No. 12-885

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

BRIEF IN OPPOSITION

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INTRODUCTION

The Seventh Circuit unanimously granted habeas relief in this case on two independent grounds: (1) that the trial court's exclusion of exculpatory eyewitness testimony violated Nicole Harris's Compulsory Process Clause rights, and (2) that trial counsel's performance at the competency hearing that resulted in exclusion of this witness violated Harris's right to effective assistance of counsel.

The State asks this Court to expend the rare grant of the writ of certiorari on the Seventh Circuit's unanimous opinion. No writ of certiorari should issue in this case. Neither issue raised by the State is the subject of disagreement in the lower courts, state or federal, as to any question of law. Instead, the State asks this Court to review the Seventh Circuit's application of settled law to the particular facts of this case. The lack of any split in the courts on a legal issue warrants denial by itself. Moreover, the fact-intensive review requested by the State is not an appropriate basis for a grant of certiorari and is particularly unjustified given that the Seventh Circuit's decision rests on two independent grounds.

The State's petition should also be denied because the Seventh Circuit's decision was correct. The State contends that the panel erred in holding that the trial court violated Harris's constitutional right to compulsory process by excluding critical, exculpatory testimony. The State primarily argues that under

AEDPA, the Seventh Circuit should have deferred to the state court's contrary ruling regarding this testimony. However, the Seventh Circuit correctly concluded that de novo review applied because the Illinois Appellate Court did not reach the federal question when it reviewed the trial court's ruling excluding the witness. It neither identified the controlling U.S. Supreme Court standard nor applied it to the facts. Moreover, the Seventh Circuit alternatively found that it would reach the same result under deferential review because the state court's determination was contrary to clearly established law.

Equally meritless is the State's alternative contention that the Seventh Circuit's compulsory process decision amounted to application of a "new" rule in violation of *Teague v. Lane*, 489 U.S 288 (1989). No new rule was adopted here. Instead, the Seventh Circuit applied a standard that was clearly established in *Washington v. Texas*, 388 U.S. 14, 19 (1967) and expanded upon in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

The Seventh Circuit also correctly decided the alternative, wholly independent basis for its habeas grant: that Harris received constitutionally deficient assistance of counsel. The State's only challenge to this holding is based on a mischaracterization of the record, turning on the State's contention that the Seventh Circuit failed to defer to a particular factual finding purportedly made by the state appellate court. But the state appellate court did not make such a finding, nor could it have. Moreover, even

assuming that such a factual finding did exist, such a finding could not be used to establish the absence of prejudice under *Strickland v. Washington*, 466 U.S 668 (1984), because the purported finding would have itself been tainted by trial counsel's ineffectiveness.

STATEMENT OF THE CASE

I. The Death of Jaquari

In May of 2005, Nicole Harris was a recent college graduate and mother of two children—Jaquari, age four, and Diante, age five. (Dkt. 1-13, p. 38.) They lived together with the boys' father, Sta-Von Dancy, in an apartment on Chicago's West Side, where they settled when Harris started a new job as an aide at a nursing home. (Dkts. 1-12, pp. 140-41; 1-13, pp. 38-39.)

Jaquari and Diante shared a bedroom and slept on bunk beds. (Dkt. 1-12, pp. 142-43.) An elastic band had come free from one end of a fitted bed sheet on the top bunk and dangled down toward the bottom bunk. (*Id.* at 182-84.) Jaquari, who slept on the bottom bunk, had been observed at various times wrapping ropes and cords, including this elastic band, around his neck while playing. (*Id.* at 187-89.)

On May 14, 2005, Dancy entered the boys' room and found Jaquari lying on his stomach on the floor with a clear "mucus" bubble coming out of his nose and his face purple. (*Id.* at 149-50, 185.) The elastic band from the top bunk was tightly wrapped around

Jaquari's neck. (*Id.* at 150-52.) Diante was in the bedroom when Dancy found Jaquari, and he had been with Jaquari since both boys first entered their room that day. (*Id.* at 146, 153.)

Dancy ran to the street, holding Jaquari. (Dkt. 1-13, p. 55.) He met Harris, who was parking the car after having unloaded laundry from it. (*Id.* at 54-55; Dkt. 1-12, pp. 153-54.) Panicked, Harris and Dancy jumped in the car with Jaquari and sped away to find help. (Dkt. 1-12, pp. 154-55.) Harris flagged down two men with cell phones and called 911 twice, begging the dispatcher to send an ambulance. (Dkt. 1-13, p. 56.) With the dispatcher's assistance, Harris coached Dancy through giving Jaquari CPR. (*Id.* at 56-57.) The ambulance arrived and Jaquari was rushed to the hospital. (*Id.*; Dkt. 1-17, p. 64.) Meanwhile, Harris and Dancy returned to the apartment to pick up Diante and then headed to the hospital. (Dkt. 1-12, pp. 156-57.)

Upon arriving at the hospital, they learned that Jaquari had been pronounced dead. (Dkt. 1-17, p. 64.) Harris collapsed and screamed in grief and had to be helped into a wheelchair. (Dkt. 1-13, pp. 61-62.) Harris and Dancy were taken to the hospital chapel, but they were soon approached by detectives from the Violent Crimes Division of the Chicago Police Department. (*Id.* at 62-64; Dkt. 1-17, p. 60.) The detectives requested that they come to the police station. (Dkt. 1-12, pp. 67-68.) The detectives brought Harris and Dancy to the police station in separate police cars and placed them in separate interview rooms. (*Id.* at 67-69.) Harris was shaking

and crying. (*Id.* at 67.) Harris would remain in police custody, subject to round after round of interrogation, for the next 27 hours. (Dkts. 1-9, pp. 68-83; 1-14, p. 92.)

