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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Antiterrorism and Effective Death Penalty Act (AEDPA) prohibits a federal court from granting habeas corpus relief to a state prisoner unless the state court determination on the merits "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." 28 U.S.C. § 2254(d)(1). This Court has established the general rule that a defendant has a constitutional right to present his defense, but has never held that a state abridges that right when it bars a defendant from introducing extrinsic evidence to support impeachment of a witness on a collateral matter. The question presented is as follows:

Did the Ninth Circuit exceed 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 when it held that respondent'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?

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Petitioners, the State of Nevada, Brian Sandoval, and Robert LeGrand, Warden of Lovelock Correctional Center in Lovelock, Nevada, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, which, in a published opinion, reversed the district court's denial of habeas relief pursuant to 28 U.S.C. § 2254.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit granting habeas relief (App. 1-31) is reported at 688 F.3d 1091 (9th Cir. 2012). The unpublished order of the United States District Court for the District of Nevada denying relief (App. 32-60) is unreported. The order of the Nevada Supreme Court on direct appeal affirming the conviction on one count of burglary, one count of first degree kidnapping with use of a deadly weapon, one count of battery with intent to commit a crime, and two counts of sexual assault with the use of a deadly weapon is unreported. App. 63-68.

JURISDICTION

The court of appeals entered judgment on August 6, 2012 and denied petitioner's timely petition for rehearing and rehearing en banc on September 17, 2012. App. 84-85. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to * * * be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor."

Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (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;
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> * * *
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be

> correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Nev. Rev. Stat. 50.085(3) states:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to an opinion of his or her character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of Nev. Rev. Stat. 50.090.

STATEMENT OF THE CASE

In violation of the limits Congress imposed in AEDPA, the Ninth Circuit granted habeas relief even though this Court has not clearly established the right upon which the Ninth Circuit relied. The Ninth Circuit held that the Nevada Supreme Court unreasonably applied the constitutional right to present a defense. But this Court has never held that the right to present a defense overrides state laws (and the federal evidentiary rule) that exclude extrinsic evidence that would support the impeachment of a witness on a collateral matter. The Ninth Circuit found that right in its own precedents, and then granted habeas relief on the ground that the Nevada Supreme Court unreasonably applied it. That is precisely the sort of

federal-court second guessing that Congress sought to put an end to when it adopted AEDPA, and 28 U.S.C. §2254(d)(1) specifically. A federal court may override a state court's denial of relief only if the state court decision was "contrary to" or "an unreasonable application of" law that *this Court* has clearly established. It may not override a state court's denial of relief based on a right of its own devising, yet that is just what the Ninth Circuit did here, as confirmed by the fact that the Ninth Circuit's decision created a split with four other circuits that have refused to recognize the right the Ninth Circuit held the Nevada court failed reasonably to apply.

Further, the decision below disregards a finding of fact by the state court that the evidence Jackson sought to admit, prior uncorroborated reports to police by the victim, had never been shown to be false. The Ninth Circuit cast this finding aside without requiring any evidence—much less the "clear and convincing" evidence that AEDPA demands—that the state court finding was erroneous. The decision below should be reversed, either summarily or after briefing and argument.

1. In 1999, respondent Calvin O'Neil Jackson was tried and convicted by a jury in state court on charges of burglary, first degree kidnapping with use of a deadly weapon, battery with intent to commit a crime, and two counts of sexual assault with the use of a deadly weapon arising from an assault on October 21, 1998. App. 3.

The victim was Jackson's on again, off again girlfriend of ten years. App. 2. The victim stated that,

on the night of the assault for which Jackson was on trial, he forced his way into her apartment; assaulted her and pulled her phone from the wall; and forced her to perform oral and vaginal sex under threat of being stabbed with a screwdriver. App. 3. The victim also testified about other prior incidents during which Jackson committed acts of violence against her, which were admitted to explain why the victim was afraid of Jackson and thereby failed to appear in court on prior occasions. App. 38. During that line of questioning, in response to an open ended question about why she chose to testify on this occasion, the victim blurted out that Jackson had previously raped her. App. 69, 72.

The defense then sought to call as witnesses four police officers who would allegedly testify about other prior complaints the victim made about Jackson to police, which the defense claimed were uncorroborated. App. 39. Jackson's attorney did not argue the prior complaints were false, but rather stated that the police officers would testify there was "no corroboration to back up" the claims made by the victim on those prior occasions, and that Jackson was entitled to present this evidence as part of his "theory of defense." App. 70. Defense counsel did not actually specify what the theory of defense was, but cryptically stated the victim "somehow" used police to control Jackson by reporting his criminal acts to police. App. 70. The trial court ruled that testimony about prior reports was a collateral matter which addressed the victim's credibility, and Nevada law did not allow extrinsic evidence to be presented in support of collateral impeachment. The trial court permitted defense counsel to cross-examine the victim about the prior reports, but declined to allow the officers to be

presented as witnesses on those "collateral issues." App. 74, 82.

