

9-1-2016

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Recommended Citation

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**DEFERENCE TO THE LOWER COURT: HOW THE
SEVENTH CIRCUIT IMPROPERLY GRANTED
HABEAS CORPUS RELIEF IN *JENSEN V.
CLEMENTS***

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Cite as: David Welch, *Deference to the Lower Court: How the Seventh Circuit Improperly Granted Habeas Corpus Relief in Jensen v. Clements*, 11 SEVENTH CIRCUIT REV. 231 (2016), at [http://www.kentlaw.iit.edu/Documents/Academic Programs/7CR/11-2/welch.pdf](http://www.kentlaw.iit.edu/Documents/Academic%20Programs/7CR/11-2/welch.pdf).

INTRODUCTION

States have the sovereign power to punish criminal offenders as long as the constitutional rights of the accused are respected.¹ But what happens when federal courts liberally disturb states' interests in the finality of verdicts and punishing those that commit crimes?

On December 3, 1998, Julie Jensen was discovered dead in her home she shared with her husband, Mark, and her two sons.² Weeks before Julie's death she gave a handwritten letter to her neighbors to give to the police in the event she died.³ In the letter Julie detailed her belief that her husband wanted her dead and would frame her death to

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¹ *Calderon v. Thompson*, 523 U.S. 538, 555–56 (1998).

² *Jensen v. Clements* (“*Jensen*”), 800 F.3d 892, 896 (7th Cir. 2015).

³ *Id.* at 895.

look like a suicide.⁴ After a police investigation, Mark Jensen was charged with her murder.⁵

Mark Jensen's lawyers were unsuccessful in challenging the admission of Julie's letter, both before and during the trial, and her letter took center stage.⁶ At the end of the trial, Mark Jensen was convicted of her murder and sentenced to life in prison.⁷ Mark Jensen appealed his conviction and the Wisconsin Appellate Court held the admission of Julie's letter, while violative of his right to confrontation, was harmless error.⁸ On writ of habeas corpus to the federal district court, Mark Jensen gained relief, and the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision.⁹

Errors in a criminal trial can be costly for both the defense and the State. If the State makes an error in trial and a defendant is found not guilty, the State cannot appeal the acquittal.¹⁰ More seriously, if a defendant is found guilty of a serious crime she did not commit, the consequences can be horrific: the loss of freedom, the loss of eligibility for public benefits such as food stamps, assisted housing, federal student aid, the loss of opportunities to serve in the military or jury service, and for non-citizens, deportation.¹¹ Nowhere else in the law are the stakes higher.¹² With these high stakes, constitutional

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Jensen v. Schwochert* ("*Jensen III*"), No. 11-C-0803, 2013 U.S. Dist. LEXIS 177420, at *1 (E.D. Wis. Dec. 18, 2013).

⁸ *State v. Jensen* ("*Jensen I*"), 2007 WI 26, ¶ 57, 727 N.W.2d 518, 536.

⁹ *Jensen*, 800 F.3d at 894; *Jensen III*, 2013 U.S. Dist. LEXIS 177420, at *1.

¹⁰ U.S. CONST. amend. V (prohibition for government appeal on acquittal) ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

¹¹ Michael Pinard, *An Integrated Perspective on The Collateral Consequences Of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 635–36 (2006).

¹² *See* 18 U.S.C.A. § 3591 (1994) (sentence of death possible for conviction of certain offenses).

protections exist at both the state and federal level to protect criminal defendants from unjust and constitutionally violative practices.¹³ However, when far-removed appellate courts make determinations of fact with little or no deference to the state court decisions under review, state court determinations may lose the finality and legality of their convictions, undermining states' sovereign rights and interests in punishing those that break their laws.¹⁴

One such protection for criminal defendants is the writ of habeas corpus.¹⁵ Known as the "great and efficacious writ," it was once referred to by William Blackstone as "another Magna Carta."¹⁶ Justice Anthony Kennedy also once said that "[t]he writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law."¹⁷ Currently, habeas corpus is codified under the amended Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter referred to as "AEDPA" or 28 U.S.C. § 2254).¹⁸ Federal courts may entertain a habeas corpus petition of a state prisoner only if the convicted defendant is in custody in violation of "the Constitution or

¹³ See generally *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the Fourth Amendment right against unreasonable search and seizure and the exclusionary rule); *Benton v. Maryland*, 395 U.S. 784 (1969) (incorporating the Fifth Amendment right against double jeopardy); *Griffin v. California*, 380 U.S. 609 (1965) (incorporating the Fifth Amendment right against self incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating the right to assistance of counsel under the Eighth Amendment for all cases in which a jail sentence can be imposed).

¹⁴ See generally Brian Hoffstadt, *The Deconstruction of Reconstruction of Habeas*, 78 S. CAL. L. REV. 1125 (2005) (discussing the history and construction of habeas review); see also Julie Austin, *Closing a Resentencing Loophole: A Proposal to Amend 28 U.S.C. 2255*, 79 S. CAL. L. REV. 909, 928, 934 (2006) (discussing the importance of finality of judgments as a guiding principle in the Supreme Court's analysis of habeas review).

¹⁵ 28 U.S.C. § 2254 (1996) (outlining the remedy of a writ of habeas corpus from the judgment of a state court to a federal court).

¹⁶ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129-30; 136 (Neill H. Alford, Jr. et al. eds., The Legal Classics Library 1983) (1768).

¹⁷ *Harrington v. Richter*, 562 U.S. 86, 90 (2011).

¹⁸ 28 U.S.C. § 2254 (1996).

laws or treaties of the United States.”¹⁹ The relevant portion of the AEDPA states:

- (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.²⁰

Once an application for writ of habeas corpus is granted, the federal court will conduct a *de novo* review of the state court’s rulings on questions of law²¹ and mixed legal-factual questions.²² On the other hand, reviewing purely factual judgments requires the federal court to: (1) adhere to the chain of “prior” courts whose fact-finding the court of appeals must defer to unless those facts are “clearly erroneous[,]” resulting in deprivation of constitutional rights;²³ and (2) examine whether the federal district court, in adhering to the first premise,

¹⁹ § 2254(a).

²⁰ § 2254(d).

²¹ *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (“The question of law, like the generality of such questions must be resolved *de novo* on appeal.”); *see also* *Ellsworth v. Levenhagen*, 248 F.3d 634, 638 (7th Cir. 2001).

²² *Strickland v. Washington*, 466 U.S. 668, 686, 698 (1984); *see also* *Andersen v. Thieret*, 903 F.2d 526, 529 (7th Cir. 1990) (relying on a “*de novo* appellate review of the district court’s decision on voluntariness [of confession]”); *Pruitt v. Neal*, 788 F.3d 248, 264 (7th Cir. 2015).

²³ *Mosley v. Butler*, 762 F.3d 579, 585 (7th Cir. 2014) (“[W]e review factual finding by the district court for clear error [. . .] reversing only if the district court’s findings are “implausible in light of the record viewed in its entirety”). [Parentheticals that are using full quote need to start with capital letter].

properly applied the correct standard of review to the applicable state court fact findings.²⁴ Additionally, for a review of a state court decision, federal courts of appeals review the last state court that addressed the merits of the claim, such as the Wisconsin Appellate Court in the instant case.²⁵

Part I of this Article discusses the history of harmless error analysis within habeas corpus reviews, specifically with regard to how much deference is given to state courts under the current standard. Part II discusses the Seventh Circuit's majority decision and dissent in *Jensen v. Clements*, where the court examined whether the Wisconsin Appellate Court misapplied the harmless error standard in affirming the trial court's decision that admission of evidence that violated the Confrontation Clause was harmless error in the jury's guilty verdict. Finally, this Article examines the majority and dissenting opinions in *Jensen*—arguing that the Seventh Circuit incorrectly decided *Jensen* based on harmless error standards and that the majority's failure to grant deference to the state court's decision that erroneously admitted evidence was harmless error.²⁶

²⁴ The majority of circuits hold that in instances where a district court reviewed mixed questions of fact and law solely on the basis of the state court record without an evidentiary hearing, the standard appellate review on district court factual findings should be “plenary” or “*de novo*” rather than the deferential “clearly erroneous” standard of review for district court findings of fact. *See, e.g.*, *Barnett v. Hargett*, 174 F.3d 1128, 1131 (10th Cir. 1999); *Hakeem v. Beyer*, 990 F.2d 750, 758 (3rd Cir. 1993); *Schlup v. Armontrout*, 941 F.2d 631, 637-38 (8th Cir. 1991). However, the 7th Circuit suggested, without deciding, that the “clearly erroneous” standard may be appropriate even for mixed questions of fact and law when the finding is based purely on documentary evidence. *Stewart v. Peters*, 958 F.2d 1379, 1381-82 (7th Cir. 1992), *cert. denied*, 506 U.S. 883 (1992).

²⁵ *Id.*

²⁶ This article will not discuss the confrontation clause issues in *Jensen v. Clements* because there is little doubt the admitted evidence at issue violated the Petitioner's Sixth Amendment right to confrontation.

