No. _____ (CAPITAL CASE)

# In the Supreme Court of the United States

SHELTON DENORIA JONES,
*Petitioner*,
vs.

LORIE DAVIS, Director, Texas Department of Criminal Justice,
Correctional Institutions Division
*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) In a federal habeas corpus proceeding where the state court did not hold a hearing or receive evidence to adjudicate facts on a claim, has the habeas applicant "failed to develop the factual basis" of the claim within the meaning of 28 U.S.C. § 2254(e)(2) because the evidence he relied on for summary judgment purposes in federal court was not presented to the state court?

(2) Whether, as a matter of law, uniformed police officers attending the trial of a person accused of killing a police officer must actively create a disturbance before their collective presence in a courtroom can create inherent prejudice to a defendant's right to a fair trial?

## PARTIES TO THE PROCEEDINGS BELOW

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the district court's grant of summary judgment is published as *Jones v. Davis*, 890 F.3d 559 (5th Cir. May 15, 2018), and is attached as Appendix 1. The unpublished memorandum opinion of the district court granting summary judgment is attached as Appendix 2.

## JURISDICTION

The district court had jurisdiction over the habeas cause under 28 U.S.C. §§ 2241 & 2254. The district court granted a certificate of appealability and thus the Fifth Circuit possessed jurisdiction pursuant to 28 U.S.C.§ § 1291 & 2253. This Court has jurisdiction to review the opinion pursuant to its authority to issue writs of certiorari. 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Fourteenth Amendment to the U.S. Constitution provides, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2254(e)(2) provides in relevant part, "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim. . . ."

## STATEMENT OF THE CASE

This case arises from the adjudication of an application for a writ of habeas corpus by the United States District Court for the Southern District of Texas. Shelton Jones, the habeas applicant, was accused of shooting and killing an on-duty Houston Police Department (HPD) officer, Bruno Soboleski.

### A. Trial Proceedings

In the court below, Jones alleged in his application that the shooting, arrest of Mr. Jones, and subsequent court proceedings generated a large amount of pre-trial publicity. ROA.557; ROA 669-711. Sergeant Soboleski was the third Houston police officer to have been killed in a ten-month period. ROA.558. To mourn Sgt. Soboleski's passing, HPD officers placed black tape or cloth over their badges. ROA.558. Some were embroidered with the motto, "Nemo me impune lacessit," which means, "No one assails me with impunity." *Id*. The Houston Post editorialized about the "brutal slaying" after Soboleski died from his wounds, demanding that capital murder

charges be filed against Mr. Jones, adding, "Certainly, the facts seem clear-cut enough." ROA.559.

Sgt. Soboleski's funeral on April 16, 1991, was covered by the Houston media. About 2,500 people attended, and the service contained "angry" criticism of the state's criminal justice system. ROA.559. Then-Police Chief Elizabeth Watson told the Houston Post, "It's an opportunity for all of us to be reminded that we're in this together. We're hearing growing concern as more and more officers fall in the line of duty. It's only when we get angry will we come together and make a difference." ROA.560.

Following the charged memorial service for Sgt. Soboleski, the Houston Post, one of Houston's two major new periodicals at the time, published two letters to the editor concerning Sgt. Soboleski's death. One of those letters advocated lynching Mr. Jones:

> The two men who shot [Officer Soboleski] should get a fast trial and then be put out of circulation of the rest of time.
>
> I know they don't do that in Texas anymore, but a tall tree and short rope would be very appropriate.

ROA.560. Mr. Jones accordingly moved to change venue out of Harris County, Texas, but his request was denied. Cl. R. Vol. I: 62-65, 70-74.

Every day, numerous uniformed Houston police officers attended Mr. Jones's trial. Officers arrived to the courtroom early and reserved seats in the first two rows nearest the jury box. ROA.713. When seating became fully occupied, uniformed officers lined the courtroom walls in the rear and side. *Id*. On the first day of trial

there were twelve to fifteen uniformed officers in the courtroom at the same time throughout the day. *Id*. Although the numbers thereafter varied, there was a constant presence of uniformed officers each day. *Id*.; ROA.717. Witness estimates range from 25% to 33% of the entire gallery at any given time occupied by uniformed officers. ROA.742; ROA.745; ROA.750.

After Mr. Jones was found guilty but before sentencing, HPD officer Jason Draycott sent a message through the media that a sentence of life in prison by the jury "would be a slap in the face of Houston's police officers":

> "I'm going to be happy with a death sentence, absolutely. With a life in prison (sentence), I don't think I'd be happy with that at all. I don't think any officer would be, or even citizens."

