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AEDPA Deference and the Undeveloped State Factual Record: Monroe v. Angelone and New Evidence

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AEDPA DEFERENCE AND THE UNDEVELOPED STATE FACTUAL RECORD: *MONROE V. ANGELONE* AND NEW EVIDENCE

INTRODUCTION

In 1992, Beverly Anne Monroe was convicted in a Virginia state court of murdering her boyfriend.[1] She exhausted the appeals process in the Virginia court system and filed a petition for habeas corpus with the Virginia Supreme Court.[2] Her most compelling claim alleged prosecutorial suppression of evidence.[3] Among other allegations, she accused the prosecution of failing to disclose that its chief witness was a career informant who received a sentence reduction in exchange for her testimony.[4] The Virginia Supreme Court denied Monroe's petition, summarily ruling that those claims that had not been procedurally defaulted were without merit.[5] The court also summarily denied Monroe's motion for additional discovery, through which she might have uncovered more evidence and further developed her claim.[6]

Petitioner then filed for habeas relief in the United States District Court for the Eastern District of Virginia, again claiming prosecuto-

1. Monroe v. Angelone, 323 F.3d 286, 290 (4th Cir. 2003).

2. *See id.* at 293.

3. *See id.* at 290. In federal district court, Monroe also alleged ineffective assistance of trial counsel and challenged the sufficiency of the evidence against her. She based her ineffective assistance of counsel claim on trial counsel's failure to challenge the voluntariness of her statements to a detective during the investigation of the murder. *See* Monroe v. Angelone, No. 3:98CV254, 2002 U.S. Dist. LEXIS 26310, at *86-89 (E.D. Va. Mar. 28, 2002). She eventually dropped the ineffective assistance of counsel claim. Following the disposition of her habeas claim in federal district court, the Court of Appeals for the Fourth Circuit declined to hear the sufficiency of the evidence claim, finding "the district court's resolution of this claim is not 'debatable amongst jurists of reason.'" *Monroe*, 323 F.3d at 290 n.2.

4. *See Monroe*, 323 F.3d at 293, 298, 301.

5. *See id.* at 294.

6. *See id.*

rial suppression of evidence.[7] The district court reviewed her claims in accordance with the precepts of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[8] AEDPA mandates that federal courts reviewing state court dispositions of habeas petitions "adjudicated ... on the merits"—those decided on substantive rather than procedural grounds[9]—must defer to those dispositions unless the state court's decision is "contrary to, or involve[s] an unreasonable application of, clearly established" Supreme Court precedent.[10] Petitioner was able to show good cause that she would be entitled to relief were she able to develop fully the factual basis for her claim, and therefore, the federal court granted petitioner's motion for additional discovery.[11] During federal discovery, petitioner uncovered a "wealth of exculpatory evidence that the prosecution

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7. *See id.* at 290. This Note refers to prosecutorial suppression of evidence claims as "*Brady* claims," named after *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court precedent that established the framework for the claim. The prosecution commits a *Brady* violation when it suppresses "evidence favorable to an accused upon request ... where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Also, this Note refers to ineffective assistance of counsel claims as "*Strickland* claims." In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court developed its two-part ineffective assistance of counsel test, requiring a petitioner to prove that counsel performed "below an objective standard of reasonableness" and that counsel's performance prejudiced the petitioner. *Id.* at 687-88.

8. 28 U.S.C. § 2254 (Supp. II 1996).

9. *See* Valdez v. Cockrell, 274 F.3d 941, 946-47 (5th Cir. 2001).

10. *Id.* at 946 (citing 28 U.S.C. § 2254(d)). Procedurally defaulted claims are largely beyond the scope of this Note; however, they are always a concern for petitioners. In Monroe's case, the Virginia Supreme Court held, and throughout the federal habeas proceeding the Commonwealth argued, that Monroe had defaulted her *Brady* claim because she had not raised it at the earliest point in the proceedings in accordance with *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974). *See Monroe*, 323 F.3d at 294. During the state proceedings, petitioner uncovered some exculpatory materials through a Freedom of Information Act (FOIA) request. *See id.* The federal district court excluded some of these exculpatory materials from its consideration, because it found that petitioner could have used the FOIA process to obtain those particular items earlier in the proceedings. *See id.* at 294-95 n.8. Ultimately, as to petitioner's *Brady* claim in totality, the Fourth Circuit did not rule on the "procedural default issue," because the evidence the district court considered was "sufficient to warrant its award of habeas corpus relief." *Id.* at 290-91.

11. *See Monroe*, 323 F.3d at 295. The Supreme Court interpreted Habeas Corpus Rule 6 on discovery in *Bracy v. Gramley*, 520 U.S. 899 (1997). The Court stated, "'[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.'" *Id.* at 908-09 (quoting Harris v. Nelson, 394 U.S. 286, 300 (1969)).

had suppressed."[12] The district court and, on appeal, the Fourth Circuit reviewed all "new evidence" discovered in the federal proceeding independently and the *Brady* claim itself de novo, reasoning that if the state court had never considered the new evidence, there was no way to apply AEDPA deference to findings regarding such evidence.[13] The Fourth Circuit then proceeded to review the entire record cumulatively, affording a presumption of correctness only to those evidentiary items on which the state court had made explicit findings.[14] It affirmed the district court's grant of habeas relief primarily on the strength of the "new evidence" on which deference did not operate.[15]

The Fourth Circuit's decision to review the evidence independently and the claim in totality de novo seems unassailable. Logically, a state court cannot rule on a claim when the facts supporting it did not surface until the federal proceeding.[16] However, the federal courts have not uniformly applied the same principle in similar circumstances: when evidence is *available* to a state court but the state court does not *actually consider* that evidence during its proceedings—for example, if the state court rules on a petitioner's claim without granting her an evidentiary hearing to develop the factual basis of her claim,[17] or if the state court loses evidence during habeas proceedings and rules without considering that evidence.[18] In such circumstances, federal circuits are split as

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12. *Monroe*, 323 F.3d at 290. Exculpatory evidence "must be favorable to the accused." *Id.* at 299.

13. *See id.* at 298-300. The district court claimed to employ a more deferential standard of review, which it certainly applied to petitioner's *Strickland* and sufficiency of the evidence claims; however, after citing the deferential standard, the text of the opinion says little about deference to the state court's determination of the *Brady* claim. *See id.* For further discussion of the district court's standard of review, see *infra* note 133.

14. *See id.* at 298-99.

15. *See id.* at 300.

16. *See id.* at 298-99.

17. *See* Bryan v. Mullin, 335 F.3d 1207, 1214 (10th Cir. 2003) (upholding the federal district court's decision to grant an evidentiary hearing because the state court denied petitioner relief on the merits without an evidentiary hearing, and reviewing the prisoner's claim de novo despite the deference mandated by AEDPA).

18. *See* Valdez v. Cockrell, 274 F.3d 941, 944 (5th Cir. 2001) (concluding that the federal district court had correctly granted an evidentiary hearing, but applying a deferential review despite the fact that the state court lost exhibits admitted into evidence and did not consider the exhibits when deciding petitioner's case).

to whether to apply AEDPA deference to any state court decision made on the merits of the claim.

