WHOSE LINE IS IT ANYWAY?: A RETROSPECTIVE STUDY OF THE SUPREME COURT'S SPLIT ANALYSIS OF § 2254(D)(1) SINCE 2000

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I. INTRODUCTION

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA or "the Act").[1] As the Supreme Court noted, AEDPA's purpose was "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases."[2] Thus, the Act sought "to prevent 'retrials' on federal habeas and to give effect to state convictions to the extent possible under law" in an effort to advance the "principles of comity, finality, and federalism."[3] In sum, Congress attempted to curb what it deemed as an abuse by convicted prisoners of the extensive appeals process in the United States court system at that time.[4] From its inception, scholars have recognized that the Act has indeed greatly limited the access of convicted state prisoners to the federal habeas system.[5]

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[1] Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254 (2006)).

[2] Woodford v. Visciotti, 538 U.S. 202, 206 (2003).

[3] *Id.* at 206 (quoting Williams v. Taylor, 529 U.S. 362, 386 (2000)).

[4] *See* H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.). Some scholars, however, have suggested that Congress adopted AEDPA more for political reasons than because of any concern for federalism or the efficiency of the judicial process. *See, e.g.*, Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Cases*, 77 N.Y.U. L. REV. 699, 701 (2002) ("AEDPA was drafted, enacted, and signed in an atmosphere of fear. The legislation, which includes substantial cutbacks in the federal habeas corpus remedy, was Congress's response to the tragedy of the Oklahoma City bombing.").

[5] *See, e.g.*, James O. Nygard, *Current Developments in the Law: A Survey of Cases Affecting the Anti-terrorism and Effective Death Penalty Act of 1996*, 6 B.U. PUB. INT. L.J. 333, 338 (1996) ("The Antiterrorism and Effective Death Penalty Act of 1996 limits the Court's power to review petitions for writs of habeas corpus."); 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, 206 (1998) ("The Act limits the scope of federal habeas review, wherein the state has rendered a decision on the merits on the claim, to determining whether that decision 'was contrary

Prior to AEDPA, federal habeas corpus courts reviewed "the petitioner's legal claims de novo in the strictest sense of that term."[6] With respect to "questions of law or mixed questions of law and fact, the federal courts treated the petition as a wholly new complaint, which originated 'an independent civil suit' and deserved to be adjudicated 'from scratch.'"[7] AEDPA changed these norms in a number of ways. Perhaps the most significant alteration was § 2254(d)(1). The statute, in pertinent part, states the following:

> (d) 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.[8]

First, note that the statute, by its terms, applies only to state-prisoner habeas corpus petitions.[9] As the provision suggests, the threshold question is whether a claim has been "adjudicated on the merits" at the state court level.[10] Yet even if this requirement is satisfied, the petitioner may not simply assert any and all issues that he or she has with the state court decision. To the contrary, for a federal court to grant the writ of habeas corpus under § 2254(d)(1), a petitioner must demonstrate that the state court decision was inconsistent with federal law.[11]

In the determination of this latter point, AEDPA drastically changed the preexisting habeas corpus process. The statute provides two requirements for establishing a reversible federal-law error. First, a federal court may only review federal-law claims, which the provision limits to "clearly established" precedents of the "Supreme Court of the United States."[12] Because federal courts formerly had a much broader body of law from which to draw when making decisions,[13]

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to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'").

[6] 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.1 (5th ed. 2005).

[7] *Id.*

[8] 28 U.S.C. § 2254(d)(1) (2006) (emphasis added).

[9] HERTZ & LIEBMAN, *supra* note 6, § 32.1.

[10] § 2254(d).

[11] § 2254(d)(1).

[12] *Id.*

[13] HERTZ & LIEBMAN, *supra* note 6, § 32.1

Congress effectually reduced the potential grounds for habeas review. Second, the provision requires that a state decision be "contrary to, or involve[] an unreasonable application of" that clearly established law before a court may grant a habeas petition.[14] Thus, in addition to limiting the potential grounds for habeas review, Congress also altered the de novo standard of review of federal legal claims that existed prior to AEDPA. By restricting the reviewable "federal law" and adopting the more stringent "contrary to" and "unreasonable application" language, AEDPA radically diminished the scope of federal review.

After years of difficulty for the circuit courts in interpreting § 2254(d)(1),[15] in 2000 the Supreme Court issued a definitive statement in *Williams v. Taylor*,[16] which continues to be the governing law today. Essentially, *Williams* established that the "contrary to" and "unreasonable application" language in the statute formulated two different tests within the standard even though they are contained in the same sentence.[17] A decision is "contrary to" federal law when a state court applies the wrong federal law entirely.[18] By contrast, a state court unreasonably applies federal law when its application of the correct precedent is "objectively unreasonable."[19] The "contrary to" test is typically, but not always, uncontroversial, because state courts usually will at least identify the correct federal law to apply.[20] Thus, the focus of this Comment is the "unreasonable application" test. Here, the *Williams* Court established its lasting legacy by insisting that an *incorrect* or *erroneous* application of federal law is different

> Until 1989 . . . federal courts could adjudicate the prisoner's "complaint" on the basis of legal principles that were not even in existence at the time the state ruled. And until AEDPA was passed, federal courts could adjudicate the complaint on the basis of legal principles that had never become binding on state courts, i.e., on the basis of federal circuit law developed in the absence of any controlling Supreme Court law on point.

Id.

[14] *Id.*

[15] *See infra* note 64.

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

[17] *Id.* at 404–05.

[18] *See id.* at 405–06.

[19] *Id.* at 409.

[20] An example of how the "contrary to" test operates can be found in *Williams* itself. Justice O'Connor held that the Virginia Supreme Court's decision was "contrary to" clearly established federal law because the state court applied *Lockhart v. Fretwell*, 506 U.S. 364 (1993), instead of *Strickland v. Washington*, 466 U.S. 668 (1984). *Williams*, 529 U.S. at 413–14 (O'Connor, J., concurring).

from an *objectively unreasonable* application of that law.[21] Accordingly, *Williams* cemented a notion that had existed, albeit tenuously, since the adoption of AEDPA: even if a federal court believes in its independent judgment that a state-court decision applied federal law incorrectly, it must deny a petition for habeas corpus so long as the decision was "objectively reasonable."[22]

The interpretative gap between *incorrect* and *unreasonable* has been the subject of many Supreme Court decisions since 2000. Because this Comment focuses exclusively on the application of § 2254(d)(1) to capital punishment cases, its analysis is necessarily limited to decisions involving capital sentences.[23] In this context, the results are staggering. The so-called conservative bloc of the Court, which at various times has consisted of Justices Scalia, Rehnquist, Thomas, Roberts, and Alito, has found a state-court decision to be an "unreasonable application" of federal law in only 4–14% of cases.[24] By contrast, Justices Ginsburg, Breyer, and Stevens—the so-called liberal bloc of the Court—have found the states' decisions to be an "unreasonable application" of the law 53–64% of the time.[25] A review of the Court's cases interpreting § 2254(d)(1) in the capital context also reveals that the decisions in this area are often split five-to-four, with the holdings hinging solely on the analyses of Justices Kennedy and O'Connor.[26] The latter two justices have applied a more genuine—yet entirely undefined—standard in reaching their conclusions.[27]

A retrospective analysis of the Court's decisions since *Williams v. Taylor* demonstrates that the two sides of the Court are not merely disagreeing over the application of the present standard; they are actually applying two completely different standards. The conservative bloc, to whom I refer throughout this Comment as the "blind deference camp," has blindly deferred to the state court's interpretation of federal law.[28] On the other hand, the more liberal justices, to whom I refer throughout this Comment as the "de novo camp," have

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[21] *Id.* at 412.

[22] *See infra* Part II.B.

[23] Contrary to what its name suggests, the AEDPA is not exclusively limited to capital cases. For purposes of this Comment—in the interest of clarity and brevity, and also because I view the results in capital cases to be particularly troublesome—I have elected to restrict my focus accordingly.

[24] *See infra* Part IV.A.

[25] *See infra* Part IV.A.

[26] *See infra* Part V.A.

[27] *See infra* Part V.A.

[28] *See infra* Part IV.A.

applied de novo review akin to what was in place prior to AEDPA.[29] This separation between the two blocs is stark and evidences three critical problems stemming from the provision as it has been applied since *Williams v. Taylor*.

First, several cases with similar facts have led to inconsistent results. Often split five-to-four, such decisions demonstrate that the standard has become arbitrary with results hinging on which camp Justices Kennedy and O'Connor aligned with in a particular case.[30] The second issue flows from the first: namely, the provision fails to provide petitioners with the proper notice of what is required to challenge a state decision.[31] Finally, and most importantly, the inconsistent standard is dangerous because the differences in opinion regarding the provision in capital cases result in life-or-death consequences.[32] Given these considerations and the fact that federal courts are generally in a better position to evaluate federal law than the state courts where these claims originate, the Supreme Court should at the very least define the standard by which "reasonableness" is to be judged. Yet it seems that the optimal solution to the current dilemma is a congressional revision of the statue creating a new exception: in capital cases, federal law claims should be reviewed as they were prior to AEDPA—de novo.[33]

Part II of this comment will outline habeas corpus procedure as it existed prior to AEDPA, as well as the legislative concerns that led to its adoption. Part III will discuss the *Williams v. Taylor* standard and how it changed the existing interpretations of § 2254(d)(1). Part IV will provide an overview of how the Supreme Court has interpreted the provision since 2000 and identify the wide and problematic split between liberal and conservative justices over the meaning of § 2254(d)(1). Part V will analyze the three main problems with the Court's split analysis: namely, that the standard has become arbitrary, that it fails to provide proper notice, and that it is dangerous in the context of life-or-death consequences. Part VI will propose potential solutions and explain why a balancing of the relevant harms weighs in favor of altering the statute to provide a de novo standard of review.

