No. 12-694

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

State of Nevada; Brian Sandoval; Robert LeGrand, Warden; Petitioners,

v.

Calvin O'Neil Jackson, Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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State of Nevada; Brian Sandoval, Robert LeGrand, Warden; Petitioners,

V.

Calvin O'Neil Jackson, Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Calvin O'Neil Jackson, asks for leave to file the attached brief in Opposition to Petition for Writ of Certiorari, without prepayment of costs and to proceed in forma pauperis. Respondent has been granted leave to so proceed in the District Court and in the United States Court of Appeals. No affidavit is attached, inasmuch as the District Court appointed counsel for Respondent under the Criminal Justice Act of 1964. 18 U.S.C. §3006A. See Supreme Court Rule 39.1.

Dated this 5th day of February, 2013.

Respectfully submitted,

LORI C. TEICHER
First Assistant Federal Public Defender
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied 28 U.S.C. § 2254(d) when it granted Mr. Jackson relief as he was prohibited from presenting his theory of defense at trial.

2. Whether the Court of Appeals improperly relied on facts contrary to those found by the Nevada Supreme Court, in violation of 28 U.S.C. § 2254(e)(1).

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I.

STATEMENT OF THE CASE[1]

On August 6, 2012, the United States Court of Appeals for the Ninth Circuit issued an opinion, reported at 688 F.3d 1091, reversing the district court's denial of Calvin O'Neil Jackson's (hereinafter "Jackson's") writ of habeas corpus and reversing his conviction. App. 1. As found by the court of appeals, Jackson's constitutional right to present a complete defense at his trial fourteen years ago was improperly denied by the Nevada trial court. Id. Specifically, Jackson sought to present testimony through police officers about at least four prior occasions where there was no corroboration to back up the allegations made by the complaining witness, Annette Heathmon (hereinafter "Heathmon"), that Jackson had physically abused her. Jackson sought to present this testimony to establish his theory of defense that Heathmon used the police to exercise control over Jackson and to present an alternative theory as to why Heathmon did not want to come to court and testify. App. 10-12.

The court of appeals held that Jackson was denied due process, conditionally granting Jackson's petition for writ of habeas corpus with directions to release Jackson from custody unless the state retries him within a reasonable time. App. 31. On September 17, 2012, the panel voted unanimously to deny the petition for rehearing. App. 84-85. The full court was advised of the request for rehearing en banc and no judge requested a vote. Id. Petitioners' Petition For Writ of Certiorari (hereinafter the "Petition") was docketed December 3, 2012. An Amicus Brief in support

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[1] Citations to the record will be referenced as they were in the court of appeals ("EOR"), except for references to the record that have been included in the appendix submitted by Petitioners ("App.").

of Petitioners was filed January 7, 2013. Respondent now files his Brief In Opposition To Petition For Writ Of Certiorari.

II.

REASON FOR DENYING THE WRIT

A. The Court of Appeals properly applied 28 U.S.C. § 2254(d) when it granted Jackson relief as he was prohibited from presenting his theory of defense at trial.

In their petition for writ of certiorari, petitioners assert that the court of appeals improperly applied 28 U.S.C. § 2254(d) when it granted Jackson relief because he was prohibited from presenting his theory of defense at trial. This case was properly decided by the court below, as the appellate court set forth an exhaustive § 2254(d) analysis, applying clearly established constitutional law. Petitioners and Amicus[2] further argue that the appellate court created a circuit split upon issuance of a new federal constitutional rule that a criminal defendant now has a federal constitutional right to admit extrinsic evidence on a collateral issue at trial. App. 3. Petitioners misstate the appellate court's holding and are seeking to develop a certiorari issue where none exists.

Section 2254(d) permits federal courts to grant habeas relief to a state prisoner if the state court's decision:

> "(1) 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; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

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[2] Amicus was filed on January 7, 2013. Both briefs are referred to as "Petitioners" unless specified as both set forth substantially identical argument.

A state court ruling is an "unreasonable application of" this Court's precedent "if the state court identifies the correct governing legal principle from this Court's decision but unreasonably applies that principle to the facts of the prisoner's case[,]" Williams v. Taylor, 529 U.S. 362, 413 (2000), or if it "fails to extend a clearly established legal principle to a new context in a way that is unreasonable." Himes v. Thompson, 336 F.3d 848, 852 (9th Cir. 2003). It is only an unreasonable application if it is "objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 75 (2003). The Ninth Circuit has explained that "[i]n assessing whether an application of federal law is objectively unreasonable, courts will often have to engage in an intensive fact-bound inquiry highly dependent upon the particular circumstances of a given case." Chia v. Cambra, 360 F.3d 997, 1002 (9th Cir. 2004).

