No. ________

IN THE

Supreme Court of the United States

XENGXAI YANG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CATHERINE E. WHITE
HURLEY BURISH, S.C.
33 East Main St., #400
P.O. Box 1528
Madison, WI 53703

VINCENT LEVY
Counsel of Record
GREGORY J. DUBINSKY
BRIAN T. GOLDMAN
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Avenue
New York, NY 10017
(646) 837-5120
vlevy@hsgllp.com

December 30, 2024

Counsel for Petitioner

QUESTION PRESENTED

The "conviction of an accused person while he is legally incompetent violates due process," *Pate* v. *Robinson*, 383 U.S. 375, 378 (1966), and thus a federal prisoner may collaterally attack his sentence on habeas review pursuant to 28 U.S.C. § 2255 by asserting that he was incompetent when tried.

Under the doctrine of procedural default, federal courts generally do not entertain claims on collateral review that a petitioner did not previously raise on direct appeal, subject to some exceptions. *Massaro* v. *United States*, 538 U.S. 500, 504 (2003). The courts of appeals are entrenched in a 5-4 split on whether procedural default can apply to competency-based due process claims.

The question presented is:

Whether the procedural-default doctrine bars a competency-based due process claim when a petitioner raises that claim for the first time on collateral review.

PARTIES TO THE PROCEEDING

Petitioner Xengxai Yang was petitioner in the district court and appellant below.

Respondent United States of America was respondent in the district court and appellee below.

RELATED PROCEEDINGS

- *Yang* v. *United States*, No. 21-C-1281, United States District Court for the Eastern District of Wisconsin. Judgment entered July 31, 2023.

- *Yang* v. *United States*, No. 23-2777, United States Court of Appeals for the Seventh Circuit. Judgment entered August 16, 2024.

There are no other proceedings in state or federal courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14(b)(1).

TABLE OF CONTENTS

QUESTION PRESENTED.......................................i

PARTIES TO THE PROCEEDING ii

RELATED PROCEEDINGS ii

TABLE OF AUTHORITIES....................................v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. Legal Background..2

II. Factual And Procedural Background 6

A. Underlying Criminal Conviction 6

B. Habeas Petition 8

C. Seventh Circuit Proceedings.......................9

REASONS FOR GRANTING THE PETITION 10

I. There Is A Deep And Mature Conflict On The Question Presented 10

A. Five Circuits Hold That Competency Claims Cannot Be Procedurally Defaulted..........11

B. Four Circuits Disagree And Hold Competency Claims Can Be Procedurally Defaulted 14

II. Resolving The Split Is Critically Important ...16

III. Applying The Procedural Default Bar To Competency Claims Misreads This Court's Precedents.....18

IV. This Case Provides An Ideal Vehicle............19

CONCLUSION...20

APPENDIX A 1a

APPENDIX B 28a

TABLE OF AUTHORITIES

Cases **Page(s)**

Adams v. *Wainwright*,
764 F.2d 1356 (11th Cir. 1985) 12, 13, 18

Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*,
523 U.S. 614 (1998) 20

Bousley v. *United States*,
523 U.S. 614 (1998) 5

Brown v. *Davenport*,
596 U.S. 118 (2022) 16

Cooper v. *Oklahoma*,
517 U.S. 348 (1996) 3

Drope v. *Missouri*,
420 U.S. 162 (1975) 2, 3, 4, 18

Dusky v. *United States*,
362 U.S. 402 (1960) 3

Freytag v. *Comm'r*,
501 U.S. 868 (1991) 18

Godinez v. *Moran*,
509 U.S. 389 (1993) 4

Guinan v. *United States*,
6 F.3d 468 (7th Cir. 1993) 5

Hodges v. *Colson*,
727 F.3d 517 (6th Cir. 2013)........................15, 16

Indiana v. *Edwards*,
554 U.S. 164 (2008)..4

Jones v. *Hendrix*,
599 U.S. 465 (2023)..4

LaFlamme v. *Hubbard*,
225 F.3d 663 (9th Cir. 2000)...............................15

Lay v. *Royal*,
860 F.3d 1307 (10th Cir. 2017)..........................14

Martinez v. *Ryan*,
566 U.S. 1 (2012)...5

Martinez-Villareal v. *Lewis,*
80 F.3d 1301 (9th Cir. 1996)...............................15

Massaro v. *United States*,
538 U.S. 500 (2003)....................................5, 6, 19

Medina v. *California*,
505 U.S. 437 (1992).......................................2, 3, 4

Murray v. *Carrier*,
477 U.S. 478 (1986)...5

Nutraceutical Corp. v. *Lambert*,
586 U.S. 188 (2019)...20

Pate v. *Robinson*,
383 U.S. 375 (1966)...................................3, 17, 18

Reed v. *Ross*,
468 U.S. 1 (1984) 5

Riggins v. *Nevada,*
504 U.S. 127 (1992) 17

Sena v. *New Mexico State Prison*,
109 F.3d 652 (10th Cir. 1997) 14

Silverstein v. *Henderson*,
706 F.2d 361 (2d Cir. 1983) 12, 18

Smith v. *Moore*,
137 F.3d 808 (4th Cir. 1998) 14, 15, 20

United States v. *Basham*,
789 F.3d 358 (4th Cir. 2015) 15

United States v. *Frady*,
456 U.S. 152 (1982) 5

Vogt v. *United States*,
88 F.3d 587 (8th Cir. 1996) 13

Wainwright v. *Sykes*,
433 U.S. 72 (1977) 5, 19

Zapata v. *Estelle*,
588 F.2d 1017 (5th Cir. 1979) 11, 12

Statutes

28 U.S.C. § 1254 1

28 U.S.C. § 2254 .... 5, 12

28 U.S.C. § 2255 ....2, 4–5, 8–9, 12–13

Other Authorities

1 M. Hale, *The History of the Pleas of the Crown*, (1736) 17

4 W. Blackstone, *Commentaries on the Law of England* (1769)...2

Daniel C. Murrie *et al.*, *Evaluations of competence to stand trial are evolving amid a national "competency crisis,"* 41 Behav. Sci. L. 310 (2023) 16

U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2022).................................16

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at 114 F.4th 899 and reproduced at Appendix ("Pet. App.") 1a. The decision of the United States District Court for the Eastern District of Wisconsin is unreported but available at 2023 WL 4868917 and reproduced at Pet. App. 28a.

JURISDICTION

The Seventh Circuit filed its published decision on August 16, 2024. Pet. App. 1a. On October 25, 2024, on Petitioner's application, Justice Barrett extended the time to file a petition for a writ of certiorari through and including December 29, 2024. This petition is timely, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2255(a), provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

I. Legal Background

A. "The rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage." *Medina* v. *California*, 505 U.S. 437, 446 (1992). "Thus, Blackstone wrote that one who became 'mad' after the commission of an offense should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought.' Similarly, if he became 'mad' after pleading, he should not be tried, 'for how can he make his defense?'" *Drope* v. *Missouri*, 420 U.S. 162, 171 (1975) (quoting 4 W. Blackstone, *Commentaries on the Laws of England* *24 (1769)).

In that vein, the nation's "settled tradition" of disallowing the trial or conviction of incompetent persons has long been deemed "fundamental to [our] adversary system of justice." *Medina*, 505 U.S. at 446; *Drope*, 420 U.S. at 172. Hence, this Court has "repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'" *Cooper* v. *Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Medina*, 505 U.S. at 453).

This Court articulated a standard for competency challenges in *Dusky* v. *United States*, 362 U.S. 402 (1960) (per curiam), and elaborated upon it in *Pate* v. *Robinson*, 383 U.S. 375 (1966). In *Pate*, this Court held that a habeas petitioner's due process rights were violated when the trial court failed to determine the petitioner's competence to stand trial. See *id.* at 385–86. In so holding, the Court dismissed as "contradictory" the suggestion "that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.* at 384.

Later, in *Drope* v. *Missouri*, this Court held a habeas petitioner's due process rights were violated when he was not afforded a competency hearing after, *inter alia*, his unsuccessful suicide attempt. See 420 U.S. at 180 ("We conclude that when considered together with the information available prior to trial and the testimony of petitioner's wife at trial, the information concerning petitioner's suicide attempt created a sufficient doubt of his competence to stand trial to require further inquiry on the question [of his

competence].”). In so holding, *Drope* underscored that, in *Pate*, it had “expressed doubt that the right to further inquiry upon the question [of a criminal defendant’s competence to stand trial] can be waived.” See *Drope*, 420 U.S. at 176 (citing *Pate*, 383 U.S. at 384).

Dusky, *Pate*, and *Drope* have played central roles in this Court’s subsequent competence decisions. See *Medina*, 505 U.S. at 448–53 (applying *Dusky*, *Pate*, and *Drope*, and holding due process not violated by statute that (a) placed burden of proof on criminal defendant asserting defense of incompetence, or (b) set presumption of competence); *Godinez* v. *Moran*, 509 U.S. 389, 396–402 (1993) (applying *Dusky* and *Drope*, and holding competence standard for pleading guilty or waiving right to counsel is same as competency standard for standing trial); *Indiana* v. *Edwards*, 554 U.S. 164, 169–79 (2008) (applying *Dusky* and *Drope*, and holding due process permits a State to insist on representation by counsel for those competent to stand trial but incompetent to conduct trial proceedings by themselves).

B. The federal habeas statute, 28 U.S.C. § 2255, “is an outgrowth of the historic habeas corpus powers of the federal courts as applied to the special case of federal prisoners.” *Jones* v. *Hendrix*, 599 U.S. 465, 472 (2023). Section 2255 allows, in relevant part, federal inmates to contest a sentence or conviction “upon the ground that [it] was imposed in violation of the Constitution or laws of the United States.” 28 U.S.C.

§ 2255(a). Another statute, 28 U.S.C. § 2254, provides a similar mechanism for state inmates.

This Court has held that federal habeas petitioners may "procedurally default" certain habeas claims "by failing to raise [them] on direct review." *Bousley* v. *United States*, 523 U.S. 614, 622 (1998). "The procedural-default rule is neither a statutory nor a constitutional requirement"; rather, it is a prudential "doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Massaro* v. *United States*, 538 U.S. 500, 504 (2003); see *Wainwright* v. *Sykes*, 433 U.S. 72, 84 (1977) (setting forth procedural default rule for Section 2254 habeas petitions); *United States* v. *Frady*, 456 U.S. 152 (1982) (same, for Section 2255).

Not all habeas claims are subject to the procedural-default bar. See, *e.g.*, *Reed* v. *Ross*, 468 U.S. 1 (1984) (claims based on then-unavailable legal theory excepted from procedural default); *Murray* v. *Carrier*, 477 U.S. 478 (1986) (same, actual innocence); *Massaro*, 538 U.S. (ineffective assistance of trial counsel); *Martinez* v. *Ryan*, 566 U.S. 1 (2012) (ineffective assistance of postconviction counsel). And as discussed *supra*, lower courts have recognized other exceptions, including in the case of competence.

The reasons for not imposing a procedural default bar, turn, in part, on "induc[ing] litigants to present their contentions to the right tribunal at the right time." *Guinan* v. *United States*, 6 F.3d 468, 474 (7th Cir. 1993) (Easterbrook, J., concurring) (cited

approvingly in *Massaro*, 538 U.S. at 504). As this Court explained in *Massaro*, imposing the bar of procedural default for claims that rely on a record different than the record developed in a criminal trial would incentivize inmates to raise claims on direct appeal when such claims would be more efficiently handled on collateral review. 538 U.S. at 506–07.

II. Factual And Procedural Background

A. Underlying Criminal Conviction

In April 2019, a federal grand jury indicted Yang for armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d) (Count One); brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) and (B)(i) (Count Two); and unlawful possession of a firearm, in violation of 26 U.S.C. §§ 5841, 5845(a), 5861(d), and 5871 (Count Three). Pet. App. 30a. Yang's family retained Kevin Musolf to represent him. *Ibid.* At his arraignment, Yang pleaded not guilty. *Ibid.*

Yang's trial date was set to begin in July 2019 in the United States District Court for the Eastern District of Wisconsin. *Ibid.* In June 2019, Yang filed a Notice of Insanity Defense pursuant to Federal Rule of Criminal Procedure 12.2(a). *Ibid.* Although the Notice was untimely, the district court found good cause for the delay, removed Yang's case from the trial calendar, and ordered a psychological evaluation. *Id.* 30a–31a; *id.* 3a.

