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I. Introduction

The interpretation of a statute is not an event. It is a process. It begins with the text, though the reader brings much to this beginning, requires an immersion in context, inevitably circles back to history and the legislative record whether we want it to or not, and then proceeds to the consideration of ever-expanding layers of judicial interpretation and application. It involves contemplation, common sense, an awareness of related legal principles, a willingness to reconsider, to begin anew, and, at its very best, a good faith fidelity to the words of the text. At some point the text takes on a life of its own, its individual words becoming nothing more than the skeleton over which a skin of perceived understandings and assumptions loosely drapes. At times, the duty of the textual interpreter, like a forensic pathologist, is to return to that skeleton.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") extensively revised the law of habeas corpus as practiced within the federal judicial system. One of those revisions applied to 28 U.S.C. § 2254(d), which limits a federal court's authority to grant writs of habeas corpus on behalf of
persons in state custody. Consistent with this section, a federal court's jurisdictional authority is constrained by three specified standards of review, two pertaining to errors of law and one pertaining to errors of fact. This Article focuses on subsection (d)(1), which creates the critical review standards applicable to errors of law.

A mere seventy-six words in length, subsection (d)(1) is enormously important because it performs a gatekeeper function for federal habeas review of state court judgments. It controls all "error of law" access to federal habeas review. As a practical matter, the operational scope of subsection (d)(1) depends on the interpretation of its two key textual components. The first limits the grant of federal habeas to state court decisions that contravene "clearly established Federal law, as determined by the Supreme Court." Careful attention to these words is required to appreciate the nature and scope of the claims that may be asserted on habeas. The second component creates two alternative standards of review, one pertaining to state court decisions that are "contrary to" clearly established federal law, and the other pertaining to state court decisions that "involve an unreasonable application of" that law. While neither of these phrases seems mysterious or elusive in isolation, we will see that some effort is required to understand how each phrase operates in the context of federal habeas review. Part II of this Article examines the text of subsection (d)(1) with an eye toward discovering a sensible and contextual interpretation of its words. In so doing, my goal is not to create a liberal or a conservative reading of the text, but to read that text in a manner that respects the words as they operate within the relatively sophisticated realm of the law.

Since AEDPA was adopted in 1996, and prior to the October 2002 Term, the Supreme Court decided only seven cases citing subsection (d)(1).1 Most of those cases provide little or no interpretive insight. The critical baseline interpretation of subsection (d)(1) appears in Williams v. Taylor,2 decided in June of 2000. In addition, we can glean some further insight from a few other cases decided prior to the October 2002 term of the Court. Part III of this Article examines Williams and the Court’s other early interpretations and applications of subsection (d)(1). We will see that while Williams and its satellite cases answer some basic interpretive questions, they also leave other very important questions unanswered, particularly those related to the scope of

the "unreasonable application" standard. Unfortunately, even this small pattern of decisions is not entirely coherent.

That brings us to the October 2002 Term of the Court. In that term, the Court decided six cases involving AEDPA. Four of those cases involved interpretations and applications of subsection (d)(1): Woodford v. Visciotti,3 Early v. Packer,4 Lockyer v. Andrade,5 and Wiggins v. Smith.6 In each of its majority opinions, the Court purported to apply some variation of the Williams interpretation of subsection (d)(1). Part IV of this Article examines these most recent decisions to see what they add to (or subtract from) the Court's initial interpretations of subsection (d)(1). As a preview of my critical assessment, three of those cases cohere to text and precedent in a reasonably illuminating fashion, while the fourth coheres to nothing more than the narrow result achieved in that case. We are left, therefore, with a mix of light and fog. The goal of this Article is to attempt to discover a useful way of exposing the light and penetrating the fog. The idea is to find a workable way of applying § 2254(d)(1) in a fashion that comports with text and precedent.

As I stated at the outset, statutory interpretation is a process. In Part V, I suggest a method by which to continue that process with respect to subsection (d)(1). The proposed method is somewhat counterintuitive. It posits that text informs precedent and not the converse. I refer to this method as "text-first" and will put my defense of it aside for the moment. The basic idea, however, is that text ought to prevail over precedent unless the precedent unequivocally alters a fair reading of the text. In short, we should presume that whenever the Supreme Court (or any court) interprets a statutory text, its goal is to discover and not alter the meaning that emanates from the text. Hence, the text will help inform the meaning we derive from the interpretative precedent.

II. The Text of 28 U.S.C. § 2254(d)(1)

The text of a statute should tell its own story without the intervention of a judicial narrator. Hence, before discussing the "judicial law" of § 2254(d), I begin with an examination of the statutory text in an effort to understand what the words of the text convey when read in conjunction with one another and in the overall context of the law of habeas corpus. I take as a starting point for this examination Justice Scalia's observation: "A text should not be construed

strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." The goal is not to discover what the legislature intended, but what it said, though as we will see the legislative history does play some role in this quest. 

To that end, § 2254(d) provides:

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 (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 

Note that the limitations imposed by § 2254(d) are separated according to the type of claim that is asserted. Subsection (d)(1) describes the standards applicable to issues of law, including pure questions of law and mixed questions of law and fact, while subsection (d)(2) provides the relevant standards for claims challenging a state court's findings of fact. The focus of this Article is on subsection (d)(1). Clearly, however, in either case, unless the appropriate standard is satisfied, the text of § 2254(d) operates to divest an Article I judge (hereafter "federal judge" or "federal court") of the power to grant a writ of habeas corpus as to any claim that has been "adjudicated on the merits" in a state court. I take the phrase "adjudicated on the merits" to mean that the issue was presented to the state court and that the state court resolved the claim without reference to state rules of procedural default. If a claim has not been adjudicated on the merits by a state court, § 2254(d) does not apply. It is quite likely, however, that such a claim will either fall prey to the exhaustion requirements of § 2254(b)-(c) or have been procedurally defaulted. As to the standards for procedurally defaulted claims, see Coleman v. Thompson, 501 U.S. 722, 750 (1991) (explaining the cause and prejudice standard for procedural defaults); see also Sawyer v. Whitley, 505 U.S. 333, 336–41 (1992) (explaining the "clear and convincing" innocent of the death penalty standard); Schlup v. Delo, 513 U.S. 298, 327 (1995) (explaining the "probable" innocence of the crime standard).

8. Id. at 16–18.
10. If a claim has not been adjudicated on the merits by a state court, § 2254(d) does not apply. It is quite likely, however, that such a claim will either fall prey to the exhaustion requirements of § 2254(b)-(c) or have been procedurally defaulted. As to the standards for procedurally defaulted claims, see Coleman v. Thompson, 501 U.S. 722, 750 (1991) (explaining the cause and prejudice standard for procedural defaults); see also Sawyer v. Whitley, 505 U.S. 333, 336–41 (1992) (explaining the "clear and convincing" innocent of the death penalty standard); Schlup v. Delo, 513 U.S. 298, 327 (1995) (explaining the "probable" innocence of the crime standard).
A. The First Component of Subsection (d)(1)

As noted, subsection (d)(1) pertains to claims raising issues of law, either pure or mixed. There are two critical components to this provision. The first (which actually comes second in the text) narrows the types of available claims to those premised on "clearly established Federal law, as determined by the Supreme Court of the United States."

1. Clearly Established Federal Law

The noun phrase, "Federal law" seems susceptible to only one reasonable interpretation, namely, as pertaining to the laws of the United States, including constitutional law, statutes, regulations, federal common law, and treaties. Such an interpretation would also be consistent with the scope of federal habeas as provided in §2241(b)(3), which states that the writ shall not extend to a prisoner unless "he is in custody in violation of the Constitution or laws or treaties of the Untied States." However, this law must be "clearly established." Despite the potential elasticity of the word "clearly," pinpointing a workable definition of that phrase is not particularly difficult.

The adjectival phrase, "clearly established," modifies the noun phrase "Federal law." Stated generally, we can say that a law becomes established when it is set forth in terms and under circumstances that are recognized as enforceable; this is H.L.A. Hart's so-called "rule of recognition." Thus, legislation that passes both houses of Congress and is signed by the President creates established law as of its effective date of enforcement. Similarly, Supreme Court precedent construing and applying the Constitution creates established law as of the date of the Court's decision. But the statute calls for more than mere establishment. Within the adjectival phrase, the adverb "clearly" modifies the adjective "established." This suggests that the status of the law's establishment must be readily and perhaps unmistakably discernible.

In the context of a statute, adherence to constitutional procedure surely meets this standard. In other words, a federal statute "clearly establishes" a

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11. H.L.A. HART, THE CONCEPT OF LAW 97–107 (1961). In Hart's terminology, we might say that a law is established when the law complies with the rule of recognition for the particular jurisdiction. For federal statutes in the United States, the rule of recognition provides a relatively bright-line test at the procedural level, i.e., the bicameralism and presentment rules discussed in the text accompanying this note.

federal right, unless the federal statute is enacted contrary to constitutional procedure. An enactment that satisfies bicameralism and presentment is by definition clearly established. With respect to Supreme Court precedent, one would think that the majority view of the Court expressed within the holding and rationale of a decided case represents the clearly established rule of law. This formula is neither novel nor remarkable. It conforms neatly with the "rule of recognition" that is generally applicable to Supreme Court precedent. In short, the phrase "clearly established Federal law" connotes principles of law emanating from the authority of the United States government that have been adopted or pronounced through a recognized medium such as legislation, rulemaking, or binding precedent.

2. As Determined by the Supreme Court

The limiting phrase, "as determined by the Supreme Court," suggests that these recognized principles of law must be embodied in a pre-existing Supreme Court precedent. While this phrase could mean no more than that the Supreme Court has the final authority to decide whether a question of federal law has been clearly established, that is, a simple reiteration of the Court's position in the judicial hierarchy, such an interpretation would render the language of the statute superfluous. Moreover, the concept of "clearly established Federal law," which is to some extent borrowed from the law of qualified immunity, connotes a temporal element, that is, it suggests a pre-existing state of the law. In terms of qualified immunity, for example, a clearly established principle is one that has been established as of the date of the challenged activity. Given that usage, it would seem that in the context of § 2254(d)(1), the Supreme Court's determination of what constitutes clearly established federal law must itself predate the state court's judgment, that is, the law must have been established as of the date of the challenged judgment. This interpretation is also consistent with Teague v. Lane, where the Court held that in the context of pre-AEDPA § 2254 petitions, "new law," that is, law not established as of the date of the challenged judgment, could not form the basis for habeas relief. While the text itself does not reference Teague, any statutory construction must take into account the background legal principles against which the statute was adopted. Teague clearly represents one of those background principles.

13. We might also say that a statutory principle is not clearly established if it violates some other constitutional limitation such as due process or equal protection.
If the foregoing is correct, then it follows that the federal law at issue must be embodied in a pre-existing Supreme Court precedent. This interpretation of the statutory language also finds support in the simple fact that the only basis that a lower federal court has for deciding whether a particular federal law is clearly established "as determined by the Supreme Court" is by reference to pre-existing Supreme Court precedent. Logically then, it seems that the phrase "as determined by the Supreme Court" translates into "as embodied within Supreme Court precedent." That being the case, it follows that consistent with § 2254(d)(1), lower court opinions not mandated by Supreme Court precedent cannot serve as the basis for habeas relief. It also follows, somewhat oddly, that a statute passed by Congress and signed by the President, although clearly established under a rule of recognition, cannot serve as the basis for habeas relief unless previously construed by the Supreme Court unless, of course, that statute excepts itself from the scope of § 2254(d)(1).

This focus on Supreme Court precedent can be seen as a major revision of the law of habeas. It effectively reins in circuit courts that may have a proclivity to expand the rights of habeas petitioners and leaves the development of the law in this context solely in the hands of the Supreme Court. Experimentation by the lower courts is, in essence, forbidden.

B. The Second Component of Subsection (d)(1)

The second component of subsection (d)(1) permits a federal court to grant habeas relief only "with respect to [a] claim that was adjudicated on the merits in State court proceedings" and only if that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of" clearly established federal law. Note that it is the state court's "decision" that must transgress the "contrary to" or "unreasonable application" provisions. Moreover, that decision must be preceded by an adjudication on the merits. I take the combination of these factors—adjudication on the merits and resulting decision—to mean that the writ may be issued only if the outcome of the state

16. Assuming this to be the accepted interpretation, one wonders whether clearly established statutory or treaty rights "available" at the time of the state court judgment can provide a basis for habeas if the Supreme Court has yet to interpret those provisions. Because the answer is clearly "no" with respect to constitutional law, the answer here would seem to be "no" as well unless the statute or treaty established an exception to § 2254(d)(1).
court adjudication, that is, the decision premised on that adjudication, is itself either contrary to, or the product of, an unreasonable application of federal law. In short, the statute focuses our attention on the overall decision and not on some subsidiary part of it.

As a preview, the "contrary to" and "unreasonable application" standards appear to be premised in part on the convenient distinction lawyers commonly draw between pure questions of law and mixed questions of law and fact. That common usage may suggest something like a bright-line difference between these two categories of potential legal error. Actual practice, however, reveals that the distinction is often blurred and sometimes not discernible. We should not expect, therefore, that review standards premised in part on the "distinction" between pure and mixed questions of law will themselves create distinct dichotomies. Some overlap is to be expected as a product of the overlapping categories to which they are intended to apply.

1. Contrary To

The word "contrary" denotes incompatibility or logical inconsistency.17 Two propositions are incompatible with one another if both cannot be true or correct. Thus, a state court decision is contrary to federal law if that decision and the applicable federal law cannot both be true or correct. Given this premise, there appears to be four possible combinations of state court adjudications and resulting decisions that are pertinent to this textual inquiry:

- the state court applies the correct federal standard and arrives at a correct outcome;
- the state court applies an incorrect federal standard18 and arrives at an incorrect outcome;
- the state court applies an incorrect federal standard and arrives at a correct outcome; and,
- the state court applies the correct federal standard and arrives at an incorrect outcome.

17. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (1986).
18. I take "incorrect federal standard" to include both a failure to recognize that there is an applicable federal standard and an erroneous interpretation of an applicable federal standard. In other words, the concept includes both a problem of recognition and a problem of interpretation.
In each of these combinations, I am assuming that the decision is premised on an agreed set of facts. The first two combinations provide easy solutions within the context of subsection (d)(1). If a state court achieves a correct outcome through application of the correct federal standard, then its decision cannot in any fashion be described as contrary to federal law. Both the state court decision and the federal law principle can be described as correct, that is, they are not incompatible with one another. And, of course, we would not expect a federal court to grant habeas under such circumstances. However, if the state court arrives at an incorrect outcome through application of an incorrect federal standard—our second combination, then its decision is contrary to federal law. The state court decision and the federal standard are plainly incompatible in the sense that both cannot be correct. Under such circumstances, the grant of habeas is permitted by the text of subsection (d)(1). This too is an expected conclusion.

The third combination—incorrect federal standard but correct outcome—is easily solved but requires a slightly more elaborate explanation. Although the standard identified and described by the state court is incompatible with the correct federal standard, the outcome of the case is not. Hence, even if the state court appears to have misperceived the federal standard or the range of its applicability, the decision itself is immune from federal habeas because the state court's decision, that is, the outcome, is not itself contrary to federal law. At most we have an example of harmless error. Moreover, and this is key, it is not clear that the state court applied an incorrect standard because whatever standard it applied led it to the correct result. In other words, the state court may have taken what appeared to be the wrong road by misidentifying the applicable standard, but it arrived at the right destination, suggesting that the road may not have been all that wrong to begin with, perhaps just an alternative, parallel path. At least from the perspective of the state court's ultimate decision, both the "correct" and seemingly "incorrect" standards are for all practical purposes identical because they generated the same result. As with the first combination, with which this combination is virtually identical, we would expect a federal court to deny habeas under such circumstances.

The fourth combination—correct federal standard but incorrect outcome—presents some minor interpretational challenges and a necessary shift in focus. This combination presents what lawyers would commonly describe as a misapplication of the law to the facts. Given that common usage, there are two reasons why the contrary-to standard is ill-suited to this combination. First, if a state court correctly identifies and accurately describes the correct federal standard, then the "contrary to" language does not accurately capture the relationship between the state court decision and the established principle of
federal law. The state court decision is at least partially correct: it got the law right. In this sense, the decision and the law are surely compatible with one another. One could say that the incompatibility, if any, between that decision and the law rests largely in the margins, a type of partial and perhaps even minimal incompatibility. Of course, if the facts underlying the state court decision verge on being materially identical to the facts underlying the binding federal precedent, then that incompatibility would become more evident and less marginal. But for the entire range of fact-specific application potentials, "contrary to" seems at best a blunt way to describe what is in essence a misapplication of the law.

Second, and perhaps more to the point, the text of subsection (d)(1) provides a more suitable device for these purposes, namely, the "unreasonable application" standard. Indeed, that standard seems textually designed for the measure of problems arising within the fourth combination, namely, applications of the law to the facts. Hence, a state court decision falling within this combination cannot be said, as a general matter, to be contrary to federal law.

In sum, a state court decision is "contrary to" clearly established Supreme Court precedent if and only if the state court identifies and applies a legal standard other than the one dictated by that precedent and, as a consequence, arrives at an outcome incompatible with that precedent. We could say that all misapplications of federal law are contrary to federal law, but such a usage is at the very least imprecise and, in any event, becomes unnecessary through the presence of the unreasonable application clause.

2. Involved an Unreasonable Application Of

Section 2254(d)(1) alternatively provides that a federal district court may grant habeas if a state court's adjudication of a federal claim "resulted in a decision that . . . involved an unreasonable application of, clearly established Federal law . . . ." The use of the word "involved" is a bit perplexing. The potential interpretations range from the fairly general "contained" or "included" to the somewhat more specific "to have an effect on."\textsuperscript{19} The former may suggest a loose relationship between the decision and the law being applied, more in the sense of just "being there" rather than of having any consequence to the decision. The "effect on" connotation, on the other hand, suggests a causal relationship between the law's application and the decision. This latter

\textsuperscript{19} Webster's Third International Dictionary 1191 (1986).
meaning seems the more likely. If we understand a judicial "decision" to be composed of reasoning leading to an outcome, then to say that a decision "involved" a particular application of the law is to suggest that the application was intertwined with the outcome, that is, that it had an effect on the outcome in the sense that the outcome was at least partly premised on that application. Suppose, for example, that a habeas petition included a *Miranda* claim. If the state court refused to entertain that claim based on procedural default, then we would speak imprecisely to say that the court’s decision involved a *Miranda* claim. While the case surely involved *Miranda*, the decision itself involved only a question of procedural default. I take "involve," therefore, to convey something like "premised on." To conclude otherwise would be to permit habeas when the law application at issue was of no consequence to the decision. Such an unexpected and wholly peculiar interpretation is to be avoided when plausible alternatives exist.

The noun "application" used in this context refers to the process through which a court determines the legal consequences pertaining to a particular set of facts, that is to say, application occurs when a court uses standards imposed by law to determine the legal consequences that flow from a particular set of facts. We are assuming, at least at the outset, that the court has applied the correct standard in the sense that the standard has been correctly identified and articulated. The question then is when can such a process be deemed to have been "unreasonable."

There are many contexts in which the concept of unreasonableness is used in the law. Two are relevant here. The first finds its most familiar articulation in tort law. As is well established, only unreasonable conduct can serve to establish a party’s negligence.20 The measure of this principle is the objective reasonable person standard, which posits as its ideal a "prudent and careful person, who is always up to the standard."21 Furthermore, when the conduct at issue is that of a professional person, this reasonableness standard embodies the standards of the profession. "Professional persons in general, and those who undertake any work calling for special skill, are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability."22 Here we are speaking of a reasonable jurist standard. In the specific context of a judge applying the law to an agreed set of facts, an unreasonable application is one that a prudent and careful jurist

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22. KEETON ET AL., supra note 20, at 185; DOBBS, supra note 20, at 290.
applying professional standards of craft and competence would not have made.
In this sense, an unreasonable application of the law is an application that
reflects an exercise of judgment that falls below the minimal standards of
competence expected of a judge. For example, an unreasonable application of
law might occur if the judge fails to apply an essential element of controlling
doctrine, undertakes an application that displays a material misunderstanding of
that doctrine, or fails to attend to all facts relevant under the terms of the
doctrine.

Courts sometimes use the concept of reasonableness synonymously with
rationality. This occurs when a government actor has the authority to choose
among a range of alternatives. Under this reasonableness/rationality test, a
court will uphold an actor's choice so long as the choice remains within the
permissible range of alternatives and can be deemed to have been a rational
choice among those alternatives. This type of deferential review is most often
used to measure the legitimacy of policy judgments made by legislatures or
administrative agencies. In the context of constitutional law, for example,
courts will deny a substantive due process challenge to economic legislation so
long as the legislative choice can be deemed rational. Judges too are
sometimes vested with the authority to choose among competing alternatives.
This occurs with what might be called judicial management decisions, for
example, whether to transfer a case to a different venue, but it might also occur
with decisions pertaining to substantive law. In other words, the substantive
law may give the judge a choice among competing alternatives. For example,
in criminal sentencing judges are often vested with discretion to impose a
sentence that falls within a particular range of months or years. Within that
range, the judge is free to make a rational judgment among the various
alternatives. If, on the other hand, the judge makes an irrational choice within
the range, for example, people with red hair should always get the maximum,
the choice will violate the reasonableness/rationality principle.

The reasonableness/rationality principle is actually a subset of the
reasonable jurist standard. An irrational choice is by definition an objectively
unreasonable one, for a reasonably competent jurist would not make such a
choice. Thus, if a judge makes an irrational choice among otherwise available
sentencing alternatives, the judge's application of the law of sentencing is
objectively unreasonable because a prudent and careful jurist applying
professional standards of craft and competence would not have made that

decision. The converse is not always true. A rational decision is not necessarily an objectively reasonable one. If, for example, a judge decides to sentence a particularly dangerous individual to a term of years that is clearly beyond the statutory maximum, then the sentence may be a rational one given the defendant’s dangerousness, but given the judge’s duty to comply with clearly established law, it is not an objectively reasonable one.

