IN THE

MISSOURI SUPREME COURT

STATE EX REL. MICHAEL KELLY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. SC97744
	)	
JULIE INMAN,	)	
REGIONAL EXECUTIVE OFFICER	)	
SOUTHEAST MISSOURI	)	
MENTAL HEALTH CENTER,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS

PETITIONER'S REPLY BRIEF AND ARGUMENT

Gwenda Reneé Robinson
Missouri Bar No. 43213
District Defender, Office B/Area 68
1010 Market Street, Suite 1100
St. Louis, MO 63101
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov

ATTORNEY FOR PETITIONER

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JURISDICTIONAL STATEMENT

Petitioner adopts the jurisdictional statement set out in Petitioner's Brief, Statement, and Argument, filed on August 5, 2019, in this Court in appeal no. SC97744.

STATEMENT OF FACTS

Petitioner adopts the statement of facts set out in Petitioner's Brief, Statement, and Argument, filed on August 5, 2019, in this Court in appeal no. SC97744, and corrects the unintentional misstatement included therein about the party who moved for the mental examination of Michael Kelly. The defense, and not the State, moved for the mental examination (E5).

Mr. Kelly will cite to the record as follows: Petitioner's Exhibits, "(E#, p.)"; Respondent's Exhibits, "(Resp. Ex. (letter), p.)"; Petitioner's Brief, "(Pet. Br.)"; and Respondent's Brief, "(Resp. Br.)."

REPLY POINT

Habeas corpus is proper because Mr. Kelly had a non-waivable right to be competent at his NGRI plea, and the denial of his right not to be tried or proceeded against while incompetent constituted the type of structural error that requires reversal without a showing of prejudice, and results in manifest injustice if not corrected. Any alleged procedural default of Mr. Kelly's claim of error is excusable under the cause-and-prejudice exception to the procedural bar, and the doctrine of invited error does not apply to preclude habeas review of the claim.

Pate v. Robinson, 383 U.S. 375 (1966);

Weaver v. Massachusetts, 137 S.Ct. 1899 (2017);

Raithel v. State, 226 So.3d 1028 (Fla. Dist. Ct. App. 2017);

People v. Mondragon, 217 P.3d 936 (Col. Ct. App. 2009);

§ 552.020.

REPLY ARGUMENT

- ***Mr. Kelly had a non-waivable right to be competent at his NGRI plea, and the denial of his right not to be tried or proceeded against while incompetent constituted the type of structural error that requires reversal without a showing of prejudice, and results in manifest injustice if not corrected.***

Respondent chiefly argues that Mr. Kelly's claim is procedurally defaulted and that his procedural default is inexcusable under any exception to the procedural bar, including the cause-and-prejudice exception (Resp. Br. 8-15). As support, respondent cites *State ex rel. Strong v. Griffith*, 462 S.W.3d 732, 739 (Mo. banc 2015), which is distinguishable from the present case. In *Strong*, the petitioner filed a petition for writ of habeas corpus raising a new claim that he had not previously presented at his trial, on post-conviction review, or on federal habeas review, although he had availed himself of each. *Id.* at 736. He newly claimed that "he should not be executed because he was severely mentally ill at the time he committed his crimes." *Id.*

This Court did not consider the petitioner's new claim. *Id.* at 736-39. This Court held the claim was not cognizable because petitioner had procedurally defaulted the claim by failing to raise it earlier when he had had the opportunity to do so. *Id.*

But key to the Court's holding was that in his petition to this Court, petitioner had not claimed that he was incompetent at trial or incompetent to be

executed and had, instead, claimed only mental illness at the time of the offense. *Id.* at 736, 738-739.

Here, as distinguished from the petitioner in *Strong*, Mr. Kelly has not only claimed he was incompetent at the time of his NGRI plea, but also has proven his incompetency by filing the court's order finding him to be incompetent with his petition to this Court (E3). He also has claimed that his incompetency prevented him from availing himself of available remedies for the error committed by the court's acceptance of his NGRI plea (Pet. Br. 22-25).

