No. 20-6679

IN THE SUPREME COURT OF THE UNITED STATES

LARRY DORTLEY, *Petitioner*

v.

STATE OF FLORIDA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should grant review of an unpublished, unelaborated decision of a state intermediate appellate court affirming the state trial court's ruling rejecting the postconviction claim that the Petitioner was incompetent during his trial in 1983, on the grounds the claim was procedurally barred.

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OPINIONS BELOW

The unreported decision of the First District Court of Appeals is provided in Petitioner's Appendix as Appendix A-1. The April 4, 1983, circuit court clerk's minutes are provided in the appendix as Respondent's Appendix A. Documents in the appendices are referred to as Petitioner's or Respondent's Appendix A, followed by a page number.

JURISDICTION

The First District Court of Appeal, which is the state intermediate appellate court of Florida, issued its unreported decision affirming without written opinion the trial court order denying Petitioner's post conviction motion on September 25, 2020. The Petition for Writ of Certiorari was filed on November 25, 2020. The Petition was timely. *See* Sup. Ct. R. 13.1; 28 U.S.C. § 2101(c). Jurisdiction exists pursuant to 28 U.S.C. § 1257. This Court has jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the United States Constitution, section one, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Nearly forty years ago, in 1983, a Florida jury convicted Petitioner Dortley of first degree felony murder and burglary while armed with a firearm. The court sentenced Petitioner to life in prison that same year.

Petitioner appealed. Due to the age of the case, many of the records have been destroyed, but it appears that the First District affirmed his convictions and sentences in a per curiam affirmance without written opinion in 1986. *Dortley v. Wainwright*, 495 So. 2d 751 (Fla. 1st DCA 1986). Assuming this was the direct appeal, Dortley's conviction and sentence became final on December 29, 1986. Under Florida law, any claim that a competency hearing was not held based on *Pate v. Robinson*, 383 U.S. 375 (1966), or any claim of incompetency under *Drope v. Missouri*, 420 U.S. 162 (1975) should have been raised in that direct appeal. The State, however, cannot access the briefs or the trial transcripts from that appeal to obtain a transcript of the competency hearing, as those files have long since been destroyed under Florida's 25 year retention policy. The State did determine that prior to trial, there was a question regarding Petitioner's competency, and Petitioner was placed in the custody of the Florida State Hospital for evaluation and treatment. On April 4, 1983, the circuit court clerk's minutes indicate that the trial court held a competency hearing and Petitioner was found competent to proceed. (Rep. App. A-1).

Petitioner filed numerous motions and postconviction appeals attacking his 1983 conviction including at least five appeals prior to the appeal in this case. *Dortley v. State*, 556 So. 2d 500, 501 (Fla. 1st DCA 1990). *Dortley v. State*, 568 So. 2d 436 (Fla. 1st DCA 1990), *Dortley v. State*, 996 So. 2d 216 (Fla. 1st DCA 2008); *Dortley v. State*, 41 So. 3d 893 (Fla. 1st DCA 2010).

In August of 2018, Petitioner filed a Writ of Habeas Corpus in the state trial court claiming, among other issues, that he was incompetent to proceed. The trial court

denied the claim as untimely and procedurally barred. (Pet. App at 13-14.). Petitioner appealed and the First District Court of Appeal affirmed the order denying relief and cautioned Petitioner in a written opinion that he was "warned that any future filings that this Court determines to be frivolous may result in the imposition of sanctions, including a prohibition against any further pro se filings in this Court and a referral to the appropriate institution for disciplinary procedures as provided in section 944.279, Florida Statutes (2018) (providing that a prisoner who is found by a court to have brought a frivolous or malicious suit, action, claim, proceeding, or appeal is subject to disciplinary procedures pursuant to the rules of the Department of Corrections)." *Dortley v. State*, 285 So. 3d 938 (Fla. 1st DCA 2019).