Dr. Kent Berney, a psychologist licensed by the State of Wisconsin, then examined Yang and

concluded, based upon that evaluation and his review of Yang's "well documented history of neurocognitive limitations," that "Yang, at the time of the alleged crime[,] . . . did not experience a severe mental illness that resulted in [him] being unable to appreciate the nature and quality or the wrongfulness of his acts." *Id.* 31a. After Dr. Berney issued his report, Yang withdrew his insanity defense and entered into an agreement in January 2020, pleading guilty to Counts One and Two. *Ibid.*

In February 2020, Yang submitted a handwritten letter to the district court requesting a new attorney and asking to withdraw his guilty pleas. *Ibid.* Yang's letter maintained that his attorney failed to review Dr. Berney's report with him, and that the attorney otherwise failed to answer questions about his case. *Id.* 31a–32a. Thereafter, the attorney moved to withdraw from his representation of Yang. *Id.* 32a. The district court granted the attorney's motion and directed a federal public defender to represent Yang. *Ibid.* The district court further directed the public defender to decide whether to move for withdrawal of Yang's previously entered guilty pleas after reviewing the file and consulting Yang. *Ibid.*

The public defender arranged for a second psychological evaluation by Dr. Denver Johnston, a psychologist licensed by the State of Wisconsin. *Ibid.* Based on his examination of Yang, Dr. Johnson issued a report in which he concluded "to a reasonable degree of certainty that the multiple mental conditions that . . . Yang was experiencing at the time of the

crime seriously impaired his judgment and the ability to appreciate the nature and quality of as well as the wrongfulness of his acts." *Ibid.* Based on Dr. Johnson's report, the public defender filed a motion to withdraw Yang's prior guilty pleas and to reassert his insanity defense. *Ibid.* The district court granted Yang's motion. *Ibid.*

Yang waived his right to a jury, and a bench trial was held in October 2020. *Id.* 32a–33a. The only issue in dispute was whether Yang was legally insane at the time of the crime. *Id.* 33a. Both Dr. Berney and Dr. Johnson testified on this issue. *Ibid.* Ultimately, the district court concluded the answer was no. *Ibid.* In February 2021, the district court sentenced Yang to 168 months. *Ibid.* Yang did not directly appeal his conviction. *Ibid.*

B. Habeas Petition

In November 2021, Yang filed a pro se motion to vacate his conviction under 28 U.S.C. § 2255. *Ibid.* In this motion, Yang argued his public defender had provided ineffective assistance of counsel when he rejected Yang's earlier plea agreement and proceeded to a bench trial on the insanity defense. *Ibid.* The district court decided an evidentiary hearing was needed to resolve the motion, and appointed counsel under Rule 8(c) of the Rules Governing § 2255 Proceedings. *Ibid.*

In October 2022, Yang's counsel filed an amended Section 2255 petition that withdrew Yang's ineffective assistance of counsel claim and asserted that Yang's Fifth Amendment due process rights were violated

when the district court failed to hold a competency hearing during Yang's criminal proceedings. *Id.* 34a.

The district court denied Yang's Section 2255 motion on the ground that the claim was procedurally defaulted:

> [B]y failing to raise the issue of his competency to stand trial in court or on direct appeal, and now by withdrawing his ineffective assistance of counsel claim and barring crucial evidence on the issue by asserting his attorney-client privilege, Yang has procedurally defaulted both his procedural and substantive competency claims.

Id. 44a. The district court also determined that, regardless, the claim failed on the merits as (1) no error resulted from the district court's failure to order *sua sponte* a competency hearing, and (2) "Yang was competent at the time of the proceedings." *Id.* 45a–63a. The district court issued a certificate of appealability. *Id.* 63a.

C. Seventh Circuit Proceedings

The Seventh Circuit affirmed the district court's denial of Yang's Section 2255 motion solely on the ground that procedural default barred Yang's claim. *Id.* 26a–27a.

Although the Seventh Circuit recognized that the courts of appeals were divided on whether procedural default applies to competency-based due process claims not raised on direct review, the court

determined that Yang's claim was procedurally defaulted. *Id.* 15a–27a. The Circuit recognized that "competency is not waivable," but explained that it could still be subject to default, and any contrary suggestion "conflates waiver and procedural default." See *id.* 21a–22a. As such, the Seventh Circuit maintained that "the law can prohibit a defendant from waiving competency before a trial court, while still subjecting competency claims to default for failing to observe the proper procedures in a collateral attack." *Id.* 21a.

Moreover, the Seventh Circuit rejected the argument that a due process claim should be treated the same, on collateral review, as a claim based on ineffective assistance of counsel (which is not subject to a procedural bar). *Id.* 22a–24a. The court explained that it was "reluctan[t] to broaden the exception to the procedural default doctrine beyond ineffective assistance of counsel." See *id.* 22a–23a. (collecting cases).

REASONS FOR GRANTING THE PETITION

I. There Is A Deep And Mature Conflict On The Question Presented

The courts of appeals are divided nearly evenly on whether a substantive competency claim—*i.e.*, the contention that one is not competent to stand trial—

can be asserted on habeas review if not asserted on direct appeal.[1]

A. Five Circuits Hold That Competency Claims Cannot Be Procedurally Defaulted

The genesis of the view that substantive competency claims are not subject to procedural default is a trilogy of decisions from the Second, Fifth and Eleventh Circuits.

1. In the first of the three, *Zapata* v. *Estelle*, the Fifth Circuit was faced with the issue whether the claim that a defendant was not "competent to stand trial"—raised for the first time collaterally—was subject to the "procedural default rule." 588 F.2d 1017, 1021 (5th Cir. 1979). The Fifth Circuit held that it was not. Citing this Court's decision in *Pate*, it explained, "one who is incompetent cannot waive his right to a competency hearing." *Ibid.* (citing *Pate*, 383 U.S. at 384). And upon review of the record, the Fifth Circuit held there was "sufficiently clear and convincing evidence as to raise a substantial doubt of Zapata's competency at trial" and remanded to the

[1] Some courts of appeals have "bifurcated" competency claims into procedural and substantive claims. Pet. App. 16a. A "procedural" competency claim refers to the contention that a trial court should have held a hearing to inquire into the defendant's competency. *Ibid.* A "substantive" competency claim presses that a defendant was tried while incompetent. *Id.* 17a. The Seventh Circuit declined to treat these claims as separate and held instead that "[c]ompetency pertains to a singular due process right to a fair trial." *Id.* 18a.

district court to make a competency determination. *Id*. at 1022–23.[2]

Judge Lombard's decision for the Second Circuit in *Silverstein* v. *Henderson* followed. 706 F.2d 361 (2d Cir. 1983). In *Silverstein*, the Second Circuit expressly rejected the proposition that competency to stand trial could be procedurally defaulted. Assessing "whether the waiver rule of *Wainwright* . . . applies to the right recognized by *Pate*," the court "conclude[d] that it does not." *Id.* at 367. Citing *Zapata*, the circuit explained that "*Wainwright*'s waiver rule cannot apply when the basis for attacking the conviction is that the defendant is incompetent to stand trial," and therefore "the defendant's failure to object or to take an appeal on the issue will not bar collateral attack." *Ibid*.

The Eleventh Circuit adopted the same rule based on the same reasoning in *Adams* v. *Wainwright*, 764 F.2d 1356 (11th Cir. 1985). There, the court was also confronted with whether "the procedural default rule . . . preclude[d] a defendant who failed to request a competency hearing at trial or pursue a claim of incompetency on direct appeal from contesting his competency to stand trial." *Id* at 1359. And like the

[2] Although *Zapata* and certain other cases discussed herein concerned federal habeas petitions under 28 U.S.C. § 2254, these cases make no distinction between procedural default for competency claims brought under Section 2254 versus Section 2255. That is for good reason—the split centers on disagreement over the rule governing both statutes, *i.e.*, whether *Pate* and its progeny should be read to suggest that competency cannot be procedurally defaulted.

Fifth and Second Circuits, the Eleventh Circuit said no. Rather, it explained that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial," *ibid.* (quoting *Pate*, 383 U.S. at 384), and therefore the district court "erred in holding that the petitioner was procedurally barred from pursuing a claim of mental incompetency in a federal habeas corpus proceeding," *ibid*.

2. This rule then spread to other circuits. For instance, the Eighth Circuit, relying on *Adams*, held that competency claims are not subject to procedural default. *Vogt* v. *United States*, 88 F.3d 587 (8th Cir. 1996). In *Vogt*, the petitioner, proceeding collaterally under Section 2255, alleged he was incompetent to stand trial. Although he had not raised this claim "on direct appeal," the circuit held, citing *Adams*, that the claim could still be pressed collaterally, because "the procedural default rule . . . does not operate to preclude a defendant who failed to request a competency hearing at trial or pursue a claim of incompetency on direct appeal from contesting his competency to stand trial." *Id.* at 590.[3]

[3] Although the Seventh Circuit in *Yang* viewed the Eighth Circuit as adhering to the view that substantive competency claims can be procedurally defaulted, see Pet. App. 19a (citing *Lyons* v. *Luebbers*, 403 F.3d 585, 593 (8th Cir. 2005)), that view is wrong in light of *Vogt*; regardless, where the Eighth Circuit falls is immaterial given the entrenched split.

The Tenth Circuit adhered to the same approach in *Sena* v. *New Mexico State Prison*, 109 F.3d 652 (10th Cir. 1997). Citing *Zapata* and *Vogt*, the Tenth Circuit refused to find a substantive competency claim procedurally defaulted, explaining "[t]he nature of Mr. Sena's claim" was "that he entered a plea while mentally incompetent," and therefore "[h]is failure to appeal that substantive claim . . . does not bar federal review" due to his fundamental right not to be convicted while incompetent. *Sena*, 109 F.3d at 654. Accordingly, in the Tenth Circuit, "substantive competence cannot be procedurally barred" on collateral review. *Lay* v. *Royal*, 860 F.3d 1307, 1315 (10th Cir. 2017); see also *id*. at 1318–19 (Briscoe, J., concurring) (noting circuit split on the issue).

B. Four Circuits Disagree And Hold Competency Claims Can Be Procedurally Defaulted

Four circuits, including the Seventh Circuit in the case below, have cleanly split with the circuits noted above as to whether substantive competency claims can be procedurally defaulted on collateral review.

1. In *Smith* v. *Moore*, the Fourth Circuit "h[e]ld that a claim of incompetency to stand trial asserted for the first time in a federal habeas petition is subject to procedural default." 137 F.3d 808, 819 (4th Cir. 1998). While the Fourth Circuit noted this Court's decisions in *Drope* and *Pate*, it dismissed them as standing for the "unremarkable premise" that "an incompetent defendant cannot knowingly or intelligently waive his rights," *id*. at 818, but "[u]nlike

waiver, which focuses on whether conduct is voluntary and knowing, the procedural default doctrine focuses on comity, federalism, and judicial economy," *id.* at 818–19. At the same time, the Fourth Circuit recognized that it was splitting with the Eleventh Circuit on the question. *Id.* at 819 (citing as a "but see" *Bundy* v. *Dugger,* 816 F.2d 564, 567 (11th Cir. 1987), which states that "a defendant can challenge his competency to stand trial for the first time in his initial habeas petition"); see also *United States* v. *Basham*, 789 F.3d 358, 379 n.10 (4th Cir. 2015) (noting "the court of appeals are divided on the issue" but adhering to circuit precedent).

2. The Sixth and Ninth Circuits are in accord. In *Martinez-Villareal* v. *Lewis,* 80 F.3d 1301 (9th Cir. 1996), the Ninth Circuit expressly split with the Eleventh Circuit and held that procedural default could apply to a competency claim raised for the first time collaterally because the "analytical basis of a defense of waiver differs markedly from that of a defense of procedural default," *id.* at 1307; see also *LaFlamme* v. *Hubbard*, 225 F.3d 663 (9th Cir. 2000) (unpublished) (same).

Similarly, in *Hodges* v. *Colson*, the Sixth Circuit, mirroring the reasoning of *Smith* and *Martinez-Villareal*, held that competency claims can be defaulted because procedural default is distinct from waiver. 727 F.3d 517, 540 (6th Cir. 2013). "Although it is true that substantive competency claims cannot be waived," the court explained, it viewed other courts—specifying the "Tenth and Eleventh

Circuits"—as "conflat[ing] the distinct concepts of waiver and procedural default." *Ibid.*

II. Resolving The Split Is Critically Important

The question presented is exceptionally important and warrants the Court's review. Thousands of habeas petitions are filed every year in the federal courts. See *U.S. Courts of Appeals Federal Judicial Caseload Statistics*, https://tinyurl.com/52fvypp4 (March 31, 2022) (indicating over 3,000 habeas petitions filed in the federal courts in the 12-month period ending March 31, 2022). And published estimates suggest that competency is an issue in many trials each year. Daniel C. Murrie et al., *Evaluations of competence to stand trial are evolving amid a national "competency crisis,"* 41 Behav. Sci. L. 310, 312 (2023) (estimating 130,000 competency evaluations are undertaken by courts each year).

Further, federal habeas corpus at its core is meant to ensure fair process. Habeas developed as a mechanism to "compel the crown to explain its actions . . . [and] ensure adequate process." *Brown* v. *Davenport*, 596 U.S. 118, 128 (2022). Thus, the writ of habeas corpus was inscribed in our Constitution as "no less than 'the instrument by which due process could be insisted upon.'" *Ibid.* (citing *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 555 (2004) (Scalia, J., dissenting)).

Whether a claim of competency to stand trial can be procedurally defaulted on collateral review implicates a long-standing right that is the predicate

to many fundamental fair process protections. As Matthew Hale explained, "if a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such frenzy . . . . And if such person of non-sane memory after his plea, and before his trial, become of non-sane memory, he shall not be tried[.]" 1 M. Hale, *The History of the Pleas of the Crown*, 34–35 (1736). Thus, "[c]ompetence to stand trial is rudimentary"—and the gating right to all other fair-process rights—"for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Riggins* v. *Nevada,* 504 U.S. 127, 139–140 (1992) (Kennedy, J., concurring in the judgment).

III. Applying The Procedural Default Bar To Competency Claims Misreads This Court's Precedents

Applying the procedural default bar to competency claims raised for the first time on collateral review is contrary to this Court's teachings and contravenes due process.

Pate instructs that a criminal defendant cannot waive the argument that he is incompetent to stand trial. 383 U.S. at 384. That is because "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently

'waive' his right to have the court determine his capacity to stand trial." *Ibid.*

It follows that the procedural default rule similarly "does not operate to preclude a defendant who failed to request a competency hearing at trial . . . from contesting his competency to stand trial," *Adams*, 764 F.2d at 1359, because it is a contradiction in terms to subject a claim of incompetency to default.

Further, courts cannot "constitutionally apply a procedural default rule to a possibly incompetent defendant," *Silverstein*, 706 F.2d at 366, because being "convicted while incompetent to stand trial deprives [the convicted] of [their] due process right to a fair trial," *Drope*, 420 U.S. at 172.

