

ABDUL-KABIR v.
QUARTERMAN/BREWER v.
QUARTERMAN:
A COURT DIVIDED OVER
WHAT CONSTITUTES
“CLEARLY ESTABLISHED
FEDERAL LAW”

JAROD R. STEWART*

I. INTRODUCTION

The Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) sets forth the conditions under which a court may grant a petition for a writ of habeas corpus. Habeas relief is granted when the proceedings leading to conviction “resulted in a decision that was contrary to, or involved an unreasonable application of, *clearly established Federal law*, as determined by the Supreme Court of the United States.”¹ A state court unreasonably applies Supreme Court precedent if it: (1) unreasonably applies the correct legal rule to the facts of a particular case; or (2) extends a legal rule to a situation where it should not apply or fails to extend a rule to a situation where it should apply.²

In the consolidated cases of *Abdul-Kabir v. Quarterman* and *Brewer v. Quarterman*, both petitioners were sentenced to death under Texas’s then-applicable statutory special issue instructions, which asked the jury to determine (1) whether the defendant’s conduct was committed deliberately, and (2) whether there was a probability that the defendant would commit future violent acts.

* 2008 J.D., Duke University School of Law.

1. 28 U.S.C. § 2254(d)(1) (1996) (emphasis added).

2. *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000).

Under this statutory regime, if the jury answered both issues in the affirmative, the judge was required to impose the death penalty. In 1989, the Supreme Court held that Texas's special issue instructions were insufficient to give full effect to a defendant's mitigating evidence of mental retardation and a history of severe childhood abuse.³ Drawing on that decision, both Abdul-Kabir and Brewer filed applications for a writ of habeas corpus in federal district court. On appeal to the Supreme Court, Abdul-Kabir and Brewer argued that the special issue instructions did not permit jurors to give full effect to the mitigating qualities of their abused childhoods and mental impairment.⁴ By a vote of 5-4, the Court agreed with Abdul-Kabir's and Brewer's arguments and therefore granted relief.⁵ The Supreme Court held that their applications for a writ of habeas corpus should have been granted because the Texas state court decisions denying Abdul-Kabir and Brewer post-conviction relief were "contrary to" and "involved unreasonable application[s] of clearly established federal law."⁶

II. FACTUAL AND PROCEDURAL HISTORY

A. *Abdul-Kabir*

Jalil Abdul-Kabir, formerly known as Ted Calvin Cole,⁷ was convicted of capital murder in 1987 for strangling Raymond Richardson.⁸ At his sentencing hearing, prosecutors introduced aggravating evidence, including several prior convictions and expert testimony that described Cole as a sociopath who showed no promise of learning from his experiences.⁹ Cole presented two categories of mitigating evidence: (1) testimony from family members describing his unhappy childhood; and (2) expert testimony discussing the consequences of his childhood.¹⁰ The State discouraged jurors from

3. *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 322 (1989).

4. Brief of Petitioner at 13, *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007) (No. 05-11284) [hereinafter *Abdul-Kabir's* brief]; Brief of Petitioner at 9, *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007) (No. 05-11287) [hereinafter *Brewer's* brief].

5. *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1659 (2007).

6. *Id.*; *Brewer v. Quarterman*, 127 S. Ct. 1706, 1710 (2007).

7. This commentary will refer to the petitioner as Cole, and will only use "Abdul-Kabir" when referring to the Supreme Court's actual opinion.

8. *Cole v. Dretke*, 418 F.3d 494, 496-97 (5th Cir. 2005).

9. *Abdul-Kabir's* brief, *supra* note 4, at 3-4.

10. *Id.* at 4.

taking this evidence into account when determining the special issues, and asserted that each juror had a duty to objectively answer the issues based on the facts rather than on their own views about what sentence would be appropriate for Cole.¹¹ The jury answered both special issues in the affirmative and Cole was sentenced to death.¹²

After his sentence was affirmed on appeal, Cole's application for post-conviction relief was denied by the Texas Court of Criminal Appeals.¹³ Shortly thereafter, he sought habeas corpus relief in federal court under 28 U.S.C. § 2254, arguing that the special issues constrained the jury from giving full effect to his mitigating evidence.¹⁴ The district court dismissed Cole's petition because, under the Fifth Circuit's "screening test,"¹⁵ there was no nexus between his mental/emotional condition and the murder.¹⁶ The United States Court of Appeals for the Fifth Circuit denied Cole's application for a certificate of appealability.¹⁷ Shortly thereafter, in *Tennard v. Dretke*,¹⁸ the Supreme Court rejected the Fifth Circuit's "screening test" established by *Davis v. Scott*,¹⁹ and vacated and remanded Cole's case for further proceedings consistent with *Tennard*.²⁰

