No. 19–8022

IN THE
SUPREME COURT OF THE UNITED STATES

CLARENCE WAYNE DIXON,
PETITIONER,
-vs-

DAVID SHINN, ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1) When the Arizona Supreme Court rejected Clarence Wayne Dixon's claim under *Deck v. Missouri*, 544 U.S. 622 (2005), on direct review, had this Court clearly established that the State must prove that jurors had not seen any visible shackling?

2) Does the failure of a state court to hold an evidentiary hearing make its factual determinations unreasonable under 28 U.S.C. § 2254(d)(2)?

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INTRODUCTION

In 1978, Deana Lynn Bowdoin, then a senior at Arizona State University, was found dead in her apartment, having been raped, stabbed multiple times, and strangled with a belt. The case went unsolved until 2001, when law enforcement submitted the deoxyribonucleic acid ("DNA") profile from semen recovered from Bowdoin's vagina and underwear into the national database. The profile matched Habeas Petitioner, Clarence Wayne Dixon.

Here, Dixon concedes that, at the time of his direct appeal, this Court had not clearly established which party bears the burden of proving whether jurors actually saw the leg brace and stun-belt restraints he wore underneath his clothing at trial. *See* Pet. at 19–20. Thus, in this AEDPA habeas case, Dixon cannot establish under 28 U.S.C. § 2254(d)(1) that the Arizona Supreme Court's 2011 decision was contrary to this Court's clearly established law.

Dixon's second issue is based on whether the facts required the Arizona post-conviction court to hold an evidentiary hearing prior to finding that counsel was not ineffective in failing to seek a competency hearing before Dixon exercised his right to represent himself at trial. The Ninth Circuit found that decision reasonable. This claim is fact-intensive and the errors Dixon alleges generally affect only his case. Such purported error correction is not a reason to grant certiorari. U.S. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Butler v. McKellar*, 494 U.S. 407, 429 (1990) (Brennan, J., dissenting).

STATEMENT OF THE CASE[1]

On January 6, 1978, Deana Bowdoin, a senior at Arizona State University met a female friend at a bar after having dinner with her parents. Pet. App. A–4, at 2. She left her friend around 12:30 a.m. and went home to the apartment she shared with her boyfriend. *Id.* Around 2:00 a.m., her boyfriend returned to their apartment and found her dead. *Id.* She had been raped, stabbed multiple times, and strangled to death with a belt. *Id.* At the time of the murder, Dixon lived across the street from her apartment. *Id.* For decades her murder was unsolved.

In the months following Bowdoin's murder, Dixon assaulted two other women. On March 18, 1978, he assaulted Joan R. in her apartment, and on July 22, 1978, he assaulted Regina G. when she was driving home. ER 460.

About 9 months after Bowdoin's murder, in the early morning hours of September 16, 1978, Dixon entered the residence of another Tempe college coed, Judy J., and assaulted her. ER 374; ER 460. He was arrested, pleaded guilty to first-degree burglary and aggravated assault, and was sentenced to prison, where he remained until March 1985. ER 374.

After Dixon's parole from prison, he went to live with his brother in Flagstaff. ER 374. He was there only 3 months before he sexually assaulted a Northern Arizona University ("NAU") student while she was jogging on a dirt road on June 10, 1985. *State v. Dixon*, 735 P.2d 761, 762 (Ariz. 1987). Threatening her with a

[1] Dixon wrote extensively about his background and additional mitigation in his Petition for Writ of Certiorari. Pet. at 10–13. While much of this information was part of the state court record, citations to ER 152–301 are to exhibits that were offered in district court in a rejected effort to expand the record (ER 098), and are not properly before this Court.

knife, Dixon dragged her off the road into a secluded forest clearing where, while wielding the knife, he forced her to engage in numerous sexual acts. *Id.* Dixon was convicted of multiple offenses arising out of this assault, and, because he was on parole at the time of the crimes, he was sentenced to multiple consecutive life sentences. *Id.*

In 2001, a police detective ran the DNA profile from semen recovered from Bowdoin's vagina and underwear during the 1978 investigation through a national database. Pet. App. A–4, at 2. The profile matched Dixon. *Id.*

On November 26, 2002, in a two-count indictment, a grand jury charged Dixon with the first-degree premediated murder of Deana Lynn Bowdoin and, in the alterative, with felony murder, for causing her death in the commission or attempted commission of rape. ER 989. Count 2 charged that Dixon raped Deana Bowdoin.[2] *Id.* The State sought the death penalty. ER 985–86.

