No. 14-95

In the Supreme Court of the United States

PATRICK GLEBE,

Petitioner,

v.

JOSHUA JAMES FROST,

Respondent.

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

BRIEF OF THE STATES OF ARIZONA, ET AL., AS *AMICI CURIAE* SUPPORTING PETITIONER

Thomas C. Horne
Arizona Attorney General
Robert L. Ellman
Solicitor General
Jeffrey A. Zick
Chief Counsel
Laura P. Chiasson*
Assistant Attorney General
400 West Congress, Bldg. S-315
Tucson, AZ 85701
Phone (520) 628-6520
Laura.Chiasson@azag.gov
**Counsel of Record*

Counsel for Amici Curiae

(*additional counsel listed on inside cover*)

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

John W. Suthers
Attorney General
State of Colorado

Lawrence G. Wasden
Attorney General
State of Idaho

Gregory F. Zoeller
Attorney General
State of Indiana

Thomas J. Miller
Attorney General
State of Iowa

Derek Schmidt
Attorney General
State of Kansas

Timothy C. Fox
Attorney General
State of Montana

Jon Bruning
Attorney General
State of Nebraska

Wayne Stenehjem
Attorney General
State of North Dakota

Ellen F. Rosenblum
Attorney General
State of Oregon

Robert E. Cooper, Jr.
Attorney General
State of Tennessee

Greg Abbott
Attorney General
State of Texas

J.B. Van Hollen
Attorney General
State of Wisconsin

Peter K. Michael
Attorney General
State of Wyoming

QUESTION PRESENTED

Does *Herring v. New York*, 422 U.S. 853 (1975), clearly establish that a limitation on closing argument is structural error, as the Ninth Circuit held here, or, as many other courts have held, does *Herring* allow the possibility that such a limitation is subject to harmless error review?

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INTEREST OF AMICI CURIAE[1]

The amici States have a strong interest in ensuring the finality of the convictions obtained in their states and in the consistent application of the deferential standard of review Congress imposed in the Antiterrorism and Effective Death Penalty Act (AEDPA). By looking to its own precedent and extending rules announced by this Court to determine "clearly established Federal law," the Ninth Circuit threatens both of these concerns and grants habeas relief in contradiction to AEDPA's deferential standards. 28 U.S.C. § 2254(d)(1) Unless the Court grants review, the law in the Ninth Circuit will remain that a State commits structural error by defining (as many states do) an affirmative defense to require the admission of the elements of the offense. *See Biggs v. Sec'y of Cal. Dep't Corr. & Rehab*., 717 F.3d 678, 690 (9th Cir. 2013) (Courts in the Ninth Circuit are "bound to respect a panel holding that [a rule] is clearly established Supreme Court law in a given context, just like [they] would be bound to respect any other panel holding.").

STATEMENT

Frost was charged with several counts of burglary, robbery and assault. (Pet. at 5.) At trial, he admitted his involvement in most of the crimes, but asserted

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[1] Counsel of record received timely notice of the States' intent to file this amicus curiae brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the States to file this brief.

duress as an affirmative defense.[2] (Pet. at 5–6.) The trial court informed Frost's counsel that if he argued in closing that the State had not met its burden to prove the elements of the offenses for which he was claiming duress, it would not instruct the jury on that defense. (*See* Pet. App. at 146a (trial court stating, "You cannot argue to the jury that the state hasn't proved accomplice liability and claim a duress defense. You must opt for one or the other."). Frost's counsel chose to argue that Frost committed the offenses under duress, and he did not challenge the State's proof on the elements of the offenses.

