No. _____

IN THE

Supreme Court of the United States

DAVID BYRON RUSS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Florida Supreme Court

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

Karin L. Moore
Counsel of Record
Capital Collateral Counsel-North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
850-487-0922 ext. 104
Karin.moore@ccrc-north.org

CAPITAL CASE

QUESTION PRESENTED

1. Whether a state court may refuse to review a capital defendant's claim of substantive incompetency?

PARTIES TO THE PROCEEDINGS

Petitioner, David Byron Russ, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

LIST OF DIRECTLY RELATED PROCEEDINGS

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Trial:
Circuit Court of Seminole County, Florida
State of Florida v. David Byron Russ, Case No. 2007-CF-2377
Judgment Entered: May 13, 2009

Direct Appeal:
Florida Supreme Court (Case No. SC09-923)
Russ v. State, 73 So. 3d 178 (Fla. 2011) (affirming)
Judgment Entered: September 22, 2011

Initial Postconviction Proceedings:
Circuit Court of Seminole County, FL
State of Florida v. David Byron Russ, Case No. 2007-CF-2377
Judgment Entered: February 9, 2012 (dismissing proceedings)

Florida Supreme Court (Case No. SC12-509)
Russ v. State, 107 So. 3d 406 (Table) (Fla. 2008) (affirming)
Judgment Entered: November 27, 2012

Second/Instant Postconviction Proceedings:
Circuit Court of Seminole County, FL
State of Florida v. David Byron Russ, Case No. 2007-CF-2377
Judgment Entered: July 16, 2021

Florida Supreme Court (Case No. SC21-1205)
Russ v. State, 2022 WL 1055029 (Fla. 2022) (affirming)
Judgment Entered: April 8, 2022, *reh'g denied* November 29, 2022

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DECISION BELOW

The Florida Supreme Court's decision is available at *Russ v. State*, 2022 WL 1055029 (Fla. 2022), *reh'g denied Russ v. State*, 2022 WL 17257044 (Fla. Nov. 29, 2022), and is reprinted in the Appendix (App.) at 2-3, 13.[1]

JURISDICTION

The judgment of the Florida Supreme Court was entered on April 8, 2022. App. at 2. Rehearing was denied on November 29, 2022. App. at 13. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides, in relevant part:

> Excessive bail shall not be required…nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 10, 2007, Petitioner David Russ was arrested on a warrant for first-degree murder and other related charges. *State v. Russ*, No. 07-02377-CFA (Fla. Seminole County Ct) R. Vol. 1 at 15-16. On June 5, 2007, Mr. Russ was indicted in the Seminole County Circuit Court for first-degree murder, kidnapping with a

[1] Citations to non-appendix material from the record below are as follows: R. – record and transcript from original trial; PCR – record from postconviction proceeding; PSCR – supplemental record from postconviction proceeding; SPCR – record from successive postconviction motion giving rise to the instant petition.

weapon, carjacking with a deadly weapon, robbery with a deadly weapon, and burglary of a dwelling with an assault or battery. *Id*. at 14.1-14.2. On July 10, 2007, Mr. Russ entered a plea of not guilty to the charges. *Id*. at 33. Less than seven months later, on February 6, 2008, Mr. Russ pleaded guilty to all charges, for no benefit and no agreement from the State to drop the death penalty. *Id*. at 178-180; R. Vol. 12 at 425-452.

In April 2008, Mr. Russ's counsel informed the trial court that Mr. Russ intended to waive the presentation of mitigating evidence and waive the presence of an advisory jury (pursuant to Florida's pre-*Hurst v. Florida* scheme) for his penalty phase. R. Vol. 12 at 469. In May 2008, the state court relied on trial counsel's false representation that Mr. Russ had undergone a competency evaluation, and found Mr. Russ competent to waive mitigation and an advisory jury for his penalty phase. R. Vol. 13 at 544. Against Mr. Russ's wishes, the trial court appointed the Office of Criminal Conflict and Civil Regional Counsel for the purpose of presenting mitigation "in the public interest." R. Vol. 1 at 198.

