No. 18-7696

In the Supreme Court of the United States

TONY J. WALTON,

Petitioner,

v.

DAVID BALLARD, WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

PATRICK MORRISEY
Attorney General

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

LINDSAY S. SEE
Solicitor General
Counsel of Record

THOMAS T. LAMPMAN
Assistant Attorney General

Counsel for Respondent

QUESTION PRESENTED

Whether reasonable jurists could conclude, under the Anti-Terrorism and Effective Death Penalty Act, that a state court's choice to address a juror's generalized fear of repercussions from persons not party to the case with a precautionary jury instruction, but not with additional *voir dire* or a mistrial, establishes a violation of a defendant's due process right to an impartial jury?

TABLE OF CONTENTS

Page

Question Presented i

Brief In Opposition 1

Introduction 1

Opinions Below 2

Statement Of Jurisdiction 2

Statement 3

Reasons For Denying The Petition 10

I. There Are Serious Threshold Concerns In This Case Because Walton's Claim Was Time-Barred Under AEDPA 10

II. The Fourth Circuit's Refusal To Grant A Certificate Of Appealability Does Not Warrant Certiorari Review 13

III. The Issue Walton Tried To Appeal Does Not Warrant Certiorari Review 19

A. The Decision Below Is Consistent With Each Of The Cases On Which The Petition Relies 19

B. Lower Courts Are Not Divided Over Any Issue Presented In This Case 24

Conclusion 27

TABLE OF AUTHORITIES

Page(s)

Cases

Artuz v. Bennett,
531 U.S. 4 (2000) 8, 9, 11
Clay v. United States,
537 U.S. 522 (2003) 7, 10
Gonzalez v. Thaler,
565 U.S. 134 (2012) 13
Hohn v. United States,
524 U.S. 236 (1998) 13
Holland v. Florida,
560 U.S. 631 (2010) 10, 11
Holt v. United States,
218 U.S. 245 (1910) 6
Irvin v. Dowd,
366 U.S. 717 (1961) 6, 18
Miller-El v. Cockrell,
537 U.S. 322 (2003) 13, 14
Murphy v. Florida,
421 U.S. 794 (1975) 18
Mu'min v. Virginia,
500 U.S. 415 (1991) 20
Pace v. DiGuglielmo,
544 U.S. 408 (2005) 11, 13
Remmer v. United States,
347 U.S. 227 (1954) 25
Reynolds v. United States,
98 U.S. 145 (1878) 6
Sheppard v. Maxwell,
384 U.S. 333 (1966) 8
Skilling v. United States,
561 U.S. 358 (2010) 16, 20, 22, 23
Slack v. McDaniel,
529 U.S. 473 (1983) 14
Smith v. Phillips,
455 U.S. 209 (1982) 16, 17
State v. Head,
480 S.E.2d 507 (W. Va. 1996) 12, 13

United States v. Babb,
369 F. App'x 503 (4th Cir. 2010) 25
United States v. Benabe,
654 F.3d 753 (7th Cir. 2011) 24, 25
United States v. Blitch,
622 F.3d 658 (7th Cir. 2010) 19, 20, 21, 22, 23
United States v. Bristol-Martir,
570 F.3d 29 (1st Cir. 2009) 19, 21, 22
United States v. Corrado,
227 F.3d 528 (6th Cir. 2000) 20
United States v. Corrado,
304 F.3d 593 (6th Cir. 2002) 19, 20
United States v. Dominguez,
226 F.3d 1235 (11th Cir. 2000) 26
United States v. Resko,
3 F.3d 684 (3rd Cir. 1993) 19, 21, 23, 24, 26
United States v. Rutherford,
371 F.3d 634 (9th Cir. 2004) 25
United States v. Wood,
299 U.S. 123 (1936) 16
Wall v. Kholi,
562 U.S. 545 (2011) 11
Walton v. Ballard
738 F. App'x 159 ..... 2, 9, 14
Walton v. Ballard
2015 WL 571031 ..... 2, 3, 4, 5, 6, 7, 10, 23, 25
Walton v. Ballard
2018 WL 1582737 2
Williams v. Taylor,
529 U.S. 362 (2000) 15

Statutes

28 U.S.C. § 2244 ..... 2, 7, 10, 11
28 U.S.C. § 2253 ..... 9, 13
28 U.S.C. § 2254 ..... 7, 9, 15

Rules

West Virginia Rule of Criminal Procedure 35 ..... 5, 6, 7, 8, 12, 14, 21, 22, 23, 24, 25

BRIEF IN OPPOSITION

Respondent Warden David Ballard ("the State") respectfully submits that the petition for a writ of certiorari should be denied.

INTRODUCTION

In the state-court proceedings underlying this habeas petition, the jury sent a note to the trial court stating that one of the jurors knew some of the spectators in the courtroom and was afraid of possible repercussions if she continued to serve. The trial court concluded that this information did not reveal a lack of impartiality, and nonetheless issued a precautionary instruction to the entire jury explaining that the law protects them against juror intimidation and reminding them of their duty to remain impartial. The district court correctly concluded that this response was within the trial court's broad supervisory discretion and did not violate clearly established federal law—and the Fourth Circuit deemed this conclusion so unabashedly correct that it declined to issue a certificate of appealability.

There is no division among lower courts over the constitutional issue the Petition raises, nor any error—by the state *or* federal courts that have already addressed that question—to correct. The lack of a certificate of appealability also makes this a particularly poor case to revisit the scope of the right to a fair and impartial trial, and serious timeliness questions further caution against granting review.

