No. 16-1308

In the Supreme Court of the United States

DARRELL I. BOLDEN,

Petitioner,

v.

MISSOURI,

Respondent.

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

REPLY BRIEF FOR PETITIONER

AMY M. BARTHOLOW
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, MO 65203

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

REPLY BRIEF FOR PETITIONER

Missouri concedes (BIO 21-22) that the Courts of Appeals are split 4-2 on the question presented. Four circuits hold that reversal is the appropriate remedy when a defendant is deprived of his Sixth Amendment right to counsel at a pretrial competency proceeding. *United States v. Purnett*, 910 F.2d 51, 56 (2d Cir. 1990); *Appel v. Horn*, 250 F.3d 203, 217-18 (3d Cir. 2001); *United States v. Ross*, 703 F.3d 856, 874 (6th Cir. 2012); *United States v. Aponte*, 591 F.2d 1247, 1249-50 (9th Cir. 1978). Two other circuits, by contrast, hold that the appropriate remedy is a remand for a retrospective competency hearing. *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).

Nor does Missouri dispute that a retrospective competency hearing is inherently slanted against the defendant. Pet. 13-16. A remedy is supposed to put the defendant in the position he would have occupied had the constitutional violation never occurred. But a retrospective competency hearing is no substitute for a normal present-tense competency hearing, because the defense is unable to counter the government's psychiatrist with one of its own, or to cross-examine the government's psychiatrist effectively, or even to gather and introduce lay evidence contradicting the government psychiatrist's view.

Missouri argues instead that this issue is not important enough to warrant review (BIO 22-23), and that our case is not an appropriate vehicle in which to address the issue (BIO 15-20). Both of these arguments are incorrect.

I. The question presented is important.

Missouri suggests (BIO 23) that the question presented is not important because "the decision below is not directly contrary to any precedent of this Court." But the same could be said of virtually every case in which the Court grants certiorari to resolve a lower court conflict, because conflicts normally arise on issues to which the Court has not directly spoken. The bigger the conflict, the less likely it is that one side of it consists of decisions directly contrary to one of this Court's precedents.

Missouri also suggests (BIO 23) that the question is not important because it does not arise often enough. But the question has already come up in six circuits, along with a few state courts. This Court routinely grants certiorari to resolve conflicts on questions that have arisen less frequently. *See, e.g.*, *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1416-17 (2016) (resolving a conflict consisting of only one court on each side); *Salman v. United States*, 137 S. Ct. 420, 425 (2017) (same); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (resolving a 2-1 conflict). If a 4-2 circuit conflict is not enough to warrant review, the Court's merits docket would be nearly empty.

II. This case is an appropriate vehicle.

Missouri argues (BIO 15-20) that the Court lacks jurisdiction, on the ground that the judgment below is not final because it involved a remand for further proceedings. Missouri misunderstands this Court's jurisdiction.

"[F]inality in the context of a criminal prosecution is defined by a judgment of conviction and the imposition of a sentence." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54 (1989). Darrell Bolden was convicted and sentenced, so the judgment below is final. This is not an interlocutory appeal, as in *Flynt v. Ohio*, 451 U.S. 619, 620 (1981), where there had been "no finding of guilt and no sentence imposed." There are no unresolved appellate issues the state courts must still address, as in *Johnson v. California*, 541 U.S. 428, 429 (2004). In our case, the Court of Appeals resolved all of Bolden's claims of error. The judgment below is thus final.

In prior cases, Missouri understood the Court's jurisdiction correctly. For example, in *Missouri v. Frye*, 566 U.S. 133, 140 (2012), the judgment below involved a remand for further proceedings, as in our case, but Missouri nevertheless filed a certiorari petition, which the Court granted. The same was true in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013); *Missouri v. Seibert*, 542 U.S. 600 (2004); and many other cases. The meaning of finality does not vary according to whether the state is petitioner or respondent. If the Court had jurisdiction in *Frye*, *McNeely*, and *Seibert*, it has jurisdiction in our case.

Even if that were not so, the Court would have jurisdiction under the fourth *Cox Broadcasting* category. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). Missouri misapprehends (BIO 17-20) the scope of this category. The category includes cases "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Id.* That is

precisely what would happen if the Court reverses in our case. Reversing the judgment below would preclude further litigation on whether Darrell Bolden was competent when he was tried. His conviction would cease to exist. To be sure, the state might go back to square one and re-prosecute him, but *Cox Broadcasting* does not require that success bring immunity from *all* future litigation—just the "relevant cause of action," which in our case is the criminal prosecution that led to his conviction.

Missouri likewise errs in denying (BIO 18-19) that under *Cox Broadcasting* the decision below, if left unreviewed, "might seriously erode federal policy." *Id.* at 483. Missouri reasons (BIO 19) that "[t]his case does not implicate any ruling of this Court." Time and again, however, the Court has made clear that retrospective competency hearings are not an appropriate remedy for constitutional violations. *See Drope v. Missouri*, 420 U.S. 162, 183 (1975); *Pate v. Robinson*, 383 U.S. 375, 387 (1966); *Dusky v. United States*, 362 U.S. 402, 403 (1960). It would be hard to imagine any clearer statement of a federal policy against retrospective competency hearings.

Moreover, Congress has mandated that at competency hearings the defendant must be allowed to present his own witnesses and to cross-examine the government's witnesses. 18 U.S.C. § 4247(d). These statutory protections would be virtually meaningless at a *retrospective* competency hearing, because the issue at such a hearing is the defendant's mental state several years in the past. It would be impossible to present the testimony of a defense psychiatrist, because a psychiatrist could only interview the

defendant in the present, not in the past. And it would be extraordinarily difficult to cross-examine the government psychiatrist who interviewed the defendant several years earlier, because the government psychiatrist is not likely to remember anything other than what is written in his or her report. Failure to review the decision below would thus seriously erode the federal policy embodied in the statute.

For these reasons, there can be little doubt that the Court has jurisdiction. The real question is whether it would be wise to exercise that jurisdiction now, or whether it would be more prudent to wait until Missouri has conducted the retrospective competency hearing ordered by the court below.

The answer to this question depends on what one thinks of retrospective competency hearings. If one has confidence that a retrospective competency hearing is a fair proceeding at which each side has an equal ability to prove or disprove the defendant's competence, then it would make sense to await the outcome of Darrell Bolden's retrospective competency hearing.

By contrast, if one thinks that a retrospective competency hearing is a grossly unfair proceeding, at which the state has the insurmountable advantage of having on its side the only contemporaneous psychiatric evaluation of the defendant, then it would not make sense to wait. Our argument is that a retrospective competency hearing is a sham remedy. It is a playing field tilted sharply against the defendant, who cannot counter the government's psychiatrist with one of his own, or even effectively cross-examine the government's psychiatrist. A retrospec-

tive competency hearing does not enable the trial court to fulfill its duty to make "fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant," *Indiana v. Edwards*, 554 U.S. 164, 177 (2008), because the trial court will hear relevant evidence only from the prosecutor. The question presented is whether we should be carrying on this charade in the first place.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

AMY M. BARTHOLOW
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, MO 65203

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu