No. 18-6992

In The
Supreme Court of the United States

BRANDON BERNARD,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ETHICS BUREAU AT YALE IN SUPPORT OF PETITIONER

Lawrence J. Fox
Counsel of Record
George W. and Sadella D. Crawford
Visiting Lecturer in Law
YALE LAW SCHOOL
127 Wall Street
New Haven, Connecticut 06511
(203) 432-9358
lawrence.fox@yale.edu

Counsel for Amicus Curiae ***Dated: January 10, 2019***

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTE

RULE

ETHICS RULES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Ethics Bureau at Yale is a clinic composed of fifteen law students supervised by an experienced practicing lawyer, lecturer, and ethics teacher. The Bureau has drafted *amicus* briefs in matters involving lawyer and judicial conduct and ethics; assisted defense counsel with ineffective assistance of counsel claims implicating issues of professional responsibility; and provided assistance, counsel, and guidance on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

Amicus has no direct interest in the outcome of this litigation. Because this case implicates the professional responsibilities of judges, the Bureau believes it might assist the Court in resolving the important issues presented.

---

[1] Pursuant to Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *Amicus* and its counsel made a monetary contribution to its preparation or submission. All parties have received timely notice and have consented to the filing of this brief. The Ethics Bureau at Yale is a student clinic of Yale Law School. The views expressed herein are not necessarily those of Yale University or Yale Law School.

SUMMARY OF ARGUMENT

Courts provide justice to individuals—even if that means asking uncomfortable questions about a former colleague. When Petitioner Brandon Bernard was still a teenager, he had the misfortune of having his criminal case assigned to United States District Judge Walter S. Smith, Jr., a man who abused alcohol, sexually harassed a female court employee, and then tried to impede an investigation into his misconduct. The Judicial Council of the Fifth Circuit suspended Judge Smith for this behavior, but a second investigation into possible additional ethics violations was cut short by his sudden retirement. The Judicial Council, believing the Judge's retirement rendered its inquiry moot, did not do any additional fact-finding. For Mr. Bernard, however, the question of how far former Judge Smith's impropriety extended is far from moot.

In 2017, U.S. District Judge Lee Yaekel, to whom Mr. Bernard's case was reassigned after Judge Smith's retirement, denied Mr. Bernard's motion to reopen the proceedings under Fed. R. Civ. P. 60(b). In a mere two pages of analysis, he rejected the possibility that Judge Smith's behavior could have affected Mr. Bernard's case and summarily dismissed evidence such as an unexplained period of *seven years* in which the Judge ignored Mr. Bernard's § 2255 motion. When Mr. Bernard requested a Certificate of Appealability from the Fifth Circuit, his request was denied. In doing so, the Fifth Circuit applied an inappropriately high standard, one that this Court has criticized three times.

As members of a self-regulating profession, lawyers and judges have an ethical responsibility not to turn away from the misconduct of their peers. In Judge Smith's case, the District Court and Fifth Circuit neglected to do so, to the detriment of a man facing the death penalty. Ethics rules emphasize that judges must preserve the public legitimacy of the courts by avoiding even the appearance of judicial misconduct. By allowing Judge Smith's misconduct to remain largely uninvestigated, the District Court and the Fifth Circuit left uncorrected the appearance of impropriety surrounding Judge Smith's tenure on the bench. This Court should grant certiorari to remedy the repeated failures of the judiciary thus far.

ARGUMENT

I. Former Judge Smith Violated His Professional Obligations as a Judge, to the Detriment of the Parties in Front of Him and the Legitimacy of the Judiciary as a Whole.

A. Federal Judges Have Ethical Obligations To Avoid Both Improper Conduct and the Appearance of Impropriety.

Federal judges occupy exceptionally powerful positions in our system of government. For this reason, both Congress and the Judicial Conference of the United States have adopted strict rules designed to hold judges to a very high standard of behavior. Meaningful enforcement of these rules is essential to maintaining a credible judiciary. As Justice Stewart once observed, "[t]here could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J.,

concurring). Indeed, this interest in the quality and capability of the judiciary belongs not only to the state but also to the public writ large. The people, too, have "a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform." *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991).

