No. ____

IN THE
Supreme Court of the United States

ERIC WALLACE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause requires that a defendant who has pled guilty nonetheless retains the right to contest on direct appeal a trial court's competency determination.

PARTIES TO THE PROCEEDING

There were no parties to the proceedings below other than those identified in the caption of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Eric Wallace respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 2007 WL 2669564 (D.C. Sept. 13, 2007), and is reprinted in the Appendix to this petition ("Pet. App.") at 1a. The trial court's competency determination (Pet. App at 71a) is unpublished. The trial court's denial of petitioner's motion to withdraw his guilty plea (Pet. App. at 51a) is unpublished.

JURISDICTION

The court of appeals entered its judgment on September 13, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a)-(b).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment, Section 1, to the United States Constitution provides in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT

The Due Process Clauses of the Fifth and Fourteenth Amendments unequivocally require that no individual who is legally incompetent shall be

forced to answer a criminal charge. In the proceedings below, the trial court determined that petitioner Eric Wallace was legally competent to stand trial for murder, despite abundant evidence to the contrary. Unable to help his defense, Mr. Wallace pled guilty, and then sought to argue on direct appeal that his conviction violated Due Process because he was not competent to stand trial or enter a guilty plea.

In the decision below, the District of Columbia Court of Appeals held that it could not review Mr. Wallace's constitutional claim on direct appeal, because "the only issues that are appropriately raised in an appeal from a conviction entered after a guilty plea are the exercise of jurisdiction by the trial court and the legality of the sentence imposed." Pet. App. 4a-5a (citation omitted). In other words, Mr. Wallace had waived the right to assert his constitutional competency claim when he pled guilty. The court thus dismissed Mr. Wallace's direct appeal.

The decision below implicates a deep and acknowledged split among the federal courts and state courts of last resort – a split that the D.C. Court of Appeals expressly noted in its opinion. *See* Pet. App. 5a-7a. Indeed, courts in Vermont, New York, Kentucky, Michigan, and several other States have held, contrary to the D.C. Court of Appeals, that a guilty plea does not waive a constitutional challenge to the competency of the defendant. They have thus allowed such challenges to be raised on direct appeal.

This split warrants this Court's immediate attention. The prohibition on trying a defendant who is incompetent goes to the core of the Due Process Clause. By denying defendants such as Mr. Wallace a right to challenge their competence on direct appeal, the decision below severely limits the ability of those defendants to obtain review of their constitutional claims, leaving them only the opportunity to demonstrate that their conviction constitutes a "manifest injustice." For someone like Mr. Wallace, whose compelling facts presented "a difficult case" even under the narrow scope of review employed below, Pet. App. 1a, that makes all the difference.

This Court should thus grant review to determine, consistent with the majority of courts to have considered the issue, that Due Process requires that a defendant who pleads guilty nevertheless must be permitted to challenge his competency determination on direct appeal.

1. Petitioner Eric Wallace was indicted in May 2003 on the charge of first degree murder in connection with the stabbing death of Claude McCants. The murder occurred on October 10, 2002, just hours after Mr. Wallace was released from St. Elizabeth's, a federal mental health hospital in Washington, D.C. Pet. App. 76a. Mr. Wallace had been in custody at St. Elizabeth's for eight months after having been determined incompetent to stand trial in connection with earlier misdemeanor charges. *Id.* at 74a-76a.

In pre-trial proceedings on the murder charge, Mr. Wallace asserted (through counsel) that he was

incompetent to stand trial, based on his substantial mental impairments resulting from a lifetime of diabetic comas and epileptic seizures. Pet. App. 80a, 110a. After conducting a hearing on the matter, the court found Mr. Wallace competent. *See id.* at 92a-93a. On January 5, 2004, Mr. Wallace pled guilty to second degree murder. *Id.* at 3a-4a. The trial court sentenced Mr. Wallace to a term of thirty-five years, with five years of supervised release. *Id.* at 1a, 52a.

2. Ample evidence supported Mr. Wallace's claim that he was not competent to stand trial. Since childhood, Mr. Wallace has been treated for a number of debilitating illnesses, which have only increased over the years, rendering him in his current severely incapacitated state. At age 9, Mr. Wallace was diagnosed with Type I Diabetes Mellitus, otherwise known as juvenile diabetes. Pet. App. 110a; *see also id.* at 12a. This disease has subjected Mr. Wallace to recurring episodes of hyperglycemia and hypoglycemia – erratic and abnormal swings in the content of sugar in his blood. *Id.* at 12a. On a number of occasions, Mr. Wallace's episodes have been so extreme that he has gone into a coma. Court of Appeals Appendix ("CA App.") 180 (Letter from Dr. Hyde). This type of recurring hypoglycemia, when accompanied with insulin shock, is known to cause irreversible brain damage. *Id.*

Independent of his diabetes, since age 12, Mr. Wallace has also experienced repeated epileptic seizures, which have been resistant to treatment. Pet. App. 12a, 81a. These seizures result in a loss of consciousness, falling, and contractions. *See The Merck Manual* 1403 (17th ed. 1999). In 1998, Mr.

Wallace's condition escalated when he experienced his first grand mal seizure. CA App. 183 (Letter from Dr. Pickar).

