No. 07-1223

IN THE

Supreme Court of the United States

EDWARD NATHANIEL BELL,
Petitioner,

v.

LORETTA K. KELLY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Motion for Leave to File Brief and Brief for the National Association of Federal Defenders, and the National Association of Criminal Defense Lawyers as *Amici Curiae* Supporting Petitioner

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

The National Association of Federal Defenders (NAFD) and The National Association of Criminal Defense Lawyers (NACDL) respectfully move this Court to grant them leave to file the attached brief as *amici curiae* in the above captioned case.

Pursuant to Rule 37.2 of the Rules of this Court, the NAFD and the NACDL 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 their consent has been submitted to the clerk of this Court. The consent of the Respondents has been sought but has not been provided. Respondents stated in writing that they would not provide consent for the brief unless they were given an opportunity to review the brief in advance of the filing deadline. Specifically, Respondents noted that they "do not consent to matters [they] have not had an opportunity to review." Because the NAFD and the NACDL were unable to complete a draft of the brief in time to permit such a review, the NAFD and the NACDL 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 identity of interest in the attached *amicus curiae* brief, the NAFD and the NACDL are respected national organizations with significant membership across the country, and their interests in this case are substantial.

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal

Justice Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving federal habeas corpus, particularly as they relate to matters of procedural fairness. NACDL files approximately 35 amicus curiae briefs each year on various issues in this Court and other courts. NACDL has filed amicus curiae briefs in this Court in many cases involving federal habeas corpus. *See, e.g.*, *Roper v. Weaver*, 127 S. Ct. 2022 (2007); *Pliler v. Ford*, 542 U.S. 245 (2004); *Slack v.*

McDaniel, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

The attached brief does not replicate the arguments persuasively advanced in Petitioner's brief. Instead, the NAFD and the NACDL provide the perspective of two prominent national defense organizations regarding the importance of reliability and procedural fairness in post-conviction proceedings, and the need for clarity as to a distinct question of interpretation relating to 28 U.S.C. § 2254.

The membership of the NAFD and the NACDL are concerned about the due process implications of the Fourth Circuit's decision. The NAFD and the NACDL have worked hard to ensure that the administration of justice is reliable and fair by advocating at all levels of government for procedural fairness in the adjudication of federal rights. The NAFD and the NACDL are in a unique position to outline for this Court the need for clarification as to the level of process necessary in order to trigger the limitations on relief announced in § 2254(d)(1).

Respectfully submitted,

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August 7, 2008

CAPITAL CASE

QUESTIONS PRESENTED

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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This *amici curiae* brief is submitted in support of petitioners.

INTEREST OF *AMICI CURIAE*[1]

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and

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[1]Pursuant to Rule 37.6, *Amici Curiae* certify that no counsel for a party authored this brief in whole or in part; that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. While counsel for Petitioner has consented to the filing of this brief, which consent accompanies the brief, counsel for respondent has withheld its consent. *Amici Curiae* have filed a motion for leave to file this brief at the beginning of the brief. *See* S. Ct. Rule 37.3.

the federal courts of appeals.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving federal habeas corpus, particularly as they relate to matters of procedural fairness. NACDL files approximately 35 amicus curiae briefs each year on various issues in this Court and other courts. NACDL has filed amicus curiae briefs in this Court in many cases involving federal habeas corpus. *See, e.g.*, *Roper v. Weaver*, 127 S. Ct. 2022 (2007); *Pliler v. Ford*, 542 U.S. 245 (2004); *Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

Amici file this brief because the case squarely presents the Court with an opportunity to address the relationship between minimal procedural fairness and the comity and federalism

concerns embodied by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Although amici endorse in full the approach presented in the Opening Brief, Amici's longstanding commitment to the fair administration of justice compels them to urge this Court to also, or in the alternative, address the relationship between procedural fairness and the limitations on relief announced in § 2254(d)(1). The way in which the Court decides this case will influence whether state post-conviction courts believe they are required to provide a minimally fair process in order for their decisions to be steeled from federal review by the provisions of the AEDPA.

Amici believe that core principles of due process and the legislative purpose behind the AEDPA are undermined when state adjudications that are not full and fair nonetheless enjoy deference. Because this case presents a stark example of procedural unfairness, Amici believe that the Court should take the opportunity offered by this case to emphasize that there is a *quid pro quo* relationship between fair procedures and the limitations on relief announced in § 2254(d)(1).

STATEMENT OF FACTS

Amici adopt the statement of facts in Petitioner's opening brief. Amici are, however, particularly interested in the undisputed procedural unfairness that characterized the state court's review of Petitioner's Sixth Amendment claim.

There is no dispute that Petitioner diligently pursued in state court the Sixth Amendment claim now before this Court. Unfortunately, the process afforded Petitioner was insufficient to allow a meaningful review of the claim. Petitioner's entire habeas petition was dismissed by the Virginia Supreme Court in an opinion signed only by a deputy clerk for the court, which contains no indication as to which justices, if any, participated in the decision. Pet. App. 231a-261a. The clerk's order, which serves as the first and only review of the Sixth Amendment claim at issue in this case, denied Petitioner an evidentiary hearing, discovery, experts, and an opportunity to supplement the habeas petition. *Id.* In light of the colorable allegations of Sixth Amendment harm presented to the state court, the refusal to extend minimal discovery or funding, or provide a hearing was, according to the federal courts that have reviewed this claim, procedurally improper.

The level of process due to a Petitioner necessarily varies based on the nature of the claim at issue (for example, whether the claim is record-based or requires evidentiary development beyond the record). It is not disputed that Petitioner's allegation of ineffective assistance of counsel at the sentencing phase of the trial, taken as true, would entitle him to relief. Nor is there any serious contention that this question could be resolved through briefing alone, without discovery, a hearing, or even an opportunity to supplement the record. Because Petitioner has stated a colorable claim as to a non-record-based claim, the district

court expressly found that the process afforded to Petitioner regarding this claim "was not adequate to afford a full and fair hearing." Pet. App 84a. The Warden has never challenged this finding. On this record, Petitioner did not receive a "full and fair" review in state court.