On January 8-9, 2009, Mr. Russ's penalty phase was conducted before the trial court. R. Vol. 10-11. Although Mr. Russ's counsel was present, Mr. Russ reaffirmed that he did not want counsel to participate in either the presentation of aggravating or mitigating evidence. R. Vol. 10 at 17. Special counsel appointed by the trial court conducted the penalty phase as to mitigation, in their view as "a lawyer for the Court." *Id*. at 76. On January 15, 2009, the trial court conducted a *Spencer* Hearing, in which

the Mr. Russ made a brief statement of remorse. Vol. 13 at 612-16. On May 13, 2009, the trial court formally sentenced Mr. Russ to death. Vol. 9 at 1639-54.

In its May 13, 2009 sentencing order, the trial court found the following aggravating circumstances for Mr. Russ's capital conviction: (1) the capital felony was committed while Mr. Russ was engaged in the commission of a kidnapping; (2) the capital felony was committed for pecuniary gain; (3) the capital felony was especially heinous, atrocious, or cruel ("HAC"); (4) the capital felony was committed in a cold, calculated, and premeditated manner ("CCP"). R. Vol. 9 at 1643-48, App. at 433-447.

In mitigation, the trial court found no evidence of statutory mitigating circumstances under Florida law,[2] and the following circumstances from the "catch-all" provision of Fla. Stat. § 921.141(6)(h) ("The existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty."): (1) Mr. Russ had an abusive childhood; (2) Mr. Russ suffers from a severe, long term addiction to drugs which he has been unable to conquer despite numerous attempts at rehabilitation. R. Vol. 9 at 1648-50. The trial court also found the following nonstatutory mitigating circumstances: Mr. Russ (3) is remorseful for the homicide; (4) suffers from multiple medical problems; (5) has the capacity to form and maintain loving and caring relationships with both family and non-family members; (6) pursued high education and is skilled in the roofing trade; (7) had no violent criminal history; (8) behaved appropriately in the courtroom; and (9) wrote thank-

[2] In its written order, the trial court noted that "[n]o evidence of any statutory mitigating circumstances . . . was presented or argued." Sentencing Order at 9, *State v. Russ*, No. 07-02377-CFA (Fla. Seminole County Ct). R. Vol. 9 at 1648, App. at 441.

you notes to his scholarship donors at Texas Tech University in 1997. R. Vol. 9 at 1650-53.

On September 22, 2011, the Florida Supreme Court affirmed Mr. Russ's convictions and death sentence on direct appeal. *Russ v. State*, 73 So. 3d 178, 200 (Fla. 2011).

On October 14, 2011, the Florida Supreme Court appointed Mr. Russ counsel from Capital Collateral Regional Counsel-Middle ("CCRC-M") for his initial state postconviction proceedings. Order, *Russ v. State*, No. SC09-923 (Fla. 2011). Shortly thereafter, on November 7, 2011, Mr. Russ filed a *pro se* motion with the trial court to dismiss counsel and waive initial state postconviction review. On December 1, 2011, the trial court held a hearing on Mr. Russ's *pro se* motion to dismiss, and ordered CCRC-M to meet with Mr. Russ and file a response to the *pro se* motion. Following CCRC-M's response, and a hearing on January 19, 2012, the trial court issued a written order on February 9, 2012, finding Mr. Russ competent to waive, dismissing his postconviction proceedings, and discharging his CCRC-M counsel. PCR Vol. 1, pp. 5-6, reprinted for convenience at App. at 449-50.

On November 27, 2012, the Florida Supreme Court affirmed the trial court's order. *Russ v. State*, 107 So. 3d 406 (Fla. 2012). The lower court held that, "[b]ased on the colloquy conducted and the answers provided by Russ, the trial court did not abuse its discretion in determining that Russ knowingly, intelligently, and voluntarily waived his right to postconviction counsel and proceedings." *Id*. at 406.