These relentless health problems have stunted Mr. Wallace's ability to function in society. They have also severely limited his ability to navigate the judicial system. In fact, just prior to the instant case, Mr. Wallace was repeatedly found incompetent to stand trial in relation to several misdemeanor assault charges stemming from incidents in early 2002. *See* Pet. App. 13a-14a n.14. Mr. Wallace spent eight months in St. Elizabeth's Hospital instead of facing trial. *Id.* Observing Mr. Wallace over that substantial eight-month period and based on their familiarity with him, government doctors at St. Elizabeth's found Mr. Wallace to be "severely impaired." *Id.* One physician, Dr. Hugonnet, determined that Mr. Wallace was "unable to manage the basic concepts associated with competency to stand trial." *Id.* Another, Dr. Piquet, found that "cognitive factors substantially impair his capacity to have a factual and rational understanding of the proceedings against him, and to properly assist counsel with preparation of his defense." *Id.* Moreover, they found that it was "unlikely that Mr. Wallace [would] attain competency in the foreseeable future." *Id.*

Because Mr. Wallace never attained competency, the judge in his misdemeanor case ruled that the law required that Mr. Wallace be released. *See* Henri E. Cauvin, *Guilty Plea in Slaying of Hill Aide*, Wash. Post, Jan. 6, 2004 at B1. The judge decided, however, to hold Mr. Wallace for 72 hours to give

prosecutors enough time to appeal the decision. *Id.* The U.S. Attorney's office decided not to appeal, and the District of Columbia never sought an order seeking to have Mr. Wallace held until it was determined whether he should be permanently committed. *Id.* Accordingly, on October 10, 2002, Mr. Wallace was released from St. Elizabeth's hospital. Hours later, Mr. Wallace killed Mr. McCants.

Returned to the confines of the criminal justice system, Mr. Wallace again underwent a number of tests that confirmed his continued incompetence to stand trial. A thorough neuropsychological evaluation conducted at St. Elizabeth's after Mr. Wallace was charged showed that Mr. Wallace performs "below the cutoff level" on measures of early dementia. Pet. App. 113a. Other tests confirmed Mr. Wallace's severely diminished level of functionality. On the Wechsler Adult Intelligence Scale, Mr. Wallace's aggregate IQ was just 55, placing him in the "severely impaired range" – below the first percentile of the entire population. *See id.* at 12a, 112a-113a. Electroencephalogram ("EEG") tests performed from 2000 to 2003 show increasing brain deterioration, with a December 2003 EEG indicating "markedly abnormal brain wave activity, with slowing over the frontal lobes." *Id.* at 29a.

Through numerous evaluations, government physicians determined that Mr. Wallace suffers from core cognitive deficits even on his best days; his dementia causes him to experience wild mood swings and aggressive behavior, and renders him incapable of understanding the core aspects of the judicial

process, including the concept of pleading guilty. *See* Pet. App. 107a-120a; *see also* CA App. 180-82 (Letter from Dr. Hyde); *id.* at 183-85 (Letter from Dr. Pickar).

3. At the competency hearing in the trial court, even the prosecution's own witnesses conceded that Mr. Wallace's mental capabilities were "in the moderate to severely impaired range." Pet. App. 16a. Nonetheless, the experts hired by the prosecution contended that Mr. Wallace was malingering.

That testimony was directly at odds with the conclusions of the doctors at St. Elizabeth's, who had subjected Mr. Wallace to a battery of tests over his months at the hospital and had found no signs of malingering. *See* Pet. App. 112a. Commenting on just one of these tests, one expert explained, "there's no way you can fake or malinger an abnormal EEG." CA App. 7 (Oct. 28, 2003 Transcript).

Moreover, the conclusions of the government's witnesses were deeply flawed. One of those witnesses, Dr. Raymond Patterson, based his opinion on a single interview, at which he did not perform a test for malingering, or, in fact, any other psychiatric or psychological tests. *See* CA App. 19 (Oct. 29, 2003 Transcript); *id.* at 40 (Oct. 30, 2003 Transcript) ("I don't do tests."). Instead, Dr. Patterson asked Mr. Wallace a few off-the-cuff questions and determined that a "you got me" smile from Mr. Wallace – a response mechanism entirely consistent with cognitive impairment – was evidence of malingering. *See id.* at 22 (Oct. 29, 2003 Transcript). Dr. Lally, too, testified that Mr. Wallace was malingering even though the two tests he performed on Wallace

showed no sign of fabrication of cognitive impairment. *See* Pet. App. 16a-17a.

Yet, their testimony was not even the most egregious of that presented at Mr. Wallace's competency hearing. Dr. Oliver, a Legal Services Division psychologist who provided the only "neutral" evidence that Mr. Wallace was competent, repeatedly contradicted and recanted his own testimony regarding the testing he performed. Dr. Oliver claimed at the hearing, for example, that he had gleaned a great deal of information from Mr. Wallace during his interview with him, such as the nature of the charge, his identifying information, and his mental health history. *See* CA App. 47, 51a-51b (Oct. 30, 2003 Transcript). However, cross-examination revealed that Dr. Oliver had filled in many sections of his notes before ever speaking with Mr. Wallace. *See id.* at 65 (Nov. 4, 2003 Transcript). Of critical importance to the question of competence, Dr. Oliver first testified that Mr. Wallace told him that the three possible outcomes of a criminal trial were "guilty, not guilty, not guilty by reason of insanity." *See id.* at 50 (Oct. 30, 2003 Transcript). But Dr. Oliver soon confessed that he himself had written those outcomes in his notes before he ever met Mr. Wallace. *See id.* at 66 (Nov. 3, 2003 Transcript).

