

10-224-pr  
Rivera v. Cuomo

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 -----

4 August Term, 2010

5 (Argued: May 13, 2011 Decided: August 9, 2011)

6 Docket No. 10-224-pr

7 -----X

8  
9 JOHN RIVERA,

10 Petitioner/Appellant,

11  
12 - v. -

13  
14 ANDREW CUOMO, NEW YORK STATE ATTORNEY  
15 GENERAL and JOSEPH SMITH, SUPERINTENDENT,  
16 SHAWANGUNK CORRECTIONAL FACILITY,

17 Respondents/Appellees.

18  
19 -----X

20 Before: McLAUGHLIN, POOLER, B. D. PARKER, Circuit Judges.

21  
22 Petitioner-Appellant John Rivera ("Rivera") was convicted of  
23 one count of depraved indifference murder in violation of New  
24 York Penal Law § 125.25(2). He now appeals from a judgment  
25 entered in the United States District Court for the Eastern  
26 District of New York (Townes, J.) denying his petition for a writ  
27 of habeas corpus pursuant to 28 U.S.C. § 2254. On appeal, Rivera  
28 argues that the district court erred in holding that the  
29 applicable law of depraved indifference murder was the law in  
30  
31  
32  
33

1 effect when Rivera was convicted on September 19, 1997. We  
2 agree, and hold that the district court should have applied the  
3 law as it existed at the time Rivera's conviction became final,  
4 i.e., once the period in which Rivera's time to file a writ of  
5 certiorari to the United States Supreme Court expired. Rivera  
6 also argues that, in July 2004, the evidence adduced at trial was  
7 legally insufficient to support a conviction for depraved  
8 indifference murder. Again, we agree, and hold that, at the time  
9 Rivera's conviction became final in July 2004, no reasonable jury  
10 could have found Rivera guilty of depraved indifference murder.  
11 Accordingly, the judgment of the district court is **REVERSED** and  
12 **REMANDED** with instructions to grant Rivera's petition for a writ  
13 of habeas corpus.

14 WILLIAM CARNEY, The Legal Aid Society,  
15 Criminal Appeals Bureau, New York, New  
16 York, for Appellant.

17  
18 CHARLES J. HYNES (Leonard Joblove and  
19 Seth M. Lieberman, Assistant District  
20 Attorneys), District Attorney, Kings  
21 County, Brooklyn, New York, for  
22 Respondents-Appellees.

23  
24 McLAUGHLIN, Circuit Judge:

25 Petitioner-Appellant John Rivera ("Rivera") was convicted on  
26 September 19, 1997, of one count of depraved indifference murder  
27 in violation of New York Penal Law § 125.25(2) after his  
28 estranged wife died from a single gunshot wound to the head at  
29 point-blank range. In December 2003, the Appellate Division

1 rejected Rivera's direct appeal, People v. Rivera, 2 A.D.3d 884  
2 (2d Dep't 2003), and, on April 14, 2004, Judge Rosenblatt of the  
3 New York Court of Appeals denied Rivera leave to appeal to that  
4 court, People v. Rivera, 2 N.Y.3d 764 (2004).

5 Rivera subsequently filed a petition for a writ of habeas  
6 corpus in the United States District Court for the Eastern  
7 District of New York (Townes, J.), arguing that the evidence was  
8 insufficient to support a conviction for depraved indifference  
9 murder. Applying the New York law of depraved indifference in  
10 existence at the time Rivera was convicted at trial in September  
11 1997, the district court denied relief. See Rivera v. Cuomo, No.  
12 05-CV-1699, 2009 WL 4929264, at \*22-23, 25 (E.D.N.Y. Dec. 21,  
13 2009). Rivera now appeals. In June 2010, this Court granted a  
14 certificate of appealability on the specific issue of "whether,  
15 under the law as it existed when appellant's conviction became  
16 final, the evidence was legally sufficient to support a  
17 conviction for depraved indifference murder."

18 On appeal, Rivera raises two arguments. First, Rivera  
19 argues that the district court erred in applying the law in  
20 effect when he was convicted at trial on September 19, 1997  
21 rather than the law in effect at the time his conviction became  
22 final on July 13, 2004. Second, Rivera argues that, under the  
23 law in effect at the time his conviction became final, the

1 evidence was legally insufficient to support a conviction for  
2 depraved indifference murder.

