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COMMENT

A Great Writ Reduced: Why the Tenth Circuit's Interpretation of Congressional Intent and Supreme Court Precedent Portends Defeat for State Prisoners Seeking Federal Habeas Corpus Relief*

I. Introduction

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA)¹ and transformed both the statutory and conceptual world of federal habeas corpus. Courts' efforts to interpret AEDPA have been "groping, lurching, muzzy, trying with exquisite concentration to make sense of utter incoherence."² Section 2254(d)(1) of AEDPA, which outlines the method that federal habeas courts must use in adjudicating legal claims that state courts have previously denied on the merits, appears to have sparked the most heated battle and prolonged confusion.³ Section 2254(d)(1) states:

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 . . . resulted in a decision that was contrary to, or involved an

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1. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended at 28 U.S.C. §§ 2244, 2253-2255, 2261-2266 (Supp. 1997) and scattered sections of 8, 18, and 22 U.S.C.).

2. Anthony G. Amsterdam, *Foreword* to RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE*, at v (4th ed. 2001).

3. Indeed, one view is that this "oddly drafted statute has no plain meaning." Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868, 1876 (1997); see also Robert D. Sloane, *AEDPA's "Adjudication on the Merits" Requirement: Collateral Review, Federalism, and Comity*, 78 ST. JOHN'S L. REV. 615, 646 (2004) ("The text of § 2254(d) therefore does not admit of a single 'plain meaning.' Its meaning depends in the first instance on which canons of statutory construction a court elects to apply and which to ignore.").

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States⁴

Though the word “deference” does not appear in the statute, Congress clearly intended to prescribe deferential behavior for the federal courts because federal courts may no longer “grant habeas relief based solely on [their] independent interpretation and application of federal law.”⁵

Although all federal courts must apply the standard imparted by § 2254(d)(1) of AEDPA when reviewing state prisoners’ habeas petitions,⁶ the manner in which a court of appeals applies this section is especially significant for a state prisoner. If a court of appeals denies relief, only the U.S. Supreme Court can provide the prisoner reprieve, and the Supreme Court is historically reticent to grant certiorari to review federal habeas claims.⁷ This reticence was especially notable under the direction of Chief Justice Rehnquist.⁸ Thus, defense attorneys and pro se prisoners understandably may be dismayed at having to allege that a state court’s adjudication was contrary to federal precedent or involved an unreasonable application of federal law. This pessimism is compounded when a prisoner’s application is made to a court of appeals, as this realistically may be the prisoner’s final chance at obtaining relief.

In certain cases, however, the U.S. Court of Appeals for the Tenth Circuit has granted limited or full habeas relief to a state prisoner, even though the state courts, and usually the district court as well, have denied such relief.⁹ This comment examines the Tenth Circuit’s treatment of § 2254(d)(1) of AEDPA in claims of ineffective assistance of counsel and in cases where the circuit court has extended habeas relief to prisoners over the denial of the state courts. The limited number of cases where this has occurred, combined with the Tenth Circuit’s rationale in these opinions, indicate that the Tenth Circuit is indeed

4. 28 U.S.C. § 2254(d)(1) (2000).

5. Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA’s Standard of Review Operate After Williams v. Taylor?*, 2001 WIS. L. REV. 1493, 1495 (2001); see also 2 HERTZ & LIEBMAN, *supra* note 2, at 1419-21; Monique Anne Gaylor, Note, *Postcards from the Bench: Federal Habeas Review of Unarticulated State Court Decisions*, 31 HOFSTRA L. REV. 1263, 1263 (2003).

6. The 1996 amendments are applicable only to postconviction-relief petitions filed after April 24, 1996, the effective date of AEDPA. See *Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

7. See John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. REV. 271, 273 (1996); Yale L. Rosenberg, *Constricting Federal Habeas Corpus: From Great Writ to Exceptional Remedy*, 12 HASTINGS CONST. L.Q. 597, 597 (1985); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 993-94 (1985) [hereinafter Yackle, *Explaining*].

8. See Christopher E. Smith, *Judicial Reform of Habeas Corpus: The Advocates’ Lament*, 44 CLEV. ST. L. REV. 47, 47 (1996).

9. See discussion *infra* Part IV.

following Congress's plan for restricted habeas relief, as interpreted by the U.S. Supreme Court. This comment also notes commonalities among these Tenth Circuit opinions to provide guidance to the judiciary, as well as to state prisoners and their counsel, in determining whether the Tenth Circuit will likely grant the prisoner habeas relief.

Part II of this comment examines the writ of habeas corpus, both pre- and post-AEDPA, as well as the congressional purposes behind the passage of AEDPA and the adoption of the standard in § 2254(d)(1). Part III provides an overview of Supreme Court cases that shaped the application of § 2254(d)(1) and the implications of the Supreme Court's holdings for this provision. Part IV considers cases in which the Tenth Circuit, applying § 2254(d)(1), granted some form of habeas relief to a state prisoner on a claim of ineffective assistance of counsel and analyzes the rationale the court provided in each. Part V submits that the Tenth Circuit is following the congressional habeas scheme and the Supreme Court's precedent of limiting habeas availability. Part V further considers judicial and legislative policy issues at stake, the Tenth Circuit's concerns regarding § 2254(d)(1), and the state of AEDPA and habeas jurisprudence today. This analysis provides both a forecast regarding the likelihood of success of habeas petitions in the Tenth Circuit and guidance for other circuits as they unravel the intricacies of AEDPA.

II. A Great Writ Slenderized: How Habeas May Work for You

A. The Long and Winding Road — to Relief, or at Least a Hearing

Of the various state and federal procedures of post-appeal challenges generally termed “collateral remedies,” the one collateral remedy available to all state prisoners is the writ of federal habeas corpus.¹⁰ The writ of habeas corpus does not focus on the merits of the petitioner's claim — innocence or guilt is not being relitigated — but rather evaluates whether a state is unlawfully holding a prisoner in violation of the U.S. Constitution.¹¹ Even before the enactment of AEDPA, the U.S. Supreme Court referred to the role

10. WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 28.1 (3d ed. 2000). The common law writs of *habeas corpus* and *coram nobis* provided the origin of most common collateral remedies available today. *Id.* *Coram nobis* (“before us”) was “[a] writ of error directed to a court for review of its own judgment and predicated on alleged errors of facts,” while *habeas corpus* (“that you have the body”) was, and is, a writ used “to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal.” *BLACK'S LAW DICTIONARY* 362, 728 (8th ed. 2004).

11. This does not mean that any constitutional violation will assure a prisoner's release. “[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error.” *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion).

of federal habeas proceedings as “secondary” and “limited.”¹² The Court emphasized that litigants should not use federal courts to relitigate state trials or to delay an execution in a death penalty case indefinitely because direct appeal is the primary route for review, and courts give a presumption of finality and legality to the end result of the state court appeals process.¹³

Habeas corpus was historically characterized as the “Great Writ of Liberty” and was an alleged procedural underpinning of the Magna Charta’s guarantee of due process.¹⁴ The doctrine shed its English crown with limited presence in the Judiciary Act of 1789. Later, Congress’s Habeas Corpus Act of 1867 broadened habeas corpus such that federal courts could grant writs when any person was held “in violation of the [C]onstitution, or of any treaty or law of the United States.”¹⁵ In addition, Article I, Section 9 of the Constitution explicitly grants the privilege of habeas corpus, stating: “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.”¹⁶

Habeas corpus relief became a significant possibility for state prisoners in 1953 with the U.S. Supreme Court’s decision in *Brown v. Allen*.¹⁷ Although the scope of the writ had previously been narrowly focused on jurisdictional error,¹⁸ since *Brown*, the alleged violation of a constitutional right has become cognizable in a federal habeas action.¹⁹ In addition, after *Brown*, the Supreme Court allowed independent review of state-court adjudications of federal constitutional law issues, even if the state court’s treatment was “full and fair.”²⁰ *Brown*’s holding meant that federal courts gave no deference to the state courts’ legal determinations.²¹ Instead, *Brown* required federal courts to review all of

12. *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)).

13. *Barefoot*, 463 U.S. at 887-88.

14. LAFAVE, *supra* note 10, § 28.1.

15. Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

16. U.S. CONST. art. I, § 9, cl. 2.

17. 344 U.S. 443 (1953); *see* Blume & Voisin, *supra* note 7, at 273. *See generally* ERWIN CHEREMINSKY, FEDERAL JURISDICTION § 15.2 (4th ed. 2003) (providing an overview of habeas corpus development in the United States).

18. Fred Cheesman et al., *Prisoner Litigation in Relation to Prisoner Population*, CASELOAD HIGHLIGHTS (Nat’l Ctr. for State Courts, Williamsburg, Va.), Sept. 1998, at 2 [hereinafter Cheesman et al., *Prisoner Litigation*].

19. *Brown*, 344 U.S. at 486; Blume & Voisin, *supra* note 7, at 273.

20. Blume & Voisin, *supra* note 7, at 273. *Brown* also dictated that a federal court must hold a hearing to address questions of fact if there are “unusual circumstances.” 344 U.S. at 463.

21. The former § 2254(d) stated:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court,

a petitioner's legal claims essentially "from scratch" — a *de novo* review independent of the state courts' adjudication of the same claims.²² Basically, *Brown* allowed federal courts to disregard state courts' legal conclusions and reach independent judgments on the issues presented.²³

From a prisoner's perspective, *Brown* presaged a "Golden Age" of federal habeas jurisprudence.²⁴ A decade after *Brown*, a series of decisions by the Supreme Court granted the district courts a greater role in reviewing state court decisions and removed many procedural barriers to habeas relief.²⁵ After these

a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit— (1) that the merits of the factual dispute were not resolved in the State court hearing; (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the State court hearing; (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding; (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or (7) that the applicant was otherwise denied due process of law in the State court proceeding; (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d) (1994), amended by 28 U.S.C. § 2254(d) (Supp. 1997).

22. 2 HERTZ & LIEBMAN, *supra* note 2, at 1419. See, e.g., *Wright v. West*, 505 U.S. 277, 287-88 (1992); *Thompson v. Keohane*, 516 U.S. 99, 115 (1995).

23. *Richmond v. Embry*, 122 F.3d 866, 870 (10th Cir. 1997) (citing *Lindh v. Murphy*, 96 F.3d 856, 861 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997)).

24. Steinman, *supra* note 5, at 1497, 1499 n.25.

25. See *Sanders v. United States*, 373 U.S. 1 (1963); *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963). These three cases were ultimately superseded by

cases, the district courts replaced the Supreme Court as the “principal means through which the federal judiciary exercised authority over the state criminal process.”²⁶ These pro-defendant decisions led first to an increase in the volume of habeas petitions,²⁷ and then, in the 1970s, to a decline in federal petitions while state courts improved their own capacity to apply constitutional standards to habeas claims.²⁸ In the 1980s and early 1990s, federal habeas petitions increased once again,²⁹ despite the growing constrictions by the Rehnquist court,³⁰ which were curtailing the availability of the writ with procedural hurdles and limitations on when federal courts could hear state prisoners’ claims.³¹ Decisions of this period resurrected many of the barriers the Court had eliminated in the era following *Brown*.³²

By 1989, the Supreme Court in *Teague v. Lane*³³ settled on a more narrow rule for federal habeas courts to follow than the de novo standard of review in *Brown*.³⁴ In *Teague*, the Court concluded that federal habeas courts should not focus on how they would interpret the Constitution, but instead should examine whether the state court’s interpretation reasonably applied binding precedent to the direct review of the prisoner’s conviction.³⁵ Even if a federal court would

AEDPA.

26. Cheesman et al., *Prisoner Litigation*, *supra* note 18, at 2 (quoting Daniel J. Meador, *Straightening Out Federal Review of State Criminal Cases*, 44 OHIO ST. L.J. 273, 273 (1983)).

27. *Id.*

28. *Id.*

29. *Id.*

30. Mark R. Barr, Survey, *The Not-So-Great Writ: An Analysis of Recent Tenth Circuit Decisions Reflecting the Current Difficulty in Obtaining Habeas Corpus Relief for State Prisoners*, 80 DENV. U. L. REV. 497, 499 (2003).

31. William P. Welty, Comment, “Adjudication on the Merits” Under the AEDPA, 5 U. PA. J. CONST. L. 900, 902 (2003); Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1734-48 (2000) [hereinafter Yackle, *Figure*]. See Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative “Reform” of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1 (1991), for a discussion of the “devolution” of habeas corpus after Rehnquist’s accession to the bench in 1976. See also Ronald J. Tabak, *Habeas Corpus as a Crucial Protector of Constitutional Rights: A Tribute Which May Also Be a Eulogy*, 26 SETON HALL L. REV. 1477, 1492 (1996) (“[In the 1980s and 1990s] the Supreme Court turned habeas corpus into only a shadow of its former self.”).

32. Sharad Sushil Khandelwal, Note, *The Path to Habeas Corpus Narrows: Interpreting 28 U.S.C. § 2254(d)(1)*, 96 MICH. L. REV. 434, 436 (1997). These procedural hurdles include stricter standards for harmless-error analysis and development of material facts during state proceedings. *Id.* at 436 n.25.

33. 489 U.S. 288 (1989).

34. See *supra* notes 17-23 and accompanying text.

35. *Teague*, 489 U.S. at 306-08. See also *Brown v. Allen*, 344 U.S. 443, 463-64 (1953), for the Supreme Court’s holding that federal habeas courts are not bound by state courts’ interpretation of the Constitution. *Teague* narrowed the federal courts’ “final say” and §

have reached the opposite conclusion on a point of constitutional law, it was still bound to affirm the state court's decision as long as the state court's decision applied precedent reasonably.³⁶ In effect, the *Teague* Court circumscribed federal courts' review by implementing the "reasonably applied precedent" standard.³⁷ Therefore, most habeas appeals cases did not contribute to the development of criminal law.³⁸

Clearly, the Court has not "always followed an unwavering line in its conclusions as to the availability of the Great Writ. [Its] development of the law of federal habeas corpus has been attended, seemingly, with some backing and filling."³⁹ Because of the Court's nonlinear development of habeas jurisprudence, federal habeas corpus relief has long been difficult for practitioners, prisoners, and courts to understand.⁴⁰ Also, since *Teague*, the Supreme Court has effectively limited the reach of habeas relief based on many policy concerns, including federalism issues and ensuring the finality of convictions.⁴¹ Therefore, a state prisoner seeking federal habeas relief faces both procedural battles in requesting such relief and long-standing attitudinal battles in getting such relief granted.⁴²

B. AEDPA Emerges

Habeas review was quite limited in scope by the time of AEDPA's enactment in 1996.⁴³ A major purpose for Congress's passage of AEDPA "was

2254(d) has narrowed it still more, but AEDPA did not overrule *Teague*'s main holding — that new rules of criminal procedure are not applicable to finalized cases. *Teague*, 489 U.S. at 310. Courts must still conduct a *Teague* retroactivity analysis as a threshold matter alongside any AEDPA analysis. See, e.g., *Horn v. Banks*, 536 U.S. 266, 272 (2002).

36. *Wright v. West*, 505 U.S. 277, 291 (1992).

37. *Teague*, 489 U.S. at 308.

38. Note, *supra* note 3, at 1870.

39. *Teague*, 489 U.S. at 308 (quoting *Fay v. Noia*, 372 U.S. 391, 411-12 (1963)).

40. See CHEMERINKSY, *supra* note 17, § 15.1 (discussing the uses of and debates surrounding federal habeas corpus).

41. Blume & Voisin, *supra* note 7, at 273-74.

42. Indeed, one position is that judges' aversion to increasing the availability of habeas relief is so strong that a state prisoner's attorney can maximize his chances for relief by drawing on a "bolt-hole theory of the case: a narrow argument through which [the prisoner] can be slipped away to freedom, with a door somewhere in the passageway that can be slammed shut in the faces of all other prisoners seeking to follow." Amsterdam, *supra* note 2, at ix. In other words, the bias against granting habeas relief means that a lawyer needs to present the petitioner's case so that relief would be specific only to that case, to "minimize the potential precedential effect of winning." *Id.* at xi. "Unless the judge is satisfied that s/he can give relief in [the attorney's] case with no (or very little) prospect that other accused or convicted persons will escape punishment," the judge will not grant habeas relief. *Id.* at x.

43. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended at 28 U.S.C. §§ 2244,

a desire to limit federal review to legal precepts that were binding on the state courts when they ruled, and to keep federal courts from applying precepts of their own recent invention.”⁴⁴ AEDPA phrased this as a negative limitation on federal courts’ power, granting no relief “unless” the decision was “contrary to” or an “unreasonable application” of clearly established federal law.⁴⁵ Section 2254(d) of AEDPA now governs habeas review, the area previously covered by *Brown*,⁴⁶ *Teague*,⁴⁷ and *Teague*’s progeny.⁴⁸

The motivation behind the passage of AEDPA is important in understanding the rationale and effect of § 2254(d)(1), the current congressional scheme for habeas review, and whether courts such as the Tenth Circuit are complying with Congress’s wishes. The passage of AEDPA, the most significant habeas reform since 1867,⁴⁹ came at a tempestuous time in American history, in the wake of outrage over the Oklahoma City bombing of 1995⁵⁰ and the prolonged litigation following the downing of Pan Am Flight 103 over Lockerbie, Scotland in 1988.⁵¹ As for domestic terrorism, AEDPA demonstrated President Clinton’s

2254-2255, 2261-2266 (Supp. 1997) and scattered sections of 8, 18, and 22 U.S.C.).

44. 2 HERTZ & LIEBMAN, *supra* note 2, § 32.3, at 1432 n.11.

45. 28 U.S.C. § 2254(d)(1) (2000). For further description of these standards, see *infra* Parts II.C & III.

46. 344 U.S. 443 (1953).

47. 489 U.S. 288 (1989).

48. Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 382-83 (1996) [hereinafter Yackle, *Primer*].

49. Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What’s Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 923 (2001).

