

\*\*\* CAPITAL CASE \*\*\*

No. 20-7553

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IN THE  
SUPREME COURT OF THE UNITED STATES

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LEN DAVIS,

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

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

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**REPLY BRIEF FOR PETITIONER**

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**INTRODUCTION**

Petitioner has arrived at this juncture in habeas proceedings without an evidentiary hearing in the district court and without appellate review by the Fifth Circuit Court of Appeals, a panel of which denied a Certificate of Appealability (COA). The district court's ruling denying an evidentiary hearing and denying habeas relief came as a shock. It had initially ordered Petitioner and the government to file witness

and exhibit lists for the hearing,<sup>1</sup> then admonished all counsel to be ready for an evidentiary hearing and promised oral argument on claims not requiring an evidentiary hearing. Pet. 16-17. After a flurry of pleadings were filed, the court went silent. Pet. 17; ROA.7050.

The following year, on March 21, 2018 at 8:15 PM, an op-ed appeared in the local news bemoaning the length of time involved in appealing capital cases. James Gill, *Spinning their wheels on death row*, NOLA.com (Mar. 21, 2018, 8:15 PM), [https://www.nola.com/article\\_0dbf30dc-32f6-5262-95a8-dcfc45a7b6b3.html](https://www.nola.com/article_0dbf30dc-32f6-5262-95a8-dcfc45a7b6b3.html). The very next day at 2:27 PM, the district court issued its 13-page opinion denying an evidentiary hearing by improperly applying the appellate abuse-of-discretion standard and dismissing all claims. Pet. App. 77. The opinion was issued without reference to Petitioner's witness and exhibit list. The district court also denied a COA on all claims.

A panel of the Fifth Circuit then denied a COA utilizing the wrong standard—one applicable to substantive review of Petitioner's claims rather than a COA. This Court has repeatedly corrected the Fifth Circuit's unduly restrictive approach to granting COAs. *See Banks v. Dretke*, 540 U.S. 668, 705 (2004); *Tennard v. Dretke*, 542 U.S. 274, 283 (2004) ; *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Buck v. Davis*, 137 S.Ct. 759, 773-74 (2017). *See also Jordan v. Fisher*, 135 S. Ct. 2647, 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of

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<sup>1</sup> The government ignored the district court's order to file witness and exhibit lists, and instead filed a memorandum opposing an evidentiary hearing.

certiorari) (noting Fifth Circuit’s “troubling” pattern of failing to apply the threshold COA standard required by this Court’s precedent).

Particularly given the constitutionally-recognized need for heightened reliability in capital cases, Petitioner seeks certiorari and this Court’s intervention – both to ensure meaningful review of his death sentence and to ensure uniform review among the circuits.

### **ARGUMENT**

In denying a COA for Petitioner’s constitutional ineffective-assistance-of-trial-counsel claim, the Fifth Circuit panel below stated that “no reasonable jurist could debate that Davis suffered no prejudice” Pet. App. 6. In doing so, it ignored Petitioner’s uncontroverted evidence newly presented in the Section 2255 proceeding that not only did Petitioner and Groves know each other, but they had a long-standing very personal and acrimonious relationship pre-dating Petitioner’s status as a police officer or any NOPD complaint. Contrary to the Fifth Circuit’s conclusion, *see, e.g.*, Pet. App. 7, new evidence further refuting the “under the color of law” element of Petitioner’s Section 241 and 242 convictions and supporting intensely personal reasons for commission of the crime warrants meaningful review of denial of habeas relief.

The Court based its rejection of COA on its view that the trial evidence in support of the “under color of law” element was “overwhelming.” Pet. App. 6. The cited trial evidence included: evidence that Petitioner put his plan into action after learning of Grove’s complaint against him with NOPD – the motive for the crime –

and then met with co-defendants Hardy and Causey while on duty at the police station and in his police vehicle, which he also used to “case” the neighborhood looking for Groves, while assuring Hardy that he would take care of any evidence at the crime scene. Pet. App. 6-7. According to the Fifth Circuit, this trial evidence established that (1) Petitioner misused or abused his official power and (2) there is a nexus between the victim, the improper conduct, and Petitioner’s performance of his official duties, as required for “under color of law.” Pet. App. 5.