The court below, as well as the three other circuits, depart from this commonsense application of *Pate* based on the observation that waiver is distinct from default or forfeiture, because the former requires a knowing relinquishment, while the latter does not. See Pet. App. 21a (characterizing courts on other side of the split as "conflat[ing] waiver and procedural default").

That general principle is true, so far as it goes. But it misses the forest for the trees. "A right that cannot be waived cannot be forfeited by other means[.]" *Freytag* v. *Comm'r*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part). Thus, *Pate*'s teaching that competency to stand trial cannot be waived *a fortiori* means it cannot be defaulted. Put differently, if a right is so fundamental that it cannot be

knowingly alienated, then it also cannot be mistakenly or unknowingly alienated.

Moreover, to secure fair process, competency claims should be exempted from procedural default. The point of procedural default is to encourage, "all issues which bear on th[e] [criminal] charge" to "be determined in th[e] [trial]: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify." *Wainwright*, 433 U.S. at 90. Forcing a competency claim to be pursued on direct appeal means that "appellate counsel and the court must proceed on a trial record that is . . . often incomplete or inadequate for[] the purpose of litigating or preserving the claim." *Massaro*, 538 U.S. at 504–05.

IV. This Case Provides An Ideal Vehicle

Yang pressed the question presented in the district court and in the Seventh Circuit, see Pet. App. 19a; *id*. 37a, and the Seventh Circuit affirmed the denial of Yang's habeas petition solely on the ground that Yang's competency-based due process claim was procedurally defaulted. See *id*. 26a–27a.

Although the district court noted that it would have denied Yang's habeas petition on the merits even if it were not procedurally defaulted, *id*. 45a–63a, the Seventh Circuit did not reach that issue because of the procedural-default bar. The Seventh Circuit's decision to base its ruling solely on procedural default presents this Court the ideal vehicle to resolve the question

presented, especially given that prior cases dealing with the question presented had vehicle problems for such reasons. *E.g.*, *Smith*, 137 F.3d at 819 n.8 ("The district court adopted the magistrate judge's Report and Recommendation and denied Smith's request for a competency hearing. If the issue were not procedurally defaulted, we would do likewise.").

If Yang were successful in this Court, the Seventh Circuit could review the competency determination in the first instance. See *Nutraceutical Corp.* v. *Lambert*, 586 U.S. 188, 197–98 (2019) (reversing on question presented and remanding for further proceedings, where court of appeals could consider alternative bases for affirmance not passed upon below); *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397–98 (1971) ("In addition to holding that petitioner's complaint had failed to state facts making out a cause of action, the District Court ruled that in any event respondents were immune from liability by virtue of their official position. This question was not passed upon by the Court of Appeals, and accordingly we do not consider it here." (internal citation omitted)).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

VINCENT LEVY
Counsel of Record
GREGORY J. DUBINSKY
BRIAN T. GOLDMAN
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Avenue
New York, NY 10017
(646) 837-5120
vlevy@hsgllp.com

CATHERINE E. WHITE
HURLEY BURISH, S.C.
33 East Main St., #400
P.O. Box 1528
Madison, WI 53703
(608) 257-0945

December 30, 2024

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED AUGUST 16, 2024 . . . . 1a

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, FILED JULY 31, 2023. . . . . .28a

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED AUGUST 16, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 23-2777

XENGXAI YANG,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 21-cv-1281 — **William C. Griesbach**, *Judge.*

Argued: April 18, 2024
Decided: August 16, 2024

Before SYKES, *Chief Judge*, and BRENNAN and SCUDDER, *Circuit Judges.*

BRENNAN, *Circuit Judge.* We face for the first time the question whether procedural default bars a competency claim initially raised on collateral review.

Xengxai Yang robbed a credit union in Appleton, Wisconsin. Given his medical history and some strange aspects of his offense behavior, Yang raised an insanity defense. After a bench trial, the district court rejected Yang's insanity defense, found him guilty, and sentenced him to 168 months' imprisonment. Yang did not directly appeal his conviction. Instead, he moved to vacate his conviction and sentence under 28 U.S.C. § 2255. Following an evidentiary hearing and post-hearing briefing, the district court denied Yang's motion, and he appeals.

After review of Supreme Court precedent on competency, our court's caselaw, and the decisions of other circuits, we conclude that procedural default bars Yang's competency claim. His request for special treatment of competency claims on collateral review does not persuade us otherwise. So, we affirm the district court's denial of Yang's § 2255 motion.

I

A

Wearing a black mask, a black sweatshirt, and sunglasses, and armed with a sawed-off, semiautomatic .22 caliber rifle, Yang robbed the Community First Credit Union in Appleton, Wisconsin. Law enforcement arrested Yang a block away. After being advised of his *Miranda* rights and while being questioned, Yang admitted to the robbery. When asked why he did it, Yang responded, "I decided to try something new today, so I robbed the bank."

A federal grand jury indicted Yang for armed bank robbery (Count One), brandishing a firearm during a crime of violence (Count Two), and unlawful possession of a firearm (Count Three). Yang retained an attorney, Kevin Musolf, and pleaded not guilty at his arraignment.

Less than a month before his trial date, Yang filed a Notice of Insanity Defense under Federal Rule of Criminal Procedure 12.2(a). Though the notice was untimely, the district court found good cause for the delay and ordered Dr. Kent Berney to examine Yang to opine on whether Yang was insane at the time of the charged offenses. Neither Yang, the government, nor the court raised the issue of Yang's competency.

Based on his examination of Yang and review of available records, Dr. Berney noted "a well documented history of neurocognitive limitations." But Dr. Berney believed Yang was "malingering memory deficits" as indicated by the inconsistencies in his ability to recall information about the robbery during his psychological examination, in contrast with his recall during the post-arrest interview and in a pretrial service report interview. Dr. Berney ultimately opined "that Mr. Yang, at the time of the alleged crime . . . did not experience a severe mental disease that resulted in Mr. Yang being unable to appreciate the nature and quality or the wrongfulness of his acts." Rather, at the time of the crime, Yang experienced "a depressive disorder due to other medical conditions with mixed features as a result of a closed head injury." Due to Yang's malingering, however, Dr. Berney was "not able to definitively rule in or out Mr. Yang's

possible neurological anomaly which would be consistent with a severe mental defect."

Following Dr. Berney's report, Yang withdrew his insanity defense and entered into a plea agreement under which he would be convicted of Counts One and Two.

The district court then held a change of plea hearing. Concerned about Yang's competency, the court asked Yang's counsel if he had any doubts about Yang's ability to proceed. Musolf had none. After placing Yang under oath, the court engaged in a lengthy colloquy with him, explaining the purpose of the hearing, eliciting some basic biographical information, and asking whether Yang had read and discussed the plea agreement with Musolf before signing it. The court also asked Yang if he was taking any medications at that time that might affect his ability to understand the proceedings or to make decisions. Yang responded "[n]o, I didn't take anything." At the same time, Yang said he had stopped receiving his medication and that the voices were "still here and there but not any-more." But he responded "no" when asked if the voices interfered with his ability to communicate with his attorney. Throughout the hearing, the district court frequently asked Yang if he understood what was being described or explained. Yang said he understood, and he asked no questions.

At one point the district court asked Yang to explain a jury trial in his own words. Yang responded, "[j]ury trial is when there's people from the outside that comes in and testifies or like to see if you're guilty or not guilty." The

district court then provided a thorough explanation of a jury trial and the rights Yang would give up by pleading guilty. Yang had no questions and answered "no" when asked if anyone had made any promises or threats in connection with his plea. He affirmed that he was pleading guilty because he was guilty.

In establishing the factual basis for Yang's plea, the district court read a description provided by the government and asked Yang if he agreed. Yang responded:

> I was—that day I was playing a video game. So after my head injury, I wasn't sure what was going on. I was confused of everything, and I just thought that things that was wrong were right. After playing the video game, I just thought that I was in the video game, and I went to go rob a bank.

Attorney Musolf was then asked about the validity of Dr. Berney's report. He responded, "[w]e do acknowledge the report, and I guess we agree it doesn't rise to the level of a legal insanity defense despite the fact that there are some issues." The court accepted Yang's guilty plea.

His plea did not last long, though. Just over a month later, Yang wrote the court asking for a new attorney and seeking to withdraw his guilty plea. In the letter, Yang complained that Musolf had not reviewed Dr. Berney's report with him and generally ignored his questions. At a hearing, Musolf said that he did review the report with Yang but that he did not provide Yang with a copy. He

explained he "was concerned about [Yang] having a copy of the report" in jail because it contained confidential information.

The court granted Yang's request for new counsel and appointed Thomas Phillip, a federal public defender. Phillip arranged for a second psychological evaluation. Dr. Denver Johnson conducted that evaluation and concluded "to a reasonable degree of certainty that the multiple mental conditions that Mr. Yang was experiencing at the time of the crime seriously impaired his judgment and the ability to appreciate the nature and quality of as well as the wrongfulness of his acts." Yang then moved to withdraw his guilty plea and to reassert the insanity defense, which the court granted.

Before trial, the court had another opportunity to observe Yang at a hearing on Yang's requests to waive his right to a jury trial and elect a bench trial. Phillip explained that he and Yang had discussed what a bench trial is, the differences between a bench trial and a jury trial, and the benefits and drawbacks of each. After consideration, Yang decided that he wanted a bench trial. The court explained to Yang how a bench trial would work, which party had the burdens of proof, and that the judge would decide the law and the facts. Yang said he understood. The district court also described what Yang would give up in passing on a jury trial, and Yang again expressed his understanding. Yang had no additional questions. And when the judge asked Yang how he was feeling, Yang remarked that he felt good that day. He also said, "[t]hroughout my time in the trial, I've recovered a little bit and I'm starting to feel like myself more."

The court then asked Phillip if he had any concerns about Yang's competency to proceed. Phillip responded:

> No, I believe that he's competent to make this decision, and we've discussed it at length over several meetings and we've discussed the posture of the case at length over several meetings, so I think he's making a knowing decision and a voluntary decision to waive the jury.

The court accepted Yang's jury trial waiver.

The only issue at the bench trial was Yang's insanity defense, and Dr. Berney and Dr. Johnson testified.[1] After hearing this testimony, the district court concluded that Yang did not meet his burden to prove his insanity at the time of the bank robbery. The "most powerful evidence" in the district court's eyes was the video interview conducted after Yang was arrested. During that interview, Yang was able to communicate with the detective and said he understood his rights. The court explained this demonstrated that "whatever intellectual deficits Mr. Yang has, they are not significant as a functional matter." The court viewed the evidence of a mental defect as "very suspicious," as there was "no record other than [Yang's]

1. The parties stipulated to the surveillance video capturing the robbery and the video of law enforcement's post-arrest interview of Yang. When Yang was asked whether he understood that a stipulation meant he admitted those facts as true, and whether he made the decision to stipulate after careful discussion with his attorney, he answered, "yes."

say so." The court then found Yang guilty on all three counts.

The district court held a sentencing hearing. Yang accepted the opportunity to allocute. He apologized for his actions as well as to the employees of the credit union, and he recognized that he affected the lives of those employees and his own family. Yang said he had plans to further his education, and he acknowledged that, as a father, duties and responsibilities awaited him following his incarceration. In fashioning a sentence, the district court noted "how bizarre this crime was and is" and reiterated its reasons for rejecting Yang's insanity defense. The Court imposed a sentence of 168 months' imprisonment.

Neither defense counsel nor the government raised any concerns as to Yang's competency during the bench trial or at sentencing.

B

Yang did not directly appeal his conviction. Instead, he moved to vacate his sentence under 28 U.S.C. § 2255. In that motion, he claimed his second attorney, Phillip, provided ineffective assistance of counsel. The court concluded that the motion warranted an evidentiary hearing and appointed counsel. Yang's new counsel then filed a second amended petition, withdrawing Yang's ineffective assistance claim and asserting that the court's failure to hold a competency hearing during his criminal proceedings violated due process.

The court held an evidentiary hearing in which the court began by asking Yang's counsel why Yang's claim had not been procedurally defaulted. Yang's counsel responded that procedural default did not apply. Because the claim "require[d] evidence that is outside the record to fully determine" it, counsel asserted the claim fell within the category of claims that could not be brought first on direct appeal. Missing, counsel specified, was the testimony of Yang's probation officer, Brian Koehler, and the "helpful opinion of a psychologist who can explain to us what was missed the first time around." The district court was inclined to find that Yang's claim was procedurally defaulted. But it permitted Yang to put on evidence as to its merits "to make a full record here so the Court of appeals or even this Court can decide on the basis of what else is there."

The court observed that Yang, in framing his § 2255 claim as a competency claim, "essentially shielded from the Court the best evidence as to what his competency actually was at the time in question . . . leav[ing] the Court kind of and even [the] appellate court in the dark as to key evidence surrounding the issue." That best evidence was from attorney Phillip, whom the district court ordered to testify. Yang's counsel requested a stay of that order based on attorney-client privilege, pending appeal. The court granted the stay, so Phillip did not testify.

Yang called probation officer Koehler and Dr. Johnson to testify at the evidentiary hearing. Koehler described one of his interviews with Yang following the change of plea hearing. He testified that Yang's memory issues so

pervaded the interview that he had to cut it short. On cross-examination, Koehler admitted that in another pretrial study performed by the probation office, Yang recalled many more personal details.

Dr. Johnson testified about the psychological examination he performed to evaluate Yang's sanity at the time of the offense. Though not called upon to evaluate Yang's competency, Dr. Johnson testified he believed then that Yang "would not be competent to give a true accounting of what happened, to reason properly about it." He opined it was "very likely that [Yang] was incompetent to stand trial," but because he couldn't say for sure, "we would want to do a competency evaluation to establish that." The court elicited that Dr. Johnson never raised concerns about Yang's competency with Phillip. At the close of the hearing, the court granted Yang's counsel permission to file further briefing.

