No. 18-5980

IN THE

Supreme Court of the United States

SHELTON DENORIA JONES,
Petitioner,

v.

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

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This is a capital case.

QUESTIONS PRESENTED

In the federal district court, as relevant to this brief, Jones raised a fair-trial claim, submitted media-related evidence with his petition, and requested the opportunity to conduct discovery to support that claim. The Director argued that since Jones did not present that evidence in state court, the evidence was barred from consideration under 28 U.S.C. § 2254(e)(2). Both the district court and the Fifth Circuit Court of Appeals agreed and found that Jones did not diligently develop the factual basis of the fair-trial claim.[1] Thus, without consideration of the media accounts presented for the first time in federal court, the district court determined that Jones's fair-trial claim did not warrant habeas relief. The Fifth Circuit affirmed the district court's finding that § 2254(e)(2) barred the court's consideration of the media-related evidence presented for the first time in Jones's federal habeas petition and determining, that, even assuming that the court could consider such evidence, the fair-trial claim fails.

(1) In a federal habeas corpus proceeding where the applicant did not avail himself of all state procedures to investigate claims in collateral proceedings in a capital case, and the state court, having received evidence in the form of affidavits, did not hold a live evidentiary hearing, has the applicant failed to develop the factual basis within the meaning of 28 U.S.C § 2254(e)(2) because the evidence he relied on for summary judgment purposes was not presented to the state court?

(2) Whether the presence of uniformed police officers at the trial of a person accused of killing a police officer is sufficient to create inherent prejudice to the defendant's right to a fair trial?

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[1] Prior to the district court's ruling that prompts Jones's present petition, he was granted a new sentencing trial pursuant to a claim under *Penry v. Lynaugh*, 429 U.S. 302 (1989). Therefore, the fair-trial claim relates only to the guilt phase of the trial.

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Petitioner-Appellant Shelton Jones was convicted and sentenced to death for the capital murder of Officer Bruno Soboleski. For no apparent reason, Jones shot and killed Officer Soboleski, who was in the course of performing his official duties as a Houston Police Officer. In doing so, Jones fired three times. It was determined that two of the three injuries Officer Soboleski suffered were inflicted after he was on the ground.

Jones now petitions this Court for a writ of certiorari from the Fifth Circuit's affirmance of the district court's decision to dismiss his application for writ of habeas corpus. Jones asked the Fifth Circuit to reverse the district court's rejection of his fair-trial claim and to find that the district court abused its discretion in refusing to consider evidence not presented to the state courts or permit further discovery. The Fifth Circuit addressed both the discovery issue and the fair-trial claim and affirmed the judgment of the district court.

Jones is now unable to present any special or important reason to grant certiorari review of the Fifth Circuit's decision. The appellate court, after appropriately analyzing the facts of the case in conjunction with the caselaw, reasonably concluded that the district court's rulings should be affirmed. Jones offers no compelling reason to grant certiorari review, and such review should therefore be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals (TCCA) summarized the factual background of this case as follows.

> At approximately 1:00 a.m. on April 7, 1991, Houston Police Sergeant Bruno D. Soboleski and a civilian rider approached the intersection of Hull and Calhoun streets in Houston in a marked police car. Soboleski stopped Jones and another person. Both approached the police car. Jones placed both hands on the hood of the police car next to the inspection sticker on the driver's side of the car. His companion stood near the left headlight. Soboleski exited the police car and proceeded to pat down Jones' companion. Meanwhile, the civilian rider moved from the passenger side to the driver side of the car so she could warn Soboleski with the horn, if necessary.
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> After patting down Jones' companion, Soboleski approached Jones. Jones drew a semiautomatic pistol and shot Soboleski three times. The rider testified there were two shots, a pause, and a third shot. As Jones drew his pistol, the rider attempted to warn Soboleski by honking the horn. As Jones fled, the rider heard several more shots. Police discovered bullet holes in the wind- shield and in the door of the police car indicating that Jones fired several shots at the rider. Before being transported to the hospital, Soboleski stated that he did not understand why he was shot after he had fallen to the ground. He later died as a result of the gunshot wounds. Based on this evidence, the jury found Jones guilty of capital murder for murdering a police officer while he was lawfully discharging his official duties.
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> During the penalty phase the State introduced evidence that Jones pled guilty to two counts of theft on November 4, 1986, and was sentenced to five years' probation. He violated the terms of his probation by attempting to purchase a firearm in November of 1990, and by purchasing two semi-automatic pistols on April 5, 1991. When purchasing the pistols, Jones falsely stated that he had not been convicted of a felony. Finally, one week prior to the

