No. 13–1057

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN,

Petitioner,

vs.

MICHAEL JOE MURDAUGH,

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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This case presents yet another example of the Ninth Circuit's disregard of its statutory duties under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") in reviewing habeas cases.[1] Specifically, the Ninth Circuit ignored AEDPA's requirement to follow clearly established federal law, in this case *Ring (Ring II) v. Arizona*, 536 U.S. 584 (2002), and instead expanded *Ring II* far beyond its express holding to require not only a jury finding of death-qualifying aggravating factors, but also to

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[1] *See, e.g., Marshall v. Rodgers*, 569 U.S. ___, 133 S. Ct. 1446 (2013) (*per curiam*); *Ryan v. Gonzales*, 568 U.S. ___, 133 S. Ct. 696, 703 (2013); *Cavazos v. Smith*, 565 U.S. ——, 132 S. Ct. 2, 7 (2011) (*per curiam*); *Cullen v. Pinholster*, 563 U.S. ——, 131 S. Ct. 1388, 1410–11, (2011); *Felkner v. Jackson*, 562 U.S. ——,131 S. Ct. 1305, 1307 (2011) (*per curiam*); *Swarthout v. Cooke*, 562 U.S. ——, 131 S. Ct. 859, 863 (2011) (*per curiam*); *Harrington v. Richter*, 562 U.S. ——, 131 S. Ct. 770, 785 (2011); *Premo v. Moore*, 562 U.S. ——, 131 S. Ct. 733, 740 (2011); *Rice v. Collins*, 546 U.S. 333, 342 (2006); *Schriro v. Smith*, 546 U.S. 6, 8 (2005) (*per curiam*); *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (*per curiam*); *Yarborough v. Gentry*, 540 U.S. 1, 11 (2003) (*per curiam*); *Woodford v. Visciotti*, 537 U.S. 19, 20 (2002) (*per curiam*); *Early v. Packer*, 537 U.S. 3, 10 (2002) (*per curiam*); *see generally* Hon. Diarmuid F. O'Scannlain, "A Decade of Reversal: The Ninth Circuit's Record in the Supreme Court Through October Term 2010," 87 NOTRE DAME L. REV. 2165, 2168–76 (2012).

require a jury finding of mitigation and the ultimate determination whether a death sentence is appropriate.

To place this reply in context, it is necessary to briefly summarize the facts of Murdaugh's crimes and the procedural history of his case: Murdaugh committed two brutal murders on separate occasions. He confessed to both, pled guilty to both, and waived mitigation after being found competent to do so. The trial court sentenced Murdaugh to death for the second murder after finding two aggravating circumstances and insufficient mitigation in the record to warrant leniency.

While Murdaugh's case was on direct review, this Court decided *Ring II*, holding that the Sixth Amendment requires a jury to find the aggravating circumstances that make a defendant eligible for a death sentence. Subsequently, the Arizona Legislature amended its capital sentencing statutes to prospectively provide for jury sentencing in capital cases, including the finding of mitigation and imposition of a death sentence. 2002 Ariz. Legis. 5th Sp. Sess. Ch. 1 § 2; *see also* Ariz. Rev. Stat. § 1-244 ("No statute is retroactive unless expressly declared therein"). In light of the new sentencing provisions, the Arizona Supreme Court reviewed the sentencing proceedings for all capital cases pending on direct appeal, considering both the findings of aggravation and mitigation for harmless error under *Chapman v. California*, 386 U.S. 18 (1967). *State v. Ring (III)*, 65 P.3d 915, ¶ 44 (Ariz. 2003). In Murdaugh's case, given the circumstances and evidence with respect to both

the aggravating and mitigating circumstances, the Arizona Supreme Court held that the *Ring II* error was harmless beyond a reasonable doubt. *State v. Murdaugh*, 97 P.3d 844, ¶¶ 50–91 (Ariz. 2004). Nevertheless, using the *Brecht v. Abrahamson*, 507 U.S. 618, 631 (1993), "substantial and injurious effect" standard for determining "actual prejudice"—a standard that subsumes AEDPA's objectively unreasonable standard—the Ninth Circuit panel (Circuit Judges Nelson, Reinhardt, and M. Smith) concluded the "*Ring* error" had a substantial and injurious effect on the sentence, even though the Arizona Supreme Court had found the *Ring II* error harmless beyond a reasonable doubt. *See Fry v. Pliler*, 551 U.S. 112, 119–20 (2007) (holding that the *Brecht* harmless error standard requires more deference to the state court harmless error analysis than AEDPA's "objectionably unreasonable" standard). (Petition for a Writ of Certiorari at 2-7.)

