No. 21-_____

IN THE
Supreme Court of the United States

ASKIA MUSTAFA RAHEEM,
Petitioner,
v.

GDCP WARDEN,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the lower courts violated this Court's incompetency and "right to evidentiary hearing" habeas law when they summarily denied a hearing on incompetency, and whether the panel erroneously reviewed the district court's holding for plain error?

II. Whether the split in the lower courts regarding how to address state court findings on "cause and prejudice" to excuse defaults – under de novo or AEDPA review – should be resolved by this Court?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Askia Mustafa Raheem, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW AND JURISDICTION

Petitioner seeks review of the decision by the lower court issued on April 26, 2021, affirming the district court's denial of habeas corpus relief, reported at 995 F.3d 895. *See* Appendix 1. Petitioner's petition for rehearing and rehearing en banc was denied by the lower court on June 22, 2021. *See* Appendix 2. Pursuant to this Court's orders of March 19, 2020 and July 19, 2021, Petitioner's time to file a petition for a writ of certiorari was 150 days from the order denying the petition for rehearing, or until November 19, 2021. This Court has 28 U.S.C. section 1254 jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Counsel Clause of the Sixth Amendment, the Cruel and Unusual Punishments Clause of the Eighth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, which respectively provide, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence. U.S. Const., Amend. VI.
> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S.

Const., Amend. VIII.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const., Amend. XIV, § 1.

STATEMENT OF THE CASE

A. Course of Proceedings

1. Petitioner was convicted of malice murder (two counts), armed robbery (two counts), and burglary in the Superior Court of Henry County, McDonough, Georgia, on February 15, 2001, and on February 17, 2001, was sentenced to death for malice murder, life imprisonment without the possibility of parole for malice murder, life imprisonment for armed robbery, and 20 years for burglary, to be served consecutively. The Georgia Supreme Court affirmed the judgment on March 11, 2002. *Raheem v. State,* 275 Ga. 87, 560 S.E.2d 680 (2002). A petition for writ of certiorari was denied on November 12, 2002. *Raheem v. Georgia*, 123 S.Ct. 541 (2002).

2. A petition for writ of habeas corpus was filed in Butts County, Georgia, on April 3, 2003. An amended petition for writ of habeas corpus was filed on October 23, 2006 and an evidentiary hearing was held January 28-30, 2008. The lower court signed the state's order denying relief virtually verbatim on February 19, 2009, and the Georgia Supreme Court denied an Application for Certificate of

Probable Cause to Appeal.

3. Petitioner filed a Petition for Writ of Habeas Corpus in the District Court for the Northern District of Georgia. Without an evidentiary hearing, the District Court entered an order denying all relief. *See* Appendix 3.[1] The District Court granted Petitioner's Certificate of Appealability as to Petitioner's claims that Petitioner was incompetent; counsel's ineffectiveness in allowing the prosecutor to invoke expertise, inject non-record evidence into the proceedings, and tell the jurors that petitioner would kill them unless they sentenced him to death; and other claims. The Court of Appeals expanded the Certificate of Appealability to include trial counsel's prejudicially ineffective penalty phase argument telling jurors that Petitioner was dangerous. The Court of Appeals affirmed the denial of relief on April 26, 2021. Rehearing was denied.

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[1]In addition to the appendices, the state court record was made a part of the federal district court's docket below in *Raheem v. Humphrey*, No. 1:11-CV-1694-AT, and can be accessed electronically via the PACER system. The docket entries are referred to herein as "D.[volume]:[page].

B. Statement of the Facts

1. Facts in Support of a Competency hearing (Claim I)

The parties agree the district court had the issue of petitioner's competency to stand trial before it de novo because Petitioner pled the claim in state proceedings but it was not ruled upon. The district court denied the claim without an evidentiary hearing. The following facts are proffered in support of an evidentiary hearing.[2]

a. A bizarre crime

The facts of the crime in this case were tragic and nonsensical. Petitioner was 19 years old, suicidal, and had been expelled from a mental hospital and denied treatment for his mental illness because his family had no insurance. He and a 15-year-old acquaintance picked up Petitioner's best friend, Brandon Hollis and they went to shoot a gun in the woods. Petitioner, without warning, and for no apparent reason, shot and killed his friend Hollis. Petitioner and the 15-year-old drove to Hollis's house, even though they knew someone was there, let themselves in, and shot Brandon Hollis's mother, who was sitting in her living room. They

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[2]In state court in support of an ineffectiveness claim and incompetency, trial counsel Futch and Crumbley testified, as did the state's mental health expert (Dr. Martell) and several defense experts. The state wrote the order denying relief, it was adopted by the post-conviction judge, and the lower courts deferred to it. The order did not address incompetency.

wrapped her body in garbage bags and put her in the trunk of her Lexus automobile.

They left the car Petitioner had been driving in front of the Hollis house. They then drove around in the Lexus all evening and all night, traveling the short distance from Henry County, Georgia, to Atlanta, cruising and stopping and showing the body to numerous people. They then returned to the Hollis house in the Lexus in the middle of the night, along with Petitioner's 33-year-old girlfriend. They took items like CDs and toilet paper from the house, took the stolen items back to the girlfriend's apartment, and drove the body to some nearby railroad tracks where Petitioner lit it on fire in view of the tracks. Persons on a passing train called the fire department.

> b. The district Court would not consider Dr. Melissa Carran's affidavit or any proffer of her testimony; it also would not consider Petitioner'seizures in prison

In support of his showing of incompetence, Petitioner wished to rely upon the testimony of Dr. Melissa Carran

> 2. I am a neurologist licensed to practice in New Jersey and Pennsylvania, specializing in the treatment of epilepsy. ... [3]

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[3]Dr. Carran is board-certified in Neurology and Clinical Neurophysiology, and since 1999 has been Medical Director of the Epilepsy Program at the Robert Wood Johnson Medical School, Cooper University Medical Center; she was Medical Director of the Epilepsy Program at Princeton University Medical Center

4. In my professional capacity I observe patients face-to-face in a clinical setting and by so doing, in combination with reviewing their medical and social history, I render an opinion as to whether they suffer from epileptic seizures. I diagnose and treat 10 to 20 patients on a daily basis and have diagnosed and/or treated approximately 3,000 in the course of my career through such observation and historical review.

5. I have reviewed the video documentation of Dr. Daniel Martell's evaluation of Mr. Mustafa Raheem, contained on four DVDs. It depicts Mr. Raheem interacting with Dr. Martell.[4] This DVD provides for me almost the exact same type of face-to-face observation that occurs when I diagnose and treat patients in person. I also reviewed background documents provided by Mr. Raheem's attorney. Finally, I have reviewed a DVD of an interview between Mr. Raheem and police, dated 4/6/99. It is my opinion from this review, to a reasonable degree of medical certainty, that Mr. Raheem suffers from behavioral episodes of staring and unresponsiveness consistent with a diagnosis of epilepsy, and that he should be treated for epilepsy. ..