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit is unpublished, but has been reported informally at 738 F. App'x 159. The judgment, but not the opinion, is reproduced in Petitioner's Appendix as Exhibit A.

The opinion of the United States District Court for the Southern District of West Virginia is unpublished, but has been informally reported at 2018 WL 1582737. This opinion is reproduced in Petitioner's Appendix as Exhibit B.

The opinion of the West Virginia Supreme Court of Appeals denying Petitioner's state habeas petition is unpublished, but has been informally reported at 2015 WL 571031. That opinion reproduces, in its entirety, the unpublished opinion of the Circuit Court of Fayette County.

Petitioner's request for a direct appeal of his conviction to the West Virginia Supreme Court of Appeals was denied in an unpublished order. *State v. Walton*, No. 10-750 (W. Va. Sept. 22, 2010).

STATEMENT OF JURISDICTION

The State agrees that the Petition was timely filed. Nevertheless, as discussed further below, the United States District Court for the Southern District of West Virginia should have denied Petitioner's federal habeas petition as untimely because it was filed beyond the one-year limitation period set forth in 28 U.S.C. § 2244(d). Further, because the Fourth Circuit denied a certificate of appealability, this Court's

jurisdiction extends only to review of that decision, not to the merits of the constitutional claim.

STATEMENT

1. At approximately 7:30 A.M. on December 24, 2008, Lisa Castanon was assaulted and robbed while opening the Family Dollar store she managed. Pet. App. Ex. C at 2. During the struggle, Castanon's attacker struck her in the head with a PVC pipe and pushed her into a collection of mirrors. *Id.* Castanon sprayed her attacker with pepper spray, and he fled. *Id.*

Petitioner Tony J. Walton was arrested for these offenses and indicted for first-degree robbery and assault; he invoked his right to a jury trial, which was held in the Circuit Court of Fayette County, West Virginia. Pet. App. Ex. C at 2. Among other witnesses for the prosecution, Castanon testified about the attack and identified Walton as her attacker. *Id.* at 3. During a recess in the middle of a law-enforcement officer's testimony, a juror informed the trial judge that she "knew some of the spectators" in the courtroom and "wanted to know if that was something that needed to be disclosed." *Id.* at 47. Neither party raised an objection to the juror's continued service, particularly because she, like all of the other jurors, had stated during *voir dire* that she did not know any of the participants in the trial. *Walton v. Ballard*, 2015 WL 571031, at *42 (W. Va. Feb. 9, 2015). The defense then introduced several alibi witnesses, including Walton and his mother, father, and brother, and the case was submitted to the jury. Pet. App. Ex. C at 3-4.

During deliberation, the jury foreman sent a note to the judge. *Walton*, 2015 WL 571031, at *42. The note read: "A juror who came forward yesterday and admitted to Judge Blake that she knew the family is now afraid of repercussions from the family. We are unable to move forward at this time." Pet. App. Ex. F. In response, Walton's counsel took the position that this juror could not be impartial. Pet. App. Ex. C at 48. The judge disagreed, concluding that "she was afraid of repercussions for returning her verdict" rather than "induced to find one way or the other." *Walton*, 2015 WL 571031, at *42. In response, the court read an instruction to the entire jury informing them of the criminal penalties for intimidating jurors and reminding the jurors to "decide the case fairly and without prejudice for or against either side." Pet. App. Ex. C at 48-49. Walton's counsel objected and moved for a mistrial, and the court denied that motion. *Id.* at 48. Thereafter, the jury convicted Walton on both counts. *Id.* at 2.

2. Walton petitioned to appeal his conviction to the West Virginia Supreme Court of Appeals, but that court denied his request on September 22, 2010. Pet. App. Ex. C at 6.

Walton also filed multiple motions with the Fayette County Circuit Court seeking to modify his sentence. The first, a Motion for Discretionary Reconsideration pursuant to West Virginia Rule of Criminal Procedure 35(b), was filed on March 26, 2010 and denied four days later. Resp't. App. at 2b. Rule 35(b) governs motions "to reduce a sentence," and provides that such motions must be filed "within 120 days after . . . the entry of an order by the supreme court of appeals dismissing or rejecting

a petition for appeal of a judgment of a conviction." W. Va. R. Crim. P. 35(b). Walton filed his second motion on August 17, 2011, styled as a *pro se* motion "pursuant to rule 35 a of West Virginia Rules of Criminal Procedure." Resp. Ex. 3 (Pro Se Motion) at 2 (ECF No. 21-3). Rule 35(a) provides that a court "may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided [in Rule 35(b)] for the reduction of a sentence." W. Va. R. Crim. P. 35(a). Notwithstanding its title, Walton's second motion made arguments consistent with a motion under Rule 35(b) for discretionary reconsideration, not a Rule 35(a) motion to correct an illegal sentence. Resp. Ex. 3 (Pro Se Motion) at 2 (ECF No. 21-3)[1]. Walton also filed "numerous other untimely handwritten motions purportedly under Rule 35 of the *West Virginia Rules of Criminal Procedure*." Resp't App. at 1b. The state trial court did not rule on these motions before Walton filed his federal habeas petition; nevertheless, on December 4, 2018 the court construed all of these motions as motions under Rule 35(b), and accordingly rejected "all Rule 35 motions filed by [Walton] as untimely" because they were filed outside the 120-day limitation period. Resp't App. at 2b.

