No. 18-7835

IN THE

SUPREME COURT OF THE UNITED STATES

IOURI MIKHEL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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I. This Court should grant the petition to clarify the standard of proof necessary to require a competency hearing where there is significant evidence of incompetency.

The district court declined to hold a competency hearing despite a host of red flags, increasing in intensity and cumulating over the course of this capital trial, that petitioner was in psychiatric distress and, as the result of his severe mental illness, engaged in a self-destructive course of conduct that ruptured his relationship with his trial attorneys and sabotaged his defense and, in particular, the reliability of the jury's sentencing determination. The Ninth Circuit acknowledged that this "confluence of circumstances" regarding petitioner's mental health was "concerning," *United States v. Mikhel*, 889 F.3d 1003, 1040 (9th Cir. 2018), but nevertheless upheld the district court's failure to order a competency hearing.

The analysis employed in Ninth Circuit's opinion — hypothesizing alternatives to explain away the significant evidence of psychiatric distress and decline vitiating petitioner's ability to participate rationally in his own defense at his capital trial — conflicts with analysis adopted both by this Court, in, for example, *Pate v. Robinson*, 383 U.S. 375 (1966) and *Drope v. Missouri*, 420 U.S. 162, 181 (1975), see Pet. at 21-25 (discussing cases), and by other courts, including *United States v. Mason*, 52 F.3d 1286, 1292 (4th Cir. 1995); *United*

States v. DiGilio, 538 F.2d. 972 (3d Cir. 1976); *State v. Einfeldt*, 914 N.W.2d 773 (Iowa 2018), see Pet. at 20-21 (discussing cases).

The Ninth Circuit's approach effectively conflated the standard for establishing doubt with the standard for proving incompetency and required petitioner to prove his incompetency, and disprove any alternative inferences, before requiring a district court to hold a competency hearing. Review is warranted so that this Court, which has never expressly articulated a standard for establishing the requisite doubt and the concomitant burden of proof, can resolve the conflicts and answer these important questions.[1]

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[1] Although Respondent asserts that plain-error review applies here (Br. in Opp. 26 & n.2), it does not propose a more stringent review standard and does not challenge petitioner's contention that, because both the Constitution and 18 U.S.C. § 4241 impose a special obligation on the trial court to order *sua sponte* a competency hearing if the evidence and circumstances demonstrate reasonable cause to doubt the defendant's competency, plain-error review does not alter the analysis or outcome. *See United States v. Dreyer*, 705 F.3d 951, 960 (9th Cir. 2013). As a factual matter, though, petitioner does not concede that plain-error review applies. As he has argued throughout, his counsel repeatedly raised concerns about his competency and, during the penalty phase of his capital trial, after his self-destructive (and stricken) testimony and refusal to attend or participate in the penalty phase of his trial, his counsel explicitly informed the court, in language paralleling § 4241, that he had a "question as to Mr. Mikhel's competency." Pet. 18 (quoting ER 2360-61). It is hard to imagine why counsel would have so notified the court, except for the purpose of invoking the protections of statute and due process. In *Drope*, this Court found similar language from petitioner's counsel sufficient to raise the issue of competence:

In urging this Court not to review the decision below, respondent fundamentally mischaracterizes the question identified by petitioner as "a fact-bound disagreement with the court of appeals' application of the standard that petitioner himself urged." Br. in Opp. 27; *see also id.* ("That disagreement provides no basis for this Court's review.") (*citing United States v. Johnson*, 268 U.S. 220, 227 (1925).)

To the contrary, although petitioner obviously disagrees with the result reached by the Ninth Circuit, he requests this Court to review not the facts, but the mode of analysis and the allocation of the burden of proof employed by the circuit court in assessing whether a doubt as to petitioner's competence existed sufficient to require a hearing. Instead of drawing inferences in favor of a doubt, the Ninth Circuit, without benefit of testimony, an adversarial process, or findings of fact or credibility in the district court, drew all inferences to support the opposite conclusion — indeed it labored to invent theories to explain away evidence of

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> Petitioner's somewhat inartfully drawn motion for a continuance probably fell short of appropriate assistance to the trial court in that regard. However, we are constrained to disagree with the sentencing judge that counsel's pretrial contention that "the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial," did not raise the issue of petitioner's competence to stand trial.

