No. _____

IN THE

Supreme Court of the United States

HAROLD MAX POMPEE
Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL
Respondents.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Defendants have a right to be competent at all stages of criminal proceedings. Because defense counsel has the most exposure to the defendant, the primary responsibility for raising issues of competence rests with counsel. An ineffective assistance of counsel claim arising from counsel's failure to protect the constitutional right to be competent raises fact-intensive questions regarding what counsel knew (or did not know) about the client's competence. That information is not in the trial or guilty plea record. Accordingly, this Court generally recognizes that state and federal habeas petitioners are entitled to one meaningful opportunity to develop the relevant facts in an evidentiary hearing either in state or federal court collateral review proceedings. In this context, the question presented is:

> Whether the Eleventh Circuit erred in holding that a state prisoner's ineffective assistance of counsel claim alleging that counsel failed to raise his incompetence at a guilty plea proceeding could be resolved without an evidentiary hearing because the trial record by itself did not establish counsel's ineffectiveness.

PARTIES

The parties to this proceeding are set forth in the caption.

CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Harold Max Pompee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's unpublished opinion denying Pompee's petition for review is available at *Pompee v. Sec'y, Fla. Dep't of Corr.*, 736 F. App'x 819 (11th Cir. 2018), and attached at App. 1. The order of the district court denying the petition is unpublished and attached at App. 14.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2018. App. 1. The court of appeals denied Pompee's timely pro se Petitions for Rehearing and Rehearing En Banc on August 3, 2018. App. 43–44. Because the court's later judgment starts the 90-day period for filing a petition with this Court, the last day for filing the petition is November 1, 2018. *See* S. Ct. Rules 13.1, 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1)

STATEMENT OF THE CASE

A. State Court Proceedings

1. In 2010, Harold Pompee was indicted in Florida on charges of armed robbery and discharging a firearm in public. App. 2. After the State filed the charges, the Public Defender's Office referred Pompee for a psychological evaluation. App. 2. The psychologist diagnosed Pompee with Schizoaffective Disorder and recommended that he receive continued psychiatric treatment and medication. App. 2.

2. A year after the indictment, two psychologists evaluated Pompee's competence. App. 2. One of the psychologists found that Pompee displayed paranoid ideation, delusional beliefs, and hallucinations. He also observed that Pompee's attention and concentration abilities were poor and that he displayed cognitive deficits, including a disorganized thought process. The other psychologist concurred with the original diagnosis of Schizoaffective Disorder and found Pompee to be in a psychotic upswing. Both recommended that he be found incompetent.

On the basis of these reports, the trial judge found Pompee incompetent to proceed in October 2011. The trial judge committed Pompee for treatment to restore his competence, and Pompee was sent to a residential forensic treatment center. App. 2. The treatment included several medications to treat his psychosis and extrapyramidal symptoms.

3. After a month of treatment, the forensic treatment center reported that Pompee's competence had been restored. The trial judge reappointed the same two psychologists to reevaluate Pompee's competence. Both concluded that his competence had been restored. App. 3. Both emphasized that Pompee still suffered from Schizoaffective Disorder, and one described his disorder as having pronounced mood swings in frequent cycles. That psychologist warned that Pompee could "decompensate over time, and over time he is likely to get better again." The forensic treatment center resident warned that Pompee needed to continue the same psychotropic medication regimen to maintain his competency: "Any change in his current medication regime could result in a rapid deterioration of his psychiatric

condition and competency status." A new trial judge assigned to Pompee's case entered a February 2012 order finding Pompee competent to stand trial. App. 3.

4. In June 2012, the trial court appointed another psychologist to evaluate Pompee's competence. App. 3. Citing Pompee's dysphoria, disorientation, paranoia, catatonia, and continued hallucinations, the psychologist concluded that Pompee was not competent to proceed. The trial judge again found him incompetent, and he was sent back to the same forensic treatment center to restore his competence. App. 3.

5. The forensic treatment center resident reevaluated Pompee two months later. At the time, Pompee was on multiple medications for psychosis, insomnia, and extrapyramidal symptoms. The resident reported that Pompee's competence had been restored.

The trial judge then reappointed two psychologists to assess Pompee's competence. Although recognizing that Pompee still experienced lingering psychosis, both found Pompee competent to proceed. One psychologist noted that Pompee's appreciation of his charges and the legal process were questionable. App. 3.