BACKGROUND

This section provides an overview of the relevant law concerning habeas corpus review and the harmless error analysis. It begins with the history of harmless error analysis and the standard's development through *Chapman v. California*,²⁷ which established the basic standard, and *Brecht v. Abrahamson*,²⁸ which further clarified the standard when applied in state courts. Finally, this section examines *Davis v. Ayala*,²⁹ which further refined the harmless error standard when state courts rule that an error in admission of evidence is harmless, clarifying *Chapman* and *Brecht*'s standards.³⁰ In order to prevail based on these standards, Petitioner must have shown that the Wisconsin Appellate Court's decision that the admitted evidence constituted harmless error was "lacking in justification . . . beyond *any possibility for fairminded disagreement*."³¹

A. Standard of Harmless Error.

Harmless error means "[a]ny error, defect, irregularity, or variance that does not affect substantial rights."³² Because *Jensen* involves a violation of Confrontation Clause protections, it is important to note that a mere violation does not merit automatic reversal but is subject to a harmless error analysis.³³ The standard for a Confrontation Clause error to be held harmless is that "the court must be able to declare a belief that it was harmless beyond a reasonable

²⁷ *Chapman v. California*, 386 U.S. 18, 24 (1967).

²⁸ *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

²⁹ *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (holding that on "direct appeal, the harmless standard is the one prescribed in *Chapman* [. . . but] in a collateral proceeding, the test is different).

³⁰ *Chapman*, 386 U.S. at 24; *Brecht*, 507 U.S. at 619.

³¹ *Ayala*, 135 S. Ct. at 2199 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)) (emphasis added).

³² FED. R. CRIM. P. 52(a).

³³ *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

doubt.”³⁴ Errors are truly harmless if the error does not influence the jury in their verdict.³⁵ The Supreme Court outlined various factors in *Delaware v. Van Arsdall* that help assess whether an error was truly harmless.³⁶ The factors include: (1) the importance of the witness’ testimony in the prosecution’s case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution’s case.³⁷

The harmless error inquiry cannot merely ask “whether there was enough to support the result, apart from the phrase affected by the error.”³⁸ Instead, the determination, using the factors in *Van Arsdall*, is whether the error had no or a slight influence on the jury.³⁹ If there was no or little influence then “the verdict and the judgment should stand.”⁴⁰ However, if untainted evidence in a case is so overwhelming and “the prejudicial effect [of tainted evidence is] so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error,” then the error had no or only a slight influence on the jury and does not subject the aggrieved to relief.⁴¹

The Supreme Court in *Chapman v. California* outlined, in part, that federal law rather than state law should determine what constituted harmless error in habeas petitions and that when courts

³⁴ *Chapman*, 386 U.S. at 24.

³⁵ *Id.* (stating that harmless error is harmless if it “did not contribute to the verdict obtained.”).

³⁶ *Van Arsdall*, 475 U.S. at 684.

³⁷ *Id.* (“these factors . . . [include] of course, the overall strength of the prosecution’s case.”); *cf.* *Schneble v. Florida*, 405 U.S. 427, 432 (1972) (stating that the “minds of the average jury would not have found the State’s case significantly less persuasive had the [improper evidence] been excluded.”)(internal quotations omitted).

³⁸ *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

³⁹ *Id.* at 764.

⁴⁰ *Id.*

⁴¹ *Schneble*, 405 U.S. at 430.

review errors involving constitutional rights, the court must be satisfied beyond a reasonable doubt that the error was harmless.⁴² After *Chapman*, Congress enacted the AEDPA.⁴³ The AEDPA provides that a writ of habeas corpus may not be granted unless the state court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law.”⁴⁴ The Supreme Court incorporated the “unreasonable application” language into the *Chapman* standard in subsequent cases, making the AEDPA and *Chapman* essentially analogous.⁴⁵

The Supreme Court defined a separate standard of review in *Brecht v. Abrahamson*.⁴⁶ The Court held that a petitioner is “not entitled to relief based on trial error unless [she] can establish that it resulted in ‘actual prejudice.’”⁴⁷ This *Brecht* standard distinguished itself from the *Chapman* standard based on the procedural posture of the case.⁴⁸ On a direct appeal, the *Chapman* standard applies.⁴⁹ On a collateral proceeding, the *Brecht* standard applies.⁵⁰

⁴² *Chapman v. California*, 386 U.S. 18, 21, 24 (1967) (holding that prosecutors’ repeated comments about defendant’s refusal to testify, pursuant to the Fifth Amendment, as evidence of guilt, were not harmless error beyond a reasonable doubt).

⁴³ 28 U.S.C. § 2254(d) (1996) (amending Antiterrorism and Effective Death Penalty Act of 1986).

⁴⁴ *Jensen v. Clements* (“*Jensen*”), 800 F.3d 892, 899 (7th Cir. 2015) (quoting 28 U.S.C. § 2254(d)(1)).

⁴⁵ *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003) (“[W]e may not grant respondent’s habeas petition, however, if the state court simply erred in concluding that the State’s errors were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless-error review in an ‘objectively unreasonable’ manner.”); see also *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (An “unreasonable application of federal law is different from an incorrect application of federal law.”).

⁴⁶ *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)).

⁴⁷ *Id.*

⁴⁸ *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015).

The *Brecht* standard dictates that habeas relief under AEDPA can be granted only if the federal court has “grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury’s verdict.”⁵¹ The Court held there must be more than a “reasonable possibility” that an error was harmful in determining the jury’s verdict.⁵² *Brecht* also takes into account the concerns of finality and legality that occur when a conviction is overturned on direct review.⁵³ Policy-wise, states have public safety interest in ensuring criminals are punished,⁵⁴ and re-litigation of trials encounters significant difficulties when cases become stale—namely, witnesses die or forget.⁵⁵

Confusion over which standard applied on review⁵⁶ was diffused by the Supreme Court’s recent decision in *Davis v. Ayala*.⁵⁷ In *Davis*, the Court held that a state court’s harmlessness determination under AEDPA, 28 U.S.C. §2254(d) (*Chapman*), is “subsumed” by the *Brecht*

⁴⁹ *Chapman v. California*, 386 U.S. 18, 24 (1967) (“[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”).

⁵⁰ *Brecht*, 507 U.S. at 637 (“[Habeas petitioners] are not entitled to habeas relief based on trial error unless they can establish that it resulted in ‘actual prejudice.’”) (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)).

⁵¹ *Ayala*, 135 S. Ct. at 2197–98 (quoting *O’Neal v. McAninch*, 513 U.S. 432, 435–36 (1995)) (internal quotations omitted).

⁵² *Brecht*, 507 U.S. at 637.

⁵³ *Calderon v. Coleman*, 525 U.S. 141, 145–46 (1998); see also *Brecht*, 507 U.S. at 635 (liberal allowance of habeas corpus damages the importance of trials and “encourages habeas petitioners to relitigate their claims on collateral review”).

⁵⁴ *Brecht*, 507 U.S. at 635; see also *Calderon*, 525 U.S. at 145–46 (“[The] State is not to be put to th[e] arduous task of [a retrial] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error.”).

⁵⁵ William Glaberson, *Courts in Slow Motion, Aided by the Defense*, N.Y. TIMES, Apr. 14, 2013, at A1.

⁵⁶ See *Benn v. Greiner*, 402 F.3d 100, 105 (2d Cir. 2005) (stating there is an “open question” of which standard to apply, *Chapman* or *Brecht*, declining to resolve this issue since both standards “produce the same result”).

⁵⁷ *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015).

standard when a “federal habeas petitioner contests a state court’s determination that a constitutional error was harmless under *Chapman*.”⁵⁸ Clarifying this holding, the Court stated that while a federal court reviewing habeas corpus petitions does not need to “‘formal[ly]’ apply both Brecht and ‘AEDPA/*Chapman*,’ AEDPA nevertheless ‘sets forth a precondition to the grant of habeas relief.’”⁵⁹

If an inquiry has been “adjudicated on the merits” in state court, then AEDPA/*Chapman*’s highly deferential standard is guiding.⁶⁰ Once it is determined that the state court made an adjudication on merits (such as a harmless error analysis), then in order to grant relief, the federal court must determine whether the state court’s rejection was “(1) contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts.”⁶¹ A state court’s decision that something was harmless error *cannot* be overturned unless the state court applied *Chapman*’s harmless error analysis “in an ‘objectively unreasonable’ manner.”⁶² Thus, habeas relief may not be awarded unless “*the harmless error determination itself* was unreasonable.”⁶³

The Supreme Court spelled out the definition of “unreasonable” in *Harrington v. Richter*.⁶⁴ In *Harrington*, the Court reversed the Ninth Circuit’s grant of habeas relief for a defendant convicted of murder and other charges.⁶⁵ The Supreme Court held that while a habeas examination must look at the arguments or theories that supported, or could have supported, the state court’s decision, the reviewing court must also ask “whether it is possible fairminded jurists could disagree

⁵⁸ *Id.* (citing *Fry v. Pliler*, 551 U.S. 112, 120 (2007)).

⁵⁹ *Ayala*, 135 S. Ct. at 2198 (quoting *Fry*, 551 U.S. at 119).

⁶⁰ *Id.* (citing *Harrington v. Richter*, 551 U.S. 112, 120 (2007)).

⁶¹ *Ayala*, 135 S. Ct. at 2198.

⁶² *Id.* (citing *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003) quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)).

