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THE NOT SO GREAT WRIT: CONSTITUTION *LITE* FOR STATE PRISONERS

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I. INTRODUCTION

Following up on a previous piece describing the limiting effect of confining federal habeas relief to violations of "clearly established Federal law, as determined by the Supreme Court,"[1] this brief essay focuses on a particular set of cases to examine further the constraints the Court has placed on the grant of relief to state prisoners. Over the past seven terms (October, 2009 to June, 2015), the Court has issued summary, per curiam reversal of grants of federal habeas corpus relief by circuit courts of appeals at the behest of wardens, without briefing or oral argument, in eighteen cases, including seven involving death sentences.[2] By contrast, in only five cases did the Court reverse *denials* of habeas relief per curiam, and those cases presented highly unusual circumstances.[3] Shining a bright light on cases in which the Court saw fit to undo a determination by a federal court of appeals that a state prisoner had been deprived of his constitutional rights reveals the extent to which the Great Writ has been diminished by the Court's restrictive reading of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). State prisoners are entitled to relief from federal courts, it appears, only for the most blatant violations of their rights – they must be content with Constitution *lite*.[4]

The summary reversals of cases in which a panel of one of the circuit courts of appeal, the courts directly below the Supreme Court, found merit in petitioners' claims continue the trend of interpreting AEDPA in a way that makes it virtually impossible to overcome the deference now due to state court rejections of constitutional claims. To understand the dramatic changes wrought by the Supreme Court's interpretation of AEDPA, it is useful to recall the position of state prisoners seeking redress of their constitutional rights before that statute was enacted. Petitioners who had followed the proper procedures (giving state courts opportunity to rule on their federal claims, not procedurally defaulting them, and overcoming any harmless error argument) had the right to have a federal court decide, viewing the question *de novo*, whether their constitutional rights were violated in the state court proceedings.[5] Now, state prisoners have only two ways of securing *de novo* federal court review of federal constitutional claims alleged to have been wrongly decided by the state court: through a grant of certiorari on direct review (with the Court hearing about 75 cases per year of more than 7,000 petitions filed) or by overcoming a finding of procedural default.[6]

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[1] *See* Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 LEWIS & CLARK L. REV. 741, 743-44 (2010).

[2] *See infra* Appendix A (listing cases reversing grants of habeas relief).

[3] *See infra* Appendix B (listing cases reversing denials of relief); *see also infra* notes 159-64.

[4] While this essay does not directly engage with the ongoing debate about the role of federal habeas review prompted by Nancy King and Joseph Hoffmann's book HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT (2011), the reader will correctly infer that the author's sympathies lie with those who, unlike King and Hoffmann, still see a significant role for federal courts in ensuring the protection of constitutional rights in state courts. *See, e.g.*, Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 198-99 (2012).

[5] *See, e.g.*, Brown v. Allen, 344 U.S. 443, 462-64 (1953).

[6] When a state court relies on an independent and adequate state ground, such as failure to raise appropriate objections, to deny relief on a constitutional claim, rather than addressing the merits, federal courts that find either "cause and prejudice" for the default or a showing of actual innocence may address the issue of whether the petitioner's rights were violated de novo. *See* House v. Bell, 547 U.S. 518, 536 (2006); *see also* Murray v. Carrier, 477 U.S. 478, 485, 495-96 (1986). One scholar views that potential avenue for relief as showing that the Court has a logical approach to the habeas remedy consistent with notions of fault comparable to those applied to constitutional torts. *See* Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 523, 585 (2014). On the other hand, it could be seen as perverse to provide a benefit to petitioners who failed to adhere to state procedural rules.

In all other cases, federal courts, rather than granting relief to defendants who suffered a constitutional violation that prejudiced them, instead are limited to deciding whether the state courts' refusal to acknowledge the constitutional violation represented such an unreasonable application of clearly established Supreme Court law that no rational jurist would agree with the state court.[7] The extent to which Congress actually intended, when it enacted AEDPA, to cause such a dramatic shift in habeas jurisprudence is subject to debate.[8] Even assuming the legitimacy of the new regime, the way the Supreme Court has handled cases in which circuit courts granted relief to state prisoners should raise concerns about the diminished protection of constitutional rights.

The cases examined for this essay demonstrate the Court's continuing substantive restrictions on the federal habeas remedy for state prisoners, as well as displaying its low regard for that remedy by the use of summary procedure and a highly dismissive tone. First, the Court's definition of what law it has "clearly established" is disconcertingly narrow, requiring that the Supreme Court confronted on a prior occasion, in which it had granted its notoriously parsimonious certiorari review on direct appeal, essentially the same set of facts presented by the habeas petitioner. Second, building on its increasing deference to any determinations by state courts on the merits of the constitutional claims, the Court appears to require such a determination to be basically irrational to warrant federal relief – if *any* "fairminded jurist"[9] could arrive at the same conclusion, habeas is precluded.

In terms of process, the Court issues these reversals without so much as hearing the respondent – the habeas petitioner who prevailed in the Court of Appeals – on the merits of why the grant of relief should be affirmed. On petitions by wardens, to which prisoners respond only to urge the Court not to grant review, the Court is summarily reversing decisions on the basis that those decisions were so clearly in error as to occasion no debate, even when dissenting justices disagree. In addition, the per curiam opinions are written in a tone more appropriate to scold a naughty child than to address an institution one step below the Supreme Court. The language in the opinions in some of these cases reflects a disdain not only of the petitioners, but of the courts of appeals that granted their petitions, hardly in keeping with the significant constitutional rights at stake. Finally, the few cases in which the Court uses summary reversal when habeas relief was denied display a quite different pattern.

II. CLEARLY ESTABLISHED LAW

The Supreme Court has continued its pattern, first announced in *Carey v. Musladin*, of narrowly defining what law has been so "clearly established" as to warrant

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[7] *See, e.g.*, Harrington v. Richter, 562 U.S. 86, 100-02 (2011).

[8] *See* Judith L. Ritter, *The Voice of Reason Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act's Restrictions on Habeas Corpus are Wrong*, 37 SEATTLE U. L. REV. 55, 55-56 (2013); *see also* Elizabeth J. Barnett, Comment, *A Great Writ Reduced: Why the Tenth Circuit's Interpretation of Congressional Intent and Supreme Court Precedent Portends Defeat for State Prisoners Seeking Federal Habeas Corpus Relief*, 58 OKLA. L. REV. 469, 475-78 (2005); *see also* 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, 2175 (2012); *see also* Daniel J. O'Brien, *Antiterrorism and Effective Death Penalty Act: Heeding Congress's Message: The United States Supreme Court Bars Federal Courthouse Doors to Habeas Relief Against All but Irrational State Court Decisions, and Oftentimes Doubly So*, 24 FED. SENT'G REP. 320 (2012). The authors of the latter two articles, a judge and assistant attorney general respectively, assume, without explanation, that it was Congress, rather than the Court, that intended the new meaning of "unreasonable."

[9] *See Harrington*, 562 U.S. at 101-02.

habeas relief after a state court has denied the federal constitutional claim on the merits.[10] Two consequences, both harmful to the protection of constitutional rights, flow from this approach. First, interpretation of the provisions of the Constitution designed to ensure the fairness of criminal convictions and sentences is placed entirely in the hands of the Supreme Court, with the lower federal courts playing virtually no role. Given the Court's limited review of cases on certiorari review of direct appeals, the opportunity to clarify or expand constitutional protections is vanishingly small. Second, failure to apply the constitutional principles developed in the context of appellate review to defendants, who may well have raised those challenges on direct appeal, but whose petitions for writ of certiorari were (as most are) denied, results in a stark differentiation, sometimes literally involving life or death, between prisoners whose cases are identical except for the timing of the Supreme Court's recognition of the constitutional violation. True, that difference has long been accepted as the price to pay in postconviction proceedings out of concern for finality and comity,[11] but when the petitioner unsuccessfully raised the claim on direct review, the result seems particularly unfair. Moreover, using the mechanism of summary reversal, without briefing or oral argument, for making that critical decision suggests that the cost is disproportionate to any possible benefit achieved.

One of the Court's most recent cases emphasizing the requirement that habeas relief is precluded in the absence of its own clearly established law illustrates the problem. In *White v. Woodall*,[12] over three dissents, the Court reversed the Sixth Circuit's grant of habeas relief to a Kentucky petitioner who had pled guilty to capital murder, kidnapping, and rape and been sentenced to death.[13] The court of appeals had concluded that the trial judge's failure, upon request, to give the jury a no-adverse-inference instruction from the defendant's failure to testify at the penalty phase (here, the only phase) of his trial violated law that had been clearly established in a series of Supreme Court precedents.[14] When the defendant had raised this federal constitutional issue on direct appeal, the Kentucky Supreme Court rejected it,[15] and the Supreme Court denied the petition for certiorari.[16] That denial, one of almost 2,000 issued that day,[17] turned out to have sealed the defendant's fate under the Court's current regime governing habeas review. Had the Court granted certiorari, it might well have determined that the trial court did indeed violate the defendant's rights under the Fifth Amendment by refusing to issue a no-adverse-inference instruction. Indeed, Justice Scalia's opinion for the Court denying relief to Mr. Woodall acknowledged as much: "Perhaps the logical next step from [the Supreme Court precedents] would be to hold that the Fifth Amendment requires a penalty-phase no-adverse-inference instruction in a case like this one; perhaps not. . . . The appropriate time