On remand, the Fifth Circuit granted Cole a certificate of appealability, but affirmed the district court's denial of the writ of habeas corpus.²¹ The Court of Appeals concluded that the Texas special issue instructions allowed the jury to consider and give full effect to Cole's mitigating evidence.²²

B. Brewer

Brent Ray Brewer was sentenced to death for a murder he committed while perpetrating a robbery. At his sentencing hearing, Brewer presented testimony that he was abused by his father, had used drugs, and had suffered from depression.²³ As in Cole's case, the

11. *Abdul-Kabir*, 127 S. Ct. at 1661.

12. *Cole*, 418 F.3d at 497.

13. *Id.*

14. *Id.*

15. *Davis v. Scott*, 51 F.3d 457, 460–61 (5th Cir. 1995).

16. *Cole*, 418 F.3d at 497.

17. *Id.* at 498.

18. 542 U.S. 274 (2004).

19. *Id.* at 287.

20. *Id.* at 289.

21. *Cole*, 418 F.3d at 496.

22. *Id.* at 511.

23. *Brewer v. Dretke*, 442 F.3d 273, 275 (5th Cir. 2006).

prosecutor discouraged jurors from exercising their own moral judgment in determining Brewer's sentence, and directed them to answer the questions based solely on the evidence presented at trial.²⁴ Brewer proposed several jury instructions designed to give effect to the mitigating evidence he had presented, but the trial judge rejected all of Brewer's suggested instructions.²⁵ The jury was then instructed to answer the two Texas special issue instructions, which they did in the affirmative.²⁶

Brewer's application for post-conviction relief was denied by the Texas Court of Criminal Appeals.²⁷ Like Cole, Brewer sought habeas corpus relief in federal court under 28 U.S.C. § 2254, arguing that the special issues instruction constrained the jury from giving full effect to his mitigating evidence.²⁸ The district court granted the writ of habeas corpus,²⁹ but the Fifth Circuit reversed.³⁰ The Court of Appeals distinguished Brewer's evidence from that presented in *Penry I*, on the ground that Brewer's mental illness was neither permanent nor severe.³¹ According to the Fifth Circuit, violations of *Penry I* involving mental illness evidence have only occurred where the illness is "chronic and/or immutable."³²

III. THE COURT'S OPINIONS

In the consolidated cases of *Abdul-Kabir v. Quarterman* and *Brewer v. Quarterman*, the majority held 5-4 that the decisions of the Texas state courts denying post-conviction relief to Cole and Brewer were both "contrary to" and "involved . . . unreasonable application[s] of clearly established Federal law."³³ The lynchpin of this holding is the existence of clearly established Supreme Court precedent about mitigating evidence in capital sentencing cases. Justice Stevens wrote the majority opinion in both cases. Much of Justice Stevens's opinion in *Abdul-Kabir v. Quarterman* is devoted to reviewing the Court's death penalty jurisprudence to illustrate the "clearly established law"

24. Brewer's brief, *supra* note 4, at 5–6.

25. *Id.*

26. *Brewer v. Quarterman*, 127 S. Ct. 1706, 1710–11 (2007).

27. *Ex parte Brewer*, 50 S.W.3d 492 (Tex. Crim App. 2001).

28. *Brewer*, 127 S. Ct. at 1712.

29. *Brewer v. Dretke*, 442 F.3d 273, 275 (5th Cir. 2006).

30. *Id.*

31. *Id.* at 281.

32. *Id.* at 280.

