No. 16-1308

In the Supreme Court of the United States

DARRELL I. BOLDEN, PETITIONER,

v.

STATE OF MISSOURI, RESPONDENT.

On Petition for Writ of Certiorari
to the Missouri Court of Appeals

BRIEF IN OPPOSITION

OFFICE OF THE
ATTORNEY GENERAL
Supreme Court Building
207 West High Street
P.O. Box 899
Jefferson City, MO 65102
John.Sauer@ago.mo.gov
(573) 751-3321

JOSHUA D. HAWLEY
Attorney General

D. JOHN SAUER
Solicitor General
Counsel of Record
JULIE MARIE BLAKE
Deputy Solicitor General

Counsel for Respondent State of Missouri

QUESTION PRESENTED

The Sixth Amendment to the U.S. Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

The question presented in this case is:

Whether the Sixth Amendment requires automatic reversal of a criminal conviction in any case in which a criminal defendant represents himself or herself during any pre-trial competency proceeding, regardless of the contemporaneous evidence of competency.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

OPINIONS BELOW

The opinion of the Missouri Court of Appeals is not yet published in S.W.3d, but is available at 2016 WL 7106291 (Mo. Ct. E.D. 2016). Pet. App. 1a. The Missouri Supreme Court's order denying review is unpublished. Pet. App. 21a.

JURISDICTION

The judgment of the Missouri Court of Appeals was entered on December 6, 2016. The Missouri Supreme Court denied review on February 28, 2017. A timely petition for certiorari was filed on April 27, 2017, and docketed as No. 16-1308 on May 1, 2017.

The petitioner alleges that the lower court's decision is a final judgment of a state court over which this Court has jurisdiction under 28 U.S.C. § 1257(a), but the Court of Appeals remanded the case for further proceedings in the Missouri state trial court. The judgment below is thus not final and this Court lacks jurisdiction to review it—a point discussed in this brief in opposition and raised for this Court's review in the State's conditional cross-petition. *See infra* Pt. I; Cross-Pet. Pt. I.

GLOSSARY

Cross-Pet.	Cross-Petition filed by the State
L.F.	Missouri State Appeals Court Legal File
Pet.	Petition in No. 16-1308 (U.S.)
Pet. App. (U.S.)	Petitioner's Appendix in No. 16-1308 (U.S.)
Tr.	Missouri State Trial Court Transcript

INTRODUCTION

This Court lacks jurisdiction to review the Missouri Court of Appeals' decision because the court remanded for further proceedings in state trial court. This case does not fit within any of the few, narrow exceptions to the strict finality rule established by 28 U.S.C. § 1257(a), and thus the judgment below is not "final" within the meaning of that statute. Because the Court lacks jurisdiction, the petition should be denied.

On the merits, the Missouri Court of Appeals correctly recognized that the Sixth Amendment does not require automatic reversal of a defendant's criminal conviction simply because the defendant represented himself at a competency proceeding. Instead, in a thorough and well-reasoned opinion, the lower court held that the Sixth Amendment requires a new trial only if, after a retrospective competency hearing in which the defendant is represented by counsel, there is not sufficient evidence to show that the defendant was competent to represent himself. Pet. App. 13a. This approach comports with the most persuasive federal authorities to address the same question, which have held that the appropriate remedy is to remand for a determination whether there is a reasonable possibility that counsel's participation could have made a difference to the outcome of the competency proceeding.

The petition is correct that the courts of appeals are divided on this question of remedy. Some courts embrace a harmless-error standard, while others consider the deprivation of counsel in this context to be a structural error requiring automatic reversal of

the defendant's conviction. But this split of authority is not important enough to warrant this Court's review. This Court has never addressed the issue, and none of the appellate decisions is contrary to this Court's precedents. S. Ct. R. 10. Moreover, the issue recurs only occasionally, because defendants normally are afforded counsel during competency proceedings, and very few defendants are allowed to waive that counsel.

This brief in opposition outlines the reasons this Court should decline to review the decision below. But, if this Court were to grant the present petition, it should also grant the State's conditional cross-petition to decide two additional questions: (1) whether this Court has jurisdiction to review the remand decision below, and (2) whether the Sixth Amendment requires that the right to counsel is effectively non-waivable during competency proceedings, *i.e.*, that it is always error to permit a defendant to represent himself or herself in competency proceedings, no matter how strong the contemporaneous evidence of competency. Deciding these antecedent questions is necessary for a proper and intelligent resolution of the question presented in this petition.

STATEMENT[1]

I. Factual Background

Darrell Bolden robbed five stores in two Missouri counties at gunpoint to acquire money to feed his gambling addiction.

A. Two months after serving 12 years in federal prison for an armed bank robbery in which six bank employees were forced into a closet at gunpoint, Mr. Bolden robbed a Check 'n Go payday loan store in St. Charles County, Missouri. Pet. App. 3a; *see United States v. Bolden*, No. 99-cr-30237 (E.D. Ill.); *State v. Bolden*, No. ED101297, 5/2/2013 Tr. 4; *id.* Trial Tr. 654, 664-65.

