No. _____

In the

Supreme Court of the United States

RANDALL HEPP, WARDEN,

Petitioner,

v.

DANNY L. WILBER,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

During Danny Wilber's jury trial in 2005 for fatally shooting a man at a party, Wilber became increasingly belligerent with the Milwaukee County Circuit Court and its staff. The court ordered escalating non-visible restraints on Wilber to try to control his behavior. This was for naught; on the last day of trial, Wilber got in a fistfight with the four deputies escorting him to the courtroom despite his wearing a stun belt. So, the trial court ordered him shackled to a wheelchair during closing arguments and verdict.

The Seventh Circuit invalidated Wilber's 16-year-old conviction for this murder on the grounds that, though the trial court went to great lengths to explain why each progressive security measure it was imposing was necessary, it failed to specifically articulate why the final shackles had to be visible. It determined the Wisconsin Court of Appeals' decision affirming Wilber's conviction was thus an unreasonable application of *Deck v. Missouri*, 544 U.S. 622 (2005).

The question presented is whether the Seventh Circuit's invalidation of Wilber's conviction comports with the congressionally-mandated limits on federal authority to overturn State convictions under the Antiterrorism and Effective Death Penalty Act of 1996.

RELATED PROCEEDINGS

State v. Wilber, No. 2004CF609, Milwaukee County Circuit Court, judgment of conviction for first-degree intentional homicide entered February 23, 2005.

State v. Wilber, No. 2007AP2327-CR, Wisconsin Court of Appeals, decision denying claim that shackling violated due process and affirming conviction entered September 3, 2008.

State v. Wilber, No. 2007AP2327-CR, Wisconsin Supreme Court, decision denying petition for review entered December 9, 2008.

Wilber v. Thurmer, No. 10-C-179, U.S. District Court for the Eastern District of Wisconsin, stayed and administratively closed for Wilber to exhaust remedies in Wisconsin state courts on March 8, 2010.

State v. Wilber, No. 2004CF609, Milwaukee County Circuit Court, order denying postconviction motion, entered on November 25, 2015.

State v. Wilber, No. 2016AP260, Wisconsin Court of Appeals, decision affirming Milwaukee County Circuit Court's denial of postconviction motion, entered on December 26, 2018.

State v. Wilber, No. 2016AP260, Wisconsin Supreme Court, order denying petition for review entered April 9, 2019.

Wilber v. Thurmer, No. 10-C-179, U.S. District Court for the Eastern District of Wisconsin, decision granting habeas relief, entered on August 4, 2020.

Wilber v. Hepp, Nos. 20-2614 & 20-2703, U.S. Court of Appeals for the Seventh Circuit, decision affirming grant of habeas relief, entered on October 29, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Randall Hepp, Warden of Waupun Correctional Institution, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit court of appeals (App. 1a–65a) is reported at *Wilber v. Hepp*,16 F.4th 1232 (7th Cir. 2021). The district court's opinion (App. 172a–208a) is also reported and available at *Wilber v. Thurmer*, 476 F.Supp.3d 785 (E.D. Wis. 2020).

The opinion of the Wisconsin Court of Appeals affirming the state trial court's decision to shackle Wilber (App. 66a–87a) is not reported but is available at *State v. Wilber*, No. 2007AP2327-CR, 2008 WL 4057798 (Wis. Ct. App. Sept. 3, 2008) (unpublished). The pertinent portions of Wilber's trial transcripts in which the trial court made its findings about the need for additional security measures are not reported but are reproduced at App. 88a–171a.

JURISDICTION

The court of appeals entered its judgment on October 29, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend XIV.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides in relevant part:

> (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—
>
> > (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 . . . .

28 U.S.C. § 2254(d)(1).

INTRODUCTION

In AEDPA, Congress strictly circumscribed the federal courts' authority to grant habeas relief to state prisoners. They can do so only if the state court's decision is contrary to, or an unreasonable application of, federal law that has been clearly established by this Court.

This Court has repeatedly admonished the lower federal courts that a state court's judgment is not unreasonable merely because the federal court believes the state court erred. Rather, to meet AEDPA's demanding standard, "a prisoner must

show far more than that the state court's decision was 'merely wrong' or 'even clear error.' The prisoner must show that the state court's decision is so obviously wrong that its error lies 'beyond any possibility for fairminded disagreement.'" *Shinn v. Kayer*, 141 S.Ct. 517, 523 (2020) (citations omitted).

The Seventh Circuit resolved this case in a manner fundamentally inconsistent with AEDPA. Instead of evaluating whether any fairminded jurists could agree with the Wisconsin Court of Appeals that the trial court sufficiently explained its reasons for visibly shackling Wilber on the last day of trial, the Seventh Circuit conducted a *de novo* review of the trial court's exercise of discretion. There is no discussion of the Wisconsin Court of Appeals' opinion apart from a perfunctory statement that it was an unreasonable application of *Deck*. The Seventh Circuit certainly failed to explain how it concluded that *all* fairminded jurists would disagree with the Wisconsin Court of Appeals that the trial court sufficiently explained its reasons for shackling Wilber.

Moreover, this Court has not clearly established the principle on which the Seventh Circuit relied to invalidate Wilber's conviction. This Court has never held that a trial court must specifically explain why non-visible shackles are inadequate when exercising its discretion to shackle a dangerous and obstreperous defendant, particularly after non-visible restraints have failed to control his behavior. The Seventh Circuit crafted this requirement from dicta in *Deck*.

But this Court has reiterated time and again that "[s]ection 2254(d)(1)'s 'clearly established' phrase

'refers to the holdings, as opposed to the dicta, of this Court's decisions at the time of the relevant state-court decision.'" *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). This Court held in *Deck* that defendants could not routinely be visibly shackled and that before visibly shackling a defendant, the trial court must explain on the record why it has security or decorum concerns about that defendant. It did not hold that the trial court must also specifically explain why non-visible shackles are inadequate.

