No. 21-_____

In The
Supreme Court of the United States

KORRY L. ARDELL,

Petitioner,

vs.

JOSHUA L. KAUL,
Wisconsin Attorney General,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. The jury instructions here permitted conviction for felony "stalking" based merely on the Ardell's communications with third parties *about* the alleged victim, without requiring a finding that he intended that the substance of the conversations be communicated to the alleged victim or encourage harassment of her.

The questions presented are:

A. Did those instructions deny Ardell his constitutional right to a jury finding beyond a reasonable doubt of all facts necessary for conviction on the grounds that the instructions violated his First Amendment rights by impermissibly criminalizing speech based on its content?

B. Does the fact that at least five presumably reasonable state courts have held that penalizing such third party conversations would violate the First Amendment satisfy the "substantial showing of the denial of a constitutional right" requirement under 28 U.S.C. §2253(c)(2) for a certificate of appealability authorizing Ardell to appeal the denial of his federal habeas petition raising this claim?

II. Because the district court believed Ardell's trial counsel procedurally defaulted his First Amendment/ right to a jury verdict claim in state court, depriving him of federal habeas review of that claim on its merits, Ardell presents the following pendant

QUESTIONS PRESENTED FOR REVIEW
– Continued

procedural issue, *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000):

> Does the state court's procedural denial of Ardell's constitutional claim on direct appeal bar federal habeas review where that court's procedural holding conflicts with controlling state authority and thus was not rendered pursuant to "firmly established and regularly followed state practice" as is required for an independent and adequate state law ground sufficient to bar federal habeas review?

PARTIES TO THE PROCEEDING

Other than the present Petitioner and Respondent, the only other parties in the courts below were the State of Wisconsin (also represented by the Wisconsin Department of Justice) as real party in interest for the Respondent, and Lance Wiersma, who was replaced as nominal Respondent by Attorney General Josh Kaul.

DIRECTLY RELATED CASES

- *Ardell v. Kaul*, Appeal No. 21-2240, Seventh Circuit U.S. Court of Appeals. Final Order Denying Certificate of Appealability entered March 7, 2022.
- *Ardell v. Wiersma*, Case No. 19-CV-1097, U.S. District Court for the Eastern District of Wisconsin. Judgment entered May 17, 2021
- *State of Wisconsin v. Korry L. Ardell*, Appeal No. 2017AP381-CR, Wisconsin Supreme Court. Final Order entered July 10, 2018.
- *State of Wisconsin v. Korry L. Ardell*, Appeal No. 2017AP381-CR, Wisconsin Court of Appeals. Decision entered March 6, 2018.
- *State of Wisconsin v. Korry L. Ardell*, Case No. 2014CF3516, Milwaukee County Circuit Court. Judgment of Conviction entered December 11, 2015.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Korry L. Ardell respectfully asks that the Court issue a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals which summarily denied him a certificate of appealability and thereby denied him the right to appeal from the denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 challenging his custody by the State of Wisconsin.

Ardell further asks that the Court summarily grant him a certificate of appealability on his substantive First Amendment/right to jury verdict claim, which is supported both by this Court's authorities and at least five state court decisions finding First Amendment violations under similar circumstances. Ardell also requests a certificate of appealability or summary reversal on his pendant claim that the state court's procedural default finding conflicted with controlling state procedural decisions and thus did not rely on a "firmly established and regularly followed state practice" as is required for an independent and adequate state law ground barring federal habeas review.

OPINIONS BELOW

The unpublished order of the Seventh Circuit Court of Appeals denying Ardell's request for a certificated of appealability, *Ardell v. Kaul*, Appeal No. 21-2240 (3/7/22), is in Appendix A (A:1).

The unpublished decision of the District Court for the Eastern District of Wisconsin, *Ardell v. Wiersma*, Case No. 19-CV-1097 (E.D. Wis. 5/14/21), is in Appendix B (B:1-B:25).

The unpublished order of the District Court for the Eastern District of Wisconsin denying rehearing on Ardell's habeas petition, *Ardell v. Wiersma*, Case No. 19-CV-1097-WED (E.D. Wis. 6/14/21), is in Appendix D (D:1-D:2).

The unpublished Order of the Wisconsin Supreme Court denying discretionary review on Ardell's direct appeal, *State v. Korry L. Ardell*, Appeal No. 2017AP381-CR (7/10/18), is in Appendix E (E:1-E:2).

The unpublished decision of the Wisconsin Court of Appeals on Ardell's direct appeal, *State v. Korry L. Ardell*, Appeal No. 2017AP381-CR (3/6/18) is in Appendix F (F:1-F:26).