> underlying crime, Jones robbed a couple at gunpoint, threatening to kill the husband if he did not relinquish his wallet.
>
> Jones produced numerous character witnesses during trial who testified that he was peaceable, hard-working, a good high-school student, and non-violent while incarcerated and awaiting trial. He also called a psychologist who testified that Jones' personality could be termed as an "empty vessel" personality. In other words, Jones' moral beliefs were shaped by the strongest influence available to him at that time, and a month prior to the crime an individual would have been unable to predict Jones' later behavior. The psychologist testified that because of this condition, it was impossible to predict Jones' future behavior but that individuals with an "empty vessel" personality often become model prisoners. The psychologist acknowledged, however, that if Jones was recruited by a prison gang to kill a guard, he would not have any problem participating. The jury found that there was a probability that Jones would commit future acts of criminal violence constituting a continuing threat to society, and that he acted deliberately in killing Soboleski. Accordingly, the trial court sentenced him to death.

Jones v. State, No. 71,369 (Tex. Crim. App. May 4, 1994), *cert. denied*, 514 U.S. 1067 (1995).

II. The State-Court and Federal Appellate Proceedings.

On direct appeal, the TCCA affirmed Jones's conviction and sentence. *Jones v. State*, No. 71,369. On October 26, 2005, the TCCA denied Jones's initial application for habeas corpus and treated a document styled "Errata and Corrections to Amended Application for Post-Conviction Writ of Habeas Corpus" as a successive application, dismissing it as an abuse of the writ. *Ex parte Jones*, Nos. 62,589-01, and -02 (Tex. Crim. App. Oct. 26, 2005). On January 27, 2006, Jones filed his third state habeas application raising a single

claim of error under *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"). The TCCA remanded the application to the state trial court. The trial court entered findings of fact and conclusions of law and recommended denying the claim on December 18, 2007. The TCCA denied the application on June 10, 2009. *Ex parte Jones*, No. AP-75,896 (June 10, 2009).

On April 12, 2006, while his third state application was pending, Jones filed his initial federal petition for a writ of habeas corpus, which included a *Penry* claim. He then moved for a stay and abeyance of his petition so that he could exhaust the *Penry* claim in state court. The district court stayed the case on April 20, 2006. On November 28, 2007, the district court dismissed Jones's petition without prejudice, and stated that the statute of limitations would be equitably tolled as long as Jones returned to federal court within 30 days of the conclusion of state review.

Jones refiled his federal petition on June 11, 2009, the day after the TCCA denied relief on his *Penry* claim. He filed an Amended Petition on July 9, 2009. Respondent moved for summary judgment on October 5, 2009.

On February 5, 2010, the district court again stayed the case to allow Jones to return to state court to raise a claim that the State suppressed material evidence, *see Brady v. Maryland*, 373 U.S. 83 (1963), and denied the Respondent's motion for summary judgment without prejudice. On March 2, 2010, Jones filed his fourth state habeas application, raising his *Brady* claim

and three others. On June 30, 2010, the TCCA dismissed Jones's fourth application as an abuse of the writ. *Ex parte Jones*, No. 62,589-04 (Tex. Crim. App. June 30, 2010).

On July 6, 2010, Respondent moved to lift the stay. The court lifted the stay on July 7, 2010. Respondent again moved for summary judgment on August 31, 2010, which the district court granted in part and denied in part. The court granted relief on the *Penry* claim, and ordered Petitioner's release unless the State of Texas granted Jones a resentencing hearing. The court dismissed with prejudice all of Jones's remaining claims, including the fair-trial claim at issue here. The court dismissed the fair-trial claim as procedurally defaulted and an abuse of the writ, but granted a certificate of appealability (COA).

On appeal, the Fifth Circuit vacated the COA on the fair-trial claim because the district court had failed to address whether the claim's merits were debatable, as required by *Slack v. McDaniel*, 529 U.S. 473 (2000). *See Jones v. Stephens*, 541 F. App'x 399, 408 (5th Cir. 2013) (per curiam). The Court affirmed relief on the *Penry* claim, entitling Jones to a new sentencing hearing. *Id.* at 410. The *Penry* ruling means that the instant appeal involves only guilt-innocence.

