No.

In the Supreme Court of the United States

JOHN ALLEN MUHAMMAD,
PETITIONER,

v.

LORETTA K. KELLY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

When Muhammad moved to represent himself, counsel failed to request a competency examination despite overwhelming objective evidence of Muhammad's mental illness and his inability to understand the proceedings and to assist counsel in his defense, including an expert report that he was not competent to stand trial.

The First Question Presented is:

1. In such circumstances, is the correct prejudice inquiry for Petitioner's ineffective assistance of counsel claim whether, (a) as followed by all other Circuits that have addressed the issue except the Fourth, there is a reasonable probability that Petitioner would have been found incompetent to waive his constitutional rights?, or (b) under the Fourth Circuit's standard, there is a reasonable probability of a different outcome at trial if Petitioner had not represented himself?

Contrary to the practice in all other federal jurisdictions, the District Courts in Virginia consistently deny first federal *habeas* petitioners, including Muhammad, the full year provided by Congress in 28 U.S.C. § 2244(d) to prepare their petitions.

The Second Question Presented is:

2. Whether Congress' provision of one year for a petitioner to prepare and file a first federal *habeas* petition in 28 U.S.C. § 2244(d) prohibits the District Courts of Virginia from limiting a first federal *habeas* petitioner's time to file under an *ad hoc* rule?

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The first opinion of the Supreme Court of Virginia on direct appeal was not printed in the Virginia Reports but may be found at *Muhammad v. Commonwealth*, 611 S.E.2d 537 (Va. 2005). The amended opinion of the Supreme Court of Virginia on direct appeal is reported at *Muhammad v. Commonwealth*, 619 S.E.2d 16 (Va. 2005). This Court denied *certiorari* at *Muhammad v. Virginia*, 547 U.S. 1136 (2006).

The opinion of the Supreme Court of Virginia denying state post-conviction relief is reported as *Muhammad v. Warden of the Sussex I State Prison*, 646 S.E.2d 182 (Va. 2007), reprinted at Petitioner's Appendix (hereinafter "Pet. App.") 33a. This Court denied *certiorari* at *Muhammad v. Kelly*, 128 S. Ct. 1889 (2008).

The order of the Eastern District of Virginia requiring Muhammad to file his first federal habeas petition 60 days from entry of the order appointing counsel may be found at *Muhammad v. Kelly*, No. 07-1022 (E.D. Va. Oct. 26, 2007), Pet. App. 30a. The order of the Eastern District of Virginia granting Muhammad an additional 30 days to file his habeas petition may be found at *Muhammad v. Kelly*, 2007 U.S. Dist. LEXIS 97912 (E.D. Va. Nov. 20, 2007), Pet. App. 29a. The order of the Eastern District of Virginia denying Muhammad's request for more time, but allowing him leave to amend a filed petition may be found at *Muhammad v. Kelly*, No. 07-1022 (E.D. Va. Jan. 22, 2008), Pet. App. 27a. The order of the Eastern District of Virginia denying Muhammad's request to file a second amended petition may be found at *Muhammad v. Kelly*, No. 07-1022 (E.D. Va. Aug. 6, 2008), Pet. App. 49a. The District Court's opinion granting the Warden's motion to dismiss Muhammad's petition for a writ of *habeas corpus* may be found at *Muhammad v. Kelly*, 2008 U.S. Dist. LEXIS 73691 (E.D. Va. Sept. 24, 2008), Pet. App. 12a. The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *Muhammad v. Kelly*, 575 F.3d 359 (4th Cir. 2009), reprinted at Pet. App. 1a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit affirmed the Eastern District of Virginia's denial of *habeas corpus* on August 7, 2009. Pet. App. 1a. On September 1, 2009, the Court of Appeals denied Muhammad's motion for rehearing and rehearing *en banc*. Pet. App. 43a. On October 30, 2009, the Court of Appeals denied Muhammad's motion for recall of the mandate and a stay of execution. Pet. App. 44a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 28, United States Code § 2244 provides in relevant part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the United States Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The Sixth Amendment to the United States Constitution provides, *inter alia,* that:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, *inter alia,* that:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF THE CASE

On October 24, 2002, the FBI arrested John Muhammad and Lee Boyd Malvo. *Muhammad v. Kelly*, 575 F.3d 359, 365 (4th Cir. 2009). Prince William County, Virginia, charged Muhammad with shooting sixteen people and killing ten of them. *Id.* The trial court appointed counsel to represent Muhammad. Malvo was charged and tried separately by Fairfax County, Virginia.

Muhammad's Request To Represent Himself

On October 20, 2003, after the jury was empanelled, but before opening statements, Muhammad asked to represent himself. Fourth Circuit Joint Appendix (hereinafter "J.A.") at 203. Muhammad explained that he wished to represent himself "[b]ecause I feel like I can speak better on my behalf," J.A. 204, and "[b]ecause I know me, and I know what happened, and I know what didn't happen." J.A. 205. The trial court asked Muhammad a series of questions inquiring as to why Muhammad thought he could represent himself, receiving few relevant answers. J.A. 207-08.

At the trial court's request, trial counsel commented on the motion:

> I can't add very much except to say that there's some confusion about what our duty is at this point. Mr. Muhammad wants to represent himself, and it may be that we should help him accomplish that goal. There is -- I think [co-counsel] and I have both found him to be a very bright man . . . .

J.A. 214-15.

The trial court granted Muhammad's motion. J.A. 221. In the same colloquy on self-representation, within three pages of the transcript, Muhammad revealed he was an inarticulate high school graduate with no college experience or knowledge of the law. *Cf.* J.A. 207-11 with J.A. 214-15.

Counsel's Knowledge of Evidence of Muhammad's Incompetence

At the time Muhammad asked to represent himself, trial counsel was aware of overwhelming evidence that Muhammad was not competent to represent himself or to act in his own best interest. The most compelling and obvious evidence was the medical opinion of Dr. Dorothy Lewis, board certified in psychiatry and neurology, from Yale Medical School, that Muhammad was not competent to represent himself.

Trial counsel asked Dr. Lewis to interview and evaluate Muhammad in preparation for sentencing. J.A. 2052 & 2549. On September 9 and 10, 2003, several weeks prior to trial, Dr. Lewis, along with a colleague, interviewed Muhammad. *Id.* She also reviewed portions of Muhammad's military and medical records. *Id.* Dr. Lewis told trial counsel that despite his appearance of a "sometimes . . . superficial brightness" Muhammad was not competent because he does not have "a reasonable degree of rational understanding" to represent himself. Also, she was willing to testify. J.A. 2549-50.