The Washington Supreme Court held that Frost should have been permitted under state law to argue both that he did not commit the offenses and that he committed them under duress. (*See* Pet. App. at 124a ("[T]his court did not hold [in an earlier case] that such inconsistent defenses would have been impermissible had defense counsel sought to raise them.") The court further held that the trial court violated Frost's Sixth and Fourteenth Amendment rights by requiring the defense to choose only one of the two conflicting defenses to argue. (Pet. App. at 126a.) It held, however, that the error was harmless and affirmed Frost's convictions. (Pet. App. at 128a–133a.) Both the

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[2] An affirmative defense typically requires a defendant to admit that he has committed an offense, but allows him to present evidence showing why he is not culpable—*i.e.*, he was entrapped or under duress when he committed the offense. Affirmative defenses are "in the nature of confession and avoidance—essentially admitting the crime, but proffering a reason why the defendant should not be found guilty." *United States v. Houston*, 481 Fed.Appx. 188, 192 n.3 (5th Cir. 2012) (mem.).

district court and the three-judge Ninth Circuit panel agreed that any error was harmless and denied relief to Frost. (Pet. App. at 92a–105a; 63a–64a.) Neither court found it necessary to consider whether the state court properly found that Frost's constitutional rights had been violated. (Pet. App. at 63a–64a, 91a n.3.)

On en banc review, the Ninth Circuit held that "the Washington Supreme Court correctly concluded [that] the state trial court unconstitutionally precluded defense counsel from arguing reasonable doubt, under both *Herring* and *Winship*."[3] (Pet. App. at 8a.) The en banc panel agreed that the trial court violated Frost's due process rights, but held that the Washington Supreme Court's conclusion that the error was subject to harmless error review was "contrary to clearly established Federal law." Instead, finding that *Herring* and *Winship* "clearly established" that the error was structural, the en banc panel granted habeas relief to Frost. (*See* Pet. App. at 17a–18a.)

SUMMARY OF ARGUMENT

Once again, the Ninth Circuit has failed to accord the proper deference to a state court's ruling on habeas review. Such deference requires that a federal court may not grant relief to a habeas petitioner unless the state court's ruling "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). This Court has never held that any error, let alone structural error, results when a State requires (as many do) that a defendant

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[3] *In re Winship*, 397 U.S. 358 (1970).

admit the elements of an offense before asserting an affirmative defense. Nevertheless, the Ninth Circuit held that such a procedure lessens the State's burden to demonstrate each element of an offense beyond a reasonable doubt, and improperly shifts the burden of proof to the defendant to prove the affirmative defense, in violation of *Winship*, *United States v. Gaudin*, 515 U.S. 506 (1995), *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). None of these cases, however, clearly establishes that any improper burden shifting results from a State's requirement that a defendant admit the elements of an offense before asserting an affirmative defense.

The en banc panel also improperly expanded this Court's ruling in *Herring*, which holds that the complete denial of closing argument is structural error, to apply when a defendant makes a closing argument but is foreclosed from arguing inconsistent defenses. Even if this Court ultimately agreed with the Ninth Circuit that such a requirement violates a defendant's constitutional rights, it has not yet "clearly established" such a rule, and the Ninth Circuit's grant of habeas relief failed to accord the proper deference to the Washington Supreme Court's finding that such an error can be harmless.

ARGUMENT

Affirmative defenses are not of "constitutional dimension" and therefore "Congress [and the states] may … adopt any substantive definition of the defense that it may find desirable." *United States v. Russell*, 411 U.S. 423, 433 (1973) (considering the defense of entrapment). The en banc panel held both that (1) a due process violation results from requiring a

defendant to admit the elements of an offense before presenting an affirmative defense and requiring him to argue consistent with this defense; and (2) the law is clearly established that this error is structural, requiring reversal. It could reach these conclusions, however, only by improperly extending this Court's precedent and relying on its own circuit precedent. In so doing, the en banc panel failed to accord deference to the Washington Supreme Court's finding that any error was amenable to harmless error review.