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[29] *See infra* Part IV.A.

[30] *See infra* Part V.A.

[31] *See infra* Part V.B.

[32] *See infra* Part V.C.

[33] Recognizing the unique concerns involved with capital punishment is not unprecedented. *See, e.g.*, *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 18, 2009, at A16 (explaining that fifteen states have now barred the death penalty).

II. HABEAS CORPUS PROCEDURE PRIOR TO AEDPA AND LEGISLATIVE HISTORY

A. Habeas Prior to AEDPA

The writ of habeas corpus derives from English common law. In England, the writ established a system enabling convicted prisoners to contest illegal imprisonments.[34] The United States acknowledged the writ in its Constitution, which states that "the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."[35] In 1867, Congress extended the writ of habeas corpus to state prisoners via the Habeas Corpus Act; however, the act disallowed claims alleging violations of state law and restricted federal habeas to claims stating a federal-law violation.[36] Thus, grant of the writ in federal court has always required a petitioner to demonstrate that he was being held in "custody in violation of the Constitution or laws or treaties of the United States."[37] Given this, a federal court will not grant the writ of habeas corpus where there has been an error in the application of state law.[38] Accordingly, the "vast majority of habeas corpus petitions by state prisoners allege a violation of the constitution."[39]

As discussed earlier, prior to AEDPA, the courts were permitted to find that convicted state prisoners were being held "in violation of the Constitution or laws or treaties of the United States" where a lower court applied federal law *incorrectly*.[40] An example of the Supreme Court's application of de novo review to federal law claims prior to AEDPA is *Burger v. Kemp*, where the Court affirmed the denial of a writ of habeas corpus to a petitioner claiming ineffective counsel.[41] In that case, a Georgia jury sentenced petitioner Burger to death for murder.[42] Burger claimed that his counsel was ineffective because (1) a conflict of interest existed when his counsel's partners represented his co-indictees, and (2) his counsel failed to "develop and present

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[34] MARK E. CAMMACK & NORMAN M. GARLAND, ADVANCED CRIMINAL PROCEDURE IN A NUTSHELL 483 (2d ed. 2006).

[35] U.S. CONST. art. I, § 9, cl. 2.

[36] The Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (current version at 28 U.S.C. § 2241); *see also* CAMMACK & GARLAND, *supra* note 34, at 483.

[37] CAMMACK & GARLAND, *supra* note 34, at 483.

[38] *Id.* at 487.

[39] *Id.*

[40] *See supra* notes 6–7 and accompanying text.

[41] 483 U.S. 776 (1987).

[42] *Id.* at 777.

mitigating evidence" at the sentencing hearings.[43] While the Court rightly deferred to the lower courts' *factual* findings, it applied those facts de novo with respect to the federal *legal* claims. The Court reasoned that the *Strickland* standard,[44] as it is laid out, requires deference to counsel's decisions.[45] Then, the majority directly evaluated the evidence presented of Burger's troublesome circumstances and came to an independent legal judgment that Burger had not shown that, "in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance."[46] The Court did not base the holding on the "objective reasonability" of the state court's application of federal law regarding ineffective assistance of counsel; rather, the Court simply believed that the state court did not apply the *Strickland* standard incorrectly. As *Burger v. Kemp* illustrates, federal courts possessed considerable flexibility in evaluating federal law claims prior to AEDPA.

B. Legislative History

In the wake of the Oklahoma City bombing, some lawmakers began to view the flexibility of the habeas corpus law as an enabling device for convicted prisoners to delay their sentences.[47] If courts reviewed every claim de novo, they feared, then the extensive appeals

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[43] *Id.* at 788.

[44] The *Strickland* standard states the following:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

[45] This use of deference should not be confused with the level of review federal courts apply to this standard. In other words, at that time federal courts were required to review de novo this standard of deference to counsel.

[46] *Burger*, 483 U.S. at 795.

[47] *See* H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.); 142 CONG. REC. S3454, 3463 (daily ed. April 17, 1996) (statement of Sen. Bradley); *see also* Stevenson, *supra* note 4, at 704.

process in the United States would result in endless "retrials."[48] Seeking to finalize punishments and accord proper respect for state decisions, congressional representatives debated the best mechanism to accomplish their goals. Congress, through § 2254(d)(1), ultimately decided to restrict the reviewable federal law and heighten the degree of incorrectness required to overturn a state level decision.

The legislative history of the Act reveals the intentions and concerns of the authors of § 2254(d)(1).[49] Several members of Congress worried that federal courts would interpret the "unreasonable application" language as establishing a "wrong-but-reasonable standard."[50] For example, Senator Patrick Moynihan, a critic of the statute, warned, "We are about to enact a statute which would hold that constitutional protections do not exist unless they have been unreasonably violated, an idea that would have confounded the framers. Thus we introduce a virus that will surely spread throughout our system of laws."[51] Senator Edward Kennedy's concerns were even more pointed. He interpreted the statute as requiring federal courts to simply "defer" to state-level decisions.[52] In short, members of Congress predicted that incorrect applications of federal law would be protected behind the shield of "unreasonableness," which would render even some patently wrong decisions unreviewable under habeas procedure. In this way, some congressional representatives were concerned—and as subsequent cases would show, rightly concerned—that AEDPA "would prevent federal courts from granting habeas petitions when a state court decision was wrong as a matter of federal law, but nonetheless reasonable (under some undisclosed construction of that term)."[53] This last point indicates that it was not

[48] *See* H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.); 142 CONG. REC. S3454, 3463 (daily ed. April 17, 1996) (statement of Sen. Bradley); *see also* Stevenson, *supra* note 4, at 704.

[49] As an aside, the Bill passed 91–8–1 in the Senate and 293–133–7 in the House of Representatives. 142 CONG. REC. S3454 (daily ed. April 17, 1996); 142 CONG. REC. H3618 (daily ed. April 18, 1996).

[50] *See infra* notes 51–57 and accompanying text; *see also* Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 693 (2003).

[51] 142 CONG. REC. S3438 (daily ed. April 17, 1996) (statement of Sen. Moynihan); *see also* Ides, *supra* note 50, at 693 n.29.

[52] 142 CONG. REC. S3458 (daily ed. April 17, 1996) (statement of Sen. Kennedy) ("[T]he proposal would unwisely require Federal courts to defer to State courts on issues of Federal constitutional law. A Federal court could not grant a writ habeas corpus based on Federal constitutional claims, unless the State court's judgment was 'an unreasonable application of Federal law.'").

[53] Ides, *supra* note 50, at 693.

only the standard of "reasonableness" that troubled critics, but the potential danger arising from the fact that the standard was "undefined."

Even the supporters of AEDPA spurned a wrong-but-reasonable interpretation of § 2254(d)(1).[54] For example, Senator Joseph Biden identified the potential difficulties implicated by a "wrong-but-reasonable" approach:

> [T]he bill seems to allow an exception to the general rule [against granting habeas] but one that is likely to be illusory because a claim can be granted only if the State court's application of Federal law to the facts [is] not merely wrong but unreasonable. This is an extraordinar[ily] deferential standard to the State courts, and I believe it is an inappropriate one. It puts the Federal courts in the difficult position of evaluating the reasonableness of a State court judge rather than simply deciding whether or not he correctly applied the law, not whether he did it reasonably. You can have a reasonable mistake. They could reasonably conclude that on a constitutional provision, it should not apply, when in fact the Supreme Court would rule it must apply.[55]

Senator Arlen Specter, a cosponsor of the bill, stated that he was "not entirely comfortable" with the "unreasonable application" standard but he ultimately concluded "that the standard in the bill will allow Federal courts sufficient discretion to ensure that convictions in State court have been obtained in conformity with the Constitution."[56] Senator Orin Hatch, also a cosponsor of the bill, rebutted concerns over the "wrong-but-reasonable" loophole by arguing that the standard "enables the Federal court to overturn State court positions that clearly contravene Federal law. It further allows the Federal courts to review State court decisions that *improperly apply* clearly established Federal law."[57] Senator Hatch's use of the term "improperly" instead of "unreasonably" suggests that even he, as a supporter, was using the terms interchangeably. This seems curiously close to equating "incorrect" with "unreasonable," an interpretation that the *Williams v. Taylor* decision would later expressly reject.[58]

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[54] *Id.* at 694.

[55] 141 CONG. REC. S7842 (daily ed. June 7, 1995) (statement of Sen. Biden); *see also* Ides, *supra* note 50, at 694.

[56] 142 CONG. REC. S3472 (daily ed. April 17, 1996) (statement of Sen. Specter); *see also* Ides, *supra* note 50, at 695.

[57] 141 CONG. REC. S7846 (daily ed. June 7, 1995) (statement of Sen. Hatch) (emphasis added); *see also* Ides, *supra* note 50, at 695.

[58] *See infra* note 79. Other congressional representatives were even more explicit about equating "incorrect" with "unreasonable." *See, e.g.*, 142 CONG. REC. S3465 (daily ed. April, 17, 1996) (statement of Sen. Levin) ("I believe the courts will conclude,

Moreover, even President Clinton acknowledged the danger of allowing federal courts to defer to state decisions involving federal law. Upon signing the law, the President released the following statement: "I have signed this bill because I am confident that the Federal courts will interpret these provisions to preserve *independent review* of Federal legal claims and the bedrock constitutional principle of an independent judiciary."[59] Therefore, as Professor Ides has argued, "to the extent that the legislative history is informative, it reveals some concern that the 'unreasonable application' standard of review might be read to preclude federal court review of a state court decision that could be described as wrong-but-reasonable."[60] Yet if § 2254(d)(1) is unclear regarding "the scope of the review power embodied in the 'unreasonable application' principle, the . . . legislative history seems to establish . . . that such a radically innovative wrong-but-reasonable standard has *no legitimate place within the sphere of interpretive possibilities*."[61]

After considering this legislative history, one wonders what these same members of Congress would have thought if they could have foreseen the holdings in later cases, such as *Woodford v. Visciotti*[62] and *Early v. Packer*.[63] Both opinions explicitly endorsed the "wrong-but-reasonable" interpretation of the statute. While the holdings undoubtedly conflict with the aforementioned congressional sentiments, Congress has yet to modify the statute to make it absolutely clear that such interpretations are incorrect. The Court is not obli-

as they should, that a constitutional error cannot be reasonable and that if a State court decision is wrong, it must necessarily be unreasonable.").

