No. 18-8977

IN THE

Supreme Court of the United States

SCOTT E. SCHMIDT,

Petitioner,

v.

BRIAN FOSTER,

Respondent.

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

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF

The Seventh Circuit has denied Schmidt habeas relief on a ground that the last reasoned state court ruling on the merits never reached. The *en banc* majority did so *only* because it believed that such a ruling was within the broad range of reasonableness that AEDPA provides to state court rulings on habeas review. This Court's decision in *Wilson* v. *Sellers*, 138 S. Ct. 1188 (2018), makes clear that the ground on which the Seventh Circuit relied is not entitled to AEDPA deference. The State urges the contrary only by misreading both *Wilson* and the Wisconsin appellate court ruling. And there is good reason to believe, based on the timing of *Wilson* and the procedural history of this case, that the Seventh Circuit overlooked the significance of *Wilson* here. This Court should summarily reverse or GVR in light of *Wilson*.

Alternatively, this Court should grant review on the merits to define the contours of AEDPA deference and make clear that once a violation of clearly established law as determined by the Supreme Court has occurred, a State cannot defeat relief by pointing out that the Supreme Court has yet to consider whether *other* circumstances present in the case might cure the violation. That is what the Seventh Circuit effectively did here. The Seventh Circuit's view is contrary to the approach taken by the Third and Ninth Circuits, and would create a bizarre-case exception to AEDPA relief that has no warrant in the statute or this Court's decisions.

I. THIS COURT SHOULD SUMMARILY REVERSE OR, AT A MINIMUM, GRANT, VACATE, AND REMAND IN LIGHT OF THIS COURT'S DECISION IN *WILSON* V. *SELLERS*.

A. The Seventh Circuit's Decision Conflicts with *Wilson* v. *Sellers*.

The State begins its effort to square the Seventh Circuit's ruling with this Court's decision in *Wilson* with a bit of sleight of hand. The State suggests that, under *Wilson*, a state high court ruling is *presumed* to adopt the reasoning of a lower court, but if that lower court reasoning is unreasonable, the presumption is rebutted. BIO 14, 18-19. That might be true of unexplained state high court rulings *on the merits*, see *Wilson*, 138 S. Ct. at 1192, 1196, but this case does not involve a state high court ruling on the merits. The Wisconsin Supreme Court merely denied discretionary review and never considered Schmidt's arguments on the merits. So the Wisconsin Court of Appeals' reasons are the only reasons *on the merits* that a federal court can review. If, as the State suggests here, an unexplained denial of discretionary review by the state supreme court precludes habeas relief for unreasonable state appellate court rulings, then *Wilson* is a dead letter. The State's first argument is that *Wilson* means precisely the opposite of what it held.

The State then turns from misreading *Wilson* to misreading the Wisconsin appellate court's decision. See BIO 15-18. If, as Schmidt maintains, the last paragraph of the Wisconsin appellate court ruling is *not* a ruling on the merits of whether he was completely denied counsel during the *in camera* hearing, then the Seventh Circuit was wrong to deny habeas relief on the basis that such a ruling would have been

(barely) reasonable. That is the heart of the matter for purposes of compliance with *Wilson*.

The State's view requires ignoring what the state appellate court itself said it was doing: it was "observ[ing]" certain facts about the record, App. 163a at ¶ 48, not "ruling" or "holding" anything about the legal consequences of those supposed facts. When the state appellate court meant to rule on an issue, to express a holding about the legal significance of facts, it said so. See *id.* at ¶ 47 ("Because the *in camera* hearing did not supplant Schmidt's opportunity to present evidence in support of his affirmative defense, we *hold* that it was not a critical stage." (emphasis added)). It is true that the paragraph begins with the phrase "[i]n any event," as the State notes. But the State offers only wishful thinking that that introductory phrase "signal[s] a shift to an alternative ground." BIO 17. The state appellate court told us what it signals: a shift to other facts it has merely observed without any accompanying holding or ruling. Contrary to the State's suggestion, Schmidt has a strong "basis to believe" that the Wisconsin appellate court "closed its . . . opinion" without deciding whether he had been completely denied the assistance of counsel during the hearing. *Id.* And that basis is the language of the opinion itself. This is not a matter of imposing any strict opinion-writing requirements on state courts. See *id.* at 17-18. It's merely a matter of reading what the state court has written to mean what it says.

