

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

STEPHEN COMETA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition presents the legal question in terms of what is minimally required to trigger a trial court's obligation to conduct a competency hearing *sua sponte* – when *must* a district court, as a matter of law, conduct a competency hearing *sua sponte* (even if, for example, the court has previously rendered a finding of competency)? In other words, what record evidence – quality, quantity, degree, and substance -- is enough and legally sufficient to invoke a trial court's obligation to hold a competency hearing, and subsequent competency hearings if necessary, *sua sponte*?

The test for determining competence to stand trial (or to plead guilty) is whether a defendant has the sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the proceedings against him or her. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). Generally, then, a district court must conduct a competency hearing *sua sponte* when information known to the trial judge at the time of the trial or plea hearing is sufficient to raise a bona fide doubt regarding the defendant's competence. *Pate v. Robinson*, 383 U.S. 375, 385 (1966); *see also, e.g., McNair v. Dugger*, 866 F.2d 399, 401 (11th Cir.), *cert. denied*, 493 U.S. 834 (1989). To satisfy this procedural requirement, once a court learns or is presented with information that raises a bona

fide doubt about a defendant's competence, the presiding judge must pursue and apply adequate safeguards to ascertain and determine whether the defendant is competent to move forward in the proceedings. *Pate*, 383 U.S. at 378 This case offers the Court an appropriate opportunity to define what is meant by "sufficient information" such that there exists "a bona fide doubt" about a defendant's competency.

As framed by the record-on-appeal in this cause, then, the specific question asked herein is whether the United States Court of Appeals for the Eleventh Circuit reversibly erred when it affirmed and upheld the district court's decision foregoing a competency hearing despite distinct and articulable record-evidence establishing a substantive if not organic and holistic doubt, question, and concern about Petitioner's competence to proceed.

LIST OF PARTIES and RELATED CASES

Petitioner, Stephen Cometa, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

The related cases include the district court case, *United States v. Stephen Cometa*, Case No. 5:16-cr-44-Oc-27-PRL, Middle District of Florida (Ocala Division), judgment entered on March 28, 2019.

The direct criminal appeal includes *United States v. Stephen Cometa*, published decision and opinion reported at 966 F.3d 1285 (11th Cir. 2020), with the mandate having been issued on September 2, 2020.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Stephen Cometa, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

This case comes before the Court following a published opinion on August 3, 2020, from the Eleventh Circuit Court of Appeals recorded at No. 19-11282, *United States v. Stephen Cometa*, 966 F.3d 1285 (11th Cir. 2020). The appeal to the Eleventh Circuit came as a direct criminal appeal from a criminal judgment and sentence dated March 28, 2019, from the United States District Court, Middle District of Florida (Ocala Division), in criminal case District Court Case Number 5:16-cr-44-Oc-27-PRL.

JURISDICTION

The Eleventh Circuit issued its published opinion on August 3, 2020. The court's mandate was issued on September 2, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Circuit found that there was no violation of Cometa's right to competency hearing under the Due Process Clause of the Fifth Amendment and 18 U.S.C. § 4241(a).

The Due Process Clause of the Fifth Amendment precludes the trial or conviction of incompetent defendants. *Pate v. Robinson*, 383 U.S. 375 (1966). Furthermore, such a due process right is violated when a court fails to hold a competency hearing when evidence raises sufficient doubts about a defendant's competency. *Id.*

The procedural right to a competency evaluation is codified at 18 U.S.C. § 4241(a), which provides as follows:

Motion to determine competency of defendant. — At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, . . . the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court **shall** grant the motion, or **shall order such a hearing on its own motion**, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

18 U.S.C. § 4241(a)(emphasis added).

INTRODUCTION

Does a district court violate a defendant's constitutional and statutory procedural rights when ignoring even a minimal degree of specific and articulable evidence that suggests and raises a substantive and bona fide question and concern about a defendant's competency to proceed?

As framed by the appellate court, Cometa's challenge asked it "to decide whether the district court abused its discretion by not holding additional competency hearings before the trial and the sentencing of Stephen Cometa after it previously had his competency evaluated and found him competent." *United States v. Cometa*, 966 F.3d 1285, 1286 (11th Cir. 2020). The appellate court said no; it upheld and affirmed Cometa's conviction and sentence because it agreed with the trial court "that no bona fide doubt about his competency arose *after* the district court found him competent." *Id.* (emphasis added). The problem is, Cometa was found competent in July 2018. *Id.* at 1288 Five months later, Cometa's jury trial started in December 2018 of that same year. *Id.* When issues arose concerning Cometa's competency at the start of trial, the district court, ignoring the principle "that competency is such a fluid thing," *id.*, did not conduct a competency hearing and went forward with the trial. *Id.* It did so in derogation of Cometa's constitutional and statutory procedural protections. Though the magistrate court had held a competency hearing months before trial (in July 2018), new evidence and information and questions at the start of trial (in December 2018) should have

legally triggered the district court, both constitutionally as well as by statute, to call a competency hearing – it should not have relied on its previous determinations and rulings from July when it decided that competency was not an issue in December. Neither the constitution nor the governing statute allow as much, nor should our notions of due process permit it. *See, e.g., Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).

Our Constitution “‘jealously guard[s]’ an incompetent criminal defendant’s fundamental right not to stand trial or be convicted.” *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996)). The district court in this case failed to protect this right. It failed to do so because it misunderstood, it misapplied, it misconstrued the teachings of this Court as well as the statutory requirements that are tripped when evidence and information suggest and, at a minimum, imply a defendant’s competence to move forward should be questioned and examined. Indeed, defense counsel raised the issue prior to the empanelment of the jury. *See Cometa*, 966 F.3d at 1288-89 Accordingly, the Eleventh Circuit Court of Appeals reversibly erred when upholding the trial court’s decision to forego any procedural hearing to address, ascertain, and determine Cometa’s competency before moving forward with trial in this cause because it erroneously relied on stale information.

