SEEKING CLARITY IN THE FEDERAL HABEAS FOG: DETERMINING WHAT CONSTITUTES "CLEARLY ESTABLISHED" LAW UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

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"Clear[ly]: adj. . . . plain . . . free from obscurity or ambiguity: easily understood: unmistakable."[1]

I. INTRODUCTION

"Clearly, Your Honor, ..." "It is clear that . . . ." Attorneys frequently use these words to bolster a point. We all do it.[2] Most of the time, however, "clearly" is superfluous; the argument should speak for itself. As a consequence of this overuse, "clearly" has lost much of its significance in everyday speech and writing. But this crisp seven-letter word now plays a significant role in the federal habeas corpus arena. This Article argues that, in the federal habeas corpus context, "clearly" is not superfluous. "Clearly" can mean the difference between freedom and prison.

In 1996, Congress deliberately included the word "clearly" in the Antiterrorism and Effective Death Penalty Act (AEDPA),[3] a statute that dramatically altered the federal writ of habeas corpus.[4] The "Great

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1. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 212 (10th ed. 1997).

2. Outside of this Article, I try to use "clear" and "clearly" sparingly. As a young law firm associate, I worked with a partner who had a pet peeve about the use of "clearly" in legal briefs and memoranda. "If you have to say it," he advised, "then your assertion is probably not clear." Many thanks to Ronald Berenstain of Perkins Coie LLP. This forum does not allow me to follow another critical piece of writing advice that I learned when serving as a law clerk to the Honorable David B. Sentelle of the U.S. Court of Appeals for the District of Columbia: use footnotes sparingly.

3. 28 U.S.C. § 2254(d)(1) (2000).

4. This Article does not attempt to describe all of the changes made by Congress in the Antiterrorism and Effective Death Penalty Act (AEDPA). For a comprehensive overview of AEDPA, see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

Writ" of habeas corpus allows federal courts to free state court prisoners who have been unconstitutionally imprisoned.[5] AEDPA altered many aspects of federal habeas corpus, but perhaps the most prominent change was to the method by which federal habeas courts decide legal claims that state courts have denied on the merits.[6]

Section 2254(d) of AEDPA limits a federal court's ability to grant a state prisoner's habeas application:

> 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—
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> (1) 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
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> (2) 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.[7]

This provision operates as a "constraint on the power of a federal habeas court to grant . . . [the] writ" where constitutional error has occurred.[8]

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5. The American writ of habeas corpus has deep roots in the writ of habeas corpus ad subjiciendum, often deemed the "Great Writ." The writ was employed by courts in the colonies and new states before the adoption of the U.S. Constitution. In 1867, Congress enacted a statute mandating that federal courts "shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385. For a history of the Great Writ, see WILLIAM DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 463 (1963); Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079 (1995); Dallin Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243 (1965); Dallin Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966); and Michael O'Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493 (1996).

6. Some commentators have argued that Congress followed the Court's lead in paring down the availability of the writ, primarily by adding procedural hurdles. *See, e.g.*, A. Christopher Bryant, *Retroactive Application of New Rules and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1, 5-15 (2002) (urging clarification of retroactive application of U.S. Supreme Court criminal procedure decisions under AEDPA); Melissa L. Koehn, *A Line in the Sand: The Supreme Court and the Writ of Habeas Corpus*, 32 TULSA L.J. 389, 390 (1997) (noting that approximately two decades ago, the Supreme Court began reducing availability of habeas writs, particularly through creation of technical procedures for petitions); David Blumberg, Note, *Habeas Leaps from the Pan and into the Fire:* Jacobs v. Scott *and the Antiterrorism and Effective Death Penalty Act of 1996*, 61 ALB. L. REV. 557, 559-60 (1997) (discussing different treatment under Warren and Rehnquist Courts).

7. 28 U.S.C. § 2254(d) (2000).

This constraint, or "standard of review" as it is commonly called, changed the pre-AEDPA standard of review from de novo to one that is more deferential to state courts.[9] Federal courts and commentators have struggled to understand the significance of this change.[10] Generally, however, § 2254(d)(1) is viewed as addressing the appropriate standard of review for questions of law and mixed questions of law and fact, while § 2254(d)(2) is viewed as addressing the appropriate standard of review for questions of fact.[11]

Section 2254 is also AEDPA's most controversial section. Debates over the meaning of "contrary to" and "unreasonable application" have consumed hundreds of pages in law reviews and in the federal reporters.[12]

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

9. *See* 28 U.S.C. § 2254(d). Some commentators have noted that § 2254(d) is more accurately described as a "limitation on relief" rather than a "standard of review." *See* JAMES S. LIEBMAN & RANDY HERTZ, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.1, at 1419-21 (4th ed. 2001); *id.* at 1421 ("[S]ection 2254(d)(1) operates as a 'constraint on the power of a federal habeas court to grant . . . the writ' . . . ." (first omission in original) (quoting *Williams*, 529 U.S. at 412)); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.1, at 862 (4th ed. 2003) ("Technically, federal court consideration of the habeas corpus petition is not considered a direct review of the state court decision; rather, the petition constitutes a separate civil suit filed in federal court and is termed *collateral relief*."). This author agrees but employs the standard of review terminology because it is most commonly used.

10. LIEBMAN & HERTZ, *supra* note 9, § 32.2, at 1421-28 (citing cases); *see also infra* note 12.

11. Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary of Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 681 (2003).

12. Commentators immediately took to analyzing whether AEDPA had changed the standard of review from de novo to one of deference. *See, e.g.*, Allan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535 (1999); Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337 (1997); Ides, *supra* note 11; Evan T. Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103 (1998); James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 864-84 (1998); Todd Pettys, *Federal Habeas Relief and the New Tolerance for "Reasonably Erroneous" Applications of Federal Law*, 63 OHIO ST. L.J. 731 (2002); Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888 (1998); Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703 (2000); Adam 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; Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997); Yackle, *supra* note 4; Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731 (2000) [hereinafter Yackle, *Figure*]; Sharad S. Khandelwal, Note, *The Path to Habeas Corpus Narrows: Interpreting 28 U.S.C. § 2254(d)(1)*, 96 MICH. L. REV. 434 (1997); Andrea A. Kochan, Note, *The Antiterrorism and Effective Death Penalty Act*

One issue generally glossed over in this debate has recently emerged as an issue to be reckoned with: what constitutes "clearly established Federal law, as determined by the Supreme Court of the United States"?[13] This Article focuses on that question.

Because AEDPA requires that clearly established law must exist for a court to grant a writ of habeas corpus, a habeas court's determination of what constitutes clearly established law has grave consequences. If federal courts deny habeas relief on the ground that there is no clearly established law in a particular case—and they regularly do[14]—a common understanding of what constitutes clearly established law is imperative.

Not defined in AEDPA itself, the phrase "clearly established" was first interpreted by the Supreme Court four years after AEDPA's enactment.[15] In *Williams v. Taylor*,[16] the Court defined "clearly established Federal law, as determined by the Supreme Court of the United States" as meaning the "holdings, as opposed to the dicta" of Supreme Court decisions.[17] This common sense definition, however, has not provided enough guidance to the federal district and appellate courts which regularly grapple with determining what constitutes clearly established law.

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of 1996: Habeas Corpus Reform?, 52 WASH. U. J. URB. & CONTEMP. L. 399 (1997); Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868 (1997); Kimberly Woolley, Note, *Constitutional Interpretations of the Antiterrorism Act's Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414 (1998); *see also* Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (examining the meaning of "Federal law" and "as determined by the Supreme Court of the United States" in AEDPA), *rev'd on other grounds*, 521 U.S. 320 (1997).

Some commentators have focused on AEDPA's limitation that § 2254(d)(1) applies only to claims that were "adjudicated on the merits" by the state court. *See, e.g.*, Monique Anne Gaylor, *Postcards from the Bench: Federal Habeas Review of Unarticulated State Court Decisions*, 31 HOFSTRA L. REV. 1263 (2003); Brittany Glidden, *When the State Is Silent: An Analysis of AEDPA's Adjudication Requirement*, 27 N.Y.U. REV. L. & SOC. CHANGE 177 (2001); Robert D. Sloane, *AEDPA's "Adjudication on the Merits" Requirement: Collateral Review, Federalism, and Comity*, 78 ST. JOHN'S L. REV. 615 (2004), WL 78 STJLR 615; Margery I. Miller, Note, *A Different View of Habeas: Interpreting AEDPA's "Adjudicated on the Merits" Clause When Habeas Corpus Is Understood as an Appellate Function of the Federal Courts*, 72 FORDHAM L. REV. 2593 (2004); Claudia Wilner, Note, *"We Would Not Defer to that Which Did Not Exist": AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U. L. REV. 1442 (2002).

13. 28 U.S.C. § 2254(d)(1) (2000).

14. *See infra* Part III.A (citing cases where the court disposed of the case due to the lack of clearly established law). Moreover, federal judges are not the only judges who must make this determination. State judges would be well-advised to make this determination. Even though they are reviewing the issues on direct appeal rather than habeas, they need to know what law must be followed.

15. Williams v. Taylor, 529 U.S. 362, 377 (2000) (opinion of Stevens, J.).

16. 529 U.S. 362 (2000).

17. *Id.* at 412 (O'Connor, J., writing for the majority).

A key question about AEDPA's "clearly established" limitation is whether the law must simply be "established"—meaning that there is some precedent on point—or whether the law also must be "clear." Grammatical analysis suggests that "clearly established" is an adjectival phrase modifying the noun phrase "Federal law," and that "clearly" modifies "established."[18] Under this reading, "the status of the law's establishment must be readily and perhaps unmistakably discernable."[19]

The few commentators who have offered definitions of clearly established law have suggested that it means legal directives that are "clearly anchored in existing case law"[20] or "embodied within Supreme Court precedent."[21] While useful, these definitions (like the Supreme Court's definition) lack the necessary precision to guide the lower federal courts, which currently do not share a common understanding of what constitutes clearly established law.

Such confusion reflects a larger, more fundamental question in a common law system: what constitutes precedent for a current decision?[22]

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18. Ides, *supra* note 11, at 682.

19. *Id.*

20. Lee, *supra* note 12, at 123 (stating that "the rule must blend effortlessly into the mosaic of existing decisions").

21. Ides, *supra* note 11, at 684. Professor Ides notes that "the majority view of the [Supreme] Court expressed within the holding and rationale of a decided case represents the clearly established rule of law." *Id.* at 683. He concludes that this definition comports with H.L.A. Hart's "rule of recognition" in the statutory context. *Id.* at 682-83 (citing H.L.A. HART, THE CONCEPT OF LAW 97-107 (1961)); *see also* Allan Ides, *Judicial Supremacy and the Law of the Constitution*, 47 UCLA L. REV. 491, 491-93 (1999) (arguing that the Supreme Court creates constitutional law with its decisions).

22. As Judge Ruggero Aldisert has acknowledged, "There are precedents, and there are precedents . . . All . . . do not have the same bite." Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 630-31 (1990). Although it is beyond the scope of this Article to examine the theoretical underpinning of the use of precedent in the common-law system, a number of scholars have tackled this broader issue. *See, e.g.*, Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); James Hardistry, *Reflections on Stare Decisis*, 55 IND. L.J. 41 (1979); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision Making*, 18 CONST. COMMENT. 191 (2001) [hereinafter Lawson, *Controlling Precedent*]; Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J. L. & PUB. POL'Y 23 (1994); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Robert S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707 (1978); *see also* LARRY ALEXANDER & KEN KRESS, *Against Legal Principles, Law and Interpretation*, *in* LEGAL RULES AND LEGAL REASONING 249 (2000); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); PRECEDENT IN LAW (Laurence Goldstein ed., 1987). In addition to the habeas context, questions about the meaning of precedent have arisen recently regarding the significance of unpublished opinions. *See, e.g.*, Lauren Robel, *The Practice*

The core concept of precedent is "a norm limiting the decisionmaker's flexibility."[23] Through AEDPA, Congress has limited federal judges' flexibility in determining what constitutes precedent for purposes of habeas relief. The Supreme Court has interpreted § 2254(d)(1) to limit the source and timing of clearly established law to Supreme Court precedent existing at the time of the state court decision on the petitioner's claims.[24] Any other limitations on what constitutes clearly established law, however, are not presently well defined. This Article seeks to define these limits and to provide a framework for analyzing them.

Section 2254(d)(1) purports to follow the rule model of precedential constraint, which is the general approach of our common law system.[25] "According to this model, precedent courts . . . promulgate rules of law [when deciding cases]."[26] The "rule" of the precedent case either refers to some "canonical formulation of a rule that appears in the opinion" or, when no canonical rule formulation appears in the opinion, to the rationales discernable from the opinion.[27] The model's primary problem is the identification of the precedent's rule.[28] Three main questions that center on the scope of the precedent typically arise when attempting to identify the precedent's rule: First, what is the breadth of the legal issue the precedent case has settled? Second, how many cases, i.e., factual situations, does the precedent case control? Third, how does one differentiate between the holding and dictum in the precedent case?[29]

Determining precedent under the rule model also raises questions about the strength of the precedential constraint. Such questions tend to

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of Precedent: Anastoff*, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002).

23. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575 (1987). This classic article describes the law's reliance on precedent and how precedent operates in the legal world.

24. Williams v. Taylor, 529 U.S. 362, 412 (2000) (O'Connor, J., writing for the majority).

25. *See* LARRY ALEXANDER, *Precedent*, *in* LEGAL RULES AND LEGAL REASONING, *supra* note 22, at 167, 169-71 [hereinafter ALEXANDER, *Precedent*]. Professor Alexander describes three models of precedential constraint: the rule model (described above); the natural model (past decisions naturally generate reasons, namely equality and reliance, for deciding present cases the same way); and the result model (the result is what binds the court, rather than a rule articulated by the court). *Id.* at 169-74; *see also* Alexander, *supra* note 22.

26. ALEXANDER, *Precedent*, *supra* note 25, at 170.

27. *Id.*

28. *Id.* Professor Alexander notes that "some might object to the rule model because it explicitly recognizes and endorses judicial legislation. If one's view of the proper role of courts excludes their legislating, even interstitially, then the rule model of precedential constraint would be objectionable." *Id.* (citation omitted).

29. *Id.*

focus on the reasons why a court may disregard precedent.[30] While these questions typically address whether the precedent is from a higher court (vertical) or from the same court (horizontal), in the habeas context questions of strength focus on whether a precedent's rule has been applied consistently and whether that rule has been endorsed by a majority of the Supreme Court. In general, however, the questions raised by the rule model are the same types of questions regularly encountered in the habeas context.

This Article argues that § 2254(d)(1)'s restriction of habeas relief to cases where there is "clearly established Federal law, as determined by the Supreme Court of the United States"[31] maintains the general operation of the rule model of precedential constraint, but more narrowly constrains the source and timing of the precedent. It also argues that while the source, number, and timing of the precedent are dispositive issues for the habeas court, the issues relating to the scope or strength of the precedent should not be dispositive. Instead, the court should analyze issues relating to the scope of the precedent under the "contrary to" and "unreasonable application" prongs of § 2254(d)(1).

Part II of this Article briefly reviews pre-AEDPA law before examining the text of § 2254(d)(1). It then explores how "clearly established law" has been interpreted by the Supreme Court in three major cases: *Williams v. Taylor*,[32] *Lockyer v. Andrade*,[33] and *Yarborough v. Alvarado*.[34] Part II notes that *Williams* resolved the issues of the appropriate source and timing of clearly established law under § 2254(d)(1). The Court's decisions in *Andrade* and *Alvarado*, on the other hand, raised, but did not resolve, questions about determining the scope and strength of the precedent. Furthermore, they illustrate that the clarity of the precedent is relevant under § 2254(d)(1).[35] This Part also observes that while the Supreme Court has instructed that the clearly established law inquiry should be a "threshold" issue,[36] it has not specified whether that simply means the issue should be addressed first, or whether it also means the issue should be dispositive and thus the basis for denying relief. Part II concludes that the Court's definition of clearly established law is broad and works in tandem with the standards of review under § 2254(d)(1).

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30. *Id.* at 175-76.

31. 28 U.S.C. § 2254(d)(1) (2000).

32. 529 U.S. 362 (2000).

33. 538 U.S. 63 (2003).

34. 124 S. Ct. 2140 (2004).

35. One commentator has argued that the clarity of precedent should not be relevant to the "clearly established" law inquiry. *See* Ides, *supra* note 11, at 761-62.

36. *Andrade*, 538 U.S. at 71; *Williams*, 529 U.S. at 390; *see infra* Part II.

Part III examines life in the lower federal courts after *Williams*, *Andrade*, and *Alvarado* and identifies recurring situations in which questions about clearly established law emerge. The types of questions that the lower courts have wrestled with generally fall into three categories. The first category comprises cases where courts find that there is no "clearly established law" applicable to the habeas petitioner's case. Some courts treat this determination as a dispositive issue and deny relief in the absence of clearly established law. Other courts, however, go on to analyze issues relating to the scope of the precedent under the contrary to or unreasonable application prongs of § 2254(d)(1). The second category consists of cases in which the court must decide when a rule applies to the petitioner's factual situation. Courts tend to analyze these scope of precedent issues under the contrary to or unreasonable application prongs of § 2254(d)(1). The third category comprises cases that inquire into the clarity of the precedent. These cases involve the application of general principles, old or otherwise questionable precedent, and splintered Supreme Court decisions. Courts view these issues of clarity as impacting the reasonableness of the state court's decision.

Part IV recognizes the need for a common understanding of AEDPA's clearly established law requirement and offers an analytical framework for this determination. It advocates that the determination of clearly established law should be a threshold question in the sense that the court will attempt to ascertain the relevant law at the beginning of its analysis. Part IV identifies five "analytic touchstones"[37] to which courts should refer when making this determination: the number of cases required, the source of the precedent, the timing of the precedent, the scope of the precedent, and the strength of the precedent. The proposed analytical framework recommends that the first three touchstones—number of cases, source of the precedent, and the timing of the precedent—be dispositive issues requiring the court to deny habeas relief if they are not met. If, however, a habeas court encounters questions relating to the final two touchstones—the scope of the precedent and the strength of the precedent—the court should continue with the analysis under § 2254(d)(1) and address those questions under the contrary to or unreasonable application prongs. Part IV also recognizes a role for federal court of appeals precedent in the clearly established law determination.

This Article concludes that the determination of clearly established law works in tandem with the standards of review in § 2254(d)(1). It

37. This phrase is borrowed from Professor Todd E. Pettys of the University of Iowa College of Law. *See* Pettys, *supra* note 12, at 788.

urges that, where the law appears to be clearly established because it passes the threshold test of the first three touchstones, the approach most consistent with AEDPA and Supreme Court case law is one in which the habeas court continues with its analysis under § 2254(d)(1), deferring to the state court's reasonable interpretation and application of that law on a sliding scale based on the clarity of the law, which is determined by its scope and strength, the final two touchstones.

II. DEFINING "CLEARLY ESTABLISHED" LAW UNDER § 2254(D)(1)

Although our legal system does not have an agreed-upon approach to statutory interpretation, most lawyers and judges agree that the text of the statute is the starting point.[38] Lacking guidance from the statute's text and sparse legislative history, the federal district courts and courts of appeals have struggled with the meaning of § 2254(d)(1). Commentators immediately took to analyzing whether AEDPA had changed the standard of review from de novo to one of deference.[39] Another area of concern was whether § 2254(d)(1) limited the source of clearly established law to only Supreme Court precedent (thereby proscribing the use of circuit court precedent), and, if so, whether that limitation was constitutional.[40] In general, however, the meaning of clearly established

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38. *See, e.g.*, W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 98 (1991) ("The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President."); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835 (1990) ("The starting point for interpretation of a statute is the language of the statute itself."); United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."). However, even established canons of statutory construction have long been criticized. *See* Karl L. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950). This classic article recognizes that "there are two opposing canons on almost every point." *Id.*

39. *See supra* note 12.

40. *See, e.g.*, Bocain v. Godinez, 101 F.3d 465, 471 (7th Cir. 1996) (construing § 2254(d) as requiring that "[f]ederal courts are no longer permitted to apply their own jurisprudence, but must look exclusively to Supreme Court caselaw"); Fern v. Gramley, 99 F.3d 255, 260 (7th Cir. 1996); Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (examining the meaning of "Federal law" and "*as determined by the Supreme Court of the United States*" in § 2254(d)(1)), *rev'd on other grounds*, 521 U.S. 320 (1997). In *Lindh*, the Seventh Circuit asserted that AEDPA's new scope of review provision in § 2254(d)(1) "significantly interfere[s] with the judicial role and to a great extent prevents the judicial department from accomplishing its 'constitutionally assigned functions.' Simply put, the statute, as amended, deprives a federal court of the right to adjudicate the case." 96 F.3d at 890. Although this issue was not resolved by the Supreme Court, its review of the Seventh Circuit's decision in *Lindh* clarified that AEDPA limits the source of clearly established law to Supreme Court precedent in *Williams*. The Court has never directly addressed the constitutional argument.

law was not a focus.[41] The time has come to focus the spotlight on this issue.

After briefly reviewing pre-AEDPA law, this Part examines the text and relevant legislative history of § 2254(d)(1), neither of which directly provides a definition for "clearly established" law. It then examines the three major cases in which the Supreme Court has given shape to the clearly established law requirement: *Williams v. Taylor*,[42] *Lockyer v. Andrade*,[43] and *Yarborough v. Alvarado*.[44] These decisions provide a

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It is beyond the scope of this Article to address the constitutional argument in detail. The basic argument is that AEDPA's scope of review limitations interfere with the exercise of Article III powers because Congress's authority to tell the federal courts how to use precedent is constitutionally questionable. Some scholars argue that AEDPA unconstitutionally limits the stare decisis effect of lower federal court decisions. Narrowing the role of lower federal courts coincides with and complements both the Court's and Congress's obvious effort to narrow and curtail constitutional rights, particularly in the criminal context. The counter-argument is that there is no constitutionally enshrined right to mount a collateral attack on a state court's judgment in the inferior Article III courts and, therefore, no mandate that state court judgments embracing questionable (or even erroneous) interpretations of the Federal Constitution be reviewed by the inferior Article III courts. Thus, collateral review of judgments is subject to legislative control. For a discussion of these constitutional arguments, see Lawson, *Controlling Precedent*, *supra* note 22, at 194 (rejecting Congress's power to legislate when the courts' decision-making power has been affected and making no specific reference to AEDPA); Liebman & Ryan, *supra* note 12 (explaining why one reading of § 2254(d)(1) is constitutional and why the Fifth, Seventh, and Eleventh's Circuit's reading of § 2254(d)(1) is unconstitutional); Daniel Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2537-38 (1998) (discussing the scope of congressional authority to define and limit judicial redress); Note, *Powers of Congress and the Court Regarding the Availability and Scope of Review*, 114 HARV. L. REV. 1551 (2001) (examining whether Congress can require courts to defer on direct review). *But see* Scheidegger, *supra* note 12, at 891 (arguing that AEDPA's limitation is constitutional).

41. For the most part, before the Supreme Court's decision in *Williams*, courts assumed the AEDPA codified *Teague v. Lane*'s, 489 U.S. 288 (1989), anti-retroactivity doctrine. Accordingly, most lower courts declared that to be "clearly established," a rule must be compelled by existing precedent of the Supreme Court, which was required under *Teague*. *See, e.g.*, Morgan v. Krenke, 232 F.3d 562, 567 (7th Cir. 2000); *Lindh*, 96 F.3d at 889; Walker v. McCaughtry, 72 F. Supp. 2d 1025, 1031 (E.D. Wis. 1999); Breedlove v. Moore, 74 F. Supp. 2d 1226, 1231 (S.D. Fla. 1999). In *Williams*, however, a majority of the Supreme Court did not agree that AEDPA simply codified *Teague*. 529 U.S. at 379-80 (opinion of Stevens, J.). See *infra* Part II.C.1, for a discussion of *Williams* and *infra* Part II.A, for a discussion of *Teague*.

This is not to say that commentators did not discuss the language or contemplate its meaning. But they did so in conjunction with a broader focus on the statute. *See, e.g.*, Chen, *supra* note 12, at 552-53; Lee, *supra* note 12, at 117-35; Khandelwal, *supra* note 12, at 439-45.

42. 529 U.S. 362 (2000).

43. 538 U.S. 63 (2003).

44. 124 S. Ct. 2140 (2004).

"baseline interpretation"[45] and illustrate how the clearly established law analysis works in tandem with the standards of review under § 2254(d)(1).

