No. 18-

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

PETITION FOR A WRIT OF CERTIORARI

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April 19, 2019

QUESTIONS PRESENTED

1. Whether this Court should summarily reverse or, at a minimum, grant certiorari, vacate, and remand in light of *Wilson* v. *Sellers*, 138 S. Ct. 1188 (2018), where the Seventh Circuit expressly declined to decide whether the state court's actual reason for denying relief was an "unreasonable application of clearly established federal law" under 28 U.S.C. § 2254(d), and instead applied deference to a hypothetical reason that the state court had not adopted.

2. Whether factual anomalies surrounding a violation of clearly established federal law render federal habeas relief unavailable under 28 U.S.C. § 2254(d) because no prior Supreme Court decision has addressed the same bizarre facts.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Scott E. Schmidt. Respondent is Brian Foster. No party is a corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

STATUTES

TABLE OF AUTHORITIES—continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Scott Schmidt respectfully petitions for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit, sitting *en banc* (App. 1a-63a), is reported at 911 F.3d 469. The panel opinion of the Seventh Circuit (App. 64a-115a) is reported at 891 F.3d 302. The opinion of the U.S. District Court for the Eastern District of Wisconsin (App. 116a-138a) is unpublished but available at 2017 WL 1051121.

The denial of Schmidt's petition of review to the Supreme Court of Wisconsin (App. 140a) is referenced in a table at 827 N.W.2d 374. The decision of the Court of Appeals of Wisconsin (App. 141a-163a) is reported at 824 N.W.2d 839. The decision of the state trial court (App. 164a-178a) is unpublished.

JURISDICTION

The district court had jurisdiction over Schmidt's federal habeas petition under 28 U.S.C. § 2254. The district court entered a final judgment denying the habeas petition and granted a certificate of appealability. The Seventh Circuit had jurisdiction on appeal under 28 U.S.C. §§ 1291 and 2253.

The Seventh Circuit entered judgment on December 20, 2018. App. 139a. On February 28, 2019, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including April 19, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") (codified at 28 U.S.C. § 2254) provides in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
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> * * *
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> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

STATEMENT OF THE CASE

Scott Schmidt shot and killed his estranged wife during a heated argument about, among other things, his wife's affair and whether Schmidt would be permitted to see his children again. When police officers

arrived on the scene, Schmidt quickly admitted as much. His only hope of avoiding a mandatory life sentence was to establish at trial the affirmative defense of adequate provocation (akin to a "heat of passion" defense), which would mitigate the charge of intentional homicide from first- to second-degree. After receiving written submissions from his counsel explaining the evidentiary basis of his provocation defense, the state-court trial judge decided that he wanted to hear directly from Schmidt himself. He convened an *in camera* hearing and expressly barred Schmidt's counsel from "participating" in it. This hearing was the decisive moment for Schmidt's entire defense. And he was completely deprived of the assistance of counsel during it.

After that hearing, the trial judge barred Schmidt from presenting his provocation defense. Not surprisingly, Schmidt was convicted by a jury of first-degree murder, and sentenced to a mandatory term of life in prison. Schmidt then pressed a claim through the state courts that he was deprived of his right to counsel under the Sixth Amendment at the *in camera* hearing. Federal law is clear: the "complete" deprivation of counsel (which includes allowing counsel merely to be physically present but barred from participating, as happened here) "at a critical stage" of the proceedings violates the Constitution without regard to whether any prejudice resulted. *United States* v. *Cronic*, 466 U.S. 648, 659 (1984). Wisconsin's intermediate appellate court rejected his argument, concluding that the *in camera* hearing was not a critical stage of his proceedings. Having so ruled, the appellate court did not decide the distinct question whether any deprivation of counsel had been so "complete" as to justify the presumption of prejudice.

The Wisconsin Supreme Court denied discretionary review.

Schmidt sought habeas relief under 28 U.S.C. § 2254. The district court denied relief, concluding that the Wisconsin appellate court's ruling that the *in camera* hearing was not a critical stage of the proceedings was within the range of reasonable disagreement. A divided panel of the Seventh Circuit reversed. The full Seventh Circuit granted *en banc* review.

That is when matters took a decidedly unusual turn. A divided *en banc* Seventh Circuit affirmed the trial court's denial of habeas relief, but *not* on the ground of the Wisconsin appellate court's ruling or the district court's. To the contrary, the *en banc* majority assumed that the *in camera* hearing was a critical stage of the proceedings. It ruled instead that a reasonable jurist could have concluded that the denial of the right to counsel that had occurred there was not "complete" (because counsel participated in other proceedings where the same legal issue was addressed), and thus Schmidt would have to demonstrate prejudice from the constitutional violation. App. 17a-18a. The *en banc* majority made it clear that if it were reviewing Schmidt's constitutional claim *de novo*, it might not reach the same conclusion; it was holding only that it was *reasonable* to conclude the deprivation of counsel here was not "complete," even though that was not the state court's reason for rejecting Schmidt's claim. *Id.* at 12a, 24a, 26a, 30a.

This Court should grant this petition and vacate the Seventh Circuit's ruling for two distinct reasons.

First, this Court should summarily reverse or, at a minimum, grant, vacate, and remand the Seventh

Circuit's decision in light of *Wilson* v. *Sellers*, 138 S. Ct. 1188 (2018). The *en banc* majority's ruling directly contradicts that recent decision of this Court.

Wilson held that a federal court generally must "look through" an unexplained decision by the State's highest court to the last reasoned decision rejecting the federal claim on the merits, because "[d]eciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to train its attention on *the particular reasons*—both legal and factual—why state courts rejected a state prisoner's federal claims." *Id.* at 1191-92 (emphasis added). Here, that last reasoned decision is the Wisconsin appellate court's ruling that Schmidt's claim failed because the *in camera* hearing was not a critical stage of the proceedings. Yet the Seventh Circuit's *en banc* majority specifically declined to decide whether the state court's "particular reason" for rejecting Schmidt's Sixth Amendment claim was a reasonable application of clearly established federal law. Instead, it asked whether a *different* rationale—one not adopted by the state courts—would have been a reasonable application of clearly established federal law. That is precisely what *Wilson* forbids.

