No. 21-6382
CAPITAL CASE

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. Petitioner Was Incompetent to Stand Trial and the District Court Should have Allowed Evidentiary Development on the Issue (Question 1)

A. 28 USC § 2254

When "(d)" does not apply for any reason, federal court de novo review is required.[1] Pre-AEDPA, state court findings of fact carry no presumption of correctness when "the merits of the federal dispute were not resolved." *Jefferson v. Upton,*130 S.Ct. 2217, 2221, 2222 (2010), citing 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 20.2c, pp. 915-918 (5th ed.2005), with approval.

The state concedes the state courts did not address this claim. *See* Respondent's brief in the circuit court at 135. Thus Petitioner was entitled to de novo review in district court unconstrained by anything that happened in state court.[2] Respondent's argument that "[i]n 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.

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[1]*Panetti v. Quarterman*, 127 S.Ct 2842, 2859-60 (2007) (With no AEPDA, ***[w]e therefore consider petitioner's claim on the merits and without deferring to the state court's finding of competency***.)

[2]This is particularly true when the state wrote the fact-findings that could have been relevant to the competency claim had it been adjudicated. Hotly contested issues were "resolved"on state counsel's keyboard. After the evidentiary hearing was completed in the state habeas court the presiding judge asked the parties to "brief" the case and to submit proposed orders granting/denying relief. Counsel for Petitioner objected to the parties providing the Court with proposed orders and argued "that the Court should write its own order" because "neither side is going to produce an unbiased [proposed] final order." D.10-25:583. The Court insisted that proposed orders be submitted. *Id*. After the state's proposed order denying relief was submitted to the judge, he mailed a letter asking the state to change its "proposed" order to a "final" order and to type for the Court two case citations and insert them wherever the State thought was the "appropriate place." D.25-1. The state complied, and the state court judge promptly signed the state's order denying relief. Appendix 4, D.24-20. This order did not credit, and most often did not mention, anything presented by Petitioner's witnesses.

2223, 2225 (1990), BIO at 30, does not control this case. In *Baal*, the state courts had arrived at a judgment that Baal was competent to waive post-conviction relief. Under current § 2254(d)'s presumption of correctness, the state court's factual finding as to Baal's competence was presumed to be correct and binding on a federal habeas court. There is no such presumption in this case; there is no state court judgment.

B. This 19 year old brain damaged, capital defendant has never had a competency hearing and his allegations of incompetency warranted district court fact-finding.

1. What the district court did find warranted an evidentiary hearing

Competency to stand trial turns on "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). Without independent factual development, the district court found that "[t]he record establishes that Petitioner suffered from severe depression and compensated with conduct that interfered with his ability to assist his counsel. The record supports Petitioner's contention that he suffers from brain damage, possibly organic in origin, and it supports his contention that he suffers from absence seizures of brief duration." Appendix 3, D.64:66. These finding should have prompted a hearing because the petition alleges facts that, if proved, entitle the petitioner to relief, facts that are not "'palpably incredible' [or] 'patently frivolous or false'" — the standard for summary dismissal in habeas corpus proceedings.[3]

[3] *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)).

2. Evidence of incompetence

As pled in his petition, this nineteen year old on trial for his life:

had a documented history of psychiatric diagnosis and treatment with prescription medication;

had attempted to commit suicide many times and hoped to be sentenced to death;

had been fainting in his cell with eyes rolled back (according to jailors);

had head trauma as a child and brain damage, according to all experts;

had exhibited peculiar behaviors and thought patterns since childhood and had a preoccupation with fantasies that was abnormal in that he believed the fantasies represent realities in his life;

had, according to counsel and experts, delusional thought disorder and because of it "he may be in another place right now as far as he is concerned, that *he can really go there*;"

had been recently diagnosed as suffering from borderline personality disorder, "a pretty serious disorder" with "a delusional component to it" resulting in "a lot of what appears to be delusional kind of thinking;"

had worsened with trial approaching and "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;"

had a recent changed condition that worried mental health experts who "had not seen earlier ...this dissociative disorder, where he can just dissociate from being here into somewhere else.";

asked that the judge tell someone in the audience to stop gesturing at him, real or imagined, and ignored his attorney's advice to not turn and look into the audience;

slumped in his chair and exuded an air of indifference during trial;

covered his face with his hands during trial;

jumped up at sentencing, yelled at his mother, and then turned to a deputy in open court who was preparing to shock him and said "go ahead and shock me," in the

jury's presence;

had "thinking," according to defense attorney Crumbley, that "is delusional and confused. Sometimes he believes things that aren't real. And a lot of times he hates himself so much he wants to die."

