

No. 21.293

ORIGINAL

Supreme Court, U.S.
FILED

AUG 12 2021

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

July Term 2021

Vincent A. Powell

— PETITIONER

(Your Name)

vs.

David Shinn;

— RESPONDENT(S)

MARK BRNOVICH, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals, Ninth Cir.

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Vincent A. Powell #093198

(Your Name)

A.S.P.C. Tucson-Rincon, P.O. Box 24403

(Address)

Tucson, Arizona 85734

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

- (1). Did the State of Arizona, Superior Court, Confront a Set of Facts that are materially indistinguishable from the decision of this honorable Court in the Case of Sell v. United States, 539 U.S. 166 (2003), and never the less arrived at a different result?
- (2). Did Powell make a Substantial showing that he was unconstitutionally forcibly medicated?
- (3). Did Powell make a Substantial showing that he was denied due process and Confrontation rights when the trial Court relied on Dr. Bishop's letter in declining to hold a Competency hearing?
- (4). Is there a Substantial showing that Mr. Powell's Constitutional rights were violated by the denial of a Competency hearing and his trials while incompetent?
 - (A). Powell was entitled to a Competency hearing?
 - (B). Powell was tried while incompetent?
 - (C). Powell did not validly waive his right to be present at his trials?
- (5). Does the U.S. Court of Appeals for the Ninth Circuit "Panel" decision conflict with Supreme Court and Circuit law?
 - (A). The panel decision contravenes precedent by concluding that Courts can rely on stale malingering findings to disregard new evidence of incompetence?

(Question(s) Presented
or Continuation or)

(B) Does the panel decision misapplies AEDPA by Supplanting its own reasoning for that of the Arizona Court of Appeals?

(6). Did the panel's decision overlook and misapprehend material facts?

(A) The panel decision overlooks and misapprehends the clear basis for the State Court's ruling?

(B). The panel decision mistakenly defers internally Contradictory trial Court findings?

(7). This Case involves questions of exceptional importance?

Table of Contents

Opinions Below.

Jurisdiction.

Constitutional and Statutory Provisions Involved.

Questions Presented.

Introduction.

Reason For Granting Writ.

Statement of Case.

Conclusion.

Exhibit (A) - Supporting Facts.

(Index To Appendices)

Appendix (A): United States Court of Appeals, 9th Cir.

Case No. 4:18-CV-00034-JAS

Appendix (B): United States Court of Appeals, 9th Cir.

Request For Certificate of Appealability.

Appendix (C): United States District Court - District of Arizona.

Case No. CV-18-34-Tuc-JAS (LAB).

Appendix (D): Supreme Court of Arizona.

Case No. CR-16-0293-PR.

Appendix (E): In The Arizona Court of Appeals, Division Two.

Case No. 2 CA-CR-2015-0446-PR

Appendix (F): Arizona Superior Court - CR-2007-1727,

CR-2008-0296.

TABLE OF AUTHORITIES

Cases	Page
<i>Anderson v. City of Bessemer</i> , 470 U.S. 564 (1985).....	18
<i>Bell v. Cone</i> , 535 U.S. 685 (2002).....	17
<i>Bradshaw v. Richey</i> , 546 U.S. 74 (2005).....	42
<i>Castillo v. McFadden</i> , 399 F.3d 993 (9th Cir. 2005)	44
<i>Cooper v. Neven</i> , 641 F.3d 322 (9th Cir. 2011)	43
<i>Cooper v. Oklahoma</i> , 517 U.S. 348 (1996)	19
<i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011).....	16, 20, 28, 37
<i>Deere v. Cullen</i> , 718 F.3d 1124 (9th Cir. 2013)	37
<i>Deere v. Woodford</i> , 339 F.3d 1084 (9th Cir. 3003)	37
<i>Dixon v. Ryan</i> , 932 F.3d 789 (9th Cir. 2019)	17
<i>Drope v. Missouri</i> , 420 U.S. 162 (1975).....	19, 20
<i>Dusky v. United States</i> , 362 U.S. 402 (1960).....	19, 35
<i>Estelle v. McGuire</i> , 502 U.S. 62 (1991).....	42
<i>Floyd v. Filson</i> , 949 F.3d 1128 (9th Cir. 2020).....	17
<i>Godinez v. Moran</i> , 509 U.S. 389 (1993).....	36
<i>Harrington v. Richer</i> , 562 U.S. 86 (2011)	16, 17
<i>Indiana v. Edwardds</i> , 554 U.S. 164 (2008).....	36
<i>Lockyer v. Andrade</i> , 538 U.S. 63 (2003)	17
<i>Maggio v. Fulford</i> , 462 U.S. 111 (1983).....	38
<i>Maxwell v. Roe</i> , 606 F.3d 561 (9th Cir. 210)	18
<i>McMurtrey v. Ryan</i> , 539 F.3d 1112 (9th Cir. 2008)	18, 20, 28, 37
<i>Medina v. California</i> , 505 I.S. 437 (1992).....	19
<i>Metrish v. Lancaster</i> , 569 U.S. 351 (2013).....	16
<i>Miller v. Fenton</i> , 474 U.S. 104 (1985).....	20, 30, 32, 38