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in Princeton, New Jersey from 2000 to 2007. D.24-7:5.

Dr. Carran's affidavit described her methodology for assessing and diagnosing epileptic seizures in a clinical setting. In addition to examining records and affidavits "contain[ing] clinical support consistent with [her] diagnosis of epilepsy, Dr. Carran's review of Dr. Martell's evaluation of Petitioner provided "almost the same type of face-to-face observation that occurs" when she diagnoses patients in person. Pursuant to this methodology, Dr. Carran observed that "It is clear form Dr. Martell's video documentation of Mr. Raheem's spells of staring and unresponsiveness that he is experiencing non-volitional epileptic episodes, both by their sudden onset and by Mr. Raheem's actions during the seizures, as well as his reaction following the episodes," and formed her expert opinion: "[i]t is my opinion from this review, to a reasonable degree of medical certainty, that Mr. Raheem suffers from behavioral episodes of staring and unresponsiveness consistent with a diagnosis of epilepsy, and that he should be treated for epilepsy."

[4]Dr. Martell was the state's expert in state proceedings.

Ramifications for competency

28. Apart from the affective and psychotic correlates with Mr. Raheem's epilepsy, the seizures themselves likely affect Mr. Raheem's ability to both assist his attorneys and understand the proceedings against him. Mr. Raheem's frequent seizures, during which he is unconscious and for which times he suffers amnesia, necessarily effect his ability to follow narrative, to respond appropriately, and to understand fully what is taking place. It is evident from the effects of the seizures suffered during Dr. Martell's testing how detrimental these episodes would be to a person facing a criminal trial, where preparation, concentration, and critical evaluation are key. For example, following the seizure suffered during the administration of the TOMM, Mr. Raheem could not recall many of the examples which he was shown during the spell and actually told Dr. Martell that he had not been shown certain of the cards because he had no memory of them. It follows that seizures occurring while meeting with his attorneys about evidence, attempting to follow the testimony of witnesses, or evaluating the strength of evidence, and the combined effect over the course of preparation and trial, would clearly compromise Mr. Raheem's ability to assist in his defense. In fact, when asked about episodes of non-cooperation during the trial, Mr. Raheem confesses that he does not remember the specific instances that Dr. Martell asks about, and that his general memory of the trial is not good. His response appears thoughtful and genuine. Likewise, his lack of insight into his condition, investment in pretending that he is not suffering such episodes or that his illness might be relevant to his culpability, all compromise his competency to proceed.

D.24-7.[5]

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[5]According to Dr. Carran, "profound disturbances of brain function" D.24-7:13, occur with epileptic seizures and Mr. Raheem's epilepsy is chronic in its duration, severity, and "possible multiple seizure types," D.24-7:14, which "can impair development of affective control and interrelated cognitive, social and moral behaviors, and abstract and verbal reasoning." *Id.* at 7. Dr. Carran noted that the "[d]escriptions of Mr. Raheem's behaviors contained in the affidavits and

The district court refused to consider Dr. Carran. Dr. Carran's affidavit was submitted in state court before the habeas record closed and thus is a part of the state court record. *See* Doc. 24-7. Petitioner submitted the affidavit with his post-hearing brief in state court; Respondent moved to strike the affidavit and the state court did not do so. The state court subsequently denied the petition, signing the state's order which did not say the affidavit was not part of the record. The affidavit is not mentioned in the state's 106 page proposed order denying relief.[6]

The district court refused to consider other evidence of seizures as well. In January 2013, counsel obtained Department of Corrections records documenting that Petitioner had suffered what were described by Respondent's agents/officers as seizures, convulsing and unresponsiveness. *See* Appendix 5 hereto (D.52),

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records repeatedly reflect possible psychosis" consistent with "the irrational and delusional thinking common in schizophrenia-like psychosis of epilepsy." *Id.* According to Dr. Carran, the "documented behaviors and 'choices'" made by Petitioner "are not those of a person with a non-epileptic, normal brain." *Id.*

[6]It was error for the district court to conclude Dr. Carran's affidavit was not in the record. As Respondent represented to the Eleventh Circuit in *Wilson v. Sellers*, in Georgia habeas corpus cases "[t]he record closes when the Petitioner files his notice of appeal in the Georgia Supreme Court and new facts [submitted *after that*] are not considered on appeal." State's FRAP 28(j) letter in *Wilson v. Warden*, Case No. 14-10682, dated October 16, 2015. (bracketed words added). Dr. Carran's affidavit was filed in the Georgia habeas court before the notice of appeal was filed in this case, and the state court did not grant the state's motion to strike it.

exhibits A, B and C; Appendix 6 (D.53), D.53:4-6, exhibits A-F, and K. Other documents obtained from Respondent contradicted an exhibit in the state court record relied upon by Respondent to dispute Petitioner's claims relating to competency at the time of trial, *see* Appendix 5, D.52:4-6, exhibits D, E, and F, and which strengthen the testimony of trial expert Dr. Nord, who testified Petitioner was dissociative and at times psychotic prior to trial. D.7-5:134-36. *See infra* at 19, 31. Petitioner therefore requested the court expand the record and admit and consider this evidence which met the criteria for admission of a party opponent pursuant to FRE 801(d)(2) and was clearly relevant to Petitioner's claims. Petitioner also moved the Court for discovery in the form of deposition testimony by Respondent's agents and a videotape of Petitioner suffering the seizures (which those agents indicated exists but which was not produced to Petitioner). Finally, Petitioner renewed his request for an evidentiary hearing or other factual development. *See* Appendices 5 and 6 (D.52, D.53). In denying this factual development the district court "assum[ed] arguendo" that the state court had not addressed the substantive competency issue but concluded that a hearing would not enable Petitioner to prove he was incompetent and entitle him to relief. *See* Appendix 7, D.60:6. The district court further denied a motion for reconsideration of its ruling, concluding that "the evidence at issue is not sufficiently relevant to

Petitioner's claims to provide good cause to expand the record or to allow Petitioner to conduct discovery. *See Crawford v. Head*, 311 F.3d 1288, 1328 (11th Cir. 2002)." *See* Appendix 9, D.62:3.

c. The state's expert–brain damage and seizure disorder

Dr. Martell conceded that it was "unanimous"-- *all* experts agree that Petitioner's brain does not work correctly.[7] Under questioning by the state habeas judge, Dr. Martell testified that had he been a defense expert he would have advised trial counsel to introduce to jurors the fact that Petitioner's "**brain is shriveled**." According to Dr. Martel, "Mr. Raheem does not have normal brain functioning." D.10-24:112.[8]

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[7]Dr. Martell was referring to all trial and habeas experts other than Dr. Carran when he said it was fair to conclude that "all of you [experts] agree that his brain doesn't work in the normal way" D.10-24:124-27, D.14-12:2 ("That's very fair."), *see also* D.14-11-D.14-12:1-2. Dr. Martell testified that "at the end of the day, you know, I think *we've* localized the problem to the left temporal lobe and whatever problem is going on there may account for everything that we're seeing," and that "mild impairment or moderate impairment in an important area of the brain could be very significant in terms of effect on behavior." D.10-25:6 (emphasis added).

