No. 18-8341

IN THE

SUPREME COURT OF THE UNITED STATES

LOUIE M. SCHEXNAYDER, 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

LOUIE M. SCHEXNAYDER, JR. #108097
PRO SE PETITIONER
MAIN PRISON EAST, SPRUCE-1
LOUISIANA STATE PENITENTIARY
ANGOLA, LA 70712

QUESTION PRESENTED

Could jurists of reason 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?

LIST OF PARTIES

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

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1 Petitioner does not have access to his docket sheets in the Louisiana Fifth Circuit, the Supreme Court of Louisiana, or the Court of Appeals.

TABLE OF AUTHORITIES CITED

U.S. Constitutional Provisions

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Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit denying a Certificate of Appealability (COA) on the appropriate standard of review for his habeas petition.

OPINIONS BELOW

The order of the Court of Appeals, No. 18-30670, 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 Recommendations appear in Appendix B and have not been designated for publication.

JURISDICTION

The Court of Appeals denied the timely Petition for Panel Rehearing on January 18, 2019. App. C 84. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1) and Rule 13(1) of the Supreme Court of the United States. *See Hohn v. United States*, 524 U.S. 236, 253 (1998) (holding denial of COA reviewable).

STATUTORY PROVISION INVOLVED

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment 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 . . . .

STATEMENT OF THE CASE

The *Cordero* cases, named after *State v. Cordero*, 08-1717 (La. 10/3/08), 993 So. 2d 203 (per curiam), comprise the writ applications of 299 prisoners, including Petitioner, decided during the thirteen years the Louisiana Fifth Circuit Court of Appeal issued sham rulings in all such *pro se* matters, stopping only after its Central Staff Director exposed the practice in his suicide notes. *Johnson v. Parish of Jefferson*, No. 09-2516, 2009 WL 1808718, at *1 (E.D. La. June 19, 2009); App. G 202-09; App. H 231-33. The sham was three-fold: (1) a staffer, not a judge, decided all *pro se* prisoner writ applications—writs being the method of reviewing post-conviction matters under Louisiana law—without any judicial review at all, App. G 202-03; (2) the list of fifteen possible writ dispositions the staffer had to choose from contained denials only, except for a writ limited to requesting a copy of a court document, App. G 226; and (3) the court raked in $75,000 worth of discretionary funds billing parishes for the fake dispositions and used its fraudulently inflated workload numbers to lobby for pay raises. App. H 229-30; App. G 201, 203-04.[2]

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2 Under LA. REV. STAT. ANN. § 13:352, these self-generated funds pay for:

> the purchase of stationary, books, furniture, equipment, . . . defray[ing] the expense of employment benefits for court employees, including judges, and for other expenses in the operation of the court and the clerk's office, as directed by the court. Additionally, any balance may be expended to reimburse the judges of the courts of appeal for expenses related to their office which are incurred while on official duty . . . .

Or, to put it in the final words of the staffer charged with overseeing this scheme:

> For probably the past 10 years, not one criminal writ application filed by an inmate pro se has been reviewed by a Judge on the Court. I prepared the ruling on each of those writ applications, and they were signed by a Judge, without so much as a glance at the application. In fact, two of the judges on the writ panel never even knew the pro se application was filed, much less being aware of the application's contents. . . . The total turnaround time was usually one or two days. It was obvious that these pro se criminal writ applications were not being reviewed because of the quick turnaround time. . . . Also, the large volume of pro se criminal writ applications inflated the Court's workload figures . . . . One other attractive feature of the pro se writ handling system was the money it raised for the Clerk's Fee Fund. For each pro se writ application in a criminal case, the Court charged and received a fee of $300.00 from the parish where the criminal case was pending. The Clerk's Fee Fund swelled from the money . . . .

App. G 202-04; *Johnson*, 2009 WL 1808718, at *1, *4; *see* App. G 208-09.

This—this complete "sham," to use the word from Judge Duncan's concurrence in the related case *Gilkers v. Vannoy*, No. 16-30279, 2018 WL 4356790, at *9 (5th Cir. Sept. 13, 2018)—is what the uncontroverted evidence in this case shows. In fact, the Louisiana Fifth Circuit's Chief Judge behaved with such obvious consciousness of guilt after his staffer's suicide that the investigating officers took the extraordinary step of calling his interview responses "evasive," App. G 218, and accusing him of, in effect, obstructing the investigation by concealing the "All Judges" suicide note and insisting on being present during the interview of a key

witness. *Id.* at 220-21; *see* App. H 231. Petitioner respectfully requests that the Court keep in mind these facts from this record, rather than relying on incomplete descriptions of the scandal found elsewhere.[3]

This *Cordero* case began in 1994 when a grand jury indicted Louie Schexnayder and a co-defendant on second-degree murder for the killing of Eugene Price, who died after a single knife blow to the chest. App. B 3-4. Their first trial ended in a mistrial.[4] *Id.* at 3. After a deeply flawed second trial, in a courthouse with two judges who would go on to receive federal prison terms for corruption, App. H 231, a jury found Schexnayder guilty by a vote of ten to two. App I 242.[5]

The only eyewitness who purported to identify Schexnayder recanted almost immediately after the verdict, but the court denied a new trial. App. D 94-95; App. B 70. On appeal Schexnayder assigned nine errors, including matters as serious as the State's destruction of exculpatory evidence prior to trial and repeated violations

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3 *E.g.*, App. B 10 (calling the issue "applications denied by the intermediate court . . . [that] may be tainted due to an unjust policy that was in effect"); *Gilkers v. Vannoy*, No. 16-30279, 2018 WL 4356790, at *2 (5th Cir. Sept. 13, 2018) (calling thirteen years "several years" and the problem "not adequately reviewing" *pro se* writs); *Evans v. Cain*, 577 F.3d 620, 622 (5th Cir. 2009) (framing the issue as a violation of state law only); *Severin v. Parish of Jefferson*, 357 F. App'x 601, 603 (5th Cir. 2009) (per curiam) (understating the issue as "one judge or a staff member . . . would issue a ruling . . . without review by a three judge panel").

4 After the mistrial, Schexnayder's co-defendant was allowed to plead to a lesser charge, for which he received a five-year sentence. He did not testify at the second trial, however.

5 Every judge on the panel that heard this direct appeal (Judges Gaudin, Dufresne, and Gothard) was present at the February 8, 1994, *en banc* meeting and voted in favor of what turned out to be the sham-adjudications policy. App. G 227.

of the Confrontation Clause in an eyewitness-dependent case. App. B 66-67, 72-78. The Louisiana Fifth Circuit rejected each error in turn, and the Louisiana Supreme Court and this Court denied discretionary review. *Id.* at 60-61.

