No. 01-400

In the
Supreme Court of the United States

October Term, 2001

RICKY BELL, WARDEN,
Petitioner,

v.

GARY BRADFORD CONE,
Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF TENNESSEE, IN SUPPORT OF RESPONDENT

Larry W. Yackle
*(Counsel of Recor*d)
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

28 U.S.C. §2254(d)(1)

Legislative History

141 Cong. Rec. S7840-41
(daily ed. June 7, 1995)
142 Cong. Rec. S7848
(daily ed. April 17, 1996)

INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Tennessee is one of its statewide affiliates. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. In this case, the United States Court of Appeals for the Sixth Circuit held that the prisoner was denied effective assistance of counsel at the sentencing phase of his criminal prosecution in state court. The state and its *amici* challenge not only the circuit court's conclusion, but its methodology. Accordingly, this case raises issues of fundamental importance to the ACLU and its members.

In order to focus our presentation, we limit this brief to the arguments advanced by one of the state's *amici*, the Criminal Justice Legal Foundation (CJLF), regarding proper procedure under 28 U.S.C. §2254(d), enacted as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).

STATEMENT OF THE CASE

We adopt the prisoner's statement of the case. That statement explains that the implementation of §2254(d) was not decisive below and thus is not the focus of the prisoner's brief.

SUMMARY OF ARGUMENT

The circuit court below applied §2254(d) in the proper way. That court simply followed the path this Court marked in *Williams v. Taylor*, 529 U.S. 362 (2000), and subsequent cases and concluded that §2254(d) did not foreclose habeas relief in this instance.

The state's *amicus*, the Criminal Justice Legal Foundation, argues, however, that the circuit court failed to follow a particular procedural program that the CJLF contends is required by §2254(d). The CJLF asks this Court to adopt a novel interpretation of §2254(d), not contemplated by *Williams* and more recent precedents. That course of action is unwarranted. The Court need do no more lawmaking in this case than what is required to decide whether the judgment below should be sustained.

Specifically, the CJLF asks the Court to mandate that district courts entertaining habeas petitions must: (1) bypass the question whether a prisoner's claim is meritorious and go immediately to the question whether, assuming that a previous state court decision was erroneous, §2254(d) nonetheless bars federal habeas relief; and (2) treat a prior state court decision as not "unreasonable" if the question whether the prisoner's claim was meritorious was "reasonably debatable." Neither of those two things is consistent with this Court's analysis in *Williams*.

It is not only unnecessary, but unwise to do what the CJLF advocates. The CJLF would have this Court establish procedures for all cases in the abstract, without benefit of vetting in a series of lower court cases in which issues are actually raised and thoroughly explored. The circuit court below did not so much as mention the issues that other circuits have just begun to address. The CJLF's proposed program would risk mistakes that may be avoided if the Court proceeds in the conventional, case-by-case manner.

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

In any event, the CJLF's plan is fundamentally unsound. It conflicts with §2254(d) and with other habeas statutes that AEDPA left in place, as well as with this Court's precedents in *Williams* and other cases. Section 2254(d) is not addressed to a federal court's authority and responsibility to adjudicate the merits of a prisoner's claim. Instead, this statute speaks only to the availability of habeas corpus relief in a case in which a federal court decides that a previous state court decision on the merits was erroneous.

The CJLF's proposed definition of "unreasonable" state decisions is also unjustified. The Court explained in *Williams* that the standard that Congress actually enacted is familiar to lawyers and judges and will serve perfectly well without creative judicial exegesis.

The CJLF argues specifically that the Court should hold that a state court decision was "reasonable" if the correct disposition of a prisoner's claim was "susceptible to debate among reasonable minds" at the time. That formulation would risk reviving the very "overlay" on §2254(d) that this Court squarely rejected in *Williams*.

The CJLF also argues that the Court should rely on definitions of "reasonableness" in cases elaborating qualified immunity. That, too, would be a mistake. This Court has always kept the standards for determining an executive officer's personal liability for damages separate from the standards for determining the validity of a prisoner's incarceration. The underlying rationales for the Court's decisions in the two contexts are quite different.

