

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ERNEST N. LOTCHES,

Petitioner,

v.

COREY FHUERE, SUPERINTENDENT, OREGON STATE PENITENTIARY

Respondent.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth
Circuit**

PETITION FOR WRIT OF CERTIORARI

Jonah J. Horwitz*
FEDERAL DEFENDER SERVICES OF IDAHO, INC.
702 West Idaho Street, Suite 900
Boise, Idaho 83702
Jonah.Horwitz@fd.org
208-331-5530

***Counsel of Record**

QUESTIONS PRESENTED

1. Whether a claim of incompetence to be tried can be procedurally defaulted.
2. Whether Mr. Lotches' Sixth Amendment rights were violated by trial counsel's failure to present cultural evidence regarding his Native American background.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were Petitioner Ernest N. Lotches and Respondent Jeff Premo, the prior warden of the prison where Mr. Lotches is confined. The current Respondent is Warden Corey Fhuere. There are no associated stock ticker symbols.

RELATED PROCEEDINGS

United States Court of Appeals, Ninth Circuit
Case No. 24-2652
Lotches v. Premo
Feb. 12, 2026 (affirming the denial of habeas relief)

United States District Court, District of Oregon
Case No. 6:14-cv-00369-MO
Lotches v. Premo
April 11, 2024 (denying habeas relief)

Supreme Court of Oregon
Case No. S061686
Lotches v. Premo
Dec. 12, 2013 (denying review)

Court of Appeals of Oregon
Case No. A145569
Lotches v. Premo
July 10, 2013 (affirming the denial of post-conviction relief)

Supreme Court of the United States
Case No. 00-9781
Lotches v. Oregon
Oct. 1, 2001 (denying certiorari)

Supreme Court of Oregon
Case No. S40460
State v. Lotches
Dec. 29, 2000 (affirming in part the judgment, reversing in part, and remanding)

NOTE ABOUT CITATIONS TO THE RECORDS BELOW

“9th Cir. Dkt.” citations refer to docket entries below in *Lotches v. Premo*, 9th Cir. Case No. 24-2652. “Dist. Ct. Dkt.” citations refer to docket entries in *Lotches v. Premo*, D. Or., Case No. 6:14-cv-369. All citations in either of these formats use the ECF pagination that appears in blue ink on the top of each page and that is associated with the Ninth Circuit filing or the district court filing respectively. For example, the citation below to “9th Cir. Dkt. 11-16 at 7” refers to the page in ECF where the blue ink at the top of the page reads, “DktEntry: 11.16 Page 7 of 293.”

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDINGS BELOW	ii
RELATED PROCEEDINGS.....	ii
NOTE ABOUT CITATIONS TO THE RECORDS BELOW	iii
TABLE OF CONTENTS.....	iv
APPENDICES.....	v
OPINION BELOW.....	1
JURISIDICTIONAL STATEMENT.....	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	1
REASONS FOR GRANTING THE WRIT	9
I. The competency issue warrants review.	9
A. There is an entrenched 5-4 circuit split.....	10
B. It is an important issue.	15
C. Mr. Lotches’ case is a good vehicle for resolving the split.	17
II. The ineffectiveness issue warrants review.....	18
CONCLUSION.....	26

APPENDICES

APPENDIX A:	Opinion <i>Lotches v. Premo</i> , Ninth Cir. No. 24-2652 Feb. 12, 2026	App. 001–003
APPENDIX B:	Opinion and Order <i>Lotches v. Premo</i> , U.S. Dist. Ct. No. 6:14-cv-369 Apr. 11, 2024, Dkt. 133	App. 004–170
APPENDIX C:	Judgment <i>Lotches v. Premo</i> , U.S. Dist. Ct. No. 6:14-cv-369 Apr. 11, 2024, Dkt. 134	App. 171

TABLE OF AUTHORITIES

Federal Cases

<i>Adams v. Wainwright</i> , 764 F.2d 1356 (11th Cir. 1985)	12
<i>Andrus v. Texas</i> , 590 U.S. 806 (2020)	23
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	11
<i>Drope v. Missouri</i> , 420 U.S. 162 (1975)	11, 16
<i>Granda v. United States</i> , 990 F.3d 1272 (11th Cir. 2021)	12
<i>Green v. Fisher</i> , 565 U.S. 34 (2011)	19
<i>Hinton v. Alabama</i> , 571 U.S. 263 (2014)	23, 24
<i>Hodges v. Colson</i> , 727 F.3d 517 (6th Cir. 2013)	13, 14
<i>House v. Bell</i> , 547 U.S. 518 (2006)	10
<i>Johnston v. Singletary</i> , 162 F.3d 630 (11th Cir. 1998)	18
<i>Lay v. Royal</i> , 860 F.3d 1307 (10th Cir. 2017)	14
<i>Lotches v. Premo</i> , No. 24-2652, 2026 WL 396539 (9th Cir. 2026)	1, 9, 17
<i>Martinez v. Ryan</i> , 566 U.S. 1 (2012)	10
<i>Martinez-Villareal v. Lewis</i> , 80 F.3d 1301 (9th Cir. 1996)	14
<i>Massaro v. United States</i> , 538 U.S. 500 (2003)	10
<i>Medina v. California</i> , 505 U.S. 437 (1992)	16
<i>Middleton v. McNeil</i> , 541 U.S. 433 (2004)	24
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	25
<i>Murray v. Carrier</i> , 477 U.S. 478 (1986)	10
<i>Porter v. McCollum</i> , 558 U.S. 30 (2009)	21, 22
<i>Riggins v. Nevada</i> , 504 U.S. 127 (1992)	16
<i>Sena v. New Mexico State Prison</i> , 109 F.3d 652 (10th Cir. 1997)	12–13, 13
<i>Shinn v. Ramirez</i> , 596 U.S. 366 (2022)	11, 17
<i>Silverstein v. Henderson</i> , 706 F.2d 361 (2d Cir. 1983)	11
<i>Smith v. Moore</i> , 137 F.3d 808 (4th Cir. 1998)	13
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	<i>passim</i>
<i>United States v. Snyder</i> , 871 F.3d 1122 (10th Cir. 2017)	12
<i>Vogt v. United States</i> , 88 F.3d 587 (8th Cir. 1996)	12
<i>Wainwright v. Sykes</i> , 433 U.S. 72 (1977)	10
<i>Weeden v. Johnson</i> , 854 F.3d 1063 (9th Cir. 2017)	20