3 For the reasons that follow, we agree with both of Rivera's  
4 contentions. Accordingly, Rivera's petition for a writ of habeas  
5 corpus must be granted.

6 **BACKGROUND**

7 In its Memorandum and Order of December 21, 2009, the  
8 district court provided a detailed account of the factual  
9 background of the instant petition. See Rivera, 2009 WL 4929264,  
10 at \*1-15. We assume familiarity with the district court's order  
11 and repeat the facts herein only to the extent necessary to  
12 explain our ruling.

13 On the night of January 13, 1997, Kimberly Cassas Rivera  
14 ("Cassas"), Rivera's estranged wife, suffered a single, fatal  
15 gunshot wound to the head from a nine-millimeter Beretta handgun  
16 fired at point-blank range. Rivera was ultimately indicted in  
17 New York state court on two counts of murder in the second  
18 degree--intentional murder in violation of New York Penal Law §  
19 125.25(1) and depraved indifference murder in violation of §  
20 125.25(2)--as well as lesser charges not relevant to this appeal.

21 In the summer of 1997, Rivera was tried on these charges in  
22 the Supreme Court for the State of New York, Kings County.  
23 Despite the dual indictment, at trial, the prosecution pursued a  
24 single theory of intentional murder. Specifically, the

1 prosecution argued that, after a short and tumultuous marriage,  
2 and angry that Cassas was filing for divorce and seeking primary  
3 custody of their infant son, Rivera, who had a history of violent  
4 outbursts and domestic abuse, lured Cassas to his apartment with  
5 the intention of killing her and then, while the two were  
6 standing on the sidewalk outside the apartment, "put a 9mm  
7 handgun to [her] head . . . and pulled the trigger." J.A. 28.  
8 All of the State's evidence at trial was calculated to support  
9 this theory of intentional murder, including evidence that Rivera  
10 was in possession of the nine-millimeter Beretta handgun used to  
11 kill Cassas immediately before the murder, testimony from  
12 Cassas's divorce lawyer that Rivera called her twice in the days  
13 and hours before the murder threatening to kill Cassas with her  
14 gun, and testimony from Rivera's former employer that the day  
15 before the shooting Rivera told his co-workers that he "couldn't  
16 take [Cassas], couldn't stand her," and wished her dead. J.A.  
17 1020.

18 Indeed, in summation, the prosecutor told the jury:

19 The people maintain it was an intentional act . . .  
20 . . . [E]veryone agrees that when you take this gun,  
21 which they call a deadly weapon for a good reason,  
22 and when it is pressed . . . against the head and  
23 the trigger is pulled and the gun is discharged,  
24 there can be no question in any reasonable person's  
25 mind that whoever pulled that trigger intended to  
26 cause the death of the individual against whose  
27 head it was pressed. So I submit that is not an  
28 issue. This is an intent. An intent to kill.  
29 J.A. 1463 (emphasis added).  
30

1 Throughout trial, Rivera's sole defense was that Cassas  
2 committed suicide. According to Rivera's version, Cassas, who  
3 had been depressed ever since their son's birth eight months  
4 earlier, showed up on the night of her death distraught and,  
5 threatening to kill herself, pulled the Beretta handgun from her  
6 car and put it to her head. Although Rivera attempted to take  
7 the gun away from her, while the gun was pressed near her temple,  
8 a distraught Cassas pulled the trigger, inflicting upon herself a  
9 single gunshot wound to the head. In support of this theory,  
10 Rivera presented, inter alia, both expert and eyewitness  
11 testimony suggesting that, at some point immediately before the  
12 gun went off, there had been a struggle between Rivera and Cassas  
13 for possession of the gun.

14 During the trial, defense counsel moved to dismiss the  
15 depraved indifference murder charge for lack of evidence. The  
16 court denied the motion and charged the jury on both intentional  
17 and depraved indifference murder, as well as on manslaughter in  
18 the first degree as a lesser included offense to intentional  
19 murder. Manslaughter as a lesser included offense to depraved  
20 indifference murder (i.e., "reckless manslaughter") was not  
21 submitted to the jury.