In a timely application for state post-conviction relief, Schexnayder raised thirteen claims, all of which the trial court rejected summarily. *Id.* at 6-7. On May 11, 1998, which is to say well within the *Cordero* window of February 8, 1994, to May 21, 2007, the Louisiana Fifth Circuit summarily denied his application for writs. *Id.* at 7, 10. Thereafter, the Louisiana Supreme Court summarily denied relief. *Id.* at 7. No state court provided a single word of reasoning on any of the thirteen claims.

In 1999, Schexnayder filed a timely habeas petition in federal court asserting eighteen claims. *Id.* at 8-9. The Magistrate Judge *sua sponte* recommended dismissing nine claims as unexhausted—after the State conceded exhaustion—and recommended denying relief on eight of the nine remaining claims under AEDPA's deferential standards of review.[6] App. F 158 & n.6. In due course the District Court

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6 The Magistrate Judge seems to have reviewed Schexnayder's insufficient-evidence claim *de novo* in 1999. App B 64. All this petition seeks, all Schexnayder has ever sought, is a *de novo* federal adjudication of his claims, so he did not re-urge the insufficient-evidence claim in his supplemental habeas petition. He did, however, reurge those claims where it is clear the Magistrate Judge deferred or the opinion does not specify the standard of review but simply states the claim "does not constitute a basis for habeas relief." *E.g.*, App. B 69, 71-72, 78 (applying AEDPA deference by ruling Schexnayder "failed to present evidence that the state court ruling was based upon an unreasonable determination of the facts in light of the testimony"; "failed to show that the state court ruling was contrary to clearly established federal law"; "failed to present evidence that the state courts [sic] consideration of this issue

overruled timely objections to the Report and Recommendations and dismissed the petition with prejudice. App. B 9-10. The District Court and Court of Appeals denied timely requests for a COA, and the Clerk closed the case. *Id.* at 10.

Shortly after the *Cordero* scandal came to light in 2007, Schexnayder and others petitioned the Louisiana Supreme Court for relief. *Id.* at 10-11; *State v. Cordero*, 08-1717 (La. 10/3/08), 993 So. 2d 203, 209 (per curiam). A bare four-justice majority of the Louisiana Supreme Court adopted the solution proposed to it *ex proprio motu* by the Louisiana Fifth Circuit, and did so without notice or an opportunity for petitioners to be heard. The proposal, in the form of an *en banc* resolution, read in relevant part:

> First, we are proposing that you consider remanding each of the current applications in your court to this court with direction that they be assigned to respective three-judge panels randomly selected from five judges of this [eight-judge] court; namely, Judges Chedhardy, McManus, Wicker, Guidry, and Pro Tempore Jasmine who incidentally have had no hand in the process by which this court earlier handled these multiple applicants' earlier writs in this court.[7]

Cordero, 993 So. 2d at 206. "[I]ncidentially . . . no hand" indeed. The suggestion that those five judges never, over all the many years, noticed the total absence of *pro*

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constituted an unreasonable application of the harmless error rule").

7 Judge Chehardy was Schexnayder's trial judge, and Judge Wicker was his prosecutor. App. F 164 n.34; App. B 68. While neither served on his *Cordero* panel, they did vote on this *en banc* resolution that governed his case.

se prisoner writs from their workloads is incredible, particularly when their office slush fund received $75,000 in fees for disposing of the writs. App. H 229-30.

But neither those five judges' mendacity nor the gross misconduct of the other three judges on the court, including its Chief Judge, deterred the four-justice majority of the Louisiana Supreme Court. All the *Cordero* cases were sent back to the Louisiana Fifth Circuit for what it chose to call "reconsideration," perhaps to suggest, contrary to fact, that there had been "consideration" before. *Cordero*, 993 So. 2d at 205, 214; App. D 85-86. Then, so far as Schexnayder was concerned, nothing happened for the next two-and-a-half years.

In early 2011, the Louisiana Fifth Circuit issued a single opinion on the eleven writ applications Schexnayder filed between 1994 and 2007. App D 85. As in every other *Cordero* opinion, the panel denied relief.[8] *Id.* at 103. As in many other *Cordero* opinions, the panel made numerous misstatements of federal law, such as faulting Schexnayder for failing to assert prejudice in his grand-juror-foreperson discrimination claim; substituting a "globally unfair" prejudice standard for *Strickland*'s "reasonable probability" standard; and conflating the *Brecht* and

8 The Court need not take Schexnayder's word for this. A member of the bar of this Court wrote in Schexnayder's supplemental habeas petition: "Undersigned counsel was unable to find a single case where the Louisiana Fifth Circuit granted substantive relief to any *pro se* applicant on re-review." App. F 160-61, 165.

Chapman standards. *Id.* at 94, 96, 103-04. The Louisiana Supreme Court again summarily denied relief, the last time in a September 2012 order. App. F 161.

In November 2012, Schexnayder, acting *pro se*, filed what he titled an "Independent Action for Relief from Judgment Rule 60(b)" with the District Court, asserting that, under *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the *Cordero* scandal provided cause for relief from the prior judgment dismissing his federal habeas petition. App. B 10. The District Court construed the motion as a successive petition and dismissed. *Id.* at 11. Schexnayder timely noticed an appeal, but the District Court denied a COA. App. F 161.

In 2014, the Fifth Circuit granted Schexnayder's request for a COA on two issues: "(1) whether Schexnayder's Rule 60(b) motion alleged defects in the integrity of his prior federal habeas proceeding and as such was a true Rule 60(b) motion; and (2) whether Schexnayder's motion under Rule 60(b), subsections (5) and (6), has merit." *Id.* at 162. At this point, Schexnayder's family mustered sufficient funds to hire an appellate attorney. After briefing and oral argument, the Court of Appeal issued an unpublished per curiam holding that

> because the federal court has not considered constitutional claims related to the decisions of the Louisiana courts after the Louisiana Supreme Court's judgment in *State v. Cordero*, 993 So. 2d 203 (La. 2008), the present motion is not successive, but is a true rule 60(b) motion entitled to be decided.

App. B 11-12.

On remand the District Court granted Rule 60(b)(6) relief based on the extraordinary circumstances of *Cordero* and referred Schexnayder's 1999 habeas petition to the Magistrate Judge for further proceedings. *Id.* at 12. He was granted leave to file a supplemental petition, this time with the benefit of counsel, wherein he amplified three basic claims: the grand-juror-foreperson discrimination claim; a Fourteenth Amendment claim based on the state courts' refusal to provide him a free copy of his transcript for appeal; and a multi-layered ineffective assistance of counsel claim. App. F 155.

Among the issues disputed by the parties was the standard of review. The State took the position that the *Cordero* "reconsideration" opinion was entitled to AEDPA deference. *Id.* at 179-80. Schexnayder's counsel disagreed, writing:

> Federal habeas review is premised on the notion that "State courts are adequate forums for the vindication of federal rights." *See Burt v. Titlow*, 134 S. Ct. 10, 15 (2013). But here, the Louisiana Fifth Circuit clearly was not. Schexnayder, through his *Cordero* claim, asserts that the [Louisiana] Fifth Circuit, even on *Cordero* remand, was not a fair and unbiased tribunal. As such, he urges this Court to review all of his claims anew, without any deference to either of the Louisiana Fifth Circuit's decisions.

