No. _____

In the Supreme Court of the United States

STATE OF NEVADA; BRIAN SANDOVAL;
ROBERT LEGRAND, WARDEN,
Petitioners,

v.

CALVIN O'NEIL JACKSON,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULE

OTHER AUTHORITY

REPLY BRIEF FOR PETITIONERS

The trial court in this case, in compliance with a local rule of evidence that mirrors Federal Rule of Evidence 608, excluded extrinsic evidence that respondent Calvin Jackson sought to introduce to impeach a prosecution witness on a collateral matter. The Nevada Supreme Court affirmed the conviction, but the Ninth Circuit granted habeas relief under 28 U.S.C. §2254(d)(1) based on its conclusion that the Nevada Supreme Court unreasonably applied the constitutional right to present a defense. As the petition explained, however, this Court has never held that the constitutional right to present a defense includes the right to present extrinsic evidence to impeach a prosecution witness on a collateral matter. Pet. 11-16.

In his brief in opposition, Jackson agrees with that proposition. See Br. in Opp. 5-6. He instead defends the Ninth Circuit's opinion by contending that the excluded evidence was "not collateral." *Id*. at 6, 8. That contention is manifestly without merit. Under any plausible understanding of what constitutes "collateral" testimony, the excluded evidence here – police officers' testimony about the victim's reports of *prior* attacks – is "collateral." The Ninth Circuit therefore granted habeas relief based on what even Jackson concedes was not "clearly established Federal law as determined by [this Court]." Given that blatant violation of the limits this Court imposed in AEDPA, this Court should grant certiorari and summarily reverse the decision below.

I. The Ninth Circuit Granted Habeas Corpus Relief Based On Federal Law That This Court Has Not "Clearly Established."

The excluded evidence that forms the basis of Jackson's right-to-present-a-defense claim "was testimony from officers who responded to [the victim's] prior allegations of abuse." Pet. App. 10. Specifically, he hoped the officers' testimony would show "that [the victim] had, on prior occasions, made claims of assault that were contradicted or uncorroborated by the evidence observed by the responding or investigating officers." Pet. App. 12. That is precisely the type of evidence that is inadmissible under Federal Rule of Evidence 608, which provides that "[s]pecific instances of a conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime . . ., may not be proved by extrinsic evidence." The Nevada rule, codified at Nev. Rev. Stat. §50.085(3), is virtually verbatim. "Such rules are designed to prevent distracting mini-trials on collateral matters." *Boggs v. Collins*, 226 F.3d 728, 744 (6th Cir. 2000), *cert. denied*, 532 U.S. 913 (2001).

This Court has never held that the right to present a defense entitles a defendant to present extrinsic evidence that would be excluded under Federal Rule 608 or a state equivalent. Jackson does not appear to dispute this, but insists that this case is somehow different because the excluded evidence was not collateral, but rather "goes squarely to [Jackson's] right to present a defense." Br. in Opp. 5 (citing Pet. App. 18-19). This argument is circular and ignores the manifest nature of the excluded evidence, whether viewed under Nevada or federal law.

Black's Law Dictionary (8th ed. 2004) defines a "[c]ollateral fact" as "[a] fact not directly connected to the issue in dispute, especially because it involves a different transaction from the one at issue." *Id*. at 628. The Nevada Supreme Court has similarly held that evidence is collateral if it does not pertain "to the issues being decided at trial," regardless of whether it pertains to something testified to on direct examination. *Rembert v. State*, 104 Nev. 680, 683, 766 P.2d 890 (1988). And federal courts have held likewise. *See, e.g., United States v. Tarantino*, 846 F.2d 1384, 1410 (D.C. Cir. 1988) (defining collateral evidence as that which "bears no relevance to any elements of the crimes charged or to any affirmative defenses to those crimes"). Whether Jackson's victim's prior reports of assault were accurate may bear on her credibility; but those reports involve incidents for which Jackson was not currently on trial.

To be sure, a defendant has a qualified right to present evidence that would constitute a *defense* to the matter being determined by the jury. *Crane v. Kentucky*, 476 U.S. 683 (1986) (exclusion of confession); *Washington v. Texas*, 388 U.S. 14 (1967) (testimony of accomplice). This Court has never held, however, that the right to present a defense includes the right to present evidence designed solely to denigrate the credibility of a witness concerning a matter not being determined by the jury. This Court has simply never placed "uncorroborated prior reports to police" in the same category as a coerced confession or excluded accomplice testimony – items which if believed by a jury would necessarily directly lead to an acquittal. The Ninth Circuit's decision to do so here is precisely

the kind of lower-court extension of the law that AEDPA forbids.

