CAPITAL CASE
No. 23-_____

IN THE
Supreme Court of the United States

BRANDON MICHAEL COUNCIL,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In the middle of his federal death-penalty trial, Brandon Council had a delusional breakdown, asking his attorneys to "subpoena God." The District Court determined that Council's break with reality raised a bona fide doubt about Council's competence, requiring the court to independently conduct "further inquiry" with "adequate" "procedures" to determine whether Council was, in fact, competent to stand trial. *Drope* v. *Missouri*, 420 U.S. 162, 180-181 (1975); *Pate* v. *Robinson*, 383 U.S. 375, 378 (1966); *see also* 18 U.S.C. § 4241(a) (requiring a "hearing" on competency). But the next trial day, after defense counsel handed up an eleven-line statement that Council understood the proceedings and could communicate with his lawyers, the court declared Council fit to continue. He was sentenced to death.

The Fourth Circuit held that defense counsel's handing up of the statement was an adequate competency "hearing." It also held that deference to defense counsel was appropriate because the District Court had to "balance" Council's "right to be tried only if competent" against "the right to effective assistance of counsel."

The questions presented are:

(1) Once a trial court has found a bona fide doubt about a defendant's competence, may it deem the defendant competent based solely on the unexplained, unsupported opinion of a defense expert or defense counsel?

(2) Once a trial court has found a bona fide doubt about the defendant's competence, may it defer to

defense counsel's opposition to a competency inquiry on the theory that it is safeguarding the defendant's right to "effective assistance" of counsel?

PARTIES TO THE PROCEEDING

Petitioner is Brandon Michael Council. Respondent is the United States of America.

STATEMENT OF RELATED PROCEEDINGS

U.S. Court of Appeals for the Fourth Circuit:

United States v. *Council*, Nos. 20-1, 21-8 (Aug. 9, 2023) (reported at 77 F.4th 240).

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Brandon Michael Council respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's decision (Pet. App. 1a) is reported at 77 F.4th 240. The exchange in which the District Court found Council competent is at 10 Joint Appendix 4781-82, *Council*, Nos. 20-1, 21-8, Dkt. 122 (4th Cir. Feb. 28, 2023).

JURISDICTION

The Fourth Circuit entered judgment on August 9, 2023. Pet. App. 1a. The en banc court denied

Council's timely rehearing petition on September 26, 2023. Pet. App. 48a. On December 13, 2023, this Court extended the deadline to petition for a writ of certiorari up to and including February 23, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The Fifth Amendment to the Constitution provides in relevant part that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law."

The relevant provisions of the Insanity Defense Reform Act, 18 U.S.C. §§ 4241 (a-f), 4247(b-d) are reproduced at Pet. App. 60a-65a.

INTRODUCTION

The opinion below defies this Court's precedents on the right to stand trial only while competent—and in doing so, it deepens a divide among the circuits and state high courts. This petition asks this Court to reaffirm its precedents and resolve those conflicts.

In the middle of his federal death penalty trial, Brandon Council suffered a delusional break from reality: He demanded to subpoena God, and sat weeping, unresponsive, and muttering incoherently in the courtroom. In response, the District Court found that a bona fide doubt existed about Council's competence to stand trial. Under this Court's precedents, when such a doubt arises, a trial court must conduct "further inquiry" into the defendant's mental state. *Drope* v. *Missouri*, 420 U.S. 162, 180 (1975). That inquiry must involve an "adequate hearing" at which the court considers evidence that is "dispositive on the issue of [the defendant's] competence." *Pate* v. *Robinson*, 383

U.S. 375, 386 (1966). At such a hearing, "psychiatric evidence is brought to bear on the question of the defendant's mental condition." *Medina* v. *California*, 505 U.S. 437, 450 (1992).

Nothing like that happened here. Instead, on the next trial day, defense counsel handed up an eleven-line statement claiming, without explanation, that Council satisfied the legal understanding of competency: he understood the proceedings and could communicate with his lawyers. The District Court then declared Council fit to continue. That was the beginning and end of the "hearing."

In approving that approach, the Fourth Circuit issued an opinion in sharp conflict with this Court's precedents. This Court has held that the Due Process Clause requires an "adequate hearing" at which the trial court considers "dispositive" "evidence" on a criminal defendant's competency. *Pate*, 383 U.S. at 386. But the panel held that while *Pate* requires a competency hearing, it has nothing to say about the "nature and characteristics" of a competency hearing. Pet. App. 12a.

This Court has also explained that competence is the "foundation[]" upon which the right to effective assistance of counsel rests, because an incompetent defendant cannot properly communicate with his lawyer in the first place. *Cooper* v. *Oklahoma*, 517 U.S. 348, 354 (1996). But the panel held that a trial court must "balanc[e]" a defendant's right to competence *against* his right to counsel. Pet. App. 10a. Those errant rules now govern the Fourth Circuit, and they cry out for this Court's review.