In June 2018, the Capital Habeas Unit of the Office of the Federal Public Defender for the Northern District of Florida ("CHU") moved for appointment as Mr. Russ's federal counsel in order to ascertain the status of Mr. Russ's federal habeas rights and pursue potential federal remedies. *See* ECF No. 1, reprinted for convenience as App. at 452-57. The district court granted the motion, explaining that 18 U.S.C. § 3599 requires indigent death-sentenced state prisoners to be afforded federal habeas counsel. *See* ECF No. 10, reprinted for convenience as App. at 459-66. The court explained that Mr. Russ should have the opportunity to raise arguments addressing issues of timeliness and procedural default. *Id.*

The court directed the CHU to file both a § 2254 petition and a memorandum of law discussing why the petition should not be dismissed on timeliness or exhaustion grounds within 90 days of the date of the CHU's appointment. *Id.* On September 28, 2018, Mr. Russ filed an unopposed motion for an extension of time to file his petition, ECF. No. 12, which was granted on September 28, 2018, ECF No. 13. The CHU filed the petition and memorandum of law on December 23, 2018. ECF No. 16, 17, as well as a motion to stay the federal proceedings pending the state court's decision to appoint state court counsel. ECF No. 18.

On April 17, 2019, the state circuit court entered an order appointing CCRC-N to represent Mr. Russ. SPCR 20-21. The district court stayed Mr. Russ's federal proceedings while CCRC-N exhausted his unexhausted claims in state court. ECF No. 22.

On December 30, 2020, Mr. Russ filed his successive motion for postconviction relief in the state circuit court. SPCR 24-177, App. at 15-168. The State filed its response on January 19, 2021. SPCR 180-218.

A case management hearing was held on Mr. Russ's state court successive postconviction motion on March 25, 2021. The state circuit court entered an order dismissing Mr. Russ's successive motion on July 16, 2021. SPCR 223-229, reprinted for convenience as App. 5-11.

Mr. Russ filed a notice of appeal of the state court's order dismissing his successive motion on August 17, 2021. SC21-1205. On April 8, 2022, the Florida Supreme Court affirmed the circuit court's order. *Russ v. State*, 2022 WL 1055029 (Fla. 2022). App. at 2-3. The Florida Supreme Court denied rehearing on November 29, 2022. *See* Order Denying Motion for Rehearing reprinted for convenience as App. at 13.

REASONS FOR GRANTING THE WRIT

This Court has jurisdiction to hear Mr. Russ's case because it presents an important question of federal law and the state court's grounds for denying Mr. Russ's claim were not "adequate" to support the judgment and "independent" of federal law. *See Michigan v. Long*, 463 U.S. 1032. This case also involves a lack of consensus among states and federal circuits regarding the applicability of a procedural bar to substantive competency claims, and requires this Court's resolution.

I. This Court Should Grant Review Because This Case Presents the Important Issue of Whether a Court May Refuse to Review a Capital Defendant's Substantive Incompetency Claim.

A. The State Time Bar Is Not a Barrier to Review of the Federal Question Presented.

Mr. Russ's case involves important federal constitutional challenges to the validity of his guilty pleas, penalty phase, sentencing proceeding, and postconviction waiver. All claims related to his substantive incompetency should not be subject to a procedural bar. Although the Florida Supreme Court purported to apply a state time-bar, that ruling is not an obstacle to this Court reaching the federal constitutional questions presented in this petition.

1. Mr. Russ Could Not Litigate His Own Incompetency *Pro Se*.

The state courts ruled that Mr. Russ's competency claims were time-barred because they were not raised within one year of his state postconviction waiver. *Russ v. State*, No. 07-CF-2377 at 6, *Russ v. State*, 2022 WL 1055029 (Fla. 2022). However, Mr. Russ was without counsel during this time.[3] A "timely" filing under the state courts' reasoning would have required an incompetent defendant to raise and litigate the issue of their own incompetency. This cannot be as a matter of federal constitutional law.

