

Summer 2012

Certifiable: Certificates of Appealability, Habeas Corpus, and the Perils of Self-Judging

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Articles

Certifiable:

Certificates of Appealability, Habeas Corpus, and the Perils of Self-Judging

Jonah J. Horwitz*

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INTRODUCTION

There is, happily, no shortage of scholarship offering detailed analysis of the higher courts' jurisprudence on the crucial legal questions of the day.¹ We are also lucky to live in a day and age with a large and growing body of exhaustive, statistical literature examining the day-to-day work of the lower courts.² Unfortunately, law reviews rarely contain articles that fill the gap between these two approaches.³ That is, there are few, if any, meticulous discussions of the lower courts' decisions on routine types of cases.⁴ This is a shame, for such cases are the ones that most deeply affect the largest number of Americans.⁵ Without

1. See, e.g., Erwin Chemerinsky, *Losing Faith: The Supreme Court and the Abandonment of the Adjudicatory Process*, 60 HASTINGS L.J. 1129 (2009).

2. See, e.g., Frank S. Bloch, Jeffrey S. Lubbers & Paul R. Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1 (2003).

3. Indeed, that gap is starkly illustrated by the fact that of the forty-seven cases that constitute the empirical sample analyzed by the article, see *infra* Table I, only five have been mentioned in law review articles, two of which are the only two published cases in the sample. See Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1093 n.87, 1095 n.101 & 103 (2011) (citing *Elder v. Berghuis*, 644 F. Supp. 2d 888 (W.D. Mich. 2009); *Hayes v. Quarterman*, No. 05-1974, 2007 WL 4440951 (N.D. Tex. Dec. 18, 2007)); Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1587 n.38 (2011) (citing *Rucker v. Patrick*, No. 08cv0364-IEG (RBB), 2008 WL 4104230 (S.D. Cal. Sept. 3, 2008)); Parker B. Potter, Jr., *Antipodal Inveective: A Field Guide to Kangaroos in American Courtrooms*, 39 AKRON L. REV. 73, 88 n.68 (2006) (citing *Tunstall v. Hopkins*, 126 F. Supp. 2d 1196 (N.D. Iowa 2000)); Dru Stevenson, *The Function of Uncertainty Within Jury Systems*, 19 GEO. MASON L. REV. 513, 544 n.175 (2012) (citing *Rhodes v. Varano*, No. 08-3236, 2009 WL 805506 (E.D. Pa. Mar. 26, 2009)).

4. See Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 966 (2002) ("[T]he literature on race and the Fourth Amendment has not fully examined the ways in which current doctrine affects the everyday lives of people of color."); Katharina Heyer, *A Disability Lens on Sociological Research: Reading Rights of Inclusion from a Disability Studies Perspective*, 32 LAW & SOC. INQUIRY 261, 267 (2007) (noting the lack of legal scholarship on the impact of disability rights on "ordinary" people with disabilities); Mark D. West, *Losers: Recovering Lost Property in Japan and the United States*, 37 LAW & SOC'Y REV. 369, 370 (2003) ("While much legal scholarship examines high-stakes issues, little focuses on lower-stakes, everyday concerns that resonate with the life experiences of ordinary people.").

5. See generally *supra* note 4.

sustained, scholarly exploration of the lower courts' everyday work-product, there will be large holes in the academy's understanding of the judiciary and its role in modern society. And without that understanding, serious proposals for reforming the courts will suffer.

This article begins filling that gap. It does so by addressing an extremely narrow question, but one with far-reaching implications for our picture of judges and their role in American life. The narrow question is this: what happens when a federal district court judge rejects a federal magistrate judge's⁶ recommendation to grant habeas relief and then rules on a certificate of appealability (COA)? As with many judicial decisions themselves, this highly specific question implicates a host of more general concerns. Most importantly, can we trust judges to consistently and effectively evaluate the quality and certainty of their own decisions? In other words, can we trust judges to judge themselves?

The answer presented here is a resounding no. Judges are human, and however true their intentions are, they are simply incapable of judging their own decisions in any meaningful way. The futility of self-judging is presented in the starkest possible terms by the context at issue in this article. When district judges decline to issue a COA on a habeas petition that a magistrate recommends granting, as we will see they routinely do,⁷ they say, in effect, "I am so utterly confident in my ruling that I do not believe the magistrate, who I appointed and who I rely upon on a daily basis, is a reasonable jurist." The district judge says further, "I have such unshakeable faith in my own ruling that I do not believe any higher court should bother reconsidering my conclusions." It is difficult to imagine a more striking reminder of why judges are rarely permitted to be their own appellate review,⁸ and a more striking illustration of why they should not be given that authority with respect to COAs.

There are two lessons to take from the article's conclusion, a

6. In the interest of simplicity, federal district court judges will henceforth be referred to as "district judges" and federal magistrate judges as "magistrates."

7. See *infra* Table I.

8. See, e.g., *In re Murchison*, 349 U.S. 133, 136 (1955) ("[N]o man can be a judge in his own case").

straightforward and highly specific policy lesson, and a subtler lesson that goes to the very heart of our judicial system. First, federal district courts should not be allowed to deny COAs for petitions after ruling on them on the merits. There should either be no such thing as a COA, or circuit courts and the United States Supreme Court should be the sole tribunals with the power to issue them. Second, we need to think seriously about eliminating self-judging elsewhere in the judicial system in light of this indisputable evidence of its wrongheadedness.

The article proceeds in three parts. Part I provides a general overview of COAs to contextualize the discussion that follows, explaining how they function and how they evolved historically. Part II critiques, in logical and pragmatic terms, the practice of allowing or requiring district judges to rule on COAs. Part III bolsters that critique with the empirical case against the practice. The article concludes with proposals for future research on this subject and for more scholarship aligned with its novel methodology.

I. GENERAL CONTEXT FOR COAS

We begin with a brief overview of how COAs work and how they came to assume their current form in order to provide some context for the rest of the article.

A. How COAs Work

Pursuant to 28 U.S.C. § 2254, an inmate in state custody is entitled to a writ of habeas corpus if he is being held in violation of his federal rights.⁹ When a federal court issues the writ, it typically voids the challenged conviction and orders the state to release the petitioner within a certain period of time or retry him on the charges.¹⁰ Section 2254 petitions make up a substantial

9. 28 U.S.C. § 2254(a) (2006) (“The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”).

10. See, e.g., *Moore v. Haviland*, 476 F. Supp. 2d 768, 778 (N.D. Ohio 2007), *aff’d*, 531 F.3d 393 (6th Cir. 2008). Some § 2254 petitions challenge state prison disciplinary proceedings. In such cases, if courts find the claim meritorious, they will ordinarily vacate the disciplinary conviction and order

portion of the federal judicial docket.¹¹ Because most petitions are meritless,¹² because most federal courts are loath to interfere aggressively with state criminal justice systems,¹³ and because Congress and the Supreme Court have made it increasingly difficult to obtain federal habeas relief by imposing a series of procedural and substantive hurdles,¹⁴ § 2254 petitions are very seldom granted.¹⁵

A § 2254 petitioner is entitled to appeal the denial of the writ only if he is granted a COA.¹⁶ The COA, if granted, specifies the particular issues that can be appealed.¹⁷ Either a district court or a circuit court can issue the certificate,¹⁸ but the district court is required to rule on the COA in the first instance when it denies habeas relief.¹⁹ If the district court denies the certificate, the

any other relief appropriate under the circumstances. *See, e.g.*, *Giano v. Sullivan*, 709 F. Supp. 1209, 1218 (S.D.N.Y. 1989).

11. Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 1 (2007) (calculating that each year more than 18,000 cases are filed by state prisoners seeking § 2254 habeas corpus relief, constituting one out of every fourteen civil cases filed in federal district courts).

12. *See, e.g.*, Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148-49 (1970) (deeming meritless habeas petitions “the most serious single evil” of collateral attacks on convictions).

13. *See, e.g.*, *Ex parte Haumesch*, 82 F.2d 558, 559 (9th Cir. 1936) (“Federal judges are reluctant to interfere with the orderly process of the state courts, and should not do so by the issuance of a writ of habeas corpus unless a substantial case is presented by the petitioner.”).

14. *See, e.g.*, *Phelps v. Alameida*, 569 F.3d 1120, 1123 (9th Cir. 2009) (“Given the trend these last decades on the part of Congress and the Supreme Court increasingly to bar the federal courthouse door to litigants with substantial federal claims, *habeas* petitioners—including petitioners who may have suffered severe deprivations of their constitutional rights—now face myriad procedural hurdles specifically designed to restrict their access to the once-Great Writ.” (footnote omitted) (internal quotation marks omitted)).

15. *See* Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 778 n.183 (2010) (noting that .29% of habeas petitioners received relief in a sample of noncapital cases).

16. 28 U.S.C. § 2253(c)(1) (2006).

17. *Id.* § 2253(c)(3).

18. *See* cases cited *infra* notes 59, 60, and 62.

19. RULES GOVERNING SECTION 2254 CASES IN THE U.S. DIST. CTS., R. 11(a) (2010) (“The district court must issue or deny a [COA] when it enters a final order adverse to the applicant.”) [hereinafter Rule 11(a)].

petitioner may seek one from the circuit court.²⁰ Most important for purposes of this article is the standard that courts are required to bring to bear on motions for COAs. When a petition has been denied on the merits, the Supreme Court has held, a COA must be granted where “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.”²¹ Where a petition has been denied on procedural grounds, by contrast, the certificate issues if “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”²² Because this article is concerned only with cases in which magistrates recommended granting habeas relief (and therefore implicitly found no fatal procedural defects), the distinction between the two standards is irrelevant for present purposes. The simple proposition that undergirds the entire article is that a COA should be granted where a reasonable jurist would disagree with the district judge’s disposition of the petition.

B. The History of Appealability in Habeas Law

To fully register the import of the findings presented here, it is essential to have a general understanding of how appellate procedures in habeas law have evolved to the present day.

1. *The COA’s Predecessors*

The general right to a direct appeal from the initial tribunal that hears a dispute is a bedrock principle in the American judicial system and its forbears.²³ This is an important point to keep in mind throughout the article, as everything discussed below is essentially an exception to that general rule.

Turning to the unique context of appeals in habeas law, the Supreme Court has intimated that there may be a constitutional

20. FED R. APP. P. 22(b)(1).

21. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

22. *Id.*

23. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) (affirming necessity of appellate review as a force that “revises and corrects the proceedings in a case already instituted . . .”). *See generally* Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985).

right to habeas corpus relief,²⁴ but has definitively held that there is no constitutional right to appeal the denial of such relief.²⁵ Freed from the constraints of any constitutional prohibition, Congress has used restrictions on habeas appeals to regulate the flow of habeas petitions through the federal courts.²⁶ The COA as it stands today is the product of that history.

For present purposes, the historical narrative begins in 1867 with the passage of the Habeas Corpus Act. That Act placed no limitations on the appeal of denied habeas petitions.²⁷ However, because of worry that prisoners were deliberately abusing their rights of appeal to stay executions (which automatically occurred while appeals were pending), Congress mandated, in 1908, that habeas petitioners be granted a certificate of probable cause (CPC) in order to proceed on their petitions after denial by the trial court.²⁸ Congress added the CPC requirement because of delays in state capital cases caused by perceived “frivolous” appeals in federal habeas proceedings.²⁹ The Committee of the Judiciary of the House of Representatives viewed the bill as a means “to correct a very vicious practice of delaying the execution of criminals by groundless habeas corpus proceedings and appeals therein taken just before the day set for execution”³⁰ With respect to this article, there are two important elements to the CPC, both of which, more or less, carried over into its successor, the COA.

First is the standard for its issuance. In the absence of

24. See *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95–96 (1868) (“The terms of [the Suspension Clause] necessarily imply judicial action” on habeas petitions).

25. See *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003) (“As mandated by federal statute, a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court’s denial of his petition.”).

26. For a good general overview of this history, see Christopher Q. Cutler, *Friendly Habeas Reform—Reconsidering a District Court’s Threshold Role in the Appellate Habeas Process*, 43 WILLAMETTE L. REV. 281, 283–309 (2007). See also Ira P. Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 OHIO ST. L.J. 307, 313–15 (1983); Ryan Hagglund, Comment, *Review and Vacatur of Certificates of Appealability Issued After the Denial of Habeas Corpus Petitions*, 72 U. CHI. L. REV. 989, 994–98 (2005).

27. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (1867).

28. Act of March 10, 1908, ch. 76, 35 Stat. 40 (codified at 28 U.S.C. § 2253 (2006)).

29. See *Barefoot v. Estelle*, 463 U.S. 880, 892 (1983).

30. H.R. REP. NO. 23, at 1 (1908).

Supreme Court guidance for roughly seventy-five years, the circuits differed slightly in their formulations of the appropriate standard for issuing the CPC.³¹ Some appellate courts thought a certificate was warranted “if it appeared from the petition itself that appellant (petitioner) was not entitled to” habeas relief,³² others that certification was proper where “the petition [was] not frivolous and that it present[ed] some question deserving appellate review,”³³ and still others that a “substantial constitutional question” must have been presented to merit a CPC.³⁴ The Supreme Court eventually resolved the inconsistency, arriving at the same standard it later applied to COAs: “that the issues are debatable among jurists of reason; that a court could resolve the issues (in a different manner); or that the questions are adequate to deserve encouragement to proceed further.”³⁵ Additionally, like the COA, the CPC could be granted by a district court, and like the COA, the practice was encouraged by the federal appellate courts.³⁶

2. *The Emergence of the COA*

Federal habeas law underwent major renovation in 1996. That year, Congress, with broad bipartisan support,³⁷ and in response to the Oklahoma City bombing,³⁸ passed the

31. See generally Harry A. Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 352 (1967) (collecting cases).

32. *In re Mooney*, 72 F.2d 503, 505 (9th Cir. 1934) (citation omitted) (internal quotation marks omitted).

