No. 13-1227

In the Supreme Court of the United States

MICHAEL D. CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *PETITIONER*,

v.

ANTHONY JOSEPH FARINA, *RESPONDENT*.

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

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SUPPLEMENTAL PETITION

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CAPITAL CASE

Question Presented

Whether a habeas court may evade the highly-deferential standard of review in the habeas statute by characterizing its legal and policy differences with the state court as unreasonable factual determinations and grant the writ on the basis of ineffectiveness of appellate counsel contrary to the state court's holding that the cross-examination of the mitigation witness was not fundamental error under state law?

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SUPPLEMENTAL PETITION

This Court recently summarily reversed the Ninth Circuit for improperly characterizing a matter as being one of fact and then invoking the AEDPA provision regarding determinations of fact, 28 U.S.C. § 2254(d)(2), rather than properly following the AEDPA provision regarding determinations of law, 28 U.S.C. § 2254(d)(1). In *Lopez v. Smith*, 2014 WL 4956764 (Oct. 6, 2014), this Court unanimously reversed the Ninth Circuit for not following the appropriate provision of the AEDPA. This Court first noted that under 28 U.S.C. § 2254(d)(1), when a state court adjudicates a claim on the merits, "a federal court may grant relief only if the state court's decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Smith*, 2014 WL 4956764 at *1.

The Ninth Circuit concluded that Smith's Sixth Amendment and due process right to notice had been violated when the information did not include an aider-and-abettor theory of liability and the prosecutor at trial focused on the principal theory at the expense of the aider-and-abettor theory. The Ninth Circuit concluded the constitutional right to notice of charges had been violated when the prosecution focused only on one theory at trial. *Id.* at *2-*4.

The Ninth Circuit relied on its own circuit precedent to support its conclusions. But the AEDPA permits habeas relief only if a state court's

decision is contrary to, or involved an unreasonable application of, clearly established Federal law "as determined by this Court, not by the courts of appeals." *Smith*, 2014 WL 4956764 at *3. The Ninth Circuit relied on its own circuit precedent because it thought that its own precedent "faithfully applied the principles enunciated by the Supreme Court." *Id.* at *2,*3. But circuit precedent "cannot refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced." *Id.* at *1 (citing *Marshall v. Rodgers*, 133 S.Ct. 1446 (2013)). This Court concluded that the circuit precedent relied on by the panel was "irrelevant" to the question presented. *Id.* at *3.

The Ninth Circuit cited three older Supreme Court cases for the general proposition that a defendant must have adequate notice of the charges against him. Those cases, however, as this Court explained, were "far too abstract" to establish "clearly established" law for purposes of the AEDPA. *Id.* at *3. This Court noted that none of the three Supreme Court cases cited by the Ninth Circuit addressed "even remotely" the "specific question presented" by the case at hand. *Id.* This Court cautioned the lower courts yet again against "framing our precedents at such a high level of generality." *Id.* (citing *Jackson v. Nevada*, 133 S.Ct. 1990, 1994 (2013)).

The Ninth Circuit also concluded that the state court's determination that the preliminary examination testimony and the jury instructions conference put Smith on notice of the aiding-and-

abetting theory was an unreasonable determination of the facts under § 2254(d)(2). This Court determined that the Ninth Circuit's holding in this regard could not be sustained. *Id.* at *4. This Court explained, that although the Ninth Circuit "claimed its disagreement with the state court was factual in nature, in reality its grant of relief was based on a legal conclusion . . ." *Smith*, 2014 WL 4956764 at *4. This Court determined that the issue was "a legal determination governed by § 2254(d)(1), not one of fact governed by § 2254(d)(2)." *Id.* This Court remanded for further proceedings consistent with its opinion. *Id.* at *5.

Here, as in *Smith*, the panel improperly relied on its own circuit precedent to support its conclusions. The panel repeatedly invoked its own Circuit precedent as the basis for habeas relief. *Farina v. Sec'y, Fla. Dep't. of Corr.*, 536 Fed.Appx. 966, 978, 979, n.3, 980-981, 983 (11th Cir. 2013)(citing *Romine v. Head*, 253 F.3d 1349 (11th Cir. 2001)(stating that the "conduct we found unconstitutionally improper in *Romine* is strikingly similar to the conduct of the prosecutor here."). As this Court explained in *Smith*, however, clearly established Federal law for purposes of the AEDPA is determined "by this Court, not by the courts of appeals." *Smith*, 2014 WL 4956764 at *3. [1]

[1] The panel here also improperly relied on a district court case and State Supreme Court case as support for its conclusions. *Farina*, 536 Fed.Appx. at 984 (citing *Jones v. Kemp*, 706 F.Supp. 1534, 1558–59 (N.D.Ga.1989), and *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630, 644 (1991)). Obviously, if federal appellate courts are not proper reference points for determining clearly established Federal law for purposes of