50. See Khandelwal, *supra* note 32, at 437.

51. AEDPA, in effect, allowed civil jurisdiction for U.S. citizens’ claims against Libya in 28 U.S.C. § 1605(a)(7); this section created an exception to the general immunity granted foreign jurisdictions for damage actions for personal injury or death resulting from aircraft sabotage. Because Libya was already on the U.S. Department of State’s list of state sponsors of terrorism when AEDPA was passed, jurisdiction over Libya “existed the moment that the AEDPA amendment became law” without any separate decision by the Secretary of State needed. *Rein v. Socialist People’s Libyan Arab Jamahiriya*, 162 F.3d 748, 764 (2d Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999). Title 28 U.S.C. § 1605 (2000) reads in pertinent part:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(7) . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App.

tough stance on crime as he faced reelection⁵² and appealed to the public's wish to prevent federal courts from releasing criminals and terrorists, such as Timothy McVeigh, on the basis of their alternative adjudication of legal issues.⁵³ AEDPA was an effort "to legislatively follow in the Rehnquist Court's judicial footsteps" by limiting the availability of habeas relief.⁵⁴ The public stirred Congress to action with its frustration over the high reversal rate of death sentences and slow pace of executions.⁵⁵ This heightened fear and awareness culminated in what has been called

a passion-fueled, extreme, and not well thought-out form of *habeas corpus* bashing. It overshot by a considerable margin the *habeas*-curbing doctrines that the Supreme Court had been developing progressively though controversially case-by-case since the mid 1980's. . . . In short, even more than the Rehnquistian *habeas* agenda that preceded AEDPA, AEDPA itself was fated to arouse polarized judicial reactions: love, loathing, and very little in between.⁵⁶

Neither the intense controversy over habeas corpus nor legislators' high hopes for reducing habeas litigation has diminished since AEDPA took effect, although reviews of the statute have been mixed.⁵⁷ The enactment of AEDPA led to changes for numerous aspects of the statutory federal habeas system, including strict filing deadlines, a requirement for exhaustion of state remedies before filing a petition in federal court, the curtailment of state prisoners' ability to obtain evidentiary hearings, and limits on appellate review and successive federal petitions.⁵⁸ Specifically, AEDPA established a one-year statute of

2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act[.]

Id.

52. Williams, *supra* note 49, at 923; see also Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103, 136 (1998) ("Of course, the AEDPA largely owes its existence to long-standing Republican dissatisfaction with lower federal courts' general treatment of habeas petitions from state prisoners.").

53. President's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 720 (Apr. 24, 1996); see also 142 CONG. REC. S3362 (daily ed. Apr. 16, 1996) (statement of Sen. Hatch) ("I have to say one of the biggest problems [is] loony judges in the Federal courts who basically will grant a habeas corpus petition for any reason at all.").

54. Welty, *supra* note 31, at 902-03.

55. Williams, *supra* note 49, at 923.

56. Amsterdam, *supra* note 2, at vi. Comment from the prosecution's side of the field, naturally, has been more positive. See, e.g., *infra* note 65.

57. See discussion *infra* Part V.B.3.

58. Yackle, *Primer*, *supra* note 48, at 386-97; see also CHEMERINSKY, *supra* note 17, § 15.4.3.

limitations to file a federal habeas corpus provision for both federal and state inmates, beginning when the inmate exhausts all direct appeals.⁵⁹ AEDPA also requires that a panel of the applicable court of appeals approve the filing of successive habeas corpus petitions in district court⁶⁰ and prohibits claims that were presented in an earlier habeas application from being repeated in a subsequent petition.⁶¹

Congress designed these mechanisms to assist with AEDPA's stated purpose of ending prolonged habeas litigation in capital cases.⁶² Before AEDPA's passage, numerous attorneys, scholars, judicial committees, and judges had criticized the federal habeas system on account of overloaded federal dockets, delay because of frivolous claims, and a disruption of comity among the federal and state courts.⁶³ Additional reasons for enacting AEDPA included the following: (1) to restrain the federal courts' ability to review death sentences in the midst of these courts' overturning of death row inmates' convictions and capital sentences,⁶⁴ (2) to increase the deterrent effect of those death sentences and provide assistance to victims' families,⁶⁵ and (3) in the words of AEDPA itself, "to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes."⁶⁶ As finding fault with deterring terrorism and providing justice is difficult, and not having controversy over capital punishment is impossible, these "other purposes" have sparked controversy in the debate over the doctrine of federal habeas relief and its role in the American judicial system.⁶⁷

59. Fred Cheesman, II et al., *A Tale of Two Laws: The U.S. Congress Confronts Habeas Corpus Petitions and Section 1983 Lawsuits*, 22 LAW & POL'Y 89, 95 (2000) [hereinafter Cheesman et al., *A Tale of Two Laws*].

60. JOHN SCALIA, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000, at 4 (2002) [hereinafter BJS SPECIAL REPORT].

61. Cheesman et al., *A Tale of Two Laws*, *supra* note 59, at 95.

62. Williams, *supra* note 49, at 923.

63. Note, *supra* note 3, at 1878.

64. Yackle, *Figure*, *supra* note 31, at 1734.

65. *Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 485 (June 27, 2001) (statement of Bill Pryor, Attorney General of the State of Alabama) ("In 1996, Congress wisely concluded that the Federal process for review of death sentences should accord deference to State courts and be streamlined to make capital punishment a more effective deterrent of heinous crimes and a better system of justice for the innocent families of victims of capital murder.").

66. Pub. L. No. 104-132, 110 Stat. 1214, 1214 (1996).

67. Indeed, one commentator remarked that the law should be entitled "[T]he Anti-Terrorism and Anti-Habeas Corpus Act of 1996." Tabak, *supra* note 31, at 1477.

C. What It Takes for Habeas to Happen Under AEDPA

Although AEDPA played an important role in modifying the federal habeas structural scheme, the statute's specific requirements also set forth new procedural steps that a state prisoner must fulfill to assert his claim. Procedurally, the *Federal Rules of Civil Procedure* and the *Rules Governing § 2254 Cases in the United States District Courts*⁶⁸ regulate federal habeas corpus. State courts have the power to evaluate the constitutionality of state criminal prosecutions, including any federal issues that arise in those prosecutions.⁶⁹ These state courts' legal determinations are then entitled to finality absent a violation of either § 2254(d)(1)'s "unreasonable" or "contrary to" standard or of another AEDPA provision.⁷⁰ Individuals who have been convicted by jury trial of a serious offense file the majority of habeas petitions.⁷¹ The state prisoner will face opposition from the state's Attorney General, who generally represents the state when the state prisoner claims his federal constitutional rights were violated in state criminal proceedings.⁷² If a federal district court denies a state prisoner's petition, the prisoner may present the habeas corpus petition to a court of appeals for consideration.⁷³

68. FEDERAL RULES OF CIVIL PROCEDURE; RULES GOVERNING § 2254 CASES IN THE U.S. DISTRICT COURTS. There are, however, differences between habeas cases and other civil actions, including the use of fact-based rather than notice-based pleading. See Blume & Voisin, *supra* note 7, at 277.

69. U.S. CONST. art. VI; *Robb v. Connolly*, 111 U.S. 624, 637 (1884) (stating that "[u]pon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States"); see also Yackle, *Explaining*, *supra* note 7, at 992.

70. Violations other than under § 2254(d)(1) are outside the scope of this comment.

71. Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 237, 242-44 (1995). Because of the lengthy procedural steps (for example, exhaustion of state remedies) required before filing a habeas petition, a longer sentence, as might be expected for a conviction of a serious offense by jury trial, is necessarily prerequisite to petitioning for relief. *Id.*

72. 28 U.S.C. § 2252 (2000).

73. The courts of appeals system is fairly simple:

The federal courts of appeals are the intermediate appellate courts between the district (trial) courts and the Supreme Court of the United States. There are thirteen courts of appeals: eleven numbered circuits (First through Eleventh), the District of Columbia Circuit, and the Federal Circuit. The numbered circuits, including the Tenth Circuit, provide appellate review of all cases tried in the district courts within the geographic area of their jurisdiction; they also decide appeals brought to them by residents of the circuit from various administrative tribunals, including the Tax Court and agencies of the federal government. The territorial jurisdiction of the Tenth Circuit includes the six states of Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah, plus those portions of the

Sections 2241 through 2254 of AEDPA outline the facets of federal habeas relief, including the federal courts' power to grant the writ, finality of the federal courts' determination, and review and appeal of federal habeas orders.⁷⁴ A petition for habeas relief filed on § 2254(d)(1) grounds — a claim that relief is warranted because the case's adjudication involved a decision that was "contrary to," or "an unreasonable application of, clearly established Federal law" — also must meet the other criteria outlined in § 2254.⁷⁵ Under § 2254, a federal court will only consider an application for a writ of habeas corpus if the state prisoner is (1) in custody⁷⁶ and (2) being held in violation of federal law.⁷⁷ In addition, courts can only grant a writ of habeas corpus when the applicant has exhausted all available state remedies, when no state corrective process is available, or when the state corrective process is ineffective in protecting the applicant's rights.⁷⁸ Even if the applicant has not exhausted available state remedies, a federal court may deny the application on the merits; only the state can expressly waive the exhaustion requirement.⁷⁹ If a petitioner still has the right to raise the question presented by any existing state procedure, he or she has not exhausted available state remedies.⁸⁰

Yellowstone National Park extending into Montana and Idaho.

The U.S. Court of Appeals for the Tenth Circuit: Who We Are, at <http://www.ck10.uscourts.gov/info.cfm?part=4> (last visited Oct. 5, 2004); see also 28 U.S.C. § 1291 (stating that the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts).

74. 28 U.S.C. §§ 2241-2254. A federal prisoner claiming the right to be released because (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack, may move the court that imposed the sentence to vacate, set aside, or correct the sentence. *Id.* § 2255.

75. *Id.* § 2254.

76. *Id.* § 2254(a). See *id.* § 2241(c) for further description of the "in custody" requirement. See also *infra* Part IV (discussing *Holmes v. McKune*, No. 01-3004, 2003 WL 220496 (10th Cir. Jan. 31, 2003) (unpub. op.), in which a habeas petitioner released on parole was held to be "in custody" for federal habeas review purposes).

77. 28 U.S.C. § 2254(a). Not all federal claims are cognizable for habeas purposes, however. On account of *Stone v. Powell*, 428 U.S. 465 (1976), a habeas petitioner generally cannot raise an assertion of illegal search and seizure grounded in the Fourth Amendment unless the state courts failed to provide him with a full and fair opportunity to present his claim. See Blume & Voisin, *supra* note 7, at 277 & n.34. However, a petitioner may raise search and seizure issues if defense counsel failed to object to the denial of a suppression motion. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986).

78. 28 U.S.C. § 2254(b)(1).

79. *Id.* § 2254(b)(2)-(3).

80. *Id.* § 2254(c). Although AEDPA is stringent in its treatment of exhaustion, the U.S. Supreme Court has rejected the argument that AEDPA's provisions requiring leave from the court of appeals before filing a second habeas petition in district court violates the Suspension

Section 2254(d) separates its criteria for grants of habeas relief according to the type of claim asserted by the prisoner.⁸¹ Although § 2254(d)(1) provides a standard for federal courts to review the state's legal, and possibly mixed legal-factual, determinations,⁸² § 2254(d)(2) provides a standard for reviewing the state's factual determinations. Under § 2254(d)(2), a federal court may grant the writ if the state court's adjudication resulted in a decision employing an "unreasonable determination of the facts in light of the evidence" in the proceeding.⁸³ Sections 2254(e) through 2254(i) of AEDPA require federal courts to apply a presumption of correctness to a state court's determination of factual issues.⁸⁴ These sections also contain procedural guidelines for federal courts to apply in determining sufficiency of the evidence and other factual claims.⁸⁵ When taken as a whole, § 2254 sets forth specific conditions that state prisoners must meet to present claims for habeas corpus relief in federal court.⁸⁶

Section 2254(d)(1) is an important part of AEDPA because it serves a "gatekeeper" function, controlling all "error of law" access to federal habeas review.⁸⁷ Section 2254(d)(1) modified the previous rule of independent federal review to curb delays, prevent "retrials" on federal habeas, and give effect to state convictions to the extent possible under the law.⁸⁸ Some scholars were expecting § 2254(d)(1) to greatly restrict habeas availability in light of the Rehnquistian attitude toward federal habeas relief — even possibly extending federal court deference to any state's "reasonable" adjudication of the merits.⁸⁹ Instead, the § 2254(d)(1) standard expressly focuses on relief for *unreasonable* adjudication.⁹⁰ This seems understandable, as affording complete deference to any "reasonable" adjudication goes beyond even *Teague*'s "reasonably applied

Clause of Article I, Section 9 of the Constitution. *Felker v. Turpin*, 518 U.S. 651, 654 (1996).

81. Before passage of AEDPA, § 2254(d) dictated the standards for the grant of an evidentiary hearing in habeas proceedings; that section is now re-designated as § 2254(e).

82. *See infra* note 103 and accompanying text.

83. 28 U.S.C. § 2254(d)(2).

84. *Id.* § 2254(e)-(i).

85. *Id.*

86. Section 2254(d)(1) applies only to state prisoners' habeas petitions; section 2255, which governs habeas relief for federal prisoners, does not have a comparable provision. *See id.* § 2255.

87. Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 679 (2003).

88. *Williams v. Taylor*, 529 U.S. 362, 386 (2000); *see also* *Emerson v. Johnson*, 243 F.3d 931, 935 (5th Cir. 2001) (stating that part of the congressional rationale in passing AEDPA stemmed from a desire to require habeas petitioners to exhaust their claims in state courts).

89. Yackle, *Primer*, *supra* note 48, at 383-84 (citing *Wright v. West*, 505 U.S. 277, 287 (1992) (Thomas, J.) (dictum)).

90. 28 U.S.C. § 2254(d)(1).

precedent” standard.⁹¹ Such a standard would so limit relief that its application could conceivably violate the Suspension Clause of the Constitution.⁹² Notably, § 2254(d)(1) only applies to claims adjudicated on the merits by a state court.⁹³ If a federal court finds that the state court did not adjudicate the claim on the merits, applied an incorrect legal standard, or rejected the claim on procedural grounds, the reviewing court reverts to the pre-AEDPA *de novo* standard of review for any legal or legal-factual rulings.⁹⁴ Considerable controversy surrounds the designation of “adjudicated on the merits,” as well as the proper standard of review for a federal court faced with a state court decision that does not reach the merits of the claim.⁹⁵

III. Construing AEDPA: Not a Silk Purse to Be Found

Between AEDPA’s inception in 1996 and the U.S. Supreme Court’s 2000 term, the cases decided by the Supreme Court with reference to § 2254(d)(1) of AEDPA were not terribly instructive in how the federal courts should interpret this provision.⁹⁶ The Supreme Court did not establish concrete guidelines regarding what constituted an “unreasonable application” or whether a holding that was merely distinguishable from federal precedent was automatically

91. See *Butler v. McKellar*, 494 U.S. 407, 414 (1990) (stating that *Teague* “validates reasonable, good-faith interpretations of existing precedents made by state courts”).

92. See *supra* note 16 and accompanying text.

93. 28 U.S.C. § 2254(d)(1).

94. See 2 HERTZ & LIEBMAN, *supra* note 2, at 1419; see, e.g., *Smith v. Mullin*, 379 F.3d 919, 929, 932 n.5 (10th Cir. 2004); *Lopez v. Williams*, No. 00-2247, 2003 WL 356636, at *3 (10th Cir. Feb. 19, 2003) (unpub. op.); *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003); *Ellis v. Mullin*, 326 F.3d 1122, 1128 (10th Cir. 2002), *cert. denied*, 540 U.S. 977 (2003); *Scott v. Mullin*, 303 F.3d 1222, 1227 n.1 (10th Cir. 2002); *Sallahdin v. Gibson*, 275 F.3d 1211, 1235 (10th Cir. 2002); *Mitchell v. Gibson*, 262 F.3d 1036, 1061-62 (10th Cir. 2001); *McGregor v. Gibson*, 248 F.3d 946, 951 (10th Cir. 2001) (en banc); *Hogan v. Gibson*, 197 F.3d 1297, 1302 n.2 (10th Cir. 1999); *Hooks v. Ward*, 184 F.3d 1206, 1223 (10th Cir. 1999).

95. *Welty*, *supra* note 31, at 902-06. Each circuit has adopted fundamentally similar definitions, though the Tenth Circuit especially has articulated a literal definition of “adjudication” that would prescribe deference to all state court decisions. *Id. Compare Paine v. Massie*, 339 F.3d 1194, 1998 (10th Cir. 2003) (“Even if a state court resolves a claim in a summary fashion with little or no reasoning, we owe deference to the state court’s result.”), *with Ides*, *supra* note 87, at 681 (“[T]he phrase ‘adjudication on the merits’ . . . mean[s] that the issue was presented to the state court and that the state court resolved the claim without reference to state rules of procedural default.”). See generally *Sloane*, *supra* note 3, for an argument that a summary dismissal of a federal claim by a state appellate court should not be considered an “adjudication on the merits.” Under AEDPA, federal courts’ review of factual findings now appears grounded in a reasonableness standard, but their review of legal questions requires some level of deference to state courts’ rulings. Note, *supra* note 3, at 1872.

96. *Ides*, *supra* note 87, at 679.

“contrary to” clearly established federal law. Moreover, until 2000, the Supreme Court failed to define “clearly established” federal law and did not state whether that phrase referred to any part of a written opinion or just the holding. The Supreme Court itself admitted the ambiguity of AEDPA: “All we can say is that in a world of silk purses and pigs’ ears, the Act is not a silk purse of the art of statutory drafting.”⁹⁷ As one scholar flatly expressed it, “[t]he new law is not well drafted.”⁹⁸

Federal courts were hard-pressed to grasp Congress’s intent because the statute failed to clearly define the limitations Congress wanted to place on their scope of review.⁹⁹ Courts of appeals interpreted each of § 2254(d)(1)’s prongs in different ways. For example, the U.S. Courts of Appeals for the Fourth, Fifth, Sixth, and Eleventh Circuits created a “reasonable jurist” standard of “unreasonable application,” which the Supreme Court ultimately rejected in *Williams v. Taylor*.¹⁰⁰ Although the language of § 2254(d)(1) seems to discard the de novo standard of review developed by the Court in *Brown v. Allen*,¹⁰¹ it does not clearly articulate the standard that should replace the de novo standard.¹⁰² Additionally, the language of § 2254(d)(1) does not provide guidance concerning mixed questions of law and fact. Even after *Williams*, the courts of appeals and district courts continue to differ on whether the provisions of § 2254(d)(1) address such questions, and if so, which provision applies.¹⁰³

Another unresolved problem arises when state court decisions address only procedural grounds as a basis for their refusal to grant habeas relief¹⁰⁴ or issue

97. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

98. Yackle, *Primer*, *supra* note 48, at 381.

99. Welty, *supra* note 31, at 903.

100. 529 U.S. 362, 376 (2000) (quoting *Williams v. Taylor*, 163 F.3d 860, 865 (4th Cir. 1998) (“[A] federal court may issue habeas relief only if ‘the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable.’”)).

