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“YOU CAN’T GET THERE FROM HERE?”: INEFFECTIVE ASSISTANCE CLAIMS IN FEDERAL CIRCUIT COURTS AFTER AEDPA

GREGORY J. O’MEARA, S.J.*

One measure of a society is how it treats those with little power, those who have suffered from problems not of their own choosing.¹ Surely victims of crime fit into this category, and society has not often given them what they desire and need.² Though they garner far less sympathy, perpetrators of crime may also be vulnerable to forces beyond their control, including physical and mental disabilities, childhoods marked by abuse and neglect, and incompetent attorneys who fail to fulfill constitutionally mandated standards.³ The criminal justice system attempts to address deficiencies in the representation criminal defendants receive in part through its appellate process. Following the exhaustion of state court postconviction review, prisoners in state custody can petition for relief in federal courts by applying for a writ of habeas corpus.⁴ Congress attempted to restrict access to federal courts for habeas relief with the Antiterrorism and Effective Death Penalty Act of 1996

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1. *See, e.g.*, ENRIQUE DUSSEL, *PHILOSOPHY OF LIBERATION* 60 (Aquilina Martinez & Christine Morkovsky trans., Orbis Books 1990).

2. *See, e.g.*, CHARLES DOYLE, *CRIME VICTIMS’ RIGHTS ACT* 3 (2008).

3. This position that the system can serve the rights of both victims and criminals is not uncontroversial. *See, e.g.*, MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* 137 (2004). “[A] senior U.S. Justice Department official . . . once told us, ‘People are either for victims or for criminals, . . . you’re for criminals.’ That forced choice is nonsense, but it was widely held to be necessary in the 1980s and early 1990s.” *Id.* Most studies associate crime with poverty, and studies which draw different conclusions seem to suffer from methodological flaws. For a broad exploration of crime statistics and their difficulties, see generally ROBERT REINER, *LAW AND ORDER: AN HONEST CITIZEN’S GUIDE TO CRIME AND CONTROL* 44–116 (2007).

4. 28 U.S.C. § 2254(b)(1)(A) (2006) provides that “application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State” *Id.*

(AEDPA).⁵ This Article explores how representative federal courts have responded to that legislation.

AEDPA's limitations on habeas relief for state prisoners⁶ have been quite successful in some ways;⁷ nevertheless, petitioners claiming ineffective assistance of counsel have met with more success in circuit and district courts than anticipated. Despite AEDPA, courts have expanded *Strickland v. Washington's* holding beyond an honest reading of the original case.⁸ This expansion, I argue, is not unrelated to AEDPA itself. First, AEDPA ignores that the writ of habeas corpus is rooted not only in statute but also in the text of the Constitution itself. Second, AEDPA's drafters assumed that case precedent binds lower courts as statutory law does; therefore, they believed AEDPA would confer greater authority upon Supreme Court precedent than these cases already possess. It does not. These problems with the original legislation have led federal courts, including the Supreme Court, to expand the class of successful petitioners who claim ineffective assistance of counsel.

I. INTRODUCTION

Habeas review for state prisoners is currently seen as an exercise in futility.⁹ This conclusion emerges out of appellate counsel's wrestling with

5. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–108, 110 Stat. 1214, 1217–26 (1996).

6. “Section 2254(d)(1) of AEDPA tightly circumscribes grants of habeas relief to a limited set of state court decisions” *Antiterrorism and Effective Death Penalty Act “Clearly Established Law” in Habeas Review: Carey v. Musladin*, 121 HARV. L. REV. 335, 335 (2007) [hereinafter *Clearly Established Law*]. For a general analysis of AEDPA, see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

7. See, e.g., *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 279 (2007) (Roberts, C.J., dissenting) (“In AEDPA, Congress work[ed] substantial changes to the power of federal courts to grant habeas corpus relief.”) (internal quotation marks omitted) (alteration in original). But see Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 547 (2006).

[With the passage of AEDPA,] the Court might have used the occasion provided by new legislation to shape things into a more sensible form—integrating new statutory provisions into existing decisional law, identifying and reconciling discernible rationales, and blending everything together into a more coherent system. That has not happened. . . . AEDPA is replete with tensions that defy resolution through pragmatic judicial construction.

Id.

8. *Strickland v. Washington*, 466 U.S. 668 (1984) (setting out affirmative standards for determining if counsel's representation is effective within the requirements of the Sixth Amendment guarantee of counsel for criminal defendants).

9. As Professor Stephen Vladeck observes:

More than a dozen times in the past five Terms, the Supreme Court has reversed an appellate court's decision granting postconviction habeas relief to a state prisoner: not because it concluded that the state court had acted *correctly*, but because the state court's error was neither contrary to, nor an unreasonable

the roadblocks AEDPA erected to limit federal review.¹⁰ Even before the passage of AEDPA, the Supreme Court severely limited petitioners' access to federal courts.¹¹ Anecdotally, appellate attorneys have mentioned that, because petitioning for a writ of habeas corpus is a losing proposition, their time is better spent elsewhere.

This Article challenges the belief that defendants cannot prevail in habeas actions; although few prisoners successfully petition for the writ, recent federal circuit court cases addressing ineffective assistance of counsel indicate there may be more life in this body of law than is commonly thought.¹² After briefly describing the procedural posture in which the writ of habeas corpus for state prisoners arises, the Article shows how AEDPA's requirement of deferential review restricts habeas access. The Article then considers two mistaken assumptions that underlie AEDPA's analytical framework: first, the

application of, clearly established federal law as determined by the Supreme Court, which is the standard of review prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Stephen I. Vladeck, *AEDPA, Saucier, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595, 595 (2009) (citing *Wright v. Van Patten*, 552 U.S. 120 (2008) (per curiam); *Uttecht v. Brown*, 551 U.S. 1 (2007); *Schriro v. Landrigan*, 550 U.S. 465 (2007); *Carey v. Musladin*, 549 U.S. 70 (2006); *Rice v. Collins*, 546 U.S. 333 (2006); *Kane v. Garcia Espitia*, 546 U.S. 9 (2005) (per curiam); *Bradshaw v. Stumpf*, 545 U.S. 175 (2005); *Brown v. Payton*, 544 U.S. 133 (2005); *Bell v. Cone*, 543 U.S. 447 (2005) (per curiam); *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam); *Yarborough v. Alvarado*, 541 U.S. 652 (2004); *Middleton v. McNeil*, 541 U.S. 433 (2004) (per curiam); *Mitchell v. Esparza*, 540 U.S. 12 (2003) (per curiam); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam)).

10. The specific limitations on access have been codified at 28 U.S.C. § 2254(d) (2006), which provides as follows:

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 at the State court proceeding.

Id. In this Article, when I refer to AEDPA, I am usually referring to 28 U.S.C. § 2254(d).

11. See, e.g., John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 262 (2006); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 4–5 (1997); Yackle, *supra* note 7, at 544, 547.

12. Even though few petitioners are successful in applying for the writ, the impact of habeas cases on criminal procedure cannot be overstated. Most of the major Supreme Court precedent expanding or contracting what we now know as the constitutional aspects of the criminal justice system arose in habeas cases. Even though these cases seem statistically insignificant, they acquire a symbolic value as they act as a lodestar, guiding courts and counsel about what constitutes constitutionally significant arguments before the courts.

writ of habeas corpus rests not only on statutory but also on constitutional grounds, which limits how far AEDPA's restrictions can go, and second, AEDPA ignores that case precedent binds differently from statutory law.

With the foregoing as prologue, I turn to the substantive case law of ineffective assistance of counsel in the *Strickland* line of cases. After briefly predicting how post-AEDPA cases should be decided based on a fair read of *Strickland*, the Article examines more recent decisions of the circuit courts. Representative cases reveal that courts have insisted that defense attorneys do far more than *Strickland* required to be found effective. In so ruling, federal courts uphold their rightful place as interpreters of the Constitution and as protectors of defendants' rights.

As a final preliminary matter, petitioners subject to the death penalty constitute most of the successful applicants for the writ in the cases that follow.¹³ Because habeas petitioners are not granted counsel as a matter of constitutional right, they must represent themselves, pay for counsel, or rely on attorneys who act pro bono or are appointed by the district court.¹⁴ Thus, paradoxically, those facing the death penalty may be in a better position to have their rights vindicated in federal court than those not subject to capital punishment. Presumably, a number of state prisoners sentenced to life or less time in prison have also suffered constitutionally infirm representation. However, these petitioners' meritorious claims may go unheard because their

13. See, e.g., MICHAEL A. MELLO, DEAD WRONG: A DEATH ROW LAWYER SPEAKS OUT AGAINST CAPITAL PUNISHMENT 137–38 (1997).

[T]he success rate of noncapital habeas petitions is low, with estimates ranging from 0.25 percent to 3.2 percent to 7 percent. The success rate in capital habeas is much higher, however: 70 percent as of 1983, 60 percent as of 1986, and 40 percent as of today. Between 1976 and 1983 federal appellate courts ruled in favor of the condemned inmate in 73.2 percent of the capital habeas appeals heard, compared with only 6.5 percent of the decisions in noncapital habeas cases.

Id. (footnotes omitted). But see *Richards v. Quarterman*, 566 F.3d 553, 558, 572 (5th Cir. 2009) (affirming the district court's granting of the writ in a non-death penalty case).

14. See, e.g., *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Chief Justice Rehnquist, writing for the majority, explained:

We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.

Id. (citations omitted).

assigned punishment does not provide free representation.¹⁵ Perhaps the most important “difference” in capital punishment is better access to attorneys for habeas review.¹⁶ Thus, while capital defendants may find a hearing despite AEDPA’s restrictions, other defendants may not, leaving AEDPA’s restrictions important, even if not consistently enforced.

II. PROCEDURAL POSTURE: HOW HABEAS WORKS

A. *Who Can Petition for a Writ*

Most criminal cases arise in state jurisdictions rather than in the federal system.¹⁷ Therefore, most ineffective assistance claims come from state court proceedings. Although ineffectiveness claims are ordinarily grounded in the Sixth Amendment,¹⁸ such claims could also rest on an independent state ground guaranteed by a state’s constitution.¹⁹ The independent state ground for relief must guarantee at least what the federal Constitution guarantees, but it could hold state criminal courts and counsel to a higher standard.²⁰ The

15. *Id.*

16. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 286, 289 (1972) (Brennan, J., concurring) (“Death is a unique punishment [D]eath . . . is in a class by itself.”); *id.* at 306 (Stewart, J., concurring) (“[P]enalty of death differs from all other forms of criminal punishment, not in degree but in kind.”).

17. YALE KAMISAR, WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, QUESTIONS* 18 (12th ed. 2008) (“[W]hen the federal system is compared to the state systems as a group, the combined state systems clearly dominate, as they account for a much larger portion of the nation’s criminal justice workload (e.g., roughly 96% of all felony prosecutions and over 99% of all misdemeanor prosecutions).”).

18. The entire amendment provides that

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

19. *See, e.g., WIS. CONST.* art. I, § 8, cl. 4 (“[T]he privilege of the writ of habeas corpus shall not be suspended unless, in cases of rebellion or invasion, the public safety requires it.”). *See also WIS. STAT.* § 974.06 (2007–2008).

20. *See, e.g., State ex rel. Hager v. Marten*, 594 N.W.2d 791 (Wis. 1999). The petitioner applied to the state trial court for habeas relief on the ground that the state failed to comply with state statutes governing inpatient competency examinations. *Id.* at 794. He argued that the failure to follow the statute was a jurisdictional defect in his continuing confinement and required dismissal of his criminal complaint. *Id.* at 795. In ruling on the matter, the court observed that “[i]n a habeas corpus action, we apply a de novo standard to issues of law” *Id.* The de novo standard of review is more favorable to petitioners than is the deferential standard laid out in AEDPA. *See infra* notes 56–60 and accompanying text. This holding illustrates how state laws can be more protective of petitioner’s rights than is required by the federal Constitution. But, if a prisoner relies solely on state law, he cannot have recourse to the federal courts if the state decision goes against him.

prisoner raising only state law questions can appeal only to the highest courts within her state.²¹

However, if a prisoner in state custody alleges she is held in violation of the United States Constitution, a final decision by the highest state court need not be the end of the road. When state appeals have been exhausted,²² a prisoner who believes her conviction was obtained in violation of the U.S. Constitution has a right to petition federal courts for release from custody through the writ of habeas corpus.²³ This petition is a collateral attack on the state conviction, alleging it was obtained in violation of the U.S. Constitution.²⁴

B. Habeas Filings Increase, but They Do Not Overwhelm Federal Courts

Before the 1950s, the Supreme Court rarely intervened in state convictions.²⁵ The Court's willingness to consider these claims grew out of rising political sensitivity stemming in part from the civil rights movement; one commentator notes:

After World War II, however . . . [m]any critics, particularly members of the civil rights movement, saw state judiciaries as insensitive to defendants' constitutional rights and demanded more extensive federal oversight of criminal law. In its 1953 decision *Brown v. Allen*, the U.S. Supreme Court expanded the system of federal habeas corpus to provide such

21. See generally LARRY W. YACKLE, POSTCONVICTION REMEDIES §§ 1–13 (1981 & Supp. 2008); see, e.g., *Aparicio v. Artuz*, 269 F.3d 78, 92 (2d Cir. 2001) (holding that where the state court makes a finding prohibiting collateral review “on an adequate and independent state procedural ground,” the matter cannot be reviewed by a federal court on federal constitutional grounds).

