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# Accelerating Pace of Supreme Court's Summary Reversals of Habeas Relief Suggests Impatience With Circuit Courts' Failure to Defer to State Tribunals

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In December 2010, U.S. Supreme Court Justice Antonin Scalia issued an ominous warning. In a dissent from the denial of certiorari in a capital habeas corpus case called *Allen v. Lawhorn*,[1] he expressed his outrage over the Eleventh Circuit's grant of habeas relief under the 28 U.S.C. § 2254(d) standard of review. In particular, he felt that the circuit court had failed to provide the level of deference required by that standard of review to the state court's decision rejecting the habeas petitioner's claim that he received ineffective assistance of counsel at his sentencing hearing based on his attorney's failure to make a closing argument. According to Scalia, the Supreme Court should have summarily reversed the decision.

[1] 131 S. Ct. 562 (2010).

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At the end of his dissent, Scalia issued the following warning:

> I would not dissent from denial of certiorari if what happened here were an isolated error. It is not. With distressing frequency, especially in capital cases such as this, federal judges refuse to be governed by Congress's command 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, as determined by the Supreme Court of the United States,'' 28 U.S.C. § 2254(d)(1) . . . . We invite continued lawlessness when we permit a patently improper interference with state justice such as that which occurred in this case to stand.[2]

It was a striking proclamation, suggesting that rampant misconduct had permeated the federal court system. However, at the time, there did not appear to be much evidence to back up the strong language. The court had not been issuing an increasing number of opinions that indicated such a problem in the federal courts. Scalia's statement seemed a bit out of left field, nothing more than heated rhetoric.

However, in relatively short order, the court demonstrated that Scalia's stern warning had a great deal of support. First, in January 2011, the court issued its decision in *Harrington v. Richter*, 88 CrL 453 (U.S. 2011). In that case, the court severely criticized the circuit court for failing to provide the required level of deference under the Section 2254(d)(1) standard of review. In an exceptional section in the opinion, the court emphasized the amount of deference that the federal courts must give to state court decisions on habeas review and provided detailed guidance to the lower courts on how to apply that deference. In the course of this analysis, the court dramatically altered habeas jurisprudence, readjusting the core philosophy of habeas review.

Following *Richter*, the court utilized an exceptional practice to give force to the stiffer rules it implemented in that decision. Over the course of 14 months, the court

[2] Id. at 565 (emphasis removed).

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took the unusual step of issuing *seven* summary reversals on what was essentially the exact same issue, the circuit court's failure to engage in the required amount of deference under the standard of review. What is so striking about the court's actions in these cases is that the summary reversal is a blunt tool, typically used in moderation. A summary reversal represents a potent statement that the lower court's decision was so patently wrong that the court can reverse it without briefing on the merits or oral argument from the parties. In issuing the large number of summary reversals on a single issue in such a short time period, the court was sending a clear message to the lower courts: We are carefully watching your habeas grants to make sure you are providing the required level of deference.

And the message was received, at least in one notable instance. The Second Circuit—which had not yet experienced the Supreme Court's wrath in a summary reversal—granted a state's petition for rehearing and vacated a prior habeas grant, specifically pointing to one of the summary reversals as a basis for its actions. It was an unusual and jarring turnabout with only a peremptory explanation for a drastic about-face. The best explanation for that reversal must be the most obvious one: The summary reversals had the impact that Scalia was seeking with his warning in *Allen*.

## Deference, Please!

Any article about federal habeas review of state court criminal convictions must (necessarily) start with the Antiterrorism and Effective Death Penalty Act. In April 1996, Congress passed AEDPA with the obvious intent of limiting the availability of federal habeas relief for state prisoners. One of the major changes the statute wrought was the implementation of what's known as the ''standard of review'' contained in Section 2254(d). It provides that habeas relief in federal court cannot be granted unless the state habeas petitioner shows that the state court decision rejecting the merits of a federal constitutional claim was ''contrary to, or involve[d] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.''