<i>Whitton v. Dixon</i> , --- S. Ct. ---, 2026 WL 1513270 (2026)	26
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	19, 21
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000)	20
<i>Yang v. United States</i> , 114 F.4th 899 (7th Cir. 2024)	14, 15
<i>Ylst v. Nunnemaker</i> , 501 U.S. 797 (1991)	19
<i>Zapata v. Estelle</i> , 588 F.2d 1017 (5th Cir. 1979)	11

Constitutional Provisions

U.S. Const. amend. VI	1, 7, 19
U.S. Const. amend. XIV	1, 2, 3, 4

Federal Statutes

28 U.S.C. § 2254.....	<i>passim</i>
28 U.S.C. § 2255	12

State Cases

<i>Lotches v. Premo</i> , No. 6:14-cv-369, 2024 WL 1579428 (D. Or. Apr. 11, 2024) ..	<i>passim</i>
<i>Lotches v. Premo</i> , 306 P.3d 768 (Or. Ct. App. 2013)	<i>passim</i>
<i>People v. Croy</i> , 710 P.2d 392 (Cal. 1985)	25, 26
<i>State v. Bartol</i> , 496 P.3d 1013 (Or. 2021)	8
<i>State v. Lotches</i> , 17 P.3d 1045 (Or. 2000)	5, 6, 7, 23
<i>State v. Ott</i> , 686 P.2d 1001 (Or. 1984)	23
<i>State v. Smith</i> , 872 P.2d 966 (Or. 1994)	5

Other

Charles Eric Hintz, <i>The Plain Solution to Federal Habeas</i> , 2026 Utah L. Rev. 261	15
Daniel C. Murrie et al., <i>Evaluations of competence to stand trial are evolving amid a national “competency crisis,”</i> 41 Behav. Sci. L. 310 (2023).....	15
Eve Brensike Primus, <i>Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State-Court Criminal Convictions</i> , 61 Ariz. L. Rev. 291 (2019)	15
<i>Klamath Tribes and the Boarding School Experience: Part II</i> , https://www.oregon.gov/ode/students-and- family/equity/NativeAmericanEducation/Documents/SB13%20Curriculum/Grade%2011%20- Boarding%20Schools%20Part%20II%20The%20Klamath%20Expereince.pdf	15

Petitioner Ernest N. Lotches respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

A copy of the opinion below is attached as Appendix A, App. 001–003, and is available at *Lotches v. Premo*, No. 24-2652, 2026 WL 396539 (9th Cir. 2026) (per curiam).

JURISIDICTIONAL STATEMENT

On February 12, 2026, the Ninth Circuit issued its decision affirming the denial of habeas relief by the district court. *See id.* The petition is timely filed, as Justice Kagan extended the deadline to July 12, 2026.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part that every criminal defendant “shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI.

The appeal also implicates the Due Process Clause in the Fourteenth Amendment to the United States Constitution. Under that Clause, a state may not deprive a person of “life, liberty, or property, without due process of law.” U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Petitioner Ernest Lotches is a Native American, an enrolled member of the Klamath-Modoc Tribe. 9th Cir. Dkt. 11-12 at 180–81, 187. The Klamath Tribe

historically lived in an expansive area in the Pacific Northwest. 9th Cir. Dkt. 11-20 at 192. In 1864, the Klamath Tribe was coerced into selling its ancestral land and confined to the timbered mountains of Southern Oregon, so that white settlers could monopolize the pastures and farmland. 9th Cir. Dkt. 11-16 at 7. This relocation led to armed conflict, with the U.S. Cavalry destroying the tribe's settlements and killing Native Americans who resisted its authority. *Id.* at 7–12.

After its military subjugation, the Klamath Tribe was targeted between the late 1880s and the early 1940s with the forcible removal of its children from their parents so that they could be re-educated at harsh residential boarding schools. *Id.* at 12–14. The children there were beaten if they spoke their native language or practiced their traditional rituals. 9th Cir. Dkt. 11-18 at 258. Conditions at the schools were deplorable, with rampant violence, torture, and sexual abuse. *See, e.g., Klamath Tribes and the Boarding School Experience: Part II*, at <https://www.oregon.gov/ode/students-and-family/equity/NativeAmericanEducation/Documents/SB13%20Curriculum/Grade%2011%20-Boarding%20Schools%20Part%20II%20The%20Klamath%20Expereince.pdf> (referring to “the horrible conditions and abuses in the boarding schools” where Klamath children were sent during this period).

In 1954, the U.S. Government sold the Klamath Tribe's land and ended federal supervision of its members. 9th Cir. Dkt. 11-17 at 4. This transition was devastating for the tribe, with 52% of its members dying by age 40 in the period that followed and alcohol-related deaths skyrocketing. 9th Cir. Dkt. 11-16 at 17.

Suddenly, the Klamath Tribe was living in one of the poorest and most dysfunctional native communities in the country. *Id.*

That was the environment into which Mr. Lotches was born in 1954, in the heart of the Klamath Tribe's territory and in the very year that community was rocked by the federal government's termination decision. 9th Cir. Dkt. 11-12 at 177.

