No. 21-1053

In The
Supreme Court of the United States

RANDALL HEPP, Warden,

Petitioner,

vs.

DANNY L. WILBER,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
Seventh Circuit

BRIEF IN OPPOSITION

ROBERT R. HENAK
Counsel of Record
ELLEN HENAK
HENAK LAW OFFICE, S.C.
5205 N. Ironwood Rd., #100
Milwaukee, Wisconsin 53217
(414) 283-9300
Henaklaw@sbcglobal.net

Attorneys for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

As discussed below, the lack of an Article III case or controversy due to mootness prevents this Court from reaching the merits.

On the merits, the issue presented is as follows:

Over defense objection, the state trial court ordered that Danny Wilber be restrained in a wheelchair during closing arguments and further required, without explanation, that those restraints remain visible to the jury. Although the state court of appeals held that the trial court was justified in ordering restraints, it failed to address or justify why the restraints had to be visible to the jury.

Under these circumstances, did the Seventh Circuit err in concluding that Wilber is entitled to federal habeas relief on the grounds that the state appellate court unreasonably applied clearly established Supreme Court authority in *Deck v. Missouri*, 544 U.S. 622, 624, 629, 634-35 (2005), to the effect that due process requires case-specific justification for requiring restraints to be visible to jury?

PARTIES IN COURT BELOW

Other than the present Petitioner and Respondent, the only other party in the court below was the State of Wisconsin (also represented by the Wisconsin Department of Justice) as real party in interest for the Respondent.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

Respondent, Danny Wilber, respectfully submits this brief in opposition to Petitioner Randall Hepp's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit unanimously affirmed a grant of federal habeas relief on the grounds that the Wisconsin Court of Appeals unreasonably applied clearly established Supreme Court authority and violated Wilber's rights to due process by affirming the trial court's requirement that he appear before the jury while visibly restrained to a wheelchair, without explanation or justification by either court for requiring the restraints to be visible.

Wilber respectfully asks that the Court dismiss the petition as moot. Rather than seek a stay of the Seventh Circuit's decision, the State of Wisconsin, as the real party in interest,[1] joined with Wilber in successfully moving the Wisconsin trial court to vacate the judgment on which Wilber's unconstitutional confinement had been based. Resp-Ap B:1. Accordingly, the district court's conditional writ requiring Wilber's release never took effect and reversing that writ thus would provide no effectual relief to Hepp or the State.

---

[1] *Knewel v. Egan*, 268 U.S. 442, 448 (1925) (On habeas petition challenging custody pursuant to state court judgment, the state is the real party in interest).

Barring dismissal of the petition, Wilber respectfully asks that the Court deny Hepp's petition because the case does not warrant this Court's review.

SUPPLEMENTAL STATEMENT OF THE CASE

Warden Hepp seeks review of the Seventh Circuit's decision unanimously affirming the district court's decision conditionally granting Danny Wilber habeas relief under 28 U.S.C. §2254. Hepp is displeased with the Seventh Circuit's holding that the Wisconsin trial court's unexplained and unjustified requirement that Wilber appear before the jury visibly restrained in a wheelchair denied Wilber due process under clearly established Supreme Court authority in *Deck v. Missouri*, 544 U.S. 622 (2005), and that the state appellate court's contrary conclusion was objectively unreasonable under AEDPA.[2] Instead, Hepp asks this Court to summarily reverse the Seventh Circuit without full briefing or consideration of the actual record. Hepp's Petition at 30-34.

[2] The Seventh Circuit also affirmed denial of Wilber's argument that the undisputed physical evidence showing that he could not have committed the offense rendered the evidence insufficient for conviction, Pet-Ap 35a-39a, and, like the district court, the Seventh Circuit neither addressed nor decided Wilber's alternative claim of ineffective assistance of counsel, Pet-Ap 27a n.4.

Procedural History and General Background

During an early morning after-hours party at his home, someone shot David Diaz in the back of the head as he was standing in the open doorway between his living room and kitchen. He died immediately and collapsed face-first to the north into the kitchen, his arms under him. (R61-20:49-50; R61-22:40, 66; R61-23:44-50; R61-24:279-80; R69-28; R69-30; R69-40; R69-41).[3] Bullet fragments were found under the stove, a few feet further north and in front of where Diaz's body fell (R61-20:24-26, 59-60).

Several people were in the kitchen at the time. All witnesses agreed that Wilber was in the kitchen north and in front of where Diaz fell when he was shot (R61-22:26; R61-23:102, 106-07, 116; R61-24:176). None claimed to have seen Wilber behind Diaz (R61-21:44, 57; R61-24:176; 253).

They also agreed that Wilber was drunk, obnoxious, and starting fist-fights (*e.g.*, R61-20:90-91; R61-23:122-23).

However, contrary to Hepp's assertions, Hepp's Petition at 5-6, none of the witnesses testified that they saw who fired the shot that killed Diaz.[4] All of the

---

[3] Like Hepp, Hepp's Petition at 6, n.1, Wilber provides record cites in the form (R__:__) to documents in the district court record not contained in either appendix.

[4] Contrary to Hepp's assertions, Hepp's Petition at 5-6, neither Richard Torres nor Jeranek Diaz " 'identified Wilber as the shooter.' " Rather, Torres testified that he did not see who shot Diaz, having blacked out just before the gunshot (R61-24:249,

eye-witnesses at trial swore either that Wilber did not shoot Diaz (R61-21:35, 141; R61-22:8, 11-12, 46) or that they did not see who shot Diaz (R61-22:31, 41; R61-23:53, 60; R61-24:115-16, 175-76; R61-24:249, 255-56; R61-25:28-29).

At best for the state, a few testified that they heard a shot from the area where Wilber and Diaz were standing and assumed that Wilber had fired it (*e.g.*, R61-24:256-58, 281-82). However, because the state's medical expert testified that the shot was fired from 2-3 inches away (R61-22:57), it was fired near Wilber and Diaz regardless who fired it.

Diaz was shot with a .38 or .357 caliber revolver (R61-20:56; R61-22:84-88, 98).

The state argued, based on a retired detective's claim that even though Wilber was in front of Diaz in the kitchen just prior to Diaz's death, a single witness had suggested that Diaz might have been turning to leave the kitchen when he was shot (R61-28:137-38, 153-54; *see* R61-24:286, 303, 305-08). To explain Diaz's body facing into the kitchen despite supposedly being shot exiting the kitchen, the state speculated that the shot somehow spun Diaz around so he fell face-first into the kitchen toward Wilber (R61-28:183). However, no one saw that and no expert testified that it was even possible.