Id. at 195.

In his Report and Recommendations, the Magistrate Judge resolved the standard-of-review issue against Schexnayder, ruling:

> As a preliminary matter, the Court addresses Schexnayder's arguments pertaining to the applicable standard of review. This matter is intertwined with his first supplemental claim for relief alleging the denial of procedural due process during reconsideration of his writ applications on state-court collateral review after *Cordero*. . . . Based on his rationale, he urges the Court to review all of his claims *anew*—those presented in his original petition and in his supplemental petition—*without any deference* to the state-court rulings. . . . Schexnayder [is not] entitled to de novo review of his claims for relief. It is clear that . . . § 2254(d)(1) and (2) . . . provides [sic] the applicable standards of review in this case . . . .

App. B 15-16 (emphases in original). The Magistrate Judge went on to recommend dismissal of the petition, and counsel withdrew. App. B 47.

Schexnayder timely filed *pro se* objections to the Report and Recommendations. App B 48. Although they lack the precision and shine of counseled argument, the objections do make certain to "object[] to all adverse rulings in the Report and Recommendation." *Id.* Schexnayder also specifically objected to the denial of "due process" in the state courts that "affect[ed] the Federal review." *Id.* at 49. The District Court overruled the objections without giving reasons and entered judgment against Schexnayder. *Id.* at 55-56.

Schexnayder filed a timely notice of appeal *pro se*, App. E 154, which operated as "a request for a COA on all issues raised" in his habeas petition. *Bui v. DiPaolo*, 170 F.3d 232, 237 (1st Cir. 1999); *see Smith v. Duncan*, 411 F.3d 340, 346

(2d Cir. 2005). He also moved for a COA from the District Court and "incorporate[d] by reference the arguments in his Response to Respondent's Answer," where his specific argument against AEDPA deference appeared, before asserting his entitlement to a COA "On Each Claim," including the claim "intertwined with" his argument concerning AEDPA deference.[9] *Id.* at 49-50.

The District Court denied a COA on all issues. App. E 147. The Court of Appeals did likewise, App. A 1, whereupon Schexnayder filed a Petition for Panel Rehearing, App. E 106, which was denied January 19, 2019. App. C 84. This timely petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

This case is only incidentally about Louie Schexnayder. The wrongful imprisonment of one man, produced by the usual suspects in the known ways, is not, he acknowledges, the kind of error this Court sits to fix. Instead, this case, perhaps the last of the *Cordero* cases in the proper procedural posture, is about a novel and

9 These acts should be sufficient to have preserved the issue, particularly for a *pro se* prisoner of limited educational attainment confronted with a complex, technical matter. But if the Court looks further, Schexnayder did more. In each of the four relevant documents—the Objections to the R&R, App. B 48, the Motion for COA, *id.* at 150, the Application for COA, *id.* at 143, 128, and the Petition for Panel Rehearing, *id.* at 114—Schexnayder specifically complained about the standard of review applied. It is true he incorrectly referred to "*de novo* review" as "Plain Error review" throughout, based on his mistaken belief that "plain" meant "regular" (instead of "patent") in this context. But it is also true that, construed liberally and read in context, any reasonable judge could see he was asking for some kind of more meaningful review than he received from the District Court, because the state courts had denied him due process. In any event, the Court of Appeals had notice the standard of review was in play and passed on the issue by refusing to apply the "Plain Error" standard, App. A 1, which should be sufficient under *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379-80 (1995).

important question of judicial federalism: How should a federal habeas court respond when a state habeas court has abdicated its duty in hundreds of criminal cases and, once caught, purported to cure its own bad-faith conduct?[10]

But that technical issue, important as it is, pales in comparison to two practical questions in this case. First, why would the Louisiana Fifth Circuit think it could get away with such appalling misconduct? To this there is an easy, if disturbing, answer. Because it has. Not one of the five judges directly implicated has ever been disciplined; all the civil suits have been dismissed; all the prior rulings have been reaffirmed; the judges have kept the pay raises lobbied for with fraudulently inflated workload numbers; and the court has even kept the slush fund money it charged the parishes.[11] And now, the lower federal courts are *deferring* to that court's decisions in the affected cases, many involving a sentence to life without

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10 This case may be the last because the Court of Appeals recently decided in *Gilkers v. Vannoy*, No. 16-30279, 2018 WL 4356790 (5th Cir. Sept. 13, 2018), that *Cordero* petitioners cannot re-open their habeas judgments under Federal Rule of Civil Procedure 60(b). That means *Cordero* petitioners henceforth will never receive federal review, deferential or otherwise, of their "reconsideration" opinions.

11 Chief Judge Dufresne continued to serve until his death, *State v. Durham*, 11-652 (La. 5 Cir. 3/13/12), 90 So. 3d 1126, 1127, and was not, so far as can be told, disciplined. Neither were Judges Edwards, Rothschild, Cannella, or Grisbaum, to say nothing of the five judges who claimed "clean hands" in the *en banc* resolution. The Judiciary Commission did not even publish a report on what, if any, investigation it conducted into the scandal. For examples of the unsuccessful civil cases, see *Severin v. Parish of Jefferson*, 357 F. App'x 601 (5th Cir. 2009) (per curiam); *Johnson v. Parish of Jefferson*, No. 09-2516, 2009 WL 1808718, at *1 (E.D. La. June 19, 2009). For no relief from any *Cordero* reconsideration panels, see *supra* n.8 and accompanying text. For the inflated workload numbers used to lobby for pay raises, see App. G, 200-01, 203-05. For retention of the "Clerk's Fee Fund" monies, the negative inference may be drawn from the reports in Appendix H, none of which mention disgorgement.

parole. This gives rise to the second question: If state judges believe they can get away with—and if the Court does not hear this case, they will get away with—*Cordero*-scale misconduct, has the thirty-odd-year campaign to circumscribe federal habeas review overshot the mark, particularly in the Deep South?

I. The Court of Appeals has decided a novel and important question in judicial federalism, a subject squarely within this Court's special competence and responsibility.

Authorities have "no doubt that [the] delicate task" of striking the proper balance with judicial federalism "must be a central part of the [Supreme] Court's function." WRIGHT, MILLER & COOPER, 16B FEDERAL PRACTICE & PROCEDURE § 4021, at 59276 (West 2018). The Court's docket bears this out, as its calibration tools—abstention, preemption, the various immunities, the several kinds of subject-matter jurisdiction, and habeas corpus—receive certiorari far more frequently than one would expect from the small number of disputes they provoke in workaday litigation.