Like the other members of their community, Mr. Lotches' family was shaped by the turmoil the tribe experienced. When Mr. Lotches was six or seven years old, his father died in a drunk-driving accident. 9th Cir. Dkt. 11-12 at 198. Mr. Lotches' mother was a promiscuous alcoholic who drank while she was pregnant with her son. 9th Cir. Dkt. 11-17 at 275. With no stable home, she moved herself, Mr. Lotches, and his younger sister Eva from motel to motel, staying with various boyfriends. 9th Cir. Dkt. 11-12 at 203. At times, she abandoned the children, leaving them in a car when she went to drink or just completely disappearing. 9th Cir. Dkt. 11-17 at 267. Mr. Lotches was often left to the care of his grandmother, a mentally ill alcoholic, who would chase him around with butcher knives. 9th Cir. Dkt. 11-12 at 194.

Raised in this culture, Mr. Lotches himself inevitably developed his own problems with alcohol and then with law enforcement—which had continued the government's long history of abusing Klamath Tribe members. At the age of thirteen, Mr. Lotches was arrested and beaten by the police. *Id.* at 224. Other members of the Klamath Tribe in the area experienced similar police abuse. Mr. Lotches' uncle relates how the police in the area “were prejudiced against Native

Americans” and how he was personally “beaten up many times by law enforcement,” including once “with flashlights and nightsticks” so badly that he “could not be identified in a mug shot.” 9th Cir. Dkt. 11-17 at 270. An aunt agrees that “[t]he police were hostile towards” the Klamath. *Id.* at 267.

In 1981, Mr. Lotches stood trial in Colorado state court for robbery. 9th Cir. Dkt. 11-20 at 227. His attorneys presented evidence from three mental-health professionals, who concluded that Mr. Lotches suffered from paranoid schizophrenia, autism, and other related disorders. 9th Cir. Dkt. 11-16 at 241–44; 9th Cir. Dkt. 11-20 at 204–09, 225–26. The defense also submitted extensive evidence of Mr. Lotches’ background as a Native American, including the trauma that the Klamath Tribe—and he—experienced because of their heritage. 9th Cir. Dkt. 11-20 at 227. In February 1981, Mr. Lotches was found “legally insane” on two of the robbery charges by a jury and a state trial judge “determined he was legally insane on the third.” *Lotches v. Premo*, No. 6:14-cv-369, 2024 WL 1579428, at *6 (D. Or. Apr. 11, 2024).

During the same timeframe, Mr. Lotches was also charged with another Colorado robbery. 9th Cir. Dkt. 11-3 at 5.¹ The defense successfully challenged a habitual-offender charge by demonstrating that Mr. Lotches’ prior convictions were obtained through pleas that “were not freely, voluntarily, and knowingly entered into due to petitioner’s mental status at the time.” *Lotches*, 2024 WL 1579428, at *6.

¹ During this period of his life, Mr. Lotches went by the name “Kneka Knoke,” which is how he was identified in the court papers related to these proceedings.

Mr. Lotches then secured another verdict of not guilty by reason of insanity. 9th Cir. Dkt. 11-3 at 17.

Eventually, Mr. Lotches found his way back to Oregon, where he was charged with robbery in 1989. *See Lotches*, 2024 WL 1579428, at *6. A jury found him “guilty but insane.” *See id.* By law, Mr. Lotches should have been hospitalized after this judgment. *See State v. Smith*, 872 P.2d 966, 979–80 (Or. 1994) (Fadeley, J., dissenting). Instead, Mr. Lotches was released back to the streets. *See Lotches*, 2024 WL 1579428, at *6.

On August 22, 1992, an extremely inebriated Mr. Lotches had a confrontational exchange on a Portland street with Donald Hedges, who was on LSD. 9th Cir. Dkt. 11-4 at 6–7. Mr. Hedges reported the incident to an officer with a private security company. *See Lotches*, 2024 WL 1579428, at *15. Several armed officers with the company then pursued Mr. Lotches through the streets. *See State v. Lotches*, 17 P.3d 1045, 1050 (Or. 2000). At some point, the encounter turned violent and shots were fired by both the officers and Mr. Lotches. *See id.* There were different accounts of the timeline, but one neutral eyewitness originally recalled the guards firing first. *See id.*; *see also* 9th Cir. Dkt. 11-3 at 64. During the shootout, a bullet fired by Mr. Lotches struck Valencia Edwards, one of the private security officers. *See Lotches*, 17 P.3d at 1050. Another of Mr. Lotches’ bullets hit William Hall, an armed security officer in the group chasing Mr. Lotches. *See id.* at 1050–51. Ms. Edwards survived, but Mr. Hall died from his wound. *See id.* at 1051–52. After

his arrest, Mr. Lotches was charged in Oregon state court with murder and several related offenses. *See id.*

Mr. Lotches' lead defense attorney at trial later testified that the team never considered presenting a defense to the crimes at the guilt phase based on Mr. Lotches' Native American background, 9th Cir. Dkt. 11-14 at 212, even though their client proudly told them about his heritage, *id.* at 157. The attorney explained that he either did not consider the cultural evidence important enough or did not have enough experience to present it. *See id.* at 151. Similarly, defense counsel did not explore the prospect of using post-traumatic stress disorder in a self-defense-type theory. 9th Cir. Dkt. 11-18 at 135–36. The attorneys called several mental-health professionals to testify, but they did not present a consistent diagnosis for Mr. Lotches or a coherent defense related to mens rea. *Lotches*, 2024 WL 1579428, at *24 (summarizing that testimony). At closing, Mr. Lotches' counsel proffered a smorgasbord of possible defense theories to the jury, including guilty but insane, extreme emotional disturbance, self-defense, duress, choice of evils, and voluntary intoxication. *See* 9th Cir. Dkt. 11-10 at 78, 115, 122–23. Counsel did not explain to the jury how these various defenses related to one another or which theory was supported by what evidence, opting instead to throw the kitchen sink at the wall in a summary fashion. *See id.* at 67–125.

