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NOTE

REDEFINING THE RELATIONSHIP BETWEEN *STONE* AND AEDPA

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This Note challenges the current conception of the availability of federal habeas corpus relief for state prisoners claiming a violation of the Fourth Amendment. Since the Supreme Court's 1973 decision in Stone v. Powell*, federal courts have analyzed Fourth Amendment violations under a different legal regime than that used for other constitutional violations challenged on habeas corpus. This has persisted despite passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which amended the federal habeas corpus statute for state prisoners, 28 U.S.C. § 2254. Federal courts have largely held that AEDPA has not changed the relationship between* Stone*'s holding and Section 2254. This Note argues that the current conception of federal habeas corpus review of Fourth Amendment claims is fundamentally inconsistent and asserts that the AEDPA standard should be applied to Fourth Amendment claims brought by state prisoners.*

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I. INTRODUCTION

On June 17, 2013, the Baton Rouge Police Department received an unconfirmed anonymous tip that Cedric Spears was trafficking cocaine and in possession of a firearm in his home.[1] Two police officers obtained Spears's criminal history, confirmed only that he was a convicted felon, and, without a warrant, proceeded to his apartment complex.[2] The officers waited in the parking lot until just before midnight to approach the apartment, when, coincidentally, Spears opened the door.[3] The officers spotted a gun in his apartment.[4] After officers gathered Spears and the apartment's other occupants into a central location and patted them down, Spears was handcuffed and read his rights.[5]

Spears admitted to owning the gun.[6] On November 4, 2013, he was convicted on one count of felon in possession of a firearm and was sentenced to eighteen years of hard labor without benefit or probation,

[1] Spears v. Vannoy (Spears I), Civ. No. 15-495-SDD-RLB, 2018 WL 2423017, *1 (M.D. La. Apr. 30, 2018).
[2] Id.
[3] Id.
[4] Id.
[5] Id.
[6] Id.

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parole, or suspension of sentence.[7] Spears filed a *pro se* appeal to the Louisiana Court of Appeal for the First Circuit, arguing that the trial court wrongly denied his motion to suppress the evidence resulting from the illegal warrantless search.[8] His appeal was denied.[9] He then petitioned for supervisory review in the Louisiana Supreme Court.[10] His petition was denied.[11] Spears then filed a *pro se* petition for federal habeas corpus relief in the Middle District of Louisiana.[12] This petition was denied, as well.[13]

In denying Spears's habeas petition, the federal court simply stated that Fourth Amendment violations are "generally not cognizable on federal habeas review."[14] This categorical denial is based on the Supreme Court's 1976 decision in *Stone v. Powell*,[15] which held that a state prisoner may not be granted federal habeas corpus relief based on a Fourth Amendment violation "where the State has provided an opportunity for full and fair litigation of [that] Fourth Amendment claim."[16] Despite Spears's claim of a "defective warrant"—or lack of a warrant—the court held that the Fifth Circuit only requires the trial court to provide "an opportunity" to litigate one's claim, nothing further.[17] A mere opportunity to litigate a Fourth Amendment claim in state court is all that is required for a federal court to refuse to even consider a state prisoner's habeas petition.[18] In Spears's case, the federal district court went on to deny him a certificate of appealability, terminating his one remaining option.[19] Despite no search warrant and arguably no probable cause to approach the house, Cedric Spears was searched, tried, convicted, and sentenced to eighteen years in prison.[20] And the federal court would not even entertain his petition for habeas corpus.

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[7] Id.
[8] Id.
[9] Id.
[10] Id.
[11] Id.
[12] Id.
[13] Spears v. Vannoy (Spears II), Civ. No. 15-495-SDD-RLB, 2018 WL 2422749, *1 (M.D. La. May 29, 2018) (adopting the magistrate judge's report and recommendation).
[14] *Spears I*, 2018 WL 2423017, at *2.
[15] 428 U.S. 465 (1976).
[16] Id. at 482, 494.
[17] *Spears I*, 2018 WL 2423017, at *2–3.
[18] Id. at *2 (citing Carver v. Alabama, 577 F.2d 1188, 1192 (5th Cir. 1978)).
[19] Spears v. Vannoy (Spears II), Civ. No. 15-495-SDD-RLB, 2018 WL 2422749, *1 (M.D. La. May 29, 2018).
[20] *Spears I*, 2018 WL 2423017, at *1, *3–4.

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As displayed in Spears's case, federal courts currently hold *Stone v. Powell* to be controlling when state prisoners allege a Fourth Amendment violation on habeas. All other constitutional violations, on the other hand, are adjudicated under a different standard provided by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[21] The two regimes have at least one primary difference. While *Stone* restricts the cognizance of such habeas petitions, AEDPA at least allows federal courts to review the petitioner's claim. Fourth Amendment violations are the only constitutional violations not litigated under the AEDPA standard. Therefore, if Spears was alleging a due process violation or bringing a claim for ineffective assistance of counsel, his case would at least have been heard by a federal court rather than dismissed as not cognizable.

This Note argues that the current approach adopted by the federal courts is incorrect in light of AEDPA. Instead of looking to *Stone* for guidance, federal courts should adopt the AEDPA standard for habeas review in the context of alleged Fourth Amendment violations. This presents a rare opportunity to right the current course of the federal courts. With this approach, federal courts would treat Fourth Amendment violations the same as every other constitutional violation with respect to federal habeas petitions, instead of relegating Fourth Amendment claims to a lower tier.

Adopting the AEDPA standard will provide four primary benefits. First, this change will simplify the process for state prisoners. This is especially important for those representing themselves *pro se*, like Cedric Spears. Holding alleged Fourth Amendment violations to a different standard than all other constitutional harms only further complicates an already complex area of law that affects many criminal defendants.[22] Second, it would resolve a split among the federal circuits as to how to interpret the meaning of the Court's language in *Stone*, and thereby create a uniform, national standard of review. A uniform, national standard is vitally important because where one's claim is brought should not

[21] Pub. L. No. 104-132, 110 Stat. 1218. AEDPA amended 28 U.S.C. § 2254, the sole statute governing habeas corpus review for state prisoners; thus, "the AEDPA standard" refers to the standard of review enacted as a result of the passage of AEDPA and is codified at 28 U.S.C. § 2254(d).

[22] According to a study funded by the United States Department of Justice, state prisoners file about 16,000 to 18,000 habeas petitions every year. Unfortunately, a breakdown by constitutional violation is not available. See Nancy J. King et al., Habeas Corpus Litigation in United States District Courts: An Empirical Study, 2000–2006, at ii, iv (2013), https://doi.org/10.3886/ICPSR21200.v1 [https://perma.cc/Z7RS-AECM].

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determine whether that state prisoner has access to federal habeas review. Third, adopting the AEDPA standard will allow state prisoners to actually have their federal habeas petitions reviewed, rather than denied without consideration, as Spears's was. As a matter of procedural justice, all habeas petitioners deserve the right to be heard, regardless of the nature of their claim. Litigants, especially *pro se* litigants, can use this Note as a roadmap to challenge the current legal regime and, hopefully, have their petitions heard by the federal courts.

Finally, adopting this approach will allow any future statutory reform to current habeas corpus law to include claims alleging violations of the Fourth Amendment, rather than continue to leave them behind. Fourth Amendment violations are treated differently than all other constitutional violations. While all other constitutional violations are governed by AEDPA, Fourth Amendment violations are treated as outside the statutory scheme. Adopting this approach, however, brings Fourth Amendment violations back into the fold of AEDPA alongside all other constitutional violations. If federal courts continue to treat Fourth Amendment violations as outside of the AEDPA statutory scheme,[23] then future habeas reform will not affect habeas petitions alleging Fourth Amendment violations. Thus, if the language of AEDPA is amended, under this proposed approach, the statutory reform would not further widen the gap between how Fourth Amendment claims are treated and how all other constitutional claims are treated.

As explained below, the two regimes—review under AEDPA and review under *Stone*—currently produce similar outcomes;[24] however, future changes to the AEDPA standard could yield different outcomes for Fourth Amendment violations and all other constitutional violations. Adopting the AEDPA standard will have truly tangible benefits to defendants, practitioners, and judges even if it may not have an enormous impact on the number of federal habeas petitions ultimately granted for state prisoners.[25] As one commentator has put it, habeas corpus has played an "important role . . . as a postconviction remedy" and has the "unique nature and suitability . . . to bring about transformative change."[26]

[23] See infra Part III.

[24] See infra Section II.C, Part III.

[25] See infra Part III.

[26] LeRoy Pernell, Racial Justice and Federal Habeas Corpus as Postconviction Relief from State Convictions, 69 Mercer L. Rev. 453, 453 (2018).

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Surprisingly, despite the significant academic attention dedicated to federal habeas corpus, little attention has been focused on the collateral review of alleged Fourth Amendment violations. Much of the post-AEDPA academic literature identifies and defines the standard set forth in AEDPA,[27] further defines the standard set forth in *Stone* independent from AEDPA, [28] or argues for an overhaul of the current federal habeas system altogether.[29] Some of the nation's leading federal courts textbooks do not even specifically address this issue.[30]

Only one scholar has touched on the relationship between *Stone* and AEDPA. In a 2006 article, Professor Steven Semeraro argued that the historical changes in the treatment of the exclusionary rule, which is the primary vehicle by which courts remedy Fourth Amendment violations, coupled with the changes to habeas practice generally, require that *Stone* be overruled.[31] Professor Semeraro's argument is primarily focused on *Stone*'s deficiencies in modern litigation and the reasons that decision should be overturned rather than, as this Note argues, the reasons why AEDPA specifically should replace it.[32] This Note examines the various possible solutions to reconciling the language of *Stone* with the text of AEDPA and argues for a clear, simple, statutory text-based rule for the federal courts to follow.

Part II of this Note reviews the legal history of the availability of habeas corpus relief for violations of the Fourth Amendment. It summarizes the

[27] See e.g., John H. Blume, AEDPA: The "Hype" and The "Bite," 91 Cornell L. Rev. 259, 272–73 (2006); Evan Tsen Lee, Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?, 56 Hastings L.J. 283, 283 (2004); Adam N. Steinman, Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After *Williams v. Taylor*?, 2001 Wis. L. Rev. 1493, 1495.

[28] See e.g., Justin F. Marceau, Challenging the Habeas Process Rather Than the Result, 69 Wash. & Lee L. Rev. 85, 141 (2012); Justin F. Marceau, Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications, 62 Hastings L.J. 1, 17, 26–27 (2010).