This Note argues that courts should treat all material evidence not considered by the state courts as "new evidence"—whether it surfaces during state or federal proceedings—and that courts should review the claim as supported by the new evidence de novo, as the Fourth Circuit did in *Monroe*.[19] Part I of this Note briefly discusses AEDPA and the manner in which this legislation has changed federal habeas review.[20] This Part also examines recent Supreme Court precedent regarding the application of AEDPA standards in federal court and argues that despite these opinions, uncertainty persists as to how federal courts must apply deference. Part II argues that this uncertainty manifests itself most obviously in cases like *Monroe*, in which a petitioner is unable to develop fully the factual basis for her claim in state court. It discusses the stark split between the Fifth and Tenth Circuits regarding evidentiary hearings and the application of deference in this area.[21] Like a grant of federal discovery, an evidentiary hearing at the federal level allows a petitioner to develop fully the factual basis for her claim; however, some courts effectively ignore the full factual record as developed pursuant to an evidentiary hearing and continue to defer to the undeveloped state record.[22] Finally, Part III discusses the need for a uniform standard of review regarding undeveloped factual records that are completed during a federal proceeding. Fundamental fairness and judicial efficiency support the idea that evidence available to, but not actually considered by, state courts should be treated in the same manner as evidence revealed for the first time in federal court, without deference to the state court. Consequently, this Note argues that federal courts should review all such evidence independently to determine whether it is material to the claim, and if the court finds the evidence material, it should then review the claim de novo.

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19. *See Monroe*, 323 F.3d at 298.

20. While numerous federal judges and legal scholars have already commented on the 1996 changes to the federal habeas corpus process, this Note will likewise highlight these changes to develop the context for this Note's argument.

21. *See* 28 U.S.C. § 2254(e) (Supp. II 1996) (governing evidentiary hearings).

22. *See Valdez*, 274 F.3d at 941.

I. AEDPA AND SUPREME COURT PRECEDENT

This Part briefly discusses pre- and post-AEDPA habeas review at the federal level. It then analyzes *Williams v. Taylor*,[23] the seminal Supreme Court case interpreting the § 2254(d)(1) standard of review, and a more recent decision, *Lockyer v. Andrade*,[24] neither of which has served to crystallize the process by which a federal court should apply AEDPA deference.

A. 28 U.S.C. § 2254 Before and After 1996

Prior to 1996, the main restriction on a federal court's review of a state court's disposition of a habeas petition was that the federal court had to afford a presumption of correctness to state court findings of fact.[25] At first, the Supreme Court tempered that requirement by allowing a federal court "to receive evidence and try the facts anew" if a petitioner could prove she was entitled to relief.[26] However, federal courts began to lose their comprehensive powers of review in the 1970s when the Supreme Court ordered them to abide by decisions made in accordance with state procedural rules.[27] With the passage of AEDPA in 1996, Congress further restricted independent federal review of a state court's legal conclusions.[28] Through AEDPA, Congress confined de novo review of mixed questions of law and fact to situations in which a petitioner could prove the state court had made a decision based on an "unreasonable application of" or a determination "contrary to"

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23. 529 U.S. 362 (2000). For clarity, this case will subsequently be referred to as *Terry Williams*.

24. 538 U.S. 63 (2003).

25. *See* 28 U.S.C. § 2254(d) (1994) (revised and redesignated subsection (e) in 1996).

26. Townsend v. Sain, 372 U.S. 293, 312 (1963).

27. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (holding that a prisoner who failed to challenge his confession at trial could not raise the point for the first time in federal habeas court); *see also* Christopher Flood, *Closing the Circle:* Case v. Nebraska *and the Future of Habeas Reform*, 27 N.Y.U. REV. L. & SOC. CHANGE 633, 646-47 (2001-2002) (tracing the increased deference given to state procedural rules from the 1970s onward).

28. Justice Stevens noted that Congress enacted these changes "to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Terry Williams*, 529 U.S. at 386 (Stevens, J., dissenting in part).

Supreme Court precedent, or based on an "unreasonable determination of the facts."[29]

Before the Supreme Court interpreted the 1996 amendments, some federal courts persisted in reviewing the disposition of habeas petitions by state courts in much the same fashion as they had pre-AEDPA, because the new statute prescribed an unfamiliar standard of review they found difficult to apply.[30] While Supreme Court precedent now clearly limits federal review of state dispositions of fully developed habeas claims,[31] confusion persists as to the manner in which deference operates on undeveloped factual records.[32]

B. Terry Williams v. Taylor: *Defining § 2254(d)(1)'s Prongs of Deference*

Congress's desire to curb the federal habeas review process and to give force to state court decisions resulted in avoidance of the familiar "clearly erroneous" standard for appellate review in § 2254(d)(1).[33] Congress instead crafted a new standard: A federal court can grant a writ only when it finds the state court's disposition of a habeas petition is "contrary to" or an "unreasonable application of" Supreme Court precedent.[34] Because this standard was unfamiliar to federal court judges, the federal courts did not apply it uniformly. For instance, the Seventh Circuit read the statute as restricting the breadth of precedent on which a federal court could rely when assessing a state court's disposition of a habeas claim to

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29. *See* 28 U.S.C. § 2254(d) (Supp. II 1996). In *Terry Williams*, Justice Stevens, dissenting in part, noted that questions of pure law and questions of mixed law and fact are difficult to distinguish, as "[m]ost ... questions that arise in habeas corpus proceedings—and therefore most 'decisions' to be made—require the federal judge to apply a rule of law to a set of facts, some of which may be disputed and some undisputed." *Terry Williams*, 529 U.S. at 384 (Stevens, J., dissenting in part). This Note is primarily concerned with *Brady* and *Strickland* claims, which courts have widely considered to be mixed questions of law and fact. *See id.* at 405-06; Bryan v. Mullin, 335 F.3d 1207, 1215-16 (10th Cir. 2003).

30. *See infra* text accompanying notes 33-37.

31. *See infra* Part I.B.

32. *See infra* Part II.

33. *See* 28 U.S.C. 8 (2254(d) (1994) (revised and redesigned subsection (e) in 1996).

34. 28 U.S.C. § 2254(d)(1) (Supp. II 1996). Once a federal court determines that a state court's disposition of a petition runs afoul of either of the prongs, it no longer has to apply deference to the state court's legal conclusions. *See id.*

Supreme Court precedent only, not a circuit's own precedent.[35] The court interpreted the statute as leaving intact a federal court's independent power of review over questions of federal law.[36] In contrast, the Fourth Circuit held that the statute curtailed a federal court's independent power of review and allowed a federal court to grant a writ only when the state court applied "relevant precedent in a manner that reasonable jurists would all agree is unreasonable."[37]

In *Terry Williams*, the Supreme Court finally interpreted § 2254(d)(1)'s two prongs and overturned a Fourth Circuit decision requiring deference to the state habeas court's dismissal of petitioner's ineffective assistance of counsel claim.[38] Though this opinion served to alleviate some of the discrepancies among the circuits, it was unusual in that Justice O'Connor wrote for the majority in defining the standard of review, while Justice Stevens authored the section applying the standard to the facts of the case and applied a somewhat different standard to find that the Virginia Supreme Court had erroneously decided the case.[39]

Justice O'Connor explained the standard of review first by providing examples of decisions contrary to federal law and unreasonable applications of federal law, and then by construing specific words in the statute.[40] She stated that a state court makes a decision contrary to Supreme Court precedent if it "arrives at a conclusion opposite to that reached by this Court on a question of law" or reaches a different outcome when faced with a set of facts identical to those the Supreme Court has faced.[41] If a state court unreasonably applies Supreme Court precedent, it means it has "identifie[d] the correct governing legal rule from this Court's cases but unreasonably applie[d] it to the facts of the particular state prisoner's case."[42] Justice O'Connor next stated that federal courts

35. *See* Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996).

