No. _____

IN THE
Supreme Court of the United States

TYLER A. GONZALES,

Petitioner,

v.

CHERYL EPLETT,

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

Federal habeas courts must review the particular reasons in the last state court's decision to determine whether that decision involves an unreasonable application of clearly established federal law or is based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). If either condition is met, then the federal court must undertake its own de novo review of the petitioner's claim.

Here, the Wisconsin Court of Appeals issued a decision on the merits of Petitioner Tyler Gonzales's ineffective-assistance-of-counsel claim. That *Strickland* claim required the Wisconsin court to decide, *inter alia*, whether trial counsel performed deficiently—i.e., whether her performance was "reasonable[] under prevailing professional norms" (*Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

The questions presented are:

1. Did the Seventh Circuit err when it reviewed the merits of Gonzales's claim de novo, did not analyze the particular reasons the Wisconsin court provided, and then "deferred"?

2. Did the Seventh Circuit err in deferring to the state court's decision when that decision involves an unreasonable application of *Strickland* and is based on an unreasonable determination of the facts?

3. Did the Seventh Circuit err when it concluded that counsel's performance was not deficient without assessing whether her performance was reasonable under prevailing professional norms?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Tyler A. Gonzales. Respondent is Cheryl Eplett, Warden of Oshkosh Correctional Institution. No party is a corporation.

RELATED PROCEEDINGS[1]

This case is directly related to the following proceedings:

- Oral Ruling, *State v. Montour*, No. 2015CF219 (Walworth Cty. Cir. Ct. Mar. 1, 2017) (unpublished) (findings of fact following evidentiary hearing and explanation of denial of motion for post-conviction relief);

- *State v. Montour*, 921 N.W.2d 10 (Wis. Ct. App. 2018) (per curiam) (Table) (unpublished) (affirming denial of post-conviction relief);

- *State v. Montour*, 923 N.W.2d 153 (Wis. 2018) (Table) (unpublished) (denying petition for review);

- Decision and Order, *Montour v. Jess*, No. 19-C-1604, 2021 WL 734396 (E.D. Wis. Feb. 25, 2021) (unpublished) (denying State's motion to dismiss);

- Decision and Order, *Montour v. Jess*, No. 19-C-1604, 2022 WL 2869603 (E.D. Wis. July 21, 2022) (unpublished) (denying § 2254 petition and granting certificate of appealability);

- *Gonzales v. Eplett*, 77 F.4th 585 (7th Cir. 2023) (affirming denial of § 2254 petition);

- Order, *Gonzales v. Eplett*, No. 22-2393, 2023 WL 6540699 (7th Cir. Oct. 6, 2023) (per curiam) (denying rehearing); *and*

- Order, *Gonzales v. Eplett*, No. 23A577 (U.S. Jan. 2, 2024) (extending time in which to file petition for writ of certiorari).

[1] Petitioner Tyler Gonzales changed his last name from Montour to Gonzales during the course of this litigation. Thus, some case captions reference Montour and others reference Gonzales. Both names refer to the Petitioner.

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PETITION FOR WRIT OF CERTIORARI

Tyler Gonzales respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 77 F.4th 585 (Appx.1a–15a, *infra*), and its order denying rehearing is unreported but available at 2023 WL 6540699 (Appx.17a).[2] The opinion of the district court is unpublished but available at 2022 WL 2869603 (Appx.18a–34a).

JURISDICTION

The judgment of the federal court of appeals was entered on August 9, 2023, and that court denied rehearing on October 6, 2023. On January 2, 2024, Justice Barrett extended the deadline to file this petition to March 4, 2024. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

[2] Abbreviations appear throughout this petition. Documents in the Appendix are cited as "Appx.___." Documents in the federal district court record are cited as "R.___:___," with the first number indicating the docket entry and the second pin citing to the Bates-stamped pagination.

INTRODUCTION

Federal courts play a limited but important role in ensuring that state criminal convictions are constitutionally sound. When reviewing an ineffective-assistance-of-counsel claim, a federal habeas court must decide whether it is required to defer to the state court's decision by looking to the "particular reasons" the state court gave and asking "whether the state court's application of the *Strickland* [*v. Washington*, 466 U.S. 668 (1984),] standard was unreasonable" or rests on unreasonable determinations of fact—not by conducting a de novo analysis and seeing whether its own outcome aligns with that of the state court. *Wilson v. Sellers*, 138 S. Ct. 1188, 1191 (2018) (first quote); *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (second quote); 28 U.S.C. § 2254(d).[3] This process furthers principles of comity and federalism. And following it ensures that federal courts neither overstep nor serve as paper tigers; they displace only unreasonably wrong state court decisions.

This case contravenes those precedents and, therefore, is a straightforward candidate for certiorari. The Seventh Circuit disregarded AEDPA's clear rules when it conducted its own review of the record, ignored the state court's explanation for its decision, and then "deferred." That analysis is obviously wrong and problematic; it inverts *Richter*'s rule and, in turn, erodes AEDPA. It also leaves the Wisconsin Court of Appeals' unreasonably wrong decision intact. This Court has an established

[3] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 104(3), *codified at* 28 U.S.C. § 2254(d) ("AEDPA").

practice for enforcing AEDPA's procedural requirements in situations like this one: summary reversal. That is precisely what is warranted here.

This Court might go one step further and reach the merits of Gonzales's claim, because the decision below is flawed in ways that will affect future cases. In this attempted first-degree homicide case, trial counsel unreasonably assumed that she could argue for acquittal because none of the State's cooperating eyewitnesses would appear. Even after all the witnesses testified, counsel did not change her approach; in her own words, it "never even crossed [her] mind" to adjust to meet the State's evidence. Appx.5a. Although "greatly troubled" by counsel's performance and finding it "hard to justify," the Seventh Circuit denied relief. *Id.* at 14a. The court held that counsel's performance was not deficient because the defense case was hopeless *regardless* of what counsel did. In so holding, the decision below materially alters *Strickland*'s rule. It collapses this Court's two-part test into a single subjective gut-check as to the strength of the State's evidence.

This Court must step in to reaffirm its precedents. The questions presented are important—they go to the balance of state and federal court review of criminal convictions and the contours of the Sixth Amendment, which is fundamental to the adversary process and the fairness of the criminal justice system. The Seventh Circuit's flawed analysis disturbs that balance and twists *Strickland* severely out of shape. No procedural hurdle stands in the way of reversal. For all these reasons, discussed at greater length herein, Gonzales respectfully asks this Court to accept review, reverse the decision below, and remand for further proceedings.

STATEMENT OF THE CASE

A. Tyler Gonzales's trial counsel assumed that none of the State's key fact witnesses would testify, and, after they did testify, she did not adjust to meet the State's case as presented.

Shots fired outside the Hawk's Nest Bar in mid-June 2015 led the State of Wisconsin to charge Tyler Gonzales with one count of attempted first-degree homicide and one count of unlawful possession of a firearm. The criminal complaint explained that several witnesses—namely, Adrian Valadez ("Adrian"), Alex Valadez ("Alex"), and Pedro Gonzalez ("Pedro")—had been interviewed by the police and saw what happened. R.39:1–2.[4] Alex and Adrian both reported a "verbal altercation" inside the bar between Gonzales and Blake Kruizenga ("Kruizenga"). *Id.* Adrian also reported that, later, while he and Kruizenga were standing outside, they saw a car approach, they watched Gonzales lean out the passenger window holding a gun, they heard Gonzales yell, and they saw Gonzales fire several shots in their direction. *Id.* at 2. Kruizenga was struck in the leg. *Id.* Further, Pedro (Gonzales's brother-in-law) reported that he picked Gonzales up from the bar that night, he saw Adrian and Kruizenga standing outside the bar, and, as they were driving away, Pedro heard Gonzales yell out to them and then heard gunshots. *Id.*

Melissa Frost was appointed to represent Gonzales, and she based her defense theory on the State's witnesses *not* testifying. Just after the preliminary hearing, Frost learned that Kruizenga had absconded from probation and that the State intended to proceed "with or without him." *See* R.39:771–72. From that point forward,

[4] Alex Valadez previously was known as Alex Garnica.

she assumed that *none* of the four key fact witnesses (Alex, Adrian, Kruizenga, and Pedro) would appear to testify. *Id.* at 771–72, 795; Appx.3a. In her words, Frost believed she could argue that Gonzales "did not do this thing" because the State would not produce a witness to say otherwise. R.39:772–73. She did not discuss with Gonzales whether he had fired the gun (i.e., investigate capacity, mens rea, or affirmative defenses). *See* Appx.49a. There was no evidence that someone else was the shooter.[5] And there was no alibi. Still, she intended to pursue across-the-board acquittal rather than a compromise verdict—an "all-or-nothing approach."

Frost also adopted the all-or-nothing approach knowing that the court would instruct the jury on the lesser-included homicide offense of first-degree recklessly endangering safety. Appx.47a. The mens rea required for the lesser-included offense is lower than for the greater offense.[6] Thus, the State could obtain a homicide conviction even if jurors doubted whether the shooter intended to kill Kruizenga.[7]

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[5] In Wisconsin, criminal defense attorneys must seek permission to argue that another person is responsible for the crime charged. *See State v. Denny*, 357 N.W.2d 12 (Wis. Ct. App. 1984). Frost did not have a basis for such a motion. R.39:797–98.

[6] Attempted first-degree intentional homicide demands proof of "intent to cause the death of another human being," which requires the State to demonstrate "that the defendant 'has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.'" Appx.3a (quoting Wis. Stat. § 939.23). The lesser-included offense is defined as "recklessly endanger[ing] another's safety under circumstances which show utter disregard for human life," which requires the State to demonstrate that the defendant "was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm." Wis. Stat. § 941.30(1) (first quote); R.39:701 (second quote) (jury instruction).

[7] To convict on the greater homicide offense, the jury needed to be "satisfied beyond a reasonable doubt that the defendant intended to kill Blake Kruizenga and that the defendant's acts demonstrated unequivocally that the defendant intended to kill and would have killed Blake Kruizenga except for the intervention of another person or some other extraneous factor." R.39:699 (jury instruction).

Further, the lesser-included offense carries a lower maximum penalty than the greater offense: 7½ years' initial confinement versus 40 years' initial confinement. Appx.3a. But Frost assumed the witnesses would not appear. And, in light of that assumption, she both held onto the all-or-nothing approach and advised Gonzales to reject an offer to plead guilty to the lesser-included homicide and unlawful possession charges in exchange "for a recommended ten-year sentence." *Id.* at 2a–3a.