This Court should find these distinctions to be decisively significant, and that these distinctions dictate a different outcome in Mr. Kelly's case than that in *Strong*. The right to be competent is non-waivable. In *Pate v. Robinson*, the Supreme Court held: "[I]t is contradictory to argue that a defendant may be incompetent, yet knowingly or intelligently 'waive' his right to have the court determine his competency to stand trial." 383 U.S. 375, 384 (1966).

Also, although undersigned counsel has not found Supreme Court case law expressly stating so, the denial of the right not to be tried or proceeded against while incompetent seems to fall within at least one or more of the three recognized categories of structural error. *See, e.g., People v. Mondragon*, 217 P.3d 936, 942 (Col. Ct. App. 2009) ("[i]f defendant was in fact incompetent, reversal is required because we conclude that the trial of an incompetent defendant constitutes structural error").

"Structural [errors] are 'constitutional deprivations . . . affecting the framework within which trial proceeds, rather than simply error in the trial process itself.'" *Strong v. State*, 263 S.W.3d 636, 647 (Mo. banc 2008) (*quoting Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). "These errors deprive defendants of 'basic protections' without which a 'criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (*quoting Rose v. Clark*, 478 U.S. 570, 577-78 (1986)).

Structural errors also stand apart from other constitutional errors because they require automatic reversal without a showing of prejudice. *State v. Hastings*, 450 S.W.3d 479, 448 n. 6 (Mo. App. E.D. 2014) (*citing Washington v. Recuenco*, 548 U.S. 212, 218-19 (2006)). They are presumptively prejudicial and not subject to harmless error analysis. *State v. Bolden*, 558 S.W.3d 513, 517 (Mo. App. E.D. 2016); *State v. Kunoga*, 490 S.W.3d 746, 767 (Mo. App. W.D. 2016). "A constitutional right implicating structural error 'is either respected or denied; its deprivation cannot be harmless.'" *Kunoga*, 490 S.W.3d at 767 (*quoting McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984)).

There are at least three broad categories of structural errors. *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017). "First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest."

Id. "Second, an error has been deemed structural if the effects of the error are simply too hard to measure." *Id.* "Third, an error has been deemed structural if the error always results in fundamental unfairness." *Id.*

The denial of the constitutional right not to be tried or proceeded against while incompetent is an error that so undermines the fairness of the entire adjudicatory process that it is not amenable to harmless error review. *Pate*, 383 U.S. at 378. The right not to be tried or proceeded against while incompetent is a significant fundamental right because a fair trial is not possible if the defendant does not have the competence to exercise the rights that he is afforded. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996).

Also, as is the case with other structural errors, the denial of this fundamental right requires automatic reversal without a showing of prejudice. *See Thomas v. State,* 249 S.W.3d 234, 239 (Mo. App. E.D. 2008) ("if Movant was not competent at the time of his plea, then his motion clearly would merit relief, and he suffered prejudice"); *see also State v. McCurry-Bey*, 298 S.W.3d 898, 903 (Mo. App. E.D. 2009) (reversing because evidence showed the defendant was incompetent); *see also Hubbard v. State*, 31 S.W.3d 25, 38 (Mo. App. W.D. 2000) (stating prejudice prong for ineffective assistance of counsel claim is satisfied if movant demonstrates a reasonable probability that he was incompetent, sufficient to undermine confidence in the outcome).

Because Mr. Kelly has shown that structural error occurred resulting in the denial of his due process right to be competent at his NGRI plea, this Court

should grant relief, irrespective of any alleged procedural default. This is a circumstance so rare and exceptional that failure to hear and determine Mr. Kelly's claim will result in manifest injustice. *State ex rel. Clemons v. Larkins*, 475 S.W.3d 60, 76 (Mo. banc 2015) (*citing State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993)).

- ***Any alleged procedural default of Mr. Kelly's claim of error is excusable under the cause-and-prejudice exception to the procedural bar.***

Moreover, any alleged procedural default is excusable based on the cause-and-prejudice exception to the procedural bar (*see* Pet. Br., pp. 22-25 (discussing that Mr. Kelly's incompetency and its effect on his ability to pursue available post-conviction remedies constitute cause and prejudice).

