No. 18-1424

# In the Supreme Court of the United States

MICHAEL N. THOMAS, PETITIONER,
*v.*
RAYMOND ANDERSON, RICHARD W. COCHRAN, CORNEALIOUS SANDERS, SCOTT A. BAILEY, AND ROGER FITCHPATRICK, RESPONDENTS.

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

## BRIEF IN OPPOSITION FOR RESPONDENTS

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## QUESTION PRESENTED

Whether the Seventh Circuit erred in concluding that the district court acted within its discretion by excluding two of petitioner's proposed witnesses, where the Seventh Circuit properly weighed petitioner's interest in the testimony of the prisoner-witnesses against the government's interest in maintaining their confinement and where, in any event, neither witness could have testified in person at trial.

## RELATED CASES

- *Thomas v. Anderson, et al.*, No. 1:12-cv-01343-JBM, U.S. District Court for the Central District of Illinois, Peoria Division. Judgment entered Aug. 13, 2015.
- *Thomas v. Anderson, et al.*, No. 15-2830, U.S. Court of Appeals for the Seventh Circuit. Judgment entered Nov. 14, 2018.

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## BRIEF IN OPPOSITION

When deciding whether two prisoner-witnesses proposed by petitioner should be brought to court to testify, the Seventh Circuit balanced petitioner's interest in the witnesses' testimony against the expense and inconvenience of transporting them to trial and concluded that the district court did not abuse its discretion in proceeding without them. The question presented, however, assumes that the Seventh Circuit instead ignored petitioner's interest in the witnesses' testimony and asks if it would have been an error to do so. The Seventh Circuit's express consideration of that interest demonstrates that petitioner seeks review of a question not presented by this case. And to the extent petitioner disagrees with the weight given to his interest in the witnesses' testimony, that question does not warrant the Court's review.

Nor does petitioner identify any other basis for certiorari. The Seventh Circuit, by weighing petitioner's interest in the witnesses' testimony against the government's interest in maintaining their confinement, took an approach that was consistent with decisions of other courts. Because all courts assess the same two baseline interests, any minor variations in how they articulate the governing standard have no practical effect and do not reflect a circuit split. Moreover, petitioner's proposed witnesses would not have testified at trial under any analysis. Given the defects in the question presented, the absence of a circuit split, and the vehicle problems this case presents, certiorari is unwarranted.

## STATEMENT

1. Petitioner Michael Thomas, an inmate in the custody of the Illinois Department of Corrections ("Department"), filed suit under 42 U.S.C. § 1983, asserting multiple constitutional claims against various corrections officers. Pet. App. 45a-65a. Some of his claims were dismissed at screening, Dist. Ct. Doc. 6, and others were resolved at summary judgment, Dist. Ct. Doc. 53. Relevant here are excessive force and retaliation claims against Respondents Raymond Anderson, Richard Cochran, Roger Fitchpatrick, Scott Bailey, and Cornealious Sanders that proceeded to trial.

Petitioner's complaint alleged that on March 24, 2011, Anderson, Cochran, and Fitchpatrick ordered an early lock-up while petitioner was in the shower. Pet. App. 50a. After petitioner had hurried to his cell, Anderson told Cochran to issue him a disciplinary ticket for refusing to comply with the order. *Id*. at 50a-51a. The officers handcuffed petitioner and ordered his cellmate to vacate the area before Cochran beat him, at Anderson's direction. *Id*. at 52a. That same day, Cochran issued petitioner a disciplinary ticket stating that he had refused to comply with the lock-up order and threatened to attack Cochran. *Id*. at 52a-53a; Dist. Ct. Doc. 1-3 at 6. Bailey and Sanders conducted a hearing on the ticket and found petitioner guilty of several offenses for refusing to comply with the lock-up order and for threatening Cochran. Pet. App. 55a-57a; Dist. Ct. Doc. 1-3 at 16.

Based on these allegations, the district court concluded that petitioner stated an Eighth Amendment claim against Anderson and Cochran for their pur-

ported excessive force and against Fitchpatrick for his alleged failure to intervene. Pet. App. at 71a; Dist. Ct. Doc. 6 at 2. The district court also recognized retaliation claims based on petitioner's allegations that respondents took the alleged actions against him because he had made complaints against Anderson and other prison staff. Pet. App. 48a, 73a-76a; Dist. Ct. Doc. 6 at 2.

