IN THE
SUPREME COURT OF THE UNITED STATES

Hawes v. United States of America

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

ATTACHMENT C

FILED
United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GREGORY M. HAWES,

Petitioner - Appellant,

v.

MICHAEL PACHECO, Warden, Wyoming State Penitentiary; WYOMING ATTORNEY GENERAL,

Respondents - Appellees.

No. 19-8047

Appeal from the United States District Court for the District of Wyoming (D.C. No. 1:17-CV-00052-ABJ)

John C. Arceci, Assistant Federal Public Defender, Denver, Colorado, (Virginia L. Grady, Federal Public Defender, Denver, Colorado, with him on the briefs; and Gregory M. Hawes, *pro se*, Rawlins, Wyoming), for Petitioner – Appellant.

Jenny L. Craig, Deputy Attorney General, Cheyenne, Wyoming, for Respondents – Appellees.

Before **MATHESON**, **BALDOCK**, and **MORITZ**, Circuit Judges.

MATHESON, Circuit Judge.

Wyoming state prisoner Gregory Hawes appeals the dismissal of his habeas corpus petition filed under 28 U.S.C. § 2254 to challenge his kidnapping conviction.

This court granted a certificate of appealability ("COA") on the issue of whether application of the Wyoming kidnapping statute to him was constitutional under the Sixth and Fourteenth Amendments.

Under the statute, whether a kidnapping ends with a "safe release" of the victim can affect the defendant's sentence. At trial, the state district court imposed the burden to show safe release on Mr. Hawes. The jury found that he had not proved safe release, which subjected him to higher statutory minimum and maximum sentences. A state court denied his post-conviction challenge to the imposition of this burden. It relied on Wyoming Supreme Court decisions holding that a kidnapping defendant must prove safe release rather than the prosecution having to prove lack of safe release.

Mr. Hawes argues the Wyoming court's application of the statute violated his Sixth and Fourteenth Amendment rights under *Alleyne v. United States*, 570 U.S. 99 (2013), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). He makes colorable arguments, but he does not surmount the habeas restrictions that require us to (1) give deference to the state court's application of Supreme Court law under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and (2) accept the state court's interpretation of state law. Exercising jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 2253(a) and (c)(1)(A), we affirm.

I. BACKGROUND

A. *Legal Background*

1. Federal Law

a. *U.S. Constitution*

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. The Fourteenth Amendment guarantees that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (alteration in original) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)); *see In re Winship*, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

b. *United States Supreme Court cases*

Four Supreme Court decisions are relevant to this appeal.

i. *Mullaney*

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Supreme Court considered whether Maine's murder statute met the constitutional due process requirement that the state must prove every element of a criminal offense beyond a reasonable doubt. *See id.* at 684-85. Under Maine law, murder required malice aforethought. *See id.* at 686 n.3.

Without malice aforethought, a "homicide would be manslaughter." *See id.* at 686. In practice, "if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." *Id.* at 686.

The Court found this burden shifting unconstitutional. It "h[e]ld that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Id.* at 704.

ii. *Patterson*

Two years later, in *Patterson v. New York*, 432 U.S. 197 (1977), the Court again considered the constitutionality of allocating a burden of proof to a criminal defendant. New York's homicide statute allowed a murder defendant "to raise an affirmative defense that he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." *Id.* (quotations omitted). "[T]he defendant had the burden of proving his affirmative defense by a preponderance of the evidence." *Id.* at 200. Doing so would reduce the offense from second-degree murder to manslaughter. *See id.* at 198-99.

The Court found this scheme constitutionally permissible. It "decline[d] to adopt as a constitutional imperative . . . that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." *Id.* at 210. The Court thus held that "the prosecution [must] prove beyond a

reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged," but "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required." *Id.*[1]

iii. *Apprendi*

Nearly 25 years later, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court addressed what facts needed to be proved beyond a reasonable doubt based on their sentencing impact. In *Apprendi*, the defendant pled guilty to a firearms offense that carried a maximum statutory punishment of 10 years in prison. *See id.* at 468-70. After the defendant entered his plea, the trial judge found by a preponderance of the evidence that the defendant intended to intimidate his victims because of their race, and thus enhanced his sentence under a separate hate crime statute. *See id.* at 468-71. Under this statute, the defendant's maximum statutory punishment was 20 years. *See id.* at 469.

The Court found the defendant's Sixth and Fourteenth Amendment rights had been violated. *See id.* at 476, 497. It stated: "Other than the fact of a prior conviction,

[1] *Patterson* distinguished the New York statute from the Maine statute in *Mullaney*. Under the latter, "malice, in the sense of the absence of provocation, was part of the definition of [murder]. Yet malice, i.e., lack of provocation, was presumed and could be rebutted by the defendant only by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation." *Patterson*, 432 U.S. at 216. Because *Mullaney* "held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense," *id.* at 215, the Maine statute was unconstitutional. Under the New York statute, though, "nothing was presumed or implied against [the defendant]." *Id.* at 216. Thus, the Court upheld the application of the New York statute.

any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

iv. *Alleyne*

More recently, in *Alleyne v. United States*, 570 U.S. 99 (2013), the Court extended its *Apprendi* holding. *See id.* at 111-12. In *Alleyne*, a jury convicted the defendant of "using or carrying a firearm in relation to a crime of violence." *See id.* at 103-04. The statute of conviction required a mandatory minimum sentence of five years of imprisonment, but if the firearm was "brandished," it required a mandatory minimum of seven years. *See id.* (quoting 18 U.S.C. § 924(c)(1)(A)(ii)). The jury's findings did not indicate that the firearm was "brandished." *See id.* at 104. But the sentencing judge determined it was, and thus applied the seven-year mandatory minimum. *See id.*

The Court found a constitutional violation. *See id.* at 117. "*Apprendi* concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Id.* at 111 (quoting *Apprendi*, 530 U.S. at 490). But "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." *Id.* at 112. "[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime." *Id.* at 114. And "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Id.* at 114-15. "Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range *and* does so in a way that aggravates the penalty." *Id.* at 113 n.2.

"Because the finding of brandishing increased the penalty to which the defendant was subjected, it was an element, which had to be found by the jury beyond a reasonable doubt." *Id.* at 117.

To summarize, "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt." *Id.* at 115-16.

2. **Wyoming Law**

a. *Kidnapping statute*

Section 6-2-201 of the Wyoming criminal code addresses "Kidnapping; penalties; effect of release of victim." Wyo. Stat. § 6-2-201. It provides:

> (a) A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business or from the vicinity where he was at the time of the removal, or if he unlawfully confines another person, with the intent to:
>
> > (i) Hold for ransom or reward, or as a shield or hostage;
> >
> > (ii) Facilitate the commission of a felony; or
> >
> > (iii) Inflict bodily injury on or to terrorize the victim or another.
>
> (b) A removal or confinement is unlawful if it is accomplished:
>
> > (i) By force, threat or deception; or
> >
> > (ii) Without the consent of a parent, guardian or other person responsible for the general supervision of an

> individual who is under the age of fourteen (14) or who is adjudicated incompetent.
>
> (c) If the defendant voluntarily releases the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not more than twenty (20) years.
>
> (d) If the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not less than twenty (20) years or for life except as provided in W.S. 6-2-101.

Id.

b. *Wyoming Supreme Court cases*

i. *Loomer*

In 1989, well before *Apprendi* and *Alleyne*, the Wyoming Supreme Court considered whether subsection (c) of Wyoming's kidnapping statute created a lesser-included offense to kidnapping. *See Loomer v. State*, 768 P.2d 1042, 1046 (Wyo. 1989). The court concluded it did not. *See id.* Instead, "[i]t describes mitigating circumstances rather than elements of the offense." *Id.*

The court reasoned that "[t]he statute defines a single crime, kidnapping, which carries a sentence of 20 years to life." *Id.* Subsection (c) "provides for a reduced sentence based upon defendant's conduct subsequent to the kidnapping." *Id.* And because "[t]he burden of showing mitigating circumstances which are not an element of the offense may be placed on a defendant without violating due process requirements," *id.* at 1047 (citing *Patterson*, 432 U.S. 197), "the defendant has the burden of going forward with evidence to show that the circumstances exist," *id.*

ii. *Rathbun*

In 2011, the Wyoming Supreme Court reaffirmed *Loomer*'s holding in *Rathbun v. State*, 257 P.3d 29 (Wyo. 2011). The court stated:

> There is one crime—kidnapping—for which the maximum sentence is as stated in Subsection (d). Where there has been a completed kidnapping, the defendant is at liberty to produce evidence to prove, in mitigation of sentence, that he or she voluntarily released the victim substantially unharmed. If that is not accomplished, the sentencing range remains as it is stated in Subsection (d).

