). He also noted:

the only evidence offered by plaintiff to support th[e] assertion [that Ross was incompetent] is that by waiving his right to further appeal his death sentence, Michael Ross is endangering his health by committing “state-assisted suicide.” Whatever the wisdom of Michael Ross’ decision to forgo additional appeals, that decision standing alone does not suffice to establish his incompetence. . . . While the proffered evidence provided information on Michael Ross’ history of mental health treatment, it did not support a conclusion that he currently is incompetent. Michael Ross is not unable to litigate his own cause, as *Whitmore* requires; Michael Ross simply has chosen not to exercise his right to litigate. . . . Given Michael Ross’ amply demonstrated competence before this Court and other courts, there is no basis for ordering a full evidentiary hearing on the issue of his competency. Nor, given Michael Ross’ reasoned and rational decision not to pursue this action, is there any basis for allowing a “next friend” to pursue it on his behalf.

Id. at 227-29.

- a) **Did you read Judge Droney’s opinion before issuing your stay of Michael Ross’s execution?**

Response: I do not recall when I first read Judge Droney’s opinion.

- b) **Given that you and Judge Droney reviewed substantially similar evidence, how do you explain the marked difference between your rulings?**

Response: I do not believe the evidence we reviewed was substantially similar. Judge Droney’s opinion states that the plaintiff in the case before him, Ross’s father, “provided no affirmative evidence of incompetence, incapacity, or other disability suffered by Michael Ross.” 392 F. Supp. 2d at 227. In the case before me, in contrast, the Office of the Chief Public Defender, Ross’s longtime counsel, proffered extensive evidence, including expert psychiatric testimony, in support of the claim that Ross lacked volitional competence. It is apparent from Judge Droney’s opinion that he was not provided with the evidence that was presented to me. Judge Droney’s opinion specifically notes that the Connecticut Supreme Court had entered an order three days earlier permitting Ross’s former public defenders to file a written offer of proof. *Id.* at 228 n.5. Judge Droney’s opinion states, “no similar written offer of proof is required here.” *Id.* The offer of proof Judge Droney referred to was presented to me along with additional evidence. Judge Droney’s opinion lists materials he did review: Dr. Norko’s evaluations of Ross in 1995 and 2004; an affidavit filed by Ross in 2004; transcripts of proceedings before Judge Clifford in 2004; and transcripts of proceedings before Judge Fuger in 2005. See *Id.* at 228-29. These materials formed only part of the evidence presented to me.

- c) **How do you distinguish Judge Droney’s consideration of whether Ross was committing “state-assisted suicide” from your consideration of whether he was suffering from “death row syndrome”?**

Response: Judge Droney’s decision did not bear directly on the issue presented to me. The claim presented to me was that Ross lacked volitional capacity to waive legal challenges to his death sentence due to suicidal despair caused by “death row syndrome.” This claim was not presented to Judge Droney. The claim presented to him was that the State’s lethal injection protocol violated the Eighth Amendment’s prohibition of cruel and unusual punishment. The two cases were similar because both involved an issue of next friend standing, which required consideration of Ross’s competence to litigate on his own behalf. Even as to this shared feature, however, the cases were different. In the case before Judge Droney, the next friend’s claim that Ross could not care for himself was based on an assertion that he was “endangering his health by committing ‘state-assisted suicide.’” 392 F. Supp. 2d at 227. Judge Droney rejected this assertion stating, “[w]hatever the wisdom of Michael Ross’ decision to forego additional appeals, that decision standing alone does not suffice to establish his incompetence.” *Id.* In the case before me, the next friend’s claim that Ross could not care for himself was based not on his decision to waive appeals “standing alone,” *id.*, but rather on evidence that he was suffering from suicidal despair caused by “death row syndrome.”

7) **In your opinion staying Ross’s execution, you stated: “my analysis of the issues presented by the petition has been aided by Judge Berzon’s concurring opinion in *Dennis ex rel. Butko v. Budge*, 378 F.3d 880, 895 (9th Cir. 2004).” *Ross*, 392 F.Supp.2d at 238 n.1.**

a) **What relevance did Judge Berzon’s concurrence have to your determination of whether the Connecticut courts’ competency rulings were “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”?**

Response: As discussed above in my response to question 4, I considered whether the Connecticut Supreme Court’s decision on the issue of next friend standing was binding under § 2254(d)(1), as the State contended. I concluded it was not, in part because the evidence contained in the written proffer, if credited, supported a finding that Ross lacked volitional competence under *Rees*, and the issue of Ross’s volitional competence under *Rees* had not been adequately addressed in the state courts. Judge Berzon’s concurrence was relevant to my determination because it analyzes the *Rees* standard of volitional competence.

b) **Do you consider your views on criminal and sentencing matters generally to be in line with those of Judge Berzon?**

