No. 23-953

In the Supreme Court of the United States

BRANDON MICHAEL COUNCIL, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the district court employed adequate procedures when it convened a competency hearing and determined that petitioner was competent to stand trial.

2. Whether the district court improperly deferred to the assessment of petitioner's counsel that petitioner was competent to stand trial.

ADDITIONAL RELATED PROCEEDING

United States District Court (D.S.C.):

United States v. *Council*, No. 17-cr-866 (Oct. 7, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 77 F.4th 240.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2023. A petition for rehearing was denied on September 26, 2023 (Pet. App. 48a-49a). On December 15, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 23, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was

convicted of bank robbery resulting in death, in violation of 18 U.S.C. 2113(a) and (e); and murder resulting from the use or carrying of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (2012), 18 U.S.C. 924(c)(1)(A)(iii) and (j)(1). Judgment 1. The court sentenced petitioner to death on each count. Judgment 2. The court of appeals affirmed. Pet. App. 1a-47a.

1. On August 21, 2017, petitioner robbed the CresCom Bank in Conway, South Carolina, and murdered two of the bank's employees. Pet. App. 3a-4a. Petitioner entered the bank with a .22-caliber pistol under his shirt, approached bank teller Donna Major at the counter, and asked her to cash a check. Gov't C.A. Br. 9. Without any warning or any verbal or written demand for money, he pulled out the gun and shot Major multiple times. *Ibid.* Petitioner then ran into the office of the bank manager, Kathryn Skeen, who was hiding under a desk. *Id.* at 1, 9. He shot her multiple times, took keys from her pocketbook, and returned to the counter to steal cash. *Id.* at 9-10; C.A. App. 380. Petitioner stole $15,294 from the registers, took both victims' wallets, and fled in Skeen's car. Gov't C.A. Br. 10. Major and Skeen died at the scene. *Ibid.*

Over the next two days, petitioner used the stolen cash to purchase ammunition, jewelry, and a Mercedes-Benz, and he spent time partying. Gov't C.A. Br. 11-13. When petitioner tried to rent a room at a motel in Greenville, North Carolina, the front-desk attendant recognized him from a news report and reported details about his vehicle to police. *Id.* at 13. Police located petitioner at another motel and arrested him. *Id.* at 14. After waiving his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), petitioner confessed to robbing CresCom

Bank, murdering Major and Skeen, and robbing a Food Lion and a BB&T Bank in the days leading up to the CresCom robbery. Gov't C.A. Br. 14-15.

2. a. A grand jury in the District of South Carolina returned an indictment charging petitioner with bank robbery resulting in death, in violation of 18 U.S.C. 2113(a) and (e); murder resulting from the use or carrying of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (2012), 18 U.S.C. 924(c)(1)(A)(iii) and (j)(1); and possessing a firearm following a felony conviction, in violation of 18 U.S.C. 924(a)(2) (2012), 18 U.S.C. 922(g)(1) and 924(e). Indictment 2-4. The government later dismissed the felon-in-possession count. Judgment 1.

Congress has authorized death as a permissible punishment for violations of Section 2113 resulting in death and for violations of Section 924(j)(1). See 18 U.S.C. 924(j)(1), 2113(e). The government filed a notice of its intent to seek the death penalty for both counts. Pet. App. 4a; C.A. App. 138-143.

b. Before an April 6, 2018 pretrial conference, the district court ordered the parties to "be prepared to discuss the Court's consideration of a[n] [18 U.S.C.] 4241 competency evaluation." C.A. App. 10. Section 4241 requires a federal district court to grant a motion by either party for a competency hearing, or to order such a hearing on its own motion, if it determines that "there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. 4241(a). At the pretrial conference, defense counsel assured the court that they were

"aware of [their] duties to have [petitioner] evaluated through appropriate mental health professionals" but stated that they did not believe there was any reason to discuss competency at that time. C.A. App. 968. Defense counsel requested to have until June 1, 2018, when they would either request a competency evaluation or submit a declaration confirming that they did not believe an evaluation was warranted. *Ibid.*

The district court explained that it had raised the issue because, in the court's view, a few statements in the affidavit in support of the government's criminal complaint might raise questions about petitioner's competency: Petitioner had told the Federal Bureau of Investigation that "he was desperate, needed money, and he knew he was going to shoot someone"; that "he knew he was going to hurt somebody that day"; and "that he did not deserve to live." C.A. App. 972.[1] Defense counsel reassured the court that they would be engaging experts to review petitioner's background and mental health. *Id.* at 972-973. Defense counsel requested that the court allow them time to complete their work before ordering a competency hearing that would give the government access to information about petitioner's mental health. *Id.* at 976-979; see Pet. App. 7a.