That failure warrants this Court's intervention. AEDPA permits a federal court to grant habeas relief to a defendant who has been convicted in state court if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1). This standard is highly deferential to state court decisions, and this Court has repeatedly rebuked the lower courts when they failed to apply this "demanding standard" of deference. *Metrish v. Lancaster*, 133 S. Ct. 1781, 1784 (2013). Most recently, just 6 days before the Ninth Circuit issued its ruling in this case, this Court chided the Sixth Circuit for "disregard[ing] the limitations of 28 U.S.C. § 2254(d)—a provision of law that some federal judges find too confining, but that all federal judges must obey." *White v. Woodall*, 134 S. Ct. 1697, 1701 (2014); *see also Burt v. Titlow*, 134 S. Ct. 10, 17 (2013) ("[T]he Sixth Circuit improperly set aside a reasonable state-court determination of fact in favor of its own debatable interpretation of the record." (internal quotation marks and alteration omitted)); *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) ("In … collapsing the distinction between an *unreasonable* application of federal law and

what a lower court believes to be an *incorrect or erroneous* application of federal law, the Ninth Circuit's approach would defeat the substantial deference that AEDPA requires." (Internal quotation marks and citation omitted); *Lancaster*, 133 S. Ct. at 1792 (reversing the Sixth Circuit's grant of habeas relief because "[f]airminded jurists could conclude that [the] state supreme court decision … is not unexpected and indefensible by reference to existing law." (Internal quotation marks and alteration omitted)); *Johnson v. Williams*, 133 S. Ct. 1088, 1094 (2013) ("[T]he Ninth Circuit declined to apply the deferential standard of review contained in § 2254(d).").

Here, the Ninth Circuit relied on its own precedent and improperly extended this Court's holding in *Herring v. New York*, 422 U.S. 853 (1975), to find a "clearly established" rule on an issue this Court has never addressed, let alone held: that a trial court commits structural error by requiring a defendant to admit the elements of an offense before presenting an affirmative defense. That flouting of the limits Congress imposed in AEDPA should not stand.

I. This Court has never "clearly established" that a trial court violates a defendant's due process rights by requiring him to admit the elements of an offense before asserting an affirmative defense; it could not, therefore, have held that such a procedure is structural error.

As noted above, the trial court required Frost to choose between arguing that the State had not proven the elements of the offenses beyond reasonable doubt, or admitting the offenses and asserting that he

committed them under duress. (Pet. App. at 146a.) While the Washington Supreme Court found this to be error, many states adopt the procedure used by the trial court, and this Court has never held that this procedure violates a defendant's due process rights. It could not, therefore, have "clearly established" that this procedure is structural error.

A. State courts around the nation have held that defendants can be put to the choice of admitting the elements of the offense or asserting an affirmative defense.

Although substantive federal criminal law does not require a defendant to admit the elements of the offense before he may assert an affirmative defense, many states have chosen to impose that requirement. Interpreting a federal statute, this Court held that, "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." *Mathews v. United States*, 485 U.S. 58, 62 (1988). The States are not required to follow suit, however, but are free to define affirmative defenses as they see fit. As a Georgia appellate court explained, "the *Mathews* court did not recognize an entitlement to instructions on inconsistent affirmative defenses as a matter of constitutional dimension, but rather merely resolved the issue in federal courts under federal rules of criminal procedure." *Ray v. State*, 383 S.E.2d 364, 366 (Ga. Ct. App. 1989) (internal citation omitted)

In fact, the federal rule (and that adopted by the Washington Supreme Court) permitting a defendant to argue *both* that he did not commit a crime *and* that he

was justified in committing it (*i.e.* he was entrapped or under duress) may "encourage perjury, lead to jury confusion, and subvert the truth-finding function of the trial." *Mathews*, 485 U.S. at 65. The Arizona Supreme Court concluded it would not follow *Mathews* for that very reason:

> When a defendant testifies that he did not commit the elements of the offense charged, the entrapment defense is not a plausible alternate legal theory of the case. *Entrapment is a proper defense under these circumstances only if the accused is lying.* We do not believe that the defendant has a right to lie at trial or a right to solicit his attorney's aid in executing such a defense strategy…. *Requiring a trial court to entertain an entrapment defense when the defendant has not admitted all elements of the crime does not serve the cause of criminal justice.*