What is more, the panel opinion creates and deepens splits among circuits and state high courts. The Second, Fifth, and Eighth Circuits, and the West Virginia Supreme Court, have confirmed that when a bona fide doubt arises about a defendant's competence, the trial court must conduct a *meaningful* and *adequate* competence inquiry, in which a court must consider and gather evidence sufficient to actually determine whether a defendant is competent. The Kansas Supreme Court—and now the Fourth Circuit—hold that a trial court may satisfy the Due Process Clause simply by holding something labelled a "competency hearing," even if the hearing itself is contentless.

And by holding that a trial court may defer to an attorney's mere assertion that his client is competent, the Fourth Circuit created a split with the Ninth and Sixth Circuits. Each of those circuits have held that a trial court's constitutional duty to resolve doubts about a defendant's competence applies *regardless* of whether the defendant's attorney chooses to press the issue. Only this Court can resolve these divides over the meaning of its own precedent.

Finally, this case presents a clean vehicle to address important constitutional questions. The panel issued a categorical holding: In the Fourth Circuit, the Due Process Clause imposes no standards on a trial court's competence inquiry. This Court can and should reiterate what its own precedents should make clear: The Due Process Clause requires an "adequate hearing" at which the trial court considers "evidence" which is "dispositive on the issue." *Pate*, 383 U.S. at 386.

The panel was grievously wrong to hold otherwise—in a capital case, no less. The petition should be granted.

STATEMENT OF THE CASE

In 2017, the government arrested and indicted Brandon Council, alleging that he had robbed a bank in Conway, South Carolina, and fatally shot two employees. Pet. App. 3a-4a. The Government notified the District Court that it intended to seek the death penalty. *Id.*

Troubling signs quickly emerged, however, that Council might not be competent to stand trial. In his first interview with the FBI, Council invoked "demons" that "control the people's minds," and said that he was "demonic" at the time of the robbery. 1 Joint Appendix 376-377, *Council*, Nos. 20-1, 21-8, Dkt. 122 (4th Cir. Feb. 28, 2023). Council's court-appointed attorneys similarly wrote in their CJA vouchers—nearly 18 months before trial—that Council was "crazy" and that he spoke of "demons." 3 *id.* at 1025.

Recognizing its "independent duty" to ensure that Council was competent to stand trial, the District Court told Council's lawyers that it was considering ordering an expert to evaluate Council's mental state. 2 *id.* at 972. Believing the government would use information from such an evaluation to help obtain a death sentence, Council's lawyers resisted. *See id.* at 976-977. They filed an "Opposition" to an independent expert evaluation, arguing that the government could use an independent expert report as

"ammunition * * * to secure Mr. Council's execution." 1 *id.* at 196-208. Defense counsel then filed a one-page ex parte declaration stating that a psychologist had evaluated Council and found him competent. *Id.* at 215. A different defense psychiatrist, however, believed Council might suffer from bipolar disorder, and several family members had been diagnosed with similar mental illnesses. 2 *id.* at 895-908. But the District Court did not press the issue further. And so the trial commenced.

After the government rested its case, Council unexpectedly asked to testify, and his attorneys met twice with him, once in the jail for 90 minutes. 10 *id.* at 4770-71. During those meetings, the attorneys observed that Council was "delusional" and that he had suffered "a break from reality." *Id.* at 4771. He believed that "God is somehow responsible" for the bank employees' deaths and that he was "being persecuted" because he could "not subpoena God." *Id.* at 4772-73. Late that night, around 11:00 P.M., Council's attorneys filed a motion stating that Council was "unable to understand the nature and consequences of the proceedings against him and is not assisting properly in his defense." Pet. App. 55a. The motion asked the District Court to "suspend court proceedings" "so that a competency evaluation can be completed." Pet. App. 56a.

The next morning, in an ex parte meeting with the District Court, Council's attorneys explained the bizarre behavior they had observed from their client.

The District Court tried to speak with Council, "who was seated, unresponsive to the court's questions, and crying." Pet. App. 9a. Then, he began muttering about God being responsible for the murders. 10 Joint Appendix at 4777. Based on that meeting, the District Court summoned the prosecutor and explained that there was "reasonable cause to order an examination" of Council's competency. *Id.* at 4754.

When a trial court finds reasonable cause to examine a criminal defendant's competence to stand trial, the Due Process Clause requires the court to independently conduct "further inquiry" into the defendant's mental state. *See Drope*, 420 U.S. at 180-181; *Pate*, 383 U.S. at 378. That inquiry must involve an "adequate hearing" at which the trial court considers evidence that is "dispositive on the issue of [the defendant's] competence." *Id.* at 386. At such a hearing, "psychiatric evidence is brought to bear on the question of the defendant's mental condition." *Medina*, 505 U.S. at 450.