33. *Alexander v. Harris*, 595 F.2d 87, 89-91 (2d Cir. 1979).

34. *Player v. Steiner*, 292 F.2d 1, 2 (4th Cir. 1961).

35. See *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (citation omitted) (internal quotation marks omitted). (articulating standard for CPCs); see also *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (applying *Barefoot* standard to COAs).

36. See *Nowakowski v. Maroney*, 386 U.S. 542, 543 (1967); *Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977); *Flint v. Howard*, 464 F.2d 1084, 1086 n.* (1st Cir. 1972) (per curiam); *Taylor v. Swenson*, 458 F.2d 593, 595 (8th Cir. 1972).

37. AEDPA passed 91-8 in the United States Senate, 140 CONG. REC. S7, 858 (1995), and 293-133 in the House of Representatives, 140 CONG. REC. H3, 618 (1996).

38. See 142 CONG. REC. H3614 (daily ed. Apr. 18, 1996) (statement of Rep. Pelosi) (acknowledging the Oklahoma City bombing as the impetus for AEDPA).

Antiterrorism and Effective Death Penalty Act (AEDPA), a law that imposed significant procedural hurdles on federal habeas petitioners.³⁹ For present purposes, the important novelty introduced by AEDPA was the COA. Under AEDPA, “unless a circuit justice⁴⁰ or judge issues a [COA], an appeal may not be taken to the court of appeals”⁴¹ The statute further provides that a COA may only issue when “the applicant has made a substantial showing of the denial of a constitutional right.”⁴² Finally, the statute requires that the COA indicate “which specific issue or issues satisfy” the standard.⁴³

The standard that applied to the issuance of the COA was the same as the standard the Supreme Court (belatedly) required for the issuance of the CPC: whether reasonable jurists could debate the result.⁴⁴ This continuity resulted not so much from anything inherent in the statutory bases for either the CPC or the COA,⁴⁵ as because the Supreme Court said so.⁴⁶ However the continuity arose, though, it cannot be doubted.⁴⁷ Within the context of this article, therefore, it is important to note that the “reasonable jurist” standard has a long lineage in American habeas law and the federal courts have been (ostensibly) applying it for decades.

There is one other important continuity between the CPC and COA: district courts’ ability to issue and deny COAs. Interestingly, AEDPA appears to restrict the power to grant COAs

39. See, e.g., Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 203 (2008) (discussing the impediments to habeas petitioners imposed by AEDPA’s “one-year statute of limitations, its absolute ban on same-claim second petitions, its higher bar for filing new-claim second petitions, its onerous exhaustion provisions, and its restrictions on federal evidentiary hearings”).

40. “Circuit justice” referred to Supreme Court justices temporarily sitting on the courts of appeals. See 28 U.S.C. § 42 (2006).

41. *Id.* § 2253(c)(1).

42. *Id.* § 2253(c)(2).

43. *Id.* § 2253(c)(3).

44. See, e.g., *Drinkard v. Johnson*, 97 F.3d 751, 756 (5th Cir. 1996).

45. Compare Act of March 10, 1908, ch. 76, 35 Stat. 40 with 28 U.S.C. § 2253.

46. Compare Act of March 10, 1908, ch. 76, 35 Stat. 40 with 28 U.S.C. § 2253.

47. See *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

strictly to circuit judges,⁴⁸ yet at the same time the Act amended Rule 22 of the Federal Rules of Civil Procedure to require a district judge to rule on certification in the first instance.⁴⁹ It is not clear how this inconsistency emerged, a problem that, as we shall see, later troubled courts struggling to apply the contradictory language.⁵⁰

Congress considered the question of whether district courts should be allowed to rule on the appealability of denied habeas petitions at length during the numerous debates over habeas reform that preceded the passage of AEDPA. At one point it had before it a proposal to explicitly strip district judges of the power to hear applications for CPCs.⁵¹ Although it is not clear why the proposal was drafted, or why it was rejected, it is instructive to review the testimony the Judiciary Committee heard on the subject. Eminent scholars spoke on both sides of the question. While Professor Stephen Gillers of New York University School of Law warned the Senate Judiciary Committee about “giv[ing] the district judge the power to block review of his own decision simply by denying a certificate,”⁵² Larry Yackle, a law professor at Boston University (testifying on behalf of the ACLU) remarked that “[i]f any judge can make a reliable determination regarding the arguable merit of an appeal, it is . . . the judge who considered the claim at the trial level.”⁵³ Some members of Congress recognized

48. See 28 U.S.C. § 2253(c)(1) (“Unless a *circuit* justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals” (emphasis added)). *But see* cases cited *infra* notes 59, 60 and 62 (concluding that the provision allows district judges to issue COAs).

49. The requirement was later moved to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts. See FED. R. APP. P. 22 advisory committee notes to 2009 amendments. Henceforth “Rule 11(a)” will be used as shorthand for the requirement that district judges rule on COAs in the first instance for the petitions they deny before circuit courts can. In the interest of simplicity, this shorthand will be used even when anachronistically referring to writings predating the 2009 amendments.

50. See cases cited *infra* note 65.

51. See Robbins, *supra* note 26, at 329-30 (discussing S. 2216, 97th Cong., 2d Sess. (1982), S. 2838, 97th Cong., 2d Sess. (1982), and S. 2903, 97th Cong., 2d Sess. (1982)).

52. *The Habeas Reform Act of 1982: Hearing Before the S. Comm. on the Judiciary on S. 2216*, 97th Cong. 146 (2d Sess. 1982) (statement of Stephen Gillers, Professor, N.Y. Univ. Sch. of Law).

53. *Habeas Corpus Reform: Hearing Before the S. Comm. on the*

the discrepancy, but their warnings went unheeded and AEDPA was passed without any attempt to resolve the contradictory rules.⁵⁴

Nonetheless, after a period of uncertainty,⁵⁵ Rule 11(a) curiously trumped § 2253(c)(1), and the power of a district court to certify habeas appeals became, once again, universally accepted and, once again, not just an option but an obligation.⁵⁶ The rationalization that emerged for this practice is intriguing and central to the article's thesis.

First, a number of circuit courts acknowledged, as they had to, the tension—if not the outright irreconcilability—of Rule 11(a) and § 2253(c)(1).⁵⁷ In light of such conflict, the reader might expect that the circuit courts endeavored to discern the policy that would have made the most sense for Congress to adopt, as courts are wont to do in such circumstances.⁵⁸ For the most part, they did not. Instead, the seminal circuit court decision on the issue, the Eleventh Circuit's opinion in *Hunter v. United States*,⁵⁹ conducted a lengthy exposition on statutory construction, legislative history, and prior case law before concluding that the

Judiciary on S. 238, 99th Cong. 133 (1st Sess. 1985). It is rather inexplicable that the ACLU took this position given the constraints it imposes on the ability of indigent prisoners to obtain appellate review of denied habeas petitions. See discussion *infra* Part III.B.2. The Sixth Circuit appeared to echo this strange perspective on the prisoner's stake in the question, suggesting that inmates may in fact have a *right* to the district court passing on the certification issue, and that a decision placing the power exclusively in the circuit courts would therefore deprive them of that right. *Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1073 (6th Cir. 1997). It is a unique view of civil rights that imposes them upon an individual when they are manifestly aligned against his interests.

54. See Cutler, *supra* note 26, at 303.

55. See *id.* at 303-04 & n.101 (collecting early cases finding that district courts could not issue COAs under AEDPA).

56. See *Gonzalez v. Thaler*, 132 S. Ct. 641, 649 n.5 (2012) (“The courts of appeals uniformly interpret ‘circuit justice or judge’ to encompass district judges. Habeas Corpus Rule 11(a) requires district judges to decide whether to grant or deny a COA in the first instance.” (citations omitted)).

57. See, e.g., *Lyons*, 105 F.3d at 1067 (“The Act’s two provisions governing the issuance of certificates of appealability are in direct conflict with each other.”).

58. See, e.g., *In re Gelin*, 437 B.R. 435, 441 (Bankr. M.D. Fla. 2010) (noting that where legislative intent is unclear, a court will interpret statutes “as best it can by giving the statutes their most sensible meaning” in context).

59. 101 F.3d 1565 (11th Cir. 1996) (en banc).

sounder reading of AEDPA endowed district courts with the authority and the obligation to issue COAs. The remaining circuits largely took the same position out of politeness to the Eleventh Circuit, with little or no explanation.⁶⁰ We are all instilled in law school with a healthy fear of circuit splits, of course, but it is nevertheless breathtaking that the United States courts of appeals would deal with a difficult and important question of law by responding en masse: “what they said.”⁶¹

Even limiting the inquiry to those circuit courts that took the trouble to conduct an independent analysis,⁶² there is still cause for concern. What is unusual, in a nutshell, is that they say so *little* about the pragmatic consequences of the decision. Indeed, while the specifics of these long and elaborate discussions are largely irrelevant to the article, the pains that the courts took to establish, rather implausibly, that the two provisions were reconcilable (and to thereby establish that an examination of Congress’ policy choice was unnecessary) is nothing short of remarkable.⁶³ Simply put, the two provisions obviously butt heads⁶⁴ and only legal acrobatics can make them jibe. Rule 11(a) explicitly requires a district judge to rule on a COA and § 2253(c)(1) plainly implies that only circuit judges have that authority. It is therefore particularly striking that the courts of appeals would place such heavy reliance on statutory construction

60. See *United States v. Mitchell*, 216 F.3d 1126, 1129-30 (D.C. Cir. 2000); *Grant-Chase v. Comm’r, N.H. Dep’t of Corrs.*, 145 F.3d 431, 435 (1st Cir. 1998); *Tiedeman v. Benson*, 122 F.3d 518, 521 (8th Cir. 1997); *United States v. Asrar*, 108 F.3d 217, 218 (9th Cir. 1997) (per curiam); *Lozada v. United States*, 107 F.3d 1011, 1016 (2d Cir. 1997); *Else v. Johnson*, 104 F.3d 82, 83 (5th Cir. 1997) (per curiam).

61. See, e.g., *Grant-Chase*, 145 F.3d at 435 (seeing “no reason to reinvent the wheel” and endorsing the views expressed by the Eleventh Circuit in *Hunter*); *Lozada*, 107 F.3d at 1015 (“We are fully persuaded by Judge Carnes’s careful analysis [in *Hunter*] of both the ambiguous texts and the legislative history, and we share his conclusion.”).

62. Those decisions are, to varying degrees, *Hunter*, 101 F.3d 1565, *Lyons*, 105 F.3d 1063, *United States v. Eyer*, 113 F.3d 470 (3d Cir. 1997), and *Houchin v. Zavaras*, 107 F.3d 1465 (10th Cir. 1997).

63. See, e.g., *Eyer*, 113 F.3d at 473 n.1 (acknowledging that its interpretation was “tortured” but finding it the only one that harmonized the two provisions).

64. See *Lyons*, 105 F.3d at 1067 (“The Act’s two provisions governing the issuance of certificates of appealability are in direct conflict with each other.”).

when dealing with a classic example of directly contrary legislative pronouncements.⁶⁵ It is equally striking that they would make such a big deal of legislative history when the most thoughtful and thorough analyses of that history recognized that it was far too murky and discordant to synthesize in any coherent fashion.⁶⁶ The fact that circuit courts around the country bent over backwards to reconcile the irreconcilable is in itself an interesting development, and one that we will return to shortly.

To the extent that circuit courts did have anything to say about the desirability of one interpretation over the other, it is interesting what they said. Two themes in particular deserve mention. One is the proposition that the district court is *better situated* to rule on the COA. In other words, the district court has already received (and presumably reviewed) all of the submissions in the underlying habeas petition and is therefore well-equipped to make a decision regarding appealability.⁶⁷ The other theme, in

65. The prevailing statutory construction was to read “circuit justice or judge” in 28 U.S.C. § 2253(c)(1) to mean “circuit justice or *district* judge.” See, e.g., *Hunter*, 101 F.3d at 1574–84. Although that gloss is not outside the realm of possibility, it would seem axiomatic that courts should refrain from inserting terms into statutes where the legislative language is clear on its face. See, e.g., *Harbison v. Bell*, 556 U.S. 180, 200 (2009) (Scalia, J., concurring in part and dissenting in part) (criticizing court for inserting words into a statute). Courts adopted such an interpretation on the ground that the provision was ambiguous, *Hunter*, 101 F.3d at 1574, but in actuality the phrase on its own was clear, it was only the history of district judges granting COAs that made it ambiguous, and it was, circularly, only that history that clarified the fabricated ambiguity. In any event, regardless of whether one agrees with the courts of appeals that the provision contained some ambiguity, the critique that follows stands, because the direction in which the courts resolved that ambiguity flies in the face of all reason. See *infra* Part II.

66. See *Lyons*, 105 F.3d at 1071 (“In the end, then, none of the Act’s legislative history gives us any indication as to how Congress would decide this issue.”); see also *Parker v. Norris*, 929 F. Supp. 1190, 1192 (E.D. Ark. 1996) (“[I]t is unlikely contemplation played any role at all in the drafting of these particular amendments.” (internal quotations and citations omitted)).