On remand, the district court held that jurists could find it debatable whether Jones's constitutional rights were violated by the presence of

officers at his trial. It therefore again granted a COA. But the district court held that reasonable jurists could not debate the merits of Jones's claim that he was denied a fair trial due to pre-trial publicity. Jones appealed, and the Fifth Circuit affirmed the district court's finding that § 2254(e)(2) barred the court's consideration of the media-related evidence presented for the first time in Jones's federal habeas petition. The Fifth Circuit denied his fair-trial claim regarding the presence of officers in the courtroom. It also determined that the fair-trial claim would fail even if the court could consider such evidence.

REASONS TO DENY THE PETITION

Jones presents no compelling reason to grant a writ of certiorari, and none exists. *See* Sup. Ct. R. 10 (Certiorari review "is not a matter of right but of judicial discretion," and "will be granted only for compelling reasons."). Indeed, the issues in this case involve only the lower court's proper application of this Court's precedent. Accordingly, the petition presents no important question of federal law to justify the exercise of this Court's certiorari jurisdiction.

I. The Fifth Circuit did not err in determining that the failure to develop the state court record was due to Jones's lack of due diligence.

Jones presents as his first issue the lower courts' decision that he failed to develop the factual basis of his fair-trial claim within the meaning of 28 U.S.C. § 2254(e)(2).

A. The Fifth Circuit's opinion on this issue.

The Fifth Circuit found that the evidence in the habeas petition provided enough information to determine how the scene appeared to the jury, that Jones failed to prove that any further evidence would do more than supplement the already existing evidence, and that Jones offered no explanation for why he failed to seek such discovery before now. Pet. App. [2] 1 at 8. The court concluded, "Jones failed to exercise due diligence by not introducing the media reports until more than a decade after they were written . . . . When the evidence the applicant seeks to present before a federal tribunal could have been easily obtained and introduced to the state court, the due diligence requirement is not satisfied." Pet. App. 1 at 8.

Far from creating a "Strict Liability Rule" (Pet. at 14), the court followed this Court's precedent established in *(Michael) Williams v. Taylor*, specifically the requirement that a petitioner make a "reasonable attempt, in light of the

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[2] "Pet." refers to Jones's Petition for Writ of Certiorari. "Pet. App." refers to the appendices to that petition followed by the relevant number.

information available at the time, to investigate and pursue claims in state court." 529 U.S. 420, 435 (2000). This prescription envisions more than a single, general, request for an evidentiary hearing. All of the evidence Jones sought to supplement his federal petition with was available "at the time" of the trial and certainly at the time of the filing of his state application. Locating media reports regarding the trial, all of which were publicly available, required no investigative expertise, nor any significant investment of time, and would most likely have been easier at the time the state habeas application was filed than approximately eighteen years later. Comparing this case to *Holland v. Jackson*, 542 U.S. 649 (2004), where the petitioner's seven-year delay showed a lack of diligence, the Fifth Circuit correctly determined that Jones failed to exercise diligence.

B. Jones failed to develop the state court record and as such was not entitled to discovery under § 2254(e)(2).

Jones bases his attempt to introduce new evidence in federal court on the false premise that he could not have developed the state court record without a live evidentiary hearing. He argues that, "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." Pet. at 6. But the state court's decision not to hold a live evidentiary hearing did not prevent Jones from developing

the state court record. The new evidence Jones sought to introduce for the first time in his federal habeas case was available when he filed his state habeas application, and Texas law provided alternative means to introduce that evidence in state court. The state court record was undeveloped because Jones failed to utilize the tools available to him to develop his claim, not because the state court declined to hold an evidentiary hearing.

A live evidentiary hearing is not the only available method to develop the state court record under Texas law. For example, the Texas habeas corpus statute provides for appointed and compensated counsel, reimbursement of investigation and expert witness expenses, and—most importantly here—resolution of factual issues by affidavit. Tex. Code Crim. Proc. Art. 11.071, §§ 2, 3 & 9. The convicting court retains discretion under the statute to choose the most appropriate method of fact finding, whether it is affidavit, interrogatory, deposition, or live hearing. *Id.* at § 9(a). From the appointment of counsel on January 27, 1997, to at least October 2, 2002, Jones could have requested investigation and discovery. But he did not file a request under Texas Code of Criminal Procedure Art. 11.071, § 3 for investigative and expert funding; he did not file a request for discovery; he did not request that the state habeas court issue subpoenas for the media-related material he sought to have considered in federal court; and he did not obtain that material by other means, despite the fact that it was created prior to and contemporaneous with his trial.

Instead, he waited until October 2, 2002, over five years after his habeas application was filed, to seek an evidentiary hearing.