ARGUMENT

I. SECTION 2254(d) DOES NOT RESTRICT A FEDERAL COURT'S AUTHORITY AND RESPONSIBILITY TO ADJUDICATE THE MERITS OF FEDERAL CLAIMS

The circuit court below proceeded to judgment in precisely the way this Court prescribed in its authoritative interpretation of §2254(d) in *Williams v. Taylor*, 529 U.S. 362. That court had no need to reach any §2254(d) issues not plainly resolved by *Williams*, let alone any occasion to anticipate and resolve in the abstract questions that might conceivably require attention in the future.

In Question No. 1 in its petition for *certiorari*, the state suggested that the circuit court applied a "de novo standard of review," which placed its analysis in "conflict" with *Williams*. That characterization was misleading. In fact, the circuit court used the term "de novo" only to describe its review of the district court's disposition of the prisoner's claims. *Cone v. Bell*, 243 F.3d 961, 966 (6th Cir. 2001). The circuit court did not propose that, despite *Williams*, it was free to dispose of the prisoner's habeas petition according to the standards that existed before AEDPA was enacted.

The CJLF argues that the circuit court misapplied §2254(d). By the CJLF's account, the circuit court should have assumed hypothetically that the Tennessee Court of Criminal Appeals' decision was erroneous and should have gone immediately to the question whether it was "contrary to" clearly established law or "unreasonable." That reading of §2254(d) cannot be sustained.

The CJLF's construction is flatly inconsistent with the text of §2254(d), as well as the text of §2254(a), which AEDPA preserves intact. Section 2254(d) does not restrict a district court's authority and responsibility to address prisoner's claims in the first instance, but rather limits the *relief* a district court can award, if and when it concludes that a state court reached an erroneous judgment. By its literal terms, §2254(d) specifies circumstances in which "[a]n application for a writ of habeas corpus . . . shall not be *granted* . . . ." (emphasis added).

A district court's duty to address the merits of claims is established by §2254(a), which states that a district court "shall entertain an application" for the writ if the petitioner is in

"custody" in violation of federal law. AEDPA preserves both those familiar provisions untouched.

In *Williams* and other cases, this Court recognized that §2254(d) is exclusively a remedial measure. The Court explained that "§2254(d)(1) places a new constraint on the power of a federal court to *grant* . . . a writ of habeas corpus." 529 U.S. at 412 (opinion of the Court by O'Connor, J.)(emphasis added). That has always been this Court's understanding: §2254(d) is concerned with relief and relief alone. Addressing its own work in habeas cases in the first AEDPA case, *Felker v. Turpin*, 518 U.S. 651 (1996), the Court could have been no more explicit:

> Title I of the Act has changed the standards governing our consideration of habeas petitions *by imposing new requirements for the granting of relief* to state prisoners. Our authority *to grant habeas relief* to state prisoners is limited by §2254, which specifies the conditions under which *relief* may be granted . . . . Several sections of the Act impose *new requirements for the granting of relief* under this section, and they therefore inform our authority *to grant such relief* as well.

Id. at 662 (emphasis added).

This Court has itself considered the merits of prisoners' claims before turning, if necessary, to the question whether §2254(d) bars habeas relief. This was essentially the pattern in *Williams*, *Weeks v. Angelone*, 528 U.S. 225 (2000), and *Ramdass v. Angelone*, 530 U.S. 156 (2000).

The Court explained in *Williams* that the "threshold" question is whether a prisoner applying for a writ of habeas corpus "seeks to apply a rule that was clearly established at the time his state-court conviction became final." 529 U.S. at 390 (opinion of Stevens, J.).[2] That, of course, is the choice-of-law question associated with *Teague v. Lane*, 489 U.S. 288 (1989). The choice-of-law issue must come first for the obvious reason that it identifies the law the habeas court will apply when it turns to the merits of a prisoner's claim.[3] *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Justice O'Connor explained in *Williams* that a rule was "clearly established" for habeas purposes if it could be found in this Court's contemporaneous "holdings." *Williams*, 529 U.S. at 412 (opinion for the Court by O'Connor, J.). The answer to the threshold choice-of-law question in *Williams* was easy. This Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), was the controlling contemporaneous holding.