[10] *See* Carey v. Musladin, 549 U.S. 70, 72, 74, 76-77 (2006).
[11] *See* Teague v. Lane, 489 U.S. 288, 308-09 (1989).
[12] 134 S. Ct. 1697 (2014).
[13] *Id.* at 1701, 1707 (containing a dissent written by Justice Breyer, and joined by Justices Ginsburg and Sotomayor).
[14] Woodall v. Simpson, 685 F.3d 574, 579 (6th Cir. 2012), *rev'd sub nom.* White v. Woodall, 134 S. Ct. 1697 . The Sixth Circuit concluded that the Kentucky Supreme Court had unreasonably rejected the defendant's Fifth Amendment claim based on clearly established law set forth in three Supreme Court cases. *Id.* In *Carter v. Kentucky*, 450 U.S. 288, 305 (1981), the Court held that a defendant is entitled to a "no adverse inference" instruction during the guilt phase of a trial. This Fifth Amendment protection against self-incrimination was extended from the guilt phase to the penalty phase of a capital trial in *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981). Finally, the Court determined that the "rule against negative inferences at a criminal trial appl[ies] with equal force at sentencing[,]" even where a defendant pled guilty. Mitchell v. United States, 526 U.S. 314, 317, 329 (1999).
[15] Woodall v. Commonwealth, 63 S.W.3d 104, 115 (Ky. 2001) (distinguishing each of the Supreme Court cases on its facts).
[16] Woodall v. Kentucky, 537 U.S. 835 (2002).
[17] *See* 537 U.S. 812-945 (2002) (listing the cert. petitions denied on October 7, 2002).

to consider the question as a matter of first impression would be on direct review, not in a habeas case governed by Sec. 2254(d)(1)."[18]

The Court in no way acknowledged that at the "appropriate time," the Court had denied review,[19] as it does in all but a minuscule number of cases in which certiorari is sought on direct appeal. The Court thereby summarily relegated the defendant to "Constitution *lite*," the watered-down version of constitutional protections available to state prisoners on federal habeas review. As long as the specific facts of a petitioner's case are, in the eyes of a majority of the Supreme Court, sufficiently different from the precedent cases so that the "clearly established law" does not encompass them, no habeas relief is permitted. Even if some of the justices on the Court (three, in Woodall's case) agree with the circuit court that Supreme Court precedents had clearly established the constitutional principle on which the petitioner relies, the state prisoner is without a remedy for its violation, and his execution can be carried out.[20]

In addition to characterizing the holdings of Supreme Court cases quite narrowly, the Court in *Woodall* foreclosed a basis for federal habeas relief that had been assumed to be available since Section 2254 was first interpreted in *Williams v. Taylor*.[21] Justice O'Connor had included among possible "unreasonable application" scenarios one in which "the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply."[22] The Court now rejected that possibility, asserting that the "unreasonable-refusal-to-extend rule" had never been endorsed by a majority of the Court.[23] The Court acknowledged that it is not always clear whether one is applying a rule or extending it, and that § 2254 does not require an identical fact pattern for a rule to be applied, rather than extended. Yet for relief to be available under the unreasonable application clause, a clearly established rule must so obviously apply to the given set of facts "that there could be no fairminded disagreement on the question."[24]

Finally, the Court noted in this case, as it has in several of the recent per curiam reversals, that habeas relief can never be justified by reference to a circuit court's own precedents. Use of lower court cases as part of what law has been "clearly established" is, of course, expressly prohibited by the language of § 2254(d)(1) ("clearly established Federal law, as determined by the Supreme Court of the United States"). Yet even if circuit courts may not extend the reach of Supreme Court precedents in the habeas context, are they precluded from looking to their own opinions, or the decisions of sister circuits, in determining what law the Supreme Court has clearly established? The Sixth

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[18] White v. Woodall, 134 S. Ct. at 1707.

[19] *See Woodall*, 537 U.S. at 835.

[20] Three dissenting justices in another recent case, in which the Sixth Circuit had granted habeas on the ground that the defendant prisoner was "in custody" when he was taken to a prison conference room, noted the stark difference between direct review and review of a decision on federal habeas:

> Given this Court's controlling decisions on what counts as "custody" for *Miranda* purposes, I agree that the law is not "clearly established" in respondent Fields's favor. *See, e.g.*, Maryland v. Shatzer, 559 U.S. 105, 106 (2010); Thompson v. Keohane, 516 U.S. 99, 112 (1995). But I disagree with the Court's further determination that Fields was not in custody under *Miranda*. Were the case here on direct review, I would vote to hold that *Miranda* precludes the State's introduction of Fields's confession as evidence against him.

Howes v. Fields, 132 S. Ct. 1181, 1185-87, 1194 (2012) (Ginsburg, Breyer, Sotomayor, JJ., concurring in part and dissenting in part).

[21] 529 U.S. 362 (2000).

[22] *Id.* at 407.

[23] White v. Woodall, 134 S. Ct. at 1705-06.

[24] *Id.* at 1706-07 (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).

Circuit in *Woodall* referred to a prior case in which the court had analyzed the Supreme Court's cases involving an adverse inference from a defendant's failure to testify, noting that although the high court had not "directly" addressed the specific circumstance at issue, the principles set forth in its opinions suggested that the instruction requested was constitutionally required.[25] In fact, in the circuit court's view, the question the Supreme Court had not "directly" addressed was application of the principle to non-capital cases;[26] given Woodall's death sentence, that concern was irrelevant. Nonetheless, the Supreme Court chastised the circuit for basing its conclusion on one of its own cases, broadly proclaiming that a lower court may not "consult" its own precedents in assessing a habeas claim governed by § 2254.[27]

A number of the per curiam opinions that are the subject of this essay, in which the Court has reversed circuit courts' grant of habeas relief summarily, without briefing or oral argument, assert that habeas was not warranted because the applicable law had not been "clearly established" – there simply was no explicit prior holding by the Supreme Court on the facts presented. Of course, as any law student knows after a few weeks in school, the "holding" of a case can be stated in rather general or very specific terms. In the extreme case, so many facts are incorporated in the holding that virtually any deviation from those particular facts prevents the case from being binding precedent.[28] That appears to be the route taken by the Supreme Court in the habeas context when determining that the law based on which relief was granted was not in fact "clearly established." Reliance on general principles of constitutional law drawn from Supreme Court precedents, or, even worse, on interpretation of those precedents by the circuits themselves, is condemned as departing from the highly deferential standard of review required by AEDPA.

In eight of the summary reversals in recent terms, three involving death sentences and three sentences of life imprisonment, the per curiam opinions focused primarily on the lack of clearly established law to support the grant of habeas relief. In its brief opinion

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[25] *Id.* at 1703. In the prior case, *Finney v. Rothgerber*, the court had analyzed the issue as follows:

> In Carter v. Kentucky, 450 U.S. 288, 67 L. Ed. 2d 241, 101 S. Ct. 1112 (1981), the Supreme Court held that a defendant in a state criminal trial has the right, upon request, to a jury instruction that his failure to testify may not be the basis of an inference of guilt and should not prejudice him in any way. The Court had earlier held that a federal statute required that a no adverse inference instruction be given upon request of a criminal defendant. Bruno v. United States, 308 U.S. 287, 84 L. Ed. 257, 60 S. Ct. 198 (1939). Following Carter, in Estelle v. Smith, 451 U.S. 454, 68 L. Ed. 2d 359, 101 S. Ct. 1866 (1981), the Court held a defendant is entitled to the Fifth Amendment protection against self-incrimination in the punishment phase of a bifurcated trial of a capital case, declaring, "We can discern no basis to distinguish between the guilt and penalty phase of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." *Id.* at 462-63 (footnoted omitted).
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> The Supreme Court has not held directly that a no adverse inference instruction is required in the enhancement phase of a bifurcated persistent felony offender proceeding. It can be argued that Estelle v. Smith should be applied only to the punishment phase of capital cases, in view of the emphasis the Court placed on that feature of the case: "Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." 451 U.S. at 463 (citations omitted). We do not believe this emphasis is significant.

751 F.2d 858, 863 (6th Cir. 1985).

[26] *Finney*, 751 F.2d at 863.

[27] White v. Woodall, 134 S. Ct. at 1702 n.2.

[28] Judges working within the common law tradition of stare decisis are well versed in how to characterize prior cases from which they want to deviate. A common formulation is to describe the pesky precedent as "best understood in the context of its facts." *See* Ursula Bentele, *Chief Justice Rehnquist, The Eighth Amendment, and The Role of Precedent*, 28 AM. CRIM. L. REV. 267, 290 (1991). Rehnquist was referring to *Witherspoon v. Illinois*, 391 U.S. 510 (1968), which had announced a strict rule about when jurors could be excluded from capital trials based on their death penalty views. Wainwright v. Witt, 469 U.S. 412, 418 (1985).

reversing the grant of relief to a petitioner serving life imprisonment for rape, the Court reiterated three separate times that "no prior decision of this Court" clearly established the principle on which the Ninth Circuit had relied.[29] At issue was the Nevada trial court's refusal to allow the defense to introduce evidence that the victim, defendant's former girlfriend, had made several previous reports claiming that defendant raped or assaulted her, claims the police were unable to corroborate, thereby depriving him of his federal constitutional right to present a complete defense.[30] According to the Supreme Court, the circuit court had made the mistake of describing its precedents establishing the right to present a defense too generally: "By framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.' 28 U.S.C. §2254(d)(1)."[31]

The Nevada courts had asserted that the defendant could not rely on a Nevada statute that explicitly granted defendants in sexual abuse cases the right to present extrinsic evidence of false allegations because he had not filed the written notice required by the statute. The Supreme Court declared: "No decision of this Court clearly establishes that this notice requirement is unconstitutional."[32] In response to the Ninth Circuit's conclusion that such a notice requirement is subject to examination as to whether it serves legitimate state interests, the Court proclaimed: "Nor … do our cases clearly establish that the Constitution requires a case-by-case balancing of interests before such a rule can be enforced."[33] The Court concluded: "No decision of this Court clearly establishes that the exclusion of such evidence for such reasons in a particular case violates the Constitution."[34] Of course, if that kind of specificity regarding the holding of precedents is required, habeas petitioners will virtually never be entitled to relief.