A few days after the pretrial conference, defense counsel submitted a declaration attesting to petitioner's competency to stand trial. C.A. App. 215. Defense counsel stated that, "[t]o date, [petitioner] has been appropriately cooperative with counsel," "has present ability to consult with counsel to a reasonable degree of ra-

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[1] During an ex parte portion of the pretrial conference, the district court additionally noted for defense counsel that it had noticed a reference to "crazy" in an October 2017 voucher by one of petitioner's attorneys. C.A. App. 1025; see Pet. 5.

tional understanding, and has a rational and factual understanding of the proceedings against him." *Ibid.* Defense counsel added that "[t]o make doubly sure [petitioner] is competent," they had a board-certified forensic psychologist, Dr. Geoffrey McKee, conduct a competency evaluation of petitioner. *Ibid.* Defense counsel explained that Dr. McKee determined that petitioner was competent to stand trial. *Ibid.*

On April 30, 2018, the district court granted petitioner's request to forgo a pretrial competency evaluation. C.A. App. 216-219. It explained that, at the pretrial conference, it had—"out of an abundance of caution" and to avoid a last-minute competency adjudication—expressed a concern about whether competency would be an issue in petitioner's case. *Id.* at 216; see *id.* at 219 n.3. The court observed that since that time, both parties had represented that an evaluation was unnecessary; defense counsel had submitted a declaration attesting to a forensic psychologist's opinion that petitioner was competent to stand trial; and the court had neither observed nor been informed of any unusual behavior. *Id.* at 217-219. Accordingly, based on the record and the submissions of counsel, the court determined that it "d[id] not have reasonable cause under 18 U.S.C. § 4241(a) to doubt [petitioner's] mental competency to stand trial." *Id.* at 219.

c. More than sixteen months passed—including trial preparation, pretrial hearings, jury selection, and the presentation of the government's entire case-in-chief—without any further questions about petitioner's competency. On Thursday, September 19, 2019, after the government rested, the district court advised petitioner of his right to testify and called a brief recess. C.A. App. 4739-4740. Once proceedings resumed, defense counsel

requested a further recess because petitioner had just informed them that he wanted to testify—which was an unexpected development. Pet. App. 7a; C.A. App. 4741. The court adjourned the proceedings for the day. Pet. App. 7a-8a; C.A. App. 4741-4742.

That evening, defense counsel moved for a continuance until Monday, September 23, to evaluate petitioner's competency. Pet. App. 8a; C.A. App. 2176-2182. The request stated that defense counsel had contacted an expert who could conduct an evaluation the next day. C.A. App. 2181.

On Friday, September 20, the district court held a hearing on the motion for a continuance. Pet. App. 8a. During an ex parte portion of the hearing, defense counsel told the court that after petitioner decided to testify, "[h]e was not able to stay on topic"; he "ha[d] adopted" "irrational" views about "what th[e] jury would accept"; he did not understand that the judge would "determine what" testimony "is relevant"; and "[h]e d[id] not seem to grasp" that he could not necessarily "say whatever he want[ed] * * * on the witness stand." C.A. App. 4771.[2] Defense counsel explained that petitioner wanted to testify "that even in firing the weapon he did not kill [the victims] because only God can give life and only God can give death and, therefore, God is somehow responsible for that." *Id.* at 4772. Defense counsel also stated that petitioner would likely say that "[t]he reason I'm being * * * prosecuted" is "because you can't subpoena God" and that "[a] gun can kill a person. A gun cannot decide a person's life or death. It is all God's

[2] The district court later unsealed the transcript of that hearing, as well as various other materials related to petitioner's competency claim. See D. Ct. Doc. 935 (Nov. 23, 2021); D. Ct. Doc. 937 (Feb. 14, 2022).

decision." *Id.* at 4773. Defense counsel informed the court that they had two doctors ready to evaluate petitioner, one of whom already had a relationship with petitioner. *Id.* at 4748, 4753. During the hearing, petitioner refused to answer questions posed by the court. *Id.* at 4774-4775.

When the government returned to the hearing, the district court stated that there was reasonable cause to order a competency hearing and informed the parties that it had contacted Dr. James Ballenger, who would be able to see petitioner over the weekend. Pet. App. 9a; C.A. App. 4754-4756. But the court declined to appoint Dr. Ballenger or anyone else, pending more information about potential experts' availability. See C.A. App. 4758-4764. Later that morning, defense counsel informed the court and the government that Dr. James Hilkey would see petitioner that day and on Sunday; that Dr. Donna Schwartz Maddox would also see petitioner on Sunday; and that those doctors could generate a report by Monday. *Id.* at 2185. Defense counsel objected to the appointment of Dr. Ballenger because in their view "he lack[ed] * * * experience at competency evaluations in capital cases." *Id.* at 2186 (capitalization omitted).

d. On the morning of Monday, September 23, defense counsel filed a declaration that had been signed on Sunday by Drs. Hilkey and Maddox, reflecting their determination that petitioner was competent to stand trial. Pet. App. 58a-59a. The declaration stated, in part, as follows:

> Based on a three-hour interview with [petitioner] on Sunday, September 22, 2019, we believe, to a reasonable degree of medical certainty, that [petitioner] is competent to stand trial as defined in 18 U.S.C. Sec-

> tion 4241(a), to wit: [Petitioner] is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, if he chooses to do so.