While the appeal in the above case was pending, Petitioner filed a second petition for writ of habeas corpus, which is the subject of this petition. In his motion to the state court, he specifically claimed that he was found incompetent to proceed to trial and that the trial court never held a hearing to determine whether he had regained his competency prior to his trial. Petitioner argued that although the issue should have been raised on direct appeal, he should not be penalized for failing to file a direct appeal. The State trial court denied the motion finding that "the case law is clear: 'An underlying claim that one was incompetent to stand trial should have been raised on direct appeal and therefore is procedurally barred.' *Carroll v. State*, 815 So.2d 601, 610 (Fla. 2002)(citing *Patton v. State*, 784 So.2d 380, 393 (Fla. 2000); *Johnston v. Dugger*, 583 So. 2d 657, 659 (Fla. 1991)). Accordingly, the Defendant's claim regarding his incompetence is procedurally barred." (Pet. App. at 2-3).

Petitioner appealed that order to the First District Court of Appeal. The State argued in its brief filed in the First District that: 1) a habeas petition was not the proper vehicle to raise the claim; 2) the claim was untimely even in postconviction litigation because a motion under Florida Rule of Criminal Procedure 3.850 had to be

filed within two years of the convictions and sentences becoming final, citing Rule 3.850(b); 3) the claim was procedurally barred because it had not been raised in the direct appeal, citing Rule 3.850(c); and 4) the claim was successive because the same claim had been raised in the 2018 petition, citing Rule 3.850(f). The First District issued a per curiam affirmance without written opinion. (Pet. App. at A-1).

REASON FOR DENYING THE WRIT

WHETHER THIS COURT SHOULD EXERCISE ITS CERTIORARI JURISDICTION TO REVIEW AN UNPUBLISHED UNELABORATED DECISION OF AN INTERMEDIATE STATE APPELLATE COURT TO UPHOLD THE DENIAL OF A PROCEDURALLY BARRED POST CONVICTION CLAIM IN WHICH THE PETITIONER MADE A BARE ASSERTION THAT HE WAS INCOMPETENT WHEN HE WENT TO TRIAL IN 1983?

Petitioner asserts that this Court should grant certiorari review because the state court has violated his Fifth and Fourteenth Amendment rights to due process because the state circuit court denied, as procedurally barred, his petition for writ of habeas corpus in which he asserted that he was not competent during his 1983 trial. It appears that Petitioner Dortley is arguing that his claims relating to competency to stand trial based on either *Drope v. Missouri*, 420 U.S. 162 (1975) or *Pate v. Robinson*, 383 U.S. 375 (1966) are structural errors which cannot be procedurally barred in post conviction litigation. But even assuming such claims could be raised in a direct appeal as structural errors, such claims can be procedurally barred in post conviction litigation. There is no conflict between the First District's decision in this case and this Court's jurisprudence. There is no case from this Court holding or even hinting, that *Drope* or *Pate* claims cannot be procedurally barred in state postconviction litigation. There is no conflict with any federal circuit court or state supreme court. The First District's opinion is an unpublished unelaborated per curiam opinion that has no precedential value that can conflict with any decision from any court.

State postconviction court's ruling and State postconviction appellate decision

The State postconviction court ruled that the postconviction competency claim was procedurally barred because it should have been raised decades ago in the direct appeal. The state trial court found that Petitioner's incompetence claim was procedurally barred because "the case law is clear: 'An underlying claim that one was incompetent to stand trial should have been raised on direct appeal and therefore is procedurally barred.' *Carroll v. State*, 815 So.2d 601, 610 (Fla. 2002)(citing *Patton v. State*, 784 So.2d 380, 393 (Fla. 2000); *Johnston v. Dugger*, 583 So. 2d 657, 659 (Fla. 1991))." (Pet. App. at 2-3). Under Florida law, any claim that a competency hearing was not held as required by *Pate v. Robinson* or any claim of incompetency to be tried under *Drope v. Missouri*, must be raised in the direct appeal. *Nelson v. State*, 43 So. 3d 20, 33 (Fla. 2010)(holding that *Pate* claims regarding the failure to hold a competency hearing, "can and must be raised on direct appeal."), citing, *James v. Singletary*, 957 F.2d 1562 (11th Cir. 1992). The First District Court of Appeal, the state intermediate appellate court, affirmed the denial of postconviction relief without a written opinion. (Pet. App. A-1).

