No. _____

IN THE
Supreme Court of the United States

_____

In Re
LEON CARTER,

Petitioner,

v.

LIZZIE TEGELS, WARDEN,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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July 7, 2025

QUESTION(S) PRESENTED

1. Should a writ of habeas corpus issue when a bailiff reinstructed the jury in a criminal trial by directing it to continue deliberating until it reached a verdict, and the instruction occurred *ex parte* outside the presence of the defendant and his lawyer and, therefore, deprived him of counsel at a critical stage of the trial in clear violation of the Sixth and Fourteenth Amendments to the United States Constitution, because (1) this Court has repeatedly held that the deprivation of counsel at a critical stage of a trial is presumptively prejudicial, and (2) in *Remmer v. United States*, this Court concluded that *ex parte* communication with a jury is presumptively prejudicial and deserves an evidentiary hearing?

2. Should a writ of habeas corpus issue because the Wisconsin Court of Appeals failed to follow *Anders v. California* and concluded that petitioner did not deserve appointed counsel for his appeal, solely because his appeal "lacked arguable merit," when *Anders* and later cases required the Court of Appeals to conclude that the appeal not only had "no merit" but also would be wholly frivolous? Stated another way, though the Wisconsin Court of Appeals never explained its conclusion and, in fact, articulated its conclusion in terms *Anders* forbid, the Seventh Circuit found this nevertheless met *Anders* and constitutional standards.

RELATED CASES

1. United States Court of Appeals for the Seventh Circuit, Docket Number 23-1266, *Carter v. Tegels*, decided April 24, 2025; rehearing *en banc* denied May 7, 2025. (App. 1-24).

2. United States District Court for the Eastern District of Wisconsin, Docket Number 17-CV-1497, decided January 9, 2023. (App. 25-58).

3. Wisconsin Court of Appeals, Docket Number 2011 CF 3689, decided November 5, 2015. (App. 59-66).

4. Wisconsin Supreme Court, Docket Number 2014AP1459, review denied May 5, 2016. (App. 67).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears by appendix to the petition and is reported at *Carter v. Tegels*, 135 F.4th 534 (7th Cir. 2025). (App.1-23).

The opinion of the United State district court appears by appendix to the petition and is reported at *Carter v. Tegels*, 2023 WL 129790 (E.D.Wis. 2023). (App.25-58).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Seventh Circuit decided this case April 24, 2025, and denied Carter's petition for rehearing *en banc* May 7, 2025. (App.1, 24).

The district court denied the petition on January 9, 2023. (App.58).

The district court's subject matter jurisdiction arose under 28 U.S.C. §§ 2241 and 2254, and the Seventh Circuit's jurisdiction arose under 28 U.S.C. §§ 1291 and 2253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

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

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)(1) provides, in pertinent part:

> (d): An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1): resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

A Milwaukee County jury convicted Leon Carter of multiple crimes and the trial judge sentenced him to 63 years in prison. (Dkt. 24-21:84-6; 24-24:38-46).[1] During jury deliberations the jury asked by note, "What happens if we do not unanimously agree on one of the six counts." (Dkt. 24-21:87-8). The trial judge stated she would have consulted the parties, but the bailiff told no one and instructed the jury herself. (*Id.*). No one knows for certain what she said, but the trial court paraphrased it as, "You need to just work and reach a unanimous verdict." (*Id.*).

[1] All references to the record below are found at the district court electronic docket, *Carter v. Tegels*, 17 CV 1497, United States District Court for the Eastern District of Wisconsin.

Inexplicably, the trial judge revealed the exchange only after receiving the verdict and discharging the jury. (*Id*.). Carter's counsel moved for a mistrial, but the court summarily denied it, asserting that the court probably would have "come up with saying the same thing and in fact that's the jury instruction." (*Id*.).[2] Though Carter had a constitutional right to be present and represented by counsel at the jury's reinstruction, the circuit court acknowledged neither and held no hearing under *Remmer v. United States*, 347 U.S. 227 (1954), to discern whether the bailiff's remarks influenced deliberations and the verdict. (*Id*.).