Frost maintained the all-or-nothing approach despite numerous indications that all four fact witnesses would testify. Two weeks before trial, the prosecutor confirmed that Adrian was cooperating and had "made it clear that he intended to testify and testify truthfully." R.39:914. Five days before trial, the State explained that it would present the testimony of between nine and eleven witnesses, including Alex, Adrian, and Kruizenga—all of whom were on probation. *Id.* at 142–43, 149. Around the same time, Frost received the State's witness files and learned that Pedro was a confidential informant. *Id.* at 144, 553. On the morning of voir dire, Kruizenga was seated in the front row of the courtroom, and the State again identified Alex, Adrian, Kruizenga, and Pedro as witnesses. *Id.* at 164. And, in its opening statement, the State promised the jurors that they would hear from all four of those witnesses. *Id.* at 234–35. Yet, as the trial began, Frost "still believed that the state's witnesses perhaps were not going to show up." *Id.* at 780, 782 (Frost's subsequent testimony).

All four key fact witnesses testified for the State. Consistent with the criminal complaint, Kruizenga, Adrian, and Pedro identified Gonzales as the shooter, and Alex corroborated their testimony. *See* Appx.4a, 21a.

Frost had reserved her opening statement and, therefore, was "free to incorporate . . . changes into her presentation to the jury" without ceding credibility. *Id.* at 4a, 12a. By the close of the State's case, the record already contained "evidence that would have helped [Frost] build a case for the lesser-included offense." *Id.* at 12a. A detective had testified that "someone firing a gun with the intent to kill would aim at 'center mass,'" and a firearms analyst had testified that bullets "go in a straight line from whatever direction the barrel is pointed." *Id.*; R.39:483. In addition, Frost knew that the defense investigator was prepared to introduce physical evidence that the shooter aimed low—namely, photographs showing that the bullet damage to the bar's back door was inches off the ground and that Kruizenga had suffered only a superficial wound near his sock line, indicating that the bullet likely bounced before hitting him. R.48:1069–70 (Ex.15, 78). And Gonzales had privately admitted to Frost that he was the shooter and suggested that he testify to explain that "he was not trying to hit anyone and was just trying to scare [Adrian] and Kruizenga." Appx.4a. Thus, Frost could craft a case and argue in closing that, even if the jury believed Gonzales had fired the gun, the State had not proven he did so with the higher mens rea required for attempted first-degree homicide.

Frost maintained her all-or-nothing approach. As she would later testify, the witnesses' appearance at trial had no effect on her approach to the case. R.39:783. She did not use the time between trial days to "make any adjustments to her

presentation." Appx.4a.[8] And she did not mention the lesser-included offense in her closing argument, let alone explain the different mens rea requirements. *Id.* at 4a, 13a. Instead, she argued that the witnesses were lying and that they sought to pin the crime on Gonzales as part of a town-wide conspiracy. *See* R.39:723, 728–31. Her closing argument identified discrepancies in the eyewitnesses' testimony regarding how close Kruizenga and Adrian were standing to the bar's back door and what color car was involved in the shooting. *Id.* at 724–25, 731. She could point to no evidence, however, to rebut their testimony that they saw Gonzales lean out the car window, saw him holding the gun, and saw him fire shots in their direction. *Cf. id.* at 722–36.

The jury convicted Gonzales of the greater homicide offense and unlawful possession of a firearm, and the court sentenced him to an aggregate 25 years' initial confinement and 15 years' extended supervision. Appx.6a. "[T]hree jurors told Frost after the trial that they did not understand the difference between attempted first-degree intentional homicide and first-degree recklessly endangering safety" and that they "just picked attempted intentional homicide for the conviction because they knew Gonzales had been the one who pulled the trigger." *Id.* at 5a–6a. The 20-year sentence Gonzales received for the greater homicide offense was "nearly three times the statutory maximum [he] would have faced if the jury had convicted on the lesser-included offense." *Id.* at 6a.

[8] Instead, Frost stayed up all night reviewing jail calls that, consistent with the State's representation, contained no evidence of a side deal with Kruizenga or an undisclosed police report. *See* Appx.5a.

B. The Wisconsin courts denied post-conviction relief.

Gonzales timely filed a post-conviction motion in the Walworth County Circuit Court, which the court denied after an evidentiary hearing. He alleged that he received ineffective assistance of counsel when Frost failed to adjust to the evidence presented at trial and argue for the lesser-included offense in closing. *See* R.39:1006. At the post-conviction hearing, Frost testified that she assumed the witnesses would not appear and that, when they did appear, it "never even crossed [her] mind" to adjust course. *Id.* at 784–85. Rather, she was "tunnel visioned on a not guilty across the board" and "didn't consider anything beyond the path that [they] were on because there was no more room in [her] brain to think about anything else"; "[i]t never entered [her] scope that [she] might need to deal with this lesser-included" offense; and she "never" discussed the possibility of changing approaches with Gonzales. *Id.* at 785, 792, 810. The circuit court denied relief, reasoning that Frost neither performed deficiently nor that Gonzales was prejudiced. Appx.72a.