The trial court, for its part, was aware that Cometa suffered from a mental illness that adversely impacted his ability to communicate with his lawyer. The court knew that Cometa had not been on his necessary psychiatric medications in the days leading up to the trial. The court even suggested that Cometa may need to be evaluated or have a session with a psychiatrist but declined to follow-up on this procedure since the case had been set for trial on that day and the expert may not have been immediately available for such an examination.

The court heard Cometa's complaints about his physical and psychological duress, as well as his statements that he was a POW and enemy combatant. It also heard Cometa say that his mental condition was interfering with his ability to defend himself. The court observed Cometa's delusions and his expressed desire to plead so he could be killed, as well as his similar misunderstanding regarding the types of defenses he could raise (e.g., not guilty by reason of insanity versus a simple plea of not guilty). The district court even conveyed its own doubts about Cometa's competency and the need for an evaluation immediately before impaneling the jury. Measured against this record, the district court should have conducted a competency hearing *sua sponte* to determine Cometa's competency to proceed to trial. *See* 18 U.S.C. § 4241(a). The Eleventh Circuit erred in upholding the district court's denial of a competency hearing when sufficient doubts existed as to Cometa's competency.

STATEMENT OF THE CASE

In December 2016, Mr. Cometa, a 60-year-old military veteran, walked into an outpatient clinic operated by the federal Department of Veterans Affairs (VA) carrying an AM-15 assault rifle. (DE188 at 200-201). Cometa proceeded to the office of a psychiatrist who previously treated him for bipolar disorder and banged on the door. (*Id.* at 221; 231). The psychiatrist, upon opening the door, instantaneously grabbed the rifle and attempted to wrest it from Cometa. (*Id.* at 220). The two struggled for control over the rifle. (*Id.* at 222). During the tussle, the rifle discharged two shots into a nearby wall and ceiling. (*Id.* at 222-23). Two police officers responded to the melee. (*Id.* at 224). The officers commanded Cometa to drop the rifle, but he ignored their commands and continued his fight to regain control over the weapon. (*Id.*; DE189 at 147). The officers ultimately disarmed Cometa and took him into custody. (DE189 at 152).

Before Trial

On August 22, 2018, a federal grand jury returned a three-count superseding indictment, charging Cometa with forcibly assaulting, intimidating, or interfering with a federal employee using a deadly or dangerous weapon, in violation of 18 U.S.C. § 111(a) & (b) (Count One); forcibly resisting and opposing a federal employee using a deadly or dangerous weapon, in violation of 18 U.S.C. § 111(a) & (b) (Count Two); and using, carrying and discharging a firearm during and in

relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (Count Three). (DE76). The case proceeded to trial in December of 2018, where the jury found Cometa guilty of all counts. (DE126). The district court held a sentencing hearing on March 21, 2019 and imposed a term of 207 months of incarceration. (DE154 at 2).

After his arrest and before the trial, Cometa was the subject of repeated psychological examinations relating to issues both of his competency to stand trial and insanity at the time of the alleged offenses. (DE67 at 1). Cometa's counsel retained Michel J. Herkov, Ph.D., ABPP, ABN, a licensed psychologist, who opined in December of 2017 that Cometa was incompetent to stand trial. (DE178 at 3-4; DE106 at 11). Cometa asked the Court to order an evaluation under 18 U.S.C. § 4241(b) to determine his competency. (DE13 at 2). On May 4, 2017, the district court held a competency hearing. (DE177). The parties stipulated to the submission of an expert report prepared by a psychiatrist employed by the federal Bureau of Prisons, Dr. Lisa Feldman, who found Mr. Cometa incompetent to stand trial. (*Id.* at 2-3). Given Dr. Feldman's findings, the Government did not dispute his incompetency. (*Id.* at 2-3). However, the Government requested that the district court commit Cometa for four months for restoration of his competency. (*Id.* at 3). The court, finding by a preponderance of the evidence that Cometa was incompetent, assented to this request. (DE177 at 4).

Subsequently, the magistrate convened another competency hearing on January 4, 2018. (DE178). During the hearing, defense counsel advised the court that Dr. Herkov believed that Cometa remained incompetent. (*Id.* at 3). Defense counsel concurred in that assessment and related difficulty in even communicating with her client: “[Y]ou just can’t talk to him, at all. You can’t get a word in edge-wise. He’s belligerent.” (*Id.*). She also advised the district court that Mr. Cometa was refusing to eat and take his medication. (*Id.*). Counsel attributed the degeneration of Cometa’s mental state to the lack of medication: “So you get to the local jail and you can’t force him to take his medication. He won’t take it. . . . when he’s in a place like Butner . . . , they’re . . . giving him his medication. They’re talking him into taking it.” (*Id.* at 3-4). Counsel also suggested, based on her conversation with Dr. Herkov, that forcing Cometa to take his medication might be the only way to restore his competency. (*Id.* at 4). However, Dr. Herkov had not yet had time to prepare his expert report, and so the defense could not yet proceed with a competency hearing. (*Id.* at 5). The deputy marshal also confirmed that Cometa engaged in “hunger strikes” and declined to take his medications. (*Id.* at 8).

In response, the Government noted that another expert from the Bureau of Prisons, Dr. DuBois, had opined that Mr. Cometa’s competency had been restored during his time in Butner. (DE178 at 6). Nevertheless, the Government agreed that

it sounded “very plausible” that competency had become an issue since Cometa’s return to the county jail. (*Id.*). The court decided not to take any action and reset the case for a status conference. (DE178 at 13-14).

On February 28, 2018, after Cometa filed his intent to rely on an insanity defense (DE46), along with his own expert report questioning his competency, the court ordered that Mr. Cometa be committed to the custody of the Attorney General for an evaluation to determine the existence of insanity at the time of the offense and directed that his competency to stand trial continue to be evaluated. (DE48). Accordingly, Cometa returned to FMC-Butner where the evaluations were performed. (DE67 at 3). On June 13, 2018, Dr. DuBois, a forensic psychologist, prepared a report in which he opined that Cometa was mentally competent to stand trial. (*Id.* at 2).