Following summary judgment, the parties submitted proposed pretrial orders indicating, among other things, the witnesses they expected to testify at trial. Dist. Ct. Docs. 58, 63. Petitioner proposed calling 42 witnesses, including Xavier Landers but not Kiante Simmons, and presenting 99 exhibits. Dist. Ct. Doc. 58 at 16-23. Respondents listed some of the same witnesses, plus four others, and proposed that all nonparty witnesses, including their own, testify by video. Dist. Ct. Doc. 63 at 14-15. Over multiple pretrial conferences, the district court worked with the parties to reduce their witness lists, and encouraged them to stipulate to undisputed facts. Pet. App. 30a-40a, 99a-106a; Dist. Ct. Docs. 150 at 19-26, 152 at 16-17.

At the first pretrial conference, for example, the court advised petitioner that "there may be some duplication in the evidence that [he] wish[ed] to present with some of [his] witnesses," because petitioner had listed multiple witnesses "who basically will testify to the same thing." Dist. Ct. Doc. 152 at 16. Then, at the next conference, the court remarked that the number of proposed witnesses was unusually high and directed the parties to produce a summary of each witness's expected testimony so it could decide if their testimony would be relevant or cumulative.

Dist. Ct. Doc. 150 at 24-25; see also Text Order (Entered: 1/16/2015).

Petitioner shortened his list to 27 witnesses when he submitted his summaries to the court. Pet. App. 79a-85a. He stated therein that two inmates, Willis Baird and Arnell Mills, could testify as to the alleged excessive force and that Simmons, whom petitioner said he had inadvertently left off the first list, could testify that Anderson had harassed him prior to the date of the incident in retaliation for earlier grievances and complaints. *Id.* at 80a-81a. Petitioner did not include Landers on this shortened list.

Then, at the next pretrial conference, petitioner stated that Landers, in addition to Baird and Mills, could testify as to excessive force because they were all housed in the same gallery. *Id.* at 100a. The court stated that "I don't think we need three people talking about the same thing" and asked petitioner which one was in the best position to see the incident or would be the strongest witness. *Ibid.* Petitioner chose Mills, noting that it would be difficult to contact Landers and Baird because he thought they were out of prison. *Id.* at 101a. Respondents' counsel confirmed that Mills was still in the Department's custody and that Landers and Baird had been discharged. *Id.* at 102a. The court directed respondents' counsel to find Landers and Baird's last known addresses and advised petitioner that it would then be his obligation to subpoena them for trial. *Id.* at 102a-104a. Respondents' counsel discovered Baird's current address and gave it to the court, while advising that the last known address on file for Landers was a criminal courthouse in Cook County, Illinois. Dist. Ct. Doc. 99-1.

Petitioner later submitted an 18-person witness list that included both Simmons and Landers (as well as Mills and Baird), Pet. App. 109a, which the court addressed at the next pretrial conference, *id.* at 30a-40a. When discussing the three excessive-force witnesses, petitioner first stated that he would not try to subpoena Baird because he was unable to pay the service costs. *Id.* at 31a-32a. Next, petitioner decided to keep Mills on the witness list because he was still in the custody of the Department and he had witnessed the incident. *Id.* at 32a-34a. Turning to Landers, the court pointed out that "we don't know where he is." *Id.* at 34a. But petitioner responded that Landers was in a Cook County jail, *ibid.*, even though respondents' counsel had advised that he was no longer in Department custody and the courthouse was just the last known address on file, *id.* at 102a; Dist. Ct. Doc. 99-1. The court nonetheless determined that the jail did not have videoconferencing technology, then struck Landers from the witness list after petitioner stated that "I can't subpoena him." Pet. App. 34a.

Turning to the evidence in support of his retaliation claims, petitioner stated that he thought Simmons was in "[a] federal holding system or something." *Id.* at 38a. The court explained that petitioner would need to provide more information than that to find Simmons, noting "we don't know where he is." *Id.* at 39a. The court, however, agreed to keep Simmons on the list, while warning that he would not be called at trial if petitioner did not provide his address. *Id.* at 40a. The parties also agreed to a stipulation to be read to the jury at trial regarding grievances that petitioner had made against Anderson prior to the

date of the incident for, among other things, "threatening inmates, including [petitioner], with punishment for making complaints about him." Dist. Ct. Doc. 147 at 18-19; see also Dist. Ct. Doc. 109 at 12 (stipulation); Dist. Ct. Doc. 142 at 42-43.