<i>Pate v. Robinson</i> , 383 U.S. 375 (1966).....	19
<i>Piraino v. Int’l Orientation Res., Inc.</i> , 137 F.3d 987 (7th Cir. 1998)	18
<i>Purkett v. Elem</i> , 514 U.S. 765 (1995)	1
<i>Rice v. Collins</i> , 546 U.S. 333 (2006)	18
<i>Rose v. Palmateer</i> , 395 F.3d 1108 (9th Cir. 2005)	43
<i>Runnigeagle v. Ryan</i> , 686 F.3d 758 (9th Cir. 2012)	1
<i>Sailer v. Gunn</i> , 548 F.2d 271 (9th Cir. 1977)	36
<i>Schriro v. Landrigan</i> , 550 U.S. 465 (2007)	40, 41
<i>State v. Fischer</i> , 199 P.3d 663 (Ariz. App. 2008)	42
<i>State v. James</i> , 297 P.3d 182 (Ariz. App. 2013)	6
<i>State v. Shackart</i> , 946 P.2d 315 (Ariz. 1997)	42
<i>Strickland v. Washington</i> , 466 U.S. 688 (1984)	8
<i>Summer v. Mata</i> , 449 U.S. 539 (1981)	1
<i>Swoopes v. Sublett</i> , 196 F.3d 1008 (9th Cir. 1999)	44
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	44
<i>Thompson v. Coleman</i> , 501 U.S. 722 (1991)	44
<i>Thompson v. Keohane</i> , 516 U.S. 99 (1995)	30, 32, 38
<i>United States v. Bonnett</i> , 872 F.3d 1045 (9th Cir. 2017)	30
<i>United States v. Dreyer</i> , 705 F.3d 951 (9th Cir. 2013)	19
<i>United States v. Greer</i> , 158 F.3d 228 (5th Cir. 1998)	30
<i>United States v. Neal</i> , 776 F.3d 645 (9th Cir. 2015)	36
<i>White v. Woodall</i> , 572 U.S. 415 (2014)	17
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000)	17
<i>Williams v. Woodford</i> , 384 F.3d 567 (9th Cir. 2004)	20, 28, 37
<i>Wood v. Allen</i> , 558 U.S. 290 (2010)	18

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Hurles v. Ryan, 752 F.3d 768 (9th Cir. 2014)	25
Anderson v. Gipson, 902 F.3d 1126 (9th Cir. 2018)	13,
Cooper v. Oklahoma, 517 U.S. 348 (1996)	13,
Brumfield v. Cain, 135 S.Ct. 2269 (2015)	25
Drope v. Missouri, 420 U.S. 162 (1975)	13
Buck v. Davis, 137 S.Ct. 759 (2017)	11,
Dusky v. United States, 362 U.S. 402 (1960)	19,
Cain v. Chappell, 870 F.3d 1003 (9th Cir. 2017)	21
Frost v. Gilbert, 835 F.3d 883 (9th Cir. 2016)	21
Castillo v. Stainer, 997 F.2d 669 (9th Cir. 1993)	20
Godinez v. Moran, 509 U.S. 389 (1993)	25

STATUTES AND RULES

28 U.S.C. § 2253

28 U.S.C. § 2254

OTHER

Constitutions

U.S. Const. amend XIV

U.S. Const. amend VI

(Table of Authorities Cited)
Continuation of Cases

Illinois v. Allen, 397 U.S. 337 (1970).	25
Maciel v. Cate, 731 F.3d 928 (9th Cir. 2013)	11
Maxwell v. Roe, 606 F.3d 561 (9th Cir. 2010).	14,
McMurtrey v. Ryan, 539 F.3d 1112 (9th Cir. 2008).	20,
Medina v. California, 505 U.S. 437 (1992).	17,
Miles v. Stainer, 108 F.3d 1109 (9th Cir. 1997).	20,
Miller-El v. Cockrell, 537 U.S. 322 (2003).	22
Odle v. Woodford, 238 F.3d 1084 (9th Cir. 2001).	23.
Pate v. Robinson, 383 U.S. 375 (1966).	13,
Riggins v. Nevada, 504 U.S. 127 (1992).	31
Robertson v. Pichon, 849 F.3d 1173 (9th Cir. 2017).	21
Sell v. United States, 539 U.S. 166 (2003).	6, 9, 29
Slack v. McDaniel, 529 U.S. 473 (2000).	25
Strickland v. Washington, 466 U.S. 668 (1984).	28
Sturgis v. Goldsmith, 796 F.2d 1103 (9th Cir. 1986).	26.
Torres v. Prunty, 223 F.3d 1103 (9th Cir. 2000).	15,
United States v. Gillenwater, 717 F.3d 1070 (9th Cir. 2013).	28
Weaver v. Massachusetts, 137 S.Ct. 1399 (2017).	13,
Williams v. Woodford, 384 F.3d 567 (9th Cir. 2004).	13,
Wilson v. Belleque, 554 F.3d 816 (9th Cir. 2009).	12,

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at No. 19-15375, D.C. No. 4:18-cv-00034-JAS; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix E to the petition and is

☐ reported at No. 2 CA-CR-2015-0446-PR; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Arizona Superior court appears at Appendix F to the petition and is

☒ reported at CR-2007-1727; CR-2008-0296; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