2. Substantive Mental Competency Claims Should Not Be Subject to a State Procedural Bar.

As this Court has made clear, a waiver of constitutional rights that is not

[3] Although initial postconviction counsel appealed the circuit court's order finding Mr. Russ competent to discharge his postconviction counsel and waive postconviction proceedings, this was a limited form of representation that did not allow for further investigation or litigation regarding his competency.

competently made is void and violates due process. *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969). Similarly, subjecting an incompetent defendant to a criminal trial violates their due process. *Drope v. Missouri*, 420 U.S. 162, 171 (1975). This is a due process right that can never be waived. *Pate v. Robinson*, 383 U.S. 375, 384 (1966). As this Court explained,

> [A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. . . . [T]he prohibition is fundamental to an adversary system of justice.

Drope, 420 U.S. at 171-72. A defendant is competent if he "has sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960).

Florida law recognizes that "[a]n important distinction exists between procedural and substantive incompetency claims." *Thompson v. State*, 88 So. 3d 312, 316 (Fla. 4th DCA 2012). A procedural incompetency claim alleges that a court failed to follow procedures adequate to protect an incompetent defendant's right to not be tried. *Id.* at 316. A substantive incompetency claim alleges that a defendant's "due process rights were violated by being proceeded against while actually incompetent." *Id.* Although Florida purports to only allow substantive incompetency claims to be raised on direct appeal and not in postconviction, it recognizes an exception for claims of ineffective assistance of counsel for failure to raise a defendant's incompetency, as Mr. Russ presented in his postconviction motion. *Id.* (citing *Jackson v.*

State, 29 So. 3d 1161, 1162 (Fla. 1st DCA 2010)). And, the Florida Supreme Court has acknowledged that substantive incompetency claims are viable in postconviction if the circumstances strongly suggest actual incompetency. *See Thompson*, 88 So. 3d at 317 n. 1 (citing *Jones v. State*, 478 So. 2d 346, 347 (Fla. 1985); *Bush v. Wainwright*, 505 So. 2d 409, 410-11 (Fla. 1987)).

Additionally, in *Nelson v. State*, 43 So. 3d 20 (Fla. 2010), the Florida Supreme Court, while acknowledging the substantive competency claim would be barred for not having been raised on direct appeal, still reached the merits of the claim. *Id.* at 33. In doing so, the Florida Supreme Court relied on federal law from the Eleventh Circuit. *Id.* at 33 (citing *Russ v. Singletary*, 957 F.2d 1562, 1571 (11th Cir. 1992)). Thus, it is appropriate to look to such case law for guidance.

Federal case law in the Eleventh Circuit has explained that although procedural competency claims can be defaulted, a "substantive [competency] claim, however, is not subject to procedural default and must be considered on the merits." *Medina v. Singletary*, 59 F.3d 1095, 1111 (11th Cir. 1995); *see also Wright v. Sec'y Dep't of Corr.*, 278 F.3d 1245, 1258-59 (11th Cir. 2002) (finding of default as to substantive due process mental competency claim is contrary to law of the circuit); *Lawrence v. Sec'y, Fla. Dep't. of Corr.*, 700 F.3d 464, 481 (11th Cir. 2012) (substantive incompetency claims not subject to procedural default); *Battle v. U.S.*, 419 F.3d 1292, 1298 (11th Cir. 2005) (same); *Pardo v. Sec'y, Fla. Dep't of Corr.*, 587 F.3d 1093, 1101 n.3 (11th Cir. 2009) (reiterating this standard); *Raheem v. GDCP Warden*, 995 F.3d 895 (11th Cir. 2021) (same).

To the extent that Florida state law allows such a claim to be barred, it

contravenes the spirit of this Court's precedent. This Court should intervene and clarify that a state court may not bar a capital defendant from receiving at least one round of merits review for a substantive incompetency claim.

3. Mr. Russ Presented Compelling Evidence to the State Courts That Creates a Real, Substantial, and Legitimate Doubt as to His Competence.

Mr. Russ's postconviction motion and attached documents presented compelling evidence of his substantive mental incompetency to plead guilty, have penalty phase proceedings and sentencing imposed upon him, and waive postconviction review.