According to defense counsel Futch:

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.10-23:371)(emphasis added).

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.[4] Crumbley presented expert testimony that Petitioner "has moments when he is psychotic."[5] 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.14-5:2296-97). 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.14-5:2296-98); occasionally Petitioner was hostile

[4] "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.6-13:1730)(emphasis added). The state court order did not mention this.

[5] Crumbley had ample bases for these statements. In separate meetings, he was told that Petitioner's MMPI '"looks psychotic'" (D.10-29:870) that Petitioner's "schizophrenia scale high" (D.10-29:871) and that the defendant "has a delusional problem & is schizophrenic...He has a psychotic process going on." (D.11-2:974). The state court order does not mention this.

(D.10-24:406);[6] he advised Petitioner that his chances of an acquittal were "practically non existent" (D.10-24:457) but Petitioner insisted on having a guilt/innocence defense; Petitioner repeatedly invited the 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 had ever happened." (D.10-24:409); and Petitioner was suicidal. (D.10-24:411).

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.14-5:2325). Petitioner was unconcerned about a death sentence "because I can just go to the other place." (D.14-5:2325).[7]

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.10-24:414); the way he kept his client coming to court and behaving was to bring him pizza for lunch (D.10-24:443, *see also* D.14-5:2303) and this "seemed to be enough to keep him interested in sitting there through the trial" (D.10-24:415); and that Petitioner "projected...an air of indifference" (D.10-24:452-54)

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[6]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. (D.10-22:279-80).

[7]*See also* D.14-5:2325 (the reason he was unconcerned about the death penalty was because "I can just go to the other place."); D.14-5:2327 ("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 "he never discussed it like it was something he believed was real." (D.14-5:2327). Again, Crumbley earlier had said: "[o]ne feature of Mustafa's mental illness is that he suffers from delusional thought processes" (D.6-13:1723) 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.6-13:1730) and "sometimes his thinking is delusional and confused. Sometimes he believes things that aren't real." (D.7-6:2972).

and covered his face, and "he was not doing it only occasionally." (D.10-24:453). Jurors told him after the trial that Petitioner had made obscene gestures at them while he was being tried. (D.10-24:453). 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.10-24:414).

Crumbley was asked by the state habeas court whether there were times when "Petitioner would kind of blank out and just stare off into space and he was incommunicado for a period of a few seconds," and Crumbley said "Yeah, there were times when he was not responsive."

3. State expert Martell -- Petitioner's "shriveled brain"

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. Martell, "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 stated that Petitioner has a seizure disorder. He said that a seizure disorder can have marked effects on a person's behavior and thought 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.

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).

C. Slight of hand with Dr. Carran

Dr. Carran is a neurologist specializing in the treatment of epilepsy. Pertinent to this case, she would have testified

> 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. 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. ..
>
> 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.

D. 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.

In denying that this evidence was part of the record and refusing to consider it, 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* Appendix 9, D.62:3.

E. The circuit court said the district court had considered Dr. Carran; either way both courts assumed Petitioner had absence seizures during trial; a hearing was necessary

Notwithstanding the district court's express refusal to consider Dr. Carran's affidavit, the circuit court wrote that the district court *had* considered it. Instead of believing the district court, the panel recites 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.' The district court therefore considered Carran's opinion, but after reviewing the 'totality of the evidence' it concluded that Raheem was competent." 995 F.3d at 991.