Introduction

Petitioner Vincent Powell is a Seriously mentally ill man who was twice tried in absentia and Sentenced to Consecutive life Sentences. The Crimes underlying those Sentences were bizarre, a Series of store robberies in which the robber generally made no effort to disguise himself, Sometimes Showing his hands, pretending to have a gun by placing his finger and thumb in the shape of one, and even provided his driver's license to one of the clerks before demanding money. Before and during Mr. Powell's trials, defense Counsel repeatedly requested a reevaluation of his Competency. During that time, Powell was demonstrably delusional, harbored paranoid beliefs about his attorney and engaged in Severe selfharm. Powell was also on heavy doses of psychotropic medications, which were Court ordered, one of which Caused toxicity poisoning, Serious Side effects and was stopped abruptly a little over a Week before Powell's first trial. Despite those clear indications of incompetence, the trial Court denied Powell a Competency hearing, relying in part on its ex parte Communications with a jail doctor to Conclude that Powell was malingering. Yet, in the years following his Convictions, he has Continued to receive mental health treatment and has been formally deemed Seriously mentally ill by the Arizona Dept of Corrections. The proceedings here — which resulted in Consecutive life Sentences — Transgressed the bed-rock principle that only Competent individuals may stand trial. The rights at issue are integral to any understanding of justice, and Powell has made a Substantial showing that they were Violated.

REASONS FOR GRANTING THE PETITION

This petition should be granted because it is not the petitioners innocence or guilt but solely the question whether his Constitutional rights have been violated. The record shows a manifest miscarriage of justice, and establishes that the trial Courts actions resulted in a decision that was contrary to, and involved an unreasonable application of clearly established Federal law, as determined by this Honorable Court (Supreme Court) of the United States. Specifically, as outlined in the Cases of *Sell v. United States*, *Riggins v. Nevada*, and *Washington v. Harper*, which the "Honorable Supreme Justice: Scalia J. Dissenting" stated: (The *Riggins* Court held that forced medication of a criminal defendant that fails to comply with "Harper" creates an unacceptable risk of trial error and entitles the defendant to automatic vacatur of his conviction. 504 U.S. at 135-138). It is always in the interest of justice to secure the laws of the land, which marks the "backbone of our maturing society." This is how, we the people, have become a democracy. Which implies respect for the elementary rights of all people, however suspect or unworthy, and this is done by redress for; structural defects in the Constitution of the trial mechanism, violations of fundamental, bedrock, or watershed rules that undermine the fundamental fairness of the proceedings. And therefore is the "Reason for granting this petition."

STATEMENT OF THE CASE

Mr. Powell was charged in two Cases with a Series of bizarre robberies that occurred in Arizona in 2007.¹ App. 6-7. The trial Court initially found Mr. Powell incompetent to stand trial, ordering him to participate in a restoration program and take all prescribed medications. Dkt. 8-9, pp. 85-86. (This Court-ordered treatment for Mr. Powell to take all prescribed medications should have invoked the safeguards outlined by A.R.S. § 36-533). After a final evaluation assessed Mr. Powell competent, defense Counsel so stipulated. Dkt. 8-8, p. 280; Dkt. 8-9, p. 3. Months later, defense Counsel became concerned about Mr. Powell's increasingly delusional behavior, Dkt. 8-8, pp. 179, 226, 234. Leading up to and throughout both of Mr. Powell's trials, Counsel repeatedly requested a new competency hearing. See, e.g., Dkt. 8-8, pp. 12, 179, 189, 226, 232-239, 247. The trial Court refused those requests, concluding that Mr. Powell was malingering and relying at times on an ex parte letter from jail doctor, Dr. Bishop, in doing so. See, e.g., Dkt. 8-8, pp. 6-9, 178-79, 232, 237. On the first day of Mr. Powell's first trial, he was wheeled into the Court room restrained and screaming. App. 33; Dkt. 8-8, p. 178. When Powell failed to quiet down, the Court ejected him from the courtroom and found that he had voluntarily absented himself. Dkt. 8-8, pp. 178-79. Powell refused to attend the remainder of his first trial or any of his second trial. App. 159; Dkt. 8-7, pp. 18, 26. He was convicted and sentenced to consecutive terms of life imprisonment. Dkt. 8-7, pp. 13, 15. Powell appealed, raising substantive and procedural incompetence claims and challenging his absence at trial. Dkt. 8-6, pp. 413-455, 509-549.

¹ Although the two Criminal Cases were tried separately, the competency proceedings and post-conviction proceedings were consolidated.

(Statement of the Case) Continuation

The Arizona Court of Appeals denied relief on the merits, and the Arizona Supreme Court denied review. App. 147-174. Powell then sought post-Conviction review, largely proceeding pro se. App. 139. The Arizona post-Conviction Court denied relief, the Court of Appeals affirmed, and the Arizona Supreme Court denied review. App. 131-136. Powell then filed a habeas petition, asserting three overarching claims related to Competence, the Court's reliance on Dr. Bishop's ex parte letter, and forcible medication. App. 29-130. The district Court denied relief, reaching the merits of most of Powell's claims. App. 3-5, 6-28. The Court also denied a Certificate of appealability (COA). App. 4-5.