The Code of Conduct for United States Judges, which applies to all federal judges except members of the Supreme Court, is appropriately stringent. It directs judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." CODE OF CONDUCT FOR U.S. JUDGES Canon 2(A) (JUD. CONF. U.S. 2014). Specifically, judges "must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen." *Id.* cmt.

Notably, both the U.S. Code and the Code of Conduct go beyond prohibiting actual judicial misconduct; both also prohibit the "appearance of impropriety." A judge is instructed in 28 U.S.C. § 455 to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455 (2018). Indeed, Canon 2 of the Code of Conduct is entitled: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities." CODE OF CONDUCT FOR U.S. JUDGES Canon 2. While the prohibition against actual improper behavior protects litigants, the "appearance of impropriety" standard is essential for maintaining the public legitimacy of the judiciary. Of particular relevance for Mr. Bernard's case, the stricture against the appearance of impropriety is not limited to a

judge's professional conduct. *Id.* Canon 2(A) ("A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct.").

Judicial conduct that creates the appearance of impropriety threatens the integrity of the proceedings over which a judge presides. As this Court has long recognized, "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (second alteration in original). Although concerns about the fairness of the trial and tribunal most commonly arise when there are allegations of judicial bias in favor of one of the parties to the proceedings, "[o]ur system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). If "reasonable minds . . . would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired," then "[p]ublic confidence in the judiciary [may be] eroded." CODE OF CONDUCT FOR U.S. JUDGES Canon 2(A) cmt. When judges engage in conduct that suggests they fall short of these requirements, they risk depriving parties of the "fair trial in a fair tribunal" to which they are constitutionally entitled.

B. Former Judge Smith Failed To Comply with Those Ethical Obligations.

It is undisputed that former U.S. District Judge Walter S. Smith, Jr. failed to live up to the responsibilities of his position. He both actually engaged in improper behavior and created an unmistakable appearance of impropriety. In 2015, the

Judicial Council of the Fifth Circuit imposed what it labeled "severe sanctions" against then-Judge Smith, for making "inappropriate and unwanted physical and non-physical sexual advances towards a court employee" in 1998. ROA.2209.[2] In a deposition, a former court employee described him as having "a reputation for drinking" and stated that he appeared intoxicated during the work day. ROA.2219-2221. She described how Judge Smith's former law clerk asked her to help manage his behavior, saying that he was "not functioning" and "falling apart," to the extent that he was unable to get himself to the courthouse. ROA.2221. She told a supervisor, who in turn informed the Chief Judge of the District. The Chief Judge's response was to allegedly phone the employee, asking, "[w]hat do you want me to do about it?" Tommy Witherspoon, *Waco Federal Judge Reprimanded for Sexual Misconduct, Stripped of New Cases for a Year*, WACO TRIB.-HERALD (Dec. 11, 2015), https://www.wacotrib.com/news/courts_and_trials/waco-federal-judge-reprimanded-for-sexual-misconduct-stripped-of-new/article_319e2f91-f1d7-5dfe-8311-550de00981a4.html.

Judge Smith's inappropriate behavior did not end in 1998. The Council found that, in 2015, Judge Smith "contributed greatly to the duration and cost of the investigation" and knowingly allowed others to make "false factual assertions" on his behalf. ROA.2209. At the same time, he "allowed the lawyer who was representing him in the judicial misconduct investigation to continue to appear before him on other matters," and he "did not recuse himself from

---

[2] "ROA" refers to the appellate record from the United States Court of Appeals for the Fifth Circuit.

those cases, nor even disclose to counsel for the other party that their opposing counsel was the Judge's own personal attorney." Pet. Writ Cert. at 9. It appears that the Judge's improper behavior was not an artifact of the distant past, but very much continued into the final years of his judgeship.