Id. at 58a. The doctors further noted that petitioner was experiencing anxiety and sleep deprivation, and they recommended that he be monitored for "the possibility of decompensation as the trial proceeds" and that, if he were to exhibit "signs of stress," he might benefit from "a short break in the proceedings." *Ibid.* But they reiterated their finding that, "[a]s of this date * * * he is competent to proceed." *Ibid.*

Later that day, the district court "convene[d] a competency hearing." Pet. App. 9a (quoting C.A. App. 4781). Defense counsel explained that "over the weekend[,] [petitioner] was seen by a forensic psychologist and forensic psychiatrist and they have opined to a reasonable degree of medical certainty that [petitioner] is competent to proceed." C.A. App. 4781. Defense counsel provided copies of the declaration signed by Drs. Hilkey and Maddox to the court as evidence. *Ibid.* Defense counsel stated that they "no longer believe that [petitioner] is incompetent, to the contrary, we believe that he is competent to proceed in this case." *Ibid.* The government "d[id] not oppose [the court's] moving forward in this fashion." *Id.* at 4782. The court found it "clear based on what's been presented" that petitioner "understands the nature and consequences of the proceedings against him and he's able to assist properly in his defense." *Ibid.* The court therefore concluded that petitioner "is competent to proceed." *Ibid.*

e. At the end of the trial's guilt phase, the jury convicted petitioner of bank robbery resulting in death, in violation of 18 U.S.C. 2113(a) and (e); and murder re-

sulting from the use or carrying of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (2012), 18 U.S.C. 924(c)(1)(A)(iii) and (j)(1). Judgment 1. After a six-day penalty-phase trial, the jury unanimously recommended that petitioner be sentenced to death, and the district court imposed a capital sentence on each count. Judgment 2; see Pet. App. 4a-5a.

3. a. Petitioner appealed. As relevant here, he contended that if a district court finds reasonable cause to believe that a defendant is not competent to stand trial, Section 4241(a) requires the court to

> (1) ensure an *independent expert examination* is or has been conducted; (2) obtain a *comprehensive report* that includes not just a bottom-line conclusion but the defendant's history, symptoms, test results, and the examiner's findings and diagnosis; (3) hold an *evidentiary hearing* to consider the report and other record information about the defendant's mental status, and see if it needs examiner testimony, additional evidence, or another evaluation; and[] (4) based on all this, reach its own *independent determination* about whether the defendant meets the legal standard for competency.

Pet. C.A. Br. 45; see *id.* at 67-88; Pet. C.A. Reply Br. 7, 11-24. Petitioner contended that the district court in his case had "deprived [him] of each and every one of these four critical protections." Pet. C.A. Br. 45 (emphasis omitted). Petitioner's argument in the court of appeals did not distinguish between Section 4241(a)'s requirements and the requirements of the Fifth Amendment's Due Process Clause. See, *e.g.*, Pet. C.A. Br. 44 ("[b]oth due process * * * and [Section 4241] require procedural protections"); *id.* at 46 (framing the issue for re-

view as "[w]hether" the district court's procedures were "all due process and [Section 4241] required"); *id.* at 62 (referring to "the steps mandated by due process and [Section 4241]") (emphasis omitted); *id.* at 88 (arguing that the court was "independently obligated by due process and [Section 4241] to follow [the] series of steps" listed by petitioner); see also Pet. C.A. Reply Br. 7-9, 11 (similar).

b. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 1a-47a. As relevant here, the court determined that the district court had fulfilled its obligations under Section 4241. *Id.* at 5a-12a. The court of appeals explained that the district court had "'convened a competency hearing'" as required by Section 4241(a) and that "[n]othing about the district court's handling of this delicate matter reflects a legal error or an abuse of discretion." *Id.* at 9a-10a (brackets and citation omitted). The court of appeals also observed that petitioner had been afforded other statutory procedural rights—including representation by counsel and an opportunity to testify. *Id.* at 11a (citing 18 U.S.C. 4247(d)).

The court of appeals rejected petitioner's contention "that once a district court finds reasonable cause to doubt a defendant's competency, the court must always order an examination by a court-appointed expert and insist the expert file a report satisfying" the enumerated statutory standards. Pet. App. 10a. The court of appeals explained that the text of Section 4241(b) provides that a district court "may" order a psychiatric or psychological examination and report before the competency hearing. *Ibid.* (citation omitted). Because "'the word "may" *clearly* connotes discretion,'" the court of appeals declined to "impos[e] any sort of categorical requirement." *Ibid.* (quoting *Biden* v. *Texas*, 597 U.S.

785, 802 (2022)). The court observed that the district court "was tasked with * * * balancing multiple aspects of the Constitution's fair trial guarantee, which includes not only the right to be tried only if competent but also the rights to have the effective assistance of counsel and to refuse to provide information that could compromise one's own defense." *Id.* at 10a-11a.