This brings us to a somewhat perplexing question. The statutory text, in modifying the noun "application," uses the adjective "unreasonable" and not the adjective "incorrect." Given that a person can make a reasonable mistake, does it follow that an objectively reasonable jurist can incorrectly apply the law? In other words, can the judge be wrong as a matter of law, but nonetheless reasonable? If so, the judge’s decision will be immune from federal habeas. My answer to those questions is "no" and "it depends." I begin with the "no" answer. Theoretically, the law permits only two possibilities with respect to any application. Either the application is correct or it is not. We demand that objectively reasonable jurists, acting competently and rationally, discover the correct application. This is especially true in the context of criminal law. In this sense, the notion of wrong-but-reasonable is an affront to our concept of justice. To import such a notion into habeas review would require a textual confidence that cannot be found within the word "unreasonable." Moreover, as I discuss below, the legislative history of subsection (d)(1) starkly undermines the wrong-but-reasonable thesis because the supporters of AEDPA emphatically denied the possibility. Given that the text is at least ambiguous on this score, that legislative history is of some significance. So, "no", the word "unreasonable" does not imply or import a wrong-but-reasonable standard.

On the other hand, the theory of law just sketched above is in fact not accurate. Law application does not always provide an obvious rule-bound, determinate choice. Sometimes it speaks of degrees and through multifactored tests. In such circumstances, its application may depend as much on intuition as it does on reason. This is particularly true at the microscopic level of application where the words used to describe a legal standard permit a range of possibilities and call for the exercise of fact-specific and fact-dependent judgment. That is not to say that such laws are indeterminate in the sense that they are unbounded by anything other than the exercise of power. Rather, it suggests that some laws may be underdeterminate in the sense that they are rule-guided, but not rule-bound. They instruct the law-applier as to what

25. RONALD DWORKIN, LAW’S EMPIRE (1986).
factors to consider, but do not necessarily provide a resolution for every particular set of facts.

Theoretically, there is a right and a wrong answer to each legal question, even with respect to underdeterminate laws. In fact, we may lack the ability to pinpoint that answer with scientific certainty. For example, in any given capital case, precisely how much investigation of mitigating circumstances must an effective defense counsel pursue? On either side of the divide there will be obvious answers, but in the middle range the resolution is not so clear. Here, within this very narrow range of fine-tuned judgments that apply underdeterminate laws, the unreasonableness standard may require a federal judge to defer to a state court decision with which she disagrees but as to which she cannot state with certainty that the state court was objectively wrong. This is not to say that the state court decision is wrong-but-reasonable, but that given the underdeterminate nature of the applicable legal principle and the fact-specific nature of the particular problem, the decision must be upheld because it is at least objectively reasonable and not clearly wrong.

In sum, an application of "clearly established" Supreme Court precedent is "unreasonable" if the state court's decision reflects a judgment that an objectively prudent, careful, and professionally competent jurist would not make. Thus, an unreasonable application might occur if the judge fails to give appropriate weight to a legally relevant factor, gives significant weight to an irrelevant or improper factor, renders a decision that is implausible, arbitrary, irrational, or that reflects a misunderstanding of the controlling legal principles, or, more generally, renders a decision that is plainly at odds with the applicable law or with accepted standards of judicial practice. Moreover, each of these considerations must be examined through the lens of the relative determinacy of the legal principles that are applied. Taking this all together, an unreasonable application of the law involves a derogation of duty that reflects something more than a mere disagreement between courts over the proper resolution of a particular mixed question of law and fact. It reflects the failure of one court to conform its judgment to the clear requisites of the law.27

27. Although the analogy is not perfect, the abuse of discretion standard used in the context of administrative law provides a useful model for examining whether any particular application of the law to the facts is unreasonable. Consistent with that standard, agency action may be set aside if:

A. The agency relied on factors that may not be taken into account under, or ignored factors that must be taken into account under, any authoritative source of law .

B. The action does not bear a reasonable relationship to statutory purposes or requirements.

C. The asserted or necessary factual premises of the action do not withstand
3. The Range of the Review Standards

The foregoing discussion identifies what might be characterized as a spectrum of habeas review. That spectrum covers the full range of state court decisions that may be challenged on "error-of-law" grounds. At one endpoint are those pure law questions in which a state court decision fails to recognize a controlling principle of clearly established Supreme Court precedent and arrives at an outcome incompatible with that precedent—the second combination described above. In these cases, the contrary-to standard of review provides the proper measure of a federal court's power to grant habeas relief. At the other end of the spectrum are those cases in which the state court properly identifies the controlling principle of federal law but has arguably misapplied it, that is, those cases that involve a mixed question of law and fact—the fourth combination described above. Here, the "unreasonable application" standard controls. In between these two endpoints are state court decisions in which the state court appears to have correctly identified the controlling principle of federal law but the state court’s application of that principle strongly suggests that the principle was profoundly misunderstood. Here, we have an overlap of standards, for the misunderstanding suggests that despite the proper identification, an incorrect principle may have actually been applied. Suppose, for example, that a state court decision correctly identifies the controlling Supreme Court precedent, but on facts virtually identical to

scrutiny under the relevant standard of review . . .

D. The action is unsupported by any explanation or rests upon reasoning that is seriously flawed.

E. The agency failed, without adequate justification, to give reasonable consideration to an important aspect of the problems presented by the action . . .

F. The action is, without legitimate reason and adequate explanation, inconsistent with prior agency policies or precedents.

G. The agency failed, without an adequate justification, to consider or adopt an important alternative solution to the problem addressed in the action.

H. The agency failed to consider substantial arguments, or respond to relevant and significant comments, made by the participants in the proceeding that gave rise to the agency action.

I. The agency has imposed a sanction that is greatly out of proportion to the magnitude of the violation.

J. The action fails in other respects to rest upon reasoned decisionmaking.

American Bar Association Section of Administrative Law and Regulatory Practice, A Blackletter Statement of Federal Administrative Law, 54 ADMIN. L. REV. 17, 42-43 (2002). While each of the foregoing points may not be a perfect fit with our inquiry into judicial reasonableness, the gist of these collected insights on the administrative abuse of discretion standard does shed helpful light on the right questions to ask in the context of the unreasonable-application standard under § 2254(d)(1).
those in the controlling precedent, it arrives at an opposite conclusion. Such a
decision can potentially be seen as both contrary to and an unreasonable
application of the controlling precedent because the state court either has
applied an incorrect principle or has grossly misunderstood the correct
principle.

4. The Legislative History of the "Unreasonable Application" Standard

In the above discussion of the unreasonable-application standard, I alluded
to but rejected the possibility that the word "unreasonable" imported the
concept of "wrong-but-reasonable" into the federal law of habeas. I refer now
briefly to the legislative history of the "unreasonable application" standard for
the limited purpose of showing that my reading of the text on this point (as
described above) is fully consistent with what its authors and supporters
thought it conveyed. My goal here is not to establish the congressional intent
by reference to the views of individual legislators, but simply to show the
congruency between the text and the legislative history. I focus on this
particular language because there was some congressional debate on its
meaning and because opponents of the measure seemed to put a spin on it that
went beyond what the text demands and what the authors apparently intended.

More particularly, a few members of Congress specifically expressed a concern
that the "unreasonable application" language might be read as establishing what
could be characterized as a wrong-but-reasonable standard. Essentially, they
assumed that a demonstrably incorrect application of federal law could still be
deemed reasonable and hence not reviewable on habeas. So read, AEDPA
would prevent federal courts from granting habeas when a state court decision
was wrong as a matter of federal law, but nonetheless reasonable (under some
undisclosed construction of that term). If this were true, and as some of the
critics pointed out, AEDPA would effect a remarkable alteration in the legal
landscape. However, the supporters of AEDPA expressly rejected this
interpretation.

28. For example, Anthony Lewis, a critic of proposed measures to reform habeas, argued
that the "unreasonable application" principle limited the grant of federal habeas to those cases in
which the state court decision was both incorrect and unreasonable. See Anthony Lewis, Mr.
Clinton's Betrayal, N.Y. TIMES, July 7, 1995, at A25 (claiming former President Clinton
changed his position to allow a limiting of federal habeas); Anthony Lewis, Is It a Zeal to Kill?,
N.Y. TIMES, Dec. 8, 1995 at A31 (admonishing federal steps to reign in habeas).

29. In the words of Senator Patrick Moynihan, "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
The wrong-but-reasonable critique was raised by three members of the House who ultimately voted against the bill, and arguably by one who supported it but who was of the view that this provision of AEDPA would and should be held unconstitutional. Congressman Henry Hyde, a cosponsor of the bill in the House, rejected their interpretation, stating that "the Federal judge always reviews the State court decision to see if it is in conformity with established Supreme Court precedents, or if it has been misapplied. So it is not a blank, total deference, but it is a recognition that you cannot relitigate these issues endlessly." Moreover, no House supporter of AEDPA appears to have endorsed the wrong-but-reasonable interpretation of the proposed federal review standards.

In the Senate, Senator Joseph Biden expressed similar reservations about a wrong-but-reasonable federal review standard:

The second problem, in this instance, the 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.

In an immediate response to this criticism, Senator Orrin Hatch, a cosponsor of the bill in the Senate, referred to a poster prepared by the Biden staff, and explained:

It says that Specter-Hatch requires Federal courts to defer to State courts in almost all cases, even if the State is wrong about the U.S. Constitution. That is absolutely false. The fact of the matter is, currently, Federal courts have virtual de novo review of a State court's legal determination. Under

31. Id. at H3616 (statement of Rep. Jerrold Nadler).  
32. Id. at H3602 (statement of Rep. Henry Hyde) (emphasis added).  
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our change, Federal courts would be required to defer to the determination of state courts, unless the State court's decision was "contrary to or involved in an unreasonable application of clearly established Federal laws as determined by the Supreme Court."... This is a wholly appropriate standard. It 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.\textsuperscript{34}

Hatch went on to explain that the subject language was designed to end "the improper review of the State court decisions.... There is simply no reason that Federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts."\textsuperscript{35} In other words, the reform measures were not designed to divest federal courts of their habeas review authority, but to prevent retrials of cases that have been "properly adjudicated." In short, Senator Hatch, with an explanation similar to that made by Congressman Hyde, rejected Senator Biden's wrong-but-reasonable interpretation of the federal review standards, labeling that interpretation as "false."

Senator Arlen Specter, also a cosponsor of the bill, expressed reservations about the "unreasonable application" language, but ultimately concluded, "I believe 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."\textsuperscript{36} A wrong-but-reasonable state court decision would not, it seems, be in conformity with the Constitution.

On another occasion, Senator Hatch again sought to allay concerns regarding the scope of the proposed federal review standard:

It enables the Federal court to overturn State court decisions that clearly contravene Federal law. Indeed, this standard essentially gives the Federal court the authority to review, de novo, whether the State court decided the claim in contravention of Federal law. Moreover, the review standard proposed allows the Federal courts to review State court decision [sic] that improperly apply clearly established Federal law. In other words if the State court unreasonably applied Federal laws, its determination is subject to review by the Federal courts.\textsuperscript{37}

\textsuperscript{34} 141 CONG. REC. S7803-01, at S7846 (statement of Sen. Orrin Hatch) (emphasis added).
\textsuperscript{35} Id.
\textsuperscript{36} 142 CONG. REC. S3454-01, at S3472 (statement of Sen. Arlen Specter).
Nothing in this language endorses a wrong-but-reasonable standard. In fact, by equating "unreasonably" with "improperly," the statement strongly suggests that an erroneous application of federal law can serve as a proper basis for habeas. Consistent with this view, later in the same statement, Senator Hatch observes, "The deference to state law is good, because it just means that we defer to them if they have properly applied federal law." After hearing Senator Hatch's remarks and in direct response to them, Senator Patrick Moynihan, who had previously voiced concerns similar to those expressed by Senator Biden, observed, "It is of some relief to hear the distinguished manager's statement that the Great Writ will remain substantially intact." Senator Hatch replied, "The Great Writ will not be affected by this one bit."

Senator Biden eventually accepted Senator Hatch's explanation as to the scope of the federal review standards. In later remarks referring to the proposed standards, Biden observed:

So if a State court makes an unconstitutional determination, the Federal courts will, and should, continue to say so. Therefore, I think this is a much less onerous—unnecessary but less onerous—than, in fact, it may appear on its face. If a Federal court concludes the State court violated the Federal Constitution, that, to me, is by definition—by definition—an unreasonable application of the Federal law, and, therefore, Federal habeas corpus would be able to be granted.

Senator Hatch, who spoke immediately after Senator Biden, expressed no disagreement with this view. Moments later, Biden announced his intention to vote for the pending bill. Similarly, Senator Levin appears also to have adopted what might be described as the Biden/Hatch/Specter interpretation of the "contrary to" and "unreasonable application" principles:

I interpret the new standard to give the Federal courts the final say as to what the U.S. Constitution says. I reach this conclusion for two reasons. First, several Members have raised the concern that the reference in the bill to an unreasonable application of Federal law could create two different classes of constitutional violations—reasonable and unreasonable. I vote for the bill because I have confidence that the Federal courts will not do this. I believe the courts will conclude, as they should, that a constitutional

38. Id. (emphasis added).
39. Id. at S3447 (statement of Sen. Patrick Moynihan).
40. Id. (statement of Sen. Orrin Hatch).
42. Id. at S3475–S3476 (statement of Sen. Orrin Hatch).
43. Id. at S3476 (statement of Sen. Joseph Biden).
error cannot be reasonable and that if a State court decision is wrong, it
must necessarily be unreasonable.\footnote{44}

President Clinton’s signing statement reflected a similar understanding of
the bill’s language.\footnote{45} I have been unable to find any statements in the
Congressional Record made by supporters of this provision that contradict the
view expressed by Senators Biden, Hatch, Specter, and Levin.

In sum, 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. However, the sponsors of AEDPA
emphatically rejected such a reading of the proposed language. Instead, they
endorsed a view that gave the text a sensible, literal reading that leaves federal
courts with the power to grant habeas whenever a state court decision
contravene clearly established federal law as determined by the Supreme
Court. Included within this power of review, as had long been the case, would
be those state court decisions reflecting an improper application of federal law.
In Senator Hatch’s words, "The Great Writ will not be affected
by this one bit." Thus, if the text of § 2254(d)(1) is ambiguous with respect to the scope of the
review power embodied in the "unreasonable application" principle, the
foregoing legislative history seems to establish—one is tempted to say, "clearly
establishes"—that such a radically innovative wrong-but-reasonable standard
has no legitimate place within the sphere of interpretive possibilities.

Unfortunately, this legislative history provides little affirmative guidance
as to what "unreasonable application" does mean other than Senator Hatch’s
description of an unreasonable application as an improper one. However, as
previously discussed, the textual use of the word "unreasonable" is not without
legal referents. Given those referents, an unreasonable (or improper)
application of the law would occur if the judge fails to apply an essential
element of controlling doctrine, undertakes an application that displays a
material misunderstanding of that doctrine, fails to attend to all facts relevant
under the terms of the doctrine, or, more generally, renders a decision that
under the circumstances cannot be described as competent and rational.

\footnote{44} Id. at S3465 (statement of Sen. Carl Levin).

\footnote{45} President’s Statement on the Signing of the Antiterrorism and Effective Death Penalty
Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719 (April 29, 1996) (stating, "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.").
III. The Baseline Interpretations of the Supreme Court

The Court's first discussion of subsection (d)(1) occurred in *Williams v. Taylor*, a case decided four years after the provision was enacted. Williams was convicted in a Virginia state court of capital murder and sentenced to death. In a state habeas proceeding, Williams claimed that during the sentencing phase of his capital trial, his lawyers rendered ineffective assistance of counsel through their failure to investigate and present evidence in mitigation. The state trial court agreed and ordered a new sentencing proceeding. The Virginia Supreme Court reversed. It concluded that under the standards of *Strickland v. Washington* and *Lockhart v. Fretwell*, Williams had failed to establish a violation of his Sixth Amendment right to counsel. Williams then filed a habeas petition in a Virginia federal court. That court concluded that the Virginia Supreme Court decision involved an unreasonable application of *Strickland* and *Fretwell*. As a consequence, the district court granted the writ.

The Fourth Circuit reversed. It interpreted § 2254(d) as precluding habeas relief unless the decision of the state court was either in "square conflict" with Supreme Court precedent or, if there was no controlling principle, the decision involved either an "unreasonable derivation of legal principles from the relevant" Supreme Court precedents or represented an "objectively unreasonable application of established principles to new facts." A decision would be considered unreasonable in either respect only if "reasonable jurists would all agree" such to be the case. Under that standard, the Fourth Circuit concluded that the Virginia Supreme Court had reasonably applied the law to the facts. Note that in so ruling, the Fourth Circuit was not employing an objective reasonable-jurist standard (prudent, careful, and competent), but instead applied a subjective rational basis test.

46. *Williams v. Taylor*, 529 U.S. 362 (2000). The Court obliquely addressed the "clearly established Federal law" standard in *Weeks v. Angelone*, 528 U.S. 225 (2000). *Id.* at 367. However, the bulk of the Court's brief opinion focuses on the lack of merit in the claims presented for review. The Court explains that the habeas petitioner's interpretation of the relevant precedent was, in the Court's view, incorrect. *Id.* at 377. Given that the law was not what the petitioner argued it to be, it followed that the habeas petition was not premised on a violation of clearly established Federal law, as determined by the Supreme Court of the United States. *Id.* at 399. The Court, therefore, affirmed the court of appeal's refusal to issue a certificate of appealability. *Id.*


50. *Id.* at 865.

51. *Id.*
The United States Supreme Court reversed by a six to three margin. An understanding of this decision is complicated by the array of opinions and by the floating line-ups joining various parts of different opinions. Justice Stevens announced the judgment of the Court and spoke for six members of the Court in his application of the subsection (d)(1) review standards (Parts III & IV of his opinion). His description of those standards, however, represented the views of only four Justices (Part II of his opinion). Justice O'Connor wrote a concurring opinion, Part II of which was announced as an opinion for the Court, having been joined by Justice Kennedy and the three dissenters. In this section of her opinion, Justice O'Connor provided an interpretation of the review standards that differed from that provided by Justice Stevens. Yet, despite the apparent disagreement between the Stevens plurality and the O'Connor majority, Justices O'Connor and Kennedy joined Justice Stevens in his application of the review standards. Given that the law as applied is sometimes the best gauge of the content of the law, the Court's view on the scope of the review standards is at least enigmatic. Presumably, the law established by the Williams decision lurks somewhere between these two interlocking majorities of description (Justice O'Connor's Part II) and application (Justice Stevens's Part III).

A. Clearly Established Federal Law, as Determined by the Supreme Court

Justice Stevens's plurality opinion describes the "clearly established Federal law" requirement of § 2254(d)(1) as the "functional equivalent" of the "new rule" principle adopted in Teague. According to Justice Stevens, "It is perfectly clear that AEDPA codifies Teague to the extent that Teague requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final." In so concluding, Stevens reads the text from the perspective of the pertinent

53. Id. at 374–90.
54. Id. at 379. In Teague v. Lane, 489 U.S. 288 (1989), the Court, in a plurality opinion, held that habeas relief will not be available to a petitioner who relies on a "new rule" of law unless that rule places the proscription of certain kinds of primary, private conduct beyond the power of the government, or unless the new rule is one that is implicit in the concept of ordered liberty. The post-Teague Court defined a "new rule" as one that "was not dictated by precedent existing at the time the defendant's conviction became final." Gilmore v. Taylor, 508 U.S. 333, 340 (1993) (quoting Butler v. McKellar, 494 U.S. 407, 412 (1990), quoting Penry v. Lynaugh, 492 U.S. 302, 314 (1989), in turn quoting Teague, 489 U.S. at 301).
55. Williams, 529 U.S. at 380.
background legal principles. And while he does not explain this conclusion in any detail, the intuition appears to be sound. As explained in Part II.A.1, the text of § 2254(d)(1) precludes a habeas petitioner from relying on federal law that has not been established by pre-existing Supreme Court precedent. Under Teague, a habeas petitioner is precluded from relying on federal law that is not "dictated by precedent" at the time of the state court decision. There would seem to be no significant difference between these two standards. Thus, if as Justice Stevens contends, Teague and AEDPA represent "congruent concepts," it seems to follow that an "old rule" under Teague is a "clearly established" one under AEDPA.  

Next, Justice Stevens discusses the standards for measuring whether a federal law has been clearly established. In Stevens's words, "[R]ules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." He continues by quoting Justice Kennedy:

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

Thus, in Stevens's view, if a claim is based on existing precedent, unless that claim "breaks new ground or imposes a new obligation," it will be deemed clearly established.

These passages might be a little confusing. As was noted previously, the adverb "clearly" modifies the adjective "established." Thus, from a grammatical perspective, this phrase has nothing to do with the clarity of the law. Rather, it pertains to the status of the law under a rule of recognition. Yet, what Stevens is referring to is not so much the clarity of the legal principle but how one measures the "newness" of that principle for the purposes of Teague. His point is that a recognized rule of general applicability may be deemed clearly established over a diverse array of factual scenarios unless the particular application breaks new ground. In other words, Stevens would not

56. Id.
57. Id. at 382.
58. Id. (quoting Wright v. West, 505 U.S. 277, 308–09 (1992) (Kennedy, J., concurring)).
59. Id. at 381.
60. See supra Part II.A.2 (explaining the phrase "as determined by the Supreme Court").
necessarily limit the scope of a clearly established principle to the precise facts and circumstances of the relevant precedent. Here, he seems to be recognizing that even underdeterminate principles of law can be clearly established.

Finally, Justice Stevens notes that AEDPA has added, immediately following the "clearly established law" requirement, a clause limiting the area of relevant law to that determined by the Supreme Court of the United States. If the Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar.61 Ground-breaking lower court law, in and of itself, therefore, cannot serve as the basis for habeas review under § 2254(d)(1). This conclusion directly comports with the text of § 2254(d)(1) as discussed in Part II.A.3, supra.