On the morning of the trial, the court stated that Landers would not testify "because no one knows [his] address and [he is] not within the Department of Corrections." Dist. Ct. Doc. 142 at 4. Simmons, whose address was marked as "unknown" in the final pretrial order, did not testify either. See Doc. 109 at 14. Petitioner called 16 witnesses at trial. See Dist. Ct. Docs. 142 at 2-3, 143 at 2-3, 144 at 2. At the close of evidence, the court granted judgment as a matter of law in respondents' favor on all but the excessive force claim against Anderson and Cochran and the retaliation claim against Anderson arising from the alleged use of excessive force. Dist. Ct. Doc. 144 at 85. The jury returned a verdict against petitioner on these remaining claims. Dist. Ct. Doc. 116.

2. On appeal, the Seventh Circuit reversed judgment as a matter of law on the retaliation claims stemming from Cochran's issuance of the disciplinary ticket and Bailey and Sanders' finding of violations, but affirmed the district court in all other respects. Pet. App. 1a-14a. The case was therefore remanded to the district court, *id.* at 14a, where proceedings are ongoing, see U.S. Dist. Ct. (C.D. Ill.), Civil Docket for Case No. 1:12-cv-01343-JBM.

As to the district court's handling of petitioner's request to call Simmons and Landers, the Seventh Circuit held that the court did not commit reversible error for several reasons. Pet. App. 10a-13a. First, to

the extent that either witness would have testified about events that occurred prior to the incident, that testimony was foreclosed by the district court's ruling barring evidence about those events as irrelevant and cumulative of the stipulation. *Id.* at 11a; see Dist. Ct. Doc. 142 at 39, 122. The Seventh Circuit affirmed that ruling, holding that the stipulation was an appropriate substitute for the multitude of evidence that Thomas wanted to present about his past grievances and complaints. Pet. App. 9a-10a.

Second, the Seventh Circuit held that, "assuming [Simmons and Landers] could be located and were in fact in custody," the district court did not abuse its discretion by not ordering that they be transported to the trial. *Id.* at 11a-12a. Although petitioner argued that the district court should have applied the eight-factor balancing test from *Stone v. Morris*, 546 F.2d 730, 735-736 (7th Cir. 1976), when deciding this issue, 7th Cir. Doc. 52 at 24-26, the Seventh Circuit explained that "*Stone*'s particularized balancing test," which governed when a prisoner-plaintiff should be brought to court, had not been extended to prisoner-witnesses, Pet. App. 11a. To that end, the court explained that some of the concerns that arise when a prisoner-plaintiff is forced to try his case remotely are not present when a witness testifies by video. *Ibid.* (noting that a prisoner-plaintiff faces "special challenges" associated with "the inability . . . to see jurors' faces, the difficulty in examining and evaluating witnesses, and the complications associated with communicating with the court and opposing counsel"). In any event, the Seventh Circuit determined, it was not an abuse of discretion to find that petitioner's interest in the witnesses' testimony was out-

weighed by the expense and inconvenience of transporting them to trial, given that another inmate witness (Mills) testified as to excessive force. *Id.* at 12a.

Third, the Seventh Circuit reasoned that any error was harmless because petitioner provided no reason to believe that either Simmons or Landers would have provided better testimony about the incident than Mills. *Ibid.* The Seventh Circuit thus concluded that "the judge's failure to apply *Stone*'s particularized balancing test was not reversible error." *Id.* at 12a-13a.

Petitioner filed a petition for rehearing and rehearing en banc, arguing that the panel erred by not applying the *Stone* factors to prisoner-witnesses and claiming that its decision conflicted with those of other circuits. 7th Cir. Doc. 77. The court denied the petition, Pet. App. 43a-44a, and amended its decision to note that there was no conflict among the circuits. In particular, the Seventh Circuit explained that *Jerry v. Francisco*, 632 F.2d 252 (3d Cir. 1980), was distinguishable because the district court there had entirely overlooked the request to produce a prisoner-witness, the court of appeals did not consider whether the concerns underlying the *Stone* factors applied equally to prisoner-plaintiffs and prisoner-witnesses, and the case was decided before video testimony was widely available, Pet. App. 13a.