State v. Soule, 811 P.2d 1071, 1074 (Ariz. 1991) (emphasis added; internal citations omitted)

Many other states also require a defendant to admit the elements of an offense before asserting an affirmative defense. *See, e.g.*, *Weaver v. State*, 3 S.W.3d 323, 325 (Ark. 1999) ("Our law is well established that, if a defendant denies committing an offense, he cannot assert that he was entrapped into committing the offense."); *People v. Frye*, 10 Cal. Rptr. 2d 217, 223 (Cal. Ct. App. 1992) ("[A]n affirmative defense is one which presumes the prima facie elements of the crime are true, but exculpates the defendant because of excuse or justification."); *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011) ("'[A]ffirmative' defenses … admit the defendant's commission of the elements of the charged

act, but seek to justify, excuse, or mitigate the commission of the act."); *Hicks v. State*, 695 S.E.2d 195, 197 (Ga. 2010) ("Each of these affirmative defenses requires that the defendant admit the crime before he can raise such defense." (Internal quotation marks omitted)); *People v. Arndt*, 814 N.E.2d 980, 990 (Ill. App. Ct. 2004) ("[T]he entrapment defense is not available to a defendant who denies any of the facts constituting the offense charged, including the requisite mental state."); *Melendez v. State*, 511 N.E.2d 454, 457 (Ind. 1987) ("An affirmative defense admits all the elements of the crime but proves circumstances which excuse the defendant from culpability."); *People v. Dupree*, 788 N.W.2d 399, 405 n.11 (Mich. 2010) ("An affirmative defense admits the crime but seeks to excuse or justify its commission."); *Hopson v. State*, 625 So.2d 395, 399 (Miss. 1993) ("[T]he well-established rule in Mississippi [is] that in order for one to use the affirmative defense of entrapment, one must admit that he or she committed the alleged offense."); *State v. Rhodes*, 590 N.E.2d 261, 269 (Ohio 1992) ("[A]n affirmative defense is in the nature of a 'confession and avoidance,' in which the defendant admits the elements of the crime, but seeks to prove some additional fact that absolves the defendant of guilt."); *Rodriguez v. State*, 368 S.W.3d 821, 825 (Tex. App. 2012) ("A defendant's failure to testify, stipulate, or otherwise proffer defensive evidence admitting that he engaged in the proscribed conduct prevents the defendant from benefitting from the defense of duress." (Internal quotation marks omitted)).

Some states withhold an instruction on an affirmative defense if the defendant does not affirmatively admit the elements of the offense. *See,*

e.g., State v. Nilsen, 657 P.2d 419, 420 (Ariz. 1983) (trial court erred in giving entrapment instruction where defendant "sat mute and made no active admission of the elements of the offense"); *State v. Heinz*, 473 A.2d 1242, 1247 (Conn. App. Ct. 1984) ("At no time did the defendant in this case admit that he committed the act charged. Thus, he was not entitled to an [affirmative defense instruction]."); *Olarte v. State*, 614 S.E.2d 213, 217 (Ga. Ct. App. 2005) ("[T]o establish an evidentiary foundation for an instruction on an affirmative defense, the defendant must admit to the crime charged." (Internal quotation marks omitted)); *Beets v. Commonwealth*, 437 S.W.2d 493, 496 (Ky. 1968) ("[An affirmative defense] instruction is not warranted except where the defendant admits the commission of the act charged against him but seeks to excuse or justify its commission."); *Rodriguez*, 368 S.W.3d at 825 ("Because appellant failed to testify, stipulate, or otherwise proffer defensive evidence admitting his commission of the underlying offense, we conclude that he was not entitled to a jury instruction on the affirmative defense of duress.").

