

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 19-11282

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEPHEN COMETA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
No. 5:16-CR-00044-JDW-PRL-1

DEFENDANT-APPELLANT'S
INITIAL BRIEF

FRITZ SCHELLER
Florida Bar No. 183113
Fritz Scheller, P.L.
200 E. Robinson Street, 1150
Orlando, Florida 32801
PH: (407) 792-1285
FAX: (407) 513-4146
Email: fscheller@fluaslaw.com
Counsel for Defendant-Appellant

CERTIFICATE OF INTEREST PERSONS AND
CORPORATE DISCLOSURE STATEMENT
United States v. Stephen Cometa, Case No. 19-11282

Pursuant to Rule 26.1 of the Federal Rules Appellate Procedure and Rule 26.1-2 of the Eleventh Circuit Rules, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case:

1. Anderson, Mary K., Assistant Federal Public Defender;
2. Bodnar, Robert Edward, Jr., Assistant United States Attorney;
3. Cometa, Stephen, Defendant-Appellant;
4. Elm, Donna, Federal Defender;
5. Fausnaugh, Rodney, victim;
6. G., M., victim;
7. Glober, Bonnie, Assistant United States Attorney;
8. Hamilton, William S., Assistant United States Attorney;
9. Hodges, Hon. Wm. Terrell, United States District Judge;
10. Irick, Hon. Daniel C., United States Magistrate Judge;
11. Lammens, Philip R., United States Magistrate Judge;
12. Lopez, Maria Chapa, United States Attorney;
13. McNamara, Linda Julin, Assistant United States Attorney, Deputy Chief, Appellate Division;

United States v. Stephen Cometa, Case No. 19-11282

14. Morrow, Brad, victim;
15. Perry, Michael, victim;
16. Poff, Dr. Mark, victim;
17. Rhodes, David P., Assistant United States Attorney, Chief, Appellate Division;
18. Scheller, Fritz;
19. Whittemore, James, D., United States District Judge;
20. Wolfkill, Andrea, victim.
21. Zimmerman, Warren A., Esquire;

No publicly traded company or corporation has an interest in the outcome of this appeal.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Cometa submits that oral argument will substantially assist the Court in resolving the issues on appeal and accordingly requests oral argument.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS C 1

STATEMENT REGARDING ORAL ARGUMENTi

TABLE OF CONTENTSii

TABLE OF CITATIONSiii

STATEMENT OF JURISDICTION..... 1

STATEMENT OF THE ISSUES..... 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 30

ARGUMENT AND CITATIONS OF AUTHORITY 31

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO ORDER A HEARING ON MR. COMETA’S COMPETENCY AFTER RECEIVING INFORMATION THAT RAISED A BONA FIDE DOUBT AS TO WHETHER HE REMAINED COMPETENT TO STAND TRIAL OR BE SENTENCED..... 31

A. Standard of Review 40

B. Argument on the Merits..... 31

C. Prior medical opinions available and known to the district court established bona fide doubts about Mr. Cometa’s competency 33

D. Evidence concerning Mr. Cometa’s irrational behavior raised bona fide doubts about his competency 35

E. Mr. Cometa’s demeanor at trial established bona fide doubts about his competency, despite the district court’s comments and the undeveloped nature of the record 37

CONCLUSION 40

TABLE OF CITATIONS

Cases

Cooper v. Oklahoma, 517 U.S. 348 (1996) 31, 40

Deere v. Woodford, 339 F.3d 1084 (9th Cir. 2003)..... 36

Demos v. Johnson, 835 F.2d 840 (11th Cir. 1988) 35

* *Drope v. Missouri*, 420 U.S. 162 (1975) 32, 39

Indiana v. Edwards, 554 U.S. 164 (2008) 36

James v. Singletary, 957 F.2d 1562 (11th Cir. 1992) 32

Miles v. Stainer, 108 F.3d 1109 (9th Cir. 1997) 35

* *Pate v. Robinson*, 383 U.S. 375 (1966) 32, 40

Reynolds v. Norris, 86 F.3d 796 (8th Cir. 1996) 39

Tiller v. Esposito, 911 F.2d 575 (11th Cir. 1990)..... 33, 35

* *United States v. Wingo*, 789 F.3d 1226 (11th Cir. 2015)..... 31, 32, 33, 30

Other Authority

18 U.S.C. § 3231 1

18 U.S.C. § 4241 38, 46

28 U.S.C. § 1291 1

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this federal criminal prosecution. 18 U.S.C. § 3231. On March 28, 2019, the district court entered judgment. (Doc. 154). Mr. Cometa filed a timely notice of appeal on April 1, 2019. (Doc. 155). This Court has appellate jurisdiction. 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

ISSUE: Did the district court err when it declined to hold a competency hearing after defense counsel suggested one at the outset of trial and again prior to sentencing, and where the circumstances raised reasonable doubt that Mr. Cometa might not be competent during either of these phases of the proceedings?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

On August 22, 2018, a federal grand jury returned a three-count superseding indictment, charging Mr. Cometa with forcibly assaulting, intimidating, or interfering with a federal employee using a deadly or dangerous weapon, in violation of 18 U.S.C. § 111(a) & (b) (Count One); forcibly resisting and opposing a federal employee using a deadly or dangerous weapon, in violation of 18 U.S.C. § 111(a) & (b) (Count Two); and using, carrying and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (Count Three). (Doc. 76).

The case proceeded to trial in December of 2018, where the jury found Mr. Cometa guilty of all counts. (Doc. 126). The district court held a sentencing hearing on March 21, 2019 and imposed a term of 207 months of incarceration. (Doc. 154 at 2). On April 1, 2019, Mr. Cometa filed a Notice of Appeal. (Doc. 156). Mr. Cometa, who is incarcerated at the federal correctional institution in Butner, North Carolina, now appeals his conviction.

B. Statement of the Facts

Mr. Cometa Storms a VA Clinic

In December of 2016, Mr. Cometa, a 60-year-old military veteran, walked into an outpatient clinic operated by the federal Department of Veterans Affairs (VA) carrying an AM-15 assault rifle. (Doc. 188 at 200-201). Mr. Cometa proceeded to the office of a psychiatrist who previously treated him for bipolar disorder and banged on the door. (Doc. 188 at 221; 231). The psychiatrist, upon opening the door, instantaneously grabbed the rifle and attempted to wrest it from Mr. Cometa. (Doc. 188 at 220). The two struggled for control over the rifle. (Doc. 188 at 222). During the tussle, the rifle discharged two shots, one into a nearby wall and another into the ceiling of the clinic. (Doc. 188 at 222-23).

Two police officers responded to the melee. (Doc. 188 at 224). The officers commanded Mr. Cometa to drop the rifle, but he ignored their commands and continued his fight to regain control over the weapon. (Doc. 188 at 224; Doc. 189

at 147). The officers ultimately disarmed Mr. Cometa and took him into custody. (Doc. 189 at 152).

The Competency Proceedings

Following his arrest, Mr. Cometa was the subject of repeated psychological examinations relating to issues both of his competency to stand trial and insanity at the time of the alleged offenses. (Doc. 67 at 1). Counsel for Mr. Cometa retained the services of Michel J. Herkov, Ph.D., ABPP, ABN, a licensed psychologist, who opined in December of 2017 that Mr. Cometa was incompetent to stand trial. (Doc. 178 at 3-4; Doc. 106 at 11). Mr. Cometa asked the Court to order an evaluation under 18 U.S.C. § 4241(b) to determine his competency. (Doc. 13 at 2).

