IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-30506

ALBERT WOODFOX,

Petitioner-Appellee,

v.

BURL CAIN, et al.,

Respondents-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF LOUISIANA
Civil Action No. 06-cv-789-JBB

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS
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The undersigned counsel of record certifies there are no persons with a financial interest in the outcome of this case. The Appellee's name and the names of counsel involved in this case are listed below. This information is provided for the Judges of this Court to evaluate possible recusal or disqualification:

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STATEMENT REQUESTING ORAL ARGUMENT

The Court has set this matter for oral argument on September 2, 2015.

The State appeals the grant of an unconditional writ after the second vacatur of a conviction against Woodfox. The district court fashioned this habeas remedy in light of the extraordinary circumstances present in this case.[1]

The State's appeal concerns: (a) whether the district court had the authority— where the underlying violation involved grand jury discrimination; or in light of *Younger* and exhaustion doctrines, or given the operation of Rule 23(d)—to grant an unconditional writ as remedy; or (b) whether it was an abuse of discretion for the district court to find extraordinary the following factual circumstances:

(1) Woodfox's elderly age and poor health;

(2) 42 years of incarceration, including solitary confinement, in the absence of a valid conviction;

(3) unavailable witnesses, including key witnesses for the State and Woodfox's alibi witnesses;

(4) troubling misconduct by the State, and;

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[1] ROA.V35:5755-5781 (Ruling, 6/8/15). Citations are made as follows, unless otherwise noted:

- "S.RE-A:1" refers to the State's Record Excerpts, Tab A, page 1;
- "ROA.V1:1" refers to the Record on Appeal, Volume 1 page 1 (thirty-five volumes total);
- "ROA.Trans.1.1" refers to the Record on Appeal, Record Transcript 1, page 1;
- "Blue brief" refers to the State's opening brief on appeal.
- "SR" refers to the eleven volume State court record originally transmitted to this Court in connection with *Woodfox v. Cain*, No. 08-30958 (5th Cir. February 5, 2009).

Transcript line citations are noted in parens, where relevant. All emphases in this brief were added, unless otherwise indicated.

(5) the fact that the State has already had two chances to fairly convict Woodfox and failed.

The State also challenges whether the district court could consider that the record presented includes evidence of Woodfox's actual innocence, and the fact that the state has already twice committed error at the grand jury stage.

Woodfox respectfully agrees that oral argument will assist the Court in ruling on these issues.

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I. STATEMENT OF THE CASE

The State seeks to prosecute Woodfox a third time, over forty years after the underlying crime occurred, after twice failing to secure a constitutionally valid conviction against him. The district court "carefully considered the more traditional relief of a conditional writ of habeas corpus," and then concluded correctly that "such a remedy would be unjust[.]"[2] Having found exceptional circumstances warranting an unconditional writ, the district court acted within its rightful authority when it prohibited the State from subjecting Woodfox to a third prosecution.

In so ruling, the district court correctly relied on the controlling federal statutory scheme—legislation that vests the district courts with discretion to determine whether exceptional factual circumstances warrant the issuance of an unconditional writ. The district court further supported its ruling with additional controlling and persuasive authorities.

The district court's ruling is correct. It did not abuse the broad discretion allowed by law, and that is enough to satisfy the applicable standard of review. Accordingly, the district court's ruling must be affirmed.

[2] ROA.V35:5755.

A. Disposition Below and the Nature of the Case

The district court below properly exercised the broad remedial powers bestowed by Congress when it found that, in this rare and unusual case, an unconditional writ provides the only just remedy in this case. Those powers were long ago conferred by "[t]he statutes of the United States," which "declare that the Supreme Court and the district courts shall have power to issue writs of habeas corpus" by first "'determin[ing] the facts of the case'" and then by issuing such relief "'as law and justice require.'"[3]

Regarding 28 U.S.C. § 2243's instruction that a district court entertaining a petition for habeas corpus relief "shall hear and determine the facts," the district court correctly determined that at least five factual circumstances make this case exceptional.

First, the district court concluded that the record in this case supports a finding that Woodfox is, at 68, aged and infirm. Woodfox suffers from high blood pressure, diabetes, heart disease, kidney disease, and a liver disease that leaves him at high risk for developing cancer.[4]

Second, the district court found no fair retrial could pragmatically proceed: at least thirteen witnesses can never testify live before a third jury charged with

[3] *Walker v. Johnston*, 312 U.S. 275, 283-84 (1941) (citing to U.S. Rev. Stat. § 761, codified today as 28 U.S.C. § 2243).
[4] ROA.V35:5766.

assessing the credibility of their testimony. This extraordinary circumstance creates a prejudice that "can in no way be vitiated today."[5]

Third, the district court further noted "facts of State action in the history of this case that are, at least, troubling," including prosecutorial misconduct in the second trial and the State's persistent disregard for Woodfox's rights.[6] The State's history of troubling conduct left the district court with "little confidence that any future actions in this matter will be handled fairly."[7]

Fourth, the district court found that Woodfox "has remained in the extraordinary conditions of solitary confinement for approximately forty years now."[8] Although the State has justified this harsh and atypical confinement claiming Woodfox's involvement in the murder of corrections officer Miller, Woodfox has never been validly convicted of that crime.

Fifth, and finally, the district court found it extraordinary that the State continued to seek "a third bite at the apple," after litigating, for over forty years, Woodfox's meritorious challenges to his prior convictions.[9] As the court explained, reported cases involving the grant of an unconditional writ "concerned

[5] *Id.* at 5771.
[6] *Id.* at 5771-5772.
[7] *Id.*
[8] *Id.* at 5774.
[9] *Id.* at 5776.

habeas relief relative to a first retrial."[10] This case concerns the unconstitutionality of the retrial the State was long ago accorded to allow it to fix the violations made at the first trial. That fact, the district court observed, makes the circumstances of this case "most extraordinary."[11]

Although not holding these failures dispositive, the Court also considered the fact that the State has twice already committed errors at the grand jury stage, specifically giving the district court "reason to question whether a third indictment would not suffer a similar defect."[12] Explicitly observing that weaknesses in the State's case against Woodfox were likewise non-dispositive, the Court also considered evidence of actual innocence.[13]

The State does not seriously rebut the core of Woodfox's claim: that this constellation of circumstances—individually, and most certainly in the aggregate—is extraordinary. As Kurt Wall, Head of the Criminal Division of the Attorney General's Office, conceded before the district court during a hearing on whether Woodfox should be released on bail pursuant to Federal Rule of Appellate Procedure 23, "'[t]here's just no case law to follow, there's no case law that comes close to this set of facts.'"[14] Precisely because the circumstances here are so

[10] *Id.*
[11] *Id.*
[12] *Id.* at 5775.
[13] *Id.* at 5772-5773, 5775.
[14] ROA.Trans6:6621(12-13).

exceptional that no case "comes close," the district court proceeded in accordance with its statutory mandate to "dispose of the matter as law and justice require" when it issued an absolute writ prohibiting a third retrial.[15]

"There being no doubt of the authority of the Congress to [ ] liberalize the common law procedure on *habeas corpus* in order to safeguard the liberty of all persons within the jurisdiction of the United States" by allowing district courts to dispose of habeas matters "'as law and justice require,'"[16] the district court did not abuse its discretion in ruling that "the exceptional circumstances involved in the instant case call for the issuance of an unconditional writ."[17]

B. Relevant Procedural History

1. The Underlying Crime and Investigation

When corrections officer Brent Miller was murdered on April 17, 1972, Albert Woodfox and several other inmates were immediately targeted as suspects. They were thrown into single-cell lockdown confinement despite the lack of evidence implicating any of them.[18]

These inmates were targeted because of their affiliation with the Black Panther Party. Moreover, as activists working toward reform in a segregated,

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[15] 28 U.S.C. § 2243.

[16] *Johnson v. Zerbst*, 304 U.S. 458, 466 (1938).

[17] ROA.V35:5779. *See also, Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) (the powers of the writ are, "broad with respect to the relief that may be granted.")

[18] SR 1281-83, 1342, 1448, 1451, 1583-86, 1996, 1998, 2017-19, 2342.

violent, and highly dysfunctional prison, they had been labeled "troublemakers."[19] The ensuing investigation was rushed and shoddy, rife with improprieties that were brought to light only decades later.[20] Although the crime scene was bloody—corrections officer Miller had been stabbed 32 times—no physical evidence pointed prison officials toward Woodfox or any of his co-defendants.[21] Prints left at the scene exculpated Woodfox and his co-defendants.[22]

Several days into the investigation, however, inmate Hezekiah Brown—who originally told prison officials that he was in the prison's blood plasma center selling his blood at the time of the murder—changed his story. Convicted for serial rapes, Brown had been sentenced to death. After Brown had served much of his time in the solitary cells on death row, that sentence was commuted to life imprisonment, and Brown became a resident of the dorm where Miller was killed. His bed was closest to the lobby of the dorm, just feet away from where Miller's body was found.[23]

[19] SR 1169-74, 1330, 1440, 1444, 1473-77, 1514, 1844-45, 1911-12, 1946, 2164.
[20] SR 1965-66, 1979-81 (Warden Henderson describing as "outside the scope of the legitimate investigation" some of the inducements bestowed to eventual informants.").
[21] SR 1152-53, 1180-82, 1184-88, 1203, 1206, 1217, 1219.
[22] SR 1208-09, 1213-14, 1666-68, 2315-27; Exhibit 22 at 4-5.
[23] SR 1148-49, 1773.

Several days after the murder, prison officials woke Brown in the middle of the night and brought him back to the administration building.[24] "The whole administration was present," he said.[25] They did not believe his blood bank alibi.[26]

As Brown testified at the subsequent trial of Woodfox's three co-defendants, the administration set a preselected array of inmate files before him and he was asked to identify Miller's assailants. Brown also testified in that proceeding, but not in Woodfox's—that he had feared if he didn't change his story he would be charged with the murder, and/or sent back into solitary confinement cells, as punishment.[27] Woodfox's jurors never heard any cross-examination of Brown about his basis for these fears. He had not discussed them during Woodfox's original trial, and Brown had died by Woodfox's 1998 retrial. It was only after Brown's death that the State disclosed to Woodfox that prison officials had offered Brown extraordinary inducements in return for his testimony, including a weekly carton of cigarettes (prison currency); coveted housing for prison dog handlers; and the Warden's personal promise that he would do all in his power to get Brown a pardon and ultimately, freedom.

