No. 21-6382

In the
Supreme Court of the United States

Mustafa Askia Raheem,
Petitioner,

v.

GDCP Warden,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals' denial of Petitioner's request for an evidentiary hearing for a retrospective review of his substantive competency claim conflicts with this Court's precedent or that of the other courts of appeals.

2. Whether the court of appeals' dismissal of Petitioner's prosecutorial misconduct claim on the adequate and independent state law ground of procedural default was in error.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

OPINIONS BELOW

The decision of the Georgia Supreme Court in the criminal direct appeal is published at 275 Ga. 87, 560 S.E.2d 680 (2002).

The decision of the Butts County Superior Court denying state habeas relief is unpublished and is included in Petitioner's Appendix 4.

The decision of the Georgia Supreme Court summarily denying Petitioner's application for certificate of probable cause to appeal is unpublished.

The decision of the district court denying federal habeas relief is published at 2015 U.S. Dist. LEXIS 199570 (N.D. Ga. Sep. 24, 2015) and is included in Petitioner's Appendix 3.

The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of relief is published at 995 F.3d 895 (11th Cir. 2021) and is included in Petitioner's Appendix 1.

The order of the Eleventh Circuit Court of Appeals denying rehearing and rehearing en banc is unpublished and is included in Petitioner's Appendix 2.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a … have the Assistance of Counsel for his defence.

The Eighth Amendment of the United States Constitution provides in relevant part:

> …nor [shall] cruel and unusual punishments [be] inflicted.

The Fourteenth Amendment, Section I, of the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law … .

INTRODUCTION

Both of Petitioner Mustafa Askia Raheem's challenges to the court of appeals' decision are requests for factbound error correction. Raheem complains that the court of appeals used the wrong standards for deciding whether he was entitled to an evidentiary hearing for a retrospective review of his substantive competency claim. But the court correctly defined competency as "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788 (1960). And the court applied its long-standing circuit precedent for determining whether to grant an evidentiary hearing for a substantive competency claim, which is: "a petitioner must present clear and convincing evidence that creates a real, substantial, and legitimate doubt as to his competence." *Lawrence v. Sec'y Fla. Dep't of Corr.*, 700 F.3d 464, 481 (11th Cir. 2012) (quotation marks omitted). Additionally, because competency is a factual determination, the court of appeals used the "clear error" standard for evaluating the district court's competency finding. Turning a blind eye to these standards, Raheem sets his own standards. Yet he fails to prove that the court of appeals' decision conflicts with this Court's precedent or that of any other court of appeals. Instead, Raheem mostly conflates his evidence of

mental illness with alleged incompetency and asks the Court to reevaluate the facts while ignoring the overwhelming evidence of his competency. This is no reason for the Court to grant review.

Next, Raheem disagrees with the court of appeals' dismissal of his prosecutorial misconduct claim regarding the prosecutor's future dangerousness argument. But that claim was rejected on the adequate and independent state law ground of procedural default. As cause to overcome the default, Raheem argued ineffective assistance of counsel for failure to object. The state court rejected Raheem's ineffective-assistance claim on the merits, and the court of appeals afforded that decision deference under the Antiterrorism and Effective Death Penalty Act (AEDPA). But regardless of whether Raheem's ineffective-assistance claim is reviewed with AEDPA deference or not, it clearly fails. Review would be limited to a factbound claim of error correction. The petition should be denied.

STATEMENT

A. Facts of the Crimes

"On April 2, 1999, [Petitioner Mustafa] Raheem picked up Michael Jenkins and Dione Feltus" in the "blue Honda automobile" of Raheem's girlfriend Veronica Gibbs. *Raheem v. State*, 560 S.E.2d 680, 682-83 (2002).[1] "Raheem dropped [ ] Feltus off" at work at 4:00 p.m. where "Feltus remained until 10:00 p.m." *Id.* at 682. Raheem "then shot" "his .380 caliber handgun" "out the window of the blue Honda, explaining to Jenkins that he wanted to make sure [it] would not jam." *Id.*

[1] The court of appeals also provided a detailed summary of Raheem's crimes. *See* App. 1 at 9-10.

Afterwards, Raheem bought "black plastic trash bags at a grocery store and called Brandon Hollis from a nearby payphone." *Id.* "Raheem picked up Brandon and then drove Brandon [ ] and Jenkins to a remote location, where Raheem fired his .380 caliber handgun in the direction of a tree and handed the handgun to Jenkins." *Id.* Brandon complained that the handgun was too loud. *Id.*

"Raheem then retrieved the handgun from Jenkins and started "walking toward the blue Honda." *Id.* "As Jenkins walked some distance behind Raheem and Brandon," "Raheem shot Brandon [ ] in the head." *Id.* at 683. Jenkins asked Raheem whether Brandon was dead, to which "Raheem replied, 'No, but he is on his way out.'" *Id.* "Raheem then took Brandon's watch" and told "the dying [young] man," "'I guess you ain't going to be needing this watch no more.'" *Id.* Raheem also took Brandon's keys and told Jenkins, "'I'm glad you didn't run.'" *Id.*

Raheem drove himself and Jenkins to the home of Brandon's mother, Miriam Hollis. *Id.* Raheem opened Ms. Hollis's door with Brandon's key and directed Jenkins to bring in a trash bag. *Id.* As Raheem and Jenkins entered the home, Raheem fired a shot at a standing Ms. Hollis but missed her. *Id.* "Raheem then ordered Ms. Hollis to her hands and knees," placed a trash bag over her head, and fatally shot her. *Id.*

He retrieved Ms. Hollis's keys to her white Lexus from her kitchen and placed her body in the trunk of the car. *Id.* Raheem then went back inside and tried to mop up Ms. Hollis's blood. *Id.* Later, Raheem told Jenkins "that he previously had given Ms. Hollis money for the Lexus," which she refused to deliver to him. *Id.*

Raheem, along with Jenkins, drove Ms. Hollis's Lexus to visit Gibbs. *Id.* Raheem bragged about his new car, opened its trunk to show Gibbs Ms. Hollis's body, and told Gibbs that he shot the woman and a young man. *Id.* Raheem returned to Ms. Hollis's home with Jenkins and Gibbs where they all "burglarized the home, stole a number of items, and retrieved Gibbs' Honda." *Id.* "Later, Raheem changed his shoes, which had blood on them, and drove with Jenkins to dispose of Ms. Hollis's body." *Id.* They placed her body under "planks and tires", "doused" it in gasoline, and "set [it] ablaze". *Id.*

Raheem describes his crimes as "bizarre." Brief at 4. But there was a clear pecuniary motive and, as pointed out by the court of appeals, "[a]t virtually every stage of this ten-hour crime spree, Raheem attempted to conceal and disguise the crimes he had committed." App. 1 at 24.

B. Proceedings Below

1. Trial Proceedings

On May 6, 1999, a Henry County grand jury indicted Raheem for "two counts of malice murder, four counts of felony murder, two counts of armed robbery, and one count of burglary." *Id.* at 688, n.1. On May 19, 1999, the state filed its notice of intent to seek the death penalty. *Id.* On February 15, 2001, the jury convicted Raheem of all offenses as charged in the indictment including the malice murder of Ms. Hollis. *Id.* After deliberations, on February 17, 2001, Raheem's jury recommended a death sentence for the malice murder of Ms. Hollis. *Id.*

a. Mental Health Investigation

Wade Crumbley and Gregory Futch were appointed to represent Raheem shortly after his indictment and "had each been practicing law for

over fifteen years." App. 1 at 14. Crumbley had previously handled a number of non-capital and capital murder cases, including five death penalty cases. D10-24:6,12; D14-5:37-38.[2] During his career as both a prosecutor and a defense attorney, Futch handled several murder cases and "two death penalty cases—one as a prosecutor and one as a defense attorney." App. 1 at 14.