That the state appellate court was offering bare observations is confirmed by how weakly the facts it recites in the paragraph would have supported the legal conclusion that the State now attempts to attribute to the appellate court. Consider each in turn.

First, the state court noted that the trial court "recessed to allow Schmidt to review his attorney's written offer of proof and speak with his attorney." App. 163a. But the state court did not explain how a brief discussion with counsel during a recess—specifically limited to reviewing the written offer of proof (see *id.* at 206a)—changes the fact that Schmidt's counsel could not participate during the hearing.

Second, the state court observed that counsel was physically present for the *in camera* hearing. *Id.* at 163a. But even the State does not deny that the Sixth Amendment requires more than just counsel's physical presence. See Pet. 28-29.

Third, the state court stated that, "if counsel felt Schmidt or the court was overlooking something, or had any other concerns, there was an opportunity to so advise Schmidt." App. 163a. But that just contradicts what the trial judge had ordered. He had expressly ruled at the outset of the hearing that Schmidt's counsel could *not* participate during the hearing. *Id.* at 182a.

Fourth, the state court wrote that "Schmidt had the opportunity to present any concerns or questions he had to his attorney." *Id.* at 163a. That may have been true *outside* the hearing, but the issue was whether he had assistance of counsel *during* the hearing. And it is clear that the trial judge never told Schmidt he could present any concerns or questions to his counsel during the hearing.

With no good reason in the opinion to believe the Wisconsin appellate court decided whether Schmidt was completely denied counsel during the hearing, the State tries to fill the gap with its own arguments to the Wisconsin appellate court. BIO 15 (citing R.12-

3 at 27-30).[1] But even if it were appropriate for the State's arguments to the court to substitute for the court's own explanation of its decision (and it is not), the State's briefing still would not support its interpretation of the state court opinion. What the State points to are *legal* assertions that are directly contrary to this Court's precedents. Nothing in the opinion's list of factual assertions suggests the court ruled on those bases, which merely invited error.

The State argued that "the Supreme Court has consistently limited the presumption of prejudice to cases where counsel is physically absent at a critical stage." R.12-3 at 27 (quoting *Morgan* v. *Hardy*, 662 F.3d 790, 804 (7th Cir. 2011)). That is wrong under controlling authority of this Court, as the Seventh Circuit recognized. See App. 19a ("We acknowledge that *Morgan* . . . overstated the law; the Supreme Court has in fact presumed prejudice for some constructive denials during a critical stage despite counsel's physical presence.").

The State also argued that "reversal for violation of the right to counsel is automatic only where 'the deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding.'" R.12-3 at 28 (quoting *Satterwhite* v. *Texas*, 486 U.S. 249, 257 (1988)). That view of this Court's precedent also is wrong. *Cronic* and its progeny clearly establish that the presumption of prejudice applies when the deprivation occurs during a critical stage, even if counsel is present at other stages during the proceedings. See*, e.g.*, *United States* v. *Cronic*, 466 U.S. 648, 659 & n.25 (1984).

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[1] "R." cites refer to the district court docket entries. *Schmidt* v. *Pollard*, No. 2:13-cv-01150-CNC (E.D. Wis.).