[8]The state habeas court directly addressed Dr. Martell on this issue D.10-25:20:

> THE COURT: Was it characterized [at trial] as being organic or brain damage?
> THE WITNESS: No.

Dr. Martell testified that brain damage can have significant behavioral and legal consequences for a person. It may cause psychosis, and result in memory, language, cognitive, and/or behavioral impairments with significant consequences for criminal legal standards of behavior. D.10-24:124-127.[9] Dr. Martell believes that mild brain damage almost anywhere in the brain can affect the entire range of human behavior. *Id.* It can cause a lack of impulse control, impaired social judgment, aggression, and many other things. *Id.* Dr. Martell found that Petitioner had at least three loci of brain impairment, but suspected that they were all related. First, Petitioner has "mild to moderate" damage in the left frontal lobe of his brain. D.10-25:1.[10] Second, Petitioner has attention deficit hyperactivity disorder, which is "a temporal lobe phenomenon." D.10-25:3). Third, Petitioner has a "specific learning disability." D.10-25:5. Dr. Martell's opinion is that Petitioner has brain impairment, greatest in the temporal lobe region D.10-25:8, and his impairments

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The following occurred early in Dr. Martell's testimony (D.10-24:108):

THE COURT: What's going on in there? Is something damaged?

A: Right.

[9]*See* Martell, D., "Forensic Neuropsychology and the Criminal Law," 16 Law & Human behavior 313, 315 (1992).

[10]Dr. Martell agreed that "mild [damage] represents significant loss of function in that behavioral area." D.10-25:2. *See also* D.14-12:5 (mild brain damage can disable an individual).

"may all go together and be localized to that region of interest." D.10-25:6.[11] Indeed, the whole of Petitioner's brain impairment may be greater than the sum of its parts: they "may coalesce into *something more significant* when integrated with the larger data site." D.14-12:6 (emphasis added). This went unmentioned in the state order.

Dr. Martell also states that Petitioner has a seizure disorder. He said that a seizure disorder can have marked effects on a person's behavior and thought processes. Seizure disorders are associated with violent behavior, anxiety, psychosis, and grandiosity. D.10-25:10. Dr. Martell agreed that an intact temporal lobe was integral to normal day to day functioning and that temporal lobe and amygdala problems can manifest with schizophrenic-like psychosis. D.10-25:16-17.[12]

During the course of his two day, videotaped evaluation of Petitioner Dr. Martell observed and documented Petitioner suffering multiple, "striking," brain

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[11]*See also* D.10-24:108-09 ("So, it suggests a focal, potentially some focal problem in that specific area, which is adjacent to the temporal lobe, where he may have some other problems, the attention deficit disorder, if he has that, may be there, temporal lobe epilepsy, if he has that, may be in that region.")

[12]*See also* D.14-12:22 ("Temporal lobe epilepsy, temporal lobe problems, of amygdala problems, can manifest with schizophrenia-like psychosis? A. Yes, they can."). This went unmentioned in the state order.

seizures,[13] six to eight such seizures each day. D.10-24:115. During these seizures, Petitioner would simply be unaware of what was happening in the room, he would disappear mentally, and Dr. Martell would wait for long periods of time for Petitioner to regain awareness of his surroundings and environment, or Dr. Martell would try to rouse Petitioner to "bring him back." *Id.* He called these seizures "absolutely" obvious. *Id.* When Petitioner came out of the seizures he would be lost or confused. D.10-24:113. Dr. Martell testified that this looked like "absence seizures, which would not be unusual, together with ADHD." (D.10-24:113. This state's expert testified that these seizure suggested to him an "epileptic phenomenon," D.10-25:12.,[14] which, by history, was "a longstanding disorder." D.10-24:116. Dr. Martell then testified that after an absence seizure a person would be confused and not know where they had been or what they had been doing. Dr. Martell testified that if Petitioner was falling out in his cell with his eyes rolling back before trial, that would have been important to know--as it relates to brain seizures–"that is quite consistent with a seizure disorder." (D.10-

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[13]"It really stood out to me...It was pretty striking." D.14-12:19.

[14]Dr. Martell's DVDs of his evaluation of Petitioner were admitted at D.14-1.4-7. Counsel for Petitioner made a separate DVD containing only the repeated seizures suffered by Petitioner documented by Dr. Martell, admitted at D.14-1:2-3.

25:53-54.[15] This went unmentioned in the state order.

Dr. Martell testified that his interactions with Petitioner, aside from the testing he administered and the seizures he witnessed, also documented brain dysfunction. He stated that Petitioner was tangential, expansive, labile, grandiose, and had poor insight, all indicators of psychiatric/mental problems. He told the judge below that "I'm going to say these things are necessarily related to brain damage, but the extent to which his psychiatric presentation ties up into that is less clear to me." D.10-25:17. Dr. Martell then testified that Petitioner has "had some **significant [brain] structural abnormalities** to go with it." D.10-25:21(emphasis added).

> d. Defense counsel: "We had our doubts;" we saw "some, you know, serious issues with him"
>
> Defense trial expert Dr. Farrar swore that:
>
> Based upon my interactions with and observations of Mr. Raheem during pre-trial and trial proceedings, I also advised defense counsel trial I believed that Mr. Raheem was not competent. Mr. Raheem was psychotic and delusional, he was unable to focus on or even discuss

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[15]As the state habeas court noted at the habeas hearing, the trial court had been advised that "[h]e's had at least two instances while he's been incarcerated in which he has fainted. He's had full fainting episodes where he actually hits his head, **and the guards, Henry County Jail, have told me that his eyes have actually rolled back in his head when he has fainted. And so he's had two instances of fainting, indicating another instance of neurological problem.**" D.10-25:53 (emphasis added).

> his case, was unable to determine what was in his best interest or act in his best interest, and he did not have a rational understanding of what was going on. In court he acted inappropriately due to his mental illnesses. For example, he covered his face with his hands, sat with his back to the jury, and made obscene gestures. His demeanor and affect were counterproductive, conveyed an absence of remorse, and were symptoms of his illnesses and defects over which he had no control.

D.10-26:86. Mr. Futch, trial counsel, testified that Farrar's "description of Mustafa was the same thing I experienced" including "when Mr. Crumbley and myself would meet with Mr. Raheem." D.10-22:32.