254; R61-25:28-29), and Jeranek swore that he neither saw Wilber with a gun nor told anyone that he had (R61-24:114-16).

The state did not explain either the bullet fragments found even further into the kitchen under the stove or the absence of blood and other evidence one would expect to the south of Diaz's body if the state's theory were accurate. For instance, police found no evidence of the ricochet necessary for a southbound bullet to end up north of the alleged shooter (R61-20:30-31). Indeed, Diaz was standing in an open doorway when shot, so nothing existed that a bullet could ricochet off.

Wilber's frustration with being charged and tried for a crime the physical evidence showed he could not have committed occasionally expressed itself inappropriately during the trial, albeit only twice in the courtroom and never before the jury. On the first day of trial, the court viewed Wilber's body language reacting to certain rulings and comments as disrespectful. *See* Pet-Ap 11a-12a. And on the third day of the eight-day trial, Wilber verbally objected to what he viewed as bias by the judge when ruling on motions and defense objections. *See* Pet-Ap 13a-15a.

As a result of these incidents, Wilber's reported interactions with bailiffs outside the courtroom, and actions by others that the court deemed concerning, the trial court ordered extra security, had Wilber's ankles shackled to the floor, and required a stun belt under his shirt. *See* Pet-Ap 12a, 17a. Neither restraint was visible to the jury.

Although the non-visible restraints had proved adequate in the courtroom, and although Wilber had

never acted out before the jury, the court chose to impose even more restrictive *and visible* restraints for purposes of closing argument. As described by the state court of appeals:

> During closing argument, Wilber was restrained in a way that was visible to the jury. Specifically, he was seated in a wheelchair and his wrists were chained together. His arm was strapped to the wheelchair.

Pet-Ap 75a. *See* Resp-Ap A:1 (photo of Wilber in restraints).[5]

Although trial counsel objected to the visible restraints as unnecessary and unconstitutional, the trial court overruled those objections on the grounds that *added* restraints were appropriate given reports of a struggle between Wilber and the bailiffs outside the courtroom. Pet-Ap 119a-29a. The court did not explain why making the restraints visible was necessary. *See id*. Indeed, when the prosecutor suggested obtaining "some kind of a sport coat or blazer that Mr. Wilber could wear" to cover the restraints, the court responded with a dismissive: "That's not necessary." Pet-Ap 128a.[6]

After the closing arguments proceeded without incident, counsel renewed his objection and moved for a

---

[5] Hepp chose not to include this photo, appended to the Seventh Circuit's decision, Pet-Ap 20a, in the appendix to his petition. *See* Pet-Ap 1a-65a.

[6] See the Seventh Circuit's decision, Pet-Ap 11a-24a, for a more detailed description of the circumstances leading to the visible restraints.

mistrial. The court denied that request, still focusing entirely on the perceived justification for *additional* restraints, without explaining why those restraints had to be *visible* to the jury. Pet-Ap 129a-37a.

After seeing Wilber restrained in a wheelchair during closing argument, the jury convicted him of one count of first degree intentional homicide by use of a dangerous weapon for Diaz's death (R61-29:9). The circuit court sentenced Wilber to life with eligibility for release to extended supervision after 40 years (R61-1).

Wilber filed post-conviction motions and a direct appeal, arguing that the circuit court erred, *inter alia*, by visibly shackling him during closing arguments (R69-4:8-10, 15-18). The circuit court denied the motion, concluding that Wilber's conduct justified restraints, again without explaining why *visible* restraints were necessary (R69-3:19-21).

On appeal, the Wisconsin Court of Appeals affirmed, holding that the trial court had not erroneously exercised its discretion by requiring additional restraints. It likewise neither explained why *visible* restraints were necessary nor acknowledge the requirement of such an explanation. Pet-Ap 75a-86a.[7]

The Wisconsin Supreme Court denied review (D61-7).

Wilber then filed his *pro se* habeas petition pursuant to 28 U.S.C. §2254 (R1), and the district court

[7] The court did not address or decide whether requiring the restraints was prejudicial. *See* Pet-Ap 75a-86a.

stayed it while Wilber exhausted his state court remedies (R4).

Wilber then sought relief in state court under Wis. Stat. §974.06[8] (R69-5; R69-6; R69-10). Among other claims, he argued that the evidence was insufficient to convict in light of the undisputed physical evidence showing that he could not have fired the shot that killed Diaz (R69-10:8-10). He also challenged as ineffective trial counsel's failures to consult with experts to rebut the state's theory,[9] and to investigate evidence that Roberto Gonzalez, who was at the party, saw someone else (later identified as Ricky Muniz) shoot Diaz from the living room just outside the kitchen[10] (R69-10:15-16; R69-15; R69-16). Newly discovered evidence from Jonathan Martin corroborated the latter argument. Martin said that, on the night Diaz was shot, Ricky Muniz came to Martin's home seeking a change of clothing and asking that Martin get rid of Muniz's revolver. Muniz explained that "'some shit went down'" at a party "with a guy that he had an

---

[8] Section 974.06 provides a procedure, roughly modeled on 28 U.S.C. §2255, for challenging convictions or sentences on constitutional grounds in the Wisconsin circuit court after direct appeal.

[9] Wilber's motion included affidavits from a forensic scientist and a forensic pathologist attesting to the fact that the state's theory that Diaz was shot while turning to leave the kitchen was not physically possible given the physical evidence. (R69-17 to R69-20).

[10] Before trial, Wilber advised trial counsel that Gonzalez was present at the party. Although he did not know what Gonzalez may have witnessed, he asked counsel to find out. Counsel did not do so. (R69-10:15; *see* R69-22).

altercation with a few weeks earlier." Muniz later told Martin that he had shot "Gordo," the Mexican guy who hosted the party (i.e., Diaz) in the head. (R69-10:18-20; R69-13; R69-14).

The circuit court denied Wilber's claims without a hearing (R69-2:3-21). The court opined that Martin's evidence was inadmissible hearsay[11] and that Gonzalez's eye-witness account would not create a reasonable probability of a different result given a conflicting account previously reported by Gonzalez's girlfriend[12] and the disputed evidence that Jeranek had told an officer that he saw Wilber pointing a gun at Diaz before he was shot. (R69-2:12-19).