Even though this Court has never held that a State violates a defendant's constitutional rights by requiring him to admit the elements of an offense before presenting an affirmative defense, the en banc panel here held that "the trial court violated Frost's due process rights under a long line of *clearly established Supreme Court precedent*." (Pet. App. at 15a (emphasis added).) That "precedent," the en banc panel held, established that Frost "was deprived of his right to demand that a jury find him guilty of all the elements of the crime[s]" and improperly shifted the burden of proof to Frost to prove the affirmative defense. As

discussed below, however, this Court has never "clearly established" that an affirmative defense violates a defendant's constitutional rights in these ways, let alone that structural error would result.

B. The State's burden was not lessened by Frost's choice to admit the elements and present a duress defense.

This Court has held that the prosecution must prove every element of an offense beyond a reasonable doubt. *Winship*, 397 U.S. at 364. But it has never held that this requirement is violated when a defendant must choose between contesting that he committed the offense and asserting an affirmative defense that is predicated on his commission of the offense. The en banc panel held that the trial court's requirement that Frost argue consistently with his chosen duress defense "forc[ed] defense counsel to concede guilt [and] amounted to an unconstitutional directed verdict." (Pet. App. 15a.) But Frost's counsel did not admit guilt, arguing instead that Frost was *not* criminally liable because he acted under duress. (*See* Pet. App. at 157a–158a). Further, as the dissent notes, it was Frost's *choice* to admit the elements and submit a duress defense:

> By requiring Frost to "opt for one [theory] or the other," the judge presented a choice to Frost as opposed to handing down a prohibition or mandate. And, although the judge may have hinted at his belief that abandoning the duress defense and electing to argue that the

> prosecution had not satisfied its burden of proof would be unwise, the judge did not usurp Frost's choice.

(Pet. App. at 31a.)

When a jury is properly instructed on the State's burden to prove each element beyond a reasonable doubt, that burden is not reduced by a defendant's decision to admit the elements of an offense and to present an affirmative defense.[4] *See Florida v. Nixon*, 543 U.S. 175, 188 (2004) (where defendant's attorney conceded guilt in opening statements, State was nevertheless "obliged to present … competent, admissible evidence establishing the essential elements of the crimes with which Nixon was charged"). Thus, the en banc panel's reliance on *United States v. Gaudin*, 515 U.S. 506 (1995), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), as part of the "long line of clearly established Supreme Court precedent" establishing a due process violation, is misplaced. (Pet. App. at 15a.) In those cases the jury was improperly instructed on its duty to find the elements beyond a reasonable doubt. In *Gaudin*, the judge instructed the jury that the judge, and not the jury, would determine one of the elements of the offense. 515 U.S. at 508 ("[T]he issue of materiality is not submitted to [the jury] for your decision but rather is a matter for the decision of the court." (Internal quotation marks and alterations omitted)). In *Sullivan*, the trial court

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[4] The Washington Supreme Court, the district court, and the three-judge Ninth Circuit panel all agreed that Frost's jury was properly instructed on the State's burden to prove each element. (Pet. App. at 133a, 96a, 61a.)

instructed the jury on a definition of reasonable doubt that the Court had earlier found to be unconstitutional. 508 U.S. at 277. Neither case "clearly establishes" a due process violation when a jury is properly instructed on the State's burden.

Winship, *Gaudin*, and *Sullivan* do not clearly establish that the State's burden is lessened when the defendant admits the elements of the offenses in order to present an affirmative defense. They certainly do not establish any structural error in these circumstances.

C. A State may require a defendant to bear the burden to prove an affirmative defense.

Nor has this Court held—let alone clearly established—that the burden of proof improperly shifted to Frost by requiring him to prove that he acted under duress. To the contrary, this Court has held that a State may place the burden on a defendant to prove an affirmative defense:

> This affirmative defense … does not serve to negative any facts of the crime which the State is to prove in order to convict of murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion; and … New York has not violated the Due Process Clause, and Patterson's conviction must be sustained.

Patterson v. New York, 432 U.S. 197, 206–07 (1977); *see also Smith v. United States*, 133 S. Ct. 714, 719 (2013) ("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." (Internal

quotation marks omitted)). Duress, like entrapment, admits that the defendant committed a crime but argues a justification for doing so. The defense "does not serve to negative any facts of the crime" and, if believed, relieves the defendant of criminal liability for his acts. Thus, the burden was properly on Frost to show duress.

