No. 18-8977

In the

Supreme Court of the United States

SCOTT E. SCHMIDT,

Petitioner,

v.

BRIAN FOSTER, WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In this habeas matter, did the Seventh Circuit comport with *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), when it reviewed the last-reasoned state court decision addressing the merits of Scott Schmidt's constitutional claim and deferred to reasoning contained in that court's opinion?

2. Did the Seventh Circuit correctly deny habeas relief on Schmidt's claim under *United States v. Cronic*, 466 U.S. 648 (1984)?

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INTRODUCTION

Scott Schmidt's petition boils down to little more than a request for error correction regarding how the Seventh Circuit applied AEDPA deference in this habeas matter. Nothing here warrants this Court's granting review, ordering GVR, or ordering summary reversal.

The Seventh Circuit, in affirming the federal district court's denial of Schmidt's habeas petition, soundly deferred to reasoning contained in the relevant state decision on the merits. Its decision comported wholly with this Court's decisions in *Wilson v. Sellers* and other cases guiding federal courts in applying AEDPA deference. The premise of Schmidt's first question presented—that the Seventh Circuit decided the case on reasoning not articulated by the Wisconsin Court of Appeals—is false.

The second question Schmidt presents seeks error correction. It does so under the guise of asking whether there is a "bizarre case" exception to habeas relief. At bottom, though, his complaint is that the Seventh Circuit deferred to a reasonable state court judgment when (in his opinion) it should not have. That issue does not warrant this Court's attention.

STATEMENT OF THE CASE

The State charged Schmidt with first-degree intentional homicide after he murdered his estranged wife.[1] (*See* App. 142a.) On the morning of the murder,

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[1] After shooting his estranged wife, Schmidt also shot his mother-in-law; the State charged Schmidt with attempted first-degree intentional homicide for that shooting.

Schmidt went to her home uninvited, retrieved a loaded gun, and confronted her about a receipt he found in her email account. (App. 155a–156a.) After the two got into a verbal argument, Schmidt shot her multiple times in the head, hands, and arms. (*See* App. 142a,156a–157a.)[2]

A. Pretrial evidentiary decision

Schmidt admitted to the murder but sought to mitigate the severity of the first-degree intentional homicide charge by advancing a state-law-based adequate-provocation affirmative defense. Under that theory, if Schmidt could produce "some" evidence to support jury instructions for that defense, the State would then have to prove that the alleged provocation was inadequate; if the State failed its burden, the jury would convict him of second-degree (instead of first-degree) intentional homicide. Wis. Stat. §§ 939.44; 940.01(2)(a); *State v. Head*, 648 N.W.2d 413, 437 (Wis. 2002). In Wisconsin, first-degree intentional homicide carries a life sentence with parole eligibility after a minimum of 20 years; second-degree intentional homicide carries a maximum sentence of 60 years. Wis. Stat. §§ 939.50(3)(b); 973.014(1g)(a)1.

While the "some evidence" burden of production is low, Wisconsin case law suggests that the adequate-provocation defense is available to a defendant in only narrow factual circumstances. To start, the defendant must produce evidence of a provocation that both

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[2] Citations to "Dkt." refer to the docket of the United States District Court for the Eastern District of Wisconsin in case number 13-cv-1150, and citations to "Doc." refer to the Seventh Circuit's docket in case number 17-1727.

(a) subjectively caused a loss of control in him and (b) objectively would cause such a loss of control in a reasonable person. Further, based on published case law, Wisconsin courts have recognized its viability only in cases where a long-suffering battered spouse had murdered her abuser after years of pernicious, psychologically damaging abuse. *See, e.g.*, *State v. Felton*, 329 N.W.2d 161, 172–73 (Wis. 1983); *State v. Hoyt*, 128 N.W.2d 645, 649 (Wis. 1964).

Schmidt, through his counsel, filed a pretrial motion seeking to admit other-acts evidence to support an adequate-provocation defense. (Dkt. 24-2:37–49.) He asserted that evidence of his estranged wife's "false allegations, controlling behaviors, threats, isolation, unfaithfulness, verbal abuse and arguments" would show that he was adequately provoked into shooting her. (Dkt. 24-2:42.) The State responded that Schmidt was merely making a "blanket assertion that the victim was a bad person and engaged in undesirable behavior at some point in their relationship." (Dkt. 24-2:63.)

After reviewing these submissions, the trial court expressed concerns that the evidence would be insufficient to entitle Schmidt to a jury instruction on adequate provocation; if that was the case, the jury would be exposed to extensive irrelevant and inadmissible evidence that would risk confusing the issues at trial. Accordingly, the court determined that a pretrial evidentiary hearing was warranted to determine if Schmidt could satisfy his burden of production to present evidence supporting the defense. (Dkt. 12-9:23–26, 28–29.)

In advance of further hearings on the issue, Schmidt's counsel submitted a detailed offer of proof that provided a timeline of events over a five-year period leading to the shooting; legal arguments supporting the elements of adequate provocation; and a list of 29 witnesses to the alleged provocations. (Dkt. 12-2:63–66; 24-2:65–73.) Schmidt also opposed the court's requiring an evidentiary hearing on the matter, in part because such a hearing would require his testimony, which would reveal his trial strategy to the prosecutor and violate his right against self-incrimination. (Dkt. 24-2:65–66.)

