NO. 14 – 7884

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY D. LARKIN,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(restated)

Whether a pro se defendant, is entitled to the appointment of counsel during a competency hearing, when there is no reasonable doubt concerning the defendant's competency?

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OPINION BELOW

Petitioner seeks a writ of certiorari from the May 22, 2014, opinion of the Florida Supreme Court affirming the convictions and sentence of death. The opinion is reported at *Gregory David Larkin v. State of Florida*, 147 So. 3d 452 (Fla. 2014).

JURISDICTION

This petition seeks review of a decision from the Florida Supreme Court, and therefore jurisdiction is conferred pursuant to 28 U.S.C. § 1257 (2014).

STATEMENT OF THE CASE AND FACTS

The Petitioner, Gregory Larkin, was found guilty for the first-degree murders of his parents Richard Larkin and Myra Larkin. *Larkin v. St. of Fla.*, 147 So. 3d 452, 454 (Fla. 2014).

Petitioner's parents owned a dive shop in Costa Rica named Aquamor, and Petitioner was the manager. *Id.* at 456. The business was struggling and the family was in a constant disagreement over whether or not to sell the dive shop. *Id.* Petitioner was opposed to the sale. *Id.* In January of 2009, while the family was considering selling Aquamor, Petitioner unexpectedly moved in with his parents for a couple of months. *Id.*

On April 12, 2009, Petitioner drove his parent's car to the Jacksonville airport, purchased a one-way ticket to Mexico and flew out that afternoon. *Larkin*, 147 So. 3d at 456. A week later on April 18, 2009, a Nassau Co. Sheriff's deputy performed a wellness check on Richard and Myra Larkin, as they had not been heard from in more than a week. *Id.* The Deputy notice a FedEx package that was delivered days earlier was still at the front door. *Id.* When the Deputy walked around to the back of the house, he was able to look in a window and see Mrya's body with a pool of dried blood around her head. *Id.* Richard's body was found lying on the floor of the garage. *Id.* Both Richard and Myra Larkin had been beating to death. *Id.* Richard and Myra's car was missing, but valuables that were in plain view within the home were not disturbed. *Larkin*, 147 So. 3d at 456. Richard and Myra's car was eventually located at the Jacksonville airport. *Id.*

Petitioner returned to Jacksonville the same day the bodies of his parents were discovered. *Larkin*, 147 So. 3d at 456. Petitioner was questioned by police, but "[d]uring the interview, [Petitioner] was not told that his parents were found dead, and he did not ask about his parents." *Id.* at 457. Among other items in Petitioner's possession was a gold bracelet belonging to Myra which was valued at $8,000. *Id.*

The evidence established that Richard and Myra were killed sometime between 8 p.m. on April 11, 2009, and the early morning of April 12, 2009. *Id.* at 457. On April 11, 2009, Myra rented a movie and made purchases at Home Depot and Harris Teeter. *Id.* "[W]hen Myra Larkin's body was discovered, she was dressed in the same clothes that she wore in the April 11 store [surveillance] videos." *Larkin*, 147 So. 3d at 457. The items Myra purchased from Home Depot and Harris Teeter matched those found on the kitchen counter, and Myra was murdered while watching the movie she rented on April 11. *Id.*

Richard Larkin was killed while he was using the computer in the garage. *Id.* Richard's personal office was in the garage, and consequently he spent much of his time at the computer. *Id.* An expert in digital evidence analysis from the Florida Department of Law Enforcement, concluded the last time Richard's computer was used was on April 11, 2009, at 8p.m. *Id.* at 459. Clothes were collected from the victim's home which included a pair of shorts, two pairs of socks, and a t-shirt. *Larkin*, 147 So. 3d at 460. DNA on the clothes was a match for Petitioner and blood that was present on the t-shirt, one pair of socks, and the shorts matched either Richard or Myra Larkin. *Id.*