---

[2] This analysis in Part III of the opinion by Justice Stevens had the support of Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. *See id*. at 413 (opinion of O'Connor, J.)(endorsing Part III); *id*. at 399 n.* (noting that Justice Kennedy joined Justice O'Connor's opinion in its entirety).

[3] The CJLF argues that the choice-of-law question is resolved first to avoid an unconstitutional advisory opinion. CJLF Brief at 10. In *Teague*, however, this Court expressed concern about advisory opinions in an entirely different context: If this Court announced a novel principle of constitutional law in a case and failed to give the individual in that case the benefit of that rule, *then* the Court's statement of the "new rule" would appear advisory. 489 U.S. at 315-16. The Court did not say that a federal habeas court's determination of the rule of law reflected in this Court's contemporaneous holdings would be advisory. This Court has made it clear that a federal judicial decision on an analytically prior question is part and parcel of proper Article III adjudication. *See, e.g.*, pp.9-10 *infra* (noting that federal courts routinely determine the merits of claims before passing on to the question whether an offending officer can be made to pay compensatory damages).

The Court next explained in *Williams* that the prisoner was entitled to "relief" if the Virginia Supreme Court's decision was either "contrary to" or "involved an unreasonable application of" that "established law" (*Strickland*). 529 U.S. at 391 (opinion of Stevens, J.). We do not contend that the Court then simply applied *Strickland* to the facts in *Williams* as though it were deciding whether the Virginia Supreme Court's decision was correct at the time it was rendered. Having just referred to the standards for habeas relief under §2254(d), the Court plainly had those standards in mind as it turned to the events in state court. Yet we hasten to point out that the Court set about its appraisal of the state supreme court's work by deciding that the trial judge had invoked the correct legal rule (*Strickland*). The Court then explained that the state supreme court had chosen the wrong rule by contrasting the supreme court's behavior to that of the trial judge. 529 U.S. at 394. Similarly, the Court decided that the trial judge had reached the correct result when it applied *Strickland* to the facts, and that the state supreme court had reached an unreasonable decision by contrast. *Id*. at 395.[4]

The CJLF recognizes that in *Weeks* this Court plainly addressed the merits of a prisoner's claim as the first order of business. CJLF Brief at 12. In that case, the Court held that the state court had reached the correct result with respect to the prisoner's claim. That holding, of course, was dispositive. *Weeks*, 528 U.S. at 237. Similarly, in *Ramdass*, the Court explained that "the Constitution [did] not require" the jury instruction the prisoner requested. *Ramdass*, 530 U.S. at 178. There, too, the Court based its result on a determination of the merits.

To be sure, the Court appeared to proceed differently in addressing the first of the two claims in *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910 (2000)(*Penry II*). In that case, the prisoner first claimed that the admission of a psy-chiatric report violated his right against self-incrimination. This Court disposed of that claim not by deciding whether it was valid in light of the pertinent holding of this Court, *Estelle v. Smith*, 451 U.S. 454 (1981), but rather by concluding that the Texas Court of Criminal Appeals decision rejecting it was neither "contrary to" *Estelle* nor an "unreasonable application" of that holding. 121 S.Ct. at 1919. This said, it must also be noted that *before* the Court held that §2254(d) would not permit habeas relief, the Court discussed the merits of the Fifth Amendment claim at some length. In that discussion, the Court noted four ways in which the prisoner's case was distinguishable from *Estelle*. *Id*. Plainly, then, the Court did not skip blithely by the merits of the claim and rest in a conclusory way on §2254(d). Instead, the Court seriously engaged the claim, identified its weaknesses, and *then*, in light of those weaknesses, held that the state court decision rejecting the claim was sufficient to foreclose a federal habeas remedy.