22. The issue of just what constitutes exhaustion for purposes of habeas law is beyond the scope of this Article, though it has garnered enormous attention in recent years. 28 U.S.C. § 2254(b)(1)(A) (2006) provides that application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that “the applicant has exhausted the remedies available in the courts of the State.” *Id.* Nevertheless, “[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.” *Id.* § 2254(b)(2). A good and brief overview of this topic appears in RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1443–46 (4th ed. 1996).

23. See, e.g., *Fay v. Noia*, 372 U.S. 391, 426–27 (1963); see 28 U.S.C. § 2255 (2006), noting that a court may “set the judgment aside and . . . discharge the prisoner” The best overview of how the writ of habeas corpus applies to state court prisoners appears in YACKLE, *supra* note 21, §§ 17–21.

24. The word “collateral” in this context means that the remedy “provide[s] an avenue for upsetting judgments that have become otherwise final.” *Mackey v. United States*, 401 U.S. 667, 682–83 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part).

25. See Blume, *supra* note 11, at 262–64. “*Brown v. Allen* and its three subsequent decisions establish[] the highwater mark of habeas” *Id.* at 262–63.

supervision.²⁶

After the *Brown* ruling, federal courts became more willing to entertain claims that state convictions rested on unconstitutional grounds.²⁷ For example, in *Rogers v. Richmond*, the Court found a confession to be involuntary when it emerged from a detective's threat to transport a petitioner's invalid wife to the police station for questioning.²⁸ Similarly, the Court reversed a conviction where interrogators told a woman that if she did not "cooperate," her children would be taken from her, and she would be deprived of state financial aid.²⁹ Although state courts upheld these and similar practices, federal courts condemned them on constitutional grounds.

Reaction to the expanded reach of habeas review was mixed. Some perceived the expansion unfavorably.³⁰ Simmering under the surface was a

26. Sharad Sushil Khandelwal, Note, *The Path to Habeas Corpus Narrows: Interpreting 28 U.S.C. § 2254(d)(1)*, 96 MICH. L. REV. 434, 434 (1997) (footnotes omitted).

27. *See id.* at 435.

28. 365 U.S. 534, 536, 545 (1961).

29. *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963). For further illustrations, the Court set out more egregious practices related to obtaining confessions in *Miranda v. Arizona*:

In addition, see *People v. Wakat*, 415 Ill. 610, 114 N.E.2d 706 (1953); *Wakat v. Harlib*, 253 F.2d 59 (C.A. 7th Cir. 1958) (defendant suffering from broken bones, multiple bruises and injuries sufficiently serious to require eight months' medical treatment after being manhandled by five policemen); *Kier v. State*, 213 Md. 556, 132 A.2d 494 (1957) (police doctor told accused, who was strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body); *Bruner v. People*, 113 Colo. 194, 156 P.2d 111 (1945) (defendant held in custody over two months, deprived of food for 15 hours, forced to submit to a lie detector test when he wanted to go to the toilet); *People v. Matlock*, 51 Cal. 2d 682, 336 P.2d 505 (1959) (defendant questioned incessantly over an evening's time, made to lie on cold board and to answer questions whenever it appeared he was getting sleepy). Other cases are documented in American Civil Liberties Union, Illinois Division, *Secret Detention by the Chicago Police* (1959); Potts, *The Preliminary Examination and "The Third Degree,"* 2 *Baylor L. Rev.* 131 (1950); Sterling, *Police Interrogation and the Psychology of Confession*, 14 *J. Pub. L.* 25 (1965).

384 U.S. 436, 446–47 n.7 (1966).

30. *See, e.g.,* Khandelwal, *supra* note 26, at 436.

Victims and their families found habeas corpus a torturous process, prolonging their agony by adding another layer of "appeals" to an already overburdened criminal justice system. It also led to inefficient expenditures of courts' time and attention, with federal judges facing towering stacks of barely legible handwritten petitions, very few of which were likely to raise valid constitutional claims.

Id. (footnotes omitted); *see also* Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 *COLUM. L. REV.* 1665, 1666 (1990) ("Many, therefore, have come to regard the Great Writ as a slap in the face of federalism.").

sense that federal courts usurped the legitimate authority of the states. Justice Frankfurter's admonition that "the District Judge [must] decide constitutional questions presented by a State prisoner even after his claims have been carefully considered by the State courts"³¹ illustrated what opponents of expanded habeas review feared most: a black-robed "Big Brother" looking over their collective shoulders. On the other hand, the recognition of petitioners' constitutional claims exercised a long-desired check on state judges who placed too high a value on political expediency and too low a value on rights of criminal defendants.³²

Those opposing the expanded availability of habeas review asserted that federal courts were drowning in a sea of frivolous claims because federal judges misunderstood both the realities of state criminal practice and the proper use of habeas corpus.³³ Prisoners did file habeas petitions more frequently after *Brown v. Allen*; however, even twenty years ago, the late Professor Frank Remington sagely noted that habeas actions were not overburdening federal courts.³⁴ Indeed, "the limited enthusiasm displayed over the elimination of federal court diversity jurisdiction" indicated that not all believed that the claims of efficiency were paramount.³⁵ Remington concluded that "limiting the access of state prisoners to federal habeas corpus is likely to have only a minor effect on the case load of federal courts."³⁶

31. *Brown v. Allen*, 344 U.S. 443, 508 (1953) (Frankfurter, J., concurring).

32. Blume, *supra* note 11, at 263–64.

33. See, e.g., Larry W. Yackle, *The Habeas Hagnoscope*, 66 S. CAL. L. REV. 2331, 2332 (1993) ("Over a career spanning forty years, Chief Justice Rehnquist has been witness to, or has participated in, numerous efforts to import preclusion into the law of habeas corpus . . ."); see also Blume, *supra* note 11, at 265–69, where Professor John H. Blume shows how the Court consistently restricted habeas appeals. "In each of these decisions, the majority focused on the interests of comity, federalism, and finality—interests it believed prior habeas jurisprudence had significantly undervalued." *Id.* at 269 (footnotes omitted).

34. Frank J. Remington, *Restricting Access to Federal Habeas Corpus: Justice Sacrificed on the Altars of Expediency, Federalism and Deterrence*, 16 N.Y.U. REV. L. & SOC. CHANGE 339, 346 (1987–1988).

[T]he major increase in cases filed by state prisoners in federal courts is not in habeas cases but rather in conditions-of-confinement cases brought by state prisoners. For example, while the number of habeas cases handled by federal magistrates increased from 4208 to 7184 during the decade starting in 1977, state prisoner conditions-of-confinement cases increased from 2778 to 17,229 Nonetheless, proposals to alleviate the case load burden on the federal courts continue to focus on habeas corpus petitions[.] . . . raising strong doubts as to the sincerity of the reformers' purported primary concern with the federal courts' case load.

Id. (footnotes omitted).

35. *Id.*

36. *Id.*

Current scholarship supports Remington's predictions.³⁷ Professor Blume recently calculated that the intervention of federal courts into state convictions is rare;³⁸ only 0.62% of federal habeas petitions are successful.³⁹

Habeas claims continue to occupy only a relatively small part of the federal docket. For example in June 2008, there were 1,409,422 inmates in state prisons;⁴⁰ they filed a total of 21,490 habeas petitions.⁴¹ The total number of civil suits commenced in federal courts in 2008 was 267,257.⁴² Thus, habeas cases were 8% of that total.⁴³ Personal injury and contract actions take up a significantly greater share of federal courts' calendars, and these suits do not necessarily raise issues of constitutional rights.⁴⁴ Further, state criminal cases reach federal court not only through prisoners' petitions but also through appeals by state prosecutors who challenge state court decisions on federal constitutional issues.⁴⁵ Remington maintained that if there were a difficulty with state sovereignty being set aside in these cases, the difficulty lay not with prisoners but with prosecutors.⁴⁶ The foregoing helps place any discussion of access to habeas review in a broader context.

III. THE BACKLASH AGAINST HABEAS: AEDPA AND THE COURTS

Limitations on habeas review began not with AEDPA's provisions but with Supreme Court decisions under the leadership of Justices Harlan, Burger, Powell, and Rehnquist.⁴⁷ In *Wainwright v. Sykes* the Court acknowledged its

37. Professor Blume crunches the numbers in his article, which downplays the effects of AEDPA. "[G]iven the increase in the number of incarcerated persons, the actual number of petitions filed per 1,000 inmates has decreased." Blume, *supra* note 11, at 283 n.117. Thus, the increase in the number of filings is less than would have been predicted given the greater number of prisoners in the pool and may reveal that federal courts are reluctant to overturn state convictions.

38. Blume calculates the success rate of § 2254 cases as averaging 0.62% in the years between 1997 and 2004. *Id.* at 284 tbl.4.

39. *Id.*

40. HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2008, at 2 (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf>.

41. JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 147 (2009), <http://www.uscourts.gov/judbus2008/appendices/C02ASep08.pdf>.

42. *Id.* at 146.

43. *See id.*

44. *See id.*

45. Remington, *supra* note 34, at 348.

46. *Id.*

47. Blume, *supra* note 11, at 265; *see also* Tushnet & Yackle, *supra* note 11, at 3. Professors Tushnet and Yackle maintain that these statutes enacted after "substantial judicial reconstruction of the law" were "largely symbolic." *Id.* That is to say that these statutes really added nothing of substance to what the courts had already done. Thus, "[p]risoners and their advocates will not see the AEDPA and [Prison Litigation Reform Act] as desirable statutes on the whole, but they will not find them insuperable barriers either." *Id.* at 84. Although a relatively adequate discussion of Supreme

“willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged.”⁴⁸ Commentators largely agree that congressional efforts to limit habeas review—including AEDPA—were largely “symbolic” or unnecessary because the Court’s own actions beat Congress to the punch.⁴⁹

Despite repeated analyses that habeas review was already constricted by courts before the passage of AEDPA,⁵⁰ courts and practitioners usually reference AEDPA when describing how habeas review is restricted.⁵¹ Thus, it is instructive to consider the key provision governing access to federal courts, codified at 28 U.S.C. § 2254(d)(1).⁵² Before AEDPA, the Court applied a *de novo* standard of review to: (1) legal questions in which the petitioner attacked the rule that the trial court used in the underlying case, and (2) mixed questions of fact and law in which the petitioner challenged how the trial court applied the law to the particular facts of her case.⁵³ Thus, the only cases in which federal courts deferred to state court findings were questions of fact determined by the trial court, presumably because trial judges were better able to make determinations of credibility of the witnesses.⁵⁴ AEDPA changed the law by requiring state prisoners to meet strict prerequisites before federal

Court precedent limiting access to habeas courts is beyond the scope of this Article, a clean discussion appears in A. Christopher Bryant, *Retroactive Application of “New Rules” and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1, 4–15 (2002). In particular, Professor Bryant sketches out the roots of *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. *Id.* Justice Harlan’s objections to expanding habeas jurisdiction are set forth eloquently in his concurrence to *Mackey v. United States*, 401 U.S. 667, 681–95 (1971).

48. 433 U.S. 72, 81 (1977).

49. See Blume, *supra* note 11, at 297; Tushnet & Yackle, *supra* note 11, at 3.

50. See, e.g., Blume, *supra* note 11, at 297; Tushnet & Yackle, *supra* note 11, at 3; Yackle, *supra* note 7, at 547.

51. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–108, 110 Stat. 1214, 1217–26 (1996).

52. 28 U.S.C. § 2254(d) (2006) provides as follows:

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.

Id.

53. *Brown v. Allen*, 344 U.S. 443, 506–07 (1953).

54. *Id.* at 506.

courts can consider the merits of their petition for a writ of habeas corpus.⁵⁵ The statute raises the level of deference due state court decisions by reviewing federal judges.⁵⁶

The strength of the writ of habeas corpus depends in large part on how easily petitioners can get into court.⁵⁷ AEDPA seemed to make access to federal court difficult.⁵⁸ Under AEDPA, state court proceedings will not be disturbed unless they rest on “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 a decision that was based on an “unreasonable determination of the facts in light of the evidence presented in

55. See 28 U.S.C. § 2254(d).

56. Although this provision is usually characterized as defining “standards of review,” not all commentators agree that this phrasing describes the situation with precision. See, e.g., Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User’s Manual*, 51 VAND. L. REV. 103, 107 (1998).

In colloquial terms, then, the new section 2254(d) prescribes “standards of review”—that is, the standards by which federal habeas courts are to review state court judgments. As a formal matter, this terminology is of dubious validity; federal habeas corpus has always been classed as an original proceeding whose function was to test the legality of a prisoner’s custody simpliciter. Federal habeas courts never formally reviewed state court convictions in the way that appellate courts review trial court judgments. Habeas corpus proceedings were collateral to judgments of conviction [Nevertheless,] the new section 2254(d) governs the standard of review to be employed in habeas proceedings in much the way that Federal Rule of Civil Procedure 52(a) governs the standard of federal appellate review of federal district court decisions.

Id. (footnotes omitted).