In July 2009, a Grand Jury indicted Petitioner for the murder of his parents. *Larkin*, 147 So. 3d at 454. Assistant Public Defender Brian Morrissey was initially appointed to represent Petitioner. *Id.* In November of 2009, Petitioner sought to discharge the Morrissey claiming his counsel was conspiring against him. *Id.* Following a hearing, the trial court found no basis to Petitioner's claim of ineffective counsel, and declined to discharge Morrissey. *Id.* The trial court inquired if Petitioner wanted to represent himself, but he declined. *Id.* In July of 2010 Petitioner retained private counsel until September of the same year when Petitioner's private counsel's motion to withdraw was granted. *Larkin*, 147 So. 3d at 454. Petitioner then informed the trial court of his desire to represent himself. *Id.* Following a *Ferretta* hearing, Petitioner's motion to represent himself was granted, but the trial court reappointed Mr. Morrissey as stand-by counsel. *Id.*

During the trial Petitioner gave an opening statement claiming his parents were killed while he was in Mexico, and that no physical evidence or eyewitnesses linked him to the murders. *Id.* Petitioner raised evidentiary objections which were sustained by the trial court, and conducted the direct examination of four witnesses during the defense case to establish his parents were alive on April 14, 2009. *Larkin*, 147 So. 3d at 459 – 60. In his closing argument, Petitioner again argued that no physical evidence linked him to the crime and that the state had not met its burden to support a conviction. *Id.* The jury found Petitioner guilty of first-degree murder for both Richard and Myra Larkin. *Id.*

Two days after the trial, but before the Penalty Phase began, Petitioner's stand-by counsel addressed the court stating his belief that Petitioner suffered from a delusional disorder and was not competent to proceed. *Larkin*, 147 So. 3d at 461. Based on Mr. Morrissey's motion, the trial court ordered a mental health evaluation be performed by Dr. William Meadows. *Id.* Dr. Meadows found Petitioner to be incompetent stating that his "understanding of the adversarial nature of legal proceedings, his capacity to disclose pertinent facts to counsel, and his capacity to testify relevantly and coherently were unacceptable." *Id.* at 461.

Following a hearing regarding Dr. Meadows report, the trial court appointed Dr. Alan Waldman to evaluate Petitioner for competency. *Id.* at 462. Dr. Waldman determined Petitioner "fully appreciated the charges and the range of penalties, understood the adversarial nature of the legal process, and had the capacity to disclose pertinent facts to counsel" and thus was competent to proceed. *Id.* The trial court then ordered a third evaluation of Petitioner to be conducted by Dr. Umesh Mahtre. *Id.* Dr. Mahtre found Petitioner did not suffer from either psychosis or a personality disorder, and was therefore competent to proceed. *Id.* The trial court found Petitioner competent to proceed based on the reports from Drs. Waldman and Mahtre and its own observations of Petitioner during the trial which conflicted with the findings of Dr. Meadows. *Id.* at 462.

Petitioner's trial proceeded to the penalty phase, where on the court's own motion, Dr. Meadows testified as to his findings of mental illness of Petitioner. *Larkin*, 147 So. 3d at 462 – 63. After deliberation, the jury unanimously

recommended the death penalty for both the murder of Richard Larkin and the murder of Myra Larkin. *Id.* at 463.

Petitioner appealed to the Florida Supreme Court raising four issues. *Larkin*, 147 So. 3d at 464 – 69. One of the issues Larkin argued was that his Sixth amendment right to counsel was violated when the trial court failed to appoint counsel to represent him during a hearing regarding his competence to proceed. *Id.* at 464. The Florida Supreme Court disagreed and found the initial incompetency determination did not raise a reasonable doubt regarding Larkin's competency. *Id.* at 66. Therefore the trial court did not abuse its discretion by allowing Petitioner to represent himself during the competency determination. *Id.*

The Florida Supreme Court denied Larkin relief on each of his claims ultimately affirming his convictions and sentence of death for the murders of Richard and Myra Larkin. *Id.* at 469. This petition for a writ of certiorari followed.