Indeed, the Seventh Circuit specifically relied on its own precedent establishing that requirement to conclude that the Wisconsin Court of Appeals' decision was unreasonable. But circuit precedent cannot be used to sharpen or refine this Court's precedent when evaluating a state conviction under 28 U.S.C. § 2254. Under AEDPA, "it is not 'an unreasonable application of' 'clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). This case arose under AEDPA, not on direct review. The Seventh Circuit could not reach this result without abandoning the congressionally-imposed limits on the federal courts' authority to invalidate State convictions.

This Court should grant the petition for certiorari and summarily reverse the Seventh Circuit. The Seventh Circuit essentially reviewed the trial court's decision *de novo* and concluded that because it would have reached a different decision than the trial court, the Wisconsin Court of Appeals' decision upholding Wilber's conviction was unreasonable. It did not acknowledge the deferential standard of review the

Wisconsin Court of Appeals was required to apply, it did not afford the state court decision the extraordinarily high degree of deference it was due under AEDPA, and it based its holding on a principle not clearly established by this Court. Moreover, absent relief in this Court, Wisconsin faces the untenable choice of releasing a violent murderer from his life sentence or conducting a new murder trial 16 years after the crime in a case that depended almost entirely on eyewitnesses. Assuming they can even be located again, those witnesses' memory has surely faded.

The purpose of AEDPA is to ensure that a State faces this choice only when there has been a clear departure from this Court's precedent. That is not the case here, and thus the Seventh Circuit overstepped its authority in invalidating Wilber's conviction. The Seventh Circuit's decision should be summarily reversed.

STATEMENT OF THE CASE

A. Wisconsin State Court proceedings.

1. The murder of David Diaz.

This case arose from a homicide that occurred in Milwaukee, Wisconsin, on January 31, 2004. On that date, Milwaukee police were dispatched to investigate a shooting at a house party and found David Diaz dead on the kitchen floor with a gunshot wound to the head. They interviewed several witnesses. (App. 172a–173a.) Two witnesses, Richard Torres and Jeranek Diaz, identified Wilber as the shooter. (Dkt.

61-11:2.)[1] They said Wilber had been belligerent at the party, attacking a man named Oscar Niles, and that Torres, Jeranek, and a man named Isaiah had attempted to kick Wilber out of the party. (Dkt. 61-11:2.) According to Torres and Jeranek, Wilber pulled a handgun during a struggle with Torres and Jeranek and shot Diaz, who was walking through the room at the time. (App. 173a–174a.) Jeranek told police he saw Wilber point the gun at Diaz's head and fire. (Dkt. 61-24:114–15.) Jeranek and Torres also reported that they heard Wilber's sister, Antonia West, urge Wilber to leave, saying, "Oh my God. You shot him. Get out of here. You shot him." (App. 174a.)

2. Wilber's trial.

Wilber pled not guilty and the case proceeded to an eight-day jury trial. Seven eyewitnesses to the shooting testified, including Antonia, Jeranek, Niles, and Torres, as did multiple police officers, the Milwaukee County medical examiner, and other citizen witnesses. (Dkt. 61-20–61-29.) Antonia, Niles, and Jeranek testified differently than what they told police after the shooting, and were impeached with their prior statements implicating Wilber as the shooter. (App. 174a–175a; Dkt. 61-20:66–109; 61-

[1] Given the length of the full trial transcripts and the record in this case, the State has not reproduced the entirety of the transcripts in its appendix to this Court. The State thus provides citations to the docket numbers for the case record in *Wilber v. Thurmer*, No. 10-C-179, to indicate where the facts not contained in the provided appendix excerpts can be found in the habeas record.

21:6–38, 56–74; 61-23:40, 59–93, 109–16; 61-24:111–47, 150–67, 176–85.)

Torres, on the other hand, testified consistently with his police report. (Dkt. 61-24:218–83.) He told the jury that on the night of the party, he entered the kitchen to tell Wilber "to chill out or he would have to leave." (Dkt. 61-24:238.) He said Jeranek conferred with David Diaz, Jeranek told Wilber to leave, and then Wilber started choking Jeranek. (Dkt. 61-24:240–41.) Torres then grabbed Wilber from behind and Wilber twisted around and punched Torres twice in the face. (Dkt. 61-24:246.) Torres blacked out a little from the hits, leaned against the sink, and heard a gunshot from beside him where Wilber was standing. (Dkt. 61-24:249.) His vision cleared and he saw Wilber with a gun and David Diaz falling to the floor. (Dkt. 61-24:249–56.) Torres saw Wilber run out of the house and chased him; when asked why, Torres replied "because he just killed my friend." (Dkt. 61-24:259–60.)

During the course of the trial, Wilber became progressively more combative, defiant, and threatening, including being abusive to his lawyer, the deputies, and other people in the bullpen outside the courtroom. (App. 88a–137a.) He continued being aggressive despite being placed in escalating levels of restraints and receiving multiple warnings from the court. (App. 88a–137a.) The court went to great lengths to explain its reasoning each time it ordered another level of restraints; its comments on the matter total nearly 50 pages of trial transcript. (App. 88a–137a; Dkt. 61-17:4–7; 61-20:116–17; 61-21:3–5,

149–55; 61-22:107–17; 61-24:45–49; 61-28:99–113, 196–207.)[2]

On the third day of trial, after the court made an evidentiary ruling in favor of the State, Wilber began yelling at the court and was removed. (App. 77a–78a.) The sheriff's deputies reported that Wilber continued to be aggressive and combative with everyone in the bullpen area after this exchange and made some concerning statements: he told the deputies "[I am] not going down for this, you might as well use your gun and kill me now." (App. 79a.) He also asked the deputies "detailed questions about the path he would walk to the courtroom each morning, what floor he would be coming and leaving from, when he would be coming and going, and which people would have access to that same path." (App. 79a.)

