CRIMINAL LAW — FEDERAL HABEAS REVIEW UNDER AEDPA — SIXTH CIRCUIT INTERPRETS "CLEARLY ESTABLISHED FEDERAL LAW" NARROWLY. — *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012).

Federal habeas jurisprudence has evolved rapidly since the passage of the Antiterrorism and Effective Death Penalty Act of 1996[1] (AEDPA). Most of that evolution has involved the new standard of review that AEDPA established for petitions by state prisoners, which allows a federal court to grant habeas relief from a state court decision only when it finds that the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law."[2] Since AEDPA's passage, the Supreme Court's interpretation of this standard has gradually grown stricter as the Court has shifted its emphasis from the "contrary to" and "unreasonable application of" clauses to the "clearly established" clause.[3]

Recently, in *Bunch v. Smith*,[4] the Sixth Circuit denied habeas relief to a juvenile serving an allegedly unconstitutional sentence[5] by denying that any applicable "clearly established Federal law" existed at all, ending its habeas analysis at that threshold question.[6] That approach tracked the Supreme Court's recent AEDPA-standard jurisprudence, which interprets precedent narrowly, distinguishes it from the case at hand, and denies relief without any analysis of the "contrary to" and "unreasonable application" prongs. While this approach helps the Court enforce the deference to state court decisions that was a motivating principle of AEDPA, it represents a departure from the first decade of post-AEDPA law. *Bunch* illustrates this departure — and shows that the Court's recent, aggressive effort to enforce AEDPA's strict standard on lower federal courts, including the contrarian Sixth Circuit, may be working.

In 2001, sixteen-year-old Chaz Bunch and two accomplices kidnapped, raped, and robbed M.K., a twenty-two-year-old female student.[7] Just after M.K. got out of her car on her way to work, a masked man accosted her at gunpoint and forced her back into her vehicle, which he then drove away, following a second car containing

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[1] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

[2] 28 U.S.C. § 2254(d)(1) (2006).

[3] *See, e.g.*, *The Supreme Court, 2006 Term — Leading Cases*, 121 HARV. L. REV. 185, 335–36 (2007) (describing the Court's increasingly restrictive interpretation of AEDPA).

[4] 685 F.3d 546 (6th Cir. 2012).

[5] *Id.* at 547. Bunch, convicted of nonhomicide offenses committed at age sixteen, had been sentenced to eighty-nine years in prison. *Id.* He argued that this "functional equivalent" of life without parole for crimes he committed as a juvenile was cruel and unusual punishment. *Id.*

[6] *Id.* at 551.

[7] *Id.* at 547.

Bunch and another attacker.[8] Both cars continued to a gravel lot, where Bunch and the first man orally, anally, and vaginally raped M.K., while the third man robbed her.[9] They eventually ended the attack and put M.K. back into her car, which she drove away.[10] The police arrested the three men based on their car's license plate number, which M.K. memorized during the assault.[11]

The state trial court convicted Bunch on ten counts.[12] Bunch was then sentenced to the maximum term for each count, to be served consecutively for a total of eighty-nine years' imprisonment.[13] The judge told Bunch, "I just have to make sure that you don't get out of the penitentiary. I've got to do everything I can to keep you there, because it would be a mistake to have you back in society."[14]

Bunch appealed his sentence, arguing, in part, that the court had violated his Eighth Amendment rights by sentencing him to effective life without parole despite his juvenile status and the nonhomicide nature of his crimes.[15] The Ohio Court of Appeals rejected this argument and affirmed the trial court's judgment,[16] after which the Ohio Supreme Court denied Bunch's petition for discretionary review.[17]

In 2008, Bunch filed a habeas petition in federal district court, again on the theory that his sentence was cruel and unusual.[18] In 2009, the magistrate judge assigned to the case recommended that the district court delay a decision until the Supreme Court decided *Graham v. Florida*,[19] in which the Court would rule on the constitutionality of juvenile life without parole (JLWOP) sentences for nonhomicide offenders such as Bunch.[20] The district judge rejected this recommendation and the petition, reasoning that since the two cases were factu-

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[8] *Id.* at 547–48.

[9] *Id.* at 548.

[10] *Id.*

[11] *Id.*

[12] *Id.* The counts included three counts of rape, three counts of complicity to commit rape, one count of aggravated robbery, one count of kidnaping, one count of misdemeanor menacing, and all related firearm specifications. A tenth count, conspiracy to commit aggravated robbery, was vacated on appeal. *Id.*

[13] *Id.* The sentences were ten years for each count of rape and of complicity to commit rape, ten years for aggravated robbery, ten years for kidnapping, 180 days for misdemeanor menacing, and nine years for firearms specifications. *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*; *see also* State v. Bunch, No. 06 MA 106, 2007 WL 4696832, at *5–7 (Ohio Ct. App. Dec. 21, 2007).