The District Court thus informed both parties that it had "tentatively contacted" an independent expert who could conduct a full evaluation and prepare a report within a week. 10 Joint Appendix at 4755. The prosecutor agreed that this was the required procedure. *Id.* at 4752. But with a jury already empaneled, the District Court wanted the matter to be resolved "quicker," so it asked the parties whether they could provide an expert who "can do it on a shorter time." *Id.* at 4756-57.

Two days later, on Sunday, Council's attorneys emailed the court a two-paragraph letter signed by two experts they had retained. Pet. App. 58a. The letter stated that the experts had interviewed Council. *Id.* It then recited the legal definition of competence, stating that Council was "able to understand the nature and consequences of the proceedings against him and to assist properly in his defense." *Id.* The letter did not give any details of the interview. It did not provide any medical reasons for the experts' apparent conclusion. It did not suggest that they had performed any tests or observed any symptoms. It offered no explanation for the bizarre behavior that had occurred just a few days earlier—indeed, it offered nothing to suggest that the experts were even aware of that behavior.

On Monday morning, the District Court held what it called a "competency hearing." 10 Joint Appendix at 4781. In a brief exchange that took up a single transcript page in substance, Council's attorneys handed up a paper copy of the e-mailed letter and stated without elaboration that they "no longer believe that Mr. Council is incompetent." *Id.* The government observed that it did not have access "to any of the underlying documents or test results that were conducted," but that it "d[id] not oppose" moving forward with the trial if the District Court so chose. *Id.* at 4781-82. The District Court did not speak with Council. It did not seek the testimony of the two experts who signed the letter. It did not request the "underlying documents

or test results" the Government explained it lacked. *Id.* at 4781. Instead, without any further inquiry, the District Court stated that Council "is competent," and resumed trial. *Id.* at 4782. Soon after, the jury found Council guilty and sentenced him to death.

Council appealed. With the help of his appellate attorneys, Council explained that the Insanity Defense Reform Act (IDRA), 18 U.S.C. §§ 4241, 4247, and the Due Process Clause require "[a]n 'adequate hearing' on competency," which means "a 'hearing' sufficient to equip the court to reach an independent, informed determination about the defendant's competency." Opening Br. 85-86, *Council*, Nos. 20-1, 21-8, Dkt. 138 (4th Cir. Mar. 27, 2023) (quoting *Pate*, 383 U.S. at 385-386). This Court's Due Process precedents, Council explained, require "more than a *pro forma* courtroom colloquy where the court rubberstamps an expert's opinion, even if neither party asks for more." *Id.* at 85. Thus, the District Court "erred in not requiring additional information so it could make its own independent [and] informed determination of Council's competency." Pet. App. 11a (quoting Opening Br. 85-86). And the District Court had improperly "deferr[ed]" to Council's trial attorneys, "abdicat[ing] its independent obligation" to resolve doubts about Council's competence. Opening Br. at 36, 70.

The Fourth Circuit held that the District Court's competence inquiry was constitutional. In reaching that conclusion, the panel established two new—and

troubling—principles governing competency inquiries in that circuit.

First, the panel acknowledged that this Court's Due Process Clause precedents entitled Council "to a competency hearing," but it concluded that those precedents imposed no standards whatsoever on "the nature and characteristics of such a hearing." Pet. App. 12a. In the panel's view, the District Court had "convened" what it had called a "competency hearing," and that exchange between the court and counsel, regardless of its content, was constitutionally sufficient. Pet. App. 9a, 11a (alterations omitted). The panel opined that "no * * * authority" required the District Court to seek any "additional information" that Council explained was needed to make an "informed determination." *Id.*[1]

Second, the panel concluded that the District Court was not required to conduct further inquiry into Council's mental state where "defense counsel insisted their client was competent to proceed." Pet. App. 12a (quotation marks omitted). This was so even though defense counsel's position on competency was prompted by concerns unrelated to Council's mental state; according to the panel, Council's "right to be

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[1] The panel observed in a footnote that Council had developed no "separate argument" about whether "the Constitution sometimes requires *more* than the statute." Pet. App. 6a-7a n.2 (emphasis added). That is correct; Council argued to the panel that IDRA and the Due Process Clause were necessarily coterminous. *See, e.g.*, Opening Br. at 44.

tried only if competent" had to be "balance[d]" *against* other constitutional rights, including the right to effective assistance of counsel. Pet. App. 10a-11a.

Council sought rehearing en banc, which the Fourth Circuit denied. This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION DEPARTS FROM THIS COURT'S DUE PROCESS PRECEDENTS.

A. This Court's Precedents Require An Adequate Competency Hearing, Not An Empty One.

The Fourth Circuit held that when a bona fide doubt arises as to a defendant's competence, the Due Process Clause entitles the defendant "to a competency hearing," but does not impose any standards on the "nature and characteristics of such a hearing." Pet. App. 12a. That holding contradicts this Court's precedents, flouts the historical roots of the competency right, and blinks common sense.