Part II of Justice O'Connor's opinion in Williams, that is, her opinion for the Court, focuses almost exclusively on the meaning to be attributed to the "contrary to, or involved in an unreasonable application of" standards of § 2254(d)(1).62 However, it did include a short paragraph addressing the "clearly established Federal law" requirement:

Throughout this discussion the meaning of the phrase "clearly established Federal Law, as determined by the Supreme Court of the United States" has been put to the side. That 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. In this respect, the "clearly established Federal law" phrase bears only a slight connection to our Teague jurisprudence. With one caveat, whatever would qualify as an old rule under our Teague jurisprudence will constitute "clearly established Federal law, as determined by the Supreme Court of the United States" under § 2254(d)(1). The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence.63

This is a somewhat enigmatic paragraph. The second sentence, with its reference to "holdings, as opposed to the dicta," seems clear enough. Clearly established principles of federal law for purposes of § 2254(d)(1) are those that can be distilled from holdings and not spun from dicta. As we will see in the next paragraph, Justice O'Connor and Justice Stevens are essentially in agreement on this point when they jointly conclude that the broad standards of Strickland v. Washington are clearly established. Those standards are extracted from the holding in Strickland. The third and fourth sentences of the quoted

62. Id. at 402–13.
63. Id. at 412.
paragraph, however, are baffling. The third sentence suggests that Teague has only marginal relevance to the "clearly established" inquiry, and this marginal relevance is somehow related to the "holdings, as opposed to the dicta" concept. On the other hand, the very next sentence unequivocally states that an old rule under Teague constitutes "clearly established Federal law" under AEDPA. Thus, O'Connor seems to both disparage and endorse Justice Stevens's functional equivalence argument. One commentator has interpreted these sentences as suggesting that while old rules constitute clearly established federal law, the realm of clearly established federal law may encompass more than old rules. It may include some "new rules" within the meaning of Teague. This is a plausible interpretation of O'Connor's text, but as of this writing the Court does not appear to have taken this more flexible course. Finally, the paragraph ends with an assertion that lower court precedent cannot be used to satisfy the clearly established federal law requirement. On this point the Court is unanimous.

That brings us to Part III of Justice Stevens's opinion, which also is an opinion for the Court, representing the views of six Justices. Here, Justice Stevens applies the "clearly established Federal law" principle. Williams, as noted above, claimed that he was denied effective assistance of counsel "when his trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury." The threshold question under AEDPA, was "whether Williams seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." Because Williams relied on Strickland v. Washington, this question was easily resolved:

It is past question that the rule set forth in Strickland qualifies as "clearly established Federal law, as determined by the Supreme Court of the United States." That the Strickland test "of necessity requires a case-by-case examination of the evidence," Wright, 505 U.S., at 308 (Kennedy, J., concurring in judgment), obviates neither the clarity of the rule nor the extent to which the rule must be seen as "established" by this Court. This Court's precedent "dictated" that the Virginia Supreme Court apply the Strickland test at the time that court entertained Williams' ineffective-assistance claim. Teague, 489 U.S., at 301. And it can hardly be said that recognizing the right to effective counsel "breaks new ground or imposes a new obligation on the States."

64. Larry W. Yackle, The Figure in the Carpet, 78 Tex. L. Rev. 1731, 1752–53 (2000).
65. Williams, 529 U.S. at 390.
66. Id.
67. Id. at 391.
This majority application of the statutory language conforms precisely to Justice Stevens's description of the "clearly established" standard in his plurality opinion. It embodies his view of the relevance of Teague, at least in the sense that an old law is a clearly established law, as well as his view that a rule of law premised on Supreme Court precedent will be deemed clearly established unless the application sought by the petitioner "breaks new ground or imposes a new obligation on the states." It is also consistent with Justice O'Connor's view that clearly established federal law must be derived from the holdings of Supreme Court precedent. Finally, it is worth noting that the "law" of Strickland is underdeterminate in the sense that it provides guidelines for determining the circumstances under which ineffective assistance of counsel may be established, but it does not provide bright-line solutions for each fact-specific case.

Some further insight as to the majority's view of what constitutes clearly established federal law can be gleaned from the Court's decision in Ramdass v. Angelone, decided shortly after Williams. While none of the three opinions in that case—a plurality, a concurrence, and a dissent—discusses the "clearly established Federal law" standard, the case does involve an application of § 2254(d)(1), and the Court majority treats the relevant Supreme Court precedent in a manner consistent with Justice O'Connor's "holdings, as opposed to the dicta" standard. Unlike Williams, however, Ramdass did not involve a principle of general application calling for a case-by-case analysis. Rather, at issue in Ramdass was the scope of a single fact-specific precedent, Simmons v. South Carolina. In Simmons, the Court held that due process entitles a parole-ineligible defendant in a capital case to inform the sentencing jury of that ineligibility when the prosecution puts the defendant's future dangerousness at issue. According to the Ramdass majority, that is, the plurality and the concurrence, this "clearly established Federal law" was not controlling under the facts presented. This was so because the petitioner in Ramdass was not technically parole-ineligible on the date of his capital sentencing, for the conviction on which his ineligibility was premised had not yet been entered as a judgment. The entry of that judgment came nineteen days later. In essence, both the plurality and the concurrence concluded that Simmons established a bright-line rule that was triggered only when the defendant was parole ineligible as a matter of state law at the time the jury was asked to consider his future dangerousness. Justice O'Connor, concurring in the judgment, concluded, "I believe the Virginia Supreme Court's decision was

neither contrary to, nor an unreasonable application of, our holding in Simmons.\textsuperscript{70} In short, the majority in Ramdass confined the "clearly established Federal law" to the fact-specific precedent in which the principle had been established. In this sense, the Ramdass decision also conforms to the "new rule" principle derived from Teague. At least from the perspective of the Court majority, one could say that the extension of Simmons to the facts presented in Ramdass would have broken new ground and imposed new obligations on the states.

The Court's decision in Bell v. Cone\textsuperscript{71} is also moderately instructive, though the Court did not expressly apply § 2254(d)(1). In Bell, the habeas petitioner alleged ineffective assistance of counsel at the sentencing phase of a capital case and sought to rely on the presumed prejudice standard described in United States v. Chronic.\textsuperscript{72} The petitioner's theory, derived directly from Chronic, was that his "counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing."\textsuperscript{73} The facts, at least arguably, seemed to warrant that view. Petitioner's counsel apparently lost hope and gave up during the sentencing phase. Among other things, he failed to adduce mitigating evidence and failed to make a closing argument.\textsuperscript{74} The Court, however, focused on the word "entirely" and held, in essence, that the clearly established principle was narrower than the petitioner asserted. It applied only when "the attorney's failure was complete."\textsuperscript{75} Bell's attorney had not been completely inactive during the sentencing phase. Therefore, Bell was not entitled to rely on the presumed prejudice standard. While one can see Bell as a case in which the Court simply disagreed with a party's characterization of the law or facts, it also provides some insight into the Court's perception of the clearly established standard. Thus, while in Ramdass the Court focused on the fact-specific holding of the relevant precedent, in Bell the Court focused on a specific word from the previous precedent. In each case, the result was that the "clearly established Federal law" was insufficiently broad to support the habeas petitioner's claim.

From the perspective of precedent, two things are absolutely certain with respect to the "clearly established Federal law" principle. The law must be embodied in a Supreme Court precedent and that precedent must predate the

\textsuperscript{70} Ramdass, 530 U.S. at 181 (O'Connor, J., concurring in judgment).
\textsuperscript{71} Bell v. Cone, 535 U.S. 685 (2002).
\textsuperscript{72} United States v. Chronic, 466 U.S. 648 (1984).
\textsuperscript{73} Id. at 659 (1984).
\textsuperscript{74} Bell, 535 U.S. at 691; see also id. at 703–13 (Stevens, J., dissenting) (arguing that the attorneys' failure warranted relief).
\textsuperscript{75} Id. at 697.
judgment of conviction of the person seeking habeas. The standard for determining whether a law has been clearly established also appears to be reasonably certain. The view expressed in Part III of Justice Stevens’s opinion in Williams adopts the "breaks new ground or imposes a new obligation" standard of Teague. That being the majority view, a law is clearly established if it does not violate the Teague standard. On this score, Williams and Ramdass/Bell differ only due to the nature of the precedent the habeas petitioner seeks to enforce. Ramdass involved the scope of a single, fact-specific precedent and Bell involved what the Court perceived as a narrow exception to Strickland, while Williams involved a long-established precedent calling for a case-by-case application of a broadly conceived legal principle. One could say that in the context of a single, fact-specific precedent or a narrowly confined principle, that is, relatively determinate laws, every significant extension of the precedent or principle breaks new ground. A broadly conceived principle of general application, that is, an underdeterminate law, covers a range of factual scenarios and requires no extension to accommodate cases falling within that range. Where a particular claim falls within this spectrum of possibilities between the fact-specific and the rule of general application, therefore, may be of some significance. In general, the Court’s initial interpretations of the "clearly established Federal law" principle appear wholly consistent with the text of subsection (d)(1).

B. Contrary to or Involved an Unreasonable Application Of

1. As Applied in Williams v. Taylor

Williams also provides the Court’s baseline interpretation of the "contrary to" and "unreasonable application" federal review standards. As was true of the Court’s interpretation of the "clearly established Federal law" principle, the Court’s interpretation of the federal review standards is complicated by the relationship between the respective descriptions of those standards found in the Stevens plurality and the O’Connor majority, and in the Stevens majority’s application of them.

One senses that Justice Stevens’s plurality opinion is built on an assumption that any endorsement of an independent unreasonable-application standard would, to some degree, endorse the wrong-but-reasonable principle. Attempting to avoid this possibility, he rejects what might be called the "independent" standard thesis. Under that thesis, pure questions of law are examined under the contrary-to standard, while mixed questions of law and fact
are examined under the unreasonable-application standard.\textsuperscript{76} Justice Stevens disagreed. "We are not," he says, "persuaded that the phrases define two mutually exclusive categories of questions."\textsuperscript{77} Of course, the fact that the categories are not mutually exclusive does not mean they are identical or designed for identical purposes. Having rejected the different use thesis, however, Justice Stevens's discussion proceeds to a conceptual level that emphasizes the overlap between the two standards. Of course, he is correct. There certainly is overlap, but this observation does not obviate the necessity of examining the text to discover any potential reason for treating these standards independently (other than a fear of what one might find). In any event, having found an overlap, he concludes that the contrary-to standard establishes a recognizable and centrifugal principle of federal review, namely, "independent" review by the federal courts.\textsuperscript{78} The unreasonable-application standard is essentially subsumed within this principle, reasserting itself only as a "mood" that admonishes federal courts to respect state court judgments.\textsuperscript{79} As Justice Stevens explains,

> Otherwise the federal "law as determined by the Supreme Court of the United States" might be applied by the federal courts one way in Virginia and another way in California. In light of the well-recognized interest in ensuring that federal courts interpret federal law in a uniform way, we are convinced that Congress did not intend the statute to produce such a result.\textsuperscript{80}

The primary problem with Justice Stevens's textual analysis is that there is very little of it. Instead of analyzing the text, the opinion talks around the text in an apparent effort to avoid certain implications. As I hope I have demonstrated, there is a readily-available, sensible reading of § 2254(d)(1) that in no way requires one to import a wrong-but-reasonable standard into the text. Nor does it require one to ignore any part of the text. Thus, even if the wrong-but-reasonable standard represents a plausible interpretation of the text, which I very much doubt,\textsuperscript{81} there are equally plausible interpretations that do not import that standard. Justice Stevens certainly could have addressed those possibilities and explained why they might be preferred over the wrong-but-reasonable

\begin{itemize}
\item \textsuperscript{76} Williams v. Taylor, 529 U.S. 362, 384 (2000).
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Id. at 389.
\item \textsuperscript{79} Id. at 385–86.
\item \textsuperscript{80} Id. at 389–90.
\item \textsuperscript{81} See supra Part II.B.4 (arguing that the legislative history of § 2254 does not support reading the wrong-but-reasonable standard into the federal law of habeas).
\end{itemize}
standard. Instead, he opts for a unified standard that essentially disrespects the
text by treating two alternative standards as one.

Despite these criticisms, Justice Stevens's opinion does reflect sound legal
intuition. His legitimate worry over the wrong-but-reasonable standard leads
him to search for a more coherent alternative to that potentially radical and
arguably incoherent reworking of the law of habeas. And at the same time he
expressly recognizes that the nuances of the law as applied require a sensible
deference to state court decisions. "We all agree that state-court judgments
must be upheld unless, after the closest examination of the state-court
judgment, a federal court is firmly convinced that a federal constitutional right
has been violated."82 This observation seems to embrace some independent
utility for the unreasonable-application standard. Thus, more generally
considered, his opinion appears to be searching for a middle ground between
draconian federal oversight and virtual abdication of federal court
responsibility. This may be precisely what the text of subsection (d)(1) seeks to
achieve. Stevens simply fails to see the textual path to that end.

As noted above, Justice O'Connor wrote an opinion for the Court with
respect to the scope of the federal review standards.83 Her key criticism of the
Stevens opinion was that it:

fails to give independent meaning to both the "contrary to" and
"unreasonable application" clauses of the statute. By reading § 2254(d)(1)
as one general restriction on the power of the federal habeas court, Justice
Stevens manages to avoid confronting the specific meaning of the statute's
"unreasonable application" clause and its ramifications for the independent-
review rule.84

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83. Justice O'Connor begins her critique of Justice Stevens's interpretation of the federal
review standards by arguing that his interpretation merely reiterates prior law, thereby rendering
subsection (d)(1) of no effect. Williams, 529 U.S. at 403-04. This is not entirely correct.
Subsection (d)(1), under both the Stevens and O'Connor interpretations, works a major change
in the scope of habeas by limiting the availability of the writ to claims premised on a violation
of clearly established Supreme Court precedent. No longer may lower federal court precedent
serve as a basis for habeas relief. Thus, the proclivities of any so-called liberal circuits are
effectively reined in. One can certainly argue that this is the major change rendered by
subsection (d)(1). It embodies the "new law" principle of Teague with a choker. Moreover, the
fact that a statute reflects principles previously adopted by the Court, such as the longstanding
principle of independent federal review, does not render a statute meaningless even in the
absence of other changes. The congressional endorsement of a judicially created doctrine lends
supplemental jurisdiction embodying the judicially created principles of pendent and ancillary
jurisdiction).
84. Williams, 529 U.S. at 404.
O'Connor then goes on to adopt a textually premised "independent standards" interpretation of subsection (d)(1). "The word 'contrary,'" according to Justice O'Connor, "is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'"85 Consistent with this interpretation, the contrary-to standard is satisfied, that is, transgressed, if "the state court applies a rule that contradicts the governing law set forth in our cases."86 As such, Justice O'Connor's interpretation conforms closely to the text. It also parallels the textual analysis described in Part II.B.1, reflecting the "second combination" of state court decisions in which the state court adopts an incorrect federal standard and arrives at an incorrect outcome. Undoubtedly, a state court decision that "contrads the governing law" is incompatible with that law and, hence, contrary to that law. But she then takes the contrary-to standard a step further by concluding that a state decision is also contrary to clearly established and binding 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 our precedent."87 This is a revealing move. It slides the contrary-to standard into the realm of unreasonable applications. Surely a state court decision can be said to have unreasonably applied binding precedent when it arrives at an opposite result on materially indistinguishable facts. This is not to say, however, that O'Connor's contrary-to standard swallow the unreasonable-application standard, but to recognize, at least implicitly, that the standards do overlap, just as pure questions of law and mixed questions of law and fact sometimes overlap. In this sense, the state court decision described by Justice O'Connor is both contrary to and an unreasonable application of clearly established federal law.

That brings Justice O'Connor to the independent unreasonable-application standard. "[A] run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause."88 By definition, the law applied is "in accord" with the controlling legal authority, hence, not contrary to that authority, and even if the state court achieves the incorrect result, it would, in Justice O'Connor's view, be "difficult . . . to describe . . . the decision as 'diametrically different' from, 'opposite in character or nature' from, or

85. Id. at 405.
86. Id.
87. Id. at 406.
88. Id.
'mutually opposed' to . . . our clearly established precedent." This view may sound familiar. It is the position described earlier with respect to the "fourth combination" of state-court decisions, namely, those in which the state court adopts the correct standard but arrives at an incorrect result. The "contrary to" language simply fails to describe fully the relationship between the state court decision and the principle of federal law. On the other hand, the unreasonable-application standard is a perfect fit. Thus, Justice O'Connor quite reasonably concludes that "run-of-the-mill" application problems ought to be examined under the unreasonable-application standard.

Her conclusion here, when combined with her definition of "contrary to," leads to a textually consistent and elegant universe of review standards. She has, in essence, created a spectrum of "review" possibilities, ranging from decisions that are measured exclusively under the contrary-to standard (failure to properly identify and apply the controlling precedent), to those that may be amenable to resolution under either standard (failure to conform a decision to a materially indistinguishable and controlling precedent), and to those that are measured exclusively under the unreasonable-application standard (failure to apply properly the controlling, but not materially indistinguishable precedent). The only question that remains is to determine when decisions falling into the latter category are "unreasonable." Having created this spectrum, she reminds us, almost unnecessarily, that Justice Stevens's approach "saps the 'unreasonable application' clause of any meaning." She is right.

As to the definition of unreasonableness, recall that the Fourth Circuit in Williams held that a decision would be deemed unreasonable only if "reasonable jurists would all agree" that to be the case. This is not an objective reasonable jurist standard. Rather, it is a subjective rationality standard. Justice O'Connor rejects it as such. In so doing, she opts for what she describes as an objective standard of unreasonableness. Of course, an irrational decision by a state court would violate any objective standard of unreasonableness (or reasonableness), but, as Justice O'Connor's rejection of the Fourth Circuit standard suggests, a merely rational decision is not necessarily an objectively reasonable one. Her judgment here appears to be

89. Id.
90. Supra Part II.B.1.
93. Williams, 529 U.S. at 409.
94. Id.
wholly consistent with the relevant usages of the word "reasonable" in other legal contexts.\textsuperscript{95}

Justice O'Connor does not define what she means by "objectively unreasonable," essentially leaving that task to a case-by-case determination. As we will see, this lack of a definition remains a problem. However, she does observe "that an unreasonable application of federal law is different from an incorrect application of federal law."\textsuperscript{96} From a textual perspective, her explanation for this conclusion is that Congress chose the word "unreasonable" over terms like "erroneous" or "incorrect." By so observing, Justice O'Connor did not quite endorse a wrong-but-reasonable standard. Rather, she merely posits that an unreasonable application differs from an incorrect one. This is obviously true. The words are not synonymous. In this sense, Justice O'Connor's \textit{Williams} opinion can be read as simply directing us to the proper question, that is, do not ask whether the state court decision was incorrect, but whether it was objectively reasonable.\textsuperscript{97} It would seem, however, that whether a decision is objectively unreasonable is at least partially dependent on whether the decision was incorrect. Surely, a state court decision cannot be labeled objectively unreasonable in the absence of error. Similarly, one would think that an objectively incorrect decision would by definition be an objectively unreasonable one. So, yes, the unreasonable-application standard does require one to ask a particular question, but asking that question does not eliminate the necessity of inquiring into any potential underlying error. Of course, the mere discovery of error will not itself resolve the inquiry.

In my discussion of the meaning to be attributed to the word "unreasonable," I referenced three possibilities. The first was an objective reasonable jurist standard, the second was a rationality standard incorporated into the first, and the third was a standard of deference that applies when definitively correct answers are not a practical possibility under what can be described as underdeterminate laws.\textsuperscript{98} That third possibility is also incorporated in the reasonable jurist standard. This is so because objectively reasonable jurists might rationally disagree over the "correct" result under a given set of facts as measured against an underdeterminate legal standard. Within this third realm, a federal judge might perceive the "correct" outcome in one fashion, while an objectively reasonable state judge might perceive it in

\textsuperscript{95} See \textit{supra} Part II.B.2 (discussing the meaning of the phrase "unreasonable application of").

\textsuperscript{96} \textit{Williams}, 529 U.S. at 410.

\textsuperscript{97} This "proper question" view is reiterated but not elaborated upon in \textit{Bell v. Cone}, 535 U.S. 685, 694 (2002).

\textsuperscript{98} \textit{Supra} note 26 and accompanying text.
another. Under a de novo standard of review, the federal judge’s perception would always prevail. Under the unreasonable-application standard it may not. Within the context of underdeterminate laws, there is, in essence, no superior authority when the law does not mandate a particular result.

The critical question, then, is under what circumstances might an objectively reasonable jurist arrive at a conclusion that is perceived as incorrect but which is nonetheless entitled to deference? If those circumstances arise only in the context of laws that permit a range of judgments over which objectively reasonable jurists could rationally disagree, then we have arrived at a subtle construction of § 2254(d)(1) that is consistent with text, legislative history, and a reasonably sophisticated understanding of the law. If, on the other hand, objective reasonableness operates as a blunt instrument to shield state court decisions from federal review, that is, a general rule of deference, then we have arrived at a position that is neither commanded by the text nor consistent with the legislative history of that text, and which represents a radical departure from our understanding of the law and the role of federal courts in enforcing principles of federal law. Justice O’Connor’s opinion does not provide any clue as to her answer to this critical inquiry.

That brings us back to Justice Stevens. In his plurality opinion, he states that the difference between his interpretation of the federal review standards and that of Justice O’Connor is scant at best. He may be right. Justice O’Connor’s insistence on asking the right question will quite likely affect only those cases at the margin, that is, so long as her standard is properly understood as one that demands a particular question—was the decision objectively reasonable?—and not one that more generally endorses or invites a wrong-but-reasonable standard. We can see the commonalities between the Stevens and O’Connor approaches by comparing Part IV of Justice Stevens’s opinion, which is an opinion for the Court joined by Justice O’Connor, with Justice O’Connor’s separate endorsement of that opinion.

Recall that the underlying question in Williams was whether defense counsel had rendered ineffective assistance by failing to investigate and present mitigating evidence at the sentencing phase of a capital case. The evidence plainly established that counsel had failed to discover substantial mitigating evidence pertaining to Williams’s horrendous childhood. In concluding that counsel had not been ineffective within the meaning of Strickland v. Washington, the Virginia Supreme Court committed two potential errors. First, it adopted a novel interpretation of Strickland that significantly limited the scope of that decision. Next, it applied the prejudice prong of Strickland without, as required by Strickland and its progeny, fully examining the totality of the mitigating evidence.
Justice Stevens, speaking for the Court, first held that the Virginia Supreme Court had misinterpreted the applicable standards. Simply put, "The trial judge analyzed the ineffective-assistance claim under the correct standard; the Virginia Supreme Court did not." Or, in Justice O'Connor's words, "[A]s the Court ably explains, the Virginia Supreme Court's decision was contrary to Strickland." In short, where a state court decision gets the clearly established Supreme Court precedent wrong and as a consequence arrives at an incorrect outcome, subsection (d)(1) permits a federal court to grant habeas, a classic example of the second combination—incorrect federal standard and incorrect outcome.