In all, the Fifth Circuit Judicial Council concluded in 2015 that former Judge Smith had acted in a way that was "prejudicial to the effective and expeditious administration of the business of the courts." ROA.2132. In addition to suspending him from his position for a year and requiring him to attend counseling, the Council required Judge Smith to recuse himself for three years from cases involving the lawyer who had represented him in his disciplinary case, noting that this was an extra restriction intended to "preserve public confidence in the judiciary." ROA.2132 n.1. The Council also expressed concern that Judge Smith still did not "understand the gravity of such inappropriate behavior." ROA.2132.

The lawyer who had initially brought the complaint against Judge Smith appealed, complaining that the scope of the Fifth Circuit Judicial Council's investigation was too limited and the punishment of the Judge too lenient. The Judicial Conference Committee of the United States ordered the Judicial Council to reopen the investigation to look for a "pattern and practice" to the behavior, ROA.2214, but its second investigation was cut short when former Judge Smith retired, relieving him from

additional scrutiny.[3] When the Council members closed their investigation, they did so because they believed they no longer had the ability to impose discipline on the Judge. ROA.2214-15. The Judicial Conference Committee agreed, writing that "the proceeding was unnecessary because Judge Smith . . . retired." *In re* Complaint of Judicial Misconduct, No. 16-01 (Comm. Jud. Conduct & Disability Jud. Conf. U.S. Jan. 26, 2017). The Judicial Council also dismissed a complaint against the District Judge who, as Chief, had failed to act after learning about the allegation against Judge Smith in the late 1990s and who had, like Judge Smith, since retired from the bench. *In re* Complaint of Misconduct Against United States District Judge Harry Lee Hudspeth, No. 05-14-90121 (Jud. Council 5th Cir. Oct. 21, 2016).

The disciplinary case may have been rendered moot by the judge's retirement, but the issue was far from moot from the public's perspective—or Mr. Bernard's. The questions most important to Mr. Bernard's case were left unanswered, questions like: "Did Judge Smith's alcohol abuse continue during the pendency of this capital case?"; "Why did former

---

[3] As numerous newspaper headlines noted at the time, Judge Smith was allowed to keep his full lifetime pension, despite public outcry. *See, e.g.*, Michael Barajas, *Texas Judge Who Forced Himself On Clerk Will Get $200K From the Government Every Year For the Rest of His Life*, SAN ANTONIO CURRENT (Sept. 21, 2016), https://www.sacurrent.com/the-daily/archives/2016/09/21/texas-judge-who-forced-himself-on-clerk-will-get-200k-from-the-government-every-year-for-the-rest-of-his-life; Guillermo Contreras, *Suspended For Sexual Misconduct, Federal Judge to Get Paid for Life*, SAN ANTONIO EXPRESS-NEWS (Sept. 20, 2016), https://www.expressnews.com/news/local/article/Suspended-for-sexual-misconduct-retiring-federal-9235096.php.

Judge Smith fail to rule on Mr. Bernard's § 2255 motion for more than *seven years*, only to abruptly issue a poorly reasoned and factually unsupported opinion?"; and "How else might Mr. Bernard's case have been affected in ways he does not yet know?" These are not mere hypotheticals. Former Judge Smith was assigned Mr. Bernard's case on July 13, 1999, only a year after the alcohol abuse and sexual harassment described by a former court employee. ROA.5. He ruled on Mr. Bernard's § 2255 motion a mere two years before he attempted to interfere with the Judicial Council's investigation.

II. Neither the District Judge to Whom Mr. Bernard's Case Was Reassigned nor the Court of Appeals for the Fifth Circuit Acted To Protect the Integrity of the Proceedings by Insisting on a Full Investigation into Judge Smith's Conduct.