2. Among his arguments on direct appeal, Jackson claimed that the State violated his due process rights by prohibiting him from presenting his theory of the case at trial. He claimed he would have done so through police officers' testimony about the victim's prior reports to police concerning Jackson. App. 65. The Nevada Supreme Court rejected the claim, holding that Nev. Rev. Stat. 50.085(3) "does not permit the use of extrinsic evidence to attack the credibility of a witness." App. 66. The court cited federal law recognizing a defendant's right to present a theory of defense, subject to reasonable restrictions. *Washington v. Texas*, 388 U.S. 14 (1967). The Nevada Supreme Court found, however, that Jackson's counsel failed to comply with a state law exception which may have allowed extrinsic evidence concerning one alleged prior uncorroborated sexual assault complaint, after notice and a hearing to determine if the evidence in fact showed the prior allegation was false. *Miller v. State*, 105 Nev. 497, 779 P.2d 87 (1989). The Nevada Supreme Court further found that the prior reports Jackson wished to introduce were not proper evidence for any purpose because the reports were merely alleged to have been uncorroborated, and were not shown to have been false. App. 66-67.

3. On October 22, 2007, Jackson filed an amended federal habeas petition pursuant to 28 U.S.C. § 2254, raising his Sixth Amendment issue among other claims. App. 86. The district court denied Jackson's petition, holding that to the extent Jackson even raised a federal issue, the Nevada Supreme Court did not

unreasonably apply this Court's precedents in refusing to admit extrinsic evidence on a collateral issue. App. 43-44.

The district court held, as a threshold matter, that the state court correctly articulated the general Sixth Amendment standard—that a state court defendant has a right to present his theory of defense, but the state court may exclude evidence which is "repetitive…, only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues." App. 43. The district court found that the defendant's right to present evidence is therefore "not unlimited and is instead subject to reasonable restrictions," and that the Nevada Supreme Court's rejection of the claim was therefore not objectively unreasonable. Deferring to the Nevada Supreme Court's findings, the district court further found any error was harmless because the "extrinsic evidence in question would not have proven that the victim made prior false accusations against the petitioner, only that she had made accusations that may have gone uncorroborated." App. 44.

4. In an opinion authored by Judge Reinhardt, a divided panel of the Ninth Circuit reversed. Like the district court, the court of appeals recognized that "a defendant does not have an absolute right to present evidence, no matter how minimal its significance or doubtful its source." App. 8. The court of appeals stated that the "right" is implicated only when a defendant seeks to admit relevant and material evidence that is "vital to the defense." App. 8. Further, the court of appeals recognized that even when evidence is relevant, material, and vital to the defense, it may still be excluded as long as the exclusion is not

arbitrary or disproportionate to the purpose the exclusionary rule is designed to serve. App. 8.

Despite the multiple layers of qualification owed under these tests, and the limitations imposed by AEDPA, the Ninth Circuit nonetheless held that habeas relief was required. Relying on its own decisions in *Fowler v. Sacramento Cnty. Sheriff's Dep't*, 421 F.3d 1027 (9th Cir. 2005), and *Holley v. Yarborough*, 568 F.3d 1091 (9th Cir. 2009), the court held that the right to present a defense encompasses the right to present extrinsic evidence designed to impeach a prosecution witness on a collateral matter. App. 12-15. The court therefore faulted the State for the "exclusion of critical evidence that would have served to rebut the testimony of the principal prosecution witness" and which would have undermined her credibility. App. 29. Even though the excluded evidence had never been determined to have been false by any previous court of review, the Ninth Circuit opined that the charges for which Jackson was on trial were another instance of the victim making a "false" report to police. App. 18.

The court acknowledged that in *Fenenbock v. Dir. of Corrs. for California*, 681 F.3d 968 (9th Cir. 2012), *amended* 692 F.3d 910 (9th Cir. 2012), it rejected a claim similar to Jackson's, but distinguished that decision on the ground that "the excluded evidence" in *Fenenbock* did not go to the witness's "bias or motive to lie." App. 18. Here, by contrast, the court found that "evidence that [the victim] previously made false accusations against [Jackson] as part of their relationship provided a motive for her allegedly false testimony in this instance." App. 18. In so ruling, the court rejected without discussion the state court's

finding and trial counsel's admission that the prior reports were merely uncorroborated and were never determined to be false.