II. Diante's Interview

During the night of May 14, while Harris and Dancy remained at the police station, an official from the Department of Child and Family Services removed Diante from the station (Dkts. 1-9, p. 100; 1-13, pp. 73-75) and placed him in the home of his paternal grandmother. (Dkt. 1-13, p. 74.) The next day, Diante was interviewed by Ale Levy, a specially trained child witness evaluator, at the Chicago Children's Advocacy Center. (SA 104-05.) Chicago Police Detective Randall Wo was present and took contemporaneous notes of this interview. (*Id.*)

According to Detective Wo's notes, Levy first determined that Diante was a competent witness, asking him a series of "qualify[ing] questions" and finding that Diante knew the difference between a truth and a lie. (*Id.*) Levy then asked about Jaquari's death. (*Id.*) Diante responded that he knew his brother was dead and knew that while the boys were alone in their room, "Jaquari was playing, wrapped elastic around neck from blue sheet," and Diante "couldn't help Jaquari get out of his sheet." (*Id.*) Diante also told Levy that during the incident, "Jaquari was throwing up" and that if you wrap a string around your neck, "you go to hospital." (*Id.*) Diante also told Levy that "Jaquari had a bubble" while he was asleep and that Jaquari died. (*Id.*)

Notably, as the state medical examiner would later testify, the vomiting Diante described is a classic sign of asphyxia. (Dkt. 1-12, p. 108.)

III. The Investigation

While Diante was describing what he saw to Levy, Harris was subjected to a series of increasingly aggressive interrogations that ultimately resulted in a videotaped "confession," made more than 27 hours after the detectives first brought her to the police station. (Dkts. 1-9, pp. 68-83; 1-13, pp. 68-113.) Although police chose to record only the statement and none of the interrogation sessions that preceded it, the following facts are undisputed.[1]

A. First Interrogation

Around 9:00 p.m. on May 14, Harris's first round of interrogation began, conducted by two Chicago Police Detectives. (Dkt. 1-9, p. 69.) Harris vehemently denied having done anything to harm Jaquari. (Dkt. 1-13, pp. 75-77.)

After this round of questioning, the detectives left to investigate the scene. (Dkt. 1-9, pp. 71-72, 101.) Harris remained at the station; no one told her at any time that she was free to leave. (*Id.* at pp. 71-72, 96, 101; 1-17, p. 21.)

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[1] Many of the circumstances of the interrogations were disputed at trial, but those factual disputes were not material to the Seventh Circuit's decision and are accordingly not discussed here.

B. Second Interrogation

Around 12:45 a.m., nearly four hours after Harris had first been brought to the police station, and after Diante had been taken away by child welfare authorities, two new detectives, along with one of the original interrogators, began a second round of interrogation. (Dkts. 1-9, pp. 100-02; 1-17, p. 68.) They "confronted" Harris with what they believed to be "inconsistencies" in her answers. (Dkt. 1-9, pp. 100-02.) According to the interrogators, Harris then made a "spontaneous" confession that she had killed Jaquari by wrapping a telephone cord around his neck. (*Id.* at 72, 126.) This statement was indisputably inconsistent with the actual facts of Jaquari's death (see above at pp. 4-5) (Dkts. 1-12, p. 105; 1-14, pp. 46-47.) It was consistent, however, with the detective's case theory at the time—that a phone cord found in Harris's apartment had been the instrument of death. (Dkt. 1-16, pp. 10, 14.)

C. Recantation

According to investigators, an hour later, at approximately 1:45 a.m., Harris recanted her "spontaneous" first statement and denied harming Jaquari. (Dkt. 1-9, pp. 75-76.) The interrogating detectives then suggested a polygraph examination, to which Harris readily consented. (Dkt. 1-16, pp. 69-70.) Under arrest at this time, Harris was placed in a locked cell with no bed for the remainder of the night. (Dkts. 1-9, pp. 77-78; 1-13, pp. 83-85.)

D. Dr. Denton's Original Autopsy Findings

The next morning, on May 15, Cook County medical examiner Dr. John Denton performed an autopsy of Jaquari. (Dkt. 1-12, p. 93.) Detectives presented Dr. Denton with the elastic band and phone cord they had taken from the apartment. (*Id.* at 103-05.) Denton concluded that the elastic band had caused the marks around Jaquari's neck, rather than the phone cord as investigators had originally believed. (*Id.*; Dkt. 1-16, pp. 10, 29-30.) He then concluded that Jaquari's death was a "tragic accident"—a case of accidental asphyxia. (Dkt. 1-12, pp. 105, 112-13.) Denton consulted with several other doctors, who also agreed that the child's death was a "tragic accident." (*Id.*) Denton also found vomitous material on Jaquari's clothes, consistent with the "throwing up" that Diante had described in his Child Advocacy Center interview. (*Id.* at 108.)[2]

It is not clear when, during the course of Harris's interrogation, if ever, Dr. Denton's conclusions were conveyed to the interrogating officers.

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[2] The autopsy identified no signs of injury or abuse to Jaquari's body below the ligature marks on his neck, even though he died the same day that Harris used corporal punishment to discipline him. (Dkt. 1-12, p. 136.) The lack of visible marks belie the State's repeated references to "beating," whipping, or "whoop[ing]" Jaquari, Pet. at 4, 7, 9, 10, and are more consistent with what witnesses described as a "spank[ing]." *See* SA 104-05; Dkt. 15-1, pp. 12-13.

E. Polygraph Examination & Third Interrogation

Shortly after noon on May 15, just as Dr. Denton was concluding his autopsy acrosss town, and fifteen hours after her interrogations began, Harris was transported to the Chicago Police Polygraph Unit. (Dkt. 1-9, p. 78.) According to Robert Bartik, the Chicago Police Department polygrapher, he administered a polygraph exam to Harris, the results of which were inconclusive. (*Id.* at 144.) (According to Harris, she was told she had failed the exam. (Dkt. 1-13, pp. 87-90.)) Shortly thereafter, as Bartik, along with other detectives, resumed Harris's interrogation, officers reported that Harris made yet another confession, this time claiming that Harris stated she grabbed the dangling elastic cord, put it once around Jaquari's neck, laid him on the top bunk, and left the room. (Dkt. 1-16, pp. 71, 76-77.)