Should this Court find Mr. Kelly's mental incompetency insufficient to establish cause and prejudice, this Court should consider the failures of Mr. Kelly's plea counsel who failed to object to the acceptance of the plea. "The cause and prejudice prong cannot generally be employed to redress defense counsel's failings, as cause and prejudice refers to a "procedural defect . . . caused by something external to the defense that is, a cause for which the defense is not responsible." *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 516-17 (Mo. banc 2010) (*quoting Brown v. State*, 66 S.W.3d 721, 725 (Mo. banc 2002)).

The cause and prejudice prong has, however, been used to redress the ineffective assistance of counsel, and due to the seriousness of counsel's error in

permitting an incompetent defendant to proceed with a NGRI plea, this incidence of ineffectiveness would justify its use. *See*, *e.g.*, *Ewing v. Denney*, 360 S.W.3d 325 (Mo. App. W.D. 2012) (granting relief where counsel failed to appeal and misled the defendant, resulting in the procedural default of post-conviction remedies); *see also Thomas,* 249 S.W.3d at 239 (addressing claim of ineffective assistance for failing to investigate incompetency).

- ***The doctrine of invited error does not apply to bar Mr. Kelly's claim.***

Respondent argues that due to counsel's failings, Mr. Kelly's claim is barred by the doctrine of self-invited error (Resp. Br. 26-27). The doctrine of self-invited error precludes a party from taking advantage of self-invited error or error of his own making. *State v. Ferguson*, 568 S.W.3d 533, 546 (Mo. App. E.D. 2019); *Miller v. State*, 558 S.W.3d 15, 22 (Mo. banc 2018).

This doctrine should not apply to claims of incompetency, as the right not to be tried or proceeded against while incompetent is non-waivable. *Pate*, 383 U.S. at 384. However, assuming for argument's sake, that the doctrine of invited error can apply in the incompetency context, Mr. Kelly argues that the record in this case does not support application of the doctrine.

The record does not support a finding that Mr. Kelly or his attorney invited the error by entering the NGRI plea, knowing the court would err in accepting it, or by manufacturing the error with the strategic purpose of later successfully complaining about the error on post-conviction, appeal, or habeas.

Rather, the record indicates the opposite. The record shows 27 years and eight months or 10,127 days elapsed from June 20, 1991, the date of the court's DMH commitment order, to March 12, 2019, the date Mr. Kelly filed his petition for writ of habeas corpus in this Court challenging his NGRI plea. Had Mr. Kelly knowingly and voluntarily entered the invalid NGRI plea, without objection, for purposes of later taking advantage of the court's error in accepting it, he would not have waited so long to lodge a complaint.

Instead, he would have asserted the error on post-conviction or appeal at the earliest opportunity in order to obtain a prompt release from his unlawful commitment and confinement in the DMH. But he did not because he was unaware of the error.

Respondent suggests Mr. Kelly's failure to object to the error at his plea and procedural default of appeal remedies for the error are dilatory tactics employed to prejudice the State and benefit Mr. Kelly (Resp. Br. 26). Mr. Kelly's failure and default, however, were not the result of an exercise of strategy for some tactical purpose, but were the result of ignorance, mistake, and incompetency. The record does not show otherwise.

Mr. Kelly was legally incompetent during his NGRI plea and at the time during which he could have lodged objections to his NGRI plea through the filing of post-conviction motions and appeals. While incompetent, he lacked the ability to appreciate his legal position, formulate rational strategies, and execute them to his legal advantage. He did not have "sufficient present ability to consult with his

lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960).

Under these circumstances, Mr. Kelly cannot be faulted for failing to object to his NGRI plea *pro se* or file *pro se* post-conviction motions and appeals while his incompetency remained. Mental competence is required for self-representation. *Godinez v. Moran*, 509 U.S. 389 (1993). Mr. Kelly's mental incompetency would have made it impossible for him to apprehend his claims of error and ineffective assistance of counsel, assert them, and pursue available remedies within the time limitations permitted by rule on his own, and the record does not show counsel represented Mr. Kelly at any time other than at his NGRI plea.