A. The Pre-AEDPA World: Teague v. Lane*'s Anti-retroactivity Rule*

The habeas fog rolled in before AEDPA; its roots are in the anti-retroactivity rule of *Teague v. Lane*[46] and its progeny. The *Teague* doctrine (as it has come to be called) is relevant to understanding AEDPA's clearly established law limitation because both *Teague*'s anti-retroactivity rule and AEDPA § 2254(d)(1) premise habeas relief on the existence of precedent at a particular point in time. Their focus on timing reflects a critical distinction between direct appellate review and habeas review. On direct review, courts apply the principles of federal law at the time of appellate decision.[47] On habeas review, a question arises when the habeas claim proposes an expansion of federal rights from the precedent as to whether the Court should apply the right to pending cases.[48]

Described as an "intellectual disaster area,"[49] the history of the *Teague* doctrine has been chronicled comprehensively by others.[50] This Article

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45. I borrow the term "baseline interpretation" from Professor Allan Ides. *See* Ides, *supra* note 11, at 679. Professor Ides asserts that the Supreme Court provided a baseline interpretation of § 2254(d)(1) in *Williams*. My use of the term is narrower in the sense that I am referring only to the "clearly established Federal law, as determined by the Supreme Court of the United States" language, and it is broader in the sense that the baseline definition for this language is synthesized from several Supreme Court cases, including but not limited to *Williams*.

46. 489 U.S. 288 (1989) (plurality opinion).

47. *See* Yackle, *supra* note 4, at 414. Professor Yackle notes that

> [t]his is true even if the Court chooses a particular case as the occasion for announcing a "new" rule of constitutional law. When that happens, the "new" rule is fully applicable to the case at bar, as well as to any other case that has not yet reached final disposition on direct review.

Id.

48. *See* Kaufman v. United States, 394 U.S. 217, 226 (1969); Brown v. Allen, 344 U.S. 443, 462-64 (1953).

49. Yackle, *Figure*, *supra* note 12, at 1756.

50. This Article does not attempt to provide a comprehensive review of the *Teague* doctrine and its progeny, which continue today; it has been explored in-depth by other commentators. The primary reaction to *Teague* was criticism, which provoked a great deal of scholarship. *See, e.g.*, Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After* Teague v. Lane, 69 N.C. L. REV. 371, 380-90 (1991); Susan Bandes, *Taking Justice to Its Logical Extreme: A Comment on* Teague v. Lane, 66 S. CAL. L. REV. 2453, 2462-66 (1993); Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals To Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1703 (1990); John Blume & William Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 325, 343-56 (1990-1991); David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST.

does not attempt to duplicate those efforts, but a brief overview of the doctrine is necessary to understand its relevance to AEDPA.

In *Teague*,[51] the Supreme Court divided on a state prisoner's habeas challenge that was based on the racial composition of his petit jury and the prosecutor's use of preemptory strikes to exclude African-American jurors.[52] The prisoner relied on the rule from *Batson v. Kentucky*[53] prohibiting the use of preemptory strikes on the basis of race.[54] The Court decided the case after the prisoner's conviction became final.[55] The petitioner also sought to extend *Taylor v. Louisiana*'s[56] "fair cross section" requirement to the composition of his petit jury, even though the *Taylor* Court had expressly limited its holding to the composition of the jury venire.[57]

A plurality of the Court, led by Justice O'Connor, explained that a decision would be considered to announce a new rule if it required a court to "break[] new ground or impose[] a new obligation on the States

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L.Q. 23, 31-41 (1991); Markus Dirk Dubber, *Prudence and Substance: How the Supreme Court's New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1, 3-9 (1992); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1746-49 (1991); Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice*, 88 NW. U. L. REV. 1046 (1994); Timothy Finley, *Habeas Corpus—Retroactivity of Post-Conviction Rulings: Finality at the Expense of Justice*, 84 J. CRIM. L. & CRIMINOLOGY 975, 982-88 (1994); Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 802-14 (1992); Barry Friedman, Pas De Deux*: The Supreme Court and the Habeas Courts*, 66 S. CAL. L. REV. 2467, 2496-501 (1993); Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421, 427-32 (1993); James S. Liebman, *More than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-1991); Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423 (1994); Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703 (2000); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 638-41 (1993); Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 255-81 (1998); Roger D. Branigin III, Note, *Sixth Amendment—The Evolution of the Supreme Court's Retroactivity Doctrine: A Futile Search for Theoretical Clarity*, 80 J. CRIM. L. & CRIMINOLOGY 1128 (1990); Khandelwal, *supra* note 12, at 439-40; *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 308, 309-14 (1990).

51. Although *Teague* was a plurality decision, a majority of the Court adopted the rule announced by the *Teague* plurality in *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

52. Teague v. Lane, 489 U.S. 288, 292 (1989).

53. 476 U.S. 79 (1986).

54. *Id.* at 80, 96. A lower federal court recently faced the issue of whether to extend the *Batson* rule to Italian-Americans. *See infra* Part III.B (discussing *Rico v. Leftridge-Byrd*, 340 F.3d 178, 187 (3d Cir. 2003)).

55. *Teague*, 489 U.S. at 295-96.

56. 419 U.S. 522 (1975).

57. *Teague*, 489 U.S. at 299.

or the Federal Government"—that is, when it would require a result "not dictated by precedent existing at the time the defendant's conviction became final."[58] The plurality found that the petitioner could neither rely on *Batson* nor extend *Taylor*, because to do so would allow him to invoke a "new" rule of constitutional law that had not been established at the time his conviction became final.[59] *Batson* was a good example of a new rule because the rule it announced overturned existing precedent.[60] The plurality interpreted the Habeas Corpus Act (as it then existed) to prohibit the announcement or application of "new" rules of constitutional law, except in extraordinary circumstances.[61]

While at first *Teague*'s prohibition appears to be procedural—a timing inquiry that bars retroactive application of new rules—it draws on fundamental substantive issues about the nature of our legal system. The rule announced by the plurality constrained the scope of the habeas remedy; the consequence of a new rule is no habeas relief. Because rules can be viewed at varying levels of generality, the *Teague* Court recognized that it is not always easy to determine when a new rule has been announced.[62]

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58. *Id.* at 301 (plurality opinion).

59. *See id.* at 294-96, 315-16.

60. *Id.* at 295.

61. Yackle, *supra* note 4, at 414. The Court recognized two exceptions where new rules could be retroactively applied. The first exception was "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 489 U.S. at 311 (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)). The second exception applied "if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'" *Id.* (plurality opinion) (omission in original) (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring)).

62. *Id.* at 301 (plurality opinion) ("It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes."). Professor Evan Tsen Lee provided this example:

> [I]n *Edwards v. Arizona*, [451 U.S. 477, 484-85 (1981),] the Court held that a suspect who had expressed his desire with the police only through counsel may not be interrogated further until counsel had been made available, unless the accused himself initiates further communication with the police. Then, in *Arizona v. Roberson*, [486 U.S. 675, 682 (1988),] the Court held that a suspect in this situation may not be interrogated further even as to an offense unrelated to the subject of the original interrogation. Did *Roberson* create a new rule or did it simply flesh out a more general rule . . . ? In *Butler v. McKellar*, [494 U.S. 407, 414-15 (1990),] the Court held that *Roberson* did establish a new rule, despite language in the *Roberson* opinion that the result therein was logically compelled by *Edwards*. Because *Roberson* was handed down after the petitioner's conviction became final, it could not form the basis for habeas relief.

Lee, *supra* note 12, at 118-19 (footnotes omitted).

Several years later, the Court again divided in *Wright v. West*.[63] A majority of the Court agreed that a new rule would be one that the state court did not feel "compelled by existing precedent to conclude . . . was required by the Constitution."[64] The Court split, however, on whether habeas courts should validate "reasonable, good-faith interpretations of existing precedents made by the state courts even though they are shown to be contrary to later decisions."[65] Justice O'Connor was joined by three other justices who rejected deferring to the state court; federal courts must review questions of federal law de novo.[66] Although he did not join her opinion in full, Justice Kennedy noted in his concurring opinion that

> *Teague* does bear on applications of law to fact which result in the announcement of a new rule. . . . If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.[67]

Three justices, led by Justice Thomas, favored an approach where federal habeas courts "'must defer to the state court's decision rejecting the [petitioner's] claim unless that decision is patently unreasonable.'"[68] Justice Thomas's test for a new rule would be based on this deference: "[I]f a state court has reasonably rejected the legal claim asserted by a habeas petitioner under existing law, then the claim seeks the benefit of a 'new' rule . . . and is therefore not cognizable on habeas under *Teague*."[69] This reading was grounded in a respect for the states' strong interest in the finality of criminal convictions and the recognition that a state court should not be penalized for relying on "'the constitutional standards that prevailed at the time the original proceedings took place.'"[70] Accordingly, a rule is "new" if, at the time the prisoner's conviction became final, the rule was one about which reasonable jurists disagree.[71]

Although not joining Justice Thomas's opinion, Justice Souter read *Teague* to hold that the "unlawfulness [of the conviction] must be

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63. 505 U.S. 277 (1992) (plurality opinion).

64. *Id.* at 310 (Souter, J., concurring in the judgment).

65. *Id.* at 311 (Souter, J., concurring in the judgment).

66. *Id.* at 300 (O'Connor, J., concurring). Justice Kennedy cast a fourth vote in support of this narrow reading, but wrote a concurring opinion. *Id.* at 306 (Kennedy, J., concurring in the judgment).

67. *Id.* at 308 (citation omitted) (Kennedy, J., concurring in the judgment).

68. *Id.* at 291 (plurality opinion) (quoting Butler v. McKellar, 494 U.S. 407, 422 (1990)).

69. *Id.* (plurality opinion).

70. Teague v. Lane, 489 U.S. 288, 307 (1989) (plurality opinion) (quoting Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting)).

71. *Wright*, 505 U.S. at 291 (plurality opinion).

apparent" for a prisoner to be entitled to habeas relief.[72] He reasoned that

> our cases have recognized that "[t]he interests in finality, predictability, and comity underlying our new rule jurisprudence may be undetermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent."[73]

Following *Wright*, the Supreme Court and lower federal courts used language consistent with Justice Thomas's approach. But the evolution of the *Teague* doctrine (and the resolution of confusion surrounding it) was cut short by the enactment of AEDPA in 1996.[74]

B. Statutory Text and Relevant Legislative History

Section 2254(d)(1) sets out a two-pronged approach: a federal court may grant habeas relief if either the state court decision was "contrary to clearly established Federal law, as determined by the Supreme Court" or the state court decision "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court."[75] The existence of "clearly established" law is a requirement for relief under either prong. Understanding what qualifies as "clearly established" law is therefore critical to the operation of the statutory provision as a whole.

None of the key phrases in § 2254(d)(1) are defined in AEDPA. While the legislative history[76] does shed some light on how the standard of review provisions were intended to operate,[77] it does not specifically

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72. *Id.* at 313 (Souter, J., concurring in the judgment).

73. *Id.* (Souter, J., concurring in the judgment) (alteration in original) (quoting Stringer v. Black, 503 U.S. 222, 228 (1992)).

74. Despite speculation to the contrary, the Supreme Court has recently recognized that the *Teague* doctrine survived AEDPA's enactment. *See* Horn v. Banks, 536 U.S. 266 (2002) (per curiam) (applying *Teague* but not clarifying the meaning of new rules); *see also* Bryant, *supra* note 6, at 18 n.113.

75. 28 U.S.C. § 2254(d)(1) (2000).

76. I recognize that the use of legislative history in statutory interpretation is controversial in some circles. At least two Supreme Court justices, Justice Thomas and Justice Scalia, eschew the use of legislative history. *See* Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 825, 826 & n.60; Antonin Scalia, COMMON-LAW COURTS IN A CIVIL-LAW SYSTEM: *The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 17 (Amy Gutmann ed., 1997). A majority of the Court, however, appears to find legislative history helpful in statutory interpretation when the statute's language is ambiguous. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 378 n.10, 408 (2000) (using legislative history to interpret AEDPA).

77. The most controversial issue debated with respect to § 2254 was the meaning of the "unreasonable application" standard and whether it required federal courts to defer to

address the meaning of "clearly established Federal law as determined by the Supreme Court."[78]

The closest reference to the clearly established language was a reference to the governmental qualified immunity doctrine in tort law when Senator Orrin Hatch, the primary sponsor of § 2254, referred to *Harlow v. Fitzgerald*.[79] Arguably, that reference was not made as a

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state court decisions. *See* Carrie M. Bowden, Note, *The Need for Comity: A Proposal for Federal Court Review of Suppression Issues in the Dual Sovereignty Context After the Antiterrorism and Effective Death Penalty Act of 1996*, 60 WASH. & LEE L. REV. 185, 225-26 (2003) (describing in detail floor debates on the issue); *see also* Bryant, *supra* note 6, at 27-28; Ides, *supra* note 11, at 693-97 (discussing the legislative history of the "unreasonable application" language and arguing the congruency between the legislative history and the text); Tushnet & Yackle, *supra* note 12, at 5-21 (exploring political pressures leading to AEDPA's enactment); Yackle, *supra* note 4, at 436-38. Professor Yackle argues that the legislative history demonstrates that AEDPA was the product of three significant compromises. These compromises abandoned previous legislative efforts to remove federal court jurisdiction over habeas petitions from state convicts, to give state court decisions on the merits preclusive effect in federal court, and to require federal courts to defer to "reasonable" state court decisions on questions of law and mixed questions of law and fact. *Id.* at 436-37.

78. 28 U.S.C. § 2254(d)(1); *see* Ides, *supra* note 11, at 693-97; Yackle, *supra* note 4, at 437-39; Bowden, *supra* note 77, at 225-26.

79. Yackle, *supra* note 4, at 406 & n.89, 407 n.90 (citing 141 CONG. REC. S7848 (daily ed. June 7, 1995) (statement of Sen. Hatch)). The qualified immunity doctrine requires federal courts to engage in an analysis similar to that required by *Teague* and AEDPA § 2254(d)(1): to determine whether a constitutional right had been "clearly established" by a particular point in time. Cases involving the affirmative defense of qualified immunity arise out of claims of constitutional violations under 42 U.S.C. § 1983, which allows a plaintiff to recover civil damages from a defendant government official. In the seminal decision of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court announced that a government official performing a discretionary function is entitled to qualified immunity from a claim under 42 U.S.C. § 1983 if there was no "clearly established" law at the time the official violated the constitutional rights of the plaintiff, *id.* at 818.

Since *Harlow*, the Court has intermittently attempted to clarify the meaning of "clearly established" law. *See* Anderson v. Creighton, 483 U.S. 635 (1987); Davis v. Scherer, 468 U.S. 183 (1984). In doing so, the Court has stressed the competing policy concerns in qualified immunity:

> When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.

Anderson, 483 U.S. at 638 (alteration in original) (quoting *Harlow*, 457 U.S. at 814). Recognizing the need to balance the right of a plaintiff to bring constitutional violation claims under 42 U.S.C. § 1983 with the right of an official to perform job duties without the fear of possible litigation, the Court announced that "[t]he contours of the right must be *sufficiently clear* that a reasonable official would understand that what he is doing violates that right." *Id.* at 640 (emphasis added). However, at the time AEDPA was

enacted, the Court had failed to elaborate on what exactly created a "sufficiently clear" right.

Two recent decisions, *United States v. Lanier*, 520 U.S. 259 (1997), and *Hope v. Pelzer*, 536 U.S. 730 (2002), elaborate on the meaning of clearly established law in the qualified immunity context. In *Lanier*, the defendant was convicted under 18 U.S.C. § 242 for criminally violating the constitutional rights of five women by sexually assaulting them while he served as a state judge. 520 U.S. at 261. The Sixth Circuit dismissed the indictment, finding that criminal liability may be imposed under 18 U.S.C. § 242, only if "the constitutional right said to have been violated is first identified in a decision of this Court (not any other federal, or state, court), and only when the right has been held to apply in a 'factual situation fundamentally similar to the one at bar.'" *Id.* at 263 (quoting United States v. Lanier, 73 F.3d 1380, 1393 (6th Cir. 1996), *vacated by* 520 U.S. 259 (1997)). The Sixth Circuit, following a narrow view, found "no decision of this Court applying a right to be free from unjustified assault or invasions of bodily integrity in a situation 'fundamentally similar' to those charged" and thus dismissed the charges against the defendant. *Id.* Applying the clearly established law standard for qualified immunity under 42 U.S.C. § 1983, the Supreme Court reversed. *Id.* at 270. The Court first found that nothing in its precedent required the narrow "fundamentally similar" situation for determining whether the conduct at issue violated constitutional rights. *Id.* at 269. The Court rejected the Sixth Circuit's use of the "fundamentally similar" standard because it would "lead trial judges to demand a degree of certainty at once unnecessarily high" and found that claims under § 242 needed nothing more than the "clearly established" or "fair warning" standard. *Id.* at 270. The Court, announced:

> [A]s with civil liability under § 1983 . . . all that can usefully be said about criminal liability under § 242 is that it may be imposed for deprivation of a constitutional right if, but only if, "in the light of pre-existing law the unlawfulness [. . . is] apparent." Where it is, the constitutional requirement of fair warning is satisfied.

Id. at 271-72 (second alteration in original) (quoting *Anderson*, 483 U.S. at 640). The Court also held that prior Supreme Court precedent was not necessary to give "fair warning" to an established right. *Id.* at 271.

The Court further clarified the clearly established law definition standard in *Hope*. The plaintiff, a prison inmate, brought a claim under 42 U.S.C. § 1983 for violation of his Eighth Amendment rights against cruel and unusual punishment because he was handcuffed by prison guards to a hitching post for seven hours in the hot sun. *Hope*, 536 U.S. at 734-35. The Eleventh Circuit found that the use of the hitching post violated the plaintiff's Eighth Amendment rights. *Id.* at 736. However, it granted the defendant prison guards qualified immunity after stating that "'the federal law by which the government official's conduct should be evaluated must be preexisting, obvious and mandatory,' and established, not by 'abstractions,' but by cases that are '*materially similar*' to the facts in the case in front of us." *Id.* (emphasis added) (internal quotation marks omitted) (quoting Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002)). The Supreme Court rejected the Eleventh Circuit's "materially similar" standard. *Id.* at 741. The Court recognized that it is "clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* The Court found ample evidence that the law was clearly established enough to put the defendant prison guards on notice. It determined that the law was clearly established based on binding Eleventh Circuit precedent, an Alabama Department of Corrections regulation, and a Department of Justice report, all of which concluded that the use of handcuffing to a fence or hitching post was unconstitutional. *Id.* at 744.

For a comprehensive review of the qualified immunity doctrine, see Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional*

suggestion to adopt the same "clearly established" standard from the qualified immunity context, but rather to "compare[] the deference provisions in the habeas reforms to the preference for reasonableness that courts give in other areas of the law."[80] Accordingly, the Court had to shed light on the meaning of "clearly established" law in the habeas context and it did so in a series of decisions beginning in 2000.

C. The Supreme Court Speaks

The Supreme Court addressed the proper construction of § 2254(d)(1) for the first time in *Williams*, four years after AEDPA's enactment.[81] While the determination of clearly established law was not a primary issue in *Williams*, the Court took the opportunity to define this phrase along with the other language in the section. The *Williams* Court also clarified § 2254(d)(1)'s relationship to the *Teague* doctrine. Although a majority of the Court did not accept either as a complete analogue, it did declare an explicit connection to *Teague*'s concept of "old" rules and clearly established law. It was not until 2003 in *Lockyer v. Andrade*[82] that the Court directly confronted the issue of what constitutes clearly established law. Most recently, in *Yarborough v. Alvarado*,[83] the Court explored the relationship between clearly established law and the unreasonable application of such law.[84] These cases illustrate that the clarity of the law is relevant under § 2254(d)(1), and that the Supreme Court has interpreted this provision relatively broadly.

Torts Law, 47 AM. U. L. REV. 1 (1997); Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115 (1991); Heather Meeker, *"Clearly Established" Law in Qualified Immunity Analysis for Civil Rights Actions in the Tenth Circuit*, 35 WASHBURN L.J. 79 (1995); Recent Case, Jenkins v. Talladega City Board of Education, 115 F.3d 821 (11th Cir.) (en banc), cert. denied, 118 S. Ct. 412 (1997), 111 HARV. L. REV. 1341 (1998); *see also infra* Part II.C.1.a.

80. Bowden, *supra* note 77, at 226. This conclusion was generally accepted by commentators. *See* Yackle, *supra* note 4, at 406; Khandelwal, *supra* note 12, at 440 (noting that "[a]ssessing whether precedent 'dictates' a rule is a reasonableness inquiry"); *see also infra* Part II.C.1.a.

81. Williams v. Taylor, 529 U.S. 362, 367 (2000).

82. 538 U.S. 63 (2003).

83. 124 S. Ct. 2140 (2004).

84. The Court will be deciding *Goughnour v. Payton*, 124 S. Ct. 2388 (2004) (mem.), during the 2004-2005 Term. The case is an appeal from a Ninth Circuit decision holding that the California Supreme Court unreasonably applied clearly established precedent that California's "catch-all" mitigation instruction in capital cases is constitutional as applied to post-crime evidence of mitigation. Payton v. Woodford, 346 F.3d 1204, 1206-07 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2388 (2004). This case should add to the understanding of the relationship between § 2254(d)(1)'s clearly established law limitation and the unreasonable application prong.

1. Williams v. Taylor

In *Williams*, the Supreme Court for the first time defined the terms of § 2254(d)(1) in the context of a habeas appeal.[85] Terence Williams was convicted by a Virginia jury of robbery and capital murder.[86] Sentenced to die, he filed a state habeas corpus petition alleging that he received ineffective assistance of counsel.[87] The Virginia circuit court granted his habeas claim with regard to the sentencing phase of the trial and recommended granting a rehearing for the sentencing phase.[88] The Virginia Supreme Court, however, rejected the circuit court's recommendation, thus rejecting Williams's habeas claim.[89] Williams then filed a habeas corpus petition in federal district court.[90] On federal habeas review, Williams contended that he had been deprived of his Sixth Amendment right to effective assistance of counsel, under the standard established in *Strickland v. Washington*,[91] during his sentencing proceedings.[92] The district court agreed and ordered the writ granted.[93] The Fourth Circuit reversed, finding that the Virginia Supreme Court's decision was not "contrary to" and did not involve an "unreasonable application" of clearly established law under § 2254(d)(1).[94]

The Supreme Court reversed the Fourth Circuit.[95] In doing so, the Court divided into three opinions with a shifting majority. Justice O'Connor wrote the majority opinion regarding the proper construction of § 2254(d)(1).[96] Justice Stevens wrote separately to address how § 2254(d)(1)'s scope of review applied to the decision issued by the Virginia Supreme Court in Williams's case.[97] A majority of the justices joined him in concluding that Williams satisfied § 2254(d)(1)'s standard.[98] The third opinion was that of Chief Justice Rehnquist concurring in part and dissenting in part, joined by Justices Scalia and Thomas.[99]

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85. *Williams*, 529 U.S. at 370-72.
86. *Id.* at 367-68.
87. *Id.* at 370.
88. *Id.* at 371.
89. *Id.*
90. *Id.* at 372.
91. 466 U.S. 668 (1984).
92. *Williams*, 529 U.S. at 373-74.
93. *Id.*
94. *Id.* at 374.
95. *Id.*
96. *Id.* at 402-13.
97. *Id.* at 390-99.
98. *Id.* at 367, 390-91.
99. *Id.* at 416-19 (Rehnquist, C.J., concurring in part and dissenting in part).

a. "Clearly Established Law as Determined by the Supreme Court of the United States"

Even though *Williams* did not turn on the question of whether there was "clearly established" law, the Court took this opportunity to provide a baseline definition. The Court announced that whether there was relevant clearly established law was a "threshold question."[100] Beyond that statement, however, the Court was not in full agreement on how to interpret the statutory language. A majority of the Court agreed on three criteria for "clearly established" law under § 2254(d)(1). First, a majority agreed with Justice O'Connor's definition of the phrase as referring "to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions."[101] Second, a majority agreed that the time limitation was the date of the relevant state court decision.[102] Third, a majority agreed that the clause "as determined by the United States Supreme Court" limited the source of "clearly established Federal law" to Supreme Court precedent.[103]

These last two points differed significantly from pre-AEDPA law. Before AEDPA, the timing of the relevant precedent and the source of that precedent were governed by the anti-retroactivity rule articulated in *Teague*.[104] In *Teague*, the Court held that the habeas petitioner was not entitled to relief because he relied on a rule that was announced after his conviction became final.[105] Likewise, the source of the precedent that could be used by the habeas petitioner was broader; it included federal court of appeals decisions as well as Supreme Court decisions.[106] Although a majority of the Court recognized only a "slight connection" between its *Teague* jurisprudence and § 2254(d)(1), it rejected the view that Congress's sole intention in enacting § 2254(d)(1) was to codify *Teague*.[107] Rather than finding that the two were equivalent, Justice O'Connor explained that at least "whatever would qualify as an old rule

100. *Id.* at 390.

