No. 12-694

# In the Supreme Court of the United States

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

v.

CALVIN O'NEIL JACKSON

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

## BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 14 OTHER STATES IN SUPPORT OF PETITIONERS


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## QUESTION PRESENTED

Whether the Ninth Circuit exceeded its authority under AEDPA by granting habeas relief on the ground that the Nevada Supreme Court unreasonably applied "clearly established Federal law, as determined by" this Court in holding that Respondent Jackson's right to present a defense was not violated by the exclusion of extrinsic evidence through which he sought to impeach a prosecution witness on a collateral matter.

## TABLE OF CONTENTS

Question Presented ..................................................... i

Table of Contents ...................................................... ii

Table of Authorities ................................................. iv

Interest of *Amici Curiae* ............................................ 1

Introduction and Summary of Argument ................. 2

Argument .................................................................... 3

I. The Ninth Circuit violated AEDPA and created a circuit split when it granted habeas relief in the absence of a ruling from this Court on the issue presented. ............................. 3

    A. The only source of "clearly established Federal law" in an AEDPA habeas inquiry is that "determined by the Supreme Court of the United States." .......... 3

    B. This Court has not addressed whether a defendant's right to present a defense is violated when a state court excludes extrinsic evidence meant to impeach a prosecution witness on a collateral matter. .......................................................... 4

    C. The Ninth Circuit's reliance on its own precedent violated AEDPA. .......................... 7

    D. The Ninth Circuit created a circuit split and generated disarray in the Sixth Amendment jurisprudence of its own courts. ............................................................ 8

II. A defendant's right to present a defense is not violated when a state court excludes extrinsic evidence meant to impeach a prosecution witness on a collateral matter. ...... 10

A. The Federal Rules of Evidence and trial rules in a majority of states generally prohibit the admission of extrinsic evidence on collateral matters.................... 10

B. Nevada's evidentiary rule is neither arbitrary nor disproportionate to the problem it attempts to solve. ...................... 11

Conclusion ............................................................... 14

## TABLE OF AUTHORITIES

**Cases**

*Bell* v. *Cone*,
535 U.S. 685 (2002) .......................................... 3, 7

*Carey* v. *Musladin*,
549 U.S. 70 (2006) ................................................ 4

*Chambers* v. *Mississippi*,
410 U.S. 284 (1973) ........................................ 5, 10

*Crane* v. *Kentucky*,
476 U.S. 683 (1986) .............................................. 5

*Davis* v. *Alaska*,
415 U.S. 308 (1974) .......................................... 6, 8

*Delaware* v. *Van Arsdall*,
475 U.S. 673 (1986) .......................................... 6, 8

*Earp* v. *Ornoski*,
431 F.3d 1158 (9th Cir. 2005) .............................. 7

*Ellsworth* v. *Warden*,
333 F.3d 1 (1st Cir. 2003)............................... 8, 11

*Fenenbock* v. *Director of Corrections for California*,
681 F.3d 968 (9th Cir.), amended 692 F.3d 910 (9th Cir. 2012)............................................ 5, 6

*Hogan* v. *Hanks*,
97 F.3d 189 (7th Cir. 1996) .................................. 8

*House* v. *Hatch*,
527 F.3d 1010 (10th Cir. 2008) ............................ 4

*Hughes* v. *Raines*,
641 F.2d 790 (9th Cir. 1981) ............................. 13

*Jordan* v. *Warden*,
675 F.3d 586 (6th Cir. 2012) ............................... 9

*Knowles* v. *Mirzayance*,
556 U.S. 111 (2009) ............................................ 6

*Lambert* v. *Blodgett*,
393 F.3d 943 (9th Cir. 2004) ............................... 4

*Lopez* v. *State*,
18 S.W.3d 220 (Tex. Crim. App. 2000) .. 11, 12, 13

*Michigan* v. *Lucas*,
500 U.S. 145 (1991) ............................................ 9

