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

REPLY BRIEF FOR THE PETITIONER

RÉMI J.D. JAFFRÉ
KATHERINE A. ROSOFF
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

CLIFFORD W. BERLOW
Counsel of Record
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 840-7366
cberlow@jenner.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

REPLY BRIEF

Respondents concede that to the extent the Seventh Circuit held that a district court considering a request for an inmate to testify at trial need not consider both "core interests" highlighted by *Stone v. Morris*, 546 F.2d 730 (7th Cir. 1976), including the importance of the inmate's testimony to the case, the Seventh Circuit created a split of authority worthy of resolution by this Court. BIO 12-13, 15. But they nonetheless oppose the petition for a writ of certiorari because they believe the question presented may not be before the Court and because they believe this case presents a poor vehicle for this Court's review. These arguments lack substance. The district court *did* exclude Landers and Simmons from testifying without considering the importance of their proffered testimony, and the Seventh Circuit *did* affirm those rulings, going out of its way to expressly declare that consideration of the "core interests" of *Stone* is required only for plaintiff witnesses. Pet. App. 11a, 13a n.2.

To distract from the district court's undeniable failure to apply any sort of *Stone*-type balancing to Petitioner's witness requests, and from the Seventh Circuit's affirmation that the district court had no duty to do so, Respondents claim all is well because the Seventh Circuit engaged in the balancing the district court neglected to perform. BIO 10, 12. But even that is incorrect. At best, the Seventh Circuit mischaracterized the district court's decision as having balanced the relevant factors and declared that such a balancing would have been an appropriate exercise of discretion. Pet. App. 12a. Such a *post hoc* blessing of a hypothesized

discretionary balancing of interests does not change that Petitioner did not receive fair consideration of his request in the first instance by the district court.

As for Respondents' factual assertions that the two witnesses could not be located and that the district court would have excluded their testimony anyway, those contentions simply pile speculation upon inaccuracy, while brushing aside the district court's only stated—and indisputably improper—basis for not issuing the writs of *habeas corpus ad testificandum* for Landers and Simmons: that they were not available to testify by videoconference. Pet. App. 34a, 39a-40a. Ultimately, there is no escaping that the district court gave no other reason for excluding Landers and Simmons and did not consider the importance of their testimony. The Seventh Circuit blessed this approach and explained that *Stone*, which *does* require consideration of the relevant testimony's importance, does not apply when the requested inmate witness is not a party to the lawsuit.

The decisions below deprived Petitioner of the testimony of two crucial corroborating witnesses, one of whom was even expected to testify that he saw the very beating that formed the basis of Petitioner's claims. To remedy that inequity, certiorari is warranted.

I. THE QUESTION PRESENTED IS PROPERLY BEFORE THE COURT.

Respondents do not dispute that when the district court excluded Landers and Simmons, it never considered the importance of those witnesses' testimony to Petitioner's case, as was required by the *Stone* balancing test. The Seventh Circuit offered a similar

understanding of the district court's rulings, reporting that "[i]n both instances the [district] judge stated that the witnesses must testify, if at all, using video-conferencing technology. Because [Petitioner] did not produce video-conference addresses for Simmons and Landers, they did not testify." Pet. App. 10a-11a.

The Seventh Circuit nonetheless affirmed the district court, holding that the *Stone* test does not apply "to nonparty inmate witnesses." Pet. App. 11a. In doing so, the Seventh Circuit endorsed the district court's approach, thereby giving district courts throughout the Seventh Circuit license to exclude nonparty inmate witnesses based solely on the inconvenience of facilitating the testimony and without regard for that testimony's importance. As Respondents concede, that approach is at odds with the decisions of every other circuit to have considered the issue. *See* BIO 16-17. The legitimacy of that split with the settled approach of all the other courts of appeals thus is squarely before the Court.

