
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT ADAM NEUMAN,

Petitioner,

v.

MARK NOOTH,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's opinion, which determined that it could not review a state court decision that interpreted federal law because the state court decision also involved analysis of a state statute, unreasonably insulates the state court decision from review and conflicts with *Ohio v. Reiner*, 532 U.S. 17 (2001)?

2. Whether the Ninth Circuit's opinion that interpreted state law contrary to the meaning ascribed to the statute by the state appellate court conflicts with *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005), *Estelle v. McGuire*, 502 U.S. 62 (1991), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975)?

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The petitioner, Robert Adam Neuman, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) entered on January 11, 2018. Appendix (App.) at 2-4.

OPINIONS BELOW

On June 22, 2016, the magistrate judge issued a findings and recommendation in which she recommended denial of Mr. Neuman's petition, dismissal of the case, and denial of a certificate of appealability. App at 8-20. On August 16, 2016, the United States District Court for the District of Oregon (district court) adopted the magistrate judge's findings and recommendation on the merits of the petition, but granted a certificate of appealability. App. at 5-7.

On January 11, 2018, the Ninth Circuit affirmed the district court's denial of relief in a memorandum opinion. App. at 2-4. On April 12, 2018, the Ninth Circuit denied Mr. Neuman's petition for panel rehearing and rehearing en banc. App. at 1.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2016).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. VI. provides:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

28 U.S.C. § 2254(d) (2016) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

In 2005, Robert Neuman was convicted of Burglary, Assault, Robbery, and Unlawful Use of an Electrical Stun Gun. ER 39-40.¹ At sentencing, the state sought an enhanced sentence based in part on Mr. Neuman's prior military conviction under 18 U.S.C. § 2252(A)(a)(5)(B) (1994). In Oregon, an out-of-state conviction can be used to enhance a sentence only if the elements of the statute match those of an Oregon statute. *See* OAR 213-004-0011; *State v. Provencio*, 955 P.2d 774, 776 -77 (Or. Ct. App. 1998). Despite having a strong argument that the elements of the military conviction did not match the proffered Oregon statute, counsel made a nearly unintelligible argument:

And Your Honor, I've had a chance to look at the judgments, they're out of a military court martial, I have Virginia – Your honor, I'm not convinced that that's equivalent to statutes – I haven't seen any of the police reports. I know it's been difficult to get. I'm asking the Court to sentence him as, I guess, it would be a G – 9G. And I know [the state] wants to – an upward departure. I don't think it's appropriate to say that because [Mr. Neuman is] bizarre, because he has strange behavior to hold that as a basis for departure. [. . .]

¹ ER refers to the Excerpts of Record filed in the Ninth Circuit in *Neuman v. Nooth*, CA No. 16-35682.

ER 74 (emphasis added).

When Mr. Neuman challenged his counsel's representation in a post-conviction case as ineffective under the Sixth Amendment, the state court denied relief on the basis that there was no prejudice, writing:

The elements of 18 USC 2252(A)(a)(5)(B) are sufficiently similar to Or. Rev. Stat. § 163.684(a)(A)(i) to be used to compute petitioner's guideline.

ER 17.

In his federal habeas corpus case, Mr. Neuman challenged the state court's denial as objectively unreasonable, both in its legal and factual determinations. The district court denied relief, adopting the magistrate judge's conclusion that

even if Petitioner is correct that the statutes are not equivalent, this Court is not at liberty to second-guess the PCR court's determination. In light of the state court's comparability determination, Petitioner cannot demonstrate that, but for counsel's failure to make a more vigorous comparability argument, he would have received a shorter sentence.

App. 16-17; *see* App. 7 (order adopting findings and recommendation).

However, the district court granted a certificate of appealability because it believed that the "case may present an issue of federal law." App. at 7. The district court continued:

As I explained in more detail at oral argument, unlike the cases cited by the parties, the comparison between convictions that occurred for Mr. Neuman's sentencing was a comparison between

a state conviction and a conviction obtained under a federal statute. Such a comparison necessarily involves an interpretation of federal law to determine the scope of the federal statute.

App. at 7.

On appeal, the Ninth Circuit affirmed the denial of habeas corpus relief. App. at 2-4. As relevant here, the Ninth Circuit determined that it could not review the state court's ruling on *Strickland* prejudice because it centered on a state law determination. App. at 3. The Ninth Circuit wrote that the post-conviction court's decision "while necessarily considering the elements of the federal offense for comparison purposes, was a state law determination." App. at 3. In support of that finding, the Ninth Circuit cited *Christian v. Rhode*, 41 F.3d 461 (9th Cir. 1994). App. at 3.