Similarly confining habeas relief to cases in which the Supreme Court had faced essentially identical facts, the Court reversed the Sixth Circuit's holding that the prosecutor's closing argument in a capital case deprived the defendant of due process.[35] Conceding that part of the summation did appear improperly to allege collusion between the defendant and counsel, the Court was not persuaded that his suggestion that the defendant tailored his testimony justified the grant of relief: "The Sixth Circuit cited no precedent of this Court in support of its conclusion that due process prohibits a prosecutor from emphasizing a criminal defendant's motive to exaggerate exculpatory facts."[36] Again, habeas relief seems to be authorized only when the Supreme Court has decided a case on all fours with the petitioner's.

In addition to granting relief without the requisite Supreme Court precedent, the Sixth Circuit also committed error in consulting its own precedents, rather than those of the Supreme Court.[37] Rejecting the argument that the circuit court was simply considering those cases to shed light on what law had been clearly established by the Supreme Court, the Court noted that the general standard regarding prosecutorial misconduct set forth in

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[29] Nevada v. Jackson, 133 S. Ct. 1990, 1991, 1993-94 (2013) (per curiam).
[30] *Id.* at 1990-91.
[31] *Id.* at 1994.
[32] *Id.* at 1993.
[33] *Id.* The Court described the decision on which the Ninth Circuit relied, *Michigan v. Lucas*, 500 U.S. 145 (1991), as "very far afield." *Jackson*, 133 S. Ct. at 1993. Again, any intelligent second-semester law student could make a cogent argument to the contrary.
[34] *Jackson*, 133 S. Ct. at 1994.
[35] Parker v. Matthews, 132 S. Ct. 2148, 2154-55 (2012).
[36] *Id.* at 2154.
[37] *Id.* at 2155-56.

its key precedent, *Darden v. Wainwright*,[38] did not support the more specific tests suggested by the circuit court cases cited.[39] Accordingly, the Court granted the warden's petition for writ of certiorari and reversed the circuit court's decision granting habeas relief.[40]

A third summary reversal illustrates the same pattern. At the first trial of Irving Cross, the complaining witness had described a forcible assault, while the defendant claimed a consensual sexual encounter in exchange for money and drugs.[41] The jury found the defendant not guilty of kidnapping, but when it was unable to reach a verdict on the sexual assault count, the court declared a mistrial.[42] At the retrial, the complainant could not be located and, over defense objection, her prior testimony was read by a legal intern from the State's attorney's office upon a finding that the prosecution had made sufficient efforts to secure her presence.[43] The jury acquitted Cross of aggravated sexual assault, but found him guilty of criminal sexual assault, and the Illinois appellate courts affirmed.[44] The Seventh Circuit granted habeas relief (reversing the district court), on the basis that the Illinois courts were unreasonable in finding the State's efforts to secure the complainant's testimony to be sufficient.[45] In finding that the efforts did not meet constitutional standards, given the importance of the witness's testimony, the court relied in part on the fact that the trial judge had described the witness's testimony at the first trial as halting, while the intern read the testimony without the pauses.[46] Regarding her unavailability, in addition to suggesting various avenues the State might have pursued to find the witness, the court noted that the prosecution failed to serve her with a subpoena after she had expressed concern about testifying at the retrial. The Supreme Court responded to that assertion as follows: "We have never held that the prosecution must have issued a subpoena if it wishes to prove that a witness who goes into hiding is unavailable for Confrontation Clause purposes . . . ."[47] If that kind of specificity is required in the prior holdings of Supreme Court cases, habeas relief will indeed be limited to cases that duplicate the facts in those precedents.

Two other summary reversals in which circuit courts had granted relief to death row inmates also relied on the absence of "clearly established Federal law, as determined by the Supreme Court." The Sixth Circuit had found a Fifth Amendment violation when the police persuaded the defendant to cut a deal before his accomplice did so. The Supreme Court responded: "Because no holding of this Court suggests, much less clearly establishes, that police may not urge a suspect to confess before another suspect does so, the Sixth Circuit had no authority to issue the writ on this ground." [48] Articulating a similarly narrow description of what previous high court precedents must hold, the Court reversed the Fifth Circuit's grant of relief on a *Batson* claim:

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[38] 477 U.S. 168, 189-90 (1986).
[39] Parker v. Matthews, 132 S. Ct. at 2155.
[40] *Id.* at 2156. The case was remanded for further proceedings, but as of this writing, no additional decision has been forthcoming.
[41] Hardy v. Cross, 132 S. Ct. 490, 491 (2011) (per curiam).
[42] *Id.*
[43] *Id.* at 492-93.
[44] *Id.* at 493.
[45] *Id.*
[46] *Id.* at 491, 493. *See* Cross v. Hardy, 632 F.3d 356, 362 (7th Cir. 2011) ("A.S.'s testimony at the first trial was pause-filled and evasive, which may have adversely affected the jury's impression of her, as is perhaps demonstrated by the verdict of not guilty on the kidnapping count and the lack of a verdict on the sexual assault counts.").
[47] Hardy v. Cross, 132 S. Ct. at 494.
[48] Bobby v. Dixon, 132 S. Ct. 26, 30 (2011).

> In holding that respondent is entitled to a new trial, the Court of Appeals cited two decisions of this Court, *Batson* and *Snyder*, but neither of these cases held that a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspect of the prospective juror's demeanor.[49]

Again, requiring such a fact-specific holding in a Supreme Court case before habeas relief is warranted limits state prisoners to swiss-cheese-like constitutional protections with major holes wherever the Court has not yet confronted the fact pattern presented by the petitioner.

Finally, the pattern continues in the current term. On the first day, the Court summarily reversed, in a per curiam opinion, the grant of habeas to a defendant convicted of murdering his wife when the prosecution asserted throughout the trial that he had committed the killing himself, but after all the evidence was in, requested an aiding and abetting charge.[50] The jury, instructed on both theories, found the defendant guilty without specifying which theory it found to have been proven. The Court justified its reversal both on the ground that the California courts' affirmance of the conviction did not contravene clearly established Supreme Court law and that the circuit court had committed error in relying on its own precedents.[51]

On the issue of how "clearly" the law must be established, the Court defined the principle at issue in the narrowest possible terms:

> [T]he Ninth Circuit's grant of habeas relief may be affirmed only if this Court's cases clearly establish that a defendant, once adequately apprised of such a possibility, can nevertheless be deprived of adequate notice by a prosecutorial decision to focus on another theory of liability at trial. The Ninth Circuit pointed to no case of ours holding as much. Instead, the Court of Appeals cited three older cases that stand for nothing more than the general proposition that a defendant must have adequate notice of the charges against him. This proposition is far too abstract to establish clearly the specific rule respondent needs. We have before cautioned the lower courts – and the Ninth Circuit in particular – against "framing our precedents at such a high level of generality." *Nevada v. Jackson*, 569 U. S. ___, ___ (2013) (per curiam) (slip op., at 7). None of our decisions that the Ninth Circuit cited addresses, even remotely, the specific question presented by this case.[52]

As in the cases discussed above, the Court seems to require a precedent with a fact pattern virtually on all fours to warrant federal habeas relief.

Similarly, the Court found fault with the circuit's citation to its own precedent, refusing to accept the lower court's assertion that the previous case had simply applied principles that had been established by the Supreme Court:

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[49] Thaler v. Haynes, 559 U.S. 43, 47 (2010).
[50] Lopez v. Smith, 135 S. Ct. 1, 5-6 (2014), *rev'g per curiam* 731 F.3d 859 (9th Cir. 2013).
[51] *Id.* at 1-2.
[52] *Id.* at 3-4 (citation omitted).

> The Ninth Circuit did not purport to identify any case in which we have found notice constitutionally inadequate because, although the defendant was initially adequately apprised of the offense against him, the prosecutor focused at trial on one potential theory of liability at the expense of another. Rather, it found the instant case to be "indistinguishable from" the Ninth Circuit's own decision in *Sheppard v. Rees*, 909 F.2d 1234 (1989), which the court thought "faithfully applied the principles enunciated by the Supreme Court."[53]

Apparently disagreeing with the circuit court's assessment that it was in fact applying clearly established Supreme Court law, the Court summarily reversed the decision granting habeas relief.