Legal Standard

A state prisoner may not appeal the denial of his habeas petition without first obtaining COA. 28 U.S.C. § 2253(c)(1)(A); *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). To obtain a COA, the applicant must make a "Substantial Showing of the denial of a Constitutional right." 28 U.S.C. § 2253(c)(2). "This means only 'that the issues are debatable among jurists of reason; that a Court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.'" *Maciel v. Cate*, 731 F.3d 928, 932 (9th Cir. 2013)

Legal Standard Continuation

"The Supreme Court has made clear that the standard for obtaining a COA is not a particularly exacting one." *Wilson v. Belleque*, 554 F.3d 816, 826 (9th Cir. 2009). A habeas petitioner need not demonstrate that his appeal will prevail, and the Court should not "decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* Only if the prisoner's claim is "utterly without merit" should the Court decline to issue a COA, *Id.*

Argument

In Powell's habeas petition, he raised three overarching Constitutional claims: (1) whether Powell was entitled to a new Competency hearing and whether he was actually Competent to stand trial or waive rights; (2) whether the state trial Court violated Powell's rights by relying on Dr. Bishop's ex parte letter; and (3) whether Powell was unconstitutionally forcibly medicated. App. 29-130. The latter two claims included related claims of ineffective assistance of trial and/or appellate Counsel. App. 105-106, 110, 117-122. For the reasons that follow, this honorable Court should intervene as to each of Powell's claims.

Continuation of Argument

I

(1). Powell made a Substantial Showing that his Constitutional rights were violated by the denial of a Competency hearing and his trials while incompetent (Claim One).

It is axiomatic that the Criminal trial of an incompetent defendant violates due process. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). To prevent violations of this fundamental right, the state must provide adequate procedures for determining Competency. *Id.*; *Drape v. Missouri*, 420 U.S. 162, 172 (1975); *Williams v. Woodford*, 384 F.3d 567, 603-04 (9th Cir. 2004). Any error with regard to these fundamental principles is structural, and no showing of prejudice is required to justify habeas relief. See *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1907-08 (2017); *Pate v. Robinson*, 383 U.S. 375, 386 (1966); *Anderson v. Gipson*, 902 F.3d 1126, 1135 (9th Cir. 2018).

Here, Powell's Competency claim embraced three Sub-claims: (A) a procedural incompetence claim that he was entitled to a Competency hearing; (B) a Substantive incompetence claim that he was actually incompetent when tried; and (C) a related claim that he was incapable of validly waiving his right to be present at his trials.

Continuation of Argument

(A). Powell was entitled to a Competency hearing.

"A State trial judge must Conduct a Competency hearing, regardless of whether defense Counsel requests one, Whenever the evidence before the judge raises a bona fide doubt about the defendant's Competence to stand trial." Williams, 384 F.3d at 603; see also Pate, 383 U.S. at 385. "A bona fide doubt exists if there is "substantial evidence of incompetenc[e] [citation] or substantial evidence that the defendant lacks 'sufficient present ability to Consult with his lawyer with a reasonable degree of rational understanding' or a 'rational as well as factual understanding of the proceedings against him.'" Williams, 384 F.3d at 604. One of the ultimate questions on review is "Whether a reasonable judge, Situated as was the trial Court judge whose Failure to Conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to Competency to stand trial." Maxwell v. Roe, 606 F.3d 561, 568 (9th Cir. 2010). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on Competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of those factors standing alone may, in some Circumstances, be sufficient." Drope, 420 U.S. at 180. Here, the state trial Court violated due process by denying defense Counsel's requests for a new Competency hearing. All three types of evidence — Powell's irrational behavior, his demeanor at trial, and the relevant medical evidence — supported the Conclusion that further inquiry was required.

Continuation of Argument

First, Powell's irrational behavior gave rise to a bona fide doubt as to his Competence. The trial Court initially found Powell incompetent, and he underwent months of treatment. Dkt. 8-9, pp. 3, 85-86. During that treatment, evaluators offered a bevy of tentative diagnoses, and Powell was prescribed a host of antipsychotic and psychotropic medications. See, e.g., Dkt. 8-9, pp. 25-28, 32-45, 52-53. The trial Court found Powell Competent in early November 2008. Dkt. 8-8, pp. 275-77, 280-81. Over the ensuing months, however, Powell's behavior became increasingly irrational. In the Spring and Summer of 2009, Powell appeared to be grossly delusional at status Conferences and hearings. See, e.g., Dkt. 8-8, pp. 218-19. He engaged in Confusing and tangential Colloquies, referring to "a bunch of bad demons" that were attacking him and making nonsensical references to bleeding walls, helicopters, and the Army. Dkt. 8-8, pp. 245-46. Powell harbored particularly acute paranoid beliefs about his attorney. He believed she was "a police officer that arrested me when I was 15" and that "she body slammed me on the pavement." Dkt. 8-8, p. 245. He accused her of hating him and of being "part of the prosecution team." Dkt. 8-8, pp. 219, 245. Despite the trial Court's denial of defense Counsel's motions to Withdraw, Powell claimed, "My lawyer is fired." Dkt. 8-8, pp. 219, 239. These irrational beliefs prevented Powell from being able to assist in his own defense. See *Torres v. Prunty*, 223 F.3d 1103, 1109 (9th Cir. 2000) (a defendant's paranoid delusions that his attorney is part of a Conspiracy against him can render him unable to assist rationally in his defense).