67. *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001) (“[B]ecause the district court is already deeply familiar with the claims raised by petitioner, it is in a far better position from an institutional perspective than this court to determine which claims should be certified for appeal.”); *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (per curiam) (“Arguably, the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court.”); see *Thomas v. Crosby*, 371 F.3d 782, 797 (11th Cir. 2004) (Tjoflat, J., concurring) (citing

a similar vein, is that district court dispositions of COAs advance the efficient administration of the federal docket.⁶⁸

There is one final feature of these decisions worthy of comment, and it is another omission. None of them address the most obvious, commonsense problem with allowing district courts to deal with COAs: that they have too much invested in their own rulings to be able to consider them objectively. The most that this concern gets is a passing mention during a recitation of legislative history, followed by no discussion of the point.⁶⁹

In summary, the district courts' power to issue COAs was restored after AEDPA, and in the face of contradictory legislative language on the subject, through a *mélange* of inter-circuit courtesy, tortured statutory construction, misguided policy emphases on expertise and efficiency, and willful obliviousness to the obvious major objection to the arrangement. In the unlikely event that the author's view of this jurisprudence has not been made sufficiently clear, we turn now to a more explicit critique of its premises before presenting the sample that confirms the point.

II. THE LOGICAL AND PRAGMATIC CASE AGAINST RULE 11(A)

In 1967, Harry A. Blackmun, then a judge on the Eighth Circuit Court of Appeals, presented a paper to that court's judicial conference, where he made the following remarks about a district court's power to certify the appeal of a habeas petition that it had denied:

All this adds up, in my mind, to the conclusions that

Alexander, 211 F.3d at 898); see also Catherine T. Struve, *Power, Protocol, and Practicality: Communications from the District Court During an Appeal*, 84 NOTRE DAME L. REV. 2053, 2065 (2009) ("In various situations, then, [including the COA context], the district court's gatekeeping role requires it to apply a standard which implicates the merits of the appeal. The district court's close familiarity with the case will help to inform those rulings, and the district court's findings will, in turn, assist the court of appeals in reviewing the gatekeeping decision.").

68. See *Alexander*, 211 F.3d at 898 ("Further briefing and argument on the very issues the court has just ruled on would be repetitious."); *Lyons*, 105 F.3d at 1072 ("[I]t seems clear that a district judge who has just denied a habeas petition will be able to evaluate that petitioner's request for a [COA] more quickly than would a circuit judge fresh to the case.").

69. See, e.g., *Hunter*, 101 F.3d at 1580.

there is something definitely to be gained by having the district court, in the first instance, give very careful consideration to the question whether the state prisoner federal habeas applicant has something of substance going for him, and that there is something definitely to be lost when the district court routinely issues a certificate of probable cause without this careful consideration. . . .

All this, after all, takes us right back to the philosophy that this, as with all other matters, is an issue for decision by the court of general jurisdiction, the district judge, in the first instance. This, I think, for reasons which are obvious to all of us, is where the best considered and important decision is to be made. This is the normal situation, for in the routine case the district judge is there to decide and not to bypass the responsibility of decision.⁷⁰

Judge Blackmun's eloquent yet profoundly misguided words are a good place to begin, for they embody many of the flaws in the belief that district courts have any business ruling on habeas certifications. First, he establishes a straw man, suggesting that the "routine" and careless issuance of certification is the principal evil the judiciary needs to combat. The federal judiciary deals with a deluge of meritless habeas petitions every day, dismissing the vast majority of them.⁷¹ The fear that a district judge, accustomed to looking at every such petition through jaundiced eyes, will at the very same time (or shortly after) he concludes the petition is meritless also thoughtlessly decide that the claims should proceed *further* and that his own work should be reviewed, is implausible to say the least. Such a fear flies in the face of everything we know about human psychology,⁷² not to mention

70. Blackmun, *supra* note 31, at 353.

71. See Frost & Lindquist, *supra* note 15, at 778 n.183 (noting that 0.29% of habeas petitioners received relief in sample of noncapital cases).

72. For example, in the employment context, research has shown that self-appraisals are typically more lenient than supervisory appraisals. See Ted H. Shore, Janet S. Adams & Armen Tashchian, *Effects of Self-Appraisal Information, Appraisal Purpose, and Feedback Target on Performance Appraisal Ratings*, 12 J. BUS. & PSYCHOL. 283, 283-84 (1998).

judicial decision-making.⁷³ On the contrary, it is obvious that we have far more reason to worry that district judges will *deny* COAs without adequate and objective contemplation.

Judge Blackmun's second, and more alarming, error is his assertion that a system in which district judges possess the power in question is a system more aligned with traditional judicial practices. Nothing could be further from the truth. As we have seen, the idea that *any* claim dismissed by a district judge could not be appealed to the circuit court is itself an exception to one of the oldest and most deeply-entrenched principles in the federal courts.⁷⁴ More to the point, Judge Blackmun subtly but crucially elides the entire crux of the issue when he writes that "this, *as with all other matters*, is an issue for decision by . . . the district judge, in the first instance."⁷⁵ Some matters are, of course, traditionally reserved for the district judge.⁷⁶ But the question of whether a litigant is entitled to appeal has never historically been categorized alongside such matters.⁷⁷ The very characterization of a right to appeal as something that we would think about in terms of an issue *ever* decided in the first instance is an odd one, and it instantly strikes a discordant note. In a good faith effort to simplify and make sense of a unique and anomalous vehicle, Judge Blackmun badly misconstrued the issue.

The circuit court jurisprudence justifying the grant of COA-issuing power to the district courts similarly misconstrues the issue. As mentioned, that jurisprudence rests on two basic precepts: 1) the district court is "better situated" to rule on the COA⁷⁸ and 2) judicial efficiency is furthered if they do so rule.⁷⁹ Although the two precepts might appear to represent independent

73. See, e.g., *In re Murchison*, 349 U.S. 133, 136 (1955) ("[N]o man can be a judge in his own case").

74. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) (affirming necessity of appellate review as a force that "revises and corrects the proceedings in a case already instituted"); see generally *Dalton*, *supra* note 23.

75. Blackmun, *supra* note 31, at 353 (emphasis added).

76. See, e.g., *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713-14 (1986) (holding that district courts, not appellate courts, conduct fact-finding).

77. See generally *Dalton*, *supra* note 23.

78. See sources cited *supra* note 67.

79. See cases cited *supra* note 68.

grounds, in actuality the second is totally contingent on the first. That is to say, if the district court is in fact not better situated to rule on the COA, then it follows that it will not be more efficient to place it in a gatekeeper role. For if district courts are ill-suited to judging their own judgments, then circuit courts will be required to correct all sorts of wrongly decided COAs.⁸⁰ When a district court improperly declines to issue a COA, and the petitioner takes his application to the circuit court, the circuit court will presumably have to review the same materials and then grant the COA.⁸¹ All the time that the district court spent considering the application is thus wasted.

Consequently, it all comes down to whether we should trust the district courts to properly apply the COA standard. If we can, then yes, efficiency demands that they perform this screening role. If they cannot, then efficiency demands just the opposite. There is a very simple, commonsense reason why we cannot, one that is unfortunately lost in the voluminous jurisprudence and academic scholarship. As erudite and fair-minded as they may be (and hopefully are), district judges are people, and people are not the best judges of their own decisions, regardless of the context.⁸² Seen in this light, it is a very odd thing for someone to claim that the district judge who denies a habeas petition is in the best position to determine whether a “reasonable jurist” might disagree. Quite to the contrary, he is possibly in the *worst* position to make that call. The statement that a district judge is ideally situated to make such a decision, because he has already reviewed all of the relevant submissions and knows the case, and because the circuit court would otherwise have to replicate all of that labor, sounds dangerously close to an argument that we should do away with appellate courts altogether. After all, *any* circuit court is duplicating at least some work performed by the district court, and is reconsidering at least some of the same materials. At the risk of hyperbolizing, one might as well say,

80. See, e.g., cases cited *infra* note 132.

81. There is some uncertainty as to whether and how circuit courts should approach the potential vacatur of COAs improvidently granted by district courts. See generally Hagglund, *supra* note 26, at 994-98. This uncertainty is largely irrelevant to this article, as it focuses on the danger—far greater—that district courts will improperly *deny* COAs.

82. See, e.g., Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 48 (2011) (discussing how “judges are people too”).

why have more than one decision-making entity at all? Indictment, arrest, conviction, sentence, parole, let the district judge do them all. No need to have prosecutors, law enforcement officers, juries, and parole boards all reviewing the same paperwork, it only creates bureaucratic redundancy.

There are certainly arguments that could be devised to counter this intuitive view,⁸³ but the circuit courts did not articulate them. In the large majority of cases, the most the issue got was a passing reference, and universally the circuit courts declined to engage with it in any meaningful way.⁸⁴ The most cynical explanation for that glaring silence is that it was easier for the courts of appeals to ignore the real issue. In other words, they had an internally inconsistent statute that could be plausibly read to support either result, and they chose the path of least resistance that had been cleared, after *Hunter*, by peer courts and by decades of prior practice. Even this view is not overwhelmingly cynical, given that the desire to avoid a circuit split on a pervasive issue is surely not an entirely objectionable one,⁸⁵ and years of precedent is certainly not an irrelevant factor.⁸⁶ On the other hand, it is still concerning that the circuit courts, squarely presented with an opportunity to resolve an obvious worry about the fairness and efficacy of the judicial system, essentially declined to do so.

Whatever the role of such motivations, there was also something deeper afoot. The circuit courts were correct that there is an efficiency interest advanced by the district courts ruling on COAs, they simply glided over the precise nature of that interest. It is not, as they suggested, an interest in *judicial* efficiency,⁸⁷ but

83. For instance, one might argue that district courts are required to evaluate their own prior judgments in other contexts, such as when they rule on the merits following a decision regarding preliminary injunctive relief or when they resolve a motion to alter or amend judgment, and that there is no reason to doubt the power is properly exercised there.

84. See cases cited *supra* notes 59, 60, and 62.

85. See, e.g., *Robbins*, *supra* note 26, at 317 (“Since habeas corpus deals with the fundamental liberty of people in custody, should the same petition of a state prisoner be allowed to proceed on appeal in one jurisdiction but not in another?”).

86. See, e.g., *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008) (“Principles of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same.”).

87. See cases cited *supra* note 68.

rather an interest in the efficiency of the circuit courts. When district courts rule on COAs in the first instance, they refuse to grant them the majority of the time.⁸⁸ Many petitioners will not reapply to the circuit court,⁸⁹ will reapply tardily,⁹⁰ or will submit an application that is fatally defective in some respect.⁹¹ In all of these instances, the circuit court will have to expend a very slight amount of work, if any.⁹² Even in the cases where the petitioner timely and properly reapplies, the circuit court has before it a decision by the district judge on the precise issue presented, a helpful resource that likely reduces the time and energy that any circuit court personnel will be required to devote to the case.⁹³

Stated differently, all of the *inefficiency* engendered by Rule 11(a) lands on the district judges. They are the ones deciding COA applications improperly, and it is their work that will potentially be duplicated or corrected. Any contribution that they make to the circuit courts' workload therefore does in fact expedite the circuit court docket, because in the absence of that contribution the circuit courts would be dealing with all of those cases anyway, *plus* all of the cases that would not reach them or that would require far less work. It goes without saying that a

88. There do not appear to be any statistics regarding the percentage of COAs granted by the district courts, but a general review of the cases indicates that it is a minority of the time.

89. See Christina L. Boyd & James F. Spriggs II, *An Examination of Strategic Anticipation of Appellate Court Preferences by Federal District Court Judges*, 29 WASH. U. J. L. & POL'Y 37, 40 fig.1 (2009).

90. Although there are no statistics on how often this occurs, a perusal of the available cases suggests that it is with some regularity. See, e.g., *Watkins v. Leyba*, 543 F.3d 624, 625-27 (10th Cir. 2008).

91. As with the frequency of COA applications dismissed as time-barred, there is no data on how often they are denied for other reasons. The research conducted for this article indicates that circuit courts routinely deny petitions for various other defects, including for failure to argue the proper issues. See, e.g., *Proffit v. Wyoming*, 446 Fed. App'x 83, 85-86 (10th Cir. 2011) (denying a COA in part because petitioner argued the merits of his claim, rather than the timeliness issue that resulted in the petition's dismissal below).

92. See Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 333-40 (2011) (describing how cases with jurisdictional and other technical defects are screened out and not calendared for oral argument).

93. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 74-75 (2d ed. 1996) ("[T]he less time an appellate court spends on a case the more likely it is simply to affirm the district court or agency, affirmance being the easy way out.").

rule that slightly furthers the efficiency of the circuit courts while dramatically impairing the efficiency of the trial courts is not a rule that benefits “judicial” efficiency. Indeed, the magnitude of the inefficiency imposed upon the district courts is, for the same reasons just set forth, far greater than the gain in increased efficiency afforded to the circuit courts. Rule 11(a), in a nutshell, has no rational justification.

All too often in the law, the most logical, commonsense points are lost in a cloud of analytical hair-splitting and obfuscation. The universal acceptance of Rule 11(a) over § 2253(c)(1) in the face of all reason is a textbook example, one that has been almost entirely ignored by the academy as well as the courts, and one that is therefore worthy of critique in its own right.

That said, it has long been admitted that logic is not always the most appropriate signpost to follow in the law.⁹⁴ It is not impossible that district judges are in fact the best reviewers of their own work, despite the good reasons to suspect otherwise. With that in mind, we turn to the empirical evidence to confirm that the commonsense expectation is indeed borne out by reality.

