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# Finding the Eternal and Unremitting Force of Habeas Corpus: Sec. 2254(D) and the Need for De Novo Review

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# FINDING THE "ETERNAL AND UNREMITTING FORCE"[1] OF HABEAS CORPUS: § 2254(D) AND THE NEED FOR DE NOVO REVIEW

## INTRODUCTION

In *Wilson v. Sirmons*,[2] the Tenth Circuit was placed in a rare and important position to address a question that has divided the federal circuits regarding the availability of habeas corpus relief for state prisoners. Namely, the Tenth Circuit was to decide whether federal courts should apply de novo review to the decisions of state courts when new evidence in support of a constitutional claim was presented for the first time in federal court.[3] Put more precisely, the question was whether § 2254(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA) applies to federal habeas corpus claims that rely on newly found evidence that the state court did not consider when reaching its capital conviction.[4] As the abundance of litigation over the application of § 2254(d) indicates,[5] this is a question of paramount importance in the field of habeas corpus.

This Comment argues that the Tenth Circuit came to the correct decision in limiting the scope of § 2254(d) and instead chose to apply de novo review to these kinds of federal habeas appeals. In Parts I and II, this Comment describes the history of habeas corpus, the background of the AEDPA, and the Supreme Court precedent in interpreting § 2254(d). Part III highlights the important precedent of de novo review that hatched from the Tenth Circuit. Part IV briefly looks at how other Federal Circuit courts have split on the proper scope of § 2254(d). Finally, Part V examines how federal courts have misapplied § 2254(d), and argues that federal courts should return to the procedural requirements of granting a "full and fair" hearing for habeas appeals. Moreover, as a matter of equity and statutory construction, this Comment argues that the courts should follow the Tenth Circuit's *Wilson* decision and apply de novo review when "new" evidence is presented in federal court.

## I. BACKGROUND OF HABEAS CORPUS AND THE AEDPA

Habeas corpus, a Latin phrase meaning "to have the body," is a writ used to bring a person before the court when the legality of the person's

1. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787) *in* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 159 n.18 (2001).
2. 536 F.3d 1064 (10th Cir. 2008).
3. *Id.* at 1073-74.
4. *Id.* at 1079.
5. *See infra* Part IV.

imprisonment or detention is at issue.[6] Habeas corpus is better known as "the Great Writ," because, as Blackstone famously stated, it is "the most celebrated writ in the English law" and remains "the stable bulwark of our liberties."[7] Celebrated as it may be, the "Great Writ" has been greatly curtailed in recent years.

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act,[8] which codified many of the limitations set forth by the Supreme Court,[9] while imposing a series of new and unprecedented limitations on the writ.[10] One change of particular importance was to § 2254(d), which established a new standard of review for federal courts to apply to state court decisions.[11] Under § 2254(d), federal courts are barred from granting habeas claims that were "adjudicated on the merits" in state courts unless: (1) the decision was contrary to, or was an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court;" or (2) the decision resulted in an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[12]

Accordingly, one of the major issues of § 2254(d) after the enactment of the AEDPA was determining how deferential federal courts ought to be to state court decisions. For starters, many commentators question the very the idea that § 2254(d) establishes a standard of review, arguing instead that § 2254(d) is better understood as a limitation on relief.[13] Moreover, the provisions within § 2254(d) remain intensely de-

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6. BLACK'S LAW DICTIONARY 728 (8th ed. 2004). In addition to issues of imprisonment, habeas corpus is also used as a way to ask the court to review (1) the regularity of the extradition process, (2) the right to or the amount of bail, or (3) the jurisdiction of a court that has imposed a criminal sentence. *Id.*

7. 3 WILLIAM BLACKSTONE, COMMENTARIES *129.

8. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.).

9. *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 415 (1996) ("There is no denying that § 2254(d) captures something like the descriptions of 'new' rules that appear in the *Teague* cases."); Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 530-35 (2008) (pointing out that Lockyer v. Andrade, 538 U.S. 63 (2003), further expanded the amount of deference the Supreme Court was willing to give state courts—and legislatures—in deciding what proportional punishment is).

10. Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 506 (2007) (observing that the AEDPA went beyond the Burger and Rehnquist Courts to codify jurisdiction limitations to: (1) most successive federal petitions, (2) most unexhaustive claims that are deemed frivolous, and (3) any claim filed outside of the one year statute of limitations).

11. 28 U.S.C. § 2254(d) (2006).

12. *Id.*; *See also* Justin Marceau, *Deference and Doubt: The Interaction of AEDPA § 2254(D)(2) and (E)(1)*, 82 TUL. L. REV. 385, 405 (2007) (explaining that § 2254(d) is a limit on, and not a condition for, habeas relief).

13. *See, e.g.*, John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 284 (2006) (characterizing the majority of habeas corpus cases as governed by the AEDPA and "§ 2254(d)'s limitation on relief provision."); Melissa M. Berry, *Seeking Clarity in the Federal Habeas Corpus Fog: Determining What Constitutes "clearly established law" under the Antiterrorism and Effective Death Penalty Act*, 54 CATHOLIC U. L. REV. 747, 749 n.9 (2005) (agreeing with the limitation on relief interpretation, and citing JAMES S. LIBEMAN & RANDY HERTZ, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.1, at 1419-21 (4th ed. 2001)); *id.* at 1421

bated. Primarily, the meaning of the phrases "contrary to" and "unreasonable application of" under § 2254(d)(1) have been the subject of various law review articles.[14] As for § 2254(d)(2), commentators have debated what is actually required for "an unreasonable determination of the facts" to occur.[15]

In recent decades, much of the § 2254(d) puzzle has been addressed in a patchwork of Supreme Court decisions; there remains, however, a critical gap in the jurisprudence. Specifically, § 2254(d)(1) fails to provide an adequate way to resolve federal habeas claims that proffer entirely new, potentially exculpatory, evidence on appeal. New exculpatory evidence does not fit neatly into the § 2254(d)(1) framework because it is not clear whether the claim was ever actually "adjudicated on the merits" without the newly obtained evidence. That is to say, § 2254(d)(1) only applies to claims "adjudicated on the merits," and when a federal court has new evidence, there are significant reasons to doubt whether the claim adjudicated in federal court is really the same as the claim adjudicated in state court. Accordingly, when there is significant new evidence that comes up on appeal, including mitigating evidence that might have had a direct impact on the sentencing on the defendant, it is entirely unclear whether § 2254(d)(1) even applies. In accordance with the Tenth Circuit decision in *Wilson*, this Comment argues that when this kind of situation arises, the only option available to addressing such habeas claims is de novo review of the state court decision.