Nevertheless, the en banc panel asserted that *Mullaney v. Wilbur*, 421 U.S. 684 (1975), "clearly establishes" that the burden of proof was "unconstitutionally shifted to Frost" and that this claimed error was structural. (Pet. App. at 15a.) *Mullaney* did nothing of the sort. In *Mullaney*, this Court considered "whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process." 421 U.S. at 692. After concluding that, historically, heat of passion was "the single most important factor in determining the degree of culpability attaching to an unlawful homicide," the Court concluded 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, 696. This Court distinguished *Mullaney* in *Patterson*, noting that in *Mullaney*, "lack of provocation was presumed" in violation of due process. *Patterson*, 432 U.S. at 216. Under the affirmative defense at issue in *Patterson*, however, "nothing was presumed or implied," and placing the burden on the defendant to prove the defense did not violate due process. *Id*.

Thus, the en banc panel has misconstrued this Court's rulings in finding that a "long line of clearly established Supreme Court precedent" establishes a due process violation in the trial court's procedure, resulting in structural error.

D. A defendant does not have a constitutional right to argue inconsistent defense theories.

The Washington Supreme Court observed that "it is generally permissible for defendants to argue inconsistent defenses so long as they are supported by the evidence." (Pet. App. at 120a (citing *Mathews*, 485 U.S. at 63).) The right to present inconsistent defenses, however, is not secured by the Constitution. The Sixth Circuit has explained that a court may prevent a defendant from presenting inconsistent defenses:

> Michigan law may well require a state court to let a defendant assert inconsistent defenses when supported by the evidence, and on occasion even federal courts might be required to offer instructions on inconsistent defenses when the evidence supports both instructions, *see Mathews,* 485 U.S. at 65–66, 108 S.Ct. 883. Not all states, however, follow this rule, and the right to present inconsistent defenses is not so widespread or well-established as to be a fundamental rule essential for due process.

Taylor v. Withrow, 288 F.3d 846, 854 (6th Cir. 2002) (some internal citations omitted); *see also People v. Garcia*, 826 P.2d 1259, 1263–64 (Colo. 1992) ("Garcia cannot claim that an intruder stabbed L.C. and at the same time obtain an instruction based on the theory

that he stabbed L.C. in the heat of passion."); *State v. Person*, 673 A.2d 463, 472 (Conn. 1996) (Norcott, J., concurring) ("I find it hard to accept that the right to present a defense includes the right to present to the jury a defense that the defendant's own testimony directly and conclusively contradicts."); *People v. Cooper*, 606 N.E.2d 705, 715 (Ill. App. Ct. 1992) ("[A] defendant may not choose alternative and inconsistent defenses, that is, claim at the same time that he did not commit the offense, but that if he did, he was entrapped."); *but see United States v. Trujillo*, 390 F.3d 1267, 1274 (10th Cir. 2004) (allowing inconsistent defenses); *Arcoren v. United States*, 929 F.2d 1235, 1245 (8th Cir. 1991) (same); *Johnson v. United States*, 426 F.2d 651, 656 (D.C. Cir. 1970) ("It is quite true that a defendant has the right to argue inconsistent defenses as Appellant did here.").

The Washington Supreme Court requires that a defendant be permitted to argue inconsistent defenses. (*See* Pet. App. at 120a.) Therefore, the Washington trial court erred as a matter of state law when it precluded Frost from making an inconsistent argument. But this Court has never held that a State violates a defendant's constitutional rights by requiring a defendant to admit the elements of an offense before asserting an affirmative defense, or by limiting closing argument so that it is consistent with that defense.