On May 5, 2012, Mr. Bolden lurked in a strip mall for about 10 minutes, wearing a heavy black coat and green ski mask (on a near 80-degree day), before entering the Check 'n Go payday loan store, wielding a handgun. *State v. Bolden*, No. ED102965, Trial Tr. 108–09, 114, 126–29. Demanding to know where the money was, he pointed his pistol at store manager Kaci Barnes and customer Michelle Barrasso and ordered them to kneel behind the counter and look down. *Id.* Tr. 109–11, 129–30, 132. Afraid for their lives, they did not move to press the panic button while he emptied $1,500 from the cash register's drawer into a book bag and seized $400 in cash that Ms. Barrasso had placed on the counter for a Western Union wire transfer. *Ibid.* Mr. Bolden then ordered Ms. Barnes to enter her code in the

---

[1] This statement is identical to the statement in the cross-petition.

store's safe, which she did. But when she told him that the safe had a five-minute delay, Mr. Bolden fled rather than waiting for the safe to open. *Id.* Tr. 110, 132.

After waiving his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), Mr. Bolden confessed to committing this robbery. Pet. App. 3a; Tr. 147, 151–62. He explained, "The cause of all this is because I have a gambling habit and I was just trying to support my gambling problem." Tr. 161–62, 188.

B. For Mr. Bolden, holding up the Check 'n Go in St. Charles County was only the first armed robbery of a two-county crime spree spanning five stores over four weeks. Between May 7 and June 2, 2012, donning ski masks and brandishing a silver pistol, Mr. Bolden traveled into St. Louis County and robbed a Burger King restaurant, another Check 'n Go, and a Missouri Pay Day Loans store. *See* St. Resp.'s Br., *State v. Bolden*, No. ED101297 at *4–12 (Mo. App. E.D. Mar. 20, 2015). He tried to hold up a Mattress Firm store, too, but that time the victim—a store employee who stood 6'4" and weighed 290 pounds—resisted the robbery attempt. In the ensuing scuffle, Mr. Bolden reportedly "put a gun to the man's head and pulled the trigger, but the gun misfired."[2] The victim pulled the ski mask off Mr.

---

[2] Kim Bell, *Serial robber caught after losing ski mask in scuffle is convicted by St. Louis County jury*, St. Louis Post-Dispatch (Feb 7, 2014), http://www.stltoday.com/news/local/crime-and-courts/serial-robber-caught-after-losing-ski-mask-in-scuffle-is/article_36a090fb-88cb-50fe-bd8d-ae91a3387239.html.

Bolden's head, and Mr. Bolden fled, leaving the ski mask behind.

After Mr. Bolden's DNA was found in the ski mask left at the Mattress Firm store, he confessed to everything. *See* St. Resp.'s Br., *State v. Bolden*, No. ED101297 at *4–12 (Mo. App. E.D. Mar. 20, 2015); *see also State v. Bolden*, No. ED101297, Tr. at 434–35, 699; *State v. Bolden*, No. ED101297, Tr. 384, 408, 476, 540–41, 597, 644, 664–65. As he put it, "I just liked living that type of lifestyle, gambling." *Id.* Tr. at 597.

II. Procedural Background

For his crimes, Mr. Bolden stood trial in both St. Louis County and St. Charles County. He was represented by counsel in the first case and proceeded *pro se* in the second.

A. At a jury trial in St. Louis County, during which he was represented by counsel, Mr. Bolden was convicted of three counts of first-degree robbery and three counts of armed criminal action for his armed robberies of the Burger King, the second Check 'n Go, and the Missouri Pay Day Loans; and one count of attempted first degree robbery for his attempt on the Mattress Firm store. He received a sentence of life imprisonment plus a consecutive term of 25 years. Pet. App. 3a n.3; *see* Mo. Rev. Stat. §§ 569.020, 571.015.

In his appeal of these seven felony convictions from the St. Louis County case, Mr. Bolden did not challenge the sufficiency of the evidence against him. Instead, he alleged that the lower court should have

allowed him to discharge his counsel and proceed *pro se*, as he was allowed to do in the St. Charles County case. *State v. Bolden*, No. ED 101297, 489 S.W.3d 821 at * 3 (Mo. App. E.D. 2015) (per curiam).

The Missouri Court of Appeals affirmed the lower court's decision to make Mr. Bolden proceed with counsel in his St. Louis County trial—not because Mr. Bolden was incompetent to waive his right to counsel, but because Mr. Bolden had failed to waive his right to counsel unconditionally, unequivocally, and knowingly. *Ibid.*; *see Brewer v. Williams*, 430 U.S. 387, 404 (1977). For example, although Mr. Bolden insisted that as "a Moor" he would not use a lawyer in his St. Louis County case, he also said that he was willing to go with counsel if that meant he got a speedier trial. *Bolden*, 489 S.W.3d 821 at * 3. Likewise, even though he was told that the resources of the public defender's office would not be available to him as a *pro se* defendant, he still insisted on deposing all the witnesses against him. *Ibid.* Although the trial court pleaded with him to read the standard form listing the hazards of self-representation, Mr. Bolden refused to look at it, saying that he didn't want an opportunity to think about the implications of his decision. *Ibid.*

B. Separately, in St. Charles County, the State charged Mr. Bolden with two counts of first-degree robbery and two counts of armed criminal action for his robbery of the Check 'n Go store located in St. Charles County. Pet. App. 2a.

