No. ____________

In the
Supreme Court of the United States of America

MARKEITH COX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for Writ of Certiorari

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Question Presented

Whether the courts of appeals should review a district court's failure to *sua sponte* make findings regarding a defendant's competency *de novo*, as the Third and Ninth Circuits do, or should review a silent record for "abuse of discretion" on the presumption that the failure was deliberate, as the Eleventh Circuit and five other circuits do?

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

Markeith Cox respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in United States v. Markeith Cox, No. 17-10340, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

Opinion Below

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is appended to this Petition.

Basis for Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the Court of Appeals for the Eleventh Circuit was entered on November 6, 2017. Petitioner timely petitioned the Eleventh Circuit for rehearing en banc. The Eleventh Circuit denied the petition for rehearing January 3, 2018. This petition is timely filed pursuant to Supreme Court Rule 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which provides that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

Provisions of Law Involved

The United States Criminal Code provides in relevant part:

18 U.S.C. § 4241. Determination of mental competence to stand trial to undergo postrelease proceedings

(a) Motion to determine competency of defendant. — 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. The court shall grant the motion, or shall order such a hearing on its own 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.

(b) Psychiatric or psychological examination and report. — Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

(c) Hearing. — The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition. — If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier. If, at the end of the time period

> specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

> **(e) Discharge.** — When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.

> **(f) Admissibility of finding of competency.** — A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

Statement of the Case

For at least the past seven years, Markeith Cox has suffered memory lapses that have thwarted his efforts to comply with the terms of his supervised release. At his latest revocation hearing, he admitted to twice failing to register as a sex offender and failing to participate in nine mandatory sex offender treatment programs. These unexplained memory lapses have locked Mr. Cox, who served three years in the U.S. Army and had no arrests until the age of 30, in an endless cycle of jail and supervised release.

Mr. Cox's admitted pattern of supervised-release violations, his assertions that he fails to comply because he "forgets", and his personal history gave the district court reason to doubt his competence. Indeed, the district court stated that it, in fact, understood that Mr. Cox may be "unable" to keep from violating his supervised release conditions:

> Apparently, being out on supervised release with now four violations that are very, very similar where the defendant is unable or refuses to comply with sex offender treatment is a real problem as to the most effective way for him to participate in sex offender treatment.

At Mr. Cox's most recent revocation hearing, the district court itself noted the pattern; Mr. Cox repeatedly demonstrated "the same kind of violations: failure to register, failure to participate in sex offender treatment." Mr. Cox had first violated supervised release in 2012 when he failed to register as a sex offender, report a change of employment, and report a change of address. The district court sentenced him to time served and 44 months' additional supervised release. After his second violation, for failure to give and register a new address, follow his probation officer's instructions, and report discharge information after he was hospitalized, Mr. Cox was given four months in prison and 51 more months of supervised release. In 2015, the district court sentenced Mr. Cox to six months in jail and four more years of supervised release for failing to attend and comply with requirements of sex offender treatment.

During the latest hearing, Mr. Cox told the district court that he could not remember to comply with his supervised-release obligations. He explained: "I do forget. It happens. ... I'm trying to take care of myself the best way I can." He understood the requirements and accepted responsibility, but said that his failure to comply was not volitional:

> I don't like it, but I have to do it. I'm not going to sit here and say that I'm not guilty. Yeah. I'm at fault. There are some things that I have done, and I admit to them. I'm going to be a man and I'm going to admit to that. But I have registered. It's not like I'm just not doing things on purpose. I forget.

The district court had before it evidence that Mr. Cox was working and trying to support his dependents, despite his present homelessness and his difficult upbringing. His parents were drug users. He lived with them until they abandoned him when he was ten years old. He then lived with his grandmother for the rest of his adolescence. Mr. Cox dropped out of school. The district court knew that Mr. Cox began using drugs and alcohol in his early teens. The presentence investigation report documents the severity of his substance abuse — for many years he drank six bottles of beer and vodka, smoked substantial amounts of marijuana, and snorted cocaine daily. At the time of the most recent violation hearing, Mr. Cox was living under a bridge in Miami. The court was also thoroughly versed in Mr. Cox's history of repeated failures to comply with supervised-release conditions, which had escalated in frequency over several years. The court did not find that his attributing those failures to his frequent memory lapses was not credible.

Yet, the district court did not hold a competency hearing or order an evaluation:

> [W]hile the Defendant and his counsel indicate that he has some difficulties as far as a place to live, I understand that. He also asserts that he is a productive member of his community, that he works, he provides money to his family, he's supporting them, and he just forgets that he has to go to sex offender treatment and has to register as a sex offender. Well, he cannot forget.

