THE NOT SO GREAT WRIT: TRAPPED IN THE NARROW HOLDINGS OF SUPREME COURT PRECEDENTS

by
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Recent opinions by the United States Supreme Court in cases involving petitions for writs of habeas corpus brought by state prisoners under the Antiterrorism and Effective Death Penalty Act (AEDPA) have placed increasing emphasis on precisely what law has been "clearly established" by the Supreme Court's own precedents. In making that determination, the Court has insisted that it is the holdings, not dicta, in prior cases that control. Depending on how narrowly the "holding" of a case is characterized, therefore, the federal habeas court can short-circuit its review of state court decisions by concluding that, because no clearly established Federal law governed the situation, no habeas relief is available. Particularly when holdings are closely tied to the specific, factual context in which a constitutional claim arose, only habeas petitioners presenting claims already addressed and decided by the Supreme Court on direct review can prevail. This Article suggests that such a limitation on the habeas remedy has unfortunate consequences for both the development of constitutional law and the even-handed application of fundamental rights to persons in state custody.

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I. INTRODUCTION

As any law student who has sat in a Socratic method class can attest, much of legal analysis turns on determining whether differences in factual circumstances should make a difference in the outcome. Because no two cases present identical facts, the art of legal analysis involves deciding which variations are legally significant. For example, if one case established a standard for considering the propriety of allowing uniformed police officers to sit behind the defendant in a criminal case, the case is clearly distinguishable from a case in which civilians sit behind the defendant and express support for the victim of the crime. But surely they are not different enough that you could ignore the first case in analyzing the second, and a student who tried to do so would have a rough day in class.

Yet recent opinions by the Supreme Court addressing claims by state prisoners that their federal constitutional rights were violated seem to be giving state courts the green light to ignore that first case. According to these decisions interpreting the Antiterrorism and Effective Death Penalty Act (AEDPA),[1] only when a case arises from the same factual scenario has the law been "clearly established," such that failure to abide by the principle announced in the first case can be remedied by a federal court. In other words, state courts are free to violate defendants' constitutional rights as long as no Supreme Court case has explicitly held, on the same facts, that the conduct violates the Constitution. As a result, defendants can continue to be held in custody if the state can find a way

[1] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered titles of U.S.C.).

to distinguish Supreme Court precedent from the specific facts in the defendant's case.

This series of cases denying relief to state habeas corpus petitioners because their claims are not rooted in narrowly defined Supreme Court precedents—and recent grants of certiorari and opinions suggest that the Court may continue in this vein[2]—has two main consequences. First, the underlying reasoning in these decisions places great importance on the precise facts of particular cases that happen to have been reviewed by the Supreme Court on direct appeal. Given the rarity and idiosyncrasy of direct review of criminal cases by the Supreme Court, the focus on specific facts does not advance fundamental notions of fairness and equal application of the law, nor does it comport with the way the law generally develops. Second, the spotlight shines exclusively on the Supreme Court, rather than the lower federal courts, as the high court alone is authorized to announce what law has been so "clearly established" that state courts must abide by its principles. This aspect of the recent decisions foregoes the opportunity of having federal judges play a role in the development of constitutional law, a role that was contemplated by both the Constitution and the statute governing habeas corpus.

Granted, in enacting AEDPA in 1996, Congress did place new restrictions on federal courts' power to grant relief to habeas petitioners challenging their state court convictions and sentences. These restrictions, including a one-year statute of limitations,[3] a highly deferential standard of review,[4] and conditions governing successive petitions that are virtually impossible to meet,[5] pose significant barriers to state prisoners with potentially viable constitutional claims. Yet, until recently, prisoners able to jump through the procedural and substantive hoops erected by the statute retained the possibility of securing relief in federal court. In the last three years, however, several Supreme Court opinions have included language that suggests a more pervasive obstacle to federal habeas relief. These decisions have placed increasing focus on whether the Supreme Court itself had, at the time the state court ruled

[2] *See infra* notes 9–21 and accompanying text.

[3] 28 U.S.C. § 2244(d) (2006).

[4] Under the "unreasonable application" prong of the new habeas standard, which is not the focus of this Article, petitioners must show not simply that the state courts were incorrect in their application of constitutional law, but that their decision was "objectively unreasonable." Williams v. Taylor, 529 U.S. 362, 409 (2000) (citing 28 U.S.C. § 2254(d)(1)). Relief that would have been granted under pre-AEDPA law may therefore now be denied. *See, e.g.*, Locke v. Cattell, 476 F.3d 46, 54 (1st Cir. 2007) (finding, reluctantly, that the state court's conclusion that the petitioner was not in custody for Miranda purposes was not unreasonable; had the case been reviewed de novo, the outcome might well have been different); Neal v. Puckett, 286 F.3d 230, 240–44 (5th Cir. 2002) (en banc) (per curiam) (habeas relief denied where counsel's performance at penalty phase of capital trial was deficient; Mississippi Supreme Court's decision that it did not prejudice the defendant was erroneous but not objectively unreasonable).

[5] *See* 28 U.S.C. § 2244(b).

on the case, announced the pertinent federal law with sufficient specificity to amount to "clearly established Federal law, as determined by the Supreme Court of the United States."[6] As Justice Souter noted, concurring in the first of these cases, "the ground between criteria entailed by 'clearly established' and 'unreasonable application' may be murky," yet concluded that "it makes sense to regard the standard governing this case as clearly established by this Court."[7] This Article explores in more detail why it "makes sense" to define the law governing a case as "clearly established" despite the lack of a precedent exactly on all fours with the habeas petitioner's particular facts.

Emphasis on the "clearly established" clause of AEDPA is particularly significant given its intersection with and dependence on an almost off-hand remark in the first major opinion interpreting AEDPA to the effect that such law must be found in the holdings, not dicta, of Supreme Court cases.[8] At first blush, that pronouncement, itself constituting dicta, would appear to be a benign statement, almost to go without saying. Of course courts do not really "establish" law in dicta—dicta are asides, statements about matters not directly at issue in the case at hand, matters that may not have been carefully considered by the judges in making their decision. Yet defining the holding of a case is less straightforward; those seeking to expand the reach of a precedent will characterize the decision broadly, while one who disapproves of the previous outcome will narrow it to its specific facts. When clearly established law is limited to the fact-specific holdings of Supreme Court cases, petitioners are entitled to habeas relief only when the claims they raise have already been decided by the U.S. Supreme Court in a case presenting the same, or a very similar, factual scenario on direct review.

Counsel for the wardens holding state prisoners have framed their submissions in federal court to take full advantage of the opening provided by the recent pronouncements of some members of the Supreme Court. In *Knowles v. Mirzayance*,[9] for example, the warden's petition for reversal of a habeas grant posed the question of whether the Ninth Circuit exceeded its authority under AEDPA in finding counsel ineffective when he withdrew the only defense available, that of insanity, "despite the absence of a Supreme Court decision addressing the

[6] *Id.* § 2254(d)(1).

[7] Carey v. Musladin, 127 S. Ct. 649, 657 (2006) (Souter, J., concurring).

[8] *See Williams*, 529 U.S. at 412; *infra* notes 37–41 and accompanying text.

[9] 129 S. Ct. 1411 (2009). This was the second time the case reached the Supreme Court. The Court had remanded the case in light of *Carey v. Musladin*, 127 S. Ct. 649 (2006), to the circuit court which, in an unpublished memorandum, had affirmed the district court's grant of Mirzayance's petition for writ of habeas corpus based on ineffective assistance of counsel. Knowles v. Mirzayance, 127 S. Ct. 1247 (2007) (mem.). On that remand, the circuit court, after considering *Musladin*, as well as *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007), again affirmed the grant of habeas corpus. Knowles v. Mirzayance, No. 04-57102, 2007 U.S. App. LEXIS 26225, at *2 (9th Cir. Nov. 6, 2007) (mem.).

point."[10] Similarly, in a case heard in October 2009,[11] the warden was granted review to determine whether the Sixth Circuit failed to adhere to AEDPA and *Carey v. Musladin*[12] when it resolved in petitioner's favor questions not explicitly addressed or decided in the governing Supreme Court precedents.[13] In yet another case, *McDaniel v. Brown*,[14] certiorari was granted on the question of what standard of review governs a sufficiency of the evidence claim under AEDPA, a question on which, according to some state attorneys general, the First, Sixth, and Ninth Circuits had developed a different standard from that announced by the Supreme Court in *Jackson v. Virginia*.[15] In *Patrick v. Smith*, a petition for certiorari seeking review of the Ninth Circuit's grant of habeas on insufficiency of the evidence grounds, was pending in the Court for more than nineteen months before finally being granted in January 2010.[16]

[10] Petition for Writ of Certiorari and Appendix at i, *Mirzayance*, 129 S. Ct. 1411 (No. 07-1315). The question also asked whether the circuit court exceeded its authority under AEDPA by granting habeas relief without considering whether the state court adjudication of the claim was "unreasonable" under "clearly established Federal law." *Id.* An introduction to the questions presented reminds the Court: "This Court vacated the Ninth Circuit decision and remanded the case for further consideration in light of *Carey v. Musladin*, 127 S. Ct. 649 (2006). On remand, the Ninth Circuit conceded that 'no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense' but nonetheless concluded that its original decision was 'unaffected' by *Musladin* and subsequent § 2254(d) decisions of this Court." *Id.*

[11] Smith v. Spisak, 130 S. Ct. 676 (2010).

