NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GREGORY M. HAWES,

Petitioner,

v.

MICHAEL PACHECO,
Warden, Wyoming State Penitentiary,

and

WYOMING ATTORNEY GENERAL,

Respondents.

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

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

IN THE
SUPREME COURT OF THE UNITED STATES

Hawes v. Pacheco and Wyoming Attorney General

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

Tenth Circuit Court of Appeals
Decision

August 10, 2021

7 F.4th 1252
United States Court of Appeals, Tenth Circuit.

Gregory M. HAWES, Petitioner - Appellant,
v.
Michael PACHECO, Warden, Wyoming State Penitentiary; Wyoming Attorney General, Respondents - Appellees.

No. 19-8047
|
FILED August 10, 2021

Synopsis

Background: Following affirmance of Wyoming kidnapping conviction and sentence, denial of post-conviction relief in state court, and denial of petition for a writ of certiorari, petitioner filed federal habeas corpus petition. The United States District Court for the District of Wyoming, Alan B. Johnson, J., 2019 WL 11254539, dismissed petition. The Court of Appeals granted certificate of appealability (COA) on issue of whether application of Wyoming kidnapping statute to petitioner was constitutional under the Sixth and Fourteenth Amendments.

The Court of Appeals, Matheson, Circuit Judge, held that petitioner failed to show that state court unreasonably applied clearly established Supreme Court law, and thus petitioner was not entitled to federal habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA).

Affirmed.

Moritz, Circuit Judge, filed dissenting opinion.

Procedural Posture(s): Petition for Writ of Habeas Corpus.

***1255 Appeal from the United States District Court for the District of Wyoming (D.C. No. 1:17-CV-00052-ABJ)**

Attorneys and Law Firms

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.

Opinion

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, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (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 ***1256** 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, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (alteration in original) (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)); *see In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (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, 95 S.Ct. 1881, 44 L.Ed.2d 508 (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, 95 S.Ct. 1881. Under Maine law, murder required malice aforethought. *See id.* at 686, 95 S.Ct. 1881 n.3. Without malice aforethought, a "homicide would be manslaughter." *See id.* at 686, 95 S.Ct. 1881. 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, 95 S.Ct. 1881.

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, 95 S.Ct. 1881.

ii. *Patterson*

Two years later, in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (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, 97 S.Ct. 2319. Doing so would reduce the offense from second-degree murder to manslaughter. *See id.* at 198-99, 97 S.Ct. 2319.

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, 97 S.Ct. 2319. 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 ***1257** has never been constitutionally required." *Id.* [1]

iii. *Apprendi*

Nearly 25 years later, in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (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, 120 S.Ct. 2348. 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, 120 S.Ct. 2348. Under this statute, the defendant's maximum statutory punishment was 20 years. *See id.* at 469, 120 S.Ct. 2348.

The Court found the defendant's Sixth and Fourteenth Amendment rights had been violated. *See id.* at 476, 497, 120 S.Ct. 2348. It stated: "Other than the fact of a prior conviction, 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, 120 S.Ct. 2348.

iv. *Alleyne*

More recently, in *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), the Court extended its *Apprendi* holding. *See id.* at 111-12, 133 S.Ct. 2151. 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, 133 S.Ct. 2151. 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, 133 S.Ct. 2151. 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, 133 S.Ct. 2151. "*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, 133 S.Ct. 2151 (quoting *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348). But "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." *Id.* at 112, 133 S.Ct. 2151. "[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime." *Id.* at 114, 133 S.Ct. 2151. 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." ***1258** *Id.* at 114-15, 133 S.Ct. 2151. "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, 133 S.Ct. 2151. "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, 133 S.Ct. 2151.

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, 133 S.Ct. 2151.

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, 97 S.Ct. 2319, 53 L.Ed.2d 281), "the defendant has the burden of going forward with evidence to show that the circumstances exist," *id.*

***1259** 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. § 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, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006); *Patterson*, 432 U.S. at 205, 97 S.Ct. 2319; *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 ***1260** 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*, [570] U.S. [99], 133 S. Ct. 2151 [186 L.Ed.2d 314] [(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 ***1261** 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 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 [97 S.Ct. 2319, 53 L.Ed.2d 281] (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]

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. ***1262** *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 culpability or the severity of the punishment.' " *Id.* (quoting *Patterson*, 432 U.S. at 207, 97 S.Ct. 2319). 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 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 ***1263** 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. Trammell*, 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, 122 S.Ct. 1843, 152 L.Ed.2d 914 (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, 122 S.Ct. 1843. "[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, 122 S.Ct. 1843).

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, 131 S.Ct. 770, 178 L.Ed.2d 624 (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." ***1264** *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (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, 112 S.Ct. 475. 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, 126 S.Ct. 602, 163 L.Ed.2d 407 (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]

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* ***1265** *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]

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, 112 S.Ct. 475; *Bradshaw*, 546 U.S. at 76, 126 S.Ct. 602. [11]

* * * *

In sum, our task on habeas review is to "decid[e] whether a conviction violated the Constitution." *Estelle*, 502 U.S. at

68, 112 S.Ct. 475. 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, 120 S.Ct. 2348; *Alleyne*, 570 U.S. at 113 & n.2, 133 S.Ct. 2151. The state court followed *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.

***1266** 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, 97 S.Ct. 2319. 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 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, 126 S.Ct. 602.[13] ***1267** Again, the state court decision we review 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, 120 S.Ct. 2348; *Alleyne*, 570 U.S. at 113 & n.2, 133 S.Ct. 2151. 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, 120 S.Ct. 2348). And "the *effect* of 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, 120 S.Ct. 2348 (alteration in original) (quoting *Mullaney*, 421 U.S. at 698, 95 S.Ct. 1881). [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, 95 S.Ct. 1881 (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 it "has often recognized [the distinction] between facts ***1268** in aggravation of punishment and facts in mitigation." 530 U.S. at 490 n.16, 120 S.Ct. 2348 (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 defendant' to 'prove the critical fact in dispute,' " *id.* (quoting *Mullaney*, 421 U.S. at 701, 95 S.Ct. 1881). 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, 95 S.Ct. 1881. 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, 95 S.Ct. 1881.

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, 95 S.Ct. 1881. 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 ***1269** 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, 97 S.Ct. 2319. 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.

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, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The majority acknowledges that Hawes "makes colorable arguments" and further describes one of those arguments as having "some force." Maj. Op. 1255, 1268. 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. 1262. 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] ***1270** 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 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. 1265 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. 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 ***1271** 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 ***1272** 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 '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*, 396 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 ***1273** (c)"); *Appling v. State*, 377 P.3d 769, 769 (Wyo. 2016) (Mem.) (noting that defendant pleaded guilty to "one 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 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]

***1274** 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 "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, 95 S.Ct. 1881, 44 L.Ed.2d 508 (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 ***1275** 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 the state must prove beyond a reasonable doubt. *See Winship*, 397 U.S. at 364, 90 S.Ct. 1068 (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, 95 S.Ct. 1881 (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, 120 S.Ct. 2348 (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 ***1276** *Jones v. United States*, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999))); *Alleyne v. United States*, 570 U.S. 99, 111–16, 133 S.Ct. 2151, 186 L.Ed.2d 314 (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, 90 S.Ct. 1068; *Mullaney*, 421 U.S. at 685, 703, 95 S.Ct. 1881; *Apprendi*, 530 U.S. at 476, 120 S.Ct. 2348; *Alleyne*, 570 U.S. at 115–16, 133 S.Ct. 2151.

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.