33. 28 U.S.C. § 2254(d)(1); *see also* *Williams v. Taylor*, 529 U.S. 362 (2000).

that the Texas state court failed to rely upon when denying relief to both petitioners.³⁴ In dissent, Chief Justice Roberts argues that the Court's death penalty jurisprudence was anything but clearly established in 1999, and thus the state court's decisions can neither be labeled as contrary to, nor as unreasonable applications of, clearly established federal law.³⁵

A. Justice Stevens's Majority Opinions

1. *Abdul-Kabir v. Quarterman*

In *Abdul-Kabir*, Justice Stevens concluded that “well before” *Penry I*, the Court's precedents had firmly established that sentencing juries must be able to consider and give effect to mitigating evidence.³⁶ According to the majority, a trio of cases began to lay the groundwork for this well-established principle—*Woodson v. North Carolina*,³⁷ *Proffitt v. Florida*,³⁸ and *Jurek v. Texas*.³⁹ In *Woodson*, the Court invalidated a capital punishment statute because it did not permit jurors to consider the defendant's character and background before imposing the death penalty.⁴⁰ The Court upheld Florida's and Texas's death penalty statutes in *Proffitt*⁴¹ and *Jurek*⁴² because they admitted without restriction all mitigating evidence. Justice Stevens, however, noted that a majority of the Court subsequently recognized that the holding in *Jurek* did not preclude finding that Texas's death penalty statute was unconstitutional as applied to a particular defendant.”⁴³

Continuing his review, Justice Stevens pointed to Chief Justice Burger's plurality opinion in *Lockett v. Ohio*, which stated that the sentencer cannot be precluded from considering any mitigating evidence as a basis for giving the defendant less than the death sentence.⁴⁴ The Court subsequently approved and broadened this plurality rule in *Eddings v. Oklahoma*, when the majority concluded

34. See discussion *infra*, Part A.

35. See discussion *infra*, Part B.

36. *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1664 (2007).

37. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

38. *Proffitt v. Florida*, 428 U.S. 242 (1976).

39. *Jurek v. Texas*, 428 U.S. 262 (1976).

40. *Woodson*, 428 U.S. at 303 (plurality opinion).

41. *Proffitt*, 428 U.S. at 257–58.

42. *Jurek*, 428 U.S. at 276 (joint opinion of Stewart, Powell and Stevens, J.J.).

43. *Abdul-Kabir*, 127 S. Ct. at 1665 (referencing *Franklin v. Lynaugh*, 487 U.S. 164 (1988)).

44. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original).

that jurors in capital cases must be allowed to consider *any* relevant mitigating evidence.⁴⁵

Justice O'Connor further cemented the principles announced in *Lockett* and *Eddings* in her concurrence to *Franklin v. Lynaugh*,⁴⁶ in which it was first recognized that a juror must be able to not only consider, but also to give effect to mitigating evidence. Justice O'Connor emphasized that a jury's ability to consider and weigh mitigating evidence would be meaningless without the power to give effect to that evidence during sentencing.⁴⁷ When mitigating evidence is relevant to one of the special issues, a juror can give such evidence full effect in considering the death penalty, but when a defendant's mitigating evidence is not relevant to the special issues, a juror would have no vehicle for considering such evidence.⁴⁸

According to the majority, *Penry I* was both the most important decision in this area of the law and the decision that governed the facts of Cole's case.⁴⁹ Justice Stevens pointed to the fact that the decision in *Penry I* did not create a new rule of law, but was dictated by *Lockett* and *Eddings*, and used this as evidence of the existence of "clearly established law."⁵⁰ In *Penry I*, the Court incorporated the teachings of *Lockett* and *Eddings*, as well as Justice O'Connor's concurrence in *Franklin*, and held that Texas's statutory special issue instructions were insufficient to permit jurors to give full effect to Penry's mitigating evidence.⁵¹ At trial, although Penry presented evidence that he was mentally retarded and severely abused as a child, the jury answered the special issues in the affirmative and the judge sentenced him to death.⁵²

The Supreme Court concluded that Penry's mental retardation was relevant to the first special issue, whether the defendant acted deliberately, but that it was also relevant to "his moral culpability beyond the scope of the special verdict question."⁵³ With respect to the second special issue, future dangerousness, the Court found that the jury could not give full effect to Penry's mitigating evidence

45. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

46. *Franklin v. Lynaugh*, 487 U.S. 164 (1988).

47. *Id.* at 185 (O'Connor, J. concurring in the judgment).

48. *Id.*

49. *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1668 (2007).

50. *Id.*

51. *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 323 (1989).

52. *Id.* at 309–10.

