No. 20-479

In the Supreme Court of the United States

David C. SHINN,

Petitioner

v.

RYAN ROBERT BAKER

Respondent

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Question Presented

Whether the 9th Circuit in this case violated the party presentation principle as set forth under *U.S. v. Sineneng-Smith*, 140 S.Ct. 1575 (2020).

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Jurisdiction

Petitioner timely filed his request for Certiorari. This Court asked for a response to Petitioner's request on 12/07/2020, to be filed by 01/06/2021. Respondent asked for and received an extension for time to file this until March 06, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1)

Statement of the case

Plaintiff was incarcerated in Arizona in 2007. App. 40. In 2011, he was confronted by other prisoners who claimed to know that Mr. Baker was a snitch. *Id.* Mr. Baker repeatedly asked for protective custody and was repeatedly denied. App. 40-50. A case was brought in Arizona State court initially, but was dismissed due to the requirements of A.R.S. 31-201.01(L), which requires either 1) a prisoner to claim a serious physical injury in order to maintain suit against the State in State court, and Plaintiff had not been assaulted, or 2) a claim "authorized by a federal statute". App. 47. Plaintiff intentionally sued only the State, pursuant to A.R.S. 31-201.01(F)[1], seeking to reserve the federal claim for federal court.

When the State-court action was dismissed, Plaintiff filed in U.S. District Court for the District of Arizona. Then-Director, Charles Ryan, moved to dismiss on grounds of *res judicata*. App. 10-11. The motion was granted. App. 21. Plaintiff appealed to the 9th Circuit, who reversed after briefing and oral argument. App. 1-5.

Before oral argument, the 9th Circuit requested that the parties address whether Plaintiff had waived the argument that A.R.S. 31-201.01(L) "defines the scope of the State's waiver of sovereign immunity". App. 31-32. If the State was immune from suit due to its statutory requirements, *res judicata* would not apply. Plaintiff had not raised that precise argument in District court or the 9th Circuit Opening Brief. However, Plaintiff had alluded to the issue of sovereign

1 "Any and all causes of action that may arise out of tort caused by the director, prison officers or employees of the department, within the scope of their legal duty, shall run only against the state."

immunity when he stated that he was "trying to accommodate what the State was claiming to be its statutory requirement for being sued." Opening Brief, p.30.

Petitioner seeks certiorari on the basis of this Court's ruling in *US v. Sineneng-Smith*, claiming that the 9th Circuit over-reached by deciding the appeal based on an argument that the Plaintiff had not presented.

Summary of the Argument

The U.S. Supreme Court is not a court of "error correction"[2]. Petitioner does not identify a circuit-court split, nor an important question of federal law. The underlying decision does not conflict with controlling Supreme Court precedent.

The 9th Circuit recognizes three exceptions to the party-presentation doctrine: 1) in the "exceptional" case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, 2) when a new issue arises while appeal is pending because of a change in the law, or **3) when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed**, *Bolker v. C.I.R.*, 760 F.2d 1039 (9th Cir. 1985) (emphasis added). Here, the issue was one of pure law (sovereign immunity), ***and*** the pertinent record was fully developed.

In *Sineneng-Smith*, the 9th Circuit was overruled by this Court for appointing *amici* from outside the case, in order to raise the argument used to invalidate a Federal criminal statute. Here, the 9th Circuit made their decision based ***only*** on the presentations of the parties, appointed ***no*** *amici,* and specifically invited the Defendant/Petitioner to address whether the Plaintiff had raised the issue of sovereign immunity, and whether he had waived it under the party presentation principle.

Counsel for the Director of Corrections, Christopher White, in the Arizona

2 "By this, [Chief Justice William Howard] Taft meant that the Supreme Court does not generally determine whether the lower courts have correctly disposed of a particular case... Rather than correcting errors, then, the Supreme Court is charged with providing a uniform rule of federal law in areas that require one." Reflections on the Role of Appellate Courts: A View From the Supreme Court, Justice Stephen G. Breyer, *The Journal of Appellate Practice and Process*, Vol. 8, Iss. 1, 2006, p.92.