[17] *Bunch*, 685 F.3d at 548; *see also* State v. Bunch, 886 N.E.2d 872, 872 (Ohio 2008) (unpublished table decision).

[18] *Bunch*, 685 F.3d at 548; *see also* Bunch v. Smith, No. 1:09CV0901, 2009 WL 5947369, at *6–8 (N.D. Ohio Dec. 8, 2009).

[19] 130 S. Ct. 2011 (2010).

[20] *Bunch*, 685 F.3d at 549.

ally distinguishable — one involved an explicit JLWOP sentence, the other merely a "functional" JLWOP sentence — citing any law "clearly established" in *Graham* would be of no avail to Bunch.[21] Later that month, the Supreme Court held in *Graham* that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."[22] The Sixth Circuit granted a certificate of appealability to consider the Eighth Amendment claim in light of *Graham*'s JLWOP prohibition.[23]

The Sixth Circuit affirmed the denial of habeas relief.[24] Judge Rogers, joined by Judges Griffin and Donald, first noted that AEDPA's standard of review governed Bunch's claim since it had been adjudicated on the merits in a state court.[25] This standard allows the federal courts to grant habeas relief only if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law."[26] Although the court noted that there was a question of whether the application of the *Graham* decision would be time-barred by nonretroactivity rules,[27] it set that thorny issue aside and proceeded instead to the question of whether *Graham*, assuming it applied, clearly established *any* law that was relevant to Bunch's sentence.[28] While the court observed that even the warden agreed that "Bunch's 89-year aggregate sentence may end up being the functional equivalent of life without parole,"[29] it distinguished *Graham* from *Bunch* because the former "did not encompass consecutive, fixed-term sentences."[30] Based on that distinction between the *explicit* JLWOP sentence in *Graham* and the *effective* JLWOP sentence in *Bunch*, the court held that the former was not "clearly established" law governing the latter, and so there was no need to continue the AEDPA analysis: a state court decision cannot be contrary to, or involve an unreasonable application of, nonexistent law.[31]

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[21] *Id.*; *see also* Bunch v. Smith, No. 1:09 CV 901, 2010 WL 750116, at *2 (N.D. Ohio Mar. 2, 2010).

[22] *Graham*, 130 S. Ct. at 2034.

[23] *Bunch*, 685 F.3d at 549.

[24] *Id.* at 553.

[25] *Id.* at 549.

[26] *Id.* (quoting 28 U.S.C. § 2254(d)(1) (2006)) (internal quotation marks omitted).

[27] *Id.* at 549–50 (citing Greene v. Fisher, 132 S. Ct. 38, 45 (2011)).

[28] *Id.* at 550 ("We need not resolve this threshold question of whether *Graham* applies to Bunch's case on collateral review because even assuming, without deciding, that *Graham* does apply, Bunch is still not entitled to habeas relief.").

[29] *Id.* at 551; *see also id.* at 551 n.1 ("Bunch claims, and the Warden does not dispute, that under Ohio's recently revised sentencing laws, he will be at least 95 years old before he is eligible for release from prison.").

[30] *Id.* at 551.

[31] *See id.* at 550.

The disposition of the case rested entirely on the "clearly established" clause, and Bunch's claim perished at that threshold question.

The court's focus in *Bunch* on the question of "clearly established Federal law" reflects a shift in recent years in the Supreme Court's AEDPA jurisprudence. That shift, away from a focus on AEDPA's "contrary to" and "unreasonable application of" clauses and toward the "clearly established" clause, represents the newest stage in the Supreme Court's attempts to compel AEDPA-mandated deference by the lower federal courts to state court decisions. *Bunch* illustrates that this deference and the "clearly established" formulation, aggressively enforced by the Court, are beginning to stick.

AEDPA, a landmark habeas reform bill passed in 1996, set forth a new[32] standard of review for federal habeas petitions requesting relief from state court decisions: federal courts must find that a state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" before granting a petition.[33] In the early years following AEDPA's passage, the Supreme Court "put to the side" what the phrase "clearly established Federal law" means, focusing its analysis on the "contrary to" and "unreasonable application of" prongs.[34] The first case to interpret the phrase "clearly established Federal law," *Williams v. Taylor*,[35] did not thoroughly analyze the language, describing it in "an almost offhand remark"[36] as "refer[ring] to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision."[37] That case, like the rest of the Court's early AEDPA jurisprudence, simply assumed that the relevant law had been "clearly established," and so turned on other grounds.[38] In the years following *Williams*, the Court began referring to the "clearly established" prong,

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[32] From the early days of AEDPA there has been a debate about whether the law's goals were to codify existing law or to substantively alter and restrict habeas. *See* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 864–84 (1998) (describing the debate).