101. 344 U.S. 443 (1953).

102. Compare 28 U.S.C. § 2254(d)(1) (2000) (“An application for a writ of habeas corpus . . . shall not be granted . . . unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable interpretation of, clearly established Federal law . . .”), with *Brown*, 344 U.S. at 464-65 (“Although they have the power, it is not necessary for federal courts to hold hearings . . . when satisfied that federal constitutional rights have been protected. It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice.”) (footnote omitted). Significantly, § 2254(d)(1) does not include a mandate of “deference” anywhere in its text. See *Williams*, 529 U.S. at 386 (“[I]t is significant that the word ‘deference’ does not appear in the text of the statute itself”) (Stevens, J., concurring); 2 HERTZ & LIEBMAN, *supra* note 2, § 32.3, at 1433 n.13.

103. LAFAYE ET AL., *supra* note 10, § 28.6(g); see Note, *supra* note 3, at Part II.A.

104. See Welty, *supra* note 31, at 904.

“postcard denials” that do not explicate the grounds upon which they based their denial of relief.¹⁰⁵ Section 2254(d)(1) applies only after a claim has been “adjudicated on the *merits*,”¹⁰⁶ but the circuits are split on whether the presence of procedural grounds in the court’s decision equates to a lack of adjudication on the merits.¹⁰⁷ According to the approach adopted by the Tenth Circuit, a decision that fails to articulate its analysis of the federal claim(s) still qualifies as an adjudication on the merits provided that it does not rest solely on procedural grounds.¹⁰⁸ A court’s reliance on the merits for its holding, even as an alternative basis, still constitutes an adjudication on the merits in the Tenth Circuit.¹⁰⁹ Some commentators argue that if the state court fails to convey the basis for its denial of relief, then the federal habeas court should review the federal law claims independently, which essentially means that the state court would lose the deference implied in AEDPA.¹¹⁰ Increasing confusion and disagreement in the lower federal courts compelled the U.S. Supreme Court to

105. See Steinman, *supra* note 5, Parts III.B.3 & III.C.2, at 1516-18, 1522-23 (discussing treatment of an unexplained opinion from both an opinion-deference and a result-deference standpoint).

106. 28 U.S.C. § 2254(d) (emphasis added).

107. Gaylor, *supra* note 5, at 1269.

108. *Id.* at 1269-70 (citing *Johnson v. McKune*, 288 F.3d 1187, 1191 (10th Cir. 2002)); accord *Gipson v. Jordan*, 376 F.3d 1193, 1196 (10th Cir. 2004) (stating that “where there is no indication suggesting that the state court did *not* reach the merits of a claim, we have held that a state court reaches a decision ‘on the merits’ even when it fails either to mention the federal basis for the claim or cite any state or federal law in support of its conclusion” (citing *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999)); *Hawkins v. Mullin*, 291 F.3d 658, 677 (10th Cir. 2002) (applying the standard of AEDPA though the state appellate court discussed only state law); cf. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) (applying AEDPA standard to a claim though the state court did not cite controlling Supreme Court precedent). In determining the proper standard of review to apply, the Tenth Circuit also compares the stringency of the state court standard with that of the federal standard. If the appellate court rejects a habeas claim using a state court standard “that is equally or more favorable to [the prisoner] relative to the federal standard, the state court’s decision constitutes an adjudication of the federal claim despite citing no federal decisions.” *Harris v. Poppell*, 411 F.3d 1189, 1196 (10th Cir. 2005) (citing *Packer*, 537 U.S. at 9; *Romano v. Gibson*, 239 F.3d 1156, 1164 (10th Cir. 2001); *Upchurch v. Bruce*, 333 F.3d 1158, 1164 n.4 (10th Cir. 2003)).

109. *Johnson*, 288 F.3d at 1192.

110. Steinman, *supra* note 5, at 1495. The Supreme Court’s six-Justice majority analysis in *Williams v. Taylor*, 529 U.S. 362 (2000), seems to set forth an opinion-oriented deference rather than a result-oriented deference, given that it examined the *reasoning* of the state court and ultimately granted relief based on the state court’s articulation of precedent and its “unreasonable” application of the precedent to the facts. In addition, the majority rejected Chief Justice Rehnquist’s approach, which focused on the *result* reached by the state court. *Id.* at 417-19; see 2 HERTZ & LIEBMAN, *supra* note 2, § 32.3, at 1427-28, 1448-52; *infra* Part III.A.

specifically address the language of § 2254(d)(1) in several decisions, beginning with *Williams*, four years after AEDPA took effect.¹¹¹

A. *Williams v. Taylor: A Light at the End of the AEDPA Tunnel*

*Williams v. Taylor*¹¹² was the seminal case providing guidance for the new AEDPA standard.¹¹³ A jury unanimously sentenced Terry Williams to death after his trial counsel presented minimal mitigating evidence, chose one of his witnesses from the audience at the sentencing hearing with no preparatory discussion, and explained in closing argument that “it was difficult to find a reason why the jury should spare Williams’ life.”¹¹⁴ Williams sought state collateral relief, and the trial judge found that the failure of Williams’s defense counsel to discover and present significant mitigating evidence during sentencing¹¹⁵ violated his right to the effective assistance of counsel under the standard implemented by the Supreme Court in *Strickland v. Washington*.¹¹⁶ In *Strickland*, the Supreme Court set forth a two-part test for evaluating a petitioner’s claim alleging that he has been denied his Sixth Amendment right to effective assistance of counsel.¹¹⁷ For a court to grant habeas relief, a convicted defendant must show that the counsel’s representation both “fell below an objective standard of reasonableness,”¹¹⁸ and was prejudicial to his

111. 529 U.S. 362. This decision was the case of *Terry Williams*. On the same date, the Supreme Court addressed AEDPA in the case of *Michael Williams* in *Williams v. Taylor*, 529 U.S. 420 (2000), which also was appealed from the Fourth Circuit but involved a different petitioner.

112. 529 U.S. 362.

113. *Gaylor*, *supra* note 5, at 1267.

114. *Williams*, 529 U.S. at 369. The closing argument included the following:

I will admit too that it is very difficult to ask you to show mercy to a man who maybe has not shown much mercy himself. I doubt very seriously that he thought much about mercy . . . Admittedly it is very difficult to get us and ask that you give this man mercy when he has shown so little of it himself. But I would ask that you would.

Id.

115. The Danville Circuit Court found the defense counsel’s failure to discover and present evidence of Williams’s abuse as a child, borderline mental retardation, possible mental impairments, and lack of future threat to society was “below the range expected of reasonable, professional competent assistance of counsel.” *Id.* at 371.

116. 466 U.S. 668 (1984).

117. *Id.* at 688-89.

118. Showing that counsel’s performance was deficient requires demonstrating that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687, *quoted in Williams*, 529 U.S. at 390. To establish ineffectiveness, “a defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688.

defense.¹¹⁹ Because the trial judge found that Williams's counsel had been ineffective, the trial judge made a recommendation that the Virginia Supreme Court grant Williams a hearing for resentencing.¹²⁰

Even though the Virginia Supreme Court assumed that trial counsel had been ineffective,¹²¹ it rejected this recommendation¹²² because it applied the standard for ineffective assistance of counsel of *Lockhart v. Fretwell*¹²³ rather than *Strickland*. The Virginia Supreme Court's reading of *Lockhart* required it to conduct a separate inquiry into fundamental fairness, even though Williams had shown that his lawyer's ineffectiveness probably was prejudicial to his defense.¹²⁴ Consequently, the Virginia Supreme Court concluded that introducing the mitigating evidence would not have fundamentally changed the ultimate sentencing recommendation of the jury, and it denied Williams relief.¹²⁵

After Williams exhausted all available state remedies, he sought federal habeas relief pursuant to § 2254(d)(1) in the District Court for the Eastern District of Virginia.¹²⁶ The federal district court agreed with the trial court that Williams's sentence of death was constitutionally infirm.¹²⁷ The court found that the failure of Williams's trial counsel to introduce mitigating evidence was not a strategic decision and even if it had been, the tactic would not justify the omission of potentially persuasive evidence.¹²⁸ The district judge found a substantial factual error in the Virginia Supreme Court's analysis,¹²⁹ and the

119. Showing that deficient performance prejudiced the defense requires demonstrating that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, quoted in *Williams*, 529 U.S. at 390. To establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

120. *Williams*, 529 U.S. at 371.

121. *Id.*

122. *Williams v. Warden*, 487 S.E.2d 194 (Va. 1997).

123. 506 U.S. 364 (1993). *Lockhart* held that "given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential 'windfall' to the defendant rather than the legitimate 'prejudice'" contemplated in *Strickland*. *Williams*, 529 U.S. at 392. Reading the *Lockhart* decision as requiring an additional examination of fundamental fairness in Williams's claim, the Virginia Supreme Court held that the trial judge erred in relying on mere outcome determination when gauging prejudice or a lack thereof. *Id.* at 393, 371.

124. *Id.* at 393.

125. *Id.* at 371-72.

126. *Id.* at 372.

127. *Id.*

128. *Id.* at 373.

129. *Id.* at 373 & n.5.

federal court also criticized the Virginia Supreme Court's use of the *Lockhart*, rather than the *Strickland*, standard for determining prejudice.¹³⁰ As for prejudicial effect, the district court determined that the behavior of Williams's trial counsel met the *Strickland* criterion: "but for counsel's unprofessional errors, the result of the proceeding would have been different."¹³¹ The district court therefore held that the Virginia Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" within the meaning of § 2254(d)(1) under its analysis of that provision.¹³²

In reversing the district court's grant of habeas relief, the U.S. Court of Appeals for the Fourth Circuit construed § 2254(d)(1) as prohibiting the grant of habeas relief unless the state court "decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable."¹³³ The Fourth Circuit declared that the Virginia Supreme Court's decision was not an unreasonable application of either the *Strickland* or *Lockhart* standards and endorsed the Virginia Supreme Court's interpretation of *Lockhart*.¹³⁴ Also, the Fourth Circuit determined that the state court had a "reasonable" understanding of the facts.¹³⁵

On appeal, the U.S. Supreme Court reversed the judgment of the Fourth Circuit,¹³⁶ and in so doing provided significant guidance on the workings of §

130. *Id.* at 373.

131. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

132. *Id.* at 374.

133. *Id.* (quoting *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998)); *see also supra* note 100 and accompanying text.

134. *Williams*, 529 U.S. at 374.

135. *Id.*

136. *Id.* Although Justice Stevens's opinion drew a six-Justice majority as to the application of § 2254(d)(1) to the facts, the entire decision was a hodgepodge of concurrences and dissents:

Justice Stevens' opinion, which announced the judgment of the Court, was joined in its entirety by Justices Souter, Ginsburg, and Breyer; Justices O'Connor and Kennedy joined in the portions of Justice Stevens' decision that concluded that the habeas corpus petitioner was entitled to relief under section 2254(d)(1). Justices O'Connor and Kennedy parted from Justice Stevens, however, with regard to the definition of the standard created by section 2254(d)(1). On this . . . Justice O'Connor wrote separately in an opinion that was joined in pertinent part by Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia. Thus, Justice O'Connor's analysis of the statutory standard emerged as the 5-Justice majority decision on the abstract interpretation of section 2254(d)(1), while Justice Stevens' opinion constituted the judgment of the Court . . . The remainder of Justice Stevens' opinion (on the interpretation of section 2254(d)(1)) is a 4-Justice opinion concurring in the judgment, and the remainder of Justice O'Connor's opinion (on the application of the section 2254(d)(1) to the facts) is a 2-Justice concurring opinion (joined by Kennedy, J.). In addition, Chief Justice Rehnquist filed an opinion concurring in part (on the interpretive question) and dissenting in

2254(d)(1) and what federal courts can and must do when faced with a state court's adjudication on the merits. Five Justices agreed with this long-awaited interpretation of § 2254(d)(1),¹³⁷ confirming that § 2254(d)(1) did indeed constitute a new restriction on federal courts' habeas power.¹³⁸ The Supreme Court explained that in light of Congress's intent to transform habeas corpus, concluding that AEDPA did not significantly change the habeas scheme would be erroneous.¹³⁹ Rather, according to the Supreme Court, courts must attribute independent meaning to both the "contrary to" and "unreasonable application" prongs of § 2254(d)(1)¹⁴⁰ and recognize the considerable changes Congress had wrought on federal habeas review.

The Fourth Circuit recognized that the "contrary to" and "unreasonable application" prongs constituted independent bases for considering review, but the Supreme Court disagreed with the specific manner in which the Fourth Circuit applied each prong.¹⁴¹ The Court, agreeing with the Fourth Circuit's interpretation of the statute in part, outlined two instances where the "contrary to" provision would be satisfied as a potential basis for habeas relief.¹⁴² First, a state court decision would be contrary to the Supreme Court's clearly established precedent "if the state court applies a rule that contradicts the governing law set forth in our cases."¹⁴³ Second, a state court decision would be "contrary to [the] Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of

part (on the application of section 2254(d)(1) to the facts), joined by Justices Scalia and Thomas.

2 HERTZ & LIEBMAN, *supra* note 2, § 32.3, at 1437 n.20.

137. Justice Stevens, who authored the rest of the majority opinion regarding the application of § 2254(d)(1) to the facts of Williams's case, wrote separately here; his interpretation of § 2254(d)(1), unlike the majority's, "essentially contend[ed] that [the provision] does not alter the previously settled rule of independent review" and that the "unreasonable application" prong is simply an extension of the "contrary to" prong. *Williams*, 529 U.S. at 403-04. Justice O'Connor characterized this viewpoint as giving this section of AEDPA "no effect whatsoever." *Id.* at 403.

138. *Id.* at 399; *see also* 2 HERTZ & LIEBMAN, *supra* note 2, § 32.3, at 1457-58 ("Put more simply, the Court understands section 2254(d)(1) as a constraint, not on its power and duty to determine whether the prisoner is 'in custody in violation of the Constitution, laws, and treaties of the United States,' but, instead, on its power, once having resolved that question, to remedy any violation found by issuing a writ of habeas corpus.") (footnote omitted).

139. *Williams*, 529 U.S. at 404.

140. *Id.*

141. *Id.* at 405-06, 408-09. The Fourth Circuit's decision in *Williams* relied on its holding in *Green v. French*, 143 F.3d 865 (4th Cir. 1998).

142. *Williams*, 529 U.S. at 405-06.

143. *Id.* at 405.

this Court and nevertheless arrives at a result different from our precedent.”¹⁴⁴ Unlike the Fourth Circuit, however, the Supreme Court refused to regard as “contrary to” federal precedent a state court decision that used the correct legal rule but simply reached a different conclusion.¹⁴⁵ The Supreme Court reasoned that using the prong in this way would not do justice to the § 2254(d)(1) requirement that the state court decision be “contrary to” clearly established precedent because the phrase connotes a decision that is “‘diametrically different’ from, ‘opposite in character or nature’ from, or ‘mutually opposed’” to clearly established precedent.¹⁴⁶ Rejecting an expansive interpretation of the statute, the majority noted, “If a federal habeas court can, under the ‘contrary to’ clause, issue the writ whenever it concludes that the state court’s *application* of clearly established federal law was incorrect, the ‘unreasonable application’ clause becomes a nullity.”¹⁴⁷ This would violate “a cardinal principle of statutory construction” because the court must, if possible, “give meaning to every clause of the statute.”¹⁴⁸

The Supreme Court’s analysis of the “unreasonable application” clause of § 2254(d)(1) generally agreed with that of the Fourth Circuit. Again, the Court identified precisely when a state court’s adjudication of the merits is an “unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.”¹⁴⁹ The Court began by explaining that the subjective “reasonable jurist” standard imposed by the Fourth Circuit and others¹⁵⁰ was an extraneous addition to the statute,¹⁵¹ defining an “unreasonable application” by that standard would not help the courts and could lead them to erroneous conclusions.¹⁵² The Court explained that determining whether there has been an “unreasonable application” requires an objective — not a subjective — inquiry.¹⁵³ Ultimately, the Court stated that because the federal courts have an obligation even in habeas cases to define the law,¹⁵⁴ and Congress explicitly wanted “unreasonable,” not merely misguided, state court

144. *Id.* at 406.

145. *Id.*

146. *Id.*

147. *Id.* at 407.

148. *Id.* at 404, 407.

149. 28 U.S.C. § 2254(d)(1) (2000).

150. *See supra* notes 100, 133 and accompanying text.

151. *Williams*, 529 U.S. at 409.

152. *Id.*

153. *Id.* at 409-10 (“The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation’s jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner’s case.”).

154. *Id.* at 411.

applications of federal law to trigger relief,¹⁵⁵ a court “may not issue a writ simply because [the federal] court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.”¹⁵⁶ Under the “unreasonable application” test, the Court explained, “a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.”¹⁵⁷

In *Williams*, the federal courts received clear guidance on how to apply each of the prongs in § 2254(d)(1); finally, the contours of the provision were defined so that the federal courts had the necessary aid from the U.S. Supreme Court to determine which state court decisions met the criteria for receiving habeas corpus relief. The notion that even if a federal court would apply the law differently, it must defer to a state court’s reasonable application of federal law marks a strong divergence from the de novo standard of *Brown*.¹⁵⁸ Despite the opinion’s noticeable absence of the word “deference,” it is clear that absent a finding of unreasonable constitutional error, a federal court must uphold the state court’s decision. In addition to explaining the two main clauses of the statute, the Supreme Court embedded in the opinion an answer to a question the federal courts had been asking since AEDPA’s enactment: what rulings constitute “clearly established Federal law” for § 2254(d)(1) purposes?¹⁵⁹ “[C]learly established Federal law,”¹⁶⁰ the Court declared, denotes “the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions as of the time of the relevant state-court decision.”¹⁶¹

In applying § 2254(d)(1) to the state court’s treatment of *Williams*’s petition, a six-Justice majority concluded that *Williams* was denied his constitutional

155. *Id.* at 409-11 (“[A] federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable. . . . [T]he most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law.”).