Facing the fear of solitary confinement and these powerful incentives, Brown reached for the files of Woodfox and his co-defendants—Herman Wallace,

[24] ROA.V34:5434; SR 1788-1789.
[25] ROA.V34:5434.
[26] *Id.*
[27] ROA.V34:5434.

Chester Jackson, and Gilbert Montegut. Brown claimed each had participated in the killing of corrections officer Miller.

2. State Court Proceedings

Woodfox timely moved to quash his original indictment on the ground that the composition of the grand jury had been tainted by discrimination. The prosecution and state court ignored that motion, and his hired counsel failed to pursue it.

After a three-day trial, Woodfox was convicted of Miller's murder. The conviction was largely, if not entirely, based on Hezekiah Brown's testimony. No incriminating forensic evidence was ever found. While two other inmate witnesses—Paul Fobb and Joseph Richey—very loosely corroborated Brown's narrative by placing Woodfox near the crime scene, their testimony conflicted in significant respects.

Mr. Woodfox pressed myriad claims for vacatur of his conviction, including as to his motion to quash. In 1992, nearly twenty years after the crime, Woodfox's 1973 trial was finally reviewed by the state post-conviction court. Finding error on the part of counsel "'so serious that the conviction cannot be trusted,'" the 18th Judicial District Court vacated Woodfox's conviction.[28]

[28] ROA.V35:5755, n.2 (quoting the 18th Judicial District Court of Louisiana's post-conviction relief, dated May 17, 1992).

Prior to his 1998 re-trial, Woodfox again timely moved to quash his second indictment. Again he had a sound basis for asserting that discrimination had tainted his grand jury. In presenting Woodfox's robust case of racially discriminatory foreperson appointments, trial counsel offered census data and registered voter demographics of the Parish. The State stipulated to this data. The West Feliciana Parish District Attorney proffered a list of black grand jury forepersons from 1980 onward, although he had originally compiled this list starting with 1976. The proffered list also wrongly identified two white forepersons as black. Even with the relevant time period thus truncated, plus manifest factual error, Woodfox's census data and voter registration figures still showed a highly significant racial disparity in appointments. The State elected not to present rebuttal, and the state courts unreasonably refused to require one.

It took another five and a half years for Woodfox's retrial to take place. At retrial, Woodfox and alibi witnesses testified as to his innocence. Notwithstanding that Woodfox had never had an opportunity to adequately cross-examine Hezekiah Brown, the prosecution presented Brown's 1973 testimony by having transcripts of his testimony read into the record. Trial counsel should have objected, but failed to do so. The State also improperly presented vouching testimony by the original trial prosecutor, John Sinquefield, who told jurors that Brown's 1973 testimony

was credible and that he was "proud of the way [Brown] testified."[29] Relying on this and other problematic evidence, the jury found guilt December 16, 1998.

Appellate and state post-conviction proceedings consumed another seven years. Initially, the 21st Judicial District Court summarily denied Woodfox post-conviction relief. However, the Louisiana First Circuit Court of Appeal found Woodfox's claims "if established, would entitle him to relief," and instructed the trial court to order the State to answer Woodfox's petition. The State answered, and the post-conviction court again denied relief, this time adopting the State's response as reasons.

The First Circuit denied review without reasons. The Louisiana Supreme Court also denied review, again without reasons.[30]

3. Federal Proceedings Regarding the Grant of Habeas Relief

Federal habeas review in this case has consumed nearly ten years and remains pending.[31] Apart from his due process claim of grand jury discrimination, the amended petition includes multiple claims of ineffective assistance of counsel,[32] asserts a *Brady* violation,[33] and pleads *Schlup* innocence.[34]

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[29] SR 1829-1837.

[30] *State v. Woodfox*, 2005-0551 (La. App. 1st Cir. Aug. 8. 2005), *writ denied*, 2005-2476, 937 So. 2d 850 (La. Sept. 29, 2006).

[31] ROA.V1part1:39-46; ROA.V1part2:232-237; ROA.V1part3:324-411 (Memorandum in Support of Amended Petition, 02/15/07).

[32] ROA.V1part3:368-400.

[33] *Id.* at 400-403.

[34] *Id.* at 355-367.

In 2008, the district court granted habeas relief, finding that Woodfox's trial counsel was seriously deficient for, *inter alia*, failing to object to the admission of Hezekiah Brown's testimony, and to the State's improper vouching.[35] Looking at the deficient performance cumulatively, the district court concluded "there is a reasonable probability that at least one juror would have had a reasonable doubt respecting Woodfox's guilt, such that confidence in the outcome of his 1998 trial is undermined."[36]

When a sharply-divided panel of this Court vacated this relief, it expressly acknowledged the undeniable flaws of the 1998 retrial. The retrial, this Court found, was marred by "the problems that arise when a defendant is re-tried decades after an initial conviction."[37] It was "not a perfect trial."[38] Yet, as to the specific claims then under review, the majority felt constrained by the deferential doctrines of exhaustion and the AEDPA:

> Nevertheless we must keep in mind only the clear legal issues presented by the case and the very deferential scope of review of a state habeas court's decision, which limits our review to reasonableness, not whether we think the state court decision was merely wrong or erroneous.[39]

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[35] ROA.V2:575-643 (Magistrate's Report, 06/10/08); *see also* ROA.V2:700-701 (Ruling, 07/08/08).
[36] ROA.V2:636.
[37] *Woodfox v. Cain*, 609 F.3d 774, 782 (5th Cir. 2010).
[38] *Id.* at 817.
[39] *Id*. *See also id.* at 801 (explaining the "'doubly deferential'" standard of review).

Judge Southwick dissented. In his view, the AEDPA and exhaustion did not require deference given the particulars of Woodfox's case, and he voted to affirm the district court based on trial counsel's failure to object to the admission of Brown's testimony. "Prejudice from that failure is clear," Judge Southwick concluded, "as excluding the testimony would have likely ended the case."[40] The panel remanded "for the resolution of the only remaining issue related to the selection of the grand jury foreperson."[41]

On remand, the district court allowed the State an opportunity to brief arguments based on the AEDPA—arguments that had never previously been raised—and held oral argument exclusively on that issue.[42] The district court concluded that, as to Woodfox's grand jury discrimination claim, AEDPA deference was not warranted because the state court had unreasonably applied controlling Supreme Court law.[43] No claim had ever been raised that exhaustion posed a bar to federal court review. After a three-day evidentiary hearing and extensive post-hearing briefing, the district court again ordered habeas relief.

[40] *Id.* at 831.
[41] *Id.* at 788, n.1.
[42] *See* ROA.V8part2:1760-1783; ROA.V8part2:1784-1801 and ROA.V8part3:1802-1868; ROA.V8part3:1869; ROA.Trans2:5858-5880.
[43] ROA.V34:5280-5313.

This time, on appeal, a unanimous panel of this Court affirmed.[44] The panel agreed that no AEDPA deference was due as to Woodfox's grand jury discrimination claim. With no member of the bench requesting polling, this Court denied the State's petition for rehearing *en banc*.[45] Mr. Woodfox's case was remanded "for further proceedings consistent with this opinion."[46]

4. Proceedings Regarding the Scope of the Writ

On remand, Woodfox moved the district court for release on bail pursuant to Federal Rule of Appellate Procedure 23(c). Extensive briefing was submitted and a thorough evidentiary hearing was held.

With the question of availability of relief resolved, the district court also turned to defining the scope of remedy. On March 19, 2015, while Woodfox's motion for Rule 23 release pended, the district court ordered the parties to submit briefing "on the possibility of this Court issuing a writ barring retrial, also referred to as an unconditional writ."[47]

Briefing on the issue of the scope of the writ was comprehensive and fully submitted April 10, 2015.[48] The district court deliberated for nearly two months. On June 8, 2015, the district court ruled that, given the exceptional circumstances

[44] *Woodfox v. Cain*, 772 F.3d 358 (5th Cir. 2014).
[45] *Woodfox v. Cain*, No. 13-30266 (5th Cir. 2015 Feb. 3. 2015) (Doc. No. 00512925112 at 37).
[46] *Woodfox*, 772 F.3d at 383.
[47] ROA.V35:5622-5623.
[48] *Id.* at 5642-5690; 5695-5741.

of this case, the dictates of "law and justice" require issuance of an unconditional writ.[49]

II. STATEMENT OF FACTS

Tellingly, the State's opening brief on appeal omits any Statement of Facts. That is because the district court's factual findings of exceptional circumstances are uncontroverted by the record in this case.

A. The Exceptional Circumstanced Relied Upon

1. Age and Poor Health

There is no dispute that, at age 68, Woodfox is elderly and suffers from serious health ailments. His long, documented history of grave medical issues includes high blood pressure, diabetes and kidney disease. He suffers from Hepatitis C, a liver ailment that puts him at high risk for the development of liver cancer—the same disease that killed Woodfox's co-defendant, Herman Wallace, just three days after Wallace's conviction had been vacated.

2. Duration of Solitary Confinement in the Absence of a Valid Conviction

The State stresses that Woodfox's original sentences for armed robbery and escape were valid, such that at least up until June 14, 1996, his sentence was fairly served.[50] The State does not dispute that since 1996—in other words, for nearly

[49] Blue brief at 26.
[50] Blue brief at 26.

twenty years now—Woodfox has been incarcerated in the absence of a valid conviction.

Contrary to the State's suggestion, the district court did not get this fact wrong. The court expressly recognized the portion of Woodfox's incarceration long ago served pursuant to valid convictions.[51] The district court, however, did not solely rely on the fact that, since 1996, Woodfox has been incarcerated in the absence of a valid conviction.

The district court further found that Woodfox has been held in solitary confinement for forty years without a valid conviction. Indeed, it is uncontroverted that Woodfox was placed in 23-hour a day lockdown confinement in 1972—into the very same cells Hezekiah Brown feared—pending the investigation of the Miller murder.[52] Almost without deviation, Louisiana has only ever cited "the nature of the original reason for lockdown" for why prison officials have continued this lockdown confinement every 90 days for forty years. Last year, in collateral civil rights litigation, this Court squarely addressed the exceptional nature of Woodfox's incarceration:

> [C]onsidering the duration of the solitary confinement, the severity of the restrictions, and their effectively indefinite nature, it is clear that

[51] *See* ROA.V35:5755.

