No. 21-

In the Supreme Court of the United States

DEANNA BROOKHART,
WARDEN, LAWRENCE CORRECTIONAL CENTER,
Petitioner,

v.

KENNETH SMITH,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent Kenneth Smith has been tried and convicted on three separate occasions for Raul Briseno's murder. During the last two trials, the jury heard and rejected evidence that another group of people committed the murder. On appeal from the jury's most recent verdict, the Illinois Appellate Court issued an exhaustive 93-page opinion that carefully considered and rejected each of respondent's asserted errors. But the Seventh Circuit nonetheless granted habeas relief, reasoning that the state appellate court had unreasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979), in upholding the jury's verdict. According to the Seventh Circuit, although it did not intend to "adjudicate the [alternative suspects'] guilt," the evidence implicating these suspects—evidence the jury heard and rejected—"cast[] a powerful reasonable doubt" on the State's theory that respondent committed the murder, such that "*no* rational trier of fact" could have reached the verdict the jury did. App. 30a (emphasis in original).

The question presented is whether the Seventh Circuit violated 28 U.S.C. § 2254(d)'s strictures in awarding habeas relief to respondent based on its own reweighing of the evidence rather than deferring to the state court's contrary view.

RELATED PROCEEDINGS

Smith v. Illinois, No. 13-883 (U.S.) (order denying petition for writ of certiorari in direct appeal entered March 24, 2014)

People v. Smith, No. 116100 (Ill.) (order denying petition for leave to appeal in direct appeal entered September 25, 2013)

People v. Smith, No. 2-12-0508 (Ill. App. Ct., 2d Dist.) (order affirming conviction on direct appeal entered May 29, 2013)

People v. Smith, No. 01-CF-363 (Ill. Cir. Ct., McHenry County) (judgment of conviction entered April 26, 2012)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Deanna Brookhart, Warden of the Lawrence Correctional Center, in Sumner, Illinois, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, which directed the district court to grant an unconditional writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Because the state appellate court considered and rejected respondent's sufficiency-of-the-evidence claim, federal law barred habeas relief unless respondent's state-court conviction failed to survive "two layers of judicial deference": deference first to the jury's verdict and then to the state appellate court's decision. *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam). But here the Seventh Circuit failed to consider—much less defer to—the state appellate court's detailed analysis of respondent's *Jackson* claim. And the Seventh Circuit's errors did not end there. It also failed to "consider all of the evidence admitted at trial," as is required when "considering a *Jackson* claim." *McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (per curiam). It went outside the state court record and obtained a key piece of evidence for itself, which is prohibited by 28 U.S.C. § 2254(d)(1). See *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). And it impermissibly second-guessed the jury's verdict by conducting its own independent reweighing of the evidence. See *Coleman*, 566 U.S. at 655.

Because the Seventh Circuit was able to grant respondent habeas relief only by exceeding the proper scope of federal review of a state-court conviction in multiple independent ways, this Court should grant certiorari and reverse, either summarily or after full briefing and argument.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit granting habeas relief (App. 1a-37a) is reported at 996 F.3d 402. The memorandum opinion of the United States District Court for the Northern District of Illinois (App. 38a-126a) is unpublished but available at 2020 WL 1157356.

This Court's order denying a petition for writ of certiorari on direct appeal (App. 127a) is reported at 572 U.S. 1017. The Illinois Supreme Court's order denying a petition for leave to appeal on direct appeal (App. 128a) is reported at 996 N.E.2d 21. The decision of the Illinois Appellate Court affirming respondent's conviction of first-degree murder and attempted armed robbery (App. 129a-242a) is unpublished but available at 2013 IL App (2d) 120508-U.

JURISDICTION

The Seventh Circuit entered judgment on April 29, 2021. App. 1a. The petition is timely because this Court issued an order on March 19, 2020, extending the deadline to file a petition for a writ of certiorari to 150 days from the date of judgment, 589 U.S. ___ (2020), and on July 19, 2021, further ordered that such deadline would remain in effect 150 days from lower court judgments issued prior to that date, 594 U.S. ___ (2021). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant 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

This case arises from the murder prosecution of respondent, who has been tried and found guilty on three occasions, by three juries, for the 2001 murder of Raul Briseno.

1. On March 6, 2001, two masked men attempted to rob a Burrito Express restaurant in McHenry County, Illinois. App. 130a. During the robbery, one of the robbers shot and killed the restaurant's owner, Briseno. *Ibid.*

The only eyewitness was Eduardo Pardo, a cook at the restaurant. App. 139a. Pardo saw two masked men enter the restaurant at around 7:15 p.m. on March 6, one of whom was armed. *Ibid.* The armed man entered first, and demanded something from Briseno. *Ibid.* When Briseno raised a knife at the robbers, they fled the restaurant toward a side street. *Ibid.* Pardo and Briseno ran after the robbers, and Pardo observed Briseno talk to someone in a passing car. App. 139a-140a. When the unarmed robber—who was wearing a green jacket—slipped and fell on ice, Pardo caught up to him. App. 140a. As Pardo ushered the man in the green jacket back toward the restaurant, he heard a gunshot. *Ibid.* He looked toward the sound, and saw Briseno approaching him, followed by the armed man. *Ibid.* Briseno and Pardo ran back toward the restaurant, with Pardo pulling the man in the green jacket alongside him. *Ibid.*

Pardo then heard more gunfire and saw Briseno "spit blood out of his mouth." App. 140a-141a. Pardo

ran into the restaurant to call 911. App. 141a. While he was on the phone, he could see Briseno dodging bullets, attempting to use the man in the green jacket as a shield. *Ibid.* After Pardo got off the phone, he went outside and found Briseno dead, lying in a pool of blood. *Ibid.*

2. Authorities subsequently arrested four people for the attempted armed robbery and murder: respondent, Justin Houghtaling, Jennifer McMullan, and David Collett. App. 130a-131a. Houghtaling and Collett ultimately pleaded guilty, and McMullan and respondent were convicted after separate jury trials. App. 131a.