A. Proper interpretation of AEDPA is important under Rule 10.

AEDPA's curtailment of federal habeas relief enjoys top billing among this already-privileged class of issues mediating the relationship between the state and federal courts. No fewer than 132 opinions and orders of the Court mention a law that did not exist until 1996. Even when the question in a case governed by AEDPA presents "the unaccustomed task of reviewing utterly fact-bound decisions that

present no disputed issues of law," this Court has "often not shrunk from" granting certiorari. *Cash v. Maxwell*, 132 S. Ct. 611, 616 (2012) (Scalia, J., dissenting from the denial of certiorari).

AEDPA and its proper interpretation can thus fairly be called "important" within the meaning of this Court's Rule 10(c). The novelty of Schexnayder's question on this important topic, presenting as it does for the first time a state court's wholesale abdication of its duties and an attempt at coverup, counsels granting review. *See Kossick v. United Fruit Co.*, 365 U.S. 731, 733 (1961) (granting review in light of "novel questions" in another area of judicial federalism); *In re Murchison*, 349 U.S. 133, 136 (1955) (granting review in light of the "[i]mportance of the federal constitutional questions" raised concerning state judicial misconduct). To whatever extent the question is not novel, the Court of Appeals has decided an important federal question in a way that conflicts with *Johnson v. Williams*, 568 U.S. 289, 303 (2013), for surely a single skipped claim should not trigger more searching scrutiny than an entirely ignored case.

The above establishes that the "extreme malfunction[] in the state criminal justice system[]" revealed by *Cordero* is, when viewed properly as a question of federalism, substantial enough to merit this Court's time and attention. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (internal quotation marks omitted). Although

there is no circuit split on the issue, waiting to grant review until a similar scandal arises would be waiting until too much damage has been done to public confidence in the judiciary. Neither is waiting required. "AEDPA does not limit our discretion to grant certiorari to cases in which the courts of appeals have reached divergent results." *Tyler v. Cain*, 533 U.S. 656, 663 n.5 (2001).

B. The Court of Appeals has allowed a misinterpretation of AEDPA that will cause manifest injustice in several hundred cases of life without parole.

There can be little doubt, however, of divergent results were other Courts of Appeals to be faced with similar facts. Petitioner will assume for purposes of argument that the five Louisiana Fifth Circuit judges who claimed "no hand" in the scandal really had no knowledge of the sham adjudications going on down their court's hallways, issuing in their court's name, and filling their court's coffers. Petitioner will therefore assume that the *Cordero* "reconsideration" process represented something like a good faith effort to adjudicate his cases on the merits, even though two of the five judges who came up with it were also his prosecutor and trial judge. Jurists of reason can and would still debate whether the Court of Appeals should have countenanced deferring to the *Cordero* panel's decision.

1. The Court of Appeals was wrong as a matter of statutory interpretation to permit deference under AEDPA.

AEDPA deference applies only to claims a state court has "adjudicated on the merits." 28 U.S.C. § 2254(d); *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015). It may be taken as an axiom that there can be no adjudication, on the merits or otherwise, without a court, and a court "not organized in conformity to law" is "virtually no court at all." *William Cramp & Sons Ship & Engine Bldg. Co. v. Int'l Curtis Marine Turbine Co.*, 228 U.S. 645, 651 (1913). So too is the decree of a judge "'incompetent to sit at the hearing . . . unlawful, and perhaps absolutely void, and [it] should certainly be set aside or quashed by any court having authority to review it by appeal, error, or *certiorari*." *Nguyen v. United States*, 539 U.S. 69, 78 (2003) (quoting *Am. Constr. Co. v. Jacksonville, T & K.W.R. Co.*, 148 U.S. 372, 387 (1893)).[12] The question thus becomes whether the *Cordero* panels of the Louisiana Fifth Circuit, panels assumed—however tenuously—to be untainted by the fraudulent actions of the earlier ones, were "organized in conformity to law" with judges "competent to sit at the hearing."

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12 "Any court having authority to review it by . . . error" would, by use of the word "any," presumably not have been limited to appellate courts operating by writ of error but would have included also a federal court on collateral attack via a writ of error *coram nobis*. *E.g.*, *United States v. Morgan*, 346 U.S. 502, 509-10 (1954). Though, to be fair, the phrase "perhaps absolutely void," inasmuch as it invokes the distinction between void and voidable judgments, may mean the Court did not intend to include collateral attacks. The distinction is ultimately without a difference here, as Petitioner does not seek to have the "reconsideration" opinion set aside. He simply believes it unworthy of deference.

The *Cordero* panels were not lawful and their members were incompetent to sit. In the oft-quoted words of Justice Black:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

In re Murchison, 349 U.S. 133, 136 (1955). The *Cordero* panels fail both the interest-in-the-outcome and judge-in-his-own-case prongs of this disjunctive test.[13]

i. Oddities of Louisiana law gave the state court a disqualifying pecuniary interest in the *Cordero* "reconsideration" cases.

The Louisiana Fifth Circuit as a whole and all its constituent panels had "an interest in the outcome" of the reconsideration proceedings because the Court's "general fisc" was at stake. *Caperton v. A.T. Massey Coal Co, Inc.*, 556 U.S. 868, 878 (2009). The court had charged $300 per *pro se* writ disposition to the parishes of conviction as a way of funding its office slush fund, for a total fraudulent gain of $75,000. If the *Cordero* panels sent cases back for retrial, it is conceivable the parishes faced with paying for those retrials, or the state attorney general in their

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13 Although *William Cramp & Sons Ship & Engine Building Co. v. International Curtis Marine Turbine Co.*, 228 U.S. 645, 651 (1913), and *American Construction Co. v. Jacksonville, T & K.W.R. Co.*, 148 U.S. 372, 387 (1893), concerned courts constituted in violation of statutes, their propositions apply *a fortiori* to a court sitting in violation of due process; no statute can regularize a court constituted unconstitutionally.

stead, might have come looking for their money back.

Only so long as every *Cordero* opinion revealed no harm caused by the earlier sham denial could the Louisiana Fifth Circuit avoid such claims. Then parishes had merely paid once for two correct outcomes, rather than having been defrauded once and now put to the cost of retrying cases long since gone cold, with all the special difficulties and expenses attending such.[14]

Under *Tumey v. Ohio*, 273 U.S. 510 (1927), and *Ward v. Monroeville*, 409 U.S. 57 (1972), as interpreted by *Caperton*, the Louisiana Fifth Circuit's fraudulent gain of $75,000 and the "possible temptation" to worry over losing it was, standing alone, sufficient to render the court and all of its constituent judges incompetent in the *Cordero* cases. But in fact much more than $75,000 was at stake from the court itself and, perhaps, one of the judges personally.

