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

## REPLY BRIEF IN SUPPORT OF CERTIORARI


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## INTRODUCTION

The appalling circumstances of this case, which came to light only through the suicide note of a court employee, are, one would hope, not the stuff of typical court procedure. In the same vein, however, they represent the sort of extraordinary affront to justice, liberty, and the Great Writ itself that undermines the integrity of the criminal justice system more generally.

The BIO fundamentally misconceives the role Congress preserved for federal courts when a prisoner shows that a state court completely abdicated its opportunity to participate in AEDPA's federalist habeas scheme. The BIO does not contest the factual premise of the question presented: the state court decision reviewed in Petitioner's 1999 federal habeas

proceeding—in which the Louisiana Fifth Circuit Court of Appeal purported to find "no error" in the denial of Petitioner's postconviction claims, ECF No. 22-2 at 22—arose "out of a secret, thirteen-year-long policy to deny all *pro se* prisoner writ applications without judicial review," Pet. i; *see* BIO 14 (conceding Petitioner "is correct" that his claims were "not considered"). Let that sink in for a moment. The legality of Petitioner's confinement was determined by a staff member, not a judge. And even the staff member's determination was, by design, a sham: He was not authorized to grant habeas relief, only to select one of fourteen "reasons" to deny it. The reason Petitioner received—"no error in the trial court's ruling"—was number two on the staffer's list of pretenses for denying relief. Pet.App.226.[1]

The answer to the question presented—"whether to apply AEDPA deference" when the state court's adjudication was a complete sham—follows from the straightforward operation of statutory text. As the BIO acknowledges, Petitioner has consistently urged that the state court's failure to adjudicate his claims in 1998 results in the modest, yet profoundly important consequence of preserving federal court review "without AEDPA deference." BIO 12. This is so, Petitioner explained, because his federal habeas proceeding "conducted a deferential review of a ruling [that] was not only not an adjudication on the merits, but was no adjudication at all." ECF No. 73 at 1. The plain language of § 2254(d) provides state

[1] Respondent's sole proviso is that the staff member who carried out this sham proceeding for a decade was "an experienced attorney" and veteran. BIO 2 n.1.

courts with tremendous latitude in applying the law "as determined by [this Court]." 28 U.S.C. § 2254(d). But it conditions this latitude on the very basic requirement that the "State court proceedings" actually "adjudicated [the petitioner's claims] on the merits." *Id*. Where, as here, it comes to light that a state court adopted a policy to automatically deny relief, and thereby abdicated its opportunity to "adjudicate" claims altogether, the text of § 2254(d) unambiguously withholds deference and preserves plenary review of a petitioner's entitlement to the Great Writ. *Id.*; *E.g.*, *Cone v. Bell*, 556 U.S. 449, 472 (2009) (recognizing that § 2254(d)'s deference applies only when a claim is "adjudicated on the merits"; otherwise, the claim "is reviewed *de novo*").

The courts below rejected Petitioner's repeated pleas for *de novo* review. Upon the revelation that Petitioner's 1999 federal habeas proceeding reviewed a sham proceeding and must be reopened, the district court adopted an extrastatutory federal habeas scheme, in which it gave the Louisiana Fifth Circuit a second round of review and deference. Respondent now (for the first time) defends this procedure, offering the following: After Petitioner's 1999 federal habeas proceeding presumed his claims had been adjudicated on the merits and it became known that the state court proceeding had, in fact, culminated with automatic denial, the Louisiana Fifth Circuit engaged in "re-review" of Petitioner's claims. BIO 5. Therefore, Respondent says, the state court's sham adjudication in 1998 "is not the ruling" under review upon reopening Petitioner's 1999 federal habeas proceeding. *Id.* Instead, federal courts must afford AEDPA deference to the state court's "do-over" after

it was caught abdicating the judicial role. *Id.*; *see also* BIO 6, 11-12.

The problem with Respondent's explanation is that it's not the law. In § 2254, Congress designed and enacted a particular federalist scheme for federal courts to follow. It did not say that when a state court relinquished its opportunity to adjudicate a habeas claim, a federal court affords the state court an additional opportunity to engage in a bona fide review and then affords a supplementary round of deference. Respondent offers nothing but a bare, repeated assertion that federal habeas law operates in this manner—not even a single legal text to support its view that the relevant decision in Petitioner's 1999 federal habeas proceeding transformed into the decade-later "re-review."