At a subsequent hearing, the trial court addressed Schmidt's concerns regarding the evidentiary hearing. It identified case law holding that a court does not violate a defendant's constitutional rights by holding a pretrial hearing on the admissibility of a proposed affirmative defense. (Dkt. 12-10:3 (citing *State v. McClaren*, 767 N.W.2d 550, 561 (Wis. 2009)).) It also highlighted language in that decision indicating that an *in camera* hearing—akin to the type of hearing endorsed by this Court in *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987)—could alleviate a defendant's concerns about prematurely disclosing his proposed defense to the prosecution. (Dkt.12-10:4 (discussing *McClaren*, 767 N.W.2d at 559 n.12).)

Schmidt's counsel responded that if the court needed to hear evidence from Schmidt to support the subjective prong of the adequate-provocation defense, the court should hold "an ex parte in-camera inspection of the Court and [Schmidt] and seal those records." (Dkt.12-10:5.) The prosecutor agreed to the procedure and to the court's proposal that defense

counsel would be present to observe the court's questions and Schmidt's answers. (Dkt.12-10:6–7.) The court took a recess so that Schmidt could consult with his attorney before participating in the *in camera* proceeding. (Dkt.12-10:23–24.)

The *in camera* proceeding commenced with the judge, Schmidt, a court reporter, and Schmidt's counsel; the prosecutor was not present. (App. 182a.) In response to the court's open-ended questions regarding Schmidt's subjective state of mind leading up to the murder, Schmidt described the events on the day of the murder and longer-term problems in his marriage. (App. 197a–206a.) The judge told Schmidt that his testimony suggested that the events described in his offer of proof "weighed on your mind." It allowed a break for Schmidt to confer with counsel and "take time to review" his prior written submission. (App. 206a.) After the break, the judge asked Schmidt another open-ended question about how the past events of his marriage "enter[ed] into your mind or affect[ed] you on" the day of the murder, and Schmidt explained that "it just kind of came to a head" and "overwhelmed" him, that everything "piled up one after another." (App. 207a.) Schmidt then reiterated some of the history of his troubled marriage. (App. 207a–215a.)

Ultimately, the trial court denied Schmidt's motion to introduce evidence supporting an adequate-provocation defense. (Dkt.12-11:2.) As it later articulated in its postconviction decision, the court concluded that Schmidt failed to satisfy the objective component of the adequate-provocation defense, finding that he failed to show circumstances "that

would drive a reasonable person to kill his spouse." (App. 174a.)

B. Trial and conviction

At trial, the State presented substantial evidence that Schmidt was guilty of first-degree intentional homicide. Yet—and contrary to any suggestion that adequate provocation was his "only" defense (App. 41a; Pet. 26)—Schmidt offered a defense theory that he lacked sufficient intent for first-degree intentional homicide. Counsel argued that Schmidt killed his wife, but his intent in going to the house was to save his marriage, and the situation spiraled out of control causing him to recklessly—not intentionally—shoot her. (Dkt. 12-12:44–46; 12-15:146–57, 170–75.) During trial, the jury heard much of the evidence that Schmidt had proposed to support his adequate-provocation theory, including his estranged wife's new relationship (*see, e.g.*, Dkt. 12-14:51–80), the couple's past financial and marital troubles (*see, e.g.*, Dkt. 12-14:187–90; 12-15:47–48, 58), and Schmidt's desire to save the failing marriage (*see, e.g.*, Dkt. 12-14:141–42, 226).

Schmidt's defense evidence was sufficient to warrant jury instructions on the lesser-included offense of first-degree reckless homicide—a felony identical in potential punishment to second-degree intentional homicide—but the jury convicted Schmidt of first-degree intentional homicide for his estranged wife's death. (App. 179a; Dkt.12-15:103–05, 219–20.) He received a life sentence with parole eligibility after 40 years. (App. 179a.)

C. State postconviction and appellate proceedings

Schmidt filed a postconviction motion for a new trial, arguing that the court violated his right to present a defense and that the *in camera* proceeding violated his Sixth Amendment right to counsel. (Dkt. 24-1.) On the second claim, he asserted that the deprivation of counsel during a critical stage was so complete, under *Bell v. Cone* and other critical-stage law, that he was entitled to a presumption of prejudice. (Dkt. 24-1:14–16.) The postconviction court denied the motion. (App. 164a–178a.)

Schmidt renewed his arguments to the Wisconsin Court of Appeals, which affirmed. As for the primary claim, it held that there was no violation of Schmidt's right to present a defense because, while Schmidt satisfied the subjective prong of adequate provocation, he failed his burden on the objective prong. (App. 157a–159a.)

As for the right-to-counsel claim, the court first held that the non-adversarial *in camera* proceeding did not violate Schmidt's Sixth Amendment rights because it was not a "critical stage." (App. 162a–163a.) In reaching that conclusion, the court explained that the hearing was a "supplemental proceeding conducted for [Schmidt's] benefit" intended to "prevent prejudice to him by minimizing disclosure of his defense to the State." (App. 162a.) It also emphasized that the hearing "was not the only opportunity for Schmidt to present his provocation evidence to the court. Indeed, Schmidt had already

presented written offers of proof, and had the option to present whatever additional oral testimony he desired in open court." (App. 163a.) "Because the *in camera* hearing did not supplant Schmidt's opportunity to present evidence in support of his affirmative defense," the court held, "it was not a critical stage." (*Id.*)

The court then provided reasons supporting the conclusion that the denial of counsel was not so complete that prejudice should be presumed. It held that "[i]n any event," Schmidt was permitted to speak to counsel at a recess during the hearing and his counsel "was present for the entire *in camera* hearing." (App. 163a.) "Thus," ruled the court, "if counsel felt Schmidt or the court was overlooking something, or had any other concerns, there was an opportunity to so advise Schmidt. Likewise, Schmidt had the opportunity to present any concerns or questions he had to his attorney." (*Id.*)

The Wisconsin Supreme Court summarily denied Schmidt's petition for review. (App. 140a.)

