NO. 18-8341
IN THE
UNITED STATES SUPREME COURT

LOUIE SCHEXNAYDER Petitioner

versus

DARREL VANNOY, WARDEN Respondent

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

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner asks this Court to consider whether jurists of reason could debate whether to apply AEDPA deference to a state court decision arising out of a secret, thirteen - year long policy to deny all pro se prisoner writ applications without judicial review.

Respondent submits this Court must first determine whether a constitutional case or controversy exists to warrant this Court's review.

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Respondent, Darrel Vannoy, Warden, respectfully prays that the Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

STATUTORY PROVISIONS INVOLVED

28 U.S.C 2254 (d) (1):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

Louisiana Constitution Article V § 8

Section 8. (A) Circuits; Panels. The state shall be divided into at least four circuits, with one court of appeal in each. Each court shall sit in panels of at least three judges selected according to rules adopted by the court.

Louisiana Constitution Article V § 5

Section 5. (A) Supervisory Jurisdiction; Rule- Making Power; Assignment of Judges. The supreme court has general supervisory jurisdiction over all other courts. It may establish procedural and administrative rules not in conflict with law and may assign a sitting or retired judge to any court. The supreme court shall have sole authority to provide by rule for appointments of attorneys as temporary or ad hoc judges of city, municipal, traffic, parish, juvenile, or family courts.

STATEMENT OF THE CASE

Petitioner was convicted of second degree murder in a Louisiana Court and sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. The state Fifth Circuit Court of Appeal affirmed. State v. Schexnayder, 96-98 (La. App. 5th Cir. 11-26-96), 685 So.2d 357, writ denied 97-0067 (La. 5-16-97), 693 So.2d 796, cert. denied Schexnayder v. Louisiana, 522 U.S. 839 (1997).

On February 5, 1998, petitioner filed an application for post conviction relief in the state district court. It was denied on April 15, 1998. He filed a writ with the state court of appeal on May 1, 1998; it was denied on May 11, 1998. No. 98-KH-466. He filed a writ with the Louisiana Supreme Court; it was denied on October 30, 1998. State v. Schexnayder, 98-1460 (La. 10-30-98), 723 So.2d 971.

He filed an application for federal habeas corpus in the district court on January 27, 1999. A Report and Recommendation was issued on December 17, 1999, recommending denial. It was adopted in a judgment rendered on April 14, 2000. COA was denied. Schexnayder v. Cain, (5th Cir., No. 00-30551); cert. denied 531 U.S. 1090 (2001).

Subsequently, the May 21, 2007, suicide of the state court of appeal's director of central staff, Jerry Peterson[1], revealed that between February, 1994 and May 21, 2007, the court of appeal had not been reviewing criminal pro se writs from post conviction proceedings in accordance with Louisiana law. La. Const. Art. V § 8 requires appellate courts to sit in panels of

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[1]Jerry Peterson is mischaracterized in the amicus brief as an "administrative clerk." This is not accurate. He was an experienced attorney employed by the court as its Director of the Central Staff - a team of lawyers who assist the court in handling its docket, particularly criminal matters. Mr. Peterson was a graduate of the United States Naval Academy, Tulane University Law School, and was a United States Marine who served in Operation Desert Storm and Operation Enduring Freedom.

three judges. Hundreds of such applications were affected. See, e.g., Severin v. Parish of Jefferson, 357 Fed.Appx. 601 (5th Cir. 2009), cert. denied Severin v. Jefferson Parish, 560 U.S. 911 (2010); Gilkers v. Vannoy, 904 F.3d 336 (5th Cir. 2018), cert. denied Gilkers v. Vannoy, 586 U.S. ___, 139 S.Ct. 1192 (2019). The court had apparently delegated to Jerry Peterson the task of reviewing the majority of pro se criminal writs for one judge to sign.

The Louisiana Supreme Court, to address the deficient review, adopted the resolution submitted by the Fifth Circuit that the affected cases be re- reviewed by proper, three judge panels not involved in the previous adjudications of the writs at issue. State v. Cordero, 08-1717 (La. 10-3-08), 993 So.2d 203.

