No. 21-1053

In the

Supreme Court of the United States

RANDALL HEPP, WARDEN,

Petitioner,

v.

DANNY L. WILBER,

Respondent.

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

REPLY BRIEF

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I. This case is not moot, and this Court has Article III jurisdiction.

Wilber's claim that this case no longer presents an adversarial case or controversy within the meaning of Article III, § 2 of the Constitution is patently without merit. (BIO 15–19.) The Seventh Circuit affirmed the district court's order that the State of Wisconsin initiate proceedings to retry Wilber or release him. The district court was unwilling to stay its order while Hepp petitioned this Court for review,[1] so the State moved to vacate the conviction and filed a new criminal complaint against Wilber, but no trial proceedings have taken place—the Milwaukee County Circuit Court was informed

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[1] Contrary to what Wilber claims, the State did indeed seek to stay this order while it sought review in this Court, and the district court refused. (BIO 12); *See Wilber v. Thurmer*, 476 F.Supp.3d 785 (E.D. Wis. 2020) (Dkt. 106 (minutes of conference regarding lifting previous stay where State asked the District Court to leave the stay in place so it could seek review in this Court); 107 (district court order denying State's request and lifting stay.) Given the word limit constraints on reply briefs, the State will not belabor Wilber's many other misrepresentations here except to note that the record clearly contradicts Wilber's skewed description of what occurred in the courts below. *Compare*, *e.g.*, (BIO 3–4 n.4 (claiming that "Contrary to Hepp's assertions . . . neither Richard Torres nor Jeranek Diaz 'identified Wilber as the shooter'") *with* Dkt. 61-11, Wisconsin Court of Appeals' decision in *State v. Wilber*, 2016AP260, 2018 WL 6788074, ¶ 2 (Wis. Ct. App., Dec. 26, 2018) ("Police interviewed several witnesses . . . Richard Torres and Jeranek Diaz both identified Wilber as the shooter") *and* (Dkt. 61-24:114–15 (prosecutor confronting Jeranek Diaz with his statement to police that he saw Wilber point the gun at David Diaz's head).

that Wisconsin intended to seek review of the Seventh Circuit's decision and thus has merely scheduled a status conference for April 2022—and jeopardy certainly has not attached.[2] Hepp petitioned this Court for certiorari and summary reversal of the Seventh Circuit's decision within the statutory time limits for seeking such review. If this Court determines that the Seventh Circuit exceeded its authority under AEDPA in this case, the State will duly move to reinstate Wilber's conviction. There is still very much a live controversy in this case.

This Court rejected Wilber's exact proposition that the State vacating a conviction and preparing for retrial after a federal decision granting habeas relief to a state prisoner renders the State's appeal of that decision moot, on identical facts to those here, in *Calderon v. Moore*, 518 U.S. 149 (1996) (per curiam). There, the United States District Court for the Central District of California granted a convicted homicide defendant's petition for a writ of habeas corpus and ordered California to release him or institute proceedings to retry him within 60 days. *Id.* at 149. The State filed a notice of appeal and sought to stay the district court's order, but its stay requests were denied. *Id.* at 149–50. "The State accordingly set Moore for retrial, and simultaneously pursued its appeal of the District Court's order on the merits to the Ninth Circuit." *Id.* at 150.

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[2] *See State v. Danny L. Wilber*, Milwaukee County Case No. 2004CF609, *available at* https://wcca.wicourts.gov/caseDetail.html?caseNo=2004CF000609&countyNo=40&index=0&mode=details.

The Ninth Circuit, observing that California had granted Moore a new trial, dismissed the State's appeal as moot. *Id.* This Court then granted California's petition for certiorari and summarily reversed the Ninth Circuit, recognizing that "even the availability of a 'partial remedy' is 'sufficient to prevent [a] case from being moot.'" *Id.* (citation omitted). "[T]o say the least, a 'partial remedy' necessary to avoid mootness will be available to the State of California (represented here by petitioner)." *Id.* This was because although "the administrative machinery necessary for a new trial has been set in motion, that trial [had] not yet even begun, let alone reached a point where the court could no longer award any relief in the State's favor." *Id.* Rather, "a decision in the State's favor would release it from the burden of the new trial itself," therefore "the Court of Appeals [was] not prevented from granting 'any effectual relief whatever' in the State's favor." *Id.* (citation omitted). In such circumstances, this Court stated that "the case is clearly not moot." *Id.*

