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Judge laments the whittling away of habeas corpus by high court

Stephen Reinhardt, 85, has been a judge on the U.S. 9th Circuit Court of Appeals for the last 37 years. An unabashed liberal, he once remarked, "I can't remember the last time I read 'justice' in a court opinion, except in front of someone's name." A former clerk gave him the nickname Chief Justice of the Warren Court-in-Exile.

I have read many Reinhardt opinions over the years, but a recent one on the state of federal habeas review in the U.S. is particularly significant. He laments how the Supreme Court has made habeas review absolutely toothless. Anyone involved in criminal law should make sure to read his concurrence in *Curiel v Miller*, 830 F.3d 864 (2016).

During the Warren Court era, habeas petitions offered state criminal defendants the opportunity to have federal courts correct erroneous state court interpretations of the U.S. Constitution. But the Burger and Rehnquist Courts worked hard to narrow the scope of habeas review. This culminated in the 1989 decision in *Teague v. Lane*, 489 U.S. 288.

The court there held that a federal court in its habeas review was generally not allowed to apply "new rules" of constitutional criminal law of which the state courts could not have been aware.

In other words, a habeas court should not disturb a state criminal conviction unless it could show that the state violated a rule that was "dictated by precedent" that existed at the time the conviction became final.

This was the catalyst for Congress narrowing habeas review in the Antiterrorism and Effective Death Penalty Act of 1996. This law holds that a federal court can only disturb a state conviction if it "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law,

as determined by the Supreme Court of the United States."

Reinhardt complains that the Supreme Court's "increasingly restrictive interpretation of that provision has gone well beyond the face of the statute to virtually eliminate meaningful federal review."

His first criticism is that the Supreme Court has insisted that "clearly established [f]ederal law" can mean nothing short of a specific holding by the Supreme Court itself. As Reinhardt notes, these days the court only reviews about 80 cases a year. Moreover, many points of clearly established law never require Supreme Court holdings because they are uncontroversial.

In that case, "Although a constitutional violation may be clear, federal courts will often be unable to grant habeas relief as there is no 'clearly established' Supreme Court law governing the question certainly a counter-intuitive, if not a counterproductive, result."

Next, he points to the Supreme Court's crabbed interpretation of what is an "unreasonable application" of law. The Supreme Court has interpreted this to mean that

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habeas relief is not available if the holding is merely "wrong"; it must also be objectively unreasonable.

And the court has further defined this as meaning that habeas relief can be used only if there is "no possibility fair-minded jurists could disagree" that the state ruling conflicts with the Supreme Court's holding.

Further, if the state court does not explain its reason for rejecting a petitioner's claim, the Supreme Court has held that the federal court must attempt, in Reinhardt's

CRIMINAL PROCEDURE

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words, "to conjure up a plausible, though not necessarily correct, hypothetical basis for the decision."

This, Reinhardt notes, leads to the absurdity that "Even if every imagined basis that the federal court can think of is clearly incorrect, the court may still not grant relief so long as any of the reasons, while wrong, could be deemed 'reasonable.'"

Reinhardt also points out that all of this is compounded by the heavy caseloads carried by state appellate courts that often militate

decisions. The rationale for the Supreme Court's extreme deference to state court criminal decisions lies in principles of comity and federalism.

Reinhardt basically asked whether a state Supreme Court could essentially waive this protection, suggesting that in some cases, the state Supreme Court might expressly relinquish the deference usually provided by AEDPA.

It might do this when it concedes that its decision could have benefited from more extensive review. There may be cases where a state court would welcome federal assistance to insure a just result.

Reinhardt also recommended that a state Supreme Court might certify entire categories of cases for this non-AEDPA federal review, which might include all death penalty and life-without-parole cases or certain classes of cases involving youthful offenders.

Reinhardt concedes that he cannot guarantee the U.S. Supreme Court would accept this concept of non-AEDPA certification by state courts.

But currently, a federal judge is constrained to say, in Reinhardt's words, "I know this result is unfair, unjust and unconstitutional, but I have been told that I must nevertheless defer to the view of the state courts that may have had neither the time nor resources to fully review the constitutional errors involved."

Reinhardt's goal is to have the federal and state systems working together, not in opposition of each other, in order to guarantee that the Constitution is enforced in a way that provides justice.

Justice. Reinhardt's opinion is indeed one that uses the word in the true sense, other than a title before a person's name. *Curiel* provides food for thought for those of us despairing of the current state of habeas practice in our country.