SUMMARY OF ARGUMENT

The opening brief and this brief set out compatible but alternative approaches in support of a single conclusion: the limitations provided in § 2254(d)(1) are not applicable in this case. The opening brief explains that neither of the limitations provided in § 2254(d) – (d)(1) or (d)(2) – apply when there has not been an adjudication on the meritsin question. Amici fully endorse this understanding. Amici write separately, however, in order to explain that there is an alternative analytic path to the conclusion that (d)(1) does not apply in this case.

Specifically, this brief addresses an alternative threshold question regarding AEDPA's application: do § 2254 and the Constitution contemplate an application of (d)(1)'s extremely deferential review of a state adjudication when the state review of the claim was procedurally unreasonable and deficient? Both sound principles of statutory interpretation as well as due process compel the conclusion that the Fourth Circuit erred by applying the limitations prescribed by 28 U.S.C. § 2254(d)(1) to Petitioner's federal habeas petition. The Fourth Circuit erred in holding that (d)(1)

applies even when the only state review of the constitutional claim at issue is so lacking in procedural fairness as to contravene AEDPA, its legislative history and basic expectations of procedural due process.

ARGUMENT

Amici submit that due process and § 2254 itself dictate that the absence of a "full and fair" review of Petitioner's ineffective assistance of counsel claim compels the conclusion that § 2254(d)(1), which bars habeas relief absent a ruling contrary to or unreasonably applying clearly established Federal law, does not apply to this claim.

Section 2254 contains two alternative limitations on federal habeas relief, the substantive limits announced in § 2254(d)(1), and the procedural or fact-finding limitations prescribed in § 2254(d)(2). As Chief Judge Alex Kozinski has observed, the limitations on relief announced in § 2254(d)(2) are satisfied where, as here, the state court's "fact-finding process itself is defective." *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004). Judge Kozinski's reading of the statute is consistent with the legislative history of the AEDPA, and compelled by due process, *Infra* Sections I and II.

Accordingly, amici argue that because there is no dispute that Petitioner was deprived of a full and fair review, the limitations announced in (d)(2) have been satisfied and the alternative limitations

contained in (d)(1) do not apply. *Carlson v. Jess*, 526 F.3d 1018 (7th Cir. 2008) (en banc) (recognizing that satisfying § 2254(d)(2) necessitates the conclusion that (d)(1)'s limitations are not a barrier to habeas relief).

I. BECAUSE THE STATE COURT'S ADJUDICATION WAS PROCEDURALLY UNREASONABLE, PETITIONER HAS SATISFIED THE STRICTURES OF § 2254(D)(2) AND PETITIONER IS ENTITLED TO A *DE* NOVO REVIEW OF HIS CONSTITUTIONAL CLAIMS.

Because due process and the legislative history of § 2254(d) independently require that Petitioner receive a procedurally fair and full review of his federal claims, *infra* I(b), II, and because the district court found, without objection, that the State of Virginia failed to provide Petitioner with such an opportunity in this case, Petitioner is entitled to a full and fair review of his claims in federal court. More to the point, the review of the claim at issue must not be encumbered and constrained by findings and conclusions that are the product of a procedurally inadequate state court process. It is imperative that § 2254 be read in a manner that precludes the application of the deference required by § 2254(d)(1) in this case. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (noting that the Court is obligated to construe statutes so as to avoid constitutional problems if it can do so).

A. Section 2254(d)(2) Provides an Appropriate Vehicle For Realizing The Statutory Purpose and Due Process Rights That Require Minimal Procedural Fairness

One reading of § 2254(d) that is faithful to the text and history of the statute, and that alleviates tension with the procedural requirements of due process is the interpretive approach announced by Chief Judge Kozinski of the Ninth Circuit. Reading § 2254 in manner that is "faithful to the text and consistent with the maxim that we must construe statutory language so as to avoid contradiction or redundancy," Judge Kozinski explained that a finding of fact is "unreasonable" for purposes of § 2254(d)(2) where, as here, "the process employed by the state court is defective." *Taylor*, 366 F.3d at 999.[2] Under this reading of the statute, when a state court makes evidentiary findings without providing the Petitioner an opportunity to fully and fairly litigate his claim, "such findings clearly result in an unreasonable determination of the facts." *Id.* at 1001; *see also* 1 HERTZ & LIEBMAN § 20.2c (concluding that § 2254(d)(2)'s reasonableness standard applies to both the process and the substance of state court factfindings); *Mayes v. Gibson*, 210 F.3d 1284, 1289 (10th Cir. 2000) (holding that the absence of a

[2]Judge Tallman, also of the Ninth Circuit, has echoed this analysis. *Earp v. Ornoski*, 431 F.3d 1158, 1169 (9th Cir. 2005).

"full, fair, and adequate" proceeding in state court dictates that deference would be inappropriate).[3]

Assuming the Court approves Judge Kozinski's reading of § 2254(d)(2), thereby addressing the constitutional and statutory interpretation concerns raised by amici, the Fourth Circuit's application of (d)(1) in this case was in error. If the reasonableness inquiry under (d)(2) invites a review of the procedural adequacy of the state court's decision, then the constitutional and interpretative problems associated with deferring to a proceeding that was not "full and fair" fall away. Stated more succinctly, where a Petitioner satisfies either of the gateway limitations on relief announced in § 2254, the federal court's review of the relevant claim is *de novo*. 28 U.S.C. § 2254(d) (barring habeas relief unless either (d)(1) or (d)(2) is satisfied).

Accordingly, just as a state court's adjudication of a claim that is "contrary to" clearly established law satisfies (d)(1) and warrants *de novo* review, if a state court's unreasonable process as to a claim – i.e., not "full and fair" – satisfies (d)(2), then the federal court's review of the claim would be *de novo*. *See, e.g.*, *Carlson*, 526 F.3d at

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[3] This Court has never addressed the question as to the interaction of AEDPA's two provisions addressing the factual deference owed to state court findings of fact, § 2254 (d)(2) & (e)(1). *See Rice v. Collins*, 546 U.S. 333, 338-339 (2006) (leaving unanswered the question of "whether and when" (e)(1) applies); *see also Teti v. Bender*, 507 F.3d 50, 58 (1st Cir. 2007); Marceau, 82 TUL. L. REV. 385 (surveying the confusion among circuits).