## II. THE EXISTING § 2254(d) FRAMEWORK

### A. Williams v. Taylor

*Williams v. Taylor* was the first Supreme Court case to interpret § 2254(d) after the enactment of the AEDPA.[16] In *Williams*, the Court produced two controlling opinions, one by Justice O'Connor and the other by Justice Stevens.[17] In the O'Connor opinion, the Court held that under § 2254(d)(1) a state court decision is "contrary to" federal law when (1) the state court applies a rule that "contradicts the governing law set forth in our cases,"[18] or (2) the state court decision "confronts a set of facts that are materially indistinguishable from a decision of this Court

("[S]ection 2254(d)(1) operates as a 'constraint on the power of a federal habeas court to grant . . . the writ . . . .'" (first omission in original)(quoting Williams, *infra* note 33)); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.1, at 862 (4th ed. 2003) ("Technically, federal court consideration of the habeas corpus petition is not considered a direct review of the state court decision: rather, the petition constitutes a separate civil suit filed in federal court and is termed *collateral relief*.")).

14. *See* Berry, *supra* note 13, at 749 n.12 (providing an extensive list of law review articles written on § 2254(d)(1)).

15. *See, e.g.*, Marceau, *supra* note 12, at 385 (discussing the deference owed to state findings of fact); John K. Chapman, Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. §2254*, 110 HARV. L. REV. 1868, 1874-76 (1997).

16. Williams v. Taylor, 529 U.S. 362, 412 (2000).

17. *Id.* at 367, 399.

18. *Id.* at 405.

and nevertheless arrives at a result different from our precedent."[19] As for the "unreasonable application" clause of § 2254(d)(1), the O'Connor opinion concluded that a state court's decision is unreasonable only if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular case."[20] Thus, the O'Connor opinion declared that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law,"[21] thereby advancing a more deferential standard of review to state court decisions.[22]

Although the Court produced two controlling opinions by both O'Connor and Stevens, O'Connor's opinion defining the "contrary to" and "unreasonable application" clauses of § 2254(d)(1) garnered the majority vote. And, according to one commentator, the O'Connor opinion was principally important for beginning to establish which standard of review is required under § 2254(d).[23] *Williams* signified a departure from *Brown v. Allen*[24] and the so-called "Golden Era" of habeas, with federal courts now having to defer to state court decisions even when federal courts might have reached a different conclusion.[25] In other words, "[e]ven if the state court ruling is incorrect—that is, even if a federal court exercising independent judgment would reach a different conclusion—federal habeas relief is available only if the state court's application of established Supreme Court law is unreasonable."[26] Thus, it was the legacy of O'Connor's opinion, rather than Stevens's, that controlled the analytical framework of § 2254(d) for future cases. After *Williams*, then, it was clear that if § 2254(d)(1) applied, relief was not available unless the state court's adjudication was unreasonable or contrary to clearly established federal law.

### *B.* Lockyer v. Andrade

In *Lockyer v. Andrade*, the Supreme Court further clarified how severe the limitations implied by § 2254(d)(1) actually were.[27] In *Lockyer*, the Court reversed the Ninth Circuit by applying § 2254(d)(1) to the sentencing of a repeat offender.[28] For the "unreasonable application" clause of § 2254(d)(1), the Court concluded that the standards of "clear error" and "unreasonableness" are different because the "gloss of clear error

19. *Id.* at 406.
20. *Id.* at 407-08.
21. *Id.* at 410 (emphasis in original).
22. *Id.* at 411 ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly.").
23. Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After* Williams v. Taylor*?*, 2001 WIS. L. REV. 1493, 1507 (2001).
24. 344 U.S. 443 (1953).
25. *Id.*
26. *Id.*
27. Lockyer v. Andrade, 538 U.S. 63 (2003).
28. *Id.* at 71.

fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness."[29] In other words, unreasonableness was a more deferential, higher standard to reach for the purposes of § 2254(d)(1). The Court thus defined the unreasonableness standard as when a state court decisions rested on an application of federal law so "erroneously or incorrectly" that the application itself is "objectively unreasonable."[30]

*Lockyer's* definition of "objective" reasonableness underscores the importance of determining when § 2254(d)(1) applies. As one commentator lamented, after *Lockyer*, § 2254(d)(1) appears to narrow the qualified immunity framework in civil suit actions for damages under § 1983.[31] In effect, this would allow state judges greater protection in determining federal claims in state courts the same way that "the law of qualified immunity shield[s] executive officers administering state policies in the field."[32] Thus, *Lockyer* reflects the Court's willingness to impose extraordinary deference on federal habeas courts in reviewing state court decisions. *Lockyer* does not, however, nor has any Supreme Court decision for that matter, define the necessary conditions for the application of § 2254(d)(1).

Accordingly, at present lower courts are left in something of a bind. After *Williams* and *Lockyer*, two fundamental messages emerged: (1) the unreasonableness clause of § 2254(d)(1) was intended to establish substantial deference to state court decisions that were adjudicated on the merits; but, on the other hand, (2) no clear guidelines were provided as to when § 2254(d)(1) actually applied.[33] The Tenth Circuit's *Wilson* decision does much to resolve this dilemma.