AEDPA does not require state and federal courts to wait for some nearly identical factual patterns before a legal rule must be applied, nor does it prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced. See Pannetti v. Quarterman, 551 U.S. 930, 953 (2007); Carey v. Musladin, 549 U.S. 70, 81 (2006)(Kennedy, J., concurring in judgment). The appellate court's analysis in Jackson's case does nothing more than follow this Court's command.

1. The constitutional right to present a theory of defense is clearly established by this Court and was appropriately identified as such by the appellate court.

Petitioners acknowledge that this Court has held that subject to reasonable restrictions, due process and the confrontation clause establish a criminal defendant's right to present witnesses and their theory of defense. App. 11-12. See Washington v. Texas, 388 U.S.14 (1967)[3]; Chambers v.

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[3] "The right to offer the testimony of witnesses, and to compel their attendance, if (continued...)

Mississippi, 410 U.S. 284, 294 (1973); California v. Trombetta, 467 U.S. 479, 485 (1984))(The United States Constitution guarantees a criminal defendant "a meaningful opportunity to present a complete defense."); Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting U.S. v. Scheffer, 523 U.S. 303 (1998); Taylor v. Illinois, 484 U.S. 400, 411 (1988) (This right "is itself designed to vindicate the principle that the 'ends of criminal justice would be defeated if the judgments were to be found on a partial or speculative presentation of the facts.'" (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)); Michigan v. Lucas, 500 U.S. 145, 151 (1991)(constitutional violation of right to confront or present a defense occurs when exclusion of evidence is arbitrary or disproportionate to purposes of rule under which it is excluded); Holmes v. South Carolina, 547 U.S. 319 (2006).

This Court has continuously reaffirmed that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers, 410 U.S. at 302 (holding evidentiary rules may not applied mechanistically to testimony that is critical to a defendant's defense and bears assurances of trustworthiness to "defeat the ends of justice"); see also e.g., Webb v. Texas, 409 U.S. 95, 98 (1972); In re Oliver, 333 U.S. 257, 274 (1948). The court of appeals appropriately identified and applied the clearly established law of this Court to Jackson's case. App. 7-8.

2. The court of appeals was correct in their application of this Court's constitutional law to the instant case.

Petitioners are attempting to suggest that the court of appeals "went rogue" with this holding

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[3] (...continued)
necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to his own witnesses to establish a defense. This right is a fundamental element of due process of law." Washington, 388 U.S. at 19.

and the result is a circuit split. Petitioners argue that the court failed "to cite a single United States Supreme Court case holding that the right to present a defense is violated by the exclusion of extrinsic evidence to support impeachment on a collateral matter." App. 14. It is true that this "clearly established" rule appears nowhere in the decision. It does not appear as the premise of Petitioners' argument misstates the court's decision, which is actually the opposite: that the trial court's failure to allow extrinsic evidence in Jackson's trial is *not* collateral nor impeachment evidence but goes squarely to his right to present a defense, therefore is an error of constitutional dimension. App. 18-19.

The court of appeal's opinion does not announce a "new, more ambitious constitutional rule", nor does it "void a state conviction based on its own circuit precedent." App. 15. The court thoroughly discusses AEDPA deference and the constitutional principles at issue. App. 6-10. The court next details Jackson's defense along with the extrinsic evidence sought to be presented. App. 10-12. Finally, the court appropriately analyzes circuit precedent, distinguishing and contrasting Jackson's facts to other cases.[4] App. 12-25. The court contrasts cases where extrinsic evidence was *not* found to be collateral, thus implicating the defendant's constitutional right and meriting relief[5] with instances where the evidence *was* collateral, of marginal relevance to the defense and did not

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[4] The Ninth Circuit has stated that "[a]lthough only Supreme Court law is binding on the states, our circuit precedent remains relevant persuasive authority in determining whether a state court decision is objectively unreasonable." Chia v. Cambra, 360 F.3d 997, 1002-03 (9th Cir. 2004)(quoting Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003)); see also Duchaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000).

[5] See Fowler v. Sacramento County Sheriff's Dep't, 421 F.3d 1027 (9th Cir. 2005); Holley v. Yarborough, 568 F.3d 1091, 1099 (9th Cir. 2009)

implicate the defendant's constitutional right to present a defense.[6] Id. The court concluded that the evidence was highly relevant to Jackson's defense against the charges under the standard that this Court has established. The rule presented by Petitioners has no relevance to this case.