Before he went to trial in that case, Mr. Bolden told the court that he wanted to proceed *pro se*, and the trial court allowed Mr. Bolden to exercise his

right to elect self-representation. Pet. App. 4a. Mr. Bolden never had counsel assigned to him, and he was adamant that he did not suffer from any psychiatric issues. *State v. Bolden*, No. ED102965, 5/5/14 Tr. 9. Both Mr. Bolden and the trial judge signed a waiver-of-counsel form confirming that Mr. Bolden had learned about his rights and that he had waived them knowledgeably and intelligently. *State v. Bolden*, No. ED102965, L.F. 26.

But, at the suggestion of the prosecutor, and because the court did not find Mr. Bolden's "behavior to be particularly rational in denying the help that an attorney could give," the court ordered a full psychiatric examination of Mr. Bolden, just to double-check his competence before going to trial. Pet. App. 5a. Under Section 552.020 of the Missouri Revised Statutes, if a court orders a competency examination and neither party requests a second examination or contests the report's findings, the court may determine the defendant's fitness to proceed either on the basis of the report or by holding a further hearing. Mo. Rev. Stat. § 552.020. This Court has held that this procedure adequately protects a defendant's right not to be tried while incompetent. *Drope v. Missouri*, 420 U.S. 162, 173 (1975).

Here, nothing in the psychiatric examination conducted by Dr. Rick Scott of the state Department of Mental Health suggested that Mr. Bolden was incompetent to stand trial or to represent himself. Accordingly, the trial court held on the basis of the report, and without conducting a hearing, that Mr. Bolden was competent to proceed, and it appointed

standby counsel to assist him. Pet. App. 5a; L.F. 10–11, 32, 38. Mr. Bolden then continued to represent himself at trial but consulted with standby counsel during trial. *State v. Bolden*, No. ED102965, Tr. 197.

At trial, the jury convicted Mr. Bolden on all counts. The trial court sentenced him as a prior and persistent offender to a life sentence in prison for each of the two counts of first-degree robbery and to a term of 25 years in prison for each of the two counts of armed criminal action, with all counts to be served consecutively. Pet. App. 4a–5a; *see* Mo. Rev. Stat. § 558.016.

C. Once again, Mr. Bolden appealed from the St. Charles County convictions. This time, he argued that his convictions should be vacated because he should not have been allowed to proceed *pro se*.

1. Specifically, in his appeal to the Eastern District of the Missouri Court of Appeals, Mr. Bolden argued that, under the Sixth Amendment to the United States Constitution, the trial court should not have let him waive his right to counsel without having first determined that he was mentally competent to stand trial and proceed *pro se*. Pet. App. 5a–6a. He alleged that leaving him without counsel during this critical stage of his proceedings was a structural error, requiring automatic reversal of his convictions. Appellant's Br., *State v. Bolden*, No. ED102965, at *12 (Mo. App. E.D. July 7, 2016).

The "irony here" was not lost on the Court of Appeals. Pet. App. 1a. In his first case, Mr. Bolden was convicted in St. Louis County "after a trial at which he was represented by counsel because the

trial court denied his request to proceed pro se," and in that appeal, he argued "that the trial court erred in denying his request to proceed pro se." *Id.* at 1a-2a. Now, he raises "the opposite claim," *i.e.*, "that the trial court here erred in granting his request to proceed pro se." *Ibid.*

The State argued that the Sixth Amendment did not require reversal of Mr. Bolden's convictions because the trial court had not violated Mr. Bolden's right to counsel. St. Resp.'s Br., *State v. Bolden*, No. ED102965, 2016 WL 4722617 at *9–21 (Mo. App. E.D. Sept. 6, 2016). Under this Court's cases, the Sixth Amendment protects not only the right to counsel but also the right to waive counsel, if done knowingly and intelligently. Pet. App. 7a–8a (citing *Faretta v. California*, 422 U.S. 806, 818–21 (1975)). Here, Mr. Bolden had made a valid waiver of his right to counsel, and the psychiatric examination ordered by the trial court confirmed that he was competent to do so. St. Resp.'s Br., *State v. Bolden*, No. ED102965, 2016 WL 4722617 at *20 (Mo. App. E.D. Sept. 6, 2016). Further, the trial court only ordered a psychiatric evaluation, not an adversarial competency hearing—and a defendant has no right to counsel during a mere psychiatric evaluation. *Id.* (citing *United States v. Smith*, 436 F.2d 787, 790 (5th Cir. 1971); *United States v. Albright*, 388 F.2d 719, 726–27 (4th Cir. 1968); *State v. Brown*, 601 S.W.2d 311, 315 (Mo. App. E.D. 1980)).

The Court of Appeals held that a defendant cannot knowingly and intelligently waive counsel if the defendant is not mentally competent. Pet. App. 8a (citing *Godinez v. Moran*, 509 U.S. 389, 400

(1993)). Under the Sixth Amendment, a defendant's competence to stand trial and his competence to waive counsel are measured under the same standard: whether he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." Pet. App. 8a–9a (citing *Godinez*, 509 U.S. at 396). Although Mr. Bolden had "made a knowing and voluntary waiver of counsel while unrepresented," the trial court demonstrated that it was not certain whether Mr. Bolden was competent to waive his right to counsel by ordering an examination of Mr. Bolden's competence to stand trial. Pet. App. 10a.