3. Walton initiated state habeas proceedings in 2012. He first filed a petition with the West Virginia Supreme Court of Appeals in June of 2012, which the court denied with leave to refile in circuit court. *Walton v. Ballard*, 2015 WL 571031, at *1 (W. Va. Feb. 9, 2015). Walton refiled in the Circuit Court of Fayette County on

[1] Unless otherwise indicated, all ECF citations refer to the docket in the case below, *Walton v. Ballard*, 2:15-cv-11423 (S.D. W. Va.).

October 29, 2012, *id.*, and advanced six grounds for relief, including denial of his right to a fair and impartial jury, *id.* at *5-6. Walton argued that both notes the jury sent to the judge, during trial and during deliberations, were evidence of bias. *Id.* at *37.

The circuit court denied the petition. *Ballard*, 2015 WL 571031, at *1. Regarding the impartiality claim, the court relied on decisions from this Court holding that the process of ascertaining jurors' impartiality is imprecise, and emphasized that "the Constitution lays down no particular tests and procedures" for this inquiry. *Id.* at *41 (quoting *Irvin v. Dowd*, 366 U.S. 717, 724-25 (1961)). The circuit court's starting premise was thus that the "trial court's determination should not be disturbed unless prejudice is manifest." *Id.* (citing *Reynolds v. United States*, 98 U.S. 145, 156 (1878); *Holt v. United States*, 218 U.S. 245, 248 (1910)). The court acknowledged that "[o]nce potential bias or prejudice has been revealed, the [trial] Court must then determine whether actual bias or prejudice exists necessitating the removal of the juror." *Id.* at *29 (citation omitted). With respect to both juror communications, however, the court reasoned that "[t]he mere fact that a juror recognizes spectators in a courtroom, regardless of whether they are there to support the accused or the victim, does not disqualify that juror." *Id.* The court further found no evidence contradicting the trial court's conclusion that the juror "was afraid of repercussions for returning her verdict, not that she was impartial or induced to find one way or the other." *Id.* at *42. Nor, in the circuit court's view, was the trial court acting beyond its wide discretion when it issued an instruction to the jury rather than conducting individualized *voir dire*. *Id.*

Walton appealed to the West Virginia Supreme Court of Appeals, which affirmed the denial of habeas relief and incorporated the circuit court's opinion in its entirety. *Ballard*, 2015 WL 571031, at *2-3.

4. On July 22, 2015, Walton filed a federal habeas petition under 28 U.S.C. § 2254 in the United States District Court for the Southern District of West Virginia, raising again (among other arguments) the due-process challenge to juror impartiality. Pet. App. Ex. C at 7.

The State moved to dismiss the petition as outside the one-year statute of limitations for habeas petitions set forth in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). 28 U.S.C. § 2244(d). Absent tolling, the limitations period expired in December 2011, one year after Walton's state-court conviction became final in December 2010: The Supreme Court of Appeals denied Walton's petition for a direct appeal in September 2010. *Ballard*, 2015 WL 571031, at *1. Walton had 90 days to seek certiorari, Sup. Ct. R. 13.1 (2012), and his conviction became final after that time lapsed. See *Clay v. United States*, 537 U.S. 522, 525 (2003) ("For the purpose of starting the clock on [AEDPA]'s one-year limitation period, we hold, a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction.").

The magistrate judge assigned to the case recommended that the district court grant the State's motion, but the district court rejected the recommendation. Instead, the district court construed Walton's second Rule 35 motion—which was then still

pending in the state circuit court—as "properly filed" for purposes of tolling AEPDA's statute of limitations. Order at 10 (ECF No. 32); see also 28 U.S.C. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . shall not be counted toward any period of limitation under this subsection."). The district court noted that a document is "properly filed" under this provision when "its delivery and acceptance are in compliance with the applicable laws and rules governing filing," including "time limits upon its delivery." Order at 5 (ECF No. 32) (citing *Artuz v. Bennett*, 531 U.S. 4, 8 (2000)). As the title of the motion indicated it was a Rule 35(a) motion (even though this caption did not correspond to its substance), and the state court had not yet denied the motion as untimely, it was not clear to the district court whether West Virginia law would treat this motion as a timely Rule 35(a) motion or an untimely Rule 35(b) motion. Absent such guidance on how the motion was "properly construed," the district court relied on the general policy of "liberally construing pro se filings . . . as a way to help petitioners access the proper vehicle for relief." *Id.* at 9.

On March 30, 2018, the district court denied Walton's petition. Pet. App. Ex. B at 2. The district court emphasized AEDPA's deferential standard when federal courts review claims already adjudicated in state courts, *id.* at 4, and found that Walton's claims of jury partiality did not warrant relief under that standard, *id.* at 28. The court acknowledged criminal defendants' right under the Sixth and Fourteenth Amendments to "receive a trial by an impartial jury free from outside influences." *Id.* at 27 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966)). It

also, however, recognized that defendants bear the burden to show juror bias, that it is "extremely rare that prejudice would arise because of intimidation in the courtroom," and that the Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation." *Id.* at 51 (citations omitted).

Considering the circuit court's decision in light of these principles, the district court held that the state court properly "determined [that] even if bias and prejudice does present itself, . . . it is within the trial court's discretion to determine whether the juror should be disqualified." Pet. App. Ex. B at 26. The district court also explained that the state court had "assessed the potential for bias and prejudice and determined that there was none," and concluded that Walton did not demonstrate a "strong possibility" any such prejudice even existed, much less that it remained following the trial court's "curative instruction." *Id.* at 26-27. Accordingly, the district court found that the circuit court's decision was not "contrary to, [n]or involve[d] an unreasonable application of, federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented." *Id.* at 28 (citing 28 U.S.C. § 2254(d)).