4. Despite the overwhelming evidence that Mr. Wallace was not competent to stand trial, the trial judge found that the cognitive defects from which Mr. Wallace suffers do not "preclude him from the rational understanding of the charges and proceedings against him." Pet. App. 18a. The court

determined that "the evidence of malingering is far more powerful than the evidence of significant progressive deterioration." *Id.* at 24a. The court thus declared Mr. Wallace competent to stand trial in the case. *Id.* at 93a.

5. Notwithstanding the trial court's views, Mr. Wallace was in fact incapable of assisting his defense team in mounting an effective defense. Left with little choice, Mr. Wallace accepted a guilty plea.[1] Throughout his plea proceeding, Mr. Wallace exhibited behavior indicating his confusion about the meaning of his choice. *See* CA App. 80-81 (Jan. 5, 2004 Transcript). Though the trial court attempted to lead him to the desired answers, Mr. Wallace repeatedly expressed his desire to present an insanity defense and to go to trial. *Id.* at 81-82. He could not understand the difference between a guilty plea and going to trial, and he could not grasp the key concept that a guilty plea meant the government did not have to prove its case against him. *Id.* at 84-85. Despite Mr. Wallace's confusion, the trial court accepted his guilty plea. *Id.* at 92. Apparently concerned that the plea proceeding was inadequate, the court took the unusual step of conducting an additional hearing to bolster the record. *See id.* at 95-98 (Jan. 15, 2004 Transcript). Again, Mr. Wallace demonstrated his confusion and inability to grasp key concepts involved with the waiver of rights that a guilty plea entails. *See id.* Nonetheless, the court sentenced Mr. Wallace to thirty-five years in prison.

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[1] Notably, Mr. Wallace suffered "a major seizure on December 18, 2003," just "eighteen days before his plea hearing." Pet. App. 29a.

See Pet. App. 52a; *see also* CA App. 99-112 (Feb. 27, 2004 Transcript).

6. Mr. Wallace filed a timely notice of appeal, arguing that the court erred in finding that he was competent to stand trial and to enter a guilty plea. He then filed a motion to withdraw his guilty plea, pursuant to District of Columbia Superior Court Rule 32(e), and his appeal was stayed pending the resolution of that motion. The trial court eventually denied Mr. Wallace's Rule 32(e) motion. Mr. Wallace filed a timely appeal of the trial judge's denial of the Rule 32(e) motion, and the two appeals were consolidated.

7. In the decision below, the District of Columbia Court of Appeals denied Mr. Wallace all relief. First, the Court of Appeals determined that Mr. Wallace had waived his right to a direct appeal of the trial court's competency determination when he pled guilty. The Court of Appeals acknowledged that other courts had reached the contrary conclusion, but it declined to follow those courts, concluding that appeals of competency determinations are a "great waste of judicial resources." Pet. App. 6a.

The court determined that this Court's decision in *Pate v. Robinson*, 383 U.S. 375 (1966), merely guaranteed that criminal defendants are "entitled to procedural due process to determine whether [they] are competent," and did not create the right to challenge the outcome of a competency determination. Pet App. 5a n.5. And it found unconvincing the argument that this Court's holdings in *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and *Menna* v. *New York*, 423 U.S. 61 (1975),

mandate that competency determinations cannot be waived by a guilty plea because they go to the "very power of the state 'to hal[e] a defendant into court on a charge.'" Pet. App. 6a-7a n.7 (citing *Menna*, 423 U.S. at 62; *Blackledge*, 417 U.S. at 30-31). The court suggested that while double jeopardy claims go to the government's ability to bring any indictment at all, a competency determination involves "not the government's power to indict but the defendant's ability to assist in his defense at trial or to enter a knowing and voluntary plea." *Id.* Thus, the court refused to consider Mr. Wallace's direct appeal of his competency determination.

Instead, the court determined that Wallace and others similarly situated must advance their claims in a motion to withdraw the guilty plea. The District of Columbia permits the withdrawal of a guilty plea only "to correct manifest injustice." Pet. App. 7a (citing D.C. Super. Ct. Crim. R. 32(e)). This "stringent" test, Pet. App. 7a-8a n.8, places an onerous burden on the defendant; these motions will only be granted where the plea is "fundamentally flawed" such that there has been "a complete miscarriage of justice." *Id.* at 8a n.9 (citation omitted). And the trial court's determinations in this regard are reviewed only for abuse of discretion. Even under this severely restricted scope of review, the Court of Appeals acknowledged that Mr. Wallace's facts presented "a difficult case." Pet. App. 1a. Nevertheless, the Court of Appeals affirmed the trial court's denial of Mr. Wallace's motion. *See id.*