**I. THE FIFTH CIRCUIT’S FAILURE TO APPLY THE THRESHOLD COA STANDARD MERITS SUMMARY REVERSAL**

The Fifth Circuit’s ruling, while couched in COA terms such as “no reasonable jurist could debate” that Petitioner suffered prejudice as a result of trial counsel’s under-color-of-law deficiencies, is, in fact, another “troubling” circuit ruling on the merits of Petitioner’s ineffectiveness claim at the COA stage. The Fifth Circuit has failed, once again, to take seriously this Court’s instruction that the COA question before it is whether jurists of reason could disagree with the district court’s resolution of the constitutional claim or whether jurists could conclude the issue presented is adequate to deserve encouragement to proceed further, and not whether Petitioner will actually succeed on appeal. *See Buck v. Davis*, 137 S.Ct. 759, 773 (2017). This failure is evidenced by what the Fifth Circuit panel did: undertake a full consideration of what it considered the factual and legal bases in support of the claim on the merits. It is also evidenced by what the Fifth Circuit panel did not do: there is no reference in its analysis to Judge DeMoss’ dissent on direct appeal and his

conclusion that the same trial evidence relied upon by the panel was insufficient to establish the “under color of law” element. Under the circumstances, Respondent’s argument that the Fifth Circuit cited to the correct COA standard and “faithfully applied” it, (Opp. 25), rings hollow. Summary reversal is in order.

## **II. THE FIFTH CIRCUIT’S FAILURE TO CONSIDER JUDGE DEMOSS’ DISSENT IS IN CONFLICT WITH OTHER CIRCUITS**

As set forth more fully in Petitioner’s petition for a writ of certiorari, the Fifth Circuit’s failure to consider Judge DeMoss’s dissent in its COA analysis is in conflict with the practices of other circuits in resolving the merits of COA requests. Pet. 22-26. Judge DeMoss’ dissent was based on the insufficiency of the *very same trial evidence* that the panel below relied upon to conclude that “no reasonable jurist” could debate the issue of prejudice. At the very least, the Fifth Circuit panel’s failure even to mention this dissent in its COA analysis is contrary to other federal circuits that take into account such dissenting rulings and opinions in applying this Court’s COA standard. Pet. 23-26.

In response, Respondent makes much of the Fifth Circuit’s ability to adopt differing local rules establishing procedures for addressing COA applications (Opp. 16-18), an issue not raised by Petitioner’s petition (Pet. 23). Regardless of the procedures adopted, it remains that the Fifth Circuit – and all circuits – must follow this Court’s established precedent in ruling on the merits of a COA request. Given the conflict in how the circuits apply the COA standard in light of dissenting opinions, this Court’s intervention is required. Respondent’s “procedures” argument has no relevance to this concern and is without merit.

The Respondent also tries, unsuccessfully, to dismiss the significance of Judge DeMoss' dissent to the Fifth Circuit's erroneous resolution of the COA issue on the basis that the dissent only reflects Judge DeMoss' disagreement with the majority "about the type of evidence" that can satisfy the "under color of law" element. Opp. 16. To the contrary, Judge DeMoss' focus was not on the type of evidence but the lack of evidence to establish that Petitioner's use of his police pager, radio and patrol car were necessary for the commission of the offense or that there exists a "but for relationship between Davis' status as a police officer and Groves' murder." Pet. App. 43. As Judge DeMoss concluded, based on the trial evidence, "both Davis' malevolent plan to execute Groves and his conduct to set that plan in motion were separate and apart from his status as a police officer." Pet. App. 43.

Petitioner's uncontroverted evidence of the long-standing very personal and acrimonious nature of the relationship between him and Ms. Groves only reinforces Judge DeMoss' insufficiency analysis by further eroding the government theory of a nexus or "but for" relationship between Petitioner's status as a police officer and Ms. Groves' murder. While Judge DeMoss addressed the issue in the context of an insufficiency of evidence claim on appeal, Petitioner's ineffective assistance of trial counsel claim – and its prejudice prong – likewise addresses the insufficiency of the "under color of law" evidence. In fact, Petitioner's ineffectiveness claim and the uncontroverted evidence in support go to the very heart of, and reinforce, Judge DeMoss' conclusion that the events of October 13, 1994 were separate and apart from Petitioner's status as a police officer. Moreover, Petitioner's uncontroverted evidence

goes to the heart of and undermines the appellate majority's conclusion, necessary to its affirmance, that there was a nexus between the victim, the improper conduct and Petitioner's performance of his official duties. Pet. App. 34. The Fifth Circuit's failure to recognize the significance of the Judge DeMoss dissent to the resolution of the merits of a COA for the ineffective assistance of counsel claim is stark conflict with the practice of other circuits, thereby requiring this Court's intervention.

