

No. 22-6882

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
Supreme Court of Florida*

REPLY BRIEF FOR PETITIONER

THIS IS A CAPITAL CASE

KARIN L. MOORE
Counsel of Record
Capital Collateral Regional Counsel –
Northern Region
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Karin.Moore@ccrc-north.org

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ARGUMENT

This Court should grant certiorari. Petitioner's case both implicates the federal circuit split and is the proper vehicle for resolving the split. Respondent advances several reasons why this Court should deny relief. Petitioner addresses each main reason.

I. To resolve a circuit split and reach the federal question regarding whether a substantive incompetency claim may be time barred, this Court need not determine the underlying merits of the claim.

As detailed in the petition, Petitioner presented the state courts with numerous factual allegations that create a "real, substantial, and legitimate doubt" [regarding] his competence." *Pardo v. Sec'y, Fla. Dep't of Corr.*, 587 F.3d 1093, 1101 (11th Cir. 2009) (quoting *Medina v. Singletary*, 59 F.3d 1095, 1106 (11th Cir. 1995)).

Respondent insinuates that Petitioner has "drop[ped] the issue" of competency and "later pick[ed] it up as it suits his purposes" like the petitioner in *Thomas v. Wainwright*, 788 F.2d 684, 688 (11th Cir. 1986). Brief in Opposition at 7. This false comparison ignores the first half of the alleged exception: that such tactics are improper when the issue of competency has once been raised and the state court has taken the steps to resolve said issue. *Thomas*, 788 F.2d at 688. Petitioner has not vacillated between competency and incompetency. As soon as he obtained federal counsel, he raised the issue in federal habeas proceedings and subsequently in state postconviction proceedings. And, the state court did not adequately take steps to resolve the issue. And to the extent that the court in *Thomas* also evaluated the factual support for the claim, this has no bearing on whether this Court can resolve the important federal question of

whether a court may refuse to review a substantive incompetency claim based on a procedural bar.

The simple fact that Petitioner could not have pro se raised the claim of substantive incompetency while incompetent is plainly the “credible explanation” for why this claim was delayed. *See Brief in Opposition* at 8. Petitioner was without counsel for nearly a decade—the law does not require him, nor any other incompetent petitioner, to recognize their incompetency and litigate such without counsel. To the extent Respondent disputes this, it only emphasizes the need for this Court to clarify the law regarding this important issue. Further, the possibility for future federal review—which Respondent admits requires federal courts to address state procedural bars under the extremely deferential AEDPA standard—existed in a variety of cases this Court has deemed important enough for review. *See, e.g., Hurst v. Florida*, 577 U.S. 92 (2016); *Garza v. Idaho*, 139 S. Ct. 738 (2019).

Finally, it is of little significance that the circuits addressing the merits of a procedurally defaulted substantive incompetency claim have yet to grant habeas relief. Whether or not Petitioner will prevail on the merits of his substantive incompetency claim—and in which specific court—is irrelevant to the core fact that the Supreme Court of Florida erred in refusing to review Petitioner’s claim of substantive incompetency. This erroneous procedural bar contravened this Court’s precedent, as well as Eleventh Circuit precedent, justifying this Court’s intervention. To the extent other states and circuits allow such a bar, it is appropriate for this Court to resolve the split.

II. Respondent’s characterizations of this case’s procedural history are incorrect, and the Supreme Court of Florida’s timeliness ruling should not prevent this Court from reaching the important federal questions presented in the petition.

Respondent incorrectly asserts that Petitioner has proposed a “sweeping rule” that under no circumstances may a substantive retrospective competency claim be barred. Brief in Opposition at 16. Far from doing so, Petitioner has simply pointed out that a circuit split exists over whether and how substantive competency claims may be barred. Further, the goals of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)—“conserv[ing] judicial resources” and streamlining federal habeas review—are far from undermined by Petitioner’s effort at this venture which is to clarify the law surrounding substantive competency. Even so, federal habeas review is and remains “a guard against extreme malfunctions in the state criminal justice system”—malfunctions including incompetently rendered waivers at the time of his guilty plea, subsequent penalty phase, *and postconviction proceedings. Ryan v. Gonzales*, 568 U.S. 57, 75 (2013).

By virtue of these invalid waivers, Petitioner was left without access to counsel or other expert resources for approximately eight years. To reiterate, Petitioner—who was incompetent at all crucial junctures in his state court litigation history prior to the appointment of counsel in 2018—cannot be faulted for failing to raise a claim of his own incompetence *pro se*. His state postconviction motion raising the substantive incompetency claim was filed in December 2020, once he was represented by counsel.

Although the Supreme Court of Florida disagreed with Petitioner’s timeliness arguments, this Court need not second-guess the state-law ruling in order to grant

certiorari review. This Court has authority to grant review in a “small category” of “exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question.” *Lee v. Kemna*, 534 U.S. 362, 376 (2002). In these cases, adequacy of a state rule depends on the “particular application” of the rule under “the circumstances of a particular case”—not whether the rule “generally serves a legitimate state interest.” *Id.* at 381-85, 387.

Here, under the influence of significant cognitive impairments, Petitioner waived the right to postconviction review of his plea and sentence. As a result, for eight years he languished without access to counsel or expert resources. At no point prior to 2018 did Petitioner have access to federal counsel; once he had that access, he diligently raised the appropriate claims in federal court. And, upon the appointment of undersigned counsel in 2019 for purposes of exhausting state remedies, Petitioner promptly filed his substantive incompetency claim in state court. This Court should consider all the particularities of Petitioner’s case and its procedural history, and review the federal issue presented notwithstanding the state-law rulings below.

CONCLUSION

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

Respectfully submitted,

/s/ Karin L. Moore
KARIN L. MOORE
Counsel of Record
Capital Collateral Regional Counsel –
Northern Region
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Karin.Moore@ccrc-north.org

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