All Citations

7 F.4th 1252

Footnotes

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, 97 S.Ct. 2319. 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, 97 S.Ct. 2319, the Maine statute was unconstitutional. Under the New York statute, though, "nothing was presumed or implied against [the defendant]." *Id.* at 216, 97 S.Ct. 2319. Thus, the Court upheld the application of the New York statute.

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*.

4 The court reversed the stalking conviction.

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.

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, 111 S.Ct. 2590, 115 L.Ed.2d 706 (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, 111 S.Ct. 2590), is the Wyoming district court's January 2017 order—reproduced above—dismissing Mr. Hawes's petition for post-conviction relief.

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.

8 Due process fairness may preclude certain state court interpretations of state law. *See Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (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, 121 S.Ct. 1693, 149 L.Ed.2d 697 (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 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 1271. 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 1271–72, "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 71-72, 112 S.Ct. 475)); *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, 112 S.Ct. 475)). 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, 95 S.Ct. 1881 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129, 65 S.Ct. 1475, 89 L.Ed. 569 (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).

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, 132 S.Ct. 38, 181 L.Ed.2d 336 (2011) (emphasis and quotations omitted). *Alleyne*, *Apprendi*, and *Mullaney* were decided before the state court decision here.

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 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.").

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, 120 S.Ct. 2348 (quoting *State v. Apprendi*, 159 N.J. 7, 731 A.2d 485, 492 (1999), *rev'd*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (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, 120 S.Ct. 2348 (quoting 731 A.2d at 492).

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, 112 S.Ct. 475; *Bradshaw*, 546 U.S. at 76, 126 S.Ct. 602 (2005).

16 The dissent only briefly addresses AEDPA: "[T]he state district court's decision ... was contrary to clearly established federal law." Dissent at 1276. 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.

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

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, 111 S.Ct. 461, 112 L.Ed.2d 449 (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, 75 S.Ct. 513, 99 L.Ed. 615 (1955))). Yet *Loomer* seemingly ignored this principle in disregarding the factual predicate in subsection (d).

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)).

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.

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").

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 P.2d 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 38–39, this court is not bound by such a conclusion. *See Cunningham v. California*, 549 U.S. 270, 293 n.16, 127 S.Ct. 856, 166 L.Ed.2d 856 (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. 1262–63, 1266–67 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.

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, 95 S.Ct. 1881; *see also id.* at 691 n.11, 95 S.Ct. 1881 (citing *Terre Haute & Indianapolis R.R. Co. v. Indiana ex rel. Ketcham*, 194 U.S. 579, 24 S.Ct. 767, 48 L.Ed. 1124 (1904) as one such "rare occasion[ ]"); *cf. Terre Haute & Indianapolis R.R. Co.*, 194 U.S. at 587, 589, 24 S.Ct. 767 ("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, 120 S.Ct. 2348, 147 L.Ed.2d 435 (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.

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IN THE
SUPREME COURT OF THE UNITED STATES

Hawes v. Pacheco and Wyoming Attorney General

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

Tenth Circuit Court of Appeals
Order denying Petition for Rehearing

November 12, 2021

FILED
United States Court of Appeals
Tenth Circuit

November 12, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GREGORY M. HAWES,

Petitioner - Appellant,

v.

MICHAEL PACHECO, Warden, Wyoming State Penitentiary, et al.,

Respondents - Appellees.

No. 19-8047
(D.C. No. 1:17-CV-00052-ABJ)
(D. Wyo.)

ORDER

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

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

Hawes v. Pacheco and Wyoming Attorney General

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

United States Supreme Court
Order Granting Extension of Time to File Petition for a Writ of Certiorari

January 25, 2022

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 25, 2022

Clerk
United States Court of Appeals for the Tenth
Circuit
Byron White Courthouse
1823 Stout Street
Denver, CO 80257

Re: Gregory M. Hawes
v. Michael Pacheco, Warden, et al.
Application No. 21A362
(Your No. 19-8047)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Gorsuch, who on January 25, 2022, extended the time to and including March 14, 2022.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Clayton Higgins
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. John Carl Arceci
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633 17th Street
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Denver, CO 80202

Mrs. Elizabeth B. Prelogar
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

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IN THE
SUPREME COURT OF THE UNITED STATES

Hawes v. Pacheco and Wyoming Attorney General

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

Tenth Circuit Court of Appeals
Order Granting In Part Certificate of Appealability

February 3, 2020

FILED
United States Court of Appeals
Tenth Circuit

February 3, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

GREGORY M. HAWES,

Petitioner - Appellant,

v.

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

Respondents - Appellees.

No. 19-8047
(D.C. No. 1:17-CV-00052-ABJ)
(D. Wyoming)

ORDER GRANTING IN PART CERTIFICATE OF APPEALABILITY[*]

Before **BRISCOE**, **McHUGH** and **MORITZ**, Circuit Judges.

Gregory M. Hawes, a prisoner in Wyoming state custody proceeding pro se,[1] seeks a Certificate of Appealability ("COA") to challenge the district court's dismissal of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Mr. Hawes also moves to supplement the record on appeal and to stay this appeal to procure trial transcripts. He has separately filed a document styled "Petition Requesting Plenary Review." We issue a

[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and 10th Circuit Rule 32.1.

[1] Because Mr. Hawes is proceeding pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

COA to consider whether Wyo. Stat. Ann. § 6-2-201 is constitutional. We deny Mr. Hawes's motion to supplement the record, motion to stay this appeal, and request for plenary review.

I. BACKGROUND

A. Factual History

On January 26, 2013, Mr. Hawes forcibly entered the residence of his estranged wife ("Ms. Hawes") and pushed her against the freezer with his arm against her throat. He then moved her into the bedroom, tied her hands and feet to the bed, and gagged her. Mr. Hawes threatened to kill her and then commit suicide. After consuming Xanax and wine, he removed the gag from Ms. Hawes's mouth and freed her hands with scissors. Ms. Hawes took the scissors, freed her feet, and ran out of the home towards her neighbor's house. Mr. Hawes chased after her and, at some point, grabbed hold of her coat. Ms. Hawes was able to escape and reach her neighbor's house. Ms. Hawes and her neighbor then called the police.

B. Procedural History

The Campbell County Attorney's Office filed an information charging Mr. Hawes with stalking, kidnapping, and aggravated assault and battery.[2] The trial court instructed the jury that, if it found Mr. Hawes guilty of kidnapping, it then needed to consider whether he had: (1) voluntarily released the victim (2) substantially unharmed (3) in a

[2] The record filed with this court does not include a copy of the information, the jury instructions, or the verdict form. Mr. Hawes's motion to supplement the record includes the jury instructions, the verdict form, and a single page of the information. We address the sufficiency of this record later in this order.

safe place (4) prior to trial. The trial court further instructed the jury that Mr. Hawes bore the burden of proving these four factors by a preponderance of the evidence.

The jury found Mr. Hawes guilty of stalking and kidnapping, and further found that Mr. Hawes did not voluntarily release his wife substantially unharmed and in a safe place prior to trial ("safe release").[3] Wyoming's kidnapping statute provides that a defendant who satisfies the four elements of safe release may be sentenced to "not more than twenty (20) years," and a defendant who does not satisfy those elements may be sentenced to "not less than twenty (20) years or for life." Wyo. Stat. Ann. § 6-2-201 (West 2019). The trial court sentenced Mr. Hawes to 5 to 9 years imprisonment on the stalking charge, and 30 years to life on the kidnapping charge, to run consecutively.

Mr. Hawes appealed to the Wyoming Supreme Court, which affirmed in-part and reversed in-part. Specifically, the court reversed the stalking conviction for insufficient evidence but affirmed the kidnapping conviction. With respect to the question of safe release, the court assigned Mr. Hawes the burden of proof and affirmed the jury's finding.