On March 16, 2006, the trial court held a hearing to address Dixon's request to waive counsel and exercise his constitutional right to represent himself. ER 910–923. Counsel did not object to Dixon's request, and the court found, based on the totality of the circumstances, that Dixon had "knowingly, intelligently, and voluntarily waived" his right to be represented by an attorney. ER 927–28. Subsequently, the trial court granted Dixon's request for advisory counsel, a paralegal, and a mitigation specialist. RER 5.[3]

[2] This charge was later dismissed on statute of limitations grounds. ER 942.
[3] Respondent's additional excerpts of record, filed in the Ninth Circuit, were identified as "RER."

After Dixon was allowed to represent himself, on May 1, 2006, he moved to suppress the only direct evidence tying him to Bowdoin's murder—the DNA evidence. ER 892. He argued that, because his arrest in the NAU case was unlawful, "the DNA evidence obtained under the conviction and incarceration should be suppressed" as fruit of the poisonous tree or as fundamental error. ER 893. He contended that the NAU security police at that time "lacked sufficient statutory authority or jurisdiction to conduct criminal felony investigations." ER 895. In his motion and attachments, Dixon recounted the litigation in Arizona courts concerning the authority of the University police. This is the motion that his prior attorneys felt they could not file and had explained to Dixon in detail why legally it would not succeed. ER 414–19; ER 923–24; ER 932; ER 934–35. The trial court denied the motion. ER 879.

After 22 trial days, jurors unanimously found Dixon guilty of both premediated and felony murder. ER 150. In the aggravation phase, jurors found two aggravating circumstances: (1) Dixon was previously convicted of another offense where a sentence of life was possible, A.R.S. § 13–751(F)(1), and (2) Dixon committed the murder of Bowdoin in an especially heinous and cruel manner, A.R.S. § 13–751(F)(6). ER 149.

At the conclusion of the penalty phase, the jurors returned a sentence of death. Pet. App. A–4, at 3. After conducting an independent review of the aggravating and mitigating circumstances, as well as the propriety of the death

sentence, the Arizona Supreme Court affirmed the conviction and sentence on May 6, 2011. Pet. App. A–4.

Dixon filed a petition for postconviction relief on March 18, 2013, raising *inter alia* a claim that his trial counsel provided constitutionally ineffective assistance of counsel when he failed to challenge Dixon's competency to waive counsel. ER 343. In a detailed 14-page Order, the post-conviction court dismissed the petition without an evidentiary hearing. Pet. App. A–5. Concerning the ineffective-assistance-of-counsel claim, the court found that trial counsel's performance was neither deficient nor prejudicial. *Id.* at 3–7. Dixon sought review in the Arizona Supreme Court and, on February 11, 2014, that court denied review. Pet. App. A–6.

Dixon subsequently filed his petition for a writ of habeas corpus raising 36 claims for relief. ER 012. After briefing, the district court denied the petition in a 99-page order and granted a certificate of appealability on three claims. Pet. App. A–3. Dixon briefed an additional three uncertified claims. ECF 16, at 65–99.

After briefing and oral argument, the Ninth Circuit Court of Appeals unanimously affirmed the district court's denial of habeas relief. Pet. App. A–1. The court also denied Dixon's petition for rehearing en banc, noting that "no judge of the court [had] requested a vote on the petition[.]" Pet. App. A–2.

REASONS FOR DENYING THE WRIT[4]

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Sup. Ct. R. 10. Accordingly, this Court grants certiorari "only for compelling reasons." *Id.* Dixon has presented no such reason. He has not established that a genuine conflict or important issue exists, or that this is the case to resolve any existing conflict or issue. For these general reasons, and the specific ones set forth below, this Court should deny Dixon's petition.

I. The Ninth Circuit correctly concluded that the state court's resolution of the *Deck* issue was not contrary to, or an unreasonable application of, any clearly established federal law.