Carter's appellate attorney compounded these errors by filing a no-merit report under *Anders v. California*, 386 U.S. 738 (1967). (Dkt. 24-2:42-3). The attorney summarily called the bailiff's communication harmless on a theory that the court's reinstruction would merely repeat the bailiff's message. (Dkt. 38:9; 24-2:42-3). Neither appellate counsel nor the state courts noted any empirical fact establishing the error as harmless beyond all reasonable doubt as *Chapman v. California*, 386 U.S. 18 (1967), required. (*Id*.). After discussing multiple unrelated claims, the Wisconsin Court of Appeals observed in a footnote with no recognition of the serious constitutional issues involved: "[W]e agree with counsel's analysis and conclusion

[2] The circuit court was incorrect on what Wisconsin's standard jury instruction provided for this circumstance. For decades, Wisconsin trial courts have instructed deadlocked juries with a carefully constructed instruction modeled on the federal instruction this Court endorsed in *Allen v. United States*, 164 U.S. 492 (1896). The instruction, Wis JI-Criminal 520, has no resemblance to what the bailiff told the jury here. *See Kelley v. State*, 51 Wis.2d 641, 643-7 (1971) (quoting instruction verbatim).

that none of the issues identified presents an issue of arguable merit." (Dkt. 24-6:4) (App.62).

After the Wisconsin Supreme Court denied review without discussion, *see State v. Carter*, 2016 WI 81, 371 Wis.2d 610, Carter filed a federal habeas petition *pro se* with the United States District Court for the Eastern District of Wisconsin on October 30, 2017, arguing that "the Wisconsin Court of Appeals had violated his Sixth Amendment right to effective assistance of appellate counsel and his Fourteenth Amendment right to a meaningful appeal when it accepted Attorney Schertz's [appellate counsel] no-merit report." (Dkt. 38:17) (App.41). Carter's Sixth Amendment claim was eventually withdrawn for failure to exhaust the claim in state appellate proceedings. (Dkt. 38:17-20) (App.41-44). Utilizing the standard under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the district court denied Carter's habeas petition,[3] reasoning that (1) The *Anders* procedure is not mandatory under the Constitution; and (2) even if the *Anders* procedure were mandatory, it did not require a state appellate court to address or independently review every potential issue raised. (Dkt. 38:30-3) (App.54-57). Though Carter complained at length about the bailiff's *ex parte* instruction of the jury in briefing and his petition, (Dkt. 1:52-5; Dkt. 24-7:18-21), the district court did

[3] The AEDPA allows a federal court to grant habeas relief only if the state court decision was "either (1) 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Miller v. Smith*, 765 F.3d 754, 759-60 (7th Cir. 2014) (quoting 28 U.S.C. § 2254(d)(1), (2)).

not directly address Carter's *Remmer*-based claims. Carter timely appealed the district court's decision.

The Seventh Circuit affirmed, holding, "*Remmer* does not clearly establish that the bailiff's communication with the jury here was presumptively prejudicial and therefore it follows that no evidentiary hearing was necessary to establish whether prejudice had actually occurred." (App.23). Citing 28 U.S.C. § 2254(d)(1), the court added that under AEDPA deferential review, Carter must show that the state court decision contradicted or unreasonably applied clearly established federal constitutional law, as the Supreme Court has determined it. (App.17). The Court found no such decision. (*Id.*).

As for Carter's *Anders*-based claim, the Seventh Circuit concluded that because the Wisconsin Court of Appeals had reviewed a voluminous record and lengthy no-merit reports, no deprivation of appellate counsel had occurred. (App.9). The court excused that the Wisconsin Court of Appeals articulated no analysis for itself, never determined explicitly that an appeal would be frivolous and adopted the no-merit report's conclusion, which merely described a prospective appeal in terms *Anders v. California* forbid. (App.9-10).

The Seventh Circuit denied Carter's petition for *en banc* review on May 7, 2025. (App.24).

STATEMENT OF REASONS FOR GRANTING THE PETITION

This case involves questions of exceptional importance and the Seventh Circuit decision conflicts with decisions of several other courts of appeal and this Court.

I. Carter was entitled to a hearing under *Remmer*, if not a new trial outright.

A. An evaluation of the deprivation of Carter's Sixth Amendment rights is crucial under *Remmer* and other Supreme Court precedent.

The Seventh Circuit's holding that Carter lacked a constitutional right to a hearing under *Remmer v. U.S.*, 347 U.S. 227 (1954), overlooked the important fact that the bailiff reinstructed a deadlocked jury that it must reach a verdict *ex parte* outside the presence of the Defendant and his counsel in violation of Carter's Sixth Amendment right to counsel and to be present at each critical stage of the trial.