Petitioner's previous writs were re- reviewed and none were found to warrant relief. State ex rel Louie Schexnayder v. State, 08-WR-915 c/w 09-KH-159 (La. App. 5th Cir. 2-18-11) (unpub). Other applications filed by petitioner did not seek post conviction relief.

Petitioner sought supervisory review of the re- review of his application and the Louisiana Supreme Court denied review. State ex rel Schexnayder v. State , 11-0541 (La. 3-2-12), 83 So.3d 1037; reh. denied 86 So.3d 612 (La. 4-27-12).

On November 26, 2012, petitioner filed a Motion For Relief under Rule 60(b). It was denied as successive on September 6, 2013. Under Rule 59(e) petitioner filed, on September 12, 2013, a Motion To Alter or Amend Judgement. It was denied on September 20, 2013. A certificate of appealability was denied on December 20, 2013.

Subsequently, the Court of Appeals granted a certificate of appealability on the issues of whether his Rule 60(b) motion alleged defects in the integrity of his prior federal habeas proceedings and as such was a true Rule 60(b) motion and whether his motion had merit. After

briefing and argument, the Court of Appeals vacated and remanded on April 13, 2016. The court found that the Rule 60(b) motion was a true Rule 60(b) motion entitled to be decided. Schexnayder v. Vannoy, 643 Fed. Appx. 417 (2016).

On remand, a Report and Recommendation was issued by the magistrate on December 12, 2017; it considered the claims under the deferential standard of AEDPA and concluded the claims had no merit and recommended dismissal with prejudice. Schexnayder v. Cain, 2017 WL 9437581. It was adopted by the district judge who entered a Judgment of dismissal on May 16, 2018. A certificate of appealability was denied by the district court on May 31, 2018, and by the Court of Appeals on December 28, 2018. That court denied his motion for reconsideration on January 18, 2019.

As the Court of Appeals noted in denying his certificate of appealability, petitioner sought review on the issues of whether his trial judge should have recused herself and whether the court should review his case for plain error. The court noted the recusal claim was "raised for the first time in his COA application [. . . and that] This court need not consider claims raised for the first time in a COA application." Petitioner filed an application for certiorari with this Court which has ordered a Response.

REASONS FOR DENYING THE PETITION

I.

Petitioner seeks review of the denial of his substantive claims raised since his conviction was initially affirmed on appeal in 1996. None of those claims have merit nor do they present any Constitutional issue warranting this Court's intervention. This case was given new life when the state appellate court's review of collateral proceedings was discovered to be in derogation of

state law. Petitioner's case was one of hundreds the state supreme court ordered to be re-reviewed. This re- review was conducted by proper three- judge panels uninvolved in the prior improper review. Thus, the improper collateral review was remedied by the procedure ordered by the Louisiana Supreme Court. This petition should be denied, in short, because the review of the application petitioner claims was infected by the state habeas infirmity is not the ruling sought to be challenged herein. It does not, therefore, present a case or controversy necessary for this Court to exercise its jurisdiction.

The question presented by petitioner is based on erroneous premises. He frames his question as relating to ". . . a secret, thirteen - year- long policy to deny all pro se prisoner writ applications without judicial review." (Petition, p. 1). This premise is incorrect because, as shown herein, the defective adjudication has been recognized, repudiated and replaced with a properly re- reviewed disposition. His premise is also incorrect when he alleges the re- review court (Cordero panel) was unlawful and incompetent to sit. (Petition, pp. 16-17). The panel that re- reviewed his state collateral petition was appointed pursuant to the Louisiana Supreme Court Order in Cordero, supra. The state court's composition is a matter of state law. The Louisiana Constitution authorizes the appointment of the ad hoc judges who were appointed to the panel. The Louisiana Constitution, Article V Section V (A), provides that "The supreme court has general supervisory jurisdiction over all other courts. It may establish procedural and administrative rules not in conflict with law and may assign a sitting or retired judge to any court."

He furthers asserts a faulty premise in referring to the Cordero panel's ruling as "a void or fraudulent judgment." (Petition, p. 25). There is no record fact or law upon which petitioner's

premise can be based. The re- review panel was untainted by the procedure assailed herein.