After appointment, trial counsel "quickly began investigating Raheem's background and mental health." App. 1 at 14. Trial counsel attempted to locate as many members of Raheem's family as possible to interview, and as pointed out by the court of appeals, Crumbly testified that they "tried to go back and . . . interview or at least talk to all of the mental health professionals and counselors who had talked to [Raheem] in the past." *Id.* Trial counsel spoke, "on multiple occasions," with Raheem's mother, father, sister, and grandfather. *Id.* "Crumbley talked 'at length' with Raheem's parents about 'everywhere he'd been to school, everywhere he'd ever been to the doctor, everywhere he'd ever been for counseling.'" *Id.* From over two dozen sources, the defense team obtained all of Raheem's school, medical, mental health, court, and juvenile records. *See* App. 4 at 62; D16-15:43 – D17-22:52; D17-23:126 – D17-24:59.

Trial counsel retained four mental health experts to evaluate Raheem for a possible mental health defense and mitigation purposes—Dr. Charles Nord, Dr. Jack Farrar, Dr. Jeffrey Klopper, and Dr. Dennis Herendeen. App. 4 at 8, 44, 65. Trial counsel also wanted "diagnostic testing done" to help

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[2] Citations to the record refer to the Electronic Court Filing number associated with the document followed by the appropriate ECF page number.

develop evidence that Raheem "suffered from some sort of functional abnormality of the brain." *Id.* at 31.

Trial counsel learned that at age 15, Raheem was admitted to Charter Peachford Hospital by a psychiatrist, Dr. Steven Lynn, following a suicide attempt. D11-10:3. Lynn noted that Raheem reported having difficulty with his mother, following a dispute with her about his getting fired from a vocational training program and not doing his homework. *Id.* at 27. Soon after, Raheem retrieved a 9 millimeter handgun from his parents' room and placed the "loaded weapon" to his head while his mother screamed for him to stop. *Id.* But "his hand was shaking so much that he pulled the trigger and missed" causing "the bullet to hit the ceiling." *Id.* at 3, 27. Raheem's parents called the police, who arrived and transported him to the Georgia Mental Health Institute ("GMHI"). *Id.* at 3, 10, 27. From there, Raheem's insurance provider had him transferred to Charter Peachford Hospital where he was admitted for about 12 days. *Id.* at 3. During this admission, Lynn referred Raheem to Nord for a psychological evaluation. D11-11:10. Nord performed his evaluation, generated a report, and diagnosed Raheem with major depression and oppositional defiance disorder. App. 4 at 46.

Trial counsel wanted to retain Lynn to re-evaluate Raheem, but Lynn was not available. D10-22:27; D19-19:22. Instead, they retained Nord to re-evaluate him. App. 4 at 46; D10-22:27. Following this re-evaluation, Nord diagnosed Raheem with borderline personality disorder ("BPD") and maintained that Raheem continued to show symptoms of depression as in his earlier evaluation. D7-5:134. There is no report associated with Nord's re-evaluation.

Farrar was a psychologist at Fairview Day Hospital where Raheem was admitted following his discharge from Charter Peachford Hospital. App. 4 at 54. At Fairview Day Hospital, Raheem was under the care of Farrar from August to December 1994 for a "very intensive outpatient program." D7-3:36-37. During this time, like Nord, Farrar performed on Raheem a psychological evaluation, for which he generated a report, and diagnosed Raheem with major depression and conduct disorder. D17-22:60.

Trial counsel also sought the services of Farrar to re-evaluate Raheem. App. 4 at 44-45. While trial counsel had not worked with Farrar before, they were familiar with his credentials and his reputation for making "a pretty good appearance in court." *Id.* Moreover, Farrar had previously treated Raheem, developed a relationship and rapport with him, and had met with his family. *Id.* at 101. Farrar re-evaluated Raheem after which he diagnosed Raheem with borderline personality disorder but generated no report. *Id.* at 55.

Of significance, "[a]t an April 2000 pretrial hearing on a motion requesting additional funds, the defense called Dr. Farrar. Dr. Farrar told the trial court that he recommended that Raheem be put on certain psychiatric medications." App. 1 at 28. During the hearing, trial counsel asked Farrar "'obviously, Mr. Raheem ... would have to agree to do that. I mean, he is mentally competent, is he not, to make his own decision about that?' Farrar unequivocally responded, 'Yes, sir, he is.'" *Id.*

Farrar suggested that a neurologist would be needed in order to perform a CAT scan and MRI to explain "a possible correlation between [Raheem's] depression and his childhood head injuries." App. 4 at 47. The trial court granted counsel the funds and counsel retained Klopper "to determine

whether or not [Raheem] had a functional abnormality of the brain due to childhood head injuries." *Id.*; D.16-7:141. "The MRI was performed on January 19, 2001, at Henry Medical Center. The interpreting physician concluded his report with the overall impression that Raheem had a 'normal brain MRI with no evidence of acute intracranial injury.'" App. 1 at 15-16.

Trial counsel ultimately decided not to present Klopper because he found "no evidence of any organic brain damage" or effects of childhood head injury after his examination of Raheem. App. 1 at 16; D14-5:79. There is no report associated with Klopper's evaluation.

The trial court also granted funds for a PET scan to determine if there was "any evidence of brain damage or of impaired functions of certain parts of the brain which might be attributable to head trauma in [Raheem's] past and which might in some way have a causal link with some of the psychiatric problems that he's experienced." App. 4 at 48-49.

The PET scan was scheduled during the week of voir dire. *Id.* at 49. On the day of the PET scan, trial counsel received a phone call from the sheriff's deputies notifying them that Raheem refused to exit the van. *Id.* at 49. The trial court made an inquiry regarding Raheem's refusal to have the PET scan administered. *Id.* at 50. Raheem explained that because he was wearing jail attire and was shackled, he would look like a "circus monkey" to the crowd of observers outside the hospital. D16-8:10-11.[3]

Trial counsel also retained Herendeen to evaluate Raheem. D10-27:36. Herendeen only found Raheem to be impulsive. App. 4 at 51-52. There is no report associated with Herendeen's evaluation.

[3] No subsequent PET scan was performed in any collateral proceeding.

b. Raheem's Competency

Trial counsel also discussed with their mental health experts Raheem's competency to stand trial. Futch testified that he could not imagine "not having any conversations about" Raheem's "competency early on." D10-22:115. They also discussed with the mental health experts Raheem's fantasy world about which the experts were not concerned. Crumbley testified that "it was presented [by their mental health experts] more like a child's fantasizing about how he wished things were than a delusional belief or a hallucination that he had no control over." D14-5:84. Both Crumbley and Futch testified that no expert had ever informed them that Raheem was not competent to stand trial. D14-5:94; D10-22:118-19. Futch testified that Farrar informed them that the *McNaughton* rule, for which a defendant does not know the difference between right and wrong, was not violated. D7-3:69; D10-22:92. Trial counsel were adamant that had an expert found Raheem incompetent, they would have moved the court to hold a hearing on the matter. D14-5:94; D10-22:118-19.