However, the state's expert testified about Petitioner's absence seizures, and there is no basis for finding the district court was dissembling about the evidence it did not consider to find absence seizures. Dr. Martell testified Petitioner suffered from absence seizures and "explained that when Raheem came out of one of these periods, he was extremely self-conscious, was

'aware that he had been gone,' and 'would make up stories to cover it up.' This behavior suggested to Martell an epileptic phenomenon. Martell explained that if Raheem was having one of these absences at the time of trial, he could 'zon[e] out for 30 seconds at a time,' and although Martell 'd[idn]'t see that as particularly disabling,' he conceded that 'it's certainly conceivable that he could zone out at a moment when there's critical testimony and miss that testimony.'" *Raheem v. Warden*, 995 F.3d 895, 916 (2021).

Zoning out at trial and missing critical testimony is incompetence. When the district court assumed Petitioner suffered from seizures during trial it should have been resolved with factual development.

F. Split in the circuits on standard of appellant review

This Court has not addressed, but should, the appropriate standard for federal appellate review of district court's competency determinations. The Courts of Appeal have employed conflicting standards. Some circuits, including the court below, treat competency determinations as a question of fact and apply a highly deferential standard on appeal. *See, e.g., Raheem*, 995 F.3d at 908, 928, 930 (reviewing denial of competency claim under the clearly erroneous standard); *Mackey v. Dutton*, 217 F.3d 399, 413 (6th Cir. 2000) (state court's competency determination should be treated as a question of fact); *United States v. Turner*, 897 F.3d 1084, 1105 (9th Cir. 2018) (review of competence to stand trial determination is for clear error); *Austin v. Davis*, 876 F.3d 757, 778 (5th Cir. 2017) (competency to stand trial is a question of fact)*; United States v. Hogan*, 986 F.2d 1364, 1368-72 (11th Cir. 1993) (district court's competency determination should be reviewed under the clearly erroneous standard); *McFadden v. United States*, 814 F.2d 144, 146 (3d Cir. 1987) (reviewing the district court's competency finding

following a competency *hearing* under the "clearly erroneous" standard). Other circuits have held that a competency determination is either a legal conclusion or a mixed question of law and fact. *See, e.g.*, *Johnson v. Norton*, 249 F.3d 20, 25-26 (1st Cir. 2001) (finding decision not to hold a competency hearing is either a legal question or a mixed question of law and fact); *Moody v. Johnson*, 139 F.3d 477, 482 (5th Cir. 1998) (holding that the "ultimate competency finding" is one of law or was a mixed question of law and fact); *Cremeans v. Chapleau*, 62 F.3d 167, 169 (6th Cir. 1995) (holding competency determinations are mixed questions of law and fact).

II. The lower courts applied the AEDPA to Cause and Prejudice and the State does not disagree that the Circuits are split on this issue (Question 2)

A. The Prosecutor argued to jurors that Petitioner, a young black man, would kill them, including 11 white jurors

The prosecutor argued 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. First he stated prisoners escape: "[t]here have been folks that have, ***I know that***." (D.7-6:2953) (emphasis added). There was no evidence in the record that people had escaped from anywhere. He said that the jurors would have plenty to fear if Petitioner was sentenced to life rather than death. "That gets into all of us, if he gets out." (D.7-6:2954). He said:

> *And let me tell you something,* ***he'll kill you. And I'm not having to guess.***

(D.7-6:2954)(emphasis added). Defense counsel did not object. After the prosecutors oral argument, defense counsel argued:

> You need to understand that Mustafa is not a threat any longer. The Sheriff has had him locked up ***for almost two years. He is in chains, or wearing an electric shock belt, as he is today, everywhere he goes.***

D.7-6:2979 (emphasis added). Thus, according to defense counsel, Petitioner needed chaining

every day and everywhere so he would not be able to kill the jurors.