[59] Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719 (April 26, 1996) (emphasis added), *available at* http://clinton6.nara.gov/1996/04/1996-04-24-president-statement-on-antiterrorism-bill-signing.html.

[60] *See* Ides, *infra* note 50, at 697.

[61] *Id.* (emphasis added).

[62] 537 U.S. 19 (2002). The Court reversed a grant of habeas relief in a per curiam decision. *Id.* at 20. The majority held that even if the state court was wrong, it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. *Id.* at 27. Note that while this per curiam decision appears lopsided, it is only because the case involved a denial of habeas corpus rights. When the independent judgment of the rest of the Court aligns with the conservative bloc's blind deference to the state court, lopsided results will sometimes emerge. This, however, is not proof that the different sects of the court are applying the same standard.

[63] 537 U.S. 3 (2002). The Court reversed a grant of habeas relief in a per curiam decision. *Id.* at 4. Even if the Court agreed with the Ninth Circuit majority that there was jury coercion here, the Court stated that "it is at least reasonable to conclude that there was not, which means that the state court's determination to that effect must stand." *Id.* at 11.

gated to follow the legislative history of an Act of Congress; rather, the Court is required to apply its interpretation of the statute as written. Thus, if Congress disagrees with decisions interpreting § 2254(d)(1) as allowing a wrong-but-reasonable standard of review, it has a responsibility to amend the statute to correct such a misapplication. Instead, Congress remains silent.

III. THE *WILLIAMS V. TAYLOR* INTERPRETATION OF § 2254(D)(1)

Prior to 2000, the circuit courts disagreed over the proper application of the "contrary to" and "unreasonable application" language of § 2254(d)(1).[64] In *Williams v. Taylor*,[65] a shifting majority of the Court construed § 2254(d)(1), and the Court's interpretation of the statute remains good law today. The majority granted the petition for habeas corpus and held that the state court's decision that defendant's counsel was effective was both "contrary to" and an "unreasonable application of" the Supreme Court's decisions interpreting the Sixth Amendment.[66] In *Williams*, the Court identified its decision in

[64] Hertz & Liebman described the circuit split as follows:

> Three circuits—the 5th, 7th, and 11th—treated Congress' bifurcation of section 2254(d)(1) as signaling an intention to apply the 'contrary to . . . law' clause to questions of law and the (in their view) extremely deferential 'unreasonable application of . . . law' clause to mixed questions of law and fact. The 1st, 3d, and 8th Circuits viewed the two clauses of section 2254(d)(1) as calling for a two-step inquiry, in which the reviewing court first determined whether the Supreme Court had already developed a legal standard to 'govern' claims of the sort raised in the habeas corpus application; cases coming within such a standard were subject to the 'contrary to . . . law' clause, leaving other cases subject to the 'unreasonable application . . . of law' clause. The 4th Circuit employed an approach similar to that of the 1st, 3d, and 8th Circuits but diverged from those circuits by applying more restrictive criteria for gauging the existence of a 'governing' precedent and for assessing whether an application of law was 'unreasonable.' Attempting to navigate between these various approaches, the 6th Circuit deemed one formulation (the 1st Circuit's) to be the measure of an aggregate of two other formulations (the 4th and 5th Circuits'). The remaining four circuits . . . did not adopt a definitive construction of the statute, allowing individual panels to apply apparently inconsistent standards.

HERTZ & LIEBMAN, *supra* note 6, at § 32.3.

[65] 529 U.S. 362 (2000). The decision was six-to-three, with Justice O'Connor and Justice Stevens authoring separate sections that comprised the opinion of the Court. *Id.* at 367, 399. With regard to the result, Justices O'Connor, Kennedy, Ginsburg, Breyer, Souter, and Stevens reversed the denial of the petition. *Id.* Justices Scalia, Rehnquist, and Thomas comprised the dissent and concluded that the denial of the petition was proper. *Id.* at 416 (Rehnquist, J., dissenting).

[66] *Id.* at 413 (O'Connor, J., concurring).

Strickland[67] as the "clearly established federal law" and contended that the state court's finding with respect to the counsel's failure to present adequate mitigating evidence of defendant's background and abuse as a child was "objectively unreasonable."[68]

More important than its particular facts, however, is *Williams*'s discussion of the "contrary to" and "unreasonable application" tests of § 2254(d)(1). With respect to these issues, Justice O'Connor's analysis is the governing opinion.[69] First, Justice O'Connor's construction provided that a state court decision is "contrary to . . . clearly established Supreme Court . . . law" under § 2254(d)(1) if the "state court's decision . . . is substantially different from the relevant precedent of the Supreme Court."[70] Justice O'Connor then proceeded to identify two ways in which a state court decision can be "contrary to" or "substantially different from" Supreme Court precedent.[71] First, a "state-court decision will certainly be contrary to [the Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Court's] cases."[72] Second, a "state-court decision will also be contrary to this Court's clearly established precedent if 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 [the Court's] precedent."[73]

Justice O'Connor continued, in accordance with her interpretation, to give separate consideration to the "unreasonable application" test of § 2254(d)(1).[74] She contended that a "state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involving an unreasonable application of . . . clearly established Federal law.'"[75] In what has become the crux of the debate over § 2254(d)(1) since *Williams*, the Court concluded that a "federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal

[67] See *supra* note 44 for a discussion of the *Strickland* standard for ineffective assistance of counsel.

[68] *Williams*, 529 U.S. at 413 (O'Connor, J., concurring).

[69] *Id.* at 401–13.

[70] *Id.* at 405.

[71] *Id.* at 405–06.

[72] *Id.* at 405.

[73] *Id.* at 406.

[74] *Williams*, 529 U.S. at 407–08.

[75] *Id.*

law was objectively unreasonable."[76] The difficulties that would eventually arise from this "objective unreasonableness" standard were compounded by the fact that the Court did not in any way define the term or provide a test by which to measure "objective reasonableness."[77] Instead, the majority adopted an interpretation that Congress had repudiated[78] when it held that, "for purposes of today's opinion, the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law" and that "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 clearly established federal law erroneously or incorrectly. Rather, that application must *also* be unreasonable."[79]

In his portion of the majority opinion, Justice Stevens provided the framework by which courts should evaluate petitions governed by § 2254 (d)(1).[80] Justice Stevens noted that the first issue for a federal habeas court is to determine the "clearly established" Supreme Court precedent applicable to the relevant petition.[81] The next question is whether the state court's proclamation of federal law—and not its application—is contrary to this Supreme Court precedent.[82] Finally, Justice Stevens stated that the federal courts should determine whether the state court "unreasonably" applied the relevant Supreme Court precedent.[83] Although *Williams* finally established a definitive standard by which to evaluate § 2254(d)(1), the ambiguity within that standard has created severe flaws in the federal habeas system.

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[76] *Id.* at 409.

[77] The Second Circuit noted the dilemma. *See* Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000) ("Some increment of incorrectness beyond error is required . . . . [T]he increment need not be great; otherwise, habeas relief would be limited to state court decisions 'so far off the mark as to suggest judicial incompetence.' We do not believe AEDPA restricted federal habeas corpus to that extent.").

[78] *See supra* Part II.B.

[79] *Williams*, 529 U.S. at 411 (O'Connor, J., concurring) (emphasis added).

[80] *Id.* at 391 (majority opinion).

[81] *Id.* at 379.

[82] *Id.*

[83] *Id.*

IV. THE PROBLEMATIC SPLIT STANDARD EMERGING FROM *WILLIAMS* SINCE 2000

A. The Empirical Results

The focus of this Comment is an empirical study and analysis of the Court's application of § 2254(d)(1) since *Williams*.[84] Of the twenty-two cases applying the § 2254(d)(1) standard since then, fifteen petitions were denied—the Court either affirmed a lower court decision to deny the writ or reversed a lower court's grant of the writ.[85] At first glance, this result is not surprising; in fact, the numbers align with the expectations. The standard of review requires respect for decisions at the state level while obliging the Court to exercise independent judgment to overturn "unreasonable" results. Given this, a 50–50 split would suggest that the Court has not shown enough deference and has merely applied something akin to de novo review. On the other hand, a 100% denial of the writ would imply that the Court was blindly deferring to the state.

TABLE 1.
Empirical Analysis of the Supreme Court's § 2254(d)(1) Decisions Since Williams

±Majority Opinion
•Concurring Opinion
• Dissenting Opinion

Case	Grant	Deny	Justices Favoring Grant	Justices Favoring Denial
Williams v. Taylor[86]	X		Stevens ±, Souter, Ginburg, Breyer, O'Connor •, Kennedy	Scalia, Rehnquist •, Thomas

[84] The following study represents the twenty-two cases decided by the Supreme Court since the *Williams* decision in 2000 in which the Court has applied the "unreasonable application" test of § 2254(d)(1) in a capital punishment context. Although the analysis is restricted to capital cases, it includes one non-capital case because its reasoning has been particularly influential in several of the capital cases. Throughout the Comment, I will refer to the twenty-two cases collectively as "capital" for brevity. In addition, the analysis only focuses on the application of § 2254(d)(1); decisions hinging on other parts of AEDPA are not within the scope of this Comment. The cutoff date for this analysis was February 10, 2010.