Dixon mischaracterizes the record; he was never "visibly" shackled before the jury during trial, nor has any court found as such. *See* Pet. at 9. As the record proves, and every court to consider the issue has found, "[a]t trial, Dixon was required to wear a stun belt and a leg brace *under his clothing*[.] There is no evidence here that the jury either saw the brace or inferred that Dixon wore one." Pet. App. A–4, at 8–14 (emphasis added). The Arizona Supreme Court rejected Dixon's argument, finding that there was no evidence the jury saw the leg brace or the stun belt, worn underneath Dixon's clothing. *Id.* at 8–13. It further held that any error was harmless beyond a reasonable doubt. *Id.* at 13–14. The federal district court and the Ninth Circuit correctly rejected this habeas claim, finding that Dixon had failed to show the state court's decision was objectively unreasonable.

[4] At the request of counsel for the statutory victim, Leslie Bowdoin James, and pursuant to the Arizona Constitution, Respondent notifies this Court that Ms. James requests denial of the petition for writ of certiorari and has asserted her state constitutional right to a prompt and final resolution of this criminal case. Ariz. Const. art. II, § 2.1(A)(10).

Pet. App. A–3, at 26–30; A–1, at 30–37. Dixon is not entitled to relief under 28 U.S.C. § 2254(d), and this Court should not grant certiorari review.

A. *Dixon does not dispute that the state court's decision is not contrary to, or an unreasonable application of, any clearly established federal law.*

Dixon's argument—that there is a "wide circuit split" regarding which party has the burden of establishing that the restraints were visible and seen by the jury pursuant to *Deck*—does not allege that the state court here unreasonably applied any *clearly established Supreme Court law*, which is required before habeas relief can be granted. 28 U.S.C. § 2254(d)(1) ("An application for a writ of habeas corpus […] shall not be granted with respect to any claim […] unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."); Pet. at 19. Indeed, Dixon's argument that the federal circuits have split on the question whether a defendant has the burden to demonstrate his restraints were visible *demonstrates* that there is no clearly established law from this Court settling the issue.

The Ninth Circuit rejected Dixon's reliance on circuit precedent, stating, "*Dyas* [*v. Poole*, 317 F.3d 934 (9th Cir. 2003),] itself is not relevant to our analysis of whether the Arizona Supreme Court unreasonably applied Supreme Court precedent because, as the Supreme Court has 'repeatedly pointed out, circuit precedent does not constitute clearly established Federal law, as determined by the Supreme Court.'" Pet. App. A–1, at 33 n.1 (quoting *Kernan v. Cuero*, 138 S. Ct. 4, 9 (2017); *Glebe v. Frost*, 135 S. Ct. 429, 430 (2014)).

Here, Dixon relies exclusively on decisions from federal courts of appeals, from the Ninth and other circuits, to assert that the state court erred in finding that he must demonstrate the jury saw his shackles. He has not, however, identified any "clearly established Federal law, as determined by the Supreme Court of the United States," as the basis for the violation. 28 U.S.C. § 2254(d)(1); *see* U.S. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

B. *There is no actual circuit split regarding Deck error.*

Even if this Court were to reach the merits of Dixon's argument, contrary to his contention, there is no "wide circuit split" regarding alleged *Deck* error and which party bears the burden of proving visibility. Pet. at 21–23. As the Ninth Circuit correctly recognized, Dixon conflated two very different principles of law in attempting to create a circuit split:

> The State inarguably bears the burden to prove harmlessness. *Chapman*, 386 U.S. at 24. Dixon's reliance on *Dyas*, however, improperly conflates the inquiry as to whether the restraints were visible to the jury—which is relevant to whether Dixon has demonstrated a constitutional violation under *Deck*—with the harmless error inquiry, which places the burden on the government to prove that the jury would have found Dixon guilty absent the error. *See Deck*, 544 U.S. at 635. While visibility is relevant to both considerations, the question here is whether Dixon was prejudiced under *Deck* by the jury's ability to see the restraints, which Dixon must show to succeed on his claim. The Arizona Supreme Court's determination that Dixon was not prejudiced because the jury did not see the restraints was neither an unreasonable determination of the facts nor was its application of *Deck* contrary to clearly established federal law. In the alternative, the Arizona Supreme Court held that any error under *Deck* was harmless, and the Arizona Supreme Court

> did not base its harmless error determination on a lack of visibility. Rather, the court proceeded to analyze harmless error despite its previous determination that the restraints were, in fact, not visible to the jury (and therefore there was no violation of "the rule announced in *Deck*"). *Dixon*, 250 P.3d at 1181. The Court determined that "the DNA evidence" and "the circumstances of the crime" rendered any error resulting from the improper imposition of "visible restraints" harmless. *Id.*

Pet. App. A–1, at 33–34 (footnote and internal parallel citations omitted).