At a competency hearing on October 22, 2012, the two appointed psychologists and the forensic treatment center resident all testified. Each testified that although Pompee was still mentally ill, he was competent to proceed. App. 3. Each doctor also testified that Pompee's competency depended on continuing his current treatment and maintaining consistent medication. The judge found Pompee competent, and he returned to the forensic treatment center for treatment and consistent medication. App. 3.

6. In February 2013, the trial judge scheduled a competency hearing and a trial for March 11, 2013, and appointed another psychologist to evaluate Pompee and file a report by that hearing. App. 3.

The appointed psychologist evaluated Pompee on March 7, 2013, and wrote a report finding Pompee competent. The report listed the medications Pompee was receiving. App. 3. Three of the medications Pompee had been taking when the trial court last found him competent—two for psychosis and one for extrapyramidal symptoms—had been discontinued and two new medications had been substituted. The report neither mentioned the medication change nor evaluated the effect of that medication change. The report was not docketed until March 12, 2013, and it is not clear when or if the judge or defense counsel reviewed it.

7. Despite having scheduled a competency hearing and trial for March 11, 2013, the trial court held neither. The court heard no testimony about Pompee's latest evaluation. Instead, it held a plea hearing. In response to the trial court's questions about whether his medication affected his ability to understand the court proceedings, Pompee under oath responded: "I don't really understand." App. 4.

Defense counsel did not request a competency hearing despite Pompee's statements demonstrating his confusion and the most recent competency report documenting different medications. With no request from counsel for the previously-scheduled competency hearing, the trial court moved forward with the plea. It admonished Pompee to "[s]top the pretending" and told him that they were "resolving the case one way or the other" that day. App. 12. Pompee then entered a guilty plea.

The court found that plea knowing and voluntary, sentenced him to two concurrent ten-year sentences. App. 4.

B. Federal Habeas Proceedings

1. Pompee timely filed a pro se federal habeas petition alleging that trial counsel was ineffective in not seeking a competency hearing before his guilty plea. App. 16. Adopting the magistrate judge's report and recommendation, the district court held that the claim was either procedurally defaulted or meritless.[1] App. 14.

2. The Eleventh Circuit appointed counsel and granted a certificate of appealability on the question of whether counsel was ineffective for failing to request a competency hearing at the guilty plea.

3. Pompee argued that he established cause and prejudice to excuse procedural default for failure to raise ineffective assistance on state collateral appeal under *Trevino v. Thaler*, 569 U.S. 413 (2013). The Eleventh Circuit declined to rule on procedural default and proceeded to the merits of Pompee's deficient performance and prejudice claims. App. 5–6 n.1.

4. After briefing and oral argument, the Eleventh Circuit held that the state court trial record did not demonstrate either deficient performance or prejudice. App. 13. The court held that Pompee had not established deficient performance because he "cannot show that his counsel failed to bring to the court's attention 'information raising a bona fide doubt as to his competency.'" App. 11. The court further held that

[1] Pompee's petition also raised two other ineffective assistance of trial counsel claims. The district court concluded that those claims were barred by Pompee's guilty plea. App. 14.

Pompee had not established prejudice both because the trial court was unlikely to have held the competency hearing had counsel requested it and because even if a hearing were granted, the state trial record did not establish a reasonable probability that Pompee would have been found incompetent at that hearing. App. 12. The court of appeals reached these conclusions without any testimony from defense counsel.

REASONS FOR GRANTING THE WRIT

This case presents the question whether an ineffective assistance of counsel claim arising from counsel's failure to raise competence during a guilty plea can be resolved on the basis of a state trial court record alone without an evidentiary hearing or any extrinsic evidence about what counsel knew. The court's resolution of Pompee's ineffective assistance claim is fundamentally at odds with decisions of this Court requiring at least one opportunity to develop the evidentiary record on substantial ineffective assistance of counsel claims. Summary reversal therefore is warranted.

Under the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), a cognizable ineffective assistance claim requires a showing of both deficient performance and prejudice. Lower courts agree that ineffective assistance of counsel claims for failure to seek competency hearings require that defendants establish: (1) counsel's failure to request a competency hearing falls below "objective standards of reasonableness"; and (2) a reasonable probability that (a) the trial court would have held a competency hearing had it been requested, and (b) the defendant would have been found incompetent at that hearing. *See Burt v. Uchtman*, 422 F.3d 557 (7th Cir. 2005); *Speedy v. Wyrick*, 702 F.2d 723, 726 (8th Cir. 1983). The Eleventh Circuit held that these issues could be resolved without an evidentiary hearing because the state court record of Pompee's guilty plea did not establish either deficient performance or prejudice. App. 11, 13.