III. THE EMPIRICAL CASE AGAINST RULE 11(A)

The preceding section made the logical and psychological argument against district judges enjoying the power to rule on COAs. This section substantiates the argument with concrete evidence. To cull that evidence, the article looks at the narrowest but most illuminating context in which district judges rule on COAs: when a magistrate recommends granting habeas relief and a district judge declines to do so. Such a situation is the only one in which the COA standard does not require a speculative exercise. A “reasonable jurist” has in fact disagreed.⁹⁵ Despite the standard being met on its face, judges across the country have nevertheless denied COAs and, more to the point, very few have shown any awareness of the legal significance of the recommendation. This is a powerful indication that the ability and obligation to rule on COAs should be removed from the province of the trial courts and vested exclusively with the courts

94. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) (“The life of the law has not been logic: it has been experience.”).

95. See *infra* Part III.A.

of appeals. To make this case, it is first demonstrated that magistrates must be considered “reasonable jurists” for purposes of habeas recommendations before turning to the data.

A. Background on the History of Federal Magistrates

In order to understand how compelling the sample is, it is important to have some background on United States magistrates and their role in the judicial system. Beginning with the basics, magistrates exist to assist district judges with managing their dockets.⁹⁶ In recent years, they have come to represent an ever-more crucial cog in the federal judicial machine.⁹⁷ The types of cases magistrates handle can vary widely depending on the needs and preferences of the district judges for whom they work.⁹⁸ Nevertheless, as a general matter, in terms of their civil dockets,⁹⁹ many magistrates focus on the sorts of claims that move through the federal system in the greatest quantity: prisoner civil rights actions, Social Security appeals, and, of course, petitions for habeas corpus.¹⁰⁰ In civil matters, magistrates submit recommendations to district judges on the proper disposition of various non-dispositive motions.¹⁰¹ With respect to dispositive motions, magistrates submit recommendations and, with the

96. See, e.g., *McCarthy v. Bronson*, 500 U.S. 136, 142 (1991).

97. See, e.g., *Peretz v. United States*, 501 U.S. 923, 928 (1991) (“Given the bloated dockets that district courts have now come to expect as ordinary, the role of the magistrate in today’s federal judicial system is nothing less than indispensable.”) (citation omitted) (internal quotations marks omitted).

98. See Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2139 (1989) (“[T]he use of magistrates varies substantially from district to district—often depending upon the caseload demands of the particular district and the district’s organizational philosophy about the relationship between judge and magistrate.”).

99. Magistrates often handle a wide range of preliminary duties with respect to criminal proceedings, such as authorizing warrants, as well as conducting preliminary hearings, arraignments, bond hearings and so forth. See, Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712, 749 (1994).

100. See Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 759 (2010) (“District courts were quick to delegate work to magistrate judges, including large volumes of prisoner petitions—both § 1983 suits and § 2254 habeas petitions—and social security cases.”). Many district courts also refer Title VII employment discrimination actions to magistrates. See, e.g., Silberman, *supra* note 98, at 2173.

101. 28 U.S.C. § 636(b)(1)(B) (2006).

consent of the parties, issue final orders.¹⁰² When a magistrate resolves a civil case himself, rather than drafting a recommendation, he does so on behalf of the district court.¹⁰³ Consequently, appeal is directly to the circuit court; the district judge has no further involvement in the case.¹⁰⁴

There are two specific points that one must understand about the magistrate's role in the judicial system for purposes of this article. First, the extent to which magistrates have developed expertise on habeas corpus and, particularly, on § 2254. Magistrates across the country deal with large numbers of § 2254 petitions every year.¹⁰⁵ Indeed, the magistrates discussed below have all worked on numerous § 2254 cases.¹⁰⁶

The second point is the extent to which district judges rely upon their magistrates. This reliance is evident in several different ways. Most obviously, district judges are in charge of hiring and reappointing magistrates.¹⁰⁷ Given that they personally select the individuals holding the office, and keep them on-hand at their discretion,¹⁰⁸ they presumably trust the judgment of magistrates. It is unsurprising, then, that district judges tend to approve a substantial majority of the recommendations submitted to them by magistrates.¹⁰⁹ The magistrates discussed in this article are no exception. An overview of their recommendations suggests that they are, by large margins, adopted by the presiding district judge.¹¹⁰

102. *Id.* § 636(c)(3).

103. *Id.*

104. *Id.*

105. See Higginbotham, *supra* note 100, at 759.

106. A search for "2254" in the Westlaw documents authored by each magistrate in the sample yielded a collective total of 7031 results. While a number of these may only reference § 2254 tangentially, the order of magnitude indicates that they deal with § 2254 issues on a routine basis.

107. See 28 U.S.C. § 631(a) ("The judges of each United States district court . . . shall appoint United States magistrate judges in such numbers and to serve at such locations within the judicial districts as the Judicial Conference [of the United States] may determine . . .").

108. 28 U.S.C. § 631(i).

109. See Gary M. Maveal, *Federal Presentence Reports: Multi-Tasking at Sentencing*, 26 SETON HALL L. REV. 544, 590 (1996) ("It is widely-known that the magistrate judge's [report and recommendation] is accepted by the district court in the vast majority of circumstances . . .").

110. To confirm this proposition, general searches were conducted on Westlaw for the recommendations of each magistrate in the sample and

It warrants mention that, when the prisoner and the government both consent, magistrates are empowered to issue final judgment on habeas petitions on behalf of the district court, just as they are with other civil matters.¹¹¹ In such instances, district judges have a very limited ability to review the decision of the magistrate.¹¹² The magistrates whose work is under consideration in this article have, like their colleagues across the country, decided a significant number of habeas corpus petitions through final orders, rather than recommendations. When they have done so, they have spoken for the district court itself, just as much as district judges do in their own final judgments.¹¹³ Finally, and perhaps most to the point, magistrates write enormous numbers of recommendations on habeas petitions, and the great bulk of them are accepted either in full or in substantial part.¹¹⁴ Moreover, the magistrates studied in this article have written many such recommendations themselves, and an equally large number have been adopted.¹¹⁵

This section is designed to support three simple propositions, ones that likely would have been so commonsensical as to not require support were it not for the counterintuitive sample of cases discussed below. First, magistrates hold and maintain their positions by virtue of the fact that the district judges within their districts regard them as reasonable jurists. Second, one of the

scanned the results for red flags. No magistrate had more than a small percentage of recommendations so marked, demonstrating that their recommendations are all approved a substantial majority of the time.

111. See, e.g., *Farmer v. Litscher*, 303 F.3d 840, 843 (7th Cir. 2002).

112. See 28 U.S.C. § 636(c)(3) (“Upon entry of judgment in any case [where the parties consent to proceed before a magistrate], an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court.”); *id.* § 636(c)(4) (“The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.”).

113. See *id.* § 636(c)(3) (authorizing magistrates to enter judgments of the court when the parties consent).

114. See Maveal, *supra* note 109, at 590 (“[R]eality suggests that routinely delegating certain classes of cases to magistrate judges (for example, habeas corpus and Social Security disability) gives those judges the opportunity to develop an expertise that many federal district judges may neither have nor want.”).

115. A rough overview of the magistrates’ recommendations attested to this proposition.

major roles that magistrates generally (and the magistrates in the sample in particular) play is to analyze the meritoriousness *vel non* of habeas petitions. Third, and finally, district judges generally (and the district judges supervising the magistrates discussed here in particular) view magistrates as reasonable jurists with respect to their opinions concerning federal habeas corpus cases.

B. The Data

Having established the background principles necessary to analyzing the data, we finally turn to the fascinating and surprising results of the empirical research.

1. *The Methodology*

We began this project with the goal of assembling an exhaustive list of every publicly accessible case in which a magistrate recommended granting § 2254¹¹⁶ relief, and a district judge then denied relief and ruled on a COA in the case. This proved too laborious and time-consuming. There are, of course, an enormous number of § 2254 petitions filed in the federal courts.¹¹⁷ Precious few result in any kind of relief being granted.¹¹⁸ There are, unfortunately, no words that appear in recommendations to grant habeas petitions that do not also appear in the far-more-numerous recommendations to deny them. As a result, it is

116. COAs are always required to appeal denials of motions brought to vacate federal sentences pursuant to 28 U.S.C. § 2255, *see* 28 U.S.C. § 2253(c)(1)(B), and are sometimes required in actions brought pursuant to 28 U.S.C. § 2241. However, COAs are not *always* required in § 2241 actions. *See* Nancy J. King & Suzanna Sherry, *Habeas Corpus and State Sentencing Reform: A Story of Unintended Consequences*, 58 DUKE L.J. 1, 46–47 (2008). Furthermore, § 2255 motions are directed to the district court that sentenced the movant. RULES GOVERNING SECTION 2255 CASES IN THE U.S. DIST. CTS., R. 4(a) (2010). It is likely, therefore, that the district judge will have a different perspective on the case than he would toward state court judgments, from which he is entirely divorced. As a result, § 2255 COAs potentially implicate more complex legal and psychological issues. Consequently, the article focuses on § 2254 cases to generate the purest possible evidence as to the inability of district judges to question their own decisions.

117. *See* King, Cheesman II & Ostrom, *supra* note 11.

118. *See* Frost & Lindquist, *supra* note 15, at 778 n.183 (citing King, Cheesman II & Ostrom, *supra* note 11, at 52) (noting that 0.29% of habeas petitioners received relief in a sample of noncapital cases).

exceedingly difficult to devise search terms that will call up only the former,¹¹⁹ and the researcher is inundated with unhelpful results. And, needless to say, there is no database with a separate list of cases in which magistrates have recommended habeas relief and district judges have declined to issue the writ.

To overcome these research hurdles, a method was engineered to cull a non-exhaustive but representative sample of such cases. A search was conducted for every § 2254 recommendation available on Westlaw for each active magistrate in the country.¹²⁰ Within those results, every decision marked with a red flag was inspected on the assumption that Westlaw would so designate most recommendations that were rejected either in part or in full.¹²¹ Among those cases, the text was scanned to see whether the magistrate recommended granting relief and, if so, whether the district judge declined to do so. For each case that met the criteria, subsequent history was then consulted through Westlaw and Public Access to Court Electronic Records (PACER)¹²² to determine whether and how the COA came into play.¹²³ The results follow.¹²⁴

119. For example, at the time this article was written, searching all district court opinions on Westlaw for “recommend! /s grant! /s habeas,” returned, as the first result, a case in which a magistrate “issued an *Order and Report and Recommendation* recommending Respondent’s Motion to Dismiss . . . be granted, and that the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be dismissed without prejudice.” *Anderson v. Banks*, No. 2:11-CV-276, 2011 WL 5101772, at *1 (S.D. Ohio Oct. 26, 2011).

120. A list of magistrates current through March 16, 2012 was employed, as ascertained by the websites for each respective judicial district.

121. Westlaw generally follows this practice. It does not do so uniformly, however, and one case was found through word-of-mouth even though it had not been given a red flag. *See Alonzo v. Thaler*, No. 3:07-CV-399, 2011 WL 3566973 (N.D. Tex. Aug. 12, 2011).

122. All unpublished documents cited to electronic court filings (ECF) on PACER are on file with the author.

123. A small number of cases that were discovered have visible dockets on PACER, but the individual docket entries could not be opened. *See, e.g., Letizia v. Walker*, No. 97-CV-0300E(F) (W.D.N.Y. 2001); *Tunstall v. Hopkins*, 126 F. Supp. 2d 1196 (N.D. Iowa 2000). Such cases were counted to the extent that the outcome with respect to the COAs could be discerned, but were not placed in any of the categories concerning the reasoning of the ruling.

124. The results are current through March 16, 2012.

2. *The Cases*

The investigation uncovered an intriguing assortment of cases that have largely flown under the radar.

a. *The Numbers*

Found forty-seven cases were found where a magistrate recommended granting a § 2254 petition and a district judge denied relief and then ruled on a COA.¹²⁵ The sample involves forty-two district judges and thirty-nine magistrates.¹²⁶ It covers twenty-two districts in eight circuits.¹²⁷

Of the forty-seven cases, the district judge granted a COA thirty-one times (sixty-six percent) and denied it sixteen (thirty-four percent).¹²⁸ District courts within the Ninth Circuit were responsible for forty-eight percent of the granted COAs from the entire country (fifteen) and nineteen percent of the denied COAs (three).¹²⁹ Thus, if district courts within the Ninth Circuit are eliminated from the sample, there are fifteen granted COAs (fifty-four percent) and thirteen denials (forty-six percent).¹³⁰ For ten of the fifteen denied COAs, a circuit court ruled on an appeal of the denial. Five times the higher court granted the COA,¹³¹ and five times it did not.¹³²

125. *See infra* Table I.

126. *See id.* Several cases involve the same judges.

127. *See id.* The only circuits for which there are no cases are the First, the Seventh, the Eleventh, and the D.C. Circuits.

128. *See id.*

129. *See id.*

130. *See id.* The sample is not meant to be exhaustive and is, in any event, too small to make statistically significant regional distinctions. It is nonetheless notable that there is such a sharp contrast between the Ninth Circuit and its sister circuits.

131. Order Granting a COA, *Lawwill v. Pineda*, No. 11-3645 (6th Cir. Feb. 24, 2012); Order, *Goldberg v. Maloney*, No. 11-3305 (6th Cir. Nov. 28, 2011), ECF No. 108; Order, *Quinn v. Ohio Dep't of Rehab. & Corrs.*, No. 10-3490 (6th Cir. Sept. 21, 2011), ECF No. 25; Order, *Hood v. Wilson*, No. 09-3165 (6th Cir. July 22, 2009), ECF No. 25; Order, *Pordash v. Hudson*, No. 07-4141 (6th Cir. June 19, 2008), ECF No. 27. Citations to ECF documents containing circuit court orders refer to the orders' ECF numbers on the underlying district court docket, although when referring to filings of a circuit court, the case numbers cited refer to the circuit court's case numbers.