To obtain relief under 28 U.S.C. § 2254, a state prisoner must be "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *see also* 28 U.S.C. § 2254(d)(1) (court shall not grant habeas relief unless decision was contrary to, or an unreasonable application of, clearly established federal law). The *only* federal error in Murdaugh's case was the Sixth Amendment error resulting from a trial judge, rather than a jury, determining the existence of *aggravating circumstances*. Both the Arizona Supreme Court and the Ninth Circuit panel agreed that error was harmless. *Murdaugh*, 97 P.3d at ¶¶ 52-58; *Murdaugh v. Ryan*, 724 F.3d 1104, 1118–19 (9th Cir. 2013)

Nonetheless, the panel granted habeas relief by openly disregarding § 2254(d)(1)'s "clearly established" requirement, which refers to the "holdings" of this Court's decisions. *White v. Woodall*, 572 U.S. ___, 134 S. Ct. 1697, 1702 (2014); *Howes v. Fields*, 565 U. S. ___, 132 S. Ct. 1181, 1187 (2012). The Ninth Circuit panel disregarded *Ring II's* narrow holding and extended it to require jury *sentencing* in capital cases. Highlighting its failure to follow this Court's express holding in *Ring II*, the panel wrote:

- *Ring II* should not be read as narrowly as its "express holding." (Pet. App. A-24.)

- "Applying the rationale of *Apprendi*, the existence or absence of a *mitigating* circumstance was . . . a finding of fact upon which the 'increase of a defendant's authorized punishment [was] contingent.'" (*Id.* A-26, emphasis added.)

- "The right to have a jury determine aggravating factors is therefore also a de facto *right* to have a *jury determine mitigating* facts." (*Id.* A-27, emphasis added.)

- "In *practical effect*, *Ring II* created a right to have the jury determine all the facts on which a sentence of death depended, both aggravating and mitigating, since capital sentencing

> statutes assigned this function to one factfinder." (*Id.* A-23 n.7, emphasis added.)

Having extended *Ring II* to include a *right* to jury sentencing, the panel then applied its analysis to an alleged federal error that had never occurred. At the time of Murdaugh's sentencing, he had no statutory right to jury sentencing and when the legislature enacted that right *after* he was sentenced, the legislature did not make the right retroactive to his case. 2002 Ariz. Legis. 5th Sp. Sess. Ch. 1 § 9.

> It is the intent of the Legislature that: . . .
> 3. The adoption of the new capital jury sentencing procedures contained in this act shall not be construed by any state or federal court as a legislative statement that the former judge sentencing procedures are unconstitutional or that any death sentence imposed pursuant to the former procedure is invalid.

Id. at ¶ (A)(3). For cases on direct review, such as Murdaugh's case, it was the Legislature's intent that those cases were only entitled to a new jury sentencing if found necessary by the Arizona Supreme Court. *Id.* at ¶ (A)(2)(4). As a matter of *state law*, the Arizona Supreme Court found no jury sentencing under the new law was necessary for Murdaugh.

Murdaugh argues that Petitioner's issue is not with the panel's interpretation of *Ring II*, but with the Arizona Supreme Court's "interpretation of *Ring II*."

BIO at 5. Despite the unambiguous statements of the panel, Murdaugh further argues "[t]he panel's opinion did nothing to extend the *Ring* right in Arizona." *Id.* Murdaugh is incorrect on both counts. In performing its harmless error analysis, the Arizona Supreme Court did not interpret *Ring II* to include mitigation, but applied the new state law to its analysis. *Ring III*, 65 P.3d at ¶ 104. However, as a matter of *federal* law, the Ninth Circuit panel extended *Ring II* to encompass mitigation and jury sentencing. Having created that construct, the panel then applied *Brecht* to find *Ring II* error prejudicial. Such disregard for AEDPA and its requirement of applying the express holdings of this Court, while perhaps not "groundbreaking," is yet another example of the recurring problem with the limitations imposed on federal courts by § 2254(d)—"some federal judges find [those limitations] too confining," but "all federal judges must obey" them. *Woodall*, 134 S. Ct. at 1701.

Murdaugh argues that the panel opinion "does not substantially affect a rule of national application but instead, at most, may affect one other Arizona habeas petitioner." (BIO at 5.) Even if true, that obscures the repetitive, underlying problem of the Ninth Circuit's failure to apply AEDPA and give proper deference to Arizona's harmless error analysis.