The Ninth Circuit went on to rule that the exclusion of the evidence from the police officers "was disproportionate to the state's interest in its exclusion," App. 25; that the Nevada Supreme Court's failure to so hold constituted "an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States," *id*. (quoting 28 U.S.C. § 2254(d)(1); and that the constitutional violation was not harmless. App. 26-29.

REASONS FOR GRANTING THE PETITION

"Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved," *Williams v. Taylor*, 529 U.S. 362, 404 (2000), by placing "new constraint[s] on the power of a federal habeas court to grant a state prisoner's application." *Woodward v. Garceau*, 538 U.S. 202, 206 (2003) (internal quotations omitted). Under this subsection, a state court's purported misapplication of federal law is grounds for habeas relief only if its decision runs "contrary to, or involve[s] 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) (emphasis added).

The Ninth Circuit's published decision defies that limitation on its authority and this Court's repeated admonition that lower court precedent is not a proper source of law that can serve as a basis for overriding a state court's denial of relief. This Court has explained

that "'it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.'" *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)). As four other circuits have held, this Court has never required states to admit extrinsic evidence on a collateral matter in violation of a state's law that excludes such evidence. By nonetheless granting habeas relief based on a determination that a state court defendant has a Constitutional right to present extrinsic collateral impeachment evidence, the Ninth Circuit has once again failed to abide by limits Congress imposed on federal courts in AEDPA.

The Ninth Circuit also violated AEDPA by faulting the state court for excluding extrinsic evidence of "false" prior reports to police, without affording any deference to the state court's express finding (or to trial counsel's admission) that no showing had ever been made that the reports were in fact false. These patent errors—in a published decision that threatens federal habeas law in the Ninth Circuit and runs contrary to decisions of other circuit courts—warrant reversal by this Court, either summarily or following full briefing and argument. See, *e.g.*, *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (*per curiam*) (summarily reversing Seventh Circuit's grant of habeas relief for failure to afford state court's decision AEDPA deference).

I. The Ninth Circuit Exceeded the Congressionally Imposed Limits in 28 U.S.C. § 2254(d) When it Granted Habeas Relief Based on its View that the Nevada Supreme Court's Adjudication Unreasonably Applied "Clearly Established Federal Law, as Determined by [this Court]."

A. This Court has not "clearly established" that a state rule excluding extrinsic evidence on collateral matters violates the right to present a defense.

1. Trial rules which bar admission of extrinsic evidence on collateral issues are commonplace. Nevada's rule is similar to that found in the Federal Rules of Evidence, and both bar admission of extrinsic evidence during trials for the purpose of supporting or attacking a witness' credibility. See Fed. R. Evid. 608. These rules serve the laudable purposes of avoiding mini-trials on collateral matters, minimizing the risk of jury distraction or confusion, and preventing unfair surprise arising from false allegations of improper conduct. *Carter v. Hewitt*, 617 F.2d 961, 971 (3rd Cir. 1980).

This Court has never held that a trial court's application of a rule barring admission of extrinsic evidence for purposes of collateral impeachment can violate the right to present a defense. To be sure, the Court has held that, subject to reasonable restrictions, the Due Process and Confrontation Clauses give defendants the right to present witnesses and their "theory of defense." *United States v. Scheffer*, 523 U.S. 303 (1998); *Crane v. Kentucky*, 476 U.S. 683 (1986);

Washington v. Texas, 388 U.S. 14 (1967). But none of the Court's cases went so far as to create a right to present extrinsic evidence to impeach on a collateral matter.

In *Crane*, this Court held that a defendant has the constitutional right to present evidence concerning the voluntariness of a confession. *Crane*, 476 U.S. at 691. And in *Washington*, the Court held that a defendant has a right to call an accomplice as a witness even though a state statute forbade the practice. *Washington*, 388 U.S. at 23. In both cases, the excluded evidence bore directly upon the question of guilt or innocence, not collateral matters. See also *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (finding testimony "critical" to the defense where "constitutional rights directly affecting the ascertainment of guilt are implicated").

Nor do the decisions of this Court relied on by the Ninth Circuit in *Fenenbock* establish a right to present extrinsic evidence on collateral matters. *Fenenbock* cited *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). In *Davis*, the Court held that a defendant may impeach the credibility of a state's witness by cross-examination aimed at discovering possible bias. 415 U.S. at 319. In *Olden*, the Court held that a defendant facing charges of rape had a right to cross-examine the victim about whether the acts were consensual. 488 U.S. at 232. And in *Van Arsdall*, the Court held that a defendant had a right to cross-examine a witness about his motives for testifying. 475 U.S. at 679. These cases simply do not hold, much less clearly establish, that the admission of

extrinsic evidence to support impeachment based on bias or motive to lie is ever constitutionally required. At best, these cases stand for the proposition that a defendant has a constitutionally guaranteed right to *cross-examine* a victim or witness about issues of bias or motive to lie – which the trial court allowed Jackson to do.

