

IN THE
Supreme Court of the United States

ERNEST N. LOTCHES,
Petitioner,
v.

COREY FHUERE, SUPERINTENDENT, OREGON STATE PENITENTIARY,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The requirement of competency to stand trial is a “bedrock constitutional right” that has “deep roots in our common-law heritage.” Pet. 16 (quoting *Medina v. California*, 505 U.S. 437, 446 (1992)). This Court has long held that a petitioner may not “knowingly or intelligently ‘waive’ his right” to competency. *Pate v. Robinson*, 383 U.S. 375, 384 (1966). Yet, for nearly 30 years, circuits have been split on whether this unwaivable right must nonetheless yield to the procedural default rule, which this Court has devised to “separat[e] the meritorious needles from the growing haystack” of habeas petitions. *Brown v. Davenport*, 596 U.S. 118, 132 (2022). Four circuits, including the Ninth Circuit here, say yes: the procedural default bar has nothing to do with waiver. At least four other circuits disagree. This Court should grant certiorari to decide whether the competency right, which dates back to early English common law, should languish in the haystack.

The State does not dispute the importance of this constitutional and procedural question, or the circuit split at issue. Opp. 23. Instead, it tells this Court that it should simply decide it later, postponing resolution of a question that has had three decades of percolation. But none of the vehicle problems the State tries to conjure presents an obstacle to this Court’s resolution of a question that straddles constitutional and procedural doctrines and has confounded circuits for decades.

This Court should grant the petition for certiorari.

I. The State Does Not—And Cannot—Dispute That This Case Presents A Circuit Split On An Important Question.

A. As the State Acknowledges, Circuits Are Split on the Question Presented.

The State acknowledges that this case presents “a circuit split about the procedural-default rule’s application to competence claims.” Opp. 23. In particular, circuits are split about whether the procedural default rule applies to bar collateral review of claims of violations of a petitioner’s right not to stand trial while incompetent. *See* Pet. 11.

At least four circuits—the Fifth, Second, Eleventh, and Tenth—answer no: substantive competency claims can never be procedurally defaulted. *See* Pet. 11-13. These circuits rely primarily on this Court’s waiver jurisprudence, which explains that it would be “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.” *Pate*, 383 U.S. at 384; *see Zapata v. Estelle*, 588 F.2d 1017, 1021 (5th Cir. 1979) (relying on *Pate*, 383 U.S. at 384, for the proposition that “one who is incompetent cannot waive his right to a competency hearing”); *Silverstein v. Henderson*, 706 F.2d 361, 366 (2d Cir. 1983) (reaching the same conclusion because, in *Pate*, this Court “expressly denied that a habeas petitioner could have waived his right to a competency hearing by failing to request one at trial”); *Adams v. Wainwright*, 764 F.2d 1356, 1359 (11th Cir. 1985) (concluding the same in reliance on *Pate*); *Sena v. N. Mex. State Prison*, 109 F.3d 652, 654 (10th Cir. 1997) (relying in part on the same line of waiver jurisprudence and further explaining that the test for surviving procedural default is itself satisfied in the case of a competency claim

because the plaintiff automatically demonstrates “cause and prejudice” to satisfy the default exception).

Meanwhile, four other circuits—the Fourth, Ninth, Sixth, and Seventh—disagree. *See* Pet. 13-14. Those circuits distinguish *Pate*’s waiver ruling as inapplicable in the context of procedural default. *See, e.g., Smith v. Moore*, 137 F.3d 808, 819 (4th Cir. 1998) (“[T]he rationale of *Drope* and *Pate* are inapposite in the context of a procedural default.”); *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1307 (9th Cir. 1996) (“[t]he waiver standard does not apply” to “procedural default”); *Hodges v. Colson*, 727 F.3d 517, 540 (6th Cir. 2013) (“unlike waiver, the procedural default rule does not rely on the petitioner’s voluntary abandonment of a known right, but only on the fact that the claim was rejected by the state court on independent and adequate state grounds”(quotation marks and citation omitted)); *Yang v. United States*, 114 F.4th 899, 910 (7th Cir. 2024) (“the law can prohibit a defendant from waiving competency before a trial court, while still subjecting competency claims to default for failing to observe the proper procedures in a collateral attack”), *cert. denied*, 148 S. Ct. 1182 (2025).