[52] *See, e.g.*, *Wilkerson v. Goodwin*, 774 F.3d 845, 849 (5th Cir. 2014) (explaining that Woodfox and his co-defendant were originally placed in closed cell restriction ("CCR") "in 1972 after they were suspected of the murder of corrections officer Brent Miller, a crime for which they were subsequently convicted.").

> Woodfox's continued detention in [Closed Cell Restriction] constitutes an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life' according to any possible baseline we could consider.[53]

That conclusion is consistent with long-settled findings of the district court, which noted back in 2005 that the length of Woodfox's confinement under extended lockdown conditions is "so far beyond the pale that this Court has not found anything even remotely comparable in the annals of American jurisprudence."[54]

3. Unavailable Witnesses

There is also no dispute that all of the most important witnesses in the underlying criminal case are now deceased.

Even in 2008, when this Court reversed the original habeas relief granted below, the majority was disturbed by how a 25-year lapse had impacted the integrity of the case put before Woodfox's 1998 jury. As this Court found *sua sponte*:

> [C]ertainly the jury's task was complicated by the great lapse in time between the crime and the trial, which resulted in the deaths of many witnesses, the loss of memory, and the loss of physical evidence.[55]

Today, of the 15 witnesses who testified for the State in 1998, the record in this case confirms that at least nine are deceased.[56] The tally includes Hezekiah

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[53] *See Wilkerson v. Stalder*, 329 F.3d 431, 433 (5th Cir. 2003).

[54] *See Wilkerson v. Stalder*, No. 00-304 (M.D. La. Feb. 1, 2005) (Doc. No. 105 at 21); and *see id.* (Doc. No. 116) (adopting Report without modification) (Tyson, J.).

[55] *Woodfox*, 609 F.3d at 817.

[56] ROA.V35:5658-5659 (On the record before this Court, confirmed deceased State witnesses

Brown—the linchpin and sole purported eyewitness whose testimony the State has described as "so critical to the case that without it there would probably be no case," as well as inmate witness Paul Fobb.[57] Brown and Fobb had died prior to 1998 but others have passed on since, including inmate witness Joseph Richey (2013) and witnesses integral to the investigation, such as correctional officer Gerald Rheams (2012), Sheriff Bill Daniels (2013), Warden Lloyd Hoyle (2012), Warden C. Murray Henderson (2004), and coroner Dr. Alfred R. Gould (2012).[58]

In addition, of the 13 witnesses called in Woodfox's defense, a total of six are confirmed deceased.[59] That includes crucial alibi witness Everett Jackson, inmate legal counsel who testified to being present with Woodfox throughout the period of time when the crime is known to have happened.[60] Likewise, it includes alibi witness Herbert "Fess" Williams. Williams directly contradicted inmate

include Hezekiah Brown, Paul Fobb, Carl Cobb, Joseph Richey, Dr. Alfred Gould, Sheriff Daniels, correctional officer Gerald Rheams); *see also* ROA.V35:5677-5678, (Affidavit of Investigation Jennifer Vitry, dated March 30, 2015, confirming seven deceased witnesses whose deaths post-date 1998, and finding two "most likely deceased" witnesses).

Moreover, another witness has subsequently been confirmed deceased, inmate witness Leonard "Specs" Turner.

[57] *Woodfox v. Cain*, No. 68933 (21st JDC La. Sept. 30, 2004), (State's Response to Application for Post-Conviction Relief at 9-10).

[58] ROA.V35:5677-5678. Notably, while the State avers that "nothing has changed" in this case, since the district court issued a (now vacated) conditional writ, *see* blue brief at 12, that is plainly belied by the well over 2,000 additional days Woodfox has spent in solitary confinement; his aging and even more serious infirmities; and by the a slew of additional witnesses who have died.

[59] ROA.V35:5659 (confirmed deceased defense witnesses include Herbert "Fess" Williams, Everett Jackson, Steven Ledell, Robert Colle, Warden Henderson and Warden Hoyle. Alibi witness Clarence Sullivan is most likely deceased).

[60] SR 2068-2079.

witness Joseph Richey, who claimed he saw Woodfox run from the dorm where the crime occurred and collide with Williams's trash cart the morning of the murder.[61] Williams—the trash cart operator—testified that Woodfox never ran into him that morning.[62] And it includes Warden Henderson and Warden Hoyle. Each had participated in the investigation and was able to testify as to how inmate witnesses had been induced to testify against Woodfox. No jury will ever be able to see any of these witnesses testify live to make the crucial credibility determinations required for the State's case, which relies exclusively on witness accounts.

4. Troubling Misconduct by the State

In granting an absolute writ, the district court cited the undeniable record of "troubling misconduct" in this case. First, the district court explicitly referenced the same misconduct this Court characterized as "troubling" when it reviewed the record in 2008: the testimony of prosecutor Sinquefield, who vouched for key inmate witness Brown.[63]

Second, the district court cited the State's unlawful conduct in transferring Woodfox into pre-trial detention in contravention of Federal Rule of Appellate Procedure 23(a). Rule 23(a) mandates that habeas petitioners cannot be transferred

[61] *Id*. at 2271-2281.
[62] *Id.* at 2281.
[63] ROA.V35:5772 (citing to *Woodfox*, 609 F.3d 774, 805 (5th Cir. 2010).

without first applying to the habeas court for permission.[64] Even though Woodfox's habeas case remains under review, on the eve of the district court hearing regarding release on bail, the State unilaterally transferred Woodfox into a parish pretrial facility in an effort to evade the federal court's review. "The State's tactics in attempting to moot the issues gives this Court little confidence that any future actions in this matter will be handled fairly."[65] Indeed, Woodfox has already been prejudiced by being forced to defend himself in every forum of the federal courts—the Supreme Court, this Court, and the district court—while also defending himself in state court.

The record below is replete with additional examples of the State's out-of-bounds conduct.[66] In 2008, in an effort to resist the district court's original Rule 23(c) release order on appeal, the State removed Woodfox from dormitory housing where he had lived peacefully for 8 months, placing him back into lockdown on the pretext of three-way phone call disciplinary violations.[67] The move allowed the State to represent to this Court that Woodfox was so dangerous he needed to be kept in the cells.[68] The State also wrongly claimed "investigative privilege" in an attempt to resist disclosure of e-mail between the attorney

[64] *See* Fed. R. App. 23(a); *see also Griffin v. Ebbert*, 751 F.3d 288, 290, n.1 (5th Cir. 2014).
[65] ROA.V35:5772.
[66] *See generally* ROA.V35:5672-5673.
[67] *See* ROA.V34:5328-5330; and *see id.* at 5391-5410.
[68] *Compare* ROA.V34:5392-5393 *with* ROA.V34:5395.

general's office and prison officials which showed that the 2008 write up sentencing Woodfox back into solitary confinement indefinitely was pretextual.[69] Subsequently, in this case, in a move of pure gamesmanship, the State filed a meritless motion to disqualify counsel. The State speciously claimed that counsel was impermissibly conflicted by habeas representation of Woodfox's co-defendant Wallace who had similar claims.[70] Mr. Woodfox had to move the Court to order the State to fulfill discovery obligations.[71] The 2013 hearing on Woodfox's grand jury discrimination claim also revealed that the West Feliciana Parish District Attorney had wrongly identified two forepersons as black even though they were, in fact, white.[72] Even recently, in this very appeal, the State exhibited the sort of tactics in which they have systematically engaged. After representing consistently below that the Louisiana trial court can properly address the issue of bail, the State filed an emergency motion in this Court seeking to enjoin the state bail hearing as soon as it was calendared.

These additional examples of troubling conduct by the State were not explicitly discussed in the district court's ruling on the scope of the writ. However,

[69] ROA.V34:5412-5432 (Magistrate ordering disclosure because the emails showed that prison officials listened to a year's worth of Woodfox's recorded phone calls, including legal calls, to find, quoting the email, "'sufficient justification for stiff disciplinary action.'")
[70] ROA.V39:3427-3446.
[71] ROA.V29:3332-3360.
[72] ROA.Trans3:6063-6065.

they further demonstrate that there can be "little confidence that any future actions in this matter will be handled fairly."[73]

5. The State's "Third Bite"

Finally, there is no dispute that, in this case, the State has already had a second chance to provide Woodfox a constitutionally adequate trial process and yet failed to do so.[74]

B. Other Facts Considered

In addition to the foregoing, the district court weighed two additional factual circumstances in granting an absolute writ. First, the district court considered that, when the State had a second chance to correct discrimination in the grand jury, it again committed a due process violation at the grand jury stage. This fact left the district court with, "reason to question whether a third indictment would not suffer a similar defect."[75] Evidence already suggests the district court's concern is not far-fetched. The foreperson of the 2015 grand jury has apparently hired an attorney and written the state court judge, the federal habeas judge, and prosecutors alleging issues with how the grand jury proceedings were handled. Her letter has not yet been disclosed to Woodfox's counsel.[76]

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[73] ROA.V35:5772.
[74] *Id.* at 5776.
[75] ROA.V35:5775.
[76] *State v. Woodfox*, No. 15-WFLN-088 (Defendant's Motion for Access to Letters from Grand Jury Foreperson Concerning Grand Jury Irregularities) (20th J.D.C. La. July 24, 2015).

Second, the district court considered that the State's case against Woodfox has always been weak, and noted that the record in this case includes evidence of factual innocence.[77] The State cavalierly describes the district court's discussion of the strength of the State's case and evidence of innocence as "hollow" because Woodfox has twice been convicted by juries.[78] But while they remain rare, our nation is no stranger to cases where juries—especially when presented a case lacking constitutional safeguards, or perhaps, as this Court put it, presented a task "complicated by the great lapse in time between the crime and the trial"[79]—have made mistakes.[80]

Implicitly recognizing that jury verdicts are only as reliable as the integrity of a prosecution, the State qualifies that "apart from the indictments" the juries at Woodfox's trials had no "*reversible* constitutional infirmities."[81] Under AEDPA and exhaustion schemes, a trial free of "*reversible* constitutional infirmity" is not the same as a trial free of "constitutional infirmity." Moreover, it remains the fact that a failure to guard grand juries against the taint of racial discrimination is no

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[77] ROA.V35:5772-5773, 5779.

[78] Blue brief at 33.