The United States Court of Appeals for the Fourth Circuit denied Walton's request for a certificate of appealability in a *per curiam* decision. Pet. App. Ex. A; see also *Walton v. Ballard*, 738 F. App'x 159 (4th Cir. 2018). Certificates of appealability "will not issue absent 'a substantial showing of the denial of a constitutional right.'" *Ballard*, 738 F. App'x 159 (quoting 28 U.S.C. § 2253(c)(2)). After "independently

review[ing] the record," the court "conclude[d] that Walton has not made the requisite showing." *Id.*

Walton filed the Petition on January 22, 2019. The Court called for this response on March 25, 2019.

REASONS FOR DENYING THE PETITION

I. There Are Serious Threshold Concerns In This Case Because Walton's Claim Was Time-Barred Under AEDPA.

AEDPA establishes a one-year statute of limitations for seeking habeas relief from a state judgment in federal court. 28 U.S.C. § 2244(d)(1). This limitations period begins to run from the latest of four specified dates, in this case from "the date on which the [state-court] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). The Supreme Court of Appeals denied Walton's petition for a direct appeal in September of 2010, *Walton v. Ballard*, 2015 WL 571031, at *1 (W. Va. Feb. 9, 2015) (mem.), and the time to file a petition for certiorari in this Court expired 90 days later. Accordingly, Walton's one-year period to file under AEDPA began to run in December of 2010. *Clay v. United States*, 537 U.S. 522, 525 (2003) (holding that AEDPA limitations period begins when time to file petition for certiorari ends).

Walton filed his federal habeas petition on July 22, 2015, Pet. App. Ex. C at 7, four-and-one-half years after his conviction became final. Thus, absent any tolling mechanism, Walton's claim was time-barred.

AEDPA establishes four statutory tolling mechanisms, 28 U.S.C § 2244(d)(2), and courts also apply equitable tolling in certain circumstances (not implicated here), see *Holland v. Florida*, 560 U.S. 631, 649 (2010). Only one of the statutory devices could potentially apply: AEDPA's limitations period does not advance while "a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). A motion must satisfy two requirements under this provision. First, the motion must seek "post-conviction or other collateral review," *id.*, which means that it must request "judicial reexamination of a judgment or claim in a proceeding outside of the direct review process," *Wall v. Kholi*, 562 U.S. 545, 553 (2011). Second, the motion must be "properly filed," meaning "its delivery and acceptance are in compliance with the applicable laws and rules governing filing," including "the time limits upon its delivery." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). Timeliness is determined by state law—and "[w]hen a postconviction petition is untimely under state law, that [is] the end of the matter for purposes of § 2244(d)(2)." *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (citation omitted).

The State challenged Walton's petition as untimely in a motion to dismiss before the district court. Resp. Mot. Dismiss (ECF No. 11); Resp. Response Pet'r's Timeliness Argument (ECF No. 21). Walton had filed a number of *pro se* motions in the state trial court seeking to modify his sentence that could arguably satisfy the Section 2244(d)(2) standard—assuming they were "properly filed" under state law. Most relevant here is a motion Walton filed on August 11, 2011, which he styled as seeking relief "pursuant to Rule 35 a of West Virginia Rules of Criminal Procedure to

reduce the harsh sentence imposed by this Court." *Id.*; see also Resp. Ex. 3 (Pro Se Motion) at 2 (ECF No. 21-3). Rule 35(a) of the West Virginia Rules of Criminal Procedure, however, addresses "correct[ion] of an illegal sentence [or] a sentence imposed in an illegal manner"; it is not a mechanism to *reduce* a validly imposed sentence. W. Va. R. Crim. P. 35(a). Instead, the motion advances arguments and requests relief consistent with West Virginia Rule of Criminal Procedure 35(b), in that it was "essentially a plea for leniency from a presumptively valid conviction." *State v. Head*, 480 S.E.2d 507, 515 (W. Va. 1996) (Cleckley, J., concurring).

The distinction between Rule 35(a) and Rule 35(b) is dispositive for purposes of AEDPA tolling, because Rule 35(a) motions may be filed "at any time," W. Va. R. Crim. P. 35(a), whereas Rule 35(b) motions must be filed within 120 days after the state-court judgment becomes final, W. Va. R. Crim. P. 35(b). Walton's motion was filed in August 2011, over seven months after his conviction became final and well outside the 120-day period for a Rule 35(b) motion. Order at 3 n.3 (ECF No. 32). It was therefore only "properly filed"—and an effective toll of AEDPA's limitation period—if construed as filed under Rule 35(a).

The State's motion to dismiss urged the district court to look to the substance of the motion instead of its caption and construe it as filed under Rule 35(b). The district court, however, rejected this argument. Order at 10 (ECF No. 32). The court explained that it was not clear whether the motion would be treated as timely filed under state law, given the confusion whether it had been filed under Rule 35(a) or (b). Order at 6 (ECF No. 32). And significantly, the state trial court had not ruled on

the motion's timeliness when the district court considered the motion to dismiss Walton's federal habeas petition. Order at 3 (ECF No. 32). The district court thus relied instead on federal law governing the construction of *pro se* filings, specifically the policy of "liberally construing pro se filings . . . as a way to help petitioners access the proper vehicle for relief." *Id.*

Since that decision, the state trial court ruled on Walton's motion: In December 2018, the circuit court expressly ruled that Walton's motion was a Rule 35(b) motion, and accordingly refused it as untimely. Resp't App. at 1b-2b. The missing piece from the district court's analysis—whether the motion was timely under West Virginia law—has thus been found. That should be "the end of the matter" for purposes of construing the timeliness of Walton's federal petition, as well. *DiGuglielmo*, 544 U.S. at 414. There is also no question that the State preserved its statute-of-limitations argument below. As a result, there are significant concerns about the timeliness of the underlying habeas action that cut strongly against granting review.

