No.

In the
Supreme Court of the United States

SHERYL THOMPSON, Warden,
PETITIONER,

v.

NICOLE HARRIS,
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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QUESTIONS PRESENTED

Following a jury trial, respondent was convicted of murdering her four-year-old son. The Seventh Circuit reversed the district court's denial of habeas relief on two grounds. First, applying *de novo* review, the court held that the state trial court violated respondent's Sixth Amendment right to compulsory process by excluding the testimony of the victim's six-year-old brother through what the court necessarily presumed was a proper application of Illinois' witness competency statute. Second, the court held that respondent's trial counsel provided ineffective assistance at the child's competency hearing. Both holdings turned on the Seventh Circuit's conclusion, contrary to the state appellate court's, that the excluded witness was not asleep, as he claimed, but instead observed the victim's death. Two questions are presented:

1. Whether the Seventh Circuit contravened either AEDPA or *Teague v. Lane*, 489 U.S. 288 (1989), by announcing and applying a new rule that excluding a witness who is incompetent to testify under state law may violate a defendant's Sixth Amendment right to compulsory process.

2. Whether the Seventh Circuit contravened AEDPA by rejecting the state appellate court's factual determination that the child witness was sleeping when the victim died, as the child himself claimed, in the absence of clear and convincing evidence to the contrary.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sheryl Thompson, Warden of the Dwight Correctional Center in Dwight, Illinois, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit reversing the district court's denial of habeas relief pursuant to 28 U.S.C. § 2254.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit granting habeas relief to respondent Nicole Harris (App. 1a-89a) is reported at 698 F.3d 609. The memorandum opinion of the United States District Court for the Northern District of Illinois denying habeas relief (App. 90a-138a) is unpublished, but reported at 2011 WL 6257143. The order of the Illinois Supreme Court denying respondent's petition for leave to appeal (App. 139a) is reported at 919 N.E.2d 358 (Table). The opinion of the Illinois Appellate Court affirming respondent's conviction for first degree murder (App. 140a-191a) is reported at 904 N.E.2d 1077.

JURISDICTION

The court of appeals entered judgment on October 18, 2012. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right * * * to

have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section 2254 of Title 28 of the United States Code, enacted as part of 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; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Illinois' witness competency statute, 725 ILCS 5/115-14 (2004), provided in relevant part:

> (b) A person is disqualified to be a witness if he or she is:
>
> (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him or her; or
>
> (2) Incapable of understanding the duty of a witness to tell the truth.
>
> (c) A party may move the court prior to a witness' testimony being received in evidence, requesting that the court make a determination if a witness is competent to testify. The hearing shall be conducted outside the presence of the jury and the burden of proof shall be on the moving party.

STATEMENT

1. In May 2005, respondent lived in an apartment with Sta-Von Dancy and their two sons, four-year-old Jaquari and five-year-old Diante. App. 4a-5a. Jaquari and Diante shared a bunk bed, with Diante sleeping on the top bunk and Jaquari sleeping on the bottom. App. 7a-8a. An elastic cord had come loose from a fitted bedsheet on the top bunk, and, on May 14, 2005, Sta-Von found Jaquari's lifeless body on the floor of the boys' bedroom with the cord wrapped tightly around his neck multiple times. App. 5a. As Sta-Von testified at trial, at the time he discovered Jaquari's body, Diante was asleep in the top bunk. App. 175a; see also Doc. 1-12 at 153 (transcript of Sta-Von's testimony).

2. Detectives immediately interviewed both respondent and Sta-Von. App. 141a. Respondent initially denied harming Jaquari, but when confronted with the fact that neighbors interviewed by detectives had seen respondent beating Jaquari with a belt that day, she confessed that she had strangled Jaquari because he would not stop crying. App. 143a-147a. In her first confession, respondent stated that she had strangled Jaquari with a telephone cord and then "wrapped the elastic band from the bed sheet around his neck to make it look like an accident," but this did not conform to the physical evidence. App. 6a. Upon subsequent questioning, respondent stated that she had used the cord from the bed sheet to strangle her son. App. 6a-7a. As a result of respondent's confession, the State charged her with first degree murder. App. 7a.

3. The prosecution moved to exclude Diante as an incompetent witness. App. 11a. At the competency hearing, respondent's counsel, the prosecutor, and the judge each posed questions to Diante, who was then six years old. Doc. 1-2 at 66-89 (transcript of Diante's testimony at hearing). Pursuant to Illinois law, Diante was to be presumed competent, and the State bore the burden of establishing his incompetency, but the trial judge erroneously stated that respondent bore the burden of proof. App. 169a.

Defense counsel asked Diante whether he knew the difference between the truth and a lie, and Diante responded affirmatively. Doc. 1-2 at 69. Diante testified that he had seen Jaquari playing with the cord around his neck on the day Jaquari died while the

boys were alone in their room playing a Spiderman game, Doc. 1-2 at 73-74, but Diante could not place the observation in chronological context and claimed to recall virtually nothing else from that day, *id.* at 88. Diante confirmed that he told an investigator with the Illinois Department of Child and Family Services (DCFS), Karen Wilson, that he had been sleeping at the time Jaquari was hurt. App. 12a.

The prosecutor probed Diante's ability to distinguish between reality and fantasy, and Diante testified that Spiderman was real and that Diante had seen Spiderman in person, but had not talked to him. App. 13a. Diante knew that Scooby-Doo was not real, but was "[a] movie." App. 13a-14a. Diante claimed that the Hulk was "[s]omething else." App. 14a. Diante believed Santa Claus was real, but he had never seen Santa Claus in person. *Ibid.* The prosecutor asked Diante: "You told me earlier that you have seen Jaquari in heaven, right?" App. 15a. Diante confirmed that he had. *Ibid.* When the prosecutor asked when that was, Diante gave an answer transcribed as, "Where I was in the rainbow." *Ibid.* When pressed to clarify, Diante stated that he was "in the car" when he saw Jaquari in heaven.[1] *Ibid.* Diante stated that his other brother and his cousin were with Jaquari in heaven. App. 16a. The prosecutor asked

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[1] A child psychologist later clarified that Diante pronounced the word "limo" as "lambo," and thus apparently had testified that he was "in a lambo" when he talked to Jaquari, rather than "in a rainbow." App. 15a-16a. But this information was not available at the time of the competency hearing.