22 The jury eventually found Rivera not guilty of intentional  
23 murder, but guilty of depraved indifference murder--and found  
24 Rivera guilty of the remaining misdemeanor charges not relevant

1 to this appeal. The court then sentenced Rivera to 23 years to  
2 life in prison on the depraved indifference murder charge.

3 On direct appeal, Rivera challenged his conviction for  
4 depraved indifference murder on the ground that the evidence was  
5 insufficient to support a finding of recklessness since all of  
6 the evidence adduced at trial went to a theory of intentional  
7 conduct. The Appellate Division rejected this argument and  
8 upheld Rivera's conviction. See Rivera, 2 A.D.3d at 884.

9 On April 14, 2004, Judge Rosenblatt of the New York Court of  
10 Appeals denied Rivera leave to appeal to that court. See Rivera,  
11 2 N.Y.3d at 764.

12 In April 2005, Rivera filed a petition for a writ of habeas  
13 corpus pursuant to 28 U.S.C. § 2254 in the Eastern District of  
14 New York, on the sole ground that, by affirming Rivera's  
15 conviction for depraved indifference murder, the state courts  
16 unreasonably applied federal law. See 28 U.S.C. § 2254(d).  
17 Specifically, Rivera argued that the evidence was legally  
18 insufficient in his case to support a finding of reckless and  
19 depraved conduct since all of the evidence adduced at trial went  
20 to a theory of intentional conduct, and therefore his conviction  
21 violated the rule of Jackson v. Virginia, 443 U.S. 307 (1979),  
22 requiring proof beyond a reasonable doubt of every element of a  
23 crime to support a conviction. See Rivera, 2009 WL 4929264, at  
24 \*15. The district court disagreed, holding that, under the law

1 of depraved indifference in effect at the time of Rivera's trial  
2 in September 1997, the evidence was legally sufficient to support  
3 a conviction for depraved indifference murder. See id. at \*22-  
4 23, 25. Rivera now appeals.

5 In June 2010, this Court granted a certificate of  
6 appealability on the specific issue of "whether, under the law as  
7 it existed when appellant's conviction became final, the evidence  
8 was legally sufficient to support a conviction for depraved  
9 indifference murder," and this appeal ensued.

## 10 DISCUSSION

### 11 I. Standard of Review

12 We review the district court's denial of habeas relief de  
13 novo, Henry v. Ricks, 578 F.3d 134, 137 (2d Cir. 2009), accepting  
14 the district court's factual findings unless clearly erroneous,  
15 Drake v. Portuondo, 553 F.3d 230, 239 (2d Cir. 2009).

16 Under the Antiterrorism and Effective Death Penalty Act of  
17 1996 ("AEDPA"), we may grant habeas relief only if the challenged  
18 state court decision was "contrary to, or involved an  
19 unreasonable application of, clearly established Federal law, as  
20 determined by the Supreme Court of the United States." 28 U.S.C.  
21 § 2254(d); Acosta v. Artuz, 575 F.3d 177, 184 (2d Cir. 2009). A  
22 state court decision involves an "unreasonable application of"  
23 federal law "if it correctly identifies the governing legal  
24 principle but unreasonably applies or unreasonably refuses to



1 extend that principle to the facts of a particular case.”

2 Richard S. v. Carpinello, 589 F.3d 75, 80 (2d Cir. 2009).

### 3 **II. Governing Federal Law**

4 “Under the Due Process Clause of the Fifth and Fourteenth  
5 Amendments, no conviction may be sustained ‘except upon proof  
6 beyond reasonable doubt of every fact necessary to constitute the  
7 crime . . . charged.’” Henry, 578 F.3d at 138 (quoting In re  
8 Winship, 397 U.S. 358, 364 (1970)). A habeas petitioner “is  
9 entitled to habeas corpus relief if it is found that upon the  
10 record evidence adduced at trial no rational trier of fact could  
11 have found proof of guilt beyond a reasonable doubt.” Jackson,  
12 443 U.S. at 324. When reviewing the sufficiency of a state  
13 conviction, “[t]his ‘standard must be applied with explicit  
14 reference to the substantive elements of the criminal offense as  
15 defined by state law.’” Langston v. Smith, 630 F.3d 310, 314 (2d  
16 Cir. 2011) (quoting Jackson, 443 U.S. at 324 n.16).