## III. DE NOVO REVIEW FROM THE TENTH CIRCUIT

In light of both the severity and lack of clarity in applying § 2254(d)(1), the Tenth Circuit recognized the procedural due process issues inherent in deferring to a state court decision that ignored new extrinsic evidence made available on appeal.[34] To address this problem, the Tenth Circuit adopted de novo review in certain instances when new evidence is admitted in federal court.[35] By applying de novo review to federal habeas appeals that involve new extrinsic evidence, the Tenth Circuit avoids the pitfalls of due process that were involved with other

29. *Id.* at 75.
30. *Id.* at 76 (quoting Williams, 529 U.S. at 411).
31. Yackle, *supra* note 9, at 403-04.
32. *Id.* at 404.
33. Steinman, *supra* note 24, at 1509-10.
34. Wilson v. Sirmons, 536 F.3d 1064, 1082-83 (10th Cir. 2008).
35. *Id.* at 1079.

courts straining to apply § 2254(d)(1) to these claims.[36] Below are the recent seminal cases that have established this precedent.

### A. Bryan v. Mullin: *The Beginning of De Novo Review from the Tenth Circuit*

Robert Bryan was convicted of first degree murder and sentenced to death in Oklahoma state court.[37] During a jury trial addressing the question of Bryan's competency, his counsel did not present any medical testimony.[38] Even after Bryan had replaced his original counsel, his subsequent counsel had also failed to present any mental health evidence during the guilt and penalty phase of the trial.[39] On appeal to the Oklahoma Criminal Court of Appeals, Bryan claimed ineffective assistance of counsel for the guilt and penalty phase of his trial because counsel failed to present mitigating evidence of Bryan's mental illness.[40] Although the appeal was rejected, the Tenth Circuit granted rehearing *en banc* to determine whether failing to present mental health evidence at trial comports with the Constitution, and whether relief is available under the AEDPA.[41]

The Tenth Circuit held that Bryan was entitled to a hearing because such legal issues were outside the scope of § 2254(d).[42] More precisely, the Tenth Circuit found that the court erred in applying the deferential review standards set out in § 2254(d) in reviewing Bryan's claims that his trial counsel was ineffective.[43] The Tenth Circuit ruled that de novo

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36. *Compare* Wilson v. Sirmons, 536 F.3d 1064, 1079 (10th Cir. 2008) (applying de novo review when a defendant is diligent in pursuing a new non-record claim, and the state court does not consider the non-record evidence in affirming a sentence or denying an evidentiary hearing), *and* Taylor v. Maddox, 366 F.3d 992, 999-1001 (9th Cir. 2004) (applying de novo review when the reason for denying a hearing is not rebutted by the four factor test of unreasonableness under § 2254(d)(2)), *with* Johnson v. Luoma, 425 F.3d 318, 324 (6th Cir. 2005) (applying deference to claims where "new evidence is presented on federal habeas review," and distinguishing the Ninth Circuit precedent as only applying to perjury caused by a prosecutor's failure to disclose exculpatory evidence), *and* Valdez v. Cockrell, 274 F.3d 941, 953 (5th Cir. 2001) (declining to follow Tenth Circuit de novo precedent because the Tenth Circuit was incorrectly applying pre-AEDPA rationale to present cases).

37. Bryan v. Mullin, 335 F.3d 1207, 1210 (10th Cir. 2003).

38. *Id.*

39. *Id.* at 1213.

40. *Id.*

41. *Id.* at 1214.

42. *See id.* at 1215. Instead of analyzing Bryan's claim under § 2254(d), the Tenth Circuit began evaluating the issue under § 2254(e)(2) of the AEDPA. *Id.* Section 2254(e)(2) provides that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant" satisfies the exceptions listed under § 2254(e)(2)(A) or (B). 28 U.S.C. § 2254(e)(2) (2006). However, if the applicant did not fail to develop the factual basis for his claim in state court, § 2254(e)(2) is not applicable, and "a federal habeas court should proceed to analyze whether a hearing is appropriate or required under pre-AEDPA standards." *Bryan*, 335 F.3d at 1214 (citing Miller v. Champion, 161 F.3d 1249, 1253 (10th Cir. 1998)). The Tenth Circuit found that, "[b]ecause Bryan diligently sought to 'develop the factual basis of [his] claim in State court proceedings,' § 2254(e)(2) does not bar an evidentiary hearing." *Id.* at 1215 (quoting 28 U.S.C. § 2254(e)(2)).

43. *Id.* at 1216 n.7.

was the proper standard of review for Bryan's appeal because his ineffective assistance claim involved mixed questions of law and fact.[44] Moreover, the Tenth Circuit noted that, because the state court did not hold an evidentiary hearing in reaching its decision, the Tenth Circuit was in the same position as the state court to evaluate the same factual record.[45] Thus, "to the extent the state court's dismissal of [Bryan's ineffective assistance claim] was based on its own factual findings, we need not afford those findings any deference."[46] The court concluded that counsel's choice in not presenting Bryan's mental health evidence during the guilt and penalty phase was not "objectively unreasonable" because counsel—and the court—believed presenting such testimony might ultimately do more harm than good for Bryan's case.[47]

Through *Bryan*, the Tenth Circuit greatly refined how federal habeas courts may address the issue of hearing new evidence made available on appeal. Specifically, *Bryan* left a lasting impression on how to approach newfound mitigating evidence on a federal habeas appeal that would otherwise avoid having to force the courts to apply § 2254(d)(1) under such circumstances. As a result, in recognizing that Bryan was entitled to a full and fair hearing, the Tenth Circuit avoided the procedural due process issues of denying individuals a meaningful opportunity to develop new and significant claims.[48] Thus, the Tenth Circuit set the de novo standard for addressing these types of federal habeas claims.