REASONS FOR GRANTING THE WRIT

The state courts and the federal courts are intractably divided over whether a defendant must be allowed to appeal a competency determination after he pleads guilty. The bar against trying an incompetent defendant goes to the heart of the Due Process Clause of the Fifth and Fourteenth Amendments. Given the importance of that right under our criminal justice system, such a conflict is untenable. Furthermore, the decision below conflicts with this Court's clear precedent in *Blackledge* and *Menna* that a guilty plea does not waive the right to appeal constitutional claims that assert "the right not to be haled into court at all," *Blackledge*, 417 U.S. at 30 – situations in which the State may not convict an individual "no matter how validly his factual guilt is established," *Menna*, 423 U.S. at 63 n.2. A criminal defendant's right to appeal a competency determination is such a right. The District of Columbia Court of Appeals' contrary view – that a criminal defendant loses the right to appeal a competency determination after he pleads guilty – denies criminal defendants such as Mr. Wallace their due process right to be tried only when competent. Consequently, the District of Columbia's decision should be reviewed and reversed by this Court.

I. There Is A Deep And Acknowledged Split Over The Question Presented.

The state and federal jurisdictions are divided over whether a defendant may challenge a competency determination after pleading guilty. Several courts have held that a defendant may challenge an unfavorable competency decision after

he pleads guilty. These courts have concluded that while a plea of guilty constitutes a waiver of many rights of appeal, the special nature of the competency requirement demands that a defendant cannot forfeit his right to contest the court's determination, even if he pleads guilty to a charge. Other courts have held that a defendant may not directly appeal a competency determination following a guilty plea. Rather, a defendant's sole avenue of relief is to file a motion to withdraw the guilty plea and demonstrate that a "manifest injustice" warrants withdrawal of the plea, and then to seek appellate review under the highly deferential standards that apply. The difference in the two avenues of review is outcome determinative in many instances, including this case.

1. Several state and federal jurisdictions have held that a defendant does not waive his right under the Due Process Clause of the Fifth and Fourteenth Amendments to appeal directly a competency determination after pleading guilty.

In *People v. Armlin*, 332 N.E.2d 870 (N.Y. 1975), for example, the highest court in New York determined that "the issue of competency to stand trial may be raised on appeal," even after the entry of a guilty plea. *Id.* at 874. The New York Court of Appeals reiterated this holding in *People v. Seaberg*, 541 N.E.2d 1022 (N.Y. 1989), confirming that a defendant "may not waive the right to challenge … his competency to stand trial," *id.* at 1025 (citing *Armlin*, 332 N.E.2d at 874), even if the defendant explicitly agreed to a waiver of this exact right of appeal. *See also People v. Frazier*, 495 N.Y.S.2d 478, 479 (N.Y. App. Div. 1985) ("A defendant does not

waive the right to a competency hearing by pleading guilty, and may raise for the first time on appeal the issue of capacity to stand trial.").

Likewise, as the D.C. Court of Appeals acknowledged, the Vermont Supreme Court has held that, it, too, would "treat appeals of competency determinations as exceptions to the waiver rule." *State v. Cleary*, 824 A.2d 509, 512 (Vt. 2003). Thus, in Vermont, defendants may seek direct appeal on the issue of competency notwithstanding a guilty plea.

Kentucky similarly has determined that a defendant does not waive this right after he has pled guilty. *See Thompson v. Commonwealth*, 56 S.W.3d 406, 408 (Ky. 2001). Recognizing that the "[c]riminal prosecution of a defendant who is incompetent to stand trial is a violation of due process of law under the Fourteenth Amendment," the *Thompson* court found that even where "defense counsel *conceded* the issue" of defendant's competency during the plea hearing, reviewing courts have the power of direct review over a defendant's appeal asserting his incompetence. *Id.* (emphasis added); *see also Mitchell v. Commonwealth*, No. 2000-CA-001236, 2003 WL 1339283, at *2-*3 (Ky. Ct. App. Feb. 21, 2003) (citing *Thompson* and concluding that defendant did not waive his right to a competency determination when he pled guilty).

These decisions are consistent with the approach taken in numerous other States. In *People v. Parney*, 253 N.W.2d 698 (Mich. Ct. App. 1977), for example, a Michigan court asserted that "[i]t is clear that the United States Supreme Court, while

recognizing that certain rights of defendants may be waived by a subsequent plea of guilty, does not say that is true of all rights." *Id.* at 699 (quotation marks omitted). Those unwaivable rights include constitutional claims "which undercut…the state's authority or ability to proceed with the trial," as those "rights are similar to the jurisdictional defenses in that their effect is that there should have been no trial at all." *Id.* The court found it "unquestionabl[e]" that "the state is powerless to undertake a criminal prosecution of an incompetent defendant." *Id.* As a result, under the Due Process Clause, a "defendant's later guilty plea d[oes] not waive the alleged error arising from the prior competency determination." *Id.* at 699-700; *see also People v. White*, 308 N.W.2d 128, 139 (Mich. 1981) (noting that "where a claim is one that the state may not prosecute regardless of defendant's factual guilt, a guilty plea does not waive the right to subsequently raise that claim").