There is no true circuit split regarding this issue. Dixon cites the Sixth, Ninth, Tenth, and D.C. Circuits as holding that "a criminal defendant is required to prove that shackles erroneously applied to him throughout trial were visible to the jury in order to establish a federal due process violation." Pet. at 19 (citing *Adams v. Bradshaw*, 826 F.3d 306 (6th Cir. 2016); *Dixon v. Ryan*, 932 F.3d 789 (9th Cir. 2019); *United States v. Wardell*, 591 F.3d 1279 (10th Cir. 2009); *United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016)).

Dixon next contends that there is a "sharp contrast" between those cases and the principle that "a criminal defendant need only demonstrate that he was unjustifiably shackled in order to establish a violation of due process; once that showing has been made, it is the State that must demonstrate the constitutional error was harmless beyond a reasonable doubt." Pet. at 19–20 (citing *United States v. Haynes*, 729 F.3d 178 (2d Cir. 2013); *United States v. Banegas*, 600 F.3d 342 (5th Cir. 2010); and *Wrinkles v. Buss*, 537 F.3d 804 (7th Cir. 2008)).

The cases cited by Dixon are not in conflict. Two of the three cited cases for the latter proposition hold that the defendant must prove the alleged *Deck* error—that the defendant was *visibly shackled* in front of the jury during trial—and

the State must then prove harmlessness under *Chapman v. California*, 386 U.S. 18 (1967). For example, in *Haynes*, the defendant was visibly shackled throughout trial, and her attorney even commented about her shackles during closing arguments to the jury. 729 F.3d at 183–84. There was no dispute that the defendant satisfied her burden of proving that she was visibly shackled in front of the jury, and thus the government was then required to prove harmlessness, which it could not do in light of other, numerous, cumulative errors throughout trial. *Id.* at 189–91.

Dixon fares no better relying on *Wrinkles*. In *Wrinkles*, the Seventh Circuit rejected the defendant's *Deck* claim, holding that it was bound by the post-conviction court's finding that "the jury did not see the stun belt," and the defendant had not presented the court "with any evidence to demonstrate that the stun belt affected his abilities to properly participate in his own defense." 537 F.3d at 823. The Seventh Circuit concluded, "Without evidence that the jurors saw the stun belt, or that he was otherwise affected by the stun belt throughout trial, Wrinkles cannot demonstrate prejudice." *Id.* Thus, very clearly, the Seventh Circuit did not place *any* burden on the government to prove that the defendant's stun belt was visible to the jury. To the contrary, the defendant bore the burden of proving the alleged constitutional violation, *i.e.*, that the shackles were visible to the jury. *Id.*

The only case which arguably supports Dixon's position is *Banegas*, but that decision is limited to its facts, potentially legally erroneous, and readily distinguishable from Dixon's case. In *Banegas*, the defendant was required to wear

visible leg shackles in the presence of the jury during trial. 600 F.3d at 345. However, the trial judge failed to articulate individualized reasons for the shackling and the record was silent regarding whether the jurors actually saw the shackles. *Id.* at 345–47. The Fifth Circuit concluded, "Here, the government has the burden of proving whether the leg irons were visible because, *under these facts*, placing the burden of proof of this question on the defendant would contravene the Supreme Court's reasoning in *Deck*." *Id.* at 347 (emphasis added). Thus, the Fifth Circuit clearly limited its holding to the unique facts of that case. *Id.*

The decision is also ambiguous, in that it appears to address the government's burden of proving harmlessness, which would be legally correct. The court held, "The correct rule is that—when the district court does not adequately articulate individualized reasons for shackling a particular defendant, and there is a question whether the defendant's leg irons were visible to the jury—the government has the burden of proving beyond a reasonable doubt that the leg irons could not be seen by the jury *as part of its general burden to show, beyond a reasonable doubt, that the shackles did not contribute to the jury verdict*." *Id.* at 347 (emphasis added). That conclusion appears to affirm the government's burden of proving harmless error, which is consistent with circuit-wide precedent.