On remand, the trial court amended its sentencing order but retained the sentence of 30 years to life on the kidnapping charge. Mr. Hawes then filed two motions to correct an illegal sentence, both of which the trial court denied. He again appealed to the Wyoming Supreme Court, which affirmed. Mr. Hawes then unsuccessfully petitioned the United States Supreme Court for certiorari.

[3] The jury found Mr. Hawes not guilty of aggravated assault and battery.

Between August 2015 and May 2016, Mr. Hawes filed a series of requests with the Wyoming trial court eventually culminating in a court-ordered 162-page consolidated petition for post-conviction relief. On January 20, 2017, the trial court denied Mr. Hawes's consolidated petition. The trial court began its analysis by sorting Mr. Hawes's various claims into twenty-four categories. Those claims included: eleven reasons why Hawes received ineffective assistance of trial counsel; two reasons why Hawes received ineffective assistance of appellate counsel; a challenge to the sufficiency of the evidence; a challenge to the jury instructions; three reasons why the charging documents were inadequate; and cumulative error.

The trial court then proceeded to analyze each claim, finding some to be procedurally barred and others to fail on the merits. First, the trial court refused to entertain Mr. Hawes's challenges to the sufficiency of the evidence and to the jury instructions because those arguments had been addressed previously in his direct appeal to the Wyoming Supreme Court. Second, the trial court reasoned that it was not ineffective assistance for Mr. Hawes's counsel not to raise his remaining arguments in the direct appeal, because each of those arguments lacked merit.

The trial court specifically rejected Mr. Hawes's argument that it was unconstitutional to assign him the burden of proof on the question of safe release. The trial court explained that "the Legislature's decision to require defendants to prove mitigation, rather than requiring the State to prove aggravation, is constitutionally permitted." ROA, Vol. I at 486 (citing *Loomer v. State*, 768 P.2d 1042 (Wyo. 1989), and *Patterson v. New York*, 432 U.S. 197 (1977)). The trial court also rejected as meritless

Mr. Hawes's argument that the information provided him inadequate notice of the charges and failed to allege each element of kidnapping.

Mr. Hawes unsuccessfully petitioned the Wyoming Supreme Court for certiorari. In its order denying the petition, the Wyoming Supreme Court "agree[d] with the district court that [Mr. Hawes's] petition for post-conviction relief should be denied." ROA, Vol. I at 658.

On March 24, 2017, Mr. Hawes filed a 28 U.S.C. § 2254 petition for a writ of habeas corpus in federal district court. Warden Michael Pacheco and the Wyoming Attorney General ("respondents") answered the petition. Mr. Hawes then attempted to file a reply, together with attachments. Those attachments included copies of the information, jury instructions, and verdict form. The respondents moved to strike Mr. Hawes's reply for failure to comply with Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts ("Section 2254 Rules"), which the district court granted. The respondents also filed a motion for summary judgment, which the district court granted.

The district court started its analysis by grouping Mr. Hawes's claims into categories and subcategories. Those claims included: eight reasons why Mr. Hawes received ineffective assistance of trial counsel; four reasons why Mr. Hawes received ineffective assistance of appellate counsel; a challenge to the specificity of the information; two reasons why the jury instructions on kidnapping impermissibly shifted the burden of proof; three challenges to the sufficiency of the evidence; an argument that

the Wyoming kidnapping statute is unconstitutionally vague; and an assertion of cumulative error.

The district court first found that Mr. Hawes had failed to exhaust his vagueness argument because he had never presented it to any Wyoming court. The district court then rejected Mr. Hawes's other claims on the merits, including his argument that safe release is an element of kidnapping that the government must prove beyond a reasonable doubt. The district court additionally denied Mr. Hawes a COA. Mr. Hawes moved for reconsideration, which the district court denied.

Mr. Hawes then appealed to this court. We granted a limited COA and reversed the district court because it had improperly issued a "hybrid disposition" by dismissing unexhausted claims "while ruling on the merits of exhausted claims." *Hawes v. Pacheco*, 737 F. App'x 905, 906 (10th Cir. 2018) (unpublished). We therefore remanded for additional proceedings.

On May 17, 2018, Mr. Hawes filed a second petition for habeas corpus in state court that advanced two claims. First, Mr. Hawes renewed his argument that the kidnapping statute is unconstitutional because it places the burden to show safe release on the defendant. Second, Mr. Hawes argued that the kidnapping statute is void-for-vagueness.[4]

On April 10, 2019, the state court dismissed Mr. Hawes's second petition. The court determined that both of Mr. Hawes's claims were barred by res judicata because his

[4] On remand from this court, the district court stayed Mr. Hawes's § 2254 petition until the state court resolved his second habeas petition.

first claim was raised, and his second claim could have been raised, in his direct appeal. In the alternative, the court held that both of Mr. Hawes's arguments failed on the merits.

On July 16, 2019, the district court dismissed Mr. Hawes's § 2254 petition with prejudice. The district court found that Mr. Hawes's void-for-vagueness argument was "procedurally barred under Wyoming law due to his failure to raise the claim in his first petition for state post-conviction relief." ROA, Vol. III at 102. The district court then considered and found inapplicable the various exceptions to the procedural default rule. Lastly, the district court incorporated by reference its prior order dismissing the other claims raised in Mr. Hawes's § 2254 petition. It again declined to issue a COA.

Mr. Hawes filed a notice of appeal on August 13, 2019.

II. ANALYSIS

Mr. Hawes raises five issues in his application for a COA: (1) the Wyoming kidnapping statute violates the Sixth and Fourteenth Amendments because it places the burden on the defendant to prove safe release; (2) the information was deficient because it failed to allege each element of kidnapping; (3) the jury instructions were deficient because they failed to instruct the jury on each element of kidnapping and otherwise misstated the law; (4) the evidence at trial was insufficient for the jury to convict Mr. Hawes of kidnapping; and (5) Mr. Hawes's sentence is unlawful because the Wyoming kidnapping statute violates the Sixth Amendment.

A. Motion to Supplement the Record

Before we decide whether to grant a COA, we first address a preliminary matter. The record on appeal does not include a copy of the information or jury instructions from

Mr. Hawes's trial. In this circuit, "[w]hen the appellant is pro se, the court prepares and dockets a record on appeal compiled in accordance with 10th Cir. R. 10.4." 10th Cir. R. 10.1. Rule 10.4(C) states that "[e]very record on appeal . . . must include: . . . the indictment or information" and "all jury instructions when an instruction is at issue on appeal."

We have reviewed the district court docket, and the record on appeal appears to include all the materials properly submitted to the district court for its consideration. Yet, to reiterate, those materials do not include the information or jury instructions.

On September 23, 2019, Mr. Hawes filed a motion to supplement the record on appeal, together with the jury instructions and verdict form used at his trial, as well as a single page excerpted from the information. In that motion, Mr. Hawes also directed our attention to his stricken reply in the district court, which included as attachments a full copy of the information, jury instructions, and verdict form. Because the district court struck the reply for failure to comply with Rule 5(e) of the Section 2254 Rules, the record before the district court did not include either the reply brief or its attachments, including the information and jury instructions.

The district court proceeded to rule on the merits of Mr. Hawes's § 2254 petition, noting that the petition presented several challenges to the information and jury instructions. The district court then rejected those challenges on the merits, in part because they were "intertwined with" Mr. Hawes's constitutional challenge to the Wyoming kidnapping statute. ROA, Vol. II at 56.