"did you talk to Jaquari then," and Diante responded that he had, stating: "He said, my mommy killed my brother, and my mommy didn't." App. 16a-17a.

When the trial judge questioned Diante, he denied that he had "spoken before with any of the people who are here today before [he] came to court." App. 18a. The prosecutors and defense counsel, however, indicated that they had previously spoken to Diante. Doc. 1-17 at 92 (transcript of arguments and ruling on motion to exclude Diante).

After observing Diante testify, the judge noted for the record that "there was quite a bit of delay" in his answering many of the questions posed. *Id.* at 106. The judge emphasized Diante's difficulty in recalling events from the date that Jaquari died, stating "[h]e's indicated that the only thing that he recalls is playing Spiderman with his brother, the aspect with the cord and the neck, but he remembers nothing else at all from that day." *Id.* at 107. The judge also expressed concern that "Diante lack[ed] the ability to differentiate between reality and fantasy," noting that Diante had testified that he both saw and spoke to his dead brother as if that had been a real event. *Id.* at 108-109. Finally, testimony failed to establish that Diante understood the importance of a witness's oath, *id.* at 105, while Diante's testimony that he had not spoken to any of the attorneys before coming to court was demonstrably false, App. 173a. The court concluded that Diante could neither express himself concerning the matter so as to be understood, nor understand the duty of a witness to tell the truth, finding Diante incompetent under both prongs of

Illinois' witness competency statute, 725 ILCS 5/115-14 (2004). See App. 171a-173a.

4. At trial, Sta-Von and respondent (through her published confession and her trial testimony) described a similar series of events on the day Jaquari died. See generally Doc. 1-12 at 144-159 (Sta-Von's testimony); Doc. 1-13 at 39-62 (respondent's trial testimony); Doc. 15-1 at 9-21 (transcript of respondent's confession). That afternoon, the parents left both children alone in the apartment, with instructions to stay inside, while they washed clothes at a nearby laundromat. Doc. 1-13 at 42-43; Doc. 15-1 at 9-10. After approximately thirty minutes, respondent returned to the apartment and found the boys outside. Doc. 1-13 at 43-46. According to her trial testimony, she yelled at them and ordered them to their room. *Id.* at 47. In her confession, respondent further stated that she pulled Jaquari's pants down, hit him on his backside with a belt four or five times, and then similarly "whooped" Diante. Doc. 15-1 at 12-13. In her trial testimony, however, she denied physically disciplining her children. Doc. 1-13 at 48-49, 108.

Sta-Von, after taking a brief detour to a store, arrived home to hear respondent shouting at the children. Doc. 1-12 at 145-146. He fell asleep on the couch shortly thereafter, and respondent helped him to bed. *Id.* at 148. According to her confession, respondent then "went in the kid's room cause [*sic*] Jaquari was crying." Doc. 15-1 at 14. Respondent "told [Jaquari] to be quiet and shut up, wasn't anything wrong with him," but Jaquari continued to cry, so she hit him on the leg with a belt three or four

times. *Id.* at 15. When Jaquari still continued crying, respondent "took the string from the blue sheet and put it around his neck," wrapping it approximately four times, and Jaquari fell silent. *Id.* at 15-16. At that point, respondent returned to the laundromat, leaving the cord wrapped around Jaquari's neck. *Id.* at 16-17. In her trial testimony, however, respondent denied going into the boys' bedroom after sending them there as punishment, instead stating that she simply returned to the laundromat. Doc. 1-13 at 52.

At the laundromat, respondent dried her clothes and then returned home. *Id.* at 53-54. Sta-Von awoke to the doorbell, and respondent asked him to help with the laundry. *Id.* at 54; Doc. 1-12 at 148. After bringing in the laundry, Sta-Von went to check on the boys and found Jaquari unconscious. Doc. 1-12 at 149. Respondent was still looking for parking outside, and Sta-Von rushed outside carrying Jaquari. Doc. 1-13 at 55. The two took Jaquari to the hospital, where he was pronounced dead. *Id.* at 59-61.

Respondent testified that her confession was false and the product of coercion. Among other things, she claimed that an officer named "Bobby" had sat with her and rehearsed the statements she later made in her videotaped confession. App. 154a-155a. "Bobby" apparently referred to Officer Robert Cordero, and Cordero testified on rebuttal that he had never been alone with respondent, nor did he tell her what to say in her confession. App. 155a-156a.

Jurors also heard testimony from the state medical examiner regarding his conclusion that Jaquari's death was a homicide rather than an accident. App. 149a-

150a. Sta-Von testified that he had seen Jaquari playing with the cord around his neck on a prior occasion, and another relative testified that Jaquari was an inquisitive child whom she had seen place a bag over his head. App. 150a-151a. The jury convicted respondent of first degree murder. App. 156a.

5. In a post-trial motion, respondent raised two claims that are relevant here. First, she claimed that her Sixth Amendment right to compulsory process was violated because the trial court misapplied Illinois' witness competency statute in deeming Diante incompetent. Doc. 1-2 at 17-27. Second, she claimed that she was denied her Sixth Amendment right to effective assistance of counsel at Diante's competency hearing because counsel did not call an expert to testify that Diante was competent. *Id.* at 27-31.