The Wisconsin Court of Appeals affirmed on performance grounds alone. It found that "counsel's strategy was the same during preparation and at trial," that she had "continued in the previously selected strategy to avoid changing strategy before the jury," and that she "believed that there was no reason to argue the lesser included offense because such an argument would have required abandoning the trial strategy that [Gonzales] was not the shooter." *Id.* at 49a–50a, 52a. Ultimately, the court held that Frost's performance was reasonable because:

> Trial counsel developed and pursued a strategy that [Gonzales] was not the shooter. [Gonzales] chose to pursue

> that strategy while withholding crucial information that undermined that strategy. [Gonzales] argues that the way the evidence came in necessitated a strategy change. As is clear from the record, the strategy issues arose because [Gonzales] belatedly informed his counsel that he was the shooter. A defendant cannot create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal.

Id. at 52a (cleaned up). It declined to address prejudice. *Id.*

Gonzales's appellate counsel filed a no-merit petition to the Wisconsin Supreme Court. That filing provided a "comprehensive account" and "alerted the court to the potential constitutional arguments in the case." *Id.* at 8a. Gonzales did not supplement his counsel's filing. *Id.* The court declined review. *Id.* at 53a.

C. The federal district court and federal court of appeals denied post-conviction relief.

Gonzales timely filed a federal habeas petition in the Eastern District of Wisconsin. He alleged that he was being held in violation of law because Frost provided ineffective assistance when she "unreasonably failed to argue for the lesser-included offense." Appx.18a. The district court appointed counsel and then denied the State's motion to dismiss for alleged procedural default. R.22; Appx.44a. The court later denied relief on the merits and issued a certificate of appealability. Appx.34a.

The Seventh Circuit rejected the State's procedural-default argument and undertook its "o[wn] review of the record." *Id.* at 5a, 9a, 10a–14a. It cited numerous facts in the record that were not included in the Wisconsin Court of Appeals' decision. In particular, the Seventh Circuit highlighted that Frost had reserved her opening statement, which allowed her to adjust the defense case without alerting the jury. *Id.*

at 4a. It acknowledged Frost's testimony that she assumed the witnesses would not appear, "that it 'never even crossed her mind' to argue for the lesser-included offense, that she had tunnel vision about pursuing the acquittal, and that she had felt no need to adjust her trial strategy even when it became clear that the state's witnesses were all available." *Id.* at 4a–5a. And it recognized that multiple jurors expressed confusion over the two homicide offenses and confessed that they "just picked" one. *Id.* at 5a.

The Seventh Circuit then analyzed Frost's performance for itself "before [it] turn[ed] to AEDPA." *Id.* at 10a. It identified "[t]he central question in this case" to be "whether Frost provided constitutionally ineffective assistance." *Id.* To answer that question, it (unlike the Wisconsin Court of Appeals) divided her representation into "three critical moments"—pre-trial, mid-trial, and closing argument. *Id.* at 11a. And the Seventh Circuit found that her "choices become less defensible as we move along the timeline." *Id.* The court determined that there was "a great deal to criticize in her performance":

> Her cross-examination of the state's witnesses failed to bring out material inconsistencies in the testimony; worse, it invited the state's witnesses to reiterate their testimony that Gonzales was armed and shooting toward them. In addition, rather than coming up with a revised trial plan in the evenings, she wasted time reviewing jail calls to see if there was evidence of a side deal or an undisclosed police report. Her cross-examination of Pedro Gonzalez also failed to shake his story.

Id. at 5a. Further, the court was "greatly troubled that the idea of strategic adaptation to the state's actual case 'never even crossed her mind'" and that Frost suffered from "plan-continuation bias." *Id.* at 14a. And it believed her "overall

performance is hard to justify." *Id.* But, the court determined that even the decision not to argue for the lesser-included offense in closing was constitutionally sound, because "Frost reasonably could have concluded, in the exercise of her professional judgment, that such a pivot would have been dangerous for Gonzales," given that it exposed him to conviction. *Id.* at 12a. Further, it reasoned, "the simple reality of the situation is that the state had put on a strong case and boxed Frost into a difficult position." *Id.* at 13a. The court noted that, if it "were writing on a clean slate, this would be a close case." *Id.* at 14a. But, giving "Frost every benefit of the doubt, it is possible that there is just enough to support her decisions at each turn." *Id.* at 13a.

The Seventh Circuit then concluded that this is "one of those cases in which the standard of review matters" and held that it was bound to defer to the Wisconsin Court of Appeals' decision. Appx.2a, 14a. It did not cite, describe, or discuss the Wisconsin Court of Appeals' explanation for why Frost's performance was not deficient, nor did it address the conflicts between its own factual findings and those on which the Wisconsin court's decision rested. Instead, it explained that Gonzales had failed to demonstrate "no possibility for fairminded disagreement" over whether Frost's performance was constitutionally deficient. *Id.* at 14a. In closing, the court again highlighted the weight of the evidence:

> It is worth noting, as we conclude, that the state trial court (whose findings strongly influenced the state appellate court) seems to have reached its decision in large part because of the strength of the state's case when all was said and done. It thought that there was little Frost could have done, in the face of that evidence.