1024 (holding that because the limits announced in (d)(2) were satisfied, "the substantive merits of Carlson's claim are analyzed under the pre-AEDPA standard - that is, *de novo*."); *Davis v. Grigas*, 443 F.3d 1155 (9th Cir. 2006); *Jones v. Walker*, 496 F.3d 1216 (11th Cir. 2007). Because the state court's adjudication of the factual questions in this case was unreasonable for purposes of § 2254(d)(2), Petitioner is entitled to a *de novo* review of his constitutional claims. Pet. App. 84a.

B. Section 2254 Dictates that States are Required to Provide a Procedurally "Full and Fair" Review of All Claims Arising Under the Federal Constitution.

The history of § 2254, particularly considering the Writ's historical relationship with due process, strongly suggests that the congressional intent to provide considerable deference to state court proceedings only extended to state court proceedings that were procedurally fair. The legislative history of § 2254 is confusing and contradictory as to several of the statute's key provisions. *See, e.g.*, Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007) (surveying the textual indeterminacy of the provisions). But as to the question of procedural fairness in the state court, the structure and legislative history of § 2254 are uniquely instructive; the structure and history of § 2254, particularly in light of the well-settled expectation that state courts must provide a procedurally full and fair process, *infra* II, affirms

the notion that "[o]ur legal regime []ensures correctness by proxy of reliable procedure." *Id.* at 454; *see also*, 141 Cong. Rec. S7836 (statement of Sen. Kyl) (recognizing that federal courts must retain the right to ensure that state procedures are "adequate and effective").

Prior to the enactment of the AEDPA, § 2254 deference to state court conclusions was expressly conditioned on the prisoner's receipt of a "full and fair" process in state court. 28 U.S.C. § 2254(d)(1) & (6) (1994). At least one Circuit Court has concluded that the omission of the "full and fair" language from the current version § 2254 provides a "clear" signal that Congress intended all of the limitations in § 2254 to apply regardless of whether the state court review of the federal claims was procedurally fair. *Valdez v. Cockrell*, 274 F.3d 941, 951 n. 17 (5th Cir. 2001) (rejecting invitation to limit deference to procedurally unfair conclusions of law and findings of fact). This conclusion is inconsistent with well-established rules of statutory interpretation and the legislative history preceding the enactment of the AEDPA.

1. Omission of the Words "Full and Fair" from § 2254, Without More, Does Not Abridge the Longstanding Tradition of Procedural Fairness.

Even if this Court rejects the premise that procedural due process requires procedural regularity and fairness in the state post-conviction

prcoess, it is beyond peradventure that the expectation of adequate procedures or corrective processes had become a long-established principle of federal habeas law by 1996. *See, e.g., Stone v. Powell*, 428 U.S. 465, 482 (1976) (invoking "full and fair" as a restriction on the Court's otherwise complete abandonment of federal habeas review under the Fourth Amendment); *Townsend v. Sain*, 372 U.S. 293, 312-314 (1963); *Moore v. Dempsey*, 261 U.S. 86, 91 (1923).

As such, the omission of the "full and fair" language cannot, without more, be construed as an affirmative repudiation of a basic requirement of procedural fairness. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:12 at 101-02 (rev. 6th ed. 2000). Courts may not infer that a legislative enactment is "intend[ed] to overthrow long-established principles of law unless that intention is made clear, through appearing either by express declaration or by necessary implication." *Id.* That is to say, even if the requirement of a "full and fair" review does not enjoy constitutional force, the expectation that conclusions derived from procedurally unfair proceedings are not entitled to deference is readily supported by the canons of statutory interpretation.[4]

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[4] The expectation of "full and fair" processes created by case law must continue to govern unless AEDPA explicitly rejects such a rule. After all, AEDPA does not displace the whole of habeas law, but rather functions by treating the "preexisting habeas landscape as its baseline." Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

Notably, the requirement of fairness as a precondition to deference is not the only procedural omission in the current version of § 2254. The previous version of § 2254 contained a series of procedural requirements that were systematically omitted from the current version. Specifically, the prior version required that the state court provide "written finding[s]" or other "adequate written indicia." 28 U.S.C. § 2254(d) (1994). Similarly, the previous version specified the "applicant for the writ and State" were the only proper parties to such an action. *Id.* The statute even specified that the adjudicating body had to be a "State court of competent jurisdiction." *Id.* In short, although the limitations on relief under the previous version of § 2254 were much less severe, Congress had formulaically announced each procedural requirement that the State Court needed to satisfy in order to warrant federal deference.

Whereas the previous version of § 2254 provided a sort of catalogue of the routine procedures that served as a prerequisite to federal deference, the current version of the statute is considerably pared down in this regard. 28 U.S.C. §2254 (1996). The present version of the statute takes for granted the procedural foundations of a reliable judgment, such as competent jurisdiction and procedural fairness. *See* Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Vikram David Amar, Federal Practice and Procedure § 4265.2 at 354-55 (2007). In view of the well-established and long-standing expectation of a full and fair review of one's federal claims, the statute's

silence on this point simply cannot be treated as dispositive.[5]

2. Even If the Omission of "Full and Fair" from § 2254 Would, in Normal Circumstances, be Operative, the Legislative History Regarding the Importance of Procedural Fairness Belies Such an Interpretation.