Respondent submitted several documents supporting these claims. First, she tendered handwritten notes purporting to describe an interview of Diante by Ale Levy, an official with DCFS, on the day after Jaquari died. Doc. 1-3 at 16-17. The document includes the following notations: Diante "knows difference between truth/lies"; "Jaquari was playing, wrapped elastic around neck from bedsheet playing Spiderman game"; "Mom whooped Jaquari on arms, pinches"; "Mom told Jaquari to clean up, Mom got closer to Jaquari, Mom told him in his ear and 'Jaquari was throwing up'"; "Mom and Dad came home gave both of them a spanking"; "'Jaquari had a bubble' while he was asleep"; and "Diante was sleeping when Jaquari died." *Ibid.*

Respondent also submitted a report from an expert in child development, Dr. Robert Galatzer-Levy, who had interviewed Diante after respondent's trial and concluded that Diante was capable of expressing himself and understood a witness's duty to tell the truth. Doc. 1-2 at 130-142. Videotapes of Dr. Galatzer-Levy's two interviews were provided to the state court and later transcribed. See Doc. 29 (transcripts of interviews). In the first interview, Diante stated that he could not recall what his school teacher looked like; he first described her skin as blue but then stated it was red. *Id.* at 4-5. By the time of his second interview four days later, Diante could not recall what had transpired at his first interview. *Id.* at 29. Diante told the expert that he was asleep when Jaquari died and he had seen Jaquari playing with the string around his neck earlier on the day he died. *Id.* at 36-41. Diante stated that "[f]irst [Jaquari] put the sheet around his neck," then the boys went outside, and then they got in trouble and respondent whipped them with a belt. *Id.* at 36. As for what occurred when Jaquari died, Diante insisted, "I didn't see what happened," and "I was still asleep." *Id.* at 40. When further pressed by Dr. Galatzer-Levy, Diante stated that at the time he fell asleep, Jaquari did not have the cord around his neck. *Id.* at 41.

6. In denying respondent's post-trial motion, the trial judge acknowledged that he had erred in placing the burden of proof on respondent to prove Diante's competency, but explained that Diante's answers at the competency hearing compelled a finding of incompetence regardless of which side bore the burden

of proof. App. 169a-170a. After denying respondent's remaining claims and hearing evidence in mitigation and aggravation, the trial court sentenced respondent to thirty years in prison. See App. 23a.

7. Respondent appealed her conviction to the Illinois Appellate Court, again claiming, among other things, that her constitutional rights were violated by the exclusion of Diante's testimony and trial counsel's deficiencies at Diante's competency hearing. Doc. 1-5 at 13-74 (respondent's appellant's brief).

In arguing the first of these claims, respondent contended that the trial court misapplied Illinois' witness competency statute, and therefore the exclusion of Diante's testimony violated both her Sixth Amendment right to compulsory process and general due process principles. *Id.* at 41-50. Respondent cited a single Supreme Court decision in support of her constitutional claim: *Washington v. Texas*, 388 U.S. 14 (1967). *Id.* at 42. The state appellate court acknowledged both the statutory and constitutional bases for her claim, stating: "Defendant * * * asserts that the trial court abused its discretion *and violated her constitutional rights* when it ruled that Diante Dancy was incompetent to testify as a defense witness." App. 168a (emphasis added). The appellate court acknowledged the trial court's error in misstating the burden of proof but concluded that "this was not a situation where the burden of proof was outcome determinative." App. 169a-170a. The appellate court further found that the record supported the trial judge's concerns that Diante could neither adequately

express himself nor appreciate a witness's duty to tell the truth. App. 171a-173a.

In the alternative, the appellate court held that any error in excluding Diante's testimony was harmless. App. 174a. Although petitioner represented Diante to be "the sole eyewitness to Jaquari's death," App. 168a, this contention was rebutted by Diante's admission to Wilson that he was asleep when Jaquari died and by Sta-Von's corroborating testimony that Diante was asleep when he found Jaquari's body, App. 175a. The appellate court reasoned that, "[a]t best, the defense might have placed before the jury Diante's observation of Jaquari wrapping an elastic band around his neck," but that testimony was cumulative to Sta-Von's testimony that he, too, had seen Jaquari playing with the cord around his neck. *Ibid.*

The appellate court also rejected petitioner's ineffective-assistance-of-counsel claim based on counsel's performance at Diante's competency hearing, holding that petitioner could not demonstrate prejudice because the court would have found Diante incompetent regardless and the exclusion of his testimony was harmless in any event. App. 182a-183a.

8. Respondent filed a federal habeas petition pursuant to 28 U.S.C. § 2254, raising four claims: (1) the exclusion of Diante's testimony violated her compulsory process right; (2) her confession should have been excluded; (3) the State failed to prove the *corpus delicti* of the crime; and (4) trial counsel was ineffective in various respects, including at Diante's competency hearing. Doc. 1.

On the first issue, respondent did not contend that the state appellate court failed to adjudicate her compulsory process claim. To the contrary, respondent stated: "[t]he Appellate Court announced the correct Supreme Court standard, which is embodied in Illinois' witness competency statute." *Id.* at 40. She argued that her constitutional right was violated because the trial court erred in finding that Diante could neither adequately express himself nor understand his duty to tell the truth (as Illinois law requires). *Id.* at 38-43. The district court so interpreted respondent's argument in denying habeas relief, summarizing: "as [respondent] points out[,] the Illinois criminal code satisfies the Constitutional standard," and, thus, "if the lower court applied the statute correctly, the Constitution has not been offended." App. 111a.

The district court concluded that the writ could not issue on this claim because the trial judge had reasonably found that Diante could not adequately express himself. App. 113a-115a. The district court furthermore deemed reasonable the state appellate court's finding that any error in excluding Diante's testimony was harmless because Diante did not see Jaquari die. App. 115a-117a. On this point, the district court noted that, if at trial, counsel for respondent "had * * * billed Diante as an 'eyewitness' to Jaquari's death (as they have done in the *habeas* briefings here)—only to have the State secure the admission that Diante was asleep when the incident actually occurred—this could have been not only unhelpful but actually harmful" to the defense. App. 117a.