Louisiana's doctrine of absolute judicial immunity has been interpreted less broadly than its federal counterpart. If the *Cordero* panels revealed the sham adjudications were also incorrect adjudications and so damages for wrongful

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14 While the parishes would always have been put to some expense based on the writs, the sham adjudications increased these costs in two ways. The first is this extra cost associated with re-trying cold cases. The second is subtler, but arises out of the maddeningly terse and unsatisfying stock phrases the Central Staff Director used to dispose of the writs. App. G 226. Prisoners undoubtedly filed many more writs than were necessary trying to get something they could understand, particularly as Fifth Circuit trial courts were and are notorious for failing to give reasons in *pro se* post-conviction matters. The obvious disinterest of the Fifth Circuit in the matters may also have been the cause of the trial courts allowing so many *pro se* matters to languish, thereby necessitating more writ practice. *E.g.*, App. D 88-89 (ruling on writs seeking to compel Petitioner's trial court to act in a timely fashion).

incarcerations arose, a suit in state court against the Louisiana Fifth Circuit for the misconduct of the Central Staff Director might have succeeded.[15] A suit in state court against the Louisiana Fifth Circuit and Chief Judge Dufresne for his misconduct might have succeeded also; Louisiana applies a more stringent "judicial act" test than federal law.[16]

Although no such suits were successful in federal court, Petitioner is not aware of any attempts in state court. The question in any event is not whether the court or a judge was, in fact, ultimately held liable. A judicial disqualification inquiry must look *ex ante* to determine if the interest "would offer a possible temptation to the average man as a judge." *Tumey*, 273 U.S. at 532. Under Louisiana law, and given the scale and gravity of the misconduct at issue, a reasonable jurist could have feared liability for the court under state law.[17] All the judges of the Louisiana Fifth Circuit therefore had a financial interest that "might lead [them] not to hold the balance nice, clear and true between the State and the

15 *Palowsky v. Campbell*, 16-1221 (La. App. 1 Cir. 4/11/18), 2018 WL 1755875, at *9 (refusing absolute immunity for a law clerk who engaged in certain misconduct).

16 *Harris v. Brustowicz*, 95-0027 (La. App. 1 Cir. 10/6/95), 671 So. 2d 440, 443 (classifying a "fail[ure] to personally review the request for protective order and make any decision thereon, fail[ure] to provide adequate procedures for the handling of such requests by a well-trained staff, [and] fail[ure] to supervise his staff" as "not judicial functions integral to the judicial process, but . . . primarily administrative, executive and/or operation in nature").

17 Sovereign immunity would have been no bar to suit in state court. LA. CONST. art. 12, § 10 (waiving sovereign immunity); LA. REV. STAT. ANN. § 9:2798.1 (allowing suits based on "acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct"); *id.* § 13:5106 (providing for delictual actions against the state to be brought in state court); *id.* § 42:1441 (failing to exempt courts from liability).

accused," *id.*, because their "responsibilities for [court] finances may make [them] partisan." *Ward*, 409 U.S. at 60.

ii. Any state court put in the *Cordero* "reconsideration" posture would suffer a disqualifying interest.

Louisiana's peculiar method of funding court perks to the side, no court anywhere would have been able to act fairly as a judge in its own *Cordero*-esque scandal. If the sham adjudications were revealed to have prolonged wrongful incarcerations, those errors would have made a stronger case for judicial discipline, which under Louisiana law takes into account whether the misconduct resulted in actual harm. *In re Williams*, 11-2243 (La. 1/24/12), 85 So. 3d 5, 13. That is presumably true in most if not all other states as well.[18] The *Cordero* panels were thus put in the position of imperiling their immediate colleagues' positions and livelihoods, not via their decisions in a misconduct case but by their decisions in cases affecting *pro se* prisoners, who, by virtue of their poverty, illiteracy, and wretchedness, make attractive sacrificial lambs.

The existence of harm, were any *Cordero* panel to have found it, also would have strengthened the case for prosecuting the judges individually or the court as a whole for malfeasance in office, which would have required "restitution to the state if the state suffered a loss as a result of the offense," such as the extra costs

18 Petitioner has access only to Louisiana and federal statutes and cases.

associated with trying a cold case, the portion of the judges' salaries they did not earn, or the costs to district attorneys and courts associated with all the fallout from *Cordero* in all the various courts and disciplinary bodies. LA. REV. STAT. ANN. § 14:134(2). Presumably most if not all other states have a similar criminal statute, and the federal government does.[19] The *Cordero* panels were thus put in the position of deciding matters with an immediate and direct influence on the probability of their institution and immediate colleagues being prosecuted under state or federal law and charged restitution.

There is a still more fundamental, if also more nebulous, problem with the *Cordero* panels. A judge can have "no pecuniary interest in the case" but still be "challenged because of a conflict arising from his participation in an earlier proceeding." *Caperton*, 556 U.S. at 880. This category of due-process-mandated recusals "cannot be defined with precision." *Id.* (internal quotation marks omitted). "Circumstances and relationships must be considered." *Id.* "The judge's prior relationship with the defendant, as well as the information acquired from the prior proceeding, [is] of critical import." *Id.*

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19 Section 1593 of Title 18 provides for mandatory restitution. As for an underlying charge, one could imagine prosecution under 18 U.S.C. § 242 (deprivation of rights under color of law), 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1001 (false statements to various federal entities in the form of the fraudulent rulings), or, depending on the sources of funds for Louisiana's judiciary, 18 U.S.C. § 666 (fraud in connection with a program receiving federal funds).

Neither *Caperton* nor the Court's earlier cases address a situation where a category of litigants has, by virtue of its mistreatment, brought a court into disrepute. But when an individual litigant has "vilified" a judge, due process requires "public trial before a judge other than the one reviled by the contemnor." *Id.* at 881. (internal quotation marks omitted). That is so because a judge who "becomes embroiled in a running, bitter controversy" is not "likely to maintain that calm detachment necessary for fair adjudication." *Id.* The *Cordero* victims, who are not responsible for the Louisiana Fifth Circuit's infamy, should receive no less protection that a litigant who has, by his own affirmative and wrongful choice, "cruelly slandered" a court. *Id.*

Limiting service on the *Cordero* panels to the "clean hands" judges was no solution to this problem either. Media coverage vilified the entire court. App. H 228-33 (referring usually to the "Fifth Circuit" as a whole). That was hardly unfair; five of the ten judges to serve on the court over the relevant period were directly implicated.[20] Although Chief Judge Dufresne and Judges Edwards and Rothschild, the malefactors still serving when the scandal came to light, were to some extent singled out for special criticism, a reasonable jurist would "likely" find it difficult to remain "neutral" with his or her institution under largely undifferentiated attack.

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20 Two judges—Judges Cannella and Grisbaum—seem to have escaped much public obloquy because they were no longer on the court when the scandal came to light. App. H 228-33.

Only by finding no error with any of the prior adjudications could the five "innocent" judges serving in 2007 purge their court of the *Cordero* stain.