101. *Id.* at 412. The Court elsewhere has defined a holding as "not only the result but also those portions of the opinion necessary to that result." Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996); *accord* Cent. Green Co. v. United States, 531 U.S. 425, 431 (2001) (stating that a sentence is dictum when it was not essential to the disposition of the contested issues); Humphrey's Ex'r v. United States, 295 U.S. 602, 626 (1935) (noting that an expression by the Court that goes beyond the point actually decided is not a holding).

102. *Williams*, 529 U.S. at 412 (O'Connor, J., writing for the majority).

103. *Id.*

104. Teague v. Lane, 489 U.S. 288, 299 (1989); *see supra* Part II.A.

105. *Teague*, 489 U.S. at 311 (plurality opinion). Under *Teague*, the timing of the relevant precedent that a habeas petitioner could invoke was arguably slightly longer because it was based on the state conviction becoming final. *Id.* (plurality opinion).

106. *Williams*, 529 U.S. at 412 (O'Connor, J., writing for the majority).

107. *Id.* (O'Connor, J., writing for the majority).

under [the Court's] *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States.'"[108] She placed a caveat on that analogy, limiting the source of clearly established law to Supreme Court precedent.[109]

Justice Stevens, in the portion of his opinion that was not joined by a majority, found that § 2254(d)(1)'s clearly established law requirement was the "functional equivalent" of the *Teague* anti-retroactivity rule.[110] He declared that *Teague*'s "new rule" doctrine was the "conceptual twin" of § 2254(d)(1)'s clearly established law requirement.[111] He further explicated that clearly established law may be "expressed in terms of a generalized standard rather than as a bright-line rule."[112] Under this definition, a general rule that requires a case-by-case application can constitute clearly established law.

Justice Stevens also noted that his definition was consistent with the view articulated by Justice Kennedy in the pre-AEDPA *Teague* doctrine case of *Wright v. West*.[113] In *Wright*, Justice Kennedy explained that some rules are general principles requiring case-by-case application to facts: "'Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it

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108. *Id.*

109. *Id.*

110. *Id.* at 379 (opinion of Stevens, J.). Justice Stevens noted that "[i]t is not unusual for Congress to codify earlier precedent in the habeas context." *Id.* at 380 n.11 (opinion of Stevens, J.). Simply because Congress used the phrase "clearly established" law rather than "new rule" does not mean that Congress did not intend to codify *Teague*'s anti-retroactivity rule. *Id.* n.12 (opinion of Stevens, J.). Moreover, Justice Stevens rejected the respondent's argument that Congress meant to import an aspect of governmental qualified immunity doctrine because that "doctrinally distinct" area employs a "clearly established law" test. *Id.* (opinion of Stevens, J.). In doing so, Justice Stevens agreed with the majority of commentators who considered the relationship between qualified immunity and § 2254(d)(1) before *Williams* was decided. Most commentators argued that the underlying policy rationales for § 2254(d)(1) and qualified immunity were too disparate to treat them equally. *See, e.g.*, Lee, *supra* note 12, at 123-24 (rejecting the possibility that clearly established under AEDPA has the same meaning as in the qualified immunity context); Yackle, *supra* note 4, at 406 (arguing that "there is not a stitch of evidence that . . . Congress proceeded with the immunity cases in view"); Khandelwal, *supra* note 12, at 441 n.48 (arguing that AEDPA borrows from qualified immunity doctrine the "clearly established" law language and operating mechanism, but not its objective). *But see* Scheidegger, *supra* note 12, at 925 (arguing that qualified immunity is closely analogous to § 2254(d)(1)'s clearly established law requirement). Justice O'Connor and the Chief Justice simply ignored the qualified immunity argument.

111. *Williams*, 529 U.S. at 380 n.12 (opinion of Stevens, J.).

112. *Id.* at 382 (opinion of Stevens, J.).

113. *Id.* (opinion of Stevens, J.); Wright v. West, 505 U.S. 277 (1992); *see also supra* Part II.A.

forges a new rule, one not dictated by precedent.'"[114] Thus, it seems, even though not all rules of law are articulated with the same degree of precision, broader rules may still be sufficiently clear for habeas purposes.[115]

b. The Standards of Review: The Meaning of "Contrary to" and "Unreasonable Application"

Justice O'Connor, joined by five justices, found that the construction of § 2254(d) "places a new constraint" on federal habeas courts' ability to review state courts' applications of law to fact.[116] In the portion of her opinion joined by the majority, she concluded that the "contrary to" and "unreasonable application" clauses in § 2254(d)(1) have independent meanings.[117] She then explained each clause in turn. A state court's ruling can be "contrary to" clearly established Supreme Court precedent in two different ways. The first is when the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases."[118] The second is when the state court "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [Supreme Court] precedent."[119]

Justice O'Connor next defined the "unreasonable application" clause to mean that a state court's application of Supreme Court precedent is unreasonable where the state court's decision "identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoner's case."[120] The standard, she stressed, is unreasonable, not erroneous or incorrect.[121] She clarified: "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied

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114. *Williams*, 529 U.S. at 382 (opinion of Stevens, J.) (quoting *Wright*, 505 U.S. at 308-09).

115. I intentionally use the phrase "sufficiently clear" to suggest that, although § 2254(d)(1)'s requirement is broader than the clearly established law requirement in the qualified immunity context, it shares the concept that there is a spectrum of clearly established law. In the qualified immunity context, the law must be "sufficiently clear" to provide "fair warning" to a reasonable state official. *See supra* note 79. In the habeas context, the audience shifts to judges, who are better equipped to ascertain the clarity of the law.

116. *Williams*, 529 U.S. at 412 (O'Connor, J., writing for the majority).

117. *Id.*

118. *Id.* at 405-06 (O'Connor, J., writing for the majority).

119. *Id.* at 406 (O'Connor, J., writing for the majority).

120. *Id.* at 407 (O'Connor, J., writing for the majority).

121. *Id.* at 411-12 (O'Connor, J., writing for the majority) (stating that "an *unreasonable* application of federal law is different from an *incorrect* . . . application of federal law").

clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."[122]

Thus, with respect to this prong of § 2254(d)(1), the Court declared that a federal habeas court could no longer reject a state court's interpretation or application of federal constitutional law under a de novo standard of review. In dicta, the Court declined to adopt the rest of the Fourth Circuit's definition of "unreasonable application," which included extending a legal principle from Supreme Court precedent to a new context where it should not apply.[123] Deciding it did not need to reach that issue, the Court recognized that this "classification does have some problems of precision."[124] Shortly after the Court decided *Williams*, a plurality of the Court adopted this second way for a state court to unreasonably apply the law to facts under § 2254(d)(1).[125]

c. Application of § 2254(d)(1) to Williams's Case

Justice Stevens authored the majority opinion applying § 2254(d)(1) to the Virginia Supreme Court's decision to the facts of Williams's case.[126] A different six-justice majority of the Court, which included Justice O'Connor, concluded that in Williams's case, the state court's denial of Williams's ineffective assistance of counsel claim was both contrary to and an unreasonable application of the clearly established law.[127]

Justice Stevens began the analysis by identifying the clearly established law relevant to Williams's claim. This "threshold question" was "easily answered" because Williams's claim of ineffective assistance of counsel was "squarely governed" by the Court's holding in *Strickland v. Washington*.[128] Although the test articulated in *Strickland* was a standard that required a case-by-case application, that "obviate[d] neither the clarity of the rule nor the extent to which the rule must be seen as

122. *Id.*

123. *Id.* at 408 (O'Connor, J., writing for the majority).

124. *Id.* at 408-09 (O'Connor, J., writing for the majority).

125. Ramdass v. Angelone, 530 U.S. 156 (2000) (plurality opinion). In *Ramdass*, the petitioner had argued that the state court should have applied a Supreme Court case (*Simmons v. South Carolina*, 512 U.S. 154 (1994)) to his case, *Ramdass*, 530 U.S. at 164-65 (plurality opinion). While a plurality of the court found that a federal court may grant habeas relief if, "under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled," in petitioner's case the state court had not acted unreasonably when it refused to extend the precedent to the facts of his case. *Id.* at 166.

126. *Williams*, 529 U.S. at 390-91.

127. *Id.* at 411-13.

128. *Id.* at 390; Strickland v. Washington, 466 U.S. 668 (1984). Justice Stevens also noted that "[i]t is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Williams*, 529 U.S. at 391.

'established' by [the] Court."[129] Using language from *Teague*, Justice Stevens noted that the Court's precedent "dictated" that the state court apply *Strickland* to Williams's ineffective assistance claim, and that recognizing the right to counsel did not "'break[] new ground or impose[] a new obligation on the States.'"[130]

Concluding that the state court's decision was contrary to clearly established federal law, the Court found that the state court had "mischaracterized" the *Strickland* rule by incorrectly interpreting a subsequent Supreme Court case as imposing an additional prejudice requirement for the second part of the *Strickland* standard.[131] Because this case did not modify the *Strickland* standard, the Court held that the state court's decision was contrary to clearly established law.[132]

The Court also held that the state court's application of *Strickland*'s two-part standard was unreasonable because "it failed to evaluate the totality of the available mitigation evidence" in assessing prejudice.[133] The Court found that Williams's attorneys had fallen short of professional standards in their handling of his sentencing proceedings in a number of ways. In particular, they failed to examine numerous records concerning Williams's "nightmarish childhood," to introduce evidence of Williams's borderline mental retardation, and to obtain evidence of Williams's favorable conduct in prison.[134] Mitigating evidence, the Court noted, even if irrelevant to future dangerousness, "might [still] have influenced the jury's appraisal of Williams's moral culpability" and may have altered the jury's selection of penalty, but "it does not undermine or rebut the prosecution's death-eligibility case."[135] The Court found that the state court did not "accord appropriate weight to the body of mitigation evidence available to trial counsel."[136] It therefore held that the state court's decision that trial counsel's failures had not prejudiced Williams was an unreasonable application of clearly established law.[137]

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129. *Williams*, 529 U.S. at 391.

130. *Id.* (quoting Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion)).

131. *Id.* at 391, 393, 397. The state court had viewed *Lockhart v. Fretwell*, 506 U.S. 364 (1993), as modifying the *Strickland* standard, *Williams*, 529 U.S. at 391. The Court found that *Lockhart* and *Nixon v. Whiteside*, 475 U.S. 157 (1986), did not "justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him," *Williams*, 529 U.S. at 393 (Stevens, J., writing for the majority).

132. *Williams*, 529 U.S. at 397 (Stevens, J., writing for the majority).

133. *Id.* at 397-98 (Stevens, J., writing for the majority).

134. *Id.* at 395-96 (Stevens, J., writing for the majority).

135. *Id.* at 398 (Stevens, J., writing for the majority).

136. *Id.*

137. *Id.* at 396-97.

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, concurred in part and dissented in part. Noting that *Strickland* was the clearly established law governing Williams's claim, he argued that the state court had reasonably concluded that even if a jury had heard all of the available mitigating evidence, it would have sentenced Williams to death because there was strong evidence of Williams's future dangerousness.[138]

d. The Aftermath

In *Williams*, the Court resolved several big questions about § 2254(d)(1), including the relationship of the "clearly established" law requirement to *Teague*. The majority's rejection of *Teague* as a complete analogue was critical given the similarities between *Teague* and the Court's interpretation of § 2254(d)(1). Both are rooted in policies encouraging finality and fairness to the state. *Teague*'s anti-retroactivity rule prevents innovation: a habeas court cannot announce or apply new doctrines on habeas review.[139] Section 2254(d)(1) is grounded in the same policy, perhaps even more obviously so. By limiting the source of the clearly established law to Supreme Court precedent, Congress intended to curb the development of constitutional law on habeas review.[140] Consequently, under both *Teague* and AEDPA, new law can only be developed on direct review.[141]

The *Williams* Court recognized this connection but stopped short of saying that all "new" rules are not clearly established law.[142] It instead carefully declared that clearly established law included at least "whatever would qualify as an old rule" under *Teague*.[143] This deliberate phraseology left the door open to widen the scope of "clearly established" law beyond rules that would qualify as "new" under *Teague*.

Notwithstanding this distinction (which I argue is not subtle), the Court employed the same analytical framework for interpreting what constitutes "clearly established" law under § 2254(d)(1) as it did under *Teague*. Both § 2254(d)(1) and *Teague* require that to be available to the habeas petitioner, a rule must have been articulated by the appropriate source and by a specific point in time. Under *Teague*, the issue about

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138. *Id.* at 416-19 (Rehnquist, C.J., concurring in part and dissenting in part).

139. *See* Lee, *supra* note 12, at 118-19.

140. *Id.* at 131-32.

141. *Cf.* Durden v. California, 531 U.S. 1184 (2001) (mem.) (Souter, J., joined by Breyer, J., dissenting from denial of certiorari) (urging the Court to hear the three-strikes gross disproportionality issue on direct review because of the "potential for disagreement over application of" *Teague*'s review standards).

142. *See Williams*, 529 U.S. at 412 (O'Connor, J., writing for the majority).

143. *Id.*

whether the legal rule the habeas petitioner seeks to apply is a "new" rule is a threshold question to be addressed before the underlying claim.[144] Under *Williams*, the Court indicated § 2254(d)(1) requires a similar approach: the determination of "clearly established" law is a "threshold question."[145] The Court did not, however, define what it meant by "threshold" other than indicating that the question should be the first addressed.

The Court left unresolved several other questions about the operation of § 2254(d)(1), particularly concerning the meaning of "unreasonable application."[146] With regard to clearly established law, however, all the justices agreed that *Strickland* governed in Williams's case. Although Justice O'Connor and Justice Stevens provided definitions that are not fully reconcilable, particularly with respect to the statutory language's relationship to the Court's *Teague* jurisprudence, it is instructive to note how the Court indirectly defined clearly established law in relation to other language in § 2254(d)(1). Namely, the Court explained that a state court decision is "contrary to" clearly established law where a state court issues a decision that is "substantially different from the relevant precedent of this Court" or uses a "rule that contradicts the governing law set forth in our cases."[147] The Court did not use "clearly" or any other modifier when referring to "precedent of this Court" or "our cases."[148] Similarly, when defining the meaning of "unreasonable application," the Court announced that the state court may use the "correct governing legal rule from this Court's cases" but not reach the same conclusion reached by the Court.[149] The Court essentially viewed clearly established law as nothing more than a reasonable application of the Court's own precedent.

*2. Post-*Williams *Enlightenment*

The *Williams* Court's definition of "clearly established" law was a common-sense, uncontroversial definition centering on the Court's holdings in its own precedent. Justice Stevens, however, suggested that

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144. *See, e.g.*, Caspari v. Bohlen, 510 U.S. 383, 389 (1994) (stating that a federal habeas court must ask whether a petitioner's claim implicates a "new" rule—and is therefore barred by *Teague*—before addressing the claim on the merits); *see also* Kinports, *supra* note 79, at 175 n.296; Scheidegger, *supra* note 12, at 935-36, 940 & n.370, 959 n.500.

145. *Williams*, 529 U.S. at 390 (Stevens, J., writing for the majority); *see also* Lockyer v. Andrade, 538 U.S. 63, 71 (2003).

146. The meaning of unreasonable application has been the focus of several commentators. *See, e.g.*, Chen, *supra* note 12 *passim*; Pettys, *supra* note 12 *passim*; Steinman, *supra* note 12 *passim*.

147. *Williams*, 529 U.S. at 405 (O'Connor, J., writing for the majority).

148. *Id.* at 406.

149. *See id.* at 407-08.

the clarity of the law, in addition to its establishment, was relevant.[150] Not until 2003 did the Court have to decide whether the law must be "clear" as well as "established." In *Lockyer v. Andrade*,[151] the Court appeared to answer "yes" to that question. Most recently, in *Yarborough v. Alvarado*,[152] the Court drew a connection between the clarity of the law and the reasonableness of the state court's application of that law.

a. Lockyer v. Andrade

The most significant decision since *Williams* for defining what constitutes clearly established law under § 2254(d)(1) is the Supreme Court's decision in *Andrade*. For the first time, the Court faced a body of law that was considerably less settled than those in other AEDPA cases that had come before the Court.[153]

In 1996, a California state court sentenced Leandro Andrade to a prison term of two consecutive terms of twenty-five years to life for shoplifting videotapes from two K-Mart stores on two occasions.[154] The merchandise was worth a total of $153.54.[155] Andrade was sentenced under the "three strikes" law, which does not allow for the possibility of parole until after the term of years is served—fifty years in this case. Andrade will not be eligible for parole until 2046, when he will be eighty-seven years old.

Under California law, Andrade's crimes would normally be classified as petty theft, which is generally treated as a misdemeanor offense with a maximum sentence of up to six months in a county jail and up to a $1000 fine.[156] Under the three strikes law, however, which imposes harsher penalties on repeat offenders, Andrade's past history of criminal convictions led to the enhancement of his sentence.[157] Because of a prior misdemeanor conviction, each of his thefts of the videotapes was

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150. *See id.* at 390-91 (Stevens, J., writing for the majority) (noting that the requirement of applying *Strickland* on a case-by-case basis did not preclude "the clarity of the rule nor the extent to which the rule must be seen as 'established'").

151. 538 U.S. 63 (2003).

152. 124 S. Ct. 2140 (2004).

153. For instance, in *Williams*, *Strickland*'s ineffective assistance of counsel standard was easily identified as the relevant law. *Williams*, 529 U.S. at 390-91 (Stevens, J., writing for the majority). Similarly, in *Penry v. Johnson*, 532 U.S. 782 (2001), analysis of the petitioner's Fifth Amendment claim centered on whether *Estelle v. Smith*, 451 U.S. 454 (1981), could be distinguished, *see Penry*, 532 U.S. at 793-95. The analysis of the petitioner's Eighth Amendment claim centered on Texas's compliance with the first *Penry* case, *Penry v. Lynaugh*, 492 U.S. 302 (1989). Penry v. Johnson, 532 U.S. 782, 786 (2001).

154. *Andrade*, 538 U.S. at 66.

155. *Id.*

156. *Id.* at 67; *see* CAL. PENAL CODE ANN. § 490 (West 1999).

157. *Andrade*, 538 U.S. at 67; *cf.* Ewing v. California, 538 U.S. 11 (2003) (reviewing sentencing under California's three strikes law on direct review).

classified as a petty theft with a prior.[158] Such offenses are called "wobbler" offenses because the prosecutor had discretion whether to charge him with a misdemeanor or a felony.[159] In Andrade's case, the prosecutor opted to charge the two petty thefts with a prior as felonies, triggering the three strikes law.[160]

Under the three strikes law, only those offenses defined as "violent" or "serious" by statute qualify as prior strikes, but the third strike may be any felony.[161] Andrade's earlier convictions for residential burglary were counted as his first and second strikes.[162] Consequently, Andrade's two convictions for shoplifting $153.54 worth of videotapes counted as his third and fourth strikes.[163] For a defendant with two prior strikes, the three strikes law mandates an indeterminate life sentence with eligibility for parole only after serving at least twenty-five years.[164] Andrade received two such sentences, to be served consecutively.[165] Andrade appealed his sentence and conviction to the California Court of Appeal, contending that his sentence violated the Eighth Amendment prohibition of cruel and unusual punishment.[166]

The *Andrade* appeal raised the question of whether, in noncapital cases, sentences that are grossly disproportionate to the crime committed violate the Eighth Amendment's prohibition on cruel and unusual punishment.[167] Before describing the federal courts' decisions on direct appeal and habeas review, this Part reviews some background on the Supreme Court's Eighth Amendment jurisprudence. It then traces Andrade's appeals through the California and federal court systems.

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158. *Andrade*, 538 U.S. at 67. In a single proceeding, Andrade pled guilty to three counts of first-degree residential burglary. *Id.* at 66.

159. *Id.* at 67.

160. *Id.* at 67-68. The trial judge also had discretion to change the classification of the offense at sentencing. *Id.*

161. *Id.*; CAL. PENAL CODE ANN. § 667(e)(2)(A) (West 1999). On November 2, 2004, California voters rejected Proposition 66, which would have changed the three-strikes law to eliminate non-violent crimes as triggering a third strike. Shawn Steel, *Not Just Bush Scored a Victory on Nov. 2 Schwarzenegger, Businesses and Parties Walked Away Winners*, L.A. DAILY NEWS, Nov. 10, 2004, at N19, 2004 WLNR 7591588.

162. *Andrade*, 538 U.S. at 68. The jury made a special finding regarding Andrade's convictions for three counts of first-degree burglary. *Id.* Under the three-strikes law, a first-degree burglary conviction qualifies as a serious or violent felony, which counts as a strike. *Id.* (citing CAL. PENAL CODE ANN. §§ 667.5, 1192.7 (West 1999)); *see also Ewing*, 538 U.S. at 19.

163. *Andrade*, 538 U.S. at 68.

164. *Id.* at 67-68 (citing CAL. PENAL CODE ANN. § 667(c)(6), (e)(2)(B) (West 1999)).

165. *Id.* at 68.

166. *Id.*

167. *Id.* at 68-69.

i. The Supreme Court's Eighth Amendment Jurisprudence

The universe of Supreme Court law dealing with disproportionality in noncapital cases consists of three cases, *Rummel v. Estelle*,[168] *Solem v. Helm*,[169] and *Harmelin v. Michigan*,[170] all of which were decided well before Andrade's conviction and sentence became final. The disagreement about the Court's jurisprudence in *Andrade* was about the state of the law derived from this precedent: how "clearly" the law was established at the time of Andrade's direct appeal. Accordingly, this section examines these three cases in the order of decision.

In *Rummel*, the Court split five-four and held that a life sentence imposed under the recidivist statute was not unconstitutionally disproportionate but acknowledged a general principle of proportionality between crimes and sentences.[171] The petitioner was sentenced under the Texas mandatory recidivist statute for three felonies involving small amounts of money, including fraudulent use of a credit card for eighty dollars, check forgery for $28.36, and obtaining $120.75 by false pretenses.[172] Without the recidivist statute, the sentence for his third felony would have been ten years.[173] In deciding that the sentence was constitutional, the Court reasoned that the legislature should be given great deference in sentencing schemes.[174] Justice Powell, joined by Justices Brennan, Marshall, and Stevens, dissented. They urged an extension of the Court's proportionality principle from capital cases to noncapital cases.[175] They maintained that the disproportionality of Rummel's sentence should be determined by weighing three factors: (1) the nature of the offense, (2) the penalties imposed in Texas for similar offenses, and (3) the penalties imposed in other jurisdictions for the same offense.[176]

The principles outlined in Justice Powell's dissent in *Rummel* were applied three years later when the Court decided *Solem*, another case involving a nonviolent recidivist.[177] The Court again split five-four, but this time it granted relief to a petitioner sentenced to life without parole

168. 445 U.S. 263 (1980).
169. 463 U.S. 277 (1983).
170. 501 U.S. 957 (1991).
171. *Rummel*, 445 U.S. at 271-73, 285. The majority consisted of Justices Rehnquist, Burger, White, Stewart, and Blackmun. *Id.* at 264.
172. *Id.* at 264-66.
173. *Id.* at 266.
174. *Id.* at 283-84.
175. *Id.* at 306-07 (Powell, J., dissenting).
176. *Id.* at 295 (Powell, J., dissenting).
177. *See* Solem v. Helm, 463 U.S. 277, 279, 290-92 (1983).

under South Dakota's recidivist statute.[178] The petitioner in *Solem* received this life sentence after a conviction for writing a $100 "no account" check.[179] Without the recidivist statute, this offense was punishable by a maximum of five years and a $5000 fine.[180] The petitioner, however, had convictions for six prior nonviolent felonies, including three for third-degree burglary.[181]

Writing for the Court, Justice Powell articulated a three-factor test to determine if a penalty is grossly disproportionate as requiring the court to weigh: (1) the "harshness of the penalty" against "the gravity of the offense," (2) "sentences imposed on other offenders in the same jurisdiction" (intra-jurisdictional comparison), and (3) "sentences imposed for [the] commission of the same offense in other jurisdictions" (inter-jurisdictional comparison).[182] The Court held that the petitioner's life sentence was excessive under each factor.[183] While specifically noting that *Rummel* was still good law, the Court distinguished it based on the petitioner's possible eligibility for parole within twelve years in that case and limited it to its facts.[184] The four dissenting justices asserted that this case could not be reconciled with the Court's decision in *Rummel*.[185]

The third relevant Eighth Amendment disproportionality decision came in 1991. In *Harmelin*, the petitioner was sentenced to life in prison without parole on a first felony conviction for possession of a substantial amount of cocaine.[186] A five-justice majority agreed to uphold the sentence under a Michigan statute mandating life sentences for certain drug offenses, but it failed to achieve a majority for any single rationale.[187]

Three of the justices, Justices Kennedy, Souter, and O'Connor, joined a separate opinion written by Justice Kennedy. Justice Kennedy asserted that the Eighth Amendment and principles of stare decisis "encompass[] a narrow proportionality principle" that applies to noncapital

178. *Id.* at 279, 303.