Houghtaling was arrested in Omaha, Nebraska, on May 12, 2001. App. 130a-131a. Although he initially denied involvement in the crime, after fifteen minutes of interrogation Houghtaling confessed, stating that he and respondent robbed the restaurant and that respondent was the gunman who killed Briseno. App. 146a-149a, 153a. Houghtaling explained that on the night of the murder, he, Collett, McMullan, and respondent were drinking near the restaurant when respondent said that he wanted to "go do something." App. 147a. Houghtaling, who was wearing a green jacket, followed respondent into the restaurant. App. 147a-149a. He told the police, without prompting, that respondent carried a "little .22," or .22-caliber firearm—the same weapon the police had concluded was used in the shooting. App. 145a-147a.

When respondent demanded money, the man behind the counter grabbed a knife, and respondent and Houghtaling fled the restaurant. App. 147a. Houghtaling ran toward a side street but was grabbed, though he did not remember how or by whom. App. 148a. Respondent fired the gun at the man with the knife. *Ibid.* Houghtaling was released and ran. *Ibid.*

Houghtaling pleaded guilty to first-degree murder and was sentenced to 20 years in prison. App. 146a. At his plea hearing, he apologized to Briseno's family, explaining that he was "sorry that it went down" and that "[i]t wasn't meant to go down that way." *Ibid.*

Collett pleaded guilty to attempted armed robbery. App. 159a. At his sentencing hearing, he, too, apologized to Briseno's widow:

> [N]o apology—nothing I can possibly say can help the victims with what they're dealing with, but I can offer my . . . apology. I really[,] if I would have known that any of this would have happened, I really would have tried to do something to stop it, but, honestly, I mean, I really didn't think that anything like [what] happened was going to happen.

App. 160a.

McMullan was charged with first-degree murder and attempted armed robbery. App. 131a. At her jury

trial in 2002, Houghtaling gave testimony consistent with his 2001 interview in Omaha—i.e., that he and respondent robbed the restaurant and that respondent was the shooter. App. 149a-150a. McMullan was convicted. App. 131a.

3. Respondent was charged with first-degree murder and attempted armed robbery. *Ibid.* Although he was convicted after a jury trial in 2003, the state appellate court reversed and remanded for a new trial following this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). App. 131a-132a.

4. The State re-tried respondent in 2008. Houghtaling testified for the prosecution, stating, consistent with his 2001 Omaha confession, that he and respondent robbed the restaurant and that respondent was the shooter. App. 150a-151a. On cross-examination, though, Houghtaling recanted this testimony, stating that he had confessed only in exchange for a plea deal. App. 151a. On redirect, Houghtaling conceded that, at the time of his Omaha confession, he had not negotiated a plea deal and so had no incentive to lie. *Ibid.*

The defense's theory at the second trial was that another group, not connected to respondent, had committed the crimes. App. 133a. The defense argued that Russell Levand had murdered Briseno with the help of Adam Hiland and Susanne Dallas DeCicco (collectively, the "DeCicco group"). *Ibid.* The jury saw two video recordings of DeCicco confessing to her supposed role in the murder. *Ibid.*; see App. 165a-172a. But DeCicco, too, recanted her

confessions on the stand, stating that they were a "fabricated story" that she had told under pressure from the police. Dist. Ct. Doc. 1-23 at 253.

The jury convicted respondent of first-degree murder and attempted armed robbery. App. 133a. The state appellate court reversed and remanded for a new trial upon determining that the trial court erroneously admitted certain character evidence and precluded the defense from impeaching its own witness with a prior inconsistent statement. App. 133a-134a.

5. The State tried respondent for Briseno's murder a third time in 2012. App. 134a. The third jury likewise heard the State's case against respondent and the defense's case that the DeCicco group was responsible. *Ibid.* And the jury again convicted respondent. App. 183a.

The State's primary witnesses were Pardo and Houghtaling. Pardo testified to the events of March 6, 2001, as described above, *supra* pp. 4-5. Pardo also explained that he had worked with a sketch artist to produce likenesses of the robbers. App. 142a. Because the robbery occurred during the evening and the men were masked, he had only glimpsed their faces: He had observed the man in the green jacket's silhouette and facial features, but he had never been closer than 25 to 40 feet from the shooter. App. 141a-142a. He did not identify respondent or Houghtaling when police showed him a photo array containing their photographs. App. 143a. But the state appellate court found that the sketch of the man in

the green jacket, produced from Pardo's description, "bears a striking resemblance" to Houghtaling. App. 187a.