[85] *See infra* Table 1.

[86] 529 U.S. 362 (2000).

Case	Grant	Deny	Justices Favoring Grant	Justices Favoring Denial
Ramdass v. Angelone[87]		X	Stevens •, Souter, Ginburg, Breyer	Scalia, Rehnquist, Thomas, O'Connor •, Kennedy ±
Penry v. Johnson[88]	X		Stevens, Souter, Ginsburg, Breyer, O'Connor ±, Kennedy	Scalia, Rehnquist, Thomas •
Woodford v. Visciotti[89]		X		Per Curiam
Early v. Packer[90]		X		Per Curiam
Bell v. Cone[91]		X	Stevens •	Scalia, Rehnquist ±, Thomas, Souter, Ginsburg, Breyer, O'Connor, Kennedy
Wiggins v. Smith[92]	X		Stevens, Souter, Ginsburg, Breyer, O'Connor ±, Kennedy, Rehnquist	Scalia •, Thomas
Price v. Vincent[93]		X		Unanimous; Rehnquist ±
Mitchell v. Esparza[94]		X		Per Curiam
Middleton v. McNeil[95]		X		Per Curiam
Yarborough v. Alvarado[96]		X	Stevens, Souter, Ginsburg, Breyer •	Scalia, Rehnquist, Thomas, O'Connor •, Kennedy ±

[87] 530 U.S. 156 (2000).
[88] 532 U.S. 782 (2001).
[89] 537 U.S. 19 (2002).
[90] 537 U.S. 3 (2002).
[91] 535 U.S. 685 (2002).
[92] 539 U.S. 510 (2003).
[93] 538 U.S. 634 (2003).
[94] 540 U.S. 12 (2003).
[95] 541 U.S. 433 (2004).
[96] 541 U.S. 652 (2004).

Case	Grant	Deny	Justices Favoring Grant	Justices Favoring Denial
Rompilla v. Beard[97]	X		Stevens, Souter ±, Ginsburg, Breyer, O'Connor •	Scalia, Rehnquist, Thomas, Kennedy •
Bell v. Cone[98]		X		Per Curiam
*Brown v. Payton**[99]		X	Souter •, Stevens, Ginsburg	Scalia •, Thomas, O'Connor, Kennedy ±, Breyer •
Carey v. Musladin[100]		X		Unanimous; Thomas ±
Uttecht v. Brown[101]		X	Stevens •, Souter, Ginsburg, Breyer •	Kennedy ±, Roberts, Scalia, Thomas, Alito
Schriro v. Landrigan[102]		X	Stevens •, Souter, Ginsburg, Breyer	Thomas ±, Roberts, Scalia, Kennedy, Alito
Abdul-Kabir v. Quarterman[103]	X		Stevens ±, Souter, Ginsburg, Breyer, Kennedy	Roberts •, Scalia, Thomas, Alito
Panetti v. Quarterman[104]	X		Stevens, Souter, Ginsburg, Breyer, Kennedy ±	Roberts, Scalia, Thomas •, Alito
Porter v. McCollum[105]	X		Per Curiam	
Smith v. Spisak[106]		X		Unanimous; Breyer ±; Stevens •
*Lockyer v. Andrade***[107]		X	Stevens, Souter •, Ginsburg, Breyer	O'Connor ±, Rehnquist, Scalia, Kennedy, Thomas

[97] 545 U.S. 374 (2005).
[98] 543 U.S. 447 (2005).
[99] 544 U.S. 133 (2005).
[100] 549 U.S. 70 (2006).
[101] 551 U.S. 1 (2007).
[102] 550 U.S. 465 (2007).
[103] 550 U.S. 233 (2007).
[104] 551 U.S. 930 (2007).
[105] 130 S. Ct. 447 (2009).
[106] 130 S. Ct. 676 (2010).

*Chief Justice Rehnquist abstaining.
**Not a capital case.

A closer look at the data reveals why these initial inclinations are mistaken. A justice-by-justice breakdown within the two respective blocs of justices is essential for a more accurate and honest analysis. On one end of the spectrum, Justices Scalia, Thomas, Rehnquist, Roberts, and Alito have applied a standard of "blind deference." These Justices have only found the state court's application of federal law to be "objectively unreasonable" in 4–14% of cases,[108] which empirically demonstrates that the "blind deference" bloc has not applied the independent review required by the standard. Although § 2254(d)(1) undoubtedly requires respect for state decisions, this was not intended to come at the expense of the Supreme Court's judgment and its expertise in federal law.[109] Justices Souter, Stevens, Ginsburg, and Breyer have basically applied "de novo" review or some standard even less deferential.[110] To say that state courts have applied federal law in an "objectively unreasonable" fashion 54–63% of the time is to disregard the heightened respect for state decisions envisioned by the statute. The numbers indicate that this group of justices is labeling as "objectively unreasonable" every state decision that it deems "incorrect," which is in direct defiance of *Williams*. Justices Kennedy and O'Connor fall in between the two blocs, sometimes aligning with the "blind deference" camp and sometimes aligning with the "de novo" camp.

The statistics demonstrate conclusively that the conservative bloc of the Court is appropriately dubbed the "blind deference camp." Out of the twenty-two cases in which Justice Scalia has applied § 2254(d)(1) in a capital context, he found the state court's application of federal law "objectively" unreasonable once (4%).[111] Similarly, out of the twenty-two cases in which Justice Thomas has applied the provision, he, like Justice Scalia, has found the state court's application to be "objectively unreasonable" once (4%). In the fifteen cases in which Chief Justice Rehnquist has applied § 2254(d)(1) in a capital

[107] 538 U.S. 63 (2003).

[108] *See supra* Table 1.

[109] *See supra* notes 56, 57, and 59 and accompanying text.

[110] Even with de novo review, appellate courts are generally cautious to overturn lower court decisions. As the data indicates, however, the justices comprising the "de novo" camp find the state court's application of federal law to be "objectively unreasonable" 54–63% of the time. Thus, it appears that the members of the Court in the "de novo" camp are not even showing the deference that might normally be attributed to that standard of review.

[111] The following statistics are derived from the data presented in Table 1.

context, he has found that the state court's application of federal law was "objectively unreasonable" only once (6%).[112] In the seven cases in which Chief Justice Roberts has considered the provision, he has joined the "blind deference" camp by finding that the state court's application of federal law was "objectively unreasonable" once (14%). Likewise, Justice Alito has found that the state court's application has been "objectively unreasonable" one time in the seven cases in which he has participated, (14%), which indicates that his replacement of Justice O'Connor will be an addition to the "blind deference" camp.[113] Thus, justices in the "blind deference" camp have found a state court's application of federal law "objectively unreasonable" in only 4–14% of cases since *Williams*.[114]

One cannot appreciate the above results without comparing them with those of the "de novo" camp. This camp, at various times, has been comprised of Justices Stevens, Souter, Ginsburg, and Breyer. In the twenty-two cases in which Justice Stevens has applied § 2254(d)(1) in a capital context, he has found the state court's application of federal law to be "objectively unreasonable" fourteen times (63%). Justice Souter has found the state court's application of federal law to be "objectively unreasonable" twelve out of twenty times (60%). In the twenty-two cases in which Justice Ginsburg has applied the provision, she has found that the state court's application of federal law was "objectively unreasonable" thirteen times (59%). Following the same trend, Justice Breyer has found that the state court's application of federal law was "objectively unreasonable" twelve out of twenty-two times (54%).[115]

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[112] *See* Wiggins v. Smith, 539 U.S. 510 (2003).

[113] *See supra* Table 1.

[114] It should be noted that the one case in which Justices Roberts, Scalia, Thomas, and Alito found the state court's application of federal law to be "objectively unreasonable" was clearly an outlier with extraordinary circumstances. In *Porter v. McCollum*, 130 S. Ct. 447, 448 (2009), the state court had found petitioner Porter guilty of murder and sentenced him to death. Subsequently, the Court held that the state decision's application of *Strickland* was objectively unreasonable; the state had concluded that no prejudice resulted from petitioner's counsel's failure to introduce certain mitigating evidence. *Id.* at 454. The evidence not presented included Porter's status as a veteran who was decorated and wounded in two major engagements during the Korean War, the subsequent trauma he suffered, brain damage that made him inclined to behave violently, and his abusive childhood. *Id.* at 449. Thus, *Porter* represents an outer fringe to the "blind deference" camp's blind allegiance to state decisions—which was previously absent. But this outer fringe, which only occurred once in the nine years following *Williams*, was largely driven by the extreme facts of a traumatized veteran and the Court's compassion for his service.

[115] Because Justice Sotomayor had only decided two cases as of the February 10, 2010 cut off, this Comment has excluded her from its analysis. *See supra* Table 1.

Justices Kennedy and O'Connor are the only justices whose numbers have aligned with the expectations of the standard.[116] Out of the fifteen cases in which Justice O'Connor applied § 2254(d)(1) in a capital context, she has found the state court's application of federal law to be "objectively unreasonable" four times (26%). Similarly, out of the twenty-two cases in which Justice Kennedy has considered the provision, he has found the state court's decision on federal law to be "objectively unreasonable" six times (27%). Thus, these two justices find the state court's application of the law reasonable most of the time, but on certain occasions, they decide that it is appropriate for the Court to intervene.