Likewise, in *State v. Wead*, 609 N.W.2d 64 (Neb. Ct. App. 2000), "bear[ing] in mind the sanctity of constitutional protections and the need to guard against constitutionally infirm convictions," *id.* at 68 (citing *State v. Johnson*, 551 N.W.2d 742, 758 (Neb. Ct. App. 1996)), the court determined that "a defendant's guilty plea…does not preclude the defendant from raising on direct appeal the issue of competency to plead or stand trial." *Id.* The Nebraska Supreme Court implicitly endorsed this conclusion, as it considered in *State v. Lassek*, without hesitation, a defendant's competency appeal

after he entered a plea of no contest. 723 N.W.2d 320, 324-26 (Neb. 2006).

Federal courts have determined, too, that a defendant may appeal his competency, notwithstanding his entry of a guilty plea. The Southern District of New York remarked that the notion that a defendant waives "his mental competency claim upon entry of a guilty plea" is "fundamentally flawed." *King v. Cunningham*, 442 F. Supp. 2d 171, 185 (S.D.N.Y. 2006). The court explained that "'[c]ompetency' and 'knowing and intelligent' waiver[s] are two separate inquiries, both necessary components of a valid guilty plea." *Id.* (citing *Godinez v. Moran*, 509 U.S. 389, 400 (1993)). Consequently, appeals directly concerning a competency determination must be distinct from those considering a denial of a motion to withdraw a guilty plea; the latter focuses on the "knowing and intelligent" inquiry, while the former goes directly to competency to stand trial.

2. The decision of the D.C. Court of Appeals here conflicts directly with these decisions. As noted, the Court of Appeals observed that, with the exception of issues concerning "the exercise of jurisdiction by the trial court and the legality of the sentence imposed," Pet. App. 5a (citation omitted), "virtually every possible avenue of appeal is waived by a guilty plea," *id.* Recognizing that some courts have found competency determinations to be exceptions to the waiver rule, *id.* at 6, the District of Columbia

"refused" to do so.[2] *Id.* Instead, the court held that the defendant's only avenue of redress is a "Rule 32(e) motion to withdraw" his guilty plea, which "attack[s] the voluntary and intelligent nature *of the plea.*"[3] *Id.* (emphasis added). As the court acknowledged, relief under Rule 32(e) is severely constrained. Such relief is available "only 'to correct manifest injustice,'" *id.* at 7 (citing D.C. Super. Ct. Crim. R. 32(e)), and the defendant "must establish either that there was a fatal defect" in the plea proceeding or that "'justice demands withdrawal.'" *Id.* (internal citation omitted).

Although the D.C. Court of Appeals' approach conflicts with that adopted by most courts to have expressly considered the issue, it is consistent with the approach taken in some other jurisdictions. In *Tillman v. State*, 570 S.W.2d 844 (Mo. Ct. App. 1978), for example, the Missouri Court of Appeals considered a defendant's claim – after he had pled guilty – "that the psychiatric reports were insufficient in that the examining psychiatrist failed to determine his mental deficiency," thus placing the court's assessment of competency in doubt. *Id.* at

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[2] The court specifically highlighted Vermont and Michigan as jurisdictions that have found the issue of competency an exception to the general waiver rule. *See* Pet. App. 6a & n.6.

[3] District of Columbia Rule 32(e) reads: "A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea." D.C. Super. Ct. Crim. R. 32(e).

846. Finding the claim "a mere trial error," the court held that the "movant's plea of guilty waived any and all alleged procedural infirmities antedating the plea." *Id.* The court concluded that "[a]ny contentions regarding the sufficiency of the psychiatric examinations" should have been made before the plea, or not at all. *Id.*

The Florida Supreme Court has signaled that it, too, believes that a guilty plea destroys a defendant's ability to appeal directly a vast majority of claims, including a competency determination. In *Robinson v. State*, 373 So. 2d 898 (Fla. 1979), the court recognized that "[t]here is an *exclusive* and limited class of issues which occur contemporaneously with the entry of the plea that may be the proper subject of an appeal." *Id.* at 902 (emphasis added). Notably, competency determinations were not included on the court's exclusive list. Rather, only claims asserting subject matter jurisdiction, the illegality of a sentence, the government's failure to adhere to a plea agreement, and the voluntary and intelligent character of the plea may form the basis of a direct appeal after a guilty plea.[4] *Id.*

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[4] Jurisdictions on the other side of the debate show no sign of a change of heart. The law in Michigan and New York, for example, has been steady since the 1970s. *See Parney*, 253 N.W.2d at 699-700; *Armlin*, 332 N.E.2d at 874. And the Southern District of New York has remarked that the notion that one waives this right of appeal after a guilty plea is "fundamentally flawed." *Cunningham*, 442 F. Supp. 2d at 185. There is little chance that either side will reconsider this question absent action by this Court.

II. The Decision Below Conflicts With This Court's Decisions And Betrays The Promises Of The Right To Due Process.

Certiorari is also warranted because the decision below conflicts with this Court's decisions, which establish that the Due Process Clause requires that defendants be permitted to appeal directly a competency determination after a guilty plea.