The Ninth Circuit then went on to hold that even if it could review the state court's ruling, Mr. Neuman was not entitled to relief because *State v. Betnar*, 166 P.3d 554 (Or. Ct. App. 2007), permitted the jury to "infer an act of duplication when the images of child pornography reside on certain forms of electronic media", which included the kind that formed the basis for Mr. Neuman's military convictions. App. at 3-4. Accordingly, the panel concluded that it was not clear that the state court "overlook[ed] the differences between the state and federal offenses or misconstrue[ed] the elements of the federal offense." App. at 4. The panel further found that *Betnar* "raises a sufficiently debatable question as to the application of

Strickland to shield the state PCR court's decision from federal relief." App. at 4.

Mr. Neuman sought panel rehearing and rehearing en banc in the Ninth Circuit, but the Ninth Circuit denied his motion on April 12, 2018. App. at 1.

REASONS FOR GRANTING THE PETITION

This Court should grant a writ of certiorari to review the Ninth Circuit's opinion which ruled contrary to controlling precedent in two main ways. First, the Ninth Circuit determined that it could not review a state court decision that depended on the state court's interpretation of a federal statute, because the state court also analyzed a state statute in the process. But this Court has been clear that when a state court ruling is intertwined with federal law, federal review is available.

Second, the Ninth Circuit interpreted a state statute in a manner that contradicted the meaning ascribed to the statute by the state appellate court. Again, this Court has been clear that states' interpretations of their own laws are controlling in federal court litigation.

Accordingly, this Court's review is necessary to re-align the Ninth Circuit's jurisprudence with controlling precedent.

ARGUMENT

A. The Ninth Circuit's Opinion That Effectively Insulated A State Court's Interpretation Of Federal Law From Federal Review Conflicts With Controlling Precedent.

While it is true that State courts are the “ultimate expositors of state law” and the federal courts are “bound by their constructions” *Mullaney v. Wilbur*, 421 U.S. 684, 691 & n.11 (1975), that rule only applies to a State court’s interpretation of *its own law*. States are given no special deference for their interpretations of federal law or the laws of other states. Indeed, in each Supreme Court case setting forth that proposition, the law that was interpreted by the State Court was — without exception — that of the State in which the State Court sat. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (Ohio State Supreme Court interpreting Ohio law on transferred intent); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); (California appellate court interpreting California evidence law); *Mullaney*, 421 U.S. at 690-91 (Maine Supreme Court interpreting Maine homicide laws).

Despite the limitations on that rule, the Ninth Circuit has twice held that a federal court cannot review a state court decision that interprets a federal statute, if that decision also involves an interpretation of a state statute. Both panels reached their decision without oral argument, and in *Christan*, with a pro se petitioner and without briefing on the issues addressed in Mr. Neuman’s case. *See Christian*, 41 F.3d at 461, 463-64.

In *Christian* the panel wrote that a “state court’s misapplication of its own sentencing laws does not justify federal habeas relief,” and then summarily wrote, without citation, that “[t]his rule applies even when a state interprets federal law to enhance a sentence.” 41 F.3d at 469.

Then, in Mr. Neuman’s case, the panel applied *Christian* to find that a state court determination “while necessarily considering the elements of the federal offense for comparison purposes, was a state law determination.” App. at 3. By reaffirming the holding in *Christian*, the *Neuman* panel perpetuated a legal rule that conflicts with controlling statutory and Supreme Court authority in several respects.

First, such a rule contradicts 28 U.S.C. § 2254(d) which establishes that state court interpretations of federal law are reviewable, albeit with significant deference.

Next, that rule contradicts well-established Supreme Court precedent that a federal court retains jurisdiction over an issue when the state law ruling is dependent on a state’s analysis of federal law. In *Ohio v. Reiner*, 532 U.S. 17, 20 (2001), this Court held that it could review the Ohio Supreme Court’s ruling on an issue of state statutory immunity, because the Ohio Supreme Court had based its statutory analysis on a determination of Fifth Amendment privilege. This Court summarized the law on this issue, writing:

We have observed that this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law. The decision at issue fairly appears to be interwoven with the federal law and no adequate and independent state ground is clear from the record. We have jurisdiction over a state court judgment that rests, as a threshold matter, on a determination of federal law.

Id. at 20 (internal citations and quotations omitted). This principle is not limited to issues of federal constitutional law. In *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138 (1984), the state's decision rested on an interpretation of a federal statute. Similarly, in the habeas corpus context, when a state court procedural decision is "so interwoven with the [federal ground] as not to be an independent matter" the federal court retains full authority to review the underlying merits of a petitioner's claim. *Michigan v. Long*, 463 U.S. 1032, 1039 n.4, 1043-44 (1983) (citation omitted).

Given that statutory and Supreme Court authority, the Ninth Circuit made an unsupportable decision when it held that the state court ruling – which it recognized involved an interpretation of a federal statute – was an unreviewable determination of state law.