Id. at 39.[2]

The *Rathbun* court further "conclude[d] that the sentencing structure of Wyo. Stat. Ann. § 6-2-201(c) and (d), as previously interpreted . . . in *Loomer*, is a structure that is authorized by *Apprendi*." *Id.*[3] It explained:

> Because a jury's guilty verdict in a kidnapping case subjects the defendant to the full punishment of Wyo. Stat. Ann.

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[2] The *Rathbun* court also similarly stated:

> We have previously held that kidnapping is a single crime described in Wyo. Stat. Ann. § 6-2-201(a) and (b), and that subsection (c), rather than defining a lesser-included offense, describes mitigating conduct subsequent to the kidnapping that may allow for a reduced sentence. *Loomer v. State*, 768 P.2d 1042, 1046-47 (Wyo. 1989). The appellant bears the burden of proving such mitigating conduct and, if competent evidence of such is produced, the question must be presented to the jury. *Id.* at 1047.

257 P.3d at 37-38. Although the court reviewed a conviction for attempted kidnapping such that safe release would not have been at issue, *see id.* at 31-32, 37-38, it confirmed that *Loomer* stated the governing interpretation of Wyoming's kidnapping statute, *see id.* at 37-38.

[3] Because *Rathbun* issued in 2011, the Wyoming Supreme Court did not yet have the benefit of the 2013 decision in *Alleyne*.

> § 6-2-201(d), *Apprendi* would not require the jury to consider mitigating circumstances that could reduce the punishment range. Similarly, it is not unconstitutional to assign to a defendant the burden of proving an affirmative defense, or the burden of proving mitigating circumstances at sentencing.

Id. at 39 n.7 (citing, among others, *Kansas v. Marsh*, 548 U.S. 163, 169-75 (2006); *Patterson*, 432 U.S. at 205; *United States v. Contreras*, 536 F.3d 1167, 1173-74 (10th Cir. 2008)). The court reasoned that, "as interpreted by *Loomer*, Wyoming's statutory scheme exceeds that which is required by *Apprendi* because [the Wyoming Supreme Court] said in *Loomer* that mitigating circumstances were to be submitted to the jury." *Id.* (citing *Loomer*, 768 P.2d at 1047).

B. ***Factual Background***

In 2013, Mr. Hawes entered the residence of his estranged wife, Donna Hawes, and "forced her into the bedroom, where he tied her hands and feet to the bed and gagged her." *Hawes v. State*, 335 P.3d 1073, 1075 (Wyo. 2014). He threatened that "he would either hang himself and make her watch, or he would kill her and then hang himself." *Id.* Instead, he "cut the restraints from her hands with a pair of scissors." *Id.* Mrs. Hawes then "took the scissors, cut her feet free," and fled. *See id.* Mr. Hawes pursued her but stopped when she reached a neighbor's yard. *See id.* "[T]he police arrived, and Mrs. Hawes was taken to the hospital for treatment of her cuts and bruises." *Id.*

C. ***Procedural Background***

1. **Trial**

Mr. Hawes was charged with felony stalking, kidnapping, and aggravated assault and battery. The information charged Mr. Hawes with "Kidnapping, in violation of

Wyoming Statute §6-2-201(a)(ii)(iii)(d), a felony, punishable by imprisonment for not less than twenty (20) years or for life . . . ." Aplt. Suppl. Br., Attachment 6 at 1-2 (emphasis removed).

At trial, the court imposed the burden of proving safe release on Mr. Hawes rather than require the State to prove that he did not safely release the victim. The jury found him guilty of kidnapping, and also found that he did not safely release Mrs. Hawes. The court thus adjudged Mr. Hawes guilty of "*Kidnapping*, in violation of Wyoming Statute §6-2-201(a)(ii)(iii)(d) where the Defendant did not voluntarily release the victim." ROA, Vol. I at 152. The jury also convicted him of felony stalking but acquitted him of aggravated assault and battery.

The trial court sentenced Mr. Hawes to five to nine years in prison for stalking and to a consecutive sentence of 30 years to life for kidnapping.

2. **Appeal**

On appeal, Mr. Hawes argued he had proved that he safely released Mrs. Hawes. *See Hawes v. State*, 335 P.3d 1073, 1077 (Wyo. 2014). He claimed "he 'voluntarily released' his victim when he cut her hands free and then allowed her to cut her own feet free and again when he stopped chasing her when she reached the edge of her neighbor's property." *Id.* But the Wyoming Supreme Court found that "a reasonable jury could certainly have concluded that Mrs. Hawes['s] cutting her own feet free and then running from the house . . . with Mr. Hawes in pursuit did not constitute 'voluntary release.'" *Id.*

In reaching this conclusion, the court noted that "[t]he burden of proof is on the defendant to establish the[] mitigating factors" of safe release. *Id.* (citing *Loomer*, 768

P.2d at 1047). "Because Mr. Hawes ha[d] not shown that there was insufficient evidence to support a finding of no voluntary release," the court "affirm[ed] the jury's finding that he was not entitled to a mitigated sentence for the kidnapping charge." *Id.* It thus affirmed his kidnapping conviction and sentence.[4]

3. **Post-Conviction**

a. *State court review*

Mr. Hawes sought post-conviction relief from the Wyoming district court. He alleged his lawyers were ineffective for failing to argue that the State had the burden of proving the absence of safe release as an aggravating fact under *Alleyne*. In January 2017, the court denied his petition. It applied *Loomer* and *Rathbun* to conclude the trial court properly imposed on Mr. Hawes the burden of proving safe release. Because the opinion is not available in a reporter, we reproduce the relevant portion here:

> 16. Hawes has not shown that either trial or appellate counsel were ineffective and, therefore, fails to overcome the procedural bar imposed upon him by Wyoming Statutes § 7-14-103(a)(i). Accordingly, Claim 1 [based on ineffective assistance of counsel] fails. First, with regard to case preparation and investigation, Hawes contends that both counsel should have been aware of cases such as *Alleyne v. United States*, --- U.S.---, 133 S. Ct. 2151 [2013]. He argues that the decision in *Alleyne* requires the State to prove "aggravating factors" in order to enhance his sentence for kidnapping, rather than requiring him to offer and prove mitigating factors in order to receive a reduced sentence for that crime. He further contends that the failure to know this law meant that his rights to due process were violated because the State was allowed to convict him without having to prove all of the essential elements of the crime with which he had

[4] The court reversed the stalking conviction.

> been charged. Finally, he asserts that the crime of kidnapping was never properly charged because the State omitted the "aggravating elements" it was required to prove, which further reflects negatively on trial and appellate counsel.
>
> 17. Hawes misunderstands the nature of Wyoming's law concerning kidnapping and its constitutionality. Under Wyoming law, a conviction for kidnapping subjects a defendant to a term of imprisonment from twenty years to life unless that defendant can prove that "he or she voluntarily released the victim substantially unharmed." *Rathbun*, ¶ 30, 257 P.3d at 39 (citing Wyo. Stat. Ann. § 6-2-201(c) and (d)). The State is not required to prove "aggravating factors" to enhance the punishment. *Id.* Further, the Legislature's decision to require defendants to prove mitigation, rather than requiring the State to prove aggravation, is constitutionally permitted. *Loomer v. State*, 768 P.2d 1042, 1047 (Wyo. 1989) (citing *Patterson v. New York*, 432 U.S. 197 (1977)). Thus, neither trial nor appellate counsel can be faulted for their decisions to not challenge this aspect of Wyoming law.

ROA, Vol. I at 485-86.[5]

[5] The Wyoming district court referred to Wyo. Stat. § 7-14-103(a)(i)'s "procedural bar," but the State has not argued that Mr. Hawes has procedurally defaulted on his claim. "[P]rocedural default is an affirmative defense, and the state must either use it or lose it." *McCormick v. Parker*, 821 F.3d 1240, 1245 (10th Cir. 2016).