[12] 127 S. Ct. 649; *see infra* notes 50–69 and accompanying text.

[13] Spisak's first claim relied on the Supreme Court's decision in *Mills v. Maryland*, 486 U.S. 367 (1988), to argue that his jury may well have been under the erroneous impression that they must be unanimous in finding mitigating factors. Brief of Respondent at 19, *Spisak*, 130 S. Ct. 676 (No. 08-724). His second claim alleged ineffective assistance of counsel based entirely on defense counsel's summation at the penalty phase, in which he described the crimes in gruesome detail and never explicitly asked for a life sentence. *Id.* at 32.

[14] 130 S. Ct. 665 (2010) (per curiam), *rev'g* Brown v. Farwell, 525 F.3d 787 (9th Cir. 2008). In its per curiam opinion, the Court did not reach the *Jackson* claim on which certiorari had been granted because the parties now agreed that the Ninth Circuit's resolution of that issue was in error. *Id.* at 671. The Court concluded that the court of appeals erred in finding that the state court's rejection of the *Jackson* claim involved an unreasonable application of clearly established federal law. *Id.* at 672. The Supreme Court reversed the judgment below and remanded for further consideration of the ineffective assistance of counsel claim. *Id.* at 675.

[15] McDaniel v. Brown, 129 S. Ct. 1038 (2009) (mem.) (granting certiorari); Jackson v. Virginia, 443 U.S. 307, 326 (1979); *see* O'Laughlin v. O'Brien, 568 F.3d 287, 298–301 (1st Cir. 2009).

[16] No. 07-1483, 2010 WL 154859 (U.S. Jan. 19, 2010), *vacating* 508 F.3d 1256 (9th Cir. 2007). The Ninth Circuit had initially granted Shirley Ree Smith's petition on the ground that insufficient evidence was presented that Smith, the victim's grandmother, had caused the infant's death. Smith v. Mitchell, 437 F.3d 884 (9th Cir. 2006). The Supreme Court granted the warden's first petition for certiorari, vacating and remanding the case for reconsideration in light of *Musladin*. Patrick v. Smith, 127 S. Ct. 2126 (2007) (mem.). The circuit court, after supplemental briefing, reinstated its original opinion, finding it unaffected by the decision in *Musladin*. *Smith*, 508 F.3d

Further suggestion of the critical importance of the Court's recent approach to the habeas remedy can be found in the August 2009 opinion of Justice Scalia, joined by Justice Thomas, dissenting from the Court's order granting a hearing to Georgia death row inmate Troy Davis on the question of his actual innocence.[17] Justice Scalia relies heavily on the cases discussed in this Article, in which the Court reversed grants of habeas relief by lower courts on the grounds that they expanded relief beyond "clearly established law," for his position that the federal courts are not required to screen state convictions for constitutional violations.[18] In addition, a recent per curiam opinion follows the same pattern.[19] Reversing the Court of Appeals for the Fifth Circuit, the Court declared that two of its precedents had not "clearly established" the principle on which the circuit based its ruling granting habeas relief to a Texas death row inmate on a claim under *Batson v. Kentucky*.[20] The Court described the holdings of the prior cases in narrow terms, concluding that they did not establish the categorical rule on which the circuit had relied.[21]

The approach that is now being increasingly urged by wardens, restricting habeas relief for state petitioners to cases presenting a factual context that has already been addressed by the Supreme Court, gives them a significant advantage. Under this approach, a federal habeas court would first look to see whether the Supreme Court had ever addressed the constitutional claim in essentially the same factual setting as that posed by the petitioner. If not, no Federal law has been clearly established by the Court, and the inquiry is at an end. The difficult issue of whether the state court's decision was "contrary to" or "involved an unreasonable application" of the law can be avoided, and the writ denied without conducting that analysis.

Part II of this Article describes the recent development in the Supreme Court's habeas corpus jurisprudence focusing on the "clearly established" clause of the key AEDPA provision, and stressing that the law must be established through the holdings, not dicta, contained in Supreme Court precedents. Part III analyzes the Court's treatment of ineffective assistance of counsel claims to show first, in Part III.A, that it has not confined itself to the holdings of precedents to find the applicable "clearly established Federal law" in those cases. Part III.B goes on to demonstrate, through reexamination of recent ineffective assistance of counsel cases, how using the Court's novel interpretation of "clearly established law" to focus on the fact-specific holdings of the

at 1261. The warden's petition seeking review of this decision was finally once again granted after nineteen months, with the judgment vacated and remanded in light of *McDaniel. Smith*, 2010 WL 154859.

[17] *In re* Davis, 130 S. Ct. 1, 2 (2009).

[18] *Id.*

[19] *See* Thaler v. Haynes, No. 09-273, 2010 U.S. LEXIS 1037 (U.S. Feb. 22, 2010) (per curiam).

[20] *Id.* at *6–8; Batson v. Kentucky, 476 U.S. 79 (1986).

[21] *Thaler*, 2010 U.S. LEXIS 1037, at *6–8.

Court's precedents could easily have changed the outcome—indeed, would have mandated the opposite result. This Article then proceeds, in Part IV, to critique the Court's approach by (1) analyzing the language of the provision and its interpretation in prior cases and other contexts; and (2) examining the purpose behind the habeas remedy and warning of the potential for manipulation given how differently the holdings of cases interpreting the Constitution can be characterized. Finally, Part V proposes adherence to a methodology more in keeping with the language and policy behind the federal habeas statute, yet giving appropriate consideration to the opinions of state courts.

II. FROM "UNREASONABLE APPLICATION" TO "CLEARLY ESTABLISHED FEDERAL LAW"

The pertinent section of AEDPA states that a federal court may not grant a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[22]

In the first case to provide detailed interpretation of this clause, *Williams v. Taylor*,[23] the Court primarily focused on the "contrary to" and "unreasonable application of" phrases.[24] It was seen as a given that in 1984, the Supreme Court in *Strickland v. Washington*[25] had "clearly established" the federal law governing resolution of the petitioner's claim that he had been deprived of the constitutional right to the effective assistance of counsel.[26]

Later cases in which the Court confronted claims of ineffective assistance of counsel raised in habeas corpus petitions governed by AEDPA followed the same pattern. Thus, in *Wiggins v. Smith*,[27] where the Court found that counsel failed to meet prevailing professional norms when they did not thoroughly investigate the defendant's background, Justice O'Connor's opinion strongly relied on *Strickland* and *Williams* as having set forth the controlling law.[28] Concluding that counsel's performance in *Wiggins* was deficient, unlike that of the attorney in

[22] 28 U.S.C. § 2254(d)(1) (2006).

[23] 529 U.S. 362 (2000). Justice O'Connor delivered the opinion of the Court with respect to Part II, setting forth the interpretation of § 2254(d)(1), while concurring in the opinion for the Court, written by Justice Stevens, as to its application to *Williams*. *Id.* at 399, 402.

[24] *Id.* at 412–13.

[25] 466 U.S. 668, 687 (1984) (stating that a petitioner must show both deficient performance and prejudice to prevail on a Sixth Amendment ineffective assistance of counsel claim and finding the defendant was not denied effective assistance of counsel).

[26] *See Williams*, 529 U.S. at 413.

[27] 539 U.S. 510 (2003).

[28] *Id.* at 521–22.

Strickland, because they "chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible," the Court found habeas relief to be warranted.[29]

Similarly, in *Rompilla v. Beard*, a habeas petitioner argued that his attorneys' performance was deficient in that they failed to review the file of a prior conviction that, to counsel's knowledge, would be used by the prosecution as an aggravating factor in the penalty phase of a capital trial.[30] The opinion, written by Justice Souter, begins with the statement:

> This case calls for specific application of the standard of reasonable competence required on the part of defense counsel by the Sixth Amendment. We hold that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.[31]

Accordingly, the Court found that the petitioner was entitled to habeas relief under the *Strickland* standard.[32]

Even more recently, in *Schriro v. Landrigan*, the majority opinion written by Justice Thomas, albeit reversing the Ninth Circuit's grant of habeas on ineffective assistance grounds, did so primarily by reference to the "unreasonable application" clause.[33] The Court concluded that, even without an evidentiary hearing, the district court properly characterized the petitioner's ineffectiveness claim as not colorable under the *Strickland* standard.[34] Petitioner's claim failed because the state courts could reasonably determine that no prejudice flowed from counsel's failures to investigate and present mitigating evidence given the defendant's objections to such a presentation.[35]

> In short, 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.[36]

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[29] *Id.* at 527–29.