Perhaps it was simply happy coincidence that, at the end of the day, every single *Cordero* panel did just that. *E.g.*, App. D 103 ("[W]e conclude that there were no errors in the prior rulings of this Court. Accordingly, we remain with this Court's original dispositions . . . ."). Or it could be that something else was afoot. Beyond the nine exonerations from the *Cordero* period, it is telling that one of the lead defendants in *Cordero* itself eventually received a commutation based on evidence strongly suggesting his innocence, which evidence he had been presenting to the Louisiana Fifth Circuit for years.[21] It strains credulity to believe the *Cordero* "reconsideration" panels did anything more than whitewash the scandal, even if one believes the five of eight then-currently serving judges who claimed to know nothing about the misconduct and so did nothing deserving opprobrium.[22]

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21 During the relevant time period the Louisiana Fifth Circuit failed to detect errors in the cases of Reginald Adams, Glenn Davis, Ryan Matthews, Douglas Dilosa, Malcolm Alexander, Larry Delmore, Terrence Meyers, Damon Thibodeaux, and Nathan Brown, all of whom were exonerated and many of whom had lawyers—some of whom had whole capital defense teams. Kerry Myers received a commutation based in part on substantial evidence of his innocence. App. H 230.

22 To believe, as the *Cordero* "reconsideration" panels would have it, that there were no errors in the 299 cases means to believe that, in one of the incarceration capitals (Jefferson Parish) of the incarceration capital (Louisiana) of the incarceration capital (the United States) of the world, during the greatest increase in the incarceration rate in the nation's history (the 1990s), under the prosecutorial policies of one of the most notorious sheriffs (Harry Lee) and district attorneys (Paul Connick) in a state known for notorious law enforcement, the court's error rate —without ever reading the briefs—was lower than 0.3% in the cases with the highest risk of wrongful conviction (indigent defendants). That seems unlikely.

What makes the "reconsideration" panels particularly galling is the existence of an obvious solution that would have avoided these problems. As Justice Weimer, later joined by Justice Johnson on rehearing, wrote in dissent from the Louisiana Supreme Court's adoption of the Fifth Circuit's self-serving solution: "[T]o avoid any appearance of impropriety, I would either randomly allot these cases to the other courts of appeal or appoint three ad hoc judges to consider these matters." *State v. Cordero*, 08-1717 (La. 10/3/08), 993 So. 2d 203, 214 (per curiam). On rehearing, Justice Kimball gave the Louisiana Supreme Court's only explanation for rejecting that solution: "[I]t is not appropriate under these circumstances"—which one cannot help but read as "dealing with *pro se* prisoners"—"to add this number of cases to those dockets of the other courts of appeal nor is it proper to expend approximately $200,000 of the public's money to hire retired judges and staff to perform this review." *Id.* Spending $669 per *Cordero* case to ensure meaningful, fair, *initial* review hardly seems outrageous when the Louisiana Fifth Circuit had been billing parishes nearly half that for doing nothing. But judicial ethics, like ethics in government more generally, have not been a traditional area of strength for Louisiana.[23]

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23 For an example, see the belletristic apoplexy of Justice Knoll, who joined Justice Kimball's dog-whistling concurrence in *Cordero*, in the "notation for the record" in *Walton v. Exxon Mobil Co.*, 15-0569 (La. 11/12/15), 182 So. 3d 937, 937-38.

2. Elementary principles of judicial federalism would prohibit Congress from requiring deference to void state court rulings on federal claims.

The above is sufficient to explain why AEDPA's statutory trigger for deference—an "adjudicat[ion] on the merits"—should not be read to include decisions like those from the *Cordero* panels. Even assuming the drafters of AEDPA purported to require deference under these circumstances, however, there would still be reason to review Petitioner's claims *de novo*. To defer to a void or fraudulent judgment would work an unconstitutional suspension of the writ under Article I, § 9 of the U.S. Constitution and a violation of the Fifth Amendment's guarantee of due process, rendering AEDPA unconstitutional as applied.

When a state court fails to pass in a permissible way on the constitutionality of a person's custody but the federal courts defer nevertheless, the habeas petitioner is stripped of his right to have some court, any court, determine whether he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). This eviscerates the essence of habeas review announced in *Moore v. Dempsey*, 261 U.S. 86, 91-92 (1923) (Holmes, J.), because no court will ever determine if the prisoner's custody actually violates the Constitution. By hypothesis, the state courts did not, and the federal courts' review will be limited to determining if there was "unreasonable" constitutional error.

Allowing a prisoner to slip through the cracks such that no court ever issues a valid judgment considering the *actual* constitutionality of his custody upsets the "delicate balance" struck by AEDPA between vindicating the Federal Constitution and upholding the authority of state courts as the primary forum for adjudicating these rights. *Williams*, 529 U.S. at 436. It is for this reason the Court refused to create an irrebuttable presumption that a state court has decided all federal claims when there is clear evidence it inadvertently failed to rule on one. *Johnson v. Williams*, 568 U.S. 289, 302-03 (2013) ("When the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, § 2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge.") So much more should be the case when the evidence establishes a willful refusal to adjudicate followed by a void judgment.

II. By allowing the District Court to halo sham state-court decisions with AEDPA deference, the Court of Appeals has sanctioned a departure so far from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's supervisory power.

Petitioner begins with what is hopefully an uncontroversial premise: The *Cordero* scandal is shameful and responsible jurists should take what reasonable steps they can to prevent its happening again or elsewhere. If that is a fair statement, then it is worrying that every single lower federal court decision

concerning the scandal has denied relief or subsequently been overruled.[24] None even criticize or express regret over its occurrence.

Petitioner is not suggesting the criminals must go free because a court has blundered, only that AEDPA deference is a step too far. It detracts nothing from the dignity of judges to observe that they are ultimately, ineluctably people. Special people, yes, whose jobs require great freedom and whose learning and oaths ordinarily place them beyond the need for extensive supervision or a heavy hand. But they are still people and therefore, like all people, susceptible to incentives and needful of consequences from time to time. Petitioner submits the *Cordero* scandal, with its temporal breadth and depth of depravity, is such a time.

Granting certiorari in this case would be an efficient use of the Court's scarce judicial resources. AEDPA has taken the federal courts out of the day-to-day business of state criminal justice administration, and this Court has never been in the business of superintending the day-to-day business of the Courts of Appeals. The Court must therefore rely on the expressive value of its opinions to reflect a "mood," as Justice Stevens once wrote concerning the Court's AEDPA jurisprudence.

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24 *Gilkers v. Vannoy*, No. 16-30279, 2018 WL 4356790, at *2 (5th Cir. Sept. 13, 2018) (overruling the unpublished per curiam in this case remanding for Federal Rule of Civil Procedure 60(b) relief); *Evans v. Cain*, 577 F.3d 620, 622 (5th Cir. 2009) (refusing to hold federal habeas petition in abeyance while petitioner underwent *Cordero* "reconsideration"); *Severin v. Parish of Jefferson*, 357 F. App'x 601, 603 (5th Cir. 2009) (per curiam) (dismissing civil claims).

