CAPITAL CASE
No. 23-953

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JACLYN L. TARLTON
Federal Defender Office, EDNC
150 Fayetteville Street
Suite 450
Raleigh, NC 27601
(919) 856-4236
jackie_tarlton@fd.org

CATHERINE E. STETSON
Counsel of Record
KEENAN ROARTY
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

BARRY J. FISHER
Federal Defender Office, NDNY
54 State Street, 3rd Floor
Albany, NY 12207
(518) 242-4010
barry_fisher@fd.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

INTRODUCTION

Brandon Council was declared competent to stand trial in his capital case after a one-minute-long proceeding. He was subsequently sentenced to death. This petition asks the Court to correct the Fourth Circuit's troubling holding, resolve two circuit splits, and affirm the fundamental right upon which all other trial rights depend. *Cooper* v. *Oklahoma*, 517 U.S. 348, 354 (1996).

Amici—leading mental health professionals and a national organization of defense lawyers—make clear that what happened here failed to "even remotely resembl[e] a competency hearing." Nat'l Ass'n for Pub. Defense Br. 2-9. The only thing posing as evidence—an emailed statement conclusorily stating Council was competent—"fell woefully short" of "widely accepted standards developed by mental health professionals for conducting competency evaluations." Mental Health Professionals Br. 3-4, 19-27. Yet the Fourth Circuit blessed this as constitutionally sufficient, holding due process has no relevance to the "nature and characteristics" of competency hearings.

Respondent largely sidesteps the Fourth Circuit's constitutional errors, arguing that Council never made, and the Fourth Circuit never ruled on, any constitutional argument. The record starkly shows otherwise.

On the merits, Respondent echoes the Fourth Circuit in contending that *Pate* v. *Robinson*, 383 U.S. 375 (1966) and *Drope* v. *Missouri*, 420 U.S. 162 (1975) only entitled Council to something *called* a competency

hearing—even if it was contentless. This extraordinary argument is wrong on the law. Respondent also waves away the Fourth Circuit's troubling decision to "balanc[e]" Council's right to be tried only if competent against other trial rights. Competence is a foundational right that cannot be sacrificed by an attorney's strategic desire to gloss over the issue.

The Fourth Circuit's holding also created two circuit splits. Respondent nitpicks the first, but does not—and cannot—dispute that the circuits have different legal standards for assessing the sufficiency of a competency hearing. As for the second, Respondent seeks to evade the circuit split on whether a court may defer to a lawyer's bare assertions his client is competent by pointing to the conclusory expert statement defense counsel handed up. But conclusory assertions are never adequate evidence.

This Court should grant the petition.

ARGUMENT

I. THE FOURTH CIRCUIT'S CONSTITUTIONAL HOLDINGS ARE DANGEROUS AND WRONG.

A. Council Made A Constitutional Argument And The Fourth Circuit Addressed It.

Respondent argues Council "did not press" any "constitutional argument" and the Fourth Circuit "did not address" one. BIO 12, 16. That is wrong on both counts.

Council rigorously and repeatedly made constitutional arguments. Indeed, Respondent quotes Council's constitutional arguments and repeats and

defends the Fourth Circuit's constitutional holdings. BIO 9-10, 17-18, 23.[1] Council argued "[b]oth due process, *see Pate v. Robinson*, * * * and [the statute] require procedural protections to ensure that questions about a defendant's competency are adequately investigated and reliably adjudicated by the district court." Opening Br. 44, *Council*, Nos. 20-1, 21-8, Dkt. 138 (4th Cir. Mar. 27, 2023); *see also id.* at 36-37, 46, 67, 77-78, 83-88 (constitutional arguments). *Pate*'s "adequate hearing on competency * * * means more than a *pro forma* courtroom colloquy where the court rubber-stamps an expert's opinion." *Id.* at 85 (quotation marks omitted). These procedural protections exist, Council explained, "even if defense counsel considers it disadvantageous or unnecessary." *Id.* at 44.

The Fourth Circuit also "passed upon" Council's constitutional argument. *United States* v. *Williams*, 504 U.S. 36, 41 (1992). The Fourth Circuit observed that the "the primary authority" Council cited for his argument that the district court needed additional information was "*Pate v. Robinson.*" But the panel concluded that *Pate* "impose[d] no such requirement." Pet. App. 11a-12a. There is no way to read this paragraph other than as rejecting the contention that the

---

[1] Respondent points to the Fourth Circuit's footnoted observation that Council claimed the District Court equally violated both the statute and due process. Pet. App. 6a-7a n.2; BIO 11. But a litigant may offer multiple different arguments toward the same remedy. *See, e.g.*, *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 328 (2010).

