No. 19-7284

ORIGINAL



**IN THE**

**SUPREME COURT OF THE UNITED STATES**

BOBBY Y. WALLACE, JR.,
*Petitioner,*

v.

DARREL VANNOY, WARDEN,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

# PETITION FOR A WRIT OF CERTIORARI

BOBBY Y. WALLACE, JR., #314373
*PRO SE PETITIONER*
MAIN PRISON WEST, PINE-2
LOUISIANA STATE PENITENTIARY
ANGOLA, LA 70712

## QUESTIONS PRESENTED

The Supreme Court of Louisiana has a demonstrable, decades-long history of substituting in word and deed a "no evidence" standard for the "insufficient evidence" standard of *Jackson* v. *Virginia*, 443 U.S. 307 (1979).

(1) Could reasonable jurists debate whether this pattern may justify concluding that, whatever the words in a particular case, the state courts are using a standard that is "contrary to" or an "unreasonable application of" *Jackson*?

Petitioner received a mandatory life-without-parole sentence as a third offender for constructive simple possession of one ounce of cocaine, while his co-defendants (including two other third offenders) received probation, time served, and a term of years.

(2) Could reasonable jurists debate whether the state court decision to affirm Petitioner's sentence is contrary to or an unreasonable application of the "gross disproportionality" standard applicable to non-categorical Eighth Amendment claims?

(3) Whether the Court of Appeals' misapplication of the standard for issuing a certificate of appealability warrants an exercise of this Court's supervisory power by a GVR.

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the order of the Court of Appeals denying a certificate of appealability (COA) on the standard of review applicable to his claim of insufficient evidence, alleging a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and his claim of a grossly disproportionate sentence, in violation of a reasonable applicable the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution.

## OPINIONS BELOW

The order of the Court of Appeals, No. 19-30209, denying a COA appears at Appendix A and has not been designated for publication. The order of the District Court and the Magistrate Judge's Report and Recommendation appear in Appendices B and C and have not been designated for publication. The last reasoned state court decision on the questions presented appears in Appendix D and is reported at *State* v. *Wallace*, 71 So. 3d 1142 (La. Ct. App. 2011).

## JURISDICTION

The Court of Appeals entered final judgment against Petitioner on October 16, 2019. Pet. 3a. As such, this Court has jurisdiction under 28 U.S.C. § 1254(1) and Rule 13.1 of the Rules of the Supreme Court of the United States. *See Hohn* v. *United States*, 524 U.S. 236, 253 (1998) (holding denial of COA reviewable).

## CONSTITUTIONAL PROVISIONS INVOLVED

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

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

The Eighth Amendment to the United States Constitution provides, in relevant part:

> [N]or [shall] cruel and unusual punishments inflicted.

## STATEMENT OF THE CASE

One bright spring morning sixteen members of the Shreveport Police Department's SRT/SWAT Team burst "with very big guns and a ballistic shield" into Glenn and Kendra Young's home swearing that their cousin Bobby Wallace shot up an occupied SUV. Pet. 19a, 33a. Please put this from your mind. There'd been a mistake. Wallace did happen to be at the Youngs' home to pick up Tan, his three-year-old cousin, to take her to Head Start. Pet. 51a. But he did not live there. Neither did he shoot at anyone. You need not take Wallace's word for this: The jury acquitted him of the trivial "illegal use" charge, punishable by no more than two years, that was all the state ever tried to prove on the shooting. Pet. 31a.

Society may rest easy, however, knowing that this vintage early-2000s tactical entry did not go to waste. In what was surely just serendipity—for nothing under, on, or around the warrant had to do with drugs—DEA agents were present. Pet. 90a-93a. With the adults cuffed and kneeling on the front lawn and small children crying, the team searched the home. Under a couch cushion in the living room they found a "baggie" containing cocaine. Pet. 7a. All of one ounce (3).[1]

1 "[O]ne ounce of cocaine, standing alone, would not have been enough to support [an] inference of intent to distribute." *United States* v. *McClellon*, 578 F.3d 846, 855 (8th Cir. 2009); *United States* v. *Brandon*, 247 F.3d 186, 192 (4th Cir. 2001); *United States* v. *Latham*, 874 F.2d 852, 862-63 (1st Cir. 1989). For movie buffs, it's around the quantity Sharon Stone insufflates in the denouement of *Casino*. Taxpayer watchdogs need not infarct though. Police waited until business hours on a Monday to execute the warrant they obtained on a Friday. Pet. 88a. Petitioner and his family members were thus only dangerous enough for a SWAT "forceful entry" with a battering ram, not overtime.

Salvaging something, the "vested up" team arrested all five adults present for simple possession. Pet. 19a, 33a-34a. Petitioner's troubled cousin Calvin Elie, who slept on the couch where the drugs were found, pleaded guilty and received probation.[2] Pet. 8a. So did Kendra Young, also Petitioner's cousin and the home's primary occupant. Pet. 81a. Anthony Wallace, another cousin, was a non-resident but a third offender. Pet. 84a. He pleaded guilty and received time served. Pet. 82a. Kendra's brother, Glenn Young, the final resident of the home, went to trial. He was found guilty (nonunanimously) of constructive possession and illegal use. Pet. 31a, 80a-82a. A third offender, he received fifty years without parole. *Id.*

Petitioner Bobby Wallace, who was a non-resident, who was rooms away from the couch, and whom neither forensics nor testimony linked to the "baggie," went to trial. The jury acquitted him of illegal use and returned a (nonunanimous) guilty verdict on constructive possession. Pet 5a. Glenn Young's second offense had been possession of cocaine. Pet. 37a n.13. Wallace's second was possession of *marijuana*, but with intent. Pet 37a n.12, 58a. So, he got life without parole. *Id.*

On whether little Tan ever made it to Head Start that day, the record is silent.

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2 At trial Elie denied everything he admitted in his plea. Pet. 34a, 41a n.16. But as the state court concluded, "[a] review of Elie's testimony as a whole reflects that of an unsophisticated and mentally slow drug abuser." Pet. 34a n.8. Perhaps for this reason its sufficiency analysis gave Elie's testimony no real weight. Pet. 40a (characterizing Elie as "a known drug user" and discounting his denial that he had lived on the Young's couch for seven months). None of Elie's testimony even remotely incriminated Wallace in any event. Pet. 21a.

The record would be silent still on this destruction of another black family—perhaps a tiny tragedy in the civil rights Chernobyl that has been Louisiana's war on drugs, but an injustice all the same—had trial counsel anything to do with it. The trial court granted an appeal returnable upon payment of costs. Pet. 52a. The attorney blew the matter, life without parole, off. *Id.* It took Wallace two years to be granted an out-of-time appeal, whereupon he asserted claims of insufficient evidence and an excessive sentence. Pet. 52a-53a.

In a published opinion, and the last reasoned state court decision on the relevant issues, Louisiana's Second Circuit Court of Appeal denied relief to Wallace while granting considerable relief in the form of parole eligibility after five years to Glenn Young. Pet. 46a. It rejected Wallace's challenge to what it called his "drastic" sentence in one paragraph. Pet. 42a. With three paragraphs of analysis, having previously mixed the inadmissible and admissible[3] and weaving in the gun story the jury rejected,[4] the state court rejected Wallace's insufficient evidence claim based basically on one fact: in the kitchen was a cupboard and in

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3 Pet. 33a n.7 ("Police found a bag of marijuana next to the scale, but because the marijuana charge was not being pursued during this trial, the court excluded that evidence and, apart from inadvertent mentions by witnesses, the jury was not aware of its discovery.") The opinion neglects to elucidate how a jury could be "not aware" of something "mention[ed]" multiple times, whether advertently or otherwise.

4 Pet. 41a & n.17 ("Moreover, only Wallace's fingerprint was found on the digital scale, which was located in the kitchen cupboard near the gun" that "[s]cientific testimony proved . . . fired the recovered bullet hulls").

that cupboard was a digital scale and on that digital scale was a fingerprint from Bobby Wallace.[5] Pet. 41a.