Pardo was also asked about the green jacket worn by the second robber. App. 142a. He described it as "long and maybe made of leather." *Ibid.* He was shown Houghtaling's green jacket and stated that it "looked like the one he saw on the man during the shooting." *Ibid.*

On direct, Houghtaling denied involvement in the crimes. App. 145a. He admitted that he had pleaded guilty to first-degree murder, but said that he had done so to obtain a plea deal. App. 146a. But he also acknowledged that he had pleaded guilty of his own free will and that he had apologized to the victim's family at his plea hearing. *Ibid*. The State played for the jury an audio recording of Houghtaling's 2001 confession in Omaha, and read into the record transcripts of Houghtaling's testimony at McMullan's 2002 trial and respondent's 2008 trial. App. 147a-152a. In all three statements, Houghtaling stated that he and respondent attempted to rob the restaurant and that respondent shot Briseno. *Supra* pp. 5-6.

On cross-examination, Houghtaling was asked about the discrepancy in his testimony. App. 153a. He explained that he was under the influence of drugs when he confessed in 2001 and that he told the officers this before the tape recorder was turned on. *Ibid*. He stated that the officers told him that respondent, McMullan, and Collett had already been

charged and had given statements. *Ibid.* Houghtaling acknowledged, however, that he was sober when he pleaded guilty. *Ibid.* And the officer who interrogated Houghtaling in 2001 testified that he showed no sign of being under the influence. App. 156a.

Other officers involved in the investigation also testified. One detective testified that the day after the shooting, respondent told him that he had been with McMullan, Houghtaling, and Collett on the night of the shooting. App. 159a. A second detective testified that respondent had later given a contrary statement, denying knowing Houghtaling at all. App. 158a-159a. A firearms expert explained that the murder weapon was likely a .22-caliber revolver, a common weapon. App. 145a. Briseno's autopsy revealed an abrasion on his forehead consistent with a blow from a gun. *Ibid.* No DNA evidence from respondent or Houghtaling was found at the scene; most DNA samples belonged to Briseno, and some samples also contained Pardo's DNA. Dist. Doc. 1-10 at 54-80.

Collett also testified. App. 159a. He stated that he did not know who committed the crimes and that he pleaded guilty to avoid a long prison sentence. *Ibid.* But he acknowledged that at his sentencing hearing, he apologized to Briseno's widow, stating that "if [he] would have known that any of this would have happened, [he] . . . would have tried to do something to stop it." App. 160a. Collett explained that he provided the apology not because he had committed a crime but because "of the grief she was going through." *Ibid.*

The defense's theory, as in 2008, was that the DeCicco group had committed the crimes. The defense's primary evidence was the two videotaped confessions that DeCicco gave in 2005 and 2006. In these recordings, DeCicco stated that Levand and Hiland robbed the restaurant and that Levand shot Briseno. *Supra* p. 7; App. 167a. According to DiCicco, Hiland (who wore the green jacket) sustained a wound from Briseno's knife during the robbery. App. 168a. She also stated that Briseno had been hit in the head with a gun and that he had shouted into a car—two facts that, the defense argued, had not been made public. App. 168-169a. Eight other witnesses also testified that DeCicco, Levand, or Hiland had confessed to them at various times between 2001 and 2011. App. 164a-165a, 172a-179a.

The defense also introduced additional evidence meant to implicate the DeCicco group and exculpate respondent and Houghtaling. For instance, an officer who interviewed Houghtaling the day after the crime, before Houghtaling left for Omaha, testified that he did not see any scratches on Houghtaling's face or hands, or any blood stains on the green jacket. App. 162a. By contrast, the defense argued, Hiland had a scar on his hand. App. 183a.

But DeCicco, Levand, and Hiland each testified on rebuttal that DeCicco's videorecorded account was untrue. DeCicco testified that she had lied in her 2005 and 2006 statements, explaining that police pressured her to inculpate Hiland and Levand. App. 181a-182a. She explained that she then stuck to her story, hoping to gain earlier release from prison

(where she was incarcerated for a separate offense). App. 182a. She did not believe that her story would lead to her conviction for her role in the offenses. *Ibid.* And she lied to her family and friends because it prompted them to give her money, which she used to buy drugs. App. 181a. Levand likewise testified that he was not involved in the shooting. App. 180a. And Hiland testified that he had never been cut with a knife on his hands or arms, as the defense had theorized, and explained that he received the scar on his hand after falling during an unrelated arrest. App. 183a.

The jury found respondent guilty, *ibid.*, and the trial court sentenced him to 67 years in prison, App. 183a-184a.

6. Respondent appealed, arguing that the evidence was insufficient to convict him and several of the state trial court's evidentiary rulings were erroneous. The state appellate court affirmed respondent's conviction. App. 242a.

The state appellate court's 93-page opinion discussed respondent's sufficiency-of-the-evidence claim at length. App. 185a-197a. The court explained that the standard for this claim was set out in *Jackson v. Virginia*, 443 U.S. 307 (1979): "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." App. 186a.