Id. The Seventh Circuit then affirmed the denial of Gonzales's habeas petition. *Id.* at 15a–16a. In a single sentence, it summarily rejected the defense's multiple arguments for why no AEDPA deference was warranted. *Id.* at 16a. The court subsequently denied Gonzales's petition for rehearing. *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

A. The decision below inverts *Richter*'s rule, disregards comity, and warrants summary reversal and remand.

This Court has given explicit guidance about how § 2254(d) operates generally and in the specific context of *Strickland* claims. In "[d]eciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact," the federal habeas court must look to the decision from "the last state court to decide a prisoner's federal claim," "train its attention on the particular reasons—both legal and factual—why" that court rejected the claim, and "defer[] to those reasons if they are reasonable." *Wilson v. Sellers*, 138 S. Ct. 1188, 1191–92 (2018); *accord Brumfield v. Cain*, 576 U.S. 305, 313 (2015). "After all, there is no way to hold that a decision was lacking in justification without identifying—let alone rebutting—all of the justifications." *Mays v. Hines*, 592 U.S. 385, 391–92 (2021) (per curiam) (cleaned up). In other words, the federal court does not begin with "a de novo review" of the law or the facts. *Harrington v. Richter*, 562 U.S. 86, 101–02 (2011). In particular, as to whether the state court unreasonably applied federal law, the "pivotal question is whether the state court's application of the *Strickland* standard was unreasonable"—*not* "whether defense counsel's performance fell below *Strickland*'s standard." *Id.* at 101.

The Seventh Circuit did *exactly the opposite* of what this Court's precedents told it to do. The court began by stating that "[t]he central question in this case is whether Frost provided constitutionally ineffective assistance" (Appx.10a)—precisely what this Court said is *not* the "pivotal question" (*Richter*, 562 U.S. at 101). From that flawed premise, it then engaged in its "o[wn] review of the record"—even though it was not free to perform "a de novo review" "before [it] turn[ed] to AEDPA." Appx.5a, 10a (first and third quotes); *contra Richter*, 562 U.S. at 101 (second quote). The Seventh Circuit's role was to "review[] the specific reasons given by" the Wisconsin Court of Appeals to determine whether they are "reasonable." *Wilson*, 138 S. Ct. at 1192. But, tellingly, the Seventh Circuit never once identified (let alone analyzed) the state court's rationale for denying relief. Rather, it "treated the unreasonableness question as a test of its confidence in the result it would reach under de novo review"—the exact approach that *Richter* rejected. 562 U.S. at 102.

This inversion of *Richter*'s rule carries serious federalism implications. Congress struck a careful balance in providing for federal review of state court convictions; "AEDPA's purpose [is] to further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). To that end, federal courts play a circumscribed but important role in safeguarding federal constitutional law: they must identify unreasonably wrong applications of this Court's precedents and review the merits of those cases (and only those cases) anew. 28 U.S.C. §§ 2243, 2254(d). That process ensures that federal habeas courts respect state courts and issue the writ only "where there is no possibility fairminded jurists could disagree

that the state court's decision conflicts with this Court's precedents" or when "reasonable minds reviewing the record" could not disagree that "the [factual] finding in question" is clearly erroneous. *Richter*, 562 U.S. at 102 (first quote); *Brumfield*. 576 U.S. at 314 (remaining quotes) (cleaned up).

Here, the Seventh Circuit did not afford the Wisconsin Court of Appeals' decision the respect that AEDPA envisions. Although sitting as a federal habeas court, the Seventh Circuit did not review the state court's decision *at all*. Rather, the federal court of appeals undertook its own review of the record, inserted facts from the state court record that *neither* Wisconsin court acknowledged, supplied a *new* rationale for Frost's behavior to support the state court's outcome, and (after misapplying *Strickland* itself, *see infra* Part B) affirmed.[9] Put differently, the Seventh Circuit did not "defer" to the Wisconsin Court of Appeals. It rewrote the state court's decision. And, in so doing, the court acted "contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system." *Richter*, 562 U.S. at 104.

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[9] The Seventh Circuit "deferred" to the state court's decision because, in part, "Frost reasonably could have concluded, in the exercise of her professional judgment, that such a pivot would have been dangerous for Gonzales." Appx.12a, 14a. But that was not one of the Wisconsin Court of Appeals' rationales for finding her performance adequate, and the Seventh Circuit was not free to supplant the state court's *actual* reasons with hypothetical ones. *See Brumfield*, 576 U.S. at 323. What's more, that hypothesis runs aground on Frost's own testimony. Frost could not have exercised professional judgment in considering and setting aside an argument for the lesser-included offense when it "[i]t never entered [her] scope that [she] might need to deal with this lesser-included" offense. R.39:792; *accord* Appx.5a; *see Richter*, 562 U.S. at 109 ("courts may not indulge post hoc rationalization for counsel's decisionmaking that contradicts the available evidence of counsel's actions" (cleaned up)).

When a federal habeas court runs afoul of AEDPA in this way, this Court has stepped in. For example, in *Shinn v. Kayer*, this Court granted the petition for certiorari and vacated the judgment below because the federal habeas court had reviewed the merits of a *Strickland* claim de novo and merely "tack[ed] on a perfunctory statement at the end of its analysis" regarding § 2254(d). 592 U.S. 111, 119 (2020) (per curiam). Similarly, in *Sexton v. Beaudreaux*, this Court granted the petition for certiorari and reversed where the federal habeas court "effectively inverted the rule established in *Richter*" by analyzing the merits de novo and backfilling with citation to § 2254(d). 585 U.S. 961, 967 (2018) (per curiam).

