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The role of the courts in criminal justice

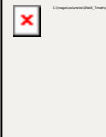
We are each shaped by our own generation. Those of you who became criminal lawyers around the 1960's witnessed two revolutions.

First, you saw the power of the U.S. Supreme Court. Led by Chief Justice Earl Warren, the Court used the 14th Amendment's Due Process Clause to selectively incorporate most of the criminal procedure guarantees of the Bill of Rights that had heretofore been applicable only in federal criminal prosecutions. The Warren Court turned the first 10 amendments into a judicial version of the Ten Commandments and aimed them at both state and federal courts: thou shalt not fail to provide appointed counsel to indigents; thou shalt not use evidence seized through unreasonable searches and seizures; thou shalt not fail to provide *Miranda* warnings to all suspects prior to custodial interrogations. The Court's decisions could almost be characterized as a kind of judicial "Code of Criminal Procedure" that states were compelled to follow.

Second, you saw the great expansion of the federal writ of habeas corpus as a vehicle for legal relief — and, in addition, legal reform. The Warren Court made it easier for defense attorneys to turn state court defeats into federal court victories through the power of habeas review. Defense attorneys no longer had to accept a "no" from state courts; they could take their case next door to federal court and get meaningful review of their federal constitutional issues. And equally important, habeas was not only a way to obtain relief in the case at bar; it was also a way to create new law.

I was reminded of the legal misunderstandings spawned by these revolutions when I read the recent U.S. Supreme Court decision in *Bobby v. Van Hook*, No. 09-144, decided Nov. 9, 2009.

In 1985, Robert Van Hook was charged with aggravated murder. An Ohio court convicted him and imposed the death penalty. After exhausting his state court appeals, Van Hook filed for federal habeas relief in 1995. The case went back and forth from the district court to the 6th Circuit for over a decade. Finally, this year the 6th Circuit granted relief to Van Hook by finding that his lawyers violated his constitutional right to effective assistance of counsel through their deficient performance in both investigating and presenting mitigating evidence. In doing so, the 6th Circuit relied on guidelines for the defense of capital cases promulgated by the American Bar Association in 2003.



Criminal Procedure
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The State of Ohio then petitioned for a writ of certiorari. On Nov. 9, the U.S. Supreme Court granted the petition, waived briefing and oral argument, and reversed the 6th Circuit in a unanimous *per curiam* opinion.

The Supreme Court excoriated the 6th Circuit for evaluating Van Hook's attorneys by using the American Bar Association's 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases that had been promulgated 18 years after the trial. The guidelines comprise what the Court characterized as 131 pages of "detailed prescriptions" for the legal representation of capital defendants. And even if Van Hook's trial had taken place after 2003, the Supreme Court further criticized the 6th Circuit for treating the ABA Guidelines "not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel must fully comply."

In summarizing the restrictions on federal review of state court judgments, the Supreme Court pointedly remarked that "While States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." Finding the trial attorneys' performances to have been "reasonable", the Supreme Court reversed the 6th Circuit's decision.

So what are the larger lessons of *Van Hook*?

First, criminal attorneys and judges need to recall that the job of the U.S. Supreme Court is not to create the perfect system of criminal law applicable to all states. I think the Warren Court may have caused some defense lawyers and judges to incorrectly believe that the role of the Supreme Court was to always be the final authority on "best practices." Obviously, that is not true. The Supreme Court's job is merely to set the absolute *minimum* constitutional floor that all state criminal systems must respect.

Think what this means in an area such as the Fourth Amendment. A U.S. Supreme Court interpretation of a search and seizure issue must by definition constitute a "one-size-fits-all" rule that applies to Vermont and North Dakota, as well as California and New York. When Illinois blindly follows U.S. Supreme Court Fourth Amendment law in its "lockstep" fashion, it is unwisely buying national law "off the rack." It thus ignores the fact that the federal system both allows — and, indeed, encourages — each state to formulate its own search and seizure rules that are "tailor-made" to address local problems.

Consider the problem of "driving while black." A few years ago, the Illinois legislature mandated a yearly study to identify racial bias in traffic stops. The 2007 report, prepared by the Northwestern University Center for Public Safety in conjunction with the Illinois Department of Transportation, concluded: "As in past years, in 2007 consent searches were conducted disproportionately by race." According to the report, an African-American driver was about three times as likely to undergo such a search as would a Caucasian driver.

As far as I know, Vermont and North Dakota have no "driving while black" problem — probably because each of these states have fewer than 1 percent black residents. When the U.S. Supreme

Court issues a national Fourth Amendment ruling, it is not presuming to describe the perfect system of search and seizure law. Rather, it is merely defining the lowest common denominator of restrictions placed on all 50 states by the Fourth Amendment. Thus, when the Supreme Court held that the Fourth Amendment did not forbid police from making racially-based "pretext" vehicle stops (*Whren v U.S.*, 517 U.S. 806 (1996)), the Court was not condoning the practice; it merely held that it was not prohibited by the Fourth Amendment. But a "lockstep" approach means Illinois enshrines every U.S. Supreme Court Fourth Amendment decision as if it were a "best practice."

It is not the job of federal courts to create the best possible system for Illinois; that job belongs solely to the Illinois courts and legislature. As a unanimous U.S. Supreme Court reminds us in *Van Hook*, states are entirely free, for example, to adopt every one of the rules set out in the 131-page ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. But federal courts have no authority to impose them on states.

And just as the job of the U.S. Supreme Court is only to define the minimum restrictions the federal constitution places on state government, federal habeas review of state court judgments is likewise cabined. The Antiterrorism and Effective Death Penalty Act of 1996 severely restricted the standard of review for federal courts in habeas cases. The free-wheeling review started by the Warren Court was replaced with a standard that is highly deferential towards state court criminal decisions. Thus, it is no longer enough for a federal habeas court to find that a state judgment is *wrong*; the federal court cannot disturb the ruling unless it actually finds it to be not only wrong, but also *unreasonable*. (Note that the trial in *Van Hook* took place so long ago that the Supreme Court reviewed it under the old defendant-friendly standard. For an example of a case in which the Supreme Court recently found the performance of defense counsel at a state court death hearing to be unconstitutionally deficient, see *Porter v McCollum*, No. 08-10537, decided Nov. 30, *per curiam*.)

What is the lesson of all this? Unlike the situation in the 1960's, defense attorneys and state courts can no longer rely on federal courts to save the day. State courts and legislatures — and all members of the criminal justice bar — have to accept the duty under our federal scheme to create the fairest possible criminal justice system that specifically deals with the unique problems of each state.

William Butler Yeats said "In dreams begins responsibility." In America, each state has the responsibility to turn its own unique dreams of criminal justice into a reality. It is not the job of the U.S. Supreme Court.

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