No. 22-6851

IN THE
Supreme Court of the United States

DAVID FREEMAN,
Petitioner,
v.
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
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

JON M. SANDS
Federal Public Defender
District of Arizona

CHRISTINE A. FREEMAN
Executive Director
Federal Defenders for the Middle District of Alabama

Robin C. Konrad
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 telephone
Robin_Konrad@fd.org

John A. Palombi*
Assistant Federal Defender
817 South Court Street
Montgomery, Alabama 36104
(334) 834-2099 telephone
John_Palombi@fd.org

**Counsel of Record*

April 4, 2023

Counsel for Petitioner

REPLY

The State has repeatedly argued—including during oral argument in the Eleventh Circuit—that the factually developed IAC claim presented in federal habeas is procedurally defaulted because it was never "fairly presented" in state court. Pet. App. 557a-558a. However, the State has changed its position, and now says that Mr. Freeman "raised the same claims in Rule 32 as he did in habeas, and the state courts had a fair opportunity to consider them." BIO at 29. But Mr. Freeman did *not* present his factually developed IAC claim in state court. And "[a] claim without any evidence to support it might as well be no claim at all." *Gallow v. Cooper*, 570 U.S. 933 (2013) (Breyer, J., statement respecting the denial of the petition for writ of certiorari).

Notably absent from the State's Brief in Opposition is any acknowledgment that it was not until Mr. Freeman entered federal habeas that he had the resources—through the appointment of Federal Defender office—to investigate his claims. Prior to that, Mr. Freeman fought tooth and nail, through his out-of-state *pro bono* counsel, to develop his claims. Mr. Freeman repeatedly asked the state courts for funding to investigate facts, hire experts, and even transport trial counsel to testify. Pet. at 11-12. The State opposed, and the court denied, *every single request*. Pet. at 11-12. As Mr. Freeman's *pro bono* counsel made clear in appealing the denial of relief in state court, "[t]he absence of an evidentiary presentation…is attributable solely to the circuit court's summary rejection of petitioner's requests for necessary expert and investigative assistance." Dist. Ct. Doc. 20-53 at 52. Thus, the State's assertion that Mr. Freeman had "a chance to present all of the factual allegations he believed

supported his claims—he even had an evidentiary hearing despite his poor pleading," BIO at 29, is disingenuous at best, and fraudulent at worst.

As this Court has recognized, ineffectiveness claims "often require investigative work and an understanding of trial strategy," *Martinez v. Ryan*, 566 U.S. 1, 11 (2012), as they often rely on "evidence outside the trial record," *id.* at 12. Given that reality, an incarcerated person lacking resources "is in no position to develop the evidentiary basis for a claim of ineffective assistance." *Id.* at 12. Mr. Freeman was no exception. While he did have *pro bono* counsel, his attorneys made clear that they could not personally fund the litigation expenses. Mr. Freeman did all that a poor prisoner in his case could do—he asked (repeatedly) for assistance in state court to develop his claim. The state court denied him assistance and then blamed him for not being able to present evidence supporting his claims.

Given the unfairness of the state court proceedings, it is far from true that "additional briefing on the application of § 2254(d) would have been futile in this case." BIO 23. Here, the State of Alabama deprived an indigent, condemned prisoner of any funding for investigation or experts while at the same time rejected his claim for failing to provide detailed facts supporting the claim. There is a strong and supported argument to be made under § 2254(d)(1) and § 2254(d)(2) regarding the unreasonableness of the state court decision. *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 952–53 (2007) (finding a state court's denial of relief unreasonable where the state process was not adequate to resolve the claim). Indeed, courts have found that petitioners can overcome § 2254(d)(2) when "the end result requires the [state]

court to make a finding on 'an unconstitutionally incomplete record.'" *Jones v. Ryan*, 52 F.4th 1104, 1121 (9th Cir. 2022) (quoting *Milke v. Ryan*, 711 F.3d. 998, 1007 (9th Cir. 2013)). *See also id.* at 1120 (noting that the circuit has "held repeatedly that where a state court makes factual findings without an . . . opportunity for the petitioner to present evidence, the fact-finding process itself is deficient, and not entitled to deference") (quoting *Hurles v. Ryan*, 752 F.3d 768, 790 (9th Cir. 2014)); *Landers v. Warden, Atty. Gen. of Ala.*, 776 F.3d 1288, 1297 (11th Cir. 2015) ("[W]e do not foreclose the possibility that a state court's fact-finding procedure could be so deficient and wholly unreliable as to result in an unreasonable determination of the facts under § 2254(d)(2) and to strip its factual determinations of deference.").

Although this Court recently noted that prisoners may have an "incentive to save claims for federal habeas proceedings in order to avoid the highly deferential standard of review that applies to claims properly raised in state court," *Shinn v. Ramirez*, 142 S. Ct. 1718, 1739–40 (2022), Mr. Freeman was not attempting to avoid review under § 2254(d). Instead, he tried—repeatedly—to develop and present his claims in state court. In a circumstance like this, where the state has not displayed "good-faith attempts to honor [Mr. Freeman's] constitutional rights," *Davila v. Davis*, 137 S. Ct. 2058, 2070 (2017) (citation omitted), deference to the state courts is not warranted. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 434 (2000) (if a prisoner's claim was "pursued with diligence" but "remained undeveloped in state court" through no fault of his own, then a federal court is not constrained from reviewing the now-developed claim).

This Court should grant a writ of certiorari.

Respectfully submitted: April 4, 2023

JON M. SANDS
Federal Public Defender
District of Arizona

Robin C. Konrad
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 telephone
Robin_Konrad@fd.org

CHRISTINE A. FREEMAN
Executive Director
Federal Defenders for the Middle
District of Alabama

John A. Palombi*
Assistant Federal Defender
817 South Court Street
Montgomery, Alabama 36104
(334) 834-2099 telephone
John_Palombi@fd.org

*Counsel of record

s/John A. Palombi
JOHN A. PALOMBI
ASSISTANT FEDERAL PUBLIC DEFENDER

Counsel for Petitioner