This Court should grant this petition for a writ of certiorari and summarily reverse because the Eleventh Circuit's summary disposition of Pompee's claim without any development of the record runs counter to: (1) this Court's holding in *Williams v. Taylor*, 529 U.S. 420 (2000), that federal habeas courts require a properly developed record before deciding habeas claims; (2) the numerous cases holding that ineffective assistance of counsel claims require development of a record regarding what counsel did and why; and (3) the decisions of other courts of appeals requiring development of the evidentiary record on ineffective assistance of trial counsel claims filed under this Court's procedural default exception set out in *Trevino*.

The nature of Pompee's allegations of ineffective assistance of counsel—in particular, counsel's failure to request a competency hearing before his guilty plea—demonstrates the Eleventh Circuit's error. Counsel has the primary responsibility for assuring that a defendant's right to be competent is protected throughout the proceedings. This is so in part because counsel has the most exposure to the defendant. But most of that attorney-client contact takes place outside of court and outside of the trial record. Ineffective assistance of counsel claims alleging a failure to raise competency therefore cannot be decided solely on the record of the trial court's proceedings. But that is precisely what happened here. Because the Eleventh Circuit erred in denying Pompee the opportunity to develop the evidentiary record, this Court should summarily reverse the court of appeals' decision. S. Ct. Rule 16.1.

I. This Court's Precedent Demonstrates that a 28 U.S.C. § 2254 Petitioner Is Entitled to Develop the Factual Basis for an Ineffective Assistance of Counsel Claim If He Had No Meaningful Opportunity to Present the Claim in State Court

1. Resolving ineffective assistance of counsel claims requires consideration of the facts of the asserted claim. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). In particular, whether a petitioner can establish deficient performance and prejudice depends on what counsel knew and the reasons she acted as she did. *See, e.g.*, *Gersten v. Senkowski*, 426 F.3d 588, 607–11 (2d Cir. 2005) (relying on defense counsel's affidavit addressing his knowledge and strategy at trial to find deficient performance and prejudice); *Ouber v. Guarino*, 293 F.3d 19, 27–31 (1st Cir. 2002) (finding deficient performance where counsel could not justify his actions at trial based on what he knew at the time).

2. Because deficient performance and prejudice ordinarily cannot be determined from the record of trial proceedings, many state appellate courts do not consider ineffective assistance of counsel claims on appeal. Instead, they require that most such claims be brought on collateral review so that evidence of the claim can be developed. *See*, *e.g.*, Brief of Utah and 24 Other States as Amici Curiae in Support of Respondent at 7–11, *Trevino v. Thaler*, 569 U.S. 413 (2013) (No. 11-10189) (documenting that forty-three states require certain ineffective assistance of trial counsel claims be brought on collateral review). In Florida, for instance, ineffective assistance of trial counsel claims cannot be raised on direct appeal unless the trial record on its face demonstrates ineffectiveness. *See*, *e.g.*, *Bruno v. State*, 807 So. 2d 55, 63 n.14 (Fla. 2001). The federal courts of appeals also agree that the facts

establishing ineffective assistance claims in federal criminal cases should be developed at evidentiary hearings on collateral review. *See*, *e.g.*, *Gaylord v. United States*, 829 F.3d 500, 506 (7th Cir. 2016) (remanding for evidentiary hearing on ineffective assistance of counsel claim because petitioner alleged "facts that, if proven, would entitle him to relief"); *United States v. Howard*, 381 F.3d 873, 883 (9th Cir. 2004) (remanding for evidentiary hearing on ineffective assistance claim because record was insufficient to show that petitioner was not entitled to relief).

3. In most 28 U.S.C. § 2254 cases, the factual bases for ineffective assistance of counsel claims must be developed before state trial courts, and petitioners are not entitled to evidentiary hearings on claims in the federal habeas petition. *See* 28 U.S.C. § 2254(e)(2). But this Court has long held that if a petitioner was unable to develop the factual record to support a claim in state court despite exercising due diligence, the district court must hold a hearing to develop that factual record. *See*, *e.g.*, *Williams v. Taylor*, 529 U.S. 420, 437–44 (2000) (holding that § 2254(e)(2) bars an evidentiary hearing only if the petitioner was at fault in failing to develop the record before the state court).