There are many explanations for this fingerprint that do not tend to prove, and certainly not beyond a reasonable doubt, that Wallace had both: (1) knowledge cocaine was hidden in the living room and (2) control and dominion over such in a home not his own, as required under Louisiana law. Pet. 40a n.15. To consider but a few scenarios, maybe Wallace put the scale in the cupboard to keep it away from the kids. (Wallace, nicknamed "Preach" for his expostulations against the gang life he left in his teens, often helped with his four young cousins living in the home. Pet. 42a, 60a.) Maybe Wallace was weighing other drugs.[6] (Marijuana that never resulted in charges was found next to the scale. Pet. 33a n.7.) Or maybe, just maybe, Wallace was telling the truth when he said the scale was previously at his grandmother's house and he handled it there, an assertion corroborated by one of the few witnesses not testifying pursuant to a plea deal. Pet. 35a-36a.

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5 Ignoring the state's nine-and-a-half sentences saying Petitioner was merely present and its Euripidean (or *kwan-li-so*) attempt to visit Petitioner with the sins of his relations, its brief on direct appeal also hangs its hat on this point. Pet. 70a-71a. Although the kitchen did contain other items that, like the scale, could conceivably be thought of as "dual use," neither the state nor the court pointed to evidence connecting them to illicit activity at even an abstract level (and such was merely abstract for the scale, as no drug residue was found on it). Pet. 33a, 41a. The connections are not necessarily obvious either. (Batteries? *Id.*)

6 "Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." *Jackson* v. *Virginia*, 443 U.S. 307, 323-24 (1979).

Whatever the case, the scale is the only probative evidence connected to Wallace.[7] True, it was in neither the living room (where the cocaine was found) nor the back bedroom (where Wallace was). True, it was not illegal in itself and, if connected to anything illegal, presumably would have had more to do with the uncharged marijuana found next to it. True, Wallace was acquitted of the only charge related to the only illegal object the state alleged was in the same room, the gun.

Yet the scale is not *no* evidence. Testimony linked digital scales and drugs, Pet. 33a, so it may well be that soupçon sufficient to support a conviction under Louisiana's "total lack of evidence" test. *State* v. *Main Motors, Inc.*, 383 So. 2d 327, 328 (La. 1979). What it is not, however, is sufficient under *Jackson* v. *Virginia*, 443 U.S. 307 (1979), which requires something more—something enough to remove a reasonable person's reasonable doubts. Wallace is not alone in this conclusion either. As the Magistrate Judge wrote in the last reasoned federal opinion on the matter, "[r]easonable minds could perhaps differ on whether the evidence was sufficient when *Jackson* was applied on direct appeal." Pet. 12a.

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7 The state court's observation that, because Elie "exuded the appearance and demeanor of a crack addict . . . the evidence supports the conclusion that the seldom employed and homeless Elie was not the only person with a connection to this significant quantity of cocaine," is risible. Pet. 41a. "A connection" is not the legal standard for constructive possession, and "not the only person with a connection" hardly implies Wallace, as opposed to one of the other three adults present, two of whom actually lived there. And Wallace's alleged statement to Kendra—conveniently overheard by the SWAT Team with egg on its face—"to, in effect, 'take the charges,'" is not inculpatory. Pet. 41a. Not "my charge," "the charge." Asking a woman to assume responsibility for her role in a crime you stand wrongly accused of may not be particularly chivalrous according to paternalistic notions, but it is not evidence of guilt.

But because the state court recited the proper standard, Pet. 38a n.14, and an unreasonable application of *Jackson* has yet to be found, the Magistrate Judge also ruled: "[O]nce that decision was made by the state court, it was adequate to withstand habeas challenge." Pet. 12a. Or, as put more technically in the case Wallace cited on page 3, note 4, of his application for a COA: "While we agree that reasonable jurists could debate whether a constitutional violation occurred, we conclude that reasonable jurists could not debate whether the state court disposition was contrary to or involved an unreasonable application of governing legal principles . . . ." *Barrientes* v. *Johnson*, 221 F.3d 741, 781 (5th Cir. 2000).

The applicability *vel non* of AEDPA deference thus became dispositive, and Wallace, by continuing to press his argument under a *de novo* standard, challenged whether to defer. The Court of Appeals resolved the issue against him, writing: "[T]he deferential standards of 2254(d) apply . . . ." Pet. 3a. This timely petition follows, limited to questions about the deference due on the insufficient evidence claim and whether Wallace's sentence merits federal habeas relief.[8]

8 To whatever extent Wallace properly stating the *de novo* question under the COA standard and citing a case explaining his posture was a less-than-perfect presentation of the deference issue, he reminds the Court of his *pro se* status. Even still, this issue is better preserved than those in *Tharpe* v. *Sellers*, 138 S. Ct. 545, 546 (2018) (per curiam), and *Sause* v. *Bauer*, 138 S. Ct. 2561, 2563 (2018) (per curiam). In any event, the Court of Appeals actually passing on the issue should render preservation issues moot. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). And the shadow of an exhaustion issue cast (but then withdrawn) by the Magistrate Judge on Wallace's sentencing claim quite rightly went unmentioned by the Court of Appeals. Pet. 13a. Wallace cited federal cases, state cases citing federal cases, and actually made a "grossly disproportionate" argument in every court. *E.g.*, Pet. 58a-59a.

## REASONS FOR GRANTING THE PETITION

The last time the Supreme Court of Louisiana applied the "insufficient evidence" standard of *Jackson* v. *Virginia*, 443 U.S. 307 (1979), to reverse, Justice Breyer was answering the door during Conference, this Term's law clerks were in short pants, and the first iPhone was still five years in the future. Over the past two decades and 103 opinions, the court has not just stopped itself granting relief. It has undone 51 of 52 lower court *Jackson* reversals, the odds against which are almost 10 billion to 1. (Seriously. Pet. 120a.) While the court has granted full relief in three cases and some relief in three more with "no evidence," it has made the "insufficient evidence" test dead letter in Louisiana—often in doctrine and always in fact.

The question presented is whether this or any other pattern of state court substantive decisions may affect the deference due under AEDPA. Petitioner's case provides an excellent vehicle for addressing this important issue. Whether deference applies to Petitioner's *Jackson* claim is likely dispositive.[9] And while the pattern involved is unmistakable, the Court need not reach that issue. The question for this Court is whether *any* pattern may *ever* be relevant to AEDPA deference. If so, lower courts may decide whether this particular pattern is sufficiently clear.

9 Petitioner does not concede the reasonableness of the state court's decision but acknowledges this would be a much harder showing to make. *See, e.g.*, *Parker* v. *Matthews*, 567 U.S. 37, 43 (2012) (per curiam); *Coleman* v. *Johnson*, 566 U.S. 650, 651 (2012) (per curiam).

Petitioner's case also involves an injustice worthy of the Court's time to correct. Drugs are bad, but throwing away young black men forever based on their simple (and constructive at that) possession is a fad whose claim to legitimacy has long since faded. There are, however, conflicting currents in the lower federal courts on the availability of habeas relief based on a claim of gross disproportionality in one's habitual offender sentence. What that conflict may lack in breadth it makes up for in constitutional importance, touching as it does today's flashpoint in the eternal dialectic of federalism and fairness: the extremity of sentencing disparities throughout the Nation, particularly for drug offenses.

Whatever the Court may conclude concerning the cert-worthiness of Petitioner's claims, the Court of Appeals' refusal to issue a COA on these debatable, and important, issues is characteristic of its chary practice. The Court criticized this parsimoniousness in *Buck* v. *Davis*, 137 S. Ct. 759 (2017), yet the Court of Appeals has evidently not absorbed the message. Simple and clear reinforcement of that message by a GVR citing *Buck* is within this Court's prerogative as an exercise of supervisory power over a wayward court of appeals. The evenhanded administration of judicial federalism counsels exercising such power here, where a court of appeals is too stringent in the application of AEDPA's standards, the same as where a court of appeals is too lax.

