No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

DANIEL GERARD LACEY,

Petitioner,

v.

BRIAN GOOTKIN, ET AL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBMITTED: February 28, 2022

QUESTION PRESENTED

Whether this Court should grant certiorari so that it can address and resolve a circuit split between the Ninth and the Second, Sixth and Seventh Circuits on the doctrine of foreshadowing and its application to ineffective assistance claims?

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Daniel Gerard Lacey, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The opinion of the Ninth Circuit is unpublished. But it can be found at *Lacey v. Gootkin*, 856 Fed.App'x. 645 (9th Cir. 2021). It is also included in the appendix. (App., infra, 1a-4a). The order denying rehearing is also included in the appendix. (App., infra, 1b).

Jurisdiction and Timeliness of Petition

The opinion of the court of appeals was filed on August 17, 2021. (App., infra, 1a-4a). After being granted an extension of time, Petitioner filed a petition for rehearing/rehearing en banc, which was denied on November 9, 2021. (App., infra, 1b).

Constitutional Provisions Involved

> **Sixth Amendment** –In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Preliminary Statement

The Petitioner, Daniel Gerard Lacey, believes that this case involves a question of exceptional importance because the Ninth Circuit's decision conflicts with decisions rendered by the Second, Sixth, and Seventh Circuits. These circuits have each held that a lawyer's "failure to raise an issue whose resolution is clearly foreshadowed by existing decisions might constitute ineffective assistance of counsel." *Lucas v. O'Dea*, 179 F.3d 412, 420 (6th Cir. 1999); *Larrea v. Bennett*, 368 F.3d 179, 183 (2nd Cir. 2004) ("To determine whether reasonable counsel would have predicted the *Antommarchi* outcome and objected to the *Allen* charge, we must examine the extent to which prior cases foreshadowed the *Antommarchi* holding."); *Shaw v. Wilson*, 721 F.3d 908, 917-18 (7th Cir. 2013) ("Defense attorneys . . . are not obliged to anticipate changes in the law, but in some instances they are obliged to make an argument that is sufficiently foreshadowed in existing case law.").

The Ninth Circuit, on the other hand, has rejected arguments that defense counsel have an obligation to raise claims that, although not yet explicitly recognized, have been foreshadowed by existing precedent. Indeed, in rejecting Lacey's ineffective assistance claim, the panel held:

> Lacey's counsel cannot be found ineffective for failing to argue a theory that had not been developed at the time of adjudication. Lawyers are "[] not . . . required to anticipate" future changes in the law, but rather under *Strickland* are evaluated "as of the time of [their] conduct." *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). The failure to predict future changes in the law cannot be considered ineffective assistance. *United States v. Chambers*, 918 F.3d 1455, 1461 (9th Cir. 1990).

Lacey v. Gootkin, No. 19-36033, slip op. at 3 (9th Cir. Aug. 17, 2021).

Mr. Lacey believes that the Ninth Circuit's failure to recognize the "foreshadowing doctrine" and apply it to his case creates an inter-circuit conflict that should be addressed by this Court.

Statement of the Case

State Court Proceedings

In March of 2005, Lacey was arrested after child pornography was found on his computer by his live-in girlfriend, Carla. Some of the pictures showed Lacey sexually abusing Carla's six year old daughter, A.C. After seizing the computer, law enforcement obtained permission from Carla to search her home. During the search, police discovered a number of videotapes, floppy disks, and USB devices stored in some boxes in the garage. A search of these materials revealed a video showing Lacey molesting a toddler, J.T., who was about two years old. Eventually Lacey was charged by the State of Montana with four counts of sexual intercourse without consent and five counts of sexual assault.

While Lacey's state case was pending, he was federally indicted and charged in three counts with sexual exploitation of children, one count of receipt of child pornography, and one count of possession of child pornography. The federal charges were based on the same conduct as that underlying his state charges.

Lacey moved to suppress the evidence seized from his computer and the garage, as well as his statements to law enforcement, in both state and federal court. Both motions were denied, and, in both cases, he entered into a conditional plea agreement allowing him to appeal the denial of his suppression motion.

Lacey pled guilty to four counts of the federal indictment on February 1, 2006. Two of those counts involved the sexual exploitation of A.C. and J.T. He was subsequently sentenced to a total term of thirty years of imprisonment on June 7, 2006.

The following October, Lacey pled guilty in state court to counts one, three, four, five, six, and nine of the amended information. Count one alleged that he had sexual intercourse without consent with A.C.; count three alleged that he sexually assaulted A.C.; counts four, five and six alleged that he had sexual intercourse without consent with J.T.; and count nine alleged that he sexually assaulted J.T. He was subsequently sentenced to lifetime imprisonment for one of the sexual intercourse without consent charges and 130 years on the remaining counts. *State v. Lacey,* 204 P.3d 1192, 1201 (Mont. 2009)(*Lacey I*).

Lacey appealed the denial of his motions to suppress. Both the Ninth Circuit and the Montana Supreme Court affirmed. *United States v. Lacey*, 225 Fed. App'x. 478 (9th Cir. 2007); *State v. Lacey,* 204 P.3d 1192 (Mont. 2009)(*Lacey I*). The Montana Supreme Court issued its decision on March 4, 2009 and denied rehearing six weeks later, on April 14, 2009.