On May 4, 2017, the district court held a competency hearing. (Doc. 177). The parties stipulated to the submission of an expert report prepared by a psychiatrist employed by the federal Bureau of Prisons, Dr. Lisa Feldman, who found Mr. Cometa incompetent to stand trial. (Doc. 177 at 2-3). Given Dr. Feldman's findings, the Government did not dispute his incompetency. (Doc. 177 at 2-3). However, the Government requested that the district court commit Mr. Cometa for four months for restoration of his competency. (Doc. 177 at 3). The district court, finding by a preponderance of the evidence that Mr. Cometa was incompetent, assented to this request. (Doc. 177 at 4).

The district court convened another competency hearing on January 4, 2018. (Doc. 178). During the hearing, defense counsel advised the court that Dr. Herkov believed that Mr. Cometa remained incompetent. (Doc. 178 at 3). Defense counsel concurred in that assessment and related difficulty in even communicating with her client: “[Y]ou just can’t talk to him, at all. You can’t get a word in edge-wise. He’s belligerent.” (Doc. 178 at 3). She also advised the district court that Mr. Cometa was refusing to eat and take his medication. (Doc. 178 at 3).

She attributed the degeneration of his mental state to the lack of medication: “So you get to the local jail and you can’t force him to take his medication. He won’t take it. . . . when he’s in a place like Butner . . . , they’re . . . giving him his medication. They’re talking him into taking it.” (Doc. 178 at 3-4). Defense counsel also suggested, based on her conversation with Dr. Herkov, that forcing Mr. Cometa to take his medication might be the only way to restore his competency. (Doc. 178 at 4). However, Dr. Herkov had not yet had time to prepare his expert report, and so the defense could not yet proceed with a competency hearing. (Doc. 178 at 5). The deputy marshal also confirmed that Mr. Cometa engaged in “hunger strikes” and declined to take his medications. (Doc. 178 at 8).

In response, the Government noted that another expert from the Bureau of Prisons, Dr. DuBois, had opined that Mr. Cometa’s competency had been restored during his time in Butner. (Doc. 178 at 6). Nevertheless, the Government agreed

that it sounded “very plausible” that competency had become an issue since Mr. Cometa’s return to the county jail. (Doc. 178 at 6). The district court decided not to take any action and reset the case for a status conference. (Doc. 178 at 13-14).

On February 28, 2018, after Mr. Cometa filed his intent to rely on an insanity defense (Doc. 46), along with his own expert report questioning his competency, the district court ordered that Mr. Cometa be committed to the custody of the Attorney General for an evaluation to determine the existence of insanity at the time of the offense, and directed that his competency to stand trial continue to be evaluated. (Doc. 48). Accordingly, Mr. Cometa returned to FMC-Butner where the evaluations were performed. (Doc. 67 at 3). On June 13, 2018, Evan S. DuBois, Psy.D., Forensic Psychologist, prepared a report in which he opined that Mr. Cometa was mentally competent to stand trial. (Doc. 67 at 2).

One week later, the district court convened a status hearing. (Doc. 180 at 2). At the outset of the hearing, the district court noted that Mr. Cometa had filed a pro se motion asking the court to relieve the federal public defender and appoint him another attorney. (Doc. 180 at 2; Doc. 50 at 1). In that motion, Mr. Cometa declared himself both sane and competent. (Doc. 50 at 1). The district court also observed that Mr. Cometa had filed a pro se civil suit against the Government and various other entities. (Doc. 180 at 5). The district court then set another hearing for the

following month so that Mr. Cometa could be heard both on his competency and his request for substitution of counsel. (Doc. 180 at 6-7).

In July of 2018, the district court held the hearing. (Doc. 181). After reciting the history of the competency proceedings, the district court checked Mr. Cometa's comprehension: "Do you understand all that, Mr. Cometa?" (Doc. 181 at 5). "Not entirely, sir," he responded. (Doc. 181 at 5). After conferring with counsel, Mr. Cometa then stated, "I understand what you said, Your Honor." (Doc. 181 at 5). The court then inquired as to whether he still wanted to discharge his attorney. (Doc. 181 at 5). Mr. Cometa confirmed that he would like another attorney to represent him. (Doc. 181 at 6). The district court then appointed a private attorney to represent him pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. (Doc. 181 at 6-7).

Newly-appointed counsel recommended that the district court conduct the arraignment and allow Mr. Cometa to enter a plea prior to holding the competency hearing. (Doc. 181 at 7). The district court declined to do so. (Doc. 181 at 8). The court pointed to the existence of two expert reports finding Mr. Cometa incompetent to proceed. (Doc. 181 at 8). It also noted that Mr. Cometa's civil suit "would touch on his competency." (Doc. 181 at 8). Thus, the district court set the competency hearing for the following week. (Doc. 181 at 10).

On July 18, 2018, the district court convened once again. (Doc. 182). When the court asked defense counsel's position on competency, Mr. Cometa's attorney

stipulated to his competency. (Doc. 182 at 3). Defense counsel advised that he had spoken with Dr. Herkov, who stood by his opinion that Mr. Cometa remained incompetent as of the last time he was evaluated. (Doc. 182 at 3). According to defense counsel, however, Dr. Herkov did not discount the possibility that Mr. Cometa might have regained competency in the six months since he had last seen him. (Doc. 182 at 3).

Defense counsel then stated that, based on his “lawyerly abilities,” he was “quite satisfied” that Mr. Cometa was competent. (Doc. 182 at 4). When the district court asked defense counsel whether he objected to any of the findings of Dr. DuBois, Mr. Cometa’s attorney admitted that he was unsure whether he had even read the report. (Doc. 182 at 4). After the district court provided him a copy to review with Mr. Cometa, defense counsel announced that he had “no problem” with the court using the findings of Dr. DuBois to render a ruling on Mr. Cometa’s competency. (Doc. 182 at 5). The court then adjudicated Mr. Cometa competent without inquiring any further into the matter and proceeded on to his arraignment. (Doc. 182 at 6). Mr. Cometa entered a plea of not guilty by reason of insanity. (Doc. 182 at 10).

One month later, after the grand jury returned a superseding indictment, Mr. Cometa appeared once again before the district court for his arraignment. (Doc. 183 at 2). This time, however, when the district court asked Mr. Cometa if he understood

the charges against him, Mr. Cometa stated, “No, I do not.” (Doc. 183 at 5). When asked whether he understood the penalties, Mr. Cometa again stated, “No, I do not.” (Doc. 183 at 6). Mr. Cometa then complained about unspecified violations of his constitutional rights. (Doc. 183 at 6). When the district court asked him yet again whether he understood the charges in the indictment, Mr. Cometa stated a third time, “No, I do not.” (Doc. 183 at 6).

The district court then opined that, “actually, it sounds to me like you understand it quite well,” to which Mr. Cometa responded as follows: “It’s -- all I understand is the United States have been trying to kill me for several years now. And I claim my right to life and liberty.” (Doc. 183 at 7). Defense counsel then attempted to explain that he believed Mr. Cometa was “hung up” on the fact that the superseding indictment could delay his trial and restart his speedy trial period. (Doc. 183 at 7).