The State also hired a board-certified forensic psychologist, Dr. David Pritchard, to provide an opinion regarding Raheem's competency to stand trial. D11-2:56; D19-18:98-99. The State did not present Pritchard's testimony, but Pritchard did generate a report in which "possible depression" is listed as Raheem's only mental illness. D19-18:99. Pritchard did not find that Raheem was incompetent to stand trial. *Id.* at 98-99.

c. Guilt Phase

Based on their review of the State's evidence and their own investigation, trial counsel believed that there was a "low probability" of Raheem being acquitted. *Id.* at 33. Therefore, they wanted to focus on the

sentencing phase of the case. *Id.* They spent a significant amount of time talking with Raheem about his accepting responsibility for the guilt phase so that they could concentrate solely on the sentencing phase. *Id.* at 34.

Raheem was not concerned with the sentencing phase. *Id.* at 33. He refused to agree to a strategy that involved him "conceding guilt and responsibility" during the guilt phase. *Id.* at 34. Crumbley testified that these decisions reflected poor judgment, not legal incompetence. D10-24:83. Crumbley believed that Raheem "was making a deliberate judgment that . . . even if his chances were very slim . . . of being acquitted, he preferred taking that chance." D14-5:61.

So, in order to maintain Raheem's cooperation, trial counsel agreed to present a defense during the guilt phase. *Id.* Crumbley testified that he "didn't have any mental health expert telling [him] that [Raheem] was incompetent, and [he] felt that it was [his] obligation as a lawyer . . . to present a defense, if that's what [Raheem] insisted on." D10-24:20. Trial counsel also wanted to use evidence of Raheem's mental health to explain Raheem's numerous police statements. App. 4 at 36. Raheem disliked the idea of presenting evidence to the jury that "he was abnormal mentally or psychologically." *Id.* But he ultimately agreed to allow trial counsel to "make some reference to his mental health history" to explain why he made statements to the police confessing to additional crimes he did not commit. *Id.*

Farrar "testified extensively about Raheem's serious mental illnesses -- including major depressive disorder, multiple suicide attempts, borderline personality disorder, and narcissistic and antisocial features -- largely in support of a theory that Raheem had falsely confessed to the crimes due to

his mental health problems." App. 1 at 16. Farrar explained that he initially met Raheem in August of 1994 when Raheem had been referred by Charter Peachford Hospital following a suicide attempt and administered psychological testing. App. 4 at 54. Farrar administered the same tests a second time following Raheem's arrest for the crimes. *Id.* Farrar testified that the test results from the two different time periods were "extremely parallel, almost identical." *Id.*; App. 1 at 16.

Following Raheem's arrest for murder, Farrar was able to diagnose Raheem with borderline personality disorder. *Id.* Farrar testified that Nord, from Charter Peachford, concurred with his diagnosis of borderline personality disorder. *Id.* Farrar also noted that Raheem exhibited antisocial features although a diagnosis of antisocial personality disorder was not supported by the testing or his evaluation of Raheem. *Id.*

Farrar stated that Raheem gave the initial impression of being someone who was "really accepting" and "very engaging," but as he developed relationships with others, he became scared and pushed people away. *Id.* at 57. Farrar testified that Raheem was "unable to be emotionally connected to anyone" despite a "great desire to be close to people." *Id.* He also stated that people with borderline personality disorder tend to "embellish things, they make up stories, they are entertaining, they try to pull people in to get close to them so they are accepted." *Id.* Farrar explained that when people with borderline personality disorder are accepted, they become "tremendously frightened of the closeness" and immediately "push away" as a result. *Id.* Farrar testified that Raheem, in particular, had a "great deal of suspiciousness and paranoia." *Id.* Moreover, Farrar noted that Raheem would tell "outlandish" stories when others started "liking him or there is

some sense of closeness that comes about." *Id.* Farrar further observed that Raheem had a tendency to "embellish tremendously," "which usually involved him committing a crime or of being a powerful and dangerous man." *Id.*

Therefore, Farrar opined that it was plausible for Raheem to "tell his girlfriend that he had committed a murder that he had not done as it was 'part of his modus operandi.'" *Id.*; App. 1 at 16. "Finally, Raheem's counsel asked whether there was a delusional component to Raheem's mental illness, which Farrar confirmed: Raheem 'has a whole world that sounds delusional [if] you listen to it. He calls it the place that he goes to.'" App. 1 at 16.

d. Sentencing Phase

Raheem severely limited trial counsel regarding which witnesses to present during the sentencing phase. *Id.* at 66. Originally, Raheem indicated that he did not want trial counsel to call any of his immediate family members as witnesses. D10-24:24. With assistance from the trial court and the district attorney, trial counsel "persuaded the TV news media . . . not to film [Raheem's] relatives on the witness stand." *Id.* Only under this condition, after "a lot of begging," Raheem agreed to let his parents testify. *Id.* However, he would not allow trial counsel to present his sister's testimony. *Id.*

(1) State Presentation

The State presented evidence that "Raheem had previously carried a weapon on school grounds at age 15 and had stolen an automobile and fled from police at age 17." *Raheem*, 560 S.E.2d at 687. The State also elicited testimony that jailers had searched Raheem's cell and found a shank, a razor blade, and a detailed map of the jail. App. 4 at 70. The map was found in

Raheem's personal Bible along with other papers with his name on them. *Id.* at 18. During cross examination, trial counsel attempted to create doubt as to whose map it was since Raheem shared his cell with other inmates. *Id.*

In addition, the State called a Henry County Police Department officer to the stand who testified that, "in a conversation initiated by Raheem, Raheem said the following about the murders: 'I had to do what I had to do. It was just business.'" *Raheem*, *supra*. The officer further testified that, "on another occasion, Raheem engaged in misconduct in the jail and then said the following to the officer: 'I also know you're a witness in my case, you little snitch. I'll kill you.'" *Id.*

One of Raheem's fellow inmates, Clyde Hufstetler, testified that "Raheem stated that he was going to have his girlfriend and the district attorney killed and that the district attorney 'didn't know who he was messing with.'" *Id.*; App. 4 at 105.

(2) Defense Presentation

Dr. Charles Nord testified that he evaluated Raheem following his admission to Charter Peachford Hospital in 1994. App. 4 at 74. Nord explained that Raheem was admitted to Charter Peachford following a suicide attempt where Nord conducted a clinical interview and administered various psychological tests. *Id.* Based on his testing, Nord diagnosed Raheem with major depression and oppositional defiant disorder. *Id.*

According to Nord's report, Raheem's situation required psychological supervision because of the potential for additional "suicidal ideation and acting out." *Id.* The report also stated: "[Raheem] 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 suicidal ideation." *Id.*

Additionally, Nord testified that he subsequently interviewed Raheem at the jail and reviewed psychological test data generated after Raheem's arrest. *Id.* at 75. After reviewing the data, Nord testified that his earlier opinion changed. *Id.* Nord stated that while Raheem continued to show symptoms of depression, he also showed characteristics of borderline personality disorder, which was consistent with Farrar's testimony from the guilt phase of trial. *Id.* Nord explained that as part of the borderline personality disorder, Raheem "'would dissociate, he would go into himself.' He was 'more distant and distractible,' and would 'zone out and move into another world, which he had control of.'" App. 1 at 17. Additionally, Nord testified that "'borderline' means 'he's on the verge of becoming more psychotic [meaning he hallucinates], but he's still within some range of reason.' Raheem felt he could 'disappear into that world,' which he found comforting." *Id.*

Next, trial counsel recalled Farrar to show that Raheem could have been helped had he been afforded the opportunity to continue treatment. App. 4 at 78. At the time of Raheem's release from Fairview Day Hospital, Farrar testified that Raheem needed further treatment. *Id.* at 76. Raheem "wasn't close to being ready to be graduated or to leave the program." *Id.* Farrar strongly believed that Raheem needed to remain in a "very intensive day treatment program." *Id.* But, the hospital received a letter from Raheem's insurance provider that stated that the "care was not medically necessary"

and Farrar noted that Raheem's parents did not have the financial resources to pay for the treatment on their own. D7-6:14-15.