57. Khandelwal, *supra* note 26, at 435.

If a federal court reviews a state judgment under a de novo standard of review, it can grant a writ of habeas corpus whenever it simply disagrees with a state court’s constitutional interpretation. Alternatively, a deferential standard of review greatly reduces the reach of a federal court’s authority, as a federal court may issue the writ only when it finds the state court’s decision unreasonable—not merely when it disagrees with that decision.

Id. (footnotes omitted).

58. But see Evan Tsen Lee, *Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?*, 56 HASTINGS L.J. 283, 283 (2004).

The world of federal habeas corpus continues to be dominated by issues arising from Congress’s passage of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). One of AEDPA’s most notable innovations was § 2254(d), which effectively requires federal habeas courts to accord state court criminal convictions a sort of deference. The problem is that § 2254(d) is unusually ambiguous with respect to how much and what sort of deference is owed, and under what circumstances.

Id. (footnotes omitted).

the State court proceeding.”⁵⁹ In *Williams v. Taylor*, the Court instructed that the “clearly established Federal law” prong was the threshold question.⁶⁰ In that same case, Justice O’Connor observed that clearly established federal law “refers to the holdings, as opposed to the dicta” of Supreme Court decisions.⁶¹ In finding that law is clearly established, the Court does not demand a narrow holding directly on point; a state court’s decision could be “contrary to” or “an unreasonable application of” Supreme Court precedent by ignoring the “fundamental principles” established by the Court’s most relevant precedents.⁶²

Finally, with regard to the unreasonable application of the clearly established federal law prong, the Court recognizes a distinction between rulings that bind lower courts with specificity and those whose analytical framework is looser. In *Yarborough v. Alvarado*, the Court observed that the “range of reasonable judgment” depends on the rule upon which it relies.⁶³ Where the legal rule is specific, “[a]pplications of the rule may be plainly correct or incorrect.”⁶⁴ By contrast, “[o]ther rules are more general, and their meaning must emerge in application over the course of time.”⁶⁵ The Court maintains that general rules call for more deference to lower court decisions

59. 28 U.S.C. § 2254(d).

60. *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Some commentary questioned if the Court simply excised the “unreasonable determination of the facts in light of the evidence presented at the State Court proceeding” prong *sub silentio* in *Carey v. Musladin*, 549 U.S. 70 (2006), wherein the Court vacated and remanded a circuit court ruling granting the petitioner habeas relief. *Id.* at 77; *see Clearly Established Law*, *supra* note 6, at 337. The Court based the *Musladin* decision solely on the “clearly established federal law” prong and never mentioned the “unreasonable determination of the facts” prong. *Musladin*, 549 U.S. at 77; *see Clearly Established Law*, *supra* note 6, at 337. Recent Supreme Court cases undermine this thesis. *See, e.g.*, *Schriro v. Landrigan*, 550 U.S. 465, 478 (2007) (ruling that “it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel’s failure to investigate further possible mitigating evidence” seems to rest on the “unreasonable determination of the facts” prong).

61. *Williams*, 529 U.S. at 412 (O’Connor, J., concurring in part and concurring in the judgment). In his concurrence to *Carey v. Musladin*, Justice Stevens disagreed with Justice O’Connor’s “dictum about dicta,” which he understood as “represent[ing] an incorrect interpretation of the statute’s text.” 549 U.S. at 79.

62. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 258 (2007) (quoting 28 U.S.C. § 2254(d)). *But see* Chief Justice Roberts’s dissent: “We give ourselves far too much credit in claiming that our sharply divided, ebbing and flowing decisions in this area gave rise to ‘clearly established’ federal law.” *Id.* at 266 (Roberts, C.J., dissenting); *see, e.g.*, *Thaler v. Haynes*, 130 S. Ct. 1171 (2010), in which the Supreme Court, in a per curiam decision, held that there was no “clearly established” law for purposes of a habeas challenge holding that a judge reviewing a *Batson* objection must “personally observe[] and recall[]” the “prospective juror’s demeanor on which the explanation [for striking the juror] is based.” *Id.* at 1172.

63. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

64. *Id.*

65. *Id.*

because they necessarily encompass a wider range of appropriate actions applying the precedent in question.⁶⁶

The Fifth Circuit expresses the common understanding of how AEDPA's language should be interpreted.⁶⁷

An application of federal law is unreasonable only when "reasonable jurists considering the question would be of one view that the state court ruling was incorrect." . . . Thus, AEDPA's standard of review both restricts the federal habeas court's review of state factual determinations, and interjects certain limitations upon the federal habeas court's review of legal conclusions that were not present under pre-AEDPA law.⁶⁸

IV. PROBLEMS WITH AEDPA MAY REINVIGORATE A MORIBUND BODY OF LAW

A. AEDPA's Roots in the "Contract with America"

As Professors Tushnet and Yackle note, AEDPA was a direct descendant of proposals in the 1994 Republican Contract with America's "Taking Back Our Streets Act."⁶⁹ The legislation passed through Congress with little discussion.⁷⁰ Following the bombing of the Murrah Federal Building in Oklahoma City, Congress rode the wave of populist outrage directed at perceived threats from domestic terrorism.⁷¹ Congressional leaders "seized

66. *Id.* The logic of this "specific rule versus general rule" distinction may go further and undermine the possibility of finding clearly established federal law in the first place. *See, e.g., Abdul-Kabir*, 550 U.S. at 266 (Roberts, C.J., dissenting). Whether a rule is characterized as a general rule that calls for more deference to lower court determinations or as failing to constitute clearly established federal law, the result is similar: the petitioner will not prevail in his application for a writ of habeas corpus. *See id.*

67. *Moore v. Johnson*, 194 F.3d 586, 603 (5th Cir. 1999) (quoting *Trevino v. Johnson*, 168 F.3d 173, 181 (5th Cir. 1999)).

68. *Id.*

69. Tushnet & Yackle, *supra* note 11, at 20–21. Arguing that "most petitions are totally lacking in merit," that

"thousands upon thousands of frivolous petitions clog the federal district court dockets each year," and that "prisoners on death row [could] almost indefinitely delay their punishment," the Contract's authors sought to impose a one-year deadline for filing habeas corpus claims generally, and a more stringent six-month deadline for capital cases.

Id. (quoting CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 44 (Ed Gillespie & Bob Schellhas eds., 1994).

70. Yackle, *supra* note 7, at 545–48, 551–53.

71. *Id.* at 545–46.

The drafting work fell to staff lawyers serving the Senate Judiciary Committee. Those drafters did not simply select a prior bill as their model. Nor

the opportunity finally to limit federal courts' authority in habeas corpus . . . in ordinary cases in which prisoners use habeas to challenge criminal convictions or sentences.⁷² The haste and underlying political agenda resulted in Professor Yackle's assessment that habeas corpus for state prisoners is an "intellectual disaster area."⁷³ In a similar vein, Justice Souter observed in *Lindh v. Murphy*, "[a]ll we can say is that in a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting."⁷⁴

AEDPA's drafters made two unsupported assumptions that this Article will develop below. Initially, they ignored the historical roots of habeas corpus; in so doing, they assumed that habeas jurisdiction is granted solely by statute. This assumption is disputed by legal historians and courts. Secondly, the drafters misperceived how statutory law and case precedent differ as binding authority. These two difficulties give weight to Professor Yackle's observation that AEDPA is conceptually flawed.⁷⁵ An understanding of these assumptions may provide petitioners and their attorneys with new tools to challenge state court convictions or sentences.⁷⁶

B. The Right to Habeas Corpus Is Both Constitutional and Statutory

As a general observation, it matters if the source of a given right is constitutional or statutory. Two different sources have been cited as grounding the federal courts' power to issue the writ of habeas corpus.⁷⁷

did they start afresh. The occasion was ripe for anything, and they emptied the committee files of virtually all the restrictive . . . procedural requirements that Republicans had tried to impose on all convicts The bill shot through committee in both bodies and went to the floor without an explanatory report. The floor debates were extensive, but scarcely rigorous. The bill was adopted by main force, and President Clinton signed it into law (though perhaps *dubitante*).

Id. at 546 (footnote omitted).

72. *Id.* at 546.

73. *Id.* at 553 (footnote omitted).

74. 521 U.S. 320, 336 (1997).

75. See Yackle, *supra* note 7, at 548. "The manner in which AEDPA was cobbled together suggests that no one thought any of this through at a conceptual level." *Id.* The two observations discussed in this Article can be seen as further examples of the AEDPA's conceptual inadequacies to which Professor Yackle refers.

76. See CHARLES TAYLOR, *A SECULAR AGE* 13 (2007) ("[A]ll beliefs are held within a context or framework of the taken-for-granted, which usually remains tacit, and may even be as yet unacknowledged by the agent, because never formulated."). *Id.* The next section of this Article tries to explore the frameworks that operated beneath the surface of the drafters' work and indicates how difficulties with those assumptions undermine the stated goals of the law they drafted.

77. YACKLE, *supra* note 21, at 77; Professor Peter J. Smith's important recent article, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883 (2008), observes how textualists on the Court limit access to courts despite expansive grants of jurisdiction laid out in congressional statutes. Smith indicates that the textualists' urge to constrain judicial power may trump their competing demands to act as faithful agents of Congress who should focus merely on the plain meaning of the

Ordinarily, authorities cite the Judiciary Act of 1789 and its amendments, which derive power from Article III of the Constitution.⁷⁸ As a result, federal habeas jurisdiction is seen as statutory and thus a matter of congressional control.⁷⁹ In accord with that view, the Supreme Court has noted that jurisdiction to challenge state and federal judgments comes from 28 U.S.C. § 2241.⁸⁰

Appreciation of this statutory basis for habeas jurisdiction is necessary, but it is not sufficient. Justice Black cautioned against efforts to restrict access to habeas review: “Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot . . . be constitutionally abridged by Executive or by Congress.”⁸¹

Black’s statement rests in part upon the reference to the writ of habeas corpus in the Suspension Clause, which reads: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”⁸² Likewise, Professor LaFave

jurisdictional statutes as written. *Id.* at 1947–48. Though his concerns are strictly beyond the scope of this study, Smith’s indication that Justices may not be motivated by considerations beyond that of the text alone is surely germane to this Article.

78. YACKLE, *supra* note 21, at 77.

79. *Id.*

80. *Lehman v. Lycoming County Children’s Servs.*, 458 U.S. 502, 509 n.9 (1982). This reading gains support from no less an authority than Chief Justice Marshall, who seemed to assert it in Aaron Burr’s conspiracy case, *Ex parte Bollman*, in which Marshall said that federal power to grant the writ “must be given by written law,” 8 U.S. (4 Cranch) 75, 94 (1807), and commentators agree that in context he meant statutory law, YACKLE, *supra* note 21, at 77 (citing *Bollman*, 8 U.S. (4 Cranch) at 94). Marshall’s opinion has come under attack. Professor Francis Paschal argues that modern courts should read the Suspension Clause as “a directive to all superior courts of record, state as well as federal, to make the habeas privilege routinely available.” Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 607. Paschal observed that Chief Justice Marshall held in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that Article III of the Constitution exhausted the possibilities of original jurisdiction for the federal courts. *Id.* at 626. Paschal maintains that in *Marbury*, “Marshall had simply forgotten the habeas corpus clause” Paschal, *supra*, at 651. The weight of current scholarship accepts Professor Paschal’s view. *See, e.g.*, Eric M. Freedman, *Milestones in Habeas Corpus, Just Because John Marshall Said It, Doesn’t Make It So: Ex parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789* (pt. 1), 51 ALA. L. REV. 531 (2000); *see also* James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000).

81. *Johnson v. Eisentrager*, 339 U.S. 763, 798 (1950) (Black, J., dissenting). More recently, Justice Blackmun noted a number of problems with the law of federal habeas corpus, which he described as “a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights.” *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

82. U.S. CONST. art I, § 9, cl. 2; *see generally* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008). Professors Halliday and White maintain that the Suspension Clause extends the applicability of the writ much more broadly than is presently thought. *See id.* at 713. Indeed, they argue that the historical record “suggests that, ‘at a minimum’ the writ of habeas, in 1789, was taken as extending

underscores this line of authority:

[The Suspension Clause] suggests that federal courts have the inherent authority to issue the writ in the absence of a valid suspension. Such a reading would establish, in effect, a constitutional right to habeas relief, at least to the extent such relief was available at common law, for persons held in custody.⁸³

In dictum, the Court has noted that jurisdictional statutes “implement[] the constitutional command that the writ of habeas corpus be made available.”⁸⁴ There is no indication AEDPA’s drafters appreciated the Court’s recognition of a constitutional basis for habeas review, and the Supreme Court in its first AEDPA case noted that even if AEDPA can restrict habeas claims, the constitutional basis for habeas at least preserves the Supreme Court’s own power to grant habeas petitions.⁸⁵ The Court so held unanimously in *Felker v. Turpin*,⁸⁶ finding the AEDPA habeas restrictions permissible in part because the Supreme Court retains its own habeas power under the text of the Constitution.⁸⁷

If courts continue to accept Justice Black’s contention that granting the writ is rooted in the Constitution, they should also accept at least one important corollary: insofar as habeas review is a constitutional matter, access to courts should be analyzed in terms of the fundamental rights granted criminal defendants, including the right to a fair trial. In *Estes v. Texas*, the Supreme Court announced that the right to a fair trial is the most fundamental right of criminal defendants.⁸⁸ To secure this right, a number of ancillary rights must be enforced. For example, freedom of the press may be impeded

to natural subjects or citizens and resident aliens in British and American territory.” *Id.* They then tease out implications of this finding, raising a number of questions about the sort of review that should be granted prisoners at Guantanamo. *Id.* at 714. If the Suspension Clause is seen as demanding expanded review for non-citizen prisoners at an offshore military prison, it may likewise demand expanded review for citizen prisoners held here in the U.S. See also Robert D. Sloane, *AEDPA’s “Adjudication on the Merits” Requirement: Collateral Review, Federalism, and Comity*, 78 ST. JOHN’S L. REV. 615, 624–28 (2004).

83. WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* § 28.2, at 1293 (3d ed. 2000).

84. *Jones v. Cunningham*, 371 U.S. 236, 238 (1963). See Halliday & White, *supra* note 82, at 578 n.2. “[T]he Supreme Court has never squarely held that ‘the privilege of the writ of habeas corpus’ amounts to an affirmative constitutional right to habeas review. It came perilously close to doing so in *INS v. St. Cyr*, 533 U.S. 289, 301, 304 (2001), but stopped short.” *Id.*

85. *Felker v. Turpin*, 518 U.S. 651, 654 (1996).

86. *Id.*

87. See Scott Moss, Recent Developments, *An Appeal by Any Other Name: Congress’s Empty Victory over Habeas Rights—Felker v. Turpin*, 32 HARV. C.R.-C.L. L. REV. 249, 252 (1997).

88. 381 U.S. 532, 540 (1965).

to avoid contaminating a jury pool before trial.⁸⁹ Defendants have the right to discover exculpatory evidence held by the prosecution.⁹⁰ Finally, indigent defendants are guaranteed the right to government-provided attorneys to assist in their defense for both felony and misdemeanor charges.⁹¹

Because the authority for habeas relief is at least unclear, and both historical evidence and Supreme Court authority root habeas corpus in the Constitution itself,⁹² courts may consider expanding jurisdiction in some cases beyond the narrow grants of statute. At the very least, where the violation affects a petitioner's right to fair trial, there are strong reasons for expanding federal court jurisdiction to cases thought untouchable because of AEDPA's restrictions.

C. AEDPA Assumes Precedent Binds as Statutory Authority Does; It Doesn't

Another resource for reinvigorating access to habeas review relies less on constitutional history and more on the jurisprudential claims undergirding AEDPA. Supreme Court cases construing AEDPA limit "clearly established Federal law" to "the holdings . . . of [the Supreme] Court's decisions as of the time of the relevant state-court decision."⁹³ Although there is some disagreement, even within the Court, about how "clearly established . . . at the time" should be parsed,⁹⁴ the Justices agree that the "clearly established" language is designed to restrict the ability of courts to review cases brought by state court petitioners.⁹⁵ Justice Scalia has observed that the law cannot change via the grant of the petition.⁹⁶ The reviewing court—including the

89. See, e.g., *Press-Enter. Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 508 (1984); *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

90. *United States v. Agurs*, 427 U.S. 97, 106 (1976); *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963).

91. *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963).

92. See *Halliday & White*, *supra* note 82, at 575.

93. *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., delivering the opinion of the Court with respect to Part II, concurring in part, and concurring in the judgment).

94. Justice Scalia defines the legal requirement as limiting precedent that can be cited to that which is "clearly established" . . . at the time of the [lower court] decision." *Wiggins v. Smith*, 539 U.S. 510, 543 (2003) (Scalia, J., dissenting). By contrast, Justice O'Connor maintains in the majority opinion that it is sufficient that the prior case merely be before the Court on habeas review. "Contrary to the dissent's contention, we therefore made no new law in resolving Williams' ineffectiveness claim." *Id.* at 522 (majority opinion) (citation omitted).

95. *Id.*

96. *Id.* at 543. As indicated below, only gradually has the Court moved away from Justice Scalia's characterization of the law as "unable to change." As noted above, in *Yarborough v. Alvarado*, the Court noted that some rules require narrow application because of their specificity while others display more play in the joints. 541 U.S. 652, 664 (2004). This past term, Justice Thomas identified the *Strickland* standard as being a "general standard" that grants state courts "even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v.*

Supreme Court—must apply the law as it has been previously determined by the Supreme Court.⁹⁷

But what does it mean to say that case precedent cannot change? The answer is far from clear. It is easiest to approach this subject obliquely by distinguishing between statutory interpretation and the interpretation of precedent. The clarity of statutory authority makes it uniquely attractive as a source of law.⁹⁸ It is no accident that Justice Scalia's textualist approach finds a congenial home in statutory interpretation.⁹⁹ Law in this vein is best understood through the lens of *Sutherland: Statutes and Statutory Construction* and is rooted in a series of assumptions of how law works.¹⁰⁰ Namely, words and phrases have a fixed meaning,¹⁰¹ and therefore, the interpreter can apply the canons of construction relatively easily.¹⁰² Law

Mirzayance, 129 S. Ct. 1411, 1420 (2009).

97. *Williams*, 529 U.S. at 412.

98. See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 14 (13th ed. 1946).

Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators.

Id.

99. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

But though I have no quarrel with the common law and its process, I do question whether the *attitude* of the common-law judge—the mind-set that asks, “What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?”—is appropriate for most of the work that I do, and much of the work that state judges do. We live in an age of legislation, and most new law is statutory law. As one legal historian has put it, in modern times “the main business of government, and therefore of law, [is] legislative and executive. . . . Even private law, so-called, [has been] turning statutory.

Id. at 13.

100. See generally NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND: STATUTES AND STATUTORY CONSTRUCTION* (Thomson West 7th ed. 2008) (1891). Despite Justice Scalia's commendation of *SUTHERLAND: STATUTES AND STATUTORY CONSTRUCTION*, the current edition questions Scalia's approach to statutory construction. See, e.g., Bradley C. Karkkainen, “*Plain Meaning*”: Justice Scalia's Jurisprudence of Strict Statutory Construction, in 3 SINGER & SINGER § 65A:10, at 717–59, *supra*.

101. See, e.g., 2A SINGER & SINGER, *supra* note 100, § 46:1, at 137.

102. See, e.g., SCALIA, *supra* note 99, at 25–29; see generally 3 SINGER & SINGER, *supra* note 100, §§ 57:1–57:26, at 2–98 (laying out the rules for mandatory and directory construction). But see Richard Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, in 3 SINGER & SINGER, *supra* note 100, § 65A:6, at 663–76. Judge Posner does not directly mention Scalia's work,

under a statutory model is understood as a collection of rules stated with clarity and designed to apply universally within a given jurisdiction.¹⁰³ Further, statutory law is understood as applying in the same way at all times until it is repealed.¹⁰⁴ The deeper implication is that unless the statute is inartfully drafted, there cannot be disagreement about what the law is or what it entails; those who differ in interpreting an unambiguous statute are either dishonest, self-deluded, or dull.¹⁰⁵

Although textualism is a popular approach to statutory interpretation, matters are perforce different when interpreting case law or constitutional precedent.¹⁰⁶ As Professor Duxbury observes, case precedent, in contrast to statutory authority, is a disfavored source for law because the rule can be

but he develops his argument based on the premise attacked directly by Scalia.

The usual criticism of the canons, forcefully advanced by Professor Llewellyn many years ago, is that for every canon one might bring to bear on a point there is an equal and opposite canon, so that the outcome of the interpretive process depends on the choice between paired opposites—a choice the canons themselves do not illuminate.

Id. at 663.

103. This view is subject to critique in WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994):

The “ORIGINAL INTENT” and “plain meaning” rhetoric in American statutory interpretation scholarship and decisions treats statutes as static texts and assumes that the meaning of a statute is fixed from the date of enactment. The implication is that a legislator interpreting the statute at the time of enactment would—or should—render the same interpretation as an agency or judge interpreting the same statute fifty years later. This is a dubious description of practical reality, and a dreary aspiration for our polity. These dubieties suggest that we might also doubt the assumptions embedded within the originalist rhetoric of statutory interpretation.

Id. at 9 (typeface in original).

104. *Id.*

105. See RONALD DWORKIN, *LAW’S EMPIRE* 8 (1986). This approach is best described by Professor Dworkin in his rendering of the “plain fact” theory of the law:

Most laymen assume that there is law in the books decisive of every issue that might come before a judge. The academic version of the plain-fact view denies this. The law may be silent on the issue in play, it insists, because no past institutional decision speaks to it either way.

Id.

106. Carleton Kemp Allen, *Precedent and Logic*, 41 L. Q. REV. 329, 334 (1925).

The ‘binding force’ of precedents has, through constant and often unthinking repetition, become a kind of sacramental phrase which contains a large element of fiction. If a Court is quite clear about the rule of law which should be applied to the case before it, it will seldom allow itself to be embarrassed by an inconvenient decision. There are many ways of ‘distinguishing,’ and a bad case . . . is soon distinguished out of existence.

Id.

difficult to understand, difficult to derive, and difficult to demarcate around the edges.¹⁰⁷ Professor Schauer maintains that when dealing with case law, we are dealing not with binding rules as we are with statutes; rather, we are dealing with authority to be followed.¹⁰⁸ Courts redraw and re-conceive categories set out by earlier precedent.¹⁰⁹ These categorical distinctions in

107. NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 92 (2008).

The casual nature of judicial precedents—the fact that judges are generally free to say as much or as little as they like, the likelihood that there will be no canonical form of words capturing the *ratio decidendi* of a case, the difficulty of determining in many instances just what is the *ratio decidendi* as opposed to *obiter dicta*—means that they are not particularly efficient vessels for conveying important legal information.

Id. at 92; see also Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 891–92 (2006). Professor Schauer sets out the challenge thusly:

I mean to pose a skeptical challenge to one pervasive argument for the common law and against its alternatives. And that argument is that one reason (and not necessarily the only reason, and not necessarily the best reason) to prefer the common law is that rulemaking and lawmaking are better done when the rulemaker has before her a live controversy, a controversy that enables her to see all of the real world implications of making one rule rather than another. When there is no actual dispute, so the argument goes, everything is speculation, and speculation that is not rooted in real world events is especially likely to be misguided.

Id. (footnotes omitted).

At the end of his analysis, Professor Schauer offers the following conclusion: “Yet when we combine the lessons of at least one strand of Legal Realism with some of the lessons of modern social science, we see as well that real events, real parties, real controversies, and real consequences may have distorting effects as well as illuminating ones.” *Id.* at 918. Schauer suggests that case law may thus come to decisions that are not in the best interests of society and should be treated with wariness by courts and counsel. *Id.*

108. See, e.g., Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 591–92 (1987).

Because the constraint of precedent might not be an all-or-nothing affair, we must consider the way in which the size of the categories of assimilation might largely determine the strength of precedent. This is admittedly an odd way of thinking about weight, because it is more common to think of the question of size and the question of strength as lying along different axes. But when we turn to precedent this distinction between size and strength collapses.

It might occur to us to say that precedent provides *one* reason for a particular decision without providing a *conclusive* reason.

Id. (footnote omitted).

109. See, e.g., CARDOZO, *supra* note 98, at 112–13.

[I]n the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social

turn emphasize or subordinate earlier holdings and affect how relevant earlier cases are to the case at hand.¹¹⁰ Schauer, among others, indicates that there is no way to correct for this fluctuation in meaning; therefore, precedent cannot provide conclusive guidance as a source of law.¹¹¹

Although the many distinctions between statutory law and case precedent as sources of legal authority are beyond the scope of this Article, one difference helps explain why AEDPA cannot work as some courts have claimed. Professors Jonsen and Toulmin observe that one virtue of the case method is its ability to manage conflicts that general propositional rules cannot address.¹¹² In particular, the case method recognizes the virtue of indeterminacy, leaving certain questions undertheorized or incompletely explored to gain agreement from a wide spectrum of viewpoints.¹¹³ As Professor Sunstein notes, parties may agree on particular conclusions or broad ideas of justice, even if they do not employ the same chains of reasoning in precisely the same way.¹¹⁴

interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey.

Id.

110. *Id.*

111. Schauer, *supra* note 108, at 591–92.

112. ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* 9 (1988).

In morality, as in law and public administration, the assumption that all practical decisions need to rest on a sufficiently clear and general system of invariable rules or principles has, from a theoretical point of view, a certain attractiveness. But in the actual business of dealing with particular real-life cases and situations, such rules and principles can never take us more than part of the way. The real-life application of moral, legal, and administrative rules calls always for the exercise of human perceptiveness and discernment—what has traditionally been referred to as “equity”—and the more problematic the situations become, the greater is the need for such discernment.

Id.

113. *Id.* at 314.

The heart of moral experience does not lie in a mastery of general rules and theoretical principles, however sound and well reasoned those principles may appear. It is located, rather, in the wisdom that comes from seeing how the ideas behind those rules work out in the course of people’s lives: in particular, seeing more exactly what is involved in insisting on (or waiving) this or that rule in one or another set of circumstances. Only experience of this kind will give individual agents the practical priorities that they need in weighing moral considerations of different kinds and resolving conflicts between those different considerations.