After conferring with Mr. Cometa, defense counsel advised the district court that he was not authorized to enter a plea of not guilty by reason of insanity. (Doc. 183 at 9-10). Counsel for the Government then expressed concern that Mr. Cometa did not even understand the nature of the charges against him, which might undermine the validity of any plea. (Doc. 183 at 10). The district court, citing Rule 10 of the Federal Rules of Criminal Procedure, dismissed this concern and stated that all that was required for an arraignment was to (1) ensure that the defendant had

a copy of the indictment; (2) have the indictment read to the defendant; and (3) ask the defendant how he wished to plead. (Doc. 183 at 10).

At this point, Mr. Cometa joined the discussion: “I’ve instructed my lawyer previously on how I wish to plead.” (Doc. 183 at 10). Defense counsel then explained that Mr. Cometa previously instructed him that he wished to plead guilty “with the condition that he be put to death within 30 days.” (Doc. 183 at 10). At this point, counsel for Mr. Cometa again raised the competency issue:

Now, one might suggest that anybody who would say that is, by definition, not competent. And I’ll respect the Court’s assessment in that regard. I’m still not prepared to say that he is incompetent. And I’m reluctant to say that we should send him back to Butner to be evaluated again, because, you know, the same thing could happen upon his return.

(Doc. 183 at 11).

The district court responded to this concern as follows:

Well, and that request hasn’t been made either by you or the Government. But he does appear to understand what was said, based on his responses.

While he doesn’t want to affirmatively say he understood, based on the conversation with him, he appears to have understood it. And I would say that insofar as his reaction to being upset and visibly annoyed that new charges were filed.

(Doc. 183 at 11).

Mr. Cometa then said, “One thing I can say that I understand is this Court is supposed to uphold the Constitution of the United States, yet it has failed to do so

on several of my requests.” (Doc. 183 at 11). After the district court reminded Mr. Cometa of his right to remain silent, he asked the court to “fully explain [his] rights . . . under the Constitution of the United States.” (Doc. 183 at 12).

Although the Government expressed some concern about Mr. Cometa not acknowledging his “understanding of the elements of the . . . offenses,” it agreed to the district court entering a plea of not guilty. (Doc. 183 at 12-13). The district court asked defense counsel whether it should restate the rights of a criminal defendant, but Mr. Cometa cut in the conversation and lodged an objection: “I object to that, as I’ve already been judged guilty by two branches of the United States Government. And I’ve already had forfeiture of property. Besides what’s mentioned in the complaint here, I’ve had forfeiture of my dwelling, vehicle, companion animal, and income.” (Doc. 183 at 13).

Mr. Cometa then reiterated his request that the court restate what rights he had under the United States Constitution, but the district court declined to discuss the matter any further, stating, “All right. Well . . . I don’t think I have anything else to take up with Mr. Cometa.” (Doc. 183 at 14).

The district court conducted another status conference prior to trial. (Doc. 184). During that hearing, defense counsel advised the district court that the county jail was not properly medicating Mr. Cometa. (Doc. 184 at 9). Counsel characterized the condition of Mr. Cometa’s mental health as “very fluid” and

advised that his “competency can come or go on short notice.” (Doc. 184 at 9). Moreover, according to Dr. Herkov, if Mr. Cometa did not receive his “regimen of these mood stabilizers and antidepressants, antianxiety . . . that’s about it for the mental health.” (Doc. 184 at 9). Mr. Cometa asked to be transferred from the county jail in Marion County, Florida, to the county jail in Citrus County, Florida, where he had received better care. (Doc. 184 at 9). The district court agreed to recommend the transfer, given the “history of mental health issues,” the “findings of Dr. Herkov” in his two reports, and Mr. Cometa’s “fragile” mental state. (Doc. 184 at 13).

The Trial

Mr. Cometa’s trial began on December 10, 2018, nearly five months after his most recent competency evaluation. (Doc. 188). In response to the court’s inquiry if the defense was ready to proceed, defense counsel stated “[a]t some point I would suggest some type of competency inquiry, if the court or the Government was interested. Until yesterday, I had no concern about it, but events overtook that, and I am a little bit concerned.” (Doc. 188 at 4). After the court observed that such proceedings had already been held before the magistrate judge, defense counsel responded that the magistrate’s competency finding occurred five months prior in July of 2018. (Doc. 188 at 4-5).

Defense counsel further stated that the defendant’s competency was a “fluid thing” and that he had previously been housed at the Citrus County Detention facility

where he was compliant with his medications. (Doc. 188 at 5). However, counsel explained that Mr. Cometa had been transferred back to the Marion County jail, which could have adversely impacted his mental health status. (Doc. 188 at 5). When Mr. Cometa attempted to speak about the issue, the court informed him that it had “to think about what’s being told to me and process it and determine how to proceed.” (Doc. 188 at 5-6).

The court then asked defense counsel if he had the defense’s competency witness (Dr. Michael Herkov) available that day to resolve the competency concerns. (Doc. 188 at 7). Counsel replied that Dr. Herkov was located in Gainesville and was not scheduled to testify until the following Wednesday. (Doc. 188 at 7).

Defense counsel then admitted that when he had previously stipulated to Mr. Cometa’s competency, he had not actually read the last report of Dr. Herkov, who opined at that time that Mr. Cometa remained incompetent to stand trial. (Doc. 188 at 7-8). In this regard, counsel noted that Dr. Herkov had found Mr. Cometa incompetent on two separate occasions including two days after the event in 2016 and a year later, on December 22, 2017. (Doc. 188 at 7). Defense counsel maintained that when the magistrate conducted the competency hearing in July 2018, it did not have Dr. Herkov’s second report establishing incompetency due to counsel’s error. (Doc. 188 at 7-8). Although counsel stated that he did not have concerns regarding Mr. Cometa’s competency when he visited him at the Citrus

County Jail, he reiterated that he had become concerned about the defendant's competency. (Doc. 188 at 8)

A colloquy between Mr. Cometa and the district court ensued. When the trial court asked Mr. Cometa whether he was ready to proceed, Mr. Cometa said that he was not. (Doc. 188 at 9). When he was asked why not, Mr. Cometa informed the court that he would like to remove his attorney and launched into a long diatribe about the violation of his constitutional rights including his right to a speedy trial. (Doc. 188 at 10-12). Mr. Cometa further explained his counsel's reference to his transfer from Citrus County facility to the jail in Marion. (Doc. 188 at 13). While he was housed in Citrus County, he was receiving his medications twice daily, and was also taking his medications for blood pressure and diabetes. (Doc. 188 at 13). However, after he was moved to Marion County in the five days leading up to his trial, he had not received any medications. (Doc. 188 at 13).

Rather than inquiring into the impact of this situation on the defendant's current mental state, the court asserted that the U.S. Marshals Service could address the problem and immediately stated, "But I have to get back to your request. You want another lawyer, is that what you are telling me." (Doc. 188 at 13).

Mr. Comet replied "Well, I have a mental illness. I don't feel I'm competent enough to represent myself, even though I am competent to stand trial." (Doc. 188 at 14).

The district court denied Mr. Cometa's request to discharge his defense attorney, finding that no good cause existed to replace him. (Doc. 188 at 15). The district court also concluded that there was no need to conduct a *Faretta* inquiry because, "Mr. Cometa, by his own acknowledgment, is not capable of representing himself." (Doc. 188 at 15). The court further asserted the importance of Mr. Cometa's ability to assist in his defense. (Doc. 188 at 17). As a result, the court engaged in the following colloquy with defense counsel:

The Court: Are you suggesting another evaluation Mr. Zimmerman? Or maybe a session with Mr. Herkov?