On June 14, 1993, the jury convicted Mr. Lotches of murder and most of the related offenses. *See* 9th Cir. Dkt. 11-12 at 135. He was sentenced to death later that month. *See id.* at 139. At no point during the trial court proceedings did either

party request a competency hearing, nor did the judge hold one sua sponte. *See Lotches*, 2024 WL 1579428, at *8–11 (addressing this claim on the merits and not suggesting that either party sought a competency hearing or that the trial court held one). Through counsel, Mr. Lotches pursued a direct appeal. Appellate counsel did not raise an issue concerning Mr. Lotches’ competence. *See* Dist. Ct. Dkt. 28-6 at 77–252; Dkt. 28-7 at 4–79. However, while the direct appeal was pending, appellate counsel for Mr. Lotches filed a state habeas petition on February 17, 2000, which did assert the competency claim. *See* Dist. Ct. Dkt. 31-5 at 10–24. The Oregon Supreme Court denied the petition without comment on February 29, 2000. *See id.* at 97.

On December 29, 2000, Mr. Lotches’ convictions and sentences were largely affirmed on direct appeal, with an irrelevant partial remand for further proceedings. *See Lotches*, 17 P.3d at 1072. Mr. Lotches then pursued state post-conviction relief with a petition filed at the trial court. 9th Cir. Dkt. 11-12 at 143. As pertinent here, Mr. Lotches alleged in his post-conviction petition that trial counsel were ineffective under the Sixth Amendment for failing to present cultural evidence relating to his Native American background as part of a guilt-phase defense theory. *Id.* at 150–51, 154–55. The state trial court denied relief and the Oregon Court of Appeals affirmed. *See Lotches v. Premo*, 306 P.3d 768 (Or. Ct. App. 2013). In the appellate court’s view, trial counsel did not act deficiently because, even if they had contemplated a cultural defense, “they would have rejected such an approach because it would have been inconsistent with the other evidence and inconsistent

with establishing credibility with the jury.” *Id.* at 772. According to the appellate court, Mr. Lotches failed to present any evidence “that he had told his attorneys about any connection between his conduct on August 22, 1992, and his Native American heritage,” nor “any evidence that his attorneys knew, or should have known” that his cultural heritage “had any significant relationship to the” crime. *Id.* After this opinion was issued at the intermediate level, Mr. Lotches filed an unsuccessful petition for review with the Oregon Supreme Court. *See Lotches v. Premo*, 318 P.3d 749 (Or. Dec. 12, 2013) (table).

Having lost in state court, Mr. Lotches turned to federal habeas proceedings, filing a petition in 2015. *See* Dist. Ct. Dkt. 47. While the federal habeas action was pending, the Oregon legislature substantially narrowed the scope of the state’s death-penalty law, and the new version was effectively applied retroactively by the courts. *See State v. Bartol*, 496 P.3d 1013, 1015 (Or. 2021). Governor Kate Brown then commuted Mr. Lotches’ death sentence—along with all of the others in the state—to life in prison without the possibility of parole. *See Lotches*, 2024 WL 1579428, at *25.

Following the reduction in his sentence, Mr. Lotches continued to litigate the guilt-phase issues in his federal habeas proceedings. That litigation concluded in April 2024, when the district court issued an order denying relief and a corresponding judgment. *See* Dist. Ct. Dkts. 133, 134. The district court rejected Mr. Lotches’ procedural and substantive competency claims on the grounds that they were procedurally defaulted because they were raised in a state habeas petition

rather than on direct appeal. *See Lotches*, 2024 WL 1579428, at *8. It denied relief on the merits on his ineffectiveness claim regarding the failure to present evidence relating to Mr. Lotches' Native American background, concluding that the state courts reasonably applied the controlling federal law to that issue. *See id.* at *59. The district court certified for appeal the ineffectiveness issue, but not the competency claim. *See id.* at *81.

Mr. Lotches appealed and briefed both the competency claim and the ineffectiveness issue. *See* 9th Cir. Dkt. 13. In regards to the competency claim, Mr. Lotches argued on appeal that such issues can never be procedurally defaulted. *See id.* at 72. The Ninth Circuit disagreed, found the claim defaulted, and declined to grant a certificate of appealability on it. *See Lotches*, 2026 WL 396539, at *3. It denied the ineffectiveness claim on the merits, concluding that the Oregon Court of Appeals reasonably determined that counsel were not deficient because they sufficiently investigated Mr. Lotches' background and prudently chose not to present a cultural defense to the crime. *See id.* at *2–3. This timely certiorari petition follows.

REASONS FOR GRANTING THE WRIT

I. The competency issue warrants review.

There is a clear and well-developed disagreement among the circuit courts on the question of whether a claim of incompetence to be tried can ever be procedurally defaulted in federal habeas litigation. That question is a weighty one, for it concerns a common procedural defense to a frequently asserted claim. Mr. Lotches' case tees

the issue up perfectly—he has a powerful competency claim that was rejected by the Ninth Circuit for the sole reason that it was procedurally defaulted.

A. There is an entrenched 5-4 circuit split.

The division between the circuits on the question presented is deep and intractable. To understand the division, a brief preface on procedural default is in order. Procedural default is a court-made doctrine that deems certain constitutional claims unreviewable in collateral proceedings if they were not raised at the time and place “required by state procedure.” *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).² The purpose of the default rule is “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). As a court-devised principle, procedural default is flexible and subject to exceptions. For instance, procedural default does not apply if the petitioner demonstrates that he is actually innocent of the crime. *See House v. Bell*, 547 U.S. 518, 536–37 (2006). That is because “the principles of comity and finality that inform” the procedural default doctrine “must yield to the imperative of correcting a fundamentally unjust incarceration.” *Murray v. Carrier*, 477 U.S. 478, 495 (1986).