The goal of the standard of review, as the Supreme Court has often declared, is for federal courts to grant a great deal of deference to the state courts on their resolution of constitutional claims. However, as Scalia's dissent in *Lawhorn* shows, the court believes (or at least certain members of the court believe) that federal courts routinely do not grant state courts the required deference. As the 15-year anniversary of the AEDPA approached, the court clearly decided that more drastic action was necessary to get the lower courts to follow this mandate.

It began on Jan. 19, 2011, with the decision in *Richter*. One of the questions on which the court had granted certiorari was whether the Ninth Circuit, in granting habeas relief, had been insufficiently deferential to the state courts. In a scathing analysis, the court answered with a resounding ''yes.'' In a truly remarkable section of the opinion, the court described habeas corpus in an exceedingly restrictive way: a ''guard against extreme malfunctions in the state criminal justice systems.'' Rarely had the court articulated habeas relief in such stark terms. The intent was clear: When we say deference, we mean *deference* to the point where the federal courts must find near judicial incompetence from the state courts.

Indeed, the court backed up that tough talk with a new interpretation of the standard of review that would make granting habeas relief an almost impossible venture: A petitioner must show that the state court's ruling ''was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'' That is a highly deferential standard, to say the very least. The court added that a federal court must review all potential reasons to support a state court decision before determining that the state court acted unreasonably. To top it off, the court utilized res judicata concepts in its discussion of the statute, which had previously not been seen in habeas review of the merits of a constitutional claim. The court went so far as to indicate that habeas review is ''barred'' unless the standard of review is met. Such strong language emphasized the depth of the level of ''deference'' that must be granted—near preclusive effect.[3]

*Richter* emphasized deference and provided the framework for analyzing this deference. It was a strong and unmistakable message to the lower courts. But clearly the court did not feel that it was enough. That's when we started seeing the summary reversals.

## The Meaning of a Summary Reversal

Most opinions from the Supreme Court are issued after full briefing and oral argument. However, the court also has the power to simply issue a per curiam opinion summarily reversing a lower court decision based on the certiorari petition alone. The idea behind these so-called summary reversals is to correct especially egregious errors or to chasten a lower court that may be deliberately flouting or ignoring the court's precedent.[4] The practice can spare the court the time and expense of full briefing while ''policing outlier decisions from lower courts.''[5] While these per curiam opinions are often viewed as having ''muted precedential value,''[6]

[3] For a more detailed discussion of *Richter*, see Jonathan M. Kirshbaum, ''Supreme Court's Recent Decisions in *Richter* and *Pinholster* Further Tilt Playing Field Against State Prisoners Seeking Habeas Relief,'' 89 CrL 672 (8/3/11).

[4] See Michelle Friedland, David Han, Jeff Bleich, Dan Bress, and Aimee Feinberg, ''Opinions of the Court by . . . Anonymous,'' 34 *San Francisco Att'y* 38, 39-40 (Summer 2008).

[5] Id. at 40.

[6] *Central State University v. American Ass'n of University Professors*, 526 U.S. 124, 129 (1999) (Ginsburg, J., concurring).



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there is no doubt that they send a clear message to the lower courts that ''the Supreme Court is watching.''[7]

On the other hand, the practice does have its potential problems. First and foremost, a certiorari petition does not often focus on the merits of the case but rather presents reasons why the court should review a specific legal question. Deciding a case on the merits at the certiorari stage may provide the court with an incomplete picture of the case. At the very least, it does not fairly give the party fighting against certiorari a full hearing on the merits of the case.[8] There is also the question of whether it actually is a good use of the court's resources to review a supposed clear error when the court's overriding mission is to resolve significant legal conflicts of nationwide importance. These opinions can also be viewed as disrespectful to a lower court; the court is very publicly and conspicuously saying that it does not even need to hear from the parties on the merits to summarily conclude that the lower court was wrong.