Id.; see also CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35–61 (1996).

114. See SUNSTEIN, *supra* note 113, at 35.

This incomplete theorization enhances social cohesion by permitting agreement on broad principles, and it opens legal reasoning to broader sorts of concerns—and perhaps less elegant formulation—than argument based on propositional rules permits.¹¹⁵ Case law thus enhances agreement among different parties for what may be different reasons; it has more “play in the joints” than does statutory law. Professor Duxbury notes how this openness leads to development of law:

If judges were bound by precedents much as they are bound by statutes, the opportunities for judge-made law to evolve would be considerably limited; but if precedents had absolutely no capacity to constrain, there would be no point to the doctrine of *stare decisis*. The idea of precedents having authority is meant to capture the fact that the truth lies somewhere between these two extremes, that the law that courts create is the law they often feel obligated and are obligated to follow.¹¹⁶

Judge-made law can and does evolve and change; this adaptability is one of its strengths.

Precedent thus provides not a binding rule but a departure point for judges contemplating similar sets of facts.¹¹⁷ Professor Duxbury suggests that

Incompletely theorized agreements play a pervasive role in law and society. It is quite rare for a person or group completely to theorize any subject, that is, to accept both a general theory and a series of steps connecting that theory to concrete conclusions. Thus we often have in law an *incompletely theorized agreement on a general principle*—incompletely theorized in the sense that people who accept the principle need not agree on what it entails in particular cases.

Id.

115. JONSEN & TOULMIN, *supra* note 112, at 299.

Some philosophers, such as Henry Sidgwick, find practical ethics messy or untidy and welcome the formal elegance of an [sic] nicely framed ethical analysis. Sidgwick’s preference was neither eccentric nor transitory: quite recently, in a similar spirit we find Jonathan Glover complaining about the “baroque complexity” of practical morals But this aesthetic preference operates only on an intellectual level. If we allow our passion for simplicity and elegance to affect our moral decisions in practice, we risk errors in moral judgment

Id. (endnote omitted).

116. DUXBURY, *supra* note 107, at 23–24.

117. *See, e.g.*, CARDOZO, *supra* note 98, at 19–20.

The first thing [a judge confronting a new case] does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books. I do not mean that precedents are ultimate sources of the law, supplying the sole equipment that is needed for the legal armory Back of precedents

precedent is helpfully understood as providing the framework for future decision making.¹¹⁸ Justice Cardozo suggests an accretion model in which new cases build on the frameworks set out in older cases.¹¹⁹ H.L.A. Hart maintains that what gives the legal system intelligibility is that judges in fact do follow precedent.¹²⁰ But just what different jurists mean when they claim to follow precedent is unsettled.¹²¹

Because case law develops and binds in ways different from statutory law, cases governed by AEDPA are not strictly tied to prior authority because of the odd way the statute is structured. Rather than attempting to codify the

are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn. None the less, in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law.

Id. (footnote omitted).

118. See, e.g., DUXBURY, *supra* note 107, at 94.

Precedents, on this account, resemble what cognitive theorists term availability heuristics. When decision-makers recognize that their capacity to obtain and assimilate information is limited, they tend to devise procedures and mechanisms which establish a link between a body of existing information they might confidently use and the decisions they have to make.

Id. (footnotes omitted).

119. CARDOZO, *supra* note 98, at 48.

These fundamental conceptions once attained form the starting point from which are derived new consequences, which, at first tentative and groping, gain by reiteration a new permanence and certainty. In the end, they become accepted themselves as fundamental and axiomatic. So it is with the growth from precedent to precedent. The implications of a decision may in the beginning be equivocal. New cases by commentary and exposition extract the essence. At last there emerges a rule or principle which becomes a datum, a point of departure, from which new lines will be run

Id.

120. H.L.A. HART, *THE CONCEPT OF LAW* 131 (1961). The difficulty for Hart is determining just what following precedent means. From his perspective, judges perform different actions when they claim to follow precedent.

The acknowledgement of precedent as a criterion of legal validity means different things in different systems, and in the same system at different times. Descriptions of the English 'theory' of precedent are, on certain points, still highly contentious: indeed, even the key terms used in the theory, '*ratio decidendi*', 'material facts', 'interpretation', have their own penumbra of uncertainty.

Id.

121. *Id.*

holdings of earlier cases, AEDPA simply points to prior Supreme Court cases as extrinsic objects and refers courts to them as sources of authority, ostensibly suggesting that by so doing, they impose a requirement of strict interpretation of earlier precedent.¹²² Because the announced authority, Supreme Court cases, are simply judge-made law, and because legal rules stemming from cases are necessarily revisable in a way that congressionally enacted or statutory law is not, AEDPA fails to bind later courts as a statute codifying prior case law would. Despite its stated purpose, AEDPA does not impart some “super-precedential power” on earlier cases. This conclusion is borne out by examining how *Strickland* has been interpreted by federal courts.

V. FIRST CRACK AT INEFFECTIVE ASSISTANCE OF COUNSEL: *STRICKLAND*

A. *The Court Vaguely Defines Ineffective Assistance*

The Sixth Amendment guarantees the accused the right to an attorney, although the substance of that right continues to evolve.¹²³ In *McMann v. Richardson*, the Court recognized that “the right to counsel is the right to the effective assistance of counsel.”¹²⁴ Not until *Strickland v. Washington* did the Court flesh out important contours of this right.¹²⁵ Although earlier cases stated that counsel must be “effective,” the Court’s pre-*Strickland* decisions considered only affirmative governmental interference with representation rather than addressing the substance of a defense attorney’s actions or omissions.¹²⁶

The *Strickland* rule is addressed to “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”¹²⁷ The Court extended this standard to capital sentencing hearings as well because they are “sufficiently like a trial in . . . adversarial format and in the existence of

122. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 543 (2003) (Scalia, J., dissenting). To be fair, the statute itself does not make these claims; however, that certainly is the interpretation textualists impart to it. See *id.*

123. U.S. CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

124. 397 U.S. 759, 771 n.14 (1970) (citations omitted).

125. 466 U.S. 668, 686 (1984). “The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in . . . those [cases] presenting claims of ‘actual ineffectiveness.’” *Id.*

126. *Id.*

127. *Id.*

standards for decision.”¹²⁸ *Strickland*’s holding is commonly expressed as a two-part test. The first prong requires that the defendant prove that trial counsel’s performance was deficient.¹²⁹ Second, the defendant must prove that this deficient performance prejudiced the defense.¹³⁰ The vague test for the deficient performance prong is whether counsel’s representation fell below “objective standard[s] of reasonableness.”¹³¹ The performance prong is evaluated using law and standards from the time of the trial or sentencing itself.¹³² By contrast, the prejudice prong is evaluated using law that exists at the time of the ineffectiveness challenge.¹³³ This prong can be found where there is a “reasonable probability” that the result of the proceeding would have been different, but for counsel’s error.¹³⁴

This two-part test is contextualized by an admonition that reviewing courts indulge a strong presumption in favor of counsel’s effectiveness.¹³⁵ Therefore, the Court directed:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the

128. *Id.*

129. *Id.* at 687.

130. *Id.*

131. *Id.* at 688. To prove deficiency, the Court stated that *The Defense Function*, ABA STANDARDS FOR CRIMINAL JUSTICE §§ 4-1.1 to 4-8.6 (2d ed. 1980) (current version at ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 4-1.1 to 4-8.6 (3d ed. 1993)), is a guide to determining what is reasonable. Nevertheless, “[no] particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Strickland*, 466 U.S. at 688–89. Justice O’Connor observed, “More specific guidelines are not appropriate.” *Id.* at 688. Despite that assertion, the wide range of findings of what does or does not constitute deficiency in the lower courts indicates that lower courts would have appreciated some guidance here. *See infra* Part VI.

132. *See Strickland*, 466 U.S. at 688–89.

133. *Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993).

134. *Strickland*, 466 U.S. at 694.

135. *Id.* at 689.

Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Id.

defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.”¹³⁶

As might be expected on the basis of this presumption, following the decision *Strickland* served more to limit the pool of litigants than expand it.¹³⁷ Anecdotally, *Strickland* was referred to as establishing “the breathing standard.” So long as counsel drew breath and sat next to her client without doing anything aggressively stupid, the representation passed constitutional muster.

B. Rules Without Facts Are Ambiguous and May Be Misleading

The *Strickland* rule as presented above ignores the facts that anchored the original decision. That position is untenable if one wishes to chart how the law has changed.¹³⁸ One oversimplified way of thinking of the interaction of law and facts is to think of a given rule of law as a filter. By announcing the rule of law, a court thereby identifies certain sorts of facts as relevant and other facts as irrelevant.¹³⁹ For example, the crime of burglary occurs when a

136. *Id.*

137. *See, e.g.*, *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001). “The *Strickland* standard is rigorous, and the great majority of habeas petitions that allege constitutionally ineffective counsel founder on that standard.” *Id.*

138. Indeed, one strategy for ignoring inconvenient precedent is simply to cite abstract legal rules in the absence of any factual grounding. Rather than tying these propositions to concrete situations, the judge acts as though law is made up of idealized, atemporal, and necessary propositions. Professors Jonsen and Toulmin demonstrate that this sort of reasoning is simply irrelevant in practical fields such as medicine, law, or ethics:

[P]ractical fields such as law, medicine, and public administration deal with concrete actual cases, not with abstract idealized situations. They are directly concerned with immediate facts about specific situations and individuals: general ideas concern them only indirectly, as they bear on the problems of those particular individuals. Unlike natural scientists, who are free to decide in advance which types of situations, cases, or individuals they may (or need not) pay attention to, physicians, lawyers, and social service workers face myriad professional problems the moment any client walks through the door. . . . [T]hey cannot choose to ignore them or their problems.

JONSEN & TOULMIN, *supra* note 112, at 31.

Thus, to separate legal rules from the facts that ground them is to act as though law were a theoretical field like geometry, which proceeds along this idealized, atemporal, and necessary sort of reasoning. This sort of reasoning applied to law is at best mistaken. Professors Jonsen and Toulmin observe:

[I]f we fight off this bewitchment by the dream of an ethical algorithm—a universal and invariable code of procedures capable of providing unique and definitive answers to all our moral questions—it quickly becomes clear that even the best set of rules or principles cannot by itself satisfy our expectations.

Id. at 7.

139. *See, e.g.*, Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J.

perpetrator enters the dwelling of another with the intent to steal or to commit a felony therein.¹⁴⁰ Whether the place illegally entered is owned rather than rented is not relevant to the question: “Did a burglary occur?” Therefore, if someone is applying the rule of the law of burglary correctly, the distinction made between one who owns and one who rents the affected property will be filtered out; it simply does not figure into determining if a burglary happened. If the distinction between renting and owning a dwelling becomes legally important, then one is no longer dealing with the same law of burglary; once this distinction becomes important, one has shifted to a different legal category.

This relationship between facts and law may be expressed in two abstract corollary presumptions that derive from the above example. When facts of sort *X* which were once vital to determining the outcome of law *A*, are no longer considered when courts apply law *A*, we can say that law *A* has changed. Similarly, when facts of sort *Y*, which were once irrelevant to determination of law *B*, become the linchpin of the argument for the application and decision by courts applying law *B*, we can say that law *B* has changed. These presumptions do not tell us what the law is at a given time, but they do indicate a way of determining if a given law has changed.

The Court underscored this relationship between facts and law in *Williams*

161, 169 (1930).

The same set of facts may look entirely different to two different persons. The judge finds his conclusions upon a group of facts selected by him as material from among a larger mass of facts, some of which might seem significant to a layman, but which, to a lawyer, are irrelevant. The judge, therefore, reaches a conclusion upon the facts as he sees them. It is on these facts that he bases his judgment, and not on any others. It follows that our task in analyzing a case is not to state the facts and the conclusion, but to state the material facts as seen by the judge and his conclusion based on them. It is by his choice of the material facts that the judge creates law. A congeries of facts is presented to him; he chooses those which he considers material and rejects those which are immaterial, and then bases his conclusion upon the material ones. To ignore his choice is to miss the whole point of the case. Our system of precedent becomes meaningless if we say that we will accept his conclusion but not his view of the facts. His conclusion is based on the material facts as he sees them, and we cannot add or subtract from them by proving that other facts existed in the case.

Id.

140. MODEL PENAL CODE: OFFICIAL DRAFT AND EXPLANATORY NOTES § 221.1 (1985).

(1) Burglary Defined. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.

Id.

v. Taylor, the first major post-AEDPA case to interpret *Strickland*.¹⁴¹ The *Williams* Court attempted to define what Congress meant by its use of the language, “unreasonable application of . . . clearly established federal law, as determined by the Supreme Court.”¹⁴² An “unreasonable application” of Supreme Court precedent occurs when “a state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that precedent].”¹⁴³ Or to put it in the abstract: when facts of sort *Y* occur, a lower court applies the law “unreasonably” when it arrives at a conclusion different from the Supreme Court when it encountered facts of sort *Y*. The cases below demonstrate that this standard has not been applied consistently.