Apart from exceptions like actual innocence, defaults can also be overcome if the petitioner demonstrates cause for the omission and prejudice from the error. *See Martinez v. Ryan*, 566 U.S. 1, 10 (2012). Cause is when “some objective factor external to the defense impeded counsel’s efforts to comply with the State’s

² Unless otherwise indicated, all internal quotations are omitted, all emphasis is added, and all citations are cleaned up.

procedural rule.” *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). And a petitioner establishes prejudice by showing that the error “worked to his actual and substantial disadvantage.” *Shinn v. Ramirez*, 596 U.S. 366, 379–80 (2022).

The question here is whether a procedural default must yield to merits review when the state has violated a petitioner’s foundational “right not to be tried or convicted while incompetent to stand trial,” *Drope v. Missouri*, 420 U.S. 162, 172 (1975), either in the sense that there is an exception to the doctrine or in the sense that cause and prejudice are by definition present when a petitioner was incompetent to be tried.

Five circuits have answered in the affirmative. On that side of the debate, the Second, Fifth, Eighth, Tenth, and Eleventh Circuits have all held that a competency claim can never be procedurally defaulted. That line of cases began with *Zapata v. Estelle*, 588 F.2d 1017, 1021 (5th Cir. 1979), which concluded that because “one who is incompetent cannot waive his right to a competency hearing,” such a claim is not subject to the “procedural default rule.” The Second Circuit followed suit in *Silverstein v. Henderson*, 706 F.2d 361, 367 (2d Cir. 1983). There, Judge Lombard explained for the majority that the procedural default “rule cannot apply when the basis for attacking the conviction is that the defendant is incompetent to stand trial,” as “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.” *Id.* at 366–67. The Eleventh Circuit concurred two years later. That court embraced *Zapata*’s reasoning and concluded that “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 and be sentenced through post-conviction proceedings.” *Adams v. Wainwright*, 764 F.2d 1356, 1359 (11th Cir. 1985), *abrogated on other grounds as recognized by Granda v. United States*, 990 F.3d 1272, 1294 (11th Cir. 2021).

Following this trio of early opinions, the Eighth and Tenth Circuits joined the same trend in the 1990s. The Eighth Circuit did so in *Vogt v. United States*, 88 F.3d 587 (8th Cir. 1996). *Vogt* involved a collateral challenge to a federal conviction under 28 U.S.C. § 2255. *See* 88 F.3d at 589.³ The inmate asserted a competency issue in his § 2255 motion without having first done so at trial or on direct appeal. *See id.* at 590. That omission was not a problem, the Eighth Circuit determined, because “the procedural default rule . . . does not operate to preclude” a competency claim under those circumstances, since it would be “contradictory to argue that a defendant may be incompetent and yet knowingly or intelligently waive [the] right to have the court determine capacity to stand trial.” *Id.*

The Tenth Circuit adopted a similar rule with a more limited scope and slightly different logic the next year. In *Sena v. New Mexico State Prison*, 109 F.3d

³ Although the federal criminal system obviously differs from its state counterparts, the basic default principles apply equally in the 28 U.S.C. § 2254 and § 2255 contexts. *See, e.g., United States v. Snyder*, 871 F.3d 1122, 1127 n.3 (10th Cir. 2017) (collecting this Court’s cases). Indeed, the cases arrayed above refer interchangeably to § 2254 and § 2255 cases when describing the conflict presented here. *See, e.g., Vogt*, 88 F.3d at 590 (citing a § 2254 precedent in a § 2255 appeal).

652 (10th Cir. 1997), the Tenth Circuit distinguished between substantive and procedural competency claims. A substantive claim, the court noted, asserts that the prisoner's due process rights were violated by virtue of his lack of competency at the proceeding in question. *See Sena*, 109 F.3d at 654. By contrast, a procedural competency claim typically contends that due process entitled the individual to an evidentiary hearing at the trial level. *See id.* For a substantive claim, *Sena* clarified, procedural default is categorically inapplicable. *See id.* That is because the test for cause and prejudice is automatically satisfied when a petitioner is incompetent. *See id.* In other words, the cause for the failure to properly exhaust the claim is the person's incompetence, and they are prejudiced by having been tried while incompetent. *See id.*

Standing in opposition to these decisions are rulings from the Fourth, Sixth, Seventh, and Ninth Circuits. The Fourth Circuit broke ranks in *Smith v. Moore*, 137 F.3d 808 (4th Cir. 1998). Invoking the usual method of procedural default in rejecting a competency claim, the Fourth Circuit dismissed the notion that competency claims are unique as a result of the petitioner's inability to waive an issue at the trial stage. *See* 137 F.3d at 818–19. “Unlike waiver,” the Fourth Circuit stated, “which focuses on whether conduct is voluntary and knowing, the procedural default doctrine focuses on comity, federalism, and judicial economy.” *Id.* The Sixth Circuit later ruled to the same effect in *Hodges v. Colson*, 727 F.3d 517 (6th Cir. 2013). Because trial waiver and procedural default are distinct, the Sixth Circuit declared there “that substantive competency claims are subject to the same rules of

procedural default as all other claims that may be presented on habeas.” *Hodges*, 727 F.3d at 540. The Ninth Circuit did likewise in *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1307 (9th Cir. 1996), taking the position that the “analytical basis of a defense of waiver differs markedly from that of a defense of procedural default.” Finally, the Seventh Circuit offered the most recent and the most detailed explication of this judicial perspective in *Yang v. United States*, 114 F.4th 899 (7th Cir. 2024), *cert. denied*, 145 S. Ct. 1182 (2025). The *Yang* court declined to draw a line between substantive and procedural competency claims. *See id.* at 909. Instead, Judge Brennan—writing for the panel—characterized all competency claims as susceptible to procedural default. *See id.* at 909–12.