[33] 28 U.S.C. § 2254(d)(1) (2006).

[34] *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 412 (2000) ("Throughout this discussion, the meaning of the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' has been put to the side."); *see also* Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 LEWIS & CLARK L. REV. 741, 747 (2010) ("In the first case to provide detailed interpretation of this clause, *Williams v. Taylor*, the Court primarily focused on the 'contrary to' and 'unreasonable application of' phrases." (footnote omitted)).

[35] 529 U.S. 362.

[36] Bentele, *supra* note 34, at 749.

[37] *Williams*, 529 U.S. at 412.

[38] *Id.* at 391 (stating that it was "past question that the rule [being applied in the case] qualifies as 'clearly established Federal law'"); *see also The Supreme Court, 2006 Term — Leading Cases*, *supra* note 3, at 340 (noting that, until 2006, "none of the Court's leading cases on § 2254(d)(1) turned on the lack of clearly established law").

citing the *Williams* formulation of it as "the holdings, as opposed to the dicta."[39] Although the Court began regularly considering the prong, none of its cases ultimately relied on it.[40]

The "clearly established" clause "moved decisively from the sidelines to center stage"[41] in 2006 when the Supreme Court decided *Carey v. Musladin*.[42] In that case, the Court considered whether a homicide defendant's right to a fair trial was violated when the victim's friends and family wore buttons depicting the victim's face to the trial.[43] The Court dispatched the issue based entirely on a "clearly established" analysis, with Justice Thomas writing that "[t]his Court has never addressed a claim that such *private-actor* courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial."[44] While the Court had twice found "that certain courtroom practices" violated defendants' rights,[45] both of those cases had involved *government-sponsored* practices, not the actions of private parties.[46] The lack of precisely on-point precedent, in the majority's view, disposed of the issue, since the state court decision could hardly have been contrary to, or have unreasonably applied, nonexistent law.[47]

Although the judgment was unanimous, three Justices concurred only in the judgment and filed separate opinions disagreeing with the majority's "clearly established" reasoning. Justice Stevens criticized the Court's focus on the "holdings, as opposed to the dicta" dictum,[48] stating that "[v]irtually every one of the Court's opinions announcing a new application of a constitutional principle contains some explanatory language that is intended to provide guidance to lawyers and judges in future cases,"[49] and that it was "quite wrong to invite state-court judges to discount the importance of such guidance."[50] Justice Kennedy also concurred only in the judgment, arguing that "AEDPA does

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[39] *E.g.*, Yarborough v. Alvarado, 541 U.S. 652, 660–61 (2004) (quoting *Williams*, 529 U.S. at 412); Lockyer v. Andrade, 538 U.S. 63, 71 (2003) (same); Tyler v. Cain, 533 U.S. 656, 664 (2001) (same).

[40] Bentele, *supra* note 34, at 750.

[41] *Id.*

[42] 549 U.S. 70 (2006).

[43] *See id.* at 72–73.

[44] *Id.* at 76 (emphasis added).

[45] *Id.* at 72 (citing Holbrook v. Flynn, 475 U.S. 560, 568 (1986); Estelle v. Williams, 425 U.S. 501, 503–06 (1976)).

[46] *See id.* at 75.

[47] *Id.* at 77 ("Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" (alterations in original) (quoting 28 U.S.C. § 2254(d)(1) (2006))).

[48] *Id.* at 78 (Stevens, J., concurring in the judgment).

[49] *Id.* at 79; *see also id.* (listing examples).

[50] *Id.*

not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied."[51] Justice Souter filed a similar concurrence, calling the meaning of "clearly established" "murky."[52]

Despite the reservations of Justices Stevens, Kennedy, and Souter, the Court has seized on the new "clearly established" tool to dispose of habeas cases. In so doing, it has aggressively imposed its view on lower courts. For example, in the same Term as it decided *Musladin*, the Court vacated and remanded *Van Patten v. Deppisch*,[53] a Seventh Circuit decision granting habeas relief, for reconsideration in light of the new "clearly established" standard the Court had just enunciated.[54] When the Seventh Circuit stuck by its earlier analysis, the Supreme Court reversed.[55] Justice Stevens, now "acquiesc[ing]" to the Court's "clearly established" analysis,[56] wrote in a concurrence that he had to join the opinion because of "[a]n unfortunate drafting error" in a previous opinion that failed to extend its holding far enough.[57] In *Van Patten*, denial turned on the fact that the Court had never explicitly found that an attorney on speakerphone is an inadequate substitute for an attorney in open court.[58] Rejecting habeas petitions at the "clearly established" threshold has thus proven very efficient, since the Court can narrowly construe its own precedent and seize on any plausible factual distinction, as it did in both *Musladin* and *Van Patten*, to end the inquiry without consideration of the "explanatory language" that Justice Stevens saw as crucial "guidance to lawyers and judges in future cases."[59]