"An incarcerated convict's (or a parolee's) challenge to the validity of his conviction always satisfies the case-or-controversy requirement, because the incarceration (or the restriction imposed by the terms of the parole) constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." *Spencer v. Kemna*, 523 U.S. 1, 8 (1998). The grave consequences that this Court has long recognized burden a state when a federal court erroneously grants habeas relief mean the corollary is of course also true when a new trial has not even begun. Forcing the State to release a duly convicted defendant or expend vast amounts of

scarce (and sometimes irretrievably lost) resources to try the defendant a second time constitutes a concrete injury to the State that is caused by the order granting habeas relief and redressable by reversal of the order, allowing the State to reinstate the conviction.

Wilber's claim that this case is moot because the state court vacated his conviction rather than the federal district court demonstrates a misunderstanding of the federal courts' habeas corpus jurisdiction. (BIO 17–19.) The federal courts have no authority to themselves "vacate" a state conviction as part of a habeas corpus action under 28 U.S.C. § 2254. Habeas corpus is an equitable doctrine, and the federal courts can order only an equitable remedy: that the State must either release the prisoner or *the State* must vacate the conviction and retry the case. Here, Wisconsin chose the latter; but review could certainly still afford Wisconsin the meaningful remedy of reinstating Wilber's conviction without retrial.

As long as the federal reviewing court could relieve the State of its burden to retry the case, an appellate challenge to an order granting habeas relief is not moot. *See Moore*, 518 U.S. at 150. That is precisely the procedural posture of this case. Wilber's mootness argument is meritless and this case easily meets Article III, § 2's case-or-controversy requirement.

II. The Seventh Circuit severely departed from AEDPA in granting habeas relief in this case, warranting summary reversal.[3]

As explained in Warden Hepp's petition for certiorari, Congress greatly circumscribed the federal courts' authority to overturn state criminal convictions when it enacted AEDPA. The statute "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).

This Court has held time and again that Federal Courts of Appeals reviewing state court decisions under 28 U.S.C. § 2254 may not graft additional requirements onto this Court's precedent. *Lopez v. Smith*, 574 U.S. 1 (2014). This Court has further made unmistakably clear that it is the holdings, and not the dicta, of this Court's decisions that provide the "clearly established Federal law" that state courts must apply. *Carey v. Musladin*, 549 U.S. 70, 74 (2006). *Deck*'s holding is this:

> Given the presence of similarly weighty considerations, we must conclude that

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[3] Petitioner Hepp did not intentionally leave the final page of the Seventh Circuit's decision containing the polaroid out of his appendix. (BIO 13.) This was an inadvertent oversight that occurred during assembly of the appendix due simply to the rarity of having an exhibit attached to an opinion and its location as a separate page after the mandate line. Hepp does not dispute that the photograph is accurate nor disputes that the Seventh Circuit appended it to its opinion as a separate page after its mandate line.

> courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding. The constitutional requirement, however, is not absolute. It 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. But any such determination 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.

Deck v. Missouri, 544 U.S. 622, 633 (2005).

That means that Wilber's continued insistence that the Seventh Circuit correctly determined that the "clearly established Federal law" controlling this case was this Court's passing observation later in the opinion that the record there contained no trial court findings about security concerns that would warrant anything beyond the non-visible shackles used during Deck's trial is wrong. (BIO 23–27; *see Deck*, 544 U.S. at 634–35.) That passage was dicta. It did not morph *Deck*'s holding into a mandate that a trial court identify and explain on the record why non-visible restraint options were inadequate before visibly shackling a demonstrably disruptive defendant during trial even after the court had used non-visible restraint options and they failed to control the defendant. Yet, that is the rule the Seventh Circuit

erroneously applied when granting habeas relief in this case.

Indeed, Wilber himself concedes that additional restraints beyond the stun belt and ankle shackles already in place may have been required to control his behavior after the fight. (BIO 20, 28.) But he then conspicuously fails to point to a single case from this Court requiring the trial court to identify and discuss what other non-visible options it even had left, let alone explain why non-visible restraint options were inadequate before shackling him after the non-visible options the court tried had failed. (BIO 23–47.) This Court has never so held. Not once. To the contrary, this Court went out of its way in *Deck* to emphasize that it did "not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations. We are mindful of the tragedy that can result if judges are not able to protect themselves and their courtrooms." *Deck*, 544 U.S. at 632. Accordingly, this Court expressly held that visible shackles do not violate the Constitution if the trial court has "taken account of the circumstances of the particular case." *Id.*

That is the exact same standard the Wisconsin Court of Appeals applied in this case. (Pet-App. 83a–84a (observing that criminal defendants "generally should not be restrained during the trial because such freedom is 'an important component of a fair and impartial trial," but recognizing that "[a] trial court maintains 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").