1. In *Pate v. Robinson*, this Court held that "the conviction of an accused person while he is legally incompetent violates due process." 383 U.S. 374, 378 (1966). And, to ensure that States guard this right, "state procedures must be adequate to protect" it. *Id.*

While a defendant forfeits many important constitutional rights when he pleads guilty, this Court's jurisprudence confirms that the right to be tried only when competent is not among them. In *Blackledge v. Perry*, this Court considered whether a defendant waives the right to pursue a constitutional double jeopardy claim after he pleads guilty. 417 U.S. 21, 29 (1974). The Court noted that when a criminal defendant enters a guilty plea, he forfeits the right to complain of "antecedent constitutional

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Further, there is no recent trend towards a particular view. Vermont, for example, determined in *Cleary* in 2003 that it will "treat appeals of competency determinations as exceptions to the waiver rule," 824 A.2d at 512, while the District of Columbia recently came to the opposite conclusion in the present matter. Considering these recent, opposing decisions, there is no benefit to further percolation, as this entrenched and intractable split will not be settled without this Court's review.

violations" through direct appeal. *Id.* at 30 (citing *Tollett v. Henderson*, 411 U.S. 258 (1973)). The forfeited rights, however, cannot go "to the very power of the State to bring the defendant into court to answer the charge brought against him." *Id.* at 30. Thus, while a defendant gives up his right to appeal a coerced confession, for example, *see id.*, he does not give up the guarantee of an appeal for the "distinctive" rights barring "[t]he very initiation of the proceedings against him." *Id.* at 30-31. The due process prohibition against double jeopardy is one of those rights, for "its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." *Id.* (quotation marks omitted).

This Court's decision in *Menna v. New York*, 423 U.S. 61 (1975), in which the Court again held that a guilty plea does not waive a double jeopardy claim, is to the same effect. In *Menna*, this Court explained that "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Id.* at 63 n.2. As a result, any claim on appeal that would go towards the factual guilt of the defendant is waived by a guilty plea. However, where "the claim is that the State may not convict [the defendant] no matter how validly his factual guilt is established," a guilty plea does not bar direct appeal. *Id.* Thus, a guilty plea does not waive a claim – like a double jeopardy claim – that contends that "the charge is one which the State may not constitutionally prosecute." *Id.*

2. For the very reasons that defendants do not waive their right to a double jeopardy claim after a guilty plea, the Due Process Clause does not permit such a waiver of claims concerning competency determinations. Competency determinations, like double jeopardy, go to the very power of the government to force a defendant to answer to a charge. When a defendant is deemed incompetent, the determination "prevent[s] a trial from taking place at all," just as a valid double jeopardy claim bars initiation of proceedings. *Blackledge*, 417 U.S. at 30-31 (quotation marks omitted).[5]

In addition, whether a defendant is competent to stand trial is entirely separate from the question of his factual guilt. Even if there is incontrovertible evidence that a defendant is guilty, the government may not initiate proceedings against him if he is incompetent. Thus, because a guilty plea "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established," *Menna*, 423 U.S. at 62-63 n.2, the right to claim incompetence to stand trial – like the right to assert a double jeopardy violation – survives a guilty plea. The D.C. Court of Appeals' contrary conclusion cannot be squared with this Court's clear directives

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[5] *See also United States v. Broadus*, 450 F.2d 639, 641 (D.C. Cir. 1971) (permitting a defendant who had entered a guilty plea but later asserted that the statute under which he was prosecuted had been found unconstitutional prior to his plea to raise that contention on appeal because "the guilty plea should not be allowed to accomplish what the Government could not constitutionally accomplish").

and with the guarantees of the Due Process Clause of the Fifth and Fourteenth Amendments.[6]

III. The Conflict Is Recurring And Important.

There can be no question that this conflict matters to criminal defendants like Wallace and to the integrity of our judicial system at large.

1. This Court's decision in *Drope v. Missouri*, 420 U.S. 162 (1975), makes clear that the prohibition on trying an incompetent person is fundamental to an adversarial system. *Id.* at 171-72. The trial of an incompetent person is akin to the repugnance of a trial in absentia; an incompetent person, for all intents and purposes, is not present in the courtroom in a legally meaningful sense, for he "is in reality afforded no opportunity to defend himself." *Id.* at 171. He cannot understand the meaning of the proceedings against him. He is unable to assist his lawyer in the preparation of his defense – a disability that inevitably taints the reliability of the outcome. *See* Richard J. Bonnie, *The Competence of Criminal Defendants With Mental Retardation To Participate In Their Own Defense*, 81 J. Crim. L. & Criminology,

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[6] The D.C. court attempted to distinguish *Menna* and *Blackledge* by claiming that those cases involved the government's very power to indict, while the question presented herein involved a different matter – "the defendant's ability to assist in his defense at trial or to enter a knowing and voluntary plea." *See* Pet. App. 7a n.7. But that description trivializes and misconstrues the right at issue. As this Court made clear in *Pate*, Due Process deprives the State of the power to try one who is incompetent, and thus, for purposes of determining whether a guilty plea waives the right to appeal, competency claims and double jeopardy claims stand on the same footing.

419, 427 (1990). And finally, he is unable to exercise the judgment needed to make the decisions that this Court has held must be made by the defendant himself in a criminal proceeding. *See e.g.*, *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987) (whether to testify); *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966) (whether to plead guilty); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-77 (1942) (whether to waive a jury trial). When a defendant's competency is in question, such that he cannot reliably be said to possess the ability to play these roles within the proceeding against him, our adversarial system fails.

2. Requiring a defendant to proceed through a motion to withdraw a guilty plea, rather than a direct appeal has a real and substantial effect on the defendant's ability to vindicate this fundamental right.