At sentencing, the government moved for an increase from the recommended guidelines sentence of four to ten months. The court issued its judgment on January 20, 2017, revoking supervised release, granting the government's request for an upward variance, and sentencing Mr. Cox to three years in prison and five more years of supervised release. Mr. Cox's competence was not addressed.

On appeal, Mr. Cox argued that the district court was obligated to order a medical and psychological evaluation *sua sponte* because the record raised significant doubts about his mental wellness. Reviewing for abuse of discretion even though the issue was not addressed in the district court, the court of appeals affirmed the district court's judgment on November 6, 2017. The court's opinion acknowledges that the district court was aware that Mr. Cox "came from a family background that was tumultuous at best, was experiencing homelessness, and was at times forgetful." The court nonetheless held that the district court did not abuse its discretion in imprisoning Mr. Cox without ensuring his ability to comply with the conditions of supervised release. It noted that "there was no prior medical opinion suggesting he might be incompetent." Opinion at 6.

Mr. Cox petitioned the Eleventh Circuit for rehearing. He argued that the court's opinion relied on inapposite caselaw, took an overly narrow view of "what the district court knew," and absolved the district court of its affirmative obligation to determine that Mr. Cox's violations were volitional and not the result of mental illness or impairment. The Eleventh Circuit denied rehearing without discussion or analysis on January 3, 2018.

Reasons for Allowance of the Writ

The Courts of Appeals apply disparate standards when reviewing whether a district court was required to order a competency hearing *sua sponte*, which causes courts in some circuits not to abide by a statutory directive to order such hearings whenever reasonable cause exists.

Circuit courts are divided over how to review for a district court's failure to order a competency hearing *sua sponte*. Some circuits use two standards, reviewing *de novo* when the district court held no competency hearing and made no findings, but reviewing findings regarding competency determinations for abuse of discretion. Other circuits, including the Eleventh Circuit, always apply an abuse-of-discretion standard, even in a case like this one where there is no district court action to review. This effectively means that district courts in the Eleventh Circuit have "discretion" to ignore signs of mental incapacity while district courts in other circuits do not. Because courts in fact enjoy no "discretion" to ignore an affirmative, statutory duty, Mr. Cox was denied due process and equal protection in the district court and on appeal.

If Markeith Cox's supervised release had been revoked in Los Angeles or Philadelphia rather than in Miami, the district court's failure to order a competency hearing *sua sponte* would have been reviewed *de novo* rather than under the less favorable abuse-of-discretion standard. The Third and Ninth Circuits apply different standards of review, depending on whether the district court made any findings regarding a defendant's competency. When there are findings, they are reviewed for abuse of discretion. If, as in this case, there are no findings to review, these courts determine *de novo* whether the district court ought to have ordered a competency evaluation. The Eleventh Circuit and five other circuits always review for abuse of discretion, even when there is no exercise of discretion to review.

Correctly applying this Court's precedent, the Ninth Circuit holds that "[w]hen a trial court has not made an express finding of competence, '... appellate review of a failure to provide a hearing on competence to stand trial is comprehensive and not limited by either the abuse of discretion or clearly erroneous standard.'" *United States v. White*, 670 F.3d 1077, 1082 (9th Cir. 2012) (quoting *de Kaplany v. Enomoto*, 540 F.2d 975, 983 (9th Cir. 1976) (internal citations omitted)). Similarly, the Third Circuit reviews *de novo* the district court's decision as to whether a competency hearing is necessary, but reviews any findings regarding competency for clear error. *See United States v. Gillette*, 738 F.3d 63, 76 (3d Cir. 2013) ("We exercise plenary review over a district court's interpretation and application of the standards for determining competency[.]"); *United States v. Leggett*, 162 F.3d 237, 241 (3rd Cir. 1998).

The Eleventh Circuit is joined by the First, Second, Fourth, Fifth, and Eighth Circuits in reviewing failures to *sua sponte* order competency evaluations for abuse of discretion, even if the issue is not raised and no discretion is exercised. *See United States v. Kenney*, 756 F.3d 36, 43 (1st Cir. 2014) (reviewing for abuse of discretion where neither party requested a competency hearing and no hearing was ordered *sua sponte*); *United States v. Arenburg*, 605 F.3d 164, 169 (2d Cir. 2010) (reviewing for abuse of discretion where neither party moved for a new competency hearing and the district court's competency determination was based on a magistrate judge's two-month-old findings); *United States v. Mason*, 52 F.3d 1286, 1289 (4th Cir. 1995) (holding that the district court abused its discretion in not ordering a competency hearing); *United States v. Mitchell*, 709 F.3d 436, 439–40 (5th Cir. 2013) (reviewing abuse of discretion and finding none); *United States v. Turner*, 644 F.3d 713, 723 (8th Cir. 2011) (reviewing finding of competency for clear error and decision not to hold a competency hearing for abuse of discretion).