This seems to be exactly what the statute, and the standard of *Williams*, intended.[117] In effect, their decisions have been the decisions of the Court, because of the unwillingness of the two blocs of justices to move across the line. Although their effort seems to have been the most genuine, the standard for "unreasonableness" that they have applied is undefined and leaves one to speculate as to how to harmonize seemingly irreconcilable results. Thus, *Williams* has left a large analytical gap between the "de novo" and "blind deference" groups, which have not applied the standard at all; the only middle ground between the two camps has been occupied by the undefined and unpredictable analyses of Justices Kennedy and O'Connor. The resulting uncertainty has led to the current state of the law—an arbitrary standard that fails to provide proper notice to potential petitioners. This standard has been particularly troublesome when considering that the stakes often involve the petitioner's life.[118]

The Justices who recently joined the Court will have an interesting impact on the two camps and likely will make the arguments put forth in this Comment even more poignant. The addition of Chief Justice Roberts will have virtually no impact because he seems to merely fill the void left by Justice Rehnquist in the "blind deference" camp.[119] Justice O'Connor's departure, however, has left a void in the middle of the Court that has been replaced with Justice Alito's allegiance to the "blind deference" camp.[120] The results of this shift cannot be understated and will be discussed in more detail later in this

[116] Presumably, the state courts' application of federal law will usually, but not always, be "objectively reasonable."

[117] *See supra* Part II.B.

[118] *See infra* Part V.

[119] *See supra* Table 1.

[120] *See supra* Table 1.

Comment.[121] While the decisions were once swayed almost entirely by two justices attempting to apply a genuine but undefined standard, now the decisions are swayed by only one justice, Justice Kennedy. Furthermore, it is unclear how Justice Sotomayor's replacement of Justice Souter will alter the balance of power between the two camps.[122]

This is not simply an area where conservative and liberal justices disagree over how to apply a standard of review. Rather, the two groups are blatantly using entirely different standards of review. This split analysis has gone undetected because the present standard is undefined, and therefore the justices are in effect free to interpret "reasonableness" in a manner that accords with their ideologies. Yet the flexibility (which has resulted in the two camps' applying different standards of review) is problematic for at least three reasons. First, as written, the statute is arbitrary because it has hinged on the opinions of two Justices, Kennedy and O'Connor, applying an undefined version of the standard. Second, because the Court has failed to establish the contours of "objectively unreasonable" with any sort of definitive test and has instead chosen to rely on its own inconsistent precedent, the statute fails to provide proper notice to petitioners as to the level of review to which courts will subject their alleged federal law violations. Finally, the unpredictability of the standard of review is dangerous in the capital context, where decisions determine whether a death sentence is upheld and carried out. Therefore, when looked at retrospectively, § 2254(d)(1) has proven to be fatally flawed and in need of revision.

B. Blind Deference, De Novo*, and Something In Between*

The following two cases, selected from the empirical study above, are illustrative of the "blind deference" and "de novo" analyses. *Ramdass v. Angelone*[123] is a prototypical "blind deference" decision. The majority affirmed a denial of the writ and held that the state court did not unreasonably apply federal law when it failed to instruct the jury that defendant Ramdass was parole ineligible at his death

[121] *See infra* Part V.

[122] In the two cases in which Justice Sotomayor has participated, she voted to grant the writ in one case and deny the writ in the other. *See supra* Table 1.

[123] 530 U.S. 156 (2000). The decision was a five-to-four split, with Justice Kennedy authoring the majority opinion, joined by Justices Scalia, Rehnquist, and Thomas. *Id.* at 159. Justice O'Connor filed a separate concurrence. *Id.* at 178 (O'Connor, J., concurring). Justice Stevens filed a dissent, in which Justices Souter, Ginsburg, and Breyer joined. *Id.* at 182 (Stevens, J., dissenting).

sentencing.[124] While Ramdass's petition for the writ of habeas corpus was pending, the Supreme Court decided *Simmons*,[125] which held that judges must inform juries when a defendant is parole ineligible under state law at the time of the jury's death penalty deliberations.[126] Ramdass argued that his case was indistinguishable from *Simmons* because a verdict in another matter involving Ramdass had made him parole ineligible.[127] The majority, however, reasoned that because the "entry of judgment" had not yet been rendered in the other matter, Ramdass had not "conclusively established" that he was in fact parole ineligible, as required by *Simmons*.[128]

By contrast, Justice Stevens's dissent first noted "an acute unfairness in permitting a State to rely on a recent conviction to establish a defendant's future dangerousness while simultaneously permitting the State to deny that there was such a conviction when the defendant attempts to argue that he is parole ineligible and therefore not a future danger."[129] Justice Stevens argued that the case was indistinguishable from, and "contrary to," *Simmons* because even Simmons was not "conclusively" parole ineligible at the time of his sentencing as the parole board had not yet made its decision regarding Simmons.[130] Justice Stevens noted that even if the Court applied the correct law, "its application would be unreasonable" under the second test.[131] The dissent provided persuasive evidence as to why the state's distinction between convictions with an entry of judgment and those with merely a guilty verdict is unreasonable.[132] The majority ignored the overwhelming evidence, noted by the dissent, that the case was indistinguishable from *Simmons* and blindly deferred to the state. This is a case where the conservative bloc's utter refusal to find any state decision unreasonable is obvious.

On the other side of the spectrum, *Rompilla v. Beard*[133] provides a prototypical "de novo" camp analysis. The Court reversed a denial of

[124] *Id.* at 166.

[125] Simmons v. South Carolina, 512 U.S. 154 (1994).

[126] *Id.* at 156.

[127] *Ramdass*, 530 U.S. at 166.

[128] *Id.* at 167.

[129] *Id.* at 182 (Stevens, J., dissenting).

[130] *Id.* at 186.

[131] *Id.* at 208.

[132] *Id.* at 185–88.

[133] 545 U.S. 374 (2005). The decision was five-to-four, with Justice Souter writing the majority opinion, joined by Justices Stevens, O'Connor, Ginsburg, and Breyer. *Id.* at 376. Justice Kennedy's dissent was joined by Justices Rehnquist, Scalia, and Thomas. *Id.* at 396 (Kennedy, J., dissenting).

the writ and held that the state court's application of the *Strickland* standard[134] was objectively unreasonable.[135] After being sentenced to death, Rompilla petitioned for a writ of habeas corpus in the district court, claiming inadequate representation.[136] The Court agreed with the district court's decision that the state court had unreasonably applied *Strickland* because Rompilla's lawyers "had failed to investigate 'pretty obvious signs' that Rompilla had a troubled childhood and suffered from mental illness and alcoholism, and instead had relied unjustifiably on Rompilla's own description of an unexceptional background."[137] The majority reasoned that Rompilla's counsel would have discovered this information if they examined the court file on one of Rompilla's prior convictions.[138] Yet the Court conceded that the lawyers did not ignore their obligation to find mitigating evidence and acknowledged that they did explore other avenues to obtain such evidence.[139] The majority's determination that the circuit court was "objectively unreasonable" in holding that counsel was efficient did not apply the deference required by *Strickland*; the Court rested its opinion on the alleged "incorrectness" of the circuit court and not the "unreasonableness" of its decision.

The dissent argued that "under any standard of review the investigation performed by Rompilla's counsel in preparation for sentencing was not only adequate but also conscientious."[140] Particularly, considering "the Court's recognition that the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up" and that "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste," counsel's performance could not be considered deficient to such a degree that a state court's judgment that it was sufficient would be "objectively unreasonable."[141] Furthermore, the dissent gave various compelling reasons for why the attorneys might not look to a previous case file for mitigating evidence.[142]

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[134] *See supra* note 44.

[135] *Rompilla*, 545 U.S. at 388 (Kennedy, J., dissenting).

[136] *Id.* at 379.

[137] *Id.*

[138] *Id.* at 383–84.

[139] *Id.* at 381.

[140] *Id.* at 397.

[141] *Rompilla*, 545 U.S. at 404.

[142] *Id.* at 401 ("The majority . . . disregards the sound strategic calculation supporting the decisions made by Rompilla's attorneys. Charles and Dantos [Rompilla's counsel] were 'aware of Rompilla's priors' and 'aware of the circumstances' surrounding these convictions. At the postconviction hearing, Dantos also indicated

Rompilla is a perfect example of the "de novo" camp applying a completely different standard than the "blind deference" camp. The majority engaged in an independent analysis and decided that if defendant's counsel looked though a prior case file, they would have found information that they eventually would have chosen to include as mitigating evidence. The Court transformed what was arguably a wise tactic into an absolute requirement under *Strickland*, without any "clearly established" Supreme Court precedent instructing it to do so. Without such precedent, the Court's finding—that the state court's decision to respect strategic decisions by counsel was "objectively unreasonable"—is difficult to understand. The Court's analysis is even more striking when one considers that the *Strickland* standard is already deferential to the judgment of counsel[143] and that the review of the state court's application of that standard requires an "objectively unreasonable" decision regarding that standard. As mentioned earlier, the Court apparently felt in its independent judgment that the counsel's performance was in fact insufficient and made its judgment based on that belief. The Court gave little, if any, deference to the state court's application of this deferential law.

An example of a genuine but puzzling attempt to apply AEDPA as written is *Penry v. Johnson*.[144] The effort was genuine in that the majority reached different results on different claims within the same set of facts. The decision was puzzling, however, because the Court refused to define the standard of "reasonableness" with respect to either claim. In *Penry*, petitioner Penry was convicted of rape and murder, and sentenced to death.[145] The majority considered his two claims separately. In Part III.A, the Court affirmed the Texas Court of Criminal Appeals' rejection of Penry's Fifth Amendment claim.[146] In Part III.B, the Court explained that Penry also contended that the jury instructions given at his second sentencing hearing did not fol-

that she had reviewed the documents relating to the prior conviction. Based on this information, as well as their numerous conversations with Rompilla and his family, Charles and Dantos reasonably could conclude that reviewing the full prior conviction case file was not the best allocation of resources.").

[143] *See supra* note 44.

[144] 532 U.S. 782 (2001). Justice O'Connor delivered the opinion of the Court, Parts I, II, and III.A of which were unanimous. III.B was joined by Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. Justice Thomas filed an opinion concurring in part and dissenting in part, in which Justices Rehnquist and Scalia joined.