[30] 545 U.S. 374 (2005).

[31] *Id.* at 377.

[32] *Id.* at 393.

[33] 127 S. Ct. 1933, 1939 (2007).

[34] *Id.* at 1942–44.

[35] *Id.* at 1942. The different results in the *Rompilla* and *Landrigan* cases may well stem more from the significance of the mitigating evidence that counsel failed to uncover than from any variance in the Court's legal analysis.

[36] *Id.* Despite the Court's use of the "unreasonable application" prong, circuit courts may well read this opinion as carving out a rule, separate from *Strickland*, for the particular facts at issue. At least one court has explicitly done so. *See* Smith v. Patrick, 508 F.3d 1256, 1260 (9th Cir. 2007) (reading *Schriro v. Landrigan* as

At the same time, while the Supreme Court's treatment of these habeas petitioners' ineffective assistance of counsel claims fell explicitly under the "unreasonable application" prong of 28 U.S.C. § 2254(d)(1), some language in the Court's opinions also addressed the "clearly established Federal law" clause.[37] Indeed, Justice O'Connor's controlling opinion in *Williams v. Taylor* interpreting the "unreasonable application" standard, having "put to the side" the meaning of "clearly established Federal law, as determined by the Supreme Court of the United States," added, without further elaboration, "[t]hat statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."[38]

While this statement in *Williams* regarding the limitation of clearly established law to the "holdings, as opposed to the dicta" was an almost off-hand remark, as well as surely itself amounting to dicta,[39] the requirement that the law be established by specific Supreme Court holdings has recently become more prominent. In four cases reviewing decisions involving claims other than ineffective assistance of counsel, the Court's opinions contain language suggesting a cramped, narrow view of what law has been "clearly established" as determined by the Supreme Court.[40] Subsequently, that language, and the focus on what law has been clearly established for purposes of AEDPA review, has also been incorporated in cases raising claims of ineffective assistance of counsel, setting the stage for the warden's framing of his "Question Presented" in the *Knowles v. Mirzayance* case.[41]

The first reference to the *Williams* admonition that it is holdings, and not dicta, that form "clearly established Federal law, as determined by the Supreme Court of the United States" was made in *Tyler v. Cain*.[42] The Court, by a five-to-four majority, relied on the distinction between holdings and dicta to determine that the rule announced in *Cage v. Louisiana*,[43] declaring unconstitutional a jury instruction that diluted the reasonable doubt requirement, had not been made retroactive to cases on collateral review.[44] In the next three cases, the Court reversed the

presenting a new situation not governed by *Strickland* in light of the defendant's interference with counsel's attempt to present mitigation evidence), *vacated and remanded*, No. 07-1483, 2010 WL 154859 (U.S. Jan. 19, 2010) (mem.). For a discussion of *Smith*, see *infra* notes 148–53 and accompanying text.

[37] 28 U.S.C. § 2254(d)(1) (2006).

[38] Williams v. Taylor, 529 U.S. 362, 412 (2000).

[39] Given the Court's explicit finding that *Strickland* had set forth the applicable, clearly established law, the statement defining this phrase as referring to holdings, not dicta, did not constitute any part of, or rationale in support of, the decision in *Williams*, and therefore constituted dicta under any definition of that term.

[40] Carey v. Musladin, 127 S. Ct. 649 (2006); Yarborough v. Alvarado, 541 U.S. 655 (2004); Lockyer v. Andrade, 538 U.S. 63 (2003); Tyler v. Cain, 533 U.S. 656 (2001).

[41] 129 S. Ct. 1411 (2009); *see supra* notes 9–10 and accompanying text.

[42] 533 U.S. 656 (2001).

[43] 498 U.S. 39, 41 (1990) (per curiam).

[44] *Tyler*, 533 U.S. at 658–59.

Ninth Circuit's rulings in favor of habeas petitioners and expressed the view that insufficient Supreme Court precedent supported the granting of relief.

In *Lockyer v. Andrade*, the circuit court had concluded that Andrade's consecutive sentences of twenty-five years to life for stealing videotapes from Kmart stores under California's three strikes law violated the Eighth and Fourteenth Amendments' proscription against cruel and unusual punishment as interpreted by the relevant Supreme Court precedents.[45] Justice O'Connor's opinion reversing the grant of relief purported to find "clearly established" by these precedents only a "gross disproportionality principle" applicable in "exceedingly rare" and "extreme" cases.[46] Under this formulation, it would be almost impossible to arrive at a decision contrary to or unreasonably applying such an amorphous principle.[47]

The following term, a similar lack of clearly established Supreme Court law contributed to the ruling in *Yarborough v. Alvarado*, reversing the Ninth Circuit's grant of relief to a petitioner who had asserted that the state courts improperly failed to consider his age and inexperience in determining whether he was in custody for purposes of assessing his rights under the Fifth and Fourteenth Amendments.[48] Although the Court focused extensively on what law had been "clearly established," in both *Yarborough* and *Lockyer* the ultimate conclusion of the Court was framed by the "unreasonable application" clause, simply finding that given the uncertainty of Supreme Court precedents, the state courts' application of that law was not objectively unreasonable.[49]

The Court's reliance on the absence of clearly established law, as reflected in the holdings of Supreme Court cases, moved decisively from the sidelines to center stage in *Carey v. Musladin*.[50] The defendant, who relied on a claim of self-defense, asserted there had been a violation of his right to due process and a fair trial when family members and friends of the homicide victim seated in the audience wore buttons with a photograph of the victim's face.[51] The Ninth Circuit agreed, basing its

[45] 538 U.S. 63, 66–68, 77 (2003).

[46] *Id.* at 73 (quoting Harmelin v. Michigan, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring in part and concurring in judgment)). These characterizations, notably, also stem from dicta.

[47] Ironically, on the same day the Court decided Andrade's case, it issued an opinion in a case arising on direct review in which, with O'Connor writing the opinion, the Court appeared to have no trouble discerning the relevant proportionality principle from its Eighth Amendment jurisprudence. *See* Ewing v. California, 538 U.S. 11, 30–31 (2003). *See also* Allen 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, 734 (2003).

[48] 541 U.S. 652, 655, 664 (2004).

[49] *Id.* at 664; *Lockyer*, 538 U.S. at 77.

[50] 127 S. Ct. 649 (2006). *See The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 335 (2007).

[51] *Musladin*, 127 S. Ct. at 651.

decision on two Supreme Court cases, *Estelle v. Williams*[52] and *Holbrook v. Flynn*,[53] supplemented by a circuit court decision involving spectators wearing "Women Against Rape" buttons at a defendant's rape trial.[54]

The Supreme Court's *Musladin* reversal was unanimous, but three justices concurred only in the judgment, writing separate opinions.[55] Justice Thomas's opinion for the Court, after noting the admonition in *Williams v. Taylor* that clearly established law refers to holdings rather than dicta, characterized the "holdings" of *Estelle v. Williams* and *Flynn* in terms of government-sponsored practices.[56] In contrast to those cases, *Musladin* involved spectator conduct, the effect of which on a defendant's fair trial rights was, according to Justice Thomas, "an open question in our jurisprudence. This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial."[57]

Justice Stevens took specific issue with Justice Thomas's invocation of Justice O'Connor's holdings/dicta dichotomy in *Williams*. He first noted that her statement that clearly established law refers to holdings, not dicta, was itself "a somewhat ironic dictum," given that the so-called *Strickland* standard for ineffective assistance of counsel, largely contained in dicta, had been recognized as "clearly established law" for more than twenty years.[58] He then voiced his disagreement with the rule Justice O'Connor had announced, characterizing it as "an incorrect interpretation" of AEDPA's text.[59] He went on to stress the importance of explanatory language in the Court's opinions announcing new constitutional principles to provide guidance for future cases, and pronounced it "quite wrong to invite state court judges to discount the importance of such guidance on the ground that it may not have been

[52] 425 U.S. 501, 512–13 (1976) (finding a due process violation when the defendant was forced to wear prison clothing, although affirming the conviction because no objection had been raised at trial). Technically speaking, what Justice Thomas in *Musladin* described as the holding could be considered dicta, as the Court did not grant relief to Williams because his attorney failed to object to his wearing prison garb at the trial. *See Musladin*, 127 S. Ct. at 653.

[53] 475 U.S. 560, 570–71 (1986) (finding no due process violation when four uniformed troopers sat behind the defendant). The standard announced regarding a due process violation here was also, strictly speaking, dicta.

[54] Norris v. Risley, 918 F.2d 828, 829 (9th Cir. 1990).