There is no denying the existence of this circuit split. In fact, in several of the cases referenced above the circuit courts themselves recognized the difference of opinion. For example, *Yang* observed that the circuits had “reached disparate answers to the question” presented. *Id.* at 909. Similarly, *Martinez-Villareal* criticized the Eleventh Circuit’s framework as “untenable.” 80 F.3d at 1307. And in 2017, Judge Briscoe emphasized the division among the circuit courts on this issue in a separate writing where she encouraged en banc review. *See Lay v. Royal*, 860 F.3d 1307, 1318–19 (10th Cir. 2017) (Briscoe, J., concurring). Secondary sources have picked up on the disagreement as well. *See* Brian R. Means, *Federal Habeas Manual*, § 9B:48 (2026) (“Circuit courts have diverged on whether a procedural default can bar a competency-based due process claim raised for the first time on collateral review.”).

This split is not going anywhere. As evident from the citations above, the division dates back decades and nine circuits—nearly evenly divided—have already weighed in. The respective stances of the circuits are fully developed. *See, e.g., Yang*, 114 F.4th at 909–12 (providing a detailed analysis in support of the minority view that competency claims can never be procedurally defaulted). There is no need for further percolation, and the matter is ripe for this Court’s review now.

B. It is an important issue.

The first question presented is one of great importance to the judicial system. As the Court well knows, collateral attacks on criminal judgments—both state and federal—make up a large share of the United States judiciary’s work. *See, e.g., Eve Brensike Primus, Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State-Court Criminal Convictions*, 61 Ariz. L. Rev. 291, 298 n.35 (2019). Competency claims are advanced in many of those attacks. *See 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) (calculating that roughly 130,000 competency evaluations are conducted by courts every year). Moreover, procedural defaults are routinely imposed in collateral review. *See, e.g., Charles Eric Hintz, The Plain Solution to Federal Habeas*, 2026 Utah L. Rev. 261, 273 (referring to the “many defaults” found in § 2254 cases). Collectively, all of these circumstances mean that there are large numbers of litigants who are impacted by the conflicting approaches taken in the circuit courts to the question presented. Furthermore, since it is a 5-4 split, the disagreement has essentially separated the country in half. If the minority view is incorrect, then there are substantial

numbers of petitioners whose competency claims are wrongly being denied review on the merits, some of which would no doubt otherwise prevail and lead to relief being granted. And if the majority view is incorrect, then a great deal of judicial resources are being wasted on resolving claims that are properly deemed defaulted. Either way, there is a compelling need for granting certiorari, so that these tens of thousands of defendants are all treated equally.

Apart from the sheer scale of cases at issue, the question presented is imperative because of how elementary the right at issue is. “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). It is a principle “fundamental to an adversary system of justice.” *Drope*, 420 U.S. at 172. The entitlement to competency “is rudimentary, for upon it depends” many other “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, 139–40 (1992) (Kennedy, J., concurring in the judgment).

With such a bedrock constitutional right, it is critical for the law to function correctly and uniformly. It would be intolerable for an incompetent defendant to lose his day in court because of a misunderstanding in the circuits about how procedural default works. And it would be equally intolerable for a state to lose its conviction by dint of a federal court inappropriately reaching the merits of a claim

that was procedurally off-limits. *See, e.g., Shinn*, 596 U.S. at 377 (emphasizing how “federal intervention imposes significant costs on state criminal justice systems” when habeas relief is granted). Either way, this long-simmering dispute is a serious one that calls for resolution.

C. Mr. Lotches’ case is a good vehicle for resolving the split.

The present certiorari petition gives the Court an excellent opportunity for providing the necessary clarification to the law.

To begin, in the Ninth Circuit below, the panel rejected Mr. Lotches’ competency claim for the sole reason that it was procedurally defaulted. *See Lotches*, 2026 WL 396539, at *3. Consequently, there are no other procedural complexities or alternative merits rulings to cloud the legal question under consideration. Additionally, Mr. Lotches clearly urged to the Ninth Circuit the rule he is advocating for here, i.e., that a competency claim can never be defaulted. *See* 9th Cir. Dkt. 13 at 72. As a result, no preservation concerns are present.

What is more, to the extent that the distinction between substantive and procedural competency claims matters, it does not weigh against certiorari. In his habeas petition, Mr. Lotches raised both types of claim and the federal district court denied each of them as procedurally defaulted. *See* Dist. Ct. Dkt. 47 at 86–98; *Lotches*, 2024 WL 1579428, at *8. Thus, however the circuit split breaks down in terms of procedural versus substantive claims, it is implicated by Mr. Lotches’ case. His certiorari petition is therefore an ideal occasion for the Court to finally settle the circuit split.

Finally, Mr. Lotches' case is a good one to take up the issue because he has an unusually strong competency claim on the merits. By the time he stood trial for the offense at issue here, Mr. Lotches had been adjudicated insane no fewer than three times in other proceedings. *See Lotches*, 2024 WL 1579428, at *6. The trial court was well-aware of those events. *See, e.g.*, 9th Cir. Dkt. 11-3 at 118–20. If there was ever a situation where a judge had reason to question a defendant's competence, it is this one, where a long and well-establish history of insanity was staring the court in the face. *See Johnston v. Singletary*, 162 F.3d 630, 634 (11th Cir. 1998) (clarifying that *Pate v. Robinson*, 383 U.S. 375 (1966) held “that the prohibition against trying an incompetent defendant necessarily require[s] the trial court to hold a competency hearing *sua sponte* when presented with information that raises a bona fide doubt as to the petitioner's competency”). Mr. Lotches' competency claim is, at a minimum, a substantial one. There is accordingly no ground to deny the petition on the ground that his claim would fail even if the courts did reach it on the merits. Rather, if the default rule at issue here is mistaken, Mr. Lotches' competency claim would demand serious consideration, and the Court should therefore grant certiorari to determine what the correct answer is to the question presented.