### *B.* Wilson v. Sirmons*: The Tenth Circuit Solidifies De Novo Review*

In *Wilson*, the Tenth Circuit held that de novo review is required when new evidence is admitted at the federal level.[49] As noted by the Tenth Circuit in *Wilson*, Federal Circuits differ in determining whether a claim has been "adjudicated on the merits" when, on appeal, there is some indication that the exclusion of significant evidence led to a prejudicial state court decision.[50] To this controversy, the Tenth Circuit applied de novo review because, according to *Wilson*, § 2254(d) deference does not apply to state court decisions that lack an evidentiary hearing or, for that matter, to "*any* factual determinations made without reference to the proffered evidence."[51] In other words, if the state court makes no reference to, or provides no procedures for, ensuring that significant mitigating evidence is part of its decision, then the claim was not

44. *Id.* 1215-16 (citing Miller, 161 F.3d at 1254).
45. *Id.*
46. *Id.*
47. *Id.* at 1224.
48. Marceau, *supra* note 12, at 418 n.173.
49. Wilson v. Sirmons, 536 F.3d 1064, 1082 (10th Cir. 2008).
50. *Id.* at 1082 n.3.
51. *Id.* at 1082 (emphasis added).

"adjudicated on the merits" and § 2254(d) deference does not apply because the defendant was never given a proper full and fair hearing.[52]

*Wilson* involved an ineffective assistance of counsel claim on federal habeas appeal from the Oklahoma Criminal Court of Appeals.[53] Michael Wilson, sentenced to death for first degree murder and robbery with a deadly weapon, argued that his capital conviction was unconstitutional because his attorney failed to adequately prepare a medical expert to testify to Wilson's mental health problems during the sentencing phase of his trial.[54] Although the medical expert performed tests prior to trial that confirmed Wilson had suffered from various mental disorders (including anxiety, bipolar, and post traumatic stress), during the direct examination of the medical expert Wilson's counsel failed to ask about the specific results from Wilson's psychiatric testing.[55] By not having the jury hear the results of the test, Wilson argued, the state court's decision to sentence him to death was "constitutionally deficient."[56]

In *Wilson*, the Tenth Circuit provided a comprehensive exegesis regarding when § 2254(d)(1) applies.[57] Under § 2254(d)(1), the court found that a state court decision is contrary to clearly established law "if the state court applied a rule differently from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court] has done on a set of materially indistinguishable facts."[58] The court also found that an unreasonable application of clearly established federal law occurs when "the state court identifies the correct governing legal principle from [the Supreme Court's] decision but unreasonably applies that principle to the facts of the petitioner's case."[59]

The Tenth Circuit uniquely drew on the import of "new evidence" to alter how certain habeas claims might be adjudicated.[60] Rather than applying § 2254(d)(1), the Tenth Circuit endorsed a more precise application of de novo review to those habeas claims with new non-record evidence, which were previously denied an evidentiary hearing in state court.[61] When a defendant is diligent in pursuing a new non-record claim, and the state court did not consider the non-record evidence in affirming a sentence or denying an evidentiary hearing, the Tenth Circuit

52. *See* Marceau, *supra* note 12, at 424-37 (recounting the legislative history of § 2254 and positing that the non-deferential standard adopted by the Tenth Circuit is in accord with legislative intention).
53. *Wilson*, 536 F.3d at 1070.
54. *Id.* at 1072, 1074.
55. *Id.* at 1075-76.
56. *Id.* at 1077.
57. *Id.* at 1073-74.
58. *Id.* (quoting Bell v. Cone, 535 U.S. 685, 694 (2002)).
59. *Id.* at 1073 (quoting Wiggins v. Smith, 539 U.S. 510, 520 (2003)).
60. *Id.* at 1079.
61. *Id.*

held that de novo review governs such habeas claims.[62] Accordingly, when a federal habeas claim provides new, significant evidence made available on appeal, and the evidence has not been previously adjudicated, then § 2254(d)(1) simply does not apply.

The Tenth Circuit was quick to note that there were limits to what type of new evidence calls for de novo review outside of the confines of § 2254(d) deference. The court reasoned that "[h]ad the state court evaluated the non-record evidence in its denial of Mr. Wilson's *Strickland* claim and his request for an evidentiary hearing, we would apply AEDPA's deferential standard."[63] Thus, it seems that a primary component as to why de novo applied in *Wilson* stems primarily from the fact that the state court simply failed to examine proffered non-record evidence. As the Tenth Circuit stated, "the OCCA in this case, by contrast [to other state courts], made clear that it was relying solely on the trial record, and not the non-record evidence, when it denied the claim and the evidentiary hearing."[64] Because the state court refused to make factual findings on the evidence, let alone have an evidentiary hearing on the matter, the Tenth Circuit concluded that it had "no choice but to review both legal and factual findings de novo."[65]

Most importantly, the Tenth Circuit emphasized the state court's decision to not fully develop the facts through an evidentiary hearing—as well as the lack of procedural fairness in deferring to the state court decision without the proffered evidence—to reach de novo review in *Wilson*.[66] The Tenth Circuit held that "[b]ecause Mr. Wilson's allegations, if true and *fully* developed, would entitle him to relief, we reverse the district court's denial of an evidentiary hearing on this claim."[67] Additionally, throughout the opinion the Tenth Circuit evaluated the case based on whether Mr. Bryan was given a "fundamentally unfair" hearing in state court.[68] Thus, the two factors of developing a full record and conducting fair hearings seemed tantamount to the Tenth Circuit's decision in *Wilson*.[69]

Having described when § 2254(d) deference does not apply, the Tenth Circuit reviewed the state court decision de novo.[70] Beginning its analysis, the Tenth Circuit noted the following:

> [I]t is well established in this Circuit that when a state court's disposition of a mixed question of law and fact, including a claim of inef-

62. *Id.*
63. *Id.*
64. *Id.* (citing Wilson v. State, 983 P.2d 448, 472 (Okla. Crim. App. 1998).
65. *Id.* at 1081.
66. *See id.* at 1083.
67. *Id.* at 1074 (emphasis added).
68. *Id.* at 1102, 1112, 1114.
69. *See id.* at 1081.
70. *Id.* at 1079.