Constitution required the District Court to do more than the nothing it did.

B. This Court's Precedents Require An Adequate Competency Hearing.

When a trial court has reasonable grounds to believe a defendant may be incompetent, due process requires it to make a "further inquiry." *See Drope*, 420 U.S. at 180-181; *Pate*, 383 U.S. at 386. This inquiry must be "adequate to protect a defendant's right not to be tried or convicted while incompetent." *Drope*, 420 U.S. at 172. When it is not—when the "facts presented to the trial court * * * could not properly have been deemed dispositive," then the defendant did not "receive an adequate hearing on his competence." *Pate*, 383 U.S. at 386. A defendant denied an adequate competency hearing receives either a nunc pro tunc competency hearing, or if that would be inadequate, has their conviction vacated pending any new trial. *Id.* at 386-387; *Drope*, 420 U.S. at 183.

By any metric, the one-minute colloquy in Council's capital case was grossly insufficient to determine his competence. *See* 10 J.A. 4781-82, *Council*, Nos. 20-1, 21-8 (4th Cir. Feb. 28, 2023), Dkt. 122-10. No witnesses were called. No questions were asked. No reports were gathered. No exchange was made with Council himself.

Respondent makes much of a two-paragraph expert statement that was handed to the trial judge. BIO 18. This statement—which, in full, recited the statutory definition of competency and then asserted Council met it—"fell woefully short" of "widely accepted standards developed by mental health

professionals for conducting competency evaluations." Mental Health Professionals Br. 3-4, 19-27. The statement gave no basis for the experts' conclusion. It is unknown what they talked to Council about. It is unknown what, if any, tests they performed. Nothing in their conclusory statement addressed Council's midtrial breakdown, or even indicates that they knew this critical fact.[2] Conclusory statements are never credible evidence, *see, e.g.*, *Illinois* v. *Gates*, 462 U.S. 213, 239 (1983), much less should they be determinative in a criminal, capital, competency context.

Respondent also argues—like the Fourth Circuit—that *Pate* "addressed whether the defendant was entitled to a competency hearing," but has nothing at all to say about "whether due process requires such a hearing to include particular procedural protections." BIO 17. Wrong again. *Pate* and *Drope* require an "*adequate* hearing," with "procedures adequate to protect a defendant's right not to be tried or convicted while incompetent." *Pate*, 383 U.S. at 386 (emphasis added); *Drope*, 460 U.S. at 172.

The trial courts in *Pate* and *Drope* both heard *some* evidence on the defendants' competence—but both

---

[2] Respondent makes an isolated reference to an old declaration of Council's attorney that stated a psychologist "conduct[ed] a competency evaluation" and said Council "was competent." BIO 18; *see* 1 J.A. 215. This statement pre-dated the delusional breakdown by a year and a half, *Drope*, 420 U.S. at 181 (courts must stay "alert" to indications of changed competency), and was neither referenced nor relied upon at the competency hearing. *See* 10 J.A. 4782.

proceedings yet were found constitutionally lacking. In *Pate*, the court saw the defendant's demeanor at trial and (much like in Council's case) reviewed a stipulation that an expert would testify that the defendant "knew the nature of the charges against him and was able to cooperate with counsel." 383 U.S. at 383. This Court concluded that that paltry evidence "could not properly have been deemed dispositive on the issue of [the defendant's] competence," and that further inquiry was required. *Id.* at 386. Likewise, in *Drope*, there was plenty of evidence "possibly relevant to petitioner's mental condition"—psychiatric evaluations, defendant's trial demeanor, the defendant's wife's testimony—but the "failure to make further inquiry * * * denied him a fair trial." 420 U.S. at 174-175. *Pate* and *Drope* thus require that sufficient information be gathered, not that the trial court nominally docket a purported, but empty, "competency hearing."

Respondent also argues that *Pate* and *Drope* involved a greater need for inquiry. BIO 17-18. How so? Council was a capital defendant with a family history of serious mental illness, who spoke of demons and subpoenaing God, and who cried uncontrollably when questioned by the court. Pet. 5-8. Assessing which incompetent defendant "needed" further inquiry does not help Respondent—it helps Council.