During more lucid moments, Powell appeared to appreciate that he was "not stable right now." Dkt. 8-8, p. 229. He mentioned side effects of and changes in his medication and referred to hallucinations and memory deficits. Id. Although he at times seemed aware that a plea offer had been made, he was confused about whether or not he had already signed it. Dkt. 8-8, pp. 226-27. Powell engaged in behavior that was not only irrational but self-defeating. For example, during a lengthy and discursive colloquy, Powell told the judge that "I never said I was incompetent to stand trial," even as defense counsel was continuing to request competency evaluations and challenge the proceedings on those grounds. Dkt. 8-7, p. 65. And after Powell was ejected from the first day of his first trial, he refused to attend any further days of trial. App. 159; Dkt. 8-7, pp. 18, 26; See Maxwell, 606 F.3d at 570 (petitioner's request to fire his attorney and refusal to attend trial proceedings was "unreasonable and self-defeating" behavior that should have raised a bona fide doubt as to his competence). Powell also had a history of self-harm in which he would punch himself in the face, attempt to pluck out his eyes, and bash his head against walls. See, e.g., Dkt. 8-8, p. 262; Dkt. 8-9, pp. 11, 20-21, 27, 60, 91, 97. Although his self-harm appeared to have decreased around the time he was deemed competent, Powell began harming himself again in early 2009. See Dkt. 8-5, p. 19; Dkt. 8, p. 116. By the summer of 2009, when defense counsel was requesting a new competency hearing and Powell was appearing before the court, he had severe, plainly visible injuries to his face and hands.

See Dkt. 8-8, p. 219 (Trial judge noted that Powell's "face looks better today"). Photos from July 2009 - the month before Powell's first trial - show Powell with two black eyes, one of which was swollen shut, an abrasion on his head, and bruises on his hands. Dkt. 8-5, pp. 2-14. Powell's renewed self-harm, which an evaluator had previously characterized as "extreme and beyond what individuals usually do to fake psychiatric illness," should have raised doubts as to his competence. Dkt. 8-9, p. 100. The change in defense counsel's position on competency should have alerted the trial court of the need to take Powell's irrational behavior seriously. In the Spring of 2009 and throughout Powell's trials, counsel raised serious concerns about Powell's competence and repeatedly and emphatically requested a new evaluation. See, e.g., Dkt. 8-8, pp. 12, 179, 189, 209, 232-239, 247. This was a stark departure from her earlier ambivalence about Powell's competence and her willingness to stipulate to it in November 2008. Dkt. 8-8, p. 280; Dkt. 8-9, pp. 74-75. Defense counsel's assertions regarding Powell's competency and inability to assist should therefore have carried significant weight. See *Torres*, 223 F.3d at 1109 ("Defense counsel was in the best position to evaluate [the petitioner's] competence and ability to render assistance. [citation.] Her recommendation to the judge, while not necessarily sufficient to create a bona fide doubt, should have been considered seriously by the court."); *Medina v. California*, 505 U.S. 437, 450 (1992) ("Defense counsel will often have the best informed view of the defendant's ability to participate in his defense.").

Second, Powell's behavior at trial—during the brief period he attended—provided further reason to doubt his Competence. On the first day of his first trial, Powell was wheeled into the Courtroom "restrained in a rolling Chair" and Screaming, Dkt. 8-8, pp. 5, 178; App. 33. He repeatedly exclaimed "No, no, no" and "I don't have to." He asked for his mother and was non-responsive to the Court's admonitions. Dkt. 8-8, pp. 5-6, 11-14. After he was ejected from the Courtroom, he refused to attend any further days of trial—behavior that, again, was highly irrational. App. 159; Dkt. 8-7, pp. 18, 26. Powell's conduct at his trials therefore also raised a bona fide doubt as to his Competence. See Anderson, 902 F.3d at 1133-34 (petitioner's outbursts during trial and refusal to show up to Court contributed to bona fide doubt as to his Competence). Third and finally, the medical information supported the need for further inquiry as to Powell's Competence. Throughout the initial evaluation and restoration process, evaluators and treating physicians expressed confusion and uncertainty about Powell's mental state. See, e.g., Dkt. 8-9, pp. 6, 8-10. He was provisionally diagnosed with numerous mental disorders, and his delusions had a cultural context that made them difficult to evaluate. See, e.g., Dkt. 8-9, pp. 6-10, 100-01. Although the final evaluation opined that Powell was malingering, it also recommended that he continue to be medicated. Dkt. 8-9, p. 3. Leading up to and during his trials, Powell was on a powerful mixture of psychotropic medications which were forced medications. As defense Counsel stated on the first day of Powell's first trial, "He is certainly under a lot of med's for someone that everybody

Says is malingering and doesn't have a mental health problem." Dkt. 8-8, p. 10. Moreover, shortly before his first trial, Powell alluded to putting his "med's in the toilet here for the last couple of weeks." Dkt. 8-8, pp. 245-46; See also Dkt. 8-8, p. 191 (defense Counsel noted that Powell's "medications is once again being changed, withheld"). And shortly before his first trial, Powell experienced lithium toxicity as a result of his forced treatment against his will (and of the jail inexplicably discontinuing his monthly blood tests, which was against the Standard of Care). See App. 32-33; Dkt. 8-8, pp. 6-7, 191-93. This level of toxicity was reached 48 hrs prior to the date of his first trial. The toxicity poisoning contributed to Powell's mental suffering, and his "non-ability to consult with his lawyer, with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." See, *Dusky v. United States*, 362 U.S. 402, 403 (1960); *Medina v. California*, 505 U.S. 437, 448 (1992) (observing that the key is whether the defendant had "the capacity to participate in his defense and understand the proceedings against him."); Arizona Rules of Criminal Procedure, 11.1. The fact that Powell had been prescribed a plethora of psychotropic medications, that he alluded to sometimes failing to take those meds, and that the administration of lithium culminated in toxicity and was abruptly discontinued while a new medication was added. Dkt. 8-8, pp. 7, 177, 191-93. Should have raised a bona fide doubt as to Powell's competence to stand trial.