> fective assistance, is based on an incomplete factual record, through no fault of the defendant, and the complete factual record has since been developed and is before this Court, we apply de novo review to our evaluation of the underlying claim.[71]

The Tenth Circuit reasoned that when a state court makes a decision based on an incomplete factual record, those factual findings are given no deference.[72] Because the district court effectively ignored Bryan's affidavits providing evidence of his emotional and mental problems, the Tenth Circuit held that it had "no choice" but to review both the legal and factual findings de novo.[73]

Interestingly, the Tenth Circuit found de novo review by noting that the Supreme Court had granted certiorari to address the exact same issue in its upcoming 2008-2009 term.[74] Although the case would later be dismissed as improvidently granted,[75] the Supreme Court nonetheless initially granted certiorari to determine whether § 2254(d) deference applies to claims "predicated on evidence of prejudice" in a state court's refusal to consider new and significant evidence.[76] Recognizing that *Wilson* involved the exact same issue, the Tenth Circuit's decision was a call of action in many ways, with the court concluding that there is a "need for de novo review" when federal habeas claims involve evidence that has not been adjudicated with a full and fair hearing.[77] Thus, the Tenth Circuit's decision was made with at least some consideration that the Supreme Court will inevitably have to wrestle with the very same issue.

Therefore, *Wilson* was a turning point not only for appropriately limiting the scope of § 2254(d)(1), but also for providing a more exacting framework for when de novo review ought to apply. According to the Tenth Circuit, de novo review is limited to those rare instances when a full and fair evidentiary hearing has been denied such that new and significant evidence would be unfairly excluded from deciding the merits of the habeas claim.[78] The Tenth Circuit concluded that when a district could has not held an evidentiary hearing or made any factual findings based on the new non-record evidence federal courts have "no choice but to review both legal and factual findings de novo."[79] As such, de novo

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71. *Id.* (citing Bryan v. Mullin, 335 F.3d 1207, 1215 (10th Cir. 2003) (en banc); Miller v. Champion, 161 F.3d 1249, 1254 (10th Cir. 1998)).

72. *Id.* (quoting *Miller*, 161 F.3d at 1254).

73. *Id.* at 1081.

74. *Id.* at 1082 n. 3.

75. 129 S. Ct. 393 (2008) (mem.) (per curiam).

76. *Bell*, 128 S. Ct. 2108 (mem.) (granting certiorari as to Question 1 presented in petition); Petition for a Writ of Certiorari at i, Bell v. Kelly, 129 S. Ct. 393 (2008) (mem.) (per curiam) (No. 07-1223).

77. *Wilson*, 536 F.3d 1079.

78. *Id.* at 1079-81.

79. *Id.* at 1081.

review is applied as a last resort; but, as the Tenth Circuit implied, it is a *necessary* last resort when the defendant was never given a full and fair hearing to adjudicate claims that implicate new and significant evidence.[80] Thus, the Tenth Circuit solidified an appropriate, albeit narrow, place for de novo review in federal habeas proceedings.

## IV. THE FEDERAL CIRCUITS SPLIT: THE STANDARD OF REVIEW UNDER § 2254(d)

Although the Tenth Circuit has required de novo review of state court decisions that failed to examine non-record evidence for claims involving significant due process issues, other circuits have not. Of the five other circuits to have addressed the issue, four have reached the opposite conclusion from the Tenth Circuit. For example, the Fifth Circuit explicitly declined to follow the Tenth Circuit de novo precedent because, according to the court, the Tenth Circuit was incorrectly applying pre-AEDPA rationale to present cases.[81] Instead, the Fifth Circuit held that a "full and fair hearing" was not a precondition for applying § 2254(d) standard of review.[82] The Sixth Circuit also applied § 2254(d) deference to claims where "new evidence [was] presented on federal habeas review," and distinguished the Ninth Circuit precedent as only applying to perjury caused by a prosecutor's failure to disclose exculpatory evidence.[83] The Seventh Circuit also implemented § 2254(d) deference to state court decisions having evidentiary issues on appeal.[84] The Seventh Circuit noted that, although an evidentiary hearing can "bear on the reasonableness of the state courts' adjudication," the court simply did not see why "it should alter the *standard* of federal review."[85]

Recently, the Fourth Circuit held in the case of *Bell v. Kelly*[86] that a defendant was not prejudiced by his counsel's failure to present mitigating evidence, upholding the lower court decision as "reasonable" under § 2254(d).[87] In reaching the decision, the Fourth Circuit reviewed the habeas appeal to determine "not whether the state court's determination was incorrect but whether the determination was unreasonable—a substantially higher threshold."[88] In other words, the Fourth Circuit found substantial deference under § 2254(d)(1) to uphold a district court conviction.[89]

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80. *Id.* at 1079-81.
81. Valdez v. Cockrell, 274 F.3d 941, 953 (5th Cir. 2001).
82. *Id.* at 951.
83. Johnson v. Luoma, 425 F.3d 318, 324 (6th Cir. 2005).
84. *See, e.g.*, Matheney v. Anderson, 377 F.3d 740, 747 (7th Cir. 2004); Pecoraro v. Walls, 286 F.3d 439, 443 (7th Cir. 2002).
85. Pecoraro, 286 F.3d at 443 (emphasis in original).
86. 260 Fed. App'x 599, 607 (4th Cir. 2008).
87. *Id.* at 607.
88. *Id.* at 605 (quoting Schriro v. Landrigan, 127 S. Ct. 1933, 1939 (2007)).
89. *Id.* at 605; *but see id.* at 604 ("We review a district court's decision to grant or deny habeas relief de novo.").

The Supreme Court granted certiorari to determine whether the Fourth Circuit was correct in applying § 2254(d) deference when the decision was "in conflict with decisions of the Ninth and Tenth Circuits."[90] Although *Bell v. Kelly* was ultimately dismissed as improvidently granted,[91] the Supreme Court is still looking for an opportunity to address this circuit split. In particular, another case this term, *Cone v. Bell*,[92] had the Court again raising the possibility that the reach of § 2254(d)(1) might not be as broad as many circuits believe.[93]

## V. FOLLOWING THE TENTH CIRCUIT'S LEAD IN APPLYING DE NOVO REVIEW

In the twelve years since the enactment of the AEDPA, a troubling trend has emerged. Namely, there seems to be a fundamental misunderstanding as to when deference is owed to state court decisions. Perversely, federal courts have rejected habeas claims that bring to light important prejudicial evidence that was excluded from otherwise reasonable state court decisions.