Next, on the "totality of the mitigating evidence" issue, the Court held that the state court's application of the prejudice standard was unreasonable. "[T]he State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceedings—in reweighing it against the evidence in aggravation." Moreover, "the state court failed even to mention the sole argument in mitigation that trial counsel did advance—Williams turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that." Stevens goes on to explain that this evidence, coupled with other evidence adduced at habeas, "might well have influenced the jury's appraisal of his moral culpability.

One could say, from the perspective of an objective reasonable jurist standard, that given the Strickland standards, a prudent, careful, and competent jurist would not have failed to consider the totality of the evidence of mitigation in determining whether prejudice had been established. Or, as Justice O'Connor phrased it, "The Virginia Supreme Court's decision reveals an obvious failure to consider the totality of the omitted mitigation evidence." Hence, one can say that the Virginia Supreme Court's decision was objectively unreasonable because a prudent, careful and competent jurist would have understood the Strickland standards to require a consideration of the totality of the evidence of mitigation. In a sense, the Virginia Supreme Court's decision revealed a misunderstanding of the clearly established principles.

100. Id. at 414.
101. Id. at 397–98.
102. Id.
103. Id.
104. Id. at 416 (emphasis added).
2. As Applied in Penry v. Johnson

The unreasonable-application standard was also revealingly applied by the Court in Penry v. Johnson (Penry II). Johnny Paul Penry was convicted of capital murder and sentenced to death in 1980. In Penry v. Lynaugh (Penry I), the Supreme Court vacated his sentence because the trial court failed to instruct the jury on its duty to consider the evidence in mitigation introduced during the penalty phase of that proceeding. In fact, the nature of the instructions seemed to suggest that the evidence in mitigation was irrelevant. Penry was retried and again sentenced to death. After being denied relief by the Texas Court of Criminal Appeals, Penry sought federal habeas on two grounds, one pertaining to the Fifth Amendment and the other pertaining to jury instructions that the court gave during the second penalty phase hearing.

The Fifth Amendment claim was premised on a violation of the principles established in Estelle v. Smith, where the Court held that the introduction of "uncounseled" statements made to a court-appointed psychiatrist violated the defendant's Fifth Amendment rights. During the Penry II penalty phase, a clinical neuropsychologist, Dr. Price, testified on Penry's behalf. In preparing to testify, Dr. Price relied, among other things, on a psychiatric evaluation of Penry prepared by another defense psychiatrist. That evaluation was prepared for use in a competency proceeding in a rape case that took place before the murder in question. On cross-examination, Dr. Price was required to read a portion of the prior report that stated the evaluator's "professional opinion that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons." The Texas Court of Criminal Appeals rejected Penry's claim that introduction of this evidence violated the Fifth Amendment. On federal habeas, the Supreme Court first distinguished Estelle on several grounds. Unlike Penry, the defendant in Estelle had not placed his mental condition at issue. Next, in Estelle, the state chose the examining psychiatrist and called that psychiatrist to testify as part of its affirmative case. Finally, the defendant in Estelle had been charged with a capital crime at the time the evaluation was undertaken. As to whether the state courts were objectively

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110. Id. at 794.
unreasonable in failing to extend *Estelle* to the facts of *Penry II*, the Court explained:

The differences between this case and *Estelle* are substantial, and the Court's *Estelle* opinion suggested that its holding was limited to the "distinct circumstances" presented there. It also indicated that the Fifth Amendment analysis might be different where a defendant introduces psychiatric evidence at the penalty phase. Indeed, the Court has never extended *Estelle*’s Fifth Amendment holding beyond its particular facts. It therefore cannot be said that it was objectively unreasonable for the Texas court to conclude that Penry’s not entitled to relief on his Fifth Amendment claim.\(^{111}\)

While the Court did not say that the Texas Court of Criminal Appeals was correct in its evaluation of Penry’s *Estelle* claim, it came very close to doing so. At a minimum, the Court’s opinion in *Penry II* makes it clear that the Texas court was not definitively, clearly, or even probably incorrect. It should, therefore, be evident that the reasonableness of the Texas court’s decision is at least partially related to the Supreme Court’s view of the merits.

The second issue in *Penry II* asked whether the jury instructions given during the second penalty phase conformed to the mandate of *Penry I*. Hence, some further background on *Penry I* is necessary. In *Penry I*, the trial court instructed the jury that it was required to answer three statutorily mandated issues. If a juror found that the issue was established beyond a reasonable doubt, the juror was required to vote "yes" on that issue. If each issue was answered "yes" by the entire jury, then the death penalty would be imposed. None of the statutorily mandated issues permitted the consideration of mitigating evidence, even though Penry’s counsel had introduced such evidence during the penalty phase. The Court in *Penry I* held that the failure to instruct on mitigating evidence was fatal. "[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."\(^{112}\)

The jury instructions in *Penry II* were identical to the jury instructions in *Penry I* except that the jury was also given a "supplemental" instruction on mitigating evidence. This instruction did not, however, explain how the mitigating evidence was to be folded into the consideration of the statutorily mandated issues. It ended with the following admonition:

If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under

\(^{111}\) Id. at 795 (citations omitted).

\(^{112}\) *Penry I*, 492 U.S. at 326.
consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

In essence, this instruction allowed the jurors to nullify the instructions on the statutorily mandated issues. The Texas Court of Criminal Appeals upheld these instructions as being consistent with Penry I.

The Supreme Court concluded that the state court's decision was objectively unreasonable. To the extent that the Texas court concluded that the mere giving of a supplemental instruction on mitigation was sufficient, "the Texas court clearly misapprehended our prior decision." The key under Penry I was that a "jury be able to 'consider and give effect to [a defendant's mitigating] evidence in imposing sentence.'" To the extent that the Texas court concluded that the supplemental instruction satisfied the standards of Penry I, it was wrong. The gist of the Court's ruling on this point is that "it would have been both logically and ethically impossible for a juror to follow both sets of instructions." In other words, in order to follow the supplemental instruction the jurors would have to violate their oath to follow the instructions on the statutorily mandated issues.

Although the Court thoroughly explains why it thinks the Texas Court of Criminal Appeals was wrong, the Court never explains why this perceived error in the application of the Penry I standards was objectively unreasonable. To be sure, the Court does state that "to the extent the Texas Court of Criminal Appeals concluded that the substance of the jury instructions given at Penry's second sentencing hearing satisfied our mandate in Penry I, that determination was objectively unreasonable." But there is no further explanation. Instead the Court's conclusion is immediately followed by a "Cf." citation to a case in which a state court decision had "incorrectly limited" a prior Supreme Court precedent. Also, later in the same paragraph, the Court describes the Penry II supplemental instruction as "ineffective and illogical." More generally, however, the Court provides no other clue as to the content of the objectively-unreasonable standard.

It is interesting to note that despite the Williams admonition that "unreasonable" is not synonymous with "incorrect," the Penry II Court's perception of objective unreasonableness is premised largely, if not completely,

114. Id. (quoting Penry v. Lynaugh, 492 U.S. 302, 319 (1989)).
115. Id. at 799.
116. Id. at 803–04.
117. Id. at 804.
on the perceived error committed by the Texas Court of Criminal Appeals. The essence of the *Penry II* holding is that the Texas court "incorrectly limited" the mandate of *Penry I*. There is, quite plainly, some tension between this aspect of *Penry II* and Justice O'Connor's admonition in *Williams* that distinguished between the words "unreasonable" and "incorrect." Somewhat surprisingly, Justice O'Connor was also the author of *Penry II*. But again, regardless of tension, it is clear that "error" plays an essential role in the establishment of objective unreasonableness.

C. Summary and Recapitulation

With the text of § 2254(d)(1) and the Court's initial interpretations of it as a guide, there are a number of propositions that we can state with confidence. However, there are a few key concepts that require further elucidation by the Court. First, with respect to our confident predictions, we can safely conclude that under § 2254(d)(1) a federal court may grant habeas on behalf of a person in state custody raising a federal claim if and only if the following propositions are satisfied:

- the petitioner's claim was adjudicated on the merits in state court;
- the claim is premised on a proposition of federal law clearly established in the holdings of pre-existing Supreme Court precedent;\(^\text{118}\)
- and one of the following propositions is true:
  - the state court decision was premised on a rule of law incompatible or logically inconsistent with that precedent;
  - the state court decision achieved a result opposite of that precedent on materially indistinguishable facts; or
  - the state court decision represents an objectively unreasonable application of that precedent.

\(^{118}\) To the extent that *Teague v. Lane*, 489 U.S. 288 (1989), remains the model for this principle, which it appears to do, those propositions of law must have been established as of the date the petitioner's judgment of conviction became final. It is possible, and in my view, constitutionally preferable, that the fundamental rights exceptions recognized by *Teague* would also be exceptions to the "clearly established" principle of § 2254(d)(1), but the text itself does not provide any such opening.
(I am assuming that any perceived error is not harmless.) There are, however, three points in this simple structure that require further judicial elucidation. They are: (1) the scope of the "clearly established" principle; (2) the treatment to be afforded the "materially indistinguishable" component of the contrary-to standard; and (3) the definition of "objectively unreasonable."

The first two points requiring further judicial guidance are reasonably lucid from a definitional perspective, but given the paucity of precedents we will need a fuller judicial track record before we can say for certain how broadly or narrowly these concepts will be applied. For example, while it seems evident that the clearly-established principle is keyed to the holdings of prior precedent, it remains unresolved as to whether and, if so, the extent to which logical extensions of precedent will be permitted or circumscribed. The trend appears to be toward circumscription, with *Teague v. Lane* lurking as the background principle, but that may be a product of the Court majority's view of the wisdom of allowing the particular doctrines at issue to spread roots, for example, the somewhat technical parole ineligibility claim in *Ramdass v. Angelone*, the narrow legal principle at issue in *Bell v. Cone*, and the fact-specific Fifth Amendment claim in *Penry v. Johnson*. On the other hand, the Court's ruling in *Williams v. Taylor* establishes the principle that courts can deem rules of general applicability designed to cover a wide spectrum of factual circumstances as clearly established within the context of subsection (d)(1).

The Court's definition of the contrary-to standard reflects the well-established and (relatively) noncontroversial principle of de novo and independent federal review of questions of law. The biggest question lurking behind this standard pertains to the phrase "materially indistinguishable." In a sense, this question is quite similar to the questions surrounding the unresolved scope of the clearly-established principle. A rigid application of the materially-indistinguishable concept, that is, requiring a virtual identity of facts, will milk it of its vitality because it should be quite rare that a state court will blunder under such circumstances. Again, we will have to keep tuned in and remain sensitive to the judicial perceptions surrounding the underlying right being claimed.

The final point requiring judicial elucidation involves the "objectively unreasonable" measure of the unreasonable-application standard. Although the Court insists that objective unreasonableness is the critical measuring device of this review standard, the Court has provided only minimal guidance as to the meaning and scope of that phrase. Further work is required in this area.

From *Williams v. Taylor*, we know four things. First, the words "unreasonable" and "incorrect" are not synonymous and the proper inquiry, therefore, involves a determination of objective unreasonableness and not one
solely premised on a perceived state court error. Second, a rational judicial decision is not necessarily an objectively reasonable decision. In other words, objective reasonableness requires something more than mere rationality. Third, whether a state court’s refusal to extend a clearly established federal law can ever be deemed objectively unreasonable remains open, because the Williams Court declined to answer that precise question. (Note the overlap between this question and the unresolved questions surrounding the scope of the clearly-established principle and materially-indistinguishable component of the contrary-to standard). Fourth, a state court’s failure to apply a critical component of a federal standard is objectively unreasonable, presumably because a prudent, careful, and competent judge, having recognized the correct standard, would apply each component of that standard.

The Court’s decision in Penry II also provides some information about the objectively-unreasonable measure. First, a state court’s refusal to extend a fact-specific Supreme Court precedent is not objectively unreasonable when the precedent is readily distinguishable from the pending case, and this is especially true when the Court perceives that precedent as narrowly limited to its specific factual circumstances. This comes very close to saying that the state court decision was correct, though the Supreme Court specifically declined to so rule in Penry II. This tells us something, but not very much. Again, as per Williams, whether refusal to extend precedent will ever be deemed objectively unreasonable remains to be seen.

The only other point of knowledge to be gleaned from Penry II is more enigmatic. The Court’s conclusion that the state court failed to follow the mandate of Penry I respecting jury instructions on mitigating evidence focused entirely on whether the Texas Court of Criminal Appeals was correct when it ruled that the jury instructions in the second penalty phase were consistent with Penry I. In other words, in approaching the question of objective unreasonableness, the Penry II Court did precisely what it had admonished lower federal courts against doing in Williams. It measured objective unreasonableness by determining that the state court decision was incorrect. In so doing, the Court seemed completely unaware of this inconsistency. Nor did the Court suggest that the error was of a magnitude that objective unreasonableness could be presumed. At the very least, the Court’s approach suggests that even if error is not the measure of objective unreasonableness, the ascertainment of error plays some role in the determination of objective unreasonableness. Precisely what that role is remains to be seen. One thing is certain. The objectively unreasonable standard needs further and substantial elaboration.
IV. The October 2002 Term

In the October 2002 Term, the Supreme Court decided four cases involving the application of § 2254(d)(1). Two of those decisions were announced in per curiam opinions. Two were issued in full-dress opinions. In this section, I examine each of those decisions in an effort to determine the extent to which they either conform to the above model, alter that model, or add to our understanding of it.

A. The Per Curiam Opinions

1. Woodford v. Visciotti

The underlying crime in *Woodford v. Visciotti* involved an execution-style murder, a related attempted execution-style murder, and an armed robbery. Visciotti was convicted of all three crimes. After the penalty phase of his trial, in which evidence of prior violent acts was introduced, including the multiple stabbing of a pregnant woman, he was sentenced to death by the same jury that had convicted him. After his conviction and sentence were affirmed on direct appeal, Visciotti filed a petition for a writ of habeas corpus with the California Supreme Court. Among other things, he claimed ineffective assistance of counsel stemming from his lawyer's substandard preparation for and performance during the penalty phase. Specifically, Visciotti alleged that counsel failed completely to investigate mitigating circumstances and failed to present a coherent case in mitigation. The California Supreme Court appointed a special master to hold a hearing on these allegations. After receiving the master's report and after briefing on the merits, the California Supreme Court denied the petition. It concluded that regardless of whether counsel's performance was constitutionally inadequate, Visciotti had failed to establish prejudice under the standards of *Strickland v. Washington*.

Visciotti then filed a petition for habeas corpus in federal district court. The district court granted the petition and the Ninth Circuit affirmed. The Ninth Circuit recognized that § 2254(d)(1) precluded habeas relief unless the state court decision was either contrary to or an unreasonable application of clearly established federal law. It also appeared to adopt the *Williams* standards...

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122. *Visciotti v. Woodford*, 288 F.3d 1097, 1119 (9th Cir. 2002).
interpretation of those standards. Thus, according to the Ninth Circuit, a
decision is "contrary to federal law if it 'fail[s] to apply the correct controlling
authority from the Supreme Court.'"\textsuperscript{123} As to the unreasonable-application
standard, if a state court correctly identifies the controlling precedent, it can be
reversed only if its application of the law to the facts is "objectively
unreasonable."\textsuperscript{124} Purporting to apply these standards, the Ninth Circuit
concluded that the California Supreme Court's decision was both contrary to
and an unreasonable application of \textit{Strickland v. Washington}. The Ninth
Circuit cited three grounds for its ruling: (1) the California Supreme Court
applied the wrong legal standard in determining whether the petitioner had
established prejudice; (2) the California Supreme Court failed to assess the
totality of the mitigating evidence in applying the \textit{Strickland} prejudice
standards; and (3) the California Supreme Court unreasonably concluded that
the evidence of aggravating circumstances was overwhelming.

The key issue before the Ninth Circuit pertained to the standard of proof
necessary to establish prejudice. \textit{Strickland} imposes a reasonable probability
standard.\textsuperscript{125} The Ninth Circuit concluded that the California Supreme Court
applied a stricter preponderance-of-the-evidence standard.\textsuperscript{126} Hence, in the
Ninth Circuit's view, the state court's decision failed to apply the correct
controlling authority and was contrary to clearly established federal law.

The California Supreme Court described the standard it intended to apply
as follows: "The question we must answer is whether there is a \textit{reasonable probability}
that, but for counsel's errors and omissions, the sentencing
authority, would have found that the balance of aggravating and mitigating
factors did not warrant imposition of the death penalty."\textsuperscript{127} The court also
quoted from \textit{Strickland} at length and, borrowing language from \textit{Strickland},
described the inquiry into reasonable probability as focused on whether
counsel's performance had "undermined confidence in the outcome."\textsuperscript{128} The
reasonable-probability language was used three times in describing the
\textit{Strickland} standard.\textsuperscript{129} Yet, after examining and weighing the evidence of
mitigating and aggravating circumstances, the California court stated, "It is not
\textit{probable} that had this evidence been presented a more favorable result would

\textsuperscript{123} \textit{Id.} at 1104 (quoting Shackleford v. Hubbard, 234 F.3d 1072, 1077 (9th Cir. 2000)).
\textsuperscript{124} \textit{Id.} (quoting \textit{Williams}, 529 U.S. at 409).
\textsuperscript{126} \textit{Visciotti}, 288 F.3d at 1108–09.
\textsuperscript{127} \textit{In re Visciotti}, 926 P.2d 987, 1003 (Cal. 1996) (emphasis added).
\textsuperscript{128} \textit{Id.} at 1004; \textit{Strickland}, 466 U.S. at 694.
\textsuperscript{129} \textit{Id.} at 1003–04.
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have resulted at the penalty phase.\(^{130}\) This formula was repeated twice in the text. The Ninth Circuit concluded that the failure to use the modifier "reasonably" indicated a failure to apply the correct standard.\(^{131}\) In so ruling, the Ninth Circuit made no reference to the California Supreme Court’s previous use of the modifier in describing the standard. Nor did it reference the California Supreme Court’s extensive discussion of the *Strickland* standard. Instead, the Ninth Circuit assumed that the California Supreme Court had applied an erroneous preponderance-of-the-evidence standard, even though the state court never used that phrase.\(^{132}\)

The United States Supreme Court described the Ninth Circuit’s ruling as "a mischaracterization of the state court opinion."\(^{133}\) The high court was confident that the California Supreme Court had applied the correct standard, given that the state court used the modifier "reasonable" in describing the standard and given that the state court properly identified "undermin[ing] confidence in the outcome" as the proper measure of that standard.\(^{134}\) Hence, the decision of that court was not contrary to clearly established law as embodied in Supreme Court precedent. As to the unmodified use of the word "probable," the Court observed:

The California Supreme Court’s opinion painstakingly describes the *Strickland* standard. Its occasional shorthand reference to that standard by use of the term "probable" without the modifier may perhaps be imprecise, but if so it can no more be considered a repudiation of the standard than can this Court’s own occasional indulgence in the same imprecision.\(^{135}\)

As for the Ninth Circuit,

The Court of Appeals made no effort to reconcile the state court’s use of term "probable" with its use, elsewhere, of *Strickland’s* term "reasonably probable," nor did it even acknowledge, much less discuss, the California Supreme Court’s proper framing of the question as whether the evidence "undermines confidence" in the outcome of the sentencing proceeding. This readiness to attribute error is inconsistent with the presumption that state courts know and follow the law.\(^{136}\)

\(^{130}\) *Id.* at 1005 (emphasis added).

\(^{131}\) Visciotti v. Woodford, 288 F.3d 1097, 1109 & n.11 (9th Cir. 2002).

\(^{132}\) *Id.* at 1108–09.


\(^{134}\) *Id.*

\(^{135}\) *Id.*

\(^{136}\) *Id.* at 24.
In short, the Ninth Circuit’s ruling that the California Supreme Court had applied the wrong law was belied by the content of the state court’s opinion.

The Ninth Circuit also held that even had the California Supreme Court applied the correct standard, its application of that standard was objectively unreasonable because the state court failed to consider the totality of the mitigating evidence and because, contrary to the state court’s conclusion, the aggravating factors were not overwhelming.137 On the first point, the Supreme Court again disagreed with the Ninth Circuit’s characterization of the California Supreme Court opinion. "All of the mitigating evidence, and all of counsel’s prejudicial actions, that the Ninth Circuit specifically referred to as having been left out of account or consideration were in fact described in the California Supreme Court’s lengthy and careful opinion."138 The Court went on to detail the California Supreme Court’s discussion and integration of these factors.139 Hence, in the Court’s view, the Ninth Circuit failed to establish that the state court’s application of the "totality" prong of Strickland was objectively unreasonable. In essence, the United States Supreme Court was confident that the state supreme court had considered the totality of the mitigating evidence.

