Postcard From The Ninth Circuit: "Please Help"

This week an LA Times article described a recurring problem in the relationship between SCOCA and the Ninth Circuit. The issue concerns the brevity of SCOCA orders denying state habeas petitions. When those cases reach the Ninth Circuit, that court must determine the basis for the SCOCA ruling: specifically, whether the petition was denied as untimely. According to the article, SCOCA decides most such petitions "with one-paragraph summary rulings that frustrate federal judges who later are asked to review them."

The issue stems from the SCOTUS decision in Harrington v. Richter (2011) 562 U.S. 86, holding that the prohibition in 28 U.S.C. § 2254(d) (as amended by the Antiterrorism and Effective Death Penalty Act of 1996) on re-litigation of habeas claims applies even if the state court issues only a summary denial. The decision noted that nothing in the statute's text requires a statement of reasons. Consequently, it reversed the Ninth Circuit because it failed to accord the required deference to the SCOCA decision—which in that case was exactly the same sort of brief summary ruling the Ninth Circuit is bemoaning now. But while Harrington resolved the question of whether summary denials are sufficient (they are), the Ninth Circuit's point is that the practical problem remains: if the state court's summary denial is silent on its reasoning, how can the federal court divine whether the state petition was late?

Asked what he thought about the matter, Professor Gerald Uelmen "predicted the state court would adopt some of the federal judges' suggestions" because in his view "the new majority clearly wants to position the court as a leading state court in the nation, and this is an opportunity to show some leadership."

We disagree.

The article notes that SCOCA is "overwhelmed by thousands of challenges from inmates each year." That is beyond cavil: according to the 2015 Court Statistics Report between two and three *thousand* criminal habeas petitions are filed each

year, and that's excluding those related to automatic appeals.

On this topic, as in all others related to the court's workload, the facts of life are immutable. This is why we think it unlikely that the court's justices (new or veteran) can effect any major change in their output. The reality is that SCOCA is overwhelmed with work, financially handicapped, and lacks the resources to write full opinions in every case. Brandon Stracener recently pointed out that those factors explain the court's reliance on procedural remedies like depublication and grant-and-transfer. Stracener's proposed solution was to institute summary reversals—much as the Ninth Circuit does with its memorandum dispositions. There is a paradox here: the Ninth Circuit complains that SCOCA habeas resolutions are *too* brief, while we call out the California court for *not* using summary dispositions. What's a court to do?

There's an underlying issue not raised in the article: whether summary dispositions are actually permissible in California habeas proceedings. Stracener's piece argues against the conventional wisdom that SCOCA is barred from writing summary dispositions. But when asked to comment for the LA Times article on the Ninth Circuit's complaints about these so-called "postcard denials," a SCOCA spokesman was firm: "the court follows what the state Constitution mandates—to provide a ruling, not a written decision." So why are summary dispositions permissible in the habeas context and not elsewhere on the SCOCA docket?

Article 6, section 14 requires that SCOCA decisions "that determine causes shall be in writing with reasons stated." The court has held that this provision applies even when defense counsel files a brief per People v. Wende (1979) 25 Cal.3d 436, in which no issues are raised for review, and the appellate court identifies no arguable issue. People v. Kelly (2006) 40 Cal.4th 106, 109-10. So does this requirement apply to habeas resolutions?

It does not. Habeas is a collateral attack on a judgment, not a direct appeal. A right to a direct appeal of a final judgment gives rise to a "cause" within the meaning of article 6, section 14. Powers v. City of Richmond (1995) 10 Cal.4th 85, 91 n.1; People v. Medina (1972) 6 Cal.3d 484, 489–490. Thus, when a court affirms a judgment in a Wende appeal, it is disposing of a "cause" and must do so "in writing

with reasons stated." But unlike a direct appeal, which falls within SCOCA's appellate jurisdiction, SCOCA has original jurisdiction in habeas proceedings. And it is "well established" that an appellate court may summarily deny a petition for an original writ without violating article 6, section 14. Powers v. City of Richmond (1995) 10 Cal.4th 85, 142. This is why there is no requirement for a decision on a habeas petition with reasons stated.

So where does that leave things?

SCOCA is proceeding correctly under the California constitution in summarily disposing of habeas petitions. Indeed, given the volume of habeas petitions that are filed each year (around three thousand), given the current state of the court's resources there is zero chance the court could produce a merits decision on even a fraction of those petitions—remember, the court only manages some 100 opinions each year. And SCOTUS has expressly rejected the Ninth Circuit's argument that postcard denials are legally inadequate. So, to summarize: SCOCA is right under California and federal law, and lacks the resources to do more anyway.

This is not to say that change is impossible. One small change could resolve the matter, or at least put the ball back in the Ninth Circuit's court. If the federal judges say it would make their lives easier, then it would cause little harm and only trivial additional effort for SCOCA to add this to its postcards (where justified): "The petition is untimely."

So let it be written, so let it be done.

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