1. Respondents insist that "[t]he Seventh Circuit did not depart from *Stone*." BIO 14. But not only did the Seventh Circuit expressly reject *Stone*, it devoted a paragraph to explaining why, in its view, the concerns animating its reaffirmance of *Stone* in *Perotti v. Quinones*, 790 F.3d 712 (7th Cir. 2015), "do not affect nonparty inmate witnesses." Pet. App. 11a. Then, after Petitioner pointed out in his petition for rehearing that the Seventh Circuit's decision conflicted with the Third Circuit's decision in *Jerry v. Francisco*, 632 F.2d 252 (3d Cir. 1980), the Seventh Circuit doubled down by amending its decision to add a lengthy footnote

disagreeing with *Jerry*, which it faulted for reaching its holding "without analysis and in a single sentence." Pet. App. 13a n.2. This would all have been unnecessary if the Seventh Circuit were adhering to *Stone* all along.

Against this backdrop, it is revealing that Respondents do not defend the *district court's* failure to give any weight to the importance of Landers's and Simmons's testimony. Instead, Respondents urge the Court to credit the *Seventh Circuit's* balancing of the relevant factors and to treat the Seventh Circuit's *post hoc* balancing as having cured the district court's error. *See* BIO 9-12, 14. For two reasons, this gets Respondents nowhere.

First, the Seventh Circuit never balanced the *Stone* "core interests," let alone made that balancing "the crux of its decision," as Respondents claim. *See* BIO 11-12. Instead, the Seventh Circuit stated, inaccurately, that the *district court* had balanced those interests—a position Respondents themselves are unwilling to take. *See* Pet. App. 12a ("The [district] judge determined that [Petitioner]'s interest in their testimony was outweighed by the expense and inconvenience of transporting them for trial…."). The record simply does not support that assertion.

Second, it would not have mattered if the Seventh Circuit had balanced the *Stone* "core interests" because the *Stone*-type balancing test that should have applied governs the district court's exercise of its discretion, not the circuit court's review of the district court's decision. Because the district court failed to apply the test, the circuit court should have remanded for the district court to exercise its discretion under the proper standard, not

substituted its own balancing analysis. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 386-87 (2008) (discussing balancing under Fed. R. Evid. 403).

In the end, the district court never applied any version of the *Stone* balancing test when it excluded Landers and Simmons from testifying at trial. By affirming that decision, the Seventh Circuit necessarily departed from *Stone*. Indeed, the Seventh Circuit was explicit in holding that *Stone* does not apply to requests for "nonparty inmates" to appear at trial, which it acknowledged put that court in conflict with the Third Circuit. Pet. App. 11a, 13a n.2.

2. The Petition explains that *Stone* and the similar tests adopted by other circuits provide the framework for district courts to determine whether it is "necessary" to bring an inmate to appear at trial under 28 U.S.C. § 2254(c)(5). *See* Pet. 5-6. It further explains that Federal Rule of Civil Procedure 43(a) governs the separate issue of the manner in which trial witnesses' testimony will be delivered. *See* Pet. 7. These provisions thus require that a district court should first determine whether the inmate witness's proposed testimony is "necessary" under Section 2254(c)(5), by performing a *Stone*-type balancing and considering the importance of the testimony to the case and, only if it determines that the testimony is "necessary," should it move on to consider whether "good cause," "compelling circumstances," and "appropriate safeguards" exist to permit testimony by video under Rule 43(a). *See* Pet. 7.

In Respondents' view, however, these two inquiries may be merged and the "necessity" of testimony may be

resolved based upon whether videoconferencing is available. BIO 13-15. That is inconsistent with the text of both Section 2254(c)(5) and Rule 43(a). Whether an inmate's testimony is "necessary" does not depend on whether it can be delivered by video. As for Rule 43(a), it expresses a strong preference for live, in-person testimony, with testimony by video permitted only "[f]or good cause in compelling circumstances and with appropriate safeguards[.]" Fed. R. Civ. P. 43(a). Respondents' position turns that preference on its head by permitting a district court to refuse to call a witness unless he testifies by video, as the district court did here.