Trial counsel also was aware of compelling and objective physical evidence corroborating Dr. Lewis' finding. Dr. Jonathan Pincus, a neurologist, informed counsel of serious abnormalities in Muhammad's brain discovered in an MRI scan prior to Muhammad's request to represent himself. J.A. 126. The MRI of Muhammad's brain showed three serious malformations: a) a shrunken cortex; b) a cavum septum pellucidum; and c) an abnormal shortening of the corpus callosum. J.A. 2630; Pet. App. 45a-47a (Fourth Circuit Opening Brief of Petitioner at 24-26).[1]

The shrunken cortex is unequivocal evidence of the loss of vital brain tissue and likely concomitant brain injury. *Id.*; Pet. App. 45a. Severe physical abuse inflicted on Muhammad as a child – well known to trial counsel prior to the start of trial, *see, e.g.,* J.A. 2637-38, 2641 – was most likely the primary factor in causing damage to Muhammad's brain.

Muhammad's MRI also showed a cavum septum pellucidum, Pet. App. 46a, an abnormality that strongly correlates with the presence of atypical psychoses and schizophrenia, J.A. 2630. These conditions are consistent with Dr. Lewis' psychiatric opinion.

In addition, neuropsychological testing – also known to trial counsel, J.A. 125 – provided objective scientific evidence of severe cognitive impairments that also were consistent with Dr. Lewis' opinion as well as the brain abnormalities revealed

[1] High quality MRI pictures and neuroimaging pictures were included in Muhammad's brief, rather than appendix, in the Fourth Circuit. Lower quality pictures are available in the J.A. 2452-55.

in the MRI. J.A. 2631-34. The schematic image of Muhammad's brain, Pet. App. 48a (Fourth Circuit Opening Brief of Petitioner at 27), illustrates multiple impairments to Muhammad's executive functions. J.A. 2633.

Intelligence testing in trial counsel's possession flatly contradicted counsel's statement that Muhammad was "very bright." A WAIS-III IQ test established that, although Muhammad gave his best effort, his performance was "below the level of performance obtained by approximately 73 percent of other men his age." J.A. 113.

Counsel's witness interviews and personal observations provided further evidence of severe mental illness. Trial counsel knew that Muhammad had been diagnosed with severe mental illness, J.A. 2094, and personally observed Muhammad's struggle with severe symptoms of psychiatric disorders prior to the start of trial. J.A. 2052-54. They knew that Muhammad was strongly controlled by a delusional belief system because he insisted that he had no involvement in any of the charged crimes and was arrested only because of an elaborate scheme to frame him for the murders. J.A. 2052. Trial counsel knew that Muhammad was amnesic of the events surrounding the crimes and incapable of acknowledging his neuropsychiatric disorders and their disabling impact on his capacity to assist in preparing his defense. J.A. 2053. Trial counsel knew that Muhammad claimed to have a "secret defense strategy." *Id.* Trial counsel knew that "although Muhammad could appear coherent and logical for a few minutes, his thinking and

behavior soon deteriorated, and he often became loose, rambling, illogical and inappropriate." *Id.*

Muhammad also made many bizarre and illogical statements to trial counsel and their mental health experts pre-trial. For example, Muhammad insisted "that the Berlin Wall fell while he was in Germany and that 'the history books lied' about the date." J.A. 2091 n.7. Muhammad stated that "I don't know. Things I thought would help were turned against me . . . I might be on another planet. I don't understand the gravitational pull." *Id.* Muhammad "insisted that he removed materials from his military record regarding training he received at 'secret schools' regarding 'urban warfare.'" *Id.* Muhammad expressed many paranoid beliefs, such as that his attorneys deliberately deprived him of information he needed for preparing a not guilty defense. *Id.* Muhammad believed no one could be trusted. J.A. 2091 n.7. He was so confident of a not-guilty finding that he refused to plan for mitigation at a possible sentencing phase of his trial. *Id.* Muhammad's grandiose statements include a claim that he bought and donated 18 computers for a school, but they never arrived, *id.*; his belief that he was a prophet, *id.*, and his belief that Malvo, Muhammad's co-defendant in the killings, had concocted a cure for AIDS with a herbal remedy. J.A. 112.

These paranoid and delusional beliefs were clearly evident in, and had a devastating effect on, Muhammad's behavior in this case, as he 1) refused to cooperate with the state's mental health expert, resulting in a critical ruling

banning the defense's mental health expert's testimony from the sentencing phase, J.A. 170-71; 2) he fired his trial attorneys for two days during the trial, J.A. 203; and 3) during his self-representation he gave an illogical and rambling opening statement. The opening statement discussed three types of truths, J.A. 225-27, two types of lies, J.A. 235, conspiracy theories, J.A. 232-33, various metaphysical questions on the meaning of truth, theory, and assumptions, J.A. 226-27, 233, without addressing the evidence or facts.

Finally, witnesses who defense counsel had interviewed and prepared for testimony pretrial were called by the defense during the sentencing hearing and confirmed Muhammad's strange behavior. J.A. 1280, 2088. An acquaintance, Nathan Perry, testified that Muhammad appeared to be out of touch with reality. J.A. 1281. Muhammad appeared disheveled. J.A. 1281-82. Particularly after his family situation deteriorated, Muhammad was "falling apart." J.A. 1284. Robert Holmes testified that after the court took his children, Muhammad had "a nervous breakdown," J.A. 1303.

On November 17, 2003, the jury convicted Muhammad of the capital murder of Dean Meyers in the commission of an act of terrorism,[2] capital murder of Meyers and at least one other person within a three-year period,[3] and two non-capital

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[2] Virginia Code §§ 18.2-31(13) and 18.2-46.4.

[3] Virginia Code § 18.2-31(8).

crimes.[4] J.A. 1962 (*Muhammad v. Commonwealth*, 619 S.E.2d 16, 30 (Va. 2005)). The jury recommended a death sentence for each of the two capital murder convictions, which the court imposed. *Id.* The Supreme Court of Virginia took the unprecedented (for that court) step of expanding the limit on the Opening Brief from 50 pages to 140 pages, J.A. 1566, but affirmed Muhammad's convictions and the death sentences. J.A. 1956.

This Court denied *certiorari* on direct review on May 15, 2006. *Muhammad v. Virginia*, 547 U.S. 1136, 1136 (2006). As required by Va. Code § 8.01-654.1 and Virginia Supreme Court Rule 5:7A, Muhammad filed his state petition for *habeas corpus* directly in the Supreme Court of Virginia sixty days later, on July 14, 2006.

Muhammad sought post-conviction relief in the Supreme Court of Virginia based, in part, on the claim that he was deprived of his right to effective counsel because trial counsel failed to present information to the court regarding Muhammad's mental condition when the court was asked to determine whether he was competent to represent himself.[5] J.A. 2082; *see also* J.A. 2079, 2081, 2089-90. Muhammad also asked the state post-conviction court for expert assistance to

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[4] Virginia Code §§ 18.2-22, 18.2-32, and 18.2-53.1.