### 17 **III. Applicable State Law**

18 Under New York law, a person is guilty of depraved  
19 indifference murder when “[u]nder circumstances evincing a  
20 depraved indifference to human life, he recklessly engages in  
21 conduct which creates a grave risk of death to another person,  
22 and thereby causes the death of another person.” N.Y. Penal L. §  
23 125.25(2) (emphasis added). Thus, “recklessness” has always been  
24 an element of the offense of depraved indifference murder, see,

1 e.g., People v. Sanchez, 98 N.Y.2d 373, 380(2002), which the  
2 prosecution had to prove beyond a reasonable doubt in order to  
3 support Rivera's conviction, see Langston, 630 F.3d at 314-15.  
4 Because "one who acts intentionally in shooting a person to death  
5 . . . cannot at the same time act recklessly," People v.  
6 Gallagher, 69 N.Y.2d 525, 528-29 (1987), "under N.Y. law,  
7 intentional murder and depraved indifference murder are mutually  
8 exclusive," Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 812 (2d  
9 Cir. 2000).

10 From 1983 to 2002, the N.Y. Court of Appeals understood  
11 "depraved indifference" to "refer[] to neither the mens rea nor  
12 actus reus" of the crime of depraved indifference murder, but to  
13 the "factual setting in which the risk creating conduct must  
14 occur." People v. Register, 60 N.Y.2d 270, 276 (1983) (emphasis  
15 removed from original); accord Sanchez, 98 N.Y.2d at 379-84.  
16 Under this formulation, "the very facts establishing a risk of  
17 death approaching certainty and thus presenting compelling  
18 circumstantial evidence of intent--for example, a point blank  
19 shooting of a victim in the head--likewise demonstrated depraved  
20 indifference." Policano v. Herbert, 7 N.Y.3d 588, 601 (2006).

21 In 2003, however, in People v. Hafeez, the New York Court of  
22 Appeals departed slightly from this earlier understanding of  
23 "depraved indifference," recognizing that certain murders are so  
24 "quintessentially intentional" that they cannot properly be

1 categorized as depraved indifference murder. See 100 N.Y.2d 253,  
2 257-59 (2003); see also People v. Feingold, 7 N.Y.3d 288, 294  
3 (2006) (noting that the shift away from the Register/Sanchez  
4 formulation of depraved indifference murder began with Hafeez).  
5 In that case, Hafeez had plotted for months with a friend to get  
6 revenge on the victim--with whom they had a previous  
7 altercation--and had lured the victim out of a bar, where, after  
8 a brief struggle, the friend administered a fatal wound to the  
9 victim's heart with a knife. See Hafeez, 100 N.Y.2d at 257. At  
10 trial, the State pursued a theory of intentional murder: the  
11 defendants plotted the murder for months in advance, lured the  
12 victim out of the bar to a place "where he would be vulnerable to  
13 attack," and then killed the victim instantly by way of a "single  
14 deliberate wound" to his chest. See id. at 258. Hafeez, on the  
15 other hand, insisted that the death was accidental: he and his  
16 friend intended only to beat up the victim but, during a "quick-  
17 moving fistfight," the victim was accidentally stabbed. See id.  
18 at 261 (dissent). The jury acquitted Hafeez of intentional  
19 murder, but convicted him of depraved indifference murder.

20 On appeal, the N.Y. Court of Appeals held that, despite some  
21 possible evidence of a struggle, because the overwhelming weight  
22 of the evidence suggested that Hafeez and his friend had plotted  
23 the attack ahead of time, deliberately lured the victim out of  
24 the bar to effectuate their plan, and killed the victim by way of

1 a "single deliberate wound," the attack was "quintessentially  
2 intentional," and therefore the "'heightened recklessness'  
3 required for depraved indifference murder was simply not  
4 present." See id. at 258-59 (quoting Sanchez, 98 N.Y.2d at 380).  
5 As such, because "the actions of both defendants were focused on  
6 first isolating, and then intentionally injuring, the victim,"  
7 no reasonable jury could have found Hafeez guilty of depraved  
8 indifference murder rather than intentional murder. Id. at 259.