[145] *Id.* at 786.

[146] *Id.* at 795 ("We therefore cannot say that it was objectively unreasonable for the Texas court to conclude that Penry is not entitled to relief on his Fifth Amendment claim.").

low *Penry I*[147] because the instructions did not allow the jury to express "its reasoned moral response to the mitigating evidence of Penry's mental retardation and childhood abuse."[148] The Court found that, under the instructions as given, "a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence."[149] Thus, the state court's decision that the jury instructions provided at Penry's second sentencing hearing satisfied *Penry I* was objectively unreasonable.[150] Therefore, while "blind deference" justices gave their usual flat out rejection of the writ, the majority engaged in a genuine attempt to apply the statute and came to different results with regard to different claims within the same case.

V. THE PROBLEMS PRESENTED BY THE COURT'S SPLIT ANALYSIS

With the background information in proper context, it is necessary to discern why the stark divide over the standard of review in § 2254(d)(1) is so problematic. The Court's decisions since *Williams* have raised three critical issues. First, because of the unrelenting stubbornness of both camps, the fact that most decisions have been five to four and that most decisions have hinged solely on Justices Kennedy's and O'Connor's (undefined) analyses, the results are arbitrary. Second, the cases fail to treat similar situations similarly and thus do not provide proper notice to potential petitioners of the degree of evidence required to succeed on habeas claims. Third, because cases in the capital punishment context are literally life or death decisions, this is hardly the area of law to have ambiguity. These issues are serious and demand a resolution.

A. Arbitrariness

As noted earlier, most of the relevant decisions applying § 2254(d)(1) in the capital punishment context are decided five to four. Given that the "blind deference" and "de novo" camps are fixed, the split decisions are strong evidence that the opinions have almost entirely hinged on Justices Kennedy and O'Connor. Yet be-

[147] Penry v. Lynaugh (*Penry I*), 492 U.S. 302, 327–28 (1989) ("In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,' the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.").

[148] *Penry*, 532 U.S. at 796.

[149] *Id.*

[150] *Id.* at 797.

cause even these two Justices have applied an undefined—albeit more genuine—interpretation of the statute, the results have been inconsistent. This point is best demonstrated by comparing some of the five-to-four analyses that depended solely on Justice Kennedy's or Justice O'Connor's addition to one of the predetermined groups. These cases illustrate that in the absence of some explanation of what standard the two Justices have been applying, we cannot be certain that these cases were not decided merely at the whim of two individuals. The replacement of Justice O'Connor with Justice Alito—who has fallen squarely into the "blind deference" camp in the seven decisions in which he has taken part—has further magnified this point.[151] Thus, instead of the whim of two individuals, who could at least potentially balance against one another, future § 2254(d)(1) cases in the capital context may rest solely on Justice Kennedy's unspecified analysis.

The arbitrariness of the provision is a simple but important issue. Because the two camps are fixed and neither Justice O'Connor's nor Justice Kennedy's standards have any definite contours, the Court's decisions in this area have been, at the very best, unpredictable and, at worst random. As the following discussion will demonstrate, Justices Kennedy and O'Connor have authored opinions of both the "de novo" and "blind deference" camps at various times. For example, in *Yarborough v. Alvarado*, the Court denied the writ of habeas corpus and held that the state court's decision—that the seventeen-year-old defendant was not "in custody" when he was brought to the police station and questioned without counsel and without a reading of his *Miranda* rights—was not objectively unreasonable.[152] In this decision, Justice Kennedy's majority opinion aligned with the "blind deference" camp to sway the balance in its favor. Sounding extremely deferential, Justice Kennedy stated that "fair-minded jurists could disagree over whether Alvarado was in custody."[153] Justice Kennedy continued, reasoning that "[w]e cannot grant relief under AEDPA by conducting our own independent inquiry into whether the state court was correct as a de novo matter."[154] Therefore, in this case, Justice Kennedy disclaimed the ability to conduct an "indepen-

[151] *See* discussion *supra* Part IV.A.

[152] 541 U.S. 652, 665 (2004). The decision was five to four with Justice Kennedy writing the majority opinion, joined by Justices Rehnquist, Scalia, O'Connor, and Thomas. *Id.* at 655. Justice Breyer filed the dissent, joined by Justices Stevens, Souter, and Ginsburg. *Id.* at 669 (Breyer, J., dissenting).

[153] *Id.* at 664 (majority opinion).

[154] *Id.* at 665.

dent inquiry" and contended that while the state court's application may have been wrong, it was not unreasonable.[155]

Justice O'Connor has aligned with the "blind deference" camp in many cases as well. Most notably, she authored the opinion joined by the "blind deference" members in *Lockyer v. Andrade*.[156] In this case, the majority found that the Ninth Circuit erred in ruling that the state court's decision—sentencing petitioner to two consecutive terms of twenty-five years to life in prison for a "third strike" conviction—was an unreasonable application of the clearly established federal law.[157] The Court stated that the precedents were unclear in this area but ultimately concluded that "a gross disproportionality principle is applicable to sentences for terms of years."[158] In *Lockyer*, the state court found petitioner guilty of violating California's "three strike" law.[159] On two occasions, petitioner stole videotapes totaling about $150—which the prosecutor discretionarily charged as felonies and not misdemeanors—and this triggered the law because he had a prior misdemeanor.[160] Hiding behind what she deemed an "unclear" precedent, Justice O'Connor expressed reservations about overturning the state court's judgment and ultimately concluded that the grossly disproportionate principle only applied to "extraordinary" cases.[161] But if fifty years to life in prison for stealing $150 of videotapes is not sufficiently "extraordinary," then one has difficulty imaging a scenario that would be. In truth, Justice O'Connor was the speaker for the "blind deference" camp in this opinion by refusing to question a patently unjust state application of federal law.

In other cases, Justices Kennedy and O'Connor align with the "de novo" camp, and their decisions fail to elaborate on the principles they used to justify such a radical shift. For example, Justice Kennedy joined the "de novo" camp when he wrote the opinion in

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[155] *Id.*

[156] 538 U.S. 63 (2003). The decision was five to four, with Justice O'Connor authoring the majority, joined by Justices Rehnquist, Scalia, Kennedy and Thomas. *Id.* at 66. Justice Souter filed a dissent, in which Justices Stevens, Ginsburg, and Breyer joined. *Id.* at 77 (Souter, J., dissenting). As noted earlier, this case did not involve a capital sentence; its reasoning, however, has proved to be influential in capital cases. *See, e.g.*, Panetti v. Quarterman, 551 U.S. 930, 953 (2007); Brown v. Payton, 544 U.S. 133, 147 (2005); Yarborough v. Alvarado, 541 U.S. 652, 661, 666 (2004); Mitchell v. Esparza, 540 U.S. 12, 18 (2003); Wiggins v. Smith, 539 U.S. 510, 520 (2003).

[157] *Lockyer*, 538 U.S. at 77.

[158] *Id.* at 72.

[159] *Id.* at 67–68.

[160] *Id.* at 67.

[161] *Id.* at 77.

Pannetti v. Quarterman, which reversed a denial of the writ of habeas corpus.[162] In *Pannetti*, the majority held that the state court's application of federal law was objectively unreasonable when it determined that petitioner was competent to be executed.[163] The state courts and court-appointed experts determined that petitioner *was* competent to be executed.[164] Yet the Court disregarded these findings and, drawing conclusions of its own from the record that petitioner's condition was "worsening," concluded that petitioner was not competent.[165] This reasoning directly conflicts with *Yarborough*, in which Kennedy stated that the Court could not conduct its "own independent inquiry into whether the state court was correct . . . ."[166]

Similarly, Justice O'Connor has written opinions demonstrative of the de novo camp. In *Penry*, she authored the majority opinion, which was joined unanimously as to the part that denied the writ, but only by the de novo camp (plus Justice Kennedy) as to the portion of the opinion that granted the writ.[167] As noted earlier, this case allegedly involved a defective jury instruction, and the Court held that the addition of a "supplemental instruction" was insufficient to meet the standard of *Penry I*.[168] Because of this, Justice O'Connor and the "de novo" camp, found the state decision to be an "objectively unreasonable" application of federal law.[169] Therefore, Justices Kennedy and O'Connor demonstrated willingness to join either the "de novo" or "blind deference" camps without any particular principle explaining why they joined one camp or the other.[170]

The particular issue is not that Justices Kennedy and O'Connor have aligned with one camp or another; the problem is that they do so without definition or explanation or even an acknowledgment that they are doing so. If they are measuring reasonableness by some test,

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[162] 551 U.S. 930, 934 (2007). The decision was five to four. Justice Kennedy delivered the opinion of the Court, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. *Id.* at 934. Justice Thomas filed a dissenting opinion, in which Justices Roberts, Scalia, and Alito joined. *Id.* at 962 (Thomas, J. dissenting).

[163] *Id.* at 954 (majority opinion).

[164] *Id.*

[165] *Id.* at 937

[166] Yarborough v. Alvarado, 541 U.S. 652, 665 (2004)

[167] Penry v. Johnson, 532 U.S. 782 (2001).

[168] *See supra* notes 144–50 and accompanying text.

[169] *See supra* notes 144–50 and accompanying text.

[170] The cases above were selected because Justices O'Connor and Kennedy actually wrote the opinions of the "blind deference" camp or the "de novo" camp. There are many more decisions—in fact, most of the decisions—where their alliance with one group or the other swayed the decision. *See supra* Table 1.

they should transfer that test from the contours of their imagination into the opinions that comprise the law. The Court's decisions have shown that an undefined standard of "reasonableness" has not sufficed to lead to the predictable results required by the law. Instead, it has allowed wiggle room for "blind deference" and "de novo" Justices to carve out their own standards. When the standards amount to polar-opposite analyses, the law is unworkable and in need of revision.