The state appellate court then applied this standard to the trial record. The court conducted a meticulous analysis of the evidence presented at trial, highlighting Houghtaling's multiple statements confessing to the crime, App. 186a-187a; Houghtaling's distinctive green jacket, which Pardo identified as looking like the unarmed robber's, App. 187a; the "striking resemblance" that Pardo's police sketch of the man in the green jacket bore to Houghtaling, *ibid.*; respondent's own conflicting statements to police, App. 187a-188a; Collett's and Houghtaling's guilty pleas and Collett's apology at his sentencing hearing, *ibid.*; and McMullan's conviction for her involvement in the crime, App. 188a. The court concluded that a rational jury, after making the necessary credibility determinations and weighing the evidence, could have found respondent guilty beyond a reasonable doubt. App. 186a.

The state appellate court also considered and rejected respondent's arguments to the contrary. It explained that it "disagree[d]" with respondent's argument that Houghtaling's confessions were inherently incredible, reasoning that those confessions were generally consistent with each other and with Pardo's testimony. App. 188a-189a. Both men stated that: Respondent entered the restaurant first, carrying a "little .22"; Houghtaling and respondent concealed their faces with masks; respondent announced the robbery to Briseno by demanding money; Houghtaling ran from the restaurant toward the side street; Houghtaling fell on ice; and Pardo caught Houghtaling while respondent and Briseno were out of sight. *Ibid.* Moreover, the

court reasoned, "any inconsistencies in Houghtaling's testimony or statements were before the jury and did not render his testimony inherently unreliable, but merely affected the weight to be given to the testimony, which was the jury's role to assess." App. 191a. As for Houghtaling's claim that he had given his 2001 statement while under the influence of drugs, that, the court reasoned, was contradicted by the officer's testimony that Houghtaling did not seem to be under the influence. App. 190a.

The state appellate court likewise considered and rejected respondent's argument that the evidence of the DeCicco group's culpability was "overwhelm[ing]" and could not have been rationally rejected by the jury. App. 192a-193a. "DeCicco's confessions to the police, which were central to defendant's case," the court explained, "were fraught with significant inconsistencies," which the court described in detail. App. 193a; see also App. 193a-195a. In the end, the court reasoned, "[i]t was the jury's function to assess the witnesses' credibility," and "[i]t found Houghtaling's prior statements credible and the DeCicco group's confessions incredible." App. 196a. Put differently, "the jury was presented with two versions of the events and, given its verdict, it found the State's version persuasive." App. 197a.

The Illinois Supreme Court denied respondent's petition for leave to appeal, App. 128a, and this Court denied respondent's petition for a writ of certiorari, App. 127a. Respondent did not pursue state collateral review.

7. Respondent instead sought relief in federal court under 28 U.S.C. § 2254, again arguing that the evidence was insufficient to convict him and challenging the alleged evidentiary errors. See App. 78a. Relevant here, the district court rejected respondent's sufficiency claim, holding that Pardo's identification of the green jacket and Houghtaling's Omaha confession were sufficient evidence on which to convict respondent. App. 86a-87a.[1]

The Seventh Circuit, however, reversed, granting habeas relief outright and holding that the evidence was insufficient to prove respondent guilty beyond a reasonable doubt. App. 37a.

The Seventh Circuit acknowledged that the deferential standards set out in *Jackson* and § 2254 "leave only a narrow path for the federal writ of habeas corpus." App. 22a. But, the panel explained, "[e]ven so, in the rare case a successful sufficiency challenge is possible." *Ibid.* It chastised the district court for applying too demanding a standard, reasoning that the district court had asked not whether the record was "devoid of evidence" from which a jury could find respondent guilty beyond a reasonable doubt but instead whether the record was "'devoid of evidence' of [respondent's] guilt." *Ibid.* "[E]ven under AEDPA," the panel explained, "we are

[1] The district court granted a conditional writ on the ground that three of the trial court's evidentiary rulings were erroneous. App. 126a. The Seventh Circuit upheld this aspect of the district court's decision, App. 31a-36a, and the State does not seek further review of these issues.

permitted . . . to correct this type of legal error." App 23a.

Applying what it believed to be the appropriate standard, the Seventh Circuit proceeded to review the evidence supporting respondent's conviction, focusing primarily on the two pieces of evidence highlighted by the district court: Pardo's identification of the green jacket at trial and Houghtaling's 2001 confession in Omaha. *Ibid.*

The panel first dismissed the relevance of Pardo's in-court identification of the green jacket in a single paragraph. It explained that Pardo's identification was not "a positive identification" because Pardo said only that it "looked like" the jacket worn by the unarmed robber, not that "he was looking at 'the' jacket" worn by the robber. *Ibid.* Although the court acknowledged that Pardo could have intended to identify the jacket, it rejected that possibility as a "recharacterization of the evidence." *Ibid.*[2]

The panel then turned to Houghtaling's 2001 confession, which it dismissed as "riddled with holes." App. 26a. The panel acknowledged that the jury must have believed Houghtaling's three confessions and disbelieved his recantation. App. 24a. But it reasoned that Houghtaling's 2001 confession—which was, in the panel's view, the only relevant one, since it predated his plea agreement and preparation for

[2] The panel also discounted the relevance of the green jacket based on its examination of photos taken of the jacket—at the panel's direction—nearly a decade after the trial. See *infra* pp. 28-29.

trial—was insufficiently detailed to support respondent's conviction. Specifically, the panel stated, Houghtaling had not provided "a single detail" that "was (1) factually consistent with Pardo's eyewitness testimony and the investigation, (2) not prompted by a leading question by police officers, and (3) not publicly known." App. 25a. The panel went on to acknowledge that two aspects of Houghtaling's 2001 statement in fact satisfied its test—the shooter's use of a .22-caliber firearm and the robbers' flight toward a side street—but dismissed those aspects of the confession on other grounds. App. 25a-26a.