The court of appeals noted that petitioner "develop[ed] no separate argument" based on the Due Process Clause. Pet. App. 6a n.2 (citation omitted). The court therefore "d[id] not consider whether the Constitution sometimes requires more than" Section 4241. *Ibid.* The court noted, however, that *Pate* v. *Robinson*, 383 U.S. 375 (1966), did not require the district court here to obtain "additional information." Pet. App. 11a-12a. The court of appeals explained that *Robinson*'s "holding" "was about whether a defendant is entitled to a competency hearing, not the nature and characteristics of such a hearing." *Id.* at 12a. And the court emphasized that the facts of *Robinson* were a "far cry from the situation the district court confronted here" because the defendant's "'sanity was very much in issue'" in *Robinson*, where four witnesses "'expressed the opinion that the defendant was insane.'" *Ibid.* (quoting *Robinson*, 383 U.S. at 383-384) (brackets omitted).

ARGUMENT

Petitioner contends (Pet. 11-17) that the court of appeals erred in concluding that his competency hearing was procedurally adequate under the Due Process Clause. But petitioner did not raise in the court of appeals the due process arguments that he now raises in this Court, and the court of appeals accordingly did not address those arguments. Regardless, this Court's decisions do not suggest that petitioner's competency

hearing violated due process, and the court of appeals' decision does not conflict with any decision of another court of appeals or a state supreme court. Further review of the first question presented is unwarranted.

Petitioner also contends (Pet. 17-20) that the court of appeals impermissibly allowed the district court to defer to defense counsel's assessment of petitioner's competency. But the record does not support petitioner's conclusion that the district court was simply deferring to defense counsel. Rather, at all stages of the proceeding, the court also relied on other evidence—including from medical professionals—when concluding that petitioner was competent. And the court of appeals' resolution of that issue does not conflict with decisions of other courts of appeals. Further review of the second question presented is also unwarranted.

1. Petitioner first contends (Pet. 11-17) that his competency hearing was inadequate under the Due Process Clause and that the court of appeals erred in concluding otherwise. But that court did not address the due process arguments that petitioner now raises. Instead, it concluded that petitioner's competency hearing satisfied the requirements of 18 U.S.C. 4241—and noted that petitioner had failed to make any argument that due process requires more than the statute does. This Court's review is therefore unwarranted for the simple reason that petitioner failed below to raise the argument he now presents. In any event, petitioner received due process in his competency hearing. And the court of appeals' decision does not conflict with decisions of other courts of appeals or state supreme courts.

a. A defendant is competent to stand trial when "he has 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, 402 (1960) (per curiam). Section 4241 provides the procedures that a federal district court is required to follow when adjudicating a defendant's competency. The court must grant a motion by either party for a competency hearing, or order such a hearing on its own motion, if it determines that "there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. 4241(a). The court is afforded discretion in how it carries out that mandate. Before the hearing, "the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court." 18 U.S.C. 4241(b). If the court requires a report, the report must address various aspects of the defendant's background and condition and must be shared with counsel for both the defense and the government. 18 U.S.C. 4247(c).

At the competency hearing, the defendant "shall be represented by counsel and * * * afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing." 18 U.S.C. 4247(d). The defendant "has the burden, 'by a preponderance of the evidence to show that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his de-

fense.'" *United States* v. *Robinson*, 404 F.3d 850, 856 (4th Cir.) (quoting 18 U.S.C. 4241(d) (2009)) (brackets omitted), cert. denied, 546 U.S. 916, and 546 U.S. 955 (2005).

b. The court of appeals correctly concluded that the district court did not commit reversible error under Section 4241. After the district court determined that reasonable cause existed to doubt petitioner's competency, it paused the proceedings in the middle of trial. See pp. 6-7, *supra*. The court then followed the proposal of petitioner's counsel: that petitioner should be evaluated by two medical professionals, Drs. Hilkey and Maddox. See pp. 7-8, *supra*. Petitioner has never contested their qualifications to evaluate his mental competency. Dr. Maddox is a board-certified forensic psychiatrist with a medical degree and significant academic and clinical experience. C.A. App. 2189-2198. Dr. Hilkey is a licensed practicing psychologist with a doctorate and substantial professional experience, including two decades of employment at the Federal Medical Center in Butner, North Carolina. *Id.* at 2199-2206. Both have testified about competency in previous cases. See, *e.g.*, *United States* v. *Roof*, 10 F.4th 314, 336 (4th Cir. 2021) (per curiam) (discussing multiple competency evaluations undertaken by Dr. Maddox), cert. denied, 143 S. Ct. 303 (2022); *United States* v. *General*, 278 F.3d 389, 397 (4th Cir.) (same as to Dr. Hilkey), cert. denied, 536 U.S. 950 (2002).