D. Federal habeas proceedings

Schmidt filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Wisconsin, which the district court denied. (App.116a–138a.)

On appeal, a divided panel of the Seventh Circuit held that the trial court unreasonably applied this Court's clearly established case law. In the two-judge majority's view, the *in camera* proceeding was a "critical stage" (App. 73a–76a), and the Wisconsin

Court of Appeals unreasonably refused to extend this Court's case law to the "unprecedented" proceeding here (App. 72a, 76a–77a, 85a–87a).

Judge Barrett dissented. In her view, the majority committed the same type of error that this Court has remedied in its numerous reversals of habeas petition grants. (App. 98a–99a.) No clearly established precedent dictated that the non-adversarial *in camera* proceeding was a critical stage, Judge Barrett reasoned, and the majority framed its "clearly established" rule on critical stages "more broadly than the Court" ever had. (App. 99a, 104a–107a.) Judge Barrett also concluded that under the circumstances, "[a] fairminded jurist could find that this proceeding . . . did not risk substantial unfair prejudice to Schmidt." (App. 112a–113a.)

The Seventh Circuit granted en banc rehearing, vacated the panel decision, and then affirmed the district court in a decision joined by seven of the ten judges. (App. 1a–30a.) The court deemed Schmidt's case to be "not one of those uncommon cases" in which habeas relief is appropriate because "the Supreme Court has 'never addressed' a case like this one—factually or legally—and so we cannot brand the state-court decision unreasonable." (App. 12a (quoting *Carey v. Musladin*, 549 U.S. 70, 76 (2006)).)

The court recognized that Schmidt was invoking *Cronic* and its presumption of prejudice for "the complete denial of counsel" in a critical stage of a criminal proceeding. (App. 13a–15a.) The court declined "to resolve how to define the scope of a critical stage in cases like this one." Rather, it "assume[d] this case involves a critical stage" and

went on to deny habeas relief on a different ground—that the state court of appeals reasonably concluded that "Schmidt suffered nothing near a complete denial of counsel," whether the critical stage was the whole evidentiary presentation or just the *in camera* portion. (App. 16a–19a.)

In so holding, the court explained that Schmidt and counsel consulted before the hearing, Schmidt presented a detailed written offer of proof, witness summaries, and arguments supporting the defense, and Schmidt and counsel conferred on the matter before and during the hearing. Against that background, fair-minded jurists could conclude that Schmidt did not experience a complete deprivation of counsel, and "[n]o clearly established holding of the Supreme Court mandates otherwise." (App. 18a–19a.) Accordingly, "[t]he state-court decision was a reasonable application of Supreme Court law, namely the complete-denial requirement for the presumption of prejudice in critical-stage cases." (App. 23a.) And in response to the dissent, the court stated that it was not embracing a "new theory": "The warden argued in his brief that Schmidt's denial was not complete, and the state court of appeals ruled similarly." (App. 23a n.5.)

The court also observed that fair-minded jurists could conclude "that this case's facts were not 'so likely to prejudice the accused' as to warrant the presumption of prejudice upon which Schmidt's case depends." (App. 23a–24a (quoting *Cronic*, 466 U.S. at 658).) As the court explained, Schmidt's case did not present inherently prejudicial circumstances, because "[t]he primary purpose of the *in camera* examination was to assess Schmidt's subjective belief of

provocation." (App. 24a.) Yet the state courts denied his provocation defense because he failed the objective prong. (App. 24a.) Accordingly, Schmidt's testimony did not likely confuse the state courts into denying his defense, the Seventh Circuit wrote, because "[t]he trial court and court of appeals had plenty before them in deciding whether Schmidt's evidence sufficed," such as a motion, a brief, a written offer of proof, a summary of 29 witnesses' testimony, and his testimony at the *in camera* hearing. (App. 24a–25a.) "Schmidt has not cited one fact or piece of evidence he could have raised during the examination if only he had counsel." (App. 25a.) And even if Schmidt provided "superfluous testimony," the state courts were presumptively not "prone to distraction or obfuscation by a poorly performing witness." (*Id.*)

The court concluded by reiterating that the prior court decisions in this matter illustrated that Schmidt could not overcome the fair-minded-jurist standard: "That so many judges see Schmidt's claim differently underscores that there is room for fair-minded disagreement about how to view and resolve Schmidt's claim." (App. 26a.) "That room exists," it continued, because this Court's decisions "emphasize the limited reach of right-to-counsel claims that presume prejudice, especially when considered on habeas review."[3] (*Id.* (citing *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).)

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[3] The court also rejected a second due process claim that Schmidt had raised. (App. 26a–29a.) Schmidt does not advance the decision on that claim as a reason to grant his certiorari petition.