[5] Whether the question is articulated as failure to present evidence of Muhammad's competence to "represent himself," or "waive his rights," or "stand trial" is a distinction without a difference. Once counsel was aware of the compelling evidence of Muhammad's incompetence, counsel were obligated to raise it; once the court was aware of the evidence, it was obligated to inquire into Muhammad's competence to stand trial under both Virginia and constitutional law. Va. Code § 19.2-169.1; *Godinez v. Moran*, 509 U.S. 389, 401 n.13 (1993) ("[A] competency determination is necessary" when the court perceives a "reason to doubt the defendant's competence.") (citing *Drope*, 420 U.S. at 180-81; *Pate*, 383 U.S. at 385).

develop and present the claim and for an evidentiary hearing on the claim. J.A. 2057 n.1 & 2106. The Warden moved that the claim be dismissed as a matter of law. Muhammad replied that his "mental capacity is a fact vigorously disputed between the parties . . . ." J.A. 2106. He repeated his request for funds for experts and a hearing. J.A. 2187 The court never explicitly ruled on Muhammad's motions but denied the claim without providing an evidentiary hearing or expert assistance. The court found that counsel's failure to object did not constitute deficient performance and did not prejudice Muhammad's defense, because counsel lacked evidence of Muhammad's inability to understand the proceedings.[6] *Muhammad v. Warden of Sussex I State Prison*, 646 S.E.2d 182, 192 (Va. 2007), Pet. App. 39a. The Supreme Court of Virginia denied rehearing on the petition on September 25, 2007.

Muhammad requested counsel in the Eastern District of Virginia seventeen days later, on October 11, 2007. At the time of Muhammad's request for counsel,

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[6] Specifically, the state court found that "Petitioner fails to point to expert evidence, available at that time, upon which counsel could have relied and which would have established that petitioner's ability to make decisions and understand the proceedings was impaired." *Id.* Perhaps because this statement was plainly wrong, the Fourth Circuit did not rely on this, but instead assessed Muhammad's claim of prejudice. Muhammad had included in his state habeas pleadings and appendix three such expert opinions: 1) psychologist Mark Cunningham, J.A. 2085 n.6; 2) neurologist Jonathan Pincus, J.A. 2090 & 2052; and 3) psychiatrist Dorothy Lewis, J.A. 2090, 2093-94, 2052. In fact, the Warden's argument in its motion to dismiss in state habeas was not that Muhammad's counsel did not have a diagnosis of a severe mental illness (the Warden conceded in state habeas that counsel "might well have" obtained such a diagnosis, J.A. 2142), but that Muhammad waived his right to present the diagnosis when he refused to cooperate with the Commonwealth's expert. J.A. 2142.

only seventy-seven days of the one-year statute of limitations established by § 2244(d) had run.

Following Muhammad's request for counsel, the District Court ordered Muhammad to file his first federal *habeas* petition by December 26, 2007. Pet App. 30a. In opposing this artificial deadline, Muhammad presented an affidavit and testimony from his trial counsel, who explained that Muhammad "was the subject of one of the most extensive investigation and prosecution efforts ever carried out in Virginia" and that the case "was in a class by itself." J.A. 2249. "The trial and appeal of this case were truly extraordinary in the scope of the investigation, the length of the trial, and the number of meritorious issues." *Id.* In state *habeas* proceedings, Muhammad obtained approximately 30,000 pages of discovery provided in his Maryland case that were never turned over in Virginia. *Id.* Despite these challenges, Muhammad complied with all Virginia deadlines, and the court noted that he "operated at a very high level of intensity" in preparing his federal *habeas* petition. J.A. 2359.

"If a time limit, other than the AEDPA's 1-year statute of limitations, was ever appropriate in a capital § 2254 case," trial counsel averred, "it is not this one." Motion to Rescind Time Limit, Ex. 6 (filed E.D.Va. Nov. 8, 2007). Professor Ira Robbins, the *habeas* expert who authored the ABA report which informed Congress' enactment of the AEDPA, explained in an affidavit that artificial filing deadlines were contrary to Congress' legislative compromise in § 2244(d) and virtually

unknown in federal courts outside of Virginia. Pet. App. 52a. The District Court extended the filing deadline to January 24, 2009. Pet App. 29a.

Muhammad again challenged the District Court's order denying him the full year to file established by Congress in § 2244(d). J.A. 2314. The District Court rejected Muhammad's arguments and ordered him to file his *habeas* petition by January 24, 2004 (when only 181 days of the § 2244(d) period had run), but granted leave to amend for good cause shown within 90 days. Pet. App. 29a. Muhammad complied with the Court's order, filing his petition on January 23, 2008, and his First Amended Petition on April 23, 2008. J.A. 2406. In both petitions, Muhammad raised his claim that his trial counsel were ineffective for failing to raise the issue of his competence, and requested an evidentiary hearing and appointment of experts. Muhammad also raised *Brady* claims arising from the evidence Maryland had disclosed after Muhammad's Virginia trial and death sentence.

On July 24, 2008, still within the § 2244(d) one-year statute of limitations, Muhammad filed a motion for leave to amend with his Second Amended Petition attached. J.A. 2750, 2755. In his Second Amended Petition, Muhammad greatly expanded his *Brady* claims after additional review of the 30,000 pages of Maryland-provided discovery. J.A. 2755.

On August 6, 2008, the District Court rejected Muhammad's proffered Second Amended Petition. Pet. App. 49s. The District Court reasoned that 28 U.S.C. § 2266 (governing the accelerated timeframe in "opt-in" states) required it to rule by

August 16, 2008, and that allowing Muhammad the benefit of the full one-year time to file would prejudice the court's ability to meet that deadline. Pet. App. 50a.

Notwithstanding this reasoning, the District Court denied Muhammad's First Amended Petition forty-nine days later, on September 24, 2008. Pet. App. 12a. The court denied the request for a hearing and expert funding, and denied the claim of ineffective assistance of counsel for failure to raise competence, citing lack of prejudice resulting from the self-representation, as well as lack of evidence supporting a claim of incompetence. Pet. App. 18a.

On appeal in the Fourth Circuit, Muhammad pressed his ineffective assistance of counsel claim and the diminished form of his *Brady* claims presented in the First Amended Petition, and challenged the artificial limitation of his time to prepare and file his first federal habeas petition. The Court of Appeals for the Fourth Circuit affirmed the district court's decision. *Muhammad v. Kelly,* 575 F.3d 359, 371 (4th Cir. 2009), Pet. App. 8a. Rather than evaluating Muhammad's claim of prejudice by asking whether there was a reasonable probability that, but for counsel's omissions, Muhammad would not have been found competent to represent himself, the court instead asked whether, absent the allegedly improper self-representation, Muhammad still would have been convicted of the crimes charged. *Id.* The Fourth Circuit held that there was no authority for Muhammad's claim that he was entitled to the full § 2244(d) year to prepare and file his petition, and

applied the harmless error analysis of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), despite the fact that Muhammad challenged District Court rather than state court error. Pet. App. 10a.