The First District's Unpublished Unelaborated Opinion

A major consideration in this Court's decision to grant review is whether there is conflict on a significant legal issue among federal circuit courts and state supreme courts. The rule of this Court explaining the considerations governing review on writ of certiorari, Rule 10, provides:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari to invoke "this Court's appellate jurisdiction of state criminal judgments, 'is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.'" *Fay v. Noia*, 372 U.S. 391, 436 (1963), overruled in part by *Wainwright v. Sykes*, 433 U.S. 72 (1977), and abrogated by *Coleman v. Thompson*, 501 U.S. 722 (1991). Petitioner is asking this Court to review an unpublished decision of the First District Court of Appeal, which has no precedential value. *Dep't of Legal Affairs v. Dist. Court of Appeal, 5th Dist.*, 434 So. 2d 310, 311 (Fla. 1983)(holding that a per curiam appellate court decision with no written opinion does not have any precedential value). Because the State court decision merely states "affirmed," it cannot conflict with a decision of another state court of last resort or of a United States Court of Appeals. The opinion does not decide an important question of federal law that has not been, but should be, settled by this Court, or decid an important federal question in a way that conflicts with relevant decisions of this Court. No such conflict is presented in this petition. Nor does this case test the limits of this Court's precedent.

No Conflict

In addition to the fact that the opinion is an unelaborated decision, there is no conflict between the First District's decision and this Court's jurisprudence. S.Ct. Rule 10(c). There is no case from this Court holding that procedural bars or time limits on postconviction claims violate due process, and there is no case from this Court hold

that *Drope* or *Pate* claims raised for the first time in state successive postconviction litigation cannot be procedurally barred or time barred. In similar cases, this Court has enforced the one-year time limitation in the AEDPA on filing federal habeas petitions, *Lawrence v. Florida*, 549 U.S. 327 (2007).

Even assuming both types of competency claims are structural error, that does not mean that such claims cannot be procedurally barred in postconviction litigation. The state postconviction court basically ruled that such claims must be raised in the direct appeal. This is standard Florida law. *Tittle v. Sec'y, Fla. Dep't. of Corr.*, 605 Fed. Appx. 961, 962 (11th Cir. 2015) (noting in Florida, *Pate* claims must be raised on direct appeal citing *Nelson v. State*, 43 So.3d 20, 33 (Fla. 2010)). This Court also has precedent requiring similar types of claims to be raised in the direct appeal on pain of the legal test becoming more stringent if raised in postconviction proceedings. *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017) (holding that while prejudice is presumed when the issue of a violation of the right to a public trial is raised in the direct appeal, prejudice is not presumed in the postconviction context). The violation at issue in *Weaver* was structural error yet, this Court refused to automatically reverse in the postconviction context. *Weaver*, 137 S.Ct. at 1908 (noting a violation of the right to a public trial is a structural error). The *Weaver* Court observed, that, in direct review, the balance between a fair trial and finality is often in the defendant's favor, but in the postconviction proceedings, finality concerns are far more pronounced. *Weaver*, 137 S.Ct. at 1913. There is no conflict between Florida law requiring claims to be raised in direct appeal and the reasoning of this Court regarding the importance of claims being raised in direct appeal in *Weaver*.