The district court likewise rejected respondent's contention that she was denied effective assistance of counsel at Diante's competency hearing, holding that "the appellate court's reasonable determination that it was harmless beyond a reasonable doubt for Diante not to testify foreclosed any argument that ineffective assistance in the competency hearing resulted in *Strickland* prejudice." App. 127a-128a.

Upon finding these and petitioner's remaining claims to be meritless, the district court denied habeas relief but issued a certificate of appealability. App. 138a.

9. Petitioner argued her same four claims to the Seventh Circuit. Once again, in presenting her claim that exclusion of Diante's testimony violated her constitutional rights, petitioner argued that Illinois' witness competency statute satisfied the requirements of the Constitution, that the state courts misapplied that statute in deeming Diante incompetent, and that exclusion of this competent witness violated her Sixth Amendment right to compulsory process. See Appellant's Br., *Harris v. Thompson*, No. 12-1088, at 20-21. She nowhere claimed that the state appellate court failed to adjudicate her claim. See *id.* at 20-27.

But the Seventh Circuit concluded, *sua sponte*, that the state appellate court did not adjudicate the compulsory process claim, and the Seventh Circuit therefore reviewed that claim *de novo*. App. 27a-33a. It acknowledged that the state appellate court characterized respondent's claim as arguing that "'the trial court abused its discretion and *violated her constitutional rights* when it ruled that Diante Dancy

was incompetent to testify,'" but deemed this reference insufficient because "the appellate court never identified which constitutional rights were at issue or referred to the Compulsory Process Clause, the Sixth Amendment, or even the Due Process Clause." App. 27a-28a. In a footnote, the Seventh Circuit recognized that a "state court's analysis of state law may be substantively co-extensive with the federal constitutional issue," but stated, without further analysis, that in this case "[t]he constitutional implications of the competency ruling were simply overlooked." App. 31a-32a n.5.

The Seventh Circuit's holding that respondent's claim was unadjudicated rested in part on its conclusion, never argued by respondent, that the state appellate court should have realized that exclusion of an incompetent witness could violate a defendant's compulsory process right *even if* the competency determination were correct as a matter of Illinois law. App. 61a-62a. Emphasizing that it was not second-guessing the state courts' conclusion that Diante was an incompetent witness pursuant to state law, the Seventh Circuit granted habeas relief on what it characterized as "a different question: whether in this case the damage done to [respondent's] defense by disqualifying Diante as a witness was disproportionate to the state's interest in guarding against the admission of unreliable testimony." App. 61a.

The Seventh Circuit cited no case from this Court or any other applying such a balancing test to assess the constitutionality of excluding an apparently incompetent witness, and it did not consider whether

such a principle was "clearly established" for purposes of § 2254(d) or a "new rule" for purposes of *Teague v. Lane*, 489 U.S. 288 (1989). Applying its new test, the Seventh Circuit concluded that even if Diante was incompetent as a matter of Illinois law, his exclusion violated the Sixth Amendment because (1) his testimony was "material" to respondent's defense, and (2) even a correct application of Illinois' competency statute in respondent's case "was 'arbitrary' or 'disproportionate' to the evidentiary purpose advanced by the exclusion." App. 35a-36a. In reaching the latter conclusion, the Seventh Circuit recognized that "competency requirements serve legitimate and important state interests," but reasoned that "[t]he Compulsory Process Clause demands more particularized scrutiny of the application of the rule in each case," and found that "Diante's competency hearing did not reveal that he was so unreliable as a witness as to justify depriving the defense of his uniquely exculpatory testimony." App. 52a, 55a.

Applying *de novo* review, the Seventh Circuit concluded that Diante's testimony was "material" because—despite Diante's own insistence that he was asleep when Jaquari died—the Seventh Circuit believed that Diante in fact observed his brother's death. App. 37a-42a. Rather than defer to the state appellate court's factual determination that Diante was asleep when Jaquari died, the court reasoned that Diante's testimony to that effect "[a]t most * * * suggests that Diante, like many children, did not fully comprehend the concept of death and that * * * he may well have watched his brother die without realizing it." App. 41a. As support, the Court cited an article

published in an academic journal on child development for the proposition that "studies show that children acquire some understanding of conceptual components of death between ages five and seven, with 'wide range of ages of acquisition' observed." *Ibid.* Based on this, the Court concluded that Diante watched Jaquari asphyxiate himself, believed that Jaquari was only sleeping, and failed to comprehend, even after being told that Jaquari was dead, that he had actually watched his brother die. *Ibid.*

The Seventh Circuit further concluded that respondent's trial counsel was ineffective at the competency hearing, although the court acknowledged that the state appellate court had adjudicated *Strickland*'s prejudice prong and therefore habeas relief was available only if the state court's determination on that issue was objectively unreasonable. App. 63a-64a. The Seventh Circuit rejected the claim based on its view (obtained after reviewing the state appellate court's contrary finding of fact *de novo*) that Diante was an eyewitness to Jaquari's death. App. 76a-81a. The court did not explain why the state appellate court was objectively unreasonable in concluding that Diante was, as he had stated repeatedly, asleep when Jaquari died. *Ibid.*

Granting habeas relief on these two claims, the Seventh Circuit declined to rule on respondent's remaining claims. App. 7a-9a nn.1-2; App. 64a n.18. The Seventh Circuit issued its mandate on December 14, 2012, directing the district court to issue a writ of habeas corpus unless the State of Illinois elects, within 120 days, to retry respondent. The Seventh Circuit

denied petitioner's motion to stay its mandate pending disposition of this certiorari petition.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit violated federal habeas principles in two critical respects. First, contrary to both AEDPA and Supreme Court precedents, the decision below awarded federal habeas relief based on a new rule of law announced for the first time in this case. Second, the Seventh Circuit failed to defer to the state appellate court's reasonable factual determination that Diante was sleeping when Jaquari died—a determination that should have foreclosed *any* claim to habeas relief. These errors reflect a fundamental misapplication of federal habeas law, and the decision below should be reversed, either summarily or after briefing and argument, to correct these errors and to avoid use of the Seventh Circuit's published decision in future cases.

