

In the
Supreme Court of the United States

Donald Sherman,

Petitioner,

v.

Jeremy Bean, Warden, *et al.*,

Respondents.

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

Reply to Brief in Opposition to Petition for Writ of Certiorari

CAPITAL CASE

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Sherman’s case allows this Court to resolve a circuit split regarding whether a separate COA is required for factual development.

Respondent essentially acknowledges the existence of a circuit split that is implicated in Sherman’s case. While Respondent says the split “is not well-defined,” BIO at 1, the split is clear enough for Respondent to acknowledge the existence of intra-circuit splits in the Sixth, Eighth, Ninth, and Tenth Circuits. BIO at 8–9. The split is also apparently well-defined enough for Respondent to argue the Fourth Circuit has adopted the minority view on the split (or has an intra-circuit split). BIO at 7. Respondent argues “this Court should wait to address the issue until the circuits resolve their own internal splits of authority and settle on a given rule.” BIO at 9. But even Respondent acknowledges the split has definitively been resolved in the Fifth, Sixth, and Eleventh Circuits. *E.g.*, *United States v. Lincks*, 82 F.4th 325, 333 (5th Cir. 2023) (resolving intra-circuit split); *Mammone v. Jenkins*, 49 F.4th 1026 (6 Cir. 2022) (same). And although Respondent fails to acknowledge the First Circuit’s decision, that court has definitively resolved the issue in the opposite direction. *E.g.*, *Lee v. Corsini*, 777 F.3d 46, 62 (1st Cir. 2015). The split is clear enough for Respondent to argue this Court should adopt the minority view espoused by the First Circuit. BIO at 11 (analyzing *Slack v. McDaniel*, 529 U.S. 473 (2000)).

As to the circuits that have definitively reached opposing conclusions on the split in published decisions Respondent doesn’t explain the benefit of

further percolation of the issue. As to those with intra-circuit splits—Fourth, Eighth, Ninth, and Tenth Circuits—Sherman argued those splits are unlikely to be resolved because the circuit courts of appeal do not recognize the split, possibly because some of the cases are unpublished and therefore were resolved in a summary manner. But intra-circuit splits exist in the published decisions of the Eighth and Tenth Circuits while published decisions in the Fourth and Ninth Circuits adopt the majority rule while unpublished ones, like Sherman’s case and the cases cited by Respondent from the Fourth Circuit, don’t acknowledge the intra-circuit splits. The upshot is there is a mature and unresolved circuit split in published decisions and this Court’s intervention is needed to resolve the split for federal courts and habeas litigants.

To the extent anything is murky it is only because Respondent posits unwarranted distinctions between the cases. For example, Respondent argues there is a distinction between cases brought under 28 U.S.C. § 2254 and those brought under § 2255. BIO at 8. But Respondent fails to explain how this purported distinction means that a separate COA should be required for factual development. And this distinction has not been recognized by any federal court. Respondent also argues that if the state “doesn’t object to a habeas petitioner including an uncertified discovery issue in the opening brief, 28 U.S.C. § 2253(c) is no bar to the appellate court exercising jurisdiction over the issue.” BIO at 9 n.5. What Respondent does not acknowledge is that is exactly what happened here: Respondent did not argue in their answering

brief a separate COA was required for factual issues, and the Ninth Circuit nonetheless imposed the minority rule *sua sponte*. Stripping away these legally baseless distinctions reveals a mature and well-developed circuit split this Court should resolve.

II. Sherman’s case presents an excellent vehicle to decide the question presented.

Sherman’s case is not encumbered with other procedural or substantive issues that would prevent this Court from granting plenary review.

Respondent argues “Sherman failed to preserve the issue, and the Ninth Circuit appropriately declined to address the issue because Sherman improperly raised the issue for the first time in a footnote of his reply brief.” BIO at 1, 12–13. This is incorrect. As the Ninth Circuit noted, the argument contained in Sherman’s reply was “the issue on appeal is not the reasonableness of the state court’s determination of this claim under § 2254(d), but ‘whether Sherman demonstrated good cause for discovery under Rule 6(a) of the Rules Governing Section 2254 Cases.’” App. 40. Sherman does not raise this argument here: he acknowledges deference applies to the state court’s factual finding and argues the finding was unreasonable. *See* Section III, below.

Respondent acknowledges the only other waiver is intertwined with the question presented, i.e., that the request for discovery was waived because Sherman did not seek a separate COA on that issue. BIO at 12. Respondent acknowledges Sherman requested a remand for discovery in his opening brief,

BIO at 5, and mentioned formal discovery eleven times in his brief, including in the specific section of the brief raising a claim under *Napue v. Illinois*, 360 U.S. 264 (1959). BIO at 13. Sherman did not waive the issue he raises here.

Respondent argues Hammack’s and Kalter’s false testimonies were not material to the penalty verdict. BIO at 1, 26–27. However, Sherman’s *Napue* claim was rejected by the Ninth Circuit on the sole ground that the state court’s factual finding—that there was no connection between the benefits received by Placencia and Kalter and their cooperation in Sherman’s case—was entitled to deference. App. 40. And Respondent acknowledges the state court “did not directly address the substantive claim of a *Napue* violation,” which means the issue is reviewed *de novo*. BIO at 21. Materiality under *Napue* is assessed under its own prejudice standard, *Glossip v. Oklahoma*, 145 S. Ct. 612, 624 n.5 (2025), and it is appropriate for the Ninth Circuit to apply that standard in the first instance on remand.

III. Alternatively, Sherman is entitled to summary reversal of the Ninth Circuit’s decision based on the court’s failure to address his compelling factual proffer.

Respondent contends that Sherman’s argument that the Ninth Circuit erred by failing to reconcile his evidentiary proffer with the state court’s factual finding is immaterial because it relies on this Court’s pre-AEDPA case law. BIO at 18–20. But Respondent acknowledges AEDPA maintains “the presumption of correctness of state court findings,” BIO at 19, and this Court does not hesitate to correct deficiencies in a federal court’s decision if it gave short shrift to the state court’s factual findings, *e.g.*, *Burt v. Titlow*, 571 U.S.

12, 20 (2013), or failed to consider the import of the petitioner’s factual proffer. *E.g.*, *Brumfield v. Cain*, 576 U.S. 305, 314–16 (2015).

Respondent does not acknowledge the detailed evidentiary proffer Sherman made to the state and federal courts showing an obvious connection between the benefits received by the jailhouse informant witnesses and their cooperation in Sherman’s case. Petition at 9–11. Instead, Respondent merely asserts Sherman cannot “demonstrate that Sgt. Hammack lied during his testimony or that the prosecution failed to correct any false statements by Sgt. Hammack.” BIO at 24. But Sherman’s evidentiary proffer showed Hammack himself was personally involved in procuring benefits for Placencia, App. 103, and further that the prosecutor’s office also became involved in getting Placencia excused from serving his jail sentence. *Id.* There is nothing in the record that would allow a reasonable fact finder to reach any other conclusion than that the prosecutor failed to correct Hammack’s false testimony.

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CONCLUSION

For the foregoing reasons, Sherman requests that this Court grant his petition for writ of certiorari to resolve a split among the circuits and reverse the judgment of the Ninth Circuit. In the alternative, Sherman requests that this Court summarily reverse for the Ninth Circuit to consider his factual proffer showing the state court's factual finding was unreasonable in light of the evidence presented.

Dated this 21st day of April, 2025.

Respectfully submitted,

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