420 U.S. at 177.

petitioner's psychiatric distress and impaired functioning. Review is warranted to clarify the proper standard of analysis and allocation of burden of proof, not just the result in this case.

Respondent's approach now, in its Brief in Opposition, mirrors exactly the circuit court's flawed analysis and burden allocation and illustrates precisely the problem with the Ninth Circuit's approach. Respondent scours the record for possible explanations, sometimes inventing them out of whole cloth, to support a conclusion that no doubt existed as to petitioner's competence sufficient to require a hearing. But none of its hypotheses have been tested by an evidentiary hearing, at which the district court could have heard evidence, at which expert witnesses with competing opinions could have testified and been subject to cross examination, and after which the district court could have determined credibility and made findings of fact.

Three Suicide Attempts, Including One on the Very Eve of Trial

Petitioner made three serious suicide attempts in the run-up to his capital trial, the last of which occurred just after guilt-phase openings. Pet. 3-5, 15-16. Respondent does not challenge either the sincerity or severity of the attempts.

Respondent urges, instead, that suicide attempts "do not necessarily indicate that a defendant lacks present ability to understand the proceedings against him or

assist counsel in those proceedings." Br. in Opp. 28 (citing *Drope*, 420 U.S. at 181 n.16). The statement is true as far as it goes, but is also besides the point. Respondent, as did the Ninth Circuit, conflates the standard for determining competency after a hearing with the quantum of evidence necessary to require a hearing in the first instance. Whether or not a suicide attempt, alone, requires a *finding of incompetence*, numerous courts have held that a suicide attempt (to say nothing of three suicide attempts) raises a doubt as to a criminal defendant's competence sufficient to warrant a hearing. *See* Pet. 15 (citing cases). Indeed, this Court in *Drope* — on a factual showing remarkably similar to that in this case — concluded that Drope's suicide attempt, combined with additional evidence of irrational behavior and expert opinion concerning psychiatric symptoms (even in the absence of an express opinion on competence) required further inquiry and set aside the conviction for the trial court's failure to do so. *Drope*, 420 U.S. at 180.

Respondent also focuses on Dr. Ihle's conclusion that petitioner suffered depression, but was otherwise competent to stand trial. Br. in Opp. 28. But two other mental health experts, Dr. Dhillon, a mental health professional employed by the correction facility where petitioner was incarcerated and who treated petitioner in jail for over two years, and Dr. Vicary, retained by the defense, both opined that petitioner suffers Bipolar Disorder and that this major mental illness impaired his

insight and judgment and caused him to labor under a paranoid delusion that his attorneys were part of a conspiracy against him. Pet. 3-6, 8-9, 19. Respondent simply ignores this contrary expert opinion evidence and offers no principled explanation as to how the district court or the Ninth Circuit could have selected between the dueling expert diagnoses, simply preferring the one favoring competence over the two casting doubt, absent a hearing at which the experts testified and were cross-examined and findings of fact made.

Finally, respondent emphasizes petitioner's own self-report that he tried to kill himself because he regarded his future as hopeless. Br. in Opp. 28. It is unclear why, exactly, respondent finds petitioner's self-reports inconsistent with a doubt as to competence or psychiatric impairment vitiating his ability to participate rationally in his own defense. Even if they were, Dr. Vicary offered his expert opinion that petitioner's self-reports as to his functioning should not, because of his mental illness, be taken at face value:

> The technical term is "dissimulation," meaning faking health when you're sick.
>
> Lots of sick people do this; psychotic people at the jail that don't want to be put on Haldol and Thorazine and all these nasty medicines. When they go into jail or the MDC and they say questions like, "Do you hear voices?" "Have you ever been in the psychiatric hospital?" "Have you ever had psychiatric treatment?" They know from experience, no, no, no, I don't have any of these things, because

> they don't want to be on the psych unit, and they don't want psych meds. They want to be in the general population, so they're faking health.

