No._____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES ALLEN MINYARD,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There was a bona fide doubt as to Petitioner's competence to be tried, due to him becoming stuporous and non-responsive in the second day of his two-day trial, his hospitalization for a medical examination, and his confusing testimony. Rather than holding a competency hearing, the trial court determined—based on unconfirmed and conflicting reports—that Petitioner was voluntarily absent due to ingesting drugs, and the trial court completed the trial. Despite medical records that there were no drugs in his system, the state courts have subsequently held that Petitioner's claim is subject to harmless error review and that he must show that his absence from court caused him prejudice. The questions presented are:

I. Whether, despite there being a bona fide doubt as to Petitioner's competence, the trial court violated Petitioner's Fourteenth Amendment due process right to a fair trial by failing to hold a competency hearing before determining that Petitioner was voluntarily absent and completing the trial.

II. Whether a trial court's failure to hold a competency hearing, when there was a bona fide doubt as to the defendant's competence to be tried, is a structural error not subject to harmless error review.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF ALL PROCEEDINGS

1. *State of North Carolina v. James Allen Minyard*, Nos. 09 CRS 3910, 09 CRS 4222-4223, 11 CRS 1471, Burke County (N.C.) Superior Court. Judgment entered August 16, 2012.
2. *State of North Carolina v. James Allen Minyard*, No. COA13-377, North Carolina Court of Appeals. Judgment entered January 7, 2014.
3. *State of North Carolina v. James Allen Minyard*, No. 50P14, Supreme Court of North Carolina. Judgment entered April 10, 2014.
4. *State of North Carolina v. James Allen Minyard*, Nos. 09 CRS 3910, 09 CRS 4222-4223, 11 CRS 1471, Burke County (N.C.) Superior Court. Judgment entered March 21, 2018.
5. *State of North Carolina v. James Allen Minyard*, No. P19-17, North Carolina Court of Appeals. Judgment entered January 24, 2019.
6. *State of North Carolina v. James Allen Minyard*, No. 50P14-2, Supreme Court of North Carolina. Judgment entered April 1, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authority **Page**

PETITION FOR A WRIT OF CERTIORARI

James Allen Minyard respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of North Carolina.

OPINIONS BELOW

The order of the North Carolina Supreme Court (Pet. App. 15a-16a) is reported at 839 S.E.2d 849 (N.C. 2020). The orders of the North Carolina Court of Appeals (Pet. App. 14a) and the North Carolina Superior Court (Pet. App. 1a-13a) are unreported.

JURISDICTION

The North Carolina Superior Court denied Petitioner's Motion for Appropriate Relief on March 21, 2018. The North Carolina Court of Appeals denied Petitioner's Petition for Writ of Certiorari on January 24, 2019. The North Carolina Supreme Court dismissed Petitioner's Petition for Writ of Certiorari on April 1, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

[1] Certiorari is properly directed to the North Carolina Supreme Court's judgment dismissing the appeal. *See Grady v. North Carolina*, 135 S. Ct. 1368, 1370 n.* (2015) (per curiam); *R.J. Reynolds Tobacco Co. v. Durham Cty.*, 479 U.S. 130, 138–39 (1986).

STATEMENT OF THE CASE

When Petitioner became unconscious during his trial, the trial court failed to determine whether he was competent, ordered him removed to a hospital, ruled that he had voluntarily waived his presence by ingesting two medications and alcohol, and continued trial without him. In Petitioner's direct appeal, the state court of appeals held there was a bona fide doubt as to Petitioner's competency when he became stuporous and nonresponsive during trial, and noted that such doubt would ordinarily require a competency hearing. Pet. App. 52a. Yet, the court of appeals held that the trial court did not err by failing to hold a competency hearing because Petitioner had voluntarily ingested large amounts of intoxicants and thereby waived his right to be present at trial. Pet. App. 53a-55a.

In a post-conviction motion, Petitioner provided medical records showing that he did not have any alcohol or drugs in his system when he was evaluated at the hospital soon after being removed from court. Pet. App. 57a-72a. Petitioner claimed that his Fourteenth Amendment right to a competency hearing had been violated. While acknowledging the medical records, the trial court nevertheless analyzed the claim as a right to be present—not as a right to be tried while competent—and denied the motion because Petitioner had not shown he was prejudiced. Pet. App. 7a-8a. State appellate courts denied his timely petitions for review, Pet. App. 14a-16a, and he asks this Court to apply its Fourteenth Amendment precedent.