To the extent the *Banegas* decision actually establishes an affirmative burden on the government of proving the defendant's alleged constitutional violation, it is anomalous and legally erroneous. *See Adams*, 826 F.3d 306; *Wardell*, 591 F.3d 1279; *McGill*, 815 F.3d 846. And it is readily distinguishable from Dixon's

case. While Banegas was visibly shackled with leg irons outside his clothing, Dixon was *never* visibly shackled in front of the jury, but only wore a stun belt and leg brace[5] *underneath his clothing*. Dixon presented no evidence whatsoever to any Arizona or federal court that the jury actually saw either restraint underneath his clothing. Thus, at best, Dixon has established only that there is a single outlier case from what is otherwise settled federal circuit precedent. And, the lone *Banegas* decision does not support his claim based upon the unique and distinguishable facts.

Thus, as the Ninth Circuit recognized, Dixon conflated two very different principles of law in attempting to create an issue: (1) a defendant's burden of proving an alleged constitutional error, and (2) the government's burden of proving harmlessness after such error has been established. Pet. App. A–1, at 33–34. Dixon has not demonstrated some "wide circuit split" among the federal circuit courts of appeals warranting this Court's extraordinary intervention.

C. *The state court did not act contrary to clearly established federal law by finding that any error was harmless.*

Dixon next argues that the Arizona Supreme Court and the Ninth Circuit erred in holding that any alleged *Deck* error was harmless in light of the overwhelming facts and evidence against him. Pet. at 27–33. Dixon contends those courts applied an erroneous harmless error analysis, focusing on the overwhelming

[5] Dixon attempts to portray the leg brace as a "full legged steel restraint" and a "full legged metal shackle," citing an Amnesty International article. Pet. at 8–9, n.2. From what Respondents can discern, Dixon *failed to make any record* regarding the appearance and size of the leg brace he wore underneath his clothing at trial. Dixon's failure to even make a record about the physical appearance of the stun belt and leg brace also demonstrate why his case is not a good vehicle for certiorari review.

evidence of his guilt rather than the "effect" the error had on "the jury's decision." Pet. at 28. At bottom, Dixon's argument seeks routine correction of the perceived error in the courts' application of harmless error *in this case*, which is not an appropriate basis for certiorari review. *See* U.S. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Turning briefly to the merits of Dixon's argument, the Arizona Supreme Court properly applied the harmless error analysis articulated in *Deck* and *Chapman v. California*, 386 U.S. 18, 24 (1967), as the Ninth Circuit correctly held. Pet. App. A–4, at 13 (citing *Deck*, 544 U.S. at 635). After citing the harmless error analysis in *Deck*, the Arizona Supreme Court *assumed visibility* (which it had previously rejected) for purposes of the analysis, and still rejected Dixon's claim based upon the overwhelming evidence of his guilt, the brutal nature of the crime, and the implausibility that someone else committed the crime. Pet. App. A–4, at 13–14. Thus, the Arizona Supreme Court specifically considered the effect of any visibility of a leg brace or a stun belt underneath Dixon's clothing on the jurors' decision when considering the case. That analysis, as the Ninth Circuit concluded, was the correct application of harmless error analysis under *Deck* and *Chapman*. Pet. App. A–1, at 33–34.

In sum, this Court should deny certiorari review because Dixon has not alleged a violation of controlling Supreme Court precedent, which consequently precludes federal habeas relief. 28 U.S.C. § 2254(d)(1) ("An application for a writ of

habeas corpus […] shall not be granted with respect to any claim […] unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*.") (emphasis added). In addition, he has not proven a "wide circuit split" as to whether *Deck* requires him to establish that the jury saw his restraints, and there is therefore nothing for this Court to resolve even if the question were properly presented in the petition. And even if some error occurred, the state court's conclusion that the error was harmless is not contrary to, or an unreasonable application of, clearly established federal law.

II. The state court's alleged failure to follow its own procedural rules does not warrant this Court's review.

Dixon next faults the Ninth Circuit for rejecting his argument that the state court unreasonably determined the facts under 28 U.S.C. § 2254(d)(2) when it dismissed, without an evidentiary hearing, his claim that counsel performed ineffectively by failing to request a competency examination when Dixon sought to waive counsel. Pet. 33–40. He further asserts that he has satisfied § 2254(d)(2), and is thus entitled to *de novo* review of his claim. *Id.*

An ineffective assistance of counsel claim is governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a petitioner "must show that counsel's performance was deficient" and that "the deficient performance prejudiced" the petitioner. *Id.* at 687. This inquiry is "highly deferential." *Id.* at 689.