The legislative history of § 2254 substantially predates the congressional debate immediately preceding the 1996 enactment of the AEDPA. *Wright v. West*, 505 U.S. 277, 295 n.9 (1992) (Thomas, J.) (noting that as of 1992, Congress had attempted to amend § 2254 for more than 25 years). The ultimate compromise legislation that was enacted cannot be divorced from this lengthy evolution in congressional goals

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[5] One commentator has provided a particularly vivid illustration of the importance of procedural fairness in all adjudications, whether required by statute or not. Frederic M. Bloom, *Unconstitutional Courses*, 83 WASH. UNIV. L.Q. 1679, 1687 (2005) ("Imagine that the Supreme Court required all civil rights claims to be decided by flipping a coin. Or that all antitrust issues were to be resolved by consulting a 'Delphic oracle.' Or even that all copyright questions were to be answered by 'studying the entrails of a dead fowl.'")(footnotes omitted). "Just as a coin may provide the 'correct' substantive answer, so might a state habeas court in the absence of a 'full and fair hearing,' but the adjudication of habeas claims requires more than a mere chance that the 'right' result will be reached." Justin F. Marceau, *Deference and Doubt, the Interaction of AEDPA § 2254(d)(2) and (e)(1)*, 82 TUL. L. REV. 385, 404 n.93 (2007).

with regard to habeas reform. *Id.* (interpreting the 1966 version of § 2254 and noting that the 25-plus years of legislative debate would not be relevant to legislative interpretation until § 2254 was amended). This Court has yet to acknowledge the defining role that the phrase "full and fair" played in the legislative history of the AEDPA, and this case squarely presents the Court with an opportunity to do so. Evan Tsen Lee, *Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?*, 56 HASTINGS L. J. 283, 302 (2004) (surveying the legislative history and specifically examining the phrase "full and fair").

Ultimately, the legislative history of § 2254 can be summarized as an illustration of the maxim that the greater includes the lesser. *Cf. Posadas de Puerto Rico Assocs v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (recognizing that the greater power to eliminate gambling altogether necessarily includes the lesser power to eliminate casino advertisements). The most severe limitations on federal habeas review considered by Congress were modeled after the scholarship of Professor Bator, who proposed that state court judgments should be given preclusive effect so long as the state court process was "full and fair." *See, e.g.*, Applications for Writs of Habeas Corpus and Post Review of Sentences in the United States Courts, 33 F.R.D. 363, 369-70 (1963). In the years leading up to AEDPA's enactment, however, the model of habeas review built on Bator's vision of absolute federal deference to procedurally full and fair state proceedings was repeatedly and unequivocally rejected by Congress. *See* Larry W. Yackle, *A*

Primer on the New Habeas Corpus Statute, 44 BUFF. L. REV. 381 (1996) (compiling the various legislative proposals). For Senator Arlen Specter and other legislators committed to successfully revising § 2254, avoiding an association or connection with Bator's limited model of habeas review, which had became infamously known as the "full and fair" approach, became a top priority. *Id.* at 438-43; Marceau, 82 TUL. L. REV. at 427-32. Accordingly, understanding the progression of § 2254 from its 1966 version until it was finally amended by the 104th Congress in 1996 is of the utmost importance to the question of whether the current version of the statute requires a full and fair state court proceeding.

In 1963, Professor Bator published his influential article in the Harvard law review, and within a few years the first Congressional proposals to preclude federal habeas review, except when the state court failed to provide a "full and fair" review, began to emerge. *See, e.g.*, Yackle, 44 BUFF. L. REV., at 424-30 (discussing the fact that Bator's model framed the habeas debate from the 1960s through the enactment of AEDPA). In 1968, for example, a proposal to limit federal habeas review was included in the Omnibus Crime Control and Safe Streets Act. *Id. at* 425. In 1973, again at the urging of Assistant Attorney General William Rehnquist, Senator Roman Hruska introduced a bill that would have limited federal habeas review to those cases where the state process was not "full and fair." *Id. at* 425-26. Bator's thesis became the centerpiece of every significant reform proposal for decades: "An application for writ of habeas corpus

on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that has been fully and fairly adjudicated in state court proceedings." S. 2216, 97th Cong. § 5 (1982).

By the 1990s, opponents of Bator's legal process approach ("full and fair") to federal habeas review had become wary of any statutory reform that even contained the phrase. After thirty years of efforts to remove general substantive review by federal courts when the state process was adequate, "full and fair" emerged as a shorthand for the sort of far-reaching habeas reform that would never receive the support of a majority of Congress. *See, e.g.*, 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); 137 Cong. Rec. H8003 (daily ed. Oct. 17, 1991) (statement of Rep. Hughes) (speaking to the fact that "full and fair" is inextricably linked to procedural rights alone); 137 Cong. Rec. H7894 (daily ed. Oct. 17, 1991) (statement of Rep. Edwards) (noting that "full and fair" has always meant a limited review of the procedural fairness and nothing more).

Recognizing that the phrase "full and fair" had become linked in the legislative consciousness with Bator's model of reform, shrewd compromises began to emerge that attempted to redefine the

phrase "full and fair" more broadly, and in a manner that appealed to those who opposed limiting federal habeas review to state procedural failings. *See, e.g.*, 137 Cong. Rec. H7996 (daily ed. Oct. 17, 1991. For example, Representative Henry Hyde proposed a habeas amendment using the phrase "full and fair," but he expressly abandoned the Bator definition of "full and fair," and instead stated that a state adjudication would not be considered "full and fair" if it was "contrary to or involved an unreasonable interpretation or application of clearly established Federal law." *Id.* In the end, however, merely redefining "full and fair" would not be sufficient. The phrase "full and fair" had become inextricably linked with the Bator process model of adjudication that proved unpalatable to moderates in Congress. *The Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the S. Comm. on the Judiciary,* 97th Cong. 153-54 (1982) (testimony of Phylis Skloot Bamberger) (recognizing that any use of the phrase "full and fair" in § 2254 would dominate the provision's interpretation, and force a Bator-like approach to federal habeas review, regardless of clarifying statements by members of Congress).