The court deemed Wilber's sufficiency argument inappropriate for a §974.06 motion (R69-2:12 n.5).

After the Wisconsin Court of Appeals affirmed denial of the motion (R61-11), and the Wisconsin Supreme Court denied review (R61-13), Wilber returned to federal court.

The district court entered its Order and Judgment on August 4, 2020. Pet-Ap 172a-208a.

---

[11] The court did not consider exceptions to the hearsay rule such as admissions against interest or the fact that asking someone for clean clothing or to dispose of a gun are not assertions of fact and thus not hearsay.

[12] After the evidence closed at trial, Monique West (Wilber's sister and Gonzalez's girlfriend) told trial counsel that Gonzalez had told her that he was at the party and saw "Isaiah" shoot Diaz (R61-28:64-68). Another sister also testified in an offer of proof to what Monique West supposedly told her (R61-28:11-56, 61-63).

The district court reviewed all of the bases asserted for requiring the restraints, Pet-Ap at 175a-89a, 199a-200a, but concluded that the state courts unreasonably failed to comply with clearly established federal law under *Deck* requiring an explanation and justification for making the restraints visible. Because that error was not harmless, the court conditionally granted the writ, requiring Wilber's release if the state did not initiate proceedings to retry him within 90 days. Pet-Ap 199a-208a.

However, while deeming reasonable Wilber's argument that the undisputed physical evidence demonstrated that he could not have been the shooter, that court denied his claim that the evidence was insufficient for conviction. Pet-Ap 193a-96a.

Having granted relief on other grounds, the court did not consider or decide Wilber's claim that trial counsel was ineffective for failing to investigate what Gonzalez knew or saw and by failing to consult with experts on the feasibility of the state's theory that Wilber could have committed the homicide given the undisputed physical evidence. Pet-Ap 173a; *see id.* 33a.

On October 9, 2020, the district court granted Hepp's motion for a stay pending appeal to the court of appeals with 25 days remaining of the 90-day period provided in the original order conditionally granting habeas relief (R100).

On October 29, 2021, the Seventh Circuit affirmed the district court's grant of habeas relief. Having identified the restrictive requirements of the Antiterrorism

and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. §2254(d), as controlling, Pet-Ap 33a-34a, the court based its decision on the state courts' unexplained and unjustified requirement that the restraints be visible during closing arguments constituting an unreasonable application of the requirements of due process clearly established by this Court in *Deck*. Pet-Ap 34a-35a, 39a-65a.

That court also affirmed the denial of Wilber's cross-appeal challenging the sufficiency of the evidence given the undisputed physical evidence. Pet-Ap 35a-39a. Having granted relief on due process grounds, the court did not address or decide Wilber's ineffectiveness claims. Pet-Ap 27a fn.4.

On December 3, 2021, the district court lifted the former stay pending appeal, leaving the state 25 days in which to initiate proceedings to retry Wilber before the district court's Order would require his release (R107). Although Hepp opposed lifting the stay, he made no further efforts to prevent the grant of habeas relief from taking effect. He did not seek a stay of the Seventh Circuit's decision from that court, *see* Fed. R. App. P. 41(d), or from this one, *see* Sup. Ct. R. 23.

On December 20, 2021, prior to the district court's conditional writ taking effect, the state circuit court granted the parties' joint motion to vacate the judgment of conviction in Wilber's underlying criminal case. Resp-Ap B:1. Without objection from the state, that court then ordered his release on $10,000 cash bail. On December 21, 2021, Wilber posted bail and

was released pending the state's decision whether to retry him.

REASONS FOR DENYING THE WRIT

Hepp's request for summary reversal, or even for review by this Court, is baseless.

First, the issue Hepp proffers is moot. He chose not to request a stay and the state court vacated the relevant judgment of conviction before the district court's conditional order of release took effect. Accordingly, there is no longer any state court judgment holding Wilber. Reversing the district court's unexecuted conditional writ thus can provide no effectual relief and there is no ongoing case or controversy in this Court. Section I, *infra*.

Second, the Seventh Circuit committed no error. This Court clearly established the substantive standard applied by the Seventh Circuit: "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." *Deck*, 544 U.S. at 629; *see id.* at 624, 635-36. *See* Pet.-Ap. 39a-49a.

The issue under *Deck* is not, as Hepp claims, whether restraints in general are justified, but whether "visible restraints" are. The state courts

provided no such justification for requiring Wilber to appear before the jury visibly restrained.

The Seventh Circuit likewise acknowledged and properly applied the restrictive review standards under AEDPA, basing its decision that the state appellate court unreasonably applied clearly established federal law squarely on *this Court's* holdings in *Deck* and other cases, and reasonably concluding that the state court's failure to apply the standard dictated by *Deck* was objectively unreasonable. Pet-Ap 39a-60a. The fact that Hepp does not like the result mandated by application of those standards on the facts here, or that he would prefer the Seventh Circuit had used certain magic words in reaching its conclusion, does not support summary reversal or even certiorari review. Section II, *infra*.

Third, Hepp's petition is riddled with inaccurate or misleading assertions.[13] It ignores his choice not to seek a stay of the Seventh Circuit's decision and the state's role in preventing the conditional writ taking effect by joining Wilber in convincing the state trial court to vacate the judgment of conviction. Hepp even fails to provide the Seventh Circuit's entire opinion, omitting from his appendix the photograph of Wilber in restraints appended to that opinion. *See* Pet-Ap

[13] Hepp's Statement of the Case, for instance, both misstates the record, *e.g.*, Footnote 4, *supra*, and ignores the undisputed physical evidence that renders its theory of Wilber's guilt virtually, if not totally, impossible.

1a-64a. Wilber provides the omitted portion of the decision in his appendix. Resp-Ap A:1.

Perhaps most significant, Hepp string cites cases supposedly supporting his claim that the Seventh Circuit's application of *Deck* conflicts with decisions from virtually every other circuit and state court. Petition at 19-21. And yet, all but one rogue decision among those he cites are fully consistent with the Seventh Circuit's application of this Court's clear mandate in *Deck*. It is the Wisconsin state court's decision upholding Wilber's conviction that conflicts with controlling authority, not the Seventh Circuit's decision. Section III, *infra*.