I. The Seventh Circuit Violated Both AEDPA And *Teague v. Lane*, 489 U.S. 288 (1989), By Holding That The State Court's Exclusion Of Even An Incompetent Witness Violated Respondent's Compulsory Process Right.

In granting respondent habeas relief, the Seventh Circuit relied on a novel theory that not even respondent thought to advance, held that the state court failed to adjudicate this newly identified claim, and granted habeas relief based on an unprecedented interpretation of the Compulsory Process Clause that the state court could not have anticipated. The decision below violates both AEDPA and broader principles cabining federal habeas review.

A. The State Appellate Court Adjudicated Respondent's Compulsory Process Claim And Did Not Unreasonably Apply Clearly Established Supreme Court Precedent.

Respondent urged the Seventh Circuit to grant the writ because the state appellate court unreasonably applied Illinois' witness competency statute, thereby violating her compulsory process right. In contrast, the Seventh Circuit, *sua sponte*, concluded that the state court failed to adjudicate respondent's compulsory process claim, and, accordingly, that its judgment was not entitled to deference under § 2254(d). This conclusion afforded the Seventh Circuit the latitude, it believed, to announce a new rule of constitutional law under the Compulsory Process Clause that was not suggested, much less "clearly established" by this Court's precedent, and to use this new rule to award habeas relief. The court's misapplication of habeas law warrants certiorari review and reversal.

1. The Seventh Circuit Erroneously Held That The State Court Did Not Adjudicate Respondent's Federal Claim, For The State Court Expressly Referenced That Claim And It Was Coextensive With Respondent's State-Law Claim In Any Event.

Throughout her state and federal proceedings, respondent relied on *Washington v. Texas*, 388 U.S. 14 (1967), to argue that excluding Diante's testimony violated her right to compulsory process. See Doc. 1-5 at 41-50 (state appellate brief); Doc. 1 at 38-45 (habeas petition); Appellant's Br., *Harris v. Thompson*, No. 12-

1088, at 20-27. In *Washington*, this Court held that a State may not "arbitrarily den[y]" a criminal defendant "the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." 388 U.S. at 23. But the Court emphasized that the Compulsory Process Clause does not prohibit "nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them." *Id.* at 23 n.21. *Washington* therefore establishes a right to present *competent* testimony, and Illinois' witness competency statute identifies witnesses who fall outside *Washington*'s scope. Consistent with this framework, respondent argued that *Washington* was violated because Diante was, in fact, a competent witness *under Illinois law*. As the district court recognized, respondent's state-statutory and federal-constitutional claims were therefore coextensive as she presented them. App. 111a.

The state appellate court expressly referred to the constitutional basis for respondent's claim in denying relief, and it treated the state-law and federal-constitutional issues as coextensive, just as respondent had. Specifically, the state appellate court stated: "[d]efendant * * * asserts that the trial court abused its discretion *and violated her constitutional rights* when it ruled that Diante Dancy was incompetent to testify as a defense witness." App. 168a (emphasis added). After thus summarizing respondent's claim, the state appellate court concluded that the state trial court had

properly applied Illinois competency law when it deemed Diante incompetent to testify, App. 168a-173a, thereby resolving all aspects of that claim.

Despite the state appellate court's express reference to the Constitution, the Seventh Circuit held that the court somehow failed to adjudicate the constitutional claim by not specifying that the constitutional right at issue was respondent's Sixth Amendment right to compulsory process. App. 28a. But state courts are presumed to know and follow the law and are entitled to the benefit of the doubt in habeas proceedings. See *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002); see also, *e.g.*, *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). Where, as here, a state court indicates expressly that a defendant has raised a constitutional issue, the only appropriate conclusion is that the state court understood the constitutional issue as the one presented in the defendant's brief.

As this Court has emphasized, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 131 S. Ct. 770, 784-785 (2011). *Harrington* is impossible to reconcile with the Seventh Circuit's holding that a state court must carefully list the claims presented by the defendant to prove to a future habeas court that it understood the nature of those claims. It would have been sufficient under *Harrington* for the state appellate court to issue a one-sentence order denying relief, see *ibid.*, so it cannot be proper to hold that the

state court did not adjudicate a constitutional claim that it *expressly* identified.

Furthermore, because respondent's state and federal claims were coextensive—as she consistently presented them—the Illinois Appellate Court was not even required to recognize the federal claim to "adjudicate" it for habeas purposes. See *Childers v. Floyd*, 642 F.3d 953, 968-971 (11th Cir. 2011) (*en banc*) (state appellate court adjudicated Confrontation Clause claim by upholding exclusion of testimony under state law, thereby implicitly resolving federal claim), *petition for cert. filed*, 80 U.S.L.W. 3055 (U.S. July 6, 2011) (No. 11-42); *Cox v. Burger*, 398 F.3d 1025, 1029-1030 (8th Cir. 2005) (same). But see *Williams v. Cavazos*, 646 F.3d 626, 639 (9th Cir. 2011), *cert. granted*, *Cavazos v. Williams*, 132 S. Ct. 1088 (2011) (Mem.). Consequently, the state appellate court's reference to respondent's "constitutional rights"—while sufficient in its own right—was in fact unnecessary, as that court's adjudication of the state statutory issue resolved the constitutional claim under *Washington*.[2]

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[2] Were this Court to conclude, as the Seventh Circuit did, that the state appellate court's express reference to "constitutional rights" was tantamount to silence on the constitutional question, then this Court should hold the petition, pending resolution of *Williams*. *Williams* presents the question of whether a habeas petitioner's claim was "adjudicated on the merits" for purposes of § 2254(d) if "the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim."

Thus, the Seventh Circuit broke with *Harrington* and the rulings of other circuits in holding that the state appellate court's decision was not entitled to § 2254(d) deference. Had the court complied with AEDPA, it could have awarded respondent habeas relief only if she demonstrated that the state appellate court's decision was contrary to or an unreasonable application of this Court's "clearly established" precedent. See 28 U.S.C. § 2254(d)(1); *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (*per curiam*). Respondent cannot do so.