Mr. Futch testified that he "certainly suspected something was wrong with" Petitioner. D.10-22:14. He explained that

> [i]n our many meetings and interactions with each other, *he would, for lack of a better way to explain it, like, go off somewhere else in his mind. We'd have to bring him back to where we were. Where he went, what he was thinking about, I have no clue but he was hard to focus, hard to pin down on things that obviously would be helpful to his defense team, to try to investigate.* And just in the personal interactions with him, it was apparent that he, I thought there was something wrong with him.
>
> Q And that was from the beginning to the end?
>
> A Yes, sir.

D.10-22:30 (emphasis added). Mr. Futch also watched Dr. Martell's DVD documenting Petitioner's brain seizures and testified that "that was very much like Mustafa. He would sort of fade out and that happened a lot." D.10-22:31. He

testified that the seizures he saw on the DVD were not new behavior. D.10-22:32.

Futch testified Petitioner spoke to investigators in the absence of counsel, D.10-22:158-59, that he yelled at his mother in open court, that he was psychotic, and that he had fainting spells. D.10-22:115. Futch agreed that these and other facts raise questions about competency ("Yes, sir. I would agree with that, yes." D.10-22:115), and "I'm sure that both Wade Crumbley, myself, and Dr. Farrar had had conversations about those issues. I'm sure we did." *Id.* "I'm sure we had to have had some discussion about competency early on." *Id.* They all had "concerns" about these competency issues. D.10-22:116. Futch believed that Mustafa was so erratic at times that he was not looking out for his own best interests. *Id.*

Under questioning by the Court, Futch said "**[t]hat's not to say, certainly, that Mr. Crumbley and I didn't see some, you know, serious issues with him**.....I think that we both felt that he was competent enough at least that his trial could proceed." D.10-22:134-35 (emphasis added). Futch testified that Petitioner was psychotic, not acting in his best interest, unable to focus on his case, unable to understand what was going on, covered his face in court, displayed counterproductive demeanor in court, and "**We had our doubts [about competency], there's no question about that**." D.10-23:14 (emphasis added).

Co-counsel Crumbley told the trial court repeatedly that Petitioner was mentally ill and repeatedly introduced expert testimony on the matter. He told the jurors the same thing.[16] Crumbley presented expert testimony that Petitioner "has moments when he is psychotic."[17] Crumbley testified that "Mr. Raheem's attitude toward me and his attitude about the case and his demeanor varied pretty dramatically from one visit to the next, there was no predictable pattern about it." D.14-5:57-58. He testified that: Petitioner was strong-willed about his case and had a need to control the goal of the defense, which "didn't necessarily have any, involve any level of concern about outcome as to sentence" D.14-5:58-59; occasionally Petitioner was hostile D.10-24:17;[18] he advised Petitioner that his chances of an acquittal were "practically non-existent," D.10-24:68, but Petitioner insisted on having a guilt/innocence defense; Petitioner repeatedly invited the

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[16]"This mentally ill 19-year-old who would tell you ....**that he can transport himself mentally from one place to another. He may be in another place right now as far as he is concerned, *that he can really go there.*"** D.6-13:66.

[17] Crumbly had ample bases for these statements. In separate meetings, he was told that Petitioner's MMPI "looks psychotic," D.10-29:18, that Petitioner's "schizophrenia scale is high," D.10-29:19, and that the defendant "has a delusional problem & is schizophrenic...He has a psychotic process going on." D.11-2:83.

[18]By contrast, Futch testified that "I thought [our relationship with Petitioner] was Okay. We certainly never had any cross words. I don't recall him ever getting upset at myself or Judge Crumbly for that matter.....There's only a couple of times that I can recall meeting with Mustafa when he was just distant, really didn't have a whole lot to say. HT D.10-22:59.

sheriff's chief investigator to come speak with him with counsel not present, telling her all sorts of crimes he had committed when "[t]here was no evidence any of those things happened." D.10-24:20. Petitioner was suicidal. D.10-24:22. Crumbley explained that the reason Petitioner was not worried about a death sentence was because of his "other world." He testified that Petitioner "very rarely discussed that with me unless I tried to get him to talk to me about it." D.14-5:86. Petitioner was unconcerned about a death sentence because "because I can go to that other place." *Id.* [19]

Crumbley testified that: during the trial Petitioner asked the judge to let him just stay in the jail and not attend the trial, but the judge would not allow that D.10-24:25; the way he kept his client coming to court and behaving was to bring him pizza for lunch, *id.*; *see also* D.14-5:64 and this "seemed to be enough to keep him interested in sitting there through the trial," D.10-24:26; and that Petitioner

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[19]*See also* D.14-5:86 (the reason he was unconcerned about the death penalty was because "I can just go to the other place."); D.14-5:88 ("He would not be concerned about an execution being carried out because he would just be thinking about these other things."). He testified though that "[h]e never discussed it like it was something he believed was real." *Id.* Again, Crumbley earlier had said: "[o]ne feature of Mustafa's mental illness is that he suffers from delusional thought processes," D.6-13:59, that "he can transport himself mentally from one place to another. He may be in another place right now as far as he is concerned, that he can really go there," D.6-13:66 and "sometimes his thinking is delusional and confused. Sometimes he believes things that aren't real." D.7-6:75.

"projected an air of indifference," D.10-24:65, and covered his face, and "he was not doing it only occasionally." D.10.24:64. Jurors told him after the trial that Petitioner had made obscene gestures at them while he was being tried. *Id.* When his mother was testifying, Petitioner jumped up and screamed at her in plain view of the jurors, "I heard the deputy who started that thing beeping to warn him that he was about to shock him, and Mustafa turned and looked at him and said 'Go ahead and shock me.'" D.10-24:52.

e. Petitioner's mental deterioration during trial

At sentencing, Dr. Charles Nord testified. He said that in 1994–six years before the crime–he treated Petitioner for mental illness. His conclusion about Petitioner was:

> Mustafa is a young man at risk. He's depressed, continues to have suicidal ideation, gets disorganized easily and is quite impulsive. At times he doesn't care what happens to him. He will continue to be at risk until one gets control of his depression, agitation, and ideation.

D.7-5:132. When he interviewed Mustafa just days before trial, he had to change his diagnosis because Petitioner then showed a lot of borderline characteristics, *i.e.*, "he would dissociate." "He would zone out and move into another world...He's on the verge of becoming more psychotic...[and] has moments when he is psychotic...He hallucinates....He may at time hear voices." D.7-5:134-35. Dr. Nord was worried because "I had not seen earlier ...this dissociative disorder,

where he can just dissociate from being here into somewhere else." D.7-5:136.

Dr. Farrar was also called to testify at sentencing. He testified that when he first saw Petitioner in 1994 he was "very suicidal, had severe problems," but his insurance would not provide for the structured care he needed. D.7-6:9. He testified that in 1994 that "there were four psychologists besides me – three psychologists, myself, and another therapist, all of us diagnosed independently Mr. Raheem with at least depressive, major depressive disorder. And Dr. Slaughter, our psychiatrist, diagnosed him with bipolar disorder." D.7-6:12-13. He testified that "I believe that Mustafa wants to die. I think he's been on a suicide mission from a very young age." D.7-6:15.