Another recent case, again from the Ninth Circuit, continued in the same vein. Habeas relief had been denied by the district court and a panel of the circuit, but the en banc court reversed in a decision that was, in turn, reversed summarily by the Supreme Court.[54] At trial, the defendant, charged with participating in robberies with two associates, had relied on a defense of duress. Before summation, his attorney asked to be able to argue both that the state had not proven that his client was an accomplice and, in the alternative, that he had acted under duress. The trial court ruled that, under state law, a defendant was prohibited from simultaneously contesting an element of the crime and raising an affirmative defense.[55] The state appellate court agreed that the trial court's decision was in error, but ruled the error harmless. On federal habeas, the en banc court deemed the mistake to constitute structural error, the kind of error that is not subject to harmless error analysis. The Supreme Court declared this ruling not to have been clearly established, noting that most constitutional errors call for reversal only if the government fails to show harmlessness, with only a rare type of error requiring automatic reversal: "None of our cases clearly requires placing improper restriction of closing argument in this narrow category."[56]

In addition to interpreting the relevant Supreme Court precedent too broadly, the circuit had also cited to precedents from its own circuit. Again declining to accept that the court referred to these decisions simply to shed light on what law had been clearly established by the Supreme Court,[57] the Court reminded the circuit that, as "we have repeatedly emphasized," circuit court precedent does not satisfy AEDPA's clearly established law requirement.[58]

Most recently, the Sixth Circuit was the subject of the Court's tongue-lashing for its grant of habeas relief to a Michigan defendant serving a life sentence.[59] During the trial, the defendant's attorney was absent from the courtroom when testimony was given by a prosecution witness concerning telephone calls among the codefendants.[60] Chiding the lower court for finding counsel's absence during a critical stage to amount to a Sixth Amendment violation under *United States v. Cronic*, the Supreme Court noted that "We have never addressed whether the rule announced in *Cronic* applies to testimony regarding

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[53] *Id.* at 3.
[54] *See* Glebe v. Frost, 135 S. Ct. 429, 430-31 (2014), *rev'g* Frost v. Van Boening, 757 F.3d 910 (9th Cir. 2014).
[55] *Id.* at 430.
[56] *Id.* at 430-31.
[57] *Id.* at 431. The Court seemed to find it determinative that the precedents did not arise under AEDPA; it did not explain why that fact should be conclusive on the issue of what law the Supreme Court had "clearly established".
[58] *Id.* at. 431-32.
[59] Woods v. Donald, 135 S. Ct. 1372 (2015).
[60] *Id.* at 1375.

codefendants' actions."[61] Reprising its theme that to be "contrary to" Supreme Court law, one of its own precedents must have confronted the specific question presented, the Court saw no case in which testimony relevant to a codefendant was deemed to amount to a critical stage of the proceeding.[62]

These per curiam, summary decisions by the Supreme Court send a strong message to lower federal courts considering granting habeas relief to a state prisoner.[63] That message is obviously most explicit when the Court directly orders habeas relief to be denied.[64] In most cases, however, the Court remands to the circuit court for further proceedings consistent with the per curiam opinion.[65] Such remands generally, but not always, result in denial of habeas relief.[66] In addition, the Court with some frequency issues orders granting certiorari, vacating, and remanding (gvr) for reconsideration in light of decisions that have some bearing on the opinion below.[67] In those cases, too, the lower courts most often "get the hint" and issue an opinion in keeping with the Court's restrictive view of the availability of habeas relief under AEDPA.[68] Finally, even without an order from the Court, some circuits, presumably gleaning an implicit threat of summary reversal, have sua sponte changed outcomes in cases previously granting relief, citing to recent Supreme Court opinions.[69] The pronounced ripple effect of the Court's admonition that circuit courts are prohibited from playing any role in developing principles of constitutional law in the context of assessing state court decisions under AEDPA means that state prisoners throughout the country must be satisfied with Constitution *lite*.

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[61] *Id.* at 1377.

[62] *Id.*

[63] To further complicate matters, the message may be strong, but not entirely clear. As one scholar has pointed out, use of the summary reversal has the potential of muddying up "clearly established law." *See* Richard M. Re, *Did the Martinez Sum Rev Apply or Change the Law?*, RE'S JUDICATA (June 6, 2014), https://richardresjudicata.wordpress.com/2014/06/06/did-the-martinez-sum-rev-apply-or-change-the-law/.

[64] Indeed, in one recent case, the Court at first stated that habeas relief should be denied despite an open issue on which the circuit had not yet ruled. *See* Johnson v. Williams, 133 S. Ct. 1088, 1092 (2013). Then, alerted by two circuit judges pointing out the error, the Court issued a per curiam decision remanding for consideration of that claim under the proper standard. *See* Johnson v. Williams, 134 S. Ct. 2659 (2014), *vacating* 720 F.3d 1212 (9th Cir. 2013). Judges Reinhardt and Kozinski concurred in denial of the habeas petition but expressed concern about the Court's previous opinion. *See* 720 F.3d at 1212, 1214.

[65] *See, e.g.*, Parker v. Matthews, 132 S. Ct. 2148, 2155 (2012) ("The petition for a writ of certiorari and respondent's motion to proceed in forma pauperis are granted. The judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.").

[66] *See* discussion *infra* notes 81-96.

[67] See, for example, two cases remanded for reconsideration in light of *White v. Woodall*: Washington v. Sec'y Pa. Dep't of Corr., 726 F.3d 471 (3d Cir. 2013), *vacated sub nom.* Wetzel v. Washington, 134 S. Ct. 1935 (2014) (granting habeas for confrontation clause violation when codefendant's confession implicated the defendant); Drummond v. Houk, 728 F.3d 520 (6th Cir. 2013*) cert. granted, judgment vacated sub nom.* Robinson v. Drummond, 134 S. Ct. 1934 (2014) (granting habeas for violation of right to a public trial by closure of the courtroom without demonstration of an overriding interest). According to one observer, some remands are not easily explained. *See* James J. Duane, *Sherlock Holmes and the Mystery of the Pointless Remand*, 18 BERKELEY J. CRIM. L. 154, 169-70 (2013).

[68] *See, e.g., infra* note 114.

[69] *See, e.g.*, Moore v. Helling, 763 F.3d 1011 (9th Cir. 2014). The original opinion granting habeas was withdrawn (Warden had petitioned for rehearing) in light of the intervening decision in *White v. Woodall*, which made clear that relief may not be based on a state court's unreasonable refusal to extend a rule set forth by Supreme Court precedent. *Id.* at 1015. The court explained that when petitioner's conviction became final, fairminded jurists could conclude that the Supreme Court had not yet clearly established that an ameliorative change in state law must be applied retroactively to cases pending on appeal. *Id.* at 1020. *See also* Rivera v. Cuomo, 664 F.3d 20 (2d Cir. 2011) (panel decision granting habeas on ground of insufficiency of the evidence reversed on rehearing based on summary reversal in *Cavazos v. Smith*, which reasserted the "double deference" due to state court decisions raising such a claim).

III. NO FAIRMINDED JURIST

The Supreme Court's insistence that, before any federal court, including the Court itself, is authorized to grant habeas relief to a state prisoner, the law governing the claim must have been clearly established by the high court in the factual context in which the petitioner presents it poses a significant constraint. That limitation has been magnified exponentially by the Court's recent redefinition of the meaning of the term "unreasonable application." In cases where the state court adjudicated the federal constitutional claim on the merits, comprising the vast majority of federal habeas petitions,[70] the federal court is precluded from granting the writ unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ."[71] Particularly given that even so-called postcard denials of relief, that is those in which the state court provides no reasons whatever, are deemed to be on the merits,[72] it is not surprising that state decisions will rarely be challengeable as "contrary to" clearly established law. Most cases, therefore, will fall under the "unreasonable application" clause.

That clause was first interpreted in *Williams v. Taylor*,[73] where, with Justice O'Connor writing the controlling opinion, the Court emphasized that the petitioner must show something more than that the state court's decision was erroneous; rather, the decision must have been "objectively unreasonable."[74] The Court firmly rejected, however, the position taken by some circuits that, to be unreasonable, the challenged state court decision had to be one that no reasonable jurist could make.[75] Yet eleven years later, in *Harrington v. Richter*,[76] without so much as acknowledging its about-face, the Court adopted just that interpretation.[77] State prisoners whose claims were adjudicated on the merits by state courts are now barred from federal relief unless there is "no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents."[78] A number of the summary per curiam opinions have explicitly relied on this standard in reversing the circuit courts' grants of habeas relief, at times placing an additional gloss on the meaning of "unreasonable application." Quoting the *Richter* standard in the first paragraph of its opinion reinstating a death sentence, for example, the Court asserted: "Because it is not clear that the Ohio Supreme Court erred at all, much less

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[70] The most common scenario where a state court does not reach the merits involves reliance on the defendant's failure to follow a state procedural rule, thereby defaulting the claim. Under such circumstances, the habeas petitioner is not entitled to federal review at all without demonstrating either "cause and prejudice" or actual innocence. Fortunate petitioners who can overcome that high bar may then be granted de novo review. *See* cases cited *supra* note 6 and accompanying text.

[71] 28 U.S.C.A. § 2254(d)(1) (West 1996).

[72] *See* Harrington v. Richter, 562 U.S. 86, 98-99 (2011).

[73] 529 U.S. 362 (2000).

[74] *Id.* at 409.

[75] *Id.*

[76] 562 U.S. 86.

[77] Justice Kennedy's opinion cites to *Williams* only generally as distinguishing between an unreasonable application and an incorrect application. Harrington v. Richter, 562 U.S. at 100-01. Without explanation, the opinion goes on to assert that federal habeas relief is precluded so long as "fairminded jurists could disagree" on the correctness of the state court's decision. *Id.* at 88 (citing Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). In that 5 to 4 decision, again without any reference to the discussion in *Williams*, the majority introduced the idea of the fairminded jurist as the appropriate standard for determining whether a state court decision was unreasonable. *Yarborough*, 541 U.S. 663-64. Scholarship supporting the Court's restrictive interpretation of AEDPA similarly ignores the initial interpretation of the AEDPA language in *Williams v. Taylor*. *See, e.g.*, O'Scannlain, *supra* note 8; *see also* O'Brien, *supra* note 8. Neither article so much as mentions the opinion in *Williams v. Taylor*.