ER 2315-16. Dr. Vicary explained that petitioner was "faking health." *Id.* Again, petitioner's request for this Court's review rests not on the circuit reaching the wrong result on facts, but on its employing an analysis — conflating the ultimate issue of competence with the threshold question of whether the district court was required to hold a hearing — under which it felt free to credit its own hypothesis, over the expert opinion of a mental health professional who had evaluated petitioner, without testimony, cross-examination, or findings of fact in the district court.

Irreparable Breakdown in Attorney-Client Relationship and a Suicidal Course of Conduct throughout the Trial

Petitioner's relationship with his trial attorneys ruptured irreparably during the trial, as a result of a paranoid delusion that they were in a conspiracy against him, and he engaged in an irrational and self-destructive course of conduct throughout his trial, including appearing in jail garb; testifying, against advice of the district court and counsel, in a grandiose and prejudicial manner, and then refusing to submit to cross-examination, leading to his testimony being stricken;

and then subsequently refusing to appear and participate in the penalty phase of his capital trial. Pet. 6-8, 16-19.

Respondent surmises that petitioner may simply have preferred to attend the proceedings in jail garb and that his appearance could not have prejudiced him in the eyes of the jurors who heard evidence of his attempt to escape from custody and, so, would already have learned of his incarceration. Br. in Opp. 28-29. And respondent, with extraordinary understatement, acknowledges petitioner's testimony may have been "incredible" and "perhaps ill advised," *id.* at 31, but emphasizes that, petitioner "in exercising his constitutional rights," pursued a defense strategy of shifting blame to a co-conspirator and demonstrated his "native intelligence," his "ability to understand and respond to questions, convey a narrative, and recall details from events spanning decades." Br. in Opp. 31 (quoting Pet. App. 36a).

Respondent's benign, post-hoc characterizations of petitioner's course of conduct at trial and its speculation as to the potential salutary effects of his clothes and testimony, however, cannot be squared with the observations of the trial participants themselves at the time. Counsel for petitioner's co-defendant urgently complained that petitioner appeared to "be on some type of suicide mission." ER 1777. And the prosecuting Assistant United States Attorney informed the court

that the government might not move to strike petitioner's testimony because it was so helpful to the government:

> Well frankly, your Honor, we like his testimony the way it is. So I don't know if we would make that -- we would ask the Court to do such a thing. I think that Mr. Mikhel's testimony actually is very helpful for the Government, because it is so patently absurd.
>
> So I'm going to ask the question and he can refuse to answer and we may just leave that as it is to demonstrate the type of person that Mr. Mikhel is when he takes the witness stand. But we will not request that his testimony be stricken. We intend on using it extensively in our closing argument in fact.

ER 1782. And whatever value Respondent now imagines petitioner might have hoped to accomplish through his testimony, Respondent fails to account for the loss of that value, when petitioner declined to be cross-examined and his testimony was stricken.

More importantly, however, respondent's emphasis on petitioner's intelligence, memory, ability to form a coherent narrative, like the panel opinion's below, is utterly beside the point. None of the experts below questioned petitioner's intelligence or memory or claimed that his mental illness impaired those cognitive functions. Drs. Dhillon and Vicary opined, instead, that as a result of his Bipolar Disorder, petitioner suffered, as psychiatric symptoms, impaired judgment and insight and labored under a paranoid delusion that his counsel were

part of a conspiracy against him, which caused the breakdown in the attorney-client relationship, vitiated his ability to make rational choices (such as what to wear and whether or not to testify), and led to his self-destructive course of conduct. Pet. 19 (citing ER 2274, 2307, 2320).

In any event, once again, the results of the circuit court's analysis are not at issue here, but the mode of the analysis it employed — an approach under which it believed itself licensed to ignore two expert mental health opinions, including one of a physician employed by the custodial facility that held petitioner, who treated him for over two years, in favor of its own unsupported speculation that, because petitioner is smart and his memory was intact, his choices must have been free of the taint of mental illness, such that no hearing on the matter was required.