Even though the Wyoming district court addressed Mr. Hawes's challenge to the constitutionality of Wyoming's kidnapping statute as part of its analysis of his ineffective assistance of counsel claim, the court's reasoning adjudicated on the merits the constitutional claim that he asserts here. *See Albrecht v. Horn*, 485 F.3d 103, 116 (3d Cir. 2007) (concluding that even though "[t]he state Supreme Court did not . . . address [a constitutional claim] on the merits in the ordinary sense" but "instead . . . examined the merits in the context of the prejudice prong of an ineffective assistance of post-conviction counsel claim," that the state court's decision "constitute[d] an adjudication on the merits sufficient for purposes of [AEDPA]"). Mr. Hawes agrees that "[t]he state courts adjudicated the claim on the merits." *See* Aplt. Suppl. Br. at 13.

The Wyoming Supreme Court summarily denied Mr. Hawes's petition for a writ of certiorari.[6]

b. *Federal district court review*

Mr. Hawes next filed a 28 U.S.C. § 2254 habeas petition in federal district court. *See Hawes v. Pacheco*, No. 1:17-cv-00052-ABJ, 2018 WL 11239562 (D. Wyo. Jan. 24, 2018). He "assert[ed] the Wyoming kidnaping statute creates two degrees of the crime, 'simple' and 'aggravated,[']with the latter requiring the prosecution prove a defendant did not voluntarily release his victim substantially unharmed." *Id.* at *10.

The district court said that Mr. Hawes "has not shown, nor can he show, any constitutional requirement a state invert its statutory sentencing mitigators by requiring a prosecution prove their absence in order to secure a conviction." *Id.* at *12. Rather, "courts, quite to the contrary, have clearly rejected the assertion the prosecution 'prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of

[6] "As instructed by the Supreme Court, we must focus on the last state court decision explaining its resolution of [the petitioner's] federal claims." *Church v. Sullivan*, 942 F.2d 1501, 1507 (10th Cir. 1991) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-05 (1991)). Because the Wyoming Supreme Court summarily denied Mr. Hawes's petition for a writ of certiorari, the "look-through rule" requires us to analyze the lower court's opinion. *See Brecheen v. Reynolds*, 41 F.3d 1343, 1358 (10th Cir. 1994); *see also Bonney v. Wilson*, 817 F.3d 703, 711 & n.6 (10th Cir. 2016) (looking to a Wyoming district decision when "[i]n post-conviction proceedings, the Wyoming Supreme Court denied certiorari" "[b]ut . . . did not provide analysis").

Thus, the "last reasoned opinion" at issue for this habeas appeal, *see Church*, 942 F.2d at 1507 (quoting *Ylst*, 501 U.S. at 803), is the Wyoming district court's January 2017 order—reproduced above—dismissing Mr. Hawes's petition for post-conviction relief.

culpability or the severity of the punishment.'" *Id.* (quoting *Patterson*, 432 U.S. at 207). The court held that "[i]t was . . . not a violation of clearly established constitutional law for the jury to reject [Mr. Hawes's] argument" about proof of safe release. *Id.*

The district court dismissed Mr. Hawes's § 2254 petition and denied a COA.

c. *Certificate of appealability*

Mr. Hawes sought a COA from this court. We determined that "[r]easonable jurists would find . . . debatable" whether "Wyo. Stat. Ann. § 6-2-201 is unconstitutional because it places the burden on the defendant to prove safe release by a preponderance of the evidence and because it establishes a 20-year minimum sentence for defendants who do not prove safe release." Doc. 10715021 at 11. We thus granted "a COA to consider Mr. Hawes's argument that Wyo. Stat. Ann. § 6-2-201 violates the Sixth and Fourteenth Amendments." *Id.* at 19.[7]

II. **DISCUSSION**

Mr. Hawes's appeal fails because he cannot show that the state post-conviction court's decision denying his constitutional claims "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court] law." 28 U.S.C. § 2254(d)(1). Given (1) the deference we must accord to the state court under AEDPA and (2) the precedent that constrains us to accept the state court's interpretation of the

[7] Before we issued this COA, another round of habeas proceedings occurred because the district court originally entered a "hybrid disposition" that "improperly dismisse[d] unexhausted claims while ruling on the merits of exhausted claims." *See Hawes v. Pacheco*, 737 F. App'x 905, 906 (10th Cir. 2018) (unpublished). We need not recount those proceedings for the purposes of this appeal.

Wyoming kidnapping statute, we are compelled to deny Mr. Hawes habeas relief. His arguments, which largely quarrel with the state court's interpretation of state law, do not convince us otherwise.

A. ***Restrictions on Habeas Review***

This appeal implicates the restrictions on habeas review (1) requiring a federal court to defer under AEDPA to the state court's merits decision rejecting a constitutional claim and (2) prohibiting a federal court from interpreting state law differently from the state court decision under review.

As we explain below, when a federal court considers a § 2254 habeas petition, it reviews a state court's denial of an alleged violation of federal law. We thus must focus on the Wyoming state court's ruling in January 2017 that Mr. Hawes did not suffer a constitutional violation based on the trial court's placing the burden on him to show safe release under the Wyoming kidnapping statute.

Rather than focus on that decision, the dissent concentrates on whether the Wyoming Supreme Court's 1989 decision in *Loomer* interpreting the statute is correct as a matter of state law. But our habeas review under AEDPA is limited to whether the state court's application of the statute in Mr. Hawes's case violated clearly established Supreme Court law, not whether the state court misinterpreted Wyoming law. Under this standard, we must affirm.

1. **AEDPA Deference**

On habeas review of a state conviction, AEDPA "requires federal courts to give significant deference to state court decisions" on constitutional issues. *See Lockett v. Trammel*, 711 F.3d 1218, 1230 (10th Cir. 2013); *see also Hooks v. Workman*, 689 F.3d 1148, 1163 (10th Cir. 2012) ("This highly deferential standard for evaluating state-court rulings demands that state-court decisions be given the benefit of the doubt." (alterations and quotations omitted)).

When a state court has adjudicated the merits of a claim and denied relief, a federal court may grant habeas relief only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

"Clearly established law is determined by the United States Supreme Court, and refers to the Court's holdings, as opposed to the dicta." *Lockett*, 711 F.3d at 1231 (quotations omitted). These "holdings . . . must be construed narrowly and consist only of something akin to on-point holdings." *House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008).

A state court decision is "contrary to" clearly established federal law "if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002) (quotations omitted).

A "decision is an 'unreasonable application' of clearly established federal law if it identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of petitioner's case." *Underwood v. Royal*, 894 F.3d 1154, 1162 (10th Cir. 2018) (quotations omitted); *see also Bell*, 535 U.S. at 694. "[T]he ultimate focus of the inquiry is whether the state court's application of the clearly established federal law is objectively unreasonable." *House*, 527 F.3d at 1019 (citing *Bell*, 535 U.S. at 694).

But "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Habeas relief may be granted only if "there is *no possibility* fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents." *Coddington v. Sharp*, 959 F.3d 947, 953 (10th Cir. 2020) (quotations omitted).

2. **State Law and AEDPA Review**

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Id.* at 67-68. Thus, the Supreme Court has "repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam). "To the extent [the petitioner] argues the state court erroneously interpreted and applied state law, that does not warrant habeas relief[.]" *Boyd v. Ward*, 179 F.3d 904, 916 (10th Cir. 1999).

We find instructive our decision in *Anderson-Bey v. Zavaras*, 641 F.3d 445 (10th Cir. 2011). There, a habeas petitioner challenged the sufficiency of the evidence to convict him under state law. *See id.* at 448. We explained that a sufficiency challenge requires that we "first determine the elements of the offense and then examine whether the evidence suffices to establish each element." *Id.* "State law governs what the elements are." *Id.* "[I]f the defendant argued that the state court erred by holding that the prosecution did not need to prove his intent to kill before he arrived at the scene of the crime," the habeas "challenge would clearly be to an interpretation of state law," which would be "barred by *Estelle*." *See id.* "[S]tate law determines the parameters of the offense and its elements and a federal court may not reinterpret state law. We, thus, accept the state court's interpretation of [its criminal statutes]." *Tillman v. Cook*, 215 F.3d 1116, 1131-32 (10th Cir. 2000) (brackets, quotations, and citations omitted).[8]

[8] Due process fairness may preclude certain state court interpretations of state law. *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("[F]ederal habeas review of a state court's application of a [state law] is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation."); *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) ("Deprivation of the right to fair warning . . . can result both from vague statutory language and from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face."); *see also Leatherwood v. Allbaugh*, 861 F.3d 1034, 1043 (10th Cir. 2017) ("A prisoner may seek relief, however, if a state law decision is so fundamentally unfair that it implicates federal due process.").