132. Order, *Salinas v. Thaler*, No. 10-40984 (5th Cir. Feb. 14, 2011), ECF No. 68; *Mathers v. Seifert*, 296 F. App'x 375, 376 (4th Cir. 2008) (*per curiam*); Order, *Pordash v. Hudson*, No. 07-4171 (6th Cir. Mar. 18, 2008), ECF No. 26;

b. The Content

Because of the cursory nature of these orders, a description of their content can be nearly as brief as a summary of the numbers. Nevertheless, there are several features that merit comment.

First, the brevity of the orders is itself remarkable. A number of the decisions were rendered in form orders, where the district judge simply checked a line to indicate the disposition of the COA. Interestingly, this was done both by judges granting COAs,¹³³ and those denying them.¹³⁴ In the same vein, the great majority of the orders, whether they grant or deny the COA, contain little to no analysis.¹³⁵ A number of them simply concisely state the COA standard and then summarily conclude that it is satisfied or unsatisfied with no discussion of the details of the case, let alone mention that a federal judge deemed the petition meritorious.¹³⁶ Slightly more conscientious district judges make passing mention of the magistrate's recommendation, but give no indication that

Order, *Gooden v. Dretke*, No. 03-10578 (5th Cir. Feb. 24, 2004), ECF No. 32; *Letizia v. Walker*, No. 97-CV-0300E(F) (2d Cir. Sept. 8, 2003), ECF No. 80.

133. See e.g., Certificate of Appealability, *Higgins v. Cain*, No. 09-2330 (E.D. La. Apr. 14, 2011), ECF No. 52; Order on Certificate of Appealability and In Forma Pauperis Status, *DeBerry v. Ryan*, No. CV 04-0858-PCT-SMM (D. Ariz. Oct. 28, 2009), ECF No. 75; Order Re: Certificate of Appealability, *Wyrick v. Mendoza-Powers*, No. 1:05-CV-1194 (E.D. Cal. Apr. 8, 2008), ECF No. 33 [hereinafter *Wyrick COA Order*]; *Hayes v. Quarterman*, No. 3-05-CV-1974-M (N.D. Tex. Jan. 30, 2008), ECF No. 66.

134. Certificate of Appealability, *McCullough v. Warden, LSP*, No. 1:05CV0674 (W.D. La. Dec. 4, 2008), ECF No. 51; Certificate as to Appealability, *Gooden v. Dretke*, No. 3:00-CV-0286-P (N.D. Tex. Sept. 10, 2003), ECF No. 28 [hereinafter *Gooden COA Order*].

135. For example, one form order in the sample includes a space for the judge to indicate the reason that he granted the COA, in which he instead handwrote the certified issue, while declining to articulate any reasoning to support the result. *Wyrick COA Order*, *supra* note 133.

136. See, e.g., Order Denying Certificate of Appealability, *Goldberg v. Maloney*, No. 4:03 CV 2190 (N.D. Ohio July 7, 2011), ECF No. 107 [hereinafter *Goldberg COA Order*]; *Salinas v. Johnson*, No. C-02-214, 2010 WL 3732059, at *10 (S.D. Tex. Sept. 20, 2010); *Larson v. Glebe*, No. C09-1453Z, 2010 WL 2486428, at *5 (W.D. Wash. June 16, 2010); Order and Opinion Granting Certificate of Appealability, *Mitchell v. Jones*, No. CIV-06-503-RAW-KEW (E.D. Okla. Apr. 27, 2010), ECF No. 38; Order, *Moeller v. Lockyer*, No. 2:01-CV-2351 FCD JFM (HC) (E.D. Cal. July 8, 2009), ECF No. 29; *Rucker v. Patrick*, No. 07cv0364-IEG (RBB), 2008 WL 4104230, at *16 (S.D. Cal. Sept. 3, 2008); Order Granting Certificate of Appealability, *Smith v. Romanowski*, No. 05-73711 (E.D. Mich. May 1, 2007), ECF No. 27.

they think it relevant to the “reasonable jurist” standard.¹³⁷ Some do not even bother to include the COA standard.¹³⁸

Perhaps most interesting of all is what district judges offer, and what they do not offer, by way of analysis, when they do endeavor to justify the decision. To begin with the latter, they rarely point to the magistrates’ recommendations as a consideration in their calculus, either one that supports the grant of a COA or one that must be dealt with in order to deny the COA. District judges explicitly noted their disagreement with the magistrate as a factor relevant to their ruling on the COA only eight times, seven times when granting a COA,¹³⁹ and one time when denying a COA,¹⁴⁰ meaning that they noted their

137. See, e.g., *Johnson v. Finn*, No. Civ. S 03-2063 JAM JFM P (E.D. Cal. Mar. 23, 2010), ECF No. 71.

138. See, e.g., Amended Judgment Order, *Lawwill v. Pineda*, No. 1:08 CV 2840 (N.D. Ohio June 15, 2011), ECF No. 41; *Armitage v. Clark*, No. 09cv463-L, 2011 WL 1584946, at *6 (S.D. Cal. Apr. 25, 2011); *McDonald v. Lebanon*, No. 3:08 CV 1718, 2010 WL 3036730, at *13 (N.D. Ohio July 30, 2010); *Quinn v. Ohio Dep’t of Rehab. & Corrs.*, No. 3:09 CV 546, 2010 WL 1433400, at *4 (N.D. Ohio Apr. 7, 2010); *Corona v. Almager*, No. 07cv2117-BTM (NLS), 2009 WL 3246452, at *15 (S.D. Cal. Oct. 5, 2009); *Bell v. Anderson*, No. 1:05-CV-2415, 2006 WL 2864121, at *7 (N.D. Ohio Sept. 29, 2009); *Hood v. Bobby*, No. 3:07 CV 3319, 2009 WL 111633, at *7 (N.D. Ohio Jan. 15, 2009); *Brooks v. Eberlin*, No. 4:07CV2162 (N.D. Ohio Dec. 31, 2008), ECF No. 30; *Order, Yenawine v. Motley*, No. 3:06CV-413-R (W.D. Ky. Feb. 7, 2008), ECF No. 19; *Certificate of Appealability, Holley v. Yarborough*, No. CIV S-02-0310 RRB JFM P (E.D. Cal. Jan. 10, 2008), ECF No. 31; *Pordash v. Hudson*, No. 1:06 CV 836, 2007 WL 2229833, at *3 (N.D. Ohio July 31, 2007). Some of these decisions have the “appeal cannot be taken in good faith” language from 28 U.S.C. § 1915(a)(3) (2006), but none have any of the “reasonable jurist” or “substantial constitutional issue” or “deserving encouragement” to go forward language from § 2253(c)(2) or the Supreme Court’s COA cases.

139. *Howard v. Warden, Lebanon Corr. Inst.*, No. 3:08-cv-424, 2012 WL 395186, at *8 n.7 (S.D. Ohio Feb. 7, 2012); *Rosser v. Cate*, No. 10-CV-2203 MMA (WVG), 2012 WL 170077, at *5 (S.D. Cal. Jan. 19, 2012); *Order Granting Certificate of Appealability at 2, Davis v. Guirbino*, No. CV 06-7315 VBF (FFM) (C.D. Cal. Apr. 26, 2011) [hereinafter *Guirbino COA Order*], ECF No. 42; *Askew v. Phillips*, No. 1:06-cv-708, 2010 WL 2802280, at *8 (W.D. Mich. July 13, 2010); *Order Issuing a Certificate of Appealability at 2, Thompson v. Sisto*, No. CIV. 2:07-2577 WBS JFM (HC) (E.D. Cal. Apr. 13, 2010), ECF No. 21 [hereinafter *Sisto COA Order*]; *Matthews v. Purkett*, No. 4:06-CV-925 (CEJ), 2009 WL 2982912, at *11 (E.D. Mo. Sept. 14, 2009); *Sargent v. Kelchner*, No. 03-327 Erie, 2005 WL 5298488, at *6 (W.D. Pa. Aug. 22, 2005).

140. In the order denying a certificate of appealability, the district judge denied a COA due to mootness but noted that she would have granted one, in part because of the magistrate’s recommendation, were it not for the

disagreement in twenty-three percent of the grants and seventeen percent of the total sample.¹⁴¹

What factors do the district judges cite, then, if not the magistrate's recommendation? It varies. Some district judges refer to their opinion dismissing the petition on the merits as a reason, in and of itself, to deny a COA.¹⁴² In a typical formulation of this approach, a district judge in the Eastern District of California wrote that "[f]or the reasons set forth in this court's . . . order [denying habeas relief], petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, a certificate of appealability should not issue in this action."¹⁴³ Similarly, a district judge in the Northern District of Texas had this to say about why a COA was inappropriate: "[f]or the reasons stated in the Court's Order accepting in part and denying in part the Recommendation of the . . . Magistrate . . . , the Petitioner has failed to demonstrate that jurists of reason would find it debatable whether" he was entitled to relief.¹⁴⁴ Another district judge appears to use a form order that makes the same point,¹⁴⁵ presumably one that is used where magistrates

mootness. Order Denying Certificate of Appealability at 3-6, *Stallworth v. Salazar*, No. CV 05-03829 (C.D. Cal. June 14, 2010), ECF No. 57 [hereinafter *Stallworth COA Order*].

141. In several cases, the district judge either mentioned the magistrate's disagreement and/or issued a COA on only the grounds upon which the magistrate recommended relief, but did not suggest that the disagreement itself constituted satisfaction of the "reasonable jurist" standard. *See, e.g.*, Order on Reconsideration Motion and to Enter Judgment at 3-4, *Gregory v. Chavez*, No. CV F 98-6521 LJO MJS HC (E.D. Cal. Oct. 11, 2011), ECF No. 134 (declining to rely upon disagreement but then finding that "a limited COA is proper as to the claims which [the] Magistrate Judge . . . recommended granting"). These cases are not included in note 139, *supra*.

142. *See e.g.*, cases cited *infra* notes 143, 144, and 145.

143. Order at 2, *Saifullah v. Carey*, No. CIV S-02-2664 MCE DAD P (E.D. Cal. Dec. 20, 2006), ECF No. 55 [hereinafter *Saifullah COA Order*].

144. Order of the Court on Certificate As to Appealability, *Alonzo v. Thaler*, No. 3:07-CV-399 (N.D. Tex. Aug. 12, 2011), ECF No. 92.

145. *Gooden COA Order*, *supra* note 134, at 1; *see also Goldberg COA Order*, *supra* note 136, at 3 ("For the reasons stated in this Court's Memorandum Opinion and Order, a reasonable jurist could not conclude that dismissal of the Petition is in error or that Petitioner should be permitted to proceed further."); *Quinn v. Ohio Dep't of Rehab. & Corrs.*, No. 3:09 CV 546, 2010 WL 1433400, at *4 (N.D. Ohio Apr. 7, 2010) ("[F]or the reasons stated herein and in the Report and Recommendation, the Court certifies . . . that there is no basis upon which to issue a [COA]."); Order at 12, *Benchoff v.*

recommend denial as well.

Other district judges present a vague and cursory description of the reasons that moved them to grant the COA.¹⁴⁶ Still others, perhaps the most interesting of all, seek to show that reasonable jurists could disagree, but do so without reference to the ostensibly reasonable jurist who has *already* disagreed.¹⁴⁷

c. Analysis

These ostensibly routine orders are modest in length and size, but, as the following analysis shows, they constitute powerful evidence that something has gone badly awry in the federal judiciary.

i. Understanding the Sample

As an initial matter, it bears repeating that the sample is not exhaustive, and is, by any accounting, a small one. It does not speak directly to any pervasive, overwhelming trends in the federal judiciary. Then again, the question under consideration is an extremely narrow one, and it would therefore be unreasonable to expect a large sample. Furthermore, the breadth of the sample in terms of the numbers of judges, districts, and circuits involved¹⁴⁸ suggests that the problem, such as it is, is not an isolated or an exceptional one.

What, then, do the data mean? Recall that a district judge is

Colleran, No. 03-CV-740-ARC (M.D. Pa. Oct. 3, 2006), ECF No. 106 (“The Court also denies a [COA], based on the above analysis.”).

146. See, e.g., *Elder v. Berghuis*, 644 F. Supp. 2d 888, 904 (W.D. Mich. 2009) (issuing a COA with reference to various iterations of the standard); *Walbey v. Quarterman*, No. G-99-496, 2008 WL 6841900, at *40 (S.D. Tex. Feb. 20, 2008) (issuing a COA because of “the complex factual record and the serious issues” raised by the petitioner).

147. Order at 1 n.1, *Rhodes v. Varano*, No. 08-3236 (E.D. Pa. Aug. 17, 2011), ECF No. 36 (citing the absence of appellate precedent addressing “the precise circumstances presented by this case”); *Somers v. Schwartz*, No. 2:04-cv-00698-JKS-KJM, 2007 WL 4530867, at *4 n.5 (E.D. Cal. Dec. 18, 2007) (citing four different California state court decisions to show that the law was uncertain so as to justify a COA). In perhaps the most remarkable statement in the sample, the district court in *Mathers v. Seifert* related that the magistrate believed relief should be granted and then proceeded to describe its own, contrary position as “not debatable.” Order at 2, *Mathers v. Seifert*, No. 6:07-cv-00734 (S.D. W. Va. July 7, 2008), ECF No. 19,

148. See *supra* text accompanying notes 126-27.

required to grant a COA if a “reasonable jurist” could debate the result.¹⁴⁹ When a magistrate recommends issuing the writ, he or she has, quite plainly, “debated” the district judge’s conclusion. In other words, if the district judge declines, in such circumstances, to issue a COA, the judge is essentially declaring: the magistrate is not a reasonable jurist. It is astonishing, in the author’s view, that a third of the district judges who have been presented with this question—is the magistrate a reasonable jurist or not—have answered in the negative.¹⁵⁰ It is even more astonishing that only *seventeen percent* of the district judges presented with the question seem to even realize what the question is.¹⁵¹ That is, only that paltry number regarded it as even *relevant* that the magistrate disagreed with them.