The unpublished order of the Wisconsin Court of Appeals denying reconsideration on Ardell's direct appeal, *State v. Korry L. Ardell*, Appeal No. 2017AP381-CR (3/22/18) is in Appendix G (G:1-G2).

The unpublished decision and order of the Wisconsin Circuit Court in *State of Wisconsin v. Korry L. Ardell*, Milwaukee County Case No. 14CF3516 (2/9/17), denying Ardell's post-conviction motion as part of his direct appeal is in Appendix H (H:1-H:5).

JURISDICTION

The Seventh Circuit Court of Appeals denied Ardell's motion for a certificate of appealability from the denial of his federal habeas petition on March 7, 2022. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) & §2101(c) and Supreme Court Rules 13.1 & 13.3. As he did below, Ardell asserts the deprivation of his rights to free speech and due process secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns the construction and application of the Freedom of Speech Clause of the First Amendment to the United States Constitution which provides:

> Congress shall make no law respecting . . . abridging the freedom of speech

U.S. Const. amend. I.

This petition also concerns the construction and application of the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides:

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

U.S. Const. amend. XIV.

This petition also concerns the construction and application of Wisconsin's stalking statute, Wis. Stat. §940.32 (2015-16), the relevant provisions of which follow:

> (1) In this section:
>
> > (a) "Course of conduct" means a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose, including any of the following:
>
> * * *

> 7. Sending material by any means to the victim or, for the purpose of obtaining information about, disseminating information about, or communicating with the victim, to a member of the victim's family or household or an employer, coworker, or friend of the victim.

* * *

(2) Whoever meets all of the following criteria is guilty of a Class I felony:

> (a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear bodily injury to or the death of himself or herself or a member of his or her family or household.
>
> (b) The actor knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury to or the death of himself or herself or a member of his or her family or household.
>
> (c) The actor's acts cause the specific person to suffer serious emotional distress or induce fear in the specific person of bodily injury to or the death of himself

> or herself or a member of his or her family or household.
>
> * * *
>
> (4)(a) This section does not apply to conduct that is or acts that are protected by the person's right to freedom of speech or to peaceably assemble with others under the state and U.S. constitutions, including, but not limited to, any of the following:
>
> 1. Giving publicity to and obtaining or communicating information regarding any subject, whether by advertising, speaking or patrolling any public street or any place where any person or persons may lawfully be.
>
> 2. Assembling peaceably.
>
> 3. Peaceful picketing or patrolling.
>
> (b) Paragraph (a) does not limit the activities that may be considered to serve a legitimate purpose under this section.

INTRODUCTION

Ardell appeals from the denial of his federal habeas petition under 28 U.S.C. §2254 by a person in custody pursuant to a state court judgment of conviction. As relevant here, the petition claimed violation of Ardell's First Amendment right to freedom of speech and his right under the Due Process Clause of the Fourteenth Amendment to a jury verdict beyond a

reasonable doubt on all facts legally and constitutionally required for conviction.

This case addresses the intersection between one's First Amendment and statutory rights to seek and communicate information "regarding any subject," Wis. Stat. §940.32(4), and Wisconsin's version of the National Institute of Justice's Model Anti-Stalking Code that seeks to protect individuals from fear-inducing conduct "directed at" them. Wis. Stat. §940.32(2) (2015-16). Specifically, this case addresses whether and when Wisconsin's stalking statute constitutionally applies to communications with third parties *about* the alleged victim. Here, those communications were emails providing information to and requesting information from someone who had previously worked with the alleged victim but had no ongoing relationship with her, and the jury instructions did not require that Ardell intended that the communications be relayed to the alleged victim or used to harm her.

The focus on this issue is aided by the fact that even the prosecutor at trial chose not to dispute that the alleged victim's own uncorroborated assertions of more prototypical "stalking" behavior by Ardell (i.e., threatening calls, sitting outside her home, following her to work) were unworthy of belief after independent witnesses and documentary evidence disproved substantial portions of her claims and demonstrated that she had attempted to suborn perjury against Ardell. (*See* R12-17:57, 86). For completeness, however, Ardell will provide a full summary, including the

complainant's allegations that even the trial prosecutor deemed unworthy of reliance.