**I. Whether patterns of state court substantive decisions may be relevant to AEDPA deference is an important question in need of answer.**

One need not be a devotee of Justice Holmes or Professor Llewellyn to acknowledge that it matters not just what courts say but what they do.[10] As Part I(C)(2) shows, Louisiana courts are not doing "insufficient evidence" review despite occasionally mouthing the right words. In part for idiosyncratic historical reasons, Part I(C)(1), Louisiana courts are instead doing "no evidence" reviews.

Under AEDPA this open defiance of the Federal Constitution is Louisiana courts' practical prerogative, particularly given apparent barriers to invoking this Court's supervision on direct appeal, noted in Part I(C)(3). The principle of deference, sound in principle, is not working in practice, with the result that the Great Writ is suspended as to *Jackson* claims in this state. More, this situation is easily remedied with a small, workable, and AEDPA-sanctioned solution: *de novo* federal review of Louisiana *Jackson* adjudications under Section 2254(d)(1)'s "contrary to[] or . . . an unreasonable application of" clause.

Taking action is important in this state, the epicenter of the mass incarceration crisis, and this parish, the epicenter of the epicenter, not just for the effect on the few cases that go to trial and end up in the constitutionally critical gap

10 KARL LLEWELLYN THE BRAMBLE BUSH 3 (1930); Oliver Wendell Holmes, Jr., *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 173, 181 (1920). *See also* Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 7 (1936); BENJAMIN CARDOZO THE NATURE OF THE JUDICIAL PROCESS 41-43 (1921).

between "no evidence" and "insufficient evidence." It is important so that charging decisions, and so plea negotiations, are made under some realistic prospect of constraint by the "beyond a reasonable doubt" standard central to due process. This high standard is as persistently disregarded pretrial in Louisiana as it once was at trial, with the result that prosecutors can and do force pleas to charges much more serious than fair-minded sufficiency review would ever allow.[11]

### A. The need to consider patterns of state court procedural decisions under AEDPA is well-established and noncontroversial.

Every member of the Court whose decisions Petitioner can access has subscribed to an opinion canvasing state law to determine what effect to give a state court ruling in a federal habeas proceeding.[12] Indeed, the Court has had occasion in recent memory to go beyond what a state court wrote to look at its practices in fact and their practical effects in the habeas context. *Trevino* v. *Thaler*,

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11 *Sullivan* v. *Louisiana*, 508 U.S. 275, 277 (1993) (criticizing Louisiana for failing to honor *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), which set aside its defective reasonable doubt instruction). The judgment of prosecutors in Caddo Parish, Petitioner's specific jurisdiction, has attracted comment before. *Reed* v. *Louisiana*, 137 S. Ct. 787 (2017) (Breyer, J., discertal); *Tucker* v. *Louisiana*, 136 S. Ct. 1801 (2016) (Breyer, J., discertal). Petitioner's sentence to life without parole instead of death is a slender reed indeed on which to rest the legitimacy of a justice system.

12 *Johnson* v. *Lee*, 136 S. Ct. 1802, 1804 (2016) (per curiam) (relying on "California's procedural bar [being] longstanding [and] oft-cited . . . ."). *See also Wilson* v. *Sellers*, 138 S. Ct. 1188, 1200-01, 1203 (2018) (Gorsuch, J., dissenting) (discussing Georgia procedural law); *Wood* v. *Milyard*, 721 F.3d 1190, 1193 (10th Cir. 2013) (Gorsuch, J.) (concluding pattern of state cases too extraordinary to consider procedural bar "adequate"). Petitioner does not yet have access to any cases in which Justice Kavanaugh participated, and his prior court handled relatively few Section 2254 cases. Still, the technique is not unfamiliar. *Abbas* v. *Foreign Policy Group, LLC*, 783 F.3d 1328, 1336 (D.C. Cir. 2015) (*Shady Grove* question).

569 U.S. 413, 423-25 (2013). That decision is now firmly established, *Buck* v. *Davis*, 137 S. Ct. 759, 771 (2017), as is an earlier, but still recent, unanimous example. *Walker* v. *Martin*, 562 U.S. 307, 317 (2011).

Where there is debate, it is at the margins—on the results of the methodology, not the methodology itself,[13] which goes back decades and appears in multiple fields of federal law.[14] It is thus neither a novel nor a controversial technique to study a swath of state court decisions to determine, as a matter of federal law, the effect to be given a particular state court decision under review.

**B. The need to consider patterns of state court substantive decisions inheres in AEDPA's federalist scheme just as indispensably.**

There is no reason to distinguish between the techniques applicable to readings of state procedural decisions for AEDPA purposes and the techniques applicable to readings of state substantive decisions for AEDPA purposes. *Wilson* v. *Sellers*, 138 S. Ct. 1188, 1197 (2018) (applying "look through" doctrine to questions of substance as well as procedure). And the Court made the move, to whatever extent it may be one, from consideration of patterns of procedural decisions to patterns of substantive decisions in *Johnson* v. *Williams*, where it

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13 *E.g.*, *Foster* v. *Chatman*, 136 S. Ct. 1737, 1756 n.2 (2016) (Thomas, J., dissenting) (noting "[t]hat is a question of Georgia law that is best answered by the decisions of the Supreme Court of Georgia," rather than "a single State Superior Court decision").

14 *E.g.*, *Henry* v. *Mississippi*, 379 U.S. 443, 448 & n.4 (1965) (surveying for independent-and-adequate-grounds purposes); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949) (using "careful canvass of Kansas law" to answer whether Federal Rules govern).

noted the potential relevance of "in at least some circumstances the state standard [being] less protective." 568 U.S. 289, 301 (2013) (emphasis omitted).

Mere months later, the Court had occasion to extend that substantive inquiry in *Trevino*, writing: "This opinion considers whether, *as a systematic matter*, Texas affords *meaningful review* of a claim" of constitutional law. 569 U.S. at 425 (emphases added). In the related context of "full and fair opportunity" determinations under *Stone* v. *Powell*, 428 U.S. 465 (1976), courts have recognized that a "meaningful inquiry" requires state courts to "apply the proper constitutional case law." *E.g.*, *United States ex rel. Bostick* v. *Peters*, 3 F.3d 1023, 1027 (7th Cir. 1993).[15] AEDPA thus allows inquiry into whether, "as a systematic matter," the state courts "apply"—not merely quote—constitutional law reasonably.[16] A focus on what the state courts actually do "is more likely to respect" their work in any event. *Trevino*, 569 U.S. at 425.

Petitioner does not, however, need a rule as broad as this Court's precedents tend to inexorably. He submits consideration of a systematic "contrary to" or

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15 *Herrera* v. *Lemaster*, 301 F.3d 1192, 1195 n.4 (10th Cir. 2002) (en banc) (holding "no full and fair hearing on the issue in state court" because of "state court's failure to assess" his claim under proper standard); *Matthews* v. *Workman*, 577 F.3d 1175, 1194 (10th Cir. 2009) (Gorsuch, J.).

16 *Gamble* v. *Oklahoma*, 583 F.2d 1161, 1165 & n.3 (10th Cir. 1978) (holding "full and fair" requires "at least colorable application of the correct . . . constitutional standards").