[55] *Musladin*, 127 S. Ct. at 654, 656, 657.

[56] *Id.* at 653 (citing Williams v. Taylor, 529 U.S. 362, 412 (2000); *Flynn*, 475 U.S. 560; *Estelle v. Williams*, 425 U.S. 501).

[57] *Id.* This statement was followed by a footnote conceding that the Court had considered cases in which trials were a sham or mob dominated, with parentheticals suggesting that the judges' failures to control the trials placed these fact patterns into the state actor category. *Id.* at 653 n.2. Why the judge in Musladin's case was not similarly situated was not explained.

[58] *Id.* at 655 (Stevens, J., concurring); *see infra* Part III.

[59] *Id.* at 655.

strictly necessary as an explanation of the Court's specific holding in the case."[60]

Justice Kennedy, also concurring only in the judgment, began his opinion with a strong statement that the constitutional law at issue had indeed been clearly established: "Trials must be free from a coercive or intimidating atmosphere. This fundamental principle of due process is well established."[61] Perhaps thinking of a hypothetical, posed during oral argument, of audience members wearing large buttons proclaiming: "Hang Musladin!," Justice Kennedy stated that if buttons created an intimidating atmosphere, AEDPA relief would be available even without a Supreme Court precedent addressing the wearing of buttons.[62] Indeed, the Deputy Attorney General conceded at oral argument that habeas relief would be appropriate under these circumstances.[63] Here, however, the facts did not suggest the kind of coercive atmosphere condemned in the Court's precedents, and a rule prohibiting the wearing of any buttons relating to the case, as a preventative measure, would call for a new rule that should first be explored on direct review.[64]

Justice Souter's concurrence, acknowledging that there is some lack of clarity in defining "clearly established" law,[65] found that the constitutional standard controlling Musladin's case had indeed been clearly established by the Court.[66] Based on the Supreme Court's decisions in *Flynn* and *Estelle v. Williams,* he saw the question as revolving around whether what occurred at the trial presented an "unacceptable risk . . . of impermissible factors coming into play" in the jury's consideration of the case.[67] He added: "The Court's intent to adopt a standard at this general and comprehensive level could not be much clearer."[68] He saw nothing in the Court's decisions suggesting a distinction between improper influences caused by the State or by spectators, but concurred in the result here because the state court's conclusion that the risk did not rise to the level of the unacceptable was not unreasonable.[69]

Shortly after the ruling in *Musladin*, the Supreme Court addressed an ineffective assistance of counsel claim in *Landrigan*.[70] While the Court, as described above,[71] analyzed the claim under the "unreasonable application" clause, Justice Thomas's opinion for the majority also used

[60] *Id.*

[61] *Id.* at 656 (Kennedy, J., concurring).

[62] *Id.* ("AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.").

[63] Transcript of Oral Argument at 19, *Musladin*, 127 S. Ct. 649 (No. 05-785).

[64] *See id.* at 16–18.

[65] For a discussion on the lack of clarity, see *supra* text accompanying note 7.

[66] *Musladin*, 127 S. Ct. at 657 (Souter, J., concurring).

[67] *Id.* (quoting Holbrook v. Flynn, 475 U.S. 560, 570 (1986)).

[68] *Id.*

[69] *Id.* at 657–58.

[70] Schriro v. Landrigan, 127 S. Ct. 1933 (2007).

[71] *See supra* notes 33–36 and accompanying text.

language suggesting the absence of clearly established Supreme Court precedent on the issue. He noted that neither *Wiggins* nor *Strickland* addressed a situation where a client had interfered with counsel's efforts to present mitigating evidence: "Indeed, we have never addressed a situation like this."[72] Moreover, he distinguished *Rompilla*, on which the Ninth Circuit had also relied, on the ground that although the defendant had refused to assist in the development of a mitigation case, he had not informed the court that he did not want mitigation presented.[73]

In another case involving a right to counsel claim, *Wright v. Van Patten*, the Court reversed the Seventh Circuit's grant of habeas relief, reaffirmed after a remand in light of *Musladin*, to a petitioner whose attorney was "present" on the other end of a speakerphone at the proceeding in which he entered a guilty plea.[74] The Wisconsin courts had analyzed the claim under *Strickland* and denied relief in light of petitioner's failure to show prejudice from this form of representation. The circuit court, on the other hand, found that the petitioner was deprived of the assistance of counsel at this critical stage of the proceedings, warranting reversal without a finding of prejudice pursuant to an exception of the *Strickland* rule announced the same day in *United States v. Cronic*.[75] The Supreme Court's per curiam opinion in the *Van Patten* case stressed that:

> No decision of this Court, however, squarely addresses the issue in this case . . . or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context. Our precedents do not clearly hold that counsel's participation by speaker phone should be treated as a "complete denial of counsel," on par with total absence.[76]

Justice Stevens concurred in part in the judgment, joining in reversal only on the basis that "[a]n unfortunate drafting error in the Court's opinion in *United States v. Cronic*" failed clearly to establish that counsel must be physically present in court.[77]

Finally, in *Knowles v. Mirzayance* the Court, with Justice Thomas writing the opinion, reversed the Ninth Circuit's grant of relief to the petitioner.[78] The decision was unanimous, although interestingly Justices Ginsburg, Scalia, and Souter did not join in the part of the opinion addressing the habeas standard, agreeing with the result only because the petitioner could not, in their view, prevail on his ineffective assistance

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[72] *Landrigan*, 127 S. Ct. at 1942.

[73] *Id.*

[74] Wright v. Van Patten, 128 S. Ct. 743, 744 (2008) (per curiam), *rev'g* 489 F.3d 827 (7th Cir. 2007) (reinstating prior judgment after Supreme Court had vacated it).

[75] Van Patten v. Deppisch, 434 F.3d 1038, 1041–43 (7th Cir. 2006) (citing United States v. Cronic, 466 U.S. 648 (1984)), *vacated*, 127 S. Ct. 1120 (2007) (mem.), *reinstated*, 489 F.3d 827, *rev'd*, 128 S. Ct. 743.

[76] *Van Patten*, 128 S. Ct. at 746 (citations omitted).

[77] *Id.* at 747 (Stevens, J., concurring).

[78] 129 S. Ct. 1411, 1414–15 (2009); *see supra* notes 9–10 and accompanying text.

claim even applying de novo review.[79] In his discussion of the AEDPA standard, Justice Thomas chided the circuit for its conclusion that petitioner was deprived of the effective assistance of counsel when his attorney, for no strategic reasons, abandoned the sole defense of insanity, finding that the court improperly applied a "nothing to lose" gloss on the *Strickland* standard.[80] He noted pointedly: "This Court has never established anything akin to the Court of Appeals' 'nothing to lose' standard for evaluating *Strickland* claims."[81] Furthermore, "the Court of Appeals did not cite any Supreme Court decision establishing a 'nothing to lose' standard."[82] Under these circumstances, the court should have evaluated counsel's conduct under the general *Strickland* standard, asking whether the state court's determination that counsel provided effective assistance was unreasonable, which he noted was a substantially higher threshold than whether the determination was incorrect.[83]

The common theme of the *Musladin* line of cases is that circuit courts have improperly decided to grant relief to a habeas corpus petitioner in situations where the Supreme Court had not addressed the constitutional claim at issue in the same factual context raised by the habeas petition. The more specific facts that are incorporated in the characterization of the "holding," the narrower that holding will be, and, by necessary implication, explanations of the rationale for the court's conclusion that stray from the facts at issue can be described as "dicta." It is this aspect of the recent habeas corpus jurisprudence that poses serious potential problems. If a habeas petitioner must demonstrate that the Supreme Court has "clearly established" the law applicable to his particular factual circumstance, relief pursuant to AEDPA will not only be severely curtailed, but applied in an arbitrary way simply by the happenstance of the small number of cases granted direct review in the Supreme Court.

III. THE HOLDING/DICTA PARADIGM DOES NOT EXPLAIN WHAT THE SUPREME COURT ITSELF HAS PRONOUNCED TO BE "CLEARLY ESTABLISHED" LAW

As any first year law student knows, distinguishing holdings from dicta is by no means a straightforward assignment. An extensive body of literature has debated the various ways to distinguish holdings from dicta, with different implications for notions of judicial legitimacy and stare decisis. In his 2005 Madison lecture, Judge Pierre Leval set forth a definition that, at least theoretically, should enable an objective reader of

[79] *Mirzayance*, 129 S. Ct. at 1414, 1418–19.
[80] *Id.* at 1419.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 1420.

an opinion to distinguish its holding from any dicta.[84] In his words, "A dictum is an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner."[85] Judge Leval acknowledged that the line between holding and dicta, while often clear, can at times also be murky.[86] In that zone, the precedential value of a court's statements, whether properly characterized as holding or dicta, should depend on how closely the assertion matches the court's justification of its decision.[87]

This focus on a court's rationale for its conclusions as a critical aspect of American legal decision-making has formed a key component of Frederich Schauer's scholarship in the area.[88] When a court provides reasons for its conclusion, it operates as a form of commitment to decide future cases in accordance with the same rationale. The more general the reasons, the more sweeping is the potential applicability of those reasons to a wide range of fact patterns. The more particular the reason given, the less likely it is to produce reliance, perhaps unwarranted, that the same result will follow given somewhat different facts. In either event, if a new case is decided in a way that diverges from the logical implications of the reasons given, it would be expected that the court would provide an explanation, if not an apology, for failure to abide by the earlier pronouncement, even if the specific facts are distinguishable.[89] In other words, the reasons given by courts, even if technically contained in dicta, are worthy of respect quite apart from the narrow holdings of their precedents.