9 The N.Y. Court of Appeals further eroded its prior case law  
10 in People v. Gonzalez, decided in March 2004. See 1 N.Y.3d 464,  
11 467 (2004). Finding that defendant's act of shooting his victim  
12 at close range could not be depraved indifference murder, the  
13 court explained:

14 Depraved indifference murder differs from  
15 intentional murder in that it results not from a  
16 specific, conscious intent to cause death, but from  
17 an indifference to or disregard of the risks  
18 attending defendant's conduct. . . . [W]here, as  
19 here, a defendant's conduct is specifically  
20 designed to cause the death of the victim, it  
21 simply cannot be said that the defendant is  
22 indifferent to the consequences of his or her  
23 conduct.

24  
25 Id. at 467. Were it otherwise, the court cautioned, it would  
26 "improperly convert every intentional homicide into a depraved  
27 indifference murder," id. at 468, since there is always some  
28 remote chance, if the jury wishes to so speculate, that a  
29 defendant who shot his victim point blank did so spontaneously or  
30 accidentally, see id. at 467-68. The court made clear, however,

1 that such speculation cannot convert an intentional homicide into  
2 depraved indifference murder. See id.

3 After Rivera's conviction became final in July 2004, the New  
4 York Court of Appeals decided a number of additional cases that  
5 further recast the Register/Sanchez formulation of depraved  
6 indifference murder, see People v. Payne, 3 N.Y.3d 266 (2004);  
7 People v. Suarez, 6 N.Y.3d 202 (2005), until finally, in People  
8 v. Feingold, the court formally overruled Register and Sanchez. 7  
9 N.Y.3d 288, 292, 296 (2006); see also id. (stating that, in  
10 overruling Register and Sanchez, the court was simply "confirming  
11 what [was] implicit in the line of cases [beginning with]  
12 Hafeez"). However, because these cases were decided after  
13 Rivera's conviction became final in July 2004, we cite to them  
14 only to the extent that they provide a clarification of pre-  
15 existing law. See Henry, 578 F.3d at 138; People v. Policano, 7  
16 N.Y.3d 588, 603-04 (2006). In any event, as discussed further  
17 below, even in the absence of these additional cases, the New  
18 York Court of Appeals had made sufficiently clear by the time  
19 Rivera's conviction became final in July 2004 that facts such as  
20 those in Rivera's case could not support a conviction for  
21 depraved indifference murder.

#### 22 **IV. Law To Be Applied On Collateral Review**

23 For habeas purposes, a New York state-court conviction  
24 becomes final 90 days after the New York Court of Appeals denies

1 leave to appeal, which is when the petitioner's time to apply for  
2 a writ of certiorari to the United State Supreme Court expires.  
3 See Fernandez v. Artuz, 402 F.3d 111, 112 (2d Cir. 2005).

4 **V. Analysis**

5 As a preliminary matter, the district court erred in finding  
6 that the applicable law of depraved indifference murder was the  
7 law in effect when Rivera was convicted at trial on September 19,  
8 1997. See Rivera, 2009 WL 4929264, at \*23. Instead, the  
9 district court should have applied the law as it existed at the  
10 time Rivera's conviction became final, 90 days after the New York  
11 Court of Appeals denied Rivera leave to appeal to that court.  
12 See Fernandez, 402 F.3d at 112. Applying this rule, Rivera's  
13 conviction became final on July 13, 2004. Since, as we explain  
14 in further detail below, the date used to determine which version  
15 of New York law to apply is determinative in Rivera's case, we  
16 reverse the district court on this point.

17 Turning to the merits, Rivera asks us to find that, by the  
18 time his conviction became final in July 2004--and thus after  
19 Hafeez and Gonzalez had been decided--the law of depraved  
20 indifference had so fundamentally changed that no point-blank,  
21 one-on-one shooting could be depraved indifference murder.  
22 Appellant's Br. 43-44. The State, on the other hand, suggests  
23 that Hafeez and Gonzalez effected no change in New York's law of  
24 depraved indifference murder because both of those decisions