Mr. Zimmerman: Or even possibly a telephone contact, although I guess I'm not the PhD. So maybe doing it in person is the professionally –

The Court: Well, what's -- I mean, without divulging attorney-client privileged information, is this just a disagreement or you guys still having conversation?

Mr. Zimmerman: Yeah, I mean we spoke briefly this morning. If I can just have one moment here.

(Doc. 188 at 17).

After consulting with Mr. Cometa, defense counsel advised the court that Mr. Cometa had disagreed on trial strategy, witnesses, etc. (Doc. 188 at 18). The court asserted that without a total breakdown in communication, the case was moving forward, and it turned immediately to Mr. Cometa's insanity defense. (Doc. 188 at 18).

The court asked Mr. Cometa if he wanted to proceed on an insanity defense. (Doc. 188 at 22). In response, Mr. Cometa stated that he did not know how he wished to proceed. (Doc. 188 at 12). The court replied “That’s not what I asked. I need to know if you are telling me that you do not want the insanity defense, is that right?” (Doc. 188 at 12). Mr. Cometa explained that since his lawyer had entered an insanity defense at his first arraignment and had entered a not guilty plea at the second arraignment, he was not certain which one applied. In response, the court accused Mr. Cometa of “playing games.” (Doc. 188 at 22-23). After Mr. Cometa stated he was not playing games, the court again asked him if he wanted the insanity defense. (Doc. 188 at 23). Before Mr. Cometa could ask a question concerning the first or second defense, the court cut him off and stated that his question was “nonsense.” (Doc. 188 at 23).

After Mr. Cometa attempted to explain his historical problems with medications during his incarceration, the court concluded that Mr. Cometa did not express good cause to discharge counsel. (Doc. 188 at 23-26). The court asserted that there was not a complete breakdown in communication, and the disagreements stemmed in part from the “very mental health challenges that Mr. Cometa alludes to.” (Doc. 188 at 26).

Mr. Cometa informed the court that he wished to plead guilty due to extreme and psychological duress, and stated that he was POW and an “enemy combatant”

being tried. (Doc. 188 at 40-41). After suggesting he had been tortured during his incarceration, the court stated “I’m . . . beginning now to think, Mr. Cometa, maybe we need to have you evaluated. Or are you just going to put on a show.” (Doc. 188 at 42).

Notwithstanding this observation, as well as defense counsel’s concerns about Mr. Cometa’s competency and the court’s own finding that he was not capable of representing himself due to his mental disease, the district court did not conduct any sort of hearing or evaluation to determine whether Mr. Cometa was competent to stand trial. (Doc. 188 at 15-39).

During trial, the Government called Dr. Poff, the VA psychiatrist who struggled with Mr. Cometa on the date of the charged offenses. (Doc. 188 at 211). Dr. Poff, who had treated Mr. Cometa for over a year at the VA, wrote in a progress note that Mr. Cometa suffered from both Post-Traumatic Stress Disorder (PTSD) and bipolar disorder. (Doc. 188 at 229; Doc. 189 at 39). Dr. Poff testified that patients with bipolar disorder “in many cases become delusional.” (Doc. 189 at 25). One of his bipolar patients “literally thought he was Jesus Christ,” while other patients would come to believe they were “invincible” and would “jump off the top of buildings.” (Doc. 189 at 25-26).

According to one progress note, Mr. Cometa had been prescribed an antipsychotic medication, aripiprazole, but developed an allergic reaction to that

medication. (Doc. 189 at 30). Dr. Poff did not recall prescribing Mr. Cometa with another antipsychotic medication, even though the “only effective treatment” for someone who is psychotic is “antipsychotic medications.” (Doc. 189 at 35). Other forms of treatment are ineffective because “the problem is more of a neurochemical issue than anything else, and therapy just does not work.” (Doc. 189 at 35).

During the second day of trial, the judge asked whether the issue with Mr. Cometa’s medication had been resolved. (Doc. 189 at 104). Mr. Cometa stated that it had not, and he informed the district court that he had not received medications since his arrival at the Marion County jail. (Doc. 189 at 104). The district court advised the parties that it would raise the issue with the Marshal. (Doc. 189 at 104). A deputy marshal later reported that Mr. Cometa “has been refusing his medications numerous times,” though the medications were available to him. (Doc. 189 at 170). According to the Marshal, the latest date Mr. Cometa had taken his antipsychotic medications was December 6, four days before trial. (Doc. 189 at 170).

The district court then addressed Mr. Cometa as follows:

It appears to me then that Mr. Cometa’s complaints about having never been provided meds while at Marion County are simply incorrect. And he specifically denied that he had refused his meds earlier to me, which is apparently incorrect.

As far as I’m concerned, Mr. Cometa, the meds are available to you through the jail, and if you’re refused to take them, that’s your decision. I’ll hear no more complaints about that.

(Doc. 189 at 171).

The district court still did not conduct any competency evaluation, even though Mr. Cometa was not taking his medications, and Dr. Poff testified that bipolar disorder can make unmedicated patients delusional. (Doc. 189 at 171).

After the Government concluded its case-in-chief, Mr. Cometa called Dr. Herkov, who opined that Mr. Cometa was insane at the time of the charged offenses. Dr. Herkov testified that when he first met Mr. Cometa two days after the offense, he diagnosed him with bipolar disorder without the benefit of reviewing his medical records. (Doc. 190 at 142). When he received Mr. Cometa's records, Dr. Herkov was struck by the "long history of severe mental illness," which was important because it showed that Mr. Cometa "had a serious mental disorder long before this event took place." (Doc. 190 at 142-43).

The medical records revealed that Mr. Cometa was "hearing voices" and suffered from paranoia back in 2008. (Doc. 190 at 143). Mr. Cometa received a medication called risperidone after that incident. (Doc. 190 at 144). That he was prescribed this drug was significant to Dr. Herkov, because psychiatrists "don't put [psychotropic medications] on people rather whimsically. If they put you on it, they have real concerns." (Doc. 190 at 144).

Less than one year later, Mr. Cometa was diagnosed with psychotic disorders; specifically, paranoia and delusions. (Doc. 190 at 144). Dr. Herkov explained that a person with delusions "has this fixed false belief that is not remotely

true, that is not shared by anyone else in his group, and that remains despite any type of evidence that you show a person.” (Doc. 190 at 144). Thus, “somebody may have the delusion that they are God or that they are the president of the United States, and you can talk to them and show them evidence that they’re not, and it doesn’t impact them at all.” (Doc. 190 at 144). Mr. Cometa’s paranoid delusions manifested themselves at that time even though he was medicated with risperidone. (Doc. 190 at 144).

Three months later, his physicians increased his dosage of risperidone due to his paranoia and delusions, but that still did not prevent delusional episodes from recurring in May of 2010, April of 2013, and May of 2013. (Doc. 190 at 144-45). Then, on June 5, 2013, Mr. Cometa was diagnosed with bipolar disorder I. (Doc. 190 at 145). Unlike bipolar disorder II or bipolar disorder III, disorders that are serious but still may allow people to “function,” a diagnosis of bipolar disorder I is the “bad one” and means the person is delusional. (Doc. 190 at 145).