Respondent notes that Mr. Kelly had defense counsel at the time of his NGRI plea who filed the motion for mental examination, filed the notice of intent to rely on the NGRI defense, and stood silent as the court accepted Mr. Kelly's plea (Resp. Br. 8-10, 26). Respondent further argues that counsel's actions invited the court's error, and that for this reason, the doctrine of invited error applies (Resp. Br. 8-10, 26).

A party is not estopped by the doctrine of invited error, however, unless it appears from the record that the court was led or induced by counsel to commit the error. *See, e.g., Myers v. Buchanan*, 333 S.W.2d 18, 23 (Mo. banc 1960) (discussing application of the doctrine to instructions); *Washburn v. Grundy*

Elec. Co-op, 804 S.W.2d 424, 430 (Mo. App. W.D. 1991) (same). "A party has a right to try the issues which have been forced upon him" by the court. *Arnold v. City of Maryville*, 85 S.W. 107, 108 (Mo. App. 1905).

Mr. Kelly has the right to try the issue of his incompetency at his NGRI plea on the merits. It does not appear from the record that Mr. Kelly and his counsel misled or induced the court to commit the error of accepting a NGRI plea from an incompetent defendant. Mr. Kelly's attorney merely requested an examination as to Mr. Kelly's competency and mental state at the time of the offense, without knowing with certainty the outcome. Once the court ordered the requested mental examination, Mr. Kelly and his counsel had no control over the results of the examination, and no choice of whether Mr. Kelly would be found competent or not. The determination of competency was left to the court, and Mr. Kelly and his counsel were bound by the court's determination. § 552.020.7, RSMo 1986.

The record also does not show that counsel or Mr. Kelly, as a matter of strategy, influenced or induced the court to find Mr. Kelly to be incompetent, as opposed to competent. Instead, counsel and Mr. Kelly waited for the court's finding of competency, and after the adjudication of incompetency, they yielded to the court's judgment and participated in the NGRI plea.

Respondent argues that their participation in the NGRI plea, without objection, waived the error (Resp. Br. 8-10, 26). Mr. Kelly argues that it did not. Their participation in the NGRI plea without objecting does not alone indicate that counsel and Mr. Kelly were knowingly complicit in the court's error, or

manufactured the error with the strategic purpose of later taking advantage of it. There are other reasons for their failure to object, including mistake of law or fact, ignorance of the error, or in Mr. Kelly's case, mental incompetency.

Mr. Kelly acknowledges, however, that "[a] client is bound by the decisions of counsel as to the management of the trial and as to stipulations which give effect to that strategy." *Worthington v. State*, 166 S.W.3d 566, 578-79 (Mo. banc 2005) (*quoting State v. Hurt*, 931 S.W.2d 213, 214 (Mo. App. W.D. 1996)). He further acknowledges that "[a] party cannot complain on appeal of any alleged error in which, by his or her own conduct at trial, he or she joined in or acquiesced to." *State v. Hogan*, 297 S.W.3d 597, 602 (Mo. App. E.D. 2009) (*citing State v. Fackrell*, 277 S.W.3d 859, 865 (Mo. App. S.D. 2009)).

Although this Court could find that Mr. Kelly's attorney's passive acquiescence to Mr. Kelly's NGRI plea, knowing Mr. Kelly's incompetence, invited the court's error, it shouldn't. To do so would eviscerate the court's independent duty to *sua sponte* protect the defendant's right not to be tried or proceeded against while incompetent and sanction the court's error in accepting an incompetent defendant's NGRI plea.

It is a violation of the defendant's right to due process for the court to convict and sentence him while he is legally incompetent. *State v. Tilden*, 988 S.W.2d 568, 577 (Mo. App. W.D. 1999) (*citing State v. Moon*, 602 S.W.2d 828, 834 (Mo. App. W.D. 1980)); *see also Pate*, 383 U.S. at 378.

"The protection of the incompetent defendant's due process rights is of such primary importance" that it is shared by the court, and if sufficient information raises reasonable cause to believe the defendant is incompetent, the court has a duty to confront and determine the issue at whatever stage it may arise, even if no party raises it. *McCurry-Bey*, 298 S.W.3d at 901 (*citing Tilden*, 988 S.W.2d at 577); § 552.020.2, RSMo 1986.