A. Trial

In September 2009, a grand jury indicted Petitioner for six counts of taking indecent liberties with a child and one count of first-degree sexual offense. PWC App. 5-10.[2] In June 2011, a grand jury indicted Petitioner for attaining the status of habitual felon. PWC App. 11. The matter came on for trial in August 2012 in Burke County Superior Court, the Honorable Jerry Cash Martin presiding. PWC App. 14-313.

On the first day of trial, the judge questioned Petitioner to ensure that he understood that he was rejecting his attorney's advice to take a plea and proceeding to trial. PWC App. 25–26. Petitioner responded to the judge's questions concisely and directly. PWC App. 26–27. When Petitioner next spoke on the record, on the second and final day of trial, his interactions with the court differed. PWC App. 174-201. Petitioner testified in his own defense, yet instead of providing concise and direct answers to questions, Petitioner's testimony appeared disjointed. PWC App. 174-200. The prosecutor objected to Petitioner's nonresponsive answers approximately eight different times, and the judge sustained each objection. PWC App. 177-79, 181, 186-88, 196.

When Petitioner's attorney asked what Petitioner and an earlier witness had fought about, Petitioner chattered about how gastric bypass surgery had changed his outlook on life. PWC App. 178. Later, as Petitioner's counsel tried to

[2] This Petition cites the trial transcript and other documents that were filed as part of the appendix to the Petition for Writ of Certiorari filed in the Supreme Court of North Carolina as "PWC App. __".

lay a foundation to admit a photograph, Petitioner struggled to understand his attorney's simple question—Will this picture "aid you in your testimony?" PWC App. 183. On cross-examination, Petitioner struggled to give his daughter's birth date, alternately stating that she was born in 1988; on February 4, 2008; and in March; before finally stating it was October 4, 2009. PWC App. 189-90. Most peculiarly, Petitioner stated he did not remember testimony from the witness who had testified immediately before he took the witness stand. PWC App. 194-95.

During jury deliberations later that day, Petitioner was not able to join his counsel at the defense table, with Petitioner's counsel reporting that Petitioner was "having a little problem, Your Honor." PWC App. 233. The judge responded, "Sir, stay with us if you will. If you got out, we're going to have to go on without you. If you want to see what happens here, try to stay vertical." PWC App. 233. Petitioner did not respond. PWC App. 233. The judge then called for the jurors and responded to the jury's first question. PWC App. 234. While the judge noted that "Defendant [was] present in the courtroom and . . . can hear," neither the judge nor Petitioner's counsel asked Petitioner if he actually could hear. PWC App. 233.

After the jury resumed deliberations, the trial court, unprompted, stated:

> Mr. Minyard, you've been able to join us all the way through this. And let me suggest that you continue to do that. If you go out on us, I very likely will revoke your conditions of release. I'll order you arrested. We'll call emergency medical services; we'll let them examine you. If you're healthy, you'll be here laid out on a stretcher if need be. If you're not healthy, we will continue on without you, whether you're here or not. So do your very best to stay vertical, stay conscious, stay with us.

PWC App. 235. Again, Petitioner did not respond. Even though Petitioner was

nonresponsive, the judge made no attempt to ascertain whether Petitioner was still competent to stand trial. PWC App. 235. Instead, the judge recessed for six minutes, and upon reconvening, answered the jury's second question. PWC App. 235-36.

After reading the jury's second question to the parties, the judge noted that "Defendant [was] present in the courtroom within hearing." PWC App. 235. Yet again, the judge made no attempt to ascertain whether Petitioner could actually hear the proceedings. PWC App. 235.

Twenty-three minutes passed, and then the judge stated:

> Defendant is present, and the Defendant is not – is in the courtroom but is not joining us at the defense table, and has not come up at the request of the Court. I have a report that he has overdosed. That is, he has taken medication, so much medication that he's at a point where he might not be functioning very well.

App. 235–37. The judge asked a sheriff's deputy if he knew what happened. PWC App. 237. The deputy said that a witness present in the galley, Evelyn Gantt, told him Petitioner had taken eight Xanax pills. PWC App. 237. Gantt, who had testified for Petitioner, stated, "He was just worried about the outcome and I don't know why he took the pills." PWC App. 237-38. She said she thought he had overdosed. PWC App. 238. Gaynell Toney, who had also testified for Petitioner, stated, "He took more than he was supposed to have." PWC App. 238. In a dictated order, the judge characterized Gantt's statement as a "report" that Petitioner voluntarily overdosed. PWC App. 245, 248.