The deputies became concerned that Wilber was going to commit suicide by cop or try to flee, perhaps with the help of others. (App. 79a.) At that point, the court ordered a stun belt be placed on Wilber, and additional deputies were assigned to the courtroom. (App. 79a.) The court warned that if there were

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[2] As respondent on direct appeal, the State located all of the circuit court's comments in the transcripts explaining why Wilber's behavior throughout the trial warranted escalating restraints and transcribed them in a single document that it submitted as its appendix to its response brief in the Wisconsin Court of Appeals. (Dkt. 61-3:29–56.) The State has provided this document in its appendix to this Court, as well. (App. 138a–171a.) The record citations in this document do not correspond to the habeas docket numbers since the record was in the Wisconsin Court of Appeals at the time. The State has therefore provided the docket numbers for where these excerpts can be found in the transcripts in the text here, but notes that all of these excerpts can be read in the State's appendix to this Court.

further issues, Wilber might have to either have his hands secured or be removed from the courtroom and watch the duration of the trial via video conference. (App. 80a.) Wilber again indicated he would control his behavior. (App. 80a.)

The court noted that that same day, three men approached the trial court's clerk and made some concerning comments to her about whether she was going to "get[ ] her fingers ready." (App. 80a n.6.) Another three men watched the trial and then were seen next to witnesses who were under a sequestration order. (App. 80a.) The court decided to sequester the jury for the remainder of the trial. (App. 80a.)

On his way to the courtroom on the last day of trial, Wilber began to scream profanities at the four deputies who were escorting him to the courtroom and engaged in a physical fight with them. (App. 81a; 119a–127a.) Accordingly, after noting that the court's many warnings and addition of the stun belt apparently had been insufficient, the court ordered Wilber to be shackled to a wheelchair at the wrists and ankles during closing arguments and the verdict. (App. 119a–132a.)

Wilber's attorney objected. (App. 82a.) The court reminded counsel that Wilber had been warned, the use of increased restraints had been progressive, and that Wilber "was still able to 'get into it, both physically and verbally' with the bailiffs" even though he had been wearing a stun belt. (App. 82a.) It also reminded counsel of Wilber's prior comments that the deputies should "just shoot him now." (App. 83a.) The court offered to give a cautionary instruction to the

jury about the restraints, but counsel declined. (App. 85a n.8.) The jury therefore saw Wilber in the restraints during closing arguments, which occurred without incident. (App. 83a.)

The jury found Wilber guilty. (Dkt. 61-1.) The court sentenced him to life in prison with eligibility for release on extended supervision after serving 40 years. (Dkt. 61-1.)

3. Direct review proceedings.

Wilber sought review of his conviction. As relevant here, Wilber claimed that the court erroneously exercised its discretion in ordering him bound in visible restraints during closing argument, violating his due process right to a fair trial. (App. 84a.)

Regarding the visible restraints, the court of appeals noted that criminal defendants "generally should not be restrained during the trial because such freedom is 'an important component of a fair and impartial trial.'" (App. 83a (citing *State v. Champlain*, 2008 WI App 5, ¶ 22, 307 Wis. 2d 232, 744 N.W.2d 889 (Ct. App. 2007).) However, a defendant may be physically restrained if it is necessary to maintain order, and "[a] trial court maintains the discretion to decide whether a defendant should be shackled during a trial as long as the reasons justifying the restraints have been set forth on the record." (App. 84a (citing *State v. Grinder*, 190 Wis. 2d 541, 527 N.W.2d 326, 329 (1995).)

The court of appeals observed that here, the visible restraints were "the last in a series of orders concerning security that were made over the course of the seven-day trial. Less restrictive means of

restraint were employed, but they were unsuccessful at controlling Wilber's behavior." (App. 76a.) The court of appeals summarized the most noteworthy of these issues from the seven-day trial and the court's progressive measures to deal with them, including his outbursts, threats, concerning comments about suicide by cop, questions about the route to and from the courtroom suggesting an escape attempt, and finally his screaming match and physical fight with the deputies immediately before the visible restraints were imposed. (App. 76a–86a.) Further, the trial court's comments on the security issues "were extensive, composing nearly fifty pages of transcript." (App. 76a.)

Given the record, the court of appeals concluded "that the trial court did not erroneously exercise its discretion when it ordered the additional restraints." (App. 85a.) "The trial court took great pains to explain its concerns and each level of increased security that it imposed. It warned Wilber numerous times that would occur if there were continued threats to security and decorum." (App. 85a.) "Despite these warnings, on the final day of trial, Wilber engaged in a verbal and physical altercation with the sheriff's deputies. The trial court determined that in light of that altercation, the security measures in place were insufficient and additional restraints should be used." (App. 85a.) Wilber petitioned the Wisconsin Supreme Court for review, which it denied on December 9, 2008. (Dkt. 61-6; 61-7.)

B. Federal habeas proceedings.

1. The Eastern District of Wisconsin's order granting habeas relief.

On March 3, 2010, Wilber filed a 28 U.S.C. § 2254 petition for a writ of habeas corpus in the United States District Court for the Eastern District of Wisconsin. (Dkt. 1.) He also filed a motion to hold his petition in abeyance and return to state court to pursue a collateral attack on his conviction. (Dkt. 2.) The district court granted the stay and administratively closed the case. (Dkt. 4.) Nine years later Wilber informed the district court that he had exhausted his other claims and the court reopened the case.

On August 4, 2020, the district court issued an opinion and order granting Wilber's habeas petition and directing the State to release Wilber from custody within 90 days or institute proceedings to retry him. (App. 172a–208a.) The court concluded that the Wisconsin Court of Appeals unreasonably applied, *Deck*, 544 U.S. at 629, in rejecting his claim that the visible shackles during closing arguments violated due process. (App. 195a–207a.)

The district court recognized that the question for the State court of appeals was whether the trial court erroneously exercised its discretion in ordering the shackles. (App. 198a.) It determined that in its view, however, the visible restraints were not warranted. (App. 199a.) It described Wilber's behavior as simply "verbally protest[ing] the court's ruling before the noon break on the third day of trial."