The panel consisted of Judges Jude Gravois, Robert Klees and Jerome Winsberg. Judge Gravois was elected to the Fifth Circuit and took the bench in December of 2010. Judge Klees was a retired Fourth Circuit Court of Appeal judge appointed by the Louisiana Supreme Court for several of these cases. Similarly, Judge Winsberg was a retired Criminal District Court judge from New Orleans appointed for several of these cases. Thus, none of the judges who re-reviewed petitioner's state collateral application were involved in any way with the court from 1994-2007 when the improper procedure was in place. This panel's ruling supplanted the infirm state habeas ruling. It and the panel are untainted. Petitioner and amicus' concern that these three judges had a probability of bias is unfounded and purely speculation. See, e.g., n. 2, pp. 6 and 7 of the amicus brief. Thus, to contend, as does amicus, that AEDPA deference should not apply to judges, against whom a mere allegation of bias is made, is in conflict with AEDPA and this Court's decisions. Such a speculative claim would disqualify any judge against whom a claim of bias is made no matter how baseless. Recusals of judges found to be biased must be based on fact, not speculation. Instead, lacking any evidence, amicus refers to media accounts and rank speculation. (Amicus brief, p. 4, 5).

Despite the absence of any relief available to petitioner, amicus seeks to have this Court grant review to resolve a split among the Circuits. Respondent notes petitioner contradicts amicus when he avers "there is no circuit split on the issue." (Petition, p. 15). This presents the question of whether an amicus can ask this Court to grant review of a claim petitioner disputes. Petitioner's pro se status is, of course, acknowledged.

Before such a split could be properly resolved, there must be an active case presenting a "state habeas infirmities" issue. As noted, the writ disposition which created the state habeas infirmity herein was vacated, re - reviewed and denied anew. Further it should be noted that petitioner's application was initially reviewed properly by the state district court and subsequently properly reviewed by the Louisiana Supreme Court.

Therefore, the state habeas infirmity ceased to exist and the proceedings thereafter were conducted properly. This includes the federal courts' re- review of petitioner's federal claims attacked herein.[2] Thus, this case does not present an issue of a state habeas infirmity. Any pronouncement in this case would be an advisory opinion. This Court has consistently refused to issue advisory opinions. See, e.g., Mistretta v. United States, 488 U.S. 361 (1989). In Montana v. Imlay, 506 U.S. 5 (1992), this Court issued a Per Curiam dismissing a writ which it determined was improvidently granted. Although this Court gave no reasons for dismissing the writ other than "improvidently granted", Justice Stevens' concurrence demonstrated this Court's reasoning in not issuing advisory opinions:

> Thus, no matter which party might prevail in this Court, the respondent's term of imprisonment will be the same. At oral argument, neither counsel identified any way in which the interests of his client would be advanced by a favorable decision on the merits- - except, of course, for the potential benefit that might flow from an advisory opinion. Because it is not the business of this Court to render such opinions, it wisely decides to dismiss a petition that should not have been granted in the first place.
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> Montana v. Inlay, 506 U.S. at 6 (per curiam) (Stevens, J. concurring).

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[2]Magistrate's Report and Recommendation, 2017 WL 9437581; District Court's judgment, 2018 WL 2268244; and the Fifth Circuit's denial of a certificate of appealability and rehearing. (No. 18-30670).

Because any ruling in favor of petitioner could not result in relief to petitioner, such a ruling would of necessity be an advisory opinion. Similarly, because the ruling complained of no longer exists as it has been supplanted by the subsequent, proper ruling of the state appellate court, petitioner's application. ". . . has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." Half v. Beals, 396 U.S. 45, 48 (1969). Under Article III of the Constitution, a federal court may adjudicate only actual, ongoing cases or controversies. To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1999). This Court in Lewis continued, apropos of the current posture of this case, that Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the cases before them, and confines them to resolving real and substantial controversies admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. This case - or - controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. Id. (citations and quotation marks omitted).

Lewis was cited in Spencer v. Kemna, 523 U.S. 1 (1998), in considering whether a habeas petitioner's claim was moot and, if so, why: The more substantial question, however, is whether petitioner's subsequent release caused the petition to be moot because it no longer presented a case or controversy under Article III, §2, of the Constitution. The Court concluded:

> But mootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so. We are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong.

Spencer, supra, at 18.