Nevertheless, despite their inherent problems, the summary reversals remain a steady part of Supreme Court practice. Indeed, the court of Chief Judge John J. Roberts Jr. has consistently utilized the method, issuing as many as 10 in some terms.[9] The current court clearly views these summary reversals as a potential tool to develop the law.

## A Lot of Summary Reversals On a Single Issue In a Short of Period of Time

Shortly after the decision in *Richter* in January 2011, the court issued a series of summary reversals, criticizing the lower courts for failing to properly apply the deferential standard of review. In a 14-month stretch between March 2011 and June 2012, the court issued no fewer than *seven* summary reversals specifically criticizing the circuit courts for failing to be sufficiently deferential to the state courts.

The first lack-of-deference summary reversal appeared March 21, 2011, in *Felkner v. Jackson*.[10] The court reversed a habeas grant from the Ninth Circuit for failing to be ''highly deferential'' to the state court ruling as to whether the prosecutor had exercised peremptory challenges in a racially discriminatory fashion. The state appellate court, as the Supreme Court pointed out, had carefully reviewed the record at some length in upholding the lower court's finding that there was no discrimination. The court concluded that the state court decision was ''plainly not unreasonable.'' The court further criticized the Ninth Circuit for granting habeas in an unpublished memorandum that had solely a ''one-sentence conclusory explanation for its decision.''

The next lack-of-deference summary reversal did not appear for a few months, mostly due to the break between terms. But after the court rested through the summer months, the pace of issuance of the lack-of-deference summary reversals greatly increased upon the commencement of the October 2011 term. It began Oct. 31, 2011, in *Cavazos v. Smith*.[11] The Ninth Circuit had granted habeas relief after concluding that it was unreasonable for the state court to reject the petitioner's claim that the evidence was legally insufficient to support her conviction for murder under a shaken-baby-syndrome theory. The Supreme Court believed that this was ''plainly wrong'' due to the great deal of deference that must be afforded state courts on a legal insufficiency claim, which itself requires deference to the jury's conclusion. The court emphasized that, despite any doubts there may be about petitioner's guilt, it is not up to the federal courts, as the Ninth Circuit had done here, to second-guess the reliability of the expert testimony that the state presented at trial. Citing its prior decision in *Renico v. Lett*,[12] the court stated, ''When the deference to state court decisions required by § 2254(d) is applied to the state court's already deferential review . . . there can be no doubt of the Ninth Circuit's error below.''

One week later, on Nov. 7, 2011, the court issued the next lack-of-deference summary reversal, in *Bobby v. Dixon*.[13] The Sixth Circuit had concluded that relief must be granted under Section 2254(d) based on the state court's decision that the habeas petitioner's confessions, both before and after he received *Miranda* warnings, were made voluntarily. Relying heavily on the new interpretation of the standard of review articulated in *Richter*, the Supreme Court concluded that the Sixth Circuit failed to identify any errors in the state court's opinion that would meet the exacting requirements of *Richter*.

One month later, on Dec. 12, 2011, the next lack-of-deference summary reversal, in *Hardy v. Cross*,[14] appeared. The Seventh Circuit had granted habeas relief, concluding that it was unreasonable for the state courts to decide that a witness was unavailable so that the witness's out-of-court statement could be admitted at trial. Believing that the circuit court did not engage in a ''highly deferential'' review of the state court decision, the Supreme Court reversed the habeas grant, concluding that the state court identified the correct legal principle and ''applied it in a reasonable manner.''

On Feb. 21, 2012, the court issued another lack-of-deference summary reversal, in *Wetzel v. Lambert*.[15] The Third Circuit concluded that the state courts had unreasonably determined that the state had suppressed favorable and material evidence. Relying heavily on the new interpretation of the standard of review set forth in *Richter*, the Supreme Court vacated the habeas grant, concluding that the circuit court failed to give the appropriate deference to the state court's reasoning as it ''overlooked'' one of the reasons underlying the state court's conclusion. The court stated that the burden to retry a defendant, particularly after a great many years, should not ''be imposed unless *each* ground supporting the state court decision is examined and found to be unreasonable under the AEDPA.''