Second, even if § 2254(d)'s "unreasonable application" standard applies to the Seventh Circuit's "complete deprivation" rationale, this Court should grant certiorari to clarify the limits of AEDPA deference, which the Seventh Circuit here stretched beyond its breaking point. Section 2254(d), by design, erects a high barrier to federal habeas relief, but it does not require the habeas petitioner to identify a Supreme Court case with identical facts. Here, the Seventh Circuit assumed that the *in camera* hearing was a

critical stage *and agreed* that Schmidt was deprived his right to counsel during that critical stage. It nevertheless denied relief because of facts *outside* the critical stage: it believed that facts about other stages of Schmidt's proceedings made the complete denial of Schmidt's right to counsel during the critical stage not presumptively prejudicial and therefore outside the rule clearly established by *Cronic* and its progeny.

Neither the language of § 2254(d) nor this Court's decisions making clear that the statutory standard is demanding endorses the Seventh Circuit's "search-and-destroy" approach to federal habeas claims. The law does not authorize federal judges to look for factual anomalies surrounding a clear violation of federal law and thereby reject a claim for habeas relief. The approach the Seventh Circuit took here reflects a unique and troubling extension of the § 2254(d) standard, one that makes bizarre circumstances a reason to deny habeas relief, even in the face of clear violations of federal law, simply because they have never occurred before. To secure habeas relief, a petitioner should not be required to identify a Supreme Court case that rules out a clear misinterpretation of clearly established federal law. Yet that is the practical effect of the Seventh Circuit's decision if left to stand.

I. BACKGROUND OF THE CASE

A. Pretrial Proceedings

In April 2009, Scott Schmidt shot his estranged wife, Kelly Wing-Schmidt, during a heated argument. She died in their driveway. When police officers arrived on the scene, they found Schmidt standing by her body. He quickly admitted that he had shot her.

The State of Wisconsin charged Schmidt with first-degree intentional homicide. Schmidt never denied shooting and killing his wife, but he intended to argue at trial that he acted with "adequate provocation." In Wisconsin, adequate provocation is an affirmative defense that mitigates intentional homicide from first- to second-degree for defendants who "lack self-control completely at the time of causing death." Wis. Stat. § 939.44; *accord id.* § 940.01(2)(a). First-degree intentional homicide carries a mandatory life sentence, while the maximum sentence for second-degree intentional homicide comes with no mandatory-minimum sentence and a maximum of 40 years' imprisonment. See *id.* §§ 940.01(1)(a), 940.05, 973.01.

The adequate-provocation defense has "both subjective and objective components": (1) a defendant "must actually believe the provocation occurred," and (2) the provocation must be one "that would cause an ordinary, reasonable person to lack self-control completely." App. 144a (citing Wis. Stat. § 939.44(1); *State* v. *Felton*, 329 N.W.2d 161, 172 (1983)). "Once a defendant successfully places" adequate provocation "in issue," the state must "disprove [it] beyond a reasonable doubt." *Id.* (citing *State* v. *Head*, 648 N.W.2d 413 (Wis. 2002)). To place the defense "in issue," a defendant need only present "'some' evidence supporting the defense." *Id.* at 145a (quoting *Head*, 648 N.W.2d at 439).

Schmidt planned to present evidence that his wife had abused him emotionally and physically throughout their marriage. He would have testified that immediately before the shooting he and his wife had a bitter argument in which his wife taunted him about an affair he had just discovered, told him their children were not actually his, said she intended to file for divorce, and threatened that he would never see

his children again. R.12-2 at 71-75. According to Schmidt, he lost control and shot his wife in the heat of passion.

The State objected to this evidence, arguing that Schmidt's disclosure lacked specificity and that the circumstances did not support an adequate-provocation defense. R.12-9 at 26-27. The State also argued that Schmidt did not clarify the timeframe for the provocation evidence and that evidence dating back too far in time would be irrelevant and prejudicial to the prosecution. *Id.*

The trial court acknowledged the State's concerns. *Id.* at 27-28. Over Schmidt's objection (*id.* at 29-31), the court scheduled a hearing to determine whether Schmidt had met the low "some evidence" standard so that he could present the defense at trial. Before the hearing, Schmidt submitted two documents: an offer of proof summarizing the expected testimony of 29 potential witnesses and a legal analysis of the adequate-provocation defense with a timeline of events about the couple's divisive relationship from 2004 through the April 2009 shooting. In the legal analysis, Schmidt reiterated that a pretrial evidentiary hearing on this issue would be inappropriate. R.12-2 at 68-69.

Before conducting the *in camera* evidentiary hearing, the trial judge met in court with Schmidt, his lawyer, and the prosecutor. R.12-10 at 2. The judge made clear he was not prepared to decide to allow the defense based on the written submissions alone. *Id.* at 2-7. Instead, the judge wanted to hear directly from Schmidt about his state of mind at the time of the shooting. Schmidt's lawyer objected to having to reveal defense evidence to the prosecution before trial. *Id.* at 5.

To address this concern, the judge decided that he should question Schmidt *ex parte*. *Id.* at 3-4. Schmidt's counsel agreed that, if the court insisted on questioning Schmidt directly, he should do so in chambers outside the prosecutor's presence. *Id.* at 5. The judge then asked the prosecutor whether he would assent to that procedure, so long as Schmidt's counsel would be permitted only to attend the hearing in chambers, to "just be present" and "not saying anything." *Id.* at 7. The prosecutor agreed, but said he did not "want there being opportunities for [Schmidt and his lawyer] to confer and to discuss" his testimony. *Id.* The judge did not ask Schmidt whether he assented to this procedure.