1 "necessarily rest on the particular facts of [those] cases."  
2 Appellee's Br. 48-54. Thus, the State argues, the decisions in  
3 Hafeez and Gonzalez have no bearing on Rivera's case. Id. at 49.  
4 While we decline to go as far as Rivera urges, neither do we  
5 accept the State's position. Rather, we find that, although  
6 perhaps some point-blank shootings could still have been  
7 categorized as depraved indifference murder when Rivera's  
8 conviction became final in July 2004, cf. People v. Baptiste, 51  
9 A.D.3d 184, 185 (3d Dep't 2008) (concluding that the law did not  
10 completely change until the New York Court of Appeals decided  
11 Payne in October 2004), by that time, under any reasonable view  
12 of the evidence adduced at trial, Rivera's point-blank shooting  
13 of Cassas--which, as explained in further detail below, was  
14 either undoubtedly intentional or accidental in the course of a  
15 struggle--could not support a depraved indifference murder  
16 conviction. As such, by upholding Rivera's conviction for  
17 depraved indifference murder in July 2004, the state courts  
18 unreasonably applied federal law. See 28 U.S.C. § 2254(d);  
19 Jackson, 443 U.S. at 315, 324.

20 Viewing the evidence adduced at Rivera's trial in the light  
21 most favorable to the verdict, as we must at this juncture, see  
22 id. at 319, a reasonable jury could have found either of two  
23 possible scenarios to explain Cassas's death. First, a  
24 reasonable jury could have found, as the State argued at trial,

1 that Rivera plotted his attack on Cassas in advance, lured her to  
2 his home on the night of the murder, and then deliberately "put a  
3 nine millimeter semiautomatic Beretta handgun to [her] head . . .  
4 and pulled the trigger." J.A. 28. After Hafeez, however, such a  
5 "quintessentially intentional attack" could no longer be  
6 categorized as depraved indifference murder. See id. at 258-59.  
7 Thus, to the same extent as in Hafeez, in Rivera's case, no  
8 reasonable jury could find Rivera guilty of depraved indifference  
9 murder rather than intentional murder on such facts. See id. at  
10 259.

11 Moreover, any doubt that may have remained after Hafeez as  
12 to whether such a "quintessentially intentional" killing could  
13 support a conviction for depraved indifference murder was  
14 definitively laid to rest in Gonzalez (which we note had not yet  
15 been decided at the time of Rivera's trial or appeal to the  
16 Appellate Division), when the New York Court of Appeals declared  
17 that "where . . . a defendant's conduct is specifically designed  
18 to cause the death of the victim"--as would have been the case if  
19 the jury found that Rivera lured Cassas to his apartment,  
20 intentionally put the gun to her temple, and pulled the  
21 trigger--"it simply cannot be said that the defendant is  
22 indifferent to the consequences of his or her conduct." 1 N.Y.3d  
23 at 467, 469; accord Payne, 3 N.Y.3d at 270 (stating that Hafeez,  
24 Gonzalez, and Sanchez "made it clear that depraved indifference



1 murder may not be properly charged in the overwhelming majority  
2 of homicides that are prosecuted in New York").

3         Alternatively, the State now contends--contrary to its  
4 position at Rivera's trial--that a reasonable jury could also  
5 have found that, after bringing the gun to his meeting with  
6 Cassas in an attempt to scare or intimidate her, Rivera  
7 accidentally shot Cassas when the gun discharged during a  
8 struggle.<sup>1</sup> The State argues that this alternative set of facts  
9 would support a conviction for depraved indifference murder  
10 because the act of "confronting [Cassas] . . .with a loaded  
11 weapon, thereby precipitating a struggle for the gun," was  
12 sufficiently reckless to render Cassas's resulting death depraved  
13 indifference murder. Appellee's Br. 39-40. This argument is

---

<sup>1</sup> We note that this theory hinges on a good deal of speculation, as it relies in large part on the defense's evidence at trial that a struggle over the gun ensued when Rivera attempted to stop Cassas from shooting herself in the head. See, e.g., Appellee's Br. 23-24, 26-27, 43; see also Langston, 630 F.3d at 314 (cautioning that "a conviction based on speculation and surmise alone cannot stand, and courts cannot credit inferences within the realm of possibility when those inferences are unreasonable"); id. (explaining that, where an inference is necessary to support an element of the crime, "it is not enough that the inferences in the government's favor are permissible"; rather, the "inferences must be sufficiently supported to permit a rational juror to find that the element is established beyond a reasonable doubt"); Gonzalez, 1 N.Y.3d at 467-68 (rejecting the prosecution's speculative argument that the jury may have concluded that defendant recklessly fired the first shot spontaneously or impulsively rather than intentionally). However, without passing on the reasonableness of this theory in light of the trial record, we accept this version of the facts as plausible for purposes of this appeal and proceed accordingly.