F. Fourth Interrogation

Like the first alleged confession, Harris's second reported statement did not fit with the crime scene evidence; Jaquari was found on the floor and a guard rail on the top bunk made a fall from the top bunk unlikely. (Dkt. 1-16, p. 77.) In addition, the cord was wrapped multiple times around Jaquari's neck. (Dkt. 1-14, p. 7.) Consequently, the detectives resumed the interrogation. (Dkt. 1-16, p. 77.)

At this point, police obtained a statement that finally conformed to the physical evidence then known to law enforcement. According to detectives, Harris said at this juncture that she had wrapped

the band around Jaquari's neck three or four times (matching what the detectives had learned about the band during their questioning of Dancy); that she saw blood coming from Jaquari's nose (lining up with blood stains the authorities had noted on the sheets); and that she laid Jaquari down on the floor (matching where Jaquari was found). (*Id.* at 16-17, 77-78; Dkt. 1-13, p. 94.)

G. The Videotaped Statement

At approximately 1:06 a.m. on May 16, more than 27 hours after being taken to the police station, Harris repeated on videotape the most recent version of her statement. (Dkt. 1-9, pp. 82-83.)

H. Dr. Denton's Revised Autopsy Findings

A few days later, police provided Dr. Denton with the results of their investigation, including Harris's videotaped statement. (Dkt. 1-12, pp. 113-16.) Dr. Denton then changed his original opinion and declared Jaquari's death to be a homicide. (*Id.* at 112-17.) There is no indication that the detectives ever informed Dr. Denton of Diante's statements exculpating Harris, of the circumstances of Harris's 27 hours of interrogation, or of the demonstrable falsity of Harris's first several confessions. (*Id.* at 113-17.)

REASONS FOR DENYING THE WRIT

The Court should not grant certiorari in this case for three reasons. First, this case does not meet the standards governing grants of certiorari. Second, the Seventh Circuit properly granted habeas relief in this case under the Compulsory Process Clause. Third, the Seventh Circuit properly granted habeas relief based on a second, entirely independent ground—Ineffective Assistance of Counsel.

I. This case does not meet the standards governing grants of certiorari.

The petition presents no question of law for which there is a split of authority, and indeed does not squarely present any question of law. The State does not attempt to show that the Seventh Circuit's decision departed from the decision of any other federal or state court. Rather, the issues argued by the State turn on the application of settled law to the particular facts of this case. For that reason alone, certiorari is unwarranted.

Moreover, the Seventh Circuit's unanimous decision rested on two independent grounds—(1) that Harris was entitled to relief under the Compulsory Process Clause (a determination that itself rested on alternative grounds because the Court found it was warranted regardless whether or not AEDPA deference applied), and (2) that Harris was entitled to relief in light of the prejudicial incompetence of her counsel. Because either ground is sufficient to support the judgment of the Court of Appeals, the

State must show that both are worthy of this Court's review, which it cannot.

Indeed, to the extent the State attempts to invoke the traditional criteria for granting review, it appears to contend that summary reversal is warranted as an exercise of this Court's supervisory powers. Pet. 37. However, the Seventh Circuit did not err, let alone commit error that "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers. " Sup. Ct. R. 10(a); *see also* Eugene Gressman et al., Supreme Court Practice § 5.12(c)(3), at 351 (9th ed. 2007) (error correction is "outside the mainstream of the Court's function"). Instead, the unanimous opinion of Judges Hamilton, Kanne, and Manion thoughtfully applied well-established law under AEDPA. Therefore, the rare exercise of the writ should not be expended on this highly fact-bound case. *See Kyles v. Whitley*, 514 U.S. 419, 456-57, 460 (1995) (Scalia, J., dissenting) (a fact-bound case is "precisely the type of case in which [the Court is] *most* inclined to deny certiorari").

II. The Seventh Circuit properly granted habeas relief under the Compulsory Process Clause.

The writ should also be denied because the Seventh Circuit's Compulsory Process Clause determination is correct. The State contends that the Seventh Circuit erred in resolving this issue both because it should have deferred to the Illinois Appellate Court's ruling regarding Diante's competency and because the Seventh Circuit applied

a "new" rule of law in violation of *Teague v. Lane*, 489 U.S. 288 (1989). Neither argument has merit.

As to the State's lead argument—that deference was warranted under AEDPA—the Seventh Circuit properly found that no deference was warranted as the state court had not adjudicated the federal Compulsory Process Clause question, and instead resolved the witness exclusion issue entirely under state evidentiary law. In addition, the Seventh Circuit held in the alternative that habeas relief was appropriate on Compulsory Process Clause grounds even if AEDPA deference were applied. The Seventh Circuit's reasoning accords both with this Court's recent guidance in *Johnson v. Williams*, 133 S. Ct. 1088 (2013), as to when a federal court may conclude that a state court did not adjudicate a federal issue, and with this Court's substantive teachings about the Compulsory Process Clause.

The State's *Teague* argument fares no better. The decision below did not create or apply a new rule of law, but rather applied this Court's settled *Washington-Chambers* doctrine to the particular facts of this case.

A. The Seventh Circuit properly applied the law under AEDPA.

The State argues that AEDPA deference is required on two grounds. It first reasons that the Illinois Appellate Court adjudicated Harris's Compulsory Process Clause claim "on the merits." Pet. 21-23. Second, it argues in the alternative that

even if the Illinois Appellate Court did not expressly identify Harris's Compulsory Process Clause claim, AEDPA deference should apply because that claim was entirely coextensive with her state law claim regarding the witness at issue. Pet. 20-23. Both arguments are unavailing.

The Seventh Circuit properly concluded that AEDPA deference did not apply. As the Seventh Circuit explained, the state court neither addressed nor conceptualized the witness exclusion in this case as a Compulsory Process Clause question. The Illinois Appellate Court failed to cite to any case, state or federal, referencing this constitutional right or the applicable standard under the Sixth Amendment. Moreover, it failed to apply the dictates of the Compulsory Process Clause test, or any equivalent constitutional test, to Harris's claim. Furthermore, Harris's constitutional claim was not coextensive with her state law claim. Finally, the Seventh Circuit expressly stated that even if it were to apply AEDPA deference on this issue, it would still grant habeas relief on the ground that the state court's analysis was unreasonable.