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[51] *Id.* at 81 (Kennedy, J., concurring in the judgment). Justice Kennedy described the extreme form of the majority's argument, rejecting the notion that a federal court might require button-specific precedent to decide whether wearing buttons created a coercive environment. *Id.*

[52] *Id.* at 82 (Souter, J., concurring in the judgment).

[53] 434 F.3d 1038 (7th Cir. 2006).

[54] *See* Schmidt v. Van Patten, 549 U.S. 1163 (2007); *see also* Wright v. Van Patten, 552 U.S. 120, 123 (2008) (per curiam) ("*Musladin*'s explanation of the 'clearly established Federal law' requirement prompted us to remand Van Patten's case to the Seventh Circuit for further consideration.").

[55] *Van Patten*, 552 U.S. at 125–26 (denying habeas relief because "[n]o decision of this Court . . . squarely addresses the issue in this case," *id.* at 125).

[56] *Id.* at 128–29 (Stevens, J., concurring in the judgment).

[57] *Id.* at 126 (citing United States v. Cronic, 466 U.S. 648 (1984)). In *Cronic*, the Court held that for purposes of an ineffective assistance of counsel claim, prejudice can be assumed if the defendant is "denied the presence of counsel at a critical stage of the prosecution," 466 U.S. at 662, but it stopped short of defining "presence" as physical presence in open court, *see Van Patten*, 552 U.S. at 126–28 (Stevens, J., concurring in the judgment).

[58] *Van Patten*, 552 U.S. at 125 (per curiam). While the case turned on the lack of on-point precedent, Justice Stevens did couch his opinion in the language of "unreasonable application." *Id.* at 128–29 (Stevens, J., concurring in the judgment).

[59] Carey v. Musladin, 549 U.S. 70, 79 (2006) (Stevens, J., concurring in the judgment).

The availability of this new and efficient tool has coincided with the Court's push to impose AEDPA deference in what increasingly resembles a concerted campaign against the circuit courts.[60] Justice Scalia set the tone in a 2010 dissent from a denial of certiorari for a lower court habeas grant. He argued that the Court should have taken up and reversed the lower court's grant, calling it "lawless speculation"[61]:

> With distressing frequency . . . federal judges refuse to be governed by Congress's command [in AEDPA] that state criminal judgments must not be revised by federal courts unless they are "contrary to, or involv[e] an unreasonable application of, *clearly established Federal law* . . . ." We invite continued lawlessness when we permit a patently improper interference with state justice such as that which occurred in this case to stand.[62]

Justice Scalia's desire for aggressive AEDPA enforcement seems to have come to pass. Whereas from 1996 to 2005 the Court reversed only twenty-seven habeas grants,[63] "[i]n 2010–11 alone, the Supreme Court . . . reversed . . . ten decisions for not adhering to AEDPA's requirements."[64] Many such reversals have relied on the post-*Musladin* "clearly established" technique,[65] including one decided as recently as last Term.[66] The Sixth Circuit has been at the center of this controversy, with five habeas reversals in the 2009 Term alone.[67] Last June, in fact, only a month before the court decided *Bunch*, the Supreme Court summarily reversed a Sixth Circuit habeas grant in a decision that was called a "smackdown" or "slam" of the circuit's AEDPA rul-

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60 *See* Jonathan M. Kirshbaum, *Accelerating Pace of Supreme Court's Summary Reversals of Habeas Relief Suggests Impatience with Circuit Courts' Failure to Defer to State Tribunals*, 91 Crim. L. Rep. (BNA) No. 13, at 429 (June 27, 2012).

61 Allen v. Lawhorn, 131 S. Ct. 562, 565 (2010) (Scalia, J., dissenting from denial of certiorari).

62 *Id.* (citation omitted) (quoting 28 U.S.C. § 2254(d)(1) (alteration in original) (emphasis added)).

63 Recent Case, 125 HARV. L. REV. 2185, 2191 (2012) (citing John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 277 (2006)).