## REASONS FOR DENYING THE PETITION

Petitioner seeks review of a question not presented by this case. The Seventh Circuit held that it was not an abuse of discretion to find that petitioner's interest in the proposed testimony of Simmons and Landers

was outweighed by the expense and inconvenience of transporting them for trial. The question presented, which assumes that the court ignored petitioner's interest in the witnesses' testimony, cannot be reconciled with its holding. Indeed, petitioner acknowledges that the Seventh Circuit weighed his interest in the witnesses' testimony against the government's concerns and simply disagrees with the balance the court struck.

In addition, petitioner has not identified a conflict of authority as to the standard for deciding when the government must transport a prisoner-witness to testify at a trial. All circuits to have addressed the question agree that district courts should balance the litigant's interest in the witness's presence at trial and the government's interest in maintaining his confinement. The Seventh Circuit, consistent with those decisions, assessed the strength of those two considerations.

Petitioner places undue weight on the Seventh Circuit's statement that "*Stone*'s particularized balancing test" had not been extended to the context of prisoner-witnesses, because the court nonetheless proceeded to balance the same two factors identified in *Stone*—the plaintiff's interest in the witnesses' testimony and the government's interest in maintaining their confinement. Whatever daylight exists between that simplified articulation of *Stone* and the original is negligible.

This case, moreover, is a poor vehicle for resolving the question presented because applying the standard that petitioner requests would have had no effect on whether Simmons or Landers testified, much less the

outcome of the trial. By the time of trial, neither witness was in custody, and petitioner did not know where they were located. Additionally, Simmons's proposed testimony as to past grievances was barred as cumulative of the stipulation to those facts, and another prisoner-witness was able to testify about the excessive force that Landers allegedly witnessed. The Seventh Circuit thus rightly determined that any error was harmless.

Finally, because the analysis applied by the Seventh Circuit below is so closely related to the *Stone* standard, few, if any, evidentiary decisions would turn out differently if one test were applied instead of the other. Petitioner's assertions about the prevalence of prisoner civil rights suits are therefore beside the point because requiring application of the full-fledged *Stone* test would make little-to-no difference in how those cases are litigated.

## I. Petitioner Seeks Review Of A Question Not Presented By This Case.

The question presented asks if the Seventh Circuit erred by holding that a court may deny a request to produce a prisoner-witness at trial "without regard" to the importance of the witness's testimony. Pet. i. The Seventh Circuit, however, expressly considered that very concern when it held that it was not an abuse of discretion to find "that [petitioner's] interest in [Simmons and Landers's] testimony was outweighed by the expense and inconvenience of transporting them for trial." Pet. App. 12a. Petitioner's insistence that the court granted "unfettered discretion," Pet. 2, 15, to exclude prisoner-witnesses "with

impunity," *id.* at 21, is at odds with the court's clear holding.

That disconnect between the question presented and the Seventh Circuit's decision is fatal to petitioner's asserted bases for certiorari. His argument that the Seventh Circuit created a circuit split is entirely dependent on the proposition that the court ignored his interest in the witnesses' testimony. See Pet. 20-25. But that premise is foreclosed by the decision itself. Petitioner's interest in Simmons and Landers's testimony was one of the two factors that the Seventh Circuit weighed when deciding the appeal. See Pet. App. 12a.

Indeed, petitioner eventually acknowledges that the Seventh Circuit did, in fact, consider his interest in the proposed witnesses' testimony, but suggests that it did so only "in passing." Pet. 25. That characterization is inapt. The court's conclusion that it was not an abuse of discretion to find that petitioner's interest in the witnesses' testimony was outweighed by the expense and inconvenience of transporting them to trial was the crux of its decision. See Pet. App. 12a. And, in reaching that conclusion, the Seventh Circuit assessed the strength of petitioner's interest in the witnesses' testimony, and determined that it was limited because "another inmate witness [Mills] testified to the same information that [petitioner] says he wanted to cover with Simmons and Landers." *Ibid.* While petitioner may disagree with how the Seventh Circuit weighed the relevant interests, see Pet. 25, his quarrel is with the court's application of the standard rather than the standard itself. This case does not present the question of whether a court may ignore a litigant's interest in a prisoner-

witness's testimony because that is not what the Seventh Circuit did.

## II. The Seventh Circuit Correctly Balanced The Relevant Factors And Its Decision Is Consistent With Other Circuits.

Certiorari is also unwarranted for the related, but distinct reason that the Seventh Circuit did not depart from *Stone* or the decisions of any other circuit. Indeed, it weighed the two foundational interests that were identified in *Stone*, and any difference between its analysis and a consideration of all the subsidiary factors identified in that decision is insignificant. In fact, the court's streamlined analysis was consistent with the approach followed by other courts, including all other circuits to have addressed the issue.