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[84] Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1256 (2006). Judge Leval's principal message in this speech was, as I understand it, a strong plea for courts to identify explicitly and scrupulously the holding of a case, and just as clearly to differentiate any statements that are not necessary to the outcome in the case. His primary concern was the treatment of dicta (which, as he noted, might be dressed as a holding: "A dictum is not converted into holding by forceful utterance, or by preceding it with the words 'We hold that . . . .'") as binding in future cases when, in fact, the new case may present a legally significant factual variation that should be considered thoughtfully without the shadow of a prior determination. *Id.* at 1257.

[85] *Id.* at 1256.

[86] *Id.* at 1258.

[87] *Id.* at 1258 n.23.

[88] *See, e.g.*, Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

[89] Professor Schauer illustrates this idea with a "silly" hypothetical: Talking about food with a friend, he says he adores lobster. Asked why, he says he likes the red color, finds the taste and texture of shellfish very appealing, and enjoys the process of cracking the shells and working to remove the flesh inside. When he is invited to her house two weeks later for dinner, she serves crab legs. Because he was bitten by a crab as a child, he strongly dislikes crab legs and does not eat them. *Id.* at 644. Schauer concludes that his dinner host has reason to feel more aggrieved by his refusal to eat the crab legs than she would have been had he not given his reasons for liking lobster. *Id.*

A. The Standard for Effective Assistance of Counsel Has Evolved Primarily Through Dicta in Supreme Court Precedents

With this understanding of the difference between holdings and dicta in mind, the Supreme Court's unanimous, and apparently uncontroversial, conclusion in *Williams v. Taylor* that the law governing a claim of effective assistance of counsel had been clearly established, presumably through the holdings of its precedents, is puzzling at best.[90] The Supreme Court's jurisprudence regarding the contours of the Sixth Amendment right to counsel developed primarily through its statement of reasons, almost exclusively contained in dicta, in the seminal opinion on this subject, *Strickland v. Washington*.[91] In this case, the Court announced the familiar two-pronged test for determining whether a defendant was deprived of the effective assistance of counsel. A defendant must show both that the attorney's performance was deficient according to the norms of the profession and that this deficiency caused prejudice, defined as a reasonable probability that, but for the deficient performance, the outcome would have been more favorable.[92]

In the *Strickland* case itself, however, the Court found that defense counsel's performance was neither deficient under the newly announced principles, nor did it cause prejudice according to the test adopted by the Court.[93] Accordingly, the "holding" in that case is far from clear. First, the Court's conclusion, finding that counsel's conduct was not deficient, might well have been the same even under a different standard for measuring performance. To the extent that the language explaining the appropriate standard for assessing effectiveness was not necessary to the outcome, that language, in Judge Leval's terms, amounts to dicta. In fact, one could argue that the entirety of the Court's description of the effective performance prong consisted of dicta in light of the determination that, even had his attorney's performance been deficient, the defendant suffered no prejudice. As the defendant has to satisfy both prongs, the result in the case would have been the same even if counsel's performance had been found deficient. Second, because the Court found that the defendant was not entitled to relief under the prejudice prong in any event, the precise formula for assessing prejudice also did not amount to a holding in the case. It is entirely possible that the Court would have arrived at the same result had it formulated the prejudice requirement differently, or had it placed the burden on the prosecution to show that the defendant had not suffered prejudice from his attorney's poor performance. Only Justice Marshall's dissenting opinion, declaring that the petitioner should not be required to show any prejudice from

[90] *See* 529 U.S. 362, 390 (2000).
[91] *See* 466 U.S. 668 (1984).
[92] *Id.* at 694.
[93] *Id.* at 699–700.

deficient performance by defense counsel,[94] would have signaled a different result.

Strictly speaking, therefore, *Strickland* itself contains no holding with regard to an ineffective assistance claim, as on the facts before the Court, the petitioner was denied relief. Moreover, that conclusion was based on two separate rationales, either of which would have achieved the same result. As the next Part demonstrates, had the Court been limited to reliance on the holding of *Strickland*, subsequent ineffective assistance of counsel cases in which the Court granted habeas relief might well have been decided differently.

B. Were Clearly Established Law Limited to Holdings, Habeas Relief Should Have Been Denied in Recent Supreme Court Cases

To illustrate the difference between an approach that asks whether a state court unreasonably applied federal law and one that insists on identifying the precise contours of that law through the holdings of Supreme Court precedents, it is instructive to examine a series of recent cases addressing claims of ineffective assistance of counsel under the *Strickland* standard. In all of these cases, federal courts granted habeas relief pursuant to AEDPA. Yet a court confronting the facts in these cases could easily have characterized the issue in a way that would find an absence of Supreme Court precedent, embodied in holdings and not dicta, clearly establishing the law that would entitle the petitioner to relief. According to the *Carey v. Musladin* approach, therefore, given the lack of "clearly established Federal law, as determined by the Supreme Court of the United States,"[95] the petitions should have been denied.

In the very first case interpreting the AEDPA language, *Williams v. Taylor*, the trial attorney failed to present potentially mitigating facts relating to the defendant's troubled childhood and his good adjustment to the structured prison environment, relying instead on his cooperation with law enforcement, admission of culpability, and remorse.[96] The strategy of David Leroy Washington's counsel, whose performance was deemed adequate in *Strickland v. Washington*, the case establishing the standard for effective assistance, was strikingly similar. Counsel there had failed to investigate or present evidence about defendant's character and emotional state, focusing instead on his guilty plea, expression of remorse, and acceptance of responsibility to try to persuade the judge not to impose a death sentence.[97] In addition, on the prejudice prong, the Supreme Court of Virginia in the *Williams* case had noted that in light of the strong evidence supporting the aggravating factor of "future dangerousness," the additional mitigating evidence would not have

[94] *Id.* at 710 (Marshall, J., dissenting).
[95] 28 U.S.C. § 2254(d)(1) (2006).
[96] 529 U.S. 362, 370, 398 (2000).
[97] *Strickland*, 466 U.S. at 673.

affected the jury's sentencing recommendation.[98] Similarly, the Florida courts had found that the additional evidence proffered on behalf of Washington in *Strickland* would not have affected the outcome.[99] When the federal court was confronted with the habeas petition brought on Williams's behalf, no prior Supreme Court opinion had held that a defendant was deprived of the effective assistance of counsel under these particular circumstances. Yet the Supreme Court in this case, applying the AEDPA standard, concluded that Williams, unlike Washington, was entitled to relief.[100]

Similarly, the judge examining the habeas petition brought by Kevin Wiggins in *Wiggins v. Smith*[101] could state, without fear of contradiction, that no Supreme Court case had ever held a lawyer ineffective for failing to follow up on information suggesting that further investigation might be fruitful. *Strickland* was not such a case. The Court could have said, as Justice Thomas did in *Schriro v. Landrigan*: "Indeed, we have never addressed a situation like this."[102] Once again the Supreme Court granted relief despite the absence of such a fact-specific precedent.[103]

The third recent case, *Rompilla v. Beard*, involving ineffective assistance of counsel in a capital case follows the same pattern.[104] The district court trying to decide whether to grant relief to Ronald Rompilla would have searched in vain for a Supreme Court case where counsel was deemed ineffective for failing to look at the record of a prior conviction on which he knew the prosecution would rely at the penalty phase of a capital trial. Responding to the dissenting opinion's objection that the Court appeared to be imposing a rigid requirement on defense counsel to review all the documents in the case file of any prior conviction on which the prosecution might rely in a capital case, Justice O'Connor, concurring, sought to put any such concern to rest. Insisting that no overarching rule had been set forth, she stated: "Rather, today's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland v. Washington*. Trial counsel's performance in Rompilla's case falls short under that standard, because the attorneys' behavior was not 'reasonable considering all the circumstances.'"[105]

These alternative ways of approaching ineffective assistance of counsel claims surely demonstrate the folly of demanding clearly established law, as reflected in the specific holdings of Supreme Court precedents, in order to grant habeas relief. Moreover, as developed in the next Part, neither the language of AEDPA, nor the purpose behind

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[98] *Williams,* 529 U.S. at 371–72.
[99] *Strickland*, 466 U.S. at 699–700.
[100] *Williams*, 529 U.S. at 398–99.
[101] 539 U.S. 510 (2003).
[102] Schriro v. Landrigan, 127 S. Ct. 1933, 1942 (2007).
[103] *Wiggins*, 539 U.S. at 528–29.
[104] 545 U.S. 374 (2005).
[105] *Id.* at 393–94 (O'Connor, J., concurring) (citation omitted).

the federal habeas remedy, warrant such a narrow approach. In addition, placing emphasis on holdings, rather than on the constitutional principles underlying the precedents, may encourage unseemly manipulation of the proper way of characterizing the holdings of cases, as well as resulting in arbitrary decisions on federal habeas petitions depending on what fact patterns happen to have made their way to the Supreme Court on direct review.