To digest the importance of these numbers, it is worth returning for a moment to the purpose and role of magistrates, the purpose and role of COAs, and the general nature of federal habeas review. Magistrates serve entirely at the pleasure of district judges.¹⁵² District judges appoint magistrates, and magistrates’ primary purpose is to make district judges’ lives easier.¹⁵³ Unsurprisingly, district judges generally follow the recommendations of their magistrates—who they have, after all, appointed for the very reason that they trust them to make sound recommendations—a large majority of the time.¹⁵⁴

COAs, like magistrates, were created with efficiency in mind.¹⁵⁵ They were invented to reduce the amount of judicial resources expended on frivolous appeals.¹⁵⁶ Likewise, the decision to allow district courts to issue COAs was plainly done to free up the circuit courts from a torrent of meritless habeas claims.¹⁵⁷

Finally, § 2254 habeas review has been gradually restricted to only those cases where state inmates are being held in egregious violation of the United States Constitution *and* the inmates have

149. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

150. *See* cases cited *supra* note 128 and accompanying text.

151. *See* cases cited *supra* notes 139-40 and accompanying text.

152. 28 U.S.C. § 631(i) (2006).

153. *See supra* Part III.A.

154. *See supra* note 109 and accompanying text.

155. *See supra* Part I.B.2.

156. *See supra* notes 29–34 and accompanying text.

157. *See supra* Part I.B.2.

met the onerous procedural requirements imposed by AEDPA.¹⁵⁸ As a consequence, the federal courts very seldom grant any type of relief to § 2254 petitioners.¹⁵⁹

Considered in this light, the data is even more striking. A district judge who denies a COA after a magistrate recommends issuing the writ has before her the exceedingly rare case in which a federal judge believes that the Constitution has been so badly transgressed that the federal judiciary should take the extraordinary step of ordering a state penal system to release a prisoner. For such a judge to disagree with that step is unremarkable. But it is almost incredible that she would not only disagree, but also rule that the magistrate—whose judgment the district judge routinely relies upon—is so unreasonable that the petitioner has no right to higher review, a right that litigants possess in almost every other circumstance.

The manner in which district judges make this extraordinary decision is, if possible, even more extraordinary. They do not recite the magistrates' recommendations in detail and then attempt, through considered analysis, to demonstrate that the magistrates were so unreasonable as to make an appeal unnecessary. In fact, they almost never even *mention* the magistrates' recommendations with respect to the COA determination.¹⁶⁰ By and large, they rule on the COA in the same fashion as they would in any other case (i.e., in any case where the magistrate recommended against habeas relief). That is, they issue a *pro forma* opinion, briefly stating the standard

158. See *supra* notes 14 and 39 and accompanying text.

159. See *supra* note 15 and accompanying text.

160. See cases cited *supra* notes 139 and 140. In one interesting case from the sample, the district judge mentioned the disagreement she had with the magistrate's recommendation, but then proceeded to conduct the "reasonable jurist" test in the abstract, rather than simply noting that a "reasonable jurist" had in fact disagreed. Guirbino COA Order, *supra* note 139, at 2 ("Although the Court disagrees with the [Report and Recommendation] . . . the Court does not find the decision recommended in the [Report and Recommendation] to be outside of the possible decisions reached by a reasonable jurist."). Such a passage reinforces the notion that judges are incapable of soundly assessing their own decisions. That judge, after all, acknowledged the disagreement with a reasonable jurist, and still felt compelled to pose the test in the abstract when it had been answered concretely.

(sometimes), before summarily denying or granting the COA.¹⁶¹ Indeed, if they cite anything at all to support the COA denial, they typically do so in a passing reference to their own opinion on the merits.¹⁶² In so doing, they imply that the mere existence of a district judge's opinion disagreeing with a magistrate's automatically signifies that the latter is the product of an unreasonable jurist's mind.

ii. Interpreting the Data

There are two ways to take the surprising ease with which district judges ignore conflicting magistrate recommendations when ruling on COAs in such circumstances. Taking the most literal route, one could interpret the sample as an explicit declaration by the district judge that she does not regard her magistrate as a reasonable jurist. Although logical, this interpretation is belied by the pragmatic reality. Magistrates are appointed by district judges, they serve only while they retain their trust, and their recommendations are overwhelmingly accepted.¹⁶³ Indeed, a review of the records established by the magistrates who authored the recommendations that were denied with no COA issued does not suggest that they differ at all from their colleagues across the country in terms of the general agreement they elicit from the district judges.¹⁶⁴ In other words, these district judges *do* have faith that these magistrates are reasonable jurists.

The alternative is simple: the district judges were unable or unwilling to apply the proper standard. They knew that they were supposed to issue a COA if a reasonable jurist could disagree; they knew that a reasonable jurist—by their own standards—*had* in fact disagreed; and yet they could not or would not issue a COA for that reason alone. Why?

There is certainly reason to believe that courts sometimes willfully refuse to apply legally mandated standards, including in the realm of habeas.¹⁶⁵ Nevertheless, this is not such a case. On

161. See cases cited *supra* notes 136–38.

162. See *e.g.*, cases cited *supra* notes 143–45.

163. See *supra* Part III.A.

164. See *supra* note 113-15 and accompanying text.

165. See, *e.g.*, Christopher E. Smith, *Judicial Reform of Habeas Corpus: The Advocates' Lament*, 44 CLEV. ST. L. REV. 47, 56 (1996) (describing

the contrary, the most reasonable way to understand these cases is as a demonstration of why judges are constitutionally (in the psychological, not the legal, sense) incapable of effectively judging their own work.

One major factor supporting this explanation is the meager rationales put forth by the district judges in the sample who *did* issue a COA. By and large, these judges did not simply say, as one would expect them to: I am required by law to grant a COA if a reasonable jurist could disagree with my conclusion; the magistrate disagreed with my conclusion; the magistrate was hired by myself and my colleagues to serve as a reasonable jurist, we agree with him the vast majority of the time, and we therefore regard him as a reasonable jurist; ergo, a reasonable jurist could disagree and the COA is granted. Instead, the district judges who grant COAs are mostly as summary and opaque in their reasoning as are those who deny them.¹⁶⁶ If they do offer any reasoning, it is typically substantially more abstract and removed from the specifics of the case than the straightforward rationale suggested above.¹⁶⁷ This failure reflects a deeper problem with COAs as a whole: judges are simply unable to think in a meaningful way about their own level of self-certainty.

In a sense, it is not that surprising that district judges lack this ability. As officers of trial courts, they are accustomed to assume that appellate review will always be available for litigants dissatisfied with their rulings. Indeed, any attentive observer who sits in on federal trials or motion hearings will get used to hearing comments from the bench to the effect of, “this ruling may be wrong, but it’s what I think, and if I’m wrong the circuit court will let me know.”¹⁶⁸ The mindset of the district judge is deeply intertwined with this self-conception as the *first* judge, whose work will be the subject of higher review if any party desires it. COAs are entirely foreign to such a self-conception, for they allow

practitioners who suspect that the lower federal courts “evade[] the Supreme Court’s decisions” on habeas cases).

166. See cases cited *supra* notes 133 and 135–38.

167. See cases cited *supra* notes 146 and 147.

168. See, e.g., Todd A. Buchman, Comment, *Due Process and Sentencing: Third Circuit Holds That Plea of Guilt Waives Fifth Amendment Privilege*, 103 DICK. L. REV. 227, 237-38 & nn.96 & 97 (1998) (quoting a federal trial judge suggesting an attorney take up an uncertain issue on appeal).

district judges to become, at least in the first instance, the decision-maker about the very possibility of appellate review. The sample above vividly highlights the futility of asking trial judges to ignore hundreds of years of judicial psychology and become the gatekeepers to review of their own decisions.

Now, one might lodge the following objecting to this interpretation of the data: “this sample illustrates nothing profound about the decision-making process in the federal judiciary; COAs are routine, mundane business, and district judges are simply treating them as such. If the judges made some mistakes in these cases, it was only because the situation was so unusual and they are so accustomed to issuing rote orders with COAs.”

The first response to this “mountain out of a molehill” argument is: so what? That is, it makes no difference whether judges are ignoring the “reasonable jurist” standard deliberately or inadvertently. The fact remains that they are ignoring it. Indeed, to suggest that judges are only issuing these orders because they are so accustomed to issuing them in the context of frivolous habeas petitions only underscores the significance of the sample. These are not frivolous petitions; they are petitions found meritorious by federal judges. If a district judge fails to register that distinction, then he *is* failing to thoughtfully judge his own work-product, whether consciously or unconsciously.

The second response is that the criticism makes no sense in light of the small but illuminating group of cases in which district judges said exactly what is suggested here they ought to: “In light of the differing conclusions reached by the undersigned and the assigned Magistrate Judge, ‘jurists of reason’ could reach different conclusions with respect to the merits of petitioner’s petition.”¹⁶⁹ As this quotation demonstrates, and as several others confirm,¹⁷⁰

169. Sisto COA Order, *supra* note 139, at 2.

170. Howard v. Warden, Lebanon Corr. Inst., No. 3:08-cv-424, 2012 WL 395186, at *8 n.7 (S.D. Ohio Feb. 7, 2012) (“Here, the Magistrate Judge and the District Judge diverged Thus, the Court grants a certificate of appealability”); Rosser v. Cate, No. 10-cv-2203 MMA (WVG), 2012 WL 170077, at *5 (S.D. Cal. Jan. 19, 2012); Askew v. Phillips, No. 1:06-cv-708, 2010 WL 2802280, at *8 (W.D. Mich. July 13, 2010) (“[T]he plaintiff meets the standard for a COA, because other reasonable jurists—such as the learned Magistrate Judge here—could disagree with the [district judge’s] determination”); Stallworth COA Order, *supra* note 140, at 6 (“Given

it is not a difficult thing to correctly apply the “reasonable jurist” standard to the cases in the sample. If anything, it is the *easiest* approach to take, because it requires no laborious speculation on the possible perspective of some theoretical reasonable jurist. That so few district judges managed to get it right therefore cannot be chalked up to simple absent-mindedness alone. At most, it was an absent-mindedness that underscores the theory advanced by this article.

This point is further supported by the cases in which district judges did attempt to apply the proper standard, but seemed oblivious to the fact that a “reasonable jurist” had already satisfied it.¹⁷¹ Here, it cannot be said that district judges were simply seeking to avoid more work, because they were actually imposing on themselves additional labor.

And finally, in perhaps the most arresting evidence of all, a number of district judges regarded their own opinions denying habeas relief as evidence, in and of itself, to deny a COA.¹⁷² A judge who takes such a position with absolutely no explanation, as many of these judges did, implies that *anything* he thinks cannot, by definition, be debated by a reasonable jurist. It is difficult to imagine a more complete perversion of the standard. If a district judge’s view that habeas relief is unwarranted is *per se proof* that no reasonable jurist could disagree, even where another federal judge has already voiced disagreement, there would be no point in even having a COA. The denial itself would constitute an adequate explanation as to why no appeal was appropriate.

In sum, it is impossible to regard the sample as anything other than incontrovertible evidence of the widespread inability of

the . . . contrary opinions from this court, ‘reasonable jurists could debate whether . . . the petition should have been resolved in a different manner.’” (citation omitted); *Matthews v. Purkett*, No. 4:06-CV-925 (CEJ), 2009 WL 2982912, at *11 (E.D. Mo. Sept. 14, 2009) (“The magistrate judge, for whom the Court holds much respect, concluded that petitioner was denied effective assistance of appellate counsel. Clearly, the issue is one that is ‘debatable among reasonable jurists.’”); *Sargent v. Kelchner*, No. 03-327 Erie, 2005 WL 5298488, at *6 (W.D. Pa. Aug. 22, 2005) (“[W]hile we conclude that each of Petitioner’s grounds for relief lack merit, we recognize that reasonable jurists could disagree with our resolution of Petitioner’s Rule 102 claim, as evidenced by the Magistrate Judge’s conclusion in her report and recommendation.”).

171. See cases cited *supra* note 147.

172. See *e.g.*, cases cited *supra* notes 142–45.

district judges to sufficiently evaluate their own decisions.

iii. Implications

The sample presents two major implications, two simple and specific, a third subtler and more sweeping. Most obvious and easiest, the Supreme Court should unequivocally declare that where a magistrate recommends relief and a district judge denies it, the standard for issuance of a COA has been met, at least on the grounds underlying the magistrate's recommendation, and there is no need for further analysis. Any decision to the contrary, the Supreme Court should add, is therefore in error.¹⁷³ The ruling would require only a cursory, per curiam writing, and would serve as a healthy reminder to the lower courts to obey the "reasonable jurist" standard in the one instance where the standard is met on its face. In fact, there is an interesting argument to be made that the Supreme Court is legally *obligated* to take up these erroneously denied COAs.¹⁷⁴ Although that argument implicates many issues outside the scope of the article, it adds substantial support to a demand that the Supreme Court correct, as soon as it can, the problem reflected by the sample.