Then, on May 29, a lack-of-deference summary reversal was issued in *Coleman v. Johnson*.[16] Relying upon the prior summary reversal in *Cavazos*, the Supreme Court concluded that the Third Circuit did not properly

[7] Friedland, et al., at 40.
[8] Id.
[9] See, e.g., id. at 42.
[10] 131 S. Ct. 1305 (2011).
[11] 132 S. Ct. 2 (2011).
[12] 130 S. Ct. 1855 (2010).
[13] 132 S. Ct. 26 (2011).
[14] 132 S. Ct. 490 (2011).
[15] 132 S. Ct. 1195 (2012).
[16] __ S. Ct. __, 2012 WL 1912196 (May 29, 2012).

apply the ''doubly deferential'' standard of review required when reviewing a legal insufficiency claim.

Less than two weeks later, on June 11, the court issued lack-of-deference summary reversal number seven in *Parker v. Matthews*.[17] The Sixth Circuit had granted habeas relief on two grounds: legal insufficiency and prosecutorial misconduct in summation. Relying heavily upon *Cavazos* with respect to the legal-insufficiency claim and primarily upon *Richter* with respect to the prosecutorial misconduct claim, the court summarily reversed the Sixth Circuit, concluding that the lower court simply did not exercise the appropriate level of deference toward the state courts.

## The Message

It simply cannot be disputed that the court was seeking to send a message with this large number of lack-of-deference summary reversals. The sheer number of summary reversals in such a short period of time shows that the court intends to take a very active role in reviewing habeas grants. It places every habeas grant from the circuits on watch. And the court will not be afraid to expend the resources to strike down a habeas grant in a summary fashion when necessary. In issuing so many of these so rapidly, the court reveals its high level of intolerance with the current state of habeas law.

And it cannot be emphasized enough that these summary reversals all focus on a single issue: a federal court's lack of deference to the state courts. This is the *only* issue on which the court has issued multiple summary reversals during this same time period. Indeed, during the Roberts era, the number of summary reversals based on this issue far outstrips those issued on any other ground. It's not even close. This single issue is obviously of great concern to the current justices. It almost feels as though it is their mission to get this point across. There can be no doubt of the message: This court is watching over the lower courts like a hawk to make sure that deference is shown under Section 2254(d).

It is also important that these summary reversals followed closely on the heels of *Richter*, with its new and difficult-to-meet standard for granting habeas relief. While not every summary reversal has explicitly relied upon *Richter*, there can be no doubt that each reflects the spirit and unmistakable message of that decision: A high level of deference is absolutely necessary, so much so that a federal court must go to great lengths before upsetting a nearly preclusive state court decision. With the one-two punch of *Richter* and the numerous summary reversals, the court was admonishing the circuit courts to think twice (or maybe even thrice) before granting habeas relief or potentially open themselves up for a very public and embarrassing rebuke. It is the court exercising brute force to get the lower courts to follow.

To be sure, the court has issued several summary reversals on this basis before. What's more, the court has previously attempted a similar type of an experiment, issuing a bunch of lack-of-deference summary reversals in a short period of time. During the October 2003 term, the court issued four of these summary reversals over the course of eight months.[18]

However, that prior batch of summary reversals clearly did not have its intended effect, as can be seen from Scalia's *Lawhorn* dissent. And the more recent wave of summary reversals has elements that are clearly distinct from the earlier one. While the pace of issuance seems to be similar, there has been an even greater number of reversals, including *six* in a single term. More interestingly, the number of lower courts that are getting scrutinized is now greater. The first wave focused exclusively on the Sixth and Ninth circuits—two courts often scrutinized by the court in habeas cases. However, the second wave doubled the number of circuits receiving the court's criticism. Apart from the Sixth and Ninth circuits, the new batch also included cases from the Third and Seventh circuits. Further, although not a summary reversal, *Lawhorn* was a case out of the Eleventh Circuit, certainly not friendly territory for habeas petitioners. Scalia's strong language in that dissent would send shivers down the spine of any circuit court judge. This increase in scrutiny spread out among multiple circuits sends the clear message that every circuit, not just those typically viewed as outliers, is now under the court's watch.