In post-hearing briefing, Yang argued against a finding of procedural default. Seventh Circuit precedent, he asserted, prohibited the application of procedural default to competency claims. Yang also turned to caselaw from the Eleventh Circuit to resist the application of procedural default. That court divides postconviction competency claims into procedural and substantive claims, holding that the former but not the latter may be procedurally defaulted.

The district court denied Yang's § 2255 motion. The court—relying on Seventh Circuit and Eleventh Circuit caselaw—agreed with the government:

> [B]y failing to raise the issue of his competency to stand trial in court or on direct appeal, and now by withdrawing his ineffective assistance of counsel claim and barring crucial evidence on the issue by asserting his attorney-client privilege, Yang has procedurally defaulted both his procedural and substantive competency claims.

Even if not procedurally defaulted, Yang's claims failed on the merits, the court explained, because the court did not believe it erred by "failing to *sua sponte* order a competency evaluation" and because "Yang was competent at the time of the proceedings." The district court issued a certificate of appealability.

II

On appeal, Yang challenges the district court's procedural default determination, its merits findings, and its stayed order requiring attorney Phillip to testify at the evidentiary hearing. We examine only the procedural default question. Supreme Court precedent on competency, our court's caselaw, and the decisions of other courts convince us that procedural default may bar a competency claim. Applying that doctrine to the facts here, Yang defaulted his claim and is barred from raising it.

A

Three Supreme Court cases form the foundation for the law on a defendant's competency. In *Dusky v.*

United States, the Court set forth the seminal test for determining a criminal defendant's competency: "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

In *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966), the Court added to this law. There, the Court ruled that the habeas petitioner "was constitutionally entitled to a hearing on the issue of his competence to stand trial." *Id.* at 377. In so concluding, the Court announced additional rules safeguarding a criminal defendant's right to a fair trial in the context of a defendant's competency. First, criminal defendants cannot waive competency *Id.* at 384. This is because waivers of rights must be knowing and intelligent. And if a defendant is incompetent, then the defendant cannot meet that waiver standard. *Id.* Second, where the evidence calls into question a defendant's competency, the trial court's failure to inquire into the defendant's competency abridges the constitutional right to a fair trial. *Id.* at 385. Applying these rules, the Court reasoned that the petitioner's history of "pronounced irrational behavior" should have triggered the state courts to invoke Illinois' statutory procedures designed to protect a defendant's right to a fair trial. *Id.* at 385-86.

Drope v. Missouri, further shaped this area of law. 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). Like in *Pate*, the Court held that the Missouri state courts failed

to give proper weight to record evidence that should have prompted further inquiry into the defendant's competency to stand trial. *Id.* at 179. The Court noted that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Id.* at 171. Additionally, the Court in *Drope* described *Pate*'s holding as "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Id.* at 172. The import of *Pate*, the Court added, is "that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required. . . ." *Id.* at 180. Moreover, because a defendant may flit in-and-out of competency, "a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competency to stand trial." *Id.* at 181.

Dusky, Pate, and *Drope* have served as the wellspring for resolving other competency issues addressed by the Supreme Court. *See Medina v. California*, 505 U.S. 437, 442, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) (holding that a state may place the burden on a defendant to prove incompetency by a preponderance of the evidence); *Godinez v. Moran*, 509 U.S. 389, 391, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993) (holding that the standard of competency for pleading guilty or waiving the right to counsel is the same as that for standing trial); *Indiana*

v. Edwards, 554 U.S. 164, 169-70, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008) (noting that *Dusky* and *Drope* help to frame the question of whether it is constitutionally permissible to find a defendant competent to stand trial but not so competent that he must be represented by counsel).

This court has built on those cases. In this circuit, the competency inquiry, generally, "focuses on 'whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" *Burt v. Uchtman*, 422 F.3d 557, 564 (7th Cir. 2005) (quoting *Dusky*, 363 U.S. at 402). The competency requirement "at its core, preserves the right to a fair trial," but also safeguards fairness throughout criminal proceedings, as it also applies to pleas and sentencing proceedings. *Anderson v. United States*, 865 F.3d 914, 919 (7th Cir. 2017) (citing *Godinez*, 509 U.S. at 391, and *United States v. Garrett*, 903 F.2d 1105, 1115 (7th Cir. 1990)). Thus, courts have a role in promoting "the fundamental principle that it is unjust to punish a person who lacks the mental capacity to understand the proceedings against him and participate in his own defense." *McManus v. Neal*, 779 F.3d 634, 656 (7th Cir. 2015)

Congress has also codified a procedure for raising competency issues. *See* 18 U.S.C. § 4241. The parties have a role in that procedure:

> At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant.

Id. § 4241(a). Congress has provided the district courts with the authority—in conjunction with and independent of the parties—to sua sponte raise the issue of competency:

> The court shall grant the motion [for a hearing], or shall order such a hearing on its own motion, if there is a 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 consequence of the proceedings against him or to assist properly in his defense.

Id. We evaluate the parties' arguments under these bodies of law.

B

Neither the Supreme Court nor our court has resolved whether the doctrine of procedural default bars competency claims raised for the first time on collateral

review. But the majority of our fellow circuits have, doing so by bifurcating competency claims into procedural and substantive claims. *See United States v. Basham*, 789 F.3d 358, 379 (4th Cir. 2015); *United States v. Flores-Martinez*, 677 F.3d 699, 705-06 (5th Cir. 2012); *Hodges v. Colson*, 727 F.3d 517, 540 (6th Cir. 2013); *Vogt v. United States*, 88 F.3d 587, 590-91 (8th Cir. 1996); *Williams v. Woodford*, 384 F.3d 567, 603-610 (9th Cir. 2004); *Lay v. Royal*, 860 F.3d 1307, 1314-15 (10th Cir. 2017); *Raheem v. GDCP Warden*, 995 F.3d 895, 928-29 (11th Cir. 2021). Because the parties' arguments and the district court's order rely on this bifurcation, we consider whether our court should recognize it as well.

Our companion circuits derive the procedural claim from *Pate*'s holding that the due process right to a fair trial is deprived by a trial court's failure to inquire into a defendant's competency when required by applicable procedures. 383 U.S. at 385; *see also*, *Drope*, 420 U.S. at 172 (describing *Pate*'s holding). Procedural competency claims typically arise where the trial court fails to hold a competency hearing or comply with Congress's directives in 18 U.S.C. § 4241. *See Flores-Martinez*, 677 F.3d at 705-06; *see also*, *Basham*, 789 F.3d at 379 (describing a procedural claim as when "the movant contends that the trial court failed to properly ensure that the accused was competent to stand trial, as required by 18 U.S.C. § 4241"); *Vogt*, 88 F.3d at 591 (noting "the issue in a procedural competency claim is whether the trial court should have conducted a competency hearing"); *James v. Singletary*, 957 F.2d 1562, 1571 (11th Cir. 1992) (same). To succeed on a procedural competency claim, a petitioner must point to

evidence before the trial court that should have raised a bona fide doubt as to his competency. *See Flores-Martinez*, 677 F.3d at 706; *Williams*, 384 F.3d at 603-04 (citing *Pate*, 383 U.S. at 385).

On the other hand, our fellow circuits derive substantive claims from the Supreme Court's language in *Dusky* and *Drope*. At bottom, that language means criminal defendants should not be tried while incompetent. *See Basham*, 789 F.3d at 379; *Flores-Martinez*, 677 F.3d at 705; *Vogt*, 88 F.3d at 590; *McGregor v. Gibson*, 248 F.3d 946, 952 (10th Cir. 2001); *James*, 957 F.2d at 1571. Therefore, to succeed on a substantive claim, "an accused must prove an inability either to comprehend or participate in the criminal proceedings." *Flores-Martinez*, 677 F.3d at 706 (citation omitted). That is, a defendant "must show that, at the time of trial, he lacked either sufficient ability to consult with his lawyer with a reasonable degree of rational understanding, or a rational and factual understanding of the proceedings against him." *Williams*, 384 F.3d at 608 (citing *Dusky*, 362 U.S. at 402).

In our circuit, some previous cases described separate substantive and procedural rights in the competency context. *See United States ex rel. Rivers v. Franzen*, 692 F.2d 491, 495 (7th Cir. 1982) (describing *Dusky* and *Pate* as the Supreme Court's delineation of separate substantive and procedural due process rights), *abrogated in part on other grounds recognized in United States ex rel Mireles v. Greer*, 736 F.2d 1160, 1168 n.4 (7th Cir. 1984); *Greer*, 736 F.2d at 1165 (discussing *Franzen*); *Woods v.*

McBride, 430 F.3d 813, 819-20 (7th Cir. 2005) (addressing both the "procedural matter" and "substantive matter" of petitioner's due process competency argument). But since *Woods*, our court has not referenced the distinction. *See United States v. Savage*, 505 F.3d 754, 758-60 (7th Cir. 2007) (holding on direct appeal that district court did not err in declining to sua sponte order a competency hearing under 18 U.S.C. § 4241); *Anderson*, 865 F.3d at 920-22 (7th Cir. 2017) (concluding district court erred in failing to hold a § 2255 evidentiary hearing to explore whether petitioner was incompetent when he pleaded guilty and at sentencing); *United States v. Wessel*, 2 F.4th 1043, 1059 (7th Cir. 2021) (holding on direct appeal that district court did not err in finding defendant competent to stand trial).

Given this state of the law and the parties' arguments in the collateral proceedings before the district court and on appeal, we now take the opportunity to clarify competency law in our circuit.

Competency pertains to a singular due process right to a fair trial under the Fifth Amendment. *See Anderson*, 865 F.3d at 919 (7th Cir. 2017) (citing *Drope*, 420 U.S. at 171-72). In the context of a fair trial and a defendant's competency, we look to whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Drope*, 420 U.S. at 172 (quoting *Dusky*, 362 U.S. at 402). And *Drope* explains how *Pate* relates to *Dusky*: *Pate* tells us that "the failure to observe procedures adequate to protect a defendant's right not

to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope*, 420 U.S. at 172. Our court's earlier references to separate "substantive" and "procedural" rights are confusing. We do not see a bifurcation between procedural competency and substantive competency rights.

C

The question for us to answer, then, is whether procedural default doctrine bars a competency-based due process claim when a petitioner raises that claim for the first time on collateral review.

Our fellow circuits—tying the analysis to the bifurcation of competency claims—have reached disparate answers to the question. The Eighth and Ninth Circuits hold that a petitioner may procedurally default both procedural and substantive competency claims. *See Lyons v. Luebbers*, 403 F.3d 585, 593 (8th Cir. 2005); *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1306-07 (9th Cir. 1996). The Fourth and Sixth Circuits hold that substantive competency claims are subject to procedural default. *See Basham*, 789 F.3d at 379 n.10 (citing *Smith v. Moore*, 137 F.3d 808, 819 (4th Cir. 1998); *Hodges*, 727 F.3d at 540. The Fifth Circuit has reached the same conclusion in an unpublished case. *Green v. Lumpkin*, 2023 U.S. App. LEXIS 8894, 2023 WL 2941470, at *3 (5th Cir. Apr. 13, 2023).[2] The Tenth and Eleventh Circuits, however, hold

2. We could not locate any decision from the Fourth, Fifth, or Sixth Circuits speaking to whether procedural competency claims may be procedurally defaulted.

that procedural default doctrine bars only procedural competency claims, but not substantive competency claims. *See Lay*, 860 F.3d at 1315; *Raheem*, 995 F.3d at 928-29. These courts reason that procedural competency claims must be raised first on direct appeal "because an appellate court hearing the claim 'may consider only the information before the trial court before and during trial.'" *Medina v. Singletary*, 59 F.3d 1095, 1106 (11th Cir. 1995) (quoting *James*, 957 F.2d at 1572). But substantive competency claims cannot be subject to procedural default because of the Supreme Court's determination that criminal defendants may not waive the right to be tried only while competent. *See*, *e.g.*, *Adams v. Wainwright*, 764 F.2d 1356, 1359 (11th Cir. 1985) (citing *Pate*, 383 U.S. at 384), *abrogated on other grounds as recognized in Granda v. United States*, 990 F.3d 1272, 1294 (11th Cir. 2021).

We align ourselves with the emerging consensus that procedural default may apply to a competency-based due process claim. As seen in our discussion above, *supra* II.B., our circuit does not adopt a distinction between substantive and procedural competency claims, but we reach the same conclusion as those that hold competency claims can be barred under procedural default doctrine.

Yang presents three arguments to the contrary. He analogizes procedural default and waiver, compares competency claims on collateral review to ineffective assistance of counsel claims in the same context, and asserts that our decision in *Anderson v. United States*, 865 F.3d 914, previously concluded that procedural default doctrine cannot bar competency claims on collateral review. None of these arguments are persuasive.

First, he contends that procedural default does not apply because competency is not waivable. But this contention is unconvincing because it conflates waiver and procedural default. *See Hodges*, 727 F.3d at 540. Waiver is the intentional relinquishment of a known right. *See United States v. Flores*, 929 F.3d 443, 447 (7th Cir. 2019). As *Pate* recognizes, waiver cannot be applied to competency in the original trial proceedings because the potentially incompetent defendant cannot knowingly and voluntarily relinquish his rights. 383 U.S. at 384. Default, however, is a different animal. It is a "failure to act when action is required." *Default*, Garner's Dictionary of Legal Usage (3d ed. 2011).

Yang argues that *Pate*'s recognition of a defendant's inability to waive competency implies that procedural default cannot apply. In his view, it is contradictory to prohibit waiver but to permit procedural default. But the law can prohibit a defendant from waiving competency before a trial court, while still subjecting competency claims to default for failing to observe the proper procedures in a collateral attack. Nearly fifty years ago, in the § 2254 context, the Supreme Court rejected as "sweeping" a rule that "would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention." *Wainwright v. Sykes*, 433 U.S. 72, 87-88, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). And the comparison of default to waiver is particularly unavailing in the § 2255 arena where default roots itself in finality and procedural efficiency. *See United States v. Frady*, 456 U.S. 152, 164-65, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982) ("Our trial and appellate

procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks. To the contrary, a final judgment commands respect."). We thus reject Yang's argument that procedural default does not apply because competency is not waivable.

