No. 07-1223

IN THE
Supreme Court of the United States

EDWARD NATHANIEL BELL,
PETITIONER,
v.

LORETTA K. KELLY, Warden, Sussex I State Prison,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* FORMER STATE COURT JUDGES AND BRIEF OF *AMICI CURIAE* FORMER STATE COURT JUDGES IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Amici former state court judges respectfully move this Court to grant them leave to file the attached brief as *amici curiae* in the above-captioned case.

Pursuant to Rule 37.3 of the Rules of this Court, the *amici* sought written permission of all parties to file a brief as *amici curiae*. The consent of the attorney for Petitioner has been obtained. A letter attesting to Petitioner's consent has been submitted to the clerk of this Court. The consent of Respondent has been sought but has not been provided. Respondent stated that she would not provide

consent without first reviewing the brief. Because *amici* were unable to complete this brief with time to permit such a review, *amici* respectfully request leave to file the attached brief.

There is good cause for this Court to grant this motion. As described in the statement of interest in the attached brief, the *amici* present an important perspective in this case, as they are uniquely qualified to address the issues presented by federal review of state court decisions in the habeas corpus process.

The former state court judges represented have provided decades of service to a number of state courts throughout the country and have collectively served at every level of the state judiciary. They have held the highest positions in the state courts and served with great distinction. The experience of the *amici* with habeas litigation has provided each of them with valuable insight into the impact that this Court's decision will have on the principles of comity, federalism, and adequate process for criminal defendants.

Amici continue to be involved in educating legal professionals and improving the criminal justice system through a variety of means. The former state court judges represented in this brief hope that this brief will contribute to the advancement of the habeas corpus process.

Respectfully submitted,

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QUESTION PRESENTED

This brief will address the following question on certiorari:

Did the Fourth Circuit err 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?

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BRIEF OF *AMICI CURIAE* FORMER STATE COURT JUDGES IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici are former state court judges who have collectively served at all levels of the state judiciary. *Amici*'s views are based on decades of service to state courts throughout the United States. *Amici* are uniquely qualified to address the manner in which state court decisions are reviewed by federal courts, and the impact that this decision will have on the principles of comity, federalism, and due process.

Amici have been intimately involved in the habeas corpus process, both as members of the judiciary and as practicing attorneys. They have experienced federal review of their decisions, both affirming and reversing, and as a result, have thought critically about the habeas process and the interests affected by it. *Amici* now serve as scholars, educators, and practitioners in various capacities and continue to consider these important issues. *Amici* respectfully submit this brief in an effort to

[1] Pursuant to Rule 37.6, *amici curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for Petitioner has consented to the filing of this brief and the consent accompanies the brief. Counsel for Respondent has withheld its consent, and, accordingly, *amici* have filed a motion for leave to file this brief. *See* S. Ct. Rule 37.3.

provide insight on how members of the state judiciary interpret these statutes and the impact that this Court's decision will have on the critical principles of comity, federalism, and due process.

The Honorable Fred L. Banks, Jr. is a former Presiding Justice of the Mississippi Supreme Court, where he served for eleven years. Prior to that, Justice Banks served as a circuit judge for six years. He was also a member of the Mississippi House of Representatives, where he served as Chair of the Ethics Committee, the Judiciary Committee, and the Legislative Black Caucus.

The Honorable William M. Bowen, Jr. served on the Alabama Court of Criminal Appeals for eighteen years. At the time of his retirement he had written more published opinions than any other appellate judge in the history of the State of Alabama. He has also served as the Chair of the Alabama Supreme Court's Advisory Committee on Rules of Criminal Procedure.

The Honorable James G. Exum, Jr. served on the North Carolina Supreme Court for twenty years, eight as Chief Justice and twelve as Associate Justice. During his career on the Supreme Court, Justice Exum authored more than 600 opinions. Justice Exum also served as a Superior Court Judge, a member of the North Carolina legislature, and an instructor at Duke University School of Law and University of North Carolina at Chapel Hill School of Law. Justice Exum is currently Jurist in Residence at the Elon University School of Law.

The Honorable Norman S. Fletcher served on the Georgia Supreme Court for fifteen years, four as the Chief Justice and six as the Presiding Justice. He has also served as the Chair for the Judicial Counsel of Georgia and sat on the Board of Directors of the Conference of Chief Justices.