Dr. Richard Dudley, Ph.D., cast significant doubt upon Mr. Russ's competence to plead guilty to his capital charge. *See* App. at 467-78. He conducted a five-hour long evaluation of Mr. Russ's mental health and competency at Union Correctional Institution in October of 2018. Dr. Dudley reviewed Russ's medical, child social service, and corrections records, including a psychiatric evaluation conducted by the Department of Corrections. In a declaration dated December 18, 2018, Dr. Dudley found that Russ suffers from multiple psychiatric and neuropsychiatric disorders, most of which, if not all, predate his guilty pleas and subsequent waivers of a jury trial and presentation of mitigation. App. at 469. Dr. Dudley found that Russ meets diagnostic criteria for:

- Possible traumatic brain injuries, the likely result of multiple head injuries and longstanding, severe stimulant use disorder. App. at 477.
- Post-Traumatic Stress Disorder caused by years of unrelenting physical and emotional abuse by his father, primarily, and related dissociative episodes in the wake of events that trigger memories of the abuse, characterized by persistent and negative beliefs about himself that he is evil and without redemption and persistent emotional states of fear, shame, anger and

detachment resulting in self-destructive behavior and overreaction to perceived threats and everyday events. *Id.* at 469.

- Manifests developmental difficulties consistent with borderline personality disorder, the result of inadequate parenting (extreme abuse by his father and repeated abandonment by his mother), characterized by relationships marked by intensity and instability with an abiding fear of abandonment. As a result, he often created "self-fulfilling prophecies" that destroyed his most prized relationships. *Id.* at 470.
- Manifests symptoms of a mood disorder, most likely bi-polar disorder characterized by periods of profound depression, hopelessness, anhedonia, feelings of worthlessness and excessive guilt with suicidal ideations. *Id.* at 472.
- Manifests schizotypal features, such as cognitive and perceptual distortions characterized by suspicion and paranoid ideations with inappropriate effect. *Id.* at 473.
- Presents indicia of psychosis. *Id.* at 475.

Dr. Dudley is of the opinion that each of these brain and psychiatric impairments impacted and continue to impact Russ's ability to function in his everyday life and his ability to function at every stage of the legal process. *Id.* at 478. The collective impact of each condition exacerbates the other conditions. *Id.*

Dr. Dudley recommended further examinations by a trauma expert, neuropsychologist, neurologist, and psychopharmocologist. Based upon his recommendations, undersigned counsel retained forensic psychologist Dr. Harry Krop, Ph.D., to conduct a neuropsychological evaluation, Dr. Drew Edwards, Ed.D., to evaluate Mr. Russ's addiction issues, and Dr. Jethro Toomer, Ph.D., to evaluate the impact of Mr. Russ's extreme childhood abuse.

Dr. Krop holds a doctorate degree in clinical psychology and is licensed in the State of Florida. *See* Declaration of Dr. Harry Krop, App. at 480. He conducted a neuropsychological examination on Russ at UCI on January 31, 2020. Based on his review of the records and his examination of Russ, it is his opinion within a

reasonable degree of psychological certainty that Russ's capacity to make rational decisions, communicate with counsel, and assist counsel in the preparation of his defense, was compromised at the time he entered his pleas, waived a jury trial, waived mitigation, and waived initial postconviction. *Id*. at 483.

Dr. Edwards holds a master's of science in health science/addictions counseling from the University of North Florida and a doctorate degree in education from Nova Southeastern University. *See* Declaration of Dr. Drew Edwards, App. at 485. He has established and directed chemical dependency centers in Minnesota, Indiana and Florida and has been on the medical faculty at the University of Florida's Health Science Center in Jacksonville. He has counseled countless drug-addicted patients.