REASONS FOR DENYING THE WRIT

THE TRIAL COURT AND THE FLORIDA SUPREME COURT HELD THAT NO REASONABLE QUESTION EXISTED CONCERNING PETITIONER'S COMPETENCY TO PROCEED. THEREFORE THE HOLDING OF THE FLORIDA SUPREME COURT NEITHER CONFLICTS WITH ANY DECISION OF THIS COURT NOR ANSWERS AN UNSETTLED QUESTION OF FEDERAL LAW.

Petitioner claims he was required to represent himself during a hearing to determine his competency to proceed. Although Petitioner was pro se, no reasonable question existed regarding his competency. The trial court observed Petitioner represent himself throughout the guilt phase of his trial, and when stand-by counsel raised the issue of competency, a hearing was conducted in an abundance of caution.

In addition, Petitioner was not denied the assistance of counsel during the competency proceedings. The question of Petitioner's competency was raised and litigated by stand-by counsel. Three doctors were appointed to evaluate Petitioner. Each of these doctors filed reports with the court, and one of them testified regarding Petitioner's competency. Stand-by counsel was given the opportunity to cross-examine this doctor and declined. Following the hearing, Petitioner was determined to be competent to proceed and competent to make a knowing, intelligent, and voluntary waiver of counsel. In Petitioner's case, the holding of the Florida Supreme Court did not decide an important question of federal law in a manner that conflicts with a decision of this Court. The issue before the Florida Supreme Court has also neither divided the federal or state courts nor presented an

important, unsettled question of federal law. See Sup. Ct. R. 10. As such, this Court should deny certiorari.

I. No Reasonable Question Exists Regarding Petitioner's Competency

Both the Florida Supreme Court and the trial court made a factual finding that no reasonable question existed regarding Petitioner's competency to proceed. *Larkin*, 147 So. 3d at 466. Those findings are presumed to be correct, and this Court may not substitute its factual findings absent demonstrable proof that the state court's facts are unsupported by the record. *Marshall v. Loneberger*, 459 U.S. 422, 432 (1983) (requiring federal courts to afford state court factual findings high degree of deference); *Hoag v. New Jersey*, 356 U.S. 464, 471 (1958) (ruling federal court's authority to examine record does not include authority to substitute state findings on controverted factual findings); *Thomas v. Arizona*, 356 U.S. 390, 402 (1958).

In reviewing Petitioner's case on direct appeal, the Florida Supreme Court thoroughly analyzed the facts and found that because standby counsel's suggestion of incompetency did not raise a reasonable ground to believe Larkin was not competent to proceed, the trial court did not abuse its discretion in allowing Larkin to represent himself during the competency proceedings. *Larkin*, 147 So. 3d at 465-66. Specifically, the Court stated:

> In this case, when Morrissey raised the question of Larkin's competence, he offered not a single specific example to support the claim. The motion was based on unspecified observations and allegedly—but unidentified—illogical decisions that Larkin made during the court proceedings. Thus, the trial court ordered the

