

No. 20-633

In The
Supreme Court of the United States

—◆—
BYRON DAVID SMITH,

Petitioner,

v.

JEFF TITUS, WARDEN,
MINNESOTA CORRECTIONAL FACILITY,
OAK PARK HEIGHTS,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

—◆—
BRIEF IN OPPOSITION
—◆—

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QUESTION PRESENTED

Before Petitioner Smith’s murder trial began, the trial court made a public pretrial ruling on an evidentiary issue raised by Smith. Immediately before opening statements, but before the jury was sworn, the trial court briefly excluded the public from the courtroom while it provided clarification on the parameters of its order to counsel in a sidebar-like conference. The Minnesota Supreme Court made a factbound determination that this event was an administrative hearing and not part of the trial proceedings for purposes of the Sixth Amendment right to a public trial.

The question presented is whether the Eighth Circuit erred by concluding, under the highly deferential standard of the Antiterrorism and Effective Death Penalty Act of 1996, that the Minnesota Supreme Court did not unreasonably apply federal law as “clearly established” by this Court, 28 U.S.C. § 2254(d)(1), by holding that this brief, nonpublic proceeding, which was held before the jury was sworn, that was administrative in nature, and which merely clarified the parameters of a previous evidentiary ruling, did not violate Smith’s Sixth Amendment right to a public trial.

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STATEMENT OF THE CASE**A. Smith murders Nicholas Brady and Haile Kifer.**

Petitioner Byron Smith was convicted by a Morrison County, Minnesota jury of two counts of first-degree premeditated murder for executing two teenagers, Nicholas Brady and Haile Kifer, on Thanksgiving Day, November 22, 2012. App. 76.

Smith's home had been burglarized about a month before he killed Brady and Kifer. *Id.* Smith believed his neighbor and her parents, who were not Brady or Kifer, had committed the burglary. *Id.* On the morning of the murders, Smith was outside his home when he saw the neighbor he suspected of committing the burglaries drive by. App. 77.

Less than an hour after seeing his neighbor drive by his home, Smith drove his vehicle away from his home and parked several blocks away. *Id.* Smith walked home and entered his home by walking through his backyard rather than going through his front door, which faced the street. *Id.*

About 15 minutes after arriving at his home, Smith "went down to his basement and turned on a digital audio recorder." *Id.* Smith "sat down in an upholstered reading chair" with "a novel, a water bottle, and some snack bars." *Id.* Smith had a revolver on his belt clip. *Id.* Smith's chair faced the stairs that came from the main floor to the basement. *Id.* Smith had a loaded rifle "[s]teps away" from his chair. *Id.* Smith also

had a four-screen monitor showing surveillance video from the outside of his house. *Id.*

As Smith waited in his basement, Smith made various comments that were captured on the digital audio recorder he had activated. App. 77-78. Smith made statements about needing to see a lawyer. App. 78. Smith also said, “In your left eye.” *Id.*

After about a half-hour, Smith heard a window break and then heard someone—who turned out to be Brady—walking around in the house. App. 77-78. Smith waited in his basement, with his loaded Mini 14 rifle and .22 caliber nine-shot revolver, until Brady began walking down the basement stairwell. App. 77. As Brady walked down the stairs, Smith shot him several times with the Mini 14 until Brady fell down. App. 78.

After Brady fell, Smith went up to him and shot him in the head, saying to Brady, “You’re dead.” App. 78-79. Smith put Brady’s body on a plastic tarp and dragged the tarped body out of sight into a basement workshop. App. 79.

After trying to reach Brady on his cell phone, Kifer entered the house and eventually walked down the stairwell to the basement. *Id.* When Smith saw her, he shot her with the Mini 14. *Id.* Kifer fell down the stairs as Smith shot her multiple times. App. 79-80.

Smith dragged Kifer’s body into the workshop and placed her next to Brady’s body. App. 79. Smith then heard Kifer gasp for air, so he shot her a sixth and final time. App. 80.

After approximately 30 hours passed, Smith called a neighbor and asked the neighbor to find Smith a lawyer. App. 82. After Smith later told the neighbor that Smith had “solved the break-ins in the neighborhood,” Smith asked the neighbor to call police. *Id.*

B. The trial judge makes pretrial evidentiary rulings regarding the admission of evidence of prior burglaries at Smith’s home, and Smith is ultimately convicted of murdering Brady and Kifer.