Although Mr. Hawes pressed a due-process void-for-vagueness challenge before the federal district court, that court found the claim procedurally defaulted. *See* Doc. 10715021 at 10 n.5. And Mr. Hawes "omitted his vagueness claim" when he sought this COA from us. *See id.* (quoting Aplt. Br. at 6 n.1). He thus has waived a due process argument based on the state court's interpretation of state law. *See United States v. Cruz-Rodriguez*, 570 F.3d 1179, 1185 (10th Cir. 2009) (identifying the "classic waiver situation" as when "a party actually identified the issue, deliberately considered it, and then affirmatively acted in a manner that abandoned any claim on the issue" (quotations

Here, the state court's interpretation of Wyoming kidnapping law in Mr. Hawes's case followed *Loomer* and *Rathbun*. *See* ROA, Vol. I at 485-86. In short, *Loomer* held and *Rathbun* reaffirmed that once the prosecution proves kidnapping under subsections (a) and (b) of the statute, the sentence is 20 years to life under subsection (d). *See Loomer*, 768 P.2d at 1046; *Rathbun*, 257 P.3d at 37-39; *see also* ROA, Vol. I at 485-86. No proof of lack of safe release is required. *See Loomer*, 768 P.2d at 1046; *Rathbun*, 257 P.3d at 37-39; *see also* ROA, Vol. I at 485-86.[9] The defendant must prove safe release to reduce the sentence range under subsection (c). *See Loomer*, 768 P.2d at 1046-47; *Rathbun*, 257 P.3d at 37-39; *see also* ROA, Vol. I at 485-86.[10]

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omitted); *see also Anderson-Bey*, 641 F.3d at 453 n.1 (noting that the petitioner had waived the argument that if the state courts upholding his conviction "were merely interpreting state law, then the change in law was applied retroactively, thereby violating his due-process rights").

[9] The Wyoming Supreme Court did not explain in *Loomer* or *Rathbun* how the conditional clause in subsection (d)—"If the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial," Wyo. Stat. § 6-2-201(d)—serves any function.

[10] The dissent argues "the Wyoming Supreme Court changed course in *McDermott v. State*, 870 P.2d 339 (Wyo. 1994)," and interpreted the statute "contrary to that in *Loomer*." Dissent at 5-6. But the *McDermott* Court quoted *Loomer*'s central holding—that the Wyoming kidnapping "statute defines a single crime, kidnapping, which carries a sentence of 20 years to life, *id.* at 347 (quoting *Loomer*, 768 P.2d at 1046)—without contesting it. As Mr. Hawes's counsel stated at oral argument, despite the "[in]artful" jury instruction the *McDermott* Court was reviewing, *see id.*, it was "trying to . . . follow *Loomer*," *see* Oral. Arg. at 4:56-5:00. And he conceded that the jury instruction discussed by the dissent, *see* Dissent at 5-6, "doesn't move the ball forward one way or the other for us," *see* Oral Arg. at 5:24-28.

Even if the state court decision that we review had incorrectly interpreted Wyoming law, it would not matter. *See Turrentine v. Mullin*, 390 F.3d 1181, 1191 (10th Cir. 2004) ("[T]he fact that [a jury] instruction was allegedly incorrect under state law is not a basis for habeas relief." (second alteration in original) (quoting *Estelle*, 502 U.S. at

We must accept this interpretation of Wyoming's kidnapping statute for the purpose of our habeas review. *See Estelle*, 502 U.S. at 67-68; *Bradshaw*, 546 U.S. at 76.[11]

* * * *

In sum, our task on habeas review is to "decid[e] whether a conviction violated the Constitution." *Estelle*, 502 U.S. at 68. In doing so, we may afford relief under AEDPA only if the state court's decision in Mr. Hawes's case was contrary to or an unreasonable application of clearly established United States Supreme Court law. We must accept the state court's interpretation of state law.

B. ***Mr. Hawes's Habeas Claim Fails***

The state court's application of the Wyoming kidnapping statute did not violate *Apprendi* and *Alleyne*. *Apprendi* and *Alleyne* apply to facts that increase a sentence. *See Apprendi*, 530 U.S. at 490; *Alleyne*, 570 U.S. at 113 & n.2. The state court followed

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71-72)); *McCormick v. Kline*, 572 F.3d 841, 850 (10th Cir. 2009) ("Even if Kansas did commit . . . errors under state law, . . . it is simply not our province 'to reexamine state-court determinations on state-law questions.'" (quoting *Estelle*, 502 U.S. at 68)). The remedy for an alleged error of state law is with the state courts—and here, the state court rejected Mr. Hawes's preferred reading of state law. *See Tyler v. Nelson*, 163 F.3d 1222, 1226 (10th Cir. 1999) ("We lack authority to correct errors of state law made by state courts.").

[11] In *Mullaney*, the Supreme Court said, "On rare occasions the Court has re-examined a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.'" *Mullaney*, 421 U.S. at 691 n.11 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945)). Given that the state court decision we review here relied on *Loomer*'s construction of the kidnapping statute—which predated *Apprendi* and *Alleyne* by over a decade—we do not see how the state court's interpretation and application of state law could be an "obvious subterfuge to evade consideration of a federal issue." *See id.* (quotations omitted).

Loomer and *Rathbun*'s interpretation of the statute, which found that safe release can only reduce a sentence, not increase it. *See Loomer*, 768 P.2d at 1046-47; *Rathbun*, 257 P.3d at 37-39.

We also do not see a violation of *Mullaney*, which requires the prosecution to prove "every ingredient of an offense." *See Patterson*, 432 U.S. at 215. Again, the state court followed *Loomer* and *Rathbun*'s interpretation that only subsections (a) and (b) of the Wyoming kidnapping statute define the ingredients of kidnapping, which the prosecution must prove. *See Loomer*, 768 P.2d at 1046; *Rathbun*, 257 P.3d at 37-38.

We thus affirm the district court's dismissal of Mr. Hawes's Sixth and Fourteenth Amendment § 2254 challenge to the state court's application of Wyoming's kidnapping statute. We elaborate on these conclusions in our following discussion of Mr. Hawes's counterarguments.

C. ***Mr. Hawes's Arguments***

Mr. Hawes argues the state court violated *Apprendi/Alleyne* and *Mullaney*.[12] His arguments cannot overcome the deference standards described above.

1. ***Apprendi/Alleyne* Arguments**

Mr. Hawes makes two arguments based on *Apprendi* and *Alleyne*. First, he contends the text of the Wyoming kidnapping statute makes safe release a fact question

[12] We must "measure state-court decisions against [the Supreme] Court's precedents as of the time the state court renders its decision." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (emphasis and quotations omitted). *Alleyne*, *Apprendi*, and *Mullaney* were decided before the state court decision here.

that the State must prove. We reject this argument because a federal habeas court may not second guess the state court's interpretation of state law. Second, he contends that the effect of requiring him to prove safe release violated *Apprendi* and *Alleyne.* We reject this argument based on AEDPA deference.

a. *Statutory text argument*

Mr. Hawes posits that "[t]he statute provides no penalty for [kidnapping] standing alone, but rather . . . establish[es] *two possible* statutory penalty ranges, which . . . depend on whether or not the defendant safely released the victim." Aplt. Suppl. Br. at 16. With safe release, the maximum statutory penalty is 20 years in prison, and there is no sentencing floor. *See* Wyo. Stat. § 6-2-201(c). Without safe release, the maximum penalty is life in prison, and the sentencing floor is 20 years. *See* Wyo. Stat. § 6-2-201(d). Because "the question of safe release is the sole factor" "determining whether a defendant faces *no* mandatory minimum, or one of *twenty years*," and because it also "is the sole factor . . . authoriz[ing] a statutory maximum lifetime imprisonment," not requiring a "jury . . . to make that determination beyond a reasonable doubt" violates *Apprendi* and *Alleyne*. *See* Aplt. Suppl. Br. at 19-20.