1 without merit, however, as such facts would not rise to the level  
2 of depraved indifference murder even under Register and Sanchez.

3 As the New York Court of Appeals has repeatedly explained,  
4 to find depraved indifference murder rather than manslaughter,  
5 the jury needs to

6 find defendant's conduct, beyond being reckless, so  
7 wanton, so deficient in a moral sense of concern,  
8 so devoid of regard of the life or lives of others,  
9 and so blameworthy as to warrant the same criminal  
10 liability as that which the law imposes upon a  
11 person who intentionally causes the death of  
12 another.

13  
14 People v. Fenner, 61 N.Y.2d 971, 973 (1984); accord Gonzalez, 1  
15 N.Y.3d at 467. The New York Court of Appeals further reinforced  
16 the distinction between depraved indifference murder and  
17 manslaughter in Sanchez:

18 [T]he majority writing in Register does not hold  
19 that "ordinary recklessness" is sufficient to  
20 establish depraved indifference murder. Register  
21 requires a significantly heightened recklessness,  
22 distinguishing it from manslaughter in two ways.  
23 First, "in a depraved mind murder the actor's  
24 conduct must present a grave risk of death whereas  
25 in manslaughter it presents the lesser substantial  
26 risk of death." Then, it also requires proof of  
27 circumstances manifesting a depraved indifference  
28 to human life, focusing the injury, as we have  
29 seen, "upon an objective assessment of the degree  
30 of risk" which "converts the substantial risk  
31 present in manslaughter into a very substantial  
32 risk."

33  
34 98 N.Y.2d at 380 (quoting Register, 60 N.Y.2d at 276) (internal  
35 citations omitted) (first emphasis added); see also id. ("[T]he  
36 statutory requirement that the homicide result from conduct

1 evincing a depraved indifference to human life is a legislative  
2 attempt to qualitatively measure egregiously reckless conduct and  
3 to differentiate it from manslaughter." (quoting Register, 60  
4 N.Y.2d at 279) (emphasis in original)).

5 Quintessential examples of such "significantly heightened  
6 recklessness," id., include intentionally firing multiple shots  
7 into a crowd, see Fenner, 61 N.Y.2d at 973, intentionally firing  
8 several shots through a lit window next to which the decedent was  
9 standing, see People v. Jernatowski, 238 N.Y. 188, 193 (1924),  
10 intentionally firing a pistol through a door into a small,  
11 enclosed space that the shooter knew contained the victim, see  
12 People v. Mannix, 302 A.D.2d 297, 297-98 (1st Dep't 2003),  
13 intentionally driving an automobile along a crowded sidewalk at  
14 high speed, see People v. Gomez, 65 N.Y.2d 9, 12 (1985), or  
15 shooting a partially loaded gun at a person's chest during a game  
16 of Russian roulette, see People v. Roe, 74 N.Y.2d 20, 27-28  
17 (1989).

18 None of these fact patterns are analogous to Rivera's case,  
19 however. To wit, the mere act of bringing a gun to a contentious  
20 confrontation, as Rivera may have done--while grossly reckless  
21 and perhaps posing the "substantial risk," Sanchez, 98 N.Y.2d at  
22 380, required to support a conviction for manslaughter--is not  
23 "so wanton, so deficient in a moral sense of concern, so devoid  
24 of regard of the life or lives of others, and so blameworthy,"

1 Fenner, 61 N.Y.2d at 973, as to render a resulting death depraved  
2 indifference murder as opposed to manslaughter. See Gonzalez, 1  
3 N.Y.3d at 467; Sanchez, 98 N.Y.2d at 378-84; Fenner, 61 N.Y.2d at  
4 973; People v. Maqliato, 110 A.D.2d 266, 270 (1st Dep't  
5 1985)(reducing conviction from depraved indifference murder to  
6 manslaughter because defendant's conduct of bringing a loaded gun  
7 to a confrontation, then cocking the gun and aiming it at  
8 victim's head, where it accidentally discharged and fired a fatal  
9 bullet into the victim's forehead, was not so egregiously  
10 reckless that it rendered the killing depraved indifference  
11 murder rather than manslaughter under Register and its progeny),  
12 aff'd, 68 N.Y.2d 24 (1986); id. ("If . . . the jury concluded  
13 [that] the actual firing of the weapon was accidental, the  
14 recklessness of defendant in placing himself in the position  
15 where this could happen did not rise to the point where it was  
16 the equivalent of [depraved indifference] murder."). In fact, in  
17 Payne, the New York Court of Appeals made clear that, although it  
18 is "reckless" to "br[ing] a weapon to a contentious  
19 confrontation" or "wield a weapon carelessly," the law does not  
20 hold that "any homicide that results [from such conduct] could  
21 qualify as depraved indifference murder."<sup>2</sup> 3 N.Y.3d at 270.

