No. 18-680

In the Supreme Court of the United States

ERICA HUSS, PETITIONER

v.

LOREN ROBINSON

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

INTRODUCTION

Robinson raises several arguments in opposition to certiorari, but has not shown that this Court should not correct the Sixth Circuit's unwarranted extension of this Court's precedent to overturn a valid state-court decision. Although Robinson claims this decision does not merit this Court's attention, this Court has often stepped in to summarily reverse federal intrusions into state judgments.

Robinson also argues that the decision below is correct and that the Sixth Circuit did not extend *Alleyne* v. *United States*, 570 U.S. 99 (2013), but merely applied it. He is mistaken. The minimum sentence at issue in this case is an entirely different thing than the minimum sentence in *Alleyne*. While Robinson insists that this case has nothing to do with parole, the truth is that parole is all it is about. The only significance a minimum sentence has in Michigan is to determine when a prisoner becomes eligible for parole.

Under the decision below, a defendant has a right to a jury trial of facts that restrict a judge's discretion in determining when that defendant will be eligible for parole. Because no decision of this Court has ever extended the jury trial right to that circumstance, the decision below should be summarily reversed.

ARGUMENT

I. Cases in which the courts of appeals overreach and strike down valid state-court judgments in the absence of governing clearly established federal law are proper cases for this Court's review.

Robinson asks this Court to refrain from correcting the Sixth Circuit's overreach because of this case's "utter unsuitability" for certiorari review. Br. in Opp. at 9. But this is the type of case that has repeatedly merited this Court's review. When the courts of appeals have misused habeas jurisdiction to intrude on legitimate state-court judgments through a failure to properly defer to state courts and through expanding the scope of "clearly established federal law" beyond what this Court has established, this Court has been willing to put matters right through certiorari and summary reversal. See, e.g., *Shoop* v. *Hill*, 139 S. Ct. 504 (2019) (per curiam summary reversal of habeas grant where the Sixth Circuit relied on Supreme Court holding that was not clearly established federal law); *Sexton* v. *Beaudreaux*, 138 S. Ct. 2555 (2018) (per curiam summary reversal of habeas grant where the Ninth Circuit failed to properly defer to the state court's decision); *Dunn* v. *Madison*, 138 S. Ct. 9 (2017) (per curiam summary reversal of habeas grant where the Eleventh Circuit failed to properly defer to the state court's decision); *Kernan* v. *Cuero*, 138 S. Ct. 4 (2017) (per curiam summary reversal of habeas grant where the Ninth Circuit ordered a remedy that was not required by clearly established federal law); *Virginia* v. *LeBlanc*, 137 S. Ct. 1726 (2017) (per curiam summary reversal of habeas grant where the Fourth Circuit erroneously extended *Graham* v. *Florida*).

Robinson's arguments that the petition seeks mere error correction, is not likely to affect many other cases or other States, and presents a splitless issue are all similarly unavailing. The Sixth Circuit's erroneous holding in *Shoop* v. *Hill* was not likely to affect many other cases—the error was in relying on *Moore* v. *Texas*, 137 S. Ct. 1039 (2017), even though it was decided after the Ohio courts' decisions. The Sixth Circuit reasoned that *Moore* did not break any new ground, but that the rule in question was clearly established by *Atkins* v. *Virginia*, 536 U.S. 304 (2002). In that respect, *Shoop* v. *Hill* was like this case—in that case, the Sixth Circuit extended *Atkins* beyond what it actually held, and in this case, the Sixth Circuit extended *Alleyne* beyond what it actually held.

Robinson argues that the error in this case will have limited effect because the Michigan Supreme Court's decision in *People* v. *Lockridge*, 870 N.W.2d 502 (Mich. 2015), ensures that future sentencings will pass Sixth Amendment muster. But Hill could have argued with equal force that the error in *his* case would have limited effect because this Court's decision in *Moore* ensures future sentencings pass Eighth Amendment muster. Nevertheless, this Court understood the importance of overturning the Sixth Circuit's habeas grant.

California's petition in *Sexton* v. *Beaudreaux* did not allege any circuit split, nor did it ask this Court to do anything it had not done many times before—restore a rightful state-court conviction that had been overturned because a federal habeas court failed to give proper deference to the state courts' decisions.

The prisoner in that case could have argued, as Robinson does, that there was no indication "that answering the question presented would provide helpful guidance to other states or courts throughout the Nation." Br. in Opp. at 9. The prisoner in that cased argued, as Robinson does, that the Ninth Circuit's decision would "have few ramifications, if any, on other cases[.]" No. 17-1106, Resp's Br. in Opp. at 19. And yet this Court recognized the importance of restoring a valid state-court conviction that had been wrongfully set aside.