We reject this argument because it disregards the state court's interpretation of the statute. "[A] state court's interpretation of state law . . . binds a federal court sitting in habeas corpus." *Bradshaw*, 546 U.S. at 76.[13] Again, the state court decision we review

[13] We appreciate the dissent's discussion of Wyoming kidnapping cases, but its pointing to possible inconsistencies ignores the limits on a federal habeas court's second-guessing of how the state court in Mr. Hawes's case interpreted state law. *See Johnson v. Mullin*, 505 F.3d 1128, 1141 (10th Cir. 2007) (dismissing without further analysis most

interpreted the Wyoming kidnapping statute to operate as stated in *Loomer* and *Rathbun*. *See* ROA, Vol. I at 485-86. Under *Loomer* and *Rathbun*, once the prosecution proves kidnapping under subsections (a) and (b), the sentence is 20 years to life under subsection (d). *See Loomer*, 768 P.2d at 1046; *Rathbun*, 257 P.3d at 37-39. To reduce his sentence range under subsection (c), the defendant must prove safe release. *See Loomer*, 768 P.2d at 1046-47; *Rathbun*, 257 P.3d at 37-39. Thus, proof of whether there was safe release can only reduce the defendant's sentencing exposure. *Apprendi* and *Alleyne*, though, apply only to facts that increase a sentence. *See Apprendi*, 530 U.S. at 490; *Alleyne*, 570 U.S. at 113 & n.2. Although Mr. Hawes's reading of the statute may be plausible, it conflicts with *Loomer* and *Rathbun*'s interpretation. Our review is limited to the state post-conviction court's analysis, which relied on *Loomer* and *Rathbun*.

b. *Unconstitutional effect argument*

Mr. Hawes next argues that the "description of safe release as a 'mitigating' fact is entitled to no weight in the federal constitutional analysis, and, in any event, is wrong." Aplt. Suppl. Br. at 23 (emphasis omitted). He contends "the 'relevant inquiry is one not of form, but of effect.'" *Id.* at 24 (quoting *Apprendi*, 530 U.S. at 494). And "the *effect* of

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of a petitioner's arguments, because "they all focus exclusively on the proper interpretation of Oklahoma state law"); *Anderson-Bey*, 641 F.3d at 452-53 (noting that "[a]lthough it would have been reasonable to interpret" a state's criminal law in the fashion the petitioner argued, "the state court did not adopt that interpretation," and thus his "challenge to the affirmance of his conviction is in essence a challenge to the [state's] interpretation of the state [criminal] statute, a challenge that we cannot entertain in a proceeding under § 2254"); *Williams v. Trammell*, 782 F.3d 1184, 1195 (10th Cir. 2015) ("Although it would have been reasonable to reach a different conclusion, the [state court] did not—and its interpretation is authoritative.").

the safe release provisions in § 6-2-201 [is] clear—the question of safe release is the question of which penalty provision applies." Aplt. Reply Br. at 3. Thus, because requiring him to prove safe release had the effect of aggravating his sentence, Mr. Hawes requests habeas relief.

This argument finds support in passages from *Apprendi* and *Mullaney*. In *Apprendi*, the Court "dismissed the possibility that a State could circumvent the protections of *Winship* merely by 'redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.'" 530 U.S. at 485 (alteration in original) (quoting *Mullaney*, 421 U.S. at 698).[14] And in *Mullaney*, the Court endorsed "an analysis that looks to the operation and effect of the law as applied and enforced by the state." *See* 421 U.S. at 699 (quotations omitted).

But even considering the effect of applying Wyoming's kidnapping statute to Mr. Hawes, we conclude he has not made a showing under AEDPA that the state court unreasonably applied clearly established Supreme Court law. First, *Apprendi* and *Alleyne* did not address a situation where, as here, the defendant's proof of a fact—safe release—would lower the minimum and maximum sentence. Second, the *Apprendi* Court said that

[14] Indeed, the *Apprendi* Court agreed with the New Jersey Supreme Court's conclusion that "merely because the state legislature placed its . . . sentence 'enhancer' 'within the sentencing provisions' of the criminal code 'does not mean that the finding . . . is not an essential element of the offense.'" *See* 530 U.S. at 495 (quoting *State v. Apprendi*, 731 A.2d 485, 492 (1999), *rev'd*, 530 U.S. 466 (2000)). Otherwise, "the Legislature could just as easily allow judges, not juries, to determine if a kidnapping victim has been released unharmed." *Id.* at 472 (quoting 731 A.2d at 492).

it "has often recognized [the distinction] between facts in aggravation of punishment and facts in mitigation." 530 U.S. at 490 n.16 (citation omitted).[15]

A plausible extension of *Apprendi/Alleyne* might support Mr. Hawes, but that is not the same as showing under AEDPA that the state court unreasonably applied clearly established Supreme Court law.[16]

2. ***Mullaney* Argument**

Mr. Hawes further argues that application of the Wyoming kidnapping statute to him violated *Mullaney*. AEDPA deference also blocks habeas relief based on this argument.

Mr. Hawes contends that "the state impermissibly *presumes* that a defendant did not voluntarily release the victim substantially unharmed in a safe place prior to trial," Aplt. Suppl. Br. at 18, and has "'has affirmatively shifted the burden of proof to the

[15] Mr. Hawes also points to the information charging him under subsection (d) and various Wyoming decisions distinguishing between "simple" and "aggravated" kidnapping as demonstrating that safe release does not function as a mitigator under Wyoming law.

But the state court decision here was consistent with *Loomer* and *Rathbun*, which held the kidnapping statute "defines a single crime," *Loomer*, 768 P.2d at 1046, or "one crime," *Rathbun*, 257 P.3d at 39, with a default penalty of 20 years to life, *see Loomer*, 768 P.2d at 1046; *Rathbun*, 257 P.3d at 39. Under this construction, "safe release" functions as a mitigator. *See Loomer*, 768 P.2d at 1046-47; *Rathbun*, 257 P.3d at 37-39. And we must accept the state court's interpretation of Wyoming's kidnapping statute. *See Estelle*, 502 U.S. at 67-68; *Bradshaw*, 546 U.S. at 76 (2005).

[16] The dissent only briefly addresses AEDPA: "[T]he state district court's decision . . . was contrary to clearly established federal law." Dissent at 15. This conclusion, however, is based on the dissent's reading the Wyoming kidnapping statute de novo, which, as we have explained, this court cannot do.

defendant' to 'prove the critical fact in dispute,'" *id.* (quoting *Mullaney*, 421 U.S. at 701). He contends that "*Mullaney* makes clear that such a provision cannot be presumed satisfied and then flipped to the defendant to disprove." *Id.* at 23.

Mr. Hawes's argument has some force but fails under AEDPA. As noted above, *Mullaney* involved a state court's interpretation of the state's homicide statute that presumed malice and placed the burden on the defendant to prove heat of passion to reduce murder to manslaughter. *See* 421 U.S. at 686 & n.3. The Supreme Court found this presumption violated the defendant's due process right to have the prosecution prove malice beyond a reasonable doubt. *See id.* at 704.

Mr. Hawes argues the Wyoming courts did the same thing to him. That is, under *Loomer* and *Rathbun*, a lack of safe release was presumed once the State proved kidnapping under subsections (a) and (b). The burden was then placed on him to prove safe release to reduce his sentence from subsection (d)'s range to subsection (c)'s.

Mr. Hawes has not shown under AEDPA, however, that the state court's rejection of his constitutional claim was contrary to or an unreasonable application of clearly established Supreme Court law. First, *Mullaney* concerned a presumed fact that determined whether the substantive offense was murder or manslaughter. *See Mullaney*, 421 U.S. at 686. Mr. Hawes's appeal concerns a fact that affects his sentence, not his substantive offense. *See Loomer*, 768 P.2d at 1046; *Rathbun*, 257 P.3d at 39. Second, the state district court in this case cited *Patterson* as support for imposing the burden of proving safe release on Mr. Hawes. *See* ROA, Vol. I at 486. In *Patterson*, decided after *Mullaney*, the Court said that a state may impose the burden to prove an affirmative

defense on the defendant. *See* 432 U.S. at 210. Although Mr. Hawes may be correct that *Mullaney* is closer to his case, we cannot say the Wyoming court unreasonably relied on *Patterson.*

III. **CONCLUSION**

We affirm the district court.

19-8047, *Hawes v. Pacheco*

MORITZ, Circuit Judge, dissenting.