Neither this Court nor the Missouri Supreme Court has ever considered the application of the Sixth Amendment to a situation like this case, where a defendant validly waives his right to counsel and has no lawyer, but the trial court nevertheless orders a competency evaluation out of abundance of caution. Pet. App. 10a–11a.

To resolve this question, the Missouri Court of Appeals looked to the decisions of the U.S. Court of Appeals for the Sixth Circuit in *United States v. Ross*, 703 F.3d 856, 874 (6th Cir. 2012) and the U.S. Court of Appeals for the D.C. Circuit in *United States v. Klat*, 156 F.3d 1258, 1263 (D.C. Cir. 1998). *Ibid.* Both courts hold that, even if a defendant validly waives counsel, the trial court must appoint counsel for the defendant for the competency hearing "to assure that the evidence supporting competency is closely examined." *Ibid.*

Adopting these courts' per se rule, the Missouri Court of Appeals held that every defendant must be represented by counsel during every pre-trial competency proceeding—even if the defendant has previously validly waived his or her right to counsel, even if there is strong contemporaneous evidence of competency, and even if the trial court has no duty to order a competency evaluation in the first place. Pet. App. 10a–12a (citing 703 F.3d at 870). The lower court held that failure to require representation by counsel at a pre-trial competency proceeding is plain error. Pet. App. 6a–8a.

2. The Missouri Court of Appeals did not vacate Mr. Bolden's convictions and order a new trial. Pet. App. 12a–13a. Instead, the court held that, under the circumstances of this case, a new trial was not yet necessary. Pet. App. 12a. The court held that determination of competency requires contemporaneous evidence. Pet. App. 13a (citing *Eley v. Bagley*, 604 F.3d 958 (6th Cir. 2010)). Thus, a new trial would be necessary only if there had been no competency evaluation contemporaneous with Mr. Bolden's trial. Pet. App. 12a–13a (citing *Pate v. Robinson*, 383 U.S. 375, 387 (1966)). In Mr. Bolden's case, the trial court had ordered a contemporaneous competency evaluation, and if this evidence showed that Mr. Bolden was competent after being scrutinized by Mr. Bolden's new counsel, no new trial would be necessary. The court held that this approach provided a workable way to retrospectively determine Mr. Bolden's competency while complying with the Sixth Amendment. Pet. App. 13a.

The court of appeals therefore remanded this case to the trial court for a retrospective hearing on Mr. Bolden's competency—this time with Mr. Bolden represented by counsel. *Ibid*. If that retrospective hearing based on contemporaneous evidence establishes that Mr. Bolden was competent at the time of the original proceeding, the trial court must certify that finding to the court of appeals, which will then dispose of Mr. Bolden's appeal on that record. *Id*. (following *State v. Nebbitt*, 455 S.W.3d 79, 89 (Mo. App. E.D. 2014)). But if, "after the hearing, the trial court finds that the report cannot establish [Mr. Bolden's] competency at the time of trial, then the trial court shall set aside the judgment and sentence and grant a new trial." *Id*. (citing *Pate*, 383 U.S. at 387).

D. The Missouri Supreme Court declined to review the appellate court's decision remanding the case. Pet. App. 21a.

REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction to review the question presented.

A. This Court must examine its jurisdiction before reaching any other question in the case.

This Court cannot reach any merits question before making sure that it has jurisdiction to do so. *Florida v. Thomas*, 532 U.S. 774, 777 (2001). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact

and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514 (1869). As a result, this Court cannot decide any question, no matter how simple, without first examining jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). This holds true even if the parties do not contest jurisdiction, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178 (1988), because it "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382 (1884).

B. This Court lacks jurisdiction to review this case because the judgment below is not a final judgment under 28 U.S.C. § 1257(a).

In this case, the Missouri Court of Appeals remanded the case to the trial court for further proceedings, including a retrospective competency hearing and possibly a new trial. Pet. App. 19a–20a. Recognizing that this decision is far from a classic final judgment, which leaves nothing to be done in the state courts, Mr. Bolden argues that this Court nevertheless has jurisdiction over this case under 28 U.S.C. § 1257(a). He contends that the remand decision below should be considered a final judgment, either as a general matter or under an exception to the final-judgment rule. Pet. 18 (citing *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54 (1989); *Berman v. United States*, 302 U.S. 211, 212 (1937)). Both contentions are incorrect. This Court lacks jurisdiction because the Missouri Court of Appeals' decision is not a "final" judgment within the meaning of 28 U.S.C. § 1257(a).

1. Under 28 U.S.C. § 1257(a), this Court may review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had * * * by writ of certiorari." 28 U.S.C. § 1257(a).