The Seventh Circuit ultimately concluded, "*Remmer* does not clearly establish that the bailiff's communication with the jury here was presumptively prejudicial," so no evidentiary hearing was necessary, and that Carter also failed to show that the state court decision contradicted or unreasonably applied clear Supreme Court constitutional precedent, something essential under AEDPA review. (App.23, 17).

Yet, this Court has termed these unconstitutional deprivations presumptively prejudicial. In fact, counsel's absence involves a constitutional error so significant that proving prejudice is often unnecessary. "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the

proceeding." *U.S. v. Cronic*, 466 U.S. 648, 659 n.25 (1984). Ample Supreme Court precedent establishes that proceedings held without the defendant or his counsel—including a jury's instruction—violates the Sixth Amendment. *Illinois v. Allen*, 397 U.S. 337, 343 (1970), holds that Carter had a constitutional right to be present at each critical stage of trial. So, too, with counsel's assistance, since lawyers in criminal cases are "necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured." (*Id.*). Jury deliberations and reinstruction represent such a critical stage. *Siverson v. O'Leary*, 764 F.2d 1208, 1214 (7th Cir. 1985).

In *Shields v. United States*, 273 U.S. 583 (1927), a deadlocked jury sought guidance during deliberations. The court responded outside the presence of the defendant and counsel. This Court reversed the conviction due to their absence, relying extensively on *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 88 (1919):

> Where a jury has retired to consider their verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object.

273 U.S. at 588. *Shields* found the defendant entitled to be present "from the time the jury is impaneled until its discharge after rendering the verdict." *Id*.

In *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (per curiam), a judge, who instructed a deadlocked jury that "You have got to reach a decision in this case,"

improperly coerced a verdict. And, *Penson v. Ohio*, 488 U.S. 75 (1988), a case involving the denial of appellate counsel, held:

> Our decision in *United States v. Cronic* [*supra*], likewise, makes clear that the "presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." Similarly, *Chapman* recognizes that the right to counsel is "so basic to a fair trial that its infraction can never be treated as harmless error."

Id. at 88 [citations omitted].

Herring v. New York, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972); *Hamilton v. State of Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963); *Ferguson v. Georgia*, 365 U.S. 570 (1961); and *Williams v. Kaiser*, 323 U.S. 471, 475-6 (1945), hold that the deprivation of counsel at a critical stage of trial is never harmless.

Finally, in *Rogers v. U.S.*, 422 U.S. 35, 37 (1975), this Court found that a judge addressing a jury's question when neither the defendant nor counsel were present violated the defendant's rights. While the Court addressed the subject as a violation of a procedural rule, it indicated that the court's instruction could not be harmless, when the "trial judge's response may have induced unanimity." *Id*. at 40.

In this matter, the Seventh Circuit opinion focused exclusively on *Remmer* without acknowledging these Sixth Amendment deprivations and while ignoring the wealth of precedent calling such communications presumptively prejudicial. In *Remmer*, an unknown outsider tried to bribe a juror, something the trial court

alerted the prosecution about but not the defendant or his counsel. The trial continued but the Supreme Court later vacated the conviction noting:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such conduct with the juror was harmless to the defendant.

Id. at 229.

The Seventh Circuit mistakenly confined *Remmer* to similar jury tampering cases, (App.18), but the *Remmer* Court wrote that it applied to "any" jury communication. 347 U.S. at 229. And, in *Hall v. Zenk*, 692 F.3d 793, 804 (7th Cir. 2012), the Seventh Circuit actually rejected the limitation, concluding that "the procedural requirements established by *Remmer* are triggered by more than just tampering cases."

So, like *Remmer*, this case involves the introduction of extraneous information before a jury, but it is more egregious than *Remmer*, since it involves a *government official's* clear violation of the Sixth and Fourteenth Amendments. This surpasses what this Court corrected in *Remmer*, where a stranger passed prejudicial information. *Remmer* logically focused on the illicit information's effect on the verdict. This case focuses on the effect of the bailiff's illicit instruction *and* the legal consequence of the absence of counsel and Carter at a critical stage of trial. Those constitutional deprivations are therefore at the center of this case. If the lower

courts correctly portrayed these deprivations as inconsequential, undeserving of habeas protection, such an extraordinary holding needs the imprimatur of this Court.