IV. LIMITING "CLEARLY ESTABLISHED FEDERAL LAW" UNDER AEDPA TO THE FACT-BASED HOLDINGS OF SUPREME COURT CASES IS UNWARRANTED

A. The Natural Meaning of the Phrase "Clearly Established" Law Focuses on the Reach of Constitutional Principles; Limitation to Fact-Based Holdings Would Read the Unreasonable Application Clause Out of the Statute

The most natural reading of the clause limiting habeas relief to state decisions that are "contrary to, or involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,"[106] puts the emphasis on decisions that contradict, or unreasonably interpret, established law. If there is no established law, there is obviously nothing to which the state court decision can be compared, either in terms of whether it is "contrary to" established principles or in terms of whether it has failed to apply those principles to situations in which they should be applied. The more the focus is placed on delineating the law that has been "clearly established," the less federal courts will be obligated to look at how state courts are treating that law.

The statute uses the term "clearly established Federal law."[107] It does not define that phrase, and nowhere does it restrict such law by reference to holdings as opposed to dicta, or indeed in any other way. The Supreme Court has, however, interpreted the phrase "clearly established law" in other contexts that provide useful insight into its meaning. There is no reason to believe that Congress had a different interpretation of the phrase in mind when it enacted AEDPA.[108]

State officials may be held liable for civil penalties[109] or may be prosecuted criminally[110] for violation of a person's constitutional rights.

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[106] 28 U.S.C. § 2254(d)(1) (2006).

[107] *Id.*

[108] Justice Stevens has expressed the view that Congress had *Teague v. Lane* retroactivity principles in mind and was not specifically incorporating principles from the doctrine of qualified immunity. *See* Williams v. Taylor, 529 U.S. 362, 379–80, 380 n.12 (2000) (citing Teague v. Lane, 489 U.S. 288 (1989)). Justice Stevens argued that the significant change in AEDPA revolved around the requirement that the law be established by the Supreme Court itself, rather than by lower federal courts. *Id.* at 381.

[109] 42 U.S.C. § 1983 (2006).

[110] 18 U.S.C. § 242 (2006); United States v. Lanier, 520 U.S. 259, 269 (1997) (applying the same definition of whether a constitutional right was "clearly

Both in analyzing when officials are entitled to qualified immunity under 42 U.S.C. § 1983, and when dealing with the issue of what notice is required under the due process clause before criminal liability may be imposed, the Supreme Court has found the determinative question to be whether the law clearly established that the official's conduct violated constitutional rights.[111]

In *Hope v. Pelzer*, the Court addressed the question of how closely the facts in controlling precedents must mirror those in the matter at hand.[112] The Court of Appeals for the Eleventh Circuit had affirmed the district court's ruling, on summary judgment, that officers who had handcuffed a prisoner to a hitching post in the hot sun for many hours as punishment were entitled to immunity based in part on the fact that previous cases had not involved "materially similar" facts.[113] The Supreme Court reversed, quoting a previous opinion on this topic:

> In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.[114]

The Court noted that the purpose of the clearly established law requirement is to provide adequate notice before civil, or even criminal, penalties may be imposed. The Court had before it an amicus brief submitted by the Solicitor General supporting the petitioner.[115] The United States noted its "interest in ensuring effective deterrence of unconstitutional conduct by government employees and in ensuring that adequate remedies exist for violations of constitutional rights."[116] With these considerations in mind, the Solicitor urged the Court to deny the

established" to 18 U.S.C. § 242, making it a crime for a state official to willfully and under color of law deprive a person of a constitutional right, as that phrase was used in the civil § 1983 context).

[111] The Supreme Court's recent abandonment in *Pearson v. Callahan* of the *Saucier v. Katz* approach, requiring federal courts to look first to whether a right exists before deciding whether it is so "clearly established" as to negate qualified immunity, does not affect the point made here, which involves not which question should be addressed first, but rather how to define the contours of "clearly established law." *See* Pearson v. Callahan, 129 S. Ct. 808, 813 (2009) (citing Saucier v. Katz, 533 U.S. 194 (2001)).

[112] 536 U.S. 730, 733 (2002).

[113] Hope v. Pelzer, 240 F.3d 975, 977, 981 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002).

[114] *Hope*, 536 U.S. at 740–41 (quoting *Lanier*, 520 U.S. at 271).

[115] Brief for the United States as Amicus Curiae Supporting Petitioner, *Hope*, 536 U.S. 730 (No. 01-309).

[116] *Id.* at 2.

officials qualified immunity despite the lack of precedent involving materially similar facts.[117] In ruling for petitioner, the Supreme Court adopted this very line of reasoning to conclude that the conduct at issue violated "clearly established" constitutional rights.[118] It may be noteworthy that Justice Thomas remarked in his dissenting opinion: "[I]t is crucial to look at precedent applying the relevant legal rule in similar factual circumstances."[119]

In the criminal context referred to in the *Hope* opinion, the concept of adequate notice is enshrined as a bedrock component of the Due Process Clause. Yet even with liberty at stake, such notice that an official is violating a person's constitutional rights can be clear without an opinion identifying the right in the context of fundamentally similar facts.[120] As the Court in *United States v. Lanier* noted, general statements of the law can give fair and clear warning, and indeed conduct may be so clearly violative of the Constitution that a case presenting the issue would never arise.[121]

Under this line of cases, it was deemed appropriate to force officials to pay fines or even to be sent to prison if their conduct violated constitutional principles that had been clearly established, albeit not announced in the holdings of any precedent. Requiring a particular factual scenario to make its way to the Supreme Court on direct review, especially given the vagaries of the Court's certiorari jurisdiction, would introduce undesirable instability into the interpretation of constitutional rights.[122] Surely if officials may be penalized, by civil penalties or criminal sanctions, for the violation of constitutional rights that have been clearly established in those terms, state courts making decisions about constitutional rights should be held at least to the same standard.

Such an interpretation of clearly established law to encompass more than the holdings of Supreme Court precedents was also suggested by the Court's own early description of what may be an "unreasonable application" of clearly established law. In *Williams v. Taylor*, Justice O'Connor noted that a state court decision could be unreasonable in two ways:

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[117] *Id.* at 16 ("[G]overnment officials are not immune from liability for clear constitutional violations simply because courts have never had occasion to enforce the relevant constitutional right on materially similar facts.").

[118] *Hope*, 536 U.S. at 744.

[119] *Id.* at 753 (Thomas, J., dissenting).

[120] United States v. Lanier, 520 U.S. 259, 269 (1997).

[121] *Id.* at 271. Quoting a dissenting judge in the lower court, the Court noted that "the easiest cases don't even arise," giving as an example the clear 42 U.S.C. § 1983 violation if welfare officials were accused of selling foster children into slavery, despite the absence of a precedent so holding. *Id.* (quoting *Lanier*, 73 F.3d 1380, 1410 (1996)).

[122] *See* County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) (noting that the general policy of constitutional avoidance is inappropriate when it would leave standards of official conduct uncertain).

> First . . . if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.[123]

Yet this second possibility is eliminated entirely if clearly established law consists only of narrow fact-sensitive holdings; any extension of legal principles, or failure to extend those principles, beyond the holdings of Supreme Court precedents would be immune from federal review. In addition, narrow construction of clearly established law in terms of holdings would severely limit the first way state courts might be unreasonable; the more specifically the "correct governing legal rule" is defined, the less likely that its application to another set of facts can be considered unreasonable. In both situations, if law can be "clearly established" only in terms of the particular facts at issue in the Supreme Court's precedents, a court confronted with a new factual context need not conduct any inquiry regarding the way the state courts applied federal law. Finding no law clearly established, its inquiry is at an end and habeas relief must be denied.