36. *See id.*

37. Green v. French, 143 F.3d 865, 870 (4th Cir. 1998).

38. 529 U.S. 362, 402-13 (2000).

39. *See id.* at 390-98, 402-13.

40. *See id.* at 405-13.

41. *Id.* at 405.

42. *Id.* at 407. A state court can also unreasonably extend Supreme Court precedent to a new area of law, *see id.*, but that portion of the analysis is beyond the scope of this Note.

must examine unreasonableness objectively.[43] She admitted that "[t]he term 'unreasonable' is no doubt difficult to define.... [but] [f]or purposes of today's opinion, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law."[44] Furthermore, the Court held that a federal court should not employ more familiar standards such as "erroneous" or "incorrect" to determine in its "independent judgment" that the state court "applied ... federal law erroneously or incorrectly."[45]

Though the majority's interpretation of § 2254(d)(1) certainly circumscribed the type of review the Seventh Circuit had endorsed,[46] its explanation of unreasonable applications of federal law and decisions made contrary to federal law read less as affirmative guidance and more as a list of prohibitions.[47] Making the standard more confusing, Justice Stevens, whose interpretation of § 2254(d)(1) differed from Justice O'Connor's, wrote for the majority in applying the standard to the context of Williams' case.[48] He found the Virginia Supreme Court had applied the clearly established Supreme Court precedent announced in *Strickland v. Washington* in both a "contrary" and "unreasonable" manner.[49] He determined that the court had unreasonably applied the precedent first by "requir[ing] a separate inquiry into fundamental fairness," which the precedent did not mandate.[50] Second, the court had been unreasonable in determining that petitioner was not prejudiced by trial counsel's failure to investigate and present mitigating evidence during petitioner's sentencing phase, because it had not "evaluate[d] the totality of the available mitigation evidence ... in reweighing it against the evidence in aggravation."[51] Likewise, in her concurring opinion, Justice O'Connor found unreasonable and contrary applications of *Strickland v. Washington*.[52] She, too,

43. *Id.* at 410.
44. *Id.*
45. *Id.* at 411.
46. *See supra* note 35 and accompanying text.
47. *Terry Williams*, 529 U.S. at 409-10.
48. *Id.* at 392-98.
49. *Id.* at 399.
50. *Id.* at 393-95.
51. *Id.* at 397-98.
52. *Id.* at 413-14 (O'Connor, J., concurring in part).

examined each piece of evidence to determine that "[t]he Virginia Supreme Court's decision reveals an obvious failure to consider the totality of the omitted mitigation evidence."[53] The Justices did not explain what made their two opinions "objective" reviews of "unreasonableness," rather than applications of their own "independent judgment."[54] In other words, no single methodology was apparent, and the Justices did not attempt to reconcile their differing interpretations of § 2254(d)(1) with their similar applications of its mandates to the facts of Williams' case.

In conclusion, other than prohibiting an independent review and providing examples of "contrary" and "unreasonable applications" of Supreme Court precedent, *Terry Williams* offers little in the way of a methodology for federal courts to use in assessing state court dismissals of habeas petitions. This is particularly true in the sense that Justice O'Connor, writing for the majority, recited one standard of review and Justice Stevens, writing for another majority, perhaps applied another standard in reaching his decision to reverse the Fourth Circuit.

C. Lockyer v. Andrade*: Recent Precedent Adds a Further Prohibition to a Federal Court's Determination of "Contrary" and "Unreasonable"*

The fact that the *Terry Williams* standard of review is difficult for federal courts to apply consistently is clear even in subsequent Supreme Court decisions. In *Lockyer v. Andrade*,[55] the Court reviewed whether the California Court of Appeal's disposition of a habeas petition was an unreasonable interpretation of Supreme Court precedent regarding excessive prison sentences.[56] In contrast with the *Terry Williams* Court, the *Lockyer* majority and dissent recited the same standard of review[57] but came up with very different conclusions when they applied that standard to Andrade's case.[58] Although unanimity is rare in any court, the striking aspect

53. *Id.* at 416 (O'Connor, J., concurring in part).
54. *Id.* at 411.
55. 538 U.S. 63 (2003).
56. *Id.* at 66.
57. *See id.* at 72, 77.
58. *See id.* at 77, 83.

of this case was the disparity among the Justices' opinions, despite the fact that they were interpreting their own "clearly established" precedent.[59]

In *Lockyer*, petitioner received a fifty-year sentence under California's three strikes law for three crimes he alleged amounted only to "stealing approximately $150 in videotapes."[60] He petitioned for habeas relief on the grounds that such a sentence was excessive and grossly disproportionate to the crimes he committed, in violation of the constitutional prohibition against cruel and unusual punishment.[61] The Ninth Circuit granted petitioner relief by interpreting the § 2254(d)(1) provision of "unreasonable application" of federal law as allowing a federal court to conduct an "independent review of the legal question ... [prior to applying deference to determine if] clear error occurred" at the state level.[62]

Writing for the majority, Justice O'Connor rejected the Ninth Circuit's methodology, stating: "We disagree with this approach. AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1)—whether a state court decision is contrary to, or

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59. 28 U.S.C. § 2254(d)(1) (Supp. II 1996). Another example of conflicting interpretations of precedent occurred in *Wiggins v. Smith*, 539 U.S. 510 (2003), an ineffective assistance of counsel case. The majority relied in part on *Terry Williams* as "clearly established" precedent, requiring that trial counsel conduct a reasonable investigation into the background of a defendant in a capital case before making a "tactical decision" not to present mitigating evidence of the defendant's background. *See id.* at 522-23. In finding that the state court unreasonably applied Supreme Court precedent, the Court conducted a thorough analysis of trial counsel's decisions and meticulously reviewed portions of the transcript from state court proceedings. *See id.* at 523-29.

In a vigorous dissent, Justice Scalia first accused the majority of relying on precedent that was not even decided at the time the state court ruled on Wiggins' claim and that therefore was not "clearly established." *Id.* at 542-43 (Scalia, J., dissenting) (noting that even the majority recognized *Terry Williams* was merely before the court on habeas review at the time of the state court's decision). Second, he argued that even if *Terry Williams* could be considered precedent, the majority had "set[] at naught the statutory scheme we once described as ... 'highly deferential'" by ignoring the state court's factual findings without "clear and convincing evidence" rebutting their accuracy. *Id.* at 538. The *Wiggins* decision illustrates how unsettled the § 2254(d)(1) analysis remains.

60. *Lockyer*, 538 U.S. at 70.

61. *Id.* The prosecution elected to treat these crimes as felonies rather than misdemeanors, and the jury determined that the defendant's three counts of first-degree residential burglary constituted three violent felonies as required by the three strikes law. *Id.* at 67-68.