The Ninth Circuit's finding of structural error, where this Court has never found error of any kind, conflicts with the manner in which many states define affirmative defenses and promotes uncertainty among the states as to whether their established definitions of affirmative defenses will survive federal scrutiny. It

further threatens to overturn valid state convictions whenever a defendant chooses to present an affirmative defense and carries the burden to prove that defense. AEDPA does not authorize a federal court to grant habeas relief in such a situation.

II. The Ninth Circuit improperly extended *Herring* and relied on its own circuit precedent to find that any error was structural.

When considering a federal habeas petition brought by a prisoner in State custody, a federal court must defer to the State court's decision and may grant habeas relief only if the State court's adjudication "resulted in a decision that 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). "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." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (internal quotation marks omitted).

Here, even if the en banc panel were correct that the trial court violated Frost's Sixth Amendment and due process rights by requiring that he admit the elements of the offenses before asserting his affirmative defense, this Court has not "clearly established" that the error was structural. The en banc panel concluded otherwise only after improperly extending this Court's holding in *Herring* and relying on its own circuit precedent, failing to accord the state court's decision the proper deference in violation of

both AEDPA's requirements and this Court's precedent.

A. *The en banc panel improperly extended* Herring *to conclude that structural error occurred.*

In *Herring*, this Court held that the Sixth Amendment right to the assistance of counsel and to present a defense guarantees all defendants the right to make closing arguments at trial. 422 U.S. at 859 ("[A] total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense."). At the same time, this Court recognized the trial court's ability—and duty—to control argument:

> This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. . . . In all these respects he must have broad discretion.

Id. at 862. Thus, *Herring* expressly reserves to the trial court an ability to limit argument, and it is silent as to whether an improper restriction on closing argument is structural error.

In AEDPA terms, this Court has "clearly established" that a total denial of closing argument in a criminal trial is structural error. But it has not clearly established that an unconstitutional *partial* denial of closing argument is structural error. *Herring* did not address that issue; nor have any of this Court's cases since *Herring*. For this reason, even if the Washington Supreme Court was wrong in concluding

that the limit on closing argument here was subject to harmless-error review, AEDPA forecloses a grant of habeas relief.

Nevertheless, the en banc panel held that Frost's choice to present an affirmative defense, thereby admitting the elements of the offenses, "amounted to a total denial of closing argument on a legitimate defense theory and is thus squarely within the *Herring* rule." (Pet. App. at 17a.) Concluding that *Herring* error is always structural, the en banc panel reversed the Washington Supreme Court's finding of harmless error. (Pet. App. at 10a ("In assessing whether the error in this case is structural, our task is easy because the Supreme Court has determined that *Herring* error is structural."). But saying this was "*Herring* error" does not make it so.[5] Frost's counsel, unlike Herring's counsel, made a closing argument. The en banc court's statement that this was *Herring* error assumed the very issue in dispute, which is whether an unconstitutional partial limit on closing argument should be treated the same way as a total denial of closing argument.

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[5] The panel states that the Washington Supreme Court "explicitly held that the error here was *Herring* error, not mere trial error." (Pet. App. at 17a.) While the state court cited *Herring* to support its conclusion that the trial court "infringed upon [Frost's] Sixth Amendment right to counsel," it did not label the error "*Herring* error" or find that the trial court violated *Herring*. (Pet. App. at 128a.) The court did not reference *Herring* at all in its discussion of harmless error and did, in fact, find that the error was "mere trial error." (Pet. App. at 132a ("[A]n erroneous limitation of the scope of closing argument merely affects the trial process itself." (internal quotation marks omitted).)

This Court has not clearly established the answer to that question, and "fairminded jurists could disagree" as to whether the *Herring* rule applies in this situation, thus precluding habeas relief. *Richter*, 131 S. Ct. at 786 (internal quotation marks omitted).