ROA.560–61. At the beginning of the sentencing phase, there were twelve or more uniformed officers in attendance. ROA.713. Their presence increased throughout the hearing, peaking during closing argument. *Id*.

Media accounts confirm the witness accounts. A Houston Chronicle article reported that eighteen uniformed Houston police officers were in the courtroom at the time the sentence of death was read. ROA.555. The Houston Post reported that, following the death verdict, "a sea of blue uniforms filled the courtroom and a collective 'Yes!' rippled through the spectators…." *Id*. Mr. Soboleski's wife "said she was grateful for the officers who crowded Densen's courtroom for most of the trial." *Id*. Photographs taken by news media confirm these accounts. *Id*.

Contemporaneous objections to the courtroom atmosphere in light of the continual presence of so many uniformed police officers were made both on and off

the record. ROA.711; S.F. Vol. 31: 54-55. During the morning of the first full day of testimony in the punishment phase of the case, defense counsel objected on the record,

> Your Honor, we would object to the presence of all these uniformed officers being in this room at this time. They have been packing the courtroom since the inception of this trial, and I think their proximity to the jurors intimidates the jurors and puts undue pressure on them. It lets the jurors know the only acceptable verdict is guilty and that the only acceptable verdict in this phase is going to be death. I think he's being denied his right to a fair trial and we would ask, Your Honor, that you ask these officers in uniform to step outside. I believe, as you can see, there are one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve officers in the courtroom and I think that is in violation of his Eighth Amendment right for a fair trial, Your Honor. We would ask these officers be asked to step outside.
>
> I know we have an open courtroom, Your Honor, but they can come back if they come in civilian clothes so that they don't put that type of undue pressure on the jury.

S.F. Vol. 31: 54-55. The objection was overruled, and the uniformed police officers remained in the courtroom, increasing in number until a death verdict was returned. *Id.*; ROA.713.

The courtroom in which the trial occurred was a small room in which the front row of seats occupied by police throughout the trial is only six feet from the jury box. ROA.729-38. The spectator area of the courtroom had five rows of pews that seated approximately 60 people. ROA.741.

**B. State Collateral Proceedings**

Mr. Jones filed timely filed an amended habeas corpus application in state court on July 28, 1998. That same day, Mr. Jones filed a document entitled "Errata and Corrections to Amended Application for Post-Conviction Writ of Habeas Corpus"

("Errata"). S.H.Tr. at 208-21. The document contained a list of various grammatical omissions and errors, and also included the entire text of a fair trial claim that had been omitted from the Amended Application by a computer error.[1] The fair trial claim alleged that Mr. Jones's confinement was unlawful because the pervasive hostile and prejudicial atmosphere in the courtroom—specifically, the presence of numerous uniformed police officers and extensive negative pretrial publicity—rendered the trial unfair and violated due process Subsequently, on October 27, 1997, and with permission of the trial court, Mr. Jones filed a single document that combined the Errata and Amended Application into one document for ease of reading and comprehension. The unified pleading contained no substantive changes.

No action occurred on the application for several years thereafter, during which time the counsel of record for the State as well as the trial court judge changed. On October 2, 2002, the trial court ruled it would not hold a hearing on the claims, thereby prohibiting Mr. Jones the opportunity of submitting evidence to prove any of the allegations made in his application. In 2003, the new assistant district attorney mistakenly proposed to the state trial court as a legal finding—and the trial court mistakenly adopted as a finding—that Mr. Jones's fair trial claim had not been presented until October 24, 1997 (the date the unified pleading had been filed), and therefore constituted a subsequent application for writ of habeas corpus that the court was without jurisdiction to consider absent authorization from Texas's highest

[1] Notably, the affidavits that supported the fair trial claim had been filed in the Amended Application because they were not implicated by the computer error.

criminal court, the Court of Criminal Appeals ("CCA"). After recommending denial of relief on the remaining claims, the trial court transferred the case to the CCA for decision.[2] The CCA, also not realizing the error, adopted the trial court's mistaken finding about when the claim was filed, found the claim to have been not timely raised, and dismissed it without adjudicating its merit.[3] Order, *Ex parte Jones*, No. WR-62,589-02 (Tex. Crim. App. Oct. 26, 2005).