4. This Court also held that a petitioner who fails to raise an ineffective assistance of trial counsel claim in state court may be excused for that default if he lacked a meaningful opportunity to raise the claim in state court. *See Trevino v. Thaler*, 569 U.S. 413, 429 (2013).[2]

[2] Pompee argued before the court of appeals that *Trevino* excused the procedural default of his ineffective assistance claim because: (1) Florida requires ineffective assistance of counsel claims to be brought on collateral review unless they can be

5. Relying on *Williams*, courts of appeal have recognized that petitioners whose procedural default of ineffective assistance of trial counsel claims is excused by *Trevino* are entitled to evidentiary hearings on the merits of their underlying ineffective assistance of trial counsel claims. *See, e.g.*, *Sasser v. Hobbs*, 735 F.3d 833, 853 (8th Cir. 2013) (holding that *Trevino* required the district court to hold an evidentiary hearing on full merits of the petitioner's procedurally defaulted claim that was excused under *Trevino*); *see also Brown v. Brown*, 847 F.3d 502, 517 (7th Cir. 2017) (explaining that where petitioner's default is excused, "he will be entitled to an evidentiary hearing on the merits in the district court for the underlying claim"). After all, state courts ordinarily will not have developed an evidentiary record on procedurally defaulted claims that fall under *Trevino*. In order to have meaningful federal habeas review of those claims, the federal court must develop an evidentiary record.

6. Pompee was entitled to an evidentiary hearing on the merits of his ineffective assistance claim to determine the reasons underlying trial counsel's failure to request a competency hearing and whether trial counsel made a strategic or accidental decision not to ask the court to hold the already-scheduled competency hearing.

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resolved on the face of the record; (2) Pompee was unrepresented on collateral review; and (3) he raised a substantial ineffective assistance of counsel claim.

The court of appeals did not address the claim that this issue was procedurally defaulted, preferring to assume that it was not defaulted and then resolving the case on the merits. App. 5–6 n.1. This petition proceeds on that basis with the understanding that if review is granted and the decision reversed, on remand the court of appeals could then address the default issue.

II. Pompee's Claim of Ineffective Assistance of Trial Counsel for Failure to Raise Competence Could Not Be Resolved Solely on the Basis of the Record of Proceedings in the Plea Court

1. Nearly seventy years ago, this Court held that the accused has a constitutional right to be competent at all stages of prosecution. *Dusky v. United States*, 362 U.S. 402, 402 (1960). The right to be competent during criminal proceedings is so critical to the fairness of the proceedings that both defense counsel and the trial court have independent obligations to ensure that a competency hearing is held if the defendant shows signs of incompetence.

2. This Court has held that the Sixth Amendment requires defense counsel to provide adequate representation pursuant to prevailing professional norms. *Strickland*, 466 U.S. at 687. This Court has not yet considered whether counsel has a Sixth Amendment duty to request a competency hearing, but most circuits have held that counsel has a Sixth Amendment obligation to seek a competency hearing where the defendant exhibits signs of incompetence. *See, e.g.*, *United States v. Boigegrain*, 155 F.3d 1181, 1188–89 (10th Cir. 1998) (finding counsel has a "professional duty" to raise competency); *Speedy v. Wyrick*, 702 F.2d 723, 726 (8th Cir. 1983) (remanding on the basis that counsel's failure to seek a competency hearing may have been ineffective assistance of counsel).

3. The trial court is obligated to hold a competency hearing when the evidence before it raises a "bona fide" doubt about the defendant's competence to ensure that the defendant is not deprived of his Fourteenth Amendment due process right to a fair trial." *Pate v. Robinson*, 383 U.S. 375, 385 (1966).

4. In deciding the ineffective assistance of counsel claim on the basis of the guilty plea record alone, the Eleventh Circuit below considered only the evidence relevant to Fourteenth Amendment claims that the trial court was required to hold a competency hearing—the trial record—rather than the broader evidence relevant to Sixth Amendment ineffective assistance of counsel claims—what counsel knew and why she did what she did. In so doing, the court violated basic principles this Court has established for the proper review of habeas claims.

A. Defense Counsel Has the Primary Obligation for Assuring Defendant's Competence During the Proceedings

1. Defense counsel has an obligation to investigate her client's competence and notify the trial court if there is evidence that the defendant is not competent to stand trial. *See Boigegrain*, 155 F.3d at 1188–89. Because defense counsel has "the most exposure" to the defendant, she has primary responsibility for safeguarding the defendant's right to be competent at trial. *Blakeney v. United States*, 77 A.3d 328, 342 (D.C. 2013); *see also State v. Veale*, 972 A.2d 1009, 1018 (N.H. 2009).