The State does not dispute the existence of this longstanding, entrenched, and acknowledged circuit split. *See* Pet. 14; Opp. 23. Instead, the State tells this Court in a perfunctory footnote that it should stand down in the face of such confusion simply because this “circuit split ... may well resolve without this Court’s intervention.” Opp. 23 n.11. But the likelihood that this 30-year split resolves itself without this Court’s intervention is highly remote.

As the State itself points out, this split has been dividing circuits for nearly 30 years. Opp. 24 n.11; *see* Pet. 13. That is hardly an argument that further percolation is needed or that the matter is not ripe for this Court’s intervention. The State speculates that courts on one side of the split will suddenly “abandon[]” their longstanding rule. Opp. 24 n.11. The State’s speculation is baseless.

As an initial matter, the Eighth Circuit, which the State claims has already “abandoned” its rule, has not been so decisive. It has been inconsistent at best. In *Vogt v. United States*, 88 F.3d 587, 589-90 (8th Cir. 1996), the Eighth Circuit held that a collateral challenge under 28 U.S.C. § 2255 could not be procedurally defaulted, relying on the waiver principle this Court outlined in *Pate*. *See* Pet. 12. But as the State points out, the panel in *Lyons v. Luebbbers*, 403 F.3d 585, 593 (8th Cir. 2005), later declined to apply that principle to a claim filed under 28 U.S.C. § 2254, holding that the petitioner there “procedurally defaulted” on his trial competency claim. *Lyons* said nothing to overrule or “abandon” the court’s earlier holding in *Vogt*. Rather, courts have continued to regard both precedents as good law. *See, e.g., United States v. Casteel*, 717 F.3d 635, 641 (8th Cir. 2013) (relying on both *Vogt* and *Lyons* for the standard for incompetency without addressing default); *see also Yang*, 114 F.4th at 908 (discussing *Vogt* as the law in the Eighth Circuit on the distinction between procedural and substantive competency claims); *Jones v. United States*, No. C 11-4028, 2012 WL 13195866, at *16 (N.D. Iowa Aug. 22, 2012) (relying on *Vogt*’s holding regarding default and competency claims). The Eighth Circuit’s inability to

choose a side in the split serves only to illustrate the need for guidance from this Court.

More importantly, no other courts have even arguably abandoned their existing precedent. Indeed, earlier this year the Eleventh Circuit *reiterated* its long-dated rule that the procedural default bar does not apply for competency claims, emphasizing, once again, that “it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently ‘waive’ his right to have the court determine his capacity to stand trial.” *Dawson v. Macon SP Warden*, No. 23-13226, 2026 WL 295429, at *1 (11th Cir. Feb. 4, 2026). Without intervention from this Court, this issue will persist in dividing circuits, and at least four circuits will—one way or the other—continue to get it wrong.

B. This Case Presents A Question Of Constitutional And Procedural Importance.

This Court has “repeatedly and consistently recognized” that “the right not to stand trial while incompetent is ... important.” *Cooper v. Oklahoma*, 517 U.S. 348, 354 & n.4 (1996); *see also* Pet. 16. The State rightly does not even attempt to dispute the importance of this “fundamental right,” which has “deep roots in our common-law heritage.” *Cooper*, 517 U.S. at 354-55 (quotation marks omitted); *see also* 1 Mathew Hale, *The History of the Pleas of the Crown*, 34-35 (1736) (“[I]f a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such frenzy.”). After all, every other constitutional due process right “depends” on the principle that a criminal defendant is competent to exercise it. *Cooper*, 517 U.S. at 354 (quotation marks omitted); Pet.