Dr. Edwards met with Russ at UCI on February 26 and June 17, 2020, for a total of five hours. *Id.* at 487. Dr. Edwards is of the opinion, based on his thorough examination, that Russ was likely incompetent to proceed in his initial trial proceedings due to his documented history of drug addiction caused by his unrelenting and extreme physical abuse by his father. *Id*. at 499-505. Dr. Edwards cited to relevant literature in the field demonstrating discernable injuries to the frontal cortex that controls executive functioning in humans caused by extensive stimulant use, leading Dr. Edwards to conclude that Russ suffered impairment to his frontal cortex "to the degree that it could no longer inhibit his hedonic survival drives." *Id*. at 503. He further stated, "[I]t is possible that Russ relied on language from Alcoholics Anonymous to justify his legal waivers, masking the level of his impairment and irrationality, and misleading the court into believing Russ was

making rational decisions when the opposite is true." *Id*. at 506. Based on his understanding of the legal definition of incompetence to proceed in Florida and elsewhere, he is of the opinion that Russ fell short of the competence required to enter pleas and waive other constitutional rights. *Id*.

Dr. Toomer holds a doctorate degree from Temple University and completed his post-doctoral residency at the Albert Einstein Hospital-Moss Rehabilitation Center and teaching hospital in Philadelphia. *See* Declaration of Dr. Jethro Toomer, App., Exhibit 17 at 1. In 2009, he retired from his teaching position at Florida International University in the graduate studies program in Mental Health and has engaged in the private practice of clinical and forensic psychology for more than twenty-five years. *Id.*

Dr. Toomer examined Russ in December 2019 at UCI. Based on his examination and review of pertinent sections of the record in this case, Dr. Toomer opined that, "[D]espite Russ's prior assurances [to the court], the totality of data indicates, to a reasonable degree of psychological certainty, that Russ's capacity to make competent decisions was impaired at the time of his trial level and postconviction waivers." *Id*. at 511.

Mr. Russ proffered sufficient evidence of his incompetency to the lower courts. The state courts should have allowed development of this evidence and considered it in adjudication of Mr. Russ's postconviction motion at an evidentiary hearing. The failure to do so undermines the reliability of his death sentence, and necessitates correction by this Court. The only remedy that can protect Mr. Russ's rights to due process, reliable

and individualized sentencing, and equal protection within the criminal justice system, is a remand to the lower courts for an evidentiary hearing in accordance with Florida law,[4] in which Mr. Russ may present evidence of how his incompetency rendered his pleas, penalty phase and sentencing, and initial postconviction waivers invalid.

II. This Court Should Also Grant Review to Resolve a Lack of Consensus Regarding Whether a State Procedural Bar is Applicable to Substantive Competency Claims.

Although this Court has made clear that the criminal trial of an incompetent defendant violates due process, *Drope v. Missouri*, 420 U.S. 162, 171 (1975), and that this due process right cannot be waived, *Pate v. Robinson*, 383 U.S. 375, 384 (1966), courts have struggled with implementing these principles. There is a present lack of consensus in state and federal courts alike regarding whether a substantive claim of a defendant's mental incompetency can be subject to a time or procedural bar. This jurisprudential split has significant consequences for some of the most vulnerable criminal defendants—those who are incompetent—and calls for intervention by this Court.

As discussed above, Florida state law purports to apply a procedural bar to substantive competency claims, but is inconsistent in its application of such a bar to consideration of a freestanding substantive competency claim. *See Nelson v. State*, 43 So. 3d 20 (Fla. 2010). In addressing substantive competency on the merits despite finding it

[4] *See Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999) (overruled on other grounds) ("While the postconviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a conclusive determination that the defendant is entitled to no relief.").

barred, the Florida Supreme Court in *Nelson* cited with approval and utilized federal case law from the Eleventh Circuit.

Federal circuit courts are split over whether a substantive mental competency claim can be procedurally defaulted. As discussed, Eleventh Circuit precedent is clear that a substantive competency claim is not subject to procedural bar. *See, e.g.*, *Medina v. Singletary*, 59 F.3d 1095, 1111 (11th Cir. 1995); *Wright v. Sec'y Dep't of Corr.*, 278 F.3d 1245, 1258-59 (11th Cir. 2002); *Lawrence v. Sec'y, Fla. Dep't. of Corr.*, 700 F.3d 464, 481 (11th Cir. 2012); *Battle v. U.S.*, 419 F.3d 1292, 1298 (11th Cir. 2005); *Pardo v. Sec'y, Fla. Dep't of Corr.*, 587 F.3d 1093, 1101 n.3 (11th Cir. 2009); *Raheem v. GDCP Warden*, 995 F.3d 895 (11th Cir. 2021) (same).