A grand jury indicted Smith on two counts of first-degree premeditated murder. App. 86. Smith’s main defense at trial was that he used reasonable force in defense of himself and his home. *Id.*

Public pretrial proceedings held on Thursday, April 17, 2014, included motions in limine on the extent to which Smith could offer evidence of previous burglaries of his house. App. 100-101. This hearing was in preparation for Monday, April 21, 2014, the first day of trial, where arguments and evidence would be presented to the jury. App. 101.

On the first day of trial, the court began an on-the-record discussion of a need for a nonpublic hearing. *Id.* The Minnesota Supreme Court described the facts underlying the nonpublic hearing as follows:

The courtroom closure occurred at the beginning of trial on April 21, 2014, shortly after the case was called but before the jury took its

final oath and began to hear argument and testimony.

The closure was the sequel to a pretrial hearing on April 17, 2014, which was open to the public. That hearing was on motions in limine, including the issue of the extent to which Smith could offer evidence of the previous burglaries of his house. Smith argued that he should be able to call Brady's mother and Brady's friends, C.K. and J.K., as witnesses to testify to Brady's involvement in the previous burglaries. Defense counsel discussed Brady's alleged co-participants by name at the hearing, so those names were in the public record.

On Monday, April 21, 2014, the day the parties would present opening statements and witnesses to the jury, the deputy court administrator called the case. The court then closed the courtroom to all except the attorneys, the defendant, and court staff. The court said: "We have just cleared the courtroom just for a quick moment from the spectator gallery." Defense counsel then stated: "Your Honor, this is a—I thought about the court's suggestion, and I would ask the court to reconsider." Defense counsel asked that the public be allowed to be present, including media, because "[t]o not allow that would infringe upon the freedom of the public to be present as well as the free press. [Smith] has that right to a public trial."

The district court proceeded to discuss the "pretrial ruling of the court" and advised the parties and Smith that the court had ruled to

exclude some of the evidence of Brady's prior bad acts. As part of the ruling, the court explained that defense counsel could not "disclose the names of [J.K., C.K.] or Brady involved in prior burglaries before November 22, 2012." The court stated that the evidence was inadmissible because Smith did not know the identity of those who broke into his home before Thanksgiving. The court then explained its reasoning for closing the courtroom:

And for that reason—that was the reason that the court is not allowing the press in for this ruling, because otherwise it could be printed, and indeed, while the jurors hopefully will follow the admonition not to read or hear anything in the press and TV and such in the meantime while this case is pending, certainly the media would publish and print the substance of the court's pretrial ruling, and then of course it runs the risk of getting to the jury if for some reason they don't adhere to their oath.

Defense counsel then clarified whether he could call C.K. as a witness and asked: "Your Honor, if I—are we done with the record?" Counsel and the court had a discussion off the record. Then the courtroom was opened. The proceeding in the closed courtroom constituted four pages out of the 1899–page trial transcript.

Immediately after the closed proceeding, at 10:00 a.m., the judge filed a written order on the motion in limine heard on April 17 and then discussed briefly in the closed courtroom. The order, publicly available, ruled that evidence of prior bad acts by Brady or Kifer, of which Smith was not aware at the time of the shooting, would be inadmissible at trial. The order explained that “insofar as the [evidence that Smith was the victim of prior burglaries occurring before the shooting, that forcible entry was made, and that weapons were taken that were not recovered at the time of the shooting] may be received through the testimony of Deputy Luberts or other law enforcement agents, there will be no need to seek its admission through more prejudicial means (*i.e.*, through the testimony of Brady’s mother or of a perpetrator of the prior break-ins).” The order did not name J.K. or C.K., the alleged co-perpetrators of the prior burglaries. At 10:03 a.m., the jury entered the courtroom to be sworn and to hear opening statements.