A favorable ruling by this Court for petitioner could result in no relief unless, at most, only a federal re- review of the state court's re- review. As the record demonstrates, this would result in no relief to petitioner. That simply deprives this Court of its power to act.

II.

The purpose of federal habeas corpus is to make certain that a man is not unjustly imprisoned. Townsend v. Sain, 372 U.S. 293, 317 (1963), overruled on other grounds Keeney v. Tamayo - Reyes, 504 U.S. 1, 5 (1992). Petitioner is not imprisoned because of a state habeas infirmity.

Petitioner is asking this Court to review the fairness of his incarceration by considering state appellate collateral review which occurred almost three years after his trial, after proper appellate review, after proper review of his application for supervisory review by the Louisiana Supreme Court and by this Court and after proper review of his state post conviction application. Respondent submits that events occurring after the untainted trial, appeal and supervisory review by the state and federal supreme courts can have had no affect on the legality of petitioner's trial or incarceration. See, e.g., Hassine v. Zimmerman, 160 F.3d 941 (3rd Cir. 1998), cert. denied Hassine v. Zimmerman, 526 U.S. 1065 (1999): Thus, the federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state proceedings that actually led to petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter

into the habeas calculation.

It is important to note that although the Louisiana Supreme Court recognized deficiencies by the Louisiana Fifth Circuit Court of Appeal in reviewing pro se post- conviction writ applications, these deficiencies only concerned the review of district court rulings by the court of appeal. There were never any deficiencies at the district court level regarding pro se prisoners' post- conviction applications nor were there ever any deficiencies at the Louisiana Supreme Court. This only concerned the intermediate review by the court of appeal on collateral review on writ applications seeking review of the district court's denial of post- conviction relief.

Thus, the genesis of the substantive ruling complained of herein is that of the state district (collateral) court rendered on April 5, 1998. That ruling denied relief as follows:

ORDER

> This matter comes before the Court on defendant's APPLICATION FOR POST- CONVICTION RELIEF filed February 5, 1998.
>
> Defendant was found guilty on July 19, 1995 of Second Degree Murder. He was sentenced to life in prison. His Motion for Appeal was granted by the Fifth Circuit Court of Appeal on October 11, 1995. That court affirmed defendant's conviction and sentence, finding all of his assignments of error to be without merit, but suggested his claim of ineffective assistance of counsel should be raised in an application for post- conviction relief. State v. Schexnayder, 685 So.2d 357, (La. App. 5th Cir., 1996), writ denied 693 So.2d 796 (La. 1997). Defendant's petition for writ of certiorari was denied by the United States Supreme Court on October 6, 1997, docket 96-9282, rehearing denied, December 1, 1997.
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> Upon review, the Court finds the defendant's application to be without merit.
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> Accordingly,
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> **IT IS ORDERED BY THE COURT** that defendant's motion be and the same is hereby **DENIED**.

The substantive issues that ruling rejected were listed by petitioner:

THE ISSUES PRESENTED ARE AS FOLLOWS

1. The Trial Court and Court of Appeal for the Fifth Circuit, State of Louisiana, violated the petitioner's due process and equal protection rights when they denied the defendant his court records and made him exhaust his appeals in the blind (p.1).

2. The evidence is insufficient to convict therefore violating the defendant's 5th and 14th Amendment rights (p.4).

3. The defendant was denied the right to effective assistance of counsel (p.8).

4. The Trial Court erred by not suppressing the identification of petitioner violating his due process rights (p.12).

5. Court- appointed counsel, Donald Soignet, Esq., violated the defendant's right to present a defense when he denied the defendant a lineup, and the Court erred when they said defendant was not entitled to a lineup (p. 16).

6. Trial counsel violated the defendant's right to present a defense when counsel denied the defendant the right to testify on his own behalf (p. 19).

7. The Trial Court violated the defendant's right to self- representation when the Court did not rule on the defendant's motion filed to the Court with the Clerk's office (p. 22).

8. The Trial Court violated the defendant's 6th Amendment right to effective pre- trial counsel when the Court appointed a merely stand - in counsel to represent the defendant on his Motion to Dismiss Counsel (p. 23).