B. Notice

Section 2254(d)(1) is also troublesome because it does not treat similar situations similarly. This is the zenith of injustice, and the concern is only magnified by the life or death consequences present in the capital punishment context. In situations where de novo review applies, the petitioner obviously has a much better chance of having the writ granted and hence living. By contrast, where "blind deference" applies, the petitioner is virtually assured of being denied the writ and hence executed. The inconsistencies within the Court regarding the standard of "objective reasonableness" fail to provide the proper notice to petitioners as to the level of "incorrectness" required for a court to grant a writ of habeas corpus.

This point is evident when comparing the similar facts in *Rompilla*[171] and *Schriro v. Landrigan*[172] that led to opposite results. As noted earlier, *Rompilla* held that the state court's decision that defendant's counsel were not ineffective was "objectively unreasonable."[173] The Court's *Rompilla* decision was the prototype "de novo" case, where the Court reasoned that defendant's counsels were "unreasonable" because they did not research the case file on one of defendant's prior crimes that would have led to mitigating evidence that might have avoided a death sentence, even though substantial evidence indicated that counsel did make an investigation into other sources.[174] By contrast, only two years after the *Rompilla* decision the *Schriro* Court reversed a grant of the writ and held that counsel was not ineffective under the *Strickland* standard[175] when he failed to investigate further

[171] Rompilla v. Beard, 545 U.S. 374 (2005). *See supra* notes 133–43143 and accompanying text.

[172] 550 U.S. 465 (2007). The decision was five to four, with Justice Thomas delivering the opinion of the Court, joined by Justices Roberts, Scalia, Kennedy, and Alito. *Id.* at 468. Justice Stevens filed a dissent, joined by Justices Souter, Ginsburg, and Breyer. *Id.* at 482 (Stevens, J., dissenting).

[173] *Rompilla*, 545 U.S. at 388; *see also supra* notes 135–39 and accompanying text.

[174] *Rompilla*, 545 U.S. at 383–84; *see also supra* notes 135–39 and accompanying text.

[175] *See supra* note 44.

sources of mitigating evidence at defendant's request.[176] In *Schriro*, counsel interviewed defendant's relatives but did not search into other sources that would have evidenced his troubled background.[177] The majority reasoned that "at the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence."[178]

These decisions are irreconcilable. If the same standard had been applied the results would have been the same; indeed, with respect to the result, every Justice ruled the same in *Schriro* as he or she did in *Rompilla*. The only difference between these cases is that Justice Alito had replaced Justice O'Connor upon her retirement, and his addition to the Court swayed the analysis in favor of the "blind deference" camp in *Schriro*, which came later. When defendants cannot be sure which standard, "blind deference" or "de novo," will be applied to essentially identical facts, the law fails to provide proper notice to petitioners. The Court's decision on these issues—life-or-death issues—should not be dictated by which ideological camp the Justices choose. Instead, these decisions should be dictated by the law, with all of the justices applying the same standard, even if they disagree as to how the facts apply to the agreed-upon standard.

C. Life-or-Death Results

The Court has often stressed the necessity of ensuring correct results in the capital punishment context. For instance, in *Dobbs v. Zant*,[179] the Court noted that it had "emphasized before the importance of reviewing capital sentences on a complete record."[180] Agreeing with this notion, Justice Marshall's dissent in *Barefoot v. Estelle* stated that "time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary

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[176] *Schriro*, 550 U.S. at 472.

[177] *Id.* at 469, 471.

[178] *Id.* at 478.

[179] 506 U.S. 357 (1993).

[180] *Id.* at 358. Petitioner, who was convicted of murder and sentenced to death, alleged that his counsel was ineffective. *Id.* at 358. The State represented that a copy of the transcript of the closing arguments at the sentencing phase was unavailable and relied solely on the counsel's testimony. *Id.* Petitioner subsequently located the transcript which directly contradicted the counsel's testimony. *Id.* The Supreme Court held that the Eleventh Circuit erred in its conclusion that the record could not be reconsidered. *Id.*

case."[181] The Court in *Woodson v. North Carolina* urged something similar:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[182]

As the Court has rightly recognized, the consequences of decisions in this context are indeed severe. Of relevance to this Comment, when the Court affirms a denial of the writ or reverses a grant of the writ, it is essentially permitting the previous execution sentence to proceed. Therefore, these decisions ultimately can lead to the death of human beings.

The Court's recognition of capital punishment's finality renders the uncertainty of the § 2254(d)(1) "reasonableness" test for habeas review troubling. After thirteen years of courts applying a standard that has received steady criticism for its ambiguity and inconsistency, neither Congress nor the Court has attempted to establish clearer guidelines for the habeas review of federal law claims under § 2254(d)(1). Ultimately, Congress has the most power to change the law in this respect by amending the Act. Even so, the Court—whether or not it would like to admit it—also has the power to modify the standard to reach a clearer and fairer results. In *Casey v. Planned Parenthood*, Justice O'Connor established considerations for the Court to weigh when deciding whether to overrule one of its precedents[183]—which in this case would be *Williams*. She noted that in evaluating an existing law, "we may ask whether the rule has proven to be intolerable simply in defying practical workability."[184] Analyzing the results of the *Williams* interpretation of § 2254(d)(1) and its split standard demonstrates that this law, in its undefined present state, is unworkable and in need of alteration.

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[181] 463 U.S. 880, 913 (1983) (Marshall, J., dissenting). The majority held that evidence presented by two psychiatrists regarding petitioner's future dangerousness, which ultimately contributed to the petitioner's death sentence, was not barred by the Constitution. *Id.* at 896 (majority opinion). The psychiatrists had never evaluated petitioner personally. *Id.* at 917. (Blackmun, J., dissenting).

[182] 428 U.S. 280, 305 (1976). The Court invalidated a North Carolina statute that imposed a mandatory death sentence and held that a court must be allowed to consider the character and record of the defendant in its decision. *Id.*

[183] 505 U.S. 833, 854 (1992).

[184] *Id.*

Brown v. Payton demonstrates the precise problem of allowing incorrect applications of federal law to stand in AEDPA cases.[185] In *Brown*, the Court reversed a grant of the writ of habeas corpus and held that the state court did not unreasonably apply federal law when it concluded that a jury instruction did not have to take count of defendant's post-crime religious conversion.[186] With regard to jury instructions, the judge directed—in accordance with factor (k)[187]—that jurors consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."[188] Defense counsel requested that the court alter the instruction to make explicit the jury's obligation to evaluate the evidence of the defendant's character, including his religious conversion.[189] The state court refused to alter the instruction.[190] The Court did not think that the California Supreme Court's determination—that factor (k) was sufficiently broad to encompass petitioner's concerns—was unreasonable.[191] The majority ruled that, "[e]ven on the assumption that [the California Supreme Court's] conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review."[192]

The *Brown* analysis provides another clear example of the problem with the current application of § 2254(d)(1) in a capital context. The majority hides behind the cloak of its "wrong-but-reasonable" analysis, which Congress explicitly rejected as a possible interpretation of the provision,[193] and signals its approval of the execution of a man that concededly might have been convicted in violation of his constitutional rights. As Justice Breyer noted in concurrence, "[T]his

[185] 544 U.S. 133 (2005). The decision was five to three, with Justice Kennedy authoring the majority opinion, joined by Justices Breyer, O'Connor, Scalia, and Thomas. *Id.* at 135. Justice Scalia filed a concurring opinion, joined by Thomas. *Id.* at 147 (Scalia, J., concurring). Justice Breyer also filed a concurring opinion. *Id.* at 148 (Breyer, J., concurring). Justice Souter filed a dissenting opinion, joined by Stevens and Ginsburg. *Id.* at 149 (Souter, J., dissenting). Chief Justice Rehnquist did not take part in the decision. *Id.* at 147.

[186] *Id.* at 143 (majority opinion).

[187] "Factor (k) was a catchall instruction, in contrast to the greater specificity of the instructions that preceded it. As set forth in the statute, and as explained to the jury, it directed jurors to consider '[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.'" *Id.* at 137.

[188] *Id.* at 164.

[189] *Id.* at 137.

[190] *Id.* at 153.

[191] *Brown*, 544 U.S. at 142.

[192] *Id.* at 143.

[193] *See supra* Part II.B.

is a case in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference. Were I a California state judge, I would likely hold that Payton's penalty-phase proceedings violated the 8th Amendment."[194] As a five-to-three decision, if Justice Breyer had been able to rule that the application of federal law was incorrect, as he admitted it was, the result would have been different.[195] Because his hands were tied by the procedural thicket of AEDPA and *Williams*, Breyer was in effect "forced" to deny the writ, which ended up resulting in an affirmed death sentence of petitioner. The U.S. Supreme Court is the ultimate arbiter of federal law, not the state courts. If the Court finds a mistake regarding federal law, as there was in this case, the Court's job to remedy that error.

VI. PROPOSED SOLUTIONS

A complete analysis of § 2254(d)(1) requires an evaluation of potential solutions to the problems created by the Court's split interpretation. There are primarily two potential solutions to the issues posed by the current standard. First, the Court could identify criteria by which to evaluate the "reasonableness" of the state court's application of federal law. When one group of Justices says that the state court is almost never "unreasonable" and another says that the state court is "unreasonable" up to 63 % of the time, the standard is anything but "objective." Other areas of the law have demonstrated that defining "reasonableness" is possible. For instance, in tort law judges frequently evaluate reasonableness by using the "Hand Formula." Under this equation, an individual is negligent when the burden of adequate care is less than the combination of the probability of the harm and gravity of the harm.[196] Yet the Hand formula evaluates the reasonableness of conduct, which is conceptually easier to understand than the reasonableness of a court's application of law.