The same result is warranted here. As in *Kayer* and *Beaudreaux*, the decision below inverts *Richter*'s rule by rushing to the merits of Gonzales's claim, eschewing its obligation to look for unreasonably wrong errors in the state court's decision, and offering only a perfunctory assessment of deference at the end. It makes no difference that the federal habeas court's error here led it to deny relief rather than grant it. The same problem plagues all three opinions: complete disregard for the state court's decision, which is "fundamentally inconsistent with AEDPA." *See Kayer*, 592 U.S. at 119. And, accordingly, that error should lead the Court to grant this petition, vacate the judgment below, and remand for further proceedings, just as it has in other cases.

Granting review and summarily reversing is all the more important in a case like this one, where the federal habeas court's convoluted analysis caused it to leave an unreasonable state court decision in place. Congress tasked federal habeas courts with identifying state court decisions that involve unreasonable applications of this

Court's precedent, as well as state court decisions based on unreasonable determinations of fact. 28 U.S.C. § 2254(d). And that standard "does not imply abandonment or abdication of [federal] judicial review." *Brumfield*, 576 U.S. at 314 (cleaned up). In bypassing the Wisconsin Court of Appeals' rationales for denying relief, the Seventh Circuit neglected its own duty. And, as a result, it left in place a decision that is unreasonably wrong. *See infra* Part B.

B. The decision below is egregiously wrong on the merits.

Looking at the merits adds to the reasons to grant this petition and reverse the decision below. A proper AEDPA analysis dictates that the state court's decision is unreasonably wrong on the law and the facts—it sidesteps *Strickland*'s well-worn deficient-performance test and cherry-picks facts in order to label Frost's unthinking choices "strategic." Setting that decision aside and hewing to "prevailing professional norms" as the governing metric, it is plain that Frost's performance fell short of the Constitution's bar. Yet, the Seventh Circuit's decision fumbles the ball at both steps, leaving in place an egregiously wrong state court decision and, in the process, disfiguring the test for deficient performance. A faithful application of § 2254(d), *Richter*, and *Strickland* directs a different outcome.[10]

1. A defendant's right to counsel is violated if his counsel performs deficiently and that deficient performance prejudices him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Deficient performance" is "an objective standard"; it asks

[10] The Seventh Circuit has not addressed the question of prejudice; it should do so in the first instance and determine whether to grant relief. *E.g.*, *Andrus v. Texas*, 140 S. Ct. 1875, 1887 (2020) (per curiam); *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).

whether counsel's performance was "reasonable[] *under prevailing professional norms*." *Id.* at 688 (emphasis added). And this Court has instructed lower courts to look to "[p]revailing norms of practice as reflected in American Bar Association standards and the like" as "guides to determining what is reasonable." *Id.* Thus, *Strickland*'s deficient-performance test "is necessarily linked to the practice and expectations of the legal community." *See Padilla*, 559 U.S. at 366. A reviewing court must "keep in mind that counsel's function, *as elaborated in prevailing professional norms*, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690 (emphasis added). Even counsel's "strategic" decisions may be deficient, because those "choices made after less than complete investigation are reasonable precisely to the extent *that reasonable professional judgments* support the limitations on investigation." *Id.* at 691 (emphasis added).

Assessing counsel's performance in light of prevailing professional norms is not optional. This Court has been explicit: "[i]n highlighting counsel's dut[ies] . . . and in referring to the ABA Standards for Criminal Justice as guides," a reviewing court "applie[s] the same 'clearly established' precedent of *Strickland*" to the facts presented. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).[11] And, in numerous cases, this Court has demonstrated the proper analysis by identifying contemporary professional standards and evaluating counsel's performance against that objective

[11] *See also* Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 541 (2009) ("By repeatedly relying on the ABA Standards, the recent *Strickland* cases make clear that general norms of professional criminal representation must be applied in evaluating attorney performance.").

criteria. *E.g.*, *Padilla*, 559 U.S. at 366–69; *Porter v. McCollum*, 558 U.S. 30, 39–40 (2009) (per curiam); *Bobby v. Van Hook*, 558 U.S. 4, 11–12 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 387–90 (2005); *Florida v. Nixon*, 543 U.S. 175, 191–92 (2004); *Wiggins*, 539 U.S. at 522–27; *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000); *Roe v. Flores-Ortega*, 528 U.S. 470, 479–80, 487 (2000); *cf., e.g.*, *Knowles v. Mirzayance*, 556 U.S. 111, 126–27 (2009) (considering whether any "prevailing professional norms" "prevent[ed]" counsel's behavior). Thus, prevailing professional norms are a requisite part of a *Strickland* performance analysis.