9. The Trial Court violated the defendant's 6th Amendment right to effective pre- trial counsel when the Court appointed a merely stand- in counsel to represent the defendant on his pro- se Motion to Quash (p. 25).

10. The Trial Court violated the defendant's right to counsel when the court ruled on the defendant's Motion to Suppress Evidence filed pro- se which was based on counsel's ineffectiveness (p. 27).

11. The Trial Court violated the defendant's 6th Amendment right to conflict free counsel, and the Court failed to make any inquiry into the factual basis of the defendant's claims.

12. The Trial Court violated the defendant's 5th and 6th Amendment rights when the Court denied the defendant's Motion to Quash based upon conspiracy and double jeopardy by ineffective assistance of counsel (p. 31).

13. The Trial Court erred in denying the defendant's Motion for New Trial based upon newly discovered evidence and ineffective assistance of Counsel.

There are no reasons why these claims which universally have been found to have no merit would warrant federal intervention. Petitioner's request that they should be (1) reviewed again and (2) without AEDPA deference is legally baseless. Deferential federal habeas review is well - established. "It is settled that federal habeas court may overturn a state court's application of federal law only if it is so erroneous that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with the Court's precedents.'" Nevada v. Jackson, 569 U.S. 505 (2013) (per curiam). Citing Harrington v. Richter, 562 U.S. 86 (2011), this Court, applying the "deferential standard," reversed the Ninth Circuit. See also McDaniel v. Brown, 558 U.S. 120 (2010) (court departed from deferential review). Indeed, Richter referred to it as "highly deferential." Id., at 105. Also, in Renico v. Lett, 559 U.S. 766 (2010), this Court, n. 1 at 773, noted its use of deference ". . . over and over again to describe the effect of the threshold restrictions in 28 U.S.C. 2254 (d) on granting federal habeas relief to state prisoner."

Thus, the original "infirm" denial of state collateral relief by the state Fifth Circuit was cured by the proper re - review by the properly constituted three judge appellate panel. This is the ruling of which petitioner seeks AEDPA non- deferential review. Respondent submits that the state courts and federal district court correctly found petitioner's claims have no merit- regardless of whether AEDPA deference was applied or not. Thus, any order by this court for the

federal district court to re- review petitioner's claims without deference would not result in any relief to petitioner. Therefore, such an order by this Court would be an advisory opinion affording no relief to petitioner.

In addition to the foregoing, Respondent further submits that the phrasing of the issue presented by petitioner refutes itself by suggesting that "the state court decision" assailed herein is the decision being attacked. His premise is faulty as that decision was replaced with the valid one petitioner agrees is not being challenged. Further, amicus' urging of a circuit split as a basis to grant review does not create a claim ripe for this Court's consideration. Respondent respectfully submits that even should this Court consider the split in the circuits, the split does not warrant review of the issue. The defective state habeas proceeding has been remedied and is unlikely to reoccur. Thus, the split is not intolerable such that this Court's intervention is warranted.

This application does not present a justiciable case or controversy for which this Court could provide a remedy. Any relief this Court could purport to order would not result in any relief to petitioner. Relief would be limited to another re- review of the once, but no longer, infirm state habeas application. This would be for naught as he has already been provided with that relief pursuant to the order of the Louisiana Supreme Court which mandated a re- review by an untainted panel.

III.

Respondent alternatively submits that should this Court choose to consider the merits of a circuit split, the issue should be resolved in favor of the no state habeas infirmity rule utilized below in the Fifth Circuit, as well as in the Second, Fourth, Sixth, Eighth, Ninth and Tenth

Circuits.

Federal habeas lies to allow a state prisoner to challenge his custody as being in violation of the United States Constitution. 28 U.S.C. 2254. This Court has said that "It is only noncompliance with federal law that renders a State's criminal judgment susceptible to collateral attack in the federal courts." Wilson v. Corcoran, 562 U.S. 1 (2010)(per curiam).

Petitioner's claim is that his pursuit of discretionary, post- trial, post- appeal intermediate appellate collateral review was not considered as required by state law. He is correct. The state supreme court ordered that his claim be properly considered in accordance with state law. It was. Under these circumstances, this Court's further statement in Wilson is instructive: "we have repeatedly held that ' federal habeas corpus relief does not lie for errors of state law.'" Id., at 5. And further, respondent respectfully submits, it does not lie for errors of state law which have been corrected.