### **III. THE FIFTH CIRCUIT'S FAILURE TO ADDRESS THE DENIAL OF AN EVIDENTIARY HEARING ON JURISDICTIONAL GROUNDS RAISES A CIRCUIT CONFLICT**

As set forth in Petitioner's petition (Pet. 27-35), the Fifth Circuit panel's refusal to address the improper denial of Petitioner's request for an evidentiary hearing based on what it concludes is a lack of jurisdiction due to its denial of a COA is an outlier position among the circuits. Respondent acknowledges a conflict in the circuits about whether a court can review the denial of an evidentiary hearing while also denying a COA on a petitioner's constitutional claims, but dismisses these varying approaches as unlikely to produce different results and of little concern. Opp. 22-24. Respondent never addresses the deleterious effects its position would have on capital § 2255 cases<sup>2</sup> (as it did in Petitioner's case below): a § 2255 movant could be denied all appellate rights because a district court improperly denied an evidentiary hearing and no federal appellate court would have jurisdiction to correct the lower court error. Respondent's position in this case undermines the importance of the one

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<sup>2</sup> In fact, Respondent's brief erroneously relies on § 2254 cases (*Schriro v. Landrigan*, 550 U.S. 465 (2007) and *Hill v. Lockhart*, 474 U.S. 52 (1985)) and a case examining a successive § 2255 application (*Sanders v. United States*, 373 U.S. 1 (1963)). Opp. at 20-22.

opportunity for factual development of constitutional claims that exists in capital § 2255 proceedings and ignores how the Fifth Circuit's unique no-jurisdiction approach soundly defeats this opportunity contrary to the heightened level of reliability constitutionally required in death penalty cases.

The denial of the opportunity for factual development in support of the prejudice prong of Petitioner's ineffectiveness claim makes the point. The under color of law element was crucial to federal jurisdiction in this case. The post-conviction evidence of the long-standing (predating his status as a police officer) and very personal and acrimonious relationship between Petitioner and Ms. Groves was never heard by the trial jury due to trial counsel's deficient performance. That evidence was directly relevant to the issue of the necessary nexus between Ms. Groves, her death and Petitioner's performance of his official duties, which nexus the government argued was satisfied as a result of Ms. Groves' filing an internal affairs complaint against Petitioner in his capacity as a police officer and her resulting death. But the complaint was for improper police conduct which was known to have been committed by Petitioner's partner, Sammie Williams, and not Petitioner. The nature of the relationship between Petitioner and Ms. Groves puts this unfounded complaint in a different light altogether and as having nothing to do with Petitioner's status as a police officer or the performance of his official duties.

The district court, by erroneously denying a hearing, never considered this new evidence in the context of the trial ineffectiveness claim. Instead, it merely pointed to the previous appellate ruling on the color-of-law issue, a decision issued before this

evidence was discovered in post-conviction. App. 97. In fact, the fractured Fifth Circuit opinion highlights the merit in Petitioner's § 2255 claim: one judge dissented because even the evidence known at that time failed to support "color of law" and a second judge concurred in the denial only because the evidence could not support a showing that Petitioner's actions were in "pursuit of a purely personal goal." App. 44, App. 57. The evidence Petitioner sought to present at his evidentiary hearing would have established that the crime was indeed in pursuit of a private aim and therefore not under color of law.

The Fifth Circuit's refusal, in conflict with the other circuits, to consider on jurisdictional grounds the failure of the district court to provide Petitioner an opportunity to present evidence in support of his fact-based ineffectiveness claim and the prejudice prong compounded this error. For example, the Fifth Circuit's conclusion that Petitioner should be denied a COA because he failed to show what difference additional information about his relationship with Ms. Groves would have made to the under color of law element, App. 7, is the very evidence that Petitioner would have developed, and the burden of proof that he would have satisfied, at an evidentiary hearing. Respondent's cavalier approach to this circuit conflict should be rejected by this Court, and review granted in this case, where the issue is ripe for resolution.

## CONCLUSION

For all the foregoing reasons, petitioner respectfully prays that this Court grant a writ of certiorari and permit briefing and argument on the issues presented.

Respectfully submitted,

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