Judge Hamilton, joined by two judges, dissented. (App. 31a–63a.) In his view, the *in camera* hearing was a critical stage. (App. 36a–44a.) He understood the trial judge's statement at the start of the hearing that counsel was present but not participating as "commanding the lawyer to stay silent while the judge interrogated his client." (App. 31a.) Under the circumstances, according to Judge Hamilton, "[i]t was objectively unreasonable for the state court to conclude that Schmidt's counsel could have provided effective assistance" to Schmidt (App. 47a.) Thus, Judge Hamilton believed that the presumption of prejudice under *Cronic* should apply. (App. 61a.) He further criticized the majority's approach, deeming the "complete denial" theory a new one lacking support in the law. (App. 34a, 52a.)

REASONS TO DENY THE PETITION

I. The Seventh Circuit comported with *Wilson v. Sellers* when it deferred to reasoning contained in the Wisconsin Court of Appeals' decision.

Schmidt contends that *Wilson v. Sellers* established that a federal habeas court, when reviewing a reasoned state-court opinion, may not give AEDPA deference "to a hypothetical reason not relied on by the state court." (Pet. 19.) Even assuming for the sake of argument that *Wilson* created that rule, Schmidt's argument rests on a false premise. The Wisconsin Court of Appeals rejected Schmidt's claim on the very ground to which the Seventh Circuit gave AEDPA deference—that Schmidt was not completely deprived of counsel during the relevant phase of the case. Schmidt's first question presented

does not make it past the starting gate. At most it involves a dispute about the meaning of one paragraph in the Wisconsin court's opinion, an issue not worthy of this Court's attention.

Schmidt's request for a grant, vacate, and remand based on *Wilson* stems from yet another false premise—that the Seventh Circuit lacked the time to fully consider *Wilson* and therefore "miss[ed]" its "significance." (Pet. 24.) The Seventh Circuit was well aware of *Wilson* and faithfully applied it to the extent that it was relevant.

A. The state court of appeals' decision contained the reasoning to which the Seventh Circuit deferred.

Wilson addressed "how a federal habeas court is to find the state court's reasons when the relevant state-court decision on the merits . . . does not come accompanied with those reasons." 138 S. Ct. at 1192. This Court reaffirmed the "look through" presumption: when the relevant state-court decision on the merits, such as a state supreme court decision, "does not come accompanied with [its] reasons," federal habeas courts should "'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Id.*

Schmidt contends that *Wilson* means, broadly, "[i]f the actual reasons provided by the state court are unreasonable, the petitioner has satisfied § 2254." (Pet. 19.) He further claims that "the Seventh Circuit

applied AEDPA deference to a hypothetical reason not relied upon by the state court." (*Id.*)

Schmidt misreads *Wilson*. That decision reaffirms a mere presumption that a silent decision on the merits adopted the stated reasons in the lower court decision. 138 S. Ct. at 1196. This Court in *Wilson* held that this presumption can easily be rebutted when the last-reasoned state court decision is based on "unreasonable grounds." *Id.* That holding defeats Schmidt's claim that a petitioner satisfies § 2254 whenever the state court's actual reasons provided are unreasonable. *Id.*

Importantly, even assuming that Schmidt's interpretation of *Wilson* is correct, it has no bearing on this case. The Wisconsin Supreme Court denied review, so the Seventh Circuit correctly identified the Wisconsin Court of Appeals' decision as the relevant last related state-court opinion on the merits. (App. 10a.) It then deferred to reasoning contained in that opinion regarding counsel's ability to assist Schmidt. More precisely, as the Seventh Circuit found (App. 23a n.5), the "warden argued in his brief that Schmidt's denial was not complete, and the state court of appeals ruled similarly." That is the reasoning to which the Seventh Circuit deferred.[4]

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[4] Schmidt acknowledges the Seventh Circuit's statement (App. 23a n.5) that the absence of a "complete denial" was not a "new theory" and that the state court of appeals ruled "that Schmidt's denial was not complete." But he nonetheless insists (Pet. 22) that the Seventh Circuit said just the opposite when it summarized the grounds relied upon by prior courts for rejecting his claim. Schmidt misreads the relevant passage.

Schmidt further maintains that, despite what the Seventh Circuit found, the Wisconsin Court of Appeals did not rule in the alternative that he was not completely denied counsel. He is wrong.

To start, the briefing to the court of appeals supports the conclusion that the "in any event" paragraph is a holding that the denial of counsel was not complete. Schmidt's right-to-counsel claim relied on the presumption of prejudice under *Cronic*. And, in response to Schmidt's arguments to the court of appeals that the presumption should apply (Dkt. 12-2:40–45), the State asserted that Schmidt's claimed denial of counsel was neither complete nor to a degree to which application of the presumption would be required under this Court's critical-stage law (Dkt. 12-3:27–30).

Consistently with those arguments, in denying Schmidt's right-to-counsel claim, the Wisconsin Court of Appeals soundly invoked *Bell v. Cone*, which provides that the *Cronic*-based presumption of prejudice applies to a "complete denial of counsel" at a critical stage under "circumstances so likely to

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He points to the Seventh Circuit's statement, "Those judges have decided that Schmidt had adequate counsel (the state courts), that the examination was not a critical stage (the state court of appeals) . . . ." (App. 25a–26a.) Fairly read, the ground "Schmidt had adequate counsel" encompasses a ruling that the denial of counsel was not complete and the presumption of prejudice was therefore not warranted. And the Seventh Circuit identified "the state courts"—plural—as ruling on that ground. "The state courts" had to mean *both* the state circuit court and the court of appeals. Reading the passage this way harmonizes it with the Seventh Circuit's statement (App. 23a n.5) that the "warden argued in his brief that Schmidt's denial was not complete, and the state court of appeals ruled similarly."

prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 535 U.S. 685, 695–96 (2002) (quoting *Cronic*, 466 U.S. at 658–59).