[29] See e.g., Joseph L. Hoffmann & Nancy J. King, Rethinking the Federal Role in State Criminal Justice, 84 N.Y.U. L. Rev. 791, 797 (2009).

[30] See, e.g., Brandon L. Garrett & Lee Kovarsky, Federal Habeas Corpus: Executive Detention and Post-Conviction Litigation 141–50 (2013) (failing to discuss the issue); Peter W. Low et al., Federal Courts and the Law of Federal-State Relations 966 (9th ed. 2018) (speculating only that AEDPA "may have introduced a subtle but not fundamental change in the meaning of *Stone v. Powell*").

[31] Steven Semeraro, Enforcing Fourth Amendment Rights Through Federal Habeas Corpus, 58 Rutgers L. Rev. 983, 1016–18 (2006). Professor Semeraro also notes that "there has been remarkably little historical analysis directed at the judicial treatment of collateral search-and-seizure claims." Id. at 984–85.

[32] See id. at 986.

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evolution of federal habeas corpus law from the Supreme Court's landmark decision in *Brown v. Allen*,[33] to its Fourth Amendment carve out in *Stone v. Powell*, to the enactment of AEDPA. Part III describes the current approach taken to federal habeas petitions brought by state prisoners alleging a violation of the Fourth Amendment and why there is a need for change. Part IV analyzes two possible solutions to reconciling the standard set forth by AEDPA with the *Stone* decision. Finally, Part V proposes that federal district courts adopt a third solution and hold that the AEDPA standard replace *Stone*'s framework with respect to Fourth Amendment claims going forward.

II. BACKGROUND: FROM *BROWN* TO AEDPA

In order to understand the issue at hand, it is important to understand how federal habeas corpus law has evolved since it was reignited in 1953.

A. The Brown *Decision*

Modern federal habeas corpus relief for state prisoners seeking to relitigate their state convictions in federal court began in 1953 with the Supreme Court's decision in *Brown v. Allen*.[34] In *Brown*, the Court held that state court decisions on the merits of federal constitutional questions raised in defense of a state criminal prosecution could be reviewable *de novo* in federal court.[35] After *Brown*, a federal court would be required,

[33] 344 U.S. 443 (1953).

[34] Habeas corpus is derived from the English common law and is enshrined in the United States Constitution. The Constitution protects against the suspension of "[t]he Privilege of the Writ of Habeas Corpus." U.S. Const., art. I, § 9, cl. 2. Congress first conferred statutory authority on federal courts to grant writs of habeas corpus under the Judiciary Act of 1789—though only for federal prisoners. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 97–100 (1807). In 1867, Congress enacted the Habeas Corpus Act, which authorized federal courts to issue writs of habeas corpus to prisoners in custody in violation of the Constitution or laws or treaties of the United States. See Habeas Corpus Act of Feb. 5, 1867, ch. 27, 14 Stat. 385. The original understanding was that the writ of habeas corpus was not available to challenge sentences imposed by a court. Rather, its historic purpose was to relieve persons who were detained by executive authorities without judicial trial. In *Frank v. Mangum*, 237 U.S. 309 (1915), the Supreme Court opened the door (if only slightly) for federal judges to entertain collateral attacks on state court criminal judgments. *Frank* held that the state must provide a corrective process for hearing a federal court claim raised in state court. Id. at 325–28, 335. Habeas corpus relief has since evolved to become "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." Harris v. Nelson, 394 U.S. 286, 290–91 (1969).

[35] *Brown*, 344 U.S. at 546 (Jackson, J., concurring in the judgment). Justice Jackson's concurrence characterized the Court's decision as establishing "*de novo*" review, id., and "that

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for example, to determine for itself whether a confession used to obtain a state conviction was obtained in violation of the federal constitution.[36] Under *Brown*, a federal court would have reviewed Cedric Spears's Fourth Amendment claim *de novo*.

B. Stone v. Powell *Restricts* Brown *for Fourth Amendment Challenges*

The Court held in 1976, however, that Fourth Amendment claims were to be treated differently. In *Stone v. Powell*, the Supreme Court was asked whether federal courts should review habeas petitions—as it had begun to do since *Brown*—based on the admission of illegal evidence afoul of the exclusionary rule, which was incorporated against the states in *Mapp v. Ohio*[37] in 1963. *Stone* arose after respondent Lloyd Powell's conviction for murder in June 1968 in a California state court.[38] The murder was the result of an altercation between Powell and the manager of a liquor store in San Bernardino, California.[39] Shortly after the murder occurred, an

understanding was confirmed by Justice Frankfurter's separate opinion in *Brown*," which reflected the view of the majority of the Justices on habeas review for state convicts. Larry W. Yackle, Federal Courts: Habeas Corpus 101 (2d ed. 2010). See also Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (noting that since *Brown*, "it has been the rule that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, *without being bound* by the determination on the merits of that claim reached in the state proceedings") (emphasis added)). The decision in *Brown* has not been warmly regarded by all. Some commentators, including the late Justice Antonin Scalia, have argued that the habeas statutes should never have been interpreted to open the federal courts to prisoners challenging their state criminal convictions collaterally. See, e.g., McQuiggin v. Perkins, 569 U.S. 383, 411 (2013) (Scalia, J., dissenting) (referring to *Brown* as a "Faustian bargain").

[36] See, e.g., Pemberton v. Collins, 991 F.2d 1218, 1223 (5th Cir. 1993) (reviewing a habeas petition alleging an involuntary confession); Collazo v. Estelle, 940 F.2d 411, 413 (9th Cir. 1991) (en banc) (same).

[37] 367 U.S. 643, 657 (1961). In *Mapp*, the Supreme Court held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." Id. at 655. In *Mapp*, the Court thus extended the federal exclusionary rule—that is, that the government cannot use evidence obtained in violation of the Constitution—to the states. The federal exclusionary rule is essentially derived from the Court's rulings in *Boyd v. United States*, 116 U.S. 616, 638 (1886) (holding that when the government invades a person's privacy in violation of the Fourth and Fifth Amendments to the Constitution, any evidence obtained by that invasion is unconstitutional) and *Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that evidence derived from an unreasonable search and seizure was inadmissible in federal courts, because excluding such evidence was the only way to vindicate the rights guaranteed by the Fourth Amendment).

[38] Stone v. Powell, 428 U.S. 465, 469 (1976).

[39] Id. at 469.

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officer arrested Powell for violating an unrelated vagrancy ordinance.[40] While searching Powell in relation to the vagrancy charge, the arresting officer discovered what was later determined to be the murder weapon from the liquor store altercation.[41] At trial, Powell attempted to exclude the officer's testimony regarding the weapon's discovery on the ground that the vagrancy ordinance was unconstitutionally vague and that the weapon was therefore found as a result of an illegal search.[42] When the California state courts denied this claim, Powell renewed his constitutional argument in a petition for habeas corpus in federal district court.[43] If *Brown* applied, the federal district court would have decided the claim *de novo* and would have granted habeas relief if the Constitution was violated. Instead, the district court denied Powell's petition, concluding that "the deterrent purpose of the exclusionary rule does not require that it be applied to bar admission of the fruits of a search incident to an otherwise valid arrest."[44] The Ninth Circuit reversed, holding that the vagrancy ordinance was unconstitutional and thus the evidence obtained from the search should have been excluded.[45]

In reversing the Ninth Circuit's grant of habeas corpus, the Supreme Court held that federal district courts should not hear habeas corpus petitions where a state prisoner had previously been afforded an "opportunity for full and fair litigation" of the Fourth Amendment claim at the state level, a level of deference higher than the *de novo* rule from *Brown*.[46] This severely limited the scope of review for claims of alleged Fourth Amendment violations brought under habeas corpus. To reach its conclusion, the Court held that the exclusionary rule is not an absolute right.[47] To do so, the Court relied chiefly on its previous Fourth

[40] Id.

[41] Id.

[42] Id. at 470.

[43] Id.

[44] Id.

[45] Id. at 471. The Supreme Court paraphrased the Ninth Circuit's rationale as: "[A]lthough the exclusion of the evidence would serve no deterrent purpose with regard to police officers who were enforcing statutes in good faith, exclusion would serve the public interest by deterring legislators from enacting unconstitutional statutes." Id.

[46] Id. at 469.

[47] Id. at 488. In concluding that "the policies behind the exclusionary rule are not absolute" and that "[p]ost-*Mapp* decisions have established that the rule is not a personal constitutional right," the Court looked to its own treatment of *Mapp*'s primary rationale to provide the necessary incentive to state officials to refrain from unreasonable searches and seizures. Id. at 486, 488; see also Mapp v. Ohio, 367 U.S. 643, 656 (1961) ("[T]he purpose of the exclusionary rule 'is to deter . . . .'") (citation omitted). Relying on this rationale, the Court had limited its

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Amendment decisions and concluded that the primary purpose of the exclusionary rule, namely, deterrence of police misconduct, was not furthered by permitting enforcement of the rule on collateral review.[48] In a footnote, the Court summarized its holding:

> In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation.[49]

After *Stone*, all non-Fourth Amendment federal constitutional challenges resolved on the merits in state court could be relitigated on federal habeas corpus review regardless of the adequacy of the state proceeding. Fourth Amendment challenges, however, could be relitigated on a federal habeas corpus petition only if "the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review."[50]

Stone was a monumental change in federal habeas law. Prior to *Stone*, Fourth Amendment claims, like other alleged constitutional violations, were assessed under the same standard mandated by *Brown*: federal *de novo* review of the alleged violation. After *Stone*, federal courts would

application where that purpose was not served. See, e.g., United States v. Calandra, 414 U.S. 338, 354 (1974) (refusing to extend the exclusionary rule to grand jury proceedings); Brown v. United States, 411 U.S. 223, 229 (1973); Alderman v. United States, 394 U.S. 165, 174 (1969) (limiting standing to invoke the exclusionary rule to instances where the illegally obtained evidence is used against the victim of the illegal search); Linkletter v. Walker, 381 U.S. 618, 637–38 (1965) (limiting the exclusionary rule's retroactive availability); Walder v. United States, 347 U.S. 62, 65 (1954) (refusing to extend the exclusionary rule to the use of illegally obtained evidence used for purposes of impeaching a defendant).