In sum, the panel reasoned, "Houghtaling's testimony and the green jacket are a thin reed indeed on which to try to base a conviction." App. 26a. And it further explained that if it "remove[d] the green jacket from the picture and recognize[d] the holes in the Omaha interview," the evidence implicating the DeCicco group "adds powerfully to the existence of the reasonable doubt" the panel had identified. App. 27a. Although the panel emphasized that it did not mean to "adjudicate the DeCicco Group's guilt," "such a serious possibility of a third party's guilt" convinced it "as an objective matter that *no* rational trier of fact could have found Smith guilty beyond a reasonable doubt." App. 30a (emphasis in original).

REASONS FOR GRANTING THE PETITION

Three separate juries have convicted respondent of Briseno's murder, and on appeal from his last conviction, the state appellate court considered and rejected every alleged error that he presented to the

Seventh Circuit—including the sufficiency-of-the-evidence claim accepted by that court. Federal law thus barred the Seventh Circuit from awarding habeas relief unless the state court "took an 'unreasonable' view of the facts or law." *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (per curiam) (quoting 28 U.S.C. § 2254(d)).

This "standard is difficult to meet," *Harrington v. Richter*, 562 U.S. 86, 102 (2011): It refers "not to 'ordinary error' or even to circumstances where the [habeas] petitioner offers 'a strong case for relief,' but rather to 'extreme malfunctions in the criminal justice system.'" *Mays*, 141 S. Ct. at 1149 (quoting *Richter*, 562 U.S. at 102). And it is an especially difficult bar to surmount when bringing a sufficiency-of-the-evidence claim, which on federal habeas review is "subject to two layers of judicial deference": deference first to the jury's verdict and then to the state appellate court's decision. *Coleman*, 566 U.S. at 651.

The decision below contravenes these principles. It awards habeas relief not on the basis of any alleged error in the state appellate court's decision; indeed, the Seventh Circuit panel that granted the writ did not meaningfully engage with that court's analysis at all. Instead, the decision below awards habeas relief based on the panel's own independent reweighing of the evidence, including evidence that the panel went outside the state-court record to obtain. But "AEDPA demands more" than mere disagreement, *Richter*, 562 U.S. at 102, and here the Seventh Circuit identified no reason to second-guess not only the state court's

analysis, but the verdict of a jury that heard every piece of evidence on which respondent now relies. The Seventh Circuit's errors warrant reversal by this Court, either summarily or following full briefing and argument.

I. The State Appellate Court Reasonably Applied the Correct Standard to Affirm Respondent's Conviction.

As the state appellate court here explained, App. 186a, evidence is sufficient to sustain a conviction if, viewed "in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original). Thus, a "reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (per curiam) (quoting *Jackson*, 443 U.S. at 326).

The state appellate court correctly—or, at the very least, reasonably—applied these fundamental principles to respondent's case. As noted, *supra* pp. 12-14, the state appellate court conducted a thorough review of the record, identifying the evidence that supported respondent's conviction—including, but not limited to, Houghtaling's confessions, Pardo's identification of the green jacket, the sketch produced based on Pardo's description of the second robber,

respondent's conflicting statements to police, and Houghtaling and Collett's guilty plea and Collett's apology. App. 188a-191a. The court then considered and rejected the arguments that respondent now presses—i.e., that Houghtaling's confessions were inconsistent and unreliable and that the evidence of the DeCicco group's guilt was strong enough to undermine the jury's verdict. App. 192a-196a. Applying *Jackson*, the court concluded that "the jury was presented with two versions of the events and, given its verdict, it found the State's version persuasive." App. 197a.

The state appellate court, in other words, canvassed the evidence, considered respondent's arguments, and reasonably concluded that the evidence was sufficient to sustain respondent's conviction. This resolution of respondent's direct appeal by the state appellate court provides no basis on which to award federal habeas relief.

II. The Seventh Circuit Disregarded AEDPA In Awarding Respondent Habeas Relief.

Because the state appellate court considered and rejected respondent's arguments, the "already deferential" review of the jury's verdict that *Jackson* requires is compounded by the "deference to state court decisions required by § 2254(d)." *Cavazos*, 565 U.S. at 7; *Coleman*, 566 U.S. at 651. And because a sufficiency analysis involves "a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Sexton v. Beaudreaux*, 138 S. Ct. 2555,

2560 (2018) (per curiam) (internal quotation marks omitted); *Richter*, 562 U.S. at 105; *accord Dunn v. Reeves*, 141 S. Ct. 2405, 2411 (2021) (per curiam) (federal courts "may grant relief only if *every* fairminded jurist would agree" that the evidence was insufficient) (internal quotation marks omitted) (emphasis in original).

The decision below contravenes these principles. It all but disregards the state appellate court's opinion, instead focusing on the district court's opinion and analysis. And it does not provide proper deference to the contrary judgments of both the jury and the state appellate court, by failing to consider all of the evidence introduced at trial, considering a piece of evidence that was never introduced, and conducting its own independent reweighing of the evidence.