The trial court began the *in camera* hearing by clarifying for the record that Schmidt "appears in person, and his attorney is also present but is not participating in the hearing." App. 182a. The court then said:

> Scott, the date in question was April 17, 2009. At that time you went to Kelly Wing-Schmidt's residence apparently. And at that time there was a confrontation between you and Kelly Wing-Schmidt. Can you tell us what was in your mind at that time?

Id.

In response, Schmidt offered a "rambling narrative" that fills dozens of transcript pages, App. 153a, and addresses provocation only in an indirect, roundabout way, see *id.* at 182a-216a. At one point, as the court struggled to determine how Schmidt's testimony fit into his counsel's offer of proof, the court noted that Schmidt was "not really that well prepared." *Id.* at 205a. The court then took a brief recess to make a telephone call, during which it said Schmidt could review the written offer of proof, which Schmidt said he

had not previously read. *Id.* at 205a-206a. Schmidt's lawyer asked whether he was allowed to consult with his client. *Id.* at 206a. The court said the lawyer could talk to his client but only to review the written offer of proof. *Id.* When the *in camera* hearing resumed, Schmidt continued to provide meandering, largely nonresponsive testimony. *Id.* at 206a-215a.

Although Schmidt's lawyer remained physically present the whole time, he was never allowed to participate during the *in camera* hearing. During the course of the examination, the court repeated the same question—what was in Schmidt's mind at the time of the shooting?—six times. See *id.* at 182a, 196a-197a, 199a, 203a, 207a, 208a. Each time, Schmidt responded with unfocused, often confused answers, full of irrelevant details.

After the *in camera* hearing ended, everyone returned to the courtroom. The court gave neither party the opportunity to present any additional argument. It explained that, due to the special nature of the hearing, "it cannot make any extensive findings of fact because that would affect the defense of the defendant, so I'm just going to render a decision." R.12-11 at 2. Without discussing either a factual or legal basis for its ruling, the court announced:

> The Court finds that the circumstances that led to the death of Kelly Wing did not involve a provocation and it was not an adequate provocation and denies the motion. So this matter is adjourned.

Id.

A month later, the parties discussed whether Schmidt would call at trial one of the 29 witnesses identified before the *in camera* hearing. The trial court stated that, because it had already ruled that

the adequate-provocation defense was unavailable, it did not see the relevance of the proffered testimony. Schmidt's lawyer explained that he thought the issue was still "open" and believed that the court would allow further evidence to support the provocation defense. The court rejected that view. The ruling was the end of the matter.

B. Trial and Posttrial Proceedings

The legal bar on presenting a provocation defense eviscerated Schmidt's defense. At trial, Schmidt did not dispute that he shot and killed his wife. In fact, early into his opening statement Schmidt's lawyer told the jury point-blank: "I'm not going to tell you that my client is innocent. I'm not going to tell you that he didn't shoot his wife." R.12-12 at 40. Instead, Schmidt attempted to argue that he was not guilty of first-degree intentional homicide, because he did not "intend" to kill his wife. See*, e.g.*, R.12-15 at 154-55. But, because he was not able to present his provocation defense, the argument fell flat. Premeditation is not an element of first-degree intentional homicide under Wisconsin law, as the prosecutor repeatedly emphasized. See*, e.g.*, *id.* at 179-80. The jury convicted Schmidt of first-degree intentional homicide on the same day the defense rested, and the trial court sentenced him to the mandatory term of life imprisonment. R.12-1.[1]

Schmidt moved for a new trial, arguing that he had been denied his Sixth Amendment right to counsel and his Sixth and Fourteenth Amendment rights to

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[1] Schmidt also was convicted of recklessly endangering safety and bail-jumping. He did not challenge those convictions in his federal habeas petition.

present a defense.[2] The court denied the motion, concluding that Schmidt had not met his burden to show "some evidence" of adequate provocation. The court also concluded that Schmidt was not denied his right to counsel at the *in camera* hearing because his counsel submitted the written offer of proof, presented argument (both before the hearing), and conferred with Schmidt about the written offer of proof during the brief recess when the judge made a phone call.

Schmidt appealed, and the Court of Appeals of Wisconsin affirmed. The court explained that Schmidt's case presented a "close question" as to whether he put forth "some evidence" of adequate provocation, which presents a "low burden." App. 157a. It noted that the State had conceded on appeal that "Schmidt, subjectively, acted in the heat of passion when he shot Wing-Schmidt." *Id.* at 159a n.8; see also *id.* at 147a n.5. But the court, relying heavily on Schmidt's "rambling narrative" during the *in camera* hearing, held that Schmidt had failed to present some evidence of objectively adequate provocation. *Id.* at 153a-157a.

As for Schmidt's right-to-counsel claim, the court rejected the claim because "the *in camera* hearing was merely a supplementary proceeding conducted for his benefit." *Id.* at 162a. "While, in retrospect, it may have been more efficient to have counsel guide Schmidt's testimony rather than having the court elicit an unguided narrative, a court has broad discretion in the conduct of its proceedings." *Id.* This procedure did not raise a Sixth Amendment problem, the court explained, because the *in camera* hearing was not a "critical stage" within the meaning of *Unit-*

[2] Wisconsin's procedure for direct criminal appeals is unusual in that it permits defendants to raise appellate issues first in the trial court. *See* Wis. Stat. § 809.30(2).

ed States v. *Cronic*, 466 U.S. 648, 654 (1984). *Id.* at 163a (citing *Bell* v. *Cone*, 535 U.S. 685, 695-96 (2002)). The court concluded: "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." *Id.*

After holding that the *in camera* hearing was not a critical stage, the Wisconsin Court of Appeals "observe[d]" that there had been a recess during the hearing during which Schmidt was able to review his written offer of proof with his attorney. *Id.* The court also noted that Schmidt's lawyer "was present for the entire *in camera* hearing." *Id.* And, according to 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." *Id.* "Likewise," the court continued, "Schmidt had the opportunity to present any concerns or questions he had to his attorney." *Id.* The Wisconsin Court of Appeals did not explain how Schmidt's lawyer could have advised Schmidt, or how Schmidt had the opportunity to present any concerns or questions, given that the trial judge had specifically ordered counsel not to participate during the hearing and limited discussion during the recess to reviewing the written offer of proof. See *id.* at 182a, 206a.