The Wisconsin Court of Appeals unreasonably applied *Strickland*. The state court determined that Frost's performance was not deficient because she "developed and pursued a strategy" and was not required to adjust for "strategy issues"; Gonzales "create[d] his own error by deliberate choice of strategy." Appx.52a (cleaned up). Every "fairminded jurist" would agree that this rationale is "inconsistent with the holding in [*Strickland*]." *See Richter*, 562 U.S. at 102. Frost (not Gonzales) was responsible for investigating, developing, and refining the defense strategy.[12] And "*Strickland* does not establish that a cursory investigation" as to witness availability "automatically justifies a tactical decision." *See Wiggins*, 539 U.S. at 527. Yet, the Wisconsin court never considered whether *Frost's* choices were reasonable under prevailing professional norms, and it blamed Gonzales for her shortcomings. *Contra*

[12] *See, e.g.*, Am. Bar Ass'n Standards for Criminal Justice, *Standards for the Defense Function* ("ABA Standards") §§ 4-3.7(c), 4-4.1(a) (4th ed. 2015) (Westlaw); Nat'l Legal Aid & Def. Ass'n, *Performance Guidelines for Criminal Defense Representation* ("NLADA Standards") § 4.1(a) (2006), http://tinyurl.com/mr3ecauc.

id. at 522. In fact, the state court's decision does not even cite *Strickland*'s test for deficient performance. *Cf.* Appx.51a–52a. Instead, it jettisons "prevailing professional norms" as the governing metric and equates the existence of *a* "strategy" (however unreasonable) with constitutional sufficiency. *Contra Strickland*, 466 U.S. at 687–91. Thus, the Wisconsin Court of Appeals' decision involves an unreasonable application of clearly established law; no deference is warranted. *See* 28 U.S.C. § 2254(d)(1).

Looking to the ABA Standards and like sources for guidance, as the Wisconsin Court of Appeals should have done, it is obvious that Frost's performance was deficient. In fact, she failed to fulfill her basic obligations as Gonzales's attorney:

Prevailing Professional Norm	**Frost's Performance**
Counsel must interview the client "as many times as necessary" to "determine in depth [his] view of the facts" and "encourage candid disclosure"; she may not "induce . . . factual responses that are not true" or "seek to maintain a calculated ignorance" of the facts.[13]	Frost went to trial without interviewing Gonzales to learn whether he fired the gun, whether he could raise an affirmative defense, or what his mens rea or capacity was at the time.
Counsel must "work diligently to develop" "an investigative and legal defense strategy, including a theory of the case."[14]	Frost adopted an all-or-nothing theory based on an assumption that none of the key fact witnesses would testify.
"As the matter progresses, counsel should refine or alter the theory of the case as necessary, and similarly adjust the investigative or defense strategy."[15]	Frost maintained an all-or-nothing approach even after multiple witnesses testified that Gonzales fired the gun and he privately told Frost the same.

[13] ABA Standards § 4-3.3; *see also* NLADA Standards § 4.1(a) (counsel must "conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt").

[14] ABA Standards § 4-3.7(c).

[15] *Id.*; *accord* NLADA Standards § 4.3 ("During investigation and trial preparation, counsel should develop and continually reassess a theory of the case.").

As the chart illustrates, Frost's performance *contradicted* prevailing professional norms. She adopted an all-or-nothing approach "after less than complete investigation" of the facts. *See Strickland*, 466 U.S. at 691. It was not a "remote possibilit[y]" that the witnesses would testify, particularly given the prosecutor's representations. *Cf. Richter*, 562 U.S. at 110; *e.g.*, *Rompilla*, 545 U.S. at 389 ("looking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell defense counsel something about what the prosecution can produce").[16] Regardless, it was anything but a remote possibility after they *did* testify. Every reasonable attorney would have adjusted course and argued for the lesser-included offense. Frost could not impeach the witnesses' testimony; in fact, she caused the witnesses to *repeat* incriminating first-hand accounts of Gonzales firing the gun. Appx.5a; *e.g.*, *Andrus*, 140 S. Ct. at 1883 ("Counsel's introduction of seemingly aggravating evidence confirms the gaping distance between his performance at trial and objectively reasonable professional judgment."). And the record contained evidence with which to "build a case for the lesser-included offense." Appx.12a. Under these circumstances, to forego arguing for the lesser-included offense, as Frost did, was to "give up the only defense available." *Cf. Mirzayance*, 556 U.S. at 126 (cleaned up). Rather than "make the adversarial testing process work," she "took an approach that no competent lawyer would have chosen"—pursuing an all-or-nothing approach

[16] It is also common sense that witnesses on probation or serving as confidential informants (like all four key witnesses here) are likely to testify. They have supervising probation agents or law enforcement officers to explain the consequences of failing to comply with a trial subpoena. And, to avoid testifying, they would have to evade bench warrants for their arrest.

that was bound to fail. *See Strickland*, 466 U.S. at 690 (first quote); *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (per curiam) (second quote). Frost performed deficiently.

The Wisconsin Court of Appeals' decision also is based on an unreasonable determination of the facts. The state court decided that Frost's performance was not deficient because she "developed and pursued a strategy" and Gonzales was to blame for "the strategy issues [that] arose." Appx.52a. But those two findings run headlong into Frost's own testimony. Frost testified that she pursued the all-or-nothing approach because she assumed the witnesses would not appear and, when they did appear, she made no choice at all— it "never even crossed her mind" to adjust to the State's case and argue for the lesser-included offense because she was "tunnel vision[ed]," fixated on continuing with the all-or-nothing approach. *Id.* at 5a (cleaned up). The Wisconsin Court of Appeals ignored this testimony. *Cf. id.* at 46a–52a.