B. Narrow Interpretation of Clearly Established Law Is Inconsistent with the Federal Courts' Role as Protectors of Constitutional Principles When State Courts Flaunt or Adopt Unduly Cramped Interpretations of Those Principles

1. The Purpose Underlying the Availability of Federal Habeas Corpus Relief Requires Broad Acceptance of Constitutional Norms

Particularly in the context of the habeas corpus remedy, federal courts should be bound to respect the rationale of Supreme Court opinions interpreting the Constitution, not just the narrowly-defined holdings. At the very least, the reasoning used by the Court in arriving at its conclusion must be considered part of the established law. When a case announces a rule or principle that should logically apply to a range of factual contexts, that principle should be considered clearly established, such that habeas relief may be afforded despite the absence of a controlling precedent directly on point. Restricting the habeas remedy by focus on the particular holdings of Supreme Court precedents limits relief to the rather arbitrary category of petitioners whose facts happen to coincide with those of cases that reached the Supreme Court on direct appeal.

The rationale upon which a court bases its conclusion is an integral part of its decision. Even Judge Leval's strict definition of holdings encompasses the reasons provided by a court for rendering judgment in

[123] Williams v. Taylor, 529 U.S. 362, 407 (2000).

favor of the prevailing party.[124] Yet as Judge Leval acknowledged, courts faced with a precedent of which they disapprove have at times framed a case's holding so narrowly as simply to incorporate the specific facts and the outcome.[125] The significance of an unfavorable precedent is effectively undermined with a common opening salvo: "[Case X] is best understood in the context of its facts."[126]

2. Strict Limitation to "Holdings" Provides the Opportunity for Manipulation

Undue focus on whether the law has been established through explicit holdings also would encourage manipulation of what Supreme Court cases in fact held. As Judge Rosemary Barkett of the Court of Appeals for the Eleventh Circuit has persuasively demonstrated, Supreme Court opinions can be described in significantly different ways with correspondingly different outcomes in cases presenting new fact patterns.[127] When framed in terms of an "individual's right to make decisions about intimate matters pertaining to sexuality and personal relationships," the Court granted petitioners the right to use contraceptives, have an abortion during the first trimester of pregnancy, and marry a person of another race.[128] Yet when the Court was first confronted with a prosecution for homosexual sodomy, it looked to whether the Constitution specifically protected the right to engage in that conduct, rather than analyzing the issue in terms of the right to privacy in intimate sexual matters.[129] Not until fifteen years later, when it revisited the question in *Lawrence v. Texas*,[130] did the Court acknowledge that it had, in *Bowers v. Hardwick*,[131]

> "misapprehended the claim of liberty there presented" by framing the issue as whether the Constitution protects "a fundamental right to engage in consensual sodomy" when the Court's prior holdings had already made "abundantly clear" that individuals have a right to

[124] Leval, *supra* note 84, at 1257.

[125] *Id.* at 1256 n.20. *See also* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2003 (1994).

[126] *See, e.g.*, Wainwright v. Witt, 469 U.S. 412, 418 (1985). Chief Justice Rehnquist consigned *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the previously controlling case setting forth the standard for exclusion of jurors opposed to the death penalty, to virtual oblivion with this characterization. *See* Ursula Bentele, *Chief Justice Rehnquist, the Eighth Amendment, and the Role of Precedent*, 28 AM. CRIM. L. REV. 267, 287–91 (1991).

[127] Rosemary Barkett, *The Tyranny of Labels*, 38 SUFFOLK U. L. REV. 749, 752 (2005).

[128] *Id.* (citing Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965)).

[129] *See* Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

[130] 539 U.S. 558 (2003).

[131] 478 U.S. 186.

> make personal decisions "concerning the intimacies of their physical relationships."[132]

Such recharacterization of the holdings of cases has already been in evidence in the Supreme Court's recent habeas corpus jurisprudence. In *Carey v. Musladin*, for example, the majority reframed the precedents cited by the habeas petitioner to focus on the fact that the outside influence in those cases had involved state actors in an attempt to negate their relevance for a case involving private action by members of the audience in a courtroom.[133] Yet in some instances when private behavior caused the risk of external influence on a jury, such as in the mob-dominated trial, the Court had also found a constitutional violation.[134] That can be explained either by looking at the judge's role in regulating such behavior, in which case the buttons worn by audience members would surely also fall within that category, or one can describe the principle announced by the cases more broadly as covering both private and official state conduct whenever it poses an unacceptable risk of improper outside influence. As the Court has explained, when a principle sets a standard governing a wide range of possible fact patterns, state courts have greater leeway in applying that principle in a "reasonable" fashion, making it more difficult for a federal court to conclude that a state court decision constitutes an objectively unreasonable application of clearly established law.

V. FEDERAL HABEAS COURTS HAVE AN OBLIGATION TO ENSURE THAT STATE COURTS ADHERE TO FUNDAMENTAL CONSTITUTIONAL PRINCIPLES

Rather than straining to determine the fact-specific contours of clearly established law, habeas courts will better serve the cause of upholding the Constitution if they look to the fundamental principles contained in Supreme Court opinions interpreting constitutional rights. The more general these principles are, the wider the range of permissible application to particular facts. Accordingly, federal courts are likely to find that state court decisions adverse to criminal defendants were not contrary to, and did not unreasonably apply, such broad constitutional norms. On the other hand, if a fundamental constitutional principle was indeed violated, the habeas petitioner may prevail even without a Supreme Court precedent directly on point.

A series of cases arising from *United States v. Cronic*[135] serves to illustrate the differing approaches. In *Cronic*, the defendant had argued,

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[132] Barkett, *supra* note 127, at 753 (citations omitted) (quoting *Lawrence*, 539 U.S. at 567, 577–78 (overruling *Bowers*, 478 U.S. 186)).

[133] 127 S. Ct. 649, 651–53, 653 n.2 (2006); *see supra* notes 56–57 and accompanying text.

[134] *See, e.g.*, *supra* notes 57, 67–69 and accompanying text.

[135] 466 U.S. 648 (1984).

and the Court of Appeals for the Tenth Circuit agreed, that he was deprived of his Sixth Amendment right to effective counsel when, shortly before the trial date, an inexperienced real estate attorney who had never conducted a jury trial was appointed and given only twenty-five days to prepare for trial on a complex bank fraud case after retained counsel withdrew.[136] The Supreme Court reversed, finding that this situation was properly analyzed under the *Strickland* standard—announced the same day—so that Cronic would have to demonstrate not only deficient performance by his trial attorney, but also that he was prejudiced thereby.[137] In its opinion, however, the Court carved out an exception to the *Strickland* requirement that a defendant alleging ineffective assistance must show prejudice, stating that "[t]here are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[138] The Court concluded, again in dicta given that Cronic did not fall within this exception, that a probable effect upon the outcome should be presumed where assistance of counsel has been denied entirely, during a critical stage of the proceeding, or when counsel entirely failed to subject the prosecution's case to meaningful adversarial testing.[139]

When petitioners have sought habeas relief on the basis of ineffective assistance under the *Cronic* exception, the Supreme Court has consistently assumed that the presumption of prejudice announced in that case was part of the constitutional interpretation of the right to the effective assistance of counsel. Never has the Court suggested that because it was technically dicta in the *Cronic* case itself, it need not be followed. The Court has, however, strictly limited the category of cases in which prejudice will be presumed to situations where counsel was indeed entirely absent during a critical stage of the proceedings or totally failed to subject the prosecution's case to adversarial testing. In *Bell v. Cone*, for example, the Court reversed the Sixth Circuit's grant of habeas, under the *Cronic* principle presuming prejudice, where defense counsel had failed to present any mitigation or closing argument at the penalty phase of a capital trial.[140] The Court concluded that because this did not amount to a total failure to test prosecution's case, the *Strickland* standard should have been applied.[141] Similarly, in *Florida v. Nixon*, where the Florida Supreme Court determined that a defense attorney's concession of defendant's guilt of murder at trial phase without the express consent of the client amounted to such a total failure to test the prosecution's case that prejudice should be presumed under *Cronic*, the U.S. Supreme Court disagreed.[142] Finding that counsel's concession might have been

[136] *Id.* at 649–50.
[137] *Id.* at 666 n.41.
[138] *Id.* at 658.
[139] *Id.* at 659.
[140] Bell v. Cone, 535 U.S. 685, 701–02 (2002).
[141] *Id.* at 702.
[142] Florida v. Nixon, 543 U.S. 175, 178 (2004).

based on strategic considerations, the Court instead analyzed the case under *Strickland* and concluded that the defendant could not show a reasonable probability of a more favorable outcome.[143]

Given this gloss that the Supreme Court had placed on the *Cronic* principle, the Wisconsin courts' conclusion in *Wright v. Van Patten* that the defendant had not been entirely deprived of the assistance of counsel, when counsel was "present" by speakerphone,[144] could hardly be considered an unreasonable application of clearly established law. Yet the Supreme Court did not use that rationale to reverse the Court of Appeals for the Seventh Circuit. Instead, the Court framed the issue in terms of whether there was any clearly established law governing the question, and finding no precedents involving an attorney "present" by speakerphone, concluded that there was not.[145]

As noted above, Justice Stevens concurred, lamenting the fact that, because of a "drafting error" in *Cronic*, the Supreme Court had not clearly established that a lawyer must be physically present in court at critical stages.[146] Accordingly, the Wisconsin courts' decision analyzing the issue under *Strickland* was not "objectively unreasonable." Stevens stressed that this does not mean that the state courts' conclusion was correct, or that their view of the requirements under *Cronic* would have been accepted had the case come to the Court on direct review.[147]

This stark differentiation between constitutional principles that will be found determinative on direct review and those that govern a federal habeas petition is unfortunate, both from the point of view of doing justice and the appearance of justice. When two defendants suffer the same violation of fundamental rights, providing relief to one and not the other can only undermine public perception that the Constitution sets forth controlling standards to be applied regardless of the procedural posture of a case. True, retroactivity principles may under certain circumstances warrant departure from the ideal of evenhanded justice in the interests of the finality of judgments, but those situations should constitute the exceptions, not the rules.