B. The state court found a default and no cause and/or prejudice to excuse it

Petitioner raised a constitutional objection to this argument in post-conviction proceedings. The state post-conviction court signed the order prepared by Respondent's counsel finding the argument that Petitioner would kill the jurors was defaulted, Appendix 4, D.24-20:6, and finding there was no cause and/or prejudice to excuse the default. *Id.* at 10. The district court noted that "[t]he state habeas court addressed the Prosecutor's argument regarding Petitioner's future dangerousness in general but did not reference this particular comment. (footnote omitted). The [state-post conviction order] held that '[t]he District Attorney's argument concerning future dangerousness was not improper as the prosecutor made a reasonable deduction from the evidence in suggesting that Petitioner would pose a future danger . . . .'[8] and

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[8]Yet the district court wrote

> "Raheem was nineteen years old at the time of the indictment and two years older by the time of trial in 2001. He had a history of severe mental disorders, intermittent hospitalizations, and at least four suicide attempts. Experts speculated that his mental health problems might have arisen in part from organic brain damage caused by a closed head injury during his childhood. (RX 108 at 654, 673, 848, 871.) Raheem's prior criminal history consisted of petty and property-related crimes. He had a pattern of committing "pointless crimes," like stealing a cement truck and driving it around and breaking into a house and then waiting outside in a car while calling the police. (*Id.* at 782; *id.* at 724-25.) In July of 1996, he was adjudicated delinquent for burglary and sentenced to 90 days in boot camp. Records from that time show reveal that Raheem was confused and suffering from clinical depression. He served time for forgery and financial transaction card fraud beginning in the fall of 1997, (RX 17 at 2543-44), during which time he attempted suicide in jail. (RX 111 at 1715.) **Up to the date of the events in question, he had no reported history of violence directed at anyone other than himself.**

D.64:4 (footnote omitted).

that 'Petitioner [had] failed to establish that trial counsel were deficient or Petitioner prejudiced by trial counsel not objecting to the District Attorney's arguments . . . . (RX 177 at 104.)" Appendix 3, D.64:85.

C. The district court and circuit court applied the AEDPA to Cause and Prejudice

Reviewing this determination, the district court described the prosecutor's comment as "very troubling." D.64:86. It noted 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.64:85 n.18. 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."[9] *Id*.

The district court held

> [t]his portion of the Prosecutor's argument is very troubling. The Prosecutor appears to have skated dangerously close to injecting passion and prejudice into his argument. Still, under the double deferential standard of review required here, this Court finds some support for the state habeas court ruling that the Prosecutor's arguments regarding future dangerousness were 'a reasonable deduction from the evidence' (RX 177 at 104) and that counsel were 'not deficient or Petitioner prejudiced' by the failure to object. (footnote omitted) This ruling did not '(1) result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) result in a decision that 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).'

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[9]But defense counsel in closing argument stated the prosecutor had been directly addressing the jurors.

> 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.

Appendix 1, 995 F.3d at 986, quoting D.7-6:81-82.

D.64:86.

> The circuit court's assessment under the AEDPA was:
>
> > 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 to object to the prosecutor's comment....
> >
> > 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.

Appendix 1, 995 F.3d at 935-936.

D. The state court does not disagree that the circuits are split on whether the AEDPA applies to cause and prejudice; this is an excellent vehicle to resolve the split

Petitioner demonstrated in his petition that the courts were split on whether the AEDPA applies to cause and prejudice. *Wrinkles v. Buss,* 537 F.3d 804, 813 (7th Cir.2008)(applying AEDPA); *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); *Fischetti v. Johnson,* 384 F.3d 140, 154–55 (3d Cir.2004) (same). Pet. at 38.

The state does not dispute this: "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," BIO at 38, because the argument was not prejudicial. To the contrary, this case is perfectly situated to resolve the split.

The district court was "troubled" by the prosecutor's argument and the circuit court "readily accept[ed] that it likely was erroneous for the prosecutor to tell the jury that Raheem will 'kill you' and for defense counsel not to object." One is left with the impression that it was only the state courts no-prejudice finding that barred relief.

Is telling jurors the defendant will escape and kill them all ever not prejudicial? If there are such times, is telling eleven white jurors that a young black man will escape and kill them prejudicial? "Some toxins can be deadly in small doses." *Buck v. Davis*, 137 S.Ct. 759, 777 (2017).

In any event, Petitioner had no history of harming anyone but himself before this crime. *See* n.8, *supra*. The things he said about himself would be prejudicial if true, but he made them up. *Id.*

An independent federal court review of prejudice here without an AEDPA lens could make all the difference.

Respectfully submitted, this 15th day of February, 2022

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