Here, there is no question that Jones could have used alternative methods to introduce evidence supporting his fair-trial claim. The underlying facts were known to him at the time of trial. The media reports he sought to introduce were written in 1991 and were available to the public. Pet. App. 1 at 9. Yet Jones did not attempt to introduce that evidence until he filed his federal habeas petition in 2009, roughly eighteen years later. *Id.* But by submitting the media-related evidence as exhibits to his federal petition, Jones proved that an evidentiary hearing was not necessary to obtain those documents or introduce them in his state habeas proceedings. The Fifth Circuit therefore correctly held that this new evidence "could have been easily obtained and introduced to the state court." *Id.* Given Jones's failure to do so, the only reasonable decision is the one that the district court and the Fifth Circuit reached: Jones failed to exercise the necessary due diligence under §2254(e)(2).Because an evidentiary hearing was not necessary to introduce evidence in state court, the state court's reason for declining to hold an evidentiary hearing is immaterial. But in any event, the record does not support Jones's claim (Pet. 14) that the state court refused to hold a hearing because it found his fair-trial claim to be procedurally barred. The state habeas court ruled on Jones's motion for an evidentiary hearing on October 2, 2002.

That court did not make a recommendation that the fair-trial claim was successive until July 5, 2005, almost three years later. Thus, the determination that the claim was successive played no part in the decision not to hold a live hearing. Jones's focus on this irrelevant point, together with the clear lack of merit in his position, further undermines his attempt to manufacture a circuit split.

C. There is little conflict in the courts of appeals on this issue.

Jones claims that there is a significant split among the circuits on what is required before a court will find that the petitioner exercised due diligence so as to permit discovery in federal court. Petitioner even goes so far as to argue, erroneously, that the Fifth Circuit stands alone in holding 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." Pet. at 12. Specifically, Jones accuses the Fifth Circuit of not applying this Court's precedent in *Williams v. Taylor*. These claims are inaccurate and disingenuous.

Nonetheless, in support of his allegations that the Fifth Circuit presumes to flout this Court's precedent, Jones cites to a number of cases from other circuits, purportedly demonstrating the difference between the Fifth Circuit's application of *Williams* to those circuits. While one circuit appears to require that the petitioner only request a hearing in state court to be found

diligent, that opinion is in the minority. Jones is only able to create a circuit split in which the Fifth Circuit stands alone through a combination of a misconstruction of the Fifth Circuit's holding in this case with an incomplete description of the majority of the other circuits decisions. In those cases there were a number of factual and legal differences upon which the ultimate decision was based. Just as the Fifth Circuit did in Jones's case, the courts looked at the circumstances specific to each petitioner. The Director will address some of these circumstances in each case in turn.

Jones states that the First Circuit Court of Appeals held in *Dugas v. Coplan*, 506 F.3d 1, 7 (1st Cir. 2011), that an applicant did not fail to develop the record when the lack of factual development was due to the state court's decision not to address the merits of the claim. Pet. at 13. While that statement is technically accurate, the factual underpinnings of the case are far more nuanced.[3] In reviewing an ineffective assistance of trial counsel claim, the New Hampshire state habeas court determined that the attorney was not deficient and therefore did not continue with fact-finding on the issue of prejudice. *Dugas,* 506 F.3d at 5. Thus, when the federal courts determined that the state

[3] In fact, in the First Circuit's first opinion in this case, when the court remanded the prejudice issue to the district court for further development, the court specifically stated that the decision was based upon the "facts of this closely contested case" in combination with the lack of a state court decision to defer to. *Dugas v. Coplan*, 428 F.3d 317, 343 (1st Cir. 2005).

court's finding on the deficiency prong was unreasonable, the federal district court was left with an undeveloped record with which to decide the issue of prejudice under a *de novo* standard of review. *Id.* Under those specific circumstances, when the state court's erroneous decision on deficiency was the sole reason why the state court record was not developed on the prejudice prong, the First Circuit instructed the district court to conduct a hearing on the issue of prejudice. *Id.* at 6. The court did not hold that a single request for an evidentiary hearing always constituted due diligence.[4] (*See also, Teti v. Bender,* 507 F.3d 50, 62 (1st Cir. 2007) (petitioner did not demonstrate due diligence when he submitted only broad allegations to the state court and did not develop his argument on appeal)).