The *Wilson* decision has changed all that. By emphasizing the factors of procedural fairness and the state courts' development of a full factual record, the Tenth Circuit leads the circuit courts in determining when "new evidence" is sufficient to require de novo review. As the Tenth Circuit held, if the allegations in *Wilson* were true and fully developed, then the state court decision was never "adjudicated on the merits," and the defendant was therefore denied a proper full and fair hearing on the claim.[94] Thus, the federal courts should follow the Tenth Circuit's lead in recognizing that § 2254(d) simply does not apply to claims that had never been "adjudicated on the merits" in state court.

Historically, this was exactly how § 2254(d) was viewed. Prior to the AEDPA, § 2254(d) provided that any proceeding instituted in a federal court by an application of writ of habeas "shall be presumed to be correct" unless "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing."[95] This "full and fair" requirement is derived from Professor Bator's seminal law review article, which argued that the only instance where a federal habeas court has jurisdiction to review a state court's final decision is when the state court

90. *See* Petition for Writ of Certiorari, Bell v. Kelly, 2008 WL 819276, *1 (Mar. 26, 2008) (requesting the Supreme Court whether "the Fourth Circuit err[ed] when, in conflict with decisions of the Ninth and Tenth Circuits, it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims "adjudicated on the merits" in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing?").

91. *Bell*, 129 S. Ct. 393.

92. 128 S. Ct. 2961 (2008).

93. *Id.* ("The question presented is whether petitioner is entitled to federal habeas review of his claim that the State suppressed material evidence in violation of *Brady v. Maryland* . . . .").

94. Wilson v. Sirmons, 563 F.3d 1064, 1074 (10th Cir. 2008).

95. 28 U.S.C. § 2254(d)(2) (1994).

failed to "furnish a criminal defendant with a full and fair opportunity to make his case and litigate his case."[96]

Interestingly, the "full and fair" language was omitted from the AEDPA version of § 2254(d).[97] Some commentators have argued that this omission was not a rejection of this procedural rule.[98] Rather, it seems nearly self-evident that state courts would still be expected to have adequate, full, and fair procedures in place to satisfy the Fourteenth Amendment's Due Process Clause.[99] The question, then, is why was the "full and fair" language omitted from the AEDPA version of § 2254(d)? The answer, according to at least one commentator, was that Congress wanted to avoid linking the AEDPA to Bator's model of federal habeas reform.[100] Looking at the Congressional debates, "full and fair" became a pejorative phrase to describe far-reaching habeas reform involving complete deference to state court findings.[101] Congress omitted the phrase to instead include an "unreasonable application" clause in § 2254(d)(2) to define what procedural standard was required for state court decisions.[102] Although this change in phrase is undeniably operative, it is important to note that the change was made because the phrases "full and fair" and "unreasonable application" were viewed as redundant.[103] Thus, although the "full and fair" language was dropped from the AEDPA, the omission may have involved political semantics rather than a substantive change in Congressional intent.

As such, federal courts should still apply the procedural requirements of a "full and fair" hearing to federal habeas claims. At a minimum, the absence of a full and fair hearing in the state court is itself a relevant violation of due process.[104] Thus, at a bare minimum, a "full and fair" hearing is required for the state court to have properly adjudicated the merits of the case. As the Tenth Circuit made clear, if a defendant tries to develop facts for his claim that were excluded from a state court decision, then the AEDPA is not applicable and "a federal habeas court should proceed to analyze whether a hearing is appropriate or re-

96. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 456 (1963).

97. 28 U.S.C. § 2254(d) (1996).

98. *See* Marceau, *supra* note 12, at 425-26; Yackle, *supra* note 9, at 381 ("On the whole [the AEDPA] presupposes the basic framework already in place. . . . [T]he new statute takes the preexisting habeas landscape as its baseline.").

99. U.S. CONST. amend. XIV, § 1.

100. Marceau, *supra* note 12, at 430.

101. *See, e.g.*, Yackle, *supra* note 9, at 428; S. Rep. No. 98-226, at 24-27 (1983); 137 Cong. Rec. H8001 (daily ed. Oct. 17, 1991) (statement of Rep. Fish) (noting that the attempts to redefine "full and fair" do not adequately address his concern that the reform will have the effect of stripping federal courts' power to review the merits of state habeas decisions).

102. *See* Kovarsky, *supra* note 10, at 506.

103. *Id.*

104. Wright v. West, 505 U.S. 277, 299 (1992).

quired under pre-AEDPA standards."[105] Thus, when a state court lacks some extrinsic and substantive evidence to make a decision, the AEDPA simply does not apply, and, therefore, de novo review is proper.

Additionally, a "full and fair" hearing is the most proper way to ensure that state court decisions are adjudicated on the merits. Granted, the wording of the AEDPA is unequivocal in limiting federal courts from granting habeas to "*any* claim that was adjudicated on the merits."[106] Nevertheless, if a state court decision was made without a full and fair hearing, then the decision could not be—by sheer definition—properly adjudicated on the merits. Consequently, as the Tenth Circuit correctly found in *Wilson*, when a state court makes a decision based on an incomplete factual record, those factual findings afford no deference on federal habeas appeal.[107] Therefore, although the AEDPA was meant to generally limit federal habeas appeals, this limitation was not meant for cases that failed to have a "full and fair" hearing in state court.