Schmidt filed a petition for review to the Supreme Court of Wisconsin under Wis. Stat. § 808.10, which provides for discretionary review. The Supreme Court of Wisconsin denied the petition. App. 140a.

C. Federal Habeas Proceedings

Schmidt timely filed a federal habeas petition under 28 U.S.C. § 2254(a). The State raised no procedural defenses to Schmidt's claims; it argued that Schmidt was not entitled to relief on the merits. The

district court agreed with the State and denied Schmidt's habeas petition, but granted a certificate of appealability as to both Schmidt's right-to-present-a-defense and right-to-counsel claims. App. 138a. Only the right-to-counsel claim is relevant here.

A panel of the Seventh Circuit initially reversed the district court's denial of federal habeas relief. The panel held that the state court's decision that the *in camera* hearing was not a critical stage unreasonably applied this Court's "critical stage" precedents, which clearly establish that "the right to counsel extends to a pretrial evidentiary hearing on a contested, substantive issue, where an uncounseled defendant risks decisive consequences for his prospects at trial." App. 85a. As Judge Hamilton explained for the panel, "Schmidt was asked to meet the burden of production to preserve his most promising—indeed, his only—defense in mitigation at trial. In this case, no stage was more critical. What happened in chambers settled Schmidt's fate. It reduced 'the trial itself to a mere formality.'" *Id.* at 88a (quoting *United States* v. *Wade*, 388 U.S. 218, 224 (1967)).

The panel also held that Schmidt was denied the effective assistance of counsel during this critical stage because, although Schmidt's lawyer was physically present, he was barred by the trial court from participating during the hearing. *Id.* at 92a-94a. The panel explained that it was "objectively unreasonable for the state court to conclude that Schmidt's counsel could have provided effective assistance and meaningfully tested the arguments against the provocation defense by not saying anything." *Id.* at 94a.

Judge Barrett dissented. She concluded that no clearly established federal law treats this type of *in camera* hearing as a critical stage. *Id.* at 98a. In her view, the fact that the hearing was "non-

adversarial"—*i.e.*, there was no prosecutor present—took this case outside the ambit of this Court's critical-stage case law. As she put it, the Court's "'critical stage' precedent deals exclusively with a defendant's right to counsel in adversarial confrontations with law enforcement." *Id.* at 99a. (The majority cited several cases of this Court countering this point, showing that whether a proceeding is deemed "critical" does not turn on who is in the room. *Id.* at 80a-84a.)

The State filed a petition for rehearing centered on the argument that Judge Barrett had advanced in her dissenting opinion. The Seventh Circuit granted the petition and reheard the case *en banc* and, by a 7-3 vote, affirmed the district court's decision denying habeas relief. Writing for the majority, Judge St. Eve did not adopt the reasoning of Judge Barrett's panel dissent. Instead, she ruled on an entirely separate ground.

After a brief discussion of the differences between this case and this Court's critical-stage cases, and the question whether the relevant "critical stage" would be the *in camera* proceeding alone or the entire evidentiary presentation regarding the provocation defense, Judge St. Eve sidestepped the issue:

> We need not resolve how to define the scope of a critical stage in cases like this one. Nor do we need to decide whether this case presents a critical stage, whatever its scope, under clearly established law. . . . We can assume this case involves a critical stage, and whether that stage was the entire evidentiary presentation or only the *in camera* examination, Schmidt cannot meet the second part of the analysis—that he was so deprived of counsel as to mandate the presumption of prejudice.

Id. at 16a-17a.

The *en banc* majority then ruled that Schmidt was deprived his right to counsel during the *in camera* proceeding, but that deprivation was not "complete." Citing *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), the court wrote that "Schmidt's *Cronic*-based claim lies only when there is a *complete* denial of counsel during a critical stage." App. 17a. According to the court, the presumption of prejudice applies only to "out-and-out deprivations—those 'on par with total absence.'" *Id.* And here, the court concluded, a reasonable jurist could conclude that Schmidt was not *completely* denied his right to counsel because (1) Schmidt and his counsel consulted before the *in camera* hearing, (2) Schmidt's lawyer had submitted a written offer of proof before the hearing, and (3) Schmidt was able to review the written offer of proof during the hearing's brief recess. *Id.* at 18a. Ultimately, the court explained:

> Nothing we have said should be mistaken as 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. . . . Applied here, trial courts should not opt to hold *ex parte* hearings and silence defense counsel over other, less severe alternatives without exceedingly good reasons. Even then, trial courts must, if necessary, obtain a knowing and voluntary right-to-counsel waiver from the accused for purposes of the hearing. These, however, are our admonitions. They are not clearly established Supreme Court precedent dictating habeas relief in this case. No such precedent exists.

Id. at 30a. Because Schmidt could not satisfy § 2254(d)'s demanding standard, he was not entitled to relief on his right-to-counsel claim. *Id.*

Judge Hamilton, joined by Chief Judge Wood and Judge Rovner, dissented. He reiterated his view that the *in camera* proceeding was a critical stage and noted that the *en banc* majority did not disagree. *Id.* at 36a-47a. He then explained that the *en banc* majority's decision hinged on the premise that Supreme Court precedent requires a complete denial of counsel throughout a proceeding to invoke the presumption of prejudice. *Id.* at 50a. That premise is "demonstrably wrong," he wrote. *Id.* According to Judge Hamilton, *Cronic* itself shows that the presumption of prejudice applies not just when counsel is totally absent but also when counsel is "prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 50a-51a (quoting *Cronic*, 466 U.S. at 659 n.25). Recognizing that § 2254(d)(1) imposes a high bar on a habeas petitioner, Judge Hamilton explained that habeas relief "cannot reasonably be denied on the basis of distinctions the Supreme Court itself has rejected by extending [the] right [to counsel] and the presumption of prejudice so broadly and in so many contexts." *Id.* at 58a-59a.