[79] *Woodfox*, 609 F.3d at 817.

[80] *See, e.g.*, Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments* 38 U. CHI. L. REV. 142 (1970-1971); E.F. Connors, *Convicted by Juries, Exonerated by Science, Case Studies in the Use of DNA Evidence to Establish Innocence After Trials*, U.S. Department of Justice Office of Justice Programs; Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2006-2007). S*ee also Rose*, 443 U.S. at 584 (Powell, J., concurring).

[81] Blue brief at 33.

inconsequential thing.[82] That failure, present in both of Woodfox's trials, casts "doubt [ ] over the fairness of all subsequent decisions."[83]

The past forty years have proven that doubt well-founded. The state post-conviction court was right in 1992 to announce that it had no confidence in Woodfox's first conviction. We know, in retrospect, that the State had wrongfully suppressed evidence of the extraordinary favors bestowed upon their key and only eyewitness at that trial. Further, the State actively solicited false testimony that he wasn't promised anything except to be protected from retaliation.

Likewise, at Woodfox's second trial, because trial counsel inexplicably failed to object, the *Giglio* violation—involving the State's solicitation of false testimony—was repeated when Brown's testimony was read into the record. Moreover, even though Brown was the key (and only) eyewitness against him, Woodfox could not fully impeach Brown's credibility by confronting him with the finally disclosed records showing he was promised, and received, *inter alia*, a weekly delivery of a carton of cigarettes, a pardon and freedom. Further, significant aspects of the State's shaky case went unchallenged by trial counsel's deficient performance. The infirmity of Woodfox's 1993 indictment was not a

[82] *Rideau v. Whitley*, 237 F.3d 472, 489 (5th Cir. 2000) ("[I]ntentional discrimination in the selection of grand jurors is a grave constitutional trespass…") (quoting *Vasquez v. Hillery*, 474 US 254, 262 (1986)). *See also Vasquez*, 474 US at 264 ("The overwidening imperative to eliminate this systemic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal.").

[83] *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998).

mere technicality. It led to 42 years of wrongful solitary confinement for an actually innocent man.[84]

III. SUMMARY OF THE ARGUMENT

The remedy at issue here—the barring of a third trial following the second reversal of a conviction against Woodfox—is warranted by the extraordinary procedural posture and record in this case. The district court correctly concluded that exceptional circumstances exist, including: (1) Woodfox's age and poor health; (2) unavailable witnesses; (3) troubling misconduct by the State; (4) the duration of Woodfox's wrongful confinement in 23-hour a day lockdown; and (5) the State's repeated failure to provide a fair prosecution.[85]

The district court also correctly recognized that the federal habeas corpus statute, 28 U.S.C. § 2243, confers discretion to define the scope of the writ in this case "as law and justice require."[86] It further correctly recognized—as every circuit to consider the issue has held—that the statute authorizes a district court to grant unconditional writs in exceptional circumstances.

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[84] Evidence of innocence pleaded with Woodfox's petition includes, *inter alia*; (1) a statement by inmate witness Leonard "Specs" Turner maintaining that Woodfox was *not* involved in Miller's murder; (2) statements from two women Chester Jackson (who pleaded to manslaughter for the same crime) spoke with upon his release from prison about Woodfox's actual innocence; (3) a reliable scientific review of the bloody crime scene print, exculpating Woodfox; (4) evidence which severely undermines the credibility of three State prisoner witnesses; and (5) a polygraph exam that indicates Woodfox's denial of involvement in the crime is truthful. ROA.V1part3:355-367.

[85] ROA.V35:5779.

[86] *Id.* at 5757.

The district court's consideration of "the parties' arguments, the jurisprudence, and the factual and procedural history of this case," and ultimate decision to "exercise[] its discretion in finding that there are exceptional circumstances, and the only just remedy is an unconditional writ of habeas corpus," was without error, much less an abuse of discretion.

IV. ARGUMENT

A. Standard of Review

Congress's mandate under 28 U.S.C. § 2243 has been interpreted by the Supreme Court "as vesting a federal court with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus.*"[87]

Appreciating the wide latitude § 2243 affords, this Court reviews the remedy fashioned by the habeas court for abuse of discretion.[88] A district court "abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence."[89] The abuse of discretion standard of review is "highly deferential."[90] As this Court has explained, "[g]enerally, an

[87] *Hilton v. Braunskill*, 480 U.S. 770, 775 (1987) (internal quotations and citations omitted).
[88] *Jones v. Cain*, 600 F.3d 527, 541 (2010) (citing *Hilton*, 480 U.S. at 775).
[89] *U.S. v. Sosa*, 513 F.3d 194, 200 (5th Cir. 2008).
[90] *Gall v. U.S.*, 552 U.S. 38, 60 (2007) (Scalia, J., concurring).

abuse of discretion only occurs where *no reasonable person* could take the view adopted by the trial Court."[91]

The district court's findings as to factual circumstances—which go to the heart of whether an absolute writ is warranted here—are not only subject to the most deferential clear error review; they are also patently correct conclusions in this case.[92]

B. The District Court Correctly Determined that an Unconditional Writ Serves the Requirements of "Law and Justice"

1. *The Power to Issue an Absolute Writ is Within the District Court's Broad Discretion.*

The State contends that the district court erred as a matter of law because: (1) a rule exists that absolute writs may never be issued where the underlying violation can theoretically be remedied by a new prosecution; (2) the *Younger* and exhaustion doctrines preclude the issuance of an unconditional writ; or (3) the operation of Federal Rule of Appellate Procedure 23(d) precludes such an issuance. These arguments are legally unsupportable, and cannot be squared with the statutory basis for the district court's broad discretion to fashion a habeas remedy and dispose of petitions "as law and justice require."[93]

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[91] *Whitehead v. Food Max of Mississippi Inc.*, 332 F.3d 796, 803 (5th Cir. 2003) (internal quotations and citation omitted) (emphasis in original).

[92] *Ladd v. Cockrell*, 311 F.3d 349, 356 (5th Cir. 2002).

[93] 28 U.S.C. § 2243; *see also Hilton*, 481 U.S. at 775.

a. Congress's Mandate to Habeas Courts.

Since 1867, Congress has instructed that, where habeas relief is available, the district courts and the Supreme Court must fashion the remedy "as law and justice require."[94] The Supreme Court interprets that mandate expansively.[95] Indeed, it has long been the Supreme Court's view that the federal habeas statute has been, "of the most comprehensive character," and the Court instructs that it is "impossible to widen" habeas jurisdiction.[96] The power to "direct and control the form of judgment" is the "largest power."[97]

In 1996, Congress revisited Chapter 153 of Title 28 of the U.S. Code—the statutory scheme governing federal habeas corpus cases—with the passage of the watershed Antiterrorism and Effective Death Penalty Act (the "AEDPA"). The AEDPA significantly retooled key sections of the habeas corpus statute, dramatically changing the availability of and standards for granting relief.[98] However, Congress placed no new constraints on potential remedies. Federal courts' traditionally broad discretion to define the scope of remedy once relief is

[94] Ch. 28, 14 Stat. 385 (1867).

[95] *See* 2-3 Federal Habeas Corpus Practice and Procedure § 33.4 ("[I]t is clear that Congress intended the quoted catch-all provision of section 2243 ["dispose of the matter as law and justice require"] to give those courts broad power to redress unconstitutional incarcerations in a fair and equitable manner.")

[96] *Ex Parte McCardle*, 73 U.S. 318, 325-26 (1868).

[97] *Hilton*, 481 U.S. at 775.

[98] *See, e.g., Felker v. Turpin*, 518 U.S. 651, 654 (1996) (the AEDPA "works substantial changes to" habeas laws); *see also In re Vial*, 115 F.3d 1192, 1194 (4th Cir. 1997) (The "AEDPA effected a number of substantial changes regarding the *availability of* federal postconviction relief to individuals convicted of crimes in federal and state courts.")

deemed available remains unchanged by the AEDPA. The Supreme Court "has interpreted that congressional silence—along with the statute's command to dispose of habeas petitions 'as law and justice require,' 28 U.S.C. § 2243—as an authorization to adjust the scope of the writ in accordance with equitable and prudential concerns."[99]

At one point in our history, nearly all writs were absolute. Federal courts understood habeas power to require the unconditional release of any person found to be unlawfully confined.[100] However, under modern judicial practice, before and after the AEDPA, courts are not forced to choose between "ordering an absolute discharge of the prisoner and denying [the petitioner] all relief."[101] Instead, balancing comity and the states' interest in procedural consistency against petitioners' interest in release from unlawful restraint, courts today issue unconditional writs only if exceptional circumstances support such a remedy. This modern practice is fully consistent with *Younger*, which provides that federal courts should not interfere with pending state criminal prosecutions in the absence of "very special" or "extraordinary" circumstances. [102]

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[99] *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008); *accord Schlup v. Delo*, 513 U.S. 298, 319 (1995) (The Court "has adhered to the principle that habeas corpus is, at its core, and equitable remedy.")

[100] *See In re Medley*, 134 U.S. 160, 173 (1890).

[101] *Dowd v. U.S. ex rel. Cook*, 340 U.S. 206, 209-10 (1951).

[102] *Younger v. Harris*, 401 U.S. 37, 45 (1971).

Thus, the scope of remedy "generally"[103] or "typically"[104] accorded a successful petition is a conditional order of release. Such orders allow the state time to correct the underlying constitutional violation at a retrial, prior to requiring release.[105] Put differently, the order of release is conditioned on the state's failure to take prompt measures to correct the underlying constitutional violation.[106] In this way, conditional writs are "essentially accommodations accorded to the state."[107] That is because "[c]onditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one, and the consequence when they fail to do so is always release."[108]

However, given the reach of § 2243 in this Circuit and nationally, it remains squarely within the scope of a district court's discretion to issue an absolute writ if "law and justice" so require. This power is consistent with well-settled doctrine that allows habeas courts to remedy the continuing collateral consequences of a wrongful conviction, even beyond release of the physical body.[109] Indeed, in *Jones*

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[103] *Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir. 2006). *See also Jones v. Cain*, 600 F.3d 527, 542 (2010) ("The state is *generally* free to re-arrest and retry the defendant on the original indictment.").

[104] *Herrera v. Collins*, 506 U.S. 390, 403 (1993).

[105] *See, e.g.*, *Mahler v. Eby*, 264 U.S. 32, 46 (1924).