B. The opinion conflicts with decisions from other circuit courts of appeal.

1. Does *Remmer* create a constitutional right to an evidentiary hearing?

The Seventh Circuit noted that a split exists among the circuit courts over whether *Remmer* implicates the Constitution at all. (App.16). The court listed six reasons as to why *Remmer* does not, while noting its own decisions in *Hall v. Zenk*, 692 F.3d 793 (7th Cir. 2012), and *Oswald v. Bertrand*, 374 F.3d 475 (7th Cir. 2004), call a *Remmer* hearing constitutionally mandated. (App.13-16). The court noted a conflict exists with the Tenth Circuit, *Crease v. McKune*, 189 F.3d 1188, 1193 (10th Cir. 1999), which regards *Remmer* as procedural, not constitutional, a view three justices recently expressed in dissent. *Shoop v. Cunningham*, 143 S.Ct. 37 (2022). (App.16). Most significantly, the Seventh Circuit confirmed the issue's exceeding importance: "[w]e see this as a question for resolution by the Supreme Court." (App.16).

2. The Sixth and Ninth Circuits contradict the Seventh Circuit's conclusion that no writ should issue.

And other conflicts exist with the Sixth and Ninth Circuits. In *Caver v. Straub*, 349 F.3d 340, 350 (6th Cir. 2003), a trial court re-read a substantive instruction despite defense counsel's absence. Caver ultimately concluded that given the absence of counsel at this critical stage of trial, the habeas writ must issue: "Any

conclusion otherwise would be an unreasonable application of clearly established federal law as stated in *Cronic*." *Id*. at 349-50.

The opinion also conflicts with *Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999), a near identical case where a bailiff received a note from the jury, telephoned the judge, and then instructed the jury himself as the judge returned to court. Some jurors said the bailiff told them they must reach a verdict, while others denied that occurred. Neither counsel nor the defendant knew about the note or the bailiff's reinstruction at the time. *Weaver* concluded the instruction likely coerced a verdict and called it plainly prejudicial, noting without the benefit of an "offsetting cautionary instruction informing jurors that they need not give up their consciously held views," the instruction was coercive. *Weaver*, 197 F.3d at 366. The Ninth Circuit also concluded in *Riley v. Deeds*, 56 F.3d 1117 (9th Cir. 1995), that a clerk reading back trial testimony at a jury's request despite the judge's absence was such a fundamental error that the writ must issue. The Seventh Circuit opinion is irreconcilable with *Caver*, *Weaver*, and *Riley*, and the court's opinion does not address the conflicts.

C. The Seventh Circuit opinion overlooks the law regarding structural errors.

The opinion suggests that no prejudice occurred, but it focused solely on the absence of a *Remmer* hearing, not on whether the absence of the defendant and counsel at a critical stage of trial required one. That focus probably stems from *Remmer*'s facts, where an outsider communicated with one juror, so this Court logically inquired whether that communication was prejudicial. Here, however, a

court official addressed the jury *ex parte* and at an extraordinarily vulnerable time. A deadlocked jury seeks guidance from one source—the court—and is especially susceptible to influence from court officials. Carter lost rights not only when the state court conducted no evidentiary hearing (though *Remmer* required one) but also because a court officer deprived Carter of important Sixth Amendment rights. If the deprivation of counsel is presumptively prejudicial, as the many cases from this Court cited already hold, the Seventh Circuit's conclusion that it was reasonable for a state court to conclude otherwise deserves review.

The Seventh Circuit's conclusion certainly contradicts this Court's jurisprudence on structural errors. Structural errors always require a new trial. *Weaver v. Massachusetts*, 582 U.S. 286, 299 (2017), explained why: some errors are structural when they deprive defendants of valuable choices; others if the error's consequences are too hard to measure; and yet others are structural when the error invariably results in fundamental unfairness. The bailiff's misconduct here qualifies under each.

Weaver v. Massachusetts therefore held "the defendant generally is entitled to automatic reversal regardless of the error's actual effect on the outcome." *Id*. at 299, quoting *Neder v. United States*, 527 U.S. 1, 7 (1999). Likewise, *United States v. Gonzalez Lopez*, 548 U.S. 140, 147-9, confirmed that a Sixth Amendment right to counsel violation forgoes analysis for harmless error, for that analysis amounts invariably to a speculative inquiry into what might have occurred in an "alternate universe." *Id*. at 150. Certainly, harm from the structural errors here cannot be

readily quantified, much less called harmless, so these serious deprivations are sufficiently important that the writ must issue.