The state court of appeals then denied Schmidt relief for two reasons within the standard articulated in *Bell*. First, it held that the *in camera* hearing at issue was not a critical stage under the circumstances, given that Schmidt had a full opportunity to meet his burden through his written offer, counsel's arguments, and other testimony. (App. 162a–163a.)

Second, and alternatively, the state court of appeals determined that Schmidt received assistance of counsel during the hearing. Immediately after finding that the *in camera* proceeding was not a critical stage, the court wrote:

> In any event, we observe that, in the middle of the hearing, the court recessed to allow Schmidt to review his attorney's written offer of proof and speak with his attorney. Counsel was present for the entire *in camera* hearing. Thus, if counsel felt Schmidt or the court was overlooking something, or had any other concerns, there was an opportunity to so advise Schmidt. Likewise, Schmidt had the opportunity to present any concerns or question he had to his attorney.

(App. 163a.) That alternative reasoning recognized that the limitations the trial court placed on counsel did not amount to a complete denial of counsel. Yet all agree that a complete denial "on par with total absence" is required for the *Cronic* presumption of

prejudice to apply. *See, e.g.*, *Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (per curiam); *Bell*, 535 U.S. at 696–97 (for the presumption of prejudice to apply to a *Cronic*-based claim, counsel's "failure must be complete").

The Seventh Circuit deferred to that reasoning to hold that Schmidt was not entitled to the presumption of prejudice. (App. 17a–26a.) That deference was perfectly consistent with *Wilson* and other case law interpreting AEDPA.

Schmidt insists that the state court's reasoning "does not provide an independent reason" entitled to deference and that it is "nothing more than an observation about one undisputed fact" and other "highly ambiguous" observations. (Pet. 21.) Not so. To start, that assertion is divorced from context. Immediately after invoking *Bell* and holding that the hearing was not a critical stage, the state court transitioned with the phrase, "In any event," to signal a shift to an alternative ground. As discussed, the reasoning following that phrase supports the conclusion that the denial of counsel was not "complete" such that a presumption of prejudice should attach. Schmidt fails to identify any basis to believe that the state court of appeals closed its 23-page opinion with a stray observation about ambiguous and undisputed facts that carried no legal significance.

And contrary to Schmidt's suggestion, the state court's decision did not need to expressly "recognize a complete denial requirement under Supreme Court case law" for it to be a "specific reason" entitled to deference. (Pet. 21.) This Court has long recognized

that "federal courts have no authority to impose mandatory opinion-writing standards on state courts." *Johnson v. Williams*, 568 U.S. 289, 300 (2013); *see Coleman v. Thompson*, 501 U.S. 722, 739 (1991) ("[W]e have no power to tell state courts how they must write their opinions."). And in *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam), this Court explained that a state court's reasoning "does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Wilson* did not overrule or raise doubts about the vitality of those decisions.

Moreover, to read *Wilson* as Schmidt proposes is inconsistent with federal habeas courts' longstanding "presumption that state courts know and follow the law" and "is also incompatible with § 2254's 'highly deferential standard for evaluating state-court rulings,' which demands that state-court decisions be given the benefit of the doubt," *see Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (citations omitted), particularly in light of state appellate courts' "very heavy" caseloads. *Williams*, 568 U.S. at 300. Nothing in *Wilson* disturbs those principles or otherwise demands more of state courts in their opinion-writing.

Finally, *Wilson* would not help Schmidt even if the "In any event" paragraph was not separate reasoning and the Wisconsin Court of Appeals unreasonably relied entirely on its holding that the *in camera* hearing was not a critical stage. Under *Wilson*, "it is more likely that a state supreme court's single word 'affirm' rests upon alternative grounds where the lower state court decision is unreasonable." 138 S. Ct.

at 1196. This likelihood increases if alternative grounds were briefed in that court or are otherwise obvious from the record. *Id.* at 1192, 1196. Here, in its response opposing Schmidt's petition for Wisconsin Supreme Court review, the State argued that the limitations placed on Schmidt during the *in camera* proceeding were not tantamount to the complete denial or absence of counsel. (Dkt. 12-7:9–13.) Hence, if Schmidt is correct that the Wisconsin Court of Appeals' critical-stage holding is unreasonable and was its sole reason for denying Schmidt's claim, *Wilson* would have allowed the Seventh Circuit to find that the Wisconsin Supreme Court likely affirmed on the complete-deprivation reasoning argued to it by the State. The Seventh Circuit could have then deferred to that reasoning.

In the end, the present dispute centers on whether the Seventh Circuit correctly interpreted the "In any event" paragraph in the Wisconsin Court of Appeals' decision as holding that the denial of counsel was not complete. Such a case-specific dispute hardly merits this Court's review. (And again, that all assumes for the sake of argument that *Wilson* created the rule that Schmidt attributes to it.)