II. The ineffectiveness issue warrants review.

Moving on to the second question presented, Mr. Lotches' counsel were ineffective for failing to present powerful cultural evidence at the guilt-phase trial to explain how their client's violent reaction to his armed pursuit by the victims was

shaped by the long history of governmental abuse of Klamath Indians like himself. If certiorari is not granted on the first question presented, summary reversal is appropriate on the second.

Trial attorneys are ineffective under the Sixth Amendment where they perform deficiently and their errors are prejudicial. *See generally Strickland v. Washington*, 466 U.S. 668, 687, 691 (1984). Because the state courts addressed this claim on the merits, it is subject to the Antiterrorism and Effective Death Penalty Act. *See Green v. Fisher*, 565 U.S. 34, 35–36 (2011). Section 2254(d) is part of that Act. *See id.* Under § 2254(d)(1), a petitioner may obtain habeas relief if he shows that the state court decision “involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” The § 2254(d)(1) inquiry focuses on the last reasoned opinion by the state courts on the issue. *See Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991). Here, that opinion came in the form of the Oregon Court of Appeals’ 2013 decision. *See Lotches*, 306 P.3d at 771–73. The state intermediate court denied Mr. Lotches’ ineffectiveness claim solely because it found his presentation lacking on deficient performance, without reaching prejudice. *See id.* at 771 n.4. Thus, § 2254(d)(1) must be satisfied with respect to deficient performance, but prejudice is considered de novo. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

The state opinion in Mr. Lotches’ case unreasonably applied this Court’s law in finding no deficient performance. For starters, it was inappropriate for the Oregon Court of Appeals to use hypothetical, revisionist history to justify trial

counsel's errors. The appellate court stressed that, "even if petitioner's trial attorneys had considered a 'culturally attuned' defense, they would have rejected such an approach because it would have been inconsistent with the other evidence and inconsistent with establishing credibility with the jury." *Lotches*, 306 P.3d at 772.

That logic conflicts with the black-letter principle that courts assessing ineffectiveness claims must "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Following that principle, it is no defense to an omission by trial counsel to say that their mistake made no difference. Counsel's obligation is to do the work in the first place, investigate the defenses that must be investigated, and consider the arguments that must be considered. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (explaining that a failure to unearth mitigating evidence was "not justified by a tactical decision" where counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background"). To excuse defense counsel's omissions by relying on the nature of evidence they never even uncovered "puts the cart before the horse." *Weeden v. Johnson*, 854 F.3d 1063, 1070 (9th Cir. 2017). If counsel do not discharge their basic investigative responsibilities, they are deficient—regardless of what ultimate decision they would have made in an alternate universe where their investigation was competent. Because the Oregon Court of Appeals misapplied *Strickland* in this regard, § 2254(d)(1) is satisfied with respect to deficient performance.

The Oregon Court of Appeals also erroneously applied *Strickland* by faulting Mr. Lotches for having “presented no evidence to show that he had told his attorneys about any connection between his conduct on August 22, 1992, and his Native American heritage,” and likewise no evidence that his lawyers “knew, or should have known” that his cultural background was connected to his crime. *Lotches*, 306 P.3d at 772. As to the first point, this Court’s precedent does not require a defendant to do his lawyers’ job for them. Quite to the contrary, it is counsel’s independent duty to conduct a wide-ranging investigation. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam) (emphasizing the “unquestioned” principle that “counsel had an obligation to conduct a thorough investigation of the defendant’s background”). That obligation is especially rigorous when it comes to counsel’s investigation into a client’s background for mitigation purposes in a capital case. *See, e.g., Wiggins*, 539 U.S. at 524 (relying on the American Bar Association’s direction to trial lawyers in capital cases to undertake “efforts to discover all reasonably available mitigating evidence”). Although Mr. Lotches’ death sentence was later reduced, and although his current claim relates to counsel’s failure to use this information at the guilt phase, that does not change the responsibilities that the attorneys had at the time. *See Strickland*, 466 U.S. at 689 (reiterating that in ineffectiveness analyses “every effort [must] be made to eliminate the distorting effects of hindsight”).

The Oregon Court of Appeals’ reliance upon Mr. Lotches’ supposed failure to inform his attorneys about this defense also runs afoul of the federal rule that, even

when a client is “fatalistic or uncooperative,” “that does not obviate the need for defense counsel” to investigate mitigating evidence. *Porter*, 558 U.S. at 40. There was no suggestion by the Oregon Court of Appeals that Mr. Lotches wanted to be sentenced to death, as Mr. Porter did. At most, he was reluctant to offer certain mitigating information. 9th Cir. Dkt. 11-15 at 138–39. Under *Porter*, that was a fortiori no excuse for counsel to avoid their basic responsibilities. Because counsel were compelled by this Court’s caselaw to conduct a thorough investigation into their client’s background, it was unreasonable for the Oregon Court of Appeals to suggest that Mr. Lotches himself had to tell his lawyers what to do.

Turning to the Oregon Court of Appeals’ insistence that his counsel had no basis to suppose that Mr. Lotches’ background played a role in his offense, that is an unreasonable factual finding under § 2254(d)(2). A wealth of information was presented to the state courts in post-conviction litigation to tell the story of the Klamath Tribe and its mistreatment by government actors. *See, e.g.*, 9th Cir. Dkt. 11-17 at 2–70, 266–73. That story involved numerous abuses of tribal members by law enforcement and other officials, including murder, rape, and theft. *See, e.g.*, 9th Cir. Dkt. 11-16 at 7–12; 9th Cir. Dkt. 11-17 at 270. And it involved Mr. Lotches’ own exposure to similar misconduct, such as his beating at the hands of the police as a young adolescent. 9th Cir. Dkt. 11-12 at 224. More generally, there was evidence in the post-conviction record that “[t]he police abuse and brutality towards the Klamath . . . was widely known, shared, and talked about among the members.” 9th Cir. Dkt. 11-17 at 268. Had trial counsel simply spoken to the community from

which their client came, as any competent capital defense lawyers would have, they would have quickly learned those same crucial facts. Yet defense counsel did not even contact the members of Mr. Lotches' own family who were in possession of this pivotal information, 9th Cir. Dkt. 11-17 at 273, 280, 284, even though interviewing such individuals is a core responsibility of a lawyer attempting to stave off capital charges, *see, e.g., Andrus v. Texas*, 590 U.S. 806, 815–16 (2020) (per curiam).