Nor, contrary to the Ninth Circuit's decision and the Brief in Opposition, has this Court held that a state court defendant's right to present a defense includes the right to present evidence regarding a witness's credibility "that goes towards bias or motive to lie." Pet. App. 18; Br. in Opp. 6. Their sole support for this proposition is the Ninth Circuit's decision in *Fenenbock v. Director of Corrections for California*, 681 F.3d 968, *amended*, 692 F.3d 910 (9th Cir. 2012). This confirms that no decision by *this* Court has established that rule, as is required for relief under 28 U.S.C. §2254(d)(1). (And as explained in the petition, none of the Supreme Court decisions cited in *Fenenbock* establish such a rule. Pet. 12-13.)

As also explained in the petition, the absence of "clearly established Federal law as determined by [this Court]" is demonstrated by the fact that five circuits have confronted and rejected the Ninth Circuit's "interpretation" of Supreme Court authority. Pet. 16-17; Amicus Br. of Michigan *et. al*. 8-9. Jackson does not even attempt to distinguish those cases. The Ninth Circuit has indeed created a circuit split and blazed a new constitutional path in defiance of AEDPA.

II. Even Assuming The Federal Law At Issue Was Clearly Established, The Nevada Supreme Court's Application Of It Was Not Objectively Unreasonable.

A state court ruling is objectively unreasonable only if it "was so lacking in justification that there was an

error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011). Even if the excluded evidence at issue fell under the constitutional right to present a defense, the Nevada Supreme Court's decision excluding the testimony was not objectively unreasonable.

First, it was not objectively unreasonable for the Nevada Supreme Court to conclude that the excluded evidence was collateral and that its exclusion therefore did not fall within the scope of the constitutional right to present a defense. Neither this Court nor any known federal court of appeals has held that the constitutional right to present a defense can override a proper application of Federal Rule 608 or its state equivalent. Certainly, the Brief in Opposition does not cite such a case. A reasonable jurist could conclude that there is good reason for that: extrinsic evidence on past conduct by a witness is too remote to implicate the defense.

Second, Federal Rule 608 and its Nevada counterpart permit cross-examination on the past conduct, and Jackson was permitted to cross-examine the victim about her prior complaints of assault. Pet. App. 74, 82. A fairminded jurist could conclude that the cross-examination of the testifying victim was a sufficient means of ensuring the defendant's right to challenge the victim's credibility and defend himself against the charged offense.

Third, it was not objectively unreasonable for the Nevada Supreme Court to exclude the testimony because it was not vital to the defense. The Nevada

Supreme Court and the district court concluded that the testimony, even in its best light, would not have shown the victim made prior "false" allegations against Jackson. Pet. App. 67, 44. The most they could have shown was "that she made accusations that may have gone uncorroborated." *Id*. at 44. That is a thin reed on which to overturn a 14-year-old conviction – an unacceptably thin reed in a federal habeas corpus case governed by §2254(d)(1).

This Court's decisions finding infringements of the constitutional right to present a defense involved serious government-created impediments to defendants' presentation of evidence that directly went to guilt or innocence of the charged crime. *See Crane*, 476 U.S. at 690 (1986) (excluded evidence concerned the voluntariness of a confession); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (defendant had been barred from cross-examining witness who had previously confessed to the crime); *Washington*, 388 U.S. at 23 (defendant had been barred from calling accomplice as witness). Given this background, the Nevada Supreme Court's conclusion that the excluded evidence here does not amount to a denial of the constitutional right to present a defense was a reasonable one.

In sum, the opposition brief simply defends the decision of the Ninth Circuit as a proper *de novo* consideration of the evidentiary claim. The Ninth Circuit's failure to follow AEDPA and its creation of a new constitutional rule within a habeas corpus proceeding should not be allowed to stand. In similar prior circumstances, this Court has not hesitated to grant certiorari and summarily reverse the lower

court's decision. See Pet. 22-23 (listing cases). The Court should do the same here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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