On the question of whether the California Supreme Court was "objectively unreasonable" in concluding that the aggravating circumstances were "overwhelming," hence negating the reasonable probability of prejudice, the Ninth Circuit said, "The record reflects, however, that the aggravating factors were not overwhelming, as the jury deliberated a full day and then requested additional guidance on the definitions of ‘moral justification’ and ‘extreme duress.’"140 This is certainly a reasonable observation, but nowhere does the Ninth Circuit explain why the contrary view of the state court, premised on the nature of the crime and the evidence of other crimes of violence, was objectively unreasonable. Rather, the Ninth Circuit seemed to be saying no more than that it disagreed with the decision of the state court. As the United States Supreme Court correctly noted, the Ninth Circuit, applying the unreasonable-application standard, lacked authority to substitute its judgment for that of the state court.141

The Supreme Court’s decision in Woodford v. Visciotti breaks no new ground, but it does provide a few lessons for attorneys and judges. Two of the errors committed by the Ninth Circuit involved that court’s mischaracterization

137. Visciotti v. Woodford, 288 F.3d 1097, 1118 (9th Cir. 2002).
139. Id. at 25–26.
140. Visciotti, 288 F.3d at 1118.
of the California Supreme Court's decision. One can generously characterize
the first error, pertaining to the reasonable probability standard, as involving the
Ninth Circuit's incomplete and selective reading of the state court opinion. The
second error, pertaining to whether the state court considered the totality of the
mitigating evidence, suffered from the same type of flaws, though it was
probably not as egregious. The Supreme Court's reaction to the Ninth Circuit's
judgment on these particular points can be seen as reflective of an attitude of
deference the Court perceives to be embodied in the text of § 2254(d), an
interpretive skin the Court has placed on the text. As the Court put it, "This
readiness to attribute error is inconsistent with the presumption that state courts
know and follow the law."142 In other words, before arriving at such
conclusions, a federal court must fully and fairly examine the text of a decision
that it has been asked to reverse. The third error, pertaining to the
"overwhelming" nature of the aggravating circumstances, reveals a failure by
the Ninth Circuit to follow Justice O'Connor's admonition in Williams that
§ 2254(d)(1) requires the resolution of a particular question, namely, whether
the state court decision was objectively unreasonable. The Ninth Circuit cited
but never examined that question. In this sense, the Ninth Circuit misperceived
its function. Instead of asking whether the state court decision was objectively
unreasonable, it asked whether that decision was correct and having concluded
that it was not correct, labeled it objectively unreasonable. The lesson here is
that a federal court must begin with the right question and arrive at its judgment
based on an examination of the criteria that might measure objective
reasonableness.143

142. Id. at 24.

143. A third lesson can be gleaned from Visciotti. To determine whether a reasonable
probability of prejudice had been established, the California Supreme Court was required to
consider the totality of the evidence in mitigation, weigh that evidence against the evidence in
aggravation, and then make a judgment about what the jury's response would have been had it
seen all the evidence. In some cases, the resolution of the reasonable probability question may
be clear, either because the evidence on one side or the other is such that no rational person
could disagree, or because binding precedent on materially indistinguishable facts provides an
obvious answer. But this was not such a case. The type of mitigating evidence that would have
been discovered had counsel done a thorough investigation was, although considerable, of a
type that is often presented during penalty phases and which sometimes makes a difference and
sometimes does not. Hence, the critical questions for the California Supreme Court were, first,
how this relatively standard, albeit not inconsequential, mitigating evidence stacked up against
the aggravating evidence and, second, whether it was reasonably probable that had this
mitigating evidence been introduced the jurors would not have voted for the death penalty.
There is one and only one correct answer to this question. Either it is reasonably probable or it
is not. Unfortunately, given the limits of human capability and the undetermined nature of
the legal standard, particularly on facts that do not point in any obvious direction, it is virtually
impossible to pinpoint that answer with anything like certainty. As I stated earlier,
2. Early v. Packer

The defendant in *Early v. Packer*\(^4\) was convicted in a California state court of second-degree murder and attempted murder. His convictions were affirmed by the state court of appeal. Among other things, the Court of Appeal rejected the defendant's argument that the trial court coerced the jury to reach a verdict and therefore "denied him his due process right to a fair and impartial jury."\(^145\) Defendant's argument centered on comments made by the judge to one juror, as well as on events surrounding those comments. The juror had asked to be excused after twenty-eight hours of deliberations. When she agreed that she could "hold out just a little bit longer," the judge replied to her: "I really appreciate it. Otherwise, they have to start deliberations all over again with another person."\(^146\) In ruling against the defendant, the appellate court relied exclusively on California precedent. The California Supreme Court denied discretionary review. The defendant sought a writ of habeas corpus in federal district court. The district court denied the writ but issued a certificate of appealability on the coercion issue. The Ninth Circuit, concluding that the judge's comments were unconstitutionally coercive, reversed and ordered the district court to grant the writ.\(^147\)

The Ninth Circuit ruled that the state court decision was contrary to clearly established federal law, namely, the Supreme Court's decisions in *Jenkins v. United States*\(^148\) and *Lowenfield v. Phelps*.\(^149\) Those cases, according to the

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Here, within this very narrow range of fine-tuned judgments that apply underdeterminate laws, the unreasonableness standard may require a federal judge to defer to a state court decision with which she disagrees but as to which she cannot state with certainty that the state court was objectively wrong. This is not to say that the state court decision is wrong-but-reasonable, but that given the underdeterminate nature of the applicable legal principle and the fact-specific nature of the particular problem, the decision must be upheld because it is at least objectively reasonable and not clearly wrong.

*Supra* page 691. Applying this principle here, neither possible conclusion as to whether a reasonable probability had been established can be described as certainly or definitively correct. In short, this aspect of *Viscioti* represents a case in which the ideal of definitive legal solutions is met with the practical reality of objectively reasonable alternatives under underdeterminate standards of law, either of which could be correct.

\(^{145}\) *Id.* at 6.
\(^{146}\) *Id.* at 4.
\(^{147}\) Packer v. Hill, 291 F.3d 569, 572 (9th Cir. 2002).
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Ninth Circuit, created a "working constitutional standard" through which to evaluate the petitioner's claim. Under that standard,

Coercive statements from the judge to the jury result in a denial of the defendant's right to a fair trial and an impartial jury. In order to determine whether the judge's comments were impermissibly coercive, the court must evaluate them "in [their] context and under all the circumstances."

In the judgment of the Ninth Circuit, the California Court of Appeal decision was contrary to federal law because the state court failed to apply the totality of the circumstances test:

[Instead that court] simply mentioned three particular incidents in its analysis and considered each of them separately. The California Court of Appeal failed to consider the cumulative impact of these three incidents, as well as the cumulative effect of several other coercive judicial actions and statements in this case.

The Ninth Circuit also noted that the state Court of Appeal's opinion "failed to cite any federal law, much less the controlling Supreme Court precedents." Finally, the Ninth Circuit held that the state court's decision "made an explicit statement of law that is contrary to Supreme Court precedent." As to this point, the state court had observed that a statement is only coercive if it coaxes "a particular type of verdict." Under Supreme Court precedent, as explained by the Ninth Circuit, a judge's comments can be deemed coercive if they "coerced a verdict."

The Supreme Court reversed in a unanimous per curiam opinion. The Court gave three reasons for its reversal of the Ninth Circuit. As to the first, the Court held that the state court's failure to cite the controlling Supreme Court precedent was not fatal. According to the Court, the contrary-to standard "does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." This observation is surely correct because, as noted previously, if the application of an incorrect standard nonetheless leads to a correct outcome (the third combination), then the state court decision is not incompatible with the applicable federal law. Moreover, if the state-imposed standards are either equally or more restrictive

150. Packer, 291 F.3d at 578.
151. Id.
152. Id. at 578-79 & n.10.
153. Id. at 578.
154. Id. at 579.
of state power than federal precedent, the state standards can hardly be described as incompatible with federal law. In fairness to the Ninth Circuit, however, the "failure to cite any federal law" statement in its opinion appears to be more of an introductory observation than a basis for that court’s holding.

Next, the Court disagreed with the Ninth Circuit’s judgment that the state court failed to consider the totality of the circumstances. Because the state appellate court described all the circumstances surrounding the coercion claim, "[t]he contention that the California court ‘failed to consider’ facts and circumstances that it had taken the trouble to recite strains credulity,"[5] Nor did the Court agree with the Ninth Circuit that the state court failed to consider the "cumulative impact" of the various events. "Compliance with Lowenfield does not demand a formulary statement that the trial court's actions and inactions were noncoercive ‘individually and cumulatively.’ It suffices that that was the fair import of the Court of Appeal’s opinion."[157] In short, in the view of a unanimous Supreme Court, the state court did apply the totality of the circumstances test as mandated by the Court’s precedents. That being the case, the state court’s decision was not contrary to clearly established federal law.

Of course, whether one agrees with the Court on this point depends on how one reads the California Court of Appeal’s decision. The slightly over three-page section of that opinion that addresses the coercion issue details all the pertinent facts, save one pertaining to a shift from the 10-2 vote to the 11-1 vote, focuses most of its analytical attention on the statements made to the reluctant juror, and then concludes, "Accordingly, the comments made and not made by the court to the jury did not coerce a particular verdict or deny Packer any constitutional rights."[158] The statement made to the juror was undoubtedly the key component of the coercion claim. Moreover, given that the generally thorough statement of facts preceded the appellate court’s conclusion regarding the coercive nature of the trial court’s "comments," it seems reasonable to conclude that the "fair import" of the Court of Appeal’s opinion is that it considered the totality of the circumstances. Undoubtedly, reasonable minds could differ, but as the Court observed in Woodford v. Visciotti, "This readiness to attribute error is inconsistent with the presumption that state courts know and follow the law."[159]

The third point of reversal involved the distinction between the "coerced any verdict" and the "coerced a verdict" standards. On this issue, the Supreme

156. Id. at 9.
157. Id.
Court explained that the federal standard did not state a constitutional principle, but was derived solely from the Court's supervisory powers over federal courts. Hence, the standard did not bind state courts. As a consequence, the state court's decision in this regard was not contrary to binding Supreme Court precedent.

The primary lesson to be gleaned from Early v. Packer is that a state court's failure to follow Supreme Court precedent is not to be presumed. Neither the failure to cite the applicable precedent nor the failure to write an opinion that conforms to a precise federal formula is sufficient to establish that a state court decision is contrary to clearly established federal law.

B. Lockyer v. Andrade

Lockyer v. Andrade involved a challenge to an application of California's three strikes law. The primary issue before the Court was whether the Ninth Circuit, in ordering a district court to grant habeas, had properly applied the unreasonable-application principle. By a five to four vote, the Court held that it had not. Justice O'Connor wrote the opinion for the Court and was joined by the Chief Justice and Justices Scalia, Kennedy, and Thomas. Justice Souter wrote the dissent and was joined by Justices Stevens, Ginsburg, and Breyer.

1. Facts, Proceedings, and Background Legal Principles

The facts of Lockyer v. Andrade can be simply stated. Leandro Andrade was charged with two counts of petty theft for stealing videotapes from two different Kmart stores. The total value of the merchandise stolen was approximately $150. The prosecutor, in an exercise of discretion, chose to prosecute these misdemeanor/felony "wobblers" as felonies. The jury convicted Andrade on both counts and also found that he had been previously convicted of three counts of residential burglary. All of Andrade's convictions were for nonviolent offenses. Nonetheless, each of the felony petty

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162. Id. at 1169–70; id. at 1176–77 (Souter, J., dissenting).
163. Andrade had also been twice convicted of misdemeanor petty theft, once convicted of escape from prison, and on two separate occasions convicted in federal court of transporting marijuana. Id. at 1170. These prior crimes did not operate as predicate offenses for the purpose of the three strikes law.
theft convictions qualified as a third strike under California law based on the three previous residential burglary convictions. Pursuant to that law, the trial court sentenced Andrade to twenty-five years to life on each count, to be served consecutively. Under this sentence, Andrade would be eligible for parole after fifty years, that is, at age eighty-seven.

Andrade challenged his sentence under the proportionality principle embodied in the Eighth and Fourteenth Amendments. Because the substance of his claim is intertwined with the questions presented under § 2254(d)(1), some background on the Court's proportionality precedents is necessary. There are three key decisions: Rummel v. Estelle, Solem v. Helm, and Harmelin v. Michigan.

In Rummel v. Estelle, the defendant was sentenced to a mandatory life term as a recidivist after his third felony conviction. His three convictions were all relatively minor—fraudulent use of a credit card to obtain $80 worth of goods and services, passing a $28.36 fraudulent check, and obtaining $120.75 by false pretenses. Nonetheless, by a 5-4 majority, the Rummel Court held that the defendant's life sentence, which carried the possibility of parole in twelve years, was not grossly disproportionate to his crime. Essentially, the Court adopted a circumscribed view of proportionality, observing that, "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." The obvious point of the Rummel majority was to continue that tradition. Justice Powell wrote the four-person dissent.

Solem v. Helm, was decided three years later. In that case, the defendant was sentenced to life imprisonment without the possibility of parole under a South Dakota recidivism statute. The triggering offense for Solem's sentence was uttering a "no account" check for $100. Solem had six prior convictions, all nonviolent: three for third-degree burglary, and one each for obtaining money under false pretenses, grand larceny, and "third-offense" driving while intoxicated. The Court, again by a 5-4 majority, this time in an opinion by Justice Powell, held that Solem's sentence was disproportionate to his crime and, hence, violated the Eighth Amendment's proscription against cruel and

168. Id. at 272.
unusual punishment. In so ruling, the *Solem* Court described and applied what it deemed the "objective" criteria for measuring proportionality:

> In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

The *Solem* Court distinguished *Rummel* based on the relative harshness of the life-without-parole sentence imposed in *Solem*. "This sentence is far more severe than the life sentence we considered in *Rummel* v. *Estelle*. Rummel was likely to have been eligible for parole within twelve years of his initial confinement, a fact on which the Court relied heavily." The dissent was written by Justice Rehnquist, the author of *Rummel*.

Finally, in *Harmelin* v. *Michigan*, the defendant was sentenced to a mandatory term of life without the possibility of parole for possession of 650 grams of cocaine. Justice Scalia, writing for himself and the Chief Justice, announced the judgment of the Court affirming the sentence and argued that *Solem* should be overruled. In so doing, he described that case as being "scarcely the expression of clear and well accepted constitutional law." A concurring opinion, authored by Justice Kennedy and joined by Justices O'Connor and Souter, also worried about the clarity of the standards, but endorsed the proportionality principle and the decision in *Solem*. Applying the *Solem* gravity-of-the-offense and harshness-of-the-sentence factor, the opinion concluded that the sentence imposed was not disproportionate to what the plurality perceived as a very serious crime. This conclusion alone was enough to dispose of Harmelin's claim since the plurality also concluded that the second and third *Solem* factors, that is, the comparative factors, need be applied only if a "comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." In short, the seriousness of the drug offense obviated the necessity of examining the second and third factors. The three-person dissent, authored by Justice White, joined by Justices

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170. Justice Blackmun provided the "swing votes" in *Rummel* and *Solem*.
172. *Id.* at 297.
174. *Id.* at 1003–04.
175. *Id.* at 1005.
Blackmun and Stevens, and essentially concurred in by Justice Marshall, applied all three Solem factors and found the sentence to be disproportionate. 7

Returning to the proceedings in Andrade, on direct appeal, the California Court of Appeal rejected Andrade’s proportionality argument. As to the federal proportionality standards, the Court of Appeal began by observing:

[T]o the extent defendant suggests that the proportionality analysis applies under both the state and federal constitutions, we must question that assertion. As Division One of this court noted recently... the current validity of the Solem proportionality analysis is questionable in light of Harmelin v. Michigan.177

The appellate court, therefore, ignored Solem/Harmelin completely and instead compared the crimes committed by Andrade solely with those committed by the defendant of Rummel. Given the rough similarity of the offenses, the court concluded, "Comparing defendant’s crimes and criminal history with that of defendant Rummel, we cannot say the sentence of fifty years to life at issue in this case is disproportionate and constitutes cruel and unusual punishment under the United States Constitution."178 The comparison with Rummel did not mention that Rummel would have been parole eligible in twelve years, while Andrade’s parole eligibility was set at fifty years. The court similarly found that Andrade’s sentence did not violate the state’s constitution.

2. The Ninth Circuit Opinion

Andrade then filed a petition for a writ of habeas corpus in federal district court raising an Eighth Amendment proportionality claim. The district court denied the petition. The Ninth Circuit reversed. 179 Judge Richard Paez, writing for a split panel, began his opinion for the court by citing the § 2254(d)(1) federal review standards and by recognizing Williams v. Taylor as the controlling authority as to the scope of these standards. 180 Although Judge Paez noted that the contrary-to and unreasonable-application standards sometimes

176. Id. at 1009–27; id. at 1027.
177. Pet. for Cert., App. E at 76, Lockyer v. Andrade, 123 S. Ct. 1166 (2003) (No. 01-1127) (citation omitted). The "assertion" being questioned was whether the U.S. Constitution imposed a proportionality requirement. The California Court of Appeal expressly recognized that an apparently less stringent version of proportionality was available under the state constitution. Id. at 77.
178. Id. at 77.
179. Andrade v. Attorney Gen. of Cal., 270 F.3d 743, 753 (9th Cir. 2001).
180. Id.
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overlap, he implicitly assumed that Andrade's challenge to the California Court of Appeal decision involved only the latter. Having made this assumption, he described the proper structure of a federal court's analysis under § 2254(d)(1) as follows: First, the federal court must identify the clearly established principle of federal law. Next, if and only if such a principle has been identified, the federal court must determine whether the state court erred in applying that principle. Finally, if and only if an error of application has been found, the federal court must determine whether that error was unreasonable. An application will be deemed unreasonable "only when our independent review of the legal question 'leaves us with a "firm conviction" that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the [state] court adopted, was erroneous—in other words that clear error occurred.'181

Proceeding to the first step in the analysis, Judge Paez identified the clearly established principle of federal law as one prohibiting "gross disproportionality" in sentencing, as measured by the objective criteria described in Solem v. Helm and as modified in Harmelin v. Michigan. More generally, he relied on principles extracted from Rummel v. Estelle, Solem, and Harmelin.182 He described these cases in some detail, noting the salient factual and legal differences between and among them. In concluding his survey of Supreme Court proportionality precedent, he explained that Justice Kennedy's opinion in Harmelin states the rule of that case due to the congruence between Kennedy's three-person concurrence and the four-person dissent. Moreover, while the Harmelin "rule" modifies the Solem three-factor test by treating the gravity-of-the-offense factor as a threshold requirement, Justice Kennedy's opinion "did not suggest, implicitly or explicitly, that his analysis would have led to a different outcome in Solem."183 In short, the clearly-established principle of federal law is the law that emerges from this trio of precedents, and the decision in Solem remains an integral part of that law.

Having identified the clearly established principle, Judge Paez applied that principle to determine if the state court committed error.184 He began, as Harmelin requires, by comparing the harshness of the penalty with the gravity of the offense. As a factual matter, Andrade's sentence was a term of fifty years to life, with no reduction for good behavior or for working while in

181. Id. (quoting Van Tran v. Lindsey, 212 F.3d 1143, 1153–54 (9th Cir. 2000)).
182. Id. at 753–58.
183. Id. at 758.
184. Id. at 758–66.
prison, and no parole eligibility until the expiration of fifty years. Judge Paez then noted that this sentence was "substantially more severe than the life sentence at issue in Rummel," where the defendant would be parole eligible in twelve years. By way of contrast, Andrade's sentence is the functional equivalent of the sentences at issue in Solem and Harmelin—life in prison without the possibility of parole. Given that "the life expectancy of a 37-year-old American male is 77 years . . . [i]t is more likely than not that Andrade will spend the remainder of his life in prison without ever becoming eligible for parole." In short, Andrade's sentence is harsh, the functional equivalent of the second most severe sentence possible, namely, life without the possibility of parole.

Harshness alone, however, does not establish disproportionality. The next step is to "examine the punishment in light of the gravity of the offense." Here Judge Paez concluded that Solem provides the closest analogy:

Even if we consider Andrade's entire criminal history record—five felonies, two misdemeanors, and one parole violation—it is still comparable, quantitatively and qualitatively, to that of the defendant in Solem. Both defendants had three burglary convictions, although only Andrade was convicted of all three in a single proceeding. All of the offenses were non-violent. Given that Andrade's sentence of 50 years to life is a sentence of life without a realistic possibility of parole, his case is most analogous to Solem.

In short, given the harshness of the sentence as compared to the gravity of the crimes, and measuring these factors against the precedents, Judge Paez concluded that an inference of gross disproportionality had been established.

Judge Paez completed the disproportionality inquiry by undertaking the intra- and inter-jurisdictional sentencing comparisons required by Solem and Harmelin. The inference of gross disproportionality was supported by both comparisons. As to the first, Judge Paez explained that Andrade's sentence was longer than sentences available for most violent crimes committed within the State of California and was twice as long as the comparable three-strikes sentences submitted for comparative reference by the state. With respect to the inter-jurisdictional comparison, Judge Paez performed a detailed survey of

185. Id. at 758.
186. Id.
187. Id. at 759.
188. Id.
189. Id.
190. Id. at 760–61.
191. Id. at 761–62.
other states with comparable recidivist statutes and concluded that Andrade "could not have received such a severe sentence anywhere else in the United States, with the possible exception of Louisiana."\textsuperscript{192}

Having applied the objective measures of gross disproportionality, Judge Paez concluded, "we disagree with the California Court of Appeal and conclude that Andrade's sentence is so grossly disproportionate to his crime that it violates the Eighth Amendment to the United States Constitution."\textsuperscript{193}

Given this disagreement, the question then became whether the decision of the state court involved an unreasonable application of clearly established federal law, that is, whether the state court committed clear error:

A proper analysis of gross disproportionality requires a comparison to all three cases: \textit{Rummel}, \textit{Solem}, and \textit{Harmelin}. While Andrade's crimes and history are comparable to those of the defendants in both \textit{Rummel} and \textit{Solem}, his life sentence with no possibility of parole for fifty years is most analogous to \textit{Solem}. The state court's failure to address \textit{Solem} yields an unreasonable conclusion that a non-violent recidivist sentenced to such a severe sentence for two misdemeanor offenses does not raise an inference of gross disproportionality. Its conclusion that Andrade's sentence does not violate the Eighth Amendment is irreconcilable with the Supreme Court's decision in \textit{Solem} and thus constitutes clear error.\textsuperscript{194}

The standards of § 2254(d)(1) having been satisfied, the judgment of the district court denying habeas relief was reversed. The issue before the Supreme Court was whether the Ninth Circuit had properly applied the unreasonable-application standard of § 2254(d)(1).

3. The Opinion of the Court

a. The Clearly Established Principle

The first question for the \textit{Andrade} Court was whether Andrade's proportionality claim was premised on "clearly established Federal law, as determined by the Supreme Court of the United States."\textsuperscript{195} Justice O'Connor's opinion for the Court begins this inquiry by quoting her \textit{Williams} majority opinion ("refers to holdings, as opposed to the dicta"), but then veers into entirely new territory. Instead of distilling the holdings from the relevant

\begin{itemize}
\item 192. \textit{Id.} at 766.
\item 193. \textit{Id.}
\item 194. \textit{Id.} at 766–67.
\end{itemize}
precedents, she appears bent on undermining those precedents. In her words, "Our precedents in this area have not been a model of clarity."\(^{196}\) For this proposition, she cites to the opinions written by Justices Scalia and Kennedy in *Harmelin*. Of course, Justice Scalia was writing a polemic against *Solem* and the proportionality principle as part of his two-person concurrence. Justice Kennedy's rather mild observations—"its precise contours are unclear"—were written from the perspective of one trying to bring more precision to the analysis, not less.\(^{197}\)

From the foregoing data, and without any effort to examine the elements of the doctrine of gross disproportionality, including the relationships between or among the relevant cases, Justice O'Connor simply concludes, "Thus, in this case, the only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case."\(^{198}\) For the last two internal quotes ("exceedingly rare" and "extreme") she relies on dicta extracted from the cases in which she might have discovered actual holdings. Hence, the clearly-established principle that emerges from O'Connor's analysis is simply a recognition of an amorphous principle of gross disproportionality, the potential range of which is all but indiscernible.

