No. 13–7023

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE ROBERT GLEN JONES, JR.
PETITIONER,

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

BRIEF IN OPPOSITION

CAPITAL CASE
EXECUTION SCHEDULED FOR OCTOBER 23, 2013

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Has Jones established the exceptional circumstances necessary to warrant this Court's exercise of jurisdiction under 28 U.S.C. §§ 1651(a), 2241, and 2242, where he seeks to present a claim that he omitted from his previous habeas proceedings, and where he has not satisfied AEDPA's standards for filing a second or successive habeas petition?

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OPINIONS BELOW

Jones has attached the Ninth Circuit's panel opinion denying his request to file a second or successive habeas petition containing the claim he presents in the present petition. (Appendix A to habeas petition.) Other opinions related to Jones' case are included in his appendix to his currently-pending petition for writ of certiorari; the reported opinions are as follows: *State v. Jones*, 4 P.3d 345 (Ariz. 2000) ("*Jones I*") (affirming convictions and sentences on direct appeal), *cert. denied, Jones v. Arizona*, 532 U.S. 978 (2001) (Mem.); *Jones v. Ryan*, 2010 WL 383510 (D. Ariz. Jan. 29, 2010) (denying habeas relief), *reconsideration granted in part, Jones v. Ryan*, 2010 WL 892185 (D. Ariz. Mar. 10, 2010); *Jones v. Ryan*, 691 F.3d 1093 (9th Cir. 2012) ("*Jones II*") (affirming denial of habeas relief), *cert. denied Jones v. Ryan*, __ U.S. __, 133 S.Ct. 2831 (2013); *Jones v. Ryan*, 2013 WL 5348294 (D. Ariz. Sept. 24, 2013) (denying motion for relief from judgment).

STATEMENT OF JURISDICTION

This Court's possesses discretion to exercise its jurisdiction under 28 U.S.C. §§ 1651(a), 2241, 2242, 2254(a), and Article III of the United States Constitution.

PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall … deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2244(b)(2) provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

In the summer of 1996, Jones, along with co-defendant Scott Nordstrom, murdered six people while robbing two Tucson businesses: the Moon Smoke Shop ("Smoke Shop") and the Firefighters' Union Hall ("Union Hall").[1] *Jones I*, 4 P.3d at 352–53, ¶¶ 1–11. Jones was sentenced to death for each murder. *Id.* at 351, ¶ 1. David Nordstrom was the getaway driver for the Smoke Shop crimes and, pursuant to a testimonial agreement with the State, described at trial how Jones and David's brother Scott Nordstrom committed those offenses. *Id.* at 352, ¶¶ 2–4. David Nordstrom also testified that, on the night of the Union Hall murders, Jones had appeared at his residence and had admitted that he and Scott Nordstrom had killed the victims. *Id.* at 353, ¶ 10. At the time, David Nordstrom was on parole and supervised by an electronic monitor worn on his ankle. *Id.* The monitor's records confirmed that David Nordstrom did not leave his residence the night of the Union Hall crimes. *Id.*

Less than 1 week before his execution date, Jones asked the Ninth Circuit for leave to file a second or successive habeas petition, raising a freestanding actual-

[1] For a full discussion of the facts underlying Jones' convictions and sentences, Respondent respectfully refers this Court to pages 2 to 3 of their response to Jones' certiorari petition under this Court's No. 13–6994.

innocence claim and a claim based on *Brady v. Maryland*, 373 U.S. 83 (1963). *See* 28 U.S.C. § 2244(b)(3)(A) (requiring prisoner to obtain leave of court of appeals before filing second or successive habeas petition in district court); *accord* Rule 9, Rules Governing § 2254 Cases; *see also* 28 U.S.C. § 2244(b)(3)(B), (C) (circuit court "may authorize the filing of a second or successive application *only* if it determines that the application makes a prima facie showing that the application satisfies [AEDPA's] requirements" for filing a second or successive petition) (emphasis added). Jones' claims rest on the trial prosecutor's alleged failure to disclose certain records relating to David Nordstrom's electronic monitoring system, which Jones speculates could have called into question Nordstrom's alibi for the Union Hall crimes.

The Ninth Circuit denied this request, finding that "even if the electronic monitoring evidence shows what Jones wants it to show, it is not sufficiently exculpatory" to satisfy either 28 U.S.C. § 2254(b)(2)(B) or *Schlup v. Delo*, 513 U.S. 298 (1995), which Jones claimed governs the analysis. (Appendix A to habeas petition, at pp. 28–29, 38–39 & n.5.) The court relied in part on the strength of the other evidence against Jones, including his inculpatory statements, and eyewitness descriptions of one Smoke Shop assailant and his vehicle that were consistent with Jones and his truck. (*Id.*) In connection with another claim relating to the electronic-monitoring records, the court found that Jones had failed to show that his claim's factual predicate could not have been discovered previously through the exercise of due diligence because Jones "could have discovered the potential problems associated with Nordstrom's electronic monitoring device as early as 1997 or 1998, when reports of such devices' failures made the news." (*Id.* at 36–37.)