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

As this Court has explained, the focus of a federal court reviewing a state court criminal judgment must be the last reasoned state court decision. "The pivotal question" in a case governed by § 2254 is "whether the state court's application" of federal law (here, *Jackson*) "was unreasonable." *Richter*, 562 U.S. at 101. "If this rule means anything, it is that a federal court must carefully consider all the reasons and evidence supporting the state court's decision." *Mays*, 141 S. Ct. at 1149. "Any other approach would allow a federal court to 'essentially evaluat[e] the merits de novo' by omitting inconvenient details from its

analysis." *Ibid.* (quoting *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam)).

The Seventh Circuit failed to apply that basic principle here. The state appellate court issued a comprehensive 93-page opinion that carefully considered and rejected all of respondent's claims. The Seventh Circuit's nine-page analysis of respondent's *Jackson* claim, however, contains almost no discussion of the state court opinion whatsoever. Just last Term, this Court twice summarily reversed federal courts for failing to consider "all of the justifications" offered by a state appellate court before granting habeas relief. *Mays*, 141 S. Ct. at 1149; *Shinn*, 141 S. Ct. at 524; see also *Wetzel v. Lambert*, 565 U.S. 520, 525 (2012) (per curiam) (federal courts may not disturb state court judgments unless "*each* ground supporting the state court decision is examined and found to be unreasonable") (emphasis in original). But that is just what the Seventh Circuit below did here: It awarded habeas relief without even mentioning, much less considering and rejecting, the bulk of the state appellate court's reasoning.

Instead, the Seventh Circuit appeared to view its task as primarily limited to correcting errors made (in its view) by the district court. The panel chastised the district court for committed a supposed mistake of law in reciting the *Jackson* standard, asserting that it was "permitted even under AEDPA to correct this type of legal error." App. 23a. But the question for the panel was not whether the *district court* stated and applied the correct legal standard; it was whether the *state appellate court* did. See *Mays*, 141 S. Ct. at 1149.

The panel's failure to defer to the state court's decision is likewise apparent from its treatment of the evidence that supported respondent's conviction. In discussing that evidence, the panel appeared to limit its review to the two pieces of evidence that the district court considered when analyzing respondent's sufficiency-of-the-evidence claim: Pardo's identification of the green jacket and Houghtaling's confession. App. 23a-24a. But the prosecution put on, and the state appellate court considered, far more evidence than that when rejecting respondent's *Jackson* challenge: the state court relied on respondent's conflicting statements, his co-conspirators' guilty pleas, Collett's apology to Briseno's widow, and the sketch made of the second robber based on Pardo's description, which the state court found bore a "striking resemblance to Houghtaling." App. 187a-188a. The Seventh Circuit mentioned none of these "inconvenient details," *Mays*, 141 S. Ct. at 1149, and thus was able to "essentially evaluat[e] the merits de novo," *Shinn*, 141 S. Ct. at 523; *infra* pp. 25-31.[3]

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[3] The Seventh Circuit at one point appeared to suggest that its lack of attention to the state appellate court's opinion was warranted by a single factual error—the court's rejection of one of respondent's arguments (that Houghtaling could not have been involved because he did not have blood on his clothes the day after the crime) on the ground that the crime scene was not "bloody." App. 29a. But the Seventh Circuit's critical reading of the state appellate court's remark takes its reasoning out of context, cf. *Dunn*, 141 S. Ct. at 2412 (error to "mischaracteriz[e] . . . the state-court opinion"); in context, the court meant only that no trial testimony established that blood must have gotten on Houghtaling's clothes. In any event, even if the state

To be sure, the Seventh Circuit began by reciting AEDPA's deferential standard. See App. 21a. But at no point did it actually *apply* that standard. Instead, the panel "repeatedly reach[ed] conclusions . . . without ever framing the relevant question as whether a fairminded jurist could reach a different conclusion." *Shinn*, 141 S. Ct. at 524. To take just one example, the panel mentioned neither the AEDPA standard nor the state appellate court's decision in its cursory, single-paragraph discussion of Pardo's identification of the green jacket. App. 23a. Similarly, when considering Houghtaling's confessions, the panel stated that it was "applying *Jackson*'s test*," ibid.*, and that it would "view th[e] evidence—and apply *Jackson*," App. 26a, just as it would if it were addressing the claim on direct appeal. Consistent with its stated (albeit incorrect) approach, the panel's analysis does not mention or assess the state court's lengthy analysis of Houghtaling's confessions. See App. 23a-26a; see also App. 188a-191a.

In short, the Seventh Circuit abdicated its duty to ask whether "a fairminded jurist could reach a different conclusion," *Shinn*, 141 S. Ct. at 524, with respect to Pardo's identification of the green jacket and the reliability of Houghtaling's confessions; instead, the panel appeared to simply consider respondent's *Jackson* challenge de novo. Indeed, at the conclusion of its *Jackson* analysis, the panel did it exactly what this Court has instructed federal courts

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appellate court had erred, an isolated factual error of this kind could not possibly justify the Seventh Circuit's wholesale disregard of the state court decision.

not to do: It reasoned that "no rational trier of fact could have found [respondent] guilty beyond a reasonable doubt"—i.e., it applied the *Jackson* standard, shorn of AEDPA deference—and then stated without explanation that "[t]he appellate court was unreasonable to hold otherwise." App. 30a. That is, the panel "essentially evaluated the merits de novo, only tacking on a perfunctory statement . . . asserting that the state court's decision was unreasonable." *Sexton*, 138 S. Ct. at 2560.