Next Jones cites *Fulton v Graham*, 802 F.3d 257, 266 (2nd Cir. 2015), alleging that the holding in that case was that "applicant did not fail to develop factual basis of claim where [he] sought [an] evidentiary hearing in compliance with state law but state court did not hold a hearing." Pet. App. at 13. That is the holding in that case, but, under New York law, the court *must* hold a hearing if the petitioner has alleged a ground that, if supported by the

[4] It is also important to note that none of the opinions in *Dugas* suggest that the Warden opposed the evidentiary development of the record in district court. Rather, it appears that the Warden participated by filing affidavits in response to Dugas's petition. *Dugas v. Coplan*, 2006 WL 2463670, (D.N.H. 2006).

existence or occurrence of facts, shows a legal basis for relief.[5] *See* NY Crim. Pro. §440.30. The state court improperly disposed of the case based upon a procedural bar that was not regularly applied. *Fulton,* 802 F.3d at 264. Fulton would have been entitled to a hearing under state law, and was only denied such because of the New York court's application of a procedural bar that was not regularly applied. Under those specific circumstances, the court found that Fulton had not failed to exercise diligence in developing the state court record under § 2254(e)(2). *Id.* at 265–66.

In Morris v. Beard, while the Third Circuit Court of Appeals did note that Morris did not fail to develop the state court record when the state court's decision not to hold a hearing was due to "'some reason unrelated to [his] diligence,'" the court went on to say that merely because a petitioner has complied with state law in requesting an evidentiary hearing that does not mean he has been diligent with respect to § 2254(e)(2). 633 F.3d 185, 196 (3rd Cir. 2011). The court specifically held that when "a state court gives *no* reason for denying a petitioner's hearing request other than his failure to comply with a subsequently invalidated state statute of limitations," the court could not say that petitioner was not diligent. *Id.* (emphasis added). Thus, contrary to

[5] Under § 440.30, a court must go through three previous subsections that weed out certain cases before reaching the requirements necessary to mandate a hearing. Based upon the Second Circuit's opinion, Fulton met those standards.

Jones's contention, *Morris* does not stand for the proposition that a single request for a hearing always qualifies as due diligence under § 2254(e)(2).

In *Winston v. Kelly,* while there was some discussion of the diligence requirement of § 2254(e)(2), the specific issue before the Fourth Circuit was whether an *Atkins*[6] claim was exhausted in state court. 592 F.2d 535, 552 (4th Cir. 2010). While the Fourth Circuit ultimately concluded that the district court did not abuse its discretion in holding an evidentiary hearing, the court specifically noted that "[w]hether Winston could have or should have sought a subpoena is relevant to the issue of Winston's diligence." *Id.* Therefore, again, the court's opinion supports the notion that, in order to determine a petitioner's diligence in developing the state court record, the totality of the circumstances must be considered.

As noted in *Dugas*, the respondent in *Couch v. Booker* did not object to Couch's motion for an evidentiary hearing in the district court, and only did so on appeal, after the hearing was held. 632 F.3d 241, 245 (6th Cir. 2011). The Sixth Circuit held that the district court did not abuse its discretion in granting an evidentiary hearing. *Id.* Yet, as is the situation in virtually all of the cases cited by Jones, the facts in this case are unique and highly relevant to the court's determination. On direct appeal in state court, Couch originally

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6 *Atkins v. Virginia*, 536 U.S. 304 (2002).

received an evidentiary hearing, referred to as a *Ginther*[7] hearing in Michigan, to support his ineffective assistance claim. *Id.* But, after this hearing, Couch objected to the way his counsel was proceeding, and filed a *pro se* motion for a new hearing to present the evidence he later presented to the federal district court. *Id.* Newly retained counsel requested permission to file new briefs, which was granted and the previous briefs were stricken. *Id.* Yet, Couch did not receive a hearing on the new briefs. *Id.* Couch again sought to introduce evidence in state collateral proceedings. *Id.* Based upon the totality of the circumstances, not just a simple motion for evidentiary hearing, the Sixth Circuit found that Couch exercised due diligence in developing the state court record. *Id.*

In claiming that Fifth Circuit's decision in this case is contrary to Seventh Circuit precedent, Jones cites a footnote from *Carter v. Duncan*, 819 F.3d 931 (7th Cir. 2016). However, separate from the fact that this issue was dicta as it was not necessary for the court's decision, the Illinois law on the matter is similar to that of *Fulton.* With regard to this the Seventh Circuit stated, "Both parties responded that, under Illinois Post-Conviction Act, 725 ILCS 5/122– *et seq.* Mr. Carter's filing of the petition itself effectively requested a hearing, and one would have been granted *as a matter of course* had the

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7 *People v. Ginther*, 212 N.W.2d 922 (Mich. 1973).

petition advanced beyond the early screening stages." *Carter*, 819 F.3d at 343 n.23 (emphasis added). Therefore, state law provided that Carter would have received a hearing, but for the improperly applied procedural bar. Only in this particular situation, considering Illinois' specific law on this point, did the Seventh Circuit conclude that Carter was not barred under § 2254(e)(2) from receiving a hearing in federal court.