[106] *Satterlee*, 453 F.3d at 369 ("[t]he conditional nature of the order provides the state with a window of time within which it might cure the error.").

[107] *Id.*

[108] *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring)

[109] *See Carafas v. LaValle*e, 391 U.S. 234, 239 (1968) (Section 2243, "[D]oes not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted.") (internal citation omitted); *Preiser v. Rodriguez*,

v. Cain, this Court explicitly recognized that "a habeas court can end a state criminal proceeding as part of the habeas remedy."[110] *Jones* relies, *inter alia*, on *Capps v. Sullivan*, 13 F.3d 350, 352 (10th Cir. 1993), in which the Tenth Circuit very plainly explained: "[I]t is clear [that the notion] that the district court lacked the authority to bar the retrial is meritless; the district court had the power to grant any form of relief necessary, including permanent discharge."

Contrary to the State's suggestion, the circuits that have addressed absolute writs conclude unanimously that district courts may bar reprosecution in exceptional circumstances.[111] The State represents that "other federal courts of appeal stress that this extreme remedy is generally (or in some cases, always) improper when the constitutional error requiring the vacation of the conviction can be remedied by a new trial."[112] That is, however, patently false. No circuit has ever

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411 U.S. 475, 487 (1973) ("[R]ecent cases have established that habeas corpus relief is not limited to immediate release from illegal custody, but that the writ is available as well to attack future confinement and obtain future releases[.]"); *Zalawadia v. Ashcroft*, 371 F.3d 292, 300 (5th Cir. 2004) (habeas relief is "not confined to" discharge of the petitioner from current physical custody, and that, "its mandate has become broader") (citing *Preiser* and *Carafas*); *Gall v. Scroggy*, 603 F.3d 346, 352 (6th Cir. 2010) ("If the petition is well taken, then the necessary remedy is relief from both the direct and collateral consequences of the unconstitutional conviction."); *Gentry v. Deuth*, 456 F.3d 687, 695 (6th Cir. 2006) ("[A] successful habeas challenge to an unconstitutional conviction necessitates relief not only from any present incarceration arising from that conviction, but also from any collateral consequences thereof.").

[110] *Jones*, 600 F.3d at 542.

[111] *See, e.g., Foster v. Lockhart*, 9 F.3d 722, 727 (8th Cir. 1993) ("A district court has the authority to preclude a state from retrying a successful habeas petitioner when the court deems that remedy appropriate."); *Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 (2006) ("[A] habeas court may forbid[ ] reprosecution.") (internal quotations and citations omitted).

[112] Blue brief at 16.

held categorically that an unconditional writ barring retrial may issue only in cases involving a type of constitutional error that can never be remedied.

In wrongly claiming the opposite, the State cites *Foster*, *DiSimone*, *Wolfe*, and *Douglas*. However, each of those cases recognizes the writ's availability in exceptional circumstances other than the irremediable error context.

The *Foster* court held that "[a] district court has authority to preclude a state from retrying a successful habeas petitioner when the court deems that remedy appropriate," and explained that a situation where "retrial itself would violate the petitioner's constitutional rights" was *one* context—not the only context—where such a remedy is available.[113]

In *DiSimone*, the Second Circuit similarly acknowledged that "in special circumstances federal courts may bar retrial of a successful habeas corpus petitioner without his having first sought protection from retrial in the state courts," and instructs that, in "the most extreme circumstances," this remedy remains available to a petitioner outside the irremediable constitutional error context.[114]

The *Wolfe* court could not have been more clear that its decision: "d[id] not exclude the possibility that a federal habeas court," in an "extremely rare and

[113] *Foster v. Lockhart*, 9 F.3d 722, 727 (8th Cir. 1993).
[114] *DiSimone v. Phillips*, 518 F.3d 124, 127 (2d Cir. 2008).

unique circumstance," could "proscribe a state court retrial even though the constitutional violation could be thereby remedied."[115]

As to the State's final case in support—*Douglas*—the State egregiously takes out of context a statement from the Tenth Circuit's opinion. The State, adding its own emphasis, quotes from *Douglas*: "But where nothing in the record suggests that the constitutional violation on which habeas corpus relief is predicated **could not be redressed** by holding a retrial, **granting an unconditional writ constitutes an abuse of discretion**." [116]

However, the State fails to disclose, much less explain, the passage found two sentences prior:

> Barring a new trial may be necessary, for instance, 'when the error forming the basis for the relief cannot be corrected in further proceedings,' and it may be a permissible form of relief when 'other exceptional circumstances exist such that the holding of a new trial would be unjust.'[117]

The State's misrepresentation that *Douglas* strictly limits unconditional writs "always" to cases involving irremediable constitutional error is especially disingenuous because *Capps*—which expressly recognized that exceptional circumstances outside the irremediable error context may justify such a writ—

[115] *Wolfe v. Clarke*, 718 F.3d 277, 290–91 (4th Cir. 2013) (further observing that conditional writs are the proper disposition *generally*, "in the absence of extraordinary circumstance.").
[116] *Douglas v. Workman*, 560 F.3d 1156, 1176 (10th Cir. 2009).
[117] *Id.* (quoting *Capps v. Sullivan*, 13 F.3d 350, 352–53 (10th Cir. 1993)) (emphasis added).

remains good law in the Tenth Circuit.[118] Indeed, the Tenth Circuit quotes *Capps* approvingly immediately before the sentence that the State presented, entirely out of context, in its opening brief. Moreover, *Capps* has been cited approvingly by this Court.[119]

The State thus misrepresents the law when it claims that discretion may only be exercised to issue unconditional writs in cases involving irremediable constitutional error. Every federal court of appeal that has examined the issue has concluded that an absolute writ is available in exceptional circumstances, regardless of the nature of the underlying violation.[120] The district court correctly concluded the same. Relying on § 2243 and *Jones*, the district court properly determined that in this case, as in any other where habeas relief is available, it "'possess[ed] the power to grant *any* form of relief necessary to satisfy the requirement of justice."[121]

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[118] *See Capps*, 13 F.3d at 353.

[119] *Jones*, 600 F.3d at 542.

[120] *See, e.g.*, *D'Ambrosio v. Bagley*, 688 F. Supp. 2d 709, 721 n.13 (N.D. Ohio 2010) ("[E]very circuit to consider the issue has held that, in extraordinary circumstances, a district court may bar reprosecution in lieu of issuing a conditional writ of habeas corpus."); *Wilson v. Beard*, No. 02-374, 2012 WL 1382447, at *12 (E.D. Penn. Apr. 20, 2012) ("The Circuit Courts of Appeal that have considered the issue all agree that a habeas court may bar a petitioner's retrial in exceptional circumstances.").

[121] ROA.V35:5757.

b. Absolute Writs May Remedy Due Process Violations Where "Other Exceptional Circumstances" Exist

Jones did not consider a classic absolute writ barring retrial. *Jones* involved a district court's issuance of a conditional writ, which provided at the outset that if the State failed to meet the conditions of the writ (namely, taking longer than 120 days to retry the petitioner), then the state prosecution would end. Concluding that the district court had abused its discretion, this Court assiduously took note of the district court's authority under § 2243 to fashion any remedy required by "law and justice." However, as this Court explained, law and justice will only require a permanent bar to retrial under "special" or "extraordinary" circumstances.

This Court elaborated that such circumstances will fall into one of two alternative camps.[122] First, and most obviously, extraordinary circumstances will exist where there is an underlying constitutional violation which "cannot be remedied by another trial[.]"[123] Second, and consistent with § 2243's rule that district courts may fashion a remedy required by "law and justice," this Court further recognized that an absolute writ may issue where "*other* exceptional circumstances [ ] exist such that the holding of a new trial must be unjust."[124] Finding that a retrial would not necessarily violate the petitioner's rights, and that, "additionally," no other special circumstances existed to justify an end to

[122] *Jones*, 600 F.3d at 452 (citation omitted).
[123] *Id*.
[124] *Id*.

reprosecution, this Court made clear that an absolute writ supported by either ground would have been well within the broad bounds of discretion legislatively conferred by § 2243.

In this case, the district court expressly found that other exceptional circumstances render the holding of a third trial unjust, even if the underlying constitutional violation (Woodfox's prosecution by a grand jury tainted by racial discrimination) could theoretically be remedied by another trial.[125]

The State argues, however, that either this second alternative ground for issuing an absolute writ is not operative law, or that because grand jury discrimination can conceivably be remedied by another trial, it is immaterial as a matter of law whether *other* exceptional circumstances exist that would render a retrial unjust.

The State claims that in granting Woodfox an unconditional writ, the district court "d[id] something that no other district court has ever done before, in any case, at any time, in the history of American jurisprudence: a federal habeas court has barred re-prosecution of a state conviction obtained through the discriminatory selection a of a [sic] grand jury foreperson."[126] That is technically true: an unconditional writ has not previously been granted in the specific context of grand jury foreperson racial discrimination. It is also utterly unsurprising: successful

[125] ROA.V35:5759, 5779.

[126] Blue brief, at 11 (internal quotations and citations omitted).

habeas corpus petitions are relatively rare, successful petitions based on grand jury foreperson racial discrimination are rarer still, and the additional "extraordinary circumstances" necessary to justify an unconditional writ are—by their very definition—*extraordinarily* rare. The very essence of the "*other* exceptional circumstances" test guarantees that any case where an absolute writ is warranted will be an outlier.

Further highlighting the exceedingly atypical nature of Woodfox's case, the State argues that "[a]n error concerning the selection of a grand juror is fundamentally different from other kinds of error affecting the fairness of the trial itself, because the Supreme Court in *Mitchell* connected the vacation of the conviction to the availability of retrial."[127] In fact, the Supreme Court in *Mitchell* does not at all address the circumstances under which a State retrial may be prohibited. Instead, *Mitchell* answers two questions, neither of which relate to whether unconditional writs are warranted where other exceptional circumstances exist. First, *Mitchell* addressed "whether claims of grand jury discrimination should be considered harmless error when raised, on direct review or in a habeas corpus proceeding, by a defendant who has been found guilty beyond a reasonable doubt by a properly constituted petit jury at a trial on the merits that was free from other constitutional error." Second, *Mitchell* examined "whether such claims

[127] *Id*. at 13.

should be cognizable any longer on federal habeas corpus in light of the decision in *Stone v. Powell*."[128] The Court answered both questions in the affirmative.