53. *Id.* at 322.

because his mental retardation was labeled as an aggravating factor that indicated a possibility of future dangerousness.⁵⁴ Thus, Texas's special issues allowed jurors to give full effect only to mitigating evidence that was offered to disprove deliberateness or future dangerousness, and did not tell jurors how to give effect to mitigating evidence that went beyond these two special issues.⁵⁵ The majority in *Abdul-Kabir* essentially concluded that *Penry I* illustrates the clearly established law on this issue, as evidenced by the line of cases addressing mitigating evidence in death penalty cases both before and after *Penry I*.⁵⁶

In Cole's case, the majority concluded that the trial judge's recommendation to the Court of Criminal Appeals that it should deny post-conviction relief ignored *Penry I*, the most relevant precedent in this area of jurisprudence.⁵⁷ The trial judge had instead relied upon three Texas state court decisions, as well as *Graham v. Collins*,⁵⁸ to deny relief.⁵⁹ In *Graham*, the Supreme Court concluded that under Texas's special issues, the jury was able to sufficiently consider several categories of mitigating evidence, including a troubled childhood and abuse.⁶⁰ Justice Stevens, however, concluded that the trial judge's reliance on *Graham* was misguided because the holding in *Graham* was narrow and therefore not applicable to Cole's case.⁶¹ The Court in *Graham* denied collateral relief not because it held that mitigating evidence of a troubled childhood and abuse is always sufficiently considered under Texas's special issues, but because granting relief would have required announcing a new rule of constitutional law, in contravention of *Teague v. Lane*, 489 U.S. 288 (1989).⁶² According to Justice Stevens, the narrowness of the holding in *Graham* is also illustrated by *Johnson v. Texas*, in which the Court rejected the very rule *Graham* sought—a rule that mitigating evidence of a troubled

54. *Id.* at 324.

55. *Abdul-Kabir*, 127 S. Ct. at 1670.

56. *Id.* at 1671–74.

57. *Id.* at 1671–72.

58. *Graham v. Collins*, 506 U.S. 461 (1993).

59. *Abdul-Kabir*, 127 S. Ct. at 1670.

60. *Graham*, 506 U.S. at 474.

61. *Abdul-Kabir*, 127 S. Ct. at 1671.

62. *Graham*, 506 U.S. at 477; *see also* *Teague v. Lane*, 489 U.S. 288 (1989) (prohibiting courts from applying a new rule of constitutional law to cases on collateral review unless the new rule falls within one of two narrow exceptions).

childhood and abuse is always sufficiently considered under Texas's special issues.⁶³

As further evidence that the principles of *Penry I* are a reflection of clearly established law, the majority also pointed to three decisions subsequent to *Penry I* that explained that a jury must be able to fully consider and give meaningful effect to all mitigating evidence before imposing a death sentence: *Penry v. Johnson*,⁶⁴ *Tennard v. Dretke*,⁶⁵ and *Smith v. Texas*.⁶⁶

Thus, because *Penry I* represented clearly established federal law, the majority reversed the lower courts, concluding that the Texas court's decision to deny Cole relief was an unreasonable application of *Penry I*.⁶⁷ Although Cole's evidence may not have been as persuasive as Penry's (it was arguably different in kind, as well as in degree), the Court found that it "did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing a death sentence."⁶⁸ Thus, according to the majority, the decision to deny Cole relief flatly ignored the Court's established principle that a juror must be able to consider and give full effect to all mitigating evidence before imposing the death penalty.

2. *Brewer v. Quarterman*

In a much shorter opinion, Justice Stevens relied upon his exposition from *Abdul-Kabir* on what constitutes "clearly established law," to conclude that the decision denying Brewer relief should likewise be reversed.⁶⁹ The Court did not see a constitutionally relevant distinction between *Penry I* and *Brewer* in terms of the evidence presented concerning mental illness. Although Brewer's mitigating evidence was not as persuasive as Penry's, this was not a sufficient distinction for the Supreme Court.⁷⁰ The lower courts had denied relief because Brewer was not diagnosed with a long-term mental illness, like Penry was, but was instead merely briefly

63. *Johnson v. Texas*, 509 U.S. 350, 365–68 (1993).

64. *Penry v. Johnson (Penry II)*, 532 U.S. 782 (2001).

65. *Tennard v. Dretke*, 542 U.S. 274 (2004).

66. *Smith v. Texas*, 543 U.S. 37 (2004) (per curiam).

67. *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1671 (2007).

68. *Id.* at 1672.

69. *Brewer v. Quarterman*, 127 S. Ct. 1706, 1709–10 (2007).

