

No. 25-690

In the
Supreme Court of the United States

RYAN THORNELL, ET AL.,
Petitioners,

v.

BRADLEY BIEGANSKI,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF OF PETITIONERS

A federal court may not grant an application for writ of habeas corpus based on a federal claim that was adjudicated in state court, unless the state court decision contravened or unreasonably applied this Court's clearly established precedents. See 28 U.S.C. 2254(d)(1). Clearly established federal law is comprised of the holdings, rather than the dicta, of this Court. And while this Court's holdings can determine general principles of clearly established federal law, the more general the rule at issue, the more leeway state courts are given in adjudicating federal claims.

The Ninth Circuit based its holding on the underlying due process claim on a general principle supposedly supported by this Court's holdings, and in so doing held that the Arizona Supreme Court violated clearly established federal law. This, it cannot do, at least under the strictures of 2254(d)(1). No aspect of this Court's jurisprudence, specific or general, dictates the result reached by the court below. To the contrary, as relevant here, this Court has held only that a state may not impose the burden on a criminal defendant to disprove any element of the offense to escape culpability. The Arizona law at issue complied with this directive, and the state courts were not unreasonable in so holding.

Certiorari is called for here because 2254(d)(1) means what it says: federal courts may not upset state convictions unless the state courts have ignored or misapplied the holdings of this Court. The exercise of authority by the court below thwarts federalism and comity by advancing a system of review conditioned

on tea leaves rather than predictability. This ultimately destroys the meaning of deference under AEDPA, and transforms the Great Writ into a mechanism of de novo review rather than a remedy of last resort.

I. THE NINTH CIRCUIT'S OPINION ENCOURAGES FEDERAL COURTS TO DISREGARD AEDPA'S WELL-SETTLED FRAMEWORK.

During the time that Bieganski committed his crimes, Arizona omitted “sexual motivation” from the crime of child molestation. Instead, the state included lack of sexual motivation as an affirmative defense.¹ In finding this scheme constitutional, the Arizona Supreme Court, in *State v. Holle (Holle II)*, 379 P.3d 197 (Ariz. 2016), cited this Court’s decisions in *Patterson v. New York*, 432 U.S. 197 (1977), *Martin v. Ohio*, 480 U.S. 228 (1987), and *Smith v. United States*, 568 U.S. 106 (2013), to hold that a state may assign to a defendant the burden of proving an affirmative defense so long as the defense does not negate an element of the offense. *See* Pet.App. 130–31. But contrary to Bieganski’s assertion, *see* BIO. 20–28, the

¹ Bieganski misconstrues the record in two ways. First, he attempts to couch this case as one in which he was convicted for merely bathing the victims. *See* BIO. 10–11. However, the record relates that during a rushed Sunday morning bathing routine, Bieganski personally and inexplicably washed the minor girls with his bare hands and without parental permission, gave inconsistent explanations for the practice, and initially denied the conduct to law enforcement and his wife despite later admitting it at trial. Pet.App. 106–07. Second, Bieganski implies that his first trial ended in a mistrial based on the affirmative defense burden of proof. *See* BIO. 11. However, the mistrial occurred because one of the victims testified to acts outside of those alleged in the indictment. *See* Pet.App. 51.

decision in *Holle II* was, at minimum, a reasonable application of clearly established law entitled to AEDPA deference. See *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (“A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.”) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Ninth Circuit recognized as much, acknowledging that as a matter of “substance,” the Arizona Supreme Court’s decision in “*Holle II* falls within the Supreme Court’s core pronouncements” in *Winship*, *Mullaney*, *Patterson*, *Smith*, *Martin*, and *Dixon v. United States*, 548 U.S. 1 (2006). Pet.App.30–31.