16. As Blackstone put it, if a defendant shows himself incompetent during the course of trial, “how can he make his defence?” 4 *William Blackstone, Commentaries* * 24.

Nor does the State dispute that, for this “bedrock constitutional right” to “function correctly,” this Court must settle how it interacts with the procedural default doctrine. Pet. 16; *see* Opp. 20 (acknowledging, without refuting, petitioner’s argument that this case presents an “important” question). On the one hand, “the consequences of an erroneous determination of competence are dire,” raising doubts about the propriety of all the legal proceedings that followed. *Cooper*, 517 U.S. at 364. For this reason, the right is “sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination.” *Id.* at 354 n.4 (citing *Pate*, 383 U.S. at 384). On the other hand, courts have an unquestionable interest in “conserv[ing] judicial resources and ... in the finality of judgments,” *Massaro v. United States*, 538 U.S. 500, 504 (2003), as well as in avoiding “trivializ[ing] ... the writ” of habeas corpus beyond its original scope. *Brown*, 596 U.S. at 130 (quotation marks omitted).

How to strike the right balance is a question of great import especially because, while the competency principle is deeply rooted in our nation’s constitutional tradition, “[t]he procedural-default rule is neither a statutory nor a constitutional requirement,” *Massaro*, 538 U.S. at 504. As this Court wields that rule to “return[] the Great Writ closer to its historic office,” *Brown*, 596 U.S. at 132 (citation omitted), it strives to accommodate longstanding and fundamental rights at the heart of common law habeas. Competency claims lie directly at that core. *See* 40 Am. Jur. 2d

Proof of Facts 171 § 1 (2026) (“Competency of a defendant to stand trial ... is jurisdictional and cannot be waived by the defendant.”). As Justice Robert Jackson warned, current habeas jurisprudence has long “buried” “the occasional meritorious application ... in a flood of worthless ones.” *Brown v. Allen*, 344 U.S. 443, 537 (1953). If the flood of habeas petitions is the bathwater, competency to stand trial may well be the baby.

II. The Vehicle Problems The State Purports To Identify Do Not Bar This Court’s Consideration.

Unable to dispute the importance of the question presented or the fact that circuits are split about its resolution, the State argues that “this case presents a poor vehicle for resolving” that dispute because petitioner’s competency claims would fail on the merits. Opp. 20. The State is wrong. This case presents a threshold procedural question cleanly—whether or not a competency claim can be procedurally barred—and will fully dispose of the issue if resolved. The merits of the underlying competency claim are irrelevant to its resolution.

The State first argues that the question here “was not ultimately dispositive in this case” because the *district court* went on to address the competency issue on the merits. Opp. 20-21. But the district court’s decision is not before this Court for review. It is the Ninth Circuit’s holding that is at issue, and the Ninth Circuit disposed of the competency claim solely based on the procedural default rule, as the State recognizes. Pet. App. 3; *see* Opp. 20-21. This Court has often granted certiorari to decide threshold questions about how the procedural default bar should apply and then remanded for resolution of the merits—even when the merits were reached as

alternative grounds below. *See, e.g., Cone v. Bell*, 556 U.S. 449, 461 (2009) (addressing threshold question of whether a claim was procedurally defaulted where the district court had alternatively concluded that, “even if Cone had not defaulted his ... claim, it would fail on its merits”); *Trevino v. Thaler*, 569 U.S. 413, 429 (2013) (determining that procedural default bar did not apply to ineffective assistance of counsel claim and remanding for determination of the merits of the claim). Just this Term, this Court granted review over an identical objection—that the district court’s alternative holding rendered the question non-dispositive—where the court of appeals had summarily resolved the claim based solely on the threshold legal issue. *Ass’n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, No. 26-12 (U.S. Oct. 19, 2026); *see id.*, Br. in Opp. 17; Reply 2-5.