Contrary to the Oregon Court of Appeals' unexamined assumption, a potential link between the tribal history and Mr. Lotches' crime is obvious. Mr. Lotches was accused of killing someone in the course of a gunfight that erupted after armed security guards chased him through the streets. *See Lotches*, 17 P.3d at 1049–51. It does not take Sigmund Freud to realize that someone who has been shaped by generational and personal exposure to horrific cruelties from government actors is more likely to react violently when he sees a gun-toting officer pursuing him. That dynamic could have supported powerful defenses at the guilt-phase trial. For example, Oregon permits a defendant charged with murder to argue that he is instead guilty only of manslaughter because he committed the killing as a result of "extreme emotional disturbance." *State v. Ott*, 686 P.2d 1001, 1012 (Or. 1984) (in banc). Trial counsel are required to be familiar with the governing state law, and they are deficient when they aren't. *See, e.g., Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.").

While trial counsel mentioned extreme emotional disturbance once and in passing in their closing argument, they did not explain how it might apply to the case. *See* 9th Cir. Dkt. 11-10 at 78. That explanation could and should have come from Mr. Lotches’ cultural background. The jury was instructed that an extreme emotional disturbance was properly found if Mr. Lotches committed an intentional homicide “under the influence of an emotional disturbance to the extent that he lost the capacity to control himself” and if “there was a reasonable explanation for” his actions “from the standpoint of a person in the defendant’s situation” while taking into consideration his “personal characteristics,” including his “*cultural background*.” *Id.* at 204–05. Trial counsel had an invitation on a silver platter to use their client’s cultural background as a member of the Klamath Tribe to show how centuries of governmental abuse, including police mistreatment of Mr. Lotches himself, warped his perception of the armed officers chasing him through the streets of Portland and led to the fatal shooting. They utterly failed to accept that invitation, not even mentioning extreme emotional disturbance after their perfunctory acknowledgment that “[t]here is an extreme emotional disturbance issue.” *Id.* at 78.

Instead of extreme emotional disturbance, trial counsel could also have pursued imperfect self-defense. That doctrine is typically described as something like an “honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury.” *Middleton v. McNeil*, 541 U.S. 433, 434 (2004). In all events, there plainly were lines that trial counsel could and should

have drawn between the cultural evidence and Mr. Lotches' offense. For the Oregon Court of Appeals to overlook all of the above was unreasonable within the meaning of § 2254(d)(2). *See Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) (detecting a § 2254(d)(2) problem where the state court "had before it, and apparently ignored," key evidence supporting the petitioner's constitutional claim).

That leaves the de novo analysis of prejudice. Prejudice on an ineffectiveness claim is present when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The test is satisfied here. Mr. Lotches' strongest evidence on prejudice comes from an affidavit signed by attorney J. Tony Serra and submitted to the state post-conviction court. *See* 9th Cir. Dkt. 11-18 at 2–11. As Mr. Serra relates in the affidavit, he represented a defendant named Patrick Croy on murder charges in California state court. *See id.* at 3. Mr. Croy shared Mr. Lotches' Klamath background. *See id.* Like Mr. Lotches, Mr. Croy killed a police officer with a firearm after a chase involving multiple armed members of law enforcement. *See People v. Croy*, 710 P.2d 392, 396–97 (Cal. 1985) (in bank). Unlike Mr. Lotches' attorneys, however, Mr. Serra "engaged expert witnesses in the field of Indian history and contemporary affairs who testified regarding the interactions between the Indian and non-Indian communities in" the area his client came from. 9th Cir. Dkt. 11-18 at 7. Such expert testimony "was relevant to Mr. Croy's state of mind, i.e., his good faith belief, whether reasonably or unreasonably held, that it was necessary to defend himself with lethal force." *Id.* After hearing that evidence, the

jury acquitted Mr. Croy of first-degree murder in 1990 on the ground that he was engaged in self-defense. *See id.* at 3.

It is difficult to imagine stronger evidence of prejudice than the fact that a member of the same tribe accused of a highly similar offense prevailed three years earlier in an adjacent jurisdiction after his attorneys did the work that Mr. Lotches' counsel failed to do. Given that history, Mr. Lotches' "trial cannot be relied on as having produced a just result," *Strickland*, 466 U.S. at 686, there can be no "confidence in the outcome," *id.* at 694, and prejudice is present.

This Court has not hesitated to summarily reverse the circuits when they commit clear errors while denying capital habeas petitions. *See, e.g., Whitton v. Dixon*, --- S. Ct. ----, 2026 WL 1513270 (2026) (per curiam). Because the Ninth Circuit did so below, summary reversal is appropriate here too.

CONCLUSION

Mr. Lotches respectfully asks that certiorari be granted and that the case be set for merits briefing and argument. Alternatively, he respectfully requests that the petition be summarily granted and the decision below reversed.

Respectfully submitted this 12th day of June 2026.



Jonah J. Horwitz*
Federal Defender Services of Idaho
702 West Idaho Street, Suite 900
Boise, Idaho 83702
Telephone: 208-331-5530
Facsimile: 208-331-5559

*Counsel of Record