The case Jones cites out of the Tenth Circuit also fails to support his claim that a mere motion for an evidentiary hearing is sufficient to establish diligence as a matter of law. In *Barkell v. Crouse*, the Tenth Circuit found that state law precedent was unclear as to what was necessary for pleadings to be sufficient to entitle Barkell to an evidentiary hearing. 468 F.3d 684, 696 (10th Cir. 2006). Therefore, the court held that Barkell was not at fault for complying with what reasonably appeared to be established state law requirements. *Id.* at 694. More recently, in *Cannon v. Trammell*, the Tenth Circuit held that petitioner "Cannon's efforts were insufficient to establish diligence on the juror contact claims unless he could show some kind of impediment excusing his failure to obtain eyewitness affidavits." 796 F.3d 1256, 1263 (10th Cir. 2015). This conclusion was reached even though Cannon requested an evidentiary hearing, attached a personal affidavit in support, and requested similar affidavits from his trial counsel. *Id.* The Tenth Circuit's precedent is in line with that of the Fifth Circuit.

In *Pope v. Sec'y for Dep't of Corr.,* 680 F.3d 1271, 1289 (11th Cir. 2012), the Eleventh Circuit indeed found that Pope was diligent when he "requested an evidentiary hearing on these claims at every appropriate stage of the state court collateral proceeding." But, the opinion makes clear that Pope requested an evidentiary hearing more than once. *Id.* Further, the Eleventh Circuit goes on to discuss a specific state court rule that was not followed in denying Pope an evidentiary hearing. *Id.* at 1291. Therefore, the Eleventh Circuit did not hold that a single request for an evidentiary hearing was sufficient to establish diligence.

Although Jones did not address the Eighth Circuit, that court's precedent is completely in line with the Fifth Circuit,[8] and all those analyzed above, in looking at the totality of the circumstances when determining whether a petitioner has met the diligence requirements of § 2254(e)(2).

Finally, with regard to the Ninth Circuit, the Director concedes that in *Perez v. Rosario*, 459 F.3d 943, 953 (9th Cir. 2006) it does appear that the court is stating that requesting an evidentiary hearing in the state proceedings is sufficient under § 2254(e)(2). However, the court ultimately found that the district court did not abuse its discretion in not holding a hearing as "Perez's

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[8] *See Wilcox v. Hopkins*, 249 F.3d 720, 725 (8th Cir. 2001) (petitioner failed to develop the record by failing to come forward with affidavit evidence); *Osborne v. Purkett,* 411 F.3d 911, 916 (8th Cir. 2005) (petitioner failed to develop the record because he failed to conduct follow-up interviews with witnesses).

allegations were still entirely incredible, and no further showings were made to suggest any real possibility of … a contradiction." *Id.* at 954. This is similar to the present case as Jones has been unable to suggest any new evidence would even strengthen his claim.

When the cases Jones cites are fully examined, they do not support the proposition that the mere filing of a single motion for an evidentiary hearing always qualifies as due diligence. This Court in *(Michael) Williams v. Taylor* held that a prisoner must, at a minimum, seek an evidentiary hearing in the manner prescribed by state law. 529 U.S. at 437. Considering that the minimum requirement is to seek an evidentiary hearing, it is not unreasonable, or inconsistent with this Court's ruling in *Williams*, to require the prisoner to avail himself of other avenues to establish the record prescribed by state law. Regardless of whether the Ninth Circuit only requires the minimum, that fact alone does not create a circuit split of the type to necessitate this Court's review, and it certainly does not mean that the Fifth Circuit does not properly apply this Court's precedent. This case is a poor vehicle to resolve the supposed circuit split in any event because the outcome of Jones's fair-trial claim did not turn on the Fifth Circuit's interpretation of § 2254(e)(2). Despite its holding that Jones was not diligent under § 2254(e)(2), the appellate court analyzed the fair-trial claim on the basis of both the state court record and the media-related evidence Jones presented for the first time

in federal court. Therefore, even if this Court were to find in favor of Jones on the discovery issue, the Fifth Circuit's disposition of the underlying fair-trial claim would not be affected, nor would any review of that disposition by this Court.