B. The Seventh Circuit was aware of *Wilson* when it issued its decision.

Schmidt argues that a GVR or summary reversal is warranted because he was surprised by the Seventh Circuit's "new" reasoning and because the court may not have been aware of or understood *Wilson* when it issued the decision. (Pet. 21–25.) As an initial matter, that request fails because, as just explained, the Seventh Circuit's reasoning was not "new." His

request should also be rejected because the reasoning was certainly not new to him, and the Seventh Circuit was well aware of *Wilson*.

1. If Schmidt suggests that he was surprised by a "new" theory, he disregards that the State, in both the state and federal proceedings, argued that the denial of counsel was not complete and the presumption of prejudice was not warranted. As discussed, the State briefed the point to the state court of appeals (Dkt. 12-3:26–30), which adopted the State's position that Schmidt was not entitled to the presumption of prejudice because counsel was present at the hearing and assisted Schmidt (App. 162a–163a). Moreover, as the Seventh Circuit recognized (App. 23a n.5), the warden argued in his brief that counsel's presence and ability to otherwise assist Schmidt before, during, and after the proceeding meant that there was not a complete deprivation of counsel (Doc. 16:30–33).

2. Schmidt's alleged timing concerns (Pet. 22–25) are equally unavailing. *Wilson* issued in April 2018, six weeks before the panel decision, three months before the court granted en banc review, five months before oral argument, and eight months before the decision issued in December 2018. There is nothing to suggest that the Seventh Circuit was unaware of *Wilson* or its implications in that time. To the contrary, both the majority and dissent cited *Wilson*. (App. 10a, 34a.) And the dissent cited *Wilson* for the very proposition upon which Schmidt relies—"federal habeas review should ordinarily focus on state courts' stated reasons rather than those that might be imagined." (App. 34a.) The en banc majority directly responded to that argument in footnote 5 of its opinion, discussed earlier.

To suggest, as Schmidt does, that the members of the en banc court both recognized *Wilson*'s holding and yet simultaneously failed to "appreciate" its "implications" is not credible. Rather, as discussed, the Seventh Circuit knew of and understood *Wilson* and did not contradict it. No grant of the petition—let alone summary reversal or GVR—is warranted.

II. The Seventh Circuit did not create a "bizarre case" exception to habeas relief; it simply applied AEDPA to the particular facts of this case.

Schmidt premises his second question presented on the proposition that the Seventh Circuit created a "bizarre case" exception to habeas relief. (Pet. 25.) At bottom, however, he seeks mere error correction: he simply does not agree with the Seventh Circuit's application of AEDPA. This case does not involve any categorical exception to habeas relief; it involves a routine application of AEDPA to an unusual situation. On top of that, the Seventh Circuit was correct on the merits. There is no need for this Court to intervene.

A. The Seventh Circuit's sound application of AEDPA did not create a "bizarre case" exception to habeas relief.

Schmidt claims that this case presents novel facts demonstrating an extreme rarity: a complete breakdown in the adversarial process requiring federal habeas relief. He accuses the Seventh Circuit of adopting a "'bizarre case' exception to habeas relief,

one that effectively makes it *more* difficult to obtain habeas relief when a state court's violation of federal law is more unusual." (Pet. 26.) He is wrong.

The Seventh Circuit applied standard AEDPA methodology. The court recognized that—as this Court held in *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)—when the rule is more general, as it is here, state courts have "'more leeway . . . in reaching outcomes in case-by-case determinations.'" (App. 11a) And it recognized that federal habeas courts must carefully assess what constitutes clearly established federal law. (App. 11a–12a); *see Musladin*, 549 U.S. at 76–77. This directive applies with full force in critical-stage cases. *See, e.g., Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (per curiam) (holding that no clearly established law demanded relief where counsel was briefly absent during testimony concerning other defendants); *Van Patten*, 552 U.S. at 125–26 (holding that no clearly established law demanded relief where this Court had never held that counsel's participation by speakerphone was to be treated as a "complete denial of counsel").

The Seventh Circuit also applied the now-well-established rule that federal habeas relief cannot lie in a state court's failure to extend a general rule of clearly established federal law to a new factual context. (App. 11a (citing *White v. Woodall*, 572 U.S. 415, 426 (2014).) And perhaps most fundamentally, the Seventh Circuit recognized, as this Court has long held, that a state court's incorrect or clearly erroneous application is not the same as an unreasonable one; rather the decision must be beyond any possibility of fair-minded disagreement. (App. 11a–12a.)

Those AEDPA principles often make it difficult for a petitioner to prevail in a case involving novel facts. But far from creating a "'bizarre case' exception," the Seventh Circuit simply recognized and applied AEDPA's highly demanding, "intentionally difficult" standard for relief to the facts of this case. *Donald*, 135 S. Ct. at 1376. And—contrary to Schmidt's insistence that "[i]t is beyond the possibility of fair-minded disagreement that Schmidt's right to counsel was violated under these circumstances" (Pet. 27)—the Seventh Circuit applied that standard correctly, as discussed below.

B. The Seventh Circuit was right on the merits.

To start, Schmidt's claim depended upon the presumption of prejudice under *Cronic*, 466 U.S. at 659. The presumption applies to "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. Those circumstances may arise when "the complete denial of counsel" occurs during a critical stage. *Id.* at 659. While a "complete" denial of counsel can mean situations where counsel is "either totally absent, or prevented from assisting the accused during a critical stage," this Court nevertheless has required the denial to be "complete" to warrant the presumption. *See Van Patten*, 552 U.S. at 125; *Bell*, 535 U.S. at 696–97; *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000); *Smith v. Robbins*, 528 U.S. 259, 286 (2000); *Penson v. Ohio*, 488 U.S. 75, 88 (1988).