The standard evidentiary rule that extrinsic evidence of a collateral nature cannot be admitted remains undisturbed, however the equities are different when the evidence is not collateral. There is a distinction as to whether due process rights are implicated when excluded evidence regarding a witness's credibility goes towards bias or a motive to lie. App. 18. The court notes that "[t]his is precisely the nature of the evidence excluded in Jackson's case: evidence that Heathmon previously made false accusations against him as part of their relationship provided a motive for her allegedly false testimony" during her trial testimony. Id. The court further clarifies its ruling, stating that:

> Our holding in Fenenbock also does not support a conclusion that a constitutional violation did not occur in this case because the excluded evidence in Jackson's trial was neither collateral – because it related to the core of his defense that Heathmon had a history of making false accusations *against him* – and it was not intended to impeach an out of court statement. To the contrary, the officers' testimony would have directly rebutted Heathmon's own -in-court statements that Jackson had preciously assaulted her on several occasions, including the May 7, 1995 incident, to which she had already testified at length. Thus, even an appropriate limitation on the introduction of impeachment testimony on collateral or out of court statements could not justify the total exclusion of Jackson's evidence in this instance.

App. 18-19.

The extrinsic evidence sought to be presented implicates a constitutional right because the testimony did not surround a collateral matter. Jackson's counsel was not impeaching an out of court statement, but tried to present evidence to directly rebut Heathmon's own statements on the stand. The State made Jackson and Heathmon's past relationship relevant to the case when they introduced

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[6] See Hughes v. Raines, 641 F.2d 790 (9th Cir. 1981); Fenenbock v. Dir. of Corr. For California, 681 F.3d 968 (9th Cir. 2012).

prior incidents based on the trial court's conclusion that this evidence was relevant. The defense should have been given the same opportunity. As the appellate court observed, preclusion is not consistent with the purposes of the rule when used in such an inequitable way. App. 29. Alternatively, it was unreasonable, disproportionate and arbitrary to the purposes of evidentiary rules to allow the State to use them as a sword but prevent the defense from pursuing relevant evidence where that same party had admitted related evidence at trial. The precluded testimony went to the core of Jackson's defense and violated his right to due process.

Petitioners attempt to posture the case as a renegade holding fails. The court's analysis carefully shows how Jackson's constitutional right to present a defense was violated and how it was an unreasonable application of clearly established federal law. Jackson is entitled to a new trial and the writ for petition of certiorari must be denied.

3. The court of appeals properly found that the Nevada Supreme Court's application of the clearly established federal law was unreasonable.

Petitioners begrudgingly admit that there is a well-recognized right for a criminal defendant to present a complete defense and "[n]ecessary to the realization of this right is the ability to present evidence, including the testimony of witnesses." App. 7, citing Washington v. Texas, 388 U.S. at 19. Petitioners also correctly restate the appellate court in that the right is "violated when relevant and material evidence that is vital to the defense is excluded and the exclusion is arbitrary and disproportionate to the purposes [the exclusionary rule] is designed to serve." App. at 19, citations omitted. Petitioners are wrong in their assertion that the decision acknowledges that "the excluded evidence of the police officers had no direct bearing upon the question of guilt or innocence concerning the particular acts for which Jackson was on trial." App. 20. The court found the

Nevada Supreme Court's analysis to be unreasonable because the material was relevant, vital to the defense and its exclusion arbitrary and disproportionate to the purposes the rule is designed to serve. The court explains that:

> Heathmon's credibility was crucial to Jackson's prosecution, because there was minimal physical evidence suggesting that she had been physically or sexually assaulted, and the weapon, a screwdriver, was never found, nor was it observed by the witness that saw Jackson and Heathmon together immediately following the assault. The jury therefore had to rely on Heathmon's own recitation of the facts - as presented in her own testimony at trial and as related through the testimony of other witnesses based on statements she made around the time of the assault - to conclude that Jackson had indeed assaulted her, and that he was wielding a weapon at the time. Evidence that undermined her credibility was central to Jackson's theory that this was just another instance in which Heathmon made false or exaggerated claims against him to the police. It is reasonable to conclude that witness testimony that Heathmon made uncorroborated claims against Jackson in the past, claims that were believed by impartial officers to be inaccurate and inconsistent with the physical evidence would have influenced the jury's assessment of Heathmon's credibility.

App. 15-16.