After the doctors evaluated petitioner, the district court "convene[d] a competency hearing." C.A. App. 4781. Defense counsel presented evidence at the hearing: a declaration signed by Drs. Hilkey and Maddox providing that, "[b]ased on a three-hour interview" with petitioner, they "believe[d], to a reasonable degree of

medical certainty, that [petitioner] [wa]s competent to stand trial" because he was "able to understand the nature and consequences of the proceedings against him and to assist properly in his defense." *Id.* at 2188; see *id.* at 4781. The court then determined based on the evidence presented that petitioner was competent to stand trial. *Id.* at 4782.

Although the hearing was brief, those procedures complied with Section 4241: The district court held a competency hearing, 18 U.S.C. 4241(a), and petitioner was "represented by counsel," who "present[ed] evidence" on his behalf, 18 U.S.C. 4247(d). Petitioner has never disputed that he was afforded those and other Section 4247(d) procedural rights at the hearing. See Pet. App. 11a. And, as the court of appeals recognized, *id.* at 10a, because Section 4241 provides that a "court *may* order" a formal psychiatric or psychological report by an expert, 18 U.S.C. 4241(b) (emphasis added), the district court did not run afoul of any statutory requirement by relying on more informal procedures based on mid-trial developments. The court of appeals therefore correctly rejected petitioner's claim that his competency hearing was inconsistent with Section 4241.

c. Petitioner nevertheless contends that the Due Process Clause required the district court to conduct a hearing more "meaningful" than the one he received. Pet. 13; see Pet. 11-17. He says (Pet. 13) that a "contentless exchange" and an "*empty*" hearing are insufficient. And he objects (Pet. 17) that the court did not conduct "further inquiry" after receiving the determination by two experts and hearing from counsel for both sides. Although petitioner never describes exactly what procedures he believes the Constitution requires, he complains (*ibid.*) that the court did not call witnesses,

hear testimony, or ask questions. But none of those specific steps is required by Section 4241. And this Court should not adopt a constitutional rule that micromanages how such hearings are to be conducted.

Moreover, petitioner did not press that constitutional argument in the court of appeals. There, petitioner focused on Section 4241's requirements, arguing (among other things) that Section 4241 requires a district court to order an independent expert examination and a comprehensive expert report in all cases in which there is reasonable cause to believe that a defendant is not competent to stand trial. See pp. 9-10, *supra*. The court of appeals correctly rejected that argument based on Section 4241's text, and petitioner has not contested the court's analysis of Section 4241 in this Court. While petitioner asserts (Pet. 4) that the court of appeals "issued a categorical holding" that "the Due Process Clause imposes no standards on a trial court's competence inquiry," that court did no such thing. Rather, the court expressly noted that it "d[id] not consider whether the Constitution sometimes requires more than" Section 4241 because petitioner had "develop[ed] no separate argument" based on the Due Process Clause in that court. Pet. App. 6a n.2. This Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted); see, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). No reason exists to depart from that rule here.

d. Petitioner asserts (Pet. 11-24) that the court of appeals' determination that his competency hearing was procedurally adequate conflicts with decisions of

this Court and decisions of state supreme courts and other courts of appeals. That assertion is baseless.

i. The decision below does not conflict with any decision of this Court. None of this Court's decisions on which petitioner relies (Pet. 11-17) resolved any issue related to the correct interpretation of Section 4241—which was the basis for the court of appeals' decision. Accordingly, there can be no conflict with the court of appeals' holding. But in any event, none of this Court's decisions suggests that petitioner's competency hearing was inadequate under the Due Process Clause.

The Court in *Pate* v. *Robinson*, 383 U.S. 375 (1966), see Pet. 11-12, addressed whether the defendant was entitled to a competency hearing—and did not consider whether due process requires such a hearing to include particular procedural protections. In *Robinson*, "[f]our defense witnesses [had] expressed the opinion that [the defendant] was insane," and there was "uncontradicted testimony of" the defendant's extensive "history of pronounced irrational behavior." 383 U.S. at 383, 385-386. The Court found that the existence of "some evidence" of the defendant's "ability to assist in his defense" was not sufficient "to dispense with a hearing on" competency. *Id.* at 386. The Court therefore concluded that due process entitled the defendant to a competency hearing even though his attorney never requested one. *Id.* at 385.

Because *Robinson* addressed the failure to hold any competency hearing, that decision sheds no light on whether the procedures at petitioner's competency hearing were adequate. See Pet. App. 12a (court of appeals distinguishing petitioner's case as "a far cry" from *Robinson*). And, in contrast to the record in *Robinson*, the evidence before the district court in petitioner's

case supported his competency—including the pretrial attestation that petitioner had been found competent by a forensic psychologist, C.A. App. 215, and the unanimous conclusion in two other examiners' mid-trial declaration that he remained competent as of the day before the competency hearing, Pet. App. 58a-59a. Thus, nothing in *Robinson* undermines the competency determination in this case.