179. *Id.* at 281-82.

180. *Id.* at 281 (citing S.D. CODIFIED LAWS § 22-6-1(7) (Michie Supp. 1982)).

181. *Id.* at 279-80.

182. *Id.* at 292.

183. *Id.* at 296-300.

184. *Id.* at 300-04.

185. *Id.* at 304 (Burger, C.J., dissenting). Chief Justice Burger authored the dissenting opinion, which was joined by Justices White, Rehnquist, and O'Connor. *Id.*

186. Harmelin v. Michigan, 501 U.S. 957, 961 (1991). Petitioner was convicted of possessing 672 grams of cocaine. *Id.* Michigan law required a mandatory life sentence for possession of more than 650 grams of cocaine. *Id.* n.1 (citing MICH. COMP. LAWS ANN. § 333.7403(2)(a)(i) (West Supp. 1990-1991)).

187. *Id.* at 961 n.1, 996.

sentences.[188] He noted, however, that the "'precise contours'" of the principle recognized in the Court's decisions are "unclear."[189] Justice Kennedy suggested a modification, but not an overruling, of prior case law, particularly *Solem*.[190] The modification would require a threshold inquiry to determine whether, if in light of the gravity of petitioner's offense, a comparison of his crime with his sentence gives rise to "an inference of gross disproportionality" between the harshness of the sentence and the severity of the offense.[191] Only if the inference is drawn should the reviewing court compare the petitioner's sentence to other sentences imposed by the same jurisdiction and to other jurisdictions for similar offenses.[192]

Comprising the rest of the majority, Justices Scalia and Rehnquist upheld the sentence on the ground that the Eighth Amendment embodies no proportionality requirement for noncapital sentences imposed pursuant to valid state legislation.[193] They further argued that the Court's prior decisions applying the proportionality principle to noncapital cases were wrong and that *Solem* should be overruled.[194]

Justice White, joined by Justices Blackmun and Stevens dissented, as did Justice Marshall separately. All four justices disagreed with Justice Scalia's opinion and further insisted that the Eighth Amendment embodies a stricter proportionality requirement than Justice Kennedy's plurality opinion acknowledged.[195] They urged keeping the same three-factor test articulated in *Solem*.[196]

A splintered decision and the Court's last word on the subject, *Harmelin* reflects the fissures in the Court's Eighth Amendment

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188. *Id.* at 996-97 (Kennedy, J., concurring in part and concurring in the judgment).

189. *Id.* at 998 (Kennedy, J., concurring in part and concurring in the judgment).

190. *Id.* at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

191. *Id.* at 1004-05 (Kennedy, J., concurring in part and concurring in the judgment).

192. *Id.* at 1005 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy's opinion also outlined four "principles" for determining "gross disproportionality": (1) federal courts should defer in general to state legislatures fixing of prison terms for specific crimes; (2) the Eighth Amendment does not mandate any one penological theory (such as retribution, deterrence, incapacitation, and rehabilitation); (3) marked divergences in penological theories and in sentences are inevitable, and sometimes beneficial, results of the federal system; and (4) federal judicial review should be informed to the maximum extent possible by "objective factors." *Id.* at 998-1001 (Kennedy, J., concurring in part and concurring in the judgment).

193. *Id.* at 994-96.

194. *Id.* at 962-65. They specifically noted that *Rummel* would still be good law because the principle of disproportionality it applied was treated as an aspect of the Court's death penalty jurisprudence and not a more generalized Eighth Amendment principle. *Id.* at 994.

195. *Id.* at 1009, 1018-21 (White, J., dissenting); *id.* at 1027 (Marshall, J., dissenting).

196. *Id.* at 1009, 1018-21 (White, J., dissenting).

proportionality requirement for noncapital cases. Left to discern the holding of this decision, many lower federal courts noted the confused state of the law in this area.[197] Most courts, however, accepted Justice Kennedy's concurrence as reflecting the holding of the case.[198]

ii. California State Court Decision

Andrade appealed his sentence and conviction to the California Court of Appeal, contending that his sentence violated the Eighth Amendment prohibition of cruel and unusual punishment.[199] That court held that Andrade's sentence was not disproportionate to his offense and affirmed the conviction.[200] It noted that the ongoing validity of *Solem*'s proportionality analysis "'is questionable in light of' *Harmelin v.*

197. *See, e.g.*, Hawkins v. Hargett, 200 F.3d 1279, 1281 (10th Cir. 1999) (stating that *Harmelin* "fractured" and left the significance of *Solem* "less than clear"); United States v. Sarbello, 985 F.2d 716, 723 (3d Cir. 1993) (noting a "lack of clear directive from the Supreme Court"); Neal v. Grammer, 975 F.2d 463, 465 (8th Cir. 1992) ("[T]he future of the proportionality test is uncertain."); McCullough v. Singletary, 967 F.2d 530, 535 (11th Cir. 1992) (stating that *Solem*'s continuing viability is called into doubt by *Harmelin*). A number of state courts also expressed confusion about the state of the law post-*Harmelin*. *See, e.g.*, People v. Gibson, 90 Cal. App. 4th 371, 388 (Cal. Ct. App. 2001) (noting proportionality review questionable after *Harmelin*); State v. Brown, 825 P.2d 482, 490 (Idaho 1992) ("*Harmelin* [is] "fractured . . . ."); State v. Oliver, 745 A.2d 1165, 1169 (N.J. 2000) ("We have generally avoided entering the debate among the several members of the Supreme Court concerning the Eighth Amendment's proscription against cruel and unusual punishment."); State v. Thorp, 2 P.3d 903, 906 (Or. Ct. App. 2000) (stating that *Harmelin* was "severely fractured"); State v. Jones, 543 S.E.2d 541, 545 n.11 (S.C. 2001) (questioning whether *Solem* test was still required after *Harmelin*); State v. Bonner, 577 N.W.2d 575, 579 (S.D. 1998) (noting lack of majority opinion in *Harmelin*); State v. Harris, 844 S.W.2d 601, 602 (Tenn. 1992) (noting that the "precise contours" of the proportionality principle were unclear); State v. Bacon, 702 A.2d 116, 122 n.7 (Vt. 1997) (stating that *Harmelin* was a "fractured decision" casting doubt on *Solem*'s viability).

198. Justice Kennedy's concurrence articulates the test that most circuits regard as the rule to determine the constitutionality of a sentence under the Eighth Amendment. *See, e.g.*, *Hawkins*, 200 F.3d at 1281-82; United States v. Bucuvalas, 970 F.2d 937, 946 n.15 (1st Cir. 1992), *overruled on other grounds by* Cleveland v. United Sates, 531 U.S. 12 (2000); *see also* People v. Hindson, 703 N.E.2d 956, 965 (Ill. App. Ct. 1998) (noting that *Harmelin* "narrowed" *Solem*); State v. Lee, 841 S.W.2d 648, 654 (Mo. 1992) (stating that *Harmelin* "altered" *Solem*'s test). In doing so, these courts were applying a doctrine articulated in *Marks v. United States*, 430 U.S 188 (1977), that, in a fragmented opinion, the holding of the case is the narrowest grounds on which the concurrences agree, *id.* at 193. Although this doctrine does not work with all fragmented opinions, it can be applied to *Harmelin*'s opinions. See *infra* Part III.C.3, for a discussion of the *Marks* doctrine. Two circuits followed *Solem*'s articulation of the principle. *E.g.*, United States v. Rice, 77 Fed. Appx. 692, 698 & n.3 (4th Cir. 2003); Henry v. Page, 223 F.3d 477, 482 (7th Cir. 2000). *But cf.* Smallwood v. Johnson, 73 F.3d 1346, 1246 n.4 (5th Cir. 1996) ("*Solem* was overruled to the extent that it found in the Eighth Amendment a guarantee of proportionality.").

199. People v. Andrade, No. F040587, 2003 Cal. App. Unpub. LEXIS 8320, at *44 (Cal. Ct. App. Aug. 28, 2003).

200. Lockyer v. Andrade, 538 U.S. 63, 68-69 (2003).

Michigan," the high Court's most recent statement on whether the Eighth Amendment to the U.S. Constitution includes a proportionality guarantee in a noncapital case.[201] It then proceeded with its analysis applying only *Rummel*; the court did not refer again to *Solem* or *Harmelin*.[202] The state court compared Andrade's crimes, criminal history, and sentence with the facts of *Rummel* and concluded that Andrade's sentence of fifty years to life was not disproportionate.[203] Andrade's subsequent petition for review to the California Supreme Court was summarily denied.[204]

iii. Federal Habeas Petition

Andrade's bid for habeas relief failed at the district court level.[205] The Ninth Circuit Court of Appeals reversed the district court's denial and ordered the writ to be issued.[206] After conducting a review of the three relevant Supreme Court cases, the Ninth Circuit concluded that Andrade's case was most similar to *Solem*.[207] Accordingly, the court held that the state court's discounting of *Solem* resulted in a decision that unreasonably applied clearly established law.[208]

In a five-four decision, the Supreme Court reversed the Ninth Circuit, holding that the state court's decision affirming petitioner's two consecutive terms of twenty-five years to life was not "contrary to" or an "unreasonable application" of clearly established law.[209] Writing for the majority, Justice O'Connor began the § 2254(d)(1) analysis with the

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201. *Id.* at 68.

202. *See id.* at 68-69.

203. *Id.* at 69. The state court did, however, conduct a more thorough analysis under the California State Constitution, which through case law had been found to proscribe cruel and unusual punishment when a penalty is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." *Andrade*, 2003 Cal. App. Unpub. LEXIS 8320, at *46 (internal quotation marks omitted) (citation omitted). It followed a tripartite test that is very similar to the *Solem* test. *Id.*

204. *Andrade*, 538 U.S. at 69.

205. *Id.*

206. *Id.*

207. *Id.* at 69-70.

208. *Id.* at 70. Judge Sneed dissented. He would have upheld Andrade's sentence because Andrade's sentence was "'not one of the "exceedingly rare" terms of imprisonment prohibited by the Eighth Amendment's proscription against cruel and unusual punishment.'" *Id.* (quoting Andrade v. Attorney Gen. of State of Cal., 270 F.3d 743, 767 (9th Cir. 2002) (Sneed, J., dissenting) (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

209. *Id.* at 73-74, 77. The Supreme Court consolidated oral arguments in this case with *Ewing v. California*, 538 U.S. 11 (2003), which was a direct appeal challenging a California three-strikes law life sentence on Eighth Amendment grounds, *id.* at 14.

"threshold matter" of what constitutes clearly established law.[210] The Court reiterated the language from *Williams*, defining clearly established law as the holdings of Supreme Court precedents, namely, the "governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."[211] The Court accurately noted that, in most cases, the clearly established law inquiry "will be straightforward."[212] But in this case, the Court stressed, its Eighth Amendment precedents "have not been a model of clarity."[213] Here, the Court recognized a potential problem for both appeals and habeas review: the Court has "not established a clear or consistent path for courts to follow."[214]

Continuing its self-critical analysis, the Court extracted the proverbial pearl from the oyster: "Through this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly established' under § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years."[215] The Court noted, however, that this principle was somewhat vague because the precedents "exhibit a lack of clarity" about what factors may be relevant to determining a grossly disproportionate sentence.[216] The Court then quoted Justice Scalia's and Justice Kennedy's concurring opinions in *Harmelin*, stressing the lack of clarity in the Court's jurisprudence in this area.[217] Here, the Court concluded that the only law relevant to the § 2254(d)(1) analysis was the gross disproportionality principle, the "precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case."[218] This was, however, enough to pass through the "clearly established" law threshold.

The Court next analyzed whether the state court decision was contrary to or an unreasonable application of the gross disproportionality principle. The Court found that it was not contrary to clearly established law for the state court to compare Andrade's case only to *Rummel* because in *Solem* and *Harmelin* the Court expressly declined to overrule

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210. *Andrade*, 538 U.S. at 66, 71.

211. *Id.* at 71-72 (citing Williams v. Taylor, 529 U.S. 362, 405, 412-413 (2000); Bell v. Cone, 535 U.S. 685, 698 (2002)).

212. *Id.* at 72.

213. *Id.*

214. *Id.* (citing Ewing v. California, 538 U.S. 11, 20-23 (2003)).

215. *Id.*

216. *Id.*

217. *Id.* at 72-73.

218. *Id.* at 73 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)); *see also* Solem v. Helm, 463 U.S. 277, 290 (1983); Rummel v. Estelle, 445 U.S. 263, 272 (1980)).

Rummel.[219] The state court decision also was not contrary to clearly established law because Andrade's case was not materially indistinguishable from the facts in *Solem* or any other Supreme Court case.[220]

Moving to the next prong of the analysis under § 2254(d)(1), the Court held that the state court did not unreasonably apply the gross disproportionality principle.[221] Because the Court viewed the governing legal principle in this case to be broad and lacking "precise contours," the Court found that the proportionality principle afforded state legislatures broad discretion to determine constitutional sentences.[222] After highlighting that several justices had expressed "uncertainty" about the application of the proportionality principle to three strikes laws, the Court concluded that the "contours" of the principle meant that the state court's decision to uphold Andrade's sentence was not objectively unreasonable.[223]

Justice Souter dissented, with Justices Breyer, Ginsburg, and Stevens joining in his opinion. He asserted that, "[i]f Andrade's sentence is not grossly disproportionate, the principle has no meaning."[224] Justice Souter argued that, despite the breadth of the principle, Andrade was entitled to habeas relief for two independent reasons.[225] First, he argued that *Solem* was controlling precedent that required the same result in Andrade's case.[226] Second, he contended that the state court unreasonably applied the proportionality principle in Andrade's case.[227] Justice Souter viewed Andrade's sentence as a fifty-year sentence rather than as two separate,

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219. *Andrade*, 538 U.S. at 73.

220. *Id.* at 74. The Court found that Andrade's case fell between the facts of two cases: *Rummel* and *Solem*. *Id.* In his dissent, Justice Souter disputed this point and argued that the similarity between Andrade's case and the facts in *Solem* required habeas relief under § 2254(d)(1) under the contrary to prong. *Id.* at 78-79 (Souter, J., dissenting).

221. *Id.* at 77. The Court first rejected the Ninth Circuit's approach of reviewing the state court decision de novo before applying the AEDPA standard of review. *Id.* at 75-76.

222. *Id.* at 76 (quoting *Harmelin*, 501 U.S. at 998) (Kennedy, J., concurring in part and concurring in the judgment)).

223. *Id.*; *cf.* Durden v. California, 531 U.S. 1184 (2001) (Souter, J., dissenting from denial of certiorari).

224. *Andrade*, 538 U.S. at 83 (Souter, J., dissenting).

225. *Id.* at 77-78 (Souter, J., dissenting).

226. *Id.* at 78-79 (Souter, J., dissenting). Although Justice Souter framed the issue as resulting in the state court's unreasonable application of "clear law," *see id.* (Souter, J., dissenting), he appears to be applying the "materially indistinguishable" test under the "contrary to" prong of § 2254(d)(1). Note Justice Souter's deliberate use of "clear law" to rebut the majority's claim that the law in this area is unclear. *Id.* at 78 (Souter, J., dissenting). Justice Souter also pointed out that the state court's questioning of *Solem*'s authority was wrong as a matter of law. *Id.* (Souter, J., dissenting).

227. *Id.* at 79-83 (Souter, J., dissenting).

consecutive sentences of twenty-five years.[228] Although he noted legislatures are institutionally better equipped than courts to determine what the penalty should be for a particular crime, he urged that, in Andrade's case, the state's penological policy is unjustified.[229] Doubling the sentence for a second minor crime committed less than a month after the first minor crime is "irrational" and "does not raise a seriously debatable point on which judgments might reasonably differ."[230] Accordingly, Justice Souter concluded that Andrade's was "the rare sentence of demonstrable gross disproportionality."[231]

The Court's decision in *Andrade* is important for several reasons. First, the Court finally faced directly the question of what constitutes clearly established law. While the Court recognized that its noncapital Eighth Amendment proportionality decisions were not a "model of clarity,"[232] the Court was able to glean a general principle. This lack of clarity, therefore, did not mean that there was no clearly established law; it was not a dispositive issue for the Court. The Court instead shifted the concern about the clarity of the law to its analysis under the unreasonable application prong of § 2254(d)(1). By doing so, the Court suggested that clearly established law is a spectrum running from very general to very specific principles. As long as the petitioner identifies a principle in Supreme Court precedent, the petitioner will pass through the threshold determination, but questions about the clarity and specificity of the principle will affect the reasonableness of the state court's decision applying that principle.

The Court's decision in *Andrade*'s companion case, *Ewing v. California*,[233] highlights the distinction between habeas review and direct review. In *Andrade*, the Supreme Court was highly deferential to the state court because the Court viewed its own decisions as unclear. By contrast, in *Ewing*, the Court was forced to reconcile *Rummel*, *Solem*, and *Harmelin*. In *Ewing*, the Court went into much more depth about the facts of these cases and the rules articulated in them.[234] Clarification, therefore, is a job for the Court only on direct review, not habeas review.

228. *Id.* at 79-82 (Souter, J., dissenting).
229. *Id.* at 80-82 (Souter, J., dissenting).
230. *Id.* at 82 (Souter, J., dissenting).
231. *Id.* at 83 (Souter, J., dissenting).
232. *Id.* at 72.
233. 538 U.S. 11 (2003).
234. *See id.* at 21-24.

b. Yarborough v. Alvarado

The most recent case to shed light on the meaning of clearly established law is *Yarborough v. Alvarado*.[235] On June 1, 2004, the Supreme Court issued a five-four decision denying habeas relief to a seventeen-year-old who was questioned at a police station by police concerning an attempted robbery and murder.[236] During the questioning, the young man eventually confessed to being present during the murder and helping to hide the murder weapon.[237] On direct appeal, the petitioner argued that his confession should have been suppressed because he was not given a *Miranda* warning until after the questioning concluded.[238] The state court determined that the petitioner was not "in custody" at the time of the questioning, and, thus, no *Miranda* warning was required.[239]

The petitioner then brought a federal habeas claim, which was denied by the federal district court.[240] The Ninth Circuit reversed, holding that the state court failed to account for petitioner's "youth and inexperience" in evaluating whether he was in custody, and that, in light of Supreme Court precedent, these factors were required.[241] Although no Supreme Court case was directly on point, the Ninth Circuit found that AEDPA did not bar relief "because the relevance of juvenile status in Supreme Court case law as a whole compelled the 'extension of the principle that juvenile status is relevant' to the context of *Miranda* custody determinations."[242] The Ninth Circuit therefore concluded that the state court had unreasonably applied clearly established law because it had failed to "'extend a clearly established legal principle . . . to a new context.'"[243]

The Court reversed the Ninth Circuit's decision.[244] Justice Kennedy, writing for the majority, began the analysis by determining the relevant clearly established law. First, he noted that the Court's "more recent cases instruct that custody must be determined based on . . . how a

235. 124 S. Ct. 2140 (2004).

236. *Id.* at 2144-45.

237. *Id.* at 2146.

238. *Id.*

239. *Id.* In doing so, the state court relied on the custody test articulated in *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). Under that test, a court must "consider the circumstances surrounding the interrogation and then determine whether a reasonable person would have felt at liberty to leave." *Id.*

240. *Alvarado*, 124 S. Ct. at 2146.

241. *Id.* at 2147.

242. *Id.*

243. *Id.* at 2150 (quoting Alvarado v. Hickman, 316 F.3d 841, 853 (9th Cir. 2002), *rev'd*, 124 S. Ct. 2140 (2004)).

244. *Id.* at 2144, 2152.

reasonable person in the suspect's situation would perceive his circumstances."[245] After describing the relevant precedent as requiring an objective inquiry using a "reasonable person" standard, the Court addressed whether the state court's decision was an unreasonable application of that precedent.[246]

The Court rejected petitioner's claim that the state court's decision was objectively unreasonable for refusing to extend a general principle about juvenile status from the Court's precedent in other contexts to include demanding consideration of the petitioner's age and inexperience in *Miranda* warnings.[247] After comparing the facts suggesting the petitioner was in custody with those against such a finding, the Court concluded that the state court's application of the Court's clearly established law was reasonable because "fair-minded jurists could disagree over whether [the petitioner] was in custody."[248]

Rebuking the Ninth Circuit as "nowhere close to the mark when it concluded otherwise,"[249] Justice Kennedy explained that "the [*Miranda*] custody test is general, and the state court's application of [the test] fits within the matrix of our prior decisions."[250] Justice Kennedy expressed concern about the Ninth Circuit's conclusion that "the state court's failure to 'extend a clearly established legal principle [of the relevance of juvenile status] to a new context' [was] objectively unreasonable."[251] Recognizing the strength of the state's argument that "if a habeas court must extend a rationale before it can apply to the facts at hand then the rationale cannot be clearly established at the time of the state-court decision," Justice Kennedy reasoned that "[s]ection 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law."[252]

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245. *Id.* at 2148. In *Alvarado*, Justice Kennedy described the Court's prior decision in *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984), as follows: "[A] traffic stop [was] noncustodial despite the officer's intent to arrest because [the officer] had not communicated that intent to the [suspect;] . . . '[T]he . . . [proper] inquiry is how a reasonable man in the suspect's position would have understood his [position],'" 124 S. Ct. at 2148 (citation omitted); *see also* Thompson v. Keohane, 516 U.S. 99, 112 (1995) (describing *Miranda* test as requiring two discrete inquiries); Stansbury v. California, 511 U.S. 318, 323 (1994) (per curiam) (explaining that custody determination depends on objective circumstances, not subjective views).

246. *Alvarado*, 124 S. Ct. at 2149.

247. *Id.* at 2149-50.

248. *Id.*

249. *Id.* at 2150.

250. *Id.*

251. *Id.* at 2150-51.

252. *Id.* In further support, Justice Kennedy cited *Hawkins v. Alabama*, 318 F.3d 1302, 1306 n.3 (11th Cir. 2003), and a "*cf.*" citation to *Teague v. Lane*, 489 U.S. 288 (1989).

Justice Kennedy then made a significant point about the nature of legal rules:

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. . . . Other rules are more general, and their meaning must emerge in application over the course of time. . . . The more general the rule, the more leeway the courts have in reaching outcomes in case by case determinations.[253]

He noted that "the difference between applying a rule and extending it is not always clear."[254] For example, "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt."[255] He concluded, however, that petitioner's was not such a case.[256] While the custody inquiry is an "objective rule designed to give clear guidance to the police," consideration of a suspect's age and inexperience with the police could create a subjective inquiry.[257]

Justice O'Connor concurred with the majority decision, but focused on the petitioner's age.[258] Because the petitioner in this case was "almost 18 years old[,]" his age was not relevant to the *Miranda* custody inquiry.[259] She acknowledged, however, "There may be cases in which a suspect's age will be relevant to the . . . inquiry."[260]

Justice Breyer, joined by Justices Souter, Stevens, and Ginsburg, dissented. To these justices, "the law in this case [was] clear";[261] it "asks judges to apply, not arcane or complex legal directives, but ordinary common sense."[262] Justice Breyer focused on the application of the law to the facts. He began by presenting the question "in terms of federal law's well-established standards: Would a 'reasonable person' in Alvarado's 'position' have felt he was 'at liberty to terminate the

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Alvarado, 124 S. Ct. at 2150-51. See *supra* Part II.A, for a discussion of *Teague*, and *infra* text accompanying notes 362-92, for a discussion of *Hawkins*.

253. *Alvarado*, 124 S. Ct. at 2149. In support of this statement, Justice Kennedy cited his concurring opinion in the pre-AEDPA case of *Wright v. West*, 505 U.S. 277, 308-09 (1992), which was also cited by Justice Stevens in *Williams*, *see* Williams v. Taylor, 529 U.S. 362, 379 (2000) (opinion of Stevens, J.).

254. *Alvarado*, 124 S. Ct. at 2151.

255. *Id.*

256. *Id.*

257. *Id.* at 2151-52.

258. *Id.* at 2152 (O'Connor, J., concurring).

259. *Id.* (O'Connor, J., concurring).

260. *Id.* (O'Connor, J., concurring).

261. *Id.* at 2156 (Breyer, J., dissenting).