The Sixth Circuit has declined to decide whether the *de novo* standard applies where the record is silent regarding competency. *See United States v. Coleman*, 871 F.3d 470, 474 (6th Cir. 2017) ("Defendant contends that we review the question ... for abuse of discretion, and the government claims that plain error review applies because this issue was not raised below ... . We need not decide in this case which standard is proper because Defendant's claim fails under either standard.").

The Third and the Ninth Circuits' approach properly depends on the level of consideration that the district court gave to competency issues. Appellate review of a district court's failure to order a competency hearing *sua sponte* should be tailored to what actually happened in the district court. Deferential review is appropriate where the district court attempted to apply the law and made factual findings. The Eleventh Circuit's approach, on the other hand, defies logic. It is impossible to say whether a court abused its discretion when the record does not show a clear exercise of judgment or discretion.

The approach used in most circuits, thus, deprives defendants of due process and equal protection by effectively assuming from a silent record that the accused was found to be competent and then subjecting that supposed judgment to highly deferential review. This arbitrarily exposes people, like Mr. Cox, to extended and repeated bouts of incarceration for actions that may well be outside their control. It also denies them treatment they might otherwise get. Finally, it by and large absolves district courts in those circuits of their statutory, affirmative obligation to ensure that each accused is competent to understand the proceedings and comply with court orders even if the parties fail to raise the issue. *See* 18 U.S.C. § 4241(a) (requiring courts to order a competency hearing *sua sponte* "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"). When the question of competency is not raised or considered, it is unfair for a reviewing court to presume that the district court's failure to act *sua sponte* was in every case the product of reasoned judgment and never the result of oversight or inattention.

In this case, the record shows that Mr. Cox's personal history and his difficulties complying with the terms of his supervised release were well known to the district court. Mr. Cox professed that his failures were not willful. The record also seems to indicate that the district court found Mr. Cox to be generally credible and acting in good faith but nonetheless faulted him for his memory lapses and imposed incarceration as a cure:

> [W]hile the Defendant and his counsel indicate that he has some difficulties as far as a place to live, I understand that. He also asserts that he is a productive member of his community, that he works, he provides money to his family, he's supporting them, and he just forgets that he has to go to sex offender treatment and has to register as a sex offender. Well, he cannot forget.

The Eleventh Circuit affirmed the revocation of supervised release, implicitly assuming that the district court had decided, when in fact the record contained no findings or discussion on this point, that Mr. Cox's symptoms were not severe enough to necessitate a hearing to investigate his competency: "Although Cox's background and homelessness are unfortunate, based on this record cause to question Cox's competency was not so evident that the district court abused its discretion in failing to act on it." Opinion at 7. The court did not explain why Mr. Cox's explanation for his repeated supervised-release violations, which the district court did not find to be disingenuous, was not itself "reasonable cause to believe that [he] *may* presently be suffering from a mental disease or defect," which is all the statute requires. By inappropriately employing an overly deferential standard of review, the court of appeals required more flagrant symptoms than Congress did to trigger an evaluation. This effectively relieves the district courts of their statutory obligation even while the Eleventh Circuit professes that it is an important judicial responsibility. *See United States v. Wingo*, 789 F.3d 1226, 1238 (11th Cir. 2015) (holding that defense counsel's failure to raise competency does not relieve the court of its responsibility because if counsel's failure to raise competency were conclusive "the mandatory requirement in § 4241 for a court to *sua sponte* address the issue . . . would be meaningless.").

Relieving most district courts in the country of this duty implicates due process and equal protection. Sending an incompetent defendant to jail violates due process. *See Drope v. Mississippi*, 420 U.S. 162, 172 (1975) ("[T]he 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.") (citing *Pate v. Robinson*, 383 U.S. 375, 386 (1966)). Equal protection is implicated because, when courts determine whether there is reason to doubt a defendant's competence, "any prior medical opinion on competence" is one of three primary factors considered. *See Drope*, 420 U.S. at 180. Indigent defendants like Mr. Cox may be unable to obtain psychiatric evaluation and treatment because of prohibitively high costs, and courts are less likely to order competency hearings in the absence of medical history.