In AEDPA, Congress no doubt guaranteed state courts the opportunity to be treated as equal counterparts in applying the law of this Court and regulating access to the Great Writ. But the potent deference AEDPA offers to state courts was explicitly conditioned on at least "adjudicat[ing]" the petitioner's claims. The sham denial of relief falls short of that low threshold. This Court has staunchly intervened when federal courts flout the federalist balance Congress struck in AEDPA, and it has urged federal courts to proceed on the "presumption" that claims "have been adjudicated on the merits by [state] courts." *Johnson v. Williams*, 568 U.S. 289, 293 (2013). Even-handed enforcement of this federalist balance calls for this Court's intervention when a state court takes the profoundly troubling step of treating a prisoner's entitlement to the Great Writ—the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2—as a farce.

## ARGUMENT

### I. The Appalling Circumstances Of This Case Warrant This Court's Review.

As the BIO recognizes, this petition arises from two distinct sets of claims in the proceedings below. First, Petitioner maintains he is entitled to *de novo* review of the claims raised, and accorded AEDPA deference, in his original federal habeas proceeding because it is now undisputed the Louisiana Fifth Circuit denied his claims as part of a "secret, thirteen-year-long policy" to deny relief in *pro se* habeas cases. BIO 5; *see also* BIO 11-12 (addressing Petitioner's argument to have his original claims "reviewed again . . . without AEDPA deference"). Second, Petitioner argues that, insofar as the decision under review is somehow Louisiana Fifth Circuit's 2011 "re-review," it failed to comport with basic requirements of due process. BIO 5; *see also* BIO 14-19 (addressing this issue); NACDL Br. 8-10 (describing the circuit split on this issue). Both arguments justify this Court's review.[2]

#### A. The Disclosure Of This Decade-Long State Court Policy To Automatically Deny Habeas Relief Calls For The Court To Recognize This Outmost Boundary Of § 2254(d).

Defense and civil rights attorneys never expected to have to ask this Court to grant certiorari to establish that a state court may not adopt a policy of automatic denial of habeas petitions yet maintain

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[2] Below, Petitioner also sought review of claims denied in his direct appeal, Pet.App.19-20, and new claims denied for the first time in the Louisiana Fifth Circuit's 2011 "re-review," Pet.App.20-28. Those claims are not at issue.

the substantial deference afforded under § 2254(d). But now-public knowledge that the Louisiana Fifth Circuit adopted this practice for a decade—and may have continued it indefinitely absent disclosure in a suicide note—beckons this Court to establish this humble, but fundamental limit to AEDPA.

The BIO confirms the relevant facts are undisputed. After the Louisiana Fifth Circuit concluded there was "no error in the trial court's ruling" and denied habeas relief in 1998, ECF No. 22-2 at 22, Petitioner filed a timely federal habeas petition under § 2254.[3] Recognizing that the Louisiana Fifth Circuit "affirmed the trial court's denial," the district court presumed Petitioner's claims had been adjudicated on the merits (as this Court's caselaw mandates) and reviewed Petitioner's claims under the substantial deference afforded by § 2254(d). Pet.App.61. The court reviewed only whether the denial of each claim was "contrary to clearly established federal law"; an "unreasonable application of clearly established federal law"; or "based upon an unreasonable determination of the facts." *E.g.*, Pet.App.69, 78.

We now know—and Respondent does not deny—the Louisiana Fifth Circuit's conclusion there was "no error" in denying Petitioner's habeas claims was a sham. What the BIO tags "a state habeas infirmity," BIO 7, took place as follows: When a *pro se* prisoner appealed the denial of habeas relief, a

[3] The Louisiana Supreme Court declined discretionary review, "so the Louisiana Court of Appeal's decision was the last decision on the merits in the state system." *Langley v. Prince*, No. 16-30486, __ F.3d __ , 2019 WL 2384159 at *26 n.13 (5th Cir. June 6, 2019).

staffer was charged with "prepar[ing] the ruling" by selecting from a list of fourteen possible "reasons" for denying the writ. Pet.App. 202, 226. The staffer had no option to grant habeas relief or reverse denial of habeas relief.[4] The reason chosen was signed by one judge (who was assigned to all *pro se* habeas appeals) "without so much as a glance at" the petitioner's claims. *Id.* at 202. The other two judges on the panel "never even knew the *pro se* application was filed, much less being aware of the application's contents." *Id*. "*[N]ot one*" of these requests for habeas relief was "reviewed by a Judge on the Court." *Id*.