A petitioner must prove that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. Defense counsel is "strongly presumed to have rendered adequate assistance" and a petitioner must demonstrate that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." *Id.* at 687, 690. To prove prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

"More specifically, to succeed on a claim that counsel was ineffective for failing to move for a competency hearing, there must be 'sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt defendant's competency' and 'a reasonable probability that the defendant would have been found incompetent.'" Pet. A–1, at 18 (quoting *Hibbler v. Benedetti*, 693 F.3d 1140, 1149–50 (9th Cir. 2012) and *Stanley v. Cullen*, 633 F.3d 852, 862 (9th Cir. 2011)). A competency determination is not required every time a defendant wishes to waive counsel. *Godinez*, 509 U.S. at 401 n.13.

Dixon's argument that the Arizona courts violated their own rules by failing to hold an evidentiary hearing on his claim does not present a compelling reason for this Court's certiorari review. The state post-conviction court, in finding his claim not colorable, necessarily accepted his factual allegations as true. Pet. at 36; *see, e.g.*, *State v. Jeffers*, 661 P.2d 1105, 1128 (Ariz. 1983) (colorable-claim determination asks whether, "if the defendant's allegations are taken as true, would

they have changed the verdict?"). In other words, the court found that Dixon's factual proffer, even if true, did not suffice to prove his claim under *Strickland*.

Dixon's proposed interpretation of § 2254(d)(2) would work an end-run around *Pinholster*, which limits federal review of claims governed by § 2254(d)(1) to evidence in the state-court record. *Cullen v. Pinholster*, 563 U.S. 170, 180–85 (2011) ("We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). Were this Court to construe § 2254(d)(2) to require a state-court evidentiary hearing as Dixon urges, an inmate whose claim was adjudicated on the merits in state court without a hearing would be foreclosed from federal evidentiary development under *Pinholster*, but could invoke the state court's failure to conduct a hearing to relieve himself of AEDPA deference under § 2254(d)(2). This, in turn, would frustrate AEDPA's goals of limiting federal evidentiary hearings and protecting comity, finality, and federalism. *See Williams v. Taylor*, 529 U.S. 420, 433–34, 436 (2000).

Dixon also relies primarily on *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), for his argument that the post-conviction court should have held an evidentiary hearing on his claims. Pet. at 33–35. However, *Brumfield* does not help Dixon. There, this Court found the state court's factual determination unreasonable under § 2254(d)(2), but not because the state court failed to conduct an evidentiary hearing. Rather, that case involved state-court procedures dissimilar to those employed here, in which the state court drew factual inferences on a disputed issue from documentary evidence. Here, as discussed herein, Dixon's evidence was

accepted as true in its entirety, and his claim failed even where there was no material factual dispute.

Dixon argues that the Ninth Circuit erred when it rejected his claim that his counsel was ineffective in failing to request a competency evaluation when he waived counsel. Dixon contends that, because the state court did not hold an evidentiary hearing, its factual findings are not entitled to deference. Dixon argues that he satisfied § 2254(d)(2) and proved that he was incompetent to waive counsel and represent himself under a *de novo* standard of review. Pet. 33–40.

Dixon is again mistaken. *See Wood v. Allen*, 558 U.S. 290, 301 (2010) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance."). The state superior court rejected this claim, citing *Godinez v. Moran*, 509 U.S. 389, 399–400 (1993), and *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). Pet. App. A–5, at 7.

The post-conviction judge, who was also the trial judge, noted that he saw no evidence of Dixon's incompetence at any point during the proceedings, nor did Dixon's counsel, who had represented him for years, raise any issue concerning his incompetence. *Id.* The court found Dixon's waiver of counsel "was a knowing, voluntary, and intelligent decision on the part of a competent individual." *Id.* Both the district court and the Ninth Circuit found that this decision "was neither contrary to nor an unreasonable application of clearly established federal law, nor

was it based on an unreasonable determination of the facts." Pet. App. A–1, at 19–22; A–3, at 11–15.

