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Deferring to a higher power: Knowing how to mesh state court, high court

Why would a state supreme court bother to write a lengthy opinion deciding serious constitutional issues and then allow the U.S. Supreme Court to reverse that decision?

I don't know either.

But that is the story behind the U.S. Supreme Court's recent decision in *Kansas v. Carr*, No. 14-449 (decided Jan. 20).

So what's the matter with *Kansas*?

Here's the story. The case involved two separate death penalty cases, one involving Reginald and Jonathan Carr and the other Sidney Gleason. In both the Carr brothers' case and the Gleason case, the Kansas Supreme Court vacated the death sentences because it found that the jury instructions at the sentencing phase were constitutionally flawed.

The mistake was that in each case the trial judge did not specifically inform the jury mitigating circumstances that would preclude a finding of death did not have to be established beyond a reasonable doubt; rather, the Kansas court held, the jury should have been told that mitigating circumstances need only be proved to the satisfaction of the individual juror.

Additionally, in the Carr brothers' case, the Kansas court found that their constitutional right to individualized capital sentencing determinations was violated by the trial court's failure to sever their sentencing hearings.

The U.S. Supreme Court reversed in an 8-1 decision. The court found that the Eighth Amendment did not mandate that capital-sentencing courts must give such a jury instruction. It also held that neither the Eighth Amendment nor the due process clause required severance in the Carr case.

Whenever the Supreme Court examines a pro-defense state court criminal decision on direct review, the first question is always the same: "Why did the state

court allow the U.S. Supreme Court to review its decision?" For it is black-letter law that a state court always has the power to preclude U.S. Supreme Court review of any pro-defense criminal decision.

How can a mere state court do this? Simple. All the court has to do is base its pro-defense criminal decision on adequate and independent state law grounds (assuming they exist).

What we call the federal Bill of Rights may likewise be characterized as a "Bill of Restrictions" on government action. Originally, the Bill of Rights only restricted the federal government. However, the Warren Court in the 1960s made almost all the criminal procedure provisions applicable against state governments by selectively incorporating them through the due process clause of the 14th Amendment.

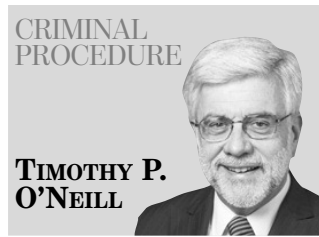
But this did not create a procedural straitjacket for states. Rather, the U.S. Supreme Court

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merely created a constitutional "floor," i.e., a minimum level of protection for all criminal defendants below which neither state nor federal courts may venture.

States remain free to exceed this minimum "floor" by offering greater protection to their citizens than mandated by the U.S. Constitution. With regards to the rights of criminal defendants, although the U.S. Constitution provides the "floor," states may freely dictate the height of the "ceiling."

So how does a state court prevent U.S. Supreme Court review of a pro-defense criminal decision? The court explained this more than 30 years ago. It said it would not review a pro-defense criminal decision from a state



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court as long as that decision was based on "bona fide separate, adequate and independent grounds."

But it stressed that there was a burden on the state court to "clearly and expressly" indicate that the decision was based on state law. *Michigan v. Long*, 463 U.S. 1032 (1983).

And the reason for this is obvious. If state law really is the

foundation for the decision, then even if the Supreme Court finds the decision is not mandated by the U.S. Constitution, the state court could simply reinstate its decision on remand. This results flies in the face of the court's refusal to issue "advisory opinions." *Florida v. Meyers*, 466 U.S. 380 (1984).

The defendants tried to defend their victories in *Kansas* by arguing that the state Supreme Court had relied on state law. But the U.S. Supreme Court held that the Kansas court "decidedly did not." Citing references to the Eighth Amendment in the Kansas court's opinion, the Supreme Court held that although a state "may experiment all they want

with their own constitutions[,] what a state court cannot do is experiment with our [f]ederal Constitution and expect to elude this court's review so long as victory goes to the criminal defendant."

Failing to protect pro-defense criminal decisions is a hallmark of Illinois state courts. Between 1980 and 2005, Illinois courts had 12 pro-defense criminal decisions reversed on direct appeal by the U.S. Supreme Court because they failed to rely on adequate and independent state grounds. See O'Neill, "Stop Me Before I Get Reversed Again: The Failure of Illinois Appellate Courts to Protect Their Criminal Decisions from United States Supreme Court Review," 36 Loy. U. Chi. L. J. 893 (2005), ft. 121. Maybe the U.S. Supreme Court refuses advisory opinions, but Illinois courts do it over and over.

Justice Sonia M. Sotomayor was the sole dissenter. She criticized the court for taking the case at all. She argued that *Kansas* did not actually violate the Constitution. At worst, *Kansas* merely "overprotected its citizens" through these decisions. She chided the court for placing a "thumb on the scale" against a state adopting procedural protections that the federal Constitution may not actually mandate.

Her dissent is cogent, but I am on the side of the majority on this one. *Michigan v. Long* has been around for one-third of a century. A state Supreme Court and the criminal defense lawyers presenting the case have no excuse for not understanding by this time that reversal in pro-defense decisions can be avoided merely by a simple statement that the court is relying on the cognate provisions of its own state constitution.

A recent New Yorker cartoon shows a lawyer arguing before the Supreme Court with one of the justices saying, "Whoa, don't ask constitutional questions you don't want to know the answers to." After *Carr*, state courts should take heed.