As an initial matter, the Seventh Circuit followed the precise standards this Court established in *Harrington v. Richter*, 131 S. Ct. 770 (2011), and confirmed (subsequent to the Seventh Circuit's decision) in *Johnson*, 133 S. Ct. at 1094, 1096-97, for deciding when a state court determination can be deemed to have addressed a federal issue for AEDPA purposes. Under *Harrington*, "[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." 131 S. Ct. at 784. *Johnson* extended that principle to situations where a state court opinion "rules against the defendant and issues an opinion that addresses some issues but does not expressly address the federal claim in question." 133 S. Ct. at 1091, 1094. However, both *Harrington* and *Johnson* also provide that these presumptions can be rebutted where there are "indication[s]" that the state court did not in fact address the federal claim on the merits. *Id.* at 1094, 1096-97; *see also Harrington*, 131 S. Ct. at 784-85. In particular, "[t]he presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Harrington*, 131 S. Ct. at 785.

In this case, the Seventh Circuit expressly followed the *Harrington* standard to find that the state court did not adjudicate Harris's compulsory process claim. As the Seventh Circuit correctly noted, Harris fully and expressly articulated her federal claim before the Illinois Appellate Court and articulated the proper federal standard—that a reviewing court must consider whether the excluded evidence was "material and favorable" and whether the exclusion was "arbitrary or disproportionate" to the legitimate purposes of the procedural rule. *See* Pet. App. 27a, 35a-36a; Brief for Harris at 29, *People v. Harris*, 904 N.E.2d. 1077 (Ill. App. Ct. 2009) (No. 06-3086). In doing so, Harris cited the seminal case of *Washington v. Texas*, 388 U.S. 14, 19 (1967), cited directly to the Sixth Amendment, and also cited to

Government of the Virgin Islands v. Mills, 956 F.2d 443, 445-46 (3d Cir. 1992), which laid out in detail Supreme Court precedent explaining the *Washington-Chambers* Compulsory Process Clause standard. Pet. App. 27a. Harris also argued that Diante was a competent witness under the Illinois competency statute, *see* Brief for Harris at 29-30, *Harris*, 904 N.E.2d 1077, but raising this alternative state claim did not somehow cancel out her federal claim.

Moreover, there are several "indications" that the Illinois Appellate Court did not address the federal Compulsory Process Clause claim. *First*, the Illinois Appellate Court disposed of the issue of excluding Diante's testimony by relying entirely "on state evidence law." Pet. App. 28a-30a. As the Seventh Circuit observed, the Illinois Appellate Court "cited no case—state or federal—on the constitutional issue." Pet. App. 28a. The Illinois Appellate Court did not even cite to any state case law that had contemplated the constitutional dimension of the competency issue. Instead, the Illinois Appellate Court relied entirely on state case law analyzing an issue of state law—the standard for satisfying the statutory test for witness competency. Pet. App. 168a-175a.

The State attempts to distract the Court from the substance of the Illinois Appellate Court's rationale—anchored in state evidentiary law—by noting that the Illinois Appellate Court observed, in an introductory section, devoid of actual analysis, that Harris had asserted that the "trial court abused

its discretion and violated her constitutional rights" in excluding Diante's testimony. Pet. 21. Even if the Illinois Appellate Court's introductory acknowledgement was indeed a reference to Harris's federal Compulsory Process Clause claim, identifying the claim and adjudicating the claim are two different matters entirely. As the Seventh Circuit explained, what matters for AEDPA deference is whether the state court in fact analyzed the federal claim in question, and in this case, it did not. As the Seventh Circuit noted, "the [Illinois] 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."[3] Pet. App. 28a.

Second, rejection of Harris's state law claim was insufficient to dispose of her federal constitutional claim because the state standard that the Illinois Appellate Court applied in this case is "*less* protective" of Harris's rights than the Compulsory Process Clause standard. *Johnson*, 133 S. Ct. at

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[3] It is also unclear whether this passing reference to "constitutional" concerns was indeed a reference to Harris's federal constitutional claim as Harris raised compulsory process claims under both the Illinois and U.S. Constitutions in arguing that the exclusion was erroneous. Brief for Harris at 29, *People v. Harris*, 904 N.E.2d. 1077 (Ill. App. Ct. 2009) (No. 06-3086). Notably, these state and federal provisions are not always applied in the same manner. *See, e.g.*, *People v. Boles*, 367 N.E.2d 1013, 1015-16 (Ill. App. Ct. 1977) (not applying the arbitrary or disproportionate standard). There is no indication that the Illinois Appellate court was addressing the federal, as opposed to the state, constitutional claim.

1096. Indeed, none of the inquiries under the state standard even approximates the *Washington-Chambers* standard—which requires courts to consider whether even a correct application of a state procedural rule was "arbitrary or disproportionate" to the purposes served by the rule. *See Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006).

The State's argument that the Illinois Appellate Court implicitly addressed Harris's Compulsory Process Clause claim in its exclusively state-law analysis rests on a misapprehension of the nature of that claim. The State portrays Harris's constitutional claim before the Illinois Appellate Court as a narrow request to apply *Washington v. Texas* in its most literal form—to require reversal of a conviction where a defendant was precluded from calling an undisputedly competent witness to the stand. The State argues that this claim is coextensive with the state competency law. Pet. at 21.

But Harris's pleadings explicitly identified the *Washington-Chambers* "arbitrary or disproportionate" standard, which by its very terms *is more protective* than state law. This standard required the Illinois Appellate Court to assess whether a technically correct application of a state procedural rule (here the witness competency statute), excluded "material and favorable" evidence and operated in a manner that was "arbitrary and disproportionate" to the purposes served by the rule. *See* Pet. App. 35-36a. The State nowhere asserts, nor could it, that the Illinois Appellate Court addressed this broader *Washington-Chambers* claim that

Harris articulated in her state appellate brief.[4] Therefore, the Seventh Circuit properly concluded that Harris raised, and the Illinois Appellate Court failed to address, the Compulsory Process Clause claim. Consequently, the Seventh Circuit properly determined that deference under AEDPA was not appropriate as to this claim.