262. *Id.* at 2153 (Breyer, J., dissenting).

interrogation and leave'?"[263] Noting that "a court must answer [the] question in light of 'all the circumstances surrounding the interrogation,'" he concluded that answer was "no."[264] Justice Breyer thus found that the petitioner "was [clearly] . . . 'in custody' when the police questioned him."[265] Accordingly, the state court's conclusion that Alvarado was not in custody when the police questioned him without *Miranda* warnings was objectively unreasonable.[266]

Justice Breyer reasoned that the suspect's youth was an objective circumstance known to the police in this case.[267] He did not take on the Ninth Circuit's extension argument from the juvenile status cases. He did, however, make an analogy to the "reasonable person" in tort law as taking into account personal characteristics.[268] He also noted that the majority did not cite any case suggesting a limitation that courts should ignore objective characteristics like age.[269]

The Court's decision in *Alvarado* is significant because it illustrates the relationship between clearly established law and unreasonable application under § 2254(d)(1). In denying relief under the unreasonable application prong, the Court recognized a connection between the scope of the precedent and whether a state court's application of that precedent is reasonable.

Two legal principles were at play in *Alvarado*: the custody standard (how a reasonable person in the suspect's situation would perceive his circumstances) and the "reasonable person" standard. The Court identified the custody standard without difficulty. The Court also seemed to agree that the "reasonable person" standard embedded in the custody standard is objective. The justices disagreed, however, about whether the suspect's age and inexperience were factors that should have been considered under this objective standard. The majority rejected these as subjective factors.[270] Analogizing to the reasonable person standard in tort law, which takes a child's age, intelligence, and experience into consideration, Justice Breyer insisted that Alvarado's age and inexperience should have been considered.[271] Justice O'Connor's

263. *Id.* at 2152 (Breyer, J., dissenting) (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995); Stansbury v. California, 511 U.S. 318, 325 (1994) (per curiam)).

264. *Id.* (Breyer, J., dissenting) (quoting *Stansbury*, 511 U.S. at 322).

265. *Id.* (Breyer, J., dissenting).

266. *Id.* at 2153 (Breyer, J., dissenting).

267. *Id.* at 2155 (Breyer, J., dissenting).

268. *See id.* (Breyer, J., dissenting).

269. *See id.* at 2154-55 (Breyer, J., dissenting).

270. *See id.* at 2151.

271. *See id.* at 2155-56 (Breyer, J., dissenting) (noting that "all American jurisdictions count a person's childhood as a 'relevant circumstance' in negligence determinations" (citing and quoting RESTATEMENT (THIRD) OF TORTS § 10 cmt. b, at 128-130 (Tentative

concurring opinion is less straightforward. She seemed to agree that age may be part of the reasonable person inquiry in certain cases, but not in Alvarado's case. By doing so, she left for another case the clarification of whether age is an appropriate consideration under the reasonable person standard.

The Court, however, framed the issue not as a disagreement about the contours of the reasonable person standard but as a disagreement about the application of that standard to Alvarado's facts. Because the reasonable person standard is embedded in the *Miranda* custody standard, application of the custody standard permits a wide range of discretion by the state court. Where the facts of the habeas petitioner's case are not materially indistinguishable from a Supreme Court precedent, § 2254(d)(1) requires deference to the state court's reasonable application of the standard.

The reasonableness of the state court's application of the standard depends on the breadth of that standard. The breadth of any legal principle can be viewed on a spectrum from broad to narrow: from very general principle to very fact-specific rule. The more general the principle, the more the state court needs to invoke its discretion to apply it; on the other hand, bright-line rules require less discretion to apply. The Court's decisions in *Andrade* and *Alvarado* demonstrate that it will not find a lack of clearly established law where it can discern a legal principle in the Court's precedent, even if that principle is general or otherwise indeterminate. Instead of analyzing the scope of the precedent at a threshold level, the Court analyzed questions of scope under the unreasonable application prong. Because a general principle requires more discretion for a court to apply it to a specific factual situation, the Court deferred to the state court's reasonable application of that principle.

In *Andrade* and *Alvarado*, the Court seemed to employ a sliding scale of deference to the state court's application of the legal principles depending on how broad or narrow the principles were. In *Andrade*, the disproportionality principle was viewed as very general, and the Court found that the state court's application was not objectively unreasonable.[272] Likewise, in *Alvarado*, it was not clear from the precedent that a suspect's age and inexperience should be considered under the reasonable person standard, and the Court found that the state court's decision to ignore the suspect's age and inexperience was not

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Draft No. 1, 2001))); *see also* RESTATEMENT (SECOND) OF TORTS § 283A (1965) ("If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.").

272. *See* Lockyer v. Andrade, 538 U.S. 63, 76-77 (2003).

objectively unreasonable. A reasonable application, therefore, includes a spectrum of outcomes that are linked to the scope of the precedent. In the deference environment of AEDPA, when a large degree of discretion is required for the state court to apply the relevant precedent, the state court's application will likely be reasonable.

AEDPA therefore limits the scope of review by federal courts in a number of ways. While the statute does not define the key terms in § 2254(d)(1), the Supreme Court's decisions in *Williams*, *Andrade*, and *Alvarado* provide a context for understanding the meaning of clearly established law. First, they define clearly established law as the Court's holdings and (revealing a broad reading of the requirement) reasonable applications of the Court's precedent. Second, they instruct that the determination of clearly established law should be a threshold issue. Where the Court's precedents were not "clear," it did not deny relief on that basis alone. Instead, it analyzed the clarity of the law under the unreasonable application prong. Third, these decisions confirm that broad principles can qualify as clearly established law, but they also reveal that the broader the principle, the more likely the state court's decision will be reasonable. Although one commentator has argued that the clarity of the law should not be part of the analysis under § 2254(d)(1),[273] these decisions contrast that view. This Article argues that clarity does matter and that it is an appropriate part of the analysis. The next Part will demonstrate that lower courts are considering clarity, but they are not doing so in a uniform fashion.

III. LIFE IN THE LOWER FEDERAL COURTS

The dearth of Supreme Court guidance about what constitutes clearly established law has left the lower federal courts to fill in the details.[274] Cases in which the lower courts have struggled with clearly established law questions fall into three categories. The first occurs when courts find that there is no clearly established law applicable to the habeas petitioner's case. Some courts treat this determination as a dispositive issue and deny relief. Other courts go on to analyze clearly established law issues under the contrary to or unreasonable application prongs of § 2254(d)(1). The second category relates to the scope of precedent. In

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273. *See* Ides, *supra* note 11, at 761-62.

274. To the extent that state courts must ascertain U.S. Supreme Court precedent for a particular issue, these situations will likely require a similar analysis. Although this Article does not address how state courts should analyze Supreme Court precedent on direct review, many of the same principles apply. For a discussion of how state courts should determine federal law, see Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use To Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143 (1999).

these cases, the courts decide whether a rule applies to the habeas petitioner's factual situation. The third category concerns inquiries into the clarity of the precedent. These cases involve the application of general principles, old or otherwise questionable precedent, and splintered Supreme Court decisions. This Part examines each of these categories in turn.

A. Lack of Precedent

The first type of issue that habeas courts encounter is the lack of any Supreme Court precedent for the petitioner's claim. Given the small number of Supreme Court cases decided each year, this is hardly a surprise. Although the Supreme Court has not yet had to deny habeas relief under AEDPA because there was no clearly established law at the time of the state court decision, lower federal courts have done so.

In this sense, the Court's instruction that the determination of clearly established law is a "threshold question" in § 2254(d)(1) cases[275] is ambiguous. By "threshold," did the Court simply mean that habeas courts should ask this question at the beginning of the analysis, or did it intend for this question to be dispositive? If it is a dispositive question and the court finds that there is no clearly established law, then habeas relief must be denied.

One seemingly easy case would be when the habeas court faces an issue of first impression. If the Supreme Court has not addressed the issue by the time the state court decision is rendered, then the habeas court should deny relief outright. The rationale supporting this outcome is logical as well as practical: if the state court has no Supreme Court precedent to guide it, the state court's decision cannot be contrary to or an unreasonable application of law that does not exist. It would practically be very difficult for the habeas court to meet AEDPA's standard under these circumstances.[276] This approach also makes sense from a policy perspective, and it is consistent with legislative intent, the Court's approach in *Teague*, and qualified immunity jurisprudence. The state court should not be in a position to speculate as to how the Supreme Court—or any federal court—would decide the issue when and if it ever faced it. State court decisions on issues of first impression should be decided on direct review, not habeas review.

Unfortunately, the clearly established law inquiry is seldom so simple. Unless the Supreme Court has expressly declined to address a particular

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275. *Andrade*, 538 U.S. at 71; Williams v. Taylor, 529 U.S. 362, 390 (2000) (Stevens, J., writing for the majority).

276. *See* Ides, *supra* note 11, at 761 (arguing that it would be "nigh impossible for a state court decision to be contrary to or an unreasonable application of law [if the law is] stated at its most abstract level").

issue, the questions quickly become more tangled. For instance, must a court of appeals ignore its own circuit's precedent? Must the district court ignore what would otherwise be binding circuit precedent? AEDPA's apparent disregard for traditional rules of vertical stare decisis in the federal courts can lead to dramatic results. In the absence of at least one Supreme Court case on a given issue, AEDPA effectively ties the hands of the habeas court: lower federal courts are prohibited from granting relief even if that court has directly addressed the issue in its own precedent. This curtails the development of constitutional law in the lower courts on habeas review, a congressional goal in enacting AEDPA. While AEDPA's source limitation for clearly established law has been the subject of debate,[277] the lower federal courts are dealing with this limitation fairly consistently by requiring the petitioner to cite at least one Supreme Court case in support of the petitioner's position.[278]

More complicated questions arise when courts need to discern the scope of the Supreme Court precedent. This is a two-fold question: (1) how broad or narrow is the rule articulated in the precedent, and (2) how similar are the facts of the precedent case to the habeas petitioner's case. These same questions are at the heart of our common-law system's reliance on precedent and practice of reasoning by analogy. In the habeas context, however, some courts deny relief based on their answers to these questions.

1. Dispositive Issue

Most lower federal courts begin their analysis under § 2254(d)(1) by determining as a threshold issue whether there is Supreme Court precedent "on point" before proceeding with § 2254(d)(1)'s two-pronged inquiry about whether the state court's decision is contrary to or an unreasonable application of clearly established law.[279] From a practical standpoint, if there is no law to apply, the habeas court seemingly could

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277. *See supra* note 40.

278. *See, e.g.*, Gonzalez v. Fischer, No. 01-CV-8523 (JBW), 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 23874, at *38 (E.D.N.Y. Oct. 16, 2003) (stating that "[a habeas] petitioner must 'identify a clearly established Supreme Court precedent that bears on his claim'" (quoting Loliscio v. Goord, 263 F.3d 178, 191 (2d Cir. 2001); Sellan v. Kuhlman, 261 F.3d 303 (2d Cir. 2001))). The district court need not proceed with the analysis if the petitioner fails to cite a Supreme Court case. *Id.*; *see* Estrada v. Jones, No. 03 C 3092, 2004 U.S. Dist. LEXIS 6502, at *4-5 (N.D. Ill. Apr. 14, 2004).

> [A] "petitioner first must show that the Supreme Court has 'clearly established' the propositions essential to [his] position." . . . "[He] must have a Supreme Court case to support his claim, and that Supreme Court decision must have clearly established the relevant principle as of the time of his direct appeal."

Id. (second alteration in original) (quoting Schaff v. Snyder, 190 F.3d 513, 522 (7th Cir. 1999)).

279. *See, e.g.*, Chin v. Runnels, 343 F. Supp. 2d 891, 902 (N.D. Cal. 2004).

not analyze whether the state court decision was contrary to or an unreasonable application of clearly established law.[280]

The most straightforward case is where the Supreme Court has expressly declined to decide an issue. If the issue was still unresolved when the state court decided the habeas petitioner's case, then there is no clearly established law. For example, the Supreme Court expressly left open the question of whether, in a noncapital case, the Due Process Clause requires that a lesser-included offense be charged when supported by the evidence.[281] Lower courts facing this issue on habeas review have denied relief because the law governing that issue is not clearly established.[282]

The slightly harder cases are those where the line between holding and dicta is not as clear as Justice O'Connor suggested in her statement in *Williams*.[283] For example, in *Dallio v. Spitzer*,[284] a habeas petitioner

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280. The lack of law for the state court to apply is somewhat analogous to the "committed to agency discretion by law" doctrine in administrative law. The Federal Administrative Procedure Act excludes agency action from judicial review "to the extent that—the agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (2000). The Supreme Court has interpreted this exception narrowly to apply "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *See* Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 26 (1945)). In other words, judicial review would be precluded in those situations where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's discretion." Heckler v. Chaney, 470 U.S. 821, 830 (1985). In the habeas context, a further question arises whether a principle might be too broad to constitute "clearly established" law.

281. Beck v. Alabama, 447 U.S. 625, 638 & n.14 (1980).

282. *See, e.g.*, House v. Miller, No. 02-CV-5379, 03-MISC-0066, 2003 U.S. Dist. LEXIS 24380, at *46-47 (E.D.N.Y. Nov. 13, 2003) ("[T]here is no Supreme Court precedent that addresses the issue of whether a lesser-included offense must be charged when supported by the evidence."); Davis v. Herbert, No. 02-CV-04908, 03-MISC 0066 (JBW), 2003 U.S. Dist. LEXIS 24121 (E.D.N.Y. Oct. 24, 2003). *But see* Peakes v. Spitzer, No. 04 Civ. 1342 (RMB) (AJP), 2004 U.S. Dist. LEXIS 10905, at *34-44 (S.D.N.Y. June 16, 2004) (finding lack of Supreme Court precedent but also looking to federal circuit court cases before concluding that there is no clearly established law). For an example in another context, see *Gonzalez*, 2003 U.S. Dist. LEXIS 23874, at *39 (holding that while the Supreme Court has held that indigent defendants are entitled to a free set of trial transcripts to prepare for direct appeal, there is no clearly established law entitling petitioner to a free set of trial transcripts to prepare for collateral attacks because the Court expressly left that question open). *See supra* note 278.

283. *See* Williams v. Taylor, 529 U.S. 362, 412 (2000) (O'Connor, J., writing for the majority) (stating that the Court's holdings, not dicta, constitute clearly established law). First-year law students should be comforted that this distinction occasionally eludes even some judges. *See, e.g.*, Johnson v. Carroll, 369 F.3d 253, 263 (3d Cir. 2004) (noting that "the Supreme Court[] . . . has not held, not even in dicta, let alone 'clearly established,' that the mere appearance of bias on the part of a state trial judge, without more, violates the Due Process Clause").

284. 343 F.3d 553 (2d Cir. 2003).

claimed that his Sixth Amendment right to counsel and corollary right to self-representation were violated when the trial court failed to warn him of the dangers of self-representation.[285] He relied on one Supreme Court case, *Faretta v. California*,[286] where the defendant's request to proceed pro se was denied.[287] The Second Circuit distinguished *Faretta* and determined that the only relevant portion of the case—that a defendant waiving his right to counsel "'should be made aware of the dangers and disadvantages of self-representation'"—was dictum and not part of the holding.[288] The court further noted that the word "should" in this context reflects a preference rather than a mandate.[289] Finally, the court noted that "the Supreme Court has repeatedly emphasized that a knowing and intelligent waiver depends on the totality of 'facts and circumstances' in a given case."[290] Citing a lack of clearly established Supreme Court precedent, the Second Circuit denied habeas relief.[291]

In a concurring opinion, Judge Katzmann disagreed with the majority's characterization of the holding in *Faretta*. In his view, *Faretta* "establishe[d] clear federal law [that] requir[ed]"[292] at least "*some* basis in the record . . . to conclude that the defendant was aware of the adverse consequences of proceeding *pro se*."[293] He therefore would have found that the state court unreasonably applied the rule from *Faretta*.[294] He agreed with the district court, however, that the error was harmless, and thus would still deny relief.[295] While the panel ultimately agreed on the same result (no relief), Judge Katzmann's concurrence demonstrates a fundamental disagreement about the scope of the holding of the relevant Supreme Court precedent.

Disagreement over the scope of the precedent has significant consequences when courts treat the clearly established law inquiry as a

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285. *Id.* at 555.

286. 422 U.S. 806 (1975).

287. *Id.* at 807. On direct appeal, the petitioner also cited a number of New York Court of Appeals decisions. *Id.*

288. *Dallio*, 343 F.3d at 561 (quoting *Faretta*, 422 U.S. at 835).

289. *Id.* at 562.

290. *Id.* at 563 (quoting Edwards v. Arizona, 451 U.S. 477, 482 (1981)).

291. *Id.* at 564-65.

292. *Id.* at 565 (Katzmann, J., concurring).

293. *Id.* at 567 (Katzmann, J., concurring).

294. *Id.* at 568 (Katzmann, J., concurring).

295. *Id.* at 565 (Katzmann, J., concurring). The district court found that there was a constitutional violation and that the state court decision was an unreasonable application of clearly established federal law, but concluded that the error was harmless and thus denied relief. Dallio v. Spitzer, 170 F. Supp. 2d 327, 336-37, 338 (E.D.N.Y. 2001), *aff'd*, 343 F.3d 553 (2d Cir. 2003).

dispositive issue. For example, in *Estrada v. Jones*,[296] the court read the Supreme Court precedent narrowly. The petitioner in *Estrada* "claim[ed] . . . that the trial court erred in denying his motion for funds to obtain expert psychiatric assistance" to determine his fitness at the time of his plea.[297] The court declared that the petitioner failed to cite any authority in support of his claim and denied relief.[298] The petitioner did cite one Supreme Court case, *Ake v. Oklahoma*;[299] however, the court distinguished *Ake* because it involved "the appointment of psychiatric experts in the context of an insanity defense . . . [relating to] defendant's sanity at the time of the offense."[300] Because the court treated the lack of clearly established law as a dispositive issue, it did not continue with the analysis under § 2254(d)(1) to determine whether it was objectively unreasonable for the state court not to extend *Ake*'s rule to the facts of petitioner's case.

By contrast, a habeas court can view a general legal principle as being too broad to apply to petitioner's specific factual situation. In *Johnson v. Carroll*,[301] the district court and the appellate court disagreed about the scope of Supreme Court precedent. The case raised the issue of whether there was clearly established law that the appearance of bias on the part of a state judge violates the Due Process Clause.[302] After concluding that the judge's actions did have an appearance of bias, the district court conditionally granted the petition.[303] Citing the AEDPA's "stringent provisions" the Third Circuit reversed.[304]

In *Johnson*, the district court and the habeas petitioner relied on three Supreme Court cases as establishing a general principle that the appearance of bias on the part of a state judge violates the Due Process Clause.[305] The Third Circuit did not view these three cases, or any other

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296. No. 03 C 3092, 2004 U.S. Dist. LEXIS 6502 (N.D. Ill. Apr. 14, 2004).

297. *Id.* at *9.

298. *Id.*

299. 470 U.S. 68 (1985).

300. *Estrada*, 2004 U.S. Dist. LEXIS 6502, at *9-10.

301. 369 F.3d 253 (3d Cir. 2004).

302. *Id.* at 259.

303. *Id.* at 255. The defendant did not file any postconviction motions, instead filing a petition for a writ of habeas corpus in federal court. *Id.*

304. *Id.*

305. *Id.* at 258. The three Supreme Court cases relied on were *In re Murchison*, 349 U.S. 133 (1955); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988); and *Liteky v. United States*, 510 U.S. 540 (1994). *Johnson*, 369 F.3d at 258. The district court also relied on a Delaware state court decision, but because AEDPA limits the relevant law to Supreme Court decisions, the Third Circuit disregarded the state court case in its review. *See id.* n.2. The Third Circuit also noted that the district court had not used the phrase "clearly established" in its opinion. *Id.* at 259.

Supreme Court case, as standing for the legal principle at issue.[306] The Third Circuit noted that the district court seemed to acknowledge that it made an overly broad reading. In a "decision to grant the state's motion for an enlargement of the stay . . . pending . . . resolution of [the] appeal," the district court stated that "its earlier decision . . . 'was based on an *analogy* to Supreme Court cases related to the issue of recusal under 28 U.S.C. § 455 [for *federal* judges] and *not on direct precedent* related to the trial judge's appearance of bias under the Due Process Clause.'"[307] As further support for its conclusion, the Third Circuit cited three other circuits' pre-AEDPA decisions rejecting arguments similar to those made by the petitioner.[308] The Third Circuit concluded that "the Supreme Court[] . . . has not held, not even in dicta, let alone 'clearly established,' that the mere appearance of bias on the part of a state trial judge, without more, violates the Due Process Clause," and it reversed and remanded the case with directions to dismiss the habeas petition.[309]

Because this case involved a general principle, the Third Circuit should have examined the scope of that principle under the unreasonable application prong of § 2254(d)(1). Even if the court ultimately would have denied relief under that prong, continuing with the analysis to evaluate the reasonableness of the state court's decision with existing Supreme Court precedent would have been more in line with AEDPA's goals. By treating the determination of clearly established law as a dispositive issue when there is a disagreement about the scope of the precedent, courts are not fulfilling their duty under AEDPA to review the state court's decision.[310]

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306. *Johnson*, 369 F.3d at 262.

307. *Id.* at 259 (second alteration in original) (quoting Johnson v. Carroll, No. 02-562-JJF, 2003 WL 22136302, at *1 (D. Del. Sept. 10, 2003)).

308. *Id.* at 262. The court cited *Hardy v. United States*, 878 F.2d 94, 97 (2d Cir. 1989) (concluding that the Due Process Clause does not mandate § 455's "'appearance of impropriety standard'" (citation omitted)); *United States v. Couch*, 896 F.2d 78, 81 (5th Cir. 1990) ("'[C]onduct violative of section 455 may not [necessarily] constitute a due process deficiency.'" (alterations in original) (citation omitted)); and *Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363, 1371 (7th Cir. 1994) (en banc) (rejecting the view that two of the cases cited by petitioner, *Murchinson* and *Aetna*, held that due process "'requires judges to recuse themselves based solely on appearances'" (citation omitted)).

309. *Johnson*, 369 F.3d at 263.

310. A related but different problem is when a court completely fails to analyze whether there is clearly established law. For example, the Ninth Circuit recently issued an amended opinion in *Shaw v. Terhune*, 380 F.3d 473 (9th Cir. 2004). In the original opinion, the panel disagreed about the scope of Supreme Court precedent. Shaw v. Terhune, 353 F.3d 697, 706 (9th Cir. 2003) (Wallace, J., dissenting), *withdrawn*, 380 F.3d 473 (9th Cir. 2003). The Ninth Circuit reviewed two issues and found there was no clearly established law for either issue. The first issue was whether prosecutors must give consistent interpretations of the same evidence in different trials. *Id.* at 701. The court

2. Non-dispositive Issue

While the dispositive approach makes sense in theory, the previous Subpart has demonstrated that this can be complicated in practice. This is because the analysis often depends on the court's determination of whether the Supreme Court precedent is "on point," which is another way of assessing the scope of the precedent. To determine how similar the relevant Supreme Court precedent is to the case before the habeas court, habeas courts usually need to reference the factual context; they generally cannot ascertain clearly established law in the abstract. Accordingly, many courts address clearly established law as a threshold question (in the sense of asking at the beginning of the analysis what the relevant law is) but consider issues about the scope of the precedent under the contrary to and unreasonable application prongs of § 2254(d)(1).

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found that while prosecutors are prohibited from knowingly presenting false evidence, no clearly established federal law precluded a prosecutor from arguing two inconsistent theories that were equally supported by ambiguous evidence. *Id.* at 704-05. The second issue was whether inconsistent convictions violated due process. *Id.* at 701. The majority noted that "[t]he [Supreme] Court has . . . expressly rejected the proposition that due process always requires consistent convictions." *Id.* at 705. Treating the "absence of 'clearly established federal law'" as a dispositive issue, the majority denied relief. *Id.* at 706.

Judge Wallace dissented. While the majority viewed the Supreme Court as not having directly addressed the issue, he insisted that to find clearly established law, the identical factual circumstances at issue need not be previously addressed by the Supreme Court. *Id.* at 707 (Wallace, J., dissenting). He relied instead on the broad principle derived from several Supreme Court cases that "[t]he prosecutor's duty to seek the truth and vindicate the demands of justice distinguishes his role from that of ordinary trial counsel," and that "prosecutorial foul play" is not acceptable. *Id.* (Wallace, J., dissenting). Judge Wallace also found that the prosecutor acted in bad faith, and that prosecutorial bad faith is proscribed by Supreme Court precedent. *Id.* at 710 (Wallace, J., dissenting); *see also* Smith v. Groose, 205 F.3d 1045, 1051 (8th Cir. 2001). His approach was similar to the Ninth Circuit's approach in *Alvarado v. Hickman*, 316 F.3d 841 (9th Cir. 2002), *rev'd sub nom.* Yarborough v. Alvarado, 124 S. Ct. 2140 (2004), where the court extracted a general principle about recognizing juvenile status as a special circumstance to be considered. *See supra* Part II.C.2.b.