156. *Id.* at 411 (“Rather, that application must also be unreasonable.”).

157. *Id.* at 413.

158. Steinman, *supra* note 5, at 1507.

159. See 2 HERTZ & LIEBMAN, *supra* note 2, § 32.3, at 1431 n.10.

160. 28 U.S.C. § 2254(d)(1) (2000).

161. *Williams*, 529 U.S. at 412. The Court explained that “clearly established Federal law” equates to “an old rule” under *Teague* even though § 2254(d)(1)’s formulation includes only law issued from the U.S. Supreme Court. *Id.*; see also CHEMERINSKY, *supra* note 17, § 15.51, at 905 (“[The § 2254(d)(1) standard] effectively codifies *Teague v. Lane*: [n]o new rules can be asserted on habeas corpus; relief can be granted only on the basis of Supreme Court decisions clearly establishing rights.”).

right to effective assistance of counsel, as defined in *Strickland*,¹⁶² and that Williams should be granted habeas relief.¹⁶³ The Court clarified that “[t]he threshold question under AEDPA is whether Williams seeks to apply a rule of law that was clearly established at the time his state-court conviction became final.”¹⁶⁴ The Court answered this question in the affirmative and noted that *Strickland* governed the merits of Williams’s ineffective assistance of counsel claim because the decision’s holding fit the definition of “clearly established Federal law, as determined by the Supreme Court of the United States.”¹⁶⁵

The Court determined that the Virginia Supreme Court’s rejection of Williams’s claim warranted relief under both of the prongs of § 2254(d)(1).¹⁶⁶ The majority first examined the “contrary to” criterion and determined that by erroneously supplanting the *Strickland* framework with *Lockhart*’s ineffectiveness standard, the Virginia Supreme Court had acted “contrary to” clearly established federal law because it had applied a rule that contradicted the governing law of U.S. Supreme Court cases.¹⁶⁷ The Court noted that *Lockhart* was not intended to supplant *Strickland* in a case such as Williams’s, where the ineffective assistance of counsel deprives the defendant of a substantive or procedural right.¹⁶⁸ Additionally, the Supreme Court found that the Virginia Supreme Court’s decision was an “unreasonable application” in two respects: first, its improper reliance on the fundamental fairness exception found in *Lockhart*, and second, its failure to consider comprehensively the body of mitigating evidence advanced at trial and developed in the postconviction proceedings — the totality of which, if introduced, could have altered the jury’s penalty decision.¹⁶⁹

With its instructive interpretation of § 2254(d)(1), the Supreme Court demonstrated that a state court decision applying precedent in the wrong context and failing to give proper consideration to mitigating evidence in evaluating prejudicial effect constitutes an adjudication of the claim that is both “contrary to” and an “unreasonable application” of U.S. Supreme Court precedent under § 2254(d)(1).¹⁷⁰ *Williams* stands today as a model for federal

162. *Williams*, 529 U.S. at 399.

163. *Id.* at 367.

164. *Id.* at 390.

165. *Id.* at 391.

166. *Id.*

167. *Id.* at 391-98. The other category of “contrary to” cases — where “the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent” — was not a factor in *Williams*. *Id.* at 406.

168. *Id.* at 393.

169. *Id.* at 397-98.

170. See 2 HERTZ & LIEBMAN, *supra* note 2, § 32.3, at 1449-50; Ides, *supra* note 87, at 718

courts to use in interpreting AEDPA, as they can now apply the Supreme Court's outlined analysis to habeas review following the state courts' adjudication of the claims on the merits.

B. Building on the Foundation: Additional Guidance Emerges from the Supreme Court

Since *Williams*, the Supreme Court has issued several decisions that provide guidance on the standard of § 2254(d)(1) and how federal courts should apply AEDPA. Both the "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have been the subject of controversy; the phrases are sufficiently cloudy that one may appreciate why interpretations in federal habeas courts have differed. Questions have arisen concerning requirements of state courts' use of precedent, prescriptions for federal courts' methodology in reviewing decisions pursuant to AEDPA, the extent of the deference implicit in § 2254(d)(1)'s constraints on habeas corpus review, and the flexibility of state courts in applying legal tests to habeas petitions.

1. The State Court's Discussion of Precedent

*Early v. Packer*¹⁷¹ placed a major limitation on what a court may find "contrary to" clearly established federal law. In *Packer*, the Supreme Court reversed the Ninth Circuit's grant of habeas relief after the Ninth Circuit found that the state court's decision denying relief was contrary to established federal law on several grounds.¹⁷² The Court reiterated that a state court decision would be "contrary to" federal precedent under § 2254(d)(1) if it fulfilled one of the *Williams* criteria: either by applying a rule that contradicts precedent or by reaching a different result than did the Supreme Court when faced with "materially indistinguishable" facts.¹⁷³ The Court then added the following significant qualification to the existing framework: a state court decision would not be "contrary to" clearly established federal law under § 2254(d)(1), even if the state court issued it without knowledge of the applicable Supreme Court precedent, as long as the state court's decision was consistent with federal law.¹⁷⁴ The Supreme Court provided the state courts with a seemingly low threshold to meet when issuing their decisions: avoiding a "contrary to"

("[A] state court's failure to apply a critical component of a federal standard is objectively unreasonable, presumably because a prudent, careful, and competent judge, having recognized the correct standard, would apply each component of that standard.").

171. 537 U.S. 3 (2002) (per curiam).

172. *Id.* at 8.

173. *Id.*

174. *Id.*

designation and its corresponding grant of relief “does not require citation of our cases — indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.”¹⁷⁵ The Court’s explicit pronouncement that state courts need not discuss or even be aware of applicable precedent, as long they do not contradict it, demonstrates the federal courts’ significant deference toward state courts’ decisions under AEDPA.¹⁷⁶

2. Methodology of Federal Habeas Review

In addition to directing state courts’ treatment of habeas cases, the Supreme Court issued guidance to the federal courts concerning their methodology in analyzing habeas corpus petitions. In *Lockyer v. Andrade*,¹⁷⁷ the Court advised the federal courts that they had substantial freedom in reviewing state court decisions but must take seriously the explicit language of AEDPA.¹⁷⁸ In *Andrade*, the Court disagreed with the Ninth Circuit’s ruling that a state court decision affirming Andrade’s prolonged sentence¹⁷⁹ was “contrary to” or an “unreasonable application” of federal precedent under § 2254(d)(1).¹⁸⁰ The Ninth Circuit had applied its own precedent and held that

an unreasonable application of clearly established federal law occurs “when our independent review of the legal question ‘leaves us with a “firm conviction” that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law

175. *Id.*; see also *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003), *Cook v. McKune*, 323 F.3d 825, 830-31 (10th Cir. 2003).

176. See *Ides*, *supra* note 87, at 727 (“The primary lesson to be gleaned from *Early v. Packer* is that a state court’s failure to follow Supreme Court precedent is not to be presumed. Neither the failure to cite the applicable precedent nor the failure to write an opinion that conforms to a precise federal formula is sufficient to establish that a state court decision is contrary to clearly established federal law.”).

177. 538 U.S. 63 (2003).

178. *Id.* at 71.

179. In California, any felony can be the “third strike” that subjects a defendant to a prison term of twenty-five years to life, if the defendant has also been convicted of two or more serious or violent felonies. *Id.* at 67. Andrade was convicted of two counts of petty theft with a prior conviction, which the prosecutor had the discretion to and chose to prosecute as a felony, as well as three counts of first-degree residential burglary. *Id.* at 67-68. The burglary convictions qualified as “serious or violent” felonies under the three strikes law, and therefore each theft conviction triggered the increased sentencing separately. *Id.* at 68. Andrade was sentenced to two consecutive terms of twenty-five years to life in prison. *Id.*

180. *Id.* at 73, 77.

that the [state] court adopted, was erroneous — in other words that clear error occurred.”¹⁸¹

The Supreme Court disagreed with the Ninth Circuit’s defining “objectively unreasonable” to mean “clear error”; “clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness.”¹⁸² This further elucidation of the meaning of “objectively unreasonable” — or, rather, what “objectively unreasonable” does *not* mean — reflects the Court’s mandate in *Williams* that (1) reasonableness is measured objectively, not subjectively,¹⁸³ and (2) an unreasonable application does not mean merely incorrect or erroneous.¹⁸⁴

In addition to providing guidance regarding the statutory language of AEDPA, the Supreme Court in *Andrade* clarified its procedural disagreement with the Ninth Circuit’s requirement that federal habeas courts review state court decisions de novo before applying AEDPA’s standard of review.¹⁸⁵ Relying on its earlier decision in *Weeks v. Angelone*,¹⁸⁶ the Court emphasized that determining satisfaction of the “contrary to” or “unreasonable application” prongs is “the only question that matters” for purposes of the statute.¹⁸⁷ The *Andrade* Court stated that “AEDPA does not require a federal habeas court to adopt any one methodology.”¹⁸⁸ With this proclamation, the Court in effect prohibited courts of appeals from foisting a pre-review process on federal habeas courts under § 2254(d)(1). This procedural tightening on the circuit courts, however, amounts to a lessening of steps for the district courts; such a reduction of requirements is analogous to *Packer*’s declaration that state courts are not required to discuss federal precedent in their habeas opinions.¹⁸⁹ With each of these decisions, the U.S. Supreme Court conveyed that federal habeas review, while procedurally complex, does not follow an immutable formula.

181. *Id.* at 69 (quoting *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000) (alterations in original)).

182. *Id.* at 75.

183. *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

184. *Id.* at 411.

185. *Andrade*, 538 U.S. at 71 (citing *Clark v. Murphy*, 317 F.3d 1038, 1044 n.3 (9th Cir. 2003); *Van Tran*, 212 F.3d at 1154-55).

186. 528 U.S. 225 (2000). *Weeks* concluded that a state need not have a particular structure for juries to consider mitigating evidence. *Id.* at 233.

187. *Andrade*, 538 U.S. at 71.

188. *Id.*; *cf.* *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (holding that absent compelling circumstances, agencies retain discretion over the formulation of their own procedures and reviewing courts may not impose additional requirements beyond those required by statute).

189. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam).

Therefore, room exists for courts within the Tenth and other Circuits to exercise judicial discretion at each level of the habeas review process.

3. *Deference of § 2254: What Is It Good for?*

An ongoing question in habeas review is the level of deference that state court decisions should receive from the federal courts that review their adjudications. Two Supreme Court decisions have shaped the contours of what is required for federal courts to review state court decisions with an appropriate degree of deference.¹⁹⁰ In *Woodford v. Visciotti*,¹⁹¹ the Supreme Court again reversed a Ninth Circuit decision. The circuit court had found a California Supreme Court decision to be both “contrary to” and an “unreasonable application” of *Strickland*, and thus, affirmed the district court’s grant of relief on grounds of ineffective assistance of counsel.¹⁹² The Supreme Court’s analysis followed the framework established in *Williams*, but its discussion of the “contrary to” prong of § 2254(d)(1) is noteworthy for including language indicating that “a federal court must show respect for state court decisions being challenged on habeas.”¹⁹³

The Supreme Court in *Visciotti*, unlike *Williams*, explicitly stated that § 2254(d)(1) is a “highly deferential standard,”¹⁹⁴ and the Court took exception to the Ninth Circuit’s unwillingness to try to reconcile the state court’s discussion with the “reasonable probability” standard established in *Strickland*.¹⁹⁵ *Strickland*, the applicable federal precedent for ineffective assistance of counsel claims, prescribes a “reasonable probability” standard for gauging if counsel’s conduct has undermined the confidence in the outcome of the proceedings.¹⁹⁶ The state court referred multiple times to “probable,” with no modifier of “reasonably”; the Ninth Circuit, instead of acknowledging this as use of occasional shorthand, held that the state court had applied an erroneous higher standard of proof.¹⁹⁷ The Supreme Court found that because the state court’s decision described the *Strickland* standard in detail, the Ninth

190. See *Ides*, *supra* note 87, Parts IV.A.1 & C.2, at 719-23, 752-58, for further discussion of the concept of deference and how it is explored in these and other cases. “[A] sensible reading is, almost by definition, a properly deferential reading.” *Id.* at 758.

191. 537 U.S. 19 (2002) (per curiam).

192. *Id.* at 21-22.

193. *Ides*, *supra* note 87, at 758.

194. *Visciotti*, 537 U.S. at 24 (“It is also [highly] incompatible with § 2254(d)[(1)]’s ‘highly deferential standard for evaluating state court rulings,’ . . . which demands that state-court decisions be given the benefit of the doubt.” (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997))).

195. *Id.* at 24-25.

196. *Id.* at 23.

197. *Id.*

Circuit's selective reading and apparent "readiness to attribute error" was "inconsistent with the presumption that state courts know and follow the law."¹⁹⁸

The Supreme Court's reprimand of the Ninth Circuit in *Visciotti* for insufficient deference inevitably leads to an inquiry about what precisely deference entails. In another decision, *Wiggins v. Smith*,¹⁹⁹ the Court eliminated any notion that the federal habeas courts should go to extreme lengths to uphold state courts' decisions. A state court denied Wiggins's petition for postconviction relief, and the Maryland Court of Appeals affirmed the state court's decision.²⁰⁰ Thereafter, a federal district court granted his habeas petition, but the Fourth Circuit reversed.²⁰¹

In reversing the Fourth Circuit, the Court found that the performance of Wiggins's trial counsel fell short of the standard set forth in *Strickland* because his attorneys' conduct failed to meet prevailing standards of professionalism and had a prejudicial effect on the defense.²⁰² One of the major bases for the Supreme Court's conclusion was its belief that the Maryland Court of Appeals, in examining his claim of ineffective assistance of counsel, assumed Wiggins's trial attorneys had not conducted any investigation into his personal history beyond examining social service records and a presentence report made available by enforcement officials.²⁰³ This conclusion would impute to the state court's denial of habeas relief weaker grounds than if that court assumed that Wiggins's trial counsel had investigated beyond those records. Citing several bases, the Supreme Court rejected an interpretation of the Maryland Court of Appeals' denial of relief that presumed Wiggins's attorney had conducted more thorough research and thereby illustrated only a circumscribed level of deference to the state court decision.²⁰⁴ The Supreme Court not only declined to defer to the state court's decision, it opted to view the state-level decision as having less evidentiary support than an alternative, plausible reading embraced by the dissent.²⁰⁵

Wiggins teaches that "a federal court need not engage in a strained reading of a state court opinion in order to avoid a potential constitutional flaw in that decision."²⁰⁶ Considered in combination with the Supreme Court's mild rebuke

198. *Id.* at 24 (citations omitted).

199. 539 U.S. 510 (2003).

200. *Id.* at 518-19.

201. *Id.*

202. *Id.* at 533-34, 538.

203. *Id.* at 523-24. The dissent heartily disagreed with this finding and presented commentary to support the opposite holding. *Id.* at 538-57 (Scalia, J., dissenting).

204. *Id.* at 523-29 (majority opinion).

205. *Id.* at 545-46 (Scalia, J., dissenting).

206. *Ides, supra* note 87, at 758.

in *Visciotti* toward federal courts that do not afford state courts their due respect, the Supreme Court appears to instruct federal courts neither to presume state court decisions are automatically flawless, nor ascribe to those decisions such deference that a labored or unsupported interpretation of the opinion is required to support their holdings.

4. Legal Tests in the AEDPA Framework

In 2004, the Supreme Court addressed another aspect of AEDPA that the statutory language itself leaves untouched: the circumstances under which a federal court can determine if a state court's application of a legal test is "unreasonable." In *Yarborough v. Alvarado*,²⁰⁷ the Court reversed the Ninth Circuit and denied habeas relief to a seventeen-year-old interviewed without parents or counsel.²⁰⁸ The federal district court had denied habeas relief, agreeing with the state court that the youth had not been "in custody" for *Miranda*²⁰⁹ purposes and stating that "[a]t a minimum . . . the deferential standard of review provided by 28 U.S.C. § 2254(d) foreclosed relief."²¹⁰ The Ninth Circuit reversed the district court's opinion and granted habeas relief.²¹¹ On appeal, however, the Supreme Court reversed the Ninth Circuit and denied habeas relief under § 2254(d)(1), applying the principles outlined in *Williams* and examining the state court's test for deciding whether a defendant is in custody for *Miranda* purposes.²¹²

In *Alvarado*, the Court thoroughly addressed state courts' treatment of legal tests in determining whether the state court's decision implicated the "unreasonable application" prong of § 2254(d)(1).²¹³ According to the Court, even though federal judges are familiar with the meaning of the term "unreasonable,"

the range of . . . judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more

207. 541 U.S. 652 (2004) (5-4 decision).

208. *Id.* at 668-69.

209. *Miranda v. Arizona*, 384 U.S. 436 (1966).

210. *Alvarado*, 541 U.S. at 659.

211. *Id.*

212. *Id.* at 659, 669.

213. *Id.* at 663-64.

general the rule, the more leeway courts have in reaching outcomes in case by case determinations.²¹⁴

The *Alvarado* opinion reiterated that the federal courts could not grant relief under AEDPA by conducting a de novo review of the state court's decision.²¹⁵ The Court further explained that in this case, the state court's determination was reasonable because the *Miranda* custody test is a general test and the state court's application of federal law "fits within the matrix" of Supreme Court decisions.²¹⁶ According to the Court, the state court's ruling that jurors could find that the teenager was not in custody for *Miranda* purposes was a reasonable application of clearly established law.²¹⁷ By allowing considerable leeway for state courts to apply legal tests, the holding in *Alvarado* stressed yet again the "deferential standard" that § 2254(d)(1) prescribes for state court decisions. The undefined boundaries of a "general" test and the "matrix" of clearly established federal precedent, however, seem likely to produce more controversy in federal habeas review than the guidelines of AEDPA and the cases discussed in this section will prevent.