62. *Id.* at 69.

involved an unreasonable application of, clearly established federal law."[63] Then, in reversing the Ninth Circuit's finding of unreasonableness, Justice O'Connor reviewed the "clearly established" precedent in the excessive sentencing area and noted that it was "not ... a model of clarity."[64] Despite the murkiness, she found that a contrary or unreasonable application of this precedent would occur only under the "gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case."[65] The majority held that the California Court of Appeal's decision was not a contrary decision, because it relied on correct precedent and because the court faced a set of facts distinguishable from those in the original cases.[66] Furthermore, the decision was not unreasonable, primarily because precedent provide legislatures with "broad discretion to fashion a sentence," giving the state courts considerable leeway to review the "contours" of the sentence.[67] In sum, the majority simply did not see this case as exceptional enough to qualify as a constitutional violation under the gross disproportionality principle.[68]

In contrast, Justice Souter, employing the same standard of review, found both contrary and unreasonable applications of Supreme Court precedent.[69] First, he declared that the facts of Andrade's case were sufficiently similar to clearly established Supreme Court precedent finding gross disproportionality.[70] Therefore, the fact that the California Court of Appeal reached the opposite result in *Lockyer* meant the decision was contrary to clearly

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63. *Id.* at 71.

64. *Id.* at 71-72.

65. *Id.* at 73 (citing Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

66. *See id.* at 73-74.

67. *Id.* at 76.

68. *See id.* at 77.

69. *Id.* at 78 (Souter, J., dissenting).

70. *See id.* at 78-79 (Souter, J., dissenting). Justice Souter compared this case with *Solem v. Helm*, 463 U.S. 277 (1983), in which a nonviolent offender received a life sentence without parole under South Dakota's recidivist statute after committing seven nonviolent crimes, the last of which was issuing a $100 "no account" check, which carried a maximum punishment of five years in prison and a $5,000 fine. *Id.* at 279-81. The *Solem* Court granted the writ, finding that the punishment exceeded the gravity of the crime and was disproportionate to sentences served by similar offenders in the same jurisdiction and other jurisdictions. *Id.* at 303.

established precedent.[71] Second, Justice Souter reviewed gross proportionality in light of the California legislature's purpose in passing the three strikes law.[72] The law "responds to a condition of the defendant shown by his prior felony record, his danger to society, and it reflects a judgment that 25 years of incapacitation prior to parole eligibility is appropriate when a defendant exhibiting such a condition commits another felony."[73] Justice Souter's concern with the state court's application of the sentence in Lockyer's case was that Lockyer committed two minor felonies in quick succession and did not become substantially more dangerous between the two crimes as to warrant a doubling of his sentence.[74] Justice Souter claimed that the application of the three strikes law to trivial crimes constituted an "irrational" and therefore "unreasonable" application of Supreme Court precedent.[75]

In a similar fashion to the *Terry Williams* Court, the *Lockyer* Court clearly articulated only the standard of review it was *not* using.[76] The majority accused the Ninth Circuit of employing the wrong standard of review and then focused on the murkiness of Supreme Court precedent in the area of gross proportionality. It concluded that the lack of clarity gave state courts leeway to fashion sentences and that violations of the principle would be extremely rare.[77] In contrast, the dissent, also using the "objectively unreasonable" standard, never chastised the appellate court's liberal methodology but instead found unreasonable both the state court's contrary decision in a fact scenario similar to the clearly established Supreme Court precedent, and the state court's application of the three strikes law to trivial crimes that did not meet the California legislature's purpose for passing the law.[78]

With Justices O'Connor and Stevens espousing different standards of review but the same outcome in *Terry Williams*, and Justices O'Connor and Souter employing the same standard of

71. *See Lockyer*, 538 U.S. at 78-79 (Souter, J., dissenting).
72. *See id.* at 80-81.
73. *Id.* at 81.
74. *Id.* at 81-82.
75. *Id.* at 82.
76. *See id.* at 75.
77. *See id.* at 73, 76.
78. *See id.* at 80-82.

review but coming to very different conclusions in *Lockyer*, it is no wonder that applying deference consistently continues to be a confusing task for federal courts reviewing state court dispositions of habeas petitions. The next Part of this Note examines this confusion in the context of habeas claims that petitioners are unable to develop fully during the state court proceedings.

II. DIFFERENCES AMONG THE CIRCUITS IN CASES WITH UNDEVELOPED FACTUAL RECORDS

Taken together, *Terry Williams* and *Lockyer* place restrictions on a federal court's review of a state court's dismissal of a habeas petition but do not offer a clear methodology for reviewing such dismissals, particularly with regard to determining whether a state court decision was "objectively unreasonable." The decisions indicate that the Supreme Court condones a variety of approaches in applying § 2254(d)(1). This Part argues that while variety might well be defensible when a state court's dismissal of a habeas petition is thorough in its analysis of facts and legal conclusions, the same cannot be said for dismissals of undeveloped factual claims on the basis of incomplete legal analysis. In making this argument, this Part discusses methods by which federal courts remedy undeveloped factual records and the approaches they take when applying AEDPA deference pursuant to these remedial procedures.

One way a federal court can remedy an incomplete factual record is by holding a federal evidentiary hearing.[79] AEDPA limits federal evidentiary hearings to situations in which, *inter alia*, the claim relies on a "factual predicate that could not have been previously discovered through the exercise of due diligence."[80] In its decision in *Williams v. Taylor*,[81] the Supreme Court spoke decisively in holding that a federal evidentiary hearing is warranted whenever a petitioner is diligent but unsuccessful in developing the factual basis for his claim in state court.[82] Writing for a unanimous Court,

79. *See, e.g.*, 28 U.S.C. § 2254(e)(2) (Supp. II 1996).

80. 28 U.S.C. § 2254(e)(2)(A)(ii) (Supp. II 1996).

81. 529 U.S. 420 (2000). For clarity, this case will subsequently be referred to as *Michael Williams*.

82. *Id.* at 430, 437.

Justice Kennedy emphasized that the petitioner's "reasonable attempt" to develop the claims and his lack of fault in failing to do so were crucial to the decision.[83] Whether the petitioner "could have ... discovered" the facts during the state court proceedings was not important, as the only relevant inquiry was whether he was "diligent in his efforts" to uncover evidence.[84]

Despite the fact that *Michael Williams* makes clear the standard for granting an evidentiary hearing, no such precedent exists to instruct federal courts on whether and how AEDPA deference applies to evidence developed in those hearings. The Fifth and Tenth Circuits take opposing positions on this question. The Fifth Circuit has held that even in cases in which a district court correctly grants an evidentiary hearing to remedy an incomplete record, it still must afford AEDPA deference to the state court's "adjudication on the merits."[85] In contrast, the Tenth Circuit has held that the lack of a full and fair hearing during the state proceeding lifts the bar of deference.[86]

A related line of cases with undeveloped state court factual records, including *Monroe v. Angelone*,[87] involves "new evidence" uncovered for the first time in federal discovery or through a petitioner's FOIA request.[88] Generally, the "new evidence" is *Brady* evidence.[89] Several federal courts of appeals have reviewed such claims de novo, reasoning that because the factual underpinnings of the claim were either nonexistent or very primitive during the state court proceedings, deferring to the state court decision is generally infeasible.[90] Others, however, have been much more deferential to the state court's disposition. This Part focuses on the reasoning in opinions from the Fifth, Tenth, and Fourth Circuits

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83. *See id.* at 435.

84. *Id.*

85. *See* Valdez v. Cockrell, 274 F.3d 941, 950 (5th Cir. 2001). Again, an "adjudication on the merits" occurs whenever a state court rules substantively. Adjudication on the merits "does not speak to the quality of the process," and the disposition of the claim can be as terse as one word. *Id.*

86. *See* Bryan v. Mullin, 335 F.3d 1207, 1215-16 (10th Cir. 2003).