### A. The Seventh Circuit balanced the same core interests as in *Stone*.

1. Federal courts have the power to issue a writ of habeas corpus *ad testificandum* to compel the production of a prisoner when necessary "to bring him into court to testify or for trial." 28 U.S.C. § 2241(c)(5); see *Mancusi v. Stubbs*, 408 U.S. 204, 210 (1972). In *Stone*, the Seventh Circuit determined that although a prisoner does not have a constitutional right to attend the trial on his own civil rights action, the district court's discretion to issue a writ to compel his production is not unbounded. 546 F.2d at 735 (citing *Price v. Johnston*, 334 U.S. 266, 284-285 (1948)). Rather, the court stated, "the trial court must weigh the interest of the plaintiff in presenting his testimony in person against the interest of the state in main-

taining the confinement of the plaintiff-prisoner." *Ibid.*

*Stone* then listed eight factors to guide the court's analysis when deciding whether the plaintiff's interest outweighs the interest of the government:

> the costs and inconvenience of transporting a prisoner from his place of incarceration to the courtroom, any potential danger or security risk which the presence of a particular inmate would pose to the court, the substantiality of the matter at issue, the need for an early determination of the matter, the possibility of delaying trial until the prisoner is released, the probability of success on the merits, the integrity of the correctional system, and the interests of the inmate in presenting his testimony in person rather than by deposition.

*Id.* at 735-736. Other circuits have since taken similar approaches to deciding when a writ must be issued for a plaintiff-prisoner. See *Latiolais v. Whitley*, 93 F.3d 205, 208 (5th Cir. 1996); *Hawkins v. Maynard*, 89 F.3d 850, 1996 WL 335234, at *1 (10th Cir. 1996) (Mem.); *Michaud v. Michaud*, 932 F.2d 77, 81 (1st Cir. 1991); *Muhammad v. Warden, Baltimore City Jail*, 849 F.2d 107, 111-113 (4th Cir. 1988); *Wiggins v. Alameda Cty.*, 717 F.2d 466, 468 n.1 (9th Cir. 1983); *Jerry*, 632 F.2d at 255; *Holt v. Pitts*, 619 F.2d 558, 560-561 (6th Cir. 1980).

In addition, Federal Rule of Civil Procedure 43(a) grants district courts the authority to allow a witness to testify "by contemporaneous transmission from a different location" in appropriate circumstances. As technological capabilities have improved, testimony

by video has become a realistic alternative to in-court participation that was not available when *Stone* was decided. See *Perotti v. Quinones*, 790 F.3d 712, 721-722 (7th Cir. 2015) ("*Stone* itself assumed that, as a practical matter, the likely alternative to having an inmate transported to court to testify in support of his complaint was having his deposition testimony read aloud in court."). Consequently, videoconferencing now presents an additional option for courts to consider within the *Stone* framework when balancing "the prisoner's interest in being present physically in the courtroom and the government's interest in having him remain in his place of incarceration." *Id.* at 724-725.

2. The Seventh Circuit did not depart from *Stone*. The court weighed petitioner's interest in Simmons and Landers's proposed testimony against "the expense and inconvenience of transporting them for trial (assuming they could be located and were in fact in custody)." Pet. App. 12a. While the court declined to extend "*Stone's* particularized balancing test" to the context of prisoner-witnesses, it did not abandon that framework altogether. *Id.* at 11a-12a. Instead, it streamlined the analysis by focusing on its core components—the litigant's interest in the prisoner-witness's presence at trial and the government's interest in maintaining his confinement—and based its decision on the comparative strength of those two concerns. *Id.* at 12a. The court's decision not to extend "*Stone*'s particularized balancing test" simply reflects its judgment that it was unnecessary to review all eight factors in the context of a prisoner-witness. See *id.* at 11a, 13a.

