NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

DARIUS SMITH

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Deborah A. Persico, PLLC
Attorney At Law
5614 Connecticut Avenue NW, #105
Washington DC 20015
(202) 244-7127
Counsel for Petitioner
persico33@yahoo.com

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's Fifth Amendment right to Due Process was violated where the record demonstrated that he had mental illness and intellectual disabilities that rendered him functionally illiterate and with processing speed deficits and, therefore, not competent to plead guilty, but the trial court relied solely on its inquiry of Petitioner, which consisted of lengthy legalese-filled questions requiring only a yes or no answer, it did not ask if Petitioner was taking medication that would affect his ability to plead guilty, it did not explain the elements of the crime to which Petitioner plead guilty, and it did not ask Petitioner for his own explanation of what happened during the charged crime, and both the defense and government psychiatric experts testified that Petitioner could become competent if adequately advised by his attorney but the record contained no evidence of what or how the attorney counseled Petitioner regarding the plea proceeding.

2. Whether Petitioner's Sixth Amendment right to effective assistance of counsel was violated where the record demonstrated that Petitioner had mental illness and intellectual disabilities that rendered him functionally illiterate and with processing speed deficits, both the defense and government psychiatric experts testified that Petitioner could become competent if adequately advised by his attorney but the record contained no evidence of what or how the attorney counseled Petitioner regarding the plea proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PETITION FOR WRIT OF CERTIORARI

Darius Smith respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

CITATION TO OPINIONS BELOW

The unpublished *Memorandum Opinion and Judgment* ("*MOJ*") of the District of Columbia Court of Appeals ("DCCA") in Record No. 19-CO-946 was issued on July 22, 2021. *See,* Appendix A. The DCCA denied Petitioner's *Petition for Rehearing or Rehearing En Banc* in an *Order* issued October 6, 2021. *See*, Appendix B.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254. The District of Columbia Court of Appeals denied a petition for rehearing in this matter on October 6, 2021. Pursuant to Supreme Court Rule 13.3, this petition has been timely filed within 90 days of October 6, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On May 22, 2012 Petitioner was charged by Complaint with First Degree Sexual Abuse While Armed, in violation of D.C. Code § 22-3002(a)(1), 4502. Just 35 days later, on October 26, 2012, Petitioner entered a guilty plea to First Degree Sexual Abuse in exchange for the government dismissing the "while armed" enhancement and agreeing not to seek indictment on any remaining charges stemming from the incident. Petitioner was sentenced to 228 months in prison, to be followed by 5 years supervised release.

On May 1, 2015 Petitioner filed a *pro se* motion to vacate his conviction. An attorney was appointed to represent him. On July 3, 2017 Petitioner filed *Defendant's First Amended Motion to Vacate, Set Aside, or Correct His Convictions and Sentences*. In an initial written Order issued without a hearing the court denied Petitioner's claims that his trial attorney was ineffective. It then held a hearing on Petitioner's claims that he was not competent to enter a guilty plea on October 26, after which it denied Petitioner's remaining claims.

Petitioner's guilty plea stemmed from a robbery and rape that occurred on October 8, 2010 at the D&T Variety Store located at 1325 Kenilworth Avenue NE. During his guilty plea, he answered "yes" with no further explanation to many lengthy questions posed by the trial court. The court did not inquire whether Petitioner's mental health issues, known to the court from the time of Petitioner's presentment, had been resolved or whether Petitioner was on any medication or other substance that would affect his ability to understand the proceedings. It did not inquire how far Petitioner had gone in school. It did not detail the elements of the charged crime. It did not require Petitioner to state his own account of what happened. It did not ask counsel if additional questions were needed.

Both the Presentence Investigation Report and Youth Rehabilitation Act study indicated that Petitioner was cognitively impaired and suffered from mental illness. Petitioner's mother told the PSR writer that Petitioner had a "mental health history of Bi-Polar and ADHD," and the report writer lifted from a previous PSR in 2011 that Petitioner was expelled from school in 4th grade, was later "placed in special education classes due [to] his low reading and spelling ability," and had not graduated from high school. The report noted that Petitioner had "antisocial personality and attitudes. . . low education and employment achievement, and a history of

substance abuse," "a low maturity level, and mental health problems," "[f]rom a young age [] exhibited severe behavior and emotional problems," and had been diagnosed with Bipolar Disorder and "a learning disability."

The YRA study indicated that Petitioner was at a 4th to 5th grade reading level and a second to third grade math level, had a "nonverbal intellectual ability" "in the Borderline classification" of the 8th percentile range. The Committee conducted "a non-reading vocational preference inventory for use with individuals with mental retardation, learning disabilities, the disadvantaged and regular classroom students," concluding that Petitioner was interested in certain careers. It also found that Petitioner "cognitively functions with the Low Average range (80-89) of intellectual abilities." A clinical profile resulted in a finding that his "moderately high degree of situational (acute/transient) distress and []moderate amount of characterological (chronic/enduring) discomfort" "have the potential to produce a greater degree of internal disorganization generally manifesting in some type of dysfunction within the areas of emotional expression. . . and/or the cognitive processing of materials (i.e., difficulty with attention, concentration, and/or ability to follow through on planned behaviors)." As a consequence, "he will probably function in a fairly simplistic and predictable manner." His "cognitive distortions will tend to interfere with his logic and judgment, as well as promote errors in his decision-making."