87. 323 F.3d 286 (4th Cir. 2003).

88. For a discussion of the standard of review for federal discovery, see *supra* note 11 and accompanying text.

89. For a definition of *Brady* evidence, see *supra* note 7.

90. For a discussion of the other circuits that employ this standard, see *infra* note 133.

and concludes that, depending on the type of claim and the circuit in which the petitioner brings the claim, she is likely to experience a strikingly different result.

A. The Fifth Circuit's Lack of a Requirement of a Full and Fair Hearing for Deference to Operate

Like the petitioner in *Terry Williams*, the petitioner in *Valdez v. Cockrell*[91] alleged his trial counsel were ineffective by failing to present mitigating evidence regarding his background, evidence that he alleged would have spared him the death penalty.[92] The state habeas court afforded petitioner an evidentiary hearing and made historical findings of fact as to certain pieces of evidence;[93] however, that court lost a number of exhibits, including the trial transcript.[94] Excluding the missing evidence from its consideration, the court dismissed the petition.[95] The United States District Court for the Southern District of Texas granted petitioner an evidentiary hearing, finding that the state court's error, rather than petitioner's lack of diligence, prevented petitioner from developing fully the factual basis for his claim.[96] Though the Fifth Circuit concurred that the granting of the evidentiary hearing was appropriate under

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91. 274 F.3d 941 (5th Cir. 2001).

92. *Id.* at 943.

93. *See id.* at 943-44.

94. *See id.* at 944.

95. *See id.* Particularly egregious in this case was the fact that the state habeas judge expressed to the parties that he "'had never read the record of the trial' and that he 'did not intend to' as he did not 'have the time.'" *Id.* (citing Order for Evidentiary Hr'g at 10 n.8 (S.D. Tex. Jan. 13, 1999) (unpublished)).

The *Valdez* dissent explained the importance of the trial transcript, particularly in capital cases, noting that:

> [T]his court has recognized that meaningful federal habeas review requires a trial transcript, and familiarity with the trial and sentencing proceedings is no less indispensable to the state habeas court in reaching its resolution on the merits. In the present case, the state habeas judge did not preside over Valdez's criminal trial. Consequently, he lacked the advantage of a personal recollection of the trial proceedings.

Id. at 960 (Dennis, J., dissenting) (internal citations omitted). For the dissent, this fundamental flaw in the state proceeding rendered a de novo review mandatory. *See id.* at 961 (Dennis, J., dissenting).

96. *See id.* at 944-45.

Michael Williams,[97] it disagreed with both the district court's methodology for reviewing the claim and its decision to grant habeas relief.[98]

The district court determined "that the deferential framework set forth at § 2254(d) and § 2254(e)(1) 'largely d[id] not apply' because it had held an evidentiary hearing to remedy the state's denial of a full and fair hearing."[99] It afforded a "presumption of correctness only to the state habeas court's specific findings of historical fact" and reviewed the rest of the evidence by a "preponderance of the evidence" standard and petitioner's ineffective assistance of counsel claim de novo.[100] On review, the Fifth Circuit held that the lack of a full and fair hearing did not lift the bar of deference.[101] It noted that, instead, the lower court should have examined the state court's dismissal of the ineffective assistance of counsel claim under AEDPA's "objectively unreasonable" standard, and it should have presumed the correctness of findings of fact "implicit" therein.[102]

Interestingly, in concluding that a full and fair hearing was not necessary for the lower court to apply deference, the Fifth Circuit in part relied on Fourth Circuit precedent—*Bell v. Jarvis*[103]—for its interpretation of *Terry Williams* and its handling of perfunctory opinions.[104] *Bell*, however, did not pertain to whether the petitioner was denied a full and fair hearing. Instead, it involved the Fourth Circuit's review of a petitioner's ineffective assistance of counsel claim based on a summary state court dismissal, which simply read: "[T]he Motion for Appropriate Relief ... fails to state a claim upon which relief can be granted. It is, therefore, denied."[105] The Fifth

97. *See id.* at 945 n.6.

98. *See id.* at 957.

99. *Id.* at 945 (citing Valdez v. Johnson, 93 F. Supp. 2d 769, 777 (S.D. Tex. 1999) (alteration in original)).

100. *Id.* at 945-46.

101. *See id.* at 948.

102. *Id.* The opinion did not make clear exactly which findings of fact were implicit in the state court's decision to dismiss the habeas petition. Presumably, because the Fifth Circuit remanded the case for compliance with its instructions, it expected the district court to make that determination. *See id.* at 957.

103. 236 F.3d 149 (4th Cir. 2000).

104. *See Valdez*, 274 F.3d at 953-54.

105. *Bell*, 236 F.3d at 176 (Motz, J., dissenting); *see Valdez*, 274 F.3d at 954.

Circuit seemed to rely on *Bell*, because *Bell* overturned *Cardwell v. Greene*,[106] another ineffective assistance of counsel claim that involved both a perfunctory opinion from the state court and the absence of a full and fair hearing during state proceedings.[107] Though *Cardwell* implied that a full and fair hearing was required, the *Bell* court rejected *Cardwell* only "'to the extent that *Cardwell* requires federal habeas courts to conduct a de novo or effectively de novo review of a summary state court decision, or to grant habeas relief based upon an independent determination that the state court has violated the constitutional rights of the petitioner.'"[108] Additionally, the standard of review the *Bell* court adopted in response to the perfunctory opinion was somewhat different from its normal deferential review and from the review that the Fifth Circuit embraced. The *Bell* court claimed: "In such cases [of perfunctory opinions], we conduct an independent examination of the record and the clearly established Supreme Court law" while still applying the "objectively unreasonable" standard.[109] Whether the independent review ultimately affected the Fourth Circuit's judgment in this and similar cases is debatable.[110] However, the *Valdez* court made no mention of such a standard, instead indicating that it treated claims based on undeveloped factual records and perfunctory analyses in

106. 152 F.3d 331 (4th Cir. 1998).

107. *See Valdez*, 274 F.3d at 953.

108. *Id.* at 953-54 (quoting *Bell*, 236 F.3d at 160).

109. *Bell*, 236 F.3d at 158. Exactly what the Fourth Circuit meant by an "independent" review of the record is not altogether clear. The district court hearing Monroe's case claimed it was using the same standard. *See* Monroe v. Angelone, No. 3:98CV254, 2002 U.S. Dist. LEXIS 26310, at *73-76 (E.D. Va. Mar. 28, 2002). For a further discussion of independent review with deference, see *infra* note 110.

110. One commentator writing on *Bell* and perfunctory opinions generally broke the circuits into three categories: high deference, medium deference, and no deference at all. *See* Brittany Glidden, *When the State Is Silent: An Analysis of AEDPA's Adjudication Requirement*, 27 N.Y.U. REV. L. & SOC. CHANGE 177, 184-85 (2001-2002). Glidden places the Fourth Circuit in the high deference category and implies that any independent review that such a circuit claims to perform is meaningless, because the court simply "craft[s] a story that makes the state result justifiable." *Id.* at 189.