(App. 199a–200a.) It then claimed that "[t]he record reflects no further instances of courtroom misconduct by Wilber for the duration of the trial. The only other instances of improper courtroom behavior reflected in the record . . . were his nonverbal reactions to the court's rulings and the prosecutor's arguments for which the court admonished Wilber on the first day of trial." (App.200a.)

The district court ignored the extensive remarks about Wilber's behavior in the transcripts and erroneously stated that the record reflected "only two instances" of disruptive behavior by Wilber. (App. 200a.) It gave no consideration to Wilber's concerning questions suggesting he was contemplating an escape attempt or his comments about provoking the deputies into shooting him and that he was "not going down for this." (App. 181a, 198a–200a.) The district court mentioned in passing Wilber's screaming match and physical fight with the deputies immediately before the shackles were ordered, but concluded that because that conduct took place outside of the presence of the jury, it was not part of the calculus whether shackles were warranted, and concluded that the security already imposed was sufficient. (App. 202a–03a.) Finally, the district court determined habeas relief was appropriate because "[e]ven if the record supported additional restraints on Wilber's wrists and arms . . . no explanation was offered as to why the restraints had to be visible to the jury." (App. 206a.)

2. The Seventh Circuit's decision.

The Seventh Circuit affirmed the district court. It, too, construed *Deck* as requiring an explanation

specifically addressing why non-visible shackles are inadequate, even if they have already been tried and failed, before a trial court may visibly shackle a defendant. (App. 39a–59a.) It then, like the district court, reviewed the trial court's exercise of discretion and determined that, though the trial court had made an extensive record about the security threat Wilber posed, Wilber's shackling amounted to a due process violation because the trial court had not specifically addressed why the final restraints had to be visible. Therefore, the Seventh Circuit concluded, the Wisconsin Court of Appeals' determination that the trial court appropriately exercised its discretion was an unreasonable application of *Deck*. (App. 50a–54a.) It ordered Wisconsin to retry Wilber or release him.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit substantially exceeded its authority under 28 U.S.C. § 2254(d) when granting habeas relief in this case. The Seventh Circuit ignored multiple longstanding precedents from this Court regarding the scope and substance of federal habeas review of state court decisions, and its conclusion that the Wisconsin Court of Appeals unreasonably applied *Deck* was wrong. This Court should summarily reverse the Seventh Circuit's decision for three reasons: (1) the principle on which the Seventh Circuit relied to grant relief in this case has not been clearly established by this Court; (2) Wilber fell far short of showing that all fairminded jurists would agree that the Wisconsin Court of Appeals' holding that the trial court sufficiently explained its reasons for shackling him was wrong; and (3) severe

consequences will follow if the Seventh Circuit's decision is not reversed.

I. The Seventh Circuit's grant of habeas relief defies the strict limits placed on such claims by Congress and this Court.

The Seventh Circuit ignored "the only question that matters under § 2254(d)(1)" in this case. *Andrade*, 538 U.S. at 71. That question was not whether the trial court should have shackled Wilber or whether it had other options it could have explored, nor whether the trial court appropriately exercised its discretion under "[the Seventh Circuit's] own jurisprudence," as it so held. (App. 54a.) The question was whether the Wisconsin Court of Appeals' determination that there was no abuse of discretion when the court ordered Wilber visibly restrained on the last day of trial was "an unreasonable application of, clearly established Federal law" as established by this Court. 28 U.S.C. § 2254(d)(1). The record shows that the answer to that question is undisputedly "no."

A. This Court has not clearly established that a trial court must explain why non-visible shackles are inadequate when shackling a demonstrably dangerous defendant during trial.

The Seventh Circuit materially misread *Deck*'s holding when granting habeas relief in this case. This Court held in *Deck* that before visibly shackling a defendant, the trial court must state on the record why it has security or escape concerns about the specific defendant. This Court has never held, as the

Seventh Circuit claimed, that the trial court must also specifically explain why non-visible shackles are inadequate to properly exercise its discretion to visibly shackle a disruptive defendant, especially after non-visible means of restraint have already been attempted and failed to control the defendant's behavior.

In *Deck*, the defendant was required to appear before the jury at the penalty phase of his capital murder trial in leg irons, a belly chain, and handcuffs. *Deck*, 544 U.S at 625. He had not engaged in any disruptive or threatening behavior. *Id.* at 625. The trial court denied the defense's objection to the visible shackles purely on the ground that the defendant had been found guilty of a crime. *Id.*

This Court explained that the Due Process Clause of the Fourteenth Amendment forbids the "*routine* use of visible shackles during the guilt phase" of trial. *Deck*, 544 U.S. at 626 (emphasis added). The defendant's right to remain free of visible physical restraints, however, "may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum." *Id.* at 628. Recognizing the need for balancing both interests, this Court held "that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during [trial or] the penalty phase of a capital proceeding. The constitutional requirement, however, is not absolute." *Id.* at 633. Rather, "[i]t permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its

occupants." *Id.* "But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security concerns or escape risks, related to the defendant on trial." *Id.*

In granting habeas relief, the Seventh Circuit here crafted a different rule: it determined that *Deck* requires a court to describe security risks specific to the defendant *and* to specifically explain why non-visible shackles are inadequate, even after non-visible options have already been tried. (App. 53a–56a) But the Seventh Circuit specifically—and inappropriately—relied on its *own* precedent for that rule. (App. 55a–56a.) And the portion of *Deck* on which the Seventh Circuit relied to create this rule was not part of *Deck*'s holding in any respect. (App. 49a (citing *Deck*, 544 U.S. at 634–35).)

In response to Missouri's argument before this Court that the trial court in *Deck* had acted within its discretion, this Court noted that the record contained no formal or informal findings suggesting that the trial court thought any exercise of discretion was needed to order the shackles, and no evidence of any specific dangerousness or escape risks that Deck himself posed that warranted them. *Deck*, 544 U.S. at 634–35. This Court observed,

> The judge did not refer to a risk of escape . . . or a threat to courtroom security. Rather, he gave as his reason for imposing the shackles the fact that Deck already 'has been convicted.' While he also said that the shackles would 'take any fear out of' the juror's 'minds,' he nowhere explained any special reason for fear. Nor did he explain why, if shackles were necessary, he

> chose not to provide for shackles that the jury could not see—apparently the arrangement used at trial. If there is an exceptional case where the record itself makes clear that there are indisputably good reasons for shackling, it is not this one.