2. This Court has recognized that defense counsel—the person in "closest contact" with the defendant—plays the critical role in assuring that the defendant is competent. *Drope v. Missouri*, 420 U.S. 162, 178 n.13 (1975). In deciding whether trial courts have erred in failing to order a competency hearing, courts view as a critical—if not dispositive—factor whether defense counsel raised concerns about her client's ability to participate in the proceedings and requested a competency hearing. *See, e.g.*, *Jermyn v. Horn*, 266 F.3d 257, 297 (3d Cir. 2001); *Speedy*, 748 F.2d at 486; *Reese v. Wainwright*, 600 F.2d 1085, 1092 (5th Cir. 1979). For example, in holding

that petitioner established he was entitled to a competency hearing, the en banc Tenth Circuit held that counsel's "frequent assertions" at trial that his client was incompetent were "perhaps the most important" evidence that a hearing was required. *McGregor v. Gibson*, 248 F.3d 946, 959–60 (10th Cir. 2001) (en banc). Although the court recognized that the concerns of counsel are not alone sufficient to require a competency hearing, it emphasized that counsel "is often in the best position to determine whether a defendant's competency is questionable." *Id*. at 960 (internal quotation marks omitted).

3. Further demonstrating the importance of counsel's role, other courts have concluded that defense counsel's *failure* to raise competence, in conjunction with the trial court's observations of the defendant, relieved the trial court of any obligation to order a competency hearing. *See*, *e.g.*, *Jermyn*, 266 F.3d at 297; *Watts v. Singletary*, 87 F.3d 1282, 1288 (11th Cir. 1996) (noting that defense counsel's decision not to raise the issue of competency at trial is "evidence" that a hearing was not necessary); *Speedy*, 748 F.2d at 486–87 (holding that where defense counsel did not offer a "warning signal," the trial court was not obligated to order a competency hearing); *United States v. Clark*, 617 F.2d 180, 186 n.11 (9th Cir. 1980) (stating that defense counsel's decision not to raise the issue of competency at trial is "significant evidence" of competence); *Reese*, 600 F.2d at 1092 (finding it "significant" that defense counsel did not assert the defendant's incompetence because counsel's failure to raise the issue of competence serves as "persuasive evidence" that the trial court did not violate its obligation to order a competency hearing). In *Jermyn*, for instance, the court

concluded that defense counsel's failure to express any concern about her client's competency was "critical" to its holding that the trial court had no obligation to order a competency hearing. 266 F.3d at 297. Federal appellate courts have thus consistently held that the views of defense counsel are critical to determining whether a trial court is constitutionally required to conduct a competency hearing. But in this case, the courts below denied relief without knowing the views of counsel.

B. Ineffective Assistance of Counsel Claims Alleging that Counsel Failed to Protect the Right to Be Competent at All Stages Cannot Be Resolved on the Trial Record

1. Defense counsel never expressed a view about Pompee's competence during his guilty plea hearing. She failed to do so despite Pompee's schizoaffective disorder diagnoses; two previous findings by the trial court that Pompee was incompetent; the views of numerous psychologists who agreed that Pompee required certain psychotropic drugs to remain competent; a report indicating Pompee's psychotropic medications had been changed in the weeks leading up to his guilty plea hearing; and Pompee's own statements at the plea hearing that he did not understand the nature of the proceedings. *See* App. 2–4.

But the Eleventh Circuit, relying only on the records of the trial court proceedings and with no record about what defense counsel knew or why she failed to seek a hearing, affirmed the dismissal of Pompee's ineffective assistance claim. As discussed above, that holding is at odds with precedent of this Court and federal courts of appeals that ineffective assistance of counsel claims often require evidence beyond the record of proceedings in the trial court. *See supra* Part I. Of critical

importance, the Eleventh Circuit's holding—that it could decide the merits of this Pompee's ineffective assistance claim related to failure to seek a competency hearing—runs counter to the body of cases emphasizing the importance of counsel's role in seeking competency hearings.