*Montana* v. *Egelhoff*,
518 U.S. 37 (1996) ............................................... 5

*Olden* v. *Kentucky*,
488 U.S. 227 (1988) ......................................... 6, 8

*Ortiz* v. *Yates*,
2012 WL 6052251 (9th Cir. Dec. 6, 2012)........... 9

*Parker* v. *Matthews*,
132 S. Ct. 2148 (2012) ......................................... 7

*Quinn* v. *Haynes*,
234 F.3d 837 (4th Cir. 2000) ............................... 9

*Renico* v. *Lett*,
130 S. Ct. 1855 (2010) ......................................... 7

*Rock* v. *Arkansas*,
483 U.S. 44 (1987) ............................................. 10

*State* v. *Boggs*,
588 N.E.2d 813 (Ohio 1992) .............................. 13

*State* v. *Wyrick*,
62 S.W.3d 751 (Tenn. Crim. App. 2001) ........... 13

*United States* v. *Higa*,
55 F.3d 448 (9th Cir. 1995) ................................ 5

*United States* v. *Scheffer*,
523 U.S. 303 (1998) .......................................... 10

*United States* v. *Withorn*,
204 F.3d 790 (8th Cir. 2000) ............................... 9

*Washington* v. *Texas*,
388 U.S. 14 (1967) ............................................... 5

*Williams* v. *Taylor*,
529 U.S. 420 (2000) ......................................... 3, 7

**Statutes**

28 U.S.C. § 2241 *et seq*.................................... passim

28 U.S.C. § 2254(d)(1)....................................... 2, 4, 7

Nev. Rev. Stat. 50.085(3)......................................... 11

**Other Authorities**

Charles Tilford McCormick, *Handbook of the Law of Evidence* § 47 (Edward W. Cleary revisor, 2d ed. 1972) ............................................. 5

**Rules**

Fed. R. Evid. 404(a) ................................................. 10

Fed. R. Evid. 608(b) ........................................... 10, 11

Mich. R. Evid. 608(b) ............................................... 11

## INTEREST OF *AMICI CURIAE*

One of the states' core functions in our federal system is to protect the community by securing state-court convictions and defending those convictions against federal habeas corpus challenges. This function gives rise to the *amici* states' significant interests in having this Court review the question presented in this case.

To begin, the *amici* states seek to ensure that lower courts properly apply the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). By its terms, AEDPA limits the scope of "clearly established Federal law" in a habeas inquiry to that "determined by the Supreme Court of the United States." Where, as here, a circuit relies on its own precedents to grant habeas relief, it undermines both AEDPA's terms and its underlying purposes—to prevent federal court second-guessing and ensure state-court convictions are given effect to the fullest extent possible under the law.

In addition, the vast majority of criminal jury trials that are held in this country occur in state court and are governed by state procedural rules. The question of the state courts' ability to forbid distracting and time-intensive battles over collateral matters is a critical one to the *amici* states. There is no constitutional reason for rejecting Nevada's rule, particularly given that Nevada's approach is aligned with the vast majority of other states and the Federal Rules of Evidence.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The *amici* states respectfully request that this Court grant the petition for two important reasons.

First, this Court should reaffirm that its precedent is the only source of "clearly established Federal law" under AEDPA. A federal court may not grant habeas relief to a state prisoner under 28 U.S.C. § 2254(d)(1) unless the state-court adjudication of the prisoner's claim was contrary to or unreasonably applied "clearly established Federal law, as determined by the Supreme Court of the United States." Thus, a federal court reviewing a prisoner's habeas petition must determine, as a threshold matter, whether this Court's precedents address the specific issue presented.

The issue presented here is whether a defendant's right to present a defense is violated when a state court excludes extrinsic evidence to support collateral impeachment. This Court has never addressed that issue. Nevertheless, the Ninth Circuit concluded that the Nevada state court's exclusion of police officer testimony about a rape victim's allegedly uncorroborated prior reports of sexual assault was "an unreasonable application of . . . clearly established Federal law." Finding no decision of this Court that would support such a result, the Ninth Circuit turned to its own precedent (and rejected that of its sister circuits) to justify its grant of habeas relief. In doing so, the Ninth Circuit ignored AEDPA's express term and created a circuit split.