Two different possible approaches to the ineffective assistance of counsel claim were recently argued before the Court.[148] One approach, based on *Strickland* rather than *Cronic* principles, could have further elucidated the consequences of focusing on the particular facts of the Court's precedents in looking for law that has been clearly established. At oral argument in *Smith v. Spisak*, Justice Ginsburg asked whether any Supreme Court case had found ineffective assistance of counsel based

[143] *Id.* at 189–90.

[144] Wright v. Van Patten, 128 S. Ct. 743, 744 (2008) (per curiam).

[145] *Id.* at 746.

[146] *Id.* at 747 (Stevens, J., concurring); s*ee supra* note 77 and accompanying text.

[147] *Id.* at 748.

[148] *See* Smith v. Spisak, 130 S. Ct. 676 (2010); *supra* notes 11–13 and accompanying text.

solely on the attorney's closing argument.[149] The answer was no.[150] Based on this exchange, the Court might have concluded that no law has been clearly established regarding the effect of counsel's summation on an ineffective assistance claim, thereby precluding habeas relief. If a defendant happened to secure direct review in a case in which counsel essentially argued for the prosecution in closing argument, presumably the Court would then rule that the defendant had been deprived of his Sixth Amendment right.[151] On the other hand, the Court could decide that, given the facts before it, the principles established in *Strickland* are broad enough to warrant habeas relief to the petitioner, even in the absence of a previous case with virtually identical facts as the present one. In its *Spisak* opinion, written by Justice Breyer, the Court essentially took the second approach, looking to *Strickland* to analyze whether counsel's closing argument amounted to deficient performance.[152] The Court avoided answering the question, however, by "assum[ing] for present purposes" that the closing argument was inadequate, yet finding that there was no reasonable probability of a different outcome regardless of the defective performance.[153]

In areas other than those claiming violation of the Sixth Amendment right to the effective assistance of counsel, the outcomes are also likely to depend on whether habeas courts first look for a Supreme Court precedent on all fours with the case at hand, or whether they instead seek to determine if a fundamental constitutional principle was improperly applied to the facts of the case. The opposite reaction of the circuit courts to two cases remanded in light of *Carey v. Musladin* provide telling illustrations.

In *Rodriguez v. Miller*, the Court of Appeals had found that New York courts unreasonably applied clearly established law in excluding the defendant's family from attendance at trial during the testimony of an undercover officer.[154] That opinion relied on Second Circuit precedent

[149] Transcript of Oral Argument at 23, *Spisak*, 130 S. Ct. 676 (No. 08-724).

[150] *Id.* at 24.

[151] A similar analysis could be applied to *Knowles v. Mirzayance*, 129 S. Ct. 1411 (2009). *See supra* notes 9–10, 78–83 and accompanying text. There, the warden sought to avoid consideration of whether counsel's conduct was, under the circumstances of the case, below professional standards by arguing in effect that, even if it were, it would not call for habeas relief because the Supreme Court had never ruled on a case with the same alleged deficiency in representation—that is, abandoning the sole defense without gaining any strategic advantage. *See Mirzayance*, 129 S. Ct. at 1415. Because no law had been clearly established to govern that circumstance, the state courts' determination could not, by definition, be either contrary to or an unreasonable application of that law. Justice Thomas's opinion contains language suggesting this approach, although he ultimately concludes only that in the absence of specific Supreme Court precedent, the state courts' decision could justify relief only by meeting the high threshold of unreasonableness based on the general *Strickland* standard. *Id.* at 1419–20.

[152] *Spisak*, 130 S. Ct. at 685.

[153] *Id.*

[154] 439 F.3d 68, 72 (2d Cir. 2006), *vacated*, 127 S. Ct. 1119 (2007) (mem.).

interpreting the Supreme Court's rulings as requiring greater scrutiny before barring family members than was necessary to exclude the public in general, given the Supreme Court's focus on the various interests at stake in analyzing the right to a public trial.[155] On remand in light of *Musladin*, however, the Second Circuit decided that Supreme Court precedent must be construed narrowly, looking for specific holdings rather than considering dicta to see underlying logic and rationale.[156] The court therefore reversed itself, now finding that the defendant was not deprived of his right to a public trial.[157]

In *Smith v. Patrick*, by contrast, the Court of Appeals for the Ninth Circuit adhered to its prior decision on remand in light of *Musladin*.[158] A panel of the circuit had granted habeas relief based on insufficiency of the evidence in a case in which the California courts had affirmed a conviction for assault resulting in the death of a baby, despite inconclusive evidence regarding shaken baby syndrome. Upon remand, the circuit court ruled that the applicable standard set forth in *Jackson v. Virginia*[159] was clearly established, and the fact that the Supreme Court had never addressed a case with similar facts as those at issue here was of no moment.[160] The court distinguished the *Musladin* and *Van Patten* rulings by asserting that, unlike in those cases, it is not possible to carve out a narrower principle from the governing Supreme Court precedent that would preclude a finding of clearly established law.[161] In *Musladin*, the Court was able to announce that, because the precedents had all involved state actors, no law was clearly established regarding improper influences injected by private persons.[162] In *Van Patten*, the Court could point to the fact that the "presence" of counsel had not been defined as requiring actual physical presence in court.[163] In *Smith*, on the other hand, the circuit concluded, the sufficiency standard—the evidence was such that no reasonable juror would find guilt beyond a reasonable doubt—was a given, and its application to the present facts required granting relief.[164] It remains to be seen whether the circuit abides by this conclusion on the latest remand by the Supreme Court.[165]

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[155] *Id.* at 74–76.

[156] Rodriguez v. Miller, 537 F.3d 102, 106–07 (2d Cir. 2008).

[157] *Id.* at 104.

[158] Smith v. Patrick, 508 F.3d 1256, 1257–58 (9th Cir. 2007) (per curiam), *vacated*, No. 07-1483, 2010 WL 154859 (U.S. Jan. 19, 2010). As noted above, the warden's petition for certiorari was recently granted, the judgment vacated, and the case remanded for further consideration in light of *McDaniel v. Brown*, 130 S. Ct. 665 (2010). *See Smith*, 2010 WL 154859; *supra* note 16 and accompanying text.

[159] 443 U.S. 307 (1979). As in other cases, the *Jackson* standard could technically be seen as dicta, as the Court there denied relief.

[160] *Smith*, 508 F.3d at 1258.

[161] *Id.* at 1258–59.

[162] Carey v. Musladin, 127 S. Ct. 649, 653 (2006).

[163] Wright v. Van Patten, 128 S. Ct. 743, 746 (2008) (per curiam).

[164] *Smith*, 508 F.3d at 1259.

[165] *See* Patrick v. Smith, No. 07-1483, 2010 WL 154859 (U.S. Jan. 19, 2010).

Both of these cases could easily have been decided the other way. The Second Circuit could have relied on the fundamental principles set forth in Supreme Court precedents regarding how to weigh the interests at stake in determining whether exclusion of members of the audience was warranted during a portion of a criminal trial. And the Ninth Circuit could have stated, and perhaps yet will, that in the absence of a Supreme Court precedent where the sufficiency of the evidence depended on the findings of an expert regarding the cause of death, there was no clearly established law against which to measure the state courts' conclusion that the evidence supported the defendant's conviction.

VI. CONCLUSION

The cause of upholding the Constitution will be better served if federal habeas courts heed Justice Kennedy's admonition that "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'"[166] When a Supreme Court opinion has set forth an interpretation of the Constitution that provides notice of the reach of a constitutional right, the federal courts should determine whether state court decisions are contrary to, or reflect unreasonable application of, those constitutional principles.

[166] Panetti v. Quarterman, 127 S. Ct. 2842, 2858 (2007) (quoting Carey v. Musladin, 127 S. Ct. 649, 656 (2006) (Kennedy, J., concurring)).