Gregory Hawes contends that Wyoming's kidnapping statute required him to prove an element of his crime—that he safely released his victim—in violation of the constitutional principles that require the state to prove each element of a crime beyond a reasonable doubt. *See, e.g.*, *In re Winship*, 397 U.S. 358 (1970). The majority acknowledges that Hawes "makes colorable arguments" and further describes one of those arguments as having "some force." Maj. Op. 2, 27. But the majority rejects Hawes's arguments because it finds itself "constrain[ed]" by the Wyoming Supreme Court's interpretation of its kidnapping statute in *Loomer v. State*, 768 P.2d 1042 (Wyo. 1989). Maj. Op. 15. Indeed, as Hawes points out, the State's "entire argument turns on this [c]ourt deferring to *Loomer*[]." Rep. Br. 6. But after its 1989 decision in *Loomer*, the Wyoming Supreme Court frequently interpreted and applied its kidnapping statute inconsistently with *Loomer*. Because we should not blindly accept these inconsistencies, defer to all such differing interpretations, or select the interpretation we find the most reasonable, I would conclude that we owe no deference to *Loomer*. I would then interpret Wyoming's kidnapping statute anew, unconstrained by any particular state-court interpretation. Under any de novo interpretation, Hawes's "colorable arguments" become much more than that: They succeed. I would accordingly grant Hawes habeas relief and therefore respectfully dissent.

I. The Wyoming Supreme Court's Inconsistent Interpretations of Wyoming's Kidnapping Statute

Quoted in full, Wyoming's kidnapping statute provides:

> (a) A person is guilty of kidnapping if he [or she] unlawfully removes another from his [or her] place of residence or business or from the vicinity where he [or she] was at the time of the removal, or if he [or she] unlawfully confines another person, with the intent to:
>
> > (i) Hold for ransom or reward, or as a shield or hostage;
> >
> > (ii) Facilitate the commission of a felony; or
> >
> > (iii) Inflict bodily injury on or to terrorize the victim or another.
>
> (b) A removal or confinement is unlawful if it is accomplished:
>
> > (i) By force, threat[,] or deception; or
> >
> > (ii) Without the consent of a parent, guardian[,] or other person responsible for the general supervision of an individual who is under the age of [14] or who is adjudicated incompetent.
>
> (c) If the defendant voluntarily releases the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not more than [20] years.
>
> (d) If the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not less than [20] years or for life except as provided in [Wyo. Stat. Ann. §] 6-2-101.

Wyo. Stat. Ann. § 6-2-201.[1]

Interpreting this statute in *Loomer*, the Wyoming Supreme Court stated that § 6-2-201 "defines a single crime, kidnapping, which carries a sentence of 20 years to

[1] I refer to the factual predicate in subsection (c) as "safe release" and the mirror-image factual predicate in subsection (d) as "nonrelease."

life." 768 P.2d at 1046. In other words, according to *Loomer*, the crime of kidnapping involves subsections (a), (b), and (d): Subsection (a) describes the criminal conduct, subsection (b) defines certain key terms in subsection (a), and subsection (d) provides the base sentence for the crime. *See id.*

Yet by its plain terms, subsection (d) provides more than just a base sentence—it also includes a factual predicate, stating that kidnapping is a felony subject to a 20-to-life sentence only "[*i*]*f* the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial." § 6-2-201(d) (emphasis added). Nevertheless, *Loomer* ignored that portion of subsection (d). *See* 768 P.2d at 1046. Or, as the majority puts it, "[t]he Wyoming Supreme Court did not explain in *Loomer* . . . how the conditional clause in subsection (d) . . . serves any function."[2] Maj. Op. 20 n.9.

As for subsection (c), *Loomer* concluded that it "describes mitigating circumstances" that could "provide[] for a reduced sentence," 768 P.2d at 1046, of "not more than [20] years," § 6-2-201(c). *Loomer* further held that the defendant bore the burden of proving these "mitigating circumstances," noting that the jury instruction at issue in that case had "incorrect[ly]" placed that burden on the state.

[2] As a matter of statutory interpretation, *Loomer* is puzzling. In Wyoming, as in federal courts, "[e]very word in a statute must be given meaning." *Keene v. State*, 812 P.2d 147, 150 (Wyo. 1991) (quoting *In re Patch*, 798 P.2d 839, 841 (Wyo. 1990)); *see also Moskal v. United States*, 498 U.S. 103, 109 (1990) (noting "the established principle that a court should '"give effect, if possible, to every clause and word of a statute"'" (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955))). Yet *Loomer* seemingly ignored this principle in disregarding the factual predicate in subsection (d).

768 P.2d at 1047. Notably, the "mitigating circumstances" in subsection (c) are a mirror image of the factual predicate outlined in subsection (d): Both ask whether "the defendant voluntarily release[d] the victim substantially unharmed and in a safe place prior to trial." *Id.* at 1046; *see also* § 6-2-201(c), (d). But according to *Loomer*, that mirror-image sentence has meaning in subsection (c)—that is, it "describes mitigating circumstances" the defendant must prove; yet it has no meaning whatsoever in subsection (d), which describes only the base sentence of 20 years to life. 768 P.2d at 1046–47. And that base sentence apparently applies regardless of whether its factual question—nonrelease—is answered. *See id.* at 1047 (noting that state has no burden to prove factual conditions of nonrelease).

In any event, *Loomer* clearly held that § 6-2-201 describes a single crime of kidnapping. *Id.* at 1046. To prove this single crime, the state need only establish that the defendant's conduct satisfies subsections (a) and (b). *See id.* If the state does so, the defendant is subject to the 20-to-life sentence provided in subsection (d); no proof of nonrelease is required, despite subsection (d)'s plain language stating otherwise. *See id.* Thus, under *Loomer*, neither a crime of "aggravated kidnapping" under subsection (d) nor a crime of "simple kidnapping" under subsection (c) exists: There is only one crime—kidnapping. *See id.* Relatedly, the state is never required to prove nonrelease in order to prove this single crime of kidnapping; nor is it required to prove nonrelease as an aggravating sentencing factor. Instead, safe release is relevant only as a mitigating sentencing factor, and it must be proven by the defendant. *See id.*

at 1046–47. Moreover, although the jury decides that fact, it relates only to the sentence and is not relevant to conviction itself, according to *Loomer*. *See id.*

But a mere five years later, the Wyoming Supreme Court changed course in *McDermott v. State*, 870 P.2d 339 (Wyo. 1994), *overruled in part on other grounds by Jones v. State*, 902 P.2d 686 (Wyo. 1995). There, the state originally charged the defendant with "one count of kidnapping." *Id.* at 342–43. But at a later hearing, "the information was orally amended . . . to charge the kidnapping as an *aggravated* kidnapping because [the victim] had not been released by [the defendant] substantially unharmed." *Id.* at 343 (emphasis added). Charging "aggravated kidnapping" because the defendant did not safely release the victim directly contradicts *Loomer*'s holding that kidnapping is only one crime in Wyoming and that nonrelease is not an element of that crime. Yet the *McDermott* court affirmed the conviction, going so far as to characterize subsection (d) as "[*t*]*he enhancement portion* of the kidnapping statute," despite simultaneously reiterating *Loomer*'s statement that subsection (c) "describ[es] mitigating circumstances." *Id.* at 346–47 (emphasis added) (citing *Loomer*, 768 P.2d at 1046).

Additionally, the jury instruction at issue in *McDermott* specifically included nonrelease as one of "[t]he *necessary elements* of the crime of *aggravated* kidnapping" that the state was required to prove beyond a reasonable doubt. *Id*. at 346 (emphases added). This is contrary to *Loomer*'s holding that safe release is a mitigating circumstance to be proved by the defendant. But the *McDermott* court inexplicably approved the instruction as "legally correct." *Id.* at 347. Thus, despite

giving *Loomer* lip service, the Wyoming Supreme court in *McDermott* interpreted § 6-2-201 in a manner directly contrary to that in *Loomer*.[3]

And *McDermott* is not unique: Many other post-*Loomer* Wyoming Supreme Court cases, none of which cite *Loomer*, involve charges of, convictions for, and pleas to aggravated kidnapping, a crime that does not exist post-*Loomer*.[4] *See, e.g.*, *Bird v. State*, 901 P.2d 1123, 1127 (Wyo. 1995) (noting that defendant pleaded guilty to "aggravated kidnapping"); *Kolb v. State*, 930 P.2d 1238, 1239–40 (Wyo. 1996) (explaining that jury convicted defendant of "aggravated kidnap[p]ing, [§] 6-2-201(a)(iii)(d)"); *Gould v. State*, 151 P.3d 261, 264 & n.5, 266–67 (Wyo. 2006) (explaining that subsections (a)(iii) and (d) "set out the definition of aggravated kidnapping," that defendant was convicted of "aggravated kidnapping," and that it previously affirmed this conviction); *Moore v. State*, 80 P.3d 191, 193–94 (Wyo. 2003) (explaining that defendant "was originally charged with . . . two counts of aggravated kidnapping" but was instead convicted of "two counts of kidnapping" and sentenced within lower range of subsection (c)); *Herrera v. State*, 64 P.3d 724, 725 (Wyo. 2003) (describing plea agreement under which state agreed to "reduce the

[3] Notably, in referring to nonrelease as both an element of aggravated kidnapping and a sentencing enhancement and in approving a jury instruction that places the burden on the state to prove nonrelease, *McDermott* appears to align with the statute as written—that is, it appears to recognize all of subsection (d) rather than only the sentencing portion of subsection (d).