The judge added later that he received a different report that Petitioner had

taken fifteen Klonopin and drunk two forty-ounce alcoholic beverages. PWC App. 261-62. The judge revoked the conditions of Petitioner's pretrial release and ordered Petitioner into the custody of the sheriff for a medical examination. PWC App. 238, 314.

Counsel responded to the trial court's proposal to play a portion of a video in response to the jury's second question. PWC App. 238-39. The trial court then read the jury's third question, and counsel again responded to the trial court's proposed response. PWC App. 238-39.

The sheriff escorted Petitioner out of the courtroom for a medical examination. PWC App. 240. The trial court had a portion of a video played for the jurors in response to their second question and allowed them to review an exhibit in response to their third question. PWC App. 240–42. The trial court also read the jury's fourth question and responded to it. PWC App. 244. The jury resumed deliberations. PWC App. 240–44.

Based on Gantt's statement, Judge Martin found that:

> Defendant took an overdose of Xanax.While he was here in the courtroom and while the jury was still out in deliberations, Defendant became lethargic and slumped over in the courtroom. The Court finds he was being ministered to by two – by at least one lady who was here as a witness for him. The bailiff learned that Defendant had taken an overdose of medication; that is, eight pills of Xanax.

PWC App. 248. The judge further found that Petitioner "was stuporous and refused to cooperate with the Court and refused reasonable requests by bailiffs. The Court received statements in open court with all counsel present, no jurors

present, from the bailiff and from one of Defendant's witnesses that the Defendant had overdosed on some drugs." PWC App. 248.

The judge found that Petitioner, "by his own conduct, voluntarily disrupted the proceedings in this matter by stopping the proceedings for a period of time so the Court might resolve the issue of his overdose." PWC App. 249. The judge further "infer[red] from Defendant's conduct on the occasion that it was an attempt by him to garner sympathy from the jurors." PWC App. 249. Thus, the judge ruled that Petitioner "waived his presence by his disruptive conduct." PWC App. 252.

The trial court failed to make a sua sponte inquiry into Petitioner's Fourteenth Amendment right to be competent when standing trial. PWC App. 245-50. The trial court only evaluated whether Petitioner waived his Sixth Amendment right to be present. PWC App. 245-50.

Later that afternoon, while Petitioner was still absent, the jury returned guilty verdicts on five counts of taking indecent liberties with a child and one count of attempted first-degree sexual offense, and the judge accepted the verdicts. PWC App. 253-58. The judge later stated he received a report from a sheriff's department sergeant that Petitioner had taken fifteen Klonopin and consumed two forty-ounce beers and that two beer cans were found in the back of Petitioner's truck. PWC App. 261. The judge recessed court for the day. PWC App. 262.

The judge conducted the habitual felon phase the next day, and Petitioner was physically present. PWC App. 264, 275. The trial court asked Petitioner

whether he wanted to testify in the habitual felon phase and Petitioner responded, "Sir, I would – I was hoping to testify yesterday. Unfortunate circumstances didn't allow me to." PWC App. 275. Though Petitioner had in fact testified the day before, PWC App. 161-188, the judge did not question Petitioner about his misstatement. PWC App. 275.

B. Direct Appeal

On direct appeal, Petitioner raised three issues, including that the trial court "improperly failed to institute, sua sponte, a competency hearing during the trial when Defendant became 'stuporous and non-responsive' during the trial." Pet. App. 32a.

The Court of Appeals held there was "ample evidence to raise a bona fide doubt whether Defendant was competent to stand trial. Defendant appeared lethargic, 'stuporous,' and non-responsive. Such conduct would ordinarily necessitate a *sua sponte* hearing." Pet. App. 52a. The Court further held, "The inability to 'stay vertical' or to obey the commands of court personnel certainly would give rise to such a *bona fide* doubt." Pet. App. 52a-53a. The Court of Appeals held, however, that "[b]y voluntarily ingesting intoxicants, Defendant waived his right to be present during a portion of these proceedings." Pet. App. 55a. The Court of Appeals also stated that "Defendant does not offer evidence that his absence prejudiced the proceedings." Pet. App. 55a. The North Carolina Supreme Court denied Petitioner's petition for discretionary review.