"unreasonable application of" argument is appropriate only when a petitioner makes a *prima facie* showing that:

> (1) survey of state high court cases reveals a pattern of rulings failing to vindicate a particular federal right so egregious as to defy explanation except by bias;
>
> (2) it is not simply the pattern but the substance of the rules announced in those cases that is contrary to or an unreasonable application this Court's precedents;
>
> (3) those state high court cases plainly infected the determination under review; and
>
> (4) there is reason to believe this Court is not being afforded adequate opportunity to address the state high court's string of errors on direct review.[17]

AEDPA was adopted to put the federal courts out of the day-to-day business of state criminal justice. As applied by the Court of Appeals, AEDPA is allowing a two-decade-long oil spill in *Jackson* cases to slick a state into disobedience of the Supremacy Clause. That is not federalism, and this cannot be the law. Restoring *de novo* review until a state high court realigns itself with this Court's teachings on an issue of federal constitutional law—an event the state, as habeas respondent, would be free to argue has come to pass whenever it likes—does nothing more than necessary and permitted to ensure the proper function of federalism.

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17 This test is thus much more narrow than *Stone*'s, which "[f]ederal habeas petitioners have sometimes succeeded in" meeting, but rarely. *Wallace* v. *Kato*, 549 U.S. 384, 395 n.5 (2007).

### C. The clear and longstanding pattern of Louisiana decisions openly defying *Jackson*'s "insufficient evidence" standard mandates *de novo* federal review.

Petitioner's argument is one part empirical and one part normative. As a matter of fact, Louisiana's Supreme Court has a demonstrable, clear, and lengthy history of applying a "no evidence" test, the standard to which it is limited by its constitution, *State* v. *Main Motors, Inc.*, 383 So. 2d 327, 328 (La. 1979), instead of *Jackson*'s "insufficient evidence" test. As a matter of law, this should matter, for courts should be accountable for what they do, not merely what they say they do.

#### 1. As this Court is aware, the Louisiana Supreme Court has applied a "no evidence" test in defiance of *Jackson* before.

The ink was not yet dry on *Jackson* when the Louisiana Supreme Court refused four-to-three to rehear a case that, for reasons of state constitutional law, adopted a "No evidence" test—and expressly rejected an "Insufficient evidence" test—on the closely related issue whether double jeopardy bars retrial after a reversal for insufficient evidence.[18] *State* v. *Hudson*, 373 So. 2d 1294, 1294 n.*, 1297 (1979) (capitalization in original); *id.* at 1298 (Tate, J., concurring). This Court reversed: "Nothing in [a then-recent case] suggests, as the Louisiana

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18 So closely related that cites to *Hudson* very often follow or precede those to *Jackson* in Louisiana. *E.g.*, *State* v. *Brown*, 966 So. 2d 727, 741 (La. Ct. App. 2007) (Second Circuit); *accord State* v. *Priest*, No. 18-518, 2019 WL 454488, at *4 (La. Ct. App. Feb. 6, 2019) (Fifth Circuit); *State* v. *Duhon*, No. 18-593, 2018 WL 6839533, at *5 (La. Ct. App. Dec. 28, 2018) (First Circuit); *State* v. *Thomas*, 258 So. 3d 708, 710 (La. Ct. App. 2017) (Third Circuit); *State* v. *King*, 231 So. 3d 110, 118 (La. Ct. App. 2017) (Fourth Circuit).

Supreme Court seemed to believe, that double jeopardy protections are violated only when the prosecution has adduced no evidence at all of the crime or an element thereof." *Hudson* v. *Louisiana*, 450 U.S. 40, 43 (1981).

There were more direct assaults on *Jackson* as well. After the decision issued, the Louisiana Supreme Court still had no trouble reiterating that "it is only when there is a total lack of evidence of an essential element of a crime that a question of law is presented." *State* v. *Main Motors, Inc.*, 383 So. 2d 327, 328 (La. 1979); *State* v. *Custard*, 384 So. 2d 428, 429 (La. 1980). The reason, perhaps, appears in another four-to-three decision, this time (temporarily) vindicating *Jackson*. Dissenting, Louisiana's Chief Justice wrote that this Court would have to take Louisiana's "no evidence" standard from his cold, dead quill:

> The reliance on *Jackson v. Virginia*, 443 U.S. 307 (1979), to support the majority view is misplaced. That decision does not purport to invalidate Louisiana's constitutional limitation on review of facts by this Court in criminal cases. So deeply ingrained is the law's tradition of refusal to engage in after-the-fact review of jury deliberations, until the United States Supreme Court invalidates that concept in Louisiana's Constitution, I will adhere to the Louisiana Constitution.

*State* v. *Matthews*, 375 So. 2d 1165, 1170 (La. 1979) (Summers, C.J., dissenting).

Even once the *Hudson* Court did precisely what Chief Justice Summers demanded, the *Jackson* rule continued to attract curious ire in this state. In a

jeremiad bemoaning a visiting justice's practical inability to stop the court from conducting *Jackson* reviews, a *pro tempore* member ended his dissent in what can only be called a judicial huff: "If federal courts wish to review the sufficiency of the evidence (facts) of all criminal convictions in state courts, that is their prerogative." *State* v. *Ennis*, 414 So. 2d 661, 665-66 & n.1 (La. 1982) (Lanier, J., dissenting). Neither is grumbling about *Jackson* a thing of the past. As recently as 2014, a majority opinion recalled (quite unnecessarily) how this Court "invalidated the distinction between 'no evidence' and 'insufficient evidence' which Louisiana courts had used to avoid conflict with the state constitution's limitation on the appellate jurisdiction of the court." *State* v. *Davenport*, 147 So. 3d 137, 149 n.20 (La. 2014) (citing *Hudson*).[19]

None of these expressions of judicial discontent alone would justify *de novo* review of *Jackson* claims in federal court. Indeed, they are not sufficient when taken together. They are, however, important background to the examination below of the Louisiana Supreme Court's actual *Jackson* practices. Once, in an exhortation to take up an AEDPA issue, Justice Scalia had occasion to observe that "[i]t is a regrettable reality that some federal judges *like* to second-guess state

19 Revenge was had, though, as *Davenport* ruled—directly contrary to *Evans* v. *Michigan*, 133 S. Ct. 1069 (2013)—that double jeopardy does not bar retrial of an erroneously entered judgment of acquittal based on insufficient evidence. Of course, even jury acquittals do not invariably bar retrial on the same offense in Louisiana. *State* v. *Thomas*, 926 So. 2d 490, 491 (La. 2006). Certiorari from this Court was not sought in either case.

courts." *Cash v. Maxwell*, 132 S. Ct. 611, 616 (2012) (Scalia, J., discertal) (emphasis in original). It is also a regrettable reality that some state judges *like* to second-guess this Court. Evenhanded administration of AEDPA's federalist scheme suggests it would be unwise to "shr[i]nk" from this kind of overreach. *Id.*

**2. The Louisiana Supreme Court has a two-decade-long pattern across more than 100 opinions of substituting in word and deed its old "no evidence" rule.**

Beginning with the most recent decisions available, Petitioner compiled a list of every Louisiana Supreme Court case to cite *Jackson* until finally running across a 2001 reversal for insufficient (as opposed to no) evidence.[20] His search methodology (Pet. 108a) and a list of all such cases appear in Appendix H. Of the 116 cases (Pet. 117a-119a), 103 cases actually decided a sufficiency issue (Pet. 108a-116a) and may be summarized:

| | | Supreme Court | | |
|---|---|---|---|---|
| | | Reversed | Affirmed | Total |
| Courts of Appeal | Reversed | 51 | 1 | 52 |
| | Affirmed | 6 | 45 | 51 |
| | Total | 57 | 46 | 103 |

20 This last insufficient evidence reversal set aside a prosecutor's conviction and six-month sentence for planting evidence in a rape case, though the fine for hiding the probably planted evidence did stick. *In re Burns*, 800 So.2d 833, 343 (La. 2001). Of all the gin joints . . .

**a. The odds of this pattern occurring without biased adjudications of *Jackson* claims are beyond astronomical—they are cosmological.**

Using conservative assumptions, the odds against observing the Louisiana Supreme Court reverse 51 out of 52 lower court reversals are 9.9 billion to 1. Pet. 120a. Using the same assumptions, the odds against observing the court reverse only 6 times out of 51 lower court affirmances are 961.4 billion to 1. *Id.*[21]

These odds are *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), and *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), numbers. There is not simply one inference fairly to be drawn. There is only one inference that can be drawn. Louisiana criminal defendants would do better, something like 40 times better, going for the Powerball than hoping *Jackson* claims receive just treatment in Louisiana's high court. Faith in the fair administration of federal constitutional law in Louisiana is therefore less the stuff of a rational and civicly minded public than a gambler's dream.