Having stated that, it is important to note that federal courts may still have federalism concerns for applying de novo review. The AEDPA emerged from an era when Congress feared that state court decisions were not given proper deference in reaching judicial finality.[108] For example, one of the most significant arguments for habeas reform came from Professor Bator, who recognized that finality in criminal law is generally avoided until "we are somehow truly satisfied that justice has been done."[109] His point was that no judicial process can assure ultimate truth, but a justice system can provide some finality in the process to gain greater trust and confidence in the system.[110] Professor Bator accordingly argued that the greatest mistake courts can make is to second guess decisions "merely for the sake of second-guessing, in the service of the illusory notion that if we only try hard enough we will find the 'truth.'"[111] By allowing courts to continually second-guess other courts, the justice system risks creating greater disagreement and unease about the criminal law system.[112]

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105. Bryan v. Mullin, 335 F.3d 1207, 1214 (10th Cir. 2003) (quoting Miller v. Champion, 161 F.3d 1249, 1253 (10th Cir. 1998)).

106. 28 U.S.C. § 2254(d) (1996) (emphasis added).

107. Wilson v. Sirmons, 536 F.3d 1064, 1079 (10th Cir. 2008) (quoting *Miller*, 161 F.3d at 1254).

108. Yackle, *supra* note 9, at 436 n.181 ("[If] we do not reform Federal habeas corpus review of State cases, then we will have the same incessant, frivolous appeals ad hominem [sic], day and night, from that point on because this amendment would not take care of that problem. If we are going to pass habeas reform, let us pass real habeas reform . . . . Let us protect civil liberties, but let us get some finality into the law so that the frivolous appeal game will be over.").

109. Bator, *supra* note 96, at 441.

110. *Id.* at 452.

111. *Id.* at 451.

112. *Id.* at 443.

As such, these concerns played a fundamental role in shaping the policy decisions behind the AEDPA.[113] Though Congress was adamant about rejecting Bator's phrase "full and fair" into the provisions of § 2254(d),[114] Congress was nonetheless in agreement with Bator in desiring further limitations in which habeas appeals could be heard at the federal level.[115] The AEDPA was meant to correct deficiencies that members of Congress saw in the federal habeas appeal process, including "frivolous" lawsuits clogging up the criminal courts.[116] More broadly, the AEDPA was intended to grant state courts greater deference, as a matter of comity and federalism.[117]

Yet, these policies of finality, comity, and federalism have led to the creation of a higher standard of unreasonableness rather than addressing state court decisions involving an incorrect error. As the Supreme Court duly noted, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law."[118] An unreasonable application standard under § 2254(d)(1) permits state courts to err above and beyond an incorrect application of the law. And, in turn, federal habeas courts "may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly."[119] Thus, the principles of finality, comity, and federalism are already captured in the § 2254(d)(1) provision, but only to those claims that have been adjudicated on the merits.

As a result, federal courts can address these federalism concerns by providing a clearer standard on what an unreasonable application of federal law entails. As provided by the Tenth Circuit in *Wilson*, "while federalism, comity, and finality . . . are undoubtedly important values, the importance of these values is reduced when a claim has never been considered on the merits."[120] Accordingly, de novo review is a drastic measure, but it is a necessary one when the state court fails to hold an evidentiary hearing or make factual findings on new significant evidence. Thus, nearly the only time when new evidence requires federal courts to apply de novo review is when, as the Tenth Circuit found in *Wilson*, the federal court has "no choice but to review both legal and factual findings de novo."[121] In other words, by following the analysis of the *Wilson* de-

113. *Cf.* Marceau, *supra* note 12, at 429-30 (noting that Bator's approach was the model expressly and repeatedly rejected by Congress).
114. *Id.*
115. Yackle, *supra* note 9, at 388.
116. *Id.* at 398.
117. Williams v. Taylor, 529 U.S. 362, 436 (2000).
118. *Id.* at 410 (emphasis in original).
119. *Id.* at 411.
120. Wilson v. Sirmons, 536 F.3d 1064, 1083 (10th Cir. 2008).
121. *Id.* at 1081.

cision, federalism is still upheld so long as the state court has demonstrated a full and fair examination of the facts in reaching its decision.

Finally, it is important to note that de novo review encourages federal courts to return to the duty of deciding matters of law. There has been a general tendency by the federal courts—including the Supreme Court—to use § 2254(d) as a way to avoid having to address significant constitutional issues.[122] Habeas corpus is the Great Writ because it uniquely requires courts to address some of most fundamental issues of constitutional law in the context of criminal procedure. This includes the possibility of a person being sentenced to death because of ineffective assistance of counsel, a concealment of exculpatory evidence, or even a confession that is obtained by artifice or force.[123] Federal habeas courts must address these issues head on, rather than hide behind a mischaracterization of "§ 2254(d) deference."

For example, the Supreme Court has seemingly hidden behind § 2254(d) deference to sidestep making important decisions on whether (1) the Eighth Amendment limits the states' three strikes policies for applying harsher punishments,[124] (2) the Fourteenth Amendment limits the potentially prejudicial effects of spectators wearing buttons depicting the image of the murder victim during trial,[125] and (3) the Sixth Amendment renders an ineffective assistance of counsel claim successful when the lawyer participates in a first-degree murder plea hearing by phone.[126] Consistently, the Supreme Court punts on these constitutional issues because its previous decisions "give no clear answer to the question presented, let alone one in [the habeas peitioner's] favor," and therefore "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'"[127]

Although the proponents for habeas reform might call for federal courts to avoid making decisions on these controversial constitutional issues, it might be that this restraint is the very reason for why federal habeas appeals still creates significant problems for procedural due process. The most important constitutional rights in criminal procedure sprang from the writ of habeas corpus, including the right to counsel for indigents,[128] the incorporation of the rights to due process and protection from self incrimination in state court proceedings,[129] and a constitutional

122. *See "Clearly Established Law" in Habeas Review*, 121 HARV. L. REV. 335, 336 (2007) (noting that the Supreme Court used the AEDPA to "neatly sidestep" substantive constitutional law issues and instead provide deference to state-court decisions without offering "a coherent justification for its deference.").