Finally, there is no basis for summary reversal. This is not an error correcting court. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); *Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring in the judgment).

More important, the Seventh Circuit committed no error. Section II, *infra*. Hepp's allegations, moreover, cannot be trusted to justify such extraordinary relief without review of the entire record. And, given that Wilber already has been released (with the state's consent) two months without incident, there is no basis to believe that he presents *any* danger to society. In fact, since none of the witnesses at trial claimed to have seen Wilber shoot the victim, the undisputed physical evidence contradicts the state's theory of guilt, and new evidence discovered after trial establishes that

another man committed the crime, there is every reason to doubt that Wilber is guilty at all. Section IV, *infra*.

I. This Court Lacks Jurisdiction To Hear This Case Because It Is Moot

This case no longer presents an Article III case or controversy or a basis for jurisdiction under 28 U.S.C. §2254 because Hepp chose not to seek a stay of the Seventh Circuit's decision and the state trial court vacated the underlying judgment of conviction that was the subject of Wilber's habeas proceeding. Resp-Ap B:1. Accordingly, the challenged judgment ceased to exist, the district court's conditional writ never took effect, and any decision by this Court became purely advisory. *Cf. Jensen v. Pollard*, 924 F.3d 451, 454-55 (7th Cir. 2019) (Where state court vacated challenged judgment, conditional habeas grant was satisfied and district court lost jurisdiction to oversee subsequent actions in state court), *cert. denied*, 141 S.Ct. 165 (2020).

A federal court may entertain "a writ of habeas corpus in behalf of a person *in custody pursuant to the judgment of a State court*. . . ." 28 U.S.C. §2254(a) (emphasis added). Once the state court acts to vacate the judgment of conviction on which the challenged unlawful custody is based, no further basis for federal jurisdiction exists. *Brown v. Vanihel*, 7 F.4th 666, 670 (7th Cir. 2021) ("The state court's vacatur of Brown's conviction ended this court's jurisdiction over the State's appeal because the appeal attacks an order directed to

a judgment that no longer exists."); *Eddleman v. McKee*, 586 F.3d 409, 412-14 (6th Cir. 2009) (district court acted without jurisdiction when it issued a new order barring retrial after the original conviction was vacated; "once the unconstitutional judgment is gone, so too is federal jurisdiction under § 2254").

The state court's order vacating Wilber's judgment of conviction also renders this case moot under Article III.

"Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case" regardless of whether there "may have been a live case or controversy when the case was decided [in the lower courts]." *Burke v. Barnes*, 479 U.S. 361, 363 (1987). "It is therefore familiar learning that no justiciable 'controversy' exists when parties . . . ask for an advisory opinion, . . . , or when the question sought to be adjudicated has been mooted by subsequent developments." *Massachusetts v. E.P.A.*, 549 U.S. 497, 516 (2007) (citations omitted). "[A]n appeal should therefore be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant." *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (*per curiam*) (citation omitted).

Because the state court, not the action of the district court, vacated Wilber's conviction, nothing this Court can do will provide relief for Hepp. Had Hepp chosen to request a stay from either the Seventh Circuit, Fed. R. App. P. 41(d), or, if unsuccessful, from this

Court, Sup. Ct. R. 23, the situation might be different.[14] In that situation, reversing the lower courts would prevent Wilber's release. But, instead, at the parties' joint request, the state court vacated the conviction. Resp-Ap B:1.

Moreover, relief for Hepp would require reinstating the state conviction, but federal courts cannot do that. *See Brown*, 7 F.4th at 670. This Court has explained that

> [h]abeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.

Fay v. Noia, 372 U.S. 391, 430-31 (1963) (citation omitted), *abrogated on other grounds by Coleman v. Thompson*, 501 U.S. 722 (1991). *See also In re Medley*, 134 U.S. 160, 173 (1890) ("But under the writ of habeas corpus we cannot do anything else than discharge the prisoner from the wrongful confinement in the penitentiary. . . .") (emphasis omitted).

"At best for [Hepp,] this court could issue an advisory opinion saying that the district court had

---

[14] *Brown*, 7 F.4th at 671; *see Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, Ch.J., in chambers) (staying order granting writ of habeas corpus where state's certiorari petition to review the grant could not be acted upon until after the scheduled date of retrial: "When . . . the normal course of appellate review might otherwise cause the case to become moot, . . . issuance of a stay is warranted" (citations and quotations omitted)).

erred in issuing the writ with which the state courts had already complied." *Brown*, 7 F.4th at 671 (footnote omitted). Here, as in *Brown*, therefore, there is no "meaningful relief" available and no jurisdiction. *Id.*

The situation also might have been different if the state had allowed Wilber to be released under the authority of the writ upon the state's failure to vacate the conviction. Reversing the conditional writ then could allow the state to again act upon its original judgment.

In *Eagles v. U.S. ex rel. Samuels*, 329 U.S. 304 (1946), for instance, the reversal of a habeas order freeing a draftee from military custody was not moot following his release under the order because the reversal alone "makes lawful a resumption of the custody." *Id.* at 308 (citations omitted). Given the intervening state court order vacating Wilber's judgment, however, reversal of the conditional writ that never took effect could have no effect on the state court's order or Wilber's custody.

It also would have been different if the district court, rather than the state court, had vacated the state judgment of conviction as in *Calderon v. Moore*, *supra*. When the district court vacates the conviction, federal appellate courts can provide "effectual relief" by reversing that decision. 518 U.S. at 151.

Here, however, the state court's order vacating the judgment of conviction freed Wilber from his unconstitutional confinement, not the district court's order conditionally granting the writ. Because the state court's order intervened, the district court's order never took

effect. Reversal of the federal order thus could no longer provide "effectual relief."

Because reversing the lower courts' decisions "cannot grant 'any effectual relief whatever'" in favor of Hepp, and at best would provide an advisory opinion regarding the validity of a conditional district court order that never took effect and a state court judgment that no longer exists, the issue Hepp seeks to raise here is moot.