Second, Yang analogizes his competency claim to an ineffective assistance of counsel claim. He asserts these claims are similar because both are poorly situated for direct review in the first instance—they both "involve evidence outside the record" and a "reviewing court on direct appeal is limited to the record of trial and cannot consider any extrinsic evidence that may be necessary to support" them. Appellant's Brief at 20, quoting *Galbraith v. United States*, 313 F.3d 1001, 1007-08 (7th Cir. 2002).

This court has been reluctant to broaden the exception to the procedural default doctrine beyond ineffective assistance of counsel. In *Delatorre v. United States*, we held that a prosecutorial misconduct claim raised for the first time in a § 2255 motion was procedurally defaulted. 847 F.3d 837, 844 (7th Cir. 2017). In doing so, we rejected an argument that prosecutorial misconduct claims were like ineffective assistance of counsel claims—"so inextricably linked to extrinsic evidence that it could not have been properly considered on direct appeal." *Id.* That is because "prosecutorial misconduct claim[s] . . . do[] not, by [their] very nature, require augmentation of the record." *Id.* In contrast, ineffective assistance of counsel claims "are almost invariably doomed on direct review because they often require augmentation of the record

with extrinsic evidence, which cannot be considered." *Id.* (internal quotation marks omitted).

But competency claims are not "invariably doomed," *id.*, on direct review because of a lack of record evidence. Defendants regularly raise, and this court addresses, competency claims on direct review of criminal convictions and sentences. *See United States v. Anzaldi*, 800 F.3d 872, 877-80 (7th Cir. 2015) (holding district court did not abuse its discretion in declining to order a competency evaluation); *United States v. Stoller*, 827 F.3d 591, 596 (7th Cir. 2016) (holding a district court did not abuse its discretion in declining to hold a hearing on defendant's competency); *United States v. Ewing*, 494 F.3d 607, 622-23 (7th Cir. 2007) (same). Moreover, analogizing competency claims to ineffective assistance claims and permitting Yang (and future petitioners) to avoid procedural default countenances the gamesmanship that the district court feared was playing out in the proceedings before it. As that court noted, there is one witness who can testify directly as to whether Yang was competent—attorney Phillip. But because Yang does not assert an ineffective assistance of counsel claim, he may assert attorney-client privilege to shield Phillip's thoughts on competency.

Ultimately, Yang wants a special procedural default exemption for competency claims. We see no reason to recognize one, especially when our court consistently applies the procedural default doctrine to other claims raised for the first time in § 2255 motions. *See Conley v. United States*, 5 F.4th 781, 799 (7th Cir. 2021) (holding that due process claim rooted in unrecognized "outrageous

government conduct" theory was otherwise procedurally defaulted); *McCoy v. United States*, 815 F.3d 292, 295-96 (7th Cir. 2016) (holding defendant defaulted claim that magistrate judge exceeded authority under Federal Magistrates Act and Article III by failing to raise issue on direct appeal or in § 2255 motion); *Theodorou v. United States*, 887 F.2d 1336, 1341 (7th Cir. 1989) (holding that defendant's failure to raise his constitutional claim of a due process violation on direct appeal precluded him from raising the issue in a § 2255 proceeding). Constitutional claims in the collateral review context (save for ineffective assistance of counsel claims) are almost always tethered to arguments regarding deprivation of a due process right to a fair trial. We routinely apply procedural default doctrine to those claims, and Yang does not convince us to depart from that general rule.

Third, Yang relies on *Anderson* to argue that our court does not apply procedural default doctrine to competency claims. He submits that, "as the Seventh Circuit's most recent opinion applying the Due Process competency framework, [*Anderson*] should have supplied the roadmap for the district court's decision here." Anderson pleaded guilty to being a felon in possession of a firearm. 865 F.3d at 916. As this court described it, though the district court had some "general knowledge of Anderson's mental health problems," it was unaware of the illnesses he suffered, the medication he was prescribed, and how the medication affected him. *Id.* In the underlying criminal proceeding, neither the court, Anderson's counsel, nor the government raised the issue of Anderson's competency. *Id.* Anderson's plea agreement foreclosed a direct appeal,

so following his conviction and sentence he sought § 2255 relief, arguing (1) that he was not competent at the time of his plea and (2) that his counsel was constitutionally defective in failing to raise the issue of his competency. *Id.* The district court rejected Anderson's petition without holding an evidentiary hearing. *Id.*

This court's decision in *Anderson* addressed only whether the district court should have held an evidentiary hearing before ruling on the petition. *Id.* The court concluded that an evidentiary hearing was needed: "Because the district court lacked a full picture of Anderson's mental health, its finding that Anderson had the capacity to plead guilty rests on a flawed factual foundation that must be explored in a hearing." *Id.* at 920. Informing this conclusion were facts that "the district court knew Anderson was a paranoid schizophrenic" and that "Anderson disclosed his use of unspecified psychotropic drugs" in the underlying proceedings. *Id.*

Anderson does not support Yang's argument that our court would not apply procedural default to his § 2255 competency claim. Though *Anderson* certainly sketches out the general principles governing competency and due process, it does so while resolving a narrow issue: the necessity of a § 2255 evidentiary hearing. That issue is not pertinent here because the district conducted an evidentiary hearing.

Although neither our court nor the district court determined that Anderson's competency claim was procedurally defaulted, that was because no party

addressed procedural default. Additionally, though not discussed by the court in *Anderson*, a different procedural background may have counseled a different result on the issue of procedural default had it been raised. Unlike here, where Yang was free to seek the direct appeal of his conviction and sentence, Anderson was foreclosed from seeking any direct appeal by the terms of his plea agreement. 865 F.3d at 916. These differences make *Anderson* distinguishable.

D

Having determined that the doctrine of procedural default applies to competency claims, we apply it here. "A claim not raised on direct appeal generally may not be raised for the first time on collateral review and amounts to procedural default." *White v. United States*, 8 F.4th 547, 554 (7th Cir. 2021). Usually, when confronted with procedural default, a petitioner can overcome that hurdle by showing "either cause for the default and actual prejudice from the alleged error, or that he is actually innocent." *Id.*

Application of these principles is straightforward here and requires denial of Yang's motion. Neither Yang nor his counsel raised the issue of competency before the trial court. In fact, at two different times, both attorney Musolf and attorney Phillip said they saw no impediment to proceeding based on Yang's competency.

And Yang did not directly appeal his conviction and sentence, electing instead to move under § 2255 to vacate

his sentence. At first, Yang's motion raised the ineffective assistance of counsel issue. Only after the court concluded that an evidentiary hearing was warranted and appointed counsel did Yang, through his new counsel, withdraw his ineffective assistance claim and raise the competency claim at issue here. Yang did not attempt to make the traditional showing of cause and prejudice or of actual innocence in bringing his claim. Nor has he asserted those exceptions here on appeal to overcome procedural default. Therefore, Yang's petition must be dismissed.[3]

III

Yang is not entitled to collateral relief under § 2255 because he procedurally defaulted his competency claim in his second amended petition. The district court concluded the same after presiding over Yang's criminal trial and conducing a complete inquiry into Yang's claim on collateral review. Therefore, we Affirm the denial of Yang's § 2255 motion.

---

3. In its thoroughness, the district court addressed the merits of Yang's § 2255 motion. As stated above, because we conclude that Yang procedurally defaulted his claim, we decline to address the merits. For the same reason we need not resolve Yang's challenge to the district court's order that attorney Phillip testify at the evidentiary hearing.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, FILED JULY 31, 2023

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Case No. 21-C-1281

XENGXAI YANG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Filed: July 31, 2023

DECISION AND ORDER DENYING § 2255 MOTION TO VACATE JUDGMENT

William C. Griesbach, United States District Judge

Xengxai Yang is currently serving a 168-month sentence for armed bank robbery and related offenses. On November 5, 2021, he filed a timely petition under 28 U.S.C. § 2255 to vacate his conviction on the ground of ineffective assistance of counsel. With the assistance of counsel, Yang filed a second amended petition in which he withdrew his claim for ineffective assistance of counsel

and alleged that he had been denied due process by the failure to conduct a hearing to determine whether he was competent to proceed to trial in the underlying action. The court held an evidentiary hearing on February 9, 2023, and ordered post-hearing briefing. Yang filed a post-hearing brief, to which the Government filed a response, and Yang filed a reply. The matter is now ripe for review. For the reasons set forth below, the court concludes that Yang's due process claim is procedurally defaulted. The court further concludes that, even if the claim was not procedurally defaulted, it fails on its merits. Accordingly, Yang's petition for relief under § 2255 will be denied.

THE UNDERLYING CRIMINAL CASE—CASE NO. 19-CR-67

Shortly before 6:00 p.m. on March 15, 2019, nineteen-year-old Xengxai Yang walked into the Community First Credit Union in Appleton, Wisconsin, wearing a black plastic theater mask, sunglasses, and a black sweatshirt with a hood covering his head, and carrying a sawed-off semiautomatic .22 caliber rifle. Yang pointed the rifle at a teller and the on-duty branch manager while another teller assisted a customer at the drive-up window. Case No. 19-CR-67, Presentence Investigation Report, Dkt. No. 45, ¶ 17. When that customer transaction was completed, Yang chambered a round into the rifle and ordered the tellers to give him the money from their respective cash drawers. He then placed the money from the drawers in a nylon drawstring backpack, restrained two of the employees with cable ties, and walked out the doors. *Id.* ¶ 18.

Alerted to the robbery by a customer waiting in the drive-up lane, Appleton police promptly responded and located Yang walking on a near-by street about a block from the credit union. He was still wearing the theater mask, sunglasses, and hooded sweatshirt and carrying the sawed-off rifle. Officers located on his person two additional loaded magazines for the rifle, a 100-round box of .22 ammunition, the nylon drawstring backpack containing $10,745 in U.S. currency, and black plastic cable ties. *Id.* ¶ 19. Yang was placed under arrest and transported to the Appleton Police Department where, after being advised of his *Miranda* rights, he underwent an extensive video-recorded interview and admitted robbing the credit union. When questioned about his motive, Yang stated, "I decided to try something new today, so I robbed the bank." *Id.* ¶ 20.

On April 16, 2019, Yang was charged in an indictment with armed bank robbery, in violation of 18 U.S.C. §§ 2113(a) and (d) (Count One); brandishing a firearm during a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and (B)(i) (Count Two); and unlawful possession of a firearm, in violation of 26 U.S.C. §§ 5841, 5845(a), 5861(d), and 5871 (Count Three). Case No. 19-CR-67, Dkt. No. 1. Yang's family retained Attorney Kevin Musolf to represent him, and at his arraignment Yang entered pleas of not guilty. The case was set for trial to commence on July 1, 2019. On June 11, 2019, Yang filed a Notice of Insanity Defense pursuant to Federal Rule of Criminal Procedure 12.2(a). The court then removed the case from the trial calendar and ordered a psychological evaluation pursuant to 18 U.S.C. § 4247(c) to be performed

by Dr. Kent Berney, a psychologist licensed by the State of Wisconsin.

Based upon his evaluation, Dr. Berney concluded that Yang did not meet the legal definition of insane at the time of the offense. Case No. 19-CR-67, Dkt. No. 13. From his testing and clinical interview, Dr. Berney found that "Mr. Yang clearly engaged in malingering during [his] examination, primarily related to memory defect." Despite this finding, however, Dr. Berney stated he could not rule out a "neurological anomaly which would be consistent with a severe mental defect." *Id.* at 14. Nevertheless, Dr. Berney stated that it was his opinion "to a reasonable degree of psychological certainty, that Mr. Yang does not experience a severe mental disease that would be appropriate for consideration of an insanity defense." *Id.* at 15. In Dr. Berney's opinion, "Mr. Yang did appreciate the wrongfulness of his acts." *Id.*

After reviewing Dr. Berney's report, Yang withdrew his insanity defense and entered into a Plea Agreement with the Government. Case No. 19-CR-67, Dkt. No. 15. On January 17, 2020, pursuant to that Agreement, Yang entered pleas of guilty to Armed Bank Robbery (Count One) and Using a Firearm in furtherance of a Crime of Violence (Count Two), and sentencing was set for April 13, 2020.

On February 6, 2020, Yang wrote to the court asking for a new attorney and to withdraw his guilty pleas. Yang claimed in his handwritten letter that his attorney had not reviewed Dr. Berney's report with him and in general

ignored his questions about his case. As a result, he claimed that his plea was neither voluntary nor intelligent. Case No. 19-CR-67, Dkt. No. 17. At a hearing on Yang's request, Attorney Musolf disputed Yang's claim that he did not discuss Dr. Berney's report with him but acknowledged that Yang no longer had confidence in him and asked to withdraw. The court granted Attorney Musolf's motion and directed that a new attorney be appointed under 18 U.S.C. § 3006A with the understanding that, after reviewing the file and consulting with Yang, counsel would decide whether to move for withdrawal of his pleas.

Attorney Thomas Phillip was appointed to represent Yang and entered his appearance on February 19, 2020. Attorney Phillip arranged for Dr. Denver Johnson, also a psychologist licensed by the State of Wisconsin, to conduct a neuropsychological evaluation of Yang. Based on his evaluation, Dr. Johnson concluded "to a reasonable degree of certainty that the multiple mental conditions that Mr. Yang was experiencing at the time of the crime seriously impaired his judgment and the ability to appreciate the nature and quality of as well as the wrongfulness of his acts." Case No. 19-CR-67, Dkt. No. 29-1 at 36. Based on Dr. Johnson's report, Attorney Phillip filed, on Yang's behalf, a motion to withdraw Yang's guilty pleas and reassert his insanity defense. Case No. 19-CR-67, Dkt. No. 27. The court granted Yang's motion over the Government's objection, concluding that Yang had shown a fair and just reason for the withdrawal. Case No. 19-CR-67, Dkt. No. 34.