In fact, Beaudreaux's argument on that point, though not strong enough to prevent summary reversal, was stronger than Robinson's is. Beaudreaux was able to argue that his case and his claim presented "highly unusual facts and fact-bound conclusions[.]" *Id*. The claim here presents neither—the facts of the case matter very little. And Michigan has already begun to see habeas petitions containing claims based on *Alleyne* or *Lockridge*—claims governed or affected by the published decision below as long as that decision stands. E.g., *Magnum Reign* v. *Gidley*, 6th Cir. No. 18-1086; *Varnes* v. *Nagy*, E.D. Mich. No. 2:18-cv-12395; *Crockett* v. *Winn*, E.D. Mich. No. 2:18-cv-12180; *Payne* v. *Horton*, E.D. Mich. No. 2:18-cv-10231; *Stocks* v. *Nagy*, E.D. Mich. No. 2:18-cv-11768; *Wimberly* v. *Warren*, E.D. Mich. No. 4:18-cv-11953. Robinson is wrong in assuming that the error below "has virtually zero prospective effect, even in Michigan." Br. in Opp. at 15.

II. Robinson is wrong in claiming this case has nothing to do with parole.

Coming to the merits, Robinson's first error is in saying that Michigan is being "creative" in explaining that the decision below extended *Alleyne* to the question of parole eligibility. Br. in Opp. at 2. Robinson counters that "[n]o parole guidelines, entities, procedures, proceedings, standards, or rulings are implicated here." *Id*. What Robinson cannot include on that list is parole eligibility determinations. Because what *is* implicated here—in fact the *only* thing implicated here—is the date Robinson will become eligible for parole. Robinson says that "[t]he decision below is necessarily limited to the minimum sentence imposed by the state court judge." *Id*. True enough. But the only significance a Michigan prisoner's minimum sentence has is determining when that prisoner will become eligible for parole. If Robinson's claim is not about parole eligibility, then it is not about anything at all.

Thus, Robinson attempts to elevate form over substance: he says that this case is not about parole because Michigan has named its determinant of parole eligibility a "minimum sentence," which Robinson contends brings it within the holding of *Alleyne*. But this Court should look at substance, not form. The sentence in *Alleyne*, like every term-of-years sentence struck down in the *Apprendi* line of cases, was a definite maximum sentence carrying the guarantee of release at its end. Robinson's *minimum* sentence only determines parole eligibility, and by applying *Alleyne* to a determination of parole eligibility, the Sixth Circuit necessarily extended *Alleyne* beyond what it clearly established.

III. The overruling of *McMillan* is implied at best, and is not clearly established federal law.

Robinson accuses Michigan of relying on "a hackneyed reading of *Alleyne* that leaves *McMillan* intact." Br. in Opp. at 10. Robinson states in his response that he is "baffl[ed]" by the state's argument. *Id.* at 14. To make it clear: the *reasoning* upholding the sentence in *McMillan*, which was affirmed in *Harris*, was overturned by *Alleyne*. The *outcome* in *McMillan*, however, which was entirely correct for other reasons, was not overturned by *Alleyne*. The reason the outcome in *McMillan* is correct is because there is a different rationale to uphold the sentence in that case that was absent in *Harris* and *Alleyne*. That rationale was also absent in *Apprendi*, *Booker*, *Blakely*, *Ring*, and *Cunningham*. Specifically, the sentence at issue in *McMillan*, like the sentence at issue here, was not a definite maximum sentence that entitled the prisoner to release at its conclusion, but only a means of determining parole eligibility. In addition, Michigan's argument is not, as Robinson claims, that this Court failed to use "magic words" to overrule *McMillan*, but that it has not overruled the disposition in *McMillan*. But see *Alleyne*, 570 U.S. at 118 (Sotomayor, J., concurring) (majority found that *McMillan* was "wrongly decided").

Aside from this disagreement, this Court need not make clear in this case whether *McMillan* is overruled. The question for this Court is whether any reasonable jurist could read *Alleyne* and believe that a sentence that determines parole eligibility is outside its scope. The answer is yes.

And even to the extent *Alleyne*, by overruling *Harris*, could be read to have overruled *McMillan*, it could have only overruled the reasoning of *McMillan*—because that is all *Harris* affirmed. Because *McMillan* did not address the distinction between a parole-eligibility sentence and a sentence entitling the prisoner to release at its conclusion—much less the Sixth Amendment significance of that distinction—it cannot be said that *Harris* affirmed any reasoning on that point or that *Alleyne* overruled any.

IV. The distinction between the sentence at issue in *Alleyne* and the sentence at issue in this case demonstrates that the court below extended *Alleyne* beyond its holding.