Justice O'Connor's approach to the clearly-established principle here contrasts with the approach she and Justice Stevens adopted in *Williams v. Taylor*. Williams claimed a violation of his Sixth Amendment right to counsel. The Court had no difficulty recognizing that the rule Williams sought to enforce was clearly established by the Court's decision in *Strickland v. Washington*. This was true despite the fact that application of *Strickland* would require a case-by-case analysis of whether counsel's performance fell below an objective standard of reasonableness and, if so, whether it was reasonably probable that counsel's deficient performance adversely affected the result. One could say that the "precise contours" of these principles are unclear. Certainly, reasonable minds might well differ as to their application in particular cases. Yet the *Williams* Court had no difficulty identifying this clearly-established principle of federal law and then applying it as a measure of the state court's decision.\(^{199}\) The three objective factors described in *Solem*

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196. *Id.* at 1173.
199. *See Williams v. Taylor*, 529 U.S. 362, 391 (2000) (ruling in the plaintiff's favor on his ineffective assistance of counsel claim); *id.* at 413 (O'Connor, J., concurring) (expressing approval of the court's ruling in the plaintiff's favor on his ineffective assistance of counsel.
appear to be of the very same ilk as the two-part Strickland test. Indeed, both Strickland and Solem create underdeterminate multifactored tests to measure the underlying constitutional claim. Moreover, one can sensibly argue that Solem's objective standards are less underdetermined than the relatively open-ended questions asked under Strickland.

The approach adopted by Justice O'Connor in Andrade is also at odds with the text of § 2254(d)(1). The text does not call for a rule that is both clear and established. It calls for a rule, the establishment of which is undisputed, that is, clearly established, under an accepted rule of recognition. In the specific context of § 2254(d)(1), the only recognized rule of law is Supreme Court precedent. As such, Justice O'Connor's "holdings, as opposed to the dicta" principle from Williams provides the proper guidance. Consistent with that principle, a court searching for clearly established law within the meaning of § 2254(d)(1) must identify the law that emerges from the holdings of the relevant precedent. A conceptual discourse on the clarity of the law has little relevance to this inquiry.

Suppose Justice O'Connor had actually applied her Williams principle. Presumably, she would have attended to the three critical cases, Rummel, Solem, and Harmelin, in an effort to determine the established law that emerges from the respective holdings in each case. Because Andrade placed principal reliance on Solem, the critical question would have been whether Solem survived the Court's judgment in Harmelin. It certainly seems to have done so. A seven-person majority of the Justices in Harmelin rejected Justice Scalia's call to overrule Solem. Four of those Justices voted to reaffirm Solem in its entirety. Three Justices voted to reaffirm Solem, but concluded that the first objective factor—comparing the gravity of the offense with the harshness of the punishment—should be treated as a key threshold issue. By way of contrast, only two Justices voted to overrule Solem.

Any reasonable reading of this trio of proportionality decisions, that is, a reading undertaken by any prudent, careful, and competent jurist, makes two things abundantly clear. First, the Harmelin judgment did not overrule Solem, but reaffirmed it. Second, to the extent that the Harmelin judgment modified Solem, it did so in the manner endorsed in Justice Kennedy's concurring

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200. See supra Part II.A.1 (discussing the meaning of the phrase "clearly established federal law").
201. Harmelin, 501 U.S. at 1009 (White, J., dissenting, joined by Blackmun & Stevens, JJ.); id. at 1027 (Marshall, J., dissenting).
202. Id. at 996 (Kennedy, J., concurring, joined by O'Connor & Souter, JJ.).
203. Id. at 962 (Scalia, J., joined by the Chief Justice).
opinion, which, rather than confusing the problem, clarified the manner in which the Solem objective factors were to be applied.\textsuperscript{204} I arrive at this conclusion with some confidence because on the very day that the Court decided \textit{Lockyer v. Andrade}, it reaffirmed the Solem/Harmelin principles in \textit{Ewing v. California}.\textsuperscript{205} \textit{Ewing} involved the direct review of a proportionality challenge to a three-strikes sentence. Hence, the Court's opinion in that case is unclouded by concerns regarding the federal review standards of § 2254(d)(1).

The opinion announcing the judgment of the \textit{Ewing} Court, which was written by Justice O'Connor and joined by the Chief Justice and Justice Kennedy, describes the \textit{Rummel, Solem, and Harmelin} proportionality precedents with confident clarity and in a manner that neatly parallels the above distillation of the underlying doctrine.\textsuperscript{206} Justice O'Connor concludes in \textit{Ewing}, "The proportionality principles in our cases distilled in Justice Kennedy's concurrence [in \textit{Harmelin}] guide our application of the Eighth Amendment . . . ."\textsuperscript{207} Later in her opinion, she applies this proportionality principle by comparing the severity of the crimes committed by the defendant in \textit{Ewing} with the harshness of the sentence imposed.\textsuperscript{208} The four-person dissent in \textit{Ewing}, although arriving at a different result, also adopts Justice Kennedy's \textit{Harmelin} concurrence as its model of proportionality review.\textsuperscript{209} In short, on the same day \textit{Andrade} announced the lack of clarity in the doctrine of gross disproportionality for purposes of § 2254(d)(1), a seven-person majority of the Court in \textit{Ewing} reaffirmed the specific and reasonably discernible contours of that same doctrine.

The approach to the clearly-established principle adopted by the \textit{Andrade} majority is both difficult to understand and impossible to justify other than on purely instrumentalist grounds. It is difficult to understand in part because the approach adopted is inconsistent with the text of § 2254(d)(1) and with the \textit{Williams} interpretation of that text, and in part because the "lack of clarity" conclusion is so plainly at odds with the Court's own perception of the controlling principles of law. It is impossible to justify, because by describing a

\begin{footnotesize}
\begin{enumerate}
\item[204.] This view of the "holding" in \textit{Harmelin} is standard. \textit{See}, e.g., Henderson v. Norris, 258 F.3d 706, 709 (8th Cir. 2001) (following Justice Kennedy's concurrence); Henry v. Page, 223 F.3d 477, 482 (7th Cir. 2000) (same); United States v. Jones, 213 F.3d 1253, 1261 (10th Cir. 2000) (same).
\item[206.] \textit{Id.} at 1185–87 (O'Connor, J., announcing the judgment of the Court, joined by Chief Justice Rehnquist and Kennedy, J.).
\item[207.] \textit{Id.} at 1187.
\item[208.] \textit{Id.} at 1190.
\item[209.] \textit{Id.} at 1193 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.).
\end{enumerate}
\end{footnotesize}
clearly-established principle at its most abstract level, the Court essentially
eviscerates the federal review standards. It will be rare indeed that a state-court
decision will be either contrary to or involve an unreasonable application of
amorphously described federal law. In neither Williams nor any other previous
case did the Court resort to this sleight of hand. One hopes then that this aspect
of Andrade is an aberration and not a standard-setting decision. It may not
even be binding on future proportionality cases, given the Court’s
contemporaneous and contradictory decision in Ewing.

b. Contrary To

The Ninth Circuit did not address the contrary-to standard. The Supreme
Court, nonetheless, discussed and applied that standard. The Court’s
discussion begins with a reiteration of the Williams definition of the contrary-to
principle. Under that definition, a state court decision is contrary to clearly
established federal law if the state court "applies a rule that contradicts the
governing law set forth in our cases" or "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 our precedent."210 Applying the
first component of this definition, Justice O’Connor explains:

In terms of length of sentence and availability of parole, severity of the
underlying offense, and the impact of recidivism, Andrade’s sentence
implicates factors relevant in both Rummel and Solem. Because Harmelin
and Solem specifically stated that they did not overrule Rummel, it was not
contary to our clearly established law for the California Court of Appeal to
turn to Rummel in deciding whether a sentence is grossly disproportionate.
Indeed, Harmelin allows a state court to reasonably rely on Rummel in
determining whether a sentence is grossly disproportionate. The California
Court of Appeal’s decision was therefore not "contrary to" the governing
legal principles set forth in our cases.211

The foregoing statement represents the Court’s complete discussion and
application of the first component of the contrary-to principle. One almost feels
rude in pointing out that the Court answered the wrong question. The question
was not whether the California Court of Appeal could rely on Rummel—it
surely could—but whether it could ignore Solem/Harmelin, which it surely
could not. Thus, while reliance on Rummel would not "contradict the
governing law set forth" in the Court’s cases, refusing to apply Solem, the case

211. Id. at 1174 (citation omitted).
that established the objective measures of proportionality, seems to involve precisely such a contradiction. This contradiction is made all the more apparent by the California Court of Appeal's assertions that proportionality review may no longer be available under the federal constitution, and that "the current validity of the Solem proportionality analysis is questionable in light of Harmelin v. Michigan." Even if this latter assertion were true, the Court of Appeal would at least have been required to apply Harmelin. Instead, that court applied Rummel and no other case. One can fairly infer, therefore, that the California Court of Appeal mistakenly thought that Rummel set the exclusive measure of the federal proportionality standard, that is, to the extent there was any such standard. This view was incompatible with the principles of federal law clearly established in Solem and Harmelin.

As noted, the Ninth Circuit did not apply the contrary-to principle. This was, in my estimation, a major oversight, but the Ninth Circuit's default cannot excuse the Supreme Court's woefully incomplete analysis of this issue. For one thing, the Court chose to address the issue. Having done so, at the very least it could have asked the right question. For another thing, Andrade's counsel raised and discussed this point at length in the Respondent's Brief on the Merits. The Court, therefore, was quite aware of the problem and its scope.

As matters now rest, one could argue that Andrade stands for the proposition that the failure to apply a plainly applicable standard of federal law is not contrary to that standard even if the default leads to an incorrect outcome. To put it mildly, this must be wrong. If the standard requires a particular analysis and/or the consideration of a specific precedent, the failure to undertake that analysis or to apply that precedent is "incompatible" with the standard. Or to use Justice O'Connor's language from Williams, such a default is "diametrically different" from or "opposite in character or nature" or "mutually opposed" to the clearly-established standard. The most sensible position to take, given the Court's failure to ask the correct question, is that the Court's truncated application of this aspect of the contrary-to standard sets no new principles and simply represents an incomplete analysis of the question presented.

The second component of the definition of "contrary-to" involves those state court decisions that confront a case materially indistinguishable from a


Supreme Court precedent, but that arrive at a conclusion opposite to that precedent. Given that the standards for measuring proportionality are keyed to an assessment of the harshness of the offense as weighed against the gravity of the crime, it would seem that a material distinction in this context would be one that pertained to either of these factors and that differed in some significant way from the sentence or crime in the controlling precedent. Thus, a sentence that was significantly less harsh than the sentence imposed in the precedent would constitute a material distinction. To state an obvious example, life without the possibility of parole is significantly less harsh than the death penalty. A similar analysis could be performed on the relative gravity of the crimes.

In a brief and almost cryptic paragraph, Justice O'Connor announces that Andrade's case is materially distinguishable from Solem. Her sole justification for this conclusion is that Solem received a life sentence without the possibility of parole while "Andrade retains the possibility of parole." On its face, this seems plausible. In the abstract, life with parole is significantly less harsh than life without parole. Justice O'Connor does not, however, move beyond this abstraction. She never explains how a sentence with parole eligibility after fifty years is materially distinguishable from a life without parole sentence. Perhaps they are distinguishable, but if so some explanation as to why is warranted. Her specific response to the claim that Andrade's fifty year parole eligibility date "makes this case similar to the facts" in Solem, is a complete non sequitur: "Andrade's sentence, however, is also similar to the facts in Rummel . . . a case that is also 'controlling.'" Yes, similar, but quite different given the widely disparate parole eligibility dates in Rummel and Andrade. Nonetheless, Justice O'Connor explains, "[t]he facts here fall in between the facts in Rummel and the facts in Solem." Of course, Nevada is somewhere in between California and New York. None of this helps us understand why Solem and Andrade are materially distinguishable from one another, except perhaps on a technicality.

I think, as lawyers, we must be aware of the possibility, and perhaps even the likelihood, that under the second definition of "contrary-to," technical differences will be treated as materially significant distinctions. We saw a similar phenomenon in Ramdass v. Angelone, where the Court refused to extend the rule of Simmons v. South Carolina to the functionally similar but technically different facts in Ramdass. The Andrade Court did not announce such a position, but one can infer a reluctance to recognize anything like functional equivalence in both Ramdass and Andrade. On the other hand, both decisions may simply reflect the majority's Teague-influenced reluctance to

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215. Andrade, 123 S. Ct. at 1174.
216. Id. at 1174 n.1.
extend a precedent beyond its fact-specific context. In the context of gross disproportionality, this may mean that *Solem*, as a fact-specific precedent, is limited to those cases in which the sentence is actually and technically a life sentence without the possibility of parole. As such, this aspect of the *Andrade* decision may speak more to proportionality than it does to the contrary-to-standard.

c. Unreasonable Application

The Court’s discussion of the unreasonable-application standard consists of six relatively brief paragraphs. The first quotes the *Williams* definition of the standard:

[U]nder the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.\(^{217}\)

It then references *Williams* for the proposition that the state court decision must "be more than incorrect or erroneous.\(^{218}\) What *Williams* actually said, however, was "an unreasonable application of federal law is different from an incorrect application of federal law.\(^{219}\) I think the phrases are subtly different, and by this observation I do not mean to suggest that the one phrase is "more than" the other. My hunch is that the alteration of word choice was inadvertent, for were it otherwise, the Ninth Circuit’s clear-error standard would have been more to the Court’s liking. A clear error is "more than" a simple error. On the other hand, an unreasonable application is not necessarily more than an error; rather, it is different from an error, even though the two may coincide. In any event, the Court ends this paragraph by returning to the actual question that must be asked: "The state court’s application of clearly established law must be objectively unreasonable.\(^{220}\)

In the next two paragraphs, the Court rejects the Ninth Circuit’s clear error standard. Under that standard, an application of clearly established federal law is deemed unreasonable:

only when our independent review of the legal question "leaves us with a ‘firm conviction’ that one answer, the one rejected by the [state] court, was

\(^{217}\) *Id.* at 1174 (quoting *Williams*, 529 U.S. at 413).

\(^{218}\) *Id*.

\(^{219}\) *Williams*, 529 U.S. at 410 (emphasis added).

correct and the other, the application of the federal law that the [state] court adopted, was erroneous—in other words that clear error occurred.

This standard has roots in both the abuse of discretion standard and in Federal Rule of Civil Procedure 52(a)'s clearly erroneous standard, both of which are deferential standards that do not allow the reviewing court to substitute its judgment for that of the initiating court. Under the former, a court would abuse its discretion, that is, commit a clear error of judgment, if it failed to apply all relevant factors in arriving at a particular conclusion. Under the latter, a finding of fact is clearly erroneous if an appellate court "is left with the definite and firm conviction that a mistake has been committed." On the other hand, if a trial court's view of the evidence is plausible, that is, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." It seems then that under a "clear error" standard, a state court decision could not be reversed if the state court's application of the clearly established federal law attended to all relevant factors and represented a plausible choice. In other words, a mere disagreement with the state court would not be enough. In fact, the Ninth Circuit's conclusion that clear error had been committed by the California Court of Appeal was based on that court's "disregard for Solem," a case that the Ninth Circuit correctly perceived to be a relevant and, at the very least, significant precedent. Hence, the perceived unreasonable application derived from the state court's failure to apply the full range of the Supreme Court's binding precedents.

The Court makes absolutely no effort to get beneath the skin of the Ninth Circuit standard. Instead, the Court simply asserts that clear error and objective unreasonableness "are not the same." While this is literally true, whether it is true as a practical matter presents another question. There may well be a congruence between the commission of a clear error and an objectively unreasonable application of the law. We would not likely describe a state court decision as objectively reasonable if the state court failed to apply the full range of the relevant law or applied the law to the facts in a manner that we could fairly describe as implausible. A judge that makes implausible choices is not an objectively reasonable judge.

The Court's application of the unreasonable-application standard in Williams supports this view. In that case, the Virginia Supreme Court "failed to evaluate the totality of the available mitigation evidence" as required by

221. Andrade v. Attorney Gen. of Cal., 270 F.3d 743, 753 (9th Cir. 2001) (quoting Van Tran v. Lindsey, 212 F.3d 1143, 1153-54 (9th Cir. 2000)).
Supreme Court precedent.\textsuperscript{224} In other words, the Virginia Supreme Court ignored a key precedent pertaining to the prejudice prong of \textit{Strickland}. This default, according to the \textit{Williams} Court, constituted an unreasonable application of clearly established federal law.\textsuperscript{225} Justice O'Connor, who joined the Court's opinion on this issue, agreed: "The Virginia Supreme Court's decision reveals an \textit{obvious failure} to consider the totality of the omitted mitigation evidence."\textsuperscript{226} If an "obvious failure" to apply the rule derived from a particular precedent constitutes an unreasonable application of that precedent, then it is difficult to understand why the Ninth Circuit's "clear error" standard discovering a similar "obvious failure" was somehow deficient. Moreover, the approach adopted by the Ninth Circuit is similar to, though apparently stricter than, the approach adopted by Justice O'Connor in \textit{Penry II} where the entire focus of her jury instruction discussion was on the fact that the Texas Court of Criminal Appeals had committed error (and not even clear error).

Instead of engaging the Ninth Circuit standard to determine if it was being applied in a fashion consistent with \textit{Williams}, that is, instead of asking whether the California Court of Appeal's perception of the continuing legitimacy of \textit{Solem} represented an "obvious failure," the Court simply rejects the clear error standard: "The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness."\textsuperscript{227} But what is the proper scope of deference when the error represents an "obvious failure" or reflects an implausible choice under the clearly established law? None, I should think. In any event, the Court ends this discussion by reiterating its view that the "application must be objectively unreasonable."\textsuperscript{228} The critical issue then is what the Court means to include within this concept of objective unreasonableness. Is the Court talking about applications of the law from the perspective of a prudent, careful, and competent jurist, or is the standard something entirely different?

The Court's "objectively unreasonable" test is ostensibly applied in the next three paragraphs. In the first of these, the Court notes that state legislatures have "broad discretion to fashion a sentence that fits within the scope of the proportionality principle—the 'precise contours' of which 'are


\textsuperscript{225} \textit{Id. at} 397.

\textsuperscript{226} \textit{Id. at} 416 (O'Connor, J., concurring) (emphasis added). Aside from the "obvious failure," Justice O'Connor offers no further explanation as to why the Virginia Supreme Court's application was unreasonable.

\textsuperscript{227} \textit{Lockyer v. Andrade}, 123 S. Ct. 1166, 1175 (2002).

\textsuperscript{228} \textit{Id.}
unclear. It then concludes, without any explanation, that "it was not objectively unreasonable for the California Court of Appeal to conclude that these ‘contours’ permitted an affirmance of Andrade’s sentence." The next paragraph cites two dissents from the denial of certiorari in separate three-strikes cases where the dissenting Justices argued that certiorari should have been granted to clarify the scope of proportionality review in that context. The apparent point of these citations is to reemphasize the lack of clarity in the law. The final paragraph simply reiterates the Court’s conclusion, namely, "it was not an unreasonable application of our clearly established law for the California Court of Appeal to affirm Andrade’s sentence of two consecutive terms of 25 years to life in prison." As I finished reading this sentence, which appears at the very bottom of the right-hand page in the Supreme Court Reporter, I turned the leaf, fully expecting to see the Court’s explanation for its conclusion. I was stunned when I saw that the discussion had ended and all that remained was a single sentence: "The judgment of the United States Court of Appeals for the Ninth Circuit, accordingly is reversed." In short, the Court never provides any explanation as to what it means by the phrase "objectively unreasonable" nor does it ever explain why the decision of the California Court of Appeal is objectively reasonable, that is, not objectively unreasonable.

Let us put this in context. The Ninth Circuit ruled that the California Court of Appeal’s decision involved an unreasonable application of clearly established federal law. The key issue before the Supreme Court was whether the Ninth Circuit’s ruling was correct. One would think, then, that the Court’s opinion would fully attend to this issue and would bring to the table a sufficient quantity and quality of analysis to shed light on this critical question. To do so would require, at a minimum, an examination (not just a description) of the standard applied by the Ninth Circuit, a reasoned explanation as to why that standard was inadequate to satisfy objective unreasonableness, a description of the content of the correct standard and an explanation, express or implicit, as to how the correct standard differed in practical effect from the rejected standard, and, perhaps most importantly—unless the Court were to remand the case for these purposes—an application of the correct standard, including an explanation as to how the state court decision did not transgress that standard. None of these things occurred in the Court’s discussion. None. At most the discussion involves nothing more than an interlocking set of descriptions and

229. Id. at 1175.
230. Id.
231. Id.
232. Id. at 1176.
conclusions. In the end, we do know, although we do not know why, that the clear error test is not an acceptable measure of objective unreasonableness, but we know little else. Given that habeas cannot issue unless there is error, if neither simple error nor clear error will suffice, what else must be established in order to conclude that a state-court decision was objectively unreasonable? Or, as Justice O'Connor put it in Williams, what will qualify as an "obvious failure" to apply the law correctly?

4. Rewinding Through the Court's Opinion

The problem with the Andrade opinion is not simply a lack of craftsmanship, though its lack of craftsmanship is not inconsequential. Rather, the deeper problem is one of potential incoherence. I can best explain that point by working through the Andrade opinion in reverse order, beginning with the unreasonable-application standard and ending with the clearly-established-federal-law principle. What we will see is that Andrade potentially dismantles the text-based interpretation that the Williams Court so carefully constructed. Ironically, Andrade and significant portions of Williams were formally authored by the same Justice, though they were clearly not written by the same person or with the same care. In the end, Andrade provides almost no sensible guidance to lower federal courts who must apply what may now appear to be the indeterminate standards of § 2254(d)(1).

I must make one preliminary point. Before a federal court can grant habeas under either the contrary-to or unreasonable-application standards, that court must establish that the state court decision was erroneous. That does not mean that "error of law" is the standard of review. Quite clearly, it is not. What it does mean, however, is that the presence of error is a necessary, albeit not sufficient, condition for granting habeas. Hence, in determining that error was committed by the California Court of Appeal, the Ninth Circuit did what it had to do and precisely what the Supreme Court had done in both Williams and Penry II. The Andrade Court's objection to this preliminary inquiry seems not only misplaced and inconsistent with precedent but completely illogical.233 One cannot determine whether a particular application of the law is objectively reasonable or unreasonable without at some point asking whether that application reflects an error of law. I suppose it is possible to conjure up an unreasonable but error-free application of the law, but I cannot imagine what real-world relevance any such standard would have. Again, this does not mean

233. See Lockyer v. Andrade, 123 S. Ct. 1166, 1172 (2002) ("We disagree with this approach.").
that the unreasonable-application standard of review invites de novo review, but only that the standard of review necessarily encompasses the concept of error.