> examination solely because Morrissey requested it and not because a "reasonable ground" to doubt Larkin's competence had been demonstrated.
>
> Larkin contends that error occurred when he was allowed to continue to represent himself at the hearing held on the incompetency determination by Dr. Meadows. At the hearing, before Dr. Meadows arrived, the trial judge again asked Morrissey for a factual basis supporting his original allegation of incompetence. Morrissey could provide none, instead suggesting that the trial judge witnessed the unspecified behavior as well. The trial judge responded that he had not witnessed any delusional behavior by Larkin at the trial. In fact, the judge stated that the competency report's findings were completely contradicted by the events at trial. For example, Dr. Meadows' findings that Larkin lacked an understanding of the adversarial nature of the trial and the capacity to testify coherently were clearly rebutted by his able self-representation at trial. Moreover, Dr. Meadows' determination of incompetency was based in part on Larkin's belief that an insurance company had targeted his father and that Larkin insisted people had seen his parents alive while he was in Mexico. However these facts were supported by witness testimony at trial. In addition, Larkin created no disruptions at trial, and the trial judge witnessed nothing to indicate that Larkin was delusional. Accordingly, the trial court found the report "flimsy at best" and stated that had it not been a death penalty case, he would have rejected the determination. Dr. Meadows' testimony at the hearing did nothing to alter the trial court's conclusion. Moreover, the other mental health experts who subsequently examined Larkin found him competent to proceed.
>
> In this case, the initial incompetency determination did not raise a reasonable doubt regarding Larkin's competency. The findings were clearly contradicted by the actual events at trial. Accordingly, we conclude that the trial court did not abuse its discretion by allowing Larkin to continue to represent himself during the competency proceedings.

Larkin, 147 So. 3d at 465 -466.

Although *Faretta*, made clear that the right of self-representation is not absolute, this Court did not address the problem of mental competency within its

decision. *Edwards*, 554 U.S. at 171. This Court, however, "has not held that a court must appoint counsel for a competency hearing after a defendant had been found competent and waived his right to counsel." *Porter v. Attorney General*, 552 F.3d 1260, 1268 (11th Cir. 2008) (overturned on other grounds by *Porter v. McCollum*, 558 U.S. 30 (2009). Nevertheless, because the standard for self-representation is higher than the standard of competency to proceed, it therefore follows that a defendant who is competent for self-representation is also competent to proceed. *See Edwards*, 554 U.S. at 177 – 78.

Certiorari should be denied as the question of whether a defendant whose competency is at question should be allowed to represent himself is not squarely presented where, as here, the state court made factual findings that no reasonable question existed regarding Petitioner's competency to proceed.

II. Petitioner Received the Assistance of Standby Counsel During the Competency Hearing.

Regardless of Petitioner's claim, the record shows that Petitioner was in fact receiving the assistance of counsel. Prior to any question of competency, Petitioner was acting as his own counsel and the trial court had no reason to question Petitioner's competency. At each stage of the proceedings Petitioner was given the option of counsel and each time, Petitioner declined. *Id.* at 462.

On the motion of stand-by counsel, the trial court appointed a doctor to evaluate Petitioner for mental competency. *Id.* at 461. Then, prior to the evaluation, Mr. Morrissey, stand-by counsel, sent a detailed letter with background information on

Petitioner to Dr. Meadows, and suggested family members and friends the doctor contact in forming his medical opinion. (Petitioner Appendix "B"). While Mr. Morrissey states that his motion came "as an officer of the court" his actions show considerably more involvement in the case than what is required for stand-by counsel. In fact, Mr. Morrissey was given an opportunity to cross-examine Dr. Meadows during the competency hearing, but Mr. Morrissey declined. *Larkin*, 147 So. 3d at 462. Were it not for the actions of Mr. Morrissey the question of Petitioner's competency would never have been raised. Therefore, the contention that Petitioner did not have the assistance of counsel during a hearing to establish his competency is an exaggeration of the record.

III. The Circuit Courts Have Ruled Only in Cases Where a Reasonable Question Existed Regarding the Defendant's Competency.