See Maxwell, 606 F.3d at 570 ("The panoply of drugs he was administered during trial, and his reported failure to take them 'alone should have raised concerns.'"); McMurtrey v. Ryan, 539 F.3d 1112, 1125 (9th Cir. 2008) (where the record before the trial Court showed that the petitioner "received a wide variety of antipsychotic and anti-anxiety medications over the course of his incarceration... [t]he medications alone should have raised concerns" regarding his competence). Moreover, Powell's last competency evaluation was nine months old by the time of his first trial and over a year old by the time of his second trial. Given the passage of time — and the changes in Powell's behavior and medications during that time — the trial Court acted unreasonably in relying on a stale report to deny a new hearing. See Maxwell, 606 F.3d at 575 (noting that "a defendant's competency can change within a short period of time" and concluding the trial Court acted unreasonably by relying on a stale evaluation to decline a new competency hearing); McMurtrey, 539 F.3d at 1125 ("[A doctor's] previous conclusion that [the defendant] was competent to stand trial does not obviate the need for a hearing."); Miles v. Stainer, 108 F.3d 1109, 1113 (9th Cir. 1997) (recognizing that notes suggesting competence were unhelpful to establish competence a month later, particularly after a change in medication).

Under these circumstances, the evidence raised a bona fide doubt as to Powell's Competence.² Given the gravity of the issue, Powell's procedural incompetence claim deserves this Court's review... To the extent it is relevant to the COA inquiry, reasonable jurists could debate whether Powell is ultimately entitled to relief under AEDPA.³

² Indeed, the trial Court's actions suggest that it did doubt Powell's Competence. As discussed in greater detail below, the trial Court was unsure enough about Powell's Competence that it communicated ex parte with a jail doctor, Dr. Bishop, to get more information. Moreover, the Court ran the life sentences from the second trial consecutive to Powell's life sentence from his first trial because it "want[ed] to know what happens on that appeal in the first case"—an appeal that challenged Powell's Competence. And during sentencing, the Court noted that "the good Vincent" did not commit the crimes "it was the psychotic and ill Vincent." Dkt. 8-7, pp. 14-15.

³ It is unclear whether a petitioner seeking a COA must show not only that the constitutional claim is debatable whether relief would ultimately be available under Section 2254(d) of AEDPA. Compare, e.g., *Cain v. Chappell*, 870 F.3d 1003, 1015 (9th Cir. 2017); *Frost v. Gilbert*, 835 F.3d 883, 888-89 (9th Cir. 2016); *Maciel*, 731 F.3d at 432; *Wilson*, 554 F.3d at 825-26 (requiring no such showing); with *Robertson v. Pichon*, 844 F.3d 1173, 1187-89 (9th Cir. 2017) (appearing to require such a showing).

B. Powell was tried while incompetent.

A defendant is competent to stand trial if "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and... he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per Curiam). Competence "requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense." *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001). Here, the evidence raised a substantial doubt as to Powell's competency during his trials. As discussed above, leading up to and during his trials, Powell behaved in irrational and self-defeating ways, engaged in self-harm by punching himself in the face and banging his head against walls, and was on a panoply of psychotropic medications, some of which had recently been changed. In addition to the evidence available to the state trial court, Powell attempted to further develop his substantive incompetence claim during post-conviction proceedings. Acting pro se and denied an evidentiary hearing, Powell nonetheless scraped together some of his medical records, as well as evidence on the effects of lithium toxicity and the large doses of other medication he was prescribed. See App. 139, 146; Dkt. 8-1, pp. 44-45; Dkt. 8-4, pp. 20-55. Powell's evidence established that, during the period leading up to and shortly after both of his trials, multiple clinicians had diagnosed him with psychotic disorders or schizoaffective disorders; he was

on heavy and often changing doses of medications; and he consistently reported hallucinations. Dkt. 8-4, pp. 3-6, 20-36, 41-43. The evidence also established that Powell's self-harm was severe, ritualistic, and related to his delusions; that he suffered hypothyroidism as a result of lithium toxicity shortly before his first trial; and that hypothyroidism itself can cause psychosis. See, e.g. Dkt. 8, pp. 106-62; Dkt. 8-1, p. 49; Dkt. 8-3, pp. 7-29, 43-50, 55, 79-88; Dkt. 8-4, pp. 20-22, 29-31. Moreover, after his convictions, the Arizona Dept of Corrections formally determined that Powell has "Serious Mental Illness" (SMI), suffering from both bipolar disorder and a psychotic disorder. Dkt. 8, p. 150. Under the long term care of the Dept of Corrections, Powell's condition stabilized. This evidence, at minimum, raised a grave doubt as to whether Powell was competent during his trials. But the state post-conviction court - the only state court that could have taken additional evidence and consider this claim in full - unreasonably found that Powell had failed to raise even a colorable claim and denied an evidentiary hearing. Dkt. 8-1, p. 11. Accordingly, the district court should have granted relief (or at least an evidentiary hearing) on this claim.

⁴ To the extent that any of Powell's claims require further development, the district court erred in denying his request for an evidentiary hearing because the underlying state court decisions were not entitled to deference and Powell's allegation if proven, would entitle him to relief. *Hurles*, 725 F.3d at 778.

See *Hurles v. Ryan*, 752 F.3d 768, 778, 790-91 (9th Cir. 2014);
Brumfield v. Cain, 135 S.Ct. 2269, 2275-76, 2283 (2015).