[4] Similarly, this court has described subsection (d) as "impos[ing] an enhanced punishment '[i]f the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial.'" *Daves v. Wilson*, 632 F. App'x 470, 474 (10th Cir. 2015) (unpublished) (second alteration in original) (quoting § 6-2-201(d)).

'aggravated' kidnapping charge to 'simple' kidnapping, thereby reducing the possible sentence length"); *Winters v. State*, 446 P.3d 191, 196, 198, 219 & n.20 (Wyo. 2019) (noting that state charged defendant "with aggravated kidnapping under . . . § 6-2-201(a)(ii), (b)(ii), and (d)"; explaining that defendant "was actually convicted of aggravated kidnapping because the jury found [he] did not voluntarily release [victim] substantially unharmed and in a safe place prior to trial"); *Duffy v. State*, 789 P.2d 821, 853 n.21 (Wyo. 1990) (Urbigkit, J., dissenting) (mentioning "kidnapping with physical harm, [§] 6-2-201, [20] years to life").

Similarly contrary to *Loomer*'s holding that kidnapping is a single crime comprising subsections (a) and (b) and the sentence provided in subsection (d), a second set of contradictory post-*Loomer* cases involve kidnapping under subsection (c). According to *Loomer*, subsection (c) is *only* a mitigating factor that can reduce a sentence. *See* 768 P.2d at 1046–47. Thus, after *Loomer*, the state cannot charge or convict a defendant under subsection (c). But the state has routinely done just that, with the imprimatur of the Wyoming Supreme Court. For instance, in *Dockter v. State*, the state charged the defendant "with kidnapping with voluntary release in violation of . . . § 6-2-201." 396 P.3d 405, 407 (Wyo. 2017). In this appeal, the State asserts that *Dockter* "do[es] not make [a] distinction between" subsections (c) and (d) because it "analyz[ed] the elements of kidnapping without mentioning subsections (c) and (d)." Aplee. Br. 15–16. But the State fails to explain how being charged "with kidnapping *with voluntary release*" could refer to anything other than kidnapping

under subsection (c)—a crime that, under *Loomer*, does not exist. *Dockter*, 369 P.3d at 407 (emphasis added).

And *Dockter* does not stand alone. Another example is *Major v. State*, 83 P.3d 468 (Wyo. 2004). There, the Wyoming Supreme Court explained that under the applicable plea agreement, the state had amended the charge for "kidnapping in violation of . . . § 6-2-201 . . . (d)" to charge the defendant under subsection (c) in order "to reflect the fact that the victim had been released 'substantially unharmed.'" *Id.* at 470, 472 n.3 (quoting § 6-2-201(c)). In a variety of other cases, none of which cite *Loomer*, defendants have been charged with, have been convicted of, or have pleaded guilty to kidnapping under subsection (c). *See, e.g.*, *Eustice v. State*, 871 P.2d 682, 683 (Wyo. 1994) (explaining that defendant pleaded guilty "to one count of kidnapping in violation of . . . § 6-2-201(a)(ii), (b)(i), and (c)"); *Darrow v. State*, 824 P.2d 1269, 1269 (Wyo. 1992) (explaining that defendant was convicted of kidnapping under "[§] 6-2-201(a)(i), (ii), (c)");[5] *Alcalde v. State*, 74 P.3d 1253, 1255–56 (Wyo. 2003) (stating that defendant was charged with and convicted of "kidnapping in violation of . . . § 6-2-201(a)(iii), (b)(i)[,] and (c)"); *Royball v. State*, 210 P.3d 1073, 1074 (Wyo. 2009) (explaining that state charged defendant with "kidnapping in violation of . . . § 6-2-201(a)(i), (b)(i)[,] and (c)"); *Appling v. State*, 377 P.3d 769, 769 (Wyo. 2016) (Mem.) (noting that defendant pleaded guilty to "one

[5] Even the State acknowledges that *Darrow* involved "a kidnapping charged under subsection (c)." Aplee. Br. 16. But it does not explain how, after *Loomer*, a defendant could be charged under subsection (c) in the first instance.

count of kidnapping" and citing "§ 6-2-201(a)(iii) & (c)"). The Wyoming Supreme Court's multiple references to subsection (c) in these cases are at odds with *Loomer*'s designation of subsection (c) as mitigating circumstances to be proven by a defendant after that defendant is found guilty of kidnapping under subsections (a) and (b).[6]

I acknowledge that some post-*Loomer* cases do not directly contradict its holdings. For instance, in *Vaught v. State*, the jury convicted the defendant of "kidnapping under . . . § 6-2-201(a)(iii), (d)," and the district court sentenced him accordingly, based on facts that appear to support the conclusion that the defendant did not safely release the victim (the victim escaped while the defendant was in another room). 366 P.3d 512, 514–15 (Wyo. 2016). The same is true of several other cases cited by the State. *See Counts v. State*, 277 P.3d 94, 99–100, 106–08, 110–11 (Wyo. 2012) (noting defendant was charged with and convicted of "kidnapping in

[6] It is worth noting that in a subset of post-*Loomer* cases, the Wyoming Supreme Court has approved charges of, pleas to, convictions for, and sentences for kidnapping under subsection (c) when the facts, as recounted by the Wyoming Supreme Court, strongly suggest the defendant did not safely release the victim or victims. *See Volpi v. State*, 419 P.3d 884, 887–88, 892 (Wyo. 2018) (explaining that defendant repeatedly "attacked" victim and victim was "rescued by law enforcement," yet defendant was sentenced to eight to 16 years' imprisonment—a sentence possible only if defendant proved mitigating circumstances under subsection (c)); *Eustice*, 871 P.2d at 683 (noting guilty plea to kidnapping under subsection (c) despite also explaining that defendant drove with victim, "continuing to beat her along the way," until law enforcement located them); *Moore*, 80 P.3d at 193–94 (explaining that jury convicted defendant of kidnapping, resulting in five to ten years' imprisonment for each count, but also noting that defendant repeatedly beat both victims until he "[e]ventually . . . tired" and "the beatings subsided"); *Major*, 83 P.3d at 470, 472 & n.3 (noting guilty plea to kidnapping under subsection (c) despite also explaining that victim was not "freed" until defendant was arrested); *Darrow*, 824 P.2d at 1269–70 (noting sentence within lower range but also explaining that victims "escaped").

violation of . . . § 6-2-201(a)(iii)" and sentenced to life in prison based on facts supporting conclusion of nonrelease; quoting jury instruction that did not require state to prove nonrelease); *Dean v. State*, 77 P.3d 692, 694–96, 699 (Wyo. 2003) (affirming conviction for "kidnapping" arising from facts supporting conclusion of nonrelease; quoting jury instruction that did not require state to prove nonrelease); *Doud v. State*, 845 P.2d 402, 403, 407–08 (Wyo. 1993) (affirming conviction for "kidnapping," citing *Loomer* to describe subsection (c) as "mitigating factors," and finding "sufficient evidence showing that [defendant] did not release his victim voluntarily");[7] *Keene*, 812 P.2d at 148–50 (discussing and vacating defendant's kidnapping convictions based solely on subsection (a) and citing *Loomer* during discussion about Model Penal Code). But these cases only serve to further highlight the inconsistency of the Wyoming Supreme Court's interpretations and applications of Wyoming's kidnapping statute.[8]

[7] In referring to "sufficient evidence," the Wyoming Supreme Court in *Doud* arguably implied—contrary to *Loomer*—that the burden of showing nonrelease was on the state. 845 F.3d at 408. A similar inconsistency appears in the court's statement that "[i]f the defendant fails to establish any one of the four elements contained in subsection (c), his crime *becomes punishable* by imprisonment for not less than [20] years." *Id.* at 407 (emphasis added). This statement suggests, again contrary to *Loomer*, that subsection (d) is not the base sentence.