**C. Proceedings Below**

On July 9, 2009, Mr. Jones filed an amended application for writ of habeas corpus in the United States District Court for the Southern District of Texas raising, *inter alia*, the fair trial claim. ROA.553–61. Although additional detail was provided, the factual allegations were coextensive with those made in state court in substance, *i.e.*, that numerous uniformed officers in the courtroom combined with negative pretrial publicity created inherent prejudice to Mr. Jones's right to a fair trial. In anticipation of a motion for summary judgment, Mr. Jones submitted various documentary exhibits, including certain media articles documenting the negative pretrial publicity.

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[2] In Texas, trial courts do not rule on habeas corpus applications. They are original to the CCA, and the CCA decides them in the first instance.

[3] The Fifth Circuit would later rule that the state court's dismissal of the claim was inadequate to impose a procedural default, because it was based on a misapprehension of the state court record about when the claim had first been filed. *See* App. 3. Thus, when Mr. Jones raised the claim in a federal habeas application, it was exhausted, but not adjudicated on the merits by the state court. In short, federal review was plenary and unconstrained by preclusion contained in 28 U.S.C. § 2254(d).

The Director answered and sought summary judgment on the ground that Mr. Jones's fair trial claim was procedurally defaulted because the CCA had dismissed the claim on the ground that Mr. Jones had not raised the claim in conformity with state procedural law, and that such ruling constituted an independent and adequate state ground. ROA.1548–52. The district court originally agreed with the Director's argument and held Mr. Jones's fair trial claim to be procedurally defaulted. ROA.1941. The district court's procedural default ruling was reversed by the Fifth Circuit on appeal, *Jones v. Stephens*, 612 Fed.Appx. 723, No. 14-70007 (5th Cir. May 20, 2015) (attached as Appendix 3), which found the procedural dismissal predicated on the state courts' erroneous understanding of the record to be inadequate. The case was remanded to the district court for consideration of the claim's merit. As the state court did not adjudicate the claim's merit, § 2254(d)'s preclusion bar did not apply and the federal court's review was to be plenary.

On July 7, 2015, and following remand, the district court issued an order directing the parties to file updated briefing on the fair trial claim. ROA.2169. The parties filed updated briefs on September 8, 2015. ROA.2205; ROA.2210. The district court issued a memorandum opinion and order on October 28, 2015, granting summary judgment to the Director on Jones's fair trial claim. The court held that the Director was entitled to summary judgment on the fair trial claim because (1) the trial occurred in a large city; (2) Jones "pointed to no evidence" that any juror had a friend or relative who was a police officer; and (3) there was "no evidence" that "anything resembling the facts that led to a finding of inherent prejudice in *Woods* [*v.*

*Dugger*, 923 F.2d 1454 (11th Cir. 1991), ]was present in this case." ROA.2235. The court further observed, simply, that there was "nothing to suggest" that the presence of the uniformed police officers and the pretrial publicity surrounding the trial "had any undue influence or effect on the jury." ROA.2235–36. Finding Mr. Jones's claim nevertheless to be a substantial one, the court granted a certificate of appealability (COA). ROA.2238.

On appeal, Mr. Jones argued, *inter alia*, that in making its summary judgment decision the district court had failed to consider the totality of the circumstances. Instead, the district court had simply analyzed whether Jones's factual allegations exactly matched those involved in another case in which relief had been granted, along with some irrelevant factors like whether any jury members "knew" any police officers.[4] Because a reasonable fact-finder could have inferred from the facts Mr. Jones alleged and the summary judgment materials he submitted that the courtroom atmosphere unduly influenced the jurors, Jones argued, summary judgment had been improperly granted.

The Fifth Circuit affirmed in a published opinion. The Fifth Circuit first held that certain summary judgment materials Jones had submitted in support of allegations of pre-trial publicity should not be considered under 28 U.S.C. § 2254(e)(2) because Jones was not "diligent in attempting to present the media reports in the

[4] As the Fifth Circuit determined, and as an indication of the carelessness with which the district court decided the case, the district court's (irrelevant) factual finding in this regard was clearly erroneous, as several members of the jury *did* individually know police officers. *See* App. 1 at 16.

state proceeding." App. 1 at 7-8. Although the district court did not purport to exclude consideration of any evidence when it granted summary judgment, the Fifth Circuit held that the "lengthy delay" between when the articles were published (1991) and when Mr. Jones filed them in federal court (2009) "does not constitute due diligence." *Id*. at 9. Thus, notwithstanding that the state court had not held a hearing to receive any evidence—and had denied Mr. Jones's request for a hearing—the Fifth Circuit held Mr. Jones "failed to develop the factual basis" of the claim in state court and it would not consider the reports. *Id*.