This certiorari petition arises from Petitioner's 1999 federal habeas proceeding, which was reopened after these facts came to light. Both courts below found—and Respondent has never disputed—that Petitioner filed "a true Rule 60(b) motion," *i.e.*, one that "challenges a defect in the original habeas proceeding" and that could not be construed as a successive petition to review the Louisiana Fifth Circuit's 2011 "re-review." ECF No. 60 at 3-4; *Schexnayder v. Vannoy*, 643 F. App'x 417, 417 (5th Cir. 2016) (holding that Petitioner's motion was "not successive, but is a true Rule 60(b) motion entitled to be decided"). And Respondent does not dispute that the Louisiana Fifth Circuit's sham proceeding was an "extraordinary circumstance" that justified reopening Petitioner's federal habeas proceeding under Rule 60(b)(6). ECF No. 60 at 9-10.

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[4] A fifteenth option let the staffer remand for reconsideration whether the petitioner was entitled to additional documents. Pet.App.226.

As the BIO recognizes, the disputed question is what form of review was required upon finding that the state court decision reviewed in Petitioner's federal habeas proceeding never even considered Petitioner's claims. Respondent correctly acknowledges Petitioner's consistent position: Upon showing the state court proceeding under review had been a sham, he is entitled to "non-deferential review" of his original claims. BIO 12. Below, Petitioner repeatedly urged that *de novo* review was compelled by federal law. For instance, upon the reopening of his 1999 federal habeas proceeding, Petitioner urged he was entitled to "reconsideration of the original § 2254 claims *because the original Report and Recommendations conducted a deferential review of a ruling (that we now know) was not only not an adjudication on the merits, but was no adjudication at all*." ECF No. 73 at 1 (emphasis added). He further asked the court to "re-examine the claims presented in the original § 2254 [petition], because at the time the decision was made, it appears that the court *improperly applied deferential review when it should not have*." *Id.* at 2 (emphasis added).

In response, Respondent did not even contest Petitioner was entitlemed to *de novo* review of his original claims, addressing only new claims related to the Louisiana Fifth Circuit's 2011 're-review.' ECF No. 81. Petitioner urged the district court that Respondent "made no objection to his request that the Court re-review all of the claims in his original § 2254 petition" and again requested "review all of his claims anew, without any deference to . . . either of [the] Louisiana Fifth Circuit's decisions." ECF No. 84 at 1, 4.

The district court declined *de novo* review and, without identifying any authority under federal law, afforded a second round of deference to the Louisiana Fifth Circuit's 're-review,' issued over a decade after Petitioner's original federal habeas review and after its sham process came to light. Pet.App.15, 28-46; ECF No. 91 at 1. Petitioner sought a certificate of appealability "as to all portions of each claim raised," including specifically the district court's failure to afford *de novo* review, ECF No. 94 at 6,[5] which the district court and Fifth Circuit both denied, *see* ECF No. 95 at 1; ECF No. 99 at 2. In his *pro se* petition to this Court, Petitioner reiterates: "All this petition seeks, all [Petitioner] has ever sought, is a *de novo* federal adjudication of his claims." Pet. 5 n.6.

Respondent now attempts to defend the district court's approach. And, to be sure, one could imagine a habeas scheme like the one Respondent advances—one in which the federal procedure when a state court fails to undertake bona fide adjudication is to afford the state court a do-over and to then afford the state court a supplemental round of deference. Perhaps there would even be a third or fourth round if the federal court remained unsatisfied. But that's not the federalist scheme Congress enacted. Under that scheme, a federal court affords deference when a state court has "adjudicated" the Petitioner's claims,

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[5] Although Respondent does not (and could not) argue that Petitioner failed to preserve this issue given his numerous, explicit requests for *de novo* review, Respondent also does not contest that Petitioner's occasional, mistaken use of the term "Plain Error" in some *pro se* pleadings would have been understood as further reiteration of his requests for *de novo* review. Pet. 11 n.9.

and it affords no such deference when the state court fails to meet that low bar. 28 U.S.C. § 2254(d); *Cone*, 556 U.S. at 472.