[78] Harrington v. Richter, 562 U.S. at 102.

erred so transparently that no fairminded jurist could agree with that court's decision, the Sixth Circuit's judgment must be reversed."[79] The notion that an error must be "transparent" appears to be a new, and exacting, requirement.

Application of the "no fairminded jurist" standard has led to some puzzling results. In two cases in which the Supreme Court had summarily reversed the grant of habeas but sent the case back to the circuit for further consideration, habeas relief was again affirmed, each time over the dissent of a member of the panel. Despite what appeared to be the opinion of a presumptively fairminded judge, the Supreme Court this time denied certiorari review to the wardens. Examination of these opinions reveals the extent to which the writ has been both marginalized and made dependent on the subjective views of the particular judges who happen to sit on the panel reviewing the case. These results are particularly ironic given that the standard was originally touted as suggesting that relief would be based on "objective" unreasonableness.

In one of the cases in which the Supreme Court summarily reversed the grant of habeas to a death row inmate by the Third Circuit, the Court remanded for exploration of an issue on which the state court might have relied.[80] According to the Court, the Pennsylvania Supreme Court may have concluded, when denying petitioner's *Brady* claim, that a report that had been withheld was "ambiguous." Having been chided for failing to acknowledge and address the state courts' possible reliance on the ambiguous nature of the withheld report, the Third Circuit on remand explicitly addressed that purported conclusion.[81] Even granting AEDPA deference, the majority found the state court's characterization of the police report as ambiguous to be an unreasonable determination of the facts, as well as an unreasonable application of clearly established law.[82] Accordingly, this Pennsylvania death row inmate's life was spared.

Dissenting Judge Hardiman, on the other hand, conceding that finding ambiguity was not the most natural reading of the report, asserted that the state court's decision had enough support to preclude federal habeas relief: "If we exercised *de novo* review of the state court decision, it would seem that the best reading of the activity sheet is that it relates to the . . . robbery [with which petitioner was charged]. But under AEDPA's highly deferential standard of review, 'even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.'"[83] The dissenting judge further cited to the earlier Supreme Court case of *Yarborough v. Alvarado*[84] for the proposition that habeas relief is precluded as long as the state court decision was "within the matrix" of the custody test for *Miranda* purposes as articulated by the Court.[85] Finally, the judge stressed the reach of the standard set forth in *Harrington v. Richter*, supplying emphasis to the word "possibility": "The Court has repeatedly reminded the lower federal courts that AEDPA precludes relief unless the state court's ruling was error 'beyond any *possibility* of fairminded disagreement.'"[86] In a footnote to this interpretation of the standard, Judge

[79] Bobby v. Dixon, 132 S. Ct. 26, 27 (2011).
[80] Wetzel v. Lambert, 132 S. Ct. 1195, 1198 (2012) ("[The] Third Circuit overlooked the determination of the state courts that the notations were . . . 'entirely ambiguous.'").
[81] *See* Lambert v. Beard, 537 F. App'x. 78, 84-86 (3d Cir. 2013).
[82] *Id.* at 84.
[83] *Id.* at 89 (Hardiman, J., dissenting) (quoting Harrington v. Richter, 562 U.S. at 88).
[84] *Id.* (quoting Yarborough v. Alvarado, 541 U.S. 652, 665 (2004)).
[85] *Id.* (quoting *Yarborough*, 541 U.S. at 103).
[86] *Id.* (quoting Harrington v. Richter, 562 U.S. at 103) (emphasis added).

Hardiman cited to a previous dissent in which he had collected all the cases in which the Supreme Court had reversed lower courts for failure to heed this admonition.[87]

Another case illustrates the same point. Habeas relief that had been granted by the Sixth Circuit was vacated and remanded[88] in light of *Parker v. Matthews*,[89] one of the summary reversals being considered here. Unlike in most cases, when such a remand results in the court toeing the line articulated by the Supreme Court, the lower court again found relief warranted, with one judge dissenting.[90] The circuit court acknowledged that its first decision had relied, improperly as the Supreme Court made clear in *Parker v. Matthews*, on its own precedent in evaluating the prejudice suffered by the defendant by his attorney's deficient performance.[91] On remand, the court reexamined the case using only the *Strickland* standard itself and concluded that the Michigan court both failed to apply the correct rule and, even if it stated the rule correctly, the result was an unreasonable application of federal law.[92] By contrast, the dissenting judge did not find the Michigan court's decision to be "objectively unreasonable; fairminded jurists could (and did) disagree on this point."[93]

The same pattern is reflected in another recent case, in which the Supreme Court has recently allowed the Eleventh Circuit's grant of habeas relief to vacate an Alabama death sentence to stand.[94] Here, too, a dissenting judge, praised by one of the judges ruling in the petitioner's favor as a "nationally known and admired judge,"[95] criticizes his colleagues as failing to heed the requirement that the state court's application of *Strickland* be "objectively unreasonable."[96] It is difficult to square the disagreement of a jurist acknowledged to be fairminded with the grant of habeas relief applying the "fairminded jurist" standard.

The new fairminded jurist standard poses a particular analytical challenge in the context of claims that the evidence was insufficient to support a conviction. Such claims require a defendant to demonstrate that "no rational trier of fact" could have agreed with the jury's finding of guilt beyond a reasonable doubt.[97] To secure habeas relief on that basis, in addition to making that showing, a petitioner must now show that a state court's decision rejecting the sufficiency of the evidence claim was such that "no fairminded jurist" could agree with it. As the Supreme Court noted in one of its per curiam summary reversals, over the objection of three dissenting justices, "[b]ecause rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must

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[87] *Id.* at n.2 (citing Garrus v. Sec'y of Pa. Dep't of Corrs., 694 F.3d 394, 412-15 nn.1-3 (3d Cir. 2012)). Judge Raggi of the Second Circuit provided a similar list in an opinion dissenting from a grant of habeas relief. Young v. Conway, 715. F.3d 79, 87 n.1 (2d Cir. 2013) (Raggi, J., dissenting).

[88] Howes v. Walker, 132 S. Ct. 2741, 2741 (2012), *vacating* Walker v. McQuiggan, 656 F.3d 311 (6th Cir. 2011).

[89] *Id.*

[90] Walker v. Hoffner, 534 F. App'x. 406, 416-18 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1025 (2014).

[91] *Id.* at 411 ("[A] defendant suffers prejudice when he is deprived of a 'substantial defense' by the deficient performance of his counsel.") (citing Walker v. McQuiggan, 656 F.3d at 321); *see* Parker v. Matthews, 132 S. Ct. 2148, 2155 (2012).

[92] Walker v. Hoffner, 534 F. App'x at 412-13.

[93] *Id.* at 418 (Cook, J., dissenting).

[94] *See* DeBruce v. Comm'r, Ala. Dep't of Corr., 758 F.3d 1263 (11th Cir. 2014), *cert. denied sub nom* Dunn v. DeBruce, 2015 U.S. LEXIS 4015 (June. 15, 2015).

[95] *Id.* at 1279-80 (Martin, J., concurring).

[96] *Id.* at 1280 (Tjoflat, J., concurring in part and dissenting in part).

[97] Jackson v. Virginia, 443 U.S. 307, 317, 319 (1979).

nonetheless uphold."[98] Yet in this context, several presumably fairminded jurists (including three justices of the Supreme Court) found the evidence so lacking that no rational factfinder could arrive at a verdict of guilty beyond a reasonable doubt.

The case that prompted the Court's admonition that mistaken convictions must sometimes be upheld involved Shirley Rhee Smith, a grandmother convicted of killing her seven-week-old grandchild based on questionable evidence that he had died of "shaken baby syndrome."[99] The case had a long and complicated history in the state and federal courts, including three trips to the United States Supreme Court. When the Ninth Circuit first granted habeas relief,[100] the Supreme Court vacated and remanded in light of the recently decided *Carey v. Musladin*, which, as described above, had narrowed the meaning of "clearly established law" in § 2254(d)(1).[101] The Court of Appeals reinstated its grant of relief on the grounds that, unlike the situation in *Musladin*, here, the federal law had been clearly established by the Supreme Court in *Jackson v. Virginia*.[102] The court acknowledged that the high court had not confronted the same factual scenario presented by the petitioner, but refused to accept that AEDPA could be interpreted to limit habeas relief to cases in which the Court had decided an identical case.[103] When the Warden sought rehearing en banc in light of another Supreme Court case applying the *Musladin* principle,[104] the Ninth Circuit denied the petition, again finding that the intervening opinion did not affect the grant of relief.[105] The Supreme Court vacated and remanded,[106]

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[98] Cavazos v. Smith, 132 S. Ct. 2, 4 (2011) (per curiam).

[99] *Id.* at 4-5.

[100] Smith v. Mitchell, 437 F.3d 884, 885 (9th Cir. 2006) ("We agree with Smith that no rational trier of fact could have found beyond a reasonable doubt that Smith caused the child's death. We further conclude that the state court's affirmance of Smith's conviction constituted an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), which established the standard for constitutional sufficiency of the evidence. *See* 28 U.S.C. § 2254(d)(1). We accordingly reverse and remand with instructions to grant the writ.").

[101] Patrick v. Smith, 550 U.S. 915 (2007); Carey v. Musladin, 549 U.S. 70, 74, 76 (2006). *See* 28 U.S.C. § 2254(d)(1) (2014); *see also supra* note 10 and accompanying text.

[102] Smith v. Patrick, 508 F.3d 1256, 1258-59 (9th Cir. 2007).