The previous summary reversals also did not come on the heels of *Richter*. That decision adds a level of force to this new batch of summary reversals. In the shadow of *Richter*, these new summary reversals do not feel like ''error correction,'' as they may have been before. Under the new rules of *Richter*, they feel more like a *statement* about how the court will treat all habeas grants coming out of the circuit courts: Either follow the command (and spirit) of *Richter* or face a very public repudiation.

And, in one highly unusual case out of the Second Circuit, this message was received.

## Depraved Indifference

In New York, a person can commit second degree murder in several ways. One way is to commit an intentional killing. Another, far more ambiguous, way is to cause a death while acting recklessly under circumstances that evince a depraved indifference to human life. The typical example of that type of murder is someone driving a car at high speed down a busy sidewalk; there may not be an intent to kill, but the conduct certainly shows an indifference toward life while creating a grave risk of death to those on the sidewalk.

Over time, prosecutors began charging defendants with both types of murder in the same case. These dual indictments were possible due to the ambiguous definition of depraved indifference. The idea of someone acting with depraved indifference was never defined as its own mental state. Rather, it was viewed as acting with a ''heightened recklessness'' under certain factual circumstances. But such a vague definition made it difficult to tell the difference between this type of recklessness and regular old recklessness, which would be a lower level of crime.

Beginning with a case called *People v. Hafeez*[19] in 2003, the New York Court of Appeals began to point the

[17] __ S. Ct. __, 2012 WL 2076341 (June 11, 2012).

[18] *Holland v. Jackson*, 542 U.S. 649 (2004); *Middleton v. McNeil*, 541 U.S. 433 (2004); *Mitchell v. Esparza*, 540 U.S. 12(2003); *Yarborough v. Gentry*, 540 U.S. 1 (2003).

[19] 792 N.E.2d 1060 (N.Y. 2003).

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law in a different direction. And then, in *People v. Feingold*,[20] the court officially held that depraved indifference was its own mental state, well above recklessness on the mental-state scale, requiring a truly depraved and wanton state of mind. In between *Hafeez* and *Feingold*, the court issued a series of opinions that provided guidance on what factual situations can, and cannot, represent depraved indifference murder. For example, in *Hafeez* and *People v. Gonzalez*, the court emphasized that point-blank killings that are ''quintessentially intentional,'' where the defendant's actions were specifically aimed at causing the death of the victim, *cannot* be depraved indifference. The court was interested in drawing clear and distinct lines between the two.

However, due to the dual indictments, many defendants were being convicted of depraved indifference murder when the facts of the case showed that their actions could be viewed only as intentional murder. This left many defendants in the unenviable—but legally justified—position of arguing that, because they intentionally killed someone, the evidence of depravity was insufficient and thus the conviction had to be reversed. Unsurprisingly, the state courts did not take a shine to the argument and often rejected it, even in situations where there was absolutely no doubt that the killing was intentional.

That is what happened in *Rivera v. Cuomo*.[21] The evidence at trial showed that, after a short and tumultuous marriage, and angry that the victim was filing for divorce and seeking primary custody of their son, John Rivera, who had a history of violent outbursts and domestic abuse, lured the victim to his apartment with the intention of killing her. Then, while the two were standing on the sidewalk outside the apartment, he put a gun to her head and shot her. In the days and hours leading up to the shooting, Rivera had twice called the victim's divorce lawyer threatening to shoot and kill the victim and had also told his former employer that he wished his ex-wife dead. Despite a dual indictment, the prosecution had argued at trial *solely* that this was an intentional murder. For his part, Rivera argued that he tried to intervene as the victim put her own gun to her head and shot herself. The jury acquitted him of intentional murder but convicted him of depraved indifference murder. On appeal, the state courts rejected the argument that these facts cannot constitute depraved indifference murder. The conviction became final in 2004, after the decisions in *Hafeez* and *Gonzalez*, but before *Feingold*.