With respect to the second claim in *Penry*, the Court focused even more extensively on the merits before turning to §2254(d). The prisoner claimed that a supplemental instruction to the jury at the sentencing phase of his trial failed to satisfy another of this Court's prior holdings, *Penry v. Lynaugh*, 492 U.S. 302 (1989)(*Penry I*). The Court explored that claim in detail, and in so doing squarely determined that the supplemental instruction was constitutionally inadequate under *Penry I*. 121 S.Ct. at 1922 (stating that "[t]he supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence"). Having itself decided that the supplemental instruction did not satisfy *Penry I*, the Court thereafter said: "*Thus*, to the extent the Texas Court of Criminal Appeals [concluded otherwise], that determination was objectively unreasonable." *Id*. at 1924 (emphasis added). Clearly, then, the Court was in a position to decide whether §2254(d) permitted habeas relief

---

[4] To its credit, the CJLF makes no attempt to argue that this Court followed the CJLF's formula for §2254(d) cases in *Williams*. That would not be a fair characterization of the way the Court proceeded. The Court noted that the circuit court below had assumed without deciding that the petitioner had been denied effective assistance of counsel in violation of the Sixth Amendment. 529 U.S. at 374 n.6 (opinion of Stevens, J.). But the Court itself made no such assumption.

only after it first decided that the prisoner's second claim was valid in light of the holding that supplied the applicable rule of decision.

The CJLF makes far too much of *Penry II*. Even though the Court did plainly rest on §2254(d) in that instance, once to deny habeas relief and once to award it, the Court just as plainly examined the merits of the prisoner's two claims before announcing its judgments regarding the availability of a habeas remedy. Certainly, *Penry II* cannot be cited as an illustration of the kind of formulaic program for §2254(d) that the CJLF proposes.

The procedure in *Weeks* and *Ramdass* is logical, practical, and efficient. Once a federal court has identified the rule of law that is applicable to a claim, it makes sense to move next to the question whether, in light of that rule, the prisoner's federal rights were violated in previous state proceedings. If the court decides that a previous state court judgment was correct at the time, the case ends then and there. If the court decides that the state court decision was erroneous, it will be in a good position to decide whether that erroneous judgment was "also" unreasonable. *Williams*, 529 U.S. at 411 (opinion of O'Connor, J.). Proceeding from one question to the next in a logical, linear fashion fosters clear analysis and exposition. If, in the end, the federal court determines that §2254(d) permits habeas relief, the court will be able to explain why -- by contrasting what the state court did with what it should have done. That, after all, was precisely this Court's approach in *Williams*.

The Court has recognized these advantages in qualified immunity cases, where district courts are explicitly instructed to address the merits of plaintiffs' claims before turning to the question whether an award of damages can be made. *E.g.*, *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *County of Sacramento v. Lewis*, 523 U.S. 833, 841-42 n.5 (1998). The CJLF dismisses this point on the ground that in the immunity context there is typically no state court decision on the merits and, accordingly, a federal court decision may be needed to clarify whether a defendant officer actually violated a plaintiff's rights. Moreover, according to the CJLF, a federal habeas court judgment on the merits of a federal claim is without value even as a precedent for future reference. CJLF Brief at 13.

The CJLF's argument in this vein is overdrawn on both points. This Court has required district courts to treat the merits first in immunity cases not merely to establish precedents for executive officers to follow, but also to achieve a better brand of adjudication. A federal court's assessment of a federal claim is a step toward clarity, even if it is not the final step. *See County of Sacramento v. Lewis*, 523 U.S. at 841 n.5 (explaining that "even a finding of qualified immunity requires some determination about the state of constitutional law at the time the officer acted"). It is true that under §2254(d) only this Court's holdings form "clearly established Federal law." Yet inferior court decisions are not for that reason without value. They guide state and lower federal courts alike regarding what this Court's decisions mean. In addition, they inform this Court's consideration of the content of federal rights.