II. The Seventh Circuit Committed No Error in Holding That the State Trial Court's Unexplained and Unjustified Requirement That Wilber Appear Before the Jury for Closing Arguments While Visibly Restrained in a Wheelchair Justified Federal Habeas Relief

In affirming the grant of federal habeas relief to Wilber, the Seventh Circuit strictly and accurately followed both the requirements of AEDPA, 28 U.S.C. §2254(d), generally limiting federal habeas relief to cases where state court decisions are contrary to, or involve an unreasonable application of controlling authority from this Court, and the clearly established legal standards as set forth in this Court's decision in *Deck, supra*, for assessing whether the use of visible restraints at trial violate due process. *See* Pet-Ap 33a-60a. Hepp's assertions to the contrary distort both the

controlling law and the Seventh Circuit's decision. *See* Hepp's Petition at 14-32.[15]

Regardless of whether Hepp is correct that the trial court was justified in imposing *additional* restraints on Wilber during closing arguments, that is not the issue. What Wilber has argued, and what the lower federal courts correctly held, is that the trial court violated clearly established requirements of due process by mandating that those restraints be visible to the jury while neither explaining why they had to be visible nor having justification for making them visible. *See*, *e.g.*, *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"); *id.* at 634-35 (trial judge abused discretion and denied due process by failing to "explain why, if shackles were necessary, he chose not to provide for shackles that the jury could not see").

The state court of appeals likewise unreasonably applied clearly established law as recognized by this Court by focusing entirely on the perceived justification for *additional* restraints and never addressing, acknowledging, or applying the due process mandate of

---

[15] Hepp does not here dispute the Seventh Circuit's conclusion that use of the visible restraints prejudiced Wilber's defense under the "substantial or injurious effect" standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See* Pet-Ap 60a-64a.

an explanation and justification for requiring them to be visible to the jury.

A. Background

As described by the state court of appeals:

> During closing argument, Wilber was restrained in a way that was visible to the jury. Specifically, he was seated in a wheelchair and his wrists were chained together. His arm was strapped to the wheelchair.

Pet-Ap 75a. *See* Resp-Ap A:1 (photo appended to Seventh Circuit decision showing Wilber in restraints, Pet-Ap 20a).

The trial court overruled Wilber's objections to the *visible* restraints, holding that *added* restraints were appropriate. Pet-Ap 119a-28a. The court did not suggest why making the restraints visible was necessary. *See id*. Indeed, when the prosecutor suggested obtaining "some kind of a sport coat or blazer that Mr. Wilber could wear" to cover the restraints, the court responded with a dismissive: "That's not necessary." Pet-Ap 128a.

After the closing arguments proceeded without incident, counsel renewed his objection and moved for a mistrial. Again focusing entirely on the perceived justification for *additional* restraints, while saying nothing to justify requiring that those restraints be *visible* to the jury, the court denied that request. Pet-Ap 129a-37a.

While noting that "[a]t issue is the visible, physical restraint of Wilber during closing arguments," Pet-Ap 83a, the state appellate court only addressed and decided that "the trial court did not erroneously exercise its discretion when it ordered the *additional* restraints." Pet-Ap 85a (emphasis added). The state court never addressed or provided any rationale regarding whether the trial court's insistence that those restraints unnecessarily be visible to the jury denied Wilber due process. *See* Pet-Ap 75a-86a.

Instead, that court, like Hepp here, appeared to believe that the conclusion that "additional restraints" were justified was sufficient alone to justify visible restraints:

> We conclude that the trial court did not erroneously exercise its discretion when it ordered the additional restraints for closing arguments. The record provides ample support for the trial court's conclusion that restraints were necessary to maintain order and ensure the safety of the participants. [Citation omitted] Therefore, we reject Wilber's claim that the use of visible restraints denied him a fair trial.

Pet-Ap 86a.

B. This Court's Clearly Established Legal Standards Dictate That the Unexplained and Unjustified Requirement That Restraints Be Visible to the Jury Violates Due Process

This Court has clearly established that "the Constitution forbids the use of visible shackles [at trial] unless that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." *Deck*, 544 U.S. at 624; *see id.* at 629, 633. *See also id.* at 635 (describing the due process violation as "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury").

This is exactly the "clearly established" rule that the Seventh Circuit applied here, i.e., "that visible restraints at either phase of a criminal trial must be justified by case-specific circumstances." Pet-Ap 48a.

Hepp's entire argument is based on the mistaken assumption that this Court's requirement that trial courts justify making shackles or restraints visible is mere *dicta*. Instead, according to Hepp, due process requires only that a court mention concerns that might justify restraints in general, regardless of whether those concerns justify making the restraints visible to the jury. Hepp's Petition at 3, 4, 15, 18, 19, 21.

Hepp's position clearly is *not* the law, nor does it make any sense.

This Court has clearly established that trial courts must justify using "visible restraints." Indeed, the Court has emphasized the visible nature of the restraints is what violates due process. It has long recognized that shackling a defendant *within the view of a jury* is an "inherently prejudicial practice." *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986). *Visible shackling* of a defendant during trial "undermines the presumption of innocence and the related fairness of the factfinding process." *Deck*, 544 U.S. at 630. "It suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.' " *Id.* (citations omitted).

Because the presumption of innocence is "a basic component of a fair trial under our system of criminal justice," *Estelle v. Williams*, 425 U.S. 501, 503 (1976), the Constitution forbids the use of *visible shackles* during a jury trial unless visibility of the restraints is "justified by an essential state interest"—such as the interest in courtroom security—"specific to the defendant on trial." *Deck*, 544 U.S. at 624 (citations omitted); *see id.* at 626-29.

A criminal defendant's right to freedom from visible physical restraints may be "overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum." *Deck*, 544 U.S. at 628. However, the determination to "place defendants in shackles or other physical restraints visible to the jury" "must be case specific; that is to say, it should reflect particular concerns, say,

special security needs or escape risks, related to the defendant on trial." *Id.* at 633.

The Court thus has held that reasons that may justify restraints do not necessarily justify making those restraints visible to the jury. Rather, failure to justify both imposition of restraints *and* making them visible to the jury violates due process. *Deck*, 544 U.S. at 634-35 (trial judge abused discretion and denied due process by failing to "explain why, if shackles were necessary, he chose not to provide for shackles that the jury could not see").

Suggesting, as Hepp does, that a trial court may require restraints to be visible while providing no justification for doing so is irrational. To the contrary, *Deck* clearly requires a case-specific justification for "visible restraints." *E.g.*, 544 U.S. at 633.