To start, this Court's precedents *do* impose constitutional standards on the "nature and characteristics" of the trial court's competence inquiry. Such an inquiry must be "adequate to protect a defendant's right not to be tried or convicted while incompetent." *Drope*, 420 U.S. at 172. It must be "aimed at establishing whether [the defendant] [i]s in fact competent" to stand trial. *Id.* at 183. And if the "facts presented to the trial court * * * could not properly have been deemed dispositive," then the defendant has not

"receive[d] an adequate hearing on his competence." *Pate*, 383 U.S. at 386.

Those holdings make clear that Due Process requires more than a mere court appearance nominally related to the defendant's mental state. Take, for example, *Pate*. There, the defendant's competence was extensively discussed during trial court proceedings. *See id.* at 378-384. Several witnesses testified to the court about the defendant's mental state, and the court considered the opinion of at least one expert. *Id.* And Pate's attorney stipulated that an expert would testify that the defendant "knew the nature of the charges against him and was able to cooperate with counsel." *Id.* at 383.

But this Court still held that the defendant's Due Process rights were violated—not because the court never "heard" any evidence on competence, but because the evidence the court *did* hear "could not properly have been deemed dispositive on the issue." *Id.* at 384, 386. Thus, this Court reasoned, the defendant had "fail[ed] to receive an *adequate* hearing on his competence to stand trial." *Id.* at 386 (emphasis added). In Pate's particular circumstances, Illinois law prescribed a "sanity hearing" as the way for a court to further examine a defendant's mental state. *Id.* at 385. The *constitutional* violation, however, stemmed from the trial court's failure to conduct an "adequate" competence inquiry. *Id.* at 386.

Similarly, in *Drope*, the trial court heard significant evidence that was "possibly relevant to petitioner's mental condition." 420 U.S. at 174. This included psychiatric evaluations and the testimony of

the defendant's wife. *Id.* at 164-166 & n.1, 169. But this Court held that the evidence in front of the trial court was not sufficient to "determine [the defendant's] fitness to proceed," and thus that the court was constitutionally obligated to investigate further. *Id.* at 180. The constitutional issue arose not from the lack of *any* competence inquiry, but rather from "the failure to make *further* inquiry" "in light of what was then known." *Id.* at 174-175 (emphasis added).

The panel's contrary view cannot be reconciled with *Pate* and *Drope*. The whole point of the "further inquiry" requirement is to ensure that a defendant is not "tried while legally incompetent." *Id.* at 173. But a contentless exchange does nothing to accomplish that. It blinks common sense to suggest that the Constitution entitles a defendant to an *empty* competency hearing. "The Constitution deals with substance, not shadows." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (quoting *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)). As one circuit explained shortly after *Pate* and *Drope* were decided, the right to "further inquiry" into competence necessarily "entails the right to an *adequate* or '*meaningful*' hearing." *Pedrero* v. *Wainwright*, 590 F.2d 1383, 1389 (5th Cir. 1979) (emphasis added) (citation omitted). That "constitutional duty" is the "direct consequence of the *Pate* right to a competency hearing." *Id.*

What is more, *all* courts agree that Due Process requires a meaningful competency hearing in an analogous—and substantively identical—context. When a trial court wrongly fails to hold any kind of competency hearing in the first instance, a potential remedy

on remand is a retrospective competency hearing—i.e., a hearing conducted after trial to determine whether the defendant was competent at the time of trial. In both *Pate* and *Drope*, the government asked this Court to remand for a "limited" retrospective competence inquiry. *Drope*, 420 U.S. at 174, 183; *Pate*, 383 U.S. at 387. But this Court explained that the competence inquiry on remand must involve a *meaningful* one, where the factfinder would "observe the subject of the[] inquiry," and "expert witnesses would have to testify." *Id.* at 387. Because of the "inherent difficulties" of conducting the necessary robust inquiry years after the trial, this Court ordered a new trial instead. *Drope*, 420 U.S. at 183; *Pate*, 383 U.S. at 387. Those holdings would make no sense if the Due Process Clause's "further inquiry" requirement were satisfied by a pro forma exchange. *See Drope*, 420 U.S. at 173.

Circuit courts roundly agree that under the Due Process Clause, retrospective competency hearings must be "meaningful"—i.e., based on facts that "permit[] an accurate assessment of the defendant's condition at the time of the original state proceedings." *See, e.g.*, *Reynolds* v. *Norris*, 86 F.3d 796, 802 (8th Cir. 1996) (citation omitted). Thus, for example, the factfinder must have "sufficient information upon which to base a reasonable psychiatric judgment." *Odle* v. *Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001). And a retrospective competence finding cannot be made where there is a "lack of contemporaneous medical evidence in the record regarding * * * competency at the

time of trial." *McGregor* v. *Gibson*, 248 F.3d 946, 963 (10th Cir. 2001) (en banc).[2]

If the Due Process Clause imposes such robust standards on a remedial post-trial competency hearing, it surely imposes the same standards on a hearing conducted *during trial*. After all, the whole point of a retrospective hearing is to "repair the damage" caused by the district court's refusal to hold a competency hearing in the first instance. *Moran* v. *Godinez*, 57 F.3d 690, 696 (9th Cir. 1994). So if a retrospective competency hearing must involve meaningful evidence—a premise that flows clearly from *Pate* and *Drope* and on which the circuits roundly agree—then surely the same goes for a pre- or mid-trial competency hearing.