In contrast, and to support its conclusion otherwise, the Seventh Circuit invoked its decision in *Hall v. Zenk*, *supra*, a case unlike *Remmer*, where an outsider unaffiliated with the court provided a juror information that potentially affected the verdict. The case involved no deprivation of counsel or the right to be present at trial. *Hall* held that "[i]f the jury intrusion had a great impact on an average juror's deliberation, then the contact is presumptively prejudicial, and a hearing is necessary;" otherwise not. (App.21). From this, the court reasoned that the bailiff's interaction with the jury lacked such an impact. The court consequently overlooked the critical difference between *Hall* and this case, since *Hall* neither involved the deprivation of Sixth Amendment rights nor circumstances where a court official potentially coerced a verdict.

D. The conclusion that the bailiff's instruction was harmless is solely based on conjecture.

The conclusion that reasonable jurists might believe the bailiff's reinstruction was harmless alone deserves Supreme Court review, since the belief was based solely on conjecture without empirical fact. Reasonable jurists do not speculate, and nothing in 28 U.S.C. § 2254(d)(1) requires federal courts reviewing state court decisions under a habeas review to lend deference when they do.

No one knows what actually happened, certainly not Carter, since he and his counsel were missing from the courtroom when the bailiff instructed the jury. No

one ever justified, or even explained the bailiff's intrusion. The trial court held no hearing, so there exists no account of the exact instruction, much less one given under oath and subject to thorough examination. Instead, the trial court dedicated a few minutes to the issue, noting that in response to a note, the bailiff directed the jury to continue deliberations and reach a verdict. (Dkt. 24-21:87-8).

Almost certainly, participation by defense counsel would have altered events. Wisconsin has a carefully crafted jury instruction that provides deadlocked juries important guidance. *Kelley v. State*, 51 Wis.2d 641, 643 (1971) (quoting instruction verbatim). It contrasts the instruction the circuit court claims it would have given. This instruction does not goad the jury into reaching a verdict. Instead, it emphasizes collaboration and respectful discussion but promotes adhering to a juror's own conscientiously held beliefs. It tells the jury that collegiality—compromise for the sake of compromise—is wrong if it sacrifices those true beliefs. The trial court's inexplicable withholding of all information about the bailiff's intervention until it had discharged the jury only compounded the problem because it sidelined Carter's counsel altogether.

Finally, two decisions from this Court contradict the conclusion that the communication was probably harmless. *Jenkins v. United States*, 380 U.S. 445, 446 (1965), and *Rogers v. U.S.*, 422 U.S. 35, 37 (1975), hold the bailiff's instruction here was hardly inconsequential. *Jenkins* concluded that a judge instructing a jury, "You have got to reach a decision in this case," likely compelled a verdict, and that error established prejudice *per se*. *Rogers v. United States*, 422 U.S. 35, 37 (1975), held

that a court's communication with the jury about its verdict in the absence of counsel and the defendant violated Fed. R. Crim. P. 43, since "the trial judge's response may have induced unanimity." *Id*.

The ultimate question underlying *Remmer* is how the deprivation of important constitutional rights affected the outcome. The Seventh Circuit never examined that fundamental question of how Carter's and his lawyer's absence affected the trial. This Court should review the case with that fundamental question at the forefront.

II. The Wisconsin Court of Appeals' perfunctory review fell well below *Anders* standards.

Carter's appeal raised a separate question under *Anders v. California*, 386 U.S. 738 (1967), which concluded that Carter had a right to appellate counsel unless an appeal would be "frivolous." *Smith v. Robbins*, 528 U.S. 259, 270 (2000). A finding of "no merit" failed to suffice. *Id*.

The Wisconsin Court of Appeals adopted appellate counsel's no-merit report and merely articulated that it believed the appeal lacked "arguable merit," a conclusion no different from the language *Anders* found inadequate. (Dkt. 24-2:43; 24-6:4) (App.62).

Despite noting the Wisconsin Court of Appeals decision deserved no deference under the AEDPA, and acknowledging the strict constitutional standard that the "state courts must find the appeal lacking in arguable issues, which is to say, frivolous" before depriving Carter of counsel, the Seventh Circuit found *Anders* satisfied. (App.8).