Almost eight months later, the Ninth Circuit withdrew the original opinion and issued an amended opinion. The amended opinion is odd. In the amended opinion, a unanimous panel simply notes § 2254(d)(1)'s standard and skips over the clearly established law question. *Shaw*, 380 F.3d at 477. After acknowledging the canon of avoiding constitutional questions if an issue may be resolved on narrower grounds, the court stated that it was "not reach[ing] the . . . merits of [petitioner's] due process claim [because it] conclude[ed] that, even if [petitioner's] due process rights were infringed by the prosecutor[] . . . , such error was harmless." *Id.* at 748. It is not appropriate for a court to skip over the threshold question of clearly established law. Theoretically, the canon of avoidance of constitutional questions could be invoked in every habeas case. Such a result would be antithetical to habeas review under § 2254.

For instance, in *Lopez v. Wilson*,[311] the Sixth Circuit affirmed the district court's denial of habeas relief to a petitioner claiming that his right to effective assistance of counsel was violated because he was denied appointment of counsel to file a motion to reopen the appeal.[312] Rather than treating the existence of clearly established law as a threshold inquiry, the court asked that question in conjunction with determining whether the state court decision was contrary to Supreme Court precedent.[313] The Sixth Circuit held that the state court decision was not contrary to Supreme Court precedent because the two Supreme Court cases relied on by the petitioner were materially distinguishable from his case.[314]

The first case the petitioner relied on was *Douglas v. California*.[315] In *Douglas*, the Supreme Court held that a defendant is entitled to counsel for purposes of an appeal, but specifically stated that the Court was "'dealing only with the first appeal.'"[316] In the second case the petitioner cited, the Supreme Court held that due process guarantees a defendant effective assistance of counsel where his appointed counsel failed to properly file an appeal.[317] The Sixth Circuit found that neither of these cases constituted clearly established Supreme Court precedent on the issue of denying the appointment of counsel to file a motion to reopen an appeal.[318]

Although the Sixth Circuit itself had directly addressed the issue itself several years ago and had determined that a defendant did have a constitutional right to counsel in such a situation,[319] the court announced that because its decision predated *Williams*, the decision was not relevant for purposes of AEDPA.[320] Accordingly, it held that the state court's decision was not contrary to clearly established law.[321] Judge Cole concurred in the judgment, but disagreed with the majority's analytical

311. 355 F.3d 931 (6th Cir.), *vacated, reh'g en banc granted,* 366 F.3d 430 (6th Cir. 2004). At the time this Article went to press, no en banc decision had been issued.

312. *Id.* at 933-34.

313. *Id.* at 937.

314. *Id.* at 939-41.

315. *Id.* at 940; Douglas v. California, 372 U.S. 353 (1963).

316. *Lopez*, 355 F.3d at 940-41 (quoting *Douglas*, 372 U.S. at 356).

317. *Id.* at 941; *see* Evitts v. Lucey, 469 U.S. 387, 393 (1985).

318. *Lopez*, 355 F.3d at 941.

319. White v. Schotten, 201 F.3d 743, 752-53 (6th Cir. 2000).

320. *Lopez*, 355 F.3d at 936. This statement highlights the importance of AEDPA's source limitation, which is more restrictive than under *Teague* or in the qualified immunity context. *See supra* Part II.A.

321. *Lopez*, 355 F.3d at 941.

approach. He would have treated the absence of Supreme Court precedent as a dispositive issue and denied relief on that basis alone.[322]

The majority's view in *Lopez* reflects an approach the lower federal courts often take. Where the scope of the precedent is not clear, these courts tend to continue with the § 2254(d)(1) analysis rather than treat the clearly established inquiry as dispositive.[323] For example, in *Gilchrist v. O'Keefe*,[324] the Second Circuit reviewed under AEDPA whether the state court had unconstitutionally denied the petitioner's right to counsel when it refused to appoint new counsel at sentencing after petitioner's previous appointed counsel withdrew because the petitioner punched him, puncturing his eardrum.[325] The State argued that "petitioner *forfeited* rather than *waived* his right to counsel."[326]

Although there was not a Supreme Court case directly on point, the Second Circuit found clearly established law through the following analysis. First, Supreme Court precedent recognizes a distinction between waiver and forfeiture of constitutional rights in general.[327] Second, the Supreme Court has not held that an indigent defendant may not forfeit the right to counsel by misconduct.[328] Third, the Supreme Court has not held that a defendant may not forfeit a constitutional right.[329] The court then held that the state court ruling that petitioner had forfeited his right to counsel was not contrary to clearly established law.[330]

The court next considered whether the state court's ruling that the petitioner forfeited his right to counsel by this single, violent incident was an "'unreasonable application' of the more general principles in Supreme Court cases such as *Gideon* [*v. Wainwright*] emphasizing the tremendous importance of the right to counsel."[331] The court emphasized that this

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322. *Id.* at 942 (Cole, J., concurring in the judgment).

323. For instance, the court and parties could agree that a particular case stands for a particular rule or standard, but disagree on the facts of the case at bar.

324. 260 F.3d 87 (2d Cir. 2001).

325. *Id.* at 90.

326. *Id.* at 94.

327. *Id.* at 95-97. The court examined the following cases: *Johnson v. Zerbst*, 304 U.S. 458, 464 (1958); *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (holding that, after a judge has warned a defendant, a defendant can lose the right to be present at his trial if he continues disruptive behavior in the courtroom); and *Taylor v. United States*, 414 U.S. 17, 20 (1973) (rejecting defendant's constitutional claim where defendant had only attended the beginning of trial and failed to appear for the remainder, even absent a specific warning by the judge).

328. *Gilchrist*, 260 F.3d at 97.

329. *Id.*

330. *Id.*

331. *Id.*

step was "necessary because the lack of Supreme Court precedent specifically addressing forfeiture of the right to counsel does not mean that any determination that such a fundamental right has been forfeited, even if based on an utterly trivial ground, would survive habeas review."[332] Because the Supreme Court had recognized that other important constitutional rights may be forfeited by serious misconduct, the Second Circuit held that the state court did not unreasonably apply clearly established law.[333] As support, the Second Circuit cited other circuits that had reached similar results.[334] In the absence of clearly established law on the precise issue, the habeas court was unwilling to find fault in either the state court's analysis of or its application of the more general existing law.[335]

The divergence in the lower courts' approaches regarding whether clearly established law is a dispositive issue is not easily explained. Currently some courts are denying habeas relief without analyzing the questions of scope under the contrary to or unreasonable application prongs of § 2254(d)(1). Other courts have not been comfortable with this approach. In close cases, courts should be reluctant to draw the line at denying relief for lack of clearly established law, because liberty interests are at stake.

B. Failure to Extend a Supreme Court Precedent to New Facts

The second recurring issue habeas courts face arises when they must determine whether a rule from Supreme Court precedent should apply to the facts of the petitioner's case. Cases in this category essentially require the court to determine the scope of the precedent, which in turn asks two questions: how broad or narrow is the precedent and how many cases does the precedent control? This category requires courts to reason by analogy and directly invokes § 2254(d)(1)'s contrary to and unreasonable application prongs.

Courts must first ascertain the scope of the rule articulated in the precedent. For example, in *Rico v. Leftridge-Byrd*[336] the Third Circuit affirmed the denial of habeas relief to a petitioner who argued that the

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332. *Id.*

333. *Id.*

334. *Id.* at 97-99. The court cited *United States v. McLeod*, 53 F.3d 322 (11th Cir. 1995) (affirming denial of defendant's request for a new attorney to represent him at a motion for a new trial after prior attorney withdrew on the basis that defendant had threatened to harm the attorney and had verbally abused him), and *United States v. Leggett*, 162 F.3d 237 (3d Cir. 1998) (affirming district court's ruling at sentencing that defendant had forfeited right to counsel when he physically attacked his second court-appointed attorney in the courtroom on the day he was to be sentenced).

335. *Gilchrist*, 260 F.3d at 100.

336. 340 F.3d 178 (3d Cir. 2003).

rule from *Batson v. Kentucky*[337] should apply to exercising peremptory challenges to eliminate Italian-American jurors.[338] The state supreme court found the *Batson* rule applied to Italian-Americans but rejected the petitioner's *Batson* claim because the trial court found that the prosecutor's strikes were ethnically-neutral and not purposeful discrimination.[339]

The Third Circuit began its analysis by examining the scope of the *Batson* rule. In *Batson*, the Supreme Court held that to establish a prima facie case of discrimination for a prosecutor's exercise of peremptory challenges, a black "defendant must 'show that he is a member of a cognizable *racial* group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's *race*.'"[340] In subsequent cases, the Supreme Court extended the rule to cover discrimination against bilingual Latino jurors,[341] with the Court referring to "Latino" as both a race and an ethnicity,[342] and to cover discrimination on the basis of gender.[343] The Third Circuit stressed that the Supreme Court had not at the time of the state court decision, or subsequently, extended the *Batson* rule to any European-American ethnicity or national origin.[344] Accordingly, the Third Circuit quickly concluded that the state court's decision, which applied *Batson* to strikes against Italian-American jurors, was not contrary to Supreme Court precedent.[345]

The next portion of the Third Circuit's analysis—whether the state court unreasonably applied *Batson*—was more detailed. The court supported its conclusion that the state court did not unreasonably apply *Batson* by emphasizing the uncertain state of the law.[346] The court first noted that the Supreme Court's *Batson* jurisprudence was not consistent

337. 476 U.S. 19 (1986).

338. *Rico*, 340 F.3d at 186-87. The court noted that the habeas petitioner, Joseph Rico, was not Italian-American, but had changed his surname to "Rico" from "Gavel." *Id.* at 180.

339. *Id.* at 181-82. "The [Pennsylvania Supreme] Court assumed without deciding that Italian-Americans were a cognizable group subject to the *Batson* rule," *id.* at 182, which was applicable to an ethnic group that is "'a cognizable group that has been or is currently subjected to discriminatory treatment' in the community," *id.* at 181-82 (quoting Commonwealth v. Rico, 711 A.2d 990, 994 (Pa. 1998)).

340. *Id.* at 182 (quoting *Batson*, 476 U.S. at 80, 96).

341. *Id.* (citing Hernandez v. New York, 500 U.S. 352 (1991)).

342. *Id.* n.3 (citing *Hernandez*, 500 U.S. at 357 n.2).

343. *Id.* at 182.

344. *Id.*

345. *Id.* at 182-83.

346. *Id.*

in distinguishing between race and ethnicity or ethnic origin.[347] For example, in *Hernandez v. New York*,[348] where the Court extended *Batson* to Latino jurors, the Court used both "ethnicity" and "race,"[349] but in her concurrence, Justice O'Connor used only the term "race."[350] This "uncertainty," the Third Circuit acknowledged, had not been resolved.[351] The Third Circuit further noted that the definition of "race" had changed over time.[352] Finally, the court recognized that the federal courts of appeals had been restrictive in extending *Batson* beyond the classifications explicitly recognized by the Supreme Court—race, gender, and ethnicity of Latinos.[353] In light of the uncertain state of the law, the court held that "[i]t was . . . not objectively unreasonable for the state courts to consider challenges to Italian-American prospective jurors under *Batson* and that, when they did so, they did not unreasonably apply Supreme Court precedent."[354]

The Third Circuit's analysis in *Rico* is instructive on several levels. First, it did not treat clearly established law as a dispositive issue. Had the court done so, petitioner's writ could have been denied for lack of Supreme Court precedent regarding *Batson*'s application to Italian-Americans, an issue the Supreme Court has not directly faced. Second, the court found that the state court's extension of *Batson* to Italian-Americans was neither contrary to Supreme Court precedent nor objectively unreasonable. Third, the court's emphasis on the uncertain state of the law allowed the state court more leeway to be incorrect before becoming objectively unreasonable under § 2254(d)(1). The court

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347. *Id.* at 183.

348. 500 U.S. 352 (1991).

349. *Rico*, 340 F.3d at 183.

350. *Id.* at 183 n.5 ("'[A] peremptory strike will constitute a *Batson* violation only if the prosecutor struck a juror *because of the juror's* race.'" (quoting *Hernandez*, 500 U.S. at 373 (O'Connor, J., concurring))).

351. *Id.* at 183. In support, the court cited *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000), in which the Supreme Court stated that "under the Equal Protection Clause, 'a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race.'" *Rico*, 340 F.3d at 183 (quoting *Martinez-Salazar*, 528 U.S. at 315).

352. *Rico*, 340 F.3d at 183.

353. *Id.* n.6. The court cited the following cases as extending *Batson*: *Brewer v. Marshall*, 119 F.3d 993 (1st Cir. 1997); *United States v. Taylor*, 92 F.3d 1313 (2d Cir. 1996); *United States v. Krout*, 66 F.3d 1420 (5th Cir. 1995); and *United States v. Canoy*, 38 F.3d 893, 897-98 (7th Cir. 1994). The court cited the following cases that refused to extend *Batson*: *Murchu v. United States*, 926 F.2d 50 (1st Cir. 1991) (per curiam), and *United States v. Campione*, 942 F.2d 429 (7th Cir. 1991). *Rico*, 340 F.3d at 184. The Third Circuit itself had been exposed to, but had not decided, the question of whether *Batson* extended to Italian-Americans. *Id.* at 183.

354. *Rico*, 340 F.3d at 184.

established the uncertainty in the law through the Supreme Court's own language as well as the trepidation expressed by circuit courts.

In another example, *Rockwell v. Yukins*,[355] the Sixth Circuit, sitting en banc, clashed over the scope of a Supreme Court precedent.[356] The petitioner, a mother convicted of conspiring with her sons to kill their father, argued that the state court's decision to exclude evidence of the father's alleged sexual abuse of the sons violated her Sixth Amendment right to present a complete defense.[357] A majority of the court rejected the petitioner's attempt to extract a general rule that a criminal defendant must be permitted to present any evidence deemed critical to the defense and held that the state court decision was not unreasonable.[358] Although the majority did not explicitly frame the issue as a clearly established law inquiry, it found that the Supreme Court cases that the petitioner relied on did not stand for as broad a principle as the petitioner argued.[359]

Four judges joined in a strong dissent. They argued that not only was there clearly established Supreme Court precedent on the issue as petitioner claimed, but that the state court's decision excluding the evidence of the father's abuse was objectively unreasonable.[360] The dissenters noted that the majority's conclusion that one of the Supreme Court cases relied on by petitioner was "readily distinguishable" from the precedent flew "in the face of habeas review under the unreasonable application prong of § 2254(d)(1) inasmuch as under this prong, relief may be granted 'based on an application of a governing legal principle to a set of facts different from those of the case in which the principle was announced.'"[361]

The dissenters understood that the unreasonable application prong stretches the concept of clearly established law to include principles that

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355. 341 F.3d 507 (6th Cir. 2003) (en banc).

356. *Id.* at 509, 514; *see also* Swiger v. Brown, 86 Fed. Appx. 877, 880-81 (6th Cir. 2004).

357. *Rockwell*, 341 F.3d at 509-10.

358. *Id.* at 514.

359. *Id.* at 512-13.

360. *Id.* at 514, 523 (Clay, J., dissenting).

361. *Id.* at 522 n.1 (quoting Lockyer v. Andrade, 538 U.S. 63, 76 (2003)). For an example of another case where the court analyzed whether the state court decision unreasonably applied a general principle from Supreme Court precedent recognizing that "the opportunity to present a defense is one of the constitutional requirements of a fair trial," see *Jones v. Stinson*, 229 F.3d 112, 119-20 (2d Cir. 2000) (finding that the Supreme Court "[has] not decided the specific circumstances under which a criminal defendant must be allowed to introduce evidence of prior non-criminal conduct to demonstrate that he did not commit the crime at issue" and holding that the state court's decision was not contrary to or an unreasonable application of a more general principle from Supreme Court precedent).

can be reasonably applied to different factual situations. The majority, on the other hand, had a narrower view of clearly established law as governing only those cases that are materially indistinguishable. Although that standard is relevant under the contrary to prong of § 2254(d)(1), the majority's view is too limiting to accommodate the unreasonable application prong.

Sometimes courts can readily identify the relevant precedent and the only question is whether the state court should have extended the rule to a new factual situation. For example, in *Hawkins v. Alabama*,[362] the petitioner asked the Eleventh Circuit to find that the state court unreasonably applied clearly established federal law by refusing to extend a legal principle to his case.[363] The legal principle at issue, articulated by the Supreme Court in *Oregon v. Kennedy*,[364] covered prosecutorial misconduct that was intended to and did cause a mistrial.[365] The petitioner argued for an extension of the *Kennedy* rule, and cited four cases from other circuits in support of his argument.[366]

In the cases relied on by the petitioner, the Second and Seventh Circuits indicated that they might extend the *Kennedy* rule.[367] The Eleventh Circuit found these cases unhelpful for two reasons. First, the supporting cases were not habeas cases.[368] This assertion is weak, as cases analyzing the extension of Supreme Court precedent on direct appeal are still relevant. Second, and more persuasively, the court asserted that clearly established law inquiry must focus on Supreme Court decisions, not those of lower federal courts, even of the same circuit.[369] The court observed that the decisions of other federal courts and its own decisions are relevant to the AEDPA inquiry in a limited sense; they are helpful "only to the extent that the decisions demonstrate that the Supreme Court's pre-existing, clearly established law compelled the circuit courts

362. 318 F.3d 1302 (11th Cir. 2003).

363. *Id.* at 1306. *Hawkins* was cited with approval by the Court in *Yarborough v. Alvarado*, 124 S. Ct. 2140, 2150-51 (2004).

364. 456 U.S. 667 (1982).

365. *Id.* at 676 ("[O]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.").

366. *Hawkins*, 318 F.3d at 1308 (citing United States v. Catton, 130 F.3d 805 (7th Cir. 1997); United States v. Doyle, 121 F.3d 1078 (7th Cir. 1997); United States v. Pavloyianis, 996 F.2d 1467 (2d Cir. 1993); United States v. Wallach, 979 F.2d 912 (2d Cir. 1992)).

367. *Id.* at 1309 & n.5.

368. *Id.* at 1308-09.

369. *Id.* at 1309.

(and by implication would compel a state court) to decide in a definite way the case before them."[370]

The Eleventh Circuit rejected the Second and Seventh Circuits' cases because an extension of the *Kennedy* rule was not "truly compelled" by the Supreme Court's rule.[371] Rather, "[t]he inclination to widen *Kennedy* represents an independent judgment by these circuits on what the law ought to be in the circumstances contemplated by those circuit courts in those cases."[372]

The court acknowledged the difficulty of applying the unreasonable application standard. Even in light of the Supreme Court's instruction that a state court unreasonably applies clearly established federal law if "the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled,"[373] the Eleventh Circuit contended that it lacked the necessary guidance to resolve the issue because it was "uncertain about what is meant by 'extend' and by 'context.'"[374] It further expressed frustration that these critical but undefined words "appear in a plurality opinion which did not receive the votes of a majority of the Court, and the other opinions did not elaborate on the concept of extension."[375]

The Eleventh Circuit then attempted to define "extend," noting that the word "can mean different things at different times."[376] Specifically, the court conjectured:

> Extend might only mean to apply the *ratio decidendi* of Supreme Court decisions fully and completely (and not in some crabbed way) so that the rule of law covers new and different facts and circumstances as long as the new facts and circumstances—objectively reasonably viewed—are materially or, put differently, substantially the same that were in the mind of the Supreme Court when it laid down the rule.[377]

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370. *Id.*

371. *Id.* n.5. Note the court's use of *Teague*'s language of results that are "compelled" and "dictated": "The Seventh and Second Circuit cases cited by *Hawkins* do not reach this kind of conclusion about the Supreme Court's preexisting precedent dictating the circuit's decision." *Id.* at 1309. This Article argues that while AEDPA limits the source of clearly established law to Supreme Court precedent, lower federal court decisions do have a role to play. *See infra* Part IV.

372. *Hawkins*, 318 F.3d at 1309 n.5.

373. *See* Ramdass v. Angelone, 530 U.S. 156, 166 (2000) (plurality opinion).

374. *Hawkins*, 318 F.3d at 1306 n.2.

375. *Id.* See *infra* Parts III.C, IV, for a discussion of the problem of plurality decisions.

376. *Hawkins,* 318 F.3d at 1306 n.3.

377. *Id.* This author does not believe that the Supreme Court has a collective "mind" from which we can glean a rationale, other than that which is articulated in the written opinion itself.

Using this definition, the Eleventh Circuit announced that it agreed AEDPA requires state courts to "extend" a Supreme Court rule.[378]

The Eleventh Circuit also noted that "extend" has a different meaning: "to 'widen the range, scope, area of application of (a law, operation, dominion, state of things, etc.); to enlarge the scope or meaning of (a word).'"[379] The court rejected this definition as contrary to congressional intent and proclaimed that "[t]o widen the scope of or to enlarge Supreme Court rules is not to follow 'clearly established' Supreme Court law, but is to innovate."[380]

In its attempt to define "extend," the Eleventh Circuit made an important connection between the clearly established law requirement and the unreasonable application prong. The Eleventh Circuit declared that state courts are not required to predict whether the Supreme Court might widen the scope of a rule.[381] In the Eleventh Circuit's view, a state court's failure to widen the scope of "a Supreme Court rule can never be an 'unreasonable application of clearly established law.'"[382] The Eleventh Circuit reasoned that, in such situations, "the state court's decision is filling a gap for which the Supreme Court (the state court can reasonably believe) has not yet determined the law."[383]

While it seemed concerned with judicial activism by the federal habeas courts in developing constitutional law on habeas review, the Eleventh Circuit stressed that "not every factual difference between a Supreme Court precedent and the case before a state court would carry the state case beyond the borders of the Supreme Court's decisional principle."[384] It proposed that the cases must have "substantially different circumstances," meaning "differences which objectively reasonable judges could believe might make a difference on whether or not the Supreme Court's preexisting decisional principles laid down in one set of circumstances would apply to the new circumstances."[385] The Eleventh Circuit then drew the final connection:

> [A] state court is not obliged to predict more or less accurately what the Supreme Court might do in circumstances, the likes of which objectively reasonable judges can believe the Supreme

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378. *Id.* at 1307 n.3.

379. *Id.* (quoting 5 THE OXFORD ENGLISH DICTIONARY 595 (2d ed. 1989)).

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.* The court's use of a range of terms for precedent, including "precedent," "case," and "preexisting decisional principle," reflects a common terminology problem that is not limited to the habeas context.

> Court has never faced: in such state cases, no clearly established federal law exists on point that might be unreasonably applied for AEDPA purposes.[386]

In other words, state courts are prohibited from narrowing Supreme Court rules, but they are not required to widen them.[387]

The Eleventh Circuit ultimately denied relief because it found the facts of petitioner's case substantially different from those in *Kennedy*.[388] The court further concluded that "[t]he Supreme Court [had] not contemplated extending *Kennedy* to cases like Hawkins's case."[389] Although *Hawkins*'s facts involved purposeful prosecutorial misconduct that resulted in a mistrial, it was not the same "goaded-mistrial context" as in *Kennedy*.[390] The court therefore held that the state court's decision was not an unreasonable application of clearly established law and vacated the district court's order.[391]

The Eleventh Circuit's decision in *Hawkins* confuses the contrary to and the unreasonable application analyses. By insisting that new facts are "materially" or "substantially the same" as those in the case where the Supreme Court articulated the rule, the court is describing only one of two tests under the contrary to prong: a state court decision is contrary to clearly established law where the habeas case is "materially indistinguishable" from the Supreme Court precedent, and the state court has made the opposite conclusion of the Supreme Court. Under the unreasonable application prong, clearly established law includes rules that can be reasonably extended to new factual situations that are not materially indistinguishable. Clearly established law, therefore, is a broader category than those cases in which the facts are materially or substantially similar to the facts of the habeas case.[392]

The range of factual situations to which a rule may apply in each context is a question about the scope of the precedent. These questions cannot be answered at a threshold or abstract level; they must be addressed under the contrary to or unreasonable application prongs of § 2254(d)(1).

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386. *Id.*

387. *Id.*

388. *Id.* at 1309, 1310.

389. *Id.* at 1309.

390. *Id.* at 1310.

391. *Id.*

392. Even in the narrower qualified immunity context, the Supreme Court rejected a standard that limited clearly established law to those cases with "fundamentally similar" facts. The Court adopted a standard of "fair warning" instead. *See supra* note 79.

C. Lack of Clarity

The third category raises questions about the uncertain state of the law. A lack of clarity can occur for several reasons. First, the Court may not have articulated a very specific rule, such that the "precise contours" of the rule are unknown.[393] Second, the Supreme Court may have articulated a rule that has been called into question by later decisions or confusing language, as highlighted in *Rico v. Leftridge-Byrd* with the *Batson* rule.[394] Third, the Supreme Court may have addressed the issue in a nonmajority or splintered decision. This problem raises the question of whether a majority of the Court must endorse the rule articulated by a plurality for it to be considered clearly established law "as determined by the Supreme Court of the United States."[395] All three of these problems were present in *Andrade*, where the Supreme Court noted its jurisprudence was "not a model of clarity."[396] The lower courts have followed the Supreme Court's lead in dealing with these problems under § 2254(d)(1)'s unreasonable application prong.