C. Post-Conviction Motion

On 24 February 2018, Petitioner filed a post-conviction Motion for Appropriate Relief ("MAR"). PWC App. 366-489. Petitioner alleged, *inter alia*, that he was incompetent to stand trial because he experienced a medical issue that caused him to lose consciousness. Pet. App. 57a. In an affidavit filed with his MAR, Petitioner stated that he "did not take anything at trial." Pet. App. 58a. Petitioner asserted that his incapacity at trial was caused by low blood sugar, a consequence of his diabetes. Pet. App. 57a. Petitioner produced the toxicology report from his court-ordered medical examination, which showed the there was no alcohol or Benzodiazepines (which include Xanax and Klonopin) in his system. Pet. App. 61a–72a. In fact, the toxicology report, from samples collected at 4:30 p.m., also detected no presence of amphetamines, barbiturates, cocaine, methadone, opiates, oxycodone, or tetrahydrocannabinol. Pet. App. 70a.

Therefore, Petitioner claimed that continuing the trial after he became incompetent through no fault of his own deprived him of due process of law under the Fourteenth Amendment to the United States Constitution. Pet. App. 57a-60a. Specifically, Petitioner asserted that "I did not take anything at trial. A medical issue hindered my thinking, actions and ability to defend myself." Pet. App. 58a. Petitioner claimed that the trial judge, "Never stopped trial for a competency hearing to see if I was still able to continue trial." Pet. App. 59a. He noted that "E.R. Dr. Chad Ruechell had a toxicology done on me within 15 min. of entering

the E.R. No alcohol or drugs (see hospital Records) of any kind was in my system." Pet. App. 60a. Petitioner attached the Emergency Department Documentation showing he tested negative for Benzodiazepines and Ethanol. Pet. App. 61a–72a.

The trial court denied the MAR on 21 March 2018. Pet. App. 13a. As to the competency issue, the trial court first found, based on the medical records Petitioner had produced, "It appears that a urine test reflected a negative result for benzodiazepines." Pet. App. 7a.[3] But, despite Petitioner's claim that he had been denied a competency hearing, the trial court analyzed Petitioner's claim as a denial of his right to be present at trial subject to harmless error analysis and found that Petitioner had not met his burden of showing he was prejudiced by his absence during deliberations and the jury's return of verdicts. Pet. App. 8a.

Petitioner entered written notice of appeal. PWC App. 503-04. On 7 January 2019, Petitioner filed a Petition for Writ of Certiorari in the North Carolina Court of Appeals. PWC App. 509-33. The Court of Appeals denied Petitioner's Petition for Writ of Certiorari on 24 January 2019. Pet. App. 14a. On 08 March 2019, Petitioner filed a Petition for Writ of Certiorari in the North Carolina Supreme Court. The petition was dismissed on April 1, 2020. Pet. App. 15a.

[3] Xanax and Klonopin, the two drugs the trial court had found Petitioner took, are benzodiazepines. *See* Gerardo Sisson, *Klonopin vs. Xanax: Differences, Similarities, and Which is Better for You*, SingleCare (August 29, 2018), https://www.singlecare.com/blog/klonopin-vs-xanax/# (noting that "[b]oth medications are classified as benzodiazepenes").

D. Stage in Proceedings Where Federal Questions Raised.

Pursuant to Supreme Court Rule 14(g)(i), and as also noted above, Petitioner initially raised this petition's first Question Presented (whether trial court erred in failing to hold a competency hearing sua sponte) in his direct appeal to the North Carolina Court of Appeals that was decided in 2014. Specifically, one of the arguments Petitioner raised was that "the trial court erred by proceeding with the trial rather than conducting an inquiry into the defendant's capacity to proceed when Mr. Minyard became stuporous and non-responsive during the trial." Petitioner relied in part on this Court's decisions in *Drope v. Missouri*, 420 U.S. 162 (1975) and *Pate v. Robinson*, 383 U.S. 375 (1966). Petitioner raised the issue again, along with newly provided medical records showing that he could not have voluntarily absented himself from trial by ingesting drugs or alcohol, in his post-conviction MAR in 2018. *See* Pet. App. 57a-72a. Petitioner raised this petitioner's second Question Presented (whether failure to hold competency hearing is subject to harmless error review) in his 2018 Petition for Writ of Certiorari to the North Carolina Court of Appeals and in his 2019 Petition for Writ of Certiorari to the Supreme Court of North Carolina. Specifically, citing this Court's *Drope* and *Pate* decisions, Petitioner contended to both state appellate courts that "the due process violation of trying Mr. Minyard while incompetent was prejudicial per se."