Mr. Hawes's challenges to the information and jury instructions were not so intertwined with his challenge to the kidnapping statute that the district court could address the merits without examining those documents. For example, in "Ground Three" of Mr. Hawes's § 2254 petition, he argued that the information was "insufficient" because it failed to specify, among other things, "how the unlawful confinement was supposedly accomplished" and "the bodily injury that was to have been inflicted or how it was to be inflicted." ROA, Vol. I at 38. Likewise, in "Ground Seven," Mr. Hawes argued that the jury instructions misstated the degree of criminal intent required to convict him of kidnapping. To reach decision on those claims, the district court likely relied on the attachments to Mr. Hawes's stricken reply. But neither the jury instructions nor the information was made a part of the record in the district court. Thus, as the record now exists, we cannot rely on such materials on appeal. *Cf. Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1475 (10th Cir. 1993) (explaining that evidence "not filed below or presented to the district court could not properly be considered by the court and, *ipso facto*, cannot be considered by us in reviewing the court's judgment").

We could remand to the district court for the sole purpose of adding the missing materials to the docket, but we need not do so. Instead, we take judicial notice of the information and jury instructions. "Judicial notice may be taken at any time, including on appeal." *United States v. Burch*, 169 F.3d 666, 671 (10th Cir. 1999). "Although we are not obliged to do so, we may exercise our discretion to take judicial notice of publicly-filed records in our court and certain other courts concerning matters that bear directly upon the disposition of the case at hand." *United States v. Ahidley*, 486 F.3d 1184, 1192

n.5 (10th Cir. 2007). Those records include but are not limited to the "indictment, jury verdict, Presentence Report, Statement of Reasons, and judgment" in prior criminal proceedings. *United States v. Horner*, 769 F. App'x 528, 531 n.1 (10th Cir. 2019) (unpublished). Accordingly, we take judicial notice of the jury instructions and information here and deny Mr. Hawes's motion to supplement the record as moot.

We now consider whether Mr. Hawes is entitled to a COA.

B. Certificate of Appealability

"[A] prisoner seeking postconviction relief under 28 U.S.C. § 2254 has no automatic right to appeal a district court's denial or dismissal of the petition." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). "Instead, [a] petitioner must first seek and obtain a COA." *Id.* To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).[5]

[5] The district court also dismissed one of Mr. Hawes's claims as procedurally defaulted, finding that Wyoming's application of res judicata—in his second state post-conviction proceeding—to his void-for-vagueness challenge was an independent and adequate procedural bar that foreclosed federal habeas review of that issue. In this appeal, Mr. Hawes has "omitted his vagueness claim," and we therefore do not discuss it further. Hawes Br. at 6 n.1.

C. The Constitutionality of the Wyoming Kidnapping Statute

Mr. Hawes's first and fifth arguments to this court are substantively identical: namely, that 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. The district court rejected this argument because, in its view, safe release is a sentence mitigator, not an element of kidnapping.

Reasonable jurists would find the district court's conclusion debatable. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court explained that the Sixth and Fourteenth Amendments "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.'" *Id.* at 477 (alteration in original) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). The Court further held that, "[o]ther than the fact of a prior conviction, 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.

In *Alleyne v. United States*, 570 U.S. 99 (2013), the Court clarified that "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." *Id.* at 112. The Court based this conclusion on two observations: first, "[i]t is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime," and second, "it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment." *Id.* at 112–13.

Reasonable jurists could conclude that Wyo. Stat. Ann. § 6-2-201 violates the Sixth and Fourteenth Amendments. A defendant who proves safe release faces no mandatory minimum term of imprisonment, whereas a defendant who does not prove safe release faces a mandatory minimum of 20 years.

The district court upheld § 6-2-201 based on the Wyoming Supreme Court's decision in *Loomer* and the Supreme Court's decision in *Patterson*. In *Loomer*, the Wyoming Supreme Court explained that the safe release portion of the Wyoming kidnapping statute "describes mitigating circumstances rather than elements of the offense." 768 P.2d at 1046. And in *Patterson*, the Supreme Court upheld a New York statute that placed the burden on the defendant to prove an extreme emotional disturbance defense to murder. 432 U.S. at 210. The Court explained, "[i]f [a] State . . . chooses to recognize a factor that mitigates the degree of criminality or punishment, . . . [a] State may assure itself that the fact has been established with reasonably certainty." *Id.* at 209.

The Wyoming Supreme Court's description of safe release as a mitigating circumstance is not determinative of the Sixth Amendment inquiry. In *Apprendi*, the Court rejected the notion that a state could circumvent the Sixth Amendment "by 'redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.'" *Apprendi*, 530 U.S. at 485 (alteration in original) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)). Under § 6-2-201, safe release alters the maximum *and* minimum penalties for kidnapping. Reasonable jurists could therefore disagree with the district court's analysis, because it analyzed § 6-2-201 as if safe release merely reduces the statutory maximum.

Reasonable jurists could also debate whether § 6-2-201 is saved by the Supreme Court's decision in *Patterson*. In *Apprendi*, the majority and principal dissent engaged in a vigorous debate over the meaning of *Patterson*. *Compare Apprendi*, 530 U.S. at 485 n.12, *with id.* at 530–32 (O'Connor, J., dissenting). By contrast, the portions of Justice Thomas's *Alleyne* opinion joined by a majority of the Court did not mention *Patterson*; instead, Justice Thomas explained that "the essential Sixth Amendment inquiry is whether a fact is an element of the crime." *Alleyne*, 570 U.S. at 114. Aggravating facts that produce a higher sentencing range are, by definition, "element[s] of a distinct and aggravated crime." *Id.* at 116. Those facts "must, therefore, be submitted to the jury and found beyond a reasonable doubt." *Id.* Because reasonable jurists would find the district court's assessment of Mr. Hawes's Sixth Amendment claim debatable, we must grant a COA to address that claim.

D. The Information

Mr. Hawes's second argument before us challenges the adequacy of the information. Specifically, Mr. Hawes contends that the information failed to specify that he "knowingly" committed the crime of kidnapping by "force, threat or deception." Hawes Br. at 21–23 (quoting Wyo. Stat. Ann. § 6-2-201). Reasonable jurists could not debate whether the information violated Mr. Hawes's Sixth Amendment rights.

The Sixth Amendment guarantees criminal defendants a right "to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. An information falls short of that right when "the defendant could not have anticipated from the allegations in the [information] what the evidence would be at trial." *United States v. Moore*, 198 F.3d

793, 796 (10th Cir. 1999). Here, the information alleged that on a specific date—January 26, 2013—Mr. Hawes "unlawfully confine[d] another person, with the intent to facilitate the commission of a felony or inflict bodily injury on or to terrorize the victim."

Mr. Hawes's assertion that the information needed to include the words "force, threat or deception" is incorrect. The kidnapping statute defines a removal or confinement as "unlawful if it is accomplished . . . [b]y force, threat or deception." Wyo. Stat. Ann. § 6-2-201(b). In turn, the information alleged that Mr. Hawes "unlawfully" confined another person. It did not also need to include the statutory definition of that term. Mr. Hawes's claim that the word "knowingly" was omitted is also meritless; the information specified that he acted with unlawful intent, and further specified the object of that intent, *i.e.*, to "inflict bodily injury on or to terrorize the victim." We therefore decline to issue a COA on this claim.

E. The Jury Instructions

Mr. Hawes's third argument is that the jury instructions omitted elements of kidnapping, including "force, threat or deception"; "knowingly"; and "intent to . . . facilitate the commission of a felony." Hawes Br. at 26–28. He also argues that the jury instructions erroneously communicated to the jury that it could convict him without finding specific intent. Reasonable jurists could not debate whether the jury instructions denied Mr. Hawes due process, except to the extent the instructions reflected any Sixth Amendment defect in Wyo. Stat. Ann. § 6-2-201.