Having excluded consideration of Mr. Jones's allegations and evidence related to pretrial publicity, the court affirmed the district court's grant of summary judgment to the Director, because (1) other courts had declined to find the "mere presence" of officers in a courtroom sufficient to support inherent prejudice; and (2) "the record before us" did not suggest the police presence "intimidated the jury or disrupted the fact-finding process in any way." *Id*. at 16-17. The court alternatively held that, even considering the pretrial publicity, "the scene presented does not support a finding of inherent prejudice" because, as a matter of law, "the presence of uniformed officers observing a criminal trial in solidarity with a fallen officer" does not pose an unacceptable threat to a defendant's right to a fair trial.

## REASONS FOR GRANTING THE WRIT

### I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT SPLIT BETWEEN THE FIFTH CIRCUIT AND ALL OTHER CIRCUITS ABOUT WHEN A HABEAS APPLICANT HAS FAILED TO DEVELOP THE FACTUAL BASIS OF A CLAIM UNDER 28 U.S.C. § 2254(E)(2)

The Antiterrorism and Effective Death Penalty Act ("AEDPA") modified rules governing the conditions on which federal district courts adjudicating claims raised in a habeas corpus application could consider evidence. The Act moved the deference provision of § 2254(d) to § 2254(e), and then amended it to provide, in relevant part: "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim" unless certain conditions are present. 28 U.S.C. § 2254(e)(2). Straightforwardly, the provision prohibits a federal court from holding an evidentiary hearing on a claim where an applicant "failed to develop" its "factual basis" in state court.

Although Mr. Jones's case was decided on summary judgment by the district court, the Fifth Circuit held that, even in this context, certain discrete pieces of documentary evidence should not have been considered under § 2254(e)(2) because Mr. Jones was at fault for failing to develop the factual basis of the claim in state court. *Cf. Holland v. Jackson*, 542 U.S. 649, 653 (2004) (where applicable, § 2254(e)(2)'s prohibition against holding an evidentiary hearing applies "a fortiori" to consideration of evidence by expansion of the record under Habeas Rule 7). While it is not entirely clear what the applicability of § 2254(e)(2) is to the district court's summary judgment, the ruling nevertheless presents an obstacle to further

consideration of Mr. Jones's claim should he be entitled to further review. In making the ruling, the Fifth Circuit has placed itself as the lone federal circuit court to hold that an applicant is at fault for an undeveloped state court record even where the state court did not hold an evidentiary hearing and, indeed, did not even adjudicate the claim's merits due to a procedural ruling that was later determined to be inadequate to preclude federal review.

### A. All Circuit Courts Other Than the Fifth Circuit Do Not Hold a Habeas Applicant at Fault for the Failure to Develop the State Court Record When the State Court Has Not Held an Evidentiary Hearing for Reasons Unrelated to the Prisoner's Diligence

In *Williams v. Taylor*, 529 U.S. 420 (2000), the applicant filed a habeas corpus application raising, *inter alia*, three claims which had not been presented to the state court. The Commonwealth had argued that the mere absence of any of the facts in the state court record that were alleged in federal court to support the three new claims meant § 2254(e)(2) barred the federal court from holding an evidentiary hearing on any of those claims. *Id*. This Court rejected that interpretation of the statute, holding instead that a failure to develop the factual basis of a claim does not exist "unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id*. at 432. "Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id*. at 437.

All the courts of appeals other than the Fifth Circuit interpret and apply § 2254(e)(2) in a manner consistent with *Williams*. Each applies a rule that a habeas