**b. Review of the rulings involved reveals the "extreme malfunctions" of a state justice system against which even AEDPA protects.**

Of course, even odds like that are still just numbers. Perhaps, one might say, there is always the chance nothing is amiss in all these cases. Such optimism

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21 There are many ways of exploring the hypothesis that this extreme pattern of decisions reveals a bias against *Jackson* claims compared to the average reasoned adjudication. Frequentist or Bayesian, hypergeometric or binomial, and on and on. But Petitioner has limited access to comparison data, no statistics program, and in any event does not expect to be taken seriously as an authority on advanced methods. He therefore uses the simplest probability distribution (the binomial) and gives the most commonly understood, if least-used professionally, interpretation (odds). An *amicus* could, of course, assist the Court better.

would not be rewarded. Examination of the merits of the Louisiana Supreme Court's *Jackson* cases reveals precisely the "extreme malfunctions in the state criminal justice system" that federal habeas exists to correct—and to prevent. *Harrington* v. *Richter*, 562 U.S. 86, 102-03 (2011).

First, consider the cases militating most against Petitioner's position, the six cases in which the Louisiana Supreme Court granted some kind of relief. Every single case did so only upon a finding of "no evidence" or a "record . . . void of evidence" of guilt, *State* v. *Jones*, No. 16-1502, 2018 WL 618433, at *2-*3 (La. Jan. 30, 2018); *State* v. *Fields*, 842 So. 2d 316, 319 (La. 2003) ("no evidence"); *State* v. *Helou*, 857 So. 2d 1024, 1026 (La. 2003) ("no evidence"). This often happened because the state simply forgot an element of the offense.[22] *State* v. *Thompson*, 233 So. 3d 529, 556 (La. 2017) ("[S]tate failed to prove the existence of any such ordinance or state law . . . ."); *State* v. *Graham*, 180 So. 3d 271, 273 & n.1 (La. 2015) ("[N]o evidence that the crime occurred *after* the marriage . . . ." (emphasis in original)); *State* v. *Thacker*, 150 So. 3d 296, 296-97 (La. 2014) ("[S]tate's case is devoid of evidence [of victim's age] . . . ."). While the correct standard may be quoted somewhere apart from the application section, even that is not invariably true. *Thompson*, 233 So. 3d at 553 (quoting as the rule *Jackson*'s

22 In the one affirmance of a lower court *Jackson* reversal, the state neglected to introduce any evidence that the victim died by other than natural means. *State* v. *Robertson*, 172 So. 3d 616, 618 (La. 2015).

historical discussion of "conviction[s] based upon a record *wholly devoid* of *any* relevant evidence" (emphasis added)).

These cases, only three of which granted full relief, thus stand for the modest proposition that Louisiana has not time-warped to 1959, before *Thompson* v. *Louisville*, 362 U.S. 199 (1960), held that due process cannot tolerate a conviction based on "no evidence." That is well and good, but nothing to do with observance of *Jackson*, handed down twenty years later and requiring "sufficient evidence."

Consider next the cases in which the Louisiana Supreme Court has denied relief. Among these are many that employ rules "contrary to" or "an unreasonable application" of clearly established federal law, like relying on "extra-record" evidence, including but not limited to, the prosecution's opening and closing statements. *State* v. *Trahan*, 97 So. 3d 994, 998 (La. 2012).[23] Or deciding that "an appellate court will not reverse a jury's return of a responsive verdict, whether or not supported by the evidence, as long as the evidence is sufficient to support a conviction for the charged offense," *State* v. *Harris*, 846 So. 2d 709, 712-13 (La. 2003), even when the charged offense lacks an element of the responsive verdict.[24]

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23 *Contra Jackson* v. *Virginia*, 443 U.S. 307, 318 (1979) ("[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether *the record evidence* could reasonably support a finding of guilt beyond a reasonable doubt." (emphasis added)).

24 *E.g.*, a responsive verdict of attempt, requiring specific intent, on a charge for a completed offense requiring only general intent, as was the case in both *Harris*, 846 So. 2d at 712, and *State* v. *Sylvia*, 845 So. 2d 358, 361 (La. 2003). *See also State* v. *Smith*, 23 So.3d 291, 299

Or reversing without notice or an opportunity to be heard based on evidentiary inferences advanced by neither party. *State* v. *Godfrey*, 25 So. 3d 756, 761 (La. 2009). Or affirming using inadmissible evidence, but then not reversing for retrial without that inadmissible evidence. *State* v. *Mack*, 144 So. 3d 983, 991 (La. 2014).[25] Or relying on "a legal presumption that the person in the unexplained possession of property recently stolen is the thief."[26] *State* v. *Marcantel*, 815 So. 2d 50, 57, 59 (La. 2002) (Calogero, C.J., dissenting).

These were not a bunch of low stakes, penny-ante cases either. Mary Trahan and Sam Mack had their life-without-parole sentences reinstated. Mason Godfrey is serving 25 years without parole or good time for saying something mean to a DA who'd been snitty with him.[27] Then there is poor John Sylvia, given five years flat for knowingly possessing so little crack residue it could not be seen by anyone, including the lab tech, but detected only via chemical analysis of a rinsing solution used to flush the object. Real CSI stuff.

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(La. 2009) (holding evidence of principal to armed robbery, a specific intent crime, sufficient "even if [defendant] did not know at any point before [perpetrator] . . . approached the victim that he had a weapon").

25 *Contra Lockhart* v. *Nelson*, 488 U.S. 33, 39-42 (1988) (including inadmissible evidence in sufficiency review only to permit proper retrial without such evidence).

26 *Contra Francis* v. *Franklin*, 471 U.S. 307, 315-18 (1985) (holding such violates standard protected by *Jackson*); *Sandstrom* v. *Montana*, 442 U.S. 510, 524 (1979) (same).

27 Saying something mean to law enforcement is serious business in Louisiana. *E.g.*, *State* v. *Poupart*, 88 So. 3d 1132, 1135 (La. Ct. App. 2012) (20 years). In fact, the Court of Appeals finally got fed up and struck down the statute, *Seals* v. *McBee*, 898 F.3d 587, 598-99 (5th Cir. 2018), though that has done nothing for those currently serving these freakish sentences.

The techniques used to investigate an armed robbery resulting in a sentence to 40 years without parole were not quite as ready for prime time, involving as they did the scent of the defendant's socks detected near the crime scene using dogs trained only by inmates, who kept no records and did no validation testing. *State* v. *Oliphant*, 133 So. 3d 1255, 1259 (La. 2014). In the city that provided the bucolic backdrop for *Steel Magnolias*, that is sufficient evidence, even if it's the DNA of the defendant's brother on the gun grip and the mask was in that brother's car. *Id.*

C.T. got into his friend's car without first doing a title check, perhaps because the friend "possessed keys" and there was "no physical evidence to suggest that it had been broken into." *In re* C.T., 236 So. 3d 1210, 1213 (La. 2017) (Genovese, J., dissenting). Still, sufficient evidence of intentionally using the car without its owner's consent. Sad, weird Leslie Ordodi "made no threats towards anyone, he never demanded anything of value from anyone, he did not produce or brandish the gun inside the banks" and "never acted in a way suggesting he intended to rob either bank." *State* v. *Ordodi*, 946 So. 2d 654, 665-65 (La. 2006) (Kimball, J., dissenting). Attempted armed robbery. All the testimony is there was "no entry" to the home? Sufficient to find "entry" beyond a reasonable doubt. *State* v. *Bryant*, 101 So. 3d 429, 432-34 (La. 2012).