Second, this Court should hold that a defendant's right to present a defense is not violated when a state court excludes extrinsic evidence meant to impeach a prosecution witness on a collateral matter. Federal and state evidentiary rules commonly prohibit the admission of extrinsic evidence on collateral matters as confusing and time-consuming distractions for the jury with little or no probative value. The Ninth Circuit's decision encourages distracting mini-trials on matters completely collateral to the substantive issues at trial. These are the very type of distractions that evidentiary rules—which states in our federal system are empowered to adopt—are designed to prevent. Certiorari is warranted.

## ARGUMENT

### I. The Ninth Circuit violated AEDPA and created a circuit split when it granted habeas relief in the absence of a ruling from this Court on the issue presented.

#### A. The only source of "clearly established Federal law" in an AEDPA habeas inquiry is that "determined by the Supreme Court of the United States."

AEDPA modified federal courts' role in reviewing state prisoner habeas petitions "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell* v. *Cone*, 535 U.S. 685, 693 (2002). Congress erected § 2254(d)'s relitigation bar to promote "the principles of comity, finality, and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000).

Under AEDPA, a federal court may not grant habeas relief to a state prisoner unless the state-court decision of the prisoner's claim was contrary to or unreasonably applied "clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added). The Ninth Circuit itself has recognized that "[t]he statutory language plainly restricts the source of clearly established law to the Supreme Court's jurisprudence." *Lambert* v. *Blodgett*, 393 F.3d 943, 974 (9th Cir. 2004). "[F]or purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied." *Id.* (citation omitted). And this Court's holdings "must be construed narrowly and consist only of something akin to on-point holdings." *House* v. *Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008) (citing *Carey* v. *Musladin*, 549 U.S. 70 (2006)).

Inexplicably, the Ninth Circuit failed to heed that standard here.

**B. This Court has not addressed whether a defendant's right to present a defense is violated when a state court excludes extrinsic evidence meant to impeach a prosecution witness on a collateral matter.**

The Ninth Circuit held that a defendant's right to present a defense is violated by the exclusion of extrinsic evidence to support collateral impeachment. But no decision of this Court clearly establishes that controversial principle.

A criminal defendant unquestionably has a "constitutional right to a fair opportunity to present a defense." *Montana* v. *Egelhoff*, 518 U.S. 37, 63 (1996) (citing *Crane* v. *Kentucky*, 476 U.S. 683, 687 (1986)). And this Court has held that the right to present a defense includes the right to present witnesses. *Chambers* v. *Mississippi*, 410 U.S. 284, 302–03 (1973) (holding limited to "facts and circumstances" of the case). In *Crane*, the Court held that this includes the right to present testimony regarding the voluntariness of a confession. 476 U.S. at 687. And in *Washington* v. *Texas*, 388 U.S. 14 (1967), this Court invalidated a categorical rule prohibiting defendants from calling accomplices as witnesses. Each case involved evidence concerning "the matter charged against [the defendant] and at issue in the trial." *United States* v. *Higa*, 55 F.3d 448, 452 (9th Cir. 1995).

Where the intent is "to show that the witness' false statement about one thing implies a probability of false statements about the matters at issue," the evidence is collateral. *Id*. (citing Charles Tilford McCormick, *Handbook of the Law of Evidence* § 47 at 97–98 (Edward W. Cleary revisor, 2d ed. 1972)). And this Court has not held that the due-process right to present testimony extends to evidence offered for collateral impeachment. Nonetheless, the Ninth Circuit extrapolated such a rule—not from any decision of this Court, but instead from its own decision in *Fenenbock* v. *Director of Corrections for California*, 681 F.3d 968 (9th Cir.), amended 692 F.3d 910 (9th Cir. 2012). The Ninth Circuit's ruling misapplied AEDPA and this Court's precedents.