REASONS FOR GRANTING THE WRIT

I. This Court should grant *certiorari* to consider whether the Fourth Circuit incorrectly applies *Strickland* prejudice analysis when it looks to the outcome of the trial rather than the result of a competency hearing in assessing prejudice in ineffective assistance of counsel claims for failure to raise competency.

A. The proper inquiry into *Strickland* prejudice arising from counsel's failure to raise overwhelming objective evidence as to defendant's competency to stand trial, as employed by all of the circuits except the Fourth, is whether there is a reasonable probability defendant would have been found incompetent.

The Due Process Clause of the Fourteenth Amendment "prohibits the criminal prosecution of a defendant who is not competent to stand trial," *Medina v. California*, 505 U.S. 437, 439 (1992) (citing *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966)), and "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope*, 420 U.S. at 172 (citing *Pate*, 383 U.S. at 385). "[A] competency determination is necessary" when the court perceives a "reason to doubt the defendant's competence." *Godinez v. Moran*, 509 U.S. 389, 401 n.13 (1993) (citing *Drope*, 420 U.S. at 180-81; *Pate*, 383 U.S. at 385).

To establish prejudice for an ineffective assistance of counsel claim, "the

defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Every circuit court, except the Fourth Circuit, that has addressed the issue of ineffective assistance of counsel for failure to raise the issue of competency determined prejudice based on whether there is a reasonable probability that the defendant would have been found incompetent. *See Hummel v. Rosemeyer*, 564 F.3d 290, 303 (3d Cir. 2009); *United States v. Alford*, 317 Fed. Appx. 813, 817 (10th Cir. 2009); *Moore v. Dretke*, 182 Fed. Appx. 329, 337 (5th Cir. 2006); *Burt v. Uchtman*, 422 F.3d 557, 567 (7th Cir. 2005); *Mallet v. United States*, 334 F.3d 491, 497 (6th Cir. 2003); *United States v. Estergard*, 188 F.3d 515, 1999 U.S. App. Lexis 19634 (9th Cir. 1999) (unpublished); *Oats v. Singletary*, 141 F.3d 1018, 1025 (11th Cir. 1998). This Court should grant review to clearly state the correct prejudice analysis and to bring the Fourth Circuit in accord with this otherwise uniform standard.

In finding no prejudice, the Fourth Circuit concentrated on the facts that Muhammad "represented himself for only two days," that no "evidence . . . was improperly received and considered by the jury," and "his defense attorneys were heavily involved as standby counsel . . . ." *Muhammad v. Kelly*, 575 F.3d 359, 371 (4th Cir. 2009), Pet. App. 8a. The Fourth Circuit thus held that the Virginia

Supreme Court's finding of no ineffective assistance "was not an unreasonable application of clearly established law." *Id.* Discussion of Petitioner's possible incompetence was relegated to a footnote in Fourth Circuit's opinion. *Id.* at 371 n.5.

The Fourth Circuit has placed an artificial wall between a defendant's competency to stand trial and his ability to waive the right to counsel.[9] This separation is a false dichotomy, as this Court has clearly established that the right of self-representation incorporates a competency determination. At the very least, waiver of the right to counsel depends upon defendant's competence, *Pate*, 383 U.S. at 384, and a competency determination must occur when "a court has reason to doubt the defendant's competence." *Godinez*, 509 U.S. at 401 n.13 (1993) (citing *Drope*, 420 U.S. at 180-81; *Pate*, 383 U.S. at 385); *see Hull v. Kyler*, 190 F.3d 88, 112 (3d Cir. 1999) (describing the "juncture of the dual constitutional requirements of effective assistance of counsel and a defendant's competency"). To conclude that Muhammad does not pursue the competency claim as part of his ineffective assistance of counsel claim is to ignore this fundamental connection. *Pate*, 383 U.S. at 384 ("[I]t is contradictory to argue that a defendant may be incompetent, and yet

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[9] The Fourth Circuit states that Muhammad's competence and his ineffective assistance of counsel are "separate inquiries," and it is the ineffective counsel claim that is pursued in his petition. *Muhammad v. Kelly*, 575 F.3d at 371 n.5. Additionally, the court stated that the only possible alternate result of proffering the evidence at issue here would "have been [Muhammad's] inability to represent himself" and "[i]t is by no means certain that the judge would have gone further to rule him incompetent to stand trial." *Id.* The question is not whether it is "certain," but whether there is a reasonable probability – less than a preponderance of the evidence.

knowingly or intelligently 'waive' his right[s] . . . .").

B. Muhammad established *Strickland* prejudice because had counsel alerted the court to the medical evidence in their possession when he asked to represent himself, there is a reasonable probability that he would have been found incompetent.

This Court requires that to be deemed competent to stand trial it is not enough that a defendant is "oriented to time and place and (has) some recollection of events," but he must possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," with a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). Under Virginia law, where there is "probable cause to believe that the defendant . . . lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense," the court must order a competency evaluation. Va. Code § 19.2-169.1; *see Godinez v. Moran*, 509 U.S. at 401 n.13 (citing *Drope*, 420 U.S. at 180-81; *Pate*, 383 U.S. at 385) (stating a competency determination is necessary when there is "reason to doubt" defendant's competency); *cf. Owsley v. Peyton*, 368 F.2d 1002, 1003 (4th Cir. 1966) (finding that counsel was ineffective where he failed to present evidence suggesting there was "reasonable ground" to question the defendant's competence).

Here, there is overwhelming objective evidence that would have likely led to a finding that Muhammad was incompetent to stand trial. First, the brain abnormalities shown on the MRI would have been objective unimpeachable proof of a severe mental disorder and sufficient evidence to require an evaluation. *See, e.g.,*

Odle v. Woodford, 238 F.3d 1084, 1088 (9th Cir. 2001) (evidence suggesting severe mental impairment is sufficient evidence to require a competency evaluation).

Second, neuropsychology testing data and conclusions describing damage to Muhammad's frontal lobe functioning confirms what the MRI picture shows: that Muhammad's brain damage is indisputable. As a result of the defects in the functioning of his frontal lobes, Muhammad is unable to rationally explore new ideas systematically, follow a logical line of thought continuously, lacks sufficient ability to distinguish truth from falsity, or incorporate new information into his thinking. *See United States v. Hammer*, 404 F. Supp. 2d 676, 704 (M.D. Pa. 2005). Third, it is well established that beatings of the type Muhammad suffered as a child substantially increase the probability of serious mental health problems. *Bouchillon*, 907 F.2d 589, 590 (5th Cir. 1990) (taking judicial notice of the relevance of abuse and neglect, less serious than Muhammad's, in a competency case).

But the highly relevant evidence of pictures of brain damage, tests showing abnormal brain functioning, and a social history and medical background correlated with brain injury and mental health disorders did not exist in a vacuum. Trial counsel also had first-hand confirmation of the impact of these factors in their own experience of Muhammad's bizarre behavior and delusional beliefs, as well as from witnesses they interviewed pre-trial who described Muhammad in terms that clearly indicated severe mental illness.