Id.

So, this Court's observation in *Deck* that the trial court had not explained the reason that non-visible shackles were inadequate there was not part of its holding that visible shackles do not violate the Constitution if a trial court makes reasonable findings about security, escape, or decorum risks the specific defendant poses. It was merely this Court's observation that the trial court in *Deck* had not explained why anything beyond the non-visible shackles used at trial was necessary given that Deck had not been disruptive in any way.

No decision from this Court establishes the rule that the Seventh Circuit applied here. No other circuits have found, even on direct review, that *Deck* requires this level of specificity from the trial court, either. All of the other federal circuits that have addressed the issue construe *Deck*'s holding the same way the Wisconsin Court of Appeals did—that if the trial court explains its concerns about decorum, safety, or escape risks the defendant poses and those are reasonable and supported by the record, it has adequate justification for its discretionary decision to visibly shackle a defendant and due process is satisfied. *See, e.g.*, *United States v. Lee*, 660 Fed. Appx. 8, 17–18 (2d. Cir. Aug. 24, 2016); *Naranjo v. Superintendent Fayette SCI*, 2019 WL 4318395 (3d.

Cir., Aug. 20, 2019) (denying certificate of appealability from a district court's denial of a habeas petition based on an alleged *Deck* violation where obstreperous defendant was bound and gagged before jury during voir dire); *Sigmon v. Stirling*, 956 F.3d 183, 201 (4th Cir. 2020); *Wilkins v. Stephens*, 560 Fed. Appx. 299, 314 (5th Cir. 2014); *Earhart v. Konteh*, 589 F.3d 337, 348–350 (6th Cir. 2009); *Williams v. Norris*, 612 F.3d 941, 958–59 (8th Cir. 2010); *Claiborne v. Blauser*, 934 F.3d 885, 895 (9th Cir. 2019); *United States v. Morales*, 758 F.3d 1232, 1238 (10th Cir. 2014); *United States v. Moore*, 954 F.3d 1322, 1329–30 (11th Cir. 2020).

Surely if this Court clearly established in *Deck* that trial courts must make specific findings on why non-visible restraints that had already demonstrably failed to control the defendant are inadequate in order to properly exercise their discretion to impose visible shackles, at least *one* of the Seventh Circuit's sister circuits would have so held in the 16 years since *Deck* was decided.

Nor has any state appellate court construed *Deck* this narrowly or adopted any concomitant state rule as strict as that imposed by the Seventh Circuit. Virtually all of them[3] follow the same rule the Wisconsin Court of Appeals applied in this case: that Due Process is not violated by visible shackles if the trial court makes reasonable findings on the record about security, escape, or decorum concerns the specific defendant poses. *See Brown v. State*, 982

[3] Petioner could not find any cases addressing the standard for visibly shackling a defendant from the District of Colombia, Maine, or New Jersey.

So.2d 565, 594–96 (Ala. 2006); *State v. Gomez*, 123 P.3d 1131, 1139–43 (Ariz. 2005); *Holt v. State*, 384 S.W.3d 498, 505–07 (Ark. 2011); *People v. Miller*, 175 Cal.App.4th 1109, 1113–15 (Cal. 2009); *People v. Knight*, 167 P.3d 147, 153 (Colo. 2006); *State v. Shashaty*, 742 A.2d 786, 796–99 (Conn. 1999), *cert. denied* 529 U.S. 1094 (2000); *Mungo v. United States*, 987 A.2d 1145, 1149 (D.C. 2010); *England v. State*, 940 So.2d 389, 403–04 (Fla. 2006); *Hill v. State*, 842 S.E.2d 853, 858–60 (Ga. 2020); *State v. Wright*, 283 P.3d 795, 801–02 (Idaho 2012); *People v. Urdiales*, 871 N.E.2d 669, 704–05 (Ill. 2007); *Stephenson v. State*, 864 N.E.2d 1022, 1028–29 (Ind. 2007); *Johnson v. State*, 860 N.W.2d 913, 918–19 (Iowa 2014); *State v. Anderson*, 192 P.3d 673, 677–78 (Kansas 2008); *Deal v. Commonwealth*, 607 S.W.3d 652, 663–65 (Ky. 2020); *State v. Sparks*, 68 So.3d 435, 479–81 (La. 2011); *Wagner v. State*, 74 A.3d 765, 797–98 (Md. 2013); *Commonwealth v. Rocheleau*, 62 N.E.3d 554, 557–58 (Mass. 2016); *People v. Dunn*, 521 N.W.2d 255, 262 (Mich. 1994); *McCollins v. State*, 952 So.2d 305, 309 (Miss. 2007); *Dickerson v. State*, 269 S.W.3d 889, 893–94 (Mo. 2008) (en banc); *State v. Hartsoe*, 258 P.3d 428, 434–36 (Mont. 2011); *State v. Mata*, 668 N.W.2d 448, 470 (Neb. 2003); *Hymon v. State*, 111 P.3d 1092, 1098–99 (Nev. 2005); *State v. Johnson*, 229 P.3d 523, 533 (N.M. 2010); *People v. Samo*, 124 A.D.3d 412, 412 (N.Y. 2015); *State v. Jackson*, 761 S.E.2d 724, 729–31 (N.C. 2014); *State v. Aguero*, 791 N.W.2d 1, 5–7 (N.D. 2010); *State v. Murphy*, 877 N.E.2d 1034, 1038 (Ohio 2007); *Ochoa v. State*, 136 P.3d 661, 668 (Okla. 2006); *State v. Osborn*, 315 Or. App 102, 107–08 (Or. 2021) (slip copy); *Commonwealth v. Patterson*, 180 A.3d 1217, 1225–26 (Penn. 2018); *State v. Snell*, 892 A.2d 108, 117–19 (R.I. 2006); *State v. Heyward*, 852

S.E.2d 452, 466–68 (S.C. 2020); *Mobley v. State*, 397 S.W.3d 70, 99–101 (Tenn. 2013); *Bell v. State*, 356 S.W.3d 528, 533–36 (Tex. Ct. App. 2011); *State v. Burke*, 54 A.3d 500, 509–10 (Vt. 2012); *Porter v. Commonwealth*, 661 S.E.2d 415, 445–46 (Va. 2008); *State v. Jackson*, 467 P.3d 97, 101–04 (Wash. 2020); *State v. Youngblood*, 618 S.E.2d 544, 553 (W.Va. 2005) *vacated on other grounds by Youngblood v. West Virginia*, 547 U.S. 867 (2006).

