

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4 August Term, 2010

5 (Argued: May 13, 2011

Decided: December 16, 2011)

6
7 Docket No. 10-224-pr

8 -----X

9
10 JOHN RIVERA,

11 *Petitioner/Appellant,*

12
13
14 - v. -

15
16 ANDREW CUOMO, NEW YORK STATE ATTORNEY
17 GENERAL and JOSEPH SMITH, SUPERINTENDENT,
18 SHAWANGUNK CORRECTIONAL FACILITY,

19
20 *Respondents/Appellees.*

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22 -----X
23
24 WILLIAM CARNEY, The Legal Aid Society, Criminal Appeals Bureau,
25 New York, New York, *for Petitioner-Appellant.*

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27 CHARLES J. HYNES (Leonard Joblove and Seth M. Lieberman,
28 Assistant District Attorneys), District Attorney, Kings County,
29 Brooklyn, New York, *for Respondents-Appellees.*

30
31 Before: McLAUGHLIN, POOLER, PARKER, *Circuit Judges.*

32
33 PER CURIAM:

34 The petitioner-appellant John Rivera appeals from a judgment
35 entered in the United States District Court for the Eastern
36 District of New York (Townes, *J.*) denying his petition for a writ
37 of habeas corpus pursuant to 28 U.S.C. § 2254.

1 Rivera was convicted after a jury trial of murder in the
2 second degree in violation of New York Penal Law § 125.25(2),
3 arising out of the death of his estranged wife, Kimberly Cassas,
4 from a single gunshot wound to her head at point-blank range.
5 Specifically, Rivera was convicted of depraved indifference
6 murder, but was acquitted of intentional murder. The Appellate
7 Division affirmed his conviction on direct appeal, *People v.*
8 *Rivera*, 2 A.D.3d 884 (2d Dep't 2003), and, on April 14, 2004,
9 Rivera was denied leave to appeal to the N.Y. Court of Appeals,
10 *People v. Rivera*, 2 N.Y.3d 764 (2004).

11 Rivera subsequently filed a petition for a writ of habeas
12 corpus in the Eastern District of New York on the sole ground
13 that, by upholding his conviction for depraved indifference
14 murder, the state courts unreasonably applied the rule of *Jackson*
15 *v. Virginia*, 443 U.S. 307 (1979), that a jury find each element
16 of the crime beyond a reasonable doubt. Applying the law of
17 depraved indifference in existence at the time Rivera was
18 convicted in September 1997, the district court denied relief.
19 See *Rivera v. Cuomo*, No. 05-CV-1699, 2009 WL 4929264, at *23
20 (E.D.N.Y. Dec. 21, 2009).

21 On August 9, 2011, we issued a decision finding, in
22 pertinent part, that (1) the district court erred in applying the
23 law of depraved indifference murder in existence at the time
24 Rivera was convicted in September 1997, rather than at the time

1 Rivera's conviction became final in July 2004, and (2) under the
2 law of depraved indifference murder as it existed in July 2004,
3 no rational jury could have found Rivera guilty of depraved
4 indifference murder, rather than intentional murder or reckless
5 manslaughter, and therefore upholding Rivera's conviction for
6 depraved indifference murder constituted an "unreasonable
7 application of clearly established federal law." On this basis,
8 we reversed the judgment of the district court and remanded with
9 instructions to grant Rivera's petition for a writ of habeas
10 corpus.

11 Subsequent to our decision, Respondents filed a petition for
12 panel rehearing or rehearing en banc, and the United States
13 Supreme Court decided *Cavazos v. Smith*, which strongly reasserted
14 "the necessity of deference to state courts in § 2254(d) habeas
15 cases." 132 S. Ct. 2, 5 (2011). In light of Respondents'
16 petition and the Supreme Court's guidance in *Cavazos*, we have
17 revisited our original decision to ensure that we had afforded
18 the state courts and the jury the full extent of the deference
19 they are owed under the Antiterrorism and Effective Death Penalty
20 Act of 1996 ("AEDPA"), 112 Stat. 1214. See *Cavazos*, 132 S. Ct.
21 at 3 (emphasizing the double deference owed in § 2254(d) habeas
22 cases). After much reflection, we now reverse course. Applying
23 the law as it existed after Rivera's conviction became final in
24 July 2004, we find that although evidence of "significantly

1 heightened recklessness," *People v. Sanchez*, 98 N.Y.2d 373, 380
2 (2002), was slim, at best, giving the state courts and the jury
3 the utmost deference, we cannot find that the evidence was so
4 completely lacking that no rational jury could have found Rivera
5 guilty of depraved indifference murder. See *Cavazos*, 132 S. Ct.
6 at 1-5; *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010). Therefore,
7 we have no choice but to uphold the decision of the state court.
8 See *Renico*, 130 S. Ct. at 1862 (explaining that "an unreasonable
9 application of federal law is different from an incorrect
10 application of federal law," and "a federal habeas court may not
11 issue [a] writ simply because . . . the relevant state-court
12 decision applied clearly established federal law erroneously or
13 incorrectly" (internal quotation marks and citations omitted)).

14 Accordingly, the judgment of the district court hereby is
15 AFFIRMED.