Additionally, Farrar explained how Raheem "ha[d] done many behaviors that set people up to do away with his life" including wanting the death penalty. App. 4 at 78. Farrar testified that part of Raheem's "persona" was to present himself to society as a "tough guy." *Id.* at 79. Farrar believed that Raheem was responsible for his actions, but had a fear of rejection and of losing people. *Id.* He stated that Raheem had "lots of potential in him that ha[d] been lost." *Id.*

Trial counsel also presented the testimony of Raheem's parents, Askia and Elaine Raheem. *Id.* at 79-80. They both apologized to the victims' family and spoke about Raheem's good qualities. *Id.* at 79. They both emphasized how they had never known Raheem to be violent against another person before the crime. *Id.* at 80.

During Elaine's testimony she became upset and cried. *Id.* at 66. Raheem stood up, yelled, and ordered trial counsel to get his mother off of the witness stand. *Id.* Courtroom deputies activated the stun belt under Raheem's clothing, which set off a beeping sound. *Id.* at 72. Then, according to trial counsel, Raheem turned toward the deputies and shouted, "Go ahead and shock me." *Id.* at 72. However, the record does not reflect that this comment was made. *Id.* In any event, Crumbley testified that Raheem's reaction might have "worked in his favor" as it "suggested to the jury at least that he had concern for some other person." *Id.* at 66.

Based on the evidence presented, the State argued that Raheem was a future danger to society and asked the jury to sentence Raheem to death. *Id.* at 104. Pertinent to Raheem's arguments before this Court, in response to

Raheem's mental health evidence, the prosecutor disagreed with the experts' "labels" for Raheem's behavior. D7-6:57. Instead, the prosecutor argued, that Raheem was "in just, plain, old country English . . .mean . . .cold-hearted . . .cold-blooded" and that "he'll kill you." *Id.* Immediately following, the prosecutor argued that Raheem was "dangerous" when he committed the crimes and would continue to be "dangerous" in the future. *Id.* This argument was a reminder to the jury that Raheem informed a police officer "I'll kill you" and threatened to "kill[]" his girlfriend and district attorney. *Raheem*, 560 S.E.2d at 687.

In response, trial counsel argued residual doubt. *Id.* at 81. Trial counsel further argued that the testimony of their mental health experts was unrefuted by the State. *Id.* at 82. Trial counsel explained that they were not using Raheem's mental illness as an excuse. *Id.* Rather, "[c]ounsel conceded that Raheem was not incompetent or insane," but argued that "he was 'not as blameworthy as a normal person who was not mentally ill, who had committed these same crimes. Sometimes his thinking is delusional and confused. Sometimes he believes things that aren't real. And a lot of times he hates himself so much that he wants to die.'" App. 1 at 18.

As for the State's future dangerousness argument, trial counsel countered to the jury that the State had not presented any evidence that Raheem had "done a single violent thing since he ha[d] been in jail." *Id.* at 83. Trial counsel stressed to the jury that there was no reason to be afraid of Raheem as he would be sent to a maximum security prison. *Id.* at 73.

2. Direct Appeal Proceedings

On September 28, 2001, Raheem appealed his death sentence to the Georgia Supreme Court. *Raheem*, 2560 S.E.2d 680. He raised a prosecutorial misconduct claim for the State's comment during its guilt phase closing argument on his failure to testify at trial. *Id.* at 685. The Georgia Supreme Court held that the State's comment was error, but that the error was harmless. *Id.*

Raheem did not challenge the prosecutor's sentencing phase closing argument or raise a substantive competency claim. On March 11, 2002, the Georgia Supreme Court affirmed Raheem's death sentence. *Id.* at 682; *cert. denied Raheem v. Georgia*, 537 U.S. 1021 (2002).

3. State Habeas Proceedings

On April 3, 2003, Raheem—represented by new counsel—filed his state habeas petition challenging his sentence of death. App. 4 at 2. He raised allegations concerning his competency to stand trial as well as trial counsel's ineffectiveness regarding the issue, and a prosecutorial misconduct claim regarding the prosecutor's future dangerousness sentencing phase closing argument. *Id.* at 7.

On January 28-30, 2008, the state habeas court held an evidentiary hearing. *Id.* at 2. Raheem presented the live testimony of neuropsychologist, Dr. Ruben Gur and trial counsel, Gregory Futch as well as affidavits from family, teachers, and experts who were retained at trial. D10-20:47–D10-23:15. In response, the Warden presented the live testimony of the State's lead investigator, Renee Swanson, the district attorney at trial, Tommy Floyd, trial counsel, Wade Crumbley, and his own forensic neuropsychologist, Dr. Daniel Martell. D10-23:18–D10-25:59.

Raheem's new expert, Gur testified about the MRI scan performed during state habeas. Gur admitted that the "initial reading" was "normal" but found after another review that Raheem's "frontal lobe was 'reduced in volume' and Raheem had "brain damage." App. 1 at 18. "Gur opined that Raheem's brain deficits could have affected his culpability for the crimes and his competence at trial because they impaired his 'ability to correctly perceive events, interpret events, exercise suitable judgment, and to plan and respond appropriately.'" *Id.* Gur diagnosed Raheem with "schizophrenia or schizophrenic-like psychosis." *Id.*

The Warden presented Martell, who "agreed that there was some evidence of organic brain damage, opining that 'the impairment that he does have appears to be mild to moderate and specific to [several] focal areas . . . : the tapping deficit, particularly with his right hand, implicating the left motor strip, the mathematic learning disability and the possibility of an attention deficit disorder.'" *Id.* Martell disagreed "that Raheem's organic brain abnormality…affect[ed] his behavior or his functioning in any of the ways that Gur had posited." *Id.* "Martell also said that he did not see any evidence that Raheem was 'unable to control his behavior,' or that he lacked the ability to understand the world around him, or, finally, that he had impaired executive functioning (i.e., problems with decision making and judgment)." *Id.* at 18-19. Moreover, "[i]n his report, also submitted as an exhibit at the state habeas hearing, Martell concluded, 'Raheem does not suffer from significant brain damage, and he is neither psychotic nor delusional.'" *Id.* at 19.