App. 100-103.¹

The parties then presented evidence to the jury, and at the close of trial, the judge instructed the jury that the government had the burden to prove beyond a reasonable doubt that Smith did not use reasonable force. App. 86. The jury returned a guilty verdict on all counts of murder. *Id.* The trial court convicted Smith of

¹ The facts of the case are not in dispute and, therefore, under AEDPA, “a determination of a factual issue made by a State court shall be presumed to be correct.” 28 U.S.C. § 2254(e)(1).

the two counts of first-degree premeditated murder and sentenced him to two concurrent life sentences without the possibility of release. *Id.*

C. The Minnesota Supreme Court affirms Smith's conviction on direct appeal.

Smith filed a direct appeal to the Minnesota Supreme Court.² App. 76. One of the issues Smith raised on appeal was the claim that the trial court erred when it briefly closed the courtroom to spectators and the press after voir dire but before the jury took its final oath. App. 100. The Minnesota Supreme Court unanimously affirmed Smith's convictions. App. 123, 138-139.

All but one justice of the Minnesota Supreme Court concluded the closure did not implicate Smith's Sixth Amendment right because the closure was administrative in nature. App. 103-109. The majority opinion exhaustively analyzed decisions from this Court, the federal circuits, and state appellate courts in determining there was no Sixth Amendment violation. App. 103-108.

The majority applied the limited precedents of this Court, as well as the decisions of many other courts, to the particular facts before it and determined no constitutional violation occurred. App. 103-109. The majority concluded that the issue discussed during the hearing

² Appeals from first-degree murder convictions in Minnesota are filed directly with the Minnesota Supreme Court rather than the Minnesota Court of Appeals. *See* Minn. Stat. § 480A.06, subd. 1; Minn. R. Crim. P. 29.02, subd. 1(a).

at issue “was an issue of evidentiary boundaries, similar to what would ordinarily and regularly be discussed in chambers or at a sidebar conference—on the record, but outside the hearing of the public.” App. 109. The Minnesota Supreme Court further reasoned, “The discussion took only minutes, it was transcribed, and it consumed only two-tenths of one percent of the trial transcript. Smith received a public trial.” *Id.*

Justice Stras filed a concurring opinion. App. 123-139. Justice Stras discussed the history of the right to a public trial and canvassed the decisions of the federal circuits and state appellate courts on the question of whether “a pretrial evidentiary ruling constitutes a part of the ‘trial’ to which the public-trial right attaches.” App. 123-124, 135. Justice Stras concluded that because the “trial-like aspects of the proceedings” occurred in open court, the discussion of “the scope of the court’s written order” in a closed proceeding did not violate Smith’s right to a public trial. App. 138-139.

D. The federal district court denies Smith’s petition for a writ of habeas corpus, and the Eighth Circuit affirms.

After losing at the Minnesota Supreme Court, Smith filed a petition for a writ of habeas corpus in the United States District Court for the District of Minnesota. In his habeas petition, Smith challenged the Minnesota Supreme Court’s factual determination that the closure was administrative in nature and that the factors set forth in *Waller v. Georgia*, 467 U.S. 39 (1984),

did not apply. App. 29. Smith argued that in failing to apply *Waller*, the Minnesota Supreme Court decision was contrary to, and involved an unreasonable application of, clearly established federal law. App. 29, 50.

Both the magistrate judge and the district court determined that under the highly deferential Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) standard, Smith was not entitled to relief. App. 31, 71. The district court granted a certificate of appealability, App. 72, and Smith appealed to the Eighth Circuit Court of Appeals.

The Eighth Circuit, applying the principles of AEDPA, affirmed the federal district court's decision denying habeas relief. App. 2. At the Eighth Circuit, Smith argued that his claim met the demanding AEDPA standard for relief because the Minnesota Supreme Court's decision was contrary to, and involved an unreasonable application of, this Court's decisions in *Waller* and *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam). App. 7.

The Eighth Circuit concluded that Smith's claim did not meet AEDPA's demanding standard for habeas relief. App. 11. First, the Eighth Circuit found that the Minnesota Supreme Court's conclusion was not contrary to either *Waller* or *Presley* because neither decision addressed whether a defendant enjoys a Sixth Amendment right to public "administrative" proceedings of the type involved in this case. App. 8-10. Second, the Eighth Circuit held that the Minnesota Supreme Court did not unreasonably apply *Waller* and *Presley*

in this case because it is an open question whether a defendant's right to a public trial encompasses the sort of nonpublic proceeding at issue here. App. 10. The Eighth Circuit observed that "fairminded jurists could disagree" with Smith's argument "for extending *Waller* and *Presley* to cover the episode in this case." App. 11. The Eighth Circuit therefore affirmed the denial of habeas relief. *Id.* The Eighth Circuit later denied Smith's petition for rehearing en banc. App. 140.