Recognizing, perhaps, that its proposed construction of §2254(d) fights the text of the statute, the precedents, and sound policy, the CJLF insists that the Court should lay all that aside and impose the CJLF program in order to further Congress' underlying "purposes." This Court commonly locates statutory purposes by drawing rational inferences from the text of a statute itself. That, indeed, is precisely what the Court did in *Williams* with respect to this very provision of AEDPA. The Court read §2254(d) to be addressed to habeas *relief* not only because its text plainly conveys that meaning, but also because that text indicates that its purpose is to restrict the habeas remedy, not habeas adjudication.[5]

---

[5] The CJLF makes no attempt to rely on rational inferences from the text here. The obvious reason is that the text of §2254(d) defies the very purposes that the CJLF wants the Court to identify.

The purpose readily apparent from the text of §2254(d) is that this new provision prevents a federal habeas court from ordering a prisoner released merely because the federal court disagrees with the judgment of a previous state court on the proper disposition of a federal claim. State courts and inferior federal courts are co-equals within a single judicial system. They are not answerable to each other, but only to this Court. Under this provision, a federal court can grant relief only if a previous state court judgment was "contrary to" or involved an "unreasonable application of" the precedents of this Court that were in place at the time.

Departing from both the text of §2254(d) and *Williams*, the CJLF seeks the "purposes" of the statute in legislative history. We, too, have urged the Court to consult informative legislative materials as an aid to interpreting AEDPA. In particular, we have argued that the sequence of bills and amendments that preceded §2254(d) illuminates the political compromise that finally won passage in the Senate.[6] The CJLF's argument here, however, is extremely weak by comparison.

The CJLF insists that speeches on the Senate floor suggest two objectives that warrant a construction of §2254(d) that goes beyond what this Court said in *Williams*: (1) the "purpose" to "expedite the resolution of habeas corpus petitions;" and (2) the "purpose" to "protect correct state-court judgments from erroneous nullification." CJLF Brief at 6-7. We have no doubt that those two concerns figured in the mix of motivations, hopes, desires, and expectations of many members of Congress who supported AEDPA. But it is patently unsound to propose, as CJLF *does* propose, that those "purposes" buttress the CJLF's program for §2254(d).

Many features of AEDPA were plainly meant to streamline and expedite the federal habeas process. This particular provision, §2254(d), was not one of them. The filing deadline sections of the bill were popular, because they were presented as a means to speed up the process without compromising the federal courts' traditional ability to grant habeas relief when prisoners established meritorious claims. By contrast, §2254(d) engendered considerably more opposition because it did *not* promise procedural efficiency and *did* limit federal court power to award habeas relief.[7]

The CJLF contends that §2254(d) was understood to promise faster process, because district courts would skip over the merits of claims and deal only with the availability of habeas relief. That is a reach, to put it mildly. The CJLF cites not one line in reliable legislative materials indicating that anyone thought or said that this provision was in the bill for that reason. Quite the contrary, §2254(d) was deviant in what was otherwise a package of procedural reforms meant to eliminate delays and procedural snarls.

Certainly, the CJLF's quotations from Senator Hatch do not support the CJLF's understanding of §2254(d). Moreover, in other statements Senator Hatch expressly urged the Senate to adopt §2254(d) because it would preserve the federal courts' authority and responsibility to adjudicate the merits of federal claims. For example, at the height of his debate with Senator Biden over the meaning of §2254(d), Senator Hatch said this:

> [The standard now in §2254(d)] is a wholly appropriate standard. It enables the Federal courts to *overturn* State court positions that clearly contravene Federal law. *Indeed, this standard essentially gives the Federal court the authority to review de novo whether the State court decided the claim in contravention of Federal law.*

---

[6] Brief *Amicus Curiae* of the ACLU, in *Williams v. Taylor*, No. 98-8384, at 22-29.

[7] Senator Biden introduced an amendment that would have deleted this provision from the larger bill. In support of that amendment, he explained that he, too, wished to place "time limits" on habeas and other "limits on successive petitions." Yet he objected to this provision because it was not a procedural reform of that order. 141 Cong. Rec. S7840-41 (daily ed. June 7, 1995).