The measure of the unreasonable-application standard is one of objective unreasonableness. This point was established in *Williams* and reaffirmed in *Andrade*. Thus, a state-court decision cannot be reversed on habeas unless that decision is objectively unreasonable, that is, unless that decision is not objectively reasonable. A decision need not be irrational to be characterized as objectively unreasonable. In other words, objective reasonableness requires something more than mere rationality. This was the holding of the Court in *Williams*. In addition, while rationality is not a sufficient component of objective reasonableness, it is a necessary one. To conclude otherwise would, at the very least, run afoul of the arbitrariness standards of the Due Process Clause. Moreover, from a textual perspective, an irrational application of the law is almost by definition an unreasonable application of the law. Enter *Andrade*.

The *Andrade* Court did not hold that the Ninth Circuit was wrong in concluding that the California Court of Appeal had committed clear error. Rather the Court held that the clear error standard was an inadequate measure of objective unreasonableness. Thus, one could read *Andrade* as implicitly instructing us that a state court decision is not objectively unreasonable even if it is clearly erroneous. In other words, under this reading of *Andrade* a clearly erroneous decision can be an objectively reasonable one. Just stating the principle sounds startling, but let us consider it further. A clear error in the application of the law is one that reflects a failure to apply the full range of the law's mandate or that arrives at an implausible choice in the application of that mandate. The first type of error is objectively unreasonable under *Williams*. Given that this was precisely the type of error identified by the Ninth Circuit in *Andrade*, the rejection of the clear-error standard in *Andrade* is in considerable tension with the decision in *Williams*. As to the "implausible choice" type of error, it is true that an implausible choice is not necessarily an irrational choice. Indeed, clear error can be established short of irrationality. But, as *Williams* also establishes, so can objective unreasonableness. If implausibility is but one step removed from irrationality, then *Andrade* and *Williams* have established a conundrum under which objective unreasonableness can be established without showing irrationality but cannot be established by demonstrating implausibility.

234. I take the phrases "objectively unreasonable" and "objectively reasonable" to state opposite propositions. Hence if a state court decision is not objectively reasonable, it is objectively unreasonable. It cannot be both, and it must be one.
If this means that there is a type of choice that falls somewhere between irrationality and implausibility, that is, a choice that is more than implausible yet not quite irrational, it remains to be discovered the word to describe that very precise species of choice. It also suggests the possibility that the unreasonable-application standard represents a null set within this realm.

Perhaps we are talking about an indisputable error, but the Williams Court rejected this high bar when it rejected the Fourth Circuit’s "reasonable jurists would all agree" standard. So while it is established that a habeas petitioner need not show that the error was irrational (Williams), it is not entirely clear what the petitioner must show or even can show to satisfy the Court’s standard of objective unreasonableness. There is one exception. In Williams, the Court found that the failure to apply clearly established federal precedent amounted to an unreasonable application of the law. Despite the Andrade Court’s "obvious failure" to apply Williams, it is fair to assume that Williams remains good law on this point, at least when the Court is willing to recognize the continuing vitality of its own precedents. But note that this aspect of Williams is essentially synonymous with the contrary-to standard. A failure to apply clearly established precedent may be an unreasonable application of that precedent, but it is also incompatible with that precedent. Hence, after Andrade, the unreasonable-application standard may be available only in a context in which there is a congruency between it and the contrary-to standard. In all other contexts, the unreasonable-application standard is freighted with a deep incoherency that seems to create a null set of potential applications. Thus, Justice O’Connor, who correctly insisted on an independent relevance for the unreasonable-application standard in Williams, may have eviscerated that independence in Andrade.

That brings us to the Andrade Court’s treatment of the contrary-to standard. The second component of that standard involved state-court decisions on facts that are materially indistinguishable from binding Supreme Court precedent but that arrive at a conclusion opposite to that precedent. While the Court’s application of this principle in Andrade is nothing more than a thinly disguised conclusion devoid of any explanatory rationale, the ultimate principle one derives from this aspect of the opinion is at least coherent. The Court’s refusal to consider functional similarities between apparently binding precedent and the facts presented in a habeas petition suggests a desire, consistent with the Teague jurisprudence, to cabin prior cases, particularly in doctrinally controversial areas, to their specific facts. I do not think this is a sensible approach to the law because it tends to exalt technical distinctions over functionally equivalent facts, but it is at least coherent. It would be more justifiable if the unreasonable-application standard retained some independent
vitality because, at least on occasion, one might conclude that a binding precedent was not sufficiently on all fours with the pending habeas case to describe the state-court decision as materially indistinguishable and contrary to that precedent, but that the cases were sufficiently close that an objectively reasonable jurist would have adhered to the principles inherent in that precedent.

The Andrade Court’s treatment of the first component of the contrary-to standard is more troubling. As I suggested earlier, this aspect of the Court’s opinion can perhaps be explained away as a failure to ask the right question, but on the other hand it seems to sanction a state court’s failure to consider and apply the full range of clearly established federal precedent. It is one thing to hold, as the Court did in Woodford v. Visciotti, that a federal court should not read a state court opinion with a jaundiced eye. It is quite another to close both eyes to a state court’s "obvious failure" to recognize and apply the clearly established federal standards. In this sense, the Court’s opinion in Andrade almost invites willful refusals to apply federal law. I say "almost," since this inference can, one hopes, be limited to those cases in which the Court itself has declared the applicable law to lack sufficient clarity to guide state courts to the correct proposition of law.

And that brings us to the clearly-established principle of federal law. We can now see why it was critically important for the Court in Andrade to avoid any discussion of the law of gross disproportionality. By describing the legal principle at an abstract level and by characterizing pertinent law as lacking in clarity, the Court made it essentially impossible to conclude that the state court’s decision was either contrary to or an unreasonable application of federal law. The lack of congruity between the Andrade description of the gross disproportionality standards and the Ewing Court’s description of those same standards is almost stunning. By opting for abstraction, the demolition of the § 2254(d)(1) federal review standards occurs at both ends of the analysis. As an opening gambit, the Court eschews its duty to describe the clearly established principles that will guide its application of the federal review standards, and as a closing move the Court compacts the unreasonable-application standard into a rule that seems more like an abdication than it does like a respectful deference for proper state-court judgments. In between, we have a rather flaccid contrary-to standard, subject to what can be charitably described as an almost whimsical application to be available as a standard of review in only the most obvious situations.

It is possible to make too much out of the Andrade Court’s construction and application of § 2254(d)(1). The underlying substantive claim in Andrade involved a proportionality challenge to the length of a sentence. Of the five
Justices who joined the opinion for the Court, not a single one has ever voted to enforce the proportionality principle in a case involving a term of incarceration. And two of those Justices, Scalia and Thomas, have expressed their complete opposition to the use of proportionality in such contexts.\(^2\) Hence, the deck was heavily stacked against affirmance of the Ninth Circuit. Indeed, one way to view Andrade is as a case in which the majority's aversion to the proportionality principle led it to a narrow, arguably unprincipled, and sui generis application of § 2254(d)(1).

C. Wiggins v. Smith

At issue in Wiggins v. Smith,\(^2\) the fourth installment of this Term's § 2254(d)(1) tetrad, was whether a Maryland Court of Appeals decision denying postconviction relief on a claim of ineffective assistance of counsel during the penalty phase of a capital case involved an unreasonable application of Strickland v. Washington.\(^2\) A Maryland federal district court, applying § 2254(d)(1), concluded that the state court's application of federal law was unreasonable and granted habeas on that ground, but the Fourth Circuit reversed, finding that the state court's decision was at least "minimally consistent" with the Strickland standards. The Supreme Court, by a seven to two margin, reversed the Fourth Circuit. Justice O'Connor wrote the opinion for the Court. Justice Scalia, joined by Justice Thomas, wrote a dissent.

1. Facts, Proceedings, and Lower Court Opinions

After a trial before a Maryland state-court judge, Kevin Wiggins was convicted of capital murder for drowning a 77-year-old woman in her bathtub. He elected to have the determination of his sentence tried to a jury. His trial counsel, both of whom were public defenders, filed a motion to bifurcate the sentencing hearing into two phases. During the first phase, they planned to retry their client's factual guilt, because under Maryland law the jury could not sentence him to death unless it found beyond a reasonable doubt that he was a principal in the first degree. During the second phase, if such a phase were necessary, defense counsel planned to present a case in mitigation, which they

\(^{235}\) See Ewing v. California, 123 S. Ct. 1179, 1190 (2003) (Scalia, J., concurring) (arguing that the state's legislative decisions should be given deference); id. at 1191 (Thomas, J., concurring) (same).


assured the trial court they had prepared. The trial court denied the motion to
bifurcate, and a "consolidated" sentencing hearing was immediately held.

At the sentencing hearing, the defense presentation focused almost
exclusively on the question of Wiggins's guilt. The only mitigating evidence
presented to the jury was the uncontested fact that Wiggins had no prior
convictions for violent crimes. After a brief deliberation, the jury sentenced
Wiggins to death. On appeal, the state court of appeals affirmed both the
conviction and sentence.\(^2\)

With the aid of new counsel, Wiggins sought postconviction relief in a
Maryland state court. Among many other claims raised, he asserted that his
trial counsel had rendered "constitutionally defective assistance at the
sentencing proceeding by failing to investigate and offer mitigating evidence
concerning [his] traumatic background and mental problems."\(^3\) This claim
was supported by the testimony of a licensed social worker who, at the behest
of postconviction counsel, had prepared an elaborate social history report on
Wiggins's childhood, detailing "the severe physical and sexual abuse petitioner
suffered at the hands of his mother and while in the care of a series of foster
parents."\(^4\) Other evidence adduced during the postconviction proceedings
established that trial counsel had been aware of the generally bleak nature of
Wiggins's upbringing by virtue of a presentence investigation report by the
Division of Parole and Probation and from records of the Baltimore City
Department of Social Services. Nonetheless, trial counsel did not retain an
expert to investigate these matters further even though funds were available for
such an investigation. In defense of this choice, one of the trial counselors
testified that he did not want to adopt a "shotgun" approach at the sentencing
hearing, but wanted to focus the jury's attention on the innocence defense.\(^5\)

The trial court denied postconviction relief and the Maryland Court of
Appeals affirmed.\(^6\) Essentially, the appellate court ruled that the decision not
to investigate and not to present evidence of Wiggins's dysfunctional
upbringing was tactical and, hence, immune from a claim of ineffective
assistance of counsel. In so ruling the court emphasized that counsel "were
aware that [Wiggins] had a most unfortunate childhood."\(^7\) Specifically, they
had available to them "not only the pre-sentence investigation report prepared

\(^3\) Wiggins v. State, 724 A.2d 1, 4 (Md. 1999).
\(^4\) Id. at 16.
\(^5\) Id. at 15.
\(^6\) Id. at 1.
\(^7\) Id. at 15.
by the Division of Parole and Probation, which included some of appellant’s social history, but also more detailed social service records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation."244 Thus, in the court’s view, this was not a case in which counsel completely failed to investigate a capital defendant’s background. Moreover, despite the absence of any detailed follow-up investigation, which the court recognized would have revealed a life "rife with episodes of neglect and abuse,"245 the court accepted counsels’ assertion that they had made a tactical choice not to pursue this course of inquiry. In the court’s words:

Counsel made a reasoned choice to proceed with what they thought was their best defense. They knew that there would be at least one mitigating factor—the uncontested fact that appellant had not previously been convicted of a violent crime—should the jury not credit their attack on criminal agency. It was not unreasonable for them to choose not to distract from their principal defense with evidence of appellant’s unfortunate childhood.246

Wiggins then filed a petition for a writ of habeas corpus in the federal district court for the District of Maryland. After a hearing on the petition, the district court found that trial counsel had rendered ineffective assistance during the sentencing phase based on their failure to investigate and present evidence in mitigation.247 In so ruling, the district court made it clear that its authority to grant a writ of habeas corpus was circumscribed by § 2254(d)(1) as interpreted by the U.S. Supreme Court in Williams v. Taylor.248 Applying the statutory review standards, the district court concluded that the Maryland courts’ decisions rejecting the ineffective assistance claim "involved an unreasonable application of clearly established federal law,"249 namely, the law established in Strickland v. Washington and subsequently applied in Williams.250 Moreover, the district court concluded that the case before it was "almost directly

244. Id.
245. Id. at 16.
246. Id. at 17.
247. Wiggins v. Corcoran, 164 F. Supp. 2d 538, 577 (D. Md. 2001). The district court also found that the evidence of guilt was constitutionally insufficient to sustain Wiggins’s conviction. Id. The Fourth Circuit reversed the district court on this issue as well. Wiggins v. Corcoran, 288 F.3d 629, 639 (4th Cir. 2002). The Supreme Court did not grant certiorari on that question.
249. Id. at 557.
250. Id. at 558 n.13.
contrary" to Williams v. Taylor because "Wiggins's mitigation evidence was much stronger, and the State's evidence favoring imposition of the death penalty was far weaker, than the comparable evidence in Williams." In so ruling, the district court specifically rejected the state's assertion that counsel's decision not to pursue mitigating evidence was tactical:

That contention, which was accepted by the Maryland courts, is based upon the testimony of trial counsel during the post-conviction hearing that they made the decision to "rety guilt" before the sentencing jury and that they did not want to dilute the effectiveness of their argument by presenting a mitigation case as well. In fact, it appears that defense counselors' "tactical decision" was forced upon them by inattention and lack of preparation. Before the trial, lead counsel had taken a new full-time job in another county, spent only "a day a week or so" attending to his former responsibilities, and left it to his co-counsel to do "most of the work." Here, the attorney left in charge had previously worked on only one or two felony jury trials, had never before worked on a capital trial, and was "frankly overwhelmed" as the trial date approached. Each of the defense attorneys testified that the other was responsible for preparing the mitigation case.

In any event, in order for a tactical decision to be reasonable, it must be based upon information the attorney has made after conducting a reasonable investigation. Wiggins's trial counsel conducted no such investigation. It is true that when making their decision solely to "rety guilt," counsel were aware of some mitigating information about Wiggins's unfortunate upbringing. However, the very possession of that information triggered their obligation to conduct a more complete investigation . . . . Had they done so, they would have learned information that was far more extensive and detailed than the information they possessed . . . .

The district court went on to hold that this more detailed information "might well have influenced the jury's appraisal of . . . [Wiggins's] moral culpability." Issuance of the writ was stayed pending appeal.

The Fourth Circuit reversed. The panel's opinion, authored by Judge Emory Widener, cited the § 2254(d)(1) review standards and explained that as to the unreasonable-application standard, federal habeas could not issue unless "the state court's application of federal law was objectively unreasonable." Furthermore, the measure of objective unreasonableness was "whether the

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251. \text{Id. at 557.}
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252. \text{Id. at 558–59 (internal citations omitted).}
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253. \text{Id. at 560 (quoting Williams v. Taylor, 529 U.S. 362, 398 (2000)).}
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254. \text{Wiggins v. Corcoran, 288 F.3d 629, 643 (4th Cir. 2002).}
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255. \text{Id. at 636.}
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[state court's] determination is at least minimally consistent with the facts and circumstances of the case.\textsuperscript{256} This language suggested a resurrection of the Fourth Circuit's "all reasonable jurists standard"—the standard expressly rejected by the Supreme Court in \textit{Williams v. Taylor}.\textsuperscript{257} Indeed, the Fourth Circuit had previously used the "minimally consistent" language in explaining the scope of its now-rejected standard.\textsuperscript{258}

On the merits of the habeas petition, the essence of the Fourth Circuit's opinion was that the Maryland Court of Appeals was reasonable in concluding that Wiggins's trial counsel made an informed, strategic decision not to present a case in mitigation.\textsuperscript{259} In so ruling, the Fourth Circuit made no independent examination of whether counsel's choice reflected an objectively reasonable exercise of professional judgment as required by \textit{Strickland}. Rather, the court sidestepped that question and, taking an uncritical approach to the facts, accepted the "informed strategic decision" thesis as a plausible explanation for counsel's decision not to pursue a case in mitigation. In this sense, one could say that the "informed strategic decision" thesis was, in the Fourth Circuit's view, at least "minimally consistent" with the facts and with \textit{Strickland}'s requirement that counsel's performance not fall below an objective standard of reasonableness.\textsuperscript{260} The Fourth Circuit did not discuss the prevailing professional norms requirement as mandated by \textit{Strickland}.\textsuperscript{261}

\textit{2. The Opinion of the Court}

The Supreme Court reversed.\textsuperscript{262} Justice O'Connor's opinion for the Court was joined by the Chief Justice and Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. The key question before the Court was whether the Maryland Court of Appeals decision denying Wiggins post-conviction relief

\begin{itemize}
\item \textsuperscript{256} Id. (quoting \textit{Bell v. Jarvis}, 236 F.3d 149, 159 (4th Cir. 2000) (en banc), quoting \textit{Wright v. Angelone}, 151 F.3d 151, 157 (4th Cir. 1998)).
\item \textsuperscript{257} See supra Part III.B.1 (discussing the Supreme Court's opinion in \textit{Williams v. Taylor}).
\item \textsuperscript{258} \textit{Wright v. Angelone}, 151 F.3d 151, 156-57 (4th Cir. 1998).
\item \textsuperscript{259} \textit{Wiggins}, 288 F.3d at 641.
\item \textsuperscript{260} Judge Niemeyer's concurring opinion expressed some doubt about the reasonableness of the Maryland Court of Appeals decision, but Judge Niemeyer joined the panel majority on the ground that "[t]here is support in the record" for the "informed strategic choice" thesis. \textit{Wiggins v. Corcoran}, 288 F.3d 629, 644 (4th Cir. 2002). Why "support in the record" is sufficient to establish objective reasonableness is not explained.
\item \textsuperscript{261} See \textit{Strickland v. Washington}, 466 U.S. 668, 688 (1984) ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").
\item \textsuperscript{262} \textit{Wiggins v. Smith}, 123 S. Ct. 2527, 2544 (2003).
\end{itemize}
involved an unreasonable application of clearly established federal law. In approaching this question, the Court briefly reiterated the principles informing the inquiry, citing both *Williams v. Taylor* and *Lockyer v. Andrade*. The bottom line remained unchanged: "The state court's application must have been 'objectively unreasonable.'" Again, however, the Court suggested no method for measuring objective unreasonableness.

The Court began its § 2254(d)(1) analysis by identifying the "clearly-established" federal law as that embodied in *Strickland v. Washington*’s two-part test for measuring claims of ineffective assistance of counsel. This position is, of course, identical to the view adopted by the Court in *Williams v. Taylor*, a case which also involved a capital defense lawyer’s failure to investigate and present evidence in mitigation during the sentencing phase of a capital trial. This reiteration of the *Williams* holding makes it clear that *Andrade* did not alter the approach to "clearly established" federal law endorsed by a majority of the Court in *Williams*. Thus, post-Andrade (and post-*Wiggins*), clearly established federal law continues to include legal standards that require a "case-by-case examination of the evidence." In other words, underdeterminate laws may still be deemed clearly established for purposes of habeas review.

Next, the *Wiggins* Court emphasized that in applying *Strickland, Williams* had made "no new law." Thus, even though *Williams* was decided after the Maryland Court of Appeals decision, the decision in *Williams* was "illustrative" as to how *Strickland* might be applied under similar circumstances. In this sense, *Williams* created a baseline from which to measure the reasonableness of the state court’s application of *Strickland*, which is precisely what the federal district court had done.

After identifying *Strickland* as creating the applicable and clearly established principle of federal law, the Court segued into a discussion of the merits of Wiggins’s claim, namely, "whether the investigation supporting counsel’s decision not to introduce mitigating evidence of Wiggins’ [sic]

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263. *Id.* at 2535.
264. *Id.* at 2535–36. The *Strickland* test requires that the defendant show that "counsel’s representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).
266. *Williams*, 529 U.S. at 391.
268. *Id.*
background was itself reasonable." (Note the double layering of the reasonableness inquiry in a habeas proceeding applying Strickland. Under Strickland, counsel's performance must be objectively reasonable under prevailing professional norms, while under § 2254(d)(1) a state court's application of this component of Strickland must itself be objectively reasonable.). In the Court's words, "In assessing counsel's performance, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time . . . .'" In moving directly to the merits, the Court demonstrated the continuing importance of the inquiry into "error" when applying the unreasonable-application standard. Ironically, the structure of the Court's opinion closely tracks the approach adopted by the Ninth Circuit in Andrade.

The Court gave three reasons for its conclusion that trial counsel's investigation was not reasonable within the meaning of Strickland. First, the failure to carry the investigation beyond the presentence report, which included a one page summary of Wiggins's personal history, and the Department of Social Services (DSS) records, which documented Wiggins's placement in various foster homes, was inconsistent with well-defined professional norms. Standard practice in Maryland called for the preparation of a social history report, for which the Public Defender's Office made funds available; and American Bar standards for the performance of counsel in death penalty cases also called for a significantly more extensive investigation. In short, counsel's performance was objectively unreasonable under prevailing professional norms, meeting the first element of Strickland's ineffective assistance of counsel test.