2. Prosecutor's argument: he will kill you (Claim II)

In closing argument at trial the prosecutor told the jurors - all but one of them white - that if they did not sentence this young Black man to death he would escape from prison and kill them all. Defense counsel did not object. The district court and panel below condemned this argument, but bound by the AEDPA denied relief.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURT DID NOT FOLLOW THIS COURT'S PRECEDENTS AND HABEAS CORPUS LAW WHEN THEY DENIED A HEARING ON PETITIONER'S INCOMPETENCY CLAIM; THUS A BRAIN DAMAGED NINETEEN-YEAR-OLD WHO PRESUMABLY SUFFERED ABSENCE SEIZURES DURING TRIAL HAS NEVER HAD HIS COMPETENCY TO FACE THE DEATH PENALTY TESTED

A. There is no greater criminal procedure right than to be competent

The right of a criminal defendant to be tried only if competent is "fundamental to an adversary system of justice," *Drope* v. *Missouri*, 420 U. S. 162, 172 (1975). The Due Process Clause forbids the trial and conviction of persons incapable of defending themselves—persons lacking the capacity to understand the nature and object of the proceedings against them, to consult with counsel, and to assist in preparing their defense. *Id.*, at 171. *See also Pate* v. *Robinson*, 383 U. S. 375, 378 (1966).

"Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Riggins* v. *Nevada*, 504 U. S. 127, 139-40 (1992) (KENNEDY, J., concurring in the judgment). Incompetent persons "are not really

present at trial; they may not be able properly to play the role of an accused person, to recall relevant events, to produce evidence and witnesses, to testify effectively on their own behalf, to help confront hostile witnesses, and to project to the trier of facts a sense of their innocence." N. Morris, Madness and the Criminal Law 37 (1982).

B. Petitioner was entitled to an evidentiary hearing in the district court

1. Standard for granting an evidentiary hearing

Petitioner raised in state habeas proceedings the claim that he was tried and sentenced while incompetent. "[T]he Superior Court judge denied Raheem's petition, adopting nearly verbatim a 106-page proposed order submitted by the state." 995 F.3d at 905. The State order signed by the state judge did not address the incompetency claim and the parties agree it was before the district court for *de novo* review, *Townsend v. Sain*, 372 U.S. (1963)(federal hearing required when the merits of the factual dispute were not resolved in the state hearing), not under the AEDPA, 28 U.S.C § 2254.[20] *See Lopez v. Miller*, 915 F. Supp. 2d 373, 418–19 (E.D.N.Y. 2013)("If the petitioner surpasses the § 2254(d) hurdle, the court may

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[20]*See Cone v. Bell*, 556 U.S. 449, 472 (2009)("Because the Tennessee courts did not reach the merits of Cone's *Brady* claim, federal habeas review is not subject to the deferential standard that applies under AEDPA to "any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). Instead, the claim is reviewed de novo.")

nonetheless grant habeas relief only if the petitioner has shown a violation of federal law under § 2254(a); *Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007) ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires."). Thus, at that point, the court may consider evidence that was not before the state court, including evidence produced at a federal evidentiary hearing.

Federal habeas corpus hearings are required if three conditions are met — (1) the petition alleges facts that, if proved, entitle the petitioner to relief;[21] (2) the

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[21]*See* Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 20.1[b], at 7-11 (supplement to 7th ed. 2015) (outlining three conditions for entitlement to hearing and collecting cases). *e.g., Hill v. Lockhart*, 474 U.S. 52, 60 (1985); *Blackledge v. Allison*, 431 U.S. 63, 82-83 (1977); *Juniper v. Zook*, 876 F.3d 551, 556, 564, 572 (4th Cir. 2017) (in determining whether petitioner has "alleged facts sufficient to obtain relief under Section 2254" and accordingly is entitled to evidentiary hearing, "[w]e evaluate the sufficiency of Petitioner's factual allegations 'pursuant to the principles of Federal Rule of Civil Procedure 12(b)(6).' . . . Under that standard, we determine whether the petition 'states "a claim to relief that is plausible on its face."' . . . 'In doing so, we construe facts in the light most favorable to the plaintiff . . . and draw all reasonable inferences in his favor.'"; "district court abused its discretion in dismissing Petitioner's *Brady* claim without holding an evidentiary hearing because it failed to assess the plausibility of that claim through the proper legal lens;" "Petitioner's *Brady* claim . . . [may not] ultimately succeed" because "district court may conclude [after evidentiary hearing] that the Roberts's recollections of the events surrounding the murders are not sufficiently credible" or that other facts refute

fact-based claims survive summary dismissal because the factual allegations are not "'palpably incredible' [or] 'patently frivolous or false'" — the standard for summary dismissal in habeas corpus proceedings; [22] and (3) the state court did not

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apparent materiality of suppressed evidence, "those determinations should not—and cannot—be made in the absence of an evidentiary hearing"); *Insyxiengmay v. Morgan*, 403 F.3d 657, 670-71 (9th Cir. 2005) (petitioner was entitled to evidentiary hearing because AEDPA's section 2254(e)(2) is inapplicable and petitioner "meet[s] one of the *Townsend* factors and [has made] . . . colorable allegations that, if proved at an evidentiary hearing, would entitle him to habeas relief"); *Davis v. Lambert*, 388 F.3d 1052, 1061, 1066 (7th Cir. 2004) (petitioner was entitled to evidentiary hearing on claim of ineffective assistance of counsel because AEDPA's section 2254(e)(2) does not apply and petitioner satisfied pre-AEDPA standards for obtaining evidentiary hearing in that petitioner "alleged facts which, if proved, would entitle him to habeas corpus relief"); *Deere v. Woodford*, 2003 U.S. App. LEXIS 16543, at *6-*7 (9th Cir. Aug. 13, 2003) (district court erred in denying evidentiary hearing on claim of incompetence to plead guilty: although district court's view of claim's lack of merit may "ultimately prove correct," declarations of two mental health experts, "[v]iewed together, . . . 'create a real and substantial doubt' as to Deere's competency" and thus petitioner "came forward with sufficient evidence at least to trigger a hearing on whether he was, in fact, competent to have pleaded guilty"); *Armienti v. United States*, 234 F.3d 820, 823, 824-25 (2d Cir. 2000) (district court erred in denying section 2255 motion without evidentiary hearing: petitioner is entitled to hearing because allegations "'establish that he has a "plausible" claim . . . . At this preliminary stage he is not required to establish that he will necessarily succeed on the claim, and indeed, if he could presently prove that proposition, no hearing would be necessary.'" (quoting *United States v. Tarricone*, 996 F.2d 1414, 1418 (2d Cir. 1993))); *Stouffer v. Reynolds*, 168 F.3d 1155, 1168 (10th Cir. 1999) (petitioner was entitled to evidentiary hearing because he "alleged specific and particularized facts, which, if proved, would entitle him to relief").