If the Supreme Court desired to cite more than simply the blatant violation of the "reasonable jurist" standard to justify such a decision, it would also have handy more pragmatic considerations. Primary among these would be the great irony that two mechanisms created with the principal aim of efficiency—magistrates¹⁷⁵ and COAs¹⁷⁶—give rise to enormous inefficiency because of Rule 11(a). When a district judge is

173. The Supreme Court has recently and repeatedly passed up the opportunity to make such a declaration. See, e.g., *Salinas v. Thaler*, 131 S. Ct. 3067, *reh'g denied*, 132 S. Ct. 66 (2011). As evidenced by the subsequent histories of the cases listed *infra* in Table I, however, habeas petitioners are nothing if not vigorous in the pursuit of legal vindication, and the occasion for the Supreme Court to pass on such a question will surely arise in the near future.

174. See Brent E. Newton, *Applications for Certificates of Appealability and the Supreme Court's "Obligatory" Jurisdiction*, 5 J. APP. PRAC. & PROCESS 177, 178 (2003) (positing that "[t]he [Supreme] Court, or at least the single Circuit Justice to whom a COA application is directed, has a legal obligation to rule on the merits of a COA application, applying the same legal standard that governs district and circuit judges in COA cases").

175. See *supra* Part III.A.

176. See *supra* Part I.B.

required to rule on a COA after a magistrate has recommended relief and the district judge denies the writ, there are several possible sequences for what follows (assuming the petitioner continues to pursue relief).¹⁷⁷ In one, the district judge denies the COA and the circuit court follows the law and grants it.¹⁷⁸ In another, the district court denies the COA and the circuit court commits the same mistake and denies it a second time.¹⁷⁹ In a third, the district court follows the law and grants the COA in the first instance, allowing the petitioner to proceed on appeal.¹⁸⁰ In none of these cases does Rule 11(a) further efficiency in such a way as to reasonably balance it with the demands of the law. For only in the second circumstance is efficiency facilitated, and only because the petitioner is wrongly stripped of his right to appeal. In other words, if the COA functions properly, there will *always* be some duplication of work by the district and circuit courts, and potentially even by the Supreme Court. The mistake is regarding this duplicativeness as problematic, when it is simply a by-product of the normal appellate process, i.e., a “problem” with our legal system as a whole. Stated yet another way, all of the efficiency created by the COA is conserved and strengthened if the courts of

177. If the petitioner declines to pursue further recourse, one could argue that efficiency has been served, because the district court has summarily disposed of the matter without burdening the court of appeals. On the other hand, it would be served only at the price of sacrificing the integrity of the law, a trade-off that is surely undesirable. *See, e.g., Carter v. Chi. Police Officers*, 165 F.3d 1071, 1078 (7th Cir. 1998) (“When considering which methods to employ, it is of paramount importance that fairness and clarity are not sacrificed for the sake of efficiency and expediency in a particular case.”).

178. *See e.g., cases cited supra* note 131.

179. *See e.g., cases cited supra* note 132.

180. In yet another possible path, the district judge neglects to rule on the COA *at all*, for whatever reason, and the circuit court has to remand for that determination alone. *See, e.g., Letter from U.S. Court of Appeals for the Sixth Circuit to M. Neal Cox, Bell v. Anderson*, No. 06-4558 (6th Cir. Dec. 5, 2006), ECF No. 23; *Order, Benchoff v. Colleran*, No. 06-3391 (3d Cir. Sept. 28, 2006), ECF No. 105. Although this eventuality does not speak to the precise question considered by the article, it does underscore the inefficiency of Rule 11(a) generally. Indeed, *Benchoff* is an especially glaring illustration of that inefficiency, for the district judge proceeded to deny the COA on remand, *id.* at ECF 106,, after which the Third Circuit granted it, *id.* at ECF 108, resulting in several completely unnecessary transfers between the courts (and corresponding lengthy delays) before they managed to reach the obvious result.

appeals and Supreme Court have the sole authority to issue it.¹⁸¹

While it is indisputable that the Supreme Court should correct the basic error occurring in the sample, such a ruling would only go so far, for it would deal directly with only a narrow subset of cases. The broader lesson here, simply put, is that Rule 11(a) is a failure. District judges should not be allowed, let alone required, to rule on motions for COAs after denying habeas relief. If they cannot consistently (indeed, if they cannot unvaryingly) grant a COA under the "reasonable jurist" standard when a magistrate disagrees with the ultimate ruling, the easiest possible circumstance in which to make a decision and plausibly defend it, then they cannot fairly apply the standard under *any* circumstances. Consequently, Rule 11(a) should be abolished and the district courts, either by virtue of their own rule-making authority or by the dictate of the circuit courts, the Supreme Court, or Congress, should get out of the business of issuing and denying COAs.¹⁸²

The other implication is that we need to rethink how the judiciary approaches similar but less obvious types of self-judging. In motions for preliminary injunctions, for example, a movant must demonstrate, *inter alia*, a "substantial likelihood of success on the merits."¹⁸³ When a district judge denies such a motion and

181. Although Judge Friendly did not appreciate the pitfalls of self-judging, he was sensitive to this point regarding the efficient allocation of judicial resources. Friendly, *supra* note 12, at 144 n.9 ("In view of the staggering growth in the case loads of the courts of appeals and prospective further increases as the ratio of criminal appeals to convictions after trial approaches 100%, Congress should move promptly to amend [the habeas statute] so as to place the authority to issue certificates of probable cause solely in the courts of appeals . . ." (citation omitted)).

182. One potential piece of evidence weighing against this proposal is the troubling ease with which circuit courts themselves appear to deny COAs after magistrates have recommended relief. *See* cases cited *supra* note 132. However, it can be assumed either that this sample is too small to be representative or that the preceding erroneous district court ruling predisposed the court of appeals to commit the same error. *See* POSNER, *supra* note 93 ("[T]he less time an appellate court spends on a case the more likely it is simply to affirm the district court or agency, affirmance being the easy way out."). If the assumption is erroneous and circuit courts are simply as incapable of conscientiously applying the "reasonable jurist" standard as are district courts, even when their own decision is not the one under review, then the judiciary is so hopeless that there is no point in seeking to improve *any* area of law.

183. *See, e.g.,* *Benten v. Kessler*, 505 U.S. 1084, 1085 (1992) (per curiam).

later has before her a dispositive motion she is, in effect, re-judging her initial determination. Although the situation is less black-and-white than in the COA context, given that substantial additional briefing and possibly evidentiary submissions have presumably occurred since the initial ruling, the results here suggest that we have reason to be wary of a district judge's capacity for a well-reasoned and consistent application of the standard. Similarly, and perhaps even more problematically, motions to alter or amend judgments require district judges to revisit a decision that was made rather recently.¹⁸⁴ If the COA sample here is taken at face-value, it seems likely that judges are often unable to truly "reconsider" their recent rulings, as required by Rule 59.¹⁸⁵

Unlike the COA setting, where the solution is clear (get rid of Rule 11(a)), the appropriate reforms to make in these other legal contexts are less obvious. It would not make sense to remove motions for preliminary injunctions and motions to reconsider from the district courts to the courts of appeals, as it does with the COA, because there is plainly a pressing need to have the trial courts rule on these motions in the first instance.¹⁸⁶ In light of that need, one possible solution would be to require a different judge to rule on the motions than ruled earlier. Unfortunately, there is insufficient space here to develop such proposals here, hopefully other commentators make use of our groundwork to raise similar questions in different areas of law.

CONCLUSION

As was noted at the outset of this article, it is a great thing that legal scholarship covers, in such voluminous detail, the

184. See FED. R. CIV. P. 59.

185. *Id.*

186. See *Judge v. Quinn*, 612 F.3d 537, 557 (7th Cir. 2010) (emphasizing that preliminary injunctive relief is warranted only where there is "urgency in the matter"). See generally *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1249 (9th Cir. 1982) (noting that the purpose of a motion to reconsider is to provide "an efficient mechanism by which a trial court judge can correct an otherwise erroneous judgment without implicating the appellate process"); Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97, 97-98 (1994) (noting long delays in the federal circuit courts).

nuances of higher courts' jurisprudence on the hot controversies of the day.¹⁸⁷ It is an equally great thing that academics are discussing, in larger and larger numbers, the body of statistical data generated by huge numbers of decisions on general legal subjects.¹⁸⁸ But these two approaches leave unexplored an important type of legal scholarship: in-depth analysis of routine types of judicial opinions in light of highly specific questions. Such a methodology is crucial for two related reasons.

First, the day-to-day work of the courts affects millions of people's lives in deep and expansive ways. Indeed, the more routine the type of case, the more important the subject is to the ordinary citizen. One can comb through literally thousands of unpublished district court opinions on the causes of action that make up the lion's share of the federal judiciary's workload—habeas, Social Security, § 1983—without finding more than a handful of decisions cited in a law review article.¹⁸⁹ Although it stands to reason that there would be *fewer* such cites, given the scale of the data, the non-precedential nature of the decisions, their often cursory analysis, and so on—there is no reason for the academy to neglect any kind of reasoned consideration of these decisions altogether. Indeed, every such decision represented a significant event in an individual's life, and each says something about the state of the law and its relationship to litigants. Scholars have a duty to address these cases.¹⁹⁰

That lesson is particularly striking in the context of this article, where every case involves one federal judge who believed the Constitution compelled the release of a prisoner and another federal judge who disagreed. These are not trivial matters.¹⁹¹ It

187. See *supra* note 1 and accompanying text.

188. See *supra* note 2 and accompanying text.

189. See, e.g., *supra* note 3 and accompanying text.

190. Indeed, while there has been substantial criticism of circuit courts for relying increasingly upon unpublished dispositions, see generally, e.g., Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 *FORDHAM L. REV.* 23 (2005), there has been little if any recognition of one corollary problem: that an insufficient number of commentators read and critique unpublished appellate decisions to keep the courts of appeals honest.

191. Section 2254 has come under increasing attack in recent years as unnecessary and burdensome. See generally, e.g., NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* (2011). The conclusions of this article can be

simply does not make sense that an unpublished district court decision automatically warrants no scholarly analysis but as soon as it is appealed and becomes a published circuit court decision it deserves such analysis, regardless of the reasoning above or below.

Second, close inspection of the day-to-day work of the courts can yield broad lessons that go to the heart of our judicial system. This article vividly illustrates the point. With an exceptionally narrow question in mind, a detailed examination of a few dozen unpublished district court opinions reveals something dramatic about the very nature of what it means to be a judge and about how we should structure the third branch of government. It is not clear how else the lesson might have been derived, and legal scholars should be sensitive to any methodology that sheds light on previously neglected aspects of our legal system.

The issue under consideration here illustrates the utility of the article's methodology. AEDPA has been a lightning rod for harsh scholarly and judicial criticism.¹⁹² Indeed, there have even been probing critiques of the very specific power that is targeted in this article.¹⁹³ But the criticism takes its lead from the published, appellate jurisprudence,¹⁹⁴ and thereby neglects the

understood to lay the groundwork for a response to such criticism, as they suggest that there continue to be potentially meritorious petitions filed in federal court and that those petitions should be treated with greater care than they currently are. More to the point, the sample indicates that the inefficiency of the federal habeas system may result as much, if not more, from ill-advised procedures practiced by the courts themselves as it does from the meritlessness of the petitions. This fact dovetails nicely with the other obvious rebuttal to Professor King and her sympathists: that the increasing restrictions on habeas relief imposed by Congress and the courts are in large part responsible for the dwindling number of successful § 2254 claims, not necessarily the improved quality of state habeas adjudication. See sources cited *supra* notes 14 and 39.

192. See, e.g., *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) ("All we can say is that in a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting."); John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 288–92 (2006); Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 992–93 (2006); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 448 (2007); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 771–76 (2002).

193. See sources cited *supra* note 26.

194. For instance, both Cutler and Hagglund focus largely on defective or

more fundamental question implicated by COAs: can district judges capably scrutinize their own decisions?¹⁹⁵ As demonstrated by the analysis above, the only way to properly answer that important question is to sift through the unnoticed, unpublished work that makes up the great mass of judicial decision-making. This article does so here, and discovers a profound dysfunction at the heart of the judicial system.

The article attempts a new type of legal scholarship that offers great promise. No doubt others will resume where it leaves off.

improvidently granted certificates. Some of this criticism seems to only compound the confusion, as it assumes the same flawed premise upon which Rule 11(a) is based. For example, Cutler appreciates the inefficiency of allowing multiple levels of the judiciary to pass on certification, but expresses support for the paradoxical view that a trial court is in a better position to determine whether there should be appellate review than an appellate court. Cutler, *supra* note 26, at 346-47 (“[A] district court’s familiarity with the case provides a solid basis for deciding the need for appellate review.”). In fact, Cutler proposes placing COAs solely in the hands of the circuit courts but appears to do so, rather strangely, because he believes that there is a greater problem with improvidently granted certificates than improperly denied ones. *Id.* at 358-59. This article arrives at the same conclusion via the opposite route.

195. Judge Friendly did not make the mistake of ignoring pragmatic considerations when he considered the question at hand, though he addressed only the narrow concern that circuit courts can more efficiently resolve applications for COAs. Friendly, *supra* note 12, at 144 n.9. He did not reflect on the most compelling support for this efficiency argument: that district judges are largely incapable of properly ruling on COAs in the first instance.