applicant has not failed to develop the factual basis of a claim where the state court does not hold an evidentiary hearing and the applicant is not at fault for that result. *See Dugas v. Coplan*, 506 F.3d 1, 7 (1st Cir. 2007) (applicant did not fail to develop factual basis of claim where lack of factual development was due to the state court's decision not to reach the issue); *Fulton v. Graham*, 802 F.3d 257, 266 (2d Cir. 2015) (applicant did not fail to develop factual basis of claim where sought evidentiary hearing in compliance with state law but state court did not hold hearing); *Morris v. Beard*, 633 F.3d 185, 196 (3d Cir. 2011) (applicant not at fault for failure to develop state court record because the state court failed to hold a hearing and rule on claim "for some reason unrelated to [applicant's] diligence"); *Winston v. Kelly*, 592 F.3d 535, 553 (4th Cir. 2010) (section 2254(e)(2) did not prohibit evidentiary hearing where state court denied evidentiary hearing); *Couch v. Booker*, 632 F.3d 241, 245 (6th Cir. 2011) (applicant's unsuccessful attempt to obtain evidentiary hearing in state court meant that §2254(e)(2) did not bar a hearing); *Carter v. Duncan*, 819 F.3d 931, 943 (7th Cir. 2016) (applicant did not fail to develop factual basis where he acted in the manner envisioned by the state postconviction procedure and state court denied evidentiary hearing); *Perez v. Rosario*, 459 F.3d 943, 953 (9th Cir. 2006) (applicant did not fail to develop factual basis of claim where evidentiary hearing was denied by state court); *Barkell v. Crouse*, 468 F.3d 684, 696 (10th Cir. 2006) (section 2254(e)(2) did not bar evidentiary hearing where applicant "not at fault in failing to obtain an evidentiary hearing in state court"); *Pope v. Sec'y for Dep't of Corr.*, 680 F.3d 1271, 1289 (11th Cir. 2012) ("In general, our precedent says that when a petitioner

requested an evidentiary hearing at every appropriate stage in state court and was denied a hearing on the claim entirely, the petitioner has satisfied the diligence requirement for purposes of avoiding Section 2254(e)(2).").

### B. The Fifth Circuit Has Adopted a Strict Liability Rule for Section 2254(e)(2) Such That a Prisoner Will Be Held to Lack Diligence Any Time the State Court Record Is Undeveloped

In this case, the Fifth Circuit ruled in its published opinion that Mr. Jones was at fault for failing to develop the factual basis of his fair trial claim within the meaning of § 2254(e)(2), notwithstanding that (1) the claim was erroneously deemed untimely by the state court due to a misapprehension about the state court record; (2) as a result, no evidentiary hearing on the claim was ordered despite Mr. Jones's request for one, nor was the claim's merit ever adjudicated (even summarily on the pleadings); and (3) the procedural rule the state court applied to dismiss the claim was deemed inadequate under federal law to preclude federal habeas review. In doing so, the Fifth Circuit has effectively adopted the same kind of strict liability rule or "no-fault reading of the statute" that this Court rejected in *Williams*. 529 U.S. at 431.

As a consequence of this published opinion, federal habeas applicants in the Fifth Circuit will be barred from a federal hearing on their claims any time the state court record is undeveloped, and for any reason at all, while habeas applicants in all other Circuits will not be barred from hearings to present evidence in support of claims on which the state court chose not to hold a hearing to allow the record to be developed for reasons unrelated to the prisoner's diligence. The Court should grant

certiorari to correct the Fifth Circuit and ensure the uniform application of federal statutes.

## II. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE FIFTH CIRCUIT'S UNIQUE GLOSS ON THE RIGHT TO A FAIR TRIAL AND TO A VERDICT BASED ONLY ON THE EVIDENCE INTRODUCED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

The Sixth and Fourteenth Amendments guarantee a criminal defendant the right to a fair trial. *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986); *Estelle v. Williams*, 425 U.S. 501, 503 (1976). The basic principle defining the right to a fair trial is that a criminal defendant is entitled to a verdict based only upon the evidence introduced at trial. *Holbrook*, 475 U.S., at 567. *See also Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) ("This Court has declared that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (holding that the verdict must be based upon the evidence developed at trial "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies"). Accordingly, courts must guard against "factors that may undermine the fairness of the fact-finding process." *Williams*, 425 U.S., at 503. *See also Cox v. Louisiana*, 379 U.S. 559, 562 (1965) (noting that a state should "adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence").

To prevail on a fair trial claim in habeas corpus, a prisoner must show either actual or inherent prejudice. *Flynn*, 475 U.S., at 572. The standard for determining when a particular courtroom occurrence is inherently prejudicial is whether "an unacceptable risk is presented of impermissible factors coming into play." *Flynn*, 475 U.S., at 570-71; *Williams*, 425 U.S., at 505. A risk becomes unacceptable when a probability of deleterious effects exists. *Williams*, 425 U.S., at 504. Courts should examine inherently prejudicial practices with close judicial scrutiny, because "the actual impact of a particular practice on the judgment of jurors cannot always be fully determined." *Id. See also Flynn*, 475 U.S., at 568. Courts must evaluate the probability of deleterious effects based on reason, principle, and common human experience. *Williams*, 425 U.S. at 504. In performing this analysis, courts should examine the totality of circumstances. *Sheppard v. Maxwell*, 384 U.S. 333, 352 (1966).