It is difficult to chart changes in the law because the relationship between facts and law is neither stable nor static; facts condition and refine legal norms that are under consideration as a matter of course. The French philosopher Paul Ricoeur described this mutual conditioning:

The application of a rule is in fact a very complex operation where the interpretation of the facts and the interpretation of the norm mutually condition each other, before ending in the qualification by which it is said that some allegedly criminal behavior falls under such and such a norm which is said to have been violated. If we begin with the interpretation of the facts, we cannot overemphasize the multitude of ways a set of interconnected facts can be considered and, let us say, recounted. . . . We never finish untangling the lines of the personal story of an accused with certainty, and even reading it in such a way is already oriented by the presumption that such an interconnectedness places the case under some rule. To say that *a* is a case of *B* is already to decide that the juridical syllogism holds for it.¹⁴⁴

Relevant legal categories are determined by the interplay among constitutions, statutes, administrative rules, and case precedent on the one hand and the facts that ground a particular dispute on the other.¹⁴⁵ As

141. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

142. 28 U.S.C. § 2254(d)(1) (2006).

143. *Williams*, 529 U.S. at 405.

144. PAUL RICOEUR, *LE JUSTE* (1995), translated in *THE JUST* 121 (David Pellauer trans., Univ. of Chicago Press 2000).

145. See, e.g., AHARON BARAK, *SHIKUL DAAT SHIPUTY* (1987), translated in *JUDICIAL DISCRETION* 17 (Yadin Kaufmann trans., Yale Univ. Press 1989) (1987).

The distinction among the three objects of judicial discretion is blurred. The difficulty is inherent in the fact that we do not have accurate instruments for determining what constitutes a fact and what a norm, and where the border

Professor Aharon Barak notes, the categories of fact and the legal norms applied to those facts remain porous and permeable.¹⁴⁶ Law and fact condition and illuminate each other such that they cannot easily be separated.¹⁴⁷

C. Strickland Changed Lower Court Rulings by Ignoring Facts

Justice O'Connor's decision in *Strickland* ignored lower courts' specific findings of fact that grounded their conclusion that Washington received constitutionally ineffective representation.¹⁴⁸ The lower courts noted that he came from a home marked by violence, abuse, and incest.¹⁴⁹ His murders were extraordinarily grisly and sexual.¹⁵⁰ All involved stabbings or shootings at point blank range that would have covered the defendant in copious amounts of blood.¹⁵¹ Two stabbings occurred while the victims were in bed.¹⁵² In the first, the victim was presumably unclothed.¹⁵³ In the third killing, the defendant stabbed the victim—who was bound to the bed and gagged throughout—so that the victim bled to death on the defendant's own mattress.¹⁵⁴ The defendant engaged in this behavior in the course of twelve days with no previous indication of sexually violent tendencies.¹⁵⁵ By excising these facts from her decision, Justice O'Connor removed the lower courts' reasons for the finding that Washington was psychologically unstable, the key to lower courts' rulings that his attorney's representation was

between them lies. Moreover, the judge cannot decide the facts before he formulates for himself, if only at first glance, a view of the law, since the number of facts is infinite and he must focus only on those that are relevant, which is determined by the law. Yet the judge cannot determine the law before he takes, again if only as a first impression, a stand regarding the facts, since the number of laws is great and he must concentrate on the law that applies, which is determined by the nature of the facts. There exists, then, an intimate link between norm and fact.

Id.

146. *Id.*

147. *Id.*

148. For a fuller explanation of judicial fact-finding by the *Strickland* Court, see Gregory J. O'Meara, S.J., *The Name Is the Same, but the Facts Have Been Changed to Protect the Attorneys: Strickland, Judicial Discretion, and Appellate Decision-Making*, 42 VAL. U. L. REV. 687 (2008).

149. *Washington v. Strickland*, 693 F.2d 1243, 1266 (5th Cir. Unit B 1982). David Washington came from a "broken and violent home, one marked by extensive child abuse and incest." *Id.*

150. See *Washington v. Florida*, 362 So. 2d 658, 660–61 (Fla. 1978), for an extended description of the crimes David Washington committed in a twelve-day period.

151. *Id.*

152. *Id.*

153. *Id.* at 660.

154. *Id.* at 661.

155. *Strickland v. Washington*, 466 U.S. 668, 673 (1984).

constitutionally defective.

Without these facts found by lower courts, the reader of *Strickland* is not particularly disturbed when she learns that, in preparation for sentencing, the attorney spoke with the defendant but never met Washington's wife or mother.¹⁵⁶ He did not seek other character witnesses to bolster Washington's case, nor did he request a psychiatric examination, "since his conversations with his client gave no indication that [Washington] had psychological problems."¹⁵⁷ Because of counsel's own sense of hopelessness about overcoming the defendant's subsequent confession to additional crimes, counsel decided not to put on further evidence about Washington's character and emotional state at the capital sentencing hearing.¹⁵⁸ Despite counsel's lack of action, the Court held that David Washington received effective assistance of counsel according to the dictates of the Sixth Amendment to the U.S. Constitution.¹⁵⁹

If the *Strickland* rule is unchanged, an honest reading of *Strickland*'s facts requires that an appellate court grant no relief when a defense attorney takes the following combined actions before a capital sentencing hearing: (1) fails to investigate a defendant's family history; (2) fails to talk with a defendant's employers; (3) fails to consult a defendant's neighbors; (4) fails to request psychological experts or read his client's psychological report filed with the court; and (5) fails to request a presentence report. In some ways, it is breathtaking how little counsel must do to comport with Sixth Amendment standards. In part, the Court's willingness to bend over backwards and find that David Washington's attorney provided constitutionally sufficient representation may have confused lower courts' analyses of the issue.

D. The Court Retreats from Strickland? Indications that "Ineffective Assistance" May Mean Something

While claiming adherence to the rule in *Strickland*—as all federal courts must lest they announce "new law" in habeas cases—the Supreme Court has applied the rule in surprising ways, given the facts in the earlier case.¹⁶⁰ In *Williams v. Taylor*,¹⁶¹ *Wiggins v. Smith*,¹⁶² and *Rompilla v. Beard*,¹⁶³ the Court

156. *Id.* at 672–73.

157. *Id.* The lower court noted that the trial attorney did not recall even reading the court-ordered psychological report filed in the case. *Washington v. Strickland*, 673 F.2d 879, 888–89 (5th Cir. Unit B 1982).

158. *Strickland v. Washington*, 466 U.S. 668, 673 (1984).

159. *Id.* at 698–99.

160. Initially, the Court applied *Strickland* quite narrowly. *See, e.g.*, *Burger v. Kemp*, 483 U.S. 776, 788–92 (1987).

161. 529 U.S. 362 (2000).

162. 539 U.S. 510 (2003).

163. 545 U.S. 374 (2005).

demanded that trial counsel engage in far more robust investigation than had been required in *Strickland*. In *Williams*, the Court remanded for resentencing because of counsel's inadequate preparation for the mitigation phase; the Court ruled that undiscovered evidence of child abuse and borderline mental retardation may have "influenced the jury's appraisal of [the defendant's] moral culpability."¹⁶⁴ In *Wiggins*, counsel, who did a great deal of investigation in the case, failed to pursue leads suggesting the defendant suffered from a history of abuse and neglect that may have diminished his moral culpability.¹⁶⁵ The Court held that counsel's representation of Wiggins was therefore ineffective.¹⁶⁶ In *Rompilla*, although counsel was far more diligent than the attorneys in either *Williams* or *Wiggins*, the Court found his representation ineffective.¹⁶⁷ Rompilla's attorney spoke with five family members and employed three mental health experts; further, the defendant himself was decidedly unhelpful and sent the lawyer on false leads.¹⁶⁸ Nevertheless, the Supreme Court found the investigation inadequate and ruled that counsel needed to investigate everything relevant to the penalty phase, regardless of the accused's admissions or statements.¹⁶⁹ As discussed below, federal circuit courts have proven willing to find ineffective assistance in cases where the *Strickland* Court presumably would not.

VI. CIRCUIT COURTS APPLYING *STRICKLAND* AFTER AEDPA

As Professor Blume observes, few habeas petitioners are successful,¹⁷⁰

164. *Williams*, 529 U.S. at 398.

165. *Wiggins*, 539 U.S. at 534–35.

166. *Id.* at 535.

167. *Rompilla*, 545 U.S. at 393.

168. *Id.* at 381–82.

169. *Id.* at 387. The recent case of *Schriro v. Landrigan* points to a sea change among even the more conservative Justices on the Court. 550 U.S. 465 (2007). In *Landrigan*, a 5–4 majority found that the reviewing district court did not abuse its discretion in refusing to grant a petitioner an evidentiary hearing on the grounds of ineffective assistance of counsel where the defendant had instructed counsel not to put on a mitigation case at all in the penalty phase of his capital sentencing trial. *Id.* at 481. In its discussion of the Ninth Circuit's decision, the majority signaled that it recognizes the *Strickland*–AEDPA combination is not merely an impenetrable loop. Rather than relying merely on *Strickland*, and applying AEDPA to uphold the district court's decision, Justice Thomas found it necessary to underscore the novelty of the claim presented to the Court. "Indeed, we have never addressed a situation like this." *Id.* at 478. Justice Thomas's decision focused on the defendant's affirmative statements in open court directing counsel not to introduce mitigation evidence. *Id.* at 478–80. Thomas had to tailor his holding this narrowly because the case is otherwise indistinguishable from the ruling in *Rompilla*, where the defendant refused to assist in the development of a mitigation case. Thomas's need to distinguish *Rompilla* (however weakly) to garner the five votes necessary to constitute the majority indicates that at least one person in that bloc recognizes that the law has changed significantly since *Strickland*'s "breathing standard" was announced as the law of the land.

170. See Blume, *supra* note 11 at 284, and accompanying text. Professor Blume calculates that 0.62% of petitioners succeed. *Id.*

and because so few writs are granted, there is no possibility of confirming a correlation, much less a cause, between a defendant's advancing particular sorts of arguments and the court's granting of the writ. Nevertheless, trends emerge in which circuit courts either redefine or ignore the standards set out in *Strickland* to grant habeas relief on the ground of ineffective assistance of counsel. Not all circuit courts have announced a robust standard that imposes higher standards on defense attorneys than did *Strickland* itself.¹⁷¹ Indeed, circuit courts have not been internally consistent in granting writs or remanding cases for evidentiary hearings. Still, as the cases below demonstrate, the *Strickland*–AEDPA combination does not in itself prevent petitioners from prevailing in federal court.

That said, surely some courts have acted as though a post-AEDPA challenge on the basis of ineffective assistance of counsel cannot prevail. In *Ward v. Dretke*, the Fifth Circuit seemed convinced its hands were tied by AEDPA's restrictions.¹⁷² In *Ward*, Judge Higginbotham reviewed a district court's finding of ineffective representation at sentencing based on trial counsel's failure to object when the prosecutor quoted a Bible passage to condemn the petitioner.¹⁷³ The court agreed that the state postconviction court unreasonably applied *Strickland* by not finding ineffective representation where the defense attorney did not object to this argument.¹⁷⁴ The court further ruled that such an objection was necessary to mitigate the "highly prejudicial effect" of the prosecutor's actions.¹⁷⁵ Nevertheless, the court understood its duty as "looking . . . through the prism of AEDPA deference," which demanded that it not "disturb the state habeas court's determination that Ward was not prejudiced."¹⁷⁶ Even though the court believed that the state court's ruling was an objectively incorrect and "unreasonable" statement of the law, it also believed AEDPA's deference standard compelled it to uphold the state court's finding on the merits.¹⁷⁷ It appears the panel thought

171. In fact, circuit courts have consistently ruled against habeas petitioners claiming ineffective assistance of counsel. See, e.g., *Lynn v. Bliden*, 443 F.3d 238, 240 (2d Cir. 2006); *Davis v. Greiner*, 428 F.3d 81, 83 (2d Cir. 2005); *Allen v. Woodford*, 366 F.3d 823, 828–29 (9th Cir. 2004); *Tucker v. Ozmint*, 350 F.3d 433, 436 (4th Cir. 2003); *Byram v. Ozmint*, 339 F.3d 203, 205 (4th Cir. 2003); *Bryan v. Mullin*, 335 F.3d 1207, 1211 (10th Cir. 2003); *Riley v. Cockrell*, 339 F.3d 308, 311 (5th Cir. 2003).

172. *Ward v. Dretke*, 420 F.3d 479, 499–500 (5th Cir. 2005).

173. *Id.* at 497.

174. *Id.* In closing, the prosecutor quoted, "But whosoever shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck and that he were drowned in the depth of the sea." *Id.* at 496 (quoting *Matthew* 18:6 (New King James)). The defendant had testified that he had turned to religion, and the prosecutor claimed his quotation constituted an invited response. *Id.* at 497.

175. *Id.*

176. *Id.* at 500.

177. *Id.* at 499–500.

AEDPA's restrictions could not be surmounted even when state courts unreasonably applied clearly established federal law.