In the current context, "reasonableness" is not so easily definable. The line between incorrect and unreasonable state court decisions is especially elusive. Perhaps the Court could apply a test similar to the one used to evaluate "plain error" in criminal and civil jury

[194] *Brown*, 544 U.S. at 148 (Breyer, J., concurring).

[195] Since the Eighth Circuit granted the writ, if Justice Breyer voted to affirm this decision the Court would have been split four to four. As such, the default rule is to revert to the circuit court's decision, which granted petitioner the writ of habeas corpus. *See, e.g.*, Jensen v. Quaring, 472 U.S. 478, 478 (1985) ("The judgment is affirmed by an equally divided Court.").

[196] United States v. Carroll Towing, 159 F.2d 169, 173 (1947).

instructions. *Johnson v. United States* identified four factors for courts to consider in determining whether plain-error review is appropriate:

> [B]efore an appellate court can correct an error not raised at trial, there must be (1) an "error," (2) that is "plain," and (3) that "affects substantial rights." If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings."[197]

Using a test similar to this, the Court would first evaluate whether an error exists at all in the state court's application of federal law. If an error exists, the Court would then determine whether the error is sufficiently obvious. Because the cases involve constitutional protections that determine whether petitioners are sentenced to death, the third factor, related to the effect on substantial rights, will always be met in the capital context. Finally, an error in cases of this magnitude would surely affect the "fairness, integrity, and public reputation of judicial proceedings." This test, however, creates more questions than answers. The most critical issue would be how to evaluate whether an error is "plain." This just seems to be another way of asking if the error was "unreasonable," which is precisely the question the test would be set out to answer. In sum, this test would not be very helpful, and it is difficult to conceive of other tests that would be.

As a second possibility, the standard could be overruled entirely—in light of the results it has produced—resulting in a reversion back to a de novo standard. This de-novo standard would apply only to capital cases because of the magnitude of the penalty. State-court factual determinations would still be treated with deference. After all, state courts are in the best position to evaluate the facts because they hear testimony and have juries to evaluate credibility. With regard to application of federal law, however, the federal courts, and the Supreme Court in particular, are in the best position to evaluate accuracy. The balancing of harms—between, on the one hand, respecting state courts and preventing abuse of the habeas process, and, on the other hand, reaching accurate results when the penalty is death on the other—clearly favors de novo review. In addition, because half of the Supreme Court is already effectually applying de novo review anyway, the alteration would encourage consistency.

Further, the repeal of § 2254(d)(1) in the capital-punishment context is a logical solution because the original justifications for the

[197] 520 U.S. 461, 467 (1997).

restrictive standard have been undermined.[198] First, the notion that courts need to guard against an influx of habeas petitions is unfounded.[199] While "the number of habeas petitions has increased," the percentage of prisoners filing habeas petitions has not.[200] In addition, the notion that prisoners facing capital sentences are particularly likely to use the habeas system to delay their punishment has been refuted. If this were the case, the percentage of habeas petitions filed would be lower in states that have abolished the death penalty.[201] Yet "five of the fourteen non-death penalty states, or thirty-five percent, had rates of habeas filings above the national average."[202] Thus, petitioners have not especially abused the habeas system in the capital-punishment context. Accordingly, repealing AEDPA would be fair and likely would not negatively impact judicial efficiency or promote abuse of the habeas system.

Furthermore, overruling AEDPA and instead instituting de-novo review would allow the Court to perform its constitutional obligation to pronounce the law. In her article, *Saying What the Law Is*, District Judge Lynn Adelman identified the problems with the current "unreasonableness" standard:

> [I]n order to grant habeas relief under AEDPA, the federal court must find the state court decision under consideration not only wrong, but unsupportable. The standard thus requires prisoners who have been convicted in violation of the Constitution to remain in prison. In addition, it does not require federal courts to determine whether state court decisions are correct or incorrect, or even to say what the law is.[203]

As Judge Adelman went on to explain, if "courts refrain from criticizing decisions hostile to constitutional rights, the result will be a decline in the level of our constitutional protections (as well as fewer conflicts for the Supreme Court to resolve, should the Court choose to resolve them)."[204] In Judge Adelman's identification of the problem, the solution becomes apparent. If the Court is able to evaluate federal legal claims de novo, it can overturn state decisions that apply

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[198] David Blumberg, *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, 577 (1997).

[199] *Id.* at 577–79.

[200] *Id.* at 578.

[201] *Id.* at 579.

[202] *Id.*

[203] Lynn Adelman & Jon Deitrich, *Saying What the Law Is: How Certain Legal Doctrines Impede the Development of Constitutional Law and What Courts Can Do About It*, 2007 FED. CTS. L. REV. 1, 4 (2007).

[204] *Id.* at 6.

federal law incorrectly. This will ensure that constitutional protections remain intact and that the Court maintains its role as the arbiter of federal law. Furthermore, allowing federal judges to "say what the law is" will enable courts to establish a law that provides proper notice and is not arbitrary. These characteristics are especially crucial in the capital punishment context.

VII. CONCLUSION

The objective data since *Williams v. Taylor* demonstrate a split standard when it comes to federal habeas review of claims adjudicated on the merits at the state level. Furthermore, even aside from the issues addressed in this Comment, federal judges have noted that AEDPA is generally flawed. For example, a recent *New York Times* article noted the disdain that many of these judges have for AEDPA's stringent provisions.[205] The article explained that "in dozens of capital cases in recent years, appeals court judges, some of whom have ruled in favor of the death penalty many times, have complained that Congress and the Supreme Court have raised daunting barriers for death row prisoners to appeal their convictions."[206] Further evidence of the displeasure of federal judges is demonstrated by the fact that "[s]ince its passage, the act has been cited in a half-dozen to two dozen dissents a year."[207]

With respect to § 2254(d)(1), the "objective unreasonableness" standard was a drastic departure from the preexisting habeas law. Prior to the adoption of AEDPA, federal courts applied de-novo review to state courts' application of federal law. Then, in the wake of the Oklahoma City bombing, Congress passed AEDPA to reduce delays in the habeas system and ensure respect for state-court sentences. Yet even when Congress debated AEDPA, both critics and supporters expressed reservations about the possibility of a "wrong-but-reasonable" interpretation, which would allow incorrect state-court interpretations to stand as long as they were reasonable. These fears were eventually realized in future Supreme Court cases that were the focus of this Comment.

In the wake of AEDPA, federal courts disagreed over how to apply the "contrary to" and "unreasonable application" language of the statute. Eventually, *Williams v. Taylor* provided that the language es-

[205] John Schwartz, *Fervent Dissents on Behalf of Death Row Inmates Are Increasing*, N.Y. TIMES, Aug. 13, 2009, at A1.

[206] *Id.*

[207] *Id.*

tablished two different tests. While the "contrary to" prong has been largely uncontroversial, the "unreasonable application" test has been extremely troublesome. As the years passed, the *Williams* Court explicitly adopted the "wrong-but-reasonable" approach, against which Congress fought prior to AEDPA's adoption. While appearing to be a unified "reasonableness" standard, not unlike in other areas of law, the standard with respect to § 2254(d)(1) proved to be elusive as applied in the cases following *Williams*.

Since *Williams*, the Court has split into two blocs and applied two entirely different standards of "reasonableness" depending on the members of the Court who represent the majority. The "blind deference" camp has read "unreasonable application" to mean that federal courts must simply defer to the state-court's application of federal law. This is evidenced by the fact that this group of justices has found the state-court application of federal law to be unreasonable in only 4–14% of the cases since *Williams*. On the other hand, the "de novo" camp has engaged in analysis even more stringent than that expected of traditional de novo review. Since 2000, this group of justices has found the state-court's application of federal law "objectively unreasonable" most of the time. This evidence indicates not merely a disagreement over how to apply the standard, but the use of two different standards.

Somewhere in the middle and vacillating between the two blocs, Justices Kennedy and O'Connor have been the crucial swing votes in this area. While their numbers have aligned with the expectations of the statute, the exact contours of the standards they have applied are unclear. Specifically, they failed to set forth the principles they used to justify aligning with the "blind deference" bloc in some cases and the "de novo" reasoning in others. Yet the real problem with the analyses of the two justices is that their standard—while admittedly more honest—remains undefined. Further, with Justice O'Connor's replacement by Justice Alito, Justice Kennedy is the sole justice standing between the two camps. This may make future § 2254(d)(1) cases even more unpredictable than they have been since *Williams*.

When studied retrospectively, the data suggests three major issues with the Court's cases since *Williams*. First, the cases have proven that the standard, as it exists, is arbitrary. Many cases are decided five to four, and the results often hinge on which camp Justices Kennedy or O'Connor aligned with on a particular day—with no reasoning or indication of how they might align prior to the decision due to their undefined standard. Second, the cases have failed to provide notice to potential petitioners as to the degree of incorrectness that the state

court must have exhibited with regard to their constitutional rights. Because Justices O'Connor and Kennedy both wrote opinions expressing "blind deference" and "de novo" sentiments and because their opinions swayed the Court, the results have been, at best, unpredictable, and, at worst, random. Finally, this area is particularly sensitive because of the Court's traditional recognition of capital punishment as an area where accuracy is of utmost priority.

These results indicate that AEDPA and its standard of "reasonableness" have failed. While lawmakers could try to come up with a way to define "reasonableness" in a way that provides more predictability, the most logical solution is to change the standard for death penalty cases back to the de novo review that existed before AEDPA's enactment. This would allow the Court to correct concededly incorrect interpretations of federal law and would further provide the Court with the flexibility to perform its constitutional function of defining the law. The de-novo standard is particularly meritorious because the original justifications for abolishing it have proven unwarranted. Because history has demonstrated that the standard of "objective unreasonableness" is unworkable, lawmakers should reinstitute the de novo standard of review for state court applications of federal law.