Because the Ninth Circuit disposed of the question based solely on its understanding of the procedural default rule, that is the only dispositive issue on appeal for this Court to review. If this Court overturns the Ninth Circuit on that issue, the Ninth Circuit will have to review the district court’s merits determination. By the State’s logic, this Court would never have occasion to reach appellate holdings that erroneously dispose of a legal question just because a district court went out of its way to cover all bases.

The State then spends three pages of its opposition litigating the merits of petitioner’s competency claim—an issue the Ninth Circuit itself declined to reach.¹

¹ The Ninth Circuit refused to expand the certificate of appealability to reach the question presented, but the State does not object on this ground. And for good reason: this Court has repeatedly granted

Opp. 21-23. Those arguments are irrelevant. The question before this Court is not whether the particular petitioner here was incompetent to stand trial, but whether the issue can be reached at all.

In any event, the record is replete with evidence on the merits of petitioner’s competency claim. This Court has held that “[w]here the evidence raises a ‘bona fide doubt’ as to a defendant’s competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing pursuant to” the relevant state procedures. *Pate*, 383 U.S. at 385. “[E]vidence of a defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but ... even one of these factors standing alone may, in some circumstances, be sufficient.” *Drope v. Missouri*, 420 U.S. 162, 180 (1975). Such evidence was ample here. Petitioner has been diagnosed with paranoid schizophrenia and psychosis, and had been specifically found incompetent in prior proceedings. *See* Pet. App. 133, 130; Pet. 18. The State appears to conflate these separate instances of mental instability, arguing that “legal insanity *at the time of criminal activity* does not equate to subsequent *incompetence to stand trial*.” Opp. 22. But the record demonstrates that petitioner had in the past been found *both* legally insane *and* incompetent, to the point of invalidating his prior guilty pleas as involuntary, and that the trial court was aware of this history. *See*

certiorari to review a court of appeal’s denial of a certificate of appealability. *See, e.g., Buck v. Davis*, 580 U.S. 100, 128 (2017); *Banks v. Dretke*, 540 U.S. 668, 703-04 (2004); *see also* Br. for the United States in Opp. 16, *Berry v. United States*, No. 25-7026 (U.S. May 27, 2026) (acknowledging that this Court “has in fact granted certiorari from denials of certificates of appealability and resolved legal questions in the course of reversing those denials”), *cert. granted*, No. 25-7026 (U.S. Oct. 13, 2026).

Pet. 18. And, at any rate, this Court has explained that there is a “relationship between mental illness and incompetence to stand trial,” and “the bearing of the former on the latter” can render it “sufficiently likely that ... the correct course was to suspend the trial until such evaluation could be made.” *Drope*, 420 U.S. at 181.

Aside from this prior record of incompetency and insanity, petitioner’s demeanor during the course of the trial here should have further raised a “bona fide doubt” as to his competency. *Pate*, 383 U.S. at 385 (quotation marks omitted). Petitioner could not remember anything about the commission of his own offense, and was thus unable to aid his own counsel in mounting his defense. Pet. App. 119-20. Thus, when petitioner’s trial counsel raised doubts about his client’s competency with the court, that concern was scaffolded on abundant reason for the court to conduct a new competency hearing. *See* Pet. 18; Pet. App. 22. After all, “[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.” *Drope*, 420 U.S. at 181. The trial court was alerted to such circumstances here, and did not act. At a bare minimum, the State’s position on the merits is certainly not so unassailable that it stands in the way of this Court granting certiorari over the procedural default question. If the State is right about the merits, it can present its view on remand.

For the foregoing reasons, this Court should grant certiorari to decide the question presented—and none of the State’s purported vehicle objections stand in the way.²

CONCLUSION

This Court should grant the petition for writ of certiorari.

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² The Court should alternatively summarily reverse the Ninth Circuit’s holding rejecting petitioner’s ineffective assistance of counsel claim. *See* Pet. 18-26.