Finally, and most importantly, Dr. Lewis clearly expressed her contemporaneous opinion to trial counsel, pretrial, that Muhammad was not competent to stand trial.[10] J.A. 2549-50. An uncontradicted expert opinion of incompetence is the most significant evidence a defendant can muster. *Bundy v. Dugger*, 816 F.2d 564, 567 (11th Cir. 1987). While Muhammad had some understanding of the charges against him, that superficial understanding was insufficient because "his impaired sense of reality substantially undermined his judgment and prevented him from cooperating rationally with his lawyer." *United States v. Hemsi*, 901 F.2d 293, 296 (2d Cir. 1990). Based on this evidence, there is a reasonable probability that Muhammad would have been found incompetent to stand trial. *Drope*, 420 U.S. at 172; *see also Medina*, 505 U.S. at 449.

C. Trial counsel's performance fell below the standard of effective representation set forth in *Strickland* when counsel failed to request a competency evaluation in light of the overwhelming evidence that showed Muhammad was incompetent.

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[10] While unknown to trial counsel at the time, it is relevant that a second expert, neuropsychiatrist Dr. David Williamson, retained by the Maryland Public Defender, later "developed substantial concerns that Mr. Muhammad was mentally ill and was not competent to stand trial." J.A. 2090, 2458. The Maryland finding of competence has no relevance to Muhammad's claim in this case because: 1) it came almost two and a half years after Muhammad's Virginia trial, *Muhammad v. State*, 934 A.2d 1059, 1065 (Md. App. 2007); 2) the Maryland finding was made despite giving the defense virtually no notice (the scheduling of the hearing without sufficient notice was a hotly contested issue on appeal), and without any expert testimony, *id.* at 1102-03; and 3) the Maryland court made the same mistakes as the Virginia court, relying on no expert testimony (because the Maryland court refused to schedule the hearing to allow the appearance of Muhammad's expert), and instead relying on its *Faretta* inquiry. *Id.*

To establish deficient performance, the "petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness" in light of prevailing norms. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 687-688). "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." *Strickland*, 466 U.S. at 688-89.

A capital defense team "should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1, The Defense Team and Supporting Services (2003). Moreover, the American Bar Association Criminal Justice Mental Health Standards instruct that "defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence." ABA Criminal Justice Mental Health Standards, Standard 7-4.2(c) (1989).

At the juncture of the dual constitutional requirements of effective assistance of counsel and a defendant's competency, defense counsel has a special role in effectively ensuring that a client is competent to stand trial. *Hull v. Kyler*, 190 F.3d 88, 112 (3d Cir. 1999) (citing *Drope*, 420 U.S. at 177 n.13). Either Muhammad's irrational behavior, his demeanor with his attorneys and at trial, or the medical

evidence or mental illness each, standing alone gave trial counsel sufficient reason to raise doubts about his competency to the court. *Drope*, 420 U.S. at 180. Together, the information available to trial counsel clearly imposed a duty to raise the issue with the court. *Id.* The Circuits that have addressed this issue have come to the same conclusion.[11]

Any superficial brightness displayed by Muhammad did not relieve counsel of their obligation to come forward with their knowledge of his mental condition, since "the existence of even a severe psychiatric defect is not always apparent to laymen." *Bruce v. Estelle*, 536 F.2d 1051, 1059 (5th Cir. 1976). Muhammad's simple responses to a superficial *Faretta* inquiry gave a woefully incomplete and inaccurate portrayal of his mental health. "Although a defendant's demeanor

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[11] *See, e.g., Richards v. Quarterman*, 566 F.3d 553, 570-71 (5th Cir. 2009) (failure to put defendant's medical records into issue and to conduct adequate pretrial investigation was deficient); *Hummel v. Rosemeyer*, 564 F.3d 290, 302 (3rd Cir. 2009) (counsel was deficient in failing to seek a competency hearing and by stipulating to competency to stand trial based only on two psychologists' reports); *Burt v. Uchtman*, 422 F.3d 557, 568 (7th Cir. 2005) (holding that defense counsel was deficient in failing to request a renewed competency hearing where counsel had ample evidence that the fitness hearing eight months before trial began was no longer reliable); *United States v. Klat*, 156 F.3d 1258, 1263 (D.C. Cir. 1998) ("where a defendant's competence to stand trial is reasonably in question, a court may not allow that defendant to waive her right to counsel and proceed *pro se* until the issue of competency has been resolved") (footnote omitted); *Williamson v. Ward*, 110 F.3d 1508, 1517-18 (10th Cir. 1997) (holding that trial counsel's failure to adequately investigate defendant's competency before forgoing a competency determination constituted deficient performance given counsel's observations of odd demeanor and documentary evidence suggesting possible mental condition); *Hull v. Kyler*, 190 F.3d 88, 106 (3rd Cir. 1999) (holding that an attorney abandoned his professional obligation when he failed to dispute his client's competency to stand trial in the face of psychiatric reports of his client's incompetency).

during trial may be such as to obviate the need for extensive reliance on psychiatric prediction concerning his capabilities, . . . this reasoning offers no justification for ignoring the uncontradicted testimony of a history of pronounced irrational behavior." *Drope*, 420 U.S. at 179 (internal quotation marks and citations omitted); *see also Bouchillon v. Collins*, 907 F.2d 589, 594 (5th Cir. 1990) ("One need not be catatonic, raving or frothing to be legally incompetent.").

A trial court relies on a defendant's attorney to raise the issue of competence. *See Drope*, 420 U.S. at 176-177 ("judges must depend to some extent on counsel to bring issues into focus"); *Bouchillon*, 907 F.2d at 597 ("where such a [mental] condition exists, the defendant's attorney is the sole hope that it will be brought to the attention of the court"). Here, Muhammad's trial attorneys' only comment to the court was that they found him to be "very bright." (J.A 5234-5235.) Based on counsel's awareness of substantial evidence that belied such a conclusion, it was simply unreasonable to ignore the evidence, whether it was to appease their difficult client, or because of a confusion of their ethical duties.[12]

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[12] Deference to the wishes of a person whose competence is in question cannot be justified as reasonable in light of professional norms. The ABA standards provide, "If the client objects to [a motion for evaluation of the defendant's competence], counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court . . . those facts known to counsel which raise the good faith doubt of competence." ABA Criminal Justice Mental Health Standards, Standard 7-4.2(c) (1989); *see also Pate*, 383 U.S. at 384 (defendant's waiver cannot be knowing or intelligent unless the defendant is competent); *United States v. Johnson*, 527 F.2d 1104, 1106 (4th Cir. 1975) (it is an "error to defer to the wish of a person charged with crime where there is reasonable cause to believe that he may

In sum, contrary to the Virginia Supreme Court's conclusions that "there was no indication that petitioner suffered from any mental illness" when he moved to represent himself and that there was no evidence disputing counsel's determination that Muhammad was a very bright man, *Muhammad*, 646 S.E.2d at 192, there was overwhelming objective evidence rebutting each conclusion, and virtually all of it was provided to the state court. Muhammad's trial attorneys had a duty to request a competency evaluation, and their failure to do so was unreasonable and below prevailing professional norms.