The panel's standardless approach is also divorced from the historical roots of the competence right. As this Court has explained, the Due Process competence right is rooted in a centuries-old "common-law tradition[]." *Cooper*, 517 U.S. at 356. As part of that tradition, factfinders have been required to "diligently inquire" into a defendant's competence. *Id.* at 357 (citation omitted); *see, e.g.*, *King* v. *Frith*, 22 How. St. Tr.

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[2] *See also, e.g.*, *Moran* v. *Godinez*, 57 F.3d 690, 696 (9th Cir. 1994) (holding that a "retrospective" competence determination on remand must be "meaningful" and based on sufficient record evidence); *Watts* v. *Singletary*, 87 F.3d 1282, 1286-87 n.6 (11th Cir. 1996) (similar); *Cremeans* v. *Chapleau*, 62 F.3d 167, 169 (6th Cir. 1995) (same); *United States* v. *Renfroe*, 825 F.2d 763, 767-768 (3d Cir. 1987) (same); *Wheat* v. *Thigpen*, 793 F.2d 621, 630 (5th Cir. 1986) (same).

307, 311 (1790) (instructing the jury to "diligently inquire * * * whether John Frith, the now prisoner at the bar * * * be of sound mind and understanding or not"); *Queen* v. *Goode*, 7 Ad. & E. 536, 112 Eng. Rep. 572, 572 n.1 (K.B.1837) (instructing the jury to "diligently inquire, and true presentment make * * * whether John Goode * * * be insane or not"). That centuries-long tradition underpins this Court's holding that the Due Process clause entitles a defendant to an "adequate hearing on his competence." *Pate*, 383 U.S. at 386.

Here, the District Court's competence inquiry was anything but adequate. The court docketed a so-called "competency hearing"—which consisted of defense counsel handing up a printout of an emailed two-paragraph statement by two defense-selected experts, reciting the legal definition of competence and stating without further explanation that Council met it.[3] But a defendant's competence is a *legal* conclusion. Expert testimony helps the judge because it is *substantive*; it "address[es] * * * medical facts bearing specifically on the issue of [the defendant's] competence to stand trial." *Drope*, 420 U.S. at 176. Remember that, in *Pate*, the defendant's attorney likewise stipulated that an expert would testify that the defendant "knew the

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[3] Indeed, the email itself should have raised the court's suspicions; it did not address Council's recent break from reality, nor did it suggest that the experts even *knew* about that episode. *See Coleman* v. *Saffle*, 912 F.2d 1217, 1227 (10th Cir. 1990) (a "trial court should [not] merely accept a psychiatrist's conclusions without meaningful inquiry where there is doubt as to the reliability of those conclusions, or the completeness and forthrightness of the information conveyed to the court").

nature of the charges against him and was able to cooperate with counsel." 383 U.S. at 383. This Court found that statement insufficient because—standing alone—it could not "properly have been deemed dispositive on the issue of [the defendant's] competence." *Id.* at 385-386. The Court thus required "further inquiry." *Drope*, 420 U.S. at 180.

But here, no further inquiry came. The court heard no testimony. It asked no questions. No witnesses were called. Not a single fact related to Council's competence was discussed. If that is constitutionally sufficient, *Pate* and *Drope* would have come out differently if the trial judges had merely had the presence of mind to announce that the deficient process they held there was a "hearing."

The Fourth Circuit therefore erred in holding that the Due Process Clause did not require the District Court to have gathered "additional information" to "make its own independent and informed determination of Council's competency." Pet. App. 11a (quotation marks and alterations omitted).

B. A Trial Court May Not Defer To A Defense Attorney's Opposition To A Competency Inquiry.

The panel also held that no additional inquiry was required because Council's attorneys "insisted their client was competent to proceed." Pet. App. 12a (quotation marks and citation omitted). The panel apparently believed that the District Court was right to defer to the assertions of Council's attorneys because the District Court had to "balanc[e]" Council's competence

right *against* his "right[] to have the effective assistance of counsel." Pet. App. 10a-11a. That approach fundamentally misunderstands the constitutional principles at play.