[48] *Stone*, 428 U.S. at 493 ("The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal."). Further, the majority postulated that the long recognized cost of the exclusionary rule was its propensity to "deflect[] the truthfinding process and often free[] the guilty." Id. at 489–91. Thus, in conducting a cost-benefit analysis regarding the extension of the exclusionary rule, the Court rationalized that the additional benefit of the exclusionary rule on collateral review is "small in relation to the costs." Id. at 493.

[49] Id. at 495 n.37.

[50] Id.

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not review alleged Fourth Amendment claims *de novo*. Instead, whenever a state prisoner alleged a violation of the Fourth Amendment, a federal court would not review the claim itself, but would review whether the state court provided the petitioner with a full and fair opportunity to litigate that claim in state court, which effectively created a strong deferential standard to state court decisions. As further developed in Part III, *Stone* fundamentally altered the nature of federal habeas claims brought by state prisoners alleging Fourth Amendment claims.

C. AEDPA Restricts Brown

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) added further limitations on the availability of federal habeas corpus relief for state prisoners. Prior to the passage of AEDPA, which is codified at 28 U.S.C. § 2254, there was no mandate—statutory or otherwise—for federal courts to afford deference to a state court's interpretation or application of federal law when reviewing habeas petitions. Federal courts reviewed non-Fourth Amendment allegations under the *de novo* standard on habeas review. However, with the passage of AEDPA, Congress provided that:

> An application for a 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 was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted *in a decision that was contrary to*, or *involved an unreasonable application of*, clearly established Federal law, as determined by the Supreme Court of the United States[, or] resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[51]

This language essentially required federal habeas courts to defer to the state court's reasonable application of federal law even if it conflicted with the federal court's "independent judgment."[52] AEDPA thus significantly limited the Court's holding in *Brown* by restricting federal habeas review to instances where the state decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," or where the state decision "was based on an unreasonable determination

[51] 28 U.S.C. § 2254(d) (2018) (emphasis added).
[52] Williams v. Taylor, 529 U.S. 362, 411 (2000) (interpreting the language of AEDPA).

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of the facts in light of the evidence."[53] The central question, and the subject of this Note, is what impact AEDPA has—or should have—on the Court's decision in *Stone*.

It is important to note that some form of what is currently codified at 28 U.S.C. § 2254 has been federal law since 1867.[54] AEDPA, which was enacted in 1996, amended 28 U.S.C. § 2254(d). This changed the standard of review for federal habeas petitions brought by state prisoners from *de novo* to its current language. The current language of Section 2254(d) is referred to here as the "AEDPA standard." The jurisdictional grant under the statute, 28 U.S.C. § 2254(a), was left unchanged by the enactment of AEDPA.

The Supreme Court has clarified Section 2254(d)'s post-AEDPA language. In *Williams v. Taylor*,[55] the Court stated that the "contrary to" clause is violated when "the state court's decision [is] substantially different from the relevant precedent of this Court" or if "the state court applies a rule that contradicts the governing law set forth in our cases."[56] Additionally, the Court elaborated the meaning of "unreasonable application," holding that a state court decision involves an unreasonable application of Supreme Court precedent "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply."[57] Finally, the Court ruled that "clearly established Federal law, as determined by the Supreme Court of the United States," refers only to the Court's holdings, rather than mere dicta, at the time of the state-court decision.[58]

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[53] § 2254(d).

[54] See Habeas Corpus Act of Feb. 5, 1867, ch. 27, 14 Stat. 385.

[55] 529 U.S. 362 (2000).

[56] Id. at 405.

[57] Id. at 407. The Court further noted that "an *unreasonable* application is different from an *incorrect* application of law." Id. at 410. Eleven years after *Williams*, the Supreme Court held that "unreasonable application" requires a showing "that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011). The Supreme Court also held that § 2254(d)(1) "does not require state courts to *extend*" Supreme Court precedent; rather, just that they apply it reasonably. White v. Woodall, 572 U.S. 415, 426 (2014).

[58] *Williams*, 529 U.S. at 412.

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Thus, a state prisoner satisfies Section 2254(d) if he or she can prove that the state court's decision was different from or contradictory to Supreme Court case law (holdings, not dicta), or if the state court knew the correct law but applied it unreasonably to the facts in the petitioner's case. After AEDPA, the inquiry under Section 2554 is not whether the state court decided correctly—as it was in *Brown*—but rather whether the state court got it unreasonably wrong. The Supreme Court has equated this to a preservation of a long-understood deference to the state's "good-faith attempts to honor constitutional rights."[59] Thus, for a petition for a writ of habeas corpus to be granted, Section 2254(d) effectively requires a showing that the state court did not act in good faith in applying Supreme Court law. If AEDPA were applied in a Fourth Amendment case, the question would be whether the state court unreasonably applied the Supreme Court's Fourth Amendment precedent, or whether, considering applicable Supreme Court precedents, the state court reviewed the defendant's Fourth Amendment claim in good faith.

One more preliminary point must be made. All state prisoners who wish to receive federal habeas relief must first invoke a federal district court's jurisdiction pursuant to 28 U.S.C. § 2254(a). To do so, they need to show they are in custody in violation of the Constitution.[60] Satisfying Section 2554(a) allows the federal court to review the claim under Section 2254(d), the standard of review for habeas petitions. Thus, to be eligible for federal habeas relief, a state prisoner must assert a federal constitutional right, the denial of which resulted in an unconstitutional conviction in state court.[61] If the petitioner fails to satisfy Section 2254(a), the petitioner is, at the outset, not entitled to habeas relief. It is, therefore,

[59] *Harrington*, 562 U.S. at 103 (quoting Calderon v. Thompson, 523 U.S. 538, 555–56 (1998)). Other commentators have also characterized § 2254(d) as a good faith standard. See also Blume, supra note 27, at 293 ("AEDPA's purpose was to give the state courts the benefit of the doubt if and when they make a good faith effort to identify and apply the correct constitutional doctrine articulated by the Supreme Court."); William J. Meade, Comment, The Demise of De Novo Review in Federal Habeas Corpus Practice, 85 Mass. L. Rev. 127, 131 (2001) ("*Williams* [*v. Taylor*] recognizes Congress' intent to preserve reasonable, good faith state court judgments that do not directly contradict Supreme Court precedent.").

[60] 28 U.S.C. § 2254(a) (2018) (permitting federal habeas only if the petitioner is "in custody pursuant to the judgment of a State court" and if the custody is "in violation of the Constitution or laws or treaties of the United States"); see also Larry W. Yackle, Federal Courts 429 (1999) (describing how "[c]ustody is a jurisdictional prerequisite . . . to the function of habeas corpus").

[61] This Note is only concerned with federal habeas petitions alleging the violation of a constitutional right, not violations of other federal laws or federal treaties.

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the nature of the claim that satisfies the habeas jurisdiction of the federal district court.

After *Stone*, there are two approaches courts can plausibly take to interpret Section 2254(a) in the Fourth Amendment context: by assertion of a violation of the *Mapp* exclusionary rule under the Fourth Amendment, or by assertion of a violation of *Stone*'s requirement that state courts provide defendants with a full and fair opportunity to litigate their Fourth Amendment claims. As developed below, the relationship between AEDPA and *Stone* could well turn on which of these claims would support habeas jurisdiction in a federal court.

III. THE CURRENT APPROACH TAKEN BY THE FEDERAL COURTS

Currently, most federal courts appear to hold that Fourth Amendment claims establish jurisdiction under 28 U.S.C. § 2254(a), but *Stone* redefined the federal courts' standard of review. Thus, federal circuits ignore the question of how to establish jurisdiction to award federal habeas relief under Section 2254, and simply apply the *Stone* standard without reference to AEDPA. Essentially, federal courts take *Stone*'s continued applicability as given without paying any mind to the basis on which they have jurisdiction (presumably under Section 2254(a)) but without mention of AEDPA or the statute at all. For example, in *Boyd v. Mintz*, the Third Circuit simply bypassed any jurisdictional question and instead merely held that the court "may not consider [F]ourth [A]mendment challenges in the habeas corpus setting 'where the State has provided an opportunity for full and fair litigation' of the [F]ourth [A]mendment claim."[62]

This is not to say the federal courts are deliberately manipulating their jurisdiction to deny federal habeas petitions. Instead, it appears that federal courts are so familiar with the holding of *Stone* (and their subsequent promulgation of that holding) that they have not even considered the tricky jurisdictional issue presented here. Since courts do not usually mention AEDPA, the reason why they do this is difficult to say with certainty. This Note posits that most federal courts believe that their jurisdiction arises from the underlying Fourth Amendment violation, but that they are unable to grant habeas relief unless the *Stone* standard is satisfied. However, as is explained below, this cannot be correct.

[62] 631 F.2d 247, 249 (3d Cir. 1980) (citing *Stone*, 428 U.S. at 494).

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A. Two Interpretations of "Opportunity for Full and Fair Litigation"

The federal circuits thus generally focus their attention on defining *Stone*'s language. In *Stone*, the Supreme Court did not elaborate the meaning of the phrase "an opportunity for full and fair litigation," and lower courts have interpreted the phrase differently.[63] In 1982, when the Supreme Court was asked to clarify the phrase's meaning, the petition for certiorari was denied over the objection of at least one Justice.[64] Thus, since *Stone*, two general categories of interpretations have emerged.[65]

1. Broad Interpretation

The minority interpretation of "an opportunity for full and fair litigation" concludes that the requirement means more than a mere fair procedural opportunity to raise the Fourth Amendment issue. The words are interpreted to require a reasonable and fair application of the governing Fourth Amendment law. This interpretation—which stresses "full and fair" rather than "opportunity"—has been adopted by the Tenth Circuit. In *Gamble v. Oklahoma*,[66] the court held that an "'[o]pportunity for full and fair consideration' . . . contemplates recognition and at least colorable application of the correct Fourth Amendment constitutional standards."[67] Thus, a federal court "is not precluded from considering Fourth Amendment claims in habeas corpus proceedings where the state court wilfully refuses to apply the correct and controlling constitutional

[63] The lack of direction from the Supreme Court comes in part from Justice Powell's variance in language in his opinion in *Stone*. For instance, Justice Powell refers to "a fair opportunity to raise *and have adjudicated the question*," the opportunity for "full and fair *consideration of* . . . [the] claim," and an opportunity for "full and fair litigation of [the] claim *at trial and on direct review*." *Stone*, 428 U.S. at 480, 489, 494–95 n.37 (emphases added).