Response: I am not familiar with Judge Berzon’s views on criminal and sentencing matters (apart from the ones expressed in the concurrence in *Butko*) and, accordingly, I am not in a position to comment. Moreover, I do not believe it would be appropriate for me to comment on whether I consider another judge’s views regarding criminal and sentencing matters generally to be in line with my own. Were I to do so, it could create an appearance of bias on my part in favor of or against the other judge’s views. In addition, I believe it would be inappropriate for me to comment on another judge’s views regarding matters of this nature because such matters are likely to come before me in future cases and I do not want to appear to have prejudged them.

c) **Even assuming that Judge Berzon’s concurrence was relevant to your determination, how do you square your interpretation of *Rees* with her statement that: “it makes much more sense to read *Rees* as requiring an actual, demonstrated inability to make rational choices because of a volitional impairment that is the product of a mental disorder”? *Butko*, 378 F.3d at 900. What “actual, demonstrated inability to make rational choices” had Michael Ross shown at the time that you stayed his execution?**

Response: Dr. Grassian testified that Ross’s decision to forego legal remedies appeared to be driven by suicidal despair, which prevented him from making a rational choice to forego legal remedies. Dr. Grassian’s testimony was supported by, among other things, Ross’s history of multiple suicide attempts since 1994 as well as correspondence and other writings in which Ross expressed a strong desire and serious intention to commit suicide. See 392 F. Supp. 2d at 239-40.

8) In the January 28, 2005 teleconference regarding the *Ross* case, you stated:

I toured [Northern] with an eye toward trying to grasp what its effect would be on the individual inmates. And I found it to be a very striking experience, one that I remember vividly years later. There is abundant literature ... not half of which, but a fair amount of which I have read, and that gives great weight to the notion that a person who is in that setting can lose his ability to make a knowing, intelligent and voluntary choice.

- a) Given that *all* inmates facing execution are housed on death row, and given that death row facilities around the country are substantially similar, can any death row inmate competently decide to abandon an appeal of a death sentence?

Response: Yes.

- b) What factors could justify a finding that a decision to waive appeals is voluntary, in light of your statement in the January 28 teleconference that an inmate suffering from “death row syndrome” could look and sound rational but in fact be “at the end of his rope”?

Response: Under *Rees*, an inmate under a sentence of death is competent to waive legal remedies if “he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation.” 384 U.S. at 314.

- c) Do you believe that inmates suffering from “death row syndrome” are competent to be executed even if forced to exhaust all appeals?

Response: If presented with the issue whether an inmate allegedly suffering from “death row syndrome” who had been forced to exhaust all appeals was competent to be executed, I would apply the standard in *Rees*.

9) In *Doe v. Lee*, 2001 U.S. Dist. LEXIS 7281 (D. Conn. May 17, 2001), you held that Connecticut’s “Megan’s Law” was unconstitutional, yet in response to Senator Sessions’ question 11(a)(i) you stated that you were not uncomfortable generally with the constitutionality of Megan’s Law. Please explain your answer to Senator Sessions in greater detail, squaring it with your ruling in *Doe v. Lee*.

Response: There is no doubt in my mind that Megan’s Law is constitutional. I have implemented and enforced Megan’s Law by sentencing criminal defendants to comply fully with Megan’s Law and have had no difficulty doing so. This is not inconsistent with my decision in *Doe v. Lee*. That case involved a challenge to an undifferentiated registry by an individual who claimed he was not dangerous. For reasons explained in my decision, I concluded that applicable precedents of the Supreme Court and Second Circuit entitled the plaintiff to a hearing to prove he was not dangerous. The Court of Appeals agreed. The Supreme Court disagreed. I have no difficulty accepting the Supreme Court’s decision.

10) In his March 5, 2010 letter to the Chairman and Ranking Member of the Senate Judiciary Committee, Connecticut State Attorney Michael O'Hare described a January 26, 2005 teleconference concerning Dan Ross's §1983 complaint on behalf of his son in which you "[R]econfigured the plaintiff's claim from one based on equal protection to one based on due process" before granting a temporary restraining order blocking Michael Ross's execution.

a) Please explain your switch from hearing a claim under Equal Protection Clause to granting a motion under a Due Process claim?

Response: The complaint alleged a deprivation of the plaintiff's relationship with his son in violation of the Fourteenth Amendment. I construed the complaint as alleging a due process claim. Plaintiff's counsel confirmed that the complaint was intended to assert a due process claim as well as an equal protection claim.

b) Was your shift in the characterization of the claim at the request of Mr. Ross' father or his attorney? If not, what motivated you?

Response: In accordance with legal requirements, I construed the allegations of the complaint in a manner most favorable to the plaintiff. Construed in this manner, I believed the allegations supported a due process claim.

c) To what Constitutional doctrine did you look to establish the cited "constitutionally protected bond with [a] son"?

Response: I looked to the doctrine that extends due process protection to the liberty interest in the parent-child relationship and applied that to the relationship between Mr. Ross and his son.