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<sup>2</sup> While we recognize that this case was decided after Rivera's conviction became final, because this proclamation serves as a clarification of existing law rather than a statement of new law, we may rely on it on collateral review. See Henry, 578 F.3d at 138.

1 Respondent has not provided, nor were we able to find, any case  
2 to the contrary, in which a New York appellate court has held  
3 that the mere act of bringing a gun to a contentious  
4 confrontation, without more, could rise to the level of depraved  
5 indifference murder.

6       Were there evidence that Rivera intentionally pulled the  
7 trigger of the gun during the struggle, then perhaps his conduct  
8 might rise to the level of depraved indifference murder. See,  
9 e.g., People v. Lanier, 275 A.D.2d 937, 937 (4th Dep't 2000)  
10 (finding that defendant's conviction for depraved indifference  
11 murder was appropriate because a reasonable jury could have  
12 concluded that, although defendant did not have the conscious  
13 objective to cause the victim's death when he acted, his conduct  
14 of firing several shots during his struggle with the victim was  
15 "reckless[]" and "evinced] a depraved indifference to human  
16 life"). But there is no such evidence in this case. In fact,  
17 there was no testimony at Rivera's trial suggesting that Rivera  
18 meant only to threaten or frighten Cassas, or that Rivera held  
19 the gun to Cassas's head, before the gun discharged. In the  
20 absence of such evidence, the jury may not use its imagination to  
21 fill in the blanks. See Langston, 630 F.3d at 314 ("[A]  
22 conviction based on speculation and surmise alone cannot stand,  
23 and courts cannot credit inferences within the realm of  
24 possibility when those inferences are unreasonable" (internal

1 citations and quotations marks omitted)); see also Gonzalez, 1  
2 N.Y.3d at 467-68 (making clear that "no rational jury could have  
3 accepted" the prosecution's speculative argument that the  
4 defendant recklessly fired his gun "spontaneously or impulsively"  
5 rather than intentionally just so that defendant's conviction for  
6 depraved indifference murder could stand). Thus, in light of the  
7 clear guidance from New York's appellate courts regarding the  
8 "significantly heightened recklessness" required to support a  
9 conviction for depraved indifference, Sanchez, 98 N.Y.2d at 380,  
10 no reasonable jury could have found that the mere act of  
11 "confronting [Cassas] . . . with a loaded weapon, thereby  
12 precipitating a struggle for the gun," Appellee's Br. 39-40,  
13 without more, could support a conviction for depraved  
14 indifference murder.

15 Since neither of the two permissible views of the evidence  
16 adduced at Rivera's trial--that Rivera either (1) plotted to kill  
17 Cassas, lured her to his apartment, and then intentionally shot  
18 her once in the head at point-blank range; or (2) brought a gun  
19 to his meeting with Cassas and then accidentally discharged the  
20 weapon into her head during a struggle--carried the requisite  
21 degree of recklessness needed to support a conviction for  
22 depraved indifference murder when Rivera's conviction became  
23 final in July 2004, upholding Rivera's conviction constituted an  
24 "unreasonable application of clearly established federal law," 28

1 U.S.C. § 2254(d), namely the mandate in Jackson that the jury  
2 find each element of the crime beyond a reasonable doubt. See  
3 443 U.S. at 315, 324. As such, we are compelled to reverse and  
4 remand this case with instructions to grant Rivera's petition for  
5 a writ of habeas corpus. See id.; 28 U.S.C. § 2254(d).

6 **CONCLUSION**

7  
8 In light of the foregoing, the judgment of the district  
9 court is **REVERSED** and **REMANDED** with instructions to grant  
10 Rivera's petition for a writ of habeas corpus.  
11