While the Council is responsible for imposing discipline on judges, courts at both the federal district and circuit levels are responsible for providing justice to parties and protecting the integrity of the court system as a whole. Mr. Bernard has given the court system ample reason to engage in further fact-finding that could illuminate how his case may have been affected by former Judge Smith's conduct, but both the District Court and the Fifth Circuit Court of Appeals failed to proceed further. Though no evidence of judicial misconduct during the pendency of the case has emerged on the record thus far, a documented decades-long pattern of ethical lapses is enough to justify holding a hearing to determine whether Mr. Bernard's case was compromised.

In 2017, Mr. Bernard filed a motion under Fed. R. Civ. P. 60(b)(6), asking U.S. District Judge Lee Yeakel to reopen the judgment in his § 2255 case. ROA.2098. Judge Yaekel denied this motion in a cursory fashion. Pet'r App. 2. Review under Rule 60(b) exists to guarantee that justice is done and to protect against the erosion of "the public's confidence in the judicial process." *See Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)). The rule exists to remedy "defect[s] in the integrity of the federal habeas proceedings," *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005), and it is an essential mechanism for judicial self-regulation. Furthermore, subsection (6)—the provision under which Mr. Bernard seeks relief—is aimed at precisely those idiosyncratic injustices that do not trigger any explicit rule authorizing relief: courts are authorized to grant relief simply "for any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). As a number of courts have recognized, this provision provides courts with "a grand reservoir of equitable power to do justice."[4] The inclusion of this catch-all provision suggests an explicit recognition that extraordinary circumstances may warrant otherwise unavailable grants of relief.

However, in Mr. Bernard's case, the District Court was unmoved. In his order denying Mr.

---

[4] This interpretation of 60(b)(6) is widely accepted. *See, e.g.*, *United States v. Doe*, 810 F.3d 132, 152 (3d Cir. 2015) (internal citation omitted); *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009) (internal citation omitted); *Harrell v. DCS Equipment Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992) (internal citation omitted); *Radack v. Norwegian America Line Agency, Inc.*, 318 F.2d 538, 542 (2nd Cir. 1963) (internal citations omitted).

Bernard's motion, Judge Yaekel minimized former Judge Smith's ethical violations, for which he was suspended from assignment to new cases for a full year, as "alleged impairments—which include . . . a reputation for . . . having a temper." Pet'r App. 2 at 13a n.2. Judge Yaekel further stated that former Judge Smith's decision to deny an evidentiary hearing for Mr. Bernard's § 2255 motion after *seven years* of unexplained delay was not the result of any "impairments," but was the result of "careful consideration." *Id.* at 13a. Yet by treating Mr. Bernard's serious and factually supported allegations so dismissively, Judge Yaekel left unresolved substantial questions about whether Judge Smith's misconduct affected Mr. Bernard's trial, and left unrepaired any damage done by Judge Smith's identified misconduct to the public perception of the legitimacy of the courts.

The Fifth Circuit then also failed Mr. Bernard when it shirked its obligation to review the District Court's decision by once again invoking an inappropriately burdensome standard for determining when to grant Certificates of Appealability. Pet'r App. 1. The artificially high threshold set by the Fifth Circuit, which this Court has been required to correct on three separate occasions, renders the circuit an outlier and amounts to an abdication of the courts' appellate functions. *See Buck*, 137 S. Ct. at 774 (stating that the Fifth Circuit's formulation of the COA standard places "too heavy a burden on the prisoner"); *Tennard v. Dretke*, 542 U.S. 274, 283 (2004) (criticizing the Fifth Circuit for merely "paying lipservice to the principles guiding [the] issuance of a COA."); *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (rejecting the standard employed

by the Fifth Circuit as "too demanding . . . on more than one level"). In fact, the Fifth Circuit's standard is so unreasonable that it has *never* issued a COA to a federal capital defendant. Brief *Amicus Curiae* of the Federal Capital Habeas Project in Support of Petitioner at 14, *Bernard v. United States*, 136 S. Ct. 892 (2016) (No. 14-8071), 2015 WL 797986.