C. Powell did not validly waive his right to be present at his trials.

The Sixth and Fourteenth Amendments of the U.S. Constitution guarantee the right to be present at one's criminal trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970). Any waiver of such a basic right must be made "competently and intelligently." See *Godinez v. Moran*, 509 U.S. 389, 396 (1993). Powell claimed that he was incompetent to waive his right to be present at either of his trials. App. 99. The district Court denied this claim on the merits as to Powell's first trial but concluded that Powell failed to exhaust it with regard to his second trial. App. 14-15. Because reasonable jurists could debate both of those rulings, this Court should grant a writ of certiorari. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). First, for the same reasons that Powell was incompetent to stand trial, he was incompetent to waive his right to be present, either through disruptive conduct or refusal to attend. See *Godinez*, 509 U.S. at 396. Moreover, as discussed above, the state court's contrary conclusion was based on an unreasonable determination of the facts of law as well as a deficient fact-finding process.

Second, Powell exhausted this claim as to his Second trial. The State Conceded that Powell exhausted his claim that he was incompetent during his Second trial, and that claim encompassed his Contention that he Could not Competently Waive his right to be present. App. 14-15; see *Godinez*, 509 U.S. at 396 (defendant who is incompetent to stand trial is incompetent to waive Constitutional rights). Moreover, in Powell's petition for review from his Second trial, he articulated the issue presented as: "Was Powell incompetent to stand trial or waive his right to be present, and therefore, was his trial absence involuntary?" Dkt. 8-6, p. 108 (emphasis added); see also App. 138, 141 (State post-Conviction Court noted claim addressed on direct appeal). That was sufficient to exhaust the claim.

II. Powell made a Substantial Showing that he was denied due process and Confrontation rights when the trial Court relied on Dr. Bishop's letter in declining to hold a Competency hearing (Claim Three). Determinations regarding Competency are "intricately linked to the fullness of a defendant's, state of mind/ability to defend against the charge." *Sturgis v. Goldsmith*, 796 F.2d 1103, 1108 (9th Cir. 1986). Because of the importance of preventing trial of incompetent defendants, state procedures for determining Competency must allow defendants a "reasonable opportunity" to present and refute relevant evidence. *Medina*, 505 U.S. at 451; See also *Cooper*, 517 U.S. at 369.

As this Court recently recognized, the Supreme Court has clearly established that a hearing is required whenever the evidence raises a bona fide doubt as to Competence. See *Anderson*, 902 F.3d at 1133-35. As discussed above, Powell's behavior and medications had changed significantly since his last Competency evaluation, raising a bona fide doubt as to his Competence. Accordingly, the State Court's Contrary Conclusion - whether viewed as an unreasonable application of clearly established Supreme Court law under 2254(d)(1) or as an unreasonable determination of the facts under 2254(d)(2) - was not entitled to deference, and Powell is entitled to relief. See *id.* at 1132 (State Court's erroneous Conclusion that there was no bona fide doubt as to Competence was an "unreasonable application of clearly established federal law"); *Maxwell*, 606 F.3d at 565 (State Court's failure to hold Competency hearing was "based on an unreasonable determination of the facts in light of the evidence known by the trial judge at the time of trial and an unreasonable application of federal law"). Therefore this Court should grant this Writ of Certiorari.

The State proceedings here failed to meet that standard. As discussed above, the trial Court repeatedly denied Powell's requests for a new Competency hearing. Dkt. 8-8, pp. 179, 209, 232, 237. At the Same time, however, the trial Court took additional evidence on Powell's Competence by reviewing and relying upon a letter apparently Submitted by Doctor Bishop, a doctor at the jail. Dkt. 8-8, pp. 6-7, 177-79. But the trial Court never afforded Powell an opportunity to view that evidence or Confront the Supposed expert, Dr. Bishop, and the letter itself was never made part of the record. Dkt. 8-5, pp. 19-22. This procedure was highly irregular and violated Powell's right's to due process and Confrontation. See *Sturgis*, 769 F.2d at 1109 ("The adversarial nature of the system does not Simply Spring out full blown at trial. It Commences earlier."); *United States v. Gillenwater*, 717 F.3d 1070, 1078 (9th Cir. 2013) (fundamental Constitutional protections apply at Competency hearings). Those violations were prejudicial. The trial Court's Statements make Clear that it relied heavily on Dr. Bishop's letter in denying Powell a new Competency hearing. Dkt. 8-8, pp. 6-7, 177-79. And, as described above, had Powell been afforded a hearing, he likely Could have established that he was incompetent to stand trial. To the extent that defense Counsel failed to challenge with enough Specificity the trial Court's reliance on Dr. Bishop's letter, She rendered ineffective assistance. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Indeed, the State Court assumed that any failure to challenge the letter Constituted deficient performance and based its decision Solely on prejudice. Dkt. 8-1, pp. 6-7, 10.

But as discussed above, the deficiency was prejudicial. Accordingly, there is a reasonable probability that, but for Counsel's errors, the result of the proceedings would have been different. In the alternative, assuming trial Counsel's objections were sufficient to challenge the Court's reliance on Dr. Bishop's letter, appellate Counsel rendered ineffective assistance by failing to pursue that issue on direct appeal. The claim that the trial Court improperly relied on a flawed ex parte medical opinion, which Powell had no opportunity to challenge, was stronger than the Sentencing issue appellate Counsel did raise. Had appellate Counsel performed adequately, the result of the appeals would likely have been different. See *Hurles*, 752 F3d at 783. The state Court's Contrary Conclusions were unreasonable. Furthermore, Dr. Bishop is a family practitioner and not a psychiatric doctor in any capacity, asking his opinion is akin to asking a dermatologist about pancreatic cancer.