Robinson misunderstands *Alleyne*'s holding when he says, "*McMillan* involved a minimum-sentencing provision that Petitioner concedes is virtually identical to the one in this case. *Alleyne* squarely held that such minimum sentences cannot be altered through judicially-found facts." Br. in Opp. at 14–15. Robinson can only make this assertion by using the same phrase ("minimum sentence") to mean two different things.

The "minimum sentence" in *McMillan*, as in this case, is the minimum amount of time the prisoner must be incarcerated before being considered for parole. But the "minimum sentence[ ]" discussed in *Harris* and *Alleyne* is the low end of a range of sentences, with that range being used to set a definite maximum sentence. The "minimum sentence" at issue in *Alleyne* does not exist in this case, and the "minimum sentence" at issue in this case does not exist in *Alleyne*.

Robinson says, "*Alleyne*'s holding was unequivocally *not* about the minimum sentence ultimately imposed[.]" Br. in Opp. at 16. On that the parties agree, and this is the clearest statement yet of why the Sixth Circuit seriously erred. In *Alleyne*, there was no minimum sentence ultimately imposed. But this case unequivocally *is* about the minimum sentence ultimately imposed—and that is why *Alleyne* does not apply to this case.

Robinson continues, "[*Alleyne*] was about the 'prescribed *range* of sentences to which a defendant is *exposed*.' " Br. in Opp. at 16 (quoting *Alleyne*, 570 U.S. at 108 (emphases added by Robinson)). But that does not eliminate the distinction. *Alleyne* was about the prescribed range of one type of sentence, and this case is about the prescribed range of another type of sentence. Nothing in *Alleyne* (or *Blakely*, or *Booker*, or *Apprendi*) indicates that the type of sentence at issue here—one establishing a minimum sentence that marks when a criminal defendant is eligible for parole—has any Sixth Amendment significance.

For that reason, Robinson's reliance on *Lockridge* (Br. in Opp. at 17–19) may be ignored. The Michigan Supreme Court in *Lockridge* was not restricted, as the court below should have been, by the universe of clearly established federal law, but was permitted to interpret the Sixth Amendment question as a matter of first impression. And, in an appropriate case, this Court could agree or disagree with *Lockridge*'s Sixth Amendment holding. But the question in *this* case is not what the Sixth Amendment might require, but what this Court has already held the Sixth Amendment requires.

Robinson claims that *Alleyne* applies to Michigan minimum sentences because "a 'minimum sentence,' in its plainest meaning, is understood to be a date of eligibility, not entitlement." Br. in Opp. at 18.

But this claim makes no sense in a discussion of *Alleyne* and only serves to further highlight the gulf between that case and this one. In *no* sense was the minimum sentence in *Alleyne* "a date of eligibility." Alleyne was not going to become eligible for parole or anything else at the end of seven years' time. The minimum sentence in *Alleyne* was not a sentence at all, of course. It was the low end of the range from which the district court could choose a sentence. Once the district court imposed a sentence of seven years, there no longer was any "minimum sentence" in the case at all. It was a flat sentence, that describes neither a maximum or minimum, but a determinate sentence.

While Robinson can try to blur the line between a sentence that establishes a set duration and entitles a prisoner to release and a sentence that entitles a prisoner to nothing but consideration for parole, he cannot escape the fact that this Court has never held—in *Alleyne* or in any other case—that the Sixth Amendment jury right is implicated in a state's determination of when a prisoner may be considered for parole. Until and unless this Court so holds, habeas courts may not grant relief on this basis.

V. To the extent the error below occurred because the Sixth Circuit misconstrued state law, that factor should weigh in favor of this Court's review.

Perhaps the most remarkable contention of Robinson's brief in opposition is the notion that a federal habeas court's erroneous overturning of a state-court judgment is somehow excusable if it is only based on a "misunderstanding of state law." Br. in Opp. at 11. If anything, the opposite is true.

It is bad enough for a federal habeas court to overturn a valid state conviction based on a mistake about what the Constitution says or what this Court has held. It is significantly more violative of the values of comity, federalism, and respect for the finality of state-court judgments when a federal habeas court looks to state law, misunderstands it, and then uses that misunderstanding to hold that a state-court decision violated the Constitution. And not only comity and federalism are implicated, but also, because the decision is published, the district courts and future Sixth Circuit panels will be bound by a federal misreading of Michigan law. If this Court agrees with Robinson that the error below, if any, was a misinterpretation of state law rather than of *Alleyne*, that is a factor weighing in *favor* of review and reversal, not against it.

CONCLUSION

This Court should grant the state's petition for certiorari.

Respectfully submitted,

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