For similar reasons, *Drope* v. *Missouri*, 420 U.S. 162 (1975), see Pet. 12-13, is inapposite. In *Drope*, the Court concluded that the defendant's suicide attempt during trial, along with information from a psychiatrist that suggested incompetence, created a sufficient doubt about the defendant's competency—and that due process therefore required a psychiatric examination. 420 U.S. at 175-183. Here, unlike in *Drope*, two medical experts evaluated petitioner mid-trial, in the wake of his unusual behavior, and determined that he was competent to stand trial. And, again, *Drope* resolved only a due process question; it discussed neither the requirements imposed by Section 4241 nor the procedural rights a district court must afford a defendant once it convenes a competency hearing.[3]

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[3] At various points, petitioner also cites (*e.g.*, Pet. 15, 18-19) this Court's decisions in *Cooper* v. *Oklahoma*, 517 U.S. 348 (1996), and *Medina* v. *California*, 505 U.S. 437 (1992), but they do not conflict with the decision below. *Medina* held that a State does not violate the Due Process Clause if it "require[s] a defendant who alleges incompetence to stand trial to bear the burden of proving so by a preponderance of the evidence." 505 U.S. at 439; see *id.* at 453. And *Cooper* held that a State violates the Due Process Clause if it requires a defendant to prove that he is incompetent by "clear and convincing evidence" because that would impermissibly allow a defendant to be tried even if he "ha[d] already demonstrated that he is more likely than not incompetent." 517 U.S. at 364. Neither de-

ii. Petitioner is also wrong to assert (Pet. 20-24) that the court of appeals' decision conflicts with decisions from the Second, Fifth, and Eighth Circuits or the West Virginia Supreme Court of Appeals. All of the decisions that petitioner identifies addressed state convictions, which means they did not address the correct interpretation of Section 4241. Moreover, none of the decisions indicates that another court would have found petitioner's competency hearing inadequate under the Due Process Clause.

Two of the decisions petitioner identifies found that the relevant competency procedures were adequate. In *Holmes* v. *King*, 709 F.2d 965, cert. denied, 464 U.S. 984 (1983), the Fifth Circuit found no reversible error in the district court's determination that the defendant was competent based on that court's colloquy with the defendant—even though experts had examined the defendant, were unable to determine whether he was competent to stand trial, and recommended further observation. *Id.* at 966-968. That decision sheds no light on whether the district court in petitioner's case used adequate procedures to evaluate a competency claim where two experts had just found that petitioner was competent to proceed. Indeed, the Fifth Circuit stated in *Holmes* that a trial court is not required to conduct a "full-blown competency hearing" any time there is "slim[] evidence of incompetency." *Id.* at 967 (citation omitted).

Similarly, in *Davis* v. *Wyrick*, 766 F.2d 1197 (1985), cert. denied, 475 U.S. 1020 (1986), the Eighth Circuit determined that a state-court competency hearing, where three doctors testified and submitted reports in-

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cision addressed the procedures that due process requires once a competency hearing is convened.

dicating that the defendant was competent, was "more than adequate to develop the facts relat[ed] to" competency. *Id.* at 1201. *Davis* did not hold that testimony or reports are required in every case, especially where neither party has any evidence of incompetence to present.

Nor does the decision below conflict with any of the remaining decisions that petitioner identifies. In *Matusiak* v. *Kelly*, 786 F.2d 536, cert. dismissed, 479 U.S. 805 (1986), the Second Circuit determined that the trial court "did virtually nothing * * * to develop the material facts as to [the defendant's] current competence to enter" a guilty plea. *Id.* at 545. The defendant in that case had been institutionalized at least five times before his arrest and had been subjected to numerous psychiatric examinations—though none was recent. *Ibid.* And two of the three psychiatrists who examined him around a year before his plea had concluded that he was incompetent. *Ibid.* The Second Circuit determined that given the defendant's "extreme equivocation" at the plea hearing and his "extensive history of psychiatric problems, the [trial] court could not, consistent with due process, accept the plea of guilty without a more searching inquiry or a more up-to-date psychiatric evaluation." *Ibid.* But petitioner's case did not present a similarly compelling need for factual development. Petitioner had no similar history of significant psychiatric issues; no expert had ever concluded that petitioner was incompetent; and the district court stopped the proceedings mid-trial and obtained up-to-date competency evaluations.

Similarly, in *Morris* v. *Painter*, 567 S.E.2d 916 (2002) (per curiam), the Supreme Court of Appeals of West Virginia determined that the trial court had used inadequate procedures where that court refused to continue

the competency hearing so that the defendant's psychiatrist could attend and explain his incompetency finding. *Id.* at 918. In the circumstances of that case—where the defendant had previously been found incompetent, had spent time in a state mental facility, and had not spoken a single word for years—the Supreme Court of Appeals determined that there was no reason to rush the competency hearing and thereby preclude the defendant's psychiatrist from testifying. *Ibid.* Again, those circumstances were nothing like those in this case, where petitioner had never been found incompetent; the district court had paused the trial in accordance with petitioner's request; and the court accepted the evidence about competency offered by defense counsel's chosen experts.