The Honorable Janine P. Geske served on the Wisconsin Supreme Court for five years and in the Milwaukee County Circuit Court for twelve years. She currently serves as a Distinguished Professor of Law at Marquette University Law School.

The Honorable Howard A. Levine served as an Associate Judge on the New York State Court of Appeals for ten years. Prior to that, Judge Levine served eleven years as an Associate Justice on the Supreme Court Appellate Division, Third Department. He has also served as the Chair of the New York Federal-State Judicial Council.

The Honorable Morris Overstreet served on the Texas Criminal Court of Appeals for seven years and as the Presiding Judge in Amarillo County for three years. He has also served as a Professor at the Texas Southern University Thurgood Marshall School of Law.

The Honorable James L. Robertson served as a Justice on the Mississippi Supreme Court for ten years. He has also served as a Professor at the University of Mississippi School of Law for fifteen years and has authored a number of publications.

The Honorable Alexander M. Sanders, Jr. served as the Chief Justice of the South Carolina Court of Appeals for eight years. Justice Sanders served in both the South Carolina House of Representatives and Senate and was a nominee for the United States Senate. He has also served as the President of the College of Charleston and the Charleston School of Law.

The Honorable Robert F. Utter served on the Supreme Court of Washington for twenty-four years, two of which as Chief Justice. Justice Utter was a Professor at Seattle University School of Law for eight years, where he taught state constitutional law. He has also served as the Chair of the Board of Directors of the American Judicature Society.

The Honorable Penny J. White served as a judge in every court of record in the state of Tennessee, serving as a trial judge for two years, as a judge on the intermediate Court of Criminal Appeals for two years, and as a Justice on the Tennessee Supreme Court for two years. Justice White is currently a Professor at the University of Tennessee College of Law and she authored the Tennessee Rules for Post-Conviction Relief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The holding of the Fourth Circuit Court of Appeals, applying 28 U.S.C. § 2254(d) to Petitioner Edward Bell's ineffective assistance of counsel claim, should be reversed. The court's application of § 2254(d) to a claim that was never reviewed by the state court, despite Petitioner's diligence, is a misapplication of law and is in conflict with this Court's precedent. Affirming the Fourth Circuit's decision would result in inadequate review of Bell's claim at every level, both state and federal, and prevent him from receiving a basic level of process.

Instead, this Court's decision in *Michael Williams v. Taylor*, 529 U.S. 420 (2000), and its analysis of § 2254(e), provides the correct framework for federal review of claims that have gone unreviewed by state courts through no fault of the petitioner. The analysis applied in *Michael Williams* compels the conclusion that if federal courts can properly receive new claims that were not reviewed by the state courts, they must also be able to review the merits of such claims. To hold otherwise would result in potentially meritorious claims being denied without de novo review by any court, state or federal.

Allowing federal courts to review these claims de novo promotes the principles of comity and federalism that underlie the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Under § 2254(e) petitioners will receive adequate process on potentially meritorious claims, while protecting the

balance between state and federal courts in habeas proceedings. Section 2254(e) is the proper framework for the instant analysis, and this Court should reverse the decision of the Fourth Circuit Court of Appeals.

ARGUMENT

I. CLAIMS THAT ARE NOT REVIEWED BY THE STATE COURT, DESPITE PETITIONER'S DILIGENCE, SHOULD BE REVIEWED DE NOVO BY FEDERAL COURTS

Petitioner Edward Bell's ineffective assistance of counsel claim is properly reviewed under 28 U.S.C. § 2254(e). Section 2254(e) provides the framework for analyzing claims that, despite petitioners' diligence, have not been reviewed at the state level. By applying § 2254(d) to Bell's claim, the Fourth Circuit improperly limited its review of a claim that, despite Petitioner's undisputed diligence (Petition Appx. 84(a)), has never been properly reviewed. The Fourth Circuit's application of § 2254(d) is inconsistent with the plain language of the statute, and as this Court's holding in *Michael Williams v. Taylor* makes clear, there is no comity or federalism-based reason to distort the statutory language in such a way.

In *Michael Williams*, the Fourth Circuit similarly rejected a petitioner's previously unreviewed claims under § 2254(d). 529 U.S. at 428. This Court granted certiorari to determine whether Michael Williams was entitled to an evidentiary hearing on his claims under § 2254(e). The unanimous decision

in *Michael Williams* reflects the proper application of §2254(e) to such facts, and is equally appropriate in this case.