In sum, the district court excluded Landers and Simmons by failing to consider the importance of their testimony, transforming the inquiry as to whether their testimony was "necessary" under Section 2254(c)(5) into an inquiry as to whether they were able to testify by video. The Seventh Circuit endorsed that approach, expressly rejecting the *Stone* framework. The question presented thus is properly before the Court.

II. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Notwithstanding that the district court provided a single reason for excluding the testimony of Landers and Simmons—that they were not available by videoconference—Respondents attack the suitability of this case as a vehicle for review by arguing that the district court could have excluded their testimony for a variety of other reasons. This Court should not credit any of this unfounded theorizing.

1. Respondents do not dispute that the subject of Landers's proposed testimony went to the very core of Petitioner's excessive force and retaliation claims. Landers was housed on the same gallery as Petitioner and Petitioner proffered to the district court that Landers was an eyewitness to the excessive force that was used against Petitioner on March 24, 2011. *See* Pet. App. 100a. Indeed, at the final pretrial conference, the district court acknowledged that Landers was "going to testify to excessive force" used against Petitioner. Pet. App. 34a. But the district court nevertheless excluded him, expressly stating that Landers was "off since he is at Cook [County Jail] and there is no video there." *Id.* The district court did not give any other reason on the record for its ruling.[1]

Seeking to evade the clarity of the record, Respondents speculate, based on statements made at another pretrial conference held several weeks before the district court excluded Landers, that Landers was actually excluded because he was not in custody and

---

[1] Defendants briefly allude to the district court's statement on the first day of trial that Landers and three other witnesses were not available because "no one knows their address and they are not within the Department of Corrections." Dist. Ct. Dkt. 142 at 4 (trial transcript) (cited at BIO 20). But that statement was inaccurate not only as to Landers but as to two of the other witnesses as well, and thus likely reflected confusion, or at least some imprecision, on the district court's part. Specifically, Thomas Turnage was not called at trial because Petitioner conceded that he could not afford to subpoena Turnage—not because Turnage's address was unknown. Pet. App. 31a, 37a-38a. Timothy Little was not called because Petitioner told the court at an earlier pretrial conference that Little could be taken off the witness list. Pet. App. 104a.

could not be found.[2] BIO 18-19. But when Petitioner told the district court at the final conference that Landers was at the Cook County Jail, counsel for Respondents did not contradict him. *See* Pet. App. 34a. Indeed, counsel for Respondents stood silently as the district court adopted that fact as the express basis for its ruling. *See id.* It is much too late now for Respondents to retract that concession.

In any event, the record does not support Respondents' hypothesizing. As Respondents correctly note, they filed a notice of compliance with the district court two weeks before the final pretrial conference, which provided a Chicago address for Landers that was the address of the Cook County Leighton Criminal Courts Building: 2650 S. California Ave.[3] Dist. Ct. Dkt. 99-1. The Cook County Jail is next door, at 2700 S. California Ave.[4] The record does not indicate whether this filing was the basis for Petitioner's assertion that Landers was located at the Cook County Jail. But if it was, that was an entirely reasonable conclusion for Petitioner to draw, especially given that he could not confirm that conclusion independently. Respondents do

---

[2] At that earlier conference, Petitioner did not state "that he thought Landers had been released from prison," as Respondents claim. BIO at 18 (citing Pet. App. 101a). He stated that Landers "might not be in custody anymore," that Landers's "info [was] unknown," and that he was relying on Respondents to confirm Landers's whereabouts. Pet App. 101a.

[3] *See* www.cookcountystatesattorney.org/about/locations/leighton-criminal-courts-building.

[4] *See* www.cookcountysheriff.org/cook-county-department-of-corrections.

not explain why Landers's address was listed in their records as a criminal courthouse adjacent to a jail if Landers was not in fact in custody there. Indeed, Respondents' silence at the July 29 conference indicates that they too understood that Landers was in custody at the Cook County Jail. Far from casting doubt on Landers's location, the extracts from the record described by Respondents confirm it.