B. The Seventh Circuit failed to consider all evidence presented at trial, went outside the state-court record, and conducted its own reweighing of the evidence.

The Seventh Circuit didn't merely fail to consider—much less defer to—the state appellate court's detailed analysis of respondent's *Jackson* claim. It also failed to "consider all of the evidence admitted at trial," as is required when "considering a *Jackson* claim." *McDaniel*, 558 U.S. at 131. It went outside the state-court record and obtained a key piece of evidence for itself, although that is forbidden by 28 U.S.C. § 2254(d)(1). See *Pinholster*, 563 U.S. at 181. And it conducted its own independent reweighing of the record, improperly engaging in "fine-grained factual parsing" to determine how much weight each piece of evidence should have been assigned. *Coleman*, 566 U.S. at 655.

1. To start, the Seventh Circuit took a blinkered view of the evidence introduced at trial. This Court

has emphasized that "a reviewing court must consider *all* of the evidence admitted at trial when considering a *Jackson* claim." *McDaniel*, 558 U.S. at 131 (emphasis added). But the Seventh Circuit took a more parsimonious approach.

For one, as noted, the panel ignored key pieces of evidence on which the state appellate court relied. *Supra* p. 23. It focused on the two pieces of evidence discussed by the district court: Pardo's identification of Houghtaling's green jacket and Houghtaling's confessions. App. 23a-26a. But the state appellate court discussed a range of evidence supporting the conviction, almost none of which was considered by the Seventh Circuit. Most notably, the Seventh Circuit ignored the state appellate court's determination that the sketch of the man in the green jacket prepared from Pardo's description "bears a striking resemblance to Houghtaling." App. 187a. As this Court explained earlier this year, "a federal court must carefully consider all the reasons and evidence supporting the state court's decision," *Mays*, 141 S. Ct. at 1149; here, the Seventh Circuit ignored key pieces of evidence considered and given weight by the state appellate court.

And the panel adopted a blinkered and artificial approach even as to the evidence that it *did* consider. The panel examined what it viewed as the three major categories of evidence—Pardo's identification of the green jacket, Houghtaling's 2001 confession, and the evidence of the DeCicco group's involvement—one by one, asking whether the first two were sufficient to support the conviction and then looking to the third.

App. 23a-27a. Doing so allowed the court to dismiss each piece of evidence that supported the conviction until only the contrary evidence remained—in the panel's words, "remov[ing] the green jacket from the picture," "recogniz[ing] the holes in the Omaha interview," and leaving only the evidence of the DeCicco group's guilt. App. 27a. But a court conducting a *Jackson* analysis must consider the totality of the evidence in order to ascertain what the jury believed; it should not employ a divide-and-conquer analysis to dismiss the import of relevant facts. See *United States v. Farmer*, 717 F.3d 559, 563 (7th Cir. 2013) (*Jackson* "does not require that each piece of evidence exclude beyond a reasonable doubt the possibility of innocence" but rather that "[t]he totality of the evidence, taken together as a whole," does so); *Maldonado v. Scully*, 86 F.3d 32, 35 (2d Cir. 1996) (evidence "must not be reviewed piecemeal, but rather as a whole").

But that is essentially what the panel did here: It discarded all of the evidence on which the verdict rested in order to place the evidence implicating the DeCicco group front and center. It did so based on its view that that evidence raised a "serious possibility of a third party's guilt," App. 30a, likening this case to *Chambers v. Mississippi*, 410 U.S. 284 (1973), in which this Court held that a defendant's right to a fair trial was violated by court rulings excluding evidence of a third party's confession, see *ibid.* But this case is nothing like *Chambers*: Unlike the defendant there, who was prevented from presenting evidence supporting his alternative-suspect theory, respondent presented to two separate juries evidence that the

DeCicco group had committed the crimes. When voting to convict respondent, those juries necessarily rejected that evidence.

2. Even worse than its failure to consider all evidence presented at trial, the Seventh Circuit contravened the basic rule that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 181. The panel did so by going outside the state-court record and obtaining a key piece of evidence for itself.

A principal piece of physical evidence at trial was the green jacket that Houghtaling wore the night of the murder—the jacket that Pardo testified "look[ed] like" the jacket worn by one of the robbers. *Supra* pp. 9, 13. Houghtaling's jacket was relevant both to Pardo's identification (which, as noted, the Seventh Circuit discredited, see App. 23a) and to respondent's argument that Houghtaling could not have been involved because he had no injuries the day after the accident. The state appellate court rejected the latter argument, reasoning that it was "undisputed that the green leather jacket [Houghtaling] wore covered his arms" and prevented him from sustaining injuries. App. 192a.