[22] *Blackledge v. Allison*, 431 U.S. 63, 75-76 (1977) (quoting *Machibroda v. United States*, 368 U.S. 487, 495 (1962); *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 119 (1956)). *Accord Velasquez v. Ndoh*, 824 Fed. Appx. 498, 500-

resolve the issue.

2. Petitioner's claim is colorable, and not implausible on its face, accepting his facts as true and construing the facts in the light most favorable to him

a. The affidavit of Dr. Carran

Carran's expert opinion on incompetency was:

28. Apart from the affective and psychotic correlates with Mr. Raheem's epilepsy, the seizures themselves likely affect Mr. Raheem's ability to both assist his attorneys and understand the proceedings against him. Mr.

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01 (2020) (reversing district court's denial of petition and remanding for evidentiary hearing: "Petitioner acknowledges that, without the results of fingerprint testing, he cannot conclusively demonstrate that he was prejudiced by [counsel's failure to obtain fingerprint analyses and] the [resulting] lack of fingerprint evidence. ... Petitioner has, however, raised a colorable claim for relief with respect to both theories of ineffective assistance of counsel. The proper remedy, therefore, is a remand to the district court for an evidentiary hearing."); *Lafuente v. United States*, 617 F.3d 944, 946-47 (7th Cir. 2010) (*per curiam*) (district court abused discretion by denying section 2255 motion "without discovery or a hearing": "The petitioner's pro se motion, sworn statement, and corroborating evidence show that his allegations are plausible, and are sufficient to warrant further inquiry by the district court."); *Chang v. United States*, 250 F.3d 79, 85 (2d Cir. 2001) (district court erred in denying hearing on claim which, "[w]hile improbable, ... is not so clearly bereft of merit as to be subject to dismissal on its face"). Unless the factual allegations are patently unbelievable, the district court is obliged to assume they are true in determining both whether summary dismissal is appropriate and whether an evidentiary hearing is required. *See Wolfe v. Johnson*, 565 F.3d 140, 169 (4th Cir. 2009) (district court erred in "fail[ing] to accept as true the allegations of [petitioner's] Amended Petition" when "assessing Wolfe's request for an evidentiary hearing": "allegations of the Amended Petition and the Appendix should be evaluated pursuant to the principles of Federal Rule of Civil Procedure 12(b)(6). . . . And, under the Rule 12(b)(6) standard, the court is 'obliged to "assume all facts pleaded by [the § 2254 petitioner] to be true."'").

> Raheem's frequent seizures, during which he is unconscious and for which times he suffers amnesia, necessarily effect his ability to follow narrative, to respond appropriately, and to understand fully what is taking place. It is evident from the effects of the seizures suffered during Dr. Martell's testing how detrimental these episodes would be to a person facing a criminal trial, where preparation, concentration, and critical evaluation are key. For example, following the seizure suffered during the administration of the TOMM, Mr. Raheem could not recall many of the examples which he was shown during the spell and actually told Dr. Martell that he had not been shown certain of the cards because he had no memory of them. It follows that seizures occurring while meeting with his attorneys about evidence, attempting to follow the testimony of witnesses, or evaluating the strength of evidence, and the combined effect over the course of preparation and trial, would clearly compromise Mr. Raheem's ability to assist in his defense. In fact, when asked about episodes of non-cooperation during the trial, Mr. Raheem confesses that he does not remember the specific instances that Dr. Martell asks about, and that his general memory of the trial is not good. His response appears thoughtful and genuine. Likewise, his lack of insight into his condition, investment in pretending that he is not suffering such episodes or that his illness might be relevant to his culpability, all compromise his competency to proceed.

D.24-7:16.

The district court refused to consider Dr. Carran's affidavit presented in support of an evidentiary hearing for two reasons. First, "the affidavit is not part of the record in this case." D.62:2. Second, "the relief requested could not enable the Petitioner to prove that he was incompetent to stand trial." D.60:6.[23]

b. Lower court found absence seizures at trial

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[23]The court would not allow discovery of the state documenting seizures, for the same reasons. *See* section B(1)(b), *supra*.

Rather than conduct an evidentiary hearing the court assumed Petitioner had absence seizures during trial based upon the record:

> **Based on its review of the record, the Court assumes, arguendo, that Petitioner did suffer brief absence seizures at the trial.**

Raheem v. Humphrey, 2015 WL 13899724 *27 (N.D. Ga. 2015).[24] (Appendix 3).

c. Petitioner has brain damage

Dr. Martell conceded that all experts agree that Petitioner's brain does not work correctly. Under questioning by the state habeas judge, Dr. Martell testified that had he been a defense expert he would have advised trial counsel to introduce to jurors the fact that Petitioner's "**brain is shriveled**." According to Dr. Martel, "Mr. Raheem does not have normal brain functioning." D.10-24:112. Dr. Martell believes that mild brain damage almost anywhere in the brain can affect the entire range of human behavior. D.10-24:124-27.

Dr. Martell also states that Petitioner has a seizure disorder. He said that a seizure disorder can have marked effects on a person's behavior and thought

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[24]The panel below found that the district court judge "considered Dr. Carran's opinion," 995 F.3d at 931, but that is wrong. The district court concluded Petitioner suffered "absence seizures of brief duration," D.64:66, but it was based on the testimony of Drs. Gur (defense expert) and Martell at the state court evidentiary hearing. *See* D.64:56; D.64:59-60. The district court also noted the testimony of trial counsel affirming observations of similar behavior in Petitioner at trial, D.64:63, and family testimony. D.64:60. But the district court did not consider Dr. Carran's opinion; it expressly rejected it.

processes. D.10-25:14-15. During the course of his two day, videotaped evaluation of Petitioner Dr. Martell observed and documented Petitioner suffering multiple, "striking," brain seizures, six to eight such seizures each day. D.10-24:115. During these seizures, Petitioner would simply be unaware of what was happening in the room, he would disappear mentally, and Dr. Martell would wait for long periods of time for Petitioner to regain awareness of his surroundings and environment, or Dr. Martell would try to rouse Petitioner to "bring him back." D.10-24:115. He called these seizures "absolutely" obvious. D.10-24:115. When Petitioner came out of the seizures he would be lost or confused. D.10-24:113. Dr. Martell testified that this looked like "absence seizures, which would not be unusual, together with ADHD." D.10-24:113. This state's expert testified that these seizures suggested to him an "epileptic phenomenon," D.10-25:12, which, by history, was "a longstanding disorder." D.10-24:116. Dr. Martell then testified that after an absence seizure a person would be confused and not know where they had been or what they had been doing. Dr. Martell testified that if Petitioner was falling out in his cell with his eyes rolling back before trial, that would have been important to know– as it relates to brain seizures–"that is quite consistent with a seizure disorder." D.10-25:53-54. This went unmentioned in the state order.