[8] Additionally, the State and the majority both rely on *Rathbun v. State*, which referenced *Loomer* for the proposition that "[t]here is one crime—kidnapping—for which the maximum sentence is as stated in [s]ubsection (d)." 257 P.3d 29, 39 (Wyo. 2011). *Rathbun*'s reliance on *Loomer* doesn't permit the conclusion that *Loomer* is the single controlling interpretation of § 6-2-201 for the simple reason that *Rathbun* dealt with an attempted kidnapping. *See id.* at 31. And as the *Rathbun* court recognized, "where there has not been a completed kidnapping . . . the mitigating circumstances described in subsection (c) cannot occur." *Id.* at 38. Further, although *Rathbun* went on to opine that *Loomer*'s interpretation was constitutional, *see id.* at

Tellingly, the State does not deny these inconsistencies, instead suggesting that the conflicting cases are outliers.[9] But the sheer number of inconsistent cases and results suggests something much more than that. It reveals that the Wyoming Supreme Court has inconsistently interpreted and applied § 6-2-201 over the past 30 years. *Loomer* said that kidnapping was one crime comprising subsections (a) and (b), which, if met, required the sentence of 20 years to life in subsection (d); subsection (c) only provides mitigating circumstances. But in the decades since, the state has consistently charged aggravated kidnapping under subsection (d). Further, the state has consistently charged kidnapping under subsection (c) and its accompanying lesser sentence, even though subsection (c)—according to *Loomer*—concerns only mitigating circumstances. And notably, it appears from the above recitation of cases that the state is charging defendants with the nonexistent

38–39, this court is not bound by such a conclusion. *See Cunningham v. California*, 549 U.S. 270, 293 n.16 (2007) (rejecting argument that state court's "'construction' of [a state sentencing] law as consistent with the Sixth Amendment is authoritative," because state court's "interpretation of federal constitutional law plainly does not qualify for th[e] [United States Supreme] Court's deference").

[9] The majority ignores these "possible" inconsistencies, instead characterizing the above analysis of Wyoming kidnapping cases as irrelevant "second-guessing" that is focused "on whether . . . *Loomer* . . . is correct as a matter of state law." Maj. Op. 16, 23 n.13. But determining the governing interpretation of the state statute of conviction at issue in a habeas proceeding is a threshold inquiry of habeas review. And my point is not that the interpretation in *Loomer* or in any other case is correct or incorrect; nor do I quarrel with the legal proposition that habeas relief does not lie for errors of state law. *See, e.g.*, *Anderson-Bey v. Zavaras*, 641 F.3d 445, 448, 452–53 (10th Cir. 2011) (rejecting challenge to state-court interpretation of state statute in habeas proceeding). Instead, I review these cases to establish the significant inconsistencies in the Wyoming Supreme Court's interpretations and applications of Wyoming's kidnapping statute.

"aggravated kidnapping" charge under subsection (d) and then offering defendants reduced plea agreements to a similarly nonexistent "simple kidnapping" charge under subsection (c). Most importantly for our purposes, the Wyoming Supreme Court has repeatedly and consistently restated these facts and approved these convictions without mentioning *Loomer* or recognizing the seeming impossibility of such circumstances, post-*Loomer*.

It is true that state courts are the expositors of their own state law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). And in conducting the above analysis, I do not rely upon any error, apparent or otherwise, in these Wyoming cases. I aim only to highlight their significant inconsistencies. And when, as here, the state's highest court has interpreted its own state statute in an inconsistent and conflicting manner, I would not defer to any particular interpretation. Rather than ignore the inconsistencies or designate one interpretation as deserving of deference, I would interpret the statute anew. *See Rael v. Sullivan*, 918 F.2d 874, 877 (10th Cir. 1990) ("*In the absence of any indication to the contrary*, we cannot assume that the elements of extortion are different than those set forth in the instructions approved by New Mexico's courts." (emphasis added)); *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Inv., II, LLC*, 887 F.3d 1003, 1021 (10th Cir. 2018) ("In the absence of a *definitive* resolution of a legal issue by [the Colorado Supreme Court], our task is to predict how the Colorado Supreme Court would rule." (emphasis added) (citing *United States v. DeGasso*, 369 F.3d 1139, 1145 (10th Cir. 2004))); *cf. Breedlove v. Moore*, 279 F.3d 952, 963–64 (11th Cir. 2002) (deferring to state court's application

of state evidentiary law when that application "was completely consistent with prior [state] evidentiary law").[10]

II. The Constitution's Protections

The State's entire argument rises and falls with *Loomer*—the State does not argue that the kidnapping statute was constitutionally applied to Hawes in the absence of *Loomer*'s supposedly controlling interpretation. Nevertheless, in the interest of clarity, I briefly explain why the kidnapping statute, interpreted de novo, violated Hawes's constitutional rights.

I see three possible interpretations of § 6-2-201. Under the first, subsection (d) provides the default penalty for the single crime of kidnapping, and nonrelease is an element of that crime. Under the second, subsections (c) and (d) create distinct crimes, and subsection (d) addresses "aggravated" kidnapping and its corresponding penalty. Under either of these interpretations, nonrelease is an element of either the single crime of kidnapping or the more specific crime of aggravated kidnapping that

[10] Alternatively, because it seems that the Wyoming Supreme Court in *Loomer* "interpreted" its own state law by rewriting it, this case may also present the rare "extreme circumstance[]" in which federal courts are not "bound by the[] constructions" of state courts. *Mullaney*, 421 U.S. at 691; *see also id.* at 691 n.11 (citing *Terre Haute & Indianapolis R.R. Co. v. Indiana ex rel. Ketcham*, 194 U.S. 579 (1904) as one such "rare occasion[]"); *cf. Terre Haute & Indianapolis R.R. Co.*, 194 U.S. at 587, 589 ("The [charter's] language is plain. . . . The state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation."). After all, a state legislature cannot circumvent a defendant's constitutional rights by redefining elements as sentencing factors. *See Apprendi v. New Jersey*, 530 U.S. 466, 485 (2000). Similarly, a state's highest court should not be permitted to circumvent a defendant's constitutional rights by "interpreting" a statute to entirely ignore or erase an element or aggravating sentencing factor.

the state must prove beyond a reasonable doubt. *See Winship*, 397 U.S. at 364 (stating that due process "protects . . . against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [defendant] is charged"); *Mullaney*, 421 U.S. at 685 (holding that due process requires "prosecution [to] prove beyond a reasonable doubt every fact necessary to constitute the crime charged").

Under the third interpretation, subsection (d) provides an aggravating factor through which the state may seek an enhanced penalty—an enhanced penalty that both increases the mandatory minimum from zero to 20 years and increases the statutory maximum from 20 years to life in prison. Here, too, the fact of nonrelease is one that must be proved by the state beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 476 (holding that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt" (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999))); *Alleyne v. United States*, 570 U.S. 99, 111–16 (2013) (holding that any "facts increasing the mandatory minimum" must "be submitted to the jury and found beyond a reasonable doubt").

But in Hawes's case, the State was not held to its constitutionally mandated burden. No matter how § 6-2-201 is interpreted, the 20-to-life sentencing range in subsection (d) turns on the elemental factual predicate of nonrelease. But the Wyoming courts did not require the State to prove this factual predicate before sentencing Hawes within that range, to 30 years in prison. Accordingly, under any of

these interpretations, the result is the same: a violation of Hawes's constitutional rights. And the state district court's decision concluding otherwise was contrary to clearly established federal law. *See Winship*, 397 U.S. at 364; *Mullaney*, 421 U.S. at 685, 703; *Apprendi*, 530 U.S. at 476; *Alleyne*, 570 U.S. at 115–16.

Conclusion

Because we cannot defer to all of the Wyoming Supreme Court's conflicting interpretations and because the statute, as applied to Hawes, was unconstitutional, I would grant Hawes's habeas petition. Thus, I respectfully dissent.