Martell also theorized that "Raheem suffer[ed] from a seizure disorder, which causes brief 'absence seizures,'" but explained that "additional testing

would be necessary to determine this conclusively."[4] *Id.* at 19, 22. "Martell noted that [the seizures] were ten to thirty seconds in duration" which he "'d[idn]'t see [] as particularly disabling,'" but "conceded that 'it's certainly conceivable that he could zone out at a moment when there's critical testimony and miss that testimony.'" *Id.* (brackets in original). "However, Martell squarely said that Raheem was competent to stand trial: 'I think he was competent then, and I think he's probably competent now.'" *Id.*

Gur testified that he was "embarrass[ed]" that he had not seen these "absent seizures" in Raheem during his evaluation. *Id.* at 19. But he also testified "that if Raheem suffers from this disorder, it would be hard even for an expert to spot it." *Id.* at 22. "Gur gave conflicting testimony about whether these absences might have affected Raheem's competency to stand trial." *Id.* at 19. However, "Gur acknowledged that he did not talk to Raheem's trial counsel about their communications with Raheem. …admitted that Raheem was able to participate in tests and gave valid test results, working with many doctors." And, "Raheem understood [Gur] and his role, and that Raheem was able to communicate with Gur and was 'apparently oriented to time, place, and person.'" *Id.*

Crumbley and Futch each testified about some difficulty communicating with Raheem but neither thought he was incompetent. As pointed out by the court of appeals, Futch testified "that 'my opinion would be that he was competent to stand trial, otherwise, I would have . . . fought very vigorously

[4] "Martell 'doubt[ed]' that Raheem could shoot someone during one of these seizures, because he was unfocused during the seizures, 'which would be inconsistent with focusing, aiming, and shooting a gun at some distance,' and a seizure lasting for ten hours would be 'rare.'" *Id.* (brackets in original).

to have his trial postponed." *Id.* at 20. And "Crumbley agreed: 'I didn't have any mental health expert telling me that [Raheem] was insane or that he was incompetent . . . . No one ever suggested to me that [Raheem] was not competent. My own impression was that he was competent.'" *Id.* (brackets in original).

Notably, even after reviewing Martell's report and conducting a deposition, habeas counsel did not attempt to have Raheem evaluated by an epileptologist in his rebuttal discovery period. Instead, after the evidentiary hearing was over, and the evidence had been closed, nearly a year later, Raheem submitted an affidavit from Dr. Melissa Carran a neurologist and epileptologist. "Carran reviewed the record and diagnosed Raheem with epilepsy," however, "Carran did not meet with Raheem and did not conduct electrophysiology, which Dr. Gur testified was necessary to diagnose an individual with epilepsy." App. 1 at 20.

Following the evidentiary hearing, arguments of counsel, post-hearing briefs, and proposed orders, on February 19, 2009, the state habeas court issued a 106-page order denying relief.[5] App. 4. The court dismissed Raheem's competency claim as procedurally defaulted. *Id.* at 7. It held that Raheem failed to prove cause and prejudice or a miscarriage of justice to overcome the default. *Id.* at 11. As cause to overcome the default, the state court considered Raheem's claim of ineffective assistance for failure to raise

[5] Following careful consideration of all of the pleadings and evidence presented by both parties, as well as proposed orders submitted by both parties, a year after the hearing, the state habeas court informed all parties that it intended to rule in favor of the Warden and directed the Warden to resubmit a proposed order entitled "final order" including additional case law cited by the state court.

competency. *Id.* It reasoned that although Raheem's mental health expert in the habeas proceedings believed Raheem to be incompetent, Raheem's expert at trial believed him to be competent—and none of the other mental health experts used by trial counsel indicated Raheem was incompetent. *Id.* Moreover, the court credited the opinion of the Warden's expert who evaluated Raheem and opined that he "was competent" at the time of trial. *Id.* at 10.

The state court also determined that Raheem's prosecutorial misconduct claim regarding the prosecutor's future dangerousness argument during sentencing phase closing was procedurally defaulted because there was no objection at trial and no claim raised on direct appeal. App. 4 at 104-05. Again, the habeas court evaluated trial counsel's ineffectiveness as cause to overcome the default and found it to be lacking. *Id.* at 105.

On May 22, 2009, Raheem applied for a certificate of probable cause to appeal ("CPC") the state habeas court's decision in the Georgia Supreme Court. D25-2–D25-3. On October 18, 2010, the Georgia Supreme Court summarily denied Raheem's application. D25-11:1. Raheem filed a petition for certiorari review with this Court asking it to grant the petition to determine whether mental illness should categorically exclude the death penalty. D25-12. This Court denied the petition on May 23, 2011. *Raheem v. Hall*, 563 U.S. 1010, 131 S. Ct. 2905 (2011).

4. Federal Habeas Proceedings

Raheem filed his federal habeas petition on May 24, 2011. App. 3 at 1. In his petition, Raheem alleged claims regarding prosecutorial misconduct, his competency to stand trial as well as a related ineffectiveness claim

regarding this issue, and ineffective-assistance claims for trial counsel's performance regarding the State's future dangerousness argument. D1:5, 21, 45, 51, 58, 69. Raheem filed a motion for discovery, evidentiary hearing, and to expand the record to include Carran's affidavit and specific Georgia Department of Corrections' medical records generated since being housed on death row. *See* App. 5–6. The district court denied all three requests. App. 7. In denying the request to expand the record, the court found, in addition to failing to show diligence, that submitting Carran's affidavit to the state court after the close of evidence was in violation of state law and it was "not part of the record in this matter." App. 9 at 2. Regarding the medical records,[6] which concerned an incident that occurred many years after trial, the district court concluded that "the evidence at issue [was] not sufficiently relevant to [Raheem]'s claims [to include his competency claim] to provide good cause to expand the record or to allow [Raheem] to conduct discovery." *Id.* at 3.

The district court denied relief for Raheem's substantive competency claim and request for an evidentiary hearing under de novo review because the state court dismissed the claim as procedurally defaulted, which is not permitted under federal law. App. 3 at 17-24. The district court thoroughly reviewed the record, assumed that Raheem suffered from "absent seizures,"

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[6] Raheem states that these records "document[ed]" that he "had suffered what were described by [the Warden]'s agents/officers as seizures, convulsing and unresponsiveness." Brief at 8. In the Warden's response in opposition to Raheem's request to expand the record, the Warden pointed out that the medical records showed that after Raheem was evaluated by the medical staff regarding this incident of him "thrashing around in his cell," the staff found he was not having a seizure, had "no medical concerns," and was "cleared by medical." D57:7.

and concluded that Raheem did "not demonstrate[ ] his incompetence at the time of trial by a preponderance of the evidence." *Id.* at 24. In denying the evidentiary hearing, the district court determined that Raheem had not established by "clear and convincing evidence" a "real, substantial, and legitimate doubt" as to his competence. *Id.* at 24.

The district court dismissed Raheem's prosecutorial misconduct claim regarding the prosecutor's future dangerousness sentencing phase closing argument as procedurally defaulted. *Id.* at 29. Raheem argued ineffective assistance of trial counsel as cause to overcome the default. Because Raheem's ineffective assistance claim was denied on the merits by the state habeas court, the district court gave it deference under the AEDPA and found it withstood scrutiny. *Id.* at 30.

On September 24, 2015, the district court denied Raheem's federal habeas petition. *Id.* On December 1, 2015, Raheem filed a motion to alter and amend the judgment, and an application for a certificate of appealability ("COA"). D71. On April 22, 2016, the district court denied Raheem's motion and granted his application in part. D72. It granted his application for, *inter alia,* his claims regarding competency to stand trial and his prosecutorial misconduct claim.