C. The Seventh Circuit Properly Applied AEDPA on the Facts Here

Hepp's misstatement of the controlling legal standards under *Deck* and of the Seventh Circuit's actual decision underlie his complaint that the Seventh Circuit improperly applied AEDPA. Hepp's Petition at 15-30.

First, the Seventh Circuit did not ignore or misapply the requirements of AEDPA. Its entire analysis centers on the requirement that,

> [a]s relevant here, the Antiterrorism and Effective Death Penalty Act authorizes relief

> under section 2254 only when the state court's decision on the merits of a claim is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." §2254(d)(1).

Pet-Ap 33.

In applying the "unreasonable application" prong of §2254(d)(1), that court likewise acknowledged and deferred to this Court's recognition that "[a] state court decision amounts to an unreasonable application of Supreme Court precedent when it applies that precedent in a manner that is 'objectively unreasonable, not merely wrong.'" Pet-Ap 33a, citing *Woods v. Donald*, 575 U.S. 312, 316 (2015) (*per curiam*); *Renico v. Lett*, 559 U.S. 766, 773 (2010). That court likewise acknowledged that "[a] state court's application of Supreme Court precedent is not objectively unreasonable simply because we might disagree with that application, but rather only when no reasonable jurist could agree with it." Pet-Ap 34a, *citing, e.g.*, *Donald*, 575 U.S. at 316; *Lett*, 559 U.S. at 773.

As required by AEDPA, the Seventh Circuit first identified the applicable "clearly established Federal law, as determined by [this] Court." Pet-Ap 39a-49a. As demonstrated above and in that court's discussion, this Court has clearly established "that visible restraints at either phase of a criminal trial must be justified by case-specific circumstances." Pet-Ap 48a.

Hepp, however, misrepresents what the Seventh Circuit actually did, repeatedly asserting that it improperly relied on its own decisions as establishing the applicable legal standard. Hepp's Petition at 4, 15, 17. To the contrary, the Seventh Circuit's analysis relied exclusively on standards clearly established by *this* Court, not the lower courts. Only after identifying and explaining this Court's mandated applicable legal standards, Pet-Ap 39a-49a, did the court below refer to other circuit court decisions as consistent with those standards. Pet-Ap 54a-55a.

Consistent with AEDPA, the Seventh Circuit then considered the "contrary to" prong of §2254(d)(1), concluding that "[t]he framework that the Wisconsin Court of Appeals applied" was not contrary to *Deck*. Pet-Ap 50a. While this conclusion is questionable,[16] correcting the court's error does not help Hepp.

Proceeding to the "unreasonable application" prong, the Seventh Circuit recognized that the state court's total failure to "articulate[] why, to the extent the

---

[16] If the court below committed any error, it was in failing to recognize that the state court's decision was not merely objectively unreasonable, but contrary to *Deck* as well. The Seventh Circuit acknowledged, for instance, that "[t]he Wisconsin Court of Appeals decision cannot be reconciled with *Deck*," Pet-Ap 50a, and "the instant case is on all fours with *Deck* where nothing the trial judge had said regarding the shackling decision explained why it was that *visible* restraints were a necessity." Pet-Ap 53a. This Court has held that a state court decision is contrary to clearly established Federal law where, as here, "the state court applies a rule that contradicts the governing law set forth in our cases." *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

additional restraints were justified, they must be restraints that were visible to the jury" "cannot be reconciled with *Deck*." Pet-Ap 50a. After stating this conclusion, the court proceeded to explain at length how the state court's analysis, focusing entirely on the perceived justification for *additional* restraints while offering no explanation for making them visible, "represents an objectively unreasonable application of the rule set forth in *Deck*." Pet-Ap 50a-55a, 58a-60a.

The fact that the Seventh Circuit correctly understood its role and carefully applied AEDPA's restrictive requirements is further reflected in its contrasting results on Wilber's sufficiency and due process claims.

While acknowledging that the physical evidence created problems for the state, the court held that it could not find that the state appellate court's conclusory assertion that the evidence was "sufficient" was either contrary to or an unreasonable application of controlling authority from this Court. Pet-Ap 35a-39a.

Wilber's due process claim was another matter. As noted, the court first identified the "clearly established" legal standards required by this Court in *Deck* to the effect that due process requires a case-specific justification for making any restraints on the defendant visible to the jury. Pet-Ap 39a-49a.

The Seventh Circuit then applied that standard to the state court decisions consistent with AEDPA's requirement that the federal court assess whether the state court decision on the merits is "contrary to or an unreasonable application of clearly established

Federal law, as established by the Supreme Court." 28 U.S.C. §2254(d)(1). Pet-Ap 50a-60a. The court concluded that, although it did not believe that the state appellate court decision was "contrary to" the due process requirements in *Deck*, Pet-Ap 50a, the state court unreasonably applied *Deck's* mandate. That is, although the state court explained why "additional restraints" might be justified, it totally failed to explain or justify why such restraints had to be visible to the jury. Pet-Ap 50a-60a.

> [T]he key point here is that neither the trial judge nor the state appellate court ever explained why they believed it necessary or unavoidable that such additional restraints be visible to the jury.

Pet-Ap 58a.

Because the state court of appeals decision unreasonably failed to apply the clearly established standards for using restraints visible to the jury, and because that failure was not remotely harmless, Pet-Ap 60a-64a, the Seventh Circuit affirmed the district court's conditional grant of habeas relief. Pet-Ap 65a.

Further demonstrating its strict adherence to AEDPA and deference to reasonable, if questionable, state court decisions, the Seventh Circuit gave the state courts here the benefit of the doubt, despite contrary evidence in the record, that they did not excessively defer to the bailiffs or make the restraints visible as punishment for perceived disrespect. Pet-Ap 56a-58a.

Because the Seventh Circuit strictly and accurately applied the controlling standards in both AEDPA and *Deck*, it did not err in affirming the grant of habeas relief on the unique facts of this case.

III. The Seventh Circuit's Application of This Court's Clearly Established Legal Standards for Assessing the Visible Restraints in Criminal Trials Is Not Inconsistent with Other Courts

Denial of Hepp's petition also is appropriate because his petition falsely asserts that the Seventh Circuit's identification and application of the due process requirement under *Deck* somehow conflicts with decisions from nine other federal circuit courts and some 40 other state courts. Hepp's Petition at 18-21.