One week later, the magistrate convened a status hearing. (DE180 at 2). At the outset of the hearing, the court noted that Cometa had filed a pro se motion asking the court to relieve the federal public defender and appoint him another attorney. (DE180 at 2; DE50 at 1). In that motion, Cometa declared himself both sane and competent. (DE50 at 1). The court also observed that Cometa had filed a pro se civil suit against the Government and various other entities. (DE180 at 5). The court then set another hearing for the following month so that Cometa could

be heard both on his competency and his request for substitution of counsel. (DE180 at 6-7).

In July of 2018, the magistrate held the hearing. (DE181). After reciting the history of the competency proceedings, the magistrate checked Cometa's comprehension: "Do you understand all that, Mr. Cometa?" (DE181 at 5). "Not entirely, sir," he responded. (*Id.*). After conferring with counsel, Cometa then stated, "I understand what you said, Your Honor." (*Id.*). The court then inquired as to whether he still wanted to discharge his attorney. (*Id.* at 5). Cometa confirmed that he would like another attorney to represent him. (*Id.* at 6). The court then appointed a private attorney to represent him pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. (*Id.* at 6-7).

Newly-appointed counsel recommended that the court conduct the arraignment and allow Cometa to enter a plea prior to holding the competency hearing. (*Id.* at 7). The court declined to do so. (*Id.* at 8). The court pointed to the existence of two expert reports finding Cometa incompetent to proceed. (*Id.*). It also noted that Cometa's civil suit "would touch on his competency." (*Id.*). Thus, the court set the competency hearing for the following week. (*Id.* at 10).

On July 18, 2018, the court convened once again. (DE182). When the magistrate asked defense counsel's position on competency, Cometa's attorney stipulated to his competency. (*Id.* at 3). Counsel advised that he had spoken with

Dr. Herkov, who stood by his opinion that Cometa remained incompetent as of the last time he was evaluated. (*Id.* at 3). According to counsel, however, Dr. Herkov did not discount the possibility that Cometa might have regained competency in the six months since he had last seen him. (*Id.*) Counsel then stated that, based on his “lawyerly abilities,” he was “quite satisfied” that Cometa was competent. (*Id.* at 4). When the magistrate asked defense counsel whether he objected to any of the findings of Dr. DuBois, Cometa’s attorney admitted that he was unsure whether he had even read the report. (*Id.*). After the court provided him a copy to review with Cometa, counsel announced that he had “no problem” with the court using the findings of Dr. DuBois to render a ruling on Cometa’s competency. (*Id.* at 5). The court then adjudicated Cometa competent without inquiring any further into the matter and proceeded to arraignment. (*Id.* at 6). Cometa entered a plea of not guilty by reason of insanity. (*Id.* at 10).

One month later, after the grand jury returned a superseding indictment, Cometa appeared once again before the magistrate court for his arraignment. (DE183 at 2). This time, however, when the court asked Cometa if he understood the charges against him, Cometa stated, “No, I do not.” (*Id.* at 5). When asked whether he understood the penalties, Cometa again stated, “No, I do not.” (DE183 at 6). Cometa then complained about unspecified violations of his constitutional rights. (*Id.*) When the court asked him yet again whether he understood the charges

in the indictment, Cometa stated a third time, “No, I do not.” (*Id.*). However, the court opined, “actually, it sounds to me like you understand it quite well,” to which Cometa responded as follows: “It’s -- all I understand is the United States have been trying to kill me for several years now. And I claim my right to life and liberty.” (*Id.* at 7). Defense counsel then attempted to explain that he believed Cometa was “hung up” on the fact that the superseding indictment could delay his trial and restart his speedy trial period. (*Id.*).

After conferring with Cometa, counsel advised the court that he was not authorized to enter a plea of not guilty by reason of insanity. (*Id.* at 9-10). The Government expressed concern that Cometa did not even understand the nature of the charges against him, which might undermine the validity of any plea. (*Id.* at 10). The court, citing Rule 10 of the Federal Rules of Criminal Procedure, dismissed this concern and stated that all that was required for an arraignment was to (1) ensure that the defendant had a copy of the indictment; (2) have the indictment read to the defendant; and (3) ask the defendant how he wished to plead. (*Id.*).

At this point, Cometa joined the discussion: “I’ve instructed my lawyer previously on how I wish to plead.” (DE183 at 10). Counsel then explained that Cometa previously instructed him that he wished to plead guilty “with the

condition that he be put to death within 30 days.” (*Id.*) At this point, counsel for Cometa again raised the competency issue:

Now, one might suggest that anybody who would say that is, by definition, not competent. And I’ll respect the Court’s assessment in that regard. I’m still not prepared to say that he is incompetent. And I’m reluctant to say that we should send him back to Butner to be evaluated again, because, you know, the same thing could happen upon his return.

(*Id.* at 11).

The court responded to this concern as follows:

Well, and that request hasn’t been made either by you or the Government. But he does appear to understand what was said, based on his responses.

While he doesn’t want to affirmatively say he understood, based on the conversation with him, he appears to have understood it. And I would say that insofar as his reaction to being upset and visibly annoyed that new charges were filed.

(*Id.*).

Cometa then said, “One thing I can say that I understand is this Court is supposed to uphold the Constitution of the United States, yet it has failed to do so on several of my requests.” (*Id.*) After the court reminded Cometa of his right to remain silent, he asked the court to “fully explain [his] rights . . . under the Constitution of the United States.” (DE183 at 12). Although the Government expressed some concern about Cometa not acknowledging his “understanding of the elements of the . . . offenses,” it agreed to the district court entering a plea of

not guilty. (*Id.* at 12-13). The magistrate asked counsel whether it should restate the rights of a criminal defendant, but Cometa cut in the conversation and lodged an objection: “I object to that, as I’ve already been judged guilty by two branches of the United States Government. And I’ve already had forfeiture of property. Besides what’s mentioned in the complaint here, I’ve had forfeiture of my dwelling, vehicle, companion animal, and income.” (*Id.* at 13). Cometa reiterated his request that the court restate what rights he had under the United States Constitution, but the court declined to discuss the matter any further, stating, “All right. Well . . . I don’t think I have anything else to take up with Mr. Cometa.” (*Id.* at 14).