Stated differently, the Seventh Circuit is the only court in the nation that has interpreted *Deck* or the Due Process Clause as requiring an on-the-record explanation addressing why non-visible shackles are inadequate in addition to an explanation why the trial court has safety, escape, or decorum concerns about the defendant after non-visible restraint options already failed.[4] It is simply not possible that every court in the country apart from the Seventh Circuit is misinterpreting what this Court "clearly established" in *Deck*.

In sum, what this Court held in *Deck* is that before visibly shackling a defendant, the trial court must articulate on the record why it has security, decorum, or escape concerns about that defendant that call for additional security measures. *Deck*, 544 U.S. at 633. That is the precise rule that the Wisconsin Court of Appeals applied. (App. 84a–85a); *Compare Grinder*, 527 N.W.2d at 329–30 (holding that visible restraints

[4] Some state courts require that the court first attempt or at least consider "less restrictive alternatives," *see, e.g, State v. Hartsoe*, 258 P.3d 428, 435–36 (Mont. 2011), but there can be no dispute that the Wisconsin trial court satisfied that burden here as well; it used every possible non-visible option it had at its disposal before ordering the visible restraints. (App. 76a–85a.)

implicate a defendant's right to a fair trial and so "a circuit court must carefully exercise its discretion in deciding whether to shackle a defendant and then, on the record, must set forth its reasons justifying the need for shackles in that particular case"), *with Deck*, 544 U.S. at 629 (holding that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.").

The Wisconsin Court of Appeals' decision applying the exact rule this Court articulated in *Deck*, but not imposing additional requirements on the trial court that the Seventh Circuit believed are necessary under its own precedent, cannot have violated any law "clearly established" by this Court. Under AEDPA, the Seventh Circuit was required to deny Wilber habeas relief and should be summarily reversed.

B. The Wisconsin Court of Appeals' holding that the trial court properly exercised its discretion was not an unreasonable application of *Deck*.

The Seventh Circuit additionally determined that, despite the trial court's exhaustive explanation of its security and decorum concerns about Wilber, the Wisconsin Court of Appeals' decision was an unreasonable application of *Deck* because there were other things the trial court could have attempted. (App. 50a–60a). It was wrong.

First, as explained above, the Seventh Circuit relied on a principle that *Deck* did not establish. The

Wisconsin Court of Appeals cannot have unreasonably applied a nonexistent rule. But second, the Wisconsin Court of Appeals' decision is perfectly in line with both *Deck* and traditional principles of appellate review of a trial court's discretionary decision. At the very least, even if the Wisconsin Court of Appeals' decision was an incorrect application of *Deck*, it was not an objectively unreasonable one.

This Court has "explained that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citing *Williams v. Taylor*, 529 U.S. 326, 410 (2000)). "Indeed, 'a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" *Id.* (citation omitted). "Rather, that application must be 'objectively unreasonable.'" *Id.* "This distinction creates 'a substantially higher threshold' for obtaining relief than *de novo* review. *Id.* (citing *Schiriro v. Landrigan*, 550 U.S. 465, 473 (2007). AEDPA "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

The legal standard applied by the Wisconsin Court of Appeals was whether there was abuse of the broad discretion reserved to trial courts regarding the necessary measures to preserve the dignity of the court proceedings and ensure the safety of the

participants.[5] *Deck*, 544 U.S. at 633. "This type of general standard triggers another consideration under AEDPA." *Lett*, 559 U.S. at 776. "When assessing whether a state court's application of federal law is unreasonable, 'the range of reasonable judgment can depend in part on the nature of the relevant rule' that the state court must apply." *Id.* (citation omitted). "'[T]he more general the rule' at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—'the more leeway [state] courts have in reaching outcomes in case-by-case determinations." *Id.* (citations omitted).

There are no legal rules more general than those calling for a court to exercise its discretion. Accordingly, the "range of reasonable applications" of *Deck* "is substantial. *Richter*, 562 U.S. at 105.

Indeed, even on direct review, a reviewing court is not free to reverse a discretionary decision simply because it disagrees with the lower court. *See, e.g.*, *United States v. W.T. Grant Co.*, 345 U.S. 629, 633–34 (1953). On direct review, reversal under the abuse of discretion standard is appropriate only when there is no basis in the record for the ruling or the judge failed to explain his or her reasoning for the decision. *See, e.g.*, *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Neese v. Southern Railway Co.*, 350 U.S. 77 (1955) (per curiam). Review of state courts' discretionary decisions under AEDPA, then, are subject to the

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[5] While Wisconsin several years ago adopted the term "*erroneous exercise of discretion*" to replace "*abuse of discretion*," the Wisconsin Supreme Court has explained that the change was merely one of terminology and not of substance. *City of Brookfield v Milwaukee Metropolitan Sewerage Dist.*, 171 Wis. 2d 400, 491 N.W.2d 484, 493 (1992).

extraordinarily high "doubly deferential" standard of review that is afforded to other flexible rules. *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam).

And here, even if one assumes arguendo that *Deck* does require some kind of explanation about why non-visible shackles are inadequate, the Wisconsin Court of Appeals' decision shows that it reasonably concluded that the trial court adequately explained on the record why it had escape and safety concerns about Wilber that made escalation to visible shackles necessary on the last day of trial.