⁶³ *Fry*, 551 U.S. at 119 (emphasis in original); *Ayala*, 135 S. Ct. at 2199.

⁶⁴ *Harrington*, 562 U.S. at 102.

⁶⁵ *Id.* at 92.

that those arguments or theories are inconsistent with the holding in a prior decision of this Court.”⁶⁶

B. Deference to State Courts.

On questions of whether a harmless error determination was indeed harmless, 28 U.S.C. § 2254(d) spells out that the review is “highly deferential”⁶⁷ and any review of error hinges on whether the harmless determination itself was unreasonable.⁶⁸ State fact-finding in the context of federal claims is of paramount importance and often determines whether a petitioner obtains habeas relief.⁶⁹ Section 2254(e)(1) of the AEDPA provides:

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.⁷⁰

The Seventh Circuit recognizes this deferential treatment to state court decisions in other determinations.⁷¹ In fact, the Seventh Circuit

⁶⁶ *Id.* at 102; *see also* *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (holding that the state appellate court’s decision on a *Batson* challenging prosecutors’ race-neutral explanations for striking jurors was not unreasonable because of evidence the California Court of Appeals “carefully reviewed the record at some length in upholding the trial court’s findings” and because of this the state appellate court’s decision was “plainly not unreasonable”).

⁶⁷ *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010).

⁶⁸ *Harrington*, 562 U.S. at 102; *Ayala*, 135 S. Ct. at 2199.

⁶⁹ *Wingo v. Wedding*, 418 U.S. 461, 468, 474 (1974).

⁷⁰ 28 U.S.C. § 2254(e)(1) (1996) (emphasis added).

⁷¹ *See McElvaney v. Pollard*, 735 F.3d 528, 532 (7th Cir. 2013) (deference in applying 28 U.S.C. § 2254 review to a *Strickland* ineffective assistance of counsel claim).

has followed Supreme Court precedent,⁷² calling the AEDPA's presumption on state court factual decisions "difficult to [overcome because of 28 U.S.C. § 2254's] highly deferential standard."⁷³ Courts presume that the state court's factual determinations are correct unless a petitioner can show that the state court relied on "fact-finding that ignores the clear and convincing weight of the evidence."⁷⁴ Much like *McElvany v. Polland*, where the Seventh Circuit stated that the state court's decision that trial counsel was effective must receive "the benefit of the doubt," and in other cases where there is a high deferential standard, a tie should go the state court's determination.⁷⁵ With the combination of AEDPA's requirements for state court factual finding deference and the Seventh Circuit's own precedents, a federal court simply disagreeing with a state court's decision is not enough for habeas relief, even if it finds constitutional error under § 2254(d).⁷⁶ As the Supreme Court has previously stated, "the Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error."⁷⁷

⁷² *Wood v. Allen*, 558 U.S. 290, 301 (2010) (holding that even if there is disagreement during review about the findings in a record that alone does not invalidate the trial court's decision); *see also Rice v. Collins*, 546 U.S. 333, 335 (2006) ("Reasonable minds reviewing the record might disagree . . . but on habeas review that does not suffice to supersede the trial court's credibility determination.").

⁷³ *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Harrington*, 562 U.S. at 102 (2011)); *see also McElvaney*, 735 F.3d at 532.

⁷⁴ *Newman v. Harrington*, 726 F.3d 921, 928 (7th Cir. 2013) ("This standard is demanding, but not insurmountable." (internal quotations omitted) (quoting *Taylor v. Grounds*, 721 F.3d 809, 817 (7th Cir. 2013))).

⁷⁵ *McElvaney*, 735 F.3d at 532 (quoting *Cullen*, 563 U.S. at 181 and holding that the state appellate court's determination was not so lacking in justification beyond any possibility for fairminded disagreement).

⁷⁶ *Harding v. Walls*, 300 F.3d 824, 828 (7th Cir. 2002), *cert. denied*, 538 U.S. 988 (2003) (citing *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)).

⁷⁷ *Teague v. Lane*, 489 U.S. 288, 308 (1989) (quoting *Kuhlman v. Wilson*, 477 U.S. 436, 447 (1986)).

JENSEN v. CLEMENTS⁷⁸

In *Jensen v. Clements*, the Seventh Circuit determined that the harmless error analysis applied by the Wisconsin Supreme Court violated the rules set forth in *Chapman v. California*⁷⁹ and *Brecht v. Abrahamson*.⁸⁰ This section begins with the factual history of *Jensen*, followed by a discussion of the procedural history of the case. This section then outlines the Seventh Circuit's majority opinion and ends with an examination of Judge Daniel Tinder's dissent.

A. Factual History

On December 3, 1998 Julie Jensen was discovered deceased in her home in Pleasant Prairie, Wisconsin.⁸¹ Two weeks prior to her death, Julie gave her neighbors a handwritten, signed letter, telling them that if "anything happened to her, they should give the envelope to the police."⁸² Learning of her death, the neighbors gave Julie's letter to the police.⁸³ The letter read:

Pleasant Prairie Police Department, Ron Kosman or Detective Ratzburg,

I took this picture [and] am writing this on Saturday 11-21-98 at 7 AM. This "list" was in my husband's business daily planner—not meant for me to see, I don't know what it means, but if anything happens to me, he would be my first suspect. Our relationship has deteriorated to the polite superficial. I know he's never forgiven me for the brief affair I had with that creep seven years ago. Mark lives for work [and] the kids; he's an avid surfer of the Internet

⁷⁸ *Jensen v. Clements* ("Jensen"), 800 F.3d 892, 896 (7th Cir. 2015).

⁷⁹ *Chapman v. California*, 386 U.S. 18, 24 (1967).

⁸⁰ *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

⁸¹ *Jensen v. Clements* ("Jensen"), 800 F.3d 892, 896 (7th Cir. 2015).

⁸² *Id.* at 895.

⁸³ *Id.*

Anyway, I do not smoke or drink. My mother was an alcoholic, so I limit my drinking to one or two a week. Mark wants me to drink more—with him in the evenings. I don't. I would never take my life because of my kids—they are everything to me! I regularly take Tylenol [and] multi-vitamins; occasionally take OTC stuff for colds, Zantac, or Immodium; have one prescription for migraine tablets, which Mark use[s] more than I.

I pray I'm wrong [and] nothing happens ... but I am suspicious of Mark's behaviors [and] fear for my early demise. However, I will not leave David [and] Douglas. My life's greatest love, accomplishment and wish: "My 3 D's"—Daddy (Mark), David, Douglas.⁸⁴

The letter echoed prior statements Julie made to the police in the weeks leading up to her death.⁸⁵ Two voicemails left for the police stated that she thought her husband, Mark Jensen (the Petitioner), was trying to kill her.⁸⁶ When officers met with Julie about her voicemails, she attempted to give them a roll of film she claimed was taken from the Petitioner's day planner.⁸⁷ Julie also repeated the statements in her letter, saying that if she died her husband should be the first suspect.⁸⁸ However, police were unable to connect any of the film's images to the case.⁸⁹

After Julie's death, police seized the Petitioner's personal computer and discovered a history of Internet searches concerning suicide and poison, including an Internet search on the morning of Julie's death at 7:40 a.m. for "ethylene glycol poisoning," commonly

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 896.

⁸⁹ *Id.*

referred to as antifreeze.⁹⁰ Also recovered from Petitioner's computer were emails between the Petitioner and a woman with whom he was having an affair.⁹¹ Evidence showed that the home computer's Internet history was "double-deleted."⁹² Petitioner's work computer was not seized because it had "been fried and [Petitioner had] to get a new one."⁹³

A medical examiner ruled Julie's death a suicide after the first autopsy was inconclusive.⁹⁴ However, toxicology reports from Dr. Christopher Long stated there was a "large concentration of ethylene glycol" in Julie's system.⁹⁵ According to Dr. Long, Julie's system contained so much ethylene glycol that he concluded her death could not have been a suicide as her body would have been too weak to drink the amount of ethylene glycol outlined in his report.⁹⁶ Three years later, in 2002, after an extensive investigation, Julie's husband, Petitioner Mark Jensen, was charged with first-degree intentional homicide.⁹⁷

1. Pre-trial Issues Regarding the Admissibility of Julie's Voicemails and Letter.

The admissibility of Julie's letter and statements to the police before her death were a source of contention from the beginning of the case.⁹⁸ Eventually, the State conceded that the voicemails Julie made to the police were inadmissible hearsay, but the letter, in its entirety,

⁹⁰ *Id.* (stating that there was 3,940 micrograms per milliliter of ethylene glycol in the 660 ml of Julie's stomach contents).

⁹¹ *Id.*

⁹² *Id.* at 910 (Tinder, J., dissenting). "Double-deleted" means someone deleted the Internet history twice in quick succession.

⁹³ *Id.*

⁹⁴ *Id.* at 896 (majority opinion).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* Petitioner was charged in March 2002.