Third, and contrary to the State's argument, Pet. at 24-28, the Seventh Circuit stated that it would have reached the same result even if it had applied AEDPA's deferential standard: "Even if this court were to indulge the presumption that the Illinois courts actually adjudicated the Compulsory Process claim 'on the merits,' the outcome of our review would be no different. . . . [T]he state court's harmless error analysis . . . would be both an unreasonable determination of facts and an unreasonable application of law in the instant case." Pet. App. 33a n.6. Indeed, as explained in the next section, the *Washington-Chambers* standard—

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[4] Contrary to the State's claim, Harris did not indicate in her habeas petition before the Northern District of Illinois that the Illinois Appellate Court had adjudicated her *Washington-Chambers* claim—nor could she have done so. The Illinois Appellate Court cited to no case law stating the Compulsory Process Clause standard. Rather, Harris observed in her petition that the Illinois Appellate Court announced the correct *state* Supreme Court standard as to the meaning of the competency statute. Brief for Harris at 30, *Harris v. Thompson*, 2011 WL 6257143 (N.D. Ill. 2011) (No. 19-cv-6257); *see also* Pet. App. 171a (citing to *People v. Puhl*, 570 N.E. 2d 447 (Ill. App. Ct. 1991), which relied on Illinois Supreme Court cases for the standard governing whether a minor is competent to testify under state law).

applied by the Seventh Circuit after being entirely ignored by the state courts—is "clearly established" federal law. *See Williams v. Taylor*, 529 U.S. 362, 379, 391, 412 (2000) (noting that analysis of what constitutes a new rule under *Teague* "is the functional equivalent of [AEDPA's] 'clearly established law' [requirement]"); Section II.B.1, below.

B. The Strictures of *Teague v. Lane* do not apply in this case, which involved only application of the well-established *Washington-Chambers* principle.

The State next asserts that *Teague v. Lane*, 489 U.S. 288 (1989), barred the Seventh Circuit's application of the Compulsory Process Clause to this case. In *Teague*, this Court established that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310. The State argues that the manner in which the Seventh Circuit resolved this issue created a new rule of criminal procedure. Pet 25-30.

Specifically, the State asserts that in assessing whether the damage done to Harris's defense by disqualifying Diante as a witness "was disproportionate to the state's interest in guarding against the admission of unreliable testimony," Pet. App. 61a, the Seventh Circuit created a new rule. Pet. 15. The State bases this allegation on a claim that 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." Pet. 15.

The State is wrong in contending that the Seventh Circuit created a new rule under *Teague*. As the Seventh Circuit explained, its "decision did not create a new rule about witness exclusion but rather *applied* the established [arbitrary or disproportionate] test required under the Supreme Court's decisions interpreting the Compulsory Process Clause." *See Harris v. Thompson*, No. 12-1088, slip op. at 3 (7th Cir. Feb. 20, 2013).

This Court has long recognized that the routine application of a settled constitutional principle to different facts does not create new law. *Wright v. West,* 505 U.S 277, 308 (1992) (Kennedy, J., concurring); *see also, e.g.*, *Bousley v. United States*, 523 U.S. 614, 619-20 (1998); *Stringer v. Black*, 503 U.S. 222, 229-30, 232 (1992). As Justice Kennedy has explained, "it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright*, 505 U.S at 308-09; *see also Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (applying this logic to AEDPA's clearly established law requirement).

The Seventh Circuit made no new rule here. The Seventh Circuit expressly cited and applied the *Washington-Chambers* test, as articulated and applied in *Holmes*, 547 U.S. at 324-25, and *Rock v. Arkansas*, 483 U.S. 44, 55 (1987). *See* Pet. App. 33a-36a. Those cases say that courts reviewing a Compulsory Process Clause or Due Process Clause

claim must, at a minimum, scrutinize state procedural rules that are applied to exclude a defendant's material and favorable evidence to determine whether the application was arbitrary or disproportionate to the purposes served by the rule. *See Holmes*, 547 U.S. at 324-25. In *Holmes*, Justice Alito explained that "evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve'" violate the right to present a complete defense under the Compulsory Process Clause or Due Process Clause. *Id.* Just as the ineffective assistance standard in *Williams* was deemed to provide sufficient guidance for resolving virtually all claims under that standard, so too does the "arbitrary or disproportionate" standard provide sufficient guidance for resolving virtually all claims regarding the right to present a complete defense. *Williams*, 529 U.S. at 390-91 (plurality opinion).

Contrary to the State's claim, Pet. 25, 26, 30, this standard has been previously applied to state evidentiary rules of competency. *See Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (recognizing that under the *Washington-Chambers* standard, "a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand"). In addition, and contrary to the State's suggestion, Pet. 27, this Court has also previously applied the *Washington-Chambers* principle to invalidate the disparate application of procedural rules to particular facts. *See, e.g.*, *Green v. Georgia*, 442 U.S. 95, 97 (1970) (per curiam) (without striking

down Georgia's hearsay rule categorically, finding that "under the facts of this case" the exclusion of the defendant's proffered evidence violated the *Washington-Chambers* principle); *see also Holmes*, 547 U.S. at 329 (citing concerns about how the state supreme court applied an evidentiary rule "in this case"). Accordingly, the Seventh Circuit did nothing more than apply the established "arbitrary or disproportionate" standard in a familiar context. *See* Pet. App. 33a-34a.

Moreover, this case is a paradigm example of the "arbitrary and disproportionate" application of a state evidentiary rule. The trial court's exclusion of Diante was fundamentally arbitrary because the court inverted the burden of proof—requiring *Harris* to prove that Diante was a competent witness, even though the law required the court to *presume* Diante was competent and to place the burden on the State to prove otherwise. *See People v. Hoke*, 571 N.E.2d 1143, 1148 (Ill. App. Ct. 1991). Indeed, the Illinois Appellate Court had previously applied the exact opposite rule in favor of the state—holding that where the prosecution seeks to introduce testimony from a child witness, and the defense fails to ask any questions regarding whether a child witness understood the duty to tell the truth, the witness is presumed competent because the *defendant* had not met his burden to prove the witness incompetent.[5] *Hoke*, 571 N.E.2d at 1148.