Smith filed a petition for writ of certiorari challenging the judgment of the Eighth Circuit Court of Appeals, and this Court directed Respondent to file a response to the petition.



REASONS FOR DENYING THE PETITION

This Court should deny certiorari for three reasons. First, there is no circuit split. This petition is a request for error correction of a properly decided state court decision. Second, the Eighth Circuit Court of Appeals properly applied this Court's settled AEDPA jurisprudence to the unique facts of this case. Third, because this case arises on federal habeas review, it is a poor vehicle for considering the question presented as phrased in the petition.

AEDPA bars a petitioner from raising a claim adjudicated on the merits in state court, with two exceptions. *See* 28 U.S.C. § 2254(d). Smith relies on one of these exceptions, which allows for review of a claim if the state court adjudication "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.” 28 U.S.C. § 2254(d)(1).³

Smith seeks to extend this Court’s clearly established law in *Waller* and *Presley* to encompass the very different facts of this case, which is exactly what the strict standard of AEDPA prevents. Granting review in this case would inevitably lead to an incomplete consideration of the substantive question Smith seeks to present. As the Eighth Circuit, the district court, and the magistrate judge all concluded, the deferential standard of AEDPA precludes expanding the law and applying it to Smith’s case.

I. The petition is a request for error correction of a factbound state court decision under habeas review on an issue with no split among federal or state appellate courts.

The petition is meritless and does not identify a conflict among the lower courts on an important legal issue.⁴ Rather, Smith asks that the petition be granted

³ Smith’s sole claim is under section 2254(d)(1). See Pet. 19-20; App. 45 n.2.

⁴ Smith does contend that two decisions of the Fifth Circuit are in conflict with each other. Pet. 17 (*comparing United States v. Norris*, 780 F.2d 1207 (5th Cir. 1986), with *Rovinsky v. McKaskle*, 722 F.2d 197, 198-99 (5th Cir. 1984). But this Court’s rules favor review of “a decision in conflict with the decision of *another* United States court of appeals on the same important matter.” Sup. Ct.

in order to correct a factual finding by the Minnesota Supreme Court about the type of hearing at issue—that the event was an administrative proceeding. App. 105. The Minnesota Supreme Court recognized the need to follow the four-factor test this Court adopted in *Waller* to determine whether a district court’s closure of a courtroom was proper. *Id.* But the Minnesota Supreme Court determined that because no closure occurred for Sixth Amendment purposes, the *Waller* analysis did not apply. *Id.*

In *Waller*, this Court held that a criminal defendant’s Sixth Amendment right to a public trial applied to a suppression hearing conducted prior to the presentation of evidence to the jury. 467 U.S. at 43. The only other Supreme Court case on a criminal defendant’s public trial right existing at the time of the Minnesota Supreme Court’s decision was *Presley*.⁵ In *Presley*, this Court held that a criminal defendant’s Sixth Amendment right to a public trial was violated when the trial court excluded the public from the voir dire of prospective jurors and failed to consider

R. 10(a) (emphasis added). An intra-circuit split can, if it exists, be resolved by that circuit sitting en banc.

⁵ Over a year after the Minnesota Supreme Court affirmed Smith’s convictions, this Court decided *Weaver v. Massachusetts*, which discussed the right to a public trial in the context of an ineffective assistance of counsel claim. 137 S.Ct. 1899, 1907 (2017). Because *Weaver* was decided after the Minnesota Supreme Court’s decision in Smith’s case, *Weaver* is not part of the analysis here. See *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (“State-court decisions are measured against this Court’s precedents as of the time the state court renders its decision.”) (quotation omitted).

reasonable alternatives to closure. 558 U.S. at 213-14. Both cases require application of a four-factor test when the public is excluded from a stage of a criminal trial. *Id.* at 213; *Waller*, 467 U.S. at 45.