The root of the defendant's burden lies in the decision forming the basis of the court's review on appeal; in the jurisdictions that permit direct appeal, the initial competency determination – and not the guilty plea – forms the basis of review. The initial competency inquiry is governed by the standard announced by this Court in *Dusky v. United States*, 362 U.S. 402 (1960). For a criminal defendant to be competent to stand trial or plead guilty, he must possess a "rational as well as a factual understanding of the proceedings against him," *id.* at 402, a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," *id.*, and the ability "to assist in preparing his defense." *Drope*, 420 U.S. at 171; *see also Godinez*, 509 U.S. at 397-98 (holding that the

competency standard for pleading guilty is the same as the competency standard for standing trial). The competency question is resolved by a simple preponderance of the evidence. *See Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996) (holding that a defendant may not be required to stand trial where he has shown it is more likely than not that he is incompetent to stand trial).

In contrast, in jurisdictions such as the District of Columbia that preclude direct appeal, it is the motion to withdraw a guilty plea that is under review. The defendant's burden in such a motion is severe. In the District of Columbia, for example, "[a] guilty plea may be withdrawn after sentencing only if the defendant affirmatively establishes that the trial court's acceptance of her plea was *manifestly unjust*, and that the plea proceeding was *fundamentally flawed* such that there was a *complete miscarriage of justice*." *Johnson v. United States*, 631 A.2d 871, 874 (D.C. 1993) (emphasis added). District of Columbia courts acknowledge that this is a "high standard." *See Southall v. United States*, 716 A.2d 183, 188 (D.C. 1998); *see also* Pet. App. 7a n.8 (describing the manifest injustice standard as "stringent").[7]

Thus, the defendant proceeds to appeal in each instance with a very different sort of determination under review. On direct appeal, the question is whether the defendant was competent; on review of

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[7] Missouri and Florida, too, permit a defendant to withdraw his guilty plea only upon a showing of "manifest injustice." *See, e.g.*, *Elam v. State*, 210 S.W.3d 216, 217 & n.1 (2006) (citing Mo. R. 29.07(d)); *Williams v. State*, 316 So. 2d 267, 273 (Fla. 1975).

denial of the Rule 32(e) motion, the question is whether there was a manifest injustice. And because the trial court considers a Rule 32(e) motion with a strong presumption against granting it, individuals such as Mr. Wallace face a double hurdle on appeal that all but forecloses the possibility of prevailing, even in cases such as Mr. Wallace's in which there is strong evidence of incompetence. In short, review of a denial of a Rule 32(e) motion is not an adequate replacement for direct review.

3. Not only is this right important, its denial has potentially great reach. A vast majority of criminal defendants choose to plead guilty, rather than face a trial. In 2004, for example, 95% of felony convictions in state courts resulted from a guilty plea. *See* U.S. Dep't of Justice: Office of Justice Programs, Sourcebook of Criminal Justice Statistics 2004 Table 5.46.2004, available at http://www.albany.edu/sourcebook/pdf/t5462004.pdf. It follows that a high number of defendants whose competency is in question ultimately will face the choice of whether to plead guilty, and statistics support the conclusion that many will "choose" this option. Thus, whether a defendant may directly appeal his competency determination after a plea of guilty is a question that has the potential to affect in a serious way a large number of criminal defendants.

Finally, this issue critically affects not only the defendants themselves, but also their attorneys. If a lawyer believes her client to be incompetent, regardless of the trial court's determination on the issue, she is presented with an impossible dilemma in jurisdictions following the District of Columbia

rule.[8] An attorney may be tempted to advise her client to accept a plea bargain where the attorney doubts that the client will be able to adequately assist in his defense at trial. Yet, the attorney must do so knowing that a guilty plea will destroy the defendant's right to appeal the competency determination – a particularly vexing situation when the attorney believes the decision was erroneous.[9]

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[8] According to one study, "attorneys have some doubt about the mental capacity of their clients in eight to fifteen percent of felony cases." *See* Richard J. Bonnie, et al., *Decision-Making in Criminal Defense: An Empirical Study of Insanity Pleas and the Impact of Doubted Client Competence*, 87 J. Crim. L. & Criminology 48, 49-50 (1996). This statistic is even higher when considering criminal proceedings in which the defendant's competency has been formally put into question: In a study of the cases of 139 criminal defendants – 89% of whom were sent for pre-trial evaluation for competence to stand trial – almost three-quarters of the trial attorneys reported that they had doubts about their clients' ability to participate in his own defense, regardless of the official determination of competency. *Id.* at 52-53. Thus, the dilemma attorneys may face is a real, substantiated problem.

[9] Particular concerns with potentially incompetent defendants pleading guilty include the distinct possibility that admissions made in the course of the plea may not be reliable and that the defendant may not be capable of making "sufficiently autonomous" decisions. Bonnie, *Competence of Criminal Defendants*, 81 J. Crim. L. & Criminology *at* 436-37. A defense lawyer's decision whether to recommend acceptance of a plea is further complicated by the fact that, after a defendant is found competent, his statements during interviews by the government's mental health experts may be used against him at trial. *See, e.g.,* D.C. Code § 24-531.10.