Yang waived his right to a jury and, with the Government's consent, a trial to the court was held

on October 29, 2020. The parties stipulated to the surveillance video from the credit union that showed Yang entering the building and completing the robbery. Case No. 19-CR-67, Trial Ex. 4. The parties also stipulated to the video of Yang's post-arrest interview at the Appleton Police Department. *Id.* The only issue in dispute was whether Yang was legally insane at the time of the crime. Both Dr. Berney and Dr. Johnson testified as to that issue. Case No. 19-CR-67, Dkt. No. 61. At the conclusion of the trial, the court found that Yang had failed to establish that, at the time of the robbery, he suffered from a mental disease or defect of such severity that he was unable to appreciate the nature and quality or the wrongfulness of his acts and found him guilty on all counts. *Id.* at 97-102. On February 5, 2021, the court imposed concurrent sentences of 48 months on Counts One (bank robbery) and Three (unlawful possession of a firearm) and 120 months as to Count Two (brandishing a firearm during a crime of violence), which was ordered to run consecutive to Counts One and Three, for a total of 168 months (14 years) imprisonment and a total of five years of supervised release. Judgment was entered that same day.

Yang did not appeal his conviction. Instead, on November 5, 2021, he filed a pro se motion to vacate his conviction under 28 U.S.C. § 2255, in which he claimed that Attorney Phillip had provided ineffective assistance of counsel by rejecting his earlier plea agreement and proceeding to trial on the defense of insanity. The court concluded that an evidentiary hearing was necessary to resolve Yang's petition and appointed counsel as required under Rule 8(c) of the Rules Governing § 2255 Proceedings.

Attorney Catherine White entered her appearance on June 14, 2022, and the court set the matter for an evidentiary hearing on September 1, 2022. Attorney White later moved to adjourn the hearing and then sought leave to file a second amended § 2255 petition. Both motions were granted, and on October 25, 2022, Attorney White filed an amended petition on Yang's behalf which withdrew Yang's original claim of ineffective assistance of counsel and in its place alleged that the court's failure to hold a competency hearing during his criminal proceedings violated Yang's right to due process of law. The evidentiary hearing was finally held on February 9, 2023. The court's findings of fact and conclusions of law are set forth in the following analysis.

ANALYSIS

The Due Process Clause prohibits the trial and conviction of mentally incompetent defendants. *Drope v. Missouri*, 420 U.S. 162, 172, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). Courts have drawn a distinction between procedural competency claims and substantive competency claims. "A petitioner may make a procedural competency claim by alleging that the trial court failed to hold a competency hearing after the defendant's mental competence was put at issue." *Medina v. Singletary*, 59 F.3d 1095, 1106 (11th Cir. 1995); *see Pate v. Robinson*, 383 U.S. 375, 385, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966) ("The failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial."). A substantive competency claim, on the other

hand, is made by alleging that, even though there was no procedural error, "[the petitioner] was, in fact, tried and convicted while mentally incompetent." *Medina*, 59 F.3d at 1106; *see also Battle v. United States*, 419 F.3d 1292, 1298 (11th Cir. 2005).

Yang has asserted both kinds of claims here. He contends that, despite his "bizarre behavior, recent diagnosis of a psychotic disorder, and long history of neurocognitive limitations, including an IQ below the first percentile, no one requested a competency evaluation during his criminal proceedings." Case No. 21-CV-1281, Dkt. No. 43 at 9. He asserts that, because the evidence demonstrates a bona fide reason to doubt his competence during the period in which he was tried, convicted, and sentenced, the court should have *sua sponte* ordered a competency evaluation pursuant to 18 U.S.C. § 4241(a) and determined whether he was competent to proceed. Because the court failed to do so, Yang contends his conviction and sentence should be vacated and a competency hearing should be held before further proceedings occur.

Alternatively, or in addition, Yang contends that the evidence establishes that he likely was not competent to stand trial at the time the proceedings in his criminal case occurred. Citing not only the same evidence referenced above, but also evidence that was not before the court at the time, Yang argues that he was likely incompetent at the time of the underlying proceedings. For this reason, as well, he contends that his conviction should be vacated. The court will address each kind of competency claim in turn, but it must first address the Government's argument

that Yang has procedurally defaulted any competency claim.

A. Procedural Default

The Government argues that Yang's claim is procedurally defaulted because it was not raised in the trial court or on direct appeal. Collateral relief under § 2255 is not a substitute for a direct appeal. "A claim not raised on direct appeal generally may not be raised for the first time on collateral review and amounts to procedural default." *White v. United States*, 8 F.4th 547, 554 (7th Cir. 2021) (citing *McCoy v. United States*, 815 F.3d 292, 295 (7th Cir. 2016)); *see also Delatorre v. United States*, 847 F.3d 837, 843 (7th Cir. 2017) ("Any claim that could have been raised originally in the trial court and then on direct appeal that is raised for the first time on collateral review is procedurally defaulted."). In pressing its argument for procedural default, the Government does not distinguish between Yang's procedural and substantive competency claims. Yang, for his part, contends that neither claim is subject to procedural default under Seventh Circuit precedent.

In this respect, Yang's argument differs from the Eleventh Circuit precedent on which he relies to distinguish between procedural and substantive competency claims. The Eleventh Circuit has held that procedural competency claims are waived if not raised on direct appeal. *Battle*, 419 F.3d at 1298 ("Because Battle failed to raise this [procedural competency] claim on direct appeal, he has waived it." (citations omitted)). As to

substantive competency, however, the Eleventh Circuit has held that such a claim "is not subject to procedural default and must be considered on the merits." *Id.* (citing *Medina*, 59 F.3d at 1111). In his response to the Government's argument that he procedurally defaulted his claim under the circumstances of this case, Yang seems to have overlooked the role of counsel in representing a criminal defendant, as well as counsel's obligation to the court.

As an initial matter, Yang asserts that the procedural default rule does not apply to the issue of competency asserted here because it is "not a 'claim' in the classic sense of the word." Case No. 21-CV-1281, Dkt. No. 43 at 19. He argues that competency is an issue the court can raise *sua sponte* if defense counsel or the Government does not raise it first. *See* 18 U.S.C. § 4241. But the fact that the court can raise the issue does not mean that the assertion that the court erred in failing to do so is not a claim. Yang does, in fact, assert a claim—that the court's failure to hold a competency hearing violated his right to due process. Yang has not shown how his due process claim is different than any other constitutional claim subject to the rule of procedural default. Of course, the defendant himself would not be expected to raise the issue, especially if he's not competent to stand trial. But just like any other claim, the attorney representing him, either at trial or on appeal, would be expected to do so. The issue, then, is whether Yang, through his attorney, procedurally defaulted his due process claim.

Yang asserts that, under the Seventh Circuit's decision in *Anderson v. United States*, 865 F.3d 914 (7th

Cir. 2017), due process competency claims are not subject to procedural default. The petitioner in that case pled guilty to being a felon in possession of a firearm. His plea agreement prevented him from directly appealing his conviction and sentence, so the petitioner filed a § 2255 motion asserting that he was not competent at the time of his guilty plea and that his counsel provided constitutionally defective assistance for failing to challenge his competence. After the district court summarily denied his § 2255 motion, the petitioner appealed and requested an evidentiary hearing to develop the facts relevant to his interrelated claims. *Id.* at 915. The court of appeals agreed that an evidentiary hearing was necessary and remanded the case for further proceedings. *Id.* at 922. In so ruling, however, the court focused on the due process claim and did not address the issue of procedural default. Contrary to Yang's suggestion, the court did not hold that such claims are categorically exempt from the procedural default rule. Yang has not cited, and the court cannot find, any cases from the Seventh Circuit adopting such an exception.

Yang also argues that his due process claim could not have been raised on direct appeal because it relies on extrinsic evidence. He analogizes his due process claim to a claim of ineffective assistance of counsel, for which the record is generally not fully developed until trial counsel testifies on collateral review. *See*, *e.g.*, *Galbraith v. United States*, 313 F.3d 1001, 1007 (7th Cir. 2002) ("A reviewing court on direct appeal is limited to the record of trial and cannot consider any extrinsic evidence."). The Seventh Circuit recently addressed the "extrinsic

evidence" exception in *Delatorre v. United States*, 847 F.3d 837 (7th Cir. 2017). Although the Seventh Circuit did not address the precise issue presented here, the case is nevertheless instructive.

In *Delatorre*, the petitioner filed a § 2255 motion asserting, among other things, that the prosecutor engaged in misconduct by reneging on a promise to provide him with a plea agreement. *Id.* at 843. Because the petitioner did not assert his prosecutorial misconduct claim in the district court or on direct appeal, the court concluded the claim was procedurally defaulted. To establish cause for his default, the petitioner argued that, like most claims of ineffective assistance of counsel, his prosecutorial-misconduct claim was so "inextricably linked to extrinsic evidence that it could not have been properly considered on direct appeal." *Id.* at 844. The court rejected the petitioner's analogy to an ineffective assistance of counsel claim. It explained:

> The evidence introduced at trial in the case giving rise to the claim of ineffective assistance . . . will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. Thus, claims of ineffective assistance, by their very nature, are almost invariably doomed on direct review because they often require augmentation of the record with extrinsic evidence, which cannot be considered. We thus permit these claims, in most instances, to be raised for the first time on collateral review.

Id. (internal citations omitted) (cleaned up). In other words, the evidence necessary to prove ineffective assistance of counsel will rarely be introduced in the underlying criminal case by the very attorney whose representation is alleged to have been deficient. That's why the record must generally be augmented to allow for review of such claims.

Conversely, the *Delatorre* court observed that the prosecutorial-misconduct claim petitioner was asserting in that case "does not, by its very nature require augmentation of the record." *Id.* "The only reason extrinsic evidence is required to prove [Delatorre's] claim," the court explained, "is because *he* [or his attorney] failed to raise this claim in the district court in the first place." *Id.* The court noted that "[h]ad he [or his attorney] raised this claim at the proper time—in the district court before he was convicted—his evidence supporting that claim would have been in the trial record and could have been considered on direct appeal." *Id.* The court concluded, "[Delatorre's] prosecutorial misconduct claim is not akin to an ineffective-assistance-of-counsel claim in this regard, and we refuse to reward [him] for *his* creation of an evidentiary issue." *Id.* It should be noted, however, that the court did allow Delatorre to assert an ineffective assistance of counsel claim based on his attorney's failure to seek enforcement of the alleged plea agreement.

The rationale of *Delatorre* applies here. If the need for a competency evaluation was so obvious that the trial court should have raised the question of Yang's competency *sua sponte* and ordered an evaluation, then it clearly should have been raised in the trial court and/

or on direct appeal. Whatever notice the trial court had of the defendant's potential incompetence would have been reflected in the record as it then existed and could have been offered in support of Yang's due process claim on appeal. Having failed to appeal, Yang has waived at least his procedural claim that he was denied due process by the court's failure to *sua sponte* order a competency evaluation in the underlying proceeding.

Like Delatorre, Yang has attempted to avoid this result by seeking to augment the record in a § 2255 proceeding with evidence that was not before the court in the original case. Yang attached to his amended petition, for example, a copy of an email that U.S. Probation Officer Brian Koehler had written to Attorney Phillip shortly after Attorney Phillip had taken over the case. A portion of the email reads:

> I "sort of" had the presentence interview. It did not go well. Mr. Yang stated he could not recall even the most basic of information about his background or upbringing; had an impossible time with names, dates, and places; and generally knew nothing about himself or his family.

Case No. 21-CV-1281, Dkt. No. 31-1. Along the same line, Yang called Officer Koehler as a witness at his evidentiary hearing. Officer Koehler testified that, during the presentence interview, Yang "was struggling to recall many aspects of his life to include his name and date of birth." Case No. 21-CV-1281, Dkt. No. 42 at 18:09-10.

More importantly, Yang also offered testimony from Dr. Johnson, who had earlier evaluated Yang and testified at Yang's trial on the issue of insanity. Dr. Johnson testified for the first time at the evidentiary hearing on Yang's § 2255 motion that, in his opinion, Yang was likely not competent to stand trial at the time of the previous criminal proceedings. *Id.* at 27:18-21. Although he had doubted Yang's competency at the time of the earlier trial, Dr. Johnson explained that the neuropsychological evaluation that he performed on Yang in the spring of 2020 was focused on insanity, not competency, and he therefore did not believe it appropriate for him to opine directly on Yang's competency. And despite his doubts about Yang's competency at the time of his earlier evaluation, Dr. Johnson testified he did not believe he mentioned it to Attorney Phillip, who had retained him to conduct the evaluation. *Id.* at 46:12-47:03.

But, of course, this evidence was not before the court in Yang's original case. To the extent Yang relies on this newly presented evidence to support his claim that the court deprived him of due process by failing to conduct a competency hearing, the claim fails because that evidence was not part of the record before the court. The court cannot have erred in failing to consider evidence that was not before it. If, on the other hand, Yang's claim now is that this or similar evidence should have been presented in the earlier proceedings, his claim is really one for ineffective assistance of counsel. However, Yang has withdrawn his claim of ineffective assistance of counsel in an obvious effort to shield himself from any damaging evidence on the very issue on which he now claims he is entitled to

relief. In doing so, Yang has also waived his substantive competency claim.