142 Cong. Rec. S7848 (daily ed. April 17, 1996)(emphasis added).

We do not contend that this second statement clearly establishes that Senator Hatch contemplated that district courts would first determine the merits of claims and then turn to the question of relief under §2254(d). We do think, however, that this statement lends itself to that reading.

We acknowledge that §2254(d) was meant to prevent federal habeas courts from nullifying "correct" state court decisions neither "contrary to" federal law nor "unreasonable." That purpose can easily be inferred from its text, without resort to floor speeches. With respect to this second "purpose," however, the CJLF's argument is weaker still. A federal court scarcely nullifies a "correct" state court decision merely by determining whether it rests on constitutional error. If "nullification" ever occurs, it can only be at the stage a federal court awards habeas relief, thus freeing a prisoner despite his conviction in state court. We agree that §2254(d) limits habeas relief. By reaffirming that well settled point, the CJLF scarcely makes its case that §2254(d) limits something quite different: a district court's antecedent authority and responsibility to determine the merits of claims.

II. SECTION 2254(d) ALLOWS A FEDERAL COURT TO GRANT HABEAS CORPUS RELIEF IF A PREVIOUS STATE COURT DECISION ON THE MERITS WAS UNREASONABLE

Section 2254(d) permits the award of habeas relief if the state court decision on which the state relies for a prisoner's custody "involved an unreasonable application" of clearly established law. Over many years prior to 1996, Congress considered an assortment of bills containing different standards. In the end, Congress settled on this one. The CJLF argues, however, that a "reasonableness" standard is inadequate and urges this Court to establish "some further definition" to guide the lower courts. But, in *Williams*, this Court has already declined to place any such judicial gloss on §2254(d).

There is nothing all so imprecise about the standard the statute expressly employs. The Court acknowledged in *Williams* that "[t]he term 'unreasonable' is no doubt difficult to define." 529 U.S. at 410 (opinion of O'Connor, J.). Yet that term is "common" in the "legal world" and "federal judges are familiar with its meaning." *Id*. It will serve in this context as well as any potential alternative and without the kind of "further definition" the CJLF proposes. That was the very point of the discussion in *Williams*, which gave this provision in §2254(d) its authoritative construction. Moreover, the Court will necessarily elaborate on what counts as "unreasonable" as it applies §2254(d) to a series of cases.

CJLF cites a few circuit court efforts to specify what should count as an "unreasonable application" of federal law. CJLF Brief at 20-22. We recognize that those circuits have struggled with this new statute in this early period. Yet in time the lower courts will develop greater facility in cases under §2254(d). There will be opportunity enough to address circuit court estimates of this statutory standard if and when cases arise in which those estimates make a difference. Certainly, there is no need for the Court to anticipate continuing disagreements among the circuits and to try to resolve those disagreements, in the abstract, in this case.

The CJLF urges the Court to declare that a state court decision cannot be said to have been "unreasonable" within the meaning of §2254(d) if the proper disposition of a claim was "susceptible to debate among reasonable minds." CJLF Brief at 22. The CJLF draws that particular verbal formulation from one of the earliest *Teague* cases, *Butler v. McKellar*, 494 U.S. 407, 415 (1990). In addition, the CJLF leans on precedents in the qualified immunity context. CJLF Brief at 21, citing *Saucier v. Katz*, 533 U.S. 194 (2001).

If the Court were inclined to specify the meaning of the term "unreasonable" in §2254(d), it could not accept the proposed definition put forth by the CJLF without effectively rejecting the teaching of *Williams*. By arguing that federal habeas relief is barred unless a state court reached

a decision that "reasonable jurists would all agree" was "unreasonable," the state in *Williams*, like the CJLF here, echoed the *Butler* formulation. But that, of course, is precisely the "overlay" on §2254(d) that this Court squarely disavowed in *Williams*. 529 U.S. at 409 (opinion of O'Connor, J.).