[64] Shoemaker v. Riley, 459 U.S. 948, 948–49 (1982) (White, J., dissenting from denial of certiorari) ("In *Stone v. Powell* . . . the Court held that 'where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.' . . . Since then, the Courts of Appeals have divided as to the meaning of the phrase 'an opportunity for full and fair litigation' . . . The issue is obviously important and recurring." (citations omitted)).

[65] Generalizing each circuit's interpretation of *Stone* is admittedly simplistic, as there are noticeable nuances; however, a deep dive into these variations is not necessary to the analysis. Despite there being multiple interpretations of *Stone*'s language, the practical result has remained constant through the circuits—the prisoner almost always loses.

[66] 583 F.2d 1161, 1165 (10th Cir. 1978) (allowing adjudication of a petitioner's Fourth Amendment claim because a controlling Supreme Court case was neither recognized nor applied by the state courts).

[67] Id.

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standards."[68] Additionally, the Tenth Circuit asserted that the Supreme Court's use of "litigation" and "consideration" interchangeably in *Stone* "suggests that in some instances more than procedural opportunity to raise and litigate a Fourth Amendment claim is required," because "consideration connotes the actual evaluation of a claim under the correct constitutional standard."[69] However, the Tenth Circuit will deny a petition for habeas relief if the challenge is "more akin to an attack on the merits . . . rather than a charge that the [appellate court] willfully misapplied constitutional law."[70] Thus, under this view, Fourth Amendment claims are cognizable on collateral review if the state courts did not "fairly" resolve them on the merits.[71]

The Seventh Circuit provides perhaps the broadest interpretation of *Stone*'s requirement. It has held that an "opportunity for full and fair litigation of a Fourth Amendment claim" has been satisfied when "(1) [the prisoner] clearly apprised the state court of his Fourth Amendment claim along with the factual basis for that claim, (2) the state court carefully and thoroughly analyzed the facts, and (3) the court applied the proper constitutional case law to those facts."[72] Thus, *Stone*'s requirement is not satisfied if the record indicates that "the state judges have closed their ears and minds to argument."[73] While this does not mean the Seventh Circuit will "examine whether the judge seemed to have done some quality preparation for the hearing or had a perfect understanding of the fine points of search and seizure law," it does mean that "*Stone* would not block habeas review if the mechanism was in some way a sham."[74] The court must flatly ignore correctly cited law in a petitioner's brief for

[68] Id.

[69] Id. at 1165 n.2. While no other circuit, outside perhaps the Seventh, has adopted this broad a reading of *Stone*, the Supreme Court has yet to rule on this circuit split despite being directly faced with it. *Shoemaker*, 459 U.S. at 948–49 (White, J., dissenting from denial of certiorari).

[70] Cannon v. Gibson, 259 F.3d 1253, 1264 (10th Cir. 2001).

[71] The Tenth Circuit has granted habeas relief under this interpretation of *Stone* where "a state court fails to apply the proper constitutional standard." Herrera v. LeMaster, 225 F.3d 1176, 1179 (10th Cir. 2000), rev'd on other grounds, 301 F.3d 1192 (10th Cir. 2002).

[72] Miranda v. Leibach, 394 F.3d 984, 997 (7th Cir. 2005); see also Cabrera v. Hinsley, 324 F.3d 527, 531–32 (7th Cir. 2003) (defining a similar standard); Hampton v. Wyant, 296 F.3d 560, 563–64 (7th Cir. 2002) (same); Pierson v. O'Leary, 959 F.2d 1385, 1391 (7th Cir. 1992) (same).

[73] *Hampton*, 296 F.3d at 564.

[74] *Cabrera*, 324 F.3d at 531. For instance, "*Stone* would not block habeas review if the judge had his mind closed to the necessity of a hearing, or was bribed, or decided . . . that probable cause is not required in Illinois, or was sleepwalking . . . or in some other obvious way subverted the hearing." Id.

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habeas relief to be open to a prisoner bringing a Fourth Amendment claim.[75]

The broad interpretation of the full and fair opportunity requirement is essentially a good faith standard, and has been characterized as such by the Seventh Circuit.[76] This is a near-identical standard to the inquiry required by AEDPA, just under different language.[77] If the two standards are ultimately the same—though applied at different times—there is no reason for the courts to continue to struggle with the language of *Stone*. They might as well apply the text of AEDPA, as it applies to *all* constitutional claims. This would produce a single, uniform approach across all jurisdictions, providing a real benefit to both litigants and judges.

2. Narrow Interpretation

In contrast to the Tenth and Seventh Circuits, most federal circuit courts have adopted the view that a state court's error in its Fourth Amendment analysis cannot constitute a denial of an "opportunity for a full and fair litigation."[78] Instead, in interpreting *Stone*, these circuits have emphasized the need for an "opportunity"—that is, whether the petitioner merely had an opportunity to raise the claim. This interpretation seems to mean that the only requirement is that the state procedures were open and fair, regardless of the state court's decisions on the merits or whether the prisoner took advantage of such procedures.[79]

[75] *Hampton*, 296 F.3d at 564. But see United States ex rel. Maxey v. Morris, 591 F.2d 386, 389 (7th Cir. 1979) (holding that *Stone* establishes that Fourth Amendment violations "are not subject to collateral review merely because the federal courts would decide the issue differently").

[76] *Miranda*, 394 F.3d at 1001 ("[T]he question before us is . . . whether [the Illinois Appellate Court's] finding was so gravely mistaken, in view of the record evidence, as to suggest that the Illinois Appellate Court was unwilling to engage in a *good faith* review of Miranda's Fourth Amendment claim." (emphasis added) (citing *Cabrera*, 324 F.3d at 531–32; *Hampton*, 296 F.3d at 563–64)).

[77] See Habeas Corpus Act of Feb. 5, 1867, ch. 27, 14 Stat. 385.

[78] For example, the First Circuit has held that "[a]n error in the state court's decision is not a denial of full and fair litigation." Palmigiano v. Houle, 618 F.2d 877, 882 (1st Cir. 1980) (citing Dupont v. Hall, 555 F.2d 15, 17 (1st Cir. 1977)). The Eighth Circuit has similarly held that after *Stone*, an "[e]rroneous application of Fourth Amendment principles by a state court is no longer relevant to the question of whether the federal court may review the merits of the claim." Holmberg v. Parratt, 548 F.2d 745, 746 (8th Cir. 1977).

[79] See, e.g., Willett v. Lockhart, 37 F.3d 1265, 1271 (8th Cir. 1994) (rejecting any requirement that petitioner's "opportunity" for full and fair litigation "depend upon whether he has taken advantage of the process available").

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The Second Circuit's approach is representative of this narrow interpretation. The circuit interpreted *Stone* as requiring only that "the state have provided the *opportunity* to the state prisoner for full and fair litigation of the Fourth Amendment claim."[80] Here, review of Fourth Amendment claims in habeas petitions are undertaken in two instances: "(a) if the state has provided no corrective procedures at all to redress the alleged fourth amendment violations; or (b) if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process."[81] Essentially, this means that if the defendant was given a procedural opportunity to assert the claim in state court and if the state court stood ready to resolve the claim on the merits, then Fourth Amendment claims cannot be raised on federal habeas. A similar framework has been adopted by the Third,[82] Fourth,[83] Sixth,[84] and Eighth

[80] Gates v. Henderson, 568 F.2d 830, 839 (2d Cir. 1977) (en banc).

[81] Capellan v. Riley, 975 F.2d 67, 70 (2d Cir. 1992) (citing *Gates*, 568 F.2d at 840, and McPhail v. Attica Corr. Facility, 707 F.2d 67, 70 (2d Cir. 1983)).

[82] In *Boyd v. Mintz*, 631 F.2d 247, 250 (3d Cir. 1980), the Third Circuit held that *Stone* "only requires that the state provide the opportunity irrespective of whether the defendant avails himself of it." But see Gilmore v. Marks, 799 F.2d 51, 57 (3d Cir. 1986) (noting that a state's "failure to give at least colorable application of the correct Fourth Amendment constitutional standard" might amount to a denial of *Stone*'s opportunity for full and fair litigation requirement).

[83] In *Doleman v. Muncy*, 579 F.2d 1258, 1265 (4th Cir. 1978), the Fourth Circuit held that federal courts faced with habeas petitions raising Fourth Amendment claims were to determine first whether the petitioner was afforded an opportunity to present his Fourth Amendment claims under the then-existing state practice. Once the court has concluded that the petitioner was afforded such an opportunity, the court "need not inquire further into the merits of the petitioner's case . . . unless the prisoner alleges something to indicate that his opportunity for a full and fair litigation of his Fourth Amendment claim or claims was in some way impaired." Id. See also United States v. Scarborough, 777 F.2d 175, 182 (4th Cir. 1985) (noting that the opportunity for a full and fair litigation of a Fourth Amendment claim "is met when state procedures provide a meaningful vehicle for a prisoner to raise a fourth amendment claim"); Grimsley v. Dodson, 696 F.2d 303, 304–05 (4th Cir. 1982) (reversing a grant of a writ of habeas corpus under a similarly restrictive standard).

[84] In *Good v. Berghuis*, 729 F.3d 636, 639 (6th Cir. 2013), the Sixth Circuit held that the *Stone* requirement "means an available avenue for the prisoner to present his claim to the state courts, not an inquiry into the adequacy of the procedure actually used to resolve that particular claim." However, the court also noted that "[i]n the absence of a sham proceeding, there is no need to ask whether the state court conducted an evidentiary hearing or to inquire otherwise into the rigor of the state judiciary's procedures for resolving the claim." Id. See also Riley v. Gray, 674 F.2d 522, 526–27 (6th Cir. 1982) (holding that "federal habeas relief is available when a criminal defendant is not allowed to fully present his fourth amendment claim in the state courts because of unanticipated and unforeseeable application of a procedural rule which prevents state court consideration of the merits of the claim").

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Circuits,[85] and was once adopted by the Seventh Circuit.[86] The First and Fifth Circuits have an even more restrictive interpretation of *Stone*, focusing solely on the first prong of the Second Circuit's inquiry (whether there was an available state corrective process) and holding, essentially, that an "opportunity for full and fair litigation" means an opportunity only.[87] These cases, and many others like them, conclude that *Stone*'s requirement of an opportunity for full and fair litigation means only that the state must provide the prisoner with a procedural opportunity to assert his Fourth Amendment claim, whether or not the prisoner seizes that opportunity.