Like Mr. Cox, the defendant in *United States v. Wingo* experienced symptoms of memory loss and forgetfulness. *See* 789 F.3d at 1229. However, that case involved a defendant who was an affluent business owner, was able to afford medical care, and could provide the court with an extensive medical history. *See id.* at 1131–32. The Eleventh Circuit, accordingly, held in light of this medical evidence that the district court abused its discretion in not *sua sponte* ordering a hearing. *See id.* at 1238. A defendant living in poverty, particularly one with a limited criminal record like Mr. Cox, is unlikely to have the kind of extensive medical history that courts have relied upon when ordering a competency hearing *sua sponte*. In fact, in this case, the Eleventh Circuit's reasoning noted that "there was no prior medical opinion suggesting he might be incompetent." Opinion at 6.

Had the court of appeals applied *de novo* review to Mr. Cox's case, his constitutional right to be free from arbitrary punishment would have been properly safeguarded. This case exemplifies a national problem. According to the Department of Justice, approximately 56% of state prisoners and 44% of federal prisoners suffer from mental health problems. *See* Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, U.S. DEP'T OF JUSTICE (Dec. 14, 2006). Congress has made it incumbent on the courts to ensure that punishment not be inflicted arbitrarily on those whose condition is severe enough to mitigate culpability. The courts of appeals must enforce that statutory requirement using a standard of review that makes sense.

The inhumanity of the Eleventh Circuit's contrary approach is self-evident. The district court found that Mr. Cox was working and trying to provide for his family despite his homelessness. The record shows that Mr. Cox owned up to the violations and explained that they were not volitional. If he is suffering from a mental impairment that is frustrating his efforts to lead a productive life and comply with the court's orders, incarcerating him for three years serves absolutely *none* of the purposes that Congress has specified a prison term upon revocation of supervised release must further. *See* 18 U.S.C. § 3583(c).

WHEREFORE this Court should grant this petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10340-FF

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MARKEITH COX,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARCUS, JILL PRYOR and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10340
Non-Argument Calendar

D.C. Docket No. 1:07-cr-20133-JAL-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MARKEITH COX,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(November 6, 2017)

Before MARCUS, JILL PRYOR and FAY, Circuit Judges.

PER CURIAM:

Markeith Cox appeals the revocation of his supervised release. He argues that the district court abused its discretion by failing to hold a hearing *sua sponte* to determine his competency before revoking his supervised release. After careful review, we affirm.

I.

Cox completed a term of incarceration in October 2010 and began a five year term of supervised release. Among other conditions of his supervised release, Cox was required to: participate in a sex offender treatment program, to include psychological testing and polygraph examination; comply with all sex offender registration and notification requirements set forth in the Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20901, and state law; and follow the instructions of the probation officer. Within the next five years, due to numerous violations of these terms, Cox's supervised release was revoked four times.

In March 2012, the district court revoked Cox's supervised release for failing to, among other things, comply with SORNA's registration and notification requirements and timely provide local police and his probation officer with his new residential address. The district court sentenced Cox to time served and 44 months of supervised release. In March 2013, the district court again revoked Cox's supervised release. Cox had failed once again to comply with SORNA's registration and notification requirements and timely provide local police and his probation officer with his new residential address. He had also failed to attend his assigned sex offender treatment program. The district court sentenced Cox to 4 months' imprisonment and 51 months' supervised release. In April 2015, the district court revoked Cox's supervised release a third time, for violations not stated in the record. The court sentenced him to 6 months' imprisonment and 48 months' supervised release.

Cox's revocation is at issue in this appeal. In June 2016, the probation office petitioned the district court for revocation of Cox's supervised release, alleging 13 different violations, including: 10 instances of failing to participate in his sex offender treatment program, one instance of failing to comply with SORNA's registration and notification requirements, one instance of failing to follow the probation officer's instructions, and one instance of failing to register as a sex offender as required by Florida law.

The district court conducted a hearing at which Cox admitted all 13 violations. The court then conducted a colloquy to ensure that Cox wished to plead guilty to violation of the terms of his supervised release. In response to the court's questions, Cox affirmed that he was not under the influence of any drug, medication, or alcohol; had not recently been under the care of a doctor or psychiatrist; had not recently been hospitalized; understood the rights he was waiving by pleading guilty; understood the charges against him; and wished to plead guilty. Finding Cox fully competent, the district court accepted his plea and adjudicated him in violation of the terms of his supervised release.