On May 21, 2014, Mr. Cometa began taking Abilify, a mood stabilizer. (Doc. 190 at 145). Several months later, his physicians began giving him lithium carbonate, which is used to treat bipolar disorder. (Doc. 190 at 145). Dr. Herkov testified that, in February of 2016,¹ Mr. Cometa had “a number of paranoid

¹ It appears that Dr. Herkov meant February of 2015, not 2016, as his recitation of Mr. Cometa’s history otherwise proceeds in chronological order. (See Doc. 191 at 144-47).

delusions.” (Doc. 190 at 145). Many “of them focused towards the government and his maltreatment by the government, some of them having to do with Agent Orange, and a whole bunch of just delusional . . . content.” (Doc. 190 at 145).

Another delusion concerned perceived attempts by the VA to “force him out of the system” and “colluding with the military” to achieve that end. (Doc. 190 at 146). In March of 2015, Mr. Cometa began taking another mood-stabilizing drug, Seroquel, though the medical notes state that he began refusing his medications. (Doc. 190 at 146). Dr. Herkov explained that the refusal to take prescribed medications is not uncommon: “It is oftentimes that paranoid patients don’t realize that they’re paranoid; otherwise, there wouldn’t be a delusion. And so they refuse to take the medication.” (Doc. 190 at 146). Sometimes, Dr. Herkov continued, patients “see the medication as being poison and won’t take it.” (Doc. 190 at 146).

The following month, April of 2015, Mr. Cometa had another delusion that he was “being filled with the Holy Spirit” and began “talking loudly” about him being a “disciple of Jesus.” (Doc. 190 at 146). The final note in Mr. Cometa’s VA records reflects that he received a letter from the VA stating that he needed to sign an agreement due to his disruptive behavior. (Doc. 190 at 147). Mr. Cometa never signed the agreement and received no more treatment. (Doc. 190 at 147).

Dr. Herkov also interviewed Mr. Cometa’s ex-wife, who reported a significant deterioration in his mental health condition following their divorce in the summer of

2016. (Doc. 190 at 147). In fact, she reported Mr. Cometa had become so irrational and paranoid, that it became “unbearable,” and she had to file for divorce. (Doc. 190 at 148). Based on his review of the medical records and his interaction with Mr. Cometa, Dr. Herkov concluded to a high degree of psychological certainty that Mr. Cometa’s severe mental illness caused him to lack the ability to appreciate the wrongfulness of his conduct on the date of the charged offenses. (Doc. 190 at 150).

In support of his opinion, Dr. Herkov noted that, in the records from Mr. Cometa’s time in the federal detention center in Miami, the Bureau of Prison’s physicians observed “blatantly psychotic behavior.” (Doc. 190 at 150). And, according to Dr. Herkov, the only place that did not find that Mr. Cometa suffered from bipolar disorder was the facility in Butner, North Carolina. (Doc. 190 at 150).

Dr. Herkov summarized his opinion as follows: “Mr. Cometa, because of his severe long-term chronic mental illness, [and the] deterioration in the months before this due to lack of any treatment, did not know the wrongfulness of what he was doing.” (Doc. 190 at 153). Thus, he concluded that Mr. Cometa was legally insane at the time of the incident.

The Government called Dr. DuBois as a rebuttal witness. (Doc. 190 at 187). Dr. DuBois testified that Mr. Cometa suffered from PTSD and borderline personality disorder, but not bipolar disorder. (Doc. 190 at 217). In addition, Dr. DuBois testified that Mr. Cometa’s disorders did not meet the legal definition of insanity,

and thus Dr. DuBois concluded that Mr. Cometa was not insane on the date in question. (Doc. 190 at 221, 227). After the testimony of Dr. DuBois, the Government rested its case. (Doc. 190 at 260).

At the conclusion of the third day of trial, the district court asked Mr. Cometa whether he intended to exercise his right to testify in his defense.² (Doc. 190 at 262). Mr. Cometa said, “I’m not sure I completely understand it.” (Doc. 190 at 262). After the district court explained his right to testify, Mr. Cometa stated that there were “a lot of factors” that were “weighing” on his “mind.” (Doc. 190 at 263). When asked for clarification, Mr. Cometa expressed doubt about his “ability to testify.” (Doc. 190 at 263).

He explained, “there’s -- there’s something that’s undue pressure that is interfering with my ability to make that choice.” (Doc. 190 at 264). The district court asked him whether he needed some time to think about it, and he responded, “I’m not sure how to phrase this. I -- I --.” At that point, the district court cut him off and advised him to confer with trial counsel. (Doc. 190 at 264). Defense counsel then informed the district court that Mr. Cometa had not yet made up his mind about whether he intended to testify. (Doc. 190 at 264). The district court then decided to

² By agreement of the parties, this colloquy took place after the close of evidence, with the understanding that the defense could reopen its case if Mr. Cometa chose to testify.

allow Mr. Cometa to think about it over the night and report back on his decision in the morning. (Doc. 190 at 265).

The following day, Mr. Cometa announced that he wanted to testify. (Doc. 191 at 2). Mr. Cometa's choice came with a caveat: "Even though I choose to testify at this time, I've been under extreme emotional and physical duress for the last 72 to -- the whole week." (Doc. 191 at 3). He reiterated his feeling of "mental duress and physical duress" and stated that he did not feel "prepared" to testify that that moment. (Doc. 191 at 3). The district court dismissed this concern out of hand: "Mr. Cometa, I don't want to hear any more about what you're claiming to be duress." (Doc. 191 at 4). Mr. Cometa pressed the point and advised the district court that it was "affecting [his] ability to present [his] defense." (Doc. 191 at 4). The judge declined to discuss the matter any further, asked that the prosecutor to return to the courtroom. (Doc. 191 at 4).

Mr. Cometa expressed confusion: "I'm confused as to --." (Doc. 191 at 5). The district court did not let him finish his thought, "There's no -- nothing confusing, sir. You want to sit there and testify or do you want to come up here and testify? I'll give you that choice." (Doc. 191 at 5). Mr. Cometa then said, "I'm not physically or mentally capable at this time to [be] able to exercise my right." (Doc. 191 at 5). The district court once again dismissed any concerns about his competency:

Well, I beg to differ, sir. You're coherent, you understand your rights. You are pretending not to be able to, but you are clearly

physically and mentally capable of testifying. I'm asking you would you like to do so from your chair where you're sitting there or would you like to come up here and sit in the witness chair? You may have either option. Matters not to me.

(Doc. 191 at 5).

Mr. Cometa reiterated his concerns:

Sir, I don't want to be disrespectful or cause any interruptions or anything. I've been trying to be respectful and -- and let things proceed as rapidly as possible, but there's been several factors outside of my control that have interfered with my right to assist my defense counsel and to at this point defend myself in these -- in these very serious charges that can result in imprisonment for the rest of my natural life.

(Doc. 191 at 6).

The district court declined to inquire any further into the "factors" that "interfered with" Mr. Cometa's "right to assist in his defense." (Doc. 191 at 6). Instead, it took a ten-minute recess. (Doc. 191 at 6). After the break, Mr. Cometa waived his right to testify. (Doc. 191 at 7). The district court then proceeded with closing arguments and jury instructions. The jury rejected Mr. Cometa's insanity defense and found him guilty of all counts. (Doc. 126).

The Faretta Hearing

After the conclusion of trial, Mr. Cometa filed a pro se motion to dismiss his court-appointed counsel, represent himself at sentencing, and undergo a presentence psychological evaluation. (Doc. 136). As grounds for the discharge of his attorney,

Mr. Cometa cited his attorney's refusal to request a presentence psychological evaluation. (Doc. 136 at 1).