The court of appeals affirmed the district court's denial of relief. App. 1. The court stated that "for Raheem's substantive competency claim, we review the district court's factual findings for clear error, and its legal conclusions *de novo.*" App. 1 at 12 (citing *Lawrence v. Sec'y, Fla. Dep't of Corr.*, 700 F.3d 464, 481 (11th Cir. 2012)). The court found that "the district court considered all the evidence in the record about Raheem's competency and found that Raheem had not established by a preponderance of the evidence

that he was incompetent." *Id.* at 28. Because this was a factual finding, the court of appeals reviewed it for "clear error" and could find none. *Id.* at 28-29. In doing so, the court pointed out that: "Raheem's lawyers spent a significant amount of time with Raheem and both believed him to be competent at the time of trial"; none of the mental health experts, at the time of trial, stated Raheem was incompetent; and the Warden's mental health expert, whom the state court credited, opined that Raheem was competent at trial. *Id.* at 29. Regarding the "absent seizures," the court held that the district court's finding that they "did not establish his incompetency" was not clearly erroneous given that trial counsel testified that "'for the most part, [Raheem] was appropriate during the trial'" and the trial court did not have any difficulty conversing with Raheem during their colloquies. *Id.* Consequently, the court of appeals concluded that the district court had not erred in denying Raheem's substantive competency claim or his request for an evidentiary hearing. *Id.*

The court of appeals also agreed that Raheem's prosecutorial misconduct claim remained procedurally defaulted. *Id.* at 32. The court recognized that Raheem was asserting ineffective assistance of trial counsel for failing to object to the prosecutor's future dangerousness argument as cause to overcome the default. *Id.* The court assumed trial counsel were deficient but held Raheem failed to prove the state court's prejudice determination was contrary to, or an unreasonable application of, Supreme Court precedent. *Id.* Specifically, the court reasoned that because the "the state offered overwhelming evidence, including strong evidence concerning Raheem's future dangerousness" and trial counsel adequately addressed the prosecutor's comments during their own closing, there was no prejudice. *Id.*

REASONS FOR DENYING THE PETITION

I. The court of appeals' decision is not in conflict with this Court's precedent nor does it conflict with any other court of appeals.

Raheem barely even pretends that there is a split of authority as to his competency claim. Raheem argues that the Eleventh Circuit used the wrong standard for determining whether an evidentiary hearing is required in a federal habeas proceeding, and he disagrees with the court of appeals' use of the "clear error" standard for reviewing the district court's factual findings of his substantive competency claim. But Raheem does not come up with any reason to *review* these supposed errors. At most, he asks this Court for an extremely fact-intensive reevaluation of the lower courts' work. Plus, there are no errors. This Court should decline Raheem's request.

A. The Eleventh Circuit's standard for determining whether an evidentiary hearing is required for a substantive competency claim is not in conflict with any other court.

This Court held in *Dusky* that the "test" for determining competency to stand trial was "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky*, 362 U.S. 402. A few years later, this Court explained that a defendant could not waive his right to be tried while competent and that a trial court should *sua sponte* hold a competency hearing if "sufficient doubt exist[ed] as to [a defendant's] present competence." *Pate v. Robinson*, 383 U.S. 375, 387, 86 S. Ct. 836, 843 (1966). And in both *Dusky* and *Pate*, the Court "noted the difficulty of retrospectively determining an accused's competence to stand trial." *Pate*, *supra*; *see also Dusky*, *supra*.

Following this precedent, the court of appeals explained that federal courts should not consider substantive competency claims unless the petitioner presents facts that create "a real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during a criminal trial." *Bruce v. Estelle*, 483 F.2d 1031, 1043 (5th Cir. 1973). Later, the court of appeals specifically held that this standard applied to a petitioner's request for a federal evidentiary hearing: "In order to be entitled to an evidentiary hearing on competence to stand trial, [Petitioner] must present sufficient facts to create a 'real, substantial and legitimate doubt as to (her) mental capacity . . . to meaningfully participate and cooperate with counsel.'" *Zapata v. Estelle*, 588 F.2d 1017, 1021-22 (5th Cir. 1979) (quoting *Nathaniel v. Estelle*, 493 F.2d at 798). Over the past four decades, the Eleventh Circuit has consistently used this standard. *See*, *e.g.*, *Adams v. Wainwright*, 764 F.2d 1356, 1359-60 (11th Cir. 1985); *James v. Singletary*, 957 F.2d 1562, 1573-74 (11th Cir. 1992); *Lawrence v. Sec'y Fla. Dep't of Corr.*, 700 F.3d 464, 476-77 (11th Cir. 2012).

Ignoring this standard all together, Raheem argues that the district court was required to hold an evidentiary hearing because the "state habeas court did not address the incompetency claim." Brief at 22. In support, Raheem points to the following holding in *Townsend v. Sain*: "the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." 372 U.S. 293, 312, 83 S. Ct. 745, 757 (1963). However, the state habeas court held an evidentiary hearing and allowed briefing on Raheem's claim. After review, as correctly found by the district court and the court of appeals, the state habeas

court considered whether trial counsel were ineffective for failing to raise the claim, ultimately determined they were not, and held Raheem had failed to show cause to overcome the procedural default of the claim. App. 3 at 17; App. 4 at 7-11. Because substantive competency claims cannot be defaulted, however, the district court correctly determined that it must review the claim de novo as there was no decision on the merits from the state court. *See Adams v. Wainwright*, 764 F.2d 1356, 1359 (11th Cir. 1985) (explaining that competency claims cannot be procedurally defaulted because "'it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waive his right to have the court determine his capacity to stand trial.'") (quoting *Pate*, 383 U.S. at 384) (quotation marks omitted). Thus, even assuming *Townsend* applied in this situation, its mandate for an evidentiary hearing was not triggered by the state court proceedings.

Relying upon Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 20.1 [b], at 7-11, Raheem also argues that a federal hearing is required "if three conditions are met." Brief at 23-24, n.21. In support, Raheem provides a string cite to cases decided in other courts of appeals. *Id.* However, only one of the cases—*Deere v. Woodford*, 339 F.3d 1084, 1086 (9th Cir. 2003)—concerns a substantive competency claim. Most importantly, the court in *Deere* used the same standard for deciding whether to grant an evidentiary hearing as the federal courts in Raheem's case: "'In 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.'" *Deere*, *supra* (quoting *Boag v. Raines*, 769 F.2d

1341, 1343 (9th Cir. 1985) (emphasis added). Raheem fails to cite to any precedent of this Court, or any other court of appeals, holding that the "three conditions" he has outlined are required to determine whether a federal habeas court must conduct an evidentiary hearing on a substantive competency claim.

Essentially, Raheem wants this Court to grant certiorari to hold that if a petitioner can point to evidence of mental illness, the federal courts are required to hold an evidentiary hearing. Given that the large number of petitioners sentenced to death rely upon some form of mental illness to mitigate their sentence, under Raheem's arguments, federal courts would routinely *be required* to hold retrospective substantive competency hearings in habeas. Raheem presents an unworkable standard for the federal courts to apply and fails to prove the court of appeals' current standard striking the necessary balance between the right not to be tried while incompetent with the "difficulty of retrospectively determining an accused's competence to stand trial" is in conflict with this Court's precedent. *Pate*, 383 U.S. at 387.