The opening clause of § 2254(e)(2) provides the standard for determining whether a federal court can hold an evidentiary hearing for habeas claims: "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold a proceeding." As this Court recognized, the phrase "failed to develop" does not embody a no-fault standard, but instead requires an analysis of the petitioner's diligence in state court. *Id.* at 431-32 (finding that if Congress had intended to create a no-fault standard, it would not have been difficult to make its intention clear); *see also Morris v. Dretke*, 313 F.3d 484, 501 (5th Cir. 2005) (Higginbotham, J., concurring) ("Limiting a federal court's review to the record before the state habeas court would undermine the Court's intention in *Williams* of providing state habeas petitioners who did not 'fail' to develop their claims with a vehicle to do so at the federal level.").

It is thus plain that the phrase "failed to develop" in this context should not be read narrowly to bar evidentiary hearings for diligent petitioners with meritorious claims. *Michael Williams*, 529 U.S. at 434. The petitioner is "not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance." *Id.* at 432. Fault in that instance rests with "the person who interfered with the accomplishment of the act or with no one at all." *Id.*

It follows that if federal courts are permitted in this instance to conduct evidentiary hearings and receive new evidence, they must also be able to review that evidence. To hold otherwise would prevent potentially meritorious claims from receiving de novo review by any court. Such a conclusion would be inconsistent with the principles of federal habeas review and would substantially interfere with the duty of federal courts in the process. *See Pierre v. Louisiana*, 306 U.S. 354, 358 (1939) (federal courts have a "solemn duty to make independent inquiry and determination of [any] disputed facts").[2]

As Petitioner has plainly demonstrated here, the admission of new evidence on habeas gives rise to a new claim that the state court has not previously adjudicated on the merits, and thus, the Petitioner's claim is properly reviewed de novo under § 2254(e) not § 2254(d).[3] Accordingly, the Fourth Circuit's application of § 2254(d) to Bell's ineffective assistance of counsel claim is contrary to the plain language of the statute, and as this Court's holding in *Michael Williams* makes clear, there is no federalism or comity-based reason to distort the

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[2] *See also Gallegos v. Nebraska*, 342 U.S. 55, 61 (1951) (the duty of federal courts "requires [those judges] to examine, in cases before [them] such facts as form the basis of a state court's denial of that right"); *Truax v. Corrigan*, 257 U.S. 312, 324-25 (1921) ("[T]his court must analyze the facts as averred and draw its own inferences as to their ultimate effect.").

[3] *See Barkell v. Crouse*, 468 F.3d 684, 695 (10th Cir. 2006) (finding "a state court would have no occasion to determine whether the defendant has satisfied the § 2254(e)(2) requirements for a federal evidentiary hearing, so we have no state adjudication on the matter to which we could defer").

statutory language to reach the Fourth Circuit's result.

II. PETITIONER'S INTERPRETATION OF §§ 2254(D) AND (E) PROMOTES THE PRINCIPLES OF COMITY AND FEDERALISM THAT UNDERLIE AEDPA AND WILL ENSURE THAT PETITIONERS RECEIVE ADEQUATE PROCESS

A. Because State Courts Have Not Reviewed These Claims And Rendered A Decision, Principles Of Comity And Federalism Will Be Protected And Promoted

The principles of comity and federalism embodied in AEDPA are predicated on an initial state court adjudication of the claim. As this Court has noted, these principles are implicated most strongly "where a federal court makes its determination on the identical record that was considered by the state appellate court." *Sumner v. Mata*, 449 U.S. 539, 547 (1981). This is not the case here, however. As this Court suggested in *Holland v. Jackson*, 542 U.S. 649, 653 (2004), "[w]here new evidence is admitted" during federal habeas, "there is no relevant state-court determination to which one could defer." Because there is no state court determination of Bell's ineffective assistance of counsel claim, the state court determination below is not relevant to the analysis of Bell's claim. Allowing de novo review by the federal court will protect and promote the principles of comity and federalism.