In granting Respondent's petition for habeas relief in *Fenenbock*, the Ninth Circuit discussed this Court's decisions in *Olden* v. *Kentucky*, 488 U.S. 227 (1988), *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), and *Davis* v. *Alaska*, 415 U.S. 308 (1974). *Fenenbock*, 681 F.3d at 977 n.11. According to the Ninth Circuit here, these three cases stood for the proposition that defendants' due-process rights were "implicated because the excluded evidence regarding a witness's credibility went to his bias or motive to lie." App. 18. Opining that this was "precisely the nature of" the officers' excluded testimony here, the Ninth Circuit determined that the excluded evidence was "both relevant and constitutionally-protected under recognized Supreme Court precedent." App. 18.

But *Olden*, *Van Arsdall*, and *Davis* do not "squarely establish[ ]" the issue presented here. *Knowles* v. *Mirzayance*, 556 U.S. 111, 122 (2009). All three cases centered on the right to *cross-examine* a victim or witness about bias or motive to lie. *Olden*, 488 U.S. at 232 (cross-examination of a rape victim about whether acts were consensual); *Van Arsdall*, 475 U.S. at 678–79 (cross-examination regarding witness's motives); *Davis*, 415 U.S. at 320 (cross-examination for bias). The Ninth Circuit impermissibly expanded the reach of these cases when it concluded that they establish a broader right to admit extrinsic collateral impeachment evidence.

In actuality, this Court has never decided whether a defendant's right to present a defense is violated by the exclusion of extrinsic evidence to support collateral impeachment. And without such a precedent, the Ninth Circuit had no authority to grant habeas relief.

### C. The Ninth Circuit's reliance on its own precedent violated AEDPA.

By relying on its own precedent to support its grant of habeas relief, the Ninth Circuit has presented another "textbook example of what [AEDPA] proscribes: using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Parker* v. *Matthews*, 132 S. Ct. 2148, 2149 (2012) (internal quotation marks and citation omitted).

This Court repeatedly has stated that circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court" under 28 U.S.C. § 2254(d)(1). *Parker*, 132 S. Ct. at 2155; *Renico* v. *Lett*, 130 S. Ct. 1855, 1866 (2010). Circuit precedent "cannot form the basis for habeas relief." *Parker*, 132 S. Ct. at 2155. And a circuit court's "reliance on its own precedents [cannot] be defended . . . on the ground that they merely reflect what has been 'clearly established'" by this Court. *Id.* The Ninth Circuit itself has previously described a habeas petitioner's reliance on circuit-court authority as "futile" because "post-AEDPA[,] only Supreme Court holdings are binding on state courts." *Earp* v. *Ornoski*, 431 F.3d 1158, 1184 n.23 (9th Cir. 2005).

In granting relief absent "clearly established Federal law," the Ninth Circuit undermined "the principles of comity, finality, and federalism" that AEDPA promotes. *Williams*, 529 U.S. at 436. The Ninth Circuit also failed to give Nevada's conviction effect "to the extent possible under law." *Bell*, 535 U.S. at 693.

### D. The Ninth Circuit created a circuit split and generated disarray in the Sixth Amendment jurisprudence of its own courts.

The Ninth Circuit's decision also conflicts with the views of numerous other circuits regarding a constitutional right to present extrinsic collateral impeachment evidence. Moreover, the decision is creating further mischief within the Ninth Circuit.

With respect to other circuits, the division is stark. Judge Easterbrook, writing for the Seventh Circuit, expressly acknowledged that this Court has "never held—or even suggested—that the longstanding rules restricting the use of specific instances and extrinsic evidence to impeach a witness's credibility pose constitutional problems. No federal court of appeals as done so either." *Hogan* v. *Hanks*, 97 F.3d 189, 191 (7th Cir. 1996). Contrary to the decision here, the Seventh Circuit disagreed that this Court's decisions in *Olden*, *Van Arsdall*, and *Davis* impliedly established a constitutional right to present extrinsic evidence offered solely to impeach a witness's credibility. *Id*.