Not only is the genesis of petitioner's claim a state law violation (subsequently corrected), but a state law violation on collateral review. This is far removed from the main event - the trial - and the state appeal.[3] "Post conviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature." Pennsylvania v. Finley, 481 U.S. 551 (1987). This Court's consideration of appellate rights in cases such as Evitts v. Lucey, 469 U.S. 387 (1985) and Murray v. Giarratano , 492 U.S. 1 (1989), shows the remove between federal review of state collateral proceedings and the state law at issue in the state court proceedings herein.

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[3]This Court has said not only that the trial is the main event, McFarland v. Scott, 512 U.S. 849 (1994), but that it enjoys pride of place in the way that an appeal does not. Davila v. Davis, 582 U.S. ____, 137 S.Ct. 2058 (2017).

Accordingly, the Fifth Circuit no state habeas infirmities rule is the better one. The majority of circuit courts agree.

In Kinsel v. Cain, 647 F.3d 265 (5th Cir. 2011), cert. denied Kinsel v. Cain, 565 U.S. 1094 (2011), Kinsel contended the Louisiana appellate court violated his due process rights during his state post conviction proceedings. The Fifth Circuit found that as a federal appeals court entertaining a federal habeas corpus application, it was without jurisdiction to review the constitutionality of Kinsel's state post conviction proceedings. "Indeed, we are barred by doing so by our no state habeas infirmities rule." Id., at 273. As authority, the court cited, in footnote 32, the following:

> See, e.g., Trevino v. Johnson, 168 F.3d 173, 180 (5th Cir. 1999) ("[The petitioner] argues that he was denied due process in his state habeas proceeding. . . Our circuit precedent makes clear that [the petitioner's] claim fails because infirmities in state habeas proceedings do not constitute grounds for relief in federal court." (Internal quotation marks and citations omitted)); Nichols v. Scott, 69 F.3d 1255, 1275 (5th Cir. 1995):
>
> [E]rrors in a state habeas proceeding cannot serve as a basis for setting aside a valid original conviction. An attack on a state habeas proceeding does not entitle the petitioner to habeas relief in respect to his conviction, as it is an attack on a proceeding collateral to the detention and not the detention itself.
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> (internal quotation marks and citation omitted).
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> The Fifth Circuit has ruled similarly in the following cases:
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> > Henderson v. Cockrell, 333 F.3d 592, 606 (5th Cir. 2003), cert. denied 540 U.S. 1163 (2004) (it is well - settled that "infirmities in state habeas proceedings do not constitute grounds for federal habeas relief");
> >
> > Millard v. Lynaugh, 810 F.2d 1403 (5th Cir. 1987), cert. denied 484 U.S. 838 (1987);
> >
> > Vail v. Procunier, 747 F.2d 277 (5th Cir. 1984) (infirmities in state habeas corpus proceedings do not constitute grounds for federal habeas relief).

Other circuits following the same rule include:

Word v. Lord, 548 F.3d 129 (**2**nd Cir. 2011) (noting that this Court has recognized that the Constitution does not compel states to provide post - conviction proceedings, the court ruled that a § 2254 petition is not a proper vehicle for challenging deficiencies in a state post - conviction proceeding);

Mason v. Meyers, 208 F.3d 414 (**3**rd Cir. 2000) (delay in state collateral proceedings is not cognizable in federal habeas corpus, even if the delay amounts to a constitutional violation);

Hassine v. Zimmerman, 160 F.3d 941 (**3**rd Cir. 1998), cert. denied 526 U.S. 1065 (1999) (federal role in reviewing habeas corpus is limited to evaluating what occurred in the state proceedings that actually led to petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter into the habeas calculation);

Lawrence v. Branker, 517 F.3d 700 (**4**th Cir. 2008), cert. denied Lawrence v. Branker, 555 U.S. 868 (2008) (citing Lackawanna County Dist. Atty. v. Coss, 532 U.S. 394 (2001), and Finley, supra, court ruled petitioner's due process claim during state post conviction proceedings not cognizable on federal habeas review);