[103] The circuit court's decision stated as follows:

> It is true, of course, that the Supreme Court has never had a case where the issue was whether the evidence, expert and otherwise, was constitutionally sufficient to establish beyond a reasonable doubt that a defendant had shaken an infant to death. But there are an infinite number of potential factual scenarios in which the evidence may be insufficient to meet constitutional standards. Each scenario theoretically could be construed artfully to constitute a class of one. If there is to be any federal habeas review of constitutional sufficiency of the evidence as required by *Jackson*, however, section 2254(d)(1) cannot be interpreted to require a Supreme Court decision to be factually identical to the case in issue before habeas can be granted on the ground of unreasonable application of Supreme Court precedent.

Id. at 1259.

[104] Wright v. Van Patten, 552 U.S. 120, 126 (2008).

[105] The court's decision stated:

> For the same reason that we determined that *Musladin* did not affect our decision in *Smith*, we conclude that *Van Patten* does not, either. *Van Patten* addresses an entire class of cases under the Supreme Court's jurisprudence applying the standards set by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984), for ineffective assistance of counsel. Whether appearance of counsel by telephone is structural error is an issue "for another day" that the Supreme Court may address to establish a rule for innumerable cases in the future. *See* 128 S. Ct. at 747.

Smith v. Patrick, 519 F.3d 900, 901 (9th Cir. 2008).

[106] Patrick v. Smith, 558 U.S. 1143 (2010).

citing yet another intervening opinion, *McDaniel v. Brown*,[107] in which it had granted certiorari to consider the insufficiency standard in the habeas context. And yet again, the Ninth Circuit reinstated its prior opinion.[108] Finally, the Supreme Court summarily reversed the grant of habeas relief, per curiam, over the dissents of three justices.[109]

The per curiam opinion begins by stressing that, under *Jackson v. Virginia*, it is the responsibility of the jury, not the court, to decide what conclusions should be drawn from evidence.[110] A reviewing court may set aside the jury verdict only if no rational trier of fact could have agreed with the jury's assessment that the evidence demonstrated the defendant's guilt beyond a reasonable doubt. Added to this significant hurdle, on habeas review, the federal court may not grant relief simply because it disagrees with the state court's rejection of the sufficiency claim; rather, the state court decision must be "objectively unreasonable" such that "no fairminded jurist" would agree with it.[111] It is almost impossible even to imagine that no fairminded jurist could agree with a conclusion of twelve jurors that the state court, by hypothesis, refused to reverse as one that "no rational factfinder" would have reached.[112]

In another per curiam opinion, the Supreme Court also summarily reversed a habeas grant on the ground of insufficiency of the evidence, chiding the Third Circuit for failing to afford the respect that the jury and Pennsylvania state courts were due.[113] The federal court had found insufficient evidence that the defendant was an accomplice of the shooter to a deliberate murder; according to the Supreme Court, under the doubly deferential standard, that conclusion could not stand. Accordingly, on remand habeas relief was denied.[114]

Analysis of claims under these multiple layers of abstract standards, most involving some notion of what is "reasonable," not only requires mind-numbing logical gymnastics, but fails to achieve results that can in any meaningful way be termed "objective." First, the *Jackson* standard itself suggests that presumably reasonable jurors may arrive, unanimously, at a verdict that "no rational factfinder" could support. To further complicate matters, that conclusion necessarily incorporates the constitutionally mandated burden that guilt must be proven "beyond a reasonable doubt."[115] Second, trial courts routinely deny defense counsel's motion before the case is submitted to the jury asking for dismissal on the basis of insufficiency of the evidence. Overturning a jury's verdict pursuant to the *Jackson* standard therefore inherently involves disagreement among fairminded jurists. Accordingly, applying the "fairminded jurist" standard would appear always to preclude the grant of federal habeas relief.

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[107] *Id.* (citing McDaniel v. Brown, 558 U.S. 120 (2010)).

[108] Smith v. Mitchell, 624 F.3d 1235, 1237 (9th Cir. 2010) ("We have now examined *Brown* along with supplemental briefs from the parties addressing its potential effect on Smith's case. We conclude that nothing in *Brown* is inconsistent with our prior decision or our method of reaching it. We accordingly reinstate our former decision . . . .").

[109] Cavazos v. Smith, 132 S. Ct. 2, 8 (2011).

[110] *Id.* at 3-4.

[111] *Id.* at 4; Bobby v. Dixon, 132 S. Ct. 26, 27 (2011) (per curiam).

[112] Although she did not secure relief through the courts, Shirley Rhee Smith was ultimately granted a commutation by Governor Jerry Brown. A.C. Thompson, *California Governor Commutes Sentence in Shaken Baby Case*, PROPUBLICA (Apr. 6, 2012), http://www.propublica.org/article/california-governor-commutes-sentence-in-shaken-baby-case.

[113] Coleman v. Johnson, 132 S. Ct. 2060, 2062 (2012).

[114] *Id.* at 2064; Johnson v. Mechling, 518 F. App'x. 106, 106-07 (3d Cir. 2013).

[115] *See In re* Winship, 397 U.S. 358, 361 (1970).

The fairminded jurist standard raises a further issue for courts of appeals considering whether to grant a certificate of appealability to a petitioner who has been denied habeas relief by a district court. Long before *Harrington v. Richter*, the Supreme Court had set the bar for issuance of such a certificate at a relatively low level.[116] Courts were admonished that they should make only a threshold inquiry into the claim, assessing whether the petitioner has made "a substantial showing of the denial of a constitutional right."[117] Such a showing is made when "jurists of reason could disagree with the district court's resolution" or conclude the issues presented are worthy of further exploration.[118] In establishing this standard for appellate review, the Court noted specifically that "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail."[119] Once the fairminded jurist test is in place, however, if the issue is debatable among such jurists, no habeas relief will ever be warranted for claims adjudicated on the merits in state courts.

IV. SUMMARY TREATMENT

The Supreme Court's practice of issuing summary per curiam opinions resolving cases on petitions for certiorari review has long come under strong criticism both within the Court and from academics and practitioners. While the earlier practice of reversing summarily without providing reasons[120] has largely been abandoned, questions have been raised about the lack of transparency and procedural regularity governing summary dispositions.[121] In addition, skeptics wonder whether such reversals are being limited to cases of clear error, and whether there is a substantive bias in the selection of cases to subject to this treatment.[122] Moreover, concern that respondents may be unfairly prejudiced when the merits of claims are adjudicated on petitions for writ of certiorari continues to be voiced.

Several of the opinions being considered here illustrate the problems of such summary reversals. In her dissent from the summary reversal in *Cavazos v. Smith*, joined by two other members of the Court, Justice Ginsburg specifically chastised the Court for its failure to allow for full briefing and argument.[123] "The fact-intensive character of the case calls for attentive review of the record, including a trial transcript that runs over 1,500 pages. Careful inspection of the record would be aided by the adversarial presentation that full briefing and argument afford."[124]

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[116] Indeed, in *Cavazos v. Smith*, the Magistrate Judge noted that this was not the typical shaken baby case, raising many questions, but found that the evidence was sufficient to a support conviction. 132 S. Ct. at 6, 8. The district court adopted this recommendation, but granted a COA on ground that question was debatable. *Id.*

[117] Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) (citing 28 U.S.C. § 2253(c) (2014)).

[118] *Id.*

[119] *Id.* at 338.

[120] Failure to give any rationale for summary reversal prompted the initial protests against the practice. *See, e.g.*, Ernest J. Brown, *Foreword: Process of Law*, 72 HARV. L. REV. 77, 82, 90 (1958).

[121] *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1 (2015). Professor Baude looked at all the Roberts Court's summary reversals so far, and studied in depth those issued in the 2013-14 term. He describes the reversals as falling into two general categories: those designed to enforce the Supreme Court's supremacy over recalcitrant circuit courts and those essentially serving an ad hoc function. *Id.* at 1-2.

[122] *See* Jonathan Kirshbaum, *Accelerating Pace of Supreme Court's Summary Reversals of Habeas Relief Suggests Impatience with Circuit Courts' Failure to Defer to State Tribunals*, CRIM. L. REP., June 27, 2012, at 1-3; *see also* Baude, *supra* note 121, at 4.

[123] 132 S. Ct. 2, 12 (2011) (Ginsburg, J., dissenting).

[124] *Id.*

Justice Ginsburg cited to two highly respected treatises in support of her objection to the summary treatment of the case. The classic treatise on Supreme Court practice[125] characterizes per curiam opinions such as those discussed in this article, in which the Court grants certiorari and, at the same time, disposes of the merits, addressing both facts and issues in detail, as the "most controversial form of summary disposition."[126] The authors note that the justices themselves characterized summary reversals as "rare and exceptional," appropriate only when "law is well settled and stable, facts are not in dispute, and the decision below is clearly wrong."[127] According to Justice Brennan, summary dispositions should be limited to situations where the decision below flatly rejected the Court's controlling authority. If even one justice disagreed, the case should be set for briefing and argument.[128] In addition, the authors describe the problems posed for counsel, particularly for respondents, by the use of summary reversals, in light of the fact that lawyers are told not to focus on briefing the merits of the issue when seeking or opposing certiorari review.[129]

Summary reversal seems particularly questionable when, as in Shirley Rhee Smith's case and the capital case involving James Lambert described above,[130] several justices of the Supreme Court dissent from the disposition. If indeed the practice is meant for cases in which the law and facts are undisputed and the decision below is clearly wrong, even one dissenting opinion, much less three, would suggest that, at the very least, full briefing and argument is in order. Moreover, the lack of any written dissent does not, in and of itself, demonstrate that summary treatment is proper. Several of the unanimous summary reversals presented both factual and legal issues that seemed worthy of full consideration by the Court. In *Felkner v. Jackson*, for example, the Ninth Circuit had granted relief on a *Batson* claim, finding that the prosecutor's proffered race-neutral bases were not sufficient to counter evidence of purposeful discrimination, given that two of three black jurors were stricken and the record reflected different treatment of comparably situated white jurors.[131] Such claims are by their nature fact-sensitive, and adherence to the prohibition against use of peremptory challenges on the basis of race has by no means been universally accepted.[132] Yet the Supreme Court summarily reversed the circuit court's determination: "That decision is as inexplicable as it is unexplained. It is reversed."[133] Noting the deference due to the trial judge's assessment of a prosecutor's credibility, to which AEDPA adds another level of deference, the Court announced: "The state appellate court's decision was plainly not unreasonable. There was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner."[134]

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[125] *Id.*; GRESSMAN, ET. AL., SUPREME COURT PRACTICE (10th ed. 2013) is "regarded as a sufficiently authoritative resource on all things related to the Court that it is cited not only by lawyers who argue there but also by the Justices themselves." Tom Goldstein and Amy Howe, *Book review: New edition for a classic treatise*, SCOTUSBLOG (Jan. 28, 2014, 7:00 PM), http://www.scotusblog.com/2014/01/book-review-new-edition-for-a-classic-treatise/.