REASONS FOR GRANTING THE PETITION

I. Petitioner's due process right to a fair trial was violated when a bona fide doubt as to his competence arose during trial and the trial court failed to hold a competency hearing.

This Court long ago established that, when there is a bona fide doubt as to a defendant's competence to be tried, the trial court must sua sponte determine whether the defendant is competent. *Pate v. Robinson*, 383 U.S. 375, 385 (1966). The trial court's "failure to make such inquiry" deprives the defendant "of his constitutional right to a fair trial." *Id.* Moreover, the Court reasoned, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to determine his capacity to stand trial." *Id.* at 384.

The *Pate* dissent fully agreed with the rules the majority had recognized, disagreeing only with their application to the facts of that case:

> The Court appears to hold that a defendant's present incompetence may become sufficiently manifest during a trial that it denies him due process for the trial court to fail to conduct a hearing on that question on its own initiative. I do not dissent from this very general proposition, and I agree also that such an error is not "waived" by failure to raise it and that it may entitle the defendant to a new trial without further proof.

Id. at 388 (Harlan, J., dissenting).

Even if a defendant appears competent at the start of trial, "a trial 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." *Drope v. Missouri*, 420 U.S. 162, 181 (1975). The competency standard "is applicable from the time of arraignment through the return of a verdict." *Godinez v. Moran*, 509 U.S.

389, 403 (1993) (Kennedy, J., concurring). Where doubt as to a defendant's competence arises during trial, the correct course is to suspend the trial until an evaluation can be made. *Drope*, 420 U.S. at 180; *Tiller v. Esposito*, 911 F.2d 575, 576 (11th Cir. 1990) ("A trial court must conduct, *sua sponte*, a competency hearing when the information known to the trial court at the time of the trial or plea hearing is sufficient to raise a bona fide doubt regarding the defendant's competence.") (citing *Pate*, 383 U.S. at 385).

Applying those long-established rules here, Petitioner's Fourteenth Amendment due process right to a fair trial was violated because the trial court failed to hold a competency hearing, had Petitioner hospitalized, and continued trial without Petitioner being present. The state Court of Appeals established that there was "ample evidence to raise a bona fide doubt whether Defendant was competent to stand trial." Pet. App. 52a. Despite noting that "[s]uch conduct would ordinarily necessitate a sua sponte hearing," *id.*, the court held that Petitioner had voluntarily waived his right to be present because he had voluntarily ingested medications. Pet. App. 55a.

In his post-conviction motion, Petitioner produced medical records showing that there were no benzodiazepines, other drugs, or alcohol in his blood shortly after he was removed from the trial courtroom. He therefore could not have voluntarily ingested the medications Xanax or Klonopin, which are both benzodiazepines, to disrupt trial. He accordingly claimed that the trial court had erred by not holding a competency hearing. While acknowledging the medical records, the post-conviction

court treated the issue as one of voluntary waiver of presence subject to harmless error review and denied Petitioner relief on that basis without addressing his due process right to be tried while competent. This was constitutional error, because "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to determine his capacity to stand trial." *Drope*, 383 U.S. at 384. It is simply mutually exclusive for the courts below to conclude that there was a bona fide doubt as to Petitioner's competence yet that he voluntarily waived his right to be present.

Despite there having been a bona fide doubt as to Petitioner's competence, and Petitioner having shown that he did not voluntarily ingest drugs or alcohol in order to disrupt trial (and thereby potentially waive his right to be present), no court has ever addressed whether his due process right to be tried while competent was violated. Under this Court's decisions, and to protect the vital due process right of defendants to be tried only while competent, review is warranted.

II. A trial court's failure to hold a competency hearing upon a bona fide doubt of competence should be treated as structural error.

This Court's guidance is necessary to delineate the appropriate appellate review of a trial court's failure to hold a competency hearing upon a bona fide doubt as to competence. This case provides an ideal vehicle for the court to clarify the review of such violations of due process. After a bona fide doubt as to Petitioner's competence was established, the lower courts improperly treated the issue as one subject to harmless error review in which Petitioner had to prove he was prejudiced

by his absence from trial. As discussed below, harmless error review should not apply, such violations should be recognized as structural errors, and the courts below erred in holding that Petitioner—despite there being a bona fide doubt as to his competency—had a burden to show that he was prejudiced by his absence.