Furthermore, here, as in *Smith*, the panel improperly relied on a Supreme Court case that is "far too abstract" to establish "clearly established" law for purposes of the AEDPA. The panel cited this Court's case of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), as support for its conclusions. *Farina*, 536 Fed.Appx. at 968, 982, 984 (quoting *Caldwell*, 472 U.S. at 341, 332-33, 328-29). But *Caldwell*'s application to Florida is not clearly established. The rule established in *Caldwell* against diminishing a jury's sense of responsibility as the ultimate decisionmaker cannot directly apply in a state where the jury does not have the ultimate decision regarding the death sentence. The judge, not the jury, is the ultimate sentencer under Florida's hybrid system. *Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002)(noting that Florida is a hybrid state "in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations."). While the jury's recommendation is often given great weight by the judge in Florida, especially a life recommendation, the final decisionmaker in Florida is the judge. The ultimate responsibility for a death sentence, in Florida, does, in fact, rest elsewhere. The panel did not take this limitation on *Caldwell*'s application to Florida into its analysis in any manner. This Court's view on the matter of the application of the *Caldwell* rule to hybrid states is not clearly established. This problem highlights why this Court has repeatedly cautioned lower courts from

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the AEDPA, neither federal trial courts nor state courts are proper reference points. The AEDPA explicitly limits habeas precedent to this Court's precedent. 28 U.S.C. § 2254(d)(1).

framing its precedents at too high a "level of generality." *Smith*, 2014 WL 4956764 at *3; *Jackson*, 133 S.Ct. at 1994. As in *Smith*, the panel improperly framed this Court's precedent at too high a level of generality.

Moreover, the panel never cited or discussed this Court's later decision in *Romano v. Oklahoma*, 512 U.S. 1 (1994), which clarified the scope of *Caldwell* including that the concurrence was the "controlling" opinion. *Romano*, 512 U.S. at 9. The panel, however, did not limit itself to statements from the concurring opinion in *Caldwell.* Instead, the panel relied exclusively on statements from the plurality opinion. While the exact role of plurality opinions in forming clearly established law for purposes of the AEDPA may be unsettled, when this Court directly states that the concurring opinion of a particular decision is the controlling opinion in a later opinion, as this Court did in *Romano*, the lower courts may grant habeas relief based only on that concurrence. Otherwise, a panel is improperly granting habeas relief based on dicta. *White v. Woodall*, 134 S.Ct. 1697, 1702 (2014)(explaining that "clearly established Federal law" for purposes of the AEDPA includes only the holdings, not the dicta, of this Court citing *Howes v. Fields*, 132 S.Ct. 1181, 1187 (2012)). The statements in *Caldwell* relied upon by the panel are not clearly established law.

Additionally, *Caldwell* is even more abstract and far afield than the Supreme Court cases cited by the Ninth Circuit in *Smith*. At least in *Smith,* the cases relied on by the Ninth Circuit were all

notice cases involving the same constitutional provisions as the case that was being decided. *Caldwell*, on the other hand, is an Eighth Amendment case, whereas this case is a Sixth Amendment case. The issue in this case is the Sixth Amendment right to the effective assistance of appellate counsel. Even the underlying issue in this case is a Sixth Amendment right to present a defense or a mitigation case and the permissible scope of the cross-examination of the defense's mitigation witnesses. *Caldwell* was not an ineffectiveness case or a cross-examination case. *Caldwell* involves an entirely different constitutional provision than the constitutional provision at issue in this case. *Caldwell* involved a prosecutor's comments about appellate review, not a prosecutor's cross-examination about religion of a minister presented as a mitigation witness. *Caldwell* is irrelevant to the "specific question presented" in this case. *Caldwell* is not specific enough to the issue presented by this case to form "clearly established" law for purposes of the AEDPA. *Caldwell* is simply too general a rule to be a basis for habeas relief in this case. As in *Smith*, the panel improperly relied on a case that was "far too abstract" to establish "clearly established" law for purposes of the AEDPA.

And, here, as in *Smith*, the correct legal standard is § 2254(d)(1), not § 2254(d)(2). The Florida Supreme Court refused to address a matter raised solely in a footnote. The footnote merely quoted the prosecutor's questions during jury selection, ignoring that the questions were typical *Witherspoon* questions. *Witherspoon v. Illinois*, 391

U.S. 510 (1968). The footnote contained no argument explaining why the prosecutor's questions were improper. Any judge familiar with jury selection in capital cases reading the footnote would wonder what the problem was with the prosecutor's typical *Witherspoon* questions. An appellate court's refusal to address an undeveloped argument raised only in a footnote is a policy, not a fact. Indeed, it is a standard policy among appellate courts including this Court. The panel here treated that policy as being "factual in nature" when "in reality," it was not a fact at all. *Smith*, 2014 WL 4956764 at *4. The factual provision of the habeas statute, § 2254(d)(2), simply does not apply. As in *Smith*, the panel treated a legal determination as a factual determination to evade the deference due to the state court. As in *Smith*, the panel improperly relied on § 2254(d)(2), instead of properly following § 2254(d)(1). This case, like *Smith*, is governed by § 2254(d)(1), which requires a showing that the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by this Court.

The Florida Supreme Court's decision was entitled to AEDPA deference but the panel did not accord the state court's decision that proper deference. As in *Smith* and for the same reasons, this Court should summarily reverse.

CONCLUSION

This Court should grant the petition for writ of certiorari and summarily reverse.

Respectfully submitted,

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