No. 21-475

In the Supreme Court of the United States

DEANNA BROOKHART,
WARDEN, LAWRENCE CORRECTIONAL CENTER,
Petitioner,

v.

KENNETH SMITH,
Respondent.

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

REPLY BRIEF FOR PETITIONER

ALEX HEMMER
Deputy Solicitor General
KATHERINE M. DOERSCH
Criminal Appeals Division Chief
ELDAD Z. MALAMUTH
Assistant Attorney General

* *Counsel of Record*

KWAME RAOUL
Attorney General
State of Illinois
JANE ELINOR NOTZ*
Solicitor General
100 West Randolph St.
Chicago, Illinois 60601
(312) 814-5376
jane.notz@ilag.gov

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

Three Illinois juries have convicted respondent for murdering Raul Briseno. Respondent maintains he is the "wrong guy," BIO 1, and contends that an alternative group of suspects was responsible. But the jury here heard every piece of evidence on which respondent relies, and it disagreed.

A federal court reviewing a state-court conviction is supposed to be doubly deferential: deferential first to the jury's verdict and then to the state court's opinion affirming that verdict. *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam). But the Seventh Circuit substituted its judgment for the jury's, disregarding not only the state-court opinion resolving respondent's claims but also the bulk of the evidence on which that court relied. And it went outside the state-court record to do so, relying on photos taken almost a decade after trial that the jury never saw.

Respondent urges this Court to take on the same role—to weigh the evidence supporting his conviction against the evidence pointing in the opposite direction and find him innocent. He defends the decision below on the ground that the evidence the Seventh Circuit overlooked was "redundant" or "marginal," and asserts that it was permitted to develop the evidentiary record on appeal. BIO 23, 26. Respondent is wrong. The Seventh Circuit usurped the jury's role and violated AEDPA. This Court should grant the petition and reverse so that the State can retry him.

ARGUMENT

The Seventh Circuit was required to deny habeas relief unless "*every* fairminded jurist would agree" that the state court erred in rejecting respondent's *Jackson* claim. *Dunn v. Reeves*, 141 S. Ct. 2405, 2411 (2021) (per curiam) (emphasis in original). But its decision cannot be squared with that limitation.

I. The Seventh Circuit Disregarded AEDPA.

As the State explained, Pet. 20-33, the Seventh Circuit's decision transgressed AEDPA's restrictions in multiple ways. Respondent's attempts to defend that decision are unpersuasive.

A. The Seventh Circuit failed to defer to the state court's decision.

To start, respondent is wrong to assert that the Seventh Circuit deferred to the state court's decision as AEDPA requires. Respondent contends that the Seventh Circuit "recited the applicable legal standard" at *some* junctures, even if it did not do so at *every* juncture, and that it permissibly "focused on" the "central justification" in the state-court opinion while ignoring only its "marginal" aspects. BIO 17-18, 20, 23. These defenses do not withstand scrutiny.

As to the appropriate standard, as the State has explained, Pet. 21-25, the Seventh Circuit paid only lip service to AEDPA's limitations, reciting the relevant standard at points but otherwise conducting an "essentially *de novo* analysis" of respondent's *Jackson*

claim. *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560-2561 (2018) (per curiam). And it "repeatedly reached conclusions" without "framing the relevant question as whether a fairminded jurist could reach a different conclusion," *Shinn v. Kayer*, 141 S. Ct. 517, 524 (2020) (per curiam)—a phrase the Seventh Circuit used only once, App. 29a.

Respondent cannot genuinely defend this aspect of the Seventh Circuit's opinion. He argues that the panel "correctly recited" the AEDPA standard, BIO 17, but *reciting* that standard without *applying* it is insufficient, as this Court explained last Term in *Kayer*, 141 S. Ct. at 523. And elsewhere respondent seriously overstates what the Seventh Circuit did. The panel did not, for instance, "reiterat[e] AEDPA's deferential standard" in discussing its disagreement with the state court, BIO 17; instead, it stated that "*Jackson* and AEDPA require[d] [it] to view the evidence in the light most favorable to the prosecution," App. 26a; accord App. 28a—i.e., it recited only the *Jackson* standard, shorn of AEDPA deference.