The Seventh Circuit explained the state appellate court met this standard because (1) it recognized its constitutional obligation under *Anders*, (2) reviewed a voluminous record, the extensive no-merit report and briefs and Carter's response, and (3) a trained legal eye had searched the record for appellate issues but found none. (App.8-9). It added that state appellate courts have "very heavy" workloads, so federal courts reviewing for constitutional violations must consider that on habeas review. (*Id*.). It was sufficient for the state appeals court to adopt the no-merit brief's conclusion without discussion or even specific mention in a footnote. (*Id.*). An explicit finding of frivolousness was unnecessary, it therefore concluded. (*Id.*). Stated succinctly, the Seventh Circuit determined that because the record was voluminous, the state Court of Appeals need say nothing on the subject besides a conclusion, provided someone with legal training had looked for appealable issues. *Anders* supposedly entitled Carter to nothing more.

But none of this complies with *Anders* or justifies depriving Carter of his Sixth Amendment right to appellate counsel. It is no solace to someone deprived of the counsel they deserved that a state court of appeals might be overworked. Nothing in the Constitution justifies dispensing with important rights because the court obliged to protect them is stretched too thin. And the voluminous record reviewed involved other issues and had nothing to do with the constitutional issues raised here. Appellate counsel's discussion of these constitutional issues in the no-merit brief was perfunctory. (Dkt. 24-2:41-2). As for adopting the no-merit report's conclusion in a short footnote, without analysis, the trained legal eye tasked with

independently verifying the absence of constitutional issues, overlooked all five very significant issues the Seventh Circuit identified in its certificate of appealability.

While the Seventh Circuit found no significance to the no-merit report, (App.11-12), the report becomes exceedingly important when the state appellate court adopted it as a substitute for its own analysis. That court merely stated, "[W]e agree with counsel's analysis and conclusion that none of the issues identified presents an issue of arguable merit," (Dkt. 24-6:4) (App.62).

The Wisconsin Court of Appeals' ultimate conclusion certainly failed to comply with *Anders* and, in fact, directly contradicted it. While *Anders* requires no special words, it mandates more than a finding that an appeal had "no merit"—for a finding of no merit might mean either the appeal is entirely frivolous or that it has a poor likelihood, but some chance, of success. Under *Anders*, only if the appeal is wholly frivolous, and the state appellate court finds it so, is the constitutional obligation satisfied. *Smith*, 528 U.S. at 270.

Here, the no-merit report that the Wisconsin Court of Appeals adopted carried identical language that *Anders v. California* prohibits: "There would thus be no merit two [*sic*] a motion for a new trial based on a claim that the court erroneously exercised its discretion in denying this final post-verdict motion [pertaining to the bailiff reinstructing the jury]." (Dkt. 24-2:43). Based on this, the Wisconsin Court of Appeals announced only that Carter's appeal lacked an "issue of arguable merit." (Dkt. 38:13) (App.62). Certainly, the negligible distinction between a finding of "no merit" under *Anders* and the finding that Carter's appeal lacked "an issue of

arguable merit" hardly satisfies the Sixth Amendment, but the Seventh Circuit concluded under the circumstances that it did. (App.10).

Entirely missing is the simple finding of frivolousness *Anders* required. As *Smith v. Robbins*, 528 U.S. at 270, explained:

> In *Anders*, neither counsel, the state appellate court on direct appeal, nor the state habeas court had made any finding of frivolity. We concluded that a finding that the appeal had "no merit" was not adequate, because it did not mean that the appeal was so lacking in prospects as to be "frivolous."

In short, to meet minimum constitutional standards, the Wisconsin Court of Appeals had to find that based on its independent examination of the record, any appeal would be frivolous before depriving Carter of counsel. Nothing shows it reached that conclusion. This Court should review the case because, as the Seventh Circuit's interpretation of *Anders* (and later cases) demonstrates, lower courts are unclear about precisely what state courts like the Wisconsin Court of Appeals must find. According to the Seventh Circuit, they must merely announce a conclusion—and that conclusion need not even state the minimum that *Anders* requires—that is, that an appeal would be frivolous.

CONCLUSION

For all these reasons, the Petitioner respectfully urges review of the Seventh Circuit's decision.

Respectfully submitted this 7th day of July, 2025.

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CERTIFICATION

I hereby certify that this Petition for Writ of Certiorari conforms to U.S. Supreme Court Rule 33.2 in that it was prepared using Century Schoolbook 12-point typeface and contains 4,570 words, based on the word-count function of Microsoft Word 2019, excluding the parts of the document that are exempted by Rule 33.1(d).

Respectfully submitted this 7th day of July, 2025.

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