70. *Id.* at 1712.

hospitalized during a bout with depression.⁷¹ The majority concluded that this difference in degree did not justify the result because jurors could reasonably find—independent of the special issues—that Brewer did not deserve to be put to death.⁷²

According to the majority, Brewer's mitigating evidence served as a double-edged sword because although it lessened his culpability, it also confirmed that he would likely pose a danger in the future.⁷³ Thus, the jury was not able to give a reasoned moral response to Brewer's mitigating evidence because it incriminated his conduct at the same time as it mitigated his culpability. The Fifth Circuit, in reversing the district court's grant of habeas relief, failed to heed the Supreme Court's repeated warnings that a jury must be allowed to give full effect to mitigating evidence in deciding whether a death sentence applies.⁷⁴

B. Chief Justice Roberts's Dissent

In a dissenting opinion joined by Justices Scalia, Thomas and Alito, Chief Justice Roberts blasted the majority by asserting that in 1999 (when the state courts denied petitioners relief) there was no "clearly established law" on point, "but instead a dog's breakfast of divided, conflicting and ever-changing analyses."⁷⁵ The Chief Justice began by stating that in the years before petitioners' state habeas claims were heard, the Supreme Court had considered similar challenges to Texas's special issue instructions at least five times.⁷⁶ In four out of five cases, the Court rejected defendants' claims that the special issues were insufficient vehicles by which to consider mitigating evidence.⁷⁷ The only case of the five to grant relief was *Penry I*, a decision that, in Chief Justice Roberts's view, the *Abdul-Kabir* and *Brewer* majority selected from the mix and anointed as the one case representing "clearly established federal law."⁷⁸

The dissent took issue with what it deemed as essentially a re-writing of history in the Court's death penalty jurisprudence.⁷⁹ The

71. *Brewer v. Dretke*, 442 F.3d 273, 279–82 (5th Cir. 2006).

72. *Brewer*, 127 S. Ct. at 1712–13.

73. *Id.*

74. *Id.* at 1714.

75. *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1676 (2007) (Roberts, C.J., dissenting).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 1681–84.

Court's 1993 decision in *Graham*, which clarified the relationship between *Jurek*, *Franklin* and *Penry I*, supports Chief Justice Roberts's position:

It seems to us, however, that reading *Penry* as petitioner urges—and thereby holding that a defendant is entitled to special instructions whenever he can offer mitigating evidence that has *some* arguable relevance beyond the special issues—would be to require in all cases that a fourth ‘special issue’ be put to the jury: ‘Does any mitigating evidence before you, whether or not relevant to the above [three] questions, lead you to believe that the death penalty should not be imposed?’ The *Franklin* plurality rejected precisely this contention, finding it irreconcilable with the Court's holding in *Jurek*, and we affirm that conclusion today.⁸⁰

The Chief Justice argued that the position rejected in *Graham* is the very position endorsed by the majority in *Abdul-Kabir*.⁸¹ Chief Justice Roberts responded to Justice Stevens's assertion that *Graham* and *Johnson* did not disturb the basic legal principle at issue by questioning how this can be so when Justice Stevens himself, claiming that the majority was no longer being faithful to *Penry I*, dissented in both of these decisions.⁸²

In Chief Justice Roberts's view, these two post-*Penry I* dissenting opinions are further evidence that the law was not “clearly established” in 1999.⁸³ Merely four years after *Penry I*, Justices Stevens and Souter (members of the *Penry I* majority) dissented in *Graham v. Collins* on the grounds that *Penry I* was the applicable controlling precedent.⁸⁴ Later that same year, in *Johnson v. Texas*, Justices Stevens and Souter again dissented from the decision denying habeas relief, and decried what they saw as the majority's failure to follow and to apply the precedent of *Penry I*.⁸⁵ Chief Justice Roberts saw this as strong evidence that *Penry I* was not clearly established law in 1999, and argued that the state courts adjudicating Cole's and Brewer's claims would have seen “an ongoing debate over the meaning and significance of *Penry I*.”⁸⁶ The dissent also took issue with, according

80. *Graham v. Collins*, 506 U.S. 461, 476–77 (1993) (quoting *Franklin v. Lynaugh*, 108 S. Ct. 2320, 2331 n.10 (1988)) (alteration in original) (internal citation omitted).

81. *Abdul-Kabir*, 127 S. Ct. at 1679 (Roberts, C.J., dissenting).

82. *Id.* at 1680.

83. *Id.*

84. *Graham*, 506 U.S. at 506–07 (Souter, J., dissenting).

85. *Johnson v. Texas*, 509 U.S. 350, 385–86 (1993) (O'Connor, J., dissenting).