To the extent that this simplified two-factor inquiry departs from the original test, any difference is negligible given that the purpose of the *Stone* factors is to measure the strength of those two core concerns. See *Stone*, 546 F.2d at 735 ("the trial court must weigh the interest of the plaintiff in presenting his testimony in person against the interest of the state in maintaining the confinement of the plaintiff-prisoner"); see also *Moeck v. Zajackowski*, 541 F.2d 177, 181 (7th Cir. 1976) (proposing factors to consider when deciding "whether a prisoner's interest in being present in court outweighs the state's relevant interest"). As a result, some of *Stone*'s factors, like the costs of transporting the prisoner, the risks to court security, and the integrity of the prison system, provide a means of identifying the strength of the government's interests, while others, like the substantiality of the issue, the need for a prompt trial, and the adequacy of alternative methods of testifying, track the litigant's. See *Stone*, 546 F.2d at 735-736.

Indeed, given the overlap between the *Stone* factors and the core concerns they are designed to illuminate, it is difficult to imagine a circumstance in which a court would find that the government's interest in not transporting a prisoner-witness to trial outweighed the prisoner-plaintiff's interest in his presence yet reach a different result after balancing the corresponding *Stone* factors. Thus, whatever minor differences may exist between *Stone*'s articulation of the test and the simplified version applied in this case are immaterial because the Seventh Circuit weighed the same two concerns that form the core of *Stone*'s test.

### B. The Seventh Circuit's decision is consistent with decisions of other circuits.

The decisions petitioner cites from other circuits, see Pet. 16-20, further confirm that there is no circuit split. Both the Third and Fifth Circuits reversed based on the district court's failure to exercise its discretion at all, while the Fourth and Tenth Circuits focused their analyses on the same core considerations highlighted by the Seventh Circuit.

In *Jerry*, the Third Circuit held that the district court abused its discretion by failing to rule on two motions to produce prisoner-witnesses, finding that the witnesses may have been able to provide material evidence that was otherwise lacking. 632 F.2d at 256. While the court also stated that the *Stone* factors applied to prisoner-witnesses, it did not consider each one. *Id.* at 255-256. As the Seventh Circuit noted, *Jerry* is distinguishable based on the district court's complete failure to decide the motions to produce witnesses in that case. Pet. App. 13a. In any event, the Third Circuit, like the Seventh, did not weigh each of the *Stone* factors when reaching its decision, precluding any conflict. Similarly, the Fifth Circuit reversed the district court for failing to rule on the plaintiff's requests to produce prisoner-witnesses without weighing *any* of the *Stone* factors. *Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982).

As for the Fourth and Tenth Circuits, the tests they applied, in two unpublished decisions, were not meaningfully different from that employed by the Seventh Circuit below. The Fourth Circuit assessed the criminal defendant's interest in the testimony of two prisoner-witnesses along with the costs of trans-

porting them to trial, and concluded that excluding the witnesses was not an abuse of discretion because their testimony would not have helped the defendant. See *United States v. Bagguley*, 838 F.2d 468, 1987 WL 35045, at *5-6 (4th Cir. 1987) (Mem.). And the Tenth Circuit upheld the denial of writs for the prisoner-plaintiff and the proposed prisoner-witnesses, holding that similar standards governed both and that their deposition testimony was an adequate alternative. See *Hawkins v. Maynard*, 89 F.3d 850, 1996 WL 335234, at *1-2 (10th Cir. 1996).

Further, the district court decisions cited by petitioner, see Pet. 19-20, cannot establish a circuit split and, regardless, their balancing is in step with the Seventh Circuit's. For example, in *Atkins v. City of New York*, 856 F. Supp. 755 (E.D.N.Y. 1994), the court found that the importance of the prisoner-witness's in-court testimony outweighed the limited expense of transporting him to trial. *Id.* at 757. Similarly, in *Greene v. Prunty*, 938 F. Supp. 637 (S.D. Cal. 1996), the court explained that it would consider both the prisoner-plaintiff's interest in the prisoner-witnesses' testimony and the security risks posed by their presence at trial when deciding a future request for a writ. *Id.* at 639. The Seventh Circuit weighed the same two factors in this case and found no abuse of discretion by the district court. Whatever minor differences exist among the analyses performed in these cases are too insignificant to constitute a conflict of authority.

## III. This Case Is A Poor Vehicle For Answering The Question Presented.

This case is not a suitable vehicle for resolving the question presented because neither Simmons nor Landers could have testified for reasons independent of the district court's decision to exclude them. And, in any event, the outcome of the case would have been the same regardless of the test applied because any error in excluding them was harmless.