And elsewhere, as respondent concedes, BIO 18, the Seventh Circuit failed to even mention AEDPA. For instance, its discussion of Houghtaling's green jacket—by respondent's account, one of "the two most important pieces of evidence," *id.* at 15—features not even a bare reference to AEDPA. App. 23a. Respondent contends that this is because the Seventh Circuit's assessment was "*consistent with* the state court's assessment," BIO 18 (emphasis in original), but this is not so: The state court cited Pardo's identification of the jacket as a key piece of evidence *supporting* the

conviction, see App. 189a, whereas the panel viewed it as so unreliable that it had to be "remove[d] . . . from the picture" in assessing respondent's *Jackson* claim, App. 26a-27a. With respect to this concededly critical evidence, then, the panel took a diametrically opposite view from the state court's without explaining why that court's conclusion could not have been reached by a "fairminded jurist." *Kayer*, 141 S. Ct. at 524.

Indeed, as the State explained, Pet. 24-25, the panel's disregard of the state-court opinion went beyond its failure to apply AEDPA deference. Although a federal court sitting in habeas is required to "carefully consider all the reasons and evidence supporting the state court's decision," *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (per curiam), the Seventh Circuit all but disregarded the state court's 93-page opinion, failing to contend with its reasoning and overlooking many of the "inconvenient details," *ibid.*, cited by that court in rejecting respondent's *Jackson* challenge.

Respondent defends the panel's approach, arguing that the panel "focused on" what it perceived to be the state court's "central justification," and ignored only evidence that was "marginal" to the case. BIO 20, 23. But that approach—under which a federal court applying AEDPA can pick and choose among the reasons offered by a state court in rejecting a federal claim—cannot be squared with AEDPA. "[T]here is no way to hold that a decision was 'lacking in justification' without identifying—let alone rebutting—all of the justifications" offered by a state court. *Hines*, 141 S. Ct. at 1149 (quoting *Harrington v. Richter*, 562

U.S. 86, 103 (2011)). In other words, a federal court cannot just dismiss the justifications it does not like as "marginal."

In any event, the parts of the state court's opinion that the panel ignored were not "marginal." The state court, for instance, devoted multiple pages to the evidence concerning Houghtaling, including his guilty plea (at which he apologized to Briseno's widow) and the sketch—based on Pardo's firsthand account–of a man who bore a "striking resemblance to Houghtaling." App. 187a-191a. But the panel did not reference these "inconvenient details," *Hines*, 141 S. Ct. at 1149, at all.

For his part, respondent attempts to diminish the import of the sketch, contending that the state court "mentioned it" only "in passing." BIO 23. But the state court highlighted the sketch as one of a handful of key facts in the first paragraph of its analysis. See App. 187a. Respondent cannot justify the Seventh Circuit's decision to ignore the sketch on the ground that the state court should have spelled out in more detail why it thought it was important. Cf. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (criticizing "readiness to attribute error" to state courts). The same goes for respondent's defense of the Seventh Circuit's failure to discuss his conflicting statements to police, which the state court spent a lengthy paragraph on, App. 187a-188a—hardly a "passing discussion," BIO 25.

Alternately, respondent contends, the panel had no *need* to discuss certain evidence because it went

only to Houghtaling's credibility, and the panel said that it assumed the jury found Houghtaling credible. BIO 23. But the lynchpin of the panel's *Jackson* holding was its conclusion that Houghtaling was lying. App. 23a-26a. The panel violated AEDPA in reaching that view without considering "all the justifications" that supported the jury's contrary conclusion. *Hines*, 141 S. Ct. at 1149.

B. The Seventh Circuit usurped the jury's role.

The Seventh Circuit also erred in impermissibly assuming the jury's role—discounting evidence that did not fit its view of what happened, going outside the state-court record to identify evidence that did, and conducting its own independent reweighing of the evidence. Pet. 25-33. Respondent's arguments to the contrary lack merit.

1. To start, as the State explained, Pet. 28-30, the Seventh Circuit exceeded AEDPA's limitations by going outside the state-court record and obtaining a key piece of physical evidence, Houghtaling's green jacket, for itself. In April 2021—almost a decade after the trial—the panel instructed the county prosecutor to take new photographs of the jacket's garment tag. The panel then relied on the photographs to observe "that the exterior shell is made of PVC casting leather (i.e., vinyl) and rayon," not leather, and so the jacket could not have been worn by the second robber. App. 29a.