Jury Instruction No. 9 stated:

> The elements of Kidnapping are:

1. On or about January 26, 2013;
2. In Campbell County, Wyoming;
3. The defendant, Gregory M. Hawes;
4. Unlawfully confined Donna Hawes;
5. With the intent to inflict bodily injury on or to terrorize Donna Hawes.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty of Kiddnapping (sic). If, on the other hand, you find from your consideration of all of the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should consider the lesser included offense of Restraint and the lesser included offense of False Imprisonment.

Jury Instruction No. 16 further explained that "[a]n act is 'knowingly' or 'intentionally' done if it is done voluntarily and purposely; not accidentally, because of a mistake, inadvertence, or for some other innocent reason." Jury Instruction No. 19 explained that if the jury found Mr. Hawes guilty of kidnapping, it then also needed to find whether he had proven the four elements of safe release by a preponderance of the evidence.

The Supreme Court has explained that a defendant who "seeks to show constitutional error from a jury instruction that quotes a state statute" faces an "'especially heavy' burden." *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977)). "Even if there is some 'ambiguity, inconsistency, or deficiency' in the instruction, such an error does not necessarily constitute a due process violation." *Id.* (quoting *Middleton v. McNeil*, 541 U.S. 433, 437 (2004)). "Rather, the defendant must show both that the instruction was ambiguous and that there was 'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a

reasonable doubt." *Id.* at 190–91 (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). Additionally, "a misstatement of an element in jury instructions is subject to harmless error analysis on habeas review." *Scoggin v. Kaiser*, 186 F.3d 1203, 1207 (10th Cir. 1999). "Error is harmless if it 'appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Gardner v. Galetka*, 568 F.3d 862, 885 (10th Cir. 2009) (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)).

Mr. Hawes first argues that the jury instructions needed to include the phrase "force, threat or deception." Hawes Br. at 27. We assume without deciding that Mr. Hawes is correct but nevertheless find that any error arising from that omission was harmless. Again, the kidnapping statute defines a removal or confinement as "unlawful if it is accomplished . . . [b]y force, threat or deception." Wyo. Stat. Ann. § 6-2-201(b). Jury Instruction No. 9 correctly listed unlawful confinement as one of the elements of kidnapping but did not explain that a confinement is unlawful only if accomplished by "force, threat or deception."

Any error in the omission of the phrase "force, threat or deception" was harmless. The evidence that Mr. Hawes employed force against Ms. Hawes on January 26, 2013, was overwhelming. He forcibly entered her residence, pushed her against the freezer, moved her into the bedroom, tied her hands and feet to the bed, and gagged her. We are therefore convinced beyond a reasonable doubt that any jury confusion over the definition of unlawful confinement had no effect on its verdict.

Nor did the jury instructions need to include the word "knowingly." Jury Instruction No. 9 correctly listed "the intent to inflict bodily injury on or to terrorize" as

one of the elements of kidnapping. Jury Instruction No. 16 explained that an act is done knowingly or intentionally "if it is done voluntarily and purposely." Together, these instructions adequately communicated to the jury the level of intent it needed to find to convict Mr. Hawes of kidnapping.

Finally, we reject Mr. Hawes's argument that the jury instructions needed to include the phrase "intent to . . . facilitate the commission of a felony." The instructions did include the phrase "intent to inflict bodily injury on or to terrorize," and the kidnapping statute makes clear that either of these two mental states is enough to convict. *See* Wyo. Stat. Ann. § 6-2-201(a).

Mr. Hawes next argues that the jury instructions erroneously described general intent, when kidnapping is a specific intent crime. But Jury Instruction No. 9 used intent language drawn directly from the kidnapping statute, *i.e.*, "[w]ith the intent to inflict bodily injury on or to terrorize." Moreover, Jury Instruction No. 16 specifically referenced acts done "knowingly" or "intentionally," not recklessly or negligently. Thus, Jury Instruction No. 16 described specific intent. *See Intent*, Black's Law Dictionary (11th ed. 2019). Mr. Hawes quotes *Pearson v. State*, 389 P.3d 794 (Wyo. 2017), for the proposition that "a specific intent crime cannot be proven with a general intent standard," *id.* at 798, but he does not explain how these jury instructions communicated a general intent standard.

Mr. Hawes's other arguments regarding the jury instructions are derivative of his constitutional challenge to the kidnapping statute, discussed above. We therefore decline

to issue a COA on this claim except to the extent it is intertwined with Mr. Hawes's Sixth Amendment challenge to Wyo. Stat. Ann. § 6-2-201.

F. The Sufficiency of the Evidence

Mr. Hawes's fourth argument is a challenge to the sufficiency of the evidence. The district court rejected this argument in a single sentence, stating that Mr. Hawes "failed to prove any authority or evidence to conclude no rational trier of fact could have agreed with the jury verdict." ROA, Vol. II at 67. The district court also treated Mr. Hawes's sufficiency argument as largely derivative of his Sixth Amendment challenge to the kidnapping statute.

We agree with the district court that Mr. Hawes's § 2254 petition challenged the sufficiency of the evidence only as a subcomponent of his challenges to the jury instructions and to the kidnapping statute. That is, Mr. Hawes argued in the district court that the evidence against him was insufficient because it was unconstitutional to assign him the burden of proof on the question of safe release.[6]

Mr. Hawes relatedly argues that the guilty verdict entered on the kidnapping charge cannot stand because it is inconsistent with the not guilty verdict entered on the aggravated assault and battery charge. The district court recognized that Mr. Hawes had raised this argument in his § 2254 petition but did not specifically address it.

[6] In his application for a COA, Mr. Hawes also disputes the Wyoming Supreme Court's account of the facts. But Mr. Hawes did not raise these factual contentions in his § 2254 petition to the district court, and "we do not address arguments presented for the first time on appeal." *United States v. Moya*, 676 F.3d 1211, 1213 (10th Cir. 2012) (quotation marks omitted).

We nevertheless deny a COA on this claim because reasonable jurists would not find it debatable whether inconsistent verdicts may provide the basis for a successful § 2254 petition. In *Harris v. Rivera*, 454 U.S. 339 (1981), the Supreme Court held that—in the habeas context—inconsistent verdicts do not "create a constitutional defect in a guilty verdict that is supported by sufficient evidence and is the product of a fair trial." *Id.* at 344. We therefore decline to issue a COA on this claim, which we may do on any ground adequately supported by the record. *See Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005).

III. CONCLUSION

For the foregoing reasons, we **GRANT** a COA to consider Mr. Hawes's argument that Wyo. Stat. Ann. § 6-2-201 violates the Sixth and Fourteenth Amendments.[7] But we **DENY** a COA on the remaining issues in Mr. Hawes's application, including deficiencies in the criminal information, deficiencies in the jury instructions other than Mr. Hawes's Sixth Amendment challenge, and insufficient evidence.

By this order we also instruct the Clerk to explore Mr. Hawes's eligibility for appointment of CJA counsel and to set a schedule for supplemental briefing.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

[7] Mr. Hawes's motion to supplement the record is **DENIED** as moot. Mr. Hawes's petition requesting plenary review is **DENIED**. Mr. Hawes's motion for leave of court for extension of time and to stay the proceedings to procure trial transcripts is also **DENIED**.