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

After explaining that *Pate* was irrelevant to the procedures required at a competency hearing, the Fourth Circuit further distinguished it because

Council's trial lawyers "insisted their client was competent to proceed." Pet. App. 12a (quotation marks omitted). As the Fourth Circuit saw things, the trial court had to "balanc[e]" Council's "right to be tried only if competent" with the right to "effective assistance of counsel." Pet. App. 10a-11a. This was wrong. Competence is a prerequisite to the effective assistance of counsel, *see Cooper*, 517 U.S. at 354, and a trial court may not defer to a trial lawyer's strategic choices regarding a potentially incompetent defendant.

Respondent argues that the District Court "did not engage in any" such balancing. BIO 22 (emphasis omitted). But the Fourth Circuit blessed the proceeding *because* of this balancing rationale, creating a perverse test for this and future cases. What is more, after claiming that such a balancing rationale did not truly motivate either court's decision, Respondent then buttresses that same rationale, arguing that the "district court could validly consider the need to respect defense counsel's strategic reluctance to turn over mental-health evidence." BIO 23. But defense counsel's "strategic reluctance" does not absolve a district court of its independent obligation to assure itself of a defendant's competence. When reasonable grounds emerge to suggest a defendant is incompetent, a trial court cannot "accept without question" a

lawyer's bare assertions their client is competent. *Drope*, 420 U.S. at 177 n.13.[3]

Respondent concedes that a trial court cannot merely defer to defense counsel, but argues that the court was not just deferring to trial counsel; it also reviewed the experts' two-paragraph conclusory statement. BIO 21-24. That statement, which fell far short of all professional standards, *see* Mental Health Professionals Br. 3-4, 19-27; Nat'l Ass'n for Pub. Defense Br. 3-4, 7-8, was no more worthy of deference than the attorney's say-so. The District Court neither analyzed its contents nor questioned its reliability. And when concluding that no "additional information" was required beyond the one-minute colloquy, the panel ignored the experts' statement entirely and gave one reason only: Council's lawyers insisted he was competent. Pet. App. 11a-12a.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE TWO CLEAR SPLITS ON THE MINIMUM CONSTITUTIONAL STANDARD FOR COMPETENCY HEARINGS.

As Council's petition explained, the Fourth Circuit's holding deepened one split and created another. Respondent fails to persuasively dispute either.

First, there is a split over a trial court's duty to hold a "further inquiry" with "procedures adequate" to

---

[3] Respondent also suggests that the panel's "balancing" rationale referred to the earlier pre-trial decision to not hold a competency hearing. BIO 23. That is wrong; the Fourth Circuit invoked it to uphold the mid-trial proceeding. Pet. App. 10a-11a.

safeguard the competence right. *Drope*, 420 U.S. at 172, 175; *Pate*, 383 U.S. at 378, 385. The Second, Fifth, and Eighth Circuits and the West Virginia Supreme Court hold this inquiry must be a meaningful one: "[T]he material facts as to [a defendant's] competence" must be "adequately developed." *Matusiak* v. *Kelly*, 786 F.2d 536, 545 (2d Cir. 1986); *Davis* v. *Wyrick*, 766 F.2d 1197, 1201 (8th Cir. 1985) (similar). There must be a "fact finding process" with "procedures and evidence sufficient to permit a trier of fact reasonably to assess an accused's competency against prevailing medical and legal standards." *Holmes* v. *King*, 709 F.2d 965, 967 (5th Cir. 1983) (quotation marks omitted). Where that process is followed, due process is satisfied. *Id.* at 966-968; *Davis*, 766 F.2d at 1201. Where the competency hearing is "deficient" and "critical" evidence not available, due process is violated. *Morris* v. *Painter*, 567 S.E.2d 916, 918 (W. Va. 2002); *Kelly*, 786 F.2d at 544-545.

The minority view holds that any competency hearing, even a contentless one, satisfies procedural Due Process protections. The Fourth Circuit reasoned that *Pate* entitled Council to a competency hearing, but had no relevance to the "nature and characteristics of" it. Pet. App. 12a. Similarly, the Kansas Supreme Court has reasoned that due process only requires a defendant have an "opportunity" to present facts; an argument that "the district court should have done more" is not a cognizable "procedural due process violation." *State* v. *Woods*, 348 P.3d 583, 591 (Kan. 2015).

Respondent compares and contrasts the facts of each case, arguing that the inquiry required in one

case does not necessarily suggest what is precisely required in another. *See* BIO 19-21. But as Respondent knows full well, factual distinctions are a distraction; the differing legal standards give rise to the conflict. The four jurisdictions in the majority require a competency hearing to have sufficient material development of the facts. The Fourth Circuit and Kansas Supreme Court do not, reasoning *Pate* is either not about "the nature and characteristics" of a competency hearing, Pet. App. 12a, or that any procedural protections are limited to the opportunity to present evidence. The relevance of *Pate* and its progeny is a legal question only this Court can resolve.