The lower court held a hearing on the motion in March of 2019. (Doc. 185). At several points during the hearing, Mr. Cometa expressed concerns that the United States government was trying to kill him and other veterans. (Doc. 185 at 9, 14, 18). When he was asked whether he understood the penalties he was facing, Mr. Cometa said, "I understand that the United States Government has been trying to take my life for the last eight years. And they take the lives of veterans -- 22 per day that they admit in this country." (Doc. 185 at 9). At another point, he asked, "Why does this country desire to kill their veterans, and me particularly, slowly? I mean this is torture." (Doc. 185 at 18).

Mr. Cometa also repeated his request to be put to death prior to standing trial for his crimes:

I've -- you know, as I said before, if the United States wants to kill me before trial, I said I would plead guilty and they could execute me. No problems.

I would -- I would gladly march to the gallows and let them lop my head off. But they choose not to do that. They choose to kill me inch by inch with locking me up with no treatment for my illnesses.

(Doc. 185 at 14). He also questioned why he was not put to death immediately: "But what I don't understand is why you don't have the -- the guts to come out and kill me right away." (Doc. 185 at 18). At another point, Mr. Cometa again stated that he

had not received any medications, apart from “over-the counter medications that have not cut it.” (Doc. 185 at 33).

Mr. Cometa renewed his request for a psychological evaluation prior to his sentencing at two different junctures of the hearing. (Doc. 185 at 12, 16). His attorney also suggested a full competency evaluation might be in order:

Mr. Cometa -- to some degree, he seems to be suggesting that he would like to be examined for his mental competency, even to be sentenced at this stage, as if there's been some change in his mental competency since trial.

And that would be at the discretion of the Court, if Your Honor feels that what has been observed here in court today indicates a lack of competency. I'll withhold any opinion unless the Court seeks it.

But I do think it's important for Mr. Cometa to acknowledge that he's aware that if his competency gets reexamined now, it will be, almost undeniably, only at the behest and pleasure of the United States, and not by virtue of any expert that I would ask to be hired under the Criminal Justice Act.

Not that I wouldn't be willing to do the motion. If I were directed, I certainly would be. But just because of the stage of the case that we're at, I think any interruption for a competency exam is probably going to be of the kind that the Government uniquely does.

And I know in the past Mr. Cometa has been very anguished about the amount of travel that's involved and the amount of delay, and the -- let's say the exam had to occur at Butner, North Carolina, a place where I know he's not thrilled to go, where a veteran or somebody committed suicide the last time he was there.

I don't know that he really wants to go on that kind of a journey at this time. But it's something that I think we all should hear from his lips, that he's considering it, if, indeed, he wants to be examined for competence.

I will tell the Court that the reason I didn't move for this so-called mental health exam, at the behest of Mr. Cometa, is that it was my impression and understanding at the time that the interests of Mr. Cometa in having such an exam was that he had -- he thought that the outcome of that exam could get him beneath the ten-year mandatory minimum of 924(c).

Now, if I'm wrong about that, he's welcome -- or if the Court were to inquire of him, he'd certainly be welcome to give his own opinion on that. But I knew that was not the case.

And, you know, I didn't really want to send him off on one of those odysseys to Butner and then have him come back and he still wouldn't have his exemption from a 924(c). And it just didn't make a lot of sense to me.

(Doc. 185 at 22-24).

The court declined to address the issue of Mr. Cometa's competency because no one had filed a formal motion requesting a competency evaluation: "Well, I don't think -- I didn't read, anyway -- the Court didn't read Mr. Cometa's motion as one in which he was seeking his own mental competency evaluation." (Doc. 185 at 27-28). Mr. Cometa confirmed that he was not seeking a competency evaluation, and instead stated that his "main concern" was his "immediate health and safety" and his "long-term health and safety." (Doc. 185 at 29).

The district court observed that Mr. Cometa was "speaking coherently" about his concerns with your health care, and so it concluded that the issue was not "a question of competency." (Doc. 185 at 38). The district court also noted that Mr. Cometa had not formally requested a competency evaluation and suggested that his

mental health was a matter that would be addressed in his presentence investigation report. (Doc. 185 at 38).

At the close of the hearing, the district court held that Mr. Cometa was competent to represent himself at sentencing. (Doc. 185 at 38-39). In a subsequent written order, the district court opined that there was “no basis” for a competency evaluation, because (1) Mr. Cometa’s request related to a challenge to his competency at the time of the offense; (2) the court already had “the benefit of numerous mental health exams”; and (3) Mr. Cometa “made clear at his hearing” that he was not “asking for a competency evaluation.” (Doc. 144 at 2). Therefore, it denied his request for a psychological evaluation, though it permitted him to proceed to sentencing pro se. (Doc. 144 at 2).

The Sentencing

During the sentencing, Mr. Cometa made several statements that were consistent with the delusions reported by Dr. Herkov. Specifically, Mr. Cometa said as follows:

Your Honor, every time I went to the VA, my belief was they were going to take my life. As it was demonstrated, my life was threatened on several occasions, I was hospitalized in life-threatening situations several times because of deliberate attempts to take my life through malpractice at the VA. And even though the doctors failed to record the symptoms that I presented to them, which was their sworn duty to record, I was in fear for my life constantly going to the VA. And my several attempts to solve these situations in a peaceful manner were turned down by every organization I approached and I was basically

ordered to return there by the Department of Justice as the only way to get a solution to this problem and by the VA as well.

(Doc. 193 at 21-22). The district court treated these delusions as objections to the minimal planning enhancement, U.S.S.G. § 2A2.2, and overruled them without inquiring into the competency of Mr. Cometa. (Doc. 193 at 22).

Later, Mr. Cometa objected that no presentence psychological examination took place. (Doc. 193 at 33). The district court treated this objection as a request for downward departure based on reduced mental capacity, U.S.S.G. § 5K2.13, and denied that request, once again without inquiring into Mr. Cometa's competency to proceed with the sentencing. (Doc. 193 at 36).

Prior to the imposition of the sentence, Mrs. Cometa testified on her ex-husband's behalf. In her testimony, she lamented Dr. Poff's failure to treat Mr. Cometa at the VA, which she viewed as the cause of his mental breakdown. (Doc. 193 at 43-45). Mr. Cometa echoed those sentiments, observing that he received no treatment whatsoever for nine months, at which point things "just unraveled." (Doc. 193 at 46).

He then descended back into the same sort of delusions described by Dr. Herkov at trial: an irrational fear of doctors—"all they want to do is harm me"—a belief that he suffered from exposure to agent orange—"I had neuropathy from I believe agent orange exposure and it got to the point where the bicycling became a torture machine"—and an irrational belief that he went to the VA on the date of the

offenses to defend himself—“I went there . . . in a defensive posture . . . [and] I saw nothing wrong with using [the assault weapon] in defense of my own freedoms when nobody else would stand up for that defense, being threatened with deadly force by people who chose to rob me of my freedom of life.” (Doc. 193 at 46).

After the conclusion of his statement, the district court pronounced its sentence: Mr. Cometa would serve a term of 207 months of incarceration, comprised of two concurrent terms of 87 months of imprisonment on Count One and Count Two, to be followed by a consecutive term of 120 months of imprisonment on Count Three. (Doc. 193 at 46). This appeal follows.

SUMMARY OF THE ARGUMENT

The district court erred when it failed to conduct a competency evaluation, even though Mr. Cometa’s competency to stand trial or be sentenced was in grave doubt. The Due Process Clause requires a trial judge to conduct a competency hearing whenever the evidence before it raises a reasonable doubt whether a defendant is mentally competent to go to trial or sentencing.