On the other hand, the attorney may advise her client to proceed to trial, with a defendant she believes to be minimally competent, in large part to preserve her client's right to a direct appeal of the competency determination. In this scenario, the defendant's right of appeal is secure. Yet, because the client's ability to assist in his defense is impaired, the attorney will be severely limited in her ability to conduct an adequate defense. The possibility of an unfavorable result is real, particularly when compared to the potentially more lenient plea offer the defendant has foregone.

In short, a rule barring direct appeal of competency determinations forces criminal attorneys to walk a fine line that has immeasurable implications for defendants' rights – a situation this Court should not condone.

IV. This Case Presents An Ideal Vehicle To Resolve The Issue.

This case presents an ideal vehicle to resolve this split and to correct the erroneous position held by the court below. The issue was squarely presented below and decided by the District of Columbia courts. Further, the evidence of incompetence was strong, indeed overwhelming. *See e.g.*, Pet. App. 1a (noting that this is a "difficult case"). Thus, Mr. Wallace's ability to appeal directly his competency determination was critical, and, in fact, outcome determinative. Had Mr. Wallace pled guilty in Vermont or Michigan, for example, he would have received a direct review of his competency determination. And in that direct review, the court

would have considered whether the vast evidence of his mental deficits demonstrated that Mr. Wallace was, in fact, incompetent to stand trial. *See Godinez*, 509 U.S. at 400-01; *Drope*, 420 U.S. at 171; *Dusky*, 362 U.S. at 402.

As overwhelming evidence demonstrates, Mr. Wallace is incompetent under the *Dusky* standard due to a lifetime of diabetic comas and epileptic seizures that have damaged his brain to the point where he cannot rationally or factually understand a criminal proceeding against him, or assist in his own defense in a meaningful way. His results on the Wechsler Adult Intelligence Scale, 3d Edition, a test of general intellectual functioning, are telling. The test was administered under the supervision of Dr. Sidney Binks, a government neuropsychologist with no stake in the trial and no incentive to distort the outcome in either way. *See* Pet. App. 112a-13a. Mr. Wallace's IQ, was only 55 – in the "severely impaired range." *Id.* This result means that Mr. Wallace does not even rank in the first percentile of all individuals.[10] *Id.* Sub-tests found that Mr. Wallace is largely incapable of listening to a spoken word, understanding what it means, remembering it, and developing a meaningful response. *See id.* This disability prevents Mr. Wallace from developing a "rational as well as factual understanding of the

[10] Numerous courts have concluded that defendants with scores *higher* than Mr. Wallace's are incompetent. *See, e.g., State v. Garfoot*, 558 N.W.2d 626 (Wis. 1997) (defendant with IQ of 64 found incompetent to stand trial); *State v. Augustine*, 215 So. 2d 634, 637 (La. 1968) (defendant had "actual brain damage" and an IQ of 57).

proceedings" and from assisting counsel in a meaningful manner. *Dusky*, 362 U.S. at 402.

In addition to Dr. Binks and two experts retained by Mr. Wallace, no fewer than five neutral government experts independently found Mr. Wallace incompetent to stand trial. *See* CA App. 113-15 (Letter from Dr. Boss); *id.* at 116-119 (Letter from Dr. Piquet); *id.* at 120-21 (Letter from Mr. Henneberry and Dr. Montalbano); *id.* at 131-32 (Certificate from Dr. Hugonnet). Further, *the prosecution's own experts* conceded that Mr. Wallace suffers from cognitive impairments. Dr. Stephen Lally, for example, performed a test on Mr. Wallace that "showed he was performing in the moderate to severely impaired range." Pet. App. 16a. Another conceded that Mr. Wallace's debilitating conditions could have caused brain damage and that Mr. Wallace "has a dementia." CA App. 41 (Oct. 30, 2003 Transcript).

The trial court, however, looked past this substantial evidence and determined instead that Mr. Wallace was malingering. *See* Pet. App. 92a-93a. This determination flies in the face of the analysis of trained medical professionals and reliable scientific tests. Mr. Wallace's EEG, for example, confirmed that Mr. Wallace exhibits "markedly abnormal brain wave activity, with slowing over the frontal lobes," CA App. 181 (Letter from Dr. Hyde), and "[g]eneralized slowing consistent with a diffuse disorder or cerebral dysfunction or encephalopathy related to a toxic metabolic, degenerative, infectious, inflammatory or other system process." *Id.* at 190 (Transfer Summary Update by Dr. Shine). As one

expert explained, "there's no way you can fake or malinger an abnormal EEG." *Id.* at 7 (October 28, 2003 Transcript). Tests administered by the government's own witnesses confirmed the real nature of Mr. Wallace's significant impairment and the conclusion that he was *not* malingering. *See* Pet. App. 88a-89a.

Had the reviewing court been able to examine the undisputed scientific evidence of Mr. Wallace's brain damage and severely impaired cognitive functioning and the preponderance of expert opinion that Mr. Wallace was incompetent on a direct appeal *of the competency determination itself*, rather than a review of the trial court's denial of Mr. Wallace's motion to withdraw his guilty plea, it likely would have found Mr. Wallace incompetent. The law of the District of Columbia, however, prevents this review from ever occurring. This practice, contrary to the law of several other jurisdictions and to this Court's precedent, betrays the promise of Due Process and strips Mr. Wallace of his right to be tried only when competent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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