[126] GRESSMAN, ET. AL., SUPREME COURT PRACTICE 349 (9th ed. 2007).

[127] *Id.* at 350-51 (quoting Justice Marshall). The other treatise cited by Justice Ginsburg, FALLON, ET. AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM (6th ed. 2009), also cites to justices in its critique of summary reversals, adding that some justices complained that they were more likely to be granted in favor of the government than an individual claiming violation of constitutional rights. *Id.* at 1479-80.

[128] Justice Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 232 (1983).

[129] GRESSMAN, AT AL., *supra* note 126, at 417 n.46.

[130] *See supra* text accompanying notes 80-87.

[131] 562 U.S. 594, 597 (2011).

[132] *See, e.g.*, Miller-El v. Cockrell, 537 U.S. 322, 335 (2003).

[133] *Felkner*, 562 U.S. at 598.

[134] *Id.*

The panel of the Ninth Circuit that did reach this conclusion surely will consider the Supreme Court's summary reversal of its decision to have been reached in a similarly "dismissive manner." As will the Sixth Circuit, whose decision that a defendant facing a death sentence did not receive effective assistance at sentencing phase was summarily reversed, with the conclusory statement: "Because we think it clear that Van Hook's attorneys met the constitutional minimum of competence under the correct standard, we grant the petition and reverse."[135] The circuit court was deemed particularly at fault for relying on the 2003 ABA guidelines for the defense of capital cases, a point that prompted Justice Alito to write a separate concurrence to make clear that the opinion in no way suggests that those guidelines have special relevance.[136] Admonishing the circuit court for relying on the well-established guidelines for the representation of defendants in capital cases seems particularly unseemly without allowing full briefing or oral argument on the issue.

V. TONE

As the previous sections have shown, these per curiam summary reversals reveal a pattern of limiting the federal habeas petitioner's opportunity to secure relief based on constitutional violations in state court. The petitioner must be able to point to "clearly established Federal law, as determined by the Supreme Court of the United States," which has been limited to narrowly defined holdings of the Court; no reference should be made to any circuit court rulings; then it must be demonstrated that "no fairminded jurist" would agree with the state court's determination that his constitutional rights were not violated. Moreover, all this must be accomplished in the context of responding to a petition for certiorari by the warden, without the opportunity for full briefing and argument. One additional characteristic of these opinions is noteworthy: their tone. The Court strikes an attitude of lecturing and dismissiveness, suggesting that the circuit courts need to be taught a lesson, that they should know better. Indeed, as one commentator has noted, the Court's summary reversals can be seen as a non-too-subtle threat to any federal court considering granting habeas relief.[137] Even if not designed to send such warnings, the language used by the Court in describing opinions granting relief certainly conveys a message any objective reader would find insulting.

The Supreme Court's attitude is well illustrated by the first paragraph of one of the summary reversals in a case in which the defendant had been sentenced to death:

> In this habeas case, the United States Court of Appeals for the Sixth Circuit set aside two 29-year-old murder convictions *based on the flimsiest of rationales*. The court's decision is a *textbook example of what the . . . AEDPA proscribes*: "using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 559 U.S. __ (2010) (slip op., at 12). We therefore grant the petition for certiorari and reverse.[138]

The Supreme Court's derogatory assessment of the Sixth Circuit's opinion is particularly striking in light of the Court's own curious evaluation of the evidence regarding extreme emotional disturbance, the issue on which the circuit had found the Kentucky courts to

[135] Bobby v. Van Hook, 558 U.S. 4, 5 (2009).
[136] *Id.* at 13-14 (Alito, J., concurring).
[137] *See* Kirshbaum, *supra* note 122, at 4.
[138] Parker v. Matthews, 132 S. Ct. 2148, 2149 (2012) (emphasis added).

have improperly shifted the burden to the defense. Noting that the defense expert admitted that many people suffer from adjustment disorders, the Court commented: "But of course very few people commit murders."[139] The Court thereby suggested that it is the murder for which there must be a reasonable explanation or excuse, while any competent first year criminal law student would understand that the requirement of a reasonable explanation applies to the emotional disturbance, not to the killing.

In the same opinion, the Court chastised the circuit court for relying on its own precedents, rather than limiting consideration to Supreme Court case law. Beginning with a phrase that appears regularly in these summary reversals:

> To make matters worse, the Sixth Circuit decided [the prior case] under pre-AEDPA law, . . . so that case did not even *purport* to reflect clearly established law as set out in this Court's holdings. It was plain and repetitive error for the Sixth Circuit to rely on its own precedents in granting Matthews habeas relief.[140]

Why reliance on a pre-AEDPA case would "make matters worse" is by no means clear; surely a circuit court could render an opinion stating well-established principles of constitutional law rooted in Supreme Court precedents at any time.[141]

The Court's reversal of habeas relief granted to a death row inmate by the Sixth Circuit contained similarly querulous language: "Because it is not clear that the Ohio Supreme Court erred at all, much less erred so transparently that no fairminded jurist could agree with that court's decision, the Sixth Circuit's judgment must be reversed."[142] Regarding the circuit court's rationale for concluding that the state courts had failed to acknowledge a *Miranda* violation, the Court announced dismissively: "That is plainly wrong."[143]

The Court used the same phraseology in rejecting the Ninth Circuit's evaluation of the evidence in Shirley Rhee Smith's case as insufficient to demonstrate the cause of the child's death beyond a reasonable doubt: "That conclusion was plainly wrong."[144] Reminding the circuit that a state appellate court can reverse for insufficiency only if no rational trier of fact could have found the essential elements of the crime; that the reviewing court must presume that jury resolved conflicts in favor of prosecution, and must defer to that resolution; and that AEDPA adds another layer of deference to state court decisions, the Court announced: "[T]here can be no doubt of the Ninth Circuit's error below."[145] The Court continued with its tone of absolute certainty, despite the disagreement of three dissenting justices: "In light of the evidence presented at trial, the Ninth Circuit plainly erred in concluding that the jury's verdict was irrational, let alone that it was unreasonable for the California Court of Appeal to think otherwise."[146] The final substantive paragraph of the Court's opinion went beyond finding the circuit to have

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[139] *Id.* at 2153.
[140] *Id.* at 2155-56.
[141] *See supra* note 57 (describing another case in which the Court made the same point in reversing the Ninth Circuit).
[142] Bobby v. Dixon, 132 S. Ct. 26, 27 (2011), *habeas denied*, 737 F.3d 1003 (6th Cir. 2013), *reh'g denied*, 2014 U.S. App. LEXIS 1890 (6th Cir. Jan. 29, 2014), *cert. denied*, 135 S. Ct. 63 (2014).
[143] *Id.* at 29.
[144] Cavazos v. Smith, 132 S. Ct. 2, 6 (2011).
[145] *Id.*
[146] *Id.* at 7.

been mistaken and accused the court of essentially ignoring the Supreme Court's directives:

> The decision below cannot be allowed to stand. This Court vacated and remanded this judgment twice before, calling the panel's attention to this Court's opinions highlighting the necessity of deference to state courts in §2254(d) habeas cases. Each time the panel *persisted in its course*, *reinstating its judgment without seriously confronting the significance of the cases called to its attention*. Its refusal to do so necessitates this Court's action today.[147]

Justice Ginsburg, dissenting with two other justices, viewed the case as intensely fact-bound and not worthy of certiorari review, and characterized the per curiam opinion as follows: "[T]he Court is bent on rebuking the Ninth Circuit for what it conceives to be defiance of our prior remands. I would not ignore Smith's plight and choose her case as a fit opportunity to teach the Ninth Circuit a lesson."[148]

Criticizing the Ninth Circuit in another case, the Supreme Court, as noted above,[149] focused on the conclusory and dismissive manner in which the circuit treated the state court's rejection of the petitioner's *Batson* claim: "The state appellate court's decision was plainly not unreasonable. There was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner."[150] Yet some of the per curiam opinions in which the high court rejected the determinations of circuit court panels appear equally "dismissive," or at least might be taken that way by the judges who had found violations of state prisoners' constitutional rights.