Expert Opinions that Petitioner's Conduct Was the Product of Mental Illness

Respondent dismisses the penalty-phase testimony of the two experts who opined that petitioner has a major mental illness, Bipolar Disorder, which caused him to suffer psychiatric symptoms that impaired his ability to participate rationally in his own defense. It urges that the district court and circuit court were free to ignore these expert opinions, in determining whether a hearing was warranted, because neither used the legal label "incompetent." Br. in Opp. 31-32.

But of course their relevant testimony occurred in front of the jury during the penalty phase of petitioner's capital trial, where his competence to stand trial was not legally relevant. Indeed, when Dr. Dhillon attempted to more fully connect petitioner's psychiatric symptoms with his capacity to rationally assist counsel — she testified that the depressive symptoms of hopelessness, mistrust, and withdrawal "would interfere in participation of his own defense and I —" but was cut off at that point when the court sustained a relevancy objection from the government. ER 2224.

In any event, as described above, both experts diagnosed him with a major mental illness and detailed the impact of that illness on discrete areas of functioning directly relevant to his ability to rationally assist counsel in his defense. In this respect, the case is indistinguishable from *Drope*, where this Court relied on a psychiatrist's description of symptoms, even in the absence of any opinion as to competence, coupled with counsel's stated concerns and observations of petitioner's irrational behavior, to hold that the trial court erred in refusing to inquire further. 420 U.S. at 175-76, 180.

Throughout its Brief in Opposition, respondent attempts to reduce the question presented to one of facts only, thus unworthy of this Court's review. To do so, it micharacterizes petitioner's challenge to the circuit court's flawed

analytical methodology and apportionment of burden. Consistent with its opposition throughout, respondent's treatment of the cases cited by petitioner as in conflict with the Ninth Circuit's approach ignores the analytical standards explicitly adopted in those cases — trial and reviewing courts must accept as true all evidence of incompetence, *Mason*, 52 F.3d at 1290, 1293, and may not apportion to defendant burden of disproving competence in order to obtain a hearing, *DiGilio*, 538 F.3d at 988, and *Einfeldt*, 914 N.W.2d at 781-82, and courts must not conflate the necessarily low quantum of evidence required to obtain a hearing, with the ultimate question of the defendant's competence to stand trial, *Einfeldt*, 914 N.W.2d at 82 see Pet. 20-21 (discussing cases) — focusing instead, irrelevantly, on the facts those courts highlighted in support of the outcomes in the cases. Br. in Opp. 32-34. At the risk of undue repetition, petitioner does not seek review of the Ninth Circuit's factual determinations. Instead he urges review of the circuit's mode of analysis, which conflicts with the approaches explicitly adopted in the cited cases. Had the Ninth Circuit employed the standards announced in those cases, its analysis in petitioner's case would have been vastly different, grounded in a principled approach to evaluating the numerous red flags it agreed were "concerning."

II. This Court should grant the petition because the Ninth Circuit's interpretation of § 1203 conflicts with the view of the Second Circuit and is inconsistent with this Court's opinion in *Bond v. United States*, 572 U.S. 844, 134 S. Ct. 2077 (2014); alternatively, this Court should grant review to resolve the important constitutional questions regarding the Treaty Power that were left open in *Bond*.

Respondent's argument in opposition to this question is contained in its brief in opposition to certiorari in *Kadamovas v. United States*, No. 18-7489 (June 10, 2019). Br. in Opp. 23, Petitioner's co-defendant. Petitioner similarly joins the reply brief filed by Kadamovas.

III. This Court should grant review to resolve the conflict in the lower courts regarding whether the federal recusal statute, 28 U.S.C. § 455, has a timeliness requirement and the standards that apply to recusal under § 455; this Court should also provide needed guidance on the precedential value of the opinions of the Committee on the Codes of Conduct of the Federal Judiciary and should otherwise hold that recusal is required when a judge applies to become the United States Attorney while presiding over a capital case prosecuted by that same office.

Respondent's argument in opposition to this question is contained in its brief in opposition to certiorari in *Kadamovas v. United States*, No. 18-7489 (June 10, 2019). Br. in Opp. 23, Petitioner's co-defendant. Petitioner similarly joins the reply brief filed by Kadamovas.

IV. Conclusion.

For all the foregoing reasons, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: June 25, 2019

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