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[5] While the trial court, post-trial, held that it would have excluded Diante's testimony even if it had applied the burden of

Furthermore, as the Seventh Circuit also observed, in many prior cases where the *prosecution* offered the testimony of very young children, Illinois courts routinely permit such testimony under the witness competency statute. Pet. App. 48a-49a n.13 (citing to ten cases in which young children ranging from ages four to six were allowed to testify for the prosecution); *People v. Nowicki*, 894 N.E.2d 896, 929 (Ill. App. Ct. 2008) (upholding a determination that the child witness was competent, citing to cases where children testified that they did not in fact know the difference between the truth and a lie, or testified merely that "*telling the truth made people 'happy' and lying made them 'mad*") (emphasis added). In rendering these decisions, Illinois courts have emphasized that "the competency bar with respect to understanding the difference between a truth and a lie, is very low." *Id.* Diante more than cleared this "very low" bar. He conveyed that he understood the duty to tell the truth, explaining that "[t]elling a lie, you might get in trouble. Telling the truth, you might get a star." (Dkt. 1-2, p. 70.)

Yet in this case, rather than apply this "very low" bar, the trial court applied a disparate and

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proof correctly at the competency hearing, as the Seventh Circuit explained, "the assessment of prejudice is an objective inquiry that 'should not depend on the idiosyncrasies of the particular decision-maker . . . .'" Pet. App. 83a. Rather, the trial judge's subjective assertion that the burden of proof would have made no difference is "irrelevant to the prejudice inquiry," Pet. App. 83a, especially when during trial, the trial court relied heavily on the burden of proof in holding Diante incompetent. (Dkt. 1-17, p. 105.)

unreasonably high standard of competency to Harris's witness. For example, it rested its finding of incompetency, in part, on the fact that the Diante testified that he believed that Spiderman, the tooth fairy, and Santa Claus were real. (Dkt. 1-17, p. 108.) Yet, these beliefs are entirely age appropriate in young children and do not trigger competency concerns the way that such beliefs might in adults. Using these beliefs to discredit Diante thus appeared to have resurrected, in spirit, the age presumptions regarding competency that the state of Illinois long ago abolished. *See People v. Westpfahl*, 692 N.E.2d 831, 834 (Ill. App. Ct. 1998).[6] Thus, the trial court's application of the competency statute in this case was fundamentally arbitrary and disproportionate, and so strikes at the heart of the Compulsory Process Clause. In consequence, the Seventh Circuit's holding rests on firm, well-established ground, and in no way implicates the *Teague v. Lane*, 489 U.S 288 (1989), bar.

III. The State's sole argument regarding the Seventh Circuit's second, independent ground for relief—that Diante was not a material eyewitness—is groundless.

The second independent basis on which the Seventh Circuit rested its grant of habeas relief was that Harris's trial counsel provided prejudicially

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[6] The Seventh Circuit also noted that state courts commonly find young children competent to testify despite declaring a belief in Santa Claus, the tooth fairy, and other fictional characters. *See* Pet. App. 57a-59a & n.17.

ineffective assistance of counsel. Pet. App. 62a-87a. The Seventh Circuit anchored this holding on three grounds.[7] First, it concluded that counsel were ineffective because they failed to interview Diante before his competency hearing. Pet. App. 65a-71a. Second, it concluded that counsel erred by failing to secure the presence of Investigator Levy to testify about Diante's description of observing Jaquari accidentally strangle himself and about Levy's finding, as a trained child witness examiner, that Diante was competent to testify. Pet. App. 71a-73a. Third, it concluded that counsel erred in failing to correct the trial court's erroneous misassignment of the burden of proof in Diante's competency hearing. Pet. App. 73a-74a. The Seventh Circuit then concluded that the Illinois Appellate Court's determination that Harris was not prejudiced by these errors was unreasonable. Pet. App. 77a-81a. It found this determination unreasonable in that the Illinois Appellate Court failed to follow Supreme Court precedent recognizing that depriving a defendant of exculpatory testimony is prejudicial to a defendant's case. *Id.*

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[7] As an initial matter, contrary to the State's assertion, Pet. at 9, Harris raised five ineffective-assistance-of-counsel claims in her state appellate brief: that her trial counsel (a) "failed to argue that the competency hearing was procedurally flawed," (b) "did not adequately prepare Diante to testify," (c) "[did not] present corroborative and expert testimony supporting a finding of competency," (d) failed to present expert testimony on accidental strangulation and false confessions, and (e) improvidently withdrew Harris's meritorious motion to quash arrest and suppress evidence. Pet. App. 179a.

The State argues that both the ineffective assistance holding and the Compulsory Process holding must be reversed because they are predicated on an improper conclusion that Diante was a material eyewitness. In support of this remarkable proposition, the State relies solely on the following brief passage in the Illinois Appellate Court's analysis of Diante's competency:

> [A]ny error in excluding his testimony was harmless beyond a reasonable doubt. . . . At best, the defense might have placed before the jury Diante's observation of Jaquari wrapping an elastic band around his neck. However, the jurors had learned from other witnesses that Jaquari had done such things before. Moreover, the proposed testimony likely would have been negated or otherwise diminished by Diante's admission to Ms. Wilson the day following the murder, that "he was asleep when his brother got hurt." That admission of course was corroborated by Dancy's testimony that Diante indeed was asleep when he discovered Jaquari's lifeless body on the bedroom floor.

Pet. App. 174a-175a (referencing the testimony of Karen Wilson, a Child Protections Examiner from the Illinois Department of Children and Family Services who interviewed Diante two days after Jaquari's death). In the State's view, this reference to testimony at the competency hearing regarding Diante being "asleep"—unlike all the other statements likewise attributed to Diante—represents

a "finding of fact" to which the Seventh Circuit paid insufficient deference under AEDPA.