The *Bell* dissent would likely agree with Glidden. It accused the majority of omitting the independent review of the state court's dismissal of petitioner's claim and proceeding straight to an analysis of the legal claim: "[T]he majority simply cites *Strickland* and concludes that the state courts' denial ... was 'neither contrary to nor an unreasonable application of clearly established federal law.'" *Bell*, 236 F.3d at 182 (Motz, J., dissenting).

the same manner as those based on fully developed factual records and complete analyses at the state court level.[111]

The *Valdez* majority also defended its view on deference following an evidentiary hearing by comparing the language of § 2254(d)(1) before and after the passage of AEDPA.[112] The court noted that prior to 1996, § 2254(d) mentioned that a state court's findings were "presumed to be correct" unless the petitioner had not been afforded a "full and fair hearing."[113] The court reasoned that since Congress omitted reference to full and fair hearings in AEDPA, Congress clearly intended that full and fair hearings were no longer a prerequisite to the operation of deference.[114] In contrast, the dissent argued that although the new statute failed to mention full and fair hearings, it also omitted other crucial language that no reasonable court could interpret as no longer required by Congress.[115] For example, the new version failed to mandate that "the applicant for the writ and the State or an officer or agent have been parties," "that the determination be evidenced by written indicia," and "that the state court that made the determination ... be a court of competent jurisdiction."[116] In other words, Congress could not have intended every provision it omitted from the text of the 1996 Act to be excluded, because it would leave the whole federal habeas review process in shambles.

Finally, the *Valdez* court dismissed the petitioner's most compelling argument against deferring to the state court's findings pursuant to a federal evidentiary hearing: namely, that if the federal court granted a petitioner an evidentiary hearing and then essentially ignored the results by referring to an incomplete state record, it rendered that evidentiary hearing a "useless exercise."[117] The majority simply responded: "[T]he hearing may assist the

111. *See Valdez*, 274 F.3d at 950.
112. *See id.* at 948-50.
113. *Id.* at 948-49 (quoting 28 U.S.C. § 2254(d) (1994) (repealed 1996)).
114. *See id.* at 949-50.
115. *See id.* at 966 (Dennis, J., dissenting).
116. *Id.* (quoting 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4265.2 (Supp. 2001)).
117. *Id.* at 951-52.

district court in ascertaining whether the state court reached an unreasonable determination under either § 2254(d)(1) or (d)(2)."[118]

Thus, a de novo review based upon an evidentiary hearing is next to impossible to obtain in the Fifth Circuit.[119] Whether the Supreme Court actually intended such an outcome when it decided *Terry Williams* and *Michael Williams* is not altogether clear.[120]

B. The Tenth Circuit's Requirement of a Full and Fair Hearing for the Operation of Deference

The case of *Bryan v. Mullin*[121] also involved an ineffective assistance of counsel claim, where the petitioner received a death sentence and alleged his trial counsel failed to present mitigating evidence of his organic brain disease.[122] In reviewing the petitioner's claim, the Oklahoma Criminal Court of Appeals "implicitly" rejected his request for an evidentiary hearing "when it proceeded to the merits of Bryan's ineffective assistance claims without an evidentiary hearing and denied him relief."[123] The federal district court granted the petitioner an evidentiary hearing, the propriety of which the Tenth Circuit confirmed, as the petitioner had "diligently

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118. *Id.* at 952. The court said nothing further to address exactly how the results of that hearing would be helpful without the benefit of a de novo review of the claim.

119. The *Valdez* majority seemed to leave open the possibility of a de novo review specifically if the federal court "lacked the necessary evidence with which to reach a disposition of Valdez's claims." *Id.* at 957. The majority examined each piece of evidence the federal court had before it and each piece of evidence the state habeas court had lost. *See id.* at 956-57. It found that the federal district court had "sufficient descriptions of the remaining missing exhibits to inform the district court of their probative value." *Id.* at 957. Presumably, the court found the evidence immaterial to the outcome of petitioner's claim.

What is most troubling about this analysis is the fact that the trial transcript was missing from all habeas proceedings. If the trial transcript was not crucial to the outcome of the case, it seems unlikely that the Fifth Circuit would find any evidence sufficiently material to warrant a de novo review. *See supra* note 95 (discussing the importance of the trial transcript).

120. The *Valdez* dissent pointed out that Justice Kennedy's "use of the phrase 'full and fair' evinces its concern for the quality of the state court process," indicating that deference to a flawed record was not the desired result. *Id.* at 970 (Dennis, J., dissenting).

121. 335 F.3d 1207 (10th Cir. 2003).

122. *See id.* at 1212-13. Petitioner claimed this omission occurred during both the adjudicatory and sentencing phases of his trial. *See id.* at 1212.

123. *Id.* at 1214.

sought to develop the factual basis underlying his claims."[124] The *Bryan* court went on to apply pre-AEDPA standards according to its own precedent, *Miller v. Champion*,[125] because § 2254(e)(2) applied. The court stated:

> [I]neffective assistance claim[s] present[] a mixed question of law and fact. Because our analysis ... primarily involves consideration of legal principles, we review this claim de novo. Further, we note that because the state court did not hold any evidentiary hearing, we are in the same position to evaluate the factual record as it was. Accordingly, to the extent the state court's dismissal of [petitioner's ineffective assistance claim] was based on its own factual findings, we need not afford those findings any deference.[126]

Though *Terry Williams* prohibits de novo review of mixed questions of law and fact, the Tenth Circuit's limited application of de novo review to situations in which petitioners have met the burden for federal evidentiary hearings may be acceptable under the *Terry Williams* case.[127] Furthermore, in *Michael Williams*, the Supreme Court cited *Miller* for its interpretation of § 2254(e)(2),[128] without commenting on or criticizing *Miller*'s position that federal courts should review mixed questions of law and fact de novo when a state court's disposition of the claim was based on an incomplete factual record.[129] Silence on the part of the Supreme Court certainly does not mean approval, but as the Tenth Circuit has consistently applied its position regarding full and fair hearings from 1998 to this most recent decision in 2003, its approach is viable for now.

In conclusion, the fact that the Fifth and Tenth Circuits have reached such diametrically opposed positions with regard to deference and full and fair hearings, particularly in light of *Terry Williams*, is a clear indication of the persistent confusion surround-

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124. *Id.*

125. 161 F.3d 1249 (10th Cir. 1998).

126. *Bryan*, 335 F.3d at 1215-16 (citing *Miller*, 161 F.3d at 1254). The court found, in light of *Miller*, the federal panel that had first reviewed the claim had "erred" by affording deference to the state court's disposition of petitioner's *Strickland* claim. *Id.* at 1216 n.7.

127. *See id.* at 1216; *see also supra* notes 79-84 and accompanying text (discussing the standard for evidentiary hearings).

128. *See* Williams v. Taylor, 529 U.S. 420, 432 (2000).

129. *See Miller*, 161 F.3d at 1254.

ing AEDPA. Though the Supreme Court stressed the importance of a variety of methodologies at the federal level for applying § 2254(d)(1),[130] it may not have intended those methodologies to result in such disparate types of reviews amongst the federal circuits.

C. The Standard of Review in the Fourth Circuit for "New Evidence"

The *Valdez* and *Bryan* courts split over whether full and fair hearings are requisite to the operation of AEDPA deference, particularly in the context of *Strickland* claims and in regard to evidence that was available to, but not considered by, state courts. In *Monroe v. Angelone*,[131] the Fourth Circuit examined a *Brady* claim based largely on evidence that did not surface until the federal proceeding.[132] The Fourth Circuit determined that AEDPA deference did not apply to such "new evidence" but only to evidence the state court had actually considered.[133] The *Brady* analysis requires a collective review of all the suppressed evidence;[134] therefore, the Fourth Circuit decided it could not "accord AEDPA deference on an item-by-item basis" to the evidence the state court

130. *See supra* notes 46-54 and accompanying text.