⁹⁸ *Id.*

was ruled admissible hearsay.⁹⁹ While awaiting trial in 2004, Petitioner moved for reconsideration of the trial court's decision to allow admission of the letter after the United States Supreme Court decided *Crawford v. Washington*.¹⁰⁰ The trial court granted the motion and ultimately ruled that Julie's letter and statements to the police were testimonial and barred under *Crawford*.¹⁰¹

In an effort to resurrect their case, the State argued that the letter and statements were admissible under an exception to the hearsay rule: the doctrine of forfeiture by wrongdoing.¹⁰² The trial court rejected the State's arguments.¹⁰³ As a result, the State appealed the trial court's order and filed an interlocutory appeal and petition to bypass directly to the Wisconsin Supreme Court.¹⁰⁴ In February 2007, the Wisconsin Supreme Court determined that Julie's statements to the police and handwritten letter were testimonial, but also that the trial court failed to properly analyze whether the statements and letter were admissible under the forfeiture by wrongdoing doctrine.¹⁰⁵

On remand from the Wisconsin Supreme Court, the trial court found by a preponderance of the evidence that Petitioner killed Julie, causing her absence from the trial and therefore satisfying the

⁹⁹ *Id.*

¹⁰⁰ *Crawford v. Washington*, 541 U.S. 36 (2004) (holding that testimonial statements require confrontation to satisfy the constitutional demand of reliability); *Jensen*, 800 F.3d at 896.

¹⁰¹ *Crawford*, 541 U.S. at 36 (trial court holding that the letter and voicemails were testimonial because the declarant was unable to testify at trial and there was no prior opportunity for cross-examination).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *State v. Jensen* ("*Jensen I*"), 2007 WI 26, ¶ 2, 299 Wis. 2d 267, 272, 727 N.W.2d 518, 521.

¹⁰⁵ *Jensen*, 800 F.3d at 897 (citing *Jensen I*, 2007 WI at ¶ 57 where the Wisconsin Supreme Court ultimately adopted a broad forfeiture by wrongdoing doctrine—if the State can prove by a preponderance of the evidence that the accused caused the absence of the witness, then testimonial evidence is admissible).

forfeiture by wrongdoing doctrine, paving the way for the admission of Julie's statements to police and her letter.¹⁰⁶

2. Petitioner's Trial for First-Degree Intentional Homicide in Julie's Death.

More than nine years after Julie's death, Petitioner's case went to trial.¹⁰⁷ During the six-week jury trial the State presented evidence of the actions of Julie and Petitioner in the months leading up to Julie's death.¹⁰⁸ During the State's case, the neighbor that Julie gave the letter to testified that three weeks prior to her death, Julie said she was "scared she was going to die" and concerned that Petitioner was trying to poison her by "put[ting] something in the wine" and insisting Julie drink it.¹⁰⁹ The neighbor also testified that Julie told him she believed she would "not make it through one particular weekend because she had found suspicious notes" and a computer page left open on their home computer revealing how to poison someone.¹¹⁰ Additionally, the neighbor discussed how Julie repeatedly told him about marital problems between her and Petitioner.¹¹¹

Another witness, Julie's son's teacher, testified that approximately a week before her death, Julie told the teacher that Julie thought her husband was trying to kill her and "was going to make it look like a suicide" by putting something in her food or drink.¹¹² Julie told the teacher that the Petitioner "never forgave her" for an affair she had eight years prior.¹¹³ The teacher also testified that Julie knew very little about computers because a few months prior to Julie's death the

¹⁰⁶ *Jensen*, 800 F.3d at 897 (citing *Jensen I*, 2007 WI at ¶ 57).

¹⁰⁷ *Jensen*, 800 F.3d at 897.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 909 (Tinder, J., dissenting).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

teacher asked Julie to help in the computer lab.¹¹⁴ Julie responded to the teacher's request by saying, "I don't even know how to turn one on."¹¹⁵

The State presented additional witnesses: Julie's physician, Petitioner's friend, and one of Petitioner's co-workers.¹¹⁶ Julie's physician testified that he saw her two days before her death and she denied being suicidal because she "loved her children more than anything."¹¹⁷ The physician also testified that Julie talked about an affair she had in the past and that Petitioner had "'never really forgiven' her for it."¹¹⁸ Both Petitioner's friend and co-worker testified that they were told about an affair Julie had and even after eight years the "[Petitioner's] anger had not diminished" for as long as they knew him.¹¹⁹

Additionally, the friend testified that Petitioner told him that he was trying to get Julie to relax at night by giving her wine.¹²⁰ While being questioned by the State, the friend also described Petitioner's computer skills as "above average" and that in the month of Julie's death, Petitioner was searching for drug interactions on the Internet "on a very frequent basis."¹²¹ One of the State's main witnesses was the Petitioner's former cellblock mate, Aaron Dillard.¹²² Dillard, who was awaiting sentencing on his own case, testified that Petitioner admitted to him in prison that he "had poisoned Julie and later suffocated her by pushing her face into a pillow."¹²³

¹¹⁴ *Id.*

¹¹⁵ *Id.* (refuting defense notion that Julie could have used the computer herself to look for ways to commit suicide).

¹¹⁶ *Id.* at 910.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 897 (majority opinion).

¹²³ *Id.* at 907.

Additional evidence presented at trial indicated that Petitioner would repeatedly place pornographic photographs around the residence for Julie to find.¹²⁴ Petitioner told investigators that he knew Julie believed the man she had an affair with was planting the images.¹²⁵ While Petitioner denied placing the photographs, he did admit that he would save the photos and use them to upset Julie when he was “pissed off.”¹²⁶ Petitioner also told investigators that he would leave the photos out for Julie to find, or bring them out to show Julie.¹²⁷ The lead investigator testified that Petitioner had admitted that his marriage with Julie was “never the same” after Julie’s affair.¹²⁸

On the morning of Julie’s death, Petitioner told the investigator that Julie could not get up and was unable to get out of bed.¹²⁹ Petitioner also said that he did not leave that day for work until 8:00 or 9:00 a.m.¹³⁰ That fact is especially significant because the time of the search for antifreeze poisoning occurred on the same day at 7:40 a.m.¹³¹ Furthermore, evidence showed that on the same day, two months before Julie’s death, the Petitioner’s computer was used to search for methods of poisoning as well as to exchange emails with Petitioner’s paramour about their future life together.¹³²

The State’s case concluded with testimony from expert witnesses: the toxicologist, a doctor who conducted an autopsy, and a medical examiner.¹³³ The toxicologist, Dr. Long, outlined his findings that there was a “large concentration of ethylene glycol” in Julie’s system at the time of her death.¹³⁴ However, during Dr. Long’s cross-

¹²⁴ *Id.* at 910 (Tinder, J., dissenting).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 896 (majority opinion).

¹³² *Id.* at 910 (Tinder, J., dissenting).

¹³³ *Id.* at 896 (majority opinion).

¹³⁴ *Id.*

examination, it was revealed that the 660 ml of Julie’s stomach contents contained only a half-teaspoon of ethylene glycol, or .083 ounces.¹³⁵ This revelation disclosed on cross-examination, “destroy[ed] the foundation of [Dr. Long’s] opinion that Julie’s death was not a suicide.”¹³⁶

The doctor that conducted one of the autopsies concluded that Julie’s cause of death was asphyxia by smothering and the medical examiner concluded her cause of death was “ethylene glycol poisoning with probable terminal asphyxia.”¹³⁷ The testimony that one cause of Julie’s death was consistent with smothering arose during the doctor’s redirect examination.¹³⁸ The doctor examined photographs from the scene that appeared to show Julie “with an unnaturally bent nose” indicating something was pushed hard into Julie’s face.¹³⁹

During the defense’s case-in-chief, evidence included testimony from Julie’s family doctor.¹⁴⁰ The family doctor testified that at an appointment two days before Julie’s death, she “seemed depressed and distraught and almost frantic, actually.”¹⁴¹ Additionally, the defense presented testimony from Julie’s neighbor.¹⁴² The day before Julie’s death, she had a fifteen minute conversation with her neighbor telling her “not to worry if she did not see Julie outside that day because she was not feeling well due to her medication.”¹⁴³ Three days prior to the statements made to her neighbor, Julie made similar statements to her sister-in-law.¹⁴⁴ She told her sister-in-law that she would be ill on

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 897 (“Surprisingly, this suffocation theory arose for the very first time at the trial more than nine years after Julie’s death.”).

¹³⁹ *Id.* Much of the expert witness testimony on the cause of death suffocation theory was based on statements from Aaron Dillard, Petitioner’s cellblock mate.

¹⁴⁰ *Id.* at 898.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

December 2, 1998 (one day prior to being discovered dead) because she expected to be placed on medication by her family doctor.¹⁴⁵

Additionally, a defense expert witness, Dr. Spiro, told the jury that he examined Julie's medical records and mental health records and interviewed those close to her.¹⁴⁶ Dr. Spiro's assessment was that Julie was suffering from a "major depressive disorder that was complicated by anxiety and agitation with possible delusional features, and he concluded that she posed a significant suicide risk."¹⁴⁷ Dr. Spiro's expert opinion was that Julie's ingestion of antifreeze was suicidal, not an accident or homicide.¹⁴⁸ Lastly, and key to the defense's case, although Julie made multiple statements to others about how she thought her husband was trying to kill her via poison, she made no attempt to seek help when she started feeling ill.¹⁴⁹

At argument, the State postulated that Petitioner murdered his wife so he could be with his mistress.¹⁵⁰ Framing Julie's death like a suicide would avoid a messy divorce, and the State argued that Petitioner searched the Internet to look for ways to make Julie's death look like a suicide.¹⁵¹ The defense responded that Julie was unhappy, depressed, and committed suicide to make it look like Petitioner killed her.¹⁵² In rebuttal, the State responded that Julie was a devoted mother, who cared about her kids and would not leave them willingly.¹⁵³ The State also argued that Julie could not have ingested the antifreeze herself and Petitioner suffocated her after he realized the poison was not having the intended effect.¹⁵⁴

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 907.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 898.