What all the above cases have in common is the possibility of an argument against a "total lack of evidence" but no argument for "sufficient evidence." Petitioner fears to tax the Court's scarce petition review resources with further case-specific discussions, particularly when, provided such a *prima facie* showing has been made, the actual existence and extent of the pattern is an issue eminently suitable for remand.[28] He will therefore offer only a few more cases, to do with possession, bearing as they do directly on Petitioner's offense.

A detective looking from a distance saw one guy take a "small white object" out of his mouth and give it to another guy who put it in his mouth. Certainly gross, but proof beyond a reasonable doubt that it was crack and not a Chiclet, or crushed aspirin being palmed off as crack, or crushed Xanax tablets? Yes, even after the detective who observed the transaction testified:

> Q: My question is, as you sit here today, with Brandon being charged and on trial for distribution of cocaine, you can't tell me that Brandon actually distributed cocaine, can you?
>
> A: No sir.

*State* v. *Smith*, 130 So. 3d 874, 877-89 (La. 2013) (10 year sentence).

Five to six grams of heroin, admittedly being divided between two friends, but seized with "no weapons, cutting agents, scales, or large amounts of cash," is

28 If this case survives to receive attention from counsel, a court could have more confidence in a summary of such cases, while Petitioner knows his is unlikely to be taken at face value.

enough for possession with intent. *State* v. *Francois*, 874 So. 2d 125, 127-28 (La. 2004) (20 years).[29] Eighteen grams of marijuana will also do it, even if you're acquitted of the gun found nearby, if there happen to be any bags in your house. *State* v. *Howard*, 226 So. 3d 419, 422-24 (La. 2017) (18 years). "Two small rocks of crack cocaine," not packaged for distribution, that were found on a "guest in defendant's home, rather than defendant," is enough if the court thinks you may have bad grammar. *State* v. *Ellis*, 179 So. 3d 586, 587-89 (La. 2015) (22 years).

Drugs are not the only objects subject to these slipshod possession findings. Juveniles may not possess a "handgun" in Louisiana, the definition of which requires propulsion by gunpowder and therefore excludes air and cartridge guns (including BB guns) that are made to look like handguns. *In re* T.E., 91 So. 3d 292, 293-94 (La. 2012). A detective using a remote video monitor saw T.E. with what looked to him like a handgun, though he didn't zoom in and so couldn't say anything about make or model. Sufficient. *Id.* at 295. Gun found on the floorboard of a car that stopped to give you a ride "moments" before, and two witnesses testify at trial it belonged to one of them? *State* v. *Johnson*, 870 So. 2d 995, 1000 (La. 2004) (Johnson, J., dissenting); *id.* at 1001-02 (Knoll, J., dissenting). That'll be 15 years of your life, no parole, please. *Id.* at 998.

29 *Contra Turner* v. *United States*, 396 U.S. 398, 423 (1970) (holding possession of 14.68 grams of cocaine, even though possessor also found to be distributing heroin, not sufficient to show intent to distribute cocaine).

### 3. These extraordinary facts justify and require unencumbered review by federal habeas courts of Louisiana *Jackson* adjudications.

Through acting in a manner explicable only by regression to a "no evidence" standard, and by repeatedly relying on and quoting that incorrect standard, the Louisiana Supreme Court has made its old "no evidence" test the law in Louisiana, regardless what verbalism is employed in a particular case. There is singularly good reason to believe so in this state, because the local constitution has been interpreted to forbid review for more than a "total lack of evidence." The words "insufficient evidence" in Petitioner's case should therefore be seen for what they are—a faithless, or perhaps just profoundly misunderstood, recitation—and he should be permitted to pass through AEDPA's door to *de novo* review.[30]

There are more causes for concern than just this pattern of substantive decisions, however. Petitioner performed a manual search of this Court's orders and discovered that, setting aside capital cases (where sufficiency is almost never at issue and always never *the* issue), only two of the 103 defendants sought certiorari from this Court from the sufficiency ruling in their case.[31] For a variety

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30 *Cf.* William Blake, *Auguries of Innocence* lns. 53-54 (1803) ("A truth that's told with bad intent / Beats all the Lies you can invent."). Before such authority is dismissed out of hand, see *Jamesway Corp.* v. *NLRB*, 676 F.2d 63, 70 n.10 (3d Cir. 1982). *See also Schering-Plough Healthcare Prods., Inc.* v. *Schwarz Pharma, Inc.*, 586 F.3d 500, 512 (7th Cir. 2009) (Posner, J.); *Disher* v. *Info. Res., Inc.*, 873 F.2d 136, 140 (7th Cir. 1989) (Posner, J.).

31 *State* v. *Ellis*, 179 So. 3d 586 (La. 2015), *cert. denied*, 136 S. Ct. 1462, 1462 (2016); *State* v. *Marshall*, 943 So. 2d 362 (La. 2006), *cert. denied*, 128 S. Ct. 239, 239 (2007). Although certiorari was sought in *State* v. *Mack*, it was from the Court of Appeal opinion on remand,

of reasons Petitioner does not find this surprising. But whatever the reason, the point remains that Louisiana's lengthy run of aberrant *Jackson* determinations has not come, and is unlikely ever to come, to this Court's attention on direct review.

The Louisiana Supreme Court's deviations from *Jackson* also plainly infected the Court of Appeal's decision in Petitioner's case. The reliance on the gun despite Petitioner's acquittal of that charge in the sufficiency discussion about the drugs, Pet. 41a, mirrors that same exact error in the *Howard* case discussed above. The mysterious mentions of the inadmissible marijuana, which the Court of Appeal compounded by bringing it up again as if somehow relevant, Pet. 33a n.7, is a species of error shared with the *Mack* case discussed above. The case of Mary Toups, a very dubious constructive possession case included in the data set, is cited repeatedly. Pet. 40a n.15 (citing *State* v. *Toups*, 833 So. 2d 910 (2002)). Another dubious constructive possession case within the data set, *State* v. *Pigford*, 922 So. 2d 517 (La. 2006), is cited as well. Pet. 38a n.14.

Beyond the above problems, a jaundiced pallor afflicts these *Jackson* adjudications. Pro-defendant *Jackson* cases are unsigned at a much higher rate (71%) than anti-defendant *Jackson* cases (41%), suggesting an unwillingness on

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which did not concern sufficiency, 162 So. 3d 1284, 1286-87 (La. Ct. App. 2015), *cert. denied*, 137 S. Ct. 312, 312 (2016). Because Petitioner does not have subsequent history on cases, or another automated means of Shepardizing, he admits one or two more could have been overlooked while scouring the Supreme Court Reporter for each data set defendant's name. He has, however, checked three times in his best effort to be precise.

the part of the justices to assume personal political risk on the topic.[32] Pet. 108a-113a. Of the only two justices willing to put their name to a pro-*Jackson* case, the sole black justice (and at present the sole woman) wrote a dissent or was the sole dissenter in 69% of the non-unanimous "reversals of reversals," leaving one with the impression that minority voices are often unheeded.[33] Pet. 108a-110a. These facts are more than merely unfortunate when they surround a task involving life without parole and disproportionately affecting minority members of society.

**II. By haloing Louisiana *Jackson* adjudications with undeserved deference, the Court of Appeals has sanctioned departures so far from the accepted and usual course of judicial proceedings as to call for an exercise this Court's supervisory power.**

Petitioner can find no definition of Rule 10(a)'s "lower court," the sanctioning of the departure of which from proper judicial proceedings may justify an exercise of supervisory power. If it must be "lower" than a court of appeals, then only federal district and specialty courts qualify. But if it need only be "lower" than this Court, then the Supreme Court of Louisiana obviously qualifies.

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32 Unsigned opinions are also often—although not invariably, and Petitioner cannot check the dockets to know—summary dispositions, meaning heavily Central Staff involved. This Court is familiar with problems concerning the Central Staff of another Louisiana court, located 15 minutes away, from consideration of *Schexnayder* v. *Vannoy*, No. 18-8341 (2018).