All that the trial court said at sentencing regarding Petitioner's mental and intellectual health status was that it "weigh[ed] that there is some mental health issues, appears to be, untreated. . .". In Petitioner's *pro se* motion to vacate his sentence, he asserted that he was not competent to enter a guilty plea "with a reasonable degree of rational understanding"

because he had been diagnosed as a paranoid schizophrenic having auditory hallucinations and "delusional chronic undifferentiation impulse control disorder," was bipolar, emotionally disturbed, and had ADHD with a "slow learning disability [and] a deficit in adaptive functioning." His court-appointed attorney then added that Petitioner's trial attorney failed to investigate Petitioner's mental state though medical records indicating a history of mental illness, impaired mental functioning and intellectual disabilities which led to his attorney exerting undue pressure on him to plead guilty without adequately explaining his constitutional rights.

A defense retained psychologist, Dr. William Stejskal, found that evaluations conducted prior to the guilty plea were "consistent in describing Petitioner as having significantly below average intellectual capacity generally, with extremely low verbal comprehension (in written or oral modalities), and extremely low processing speed (that is, the ability to evaluate information efficiently and with accuracy)." (Report of Dr. Stejskal). He opined that those deficits were "operative during Petitioner's consultations with counsel and during court proceedings, including the [plea] colloquy," and when Petitioner "added his signature to the Factual Proffer, acceptance and waiver of DNA testing. *Id*. at 10. As to the plea colloquy, Dr. Stejskal found that

> [I]n light of Mr. Smith's long history of significant deficits (intellectual, verbal comprehension, processing speed—all in the Very Low to Extremely Low range) it is improbable that Mr. Smith's affirmative responses reflected an actual knowing grasp of the explanations or questions, or an appreciation of the issues addressed. It is much more likely that his responses were unreliable, and represented stereotyped and unknowing verbalisms that he knew to utter at the appropriate pause. Mr. Smith's response to the Court's question about having read the documents comprising the "plea package" stand as the most transparent instance of this, since Mr. Smith is functionally illiterate. . .and there is no evidence that these documents were read or explained to Mr. Smith.

Id. Dr. Stejskal opined that "the deficient understanding of the proceedings against him that he demonstrated during the present evaluation, was present to at least a similar degree, if not worse, at the time of his adjudication in 2012," and that "to a reasonable degree of professional certainty. . .[Petitioner] lacked sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and lacked a rational, as well as factual, understanding of the proceedings against him." *Id*. at 11-12.

During his evaluation of Petitioner, when Petitioner did not correctly understand the process, Dr. Stejskal would "educate" him, then re-ask the same question later in the interview and Petitioner was able to retain the information (Transcript 5/8/19: 25-26, 48). According to Dr. Stejska, Petitioner could "become competent" if someone properly explained information to him but Petitioner told him that he and his attorney had brief interactions and did not go into the substance of the allegations and Dr. Stejskal had no other information about what the attorney explained. *Id*. at 68.

The government's expert, Dr. Mitchell Hugonnet, who interviewed Petitioner six years after the guilty plea, found that Petitioner was competent at the time of his guilty plea, and that Petitioner's trial attorney was not ineffective. However, he, too, agreed that Petitioner could become competent if adequately counseled by his attorney (Transcript 5/8/19: 155-156).

The trial court expressly found that *both* experts agreed that Petitioner *could become* competent and that "*had* Mr. Smith been advised and consulted by his trial attorney, he would likely have understood questions posed by the judge." Tr. 5/8/19: 32, 155-156)(emphasis added). The trial court further found that *both experts* testified that they had no information as to how trial counsel consulted and advised Petitioner regarding the plea to help him *become competent*.

Still, the trial court ruled that counsel was not ineffective in explaining the plea offer to Petitioner and that Petitioner was competent during the plea.

The D.C. Court of Appeals found Dr. Hugonnet's conclusions to be "plausible." It found that the trial court's Rule 11 inquiry showed that Petitioner was competent. And it did not address at all that both experts testified that Petitioner *could become* competent *if* adequately counseled by his attorney but that neither expert nor the trial court had any information as to how Petitioner's trial attorney counseled him about the plea proceedings.

REASONS FOR GRANTING THIS WRIT

I THE D.C. COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S PRECEDENT THAT THE FIFTH AMENDMENT REQUIRES KNOWING AND VOLUNTARY GUILTY PLEAS AND THAT THE SIXTH AMENDMENT REQUIRES EFFECTIVE ASSISTANCE OF COUNSEL.