II. The Fourth Circuit's Refusal To Grant A Certificate Of Appealability Does Not Warrant Certiorari Review.

The procedural posture of this case likewise makes it a poor candidate for review. A district court's denial of a habeas petition cannot be appealed to any federal court "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1). This requirement is a "jurisdictional prerequisite," and federal appellate courts—including this Court—accordingly cannot "rule on the merits" of a would-be habeas appeal unless and until a certificate is issued. *Miller-El v. Cockrell*, 537 U.S.

322, 336 (2003); see also *id.* at 331 ("a COA ruling is not the occasion for a ruling on the merit of petitioner's claim"); *Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012) (recognizing "'clear' jurisdictional language" in § 2253(c)(1)); *Hohn v. United States*, 524 U.S. 236, 248 (1998) (characterizing "issuance of a certificate of appealability" as "a threshold prerequisite for court of appeals jurisdiction"). Because the Fourth Circuit denied Walton's application for a certificate of appealability, Pet. App. Ex. A; *Walton v. Ballard*, 738 F. App'x 159 (4th Cir. 2018), applying those principles here shows that the Court lacks jurisdiction over the merits of Walton's habeas petition—including the Sixth and Fourteenth Amendment issue he urges the Court to take up.

The potential scope of this Court's review is thus limited to the predicate issue of whether a certificate of appealability should issue. That question does not warrant granting the Petition. There is no confusion among lower courts about the standard for issuing a certificate of appealability in constitutional cases like these, and the Fourth Circuit correctly applied that settled standard.

First, the standard for issuing a certificate of appealability is well-established. A petitioner is entitled to a certificate of appealability where the district court's judgment is "debatable"—that is, where "reasonable jurists could disagree" with the ruling below. *Slack v. McDaniel*, 529 U.S. 473, 484 (1983); see also *Miller-El*, 537 U.S. at 336. The Petition does not suggest any division in the lower courts over this standard, and this case does not involve any novel or unusual factors that might suggest a need for further elaboration.

Second, there is no error to correct. The Fourth Circuit applied the governing test correctly to conclude that Walton was not entitled to a certificate of appealability. Walton's would-be appeal arises out of a petition for a writ of habeas corpus, which is governed by the deferential framework AEDPA demands when federal courts review collateral challenges to issues previously litigated in state court. See 28 U.S.C. § 2254(d). As relevant here, AEDPA allows relief where the judgment in a state court proceeding was "contrary to, or involved an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States*." *Id.* § 2254(d)(1) (emphasis added). In other words, the "threshold question" under AEDPA is whether Walton "seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000). That "rule of law" in this case—as Walton characterizes it in his Petition (at i)—is whether the "due process right to an impartial jury" required the trial court to conduct *voir dire* (or grant a mistrial) in response to a juror's disclosure that she knew some of the spectators at trial and was afraid of repercussions from her service.

The district court concluded that the trial court's response to the juror's concern did not violate clearly established federal law, and—as the Fourth Circuit's *per curiam* opinion concluded—there is no room for reasonable debate over that outcome. The Petition includes no decisions from this Court, Pet. 5-7, much less any that could satisfy 28 U.S.C. § 2254(d)(1). And although Walton's application for a certificate of appealability cited four Supreme Court cases, no reasonable jurist could conclude that these precedents "clearly established" a rule that would entitle Walton to relief,

either. Appl. Certificate Appealability at 2-5 (ECF No. 74). Indeed, whether taken together or in isolation, these cases undercut Walton's due-process argument:

The most recent case Walton cited in his application, *Skilling v. United States*, 561 U.S. 358 (2010), does not cast doubt on the Fourth Circuit's conclusion. *Skilling* arose on direct review of a defendant's claim that several members of the jury were prejudiced against him because of pervasive pre-trial publicity. *Id.* at 377. This Court concluded that the pre-trial publicity did not deprive the defendant of a fair trial. *Id.* at 398-99. The Court emphasized the importance of comprehensive pre-trial *voir dire* to evaluate the scope of prejudicial publicity to which prospective jurors may have been exposed. *Id.* at 389. It also, however, specifically declined to set a fixed standard for screening prejudice. Instead, the Court emphasized that "the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula" for "the ascertainment of this mental attitude of appropriate indifference." *Id.* at 386 (quoting *United States v. Wood*, 299 U.S. 123, 145-46 (1936)).

Here, the fact that pre-trial *voir dire* screened for any prospective jurors who were familiar with a party to the case was a critical factor in the state court's analysis. Pet. App. Ex. C at 47. Moreover, *Skilling* expressly rejects the notion that *voir dire* is always required in response to every allegation of prejudice—which means that it could not clearly establish that the trial court erred by issuing a precautionary jury instruction instead of granting a mistrial when a juror recognized spectators in the courtroom.

The next most recent case in Walton's Fourth Circuit petition is *Smith v. Phillips*, 455 U.S. 209 (1982). There, a juror applied for a job with the prosecuting agency while the trial was pending. *Id.* at 212. The state court took testimony from the juror, and concluded that the juror's contact with law enforcement did not call the juror's impartiality into question. *Id.* at 213-14 (citation omitted). On collateral review, however, the federal district court held that "a court cannot possibly ascertain the impartiality of a juror by relying solely upon the testimony of the juror in question." *Id.* at 215.