B. The court of appeals used the correct standard of review on appeal, which does not conflict with any other court.

In outlining its standards of review, the court of appeals explained that "[a]s for Raheem's substantive competency claim, we review the district court's factual findings for clear error, and its legal conclusions *de novo*. App. 1 at 12 (citing *Lawrence*, 700 F.3d at 481). The court correctly defined "clearly erroneous" as "'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *Jenkins v. Comm'r, Ala. Dep't of Corr.,* 963 F.3d 1248, 1264 (11th Cir. 2020)). In

evaluating whether the district court should have granted an evidentiary hearing, the court of appeals stated it would "review the factual finding made by the district court for clear error." App. 1 at 29. After reviewing the district court's findings and the record, the court of appeals concluded: "The district court rightly described the competency standard as a 'narrow' one. And our review is only for clear error. [] We can discern none." *Id.* (quoting App. 3 at 24) (citation omitted).

Raheem argues that "[t]his highly deferential review standard conflicts with controlling Supreme Court precedent and the review standards employed by other Circuits." Brief at 32. But Raheem fails to support this statement with any applicable precedent. First, Raheem fails to show that the district court's evaluation of his evidence to determine whether he had shown a "substantial doubt" as to his competency was not a factual determination. In point of fact, this Court has held that a "court's factual finding as to [a petitioner's] competence" is entitled to a "presumption of correctness." *Demosthenes v. Baal*, 495 U.S. 731, 735, 110 S. Ct. 2223, 2225 (1990). This makes sense under *Drope v. Missouri* which explains that "[t]here are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed." 420 U.S. 162, 180, 95 S. Ct. 896, 908 (1975).

Second, contrary to Raheem's argument, the district court's decision to deny his request for an evidentiary hearing was discretionary. Relying once again on *Townsend*'s holding that an evidentiary hearing is required when a "full and fair hearing" is not received, Raheem complains that the district court had no choice but to hold a hearing. Brief at 33. Raheem adds to this with the following from *Schriro v. Landrigan*: "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." 550 U.S. 465, 473 (2007); *see also* Brief at 33. If this were a different claim, and a different state habeas record, perhaps Raheem would be correct. But here, the standard to obtain an evidentiary hearing was whether Raheem showed by "'clear and convincing evidence'" that there was a "'real, substantial, and legitimate doubt'" as to his competence. App. 3 at 24 (quoting *Lawrence*, 700 F.3d at 481). And in *Landrigan*, the Court stated, "Prior to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), [] the decision to grant an evidentiary hearing was generally left to the sound discretion of district courts." *Landrigan*, 550 U.S. at 473 (citation omitted).

Disputing the Eleventh Circuit's standard of review, Raheem provides another string cite of cases in which other courts of appeals remanded cases for evidentiary hearings on competency claims. Brief at 33-34. But each of these cases merely represents a fact-specific review of whether the district court should have granted an evidentiary hearing. None of the cases held or indicated that it was reviewing the fact findings of the district court under a different standard. Instead, in each of the cases, the courts of appeals merely came to varying conclusions as to whether varying facts showed a "substantial" or "sufficient doubt" as to the respective petitioner's competency. *See Deere v. Woodford*, 339 F.3d at 1086 ("'In 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*, 769 F.2d at 1343 (emphasis added)); *Sena*

v. N.M. State Prison, 109 F.3d 652, 655 (10th Cir. 1997) ("After reviewing the same record studied by the district court, we conclude it discloses ample evidence to create a *substantial doubt* regarding [] Sena's competence at the time he entered his guilty plea" and "the district court erred in denying [] Sena's request for an evidentiary hearing") (emphasis added); *Speedy v. Wyrick*, 702 F.2d 723, 726 (8th Cir. 1983) (the court of appeals disagreed with the magistrate court's determination that there was not "*sufficient doubt*" about Speedy's competence at trial, and remanded for an evidentiary hearing because neither the state court nor the lower federal court had considered the entire record and there was "at least one factual dispute" "not addressed by the magistrate").

Simply put, there is no precedent from this Court, or any other court of appeals, that conflicts with the court of appeals' decision in this case to review the fact findings of the district court under the "clear error" standard of review.

C. The decision below is correct.

Raheem's request for certiorari review reduces to nothing more than a request for factbound error review. And that review that is unnecessary because the denial of Raheem's request for an evidentiary hearing was not wrongly decided by the federal courts.

The question before the district court was not whether Raheem struggled with mental health issues—indeed the parties did not debate that Raheem had mental health problems—the question was whether he had shown by "'clear and convincing evidence' that creates a 'real, substantial, and legitimate doubt' as to his competence" to be entitled to an evidentiary

hearing. App. 1 at 17 (quoting *James v. Singletary*, 957 F.2d 1562, 1571 (11th Cir. 1992)). Again, the standard for competency is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky*, 362 U.S. 402. Notably, nowhere in Raheem's brief to this Court is the *Dusky* standard mentioned. This failure underscores Raheem's entire argument because his focus is on behavior that fits in mental health areas that are independent of whether he was competent. Most importantly, Raheem ignores the overwhelming evidence refuting his claim of incompetence and the fact that he "'is entitled to no presumption of incompetency and must demonstrate his ... incompetency by a preponderance of the evidence.'" App. 1 at 17 (quoting *James, supra*).

In support of his request for factbound error review, Raheem quotes portions of trial counsel's testimony regarding their concerns about his behavior before and during trial. Brief at 29-32. However, he ignores trial counsel's most relevant testimony relied upon by the district court and the court of appeals. Specifically, as pointed out by the court of appeals, "Futch was clear that 'my opinion would be that he was competent to stand trial, otherwise, I would have . . . fought very vigorously to have his trial postponed.'" App. 1 at 20. And, "Crumbley agreed: 'I didn't have any mental health expert telling me that [Raheem] was insane or that he was incompetent . . . . No one ever suggested to me that [Raheem] was not competent. My own impression was that he was competent.'" *Id.* The federal court rightly did not ignore this important testimony. *See generally White v. Estelle*, 459 U.S. 1118, 1125, 103 S. Ct. 757, 761 (1983) ("The court also must

take into account the observations of lay witnesses, and particularly the observations of the defendant's counsel, with respect to the defendant's ability to reason, to remember, to cooperate, and to communicate.").

Additionally, as pointed out by the court of appeals, the colloquies between the trial court and Raheem did not reveal evidence of incompetence. For example, the trial court asked him questions regarding his refusal to take the PET scan arranged by trial counsel during voir dire and his answer does not evidence an incompetent mind. *See* D16-8:10-11. During the colloquy, Raheem explained that he refused to take the PET scan because he did not want to be humiliated in his jail attire to a crowd of observers at the hospital after having been featured on the news telecasted the night before. *Id.*

Raheem also relies heavily on the opinions of the mental health experts, to include the state's expert Martell, that he had brain damage. Yet, as noted by the court of appeals, "Martell opine[d] that 'the impairment that he does have appears to be mild to moderate and specific to [several] focal areas'" and he also "said that he did not see any evidence that Raheem was 'unable to control his behavior,' or that he lacked the ability to understand the world around him, or, finally, that he had impaired executive functioning (i.e., problems with decision making and judgment)." App. 1 at 18. Moreover, in Martell's report he "concluded, 'Raheem does not suffer from significant brain damage, and he is neither psychotic nor delusional.'" *Id.* at 19. Most importantly, Martell "affirmatively asserted that Raheem was competent." *Id.* at 29.