¹⁵⁰ *Id.* at 897.

¹⁵¹ *Id.*

¹⁵² *Id.* at 894-95.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

Julie’s handwritten letter was highlighted throughout the trial.¹⁵⁵ The letter was discussed at length during the State’s opening statements.¹⁵⁶ The defense also talked about the letter in its opening, even presenting it as a large exhibit for the Jury.¹⁵⁷ In closing, the State’s last words to the jury on rebuttal stressed the letter, saying, “[s]o here was her unexpressed thoughts. [Julie] wrote them down, and she hid them away . . . Hid them away until she could resolve this terrible dilemma she was in.”¹⁵⁸ The jury deliberated for nearly thirty hours and came back with a verdict that the Petitioner was guilty of first-degree intentional homicide.¹⁵⁹

3. Post-Petitioner’s Conviction.

Four months after Petitioner’s guilty verdict at the hands of a jury, *Giles v. California*¹⁶⁰ decisively narrowed the interpretation of the forfeiture by wrongdoing statute relied on by the Wisconsin Supreme Court in its decision prior to Petitioner’s conviction.¹⁶¹ Based on *Giles*, the Petitioner appealed his conviction because of the state court’s error in admitting Julie’s letter under the hearsay exception of forfeiture by wrongdoing, directly in opposition to *Giles*’ decision that for the exception to apply there must be an intention to prevent the witness from testifying, not merely causing death.¹⁶² The Wisconsin

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 904-05. The letter was used to “underscore [the State’s] themes of Petitioner’s motive, Julie’s fear, and the absence of her intent to take her own life.”

¹⁵⁷ *Id.* Defense counsel described the letter to the jury, saying “[w]e’ll come back to the letter many times during this case, and you’ll have to decide whether it’s a blueprint for framing her husband or legitimate.”

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 898.

¹⁶⁰ See generally *Giles v. California*, 554 U.S. 353 (2008) (reversing a Petitioner’s conviction for first-degree murder after the victim’s out-of-court statements were admitted under California’s forfeiture by wrongdoing statute. The Court held that forfeiture by wrongdoing requires that the defendant intended to prevent a witness from testifying and was not merely absent from the case).

¹⁶¹ *State v. Jensen* (“*Jensen I*”), 2007 WI 26, ¶ 57, 727 N.W.2d 518, 536.

¹⁶² *Jensen*, 800 F.3d at 897.

Appellate Court subsequently found that “the disputed testimonial evidence [, Julie’s letter and statements to police, were] erroneously admitted” but that any error was harmless—affirming Petitioner’s conviction.¹⁶³ Jensen petitioned the Wisconsin Supreme Court for review of the Wisconsin Appellate Court’s decision, but that petition was denied.¹⁶⁴ As a result of the denial, Petitioner filed a petition for writ of habeas corpus in federal court.¹⁶⁵

In reviewing Petitioner’s habeas corpus assertions, the Eastern District of Wisconsin held that the Wisconsin Court of Appeals unreasonably applied the *Chapman* standard of review,¹⁶⁶ stating, “having reviewed the voluminous trial record, the court concludes that the erroneously admitted testimonial statements had a ‘substantial and injurious effect’ on the jury’s verdict.”¹⁶⁷ Making this determination, the district court examined the “host of factors” applicable to harmless error review and found that Julie’s “letter from the grave” cannot be harmless when viewed in the entire context of the trial.¹⁶⁸ Ultimately, the United States District Court for the Eastern District of Wisconsin granted Petitioner’s habeas corpus petition, and the prison warden appealed.¹⁶⁹

B. Seventh Circuit’s Majority Opinion.

The United States Court of Appeals for the Seventh Circuit affirmed the district court’s decision to grant Petitioner’s writ of habeas corpus on the basis that the Wisconsin Appellate Court’s harmless error determination reflected an unreasonable application of

¹⁶³ State v. Jensen (“*Jensen II*”), 2011 WI App. 3, 331 Wis. 2d 440, 794 N.W. 2d 482, 493 (Wis. App. Ct. 2010).

¹⁶⁴ *Jensen*, 800 F.3d at 898.

¹⁶⁵ Jensen v. Schwochert (“*Jensen III*”), No. 11-C-0803, 2013 U.S. Dist. LEXIS 177420 at *17 (E.D. Wis. Dec. 18, 2013).

¹⁶⁶ *Id.* at *31.

¹⁶⁷ *Id.* (quoting Brecht v. Abrahamson, 507 U.S. 619, 622 (1993)).

¹⁶⁸ *Jensen III*, 2013 U.S. Dist. LEXIS 177420 at *30-31.

¹⁶⁹ *Jensen*, 800 F.3d at 898.

Chapman's substantial and injurious influence or effect standard.¹⁷⁰ Judge Ann Claire Williams, joined by Judge David Hamilton, outlined the Seventh Circuit's majority opinion detailing why admitting Julie's letter and out-of-court statements had substantial and injurious effect on the jury verdict.¹⁷¹

The majority first examined whether the *Chapman* or *Brecht* standard applied, noting confusion prior to *Ayala*.¹⁷² The majority concluded that Petitioner needed to meet the *Brecht* standard that incorporates *Chapman*'s state court decision of whether the error was harmless.¹⁷³ In meeting the prevailing standard for review, the Seventh Circuit questioned whether the Seventh Circuit was in "grave doubt" about whether the confrontation error had "substantial and injurious effect or influence in determining the jury's verdict" in the Petitioner's case.¹⁷⁴ Next, the Seventh Circuit applied their own harmless error analysis, noting that the harmless error inquiry is "not the same as a review for whether there was sufficient evidence at trial to support a verdict."¹⁷⁵ Finally, the Seventh Circuit concluded that the Wisconsin State Court's determination that the error was harmless was unreasonable.¹⁷⁶

¹⁷⁰ *Id.* at 895 (holding in part that *Giles v. California*, 554 U.S. 353 (2008) was decided before Petitioner's claim was adjudicated on the merits by the Wisconsin state courts).

¹⁷¹ *Jensen*, 800 F.3d at 901.

¹⁷² *Id.*; *Chapman v. California*, 386 U.S. 18 (1967); *Brecht*, 507 U.S. at 619; *Davis v. Ayala*, 135 S. Ct. 2187 (2015).

¹⁷³ *Jensen*, 800 F.3d at 901; *Chapman*, 386 U.S. at 18; *Brecht*, 507 U.S. at 619; *Ayala*, 135 S. Ct. at 2187.

¹⁷⁴ *Jensen*, 800 F.3d at 904 (emphasis in original) (quoting *Ayala*, 135 S. Ct. at 2198 (2015)).

¹⁷⁵ *Jensen*, 800 F.3d at 902 (citing Supreme Court cases supporting the principle that harmless error analysis is not just about sufficiency of evidence).

¹⁷⁶ *Jensen*, 800 F.3d at 895.

1. The Seventh Circuit's Issue with the Wisconsin Appellate Court's Reasoning.

The Seventh Circuit took issue with the Wisconsin Appellate Court's reasoning, stating, "[the opinion] reads as though [the appellate court] is conducting an evaluation of whether there was sufficient evidence to support the verdict, not whether the error in admitting Julie's letter and statements to the police affected the jury's verdict."¹⁷⁷ The majority reinforced this criticism by illustrating the Wisconsin Appellate Court's analysis of duplicative evidence.¹⁷⁸

The Wisconsin Appellate Court's opinion stated how "[t]he rest of the record reflects that the jury had overwhelming evidence of murder, and upon [that] record [the jury] could rationally have concluded beyond a reasonable doubt that [Petitioner] murdered Julie."¹⁷⁹ The Seventh Circuit pointed to this statement by the Wisconsin Appellate Court as demonstrating "that it is conducting a review for whether there is sufficient evidence to support a verdict" rather than the harmless error examination required in the present case.¹⁸⁰

Additionally, the Seventh Circuit noted how the sufficiency of the evidence statements by the Wisconsin Appellate Court are not just "slips of the pen."¹⁸¹ What was lacking, the Seventh Circuit noted, was any discussion by the Wisconsin Appellate Court about what defense evidence rebutted the State's, such as defense expert witnesses and cross examination testimony.¹⁸² To the majority, this lack of in-depth analysis bolstered their view that the state appellate court's opinion was insufficient, noting that the Supreme Court has held that when only one party's evidence is evaluated, "no logical conclusion can be

¹⁷⁷ *Id.* at 903.

¹⁷⁸ *Id.*

¹⁷⁹ *State v. Jensen ("Jensen II")*, 2011 WI App 3, ¶ 71, 331 Wis. 2d 440, 473, 794 N.W.2d 482, 498.