In fact, only one rogue decision from Arkansas joins the Wisconsin Court of Appeals in overlooking *Deck's* clearly established due process prerequisites for requiring visible restraints. In *Holt v. State*, 384 S.W.3d 498, 505-07 (Ark. 2011), the court upheld the trial court's decision to require visible ankle shackles despite the absence of any explanation for making them visible and despite the prosecutor's suggestion to use a shocker belt under his clothing instead. Like the Wisconsin Court of Appeals decision at issue here, the *Holt* Court overlooked *Deck's* requirement that making the restraints visible requires its own justification.

None of the other authorities Hepp cites as conflicting with the Seventh Circuit's decision below (and

thus, necessarily, with *Deck*), does so. Among the federal decisions, most hold that *Deck's* due process standards did not apply because the restraints involved were not visible. *United States v. Lee*, 660 Fed. Appx. 8, 17-18 (2d Cir. 2016); *Wilkins v. Stephens*, 560 Fed. Appx. 299, 314 (5th Cir. 2014); *Earhart v. Konteh*, 589 F.3d 337, 347-50 (6th Cir. 2009); *Williams v. Norris*, 612 F.3d 941, 957-59 (8th Cir. 2010); *United States v. Morales*, 758 F.3d 1232, 1237-38 (10th Cir. 2014); *United States v. Moore*, 954 F.3d 1322, 1329-30 (11th Cir. 2020).

In one case, the state trial court had ample reason under *Deck* to visibly gag the defendant when he insisted on shouting profanities when the jury entered the courtroom. *Naranjo v. Superintendent Fayette SCI*, 2019 WL 4318395 (3d Cir. Aug. 20, 2019); *see Naranjo v. Coleman*, No. CV 13-7383, 2017 WL 10832103, at *5-*8 (E.D. Pa. Aug. 10, 2017), *report and recommendation adopted*, No. CV 13-7383, 2019 WL 632137 (E.D. Pa. Feb. 14, 2019).

And finally, in two federal cases Hepp cites as conflicting with the Seventh Circuit's decision below, the courts recognized that a trial court's failure to justify making restraints visible violated due process. *Sigmon v. Stirling*, 956 F.3d 183, 201-03 (4th Cir. 2020) (Given trial court's pre-*Deck* failure "to articulate a reason for visible restraints on the record," counsel's failure to object to use of stun belt would constitute deficient performance "if the stun belt were visible."); *Claiborne v. Blauser*, 934 F.3d 885, 895-98 (9th Cir. 2019) (Ct finds plain error in civil rights case where "the record does

not demonstrate any particular reason why Claiborne had to be visibly restrained in front of the jury.").

Similarly with the state court decisions Hepp cites, only the rogue decision in *Holt* actually conflicts with the Seventh Circuit's application of *Deck's* requirement that trial court explain the need to make any restraints visible to the jury.

Indeed, several decisions Hepp claims rejected *Deck's* requirement of a case-specific justification for making restraints visible actually *reversed* convictions based on the trial courts' unexplained or inadequately justified decisions to use restraints and/or visible restraints. *State v. Gomez*, 123 P.3d 1131, 1139-43 (Ariz. 2005) (pre-*Deck*); *People v. Miller*, 175 Cal. App.4th 1109, 1113-17 (Cal. App. 2009); *Hill v. State*, 842 S.E.2d 853, 859-61 (Ga. 2020); *State v. Wright*, 283 P.3d 795, 800-05 (Idaho 2012); *State v. Anderson*, 192 P.3d 673, 676-78 (Kan. 2008); *Deal v. Commonwealth*, 607 S.W.3d 652 (Ky. 2020); *Dickerson v. State*, 269 S.W.3d 889, 891-94 (Mo. 2008) (en banc); *State v. Osborn*, 500 P.3d 61, 66-68 (Or. App. 2021).

In four other cases, the state courts noted due process or related ineffectiveness violations based on missing or inadequate explanations for restraints or visible restraints, but deemed the violations harmless or remanded for assessment of resulting prejudice. *Johnson v. State*, 860 N.W.2d 913, 917-21 (Iowa 2014); *State v. Hartsoe*, 258 P.3d 428, 434-37 (Mont. 2011); *Mobley v. State*, 397 S.W.3d 70, 99-101 (Tenn. 2013); *State v. Jackson*, 467 P.3d 97, 102-04 (Wash. 2020).

Many of the remaining cases Hepp cites hold that the restraints were not visible, rendering *Deck's* requirement that the trial court justify making restraints visible inapplicable. *People v. Urdiales*, 871 N.E.2d 669, 706-07 (Ill. 2007); *State v. Sparks*, 68 So.3d 435, 479-81 (La. 2011); *Wagner v. State*, 74 A.3d 765, 799-800 (Md. 2013); *Commonwealth v. Rocheleau*, 62 N.E.3d 554, 557-58 (Mass. 2016); *State v. Johnson*, 229 P.3d 523, 532-33 (N.M. 2010); *People v. Dunn*, 521 N.W.2d 255, 262-63 (Mich. 1994) (pre-*Deck*); *People v. Samo*, 1 N.Y.S.3d 45 (N.Y. App. Div. 2015); *State v. Aguero*, 791 N.W.2d 1, 5-7 (N.D. 2010); *Ochoa v. State*, 136 P.3d 661, 667-70 (Okla. Crim. App. 2006); *State v. Heyward*, 852 S.E.2d 452, 466-68 (S.C. 2020); *Bell v. State*, 356 S.W.3d 528, 533-38 (Tex. Ct. App. 2011); *State v. Burke*, 54 A.3d 500, 509-10 (Vt. 2012); *State v. Youngblood*, 618 S.E.2d 544, 552-54 (W. Va. 2005), *vacated on other grounds*, *Youngblood v. West Virginia*, 547 U.S. 867 (2006); *Porter v. Commonwealth*, 661 S.E.2d 415, 444-45 (Va. 2008) (no visible restraints; defendant challenges number of bailiffs); *see State v. Murphy*, 877 N.E.2d 1034, 1038 (Ohio 2007) (Defendant chose to exclude himself from courtroom rather than wear nonvisible restraints). *See also McCollins v. State*, 952 So.2d 305, 309 (Miss. 2007) (conclusory holding on *pro se* appeal that restraints were justified; no indication whether restraints were visible); *State v. Snell*, 892 A.2d 108, 117-19 (R.I. 2006) (defendant failed to object and no record evidence defendant was restrained in courtroom, let alone that he was visibly restrained).