The record here failed to demonstrate that, given Petitioner's documented mental illness and intellectual disabilities, his guilty plea was knowing and voluntary or that his attorney adequately counseled him about the plea proceedings. A guilty plea is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It constitutes a waiver of three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *See, Brookhart v. Janis*, 384 U.S. 1 (1966); *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Competence requires that a defendant have "sufficient present 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." *Dusky v. United States*, 362 U.S. 402 (1960). A person who "lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not

be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). The standard for competence to stand trial and competence to enter a guilty plea are the same. *Godinez v. Moran*, 509 U.S. 389 (1993). And while the competence inquiry focuses on whether the defendant has the ability to understand, "[t]he purpose of the `knowing and voluntary' inquiry. . .is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Godinez,* 509 U.S. at 401 n. 12. The record here does not support the D.C. Court of Appeals *MOJ*.

First, the appellate court erroneously concluded that the trial court's Rule 11 inquiry of a person with documented mental and intellectual disabilities sufficiently demonstrated that Petitioner was competent to plead guilty. It ignored the following:

The trial court did not ask Petitioner if he was taking any medication that would affect his ability to plead guilty. *See, Wallace v. United States*, 936 A.2d 757, 779 (D.C. 2007)(Rule 11 inquiry proper where court's inquiry included whether defendant was taking medication).

Contrary to this Court's precedent, the trial court did not inquire into Petitioner's mental state or education to determine if his waiver of the right to trial was made knowingly and intelligently, and, as noted above, the record shows that Petitioner suffered mental and intellectual disabilities. "The purpose of the `knowing and voluntary' inquiry. . .is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Godinez v. Moran*, 509 U.S. 389, 401 n. 12 (1993). *See, Iowa v. Tovar*, 541 U.S. 77, 88 (2004)("The information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily

grasped nature of the charge, and the stage of the proceeding").

Also contrary to this Court's precedent, the trial court did not tell Petitioner, a person of low intellectual capacity, the elements of the crime to which he was pleading guilty: first degree sexual abuse. Nor did defense counsel represent that he had explained the nature and elements of the offense to Petitioner. *See, Henderson v. Morgan*, 426 U.S. 637, 645, 647 (1976)[internal citation omitted here] (defendant who pled guilty was not formally charged and was entitled to "`real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process,'" or "at least a representation by defense counsel that the nature of the offense has been explained to the accused").

Nor did the trial court did not ask Petitioner for his own factual account of what happened at the time of the alleged crime; rather, it allowed the government to read a lengthy factual proffer, after which the court merely sought Petitioner's assent. *See*, *Wallace,*936 A.2d at 779 (citation omitted)(Rule 11 inquiry demonstrated defendant's competence because "the court did not permit [him] merely to assent to the government's proffered account of the crime, but required him to provide his own factual account," "`demonstrat[ing] that he was actively and mentally engaged in the plea process and understood the nature of the charges he was facing'"); *Masthers v. United States*, 539 F.2d 721, 726 (D.C. Cir. 1976)(overruled on other ground by *Godinez v. Moran*, 509 U.S. 389 (1993)(because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts'").

Given the trial court's inadequate Rule 11 inquiry under the circumstances of this case, the appellate court's reliance on that inquiry as support for finding that Petitioner intentionally

relinquished three constitutional rights is unfounded and erroneous.

Second, the appellate court found Dr. Hugonnet's conclusions to be "plausible." The appellate court, like the trial court, overlooked that Dr. Hugonnet primarily relied on the YRA testing and his own testing (based on a Wechsler Abbreviated Scale of Intelligence [WASI]), *neither of which tested processing speed—the domain which the 2006 testing found to be Petitioner's weakest function*. The appellate court also overlooked that Dr. Hugonnet was not aware of the 2012 evaluation of Petitioner's special education teacher— who concluded the same as was found in the 2006 testing, that is, as the trial court acknowledged, that Petitioner was "very slow to acquire information and slow in a way that he is able to retain it and *needs lots of work and needs lots of reminders*." (emphasis added). Furthermore, the appellate court also overlooked that Dr. Hugonnet relied upon transcripts of Petitioner's guilty pleas before other courts— transcripts even he agreed the prevailing psychiatric community cautioned against using to determine competence.

Most importantly, however, the appellate Court ignored two critical facts simultaneously related both to whether the plea was knowing and voluntary and whether Petitioner's counsel was ineffective. The trial court found that *both experts agreed* that despite Petitioner's intellectual disabilities, he *could become* competent *if* he was adequately counseled by his attorney. Yet *neither expert* nor the trial court had any information whatsoever as to what or how Petitioner's counsel advised him regarding the plea proceedings. Petitioner's Affidavit stated that he was not adequately counseled but his trial attorney did not dispute the Affidavit. Therefore, the appellate court's *MOJ* did not support a finding that Petitioner's Fifth and Sixth Amendment rights were not violated.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Honorable Court grant his petition.

Respectfully submitted,

/s/

Deborah A. Persico, PLLC
Attorney At Law
5614 Connecticut Avenue NW, #105
Washington DC 20015
(202) 244-7127
Counsel for Darius Smith
(Appointed by the Court)
persico33@yahoo.com