2. Ineffective assistance of counsel claims arising from counsel's failure to protect a client's right to competence at a guilty plea raise fact-intensive questions regarding what counsel knew (or did not know) about the client's competence and whether the failure to raise the issue was strategic or not. *See Howard*, 381 F.3d at 877 (remanding for an evidentiary hearing to develop the record where counsel failed to request a competency hearing for a defendant under the influence of strong medication); *Speedy*, 702 F.2d at 726 (remanding for evidentiary hearing on ineffective assistance claim because the lower courts did not hear from counsel and failed to address factual disputes relating to petitioner's competence); *see also Trevino*, 569 U.S. at 422 (finding review of trial counsel's ineffective assistance often "depends on evidence outside the trial record"). Such claims therefore require development of a factual record beyond the record of the proceedings.

For example, in *Howard*, the defendant entered a guilty plea under the influence of narcotics. 381 F.3d at 875. The district court dismissed his § 2255 petition alleging that trial counsel had been ineffective for permitting him to enter a plea while incompetent. *Id.* The Ninth Circuit remanded, holding that the defendant was entitled to an evidentiary hearing because the drug could have rendered him incompetent and counsel's testimony was necessary to evaluate the merits of his

ineffective assistance claim. *Id.* at 883. Developing the factual record is key, and the court below did not do so.

C. The Eleventh Circuit Impermissibly Confused Pompee's Ineffective Assistance Claim Requiring an Evidentiary Hearing With a Due Process Claim That the Trial Court Was Required to Hold a Hearing

1. The Eleventh Circuit held that the record before the trial court was insufficient to establish Pompee's ineffective assistance of counsel claim. App. 11, 13. In holding that the record did not demonstrate ineffective assistance, the court relied on the fact that there was no evidence in the guilty plea record that defense counsel withheld information from the trial court. App. 8. This holding ignores the premise that ineffective assistance of counsel claims depend upon extrinsic evidence beyond the guilty plea record of proceedings. *See supra* Section II.B.

To be sure, appellate courts deciding claims that the *trial court* constitutionally erred in failing to order a competency hearing can rely on the record before the trial court. But claims alleging ineffective assistance for failure to raise competence fall into a different category: they require evidence about what counsel knew and her reasons for not asserting incompetence. The only explanation for the Eleventh Circuit's erroneous holding is that it misunderstood this Court's articulated differences between considerations of ineffective assistance of *counsel* for failure to request a competency hearing and claims that the *trial court* erred in failing to grant a competency hearing.

2. The trial court has an obligation to order a competency hearing if signs of mental illness raise bona fide doubt about the defendant's competence. *Pate*, 383 U.S.

at 385. The trial court is obliged to hold a hearing where the evidence before it should have raised substantial doubt about the defendant's competence. *See, e.g.*, *McGregor*, 248 F.3d at 955–62 (finding that based on the facts, including the defendant's mental illness and demeanor at trial, and counsel's assertions of his client's incompetence, "a reasonable judge should have had a bona fide doubt"). Such claims, assessing the trial court's obligation to hold a hearing based on the evidence before it, necessarily rely on the record before the court.

3. Claims of ineffective assistance based upon failure to seek a competency hearing fall into a different category. The trial court record ordinarily does not—and cannot—reveal what counsel knew at the time or the considerations (if any) that gave rise to counsel's decision to forego a competency hearing.

4. Notwithstanding the shortcomings in the record, the Eleventh Circuit denied Pompee's ineffective assistance claim on the evidence of the plea proceedings with no evidence regarding what counsel knew or why she failed to assert competence. As discussed above, this Court's holdings, and those of other lower courts, demonstrate the flaw in the Eleventh Circuit's reasoning. *See supra* Parts I–II. The Eleventh Circuit's reliance on the trial court record arguably could have properly disposed of a claim that the trial court erred in failing to order a competency hearing because that claim would have required no extrinsic evidentiary development beyond the evidence before the trial court. But the Eleventh Circuit could not dispose of Pompee's ineffective assistance of counsel claim without an evidentiary hearing.

5. The Eleventh Circuit's conclusion that appellate counsel could point to no information that trial counsel *withheld* from the trial court illustrates the flaw in its analysis. The Eleventh Circuit held that because the trial court had Pompee's medical records, counsel had no obligation to review the medical records or to point out that Pompee's medications had been changed between the last competency hearing and the plea hearing. App. 9. But the record leaves open questions about whether either counsel or the court even had the latest report, let alone read it. That information could only be revealed by an evidentiary hearing or other sworn testimony by counsel. The Eleventh Circuit erred in deciding this claim without allowing Pompee the opportunity to develop the record on this point.

CONCLUSION

For the above reasons, this Court should grant summary reversal of the erroneous judgment of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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