Petitioner asserts the decision of the Florida Supreme Court conflicts with the decisions of five U.S. Circuit Courts. (Petition at 16). But, in each of the cases Petitioner cites to, a reasonable question regarding the defendant's competency existed. *United States v. Ross*, 703 F.3d 856, 869 (6th Cir. 2012) (noting the government filed for a motion to determine competency after the defendant exhibited paranoid and bizarre behavior leading to the withdraw of three attorneys); *United States v. Frazier-El*, 204 F.3d 533 (4th Cir. 2000) (observing that following a motion for competency determination from defense counsel, the defendant was diagnosed as a paranoid schizophrenic and subsequently hospitalized); *United States v. Klat*, 156 F.3d 1258, 1263 (D.C. Cir. 1999)

(commenting that based on the defendant's bizarre behavior the trial court found a reasonable belief that defendant suffered from a mental disease or defect); *United States v. Boigegrain*, 155 F.3d 1181 (10th Cir. 1998) (noting trial counsel filed a motion to determine competency, the defendant was declared incompetent and hospitalized for four months); *United States v. Purnett*, 910 F.2d 51, 55 (2d Cir. 1990) (observing the trial court ordered the mental competency evaluation after defendant's unusual and bizarre behavior over multiple courtroom appearances).

In Petitioner's case, no real question existed regarding his competency, even from the outset of the motion made by stand-by counsel. The trial court had observed Petitioner conduct his own guilt phase defense which: (1) had a clear theory of defense; (2) made a coherent opening and closing statement based on his defense and the evidence presented in court; (4) made timely evidentiary objections which were sustained by the trial court; and (5) directed the testimony of his own witnesses. After Petitioner was evaluated, Dr. Meadows returned a report which was contradicted by each observation from the guilt phase trial, and found the report "flimsy at best." *Larkin*, 147 So. 3d at 466. The trial court went so far to state "had it not been a death case, eh would have rejected [Dr. Meadows] determination."

While some Circuit Courts have ruled that a defendant is required to have counsel during a competency hearing, and may not proceed *pro se*, those cases involved genuine questions regarding the defendant's competency. In this case, Petitioner's competency was never in doubt and therefore the decision of the Florida

Supreme Court does not conflict with any decision from the Circuit Courts. As such, this Court should deny certiorari.

IV. The Decision of the Florida Supreme Court Does Not Conflict with Any Decision from This Court

This Court "has not held that a court must appoint counsel for a competency hearing after a defendant had been found competent and waived his right to counsel." *Porter v. Att'y General*, 552 F.3d 1260, 1268 (11th Cir. 2008) (overruled on other grounds by *Porter v. McCollum*, 558 U.S. 30 (2009). In this case, the trial court evaluated Petitioner's competency on the motion of stand-by counsel and did not make a final determination until three experts were appointed and the trial court took into account its own observations of Petitioner during the trial. *Larkin*, 147 So. 3d at 466. The Florida Supreme Court determined the trial court did not abuse its discretion by allowing Petitioner to represent himself during the competency hearing because the initial incompetency determination did not raise a reasonable doubt regarding Petitioner's competency. *Larkin*, 147 So. 3d at 466. Even still, the record shows that Petitioner's stand-by counsel, Mr. Morrissey, was particularly involved by sending letters to at least one expert, and even being afforded the chance to question Dr. Meadows during a hearing. *Larkin*, 147 So. 3d at 462.

Petitioner was allowed to represent himself following a full *Faretta* hearing. *Id.* at 455. That right was re-affirmed by Petitioner at each critical stage, and it was only when Petitioner's stand-by counsel addressed the court that an issue regarding

Petitioner's competency was raised. *Id.* at 461 – 62. The trial court then followed this Court's precedent and the Florida Rules of Criminal Procedure in having Petitioner evaluated, receiving expert reports, and having a hearing where testimony from Dr. Meadows was taken. The actions of the trial court, and holding of the Florida Supreme Court are not in conflict with any decision from this Court. Accordingly, the petition for certiorari should be denied.

CONCLUSION

Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Carolyn M. Snukrowski, a member of the Bar of this Court, hereby certify that on this ____ day of February, 2015, a copy of the Respondent's Brief in Opposition in the above entitled case was furnished by United States mail, postage prepaid, to David A. Davis, Assistant Public Defender, Leon Co. Courthouse, 301 S. Monroe St., STE 401, Tallahassee, FL 32301.

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