86. *Abdul-Kabir*, 127 S. Ct. at 1679 (Roberts, C.J., dissenting).

to Chief Justice Roberts, the majority's use of post-*Penry I* decisions as an indicator of *Penry I*'s status as "clearly established law" in 1999.⁸⁷ That case law is irrelevant, because under AEDPA the "clearly established law" must be established at the time of the state court's decision.⁸⁸ In a strong jab to the majority, Chief Justice Roberts asserted that "AEDPA requires state courts to reasonably apply clearly established federal law. It does not require them to have a crystal ball."⁸⁹

According to Chief Justice Roberts, when the state courts adjudicated Cole's petition for post-conviction relief, no clear precedent applied to the exact type of mitigating evidence Cole presented at trial.⁹⁰ This evidence, including a troubled childhood and impulse control disorder, fell somewhere in between the type of evidence presented by the defendants in *Graham* and *Johnson* (youth and a transient upbringing) on the one hand, and the defendant in *Penry I* (mental retardation and severe abuse) on the other.⁹¹ Because there is a wide-ranging spectrum of mitigating evidence, and the effect that the jury is able to give to such evidence is a highly fact-centered determination, it was not unreasonable for the state court to conclude that Cole's evidence was more like that presented in *Graham* and *Johnson* than that in *Penry I*.⁹² Chief Justice Roberts concluded that this type of deferential review of state court decisions is exactly what AEDPA intended for habeas cases.⁹³

IV. IMPACT AND CONCLUSION

The substantive impact of the *Abdul-Kabir v. Quarterman* and *Brewer v. Quarterman* decisions will be of limited duration, as the Texas special issue instructions involved in these two cases have not been used since 1991. The sharp divide between the majority and the dissent, however, over what is "clearly established federal law, as determined by the Supreme Court" may have long-term implications for future AEDPA cases.

87. *Id.* at 1682.

88. *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

89. *Abdul-Kabir*, 127 S. Ct. at 1682 (Roberts, C.J., dissenting).

90. *Id.* at 1681.

91. *Id.*

92. *Id.* at 1682.

93. *Id.* at 1681 (citing *Brown v. Payton*, 544 U.S. 133 (2005)).

There is a dearth of guidance from the Supreme Court as to what is “clearly established federal law,” for purposes of AEDPA. The Court first addressed this question in *Williams v. Taylor*, in which a majority of the Court agreed that it referred to the existing Supreme Court holdings, as opposed to dicta, as of the date of the relevant state court decision.⁹⁴ In practice, however, this general description provides little guidance to the lower federal courts. Justice Stevens, in a plurality opinion to *Williams*, went further than the majority when he explained that clearly established law may be a standard, rather than a bright-line rule, meaning that a general rule requiring a case-by-case application will suffice.⁹⁵ This principle was illustrated in Justice Stevens’s separate majority opinion applying AEDPA to the state court adjudication, in which he stated that *Williams*’s claim of ineffective assistance of counsel was “squarely governed” by *Strickland v. Washington*.⁹⁶ Although *Strickland* was a standard to be applied on a case-by-case basis, according to Justice Stevens, that did not make its rule any less clear or established than a more bright-line rule from the Court.⁹⁷

Since *Williams*, most lower federal courts cite to the majority language from *Williams* that “clearly established law,” for AEDPA purposes, refers to the Supreme Court’s holdings. There is, however, wide divergence among the lower courts about (1) whether a Supreme Court decision applies to the habeas petitioner’s factual situation, and (2) the level of clarity of the existing precedent.

*Lockyer v. Andrade*⁹⁸ provided the Court with another opportunity to offer more guidance on what is “clearly established federal law, as determined by the Supreme Court of the United States.” There, the petitioner was convicted under California’s “three strikes” recidivist statute, and sentenced to two consecutive life terms; his third qualifying conviction was for shoplifting \$153 worth of videotapes.⁹⁹ On appeal, Andrade argued that his sentence was grossly disproportionate and violated the Eighth Amendment’s prohibition of cruel and unusual punishment.¹⁰⁰ Supreme Court precedent had

94. *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

95. *Id.* at 382.

96. *Id.* at 390.

97. *Id.* at 391.

98. *Lockyer v. Andrade*, 538 U.S. 63 (2003).

99. *Id.* at 66–68.