Attorney General's Office, had the same amount of time as Plaintiff to consider and address whether the immunity argument had been waived, and if so, whether it was within the authority of the 9th Circuit to consider the argument anyway. Mr. White, however, had the additional benefit of working in the chief legal office of the State of Arizona, and could be assumed to have knowledge of the State's immunity law. Defendant also had ***two more*** opportunities to argue when he filed for panel re-hearing, and when he sent his Rule 28(j) letter regarding the decision in *Sineneng-Smith*. However, Petitioner was unable to persuade the 9th Circuit panel that the State's own statute protecting it from prisoner lawsuits without serious physical injury was not an assertion of sovereign immunity.

Petitioner, Director of Corrections for the State of Arizona, seeks to overturn the decision of the 9th Circuit regarding the operation of State immunities because Plaintiff did not raise the specific immunity argument in argument before that court. Respondent is a prisoner in Petitioner's prisons. As between the Director of Corrections, the Arizona Attorney General, the 9th Circuit Court of Appeals, and the Plaintiff, the Plaintiff is the least suited to interpret or dictate the applicability of State immunities. Therefore, if Arizona's Attorney General's Office did not argue its position regarding its own immunities before the 9th Circuit, and it does not agree with the 9th Circuit's application of these immunities to this case, the place to look for relief is to the State's own legislature, to clarify the intent of the statute, not the highest federal Court in the land. This case is not suitable for the grant of a writ, nor should this Court Grant-Vacate-Remand (GVR).

Reasons for Denying the Petition

1. No Circuit Split.

S.Ct.R. 10 gives petitioners insight into the matters that the Court is interested in considering. The first is "an important federal question" decided in conflict with a State court of last resort or a federal circuit court, or "so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's supervisory power" S.Ct.R. 10(a).

Here, there is no such conflict. *Sineneng-Smith* set the outer limits for when a court may raise arguments not raised by the parties. The 9th Circuit did not exceed those limits in this case. Therefore this is, at most, a case of "the misapplication of a properly stated rule of law" which is rarely the proper subject of a petition for certiorari. *Id.*

2. Petitioner's Claim Does Not Implicate Federal Law.

There is no "important question of Federal Law" being asked, as Petitioner points out, "the issue was one of state law". This Court granted *cert* in *Sineneng-Smith* because "the judgment of the Court of Appeals invalidated a Federal Statute". *Id.* at p. 1578. There was no such occurrence here.

3. Baker At Least "Hinted" At The Sovereign Immunity Argument.

> The party presentation principle is supple, not ironclad. There are no doubt circumstances in which a modest initiating role for a court is appropriate.

United States v. Sineneng-Smith, 140 S.Ct. 1575, 206 L.Ed.2d 866 (2020).

Here, the 9th Circuit presented the parties with three questions to answer. The court appeared to be aware of the potential for over-reaching and guarded

against it by inviting the Petitioner to brief the issue of waiver. Significantly, the panel made its decision based ***only*** on the arguments and briefs the parties themselves presented. Petitioner contends that being asked these questions by the court is a "more egregious" takeover of this case than in *Sineneng-Smith* because he was not given an opportunity to brief the questions. Yet Petitioner was given nine days to research, 30 minutes to argue, and he petitioned for rehearing and a Rule 28(j) letter. There were no outside voices invited to weigh in. In short, there was no "takeover" of this case by the 9th Circuit, let alone one that exceeded that in *Sineneng-Smith.*

Additionally, Mr. Baker ***did*** allude to the immunity provision contained in A.R.S. 31-201.01(L) in his opening brief:

> Plaintiff's failure to serve Ryan in State court was intentional – not a failure to prosecute that would result in a judgment on the merits because of the prejudice to the defendant from plaintiff's negligence. On the contrary, **Plaintiff was trying to accommodate what the State was claiming to be its statutory requirement for being sued.**

Opening Brief, p.30 (emphasis added).

Therefore, the 9th Circuit did not inject this issue into the appeal entirely *sua sponte.* The subject was, at the very least, "hinted" at in Mr. Baker's opening brief, and that, according to *Sineneng-Smith*, is enough: "Nowhere did she so much as hint that the statute is infirm" *Sineneng-Smith,* 140 S.Ct. At 1580.