But the panel below questioned the state court's resolution of this issue. Several months after oral argument in this case, the Seventh Circuit contacted the State's counsel ex parte and requested the jacket. Counsel informed the Seventh Circuit (and respondent's attorney) that the jacket was located in

an evidence locker maintained by the clerk of the state trial court. At the Seventh Circuit's direction, a representative of the McHenry County State's Attorney's Office, in the presence of respondent's counsel, photographed the jacket's garment tag and sent the images to the Seventh Circuit. The panel's opinion relied on these photographs, "not[ing] that an examination of the garment tag inside the jacket indicates that the exterior shell is made of PVC casting leather (i.e., vinyl) and rayon—much more affordable (and less durable) than real leather." App. 29a. The panel went on to reason that "[w]hile a fair-minded jurist might reasonably conclude that leather could shield someone from physical injuries such as knife cuts or bruises, this conclusion is more tenuous for a jacket with a vinyl exterior." *Ibid.*

This contravened the proper scope of federal habeas review. Although federal habeas review "is limited to the record that was before the state court that adjudicated the claim on the merits," *Pinholster*, 563 U.S. at 181, neither the jury nor the state appellate court was told that the jacket was made of a synthetic material or informed of the alleged significance of that fact. They understood the jacket to be made of "leather." App. 192a. The Seventh Circuit had no authority to conduct an independent inquiry to second-guess the facts found by the jury and accepted by the state appellate court. Section 2254 provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and places the burden on the habeas petitioner to overturn it, 28 U.S.C. § 2254(e)(1); here, the Seventh

Circuit took that responsibility on itself. Its approach cannot be squared with AEDPA.

3. Finally, the Seventh Circuit overstepped its role by independently reweighing the evidence. In doing so, it repeatedly failed to resolve all conflicting inferences in favor of the State, much less consider whether any fairminded jurist could agree with how the state appellate court addressed any such conflict. The panel thus "unduly impinged" not only on the state appellate court's analysis of respondent's *Jackson* claim, but on "the jury's role as factfinder." *Coleman*, 566 U.S. at 655.

For starters, the Seventh Circuit viewed Pardo's identification of Houghtaling's green jacket as entitled to little weight because Pardo testified only that it "looked like" the unarmed robber's jacket. App. 23a. In the panel's view, it was possible Pardo meant "merely that one green jacket 'looks like' another green jacket." *Ibid.* But this is just the sort of "fine-grained factual parsing" that this Court has condemned as inconsistent with the doubly deferential review required of federal courts reviewing a state court's resolution of a *Jackson* challenge. *Coleman*, 566 U.S. at 655. Contrary to the panel's view, App. 23a, the jury was entitled to draw the inference that Pardo believed the jacket in question *was* the one he saw on the unarmed robber—and the state appellate court rightly (or at least

reasonably) concluded, drawing all inferences in the State's favor, that the jury had in fact done so.[4]

The panel's rejection of Houghtaling's confession likewise usurped not only the state appellate court's role but the jury's. The jury heard Houghtaling's three separate confessions—in 2001, 2002, and 2008—as well as undisputed evidence that he was near the scene, wearing a jacket that looked like the unarmed robber's, on the night of the crime. *Supra* pp. 9, 13. And, as the Seventh Circuit acknowledged, the jury "thought that Houghtaling was truthful." App. 24a. The panel nonetheless dismissed Houghtaling's three confessions as inconsequential because, in its view, he did not testify to "one fact" that was consistent with the investigation, not prompted by a leading question, and not publicly known. App. 25a. Setting aside that the panel invented this standard from whole cloth, cf. 28 U.S.C. § 2254(d)(1) (habeas relief appropriate only where state court violated "clearly established Federal law"), the panel then proceeded to dismiss not "one" but two such facts: Houghtaling's statement that the shooter used a .22-caliber firearm and his statement that the chase unfolded on a side street. App. 25a-26a. The court never explained why a rational jury could not

[4] Indeed, courts on direct appeal have sustained convictions on the basis of similar identifications. See, e.g., *United States v. Ferguson*, 211 F.3d 878, 884 (5th Cir. 2000) ("That looks like the gentleman right there"); *United States v. Smith*, 563 F.2d 1361, 1363 (9th Cir. 1977) (defendant "'look[ed] like' the masked robber").

have relied on these facts, or any other, to conclude that Houghtaling was telling the truth.

Finally, the panel's extended discussion of the evidence linking the DeCicco group to the crimes likewise overstepped its role. The panel placed great weight on this evidence, describing it as "compelling" and "powerful[]" and asserting that it was "largely free from the holes that fill Houghtaling's confession." App. 26a, 27a, 30a. But that is so only if—contrary to *Jackson*—all inferences are resolved in favor of respondent, not the State. DeCicco, Hiland, and Levand each testified at respondent's trial, and all three rejected the account on which respondent now relies. The jury was entitled to rely on that testimony to disbelieve the defense theory that the DeCicco group was responsible, and the state appellate court reasonably drew the inference that the jury did just that.

And, as the state appellate court explained, the defense theory implicating the DeCicco group did not square with Pardo's account or the physical evidence in multiple respects. To take one example, according to the defense theory, Hiland's hand was cut by the knife, but the DNA recovered from the knife belonged only to Briseno, App. 194a; indeed, no samples from the scene contained Hiland's DNA, Dist. Doc. 1-10 at 54-80. And Pardo never mentioned a struggle between Briseno and the man in the green jacket, not to mention a stabbing. App. 140a. Again, the jury was entitled to rely on discrepancies of this sort to disbelieve the defense theory, and the Seventh Circuit made no effort to explain why the state appellate

court's decision that the jury did so "was so lacking justification" that it went "beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

CONCLUSION

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

Respectfully submitted,

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