Murdaugh also contends that "[i]n Arizona, *Ring* error does not just occur when one aggravating factor is found by a judge rather than a jury. *Ring* error occurs when the jury is not involved in all the fact-findings upon which the death sentence hinges." (BIO at 6.) If Murdaugh is referring to *Ring III*, rather than

this Court's decision in *Ring II*, he is correct. In *Ring III*, the Arizona Supreme Court applied harmless error review to Arizona's newly-enacted capital sentencing law. *See Ring III*, at ¶¶ 13-14. But federal courts sitting in habeas do not review errors of state law. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 67 (1991).

While recognizing that the holding of *Ring II* was limited to the Sixth Amendment's application to aggravating factors, Murdaugh, in defense of the panel, argues that "the answer given by the United Sates Supreme Court was a broader one." (BIO at 6.) "Because *Ring* clearly defined what 'facts' implicate the Sixth Amendment, the Arizona Supreme Court was able to determine that its *statute* required a jury on mitigating facts, just as it did on aggravating facts." *Id.* at 7 (emphasis added). While it is true that the post-*Ring II* Arizona statute required a jury finding on mitigating facts, that was not the holding of *Ring II* and the panel was without power to issue a writ based on what would have been an error of state law had Murdaugh been tried after the enactment of the new statute.

Murdaugh is correct that *Fry v. Pliler* applies to the panel's harmless error test, however, the issue is not, as suggested by Murdaugh, "whether the complete lack of a jury had a substantial and injurious effect upon the death sentence." (BIO at 9.) That presupposes that Murdaugh had a federal right to a jury sentencing, which he did not then, or now. For habeas purposes, contrary to Murdaugh's contention, the question is not whether the lack of a *jury sentencing* "may have affected the outcome." *Id.* The

question instead is whether the lack of a *jury finding of aggravating factors* substantially affected the outcome. All courts to have considered that question—including the Ninth Circuit's panel—concluded that it did not.

Even assuming that the lack of a jury sentencing constituted federal constitutional error, the Ninth Circuit's speculative findings do not satisfy *Brecht*. Although Murdaugh waived mitigation, there was mitigating information in the record that the trial court considered. To find substantial and injurious error, the panel and Murdaugh speculated on how a jury might have weighed this evidence differently than the trial court. This speculative analysis is insufficient to meet the *Brecht* standard given that under federal law, once the mitigation is not barred from consideration and effect by law, how the sentencer treats it is not of federal concern. *Kansas v. Marsh*, 548 U.S. 163, 171 (2006).

Murdaugh points out that the trial judge did not find an Arizona statutory mitigator—that his ability to appreciate the wrongfulness of his conduct was significantly impaired by methamphetamine use, but not so impaired as to constitute a defense to the crime. *See* Ariz. Rev. Stat. § 13-703(G)(1) (Supp. 1995). The panel found the Arizona Supreme Court's analysis "unreasonable" "because this finding was clearly erroneous." (BIO at 4.) Of course, even if the analysis was "clearly erroneous" that would not equate with it being "unreasonable" under AEDPA. *See Woodall*, 134 S. Ct. at 1702 (noting that even "clear" error is not necessarily unreasonable). Moreover, that statutory mitigator requires a causal nexus to the crime that a

defendant must prove by the preponderance of the evidence. *Murdaugh*, 97 P.3d 844, at ¶ 73. The fact that an expert concluded that "[t]he use of methamphetamine *quite likely* greatly contribute to the alleged offenses having occurred," does not established that Murdaugh's ability to appreciate the wrongfulness of his conduct was *significantly* impaired. (*See* BIO at 4.) Even assuming there was an error cognizable under § 2254, the panel's speculation on how jurors may have weighed the evidence should not meet the *Brecht* standard of prejudice.

Finally, Murdaugh calls the circuit split identified in the petition "disingenuous." (BIO at 11.) Not surprisingly, Murdaugh states that no other federal circuit court "has been asked to address a *new state statute* that the state's own supreme court has determined *implicates Ring* in the context of harmless error analysis." (BIO at 11) (emphasis added). This is not surprising since federal habeas courts are not in the business of reviewing purported errors of state law unrelated to federal law.

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CONCLUSION

This Court should grant the petition for a writ of certiorari and summarily reverse and vacate the panel's decision in this death penalty case.

Respectfully submitted

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