There is no conflict between the First District's unpublished decision and any decision of a state court of last resort either. S.Ct.Rule 10(b). The First District is an intermediate state appellate court, not a state court of last resort, and again, an

unpublished opinion cannot establish conflict because it does not have any precedential value. *Dep't of Legal Affairs v. Dist. Court of Appeal, 5th Dist.*, 434 So.2d 310, 311 (Fla.1983) (holding that per curiam affirmances without a written opinion have no precedential value); *St. Fort ex rel. St. Fort v. Post, Buckley, Schuh & Jernigan*, 902 So. 2d 244, 248 (Fla. 4th DCA 2005) (explaining that a per curiam affirmance without written opinion, even one with a written dissent, has no precedential value and should not be relied on for anything other than res judicata citing *Dep't of Legal Affairs,* 434 So.2d at 311); *Bates v. Bates*, ___ So.3d ___, 2021 WL 35818846, *9 (Fla. 3d DCA Feb. 3, 2021) (explaining that "an appellate decision does not establish a precedent if the court did not write an opinion" and that a per curiam decision without a supporting opinion, while binding on the parties under the doctrine of the law of the case, "is not a precedent for future cases"). For the same reason, there is no conflict with any federal circuit court.

Petitioner does not cite any case from any state or federal appellate court holding that a state court's ruling that a *Pate* or *Drope* claim is procedurally barred violates due process. Indeed, federal habeas litigation involves both procedural bars and time limitations. Federal circuit courts routinely deny such claims as procedurally barred in federal habeas appeals. *Noble v. Barnett*, 24 F.3d 582, 588 (4th Cir. 1994) (finding a *Pate* claim barred by the abuse-of-the-writ doctrine); *Sawyer v. Whitley*, 945 F.2d 812, 823-24 (5th Cir.1991) (same); *Hodges v. Colson*, 727 F.3d 517, 540 (6th Cir. 2013) (holding a *Drope* claim was procedurally defaulted); *Bainter v. Trickey*, 932 F.2d 713, 716 (8th Cir. 1991) (affirming the finding of a *Pate* claim to be procedurally barred). Federal courts also emphasize the importance of claims being raised at the first opportunity in the direct appeal. As the Eleventh Circuit has explained, if federal courts did not enforce state procedural bars, it would diminish the important difference between direct and collateral review. *Whatley v. Warden, Ga. Diagnostic &*

Classification Ctr., 927 F.3d 1150, 1185-87 (11th Cir. 2019) (citing *Purvis v. Crosby*, 451 F.3d 734, 743 (11th Cir. 2006)), *pet. for cert. filed*, Sept. 17, 2020, No. 20-363. In *Weaver,* this Court followed the reasoning of the Eleventh Circuit in *Purvis. Weaver*, 137 S.Ct. at 1907 (citing *Purvis*). There is no conflict between Florida law requiring competency claims being raised on direct appeal and the reasoning of these federal circuit courts. There is no conflict between the First District's decision and the federal appellate court's similar reasoning. There is simply no conflict.

Not an important unanswered federal question

The law regarding incompetency to stand trial is well settled and has been for many decades. *Dusky v. United States*, 362 U.S. 402 (1960); *Pate v. Robinson*, 383 U.S. 375 (1966); *Drope v. Missouri*, 420 U.S. 162 (1975). It is well settled that a criminal trial of an incompetent defendant violates due process. *Drope v. Missouri*, 420 U.S. 162 (1975). This Court has stated that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope*, 420 U.S., at 171. Moreover, a defendant, whose competency is in question cannot be deemed to waive the right to a competency hearing. *Pate v. Robinson*, 383 U.S. 375 (1966). Nevertheless, this Court has held that a state may place the burden on the criminal defendant to show that he or she is incompetent. This Court has stated that "based on our review of the historical treatment of the burden of proof in competency proceedings, the operation of the challenged rule, and our precedents, we cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina v. California*, 505 U.S. 437, 446(1992), citing *Patterson v. New York*, supra, 432 U.S., at 202. "The Due Process Clause does not, however, require a

State to adopt one procedure over another on the basis that it may produce results more favorable to the accused." *Medina v. California*, 505 U.S. 437, 451(1992). "[I]t is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial." *Id.*

Additionally, "[t]he State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. 'When a State chooses to offer help to those seeking relief from convictions,' due process does not 'dictat[e] the exact form such assistance must assume.'" *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69, (2009), citing *Pennsylvania v. Finley*, 481 U.S. 551, 559(1987). "Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Id.* Furthermore, this Court has previously recognized the importance of procedural rules which require a criminal defendant "initially to raise his legal claims on appeal rather than on postconviction review[.]" *Murray v. Carrier*, 477 U.S. 478, 490(1986). This Court explained that it allows "the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal. .... This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." *Murray v. Carrier*, 477 U.S. 478, 490–91 (1986), citing *Reed v. Ross* 468 U.S. 1, 10–11 (1984). This Court does not grant review of a case to apply well settled law to a particular case. S.Ct. Rule 10.