The magistrate conducted another status conference prior to trial. (Doc. 184). During that hearing, defense counsel told the court that the county jail was not properly medicating Cometa. (*Id.* at 9). Counsel characterized the condition of Cometa’s mental health as “very fluid” and advised that his “competency can come or go on short notice.” (*Id.*). Moreover, according to Dr. Herkov, if Cometa did not receive his “regimen of these mood stabilizers and antidepressants, antianxiety . . . that’s about it for the mental health.” (*Id.* at 10). The defense asked for Cometa to be transferred from the jail in Marion County to the jail in Citrus County, Florida, where he had received better care. (*Id.* at 9-11). The court agreed to recommend

the transfer, given the “history of mental health issues,” the “findings of Dr. Herkov” in his two reports, and Cometa’s “fragile” mental state. (*Id.* at 13).

At Trial

Cometa’s trial began on December 10, 2018, nearly five months after the most recent competency evaluation. (DE188). In response to the court’s inquiry if the defense was ready to proceed, defense counsel stated “[a]t some point I would suggest some type of competency inquiry, if the court or the Government was interested. Until yesterday, I had no concern about it, but events overtook that, and I am a little bit concerned.” (*Id.* at 4). After the court observed that such proceedings had already been held before the magistrate judge, counsel responded that the magistrate’s competency finding occurred five months prior in July of 2018. (*Id.* at 4-5).

Counsel further stated that the defendant’s competency was a “fluid thing” and that he had previously been housed at the Citrus County Detention facility where he was compliant with his medications. (*Id.* at 5). Counsel explained that Cometa had been transferred back to the Marion County jail, which could have adversely impacted his mental health status. (*Id.* at 5). When Cometa attempted to speak about the issue, the court informed him that it had “to think about what’s being told to me and process it and determine how to proceed.” (DE188 at 5-6). The court then asked defense counsel if he had the defense’s competency witness

(Dr. Michael Herkov) available that day to resolve the competency concerns. (Doc. 188 at 7). Counsel replied that Dr. Herkov was located in Gainesville and was not scheduled to testify until the following Wednesday. (*Id.* at 7). Defense counsel then admitted that when he had previously stipulated to Cometa's competency, he had not actually read the last report of Dr. Herkov, who opined at that time that Cometa remained incompetent to stand trial. (*Id.* at 7-8). In this regard, counsel noted that Dr. Herkov had found Cometa incompetent on two separate occasions including two days after the event in 2016 and a year later, on December 22, 2017. (*Id.* at 7). Counsel maintained that when the magistrate conducted the competency hearing in July 2018, it did not have Dr. Herkov's second report establishing incompetency due to counsel's error. (*Id.* at 7-8). Although counsel stated that he did not have concerns regarding Cometa's competency when he visited him at the Citrus County Jail, he reiterated that he had become concerned about the defendant's competency. (*Id.* at 8).

A colloquy between Cometa and the district court ensued. When the court asked Cometa whether he was ready to proceed, Cometa said that he was not. (*Id.* at 9). When he was asked why not, Cometa told the court that he would like to remove his attorney and launched into a long diatribe about violations of his constitutional rights, including his right to a speedy trial. (DE188 at 10-12). Cometa further explained his counsel's reference to his transfer from Citrus

County facility to the jail in Marion. (*Id.* at 13). While he was housed in Citrus County, he was receiving his medications twice daily, and was also taking his medications for blood pressure and diabetes. (*Id.*) However, after he was moved to Marion County in the five days leading up to his trial, he had not received any medications. (*Id.* at 13).

Rather than inquiring into the impact of this situation on the defendant's current mental state, the court asserted that the Marshals could address the problem and immediately stated, "But I have to get back to your request. You want another lawyer, is that what you are telling me." (*Id.* at 13). Cometa answered, "Well, I have a mental illness. I don't feel I'm competent enough to represent myself, even though I am competent to stand trial." (*Id.* at 14).

The court denied Cometa's request to discharge his defense attorney, finding that no good cause existed to replace him. (*Id.* at 15). The court also concluded that there was no need to conduct a *Faretta* inquiry because, "Mr. Cometa, by his own acknowledgment, is not capable of representing himself." (*Id.*) The court further asserted the importance of Cometa's ability to assist in his defense. (*Id.* at 17). As a result, the court engaged in the following colloquy with defense counsel:

The Court: Are you suggesting another evaluation Mr. Zimmerman? Or maybe a session with Mr. Herkov?

Mr. Zimmerman: Or even possibly a telephone contact, although I guess I'm not the PhD. So maybe doing it in person is the professionally –

The Court: Well, what's -- I mean, without divulging attorney-client privileged information, is this just a disagreement or you guys still having conversation?

Mr. Zimmerman: Yeah, I mean we spoke briefly this morning. If I can just have one moment here.

(DE188 at 17).

After consulting with Cometa, counsel advised the court that Cometa had disagreed on trial strategy, witnesses, etc. (*Id.* at 18). The court asserted that without a total breakdown in communication, the case was moving forward, and it turned immediately to Cometa's insanity defense. (*Id.*) The court asked Cometa if he wanted to proceed on an insanity defense. (*Id.* at 22). Cometa stated that he did not know how he wished to proceed. (*Id.*) The court replied "That's not what I asked. I need to know if you are telling me that you do not want the insanity defense, is that right?" (*Id.* at 12). Cometa explained that since his lawyer had entered an insanity defense at his first arraignment and had entered a not guilty plea at the second arraignment, he was not certain which one applied. In response, the court accused Cometa of "playing games." (*Id.* at 22-23). After Cometa stated he was not playing games, the court again asked him if he wanted the insanity defense. (DE188 at 23). Before Cometa could ask a question concerning the first or second defense, the court cut him off and stated that his question was "nonsense." (*Id.*) After Cometa attempted to explain his historical problems with medications

during his incarceration, the court concluded that Cometa did not express good cause to discharge counsel. (*Id.* at 23-26). The court asserted that there was not a complete breakdown in communication, and the disagreements stemmed in part from the “very mental health challenges that Mr. Cometa alludes to.” (*Id.* at 26).