II. The Fifth Circuit did not err in denying Jones's fair-trial claim.

Jones presents as his second issue the lower courts' decision to dismiss his claim that he was denied his Sixth Amendment right to a fair trial due to the "hostile atmosphere" created by the presence of uniformed police officers during his trial.

A. The Fifth Circuit's opinion on this issue.

On appeal the Fifth Circuit affirmed the district court's dismissal of the fair-trial claim, holding that the presence of uniformed officers at Jones's trial did not amount to inherent prejudice so as to deny Jones a fair trial. Pet. App. 2 at 11–12. In doing so, the court examined the various decisions, in multiple jurisdictions, analyzing the issue, and consistent with this Court, and the other lower court's decisions, considered the totality of the circumstances presented to the jury. *Id.* Yet, the court did not create a bright line test, or create specific requirements necessary to advance a meritorious fair-trial claim.

On the merits of the claim, the court considered the additional documentary evidence submitted for the first time in federal court. *Id.* The opinion noted that the uniformed officers constituted, on any given day,

between one-fifth and one-third of the spectators. *Id.* The court further considered one account that indicated that officers arrived early to reserve the first two rows and, when no seating was available, some stood against the courtroom walls. *Id.* The court also remarked on Jones's inconsistent theories for the motives of the attending officers. *Id.* While Jones has maintained in federal court that the officers' only purpose in being present was to send the message that guilty and death were the only acceptable verdicts, Jones acknowledged in state court that the officers could have been present out of curiosity or in support of the victim's family. *Id.* Finally, the court observed that the record did not support a finding that the jury was, in any way, intimidated by the officers' presence, that the court had lost control of the courtroom, or that the situation had devolved into a carnival atmosphere. *Id.* Considering the totality of the circumstances, the court held that the conditions of Jones's trial did not support a finding of inherent prejudice. *Id.*

B. Even including the additional evidence, Jones's fair-trial claim fails.[9]

Jones's fair-trial claim derives most directly from *Holbrook v. Flynn*, 475 U.S. 560 (1986). In *Flynn*, four uniformed state troopers sat in the first row of the spectator's section to provide courtroom security. *Id.* at 562–63.

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[9] Although the Fifth Circuit refused to apply the principles of *Teague v. Lane*, 489 U.S. 288 (1989), the Director maintains that this claim is barred by the non-retroactivity principle announced in that case. Pet. App. 1 at 5.

This Court noted that the Sixth Amendment requires "'close judicial scrutiny'" of certain "inherently prejudicial practices" like shackling the defendant or forcing him to wear prison clothes. *Id.* at 567–68 (quoting *Estelle v. Williams*, 425 U.S. 501, 503–04 (1976)). Those practices risk "impermissible factors coming into play." *Williams*, 425 U.S. at 505. But the *Flynn* Court held that "the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial" does not rise to the level of an "inherently prejudicial practice." 475 U.S. at 568–69. That was because jurors would not necessarily infer from the security personnel's presence that the defendant is culpable or dangerous. *Id.* at 569.

This Court acknowledged, however, that inherent prejudice might arise in some situations.[10] *Id.* at 569–70. A "case-by-case approach" therefore must be used to examine the specific circumstances of the defendant's trial. *Id.* As to that question, the Court found no "unacceptable risk of prejudice in the spectacle of four such [uniformed and armed] officers quietly sitting in the first row of a courtroom's spectator section." *Id.* at 571.

The problem for Jones is that this Court "h[as] never applied [the inherent-prejudice test] to spectators' conduct." *Carey v. Musladin*, 549 U.S.

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[10] If no inherent prejudice exists, *Flynn* allows the petitioner one last recourse: to "show actual prejudice." *Id.* at 572. Jones has not alleged actual prejudice in this case.

70, 76 (2006). *Musladin* considered under AEDPA a claim based on the victim's family's courtroom behavior. This Court noted, "[n]o holding of this Court require[s] the [state court] to apply the test of *Williams* and *Flynn* to the spectators' conduct." *Musladin*, 549 U.S. at 77. Musladin was denied relief, because "*Flynn* dealt with government-sponsored practices: . . . the State seated the troopers immediately behind the defendant." *Id.* at 75. The Seventh Circuit recognized this in their holding in *Lambert v. McBride*, 365 F.3d 557, 563 (7th Cir. 2004) (denying, under AEDPA, ineffective-assistance claim premised on *Flynn* and stating that *Flynn* "involved officers stationed in the courtroom as guards, not spectators").