### B. Certiorari Is Also Warranted To Decide Whether The State Court's "Re-Review" Proceeding Was Required To Comply With The Most Basic Requirements Of Due Process.

As the BIO acknowledges, Petitioner has also consistently argued that, insofar as the "re-review" has somehow become the relevant state court decision, it was conducted in a manner that violated Petitioner's due process right to have his claims adjudicated free from "a probability of bias." BIO 5-6. The BIO concedes that the courts below reached the contrary result based on "the no state habeas infirmity rule utilized below in the Fifth Circuit." BIO 13; NACDL Br. 2.

The BIO all but concedes this rule is the subject of a circuit split. By its own count, eight other circuits follow the Fifth Circuit's rule, under which a federal habeas court is barred from even considering whether a postconviction proceeding satisfied basic tenets of due process. BIO 16-17. And the BIO acknowledges that, in contrast, the First Circuit has repeatedly engaged in review of the constitutionality of postconviction proceedings, including compliance with due process. BIO 18-19 (acknowledging that *Tevlin v. Spencer*, 621 F.3d 59 (1st Cir. 2010), adopted this Court's due process test for postconviction proceedings and that *Dickerson v. Walsh*, 750 F.2d 150 (1st Cir. 1984), "did 'hold' that petitioner's claim is the proper subject of a habeas corpus petition"). The BIO also directly quotes the Seventh Circuit's observation

that its caselaw has "not adopted" the "per se rule" of the "majority of the courts of appeals" and recognizes challenges based on an "independent constitutional right in the way the State administers its post conviction proceedings." BIO 18 (quoting *Flores-Ramirez v. Foster*, 811 F.3d 861, 866 (7th Cir. 2016)).

Respondents remaining arguments largely preview merits briefing—that "the Fifth Circuit no state habeas infirmities rule is the better one." BIO 15. With respect to certiorari criteria, Respondent asserts "the split does not warrant review" and "the split is not intolerable" because "[t]he defective state habeas proceeding has been remedied." BIO 13. This makes no sense. Petitioner's due process claim, and the split, concerns whether the Louisiana Fifth Circuit's "re-review"—which purportedly "remedied" sham adjudications—itself violated due process. Respondent also asserts that Petitioner's and amicus's concerns about the potential for bias in the "re-review" process are "unfounded." BIO 6. However, Respondent has zero response to the petition and amicus's description of the serious risk of bias, including financial incentives. Pet. 17-24; NACDL Br. 4-7; *see also State v. Cordero*, 993 So. 2d 203, 214 (La. 2008) (Weimer, J., dissenting) (specifically flagging the potential "appearance of impropriety" in the Louisiana Fifth Circuit's re-review process). In any case, Respondent concedes that the Fifth Circuit's "no state habeas infirmities" rule preempted consideration of Petitioner's due process claim by the courts below, squarely presenting the issue of whether such claims are cognizable. BIO 13.

## II. The BIO's Manufactured Vehicle Issue—A Lack Of "Case Or Controversy"—Is Frivolous.

Respondent does not dispute the question presented is preserved. In an effort to conjure a vehicle problem, the BIO says this Court would have to "first determine" whether a "case or controversy exists" in this case. BIO ii. According to Respondent, the state court's "re-review" of Petitioner's claims "remedied" its "improper collateral review" and "[t]hat simply deprives this Court of its power to act." BIO 5, 9. This is frivolous. The controversy before the Court, acknowledged throughout the BIO, is whether the district court should have engaged in *de novo* review of Petitioner's claims or whether it correctly afforded AEDPA deference to the post-sham, decade-later "re-review." This Court obviously has jurisdiction to interpret federal habeas law and remand for *de novo* review of Petitioner's claims.

The disclosure of a state court's decade-long policy to automatically deny access to the Great Writ calls for this Court's attention, to safeguard the federalist balance Congress struck in AEDPA. Of the hundreds of prisoners affected by Louisiana's sham adjudications, this appears to be *the only record* in which the parties, as well as both courts below, agree Petitioner's case was reopened pursuant to a "true" Rule 60(b) motion. It is therefore an unusually good, and perhaps the only realistic, vehicle.

## CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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