Bryant v. Maryland, 848 F.2d 492 (**4**th Cir. 1988) (recognizing contrary Circuit ruling, follows Fifth, Sixth and Eighth circuits and finds errors in state post- conviction proceeding cannot serve as a basis for federal habeas corpus relief);

Kirby v. Dutton, 794 F.2d 245 (**6**th Cir. 1986) (claim of due process violation in state post- conviction unrelated to incarceration; habeas corpus not available);

Montgomery v. Meloy, 90 F.3d 1200 (**7**th Cir. 1996), cert. denied Montgomery v. Meloy, 519 U.S. 907 (1996) (federal habeas corpus relief is available only to persons being held in state custody in violation of the Constitution or federal law; it is not a remedy for errors of state law; the court further noted that state post- conviction relief is not a part of the criminal proceeding - indeed, it is a civil proceeding that occurs only after the criminal proceeding has concluded);

Williams v. Missouri, 640 F.2d 140 (**8**th Cir. 1981), cert. denied 451 U.S. 990 (1981) (infirmities in the state's post - conviction remedy procedure cannot serve as a basis for setting aside a valid original conviction);

Kenley v. Bowersox, 228 F.3d 934 (**8**th Cir. 2000) (the question remains: is a writ of habeas corpus the remedy for a failure of due process in state post-conviction proceeding? We hold that it is not.);

Williams - Bey v. Trickey, 894 F.2d 314 (**8**th Cir. 1990), cert. denied Williams - Bey v. Trickey, 495 U.S. 936 (1990) (an infirmity in a state - post conviction proceeding does not raise a constitutional issue cognizable in a federal habeas petition).

Franzen v. Brinkman, 877 F.2d 26 (**9**th Cir. 1989) , cert. denied Franzen v. Deeds, 493 U.S. 1012 (1989) (Whether errors in a state post-conviction review proceeding are addressable through federal habeas corpus is an issue of first impression in this circuit. Four circuits have held they are not. Only one circuit has held to the contrary. Dickerson v. Walsh, 750 F.2d 150, 153–54 (1st Cir.1984). We join the majority and affirm the district court's holding that a petition alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings).

Hopkinson v. Shillinger, 866 F.2d 1185 (**10**th Cir. 1989), cert. denied 497 U.S. 1010 (1990) (recognizing Dickerson but siding with the several circuits that have held that state post conviction proceedings may not be challenged in federal habeas corpus actions) (citations omitted);

Sellers v. Ward, 135 F.3d 1333 (**10**th Cir. 1999), cert. denied Sellers v. Gibson, 525 U.S. 1024 (1998) (when petitioner asserts no constitutional trial error, but only error in the state post conviction procedure, no relief can be granted in federal habeas corpus, cited in Phillips v. Ferguson, 182 F.3d 769, 772 (10th Cir. 1999).

Amicus attempts to show a split in the circuits by reference to Dickerson v. Walsh, 750 F.2d 150 (1st Cir. 1984) and Flores - Ramirez v. Foster, 811 F.3d 861 (7th Cir. 2016) cert. denied Flores - Ramirez v. Foster, 580 U.S. ____, 137 S.Ct. 1334 (2017) (Amicus brief, p. 8).

Foster, however, does not support amicus' position. Citing Montgomery and Lord supra, Foster found the habeas petitioner did not state a basis for relief under §2254 when he alleged

that he did not receive a fair hearing on his post conviction motion. Id., at 866. Foster continued:

> Mr. Flores–Ramirez's petition fails to state a basis for relief under § 2254. It is well established that the Constitution does not guarantee any post conviction process, much less specific rights during a post conviction hearing. See Murray v. Giarratano, 492 U.S. 1, 10, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings...."). Although a majority of the courts of appeals have concluded "that errors in state post-conviction proceedings do not provide a basis for redress under § 2254," Word v. Lord, 648 F.3d 129, 131 (2d Cir.2011) (collecting cases), we have not adopted this per se rule. Instead, we have held that "[u]nless state collateral review violates some independent constitutional right, such as the Equal Protection Clause, errors in state collateral review cannot form the basis for federal habeas corpus relief." Montgomery v. Meloy, 90 F.3d 1200, 1206 (7th Cir.1996) (citations omitted). In Montgomery, we cited as an example Lane v. Brown, 372 U.S. 477, 484–85, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963), in which the Court held that, when a state prisoner is denied access to a state post conviction proceeding on the basis of indigency alone, the Equal Protection Clause is violated. Mr. Flores–Ramirez has not alleged that he was denied access to post conviction proceedings on the basis of his indigency, nor has he alleged the violation of some other, independent constitutional right in the way the State administers its post conviction proceedings. Consequently, he has not stated a claim cognizable under § 2254.
>
> Foster, at 866.