Under this final-judgment rule, if "anything further remains to be determined" by the state courts, this Court can grant review only in very rare circumstances. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Since 1789, Congress has limited this Court's jurisdiction under this statute to state-court decisions that are final judgments or decrees. 28 U.S.C. § 1257(a); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975). Section 1257(a) thus normally will "preclude review 'where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" *Cox Broadcasting Corp.*, 420 U.S. at 476 (quoting *Radio Station WOW, Inc.*, 326 U.S. at 124). There are "very few" departures from this rule, which apply only in narrow circumstances that carry "serious public consequences." *Id.*; *Radio Station WOW, Inc.*, 326 U.S. at 124.

Mr. Bolden argues that *any* case in which a state criminal defendant has appealed a final conviction and sentence is a "final" state-court judgment under Section 1257(a). Pet. 18. This argument has no merit. If any case in which the state court orders a full or partial remand is a "final" judgment, even cases in which the state courts have wiped the slate clean and ordered a new trial, the exception would swallow the rule. In criminal as well as civil cases, "the final-judgment rule" precludes review "where

anything further remains to be determined by a State court." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (per curiam) (quotation omitted) (holding that a state-court judgment was not reviewable because "[t]he resolution of this question can await final judgment without any adverse effect upon important federal interests").

2. In the alternative, Mr. Bolden argues that this case fits into an established exception to the final-judgment rule. Pet. 18–20. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court identified four exceptions to the final-judgment rule. Under the fourth exception, a judgment may be deemed final even if further proceedings will occur in the state court and even if those proceedings could resolve the case on non-federal grounds—but only if three factors are met:

- the state court finally decided the federal issue but further proceedings are pending in which the petitioner might prevail on the merits on non-federal grounds, which would render unnecessary later review of the federal issue by this Court;

- reversal of the state court on the federal issue now by this Court would preclude any further litigation on the relevant cause of action, rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come; *and*

- a refusal immediately to review the state-court decision would erode federal policy.

Id. at 482–83. In the decades since *Cox*, this Court has seldom invoked this exception.

Respondent does not dispute that the first requirement of this exception is met here. Mr. Bolden may prevail on non-federal grounds on remand, either by proving his original incompetence to stand trial or by defending his case successfully on the merits on retrial, which would remove any need to rule on the federal question presented in his petition. Pet. 18–20. But Mr. Bolden cannot satisfy the remaining two requirements of the fourth *Cox* exception in this case.

Under the second requirement for this exception, reversal of the state-court judgment must entirely "terminate litigation of the merits of this dispute," *Southland Corp. v. Keating*, 465 U.S. 1, 6–7 (1984), and entirely "preclude any further proceedings," *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179 (1988). Here, reversing the state court on the question presented in Mr. Bolden's petition would not "be preclusive of any further litigation on the relevant cause of action." *Cox*, 420 U.S. at 482-83. Rather, such a reversal would begin a new phase of litigation by undoing the old trial and remanding for a new one.

Likewise, Mr. Bolden cannot satisfy the third requirement of this exception. Under that requirement, the federal question must be so important that it is "intolerable to leave unanswered." *Cox Broad. Corp.*, 420 U.S. at 484–85 (quoting *Mills v. Alabama*, 384 U.S. 214, 221-22 (1966) (Douglas, J., concurring)). For example, the exception applies when the state-court decision

completely defeats the core purpose of an important federal policy, *Southland Corp.*, 465 U.S. at 7; or when the state court has called "into question the legitimacy of the law enforcement practices of several States, as well as the Federal Government," *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989).

Here, the state-court decision does not eviscerate a strong federal policy. This case does not implicate any ruling of this Court or an act of Congress. The lower court's decision simply adopts a narrower remedy for the perceived denial of a federal constitutional right than Mr. Bolden prefers. The alleged error in the lower court's judgment is not at all exceptional. If this Court were to expand the fourth *Cox* factor and grant review of Mr. Bolden's petition, it would open the door to exercising jurisdiction over virtually every state-court judgment on a federal question, no matter how much there remains to do on remand from the appellate court.

This is fatal to Mr. Bolden's argument. Here, Mr. Bolden "can make no convincing claim of erosion of federal policy that is not common to all decisions" presenting a certain claim. *Johnson v. California*, 541 U.S. 428, 430 (2004). Mr. Bolden has made "no claim of serious erosion of federal policy that is not common to all run-of-the-mine decisions" involving the Sixth Amendment's Assistance of Counsel Clause. *Florida v. Thomas*, 532 U.S. 774, 780 (2001). Indeed, under his theory, *any* federal issue finally decided on an interlocutory appeal in the state courts would qualify for immediate review. *Flynt v. Ohio*, 451 U.S. 619, 622, (1981). Absent such a showing of

"serious erosion of federal policy," the fourth *Cox* exception does not apply.

For these reasons, this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review the judgment below, and the petition should be denied.

C. Even if this Court had jurisdiction to review the lower court's judgment, the lack of finality in that decision provides a strong prudential reason not to review this case at this time.

This Court should only grant certiorari when its intervention is necessary. Here, depending on what happens on remand, this Court might never need to rule on the question presented. Pet. App. 13a. As Mr. Bolden admits, if his retrospective competency hearing fails to determine that he was competent, he will get a new trial, which "would render this Court's review of the federal issue unnecessary." Pet. 19. Mr. Bolden would then receive from the state court everything that he seeks from this Court.

