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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| JASON GREEN,<br><br>Petitioner-Appellant,<br><br>v.<br><br>WARREN L. MONTGOMERY, Warden,<br><br>Respondent-Appellee. | No. 21-56166<br><br>D.C. No.<br>2:18-cv-06443-JLS-SHK<br><br>MEMORANDUM* |

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| LYNETTE PENNINGTON,<br><br>Petitioner-Appellant,<br><br>v.<br><br>JANEL ESPINOZA, Acting Warden of the Central California Women's Facility; DERRAL G. ADAMS, Warden,<br><br>Respondents-Appellees. | No. 21-56174<br><br>D.C. No.<br>2:17-cv-07004-JLS-SHK |

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted March 8, 2023
Pasadena, California

Before: KLEINFELD, WATFORD, and COLLINS, Circuit Judges.

Jason Green and Lynette Pennington appeal the district court's dismissals of their habeas petitions, in which they argue that certain tactics employed by the prosecution violated their rights to due process.

We have jurisdiction pursuant to 28 U.S.C. § 2253. We review the district court's decisions de novo and decide whether the state court's decision falls afoul of the standards set forth in § 2254(d). *Van Lynn v. Farmon*, 347 F.3d 735, 738 (9th Cir. 2003). We decide it does not, so we affirm.

As a preliminary matter, we reject Green and Pennington's argument that the California Court of Appeal's decision "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). The court did not base its decision on a factual determination that "the prosecutor's dismissal and refiling was not motivated by the improper purpose of *forum shopping*" (emphasis added). Rather, it decided as a matter of law that a defendant's right to due process does not prohibit the prosecution from forum shopping, "even if the purpose of the refiling was to avoid an adverse ruling."

Next, Green and Pennington also fail to establish that 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." 28 U.S.C. § 2254(d)(1). Their burden is heavy, as the state court decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Green and Pennington did not identify a Supreme Court decision clearly holding that prosecution forum-shopping violates due process. The three Supreme Court cases they cite recognized different aspects of a state prosecution that may contravene due process: in *Chambers v. Mississippi*, it was state evidentiary rules that arbitrarily excluded the confession of a true murderer, 410 U.S. 284, 302 (1973); in *Donnelly v. DeChristoforo*, misrepresentation of evidence by the prosecution, 416 U.S. 637, 646 (1974); and in *Lisenba v. California*, the prosecution's use of a coerced confession, 314 U.S. 219, 236–37 (1941). But none of them concerned prosecution forum-shopping. To the extent that Green and Pennington cite *Chambers* and *Lisenba* for the proposition that a prosecutor's actions might offend due process even though permitted under state law, we agree

but hold below that the state court's decision is consistent with that clearly established rule.

Without the support of a clearly on-point Supreme Court precedent, Green and Pennington's argument boils down to the claim that their cases fit the general principle that prosecutorial misconduct violates due process when it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643. But state courts are only required to extend an abstract principle to a new scenario when the principle "so obvious[ly]" applies "that there could be no 'fairminded disagreement' on the question." *White v. Woodall*, 572 U.S. 415, 427 (2014) (quoting *Harrington*, 562 U.S. at 103). Here, we decide that fairminded jurists may disagree on whether the alleged misconduct meets the Supreme Court's demanding standard. Consequently, the state court's refusal to extend existing law does not constitute an unreasonable application of federal law.

Lastly, Green and Pennington are mistaken in arguing that the California Court of Appeal held that because the prosecution's forum-shopping practice was permitted by state law, it necessarily satisfied the federal Constitution's due-process requirement. This argument reads the state court's statement out of context. The court did decide that the prosecution complied with state law in

refiling charges against Green and Pennington. Nevertheless, it also considered whether the conduct violated their rights to due process under the federal Constitution, and gave independent and adequate reasons for holding that it did not.

**AFFIRMED.**