REASONS FOR DENYING THE WRIT

Less than 24 hours before his execution, Jones asks this Court to exercise its jurisdiction to grant the extraordinary remedy of habeas relief on a claim that the Ninth Circuit has already determined does not satisfy 28 U.S.C. § 2254(b)(2)(B)'s requirements. This Court should decline Jones' invitation. Jones has not shown that he could not have raised this claim earlier, or that the records at issue would have established his innocence under either 28 U.S.C. § 2254(b)(2)(B) or the less-demanding *Schlup* standard, assuming without conceding that it applies.[2]

"To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." SUP. CT. R. 20(4)(a). "This writ is rarely granted." *Id.* And AEDPA's limitations on second or successive habeas petitions, as set forth in 28 U.S.C. § 2244(b)(1) and (2), "inform [this Court's] consideration of original habeas petitions," as they "apply without qualification to any second or successive habeas corpus application under section 2254." *Felker v. Turpin*, 518 U.S. 651, 662–63 (1996) (quotations omitted); *see also Tyler v. Cain*, 533 U.S. 656, 661 (2001) (AEDPA

[2] As a threshold matter, Jones argues at length that the Ninth Circuit's abused its discretion by finding that he failed to act diligently and erred by failing to find that he had made a sufficient showing to obtain a remand for evidentiary development. (Habeas petition, at 11–13.) To the extent Jones attempts to *directly* appeal the Ninth Circuit's ruling, that appeal is prohibited by statute. *See* 28 U.S.C. § 2244(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."). This Court may only review Jones' claim by exercising its original jurisdiction, which, as set forth above, requires Jones to make an extraordinary showing.

significantly "restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications").

This Court should deny Jones' petition because he has not shown the extraordinary circumstances Rule 20 requires, and because his second or successive petition does not satisfy AEDPA's requirements. As the Ninth Circuit properly concluded, Jones failed to diligently develop his claims. *See* U.S.C. § 2244(b)(2)(B)(i). Jones offers no reason that he could not, at some earlier point in the 17 years since his crimes, have discovered the information upon which his claim rests. Jones argues that he could not have discovered his claim's factual predicate previously because of the State's allegedly-false responses to his discovery requests. But Jones' present counsel had no more cause to seek the records than did previous counsel, yet they sought the records nonetheless. Prior counsel could have done the same, either at trial, on appeal, during state post-conviction proceedings, or during habeas proceedings.

Nor has Jones shown that the information he now possesses was not available earlier. Jones learned of the monitor's purported unreliability from public records that existed during trial and post-conviction proceedings. He offers no reason that he could not, during those prior proceedings, have researched BI, made the same discovery request of the Arizona Department of Corrections that his present counsel have made, and discovered the factual basis for the claim he now seeks to present. Having foregone this opportunity, Jones should not be permitted to raise his claim now, on the eve of his execution.

Second, Jones has not shown that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole," would be sufficient to show his innocence by clear and convincing evidence. 28 U.S.C. § 2244(b)(2)(B)(ii). Most critically, Jones has been unable to obtain records from the manufacturing company that he suspects will support his claim that Nordstrom's monitoring system may have malfunctioned. As a result, he acknowledged in the Ninth Circuit proceedings, and does not dispute in his habeas petition, that he cannot prove the records would be material under *Brady*. But if Jones cannot show materiality under *Brady*, he cannot meet his higher burden of making a *prima facie* case that he is innocent by clear and convincing evidence. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). *See United States v. Bagley*, 473 U.S. 667, 682 (1985) ("[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

Jones cannot state a *prima facie* claim of his innocence by speculating that *if* discovery is granted he *might* be able to show a *Brady* violation. Speculation cannot amount to clear and convincing evidence, and this Court "should not allow [a] prisoner[] to use federal discovery for fishing expeditions to investigate mere speculation." *Calderon v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 98 F.3d 1102, 1106 (9th Cir.1996); *accord Kemp v. Ryan*, 638 F.3d 1245, 1260 (9th Cir. 2011). And it appears, based on the email Jones cites from the Arizona Board of Executive Clemency, that the manufacturing company may not retain records with the degree of specificity Jones seeks. (Habeas Petition, at 13–14.)

Further, even if the manufacturer's records support Jones' suspicion that Nordstrom's system may have malfunctioned, that fact would not show Jones' innocence in light of the evidence as a whole. *See* 28 U.S.C. § 2254(b)(2)(B)(ii). In addition to David Nordstrom's testimony implicating Jones, Lana Irwin testified that she overheard Jones describe details of the Union Hall and Smoke Shop murders that were not publically released. *Jones II*, 691 F.3d at 1098–99. She also helped Jones change his appearance after the murders, and recalled that he told her that he was hiding from someone. *Id.* David Evans heard Jones twice respond, when asked whether he was involved in the robberies, "If I told you, I'd have to kill you." *Id.* at 1099. Jones also told Evans that "you don't leave witnesses." *Id.* And a Smoke Shop survivor's physical description of one of the robbers generally matched Jones. *See Jones I*, 4 P.3d at 352, ¶ 5.

Finally, if Jones had successfully challenged Nordstrom's alibi for the Union Hall crimes, that fact would not have proved Jones' innocence—in fact, it would more likely have shown that *both* Jones and Nordstrom were involved. This is particularly true in light of the testimony described above from Irwin and Evans. And evidence impeaching Nordstrom's alibi for the Union Hall crimes would have had no bearing on the jury's finding that Jones committed the Smoke Shop crimes, as Nordstrom conceded that he was present for and participated in those events. Furthermore, Jones' counsel "attacked [Nordstrom's] credibility on every basis" at trial and persuasively highlighted his motive to fabricate. *Jones I*, 4 P.3d at 355, ¶ 18. It is therefore unlikely that additional information calling into question the monitoring system's reliability would have changed the jury's assessment of his

veracity. This Court should reject Jones' arguments and deny his original petition for writ of habeas corpus.

Respectfully submitted,

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NO APPENDIX