The First, Fourth, Sixth, and Eighth Circuits have similarly declined to require admission of extrinsic evidence on collateral issues in cases where a defendant claimed a right to present a defense or the right to confrontation. E.g., *Ellsworth* v. *Warden*, 333 F.3d 1, 8 (1st Cir. 2003) (denying habeas relief where petitioner sought to introduce extrinsic evidence to support collateral impeachment; "evidence about lies not directly relevant to the episode at hand could carry courts into an endless parade of distracting, time-consuming inquiries"); *Quinn* v. *Haynes*, 234 F.3d 837,

846, 849 n.11 (4th Cir. 2000) (rejecting a Sixth Amendment right in sexual assault cases to "introduce extrinsic evidence" whenever a witness claim of assault is allegedly uncorroborated; it was not objectively unreasonable for a state court to decline to admit such evidence); *Jordan* v. *Warden*, 675 F.3d 586, 596–97 (6th Cir. 2012) (Confrontation Clause does not "encompass the right to impeach an adverse witness by putting on a third-party witness"); *United States* v. *Withorn*, 204 F.3d 790, 795 (8th Cir. 2000) (trial court did not abuse its discretion in excluding evidence of a rape victim's prior rape allegation when offered to attack the victim's credibility). In sum, the reason Respondent obtained habeas relief was the fortuity of being incarcerated in the Ninth Circuit rather than the First, Fourth, Sixth, Seventh, or Eighth Circuit.

The Ninth Circuit's decision already is infecting other habeas cases within the circuit. In *Ortiz* v. *Yates*, 2012 WL 6052251 (9th Cir. Dec. 6, 2012), the court granted habeas relief to a petitioner who was prohibited from cross-examining his wife about whether she was afraid to recant her earlier statements due to an alleged threat of perjury from the prosecutor. *Id*. at *7. The Ninth Circuit characterized its decision in the present case as "holding that a trial court's restriction on a habeas petitioner's cross-examination of police officers regarding the victim's prior unsubstantiated claims of assault was both contrary to and an unreasonable application of" *Michigan* v. *Lucas*, 500 U.S. 145 (1991). *Id*. It then concluded that the California court denied Ortiz "the right to meaningful cross-examination of the prosecution's leading witness"—a witness who was never even called at trial. *Id*. at *2, *11. More such decisions are likely.

## II. A defendant's right to present a defense is not violated when a state court excludes extrinsic evidence meant to impeach a prosecution witness on a collateral matter.

The Ninth Circuit's decision is also wrong on the merits. A "defendant's right to present relevant evidence is not unlimited." *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998). Rather, it "is subject to reasonable restrictions." *Id*. An accused's interest in presenting evidence may "bow to accommodate other legitimate interests in the criminal trial process." *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987) (quoting *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973)). Therefore, states "have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308. There is nothing arbitrary or disproportionate about Nevada's rule here.

### A. The Federal Rules of Evidence and trial rules in a majority of states generally prohibit the admission of extrinsic evidence on collateral matters.

Courts generally prohibit the use of character or "propensity" evidence to prove that a person acted in conformity with a particular character trait on a particular occasion. E.g., Fed. R. Evid. 404(a). Exceptions to these evidentiary rules generally allow *cross-examination* regarding specific instances of conduct for the purpose of attacking or supporting a witness's character for truthfulness. E.g., Fed. R. Evid. 608(b). But most jurisdictions prohibit the use of extrinsic

evidence to impeach a witness on a collateral matter. E.g. Fed. R. Evid. 608(b); Nev. Rev. Stat. 50.085(3); Mich. R. Evid. 608(b). As the First Circuit noted, "there is nothing unusual about limiting extrinsic evidence of lies told by a witness on other occasions." *Ellsworth*, 333 F.3d at 8 (1st Cir. 2003).