REASONS FOR GRANTING THE PETITION

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*.

The Seventh Circuit's *en banc* decision cannot stand in light of *Wilson* v. *Sellers*, 138 S. Ct. 1188 (2018). By expressly declining to decide whether the actual basis for the state court's decision involved an

unreasonable application of clearly established federal law and applying deference to a hypothetical reason that "could have supported" the state court's decision, the Seventh Circuit did precisely what this Court said should not be done: it deferred under AEDPA to reasoning that is nowhere to be found in the relevant state-court decision.

To prevail on a claim that was "adjudicated on the merits" in state-court proceedings, a prisoner must "show that the relevant state-court 'decision' (1) 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' or (2) 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Wilson*, 138 S. Ct. at 1191 (quoting 28 U.S.C. § 2254(d)). "Deciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to train its attention on *the particular reasons*—both legal and factual—why state courts rejected a state prisoner's federal claims, and to give appropriate deference to that decision." *Id.* at 1191-92 (citations omitted; emphasis added).

In a case where the last state court to decide the prisoner's federal claim explains its reasons in a reasoned opinion, this inquiry is "straightforward." *Id.* at 1192. In that situation, "a federal habeas court simply reviews the *specific reasons* given by the state court and defers to *those reasons* if they are reasonable." *Id.* (emphasis added); see also *Porter* v. *McCollum*, 558 U.S. 30, 39-44 (2009) (per curiam); *Rompilla* v. *Beard*, 545 U.S. 374, 388-92 (2005); *Wiggins* v. *Smith*, 539 U.S. 510, 523-38 (2003).

The inquiry is more difficult when the last state court to decide the prisoner's federal claim does so in

an opinion without reasoning. In that situation, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale," and then consider only the actual reasons provided by the relevant state-court opinion. *Wilson*, 138 S. Ct. at 1192, 1194-95. The federal court should not ask what reasons "could have supported" the decision. *Id.* at 1195. If the actual reasons provided by the state court are unreasonable, the petitioner has satisfied § 2254(d). *Id.* at 1195-96; *accord Porter*, 558 U.S. at 39-44; *Rompilla*, 545 U.S. at 388-92; *Wiggins*, 539 U.S. at 523-38.

It is only when there is *no* reasoned state-court opinion at any level for a federal habeas court to review that the habeas court asks whether "there was no reasonable basis for the state court to deny relief." *Wilson*, 138 S. Ct. at 1195 (quoting *Harrington* v. *Richter*, 562 U.S. 86, 98 (2011)). In contrast, where there is state-court reasoning to review, a habeas court may not "imagine what might have been the state court's supportive reasoning" and then defer to that hypothetical reasoning. *Id.* at 1195.

Here, the last state court to decide Schmidt's right-to-counsel claim was the Wisconsin Court of Appeals. (The Wisconsin Supreme Court simply denied discretionary review.) Thus, under *Wilson* and this Court's earlier precedent as discussed in *Wilson*, the Seventh Circuit was allowed to apply AEDPA deference only to the Wisconsin Court of Appeals' specific reasons for rejecting Schmidt's Sixth Amendment claim. *Wilson*, 138 S. Ct. at 1191-92. Instead, directly contrary to *Wilson*, the Seventh Circuit applied AEDPA deference to a hypothetical reason not relied upon by the state court.

The Wisconsin Court of Appeals denied Schmidt's right-to-counsel claim because it believed that the *in*

camera proceeding was not a critical stage. App. 163a ("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."). The Seventh Circuit expressly declined to affirm the denial of Schmidt's habeas claim on that ground: "We can assume this case involves a critical stage . . . ." *Id.* at 17a. The Seventh Circuit was surely free to make such an assumption in evaluating Schmidt's claim. But, in light of *Wilson*, the Seventh Circuit was then required to review the issue that the state court did not decide—for which there was no state-court reasoning to defer—*de novo*. Instead, the Seventh Circuit applied AEDPA's deferential standard under § 2254(d), concluding only that a reasonable jurist applying the decisions of this Court could have determined that the denial of Schmidt's right to counsel was not so "complete" as to justify the presumption of prejudice. *Id.* at 23a-24a, 26a, 30a. That is precisely the analysis that *Wilson* prohibits.

In his dissent from the *en banc* majority decision, Judge Hamilton observed that the majority was relying on a "new theory" not embraced by the Wisconsin Court of Appeals. *Id.* at 33a-34a (citing *Wilson*, 138 S. Ct. at 1191-92). The *en banc* majority brushed this concern aside in a footnote, saying that the State "argued in [its] brief that Schmidt's denial was not complete, and the state court of appeals ruled similarly." *Id.* at 23a n.5. In support of this assertion, the court cited only page 853 of the Wisconsin Court of Appeals' decision, in an apparent reference to the last paragraph in the state court's opinion. That paragraph states in full:

> 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 questions he had to his attorney.

App. 163a.

This paragraph does not provide an independent reason for rejecting Schmidt's claim. It does not recognize a "complete denial" requirement under Supreme Court case law, nor rule on that issue. This paragraph offers nothing more than an observation about one undisputed fact (that counsel was physically present) and other observations that are highly ambiguous when viewed in light of the full record. To be sure, it is true that counsel had "an opportunity to . . . advise Schmidt" during the brief recess. But it was clear there was no such opportunity during the *in camera* hearing, and even during the recess the court had ordered counsel to limit any discussion to the written offer of proof. App. 206a. And, while it is also true that "Schmidt had the opportunity to present any concerns or questions he had to his attorney," it remains equally true that his attorney could not provide *any* answer during the *in camera* proceeding and could point only to the written submission during the recess. What's missing from the Wisconsin appellate court's observation is any analysis or ruling on whether preventing counsel from participating in the *in camera* hearing was a "complete deprivation" of Schmidt's Sixth Amendment right. The Wisconsin Court of Appeals simply did not decide that issue.