STATEMENT OF THE CASE

Procedural History and Relevant Trial Evidence[1]

The evidence at trial established the following:

After a brief intimate relationship in 2007, Ardell and N.T. split up (R12-11:26; R12-14:43). N.T. subsequently made a number of allegations about Ardell. When Ardell learned that she had falsely accused him of burning down a home he owned, he sought information relevant to her credibility so he could protect himself from her allegations (R12-14:46-48; R12-15:23-24; R14-35:Exh.121). Ardell filed open records requests with the Division of Criminal Investigation and, because N.T. was a Milwaukee Public Schools ("M.P.S.") teacher (R12-11:17), with M.P.S. (R12-11:18-22, 39-47; R12-14:51-57, 62-64; R14-10:Exhs.1-2, 4-7).

Ardell testified that he believed that he needed to show cause for the open records requests. He therefore included information that N.T. was involved in drug use and prostitution and that she had made false

[1] Many of the allegations cited as background by the district court (B:1-B:4) were, as the state court admitted, "not in this record and were excluded from the trial in this matter" (F:4), and therefore are not included here.

assertions. (R12-14:50, 52).[2] He also testified that he believed the requests would remain confidential and he did not think they would get back to N.T. (*id.*:49, 55). Only later did Ardell learn from M.P.S. and the attorney he hired to pursue the open records request that N.T. would be informed of the requests (R12-14:54; *see id.*:58-62; R14-36:Exh.123).

At trial, N.T. claimed that the eight years she had known Ardell were "horror" (R12-11:35). She claimed that he sat in front of her house and followed her to work many times, although she chose not to report them at the time or to document more than a couple of the alleged dates (*id.*:33-35, 67-69, 71; *see also* R12-12:90).

N.T. claimed at trial that Ardell called and threatened her at home on May 23, 2013, the day the circuit court dismissed his open records case against M.P.S. (R12-11:23-26, 32-33, 58, 63-64). N.T. then claimed that she saw Ardell parked in front of her house the following morning and that he followed her to work around 7:30 a.m. (*id.*:63-64). Based on N.T.'s allegations, her school principal at the time, Michelle Hagen, advised her to seek a temporary restraining order, and she did so on May 24, 2013 (R12-11:32-35, 58, 60, 63-65).

However, while unknown to the T.R.O. court (*see* R12-14:81-82), N.T.'s phone records showed that the blocked call she received on May 23 and claimed was

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[2] Ardell corroborated the prostitution claim with an online chat showing N.T.'s offer to exchange sex with him for money (R12-14:43-46; R14-34:Exh.120).

from Ardell in fact was from the City Attorney representing M.P.S. (R14-51:42-53; R14-22 to R14-24:Exhs.110-112). Moreover, independent witnesses and supporting documents, also not part of the T.R.O. proceedings, confirmed that Ardell was in Wausau overnight on May 23-24, 2013, and then working in his dump truck the next day rather than in front of N.T.'s home or following her to work in the Milwaukee area (R12-12:114-20; R14-51:10-26, 57-68; R14-17:Exh.105; R14-19:Exh.107; R14-25:Exh.113; R14-37 to R14-49:Exhs.124-126; R14-41:Exh.128; *see also* R12-14:66-77).

N.T. also told police that Ardell had been in front of her home in a maroon van on or about July 30, 2014 (R12-12:89). However, independent witnesses and documentary evidence placed Ardell in Green Lake working with his dump truck throughout the period from July 28 through August 2, 2014 (R12-12:121-26; R14-51:27-40, 63-69; *see* R12-15:6-22; R14-18:Exh.106; R14-21:Exh.109; R14-33:Exh.119; R14-45 to R14-50:Exhs.132-137). Ardell also presented evidence and photographs showing that his maroon van had been parked in his driveway, inoperable since July 2013 (R12-12:49-53; R12-14:106-07; R12-17:7-10; R14-13 to R14-16:Exhs.101-104).

Roger Myszka, a former tenant in N.T.'s duplex, testified that N.T. asked that he tell the police that he saw Ardell in a maroon van outside the duplex, even though she knew that was false. Although he initially complied with N.T.'s request to lie about Ardell, Myszka later rejected N.T.'s insistence that he stick

with the false story. Instead, he called the District Attorney, admitting that N.T. had put him up to telling the lie. (R12-12:104-13).

Ardell sought assistance from law enforcement to investigate N.T.'s falsehoods against him and sought to investigate on his own when his requests were ignored (R12-14:79-81, 84-85; R14-42:Exh.129). In July 2014, after Hagen had left M.P.S. and was no longer N.T.'s supervisor (R12-12:11, 18-19), Ardell sent her a series of emails at her new school in Fond du Lac, requesting information regarding the decision to seek the T.R.O. and reflecting his position that the evidence used to seek that T.R.O. was false (*id.*:11-17, 20-24; R12-14:85-91; R14-12:Exhs. 9-13).