Dr. Martell testified that his interactions with Petitioner, aside from the

testing he administered and the seizures he witnessed, also documented brain dysfunction. Dr. Martell then testified that Petitioner has "had some **significant [brain] structural abnormalities** to go with it." D.10-25:21(emphasis added).

d. Defense counsel: "We had our doubts;" we saw "some, you know, serious issues with him"

Petitioner yelled at his mother who was crying on the witness stand in court; said "go ahead and shock me" to the deputy; repeatedly covered his face with his hands in court; had an air of indifference in court; slouched in court; asked to leave court; thought that a death sentence did not matter because he "could just go to the other place;" would not take his attorneys' advice; had wide, dramatic, and rapid mood swings; was suicidal; would "blank out and stare off into space;" was fainting with eyes rolled back; required pizza to come to court; had a history of psychiatric commitment and treatment; hallucinated and heard voices at the time of trial; and had signs of brain damage.

Thus, Mr. Futch testified that he "certainly suspected something was wrong with" Petitioner. D.10-22:14. He explained that:

> [i]n our many meetings and interactions with each other, *he would, for lack of a better way to explain it, like, go off somewhere else in his mind. We'd have to bring him back to where we were. Where he went, what he was thinking about, I have no clue but he was hard to focus, hard to pin down on things that obviously would be helpful to his defense team, to try to investigate.* And just in the personal interactions with him, it was apparent that he, I thought there was

something wrong with him.

Q And that was from the beginning to the end?

A Yes, sir.

D.10-22:30 (emphasis added). Mr. Futch also watched Dr. Martell's DVD documenting Petitioner's brain seizures and testified that "that was very much like Mustafa." D.10-22:31.

Futch testified Petitioner spoke to investigators in the absence of counsel, D.10-22:58-59, that he yelled at his mother in open court, was psychotic, and had fainting spells falling unconscious in his cell. D.10-22:115. Futch agreed that these and other facts raise questions about competency ("Yes, sir. I would agree with that, yes." D.10-22:115), and "I'm sure that both Wade Crumbley, myself, and Dr. Farrar had had conversations about those issues. I'm sure we did." *Id.* "I'm sure we had to have had some discussion about competency early on." *Id.* They all had "concerns" about these competency issues. D.10-22:116. Futch believed that Mustafa was so erratic at times that he was not looking out for his own best interests. *Id.* Futch testified that Petitioner was psychotic, not acting in his best interest, unable to focus on his case, unable to understand what was going on, covered his face in court, displayed counterproductive demeanor in court, and "**We had our doubts [about competency], there's no question about that.**"

D.10-23:14 (emphasis added).

Crumbley testified that: during the trial Petitioner asked the judge to let him just stay in the jail and not attend the trial, but the judge would not allow that D.10-24:25; the way he kept his client coming to court and behaving was to bring him pizza for lunch, *id.*; *see also* D.14-5:64 and this "seemed to be enough to keep him interested in sitting there through the trial," D.10-24:26; and that Petitioner "projected an air of indifference," D.10-24:65, and covered his face, and "he was not doing it only occasionally." D.10-24:64. Jurors told him after the trial that Petitioner had made obscene gestures at them while he was being tried. D.10-24:64.

We have a 19 year old, mentally ill, suicidal, possibly brain damaged, delusional, counterproductive, and erratic defendant in a capital trial in the midst of in court outbursts, audible in-court challenges to deputies ("go ahead and shock me"), slouching and face-covering, being controlled by pizza.

e. Petitioner's mental deterioration during trial

At sentencing, Dr. Charles Nord testified. He said that in 1994–six years before the crime–he treated Petitioner for mental illness. His conclusion about Petitioner was:

> Mustafa is a young man at risk. He's depressed, continues to have suicidal ideation, gets disorganized easily and is quite impulsive. At

> times he doesn't care what happens to him. He will continue to be at risk until one gets control of his depression, agitation, and ideation.

D.7-5:132. When he interviewed Mustafa just days before trial, he had to change his diagnosis because Petitioner then showed a lot of borderline characteristics, *i.e.*, "he would dissociate." "He would zone out and move into another world...He's on the verge of becoming more psychotic...[and] has moments when he is psychotic...He hallucinates....He may at times hear voices." D.7-5:134-35. Dr. Nord was worried because "I had not seen earlier ...this dissociative disorder, where he can just dissociate from being here into somewhere else." D.7-5:136.

C. Circuit Court plain error standard of review was error

The lower court reviewed the district court's denial of Mr. Raheem's substantive competency claim under a clearly erroneous standard. 995 F.3d at 908, 928, 930 (stating that such review is "for clear error") (citing *Lawrence v. Sec'y, Fla. Dep't of Corr.*, 700 F.3d 464, 481 (11th Cir. 2012)). Using this highly deferential standard and conducting a "narrow" review, the lower Court affirmed the district court's conclusion that Mr. Raheem was not entitled to an evidentiary hearing by characterizing that conclusion as a "finding." *Id.* at 908, 930. This highly deferential review standard conflicts with controlling Supreme Court precedent and the review standards employed by other Circuits.

This Court long ago held that a district court does not have discretion to

deny a hearing "[w]here the facts are in dispute ... [and] the habeas applicant did not receive a full and fair evidentiary hearing in a state court." *Townsend v. Sain*, 372 U.S. 293, 312 (1963), *overruled in part on other grounds*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). The Court subsequently held that "[i]n deciding whether to grant an evidentiary hearing, a federal court *must* consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Thus, appellate courts routinely reverse a district court's denial of an evidentiary hearing when such circumstances exists. *Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005) (holding that appellate court must remand for a hearing when "the petitioner establishes a colorable claim" for relief and has never been afforded a state or federal hearing on this claim"); *Davis v. Lambert*, 388 F.3d 1052, 1061, 1065 (7th Cir. 2004) (finding petitioner entitled to a hearing because he pled sufficient facts, if true, entitled him to relief); *Medina v. Barnes*, 71 F.3d 363, 366 (10th Cir. 1995) (stating in pre-AEDPA case that petitioner entitled to evidentiary hearing if he made "allegations which, if proved, would entitle him to relief").

Most importantly, courts apply these well-established standards in reviewing district courts' denials of evidentiary hearings in substantive competency claims.