Indeed, the *en banc* majority elsewhere (beyond the footnote) makes clear that it understood the single

basis for the Wisconsin appellate court's decision. Summarizing the reasons various judges have offered for why Schmidt's deprivation of counsel claim failed, the *en banc* court said:

> 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)*, that the examination was too incomparable to anything the Supreme Court has considered (the district court), that the examination was not a critical stage under clearly established law (the panel dissent), and that Schmidt was not completely denied counsel under clearly established law (our majority).

App. 25a-26a (emphasis added). This passage makes clear that the Seventh Circuit *en banc* majority was the first court to rule on whether the deprivation of Schmidt's right to counsel was not "complete"—or more accurately, whether a reasonable jurist could conclude that the deprivation of Schmidt's right to counsel was not "complete."

The Wisconsin Court of Appeals rejected Schmidt's federal claim based on its determination that the *in camera* hearing "was not a critical stage." *Id.* at 163a. Deference under § 2254(d) applies to that holding, but nothing else. Thus, the Seventh Circuit's denial of Schmidt's habeas petition on the ground that it would have been reasonable for a court to conclude that Schmidt was not "completely" deprived of counsel (although no court had so concluded), regardless of whether Schmidt *was* completely deprived of counsel, was plainly wrong under *Wilson*. This Court should summarily reverse on that basis.

At a minimum, this Court should grant, vacate, and remand in light of *Wilson*. As this Court has recog-

nized, "a GVR order . . . assists the court below by flagging a particular issue that it does not appear to have considered, assists this Court by procuring the benefit of the lower court's insight before [it] rule[s] on the merits, and alleviates the potential for unequal treatment that is inherent in [this Court's] inability to grant plenary review of all pending cases raising similar issues." *Lawrence* v. *Chater*, 516 U.S. 163, 166-67 (1996) (per curiam) (brackets omitted). The Court has issued a GVR order even when, as here, the recent Supreme Court decision was issued before the decision that is the subject of the petition for a writ of certiorari. See*, e.g.*, *Robinson* v. *Story*, 469 U.S. 1081 (1984) (GVR for further consideration in light of Supreme Court decision rendered almost three months before vacated decision); *Lawrence*, 516 U.S. 163 (more than a year); *Stutson* v. *United States*, 516 U.S. 193 (1996) (per curiam) (more than a year); *Hodgkiss* v. *United States*, 522 U.S. 1012 (1997) (more than a year); *Walker* v. *True*, 546 U.S. 1086 (2006) (more than a year); *Webster* v. *Cooper*, 558 U.S. 1039 (2009) (more than two months). Where "recent developments that [this Court has] reason to believe the court below did not fully consider[] reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate," depending on the equities of the case. *Lawrence*, 516 U.S. at 167-68.

Here, the timing of this Court's decision and the unusual briefing schedule below supports a GVR. The briefing in the Seventh Circuit concluded on November 21, 2017—approximately five months before *Wil-*

son was decided. See Dkt. 27, *Schmidt* v. *Foster*, No. 17-1727 (7th Cir.). The panel opinion was issued on May 29, 2018, about six weeks after *Wilson* was released—less time than in *Robinson*, *Lawrence*, *Stutson*, *Hodgkiss*, *Walker*, or *Webster*. The dueling panel opinions considered only the issue actually decided by the Wisconsin appellate court; neither of them considered the separate question whether the denial of Schmidt's right to counsel had been "complete." The State's petition for rehearing also focused only on the issue actually decided by the Wisconsin appellate court; it addressed the reasoning of Judge Barrett's dissenting opinion. And when the Seventh Circuit then agreed to hear the case *en banc* on July 25, 2018, it did not request new or additional briefing and there was no reason to believe that the *en banc* court would stray beyond the issue decided by the Wisconsin appellate court and considered by the panel. The Seventh Circuit's *en banc* ruling did not issue until December 20, 2018.

By that time, *Wilson* was eight months old, but the Seventh Circuit had not been presented with any argument regarding the implications of that case for this one. And there is no reason to believe that the Seventh Circuit majority appreciated that it was contradicting *Wilson*. The *en banc* court's decision to assume away the actual basis for the state court's decision, coupled with its decision to not ask for additional briefing after *Wilson* had been decided, created the perfect storm for missing the significance of *Wilson*.

True, the *en banc* majority cited *Wilson* once in its opinion. App. 10a. But it did so for the high-level proposition that the federal habeas court should focus on "the last reasoned state-court decision on the merits," *id.* (citing *Wilson*, 138 S. Ct. at 1192), without actually applying *Wilson*'s specific holding to

Schmidt's case. If it had, the court would have realized that § 2254(d) deference does not apply to the question whether Schmidt had established a "complete" deprivation of his right to counsel, because that was not actually the reason for the state court's decision. The state court's actual holding—that the *in camera* hearing was not a critical stage—is the only reason provided by the relevant state-court opinion and therefore the only holding to which § 2254(d) deference applies.[3] Given that the Seventh Circuit repeatedly indicated that its decision might come out differently under *de novo* review, a GVR is well-warranted.

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 the Wisconsin Court of Appeals had concluded that Schmidt's deprivation of counsel was not "complete" and that § 2254(d)'s deferential standard applies to such a hypothetical ruling, this Court still should grant this petition to clarify how to evaluate whether a state-court decision involves an unreasonable application of clearly established federal law.

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[3] In any event, the mere fact that the Seventh Circuit cited *Wilson* does not counsel against a GVR here. *See, e.g.*, *United States* v. *Valensia*, 222 F.3d 1173, 1182 n.4 (9th Cir. 2000) (citing *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)), *vacated and remanded*, 532 U.S. 901 (2001) (GVR'ing in light of *Apprendi*); *In re Coleman*, Nos. C1-96-216, C0-96-1521, 1997 WL 585902, at *5 (Minn. Ct. App. Sept. 23, 1997) (citing *Kansas* v. *Hendricks*, 521 U.S. 346 (1997)), *vacated and remanded*, 524 U.S. 924 (1998) (GVR'ing in light of *Hendricks*); and *In re Schweninger*, No. C1-96-362, 1997 WL 613670, at *3 (Minn. Ct. App. Oct. 7, 1997) (citing *Hendricks*), *vacated and remanded*, 525 U.S. 802 (1998) (GVR'ing in light of *Hendricks*).