Under the federal rules, "exclusion of such evidence is the usual rule and even cross-examination as to such lies is limited." *Ellsworth*, 333 F.3d at 8. "The theory, simple enough, is that evidence about lies not directly relevant to the episode at hand could carry courts into an endless parade of distracting, time-consuming inquiries." *Id*. That is precisely the problem the Ninth Circuit has invited here.

### B. Nevada's evidentiary rule is neither arbitrary nor disproportionate to the problem it attempts to solve.

The essence of Respondent Jackson's claim here is that the victim's previous "false" rape allegation is relevant to her credibility. In other words, if the victim previously lied about being raped, she likely is lying this time, too. But there are strong, countervailing policy reasons for excluding Jackson's proposed extrinsic evidence.

First, witness credibility "is no more important in sex offenses than in any other case," *Lopez* v. *State*, 18 S.W.3d 220, 225 (Tex. Crim. App. 2000):

> Any case can involve a swearing match between two witnesses; an assault in which the defendant and the victim are alone and the defendant threatens the victim with imminent

> bodily injury; a kidnapping in which the defendant restrains the victim in an isolated location and the victim eventually escapes; an attempted theft in which the defendant and the victim are alone and the defendant grabs the victim's purse but is unable to get it away from the victim. In each of these examples, there is no physical evidence and there are no additional witnesses to the crime. In contrast, although some sex offenses have no corroborating physical evidence, many sex offenses do—such as evidence of victim penetration or traces of the attacker's DNA. So the complainant's and the defendant's credibility are no more critical issues in sex offense cases than in any other type of case. [*Id*. at 224.]

Second, the emotional implications of a sex-offense case create precisely the problems that Nevada's evidentiary rule seeks to prevent. Rape victims:

> are regarded differently from the "ordinary" victim. No other victim of any offense is so likely to be accused of fabricating, fantasizing, or "asking for it." The increased emotional level associated with sexual offenses is all the more reason to refuse to allow the jury to be additionally confused by collateral acts of misconduct by a witness. Indeed, that is the entire purpose behind Rule 608(b). [*Lopez*, 18 S.W.2d at 224.]

Finally, the probative value of such extrinsic evidence "flows from the inference it raises as to the complainant's propensity to make false claims." *Lopez*,

18 S.W.2d at 225. See *Hughes* v. *Raines*, 641 F.2d 790, 793 (9th Cir. 1981) (noting that presenting evidence of a prior false rape accusation asks the jury to conclude that because the victim lied before, she is likely telling a lie now). Such use of evidence "cannot be easily squared with the dictates of Rule 608(b)." *Lopez*, 18 S.W.3d at 225 (citation omitted). As the Ohio Supreme Court has observed:

> The mere fact that an alleged rape victim made prior false allegations does not automatically mean that she is fabricating the present charge. Likewise, prior false allegations of sexual assault do not tend to prove or disprove any of the elements of rape, nor do they relate to issues of consent. Hence, they are an entirely collateral matter which may not be proved by extrinsic evidence." [*State* v. *Boggs*, 588 N.E.2d 813, 817 (Ohio 1992).]

To be sure, "some jurisdictions have effectively created a special exception to their evidentiary rules excluding extrinsic evidence of prior bad acts in order to admit evidence that the victim has previously falsely accused someone of a sexual crime." *State* v. *Wyrick*, 62 S.W.3d 751, 772 (Tenn. Crim. App. 2001) (citations omitted). But the "majority of jurisdictions that have addressed this issue limit the defendant's use of evidence of a prior false accusation to impeachment similar to Rule 608(b)," i.e., disallowing substantive evidence of the previous false allegations. *Id*. (numerous citations omitted).

In sum, there is nothing arbitrary or disproportionate about the rule many jurisdictions

have adopted to protect victims and prevent juror confusion. The Court should affirm the states' ability to adopt such a rule.

## CONCLUSION

The petition for writ of certiorari should be granted.

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