The CJLF's analogy to the official immunity cases is equally unavailing. Justice Stevens explicitly rejected that analogy in *Williams*. *Id*. at 380 n.12 (opinion of Stevens, J.). If Justice O'Connor had meant to rely on it, she certainly would have done so expressly. In our own brief in *Williams*, we sketched the reasons why it would be a mistake, in habeas cases governed by §2254(d), to rely on cases determining "reasonableness" for qualified immunity purposes. Brief *Amicus Curiae* of the ACLU in *Williams v. Taylor*, No. 98-8384, at 19-21.

This Court has always drawn a clear distinction between qualified immunity and habeas corpus. Different considerations drive the two bodies of law. In the qualified immunity cases, the Court has addressed "special . . . federal policy concerns" relating to civil suits for damages. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). In habeas corpus, by contrast, the Court has attended to "certain" other "special concerns" touching the availability of collateral relief from state judgments. *Id*.

The considerations the Court has taken into account in qualified immunity cases do not apply in habeas corpus cases. Here, the state officers in question are judges who have the resources, time, and professional credentials to make reasoned judgments. State judges are not put on trial. Nor are they exposed to personal liability for their judicial decisions. Indeed, they are not formally involved. The dispute with which the federal district court is concerned is between the petitioner and the custodian, who defends the prisoner's detention on the basis of what state judges have done and thus places their work under examination only indirectly. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). Precedents on "reasonableness" in the qualified immunity context cannot sensibly be used in habeas cases to shield state judicial judgments from (deflected) federal examination. *Cf. Ryder v. United States*, 515 U.S. 177, 185 (1995).

A construction of §2254(d)(1) that borrows the special "reasonableness" standard from the qualified immunity context would also conflict with this Court's interpretation of 42 U.S.C. §1983 -- another statute with which this new provision governing habeas relief must be reconciled. This Court has labored long and hard to make habeas corpus and §1983 actions compatible. In *Heck v. Humphrey*, 512 U.S. 477 (1994), for example, the Court held that a §1983 suit for damages is unavailable to a prisoner whose claim goes to the validity of a criminal judgment -- unless the prisoner first undermines that judgment by some other means, typically a habeas corpus action.

The scenario the Court envisions is that a plaintiff will initially seek and obtain a favorable decision in habeas (in which case the "reasonableness" test applicable in qualified immunity cases will play no role). Then (and only then), the plaintiff will be entitled to sue the offending state executive officer for damages (in which case that officer *will* be entitled to defend on the ground that his or her behavior was "reasonable" within the meaning of this Court's precedents on immunity). If §2254(d)(1) were construed to incorporate the qualified immunity standard into the plaintiff's habeas action in the first instance, *Heck* would no longer make sense. An issue that *Heck* reserved for the subsequent §1983 suit would be jammed into the previous habeas proceeding -- making the §1983 suit's treatment of it superfluous.[8]

---

[8] No such conflict is created, of course, by Congress' decision in §2254(d) to authorize federal habeas courts to adjudicate the merits of prisoners' claims before turning to the question of habeas relief. *See* Point I, *supra*. In that respect, Congress has made the order of issues in habeas similar to the order in qualified immunity cases. And Congress has done that for reasons that apply to both kinds of cases. For the reasons described in the text, however, it would not

CONCLUSION

For the reasons stated above, the Court should not construe §2254(d) either to restrict federal courts' authority and responsibility to adjudicate the merits of federal claims or to import an understanding of "reasonableness" established for qualified immunity cases into the habeas context.

Respectfully submitted,

Larry W. Yackle
(*Counsel of Record*)
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

Steven R. Shapiro
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Dated: March 4, 2002

---

make sense to use the same understanding of "reasonableness" in both contexts. Congress has wisely avoided that mistake. With respect to the substantive standard applied to state behavior (as opposed to the order in which federal courts decide issues), the habeas and qualified immunity contexts are entirely different. And a standard developed for the one need not be appropriate for the other.