It is correct that, in discussing remedy, the Court presumed that reprosecution would be available. That is because, absent extraordinary circumstances, a chance to reprosecute *generally* will be granted to a State that has committed a constitutional violation. The Court did not consider the availability of an unconditional writ in extraordinary circumstances. Nor could it. The facts of *Mitchell* would not have supported such a claim, and no party alleged otherwise. Here, however, no less than five independent circumstances—and two additional, non-controlling considerations—render this case exceptional, including that the State has, over the course of forty years, already been given the chance to correct error, as envisaged by *Mitchell*, and failed to do so.

The State's mischaracterization of *Mitchell* in argument that grand jury discrimination "does not render a defendant 'immune from prosecution,'" and does not "'bar altogether'" subsequent reindictment and reprosecution is thus beside the point.[129] Mr. Woodfox does not now claim, nor has he ever claimed, that the underlying constitutional violation in this case is what must bar reprosecution. His argument below and in this Court is that, whatever the basis for a reversal of the conviction against him, in light of the uncontroverted record which exists here—

[128] *Rose v. Mitchell*, 443 U.S. 545, 550–51 (1979).
[129] Blue brief at 9, 12. *See also Mitchell*, 443 U.S. at 558.

exceptional by any measure—there is no way, as a pragmatic matter, to provide Woodfox a fair, constitutionally adequate retrial. These extraordinary circumstances render a retrial unjust, including that he has been demonstrably prejudiced by over 40 years in solitary confinement, myriad unavailable witnesses, and that he is unlikely to outlive another trial and rounds of appellate and post-conviction review.

No authority cited by the State counters Woodfox's claims. *Wilson v. Sec'y Penn. Dep't of Corr*., 782 F.3d 110 (3d Cir. 2015), for example, does not support the proposition that any exceptional circumstances which might warrant an absolute writ "must be related to the constitutional violation forming the basis for relief."[130] In *Wilson*, the Third Circuit considered the district court's denial of the petitioner's motion seeking reconsideration of the issuance of a conditional writ.[131] No extraordinary circumstances were found by the district court in that case.[132] The petitioner had been sentenced to death after his second murder conviction in an unrelated crime.[133] The sole extraordinary circumstance *alleged* by the petitioner in support of reconsideration was that the state had delayed commencement of retrial for over five years—five years after a conditional writ had been issued to remedy the impropriety of his first conviction. The petitioner

[130] *Id*. at 22.
[131] *Wilson v. Sec'y Penn. Dep't of Corr*., 782 F.3d 110 (3d Cir. 2015).
[132] *Id*.
[133] *Id*.

claimed that, during the delay, his mental competency had deteriorated and he had discovered a new *Brady* violation.

However, because these were "new claims," arising after the district court issued the conditional writ in 2004, and unrelated to the underlying *Batson* claim, the district court found they constituted a speedy trial cause of action which required exhaustion. Alternatively, even if they did not need to be exhausted, the delay at issue did not "establish[ ] extraordinary circumstances."[134] The Third Circuit agreed.

Likewise, *U.S. v. Morrison*, 449 U.S. 361 (1981), did not contemplate the *other* exceptional circumstances doctrine at issue here. In *Morrison*, on direct appeal, the Third Circuit dismissed an underlying indictment with prejudice because of a Sixth Amendment violation. The Supreme Court reversed, holding that Sixth Amendment violations are subject to harmless error review—unlike the underlying claim in Woodfox's case. Where the underlying violation is subject to a harmless error review, *Morrison* concludes such that there are no grounds to dismiss the underlying indictment in such cases unless a petitioner has demonstrated "demonstrable prejudice, or substantial threat thereof."[135]

Here, in contrast to *Wilson*, the district court issued an absolute writ upon finding exceptional circumstances—including demonstrable prejudice and a

[134] *Id.* at 110, 113-114.
[135] *U.S. v. Morrison*, 449 U.S. 361, 365 (1981).

substantial threat thereof). Similarly, in contrast to *Morrison*, and consistent with the instruction in *Mitchell* that a reversal for grand jury discrimination does not preclude reprosecution, the district court did not issue an absolute writ because of the underlying violation here. The district court unambiguously explained that, while *Mitchell* error can in theory be corrected by a reprosecution, here there are other extraordinary circumstances such that a reprosecution cannot fairly proceed. As a result, Woodfox faces prejudice which "can in no way be vitiated today," such that a third trial "would be unjust."[136]

These circumstances remain no matter the nature of the underlying constitutional violation, and the district court acted within the discretion afforded by § 2243 in considering them. Any finding to the contrary would require conflating "extraordinary circumstances where the underlying violation can never be remedied by reprosecution" with "extraordinary circumstances that otherwise render a retrial unjust," even though these necessarily present two distinct grounds for issuing an absolute writ.

There exists an additional disturbing irony in the State's otherwise unremarkable observation that the remedy fashioned by the district court in this case constitutes "something that no other district court has ever done before, in any

[136] ROA.V35:5771.

case, at any time, in the history of American jurisprudence."[137] That is, whereas the uniqueness of Mr. Woodfox's circumstances helps prove his case, it is the State which asks this Court to do something that—despite numerous opportunities to do so—"no [court] has ever done before, in any case, at any time, in the history of American jurisprudence."[138] Specifically, Louisiana asks this Court to categorically bar application of the exceptional circumstances doctrine for an entire category of habeas cases.[139] That request is as unsupportable as it is unprecedented. No court has ever issued so sweeping a declaration. Nor would it be consistent with the mandate that all cases must be remedied habeas as "law and justice require" to announce a new categorical rule that "*other* exceptional circumstances" could never exist in cases involving one certain constitutional violation.

The State has appreciated as much in the past, even if it does not today. Acknowledging the plain language of *Jones*, the State now refers to the recognition of the "*other* exceptional circumstances" doctrine as mere *dictum*, suggesting it is not binding in the instant case.[140] Of course, *Jones* itself relied on § 2243 and *Hilton*, both of which unquestionably govern here. However, even more telling, the State actually took a very different position in *Jones*. In the State's original brief on appeal, the State urged that the district court's conditional writ exceeded

[137] Blue brief at 11.
[138] *Id.*
[139] *See id.* at 14.
[140] *Id.*

discretion "on this record" to the extent it foreclosed a state reprosecution in the absence of "'special circumstances.'"[141] The State relied on *Capps* to explain that special circumstances include "a double jeopardy violation or a constitutional violation that cannot be remedied by another trial, or other exceptional circumstances which would render the holding of a new trial unjust."[142] As the State then elaborated, "[b]ecause no such circumstances are present herein – *none were alleged nor were any found by the district court* – it was error for the court to order the state to dismiss the charges."[143]

In this case, of course, the district court did exactly what the State criticized the district court in *Jones* for not doing. Here, the district court very comprehensively articulated a catalogue of exceptional circumstances—each thoroughly supported by the record. These factual determinations are uncontroverted and entitled to deference. Those findings properly led the district court to conclude "the only just remedy is an unconditional writ of habeas corpus."[144] This conclusion is similarly entitled to deference under the abuse of discretion standard applied by this Court.

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[141] *Jones v. Cain*, No. 09-30174 (Brief on Behalf of Respondent-Appellant) (5th Cir. May 19, 2009) (Doc. No. 0051802683 at 33-34).
[142] *Id.* at 34-35.
[143] *Id.* at 35.
[144] ROA.V35:5779-5780.

Such deference is appropriate given how highly fact-bound any determination must be as to what meets the requirements of law and justice. Not only is the district court the most intimately familiar with the factual and procedural history of this case, but it also routinely deals with fact-bound habeas petitions and thus has a broad frame of reference. Because of its familiarity with the facts of this case and others, the district court is the proper tribunal to gauge whether exceptional circumstances warrant the issuance of an absolute writ. The State has presented no citation to the record or to the controlling authorities that supports second-guessing the district court's extensive, record-supported conclusions in this complex case that has an extensive procedural history.

c. *Younger* and Exhaustion Doctrines Do Not Preclude Absolute Writ Remedy

Even if "other exceptional circumstances" may be relied upon by a district court in support of an absolute writ where the underlying constitutional violation could theoretically be cured, the State argues redundantly that the exhaustion and *Younger* doctrines bar the district court from considering them.

Younger v. Harris, 401 U.S. 37 (1971), recognized that a federal court has the power to address and remedy a constitutional violation notwithstanding any proceedings available or under way in state court, but cautioned against the use of that power when there is a genuine opportunity for fair adjudication in state court.

Pursuant to the same principles animating *Younger*, exhaustion of state court remedies is typically required before federal courts will exercise jurisdiction.

The State cites no case that applies *Younger* to the scope of the habeas remedy, as opposed to the availability of relief. *Kolski v. Watkins*, 544 F.2d 762, 766 (5th Cir. 1977), involved a petitioner who filed for federal habeas review before his state criminal prosecution was final. *Kolski* explicitly considered the applicability of abstention hurdles "before we may give relief." *Robinson v. Wade*, 686 F.3d 298 (5th Cir. 1982), presented the question of whether habeas relief—not any particular remedy—was available for a double jeopardy violation where, over the course of nine years, the petitioner had been tried three times and faced an imminent fourth trial. Moreover, though the State wrongly represents that the panel in *Robinson* applied *Younger*, *Robinson* explicitly found *Younger* inapplicable, noting that the available state court mechanism for attacking jeopardy was inadequate.[145] The panel affirmed the district court's conclusion that the misconduct in prior trials did not constitute overreaching of the sort warranting double jeopardy protection from retrial. "On the record before us," this Court held, "we cannot say the district court clearly erred."[146]

[145] *See Robinson v. Wade*, 686 F.3d 298, 302, n.3 (5th Cir. 1982) (finding Texas law "falls short" in providing double jeopardy protection; *id*. at 303, n.7 (concluding that *Younger* presented "no obstacle" to habeas review, and referencing note 3).
[146] *Id.* at 309.