The last straw at which the State grasps is its own briefing in opposition to discretionary review to the Wisconsin Supreme Court. BIO 18-19. But, as noted above, the Wisconsin Supreme Court merely denied discretionary review—it did not affirm the Wisconsin Court of Appeals' decision on the merits. The Wisconsin Supreme Court's decision is therefore irrelevant for purposes of applying AEDPA deference. See 28 U.S.C. § 2254(d) (AEDPA deference applies only to an adjudication "on the merits"); *Greene* v. *Fisher*, 565 U.S. 34, 39-40 (2011) (decision not to hear appeal is not an adjudication on the merits under § 2254(d)). Moreover, as with its arguments to the Wisconsin Court of Appeals, the State urged an erroneous legal rule on the Wisconsin Supreme Court: that the presumption of prejudice applies only when counsel is physically absent. R.12-7 at 12. The Seventh Circuit could not have and did not purport to defer to that view. See *supra* at 5.

B. The Timing of the Seventh Circuit's Decision and the Manner of Briefing Support Summary Reversal or GVR.

The State's last effort to avoid a summary reversal or GVR is that, because both *en banc* opinions cited *Wilson*, the Seventh Circuit must have considered its implications for this case. BIO 20. Even if that's true, summary reversal remains appropriate because the Seventh Circuit clearly erred. But, as explained in the petition (at 24), the dueling panel opinions in the Seventh Circuit and the State's petition for rehearing all focused on the actual basis for the Wisconsin Court of Appeals' decision: whether the *in camera* hearing was a critical stage—not whether the denial of Schmidt's right to counsel was "complete." When the Seventh Circuit granted *en banc* review, it did not request new or additional briefing. And when it de-

cided the case, the *en banc* majority assumed away the actual basis for the state court's decision and relied on a different ground that had not been briefed. As Schmidt explained (Pet. 23-24), the timing and manner of briefing created the perfect storm for missing the significance of *Wilson*.

The mere fact that the majority cited *Wilson* for the high-level proposition that the federal habeas court should focus on "the last reasoned state-court decision on the merits," App. 10a (citing *Wilson*, 138 S. Ct. at 1192), provides no reason to believe the full court understood its implications for the issue that was not discussed in the panel opinions or discussed in the *en banc* petition and response. Ultimately, as discussed above, the *en banc* majority incorrectly applied AEDPA deference to a conclusion that the state court did not actually reach. GVR is warranted under these circumstances, especially since the Seventh Circuit made clear that the case turned on AEDPA deference and that, on the merits, the state court rulings were "constitutionally dubious." *Id.* at 2a; see also *id.* at 30a ("Nothing we have said here should be mistaken as a belief that the *ex parte*, *in camera* examination of Schmidt, held without his counsel's active participation and regarding his principal defense, was in fact constitutional.").

II. THE SEVENTH CIRCUIT'S DECISION CREATES A "BIZARRE CASE" EXCEPTION TO HABEAS RELIEF, IN CONFLICT WITH THIS COURT'S HOLDINGS AND OTHER CIRCUITS.

Even if this Court does not summarily reverse or GVR in light of *Wilson*, the Seventh Circuit's extreme approach to when AEDPA deference is warranted merits this Court's review.

Start with legal principles not in dispute. The State accepts, for present purposes, that the *in camera* hearing itself "was [a] critical [stage] under clearly established law." BIO 24 n.5. The State also recognizes that a "line of cases clearly establishes that the mere appointment or presence of counsel is insufficient to protect a criminal defendant's right to counsel if counsel cannot effectively participate." Pet. 28. Put together, the State acknowledges that muzzling counsel so that he is merely physically present during a critical *in camera* hearing contravenes clearly established Supreme Court precedent.

The material facts are also not in dispute. The State recognizes that Schmidt's counsel was physically present during the *in camera* hearing, but was barred from participating during that hearing. Put simply, the rule that the State acknowledges is clearly established was just as clearly violated here.

Contrary to the State's suggestion, the state courts did not merely "fail[] to extend a general rule" here. BIO 22. Nothing about the rule the State admits exists involves "contours [that] are unclear," such that the state courts could be said to have exercised some discretion in adjudicating the dispute. See *id.* at 24. What happened violated a clearly established rule that is clearly defined.