The Minnesota Supreme Court properly analyzed the *Waller* and *Presley* decisions. App. 105-107. The Minnesota Supreme Court noted that the specific holdings of *Waller* and *Presley* applied the public trial right to a suppression hearing and jury voir dire, respectively. App. 104. In the absence of Supreme Court precedent in the very different context presented by this case, the Minnesota Supreme Court relied upon decisions from the federal circuits and state appellate courts to conclude that the public trial right does not apply to an administrative, sidebar-like discussion of an evidentiary issue. App. 106-108.

The Minnesota Supreme Court viewed the proceeding at issue in this case as a nonpublic administrative hearing between the court and counsel that did not contain any trial-like aspects. App. 108-109. “This was an issue of evidentiary boundaries, similar to what would ordinarily and regularly be discussed in chambers or at a sidebar conference—on the record, but outside the hearing of the public.” App. 109.

In this fact-specific and unusual situation, the Minnesota Supreme Court did not need to apply the *Waller* factors because this unusual situation was not trial-like in nature. The Minnesota Supreme Court therefore relied on prior Minnesota decisions, as well as decisions from federal circuits and other states, in

concluding that such closed non-trial administrative proceedings were permissible so long as a record is made and is available to the public. App. 108.

Smith asks this Court to reject the Minnesota Supreme Court's factual finding that the trial court's clarification of the contours of an evidentiary ruling was an administrative proceeding, not a trial proceeding. Notwithstanding the deferential standard of AEDPA, Smith asks this Court to make a legal finding that such a closure violates Smith's Sixth Amendment public trial right. Neither request is justified.

At best for Smith, the question of whether the Sixth Amendment's public trial guarantee applies to an administrative, sidebar-like ruling on an evidentiary issue is a question that deserves a full airing of the issues. But the restraints of AEDPA preclude a full presentation of the novel rule Smith asks this Court to adopt. Instead, AEDPA's deferential standard compelled the Eighth Circuit's affirmance of the denial of habeas relief. There is no reason for this Court to review the Eighth Circuit's decision.

II. The Eighth Circuit did not err.

While Smith does not allege any relevant conflicts of federal courts of appeals, he claims that review is warranted because the Eighth Circuit decision declined to extend the public trial right from what this Court has previously recognized to the nonpublic proceedings at issue here. Smith is asking this court to set aside the required AEDPA deference and extend

the rulings of *Waller* and *Presley* to cover the situation in this case—public trial rights in administrative, sidebar-like hearings. The Eighth Circuit declined to extend this Court’s precedent because it was not permitted to do so under the deferential AEDPA standard.

The Eighth Circuit properly determined that the demanding standard of AEDPA bars habeas relief in this case. App. 6-7. AEDPA governs review of federal habeas proceedings and bars a prisoner from relitigation of any claim adjudicated on the merits in state court, subject to two exceptions. *See* 28 U.S.C. § 2254(d). The exception Smith relies upon allows for review of a claim if the state court adjudication “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.” 28 U.S.C. § 2254(d)(1).

A state court’s decision is contrary to clearly established federal law if it “applies a rule that contradicts the governing law set forth in [this Court’s] cases” or if it “confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.” *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).⁶

Under AEDPA’s “unreasonable application” clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle but unreasonably applies that principle to the facts of the

⁶ Smith does not argue that his case involves facts materially indistinguishable from a decision of this Court. App. 46 n.4.

petitioner's case. *Id.* at 413. The unreasonable application clause requires a state court decision to be more than incorrect or erroneous. *Id.* at 410-412. A federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied" Supreme Court precedent incorrectly. *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (per curiam). AEDPA places the burden on the petitioner to demonstrate that the state court applied Supreme Court precedent to the facts of their case "in an objectively unreasonable manner." *Id.* at 25.

Smith's claim of error does not satisfy either of the clauses of the § 2254(d)(1) exception because the Minnesota Supreme Court's conclusions are neither inconsistent with prior Supreme Court precedent nor objectively unreasonable. Whether a criminal defendant's right to a public trial under the Sixth Amendment attaches to a nonpublic hearing on administrative matters is an issue that has never been decided by this Court. Under the highly deferential AEDPA standard, the Eighth Circuit properly affirmed the denial of habeas relief.