Regarding exhaustion, the State invokes similarly inapposite authority. The State relies heavily on *Pitchess v. Davis*, 421 U.S. 482, 483 (1975), a case starkly distinguishable from this case. In *Pitchess*, the respondent had complied with the terms of the conditional writ originally issued by the district court. The district court reconsidered the conditional writ after it became evident, in the course of the state retrial, that certain physical evidence had been lost, creating an issue "that was never raised until Pitchess filed his pretrial motion in state court to dismiss the charges."[147] The Court concluded that there was no justification for modifying the conditional writ where the petitioner's state claim was unexhausted, and that the exhaustion doctrine does not "permit a federal habeas court to maintain a continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court."[148]

Mr. Woodfox's case is in a markedly different posture. Here the State has not complied with a conditional writ, because no conditional writ has issued. The State has wrongly taken it upon itself to try to abrogate the district court's authority to fashion an adequate remedy by commencing a reprosecution before any writ has even issued.[149] Moreover, the exceptional circumstances that warrant the remedy fashioned by the district court in this case go far beyond the loss of some physical

[147] *Pitchess*, 421 U.S. at 487.
[148] *Id.* at 490.
[149] *See, e.g.*, ROA.V35:5757 (the State acted "in a preemptive strike" when it rearrested and reindicted Woodfox).

evidence. Instead, they put Woodfox in the posture of "the most extreme" cases, where a federal court *can* bar the retrial of a successful habeas petitioner even if the basis for a grant of relief is not premised on a theory that inevitably precludes retrial.[150]

Not only are the State's authorities inapposite, but the State's *Younger* and exhaustion arguments are redundant. Even if these doctrines bear at all on the scope of a habeas remedy—as opposed to the availability of relief—neither doctrine adds any further constraint to the district court's power under § 2243 as interpreted by *Jones*, which requires the existence of extraordinary circumstances to justify an absolute writ. Both *Younger* and exhaustion doctrines recognize exceptions for "extraordinary circumstances" or futility.[151] Under 28 U.S.C. § 2254(b)(1)(ii), a federal court may proceed where "circumstances exist that render such [state] process ineffective to protect the rights of the applicant." Under § 2243, *Hilton*, and *Jones*, Woodfox has the right to a remedy

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[150] *DiSimone*, 518 F.3d at 127. *DiSimone*, relied upon by the State for being "instructive," teaches that, no matter the underlying basis for habeas relief, exhaustion will not operate to foreclose an absolute writ in "extreme cases." It is further distinguishable from Woodfox's case because, there, the district court barred retrial solely upon the reasoning that the petitioner "'could not be convicted on the evidence before [it].'" Here, while the district court "questioned the strength of the evidence keeping Mr. Woodfox incarcerated," it also concluded that: "This factor alone would be an insufficient basis for this Court to grant an unconditional writ barring retrial." The district court explicitly relied on five different exceptional circumstances in concluding that Woodfox's circumstances "are so exceptional" as to warrant a bar against retrial. *See* ROA.V35:5773.

[151] *Younger v. Harris*, 401 U.S. 37, 53-54 (1971); *Strickland v. Director, TDCJ-CID*, No. 9:08 cv 124, 2008 WL 5245486 (E.D. Tex. Dec. 15, 2008).

fashioned by the habeas court as required by "law and justice." By definition, no state court can vindicate that particular right. Furthermore, *Younger*'s allowance for state court proceedings to be enjoined in "extraordinary circumstances" presents precisely the question which the district court has already answered: the predicate for the district court's absolute writ involves at least five extraordinary circumstances which would render a retrial unjust, as well as significant (though non-controlling) evidence of actual innocence.[152] To the extent that the *Younger* or exhaustion doctrines could be deemed applicable here, the extraordinary factual circumstances found by the district court would warrant exception.

d. Rule 23(d) Does Not Preclude Absolute Writ Remedy

Neither below, nor on the State's motion for a stay of the district court's Rule 23(c) release order, has the State ever before asserted that Federal Rule of Appellate Procedure 23(d) operates to bar a district court from issuing an absolute writ prohibiting retrial.

Typically, this Court does not address arguments not raised below, and declines to litigate on the State's behalf.[153] However, to the extent that the motions panel of this Court invited briefing on the question whether Rule 23(d) presents a

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[152] *Cf. Kolski v. Watkins*, 544 F.2d 762, 766 (5th Cir. 1977) ("Nor has Petitioner shown any other "extraordinary circumstances" which would justify federal court interference with a state pending criminal trial in this case.").

[153] *See, e.g., Young v. Dretke*, 356 F.3d 616, 630 (5th Cir. 2004) (Jones, J, concurring) ("[W]e are not authorized to litigate the State's case if the State does its job poorly.").

jurisdictional bar to the district court's ruling, Woodfox respectfully submits that the invitation, and the State's response to it, erroneously rely on a misapprehension of this case's "complex history."[154] Namely, the invitation presupposes that the "initial order" governing Petitioner's release issued in 2008 remains in effect today.[155] In fact, the 2008 release order was vacated by this Court in 2010. No order governing Woodfox's custody or release was operative when the district court ruled that Woodfox should be released under Rule 23(c) while his claims remained under federal review.

On November 25, 2008, the district court granted a writ of habeas corpus to Petitioner and directed his release pending appeal, conditioned on "his obtaining a residence and living conditions acceptable to th[e] [c]ourt."[156] On December 12, 2008, this Court stayed that release order pending determination of the State's appeal of the November 25, 2008 grant of habeas relief.[157] Thereafter, on June 21, 2010, this Court *vacated* the writ issued by the district court and remanded the case

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[154] *Woodfox v. Cain*, No. 06-789-JJB, 2105 U.S. Dist. LEXIS 73690 at *3 (M.D. La. June 8, 2015).

[155] *Woodfox v. Cain*, No. 15-30506, 2015 U.S.App. LEXIS 9920 (5th Cir. June 12, 2015) (granting stay pursuant to F.R.A.P. 23(c)).

[156] *Woodfox v. Cain*, No. 06-789-JJB, 2008 U.S.Dist.LEXIS 96146 at *27 (M.D. La. November 25, 2008).

[157] *Woodfox v. Cain*, 305 F. App'x 179, 182 (5th Cir. 2008).

to the district court.[158] This Court's Mandate was filed in the district court on July 30, 2010.[159]

Rule 23(d) is unambiguous: [a]n initial order governing the prisoner's custody or release . . . continues in effect pending review."[160] The effect of the mandate of a United States Court of Appeals is to bring the proceedings in a case on appeal to a close and to return it from the jurisdiction of the circuit.[161] With the *vacatur* of the district court's November 25, 2008 decision, and in the absence of a petition for certiorari, review on appeal was complete; no order pursuant to Rule 23(c) or 23(d) directing, or staying, Petitioner's release remained in effect. Moreover, the original presumption in favor of release created by the grant of relief was invalidated. Jurisdiction returned to the district court so that it could decide whether to grant a habeas relief on the remaining claim of grand jury discrimination.[162] Only if a grant was ordered as to that claim would a presumption in favor of release again exist, warranting consideration of whether a new "initial order" for Rule 23(c) release should issue pending appellate review.

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158 *Woodfox*, 609 F.3d at 817-818.
159 ROA.V8part1:1639.
160 Fed. R. App. P. 23(d).
161 *Bliss v. Lockhart*, No. 90-2144, 1990 U.S. App. LEXIS 23152 at *2 (8th Cir. December 26, 1990); *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978).
162 *Woodfox*, 609 F.3d at 817-818.

Subsequently, the district court granted habeas corpus relief[163], and this Court affirmed.[164] On remand "for further proceedings consistent with this opinion,"[165] the presumption in favor of release was again operative. On June 8, 2015, the district court followed the instruction of this Court's remand by entering an order (1) defining the scope of habeas corpus remedy to be accorded to Petitioner,[166] and (2) determining the State's motion to stay the release to which Woodfox was presumptively entitled pursuant to Rule 23(c).[167] The district court's ruling did not modify any previous order governing custody or release; no such order was by then in effect. The district court, and the parties below, clearly understood that the district court could, if it found Woodfox's arguments in support of release on bail persuasive, enter an initial order bailing Woodfox under Rule 23(c) in light of the relief on his grand jury claim.

Accordingly, there is no basis for the State's "alternative" argument that this Court "should maintain the 2008 custody order in place pending the final disposition by the Supreme Court of the State's petition for a writ of certiorari."[168] The 2008 custody order was vacated by this Court in 2010, together with the 2008

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[163] *Woodfox v. Cain*, No. 06-789-JJB, 2013 U.S. Dist. LEXIS 26220 (February 26, 2013).
[164] *Woodfox v. Cain*, 772 F.3d 358 (5th Cir. 2014).
[165] *Woodfox v. Cain*, No. 13-30266 (5th Cir. 2015 Feb. 3. 2015) (Doc. No. 00512925112 at 37).
[166] *Woodfox v. Cain*, No. 06-789-JJB, 2015 U.S. Dist. LEXIS 73690 at *7-*45 (M.D. La. June 8, 2015).
[167] *Id*. at *45-*47.
[168] Blue brief at 43.

grant of habeas corpus to which that custody order related. No petition for a writ of certiorari is pending concerning that decision. The operative order governing custody or release is thus the one issued by the district court on June 8, 2015 and stayed by this Court on June 15, 2015.

2. The District Court Did Not Abuse Its Discretion

a. The State Does not Seriously Refute the Existence of Other Exceptional Circumstances

Of the seven circumstances considered by the district court in deliberation over the scope of the writ, only five were expressly relied upon as sufficiently extraordinary to warrant a bar against retrial.[169] Of these, the State only takes factual issue with one: perhaps unsurprisingly, the district court's finding of troubling conduct by the State.

Even setting aside that there exists ample support for that finding given the record below,[170] four exceptional circumstances remain factually unrefuted by the State:

- Woodfox is elderly and suffers from serious health infirmities.[171]

[169] To recapitulate, the two factors considered but not relied upon by the district court included, first, the State's weak case against Woodfox and his credible evidence of actual innocence. ROA.V35:5772-5773. And, second, the fact that the error committed in both prior prosecutions was the same—grand jury stage error. ROA.V35:5775. ("This one circumstance alone would not be enough for this Court to grant an unconditional writ barring retrial. Under the second alternative in *Jones*, this Court considers all circumstances to determine if they are so extraordinary as to justify barring retrial.").

[170] *See supra* at 18-21. *See also Woodfox*, 609 F.3d at 805.

[171] ROA.V35:5766-5776.

