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Electronic research provides quick, but potentially adverse results

Yes, even federal judges make mistakes. The U.S. Supreme Court recently criticized a judge for making a research mistake that would not have been accepted from a summer intern.

Take a look at *Parker v. Matthews*, No. 11-845, decided on June 11 (per curiam). It involved the 6th U.S. Circuit Court of Appeals' grant of habeas corpus in a 1985 Kentucky capital murder case. The Supreme Court unanimously reversed, holding that the 6th Circuit had set aside the murder convictions "based on the flimsiest of rationales." It is the latest in a growing line of Roberts court decisions that have criticized lower federal courts for not reviewing state convictions with the deference mandated by the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA). See, e.g., *Wetzel v. Lambert*, 565 U.S. ____ (2012) (per curiam); *Cullen v. Pinholster*, 563 U.S. ____ (2011); *Renico v. Lett*, 559 U.S. ____ (2010).

You are probably aware of the sea-change caused by AEDPA in 1996. Prior to this, federal courts had wide-ranging powers in habeas corpus review of state convictions. AEDPA, however, mandated that a federal court had no right to issue a habeas writ unless either 1) the state court judgment "was contrary to, or involved an unreasonable application of, clearly established federal law," as determined by the U.S. Supreme Court or 2) the state court judgment "was based on an unreasonable determination of the facts." 28 U.S.C. Section 2254(d).

The Supreme Court has held that AEDPA proscribes federal courts from "using federal habeas review as a vehicle to second-guess the reasonable decisions of state courts." *Parker*, citing *Renico*, *supra*. Consequently, the Roberts court has been engaged in a search-and-destroy mission against federal courts that are not — at least in

the opinion of the Roberts court — following AEDPA.

I want to focus on just one aspect of *Parker*. One of the grounds used by the 6th Circuit in granting the petition was that the prosecutor had deprived the defendant of due process through certain comments he made in closing argument. In reaching this conclusion, the 6th Circuit held that the comments were sufficiently similar to the comments made in a decision in which it had granted habeas in 2000.

In rejecting the 6th Circuit's reliance on that case, the Supreme Court acidly noted "To make matters worse, [that 2000 case was decided] under pre-AEDPA law, so [it] did not even purport to reflect clearly established law [as AEDPA now requires]." (Slip op. 13) (emphasis in original).

So the 6th Circuit was not only told they were wrong — they were also accused of being stupid. How could a federal judge (or, more realistically, his clerk) rely on a pre-AEDPA case to support a decision under AEDPA? How could a federal circuit court make such an embarrassing legal research error?

Let's assume you were researching the issue. You want to know if certain prosecutorial comments could rise to the level of a due process violation in a habeas case under the 1996 AEDPA statute.

First, you find the proper database in LEXIS or Westlaw. You then type in several variations of the comments and start the search. Bingo! Your search takes you to the exact page in a case finding almost identical comments to violate due process and merit a habeas grant. You also notice the case was decided in 2000, so AEDPA had been in effect for four years. Your work is over.

Isn't technology wonderful?

Before you agree, you may want to read Peter M. Tiersma's book "Parchment, Paper, Pixels: Law and the Technologies of Commu-

CRIMINAL PROCEDURE

TIMOTHY P. O'NEILL



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nication" (Chicago, 2010). He argues that as a society becomes more literate, its very concept of what law is also changes. The earliest legal texts were considered "merely as evidence of an underlying oral event." Yet eventually "the written text often becomes regarded not just as evidence of a legal event, but as constituting the event itself" (7, emphasis added). That is, the words on the page don't simply provide information about a contract that was formed earlier by two people; the words on the page *actually constitute the contract itself*. Tiersma has a term for this concept that increasingly views the written words to be authoritative: he calls it "textualiza-

tion."

Tiersma then notes how this has affected legal research. "Book research" required a lawyer to formulate his or her search in terms of concepts or principles. It required some legal sophistication to construct a search that could lead to helpful case authority.

But electronic research is very different. Search engines do not deal in concepts; they merely deal in strings of text. Tiersma fears that electronic research has the potential to make common law both more textual and less conceptual. Consequently, "[i]t may lose the flexibility it once had to be interpreted and reinterpreted to fit new and unforeseen situations." (12)

Tiersma is concerned that electronic research may per se change how lawyers and judges think: "Rather than reading entire cases, they may simply be jumping from one link to the other in search of the perfect sentence or paragraph to insert into their brief [or opinion]. They may focus so intently on text that they lose sight of the context." (219)

With this in mind, consider the 6th Circuit law clerk in *Parker*. After being linked to a page in the 2000 case that found similar prosecutorial comments to be serious enough error to allow a habeas grant, he may have thought his job was over.

But if he had even briefly looked at the entire published case — as he would have seen in a book — he would have noticed that the habeas petition was filed before April 24, 1996, the effective date of AEDPA. And he would also have learned that a habeas petition filed before that date was not subject to AEDPA's new prosecution standard of review in Section 2254(d). See *Lindh v. Murphy*, 521 U.S. 320 (1997).

Electronic research is quick and accurate. But it can also be legally unsophisticated. Caveat lawyer.

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