1. General Principles

As seen with the first two categories of recurring issues, some courts have had trouble applying § 2254(d)(1) where the principle articulated by the Supreme Court is a general principle. For example, in *Cotto v. Herbert*,[397] the Second Circuit refused to find unreasonable an extension of the principle that a defendant can forfeit his constitutional right to confrontation through misconduct.[398] In *Cotto*, the petitioner was a criminal defendant who was found by the trial court to have intimidated the eyewitness of a murder.[399] The eyewitness refused to testify, and the trial court allowed the witness's hearsay statements into evidence.[400] The Second Circuit rejected petitioner's claim that the state court unreasonably extended the "forfeiture-by-misconduct principle" because petitioner's facts were not a new context; rather, the court said, his was the "paradigmatic example of the type of 'misconduct' that can lead to the forfeiture of confrontation rights."[401]

The Second Circuit then paused at petitioner's argument that the state court unreasonably applied the law regarding the sufficiency of the

393. Lockyer v. Andrade, 538 U.S. 63, 72-73 (2003).
394. *See supra* Part III.B.
395. *See* 28 U.S.C. § 2254(d)(1) (2000).
396. *Andrade*, 538 U.S. at 72.
397. 331 F.3d 217 (2d Cir. 2003).
398. *Id.* at 234.
399. *Id.* at 227.
400. *Id.* at 224, 227.
401. *Id.* at 234.

evidence necessary for forfeiture.[402] It ultimately denied habeas relief on this issue, though, because there was no Supreme Court precedent "definitively establishing" the circumstances or the standard of proof for forfeiture by misconduct.[403] Throughout its analysis of this issue, the Second Circuit referred to its own precedent and that of other circuit courts as evidence of "extensive federal precedent" permitting out-of-court statements when a defendant has intimidated a witness.[404] But the lack of Supreme Court precedent limiting the circumstances that constitute forfeiture by misconduct prohibited the court from finding that the state court decision involved an unreasonable application of clearly established law.[405]

The *Cotto* court considered a second, and related, issue of whether there was clearly established law on the waiver of the right to cross-examination through misconduct.[406] The Second Circuit noted that the Supreme Court had addressed this issue directly only once, in an 1878 case, *Reynolds v. United States*.[407] *Reynolds*, the court recognized, had a narrow holding that did not speak to the precise question of the scope of forfeiture-by-misconduct of the right to cross-examine a witness when the witness testifies at trial.[408] And even though the law in this area had developed primarily in the federal courts of appeals, none have faced this precise issue.

Given other similar decisions, one would expect that the Second Circuit would have denied habeas relief on the grounds that the state court decision was not an unreasonable application of clearly established law. The Second Circuit did the opposite: it granted habeas relief because the state court decision was objectively unreasonable.[409] The court gave three reasons for its decision. First, the court reasoned that the lack of any federal precedent—Supreme Court or courts of appeals—supported the state court's determination that the petitioner had waived his right to cross-examine a witness at trial.[410] In doing so, the court

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402. *Id.* at 234-35.

403. *Id.* at 234.

404. *Id.* at 235.

405. *Id.*

406. *Id.* at 249.

407. *Id.*; Reynolds v. United States, 98 U.S. 145 (1878). The court also noted that even though the circuits are split on the proper application of the rule from *Reynolds*, the Supreme Court has repeatedly declined to resolve the split. *Cotto*, 331 F.3d at 249.

408. *Cotto*, 331 F.3d at 249-50.

409. *Id.* at 251.

410. *Id.* The court noted that in *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court held that the Virginia Supreme Court had unreasonably applied the law, even though several federal courts of appeals and other state courts had applied the law in a similar fashion, *Cotto*, 331 F.3d at 251.

seemed to be placing the burden of citing appropriate Supreme Court precedent on the state: "[R]espondent has pointed to no other case—and our research reveals none—in which this occurred."[411] Second, the court saw a lack of specific reasons to extend the preclusion of cross-examination to this extreme, i.e., a complete ban.[412] Third, the court considered the preclusion of cross-examination under these circumstances to be inconsistent with the underlying purpose of the broader forfeiture-by-misconduct rule.[413]

The Second Circuit's decision has several controversial aspects. The first is the burden of persuasion. It is inappropriate for the court to shift the burden of citing clearly established law to the state; the habeas petitioner bears the burden on federal habeas review to prove the state courts were in error.[414] Furthermore, many courts would agree that "[t]he Supreme Court's silence on a particular issue cannot constitute 'clearly established' Federal law."[415] In *Cotto*, the court seemed to find the opposite. But the court was not operating in a complete absence of precedent; it was dealing with a broad principle articulated in one century-old Supreme Court case. Although the principle may have been broad, it was enough to pass through the threshold question of § 2254(d)(1). Perhaps the most controversial aspect of the case is the determination that the state court unreasonably applied this broad principle because it extended the principle to a new set of facts. While rare, such a determination is consistent with AEDPA as interpreted by the Supreme Court. The Second Circuit supported its holding with reasons grounded in the fundamental purposes of the *Reynolds* rule and of cross-examination.

2. Old or Otherwise Questionable Precedent

As in *Cotto*, lower courts sometimes must determine whether a Supreme Court case is still "good law" even though it is old or has been called into question by subsequent Supreme Court decisions. These questions go to how "clearly" the law has been "established." Like in *Andrade*, they often involve broad principles, the "precise contours" of which are not settled.[416]

The Seventh Circuit encountered one such broad principle in *Jackson v. Frank*.[417] *Jackson* involved a defendant who told the detective during

411. *Cotto*, 331 F.3d at 251.
412. *Id.* at 251-52.
413. *Id.* at 252.
414. *See* Hill v. Hofbauer, 337 F.3d 706, 712 n.3 (6th Cir. 2003).
415. *Id.*
416. Lockyer v. Andrade, 538 U.S. 63, 72-73 (2003).
417. 348 F.3d 658 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1723 (2004).

interrogation that he wanted a lawyer "right now."[418] The detective misstated the state law and told the defendant that he was unable to get him a lawyer and would have to end the interview unless the defendant agreed to continue without a lawyer.[419] The defendant then waived his *Miranda* rights and confessed to the crime.[420] He later argued the waiver was not voluntary and moved to suppress the confession.[421] On habeas review, the defendant claimed that his *Miranda* rights were violated because the detective's statements clouded his understanding of his Fifth Amendment right as recognized in *Miranda*.[422]

The confusion about this claim centered on the holding from *Duckworth v. Eagan*.[423] "In *Duckworth*, the Court held that when a suspect was informed that he would be provided an attorney 'if and when [he] went to court,' his subsequent waiver under *Miranda* was voluntary."[424] After the Court decided *Duckworth*, however, it found misrepresentations by police to violate defendants' *Miranda* rights in some circumstances.[425] The Seventh Circuit's uncertainty as to how to reconcile *Duckworth* with these cases led the court to conclude that there was no clearly established law.[426] The Seventh Circuit held that, in light

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418. *Id.* at 660.

419. *Id.* at 660-61. The court found that the detective's statement was misleading because state law made public defenders available on an emergency basis to suspects in custody. *Id.* at 661.

420. *Id.*

421. *Id.*

422. *Id.* at 663. He sought relief on two grounds. His first claim was that his *Miranda* rights were violated because the detective's statement was contrary to state law. *Id.* This argument failed because state law is more generous than federal law; *Miranda* does not require that a lawyer be made immediately available to a defendant. *Id.*

423. 492 U.S. 195 (1989).

424. *Jackson*, 348 F.3d at 663-64 (quoting *Duckworth*, 492 U.S. at 203-04). In *Jackson*, the defendant otherwise received warnings that comported with *Miranda*. *Id.*

425. *Id.*

426. *Id.* In doing so, the Seventh Circuit relied heavily on a Fifth Circuit habeas decision on a similar issue. *Id.* at 665. In *Soffar v. Cockrell*, 300 F.3d 588 (5th Cir. 2002) (en banc), the Fifth Circuit denied habeas relief for a petitioner who claimed that he had invoked his right to counsel during police interrogations, *id.* at 598. The court explored several Supreme Court precedents and concluded that the line of cases did not apply to petitioner's situation, and, even if it did, petitioner would be barred from relying on those cases under *Teague*'s anti-retroactivity principle. *Id.* at 596-97. Three of the en banc judges dissented. *Id.* at 598. Judge DeMoss, joined by Judges Parker and Dennis, strongly disagreed with both the majority's interpretation of the relevant law and its application of the law to the facts of the case. *Id.* One other member of the en banc court concurred in part and in the judgment. *Id.* at 590. Two judges concurred in the judgment only. *Id.*

Teague's anti-retroactivity rule was raised in another recent AEDPA case, *Hill v. Hofbauer*, 337 F.3d 706, 713 (6th Cir. 2003). In *Hill*, one of the cases relied on by petitioner was decided a year after his conviction was affirmed by the state court of appeals. *Id.* at 712. The state argued that the case was therefore a "new rule" under

of *Duckworth*, the state court opinion was not objectively unreasonable.[427]

Similarly, in *Wilson v. Superintendent of Attica Correctional Facility*,[428] a federal magistrate judge had to evaluate the extent to which Supreme Court precedent regarding how to review alleged error by the trial court was clearly established.[429] The petitioner claimed, among other things, that the state trial court judge had improperly ruled that photographs of petitioner's apartment and testimony about the condition of the apartment could be used as evidence at trial even though the judge had suppressed items seized from the apartment because they were products of an illegal search.[430] The magistrate judge noted that the standard of review articulated in *Brecht v. Abrahamson*[431] for habeas review of a trial court's errors had been called into question by several federal circuit courts.[432] While some circuit courts questioned the continuing validity of the *Brecht* test in light of AEDPA, other circuits held that the *Brecht* test was still good law.[433] After noting that the Supreme Court had cited

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Teague, and thus not clearly established law under AEDPA. *Id.* Although the Sixth Circuit agreed that reliance on that case was improper, it held that the Supreme Court had clearly established the relevant legal principle—"that a co-defendant's custodial confessions are unreliable and not within a 'firmly rooted' hearsay exception"—in three prior cases that predated petitioner's conviction. *Id.* at 712, 717. The court went on to hold that the state court's decision was both contrary to the law established in those three cases and an unreasonable application of the legal principles espoused in those cases. *Id.*

427. *Jackson*, 348 F.3d at 659.

428. No. 9:00-CV-0767 (NAM/GLS), 2003 U.S. Dist. LEXIS 2111 (N.D.N.Y. Nov. 24, 2003).

429. *Id.* at *24-25.

430. *Id.* at *24.

431. 507 U.S. 619 (1993). The *Brecht* test examines whether the trial court's error had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

432. *Wilson*, 2003 U.S. Dist. LEXIS 2111, at *24-25.

433. *Id.* The question is whether under AEDPA federal courts should review errors found to be harmless by state courts using the *Brecht* test or using the "harmless beyond a reasonable doubt" test articulated in *Chapman v. California*, 386 U.S. 18 (1967). *Wilson*, 2003 U.S. Dist. LEXIS 2111, at *25. The Seventh and Eighth Circuits have suggested that the *Chapman* test apply rather than the *Brecht* test. *See* Anderson v. Cowan, 227 F.3d 893, 897 (7th Cir. 2000); Whitmore v. Kemna, 213 F.3d 431, 433-34 (8th Cir. 2000). The Fifth, Sixth, and Tenth Circuits have held that *Brecht* is the appropriate test. *See* Hill v. Hofbauer, 337 F.3d 706, 718 (6th Cir. 2003); Robertson v. Cain, 324 F.3d 297, 299 (5th Cir. 2003); Herrera v. Lemaster, 301 F.3d 1192, 1200 (10th Cir. 2002). While the Second Circuit has noted this unresolved issue, it has not had the occasion to decide it. *E.g.*, Cotto v. Herbert, 331 F.3d 217, 253-54 (2d Cir. 2003) (holding that the error was not harmless under both standards and thus declining to resolve the issue).

Brecht on two different occasions since AEDPA was enacted,[434] the magistrate judge played it safe and applied both standards.

These cases reveal that courts determining the state of the law typically do so under the unreasonable application prong of § 2254(d)(1) rather than as a dispositive issue. A question about the clarity of the Supreme Court's precedent can affect the reasonableness of a state court's decision in applying that precedent. The more uncertain the precedent, the more leeway the state court has in reasonably applying it.

3. Splintered Decisions

An added level of complexity manifests when the Supreme Court has addressed a particular issue and articulated a rule but has done so in a splintered decision. Since the precedential value of nonmajority opinions is often uncertain even among legal scholars,[435] one might anticipate a high degree of confusion or inconsistency by habeas courts attempting to determine whether a nonmajority opinion constitutes clearly established law. However, several habeas courts have overcome this hurdle by turning to *Marks v. United States*,[436] in which the Supreme Court

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434. *Wilson*, 2003 U.S. Dist. LEXIS 2111, at *25 n.11. The Supreme Court cited *Brecht* in *Penry v. Johnson*, 532 U.S. 782, 795 (2001), and *Early v. Packer*, 537 U.S. 3, 10 (2002), but it has not specifically held that the *Brecht* test survived the enactment of AEDPA, *Wilson*, 2003 U.S. Dist. LEXIS 2111, at *25 n.11. The two citations do, however, post-date the circuit court decisions calling *Brecht*'s validity into question.

435. *See generally* Aldisert, *supra* note 22, at 605; John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59; Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593 (1992); G.P.J. McGinley, *The Search for Unity: The Impact of Consensus Seeking Procedures in Appellate Courts*, 11 ADEL. L. REV. 203 (1987); Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991 (1987); Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777 (1990); David C. Bratz, Comment, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 WASH. L. REV. 87 (1984); Adam S. Hochschild, Note, *The Modern Problem of Supreme Court Plurality Decisions: Interpretation in Historical Perspective*, 4 WASH. U.J.L. & POL'Y 261 (2000); Igor Kirman, Note, *Standing Apart To Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083 (1995); Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980); William G. Peterson, Note, *Splintered Decisions, Implicit Reversal and Lower Federal Courts:* Planned Parenthood v. Casey, 1992 BYU L. REV. 289 (1992); Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981); Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99 (1956); Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419 (1992); *cf.* Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757 (1995) (discussing in the context of civil procedure).

436. 430 U.S. 188 (1977).

developed a doctrine for establishing controlling precedent from nonmajority opinions.[437]

Marks involved an appeal from a conviction for transportation of obscene materials.[438] The Court had to examine two of its previous fragmented cases in order to evaluate the then-current state of the law, stating that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[439] Simply put, the controlling precedent is not necessarily the plurality opinion, but the opinion that "represent[s] a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment."[440]

Although lower courts sometimes struggle with properly applying the *Marks* doctrine,[441] most habeas courts invoking the doctrine to identify clearly established law have done so with relative ease. *Murillo v. Frank*[442] is a good example of *Marks* doctrine application in the habeas corpus context. In *Murillo*, the basis of the petitioner's habeas claim was that his confrontation rights were violated when his brother's statements made during a police interrogation were admitted into evidence.[443] The petitioner's brother, who was also a suspect in the homicide investigation, implicated the defendant in the murder and subsequently refused to take the stand at trial, thus denying the defendant an opportunity to cross-examine his brother.[444] The district court noted that the state court's decision was contrary to current law because the Supreme Court had recently held in *Crawford v. Washington*[445] that the Confrontation Clause proscribes the use of statements against the defendant made by a non-testifying witness during a police interview.[446] But the Court decided *Crawford* after the defendant's conviction became final.[447] Because *Crawford* overruled previous Supreme Court precedent

437. *Id.* at 193.

438. *Id.* at 189.

439. *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

440. King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991).

441. *See, e.g.*, Hopwood v. Texas, 236 F.3d 256, 275 n.66 (5th Cir. 2000) (criticizing the Ninth Circuit's application of *Marks* in *Smith v. University of Washington*, 233 F.3d 1188 (9th Cir. 2000)).

442. 316 F. Supp. 2d 744 (E.D. Wis. 2004).

443. *Id.* at 746-47.

444. *Id.* at 747.

445. Crawford v. Washington, 124 S. Ct. 1354 (2004).

446. *Id.* at 1374.

447. *Murillo*, 316 F. Supp. 2d at 749.

(*Ohio v. Roberts*[448]), the district court considered it to be a "new rule" and consequently not clearly established law for purposes of AEDPA.[449] The defendant therefore relied on the nonmajority Supreme Court opinion in *Lilly v. Virginia*.[450]

The *Lilly* plurality stated that the Confrontation Clause allows admission of statements "'[w]hen a court can be confident—as in the context of hearsay falling within a firmly rooted exception—that the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.'"[451] In addition, the plurality pointed out that the Court has "'over the years spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants.'"[452] Justice Scalia concurred in the judgment, phrasing the use of recorded statements without making the witness available for cross-examination in *Lilly* as "'a paradigmatic Confrontation Clause violation.'"[453]

The broad language in Justice Scalia's concurrence led the district court to consider the plurality the more narrow of the two opinions and thus the controlling rationale under *Marks*.[454] The district court granted the petition, reasoning that the state court's conviction was contrary to clearly established law because the petitioner's facts were materially indistinguishable from those in *Lilly*.[455]

In *Richmond v. Polk*,[456] the habeas court utilized the *Marks* doctrine to find that the state court had unreasonably applied clearly established law.[457] In *Richmond*, the petitioner was convicted of three counts of first-

448. 448 U.S. 56, 73 (1980) (upholding the admission of preliminary hearing testimony of an unavailable witness because the circumstances under which the prior testimony was given provided "sufficient indicia of its reliability").

449. *Murillo*, 316 F. Supp. 2d at 749. The district court noted that it was a close question whether *Crawford* overruled *Roberts* because the Supreme Court had not explicitly applied *Roberts* to testimonial statements. *Id.* n.4.

450. 527 U.S. 116 (1999) (plurality opinion).

451. *Murillo*, 316 F. Supp. 2d at 752 (internal quotation marks omitted) (quoting *Lilly*, 527 U.S. at 136 (plurality opinion)).

452. *Id.* at 751 (internal quotation marks omitted) (quoting *Lilly*, 527 U.S. at 131 (plurality opinion)).

453. *Id.* at 753 (quoting *Lilly*, 527 U.S. at 143 (Scalia, J., concurring)).

454. *Id.* The district court acknowledged that there were some factual differences between *Lilly* and Murillo's case, but concluded that the differences were not legally significant. *Id.* at 754. In doing so, the court noted that "it is not enough that there are differences between the two cases. No two cases are ever exactly alike in all respects. To warrant different conclusions, the differences must be material; they must be legally significant." *Id.*

455. *Id.* at 756.

456. 375 F.3d 309 (4th Cir. 2004).

457. *Id.* at 331 n.10.

degree murder and one count of first-degree rape and was sentenced to death.[458] On habeas review, he claimed, inter alia, that the state court's refusal to instruct the jury about his parole ineligibility for a prior federal murder conviction was contrary to or an unreasonable application of the Supreme Court's decision in *Simmons v. South Carolina*.[459] The Fourth Circuit applied the *Marks* doctrine and found Justice O'Connor's concurring opinion in *Simmons* to be the narrowest grounds on which the concurring justices agreed, and therefore controlling precedent.[460]

In *Simmons*, a plurality of the Court concluded that due process requires a sentencing jury be informed that a defendant is parole ineligible if the defendant's future dangerousness is at issue and state law disallows parole.[461] Justice O'Connor concurred in the judgment, stating that "'[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury . . . that he is parole ineligible.'"[462] Justice O'Connor also noted, however, that the defendant does not have this right when the prosecution limits its dangerousness argument to the defendant's potential dangerousness in prison.[463] Disagreeing with the state court's conclusion that the prosecution's dangerousness argument was limited to dangerousness in prison, the Fourth Circuit held that the state court unreasonably applied clearly established law.[464]

Coe v. Bell[465] is another example of a habeas court invoking the *Marks* doctrine to find clearly established law. In *Coe*, the Sixth Circuit was faced with applying the fragmented Supreme Court opinion of *Ford v. Wainwright*[466] to determine whether the petitioner was mentally competent to be executed.[467] In his concurring opinion in *Ford*, Justice Powell stated that prisoners will be deemed insane for competency

458. *Id.* at 314.

459. *Id.* at 314, 331; Simmons v. South Carolina, 512 U.S. 154 (1994) (plurality opinion).

460. *Polk*, 375 F.3d at 331 n.10; *accord* Smallwood v. Gibson, 191 F.3d 1257, 1280 n.15 (10th Cir. 1999) (acknowledging Justice O'Connor's concurrence in *Simmons* as controlling precedent).

461. *Simmons*, 512 U.S. at 156 (plurality opinion).

462. *Polk*, 375 F.3d at 331 (alteration in original) (quoting *Simmons*, 512 U.S. at 178 (O'Connor, J., concurring)).

463. *Id.*

464. *Id.* at 335. However, the Fourth Circuit denied the petition because it found the state court's error to be harmless. *Id.*

465. 209 F.3d 815 (6th Cir. 2000).

466. 477 U.S. 399 (1986).

467. *Coe*, 209 F.3d at 818.

purposes when "unaware of the punishment they are about to suffer and why they are about to suffer it."[468] Justice Powell also concluded that the process of evaluating a prisoner's competency must comport with due process, and the prisoner must be afforded a "fair hearing."[469] The Sixth Circuit found Justice Powell's concurring opinion to be the narrowest grounds on which all concurring justices agreed, since the plurality opinion, penned by Justice Marshall, advocated a more rigorous competency evaluation process.[470] To bolster its view that Justice Powell's concurring opinion served as the opinion of the Court, the Sixth Circuit cited a later Supreme Court case, which seemed to support the view that Justice Powell's concurrence was controlling precedent.[471] The Sixth Circuit then denied the petition, holding that the competency hearing met the minimum requirements as enunciated by Justice Powell's concurring opinion.[472]

The *Marks* doctrine can be critical in identifying whether there is clearly established law. In some situations, however, the doctrine cannot be applied logically.[473] The Supreme Court has agreed that *Marks* is not always an appropriate method for gleaning precedent from fragmented cases.[474] Despite its difficulties in application, the *Marks* doctrine is available to habeas courts and, at least in certain contexts, should be used when a nonmajority Supreme Court opinion would otherwise prevent the lower court from identifying clearly established law.[475]

The divergence in the lower courts' approaches about how to analyze clearly established law issues appears to stem from the type of issue the

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468. *Id.* at 818-19 (quoting *Ford*, 477 U.S. at 422 (Powell, J., concurring)).

469. *Id.* at 819 (quoting *Ford*, 477 U.S. at 424 (Powell, J., concurring)).

470. *Id.* n.1.

471. *Id.* at 819 (citing Penry v. Lynaugh, 492 U.S. 302, 333 (1989)).

472. *Id.* at 827-28.

473. *See, e.g.*, King v. Palmer, 950 F.2d 771, 782 (D.C. Cir. 1991) (noting that when "one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law").

474. *See* Nichols v. United States, 511 U.S. 738, 745-46 (1994) (stating that "[w]e think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it").

475. This Article does not take a position on whether the *Marks* doctrine is normatively the best solution; it treats *Marks* as current available doctrine. Others have addressed this normative question. *See generally* Hochschild, *supra* note 435; Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1 (1993); Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067 (1988); Maxwell Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321 (2000); Thurmon, *supra* note 435; Kirman, *supra* note 435.

court faces. Viewing clearly established law as a dispositive issue, some courts deny relief under § 2254(d)(1) when the petitioner fails to cite any Supreme Court precedent at all or cites only one Supreme Court case that was decided after the relevant state court decision was issued.[476] When courts address issues of the scope of the precedent, however, they tend to do so under the contrary to and unreasonable application prongs of § 2254(d)(1). Similarly, courts tend not to treat issues about the clarity of the precedent as dispositive; instead, these are addressed as part of the unreasonable application analysis.

IV. TOWARD A COMMON UNDERSTANDING

The struggles of the lower courts show that a common understanding of both the definition of clearly established law and the appropriate analytical framework is necessary. Although courts are regularly encountering the same types of issues, they are not employing a common framework for analyzing those issues.

This Part offers an analytical framework to assist federal habeas courts with the often difficult task of determining what constitutes clearly established law under § 2254(d)(1). The framework begins with the threshold question of whether there is clearly established law. It then identifies five analytic touchstones relevant to this question: (1) the source of the precedent, (2) the number of cases, (3) the timing of the precedent, (4) the scope of the precedent, (5) and the strength of the precedent. The proposed framework also provides a role for federal courts of appeals precedent to serve as evidence relating to these touchstones.