Williams v. Taylor, 529 U.S. 362, 386 (2000). Expending a relatively small effort to correct the Court of Appeals' erroneous deference in the finitely numbered, and extreme, *Cordero* cases will go a long way towards reminding states that AEDPA reflects a deal: greater comity, finality, and federalism so long as the state courts in fact "adjudicate[] on the merits" all duly presented "claims arising under the laws of the United States." 28 U.S.C. § 2254(d); *Burt v. Titlow*, 571 U.S. 12, 19 (2013).

Refusing deference to the *Cordero* cases does nothing to undermine AEDPA's scheme. *De novo* review of cases decided *in a manner* clearly "contrary to" federal law—decided by lots, or bribery, or voodoo, or any otherwise irretrievably incompetent tribunal—can offend AEDPA's "deferential architecture" no more than *de novo* review of a "federal claim [decided] . . . 'contrary to' clearly established federal law." *Johnson*, 568 U.S. at 303 (internal quotation marks omitted). While state courts are "presumptively competent" to address constitutional claims, when, as here, that presumption has been rebutted by clear and convincing evidence—when the state courts have flagrantly disregarded their "solemn responsibility equal[] with the federal courts to safeguard constitutional rights"—then it is the state courts' own failure rather than a decision of this Court that "reflect[s] negatively upon [their] ability to" hear federal claims. *Burt*, 571 U.S. at 19 (internal quotation marks omitted).

There may well be "no *intrinsic* reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned . . . that his neighbor in the state courthouse." *Id.* (emphasis added) (internal quotation marks omitted). But when a particular state courthouse has proven itself unequal to the task of adjudicating federal claims in a particular category of cases, that federal judge is the only person to whom a prisoner may turn.

Now is the time for a reaffirmation of the principle that states must make "good-faith attempts to honor constitutional rights" before deference is proper. *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (internal quotation marks omitted). Louisiana is also the place for this reaffirmation. The state has demonstrated time and again its willingness to act outside the jurisprudential mainstream, particularly in matters of criminal justice. In addition to seeming, like a mirror universe Ninth Circuit, to contribute more than its own fair share of cases to the Court's docket, scarcely a criminal justice opinion comes down that does not require Louisiana to temper its laws or its judiciary.[25] That is all well and good when, acting according to

25 For some of the examples from the same thirty-year period the Court has been restricting habeas relief, see *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018) (reversing ruling that allowed defense counsel to concede a defendant's guilt); *Montgomery v. Louisiana*, 136 S. Ct. 718, 727 (2016) (remonstrating Louisiana for "disregard[ing] a controlling, constitutional command in their own courts"); *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (per curiam) (noting Louisiana Supreme Court "egregiously misapplied settled law" in a capital case); *Brumfield v. Cain*, 135 S. Ct. 2269, 2282 (2015) (Louisiana court made "unreasonable determination of the facts" in capital case); *Miller v. Alabama*, 567 U.S. 460, 482 (2012) (holding unconstitutional Louisiana's mandatory life without parole for juvenile homicide offenders); *Graham v. Florida*, 560 U.S. 48, 64 (2010) (holding unconstitutional Louisiana's

the wishes of its citizens, the state acts as a good faith laboratory for testing the effectiveness of policies at the outer limits of constitutional acceptability. But when, as here, good faith is lacking, Louisiana merits a reminder of its place in a federal republic.

The high water mark of the Court's curtailment of the Great Writ on procedural grounds was probably October Term 2010, which saw both *Richter* and *Cullen v. Pinholster*, 563 U.S. 170 (2011), handed down.[26] The Court has started to retreat from that extreme, and it has been wise to do so. There was much truth in the findings of Justice Powell's *Report of the Judicial Conference's Ad Hoc Committee on Federal Habeas Corpus in Capital Cases* (1989), which criticized the extremely liberal habeas practice of the time. But that report, which eventually led to the

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life without parole—which was also mandatory—for juvenile non-homicide offenders); *Smith v. Cain*, 565 U.S. 73, 76-77 (2012) (Louisiana misapplying *Brady*); *Kennedy v. Louisiana*, 554 U.S. 407, 415 (2008) (Louisiana one of few states to execute non-homicide offenders); *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008) (Louisiana Supreme Court misapplying *Batson*); *Roper v. Simmons*, 543 U.S. 551, 579 (2005) (Louisiana one of few states to execute juveniles); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (Louisiana one of few states to execute mentally retarded); *Campbell v. Louisiana*, 523 U.S. 392, 396 (1998) (racial discrimination in Louisiana grand-jury-foreperson selection process); *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (Louisiana misapplying *Brady*, again); *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (Louisiana not honoring *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam), which faulted its reasonable-doubt instruction). All, of course, as this Court is aware from its consideration of *Ramos v. Louisiana*, No. 18-5924 (O.T. 2018), operating under a non-unanimous jury verdicts regime adopted specifically to subordinate racial minorities.

26 *Langley v. Prince*, 890 F.3d 504, 515 (5th Cir. 2018) (noting *Wilson v. Sellers*, 138 S. Ct. 1188, 1195 (2018), may be a retreat from *Richter*'s "could have" approach to deference); *Johnson v. Williams*, 568 U.S. 289, 303 & n.4 (2013) (retreating from *Richter*'s suggestion of an irrebutable presumption of adjudication on the merits); *Brumfield v. Cain*, 135 S. Ct. 2269, 2276 (2015) (noting the evidentiary hearing held under an exception retained by *Pinholster*).

passage of AEDPA in 1996, *Baze v. Rees*, 553 U.S. 35, 69-70 (2008), also reflected a judicial mood towards habeas that it is now apparent some start courts took too far.[27] Even in the much more vital context of national security, history has proven it "essential that there be definite limits to [governmental] discretion," as "[i]ndividuals must not be left impoverished of their constitutional rights on a plea" to pablum with "neither substance nor support." *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting). There is no substance or support for deference in this case.

Finally, refusing certiorari would be "a far more subtle blow to liberty than" the *Cordero* scandal itself. *Id.* at 245-46 (Jackson, J., dissenting). *Cordero* is over and its victims will, as measured in constitutional time, soon be dead and buried. But the federal courts' willingness to tolerate *Cordero*, to halo judicial fraud in the name of law and order with deference, would endure.