Respondents also are wrong to suggest that Landers was properly excluded because Petitioner "gave no indication that Landers would be a better witness than Mills," who testified on the same topic at trial but hardly remembered the relevant events. BIO 20; *see* Pet. 12. Petitioner warned the district court that Illinois Department of Corrections regulations prevented him from contacting Mills to determine how Mills would testify. Pet. App. 32a. Landers was projected to provide crucial testimony as a witness to the excessive force that was central to Petitioner's case. Given the importance of that testimony, and the uncertainty around how Mills would testify, it would have been premature for the district court to exclude Landers on the basis of cumulative testimony before Mills had in fact testified.

2. Simmons's expected testimony was important as well. Petitioner expected Simmons to testify that Respondent Anderson had repeatedly threatened to issue false disciplinary charges and use excessive force against Petitioner. *See* Pet. App. 81a. That testimony was directly relevant to Petitioner's central allegation that Anderson carried out those threats on March 24, 2011.

The district court nonetheless excluded Simmons upon hearing from Petitioner that he was in federal custody, stating that "[o]n the day of trial, unless we have a video address for him, he won't be called." Pet. App. 38a-40a. The district court thus expressly conditioned Simmons's testimony on the availability of videoconferencing technology. And the district court once again failed to consider the importance of Simmons's testimony.

Respondents again miss the mark by claiming that Simmons could have been excluded because he could not be located. BIO 19. The district court stated that Simmons would not testify unless a *video* address for him was provided. Pet. App. 40a. Further, Simmons could have been located by using the Federal Bureau of Prisons online inmate locator tool,[5] but Petitioner could not do this himself because, as he told the district court, he did not have access to a computer. Pet. App. 39a. In other words, Petitioner's inability to provide a precise address for Simmons resulted from conditions imposed on Petitioner *by Respondents* due to his status as an inmate.

Respondents' alternative argument—that the district court would have barred Simmons's testimony anyway, *see* BIO 19—is again based on conjecture as to how the district court might have ruled rather than on the district court's actual rulings. Petitioner repeatedly

---

[5] The tool is available at www.bop.gov/inmateloc. A search performed on October 25, 2019 indicates that a Kiante M. Simmons is currently incarcerated at the Hazelton Federal Correctional Institution in Bruceton Mills, West Virginia.

made the district court aware of the expected subject of Simmons's testimony, *see* Pet. App. 81a, 108a, and the district court nevertheless was prepared to allow him to testify if Petitioner provided a video address, Pet. App. 40a. Respondents' claim that Simmons could not have testified even if he was available by video is thus nothing more than unfounded speculation.

Nor are Respondents correct that Simmons's testimony would have been cumulative of the stipulation entered into by the parties and read to the jury at trial. *See* BIO 19. The stipulation stated only that Petitioner had previously complained and filed grievances about Respondent Anderson's threatening behavior. *See* Dist. Ct. Dkt. 142 at 42-43 (trial transcript). It did not state that Anderson had *actually* threatened Petitioner—indeed, it expressly admonished the jury that "[t]his stipulation does not in any way concede that [Petitioner]'s complaints and grievances were true[,] only that they were made by [Petitioner]." *Id.* at 43. Because Simmons was expected to testify that Petitioner's complaints about Anderson's behavior were in fact true, his testimony was not cumulative of the stipulation. If anything, the testimony would have bolstered Petitioner's credibility with the jury by refuting the picture Respondents tried to draw of Petitioner as a dishonest witness and serial filer of baseless complaints.

* * *

Both Landers's and Simmons's expected testimony were critical to Petitioner's claims. But the district court did not account for the importance of that testimony when it excluded both of these witnesses. The district

court's rulings thus deprived Petitioner of crucial testimony and prevented him from fairly presenting his case to the jury. For these reasons, the question presented bears directly on Petitioner's entitlement to relief, making this case an excellent vehicle to resolve it.

CONCLUSION

The petition for a writ of certiorari should be granted.

October 28, 2019

Respectfully submitted,

RÉMI J.D. JAFFRÉ
KATHERINE A. ROSOFF
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

CLIFFORD W. BERLOW
Counsel of Record
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 840-7366
cberlow@jenner.com