Keenly aware of the negative baggage accompanying the phrase "full and fair," in proposing a revision to § 2254 Senator Specter submitted a reform proposal that contained absolutely no reference to the stigmatized phrase. S. 623, 104th Cong. (1995). Notably, even though the proposal, which was eventually codified as § 2254(d) did not mention Bator or "full and fair," skeptics like Senator Biden expressed concern that

the "unreasonableness" analysis was a veiled "full and fair" review. *See, e.g.*, 141 Cong. Rec. S7843 (daily ed. June 7, 1995) (statement of Sen. Biden) ("[T]hrough the years we have fought ... over the so-called *full and fair* standard.... This provision suggested by my Republican friends essentially [is] the same thing . . . .") (emphasis added). This demonstrates that the phrase "full and fair" was so thoroughly stigmatized that some legislators feared the Bator model's influence even when the tag phrase was completely omitted from the statute. Under these circumstances, the omission of the language requiring a "full and fair" hearing cannot reasonably be construed as signaling an intent to abandon the requirement of procedural fairness in the state court.[6]

In sum, the omission of the "full and fair" language from § 2254(d) reflects an awareness that many members of Congress were extremely leery of anything that resembled the severe model of reform

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[6] It is worth considering the fact that at the time of AEDPA's debate in Congress, Senator Hatch had proposed a more traditional "full and fair" habeas reform, but was unable to attract sufficient votes. S. 3, 104th Cong. § 508 (1995). Instead, Senator Hatch was forced to accept the more moderate compromise bill proposed by Senator Specter. S. 623, 104th Cong. (1995). It would be odd indeed if the Court read Senator Specter's more limited restrictions on habeas relief as more severe than Senator Hatch's with regard to the question of whether procedurally unreasonable state adjudications were entitled to deference. There is no question that Senator Hatch's more restrictive proposal required full federal review of constitutional claims that were not full and fairly reviewed by the state court, and it follows that § 2254, as passed, must permit such review as well.

proposed by Professor Bator. Likewise, some commentators have observed that the "full and fair" process requirement became an avoidable redundancy once Senator Specter's reform proposal made explicit provision for *de novo* federal review when the state court's review was an "unreasonable" determination of fact or law. Lee, 56 HASTINGS L. J. at 299. As enacted, § 2254 simply cannot bear a reading that would, in significant ways, make it more restrictive than the reform proposed by Professor Bator. Professor Bator proposed eliminating substantive federal review when the state process was procedurally fair, and the reforms that ultimately succeeded were forced to abandon this model centered on the exclusivity of procedural review. Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 505 (2007). There is not, however, any suggestion in the history of § 2254 "that the right to conduct substantive review was somehow earned at the expense of the right to ensure procedural fairness." Marceau, 82 TUL. L. REV. at 432. The political compromise that resulted in greater federal habeas review (*i.e.*, substantive review) necessarily includes the right to review the procedural adequacy of the state processes. To hold otherwise would be to ignore the influence of Bator's scholarship on Congressional efforts to reform habeas corpus. Kovarsky, TUL L. REV. at 505 (observing that each successive proposal for habeas reform moderated the substantive limits suggested by Bator's "full and fair" model, without eliminating or minimizing the role of federal courts in ensuring procedural fairness).

II. THE ABSENCE OF A "FULL AND FAIR" REVIEW OF PETITIONER'S CONSTITUTIONAL CLAIM RENDERS THE FOURTH CIRCUIT'S APPLICATION OF THE LIMITATIONS ON RELIEF ANNOUNCED IN § 2254(D)(1) A DUE PROCESS VIOLATION.

Even if the Court concludes that § 2254, as revised in 1996, no longer requires minimally fair procedures for the review of federal claims in state habeas, the Constitution does require such procedures. Adequate state habeas procedures in the form of a full and fair review are particularly imperative where, as here, the claim at issue could not have been raised prior to post-conviction proceedings. *Hall v. Comm.*, 515 S.E.2d 343, 347 (Va. Ct. App. 1999).

Due process requires that every prisoner receive a full and fair review of his federal constitutional claims, either in state or federal court. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 HARV. L. REV. 441, 456-65 (1963). This requirement does not compel the conclusion that state courts are required by the federal constitution to provide discretionary forms of review. *See, e.g., Pennsylvania v. Finley*, 481 U.S. 551 (1987). The due process requirement of minimally adequate procedures does, however, dictate that at some point, either in federal or state court, a prisoner is entitled to the process necessary for a full and fair review of the claims presented.

See, e.g., Bator, 76 HARV. L. REV. at 456-65 (arguing that federal review need not be comprehensive when the state process was adequate); *Panetti v. Quarterman*, 127 S. Ct. 2848, 2856-57 (2007) (recognizing that the absence of constitutionally required procedures dictates that (d)(1) does not apply); *Herrera v. Collins*, 506 U.S. 390, 427 (1993) (O'Connor, J., concurring) (stressing that questions of innocence will rarely arise if all trial and collateral litigation comports with the "Constitution's guarantees of fair procedure").

In this case, there is no dispute that the state court failed to provide the constitutionally minimal procedures required by due process. Pet. App. At 84a (finding that there has never been a "full and fair" review of the claim). Procedural due process requires that at least one level of constitutional review be full and fair. Deference to an unfair proceeding, when it is the only forum for vindicating a federal right, cannot be reconciled with due process. Accordingly, by applying the limitations on relief announced in § 2254(d)(1), rather than reviewing the claim *simpliciter*, the lower Courts have deprived Petitioner of the sort of full and fair review contemplated by due process.

There is no question that federal habeas review under § 2254(d)(1) is extremely limited; the federal court's review, far from being full and fair, is designed to be modest and highly deferential to the state court. *See* Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 540 (2008) (surveying some of the habeas case law and concluding that (d)(1) has been interpreted to

impose "a novel and severe limit on federal habeas courts' ability to review state court [decisions]."). Because the Constitution requires a procedurally fair review of federal claims, and because state habeas was the first forum available to Petitioner to vindicate the right in question, the absence of procedural fairness in this case dictates that the limitations on relief announced in (d)(1) must not apply.