Likewise, the Tenth Circuit has found that substantive mental competency claims cannot be defaulted. *See, e.g.*, *Rogers v. Gibson*, 173 F.3d 1278, 1289 (10th Cir. 1999) (although procedural competency claim may be barred, substantive competency claim may not); *Nguyen v. Reynolds*, 131 F.3d 1340, 1346 (10th Cir. 1997) (general rules of default do not apply to substantive mental competency claims).

However, other circuits allow a procedural bar of substantive competency claims. *See, e.g.*, *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1306-07 (9th Cir. 1996) (expressly disagreeing with the Eleventh Circuit and finding substantive incompetence claim to be procedurally defaulted); *Burket v. Angelone*, 208 F.3d 172, 191 (4th Cir. 2000) (accepting state court procedural bar as adequate and independent ground). The Eighth Circuit has internally conflicting case law. In *Vogt v. U.S.*, it ruled that substantive competency claims cannot be procedurally defaulted. 88 F.3d 587, 590-91 (8th Cir. 1996). An earlier

panel, however, found that such claims could be barred. *Weekley v. Jones*, 56 F.3d 889, 894-95 (8th Cir. 1995), *reh'g granted and opinion vacated on other grounds*, 73 F.3d 763 (8th Cir. 1995) *and on reh'g*, 76 F.3d 1459 (8th Cir. 1996). The Eight Circuit, en banc, ultimately adopted a portion of the *Weekley* panel decision allowing a procedural bar. *Weekley v. Jones*, 76 F.3d 1459, 1461 (8th Cir. 1996) (en banc). Nevertheless, *Vogt* remains ostensibly good law.

Among the state courts, there is also a lack of consensus. Aside from Florida's inconsistent application, Nebraska also has internal legal inconsistency. Although the Nebraska Supreme court in *State v. Painter*, 426 N.W.2d 513 (Neb. 1988) stated that a postconviction substantive competency claim could not be a basis for relief because it could have been raised on direct appeal, it did not impose a procedural bar, but considered the claim's merits. Later in *State v. Johnson*, 551 N.W.2d 742 (Ct. App. Neb. 1996), that same court examined multiple postconviction cases in which substantive competency was at issue. There, it found that "in none of those cases was a procedural bar used to avoid consideration of issues in postconviction proceedings dealing with competency to stand trial or enter a plea." *Id.* at 800 (listing string cite of cases in which competency was not subject to procedural bar). The court in *Johnson* concluded, "we do not believe the law is that there is a procedural bar in postconviction proceedings of issues relating to competency to stand trial." *Id.* at 801.

Burket v. Angelone indicates that Virginia state courts allow substantive competency claims to be barred. 208 F.3d at 191. Mississippi, however, "has held unequivocally that 'errors affecting fundamental constitutional rights are excepted from

[a procedural bar]." *Smith v. State*, 149 So. 3d 1027, 1031 (Miss. 2014) (overruled on other grounds); *see also Jones v. State*, 174 So. 3d 902, 907 (Miss. Ct. App. 2015) (citing *Smith* and nothing that "claims regarding mental competency are not subject to procedural bars"). In support of these decisions, the Mississippi Supreme Court specifically referenced *Drope*'s language that the prohibition against trying an incompetent defendant is fundamental to an adversarial system of justice. *Smith*, 149 So. 3d at 131.

This Court should review this case in order to resolve the confusion among state and federal authorities. This issue is important because it implicates who can and cannot obtain relief of convictions and sentences obtained when they were incompetent. This Court should further grant review to address the question Mr. Russ presents, which is closely related to the central divergence among the above state and federal courts.

CONCLUSION

This Court should grant a writ of certiorari to review the Florida Supreme Court's decision.

Respectfully submitted,

Karin L. Moore
Counsel of Record
Capital Collateral Counsel-North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
850-487-0922 ext. 104
Karin.moore@ccrc-north.org

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