The Seventh Circuit thoroughly and cogently addressed the Illinois Appellate Court's review of Diante's various statements in evaluating the court's reasoning on the harmless error point. The Seventh Circuit determined that "Diante's 'admission' to Wilson that he was asleep when Jaquari died [did not] significantly reduce the probative force of his testimony." Pet. App. 41a. The court continued:

> At most, it suggests that Diante, like many children, did not fully comprehend the concept of death and that, heartbreakingly, he may well have watched his brother die without realizing it. . . . Diante believed Jaquari fell 'asleep' with the mucus bubble, and only later was he informed of Jaquari's death. Given Diante's age, a reasonable jury would understand perfectly well what was going on here. At worst, Diante's 'admission' to being asleep created a superficial tension with his earlier (and unambiguous) report that he saw Jaquari wrap the elastic around his own neck and that his mother was not present. At trial, the prosecution could certainly have explored that tension and the jury may have considered it in evaluating his testimony. But the idea that this would have 'negated' the rest of his testimony is groundless.

Pet. App. 41a. As described below, there is no merit in the State's argument that this passage constituted

an improper failure to defer to a state court finding of fact. First, the Illinois Appellate Court did not engage and could not have engaged in fact-finding of any kind. Second, neither of the Seventh Circuit's holdings actually turns on whether the Illinois Appellate Court made this purported factual determination.

A. The state appellate court did not make a factual finding.

The State's argument that the Seventh Circuit failed to defer to the Illinois Appellate Court's finding of fact is predicated on a crucial mischaracterization of the Illinois Appellate Court's opinion. First, the Illinois Appellate Court never made any findings of fact in its review of this case, and certainly not in connection with its ineffective assistance ruling. Second, the Illinois Appellate Court could not have made the purported finding of fact in this case, for doing so would have entailed acting beyond its powers.

The Illinois Appellate Court neither evaluated the credibility of, nor resolved any purported conflict between, Diante's testimony and Wilson's testimony. Nowhere in its opinion did the Illinois Appellate Court purport to make a *factual determination* that Diante was asleep for the entire period when Jaquari asphyxiated. Rather, the appellate court merely described Wilson's competency hearing testimony—as well as other statements attributed to Diante—in its harmless-error analysis of the exclusion of Diante's exculpatory testimony. Reviewing the

collective impact of the statements, the appellate court first stated, "At best, the defense might have placed before the jury Diante's observation of Jaquari wrapping an elastic band around his neck." Pet. App. 173a-175a. The appellate court then concluded that this "proposed testimony *likely* would have been negated or otherwise diminished" by another statement attributed to Diante—that "he was asleep when his brother got hurt." *Id.* (emphasis added). The Illinois Appellate Court did not make a "finding" that only one of these statements should be deemed true, while all the other statements should be deemed false, nor did it anywhere conclude that Wilson's testimony was more credible than Diante's testimony, or even that their testimonies were necessarily in conflict. Rather, it made a prediction as to how a jury would *likely* perceive all of Diante's statements *in total*. That is not a finding of fact of any kind and it certainly does not amount to the specific factual finding that the State suggests.

Indeed, under Illinois law, a reviewing court lacks authority to assess witness credibility and resolve conflicts in their testimonies. *In re H.D.B.*, 703 N.E.2d 951, 954 (Ill. App. Ct. 1998). Diante testified to having witnessed material events surrounding Jaquari's death. (*See* Dkt. 1-2, pp. 72-74.) Wilson then testified that Diante made a numbers of statements to her regarding Jaquari's death, including his statement that "you can be dead when you put a sheet around your neck." (Dkt. 1-17, p.89.) Among the statements Wilson testified to, she testified that Diante told her that when Jaquari got

hurt, Diante said that he was asleep. (*Id.* at 97-98.) While Diante agreed that he had stated this to Wilson, he was not asked, and thus had no opportunity to explain how this statement related to the other statements he made to Wilson and to Investigator Levy indicating that he had observed Jaquari wrap the elastic band around his neck.

Diante's statements could well have meant that before he fell asleep, he saw his brother wrap the band around his own neck, struggle with it, vomit, develop a bubble, and then Diante fell asleep as Jaquari was dying, without realizing the fatal significance of what he had observed. *See* Pet. App. 41a-42a. The State proffers a different interpretation, that Diante meant he was asleep the entire time he was in the room with Jaquari (contrary to his other detailed and repeated statements). Under *H.D.B.*, 703 N.E.2d at 954, the Illinois Appellate Court lacked the power to make the credibility determinations necessary to resolve any such conflict. The State's argument nonetheless assumes that the Illinois Appellate Court stepped beyond its authority by both crediting a portion of Wilson's testimony and rejecting the majority of Diante's testimony along with the other statements he made to Wilson and to Levy. This Court should not presume, without clear evidence, that the Illinois Appellate Court did so.

Moreover, the brief passage on which the State relies to argue that the Illinois Appellate Court engaged in this "fact finding" did not even come from the Illinois Appellate Court's review of Harris's

ineffective-assistance-of-counsel claim. Rather, it came from the court's analysis of the competency issue. The Illinois Appellate Court, in analyzing the ineffective-assistance claim, did not even mention the issue of whether and when Diante fell asleep. Pet. App. 179a-187a. Instead, it relied on the fact that the trial judge noted that his ruling would have been the same even if he had properly placed the burden of proof. Pet. App. 183a.

Notably, the trial court's ruling could not have turned on any purported finding that Diante was asleep for the period surrounding Jaquari's death, because the trial court never made any finding of this nature. Rather, the trial court found that Diante recalled "playing Spiderman with his brother" and "the aspect with the cord around the neck." (Dkt. 1-2, p. 118.) Additionally, the trial court admonished Harris's counsel that whether Diante witnessed Jaquari's death had "really very little to do with the issue before the Court" during the competency hearing.[8] (Dkt. 1-1, p. 127.) The trial court explained that the issues it needed to resolve during the competency hearing were whether Diante could articulate himself in a manner as to be understood and whether Diante understood the duty to speak the truth. (*Id.* at 127-28.) Thus, the trial court made

[8] While the trial court observed, *after* having made its competency ruling, that the State had provided evidence that Diante had made an allegedly "inconsistent" statement that he was asleep, in the same breath it stated that it "[didn't] know what Diante would say" if he testified at trial. (Dkt. 1-2, p. 125.)

no finding at all regarding what Diante had or had not seen.