IN THE
SUPREME COURT OF THE UNITED STATES

Hawes v. Pacheco and Wyoming Attorney General

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

U.S. District Court for the District of Wyoming

Order Lifting Stay on Petitioner's 28 U.S.C. § 2254 Petition,
Vacating Previous Order & Judgement, and
Dismissing § 2254 Petition with Prejudice

July 16, 2019

Doc. No. 111; Vol. 3 at 97-146

(selected portions, pages 133-136)

The majority of the arguments presented by Petitioner in support of his request for federal habeas relief assert 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. He is thus, in effect, arguing the prosecution must disprove a sentencing mitigator before securing a conviction. And his asserted interpretation of the statute is intertwined with at least a portion of his ineffectiveness of counsel claims, at both trial and on appeal, as well as his challenge to the sufficiency of the charging documents, the evidence, and the jury instructions. [Doc. 1 at 11, 22, 28, 33, 34, 36, 37, 39, 40, 42, 46, 53, 57, 58, 63].

The Wyoming kidnaping statute provides:

> (a) A person is guilty of kidnaping 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) [. . .]
>
> (c) If the defendant voluntarily releases the victim substantially unharmed and in a safe place prior to trial, kidnaping 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, kidnaping 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.

Wyo. Stat. Ann. § 6-2-201.

The interpretation by Petitioner, which argues the statute presumes kidnaping is punishable under section (c) **unless** the prosecution proves the factors enunciated in (d) beyond a reasonable doubt, is clearly inconsistent with the language of the statute itself, as well as the dictates of the Constitution. *See, e.g., Patterson v. New York*, 432 U.S. 197, 210 (1977)(declining "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."); *Jones v. United States*, 526 U.S. 227, 241 (1999)(quoting *Patterson v. New York*, 432 U.S. at 210). Rather, as recognized by the Wyoming Supreme Court, the kidnaping statute:

> defines a single crime, kidnaping, which carries a sentence of 20 years to life but **provides for a reduced sentence based upon defendant's conduct subsequent to the kidnaping**. Thus, subsection (c) provides for a lesser sentence if four conditions are established: (1) the defendant voluntarily releases the victim, (2) substantially unharmed, (3) in a safe place, (4) prior to trial. If any of these four conditions are not met, the lesser-sentence provision is not applicable.
>
> [. . .] The statute provides a means for reducing a defendant's possible sentence after he has committed the crime of kidnaping. Defendant is the only person who will benefit from showing that mitigating circumstances are present. Therefore, the defendant has the burden of going forward with

> evidence to show that the circumstances exist. The burden of showing mitigating circumstances which are not an element of the offense may be placed on a defendant without violating due process requirements.

Loomer v. State, 768 P.2d 1042, 1046, 1047 (Wyo. 1989) (citations omitted and emphasis added); *Hawes v. State*, 335 P.3d at 1077. The Wyoming decisions thus merely apply the previously noted constitutional rule the prosecution need not "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." *Patterson v. New York*, 432 U.S. at 210.

Petitioner attempts to distinguish this rule, however, the cases he cities are neither applicable, nor do they show the Wyoming state court decisions are contrary to, or an unreasonable application of, clearly established constitutional law.

The United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) concluded any fact which increases a criminal penalty **beyond the statutory maximum** must be found by jury beyond a reasonable doubt. *United States v. Clayton*, 659 Fed. Appx. 963, 964 (10th Cir. 2016)(citing *Apprendi*.) The Wyoming kidnaping statute does not, however, permit any upward departure, or **aggravation**, from the statutory maximum without a jury finding. *Compare Apprendi* with Wyo. Stat. Ann. § 6-2-201 and *Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013)(considering a scheme in which judge found upward departure from maximum). And there is, in addition a further distinguishing factor, *i.e.*, in Petitioner's case the jury was presented with the question of mitigation, and did not

find any to exist. The Wyoming scheme is thus doubly distinguishable as it involves a mitigator, not an aggravator, and it puts the question to the jury, not a judge. It affords a jury the right to find **mitigation** in an appropriate case.

Petitioner 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. The 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 culpability or the severity of the punishment." *Patterson v. New York*, 432 U.S. at 207. It was, therefore, not a violation of clearly established constitutional law for the jury to reject Petitioner's argument his victim's successful escape from his pursuit amounted to his voluntary decision to release her substantially unharmed.

Petitioner has alleged he received ineffective assistance from both his trial and appellate counsel. He, in order to establish a viable ineffective assistance of counsel claim, "must show both deficient performance by counsel and prejudice." *Knowles v. Mirzayance*, 556 U.S. 111, 122, (2009).

"To establish a claim for ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was constitutionally deficient, and (2) counsel's deficient performance was prejudicial." *United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)); *Harrington v. Richter*, 562 U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

Hawes v. Pacheco and Wyoming Attorney General

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

Wyoming Supreme Court

Order Denying Petition for Writ of Certiorari/Review

February 22, 2017

Doc. No. 9-26; Vol. 1 at 658-659

IN THE SUPREME COURT, STATE OF WYOMING

October Term, A.D. 2016

GREGORY MICHAEL HAWES,	
Petitioner,	
v.	**S-17-0038**
THE STATE OF WYOMING,	
Respondent.	

ORDER DENYING PETITION FOR WRIT OF CERTIORARI/REVIEW

This matter came before the Court upon a "Petition for Writ of Certiorari/Review," filed herein February 6, 2017. After a careful review of the petition, the materials attached thereto, and the file, this Court first finds that Petitioner's various motions should be denied. With respect to Petitioner's "Motion for Permission to Amend Petition for Writ of Review," this Court notes that, on February 16, 2017, Petitioner filed an "Amendment of Petition for Writ of Certiorari/Review in Opposition to the Sixth Judicial District Court's Findings of Fact and Conclusions of Law." In that "Amendment of Petition …," Petitioner takes issue with many of the district court's findings and rulings in its "Findings of Fact, Conclusions of Law, and Order Granting Respondent's Consolidated Motion Regarding Petition for Post-Conviction Relief." After considering the "Amendment of Petition …," this Court finds there is no need to grant the Motion for Permission to Amend Petition for Writ of Review. Finally, this Court finds the petition should be denied. This Court finds the district court, in its "… Order Granting Respondent's Consolidated Motion Regarding Petition for Post-Conviction Relief," carefully considered Petitioner's claims. This Court agrees with the district court that Petitioner's petition for post-conviction relief should be denied. It is, therefore,

ORDERED that Gregory Michael Hawes be allowed to proceed in this matter *in forma pauperis*; and it is further

ORDERED that the "Motion for Appointment of Counsel for Evidentiary Hearing on Petition for Writ of Review," filed herein February 6, 2017, be, and hereby is, denied. *Patrick v. State*, 2005 WY 32, ¶ 17, 108 P.3d 838, 844 (Wyo. 2005); Wyo. Stat. Ann. § 7-14-104(c); and it is further

ORDERED that the "Motion for Evidentiary / Calene Hearing," filed herein February 6, 2107, be, and hereby is, denied; and it is further

ORDERED that the "Motion for Permission to Amend Petition for Writ of Review," filed herein February 8, 2017, be, and hereby is, denied; and it is further

ORDERED that the "Motion Requesting In-Court Oral Arguments for Evidentiary Hearing on Petition for Writ of Review," filed herein February 8, 2017, be, and hereby is, denied; and it is further

ORDERED that the "Motion Requesting Court Reporter at Oral Arguments and Evidentiary Hearing for Petition for Writ of Review," filed herein February 8, 2017, be, and hereby is, denied; and it is further

ORDERED that the "Motion for Declaratory Judgment Respectfully Asking the State Supreme Court to Certify Questions," filed herein February 8, 2017, be, and hereby is, denied; and it is further

ORDERED that the Petition for Writ of Certiorari/Review filed herein February 6, 2017, be, and hereby is, denied.