IV. *The Tenth Circuit Strives, Seeks, Finds — and Yields*

Following the Supreme Court's analysis of AEDPA in *Williams*, "federal court[s] [clearly are] no longer free to grant habeas relief based solely on [their] independent interpretation and application of federal law."²¹⁸ The standard of review set forth in AEDPA has played and will continue to play a major role in Congress's and the Supreme Court's trend of constricting federal habeas relief. An examination of U.S. Court of Appeals for the Tenth Circuit decisions since the passage of AEDPA provides a useful study of the effect of § 2254(d)(1) on petitions for writs of habeas relief. In the midst of the federal courts' language of "deference" and "comity," a question arises concerning just how far those principles extend. Since the enactment of AEDPA in 1996, the Tenth Circuit has rarely ordered a state prisoner released from custody, reduced a state prisoner's sentence, or remanded his case for further proceedings.²¹⁹ The Tenth Circuit has, however, granted some relief under § 2254(d)(1)²²⁰ based on

214. *Id.*

215. *Id.* at 665.

216. *Id.*

217. *Id.* at 664. Justice Breyer issued a strongly worded dissent, concluding that a reasonable person would *not* have felt that he could leave the police interrogation, and the Ninth Circuit was correct in finding that the state courts unreasonably applied federal precedent. *Id.* at 669-70 (Breyer, J., dissenting).

218. Steinman, *supra* note 5, at 1495 (citations omitted).

219. See discussion *infra* Part V.B.3.

220. In some instances, of course, relief may be premised on grounds in addition to 28

findings that state court decisions were “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”²²¹ A careful examination of the Tenth Circuit’s rationale in these cases demonstrates that, for the most part, courts have found grounds for habeas relief in the limited instances Congress indicated in AEDPA and the Supreme Court clarified in *Williams*.²²² Where the Tenth Circuit did grant relief under § 2254(d)(1), the state court’s decision diverged substantially from applicable federal precedent, or the state court applied the correct precedent, but in a manner the Tenth Circuit found objectively unreasonable.²²³

A. Claims of Ineffective Assistance of Counsel

The issue that federal habeas corpus petitions across the nation raise most frequently is that the state prisoner has received ineffective assistance of counsel.²²⁴ For example, the petitioner may allege that his trial counsel failed to offer mitigating evidence or neglected to cross-examine a key prosecution witness.²²⁵ Petitioners for habeas relief rarely cite claims such as Fourth Amendment violations, prosecutorial misconduct, or other constitutional violations by the trial court, prosecutor, or police as grounds for the issuance of a writ.²²⁶ The notion that a defendant is entitled to assistance of counsel that does not violate *Strickland* — that is, legal assistance neither deficient nor prejudicial²²⁷ — is one that resonates with both courts and nonlegal observers, especially in proceedings where the trial counsel’s ineptitude could result in an extended prison sentence or even capital punishment. The Tenth Circuit has

U.S.C. § 2254(d)(1) (2000).

221. 28 U.S.C. § 2254(d)(1).

222. See discussion *infra* Part V.A.

223. See discussion *infra* Part V.A.

224. ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP’T OF JUSTICE, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS v (1995).

225. *Id.*; see also Flango & McKenna, *supra* note 71, at 245-58. “[M]ost ineffective assistance of counsel claims are not based on the counsel’s failure to raise a federal claim or defense, but rather involve the attorney’s decision that affected the development of facts at trial.” *Id.* at 248 (citing John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990)).

226. HANSON & DALEY, *supra* note 224, at v; Cheesman et al., *Prisoner Litigation*, *supra* note 18, at 3. Ineffective assistance of counsel claims account for 25% of the issues petitioners raised in habeas corpus petitions. HANSON & DALEY, *supra* note 224, at 14. Trial court errors constitute 15%; Fourteenth Amendment constitute 14%; Fifth Amendment constitute 12%; Sixth Amendment constitute 7%; Eighth Amendment constitute 7%; prosecutorial misconduct constitute 6%; Fourth Amendment constitute 5%. *Id.* Other claims account for 9%. *Id.*

227. See *supra* Part III.B.3 (discussing the use of the *Strickland* standard in *Wiggins v. Smith*, 539 U.S. 510 (2003)).

made explicit reference to the weight courts should give such claims: “The gravity of a claim of ineffective assistance of counsel cannot be overstated. ‘Of all the rights that an accused person has, the ability to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.’”²²⁸ The Supreme Court, however, has ordered courts to give attorneys’ actions a presumption of soundness, and the Tenth Circuit “review[s] counsel’s performance with great deference,” even above the deference prescribed by AEDPA.²²⁹

B. The Tenth Circuit’s Grants of Release or Revocation of Capital Sentence Under § 2254(d)(1)

Several cases illustrate the extreme disagreement the Tenth Circuit must have with the state court’s application of federal precedent before granting a petitioner either release or revocation of his capital sentence under § 2254(d)(1). The Tenth Circuit found sufficient grounds to overturn the state court’s application of *Strickland* in *Battenfield v. Gibson*.²³⁰ In *Battenfield*, the Oklahoma Court of Criminal Appeals (OCCA) denied postconviction relief on several grounds, including a claim of ineffective assistance of counsel during the penalty phase of the trial.²³¹ Because the OCCA did not mention the defense attorney’s failure to investigate mitigating evidence in its denial, the Tenth Circuit was free to analyze the state court’s treatment of that claim as not having been adjudicated on the merits and therefore subject to independent review.²³² Nevertheless, the Tenth Circuit examined the OCCA’s denial as if the state court had implicitly included the investigative efforts and would have found the OCCA’s application of *Strickland* unreasonable using either an independent or deferential approach.²³³ This case, therefore, still provides an example of analysis of § 2254(d)(1)’s “unreasonable application” prong.

228. *Smith v. Mullin*, 379 F.3d 919, 929 (10th Cir. 2004) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986)).

229. *Hooper v. Mullin*, 314 F.3d 1162, 1169 (10th Cir. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)); see also discussion *infra* at Part V.B.2; cf. *Torres v. Lytle*, No. 03-2098, 2004 WL 103557, at *2 (10th Cir. Jan. 23, 2004) (unpub. op.) (concluding that the deferential standard applied to sufficiency of the evidence claims combined with AEDPA deference “amounts to deference squared”).

230. 236 F.3d 1215 (10th Cir. 2001).

231. *Id.* at 1220.

232. *Id.* at 1229 n.7; see *LaFevers v. Gibson*, 182 F.3d 705, 711 (10th Cir. 1999) (“If the claim was not heard on the merits by the state courts, and the federal district court made its own determination in the first instance, we review the district court’s conclusions of law *de novo* and its findings of fact, if any, for clear error.”).

233. *Battenfield*, 236 F.3d at 1229 n.7.

Battenfield's defense attorney failed to interview anyone, including the defendant himself, regarding possible mitigating aspects of the defendant's background.²³⁴ This failure to investigate violated the attorney's duty to conduct a reasonable inquiry and also rendered him unable to competently advise the defendant regarding the penalty phase of the trial.²³⁵ The Tenth Circuit's opinion expressed disbelief at the OCCA's conclusion that the defense counsel failed to present mitigating evidence because of the petitioner's knowing, intelligent waiver of his right to present that evidence.²³⁶ The Tenth Circuit found this reasoning to be fatally flawed because the petitioner's trial counsel had not "conduct[ed] a constitutionally adequate pretrial investigation."²³⁷ The Tenth Circuit explained that defense counsel's conduct could not have been a strategic decision because the attorney was ignorant of any other mitigation approach he could have presented to the court.²³⁸

Additionally, the Tenth Circuit found that this ineffective assistance of counsel prejudiced the petitioner under the *Strickland* standard.²³⁹ Because significant mitigating evidence was available to balance against a single aggravating factor, a reasonable probability existed that the jury would have found that the defendant was not a continuing threat to society.²⁴⁰ The Tenth Circuit found that the deficient conduct "'so undermined the proper functioning of the adversarial process that the [penalty phase of] the trial cannot be relied on as having produced a just result.'"²⁴¹ The Tenth Circuit characterized the state court's contrary conclusion and application of *Strickland* as "patently unreasonable" under § 2254(d)(1) and instructed the district court to grant the writ for the petitioner's death sentence.²⁴² The state court was to follow the district court's action by either conducting a new sentencing trial or imposing a noncapital sentence.²⁴³ *Battenfield* demonstrates that the Tenth Circuit's deference, like the Supreme Court's, extends only so far. If the conduct of trial counsel is so deficient or prejudicial that it substantially harms the guilt or sentencing phases, the federal court will temper its deferential viewpoint and grant habeas relief when necessary to ensure fairness to the state prisoner.

234. *Id.* at 1228.

235. *Id.* at 1229.

236. *Id.* at 1233.

237. *Id.* at 1234.

238. *Id.* at 1229.

239. *Id.* at 1235.

240. *Id.*

241. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (alteration in original)).

242. *Id.* at 1233, 1235.

243. *Id.* at 1235.

In *Hooper v. Mullin*,²⁴⁴ the Tenth Circuit again found grounds for habeas relief under § 2254(d)(1) and upheld the Western District of Oklahoma's non-deferential grant of habeas relief, which the OCCA had denied.²⁴⁵ After a jury convicted Hooper of capital murder, Hooper alleged that his defense attorneys' performance was constitutionally deficient under *Strickland*.²⁴⁶ In preparation for trial, Hooper's attorneys retained a psychologist, who gave Hooper neuropsychological tests following six months of therapy; these tests indicated lingering mental problems but also great improvement in Hooper's ability to handle stress and "largely adequate" cognitive functioning.²⁴⁷ Hooper's attorneys then had another psychologist prepare a one-page summary based solely on the other doctor's report.²⁴⁸ This report described Hooper's mental status in less positive terms, noting the possibility of a serious psychiatric disorder or brain damage and emphasizing the need for further diagnostic investigation.²⁴⁹ The attorneys did not contact the second doctor again until after the jury found Hooper guilty of murder; they then requested that doctor's testimony at the sentencing proceeding.²⁵⁰ The second doctor told the attorneys that he could not ethically testify, because he had never met the petitioner and his testimony would likely be an aggravating rather than mitigating factor in the sentencing.²⁵¹ Nevertheless, both of the reports were admitted into evidence, and the second doctor was subpoenaed to testify. Hooper's attorneys did not prepare the second doctor for trial, and the physician told the jurors that he did not put "enormous stock" in his own conclusions in the one-page summary.²⁵² When the prosecution called the first doctor in rebuttal, his testimony further damaged Hooper because the doctor said he had found no special problems, no brain damage, and only a mild learning disability.²⁵³

Both the OCCA and the district court found that the actions of Hooper's attorneys were prejudicial under *Strickland*,²⁵⁴ but the OCCA did not find that the attorneys' performance met the "deficient performance" prong of *Strickland*.²⁵⁵ The OCCA reached this determination even though it acknowledged the doctors' testimony "was disastrous" for Hooper, counsel's

244. 314 F.3d 1162 (10th Cir. 2002).

245. *Id.* at 1178.

246. *Id.* at 1167.

247. *Id.* at 1167-68.

248. *Id.* at 1168.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 1167.

255. *Id.*

failure to speak with the first doctor before trial was “inexplicable” and “overwhelmingly prejudicial,” and Hooper himself had raised significant doubts about calling the second doctor to testify and admitting both reports.²⁵⁶ The OCCA concluded that Hooper had not shown his attorneys’ actions constituted ineffective assistance of counsel and denied Hooper’s request for an evidentiary hearing to explore trial counsel’s rationalizations for the prejudicial actions.²⁵⁷ On habeas review, however, the district court granted an evidentiary hearing and found that the trial counsel’s performance was constitutionally deficient under *Strickland*.²⁵⁸

The Tenth Circuit agreed, even though it reviewed the attorneys’ performance “with great deference.”²⁵⁹ Both the attorneys’ conduct and the state court’s application of *Strickland* were objectively unreasonable, concluded the Tenth Circuit, and the § 2254(d)(1) standard mandated relief.²⁶⁰ The Tenth Circuit’s opinion criticized the attorneys’ decision not to further investigate Hooper’s mental status, especially given that the second doctor’s report specifically recommended further diagnosis.²⁶¹ In addition, the Tenth Circuit criticized the attorneys’ decision not to interview the doctors before they testified and further stated that “[a] ‘decision not to undertake substantial pretrial investigation and instead to “investigate” the case *during* the trial [i]s not only uninformed, it [i]s patently unreasonable.”²⁶² Because the defense attorneys chose a strategy that required them to present psychological evidence, they should have conducted further exploration.²⁶³ Finally, the Tenth Circuit denounced the attorneys’ lack of foresight in offering the first physician as a witness, thereby leaving him eligible for the prosecution to use in rebuttal.²⁶⁴ Because the defense attorneys made an objectively unreasonable decision to rely on the testimony and reports without adequate investigation, and did so in “an unprepared, uninformed, and disastrous manner,”²⁶⁵ the Tenth Circuit affirmed the district court’s decision granting Hooper relief from his death sentences.²⁶⁶

256. *Id.* at 1169.

257. *Id.*

258. *Id.* at 1167.

259. *Id.* at 1169.

260. *Id.* at 1169-71.

261. *Id.* at 1170-71.

262. *Id.* at 1171 (quoting *Fisher v. Gibson*, 282 F.3d 1283, 1296 (10th Cir. 2002) (alterations in original)).

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

As in *Battenfield* and *Hooper*, the Tenth Circuit found the state court's application of federal precedent unreasonable in *Holmes v. McKune*.²⁶⁷ The Tenth Circuit reviewed the state prisoner's ineffective assistance of counsel claim under § 2254(d)(1) with reference to pre-*Strickland* Supreme Court law, which applied either a "mockery of justice" standard or a "reasonably competent assistance" standard.²⁶⁸ The Tenth Circuit noted that even before *Strickland*, every person had the right to effective assistance of counsel, and an attorney's failure to investigate the facts violated this "clearly established" Supreme Court law.²⁶⁹ Holmes retained an attorney, previously appointed when Holmes shot and killed a man named Miller, to assist him with charges of rape, assault, and kidnapping while the manslaughter charge was still pending.²⁷⁰ Although Holmes provided his attorney with a list of alibi witnesses, the attorney did not speak with any of them or call them to the stand.²⁷¹ The state court's postconviction hearing showed that these witnesses, including Holmes's mother, "could have added 'a great deal of substance and credibility' to the defendant's alibi" during the time the rape occurred.²⁷² The state called Miller's cousin to testify, and he claimed that Holmes confessed to the crime twice; Holmes's attorney, however, never mentioned to the jury the long-standing feud between the witness and the defendant or the fact that Holmes had killed the witness's cousin.²⁷³ At the state court postconviction hearing, Holmes's attorney claimed that he had relied on the defendant to bring alibi witnesses to his office, that he had "no way of knowing" if the state would interview witnesses beyond the three called to testify, and that he could not remember why Holmes's mother was not asked to testify.²⁷⁴ The state court judge, declaring that "'an attorney has a right to rely upon his client to . . . [get] witnesses in to talk to you before trial,'"²⁷⁵ found that "Holmes had some

267. No. 01-3004, 2003 WL 220496, at *4 (10th Cir. Jan. 31, 2003) (unpub. op.). Holmes had been released on parole at the time of the habeas proceedings, but the restrictions on his liberty as part of his probation — including restricting his activities to his residence, mandatory meetings and approval of his employment, and risk of being incarcerated again — sufficiently placed him "in custody" for jurisdictional purposes. *Id.* at *1 n.2.

268. *Id.* at *9-10. The Tenth Circuit did not use *Strickland* in reviewing the state court decision because that case was decided four days after the Kansas Court of Appeals decided petitioner's appeal of his first postconviction proceeding in 1984, and therefore "*Strickland* was not 'clearly established federal law'" at that time. *Id.* at *8.

269. *Id.* at *9.

270. *Id.* at *3.

271. *Id.* at *3, *5.

272. *Id.* at *11 (quoting *Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000)).

273. *Id.* at *4. Apparently the attorney feared "it might prejudice the jury to know that Holmes was charged with manslaughter." *Id.*

274. *Id.* at *6.

275. *Id.* at *7 (citation omitted).

obligation to assist in this matter”²⁷⁶ in light of the fact that the Holmeses were the only black family in a “white” community.²⁷⁷ The judge gave this admonishment despite the fact that Holmes was eighteen years old and this was his first trial.²⁷⁸

The state court found that the attorney could have determined that the alibi witnesses would not have assisted the defendant and perhaps would have harmed his defense, and the state court ultimately denied relief.²⁷⁹ The state court of appeals affirmed on appeal, and Holmes brought a petition for habeas corpus in district court. When the district court likewise denied relief, Holmes appealed to the Tenth Circuit.²⁸⁰

The Tenth Circuit held that using either of the pre-*Strickland* standards, the attorney’s conduct was ineffective and prejudicial, and the state court’s ruling was therefore an “unreasonable application” of Supreme Court law under § 2254(d)(1).²⁸¹ The Tenth Circuit disagreed with the state court’s placing the onus of finding defense witnesses on the defendant because preparing the defense is “clearly” the obligation of the attorney and “[d]efense counsel must always investigate an alibi defense.”²⁸² When Holmes’s own attorney abandoned his only defense, he both “made a ‘mockery of justice’” and failed to render “‘reasonably competent assistance,’” thus providing ineffective assistance under *any* reasonable application of Supreme Court precedent.²⁸³ In examining whether the attorney’s conduct was prejudicial,²⁸⁴ the Tenth Circuit focused on the attorney’s failure to call key witnesses to the stand.²⁸⁵ The court noted that the state’s case against Holmes was weak²⁸⁶ because each of its witnesses’ testimonies had flaws and discrepancies;²⁸⁷ thus, the defense attorney’s conduct was especially harmful.²⁸⁸ This deficient performance, combined with the state’s witnesses’ lack of credibility²⁸⁹ and the defense

276. *Id.*

277. *Id.*

278. *Id.* at *3.