While these touchstones are guideposts along the way for courts, their use will not necessarily lead to identical results in all cases. Indeed, the very nature of our common law system is that "holdings" is a flexible concept—they are often arguable as broad or narrow. This Article does not attempt to resolve these inherent problems—that task has been taken on by others[477]—but rather offers a framework to make the inquiry more uniform. Courts should at least be asking the same questions, even if they do not reach the same conclusions.

This Part then proposes a methodology based on the five touchstones. It recommends that the first three touchstones— source of the precedent, number of cases, and timing of the precedent—are dispositive issues requiring the court to deny habeas relief if they are not met. If, however, a habeas court encounters questions relating to the final two

476. This issue is more complex than it sounds because it raises a question under the *Teague* doctrine.

477. *See supra* note 22.

touchstones—the scope of the precedent or the strength of the precedent—the court should continue with the analysis under § 2254(d)(1) and address those questions under the contrary to or unreasonable application prongs. This Part concludes by advocating that federal courts employ a sliding scale of deference based on the reasonableness of the court's assessment of the precedent's scope and strength, in other words, based on how "clearly" the law is established.

A. Analytic Touchstones for Determining Whether the Law Is Clearly Established

Although these are not bright-line rules, these considerations provide some parameters for understanding what constitutes clearly established law under § 2254(d)(1).

1. Dispositive Questions: Source, Number, and Timing of Precedent

The first three touchstones are the source, number, and timing of the precedent. These three touchstones are the most straightforward in the sense that they are most easily measurable. They are interconnected because each is a dispositive question. In other words, the petitioner must cite at least one Supreme Court case that bears on petitioner's claim, and that case must have been decided before the relevant state court decision on petitioner's claim. If the petitioner fails to do so, the petition should be denied under § 2254(d)(1).

The source of the relevant precedent is the first touchstone. The Supreme Court clarified this issue in *Williams* when it interpreted "as determined by the Supreme Court of the United States" to refer to Supreme Court precedent only.[478] This source limitation is a change from pre-AEDPA law under *Teague*, which allowed the use of circuit court precedent.[479]

The purpose of this first touchstone is to determine whether the petitioner's case hinges on an issue that the Supreme Court has not addressed by the time of the relevant state court decision. It requires the habeas court to separate issues of first impression from issues regarding the scope or strength of the precedent. The most straightforward example of an issue of first impression is where the Court expressly reserved the issue for another case.[480] Both Supreme Court and lower federal court opinions may provide evidence that the issue was left open by the Supreme Court. In true cases of first impression, the lack of clearly established law should be dispositive.

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

479. *See supra* Part II.A.

480. For an example, see *supra* Part III.A.

The source limitation is related to the second touchstone: the number of cases required. The habeas petitioner must cite at least one Supreme Court case that bears on petitioner's claim.[481]

Timing is the third touchstone. In *Williams*, the Court announced that the relevant timeframe for purposes of clearly established law is the date the state court issued the decision rejecting the petitioner's constitutional claims.[482]

2. Scope of Precedent

The fourth touchstone steps away from the more determinative issues of source, number, and timing and focuses on the scope of the precedent. The scope of the precedent refers to the breadth of the issue decided and the number of possible cases that the precedent case controls.[483] Ascertaining the scope of a precedent is a two-step inquiry. The first step is to determine the breadth of the legal directive articulated in the precedent. The second step is to compare the factual similarity of the precedent case and the petitioner's case.

a. Breadth of the Legal Directive

In determining how broad or narrow the precedent is, the court should first ask whether the Supreme Court articulated a rule or standard. Although the differences between rules and standards have been well documented by others, a brief overview is necessary here. Rules and standards are both forms of legal directives.[484] As Professor Pierre Schlag has pointed out, "[D]irectives can be general or specific, conditional or

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481. *See, e.g.*, Murillo v. Frank, 316 F. Supp. 2d 744, 748 (E.D. Wis. 2004) (explaining that habeas petitioners "'must show that the Supreme Court has clearly established the propositions essential to their position'" (internal quotation marks omitted) (quoting Mueller v. Sullivan, 141 F.3d 1232, 1234 (7th Cir. 1998))); Gonzalez v. Fischer, No. 01-CV-8523 (JBW), 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 23874, at *38 (E.D.N.Y. Oct. 16, 2003) (stating that a habeas petitioner must "'identify a clearly established Supreme Court precedent that bears on his claim'" (quoting Loliscio v. Goord, 263 F.3d 178, 191 (2d Cir. 2001); Sellan v. Kuhlman, 261 F.3d 303 (2d Cir. 2001))). The district court need not proceed with the analysis if the petitioner fails to cite a Supreme Court case. *Id.*

> [A] "petitioner first must show that the Supreme Court has 'clearly established' the proposition essential to [his] position." . . . "[He] must have a Supreme Court case to support his claim, and that Supreme Court decision must have clearly established the relevant principle as of the time of his direct appeal."

Estrada v. Jones, No. 03 C 3092, 2004 U.S. Dist. LEXIS 6502, at *4-5 (N.D. Ill. Apr. 14, 2004) (quoting Schaff v. Snyder, 190 F.3d 513, 521 (7th Cir. 1999)).

482. *Williams*, 529 U.S. at 412. This statement has generally been interpreted to mean when the state court conviction becomes final. *See* Bryant, *supra* note 6, at 45. It does leave open, however, the question of whether the *Teague* exceptions apply under § 2254.

483. ALEXANDER, *Precedent*, *supra* note 25, at 167.

484. Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381-82 (1985).

absolute, narrow or broad, weak or strong."[485] Most law students, lawyers, and judges are familiar with talking about rules and standards as "'bright line rule[s]'" and "'[generalized] standard[s].'"[486]

Although the terms "rules" and "standards" do not have fixed meanings, they are generally understood in the following way.[487] Rules are thought to provide guidance to those who must follow them and limit the discretion of those who must apply them; they "establish legal boundaries based on the presence or absence of well-specified triggering facts."[488] A classic example of a rule is "[n]o dogs allowed."[489] The term "bright-line rule" often refers to this type of legal norm.

Standards, by contrast, allow judges greater discretion in application.[490] Unlike rules, standards "incorporate into the legal pronouncement a range of facts that are too broad, too variable, or too unpredictable to be cobbled into a rule."[491] A classic example here is "[n]o unreasonably annoying animals allowed."[492] The term "generalized standard" usually refers to this type of legal norm.

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485. *Id.* (footnotes omitted).

486. *Id.* at 379; *see, e.g.*, Overton v. Newton, 295 F.3d 270, 278 (2d Cir. 2002) ("[F]ederal law, as determined by the Supreme Court, may as much be a generalized standard that must be followed, as a bright-line rule designed to effectuate such a standard in a particular context.")

487. Various definitions have been articulated in the scholarly literature over time. *See, e.g.*, Schlag, *supra* note 484, at 382 n.16; *see also* Isaac Ehrlich & Richard Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 258 (1974) (distinguishing rules from standards on the grounds of precision and generality); Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. U. L. REV. 475, 482, 485 (1933) (defining rules as prescribing "definite, detailed legal consequence[s] to a definite, [set of] detailed . . . facts" and standards as specifying a general limit of permissible conduct requiring application in view of the particular facts of the case).

488. Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules v. Standards Revisited*, 79 OR. L. REV. 23, 25 (2000); *see also* Pettys, *supra* note 12, at 790.

489. *See* Chen, *supra* note 12, at 600-01.

490. *See* Pettys, *supra* note 12, at 790-91.

491. Korobkin, *supra* note 488, at 25-26.

492. *See* Chen, *supra* note 12, at 600-01.

Federal constitutional law has both rules and standards.[493] For purposes of habeas relief, both rules and standards can qualify as clearly established law under AEDPA.[494] As Justice Stevens recognized in *Williams*, "[R]ules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule."[495] But whether the relevant Supreme Court precedent is a rule or standard can affect the scope of the precedent for purposes of qualifying as clearly established law. Although the usage of these terms by the courts is not precise, typically a standard will be broader and will require case-by-case analysis.[496]

Professor Todd Pettys has suggested that the rules-standards distinction can play a role under § 2254(d)(1)'s unreasonable application prong.[497] He argues that "the more the governing legal directive appears in the form of a standard, the wider the range of outcomes that may reasonably be deemed permitted by that directive; the more the directive resembles a rule, the narrower the range of outcomes that it may

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493. Pettys, *supra* note 12, at 789. Professor Pettys notes that, in recent years, standards have come to dominate in certain areas. *Id.* n.287. For example, standards are abundant in the Fourth Amendment search and seizure area:

> [W]hether a search or seizure has occurred, whether a search or seizure was reasonable, whether an officer had probable cause to arrest, whether an officer had sufficient cause to justify an investigative stop, and whether a warrant was required for a search. . . . In contrast, [the Court's decision in] *Miranda v. Arizona* issued a directive that . . . is more in the nature of a rule: a prosecutor may not introduce *any* evidence "stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to preserve the privilege against self-incrimination."

Id. at 792 (footnotes omitted).

494. *See* Chen *supra* note 12, at 600-01; Pettys, *supra* note 12, at 792-93.

495. 529 U.S. 362, 382 (2000) (opinion of Stevens, J.). Justice Stevens cited Justice Kennedy's concurring opinion in *Wright v. West*, 505 U.S. 277, (1992), as support:

> "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."

Id. (omission in original) (quoting *Wright*, 505 U.S. at 308-09 (Kennedy, J., concurring in the judgment)).

496. The Court has acknowledged the diversity of possible outcomes broadly framed standards or rules may reasonably be interpreted to permit. *See* Yarborough v. Alvarado, 124 S. Ct. 2140, 2149 (2004); *see also* Overton v. Newton, 295 F.3d 270, 278 (2d Cir. 2002) ("[F]ederal law, as determined by the Supreme Court, may as much be a generalized standard that must be followed, as a bright-line rule designed to effectuate such a standard in a particular context.").

497. *See* Pettys, *supra* note 12, at 792-93.

reasonably be interpreted to permit."[498] I agree with Professor Pettys that

> the more general the terms appearing in the governing legal directive, as construed in the controlling Supreme Court precedent, the broader the range of outcomes a state court may reasonably interpret that legal directive to permit, and the greater the likelihood that the state court's ruling should be left undisturbed.[499]

Thus, when the relevant precedent is a standard, the clearly established law inquiry should not be dispositive; the court will need to analyze the state court decision to see if it has reasonably applied the standard to the habeas petitioner's facts. Even when dealing with a rule, the breadth of that rule may require case-by-case analysis, as it did in *Andrade*.[500] Reasonable "extensions" of Supreme Court precedent are expressly permissible under the Court's interpretation of AEDPA, as are applications of general principles to specific factual situations. The more general the directive, however, the more reasonable the state court decision not to extend becomes.

b. Factual Similarity

To qualify as clearly established law, a Supreme Court case need not be "on all fours" with the petitioner's case. Identical facts are not required.[501] While a federal court may grant habeas relief under the contrary to prong of § 2254(d)(1) if the state court decision reached a different result than a "materially indistinguishable" Supreme Court precedent, relief is not limited to such cases. Indeed, the "materially indistinguishable" test is but one of two possible ways in which a habeas

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498. *Id.*

499. *Id.* at 793.

500. The dichotomy between rules and standards is not always so severe. Professor Korobkin suggests that directives are

> better understood as spanning a spectrum rather than as being dichotomous variables. . . . At a certain point, rules can become so riddled with unpredictable exceptions that they are as much standard as rule, and standards can become so determinate that they are as much rule as standard; these composites reside in the "gray area" at the center of the spectrum. In more extreme cases, standards can become so determinate that they are transformed into rules, and rules so unpredictable that they are transformed into standards.

Korobkin, *supra* note 488, at 30 (footnote omitted).

501. *See, e.g.*, Murillo v. Frank, 316 F. Supp. 2d 744, 754 (E.D. Wis. 2004) ("[I]t is not enough that there are differences between the two cases. No two cases are ever exactly alike in all respects. To warrant different conclusions, the differences must be material; they must be legally significant.").

court may find that a state court's decision was contrary to clearly established law.[502]

The Court's interpretation of the unreasonable application prong, however, demonstrates that the concept of clearly established law is broader than materially indistinguishable cases. The unreasonable application prong contemplates that clearly established law can reasonably be extended to a new factual context.[503] For a federal court to grant relief under the unreasonable application prong of § 2254(d)(1), therefore, clearly established law must have a broader meaning that includes extending precedent to new factual contexts. Such an understanding comports with the normal operation of precedent in our rule model system, which does not require identical factual circumstances for precedents to apply.

Section § 2254(d)(1)'s clearly established law requirement, therefore, encompasses a broader range of precedents than *Teague*'s "old" rules category.[504] In *Williams*, a majority of the Court agreed that "at least" whatever qualified as an "old rule" under *Teague* would constitute clearly established law under § 2254(d)(1),[505] rejecting Justice Stevens's stronger position that Congress had codified *Teague*.[506] This choice of language is significant. Before the Court decided *Williams*, some of the lower federal courts were using the language of *Teague* ("compelled by existing precedent") to determine whether a rule was clearly established.[507] The Court's language in *Williams* was not as strong as that

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502. *See* Lockyer v. Andrade, 538 U.S. 63, 77-78 (2003) (Souter, J., dissenting). Because § 2254 also includes the "unreasonable application" prong, clearly established law must encompass a broader category of precedents.

503. By contrast, under *Teague*, federal habeas courts are "typically barred from applying a settled legal standard in a 'novel setting,' so that the reasoning undergirding the rule is 'extended.'" Yackle, *supra* note 4, at 414. "If, accordingly, a state court entertaining a prisoner's claim would not have felt 'compelled' by then-existing precedents to find his claim meritorious, then a federal habeas court cannot do so without establishing a 'new' rule of law." *Id.*

504. *See* Yackle, *Figure*, *supra* note 12, at 1754 & n.131 (arguing that AEDPA's clearly established law requirement is broader than "the old rule category" under *Teague*); Lee, *supra* note 12, at 129 (noting that the "argument is surely defensible, on balance, it is not the better course"); *see also* Kinports, *supra* note 79, at 189 & n.378 (pointing out that every Supreme Court decision could potentially be considered a new rule and arguing that the definition of new rule is therefore too broad). In this sense, it has also narrowed the "new" rules category.

505. Williams v. Taylor, 529 U.S. 362, 412 (2000). The Court put "one caveat" on this connection: the source of "clearly established" law under § 2254 is limited to Supreme Court precedent only. *Id.*

506. *See id.* at 379-80 (opinion of Stevens, J.).

507. *See, e.g.*, Walker v. McCaughtry, 72 F. Supp. 2d 1025, 1031 (E.D. Wis. 1999) (stating that "[a] rule [is] not clearly established unless it [is] compelled by existing precedent"); Breedlove v. Moore, 74 F. Supp. 2d 1226, 1231 (S.D. Fl. 1999).

of *Teague*. Moreover, Justice O'Connor's "holdings, as opposed to dictum" test is more flexible. Accordingly, I disagree with those commentators who have argued that AEDPA simply codified *Teague*.[508]

The Supreme Court's interpretation of the "contrary to" prong is the most similar to *Teague*'s requirements that precedent "compel" or "dictate" a particular result in a case. The unreasonable application prong, however, is not as narrow. As a result, clearly established law under § 2254(d)(1) can include a rule or standard that may not have been applied to the factual context of the habeas petitioner's case. A habeas court should not find that there is no clearly established law in such cases.[509] Instead, as proposed below, the habeas court should continue the analysis under the unreasonable application prong.

3. Strength of Precedent

The final touchstone, the strength of the precedent, typically refers to the reasons that a court might use to justify not being bound by the precedent.[510] Often we hear the strength analysis described as one of "weight" of the precedent or the "binding nature" of the precedent. Because in the AEDPA context courts are limited to applying Supreme Court precedent on issues of federal law, the binding nature of the precedent is more evident. This Article submits that the clarity of the precedent is related to its strength. As with most scope issues, the strength of the precedent typically should not result in a determination of no clearly established law. Instead, the strength is relevant to the reasonableness of the state court's decision.

For purposes of determining clearly established law, therefore, strength issues are limited to examining: (1) whether the rule or standard articulated was approved by a majority of the Supreme Court justices; and (2) whether the rule or standard has been consistently applied or otherwise called into question. If only the Court's holdings constitute clearly established law, a rule issued in a plurality decision may not qualify because it is not a holding. Although sometimes this problem is insurmountable, the narrowest-grounds rule articulated in *Marks* allows courts to distill a holding from fragmented opinions. Because the *Marks*

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508. *See, e.g.*, Khandelwal, *supra* note 12, at 440 & n.45 (arguing that in "us[ing] the phrase 'clearly established,' [Congress] meant to codify the entire *Teague* doctrine, including the exceptions"); Note, *supra* note 12, at 1883-85 (arguing that eliminating the *Teague* exceptions might raise constitutional objections); *see also* Lee, *supra* note 12, at 119 (noting that *Teague* and § 2254's "similarity . . . is striking").

509. For example, the Fourth Circuit held that "the relevant Supreme Court precedent need not be directly on point, but must provide a 'governing legal principle' and articulate specific considerations for the lower courts to follow when applying the precedent." Quinn v. Hayes, 234 F.3d 837, 844 (4th Cir. 2000); *see also supra* Part III.B.

510. ALEXANDER, *Precedent*, *supra* note 25, at 167.

rule is "settled jurisprudence,"[511] it should be employed whenever feasible. As Part III of this Article illustrated, federal district courts and courts of appeals are utilizing the *Marks* rule to find clearly established law. This use is appropriate and should be encouraged.

The second strength issue arises where the Court has not consistently applied a rule or standard in the same manner. This was the type of issue encountered by the courts in *Jackson* and *Wilson*, discussed in Part III of this Article.[512] This issue was also raised in *Lockyer v. Andrade*,[513] where the Court stressed that it had "not established a *clear* or *consistent* path for courts to follow."[514]

If it appears that the Supreme Court has not consistently applied a rule, but it has not overruled the rule, then the rule is still precedent and can qualify as clearly established law for purposes of § 2254(d)(1). However, the lack of consistency is relevant to the reasonableness of the state court's application of that rule. The less consistent the Supreme Court has been in applying the rule to different factual contexts, the more flexibility the state court should have in applying the rule.

B. Role of Circuit Court Precedent

As a habeas court applies each of these analytic touchstones, it may use as evidence whether the federal courts of appeals have agreed or disagreed about the state of the law. That is, lower court agreement or confusion about Supreme Court precedent is relevant to the clearly established law inquiry and should be included as part of the analysis. While federal circuit court decisions may not themselves serve as clearly established law under AEDPA,[515] they do have a role in providing evidence of the clarity of the law. Recognizing the importance of federal circuit court decisions also avoids the constitutional question of whether

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511. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 764 n.9 (1988) (writing for a four-justice majority, Justice Brennan used the rule to support the decision that a plurality decision from another case was controlling).

512. *See supra* Part III.C.2.

513. 538 U.S. 63, 72 (2003).

514. *Id.* at 72 (emphasis added).

515. *See, e.g.*, Garcia v. Cockrell, No. 3:01-CV-2245-D, 2003 U.S. Dist. LEXIS 1874, at *14 n.8 (N.D. Tex. Feb. 7, 2003) (recognizing that Supreme Court precedent controls the AEDPA clearly established federal law inquiry but citing circuit court cases in the opinion "only to the extent that they illuminate [the relevant Supreme Court precedent], not to expand or extend [it]"), *rev'd sub nom.* Garcia v. Dretke, 388 F.3d 496 (5th Cir. 2004); Kennedy v. Lockyer, 379 F.3d 1041, 1048 n.8 (9th Cir. 2004) (recognizing that own circuit's precedent is only persuasive authority under AEDPA).

AEDPA's limitation is constitutional[516] and is consistent with the *Teague* doctrine's utilization of lower court cases.[517]

Agreement among the lower courts about the rule articulated in a Supreme Court case may provide evidence of whether a law is "established" and, if so, how "clearly" established it is. For example, in *Andrade*, the Supreme Court failed to acknowledge that most federal circuits had been following Justice Kennedy's articulation of the disproportionality principle in his concurrence in *Harmelin v. Michigan*.[518] Agreement among the lower courts should get the petitioner over the threshold inquiry of clearly established law. And such agreement is relevant to, but not determinative of, the reasonableness of the state court's decision. This is particularly true where the Supreme Court precedent at issue is a general principle or standard that may reasonably vary when applied to new factual contexts.

Confusion in the lower courts provides the opposite type of evidence; it is a symptom of an unclear or conflicted body of law, i.e., law that is not "clearly" established. As with agreement among the lower courts, conflicting views of lower courts should not be determinative. They should not preclude a court from finding the law established enough to proceed with the analysis under the unreasonable application prong. In sum, confusion in the lower courts is relevant to the clarity of that law and its strength, which are factors for the habeas court to consider when determining the reasonableness of the state court's decision.

C. Methodology

This Article agrees with the Supreme Court's pronouncement that the determination of clearly established law should be a threshold inquiry. But in doing so this Article defines "threshold" narrowly to simply mean that the habeas court must be able to identify Supreme Court precedent that meets the first three touchstones—number of cases, source, and

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516. *See supra* note 40.

517. As Justice O'Connor explained in *Williams*, lower court opinions may be relevant to the analysis under *Teague*:

> [W]ith respect to the "reasonable jurist" standard in the *Teague* context, "[e]ven though we have characterized the new rule inquiry as whether 'reasonable jurists' could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new."

Williams v. Taylor, 529 U.S. 362, 410 (alteration in original) (quoting Wright v. West, 505 U.S. 277, 304 (1992)). *Contra* Caspari v. Bohlen, 510 U.S. 383, 394-96 (1994) (stating that conflicting, reasonable views of lower courts precluded the "old rule" status under *Teague*).

518. *See supra* Part II.C.2; Harmelin v. Michigan, 501 U.S. 957 (1991).

timing—before proceeding with the rest of analysis under § 2254(d)(1). If the petitioner has failed to cite in support of his petition one Supreme Court case that was decided by the date of the state court decision, then denial of relief for lack of clearly established law is warranted because there is no "established" law.

Most cases, however, will get past this threshold determination. In those cases, it is the scope and strength of the precedent that determines the parameters of how "clearly" the law is established. These issues were raised in *Andrade*, *Alvarado*, and many of the lower court cases discussed in Part III. Although in some cases the court may analyze these considerations under the "contrary to" prong of § 2254(d)(1), most of the time these considerations go to the reasonableness of the state court's decision. Because § 2254(d)(1) requires federal courts to defer to reasonable applications of clearly established federal law by state courts, a lack of clarity in the law increases the reasonableness of the state court's application more than if it were applying an unambiguous rule. Similarly, the amount of discretion necessary to apply a general principle or standard to a new factual context is a relevant consideration to the reasonableness of the state court's decision.

This Article therefore proposes a sliding scale of deference to the state court based on the complexity of the questions about the scope and strength of the Supreme Court's precedent. These will often be debatable issues; such is the nature of precedent in our legal system. Although this means that a habeas court is likely to deny relief where the law is unclear,[519] it is consistent with the underlying policies of AEDPA: fairness, finality, and federalism. If the Supreme Court needs to clarify the law, that is a function of direct review, not habeas review.[520]

V. CONCLUSION

This Article urges a broad reading of AEDPA § 2254(d)(1)'s "clearly established law" limitation on federal court habeas relief. AEDPA's limitation hinges on a concept vital to our common law system: precedent. While determining what constitutes precedent in the habeas context is complex, fundamentally it asks the same core questions about the scope and strength of Supreme Court pronouncements that courts handle everyday. Federal courts are already well equipped to handle these questions, but currently do not share a common understanding of what constitutes clearly established law in the habeas context.

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519. *See* Ides, *supra* note 11, at 761-65 (noting that where the law is unclear, habeas courts are much less likely to find that a state court decision was an unreasonable application).

520. The risk is that the Supreme Court will not clarify the issue on direct review. *See* Cotto v. Herbert, 331 F.3d 217, 240 n.11, 251 (2d Cir. 2003).

The need for a common understanding is urgent, not just to ensure the appropriate application of AEDPA, but because liberty is at stake. This Article's proposed analytical framework for determining what constitutes clearly established law provides guidance in the habeas fog. Although the clearly established law limitation does serve a gatekeeper function, most of the time it should not be dispositive. The clearly established law limitation works in tandem with the standards of review in § 2254(d)(1). The interconnection of these constraints on federal court review means that uncertainties about whether the law is "clearly" established are related to the reasonableness of the state court's decision. The approach proposed in this Article minimizes federal intrusions and defers to reasonable interpretations by the state courts when the law is not a "model of clarity."[521] Under AEDPA, "[l]iberty finds no refuge in a jurisprudence of doubt."[522]

521. Lockyer v. Andrade, 538 U.S. 63, 72 (2003).

522. Planned Parenthood v. Casey, 505 U.S. 833, 844 (1992).