A. Due Process Requires a "Full and Fair" Review of Constitutional Claims.

1. The Existence of the Right

The hallmark of due process is, as the term implies, procedural fairness. The quantity and nature of the process due necessarily varies depending on the nature of the liberty interest at stake. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). At a minimum, persons alleging federal challenges to their detentions are entitled to a full and fair review of the claims. *See Wright v. West*, 505 U.S. 277, 299 (1992) (O'Connor, J.); *Townsend v. Sain*, 372 U.S. 293, 313 (1963) (recognizing that the constitution requires additional, otherwise, discretionary federal procedures and review – *i.e.*, an evidentiary hearing – when the state court process is not procedurally "adequate").[7]

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[7] Historically, Congress also recognized "full and fair" as a due process requirement. In the version of § 2254 in effect prior to the enactment of AEDPA, Congress acknowledged that procedural fairness was, among other

Writing for three Justices in *Wright v. West,* Justice O'Connor explained that the requirement that every prisoner receive a "full and fair" review of his federal constitutional claims, whether on direct or collateral review, and whether in state or in federal court, derives from the basic tenets of procedural due process. 505 U.S. at 298 (recognizing the full and fair requirement as an analog to the notice and opportunity to be heard requirements). Justice O'Connor unequivocally concluded that "the absence of a full and fair hearing in the state courts [is] *itself* [a] violation of the Constitution." *Id.* at 299 (emphasis in original).[8] Implicit is the acknowledgment that limitations on federal habeas review might comport with procedural due process so long as at least one state process provides a full and "fair opportunity to correct the error" of constitutional law. *Id.* Conversely, where the state process is patently

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things, a due process requirement. 28 U.S.C. § 2254(d)(6)-(d)(7) (1994) (rejecting deference to state court proceedings when the "applicant did not receive a full, fair and adequate hearing in the State court proceeding; [] or that the applicant was *otherwise denied due process* of law in the State Court proceeding") (emphasis added).

[8]Reviewing the constitutional pedigree of the right, Justice O'Connor rejected the notion that the absence of full and fair review was a mere "prerequisite to a federal court's" habeas review. *Wright,* 505 U.S. at 299 (responding to Justice Thomas's three Judge opinion, *id.* at 278-97). But even Justice Thomas's opinion appears to contemplate full federal review of a claim that was adjudicated in a farcical or procedurally unseemly manner. *Id.* at 285 (focusing on the need for "*absolute*" deference to a procedurally fair state adjudication).

inadequate or unfair, due process requires a full and fair review by the federal habeas court. *Id.* at 298 (recognizing the requirement of a procedurally fair review as "a rule of constitutional law").

Both the majority and dissenting opinions in *Townsend* provide additional support for the settled proposition that due process requires that every federal claim receive a procedurally full and fair review, either in state or federal court. 372 U.S. 293. The majority stressed that just as factual determinations not supported by the record "cannot be conclusive of federal rights," substantial procedural unfairness will also deprive the state court conclusions of any foundation for deference. *Id.* at 316. Justice Stewart took issue with the specific characterization of the constitutional claim at issue, but his dissent reinforced the general relationship between full and fair procedures for the review of federal claims and due process. *Id.* at 334 (Stewart, J., dissenting). Specifically, after reviewing the record as to the claims in question, Justice Stewart concluded that the state's procedures complied with the "Due Process Clause of the Fourteenth Amendment" insofar as the claims in question were "fully and fairly determined in the courts of Illinois." *Id.* In short, the Court was divided as to whether Townsend presented a colorable claim of constitutional injury, but unanimous in concluding that due process requires, at a minimum, a procedurally full and fair review.[9]

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[9] Although Congress codified *Townsend*'s full and fair language in 28 U.S.C. § 2254 (1966), these statutory

The conclusion that due process requires that a prisoner alleging a federal constitutional violation receive a full and fair review of this claim, either in state or federal court, also received substantial attention in the late Professor Paul Bator's influential critique of *Brown v. Allen*. Bator, 76 HARV. L. REV. 441. In the context of arguing for more limited federal habeas review, Bator stressed that unencumbered review by the federal courts of the *adequacy of state procedures* was a constitutional necessity. *Id.* at 455-58. Bator did not assert generically the superiority of federal courts as a forum for adjudicating federal claims; instead, Bator merely emphasized the inextricable relationship between due process and the right of a prisoner to have at least one forum fully and fairly review a prisoner's claims. *Id.* For Bator, there was no question that "the essence of the responsibility of the states under the Due Process Clause [is] to furnish a criminal defendant with a full and fair opportunity" to litigate his constitutional claims. *Id.* at 456. The simple wisdom of this theory inheres from the recognition that due process is only served when

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amendments did not, of course, abridge or enlarge the scope of protections available under the due process clause of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (holding that Congress may not "determine what constitutes a constitutional violation."). Accordingly, the silence of the current statute, 28 U.S.C. § 2254 (1996), as to the question of whether a procedurally "adequate" review of the claims is a precondition to federal deference does not alter the scope or application of procedural due process.

comprehensive "federal collateral jurisdiction [serves] as a 'backstop' for inadequacies of state process." *Id.* at 492. It is the need for a full and fair federal backstop for procedural failures that renders (d)(1) inapposite in this narrow context.[10]

2. "Full and Fair" Review Examined

The connection between the right to a procedurally fair review of one's claims and due process has a substantial constitutional pedigree. Occasionally, the full and fair protections were announced without express reference to due process. *See, e.g., Fay v. Noia*, 372 U.S. 391, 458 (1963) (Harlan, J., dissenting). More often, however, consistent with the due process right traced by Justice O'Connor in *Wright* and expounded by Professor Bator, this Court has acknowledged the relationship between a "full and fair" review of federal claims and due process.

In *Moore v. Dempsey*, for example, the Court expressly recognized that the right to an adequate corrective process either in federal or state court derives from procedural protections enshrined in the Due Process Clause of the Fourteenth

[10] The issue before the Court does not require an expansive ruling on the adequacy of state trial or appellate procedures because the claim at issue is only cognizable on collateral review. *Hall v. Com.*, 515 S.E.2d 343, 347 (Va. Ct. App. 1999). Moreover, the Court need not define the contours of due process in all cases, but only recognize that the district court's finding that there was no fair proceeding in state court necessarily implicates due process.

Amendment. 261 U.S. 86, 91-92. (1923). In *Moore*, the Court recognized that the absence of a procedurally fair "corrective process" for allegations of constitutional injury by a prisoner would, without more, constitute a due process violation. *Id.* Specifically, the Court recognized the absence of a full and fair opportunity to litigate constitutional claims as a freestanding due process injury. *Id.* ("If the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a [constitutional error], the State deprives the accused of his life or liberty without due process of law.") (quoting *Frank v. Mangum*, 237 US 309, 335 (1915)).