AEDPA's "highly deferential standard for evaluating state-court rulings" requires that state court decisions "be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations omitted). "[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S.

652, 664 (2004)). In order to obtain habeas relief in federal court, a petitioner must show that the state court decision “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.* at 102.

Smith’s sole challenge to the Eighth Circuit’s decision is the claim that the Minnesota Supreme Court’s decision contravened or unreasonably applied clearly established federal law when it found that no Sixth Amendment closure occurred. Smith does not reconcile the Minnesota Supreme Court’s factual determination that the nature of the proceeding was administrative, App. 108, with his assertion that it was a trial proceeding.

As the Eighth Circuit noted, at the time of the Minnesota Supreme Court’s decision, the two leading decisions from this Court regarding a criminal defendant’s right to a public trial under the Sixth Amendment were *Waller* and *Presley*. App. 7-8. Though Smith’s claim correctly cites AEDPA’s demanding standard, Smith fails to take the next step to analyze and apply it to the facts of this case. Smith fails to explain how the *Waller* and *Presley* decisions apply “squarely and directly” to the analysis in this case or how the Minnesota Supreme Court’s holding is contrary to *Waller* and *Presley*. Smith is at a loss to do so because the *Waller* rule does not provide sufficient guidance for resolving his case, and a straightforward application of the *Waller* criteria does not work when the issue before the court is a nonpublic administrative hearing. The lack

of guidance in Supreme Court precedent in this area is determinative. This is precisely the type of case that merits strict adherence to the deferential standard of AEDPA.

Smith contends that, “[t]aken to its logical imperative,” the Eighth Circuit’s decision means that the only “clearly established” portions of a trial subject to the Sixth Amendment’s right to a public trial are suppression hearings and jury voir dire proceedings. Pet. 16. But that argument ignores the primary role of direct appeals in the review of criminal convictions. In its decision in Smith’s case, for example, the Minnesota Supreme Court cited its own prior decision for the proposition that the right to a public trial “applies to all phases of trial.” App. 104. The Minnesota Supreme Court went on to hold that the brief administrative hearing at issue was simply not subject to the Sixth Amendment right to a public trial. App. 108-109.

Thus, for any type of hearing that is properly considered a “phase[] of trial,” App. 104, a defendant deprived of the right to a public trial has a remedy on direct appeal in Minnesota. Smith had a direct appeal and did not seek a writ of certiorari after losing on that direct appeal. Instead, Smith has chosen to seek federal review under the demanding standard of AEDPA. Smith has therefore placed himself in a less favorable position than Waller and Presley, who sought certiorari from their direct appeals, rather than the denial of habeas relief. *See Waller*, 467 U.S. at 43; *Presley*, 558 U.S. at 209.

This Court has not spoken on the public trial right and its application to nonpublic administrative hearings, and the Court's closest cases, *Waller* and *Presley*, are distinguishable on their facts. Neither *Waller* nor *Presley* expressly answers the question Petitioner seeks to have this Court answer—whether Smith's Sixth Amendment right to a public trial extends to an administrative hearing. Because the Minnesota Supreme Court decision upholding Smith's conviction is not contrary to clearly established federal law, the Eighth Circuit properly held that Smith is not entitled to habeas relief.

III. Because this case arises on federal habeas review, it is a poor vehicle for considering the question presented, as phrased in the petition.

In his petition, Smith fails to address why this Court should take the exceptional step of granting certiorari review in a fact-specific state case subject to the deferential standard of AEDPA. Instead, without identifying any compelling basis for such a review, Smith asks this Court to disrupt an important area of federal law by ignoring the significant deference federal courts apply under AEDPA to state court decisions that are not in conflict with this Court's precedent.

A. AEDPA’s demanding standard for relief makes this case a poor vehicle for review of the substantive question Smith seeks to present because AEDPA precludes such a substantive review.

Smith’s claim that the Eighth Circuit decision causes the AEDPA standard to “swallow the Sixth Amendment” public trial right, Pet. 20, is factually and legally erroneous. Contrary to Petitioner’s assertions, the Eighth Circuit’s decision to deny the habeas petition under the deferential standard of AEDPA does not stand for the proposition that public trial rights are limited to pretrial suppression and jury voir dire proceedings. Rather, the rule that the Minnesota Supreme Court applied in this case was that the Sixth Amendment public trial right does not apply to administrative proceedings. App. 108.