33 Chief Justice Johnson had to be placed on the court by a consent decree, and it took another federal court order to stop her term as chief being stolen by a white male colleague. *Chisom* v. *Jindal*, 890 F. Supp. 2d 696, 728 (E.D. La. 2012). Further, her dissents in these "reversals of reversals" cannot be caricatured; her fair-mindedness is evidenced by the fact she is tied for second most frequent author of anti-defendant *Jackson* opinions reversing a reversal.

Assuming the latter, broader interpretation of "lower court," by haloing Louisiana's *Jackson* adjudications with deference (*i.e.*, "sanctioning" them) in the face of clear and unambiguous evidence that they flout the clearly established law of this Court, the Court of Appeals has provided cause to exercise this Court's supervisory power.[34] The lower federal courts have no business rewarding states that refuse to conform their conduct to the Federal Republic's very broad concepts of constitutional adjudication. Congress decided in AEDPA that states need not earn deference because they are presumptively the primary fora for deciding state prisoners' constitutional claims. No one disputes this. But presumptions can be rebutted, and what is freely given on faith can be forfeited.

The text of Section 2254 itself recognizes these facts. It recognizes that "circumstances [may] exist that render [state] processes ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(ii). It recognizes that a state court can reach "an unreasonable determination of the facts in light of the evidence." *Id.* § 2254(d)(2). The presumption of correctness attaching to state court findings of fact can be "rebutt[ed] . . . by clear and convincing evidence." *Id.*

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34 Neither would such an exercise of supervisory power be inconsistent with the Nation's federalist scheme. The exercise of this power would be as to the Court of Appeals' error, not the Louisiana courts', for it is the Court of Appeals' action in sanctioning deference that is challenged. *See Smith* v. *Phillips*, 455 U.S. 209, 221 (1982). In any event, the rule against federal courts exercising "supervisory authority over state judicial proceedings" does not apply when exercised "to correct wrongs of constitutional dimension." *Id.*

§ 2254(e)(1). And most importantly for these purposes, AEDPA recognizes that state court decisions may be "contrary to, or involve[] an unreasonable application of[] clearly established Federal law." *Id.* § 2254(d)(2).

The above recognitions are not insults to state courts. They reflect a long-accepted reality that, for reasons of history, structure, and function, state courts have occasionally proven inadequate to vindicate unpopular federal rights. Finding error in a general practitioner's efforts to perform a heart transplant (an operation to which pushing back against the Louisiana District Attorney's Association bears more than a passing similarity) does not mean the doctor is anything other than a very good general practitioner. It means everyone needs a little help sometimes.

Louisiana judges need help with *Jackson* adjudications. A realistic threat of federal court intervention on wrong adjudications as opposed to the campfire monster of unreasonably wrong adjudications—a judicial bugaboo that frightens malefactors within the Ninth Circuit and no other—would allow Louisiana judges and prosecutors to face their political masters and say: It's either we stick to what we can prove or the feds cut 'em loose altogether, which do you prefer?

It is state court judges who do not enjoy life tenure, who as trial judges must campaign and raise money every four years, who must decide thousands more cases a year with fewer staff of lesser training than their federal counterparts.

AEDPA is putting them on the tip of the spear with no air support and no cavalry.[35] It is not an insult to recognize that under such circumstances some state courts will falter, and neither is it an indictment of the war plan. It is an indictment of their fellow soldiers in the federal courts who, made timid by armchair warriors in Congress, fail to seize on the lawful and available means to join the fray.

### III. Whether any habitual offender sentence may involve an unreasonable application of the "gross disproportionality" principle is important, open, and debated.

So far as Petitioner can determine, only one court of appeals has invalidated a habitual offender sentence since *Lockyer* v. *Andrade*, 538 U.S. 63 (2003), limited federal habeas review of non-categorical Eighth Amendment challenges to the reasonableness of a state court's application of the "gross disproportionality" principle. *Ramirez* v. *Castro*, 365 F.3d 755, 756 (9th Cir. 2004) (setting aside 25-year three-strikes sentence for shoplifting $199 VCR). The other courts of appeals

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35 Consider the recent run-off election for an open Louisiana Supreme Court seat featuring, among other issues, an "ad [that] cast Liljeberg as 'reckless' with violent criminals, citing a rape conviction that Liljeberg and two other appeals court judges recently reversed. Liljeberg brought out some big guns in response, running a TV spot that featured an endorsement for him from Paul Connick, the Jefferson Parish district attorney whose office had won the rape conviction," but he still lost in a landslide, 57%-43%. *White Wins Run-Off*, THE ADVOCATE (Baton Rouge, LA), November 17, 2019, at A19. Perhaps Judge Liljeberg is a man of uncommon integrity who, casting his gaze beyond the shores of self interest, would never think of that ad when deciding his next rape case. But could a reasonable citizen be expected to assume that, and to assume it so strongly that, confronted with enormous statistical evidence and case-law analysis to the contrary, he feels confident leaving the power to enter wrong (just not unreasonably wrong) decisions in his hands? "[J]ustice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954).

to discuss that case have alternatively cited it approvingly, *United States* v. *Rivera-Ruperto*, 852 F.3d 1, 34 (1st Cir. 2017); *United States* v. *Beverly*, 369 F.3d 516, 537 (6th Cir. 2004), and with some skepticism, *United States* v. *Butler*, 137 F. App'x 813, 817 (6th Cir. 2005), albeit outside the habeas context. Two district courts, however, have relied on it as part of the basis for granting habeas relief. *Matthews* v. *Cain*, 337 F. Supp. 3d 687, 714 (E.D. La. 2018) (*de novo* review); *Banyard* v. *Duncan*, 342 F. Supp. 2d 865, 876 (C.D. Cal. 2004) (deferential review).

The facts of Petitioner's case check just about every problem box in this Court's Eighth Amendment jurisprudence. The sentence imposed was mandatory, and to life without parole. *Miller* v. *Alabama*, 567 U.S. 460, 478-79 (2012). Petitioner's only serious offense occurred when he was 16 years old, *id.*; *Graham* v. *Florida*, 560 U.S. 48, 68, 74 (2010), and had he not been assisted by constitutionally ineffective counsel in the present case, significant mitigating facts about that offense would have come out.[36] *Glover* v. *United States*, 531 U.S. 198,

36 This prior—manslaughter—involved such significant mitigation, even beyond Petitioner's age, and such significant question as to his actual guilt, that he received far less time than customary under Louisiana law. Further, it is not appreciably worse than the serious prior of Glenn Young, the co-defendant who went to trial, actually lived in the home, and was convicted of a gun offense to boot. His was for the heinous conduct of sexually abusing a child, yet he still received a term of years *and* parole eligibility after just five. Pet. 37a n.13, 46a. While Petitioner does not continue to press the ineffective-assistance-of-counsel claims raised below, that should not blind the Court to the role that ineffective assistance played in his receiving such an outrageously disproportionate punishment, not just to the more culpable co-defendants who pleaded guilty (Calvin Elie and Kendra Young), but to Glenn Young, the comparator who went to trial and was found more culpable, and to Anthony Wallace, the comparator of equal "culpability" who pleaded guilty and received time served.

202-04 (2001). Petitioner would not, under present Louisiana law, be eligible for life without parole, and discounting either his serious prior as a juvenile or his trivial marijuana offense as an adult would have rendered him ineligible even at the time. *Compare* LA. REV. STAT. ANN. § 15:529.1(A)(3)(a)-(b) (2019), *with* LA. REV. STAT. ANN. § 15:529.1(A)(1)(b)(i)-(ii) (2007).