By failing to appropriately grant Certificates of Appealability, as it did in this case, the Fifth Circuit is effectively declining to perform its primary function. Circuit Courts monitor District Courts because "[t]rial courts make mistakes, and appellate courts, because of their greater expertise, lesser time pressures, collegial decision making, or some other reason, correct those mistakes." Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 469-70 (1998). The obligation to review lower court decisions is especially significant in federal habeas cases. Without a COA, only one judge ever considers the claims of a federal prisoner, often the same judge who oversaw the prisoner's trial and death sentence. Brief *Amicus Curiae* of the Federal Capital Habeas Project, *supra*, at 17-18. Although District Court judges can also issue COAs, as of February 2015 only one District Court within the Fifth Circuit has ever granted one in a federal prisoner case. *Id.* at 14 (noting that, as of February 2015, in federal capital cases in other Circuits, COAs were granted in a large majority of cases). Presumably, this is a result of district judges following the artificially high standard set by the Fifth Circuit.

III. This Court Should Grant Certiorari To Remedy These Shortcomings.

A. Reversing the Decisions Below Would Publicly Reaffirm the Judiciary's Commitment to Ethical Conduct.

Together, the District Court and the Circuit Court have failed to protect Mr. Bernard from the misfortune of having his case assigned to a judge with a substantial history of misconduct. Such abdication of authority is especially harmful at a moment in which public confidence in the federal judiciary has already been undermined. *See* John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 246 (1994) ("The perception persists that judges cannot be trusted to judge themselves because the public sees lots of judges and little formal disciplinary action." (quoting Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 309 (1994))); Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301, 305-16 (2010) (surveying recent judicial misconduct and its effects on public confidence in the judicial system). Recent scandals have rendered the public acutely aware of the potential for abuse within the judiciary. *See* Editorial, *Who Will Judge the Judge?*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/opinion/kozinski-sexual-harassment-resign.html (remarking that when the norm of judicial confidentiality acts "[as] a cloak of secrecy hiding degrading behavior, it looks more like a code of omertà"). These concerns are not merely speculative: as the Chief Justice noted in

his 2017 report on the federal judiciary, "[e]vents in recent months have illuminated the depth of sexual harassment in the workplace, and events in the past few weeks have made clear that the judicial branch is not immune." John G. Roberts, *2017 Year-End Report on the Federal Judiciary* 11 (Dec. 31, 2017), https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf. These events have given rise to public questioning of whether "the judiciary itself [can] meaningfully address unacceptable behavior within its ranks." *Who Will Judge the Judge?*, *supra*. By forcefully responding when such unacceptable behavior does come to light, the judiciary will seize "the opportunity to show that it can." *Id.*

Needless to say, judges who drink on the job, harass employees, and encourage others to lie on their behalf should be aggressively policed by disciplinary committees. Public confidence in the judiciary is eroded when that kind of misconduct goes unaddressed or is punished only with a "slap on the wrist." But that is not the only kind of behavior that undermines public confidence. The District Court and the Fifth Circuit contributed to this problem by turning a blind eye to former Judge Smith's misconduct, in the process denying Mr. Bernard procedural protections he was due and creating the impression that judges will not police their own effectively.

It is a part of the ethos of the legal profession that lawyers and judges must affirmatively seek out the truth. Both the Model Rules of Professional Conduct and the Code of Judicial Conduct ask legal professionals not merely to never violate the rules themselves, but also to bring forward accusations

against others if it will protect those they serve. The Model Rules of Professional Conduct state: "A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority." MOD. R. PROF'L CONDUCT r. 8.3 (AM. BAR ASS'N 2018). The same obligation applies to federal judges: "A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code . . . ." CODE OF CONDUCT FOR U.S. JUDGES Canon 3(B)(5). Any lawyer or judge who knew of former Judge Smith's excessive drinking and other improprieties would have been ethically compelled to act.