After Rivera's habeas petition was denied in the district court, the Second Circuit granted the petition in a 10-page opinion issued in August 2011. Relying heavily on the decisions in *Hafeez* and *Gonzalez*, the court concluded that there simply was no possible view of the evidence that supported a conviction for depraved indifference murder. This was a ''quintessentially intentional'' killing and was prosecuted that way, the court held. It concluded that the state court's decision upholding the verdict was ''unreasonable.''

Then the case took an unusual turn. The state filed a petition for rehearing/rehearing en banc. In the Second Circuit, these are rarely granted. Typically, the court grants en banc rehearing only once or twice a year. And it is even more rare to see the same panel simply reverse itself on rehearing.

But that's precisely what the Second Circuit did. On Dec. 16, 2011, the original three-judge panel reversed itself.[22] The stated reason was the lack-of-deference summary reversal in *Cavazos*, which was issued after the panel's original decision. The court stated that in *Cavazos*, the Supreme Court ''strongly reasserted'' the need for ''double deference'' to state courts when reviewing a legal insufficiency claim under Section 2254(d). So the court agreed to revisit the original decision to ''ensure that we had afforded the state courts and the jury the full extent of the deference they are owed under the [AEDPA].'' It believed that it had not. And, in contrast to the court's lengthy opinion granting habeas relief, its analysis was now one sentence: Under the law in effect at the time, although the evidence of depraved indifference murder ''was slim, at best, giving the state courts and the jury the utmost deference, we cannot find that the evidence was *so* completely lacking that *no* rational jury could have found Rivera guilty of depraved indifference murder.'' End of story.

This unusual turn of events shows, at least here, that the summary reversals had their intended effect. Indeed, the Second Circuit specifically relied on the authority of one of the summary reversals in taking the exceedingly rare course of reversing itself on rehearing. But there does appear to be more lying under the surface here. Certainly, *Cavazos* did, in a way, introduce the term ''double deference'' for legal insufficiency claims, which was something that the original panel did not explicitly discuss. But there is double deference, and then there is complete abdication. The Second Circuit had previously concluded, in a lengthy analysis, that there was *no* possible view of the evidence to support depraved indifference murder. It was the only rational outcome based on the state courts' own interpretation of the crime. No amount of deference can overcome such a conclusion. It is also not clear how deference changes the quantity of evidence from none to ''slim, at best.'' At least the court didn't explain how that had happened.

Rather, the court's unusual reversal and then highly peremptory conclusion seems to suggest that *something else* made this panel fearful of standing behind the prior decision. Not being sufficiently deferential—when the court had previously shown that there was no way to justify the state courts' actions—does not feel like an adequate explanation. But the fear of a public rebuke in a summary reversal does. The court's highly unusual actions strongly suggest that it simply did not want to risk the same embarrassing fate that the lower court suffered in *Cavazos*.

That's the power of the summary reversal. It can make a respected circuit court, so far not a victim of the lack-of-deference summary reversal, completely change course and reject a prior reasoned decision in a single sentence of analysis. It certainly provides some evidence that the circuit courts are now taking notice of Scalia's warning in *Lawhorn*: The Supreme Court is closely watching your habeas grants. Make sure that the deference is sufficient. Or else.

[20] 852 N.E.2d 1163 (N.Y. 2006).
[21] 649 F.3d 132 (2d Cir. 2011).
[22] *Rivera v. Cuomo*, 664 F.3d 20 (2d Cir. 2011).