In summarily reversing the Sixth Circuit's grant of habeas to a death row inmate even in the absence of AEDPA deference, when the petitioner had filed for relief before that statute was enacted, the Court, without the benefit of full briefing and argument, was able to reject an ineffective assistance of counsel claim: "Because we think it clear that Van Hook's attorneys met the constitutional minimum of competence under the correct standard, we grant the petition and reverse."[151] After describing the gruesome crime in considerable detail, the Court noted that a panel of the circuit had been reversed by the en banc court twice, and then went on to criticize the most recent panel opinion for its reliance on the 2003 ABA guidelines for defense of capital cases, according to the Court, "without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial."[152] The Court continued: "To make matters worse," the circuit treated the guidelines as inexorable commands, rather than as guides for what is reasonable, as required by *Strickland*.[153] To the petitioner's assertion that his counsel was ineffective even under professional standards of the time, the Court responded curtly. "He is wrong."[154]

Justice Alito took the opportunity in his concurrence to stress that the Court's opinion in no way suggests that ABA guidelines have special relevance.

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[147] *Id.* at 7-8 (citations omitted) (emphasis added).
[148] *Id.* at 12 (Ginsburg, J., dissenting) (citation omitted).
[149] *See supra* notes 131-34 and accompanying text.
[150] Felkner v. Jackson, 562 U.S. at 598.
[151] Bobby v. Van Hook, 558 U.S. 4, 4-5 (2009).
[152] *Id.* at 8.
[153] *Id.*
[154] *Id.* at 9.

> It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.[155]

Particularly when a defendant's life is at stake, one might question whether it is appropriate for the Supreme Court to reach out to scold a court of appeals for relying on well-respected guidelines for the defense of capital cases without even permitting counsel to brief and argue their possible relevance.

One of the Court's summary reversals of the current term contains the same kind of sharp rebuke. Asserting that the "second rationale for the Court of Appeals' decision is no more sound than the first," the Court summarizes the key points in the circuit court's opinion leading it to the determination that the trial court's error was structural.[156] The next paragraph begins with a single word: "No."[157] The Court then goes on to find fault with each aspect of the circuit's analysis, stressing that "reasonable minds could disagree" with all of the lower court's conclusions.[158]

VI. SUMMARY REVERSALS WHEN RELIEF WAS DENIED

The five per curiam summary reversals of decisions in which the circuit court had *denied* federal habeas corpus relief during this period[159] convey strikingly different characteristics, both in terms of substance and tone. Four of these cases are essentially reversals based on procedural irregularities, in which the courts had in some way misinterpreted their task in assessing the petitioner's right to relief.[160] The fifth case, *Porter v. McCollum*,[161] was unanimous in reversing a death sentence imposed on a Korean War veteran on the basis that his attorney had provided ineffective assistance at the penalty phase of trial by not informing the jury about the defendant's post-traumatic stress disorder.[162] As Linda Greenhouse pointed out at the time, the case formed a stark contrast with that of Bobby Van Hook, whose lawyer similarly failed to present extensive

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[155] *Id.* at 14 (Alito, J., concurring).
[156] Glebe v. Frost, 135 S. Ct. 429, 431 (2014).
[157] *Id.* at 431.
[158] *Id.*
[159] *See* cases listed in Appendix B.
[160] In the most recent such case, *Williams v. Johnson*, 134 S. Ct. 2659 (2014), the Court corrected an error in its previous opinion when it declared that the petitioner was not entitled to relief despite the fact that it had not ruled on the merits of one of the issues. *See supra* note 64.
In *Jefferson v. Upton*, the Court remanded to the circuit for consideration of all the applicable exceptions to the requirement that a federal court must accept state factual findings when the circuit had considered only one of those exceptions. Justices Scalia and Thomas dissented. 560 U.S. 284, 294-95 (2010). In *Wellons v. Hall*, the Court reversed the Eleventh Circuit's denial of habeas relief to a petitioner under sentence of death because the circuit had erroneously relied on a procedural bar that may have affected its decision to deny an evidentiary hearing. 558 U.S. 220, 226 (2010). Four justices dissented on the ground that the circuit had also denied relief on the merits, making remand inappropriate. *Id.* at 226-28 (Scalia and Thomas, JJ., dissenting); *id.* at 228-32 (Alito, J., and Roberts, C.J., dissenting). And in *Corcoran v. Levenhagen*, the Court remanded to the circuit which had reversed the district court's grant of habeas relief on one bases without addressing other claims challenging the petitioner's death sentence. 558 U.S. 1, 2-3 (2009). When the circuit later granted habeas relief, the Court again reversed summarily, on the ground that the circuit had relied on a violation of state law, rather than denial of a federal constitutional right. Wilson v. Corcoran, 562 U.S. 1, 7 (2010). On remand, the district court denied the writ. Corcoran v. Buss, No. 3:05–CV–389, 2013 WL 140378, at *17 (N.D. Ind. Jan. 10, 2013).
[161] 558 U.S. 30 (2009).
[162] *Id.* at 30-31, 40.

mitigating evidence on behalf of that veteran.[163] Because the state court had not decided whether counsel's performance was deficient, Porter's claim could be reviewed *de novo* by the federal court, without the deference due under AEDPA. Bobby Van Hook was not so fortunate: habeas relief granted to that petitioner was summarily reversed.[164]

VII. CONCLUSION

The picture that emerges from examination of these summary reversals is one of a Supreme Court arrogating to itself, through its tiny direct review docket, guardianship of the Constitution as it applies to defendants in state courts, leaving no role for the lower federal courts. From this vantage point, the Court interprets constitutional protections in the narrowest possible terms, using the mechanism of summary reversals to send unmistakable messages to the circuit courts that granting relief based on generous reading of Supreme Court precedents, much less on lower court characterizations of what those precedents might have held, will be set aside without so much as a call for briefing or oral argument. Moreover, to be deemed "generous," an opinion in a petitioner's favor simply needs to be one with which any fairminded jurist could disagree. And the Supreme Court's per curiam opinions are written in a way that signals utter lack of respect for both the petitioners and the courts that found their constitutional claims to be valid. The Great Writ's protections extend only to Constitution *lite*.

[163] *See* Linda Greenhouse, *Selective Empathy*, N.Y.TIMES (Dec. 3, 2009, 9:11 PM), http://opinionator.blogs.nytimes.com/2009/12/03/selective-empathy.
[164] Bobby v. Van Hook, 558 U.S. 4, 13 (2009).

APPENDIX A

Summary reversals of grants of habeas corpus relief, October, 2009 to June, 2015

Nov. 9, 2009	Bobby v. Van Hook, No. 09-144 558 U.S. 4 (2009)	6th Cir. (death sentence)
Nov. 16, 2009	Wong v. Belmontes, No. 08-1263 558 U.S. 15 (2009)	9th Cir. (death sentence)
Jan. 11, 2010	McDaniel v. Brown, No. 08-559· 558 U.S. 120 (2010)	9th Cir.
Feb. 22, 2010	Thaler v. Haynes, No. 09-273 559 U.S. 43 (2010)	5th Cir. (death sentence)
Nov. 8, 2010	Wilson v. Corcoran, No. 10-91 562 U.S. 1 (2010)	7th Cir. (death sentence)
Mar. 21, 2011	Felkner v. Jackson, No. 10-797 562 U.S. 594 (2011)	9th Cir.
May 2, 2011	Bobby v. Mitts, No. 10-1000 131 S. Ct. 1762 (2011)	6th Cir. (death sentence)
Oct. 31, 2011	Cavazos v. Smith, No. 10-1115 132 S. Ct. 2 (2011)	9th Cir.
Nov. 7, 2011	Bobby v. Dixon, No. 10-1540 132 S. Ct. 26 (2011)	6th Cir.
Dec. 12, 2011	Hardy v. Cross, No. 11-74 132 S. Ct. 490 (2011)	7th Cir.
Feb. 21, 2012	Wetzel v. Lambert, No. 11-38 132 S. Ct. 1195 (2012)	3rd Cir. (death sentence)
May 29, 2012	Coleman v. Johnson, No. 11-1053 132 S. Ct. 2060 (2012)	3rd Cir.
June 11, 2012	Parker v. Matthews, No. 11-845 132 S. Ct. 2148 (2012)	6th Cir. (death sentence)
April 1, 2013	Marshall v. Rodgers, No. 12-382 133 S. Ct. 1446 (2013)	9th Cir.
June 3, 2013	Nevada v. Jackson, No. 12-694 133 S. Ct. 1990 (2013)	9th Cir.

· This case was briefed and scheduled for oral argument, but shortly before the argument date, it was removed from the calendar without explanation.

Oct. 6, 2014	Lopez v. Smith No. 13-946 135 S. Ct. 1 (2014)	9th Cir.
Nov. 17, 2014	Glebe v. Frost No. 14-95 135 S. Ct. 429 (2014)	9th Cir.
Mar. 30, 2015	Woods v. Donald No. 14-618 135 S. Ct. 1372 (2015)	6th Cir.

APPENDIX B

Summary reversals of denials of habeas corpus relief, October, 2009 to June, 2015

Oct. 20, 2009	Corcoran v. Levenhagen, No. 08-10495 558 U.S. 1 (2009)	7th Cir. (death sentence)
Nov. 30, 2009	Porter v. McCollum, No. 08-10537 558 U.S. 30 (2009)	11th Cir. (death sentence)
Jan. 19, 2010	Wellons v. Hall, No. 09-5731 558 U.S. 220 (2010)	11th Cir. (death sentence)
May 24, 2010	Jefferson v. Upton, No. 09-8852 560 U.S. 284 (2010)	11th Cir. (death sentence)
July 1, 2014	Johnson v. Williams, No. 13-9085 134 S. Ct. 2659 (2014)	9th Cir.