Cometa informed the court that he wished to plead guilty due to extreme and psychological duress and stated that he was a POW and an “enemy combatant” being tried. (*Id.* at 40-41). After suggesting he had been tortured during his incarceration, the court stated “I’m . . . beginning now to think, Mr. Cometa, maybe we need to have you evaluated. Or are you just going to put on a show.” (*Id.* at 42). Notwithstanding this observation, as well as defense counsel’s concerns about Cometa’s competency and the court’s own finding that he was not capable of representing himself due to his mental disease, the district court did not conduct any sort of hearing or evaluation to determine whether Cometa was competent to stand trial. (*Id.* at 15-39).

During trial, the Government called Dr. Poff, the VA psychiatrist who struggled with Cometa on the date of the charged offenses. (DE188 at 211). Dr. Poff, who had treated Cometa for over a year at the VA, wrote in a progress note that Cometa suffered from both Post-Traumatic Stress Disorder (PTSD) and bipolar disorder. (DE188 at 229; DE189 at 39). Dr. Poff testified that patients with bipolar disorder “in many cases become delusional.” (DE189 at 25). One of

his bipolar patients “literally thought he was Jesus Christ,” while other patients would come to believe they were “invincible” and would “jump off the top of buildings.” (*Id.* at 25-26). According to one progress note, Cometa had been prescribed an antipsychotic medication, aripiprazole, but developed an allergic reaction to that medication. (*Id.* at 30). Dr. Poff did not recall prescribing Cometa with another antipsychotic medication, even though the “only effective treatment” for someone who is psychotic is “antipsychotic medications.” (*Id.* at 35). Other forms of treatment are ineffective because “the problem is more of a neurochemical issue than anything else, and therapy just does not work.” (*Id.*).

During the second day of trial, the judge asked whether the issue with Cometa’s medication had been resolved. (*Id.* at 104). Cometa stated that it had not, and he informed the district court that he had not received medications since his arrival at the Marion County jail. (*Id.*). The district court advised the parties that it would raise the issue with the Marshal. (*Id.*). A deputy marshal later reported that Cometa “has been refusing his medications numerous times,” though the medications were available to him. (*Id.* at 170). According to the Marshal, the latest date Cometa had taken his antipsychotic medications was December 6, four days before trial. (DE189 at 170).

The district court then addressed Mr. Cometa as follows:

It appears to me then that Mr. Cometa's complaints about having never been provided meds while at Marion County are simply incorrect. And he specifically denied that he had refused his meds earlier to me, which is apparently incorrect.

As far as I'm concerned, Mr. Cometa, the meds are available to you through the jail, and if you're refused to take them, that's your decision. I'll hear no more complaints about that.

(*Id.* at 171).

The district court still did not conduct any competency evaluation, even though Cometa was not taking his medications, and Dr. Poff testified that bipolar disorder can make unmedicated patients delusional. (*Id.*).

After the Government concluded its case-in-chief, Cometa called Dr. Herkov, who opined that Cometa was insane at the time of the charged offenses. Dr. Herkov testified that when he first met Cometa two days after the offense, he diagnosed him with bipolar disorder without the benefit of reviewing his medical records. (DE190 at 142). When he received Cometa's records, Dr. Herkov was struck by the "long history of severe mental illness," which was important because it showed that Mr. Cometa "had a serious mental disorder long before this event took place." (*Id.* at 142-43). The medical records revealed that Cometa was "hearing voices" and suffered from paranoia back in 2008. (DE190 at 143). Cometa received a medication called risperidone after that incident. (*Id.* at 144). That he was prescribed this drug was significant to Dr. Herkov, because

psychiatrists “don’t put [psychotropic medications] on people rather whimsically. If they put you on it, they have real concerns.” (*Id.*)

Less than one year later, Cometa was diagnosed with psychotic disorders; specifically, paranoia and delusions. (*Id.*) Dr. Herkov explained that a person with delusions “has this fixed false belief that is not remotely true, that is not shared by anyone else in his group, and that remains despite any type of evidence that you show a person.” (*Id.*) Thus, “somebody may have the delusion that they are God or that they are the president of the United States, and you can talk to them and show them evidence that they’re not, and it doesn’t impact them at all.” (*Id.*) Cometa’s paranoid delusions manifested themselves at that time even though he was medicated with risperidone. (*Id.*)

Three months later, his physicians increased his dosage of risperidone due to his paranoia and delusions, but that still did not prevent delusional episodes from recurring in May of 2010, April of 2013, and May of 2013. (*Id.* at 144-45). Then, on June 5, 2013, Cometa was diagnosed with bipolar disorder I. (*Id.* at 145). Unlike bipolar disorder II or bipolar disorder III, disorders that are serious but still may allow people to “function,” a diagnosis of bipolar disorder I is the “bad one” and means the person is delusional. (DE190 at 145).