In Waco's relatively small legal community, however, many lawyers would likely hesitate before levelling accusations against the area's sole sitting federal district judge. Earning the enmity of such a man—particularly an ethically unscrupulous one—might have adverse consequences for a lawyer's clients or even her career. It is unsurprising that it took many years for Judge Smith's misconduct to come to light, and that despite that misconduct he was able to continue making literal life-or-death decisions for so many years. When professional discipline is unlikely to be effective, procedural protections like 60(b) motions and appellate review take on increased importance as a remaining avenue through which to uncover judicial misconduct.

By granting certiorari, this Court can ensure that Mr. Bernard is not executed without having an opportunity to develop a full factual record about the length and severity of former Judge Smith's

misconduct. Furthermore, by requiring the District Court to verify that Mr. Bernard's conviction was not tainted by Judge Smith's misconduct, this Court can correct the appearance of impropriety surrounding former Judge Smith's tenure and demonstrate to the public the judiciary's commitment to ensuring a fair trial for all parties who appear before it.

B. Reversal Need Not Provoke an Endless Review of All of Judge Smith's Cases.

The Fifth Circuit expressed concern that it might be forced to conduct an exhaustive reexamination of all of former Judge Smith's cases. *United States v. Vialva*, 904 F.3d 356, 361 (5th Cir. 2018). But such concern is overstated. Not all the cases he heard over the course of his career need be opened, but some, like Mr. Bernard's, undoubtedly should.

Two considerations counsel additional fact-finding. First, despite the Fifth Circuit's characterization of concerns about Judge Smith as "gross speculation," *id.*, there is ample reason to suspect that he behaved inappropriately in Mr. Bernard's case—in addition to his documented misconduct elsewhere—given the irregularities in his management of that case. Contrary to statute, he did not consult with the Federal Public Defender before appointing a lawyer of his acquaintance as Mr. Bernard's counsel for his original trial. *See* Pet. Writ Cert. at 3. He then waited more than seven years without taking any action on the case before abruptly making a decision on Mr. Bernard's § 2255 motion. *Id.* Second, Mr. Bernard is facing the death penalty. "The penalty of death differs from all other forms of

criminal punishment." *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). The incalculable value of human life alters the stakes of a capital case and demands procedural protections that might be denied in other contexts. *See Barefoot v. Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting) ("This Court has always insisted that the need for procedural safeguards is particularly great where life is at stake.").

It is well-established that former Judge Smith committed serious ethical violations the year before Mr. Bernard's case was originally assigned to him, and two years after ruling on Mr. Bernard's § 2255 motion. If Judge Smith did not, in fact, commit any ethical lapses during the intervening years, then further investigation would simply reveal that there are no grounds for reexamining Judge Smith's other cases, and the flood of other cases seeking review that the Fifth Circuit fears would be unlikely to materialize. *Vialva*, 904 F.3d at 361 ("To hold [for Mr. Bernard] would implicate every one of Judge Smith's decisions for an undetermined period of time nearly twenty years ago and would justify circumventing the second-or-successive limitations in countless cases.") However, even if this Court's decision in Mr. Bernard's cases were to incidentally open the door to other defendants who may have also been actually harmed by a compromised judge, that would be a triumph of our judicial system and a sign that it can appropriately remedy its own lapses. More importantly, the mere prospect of what might happen in other cases is hardly a reason to deny this death-sentenced man fair process.

CONCLUSION

For the foregoing reasons, *Amicus* petitions this Court to grant certiorari to review the Fifth Circuit's judgment below.

Respectfully Submitted,

Lawrence J. Fox
Counsel of Record
George W. and Sadella D.
Crawford Visiting Lecturer in Law
Yale Law School
127 Wall Street
New Haven, CT 06511
(203) 432-9358
lawrence.fox@yale.edu
Counsel for Amicus Curiae