Without Written Order

Allowing for habeas petitions to be denied 'without written order' is to invite and sanction judicial dereliction, injustice and tyranny. It denies, at least in spirit, every possibility of achieving a fair tribunal: For no tribunal can be fair absent the reasoned arguments that form its foundation for judgment. Such an absence of arguments violates the adversarial nature of the judicial process itself, and prejudices the petitioner by precluding their ability to pursue informed redress in a higher court; it blindfolds the petitioner. The reasonable person must therefore concede that any tribunal which advances the interests of the one party by diminishing the rights of the other can by no means be fair. Every such tribunal commutes its judicious decisions to be arbitrary, converts the ruling judge into a despot, and condemns the petitioner indefensible by violating his/her right to due process of law. It is axiomatic that a "fair tribunal is a basic requirement of due process" (Murchison, 349 U.S. 133 (1955)).

A state denied habeas petition, 'without written order', prejudices both parties in the federal habeas proceeding.

Petitioner.

The state's reasoning for denial absent, there is an underlying twin-forked assumption that 1) the state's denial was based on the petition's lack of meritorious claims, and 2) the denial was not arbitrary. But what is to prevent the latter, or to ensure the former, in the absence of written order? Such assumptions are dangerous as they are frequently fallacious and can encourage confirmation bias. Working under such assumptions, federal judges can find themselves seeking the comfort of the state's 'assumed to be correct and reasonable' decision rather than scrutinizing the merits of the claims raised. The Supreme Court, in Harrington v. Richter, 562 U.S. 86, 101 (2011) only exacerbates this prejudice by directing federal district courts (against their own guidance in McDonough (See endnote)) to assist the state's attorneys by second-guessing the reasoning of those courts, saying, "A federal court.. must <u>hypothesize</u> <u>every</u> <u>justification</u> that the state court <u>could</u> <u>have</u> <u>provided</u>."

These are broad and sweeping words indeed. Scenes such as these cause the federal review process to collapse alongside the state's, denying the petitioner both a fair tribunal and due process of law.

Federal Court.

When a federal petition for habeas relief is filed following a state habeas petition that was denied 'without written order' the federal judge is forced to begin anew, at ground-zero. Not only does this create unnecessary work (for the federal judge), but it also compounds costs and increases the probability of legal error (due to duplicated work processes). It is from here that the federal court must proceed; a habeas petition in one hand, a conflicting directive to second-guess the state court in the other, a potentially invalid and dangerous assumption in mind, and a stack of petitions waiting in the queue. Why did the state court deny the petition? The federal judge may never know; one can only guess.

Have state appellate judges become mere ornaments, the states' jewelry? Are federal courts now expected to do the state court's jobs? Are they better qualified than their state counterparts to research and decide the merits of a state prisoner's contestations? In this light, is it conceivable; is it believable that the federal court <u>might be tempted</u> to shed a portion of the <u>burden</u> and pursue, only tepidly, the necessary research for deciding the merits of said petition, favoring rather to abide by the state court's 'assumed to be just' decision on the matter?

We learn in Tumey v. State of Ohio, 273 U.S. 510 (1927) that "[e]very procedure which would offer <u>a possible temptation</u> to the average man as a judge to forget the <u>burden of proof</u>...or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." Continuing in this same vein, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) echoes this same "would offer a possible temptation" language, and further indicates that <u>actual proof</u> of influence upon the judge <u>is unnecessary</u>. Emphasis added throughout.

Endnote.

"If as this court has held: [d]istrict judges have no obligation to act as counsel or paralegals to pro se litigants...then, by the same token, they surely have no obligation to assist attorneys representing the state."
— Day v. McDonough, 126 S.Ct. 1675, 1684 (2006).