2. The State Court's Exclusion Of An Incompetent Witness Did Not Violate This Court's Clearly Established Precedent.

When holding that respondent's compulsory process right had been violated, the Seventh Circuit assumed that the state courts properly determined that Diante was incompetent under Illinois law. App. 61a. In places, the Seventh Circuit appears to suggest that it disagreed with the application of state law, App. 55a-56a, but elsewhere the court made clear that it did not decide "whether the trial court's incompetency determination was erroneous as a matter of Illinois law," nor did it "disturb" the state appellate court's determination that the trial judge acted within his

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Johnson v. Williams, No. 11-465, cert. petition at i. Thus, *Williams* may establish that the state appellate court's adjudication of the related state-law issue constituted an "adjudication on the merits" of the constitutional claim.

discretion in applying the statute. App. 61a. As the Seventh Circuit correctly recognized, federal habeas corpus relief is not available for errors of state law, and granting relief on that basis would have exceeded the court's authority. *Ibid.* (citing *Estelle v. McGuire*, 502 U.S. 62, 67 (1991)); see also *Wilson v. Corcoran*, 131 S. Ct. 13, 16 (2010).

Because the Seventh Circuit accepted as correct the state court's determination that Diante was incompetent as a matter of state law, that determination should have resolved the federal question, for this Court has never suggested, much less clearly held, that a defendant's compulsory process right encompasses the testimony of an incompetent witness. Rather, to the extent this Court's precedents "clearly establish" anything regarding defense witnesses who are incompetent under state law (and again, the Seventh Circuit does not dispute that Diante was), it is that a defendant has no constitutional right to present them. See *Taylor v. Illinois*, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."); *Washington*, 388 U.S. at 23 n.21 (States may enact "nonarbitrary * * * rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them.").

Despite this Court's clear statements excluding incompetent witnesses from the scope of the Compulsory Process Clause, the Seventh Circuit announced a rule that defendants have a right to

present *certain* incompetent witnesses, depending on the value of the witness's testimony to the defense and whether the witness is sufficiently reliable in the eyes of a federal habeas court. App. 54a-60a. The Seventh Circuit purported to find authority for this rule in some of this Court's precedent, but the cited decisions do not support, much less clearly establish, the Seventh Circuit's rule.

The decision below relied primarily on decisions holding that courts must apply a balancing test before excluding a defendant's proffered hearsay pursuant to state evidentiary law. See, *e.g.*, *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.") (cited at App. 34a, 49a, 53a). But this Court has never applied that test to incompetent witnesses, and the Seventh Circuit's reliance on hearsay cases in this new context violates § 2254(d). See *Wright*, 552 U.S. at 125-126 (principle of law is not "clearly established" unless this Court has "squarely addresse[d] the issue" presented).

Moreover, the Seventh Circuit's analogy was unjustified, for the rationale this Court applied to hearsay does not extend to incompetent testimony. While hearsay rules generally operate to exclude unreliable evidence, certain categories of out-of-court statements are reliable. See *Chambers*, 410 U.S. at 302 (defendant had right to present third-party confession, even though state law deemed it inadmissible hearsay, because it "bore persuasive

assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest"); see also *Green v. Georgia*, 442 U.S. 95, 97 (1979) (defendant had right to introduce "hearsay" that State deemed reliable enough to use in separate proceeding). Because some out-of-court statements that would otherwise be excluded as hearsay are reliable, requiring a more particularized inquiry to protect a defendant's right to present reliable testimony makes sense in the hearsay context. But this Court has never hinted, much less held, that a witness who is incompetent as a matter of state law nevertheless may be sufficiently "reliable" that States may not exclude his testimony without infringing the Compulsory Process Clause.

The other cases on which the Seventh Circuit relied do not support its balancing test, either. For example, this Court has held it unconstitutional to exclude evidence pursuant to a categorical rule if the rule itself is arbitrary. See *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) (rule prohibiting defendant's presentation of third-party confession where prosecution's case included forensic evidence was arbitrary and thus unconstitutional) (cited at App. 49a). But that is not the case here: as the Seventh Circuit acknowledged, competency standards like Illinois' serve the State's interest in excluding unreliable witnesses. App. 54a.

This Court has also rejected the application of state evidentiary rules that preclude a defendant from pursuing a line of defense altogether. See *Rock v. Arkansas*, 483 U.S. 44, 62 (1987) (applying rule barring

post-hypnosis testimony to preclude defendant from testifying to her version of events was unconstitutional) (cited at App. 35a); *Crane v. Kentucky*, 476 U.S. 683, 690-691 (1986) (trial court's ruling that defendant could not testify regarding circumstances of his confession precluded him from presenting defense that confession was coerced and thus was unconstitutional) (cited at App. 50a-51a). But that rationale has no application here, either: respondent was free to (and did) present the theory that Jaquari's death was accidental, and she has never claimed that excluding Diante's testimony prevented her from doing so.

In short, this Court has never suggested, much less clearly established, that a State must assess whether proper application of its admittedly constitutional rule should bend where the defendant expresses a strong desire for his testimony and the witness, though incompetent, exhibits minimal indicia of reliability. Because the state appellate court's adjudication was entitled to deference under § 2254(d), granting habeas relief on this theory requires reversal.

B. Even If The State Appellate Court Had Not Adjudicated Respondent's Compulsory Process Claim, The Seventh Circuit Violated This Court's Precedent Prohibiting The Award Of Habeas Relief Based On A New Principle Of Law.

Even if the state appellate court had not adjudicated respondent's compulsory process claim—as it plainly did, for at least two independent reasons, *see supra* pp. 20-23—the Seventh Circuit nevertheless

erred in granting habeas relief based entirely on a newly announced rule of constitutional law.