279. *Id.* at *7.

280. *Id.*

281. *Id.* at *9, *14.

282. *Id.* at *10 (citing *Powell v. Alabama*, 287 U.S. 45, 58 (1932)).

283. *Id.* at *9-10.

284. Although the court applied pre-*Strickland* standards, “the prejudice requirement of *Strickland* added nothing new to the law as it stood at the time of Holmes’s first state collateral appeal.” *Id.* at *11.

285. *Id.* at *11-14.

286. *Id.* at *13.

287. *See id.* at *3-5.

288. *Id.* at *13, *14.

289. *Id.* at *14.

attorney's failure to highlight the state's poor physical evidence against Holmes,²⁹⁰ was prejudicial to Holmes's defense.²⁹¹ Because the state court's finding that Holmes received effective assistance of counsel "could not have been justified by a finding of no prejudice,"²⁹² the Tenth Circuit held that the state court's denial of habeas corpus relief was an "unreasonable application" of federal precedent.²⁹³ Accordingly, the Tenth Circuit reversed the judgment and remanded the case with instructions that the lower court issue a writ of habeas corpus.²⁹⁴

C. The Tenth Circuit's Grants of Other Types of Habeas Relief Under § 2254(d)(1)

The Tenth Circuit does not always grant habeas relief such as that seen in *Battenfield*, *Hooper*, and *Holmes*, though a "conditional release" order is the most common habeas remedy today.²⁹⁵ In two early applications of § 2254(d)(1), for example, the Tenth Circuit vacated the cases and granted the petitioner an evidentiary hearing into the matter of ineffective assistance, rather than revoking the capital sentence or releasing the petitioner from custody.²⁹⁶ In both *Miller v. Champion*²⁹⁷ and *Mayer v. Gibson*,²⁹⁸ the Tenth Circuit disagreed with the state and district courts and found that the petitioner alleged facts sufficient to demonstrate ineffective assistance of counsel under *Strickland*.²⁹⁹

In *Miller*, although the defendant pled guilty to second-degree murder, he claimed that his defense attorney failed to inform him of the "depraved mind" element of the crime and that he would have proceeded to trial had he been so informed.³⁰⁰ The Tenth Circuit found that depraved mind was a critical element

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. 2 HERTZ & LIEBMAN, *supra* note 2, § 33.3, at 1503. A range of changes in custodial status is available via habeas relief, short of conditional or unconditional termination of physical custody. *Id.* § 33.1, at 1499. These alternative forms of habeas relief include "changes in the type, terms, length, and conditions of custody; ending or modifying certain restraints on liberty short of physical custody, such as probation, parole, and 'on recognizance' status; and, in some circumstances, enjoining the collateral consequences of a conviction . . ." *Id.* § 33.1, at 1500 (citations omitted).

296. *Mayer v. Gibson*, 210 F.3d 1284 (10th Cir. 2000) (2-1 decision); *Miller v. Champion*, 161 F.3d 1249 (10th Cir. 1998).

297. 161 F.3d 1249.

298. 210 F.3d 1284.

299. *Mayer*, 210 F.3d at 1290, 1291; *Miller*, 161 F.3d at 1254-56, 1259.

300. *Miller*, 161 F.3d at 1251.

of second-degree murder and that nothing in the “skeletal” factual record indicated that Miller’s attorney had explained this element to him at any time or that Miller knew about it from another source.³⁰¹ In addition, the Tenth Circuit found that if a jury had heard Miller’s uncontested account of the story, it would have likely found Miller innocent, or guilty of no more than first-degree manslaughter.³⁰² Concluding that without a full development of the factual record the district court could not apply *Strickland* to dismiss the habeas action, the Tenth Circuit granted Miller limited habeas relief in the form of an evidentiary hearing.³⁰³

In *Mayes*, the Tenth Circuit was “deeply disturbed by the manner in which defense counsel apparently handled the sentencing phase” of the trial³⁰⁴ but could not find an adequate basis in the factual record to show that the attorney’s conduct violated Mayes’s Sixth Amendment right to effective assistance of counsel.³⁰⁵ In light of the constitutionally protected right to present mitigating evidence to the jury,³⁰⁶ the Tenth Circuit found that the “only possible inference” from Mayes’s production of eleven mitigating affidavits from people who were never asked to testify is that “any investigation conducted by defense counsel fell well short of the mark of reasonableness.”³⁰⁷ The attorney’s failure to contact any mitigating witnesses, combined with the state’s relatively weak case, the jury’s considerable trouble with its sentencing deliberations, and the ultimate finding of only one aggravating factor, convinced the Tenth Circuit that *Strickland*’s deficient performance and prejudice standards had been met.³⁰⁸ As in *Miller*, the Tenth Circuit held that the petitioner in *Mayes* was entitled to an evidentiary hearing to fully explore his claim of ineffective assistance of counsel.³⁰⁹ The Tenth Circuit therefore vacated the district court’s order dismissing his petition for habeas relief.³¹⁰

The Tenth Circuit again granted conditional habeas corpus relief when it tackled the unconventional issue of Battered-Woman Syndrome (BWS).³¹¹ In

301. *Id.* at 1255, 1256.

302. *Id.* at 1258-59.

303. *Id.* at 1259. Because *Miller* was decided after AEDPA was enacted in 1996 but before the U.S. Supreme Court interpreted 28 U.S.C. § 2254(d)(1) in *Williams v. Taylor*, 529 U.S. 362 (2000), the Tenth Circuit applied § 2254(d)(1) but did not provide an explicit explanation as to how the state court unreasonably applied *Strickland*. *Miller*, 161 F.3d at 1259.

304. *Mayes*, 210 F.3d at 1286.

305. *Id.* at 1286-87.

306. *Id.* at 1288 (citing *Williams*, 529 U.S. at 393).

307. *Id.* at 1289.

308. *Id.* at 1291.

309. *Id.* at 1287, 1289.

310. *Id.* at 1287.

311. Battered-woman syndrome is defined legally as “[a] constellation of medical and

Paine v. Massie,³¹² the petitioner claimed that her counsel's failure to offer expert testimony on BWS constituted ineffective assistance of counsel under *Strickland*.³¹³ The Tenth Circuit agreed with Paine that the deficient performance criterion of *Strickland* was met and that the state court's denial of relief was an "objectively unreasonable application" of federal precedent under § 2254(d)(1).³¹⁴ Under the standard of *Williams*, the state court's application of the *Strickland* rule to the prisoner's case could be found unreasonable even though the state court identified *Strickland* as the correct governing legal rule.³¹⁵ The Tenth Circuit concluded that because the trial counsel's performance was both "deficient" and "'fell below an objective standard of reasonableness,'"³¹⁶ the state court's affirmation of Paine's conviction constituted an unreasonable application of *Strickland*.³¹⁷ The Tenth Circuit acknowledged that § 2254(d)(1) circumscribed its ability to grant habeas relief³¹⁸ and fully explained how the state court should have applied *Strickland*.³¹⁹

The Tenth Circuit's rationale for finding that the state court unreasonably applied *Strickland* includes two clear examples of inexpertise by petitioner's counsel. First, although the petitioner's counsel "put a BWS theory in play" and the trial court issued a BWS-specific jury instruction, the attorney failed to produce a BWS expert or explain the theory to the jury.³²⁰ Instead, counsel used an expert who specialized in determining defendants' competency to stand trial and neglected to question the expert about BWS or whether the defendant suffered from that condition.³²¹ The Tenth Circuit proclaimed that this failure to offer a BWS expert "effectively eviscerated" the petitioner's self-defense theory.³²² Second, because the reviewing state court in a prior opinion³²³ had focused extensively on the "key" component of the reasonableness of a BWS sufferer's fear in a self-defense claim, the Tenth Circuit found that the failure

psychological conditions of a woman who has suffered physical, sexual, or emotional abuse at the hands of a spouse or lover. . . . This syndrome is sometimes proposed as a defense to justify or mitigate a woman's killing of a man." BLACK'S LAW DICTIONARY 162 (8th ed. 2004).

312. 339 F.3d 1194 (10th Cir. 2003).

313. *Id.* at 1196.

314. *Id.*

315. *Id.* at 1198.

316. *Id.* at 1200 (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

317. *Id.* at 1204.

318. *Id.* at 1198.

319. *Id.* at 1200-05.

320. *Id.* at 1201-02.

321. *Id.* at 1201. The Tenth Circuit opinion further notes that because defense attorneys conceded that this physician was not a BWS expert, such testimony probably would not have been admissible even if obtained by counsel. *Id.*

322. *Id.* at 1204.

323. *Bechtel v. State*, 1992 OK CR 55, 840 P.2d 1.

of Paine's counsel to question a physician he presented as a witness regarding the reasonableness of Paine's fear was objectively unreasonable, even though the witness was not a BWS expert.³²⁴ The Tenth Circuit noted that the prior state case created "the professional standard in Oklahoma for an attorney representing a battered woman claiming self-defense, i.e., the attorney must put on an expert to explain BWS to the jury."³²⁵ Further, the opinion cited the Supreme Court decision in *Wiggins v. Smith*³²⁶ for the proposition that "an attorney's failure to follow 'standard practice'" amounts to objectively unreasonable performance.³²⁷ Because the prior state case held that in Oklahoma the "'key to the defense of self-defense is reasonableness'" within the BWS framework and a "'defendant must show that she had a *reasonable* belief as to the imminence of great bodily harm or death and as to the force necessary to compel it,'"³²⁸

counsel's failure to offer expert BWS testimony to provide context for the jury on the reasonableness of [petitioner's] subjective fear amount[ed] to objectively unreasonable performance. . . . Simply put, counsel failed to do something the [state court] said was *necessary* to mount an effective self-defense claim given the jury's likely misconceptions about BWS.³²⁹

Because Paine "easily cleared" the hurdle of showing that her counsel performed unreasonably,³³⁰ the Tenth Circuit remanded the case to allow the petitioner to produce an expert witness.³³¹ This expert's testimony could determine whether counsel's conduct had a "prejudicial effect" on the trial proceedings, and thus, whether counsel was ineffective under both prongs of *Strickland*.³³² If a BWS expert would testify both that the petitioner was suffering from BWS at the time of the crime and that the petitioner had a reasonable belief that "deadly force was necessary to protect herself from imminent danger of death or great bodily harm,"³³³ the district court was instructed to grant habeas relief.³³⁴

As demonstrated in the above cases, the Tenth Circuit is taking Congress's

324. *Paine*, 339 F.3d at 1202-03.

325. *Id.* at 1202.

326. 539 U.S. 510 (2003).

327. *Paine*, 339 F.3d at 1202 (citing *Wiggins*, 539 U.S. at 523-24).

328. *Id.* at 1199 (quoting *Bechtel*, ¶ 28, 840 P.2d at 10).

329. *Id.* at 1202.

330. *Id.* at 1201.

331. *Id.* at 1205.

332. *Id.* at 1204.

333. *Id.*

334. *Id.* at 1205.

command and the Supreme Court's interpretation of § 2254(d)(1) seriously; the state courts' application of *Strickland* in these cases does appear "unreasonable," rather than simply erroneous or incorrect.³³⁵

V. Analysis

A. The Tenth Circuit Is Performing as Commanded

Since AEDPA's enactment, the Tenth Circuit has granted habeas relief in relatively few ineffective assistance of counsel cases.³³⁶ In addition, the Tenth Circuit has only infrequently found unreasonable applications of or applications contrary to federal precedent with other habeas claims. These claims include: sufficiency of the evidence under *Jackson v. Virginia*,³³⁷ harmless error analysis under *Chapman v. California*³³⁸ and *Brecht v. Abrahamson*,³³⁹ prosecution's suppression of evidence under *Brady v. Maryland*,³⁴⁰ violation of the

335. See *Williams v. Taylor*, 529 U.S. 362, 411 (2000).

336. See discussion *supra* Part IV.

337. See *Torres v. Lytle*, No. 03-2098, 2004 WL 103557, at *3 (10th Cir. Jan. 23, 2004) (unpub. op.) (finding state court application of *Jackson v. Virginia*, 443 U.S. 307 (1979), "contrary to" federal precedent, when the state court determined that sufficient evidence was present for a conviction solely on account of a lack of evidence to the contrary).

338. 386 U.S. 18 (1967).

339. 507 U.S. 619 (1993); see *Johnson v. Gibson*, 254 F.3d 1155, 1165-66 (10th Cir. 2001) (holding that the OCCA's conclusion that the court's response to a jury question was harmless error was an "unreasonable application" of *Brecht*, 507 U.S. 619, or *Simmons v. South Carolina*, 512 U.S. 154 (1994)); *Herrera v. LeMaster*, 225 F.3d 1176, 1178 (10th Cir. 2000), (holding that state court's failure to apply correct governing rule in finding that admission of evidence seized in violation of the Fourth Amendment was harmless error was "contrary to" clearly established precedent), *rev'd en banc*, 301 F.3d 1192 (10th Cir. 2002); *Pickens v. Gibson*, 206 F.3d 988, 996-97 (10th Cir. 2000) (holding that the OCCA's determination of harmless error of defendant's videotaped confession under *Chapman*, 386 U.S. 18, was an "unreasonable application" of Supreme Court precedent).

340. 373 U.S. 83 (1963); see *Moore v. Gibson*, 195 F.3d 1152, 1165 (10th Cir. 1999) (2-1 decision) (holding that the OCCA's determination that undisclosed evidence was immaterial was an unreasonable application of *Brady* when the state's case was entirely circumstantial and a reasonable probability existed that proof that the state's evidence was planted against the defendant would change the outcome of the proceeding). The Tenth Circuit is still unsettled as to whether a related issue, a challenge to the sufficiency of the evidence, is governed by § 2254(d)(1) as a question of law or by § 2254(d)(2) as a question of fact. See *Turrentine v. Mullin*, 390 F.3d 1181, 1197 (10th Cir. 2004) (citing *Torres v. Mullin*, 317 F.3d 1145, 1151 (10th Cir. 2003); *Moore*, 195 F.3d at 1176-77); see also *Thomas v. Gibson*, 218 F.3d 1213, 1227-29 (10th Cir. 2000) (finding "[e]ven in light of the heightened deference accorded the decisions of state courts under the provisions of the AEDPA," the OCCA's determination of sufficient evidence to allow a death penalty aggravator was unreasonable under either § 2254(d)(2), which is the provision the Tenth Circuit relied upon, or § 2254(d)(1)).

Confrontation Clause under *Ohio v. Roberts*,³⁴¹ and due process violations,³⁴² including the denial of lesser-included offense instructions to the jury under *Beck v. Alabama*.³⁴³ The Tenth Circuit has granted habeas relief, in opposition to the state appellate court's ruling, in only a small number of cases for each of these types of claims.

The Tenth Circuit's holdings in these cases may appeal to both the lawyer and the layperson — neglecting to inform the client of a critical element of the

341. 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 531 U.S. 36 (2004); *see* Cook v. McKune, 323 F.3d 825, 840 (10th Cir. 2003) (holding that the state court's application of *Roberts* was "unreasonable," when state court found no Sixth Amendment violation in the admission of preliminary testimony by an absent witness).

342. *See* Mollett v. Mullin, 348 F.3d 902, 922 (10th Cir. 2003) (relying on *Johnson*, 254 F.3d at 1165, in affirming the district court's grant of habeas relief because of the OCCA's "unreasonable" and "contrary to" application of Fourteenth Amendment and *Simmons*, 512 U.S. at 171, when the state court found no due process violation in a trial court's refusal to explain to the jury the difference under Oklahoma law between life imprisonment and life imprisonment without parole); *Beem v. McKune*, 278 F.3d 1108, 1114 (10th Cir. 2002) (vacating defendants' convictions and sentences when state court found no Fourteenth Amendment violation and only harmless error after defendants were sentenced for crimes "for which they were not charged, tried, or convicted"); *Rojem v. Gibson*, 245 F.3d 1130, 1138 (10th Cir. 2001) (affirming district court's holding that the OCCA's application of federal precedent to deny relief for Fourteenth and Eighth Amendment violations was both "contrary to" and an "unreasonable application" of clearly established federal law when the jury was permitted to impose the death penalty without a weighing-of-factors instruction and by applying its instructions in a manner that prevented it from considering mitigating evidence); *Paxton v. Ward*, 199 F.3d 1197, 1211, 1216-20 (10th Cir. 1999) (affirming the district court's order of a new sentencing proceeding using a pre-*Williams* interpretation of § 2254(d)(1) because (1) the state court's analysis of state's closing argument's effect on defendant's denial of fundamental fairness was both "contrary to" governing Supreme Court authority and based on an "unreasonable" view of the state court proceedings, where the argument prejudicially infringed on defendant's constitutional rights and the state court ignored the prosecutor's deliberate misrepresentations; (2) the state court's affirmance of defendant's death sentence despite the denial of the due process right to explain or deny evidence against him and his right to present mitigating evidence was "contrary to" clearly established federal law; and (3) the state court's finding that defendant's Confrontation Clause rights had not been violated was based on an "unreasonable determination" of the facts in light of the evidence presented at trial (invoking § 2254(d)(2))).

343. 447 U.S. 625 (1980); *see Turrentine*, 390 F.3d at 1193-94 (vacating petitioner's conviction and sentence on two of four counts of first degree murder because the OCCA's application of a harmless error standard other than *Chapman*, 386 U.S. at 18, was "contrary to" clearly established federal law and the improper jury instructions were a violation of *Beck*); *Mitchell v. Gibson*, 262 F.3d 1036, 1050 (10th Cir. 2001) (holding that the state appellate court's conclusion that the defendant was precluded by state law from relying on earlier testimony to request lesser included jury instructions was an "unreasonable application" of *Beck*, but ultimately granting conditional habeas relief on alternate due process grounds for which no adjudication on the merits had occurred).

crime³⁴⁴ or expecting the accused defendant to supply his own alibi defense³⁴⁵ is flagrantly deficient — but actual trial conduct is not what the Tenth Circuit primarily focuses on under § 2254(d)(1). Rather, the Tenth Circuit principally examines how the state-level appellate court applied the relevant governing legal rule to the trial proceedings and underlying facts, and whether that application is objectively unreasonable or contrary to federal precedent. The Tenth Circuit’s decisions indicate a continued contraction of the availability of habeas relief to state prisoners.³⁴⁶ The cases above show that a petitioner attempting to convince the Tenth Circuit that it should grant habeas relief is unlikely to be successful unless the Tenth Circuit finds that the state court overtly misapplied federal law.³⁴⁷ Moreover, the relief granted may not be the sort the petitioner desires; for instance, if the Tenth Circuit’s grant applies only to the penalty phase of the proceedings, the grant will not upset the state petitioner’s original conviction and he will likely suffer severe consequences notwithstanding the habeas relief as to the term of his sentence.