About three months later, the Montana Supreme Court issued its decision in *State v. Neufeld*, 212 P.3d 1063 (Mont. 2009). The facts in *Neufeld* are, for all relevant purposes, identical to those in Lacey's case. In *Neufeld*, the defendant was charged in state district court with having sexual intercourse without consent with a minor. Before trial on that charge, he was indicted and convicted in federal court with sexual exploitation of children and possession of child pornography because he videotaped his sexual acts with the victim in his state case. After his conviction in federal court, *Neufeld* moved to dismiss his state charges based on Montana's double jeopardy provisions, which are broader than that provided by the federal constitution. *Neufeld*, 212 P.3d at 1064-65

The trial court granted his motion and the state appealed. The Montana Supreme Court upheld the trial court's ruling because the charging documents in both federal and state court referenced the same time frame, the same sexual conduct and the same victim. Although the federal prosecution focused on pornography, both the federal and state charges included, as part of the offense, sexual conduct with the same victim. *Neufeld*, 212 P.3d at 1066

Relying on *Neufeld*, Lacey filed a petition for post-conviction relief in state court alleging, among other claims, that his trial and appellate counsel were ineffective for failing to seek dismissal of his state charges on double jeopardy grounds. The trial court denied relief and the Montana Supreme Court affirmed. *Lacey v. State*, 389 P.3d 233 (Mont. 2017)(*Lacey II*).

In affirming the trial court, the Montana Supreme Court relied on *Strickland's* admonition that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct*." *Lacey II*, 389 at 240 (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984))(emphasis added in state court opinion). The Court went on to note that *Neufeld* was not decided until after Lacey's direct appeal had been resolved. And because, in its view, *Neufeld* marked a significant shift in the application of Montana's double jeopardy statute, the Montana Supreme Court determined that neither of Lacey's lawyers performed deficiently in failing to raise a *Neufeld* double jeopardy argument. *Lacey II*, 389 P.3d at 242.

Federal Habeas Proceedings

Lacey filed a timely 28 U.S.C. § 2254 petition raising, among other issues, his *Neufeld* double jeopardy/ineffective assistance claim. Relying on the strict standard of review set forth in 28 U.S.C. § 2254(d), the magistrate determined that "the Montana Supreme Court's decision regarding Lacey's IAC claim was not 'contrary to' or an 'unreasonable application' of *Strickland*"

and recommended that it be denied. In doing so, the magistrate expressed agreement with the Montana Supreme Court's holding that Lacey's counsel could not be faulted for failing to anticipate the change in law brought about by *Neufeld.* After finding that Lacey's *Neufeld* claim lacked merit, the magistrate recommended that a certificate of appealability be denied. (App. infra, 1d-37d).

Lacey filed timely objections to the magistrate's findings and recommendation. But his objections were overruled and the district court adopted the magistrate's findings and recommendation "in full." It also declined to issue a certificate of appealability. (App. infra, 1c-3c).

Lacey filed a notice of appeal, and the Ninth Circuit granted a certificate of appealability on one issue: whether counsel provided effective assistance, including whether counsel should have raised a challenge based on Montana's double jeopardy law at trial and on appeal. After his case was fully briefed, the Ninth Circuit affirmed the district court's decision denying his *Neufeld/*Ineffective Assistance claim. In coming to this conclusion, the court noted that it was bound by the provisions of 28 U.S.C. § 2254(d) in reviewing the claim and that it could not grant relief unless it found that the Montana Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established federal law." It also noted that it was "bound by 'a state court's interpretation of state law.'" *Lacey v. Gootkin*, No. 19-36033, slip op. at 2 (9th Cir. Aug. 17, 2021).

Reasons for Granting the Petition

Certiorari should be granted so that this Court can address and resolve the circuit split between the Ninth Circuit and the Second, Sixth and Seventh Circuits on the doctrine of foreshadowing and its application to ineffective assistance claims.

As stated above, Lacey's ineffective assistance claim was denied on the merits by the Montana Supreme Court. Therefore, the Ninth Circuit correctly applied 28 U.S.C. § 2254(d) in reviewing his claim. Under § 2254(d), a federal court may only grant relief on a claim that has been adjudicated on the merits if the state court adjudication of the claim either: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established 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."[1]

As § 2254(d)(1) indicates, a state court decision may not be overturned on habeas review because it conflicts with federal circuit precedent. Relief can only be granted when the relevant state court decision is contrary to, or involved an unreasonable application of, an authoritative decision of the United States Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000) ("[A]s the statutory language makes clear, . . . § 2254(d)(1) restricts the source of clearly established law to [Supreme Court] jurisprudence.").

In order to establish that a state court decision is contrary to clearly established law, a prisoner must show that the decision is (1) opposite to that reached by the Supreme Court on a question of law, or (2) that the state court decided the case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 405. A state court decision

[1] Neither the trial court nor the Montana Supreme Court were required to engage in any fact-finding in evaluating Lacey's claim. Therefore, subsection (d)(2) of § 2254 is not at issue in this appeal.

involves an unreasonable application of federal law when it identifies the correct governing rule from Supreme Court cases, but unreasonably applies it to the facts of the particular state case. *Id.* at 407-08

Because review under § 2254(d)(1) is tethered to clearly established federal law as determined by this Court, the decisions of other lesser federal courts are generally irrelevant to the evaluation of a habeas petitioner's claims. But, that being said, Mr. Lacey believes that the doctrine of foreshadowing is implicit to this Court's decision in *Strickland*, which sets forth the "clearly established law" that is applicable to his case. In his briefing to the Ninth Circuit, he established that, contrary to the view of the Montana Supreme Court, the decision in *Neufeld* was clearly foreshadowed by precedent. This Court should, therefore, grant certiorari and remand for full review of Lacey's ineffective assistance claim.

Conclusion

For all of the above stated reasons, the Court should grant this petition.

Respectfully submitted,

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Assistant Federal Defender
Counsel of Record

February 28, 2022