See, e.g., Deere v. Woodford, 339 F.3d 1084 (9th Cir. 2003) (remanding for an evidentiary hearing on competency claim, holding that "'[i]n a habeas proceeding, a petitioner is entitled to an evidentiary hearing on the issue of competency to stand trial if he presents sufficient facts to create a real and substantial doubt as to his competency, even if those facts were not presented to the trial court.'" (quoting *Boag v. Raines*, 769 F.2d 1341, 1343 (9th Cir. 1985)); *Sena v. New Mexico State Prison*, 109 F. 3d 652, 655 (10th Cir. 1997) (reviewing record de novo and reversing district court's denial of an evidentiary hearing, holding that "[w]ithout a factual determination of Mr. Sena's competence at the time he pled guilty, there can be no resolution of the fundamental substantive due process issue he raises."); *Speedy v. Wyrick*, 702 F.2d 723, 726 (8th Cir. 1983) (remanding for evidentiary hearing on substantive competency claim because a factual dispute "could not be resolved solely on the basis of the record").

D. Seizures during trial – found to be supported by the record – should begin, not end, the inquiry on incompetence

The lower court recited that "[t]he district court assumed for its analysis, however, that Raheem did suffer absence seizures at his trial, even noting that the record "'supports his contention that he suffers from absence seizures of brief duration.'" 995. F.3d at 931. With such a record Petitioner established that he was absent during trial sufficient to receive an evidentiary hearing.

II. THERE IS A SPLIT IN THE CIRCUITS REGARDING WHETHER TO SUBJECT INEFFECTIVE ASSISTANCE OF COUNSEL AS A REASON FOR EXCUSING A DEFAULT TO DE NOVO REVIEW OR AEDPA REVIEW

A. "He will kill you;" treated differently in different circuits

The prosecutor argued without objection at sentencing that Petitioner, a very young Black man, would, if sentenced to life, escape and kill all of the jurors - all but one of whom were white. Defense counsel did not object and Petitioner's complaint about the argument would have to satisfy cause and prejudice–that defense counsel was ineffective. The state court ruled counsel were not ineffective.

28 U.S.C. § 2254 applies to a "claim." What will excuse a default is not a claim. Thus § 2254 does not apply to state court findings rejecting excuses for defaults. However, the circuits are split on this issue. Among the decisions finding the AEDPA applies: the panel decision in this case:

> Raheem next challenges this statement from the prosecutor: "This man is just mean, ladies and gentlemen, in just plain, old country English, he's mean. He's cold-hearted. He's cold-blooded. And let me tell you something, he'll kill you. And I'm not having to guess." The state habeas court held that the prosecutor's future dangerous argument -- as a whole -- was not improper because the prosecutor made a "reasonable deduction from the evidence in suggesting that [Raheem] would pose a future danger based on the evidence presented at the sentencing phase of trial," and that Raheem failed to establish that trial counsel were deficient or that he was prejudiced by the

prosecutor's arguments.[25]

> Reviewing this determination, the district court described the prosecutor's comment as "very troubling noting that if the jurors heard the prosecutor's comment as articulating a specific threat to them, it was so highly improper it could potentially impermissibly taint the proceedings." The court said, however, that "[o]n a cold record ... it is not possible to determine with certitude whether the Prosecutor was using 'you' to mean the jurors, or using it to suggest general future dangerousness."[26] Applying the double deference mandated by AEDPA, the district court found "some support" for the state habeas court's holding that defense counsel's performance was not deficient in failing to object. The district court also agreed with the state habeas court that Raheem was not prejudiced by the comment, especially since Crumbley addressed it in his closing argument.
>
> We need not and do not reach the question whether defense counsel were deficient for failing to object to the prosecutor's comment, although we readily accept that it likely was erroneous for the prosecutor to tell the jury that Raheem will "kill you" and for defense counsel not to object. Nevertheless, considering the full record before the jury, we are satisfied that Raheem cannot establish that he was prejudiced by defense counsel's failure

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[25]The state court order written by Respondent in fact does not contain the words in this argument, i.e, that he will kill you.

[26]The district court answered its own question by quoting defense counsel's argument:

> Fear is our real enemy here. It's the State's ally. That's why Mr. Floyd [the prosecutor] got up close to you and yelled at you that we know one thing for sure, and that is that he'll kill you. [Raheem] is responsible for getting all that fear started, but you can stop it. The State wants you to give in to it.

2015 WL 13899724 at *35, quoting D.7-6:81-82.

Getting up close and yelling at jurors "he will kill you" means he will kill the jurors.

> to object to the prosecutor's comment. See Dallas, 964 F.3d at 1306 ("A court may decline to reach the performance prong of the ineffective assistance test if convinced that the prejudice prong cannot be satisfied.") (quotations omitted)....
>
> As we have seen, the state offered overwhelming evidence, including strong evidence concerning Raheem's future dangerousness. And although defense counsel did not object to the prosecutor's remark at the time it was made, as the district court noted, Crumbley addressed it in his closing argument....On this record, the state court's finding that Raheem was not prejudiced by his counsel's failure to object at the time this comment was made was not contrary to or an unreasonable application of clearly established law, nor was it based on an unreasonable determination of the facts in light of the evidence presented. As a result, Raheem's claims of prosecutorial misconduct remain procedurally defaulted.

995 F.3d at 935-936. *See also Wrinkles v. Buss,* 537 F.3d 804, 813 (7th Cir.2008) ("In other words, ineffective assistance only provides cause to excuse a default if the state court decision with respect that ineffective assistance claim: (1) was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d);" *Roberson v. Rudek,* 446 Fed.Appx. 107, 109 (10th Cir.2011) (affirming district court's invocation of AEDPA deference). Other courts review such issues *de novo,* or have refrained from deciding which standard of review to apply. *See, e.g., Janosky v. St. Amand*, 594 F.3d 39, 44–45 (1st Cir.2010) (acknowledging circuit split); *Hall v. Vasbinder,* 563

F.3d 222, 236–37 (6th Cir.2009) (applying *de novo* standard of review in the cause and prejudice context); *Fischetti v. Johnson,* 384 F.3d 140, 154–55 (3d Cir.2004) (same).

B. This is an important case in which to resolve this issue.

The prosecutor's argument was egregious. The district court found it very troubling, noting that if the jurors heard the prosecutor's comment "as articulating a specific threat to them, it was so highly improper it could potentially impermissibly taint the proceedings." D:64-86. Inasmuch as the defense counsel argued "Mr. Floyd [the prosecutor] got up close to you and yelled at you that we know one thing for sure, and that is that he'll kill you," D.7-6:81-82, it is clear the prosecutor meant Petitioner would kill the jurors. 2015 WL 13899724 at *35. The panel wrote "we readily accept that it likely was erroneous for the prosecutor to tell the jury that Raheem will "kill you" and for defense counsel not to object." 995 F.3d at 935.

This was prejudicial. A teenage Black man with known mental problems could receive a life sentence but the jurors would then be killed. Ineffective assistance as cause for a default should be reviewed de novo in this court.

CONCLUSION

Petitioner respectfully requests that this petition for writ of certiorari be granted and that the decision of the lower court be reversed.

Respectfully submitted,

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