At sentencing, the government moved for an upward variance based on Cox's repeated violations of the terms of his supervised release. Cox objected. He asserted that he sometimes forgot to register when required. He told the court, "I do forget. It happens. Everybody forgets certain things." Doc. 96 at 19. And, he asserted, he was living under a bridge while trying to support a family, all of which made it difficult to register. Cox also explained that the treatment program put him in the uncomfortable position of divulging painful aspects of his past, including his family history of substance abuse and physical abuse. After considering the factors delineated in 18 U.S.C. § 3553(a),[1] the district court granted the government's motion for an upward variance and sentenced Cox to 3 years' imprisonment and 5 years' supervised release.

This is Cox's appeal. On appeal, he challenges only the district court's failure to order a competency hearing *sua sponte* in light of his homelessness, personal history, and forgetfulness.

II.

[1] These factors include the nature and circumstances of the offense and history and characteristics of the defendant; the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes by the defendant, and to provide the defendant with needed educational or vocational training; and the kinds of sentences available and established sentencing ranges. *See* 18 U.S.C. § 3553(a)(1)-(5).

We review for an abuse of discretion the district court's decision not to conduct a competency hearing *sua sponte*, even when the defendant makes the challenge for the first time on appeal. *United States v. Williams*, 468 F.2d 819, 820 (5th Cir. 1972);[2] *see United States v. Wingo*, 789 F.3d 1226, 1235-36 & n.10 (11th Cir. 2015) (applying *Williams*, which construed the former mental incompetency statute, to the statute now in effect, 18 U.S.C. § 4241).

III.

"[A]t any time after the commencement of probation or supervised release and prior to the completion of the sentence," the district court must order a hearing *sua sponte* to determine the mental competency of a defendant "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). Failure to do so presumptively amounts to a due process violation. *See Watts v. Singletary*, 87 F.3d 1282, 1286 (11th Cir. 1996).

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit issued prior to October 1, 1981.

Cox asserts that his homelessness, personal history, and repeated violations due to forgetfulness made it evident to the district court that inquiry into his competency was warranted. We disagree.

In determining whether the district court should have held a competency hearing, there are "no fixed or immutable signs," but "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant." *Drope v. Missouri*, 420 U.S. 162, 180 (1975). Ultimately, we "focus[ ] on what the trial court did in light of what it knew at the time" of the revocation hearing. *Tiller v. Esposito*, 911 F.2d 575, 576 (11th Cir. 1990).

Cox seems to acknowledge that the record contains no evidence of irrational behavior, his demeanor before the district court was not out of the ordinary, and there was no prior medical opinion suggesting he might be incompetent. Instead, he takes issue with *Drope*'s test, asserting that it fails to account for memory or cognitive deficiencies, especially for someone in his circumstances (*i.e.*, his homelessness). Even assuming, however, that Cox's critique of the test is warranted—and we doubt it is considering that the factors it identified are not exhaustive—his brief implicitly acknowledges that any evidence of his mental deficiencies would not have been known to the district court:

> If there is a medical explanation for Mr. Cox's memory impairment, then [the *Drope*] test would not catch it. If he behaves irrationally,

> there is no one to testify to it because Mr. Cox is homeless. A homeless person like Mr. Cox cannot document his day-to-day behaviors or provide a physician's opinion but may nonetheless be impaired.

Appellant's Brief at 12 (citation omitted). Evidence not known to the district court cannot factor into our analysis of whether the court should have ordered a hearing. *See Tiller*, 911 F.2d at 576.[3]

Instead, we must focus on what the district court knew. *Id.* The district court was aware that Cox came from a family background that was tumultuous at best, was experiencing homelessness, and was at times forgetful. Although Cox's background and homelessness are unfortunate, based on this record cause to question Cox's competency was not so evident that the district court abused its discretion in failing to act on it. Indeed, by Cox's own testimony, his forgetfulness was garden-variety. *See* Doc. 96 at 19 ("I do forget. It happens. Everybody forgets certain things.").

For these reasons, we conclude that the district court was within its discretion not to hold a hearing *sua sponte* to determine Cox's competency. The judgment of the district court is affirmed.

AFFIRMED.

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[3] We are unpersuaded by Cox's suggestion that the district court's comment, devoid of context, that Cox "is unable . . . to comply with sex offender treatment" indicates that the district court was aware of the possibility that Cox was suffering from a mental problem that might render him incompetent. Doc. 96 at 27-28. In context, it is clear that the district court was referring to Cox's repeated violations of the same terms of his supervised release, not the cause for such violations.