100. *Id.* at 68–69.

addressed the disproportionality issue in only three cases: *Rummel v. Estelle*,¹⁰¹ *Solem v. Helm*,¹⁰² and *Harmelin v. Michigan*.¹⁰³ The Court acknowledged that these precedents were not “a model of clarity,” but nonetheless found that “one governing legal principle emerge[d] as ‘clearly established’” from this “thicket of Eighth Amendment jurisprudence”: that a gross disproportionality principle applies to all sentences for a term of years.¹⁰⁴ Although the “precise contours” of disproportionality in sentencing were unclear and there was confusion about the existing trio of cases, the gross disproportionality principle was sufficiently broad to afford the state legislature significant discretion in determining appropriate sentences. The Court held that the state court’s decision upholding Andrade’s sentence was not objectively unreasonable because it was not contrary to or an unreasonable application of the gross disproportionality principle, which was “clearly established law.”¹⁰⁵

For purposes of what is “clearly established law,” the approach from Justice Stevens’s *Williams* plurality won the day in *Abdul-Kabir* and *Brewer*. In these consolidated cases, the Court was confronted with a set of opinions that were not a model of clarity on the issue of mitigating evidence during capital sentencing. There is logical force behind Justice Stevens’s argument that the principle underlying *Penry I* was, and had been, clearly established, despite the lack of clarity in its exact contours. The effect that a jury can give to mitigating evidence appears to be based on a generalized standard, applied on a case-by-case basis, which depends on the particular evidence presented by any given petitioner. The approach taken by Chief Justice Roberts’s dissent holds water as well, because Cole’s and Brewer’s state court adjudications were not objectively unreasonable; these courts merely saw an ongoing debate within the Supreme Court on the effect that jurors must be able to give mitigating evidence in capital sentencing. Yet following Chief Justice Roberts’s approach, because the AEDPA so mandates, would have required the Court to uphold what turned out to be an unconstitutional state court adjudication.

101. *Rummel v. Estelle*, 445 U.S. 263 (1980).

102. *Solem v. Helm*, 463 U.S. 277 (1983).

103. *Harmelin v. Michigan*, 501 U.S. 957 (1991).

104. *Lockyer*, 538 U.S. at 72.

105. *Id.* at 76–77.

The likely future impact of the standard for “clearly established law” emerging from these cases is that AEDPA will not constrain the Supreme Court from making a decision that the majority views as both correct and based in some existing precedent. AEDPA was intended to streamline habeas review and to prevent the creation of federal precedent upon which habeas petitioners could rely.¹⁰⁶ The majority in *Abdul-Kabir* and in *Brewer*, however, likely saw the constitutional violations inherent in petitioners’ trials and used the approach from Justice Stevens’s plurality opinion in *Williams* (as well as that of the *Andrade* majority) to find clearly established law even though the precedents had not been a model of clarity.

In future habeas cases, federal courts can take guidance from these decisions and not be so constrained in upholding what may be unconstitutional state-court rulings merely because AEDPA intended to “freeze” the law and streamline habeas review. Where defense attorneys can find and elucidate a governing legal principle that “emerges from the thicket” in a particular area of the law, they should be able to cite to *Abdul-Kabir* and *Brewer* and argue that their clients’ situations present “clearly established federal law, as determined by the Supreme Court.” In attempting to obtain habeas relief, such defense attorneys will have a majority of the Court behind them supporting their argument that the applicable law rises to the level of clarity required by the Supreme Court. The Government will be forced to paint the applicable legal principles as a mess, and to attempt to distinguish *Abdul-Kabir* and *Brewer*. In circumstances in which a governing legal principle is clear, the federal court can rely on that principle as “clearly established law” to find that a prior adjudication was either in accordance with or in violation of that governing principle. As a result of the decisions in *Abdul-Kabir* and *Brewer*, federal courts should have more discretion in conducting habeas corpus review.

106. RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 3.2 (5th ed. 2005) (quoting Statement of the President of the United States upon signing the Antiterrorism Bill, 32 WEEKLY COMP. PRES. DOC. 719 (Apr. 24, 1996)); see also *Browning v. U.S.*, 241 F.3d 1262, 1266 (10th Cir. 2001) (stating that “AEDPA was intended to streamline the habeas application process, and our role as gatekeeper is a limited one. Analyzing the Court’s body of jurisprudence with regard to each new rule of constitutional law would be inconsistent with this limited role and could lead to unnecessarily varied results among the circuits.”).