4. Plaintiff Is The Last Person To Look To For Interpretation Of State Immunities.

Counsel for Plaintiff hinted at, but did not raise the precise argument used by the 9th Circuit - that the State court never had jurisdiction over the case due to the operation of sovereign immunity - because that argument is contradictory

from the point of view of the Plaintiff: If a lawyer believed that the State court did not have jurisdiction over the case for lack of a serious physical injury, the case should never be brought in that court. However, the statute specifically directs a prisoner-plaintiff to sue the State, and gives two options for supporting the claims. Plaintiff filed under the second one: a claim authorized by a federal statute. After the State court decided that such a claim could not survive in that court without serving the Director in his official capacity, Plaintiff made the decision to take his federal claim to federal court instead.

The Petitioner argues that the 9th Circuit has seriously misapprehended the State's statute as one of sovereign immunity. He argues that the dismissal of *Baker II* in State court was on the merits as to the state-law claim, and that because Plaintiff did not pursue his federal claim in State court, he was barred from bringing it in federal court.

However, Plaintiff sought relief from threat of assault in State court, pursuant to State law. The Petitioner's position seems to be that, if a prisoner makes the mistake of seeking relief from the State court without being assaulted first, they may not seek relief anywhere else. How could Mr. Baker know that a mistaken plea for help in the wrong forum would close the doors of justice to him for all time? How could Baker argue both that the State court did not have jurisdiction over the State and, simultaneously, that he was authorized to bring suit there?

It was not until the 9th Circuit panel began questioning the Petitioner's counsel that Respondent's counsel understood the inherent *Catch-22* of the State's position. Therefore, Plaintiff was the last person in a position to raise that argument.

5. GVR is not appropriate.

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Lawrence v. Chater, 516 U.S. 163, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996).

Sineneng-Smith is not an "intervening event" that warrants overturning the court of appeals' sound judgment. *Sineneng-Smith* is a restatement of the existing law relating to party presentation, rather than an intervening decision that would change the outcome here. See, *Tyler v. Cain*, 533 U.S. 656, 666 (2001) (GVR only warranted where there is a "reasonable probability that, in light of an intervening decision, the court of appeals would reject the legal premise on which it relied".)

The Ninth Circuit ***already*** revisited its decision after this Court's remand in *Sineneng-Smith* when Petitioner presented the 9th-Circuit panel with a Rule 28(j) letter explaining how it should reverse itself considering *Sineneng-Smith.* The letter did not induce them to change their decision.

vi

Acknowledgement of Rule 15 admonishment.

Respondent Ryan Baker acknowledges his duty to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if Certiorari were granted".

Petitioner mis-spelled Respondent's name on the cover page by reversing the first and middle names. Respondent's name is: "Ryan Robert Baker", not "Robert Ryan Baker".

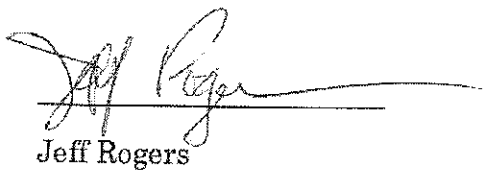
Petitioner did not consult Respondent regarding a joint appendix pursuant to S.Ct.R. 26(2).

vii

Conclusion

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted:



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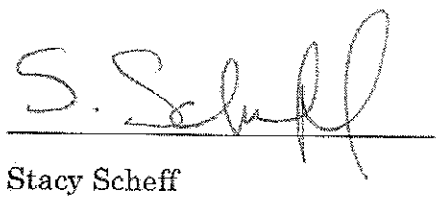

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CERTIFICATE OF SERVICE

Jeffrey Rogers, Attorney for Ryan Robert Baker in the above-captioned matter, hereby certifies the following: on this 17th day of March 2021, he caused to be delivered and/or electronically transmitted the instant pleading to the Arizona Attorney General.

CC: Drew Ensign
Deputy Solicitor General
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