¹⁸⁰ *Jensen*, 800 F.3d at 903-04 (noting that under direct appeal the evidence is viewed in the light most favorable to the conviction).

¹⁸¹ *Id.* at 904.

¹⁸² *Id.*

reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.”¹⁸³

2. The Seventh Circuit’s Examination of *Van Arsdall*’s Harmless Error Factors.

In light of the factors outlined by the Supreme Court in *Delaware v. Van Arsdall*, the Seventh Circuit then examined what influence Julie’s letter and statements to the police had on the jury verdict.¹⁸⁴ The majority highlighted the first *Van Arsdall* factor—the importance of the witness’ testimony in the State’s case.¹⁸⁵ The court pointed out that the letter is unlike any other evidence presented in the trial; it is Julie’s words from a time close to her death.¹⁸⁶ The court noted that the letter was emotional and dramatic, used by the State in openings, closings, and as the last words in their rebuttal argument.¹⁸⁷ The court stated, “damaging evidence stands impregnable—irretrievably lodged in the jurors’ minds.”¹⁸⁸

The Seventh Circuit also stressed the importance of the letter to witnesses, the Petitioner, and the State’s case.¹⁸⁹ The letter was published to the jury; twelve of the witnesses testified about the letter, including some expert witnesses that stated the letter influenced their opinions; and the State published Petitioner’s reaction to the letter in a

¹⁸³ *Id.* (quoting *Homes v. South Carolina*, 547 U.S. 319, 331 (2006)).

¹⁸⁴ *Jensen*, 800 F.3d at 904 (“[W]e look to ‘a host of factors,’ such as ‘the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.”) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

¹⁸⁵ *Jensen*, 800 F.3d at 904.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 904-05. Petitioner also used the letter but only as means to rebut the State’s assertions.

¹⁸⁸ *Id.* at 905 (citing *United States v. Brown*, 490 F.2d 758, 781 (D.C. Cir. 1973)).

¹⁸⁹ *Jensen*, 800 F.3d at 905.

videotaped interview with police.¹⁹⁰ Bolstering its viewpoint, the majority highlighted statements made by the State during pre-trial motions, calling the letter “essential,” “highly relevant,” and “extraordinar[ily] valu[able].”¹⁹¹ According to the Seventh Circuit, the Wisconsin Appellate Court’s finding that the letter and statements were harmless was unreasonable because of the amount of times the State’s case referenced or relied on the letter.¹⁹²

The Seventh Circuit then addressed the last factor under *Van Arsdall*—the overall strength of the State’s case.¹⁹³ The Seventh Circuit derided the state appellate court for not engaging with the defense evidence, using language from the district court that, “[a] reader of the court of appeals’ opinion would conclude that Jensen called no witnesses, introduced no evidence, [and] never questioned the credibility of any witness.”¹⁹⁴

In examining the strength of the State’s case, particularly addressing the State’s computer evidence, the majority discussed testimony from the son’s teacher about Julie’s computer usage, and lack of computer usage, from times that Petitioner was not at home.¹⁹⁵ The majority also responded to the Wisconsin Appellate Court’s opinion that the State’s computer evidence was “untainted and undisputed,” stating the evidence was far from undisputed: “[N]o evidence precluded a jury from finding that Julie did at least some of the Internet searches.”¹⁹⁶ The Seventh Circuit also highlighted defense

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 905-06 (quoting *State v. Jensen* (“*Jensen II*”), 2011 WI App 3, ¶ 73, 331 Wis. 2d 440, 474, 794 N.W.2d 482, 499) (“[The State] also called the letter’s admissibility ‘a make or break issue’ from the State’s perspective. While the Wisconsin appellate court found the improperly admitted evidence added ‘nothing significant beyond the properly admitted nontestimonial statements’”).

¹⁹² *Jensen*, 800 F.3d at 906.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

witnesses that refuted Julie’s computer illiteracy claims, as well as the lack of searches for poison on Petitioner’s work computer.¹⁹⁷

Next, the court addressed the appellate court’s failure to engage the defense’s evidence regarding Julie’s state of mind.¹⁹⁸ Both the family doctor and a defense expert testified Julie was depressed and when the defense expert reviewed Julie’s mental health history, determined that Julie was a significant suicide risk and her death was likely the result of suicide.¹⁹⁹ Additionally, the Seventh Circuit took issue with the amount of time it took one of the State’s witnesses to come forward and testify.²⁰⁰

Lastly, the Seventh Circuit opined that the State’s case was “no slam dunk. The evidence was all circumstantial.”²⁰¹ In the Seventh Circuit’s majority opinion, because the Wisconsin Appellate Court did not formally engage any of the defense evidence and the defense had a lot of evidence, the erroneously admitted letter and statements resulted in actual prejudice.²⁰² Because of this, the majority held that the state appellate court’s ruling was “not simply incorrect” and that “[t]he error in admission had a substantial and injurious effect or influence in determining the jury’s verdict . . . [and the result here goes] beyond any possibility for fair-minded disagreement.”²⁰³ As such, the Seventh Circuit granted Petitioner’s habeas corpus petition, holding that because Petitioner satisfied the *Brecht* standard, he also satisfied “the AEDPA standard of an unreasonable application of the *Chapman*

¹⁹⁷ *Id.* Evidence from the trial indicates that Petitioner’s work computer was destroyed before police were able to gain access to it as part of their investigation.

¹⁹⁸ *Id.* at 906-07.

¹⁹⁹ *Id.* at 907.

²⁰⁰ *Id.* The witness was a friend of the Petitioner that stated Petitioner made inculpatory statements to him about how if the Petitioner wanted to kill his wife then there are websites showing how to poison people and he could use those.

²⁰¹ *Id.* at 906.

²⁰² *Id.* at 908.

²⁰³ *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

harmless error standard.”²⁰⁴ Currently, Petitioner is awaiting retrial of his wife’s murder.²⁰⁵

C. Judge Tinder’s Dissent

Judge Tinder penned the dissent in the case.²⁰⁶ Judge Tinder agreed with the majority holding that Julie’s letter and statements to the police were admitted in violation of Petitioner’s Confrontation Clause rights.²⁰⁷ However, Judge Tinder also stated that the majority opinion improperly decided whether admitting the letter and statements were in fact harmful.²⁰⁸ The dissent outlined the determination that fairminded jurists could agree with the Wisconsin Court of Appeals.²⁰⁹ Because of this possibility for disagreement, coupled with the requirement that there must be deference to the state court’s decision, Judge Tinder would uphold the decision of the Wisconsin Court of Appeals as a reasonable application of *Chapman*.²¹⁰

Judge Tinder also highlighted the standard that Petitioner must meet to prevail on his habeas petition: “[T]o prevail, a petitioner must show that the state court’s decision to reject his claim was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”²¹¹ Judge Tinder asserted that the Wisconsin decision

²⁰⁴ *Jensen*, 800 F.3d at 908.

²⁰⁵ *Update: Bond Set For Man Convicted in Wife’s Death After Poisoning*, NBC WMTV (Jan. 6, 2016, 3:11 PM), <http://www.nbc15.com/home/headlines/15852777.html> (last updated January 6, 2016) (“A judge has set a \$1.2 million bond for a Wisconsin man once convicted in his wife’s death.”).

²⁰⁶ *Jensen*, 800 F.3d at 908 (Tinder, J., dissenting).

²⁰⁷ *Id.*

²⁰⁸ *Id.* (“[W]e are not in a position to choose between two fairminded alternatives.”).

²⁰⁹ *Id.* at 909.

²¹⁰ *Id.*

²¹¹ *Id.* at 910 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

was not so lacking.²¹² In support of this contention, Judge Tinder pointed to the *Van Arsdall* factors.²¹³

Judge Tinder addressed additional State evidence corroborating Julie’s letter and statements to police, such as the computer evidence and statements Julie made to other witnesses, and he pointed out that there were multiple sources of admissible evidence “duplicating (or corroborating) every relevant aspect of Julie’s erroneously admitted testimonial statements.”²¹⁴ All of this evidence, the dissent stated, contributed to the state appellate court’s characterization of the “staggering weight of the untainted evidence and cumulatively sound evidence presented by the State.”²¹⁵

Judge Tinder noted that the Wisconsin Court of Appeals recognized the defense theories, even noting that “[t]his case was not a classic whodunit,” but rather “the jury was asked to choose between two dark and premeditated alternatives—either [Petitioner] murdered Julie and framed it to look like suicide, or Julie committed suicide and framed [Petitioner] for murder.”²¹⁶ Judge Tinder went on to say that each of Julie’s testimonial statements, as well as the other corroborating evidence, could support either theory.²¹⁷

Referencing the majority’s rejection of the Wisconsin Court of Appeals’ decision, the dissent also pointed out that the state appellate court did say that it “review[ed] the extensive record”—but even if the state appellate court had just said “affirmed,” that is enough that the federal appellate court should give the “full deference that the habeas corpus statute demands” of state court determinations.²¹⁸ Additionally, the dissent highlighted that the Supreme Court’s own precedent

²¹² *Jensen*, 800 F.3d at 908 (Tinder, J., dissenting).

²¹³ *Id.* at 909.