As this Court noted, "[c]omity . . . dictates that when a prisoner alleges that his continued confinement for a state conviction violates federal law, the state courts should have the *opportunity* to review this claim and provide necessary relief." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (emphasis added). Federal courts have repeatedly recognized that the prerogatives of state courts are respected when they are given the opportunity to adjudicate a claim, regardless of whether they take the opportunity or not.[4]

State courts will still have the first opportunity to review these claims because § 2254(e) requires that petitioners diligently pursue their claims in state court. As this Court recognized, "comity is not served by saying a prisoner 'has failed to develop the factual basis of a claim' where he was unable to develop his claim in state court despite diligent effort." *Michael Williams*, 529 U.S. at 437. Additionally, in practical

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[4] *See, e.g., Pike v. Guarino*, 492 F.3d 61, 74 (1st Cir. 2007) ("Whatever the extent of the state court's opportunity to adjudicate the competence claim . . . the court did evaluate the factual basis upon which the competence claim is premised . . . [and] it is difficult to imagine how the interests of comity will be disserved by permitting a federal court to resolve the competence claim on its merits."); *Clinkscale v. Carter*, 375 F.3d 430, 441 (6th Cir. 2004) ("[E]ven if the Ohio Court of Appeals . . . refused to address the merits . . . that would not bar federal court review. Those concerns are satisfied here because the Ohio Courts were given a full and fair opportunity to adjudicate and grant relief."); *Hardcastle v. Horn*, 368 F.3d 246, 261 (3d Cir. 2004) ("'There is no requirement, however, that they be given more than one opportunity to adjudicate these claims.'").

terms, § 2254(e) provides a check on petitioners and will prevent them from sandbagging or withholding potentially meritorious claims until federal habeas proceedings. Moreover, the application of § 2254(e) to these facts will promote the interests of the state courts in resolving all claims raised. As courts have recognized, the diligence requirement is carefully reviewed to encourage proper presentment of issues in state court.[5]

Nor will the application of § 2254(e) interfere with the principles of federalism that underlie AEDPA. As the legislative history of AEDPA demonstrates, the purpose of § 2254(d) was to prevent endless second-guessing of state court judgments. *See* 141 Cong. Rec. 15,023 (1995) (statement of Sen. Hatch). That is hardly the case here, however, as the question before the federal court is an entirely new claim that the state court did not review.

Moreover, allowing federal courts to engage in a review of these claims on the merits is consistent with the co-equal nature of state and federal courts in habeas proceedings. State and federal courts are, "[b]y tradition . . . coordinate equals operating in a single judicial system." *See* Larry W. Yackle, *State*

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[5] *See Monroe v. Angelone*, 323 F.3d 286, 299 n.19 (4th Cir. 2003) ("[I]t may be suggested that we are encouraging defendants to make a less-than-vigorous effort to uncover *Brady* material during state proceedings. However, AEDPA guards against any strategic decision to wait to search for *Brady* material: a federal habeas petitioner may only secure an evidentiary hearing if he has been fully diligent in state court.").

Convicts and Federal Courts: Reopening the Habeas Corpus Debate, 91 CORNELL L. REV. 541, 554 (2006); *see also* Guido Calabresi, Madison Lecture, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1303-07 (2003) (discussing the evolution of judicial roles).

This balance is firmly reflected in 28 U.S.C. §§ 2246 and 2247, as well as the Rules Governing Habeas Corpus, which allow federal courts to, at times, expand the record. *See* 28 U.S.C. § 2246 ("On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or in the discretion of the judge, by affidavit"); Rule 7(a) of the Rules Governing Section 2254 ("the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition"). The expansion of the record under the Rules Governing Habeas Corpus can include, "without limitation, letters predating the filing of the petition in the district court, documents exhibits, and answers under oath, if so directed to written interrogatories propounded by the judge." *See* Rule 7(b) of the Rules Governing Section 2254.

This clearly articulated authority to inquire into the facts of a habeas petitioner's case necessarily carries the concomitant authority to use the facts uncovered. Section 2254(d) must be read against this background, and so read, cannot contemplate a federal court blindly deferring to a state court's judgment where the facts, and hence the legal claim, have sufficiently changed. Petitioner's interpretation

is consistent with, and indeed promotes, the principles of comity and federalism that underlie the habeas process.