On May 21, 2014, Cometa began taking Abilify, a mood stabilizer. (*Id.* at 190 at 145). Several months later, his physicians began giving him lithium

carbonate, which is used to treat bipolar disorder. (*Id.*) Dr. Herkov testified that, in February of 2016,¹ Cometa had “a number of paranoid delusions.” (*Id.*) Many “of them focused towards the government and his maltreatment by the government, some of them having to do with Agent Orange, and a whole bunch of just delusional . . . content.” (*Id.*)

Another delusion concerned perceived attempts by the VA to “force him out of the system” and “colluding with the military” to achieve that end. (*Id.* at 146). In March of 2015, Cometa began taking another mood-stabilizing drug, Seroquel, though the medical notes state that he began refusing his medications. (*Id.*) Dr. Herkov explained that the refusal to take prescribed medications is not uncommon: “It is oftentimes that paranoid patients don’t realize that they’re paranoid; otherwise, there wouldn’t be a delusion. And so they refuse to take the medication.” (*Id.*) Sometimes, Dr. Herkov continued, patients “see the medication as being poison and won’t take it.” (*Id.*)

The following month, April of 2015, Cometa had another delusion that he was “being filled with the Holy Spirit” and began “talking loudly” about him being a “disciple of Jesus.” (DE190 at 146). The final note in Cometa’s VA records reflects that he received a letter from the VA stating that he needed to sign an

¹ It appears that Dr. Herkov meant February of 2015, not 2016, as his recitation of Cometa’s history otherwise proceeds in chronological order. (*See* DE191 at 144-47).

agreement due to his disruptive behavior. (*Id.* at 147). Cometa never signed the agreement and received no more treatment. (*Id.*)

Dr. Herkov also interviewed Cometa's ex-wife, who reported a significant deterioration in his mental health condition following their divorce in the summer of 2016. (*Id.*) In fact, she reported Cometa had become so irrational and paranoid, that it became "unbearable," and she had to file for divorce. (*Id.* at 148). Based on his review of the medical records and his interaction with Cometa, Dr. Herkov concluded to a high degree of psychological certainty that Cometa's severe mental illness caused him to lack the ability to appreciate the wrongfulness of his conduct on the date of the charged offenses. (*Id.* at 150).

In support of his opinion, Dr. Herkov noted that, in the records from Cometa's time in the federal detention center in Miami, the Bureau of Prison's physicians observed "blatantly psychotic behavior." (*Id.*). And, according to Dr. Herkov, the only place that did not find that Cometa suffered from bipolar disorder was the facility in Butner, North Carolina. (*Id.*) Dr. Herkov summarized his opinion as follows: "Mr. Cometa, because of his severe long-term chronic mental illness, [and the] deterioration in the months before this due to lack of any treatment, did not know the wrongfulness of what he was doing." (DE190 at 153). Thus, he concluded that Cometa was legally insane at the time of the incident.

The Government called Dr. DuBois as a rebuttal witness. (*Id.* at 187). Dr. DuBois testified that Cometa suffered from PTSD and borderline personality disorder, but not bipolar disorder. (*Id.* at 217). Dr. DuBois also testified that Cometa's disorders did not meet the legal definition of insanity, and thus Dr. DuBois concluded that Cometa was not insane on the date in question. (*Id.* at 221, 227). After the testimony of Dr. DuBois, the Government rested its case. (*Id.* at 260).

At the conclusion of the third day of trial, the district court asked Cometa whether he intended to exercise his right to testify in his defense. (*Id.* at 262). Cometa said, "I'm not sure I completely understand it." (*Id.* at 262). After the district court explained his right to testify, Cometa stated that there were "a lot of factors" that were "weighing" on his "mind." (*Id.* at 263). When asked for clarification, Cometa expressed doubt about his "ability to testify." (*Id.*). He explained, "there's -- there's something that's undue pressure that is interfering with my ability to make that choice." (*Id.* at 264). The court asked whether he needed some time to think about it, and Cometa responded, "I'm not sure how to phrase this. I -- I --." At that point, the court cut him off and advised him to confer with trial counsel. (DE190 at 264). Defense counsel then informed the district court that Cometa had not yet made up his mind about whether he intended to

testify. (*Id.*) The court then decided to allow Cometa to think about it over the night and report back on his decision in the morning. (*Id.* at 265).

The following day, Cometa announced that he wanted to testify. (DE191 at 2). Cometa's choice came with a caveat: "Even though I choose to testify at this time, I've been under extreme emotional and physical duress for the last 72 to -- the whole week." (*Id.* at 3). He reiterated his feeling of "mental duress and physical duress" and stated that he did not feel "prepared" to testify at that moment. (*Id.*). The district court dismissed this concern out of hand: "Mr. Cometa, I don't want to hear any more about what you're claiming to be duress." (*Id.* at 4). Cometa pressed the point and advised the court that it was "affecting [his] ability to present [his] defense." (*Id.*). The court to discuss the matter any further, asked that the prosecutor to return to the courtroom. (*Id.*).

Cometa expressed confusion: "I'm confused as to --." (*Id.* at 5). The court did not let him finish his thought, "There's no -- nothing confusing, sir. You want to sit there and testify or do you want to come up here and testify? I'll give you that choice." (*Id.*). Cometa then said, "I'm not physically or mentally capable at this time to [be] able to exercise my right." (*Id.*). The court once again dismissed any concerns about his competency:

Well, I beg to differ, sir. You're coherent, you understand your rights. You are pretending not to be able to, but you are clearly physically and mentally capable of testifying. I'm asking you would

you like to do so from your chair where you're sitting there or would you like to come up here and sit in the witness chair? You may have either option. Matters not to me.

(DE191 at 5).

Cometa reiterated his concerns:

Sir, I don't want to be disrespectful or cause any interruptions or anything. I've been trying to be respectful and -- and let things proceed as rapidly as possible, but there's been several factors outside of my control that have interfered with my right to assist my defense counsel and to at this point defend myself in these -- in these very serious charges that can result in imprisonment for the rest of my natural life.

(*Id.* at 6).

The court declined to inquire any further into the "factors" that "interfered with" Cometa's "right to assist in his defense." (*Id.*) Instead, it took a ten-minute recess. (*Id.*) After the break, Cometa waived his right to testify. (*Id.* at 7). The court then proceeded with closing arguments and jury instructions. The jury rejected Mr. Cometa's insanity defense and found him guilty of all counts. (DE126).

REASONS FOR GRANTING THE WRIT

What it means to constitute a sufficient degree of evidence to believe a criminal defendant is not competent, as a matter of law, is an important, nationally-relevant, and repetitive question that this Court should answer and define to better guide the courts below in their gate-keeping function when deciding whether it must conduct a competency hearing, or subsequent and additional hearings for that matter, sua sponte.