The testimony Jackson sought to introduce was not collateral or marginally relevant. The only issue at trial was whether the sexual assault alleged by Heathmon occurred and the testimony Jackson sought to introduce would have gone "directly to the matters put at issue by the indictment." Williams v. Borg, 139 F.3d 737, 742 (9th Cir. 1998). The appellate court appropriately held that it was not reasonable to believe that this evidence was collateral or as the Nevada Supreme Court opined, that "such testimony was not proper impeachment or rebuttal evidence because the victim did not suggest that there was any corroboration for her other allegations." App. 67.

In Harrington v. Richter, 131 S.Ct. 770, 786-87 (2011), this Court recently reaffirmed the deference owed a state court decision. This deference, however, "does not imply the abandonment or abdication of judicial review." Collins v. Rice, 348 F.3d 1082, 1097 n.15 (9th Cir. 2003); accord

Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)("Deference does not by definition preclude relief."). AEDPA did not eliminate this Court's power to issue a writ when the facts and law so demand. Cf. Hall v. Dir. of Corrs, 343 F.3d 976, 984 n.8 (9th Cir. 2003); see also Miller-El, 537 U.S. at 340 (2003)(explaining a court can, when guided by AEDPA standards, "conclude [a state court decision] was unreasonable or that the factual premise was incorrect by clear and convincing evidence"). The heightened standards for granting habeas relief are not an unassailable barrier precluding relief. See Panetti v. Quarterman, 551 U.S. 930, 953 (2007)("Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced". . . . The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner.")(citations omitted). The standard was applied in an unreasonable manner. Petitioners fail to put forth any real argument that the appellate court showed a lack of deference. The court addressed all potential arguments, particularly why the evidentiary rule that was used to exclude the testimony was applied in a clearly disproportionate or arbitrary way. The record here cannot, under any reasonable interpretation of the controlling legal standard, support the Nevada Supreme Court's ruling.

B. Whether the Court of Appeals improperly relied on facts contrary to those found by the Nevada Supreme Court, in violation of 28 U.S.C. § 2254(e)(1).

28 U.S.C. § 2254(e)(1) states that the determination of factual issues made by a state court are presumed to be correct and the applicant has the burden to rebut the presumption of correctness by clear and convincing evidence. Petitioners maintain that the reviewing court did not grant deference to the Nevada Supreme Court ruling by disregarding the court's factual findings. App. 21. Petitioners assert that the Nevada Supreme Court determined that the prior reports to police were

merely uncorroborated; therefore they "would not establish that the prior allegations were false." App. 67. Petitioners maintain that the Nevada Supreme Court made a factual finding that the uncorroborated prior police reports to police had no evidentiary value, including for impeachment. App. 21.

The Nevada Supreme Court ruling on direct appeal stated:

> However, testimony showing a lack of corroboration would not establish that the prior allegations were false. Therefore, such testimony was not proper impeachment or rebuttal evidence because the victim did not suggest that there was any corroboration for her other allegations, and the district court did not abuse its discretion by refusing to allow Jackson to present the police officers' testimony.

Id.

The reviewing court gave proper deference to the state court's ruling. Petitioners argument is frivolous as the "facts" that they claim should be given a presumption of correctness are not factual findings but legal conclusions. Conclusions of law are not entitled to a presumption of correctness under § 2254(e)(1). See Thompson v. Keohane, 516 U.S. 99, 111 (1995); Cuyler v. Sullivan, 446 U.S. 335, 341 (1980).

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III.

CONCLUSION

The court of appeals correctly followed this Court's directive: applying the clearly established federal law, granting deference to the state court, not improperly relying on facts contrary to those found by the state court, and reasonably relied upon the clearly established federal law to conclude that no fair minded court could agree with the Nevada Supreme Court's conclusion. There is no reason to grant certiorari on the questions presented and since none of the considerations set forth in this Court's Rule 10 are present in this case, review is not warranted. Jackson respectfully asks that the Petition For Writ of Certiorari be denied.

Dated this 5th day of February, 2013.

Respectfully submitted,

LORI C. TEICHER
First Assistant Federal Public Defender

CERTIFICATE OF SERVICE

CALVIN O'NEIL JACKSON,

Petitioner-Appellant,

vs.

ROBERT LeGRAND, et al.,

Respondents-Appellees.

CA No. 09-17239

D.C. No. 3:03-CV-00257-RLH-RAM
(District of Nevada, Reno)

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on February 5, 2013, she served a copy of the attached Opposition to Petition for Writ of Certiorari and Motion to Proceed in Forma Pauperis by personally placing a copy in the United States mail, postage paid to the addresses named below:

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