It is, after all, the defendant's own attorney, not the attorney for the Government or the trial court, that is in the best position to evaluate his client's competency to proceed—his ability "to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4241(a). It is the defendant's attorney, whether retained or appointed, who directly interacts with the defendant during the course of the representation, explains to his client the applicable law and procedure, and works with the client in preparing the defense. Lack of competency to proceed is an absolute bar to trial and conviction. An attorney who fails to raise a meritorious competency issue is constitutionally ineffective. Thus, the fact that neither of Yang's previous attorneys raised the issue of his competency to proceed strongly suggests that neither saw any reason to question it. Yet, when the Government sought to elicit testimony from Attorney Phillip at the hearing on Yang's § 2255 motion, Yang objected on the ground of attorney-client privilege. When the court stated it would order Attorney Phillip to testify concerning his former client's competence to stand trial over Yang's objection, Attorney White requested that the court's order be stayed so that she could appeal. Case No. 21-CV-1281, Dkt. No. 42 at 14:21-15:07. The court granted Attorney White's request for a stay and proceeded with the evidentiary hearing rather than delay the case further. *Id.*

The court remains convinced, however, that it was entitled to hear from Yang's previous attorneys on both

the procedural and substantive competency claims on which he seeks relief. Just as an individual waives the attorney-client privilege by asserting a claim of ineffective assistance of counsel, so also the privilege is waived when a defendant claims he was incompetent. Both claims require the disclosure of otherwise confidential information for their resolution. The attorney-client privilege cannot be used to shield from the court facts showing a bona fide doubt as to a defendant's competency to stand trial. *See United States ex rel. Foster v. DeRobertis*, 741 F.2d 1007, 1012 (7th Cir. 1984) ("Counsel is not relieved of his obligation to bring to the court's attention facts showing a bona fide doubt as to the defendant's competency by claiming that the information was received in confidence. A defendant cannot hope to avoid trial by claiming incompetence and at the same time refuse to divulge the basis for his claim. This remains true whether defendant is attempting to establish incompetence or only a bona fide doubt on that score."). No court should countenance such gamesmanship. Yang's withdrawal of his ineffective assistance of counsel claim and assertion of privilege under these circumstances constitute a further basis for concluding that not only his procedural competency claim, but also his substantive claim, are waived.

In sum, by failing to raise the issue of his competency to stand trial in court or on direct appeal, and now by withdrawing his ineffective assistance of counsel claim and barring crucial evidence on the issue by asserting his attorney-client privilege, Yang has procedurally defaulted both his procedural and substantive competency claims. "Procedurally defaulted constitutional claims are not

considered on collateral review unless the petitioner shows either (1) actual innocence or (2) cause and prejudice." *Delatorre*, 847 F.3d at 843. Yang does not advance any argument of actual innocence or that he has cause for his procedural default. As a result, the claim is barred and, for this reason alone, his petition must be denied. Nevertheless, in the interest of making a full record, the court proceeded with the hearing Yang had requested. Having considered the evidence offered and the entire record in the underlying case, the court also concludes that Yang's procedural and substantive claims fail on the merits.

B. Procedural Competence Claim

It is well settled that "the criminal trial of an incompetent defendant violates due process." *Medina v. California*, 505 U.S. 437, 453, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). Federal law requires that a court order a hearing to determine the competency of a defendant, either *sua sponte* or on either parties' motion, "if 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). Yang claims that he was denied due process of law as a result of the failure of the Government or the court to raise the issue of his competency, request an evaluation, and determine whether he was competent to proceed in his underlying criminal case, even though his own attorney never raised the

issue. "Failing to *sua sponte* hold a competency hearing violates due process if, but only if, 'there is a bona fide doubt that arises as to a defendant's competency before trial.'" *United States v. Stoller*, 827 F.3d 591, 596 (7th Cir. 2016) (quoting *United States v. Woodard*, 744 F.3d 488, 493 (7th Cir. 2014)). A decision whether to order a competency evaluation *sua sponte* is entrusted to the district court's sound discretion. *Id.*

In the underlying case, the court had no reason to believe Yang had a mental disease or defect of such severity that he was unable to understand the nature or consequences of the proceedings against him or assist his attorneys in his defense. Although the brazenness of the crimes alleged and Yang's stated reason for committing them seemed bizarre, Yang appeared to be functioning within normal limits at the time. According to the Pretrial Services Report filed with the court just before his initial appearance, Yang conveyed to the author of the Report that he was born on December 29, 1999, to Yer Lee and Chao Yang. He had four brothers and four sisters, each of whom he named and each of whom lived in the Eastern District of Wisconsin. Yang stated he lived with his parents, his younger sister, and Aimee Thao, his fiancé/wife, at the Appleton home in which he had grown up. Yang stated he and Ms. Thao were expecting their first child in October of that year. He was able to speak fluently in English and Hmong. Case No. 19-CR-67, Dkt. No. 4 at 1-2.

The employment history Yang gave included working three months during the winter of 2018 as a machine operator at Agropur, a cheese factory in Appleton, as a

cashier/customer service representative at Advanced Auto Parts in Appleton during the summer of 2018, as a line worker for LCS Communications in Menasha in the Spring of 2018, and as a busser/host at Basil Café in Appleton. He had earned wages at these jobs ranging from $8.50 to $14.00 per hour. Yang stated his left each of these jobs because of mental health related stress. *Id.* at 4. He held a valid driver's license, owned a motor vehicle, and had a mobile phone. Although he appeared to be indigent, Yang indicated that he had retained Attorney Kevin Musolf from an Appleton law firm to represent him in future court proceedings. *Id.*

Yang denied any history of substance or alcohol abuse. As for his mental health history, the Pretrial Services Report explained:

> The defendant reported having some learning disabilities and has had difficulty being able to focus. He further reported bouts of stuttering and uncontrollable twitches. He related he stopped taking his medications in the seventh grade because he wanted to be "normal" like all of the other kids. He stated he now meditates to calm himself but feels that he is going "crazy." He advised hearing voices when he is day dreaming or when he doesn't get enough sleep. He further noted he would like to return to the doctor to see about getting back on his medications but feels a certain level of guilt over this as he does not want to burden his parents. Mr. Yang was unable to recall the names

> or types of medications he was previously prescribed. No gambling history was noted.

Id. at 5.

The first suggestion that Yang's mental condition might be more severe came with the October 10, 2019 psychological evaluation conducted by Dr. Berney in response to Yang's notice of insanity defense. Case No. 19-CR-67, Dkt. No. 13. Dr. Berney had interviewed Yang on June 29 and July 3, 2019. Yang reported to Dr. Berney he had a "very compromised memory" which he seemingly attributed to a head injury that had occurred at work sometime in December 2018. Following his head injury, Yang claimed he was unable to recall significant personal information, including his date of birth, where he was born, the number of siblings he had, where he lived, who he lived with, where he had attended school, and his employment history. *Id.* at 1, 3. He also claimed he could not recall any information relating to the crimes with which he was charged. Yang told Dr. Berney that he could "only remember sleeping on the couch and then [he] woke up in the Outagamie County Jail." *Id.* at 10.

Yang also reported having experienced auditory hallucinations following a head injury he sustained in December 2018 at the cheese factory where he was working at the time. Yang claims he was struck in the head with a "cheese pusher" and "blacked out a little bit," vomited, went home, and remained off work for one or two weeks. *Id.* at 3-4. Dr. Berney was unable to determine from Yang's report of the incident whether Yang had a loss

of consciousness, but it was clear Yang neither sought nor received medical treatment. One or two weeks after he returned to work, Yang claims that he left his employment because of "headaches and hearing someone talking to me, demons' voices." *Id.* at 4. He went on to state that, since the head injury, he was unable to recall any information and had significant headaches. He claims he was having bad dreams, would black out and have headaches in his dreams. *Id.* Sometimes, the voices threatened that, if he did not do what they wanted him to do, they would scare him at night. *Id.* at 5.

Though Yang's claimed extreme lack of recall and auditory hallucinations may suggest a severe mental disease or defect, Dr. Berney's report also contained strong evidence that Yang was malingering. Dr. Berney noted that Yang's claimed inability to remember his personal circumstances was inconsistent with the Pretrial Services Report which showed a clear memory of the same information he now claimed he could not recall. *Id.* at 3, 12. Dr. Berney also noted that Yang's claimed lack of memory concerning the circumstances surrounding his alleged crimes was inconsistent with the reports of the arresting officer and Detective Probst who interviewed him after his arrest. *Id.* At 10-11. Dr. Berney noted in his report that "it is unlikely that Mr. Yang would have the capacity to initially recall specific details of the alleged robbery and subsequently have absolutely no recall at all of any of the incidents related to the robbery." *Id.* at 12. Based upon his clinical experience, review of literature and consultation with a neuropsychologist, Dr. Berney also observed that "auditory hallucinations are an extremely

rare sequelae associated with a closed head injury." *Id.* at 13. As a result, Dr. Berney concluded that Yang's "expressed symptoms of auditory hallucinations are likely feigned or exaggerated. *Id.* at 14.

Psychological testing also indicated clear signs of malingering. Dr. Berney administered to Yang the Test of Memory Malingering (TOMM), a standardized measure that is used to assess feigning memory defects. According to Dr. Berney's report, "Mr. Yang's scores on the TOMM on both the first and second administration were in what would be considered the definitively malingering range." *Id.* at 9. The fact that Yang's scores on both trial one and two were below chance, "demonstrates an apparent attempt to feign memory deficits." *Id.*

Notwithstanding this clear evidence that Yang was malingering and/or exaggerating his symptoms, Dr. Berney concluded from other psychological testing he had done, previous psychological testing done by Dr. Linda Steffen of Yang from when he was a child, and information provided by Yang and his fiancé/wife, that he had significant memory difficulties as well as "a possible neurological anomaly." *Id.* at 14. And while Dr. Berney thought that Yang presented a number of complicated symptoms that may constitute a mental defect, he nevertheless concluded that Yang did appreciate the wrongfulness of his acts.

As for his competence to proceed, neither Dr. Berney, nor Attorney Musolf, who was representing Yang at the time, suggested that Yang did not understand the

proceedings or was unable to assist in his own defense. In fact, when Dr. Berney's report failed to support Yang's insanity defense, Attorney Musolf proceeded to negotiate a plea agreement on Yang's behalf in which Yang would plead guilty to the charges of bank robbery and brandishing a firearm during and in relation to a crime of violence. Yang signed the Agreement, and Attorney Musolf asked that the case be set for a change of plea hearing. Case No. 19-CR-67, Dkt. No. 15.

As in most cases, the change of plea hearing was the court's first opportunity to directly address the defendant at length. At the beginning of the hearing, the court expressly asked Attorney Musolf if he had any doubts about his client's ability to proceed. Attorney Musolf responded, "No, I do not." Case No. 19-CR-67, Dkt. No. 55 at 3:04-06. Attorney Musolf also stated he had sufficiently and satisfactorily investigated the insanity defense and fully discussed it with Yang. *Id.* at 3:07-13. Having discussed all of the facts and circumstances of the case and gone over the plea agreement and the discovery materials with him, Attorney Musolf advised the court that, if Mr. Yang proceeded to waive his rights and enter guilty pleas to the two charges as contemplated by the Agreement, those would be knowing and voluntary decisions on his part. *Id.* at 3:19-22. When Yang then acknowledged that it was his intention to waive his rights and enter pleas of guilty pursuant to the agreement he had signed, the court proceeded to question him further under oath. *Id.* at 4:21-5:09.

In the course of the plea colloquy, Yang provided personal background information in response to the

court's questions. He also acknowledged that he had read over and signed the written Plea Agreement after discussing it with his attorney and having any questions he had answered by his attorney. Although he stated he was no longer getting the medication that had been prescribed for the voices and memory loss, the voices had for the most part stopped and they did not interfere with his ability to talk with Attorney Musolf and understand his case. *Id.* at 10:06-20. The court then went over the elements of each offense and the potential penalties. When asked if he understood, Yang responded that he did. He also acknowledged that, by pleading guilty, he was giving up or waiving his right to a jury trial. *Id.* at 11:02-14:10. Yang stated he knew what a jury trial is and when asked to tell the court in his own words what a jury trial is, Yang responded: "Jury trial is when there's people from outside that comes in and testifies or like to see if you're guilty or not guilty." *Id.* at 16:08-18. The court confirmed that, at a jury trial, witnesses testify but explained that, at a jury trial, the jury is the factfinder and decides whether the Government has proven the defendant's guilt beyond a reasonable doubt. *Id.* at 16:19-24. The court then proceeded to explain in detail the rights Yang was giving up by entering his guilty plea and asked Yang if he had any questions about those rights. Yang responded, "No." *Id.* at 16:25-18:18.

At the conclusion of the colloquy, Yang entered his pleas of guilty as to each of the two counts contemplated by the Agreement and confirmed the Government's summary of the evidence as a factual basis for his pleas. The court then asked Yang why he committed those crimes. Yang responded:

> I was—that day I was playing a video game. So after my head injury, I wasn't sure what was going on. I was confused of everything, and I just thought that things that was wrong were right. After playing the video game, I just thought that I was in the video game, and I went to go rob a bank.

Id. at 20:12-18. The court then addressed Attorney Musolf, asking if he sufficiently investigated the insanity defense and concluded it is not valid. Attorney Musolf responded, "Yes," noting that Dr. Berney's report was on file and that they agreed Yang's mental condition "doesn't rise to the level of a legal insanity defense despite the fact there are some issues." *Id.* at 20:19-21:01. The court thereupon concluded that Yang had freely and voluntarily waived his rights and entered pleas of guilty on both counts. *Id.* at 21:02-22. In doing so, the court had no doubt as to Yang's competency to proceed.