To start, competence is a *prerequisite* to a defendant's ability to exercise the right to effective assistance of counsel—so the panel was wrong to say that a trial court can curtail its competence inquiry in order to "balance" one right against the other. Competence is the "rudimentary" trial right, "for upon it depends" all other trial rights—including the right to effective assistance of counsel. *Cooper*, 517 U.S. at 354 (citation omitted). An incompetent defendant lacks the "ability to consult with his lawyer with a reasonable degree of rational understanding." *Id.* (quoting *Dusky* v. *United States*, 362 U.S. 402, 402 (1960) (per curiam). Thus, an incompetent defendant cannot even *exercise* his right to effective assistance of counsel because he cannot rationally direct his attorney on the "myriad * * * decisions concerning the course of his defense." *Id.*

So where a defendant's competence is in doubt, his access to the right to counsel is likewise in doubt. *Id.* That is why a court must authoritatively resolve any doubt about a defendant's competence before criminal proceedings can move forward—because if a defendant might be incompetent, then it is "impossible to say" whether his attorney can properly make *any* litigation decision on his behalf. *Medina*, 505 U.S. at 450. Thus, it is "contradictory" to suggest that a court can declare that a potentially incompetent defendant is competent simply because his attorney declines to press the issue. *Pate*, 383 U.S. at 384. And it makes

little sense for a court to uncritically defer to an attorney's representations and strategic choices when her client might not be able to competently approve those choices in the first place. What is more, for better or worse, an attorney often has strong incentives to avoid arguing that her client is incompetent. If the court finds a defendant incompetent, he may be forcibly institutionalized. *See, e.g.*, *United States* v. *White*, 887 F.2d 705, 709 (6th Cir. 1989).

For all these reasons, the Due Process Clause imposes on the *court* the independent duty to determine competence—even where the defendant's attorney insists otherwise. In conducting that independent inquiry, a court may consider an attorney's views on her client's mental state. *See, e.g.*, *Drope*, 420 U.S. at 177 n.13. An attorney may be her client's "closest contact," *id.* (quoting *Pate*, 383 U.S. at 391), so her observations about her client's mental state are no doubt "probative evidence," *Medina*, 505 U.S. at 450. But there is a difference between treating an attorney's observations as probative evidence and "accept[ing] without question" her bare assertions. *Drope*, 420 U.S. at 177 n.13. When a court treats a defense attorney's unsupported view as dispositive, it effectively elevates a witness to the role of factfinder, abdicating its constitutional duty to conduct an independent competence inquiry.

That is precisely what happened here. At the so-called competency hearing, Council's trial attorneys provided no "probative evidence" about their client's mental state, *see Medina*, 505 U.S. at 450—they simply endorsed their experts' barebones conclusion that their client was competent without further explanation from anyone. And the District Court had every

reason to be skeptical of that assertion: Just days earlier, the same attorneys had shown the court that their client had suffered a "delusional" breakdown. 10 Joint Appendix at 4771-73. There was no indication the lawyers had even seen Council between then and the Monday morning court appearance. Yet the District Court did nothing to investigate the attorneys' unexplained 180-degree turn.

Moreover, the court knew the attorneys had other reasons for resisting a real competency inquiry: Throughout the proceedings, they had vigorously opposed a thorough independent competency evaluation because they feared it would yield evidence the government could use during sentencing. But the District Court "accept[ed]" their assertions "without question," considered no further evidence, and declared Council competent. *Drope*, 420 U.S. at 177 n.13.

Due process requires more. The panel was wrong to hold otherwise.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF SEVERAL CIRCUIT COURTS AND STATE HIGH COURTS.

A. The Fourth Circuit's Decision Deepens An Existing Conflict On Whether A Trial Court Must Make An Adequate Inquiry Into A Defendant's Competence.

The Fourth Circuit's decision deepened a split on a trial court's duty to hold a "further inquiry" with "procedures adequate" to safeguard the competence right.

Drope, 420 U.S. at 172, 175; *Pate*, 383 U.S. at 378, 385. The majority position—followed by the Second, Fifth, and Eighth Circuits, and by the West Virginia Supreme Court—is that when a bona fide doubt arises about a defendant's competence, the trial court must conduct a *meaningful* and *adequate* competence inquiry. Under that standard, a court must consider and gather evidence sufficient to actually determine whether a defendant is competent; merely docketing a hearing related to competence—without more—is insufficient. The minority position—followed by the Kansas Supreme Court and, now, the Fourth Circuit—is that a trial court may satisfy the Due Process Clause's "further inquiry" requirement simply by holding a so-called "competency hearing" of any kind, even if the hearing itself is contentless.

1. The Second Circuit holds that the Due Process "further inquiry" requirement is satisfied not just by *any* hearing on competence, but by a hearing at which there is "[]adequate development of material facts." *Matusiak* v. *Kelly*, 786 F.2d 536, 544 (2d Cir. 1986). In *Matusiak*, the defendant demonstrated signs of incompetence throughout his criminal proceedings. *Id.* at 527-538. The Second Circuit held that the defendant's behavior necessitated "further inquiry" by the trial court into the defendant's mental state. *Id.* at 545. The trial court had held several hearings at which the defendant's competence was discussed—but the Second Circuit found those hearings constitutionally "inadequate" because "the material facts as to [the defendant's] competence to proceed were not adequately developed." *Id.* at 537-539, 544-545. "The [trial] court neither sought out nor received the

necessary affirmative showing" that the defendant was competent. *Id.* at 545. Thus, the trial court's competency inquiry was not "consistent with due process." *Id.*