In this case, Mr. Cometa had been previously declared incompetent and needed to take doses of anti-psychotic medication to restore his competency. His attorney requested a competency evaluation at the beginning of trial, and shortly thereafter Mr. Cometa informed the district court that he had not received his medications for several days prior to trial. These concerns, standing alone, should

have triggered a competency evaluation. However, Mr. Cometa also exhibited other indications, both during his trial, at the *Faretta* hearing, and at his sentencing, that called his competency into question. It follows that the failure to conduct a competency evaluation at trial and/or sentencing constitutes reversible error.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO ORDER A HEARING ON MR. COMETA'S COMPETENCY AFTER RECEIVING INFORMATION THAT RAISED A BONA FIDE DOUBT AS TO WHETHER HE REMAINED COMPETENT TO STAND TRIAL OR BE SENTENCED.

A. Standard of Review

This Court reviews a district court's failure to order a hearing on a defendant's competency for an abuse of discretion. *See United States v. Wingo*, 789 F.3d 1226, 1236 (11th Cir. 2015).

B. Argument on the Merits

The district court erred when it failed to conduct a competency hearing after receiving information that raised a bona fide doubt as to whether Mr. Cometa remained competent to stand trial or proceed to his sentencing. "Every defendant has a substantive fundamental right under the Due Process Clause not to be tried or convicted while incompetent." *Wingo*, 789 F.3d at 1235 (citing *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996)). Competence requires the defendant to possess the "capacity to understand the nature and object of the proceedings against him, to

consult with counsel, and to assist in preparing his defense.” *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

The Constitution protects “not just the substantive right not to be tried or convicted while incompetent, but also the procedural right under the Due Process Clause to ‘adequate’ procedures to protect the right not to be tried or convicted while incompetent.” *Wingo*, 789 F.3d at 1235 (quoting *Pate v. Robinson*, 383 U.S. 375, 378 (1966)). “To comply with a defendant’s procedural right, once the court learns of information that raises a ‘bona fide doubt regarding the defendant’s competence,’ the court must apply adequate procedures to ascertain whether the defendant is competent to proceed to trial.” *Id.* (quoting *James v. Singletary*, 957 F.2d 1562, 1569-71 (11th Cir. 1992)) (internal punctuation omitted).

The procedural right to a competency evaluation is codified at 18 U.S.C. § 4241(a), which provides as follows:

Motion to determine competency of defendant. — At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, . . . the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court **shall** grant the motion, or **shall order such a hearing on its own motion**, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

18 U.S.C. § 4241(a) (emphasis added).

The unambiguous statutory language creates a mandatory obligation “to *sua*

sponte hold a hearing if it has ‘reasonable cause’ to believe that the defendant ‘may’ be incompetent.” *Wingo*, 789 F.3d at 1236 (quoting 18 U.S.C. § 4241(a) and citing *Tiller v. Esposito*, 911 F.2d 575, 576 (11th Cir. 1990)). A “court must conduct a hearing under those circumstances.” *Wingo*, 789 F.3d at 1236.

This Court has identified three factors to be considered in determining whether information before a court establishes a bona fide doubt regarding the defendant’s competence: (1) prior medical opinion regarding the defendant’s competence to stand trial; (2) evidence of the defendant’s irrational behavior; and (3) the defendant’s demeanor at trial. *Wingo*, 789 F.3d at 1236 (quoting *Tiller*, 911 F.2d at 576) (internal punctuation omitted).

C. Prior medical opinions available and known to the District Court established bona fide doubts about Mr. Cometa’s competency.

Here, all three of factors indicate that there was a bona fide doubt regarding Mr. Cometa’s competence to stand trial and proceed to sentencing. First, the prior medical opinions raised considerable doubt about Mr. Cometa’s competency. Mr. Cometa was previously found incompetent based on the opinions of both Dr. Herkov and Dr. Feldman, an independent psychologist employed by the BOP. And, as Dr. Herkov testified, Mr. Cometa had an extensive history of psychosis dating back to 2008, when he was treated for “hearing voices” and paranoia. (Doc. 190 at 143). He was later diagnosed with Bipolar I disorder, which renders individuals

delusional. (Doc. 190 at 145). And, during his time in the federal detention center in Miami, Mr. Cometa exhibited “blatantly psychotic behavior.” (Doc. 190 at 150).

Although Mr. Cometa was found competent some five months before trial, that finding arose out of a stipulation by newly-appointed counsel, who had not even read either of the expert reports, but instead relied on his “lawyerly abilities.” Moreover, the magistrate had not been provided with the latest competency report prepared by Dr. Herkov establishing the Defendant’s lack of competency. Finally, the restoration of Mr. Cometa’s competency turned on his receipt of antipsychotic medications. Both the federal public defender and his private CJA attorney advised the district court that Mr. Cometa’s continued competency depended on the regular administration of medication. By the time of trial, though, Mr. Cometa was no longer taking his medication.

The district court knew that a lapse in his medication could render him incompetent; indeed, the district court recommended his transfer from Marion County Jail to Citrus County Jail based on a finding regarding his “fragile” mental state, and the recognition that Mr. Cometa needed medication to retain his competency. The district court was also advised that Mr. Cometa’s competency was “fluid,” and that the failure to take his medications could very well leave him incompetent. As Dr. Poff testified, the only effective way to treat patients, like Mr. Cometa, who had psychotic disorders was medication because “the problem is more

of a neurochemical issue than anything else, and therapy just does not work.” (Doc. 189 at 35).

Given the prior medical opinions related to Mr. Cometa’s incompetency and the undisputed fact that he was not taking his medication at the time of trial, the failure to hold a hearing violated Mr. Cometa’s right to Due Process. *See Demos v. Johnson*, 835 F.2d 840, 843-44 (11th Cir. 1988) (trial court erred in refusing to grant the defendant’s request for a psychiatric examination, where evidence indicated that he had a history of glue sniffing and had two prior occasions of psychiatric treatment); *Tiller*, 911 F.2d at 577-78 (granting habeas petition where there was psychiatric testimony that the defendant suffered from auditory hallucinations and was a severe paranoid schizophrenic and where the defendant asked if he could have psychiatric treatment during the plea colloquy); *see also Miles v. Stainer*, 108 F.3d 1109 (9th Cir. 1997) (habeas relief granted where defendant had previously been declared incompetent and was taking large doses of anti-psychotic drugs and where indications existed that he was not using the drugs, and thus his ability to comprehend the proceedings would have been compromised).

D. Evidence concerning Mr. Cometa’s irrational behavior raised bona fide doubts about his competency.

Setting aside his prior medical history, Mr. Cometa displayed irrational behavior even after the finding that his competency was restored. At his arraignment, the district court learned that Mr. Cometa told his attorney that he

would plead guilty, but only on the condition that he be put to death within thirty days. (Doc. 183 at 10-11). Mr. Cometa repeated his request to be immediately executed during his *Faretta* hearing. (Doc. 185 at 14). Courts have held that the compulsion to be put to death is evidence of incompetency. *Deere v. Woodford*, 339 F.3d 1084, 1085 (9th Cir. 2003), *as amended on denial of reh'g* (Oct. 2, 2003).