A. This Court has not subjected the failure to hold a competency hearing to harmless error review.

There are two possible remedies for a trial court's failure to hold a competency hearing upon a bona fide doubt as to competence: reversal of the conviction or a retrospective competency hearing. This Court has alluded to retrospective competency hearings but never approved of one. Instead, this Court has reversed the defendant's conviction and remanded for a new trial. *See Pate*, 383 U.S. at 386–87 (remanding for grant of habeas corpus writ and stating that retrospective competency hearing would be difficult because jury could not observe defendant, experts would have to testify based on the court record, and hearing would be six years after conviction); *Drope*, 420 U.S. at 183 (noting the difficulties inherent in a retrospective competency hearing and reversing judgment).

The federal circuits have held that retrospective competency hearings are permissible in certain cases. *See, e.g.*, *United States v. Giron-Reyes*, 234 F.3d 78, 83 (1st Cir. 2000); *United States v. Auen*, 846 F.2d 872, 878 (2d Cir. 1988); *United States v. Jones*, 336 F.3d 245, 260 (3d Cir. 2003); *United States v. Mason*, 52 F.3d 1286, 1293 (4th Cir. 1995); *United States v. Hutson*, 821 F.2d 1015, 1018 (5th Cir. 1987); *Pate v. Smith*, 637 F.2d 1068, 1072 (6th Cir. 1981); *United States ex rel. Bilyew v. Franzen*, 686 F.2d 1238, 1246 (7th Cir. 1982); *Reynolds v. Norris*, 86 F.3d

796, 803 (8th Cir. 1996); *United States v. Dreyer*, 705 F.3d 951, 965 (9th Cir. 2013); *McGregor v. Gibson*, 248 F.3d 946, 962 (10th Cir. 2001); *Tiller*, 911 F.2d at 578; *United States v. Masthers*, 539 F.2d 721, 729 (D.C. Cir. 1976); *see generally* David W. Beaudreau, *Due Process or "Some Process"? Restoring* Pate v. Robinson*'s Guarantee of Adequate Competency Procedures*, 47 Cal. W. L.R. 369, 393–407 (2011) (discussing retrospective hearings and proposing that the only appropriate remedy for failure to hold a competency hearing is reversal of conviction and remand for new trial).

State appellate courts tend also to remand cases for retrospective competency hearings. *See, e.g.*, *People v. Mondragon*, 217 P.3d 936, 943 (Colo. App. 2009) (remanding the case for retrospective competency hearing); *Baker v. State*, 297 S.E.2d 9, 14 (Ga. 1982) (same); *State v. Ford*, 353 P.3d 1143, 1155 (Kan. 2015) ("[A] meaningful retrospective competency hearing may rectify the procedural error."); *Padgett v. Commonwealth*, 312 S.W.3d 336, 348 (Ky. 2010) ("A retrospective hearing, if appropriate, can satisfy due process.").

With either remedy—reversal with possible new trial or retrospective competency hearing—this Court and lower courts have never treated a bona fide doubt as to competence as subject to harmless error review, given that "*Pate* and its progeny demand more than such speculation: they demand a competency hearing." *Anderson v. Gipson*, 902 F.3d 1126, 1135 (9th Cir. 2018).

On appeal, constitutional violations are generally subject to either harmless error or structural error review. *Arizona v. Fulminante*, 499 U.S. 279, 306, 309–10

(1991). While most constitutional errors are subject to harmless error review, *id.* at 306, some errors are subject to structural error review, because they "threaten a fundamental component of our criminal justice system." *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996) (quoting *United States v. Cronic*, 466 U.S. 648, 653 (1984)).

When there is a bona fide doubt as to a defendant's competence, appellate courts have not analyzed the harmlessness of the error; they have either reversed the defendant's conviction or remanded the case for a retrospective competency hearing. In *Drope*, after determining that the trial court erred in not holding a competency hearing, this Court did not inquire into the harmlessness of such error. 420 U.S. at 180, 182–83. Instead, this Court analyzed whether a retrospective competency hearing was feasible and, upon determining that it was not, reversed the conviction. *Id.* at 183.

In effect, by not inquiring into the harmlessness of the error and instead analyzing whether either a retrospective competency hearing or reversal is appropriate, this Court has treated the failure to institute a competency hearing upon a bona fide doubt as to competence as a structural error. *See Jones v. Cavazos*, No. CV 11–06354–RGK (VBK), 2012 WL 6895643, at *16 n.6 (C.D. Cal. Dec. 17, 2012) ("This Court . . . is not aware of any Supreme Court case . . . where a competency hearing was denied despite the fact that a bona fide doubt was raised—and yet the Supreme Court went on to analyze the error for harmlessness . . . . In light of the absence of Supreme Court precedent on the harmlessness of a procedural due process violation regarding denial of a competency hearing, . . . , it

could be argued that improper denial of a competency hearing is a structural error not subject to harmless error analysis."). Petitioner asks this Court to explicitly so hold.