²¹⁴ *Id.*

²¹⁵ *Id.* (quoting *State v. Jensen* (“*Jensen II*”), 2011 WI App 3, ¶ 94, 331 Wis. 2d 440, 483-84, 794 N.W.2d 482, 504).

²¹⁶ *Jensen*, 800 F.3d at 911 (Tinder, J., dissenting) (quoting *Jensen III*, 2011 WI App at ¶ 37).

²¹⁷ *Jensen*, 800 F.3d at 911 (Tinder, J., dissenting).

²¹⁸ *Id.* (citing *Harrington v. Richter*, 562 U.S. 86, 98-99 (2011)).

prohibits federal courts from inferring error from a state court's failure to address particular evidence.²¹⁹

Even though the state appellate court decision includes statements that appear to employ a sufficiency-of-the-evidence test, there is enough reiteration of its “finding of harmlessness based on ‘the staggering weight of the untainted evidence and cumulatively sound evidence presented by the State’” that lends itself to a harmlessness inquiry.²²⁰ Most telling to the dissent was the state appellate court conclusion that “the State has proven beyond a reasonable doubt that any error complained of did not contribute to the verdict obtained.”²²¹ These statements and the evidence itself leave Judge Tinder “[un]convinced that the state court’s decision ‘was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.’”²²²

ANALYSIS

The Seventh Circuit incorrectly decided *Jensen v. Clements* because it misapplied the harmless error standard and failed to provide enough deference to the state court’s decision. Merely having a constitutional error is not enough to grant habeas relief.²²³ Instead, the habeas standard Petitioner must meet is that the error had substantial and injurious effect or influence in determining the jury’s verdict and that there was actual prejudice.²²⁴

Here, the Wisconsin Appellate Court examined the record of Petitioner’s case and determined that any effect of the erroneously

²¹⁹ *Jensen*, 800 F.3d at 911 (Tinder, J., dissenting) (quoting *Price v. Thurmer*, 637 F.3d 831, 839 (7th Cir. 2001) (citing *Harrington*, 562 U.S. at 98-99)).

²²⁰ *Jensen*, 800 F.3d at 911-12 (Tinder, J., dissenting).

²²¹ *Id.*

²²² *Id.* at 911 (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015)).

²²³ *Teague v. Lane*, 489 U.S. 288, 308 (1989)

²²⁴ *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

admitted letter and statements was harmless.²²⁵ Thus, in order to prevail, the Petitioner “must [have] show[n] that the state court’s decision to reject his claim ‘was so lacking in justification that there was an error well understood and comprehended in existing law beyond *any possibility for fairminded disagreement*.’”²²⁶

The Wisconsin Appellate Court’s decision may not have been perfectly reasoned, but their decision certainly is subject to fairminded disagreement. As such, Petitioner should fail on this standard because fairminded jurists did disagree on the Wisconsin Appellate Court’s determination.²²⁷ More than that, while this outcome may not sit well with Petitioner, it is the correct determination when all of the *Van Arsdall* factors are examined and proper deference is granted to the state court’s determination.

A. The Seventh Circuit Incorrectly Decided Jensen v. Clements by Misapplying the Harmless Error Standard.

As stated above, the factors for a harmless error analysis under *Van Arsdall* include: (1) the importance of the witness’ testimony in the prosecution’s case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution’s case.²²⁸ While the Seventh Circuit’s majority opinion touched upon some of these factors, they failed to adequately address each of them.

The majority highlighted at length the first *Van Arsdall* factor, the importance of the inadmissible evidence, as the key to showing the

²²⁵ State v. Jensen (“*Jensen II*”), 2011 WI App 3, ¶ 73, 331 Wis. 2d 440, 473, 794 N.W.2d 482, 499.

²²⁶ *Ayala*, 135 S. Ct. at 2199 (emphasis added) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

²²⁷ See *Jensen*, 800 F.3d at 911; *Jensen II*, 2011 WI App at ¶ 73.

²²⁸ *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

unreasonable nature of the Wisconsin Appellate Court's decision.²²⁹ However, the majority failed to emphasize the next three factors *Van Arsdall* factors that inform and minimize whatever harm was found by the Seventh Circuit's majority.²³⁰ All of the inadmissible evidence is corroborated or duplicated by admissible evidence. This is why the cumulative factors are so important; it is not an all or nothing analysis hinging on just the importance of the inadmissible evidence. If the examination did hinge on just one of the factors, then the Seventh Circuit would not have reiterated the Supreme Court's decision that *all* the factors guide this analysis and play an important role.²³¹ To be clear, this Article does not argue that the letter was unimportant or non-violative of Petitioner's Confrontation right. However, the mere fact that witnesses discussed Julie's letter and the State highlighted their testimony in argument is only one factor in the overall analysis of whether admitting the letter was ultimately injurious and had an effect on the jury's verdict.

Illustrating factors two and three of *Van Arsdall*'s holding, the Wisconsin Appellate Court went through each and every line in Julie's letter—all three paragraphs—and examined how the inadmissible evidence was corroborated or duplicated by admissible evidence.²³² Family, friends, neighbors, acquaintances, and police officers all testified to statements Julie made to them that corroborated information in the letter.²³³ The corroboration did not stop with live testimony; even physical evidence recovered from Petitioner's home computer echoed Julie's statements to friends about Petitioner searching for ways to poison someone on the internet.²³⁴

Furthermore, factor four is satisfied because the defense had an opportunity to cross-examine each and every one of the corroborating witnesses and rebut any physical evidence through their own experts

²²⁹ *Jensen*, 800 F.3d at 905-06.

²³⁰ *Id.* at 906.

²³¹ *Id.* at 904.

²³² *Jensen II*, 2011 WI App at ¶¶ 40-73.

²³³ *Id.*

²³⁴ *Jensen*, 800 F.3d at 910 (Tinder, J., dissenting).

or argument. “Cross examination is ‘the greatest legal engine ever invented for the discovery of truth’”²³⁵ and Petitioner cross-examined the State’s witnesses. There were even questions at trial about the authenticity of the letter itself.²³⁶ Yet, any impeachment was apparently unpersuasive to the jury.²³⁷

Finally, the Seventh Circuit’s majority extensively examined the final *Van Arsdall* factor, the overall strength of the prosecution’s case.²³⁸ The majority repeatedly remarked about statements made by the Wisconsin Appellate Court regarding the sufficiency of the evidence to support the verdict.²³⁹ The Seventh Circuit worried the state appellate court was unconcerned with the *Brecht* harmless error analysis, instead focusing on an incorrect sufficiency of the evidence test.²⁴⁰ However, the statements by the Wisconsin Appellate Court regarding the strength of the evidence of guilt are illustrative of the last *Van Arsdall* factor, rather than a superficial examination of the sufficiency of guilt as the Seventh Circuit contends.²⁴¹

The majority cited to *Holmes v. South Carolina*, stating that if only one side is evaluated on review, “no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.”²⁴² However, the Wisconsin Court of Appeals did “review the extensive record” and examined “the voluminous corroborating evidence, the duplicative untainted

²³⁵ *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (internal quotations omitted) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)).

²³⁶ *Jensen*, 800 F.3d at 911 (Tinder, J., dissenting).

²³⁷ *Id.* at 898 (majority opinion); see also *Jensen II*, 2011 WI App at ¶ 88. One of the detectives was impeached on his testimony that Petitioner admitted he was the principle computer user in the house and that Julie rarely used the computer.

²³⁸ *Jensen*, 800 F.3d at 906.

²³⁹ *Id.* at 903-04.

²⁴⁰ *Id.*

²⁴¹ *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

²⁴² *Jensen*, 800 F.3d at 904 (quoting *Homes v. South Carolina*, 547 U.S. 319, 331 (2006)).

evidence, *the nature of the defense*, the nature of the State's case, and the overall strength of the State's case."²⁴³

The First Circuit was faced with a similar issue in *Barbosa v. Mitchell*, in January of 2016.²⁴⁴ In *Barbosa*, an inmate petitioned for a writ of habeas corpus because a DNA expert's testimony included a DNA "results table" that was clearly in violation of established law under the Confrontation Clause.²⁴⁵ Relying almost entirely on factor four of *Van Arsdall*, the First Circuit found that there was an "abundance of other evidence indicating [petitioner's] guilt."²⁴⁶ Based on the "force of this [cumulative] evidence as a whole" the First Circuit determined the inadmissible DNA table was "largely cumulative evidence" and could not conclude that the violative evidence had "a substantial and injurious effect on the verdict."²⁴⁷ As in *Barbosa*, the Seventh Circuit here was obliged to give great weight to the *Van Arsdall* factors that the evidence was cumulative, there was corroborating testimony, and the strength of the prosecution's case. The Wisconsin Appellate Court went further than the state court on review in *Barbosa*, discussing how they reviewed the "extensive record" and conducting a meticulous evaluation of the evidence.²⁴⁸

Lastly, the Seventh Circuit opined that the evidence in the case was all circumstantial and subject to more than one interpretation, but this statement cuts both ways.²⁴⁹ Circumstantial evidence can be just as reliable as direct evidence, as the Supreme Court has held, "[t]he adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in

²⁴³ State v. Jensen ("*Jensen II*"), 2011 WI App 3, ¶ 35, 331 Wis. 2d 440, 462, 794 N.W.2d 482, 493 (emphasis added).