Additional evidence that Yang understood the proceedings against him and was able to assist in his defense arrived less than three weeks later, on February 6, 2020, in the form of a handwritten letter Yang sent to the court asking that his lawyer be removed and his plea be withdrawn. Case No. 19-CR-67, Dkt. No. 17. In his letter, Yang claimed, contrary to his testimony at the change of plea hearing, that Attorney Musolf had not answered all his questions. Yang denied that Attorney Musolf had discussed Dr. Berney's report with him and stated that, at the time of the change of plea hearing, he lacked focus due to his mental health. Yang further stated that he

wanted his lawyer to withdraw because he was ineffective, had ignored his questions by changing the subject, and had failed to follow up with his brother who had been acting as his guide due to Yang's special needs. Yang also requested that his plea be withdrawn because "it wasn't voluntary nor intelligent and should be voided because the plea and conviction will be unconstitutional for the reason that the defendant's 6th amendment right is hindering the guarantees of assurings [sic] of a meanful [sic] by not properly going over the Dr. report with courts and the defendant, which is guarantee by law." *Id.* Following a hearing on Yang's letter, the court granted his request for a new attorney who would then investigate the question whether there were grounds to withdraw his plea.

As noted above, Attorney Musolf was then replaced by Attorney Phillip, who, after having a neuropsychological evaluation done by Dr. Johnson, filed a motion to withdraw Yang's guilty pleas and reinstate his plea of not guilty by reason of insanity. Case No. 19-CR-67, Dkt. No. 27. Although Dr. Johnson did not disagree with Dr. Berney's findings as to Yang's malingering, he concluded that "[t]he possibility that Mr. Yang may be feigning memory problems and exaggerating some symptoms to a degree to avoid the consequences of his actions does not take away from the certainty that he was suffering from serious mental impairment at the time of the crime." Case No. 19-CR-67, Dkt. No. 29 at 36. Unlike Dr. Berney, Dr. Johnson concluded "to a reasonable degree of certainty that the multiple mental conditions that Mr. Yang was experiencing at the time of the crime seriously impaired his judgment and the ability to appreciate the nature and quality as well as the wrongfulness of his acts." *Id.*

The court granted Yang's motion to withdraw his plea and reset the case for trial. Shortly before the scheduled trial date, Attorney Phillip filed, on Yang's behalf, a waiver of his right to a jury trial. Case No. 19-CR-67, Dkt. No. 38. Further evidence of Yang's competency to proceed is apparent from the transcript of the hearing at which Yang expressly waived his right to a jury trial. Case No. 19-CR-67, Dkt. No. 63. Not only did the court have an additional opportunity to personally address Yang and assess his ability to understand the proceedings, but it also had the opinion of Attorney Phillip, who had far more extensive involvement with Yang and had discussed with him the various options he had. In response to the court's inquiry as to whether he had gone over the written waiver of right to a jury trial that bore the signatures of counsel and Yang, Attorney Phillip advised the court:

> Yes, Your Honor. In several meetings with Mr. Yang at the Brown County Jail, we discussed the concept of a court trial. We discussed the logistics of court and jury trials. We discussed the pros and cons of both and given the factual situation in the case and given the withdrawal of the plea and the reinstitution of the insanity defense. Based on all of those things together during our conversations, Mr. Yang has agreed that the trial is one for the Court rather than for a jury.

Id. at 3:01-14. When asked if it was correct that he wished to give up or waive his right to a jury trial, Yang responded, "Yes, Your Honor." *Id.* at 3:17. The court proceeded to

question Yang further to ensure he fully understood the right he was giving up. *Id.* at 3:18-8:12. After completing its questioning of Yang, the court returned to Attorney Phillip and asked if he had any reason to believe that his client's decision would be affected by any mental illness or lack of understanding or anything. Attorney Phillip responded:

> No, I believe that he's competent to make this decision, and we've discussed it at length over several meetings and we've discussed the posture of the case at length over several meetings, so I think he's making a knowing decision and a voluntary decision to waive the jury.

Id. at 8:13-21. Having satisfied itself that Yang's decision was knowing and voluntary, the court accepted the waiver.

The court trial took place less than two weeks later on October 29, 2020. After reviewing the video evidence and listening to the testimony of Drs. Berney and Johnson, the court concluded that the defense had failed to meet its burden of establishing by clear and convincing evidence that, at the time of the robbery, Yang was suffering from a mental disease or defect of such severity that he was unable to appreciate the nature and quality or the wrongfulness of his acts. Case No. 19-CR-67, Dkt. No. 61 at 102:02-04. In reaching this conclusion, the court relied primarily upon the video of the interview Detective Probst had conducted of Yang shortly after his arrest, which neither of the psychologists seemed to have watched or

given much weight. In the course of that interview, Yang acknowledged in detail what he had done and why. He said that he decided to try something new today, so he robbed the bank. He also said he knew the difference between right and wrong and that bank robbery was illegal. The court found it "clear from watching the interview that whatever intellectual deficits Mr. Yang has, they are not significant as a functional matter." *Id.* at 99:02-04. The court noted that Yang was able to communicate with Detective Probst, he understood the questions and gave responsive answers. He understood his rights as Detective Probst read them to him and asserted his right not to answer questions that he did not wish to answer. He made no mention of any head injury and denied any history of serious mental illness. He also stated he understood the consequences of his behavior, that it was serious, and that he would be going to jail. Case No. 19-CR-67, Trial Ex. 4 at 7:57-8:02.

Nothing that occurred after the trial caused the court to question whether Yang remained competent to proceed. Although the Presentence Investigation Report noted that Yang had "remained steadfast in his claim of a compromised memory of the events of the instant offense," it also observed that he had given statements to law enforcement following his arrest in which he "provided a detailed description of his conduct, as well as the reasoning for some of his actions." Case No. 19-CR-67, Dkt. No. 45, ¶ 33. The same was true concerning personal information about his family and background. *Id.* ¶¶ 64, 82. His brother Michael described Yang as "an honest, respectful, and responsible individual who had 'no interest in illegal

things' and a firm understanding between right and wrong." *Id.* ¶ 72. Michael confirmed Yang's "long history of comprehension issues . . . but advised such issues have never caused him to disregard the law or put the safety of others in jeopardy." *Id.* Michael regarded his brother as "a relatively normal person." *Id.* The Presentence Report also summarized the reports of the various psychological evaluations described above that had been conducted on Yang. *Id.* ¶¶ 79, 80, 81, 83, 84.

Based on the foregoing, the court is satisfied that it did not err in failing to *sua sponte* order a competency evaluation pursuant to 18 U.S.C. § 4241(a). Nothing in the proceedings led the court to believe that Yang was suffering from a mental disease or defect that rendered him mentally incompetent to the extent that he was unable to understand the nature and consequences of the proceeding or assist in his defense. In both the plea colloquy the court conducted with Yang when he entered his guilty plea in January of 2020 and the colloquy it conducted in October when he waived his right to a jury trial, Yang personally acknowledged that he understood the proceedings and the rights he was relinquishing. His attorneys at each proceeding, both of whom had well over twenty years of experience in representing defendants in criminal cases, affirmed that, based on their own discussions and interactions with Yang, they believed he was competent to proceed. Even Yang's letter requesting the removal of Attorney Musolf and to withdraw his plea reflects a clear understanding of the nature and consequences of the proceedings.

It should also be noted that neither of the psychologists who performed evaluations of Yang to determine his sanity at the time he committed the crimes suggested in their reports or testimony at trial that Yang lacked such competency. Indeed, both diagnosed him as having at most only mild intellectual deficits. Case No. 19-CR-67, Dkt. No. 13 at 9; Case No. 19-CR-67, Dkt. No. 29 at 31. Both also concluded Yang was malingering or feigning his symptoms to some degree, which would seem in itself evidence that he understood the nature and consequences of the proceedings. Why fake or exaggerate your symptoms if you don't understand the consequences?

In light of the record before the court in the underlying criminal proceeding, the court concludes that even if it was not waived, Yang's procedural competency claim would fail. A bona fide doubt did not arise as to Yang's competency before, at, or after his trial. The court will now turn to Yang's substantive competency claim.

C. Substantive Competency Claim

Yang also claims, based on evidence not before the court in the underlying criminal proceedings, that he was, in fact, not competent at the time of his trial. This is what the Eleventh Circuit has referred to as a substantive competency claim. *Medina*, 59 F.3d at 1106. To prevail on a substantive competency claim in a § 2255 proceeding, it is not enough to show merely that there is reason to question whether the petitioner was competent. "In contrast to a procedural competency claim, . . . 'a petitioner raising a substantive claim of incompetency is entitled to no

presumption of incompetency and must demonstrate his or her incompetency by a preponderance of the evidence.'" *Id.* (quoting *James v. Singletary*, 957 F.2d 1562, 1571 (11th Cir. 1992).

In an effort to meet this burden here, Yang offered the above-described testimony of U.S. Probation Officer Koehler and Dr. Johnson. *Supra* at 11. Yang cites the fact that Officer Koehler was unable to complete his presentence interview with Yang because of his inability to recall biographical and background information. Yang also cites Officer Koehler's testimony that he "struggled to recall many aspects of his life to include his name and date of birth," Case No. 21-CV-1281, Dkt. No. 43 at 4, as clear evidence of his incompetency.

Notwithstanding Officer Koehler's use of the word "struggled," however, there is no evidence to suggest that Yang's claimed inability to recall such information was genuine. Officer Koehler noted in the Presentence Report that Yang's claimed inability to recall such basic information stood "in complete contrast to the defendant's admissions at the time of his arrest, or the information Yang was able to provide during his pretrial interview, during which he was cited as being lucid and knowledgeable about his family and background information." Case No. 19-CR-67, Dkt. No. 45, ¶ 82. Officer Koehler also noted in the Presentence Report that both psychologists who evaluated him found that he was likely feigning memory problems and exaggerating some of his symptoms. *Id.* at ¶¶ 81, 84. Officer Koehler's testimony at the evidentiary hearing offers little that was not already before the court.

Feigning memory deficits does not constitute evidence of mental incompetence.

Yang places great weight upon the testimony of Dr. Johnson at the evidentiary hearing on his § 2255 motion. As noted above, Dr. Johnson testified that, based on his 2020 neuropsychological evaluation of Yang and records he had reviewed since then, he believed that it was "very likely that [Yang] was incompetent to stand trial during that time period." Case No. 21-CV-1281, Dkt. No. 42 at 27:10-11. Dr. Johnson based his opinion on Yang's low IQ scores, the head injury he sustained several months before the bank robbery, his own interviews with Yang, jail records, Yang's academic functioning, his memory deficits, his accounts of hearing voices, and Dr. Johnson's review of court records, including transcripts of hearings. Although he performed no competency evaluation himself, Dr. Johnson concluded in his supplemental report "that there was reason to believe that during the time period of the court proceedings Mr. Yang may have been incompetent to stand trial." Case No. 21-CV-1281, Hearing Ex. 3 at 9.

Having considered his testimony and report, the court does not place significant weight on Dr. Johnson's opinion. The fact that Dr. Johnson is qualified as an expert to offer an opinion does not mean that the finder of fact is required to accept it. *See* Federal Civil Jury Instructions of the Seventh Circuit No. 1.21. In light of the entire record in this case, the court does not find Dr. Johnson's opinion as to Yang's competence during the relevant time credible. The court reaches this conclusion for several reasons. First, Dr. Johnson, by his own admission, never

conducted a competency evaluation. He never asked Yang whether he understood the proceedings, the role of the judge, prosecutor, and defense attorney, or how a trial is conducted. Nor did he speak with the two experienced attorneys about their view of whether Yang had a reasonable understanding of such matters or whether he was able to assist in his own defense. He apparently did not even consider the opinions they expressed at the change of plea and jury waiver hearing. Both attorneys expressed the view, at least implicitly, based on their own discussions with Yang about the case and his defense, that Yang was competent to proceed.

It also appears that Dr. Johnson agreed with Dr. Berney that Yang was likely feigning memory loss and exaggerating symptoms. Yet, Dr. Johnson seemed to take Yang's account of what he experienced and remembered at face value, attributing the unusual symptoms claimed to a mysterious head injury allegedly sustained at work some three months before the robbery for which no medical treatment was ever sought or provided. He accepted Yang's account even though Yang had recounted the very facts and details he now claimed he could not recall both to Detective Probst at the time of his arrest and to the author of the Pretrial Services Report shortly after he was indicted. Dr. Johnson ignored the fact that Yang's memory loss and symptoms, for the most part, only increased when he realized the substantial prison terms his crimes carried.

Dr. Johnson also seemed to have primarily relied on various tests and instruments that are intended to

measure an individual's functional capacity, yet virtually ignored the most direct evidence of Yang's functional capacity—namely, his hour-long interview with Detective Probst shortly after his arrest in which he spoke at length and lucidly about what he had done and why. Case No. 19-CR-67, Trial Ex. 4. As the court noted in rejecting Dr. Johnson's opinion on the insanity defense at the trial, it seemed "clear from watching the interview that whatever intellectual deficits Mr. Yang has, they are not significant as a functional matter." Case No. 19-CR-67, Dkt. No. 61 at 99:02-04. The court reaches the same conclusion here. Based on the entire record before it, the court finds that Yang was competent at the time of the proceedings in the underlying case.

CONCLUSION

In sum, based on the entire record in this matter, the court is satisfied that Yang was able to understand the nature and consequences of the proceedings and to assist properly in his defense during the relevant time period. Accordingly, his § 2255 motion is denied and the case is dismissed. The Clerk is directed to enter judgment dismissing the case. The court will nevertheless grant a certificate of appealability on the issue set forth above. Although the court has concluded that Yang is not entitled to relief, it also finds that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 580 U.S. 100, 115, 137

S. Ct. 759, 197 L. Ed. 2d 1 (2017) (internal quotation marks and citation omitted).

SO ORDERED at Green Bay, Wisconsin this 31st day of July, 2023.