This Court reversed, noting that the state trial court's approach would have satisfied federal due-process requirements, and that "the Due Process Clause of the Fourteenth Amendment cannot possibly require more of a state court system" than it does of federal courts. *Smith*, 455 U.S. at 218. Trial courts bear primary responsibility "to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen," and they have discretion in how they go about this duty—conducting hearings where appropriate, but also relying on "*voir dire* and protective instructions." *Id.* at 217. Further, the Court emphasized that in a habeas posture federal courts should consider state court findings "presumptively correct," and "must not disturb the findings of state courts [without] some basis for disarming such findings of the statutory presumption that they are correct and may be overcome only by convincing evidence." *Id.* at 218.

Smith thus does not suggest any error, much less clear error, below. Indeed, the district court expressly relied on *Smith*'s recognition that "protective instructions"—

like the instruction regarding juror intimidation laws given here—are part of state-courts' arsenal when assessing potential juror bias. Pet. App. Ex. B. at 27. *Smith* also reinforces the need for federal courts to presume that state-court findings are correct, including the circuit court's finding here that the juror's generalized fear of repercussions did not go to her ability to render a fair and impartial verdict.

The final two cases, *Murphy v. Florida*, 421 U.S. 794 (1975), and *Irvin v. Dowd*, 366 U.S. 717 (1961), are similar—and neither undermines the Fourth Circuit's refusal to grant a certificate of appealability. Like *Skilling*, these cases concern jurors who learned potentially prejudicial information about the defendants through "extensive press coverage" of the cases. *Murphy*, 421 U.S. at 796; see also *Irvin*, 366 U.S. at 727. In *Irvin*, this Court held it was unreasonable to conduct a trial where "two-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved." 366 U.S. at 728. In *Murphy*, however, the Court rejected the suggestion that "the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more," is enough to "rebut the presumption of a prospective juror's impartiality." 421 U.S. at 799-800. Where pre-trial *voir dire* revealed that prospective jurors "had a vague recollection of the [crime]" and "some knowledge of [the defendant's] past crimes," it was not unreasonable for the state court to conclude that the jurors were impartial. *Id.* at 800. The facts here hardly rise to the level of those in *Murphy*, to say nothing of those in *Irvin*, further supporting the district court's decision to trust the discretion of the state trial court when addressing a potential threat to the jury's impartiality.

In short, no reasonable jurist could conclude that the state court "unreasonably applied" a "clearly established" rule of federal law as articulated in *Skilling*, *Smith*, *Murphy*, or *Irvin*—meaning that there was no error in the Fourth Circuit's refusal to grant a certificate of appealability for this Court to correct.

III. The Issue Walton Tried To Appeal Does Not Warrant Certiorari Review.

Finally, even setting aside the vehicle problems addressed above, there would still be no reason to grant the Petition because courts are neither divided nor confused over the constitutional question it presents.

A. The Decision Below Is Consistent With Each Of The Cases On Which The Petition Relies.

Walton cites four federal appellate decisions in support of his Petition: *United States v. Bristol-Martir*, 570 F.3d 29 (1st Cir. 2009); *United States v. Resko*, 3 F.3d 684 (3rd Cir. 1993); *United States v. Corrado*, 304 F.3d 593 (6th Cir. 2002); and *United States v. Blitch*, 622 F.3d 658 (7th Cir. 2010). In each of these cases, the appellate court held that the lower court erred by not ordering a mistrial or additional examination of the jurors following an allegation bearing on jurors' impartiality. Although these outcomes initially appear contradictory to the decision below, the cases' underlying facts and procedural postures reveal that the purported division is illusory.

As an initial matter, all four cases involved direct appeals of convictions under federal criminal law, which meant that the district courts had original jurisdiction in each case. *Blitch*, 622 F.3d at 661; *Bristol-Martir*, 570 F.3d at 41-43; *Corrado*, 304

F.3d at 600 n.5; *Resko*, 3 F.3d at 686. Federal courts apply an abuse-of-discretion standard in that context, and generally "leave matters relating to jury selection to the sound discretion of the trial court." *Blitch*, 622 F.3d at 665 (citing *Skilling*, 130 S. Ct. at 2917-18). Even when applying this deferential standard, however, federal appellate courts exercise more searching review than when they apply AEDPA's unreasonable application of clearly established federal law test. Indeed, federal courts "enjoy more latitude in setting standards for *voir dire* . . . under [their] supervisory power than [they] have in interpreting the provisions of the Fourteenth Amendment with respect to voir dire in state courts." *Mu'min v. Virginia*, 500 U.S. 415, 424 (1991). Thus, even if Walton were correct that the outcome below cannot be squared with the results in the First, Third, Sixth, and Seventh Circuit cases he cites, there is no indication that those courts would have reached the same outcome on collateral review.

Further, the reasoning underlying each case is not at odds with the outcome here. Of the four, only the Sixth Circuit's decision in *Corrado* suggests that failure to conduct additional *voir dire* was a *per se* abuse of discretion. That is also the only one of the cases that involved "serious" claims of witness tampering of significant "gravity and credibility." *United States v. Corrado*, 227 F.3d 528, 537 (6th Cir. 2000) ("*Corrado I*"); see also *Corrado*, 304 F.3d at 600 n.5 (explaining underlying allegations of attempted jury tampering by a third party).[2] Because egregious facts like these

[2] The Sixth Circuit analyzed whether the trial court erred in not conducting additional juror questioning—the question Walton raises here—in *Corrado I*. The decision cited in the Petition was

are "presumptively prejudicial," *Corrado I*, 227 F.3d at 536, 538, the Sixth Circuit unsurprisingly found error where the trial court failed to adequately investigate the jurors' impartiality. Here, however, with no allegations of witness tampering or intimidation, the Sixth Circuit likely would have agreed with the district court that the Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation." Pet. App. Ex. B at 27 (citation omitted).