And Wilber is simply incorrect that Hepp is "[s]uggesting . . . that a trial court may require restraints to be visible while providing no justification for doing so." (BIO 25.) Even a cursory review of the trial court record and Wisconsin Court of Appeals' decision at issue show that is not at all what happened in this case. To the contrary, the Wisconsin Court of Appeals expressly recognized that the trial court had to provide adequate reasons to justify the visible shackles. (Pet-App. 83a–84a.) The Wisconsin Court of Appeals then detailed all of the troubling incidents the trial court had set forth on the record about Wilber's escalating behavior and the court's concomitant explanations about the use of escalating restraints. (Pet-App. 76a–86a.) The trial court record was so extensive it required ten pages for the Wisconsin Court of Appeals to summarize it and covered thirty pages of trial transcript. This case is not at all like *Deck* where the trial court gave no rational explanation for the visible shackles; the trial court here was thorough about its escalating security concerns throughout the trial and why it was ordering each new security measure. There is simply no way that the Wisconsin Court of Appeals' holding in this case was an unreasonable application of *Deck* under AEDPA.

Though giving lip service to the statute, Wilber's argument to the contrary proceeds as though AEDPA does not exist, and as if the Seventh Circuit were free conduct a de novo review of the trial court's decision through the lens of whatever interpretation of the Constitution's Due Process Clause it wished. (BIO 29–47.) He also, like the Seventh Circuit, ignores the Wisconsin Court of Appeals' decision

almost entirely, thereby trying to sidestep the deferential abuse of discretion standard that the Wisconsin Court of Appeals was required to apply—and to which the Seventh Circuit was also supposed to defer—and simply argues that habeas relief was appropriate because he agrees with the Seventh Circuit that there were other things the trial court could have attempted to conceal the restraints. (BIO 37–47.) But that would have been an inappropriate reason to overturn a trial court's reasoned and explained discretionary decision even on direct review. It was certainly inappropriate on federal habeas corpus review under section 2254: "habeas corpus is not to be used as a second criminal trial, and federal courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals." *Williams v. Taylor*, 529 U.S. 362, 383 (2000). Federal habeas corpus review's purpose is to provide a remedy only when there has been an unmistakable departure from this Court's precedent. That did not happen here.

Wilber has further entirely missed the point of the state and federal cases Hepp provided that have dealt with shackling. Hepp did not cite these cases to show that the courts found for the state in every case or that every court has addressed a *Deck* challenge involving identical facts to these and resolved it against the defendant. (BIO 30–34.) The point was to show how these other courts interpreted and articulated the rule that came out of this Court's holding in *Deck*, and they are all completely in line with the rule the Wisconsin Court of Appeals applied holding that a trial court properly exercises its

discretion to shackle a dangerous defendant, visibly or otherwise, if it makes appropriate escape and security findings on the record, and not at all in line with the "explain away every other option first" rule Wilber and the Seventh Circuit assumed.

The Seventh Circuit was supposed to assess whether any rational jurists could possibly agree with the Wisconsin Court of Appeals that the trial court adequately explained its concerns about security and decorum allowing it to visibly shackle Wilber after he was in a physical fight with the deputies. *Richter*, 562 U.S. at 102. It never once considered that question. Instead, it reversed this 16-year-old murder conviction because it could think of other options the trial court could have attempted to conceal the shackles. In other words, it conducted a de novo review of the trial record and searched for reasons to reverse the Wisconsin Court of Appeals' decision. That contradicts every directive this Court has given about the scope and substance of habeas corpus review under 28 U.S.C. § 2254.

Fairminded jurists could agree with the Wisconsin Court of Appeals that the trial court properly exercised its discretion to shackle Wilber for the final day of trial. Accordingly, the Seventh Circuit was duty-bound to deny the writ. This Court should summarily reverse the Seventh Circuit's decision in this case.

CONCLUSION

This Court should grant Hepp's petition for certiorari and summarily reverse the Seventh Circuit's decision affirming the grant of writ of habeas corpus.

Dated this 7th day of March 2022.

Respectfully submitted,

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