III. Powell made a Substantial showing that he was unconstitutionally forcibly medicated (Claim Two).

Due process protects Criminal defendants from forced medication. *Sell v. United States*, 539 U.S. 166, 179 (2003). A Criminal defendant may be involuntarily medicated "in order to render that defendant Competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

Assuming *arguendo* that the State Court decisions as to Powell's Competence were reasonable, that would leave undisturbed factual findings on which those State Court decisions rested. In declining to order a new Competency hearing, the Court found that Powell could not be relapsing or decompensating from a mental "illness he does not have." Dkt. 8, p. 136. But if Powell was truly malingering - and was not in fact suffering from any serious mental illness - then his continuing forced medication was clearly unconstitutional: It could not have been medically appropriate, nor necessary to further the government's trial-related interests. The district court should have considered whether each and all medications were likely to produce any adverse side effects ("Seroquel, side effects may include: mood or behavior changes," "Celex, side effects, may cause new or worsening symptoms, mood or behavior changes, impulsive, irritable, agitated, hostile, aggressive, or thoughts about suicide or hurting yourself, trouble concentrating, memory problems, confusion and hallucinations." Powell: wheeled into the court room restrained and screaming, failed to quiet down, appeared to be grossly delusional, engaged in confusing and tangential colloquies, referring to a bunch of bad demons attacking him, and bleeding walls, helicopters and the Army, punching himself in the face, attempting to pluck out his eyes, and repeatedly exclaiming No, no, no and I don't have to and asking for his mother. All of this goes hand and hand with the listed side effects of Powell's medications, then top it all off with Lithium poisoning). The government/trial court did not provide nor assess any treatment plan

Therefore not following the set "sell formula" which was set by this Supreme Court. Moreover, Powell was not required to demonstrate prejudice because the error was structural. An error may be structural if "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," the "effects of the error are simply too hard to measure," or "the error always results in fundamental unfairness." *Weaver*, 137 S.Ct. at 1907-08. Unconstitutionally medicating a defendant during trial satisfies all three rationales for structural error. See *Riggins v. Nevada*, 504 U.S. 127, 137 (1992) (it is nearly impossible to assess prejudice arising out of unconstitutional forced medication); *Castillo v. Stainer*, 997 F.2d 669, 669 (9th Cir. 1993) ("the impact [of forcible medication] upon [petitioner] and his defense would be so pervasive that the error in permitting such a practice would not be susceptible of harmless error analysis"). The district court concluded that Powell's direct forced medication claim was procedurally defaulted. App. 21. But Powell did attempt to raise this direct claim in his post-conviction proceedings. Dkt. 8, p. 76. Moreover, the state court did not clearly invoke a procedural rule in denying the claim, and the relevant Arizona law is unclear. App. 133-146; see Dkt. 17, pp. 16-18; Dkt. 27, pp. 6-10. Accordingly, reasonable jurists could debate the correctness of the district court's procedural ruling.

In any event, Powell also claimed that the trial Counsel rendered ineffective assistance by failing to object to the forced medications, and the district Court resolved that claim on the merits. App. 21-23. For the reasons discussed above, Powell's trial Counsel was deficient in failing to raise this issue. Moreover, because this type of error always causes fundamental unfairness, no showing of prejudice was required to prevail on the ineffective assistance claim. See *Weaver*, 137 S.Ct. at 1910-11, 1913. Even if such a showing were required, Powell has demonstrated it. He was heavily medicated during pretrial proceedings (including plea negotiations), and his medications caused severe side effects and likely contributed to his absence from his trials. See Dkt. 8-4, p. 4; Dkt. 8-7, p. 26. Had trial Counsel timely objected, there is a reasonable probability that the result of the proceedings would have been different. Any contrary conclusion was unreasonable...

Conclusion

Powell respectfully requests that this Court grant his request for a Writ of Certiorari. Because aside from the numerous fundamental and structural errors in Mr. Powell's case, any and all lower State and Federal Courts by themselves should have overturned Mr. Powell's erroneous conviction and excessive sentencing. The rule of law set by this highly esteemed U.S. Supreme Court states that violating

the Sell Formula when fore medicating the defendant, Citing Nevada v. Riggins - Mr. Powell would be entitled to an automatic vacate of his conviction. Because the state of Arizona Courts or any other Courts below the U.S. Supreme Court has no authority or jurisdiction to circumvent this honorable Courts mandate of the said Sell Formula. Mr. Powell's state trial records speak for themselves. The trial Court decided to refuse to follow the well established Sell Formula, bypassing any and all safeguards that should have been in place to prevent exactly what happened to Mr. Powell. Furthermore, since being tried and sentenced to two consecutive life sentences. Mr. Powell has remained in a level four active mental health treatment program throughout his entire stay within ADOC. Since being located in ADOC. Mr. Powell has demonstrated stability, positivity and servitude. Not once has he received any disciplinary infractions. He has maintained employment working the same job as a library clerk for over ten years.

Respectfully Submitted,
Vincent Powell

Date: 8/2/2024