The Fifth Circuit agrees that when a bona fide doubt arises about a defendant's competence, Due Process requires more than *any* hearing—rather, the trial court "must conduct an *adequate* hearing." *Holmes* v. *King*, 709 F.2d 965, 967 (5th Cir. 1983) (emphasis added). In other words, the trial court must commence a "fact finding process" that involves "procedures and evidence sufficient to permit a trier of fact reasonably to assess an accused's competency against prevailing medical and legal standards." *Id.* (quotation marks omitted). The Fifth Circuit thus upheld a trial court's competence inquiry only because it met those stringent requirements—namely, the trial court considered testimony from several "doctors," reviewed a state mental health commission's investigative report, examined the defendant's "history of mental illness" and behavior at trial, and questioned the defendant himself. *Id.* at 966-968.

The Eighth Circuit similarly holds that Due Process requires a hearing that is "adequate to develop the facts relating to [the defendant's] competency." *Davis* v. *Wyrick*, 766 F.2d 1197, 1201 (8th Cir. 1985). Thus, the Eighth Circuit held that a trial court complied with the Due Process Clause by holding a hearing at which "[t]hree doctors gave testimony." *Id.* The doctors also submitted "reports on the issue," which "fully explored" the defendant's symptoms and medical history. *Id.*

The West Virginia Supreme Court also holds that when a defendant's competence is in doubt, it is not enough for a trial court to simply "[hold] a competency hearing" if the hearing itself is "deficient." *Morris* v. *Painter*, 567 S.E.2d 916, 918 (W. Va. 2002). In *Morris*, the defendant showed signs of incompetence leading up to his trial. *Id.* The trial court "held a competency hearing," but the defendant's psychiatrist was "not able to attend." *Id.* The West Virginia Supreme Court found that the psychiatrist's attendance was "critical," and thus held that the defendant's Due Process rights were violated because the "competency hearing was deficient." *Id.*

2. In contrast, the Kansas Supreme Court—and, now, the Fourth Circuit—hold that Due Process merely requires a trial court to docket a nominally labelled "competency hearing," but it imposes no standards on the content of that hearing.

In the decision below, Council argued to the Fourth Circuit that the trial judge "erred in not requiring additional information so it could make its own independent and informed determination of Council's competency." Pet. App. 11a (quotation marks and alteration omitted). The Fourth Circuit decided that *Pate* "impose[d] no such requirement" to gather adequate information, and instead was only "about whether a defendant is entitled to a competency hearing, not the nature and characteristics of such a hearing." Pet. App. 12a. It therefore dismissed Council's argument that the district court was constitutionally obligated to gather and consider the information needed to make an informed competence determination. *Id.*

The Kansas Supreme Court also holds that a trial court satisfies Due Process simply by holding a "competency hearing" at which the defendant may participate, regardless of how "thorough[]" the court's inquiry at that hearing is. *State* v. *Woods*, 348 P.3d 583, 591 (Kan. 2015). In *Woods*, the defendant was a diagnosed schizophrenic, and the trial court held a competency hearing to assess his fitness to stand trial. *Id.* at 588-591. At the time of his hearing, the defendant was not taking his medication, and he had instructed his trial attorney not to "rais[e] a mental disease or defect defense." *Id.* at 590. Thus, the defendant told the court at the hearing that he "believed himself to be competent," and his attorney provided no evidence to the contrary. *Id.* at 591. The court found him competent and he was convicted at trial. *Id.* at 588. Later—after resuming his medication—the defendant argued on appeal that the trial court should have conducted a "more thorough competency hearing." *Id.* at 590. The Kansas Supreme Court held that Due Process entitled the defendant to nothing more than a "competency hearing" at which he had an "opportunity to * * * address" his mental state. *Id.* at 591. Any argument that "the district court should have done more at the hearing," the court reasoned, does not implicate a "procedural due process violation." *Id.*

B. The Fourth Circuit's Decision Creates A Circuit Split Over Whether A Trial Court May Defer To An Attorney's Bare Assertion That His Client Is Competent.

The panel also held that this Court's precedents requiring "further inquiry" into a defendant's

competence do not apply here because Council's trial attorneys "insisted their client was competent to proceed." Pet. App. 12a (quotation marks and citation omitted). That holding creates a split with the Ninth and Sixth Circuits, each of which have held that a trial court's constitutional duty to resolve doubts about a defendant's competence applies regardless of whether the defendant's attorney chooses to press the issue.