Finally, Raheem relies upon the district court's assumption that he suffered from "absent seizures" which caused him to be absent at trial and

support his claim of incompetence and need for an evidentiary hearing.[7] Brief at 32. But a request for a retrospective competency assessment, with the burden on the petitioner, is not assessed in a vacuum. Trial counsel, who had interacted with him on many occasions over two years, never saw him as incompetent. App. 1 at 20. The four mental health experts never alerted trial counsel to a competency problem. *Id.* The expert, Carran, that actually diagnosed him with these absent seizures, never even met Raheem. *Id.* And his other state habeas expert, Gur, testified that he never saw evidence of these "seizures" during his evaluation, never spoke with trial counsel about their communication with Raheem, and disagreed that a person could be diagnosed with epilepsy without conducting an electrophysiology, which Carran did not perform. *Id.*

In the end, the court of appeals surmised that while Raheem may not have "act[ed] in his own best interests at all times," this was not enough to prove his "'ability to consult with his lawyer with a reasonable degree of rational understanding'" was constitutionally compromised. *Id.* (quoting *Dusky*, 362 U.S. at 402). Raheem has not shown that the federal courts wrongly denied his request for an evidentiary hearing because he failed to "present 'clear and convincing evidence' that create[d] a 'real,

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[7] Raheem relies often on the affidavit of Carran throughout his brief. Raheem is correct that the district court did not expand the record to include this affidavit because of Raheem's failure to properly present it and have it admitted as evidence during his state habeas evidentiary hearing. *See* App. 9. However, the court of appeals correctly stated that the district court considered Carran's opinion when it assumed that Raheem suffered from "absent seizures." App. 1 at 29. Notably, contrary to Raheem's implications, Carran is the only expert that was qualified in the area of medicine and psychiatry to give an opinion on this issue. Regardless, the courts considered Raheem's questionable evidence and found it lacking.

substantial, and legitimate doubt' as to his competence." App. 1 at 17 (quoting James, 957 F.2d at 1571). The Court should deny his request for certiorari review to consider his factbound claim.

II. Raheem's prosecutorial misconduct claim was denied on adequate and independent state law grounds and does not warrant certiorari review.

Unnecessarily exaggerating and implying inappropriate racial profiling by the prosecutor, Raheem states that "[t]he prosecutor argued …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." Brief at 34. Instead, the prosecutor argued, in response to Raheem's mental health experts' explanation for his behavior, that Raheem was in "plain, old country English" "mean," "cold-hearted," and "cold-blooded." D7-6:57. Continuing in this colloquial form, the prosecutor argued that "he'll kill you" and told the jury that Raheem was "dangerous" in the past and would be "dangerous" in the future. *Id.* No doubt, the prosecutor's "he'll kill you" remark was in reference to testimony during sentencing that Raheem threatened a police officer with "I'll kill you" and told another inmate he would "kill[]" his girlfriend and the district attorney. *Raheem*, 560 S.E.2d at 687. Trial counsel did not object but instead responded to this argument during closing.

The prosecutor's argument was not raised in a claim on direct appeal and the state habeas court determined Raheem's challenge was procedurally defaulted. *See* App. 4 at 104-05. The court of appeals agreed and because this is an adequate and independent ground for dismissal of a federal habeas claim, this Court should decline to grant review. Additionally, Raheem asks this Court to grant certiorari review of the court of appeals' determination

that he failed to establish cause and prejudice to overcome his procedurally defaulted continuance claim. But that is a request for factbound error correction that does not warrant certiorari review, and in any event, the decision below was correct.

"This Court long has held that it will not consider an issue of federal law [] from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260, 109 S. Ct. 1038 (1989). Under Georgia law, the failure to object at trial to a perceived error or to "pursue the same on appeal" will result in the procedural default of a claim absent a showing of cause and prejudice or a miscarriage of justice. *Black v. Hardin*, 336 S.E.2d 754, 755 (1985); O.C.G.A. § 9-14-48(d). Georgia's procedural default bar is an adequate and independent state law ground. *See, e.g., Davila v. Davis*, __ U.S. __, 137 S. Ct. 2058, 2064 (2017) ("a federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule.").

As pointed out by the court of appeals, "Raheem argues now -- as he must -- that ineffective assistance of counsel provides cause to overcome the procedural default, claiming that his counsel unreasonably failed to object to the comments the district attorney made during closing arguments."[8] App. 1 at 32. The state habeas court held trial counsel were not ineffective in

[8] "A state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show 'cause' to excuse his failure to comply with the state procedural rule and 'actual prejudice resulting from the alleged constitutional violation.'" *Davila*, 137 S. Ct. at 2064–65.

choosing not to object to this portion of the prosecutor's closing argument, which meant Raheem had not proven cause to overcome the default of his claim. App. 4 at 104-05. The court of appeals gave AEDPA deference to the state court's ineffective assistance determination. *See* App. 1 at 32-33. Raheem argues that the courts are split on whether the claim underlying "cause" is entitled to deference under the AEDPA. Even assuming that is true, this case provides no opportunity to resolve the split.

The court of appeals assumed deficient performance and went straight to the question of whether Raheem was prejudiced by trial counsel's decision not to object. App. 1 at 32-33. The court held that when "considering the full record before the jury, we are satisfied that Raheem cannot establish that he was prejudiced by defense counsel's failure to object to the prosecutor's comment." *Id.* at 33 (emphasis in original). In making this determination, the court of appeals pointed out that "the state offered overwhelming evidence, including strong evidence concerning Raheem's future dangerousness." *Id.* Indeed, the State elicited testimony that jailers had searched Raheem's cell and found a shank, a razor blade, and a detailed map of the jail. *Id.* In addition, the State called one of Raheem's fellow inmates, Clyde Hufstetler, who testified that "Raheem stated that he was going to have his girlfriend and the district attorney killed and that the district attorney 'didn't know who he was messing with.'" *Id.*; App. 4 at 105.

Additionally, as noted by the court of appeals, trial counsel responded to the State's argument. Crumbley argued:

> 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.

App. 1 at 33.

What is more, the substantially aggravated nature of the crime cannot be ignored. Prior to shooting Brandon Hollis in the back of the head, Raheem tested his handgun to make sure it would not jam. *See* App. 1 at 24. Raheem purchased garbage bags prior to murdering Miriam Hollis, which he used when he shot her to death. *See id.* Finally, as described by the court of appeals, "Raheem desecrated Miriam's body, first parading it around in the trunk of the car for hours and showing it off, and then dousing her body with gasoline or alcohol and burning it on train tracks." *Id.* at 24-25.

In determining prejudice, "court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland v. Washington*, 466 U.S. 668, 695, 104 S. Ct. 2052, 2069 (1984). Here, the "totality of the evidence" includes Raheem's behavior while awaiting trial, the extremely aggravated nature of the crime, and trial counsel's response. Whether prejudice is reviewed *de novo* or under the AEDPA, the inevitable conclusion is that an objection to the prosecutor's remarks would not have created any probability—much less a reasonable probability—of a different outcome. Certiorari review should be denied.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2022, I served this brief on all parties required to be served by mailing a copy of the brief to be delivered via email, addressed as follows:

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