It has been and continues to be Mr. Cometa's contention that in light of the evidence and information, as well as all the surrounding circumstances presented to the district court at the moment in time before trial, the degree, quantity, and quality of that information should have, as a legal matter, triggered the trial judge's constitutional and statutory obligations to conduct a competency hearing *sua sponte*. The district court did not do this. And then, on review, the appellate court agreed with this decision, finding that there was no abuse of discretion in not ordering, *sua sponte*, a competency hearing . . . even with everything the trial court knew and was told and shown. It is Cometa's position that this simply is not and cannot be the state of the law, especially as the record-on-appeal comes to this Court. There is a moment at which a minimal degree of information and evidence is put forth before the adjudicating authority that competency should be – *must be* – properly and substantively addressed. Our notions of Due Process require no less. This case presents the Court with a wonderful opportunity to answer and define that question as to what is "reasonable cause to believe that [a] defendant" may be

incompetent to move forward in a criminal prosecution. 18 U.S.C. § 4241(a); *see also* S. Ct. Rule 10 (“[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion”).

The decision of the Eleventh Circuit was wrongly decided on the merits, as Cometa’s constitutional claim was based solely on his due process right to have a competency hearing prior to his trial and conviction.

The district court erred (it otherwise abused its discretion) when it failed to conduct a competency hearing after receiving information that raised a bona fide doubt as to whether Cometa remained competent to stand trial or proceed to his sentencing. “Every defendant has a substantive fundamental right under the Due Process Clause not to be tried or convicted while incompetent.” *United States v. Wingo*, 789 F.3d 1226, 1235 (11th Cir. 2015) (citing *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996)). Competence requires the defendant to possess the “capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.” *Drope v. Missouri*, 420 U.S. 162, 171 (1975). The Constitution protects “not just the substantive right not to be tried or convicted while incompetent, but also the procedural right under the Due Process Clause to ‘adequate’ procedures to protect the right not to be tried or convicted while incompetent.” *Wingo*, 789 F.3d at 1235 (quoting *Pate v. Robinson*, 383 U.S. 375, 378 (1966)). “To comply with a defendant’s procedural right, once

the court learns of information that raises a ‘bona fide doubt regarding the defendant’s competence,’ the court must apply adequate procedures to ascertain whether the defendant is competent to proceed to trial.” *Id.* (quoting *James v. Singletary*, 957 F.2d 1562, 1569-71 (11th Cir. 1992)) (internal punctuation omitted).

Consistency with this tenet safeguards a defendant’s procedural right to a competency evaluation in requiring a court to hold a competency hearing on its own motion “if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.” 18 U.S.C. § 4241(a) (emphasis added).

The unambiguous statutory language creates a mandatory obligation “to *sua sponte* hold a hearing if it has ‘reasonable cause’ to believe that the defendant ‘may’ be incompetent.” *Wingo*, 789 F.3d at 1236 (quoting 18 U.S.C. § 4241(a) and citing *Tiller v. Esposito*, 911 F.2d 575, 576 (11th Cir. 1990)). A “court must conduct a hearing under those circumstances.” *Wingo*, 789 F.3d at 1236

Three factors have been suggested to be considered when determining whether information before a court otherwise establishes a bona fide doubt regarding the defendant’s competence: (1) prior medical opinion regarding the

defendant's competence to stand trial; (2) evidence of the defendant's irrational behavior; and (3) the defendant's demeanor at trial. *Wingo*, 789 F.3d at 1236 (quoting *Tiller*, 911 F.2d at 576) (internal punctuation omitted).

- (1) *Prior medical opinions available and known to the district court established bona fide doubts about Cometa's competency.*

All three factors indicated that there was a bona fide doubt regarding Cometa's competence to stand trial. First, the prior medical opinions raised considerable doubt about Cometa's competency. He was previously found incompetent based on the opinions of both Dr. Herkov and Dr. Feldman, an independent psychologist employed by the BOP. And, as Dr. Herkov testified, Cometa had an extensive history of psychosis dating back to 2008, when he was treated for "hearing voices" and paranoia. (DE190 at 143). He was later diagnosed with Bipolar I disorder, which renders individuals delusional. (*Id.* at 145). And, during his time in the federal detention center in Miami, Cometa exhibited "blatantly psychotic behavior." (*Id.* at 150).

Although Cometa was found competent some five months before trial, that finding arose out of a stipulation by newly appointed counsel, who had not even initially read either of the expert reports, instead relying on his "lawyerly abilities." Moreover, the magistrate had not been provided with the latest competency report prepared by Dr. Herkov establishing the Defendant's lack of competency. Finally,

the restoration of Cometa's competency turned on his receipt of antipsychotic medications. Both the federal public defender and his CJA attorney advised the district court that Cometa's continued competency depended on the regular administration of medication. By the time of trial, though, Cometa was no longer taking his medication. The district court knew that a lapse in his medication could render him incompetent; indeed, the magistrate had recommended his transfer from Marion County Jail to Citrus County Jail based on a finding regarding his "fragile" mental state, and the recognition that Cometa needed medication to retain his competency. The court was also advised that Cometa's competency was "fluid," and that the failure to take his medications could very well leave him incompetent. As Dr. Poff testified, the only effective way to treat patients, like Cometa, who had psychotic disorders was medication because "the problem is more of a neurochemical issue than anything else, and therapy just does not work." (DE189 at 35).