64 Hill v. Humphrey, 662 F.3d 1335, 1343 (11th Cir. 2011) (en banc).

65 *See, e.g.*, Bobby v. Dixon, 132 S. Ct. 26, 29–30 (2011) (per curiam) (denying relief partly due to lack of clearly established law); Thaler v. Haynes, 130 S. Ct. 1171, 1172 (2010) (per curiam) (denying relief because lower court was wrong in finding clearly established federal law); Wright v. Van Patten, 552 U.S. 120, 126 (2008) (per curiam) (holding habeas relief unauthorized "[b]ecause [the Court's] cases give no clear answer to the question presented, let alone one in Van Patten's favor"). *But see* Smith v. Spisak, 130 S. Ct. 676, 681 (2010) (assuming, arguendo, clearly established law before rejecting habeas on other grounds).

66 *See, e.g.*, Howes v. Fields, 132 S. Ct. 1181, 1185 (2012), *analyzed by The Supreme Court, 2011 Term — Leading Cases*, 126 HARV. L. REV. 176, 236–46 (2012).

67 Jonathan H. Adler, *Sixth Circuit Smackdown Watch*, VOLOKH CONSPIRACY (June 11, 2012, 10:49 AM), http://www.volokh.com/2012/06/11/sixth-circuit-smackdown-watch; Ed Whelan, *Supreme Court Slams Sixth Circuit Panel*, NAT'L REV. ONLINE (June 11, 2012, 11:05 AM), http://www.nationalreview.com/bench-memos/302370/supreme-court-slams-sixth-circuit-panel-ed-whelan.

ings.[68] It is too soon to tell whether *Bunch* represents the Sixth Circuit's capitulation, but given the aggressive tone of the Court's actions, rulings such as *Bunch* come as no surprise: they demonstrate that some circuits, even the recently contrarian Sixth Circuit, have noticed the Court's eagerness to reverse them and may have begun falling in line with the "clearly established" test and its greater AEDPA deference.[69]

The rapid evolution of AEDPA jurisprudence and the Court's vigorous enforcement of AEDPA-mandated deference have generated a heated debate. Critical scholars deride the Court's approach as creating an "arbitrary"[70] "fact lottery"[71] that represents an "insurmountable" obstacle to habeas.[72] Supporters see these developments as in line not only with Congress's wishes[73] and the respect and deference that state courts deserve,[74] but also with a more historically authentic vision of federalism that traces its roots back to the Founders.[75]

Regardless of the side one falls on, absent a statutory change the highly deferential "clearly established" approach pioneered in *Musladin* and illustrated in *Bunch* seems likely to dominate AEDPA review for some time.[76] Cases like *Bunch* show that an increasing number of lower courts are getting the Supreme Court's aggressively enforced AEDPA message: defer, or prepare to be reversed.

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[68] *See, e.g.*, Adler, *supra* note 67 (noting that the Supreme Court called "[t]he [circuit's] decision . . . a textbook example of what [AEDPA] proscribes" (quoting Parker v. Matthews, 132 S. Ct. 2148, 2149 (2012) (per curiam))).

[69] Other circuits have taken the Court's direction. For example, after the Supreme Court vacated a Second Circuit decision granting habeas and remanded for consideration in light of the *Musladin* standard, the circuit reversed itself, stating, "Our decision cannot stand after *Musladin*." Rodriguez v. Miller, 537 F.3d 102, 104 (2d Cir. 2008).

[70] Bentele, *supra* note 34, at 754.

[71] *The Supreme Court, 2006 Term — Leading Cases*, *supra* note 3, at 345 ("A habeas regime in which primarily fact-bound holdings constitute the 'clearly established law' will increasingly resemble a fact lottery: if cases fit into particular facts sets, state courts will be heavily bound; if cases fall beyond those narrow areas, state courts will enjoy greater latitude . . . .").

[72] Recent Case, *supra* note 63, at 2185.

[73] *See* Kirshbaum, *supra* note 60, at 429 (citing Allen v. Lawhorn, 131 S. Ct. 562, 565 (2010) (Scalia, J., dissenting from denial of certiorari)).

[74] *See* Diarmuid F. O'Scannlain, *A Decade of Reversal: The Ninth Circuit's Record in the Supreme Court Through October Term 2010*, 87 NOTRE DAME L. REV. 2165, 2168 (2012) ("[AEDPA] reflects the deference that federal courts owe to the states as a matter of federalism.").

[75] *See* Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 898–903 (1998) (discussing the early history of the relationship between state and federal courts).

[76] In *Howes v. Fields*, 132 S. Ct. 1181, 1185, 1194 (2012), all nine Justices agreed on the basic outlines of the "clearly established" AEDPA test.