Other courts have navigated ineffective assistance of counsel claims without departing from the *Strickland* test and likewise upholding AEDPA's deference requirements. *Brown v. Sternes*¹⁷⁸ reversed a district court opinion denying issuance of a writ of habeas corpus in a non-death penalty case where the defendant had been sentenced to thirty years' incarceration for armed robbery.¹⁷⁹ The petitioner had previously been diagnosed with chronic schizophrenia by two different psychiatrists.¹⁸⁰ Brown's court-appointed attorney failed to follow up on a subpoena for the petitioner's psychiatric records and also failed to advise court-appointed doctors that her client had a recent history of treatment for mental illness.¹⁸¹ She further neglected to inform stand-in counsel who tried the case for her that Brown had a history of mental illness.¹⁸² The Seventh Circuit panel found the trial attorney offered no credible explanation for why she abandoned any attempt to investigate her client's mental condition.¹⁸³ Therefore, the court ruled her unexplained failures were deficient representation,¹⁸⁴ and this deficiency prejudiced her client.¹⁸⁵ The court found that the state court's conclusions were unreasonable based on the evidence in the case,¹⁸⁶ and counsel's failure to act even when the client's previous attorney told her of his mental illness required that the court grant habeas relief.¹⁸⁷

Similarly, the Fourth Circuit's *Humphries v. Ozmint* overturned the district court's dismissal of a petition for writ of habeas corpus where it found that the court applied settled federal law unreasonably in failing to find counsel's representation ineffective.¹⁸⁸ In *Humphries*, the prosecutor's closing argument during capital sentencing compared the respective worth of the defendant's life with that of the murder victim.¹⁸⁹ This argument conflicted with Supreme Court precedent that prohibited a use of victim impact evidence "that is so unduly prejudicial that it renders the trial

178. 304 F.3d 677 (7th Cir. 2002).

179. *Id.* at 699.

180. *Id.* at 681.

181. *Id.* at 683.

182. *Id.* at 684.

183. *Id.* at 688.

184. *Id.* at 696.

185. *Id.* at 698.

186. *Id.* at 691.

187. *Id.* at 699.

188. 366 F.3d 266, 276–77 (4th Cir. 2004).

189. *Id.* at 270–71.

fundamentally unfair.”¹⁹⁰ The failure of Humphries’s counsel to object to this line of argument fell “below an objective standard of reasonableness,” and this failure prejudiced the defendant.¹⁹¹

Although each of these cases overturned district court findings denying relief, *Brown* and *Humphries* rested squarely on the original holding of *Strickland* and broke no new legal ground. Rather, the facts of these cases permitted rulings that left *Strickland*’s holding intact while paying heed to AEDPA’s deference standards. The circuit courts provided common-sense interpretations of Supreme Court precedent and AEDPA.

Nevertheless, circuit courts have gone further than merely upholding *Strickland* and deferring to AEDPA’s provisions. For example, AEDPA restricts granting evidentiary hearings to develop facts because state court findings on the merits are presumed correct unless the petitioner refutes these findings by clear and convincing evidence.¹⁹² Circuit courts have ignored this procedural hurdle and have remanded cases for hearings to determine the substance of ineffectiveness claims without ruling on the statutory presumption.¹⁹³ In *Eze v. Senkowski*, the Second Circuit vacated the denial of a writ and remanded the case to the lower court to determine, *inter alia*, (1) why counsel failed to introduce relevant medical examinations that undercut the prosecution’s chief witness, (2) why counsel did not call its own expert on injuries that may have been evidence of sexual assault, and (3) why counsel

190. *Id.* at 272 (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)).

191. *Id.* at 276 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

192. See 28 U.S.C. § 2254(e) (2006):

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id.

193. Although no court relies explicitly on the constitutional basis of habeas corpus for ignoring the statute here, it may well be that courts are willing to sidestep niceties of procedure when they see constitutional matters at issue. See *supra* Part IV.B.

failed to produce exculpatory evidence that was clearly available to him.¹⁹⁴ Although the court noted that the ineffectiveness of counsel claims regarding the expert witnesses were addressed on their merits by the district court,¹⁹⁵ it never averred to the presumption language in § 2254(e) of AEDPA. Similarly, the Sixth Circuit vacated a denial of a writ and remanded to supplement the record and determine if counsel's failure to investigate three alibi witnesses constituted ineffective assistance of counsel for lack of investigation.¹⁹⁶ The court found that the district court followed AEDPA in upholding the state court's finding that at least one alibi witness contacted the attorney before trial, and the attorney did not know of any other alibi witnesses before trial.¹⁹⁷ However, the circuit court ordered findings on why counsel failed to investigate further after receiving a call from this alibi witness.¹⁹⁸ Apparently this issue was also raised in the state court, but the district court did not address it.¹⁹⁹ The Sixth Circuit remanded and ordered a hearing on these matters arguably addressed in the state court without ruling on the § 2254(e) presumption.²⁰⁰ Both the Second and Sixth Circuits alluded to insufficiencies in the record, but neither followed the dictates of the statute. By remanding for hearings without finding the presumption was overcome, the courts arguably violated the letter of the statute while upholding the spirit of constitutional due process.

A broader ruling emerges in *Dugas v. Coplan*, where the First Circuit vacated the district court's denial of a petition for a writ.²⁰¹ The court found that because counsel failed to consult an arson expert as part of his investigation, his representation was ineffective and prejudiced the defendant.²⁰² The case was remanded to re-determine the question of prejudice that was never addressed by the state court, which failed to find deficient performance.²⁰³ The state court found that counsel's performance comported with *Strickland* and that he had properly weighed "the benefits and perils of hiring an [arson] expert."²⁰⁴ By contrast, the district court found

194. *Eze v. Senkowski*, 321 F.3d 110, 136–37 (2d Cir. 2003).

195. *Id.* at 120. The New York State Appellate Division "did not discuss the merits of Eze's ineffective assistance claim." *Id.* at 119.

196. *Bigelow v. Williams*, 367 F.3d 562, 576 (6th Cir. 2004).

197. *Id.* at 565.

198. *Id.* at 576.

199. *Id.* at 572. "Even though Bigelow raised this issue below and in state court, the district court did not address it . . ." *Id.*

200. *See id.* at 576.

201. *Dugas v. Coplan*, 428 F.3d 317, 342–43 (1st Cir. 2005).

202. *Id.* at 341.

203. *Id.* at 343.

204. *Id.* at 326.

deficiency but no prejudice.²⁰⁵ The circuit court demanded an evidentiary hearing and found the state unreasonably applied *Strickland*.²⁰⁶ Again, there was no invocation of § 2254(e)'s presumption.

In addition to ignoring the presumptions required for ordering an evidentiary hearing, the First Circuit expanded counsel's duties beyond *Strickland*'s requirements.²⁰⁷ The *Dugas* court found the defense attorney at fault for failing to hire an arson expert and investigating the case fully because the attorney evoked no "reasonable professional judgments" that supported limiting his investigation.²⁰⁸ The defense's theory of the case did not question if the fire at issue was arson; rather, his defense was an identity defense, suggesting another perpetrator started the fire.²⁰⁹ The majority maintained that the attorney still needed to investigate the possibility that the fire was not caused by arson because it would offer an alternative ground for reasonable doubt.²¹⁰ Essentially, the circuit court characterized *Strickland* as holding counsel ineffective for inadequately preparing a different theory of the case from the one counsel chose.²¹¹ This seems a stark contrast to the facts in *Strickland*, where counsel stopped preparation for capital sentencing because he was overcome by a feeling of "hopelessness," and yet his representation was sound under the Sixth Amendment.²¹² The facts in *Dugas* underscore how circuit courts see the law of ineffective assistance of counsel as demanding far more than was required in Justice O'Connor's 1984 opinion.

In particular, circuit court decisions have regularly challenged insufficient investigation by defense counsel, a factor the *Strickland* court deemed essentially unproblematic.²¹³ In *Frazier v. Huffman*,²¹⁴ the Sixth Circuit quoted *Strickland* for the proposition that "strategic choices made after less than complete investigation are reasonable precisely to the extent that

205. *Id.* at 327.

206. *Id.* at 334.

207. For a discussion of how the Supreme Court has changed the law on ineffective assistance of counsel in the cases following *Strickland*, see O'Meara, *supra* note 148.

208. *Dugas*, 428 F.3d at 327.

209. *Id.* at 331.

210. *Id.*

211. *Id.* at 332.

212. *Strickland v. Washington*, 466 U.S. 668, 718 (1984).

213. See *supra* notes 156–59 and accompanying text. In *Strickland*, the Court held that the same standards apply to counsel in both trial and capital sentencing hearings because the latter is "sufficiently like a trial in its adversarial format and in the existence of standards for decision." 466 U.S. at 686–87. *Strickland* addressed counsel's acts and omissions at the sentencing phase; by contrast, the failures to investigate addressed by the circuit courts here also involve trial matters. I am not aware that courts have made a distinction between these two phases since *Strickland*, but this difference may account for the differences in analysis.

214. 343 F.3d 780 (6th Cir. 2003).

reasonable professional judgments support the limitations.”²¹⁵ The court then distinguished *Strickland*, finding that no “reasonable attorney who saw the medical records indicating Frazier’s brain injury would have declined to investigate the matter.”²¹⁶ The court also paid lip service to the lower court’s finding on the merits, but the circuit court held the lower court’s ruling to be an unreasonable conclusion based on the facts in the record.²¹⁷ In *Bell v. Miller*, the Second Circuit granted a writ for ineffective assistance of counsel because the defense attorney failed to call an expert on the possible effects of trauma and drugs on an identifying witness, even though that witness testified that he suffered from memory loss.²¹⁸ The court held that counsel’s failure to investigate the scientific implications of a witness’s trauma, blood loss, and sedation “handicapped his cross-examination of those key prosecution witnesses.”²¹⁹ The court thus expanded the holding in *Strickland* by requiring effective counsel to research cumulative background information because it may assist in the cross-examination of a witness.²²⁰

Even the Fourth Circuit in *Gray v. Branker*²²¹ reversed the judgment of the district court to the extent that it denied the writ of habeas corpus to an inmate claiming ineffective assistance of counsel at the sentencing phase of his case.²²² The circuit court found that the attorney failed to investigate and develop, for sentencing purposes, evidence that the defendant suffered from severe mental illness, and the court found it was reasonably probable that this failure prejudiced the outcome at sentencing.²²³ The court found “Gray’s counsel were confronted repeatedly with indications of Gray’s mental impairment. . . . [C]ounsel ignored these red flags and failed to investigate.”²²⁴ The court held that a new sentencing was required.²²⁵

215. *Id.* at 794 (quoting *Strickland*, 466 U.S. at 690–91).

216. *Id.* at 795.

At a bare minimum, a reasonable attorney would have compared the records with the medical literature on brain damage, elicited information from Frazier himself about the injury and its effects on him, or presented the records on Frazier to someone who could competently evaluate them. To do none of these things after seeing Frazier’s medical records was unreasonable.

Id. Recall that *Strickland*’s attorney could not recall if he read the competency report filed in that case for his client, and *Strickland*’s representation was found to be effective. *Washington v. Strickland*, 673 F.2d 879, 888–89 (5th Cir. Unit B 1982). The difference between the results of the two cases could not be more striking.

217. *Frazier*, 343 F.3d at 795–98.

218. 500 F.3d 149, 157 (2d Cir. 2007).

219. *Id.* at 156.

220. *See id.* at 156–57.

221. 529 F.3d 220 (4th Cir. 2008).

222. *Id.* at 242.

223. *Id.* at 239–40.

224. *Id.* at 229.

Similarly, the Fifth Circuit has granted petitions alleging ineffective assistance of counsel where attorneys failed to investigate adequately. Recently, in *Adams v. Quarterman*, the Fifth Circuit affirmed the district court's grant of habeas relief where the inmate was prejudiced by trial counsel's decision not to present mitigation evidence after making only cursory contact with the defendant's family over the defendant's objection.²²⁶ The court held that counsel's failure to interview or present any witnesses during the punishment phase of petitioner's trial prevented the jury's learning of "substantial evidence that might have influenced the jury to determine that mitigating factors required a sentence of life imprisonment rather than death."²²⁷ Petitioner's half-siblings would have testified to the physical abuse and deprivation Adams suffered as a child.²²⁸ Further, affidavits from psychologists indicated that the defendant suffered from "bipolar disorder, alcohol and drug dependence, and a personality disorder with borderline and antisocial features."²²⁹ Even assuming that the inmate instructed counsel not to contact his family, counsel had a duty to seek out other mitigation.²³⁰ In the absence of significant investigation into an inmate's background, there would be no way for counsel to frame a strategy in the first place.²³¹

The Sixth Circuit's approach closely tracks the Fifth Circuit's approach. In *Jells v. Mitchell*, petitioner's application for a writ of habeas corpus on the basis of ineffective assistance of counsel was denied.²³² The court reversed the denial and remanded because of trial counsel's deficient performance.²³³

225. *Id.* at 240.

226. *Adams v. Quarterman*, 324 F. App'x 340 (5th Cir. 2009) (per curiam).

227. *Id.* at 351, 356.

228. *Id.* at 351. "Adams's foster mother, Linda Elliott, would have told the jury that when she first encountered Adams in his family's mobile home, he was two years old, and neither he nor his siblings had eaten in three or four days and did not know where their parents had gone." *Id.*

229. *Id.*

230. *Id.* at 347. In reaching this decision, the Fifth Circuit expressly disavowed a broad reading of *Schriro v. Landrigan*:

[T]he state's reliance on *Schriro v. Landrigan* is misplaced. There, the Supreme Court stated that if a defendant issues an instruction to counsel not to present any mitigating evidence, counsel's failure to investigate cannot constitute [ineffective assistance of counsel]. In contrast, the Supreme Court noted that *Rompilla v. Beard* presented a different situation, one in which "the defendant refused to assist in the development of a mitigation case, but did not inform the court that he did not want mitigating evidence presented." In the instant case, there is no evidence that Adams instructed counsel not to present mitigating evidence.