But if the retrospective competency hearing shows that Mr. Bolden was competent to represent himself in the original trial, this Court will still be able to review the question in the petition after a direct appeal. Once the state trial court certifies Mr. Bolden's past competence to the Missouri Court of Appeals, the Court of Appeals will presumably affirm his conviction on that record. This will result in a final judgment on a complete record that either the Missouri Supreme Court or this Court can then review.

II. The division of authority among the courts of appeals is not important enough to warrant this Court's review.

A. Federal and state courts of appeals are split on the question presented.

The petition is correct that federal and state courts of appeals have divided on a question decided below: whether the Sixth Amendment's Assistance of Counsel Clause requires automatic reversal of a criminal conviction when a defendant waives his right to counsel and represents himself or herself during a competency proceeding.

1. Some federal and state appellate courts hold that it is not necessary to hold a new trial after a defendant represents himself or herself during competency proceedings, if it is possible to hold a retrospective competency hearing at which the defendant is represented by counsel and is shown to have been competent at the time of the original proceeding, or if there is a determination that counsel's participation could not have made a difference to the original proceeding. *E.g.*, *United States v. Bergman*, 599 F.3d 1142, 1148 (10th Cir. 2010); *United States v. Klat*, 156 F.3d 1258, 1263–64 (D.C. Cir. 1998); *see also State v. Molner*, 355 Wis.2d 578, 851 N.W.2d 471 (Wis. Ct. App. 2014); *State v. Giles*, No. CA-977, 1991 WL 271698, at *3 (Ohio Ct. App. 1991). These courts follow the general rule that a remedy must be tailored to the wrong. "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on

competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981)).

2. Other appellate courts, however, have automatically granted a new trial, without any consideration of prejudice, when a defendant represented himself or herself at a competency proceeding. *United States v. Purnett*, 910 F.2d 51, 55–56 (2d Cir. 1990); *Appel v. Horn*, 250 F.3d 203, 217 (3d Cir. 2001); *United States v. Ross*, 703 F.3d 856, 874 (6th Cir. 2012), cert. denied, 136 S. Ct. 520 (2015); *United States v. Aponte*, 591 F.2d 1247, 1250 (9th Cir. 1978); *see also* Pet. App. 1a; *State v. Haider*, 772 So.2d 189, 194 (La. App. 2000).[3] The petition, therefore, correctly identifies a split in authority among federal and state appellate courts on the federal question decided below.

B. The split in authority does not warrant this Court's review.

Though lower courts are divided, the question is not sufficiently important to warrant this Court's review. In fact, this issue has percolated in the lower courts for several decades, yet this Court has never deemed it necessary to intervene. For two reasons, there is no pressing need for this Court to intervene to address the split of authority.

---

[3] Although not mentioned in the petition, the Ninth Circuit holds that when a defendant proceeds *pro se* through competency proceedings without first waiving his right to counsel knowingly and competently, the proper remedy is a remand for a new trial without consideration of prejudice. *United States v. Aponte*, 591 F.2d 1247, 1250 (9th Cir. 1978).

First, as the Missouri Court of Appeals recognized, and as Mr. Bolden concedes, the decision below is not directly contrary to any precedent of this Court. Pet. 2; Pet. App. 10a–11a; *see* S. Ct. R. 10.

Second, this issue does not recur with sufficient regularity to deserve this Court's attention. Most courts to consider the question have held that there is a Sixth Amendment right to counsel at competency proceedings. Accordingly, the lower courts regularly afford defendants counsel as a matter of constitutional law, as well as a matter of federal statutory and/or state constitutional or statutory law. *See, e.g.*, 18 U.S.C. § 4247(d); Pet. 11 (citing *People v. Lightsey*, 279 P.3d 1072, 1099-1104 (Cal. 2012)). Moreover, it is only the rare defendant whose competency is questioned, and thus there are relatively few cases in which a defendant both proceeds *pro se* and has his competency called into question.

III. The Sixth Amendment does not require automatic reversal of a defendant's conviction in every case in which the defendant represented himself or herself during a competency proceeding.

A. The Sixth Amendment ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const., amend. VI. This guarantee does not require automatic reversal of a criminal defendant's conviction in any case in which the defendant represented himself or herself during a competency proceeding, no matter how strong the contemporaneous evidence of competency.

1. For any Sixth Amendment error, a court should impose a remedy "tailored to the injury suffered" that does not "unnecessarily infringe on competing interests," *United States v. Morrison*, 449 U.S. 361, 364 (1981), including "society's interest in the administration of criminal justice," *Rushen v. Spain*, 464 U.S. 114, 119 (1983). The adequacy and necessity of a particular remedy is evaluated "solely by its ability to mitigate constitutional error, if any, that has occurred." *Id.* at 119–20.

Normally, this general rule leads this Court to apply the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 691–92 (1984), under which no remedy is needed if an error is harmless because it did not prejudice the defense. *Morrison*, 449 U.S. at 365.

This standard accounts for the competing interests of the defendant and the public. As this Court has "stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Van Arsdall*, 475 U.S. at 681. The public does not benefit when otherwise-valid convictions are vacated for technical errors that had no effect on the verdict.