The strictures of Section 2254(d) apply only where a state court has "adjudicated" a claim, see *Harrington*, 131 S. Ct. at 784, but AEDPA is not the sole limit on the scope of federal habeas review. Collateral relief also is unavailable for alleged constitutional violations premised on new rules of criminal procedure. See *Teague v. Lane*, 489 U.S. 288, 310 (1989). This rule protects the States' interest in the finality of convictions, as "the application of new rules * * * *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Ibid*. (emphasis in original). Accordingly, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced," unless one of two narrow exceptions applies: (1) the new rule places certain primary conduct beyond the reach of the criminal law; or (2) the new rule embodies a "bedrock" principle of criminal procedure essential to a fair trial. *Id*. at 310-311.

AEDPA largely codified *Teague*'s non-retroactivity principle where state courts have adjudicated a claim. But *Teague* still operates as an independent bar to habeas relief. See *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011) ("The retroactivity rules that govern federal habeas review on the merits—which include *Teague*—are quite separate from the relitigation bar imposed by AEDPA; neither abrogates or qualifies the other."); *Horn v. Banks*, 536 U.S. 266, 272 (2002) ("the

AEDPA and *Teague* inquires are distinct" and must be applied separately). Accordingly, even if the state courts fail to adjudicate a federal constitutional claim, the *Teague* bar still applies on federal habeas review.[3]

The threshold question under *Teague* in determining whether habeas relief may be granted on a principle of law is whether the rule was dictated by precedent at the time the habeas petitioner's conviction became final. See *Beard v. Banks*, 542 U.S. 406, 413 (2004). As discussed, see *supra* pp. 26-28, this Court's own precedent does not establish that exclusion of an incompetent witness could violate the Compulsory Process Clause. Nor have lower courts developed such a rule. See generally App. 36a n.7, 51a-52a n.14 (citing lower court cases, but none addressing witness competency determination).

Because the rule applied by the Seventh Circuit is "new," see *supra* pp. 26-28, respondent may benefit from that rule only if it satisfies one of *Teague*'s narrow exceptions, but it qualifies for neither. The new rule

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[3] Typically, the State must raise the *Teague* bar to preserve this claim. See *Horn*, 536 U.S. at 272. The State did not raise a *Teague* argument below, for respondent did not ask the Seventh Circuit to apply the novel principle of law that the Court of Appeals announced, nor did she argue that the state appellate court failed to adjudicate her claim, such that a standard other than § 2254(d) might govern. See *supra* p. 14. No forfeiture rule should apply when a federal court *sua sponte* develops a new principle of law on habeas review, as the Seventh Circuit did here.

fails to satisfy *Teague*'s first exception because standards of witness competency have no bearing on whether respondent's "primary conduct" (*i.e.*, strangulation) was criminal. Nor does the new rule constitute a "bedrock" principle of criminal procedure essential to ensuring a fair trial. See *Beard*, 542 U.S. at 417 (emphasizing "limited scope of the second *Teague* exception" and unlikelihood that "many such components of basic due process have yet to emerge"). The purpose of state competency statutes is to *exclude* unreliable evidence, as the Seventh Circuit recognized. App. 54a. Far from promoting reliability, therefore, the rule adopted by the court below would require state courts to admit unreliable testimony from persons incapable of either recounting what they observed or understanding a witness' obligation to tell the truth. Plainly, the Seventh Circuit's new rule does not bolster the reliability of criminal trials in general.

Accordingly, in the alternative, application of the Seventh Circuit's new rule is barred by *Teague*, and the grant of habeas relief on the compulsory process claim should be reversed regardless of whether the state appellate court adjudicated that claim.

II. The Seventh Circuit Erred In Concluding, Contrary To The State Court's Reasonable Finding, That A Child Who Claimed To Be Sleeping When The Victim Died Was Actually An Eyewitness.

A second error in the Seventh Circuit's reasoning also demands this Court's review. In fact, this error is dispositive of the entire appeal, for although the Seventh Circuit granted habeas relief on two independent grounds, both holdings turned on that court's erroneous conclusion that Diante was an "eyewitness" to his brother's death. See App. 38a-42a (deeming Diante's testimony material for purposes of Compulsory Process Clause because he was the "*only* eyewitness"); App. 77a-81a (finding that counsel's performance at Diante's competency hearing was prejudicial because Diante was sole eyewitness). But the state appellate court found that Diante was *asleep* when Jaquari died, App. 175a, and as the district court held, this reasonable finding defeated both respondent's compulsory process claim (because exclusion of Diante's testimony was harmless) and her related ineffective-assistance claim, App. 116a-117a, 127a-128a. The Seventh Circuit failed even to acknowledge this finding of fact by the state court, and thus failed to afford the finding any deference.

On habeas review, however, "a determination of a factual issue made by a State court shall be presumed to be correct," and a habeas petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). The presumption applies whether a state court's factual

determination is implicit or express. See *Marshall v. Lonberger*, 459 U.S. 422, 433-434 (1983). Moreover, the presumption applies to a factual determination regardless of whether the state court "adjudicated" a claim such that § 2254(d) also applies. See *Rever v. Acevedo*, 590 F.3d 533, 537 (7th Cir. 2010); *Brown v. Smith*, 551 F.3d 424, 431 (6th Cir. 2008).

As the district court recognized, the state appellate court made a factual determination that Diante was asleep when Jaquari died. App. 116a n.2 (finding that this "factual determination" was "sound"). Specifically, the state court credited Diante's statement that he was asleep when Jaquari died, and found that, "[a]t best, the defense might have placed before the jury Diante's observation of Jaquari wrapping an elastic band around his neck" on a separate occasion. App. 175a. It was error to hold that this determination was incorrect, much less that respondent rebutted it by clear and convincing evidence.