A federal court is not, as a general matter, required to provide a full and fair review of all federal claims, but in the absence of a procedurally adequate corrective process in the state court, full and fair federal review is compelled by due process. *Compare Moore*, 26 U.S. at 91-92 (requiring a full and fair federal review because such review was not provided by the state court), *with Frank v. Mangum*, 237 U.S. 309 (1915) (refusing to impose a requirement of full federal review because the state had provided a procedurally adequate corrective process); *see also Wright v. West*, 505 U.S. 277, 299 (1992) (O'Connor, J.) (noting that "the 'full and fair hearing' rule . . . defines [a] constitutional claim").[11]

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[11] An application of the balancing test prescribed in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), further highlights the constitutional pedigree of the expectation that every prisoner receive at least one full and fair review of his

Notably, the constitutional significance of full and fair adjudications oftentimes arises outside of the federal habeas corpus context and these precedents are instructive for present purposes.[12] In *Miller v. French*, for example, the Court held that the strict time lines for judicial decision making imposed by the Prison Litigation Reform Act do not, without more, offend the Constitution's

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federal claims. In assessing whether a due process violation exists, a critical aspect of the inquiry is the "fairness and reliability of the existing []procedures," balanced against the "the probable value, if any, of additional procedural safeguards." *Id.* Under this test, the due process implications of failing to conduct a full federal review when the state court's procedures are unfair and/or unreliable are plain.

[12]Counsel for amici submit that nearly every circuit has recognized the constitutional force of the right to a full and fair review of one's claims. The right is identified and applied in various contexts, but the constitutional force is beyond debate. *See, e.g., Hepp v. Astrue*, 511 F.3d 798, 804 (8th Cir. 2008) ("Procedural due process under the Fifth Amendment also requires full and fair hearings for disability benefits.") (internal citation omitted); *United States v. Gray*, 491 F.3d 138, 162-63 (4th Cir. 2007) (Michael, J., dissenting) (recognizing a due process right to a full and fair suppression hearing); *Aguilar-Solis v. I.N.S.*, 168 F.3d 565, 569 (1st Cir. 1999) ("[A] party to an immigration case, like any other litigant, is entitled to a full and fair hearing — not an idyllic one."); *Yancey v. Apfel*, 145 F.3d 106, 112 (2nd Cir. 1998) ("Generally, due process requires that a social security disability hearing must be full and fair."); *Frazier v. Kutz*, 139 F.2d 380, 383 (D.C. Cir. 1943) ("[T]he court should afford a full and fair hearing . . . . less than this would not be due process."). The common denominator among the circuits with regard to disparate questions of law is whether the individual received one full and fair review of the federal claim in question.

separation of powers; however, the Court acknowledged that an unreasonably short time limit for judicial decisions might constitute a procedural barrier to a complete and fair adjudication so as to violate due process. 530 U.S. 327, 350 (2000). This conclusion rests on the firmly held view that "due process . . . serves to protect the personal rights of litigants to a full and fair hearing." *Id.*

Similarly, in discussing the appropriateness of federal courts affording preclusive weight to a state court decision for purposes of the Full Faith and Credit Clause, this Court has held that the threshold determination is whether the state proceeding comports with the requirements of due process. *Kremer v. Chem. Constr. Corp.* 456 U.S. 461, 482 (1982). Elaborating on the due process requirement, Justice White explained that full and fair review is the quintessential procedural requirement of due process. *Id.* at 483 n.24. ("[W]hat a full and fair opportunity to litigate entails is the procedural requirements of due process"). In *Kremer*, the Court had no difficulty concluding that "the panoply of procedures" in question satisfied due process;[13] however, the Court

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[13] Just as the concept of full and fair has varied depending on the context of the right in question, the contours of procedural fairness at the state post-conviction level will not be static across all claims and in all circumstances. To be sure, there is "no single model of procedural fairness." *Kremer*, 456 U.S. at 483; *see also Chambers v. Mississippi*, 410 U.S. 284 (1973) (acknowledging cumulative effect of multiple errors as due process concern, even where no single defect in the process constitutes a constitutional violation).

expressly acknowledged that the absence of a full and fair review will, without more, fail to "satisfy the applicable requirements of the Due Process Clause". *Id.* at 483-84. *See also Ponzi v. Fessenden*, 258 U.S. 254, 260 (1922) (linking procedural due process with one's right to have a full and fair hearing in the state court).

A final noteworthy example of the Court's willingness to recognize the non-statutory, and therefore constitutionally grounded, right to fair procedures is *Stone v. Powell*, 428 U.S. 465 (1976). The Court held that the prophylactic and non-individual nature of the exclusionary rule rendered federal habeas review generally inappropriate in this context. Nonetheless, relying on Professor Bator and others, the Court stressed the importance of an adequate "state corrective process." *Id.* at 477. Specifically, the Court conditioned the limitation on federal habeas relief upon the prisoner's "opportunity for full and fair consideration of his search-and seizure claim" in

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Because due process is "the least frozen concept of our law," it is reasonable to expect that "full and fair" will not enjoy identical meaning or application across all contexts or claims. *Medina v. California,* 505 U.S. 437, 454 (1992) (O'Connor, J., concurring); *Boumediene v. Bush*, 128 S. Ct. 2229, 2267 (2008) (recognizing that habeas is an "equitable remedy" that must be applied with flexibility). It seems obvious, for example, that a record- based *Faretta* claim might require significantly less process, than, for example, an evidence-dependent claim such as a *Brady* violation. Furthermore, like nearly all states jurisdictions, ineffective assistance of counsel claims dependent on facts not in the record cannot be raised until state habeas in the state of Virginia. *Hall v. Com.*, 515 S.E.2d 343, 347 (Va. Ct. App. 1999).

state court. *Id.* at 486. That is to say, federal habeas review for the protections enshrined in the Fourth Amendment, though "crucially different from other constitutional rights," could not be unconditionally eliminated. *Id.* at 490. Even as to a Fourth Amendment claim, federal habeas review must be full and fair where the State has failed to provide any procedurally adequate opportunity to litigate the claim. *Id.* at 494; *see also* Bator, 76 HARV. L. REV. at 456 (arguing that due process compels the conclusion that a state adjudication must "not be respected" if the state fails to provide the prisoner with "a full and fair opportunity to litigate the claim"). Due process cannot countenance the absence of a full and fair federal review when there existed no full and fair state process.