Id. at 347 (footnotes omitted).

231. *Id.* at 349.

232. 538 F.3d 478, 484 (6th Cir. 2008).

233. *Id.* at 494, 513.

In particular, counsel failed to prepare adequately for the mitigation phase of sentencing because he did not hire a mitigation specialist until the defendant was already convicted in the guilt phase.²³⁴ Second, he failed to provide to the mitigation specialist the defendant's personal history records that were required for the specialist to perform the requested psychological evaluation.²³⁵ Counsel never attempted to speak with "many other family members who had lived with" the defendant and were available to testify.²³⁶ Those few witnesses with whom counsel did speak were subject only to brief inquiries, and counsel failed to discover the defendant's history of extensive abuse in the home.²³⁷ Much of this evidence was readily available to counsel in the defendant's competency report, which counsel never consulted.²³⁸ On this final point, Justice O'Connor's majority opinion in *Strickland* excised the fact found by lower courts that David Washington's trial counsel could not recall if he had ever read his client's competency report.²³⁹ By contrast, the Sixth Circuit named that exact same failure by counsel as proof that his representation was ineffective.²⁴⁰ Clearly, the circuit courts have gone beyond the *Strickland* rule.

Not all *Strickland* challenges to investigation and preparation focus on the sentencing phase. Circuit courts have granted the writ for trial errors as well. In *Richards v. Quarterman*, the Fifth Circuit affirmed a district court's granting of the writ of habeas corpus on the basis of ineffective assistance of counsel where a state inmate was sentenced to twenty-five years to life for murdering a homeless man.²⁴¹ After ruling that the lower court offered proper deference to the state habeas court's decisions and rulings in accord with AEDPA,²⁴² the district court found that counsel failed to present crucial exculpatory evidence related to a later attack on the victim involving multiple assailants other than the defendant, failed to interview three important witnesses before trial, failed to have an organized plan of defense, and failed to "conduct Richards's defense in an acceptable manner."²⁴³ Moreover, the district court made specific findings that it found the defendant's attorney to

234. *Id.* at 494.

235. *Id.* at 493.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Strickland v. Washington*, 466 U.S. 668, 673 (1984); *Washington v. Strickland*, 673 F.2d 879, 888–89 (5th Cir. Unit B 1982).

240. *Jells*, 538 F.3d at 493–94.

241. *Richards v. Quarterman*, 566 F.3d 553, 558, 572 (5th Cir. 2009).

242. *Id.* at 563.

243. *Id.* at 561.

be less than candid in replying to the court's inquiries.²⁴⁴ The federal court found that the state courts unreasonably applied federal law.²⁴⁵

Similarly, in *Lindstadt v. Keane*, another non-death penalty case, petitioner was convicted of sexual assault of his daughter, and the district court denied his application for a writ.²⁴⁶ After setting out the deferential standards in AEDPA, the Second Circuit considered four errors by counsel in the aggregate.²⁴⁷ First, counsel ignored that the dates of the offense charged were wrong because the defendant was not living in the family home at the time the charged offenses took place, thereby preventing the defendant from offering "something akin to an alibi" defense.²⁴⁸ Second, counsel failed to object to the explanation for the victim's injuries.²⁴⁹ The state's medical expert relied on vaguely identified studies to claim that the girl's injuries were caused solely by sexual contact.²⁵⁰ The defense never requested these studies, and the prosecution was unable to produce them for postconviction proceedings.²⁵¹ By contrast, petitioner's appellate counsel was able to find a number of contemporaneous studies that cast doubt on the linkage between the victim's injuries and sexual abuse.²⁵² Third, in his opening statement, counsel stated that his client would testify only if the prosecution had made its case.²⁵³ Therefore, when the defendant did testify, counsel essentially conceded that the prosecution had proved its case.²⁵⁴ Finally, defense counsel failed to make an obvious point that the defendant's wife wanted him jailed and had complained to his probation officers on a number of prior occasions.²⁵⁵ The court held that, "[t]aken together, ineffectiveness permeated

244. *Id.* at 566. The circuit court decision quotes the district court at some length concerning the testimony of the petitioner's trial counsel, Davis:

"Apparently recognizing the significance of Davis's failure to present this exculpatory evidence, or even to allow it to be presented when the prosecutor attempted to do so, Davis strived at the July 21–22 hearing to create the appearance of a strategic reason why she kept the exculpatory evidence from the jury. In the process, Davis has engaged in what might best be described as legal prestidigitation."

Id. (quoting *Richards v. Quartermann*, 578 F. Supp. 2d 849, 860 (N.D. Tex. 2008)).

245. *Id.* at 568.

246. *Lindstadt v. Keane*, 239 F.3d 191, 197 (2d Cir. 2001).

247. *Id.* at 199–203.

248. *Id.* at 200.

249. *Id.* at 201.

250. *Id.*

251. *Id.*

252. *Id.* at 202.

253. *Id.*

254. *Id.*

255. *Id.* at 203.

all the evidence.”²⁵⁶ The court found that in the face of “underwhelming evidence,” counsel’s deficiencies prejudiced his client.²⁵⁷

The Ninth Circuit’s decision in *Moore v. Czerniak* found trial error so serious that it reversed and remanded a district court’s denial of the writ.²⁵⁸ In *Moore*, defense counsel failed to file a motion to suppress his client’s taped confession.²⁵⁹ Counsel mistakenly believed that his client was not in custody when he requested an attorney before interrogation.²⁶⁰ Further, the fact that the defendant made similar statements to third parties about the crime did not render counsel’s error harmless because suppressing the taped statement given in violation of the Fourth Amendment would have placed the defendant in a far better position to negotiate a plea bargain.²⁶¹ Counsel’s failure prejudiced the defendant.²⁶² The court found that counsel failed to object because he misunderstood the law and for no strategic reason.²⁶³ Rather than indulging *Strickland*’s presumption of effectiveness, the circuit courts seem willing to recognize poor trial work and grant petitioners relief.

Two final decisions arising from the same state case demonstrate that whatever else can be said about the application of *Strickland* after AEDPA, the law continues to confuse the courts. Alexandre Mirzayance confessed to the brutal murder of his cousin whom he stabbed nine times and shot four times.²⁶⁴ He pleaded not guilty and not guilty by reason of insanity.²⁶⁵ In California, such a plea requires a bifurcated trial consisting of (1) a guilt phase wherein the state bears the burden to prove guilt beyond a reasonable doubt and (2) an insanity phase in which the defense will bear the burden of proving insanity by a preponderance of the evidence.²⁶⁶ Specifically, to establish the defense under California law, the defendant needed to prove that he “was incapable of knowing or understanding the nature and quality of his . . . act and of distinguishing right from wrong at the time of the commission of the offense.”²⁶⁷ The same jury would hear the evidence in both trial phases of the trial.²⁶⁸

256. *Id.*

257. *Id.* at 205.

258. *Moore v. Czerniak*, 534 F.3d 1128, 1135 (9th Cir. 2008).

259. *Id.* at 1137.

260. *Id.* at 1138.

261. *Id.* at 1140.

262. *Id.* at 1148–49.

263. *Id.* at 1130.

264. *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1415 (2009).

265. *Id.*

266. *Id.*

267. CAL. PENAL CODE § 25(b) (West 1985).

268. *See Knowles*, 129 S. Ct. at 1416.

Mirzayance's counsel tried to persuade a jury in the guilt phase that, because of his client's mental illness, he was unable to kill with premeditation.²⁶⁹ The jury rejected that argument and convicted him of first-degree murder.²⁷⁰ The insanity phase was set to begin on the following day.²⁷¹ Counsel then advised Mirzayance to withdraw his not guilty by reason of insanity plea (NGI), and the defendant did so.²⁷² After conviction, Mirzayance claimed ineffective assistance of counsel because his attorney's recommendation deprived him of his only viable defense.²⁷³ The state appellate court rejected this claim without giving a reason.²⁷⁴

In the ensuing habeas hearing, counsel testified that he recommended withdrawal of the NGI plea "out of a sense of hopelessness," basing his decision on two factors.²⁷⁵ Counsel explained that he did not believe that a jury that found premeditation would find insanity, and he was angry because the defendant's parents declined to testify at sentencing.²⁷⁶ Specifically, counsel testified that he was so angry at Mirzayance's parents that he was not sure if "[he] became so emotional that [he] lost [his] sense of advocacy."²⁷⁷ Further, counsel did not seem to clearly distinguish between the standards required for premeditation and insanity and did not think a jury would find premeditation and rule in favor of an insanity defense.²⁷⁸ Finally, counsel thought the judge was sympathetic to his client and "would sentence him to a psychiatric prison, but would sentence more harshly if the jury found him sane."²⁷⁹ The Ninth Circuit found the attorney's "advice to . . . withdraw the insanity plea 'fell below an objective standard of reasonableness,' and therefore constitute[d] deficient performance."²⁸⁰ The court thought he made his decision rashly and based on speculation.²⁸¹ Because a reasonable probability existed that but for the attorney's advice, the result of the proceeding would have been different, the court found prejudice and affirmed the district court's grant of habeas relief, though on different grounds.²⁸²

By contrast, the Supreme Court reversed and remanded with instructions

269. *Id.* at 1415.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Mirzayance v. Knowles*, 175 F. App'x 142, 143 (9th Cir. 2006).

276. *Id.*

277. *Id.* at 144.

278. *Id.*

279. *Id.*

280. *Id.* at 143 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

281. *Id.* at 144.

282. *Id.* at 145.

to deny the petition.²⁸³ In reaching this decision, the Court for the first time characterized the rule in *Strickland* as a “general standard” that gives the state court more latitude reasonably to determine if a defendant has failed to satisfy that standard.²⁸⁴ Therefore, the federal courts are supposed to follow a “doubly deferential” judicial review in determining whether state decisions are not simply incorrect but “unreasonable—a substantially higher threshold.”²⁸⁵ The Court then held that the state court’s determination was not unreasonable when it concluded that Mirzayance’s attorney was not deficient when he counseled his client to abandon his insanity plea in the brutal slaying of his cousin.²⁸⁶ The Court said the defense stood almost no chance of success, and the Court does not require defense counsel to pursue every claim or defense, no matter how unrealistic.²⁸⁷

The Court then, in dicta, reasoned that even if Mirzayance’s ineffective assistance of counsel claim were subject to a de novo review, it would still fail.²⁸⁸ The Court thought counsel made a strategic choice not to adopt a losing strategy.²⁸⁹ Although the Court accused the circuit court of engaging in fact-finding and overturning the lower court’s factual findings without mentioning the “clearly erroneous” standard,²⁹⁰ the Court never quoted the attorney’s testimony that “[he] became so emotional that [he] lost [his] sense of advocacy.”²⁹¹ If two courts are this far apart on one factually uncomplicated case, it is difficult to say precisely the state of settled federal law on ineffective assistance of counsel after AEDPA.

VII. CONCLUSION

My title derives from a common enough experience for anyone who has asked for directions in New England. After admitting that one is lost and needs to find the way to a lane in Marblehead, one finds a local New England guide. Invariably, the guide will pause, purse his lips, and then pronounce, “You can’t get there from here.” This could indicate any number of possibilities. The hearer could conjure up ideas of a time and space rift that separates his destination from him for all time. On a less metaphysical plane, the answer could indicate that the guide feels inadequate to the task of laying out with precision the intricate maneuvers that must be accomplished to travel

283. Knowles v. Mirzayance, 129 S. Ct. 1411, 1422 (2009).

284. *Id.* at 1420.

285. *Id.* (quoting Schriro v. Landrigan, 550 U.S. 465, 473 (2007)).

286. *Id.* at 1420.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 1421.

291. Mirzayance v. Knowles, 175 F. App’x 142, 144 (9th Cir. 2006).

two miles as the crow flies. Or it could mean that even if the guide could give the directions with precision, his assessment of the hearer is unflattering at best. In any of the above scenarios, the same conclusion follows: “You can’t get there from here.”

The common wisdom among many defense attorneys is that one cannot prevail in a habeas claim after AEDPA. This Article has attempted to debunk that idea in cases where the petitioner raises a claim of ineffective assistance of counsel. Circuit courts seem willing in some instances to rethink case law and sidestep some of AEDPA’s restrictions to review the merits of the cases before them. Because the law in this area remains confusing, it seems that courts are more likely to continue disagreement rather than converge on one approach. In short, maybe you can get there from here.

On a broader level, it may be time to question whether AEDPA’s restrictions on habeas review serve the common good. Reducing access to courts to increase efficiency and grant finality to lower court decisions is not a sufficient reason for permitting those without resources to suffer the added indignity of an ineffective attorney. How the judicial system treats those accused of crimes, and those perhaps wrongfully convicted, says something about those of us who work in that system. Are we satisfied that the lines restricting access have been drawn in the right places?