Although Ardell testified that he did not want N.T. to know of his investigation and did not intend that the emails be forwarded to her (R12-14:11, 93; R12-15:44),[3] Hagen contacted N.T. at some point and spoke with her about them (R12-12:16). However, Hagen did not testify regarding the substance of those conversations (*see id.*) and N.T. did not testify regarding the emails or their impact at all (*see* R12-11:17-78).

Over defense objection that she was neither the alleged victim nor N.T.'s employer or coworker at the time, Hagen was allowed to testify that Ardell's threat

[3] Indeed, Ardell testified that he intentionally avoided contacting relatives of N.T. who he knew might contact her (R12-15:46).

of a lawsuit against Hagen or publicity about her concerned her (R12-12:15, 27).

At some point, Ardell also learned that N.T. had made allegations against Daniel Fischer. Ardell made several calls to Fischer's number in an unsuccessful attempt to speak with him and learn whether she had made similar false allegations against him. Most calls went unanswered, although Ardell once was able to leave a voicemail and once a message with a relative. (R12-12:72-75; R12-14:96-97; R12-15:64-65; R14-12:Exh.16).

Although Ardell did not know it at the time (R12-14:95; R12-15:64), Fischer was the father of N.T.'s child (R12-11:28-29), but no evidence was presented that the two were married or maintained any current relationship. Likewise, no evidence suggested that Fischer or anyone informed N.T. of Ardell's attempts to contact Fischer. Fischer did not testify.

The state also presented evidence that, in frustration over the failure of law enforcement to investigate his claims that N.T. had falsely accused him, Ardell had left a voicemail message for an assistant district attorney, ADA Westphal, asking how he could get arrested in the hopes that would trigger such an investigation (R12-12:82-83). Again, no evidence suggested that anyone informed N.T. of Ardell's voicemail.

In closing arguments, the state effectively ignored N.T.'s own allegations of stalking behavior (R12-17:57, 86) and likewise admitted that the open records requests alone would not support conviction (*id*.:56).

Instead, it focused entirely on the Hagen emails and the attempt to contact Fischer as sufficient for conviction because they sought information about N.T. (*id.*:54-59, 84-87).

On November 5, 2015, the jury convicted Ardell of one count of stalking N.T. in violation of Wis. Stat. §940.32(2) (R12-18:8).

The circuit court denied Ardell's written Motion to Set Aside Jury Verdict, although noting he "might have appellate issues" (R12-2:55-60; *see* R14-5), and sentenced Ardell to two years initial confinement, three years extended supervision, and a fine of $7,500 (R12-1).[4]

By post-conviction motion filed as part of his direct appeal, Ardell raised the First Amendment and due process challenges raised here, among others (R14-7). The circuit court summarily denied the motion without a hearing (H:1-H:5).

On March 6, 2018, the Wisconsin Court of Appeals affirmed (F:1-F:26). Although the statutory language requires that the conduct at issue be "directed at" the alleged victim, the court deemed that requirement satisfied by the defendant's communications with certain third parties *about* the alleged victim, regardless of whether the defendant intended the comments to be

[4] Although Ardell has completed service of his sentence, he was in custody when the habeas petition was filed and this appeal is not moot. *E.g.*, *Spencer v. Kemna*, 523 U.S. 1, 7-8 (1998). (*See* B:8-B:9).

passed on to the alleged victim or used to harass her. (F:3, F:15-F:18, F:22-F:24).

The state court did not decide Ardell's First Amendment/right to a jury verdict claim on its merits, instead holding that Ardell forfeited those claims by not objecting at trial (F:22). The court did not acknowledge or address Ardell's showing that the "procedural default" finding conflicts with controlling Wisconsin authority holding that there can be no waiver or forfeiture of the right to a jury verdict on all facts necessary for conviction absent a personal, knowing, and intelligent waiver by defendant, *e.g.*, *State v. Smith*, 2012 WI 91, ¶¶52-57, 342 Wis.2d 710, 817 N.W.2d 410 (F:22; *see* R12-4:10-11).

That court then summarily denied Ardell's timely filed motion for reconsideration (G:1-G:2; *see* R12-6), and the Wisconsin Supreme Court denied Ardell's timely filed petition for review (E:1-E:2; *see* R12-8).

Ardell then raised the claims raised here, among others, in his habeas petition in the district court under 28 U.S.C. §2254 (R1). After the state's answer (R12 to R12-19) and briefing (R15-1; R23, R24), however, the district court dismissed Ardell's petition and denied him a certificate of appealability (B:1-B:25; C:1-C:2).