B. Important Considerations for the Tenth Circuit Habeas Petitioner

Even if the “unreasonable application” or “contrary to” finding is plausible for the petitioner’s case, the following factors continue to weigh against a state prisoner seeking federal habeas relief in the U.S. Court of Appeals for the Tenth Circuit: (1) the reasons Tenth Circuit judges commonly provide for denying habeas relief; (2) the federal courts’ desire to fulfill the policy goals of § 2254(d)(1);³⁴⁸ and (3) the increasing number of federal habeas petitions filed, which indicates an increasingly overloaded docket and an incentive for the federal courts to deny habeas relief.³⁴⁹ Thus, a state petitioner seeking federal habeas relief will have a difficult time convincing the Tenth Circuit that the state court decision was “unreasonable” or “contrary to” clearly established federal law. In addition, special considerations emerge from the analysis of habeas claims based on ineffective assistance of counsel within the Tenth Circuit.

344. See *Miller v. Champion*, 161 F.3d 1249, 1254 (10th Cir. 1998).

345. See *Holmes v. McKune*, No. 01-3004, 2003 WL 220496, at *7 (10th Cir. Jan. 31, 2003) (unpub. op.).

346. Barr, *supra* note 30, at 500 (commenting upon the Tenth Circuit’s holdings in regard to the harmless-error and retroactivity doctrines).

347. See discussion *supra* Part IV.

348. *Williams v. Taylor*, 529 U.S. 362, 436 (2000).

349. See discussion *infra* Part V.B.3.

1. Dissension Within the Ranks of the Tenth Circuit

The U.S. Supreme Court decided only one case dealing with § 2254(d)(1) during the 2004 Term,³⁵⁰ and no major changes to the habeas statute have been proposed. Thus, habeas counsel in the Tenth Circuit can rely on the standards and rationales set forth thus far. In addition, a habeas attorney can benefit from studying not only the majority holdings of Tenth Circuit cases, as discussed above, but also the strong dissenting opinions, which argue that the state appellate courts' denials of relief should be upheld. These dissenting opinions indicate grants of relief issued with a two-to-one majority, clearly hinting that the state court decisions could plausibly be read as either acceptable under or violative of § 2254(d)(1) and that a petitioner cannot be guaranteed a grant of habeas relief from the Tenth Circuit, no matter how compelling his particular facts may appear.³⁵¹ The opinions' mention of "reasonableness" and "speculation" also envisions a certain degree of flexibility and uncertainty in the Tenth Circuit's application of the AEDPA standard, which further compounds the habeas petitioner's improbability of obtaining relief under § 2254(d)(1).

In *Mayes v. Gibson*, the dissenting opinion disagreed with the majority's grant of an evidentiary hearing because the dissent believed that the eleven testimonial affidavits proffered by the defendant at the postconviction hearing were inadequate to determine the prejudicial effect of their absence under *Strickland*.³⁵² The affiants included family members and friends who indicated that they would have testified, if requested, about the defendant's kind behavior, work ethic, and history of being abused.³⁵³ The dissent agreed with the OCCA and the district court in a "subjective" determination that presenting affidavits to "individual jurists, each bringing his or her own professional and life experiences to bear on the issue of what a jury would have concluded," probably would not have affected the outcome of *Mayes's* sentencing proceeding.³⁵⁴ Like the majority, the dissent focused on the Sixth Amendment

350. In *Brown v. Payton*, 544 U.S. 133 (2005), the Supreme Court reversed the Ninth Circuit and determined that the California Supreme Court was not "objectively unreasonable" in finding that the state's "catch-all" mitigation instruction, which directs the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," is constitutional as applied to post-crime mitigation evidence.

351. See *Mayes v. Gibson*, 210 F.3d 1284, 1294 (10th Cir. 2000) (Brorby, J., dissenting); *Battenfield v. Gibson*, 236 F.3d 1215, 1236-39 (10th Cir. 2001) (Kelly, J., concurring in part and dissenting in part); *Hooper v. Mullin*, 314 F.3d 1162, 1178-80 (10th Cir. 2002) (Kelly, J., concurring in part and dissenting in part).

352. *Mayes*, 210 F.3d at 1294 (Brorby, J., dissenting).

353. *Id.* at 1289 (majority opinion).

354. *Id.* at 1294 (Brorby, J., dissenting).

inquiry as one of “reasonableness.”³⁵⁵ Unlike the majority, the dissent found reasonable the OCCA’s belief that producing mitigating affidavits would not have changed the jurors’ decision.³⁵⁶

Essentially, the dissenting opinion argued that a determination of prejudicial effect cannot be sufficiently objective for the court of appeals to make such a conclusion regarding a decision that has already fully addressed the claims. This view makes sense because inherently subjective factors necessarily will contribute to the “objective” standard of reasonableness. In a § 2254(d)(1) ineffective assistance of counsel claim, the Tenth Circuit will make important reasonableness determinations at several levels. First, the Tenth Circuit examines the proceedings below and decides whether defense counsel’s conduct was ineffective under *Strickland*, using reasonableness as a criterion of both the deficiency and prejudicial effect prongs.³⁵⁷ Second, relying on the state court’s adjudication on the merits, the court must determine whether the state court’s application of *Strickland* was unreasonable under § 2254(d)(1). Finally, though not explicitly provided for by § 2254(d)(1), the Tenth Circuit will examine the intervening district court opinion, particularly if the district court has granted habeas corpus relief. At each of these levels, the courts, and the individual judges within them, can conceivably disagree regarding this element of “reasonableness”; no end exists to the individual observations and opinions that will go into forming this assessment. The *Mayer* dissent highlights the inherent flexibility and discretion that courts possess regarding both the AEDPA standard and the underlying federal precedent. The deference that § 2254(d)(1) compels, combined with the reasonableness evaluations underlying application of both that standard and the governing legal rule, will be doubly complex. The dissenting opinion in *Mayer* demonstrates that although the AEDPA standard is very high, its application in the courts of appeals depends on various factors. Moreover, even if a habeas petitioner’s claim fits inside an airtight theory or fact record, the § 2254(d)(1) proscription on de novo review does not eliminate the subjectivity of each layer of analysis.

Besides these reasonableness determinations, the language of this and other dissents addresses the presence of “speculation” in the Tenth Circuit opinions and the right of the federal court to impose its analyses, which by necessity

355. *Id.* at 1289 (majority opinion) (“The Sixth Amendment imposes on counsel ‘a duty to make *reasonable* investigations or to make a *reasonable* decision that makes particular investigations unnecessary.’” (quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (emphasis added))); *id.* at 1294 (Borby, J., dissenting) (“The United States Supreme Court has directed us to determine whether there is a *reasonable probability . . .*”).

356. *Id.* at 1294 (Borby, J., dissenting).

357. *Battenfield v. Gibson*, 236 F.3d 1215, 1226 (10th Cir. 2001); *see also supra* notes 117-19 and accompanying text.

often have hypothetical elements, on claims that state courts have denied after a full adjudication on the merits.³⁵⁸ A comparison of the discussion of the federal courts' speculation over the merits of a *Strickland* claim in *Mayer*³⁵⁹ with corresponding discussions in the dissenting opinions in *Battenfield v. Gibson*³⁶⁰ and *Hooper v. Mullin*³⁶¹ is instructive. In *Mayer*, the majority remanded the petitioner's ineffective assistance of counsel claim for an evidentiary hearing because the Tenth Circuit could not determine from the record why the defense counsel failed to examine mitigating evidence.³⁶² The court declared that it "simply cannot condone the administration of the death penalty on the basis of speculation."³⁶³

But while in *Mayer* the Tenth Circuit avowedly could not rely on speculation to determine whether the failure met *Strickland*'s deficiency prong, in *Battenfield*, also a death penalty case, the court acknowledged its guesswork in finding that counsel's failure to investigate mitigating evidence had satisfied the prejudice prong.³⁶⁴ Rebutting the dissent's assertion that the finding of prejudicial effect was "nothing more than speculation,"³⁶⁵ the *Battenfield* majority defended its conclusion by arguing that (1) under the circumstances, they had "little choice" but to speculate, and (2) the dissent must also be speculating by finding a result to the contrary.³⁶⁶ In addition, even though the dissent in *Hooper* avoided using the term "speculative," the majority's speculation about whether the failure met the deficient performance prong of *Strickland* was certainly implied.³⁶⁷ Essentially, the *Hooper* dissent argued that the majority found defense counsel's decision to place the second doctor's psychological report into evidence deficient because the decision ultimately harmed the defendant.³⁶⁸ The dissent presented an alternative scenario, however, by asking whether counsel would still be deemed ineffective if the state had not been able to rebut the report and the defense had one more mitigating factor instead of one fewer.³⁶⁹ The *Hooper* dissent pointed out that

358. See *infra* notes 364-70 and accompanying text.

359. *Mayer*, 210 F.3d at 1289-90.

360. *Battenfield*, 236 F.3d at 1238 (Kelly, J., concurring in part and dissenting in part).

361. 314 F.3d 1162, 1179 (10th Cir. 2002) (Kelly, J., concurring in part and dissenting in part).

362. *Mayer*, 210 F.3d at 1289-91.

363. *Id.* at 1289-90.

364. *Battenfield*, 236 F.3d at 1235 n.13.

365. *Id.* at 1238 (Kelly, J., concurring in part and dissenting in part).

366. *Id.* at 1235 n.13.

367. *Hooper v. Mullin*, 314 F.3d 1162, 1179 (10th Cir. 2002) (Kelly, J., concurring in part and dissenting in part).

368. *Id.*

369. *Id.*

“[t]he trial of a case is not a ‘do it by the numbers’ exercise, rather it is uncertain and one uses what one has.”³⁷⁰ These cases do not hold that overt speculation about the deficiency prong of *Strickland* is inappropriate while speculation in regard to prejudicial effect is proper. Rather, these open references to the inherent speculation of federal court review of habeas corpus petitions emphasize yet again how even when the Tenth Circuit finds grounds for habeas relief under § 2254(d)(1), the court itself recognizes that in many cases a majority could just as easily have denied relief to the state prisoner.

The rationale of these dissenting opinions is both intrinsically logical and in agreement with the Tenth Circuit’s directives from Congress and the Supreme Court. Although the explicit statements of this reasoning warranted a deviation from the majority in *Battenfield* and *Hooper*, these statements bode poorly for forthcoming habeas petitioners in the Tenth Circuit. In light of the tenuous line between reasonableness and the lack thereof, the presumption these dissents give to the appropriate use of federal precedent by state courts is both well-founded and viable, as petitioners will likely see in future habeas cases.

These cases also indicate that the Tenth Circuit is most strongly inclined to grant habeas relief because of an unreasonable application of *Strickland* for deficient conduct that goes beyond a failure to investigate mitigating evidence. In *Miller v. Champion*,³⁷¹ *Holmes v. McKune*,³⁷² and *Paine v. Massie*,³⁷³ cases where the defense attorneys failed to inform the defendant of a critical element of his crime,³⁷⁴ put the burden of producing alibi witnesses on the defendant,³⁷⁵ and neglected to present a “key” element of the defense,³⁷⁶ respectively, the Tenth Circuit unanimously granted relief. But in *Mayes*, *Battenfield*, and *Hooper*, cases that revolved around counsel’s failure to investigate and present mitigating evidence, the Tenth Circuit split.³⁷⁷ Therefore, the Tenth Circuit lacks unity where the ineffective assistance of counsel centers on the investigation and presentation of mitigating evidence, rather than on another, potentially even more injurious form of deficient and prejudicial conduct.

370. *Id.*

371. 161 F.3d 1249 (10th Cir. 1998).

372. No. 01-3004, 2003 WL 220496 (10th Cir. Jan. 31, 2003) (unpub. op.).

373. 339 F.3d 1194 (10th Cir. 2003).

374. *Miller*, 161 F.3d at 1256.

375. *Holmes*, 2003 WL 220496, at *10.

376. *Paine*, 339 F.3d at 1202.

377. *Mayes v. Gibson*, 210 F.3d 1284, 1289 (10th Cir. 2000) (2-1 decision); *Battenfield v. Gibson*, 236 F.3d 1215, 1227-28 (10th Cir. 2001); *Hooper v. Mullin*, 314 F.3d 1162, 1171 (10th Cir. 2002).

2. *Policy Issues at Stake: Comity, Finality, and Efficiency*

The U.S. Supreme Court has interpreted § 2254(d)(1) under the belief that Congress wished to advance the principles of “comity, finality, and federalism,”³⁷⁸ and this understanding continues to shape AEDPA jurisprudence today. Whether on the court of appeals level, as with the Tenth Circuit’s stated policy of deferring to a state court’s result even absent explanation of the state court’s rationale,³⁷⁹ or from the Supreme Court, as seen in the Court’s reprimand of a circuit court’s lack of deference in *Woodford v. Visciotti*,³⁸⁰ courts’ mutual recognition and respect is a recurring theme of habeas corpus, especially post-AEDPA. This concept of comity is innately tied to cooperative federalism concerns, as the perpetual tension of federal courts’ oversight of state court decisions contrasts with the deference federal courts show state courts, as well as with the finality one court must impart to another’s decisions. A related consideration is recognizing the parity of state courts in their ability and willingness to protect federal and constitutional rights.

Federal review of state court convictions is a contentious and complex process that fosters resentment on both the state and federal levels. The deference prescribed by AEDPA³⁸¹ has raised constitutionality issues, because if the Constitution provides for the federal courts to have jurisdiction over all cases in law and equity “arising under” federal law, legitimate arguments exist that federal courts should be entitled to independently determine federal law.³⁸² State court judges, in turn, do not necessarily appreciate federal habeas corpus review’s implicit presumption of their incompetence, as a single federal judge may overturn the decision of the state’s highest court.³⁸³ AEDPA’s standard

proves dauntingly difficult to apply. To find a state-court decision not wrong but unreasonably wrong, assuming this distinction makes sense in the first place, involves a highly fact-sensitive — and, it

378. *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

379. *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999).

380. 537 U.S. 19, 24 (2002) (per curiam); see discussion *supra* Part III.B.3.

381. See *Moore v. Gibson*, 195 F.3d 1152, 1164 (10th Cir. 1999) (2-1 decision) (“AEDPA thereby increases the degree of deference afforded to state court adjudications.”) (citations omitted).

382. See 2 HERTZ & LIEBMAN, *supra* note 2, § 32.4, at 1462-97 (discussing the constitutional problems that are present within § 2254(d)(1)’s treatment of federal habeas and the *Williams* decision). President Clinton de-emphasized any constitutional problems with § 2254(d)(1) possibly proscribing federal courts from “making an independent determination about ‘what the law is’ . . . I expect that the courts . . . will read [§ 2254(d)(1)] to permit independent Federal court review of constitutional claims.” President’s Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, *supra* note 53, at 721.

383. Flango & McKenna, *supra* note 71, at 238; see also Khandelwal, *supra* note 32, at 435.

should be emphasized, also highly politically sensitive — judgment. To render such a judgment will almost inevitably be to impugn the integrity or competence of state-court judges. The federal judiciary understandably hesitates to send this implicit message.³⁸⁴

The § 2254(d)(1) standard, and AEDPA as a whole, indicates that state courts have more power in the habeas sphere than ever before. The heightened influence of state courts, however, is tempered by the increased responsibility required of state courts if they wish to keep their decisions intact. Section 2254(d)(1) mandates that a federal court center its examination of a habeas claim on the state court's analysis and the primary question of whether the state arrived at the proper result.³⁸⁵ In this way, a federal court such as the U.S. Court of Appeals for the Tenth Circuit builds its own analysis on the basis of the state court's prior adjudication of the claim. Though habeas relief is in a period of constriction, the principle that a federal habeas court must look beyond the language of the state court's opinion into the merits of the petitioner's claim and the constitutionality of the sentence remains the "touchstone" of federal habeas review.³⁸⁶ Along with the other circuits, the Tenth Circuit has strictly interpreted the AEDPA decisions of the Rehnquist Court, "making it increasingly difficult for state prisoners to obtain habeas relief. . . . While the net effects of [two Tenth Circuit decisions] may be small by themselves, they are representative of a larger trend within the American judiciary of attacking the foundations of the Great Writ."³⁸⁷

In addition, no clear line exists between a state court's "reasonable" application of federal law and an application that the federal court finds objectively "unreasonable." If a decision erroneously applies federal precedent, it is an open question regarding "what increment of error renders that misapplication unreasonable In practice, the answer at times must be: whatever increment of error a federal habeas court finds necessary to justify its decision to issue the writ in circumstances where justice manifestly requires it."³⁸⁸ This decision to issue the writ at the federal level is not a common one, as evidenced by the fact that the majority of habeas claims that reach the circuit courts of appeals are disposed of via a dismissal or an affirmance of the district court's denial of relief.³⁸⁹ Cases such as those from the Tenth Circuit discussed above, however, demonstrate that such grants of relief under § 2254(d)(1) can

384. Sloane, *supra* note 3, at 618 (footnote omitted).

385. *Id.* at 634.

386. *Id.* at 632.

387. Barr, *supra* note 30, at 527 (referencing *Herrera v. LeMaster*, 301 F.3d 1192 (10th Cir. 2002); *Johnson v. McKune*, 288 F.3d 1187 (10th Cir. 2002)).