In addition, at his arraignment, Mr. Cometa repeatedly stated that he did not understand the proceedings and manifested delusional behavior, stating that the “United States” had been “trying to kill” him for several years. (Doc. 183 at 5-7). That same delusion recurred during his *Faretta* hearing and again at his sentencing hearing, where Mr. Cometa expressed a belief that the Government was trying to kill him and complained of exposure to “agent orange,” a fantasy that Dr. Herkov had previously described as “delusional . . . content.” (Doc. 193 at 46; Doc. 190 at 145).

Furthermore, Mr. Cometa notified the district court that his mental illness rendered him unable to represent himself, a finding that the district court expressly endorsed as its rationale for declining to conduct a *Faretta* inquiry. The Supreme Court has recognized that an individual may lack the competency to represent himself but still retain the competency to stand trial. *Indiana v. Edwards*, 554 U.S. 164, 171 (2008). Nevertheless, a finding that mental illness prevented Mr. Cometa from exercising his constitutional right to self-representation should raise bona fide doubt about his competency to stand trial.

Finally, though the district court found that Mr. Cometa was deliberately refusing to take his medications, as opposed to the jail depriving him of the medications, the refusal to take medication can itself be a sign of mental illness. As Dr. Herkov testified, patients can “see the medication as being poison and won’t take it.” (Doc. 190 at 146). Thus, Mr. Cometa’s irrational behavior and his failure to take his medications should also have triggered a competency evaluation.

E. Mr. Cometa’s demeanor at trial established bona fide doubts about his competency, despite the district court’s comments and the undeveloped nature of the record.

The third factor, Mr. Cometa’s demeanor at trial, is somewhat underdeveloped because of the Court’s failure to conduct a competency hearing. Still, the evidence that is in the record further establishes a bona fide doubt about his competency. Although the district court commented at several junctures that Mr. Cometa seemed coherent, these comments are contradicted by defense counsel’s request for a competency hearing on the first day of trial and yet again at the *Faretta* hearing.

Mr. Cometa also appeared discombobulated during the colloquies regarding his decision on to discharge his lawyer, whether to proceed with an insanity defense and whether to testify in his defense. For instance, he testified that he did not “completely understand” his right to testify. He expressed doubt about his “ability to testify,” citing “undue pressure” that was “interfering with [his] ability to make that choice.” (Doc. 190 at 264).

The following day, he reiterated his feeling of “mental duress” and expressly advised the district court that it was “affecting [his] ability to present [his] defense.” (Doc. 191 at 3-4). While the judge opined that Mr. Cometa looked “coherent” (Doc. 191 at 5), his responses during that colloquy raise some question about the validity of the district court’s finding. Accordingly, given bona fide questions regarding Mr. Cometa’s competency, both at his trial and his sentencing, this Court should reverse his conviction and remand for further proceedings.

Two final points merit discussion. The Government might argue that Mr. Cometa received a competency hearing before trial, and so another hearing was not necessary. There are several flaws in this argument. As an initial matter, the abbreviated competency hearing that did take place lacked the procedural safeguards envisioned under 18 U.S.C. § 4247(d), which provides that provides that a defendant shall have “an opportunity” at the hearing “to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine” the Government’s witnesses. None of those procedural safeguards were afforded at the only competency hearing that took place below.

In fact, the district court found Mr. Cometa competent because the parties stipulated to the report of Dr. DuBois, which defense counsel apparently had not even read prior to his stipulation. He also had not read the second report of Dr. Herkov, who opined that Mr. Cometa remained incompetent to stand trial. As noted

previously, this report was not provided to the magistrate. Thus, it is far from clear that the hearing that took place even counts as a competency evaluation.

More importantly, Mr. Cometa's competency remained fluid, and as the Supreme Court noted in *Drope*, "[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." 420 U.S. at 181; *see also Reynolds v. Norris*, 86 F.3d 796 (8th Cir. 1996).

In *Reynolds*, as here, the defendant had a long history of mental illness. Prior to the beginning of his trial, he had been committed to a hospital after it was determined that he was not competent to stand trial. *Reynolds*, 86 F.3d at 801. Subsequent hearings revealed that he had improved to the point that he was competent. *Id.* Nevertheless, the Eighth Circuit held that the trial court erred in not conducting another hearing immediately prior to (or during) the trial because his "meandering and irrational testimony at trial evidenced that his condition had deteriorated." *Id.*

Second, the Government might point to Mr. Cometa's own insistence on his competency as evidence that the district court committed no error in having him evaluated. The flaw in this argument is that Mr. Cometa suffered from delusions that might well have prevented him from accurately assessing his competency.

Furthermore, as the Supreme Court recognized in *Pate*, a defendant who may be incompetent, cannot “knowingly or intelligently ‘waive’ his right to have the court determine his capacity to stand trial.” *Pate*, 383 U.S. at 384. The district court had an independent duty to conduct its own sua sponte competency evaluation as soon as it received information that raised a bona fide doubt as to Mr. Cometa’s competency. *Wingo*, 789 F.3d at 1235.

Here, there were myriad signs that Mr. Cometa’s competency was in doubt, including his uttering statements that strongly suggested he was delusional prior to trial, during trial, at his *Faretta* hearing, and at his sentencing.

CONCLUSION

Our Constitution “‘jealously guard[s]’ an incompetent criminal defendant’s fundamental right not to stand trial or be convicted.” *Wingo*, 789 F.3d at 1235 (quoting *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996)). The district court failed to protect this right. Indeed, a review of the transcripts establishes that defense counsel raised the issue at trial but left it to the court’s and government’s “interest” in the matter.

The court was aware that Mr. Cometa suffered from a mental illness that was impacting his ability to communicate with his lawyer. The court knew that Mr. Cometa had not been on his necessary psychiatric medications in the days leading up to the trial. The court suggested that Mr. Cometa may need to be evaluated or

have a session with Dr. Herkov but declined to follow-up on this procedure since the case had been set for trial and the expert may not have been available for such an examination on that day.

The court heard Mr. Cometa's complaints about his physical and psychological duress, as well as his statements that he was POW and enemy combatant. It also heard Mr. Cometa say that his mental condition was interfering with his ability to defend himself. The court observed Mr. Cometa's expression of his desire to plead so he could be killed, as well as his similar misunderstanding regarding the types of defenses (i.e. not guilty by reason of insanity versus a simple plea of not-guilty) he could raise. The court even expressed its own doubts about his competency and the need for an evaluation just prior to the impaneling of the jury. Against this backdrop, the district court should have conducted a competency hearing to determine his competency at trial.

The district court also should have held a competency hearing prior to sentencing. At his *Faretta* hearing, Mr. Cometa requested a psychological evaluation, and his attorney again suggested a full competency evaluation prior to his sentencing. Mr. Cometa also exhibited the same delusional behavior described by Dr. Herkov and once again asked to be executed. His delusions continued during his sentencing. Based on these facts, it was an abuse of discretion not to conduct a

competency evaluation. Accordingly, this Court should reverse Mr. Cometa's conviction and remand for a new trial.

DATED this 21st day of August, 2019.

Respectfully submitted,

/s/ Fritz Scheller

FRITZ SCHELLER

Florida Bar No. 183113

Fritz Scheller, P.L.

200 E. Robinson Street, 1150

Orlando, Florida 32801

PH: (407) 792-1285

FAX: (407) 513-4146

Email: fscheller@fluaslaw.com

Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of August, 2019, I served all parties of record via CM/ECF.

/s/ Fritz Scheller

FRITZ SCHELLER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is typed in Times New Roman style with a 14-point pitch and complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B), as it contains 10,565 words.

/s/ Fritz Scheller

FRITZ SCHELLER