Respondent does not dispute this. Instead, he defends the panel's conduct by contending that the jacket was "introduced before the state court," and so the panel did not violate § 2254(d) in directing the prosecutor to take new photographs of its tag. BIO 26. That cannot be right. As this Court has explained, § 2254(d) limits federal-court review of state-court convictions to "what [the] state court knew and did." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). That means that a federal court must review what the jury actually saw, not order further development—new photographs, tests, and more—of the evidence. Were it otherwise, a federal habeas court could order DNA testing at will on state-court exhibits and justify it on the ground that the exhibits were "introduced before the state court." Such a freewheeling approach cannot be squared with § 2254(d).[1]

Here, the panel's review of the jacket far exceeded the jury's. The jury saw Houghtaling's jacket for a matter of seconds, Dist. Ct. Doc. 1-9 at 105—just long enough for Pardo's identification. No one discussed whether it was made of "PVC casting leather" or real leather. App. 29a. No one mentioned the tag. Only the panel did that—and it did so a decade later, on

[1] The panel's assumption of a fact-finding role for itself cannot be defended, as respondent suggests, on the ground that it had identified an "evidentiary gap." BIO 26. Section 2254 instructs federal courts how to handle factual disputes in habeas cases: They must "presum[e]" the state court's resolution of factual disputes was correct unless an applicant "rebut[s]" that presumption "by clear and convincing evidence," including, if appropriate, at an evidentiary hearing. 28 U.S.C. § 2254(e). The panel did not follow these procedures.

appeal, and purporting to apply AEDPA review. It exceeded § 2254(d) in doing so.

2. As the State explained, Pet. 25-28, the panel compounded that error by isolating its review to three categories of evidence—the jacket, Houghtaling's confession, and the evidence implicating the DeCicco group—and then taking a "divide-and-conquer" approach, dismissing the significance of the first two categories in order to place more weight on the third. App. 27a. As noted, respondent defends the panel's decision to overlook a wide range of evidence supporting the conviction on the ground that such evidence was "marginal" to the state court's decision, BIO 23, but that defense flouts AEDPA, *supra* pp. 4-5.

Respondent's attempt to salvage the panel's divide-and-conquer approach, BIO 25-26, makes things worse, not better. He asserts that, "understood in context," *id.* at 25, the panel's discussion is best read to reflect its conclusion that he was entitled to habeas relief based *solely* on its review of Houghtaling's confession and the jacket. But even setting aside that the panel said no such thing, that conclusion would be even less defensible than the panel's own, because it would rest on an even *more* circumscribed view of the state-court record.

3. In the end, the panel did exactly what federal courts should not do in reviewing *Jackson* claims considered and rejected by the state courts: It assumed the jury's role, weighing the evidence inculpating respondent against the evidence inculpating the DeCicco group and concluding that the latter was

more compelling. See App. 30a. Rather than ask whether the jury's decision "was so lacking justification" that it went "beyond any possibility for fair-minded disagreement," *Richter*, 562 U.S. at 103, the panel adjudicated the case—or at least respondent's *Jackson* claim—for itself.

Respondent, for his part, urges the Court to reprise the panel's error. The bulk of his response is devoted to two extended accounts of the trial evidence, which he maintains demonstrates his innocence. BIO 20-23, 27-33. But the jury heard this evidence, and it found respondent guilty. In the state court's words, "the jury was presented with two versions of the events and, given its verdict, it found the State's version persuasive." App. 197a.

And the jury had ample reason to do so, notwithstanding respondent's account here. For instance, respondent places great weight on DeCicco's assertion that she knew two non-public facts about the investigation. BIO 10-11, 21, 31-32. But DeCicco did not confess to the police until *years* after the murder, at which point the police reports had been released to respondent and McMullan, and both had been convicted. App. 166a. DeCicco admitted that she had read the police reports, Dist. Ct. Doc. 1-11 at 109, a fact the State emphasized to the jury, *id.* at 264. So the state court's conclusion that DeCicco had learned about the details from other sources, App. 196a, was hardly speculative, as respondent suggests, BIO 21; to the contrary, it was supported by the evidence the jury heard.

Similarly, respondent errs in suggesting that he must have been innocent because he had no motive to commit the crime (and, by contrast, DeCicco had no motive to falsely assume responsibility). BIO 28, 33-34. But, again, the jury was given—and evidently accepted—reasons for both: The murder stemmed from a robbery gone wrong, Dist. Ct. Doc. 1-11 at 155, 157, and DeCicco confessed to her family so she could get "money for drugs," App. 194a; Dist. Ct. Doc. 1-11 at 107-108, and then to the police in exchange for leniency on an unrelated arrest, *id.* at 103-104.