388. Sloane, *supra* note 3, at 618 (citation omitted).

389. Flango & McKenna, *supra* note 71, at 238.

and do take place.³⁹⁰ The language that appears in both the majority and dissenting opinions of the Tenth Circuit reflects the court's hesitation to tread on the decisions of the "best available thinking on the claim at bar — the prior adjudication of that claim in state court."³⁹¹

In *Battenfield* and *Hooper*, the dissents outlined convincing reasons for disagreement with the majority's declaration that the state court "unreasonably applied" *Strickland*.³⁹² Much of the rationale in these dissents is sound and appears to fit within an overarching synthesis of deference to state courts and restriction of habeas relief even beyond applicability to claims of ineffective assistance of counsel. In *Battenfield*, the dissent argued that the majority's grant of the writ was not consistent with the AEDPA standard of review because the petitioner was only attempting to correct his own error in judgment — that is, his knowing and intelligent waiver of the right to present mitigating evidence.³⁹³ Because a defendant may waive this right³⁹⁴ and "[t]he failure to present mitigating evidence is not per se ineffective assistance of counsel,"³⁹⁵ the dissent found that the Tenth Circuit overstepped its boundaries in perceiving the attorney's conduct as deficient.³⁹⁶ The dissent concluded that the Tenth Circuit's unwillingness to agree with the state court's decision that the defendant waived his right to present mitigating evidence was not in accordance with the "proper, and properly limited, function of a federal habeas court in this context," which is "to insure that the death penalty is not imposed in violation of the Constitution."³⁹⁷ Further, the dissent found that the majority violated the deferential standard of review of § 2254(d)(1) because the state court was "unassailably correct" in finding that *Battenfield* himself caused the mitigating evidence not to be presented,³⁹⁸ and the majority's speculation to the contrary did not render the state court's application of *Strickland* "unreasonable."³⁹⁹ The tone of this opinion suggests that the Tenth Circuit's disagreement with the state court's denial is a significant event. The state prisoner filing for federal habeas relief can take from this opinion the knowledge that even if the Tenth Circuit

390. See Amsterdam, *supra* note 2, at viii-xii, for a primer on how attorneys can increase their chances of receiving habeas relief from generally unwilling federal judges.

391. Sloane, *supra* note 3, at 634 (citing Yackle, *Primer*, *supra* note 48, at 383).

392. *Hooper v. Mullin*, 314 F.3d 1162, 1178-80 (10th Cir. 2002) (Kelly, J., concurring in part and dissenting in part); *Battenfield v. Gibson*, 236 F.3d 1215, 1236-39 (10th Cir. 2001) (Kelly, J., concurring in part and dissenting in part).

393. *Battenfield*, 236 F.3d at 1236 (Kelly, J., concurring in part and dissenting in part).

394. *Id.* at 1238.

395. *Id.* at 1236 (citing *Brecheen v. Reynolds*, 41 F.3d 1343, 1366 (10th Cir. 1994)).

396. *Id.*

397. *Id.* at 1236, 1239 (citing *Herrera v. Collins*, 506 U.S. 390, 400-01 (1993)).

398. *Id.* at 1238.

399. *Id.* at 1236-37.

grants habeas corpus relief under § 2254(d)(1), the court does not take such an action lightly and will hesitate before substituting its judgment for that of the state courts.

The *Hooper* dissent again stresses the possible impropriety of finding a state court application of *Strickland* unreasonable under § 2254(d)(1) when the state court has fully considered the entire sentencing proceeding and the facts on record support the state court's conclusion.⁴⁰⁰ The majority opinion, though referring to the circumscription AEDPA places on its habeas review⁴⁰¹ and the Tenth Circuit's presumption that counsel may have used a sound trial strategy,⁴⁰² found that the defense counsel made an uninformed choice rather than choosing between two plausible alternatives.⁴⁰³ This characterization is the most significant point of contention between the majority and the dissent; the dissenting opinion argued that each of the counsel's alternatives — to introduce the medical witnesses and reports, or to not introduce them — was a "reasonable strategic choice."⁴⁰⁴ Therefore, under applicable Supreme Court precedent, defense counsel's actions were not ineffective simply because the defendant would, in hindsight, have chosen a different route.⁴⁰⁵ The dissenting opinion, while admitting that Hooper's defense counsel did not make a full investigation, nonetheless noted that § 2254(d)(1) requires a dual level of deference toward an ineffective assistance of counsel claim because "[f]irst, only if [the federal court] could conclude that the [state court's] application of *Strickland* was objectively unreasonable . . . is habeas relief on this claim warranted. . . . Second, under *Strickland*, a reviewing court presumes that counsel's decisions were an exercise of reasonable professional judgment"⁴⁰⁶ The dissent focused on the thorough attention the state court paid to the claim by "carefully [applying] *Strickland* from start to finish"⁴⁰⁷ and noted that the Supreme Court mandated in *Visciotti* that a state court's determination be "given the benefit of the doubt."⁴⁰⁸ The *Hooper* dissent echoes that of *Battenfield* in reflecting that the comity and deference mandated by § 2254(d)(1) weigh heavily against the Tenth Circuit finding a state court's application of law "unreasonable" when one could arguably see it as a "mere disagreement."⁴⁰⁹

400. *Hooper v. Mullin*, 314 F.3d 1162, 1178-80 (10th Cir. 2002) (Kelly, J., concurring in part and dissenting in part).

401. *Id.* at 1169 (majority opinion) (citing *Bell v. Cone*, 535 U.S. 685 (2002)).

402. *Id.*

403. *Id.* at 1171 & n.6.

404. *Id.* at 1179 (Kelly, J., concurring in part and dissenting in part).

405. *Id.*

406. *Id.* at 1178-79 (citation omitted).

407. *Id.* at 1180.

408. *Id.* (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

409. *Id.* See *Moore v. Gibson*, 195 F.3d 1152, 1181-83 (10th Cir. 1999) (Borby, J.,

In contrast to AEDPA's considerations of comity and finality, which the Tenth Circuit's majority and dissenting opinions explicitly contemplated, AEDPA will likely have little effect on the efficiency of habeas corpus litigation in the Tenth Circuit or anywhere else in the country. This does not necessarily mean, however, that efficiency concerns will not affect the Tenth Circuit's perspective in addressing state prisoners' petitions. Although AEDPA's statute of limitations, exhaustion requirement, and prohibition on successive petitions⁴¹⁰ seemed bound to streamline habeas proceedings and reduce the time between the filing and disposition of a habeas petition, much of the delay for state prisoners actually occurs at the state level, where AEDPA does not prescribe procedural changes.⁴¹¹ No reason exists to believe that AEDPA will significantly reduce the typical five-to-six-year period for a state prisoner to complete both the state court direct appeal and the state post-conviction relief processes.⁴¹² Only after the state prisoner has exhausted these state requirements may he file a habeas petition in federal district court under AEDPA.⁴¹³ From an efficiency standpoint, the extended period required for exhaustion seems a more significant concern than the ten months that a typical pre-AEDPA state prisoner's federal habeas petition spent between filing and disposition in a district court,⁴¹⁴ or the six and a half months that a pre-AEDPA federal habeas petition took to progress through a circuit court.⁴¹⁵ Efficiency of processing individual claims appears primed for greater alteration at the state, rather than the federal, level.⁴¹⁶ The presumed delays associated with habeas litigation, however, are apt to weigh heavily in the minds of the federal

dissenting), for an additional example of disagreement with the majority's "misapplication" of the AEDPA standard in granting habeas relief and discussion of the inherent speculation required in habeas review. The dissent notes that the Tenth Circuit "is not to reevaluate the evidence or second-guess the [state] court's conclusion To delve beyond [analysis of whether state court applied the correct rule of law] is to substitute this court's speculation as to the outcome of Petitioner's trial I do not believe the AEDPA sanctions such interference." *Id.* at 1182.

410. BJS SPECIAL REPORT, *supra* note 60, at 4.

411. HANSON & DALEY, *supra* note 224, at 12-13.

412. *Id.* at 12 (nearly five years); Cheesman et al., *A Tale of Two Laws*, *supra* note 59, at 93 (six years).

413. 28 U.S.C. § 2254(b) (2000); Cheesman et al., *A Tale of Two Laws*, *supra* note 59, at 93.

414. JOHN SCALIA, U.S. DEP'T OF JUSTICE, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980-96, at 7 tbl.7 (1997). A state prisoner's death penalty habeas corpus petition, however, averaged nearly twenty-two months to process in district court. *Id.*

415. *Id.* at 13 tbl.12. A state prisoner's death penalty habeas corpus petition, however, averaged over eleven months to process in the U.S. Courts of Appeals. *Id.*

416. Considerations regarding individual petitions may seem more or less important, depending on one's viewpoint, in light of the increasing number of federal habeas petitions filed by state prisoners since AEDPA's enactment. See discussion *infra* Part V.B.3.

judiciary, even if the problem is more pressing at the state level. Although the Tenth Circuit has not expressly discussed the concern for efficiency, in combination with reluctance to upstage the state courts or to weaken the finality afforded to the state courts' decisions, these policy considerations signify an escalating struggle for state prisoners seeking habeas relief.

3. AEDPA: For Better or for Worse?

Congress designed AEDPA not only to address the above jurisprudential concerns, but also to reduce the volume of habeas litigation in the United States. After the enactment of § 2254(d)(1) and the other deferential provisions of AEDPA, however, a "sudden and unanticipated surge"⁴¹⁷ occurred in both the rate and quantity of federal habeas petitions filed by state inmates.⁴¹⁸ Given the federal judiciary's requisite consideration of practicalities and externalities, this increase in petitions forecasts a further reduction of a state habeas petitioner's already dwindling chances of obtaining relief from the Tenth Circuit. In 2000, state prison inmates filed fifty percent more habeas petitions than in 1995.⁴¹⁹ Although one may attribute a large increase in petitions filed in 1997 to the one-year postconviction time limit required by AEDPA's enactment in 1996,⁴²⁰ the reason for the continuing rate of increase in petitions is not clear.⁴²¹ In 1991, the average number of habeas corpus petitions filed in the United States was fourteen per thousand state prisoners.⁴²² By 2000, however, the average number of habeas petitions filed in the U.S. had increased to seventeen per thousand state inmates.⁴²³ Although other factors are certainly at play in this substantial increase of petitions, AEDPA's major alteration of federal courts' review is unquestionably a cause of prisoners' willingness to expend time and resources

417. Cheesman et al., *A Tale of Two Laws*, *supra* note 59, at 92.

418. BJS SPECIAL REPORT, *supra* note 60, at 1, 4.

419. *See id.* at 2 tbl.2. In 2000, state prison inmates filed 21,345 habeas petitions compared to 13,627 in 1995. *Id.*

420. Cheesman et al., *Prisoner Litigation*, *supra* note 18, at 3.

421. *See generally* Cheesman et al., *A Tale of Two Laws*, *supra* note 59, at 90, for a somewhat negative prediction of the long-term effect of AEDPA ("[AEDPA] . . . is judged to have virtually no impact."). The article also notes the comparative success of another congressional reform of state prisoner litigation, the Prisoner Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321-66, which was also enacted in 1996. *Id.* at 94. The PLRA was designed to reduce the number of state prisoner civil rights lawsuits, and thus far it has met its goal more successfully than AEDPA. *Id.* at 96. Unlike habeas corpus petitions, after the enactment of PLRA, both the rate at which state and federal prisoners filed civil rights petitions and the number of those petitions filed decreased dramatically. BJS SPECIAL REPORT, *supra* note 60, at 4. AEDPA does not appear to have affected habeas corpus petitions filed by federal prisoners. *Id.* at 7.

422. HANSON & DALEY, *supra* note 224, at 8-9.

423. BJS SPECIAL REPORT, *supra* note 60, at 1.

on potentially fruitless applications for writs of habeas relief.⁴²⁴ One study estimates that AEDPA's passage has actually resulted in about one additional habeas corpus petition filing each month for every 3400 state prisoners.⁴²⁵

The Tenth Circuit was no exception to the national increase of federal habeas petitions filed by state prisoners. In 1991, when the average rate was fourteen petitions per thousand state prisoners, Oklahoma and New Mexico were above average, with seventeen petitions filed for every thousand state prisoners; Wyoming also had an above-average filing rate with fifteen petitions per thousand state prisoners.⁴²⁶ Colorado, Kansas, and Utah had below-average filing rates, with eleven, eleven, and eight petitions per thousand state prisoners, respectively.⁴²⁷ Yet by 2000, the states that comprise the Tenth Circuit had increased the sum of their averages from seventy-nine petitions to one hundred thirty per thousand state prisoners, even though Wyoming went from being above the 1991 average of fourteen to below it in 2000, with nine petitions per thousand state prisoners.⁴²⁸ Oklahoma and New Mexico remained above average with twenty-six and sixty petitions per thousand state prisoners, respectively.⁴²⁹ Colorado, Kansas, and Utah maintained below-average filing rates with sixteen, thirteen, and six petitions per thousand state prisoners, respectively.⁴³⁰ Since the enactment of AEDPA, courts within the Tenth Circuit have had more, not less, habeas litigation to address, and such an increase is an unlikely incentive for the federal courts to buck the mandate of Congress and actively seek to find "contrary to" or "unreasonable application" state court decisions under § 2254(d)(1).

In addition to the doubts that these increases have raised regarding the effectiveness of AEDPA in the face of the statute's "almost complete lack of success . . . in achieving [its] policy objectives,"⁴³¹ an argument exists that the extremely high standard AEDPA installed was unnecessary. The year before AEDPA was enacted, the federal appellate courts disposed of over 14,000 state and federal prisoner petitions, but in 94% of those cases the appellate courts simply dismissed the case or affirmed the district court's ruling.⁴³² In addition, even though newspaper headlines often exclaim that death penalty litigation and

424. *Id.* at 5.

425. *Id.* at 7. The increase in the number of petitions resulting from the increased rate of filing, however, was supplemented by the increase on account of the major ongoing rise in state prison populations. *Id.*

426. HANSON & DALEY, *supra* note 224, at 8-9.

427. *Id.*

428. BJS SPECIAL REPORT, *supra* note 60, at 3 tbl.2.

429. *Id.*

430. *Id.*

431. Cheesman et al., *A Tale of Two Laws*, *supra* note 59, at 105.

432. SCALIA, *supra* note 414, at 12.

postconviction appeals are tying up court dockets, both pre- and post-AEDPA death sentences accounted for only about 1% of all federal habeas corpus petitions, calling into question any presumption that these habeas petitions take a disproportionate amount of resources to resolve.⁴³³

Despite AEDPA being judged as having “virtually no impact” on achieving its objective of restricting habeas corpus petitions,⁴³⁴ “many knowledgeable observers, including [the late] U.S. Supreme Court Chief Justice William Rehnquist, are optimistic that [AEDPA is] having [its] intended effects.”⁴³⁵ Nevertheless, federal courts’ reluctance to grant writs of habeas corpus⁴³⁶ will correspondingly increase with the greater number of federal habeas petitions filed. Indeed, the higher number of habeas petitions filed, together with the perpetual shortage of funds and resources in the federal courts,⁴³⁷ will likely strengthen the circuit courts’ resolve to preserve their resources, give the state and district courts their due respect, and deny the majority of federal habeas corpus petitions by way of the safe harbor in the standard of § 2254(d)(1). These concerns perhaps signify hesitance in the Tenth Circuit to find that state courts applied clearly established federal law unreasonably or in a manner contrary to precedent. Even if courts do not explicitly mention this external factor of judicial economy, practical considerations doubtless will only heighten the circuit court’s prescribed deference to the state courts.

VI. Conclusion

Nearly ten years after AEDPA’s enactment, it remains to be seen whether AEDPA’s placement of trust in the state courts will have its desired effect of constricting habeas corpus litigation and speeding the pace of enforcement of pending death sentences. Today, a state prisoner who believes he is unconstitutionally being held in custody has an arduous task ahead with no guarantee of success.⁴³⁸ Federal courts grant only a small fraction of habeas

433. HANSON & DALEY, *supra* note 224, at 13; BJS SPECIAL REPORT, *supra* note 60, at 3 tbl.2. *Contra* Betty B. Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 N.Y.U. L. REV. 811, 826 (1995) (arguing that the capital habeas process incurs enormous financial and emotional costs and time delays without proportional benefits to the justice system).

434. Cheesman et al., *A Tale of Two Laws*, *supra* note 59, at 90.

435. *Id.* at 97 (footnote omitted).

436. *See* discussion *supra* Part I.

437. *See* ADMIN. OFFICE OF THE U.S. COURTS, 2004 YEAR-END REP. ON THE FED. JUDICIARY pt. 2, at 2-3 (discussing the federal judiciary’s budget crisis and necessary employee and service reductions).

438. A state prisoner’s pessimism can spring from considerations beyond AEDPA: Habeas corpus is *not* like a direct appeal, in which one presents the relevant facts and legal arguments in a well-written brief and relies upon the merits of the issues

corpus petitions.⁴³⁹ The Tenth Circuit is aiding Congress's purpose of restricting habeas corpus by reserving issuance of the writ to situations where legal scholars and citizens alike can see that the state court applied binding federal precedent in a way that does not redress constitutional error. A state prisoner who appeals the denial of federal habeas relief in the Tenth Circuit is unlikely to be successful. Nevertheless, a chance exists that his claim will fit into the narrow line of cases where relief was granted, or that he will be able to carve out a new, contracted tunnel to habeas relief. In addition, a petitioner claiming ineffective assistance of counsel may be granted a more attentive ear at the bench if his claim extends beyond counsel's failure to investigate mitigating evidence. Even when the Tenth Circuit has granted relief on account of a state court's unreasonable application of law, the significant subjectivity and speculation required in analyzing habeas claims under § 2254(d)(1) indicates that these grants could almost as easily have been denials. Because of the congressional mandate of AEDPA, the federal courts' long-standing respect for state courts' decisions, and the federal judiciary's practical concerns, the already difficult task of obtaining habeas corpus relief in the Tenth Circuit under § 2254(d)(1) is bound to become ever more challenging for state prisoners.

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to carry the day. A different mind-set is required. Even though many grounds for relief will be entitled to de novo review and plenary consideration, federal judges may be predisposed to deny relief Therefore, the state court's resolution of constitutional claims may be received in federal court with a practical, if not legal, presumption of correctness.

Blume & Voisin, *supra* note 7, at 275.

439. Flango & McKenna, *supra* note 71, at 238, 259; *see supra* note 432 and accompanying text.