The issue of competency is not waived once criminal proceedings begin without objection from the parties. *Tilden*, 988 S.W.2d at 577; *Pate*, 383 U.S. at 384; *see also Riggins v. Nevada*, 504 U.S. 127, 139 (1992) (Kennedy, J., concurring) ("a general rule permitting waiver [of issues of competency] would not withstand scrutiny under the Due Process Clause, given our holdings in *Pate* and *Drope*"). "If counsel for either side, including defendant's own counsel, fails to bring up the issue of defendant's competence to proceed, and there is reason to question it, the judge has the power, and the duty, to *sua sponte,* order an examination and, if necessary thereafter, order a hearing on the issue." *Tilden*, 988 S.W.2d at 577. If the court later determines the defendant to be incompetent, the court must not permit criminal proceedings to proceed against the defendant. §§ 552.020.8 & 552.020.10, RSMo 1986.

Here, the court failed to comply with its duty to *sua sponte* protect the defendant's right not to be tried or proceeded against while incompetent and knowingly accepted the NGRI plea of an incompetent defendant. The invited error doctrine should not apply to sanction this error.

Moreover, the invited error doctrine should not apply because subjecting an incompetent defendant to the criminal process falls under the category of structural error, and the doctrine of invited error should not apply to such errors. *See, e.g., Raithel v. State*, 226 So.3d 1028, 1032 (Fla. Dist. Ct. App. 2017) (finding the doctrine of invited error does not apply in the competency context).

Other state courts have held that the doctrine of invited error does not apply to structural errors, such as the denial of the right not to be tried or proceeded against while incompetent. *Raithel*, 226 So.3d at 1032; *State v. Johnson*, 391 P.3d 711, 714 (Kan. 2017) ("[t]he invited error doctrine is inapplicable when a constitutional error is structural"); *People v. Lewis*, 123 N.E.3d 1153, 1167 (Ill. App. Ct. 2019) ("whether a structural error was invited is irrelevant because reversal nevertheless would be automatic in order to preserve the integrity of the judicial process"); *State v. Decker*, 907 N.W.2d 378, 383 (N.D. 2018) ("[s]tructural errors are immune to the 'invited error' doctrine"); *State v. A.R.*, 65 A.3d 818, 831 (N.J. 2013) (discussing whether the error was structural before applying the "invited error doctrine"); *but see Durden v. State*, 99 N.E.3d 645, 655 (Ind. 2018) (finding "no reason to exempt structural errors from the invited error doctrine"); *but see Ex Parte Thuesen*, 546 S.W.3d 158, 162 (Tex. App. 2018) (stating Texas and other states apply the doctrine of invited error to errors "that might amount to fundamental or structural errors").

Likewise, this Court should find that the doctrine of invited error does not apply to the structural error committed in Mr. Kelly's case. *See, e.g., State v.*

Goucher, 111 S.W.3d 915, 917-20 (Mo. App. S.D. 2003) (holding structural error occurred when the trial court failed to submit a unanimous verdict instruction which neither party offered for submission).

CONCLUSION

WHEREFORE, Mr. Kelly respectfully requests that this Court grant a writ of habeas corpus, vacate Mr. Kelly's plea of not guilty by reason of insanity, set aside the order of commitment, and remand for proceedings on the underlying criminal case.

Respectfully submitted,

/s/ Gwenda Reneé Robinson
Gwenda Reneé Robinson, #43213
District Defender, Office B/Area 68
Missouri State Public Defender
Eastern Appellate/Post-conviction
1010 Market Street, Suite 1100
St. Louis, MO 63101
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that on Friday, September 13, 2019, a true and correct copy of the foregoing was e-filed with this Court and sent to Patrick J. Logan at Patrick.Logan@ago.mo.gov the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 per the Missouri E-Filing System Clerk. In addition, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations. This brief was prepared with Microsoft Word for Windows, uses Georgia FB 13 point font, and contains 4,205 words.

/s/ Gwenda Reneé Robinson
Gwenda Reneé Robinson, #43213
District Defender, Office B/Area 68
Missouri State Public Defender
Eastern Appellate/Post-conviction
1010 Market Street, Suite 1100
St. Louis, MO 63101
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov

ATTORNEY FOR PETITIONER