Comparison of Petitioner's sentence to those received by equally and more culpable co-defendants—their probations and times served, including for another third offender (Anthony Wallace), to Petitioner's life without parole—reveals his sentence to be grossly disproportionate, and almost certainly a result of exercising his right to trial. *Blackledge* v. *Perry*, 417 U.S. 21, 28-29 (1974). The evidence underlying the crime, should the Court consider it not unreasonably constitutionally insufficient, is still very weak indeed. The social harm involved is, given Petitioner's "conduct," negligible, while the severity of the punishment ranks second only to execution. *Solem* v. *Helm*, 463 U.S. 277, 297-300 (1983).

Petitioner lacks access to the legal materials necessary to conduct the intra- and inter-jurisdictional surveys contemplated by this Court's precedents after a threshold showing of gross disproportionality.[37] He alleges on information and

37 Petitioner has no access to cases from states other than Louisiana. There are problems keeping even the Louisiana materials current, and he under no circumstances has access to state district court or unpublished court of appeal cases, both important in an empirical survey. Before being able to complete this petition his access to published federal district court opinions expired, and he has never had access to unpublished district court opinions.

belief, however, that his sentence is unusually harsh both within and without Louisiana and that it violates the evolving standards of decency that mark the progress of a maturing society.

There can be no doubt that *Lockyer* established a high bar for habeas petitioners. But the Court is well-familiar with the observation that the need for "case-by-case examination of the evidence . . . obviates neither the clarity of the rule nor the extent to which the rule must be seen as established." *Williams* v. *Taylor*, 529 U.S. 362, 391 (2000). Clearly established law encompasses more than just bright-line rules, as even a general standard may be applied unreasonably. *Renico* v. *Lett*, 559 U.S. 766, 776 (2010). A lower court errs when it "unreasonably refuses to extend [a] principle to a new context where it should apply." *Williams*, 529 U.S. at 407.

Petitioner's mandatory sentence to life without parole for a crime that amounts to being in the wrong place at the wrong time is grossly disproportionate. He asks this Court also to conclude it would be unreasonable to hold otherwise.

**IV. The Court of Appeals' parsimonious COA practice warrants an exercise of this Court's supervisory power in the form of a GVR.**

In *Buck* v. *Davis*, the Court observed that, while the Court of Appeals used the right words in setting out the standard for a COA, it was in fact applying a different, more demanding standard. 137 S. Ct. 759, 773 (2017). This is a

frequent feature of this Court of Appeals' COA practice. *See* Amended Petition for Certiorari at 30-33, *Wills* v. *Vannoy*, No. 18-9546 (O.T. 2018). So frequent, in fact, that finding COA grants in Louisiana cases is a daunting task. In the last year to which Petitioner has complete access (2018), it would appear that the Court of Appeals granted precisely one COA out of the many sought by Louisiana prisoners, and then only because a prior panel had reversed and remanded on the same issue in an unpublished opinion.[38]

If the Court concludes that Petitioner's two substantive questions are not worthy of certiorari, there remains the question whether the Court of Appeals' refusal to acknowledge their debatability merits this Court's attention. Petitioner submits that it does under Rule 10(a). This Court takes very seriously a court of appeals' opportunity to pass on an issue before this Court's intervention is sought. *E.g.*, *Schexnayder* v. *Vannoy*, No. 18-8341, slip op. at 1 (Dec. 9, 2019) (Sotomayor, J., certment). If this Court of Appeals is desirous of that deference, it should demonstrate reciprocal respect for the expressed desire of both this Court and the Congress for reasoned lower court opinions on debatable issues.

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38 *Gilkers* v. *Vannoy*, 904 F.3d 223, 342 (2018). And the *Gilkers* panel undid the prior panel's grant. Two district courts did, however, grant COAs in 2018, *Hebert* v. *Rogers*, 890 F.3d 213, 217 (5th Cir. 2018); *Langley* v. *Prince*, 890 F.3d 504, 504 (5th Cir. 2018), and it would perhaps be more accurate to say that the Court of Appeals *decided* in 2018 only one case in which it granted a COA. There could have been COA grants in 2018 continued to 2019, but then again *Gilkers* could have been a COA grant from 2017 continued to 2018.

The need for reasoned opinions from this Court of Appeals on matters of constitutional criminal procedure and habeas law is particularly acute, as its jurisdiction includes states that, for reasons of history, have required close supervision by this Court to stay within the constitutional mainstream. An abstemious-to-absent COA practice obscures these issues. Particularly when a remedy as simple as a GVR in light of *Buck* is an option,[39] Petitioner respectfully submits that the Court should exercise its supervisory power to put a stop to this pattern in much the same way it has carefully attended to misapplications of AEDPA by other courts of appeals.

## CONCLUSION

Twelve years ago the state arrested an extended family and ended Petitioner's life, as the reader would understand that term, for an ounce of drugs belonging to a "crack addict" cousin—the state court's words. Pet. 41a. Now Petitioner sits sentenced never to leave and only to die at Angola. It is little wonder Louisiana has the crime problem it does. If driving a little girl to Head Start may merit a life sentence, why not get rich or die trying?

Perhaps, it could be said, Petitioner should have avoided anywhere drugs might be found after his prior convictions, on the off chance of all this happening.

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39 *Youngblood* v. *West Virginia*, 547 U.S. 867 (2006) (per curiam); *Stutson* v. *United States*, 516 U.S. 193 (1996); *Robinson* v. *Story*, 469 U.S. 1081 (1984).

But whither then should he have fled? The local country club was still reeling from being forced only three years before to seat white ladies in what it was pleased to call its Men's Grille; it may have been a bit much to ask them to take in an ex-con.[40] The segregated local schools had not exactly prepared Petitioner for a cardiothoracics residency at what was still referred to as Confederate Memorial Medical Center.[41] The George Cinq was booked, and no one could have expected him to have the Newport cottage open in April—you can't even wear white yet.

So, as has been true of most people for more millennia than human history records, Petitioner lived among his family in the community in which he was born. That is a community and those are family affected by the scourge of drugs. Petitioner nonetheless managed to live a pretty ordinary, law-abiding existence among them after he straightened his life up at 16. Indeed, the only hiccup between then and this arrest—the charge for possession of marijuana with intent to distribute—would be a business plan in most states today. And yet here he sits still, sentenced to life without parole on the banks of the Mississippi.

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40 *Albright* v. *So. Trace Country Club of Shreveport, Inc.*, 879 So. 2d 121, 123 (La. 2004). Not that there wouldn't have been an ounce of cocaine here too. Petitioner would, however, have probably been safer from SWAT teams ramming the door based on chameleonic allegations by a "victim" with 81 prior arrests, Pet. 95a-107a, all as a fig leaf for an operation evidently intended to search for some large drug operation for which, it would seem, probable cause was lacking—and for good reason, as the search revealed.

41 LA. REV. STAT. ANN. § 17:1517(C); *Cavalier* v. *Caddo Parish Sch. Bd.*, 403 F.3d 246, 263 (5th Cir. 2005) (Wiener, J., dissenting) (Court of Appeals' appointee from Shreveport noting school system was, in 2005, still not unitary).

As seen from the heavens, the scene on these banks has changed little since 1820: there are still little white specks with weapons sitting astride horses, supervising little black specks hand-picking crops. If Louisiana may make it this difficult for young black men to avoid a lifetime of forced agriculture labor—on a farm still named for the country from which its slaves were whisked when a plantation—and if AEDPA leaves the federal courts this powerless to provide correction, then it is time to drop the pretense of federal jurisdiction and withdraw from this American Afghanistan. After enough consent decrees New Orleans may, like Kabul, take on some trappings of modernity but life in the provinces will, it looks, always be lived like two hundred years ago.

WHEREFORE Petitioner respectfully requests that the Court grant certiorari to consider the standard of review applicable to his claim of insufficient evidence and the merits of his claim of a grossly disproportionate sentence or, in the alternative, grant, vacate, and remand to the Court of Appeals for reconsideration whether to grant a COA under *Buck* v. *Davis*, 137 S. Ct. 759, 773 (2017).

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