II. Contrary to the practice in all other jurisdictions, the District Courts in Virginia consistently deny first federal habeas petitioners, including Muhammad, the full year to prepare their petitions provided by Congress in 28 U.S.C. § 2244(d). This Court should grant *certiorari* to bring the Eastern and Western District of Virginia into compliance with the otherwise uniform nationwide rule permitting petitioners one year to prepare and file their first federal habeas petitions.

This Court has on many occasions addressed the point at which the statute of limitations in § 2244(d) begins to run and the circumstances that toll it.[13] The

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be presently insane or so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense.").

[13] *See Jiminez v. Quarterman*, 129 S. Ct. 681, 683 (2009) (meaning of "the date on which the judgment became final" in § 2244(d)(1)(A)); *Allen v. Siebert*, 552 U.S. 3, 3 (2007) (*per curiam*) (meaning of "properly filed" in § 2244(d)(2)); *Lawrence v. Florida*, 549 U.S. 327, 329 (2007) (meaning of "pending" in § 2244(d)(2)); *Evans v. Chavis*, 546 U.S. 189, 191 (2006) (meaning of pending in § 2244(d)(2)); *Pace v. DiGuglielmo*, 544 U.S. 408, 410 (2005) (meaning of "properly filed" in § 2244(d)(2)); *Carey v. Saffold*, 536 U.S. 214, 217 (2002) (meaning of "pending" in § 2244(d)(2)); *Duncan v. Walker*, 533 U.S. 167, 169 (2001) (meaning of "State post-conviction or other collateral review" in § 2244(d)(2); *Artuz v. Bennett*, 531 U.S. 4, 5 (2000) (meaning of "properly filed" in § 2244(d)(2)); *see also Dodd v. United States*, 545

Eastern and Western Districts of Virginia routinely render all of those decisions irrelevant by artificially shortening the one year to file a first federal habeas petition Congress mandated in § 2244(d): why does it matter when the time begins to run, or what circumstances toll it, if the District Court can take it away at will? In stark contrast to essentially every other District Court, District Courts in Virginia have adopted a practice of setting an *ad hoc* limit for the filing of a first federal *habeas* petition shorter than the uniform national standard enacted by Congress. In one of the largest cases, if not *the* largest case, in Virginia history, the District Court denied Muhammad half of the time Congress allocated for him to research, investigate, and prepare his *habeas* claims. This Court should grant *certiorari* to bring Virginia's District Courts in line with the otherwise uniform national respect for the directive of Congress that inmates outside opt-in states are entitled to one year to bring their first *habeas* petitions.

A. The Virginia District Courts' policy of denying first federal *habeas* petitioners the benefit of the full year for filing established by Congress cannot be reconciled with the language or rationale of this Court's opinions.

Title 28 U.S.C. § 2244(d)(1) provides, "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." This statute of limitations runs from the latest of

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U.S. 353, 354 (2005) (meaning of "initially recognized" in analogous § 2255(f)(3)); *Clay v. United States*, 537 U.S. 522, 524 (2003) (meaning of "final" in analogous § 2255(f)(1)).

one of four dates, in this case as in most from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." § 2244(d)(1)(A).

Immediately after the passage of § 2244(d), however, the District Courts in Virginia began a policy of setting artificial filing deadlines that denied capital inmates the benefit of the Congressionally-provided year to prepare and file a *habeas* petition. *See, e.g., Williams v. Taylor*, 189 F.3d 421, 431 (4th Cir. 1999), *aff'd in part, rev'd in part*, 529 U.S. 420 (2000); *Royal v. Taylor*, 188 F.3d 239, 249-50 (4th Cir. 1999). In *Bell v. True*, 356 F. Supp. 2d 613, 615 (W.D. Va. 2005), the Western District of Virginia explained its view that, "The AEDPA limitations period is the maximum, not the minimum or mandatory, amount of time a petitioner may wait before filing." *See also Lenz v. True*, 324 F. Supp. 2d 796, 797 (W.D. Va. 2004). By the time Muhammad exhausted his claims in the Virginia state courts, the District Courts in Virginia routinely set artificial filing deadlines without reference to the uniform rule of nationwide application in § 2244(d)(1).

The Eastern District of Virginia followed that practice below. When Muhammad requested appointment of counsel on October 11, 2007, he had at least 288 days remaining on the one-year statute of limitations. The District Court ordered that Muhammad file a petition within 60 days, Pet. App. 30a, and later extended that artificial deadline by 30 days, to January 24, 2008. Pet. App. 29a. The District Court denied Muhammad's request for more time, but granted 90 days

leave to amend for good cause. Pet. App. 27a.

When Muhammad filed his petition on January 23, 2008, only 180 days of Muhammad's allocated 365-day statute of limitations had run. When Muhammad sought to further amend his petition within the statute of limitations, J.A. 2750, 2755, the District Court enforced its artificial deadline by denying leave to amend. Pet. App. 49a. The District Court's order denying Muhammad more than half of the time Congress allocated for a first-time federal habeas petitioner far departs from the nationwide rule of uniform application in § 2244(d).

The language and rationales of this Court's opinions clearly establish the uniform nationwide rule of a full year to file a first federal *habeas* petition that the District Courts in Virginia flaunt. This Court has explained that "the plain language of § 2244(d)(1) . . . pinpoints the uniform date of finality set by Congress," *Jiminez v. Quarterman*, 129 S. Ct. 681, 686 (2009), and described the one-year AEDPA statute of limitations as "a uniform rule." *Day v. McDonough*, 547 U.S. 198, 202 n.1 (2006). This makes sense—"federal statutes are generally intended to have uniform nationwide application." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989). And "a uniform nationwide limitations period for a federal cause of action is *always* significantly more appropriate," *North Star Steel Co. v. Thomas*, 515 U.S. 29, 37 (1995) (Scalia, J., concurring in the judgment), because of the litigation generated and expectations disrupted by different statutes

of limitations for the same cause of action in different federal courts. *See Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 377-80 (2004).

This Court's § 2244 decisions clearly establish that Congress enacted § 2244(d)(1) not only to serve the interest in finality, *e.g.*, *Mayle v. Felix*, 545 U.S. 644, 662 (2005), but also to eliminate the variations in federal filing deadlines from jurisdiction to jurisdiction. Section 2244(d)(1)(A) provides that for challenges to state convictions, the statute of limitations runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," but the § 2255(f)(1) statute of limitations runs from "the date on which the judgment of conviction becomes final." Congress used more detailed language in § 2244(d)(1)(A) to establish a "uniform federal rule" governing the statute of limitations in § 2254 cases and guard against varying applications of § 2244(d) from state to state, a threat which was not present in federal § 2255 cases. *Clay v. United States*, 537 U.S. 522, 530-31 (2003); *see also Jiminez v. Quarterman*, 129 S. Ct. 681, 686 (2009) (expounding this reasoning from *Clay*).