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27 It is no coincidence that the sham adjudications started in 1994, in the middle of a legislative and judicial frenzy to "get tough on crime." Prison litigation reform, including habeas reform, had once been a lonely cause for Daniel Lundgren, the eventual Attorney General of California, when he was in the House of Representatives, *see* H.R. 6050, 97th Cong., 2d Sess. §§ 3-4 (1982); H.R. 2238, 98th Cong., 1st Sess. §§ 3-4 (1983), but it gained steam, *see e.g.*, S. 238, Reform of Federal Intervention in State Proceedings Act of 1985, 99th Cong. § 6 (1985), until it became a runaway train, *e.g.* Violent Crime Control & Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 2015 (1994); Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321; Anti-Terrorism & Effective Death Penalty Act of 1996, Pub. L. 104-132, 100 Stat. 1217. While many of the substantive changes to criminal law from the mid-1990s (*e.g.*, harsher three-strikes laws, mandatory minimums, and crime of violence penalties) have recently been scaled back, lawgivers have not been as quick to see how their overreaction in the procedural arena may also have played a role in exploding prison populations.

III. The number of lifers affected by the Court of Appeals' error and the gravity of the injustice they face would justify the Court's time and effort even in the absence of the usual factors favoring certiorari.

As various Justices have had occasion to observe in opinions dissenting or concurring in certiorari decisions, the Court's rules expressly state that the tests for cert-worthiness appearing in Rule 10 "neither control[] nor fully measur[e] the Court's discretion." SUP. CT. R. 10; *e.g.*, *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 915 (1996) (Scalia, J., concurring). It follows, therefore, that there must be cases where Rule 10's criteria are not met but the Court properly grants certiorari nonetheless. And there are: the Court's GVR practice, which prioritizes justice in an individual case over judicial efficiency, and certain *sui generis* matters involving the Legislative or Executive branches, where the parties involved make an ordinary legal question extraordinary.

The extra-Rule 10 example that comes most readily to the mind of a prisoner, however, is a death penalty case, where the concern for justice in an individual case (because of the severity of the punishment) and the identities of the parties (the state and a citizen it wishes to kill) combine to make a legal issue worthy of certiorari even in the absence of conflicting opinions or novel questions. The nature of the punishment itself seems to justify review of more fact-bound and less broadly applicable federal questions. Or to put it another way, the Court, it seems, has often

viewed the cost of an error in a death penalty case as so high that the frequency of the error exerts less influence in the utility function governing its certiorari practice.

Under such an analysis, this case presents a strong claim to the Court's scarce time and resources. The majority, probably the vast majority, of the 299 *pro se* prisoners who filed for *Cordero* relief are, like Sandra Cordero herself, serving an actual or constructive sentence to life without parole.[28] Life without parole is not the death penalty, but as *Miller v. Alabama*, 567 U.S. 460 (2012), and *Graham v. Florida*, 560 U.S. 48 (2010), teach, it is close. Both require the same event for their satisfaction: death in prison.

Neither does the death penalty's acceleration of that event provide a distinction, except perhaps by degree. The average age a lifer can expect to reach—around 59 at Angola—reveals daily prison existence to be its own insidious death penalty. A death by indifference and stress and boredom and inmate-on-inmate violence rather than state-sponsored violence (usually), but an unnaturally accelerated death nonetheless. Just as the victim of a killing might be said to be indifferent to the distinction between murder and manslaughter—the victim is just

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28 All but a handful of the *Cordero* reconsiderations were unpublished and Petitioner has no access to unpublished state cases, so he cannot conduct the research necessary to give the Court a precise number. Petitioner is, after twenty-five years at Angola, personally familiar with many of his fellow lifers who were affected by *Cordero* and believes this statement to be correct. Beyond a prisoner's word, however, it stands to reason that the 299 prisoners who sought review out of possibly 2,000 affected, App. H, 230, 233, did so because they still had something substantial to gain all the years later: freedom.

as dead either way—so too would many prisoners say concerning the death penalty and life without parole. Some would even prefer a death sentence, which comes with a private cell, free lawyers, and, as in the fourth capital doctrine of Epicurus's *tetrapharmakos*, a certain end to suffering.[29]

If a state court engaged in sham adjudications in twenty death penalty cases, there can be little doubt this Court would grant certiorari to decide whether AEDPA deference to those decisions would risk a quantity of injustice too horrifying for toleration in a civilized society. Surely the potential injustice resulting from sham adjudications in, conservatively, 200 life-without-parole cases weighs at least as much. However much less an erroneous sentence to life without parole might matter than an erroneous death sentence, it cannot matter more than ten times less.

It may be that, after review unencumbered by AEDPA's highly deferential standards, the federal courts conclude that the Louisiana Fifth Circuit decided every single *Cordero* case correctly. Unlikely, given Petitioner's innocence and the many erroneous legal statements in Petitioner's case alone, along with the nine exonerations of which Petitioner is aware in Fifth Circuit cases from the relevant period. But it is theoretically possible. *De novo* review is not invariably perfect.

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29 *Cf. Gilmore v. Utah*, 429 U.S. 1012, 1015 (1976) (Burger, C.J., concurring) (noting that Gilmore wished to get on with his execution because "he did not 'care to languish in prison for another day'").

Petitioner does not ask for perfection. He does not ask this Court to set him free. He asks simply for due process of law. Louisiana has denied several hundred American citizens full consideration, after a fair opportunity to develop a collateral record, of the second-most severe deprivation of life, liberty, and property a state may impose.[30] The federal courts should therefore accept the admittedly unenviable task of shouldering this responsibility. At the very least, jurists of reason may debate the issue. The insouciance of the state courts in the Deep South towards the lives, and deaths, of their impoverished litigants must stop.

CONCLUSION

The lower courts have deployed the full panoply of judicial federalism doctrines to insulate, downplay, and immunize the actions of Louisiana in the *Cordero* scandal. One would search in vain to find so much as a remonstrative aside in the state or federal cases spawned by the affair, and most opinions—the ones in this case included—even fail to recite the facts correctly, pretending there was only a violation of some nice, but hardly critical, Louisiana constitutional requirement.

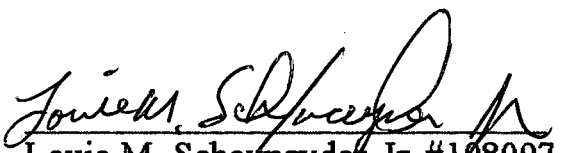
The silence of the state courts, consisting of elected judges confronted with a toxic issue, is disappointing but unsurprising. The silence of the life-tenured guardians of the Federal Constitution is shocking. The maxim, Sir Thomas More

30 In many of these cases, such as the three-strikes lifers, life without parole was, in fact, the most severe sentence that could be imposed constitutionally. *Kennedy v. Louisiana*, 554 U.S. 407, 446-47 (2008).

said, is *qui tacet consentire videtur*. The Court can still rectify the worst of this shameful complicity by ending the Court of Appeals' tolerance for deference to adjudications unworthy of the name.

Petitioner respectfully requests that the Court grant certiorari, reverse the Court of Appeals' refusal to issue a Certificate of Appealability, and remand with instructions for the Court of Appeals to remand to the District Court to review Petitioner's claims unencumbered by AEDPA's deferential standards.

Respectfully Submitted:



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Date: February 15, 2019