Given the prior medical opinions related to Cometa's incompetency and the undisputed fact that he was not taking his medication at the time of trial, the failure to hold a hearing violated Cometa's right to Due Process. *See Demos v. Johnson*, 835 F.2d 840, 843-44 (11th Cir. 1988) (trial court erred in refusing to grant the defendant's request for a psychiatric examination, where evidence indicated that he had a history of glue sniffing and had two prior occasions of psychiatric treatment);

Tiller, 911 F.2d at 577-78 (granting habeas petition where there was psychiatric testimony that the defendant suffered from auditory hallucinations and was a severe paranoid schizophrenic and where the defendant asked if he could have psychiatric treatment during the plea colloquy); *see also Miles v. Stainer*, 108 F.3d 1109 (9th Cir. 1997) (habeas relief granted where defendant had previously been declared incompetent and was taking large doses of anti-psychotic drugs and where indications existed that he was not using the drugs, and thus his ability to comprehend the proceedings would have been compromised).

- (2) *Evidence concerning Cometa's irrational behavior raised bond fide doubts about his competency.*

Setting aside his prior medical history, Cometa displayed irrational behavior even after the finding that his competency was restored. At his arraignment, the magistrate court learned that Cometa told his attorney that he would plead guilty, but only on the condition that he be put to death within thirty days. (DE183 at 10-11). Cometa repeated his request to be immediately executed during his *Faretta* hearing. (DE185 at 14). Courts have held that the compulsion to be put to death is evidence of incompetency. *Deere v. Woodford*, 339 F.3d 1084, 1085 (9th Cir. 2003), *as amended on denial of reh'g* (Oct. 2, 2003).

In addition, at his arraignment, Cometa repeatedly stated that he did not understand the proceedings and manifested delusional behavior, stating that the

“United States” had been “trying to kill” him for several years. (DE183 at 5-7). That same delusion recurred during his *Faretta* hearing and again at his sentencing hearing, where Cometa expressed a belief that the Government was trying to kill him and complained of exposure to “agent orange,” a fantasy that Dr. Herkov had previously described as “delusional . . . content.” (DE193 at 46; DE190 at 145). Moreover, Cometa notified the district court that his mental illness rendered him unable to represent himself, a finding that the district court expressly endorsed as its rationale for declining to conduct a *Faretta* inquiry. The Supreme Court has recognized that an individual may lack the competency to represent himself but still retain the competency to stand trial. *Indiana v. Edwards*, 554 U.S. 164, 171 (2008). Nevertheless, a finding that mental illness prevented Cometa from exercising his constitutional right to self-representation should raise bona fide doubt about his competency to stand trial.

Significantly, though the district court found that Cometa was deliberately refusing to take his medications, as opposed to the jail depriving him of the medications, the refusal to take medication can itself be a sign of mental illness. As Dr. Herkov testified, patients can “see the medication as being poison and won’t take it.” (DE190 at 146). Thus, Cometa’s irrational behavior and his failure to take his medications should also have triggered a competency evaluation.

- (3) *Cometa's demeanor at trial established bona fide doubts about his competency, despite the district court's comments and the undeveloped nature of the record at the time of trial.*

The third factor, Cometa's demeanor at trial, is somewhat underdeveloped because of the Court's failure to conduct a competency hearing. Still, the evidence that is in the record further establishes a bona fide doubt about his competency. Although the district court commented at several junctures that Cometa seemed coherent, these comments are contradicted by defense counsel's request for a competency hearing on the first day of trial and yet again at the *Faretta* hearing. Cometa also appeared discombobulated during the colloquies regarding his decision on to discharge his lawyer, whether to proceed with an insanity defense and whether to testify in his defense. For instance, he testified that he did not "completely understand" his right to testify. He expressed doubt about his "ability to testify," citing "undue pressure" that was "interfering with [his] ability to make that choice." (DE190 at 264).

The following day, he reiterated his feeling of "mental duress" and expressly advised the district court that it was "affecting [his] ability to present [his] defense." (DE191 at 3-4). While the judge opined that Cometa looked "coherent" (*Id.* at 5), his responses during that colloquy raise some question about the validity of the district court's finding. Accordingly, given bona fide questions regarding

Cometa's competency, both at his trial and his sentencing, this Court should reverse his conviction and remand for further proceedings

The abbreviated competency hearing that did take place lacked the procedural safeguards envisioned under 18 U.S.C. § 4247(d), which provides that that a defendant shall have "an opportunity" at the hearing "to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine" the Government's witnesses. Such procedural protections were unfortunately absent since the parties stipulated to the report of Dr. DuBois. Further undermining the defense counsel's stipulation was his failure to read the second report of Dr. Herkov, who opined that Mr. Cometa remained incompetent to stand trial. As noted previously, this report was not provided to the magistrate. Thus, it is far from clear that the hearing that took place even counts as a competency evaluation.

More importantly, Cometa's competency remained fluid, and as this Court noted in *Drope*, "[e]ven when a defendant is competent at the commencement of his 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." 420 U.S. at 181 *see also Reynolds v. Norris*, 86 F.3d 796 (8th Cir. 1996). In *Reynolds*, as here, the defendant had a long history of mental illness. Prior to the beginning of his trial, he had been committed to a hospital after it was determined that he was not competent to stand trial. *Reynolds*, 86 F.3d at 801. Subsequent

hearings revealed that he had improved to the point that he was competent. *Id.* Nevertheless, the Eighth Circuit held that the trial court erred in not conducting another hearing immediately prior to (or during) the trial because his “meandering and irrational testimony at trial evidenced that his condition had deteriorated.” *Id.*

Cometa suffered from delusions that might well have prevented him from accurately assessing his own competency. In *Pate*, this Court also recognized that a defendant who may be incompetent, cannot “knowingly or intelligently ‘waive’ his right to have the court determine his capacity to stand trial.” *Pate*, 383 U.S. at 384. The district court had an independent duty to conduct its own sua sponte competency evaluation as soon as it received information that raised a bona fide doubt as to Cometa’s competency. *Wingo*, 789 F.3d at 1235.

Here, there were myriad signs that Cometa’s competency was in doubt, including his uttering statements that strongly suggested he was delusional both prior to and during his trial.

CONCLUSION

Based on the foregoing reasons, the Petitioner, Stephen Cometa, respectfully requests that this Honorable Court grant the writ of certiorari.

Respectfully Submitted,



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