Schmidt takes as a given that the standard for relief under § 2254(d) is exceedingly demanding. Nonetheless, this case reveals the need for further clarification from this Court. The Seventh Circuit has all but adopted 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. Neither the text of § 2254(d), nor this Court's decisions, nor sound policy warrants the extreme view adopted by the Seventh Circuit here.

The standard under § 2254(d) is "intentionally difficult to meet." *Woods* v. *Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (quoting *White* v. *Woodall*, 572 U.S. 415, 419 (2014)). "[A] state prisoner must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." *Richter*, 562 U.S. at 103. This standard "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction." *Id.* at 102-03.

Even under § 2254(d)'s highly deferential standard, the unusual facts here entitle Schmidt to habeas relief. The trial judge took testimony from Schmidt for the purpose of determining whether he would be permitted to present his only defense at trial. Schmidt's counsel could not participate in the hearing where that questioning took place. These facts are unusual, but they present a clear Sixth Amendment violation. They demonstrate that there was a complete breakdown in the adversarial process—an "extreme malfunction" in the state-court process.

Immediately after hearing Schmidt testify, the trial judge ruled that Schmidt could not present his provo-

cation defense at trial. Barred from participating, Schmidt's lawyer watched helplessly as the judge "convert[ed] the hearing into a mini-trial on the ultimate merits of the defense rather than a debate about only the burden of production." App. 41a. It is beyond the possibility of fair-minded disagreement that Schmidt's right to counsel was violated under these circumstances.

Two lines of this Court's precedent make this conclusion unmistakably clear.

First, a line of cases clearly establishes that a critical stage is any step during the criminal process when the accused might suffer significant consequences because of the absence of counsel. See*, e.g.*, *Hamilton* v. *Alabama*, 368 U.S. 52, 54 (1961) (where "[a]vailable defenses may be irretrievably lost, if not then and there asserted"); *White* v. *Maryland*, 373 U.S. 59, 60 (1963) (per curiam) (where "rights are preserved or lost"); *United States* v. *Wade*, 388 U.S. 218, 225 (1967) (when counsel's presence is "necessary to assure a meaningful 'defense'"); *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967) ("where substantial rights of a criminal accused may be affected"); *Coleman* v. *Alabama*, 399 U.S. 1, 9 (1970) (where "potential substantial prejudice to defendant's rights inheres in the . . . confrontation and [where] counsel [can] help avoid that prejudice"); *Bell* v. *Cone*, 535 U.S. 685, 695-96 (2002) ("significant consequences for the accused").

Granted, there may be cases where it is debatable whether a "significant consequence" might flow from the absence of counsel, cf. *Woods*, 135 S. Ct. at 1377-78, but this is not one of them. The *in camera* evidentiary hearing was the single most important proceeding during the entire criminal process, and it resulted

in Schmidt's only possible defense being "irretrievably lost." *Hamilton*, 368 U.S. at 54.

Second, another 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. See, *e.g.*, *Powell* v. *Alabama*, 287 U.S. 45, 57-58 (1932) ("defendants were not accorded the right to counsel in any substantial sense" when the court appointed lawyers for the defendants but did not give them adequate time to prepare); *Ferguson* v. *Georgia*, 365 U.S. 570, 594-96 (1961) (rule prohibiting defense counsel—though present at trial—from directly examining defendant was unconstitutional); *Herring* v. *New York*, 422 U.S. 853, 864-65 (1975) (rule barring counsel from making summation was unconstitutional); *Geders* v. *United States*, 425 U.S. 80, 91 (1976) (court order preventing defendant from consulting with his counsel overnight during trial violated his right to counsel); *Holloway* v. *Arkansas*, 435 U.S. 475, 490 (1978) ("mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee" when the state refused to appoint conflict-free counsel and "the advocate's conflicting obligations . . . effectively sealed his lips on crucial matters"). That is why, in *Cronic*, this Court said that it "has uniformly found constitutional error without any showing of prejudice when counsel was *either* totally absent, *or prevented from assisting* the accused during a critical stage of the proceeding." 466 U.S. at 659 n.25 (emphasis added).

On this dimension, too, there is no room for fair-minded disagreement about whether Schmidt's attorney was prevented from assisting Schmidt during the hearing: even though he was physically present, the trial judge barred him from "participating." In the

judge's own words, Schmidt's lawyer was "just there" and "not saying anything."

These two lines of cases, when applied to Schmidt's case, leave no room for reasonable disagreement about whether Schmidt's Sixth Amendment right to counsel was violated. Yet the Seventh Circuit refused to say that Schmidt had satisfied § 2254(d)'s deferential standard. In doing so, the Seventh Circuit committed an error that represents a systemic problem this Court should address.

This Court has repeatedly used "summary reversals of decisions granting habeas relief to push lower federal courts toward faithful application of the demanding standard" in § 2254(d). App. 34a. In this case, the Seventh Circuit "over-corrected." *Id.* It did so by seizing on the unprecedented nature of the *in camera* hearing and emphasizing three facts that, in its view, took this case outside the heartland of this Court's right-to-counsel precedent: (1) Schmidt's lawyer presented written submissions *before* the hearing about Schmidt's offer of proof and the applicability of the adequate-provocation defense, (2) Schmidt's lawyer consulted with his client *before* the hearing began, and (3) Schmidt could review the offer of proof with his lawyer *during the brief recess* when the judge made a phone call. See *id.* at 18a. According to the Seventh Circuit, because of these facts, a reasonable jurist could conclude that the deprivation of Schmidt's right to counsel was not "complete" and therefore the presumption of prejudice did not apply.