The narrow interpretation, however, falls short. Taking this approach to its logical extreme, a federal district court would have to deny federal habeas relief to a state prisoner who was convicted in clear contravention of current Supreme Court Fourth Amendment case law if the state court

[85] In *Willett v. Lockhart*, 37 F.3d 1265, 1271 (8th Cir. 1994) (quoting *Capellan*, 975 F.2d at 70), the Eighth Circuit explicitly adopted the Second Circuit's framework that:

> "[R]eview of fourth amendment claims in habeas petitions [is] undertaken . . . (a) if the state has provided *no corrective procedures at all* to redress the alleged fourth amendment violations; or (b) if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an *unconscionable breakdown in the underlying process*."

[86] See United States ex rel. Bostick v. Peters, 3 F.3d 1023, 1027 (7th Cir. 1993) ("In deciding whether the state has afforded the petitioner an opportunity for full and fair litigation, a federal habeas court must determine first whether the state procedural mechanism, in the abstract, presents the opportunity to raise a Fourth Amendment claim. Second, there must be a determination whether the presentation of the claim in question was in fact frustrated by a failure of that mechanism.").

[87] In *Sanna v. DiPaolo*, 265 F.3d 1, 9 (1st Cir. 2001) (citations omitted), the First Circuit held that:

> "'[A] full and fair opportunity' to litigate means that the state has made available to defendants a set of procedures suitably crafted to test for possible Fourth Amendment violations. So long as a state prisoner has had an opportunity to litigate his Fourth Amendment claims by means of such a set of procedures, a federal habeas court lacks the authority, under *Stone*, to second-guess the accuracy of the state court's resolution of those claims."

In *Williams v. Brown*, 609 F.2d 216, 220 (5th Cir. 1980), the Fifth Circuit held that "an opportunity for a full and fair litigation" of Fourth Amendment claims is satisfied if "the processes provided by a state to fully and fairly litigate fourth amendment claims are [not] routinely or systematically applied in such a way as to prevent the actual litigation of fourth amendment claims on their merits." See also Caver v. Alabama, 577 F.2d 1188, 1192–93 (5th Cir. 1978) (holding habeas review precluded if a state provides a suitable procedure for full and fair opportunity to litigate Fourth Amendment claims, regardless of whether the petitioner employs that procedure); O'Berry v. Wainwright, 546 F.2d 1204, 1213 (5th Cir. 1977) (stating that full and fair litigation requires consideration of the facts by the trial court and the availability of meaningful appellate review of both the facts and the legal issue).

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had merely provided the prisoner with a corrective procedure to argue his or her claim. There would be no leeway for a federal district court judge to grant habeas relief even when the state trial and appellate courts decided the case in direct violation of clear Supreme Court precedent. The state prisoner would be able to petition the Supreme Court for a writ of certiorari in such an instance, but there is no guarantee that his or her case will be heard. The Supreme Court is not equipped to police all errors of federal law by state courts across the country. As such, the Supreme Court currently only accepts about two percent of the petitions it receives.[88] Without the Supreme Court's intervention, state trial and appellate courts could effectively ignore *Mapp*'s holding that illegally seized evidence cannot be admitted at trial in state court altogether without the threat of having convictions overturned by the federal courts. While *Stone* may have limited *Mapp*'s reach, it certainly did not mean to trivialize it entirely.

The current system does not work for a number of reasons, such as the aforementioned issues of judicial cognizance and the lack of uniformity across jurisdictions. However, as developed below, the most important reason why the current approach does not work is that it does not comport with the text of 28 U.S.C. § 2254, the only statute granting federal courts jurisdiction over federal habeas petitions brought by state prisoners. Thus, it is necessary to search for a solution to the problems of the current approach.

IV. TWO POSSIBLE SOLUTIONS TO THE AEDPA-*STONE* QUESTION

A. The Broad Interpretation Approach: All Federal Courts Merely Adopt the Broad Interpretation

One solution is to have all federal courts abandon the narrow interpretation in favor of the broad interpretation taken by the Tenth and Seventh Circuits. Thus, all circuits would abandon the narrow interpretation, which requires little more than the existence of a corrective process at the state trial level, in favor of the broad interpretation, which requires a good faith review of the state trial court's decision. This

[88] Supreme Court Procedures, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/A34G-MVYU] (last visited Nov. 7, 2019) (noting that "the Court accepts 100–150 of the more than 7,000 cases that it is asked to review each year").

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solution may be easier to implement than overturning long-standing Supreme Court precedent. Additionally, both claims reviewed under AEDPA and under the broad view are subject to a "good faith" standard, so, in theory, it should not matter whether courts adopt the AEDPA standard or the broad interpretation of *Stone* for Fourth Amendment violations. However, there are some problems with this approach.

1. Criticisms of this Approach

First, adopting the broad interpretation across all federal courts does not remedy any of the injustices caused by segregating Fourth Amendment claims from all other constitutional violations. While the two standards appear to both be ones of "good faith," the timing of such good faith review depends on which approach a court takes. For instance, under the broad interpretation approach, state prisoners petitioning for habeas relief for a Fourth Amendment violation still will not have their claim heard unless they show that they lacked a "full and fair opportunity" to litigate their claim. Without a colorable showing that their claim was not given such an opportunity, the petitioner's claim is denied outright as not cognizable, and their Fourth Amendment claim goes unheard. By contrast, under AEDPA, a state prisoner's habeas petition would be subject to "good faith" review *after* the petitioner's claim is deemed cognizable (for a violation of the Fourth Amendment), allowing the federal court to at least hear the petitioner's Fourth Amendment claim. In short, AEDPA provides for good faith review of the merits of the Fourth Amendment claim, while the broad interpretation approach requires the federal court to perform a good faith review to determine whether a petitioner's claim is even cognizable at all, which, under current practice, almost never is.

Second, the two interpretations in reality may not be that different after all, so this solution could lack any substantive reform. It is not entirely clear that the courts that take this narrow interpretation—requiring only the existence of a state corrective process—mean for it to be taken literally. While federal courts appear reluctant to find an opportunity for a full and fair litigation lacking, courts have granted habeas relief under the narrow interpretation where there was a sheer "unconscionable breakdown" of the state process;[89] where the state appellate court simply

[89] Boyd v. Mintz, 631 F.3d 247, 250–51 (3d Cir. 1980) (granting habeas relief where the state court adhered to an unwritten local rule requiring a written application of a request for

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"ignored" the prisoner's Fourth Amendment claim;[90] and where the petitioner was not allowed to fully present his Fourth Amendment claim due to "the unanticipated and unforeseeable application" of a procedural rule.[91] In other words, even courts that follow the narrow approach seem to require that the state courts act in good faith.

However, with so few courts granting federal habeas petitions alleging Fourth Amendment violations, there is limited data from which to extrapolate. Thus, in theory, a state trial court could act in bad faith, and if there was still a process in place, the federal court would be forced to deny the petitioner's claim. However, in reality, that scenario does not yet seem to have happened. Despite their restrictive language, if this is what the narrow interpretation courts ultimately mean, it would be simpler and more direct to reach this result by applying the language of AEDPA.

Finally, this solution completely ignores the statutory text. In a Fourth Amendment case, 28 U.S.C. § 2254(a), the jurisdictional provision, must be satisfied by one of two propositions: a claim that the Fourth Amendment was violated on the facts and law[92] or a claim there was no opportunity for a full and fair hearing.[93] The text of Section 2554(d), the AEDPA standard of review provision, would seem to apply to either. There is no room in the text of Section 2254 for a third approach: that the Fourth Amendment claim satisfies Section 2254(a), but the *Stone* full and fair opportunity test then governs the result, rather than Section 2254(d).

an extension despite counsel being appointed one day before the expiration of the time period for presenting a suppression motion and the court denied an oral request for an extension).

[90] Agee v. White, 809 F.2d 1487, 1490 (11th Cir. 1987) (denying relief on other grounds).

[91] United States ex rel. Bostick v. Peters, 3 F.3d 1023, 1026–29 (7th Cir. 1993) (granting habeas relief where the defendant relied on the trial court's "erroneous" procedural ruling when he declined to present evidence relevant to his Fourth Amendment claim). Note that *Bostick* was decided before the Seventh Circuit adopted its broader interpretation of *Stone*. See also Bailey v. Duckworth, 699 F.2d 424, 425–26 (7th Cir. 1983) (granting habeas relief where the state appellate court reinstated a conviction without opportunity for argument upon the state's motion for rehearing where it first argued prisoner lacked standing to challenge the search warrant); Riley v. Gray, 674 F.2d 522, 527 (6th Cir. 1982) ("[T]he state appellate court frustrated the petitioner's opportunity to litigate his fourth amendment claims because it failed to remand the case to the trial court to allow the petitioner to establish his standing to challenge the search."); Doescher v. Estelle, 616 F.2d 205, 207 (5th Cir. 1980) (granting habeas relief where the state court followed a procedure which was subsequently ruled unconstitutional and failed to provide the petitioner with a "full and fair" determination after he asserted his claim).

[92] See infra Part V (explaining the statute's jurisdictional prerequisite of an alleged Fourth Amendment violation).

[93] See infra Section IV.B (explaining that prisoners must then establish their inability to fully and fairly litigate Fourth Amendment claims in state court for federal habeas relief).

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But this is what most federal courts currently do. The current approach applies *Stone* as though the language of the statute were irrelevant. Even if Fourth Amendment claims are to be treated differently than all other constitutional violations, federal courts cannot claim jurisdiction (via AEDPA) due to a violation of the Fourth Amendment but impose a standard of review outside of AEDPA. Jurisdiction to review habeas petitions stems only from Section 2254(a), which is the sole statute authorizing federal review of state prisoners' habeas petitions. Section 2254 supplies its own standard of review.[94] Any other conclusion ignores the language of the statute. Thus, the broad interpretation approach does not adequately solve the issues at hand.