B. The failure to sua sponte hold a competency hearing upon a bona fide doubt as to competence is a structural error that does not require a defendant to demonstrate prejudice.

Structural errors tend to "necessarily render a trial fundamentally unfair" and are per se reversible. *Neder v. United States*, 527 U.S. 1, 8 (1999); *see also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) ("An error can count as structural even if the error does not lead to fundamental unfairness in every case."). Structural errors are not subject to harmless error review, given that they "affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself. 'Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Fulminante*, 499 U.S. at 310 (quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986)). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver*, 137 S. Ct. at 1907.

This Court has deemed a number of errors to be structural errors, given that they are not simply "error[s] in the trial process itself," but "affect[ ] the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 310. Such structural errors include the total deprivation of the right to counsel, *see United States v.*

Gonzalez-Lopez, 548 U.S. 140 (2006); *Gideon v. Wainwright*, 372 U.S. 335 (1963); denial of the right to self-representation, *see McKaskle v. Wiggins*, 465 U.S. 168 (1984); racial discrimination in grand jury selection, *see Vasquez v. Hillery*, 474 U.S. 254 (1986); failure to provide a correct jury instruction on reasonable doubt, *see Sullivan v. Louisiana*, 508 U.S. 275 (1993); denial of the right to a public trial, *see Presley v. Georgia*, 558 U.S. 209 (2010); *Waller v. Georgia*, 467 U.S. 39 (1984); and denial of the right to an impartial judge, *see Tumey v. Ohio*, 273 U.S. 510 (1927).

A trial court's failure to hold a competency hearing upon a bona fide doubt as to a defendant's competency should also be deemed to be a structural error, given that "an erroneous determination of competence threatens a 'fundamental component of our criminal justice system'—the basic fairness of the trial itself." *Cooper*, 517 U.S. at 364 (quoting *Cronic*, 466 U.S. at 653). This Court has delineated three rationales for why an error may be deemed structural. First, errors may be classified as structural "'if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,' such as 'the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.'" *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) (quoting *Weaver*, 137 S. Ct. at 1908). Second, an error may be considered structural "if the effects of the error are simply too hard to measure." *Weaver*, 137 S. Ct. at 1908. Third, an error may be deemed structural "if the error always results in fundamental unfairness." *Id.* The failure to hold a competency hearing meets all three of the rationales discussed in *Weaver*.

First, the right to not be tried while incompetent "is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *McCoy*, 138 S. Ct. at 1511. Similar to how this Court found that the denial of a defendant's right to self-representation was structural error, *McKaskle*, 465 U.S. at 177–78, on the basis that "a defendant must be allowed to make his own choices about the proper way to protect his own liberty," *Weaver*, 137 S. Ct. at 1908, the failure to hold a competency hearing upon a bona fide doubt as to competence raises analogous concerns of how a defendant is able to participate in his own trial.

The right to competence is rooted in common law:

> And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed: for . . . had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.

4 William Blackstone, Commentaries *24–25. Similar to this Court's conclusion that a defendant must be permitted to make his own decisions about the course of his case, the failure to hold a competency hearing upon a bona fide doubt as to competence deprives a defendant of the ability to consciously and meaningfully participate in his own defense. The right to competence is a "rudimentary" right that encompasses "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." *Riggins v. Nevada*, 504 U.S. 127, 139 (1992) (Kennedy, J., concurring). Protecting a defendant's right not to be tried while

incompetent safeguards the rights deemed fundamental to a fair trial and ensures a defendant is afforded due process. Thus, the failure to sua sponte hold a competency hearing is a structural error under the first rationale noted in *Weaver*, particularly with a defendant such as Petitioner who was stuporous, non-responsive, and removed from the courtroom. *Cf. United States v Chiappetta*, 289 F.3d 995, 1000 (7th Cir. 2002) (rejecting structural error argument based on *Pate* and *Drope* because defendant had done no more than allege being emotionally upset during trial and was able to assist during trial).