And—as the Seventh Circuit correctly observed—clearly established law under the *Cronic* line of cases demands that courts apply the presumption of prejudice in narrow, rare circumstances where the denial of counsel is complete or otherwise extreme enough to render the prosecution presumptively unreliable. (*See* App. 14a (citing *Florida v. Nixon*, 543 U.S. 175, 190 (2004); *Flores-Ortega*, 528 U.S. at 484; *Mickens v. Taylor*, 535 U.S. 162, 166 (2002)).) To that end, because "the Court has outlined the principles behind the *Cronic*-described rights in only general terms," their contours are unclear and state courts therefore have "'broad discretion' in their adjudication" of them. (App. 14a–15a); *see Donald*, 135 S. Ct. at 1377.

With that framework setting the stage, the Seventh Circuit correctly concluded that Schmidt was not entitled to relief because, even assuming that the *in camera* hearing was a critical stage,[5] the Wisconsin Court of Appeals reasonably determined that the denial of counsel was not complete, and thus did not compel the presumption of prejudice.

That is so because fair-minded jurists could disagree whether the limits placed on Schmidt's counsel's ability to participate in the *in camera* hearing rendered his ability to assist Schmidt "on par

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[5] Although Schmidt seemed to argue that the relevant stage was just the *in camera* hearing at one point and the entire evidentiary proceeding at another point (App. 16a), Schmidt appears to now be focusing again on the *in camera* hearing as the relevant, and critical, stage (Pet. 26–27, 31). The State disagrees, but for this brief's purposes it proceeds on the assumption that the *in camera* hearing was the relevant stage and that it was critical under clearly established law.

with total absence." *See Van Patten*, 552 U.S. at 125. Here, counsel was able to consult with Schmidt before and during the hearing, counsel could observe the hearing and hear the court's questions and Schmidt's answers, a court reporter made a record during the hearing, and no limits were placed on counsel's ability to raise objections or questions regarding the procedure. Accordingly, Schmidt was not so lacking assistance that a fair-minded jurist must conclude that any denial of counsel during the hearing was complete or "on par with total absence."

Contrary to Schmidt's claims (Pet. 28), nothing in this Court's clearly established case law regarding the presumption of prejudice in critical-stage cases demands a different conclusion. That is so because none address circumstances similar to the one here—i.e., limits on counsel's ability to guide the questioning of a defendant in a non-adversarial, on-the-record pretrial hearing—or created a rule that must obviously control Schmidt's claim. *See, e.g.*, *Holloway v. Arkansas*, 435 U.S. 475, 483 (1978) (failure by court to act where appointed counsel demonstrated probable risk of conflicting interests); *Geders v. New York*, 425 U.S. 80, 91 (1976) (order that defendant could not consult with attorney during overnight trial recess); *Herring v. New York*, 422 U.S. 853, 864–65 (1975) (rule barring counsel's closing summation); *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961) (statute barring counsel from eliciting defendant's unsworn statement); *Powell v. Alabama*, 287 U.S. 45, 57–58 (1932) (appointing counsel without allowing opportunity to adequately prepare).

And while of those cases, *Ferguson* arguably presents the closest point of comparison to the

circumstances here, it did not establish a clear rule applicable to Schmidt's situation. At issue in *Ferguson* was a law unique to Georgia: an antiquated common-law rule that a criminal defendant lacked competency to offer sworn testimony in his defense and a statute that allowed criminal defendants to make an unsworn statement. 365 U.S. at 570–71. Ferguson gave an unsworn statement at his murder trial, but the court prevented counsel from eliciting it through questions. *Id.* at 571. Ferguson challenged the court's preventing counsel from eliciting his unsworn trial statement. This Court held that the unsworn-statement law unconstitutionally deprived Ferguson of "the guiding hand of counsel at every step in the proceedings against him." *Id.* at 572 (citing *Powell*, 287 U.S. at 69).

In sum, *Ferguson* clearly established that a state law precluding counsel from eliciting a criminal defendant's trial testimony was unconstitutional. It did not announce that defendants have an absolute right to have their counsel elicit any important testimony or statements, let alone a rule that prejudice is presumed when counsel does not elicit those statements.

So, fair-minded jurists could easily debate *Ferguson*'s applicability to Schmidt's case. To start, while Ferguson objected to the court's bar on counsel's questions, that was not the situation here. While Schmidt objected generally to having to meet his burden of production pretrial, he endorsed the *in camera* hearing as an appropriate way to remedy his concerns about disclosing his statement to the prosecutor. (Dkt. 12-10:4–5.) Moreover, he did not ask

for counsel to elicit his statements (or object to the court's decision in that regard).

Further, the concerns present in *Ferguson*—a defendant's stand-alone statement, which he cannot correct or supplement, regarding his innocence to a jury at a public trial—were simply not present here. Schmidt was in an on-the-record, non-adversarial hearing in chambers, answering factual questions related to his subjective state of mind supported by a written offer of proof. All told, for *Ferguson* to apply to Schmidt's case, one would have to frame the issue Schmidt raises "at too high a level of generality." *See Donald*, 135 S. Ct. at 1377. In all events, reasonably fair-minded jurists would disagree that *Ferguson* applied to Schmidt's claim, let alone dictated relief.