Thus, in contrast to the above authorities, amicus' claim of a split in the circuits is based on Dickerson v. Walsh, supra. Dickerson, however, does not clearly present a conflict to support a split in the circuits. Dickerson appealed the district court's denial of relief on his claim that the state post conviction procedure violated equal protection. The First Circuit acknowledged that

> ". . . a number of courts have refused to consider attacks on post-conviction proceedings by habeas petitions on the ground that errors or defects in a state post-conviction proceeding do not ipso facto render a detention unlawful and, therefore, the petitioner is not entitled to habeas corpus relief. See Vail v. Procunier, 747 F.2d 277 (5th Cir.1984); Williams v. State of Missouri, 640 F.2d 140 (8th Cir.), cert. denied, 451 U.S. 990, 101 S.Ct. 2328, 68 L.Ed.2d 849 (1981); Noble v. Sigler, 351 F.2d 673, 678 (8th Cir.1965), cert. denied, 385 U.S. 853, 87 S.Ct. 98, 17 L.Ed.2d 81 (1966); Bradshaw v. State of Oklahoma, 398 F.Supp. 838 (E.D.Okla.1975); Stokley v. Maryland, 301 F.Supp. 653 (D.Md.1969).

> While this position is appealing at first blush, on analysis we find that it is neither consonant with the basic policies of habeas corpus relief nor Supreme Court rulings."

Id., at 152, 153.

Although the court did "hold" that petitioner's claim is the proper subject of a habeas corpus petition, Id., at 154, respondent submits that the court undermined its "holding" by proceeding to consider whether petitioner had exhausted this claim. The court concluded, ". . . we find that Dickerson did not exhaust his state remedies and, therefore, decline to exercise federal jurisdiction at this time." Id., at 154. Thus, this "holding" appears to be no more than dicta. As noted above, respondent submits that a ruling by this court would be no more than that - an advisory opinion - considering the posture of the case.

Amicus refers to another First Circuit case to show a split. Tevlin v. Spencer, 621 F.3d 59 (1st Cir. 2010). While amicus may contend that the quotation from District Attorney v. Osborne, 557 U.S. 52 (2009) in Tevlin (federal courts may upset a State's post conviction relief procedure only if they are fundamentally inadequate to vindicate the substantive rights provided) supports his claim, it is not controlling for two reasons: it does not refer to a "state habeas infirmity rule" and its statement is not applicable to petitioner's case. That is, in light of the supreme court ordered re- review, the state's procedure cannot be said to be fundamentally inadequate to vindicate the substantive rights involved. Indeed, Osborne also observed that a prisoner seeking post conviction relief does not have a due process right parallel to a trial right; the right to post conviction relief is limited as he has already been found guilty at a fair trial. Id., at 2320.

CONCLUSION

Petitioner's application should be denied because the defective state habeas ruling has been corrected and that judgment has been replaced with a valid judgment. That judgment was properly reviewed by the federal courts which found petitioner's claim warranted no relief. Thus, a second re- review, the only possible relief this Court could afford petitioner, has already been done. Thus, any intervention would only be an advisory opinion. For the same reason, any consideration of the alleged circuit split is also unwarranted. Indeed, as noted, this is not the basis for relief relied on by petitioner, but raised by amicus. This Court, in accordance with its observation in Giarratano, supra, that state collateral proceedings are not constitutionally required and serve a different and more limited purpose than either the trial or appeal, Id., at 10, should deny petitioner's writ.

Respectfully Submitted,

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CERTIFICATE

I, Terry M. Boudreaux, Assistant District Attorney for Jefferson Parish, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, and by email, a true and correct copy of the above Brief in Opposition to the following:

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