Petitioner does not raise any important unanswered federal question in the petition. Petitioner's argument seems to suggest that *Pate* and *Drope* claims should

be viewed as structural error, but this case does not present that question. The actual issue is whether *Pate* and *Drope* claims can be barred in postconviction litigation, not whether *Pate* and *Drope* claims are considered structural error in a direct appeal. This is not a direct appeal; this is successive postconviction litigation. Petitioner Dortley's convictions and sentence became final in 1986, if not earlier. Even if *Drope* and *Pate* claims are structural error, such claims may still be procedurally barred in postconviction litigation, as well as in successive postconviction litigation. *Cf. Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017) (holding that while prejudice is presumed when a violation of the right to a public trial is raised in the direct appeal, prejudice is not presumed in postconviction litigation).

Petitioner ignores the problem of the State defending against such a claim many decades after the convictions became final when the records have been destroyed, if such claims were permitted to be raised regardless of time bars and regardless of procedural bars. Both procedural bars and time bars are designed to force defendants to raise claims earlier rather than later so that evidence relating to the claim is not lost. Even before the one-year federal habeas statute of limitations was enacted, the habeas rules developed the concept of laches, allowing the dismissal of a federal habeas petition that was filed many years after the conviction if it resulted in prejudice to the State in answering the petition. Habeas Rules 9(a). Florida also applies laches. "The policy rationale for allowing a laches defense is important to acknowledge the finality of convictions at some point which, in turn, will foster confidence in the judicial system." *Bartz v. State,* 740 So. 2d 1243, 1245 (Fla. 3d DCA 1999). While the transcripts of the competency hearing and the trial seem to have been destroyed pursuant to Florida's standard public record policy, many years ago, that merely establishes the wisdom of not permitting such claims to be raised many decades after the fact in postconviction litigation, much less in successive postconviction litigation.

Illinois v. Fisher, 540 U.S. 544 (2004) (rejecting a due process challenge and finding good-faith where police disposed of evidence pursuant to standard practice 11 years after the crime); *Bartz v. State*, 740 So. 2d 1243, 1245 (Fla. 3d DCA 1999)(finding that the State had been prejudiced by the delay in filing the claim because the State could not contest Bartz's allegations because the transcript below had long since been destroyed.) Indeed, Petitioner in this case seems to be exploiting the loss of the trial transcripts.

Another problem which illustrates the prejudice to the State is the difficulties inherent in making retrospective determinations of competency many decades after the trial. *Drope*, 420 U.S. at 183 (noting the inherent difficulties of retrospective determinations of competency); *Taylor v. Davis*, 747 Fed. Appx. 577 (9th Cir. 2018) (affirming the district court's conclusion that a retrospective competency hearing was not feasible in a 30 year old case). As in Taylor, a retrospective competency hearing is simply not feasible.

Merits

Lastly, this is actually more of a *Pate* claim than a *Drope* claim because Petitioner asserts that there was no trial court order restoring him to competency. Notably, his *Pate* claim is meritless. The clerk's minutes dated April 4, 1983, show that the trial court, in fact, did make a competency determination before trial after a hearing. (Rep. App. at A-1). The minutes reflect that the State presented a mental health expert at the competency hearing and that the trial court found Dortley to be competent. The *Pate* claim is totally meritless on what little record of the trial remains. Accordingly, for all the reasons stated above, this Court should deny the petition for certiorari review.

CONCLUSION

The petition for writ of certiorari should be denied.

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