The district court held that the state court "relied on adequate and independent state law grounds" when concluding that Ardell had procedurally defaulted his First Amendment and jury instruction claims (B:11-B:12).

Responding to Ardell's showing that the state court's decision could not have rested on adequate and independent state law grounds since it conflicted with controlling state authority and thus did not apply regularly followed and firmly established state practice, the district court responded that it "cannot review such questions of state law." (B:12, citing *Oaks v. Pfister*, 863 F.3d 723, 727 (7th Cir. 2017)).

Having deemed Ardell's substantive constitutional claims forfeited, the district court limited its consideration of them to the context of ineffective assistance of counsel. It therefore focused on the reasonableness of counsel overlooking the relevant authorities and legal principles rather than on whether those principles demonstrated that the state court's interpretation of Wisconsin's stalking statute to cover conversations with third parties about the alleged victive violated the First Amendment. (B:12-B:15, B:19-B:22). The court then summarily denied Ardell a certificate of appealability (B:24-B:25).

Ardell timely filed a motion for relief from judgment under Fed. R. Civ. P. 60(b), pointing out that the question of whether a state court's procedural default decision is based on "firmly established and regularly followed" principles, as required to constitute an "independent and adequate state law ground," is a matter of *federal* law, not state law to which federal courts defer. (R28:3, citing, *e.g.*, *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (adequacy of state law ground is a matter of federal law)). Ardell also pointed out that, given its erroneous finding of procedural default, the district court

had not conducted the *de novo* review of his substantive First Amendment and jury instructions claims to which he was entitled, citing, *e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (where state court did not decide constitutional claim on its merits, federal habeas review of that claim is *de novo*) (R28:5-6, 11-13). The district court nonetheless summarily denied rehearing on both Ardell's substantive arguments and his request for a certificate of appealability (D:1-D:2).

Having been denied the certificate of appealability necessary for him to appeal the district court's decision, Ardell then filed his notice of appeal (R30), and sought the certificate from the court of appeals, again explaining that both the district court's and the state court's "procedural default" decisions conflict with controlling authority and that, on the merits, other presumably reasonable state courts had held that criminalizing communications with third parties about an alleged victim violated the First Amendment absent an intent that the communications be relayed to or used to harass the alleged victim (7th Cir. Dkt. 4).

The court of appeals nonetheless summarily denied the certificate of appealability on March 7, 2022 (A:1-A:2).

REASONS FOR ALLOWANCE OF THE WRIT

Because the lower courts' conclusory denial of a certificate of appealability reflects a serious failure to understand and comply with this Court's controlling legal standards, summary reversal or certiorari review is appropriate

At issue here is the denial of a certificate of appealability ("COA") and thus denial of Ardell's right to raise on appeal the same type of First Amendment challenges that at least five other courts have found compelling. The lower courts' summary denial of such a certificate here is fundamentally in conflict with controlling legal standards of this Court, and application of those standards mandates issuance of the certificate so that Ardell may appeal to enforce his rights. The fact that other, presumably reasonable, courts have found First Amendment violations under comparable circumstances satisfies the requirement that the petitioner make "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). *See Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (relevant question is whether claim is debatable among reasonable jurists).[5] And, on Ardell's pendant claim that he did not procedurally default his First Amendment/right to jury verdict claim, the fact that the state court's finding of forfeiture conflicts with controlling Wisconsin authority means that finding necessarily was not

[5] Because the state court did not decide Ardell's First Amendment/right to jury verdict claim on its merits, federal habeas review of that claim is *de novo*. *E.g.*, *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

rendered pursuant to "firmly established and regularly followed state practice" as is required for an independent and adequate state law ground sufficient to bar federal habeas review.

Summary reversal of the order denying the certificate thus is appropriate, as is either issuance of a COA allowing Ardell to appeal denial of his First Amendment/right to a jury verdict claim or remand for the Court of Appeals to consider Ardell's request under the appropriate legal standards. *E.g.*, *Tharpe v. Sellers*, 128 S.Ct. 545 (2018) (granting certiorari, vacating denial of COA, and remanding for further consideration where court of appeals's denial of COA was unreasonable).

A. Legal Standards for a Certificate of Appealability

A certificate of appealability must issue upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). "The COA process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels." *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012).

"Under the controlling standard, a petition must 'sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further."'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations omitted).

Ardell thus need not "prove, before the issuance of a COA that some jurists would grant the petition for habeas corpus." *Miller-El*, 537 U.S. at 338. "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.* at 342.