Christian's holding providing preclusive effect to a state's interpretation of federal law failed to follow this Court's precedent. By affirming that ruling in Mr. Neuman's case, the Ninth Circuit perpetuated a

legal rule in conflict with this Court's precedent. This Court's review is thus needed to bring the Ninth Circuit in line with controlling precedent.

B. The Ninth Circuit's Ruling On Prejudice Was Premised On Its Interpretation Of Oregon State Law That Contradicted The Interpretation Announced By The Oregon Court Of Appeals.

In the alternative, the Ninth Circuit determined that even if it could review the state court's determination, Mr. Neuman could still not prove prejudice. App. at 3-4. The Ninth Circuit concluded that Mr. Neuman's possession of the images on computer hard drives demonstrated "duplication" under Oregon law, because Oregon allows a jury to infer the duplication element when the images "reside on certain forms of electronic media." App. at 4 (citing *State v. Betnar*, 166 P.3d 554 (Or. Ct. App. 2007)). Accordingly, the "State PCR court did not necessarily overlook the differences between the state and federal offenses or misconstrue the elements of the federal offense." App. at 4.

The Ninth Circuit thus interpreted Oregon law to mean that possession of electronic media proved duplication under Oregon law. But that is not what *Betnar* held. The Oregon Court of Appeals did not hold that a person is guilty under Or. Rev. Stat. § 163.684(1)(a)(A) anytime a person is in possession of media devices with images of child pornography. Instead, the Oregon Court of Appeals concluded that duplication was a permissible

inference – but not the sole inference – to be made from possession of electronic media:

We conclude that a rational trier of fact *could infer*, based on that evidence, as well as the other evidence in the record, that defendant himself printed or duplicated the images found in his possession. *While that inference is not the only inference that could be drawn from the evidence as to how he came to possess the images, it is a permissible inference* that allowed the court to find beyond a reasonable doubt that defendant ‘printed’ or ‘duplicated’ the images.

Betnar, 166 P.3d at 560 (emphasis added).

In ruling that possession necessarily proved duplication, the Ninth Circuit thus interpreted state law contrary to the state appellate courts. But this Court’s cases demonstrate that the Ninth Circuit was wholly without authority to do so. *See Richey*, 546 U.S. at 76 (“We have repeatedly held that a state court’s interpretation of state law . . . binds a federal court sitting in habeas corpus.”)

Furthermore, not only did the Ninth Circuit violate long-standing precedent, it did so in a way that rendered the state statute unconstitutional. If *Betnar* did mandate an inference of duplication upon mere possession of a media device, it would likely be an unconstitutional ruling under *Sandstrom v. Montana*, 442 U.S. 510 (1979), which prohibits mandatory presumptions on elements of a crime.

Had the Ninth Circuit not contradicted this Court's controlling precedent, it would have recognized that in Oregon, a court does not ask whether an Oregon jury considering the facts of a federal conviction *could possibly find* that a defendant violated an Oregon statute, before determining that an enhanced sentence is permissible. Instead, the inquiry asks whether the prior conviction would necessarily be a conviction under Oregon law; comparing the elements of the crime as set forth in the statutes. *State v. Golden*, 829 P.2d 88, 89-90 (Or. Ct. App. 1992); *State v. Tapp*, 821 P.2d 1098, 1099-1100 (Or. Ct. App. 1991).

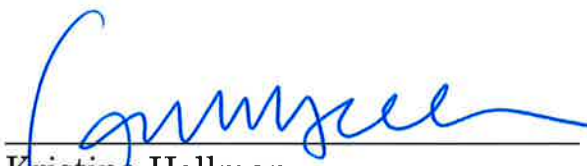
Accordingly, the Ninth Circuit would have found that a military conviction would not necessarily be a conviction under Or. Rev. Stat. § 163.684(1)(a)(A). Mr. Neuman could be guilty of possession under the federal statute if someone handed him the hard drives and he knew they contained images of child pornography. Conversely, in Oregon, the state would have to prove that Mr. Neuman, himself, downloaded the images onto the hard drive or that he had an intent to further distribute them. Although *Betnar* would permit the jury to use the fact of the hard drives in its determination, that fact alone would not compel a conviction under Or. Rev. Stat. § 163.684(1)(a)(A). Mere possession is not sufficient under Oregon law, but it is under federal law. Therefore, the military conviction would not qualify as a prior conviction for Oregon sentencing purposes.

In sum, the Ninth Circuit's ruling on prejudice was premised on two significant and impermissible deviations from this Court's past opinions. This Court's certiorari review is needed to conform the Ninth Circuit's jurisprudence to controlling precedent.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted July 11, 2018



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