Accordingly, the State's only argument challenging the Seventh Circuit's ineffective assistance holding is predicated on a mischaracterization of the appellate court's opinion. For that reason alone, the State's challenge to the Seventh Circuit's decision is defective.

B. The Seventh Circuit's Ineffective-Assistance-of-Counsel holding does not turn on whether the Illinois Appellate Court made a finding that Diante believed Jaquari "got hurt" after Diante fell asleep.

The State's argument fails for an additional and independent reason. The Seventh Circuit's ruling that Harris had been deprived of her right to assistance of counsel stands independent of any purported factual determination regarding Diante's various statements.[9]

There are two key reasons why this ruling is not predicated on the purported factual determination at issue. First, the Seventh Circuit held that: (1) Harris's trial counsel performed deficiently by doing

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[9] This purported factual determination similarly would not undermine the Seventh Circuit's Compulsory Process Clause holding. Following the same logic explained below, it would be arbitrary and circular for a factual determination *tainted* with constitutional error to automatically preclude a conclusion that testimony *untainted* by that error would have been material. *See* Pet. 32.

"nothing to prepare Diante for his testimony" at the competency hearing, (2) this error prejudiced Harris's ability to introduce Diante's testimony, and (3) this error prejudiced Harris's ability to obtain an acquittal. Pet. App. 65a, 78a-87a. Because the purported factual finding would have relied on Diante's *uncounseled* testimony at the competency hearing, the Seventh Circuit's finding of prejudice could not have been undermined by a factual determination infected with the very errors on which the court's finding of ineffective assistance were based. The State's argument thus assumes its own conclusion and ignores the fact that had counsel's performance been effective, the trial judge likely would have found Diante's testimony more coherent and convincing. If Diante's more convincing and powerful testimony had been admitted into evidence, the jury then likely would have found this testimony sufficient to outweigh any "superficial tension" between his descriptions of Jaquari's accidental death and Diante's statement to Wilson. Pet. App. 41a.

Moreover, the Seventh Circuit explained that "[p]reparation is important with witnesses of any age, but it is critical with child witnesses, who are often nervous in unfamiliar settings and among strangers." Pet. App. 66a. The Seventh Circuit further elaborated that:

> [i]nterviewing Diante in advance would have enabled defense counsel to familiarize Diante with the types of questions he would be asked, to anticipate the State's approach in

> challenging competency, and to develop a rapport with an understandably nervous and reticent child.

Pet. App. 67a.

The Illinois Appellate Court's purported finding that Diante was asleep and had witnessed nothing would have relied on Diante's uncounseled testimony resulting from trial counsel's deficient performance. Following the Seventh Circuit's reasoning, this "finding" most likely would not have been made if trial counsel had performed adequately. Therefore, the existence of such a finding would support, rather than preclude, the Seventh Circuit's holding that counsel's deficient performance prejudiced Harris.

Second, the Seventh Circuit's ruling that counsel's performance was prejudicially deficient for failing to secure the presence of Investigator Levy at the competency hearing also does not depend on whether the Illinois Appellate Court found Diante to have been asleep when Jaquari died. The Seventh Circuit observed that "Levy's testimony would have countered that of Karen Wilson," Pet. App. 71a, and that:

> Levy would have strengthened the credibility of Diante's version of how Jaquari died by showing that his account had remained consistent. Since the day after the tragedy, he had said that Jaquari put the string around his neck. . . . Diante also told Levy that he was asleep when Jaquari died, but he also

> explained that Jaquari was playing and wrapped the elastic from the sheet around his neck, and that "'Jaquari had a bubble' while he was asleep." S.A. 105. Levy's testimony thus could have helped reconcile an apparent discrepancy in Diante's account. The Levy interview notes also indicated that Diante was competent to testify, observing that he knew his age, colors, numbers, and the 'difference between truth/lies.'

Pet. App. 85a-86a.

The Seventh Circuit then concluded that trial counsel's failure to call Levy prejudiced Harris's case because this testimony would have *altered* the understanding of Diante's statement that he had fallen asleep. Therefore, this holding logically could not have hinged on whether the state court had found, in the absence of this crucial testimony, that Diante was asleep when Jaquari died. Significantly, such a purported finding would have been based solely on evidence that *failed to include* Levy's testimony. To argue that a finding tainted with the error of Levy's absence should preclude a finding that Levy's absence was not prejudicial is circular.

Finally, the State is not correct in arguing that any purported "finding" by the Illinois Appellate Court that Diante was not an eyewitness to Jaquari's death precludes the Seventh Circuit's prejudice determination that Diante was an eyewitness to Jaquari's death. Pet. 32. The Seventh Circuit indeed relied on case law establishing that depriving a

defendant of critical exculpatory testimony is prejudicial in finding a second layer of prejudice—that if Diante had been found competent, his testimony would have altered the outcome of the trial. *See* Pet. 34-35; Pet. App. 77a-81a. Again, however, the "factual determination" alleged by the State—that Diante was not an eyewitness—was infected with counsel's errors. It would be arbitrary and circular to rely on the record constitutionally tainted by Diante's lack of preparation and the absence of Levy's testimony to make a finding of whether Diante's testimony, once adequately prepared and coupled with Levy's testimony, would have presented critical exculpatory evidence. *Cf. Milke v. Ryan*, No. 07-99001, 2013 U.S. App. LEXIS 5102, at *20-21 (9th Cir. Mar. 14, 2013) (concluding that no deference is due to state fact-finding processes that are defective "based on an unconstitutionally incomplete record"). The Seventh Circuit, unlike the state courts, carefully considered what Diante's testimony would have been had that testimony not been tainted with constitutional error, and convincingly explained how this preparation would have altered the balance of evidence. *See* Pet. App. 37a-38a, 85a-86a.

CONCLUSION

For the foregoing reasons this Court should deny the State's petition for certiorari.

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