The state court's factual finding is supported by Diante's own statements, as he has consistently maintained that he was asleep when his brother died, as well as Sta-Von's testimony that Diante was asleep when he found Jaquari's body. App. 175a; see also Doc. 1-12 at 153 (Sta-Von's trial testimony). Diante told both DCFS officials who interviewed him in the days immediately following Jaquari's death (Ale Levy and Karen Wilson) that he was asleep when Jaquari died. See Doc. 1-3 at 17 (notation in Levy notes that "Diante was sleeping when Jaquari died"); App. 19a (Wilson testified at competency hearing "that Diante told her he was asleep when his brother got hurt."). He also

told this to Dr. Galatzer-Levy, who probed Diante's recollection at length, eliciting not only that Diante was sleeping when his brother died and "didn't see what happened," but also that the occasion on which Diante saw Jaquari playing with the cord around his neck occurred before respondent and Sta-Von went to the laundromat, returned, and scolded the boys for being outside. Doc. 29 at 36-41. When Galatzer-Levy sought to clarify (stating, "Both of you got in trouble. But was that before or after he put the sheet around his neck?"), Diante stated that "[f]irst he put the sheet around his neck." *Id.* at 36. Galatzer-Levy also asked if the cord was around Jaquari's neck just before Diante fell asleep, and Diante denied that it was, again emphasizing: "It was off of him when we got in trouble." *Id.* at 41. The Illinois Appellate Court's finding that Diante fell asleep and did not observe whether Jaquari strangled himself or whether his mother came into the room and wrapped the cord around Jaquari's neck is consistent with the evidence and should have been sustained under § 2254(e)(1).

Indeed, the Seventh Circuit initially concluded that Diante was an "eyewitness" to his brother's death by applying *de novo* review. App. 37a-42a (after holding that state appellate court's rejection of respondent's compulsory process claim is not entitled to § 2254(d) deference, dismissing state court's finding because its "analysis * * * lack[s] merit"). The Seventh Circuit did not revisit that conclusion when reviewing the state appellate court's determination that respondent suffered no prejudice for *Strickland* purposes, instead deeming that court unreasonable for failing to apply

precedent establishing the value of an "eyewitness." App. 77a-78a (faulting state appellate court for failing to refer to *Brady* case law showing "that the suppression of exculpatory evidence from or relating to *the case's sole eyewitness* is reasonably probable to change the outcome of trial") (emphasis added). It was hardly unreasonable for the state appellate court to decline to apply this precedent, having reasonably concluded that Diante was not an eyewitness at all.

When rejecting the state court's factual finding, the Seventh Circuit apparently relied on Diante's statements that Jaquari had a bubble in his nose and his comment to Levy that "Jaquari was throwing up," as that court stated (erroneously) that Diante "would have testified that he saw Jaquari wrap the elastic band around his own neck, that his mother was not in the room when this happened, that Jaquari vomited in his 'sleep,' and that he saw a bubble form on Jaquari's mouth." App. 37a. But these statements regarding the "bubble" and "vomiting" are not "clear and convincing evidence" sufficient to overcome the presumption of correctness that attaches to the state appellate court's finding.

Sta-Von testified that when he found Jaquari's body, a bubble had formed in Jaquari's nostril. App. 7a. Diante mentioned this to two interviewers. First, the notes generated during Levy's interview of Diante state: "'Jaquari had a bubble' while he was asleep." Doc. 1-3 at 17. Second, Diante told Galatzer-Levy: "when we falled asleep Jaquari had a bubble in his mouth, a real a bubble. In the corner. Like he was fixing to die." Doc. 29 at 37. From this statement, the

Seventh Circuit inferred that Diante saw Jaquari asphyxiate and observed the bubble noted by Sta-Von before falling asleep in his bunk. But it is equally plausible that Diante, who was with his parents at the hospital, App. 5a, heard Sta-Von describe the bubble and repeated what he had heard. In fact, this explanation is far more likely, given that in the very next sentence Diante described events he had not observed personally: "And then mom and dad took him and left me in the house when I was still sleeping." *Ibid.*

The reference to vomiting contained in the Levy notes is even less convincing as evidence that Diante watched Jaquari die. Diante never again referred to Jaquari vomiting, either at his competency hearing or in his interviews with Galatzer-Levy. And the "vomiting" comment he apparently made to Levy, in its full context, suggests that, if anything, Diante watched his mother wrap the cord around Jaquari's neck until he died, for the single notation on the subject states: "Mom told Jaquari to clean up, Mom got closer to Jaquari, Mom told him in his ear and 'Jaquari was throwing up.'" Doc.1-3 at 16. Relying on this notation to conclude instead that Diante watched Jaquari wrap the cord around his own neck, vomit while asphyxiating, and die was unreasonable. In any event, this notation does not approach the clear and convincing evidence necessary to overturn the state court's contrary finding.

In sum, the Seventh Circuit's conclusion that Diante watched his brother die and failed to comprehend it finds no support in the record, much less

clear and convincing support. That court's finding that Diante was asleep when Jaquari died should have precluded habeas relief on both of respondent's claims, and the Seventh Circuit's departure from AEDPA to hold otherwise warrants certiorari review and reversal.

* * *

The Seventh Circuit's misapplication of federal habeas law requires this Court's intervention. Reviewing habeas petitions is "a commitment that entails substantial judicial resources." *Harrington*, 131 S. Ct. at 780. And "[t]hose resources are diminished and misspent, * * * and confidence in the writ and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance." *Ibid.* Where, as here, a court disregards these dictates, this Court has granted certiorari and summarily reversed. See, *e.g.*, *Coleman v. Johnson*, 132 S. Ct. 2060 (2012) (*per curiam*)*; Parker v. Matthews*, 132 S. Ct. 2148 (2012) (*per curiam*); *Hardy v. Cross*, 132 S. Ct. 490 (2011) (*per curiam*); *Bobby v. Mitts*, 131 S. Ct. 1762 (2011) (*per curiam*); *Wright*, 552 U.S. 120. Likewise, this Court should summarily reverse here or, in the alternative, grant this petition and set the case for full briefing and argument.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should hold the petition pending resolution of *Johnson v. Williams*, No. 11-465.

Respectfully submitted.

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JANUARY 2013