B. Ardell's Claims Satisfy the Requirements for a Certificate of Appealability

Given the conclusory nature of the court of appeals' order denying Ardell a COA, it is difficult to identify exactly where that court's analysis went off track. Presumably, though inexplicably given controlling authority, it made the same error as did the district court.

It is settled law that criminal jury instructions that relieve the state of the burden of proving to the jury every fact necessary for conviction beyond reasonable doubt violate due process. *E.g.*, *California v. Roy*, 519 U.S. 2 (1996) (per curiam); *Carella v. California*, 491 U.S. 263, 265-66 (1989).

Here, the instructions failed to require a jury verdict beyond a reasonable doubt of those facts constitutionally necessary under the First Amendment for a criminal conviction based on Ardell's communications, not with the alleged victim, but with a third party *about* the alleged victim.

The district court did not hold otherwise, concluding instead that the state court's conclusion that Ardell had procedurally defaulted those claims is an independent and adequate state law ground barring federal habeas review. (B:11-B:12).[6]

Because the district court concluded that Ardell procedurally defaulted his substantive constitutional claims, he must show both that those claims are at least debatable and that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Gonzalez*, 565 U.S. at 140-41 (citation omitted).

1. Because the district court's procedural default ruling conflicted with controlling law, Ardell is entitled to a COA on his pendant procedural claim

The district court's finding that it was bound by the state court's procedural default holding (B:11-B:12) is not merely debatable; it is indisputably wrong.

It is true that habeas relief will not be granted where the ultimate decision of the state courts "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A state

[6] While the district court addressed these claims somewhat in the context of Ardell's ineffectiveness claims, it did so while applying a misplaced "doubly deferential" standard of review rather than the *de novo* review to which Ardell is entitled (*see* B:12-B:24).

procedural bar, for instance, may provide an independent and adequate state law ground for denying relief. *Gray v. Netherland*, 518 U.S. 152, 161-62 (1996). Failure to comply with such a state procedural rule thus may prevent federal habeas review of the defaulted claim unless the petitioner can demonstrate cause and prejudice for the default. *Id.*

However, only "firmly established and regularly followed state practice" may be interposed by a state to prevent subsequent federal review of a federal constitutional claim. *James v. Kentucky*, 466 U.S. 341, 348-51 (1984). *See also Barr v. Columbia*, 378 U.S. 146, 149 (1964) (state procedural rules that are "not strictly or regularly followed" do not bar review).

The state court's conclusory assertion that Ardell forfeited his substantive claims (F:22) was not pursuant to a regularly followed and firmly established state procedure; indeed, it conflicted with firmly established state procedure. As a matter of federal law, therefore, it was not an independent and adequate state law ground barring federal habeas review. *E.g.*, *James*, 466 U.S. at 348-49.

According to the district court:

> Because the court of appeals relied on adequate and independent state law grounds (i.e., Wisconsin's requirement that constitutional and jury instruction challenges must be raised prior to conviction) to decline to directly consider the merits of the claims Ardell presents in his petition, *see Promotor v.*

> *Pollard*, 628 F.3d 878, 886-87 (7th Cir. 2010), this court likewise must consider the claims only through the lens of a claim of ineffective assistance of counsel. Although Ardell argues that the court of appeals erred in finding that he waived these arguments, this court cannot review such questions of state law. *See Oaks v. Pfister*, 863 F.3d 723, 727 (7th Cir. 2017).

(B:12).

The district court thus not only failed to consider the adequacy of the state court assertion of forfeiture; it believed it was barred from doing so.

The district court was wrong on both counts. Whether a state procedural ruling is "adequate" is a question of federal law. *Lee v. Kemna*, 534 U.S. at 375. Accordingly, "'[t]he adequacy of state procedural bars to the assertion of federal questions' . . . is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.'" *Cone v. Bell*, 556 U.S. 449, 465 (2009) (citations omitted). (*See* R24:2-3, and cases cited).

In the decision cited by the district court, the Seventh Circuit itself recognized that, while federal courts generally "do 'not have license to question . . . whether the state court properly applied its own law,'" they nonetheless "could assess whether the state rule is a 'firmly established and regularly followed state practice.'" *Oaks v. Pfister*, 863 F.3d 723, 727 (7th Cir. 2017).

As Ardell explained in the district court (R15-1:25-26; R24:2-4), moreover, the state court's procedural

ruling conflicted with established state procedure. It thus could be neither "firmly established" nor "regularly followed" and therefore was not "adequate" under federal law. *E.g.*, *James*, 466 U.S. at 348-49.