131. 323 F.3d 286 (4th Cir. 2003).

132. *Id.* at 298.

133. *See id.* at 297-98. In support of its position that AEDPA deference did not apply, the *Monroe* court cited its own precedent and that of several other circuits. Two of the cases involved *Brady* claims that petitioners first raised during their federal hearings; therefore, there was no antecedent state court decision "on its merits" to which the federal court could defer. *Id.* at 297; *see* Daniels v. Lee, 316 F.3d 477, 487 (4th Cir. 2003); Williams v. Coyle, 260 F.3d 684, 706 (6th Cir. 2001). The other two cases involved some evidence that the state courts considered as well as some evidence uncovered only during the federal proceedings. In *Rojem v. Gibson*, the petitioner raised a *Brady* claim in state court but later found an undisclosed report regarding a vehicle near the crime scene. 245 F.3d 1130, 1140 (10th Cir. 2001). The court reviewed that piece of evidence de novo but assessed the collective effect of all the *Brady* evidence in determining whether the state "fail[ed] to disclose material evidence." *See id.* In *Boyette v. Lefevre*, the Second Circuit reviewed a *Brady* claim de novo, because the state court ruled that certain *Brady* items were not suppressed, without identifying the items to which it was referring. 246 F.3d 76, 88-89 (2d Cir. 2001). The court noted that "[b]ecause the Appellate Division did not specify which documents Boyette failed to show were suppressed, we have no discernable finding of fact to which we can defer." *Id.* at 88.

134. *See Monroe*, 323 F.3d at 298.

had reviewed.[135] Because petitioner had so much "new evidence," the "new evidence" had the effect of outweighing the evidence the state court had considered.[136]

Perhaps concerned about running afoul of *Terry Williams*, the Fourth Circuit was careful to note that not all *Brady* claims result in de novo reviews. When merely a "scintilla" of "new evidence" arises during the federal proceeding and the state court has considered the bulk of the evidence, the federal court will "continue to defer to state court decisions that relief would not be warranted on the basis of the *Brady* evidence that those courts considered."[137]

The *Monroe* court found particularly compelling the fact that the prosecution had suppressed evidence regarding its star witness, Zelma Smith. The state court had heard some evidence specifically related to the prosecution's suppression of its sentence reduction deal with Smith and Smith's history as a career informant.[138] Perhaps because petitioner presented so much additional evidence to discredit Smith[139] and because the court appeared to believe that

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135. *Id.* Although the District Court for the Eastern District of Virginia reached the same outcome as the Fourth Circuit, it quoted a different standard of review in doing so. *See* Monroe v. Angelone, No. 3:98CV254, 2002 U.S. Dist. LEXIS 26310, at *72 (E.D. Va. Mar. 28, 2002) (quoting 28 U.S.C. § 636(b)(1)). Instead of focusing on the new *Brady* evidence, the district court highlighted the perfunctory state court dismissal of Monroe's claim and applied the standard the Fourth Circuit condones in such cases: deference with an "'*independent* examination of the record and the clearly established Supreme Court law.'" *Id.* at *74 (quoting Wright v. Angelone, 151 F.3d 151, 157 (4th Cir. 1998)). The district court stated that "petitioner's objection to the application of any standard other than a de novo standard of review is overruled." *Id.* at *76. As to the *Brady* claim, however, the district court weighed all the exculpatory evidence and found it material to petitioner's case, never again mentioning deference. *See id.* at *105. As to petitioner's ineffective assistance of counsel claim and sufficiency of the evidence claim, the district court deferred to the state court. *See id.* at *123. The court implied that, in its independent judgment, the evidence was insufficient to support conviction, but "given the deferential standard of review that the Court is required to apply, the Court must overrule this objection." *Id.*

136. *See Monroe*, 323 F.3d at 297-99.

137. *Id.* at 299 n.19. The court also noted that § 2254(e)(2) may deter petitioners from being less than diligent in state court in uncovering evidence in hopes of receiving better treatment at the federal level. *See id.*

138. *Id.* at 298.

139. Petitioner submitted to the court the detective's notes in which the detective had written that Smith was a "professional snitch" who had helped him and the FBI on other cases. *Id.* at 315. Furthermore, during closing arguments, the prosecution told the jury "the absolute truth is that she [Smith] did not ask for any consideration for her testimony from the Commonwealth in this case. And it's absolutely true that the Commonwealth has not promised her anything." *Id.* at 307 n.36. In addition, Smith had testified that the gun she sold

the prosecution's tactics bordered on ethical violations,[140] it was willing to withhold the deference it might have accorded under normal circumstances.

Regarding "new evidence," the Fourth Circuit's opinion is reconcilable with the district court's standard in *Valdez*. Deference "'largely d[id] not apply'"[141] in either case, as the federal court cured the problem of the undeveloped factual record at the federal level. Furthermore, both courts afforded a presumption of correctness only to specific state factual findings.[142] It appears that in both cases, the more factual findings the state court made, the more deference the federal court was willing to apply.

In contrast, it is more difficult to reconcile *Monroe* with the Fifth Circuit's *Valdez* opinion. The state court in Monroe's case had some exculpatory evidence before it, particularly evidence related to Smith's history as an informant and to the prosecution's sentence reduction deal. However, the Fourth Circuit, for all intents and purposes, reviewed Monroe's claim de novo.[143] On the other hand, the presence of some evidence before the state court was enough for the *Valdez* court to defer completely to the state court's conclusions. If the trial transcript was expendable in a capital case like *Valdez*, certainly *Brady* evidence bolstering a claim of misconduct on the part of the prosecution in a non-capital case, as in *Monroe*, also would be nonmaterial, according to the Fifth Circuit.

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to Monroe came from her former boss. *Id.* at 295. The prosecution presented this evidence knowing that the detective never contacted the boss to ascertain the truth of the statement, because the detective feared the boss would deny having sold the gun to Smith. *See id.* During federal discovery, petitioner contacted the boss, and indeed he denied ever having sold a gun to Smith. *Id.* at 295 n.11. Finally, petitioner discovered that Smith had lied about the publication in which she had allegedly identified Monroe as the woman to whom she sold the gun. *See id.* at 295 n.10. Instead of seeing petitioner in *People*, Smith saw her picture in a newspaper while Smith was awaiting sentencing. *Id.* Also, the detective used the very same newspaper picture when he officially asked Smith to identify petitioner. *Id.*

140. Judge King wrote: "[I]t is difficult to ascertain whether the suppression of the Habeas Evidence resulted from bad faith, sharp practice, negligence, or inadvertence. While we are necessarily troubled by the prosecution's failure to satisfy its disclosure obligations, we need not decide whether that failure was attributable to bad faith." *Id.* at 316 n.61.

141. Valdez v. Cockrell, 274 F.3d 941, 945 (5th Cir. 2001) (quoting Valdez v. Johnson, 93 F. Supp. 2d 769, 777 (S.D. Tex. 1999)).

142. *See Monroe*, 323 F.3d at 298-99 & n.18; *Valdez*, 274 F.3d at 945.