DATED this 22nd day of February, 2017.

BY THE COURT:

/s/

E. JAMES BURKE
Chief Justice

IN THE
SUPREME COURT OF THE UNITED STATES

Hawes v. Pacheco and Wyoming Attorney General

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

District Court for the Sixth Judicial District, Campbell County, State of Wyoming

Findings of Fact, Conclusions of Law, and
Order Granting Respondent's Consolidated Motion
Regarding Petition for Post-Conviction Relief

January 23, 2017

Doc. No. 9-16; Vol. 1 at 477-490

(selected portions, pages 485-486)

assistance of trial counsel. *United States v. Garfinkle*, 261 F.3d 1030, 1032 (10th Cir. 2001). The analysis of whether trial counsel's performance was constitutionally deficient should be conducted in much the same way that Wyoming courts consider plain error. *Schreibvogel*, ¶ 12, 269 P.3d at 1102 (quoting *Smizer*, 835 P.2d at 337). In the post-conviction relief context, that means Hawes must identify facts in the trial record that demonstrate a clear and unequivocal rule of law was transgressed in a clear and obvious way that had an adverse effect on one of his substantial rights. *Id.*, ¶ 12, 269 P.3d at 1103. An adverse effect on "a substantial right in the context of ineffective assistance of appellate counsel is shown by demonstrating a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

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 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 (2012). 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 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*, ¶

62

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.

18. Second, Hawes argues that trial counsel offered ineffective assistance by failing to renew the motion for judgment of acquittal immediately after presentation of the defense's evidence at trial and by failing to challenge the jury's inconsistent verdict. At the close of the prosecution's case in chief, trial counsel moved for a judgment of acquittal, which this Court denied. *See Hawes,* ¶ 7, 335 P.3d at 1076. Trial counsel did not renew the motion after he called Hawes to testify. *Id.*, ¶ 8, 335 P.3d at 1076. However, trial counsel moved for a new trial under Rule 33(b) of the Wyoming Rules of Criminal Procedure because "the verdicts rendered are against the great weight of the evidence." This Court denied that motion. Hawes does not address the motion for a new trial but does assert that the failure to renew the motion for judgment of acquittal constituted ineffective assistance of counsel.

19. While Hawes is correct that defense counsel did not immediately renew that motion and, thereby, waived the ability to challenge this Court's denial of the motion, trial counsel's choice to forgo renewing the motion had no effect upon the ability to challenge the sufficiency of the evidence. As the Wyoming Supreme Court held, "[a]lthough it may be true that Mr. Hawes waived his right to appeal the denial of his motion of acquittal, he has not waived his right to raise the issue of sufficiency of the evidence and to have it reviewed under our established standard of review." *Hawes,* ¶ 8, 335 P.3d at 1076. The Court then considered and rejected Hawes's claim concerning the sufficiency of the evidence against him, so Hawes cannot now fault his trial counsel for failing to renew the motion for judgment of acquittal or for moving for a new trial under a different rule after the jury returned its verdict. *See, e.g., Harlow,* ¶¶ 50-54, 105 P.3d at 1071 (ineffectiveness

IN THE
SUPREME COURT OF THE UNITED STATES

Hawes v. Pacheco and Wyoming Attorney General

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

District Court for the Eighth Judicial District, Goshen County, State of Wyoming

Findings of Fact, Conclusions of Law, and
Order Granting Respondent's Motion to Dismiss Habeas Petition

April 10, 2019

Doc. No. 105-1; Vol. 3 at 66-82

(selected portions, pages 71-74)

Wyoming. Petitioner is the same party who has appealed his conviction and sentence to the Wyoming Supreme Court and Petitioner is the same person who has filed for post-judgment relief. The State of Wyoming has always been the opposing party in some form as it is the party who prosecuted the petitioner, responded to his appeal, defended post-conviction relief, and remains in privity with Respondent in this matter. As a matter of law, the first element of res judicata is satisfied.

Petitioner's claim that the statute required him to prove or disprove an essential element of the crime of kidnapping was raised in his petition for post-conviction relief and subsequent petition for review to the Wyoming Supreme Court. The trial court denied the petition and the Wyoming Supreme Court denied the petition for writ of review. Petitioner has never before raised his argument about the unconstitutional vagueness of Wyoming's kidnapping statute; however, Petitioner bypassed multiple opportunities in various state courts to raise his contention, and it relates to the same subject matter as his previous litigation. *See Hawes I*, ¶ 1, 335 P.3d at 1075; *Hawes II*, ¶ 1, 368 P.3d at 881. The elements of res judicata requiring identical subject matter and identical issues are satisfied in relation to both claims because they either have been raised before **or could have been raised** before. *See e.g. Poignee*, ¶ 14, 369 P.3d at 519 (emphasis added).

The identical capacities element of res judicata is likewise satisfied in this case. Warden Pacheco is in privity with the State of Wyoming. Petitioner is challenging the constitutionality of the kidnapping statute, and the State of Wyoming is defending against such challenges. Petitioner and the State of Wyoming have been the only parties in prior hearings, and their capacity has remained unchanged. All the elements of res judicata are satisfied.

B. Wyoming's Kidnapping Statute is Not Unconstitutional

Even if res judicata was not applicable in this case, Petitioner fails to demonstrate

Wyoming's kidnapping statute improperly shifts to a defendant the requirement to prove or disprove a material element of the crime. Further, Petitioner fails to show that the statute is unconstitutionally vague on its face or as applied. This Court finds and concludes that the kidnapping statute permissibly requires a defendant to prove a defense or a mitigation of sentence. Wyoming's kidnapping statute and relevant caselaw within Wyoming adequately puts all defendants on notice of prohibited conduct. Petitioner has failed to show that the statute has been applied arbitrarily.

(I) Wyoming's Kidnapping Statute Permissibly Requires a Defendant to Prove A Defense or a Mitigation of Sentence

Wyoming's kidnapping statute provides as follows:

> (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.

Wyo. Stat. Ann. § 6-2-201(d).

Petitioner contends that sections (c) and (d) create an unconstitutional burden on a defendant to prove or disprove an essential element of the crime, namely that a victim was or was not voluntarily released. Petitioner's contentions are not valid.

It is well-established that a legislature may, as a constitutional legislative choice, make defendants prove mitigating sentencing facts. *See e.g. Loomer v. State*, 768 P.2d 1042, 1047 (Wyo. 1989). "The 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.* "Proof of the nonexistence of all affirmative defenses has never been constitutionally required [of the State]." *Patterson v. New York*, 432 U.S. 197, 210 (1977). In this case, a plain reading of the statute will suffice without the need to resort to statutory construction. *See In re RB*, 2013 WY 15, ¶ 16, 294 P.3d 24, 29 (Wyo. 2013). "When the court determines, as a matter of law, that a statute is clear and unambiguous, it must give effect to the plain language of the statute and should not resort to the rules of statutory construction." *Id.* The Wyoming Supreme Court has previously addressed Wyoming's statute on kidnapping.