Only by extending *Herring* could the en banc panel conclude that "[p]recluding defense counsel from arguing a legitimate defense theory" is *Herring* error and, as a result, structural error. (Pet. App. at 12a.) As this Court recently held, however, "if a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision." *Woodall*, 134 S. Ct. at 1706 (internal quotation marks omitted)). In *Woodall*, the Sixth Circuit read three Supreme Court cases together to conclude that this Court had "clearly established" that "a no-adverse-inference instruction was required at the penalty phase" of a capital trial when the defendant does not testify. *Id*. at 1702. This Court disagreed, refusing to adopt the view that "a state court commits AEDPA error if it unreasonably refuses to extend a legal principle to a new context where it should apply." *Id*. at 1705 (internal quotation marks and alteration omitted). The Court observed that "AEDPA's carefully constructed framework 'would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law.'" *Id*. at 1706 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)). "The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *Id*. at

1706–07. For the reasons set out above, it is not "so obvious" here.

By extending *Herring* to the facts in Frost's case, the en banc panel failed to give the state court's decision the deference that AEDPA requires.

B. The en banc panel improperly relied on its own circuit precedent in finding clearly established law.

This Court has warned federal habeas courts not to rely on any law other than that established in its holdings when determining "clearly established Federal law" under AEDPA. *See, e.g., Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013) (The Ninth Circuit's determination of clearly established law "rested in part on the mistaken belief that circuit precedent may be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.").

In finding the law "clearly established" that "preventing a defendant from arguing a legitimate defense theory constitutes structural error" (Pet. App. at 11a), the en banc panel cited and relied on its own circuit precedent, in violation of AEDPA's requirement that only this Court may determine what constitutes "clearly established Federal law." 28 U.S.C. § 2254(d)(1). Not only was it improper for the en banc panel to consult its own precedent in determining "clearly established Federal law," but, as the dissent points out, these cases do not support the panel's finding that the trial court's error was structural because neither case involved applying AEDPA's

deferential standard of review. (*See* Pet. App. at 27a–31a.)

In relying on its own circuit precedent to determine that the law is "clearly established" that the trial court committed structural error, the en banc panel failed to accord the proper deference to the Washington Supreme Court's contrary conclusion.

C. AEDPA precludes habeas relief where, as here, fairminded jurists could disagree as to the correctness of the state court decision.

Habeas relief is precluded when "'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 131 S. Ct. at 786. Here, fairminded jurists *have* disagreed, both in the Washington Supreme Court and in the Ninth Circuit, on whether the trial court's error was subject to harmless error review. And, given this Court's reluctance to find structural error, the state court was reasonable in reading *Herring* as establishing that only a complete denial of closing arguments is structural error. *See Washington v. Recuenco*, 548 U.S. 212, 218 (2006) ("Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal."); *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991) ("[T]he Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless.").

Even if this Court were to agree with the en banc panel that the trial court's claimed error was structural, "there are reasonable arguments on both sides—which is all [Washington] needs to prevail in this AEDPA case." *Woodall*, 134 S. Ct. at 1707; *see also*

Richter, 131 S. Ct. at 786 ("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." (internal quotation marks omitted)). That "there are reasonable arguments on both sides" here is illustrated by the fact that dissenting opinions have issued at every level of appellate review. (*See* Pet. App. at 134a (Sanders, J., dissenting from Washington Supreme Court's application of harmless error review); 65a (McKeown, J., dissenting from Ninth Circuit panel's denial of habeas relief); 18a (Tallman, J., dissenting from en banc panel's finding of structural error)). Thus, not only *could* "fairminded jurists" disagree as to whether the error was structural, they have done so. The Ninth Circuit failed to accord the deference to the Washington Supreme Court's ruling that the error here was harmless.

CONCLUSION

This Court should grant the State of Washington's petition for writ of certiorari.

Respectfully submitted this 28th day of August, 2014.

THOMAS C. HORNE
Arizona Attorney General
ROBERT L. ELLMAN
Solicitor General
JEFFREY A. ZICK
Chief Counsel
LAURA P. CHIASSON*
Assistant Attorney General
400 W. Congress, Bldg. S-315
Tucson, AZ 85701
Phone (520) 628-6520
Laura.Chiasson@azag.gov
* *Counsel of Record*

Counsel for Amici Curiae