Jones's claim does not pass *Flynn*'s inherent-prejudice test. Inherent prejudice arises only where "'an unacceptable risk is presented of impermissible factors coming into play.'" *Flynn*, 475 U.S. at 570 (quoting *Williams*, 425 U.S. at 505)). "All a federal court may do [on collateral review] is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial . . ." *Id.* at 572. That standard "is difficult" to meet. *Hill v. Ozmint*, 339 F.3d 187, 199 (4th Cir. 2003); *see Heath v. Jones*, 941 F.2d 1126, 1134 (11th Cir. 1991) ("[I]nherent prejudice is rarely found.").

Relevant to the importance of the discovery claim in this case, the Fifth Circuit considered the additional evidence submitted by Jones for the first time

on federal habeas. Pet. App. 2 at 11–12. Even considering that evidence, an analysis of the totality of the circumstances, and the scene as viewed by the jurors, the court reasonably held that the facts in this case did not amount to the inherent prejudice necessary for Jones's fair-trial claim to succeed. *Id.*

In keeping with the lower court's analysis, all evidence, viewed in the light most favorable to Jones, demonstrates that these decisions were correct. The record indicates there was a notable percentage of the spectators in attendance that were uniformed officers, sitting in the first two rows of the gallery, and occasionally lining the walls of the courtroom. Pet. App. 2 at 11–12. Yet even the highest estimate indicates that no more than one-third of the spectators were uniformed officers at any one time. *Id.* Nothing in the record, including the affidavits from Jones's defense attorneys, family and friends, and media accounts, indicates any verbal, physical, or other outbursts. *Id.* The court never admonished the gallery regarding actual, or even potential, emotional displays inside the courtroom or inappropriate behavior outside the courtroom. *Id.* The record does not support a determination that the officers' presence was requested by the state or was coordinated or sanctioned by the Houston Police Department, nor has Jones made any such allegations until now. *Id.* Quite simply, the record shows only a notable uniformed police presence in the trial of a murdered officer. Jones cannot cite to any cases that

stand for the proposition that such an environment is inherently prejudicial to a petitioner's right to a fair trial, because none exist.

C. There is no circuit split on this issue.

Again, Jones claims there is a split among the circuits in the application of the law relevant to this issue. Again, Jones is wrong. The only case Jones cites to support the supposed circuit split is the Eleventh Circuit's decision in *Woods v. Duggar,* 923 F.2d. 1454 (11th Cir. 1991). But, Jones misrepresents both the Fifth Circuit's holding in this case, as well as the holding in *Woods*. *Woods* does not hold that "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." Pet. at 17. Rather, the court in *Woods* went to great lengths to describe the totality of the circumstances necessary to its finding that Woods's case was one of the "extreme" cases that warrants relief. *Woods*, 923 F.3d at 1458–59. To summarize, the court described the importance of the trial to the small community, the extensive pre-trial publicity, the fact that uniformed officers made up "about half of the spectators," and that the trial court, more than once, had to "admonish[] the crowd to remain quiet and not make audible responses." *Id.* at 1459. Based upon the totality of the circumstances, the court concluded that there was an unacceptable risk of impermissible factors coming into play. *Id.*

No court has held that the mere presence of uniformed officers violates a defendant's right to a fair trial. As demonstrated in section II(A) above, the Fifth Circuit performed a detailed analysis of the proper precedent in deciding this case. An examination of factors considered by other courts does not mean that the Fifth Circuit held that the presence of at least one of those specific factors was necessary to succeed on a fair-trial claim. Rather, such analysis is the proper application of this Court's precedent in both *Flynn* and *Musladin*. And, as noted in the Fifth Circuit's opinion,[11] this is exactly what other circuits have done as well. Therefore, instead of the circuit split Jones alleges, the caselaw reveals consistency among the circuits with regard to this issue.

CONCLUSION

For all the reasons discussed above, the Court should deny Jones's petition for a writ of certiorari.

Respectfully submitted,

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[11] *Hill v. Ozmint*, 339 F.3d 187, 199 (4th Cir. 2003); *U.S. v. Thomas*, 794 F.3d 705, 710 (7th Cir. 2015); *Smith v. Farley*, 59 F.3d 659, 664 (7th Cir. 1995).

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