The State court of appeals recognized that "visible, physical restraint" of a defendant must be justified by the individual circumstances of the defendant's case. (App. 83a.) It further recognized that the decision to visibly shackle a defendant is reviewed for an erroneous exercise of discretion, and a trial court properly exercises its discretion if its decision is "the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." (App. 84a (citing *Grinder*, 527 N.W.2d at 330)); *accord Deck*, 544 U.S. at 629–30.

The State court of appeals then looked to the record and concluded that "[t]here is no question that the trial court engaged in a 'rational mental process by which the facts of record and law relied upon are stated and considered together for the purpose of achieving a reasoned and rational determination" when it ordered the additional, visible restraints. (App. 85a.) This was so because "the trial court's order

for the use of a wheelchair, wrist chains and arm restraints was the last in a series of orders concerning security over the course of the seven-day trial. Less restrictive means of restraint were employed, but they were unsuccessful at controlling Wilber's behavior." (App. 76a.)

And for each successive measure, the State court of appeals found that the trial court adequately explained its rationale for imposing it. (App. 76a–85a.) Indeed, it found that "[t]he trial court took great pains to explain its concerns and each level of increased security that it imposed." (App. 85a.) The trial court "warned Wilber numerous times what would occur if there were continued threats to security and decorum," and despite those warnings, on the last day of trial Wilber again escalated his behavior and "engaged in a verbal and physical altercation with the sheriff's deputies" despite already being in a stun belt. (App. 85a.) "The trial court determined that in light of that altercation, the security measures in place were insufficient and additional restraints should be used." (App. 85a.)

Because the trial court gave ample rationale for its decision to use visible restraints for the last portion of the trial after all the non-visible methods of attempting to control Wilber had failed, and that rationale was supported by facts of record showing that Wilber had continued to escalate his combative behavior despite the restraints already in place, the State court of appeals held that the trial court appropriately exercised its discretion in ordering Wilber visibly shackled during closing arguments. (App. 85a.)

That was a reasonable application of *Deck*. This Court in *Deck* specifically underscored that it was not underestimating "the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations." *Deck*, 544 U.S. at 632. As the State court of appeals noted, the trial court believed the visible restraints were necessary during closing arguments for courtroom safety and decorum, because Wilber had continually escalated his behavior despite the non-visible restraints already in place.

Though another trial court might have handled Wilber's outbursts and violent behavior differently, it has been recognized for over a century that an appellate court reviewing a discretionary act of the trial court looks only to whether discretion was exercised properly by reasonably relating the law and the facts to its decision. *See Congress & Empire Spring Co. v. Edgar*, 99 U.S. 645, 658 (1878) (recognizing that an appellate court will not reverse a trial court's discretionary decision "unless the ruling is manifestly erroneous."). That is what the Wisconsin Court of Appeals did here. And that analysis is thus perfectly in line with what this Court required in *Deck*. *See Deck*, 544 U.S. at 634–35. The trial court was *not* required to attempt "to hide those restraints with something like a sweater folded in his lap" to avoid having its decision overturned on habeas review, as the Seventh Circuit held. (App. 59a.)

And even if the trial court was in error about the necessity of the shackles, "fairminded jurists could disagree" about the State court of appeals' determination that the circuit court properly

exercised its discretion in ordering them. *Richter*, 562 U.S. at 101. Though "the exercise of discretion is not the equivalent of unfettered decisionmaking," trial courts are given broad leeway to make discretionary decisions. *Hartung v. Hartung*, 102 Wis. 2d 58, 306 N.W.2d 16, 20 (1981). On review of those decisions, in both the federal and Wisconsin appellate courts, the "inquiry is whether discretion was exercised, not whether it could have been exercised differently." *State v. Prineas*, 2009 WI App 28, ¶ 34, 316 Wis. 2d 414, 766 N.W.2d 206 (citation omitted); *accord United State v. Ferrell*, 816 F.3d 433, 438 (7th Cir. 2015). On this record, it certainly cannot be said that *all* fairminded jurists would agree that the trial court did not make reasonable and adequately specific findings about the security, escape, and decorum threat that Wilber posed before ordering the visible restraints. And to be properly entitled to habeas relief under AEDPA, that was the showing Wilber had to make. *Richter*, 562 U.S. at 102.

The Seventh Circuit's decision to the contrary was a gross departure from AEDPA. Instead of searching for reasons to sustain the state court decision, the Seventh Circuit searched for reasons to invalidate it. (App. 51a–60a.) It ignored the Wisconsin Court of Appeals opinion almost entirely and said nothing about the abuse of discretion standard of review the Wisconsin Court of Appeals was required to apply. (App. 51a–60a.) Instead, the Seventh Circuit searched the trial record for a specific explanation from the trial court why the final shackles had to be visible—a requirement that, again, no other court in the country has imposed upon trial courts when making discretionary decisions to shackle a

disruptive defendant when other, non-visible options have already been exhausted—and granted habeas relief because it could think of other things the trial court could have attempted to hide the restraints. (App. 55a–60a.) The Seventh Circuit then simply declared that, because under its own precedent it requires an on-the-record statement about the inadequacy of visible shackles, the Wisconsin Court of Appeals' decision upholding Wilber's conviction was unreasonable. (App. 54a–56a.) That is contrary to every directive this Court has issued regarding review under AEDPA.

This Court has stated that such a "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). The test for unreasonableness under section 2254 is not "a test of [the Circuit Court panel's] confidence in the result it would reach under *de novo* review." *Kayer*, 141 S.Ct. 523 (citation omitted). Much like the Ninth Circuit's opinion that warranted summary reversal in *Kayer*, here, the Seventh Circuit "repeatedly reached conclusions" about whether the trial court sufficiently explained why the visible restraints were necessary "without ever framing the relevant question as whether a fairminded jurist could reach a different conclusion." *Id.* at 524; (App. 50a–60a.) Indeed, not once did the Seventh Circuit address that question.