Second, the failure to hold a competency hearing upon a bona fide doubt of competence is a structural error because the effects of the error are unquantifiable. In *Gonzalez-Lopez*, this Court held that the deprivation of the right to counsel of choice constituted a structural error "with consequences that are necessarily unquantifiable and indeterminate." 548 U.S. at 150 (quotation omitted). Because different attorneys choose different trial strategies—including witness selection and whether the defendant will take a plea bargain or go to trial—and these choices permeate the entire trial framework, it is practically impossible to predict and quantify the impact of these choices. *Id.*

Similarly, it is impossible to quantify the effect of the failure to hold a competency hearing. Here, for example, while Petitioner's incompetence physically manifested itself during jury deliberations, it seems highly likely that Petitioner was incompetent earlier in the trial. Moreover, the trial lasted only two days, and Petitioner missed some of the afternoon of the second day of a two-day trial,

including numerous questions by the jury and responses to those questions by the trial court. Regardless, at common law, the right to competence extended past closing arguments and entry of judgment to execution. 4 William Blackstone, Commentaries *24–25. Thus, the fact that Petitioner's incompetence may not have become manifest until jury deliberations is not dispositive, as the right to competence extends throughout the trial. Without a contemporaneous competency hearing, it is impossible to know exactly when Petitioner became incompetent; any inquiry into the effect of the error is purely speculative. Accordingly, the failure to hold a competency hearing is a structural error necessitating reversal because the effect is "too hard to measure." *Weaver*, 137 S. Ct. at 1908.

Finally, the failure to hold a competency hearing is also a structural error under *Weaver*'s third rationale—the error always results in fundamental unfairness. As Justice Kennedy observed, the right to competence encompasses a number of rights deemed fundamental 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." *Riggins*, 504 U.S. at 139 (Kennedy, J., concurring). At common law, the right to competence was determined to be so essential that it extended past the entry of judgment to execution. 4 William Blackstone, Commentaries *24–25. "[A]n erroneous determination of competence threatens a 'fundamental component of our criminal justice system'—the basic fairness of the trial itself." *Cooper*, 517 U.S. at 364 (quoting *Cronic*, 466 U.S. at 653).

Competence is a foundational right that allows a defendant to meaningfully exercise the other rights deemed essential to an adversarial and fair trial. The trial of an incompetent defendant permeates the entire trial framework and hinders a defendant's ability to put forth a defense. It does not matter whether a defendant becomes incompetent before trial, during jury deliberations, or at sentencing—the case law requires the court to sua sponte hold a competency hearing upon a bona fide doubt as to the defendant's competence. *Pate*, 383 U.S. at 385. By failing to hold a competency hearing, the trial court undermines a defendant's ability to exercise the myriad of rights that assume competence and that are essential to a fair trial. Accordingly, the failure to hold a competency hearing is a structural error under *Weaver*'s third rationale because it always results in fundamental unfairness.

In this case, the trial court's failure to hold a competency hearing upon a bona fide doubt as to Petitioner's competency was a structural error, given that the error meets each of the three rationales delineated in *Weaver*. The error deprived Petitioner of his Fourteenth Amendment due process right to a fair trial, necessitating reversal of Petitioner's conviction or at least a retrospective competency hearing.[4]

Though the Court of Appeals held that there was a bona fide doubt as to the defendant's competency and that ordinarily a sua sponte competency hearing

[4] Petitioner contends that the remedy of a retrospective hearing as to his competency in August 2012 would not be feasible in this case. *See, e.g.*, *Dusky v. United States*, 362 U.S. 402, 403 (1960) (noting the "difficulties of retrospectively determining the petitioner's competency as of more than a year ago" and reversing judgment); *Pate*, 383 U.S. at 387 ("That Robinson's hearing would be held six years after the fact aggravates these difficulties.").

should have been held, the Court of Appeals resolved the issue as one of voluntary waiver of presence subject to harmless error review rather than a question of competence to stand trial. Pet. App. 44a-55a. While acknowledging the medical records, the post-conviction court also treated Petitioner's claim as involving a voluntary waiver of presence subject to harmless error review and stated that "[t]here was no prejudice to the defendant as a result of his absence from the courtroom." Pet. App. 7a-8a. Because voluntary waiver presupposes competency, the issue of voluntary waiver of presence should only have been reached if competence had been first established. *See, e.g.*, *Pate*, 383 U.S. at 384 ("It is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.").

In short, to provide needed clarity for review of competence to stand trial issues, this Court should grant certiorari and hold that a trial court's failure to hold a competency hearing upon a bona fide doubt as to the defendant's competence should be treated as a structural error and not subject to harmless error review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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