- The State's key eyewitness and additional significant witnesses are all deceased, as are Woodfox's alibi witnesses, given the lapse of 40 years since the underlying crime occurred. Thus, the constitutional violations which occurred in state courts cannot ever be pragmatically cured.[172]

- Notwithstanding an excellent conduct record, and a "demonstrated [] ability to live peacefully with others," Woodfox has been held in lockdown (or solitary) confinement for over forty years in the absence of a valid conviction. The State's sole justification for that deprivation of liberty has been based on the underlying wrongful conviction at issue here.[173]

- The prospective trial would be the State's third, and it has taken over 20 years for the constitutional deficiencies of the State's second trial to be fully litigated. Accordingly, "[g]iven the nature of our criminal justice system, Mr. Woodfox, at age sixty-eight, is facing perhaps another twenty years before a court [would] determine[ ] if he was given a fair third trial."[174]

As discussed, the district court is the best-equipped tribunal both to make these factual determinations and to determine whether they are "exceptional" in comparison with other successful habeas petitions. Especially taken *in toto*, it was well within the district court's discretion to conclude that a reprosecution cannot be accommodated in this case without trespassing against the interests of "law and justice" protected by § 2243.

b. The Exceptional Circumstances Render a Retrial Unjust

While the State does not refute the foregoing factual circumstances, the State discusses each in isolation, suggesting that it is an abuse of discretion to consider

[172] *Id.*
[173] *Id.* at 5773-5774.
[174] *Id.* at 5776.

certain factors as a matter of law. The State argues that the district court could not rightfully consider Woodfox's solitary confinement an extraordinary circumstance because doing so "punishes" the State for his conditions of confinement; and that age and health cannot be "validly" considered extraordinary. The State further suggests the district court could not consider the extent to which Woodfox is today prejudiced by unavailable witnesses because that claim could be raised in the state court forum, and has not been exhausted. These arguments cannot square with the legislative mandate or Supreme Court precedent allowing district courts to consider the totality of *all* circumstances in developing a legal and equitable remedy. Moreover, even considered in isolation, the State's arguments are without merit.

i. Solitary Confinement

Echoing the State's general objection to any application of § 2243, *Hilton*, and *Jones*'s *"other* exceptional circumstances" inquiry, the State contends that, even to the extent that Woodfox's forty years in solitary confinement is exceptional, it was error for the district court to consider this circumstance in fashioning a remedy because "it has no connection whatever to the constitutional violation" requiring relief.[175] The State further urges an argument offered by the motion panel, which suggested that it was improper for the district court to

[175] Blue brief at 22.

consider Woodfox's lockdown confinement because "he is really seeking an unconditional writ as punishment for conditions of confinement."[176]

Respectfully, Woodfox disagrees. Given the latitude authorized by § 2243 and *Hilton*, it presents no erroneous application of law for the district court to consider the extraordinary circumstance of four decades under 23-hour-a-day lockdown. Moreover, as a factual matter, it is simply untrue that these four decades of deprivation have "no connection whatever" to the underlying constitutional violation. As this Court has recognized, Woodfox was placed into lockdown the day corrections officer Miller was murdered.[177] For decades thereafter, his lockdown confinement has been continued every 90 days *because* of his conviction for the Miller murder, and in the absence of any legitimate penological interests.[178] The nature and duration of his lockdown confinement, as this Court has recognized, squarely implicates his *liberty* interest; and liberty is the cornerstone of any habeas inquiry. These circumstances are all the more exceptional given the "appalling" fact that Woodfox has been subject to these deprivations in the absence of a valid conviction to support them.[179]

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[176] *Id*.

[177] *Wilkerson*, 774 F.3d at 849 (observing that Woodfox was placed into solitary confinement after he was suspected of the murder).

[178] ROA.V35:5773-5774.

[179] *Girts v. Yanai*, 600 F.3d 576 (6th Cir. 2010) (finding that the district Court's remedy—which denied an unconditional writ but ordered release on bail until *after* the State demonstrated that it could secure a valid conviction—was not an abuse of discretion, and observing: "it is appalling that Girts has spent fifteen years in prison on the basis of two constitutionally deficient

Contrary to the motion panel's suggestion, Woodfox does not seek to "punish" the State for these uncontroverted circumstances in this proceeding. He seeks only the full vindication of § 2243's allowance for the equitable consideration of these extreme facts.[180]

ii. Unavailable Witnesses

Because prejudice resulting from delay prior to indictment can give rise to an independent due process claim—and where raised independently, must be first litigated in state court—the State urges an application of the exhaustion doctrine and contends that unavailable witnesses cannot be considered in this case. The State's argument regarding unavailable witnesses, however, does not comport with the law of § 2243 and *Hilton*—which require habeas courts to consider *all* facts that bear on whether the habeas remedy is just. Nor does the State's argument align with *Jones*, which instructs district courts to consider all "*other* exceptional circumstances" that render a retrial unjust apart from those that relate to whether the underlying violation can theoretically be remedied by a new trial.

Mr. Woodfox here does not assert an independent due process claim as to the availability of habeas relief from his third indictment. He asserts that, because of unavailable witnesses and the additional other extraordinary circumstances, the

convictions.")

[180] *See also* ROA.V35:5777 (Woodfox seeks "a full and just remedy of the petition granted in his favor.").

remedy for the constitutional violation of his second indictment must be that the State is estopped from seeking a third.

It is uncontroverted on the record of this case that the unavailability of witnesses is extreme and extraordinary, and glaringly handicaps Woodfox's ability to present a defense. There has been no dispute that all of the State's significant witnesses at Woodfox's prior trials—including the State's sole purported eyewitness—are deceased. There is likewise no dispute that Woodfox's alibi witnesses are now deceased. These facts are not only exceptional, they are "most extreme," outpacing even other rare cases where absolute writs have issued on the grounds of extraordinary circumstances.

Two cases are paradigmatic, and neither is addressed by the State. In *Hannon v. Maschner*, 981 F.2d 1142 (10th Cir. 1992), the petitioner had been improperly denied state court appellate review. *Maschner* did *not* involve an uncontroverted record of myriad important yet unavailable witnesses. Nevertheless, because 33 years had lapsed since the original offense occurred, the district court ordered permanent discharge from state custody. In affirming this remedy, the Tenth Circuit reasoned that, even if the state could theoretically correct the underlying error by granting the petitioner a new appeal, after 33 years the state could never actually cure the cumulative prejudice that flowed from that

violation. As the Tenth Circuit concluded, a new direct appeal "would not vitiate the prejudice to the petitioner from the denial of direct appellate review."[181]

D'Ambrosio v. Bagley, 656 F.3d 379 (6th Cir. 2011), involved only one unavailable witness, the State's key eyewitness. On the record facts there, approximately twenty years had lapsed between the underlying crime and the grant of habeas relief. In fashioning a remedy, the district court concluded that the death of the State's key eyewitness "tipped the balance in favor of barring reprosecution."[182] Affirming on the grounds that "[t]his is the sort of argument envisioned by the 'extraordinary circumstances' standard," the Sixth Circuit explained that an absolute writ may be justified, "'if the state's delay is likely to prejudice the petitioner's ability to mount a defense at trial.'"[183]

iii. Age and Health

Finally, the State maintains that the district court could not consider Woodfox's age because no precedent suggests age may prevent the State from prosecuting someone for murder. The State argues that the district court's consideration of the fact that Woodfox would likely die before the fairness of a

[181] *Hannon v. Maschner*, 981 F.2d 1142, 1145 (10th Cir. 1992).
[182] *D'Ambrosio v. Bagley*, 656 F.3d 379, 383 (6th Cir. 2011).
[183] *Id. See also Lopez v. Miller*, 915 F. Supp. 2d 373 (E.D.N.Y. 2013) (weighing unavailability of witnesses in favor of barring retrial); *Morales v. Portuondo*, 165 F. Supp. 2d 601 (S.D.N.Y. 2001) (finding prejudice to defense due to passage of time and barring retrial).

third trial could be finally adjudicated somehow presumes the incompetence or bad faith of the state judiciary.[184]

To point out the obvious, the State is silent on the district court's finding that Woodfox's age *and health*, together, present an extraordinary circumstance here. That is because authorities plainly instruct that health may be an equitable consideration that animates a habeas court's consideration of release.[185] Furthermore, recognition of the "nature of our criminal justice system"—under which it took twenty years for Woodfox's first conviction to be overturned, six years for Woodfox to be reprosecuted, and then another seventeen years for his second conviction to be overturned—does not presume *any* court's bad faith or incompetence. It merely recognizes the fact that, if a third prosecution is allowed to proceed here, given Woodfox's age and health, the most disturbing extraordinary circumstance would almost surely come to pass: the State would be permitted to deny a man virtually all liberty interests, even those typically incident to ordinary prison life—and to hold him in jeopardy for his lifetime—all the while avoiding the possibility of *ever* being required to provide a fair and constitutionally adequate prosecution.

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[184] Blue brief at 32.

[185] *See, e.g., Johnston v. Marsh*, 227 F.2d 528 (3d Cir. 1955) (Hastie, J., concurring) (consideration of the "grave exigency" of health is within the district court's valid exercise of discretion); *Schuster v. Vincent*, 524 F.2d 153, 162 (2d Cir. 1975) (considering age).

CONCLUSION

The district court correctly determined that extraordinary circumstances exist on the record of this case. Considering these circumstances in their totality, the only remedy that serves the interests of law and justice in this case is an absolute writ prohibiting the State's third trial. Albert Woodfox respectfully submits that this remedy is required in light of the facts properly found below because the district court did not apply the law erroneously, and its factual findings are not clearly erroneous. Accordingly, Woodfox respectfully requests that this Court affirm the district court's ruling that an absolute writ should issue in this case.

Dated: New York, New York
July 31, 2015

Respectfully submitted,

By: /s/ *George H. Kendall*

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2015, I electronically uploaded a copy of the foregoing brief to the United States Court of Appeals for the Fifth Circuit. I likewise certify that I have sent two paper copies and one electronic copy to the attorneys of record for Respondent-Appellant, including: James David Caldwell, Kurt Wall, and Colin Clark, at the Office of the Attorney General, P.O. Box 94005, Baton Rouge, Louisiana 70804-9005; and Richard A. Curry and M. Brent Hicks, at McGlinchey Stafford, PLLC 14th Floor, One American Place, Baton Rouge, Louisiana 70825.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 13,864 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font, with footnotes in Times New Roman 12 point font.

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