TABLE I: CASES WHERE A DISTRICT JUDGE RULED ON A COA AFTER A MAGISTRATE RECOMMENDED GRANTING § 2254 RELIEF AND THE DISTRICT JUDGE DENIED IT¹⁹⁶

Case #	Circuit	District	Case Name & Subsequent History (if any)	COA Granted or Denied by District Court?
1	Second	Western District of New York	<i>Letizia v. Walker</i> <i>Letizia v. Walker</i> , No. 97-CV-0300E(F), 2001 WL 1117164 (W.D.N.Y. Sept. 18, 2001)	Denied
2	Third	Eastern District of Pennsylvania	<i>Rhodes v. Varano</i> , No. 08-3236, 2011 WL 3290360 (E.D. Pa. July 29, 2011)	Granted
3	Third	Middle District of Pennsylvania	<i>Benchoff v. Colleran</i> , No. CIV A 303-CV-740, 2005 WL 4708211 (M.D. Pa. Feb. 2, 2005)	Denied

196. The cases are listed in numerical order of circuit, within that in alphabetical order of state, within that in alphabetical order of district, and within that in alphabetical order of the petitioner's name. Citations are to the district court denials of habeas relief (which sometimes include the COA ruling as well), not to the magistrate recommendations, which sometimes have separate Westlaw citations. Subsequent case history for each case is presented only in this table, not in the footnotes appended to the body of the article, because the entire data sample is contained here. All citations were updated on March 16, 2012. Subsequent case history is included where it occurred within two years of that date and is available on Westlaw. Because so many of the granted COAs were granted only in part, and because the distinction is not relevant to the article's conclusions, all cases in which a COA was granted on *any* issue are demarcated as "granted."

4	Third	Western District of Pennsylvania	<i>Sargent v. Kelchner</i> , No. 03-327 Erie, 2005 WL 5298488 (W.D. Pa. Aug. 22, 2005)	Granted
5	Fourth	Southern District of West Virginia	<i>Mathers v. Seifert</i> , No. 6:07-cv-00734, 2008 WL 2437629 (S.D. W. Va. June 16, 2008), <i>appeal dismissed</i> , 296 F. App'x 375 (4th Cir. 2008)	Denied
6	Fifth	Eastern District of Louisiana	<i>Higgins v. Cain</i> , No. 09-2330, 2011 WL 1399241 (E.D. La. Apr. 13, 2011)	Granted
7	Fifth	Western District of Louisiana	<i>McCullough v. Cain</i> , No. 05-0674, 2008 WL 4899436 (W.D. La. Nov. 13, 2008), <i>aff'd</i> , 370 F. App'x 443 (5th Cir.), <i>cert. denied</i> , 131 S. Ct. 509 (2010)	Denied
8	Fifth	Northern District of Texas	<i>Alonzo v. Thaler</i> , No. 3:07-CV-399, 2011 WL 3566973 (N.D. Tex. Aug. 12, 2011)	Denied
9	Fifth	Northern District of Texas	<i>Gooden v. Cockrell</i> , No. 3:00-CV-0286-P, 2002 WL	Denied

			1840926 (N.D. Tex. Aug. 8, 2002)	
10	Fifth	Northern District of Texas	<i>Hayes v. Quarterman</i> , No. 3-05-CV-1974-M, 2007 WL 4440951 (N.D. Tex. Dec. 18, 2007), <i>rev'd and remanded</i> , 361 F. App'x 563 (5th Cir. 2010)	Granted
11	Fifth	Southern District of Texas	<i>Salinas v. Johnson</i> , No. C-02-214, 2010 WL 3732059 (S.D. Tex. Sept. 20, 2010)	Denied
12	Fifth	Southern District of Texas	<i>Walbey v. Quarterman</i> , No. G-99-496, 2008 WL 6841900 (S.D. Tex. Feb. 20, 2008), <i>rev'd and remanded</i> , 309 F. App'x 795 (5th Cir. 2009)	Granted
13	Sixth	Western District of Kentucky	<i>Yenawine v. Motley</i> , No. 3:06CV-413-R, 2008 WL 347820 (W.D. Ky. Feb. 7, 2008), <i>rev'd</i> , 402 F. App'x 997 (6th Cir. 2010), <i>cert. denied</i> , 132 S. Ct. 91 (2011)	Granted
14	Sixth	Eastern District of Michigan	<i>Smith v. Romanowski</i> , No. 05-73711,	Granted

			2007 WL 1266391 (E.D. Mich. May 1, 2007), <i>aff'd</i> , 341 F. App'x 96 (6th Cir. 2009)	
15	Sixth	Western District of Michigan	<i>Askew v. Phillips</i> , No. 1:06-cv-708, 2010 WL 2802280 (W.D. Mich. July 13, 2010)	Granted
16	Sixth	Western District of Michigan	<i>Elder v. Berghuis</i> , 644 F. Supp. 2d 888 (W.D. Mich. 2009)	Granted
17	Sixth	Northern District of Ohio	<i>Bell v. Anderson</i> , No. 1:05-CV-2415, 2006 WL 2864121 (N.D. Ohio Sept. 29, 2006), <i>aff'd</i> , 301 F. App'x 459 (6th Cir. 2008)	Granted
18	Sixth	Northern District of Ohio	<i>Brooks v. Eberlin</i> , No. 4:07CV2162, 2008 WL 5455383 (N.D. Ohio Dec. 31, 2008)	Denied
19	Sixth	Northern District of Ohio	<i>Goldberg v. Maloney</i> , No. 4:03 CV 2190, 2011 WL 864922 (N.D. Ohio Mar. 10, 2011), <i>reconsideration denied</i> , 2011 WL 1044121 (N.D.	Denied

			Ohio Mar. 16, 2011)	
20	Sixth	Northern District of Ohio	<i>Hood v. Bobby</i> , No. 3:07 CV 3319, 2009 WL 111633 (N.D. Ohio Jan. 15, 2009), <i>appeal dismissed as moot sub nom. Hood v. Wilson</i> , 389 F. App'x 522 (6th Cir. 2010)	Denied
21	Sixth	Northern District of Ohio	<i>Lawwill v. Pineda</i> , No. 1:08 CV 2840, 2011 WL 1882456 (N.D. Ohio May 17, 2011)	Denied
22	Sixth	Northern District of Ohio	<i>McDonald v. Warden, Lebanon Corr. Inst.</i> , No. 3:08 CV 1718, 2010 WL 3036730 (N.D. Ohio July 30, 2010), <i>aff'd</i> , No. 10-3997, 2012 WL 1632487 (6th Cir. May 10, 2012)	Granted
23	Sixth	Northern District of Ohio	<i>Pordash v. Hudson</i> , No. 1:06 CV 836, 2007 WL 2229833 (N.D. Ohio, July 31, 2007), <i>aff'd</i> , 388 F. App'x 466 (6th Cir.), <i>cert. denied</i> , 131 S.	Denied

			Ct. 832 (2010), <i>reh'g denied</i> , 131 S. Ct. 1562 (2011)	
24	Sixth	Northern District of Ohio	<i>Quinn v. Ohio Dep't of Rehab. & Corrs.</i> , No. 3:09 CV 546, 2010 WL 1433400 (N.D. Ohio Apr. 7, 2010)	Denied
25	Sixth	Northern District of Ohio	<i>Smith v. Moore</i> , No. 3:07CV- 1121, 2008 WL 3890009 (N.D. Ohio Aug. 19, 2008), <i>rev'd</i> , 415 F. App'x 624 (6th Cir. 2011)	Granted
26	Sixth	Southern District of Ohio	<i>Howard v. Warden, Lebanon Corr. Inst.</i> , No. 3:08- cv-424, 2012 WL 395186 (S.D. Ohio Feb. 7, 2012)	Granted
27	Eighth	Northern District of Iowa	<i>Tunstall v. Hopkins</i> , 126 F. Supp. 2d 1196 (N.D. Iowa 2000)	Granted
28	Eighth	Eastern District of Missouri	<i>Matthews v. Purkett</i> , No. 4:06-CV-925 (CEJ), 2009 WL 2982912 (E.D. Mo. Sept. 14, 2009), <i>aff'd</i> , 383 F. App'x 583 (8th Cir.), <i>cert. denied</i> , 131 S.	Granted

			Ct. 421 (2010)	
29	Ninth	District of Arizona	<i>DeBerry v. Schriro</i> , No. CV-04-0858-PCT-SMM (JI), 2009 WL 3427935 (D. Ariz. Oct. 23, 2009), <i>aff'd sub nom. DeBerry v. Ryan</i> , 415 F. App'x 804 (9th Cir.), <i>cert. denied</i> , 132 S. Ct. 182 (2011)	Granted
30	Ninth	Eastern District of California	<i>Gregory v. Chavez</i> , No. CV F 98-6521 LJO MJS HC, 2011 WL 3815769 (E.D. Cal. Aug. 26, 2011), <i>COA granted</i> , 2011 WL 4825649 (E.D. Cal. Oct. 11, 2011)	Granted
31	Ninth	Eastern District of California	<i>Holley v. Yarborough</i> , No. 2:02-CV-0310 RRB JFM P, 2007 WL 4523046 (E.D. Cal. Dec. 18, 2007), <i>rev'd</i> , 568 F.3d 1091 (9th Cir. 2009)	Granted
32	Ninth	Eastern District of California	<i>Johnson v. Finn</i> , Nos. 2:03-CV-2063 JAM JFM (HC), 2:04-CV-2208 JAM JFM (HC), 2010 WL 1186485 (E.D. Cal. Mar. 23,	Granted

			2010), <i>vacated and remanded</i> , 665 F.3d 1063 (9th Cir. 2011)	
33	Ninth	Eastern District of California	<i>Moeller v. Lockyer</i> , No. CIV. S-01-2351 FCD JFM P, 2009 WL 3169967 (E.D. Cal. June 23, 2009), <i>aff'd sub nom. Moeller v. Harris</i> , 428 F. App'x 771 (9th Cir.), <i>cert. denied</i> , 132 S. Ct. 332 (2011)	Granted
34	Ninth	Eastern District of California	<i>Saif'ullah v. Carey</i> , No. 2:02-cv-2664-MCE-DAD-P, 2006 WL 2827674 (E.D. Cal. Sept. 29, 2006), <i>aff'd on other grounds</i> , 433 F. App'x 586 (9th Cir. 2011)	Denied
35	Ninth	Eastern District of California	<i>Somers v. Schwartz</i> , No. 2:04-cv-00698-JKS-KJM, 2007 WL 4530867 (E.D. Cal. Dec. 18, 2007), <i>vacated</i> , 388 F. App'x 693 (9th Cir. 2010)	Granted
36	Ninth	Eastern District of California	<i>Thompson v. Sisto</i> , No. CIV. 2:07-2577 WBS JFM, 2010 WL	Granted

			1444583 (E.D. Cal. Apr. 12, 2010), <i>aff'd</i> , 439 F. App'x 663 (9th Cir. 2011)	
37	Ninth	Eastern District of California	<i>Wyrick v. Mendoza-Powers</i> , No. 1:05-cv-1194 OWW GSA HC, 2008 WL 752676 (E.D. Cal. Mar. 19, 2008), <i>aff'd</i> , 420 F. App'x 747 (9th Cir. 2011)	Granted
38	Ninth	Central District of California	<i>Casarotti v. Marshall</i> , No. CV-08-06966 RGK (Ex), 2009 WL 1565636 (C.D. Cal. May 14, 2009), <i>aff'd</i> , 430 F. App'x 619 (9th Cir. 2011)	Granted
39	Ninth	Central District of California	<i>Davis v. Guirbino</i> , No. CV 06-7315 VBF (FFM), 2011 WL 1584051 (C.D. Cal. Apr. 26, 2011)	Granted
40	Ninth	Central District of California	<i>Gzikowski v. Dexter</i> , No. ED CV 08-01189 RGK (RNB), 2009 WL 1530817 (C.D. Cal. May 29, 2009), <i>aff'd</i> , 439 F. App'x 675	Granted

			(9th Cir. 2011), <i>cert. denied</i> , 132 S. Ct. 1571 (2012)	
41	Ninth	Central District of California	<i>Stallworth v. Muntz</i> , Nos. CV 05-03829 VBF (SS), CV 06 03397 VBF (SS), 2008 WL 5054698 (C.D. Cal. Nov. 25, 2008)	Denied ¹⁹⁷
42	Ninth	Southern District of California	<i>Armitage v. Clark</i> , No. 09cv463- L(POR), 2011 WL 1584946 (S.D. Cal. Apr. 25, 2011)	Denied
43	Ninth	Southern District of California	<i>Corona v. Almager</i> , No. 07cv2117-BTM (NLS), 2009 WL 3246452 (S.D. Cal. Oct. 5, 2009), <i>aff'd</i> , 449 F. App'x 672, No. 09-56717, 2011 WL 4005264 (9th Cir. Sept. 9, 2011), <i>cert. denied</i> , 132 S. Ct. 1559 (2012)	Granted
44	Ninth	Southern District of California	<i>Rosser v. Cate</i> , No. 10-CV-2203 MMA (WVG), 2012 WL 170077 (S.D. Cal. Jan. 19,	Granted

197. *But see supra* note 140.

			2012)	
45	Ninth	Southern District of California	<i>Rucker v. Patrick</i> , No. 07cv0364-IEG (RBB), 2008 WL 4104230 (S.D. Cal. Sept. 3, 2008), <i>aff'd sub nom. Rucker v. Lattimore</i> , 369 F. App'x 810 (9th Cir.), <i>cert. denied</i> , 131 S. Ct. 336 (2010)	Granted
46	Ninth	Western District of Washington	<i>Larson v. Glebe</i> , No. C09-1453Z, 2010 WL 2486428 (W.D. Wash. June 16, 2010), <i>aff'd</i> , No. 10-35617, 2012 WL 605836 (9th Cir. Feb. 27, 2012)	Granted
47	Tenth	Eastern District of Oklahoma	<i>Mitchell v. Jones</i> , No. CIV-06-503-RAW, 2010 WL 1141358 (E.D. Okla. Mar. 22, 2010), <i>aff'd</i> , 415 F. App'x 106 (10th Cir. 2011)	Granted