Landers could not testify because he was not in custody and could not be found. Petitioner stated during a pretrial conference that he thought Landers had been released from prison. *Id.* at 101a. Respondents' counsel then reviewed the Department's records and confirmed that Landers's sentence had been discharged, meaning that he was not in prison or on parole. *Id.* at 102a. After the court directed respondents' counsel to provide Landers's last known address, "if that information's available," *ibid.*, counsel reported that the last address on file was a Cook County courthouse, Dist. Ct. Doc. 99-1. While petitioner volunteered at a later conference that Landers was in a Cook County jail, he gave no basis for that belief and likely confused Landers's last known address for his current one. See Pet. App. 34a. Had that been Landers's current address, respondents' counsel would have said so, as she did when providing other witnesses' addresses in the same document. See Dist. Ct. Doc. 99-1. The record thus establishes that the district court could not have issued a writ to compel Landers's production because he was not in custody when the trial occurred. See *United States v. Garrard*, 83 F.3d 889, 893 (7th Cir. 1996) (unlike a

subpoena, the writ "is directed to the custodian of the potential witness").

Simmons's location was similarly unknown. Petitioner speculated that he was in "[a] federal holding system or something," but never provided more information despite the court's admonition that it was necessary. Pet. App. at 38a-40a. While petitioner argued on appeal that the court should have done more to locate Simmons, who by then was in federal custody, 7th Cir. Docs. 54 at 29-30, 67 at 8-9, his vague statement about Simmons's whereabouts provided no basis for issuing a writ.

Regardless, Simmons could not have testified even if he were found because the information he would have provided was barred. See Pet. App. 11a. Petitioner advised the district court that Simmons was going to testify that Anderson had harassed petitioner prior to the alleged excessive force in retaliation for earlier grievances and complaints. *Id.* at 80a-81a. But the Seventh Circuit recognized that any testimony about those past grievances was barred as cumulative of the stipulation. See *id.* at 11a (noting exclusion of such testimony "was harmless because the judge's earlier ruling foreclosed that evidence"). Although petitioner argued on appeal that the district court abused its discretion when it made that ruling, see 7th Cir. Docs. 54 at 30-39, 67 at 2-4, the Seventh Circuit rejected that claim, see Pet. App. 9a-10a, and he did not renew that challenge in his petition for rehearing or now before this Court.

Petitioner's suggestion that the "single reason" the proposed witnesses did not testify was that neither could testify by video, Pet. 2, is therefore contradicted

by the record. Simmons's testimony was barred, Landers was not in custody, and neither could be found. The district court's statement about the lack of video technology at a county jail was made during the temporary confusion caused by petitioner's mistaken belief about Landers's location, see Pet. App. 34a, and followed by an explanation that Landers would not testify because he was not in custody and "no one knows" his address, Dist. Ct. Doc. 142 at 4. Thus, the fact that Simmons and Landers "were not available to testify by video," Pet. 25, was of no consequence because they could not have testified in person.

In addition, the Seventh Circuit concluded that any error in excluding Simmons and Landers was harmless because there was no basis for finding that they could have given better testimony than the inmate who testified at trial. Pet. App. 12a-13a. Petitioner faults the court for requiring too much of his offer of proof, Pet. 27, but he gave no indication that Landers would be a better witness than Mills, instead stating only that they were on the same gallery, see Pet. App. 100a. The harmlessness of any potential error presents yet another reason, in addition to the witnesses' inability to testify, to conclude that this case is a poor vehicle for answering the question presented.

## IV. The Question Presented Lacks Significance Because The Answer Will Rarely, If Ever, Impact The Outcome Of A Case.

Petitioner argues that the question presented is of great importance because how it is answered could determine the outcome of numerous prisoner civil rights actions. Pet. 28-30. But that contention rests

on the flawed premise that the Seventh Circuit adopted a test that ignores a litigant's interest in the prisoner-witness's testimony. As explained, the court expressly considered petitioner's interests when it held that there was no abuse of discretion. See Pet. App. 12a. There is thus no concern that district courts will now deny writs "with impunity," Pet. 21, as petitioner suggests.

In addition, there is little difference between the multi-factor balancing test outlined in *Stone* and the simplified analysis conducted by the Seventh Circuit. Both standards assess the litigant's interest in the prisoner-witness's presence at trial and the government's interest in maintaining his confinement. The possibility that a court could grant a writ under one standard but deny under the other is remote. Given how closely the tests are related, deciding between them will have hardly any effect on how future civil rights cases are litigated.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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