2. Petitioner separately contends (Pet. 17-20) that the court of appeals impermissibly allowed the district court to defer to defense counsel's assessment of petitioner's competency. But there is no factual basis for petitioner's claim that the district court deferred to defense counsel. The court of appeals' passing comment regarding petitioner's right to effective assistance of counsel is unproblematic in the context of this case. Nor is there any conflict between the court of appeals' resolution of that issue and the decisions of other courts of appeals.

a. A defendant has a constitutional right not to be tried while incompetent even if his attorney does not surface the issue, see *Robinson*, 383 U.S. at 384-386, and an attorney cannot elect to have an incompetent defendant tried as a matter of strategy. Here, however, petitioner's counsel raised the issue of competence midtrial; the district court subsequently held a competency hearing; and the court determined that petitioner was

competent to stand trial based on a contemporaneous declaration from two qualified medical professionals with experience in assessing competency. See pp. 5-8, *supra*. That defense counsel also viewed petitioner as competent provided further support for the court's finding of competency. See *Medina* v. *California*, 505 U.S. 437, 450 (1992) ("[D]efense counsel will often have the best-informed view of the defendant's ability to participate in his defense."). But there is no indication in the record that the court impermissibly "defer[red]" to the judgment of defense counsel. Pet. 19. And because the court decided to hold a hearing, it certainly did not endorse any "opposition to a competency inquiry," Pet. 17 (capitalization and emphasis omitted), that defense counsel may have had at that time.

Petitioner emphasizes (Pet. 17) that the court of appeals observed that the district court "was tasked with * * * balancing multiple aspects of the Constitution's fair trial guarantee, which includes not only the right to be tried only if competent but also the rights to have the effective assistance of counsel and to refuse to provide information that could compromise one's own defense." Pet. App. 10a-11a. But that passing reference, in a single sentence of the court of appeals' opinion, cannot alter what the district court actually did. At the mid-trial competency hearing, the district court *did not* engage in any balancing of such additional considerations. Instead, the court simply found that petitioner was "competent to proceed" because it was "clear based on what's been presented" that "[h]e understands the nature and consequences of the proceedings against him and he's able to assist properly in his defense." C.A. App. 4782. The court did not indicate that it was balancing—nor did it even discuss—petitioner's "rights to have effec-

tive assistance of counsel and to refuse to provide information that could compromise [his] defense." Pet. App. 10a-11a.

The court of appeals may have referred to those rights because—at an earlier stage of proceedings, in an order that is not directly at issue here—the district court had decided not to require a pretrial competency hearing. Cf. Pet. App. 7a (discussing the district court's pretrial approach to competency); see pp. 3-5, *supra* (summarizing the pretrial proceedings related to competency). At that stage, defense counsel had resisted a competency hearing, at least partly because they did not want to reveal to the government anything about petitioner's mental health before they had completed their mitigation investigation. See C.A. App. 977-980; Pet. App. 7a. That was a reasonable tactical decision for defense counsel to make, especially if their investigation was not surfacing any mental-health evidence that could be used in mitigation. Tellingly, no mental-health evidence was ultimately presented during petitioner's penalty-phase trial. See C.A. App. 2309-2315, 2323-2329. The district court could validly consider the need to respect defense counsel's strategic reluctance to turn over mental-health evidence about a competent defendant when it decided what procedures were necessary to determine whether to conduct a more intensive evaluation of competency.

In any event, even at that pretrial point, the district court did not rely solely on defense counsel's pretrial assessment of petitioner: The court also based its decision that a pretrial competency hearing was unnecessary on a forensic psychologist's opinion that petitioner was competent and on the fact that the court had neither observed nor been informed of any unusual behav-

ior. C.A. App. 217-219; see p. 5, *supra*. In light of that background, the court of appeals appropriately recognized that district courts must be afforded discretion to tailor competency inquiries to the particular situations that unfold before them and the particular interests at stake. See Pet. App. 10a-11a.

b. Petitioner asserts (Pet. 24-26) that the court of appeals created a conflict with the Sixth and Ninth Circuits on whether a trial court may defer to an attorney's assessment that his client is competent. But in three of the decisions petitioner identifies, substantial evidence indicated that a competency hearing was necessary—thus undermining defense counsel's failures to raise competency concerns or their assertions of competency. See *Maxwell* v. *Roe*, 606 F.3d 561, 574-576 (9th Cir. 2010) (lower court placed too much weight on defense counsel's failure to request a competency hearing in light of other evidence of the defendant's incompetency, including his disruptive conduct at trial and his placement on psychiatric holds during trial); *Odle* v. *Woodford*, 238 F.3d 1084, 1088-1089 (9th Cir.) (medical records about the defendant's brain function and commitment to psychiatric wards raised a bona fide doubt about competency, even though defense counsel never questioned his competency), cert. denied, 534 U.S. 888 (2001); *United States* v. *White*, 887 F.2d 705, 707, 709 (6th Cir. 1989) (per curiam) (although defense counsel had previously testified that he believed the defendant was competent, the district court "clearly was entitled to reopen the question of competency" at a later time because "all" "medical personnel" involved in the case had found the defendant incompetent). Here, however, the district court did not defer to defense counsel's assessment of petitioner's competency. See pp. 22-23, *supra*. It also

relied on contemporaneous declarations from medical experts who had reached the same conclusion.