Second, to the extent the Fourth Circuit considered *Pate* at all, it reasoned that no further inquiry was needed because Council's lawyers "insisted their client was competent to proceed." Pet. App. 12a (quotation marks omitted). That was the end of the analysis. This created a second split, this time with the Sixth and Ninth Circuits. *E.g.*, *Maxwell* v. *Roe*, 606 F.3d 561, 574 (9th Cir. 2010); *United States* v. *White*, 887 F.2d 705, 707, 709 (6th Cir. 1989) (per curiam). These cases make clear that when a bona fide doubt of a defendant's competence emerges, the "further inquiry" requirement is not satisfied merely because defense counsel claims their client is competent. *Id.*

In response, Respondent rewrites the Fourth Circuit's decision, reasoning that the empty medical statement was other crucial evidence. BIO 22-24. But the Fourth Circuit did not mention that statement *at all* in its constitutional analysis. *See* Pet. App. 11a-12a. Understandably so, since the trial court also never mentioned its contents or tested its reliability.

Nor, as outlined above, would a conclusory expert statement change the analysis; *Pate* involved one, too. 383 U.S. at 383. Finally, Respondent claims that in the contrary circuits, unlike here, "substantial evidence indicated that" further inquiry was needed. BIO 24. A capital defendant speaking of demons and subpoenaing God deserved a further inquiry, too.

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

This case presents pure legal questions with simple facts and grave consequences. A capital defendant with obvious mental problems, who (as recounted by his lawyers and witnessed by the court) had a "delusional" "break from reality" on a Friday, was found competent Monday morning after a one-minute colloquy involving an empty expert statement and its unexplained endorsement by defense counsel. 10 J.A. 4771-77, 4781-82.

Respondent nevertheless declares "there is no serious dispute that [P]etitioner was competent to stand trial." BIO 25. There is, and was below, *every* dispute over the competency of a defendant whose own lawyers called him "crazy," who spoke of "demons,"[4] and who said he was being prosecuted because God could not be subpoenaed. Pet. 5-7. Council's appellate lawyers—counsels on this brief—repeatedly told the

[4] Respondent argues that Council was not crazy because he explained that he acted independently from the "demons out here" that "control the people's minds." BIO 26-27 & n.4. It is unclear how the Government thinks this statement supports a finding of competence.

Fourth Circuit that their *own* dealings with Council confirmed he was incompetent. Opening Br. 23 n.6; 13 J.A. 6190-91. But, as counsel explained to the Fourth Circuit, they could not bring a substantive competency challenge *because there is no record*, owing to the unconstitutionally brisk disposition of the issue in the trial court. Reply Br. 4 n.2. The point of a competency hearing is to gather evidence "dispositive on the issue of * * * competence." *Pate*, 383 U.S. at 386. When that evidence is absent, meaningful appellate challenges are impossible. *See United States* v. *Haywood*, 155 F.3d 674, 680 (3d Cir. 1998) (explaining the importance of a "record-based judicial determination of competence").

Finally, Respondent alleges that Council "never describes exactly what procedures he believes the Constitution requires." BIO 15. But Council already made clear what was required. It flows directly from this Court's precedents. A competency determination must involve an "adequate hearing" whereby the court makes an independent determination from evidence "dispositive on the issue of [the defendant's] competence." *Pate*, 383 U.S. at 386. Where that independent determination is impossible "in light of what [is] then known," "further inquiry" is required. *Drope*, 420 U.S. at 174-175. District courts surely have discretion in conducting competency hearings. But that a standard is flexible doesn't mean it doesn't exist. The court could have questioned Council's attorneys. It could have questioned the experts. It could have asked for a report that substantiated the experts' conclusion, rather than just stating it. It could have put Council on the stand himself. But a court of appeals

decision blessing the failure to do *any* of that necessitates reversal. The Constitution requires more than a one-minute courtroom colloquy and conclusory allegations of competency before finding a capital defendant with grave mental problems competent and capable of being sentenced to death.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

JACLYN L. TARLTON
Federal Defender Office, EDNC
150 Fayetteville Street
Suite 450
Raleigh, NC 27601
(919) 856-4236
jackie_tarlton@fd.org

CATHERINE E. STETSON
Counsel of Record
KEENAN ROARTY
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

BARRY J. FISHER
Federal Defender Office, NDNY
54 State Street, 3rd Floor
Albany, NY 12207
(518) 242-4010
barry_fisher@fd.org

Counsel for Petitioner

August 2024