This Court has described the operation of § 2244(d) as entitling a petitioner to one year to research, investigate, and present his application for *habeas corpus* relief: "Under AEDPA's statute of limitations, Felix had until August 12, 1998, to file a petition for a writ of habeas corpus in federal district court." On a point not disputed by the majority, Justice Breyer has explained in dissent that, "Congress enacted a statute that all agree gave state prisoners a full year (plus the duration of

state collateral proceedings) to file a federal *habeas corpus* petition." *Duncan v. Walker*, 533 U.S. 167, 190 (2001) (Breyer, J., dissenting).

Although this Court's explanation of a petitioner's right to the Congressionally-mandated one year to file has not yet reached the level of a holding, neither is it merely a matter of assumption. This Court carefully described the operation of the analogous statute of limitations in § 2255(f) in terms of the petitioner's right to file up to one year after the statutory period begins to run in *Dodd v. United States*, 545 U.S. 353 (2005). There, this Court addressed the operation of the statute of limitations under § 2255(f)(3) after this Court "newly recognize[s]" a right, which is essentially identical to § 2244(d)(1)(C). This Court explained that if it "decides a case recognizing a new right, a federal prisoner seeking to assert that right will have one year from this Court's decision within which to file his § 2255 motion." *Dodd*, 545 U.S. at 358-59; *see also id.* at 357 (§ 2255(f) "gives § 2255 applicants one year"); *id.* at 357 ("An applicant has one year . . . ."); *id.* at 360 (the petitioner "had one year from that date within which to file his motion"); *id.* at 364 (Stevens, J., dissenting) ("Petitioners, whether filing an initial habeas petition or a second or successive petition, would have one year from this Court's decision to file a petition for a writ taking advantage of that decision.").

In addition to the practice of the Virginia federal courts, the District Court relied in part on its interpretation of § 2251(a)(3), a 2006 amendment to which governs stays of execution. J.A. 2358. No other federal court has held that §

2251(a)(3) overrules *McFarland v. Scott*, 512 U.S. 849 (1994), or otherwise limits the time to file under § 2244(d). The District Court's adoption of Virginia's radical assertion that § 2251(a)(3) limits a petitioner's time for filing is a reason to grant *certiorari*, rather than a reason to deny it.

Clearly, the policy of the District Courts in Virginia to deny petitions part of the § 2244(d) year to file cannot be reconciled with this Court's interpretations of § 2244(d). This Court should grant *certiorari* because the Eastern and Western Districts of Virginia have decided an important federal question, the interpretation of § 2244(d), in a way which conflicts with the relevant decisions of this Court. *See* Rule 10(c).

B. The policy of Virginia's District Courts denying first federal *habeas* petitioners the benefit of the full year for filing established by Congress conflicts with the practice of all other federal jurisdictions.

Immediately before or after this Court's decision in *Lindh v. Murphy*, 521 U.S. 320, 336 (1997), all federal jurisdictions other than those in Virginia adopted the position that first federal *habeas* petitioners were entitled to one year to prepare and file their petitions. [14] At the time, the Fourth Circuit, like the others, held that

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[14] "[T]he Courts of Appeals have uniformly created a 1-year grace period, running from the date of AEDPA's enactment, for prisoners whose state convictions became final prior to AEDPA." *Duncan v. Walker*, 533 U.S. 167, 183 (Stevens. J., concurring); *see Evans v. Chavis*, 546 U.S. 189, 200 (2006); *Carey v. Saffold*, 536 U.S. 214, 217 (2002); *Artuz v. Bennett*, 531 U.S. 4, 6 (2000); *see also Austin v. Mitchell*, 200 F.3d 391, 393 (6th Cir. 1999); *Gaskins v. Duval*, 183 F.3d 8, 9 (1st Cir. 1999); *Nichols v. Bowersox*, 172 F.2d 1068, 1073 (8th Cir. 1999) (en banc); *Flanagan v. Johnson*, 154 F.3d 196, 201 (5th Cir. 1998); *Brown v. Angelone*, 150 F.3d 370, 375 (4th Cir. 1998); *Ross v. Artuz*, 150 F.3d 97, 102-03 (2d Cir. 1998); *Burns v. Morton*,

District Courts must provide potential *habeas* litigants with "an entire year to prepare and file a *habeas* petition." *Brown v. Angelone*, 150 F.3d 370, 375 (4th Cir. 1998).

In opposing the District Court's limitation on his time to file, Muhammad documented thirteen examples (not including his own) of the consistent policy of the Virginia District Courts in limiting time to file. On the other hand, the collective efforts of Muhammad's counsel, Professor Ira Robbins, prominent *habeas* attorneys outside Virginia, counsel for the Warden, and the District Court only revealed three cases outside Virginia where a District Court imposed an artificial deadline: two in North Carolina and *Dowthitt v. Johnson*, No. H-98-3282, 1998 U.S. Dist. LEXIS 22943 (S.D. Tex. 1998). As Professor Robbins explained, the District Court's artificial deadline resulted "in an extreme inequity with how *habeas* petitioners, especially capital *habeas* petitioners, are treated throughout the country." Pet. App. 53a.

At trial, the Commonwealth sought to establish that Muhammad committed crimes in Georgia, Alabama, Louisiana, Maryland, and the District of Columbia in addition to Virginia. If any of those other states had imposed a death sentence on Muhammad which survived state review, Muhammad would have had the full year provided by Congress in § 2244(d) to prepare and file a first federal *habeas* petition

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134 F.3d 109, 111 (3d Cir. 1998); *Calderon v. United States District Court*, 128 F.3d 1283, 1287 (9th Cir. 1997); *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997).

challenging that conviction and sentence. Virginia stands alone, even within the Fourth Circuit, in its consistent and recurring policy of artificially limiting *habeas* petitioners time to file. *Cf. Williams v. Taylor*, 189 F.3d 421, 431 (4th Cir. 1999), *aff'd in part, rev'd in part*, 529 U.S. 420 (2000); *Royal v. Taylor*, 188 F.3d 239, 249-50 (4th Cir. 1999).

Despite the apparent unanimity of opinion that § 2244(d) provides a petitioner a full year to prepare and file a first federal *habeas* petition outside Virginia, the Fourth Circuit rejected Muhammad's argument that the Eastern District of Virginia erroneously curtailed the time Congress allotted Muhammad, writing that Muhammad could not cite a case holding he was entitled to the full year established in § 2244(d). *Muhammad*, 575 F.3d at 374-75. This Court should grant *certiorari* in this case because the Fourth Circuit has ruled on this important matter of a first federal petitioner's time to file in a way which conflicts with the other Courts of Appeals. If for no other reason, this Court should grant *certiorari* because the District Courts of Virginia have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See Khanh Phuong Nguyen v. United States*, 539 U.S. 69, 81 (2003).