In the final decision petitioner cites (Pet. 26), the Ninth Circuit held that the trial court did not reversibly err in *declining* to conduct a competency hearing where the only articulable concern was that the defendant "nodded off or had difficulty staying awake." *United States* v. *Fernandez*, 388 F.3d 1199, 1251 (2004), cert. denied, 544 U.S. 1009, 544 U.S. 1041, and 544 U.S. 1043 (2005), amended in part not relevant, 425 F.3d 1248 (9th Cir. 2005). That holding does not conflict with the court of appeals' decision in this case. The opinion in *Fernandez* also noted that "[f]ailure of the defense attorney to ask for a competency hearing may not be considered dispositive evidence of the defendant's competency." *Ibid.* But that statement likewise does not conflict with the decision below, which never held—let alone suggested—that a defense attorney's assessment of competency is "dispositive." *Ibid.* Nor would such a suggestion have made any sense in this case. Given the determinations of petitioner's competency by medical experts, the district court never relied solely, much less dispositively, on defense counsel's assessment.

3. Finally, this case would be a poor vehicle to address the questions presented because there is no serious dispute that petitioner was competent to stand trial. Petitioner's argument in the court of appeals and this Court has been about the district court's procedure to determine competency; he has not challenged the substantive finding that he was competent to stand trial. As the court of appeals observed, petitioner "makes no substantive argument against the district court's bottom-line finding that he was competent to proceed.

As a result, any such claim is forfeited." Pet. App. 6a n.1 (citation and internal quotation marks omitted).

The petition asserts at various points that petitioner had a "delusional" breakdown, Pet. i, 2, 6, and it concludes by asserting without any support that "a man incapable of comprehending the proceeding at which his fate was decided" was sentenced to death, Pet. 28. The petition also states (Pet. 5) that in a post-arrest interview petitioner "invoked 'demons' that 'control the people's minds.'" But in the course of that same interview answer, petitioner expressly said that demons had not been controlling his mind and that he killed Major and Skeen of his own volition. See C.A. App. 376-377.[4]

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[4] Petitioner's references to "demons" can readily be understood as metaphorical rather than an indication that he was delusionally following commands. Those references appeared in the course of his explanation that he had "nothing personal" against the two bank employees, but their deaths were akin to "collateral damage" in war, because he was "winging it" when he shot them, simply trying to keep them from setting off an alarm and preventing him from getting away from the bank. C.A. App. 374-377. When he entered the bank, he knew he "was going to shoot the woman or whoever was in there regardless," *id.* at 374, and after shooting Major at the counter, he "saw that there was a second woman in there," *id.* at 375. Here is the full context of petitioner's references to "demons," which immediately followed his answer that he had seen Skeen "in her office," *ibid.*:

> But I know you people [Major and Skeen] didn't deserve that but, man, I got to tell y'all guys [the interviewing officers] the truth, man.
>
> * * *
>
> This is where I am. This is where I am. It's—it's—*I don't know if you're religious or spiritual people but, man, this really is some shit out there that's demonic man.* I swear to God to you, man. This shit is demonic, man. It's nothing that nobody can do about it. Just like when soldiers go across in other coun-

The petition also observes (Pet. 6) that when defense counsel opposed a competency hearing before trial and submitted a declaration showing an expert's conclusion that petitioner was competent, another defense psychiatrist had "believed [petitioner] might suffer from bipolar disorder." But the petition does not explain why a person with bipolar disorder would be unable to understand court proceedings or assist his lawyers.

The passing assertions in the petition are not evidence. The record evidence—including attestations from three defense experts, before and during trial—indicates that petitioner was competent to stand trial. No further review is warranted.

> tries and shit, I know that they're fighting for a great cause, but at the same time, man, it's collateral damage, man. I didn't—I pray to God that these people are still alive, but at the same time, man.
>
> I knew that it was going—somebody was going to get hurt that day because of the circumstances that I placed myself in. You know. I did this shit because I didn't—my mother turned my—her back on me. My father is dead. I don't have any brothers and sisters. My girlfriend can't be trusted. I'm unemployed. I just said, to hell with it. I mean, shit. I—I'm going to tell you the damn truth. If the situation had—had gone out my way, I'd be dead right now today, because me and the police would've shot it out.
>
> Because I don't—this is—shit is crazy, man. It's—it's so many demons out here, man. Y'all just don't know. These demons out there—you got to control the people's minds and shit. *They don't control my mind. I—I willingly went with the demons. I knew what the hell I was doing. I didn't sell my soul to the devil. I don't believe in the illuminati or none of that stupid shit.*
>
> I—I—I made some bad decisions and it's time for me to pay the consequences. I just hope them women know, and their family know, that it wasn't nothing personal.

Id. at 375-377 (emphases added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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