The other three cases expressly state that a defendant is not automatically entitled to additional *voir dire* whenever a question of potential juror bias is raised: The First Circuit emphasized that its "holding here does not require the district court in every case in which it discovers juror misconduct to re-question all jury members." *Bristol-Martir*, 570 F.3d 44 n.7. The Third Circuit explained that trial courts do not abuse their discretion if they decline to question jurors individually where "countervailing concerns" are at play or there is "some basis for determining whether the defendants had been prejudiced." *Resko,* 3 F.3d at 692-93 (citation omitted). And the Seventh Circuit did "not say that individualized voir dire is necessarily required every time a jury expresses concern that defendants have access to information about them." *Blitch*, 622 F.3d at 667.

Like *Corrado*, these cases are also materially distinguishable on their facts. *Bristol Martir* concerned a juror who conducted independent research about the trial and introduced some of that material to the other jurors. 570 F.3d at 36. The First

---

decided two years later, and addresses the lower court's conclusions after it conducted a hearing pursuant to the Sixth Circuit's remand order in *Corrado I*.

Circuit held that additional examination of the jurors was required because of the particular need for courts to "ensure that jury members can remain impartial *when they have been exposed to extrinsic information that is potentially prejudicial*." *Id.* at 43 (emphasis added). Because researching information outside the trial record is materially different from a juror's reaction to recognizing someone in the courtroom, there is no conflict between the First Circuit's approach in *Bristol Martir* and the decision below.

In *Blitch*, the trial court empaneled a jury after the pool of prospective jurors were overheard discussing safety concerns when they learned the defendant had access to their juror questionnaires. 622 F.3d at 665-66. The Seventh Circuit granted a new trial, holding that the trial court abused its discretion by not "empanel[ing] a new venire" or "investigat[ing] bias properly." *Id.* at 664. The jurors' fear for their safety makes *Blitch* the most closely analogous case to the decision below. Yet even there, the Seventh Circuit emphasized the "general rule" that appellate courts "leave matters relating to jury selection to the sound discretion of the trial judge" because "that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record," such as "inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *Id.* at 665, 667 (quoting *Skilling*, 130 S.Ct. at 2917-18). The court departed from this general rule because of clear evidence that "scheduling concerns were the basis for the decision not to conduct individual *voir dire*." *Id.* at 667; see also *id.* at 666 (trial court explaining refusal to impanel a new jury because "we might not finish before I have to sit on the Federal Circuit").

Moreover, the same issue had arisen earlier in the proceedings, and the trial court conducted individual juror interviews and impaneled a new jury because it recognized the potential for prejudice. *Id.* Where the only reason for a different approach the second time around was scheduling concerns—and over *both* parties' objections—the Seventh Circuit found error. *Id.*

The trial court did not rely on similarly "irrelevant or improper" factors here. *Blitch*, 622 F.3d at 667 (citation omitted). Its conclusion that "the juror had indicated that she was afraid of the repercussions for returning her verdict, not that she was impartial to find one way or the other," was based on facts observed at trial and the jury's notes to the court. *Walton*, 2015 WL 571031, at *42. The trial court also issued a cautionary instruction to the entire jury, rather than abdicating its supervisory responsibility because of concerns about the collateral consequences of delay. *Id.* at *42-43. If called to review the facts in this case, the Seventh Circuit would thus very likely have followed its "general rule" by trusting the trial court's discretion.

Finally, *Resko* addressed the question of potential bias where—unlike here—jurors discussed the merits of the case before deliberations began. *Resko*, 3 F.3d at 686. The Third Circuit emphasized that it would not "assume the existence of prejudice" because of the "clear doctrinal distinction between evidence of improper intra-jury communications and extra-jury influences," like "influence[] by the media [or] communications with third parties." *Id.* at 690, 695. The "latter" category—external influences—"pose[s] a far more serious threat to the defendant's right to be tried by an impartial jury." *Id.* at 690 (citations omitted). Nevertheless, the court

found an abuse of discretion in not conducting individual *voir dire* because the trial court did not have any information about the scope or nature of the intra-jury communications, making it unclear "how the district court could have had enough information to make a reasoned determination that the defendants would suffer no prejudice due to the jury misconduct." *Id.* at 691. In other words, the Third Circuit would very likely defer to most trial courts facing similar situations, but drew the line where the judge lacked sufficient information to make a reasoned decision. Here, the state trial judge had "enough information" to assess the scope of the concern, and—in another critical departure from *Resko*—to "fashion an appropriate cautionary instruction." *Resko*, 3 F.3d at 691.

B. Lower Courts Are Not Divided Over Any Issue Presented In This Case.

Looking beyond the decisions on which the Petition relies further confirms that circuit courts facing similar issues apply the same reasoning as the district court did below.