As a result, this Court makes an exception to the prejudice requirement only if a constitutional error is "so likely to prejudice the accused that the cost of litigating [its] effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648,

658 (1984). Under this standard, the right to counsel must be totally denied at a critical stage, and the denial must cast so much doubt on the fairness of the trial that, as a matter of law, it can never be considered harmless. *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). This is a high bar. The denial of the right to counsel must have "affected—and contaminated—the entire criminal proceeding." *Id.* at 257. After all, a rule of automatic reversal is "strong medicine." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 159 (2006) (Alito, J., dissenting) (citation omitted).

2. In this case, the Missouri Court of Appeals correctly concluded that the harmless-error standard applies when a defendant represents himself during a competency proceeding. "If, after the hearing, the trial court finds that the report cannot establish Defendant's competency at the time of trial, then the trial court shall set aside the judgment and sentence and grant a new trial." Pet. 13a. "If, however, the trial court determines from the evidence that Defendant was competent to stand trial and to conduct his own trial at the time, then the trial court shall" certify its determination to the court of appeals. *Id.*

The Missouri Court of Appeals' approach comports closely with the analysis of the more persuasive federal authorities to address this question. For example, under the D.C. Circuit's test, if the trial court on remand determines that "there was a reasonable possibility that appointment of counsel to represent [the defendant] would have changed the outcome of the pre-trial competency

hearing at which [the defendant], upon his insistence, appeared *pro se*," the trial court should vacate the defendant's convictions and order a new trial. *United States v. Klat*, 213 F.3d 697, 698 (D.C. Cir. 2000). But if there is "no reasonable possibility that counsel could have affected the outcome of defendant's competency hearing," then the defendant's conviction should stand. *Id.* (quoting *United States v. Klat*, 59 F. Supp. 2d 47, 55 (D.D.C. 1999)).

This "reasonable possibility" inquiry resembles the harmless-error standard that applies to other Sixth Amendment trial errors. *Id*. at 702-03. Both inquiries turn on whether the defendant suffered any "substantial prejudice because his competency was definitively decided" without counsel present. *State v. Martin*, 72 So.3d 928, 933 (La. App. 2011). On remand, the court holds a hearing to see if the presence of counsel could possibly have made a difference to the outcome of the original competency hearing.

As the D.C. Circuit explained, this procedure is designed "to determine whether the Sixth Amendment violation here affected and contaminated the entire criminal proceeding" by gathering the information necessary to "determine whether the competency hearing could have come out differently if appellant had been represented by counsel." *United States v. Klat*, 156 F.3d 1258, 1264 (D.C. Cir. 1998). As the Tenth Circuit held, because the "[d]eprivation of the right to counsel at a competency hearing affects the entire proceeding only if the defendant stands trial while incompetent,"

the trial court must determine if the Sixth Amendment error resulted in the wrong conclusion that the defendant was competent to stand trial. *United States v. Bergman*, 599 F.3d 1142, 1148 (10th Cir. 2010).

This standard follows the general rule that this Court evaluates the adequacy and necessity of a remedy "solely by its ability to mitigate constitutional error, if any, that has occurred." *Rushen*, 464 U.S. at 119–20. The standard ensures that a new trial is available when that remedy is actually necessary. In all other cases, it reflects the federal courts' "enduring respect for 'the State's interest in the finality of convictions.'" *Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). "Finality is essential to both the retributive and the deterrent functions of criminal law." *Ibid.*

3. As the D.C. Circuit recognized, this Court "has expressed reluctance to permit retrospective hearings on questions of mental competency," but "the purpose of the hearing here is not to determine, retrospectively, whether appellant was or was not in fact incompetent to stand trial." *United States v. Klat*, 156 F.3d 1258, 1264 (D.C. Cir. 1998) (citing *Pate v. Robinson*, 383 U.S. 375, 387 (1966)). "Rather, the purpose of the hearing is to determine whether counsel might have made certain decisions or arguments which could have changed the result of the competency hearing." *Id.* In other words, the purpose of remand is to determine in the first instance whether there is any reasonable possibility that a structural error actually occurred.

B. Thus, other courts have erred in holding that the denial of counsel at competency proceedings necessarily constitutes a structural error that automatically requires a new trial. The structural error is allowing a defendant to stand trial while incompetent. By contrast, the denial of counsel at a competency proceeding is not categorically so prejudicial that it is always very likely to prejudice the accused, *United States v. Cronic*, 466 U.S. 648, 658 (1984), or to cast so much doubt on the fairness of the trial that, as a matter of law, it can never be considered harmless, *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988).