Ardell's substantive claims, including his First Amendment claim raised here, all focused on the denial of his federal constitutional right to a jury verdict on all facts statutorily or constitutionally necessary for conviction (*see* R15-1:8-26; R24:2-13). While *other* types of errors[7] and *other* types of instructional claims[8] may be forfeited under Wisconsin law simply by the failure to object at trial, Wis. Stat. §805.13, the Wisconsin Supreme Court has made clear that any waiver or forfeiture of the right to a jury verdict on all facts necessary for conviction must be made during the court's personal colloquy with the defendant demonstrating their knowledge of that right and that their actions would waive it. *E.g.*, *State v. Smith*, 2012 WI 91, ¶¶52-57, 342 Wis.2d 710, 817 N.W.2d 410; *State v. Livingston*, 159 Wis.2d 561, 464 N.W.2d 839, 842-43 (1991); *see State v. Hauk*, 2002 WI App 226, ¶¶31-37, 257 Wis.2d 579, 652 N.W.2d 393.

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[7] *See*, *e.g.*, *Promotor v. Pollard*, 628 F.3d 878, 885-87 (7th Cir. 2010) (failure to object to inaccurate information in presentence report); *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis.2d 486, 611 N.W.2d 727 (failure to object to 6-person jury forfeited the objection).

[8] Wis. Stat. §805.13; *see State v. Schumacher*, 144 Wis.2d 388, 424 N.W.2d 672 (1988) (failure to object to arguably duplicitous jury instruction splitting single offense into two).

No such colloquy was conducted regarding the instructions' failure to require a jury verdict on all facts the First Amendment requires for conviction based on conversations with third parties about the alleged victim.

Application of a procedural default rule in a manner that conflicts with controlling Wisconsin authority by definition cannot have been pursuant to a "firmly established and regularly followed state practice" and thus cannot rationally be deemed "adequate" to bar federal habeas relief. *See James*, 466 U.S. at 348-49. *See also Ford v. Georgia*, 498 U.S. 411, 423 (1991) ("'Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.'" (Citation omitted)).

Because the district court's procedural default ruling failed to recognize and apply controlling authority contrary to its analysis, and because application of that authority dictates a contrary result, reasonable jurists would at least find its procedural ruling debatable. A certificate of appealability thus is appropriate on Ardell's pendent procedural claim. The lower court's suggestion to the contrary conflicts with this Court's decisions and "so far departed from the accepted and usual course of judicial proceedings" as to support review by this Court. Sup. Ct. R. 10(a) & (c).

2. Ardell's Substantive Claims Satisfy the "Substantial Showing of the Denial of a Constitutional Right" Requirement for a Certificate of Appealability

Reasonable jurists could agree with Ardell, or at least find debatable, that the instructions permitted conviction for constitutionally protected speech by failing to require that Ardell intended his communications with third parties to impact the alleged victim by being relayed to her or used to harass her.

Having overlooked controlling authority and mistakenly concluding that Ardell procedurally defaulted his substantive claims, neither the state court nor the federal courts below decided Ardell's First Amendment/right to a jury verdict claim on the merits. Rather, both the state court and the district court limited their consideration of that argument to the context of Ardell's ineffectiveness claims. Each applied the restrictive and deferential standards for review of ineffectiveness (F:22-F:24), with the district court adding the double deference applicable to federal habeas review of merits-based state court ineffectiveness decisions (B:12-B:24). *See*, *e.g.*, *Burt v. Titlow*, 571 U.S. 12, 15 (2013).

Because he did not procedurally default his First Amendment/right to a jury verdict claim in state court, Ardell is entitled to federal review of that claim without the deferential ineffectiveness overlay. Moreover, because the state court did not decide that claim on its merits, Ardell is entitled to *de novo* review on that

claim. AEDPA deference under 28 U.S.C. §2254(d) applies *only* to matters actually decided on the merits by the relevant state court; matters not decided on the merits are reviewed *de novo*. *E.g.*, *Rompilla*, 545 U.S. at 390 (*de novo* review where state courts did not reach prejudice prong under *Strickland v. Washington*, 466 U.S. 668 (1984)).

Although overlooked by the state court when interpreting Wisconsin's stalking statute, "a statute . . . which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind." *Watts v. United States*, 394 U.S. 705, 707 (1969); *e.g.*, *United States v. X–Citement Video, Inc.*, 513 U.S. 64 (1994) (construing *mens rea* element re age into child pornography statute to protect its constitutionality).

And, although overlooked by the district court (B:19-B:22), content-based restrictions on speech – those which, as here, target speech based on its communicative content – are presumed to be invalid "and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (citations omitted).