That testimony is clear and convincing evidence that the state court's findings are unreasonably wrong. 28 U.S.C. § 2254(d)(2), (e)(1). "[R]easonable minds reviewing the record" could not disagree—Frost was not "pursu[ing] a strategy" as an "exercise of reasonable professional judgment" where, in her own words, *she was not thinking at all*. *See Brumfield*, 576 U.S. at 314 (first quote); *Strickland*, 466 U.S. at 690 (third quote); Appx.52a (second quote); *e.g.*, *Wiggins*, 539 U.S. at 536 (until counsel conducts a reasonable investigation into the relative strength of the grounds surrounding a defense, she "is not in a position to make a reasonable strategic choice"); *Andrus*, 140 S. Ct. at 1883 (counsel's inaction was not strategic where he "never offered, and no evidence supports, any tactical rationale for [his] pervasive

oversights and lapses"). Equally, reasonable minds reviewing the record could not disagree—"the strategy issues" did not arise from Gonzales' mid-trial disclosure but from an unreasonable, upended assumption that none of the State's witnesses would appear at trial to testify. *Cf.* Appx.52a. For either reason, the Wisconsin Court of Appeals' decision is based on an unreasonable determination of the facts; it is owed no deference. 28 U.S.C. § 2254(d)(2).

2. The Seventh Circuit's decision reaches the same outcome as the Wisconsin Court of Appeals' decision only by disregarding the letter of *Strickland*. The Seventh Circuit's decision quotes the test for deficient performance—"an objective standard of reasonableness under prevailing professional norms." Appx.10a. But it does not identify a single professional norm (from the ABA Standards, National Legal Aid and Defense Association, Model Rules of Professional Conduct, or any other source) in place at the time Frost represented Gonzales, let alone evaluate her performance against it. As just discussed, that is directly contrary to the rule set out in *Strickland*, the explicit instruction in *Wiggins*, and the numerous examples this Court has provided of how to analyze counsel's performance. *Contra Wiggins*, 539 U.S. at 522; *Strickland*, 466 U.S. at 688; *supra* at 18–19 (collecting cases).

Worse still, the Seventh Circuit's decision materially alters *Strickland*'s standard. By reasoning that Gonzales cannot prove Frost performed deficiently in light of "the strength of the state's case," the decision merges the two-part *Strickland* test into a single-step gut-check. Appx.14a. It holds that Frost's performance is reasonable *not based on what Frost did or did not do*, but based on a hindsight-laden

assessment of the State's evidence and a subjective sense that putting on any defense was pointless. *See id.* ("there was little Frost could have done, in the face of that evidence"). That analysis fundamentally alters the governing test. It scraps the "objective standard of reasonableness" "under prevailing professional norms" and replaces it with a subjective standard of "hopelessness," rendering *Strickland*'s performance prong superfluous. *Contra* 466 U.S. at 688. Plainly, that is not the law.

A de novo analysis consistent with *Strickland*—which the Seventh Circuit did *not* undertake—necessarily ends in a finding that Frost performed unreasonably. If the Seventh Circuit had set aside the state court's decision and contrasted Frost's representation against prevailing professional norms, then it would have been more than "deeply troubled" with her performance. As the chart above demonstrates, the obvious and substantial daylight between the two compels the conclusion that Frost's performance fell beneath the constitutional bar. *See supra* at 20–21. The Seventh Circuit's merits analysis only leads to a "close case" by disregarding prevailing professional norms as the metric for reasonableness, contrary to *Strickland*.

C. The questions presented are exceptionally important and this case presents an ideal vehicle to address them.

The facts and procedure of this case are compelling. The right to counsel ensures "the proper functioning of the adversarial process" and is "fundamental and essential to fair trials" in this country. *Strickland*, 466 U.S. at 686 (first quote); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (second quote). It should be uncontroversial that the process is not functioning properly when defense counsel does not prepare to meet the State's anticipated evidence and entirely fails to adjust

to the State's case as presented. Yet, the Wisconsin Court of Appeals held otherwise. And, in purporting to "defer" to that decision, the Seventh Circuit blesses it as "reasonable" without analyzing the actual decision below or faithfully applying this Court's precedent.

But this case is not about mere error correction; the narrative is important for its broader repercussions. As a matter of procedure, the Seventh Circuit's rush to de novo review signals to all federal habeas courts that the state court's decision is irrelevant. Such "judicial disregard for the sound and established principles that inform . . . proper issuance" of the writ of habeas corpus undermine "confidence in the writ" itself, as well as "the law it vindicates." *Richter*, 562 U.S. at 91–92. And that ideology makes it likely that many more state court decisions will be overturned and some unreasonably wrong state court decisions, like this one, will remain intact—each of which is contrary to what Congress intended.

Further, on the merits, the decision below muddies the scope of the constitutional right to effective assistance of counsel. Both the federal and state appellate courts' decisions disregard "reasonableness under prevailing professional norms" as the governing metric for deficient performance, and the Seventh Circuit's decision goes one step further by subsuming deficient performance within a subjective prejudice-focused inquiry. If left to stand, it will no longer be clear whether prevailing professional norms (or any other objective criteria) play a role in assessing counsel's performance. Thus, granting review is needed so that this Court may re-enforce not

only the procedures by which federal habeas courts review state court decisions but also the contours of the Sixth Amendment itself.

No roadblock stands in the way of accepting review. Both the federal district court and the Seventh Circuit correctly rejected the State's assertion of procedural default and ruled on the merits of Gonzales's claim. Thus, this case presents an ideal vehicle for resolving the important questions presented.

CONCLUSION

For all these reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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March 1, 2024