B. The Easterbrook Approach: No "Full and Fair Opportunity" Establishes Jurisdiction Under 28 U.S.C. § 2254(a)

A second solution to approaching the intersection of AEDPA and *Stone*, endorsed by Judge Frank Easterbrook of the Seventh Circuit, is to conclude that *Stone* redefined the constitutional right guaranteed by the Fourth Amendment. Under this approach, the Fourth Amendment, after *Stone*, guarantees a right to a full and fair hearing of a state prisoner's Fourth Amendment constitutional claims and the lack of such hearing establishes jurisdiction under 28 U.S.C. § 2254(a). This is a much more explicit approach to reconciling *Stone* and AEDPA. Whereas *Stone* outlined a general rule—no granting of habeas corpus when there has been a "full and fair opportunity" to litigate petitioner's Fourth Amendment claim in state court—and most federal courts have blindly applied it without any jurisdictional analysis, the Easterbrook approach explicitly attempts to fit *Stone*'s rule into the language of the only statute that authorizes federal habeas review for state prisoners, Section 2254.

To establish jurisdiction under 28 U.S.C. § 2254(a), a state prisoner must demonstrate to a federal court that they are "in custody in violation of the Constitution . . . of the United States."[95] If jurisdiction is established, then the federal court may entertain the state prisoner's petition for federal habeas relief, reviewing it under Section 2254(d). Thus, under this application of *Stone*, to establish Section 2254(a) jurisdiction, a state prisoner must demonstrate that they were not provided "an opportunity for full and fair litigation" rather than merely demonstrate

[94] See 28 U.S.C. § 2254(d) (2018).
[95] 28 U.S.C. § 2254(a) (2018).

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a violation of the Fourth Amendment. The lack of a "full and fair opportunity" becomes the catalyst for habeas relief and constitutes the constitutional violation that would satisfy federal habeas jurisdiction under Section 2254(a).

1. Looking to Judge Easterbrook's Analysis

Judge Easterbrook, writing for the majority in *Hampton v. Wyant*,[96] argued that, after *Stone*, federal courts lack jurisdiction to hear petitions for habeas relief brought by state prisoners on the grounds that illegally obtained evidence used at trial led to the prisoner's unconstitutional detention.[97] Relying on *Stone*'s holding that the exclusionary rule is not enforced on collateral attack, Judge Easterbrook surmised that "a person imprisoned following a trial that relies, in part, on unlawfully seized evidence is not 'in custody in violation of the Constitution or laws or treaties of the United States.'"[98] Thus, while "[t]he *seizure* may have violated the Constitution, [] the *custody* does not."[99] Therefore, Judge Easterbrook concluded, AEDPA does not affect *Stone* because "AEDPA's changes to § 2254(d) apply only to cases within the scope of § 2254(a)," and *Stone* interprets Section 2254(a) in a way that treats violations of the Fourth Amendment as "outside the scope of that statute."[100]

[96] 296 F.3d 560 (7th Cir. 2002).

[97] Id. at 563.

[98] Id. at 562 (citing § 2254(a)).

[99] Id. at 562–63.

[100] Id. at 563. See also Cabrera v. Hinsley, 324 F.3d 527, 530 (7th Cir. 2003) (noting that AEDPA's changes to § 2254(a) do not apply to Fourth Amendment claims). While the Supreme Court has not taken a position on Judge Easterbrook's argument, most federal circuits and a number of lower courts agree that the Court's decision in *Stone* is at least unmodified by the passage of AEDPA. See Newman v. Wengler, 790 F.3d 876, 878 (9th Cir. 2015) (unequivocally stating that "*Stone v. Powell* survives the passage of AEDPA"); Veasman v. Mullin, 279 F. App'x 645, 647 (10th Cir. 2008) (holding that the rule in *Stone* "has survived the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA)"); Jacobs v. Cockrell, No. 02-10258, 2002 WL 31688875, at *11 (5th Cir. Oct. 29, 2002) (rejecting the argument that Congress abolished the *Stone* distinction between Fourth Amendment claims and other constitutional claims when it enacted AEDPA and holding that *Stone* is still good law); Fisher v. Bell, No. 09-CV-245, 2012 WL 3065403, at *1 (W.D. Mich. July 27, 2012) (noting that "[a]lthough the Sixth Circuit has not directly addressed [this issue], it has repeatedly applied *Stone* in post-AEDPA cases"); Hillman v. Beightler, No. 09-CV-2538, 2010 WL 2232640, at *2 (N.D. Ohio Apr. 19, 2010) (same); Adkins v. Motley, Civil Action No. 08–09–ART, 2009 WL 960107, at *11 (E.D. Ky. Apr. 7, 2009) ("*Stone* remains binding precedent as to the availability of the Fourth Amendment as a basis for habeas relief."); Smith v. Bradshaw, No. 04-CV-1235, 2006 WL 2233211, at *4 (N.D. Ohio Aug. 3,

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Essentially, Judge Easterbrook is saying that when an "opportunity for a full and fair litigation" has been denied, a petitioner has a colorable claim that establishes federal court jurisdiction under Section 2254(a). If the petitioner was provided such an opportunity by the state, then he or she would not be "in custody in violation of the Constitution," and his or her claim would not be cognizable. However, if no such opportunity was provided, then the petitioner is being held in custody in violation of the Constitution, and thus is entitled to habeas review in federal court.[101] In theory, if jurisdiction is granted, this would require a federal court to review such a petition under the standard set forth in Section 2254(d).[102]

Without explicitly saying so, Judge Easterbrook must be concluding that *Stone* redefined the constitutional right. 28 U.S.C. § 2254(a) is the sole statute permitting federal courts to review habeas petitions brought by state prisoners. To satisfy Section 2254(a), a state prisoner must allege a constitutional violation at the state level. Judge Easterbrook interprets *Stone* as saying that convictions based on illegally obtained evidence are no longer sufficient to satisfy Section 2254(a), and, thus, convictions based on illegally obtained evidence no longer result in custody in violation of the Constitution. It follows that since convictions lacking a "full and fair opportunity" are the only ones violative of the Constitution,

2006). But see Carlson v. Ferguson (Carlson II), 9 F. Supp. 2d 654, 656 (S.D.W. Va. 1998) (holding that Fourth Amendment claims are not excluded from AEDPA, and that § 2254, as amended in 1996, actually "replaces the full and fair opportunity test"); Steven Semeraro, Enforcing Fourth Amendment Rights Through Federal Habeas Corpus, 58 Rutgers L. Rev. 983, 1016–18 (2006) (critiquing Judge Easterbrook's analysis because the *Stone* Court stated that its decision "does not mean that the federal court lacks jurisdiction over" collateral Fourth Amendment claims, Judge Easterbrook wrongly relied on a pre-AEDPA Supreme Court case for support, and Judge Easterbrook's analysis would lead to an internally inconsistent rule). But see Herrera v. LeMaster, 225 F.3d 1176, 1178 n.2 (10th Cir. 2000), rev'd on other grounds on reh'g en banc, 301 F.3d 1192 (10th Cir. 2002) (rejecting *Carlson II*'s claim that AEDPA expanded a habeas petitioner's right to overturn a state court decision).

[101] The Court in *Stone* stated that its "decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation." *Stone*, 428 U.S. at 494–95 n.37. This assertion means one of two things. Either it means that federal courts do still have jurisdiction over Fourth Amendment claims or it means that "such a claim" refers to a "showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review." Id. If it is the former, Judge Easterbrook cannot be right. However, if it is the latter, then Judge Easterbrook could be correct.

[102] Federal courts do not currently do this. This may be because, according to the federal courts, petitioners do not put forth a colorable claim that would require the granting of jurisdiction under § 2254(a). Alternatively, this could merely be a byproduct of the federal courts' current approach. See supra Part III.

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the Constitution must now guarantee such a right under the Fourth Amendment.[103]

The Easterbrook approach finds support in the language of *Stone*. Writing for the majority in *Stone*, Justice Powell asserted that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[104] The Court then contended that it is "unnecessary to consider . . . the statutory scope of the habeas corpus statute."[105] If the Court was not making a statutory determination, then it must have been making a constitutional determination.[106] Next, the Court concluded that a violation of the exclusionary rule was no longer a basis for federal habeas corpus relief.[107] A plausible reading of these findings and the Court's ultimate conclusion is that the Court, like Judge Easterbrook, implicitly redefined the constitutional right.[108] Even Justice Brennan reasoned that the "only conceivable rationale upon which the Court's

[103] While Judge Easterbrook's analysis is anchored in the jurisdictional provision of § 2254(a), the implication of his analysis is a constitutional one. Thus, Judge Easterbrook's analysis is not at odds with the Supreme Court's assertion that *Stone*'s limitation on federal habeas relief "was *not* jurisdictional in nature." Withrow v. Williams, 507 U.S. 680, 686 (1993) (emphasis added). Instead, the Court stated that *Stone* "rested on prudential concerns counseling against the application of the Fourth Amendment exclusionary rule on collateral review." Id. See also Kuhlmann v. Wilson, 477 U.S. 436, 447–48 (1986) (discussing *Stone*); Allen v. McCurry, 449 U.S. 90, 103 (1980) (holding that *Stone* concerns "the prudent exercise of federal-court jurisdiction under 28 U.S.C. § 2254").

[104] *Stone*, 428 U.S. at 482.

[105] Id. at 482 n.17. In fact, the majority failed to cite § 2254 even once in its analysis. Id. at 503–04 (Brennan, J., dissenting) (noting that § 2254 is "significantly not even mentioned by the Court").

[106] Justice Brennan, in his dissent, surmises that the majority must be implicitly coming to one of two possible conclusions. First, the majority may be saying that a state petitioner who was afforded "an opportunity for full and fair litigation" of his or her Fourth Amendment claim is not "in custody in violation of the Constitution" per 28 U.S.C. § 2254(a). *Stone*, 428 U.S. at 503–05 (Brennan, J., dissenting). Second, the majority may also be saying that "considerations of comity and concerns for the orderly administration of criminal justice" require such a rule. Id. (citing Francis v. Henderson, 425 U.S. 536, 538–39 (1976) and Fay v. Noia, 372 U.S. 391, 425–26 (1963)). However, both determinations proffered by Justice Brennan are *statutory* in nature.

[107] *Stone*, 428 U.S. at 482.

[108] Therefore, after *Stone*, a violation of *Mapp* can offend the Constitution, but—as Judge Easterbrook says—not result in a "custody in violation of the Constitution" as a statutory matter. Hampton v. Wyant, 296 F.3d 560, 562–63, 565 (7th Cir. 2002). Thus, *Stone*, according to Judge Easterbrook, redefined this phrase.