The state has made no attempt to justify the state court's interpretation criminalizing communications with third parties as narrowly tailored to any compelling state interest.

Because the district court failed to apply controlling authority, there is no rational dispute that "jurists

of reason could disagree with the district court's resolution of [Ardell's substantive] constitutional claims." *Miller-El*, 537 U.S. at 327 (citation omitted). Indeed, jurists of reason would and *have* found First Amendment claims indistinguishable from Ardell's to be not merely substantial, but legally correct.

Under this Court's decisions, it is the intended recipient of the communication, not its substance,[9] that distinguishes protected from unprotected in this context. *Compare Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (First Amendment bars enjoining defendants from distributing leaflets that criticized Keefe's business practices in Keefe's neighborhood), *with Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737-38 (1970) (no First Amendment right to press even good ideas on individual who asks to be left alone). Unless the speaker intends that the third party act as a conduit by relaying the substance of the communications to the alleged victim or using those communications to harm the alleged victim, the intended recipient of the communication is the third party, not the alleged victim.

Several courts composed of presumably reasonable jurists have found statutes or interpretations like the state court's here to violate the First Amendment on just these grounds. *Bey v. Rasawehr*, 161 N.E.3d 529

[9] While this Court has recognized certain categorical exceptions to this rule, such as "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and "true threats," *Watts*, *supra*, neither applies to communications with third parties that the defendant did not intend to be communicated to the alleged victim.

(Ohio 2020) (vacating stalking injunction barring internet postings "about" the alleged victim as unconstitutional content-based prior restraint); *State v. Shackelford*, 825 S.E.2d 689 (N.C. App. 2019) (Stalking statute unconstitutional as applied to internet posts and emails to third parties "about" the alleged victim); *People v. Relerford*, 104 N.E.3d 341 (Ill. 2017) (Stalking statute facially unconstitutional to extent it criminalizes communications "about" alleged victim); *In re JP*, 944 N.W.2d 422 (Mich. App. 2019) (reversing harassment finding absent evidence that teen defendant intended texts to third parties about the alleged victim to be communicated to the alleged victim). In *Commonwealth v. Welch*, 825 N.E.2d 1005 (Mass. 2005), moreover, the court recognized that a requirement of direct or indirect contact or intended contact between the defendant and the alleged stalking victim was necessary to protect the statute from Constitutional challenge.[10]

The state court's interpretation of §940.32 to criminalize inquiries of, and dissemination of information to, third parties about the alleged victim absent any intent that they be relayed to the alleged victim or used to harass them risks criminalizing much of the zealous advocacy required of private investigators, litigation attorneys, and even police officers. Such investigations, intended to ferret out fraud, perjury, and the like, are constitutionally protected yet could be deemed

[10] A different holding in *Welch* was abrogated on other grounds in *O'Brien v. Borowski*, 961 N.E.2d 547, 556 n.7 (Mass. 2012).

intimidating, threatening, or harassing by the target of the investigation.

The state court overlooked that point, ironically citing exactly such protected investigation as *justifying* its interpretation of the statute:

> The purpose of the July 4 email was to tell the principal about N. making false statements and obtaining restraining orders against Ardell on false grounds. The purpose of the July 23 email was to find out whether N. had been encouraged by the principal to petition for the injunction; it referred to a prior phone call when Ardell had asked the principal the same question.

(F:18; *see also* F:24 ("The statute's plain language criminalizes sending material for those purposes – obtaining information about and disseminating information about – as well as 'communicating with the victim.' The emails to the principal had both of those purposes.").)[11]

Reasonable jurists thus would find debatable or wrong the district court's suggestion in the course of its ineffectiveness discussion that criminalizing communications with third parties merely because they are *about* the alleged victim complies with the First Amendment despite the absence of proof of the

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[11] The state court's conclusion in this regard is puzzling given that Wis. Stat. §940.32(4)(a)1 expressly provides that Wisconsin's stalking statute "does not apply" to "[g]iving publicity to and obtaining or communicating information regarding any subject. . . ."

speaker's harmful intent that the communications be passed on to the alleged victim or used to harass them.

Again, the lower courts' suggestion to the contrary conflicts with this Court's decisions and the numerous other presumably reasonable jurists who have found that comparable interpretations violate the First Amendment. The conclusory decisions below denying Ardell a certificate of appealability thus "so far departed from the accepted and usual course of judicial proceedings" as to support review by this Court. Sup. Ct. R. 10(a) & (c).

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the order of the Seventh Circuit Court of Appeals, vacate that order, and either grant him a certificate of appealability or grant briefing on the issues presented.

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Respectfully submitted,

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