In fact, cases in this area demonstrate that the denial of counsel at a competency proceeding does not necessarily affect, let alone contaminate, the entire criminal proceeding. *Id.* at 257. Frequently, substantial evidence is available to show that the defendant was plainly competent to proceed throughout the whole case. *E.g.*, *United States v. Klat*, 213 F.3d 697, 705 (D.C. Cir. 2000) (holding that "the district court did not err, at least not clearly so, in determining that there was no reasonable possibility counsel could have affected the outcome of Klat's competency hearing"); *United States v. Bergman*, No. 04-CR-00180-WDM, 2011 WL 1793261, at *10 (D. Colo. May 5, 2011) ("Having retrospectively determined that Defendant was competent at trial, a new trial is not required."). As Judge Enright of the Ninth Circuit said in one case, where a defendant was proceeding *pro se* with the assistance of standby counsel, "[o]nce the narrow and technical rules regarding competency of waiver are put to one side," and the adequacy of the defendant's

actual representation is assessed, "it is manifest that the combined efforts of" the defendant and his standby counsel "secured full and fair representation to the accused." *United States v. Aponte*, 591 F.2d 1247, 1251 (9th Cir. 1978) (Enright, J., dissenting). In fact, it "would surely be egregious error to maintain" that the defendant was prejudiced by being allowed to represent himself while competent to do so and given the resources necessary to succeed. *Id.* at 1252.

Moreover, the rule of automatic reversal has resulted in unintended consequences. In order to ameliorate the harsh, all-or-nothing effect of this remedy, several of the courts of appeals to adopt the rule of automatic reversal have since pared back the substantive scope of the right to counsel at competency proceedings. Decisions from the Ninth and Sixth Circuits, for example, have held that there is not always a Sixth Amendment violation when a defendant proceeds *pro se* in competency proceedings, such as when the defendant could, if he wishes, call upon standby or amicus counsel. *United States v. Kowalczyk*, 805 F.3d 847, 859 (9th Cir. 2015), cert. denied, 136 S. Ct. 1230 (2016); *United States v. Amir*, 644 F. App'x 398, 400–01 (6th Cir. 2016); *United States v. Ross (Ross II)*, 619 F. App'x 453, 455 (6th Cir. 2015); *United States v. Martin*, 608 F. App'x 340, 344 (6th Cir. 2015). Likewise, the Second Circuit has held that a trial court need not "reappoint counsel for a *pro se* defendant every time it revisits the issue of competency," concluding instead that a defendant can represent himself or herself at second and successive competency hearings. *United States v. Morrison*, 153 F.3d 34, 47

(2d Cir. 1998); *see* Cross-Pet. Pt. II.B (discussing the split of authority on when a right to counsel can ever be waived during competency proceedings).

C. Mr. Bolden argues that this Court should consider the denial of counsel at pre-trial competency proceedings to be a structural error that requires automatic reversal regardless of prejudice. Pet. App. 12a. In other words, he would have this Court definitively presume, as a matter of law, that any defendant who represented himself or herself at a competency proceeding was incompetent to stand trial.

But this approach would disregard the actual evidence in the record by presuming, regardless of the facts, that the defendant was never competent to represent himself. It would disregard the contribution of standby counsel in cases where such counsel engage in meaningful adversarial testing of the evidence of competency. And it would jettison the rule that this Court evaluates the adequacy and necessity for a remedy "solely by its ability to mitigate constitutional error, if any, that has occurred." *Rushen v. Spain*, 464 U.S. 114, 119–20 (1983). This Court should not sacrifice "public respect for the criminal process" by ignoring "the underlying fairness of the trial" and focusing on the "virtually inevitable presence" of some immaterial error. *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988) (citations omitted).

Mr. Bolden argues that, as a matter of policy, any prejudice standard will be too hard for him or other defendants to meet, Pet. 2, 5, 13, but this objection is unconvincing. The harmless-error

standard will be met when there are real and substantial questions about a defendant's competency. One Tenth Circuit defendant, for example, met this burden without even the need for a retrospective competency hearing by showing the appellate court that the record itself suggested several arguments that a lawyer could have made during his original competency hearing. *United States v. Collins*, 430 F.3d 1260, 1268 (10th Cir. 2005). In evaluating the prior competency determination, the trial court on remand may consider many factors about the *possible* influence of counsel, such as "whether counsel could have made certain tactical decisions (such as retaining a second forensic expert to evaluate appellant) or made certain arguments [that] could have changed the outcome of the competency hearing," as well as "what impact counsel could have had on" the defendant's decision whether "to submit to formal psychological testing." *Klat*, 156 F.3d at 1264.

Rather than imposing an unreasonable hurdle for defendants, the harmless-error standard avoids granting a windfall to defendants who, though they were competent to stand trial, suffered from a technical trial error that had no effect on the fairness of their trial. The harmless-error standard also avoids unnecessarily reversing trial courts who engage in good-faith and reasonable efforts to assure themselves of *pro se* defendants' competency without unduly intruding upon their constitutional right of self-representation—as did the trial judge in the present case. *See* Pet. App. 12a (holding that the trial court "was not required to order a competency evaluation and certainly could have made its own

finding that Defendant was fit to proceed," but "chose to order an examination out of abundance of caution and for Defendant's own protection," which was "very appropriate and commendable here").

CONCLUSION

The petition should be denied. But if this Court were to grant the petition, it should also grant the State's conditional cross-petition.

Respectfully submitted,

Joshua D. Hawley
Attorney General

D. John Sauer
Solicitor General
Counsel of Record

Julie Marie Blake
Deputy Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
Supreme Court Building
207 West High Street
P.O. Box 899
Jefferson City, MO 65102
John.Sauer@ago.mo.gov
(573) 751-3321

Counsel for Respondent
State of Missouri

MAY 31, 2017