Finally, as the Seventh Circuit correctly observed, there is no holding of this Court clearly establishing that the "prevented from assisting the accused during a critical stage" language in *Cronic* means that courts must presume prejudice when a state action causes a "less-than-complete" deprivation of counsel during a critical stage. (App. 21a); *see Cronic*, 466 U.S. at 659 n.25 (and cases cited therein). Rather, this Court has required the denial at a critical stage to be "complete" and "on par with total absence." *See Van Patten*, 552 U.S. at 125 (quoting *Cronic*, 466 U.S. at 659); *Bell*, 535 U.S. at 696. And, the Seventh Circuit correctly held, this Court has not read its precedents on complete denials to extend to partial ones. (*See* App. 22a.) *See, e.g.*, *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (stating that its past precedent in *Herring*, 422 U.S. at 864–65, holding that complete denial of summation required presumption, did not clearly establish that a partial bar on summation required same result).

Accordingly, the Seventh Circuit was right on the merits when it concluded that the Wisconsin Court of Appeals' reasoning "was a reasonable application of Supreme Court law, namely the complete-denial requirement for the presumption of prejudice in critical-stage cases." (App. 23a.) Moreover, its decision represented a faithful application of this Court's "unreasonable application" case law. Far from "over-correct[ing]" in this case (Pet. 29; App. 34a), the en banc majority heeded this Court's consistent message reminding courts to adhere to AEDPA's demanding standard, and it self-corrected the panel's erroneous ruling.[6]

In sum, "[a]ll that matters here . . . is that [this Court has] not held that *Cronic* applies to the circumstances presented in this case. For that reason, federal habeas relief based upon *Cronic* is unavailable." *Donald*, 135 S. Ct. at 1378.

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[6] *See, e.g.*, *Sexton v. Beaudreax*, 138 S. Ct. 2555, 2558–60 (2018) (per curiam); *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728–29 (2017) (per curiam); *Woods v. Etherton*, 136 S. Ct. 1149, 1152 (2016) (per curiam); *White v. Wheeler*, 136 S. Ct. 456, 461–62 (2015) (per curiam); *Woods v. Donald*, 135 S. Ct. 1372, 1376–77 (2015) (per curiam); *White v. Woodall*, 572 U.S. 415, 427 (2014); *Lopez v. Smith*, 574 U.S. 1, 3–4 (2014) (per curiam); *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam); *Metrish v. Lancaster*, 569 U.S. 351, 367–68 (2013); *Hardy v. Cross*, 565 U.S. 65, 71–72 (2011) (per curiam); *Renico v. Lett*, 559 U.S. 766, 779 (2010).

C. Schmidt fails to identify valid reasons for this Court to grant his petition.

Schmidt claims that the Seventh Circuit's decision creates conflicts with this and other courts. But his arguments reflect little more than his disagreement with the Seventh Circuit's application of AEDPA.

Specifically, he thinks that the Seventh Circuit should have ignored his counsel's opportunities to consult with him and ignored that the trial court placed no express limits on counsel's raising procedural concerns or speaking with Schmidt during a recess. Similarly, Schmidt faults the Seventh Circuit for considering the written submissions and consultations between Schmidt and counsel before and during the hearing, even though he concedes that no decision of this Court bound it to hold otherwise. (Pet. 29–31.) Schmidt otherwise objects to AEDPA's requirement that there be clearly established federal law governing his claim, insisting that "the novelty of [his] situation . . . underscores" his entitlement to habeas relief. (Pet. 31–33.)

All of these arguments fly in the face of well-established AEDPA jurisprudence. Absent clearly established law from this Court obliging the state court to presume prejudice and grant Schmidt relief on his denial-of-counsel claim, he simply cannot prevail. And as discussed, fair-minded jurists could read *Cronic* and its progeny as not clearly establishing that Schmidt's right to counsel was violated by the *in camera* hearing. Schmidt's focus on novel facts is a red herring; his claim simply fails under AEDPA.

Finally, there's no circuit conflict. (Pet. 32–33.) The Third Circuit does not treat AEDPA's "unreasonable application" analysis differently from the Seventh Circuit. *See, e.g.*, *Wilkerson v. Superintendent Fayette SCI*, 871 F.3d 221, 227–28 (3d Cir. 2017) (recognizing "unreasonable application" standard to require "'error well understood and comprehended in existing law beyond any possibility for fairminded disagreement'" (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015)). That Schmidt can identify a case— *Garrus v. Sec'y of Penn. Dep't of Corrections*, 694 F.3d 394 (3d Cir. 2012)—granting habeas relief based on an unreasonable application of a highly specific rule in *Apprendi* is irrelevant. Moreover, and contrary to Schmidt's suggestion otherwise, *Moses v. Payne*, 555 F.3d 742 (9th Cir. 2009), reflects that the Ninth Circuit shares the same understanding of § 2254 as the Seventh Circuit does. *Id.* at 754–55 (recognizing that this Court's cases "underscore[] that § 2254(d)(1) tightly circumscribes the granting of habeas relief"); *id.* at 758–59, 760–61 (holding that no clearly established federal law required a "'clear exten[sion]'" to the facts of "petitioner's case").

At bottom, Schmidt's second reason for granting the petition is a veiled request for error correction. Even if that sufficed as a reason, the Seventh Circuit soundly denied relief on the merits; fair-minded jurists could disagree that any denial of counsel here was not complete and did not entitle Schmidt to the presumption of prejudice.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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