Next, the Court found that the scope of counsel's "investigation was also unreasonable in light of what counsel actually discovered in the DSS records." Those records revealed that Wiggins's "mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while there; he had frequent, lengthy absences from school; and, on at least one occasion, his mother left him and his siblings alone

269. Id. at 2530.
270. Id. (quoting Strickland v. Washington, 466 U.S. 668, 668–89 (1984)).
271. See supra Part IV.B.2 (describing the Ninth Circuit's opinion).
273. Strickland, 466 U.S. at 688.
274. Wiggins, 123 S. Ct. at 2537.
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for days without food." 275 In the Court’s view, given this information, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background." 276

Finally, the Court also found evidence of counsel’s unreasonableness in the record of the sentencing proceedings. In the Court’s view, counsel’s performance at those proceedings suggested that "inattentive, not strategic judgment" explained the failure to investigate potential evidence in mitigation. 277 In support of this contention, the Court stated:

On the eve of sentencing, counsel represented to the court that they were prepared to come forward with mitigating evidence, and that they intended to present such evidence in the event the court granted their motion to bifurcate. In other words, prior to sentence, counsel never actually abandoned the possibility that they would present a mitigation defense. Until the court denied their motion, then, they had every reason to develop the most powerful mitigation case possible. 278

Yet, clearly, given the absence of a thorough investigation, counsel was not prepared to proceed with a case in mitigation. Moreover, the sentencing defense actually presented was, in the Court’s words, not a carefully circumscribed innocence defense, as counsel asserted, but included "a halfhearted mitigation case, taking precisely the type of ‘shotgun’ approach the Maryland Court of Appeals concluded counsel sought to avoid." 279 Thus, in the Court’s view, counsel’s strategic decision to limit the "pursuit of mitigating evidence resembles more a post-hoc rationalization of counsel’s conduct than an accurate description of their deliberations prior to sentencing." 280

Having concluded that counsel’s performance fell below Strickland’s standard of professional competence, the next question was whether the opposite conclusion of the Maryland Court of Appeals was objectively unreasonable. Recall that the state court’s rejection of Wiggins’s Strickland claim was premised on that court’s determination that counsel had made what it perceived as a reasonable, tactical decision not to present a case in mitigation. The Supreme Court, having already held that counsel’s decision was not

275. Id.
276. Id.
277. Id. at 2530.
278. Id. at 2537.
279. Id. at 2538.
280. Id.
objectively reasonable within the meaning of Strickland, now concluded that the state court’s decision arriving at the opposite judgment was itself objectively unreasonable because it was based on an assumption of the adequacy of counsel’s performance and not on an examination of whether that performance was objectively reasonable under prevailing professional norms.\(^{281}\)

By making this assumption, the state court overlooked the key question under Strickland, namely, whether counsel’s choice "to cease all investigation upon obtaining the PSI and the DSS records actually demonstrated reasonable professional judgment."\(^{282}\) The Court also noted that the Maryland Court of Appeals made a "clear factual error" when the latter court described the social service records as having included references to incidences of sexual abuse. Those records contained no such references. In the Court’s words, "This partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court’s decision."\(^{283}\)

The Wiggins Court’s application of § 2254(d)(1)’s unreasonable-application principle is found largely in a single paragraph that begins with the conclusion: "The Maryland Court of Appeals’ application of Strickland’s governing legal principles was objectively unreasonable."\(^{284}\) That paragraph includes no explanation of how one is to measure whether a state court decision is objectively unreasonable, that is, how one is to determine whether a particular decision involves an unreasonable application of clearly established federal law. Yet this paragraph is nonetheless quite instructive. First, by including a reiteration that counsel’s failure to pursue a thorough investigation of evidence in mitigation violated Strickland’s first prong, the Court underscores the essential role that error plays in the § 2254(d)(1) analysis. While a perception that a state court has committed error may not end the inquiry, it remains an essential part of that inquiry. Next, the paragraph pinpoints the unreasonableness of the error committed by the Maryland Court of Appeals as a product of that court’s failure to ask the right question, namely, whether counsel’s choice to discontinue the investigation was consistent with prevailing professional norms. In fact, the state court opinion is devoid of any such discussion. The state court’s conclusion that counsel’s decision was tactical, and hence immune from Strickland, never considers whether the tactical choice, under the given facts, was objectively reasonable in light of then extant standards of professional competence. Thus, the state court’s purported

\(^{281}\) Id.
\(^{282}\) Id. at 2538.
\(^{283}\) Id. at 2539.
\(^{284}\) Id. at 2538.
application of Strickland was not only wrong in result, but unreasonable to the extent that it reflects a fundamental misunderstanding of the Strickland test. In other words, the state court’s decision did not merely reflect a disagreement over potential outcomes under an underdeterminate principle of federal law, but a failure by the state court to apply the precise principle at stake. That failure can also be seen as reflecting the state court’s misunderstanding of what that principle actually entailed.

If the Court had not decided Andrade, Wiggins would be a completely unremarkable decision. The version of the unreasonable-application principle applied by the Wiggins Court is essentially identical to the version described and applied in Williams v. Taylor. In Williams, which involved a similar Strickland claim, the Virginia Supreme Court was found to have been objectively unreasonable because it failed to consider the full range of matters mandated by Strickland’s second prong, namely, the totality of the mitigating evidence. Thus, although, the Virginia Supreme Court cited the correct legal standard, its application of that standard reflected a significant misunderstanding of it. This is quite similar to the error committed by the Maryland Court of Appeals in Wiggins, namely, a purported application of the correct standard that fails to account for the full measure of the standard. Of course, one could say the same thing about the California state court’s failure to apply the full range of the gross disproportionality principle in Andrade, and herein lies the tension between Williams and Wiggins, on the one hand, and Andrade, on the other.

There is one other feature of the Wiggins decision worth noting. It pertains to the degree of deference with which one is to read a state court decision being challenged on habeas grounds. Recall that in Woodford v. Viscotti the Court chastised the Ninth Circuit for its nondeferential and selective reading of the California Supreme Court’s decision. The Wiggins opinion makes it clear that the deference required by § 2254(d)(1) is a deference of sensible dimensions, not one of abdication. Specifically, one of the collateral issues in Wiggins involved an interpretation of the Maryland Court of Appeals opinion: Did the Maryland Court of Appeals assume that trial counsel’s investigation of Wiggins’s life history was limited to the presentence report and the social service records, or did that court’s opinion implicitly recognize that trial counsel had pursued an investigation that went beyond those records? If the latter were true, then the Maryland court’s application of Strickland would be on more defensible grounds. The Wiggins majority read the Maryland Court of Appeals decision as based on the former

285. Supra text accompanying notes 100–02.
assumption, while the dissent (and the State) argued for a broader reading of the state court's opinion, namely, one premised on an assumption that counsel did pursue a more thorough investigation of Wiggins's life history. The majority explained its rejection of this more generous reading as follows:

The dissent bases its conclusion on the Maryland Court of Appeals statements that "[c]ounsel were aware that appellant had a most unfortunate childhood," and that "counsel did investigate and were aware of appellant's background." But the state court's description of how counsel learned of petitioner's childhood speaks for itself. The court explained: "Counsel were aware that appellant had a most unfortunate childhood. [Wiggins's counsel] had available to him not only the pre-sentence investigation report...but also more detailed social service records." This construction reflects the state court's understanding that the investigation consisted of the two sources the court mentions. Indeed, when describing counsel's investigation into petitioner's background, the court never so much as implies that counsel uncovered any source other than the PSI and the DSS records. The court's conclusion that counsel were aware of "incidences...of sexual abuse" does not suggest otherwise because the court assumed that counsel learned of such incidents from the social services records.

The [Maryland] court's subsequent statement that, "as noted, counsel did investigate and were aware of appellant's background," underscores our conclusion that the Maryland Court of Appeals assumed counsel's investigation into Wiggins' [sic] childhood consisted of the PSI and the DSS records. The court's use of the phrase "as noted," which the dissent ignores, further confirms that counsel's investigation consisted of the sources previously described, i.e., the PSI and the DSS records.286

Thus, while a federal court must show respect for state court decisions being challenged on habeas—the lesson learned from Woodford v. Viscotti—a federal court need not engage in a strained reading of a state court opinion in order to avoid a potential constitutional flaw in that decision. In other words, a sensible reading is, almost by definition, a properly deferential reading.

V. Return to the Text

To what extent did this quartet of habeas decisions add to our understanding of § 2254(d)(1)? In Part III.C, supra, I suggested that there were at least three significant unresolved issues of statutory interpretation under § 2254(d)(1). Those issues pertain to the scope of the clearly established principle, the scope of the "materially indistinguishable" component of the

contrary-to standard, and the content of the "objectively unreasonable" measure of the unreasonable-application standard. I think it is fair to say that none of the Court's 2002 Term decisions resolved or appreciably contributed to our understanding of any of these open questions, and the decision in Andrade may well have contributed some unnecessary confusion. However, there are some valuable lessons to be learned from these cases, though perhaps not of a distinctly doctrinal type. In addition, the Andrade opinion, in part because of its shortcomings, invites us to revisit the text in a way that may illuminate both how to read Andrade and how to proceed with the process of textual interpretation post-Andrade.

The per curiam opinions break little new ground. While the Court in Woodford v. Visciotti speaks to both the contrary-to and unreasonable-application standards, that decision represents a more or less unremarkable application of precedent. The same can be said of Early v. Packer. The primary lesson to be gleaned from these cases pertains to the lens through which a federal court ought to read a state-court decision. In a sense, both cases do promote an overlay of deference to state-court decisions. That concept of deference could arguably run the risk of diluting the actual words used in the text of § 2254(d)(1), but the unanimous judgments issued by the Court in Visciotti and Packer largely conform to both text and precedent and present no such threat. The deference demanded by these opinions can be fairly described as a requirement that state court decisions be read with common sense and not from a presumption of suspicion. In short, neither Visciotti nor Packer sheds any significant new light on the most significant unresolved interpretive issues pertaining to § 2254(d)(1).

Lockyer v. Andrade does, however, speak to each of these unresolved issues. I will not repeat my criticisms of Andrade, but suffice it to say that Andrade added more confusion than clarity to the mix of our understanding. Some of that confusion is evident in the Andrade Court's approach to the clearly established principle, some in its approach to the contrary-to standard, and some in the palpable tension between the Court's earlier treatment of error and objective unreasonableness in cases such as Williams v. Taylor and Penry v. Johnson, and the Andrade Court's rejection of clear error as a measure of objective unreasonableness. If the ascertainment of meaning continues to be our goal, we must attend to these tensions, that is, we must continue the process of statutory interpretation.

I do think that Wiggins v. Smith operates as a partial antidote to Andrade. The Wiggins Court's approach to what constitutes clearly-established federal law returns to the common-sense approach applied in Williams v. Taylor, namely, the identification of the controlling principle by reference to pertinent
holdings in Supreme Court precedents, and completely avoids the type of sleight of hand obfuscation at work in *Andrade*. Additionally, the *Wiggins* Court approached the question of unreasonable applications of federal law in a fashion that paralleled the structure adopted by the discredited Ninth Circuit opinion in *Andrade*, under which the reviewing court must identify the error and then determine if the error was objectively unreasonable. Although, in the process, the *Wiggins* opinion does not shed any new light on the content of objective unreasonableness, at least the opinion reaffirms the principle applied in *Williams*, and ignored in *Andrade*, that a state court that fails to apply the full range of the applicable federal law standard will be deemed to have acted unreasonably within the meaning of § 2254(d)(1).

Beyond *Wiggins*, I have what may seem to be a counterintuitive suggestion. In the usual way of thinking, when the Supreme Court interprets a statutory (or constitutional) text we treat the Court's interpretation as the equivalent of the text. Lower federal courts must do this. The interpretation states the law of the text. In this sense, if there is a perceived conflict between precedent and text, the precedent trumps the text. There is, however, another way of looking at the relationship between text and interpretive precedent. If the goal of textual interpretation is to discover all that a text fairly means, then a habitual return to the text, despite the overlay of precedent, seems not only appropriate but essential. The text is, after all, the gatekeeper of its own meaning. I do not mean to suggest that the text trumps interpretive precedent. At least lower courts are bound by that precedent. But an understanding of the text unadulterated by precedent can shed light on the meaning we attribute to the precedent.

I call this a "text-first" approach. By this I mean to describe (and endorse) a process through which the text informs our understanding of the precedents construing it, and not the reverse. Thus, the text-first interpreter must continually inform her understanding of a statutory text by using that text as a primary repository of meaning. Judicial precedent should be read as a product of that primary repository. In short, she must allow her understanding of the text to inform her understanding of the precedents. In this sense, the text limits the precedent. We construe the precedent in a manner that conforms to rather than confounds the text. Of course, if the precedent establishes a principle that is plainly contrary to the text, the precedent may well trump the text. The law is what the Supreme Court says it is. But the presumption should be that the precedent is consistent with the text; hence, a text-first approach allows the text to temper the precedent unless the presumption of textual primacy is plainly rebutted. I will give three examples of how a text-first method might help us understand the legitimate scope of the *Andrade* decision.
In applying the first component of the contrary-to standard—a state court applies a rule that contradicts the governing law set forth in Supreme Court precedent—the Andrade Court did not consider whether the state court’s failure to apply Solem/Harmelin was contrary to clearly established federal law. Instead, the Court found it sufficient that the state court chose to apply Rummel without reference to the complete body of applicable federal law. On a presumption that precedent trumps text, one might argue that, after Andrade, the contrary-to principle is not offended when a state court fails to apply the full range of binding and applicable Supreme Court precedent. But such a view essentially demolishes the text. A failure to apply the full-range of that precedent is literally contrary to that precedent. A text-first argument would posit that Andrade cannot possibly stand for a principle so at odds with the text unless the Andrade Court expressly so ruled, which it did not. At most, Andrade represents an incomplete application of the doctrine of § 2254(d)(1). The interpretive inferences we might draw from the Court’s simple default cannot, under a text-first approach, alter the meaning that emanates from the text itself.

A text-first approach also helps clarify how we might understand the Andrade Court’s application of the clearly established principle. The statutory text—"clearly established Federal law, as determined by the Supreme Court of the United States"—imposes a rule of recognition that limits the scope of federal habeas to those claims that are premised on legal principles embodied in Supreme Court precedent. As Williams makes clear, this statutory provision requires the reviewing court to identify, by reference to holdings, as opposed to dicta, the content and contours of that law. As I have already noted, the Williams interpretation flows directly from a fair reading of the text. Andrade purported to apply Williams, but instead relied on various statements by individual Justices pertaining to the lack of clarity in the law of proportionality. If we were to read Andrade as revising the "clearly established" inquiry into one that permits lower federal courts the same type of latitude, we would effectively alter, and perhaps even eviscerate, the text, for it is nigh impossible for a state court decision to be contrary to or an unreasonable application of law stated at its most abstract level.

But there is no legitimate reason to read Andrade in this fashion. Andrade, as read from a text-first perspective, should be limited to those contexts in which the Supreme Court itself has held that the law established by

287. Supra Part IV.B.3.b.
288. See supra Part II.A (explaining the meaning of the phrase "clearly established Federal law, as determined by the Supreme Court of the United States").
the controlling precedents is discernible only at a highly generalized and
abstract level or in which the lack of clarity emanates directly from the Court's
holdings, as opposed to dicta. A lower federal court simply lacks the power
under § 2254(d)(1) to extract threads from concurring and dissenting opinions
as a method through which to so characterize the established law, that is, the
law that emanates from the holdings of Supreme Court precedent. After all, the
text of subsection (d)(1) instructs us that the law to be applied is the law "as
determined by the Supreme Court." 289 In this sense, Andrade is an example of
a case in which the Supreme Court exercised an exceptional power that simply
does not reside in lower federal courts. At most, Andrade stands as a warning
that the Supreme Court might, in some future case, conclude on review of a
lower federal court judgment that the legal doctrine is properly characterized at
an abstract level. A text-first approach, however, focuses attention on Supreme
Court precedent and precludes lower federal courts from engaging in what is in
essence a law-creating function. Hence, consistent with text and Andrade, the
responsibility of a lower federal court remains to identify the law at its
pragmatic level of application, and not at its most abstract level of
contemplation. The Wiggins Court's return to the Williams Court's more
prosaic approach to the clearly established principle is consistent with this
precise reading of Andrade.

Perhaps the most important use of the text-first approach apropos of
Andrade comes in the context of the unreasonable-application standard. In this
context, lower federal courts simply must do what the Supreme Court has not
done. They must, on a case-by-case basis, construct a model of objective
reasonableness in order to give meaningful content to the phrase "unreasonable
application." I suggest that the place to begin this process is with the objective
reasonable jurist standard, that is, the prudent, careful, and competent judge
who is always up to the standard. Under this approach an application of the
law is "unreasonable" if it is of the sort that an objectively reasonable jurist
would not perform. Such a measure is both consistent with the text of
§ 2254(d)(1), that is, with the mandated search for unreasonable applications,
and with the Supreme Court's own articulated but yet to be fully explained
"objectively unreasonable" standard. We can only know what is objectively
unreasonable if we know what an objectively reasonable jurist might have
done.

This process of creating the law of the objectively reasonable jurist need
not start at square one. The Court has provided some clues as to the expected

289. See Tyler v. Cain, 533 U.S. 656, 664 (2002) (defining "determined" and "held" as
synonymous for purposes of § 2254(d)(1)).
behavior of an objectively reasonable jurist. She would apply the full range of the clearly established principles of federal law (Williams), and she would not validate applications of that law that are "ineffective or illogical" (Penry II). We could reasonably conclude as well that her applications of the law would not display a material misunderstanding of the legal principles at stake. Nor would our objectively reasonable jurist fail to attend to all facts relevant under the terms of the applicable doctrine. Recall that the reversal of the Ninth Circuit in both Visciotti and Packer was premised on the Supreme Court’s judgment that the respective state courts in both cases had attended to the full range of the relevant doctrine and facts. We know too that our objectively reasonable jurist would make only rational choices among legitimately competing alternatives, though we know also that mere rationality is not itself sufficient to validate a judgment as objectively reasonable. We also know that an objectively reasonable jurist may legitimately refuse to apply an otherwise binding precedent if she concludes that the precedent is materially distinguishable from the case pending before her (Penry II).

That brings us to the clear-error standard. Given Andrade, will our jurist be deemed objectively unreasonable if she makes an implausible choice under clearly established federal law? Andrade seems to say "no" because it rejected the clear-error standard, but before arriving at that conclusion we might want to consider more closely the context of the Andrade Court’s rejection of that principle. While the Ninth Circuit opinion in Andrade represents a credible example of judicial craftsmanship with respect to the law of gross disproportionality, it also includes a large analytical gap when it comes to the relationship between clear error and the unreasonable-application standard. Absent from the Ninth Circuit’s opinion is an explanation as to how a finding of clear error equates with objective unreasonableness; nor was there any explanation as to why the error committed by the California Court of Appeal was "clear." Hence, there was nothing in the Ninth Circuit’s opinion to give the majority of the Supreme Court any confidence that clear error and objective unreasonableness represented congruent concepts. Nor is any such link established in Van Tran v. Lindsey, the Ninth Circuit’s foundational case on this issue. This assumed connectivity between error and unreasonableness flies in the face of the Williams Court’s pronouncement that the words "unreasonable" and "incorrect" do not signify the same thing. So too, the phrases "objectively unreasonable" and "clearly erroneous" do not signify the same thing. In essence, the Ninth Circuit failed to meet its burden in establishing the logical connection between clear error and objective unreasonableness.

290. Van Tran v. Lindsey, 212 F.3d 1143, 1152–53 (9th Cir. 2000).
unreasonableness. In addition, having failed to explain (other than through inference) why the error committed by the California Court of Appeal was "clear," the Supreme Court had nothing to go on but the Ninth Circuit's descriptive standard of review. Moreover, this was a standard that appeared to displace completely the statutory "unreasonable application" standard.

This flaw in the Ninth Circuit's opinion makes me think that the Supreme Court's rejection of the "clear error" rule may not be as bright-line as it seems. Let us consider a spectrum of judicially-perceived errors: potential error, possible error, probable error, clear error, and indisputable error. If we accept, as we must given *Williams, Penry II*, and *Wiggins*, that objective unreasonableness requires some type of error and that indisputable error creates too high a bar, then clear error would seem to be the window through which we can most likely view objective unreasonableness. I have already suggested that there is a strong congruence between clear error and objective unreasonableness and that failing to see that congruence may render the unreasonable-application standard superfluous. But given *Andrade*, it will not be enough to say or even insist that clear error equals objective unreasonableness. Instead, the proponent of establishing objective unreasonableness, be that person a lawyer or a judge, must demonstrate that in the particular case under review, the window of clear error fully illuminates the objectively unreasonable character of the state court decision being challenged. The most effective way to do this will be to explain why a prudent, careful, and competent jurist would not have made such an error. In other words, it will not be enough to describe the error as "clear." Rather, the implausibility of the choice must be established in terms that speak to the choices that would be made by an objectively reasonable jurist. Clear error is not a conclusion, but a means of explanation.

Adopting a text-first interpretation of *Andrade*, we would not prefer a construction of that opinion that rendered the unreasonable application superfluous. Hence, we should seek an interpretation of *Andrade* that respects both the opinion and the text it construes. The *Andrade* Court's rejection of "clear error" as a standard for measuring objective unreasonableness, therefore, should be seen as confined to the uses of clear error as a conclusion rather than as an explanatory tool. Thus, under *Andrade*, clear error is not "the" measure of objective unreasonableness, but it does, from a text-first perspective, remain available as a device through which to explain why a particular application of the law is unreasonable, lest we too readily presume that implausible choices reflect sound judicial practice. In short, after *Andrade*, an implausible choice, that is, a clearly erroneous choice, can be demonstrated to be an objectively

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unreasonable choice. It will simply not be enough to label that choice as clear error. In other words, clear error after Andrade is an analytical tool, not a dispositive conclusion.

At the conclusion of my textual analysis of the unreasonable-application standard, I observed that an unreasonable application might occur if the judge fails to give appropriate weight to a legally relevant factor, gives significant weight to an irrelevant or improper factor, renders a decision that is implausible, arbitrary, irrational, or that reflects a misunderstanding of the controlling legal principles, or, more generally, renders a decision that is plainly at odds with the applicable law or with accepted standards of judicial practice.\textsuperscript{292} I adhere to this statement post-Andrade. The flaws within the Andrade opinion should not be construed so as to alter the readily ascertainable meaning of the text of § 2254(d)(1). In short, a text-first approach to Andrade shows respect for both the text of subsection (d)(1) and the legitimate essence of the Andrade opinion.

\textit{VI. Conclusion}

I began this Article with the observation that textual interpretation is not an event but a process. The Supreme Court's most recent decisions on § 2254(d)(1) are part of that process. Whether one agrees with those opinions in whole or in part is not the critical point. The critical point is to understand those decisions and to reflect upon the next step in the interpretive process. While the Andrade opinion may not represent a wholly positive step in this process—and it does not, in my estimation—it also does not end that process. Indeed, if the net result of Andrade is that lawyers and lower federal courts give more precise attention to the text of § 2254(d)(1) and, perhaps most importantly, to the proper measure of the "unreasonable application" standard, then Andrade has accomplished a good thing. The key is to keep the text in mind and to develop principles of application that respect the text and do not float into a nether world of generalized deference and abdication.

\textsuperscript{292} Supra note 27 and accompanying text.