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'constitutional' thesis might rest" was that the Court was holding that the exclusionary rule is "not a personal constitutional right" guaranteed by the Fourth Amendment.[109] Despite Justice Brennan's objections, the majority redefined the scope of the exclusionary rule without purporting to overturn any precedent to the contrary. If the Court did not intend to overrule its decision in *Mapp* but instead based its decision on constitutional grounds, it follows that the Court may have been redefining the constitutional right guaranteed by the Fourth Amendment. Yet this reading of *Stone* appears to be in tension with the Court's original decision in *Mapp*.[110]

2. Criticisms of this Approach

This approach, while plausible, leads to an odd result that no federal circuit or federal district court has embraced, or indeed even considered—the lack of state exhaustion. A constitutional claim advanced on federal habeas must first be presented to the state courts. Originating in *Ex Parte*

[109] *Stone*, 428 U.S. at 509–10 (Brennan, J., dissenting). Justice Brennan, however, argues that this conclusion is precluded by the Court's precedent. In defense of this claim, Justice Brennan cites *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that a state court must exclude evidence from the trial of an individual whose Fourth and Fourteenth Amendment rights were violated by a search or seizure that directly or indirectly resulted in the acquisition of that evidence) and *United States v. Calandra*, 414 U.S. 338, 347 (1974) (noting that "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure"). It follows, according to Justice Brennan, that violating the exclusionary rule violates the Constitution. Therefore, such a violation that leads to a conviction would put a prisoner in "custody" in violation of the Constitution, per 28 U.S.C. § 2254(a). Assuming this is true, Justice Brennan then wonders "what logic can support the assertion that the defendant's unconstitutional confinement obtains during the process of direct review . . . but that the unconstitutionality then suddenly dissipates at the moment the claim is asserted in a collateral attack on the conviction." *Stone*, 428 U.S. at 509–10 (Brennan, J., dissenting). Justice Brennan also argues that as long as *Mapp* "remains undisturbed," the majority's constitutional decision "must fail." Id. at 509.

[110] In *Mapp*, the Court stated that "the exclusionary rule is an essential ingredient of the Fourth Amendment [and] the right it embodies." *Mapp*, 367 U.S. at 651. Additionally, the Court stated that "the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions," and that "[s]ince the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." Id. at 655.

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Royall,[111] codified in 1948 in 28 U.S.C. § 2254(b),[112] and consistently reinforced in cases like *Rose v. Lundy*,[113] this exhaustion requirement is fundamental to federal court procedure. If the lack of an opportunity for a full and fair hearing of the Fourth Amendment claim is the operative constitutional violation, the defendant should be required to first present this issue to the state courts, presumably on a state collateral attack. But no court has embraced or even considered such a requirement. And there is no hint of such a requirement in *Stone*. It seems bizarre, indeed, that the state courts should be required to determine whether their own procedures were fair. Yet, the Easterbrook approach seems to mandate it.

Under this approach, federal jurisdiction is not established by the state prisoner's Fourth Amendment claim. Jurisdiction is established by a claim of lack of full and fair opportunity. Nevertheless, despite establishing federal habeas jurisdiction, a lack of full and fair opportunity claim is not subject to the normal rules of habeas procedure, such as exhaustion. Seemingly, the federal courts are allowing a petitioner to exhaust state remedies on the violation of the exclusionary rule but are assessing the validity of his or her habeas petition under the full and fair litigation standard. This looks like a "bait and switch." One claim establishes federal court jurisdiction under the habeas statute. Another claim satisfies the exhaustion requirement.

Implementing this approach would also require a rethinking of the rights protected by the Fourth Amendment. For example, it would require Cedric Spears to prove that his right to a full and fair opportunity to litigate his claim was violated in order for his habeas petition to be cognizable. Additionally, it would require even more state review—review that failed him originally—as he would have to exhaust state remedies on his full and fair opportunity claim. Both federal and state courts would thus no longer care that the officers in Spears's case lacked a valid warrant. Rather, they would only care whether, at the state trial level, Spears was given a "full and fair" hearing. This seems incorrect, as

[111] 117 U.S. 241, 248–54 (1886) (creating a requirement that a state prisoner must exhaust state judicial remedies prior to seeking federal habeas corpus review).

[112] 28 U.S.C. § 2254(b)(1)(A) reads: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that [] the applicant has exhausted the remedies available in the courts of the State . . . ."

[113] 455 U.S. 509, 510 (1982).

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Spears's original grievance is the illegal search itself, not the fact that the state court wrongly applied the law.

In sum, the Easterbrook solution does not avoid AEDPA; rather, it merely enmeshes a different issue into the AEDPA structure. If *Stone* means that the full and fair inquiry is now the constitutional claim that establishes jurisdiction under Section 2254(a), then *that* claim (1) needs to be exhausted and (2) when resolved on the merits by the state court, should be subject to the review standards of Section 2254(d).

V. FEDERAL COURTS SHOULD APPLY AEDPA TO FOURTH AMENDMENT CLAIMS

A. The AEDPA Approach: Fourth Amendment Claims Establish Jurisdiction Under 28 U.S.C. § 2254(a)

A third way to reconcile *Stone* and AEDPA is to conclude that all *Stone* did was state the standard for review by federal courts of state decisions on habeas review. At the time *Stone* was decided, federal courts were to review all habeas petitions brought by state prisoners *de novo*.[114] This approach posits that *Stone* restricted *Brown*'s *de novo* review for Fourth Amendment claims only. *Stone* mandated that Fourth Amendment claims—and only Fourth Amendment claims—brought by state prisoners on habeas review would no longer be reviewed *de novo* by federal courts.[115] Instead, federal courts must review such claims to determine whether the state court provided the petitioner with "an opportunity for a full and fair litigation" of his or her Fourth Amendment claim.[116] If the reviewing federal court determined that the state court did not provide such an opportunity, then it should, under *Stone*, grant habeas relief to the petitioner.

[114] Brown v. Allen, 344 U.S. 443, 546 (1953) (Jackson, J., concurring in the judgment).

[115] The Supreme Court has routinely held that *Stone* should not be extended to non-Fourth Amendment constitutional violations. See, e.g., Withrow v. Williams, 507 U.S. 680, 688 (1993) (refusing to extend *Stone* to a claim of a *Miranda* violation); Kimmelman v. Morrison, 477 U.S. 365, 374–75 (1986) (refusing to extend *Stone* to a Sixth Amendment claim of ineffective assistance of counsel); Rose v. Mitchell, 443 U.S. 545, 560–61 (1979) (refusing to extend *Stone* to a Fourteenth Amendment claim regarding unconstitutional grand jury selection); Jackson v. Virginia, 443 U.S. 307, 321 (1979) (refusing to extend *Stone* to a Fourteenth Amendment due process claim of insufficient evidence to support a state conviction).

[116] Stone v. Powell, 428 U.S. 465, 494–95 n.37 (1976).

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Stone thus redefined the standard by which federal courts review habeas petitions asserting a Fourth Amendment violation. In the statutory framework of 28 U.S.C. § 2254, the violation of the exclusionary rule is the basis for the unlawful custody that satisfies Section 2254(a). After satisfying the jurisdictional prerequisite, a state petitioner must show that he or she was not afforded an "opportunity for full and fair litigation," à la *Stone*, at the state level in order to successfully receive habeas relief in federal court. The full and fair opportunity analysis is the standard by which a federal court must review a state prisoner's petition for habeas corpus *after* assessing whether the jurisdictional prerequisite is satisfied.

The text of AEDPA, as enacted in 1996, articulated a new standard under which federal courts would measure all constitutional claims asserted in state court. AEDPA restricted the standard set forth in *Brown v. Allen* from *de novo* review to a much more deferential standard akin to good faith review.[117] If *Stone* merely set forth a standard by which federal courts are to review Fourth Amendment claims brought by state prisoners on habeas, and AEDPA sets a different standard by which federal courts are to review *all* constitutional claims brought by state prisoners on habeas, then it would be logical to conclude that the AEDPA standard replaces the *Stone* standard.

The statutory text and the legislative history both support this position. The text of 28 U.S.C. § 2254, as amended by AEDPA, does not distinguish or single out Fourth Amendment claims as being outside its scope.[118] During the legislative process, members of the enacting Congress failed to specifically address Fourth Amendment claims or suggest that they are outside of the scope of the statute's language.[119] Moreover, previous drafts of an amended federal habeas statute did in fact specifically state that Fourth Amendment claims were outside the scope of Section 2254, which means that Congress at least at one point

[117] See supra note 59.

[118] 28 U.S.C. § 2254 (2018).

[119] Throughout the legislative history for the Antiterrorism and Effective Death Penalty Act of 1996, members of the 104th Congress failed to single out Fourth Amendment claims. In fact, the only reference to the Court's decision in *Stone* throughout the legislative process of the 104th Congress was to support the argument that state courts can adequately address federal constitutional and statutory issues. See 141 Cong. Rec. S7833 (daily ed. June 7, 1995) (statement of Sen. Kyl) (quoting Justice Powell: "We are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like Federal courts, have a constitutional obligation to safeguard personal liberties and to uphold Federal laws.").

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contemplated that possibility but decided against it.[120] The 104th Congress, which passed AEDPA, even heard testimony on the state of habeas corpus law and yet still refused to acknowledge *Stone* explicitly in floor debates or in the text of the statute itself.[121] It seems likely that the federal legislature had *Stone* in mind when it was considering AEDPA, yet it did not codify a Fourth Amendment carve out, instead opting for a general standard of review for all constitutional claims brought via federal habeas petition. At the very least, the legislative history is ambiguous on whether AEDPA was meant to replace the *Stone* standard. The more plausible reading is that Congress enacted a new standard of review for federal habeas petitions that applied to all constitutional claims, including alleged Fourth Amendment violations.

[120] The original amendment to 28 U.S.C. § 2254(a), proposed in 1993, codified *Brown* and contained a *Stone* carve out that read:

> (b) Standard of Review.—Section 2254(a) of title 28, United States Code, is amended by adding at the end the following: ''Except as to Fourth Amendment claims controlled by Stone v. Powell, 428 U.S. 465 (1976), the Federal courts, in reviewing an application under this section, shall review de novo the rulings of a State court on matters of Federal law, including the application of Federal law to facts, regardless of whether the opportunity for a full and fair hearing on such Federal questions has been provided in the State court. In the case of a violation that can be harmless, the State shall bear the burden of proving harmlessness.".