This reasoning cannot be squared with this Court's precedent and takes deference under § 2254(d) too far. These are facts about *other stages* of the proceedings: they do not change the inescapable reality that, *during* the critical stage—when the trial judge questioned Schmidt about the basis for his only possible

defense—Schmidt's lawyer was prevented from assisting him. There is no support in this Court's cases for the view that the deprivation of counsel during an *admittedly* critical stage of the proceeding can be cured because counsel could assist the accused during *other* parts of the criminal process.

Indeed, *Cronic* itself defined a "complete denial" in a way that makes the *en banc* majority's error plain. In *Cronic*, this Court explained: "Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel *at a critical stage* of his trial." 466 U.S. at 659 (emphasis added). The Court then clarified that this presumption applies "when counsel was *either* totally absent, *or prevented from assisting* the accused during a critical stage of the proceeding." *Id.* at n.25 (emphasis added). Once that showing is made, there is no further inquiry about whether other parts of the criminal process remediated or mitigated the deprivation of counsel.

Under the Seventh Circuit's own logic, Schmidt made precisely that showing. The Seventh Circuit assumed that the *in camera* hearing was a critical stage, App. 17a, and conceded that "Schmidt otherwise lacked assistance during the [*in camera*] examination," *id.* at 18a. No more needs to be shown. Because no more needs to be shown, the extraneous facts that the Seventh Circuit seized on—the pre-hearing written submission, the pre-hearing consultation, and the discussion during the recess limited to the pre-hearing submission—are of no moment. What mattered was the evidentiary hearing itself—when the accused was questioned directly by the judge and provided testimony on the dispositive issue in his case—without the assistance of counsel. See *Powell*,

287 U.S. at 68-69. That Schmidt received the assistance of counsel about the provocation *issue* at other points during the criminal process does not alter the fact that he was deprived the assistance of counsel during the *critical stage*.

No Supreme Court case has specifically ruled that the complete denial of the right to counsel "at a critical stage" of the proceeding means just that: *at* a critical stage of the proceeding. But that does not preclude relief here. Nothing in *Cronic* or any other decision suggests that the complete denial of the right to counsel *at* a critical stage of the proceedings is made less than complete simply because counsel submitted materials relevant to the legal dispute underlying that critical stage, or was allowed to discuss those previously prepared materials during a brief recess in that critical stage. It is true that this Court has yet to confront the bizarre series of events that occurred here. But the strangeness of the events does not count in favor of the reasonableness of the state-court ruling or of the Seventh Circuit's rationale.

The Seventh Circuit reached the wrong result because it was too preoccupied with searching for a Supreme Court case with precisely these facts. See App. 21a ("This case concerns (1) a defendant's response to questions, in part guided by his written offer of proof, (2) regarding the admissibility of a defense (3) in chambers."). In this search for factual identity, the Seventh Circuit lost sight of the fact that "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007). "Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle

was announced.'" *Id.* (quoting *Lockyer* v. *Andrade*, 538 U.S. 63, 76 (2003)). To the contrary, the statute recognizes "that even a general standard may be applied in an unreasonable manner." *Id.*

Decisions from other circuit courts of appeals show how badly off course the Seventh Circuit veered in interpreting § 2254(d)'s "unreasonable application" standard. In *Garrus* v. *Secretary of Pennsylvania Dep't of Corrections*, 694 F.3d 394 (3d Cir. 2012), for example, the Third Circuit held that a state-court decision had unreasonably applied *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). Although no Supreme Court case was on all fours factually, the Third Circuit concluded that this did not preclude habeas relief even under AEDPA's demanding standard. As the court explained, "*Apprendi* clearly requires that any fact 'other than the fact of a prior conviction' must be submitted to a jury if it will increase the penalty beyond the statutory maximum." *Garrus*, 694 F.3d at 405 (quoting *Apprendi*, 530 U.S. at 490). The habeas petitioner established a violation under *Apprendi*, even though the Supreme Court had not expressly ruled out the mistaken interpretation that the state court had given to the case. *Id.* ("[A]bsent case law authorizing some type of paradoxical interpretation, [the phrase] 'fact of a prior conviction' cannot reasonably be interpreted to allow judicial fact-finding of a fact contradicting a prior conviction or a fact inconsistent with a prior conviction."). Because "[n]o existing precedent so much as hints that a paradoxical interpretation of *Apprendi* might be reasonable," it was "objectively unreasonable" for the state court to deny the claim. *Id.* at 406. So too here.

The Ninth Circuit's understanding of § 2254(d) also shows the outlier nature of the Seventh Circuit's approach. In *Moses* v. *Payne*, 555 F.3d 742 (9th Cir.

2009), the Ninth Circuit synthesized this Court's case law on § 2254(d), explaining that "a state court must apply legal principles established by a Supreme Court decision when the case 'falls squarely within those principles,'" but not in cases "when the prior precedent requires 'tailoring or modification.'" *Id.* at 753. The Seventh Circuit's approach in this case cannot be reconciled with this sensible way of distinguishing cases in which § 2254(d) is satisfied and those in which it is not.

Here, it was the Seventh Circuit—not Schmidt—who modified a clearly established principle to deny habeas relief. There is no question Schmidt's case falls squarely within the *Cronic* rule—the Seventh Circuit assumed the *in camera* hearing was a critical stage *and agreed* he was deprived the assistance of counsel during that critical stage. But the Seventh Circuit modified that rule by saying that facts outside the critical stage made the deprivation less than "complete," and then used that modification to deny relief under § 2254(d).

The novelty of Schmidt's situation does not undermine his entitlement to habeas relief—it underscores it. The *in camera* hearing was unprecedented precisely because no reasonable person could believe such a procedure comports with the Sixth Amendment. This Court should grant the petition to make clear that § 2254(d) can be satisfied even where the facts surrounding a clear violation of a constitutional right are bizarre.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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