123. ANDREA D. LYON ET AL., FEDERAL HABEAS CORPUS xiv (2005).

124. Lockyer v. Andrade, 538 U.S. 63, 76-77 (2003).

125. Carey v. Musladin, 549 U.S. 70, 77 (2006).

126. Wright v. Van Patten, 128 S. Ct. 743, 746-47 (2008).

127. *Id.* at 747 (quoting *Carey*, 549 U.S. at 76-77 (quoting 28 U.S.C. § 2254(d)(1)).

128. Gideon v. Wainright, 372 U.S. 335, 344-45 (1963).

129. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

standard for when a defendant is receiving ineffective assistance of counsel.[130] This history has been compromised by Congress wanting to evade these difficult issues by placing the weight of such decision in state courts.

The net effect has been rather destructive for the justice system. By abusing § 2254(d) as a shield from making decisions, federal courts have created a checkerboard of constitutional rights where each state defines fundamental rights in criminal procedure differently.[131] As Alexander Hamilton portended, the consequence of this is that state courts will be unlikely to "give full scope" to federal rights that are "unpopular locally."[132] In other words, fundamental rights protected by the Equal Protection Clause are compromised because each state might define the rights in competing, if not entirely different, ways. Thus, it is little wonder why the extreme misuse of deference under § 2254(d) has created great confusion for habeas claims. Many federal courts simply do not want to address the difficult legal questions that attach to writs of habeas corpus, and therefore defer to state courts to decide.

Federal courts must return to using the Great Writ as a vehicle for addressing major constitutional issues that arise in criminal procedure, and federal courts should adopt de novo review to ensure procedural fairness. In the famous words of Justice Marshall, it is the "province and duty of the judicial department to say what the law is."[133] Constitutional rights are not meant to be fossilized under § 2254(d); rather, federal courts should play an active role in deciding the merits of those rare habeas claims that offer significant new evidence that may bring to light other substantive constitutional issues. As the Tenth Circuit ruled, if a state court decision was made without an evidentiary hearing, where the procedural requirements of a full and fair hearing is denied,[134] the federal court should apply de novo review to evaluate the underlying claim.[135] Thus, in those rare instances when state courts do not have enough factual information or legal precedent to make a decision, or in those even rarer cases like *Wilson* where the state court refuses to consider even having a full and fair evidentiary hearing to address the claim,[136] federal courts should apply de novo review. By applying de novo review in such rare circumstances, federal courts are given a better opportunity to ad-

130. Strickland v. Washington, 466 U.S. 668, 687 (1984).

131. Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 316-17 (1982).

132. Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1293 (2008).

133. Marbury v. Madison, 5 U.S. 137, 177 (1803).

134. Marceau, *supra* note 12, at 426-27

135. Wilson v. Sirmons, 536 F.3d 1064, 1079 (10th Cir. 2008) (citing Bryan v. Mullin, 335 F.3d 1207, 1215 (10th Cir. 2003)).

136. *Id.*

dress the substantive, rather than merely procedural, issues that are involved with federal habeas claims.

In sum, federal courts should adopt de novo review to ensure procedural fairness in the habeas corpus process. In *Wilson*, the Tenth Circuit captured the three-way split in how federal courts have addressed significant constitutional claims involving habeas appeals.[137] For the Tenth Circuit, the court viewed the habeas claim being brought in *Wilson* as lacking the sine qua non of a full and fair evidentiary hearing.[138] Thus, when the state court failed to consider the mitigating evidence in reaching its decision, de novo review applied.[139] In the Ninth Circuit, the court looked at whether the lack of a full fact-finding record resulted in procedural unfairness.[140] If the reason for this lack of a hearing is not rebutted by the four factor test of unreasonableness under § 2254(d)(2), then de novo review is applied.[141] Yet, the other Federal Circuit courts seem less concerned with deciding these constitutional procedural issues because the courts apply § 2254(d) deference to the state court decision, even when these decisions often times lacked exculpatory evidence.[142] Many Federal Circuits do not apply de novo review because, in the courts' opinions, the merits have not changed from the state court decision to the habeas appeal. However, as has hopefully been made more apparent from this Comment, this overextended application of § 2254(d) deference has resulted in significant constitutional violations of procedural due process because many defendants have never received a full and fair hearing on the merits of their new habeas claims.[143] Thus, from this three-way split, the best way to protect procedural due process is to adopt the narrow application of de novo review from *Wilson*.

## CONCLUSION

The Tenth Circuit recently granted the petition for *en banc* review in *Wilson* to finalize whether the decision to deny an evidentiary hearing by the state court "warrants deference under § 2254(d)."[144] *Wilson* has already provided the most compelling reasons for why de novo review offers a better solution. Namely, de novo review is the better way to address habeas appeals that claim that a full and fair evidentiary hearing was never afforded in state court. If the prerequisite of a full and fair hearing is not met, then the claim could not have been adjudicated on the merits, and, thus, § 2254(d) does not apply. Therefore, de novo review

137. *Id.* at 1082 n.3.
138. *Id.* at 1079.
139. *Id.* at 1080.
140. Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004).
141. *See* Marceau, *supra* note 12, at 408 (citing *Taylor*, 366 F.3d at 1000-01).
142. *See supra* notes 74-82.
143. *See* Marceau, *supra* note 12, at 432 (characterizing the lack of a full and fair hearing as stripping federal evidentiary hearings of their legal effect).
144. Wilson v. Sirmons, 549 F.3d. 1267, 1270 (10th Cir. 2008).

should be applied. Additionally, *Wilson* uniquely captured the importance of de novo review by emphasizing that due process requires a full and fair hearing to address significant constitutional issues. By straining to apply § 2254(d) deference, other federal courts might violate procedural due process rights. Thus, there needs to be a return to what Thomas Jefferson famously phrased as the "eternal and unremitting" force of habeas corpus.[145] There needs to be de novo review in the federal habeas appeals process. In short, the Supreme Court should adopt the precedent already set by the Tenth Circuit in *Wilson*.

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145. *See* Freedman, *supra* note 1.

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