Respondent's account of other details is similarly flawed. Respondent says, for instance, that Houghtaling had an "alibi" that was "corroborated by security footage," BIO 8, but as the State told the jury, the security footage showed a single co-conspirator (Collett) at a nearby store more than 15 minutes after the incident, Dist. Ct. Doc. 1-11 at 180, 236—a fact consistent with Houghtaling's statement that they went to the store after the robbery for the purpose of creating an alibi, App. 11a, 150a, 192a. And although respondent emphasizes that one member of DeCicco's group "later stole [her] car and burned it," BIO 12, the jury heard that "later" was "months" after the crime, Dist. Ct. Doc. 1-11 at 190; App. 16a, 169a—a fact supporting its apparent view that DeCicco's confession was not credible and that Houghtaling's was.

II. There Is No "Vehicle" Issue.

Respondent also contends that the lower courts' grant of habeas relief on other grounds makes this a

"poor vehicle" for certiorari or summary reversal. BIO 33. Respondent is incorrect.

As respondent observes, the lower courts granted him a conditional writ of habeas corpus on the ground that three of the state trial court's evidentiary rulings were erroneous. App. 30a, 126a. The State has not sought further review of these holdings, and so if the Court were to grant certiorari and reverse, the State would have to try respondent again to preserve the jury's verdict.

But respondent is wrong to contend, BIO 33-34, that the prospect of retrial makes this a "poor vehicle" for review. To the contrary, the State seeks certiorari for exactly that reason—because it intends to retry him. The district court vacated respondent's conviction but permitted the State to retry him; the Seventh Circuit's decision, by contrast, bars the State from ever prosecuting respondent for Briseno's death. App. 37a. The State's decision to seek relief from that order cannot make this case a "poor vehicle" for certiorari, because there is no bar to the Court granting exactly the relief the State seeks.

Nor does the fact that reversal would not yield an unqualified judgment for the State make the petition ill-suited to review—or unusual in any way. This Court routinely grants certiorari and reverses on a single question, leaving the parties to sort out the remaining issues on remand. See, *e.g.*, *Collins v. Virginia*, 138 S. Ct. 1663, 1675 (2018) ("leav[ing] for resolution on remand" whether petitioner's conviction could be sustained on other grounds); *Carpenter v.*

United States, 138 S. Ct. 2206, 2223 (2018) (similar). Here, reversing on the *Jackson* issue would accomplish an analogous result—vacating the order barring the State from retrying respondent and securing his conviction.

Respondent asserts that it is "unlikely" that the State would retry him, BIO 34, but cannot support that speculation. Respondent's main argument seems to be that DeCicco's 2015 death would make it more difficult to obtain a conviction. *Ibid.* But DeCicco was a "key witness" for respondent, not the State, *ibid.*, so her death has no bearing on whether the State would retry him.

Finally, respondent briefly suggests that his case is poorly suited for the Court to convey "the importance of respect for jury verdicts" because the jury's verdict was "hopelessly tainted" by the alleged evidentiary errors. BIO 35. This argument rests on two flawed premises. First, the three challenged pieces of evidence are hardly "essential," BIO 33; indeed, the State intends to retry respondent fully cognizant of the federal courts' evidentiary rulings if this Court corrects the Seventh Circuit's *Jackson* error. Moreover, the State does not seek certiorari so that the Court can send a message to other courts in other cases. It seeks certiorari because the lower court *here* transgressed AEDPA—an error this Court has not hesitated to correct even in fact-bound cases. See, *e.g.*, *Reeves*, 141 S. Ct. 2405; *Hines*, 141 S. Ct. 1145; see also *Cash v. Maxwell*, 565 U.S. 1138, 1147 (2012) (Scalia, J., dissenting) (describing this practice). The Court should take the same course now.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed summarily or after briefing and argument.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois
JANE ELINOR NOTZ*
Solicitor General
ALEX HEMMER
Deputy Solicitor General
KATHERINE M. DOERSCH
Criminal Appeals
Division Chief
ELDAD Z. MALAMUTH
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
jane.notz@ilag.gov

* *Counsel of Record*

MARCH 2022