> The purpose of the voluntary release provisions is to provide an incentive to release the victim unharmed **after a kidnap has occurred**. See Model Penal Code and Commentaries, part II, vol. 1 at pp. 232-5 (discussing Model Penal Code § 212.1, which is substantially similar to W.S. 6-2-201). The statute provides a means for reducing a defendant's possible sentence **after he has committed the crime of kidnapping.**

Loomer, 768 P.2d at 1046–47 (emphasis added). It is clear the Wyoming Legislature intended subsection (a) to be the elements of the offense while subsection (b) provides definition for unlawful confinement or removal. The intent of Wyoming's Legislature is equally clear in subsections (c) and (d) which are not essential elements of the crime but allow a defendant to prove mitigation or defense based upon whether a defendant releases a victim unharmed **after the crime**

has been committed. *See Loomer*, 768 P.2d at 1047. Conduct that occurs after a crime has been committed cannot be an essential element of that crime. The statute is constitutional as written.

However, even assuming as true Petitioner's first claim that he was required to prove or disprove an essential element rather than a defense or mitigation, a writ of habeas corpus in no way could offer the relief Petitioner seeks. Regarding habeas corpus petitions that challenge criminal convictions, the Wyoming Supreme Court held as follows:

> Jurisdictional facts alone are to be considered. If the court had jurisdiction of the person and of the subject-matter and to render the particular judgment in question, the inquiry is at an end, and, however erroneous the judgment may be, the applicant will be remanded into custody. If, upon the other hand, the court had jurisdiction of the person and of the subject-matter, but was without jurisdiction to render the particular judgment, then such judgment is void, – is, in effect, no judgment at all, – and the applicant must be discharged.

Bandy v. Hehn, 10 Wyo. 167, 174, 67 P. 979, 980 (1902). Mere errors of law or irregularities in a criminal case, even those of a constitutional magnitude, are not proper grounds for habeas corpus relief under Wyoming state law; **only issues that concern the jurisdiction of the court are proper**. *See Hovey v. Sheffner*, 16 Wyo. 254, 265–67, 93 P. 305, 308 (Wyo. 1908) (emphasis added). The proper remedy for Petitioner would direct a remand for retrial and not dismissal for lack of jurisdiction. *See Shull v. State*, 2017 WY 14, ¶ 72, 388 P.3d 763, 779 (Wyo. 2017). Such a violation would not divest the district court of jurisdiction to hear the case, the sole grounds under which a writ of habeas corpus might afford relief in criminal cases. Petitioner's claim, even when true and taken under the umbrella of Wyoming habeas corpus, would fail as a matter of law.

(2) Wyoming's Kidnapping Statute is not Vague

Petitioner also contests the constitutionality of the kidnapping statute, noting that various individuals charged with kidnapping have received varying sentences. In essence, the argument is the statute is vague. An unconstitutionally vague statute is void. *See Dougherty v. State*, 2010 WY

IN THE
SUPREME COURT OF THE UNITED STATES

Hawes v. Pacheco and Wyoming Attorney General

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

District Court for the Sixth Judicial District, Campbell County, State of Wyoming

Amended Felony Information in *State of Wyoming v. Hawes*

August 9, 2013

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
CAMPBELL COUNTY, WYOMING

STATE OF WYOMING
Plaintiff,
vs.

GREGORY M. HAWES,
DOB: 1966,
SSN: 2416,
Defendant.

Criminal Docket No. 6327

AMENDED FELONY INFORMATION

COMES NOW the State of Wyoming, by and through Ronald E. Wirthwein, Jr., Deputy County and Prosecuting Attorney in and for Campbell County, Wyoming, and hereby informs the Court and gives the Court to understand that the above-named Defendant:

COUNT I

On or between January 25, 2013 through January 26, 2013, in Campbell County, Wyoming, with the intent to harass another person, engaged in a course of conduct reasonably likely to harass that person the Defendant committed the offense of stalking in violation of a condition of bail issued in CR 2013-0057, **Felony Stalking**, in violation of Wyoming Statutes §6-2-506(b)(e)(iii), a felony, punishable by imprisonment for not more than ten (10) years, to which a fine of not more than $10,000.00 may be added pursuant to W.S. 6-10-102, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Wyoming.

COUNT II

On or about January 26, 2013 did unlawfully confine another person, with the intent to facilitate the commission of a felony or inflict bodily injury on or to terrorize the victim when the defendant did not voluntarily release the victim, **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 except as provided in Wyoming Statute §6-2-101, a fine for not more than $10,000 may be added pursuant to W.S. 6-10-102, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Wyoming.

COUNT III

On or about January 26, 2013 intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life, caused or attempted to cause serious bodily injury to another, to wit: he physically assaulted Donna Howes and put a sock in her mouth affecting her ability to breathe, **Aggravated Assault and Battery**, in violation of Wyoming Statutes §6-2-502(a)(i)(b), a felony, punishable by imprisonment for not more than ten (10) years, to which a fine of not more than $10,000.00 may be added pursuant to W.S. 6-10-102, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Wyoming.

WHEREFORE, the undersigned prays that a warrant issue for the arrest of the above-named defendant.

STATE OF WYOMING

BY: [redacted]

RONALD E. WIRTHWEIN, JR.- WSB No. 6-4084
Deputy County and Prosecuting Attorney
in and for Campbell County, Wyoming
500 South Gillette Avenue, Suite B200
Gillette, Wyoming 82716
307-682-4310 / 307-687-6441 (fax)

STATE OF WYOMING }
COUNTY OF CAMPBELL } ss.

I do solemnly swear that I have read the above and foregoing Felony Information, by me subscribed, that I know the contents thereof, and that the facts therein stated are true to the best of my knowledge and belief.

[redacted]

RONALD E. WIRTHWEIN, JR.

STATE OF WYOMING }
COUNTY OF CAMPBELL } ss.

The foregoing Felony Information was subscribed and sworn to before me, a Notarial Officer, by Ronald E. Wirthwein, Jr. on 9 day of August, 2013.

Witness my hand and seal.

[redacted]

NOTARIAL OFFICER

Teresa Kirkpatrick - Notarial Officer
County of Campbell State of Wyoming
My Commission Expires 11-15-2014

My Commission expires:

IN THE
SUPREME COURT OF THE UNITED STATES

Hawes v. Pacheco and Wyoming Attorney General

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

District Court for the Sixth Judicial District, Campbell County, State of Wyoming

Jury Instructions in *State of Wyoming v. Hawes*

August 14, 2013

JURY INSTRUCTION NO. 9

The elements of Kidnapping are:

1. On or about January 26, 2013;

2. In Campbell County, Wyoming;

3. The defendant, Gregory M. Hawes;

4. Unlawfully confined Donna Hawes;

5. With the intent to inflict bodily injury on or to terrorize Donna Hawes.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty of Kiddnapping. If, on the other hand, you find from your consideration of all of the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should consider the lesser included offense of Restraint and the lesser included offense of False Imprisonment.

JURY INSTRUCTION NO. 19

If, as a result of your deliberations, and consideration of all of the evidence, you find the defendant guilty of Kidnapping in Part Two of the verdict form, you will be asked to answer a question regarding the release of the victim. As to that question, you are instructed that the defendant has the burden of proving four (4) factors by a preponderance of the evidence. As used in this instruction, "preponderance of the evidence" means the amount of evidence, taken as a whole, that leads the jury to find that the existence of a disputed fact is more probable than not. You should understand that "a preponderance of the evidence" does not necessarily mean the greater number of witnesses or exhibits.

The defendant has the burden of showing:

1. The defendant voluntarily released the victim;
2. Substantially unharmed;
3. In a safe place;
4. Prior to trial.

If you find from your consideration of all the evidence that each of these factors have been proved by the defendant, then you should find that the defendant did voluntarily release the victim, substantially unharmed, in a safe place prior to trial.

If, on the other hand, you find from your consideration of all the evidence that any one of these elements has not been proved, then you should find the defendant did not voluntarily release the victim, substantially unharmed, in a safe place prior to trial.

211