In its published opinion in this case, the Fifth Circuit alternatively considered whether Mr. Jones had stated a claim for relief that his right to a fair trial was violated under the Sixth Amendment that took into account the media reports it held should not be considered. In doing so, the court required, as a matter of law, a prisoner to allege active disruption of the proceeding, at least where the allegations of inherent prejudice concern the coordinated presence of uniformed law enforcement officers in the courtroom.

The court held that, to state a claim for relief under the Sixth Amendment, an applicant must allege (1) harassing publicity; (2) the existence of a "carnival atmosphere;" (3) "considerable disruption" occurring in the courtroom; or (4) that the

trial judge "lost his ability to supervise [the trial] environment."[5] App. 1 at 18. The court adopted a per se rule "that the presence of uniformed officers observing a criminal trial in solidarity with a fallen officer" cannot give rise to a Sixth Amendment fair trial claim absent active disruption of the trial by them.[6] *See* App. 1 at 17 (concluding inherent prejudice could not be found because the record "does not suggest the police presence intimidated the jury or disrupted the fact-finding process in any way"). In making these rulings, the court has placed a legal gloss on the Sixth Amendment right to a fair trial which has put itself in conflict with the Eleventh Circuit. *See Woods v. Dugger*, 923 F.2d 1454 (11th Cir. 1991) (the coordinated presence of uniformed correctional officers in a courtroom created inherent prejudice to the defendant's Sixth Amendment right to a fair trial notwithstanding the lack of any active disruption).

In *Woods*, the Eleventh Circuit concluded,

> The officers in this case were there for one reason: they hoped to show solidarity with the killed correctional officer. In part, it appears that they wanted to communicate a message to the jury. The message of the officers is clear in light of the extensive pretrial publicity. The officers

[5] Notwithstanding this gloss, it is problematic that the court below did not view as "harassing publicity" the publication of a letter to the editor in a major local newspaper calling for Mr. Jones to be lynched.

[6] Mr. Jones would not dispute that police officers may attend a criminal trial in solidarity with a fallen officer. There would be nothing problematic about any number of officers attending the trial in plain clothes. There is an obvious difference, however, between police officers attending a trial as private citizens in solidarity with a fallen officer and a coordinated effort to show, specifically, *State* solidarity by attending in uniform and in an official capacity. The Houston Police Department in this case was not merely a passive entity. It was the agency that investigated the case and, therefore, a member of the prosecution team itself. *See, e.g., Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir. 1977) (state law enforcement officer was member of the prosecution team).

> wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message.

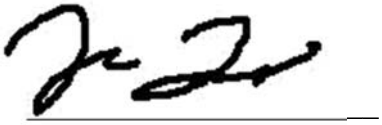
*Id*. at 1459-60. Mr. Jones's case is not meaningfully distinguishable from *Woods* in any way that detracts from his claim. The Fifth Circuit attempted to distinguish *Woods* on the specious ground that Houston is one of the largest cities in the country, whereas the trial in *Woods* occurred in a small community. App. 1 at 18. It is difficult to see how this distinction affects whether the coordinated presence of the uniformed officials communicates a message to the jury. Moreover, the one meaningful distinction between the cases runs heavily in Mr. Jones's favor. In Woods, the uniformed officers were correctional officers who were powerless to affect the lives of the jurors. In Mr. Jones's case, the uniformed officers were police officers who did hold power to potentially affect the juror's lives should they not receive the intended message. In this way, the potential influence on the jury of the coordinated presence of uniformed officers was far greater in this case than in *Woods*.

Because the Fifth Circuit has adopted a gloss on the Sixth Amendment right to a fair trial requiring active disruption beyond coordinated state activity intended to send a message to the jury, Mr. Jones will not get a new trial while the *Woods* applicant did. Accordingly, the Court should grant certiorari to correct the Fifth Circuit's misapplication of the Sixth Amendment and to resolve the conflict between the Fifth and Eleventh Circuits.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition. The Court should further summarily reverse the Fifth Circuit and remand for further proceedings.

Respectfully submitted,



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