Applying the proper standard of review, the Seventh Circuit's decision cannot stand and warrants this Court's intervention. The Wisconsin Court of Appeals decision that the trial court appropriately exercised its discretion in visibly shackling Wilber for the end of the trial is "not so obviously wrong as to be

'beyond any possibility for fairminded disagreement.'" *Kayer*, 141 S.Ct. at 526 (citation omitted). Reasonable jurists could agree with the Wisconsin Court of Appeals. And as "that is 'the only question that matters'" under AEDPA, the Seventh Circuit exceeded its authority in granting the writ. *Id.* (citation omitted).

II. The Seventh Circuit's decision warrants summary reversal.

This Court has not hesitated to reverse the Seventh Circuit in cases where it cast aside the dictates of AEDPA. *See, e.g.*, *Hardy v. Cross*, 565 U.S. 65, 70–72 (2011) (per curiam) (summarily reversing the Seventh Circuit's grant of habeas relief where it erroneously determined that an Illinois court's efforts to locate a witness were insufficient and unreasonably violated the Confrontation Clause); *Wilson v. Cocoran*, 562 U.S. 1, 4–6 (2010) (per curiam) (summarily reversing the Seventh Circuit's grant of habeas relief for alleged error of Indiana state law); *Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (per curiam) (summarily reversing the Seventh Circuit's grant of habeas relief where this Court had not clearly established that the Sixth Amendment precluded counsel for the defendant from appearing by phone).

It should do so here. This Court should summarily reverse the Seventh Circuit's decision in this case to reiterate to the court that the limitations imposed by AEDPA are not optional and that it is bound to deny the writ even if it disagrees with the state court, so long as the decision was debatable.

A. Summary reversal is necessary to promote respect for state courts' judgments.

This Court typically does not grant certiorari to correct erroneous applications of settled law. *Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring in the judgment). It has readily done so, however, when the federal courts have disregarded the limits of their authority to invalidate state convictions under AEDPA.[6] This is particularly true when, as here, the Circuit Court of Appeals "essentially evaluated the merits *de novo*, only tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable." *Kayer*, 141 S.Ct. at 523 (citation omitted).

There are compelling reasons for this departure. Federal habeas relief "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Richter*, 562 U.S. at 103 (citation omitted). It upsets state court convictions that have

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[6] *See, e.g., Dunn v. Reeves*, 141 S. Ct. 2405, 2410–12 (2021) (per curiam) (summarily reversing grant of federal habeas relief because state court determination that counsel performed adequately by not seeking an expert was reasonable); *Shinn v. Kayer*, 141 S. Ct. 517 (2020) (per curiam) (summarily reversing grant of habeas relief because state court's determination that counsel's performance was not prejudicial was reasonable); *Parker v. Matthews*, 132 S. Ct. 2148 (2012) (per curiam) (summarily reversing grant of federal habeas relief because court improperly relied on circuit law as clearly established); *Felkner v. Jackson*, 131 S. Ct. 1305, 1307–08 (2011) (per curiam) (summarily reversing grant of federal habeas relief because state's resolution of *Batson v. Kentucky*, 476 U.S. 79 (1986) claim was not unreasonable).

long become final, it disturbs the state and society's strong interests in punishing criminal offenders, and it undermines state efforts to honor constitutional rights. Accordingly, Congress intentionally made the standard for issuing the writ "difficult to meet," because "confidence in the writ and the law it vindicates [is] undermined[ ] if there is judicial disregard for the sound and established principles that inform its proper issuance." *Id.* at 91, 102.

Summary reversal is appropriate here. The Seventh Circuit's decision abridged these interests because it in no way comported with the strict limitations on federal habeas review. Allowing this published decision to stand undermines confidence in the writ and potentially paves the way for similar derogations in future habeas cases.

B. Summary reversal is necessary to avoid grave harm to the people of Wisconsin.

The need for summary reversal is particularly heightened in this case to avoid the grievous harms that the grant of the writ will impose on Wisconsin.

This Court has summarily reversed an award for habeas relief in part because after the amount of time passed, retrying the defendant would pose "the most daunting difficulties for the prosecution". *See Wetzel v. Lambert*, 565 U.S. 520, 525 (2012) (per curiam). Here, the State's case turned almost entirely on eyewitness testimony—some of whom recanted their statements to police on the stand, and many of whom can almost certainly not be found again. And apart from Wilber's own threatening and violent behavior

during trial, the trial court found that Wilber's family tried to scuttle the trial numerous ways while it was occurring, including by urging a friend of theirs to make up a third-party-perpetrator defense at the eleventh hour that, after an offer of proof, the trial court found "preposterous." (Dkt. 61-27:38–65; 61-28:3–91.) Retrying Wilber after so long, with witnesses who were recalcitrant even immediately after the fact, will be difficult, if not impossible. And that is assuming they can be found.

Moreover, Wisconsin faces a societal risk to public safety if the Seventh Circuit's decision is not reversed. At the time of his crime, Wilber was a violent menace who endangered those around him. David Diaz, an entirely innocent man, lost his life apparently because Wilber was upset about getting kicked out of a party. (Dkt. 61-11:2.) Wilber was tried and convicted by a jury of his peers of first-degree intentional homicide and received a life sentence with the possibility for supervised release only after 40 years of incarceration. In short, without this Court's intervention, a murderer that Wisconsin determined was too dangerous to ever rejoin society unsupervised is likely to walk free. That result would be acceptable if the Wisconsin courts had violated Wilber's constitutional rights beyond any possibility for fairminded disagreement, but they did not.

The State recognizes that summary reversal is a strong remedy and one that this Court does not grant lightly. However, it is warranted here. The Seventh Circuit's decision in this case "is a textbook example of what [AEDPA] proscribes: 'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of the state courts.'" *Parker v.*

Matthews, 567 U.S. 37, 38 (2012) (per curiam) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below summarily reversed.

Dated this 26th day of January 2022.

Respectfully submitted,

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