C. The policy of Virginia's District Courts denying first federal *habeas* petitioners the benefit of the full year for filing encroaches on Congress' legislative compromise in § 2244(d).

This Court should grant *certiorari* because the District Courts' arrogation of power encroaches on Congress' carefully crafted legislative compromise in § 2244(d) concerning the handling of the many *habeas* petitions which come before the federal courts each year. Prior to the passage of AEDPA in 1996, "no statute of limitations governed requests for federal *habeas corpus*." *Clay v. United States*, 537 U.S. 522, 528 (2003); *see also, e.g., Vasquez v. Hillery*, 474 U.S. 254, 265 (1986); *Chessman v. Teets*, 354 U.S. 156, 165 (1957). In the context of mounting criticism of extraordinary delays, Congress negotiated and adopted "a tight time line" governing federal *habeas* applications. *Mayle v. Felix*, 545 U.S. 644, 662 (2005).

Congress' carefully considered policy regarding the federal *habeas* statute of limitations is entitled to much more respect that the District Courts in Virginia have given it. In *Lonchar v. Thomas*, 517 U.S. 314, 322-31 (1996), this Court held that Congress, not the courts, was the proper body to balance the competing interests and establish policy on the timeliness of capital *habeas* filings. It warned courts against regulating filing deadlines through "*ad hoc* judicial exception" or making a "judicial attempt" to address perceived delay in filing capital *habeas* petitions. *Id.* at 328, 331. Less than a month after this Court decided *Lonchar*, Congress acted to balance competing interests in fair capital litigation, finality,

comity, and other concerns by passing § 2244(d) as part of AEDPA. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 179 (2001); *Lonchar*, 517 U.S. at 330-31. This Court should not permit a District Court to further tighten Congress' "a tight time line," *Mayle*, 545 U.S. at 662, especially given that Congress "may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted." *Artuz v. Bennett*, 531 U.S. 4, 10 (2000).

Not only does the District Court's policy disregard § 2244(d), but it also undermines Congress' policy of encouraging states to improve post-conviction representation in exchange for expedited deadlines. *See* 28 U.S.C. § 2261; *Lindh*, 521 U.S. at 330-31. The District Court required Muhammad to file within six months, the same statute of limitations Congress provided for "opt-in" states in § 2263(a).

D. The Fourth Circuit's harmless error analysis poses no barrier to this Court's review of this question.

As an alternative basis, the Fourth Circuit held that any error by the District Court in limiting Muhammad's time to file was harmless: "even if we assume that the district court erred in denying Muhammad an entire year in which to file his petition, 'the trial court's error must have a "substantial and injurious effect or influence in determining the jury's verdict."'" *Muhammad*, 575 F.3d at 374 (quoting *Tuggle v. Netherland*, 79 F.3d 1386, 1393 (4th Cir. 1996) (quoting *Brecht v.*

Abrahamson, 507 U.S. 619, 637 (1993))). The Fourth Circuit's deeply flawed harmless error analysis should pose no obstacle to this Court's review.

Brecht itself is inapplicable, as it adopted a test of harmless error that federal courts apply to collateral claims of state trial court error, not to appellate court review of claims that a District Court erred. *See, e.g., Brecht*, 507 U.S. at 662 (adopting the standard in *Kotteakos v. United States*, 328 U.S. 750 (1946), for federal collateral review of state court errors). Given that *Brecht* adopted the *Kotteakos* standard for assessing non-constitutional error on direct appeal, however, the proper standard of review is ultimately the same: a litigant's substantial rights were affected if a reviewing court cannot say with fair assurance that the error did not sway the judgment. 328 U.S. at 764-65. Under *Brecht*, and by extension *Kotteakos*, the prosecution bears the burden of showing the harmlessness of the error; the appellant does not bear the burden of proving its harmfulness. *See O'Neal v. McAninch*, 513 U.S.432, 436-38 (1995).

The Fourth Circuit did not actually apply the *Kotteakos* standard. The Fourth Circuit acknowledged that, with more time, Muhammad would have presented more inconsistent testimony, more exculpatory witnesses statements, more evidence that Muhammad and Malvo were not at the Parker shooting, and evidence of a compelling alternate suspect. *Muhammad*, 575 U.S. at 374-75. The court wrote, however, that "Muhammad's problem is that, given the abundance of evidence against him, none of these things likely would have resulted in a different

outcome, and thus he can show no prejudice." *Id.* at 375. Under the *Kotteakos* standard, Muhammad is not required to "show . . . prejudice" or that additional evidence "likely would have resulted in a different outcome." *Id.* The reviewing court must assess whether the artificial deadline substantially influenced the court's ruling that the withheld exculpatory evidence was not material, considered collectively, not whether Muhammad can show the additional evidence "likely would have resulted in a different outcome." *Id.*

Assuming for the sake of argument that the relevant inquiry is the effect of the suppressed evidence on the jury's verdict, rather than on the District Court's ruling, the Fourth Circuit still applied the wrong standard. In *United States v. Agurs*, 427 U.S. 97, 112 (1976), this Court rejected the application of *Kotteakos* to *Brady* error. Instead, a court reviewing a claim of *Brady* error must review the suppressed evidence for materiality under *United States v. Bagley*, 473 U.S. 667 (1985). *See Kyles v. Whitley*, 514 U.S. 419, 435-37 (1995). Even this heightened standard is less demanding than the Fourth Circuit's "likely would have resulted in a different outcome" test. This Court explained in *Kyles*, 514 U.S. at 434, "*Bagley*'s touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

The Fourth Circuit's deeply flawed harmless error analysis, which applied a test more stringent than that called for by this Court's cases, cannot stand as a barrier to this Court's correction of the Virginia District Courts' application of artificial deadlines in violation of Congress' uniform nationwide rule of one full year to file a *habeas* petition. On remand from this Court, the Fourth Circuit would be required to reassess the District Court's error in the light of this Court's ruling and the proper harmless error standard.

One other concern cautions against deciding *certiorari* on the basis of the Fourth Circuit's holding of harmless error, its third in addressing the Eastern District of Virginia's radical policy. *See Muhammad*, 575 F.3d at 374-75; *Williams*, 189 F.3d at 431; *Royal*, 188 F.3d at 249-50. If this Court declines to grant *certiorari*, the District Courts of Virginia will continue to breach accepted and usual judicial procedure until a capital petitioner falls into the unusual circumstance of discovering a meritorious, exhausted, undefaulted, and injurious claim after an artificial deadline but before the statute of limitations runs. This Court should take this opportunity to address the Fourth Circuit's sanctioning of the District Courts' misguided policy, rather than waiting for the next opportunity years from now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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