143. *See Monroe*, 323 F.3d at 298.

III. ARGUMENT FOR A DE NOVO REVIEW FOR ALL NEW EVIDENCE THAT IS MATERIAL TO PETITIONER'S CLAIM

The above analysis reveals that de novo review is appropriate for all "new evidence," regardless of when it first appears during the proceedings, provided that the evidence is material to petitioner's claim. Furthermore, fundamental fairness and judicial efficiency are best served by a consistent standard of review in this area.

Fundamental fairness requires the application of de novo review for *all* material "new evidence." This is evident in the fact that, based on the methods by which the federal courts currently apply their standards of review to state court dispositions of habeas claims with undeveloped factual records, petitioners who allege *Brady* violations are more likely to succeed than those who allege other constitutional claims, such as *Strickland* claims.[144] Again, the Second, Fourth, Sixth, and Tenth Circuits have all embraced de novo style reviews for *Brady* evidence uncovered during the federal proceeding.[145] *Brady* evidence is particularly prone to late disclosure, as suppression is a key element to the claim.[146] Furthermore, the prosecution has a duty to disclose both "impeachment material and exculpatory evidence ... includ[ing] material that is 'known only to police investigators.'"[147] If petitioner is persistent in her disclosure requests, there is a strong possibility that she will unearth more information later in the process. Of course, this is not to say the standard of review is easy to satisfy, as petitioner must prove not only that the evidence was favorable to her but also that the prosecution suppressed the evidence and that the evidence more than likely would have resulted in a different outcome at trial.[148] If

144. Other commonly alleged constitutional violations include "improper judicial bias ... [and] problems with the composition of the jury pool." Flood, *supra* note 27, at 642.

145. *See supra* note 133 and accompanying text.

146. Again, *Brady* evidence is essentially any evidence helpful to the defendant's case, regardless of whether the prosecution intended to suppress it. *See* Brady v. Maryland, 373 U.S. 83, 85 (1963).

147. *Monroe*, 323 F.3d at 299 (citing Kyles v. Whitley, 514 U.S. 419, 438 (1995)). *Kyles* also imposes a duty upon the prosecution to find out what police investigators know that the prosecutor himself does not know. *See Kyles*, 514 U.S. at 438.

148. *See Monroe*, 323 F.3d at 299-300 (describing the three-part *Brady* test as defined in *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

a petitioner can show either good cause to obtain discovery or diligence to obtain an evidentiary hearing, and if she can demonstrate that the *Brady* evidence is material, then she has a good chance of receiving a de novo review of evidence in four circuits.[149] Such a review is justified in these cases, because no previous court has weighed the effect of the evidence on petitioner's claim.

In contrast, as *Valdez* and *Bryan* illustrate, an ineffective assistance of counsel claim is less likely to involve truly "new evidence" uncovered for the first time during a federal proceeding. Certainly, defense counsel does not suppress evidence from his own client; rather, petitioners, particularly in capital cases, most often accuse trial counsel of making a tactical error in failing either to investigate petitioner's background or to present to the jury mitigating evidence regarding petitioner's background.[150] While the *Brady* framework is inherently suspicious of the prosecution by imposing the duty to turn over evidence, a presumption of effectiveness in favor of counsel is inherent within the *Strickland* framework, which makes uncovering new facts even more difficult under the deferential § 2254(d)(1) review.[151] When cases like *Valdez* or *Bryan* arise, and evidence is lost by, or not presented at all to, a state court, the federal court will often grant an evidentiary hearing. Depending upon the circuit in which petitioner brings her claim, a court may or may not treat the evidence she develops on par with *Brady* evidence, as the *Strickland* evidence is not truly "new." Yet such a distinction between "new evidence" and evidence the state court has not considered is illogical. *Brady* evidence always exists; it simply has not come before any court until it surfaces during the federal proceeding. The better argument is that if the state

149. The standard this Note espouses is more than a "scintilla" of evidence. As with Monroe's case, the more compelling evidence a petitioner can uncover during the federal proceeding, the better the chance of success.

150. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 522-23 (2003) (explaining that trial counsel did not prepare a social history for defendant despite the State of Maryland's provision of funds for such preparation); Bryan v. Mullin, 335 F.3d 1207, 1212 (10th Cir. 2003) (alleging counsel did not present mitigating evidence of petitioner's organic brain disease); Valdez v. Cockrell, 274 F.3d 941, 943 (5th Cir. 2001) (complaining counsel neither investigated petitioner's retardation and background of abuse nor presented evidence of his good conduct in prison).

151. The *Strickland* court warned: "[J]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence ...." Strickland v. Washington, 466 U.S. 668, 689 (1984).

factfinder has not considered the evidence, then the federal court should classify that "new evidence" as having surfaced during the federal proceeding.[152]

Judicial efficiency also requires that all "new evidence" be evaluated de novo. Petitioner Valdez made the most compelling argument in terms of judicial efficiency. If a federal court implements a federal proceeding to cure the problem of an undeveloped factual record but then defers to the state court's legal conclusions based on an undeveloped record, the federal proceeding is rendered "impotent" and time and money are wasted.[153] Though *Bryan*'s bright-line framework—that de novo review is required every time a petitioner is denied a full and fair hearing—is appealing, *Monroe*'s "scintilla" standard is perhaps more reconcilable with *Terry Williams*' prohibition on independent reviews[154] and *Michael Williams*' emphasis on petitioner's "reasonable attempt" to develop her claim in state court.[155] In conclusion, provided that the evidence developed during the federal proceeding is material to petitioner's claim, the federal court should review that claim de novo as a matter of both fundamental fairness and judicial efficiency.

CONCLUSION

Supreme Court precedent regarding AEDPA is far from clear. While a variety of approaches to deference might well be desirable when state courts have adjudicated claims based on complete factual records, the absence of a uniform standard of review as to undeveloped claims results in widely different outcomes for petitioners who, through no fault of their own, were unable to develop fully their claims in state court.

Several circuits are comfortable with viewing evidence that surfaces for the first time during the federal proceedings as "new" and, thus, with reviewing the underlying claim de novo. However,

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152. *See, e.g.*, *Monroe*, 323 F.3d at 299.

153. *Valdez*, 274 F.3d at 951-52.

154. The *Terry Williams* Court did not address "new evidence," because the petitioner was able to develop his claim in state court pursuant to a state evidentiary hearing. Williams v. Taylor, 529 U.S. 362, 370 (2000). Also, unlike the *Valdez* case, the same judge handled Williams' trial, sentencing, and state habeas hearing. *See id.*

155. Williams v. Taylor, 529 U.S. 420, 435 (2000).

when evidence appears during the state court proceedings but the state court does not consider that evidence, circuits disagree as to whether deference should operate. Treating only evidence that surfaces for the first time during the federal proceedings as "new" creates unfair results. This practice tends to favor *Brady*-type claims, a major element of which is suppressed evidence. Claims that rarely implicate "new evidence," such as *Strickland* ineffective assistance of counsel claims, are rarely afforded a de novo review if the factual basis for those claims went undeveloped at the state court level. Furthermore, federal courts waste their resources in remedying undeveloped factual records if they must then defer to the state court's legal conclusions. The best solution to this problem is for federal courts to determine the materiality of the new evidence to petitioner's claim. Upon a finding that the evidence would have affected the outcome of petitioner's trial, the court should review the state court's legal conclusions de novo.

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