In yet other of Hepp's cases, the defendant or defense counsel insisted on making the restraints visible. *Brown v. State*, 982 So.2d 565, 593-96 (Ala. Crim. App. 2006); *State v. Shashaty*, 742 A.2d 786, 796-98 (Conn. 1999) (pre-*Deck*); *Hymon v. State*, 111 P.3d 1092, 1098-1100 (Nev. 2010). *See also Mungo v. United States*, 987 A.2d 1145, 1148-52 (D.C. 2010) (No objection, and open question whether stun belts constitute "restraints" under *Deck* precluded ineffectiveness claim); *Stephenson v. State*, 864 N.E.2d 1022, 1028-42 (Ind. 2007) (same).

Others relied on grounds irrelevant here. *People v. Knight*, 167 P.3d 147 (Colo. 2006) (shackling of witness, not defendant); *Commonwealth v. Patterson*, 180 A.3d 1217, 1224-27 (Penn. Super. Ct. 2018) (*Deck* not applicable outside courtroom setting); *State v. Mata*, 668 N.W.2d 448, 471-72 (Neb. 2003) (inadvertent jury view of shackles, despite agreement to keep them hidden, harmless).

Beyond the Arkansas outlier, only a couple of Hepp's cited decisions found visible restraints justified, and they did so using standards consistent with *Deck's* requirement of an explanation and justification for making restraints visible. *England v. State*, 940 So.2d 389, 403-04 (Fla. 2006) (defendant gagged without objection after he ignored seven prior warnings against verbal disruptions); *State v. Jackson*, 761 S.E.2d 724, 729-31 (N.C. 2014) (visible restraints justified under standard requiring consideration of less prejudicial alternatives where defendant, *inter alia*, previously had escaped from shackles).

Hepp's attempt to label the Seventh Circuit's decision below as an outlier thus necessarily fails. The true outliers are *Holt* and the Wisconsin Court of Appeals' decision in Wilber's case that either overlooked or refused to apply the legal standard dictated by due process and this Court in *Deck*.

IV. Neither Summary Reversal Nor Certiorari Review Is Appropriate Here

This is not an appropriate case for exercise of this Court's power to summarily reverse. Indeed, this case does not even justify certiorari review.

Even if the Court does not dismiss Hepp's petition as moot, Section I, *supra*, its role is not to correct errors, but to develop the law. *E.g.*, Sup. Ct. R. 10. There is no need for this Court to act here because, despite Hepp's attempt to introduce uncertainty into the law, the applicable law is clearly established under *Deck*: "the Constitution forbids the use of visible shackles [at trial] unless that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." 544 U.S. at 624; *see id.* at 629, 633, 635.

Even if this Court had the time merely to correct errors where the applicable law is clearly established, doing so here is inappropriate because the Seventh Circuit did not err. *See* Section II, *supra*.

Summary reversal without review of the actual record also is inappropriate given the many misleading

and false assertions contained in Hepp's petition, including misstatements regarding the trial record, *e.g.*, Footnote 4, *supra*, and the Seventh Circuit's reasoning, *see* Section II, *supra*, or false claims that the Seventh Circuit's reasoning conflicts with that of other courts, Section III, *supra*. The Court should hesitate before taking the extreme step of summarily reversing a carefully considered and reasoned court of appeals decision without reviewing the entire record under such circumstances.

Hepp's speculation that failing to summarily reverse would somehow endanger the people of Wisconsin, Hepp's Petition at 32-34, is baseless. He took no action to stay the Seventh Circuit's decision, despite knowing that, as a result, Wilber would be released one way or the other by the end of December, 2021. The state joined the motion to vacate the judgment that unconstitutionally held Wilber in custody and did not object to his release on bail pending its decision whether to retry him. In fact, Wilber was released on bail in December, and since then has been at home with his longtime girlfriend, an educator and a respected member of the Native community in Escanaba, Michigan, awaiting the start of his new job and preparing for his life as a free and contributing member of society. (*See* R98 (Motion to Release Pending Appeal)).

As for the viability of retrial, the state's problems rest not in faulty memories or missing witnesses. The transcript of every witness' testimony from the original trial remains available and Wisconsin evidence law allows admission of that testimony where the witness

either cannot be found or cannot remember. Wis. Stat. §§908.04 & 908.045.

Rather, the true difficulty for the state is that every witness at trial denied seeing Wilber shoot Diaz and the physical evidence demonstrated that he could not have done so. Add the reality that forensic experts are available to attest to the fact that the state's theory is baseless and that other witnesses will testify that it was Ricky Muniz, and not Wilber, who killed Diaz, and it strongly suggests that Wilber never was guilty in the first place.

Finally, Hepp's overblown claim that Wilber presents a risk to society ignores the facts that Wilber arranged his voluntary surrender when he first learned of the homicide charges (D98:9), and he rejected the state's pretrial offer to resolve the case with a plea to second degree reckless homicide (R61-14:3-4), a Class D felony for which his maximum initial confinement term would have been 15 years. Wis. Stat. §§940.06; 973.01(1)(b)4. At the time of his release, Wilber had served more than 17 years.

Hepp also ignores the facts, as presented in response to the state's motion to stay the district court's decision granting habeas relief, that Wilber had not had a major conduct report in 10 years at that time (October, 2020) and had not received a minor conduct report in nine. He had found educational success and had found satisfaction in helping others by working as a tutor. (R98:8).

Because the Seventh Circuit strictly and accurately applied controlling standards under AEDPA and *Deck*, because Hepp's objections have no basis in the record or in fact, and because Wilber presents no danger to society, this is not an appropriate case for summary reversal. It is not even an appropriate case for certiorari review.

CONCLUSION

For the reasons stated, the Court should dismiss Hepp's Petition as moot or, barring that, deny it. Should the Court somehow deem it appropriate to reverse the Seventh Circuit, remand is necessary to address Wilber's as yet undecided ineffectiveness claims.

Dated at Milwaukee, Wisconsin, February 25, 2022.

Respectfully submitted,

ROBERT R. HENAK
Counsel of Record
ELLEN HENAK
HENAK LAW OFFICE, S.C.
5205 N. Ironwood Rd., #100
Milwaukee, Wisconsin 53217
(414) 283-9300
Henaklaw@sbcglobal.net

Attorneys for Respondent