Unlike each of the cases discussed above, 11 years after its decision in *Blitch* the Seventh Circuit confronted an almost identical scenario to that at issue here: A juror recognized a defendant's family members in court and saw them when she was "shopping and on the train coming to or leaving court," and expressed being "a little frightened." *United States v. Benabe*, 654 F.3d 753, 780 (7th Cir. 2011). The trial court reasoned that without more, this factor reflected "preexisting, intrinsic bias," rather than "extraneous contact" with third parties. *Id.* As here, the court did not question the juror or otherwise conduct further inquiry into these allegations. *Id.*

And also as here, the reviewing court affirmed the ruling, holding that allegations of bias stemming from facts like these do not "require[] that the trial court hold a hearing so that [the juror] could be questioned about any preexisting, internal bias." *Id.*

Nor have courts treated mere presence in the courtroom as a form of juror intimidation. The Fourth Circuit, for instance, has noted that it could find only one case where "prejudice was said to arise because of intimidation in the courtroom." *United States v. Babb*, 369 F. App'x 503, 511 (4th Cir. 2010) (discussing *United States v. Rutherford*, 371 F.3d 634 (9th Cir. 2004)). Unsurprisingly, the facts of the Ninth Circuit decision it cited are distinguishable in two key respects. First, the case involved an allegation against Internal Revenue Service and Department of Justice employees, and thus implicated a special rule for "government employees" in the courtroom, based on "a heightened concern that the jurors will not 'feel free to exercise [their] functions' with the Government 'looking over [their] shoulder[s].'" *Rutherford*, 371 F.3d at 643 (citing *Remmer v. United States*, 347 U.S. 227, 229 (1954)). Second, the government employees "intimately associated with the prosecution" throughout trial and "[a]t least one juror alleged that a number of the agents regularly glared at her and her fellow jurors." *Id.* Here, the juror noted only that she recognized some spectators; she did not allege any provocation or intimidating conduct. See *Walton*, 2015 WL 571031, at *30. Similarly, although the juror expressed a fear of retaliation, that fear was connected only to *knowing* "the family," not anything that they had done or said. See Pet. App. Ex. F.

And to the extent the Petition expresses concern with what the juror shared with her fellow members—and even assuming that discussion would have been improper—a trial court's discretion "is at its broadest when the allegation involves internal misconduct such as premature deliberations, instead of external misconduct such as exposure to media publicity." *United States v. Dominguez*, 226 F.3d 1235, 1246 (11th Cir. 2000). The discretion plainly extends to "the initial decision of whether to interrogate the jurors" about their discussions, *id.*, at least where—as here—there is no indication that the court proceeded without "enough information to make a reasoned determination . . . or to fashion an appropriate cautionary instruction," *Resko*, 3 F.3d at 691. And it applies with even greater force here, because discussion among the jury took place *during* deliberations, not while evidence was still being introduced and before the jurors were instructed on their role and the governing law.

As with the cases the Petition cites, there is no reason to think that the result below would change under the approach of any of these courts. Reviewing courts routinely defer to trial courts' broad discretion to assess allegations of jury bias from a variety of sources and to fashion appropriate remedies—which may include, but almost never require, *voir dire* or a mistrial. Accordingly, there is no need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PATRICK MORRISEY
Attorney General

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

LINDSAY S. SEE
Solicitor General
Counsel of Record

THOMAS T. LAMPMAN
Assistant Attorney General

Counsel for Respondent

May 24, 2019

APPENDIX

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v.

Criminal Case No. 09-F-92

Paul M. Blake, Jr., Judge

TONY J. WALTON,

Defendant.

ORDER REFUSING RULE 35 MOTIONS AS UNTIMELY FILED

On March 5, 2015, the Defendant, Tony J, Walton, *pro se*, filed a *Motion To Reduce Sentence* ("*Motion*") purportedly under Rule 35 of the *West Virginia Rules of Criminal Procedure*.

Having thoroughly reviewed the *Motion* and the record in this matter, the Court does hereby **FIND** and **CONCLUDE** the following:

1. The subject sentence was imposed upon Defendant, Tony J. Walton, in the above styled matter, on or about January 26, 2010; and

2. On or about March 26, 2010, the Defendant, Tony J. Walton, timely filed *Defendant's Motion For Reconsideration Of Sentence* pursuant to Rule 35 of the West Virginia Rules of Criminal Procedure and the same was subsequently denied by *Order* entered by this Court on or about March 30, 2010; and

3. After the Court denied Defendant's first Rule 35 motion, the Defendant has filed numerous other untimely handwritten motions purportedly under Rule 35 of the

West Virginia Rules of Criminal Procedure, including the instant one referenced by the Defendant in his recent correspondence to the Court; and

4. *Rule 35(b)* of the *West Virginia Rules of Criminal Procedure* provides that "[a] motion to reduce a sentence may be made, or the court may reduce a sentence without motion ***within 120 days after the sentence is imposed*** or probation is revoked . . .." W. Va. R. Crim. P. 35 (***emphasis added***); and

5. All Rule 35 motions filed by the Defendant subsequent to Defendant's initial motion are untimely; and

6. The Defendant's Rule 35(b) *Motion(s)* should be refused as not timely filed;

NOW, THEREFORE, in consideration of the foregoing, the Court is of the opinion that Defendant's Rule 35 *Motion(s) To Reduce Sentence* should be, and hereby are, **REFUSED** as untimely filed.

This is a Final **Order**.

The clerk of this Court is directed to forward attest copies of this Order Refusing Rule 35 Motions As Untimely Filed to: **Tony J. Walton, Inmate No. 3484794**, Mount Olive Correctional Complex, 1 Mountainside Way, Mount Olive, WV 25185; and Prosecuting Attorney **Larry E, Harrah, II,** 108 E Maple Ave., Fayetteville, WV 25840.

ENTERED this 3 day of December 2018.

Paul M. Blake, Jr., Judge