In short, procedural due process requires that the sort of liberty interests implicated by federal constitutional rights are entitled to at least one full and fair review by a court of competent jurisdiction. *See Mathews*, 424 U.S. at 335. In the context of § 2254 petitions, in the usual case, the state will provide an adequate corrective process such that the role of federal courts on collateral review might fairly be limited. However, where the state process is patently unfair or incomplete, due process necessitates that the constitutional minimum, a full and fair review of the federal claims, be provided in federal court. *See Boumediene*, 128 S.Ct at 2268 (recognizing importance of one level of procedurally fair review so as to minimize the risk of "an erroneous deprivation of a liberty interest").

B. Federal Review Constrained by (d)(1) is Extremely Deferential, and Therefore Does Not Comport With Due Process Where, as Here, the State Adjudication Was Procedurally Unreasonable.

Because every prisoner is entitled to one full and fair review of their federal claims, due process precludes the application of the deference announced in § 2254(d)(1) to a claim adjudicated in a procedurally unreasonable manner by the state court.

In the usual case, due process does not dictate unconstrained habeas review by a federal court; however, when a state court's review is not full and fair, "the due process clause itself demands that its conclusions of fact or law should not be respected." Bator, 76 HARV. L. REV. at 456 . In other words, due process requires, at a minimum, that a prisoner denied a single procedurally fair review in state court is entitled to a full and fair adjudication on federal habeas review. In the absence of a procedurally adequate state proceeding, federal review constrained by § 2254(d)(1) does not satisfy this constitutional requirement.

This Court has repeatedly concluded that federal habeas review governed by (d)(1) is extremely limited. *See, e.g., Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (precluding, under (d)(1),

a full review of the merits of the constitutional claim that was fairly adjudicated in state court). Indeed, this Court has repeatedly acknowledged that a federal court's review under § 2254(d)(1) is limited, not to determining whether a constitutional violation exists, but to evaluating whether the state court's constitutional analysis was deficient under some substantially higher threshold. *See William v. Taylor*, 529 U.S. 362, 410 (2000). There is no pretense that Congress contemplated that the review of a constitutional claim under (d)(1) would be as exacting or rigorous as a *de novo* review. Neither can the argument be seriously made that the highly deferential review under (d)(1), standing alone, satisfies the "full and fair" level of review contemplated by due process. The question, therefore, is whether a federal court's deferential review under (d)(1), in conjunction with a procedurally unreasonable state adjudication, constitute a full and fair review of the constitutional claim in question. The answer to this question is a resounding "no."

Because due process requires that every federal claim be afforded one full and fair review, federal review constrained by (d)(1) will not comport with due process where, as here, the state court process is not full and fair. If an initial proceeding is not full and fair, then a subsequent review that is significantly constrained by this initial review cannot substitute as a full and fair review in the first instance. If the State of Virginia no longer provided prisoners with any post-conviction review, then with respect to claims that can only be raised through collateral appeals, such

as the ineffective assistance of counsel claim at issue in this case – a claim almost always dependent on development of facts outside the trial record, there would be no question that the federal court's review of the Petitioner's claim would not be limited by (d)(1). Similarly, if, as in this case, the state's post-conviction system functions in such a manner as to be procedurally incomplete or unfair, then there is no justification for applying the limitations announced in (d)(1).[14]

In sum, review under (d)(1) is highly deferential, and such deference is unwarranted as a matter of comity and is unconstitutional as a matter of due process when the proceeding to which such deference is afforded was not full and fair. Accordingly, this Court should hold that the limitations on relief announced in (d)(1) are inapplicable where, as here, there is no dispute that the state court process to deference would

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[14] Notably, the comity concerns that underlie much of the deference prescribed by the AEDPA are not served when a federal court's review is constrained by proceedings in state court that were not full and fair. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992) ("[E]ncouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity."). Rejecting the application of (d)(1) in cases like this is consistent with the general *quid pro quo* nature of AEDPA's restrictions, providing for heightened finality in proportion to the establishment and provision of fair procedures. *See, e.g.,* § 2254(b)(1) (requiring exhaustion if state provides a post-conviction system); § 2261 (conditioning expedited time-frames for habeas review on, among other things, a mechanism for the appointment of post-conviction counsel).

otherwise attach was not full and fair.[15] Pet. App. 84a

CONCLUSION

Amici accept the interpretation offered by Petitioner in its entirety; indeed, that approach is entirely compatible with the interpretation suggested by amici. Amici submit, however, that even if the Court rejects the interpretation offered by Petitioner, then for the reasons set forth in this brief, the statute, the legislative history of § 2254 and due process compel the conclusion that the limitations on relief provided in (d)(1) should not apply to the instant case. Specifically, Petitioner submits that the procedural inadequacy of Virginia's post-conviction system as applied in this case dictate that(d)(1) is inapplicable, either under the terms of (d)(2) as argued by amici, or under the "adjudication on the merits" requirement announced in the prefatory language of § 2254 and discussed in Petitioner's opening brief. In conclusion, this Court should reverse the Fourth Circuit's denial of habeas corpus relief.

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[15] As this Court recently reiterated, the relationship between procedural due process and the Court's habeas jurisprudence is well "established." *Boumediene* , 128 S. Ct. at 2268. Rewarding objectively unfair state procedures with the deference enshrined in (d)(1) is the very sort of "limited procedure" that creates a risk of erroneous liberty deprivations. *Id.* at 2268, 2248 (recognizing the possibility that "the protections of the Suspension clause have expanded along with the post-1789 developments that define the present scope of the writ").

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