Despite its recognition that the Arizona Supreme Court applied this Court’s holdings to the letter, the Ninth Circuit abandoned AEDPA’s deference requirement when it went on to hold the Arizona scheme unconstitutional based on its own substance-over-form reasoning, concluding that “the state is responsible for proving beyond a reasonable doubt the *critical* facts that establish the crime.” Pet.App. 46 (original emphasis). However, this Court has never clearly-established such a rule in its core pronouncements, and clearly-established federal law, for purposes of § 2254(d)(1), cannot be based on a lower court’s attempted extension of this Court’s holdings. *White v. Woodall*, 572 U.S. 415, 426 (2014).²

² In creating its new “critical fact” theory, the Ninth Circuit emphasized Arizona’s historical treatment of sexual motivation. See Pet.App. 3–12. But, contrary to the Ninth Circuit’s analysis, and Respondent’s contention, as well, see BIO. 22–23, under AEDPA the inquiry turns on the State’s authoritative, *contemporary* construction of its statute—here, the Arizona Supreme Court’s determination in *Holle II* that lack of sexual

Put another way, requiring state courts to extend the holdings of this Court would undermine “AEDPA’s carefully constructed framework,” *id.*, which is exactly what the Ninth Circuit did here.

Bieganski attempts to cabin this case as local “error correction” tied to a short-lived Arizona statute. BIO. 14–15. Not so. The Ninth Circuit did not merely disagree with the Arizona Supreme Court’s construction of its own statute; after failing to comply with AEDPA’s requirement to defer to reasonable state-court applications of clearly established federal law, the panel recast Arizona’s legislatively designated affirmative defense—lack of sexual motivation—as an element of the crime (sexual molestation) the State must disprove, contrary to *Patterson*, *Martin*, and *Smith*. The panel itself acknowledged that, “as a matter of form,” Arizona’s scheme fell within this Court’s burden-allocation precedents, yet invalidated the scheme based on policy-laden, “substance-over-form” reasoning. That approach invites other federal habeas courts not only to cast aside the deferential standard of review required under AEDPA, but also encourages habeas courts to judicially relabel affirmative defenses as elements of a state offense whenever a court deems a defense the “critical fact” separating innocent from culpable conduct. Thus, contrary to Bieganski’s contention, both the Ninth Circuit’s methodology, as well as its ultimate decision invalidating the state statute, erodes AEDPA’s basic framework and

motivation is an affirmative defense that does not negate any statutory element. *See* 28 U.S.C. § 2254(d)(1); *Richter*, 562 U.S. at 97–98. *See also Mullaney*, 421 U.S. at 690–91 (focus is not on prior state law, but current construction of state law).

threatens burden allocations nationwide, warranting review by this Court.

Bieganski further argues that this matter is parochial because Arizona amended its statute in 2018, removing sexual motivation as an affirmative defense. *See* BIO. 16–17. But as demonstrated above, the Ninth Circuit’s methodology is a legally portable product with no expiration date: it encourages other federal courts to ignore AEDPA’s required deference to state-court decisions, to extend this Court’s jurisprudence without authority to do so, and to reclassify affirmative defenses as elements of state criminal offenses whenever a federal court deems the defense “morally central” to the offense. This upsets burden-of-proof allocations, and will invariably lead to divergent circuit court decisions and inappropriate federal intervention into the States’ authority to define and enforce the criminal law.

Thus, contrary to Bieganski’s assertion, *see* BIO. 22, the Ninth Circuit failed to apply AEDPA’s deference requirement, and then went on to extend this Court’s holdings without authority to do so. In short, the Ninth Circuit’s opinion will not only encourage other courts to circumvent the plain text of § 2254(d)(1), but it will also lead other circuits to develop their own divergent versions of “clearly established” federal law, in contravention of *White*. This will transform the current orderly adjudication of AEDPA cases into a cloud of confusing and conflicting circuit decisions. For this reason alone, intervention by the Court is warranted.

II. THE NINTH CIRCUIT'S UNSUPPORTED "CRITICAL FACT" THEORY WILL LEAD TO CIRCUIT CONFUSION, AND INAPPRO- PRIATE INTERVENTION INTO STATE AFFAIRS.

The panel converted the Arizona affirmative defense into an element of the offense because it saw "sexual motivation" as the "only evidence that is morally inculpatory." *See* Pet.App. 32. Contrary to Bieganski's assertions, *see* BIO. 23, this "critical fact" theory is, at the very least, an unauthorized extrapolation of this Court's core pronouncements.