²⁴⁴ *Barbosa v. Mitchell*, 812 F.3d 62, 68 (1st Cir. 2016).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 69.

²⁴⁸ State v. Jensen ("*Jensen II*"), 2011 WI App 3, ¶ 97, 331 Wis. 2d 440, 485, 794 N.W.2d 482, 504 (emphasis added).

²⁴⁹ *Jensen v. Clements* ("*Jensen*"), 800 F.3d 892, 906 (7th Cir. 2015).

support of a criminal conviction.”²⁵⁰ In fact, there are no instances where the Supreme Court has said that circumstantial evidence is weaker than direct evidence.²⁵¹ Just because Petitioner’s verdict relied on evidence that may be circumstantial or subject to more than one interpretation does not eviscerate or weaken that verdict.²⁵² The only question relevant in the instant case is if the Wisconsin State Court’s decision was so lacking in justification that there is no possibility for fair-minded disagreement on the harmless error analysis.²⁵³ The answer is no; there is the possibility for fair-minded disagreement in that fair-minds could conclude that the Wisconsin State Court’s decision to admit the handwritten letter constituted harmless error.

B. The Seventh Circuit Failed to Show Enough Deference to the Wisconsin Appellate Court’s Decision that Any Error was Harmless.

In addition to the Seventh Circuit’s tilted application of the harmless error analysis, the Seventh Circuit should have deferred to the Wisconsin Appellate Court’s findings that the admission of Julie’s letters and statements were harmless error. The “highly deferential” review under § 2254(d) defers to state court decisions of fact unless those determinations were unreasonable.²⁵⁴ Here, the Wisconsin appellate court determined that the wrongly admitted evidence did not have a substantial and injurious effect on the Petitioner. Merely because the Seventh Circuit could have reached a different conclusion does not overcome § 2254(d)(2)’s requirement for state court

²⁵⁰ *Holland v. United States*, 348 U.S. 121, 140 (1954) (circumstantial evidence is “intrinsicly no different from testimonial evidence”).

²⁵¹ *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003).

²⁵² The majority also makes mention that nothing was found on Petitioner’s work computer, but the computer was “fried” prior to being seized by the police; *see Jensen*, 800 F.3d at 910 (Tinder, J., dissenting).

²⁵³ *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

²⁵⁴ *Harrington*, 562 U.S. at 102; *Ayala*, 135 S. Ct. at 2199.

substantial deference.²⁵⁵ Even under a *de novo* review of the record, there is ample evidence that the Wisconsin Appellate Court applied the *Van Arsdall* factors.²⁵⁶ Since the above sections of this Article establish that the Seventh Circuit erred in deciding that the Wisconsin Appellate Court's determination was unreasonable, the state court's decision must stand.

As Judge Posner stated in *Price v. Thurmer*, where a habeas Petitioner asked for relief on an ineffective assistance of counsel claim, the Wisconsin Court of Appeal's opinion, which "ignored a good deal of the evidence on which his claim for relief was based," still had to be given full deference.²⁵⁷ After the Supreme Court's ruling in *Harrington*,²⁵⁸ Judge Posner stated, "a state court 'opinion' consisting of a single word 'affirmed' is entitled to the full deference that the habeas corpus statute demands."²⁵⁹ Because of the Supreme Court ruling in *Harrington*, the Seventh Circuit held in *Price* that they could not infer error from the Wisconsin court's failure to address particular evidence.²⁶⁰

Other circuits have come to a similar conclusion regarding interpretation of *Harrington*.²⁶¹ For example, in 2015 the Fourth Circuit in *Christian v. Ballard* decided that a petitioner's ineffective assistance of counsel claim during a guilty plea was not an unreasonable application of the "clearly established" principles of the

²⁵⁵ *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) (holding that the state court erroneously found that a prisoner was improperly denied a hearing to determine whether he was intellectually disabled and precluded from his death sentence).

²⁵⁶ *See supra* Part(A).

²⁵⁷ *Price v. Thurmer*, 637 F.3d 831, 839 (7th Cir. 2011).

²⁵⁸ *Harrington*, 562 U.S. at 102.

²⁵⁹ *Price*, 637 F.3d at 839; *contra* *Contreras v. Artus*, 778 F.3d 97, 106 (2d Cir. 2015) (holding that a petitioner's denial of habeas relief was not unreasonable because the state court did a long summation of the facts, including the defense evidence).

²⁶⁰ *Price*, 637 F.3d at 839.

²⁶¹ *Harrington*, 562 U.S. at 102; *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015).

Strickland v. Washington standard of effective assistance of counsel.²⁶² The Fourth Circuit stated that the requirement of a petitioner’s showing that the claim “resulted from an unreasonable legal or factual conclusion” beyond any fair-minded disagreement “does not require that there be an opinion from the state court explaining the state court’s reasoning.”²⁶³

As a result, even when a state court’s decision is “unaccompanied by an explanation, the habeas petitioner’s burden must still be met” by showing that there was no reasonable basis and that it is impossible for fair-minded jurists to agree on arguments or theories.”²⁶⁴ That same wisdom espoused by the Seventh Circuit in *Price* should also apply to the instant case. While the Wisconsin Appellate Court could have done a better job of addressing *all* the evidence, the length of the trial and “extensive record” dictated that the state court’s opinion only address information they believed relevant to the *Van Arsdall* harmless error factors.²⁶⁵

The Wisconsin Appellate Court went beyond merely saying “affirmed,” and instead examined the “voluminous [evidence,] . . . *the nature of the defense* . . . [and] the overall strength of the State’s case.”²⁶⁶ Given that there is no requirement that fair-minded jurists must all agree with the state court decision, the Wisconsin Appellate Court’s determination that any error from the inadmissible evidence was harmless and should stand.

The Supreme Court stated in *Harrington* that the habeas standard is “difficult to meet . . . because it was meant to be.”²⁶⁷ Federal habeas jurisdiction is designed so that state courts are the “principal forum for

²⁶² *Christian v. Ballard*, 792 F.3d 427, 445-46 (4th Cir. 2015) (citing *Strickland v. Washington*, 446 U.S. 668, 671 (1984)).

²⁶³ *Christian*, 792 F.3d at 444-45 (internal quotations omitted) (citing *Harrington*, 562 U.S. at 102).

²⁶⁴ *Christian*, 792 F.3d at 445; *see also* *McKinney v. Ryan*, 813 F.3d 798, 838-39 (Bea, J., dissenting).

²⁶⁵ *State v. Jensen* (“*Jensen II*”), 2011 WI App 3, ¶ 35, 331 Wis. 2d 440, 462, 794 N.W.2d 482, 493.

²⁶⁶ *Id.* at ¶ 35 (emphasis added).

²⁶⁷ *Harrington*, 562 U.S. at 102.

asserting constitutional challenges to state convictions.”²⁶⁸ This is because federal habeas petitions “frustrate[] both States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights” and “disturb[] the State’s significant interest in repose for conclud[ing] litigation, deny[ing] society the right to punish admitted offenders, and intrud[ing] on state sovereignty to a degree matched by few exercises of judicial authority.”²⁶⁹ Much like *Harrington*, the Seventh Circuit’s opinion in *Jensen*, “illustrates a lack of deference to the state court’s determination and an improper intervention in state criminal processes, contrary to the . . . well-settled meaning and function of habeas corpus in the federal system.”²⁷⁰

CONCLUSION

In *Jensen v. Clements*, the Seventh Circuit held that the Wisconsin Appellate Court unreasonably applied federal law when it determined that the admission of Julie’s letter and statements was harmless error. The majority’s application of the harmless error analysis fails to properly examine all of the relevant factors and evidence and fails to adequately grant deference to the state court, as required by the habeas statute itself.²⁷¹ The Seventh Circuit’s fact-intensive analysis of *Jensen*, and Judge Tinder’s dissent, shows that the state court’s decision should be granted a high level of deference and was not “so lacking in justification that there -was an error well- understood and comprehended in existing law *beyond any possibility for fairminded disagreement*.”²⁷² Holding otherwise undermines the meaning of

²⁶⁸ *Id.* at 109.

²⁶⁹ *Id.* (internal quotation marks omitted) (quoting *Calderon v. Thompson*, 523 U.S. 538, 555-556 (1998) and *Harris v. Reed*, 489 U.S. 255, 265 (1989) (Kennedy, J., dissenting)).

²⁷⁰ *Harrington*, 562 U.S. at 102.

²⁷¹ *Jensen*, 800 F.3d at 911 (Tinder, J., dissenting) (citing *Harrington v. Richter*, 562 U.S. 86, 98-99 (2011)).

²⁷² *Jensen v. Clements* (“*Jensen*”), 800 F.3d 892, 909, 910 (7th Cir. 2015) (Tinder, J., dissenting) (emphasis added) (quoting *Harrington*, 562 U.S. at 103).

habeas review and States' sovereign rights and interests in punishing criminals, which ultimately serves to weaken the finality and legality that attaches to convictions after all review is exhausted.²⁷³

²⁷³ See *Calderon v. Coleman*, 525 U.S. 141, 145-46 (1998) (noting that states have a sovereign interest in punishing offenders when examining the Brecht standard).