Here, the post-conviction court reasonably found that Dixon had not presented a colorable claim that his counsel was ineffective in failing to request a competency hearing before he was permitted to waive counsel. As the Ninth Circuit reasoned, Judge Klein, who presided over both the trial and post-conviction proceedings, knew about Dixon's brief period of incompetency, largely based upon depression, some 30 years before, in 1977. Pet. App. A–1, at 19–21. Thus, Dixon was not prejudiced by counsel's alleged failure to alert the court to information it already had. *Id.* And at the waiver-of-counsel hearing, both Dixon and his counsel agreed that he had "no mental problems that would place his ability to waive the right to counsel in jeopardy." *Id.* In addition, by that point, the trial court had significantly interacted with Dixon, and found him "able to adequately advance his positions," as well as be "cogent in his thought processes, lucid in argument, and always able to respond to all questions with appropriate answers." *Id.*

Judge Klein also noted that there were no issues of Dixon's competence in his prior criminal cases after one in 1977 in which he had been restored to competence, including the 1978 Maricopa County assault, the 1985 Coconino County rape, and his 1987 appeal. *Id.* As the Ninth Circuit correctly held, there is no question, on this record, that Dixon's waiver of counsel was "a knowing, voluntary, and intelligent decision on the part of a competent individual." Pet. App. A–1, at 19–22.

Dixon faults the Ninth Circuit for failing to acknowledge three facts which he claims prove his incompetence in March 2006, when he waived counsel: (1) the affidavits from his trial counsel, (2) Dixon's "so-called" "perseveration" and "delusional conduct" in attempting to suppress the DNA evidence that was obtained as a result of his 1985 rape conviction, and (3) Dr. Toma's report, prepared years after trial and submitted in support of Dixon's post-conviction proceeding. Pet. at 35–40. None of those bases undermines the Ninth Circuit's decision or the reasonable conclusion by the post-conviction court that a hearing was not necessary.

Regarding Dixon's first point, he relies on the sworn statements of his trial counsel, prepared for the state post-conviction relief proceedings. Pet. at 35–36, 38. However, neither attorney stated that they thought Dixon was incompetent at the time he waived counsel. ER 340–41; RER 42–43. Notably, both attorneys were aware of Dixon's brief period of incompetency some 30 years before, in 1977, as well as a subsequent verdict of not guilty by reason of insanity. ER 0341; RER 42–43.

For Dixon's second point, he asserts that his "perseveration" and "delusional conduct" in attempting to suppress the DNA evidence was evidence of incompetence. Dixon is incorrect. As the district court observed, and the Ninth Circuit agreed, "Dixon's obsession with the NAU suppression motion was not so bizarre as to suggest incompetence." Pet. App. A–3, at 14; A–1, at 21 ("As to Dixon's continued interest in the DNA suppression issue (which Dixon cites as an indication that he was not competent to waive counsel), Dixon's interest in the issue was not so bizarre or obscure as to suggest that Dixon lacked competence."). The DNA

evidence proved Dixon's guilt, beyond any doubt, for Deana Bowdoin's rape, stabbing, and strangulation homicide, and it was clearly not delusional or irrational for Dixon to focus on attempts to suppress that evidence. As the district court correctly found, "Apart from the NAU suppression issue, Dixon has failed to identify an instance in which he behaved irrationally, appeared not to understand the proceedings, or did not communicate effectively with counsel." Pet. App. A–3, at 14.

Finally, Dixon relies on Dr. Toma's report, prepared years after the trial and submitted in the state post-conviction relief proceedings, to prove his incompetence. Pet. at 38–39. The district court and the Ninth Circuit held that the state court reasonably rejected Dr. Toma's lone retrospective opinion about Dixon's competence, finding that it "fail[ed] to illuminate Dixon's competence during the relevant time period." Pet. App. A–3, at 8–21; A–1, at 21. Both courts also noted that Dr. Toma's opinion was refuted by the record; the record instead supported the Arizona court's reasonable conclusion that Dixon had been fully restored to competence 30 years before the proceedings in this case and he had no competence issues thereafter. *Id.*

As the Ninth Circuit correctly found, the record "contains no evidence of competency issues at any time throughout the course of these proceedings," including when Dixon chose to waive counsel and exercise his constitutional right to self-representation. Pet. App. A–1, at 20–21. At all times, Dixon "understood the charges against him and the potential sentences, he was able to articulate his legal positions and respond to questions with appropriate answers," and he exhibited rational behavior. *Id.*

On this record, the state court's finding that the claim is not colorable was reasonable. Both the district court and the Ninth Circuit applied the correct legal standards in finding the state court decision reasonable. This Court should deny certiorari review of this claim.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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