Like the Seventh Circuit, the State points to the fact that this case presents novel circumstances *extraneous* to the undisputed facts that violate clearly established law. See BIO 21 ("unusual situation"), 23 ("novel facts"), 25 (no prior case "address[es] circumstances similar to the one here . . . or created a rule that must obviously control Schmidt's claim"). And that is precisely why the Seventh Circuit's ruling merits this Court's review. It transformed the already demanding standard for relief under § 2254(d) into an

all-but-impossible-to-surmount barrier to relief. The more bizarre the circumstances surrounding a violation of clearly established law, the Seventh Circuit has ruled, the more difficult it will be for a prisoner to obtain relief. This is, in fact, a bizarre-case exception to habeas relief.

Consider the State's defense of the Seventh Circuit's ruling. The court denied relief only by looking at facts *outside* the critical stage: (1) Schmidt's lawyer presented written submissions *before* the hearing, (2) Schmidt's lawyer consulted with his client *before* the hearing, and (3) Schmidt could review the written offer of proof with his lawyer *during the brief recess*. See Pet. 29. None of this changes the fact that *during* the hearing—during the admitted "critical stage" of the proceedings—Schmidt's counsel was restricted to mere physical presence in violation of the Sixth Amendment.

The State falls back on the refrain that the *Cronic* presumption of prejudice applies only when there is a complete denial of counsel "on par with total absence" (see BIO 16-17, 24-25, 27), as if that introduces some ambiguity into the standard that could make it reasonable to rule that the denial of counsel here was not complete. This completely misses the point. What makes the denial of counsel here "complete" is that, during the critical stage, counsel was barred from communicating with Schmidt. The State cannot seriously be suggesting that preventing lawyer-client communication is not "on par with total absence." The phrase "on par with total absence" comes from *Wright* v. *Van Patten,* 552 U.S. 120, 125 (2008) (per curiam). There the Court held that no prior Supreme Court case had clearly held that "counsel's participation by speakerphone should be treated as a 'complete denial of counsel,' on par with total absence." *Id.*

Wright itself made clear that the "complete denial of counsel" occurs "when 'counsel [is] either totally absent, *or prevented from assisting the accused during a critical stage of the proceeding*.'" *Id.* (quoting *Cronic*, 466 U.S. at 659 & n.25 (alteration in original; emphasis added)).

Bell, too, introduces no ambiguity into the legal standard that could make the state court's decision reasonable. See BIO 15, 17, 23. *Bell* is about "the second exception identified in *Cronic*"—when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Bell* v. *Cone*, 535 U.S. 685, 697 (2002) (quoting *Cronic*, 466 U.S. at 659). That exception is not at issue here. And, in any event, *Bell* did not change the meaning of the "complete denial of counsel," either. See *id.* at 695-96, 696 n.3.

This petition, then, is not a matter of mere error correction. See BIO 1, 21, 30. The Seventh Circuit has done something to the standards for relief under § 2254(d) that both the Third and Ninth Circuits have rejected. The Seventh Circuit has allowed extraneous circumstances beyond a violation of clearly established law to create room for a state court to allow that violation to go unremedied. The Ninth Circuit takes a different approach and insists that a federal court maintain focus on the "legal principles established by a Supreme Court decision [and determine whether] the case 'falls squarely within those principles,'" even if the facts are not on all fours. *Moses* v. *Payne*, 555 F.3d 742, 753 (9th Cir. 2009). Similarly, the Third Circuit recognizes that § 2254(d)'s unreasonable application standard is satisfied where, as here, "[n]o existing precedent so much as hints that a paradoxical interpretation of [a Supreme Court precedent] might be reasonable." *Garrus* v. *Sec'y of*

Pa. Dep't of Corrections, 694 F.3d 394, 406 (3d Cir. 2012) (en banc). That approach does not, as the Seventh Circuit did here, treat a violation of clearly established law as an invitation to examine *other* circumstances in the case to determine whether the Supreme Court has already declared that such additional circumstances do not cure the violation. This Court should accept review to clarify the scope of AEDPA deference in light of these differences of opinion.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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