B. Allowing Federal Courts To Conduct De Novo Review Of Claims That Were Not Reviewed By The State Courts Will Ensure Adequate Process For Petitioners

Allowing federal courts to review new claims on the merits will ensure that diligent petitioners are not denied adequate process by forces beyond their control. As this Court has recognized, there are barriers that can prevent petitioners from receiving adequate process through no fault of their own.[6] State courts have similarly recognized and voiced opposition to procedural obstacles that act as a barrier to petitioners' gaining adequate process in federal proceedings.[7] This Court has long recognized that, while states are free to shape their own procedures, such procedures cannot defeat the assertion of federal rights. *See Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("Whatever springes [sic] the State may set for those who are endeavoring to

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[6] *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (discussing the inadequacy of counsel in preparing a mitigation case on behalf of the defendant in the sentencing phase).

[7] *See Evans v. State*, 441 So.2d 520, 531 (Miss. 1983) (Robertson, J., dissenting) ("The State's articulated motivation is to short-circuit anticipated federal court review via habeas corpus under § 2254. The State is saying we should hold Evans' claims procedurally barred, not because such would promote the interests of justice, but rather that such would pull the rug out from under Evans when he ultimately seeks federal review of his case.").

assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the same name of local practice.").[8]

This Court's jurisprudence has repeatedly recognized the duty of federal courts to review claims that state courts have not properly addressed.[9] As Justice Holmes wrote, "habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes from outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell." *See Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). This Court's holding in *Townsend v. Sain*, 372 U.S. 293, 313 (1963), makes clear that a federal habeas court must grant an evidentiary hearing where the petitioner has pled facts that, if true, would entitle

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[8] *See also Lee v. Kemma*, 534 U.S. 362, 376 (2002); *Osborne v. Ohio*, 495 U.S. 103, 125 (1990); *Felder v. Casey*, 487 U.S. 131, 152 (1988); *James v. Kentucky*, 466 U.S. 341, 349 (1984); *Brown v. W. Railway of Alabama*, 338 U.S. 294, 298-99 (1949).

[9] *See McNeal v. Culver*, 365 U.S. 109, 117 (1961) (finding that upon pleading allegations that, if true, establish a constitutional violation, court may not reject those allegations without granting a hearing); *see also Coleman v. Alabama,* 377 U.S. 129, 133 (1964) (reversing state court judgment on direct appeal where "record shows that petitioner was not permitted to offer evidence in support of his claim); *Carter v. Texas*, 177 U.S. 442, 448-49 (1900) (reversing state court on direct appeal where issue decided on a motion that "was but a mere tender of the issue, unaccompanied by any supporting testimony" and defendant "offered to introduce witnesses, to prove the allegations" but "the court . . . declined to hear any evidence upon the subject").

him to relief and "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing." As this Court has recognized, the passage of AEDPA did not change this "basic" rule. *See Schriro v. Landrigan*, 127 S. Ct. 1933, 1940 (2007).

The drafters of AEDPA acknowledged the need to protect these meritorious claims, while limiting frivolous or meritless appeals. *See* 141 Cong. Rec. 14,527 (1995) (statement of Sen. Hatch) (AEDPA would prevent individuals from "abusing our judicial system, and delaying the imposition of a just sentence, by filing appeal after meritless appeal; frivolous appeal after frivolous appeal"); 142 Cong. Rec. 7801 (1996) (statement of Sen. Dole) ("We are about to curb these endless, frivolous appeals"). The Congressional purpose to curb frivolous appeals is not implicated where a petitioner has diligently sought to develop the factual basis of a claim, has been denied the opportunity in state court, and has been properly provided an evidentiary hearing in federal court at which evidence establishes that his claim is meritorious. Indeed, as Senator Thurmond made clear, Congress always intended to "reduce the filing of repetitive habeas corpus petitions" but "without unduly limiting the right of access to the federal courts." 141 Cong. Rec. 14,533 (1995) (statement of Sen. Thurmond).

Federal review is a vital part of protecting the rights of petitioners. *See* 141 Cong. Rec. 14,526 (1995) (statement of Sen. Hatch) (stating "[t]here will be a full right of appeal all the way up the Federal

courts, from Federal court to district court [sic] to the Supreme Court of the United States, and their rights will be protected"). The Fourth Circuit's decision denies the "full and fair review" Congress intended in passing AEDPA by improperly applying the heightened standard of § 2254(d), as opposed to § 2254(e), to previously unreviewed claims.

CONCLUSION

Amici curiae former state court judges respectfully submit that the decision of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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