This Court has not held that moral centrality transforms a defense into an element the State must disprove beyond a reasonable doubt. *See Patterson*, 432 U.S. at 209 ("To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.") (footnote omitted). Similarly, evidentiary overlap between an affirmative defense and an element does not merge the two; a State may assign a defendant the burden on an affirmative defense so long as the State retains the burden to prove the actual elements of the offense. *Martin*, 480 U.S. at 234. *See also* *Smith*, 568 U.S. at 110 (the government need not disprove affirmative defenses that do not negate an element).

The Ninth Circuit's new "critical fact" test therefore invites federal courts to scrutinize the elements of state offenses, upsetting burden-of-proof allocations nationwide, which will lead to divergent circuit decisions, and inappropriate federal intervention into the States' "business" of "preventing

and dealing with crime.” *Patterson*, 432 U.S. at 201 (citing *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion)); see also *Mullaney*, 421 U.S. at 691 (“state courts are the ultimate expositors of state law”) (citing *Murdock v. City of Memphis*, 20 Wall. 590, 22 L.Ed.429 (1875), and *Winters v. New York*, 333 U.S. 507 (1948)).

III. THERE IS A CIRCUIT CONFLICT ON THE APPLICATION OF *PATTERSON* AND *MARTIN* UNDER AEDPA.

The petition identifies decisions from the Second, Fourth, Sixth, Eighth, and Tenth Circuits sustaining state allocations where the defense does not negate an element and refusing to scrutinize offense elements based on a “critical fact” test. See Pet. 15–18. The Ninth Circuit departs from those decisions by (1) redefining an affirmative defense as an element based on moral centrality, and (2) granting habeas relief despite acknowledging “as a matter of form” that the scheme complied with *Patterson/Martin*. Thus, contrary to Bieganski’s assertion, see BIO. 17–20, there is a clear conflict between the Ninth Circuit’s opinion and those other decisions regarding the application of the same controlling precedents within AEDPA’s deferential framework, satisfying Sup. Ct. R. 10(a).

IV. THE NINTH CIRCUIT ERRED WHEN IT FOUND THAT THE DECISION IN *HOLLE II* WAS AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW.

Contrary to Respondent’s protestations, see BIO. 20–28, the Ninth Circuit erred when it found that the Arizona Supreme Court’s decision in *Holle II* was an unreasonable application of this Court’s jurisprudence. In fact, the Ninth Circuit’s opinion misapprehends *Mullaney*, *Patterson*, *Smith*, and *Martin*.

As demonstrated above, the Ninth Circuit treated lack of sexual motivation as an element of the offense, based on its new “critical fact” theory. But *Mullaney* looks to how the crime is defined by the State and “as applied and enforced.” *Mullaney*, 421 U.S. at 699.

Additionally, contrary to the Ninth Circuit’s ultimate conclusion, Arizona’s pre-2018 structure fits *Patterson*: Arizona defined the elements of the crime of sexual molestation and separately recognized lack of sexual motivation as an excuse outside those elements; thus, the statutory scheme did not create an unconstitutional affirmative defense that negated one of the elements. *Patterson*, 432 U.S. at 206–07. *See also Smith*, 568 U.S. at 110 (“The State is foreclosed from shifting the burden of proof to the defendant only ‘when an affirmative defense does negate an element of the crime.’”) (quoting *Martin*, 480 U.S. at 237 (Powell, J., dissenting)).

CONCLUSION

The court below failed to afford the required deference under 2254(d)(1), and in doing so sanctioned the sort of “unreasonable-refusal-to-extend” rule this Court rejected in *White*. Then, reviewing de novo, the court substantially extended this Court’s burden shifting jurisprudence and substituted its own judgment for what facts really matter in a criminal prosecution. This results in the diminution of the States’ traditional authority to define the criminal law. Because of the severity of these errors, and because the lower court’s disposition is at odds with that of its sister circuits, this Court should grant review.

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