The Eighth Circuit therefore reviewed whether the Minnesota Supreme Court’s finding that a public trial right does not attach to administrative proceedings was contrary to, or involved an unreasonable application of, clearly established federal law. The Eighth Circuit found that this Court’s precedent did not foreclose the Minnesota Supreme Court’s rule. The Eighth Circuit’s decision is a recognition that under AEDPA, federal courts owe substantial deference to the legal and factual findings of the state courts. *See Taylor*, 529 U.S. at 402-405.

By its design, AEDPA makes it difficult for petitioners to overturn the decisions of state appellate

courts. AEDPA's demanding standard means that fact-specific decisions by state appellate courts will rarely be overturned by federal courts. This case is not the rare conviction that should be overturned. AEDPA's deferential standard prevents the full vetting of the question of whether and how the public trial right applies to administrative proceedings before a jury is sworn. This case therefore does not squarely present the question of whether the Sixth Amendment right to a public trial applies to a sidebar-like administrative hearing on an evidentiary issue, meaning this case is a poor vehicle to address that question.

B. The uncertainty that Smith has any substantial remedy for his claimed violation makes this case an even poorer vehicle for review of the substantive question Smith attempts to present.

The remedy for a violation of the Sixth Amendment right to a public trial is not always a new trial. *See Waller*, 467 U.S. at 50. In fashioning a remedy for a violation of the public trial right, a court must consider: (1) that the remedy should be appropriate to the violation; (2) that the remedy should serve the public interest; and (3) that the remedy should avoid a windfall for the defendant. *Id.*⁷

⁷ Though *Weaver* is not a part of the analysis because it was decided after Smith's direct appeal, it does not appear to change the analysis of the difficult question of a remedy for a violation of the public trial right. In *Weaver*, this Court noted that it had not ordered a new trial in *Waller* despite the structural nature of the

The federal district court briefly discussed the question of an appropriate remedy if it granted habeas relief. App. 69-70 (citing *Waller*, 467 U.S. at 50). The district court did not answer the question because Smith was not entitled to federal habeas relief. App. 70. But the court “seriously doubt[ed] that any remedy it could craft would be appropriate to the violation and not result in a windfall for Smith.” *Id.*

The district court’s doubt about an appropriate remedy further demonstrates that this case is a poor vehicle for review of the substantive issue as presented in the petition. Even if this Court were to grant review and reverse the denial of habeas relief, the relief to which Smith would be entitled is far from clear. Smith might well be entitled to nothing more than the state trial court restating the contours of its evidentiary ruling in public rather than in private and then deciding whether the evidentiary ruling would have been any different as a result of making the ruling in public.

In *Waller*, this Court remanded the case to the state trial court to hold a new suppression hearing in public. 467 U.S. at 50. This Court held that *Waller* was entitled to a new trial only if the “new, public suppression hearing result[ed] in the suppression of material evidence not suppressed at the first trial, or in some

violation of the right to a public trial. 137 S.Ct. at 1908-09. This Court observed that “while the public-trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant’s standpoint.” *Id.* at 1910. Even if *Weaver* did apply, it would not affect the analysis.

other material change in the positions of the parties.”
Id.

In this case, the nonpublic hearing did not even involve arguments by counsel, much less the presentation of testimony. The nonpublic hearing was merely the announcement by the judge of the contours of a previous, publicly-announced evidentiary ruling. Even if this Court were to grant review and reverse, it is far from clear that Smith has a remedy likely to result in anything other than the ultimate affirmance of his conviction. The apparent lack of a substantial remedy makes this case an even poorer vehicle for review of the substantive issue Smith attempts to present.

Petitioner asks this Court to expand the Sixth Amendment right to a public trial despite the restraints of AEDPA-compelled deference to state appellate courts. Under AEDPA, this Court would have no opportunity to expand the Sixth Amendment right. And even if the Court did expand upon that right, it is far from clear that Smith would gain any substantial relief. This case therefore presents a poor vehicle for review of the substantive question Smith seeks to present.



CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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