The Ninth Circuit has held that a trial judge has an "independent duty" to "meaningfully determine" a defendant's competence whenever "the evidence raises a 'bona fide doubt' " about his capacity to stand trial, even if the defendant's attorney does not argue that his client is incompetent. *Maxwell* v. *Roe*, 606 F.3d 561, 574, 576 (9th Cir. 2010) (quoting *Pate*, 383 U.S. at 385). In *Maxwell*, the defendant showed signs of incompetence throughout criminal proceedings, but his trial attorney "did not declare that he had a doubt about [the defendant's] competency," and "did not request a competency hearing." *Id.* at 574. Relying in part on those litigation decisions, the trial court chose not to conduct any "further inquiry" into the defendant's competence—instead, it proceeded to trial and the defendant was convicted. *Id.* at 566-568.

The Ninth Circuit held that the trial court had violated the Due Process Clause by "inappropriately attribut[ing] great weight" to the defense attorney's actions. *Id.* at 574. It explained that this Court's precedents "make clear" that "a trial judge has an independent duty" to resolve doubts about a defendant's competence—even where defense counsel does not press the issue. *Id.* Of course, defense counsel's views about his client's mental state are relevant to that

independent judicial inquiry, but the Ninth Circuit reasoned that an attorney's mere "failure to raise" the issue "does not establish" the defendant's competence. *Id.* (citation omitted); *see also Odle*, 238 F.3d at 1087 (a trial judge is constitutionally required to conduct a meaningful inquiry into a defendant's competence, even "if defense counsel does not ask for" such an inquiry); *United States* v. *Fernandez*, 388 F.3d 1199, 1251 (9th Cir. 2004) ("Failure of the defense attorney to ask for a competency hearing may not be considered dispositive evidence of the defendant's competency.").

Similarly, the Sixth Circuit has held that even when defense counsel "represent[s] that [the defendant is] able to assist in his own defense," a district court still has a constitutional "duty" to independently evaluate the defendant's competence. *White*, 887 F.2d at 707, 709. That duty "is in no way dependent upon the tactical decisions of the parties." *Id.* at 709. Thus, the Sixth Circuit held that a district court was right to conduct an independent competence inquiry even where the defendant's attorney "represented that [the defendant] was able to assist in his own defense" and "failed to provide testimony" to show his client's incompetence. *Id.* at 707.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO DECIDE IMPORTANT CONSTITUTIONAL QUESTIONS

1. The competence right is "foundational" to a defendant's ability to exercise all other "rights deemed essential to a fair trial." *Cooper*, 517 U.S. at 354. An incompetent defendant cannot understand his proceedings or participate in his defense—and that

means he cannot have the fair trial to which he is constitutionally entitled. *Id.* at 364. "[T]he consequences of an erroneous determination of competency" are therefore "dire." *Id.* And the failure to safeguard competency "threatens" the "fundamental component of our criminal justice system—the basic fairness of the trial itself." *Id.* at 364 (citation omitted).

It is critical, then, that the Supreme Court guard against departures from its foundational holding—rooted in hundreds of years of common-law tradition—that a potentially incompetent defendant has the right to a meaningful independent inquiry into his competence. That requirement seems common-sense and straightforward, but it has nevertheless divided circuit and state courts alike. Tens of thousands of competency hearings are held every year, in hundreds of state and federal trial courts across the country; only this Court can definitively resolve the divide. *See generally* Nathaniel P. Morris et al., *Estimating Annual Numbers of Competency to Stand Trial Evaluations Across the United States*, 49 J. Am. Acad. of Psychiatry & L. 530 (Aug. 10, 2021).

The stakes are especially high in capital cases like this one. It defies the "solemn obligation[s] of a civilized society" to execute a man that does not "comprehend the nature of the penalty." *Ford* v. *Wainwright*, 477 U.S. 399, 417 (1986) (plurality). Thus, in any "proceeding[] leading to the execution of an accused," the factfinder must have "all possible relevant information about the individual defendant whose fate it must determine." *Id.* at 413 (citation omitted). Yet an incompetent defendant is in no position to provide the court with the information it needs to decide his fate—

he is, after all, incapable of making the "myriad * * * decisions concerning the course of his defense." *Cooper*, 517 U.S. at 364.

This case is paradigmatic. Council's likely best argument to save his life was the correct one: He is incompetent, and therefore constitutionally ineligible for trial. But the District Court refused to meaningfully examine Council's mental state. The result: a death sentence, issued following the trial of a man incapable of comprehending the proceeding at which his fate was decided.

2. This case also presents a clean vehicle. The Due Process Clause arguments were ventilated below, and the panel passed on them. Indeed, the panel issued a categorical legal ruling that is easy for this Court to review: It held that this Court's Due Process Clause precedents impose *no standards whatsoever* on the inquiry a trial court must conduct when it identifies a bona fide doubt as to a defendant's competence. This Court thus can simply reverse and remand for the panel to determine in the first instance whether an "adequate hearing" occurred here.

And the answer would be straightforward. The District Court considered no substantive evidence whatsoever related to Council's mental state. In a competency hearing involving a capital defendant who showed serious signs of incompetence, the District Court should have taken care to ensure that the defendant was competent to proceed. Instead, it lowered the floor for that determination.

This Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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