However, that language was rejected and did not make the final version of the bill. Habeas Corpus Reform Act of 1993, S. 1441, 103d Cong. § 4 (1993). See also Violent Crime Control and Law Enforcement Act of 1993, H.R. 3131, 103d Cong. § 303 (1993) (mirroring the language in the Senate bill).

Another bill, proposed after the aforementioned one, attempted to amend § 2254(a) to read:

> In adjudicating the merits of any such ground, the court shall exercise independent judgment in ascertaining the pertinent Federal legal standards and in applying those standards to the facts and shall not defer to a previous State court judgment regarding a Federal legal standard or its application. Upon request, the court shall permit the parties to present evidence regarding material facts that were not adequately developed in State court. The court shall award relief with respect to any meritorious constitutional ground, unless, in the case of a violation that can be harmless, the respondent shows that the error was harmless beyond a reasonable doubt.

Habeas Corpus Revision Act of 1994, H.R. 4018, 103d Cong. § 8 (1994) (as reported by H. Comm. on the Judiciary, Mar. 25, 1994). The Committee Report accompanying the proposed bill stated that the above section "does not overrule *Stone v. Powell*." H.R. Rep. No. 103-470, at 14 (1994).

[121] See, e.g., Taking Back Our Streets Act of 1995: Hearing on H.R. 3 Before the H. Comm. on the Judiciary, 104th Cong. 286–90, 346–52 (1995) (prepared statement of Gerald H. Goldstein, Esq., on behalf of the National Association of Criminal Defense Lawyers, and prepared statement of Paul J. Larkin, Esq., King & Spalding, Washington, D.C.).

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B. Criticisms of this Approach

The main criticism of this conclusion is that nearly every federal court has failed to adopt—or even recognize—it. One federal district court, however, has explicitly adopted this position. In *Carlson v. Ferguson* (*Carlson II*),[122] the Southern District of West Virginia considered the case of a state prisoner who was convicted of three counts of burglary but asserted that the arresting officer lacked probable cause.[123] Because the officer lacked probable cause, the petitioner argued, the officer's subsequent search was unconstitutional, and he was therefore in custody in violation of the Fourth Amendment of the Constitution. [124] In determining the standard by which to review the petitioner's claim, the court held that AEDPA replaced *Stone*'s full and fair opportunity test.[125] In *Carlson II*, respondents argued that the holding in *Stone* was premised on an interpretation of the jurisdictional requirement of 28 U.S.C. § 2254(a); therefore, Congress's failure to amend that provision of the statute "evinces a clear legislative intent" to not change the status quo of federal habeas corpus procedure with respect to Fourth Amendment claims.[126] However, the court explicitly rejected that argument, relying on the Supreme Court's decisions in *Withrow v. Williams*[127] and *Kuhlmann v. Wilson*[128] as "firmly establish[ing] that the limitation on applying the Fourth Amendment exclusionary rule is neither jurisdictional nor statutorily based."[129] Instead, the court reasoned, *Stone* was based on "prudential principles of comity and deference to state courts."[130] Thus, the court in *Carlson II* concluded that a straightforward reading of both required a finding that AEDPA must replace *Stone* as the standard of

[122] 9 F. Supp. 2d 654 (S.D.W. Va. 1998). The Southern District of West Virginia considered the case again on a Motion to Amend or Alter the Judgment. It was here that the court granted habeas relief.

[123] Carlson v. Ferguson (Carlson I), 993 F. Supp. 969, 970–71 (S.D.W. Va. 1998).

[124] Id.

[125] *Carlson II*, 9 F. Supp. 2d at 656 ("AEDPA . . . replaces the full and fair opportunity test.").

[126] Id. at 657. See also Cabrera v. Hinsley, 540 U.S. 873 (2003) (denying certiorari where petitioner argued that *Stone* "should have been understood as permitting relief when state proceedings do not satisfy AEDPA standards," Petition for Writ of Certiorari at 25–26, Cabrera, 540 U.S. 873 (No. 03–9)).

[127] 507 U.S. 680, 686 (1993).

[128] 477 U.S. 436, 446–47 (1986).

[129] *Carlson II*, 9 F. Supp. 2d at 657.

[130] Id.

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review for federal courts when hearing state prisoner habeas petitions alleging Fourth Amendment violations.

Second, critics may claim this approach defies the purpose of *Stone*—namely, to create a separate, deferential standard of review for Fourth Amendment claims. However, since the *Stone* decision, Congress has amended the standard of review for all constitutional claims to reflect the deferential nature of *Stone*'s rule. In fact, as noted above, both the AEDPA standard and the *Stone* standard essentially constitute "good faith" review.[131] Since the two standards are similar, adopting the AEDPA approach—where AEDPA replaces *Stone*—thus cannot be inapposite of *Stone*'s purpose. If that is so, then the AEDPA approach seems the best way forward because this approach is textual, simple, and satisfies the purpose of both *Stone* and AEDPA.

Third, this approach—or any approach for that matter—may not have an enormous impact on the number of habeas petitions granted to state prisoners alleging a Fourth Amendment violation. Federal courts are still more than likely to continue denying habeas petitions whether on principal or because state courts are correctly (or at least not incorrectly) adjudicating the matters in the first instance. However, as argued below, adopting this approach would simplify the process for litigants, bring Fourth Amendment violations on par with all other constitutional claims, and allow for petitioners' claims to actually be heard in federal court, amplifying its impact beyond the number of future habeas petitions granted.

C. Benefits of this Approach

The AEDPA approach is superior for four main reasons. First, it flows logically from the text of both *Stone* and AEDPA. Before *Stone*, federal courts were to hear habeas petitions *de novo*. *Stone* mandated a new standard of review just for habeas petitions involving Fourth Amendment claims: whether the state court provided a full and fair opportunity to litigate the petitioner's Fourth Amendment claims. AEDPA replaced the standard of review by which federal courts were to hear all habeas petitions. The text of the amendment does not single out Fourth Amendment claims nor does it mention *Stone*. The best text-based answer is that AEDPA must have replaced *Stone*'s full and fair opportunity test.

[131] See, e.g., supra notes 59 and 76.

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There is no indication from the legislative branch that this conclusion is misguided or wrong.[132]

Second, this approach is also straightforward and simple. Abiding by the AEDPA approach, federal courts would no longer have to grapple with Justice Powell's ambiguous language in *Stone*. Instead, federal courts could once again apply the same standard of review to all federal habeas petitions, regardless of the constitutional rights at stake. Most importantly, state prisoners, like Cedric Spears, will have clear guidance on how to successfully petition a federal court for habeas corpus when they have been wronged by a violation of the Fourth Amendment in state court. Clear, universal rules are beneficial to judges, attorneys, and petitioners alike.

Third, this approach is also consistent with the policy of *Stone*. *Stone* was a groundbreaking decision because it was the first modern habeas decision whereby the Court mandated deference to the state court ruling. After *Stone*, federal courts were to defer to state court judgments on Fourth Amendment claims. AEDPA, too, mandated that federal courts give state court judgments deference for constitutional violations.[133] The *Carlson I* court noted that AEDPA is essentially "[t]he expansion of the [*Stone v.*] *Powell* framework" that "implies a greater degree of federal court deference to the state court adjudication."[134] The Supreme Court has also determined that AEDPA "plainly sought to ensure a level of 'deference to the determinations of state courts.'"[135] As a result, AEDPA has effectively applied to all constitutional rights the standard of review that *Stone* adopted for Fourth Amendment rights. If both *Stone* and AEDPA had the purpose of requiring a good faith deference to state court decisions on constitutional violations, then a federal court adopting the AEDPA approach today would be directly following the original purpose of the Supreme Court's decision in *Stone*. While this approach may not change the substance of the standard of review, it does change what is

[132] See supra notes 119–21.

[133] Some even thought it would undermine federal habeas corpus review altogether. See, e.g., 142 Cong. Rec. H3602 (daily ed. Apr. 18, 1996) (statement of Rep. Kennedy) (stating that "[w]hat we have here is an undoing of the Federal Government's rights to intervene in the State courts").

[134] Carlson I, 993 F. Supp. 969, 972 (S.D.W. Va. 1998). The court also stated: "The AEDPA's provision barring a federal court from granting a writ of habeas corpus for any claim that was adjudicated on the merits in a state court proceeding apparently has expanded the *Powell* framework to all federal claims." Id.

[135] Williams v. Taylor, 529 U.S. 362, 386 (2000).

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being reviewed.[136] Thus, the federal courts should adopt the AEDPA approach going forward, as it combines the true purpose of *Stone* with a text-based interpretation of AEDPA to form a simple and clean solution to a complex area of state and federal law.

Finally, adopting the AEDPA approach will ensure that Fourth Amendment rights do not fall further behind all constitutional rights in the future. Since most federal courts currently view Fourth Amendment violations as outside the scope of AEDPA, any future reforms to AEDPA will not affect Fourth Amendment claims. Thus, under the AEDPA approach, any substantive, positive statutory habeas reform will apply to all constitutional claims, including those alleging Fourth Amendment violations.

VI. CONCLUSION

Currently, most federal circuits have adopted an application of *Stone v. Powell* that is inconsistent with the statute authorizing federal jurisdiction of state prisoners' habeas petitions—28 U.S.C. § 2254(a)—and inconsistent with the explicit standard of review provided by AEDPA, 28 U.S.C. § 2254(d). Instead, federal courts should hold that AEDPA replaces *Stone*'s "full and fair opportunity" standard for reviewing Fourth Amendment claims on federal habeas. This approach aligns with the original purpose of both *Stone* and AEDPA. It would provide a simple, clear, and text-based solution to a convoluted area of the law and would allow state prisoners alleging a Fourth Amendment violation to finally have their habeas petitions heard by a federal court alongside habeas petitions alleging every other constitutional violation.

Under AEDPA, Cedric Spears would have had his claim heard in federal court. Instead of a federal judge throwing out Spears's habeas petition for lack of judicial cognizance, that federal judge would have allowed Spears to litigate his Fourth Amendment claim. While the judge may have ultimately decided that Spears's claim did not satisfy the "good faith" standard of AEDPA, Spears would have had his day in federal court.

[136] That is, it shifts from one "good faith" standard (assuming the broad interpretation is in practice or used in theory) to another "good faith" standard; however, it now allows federal courts to finally review federal habeas petitions brought by state prisoners asserting a Fourth Amendment violation on the merits. This does not necessarily mean that a federal court will grant more habeas petitions, but it does mean that such prisoners will be heard by federal courts, which is vital from the perspective of procedural justice.