2. In nonetheless granting habeas relief, the Ninth Circuit committed the same error it was held to have committed in *Carey v. Musladin*, 549 U.S. 70, 77 (2006). There, this Court addressed the rule announced in *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986), that "certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial." *Musladin*, 549 U.S. at 72. The Ninth Circuit applied that general rule and held that a California state court was objectively unreasonable in rejecting the claim that the defendant's due process rights were violated when, during the trial, front-row spectators wore buttons with a photograph of the victim. *Id*. at 73-74 (citing *Musladin v. Lamarque*, 427 F.3d 653, 656-58 (9th Cir. 2005)). This Court reversed on the ground that it had not "clearly established" that conduct of that sort could violate the right to a fair trial. *Id*. at 76-77.

The Court explained that its decisions in *Williams* and *Flynn* involved *state-sponsored* courtroom practices (such as compelling a defendant to wear prison clothes), whereas this case involved *spectator* conduct. *Musladin*, 549 U.S. at 76. "This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." *Id*. A state court decision

addressing private-actor courtroom conduct could not, therefore, unreasonably apply "clearly established Federal law" for AEDPA purposes. *Id*. at 77. And that is so, even though *Williams* described the rule generally as requiring "courts [to] carefully guard against dilution of the principle that guilt is to be established by probative evidence beyond a reasonable doubt." *Williams*, 425 U.S. at 503. See also *Van Patten*, 552 U.S. at 125, 126 (because "[n]o decision of this Court . . . squarely addresses the issue in the case," – the state court cannot be said to have "unreasonabl[y] appli[ed] clearly established Federal law" under AEDPA).

So too, here: There may be "clearly established" law at a high level of generality that a defendant has a Sixth Amendment right to present a defense, which can sometimes override a state-law rule regarding exclusion of evidence at trial. But (in *Musladin*'s words) this "Court has never addressed a claim that" the Sixth Amendment right to present a defense can be violated by barring a defendant from introducing extrinsic evidence to support impeachment on a collateral matter. *Musladin*, 549 U.S. at 76. In declining to find a violation in that circumstance, the Nevada Supreme Court cannot be said to have violated law "clearly established" by this Court, as required for habeas relief under AEDPA.

The Ninth Circuit's violation of AEDPA is illuminated by its failure to cite a single 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. Instead, the Ninth Circuit found its only support for this rule in

its own precedents. See App. 12 (stating that "we have recognized that" the exclusion of extrinsic evidence about a collateral matter can violate the Constitution); App. 12-15 (discussing holdings of *Fowler*, 421 F.3d 1027, and *Hughes v. Raines*, 641 F.2d 790 (9th Cir. 2005), to that effect). It is the Ninth Circuit's decision in this habeas case that first announced the circuit's new, more ambitious constitutional rule: that states are required by the Constitution to admit extrinsic evidence that would "directly undermine" the credibility of a principal prosecution witness on a collateral matter – (here, reports to police concerning the conduct of the defendant on occasions several years prior). App. 29.

This Court has repeatedly confirmed, however, that a federal court may not void a state conviction based on its own, circuit precedent; only constitutional rules "clearly established" by this Court apply. See, *e.g.*, *Renico v. Lett*, 130 S.Ct. 1855, 1866 (2010) (circuit court's decision "does not constitute 'clearly established Federal law, as determined by the Supreme Court,' § 2254(d)(1), so any failure to apply that decision cannot independently authorize habeas relief under AEDPA"); *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012). A clean-slate evaluation of what is "reasonable" for Sixth Amendment purposes is appropriate on direct appeal, but not on habeas review, where a federal court must defer to a state court determination not foreclosed as unreasonable by this Court's precedent. See *Richter*, 131 S. Ct. at 785 (distinguishing between error sufficient to reverse on direct appeal and finding required to grant habeas relief). Here, as in *Richter*, "it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA," *id.* at

786, for the Ninth Circuit faulted the state court for purportedly failing to exercise constitutional duties never "clearly established" by this Court.

3. The Ninth Circuit's misapplication of AEDPA was even more pronounced here because it created a split with several other circuits that previously rejected the constitutional requirement that the decision below announces. The fact that other federal courts are in line with the Nevada Supreme Court's decision is conclusive proof (if any were needed) that the latter decision was not an unreasonable application of this Court's Sixth Amendment precedent. See, *e.g.*, *Musladin*, 549 U.S. at 76 ("the lack of guidance from this Court" is "[r]eflect[ed]" in fact that "lower courts have diverged widely in their treatment of defendants' spectator-conduct claims"); *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (*per curiam*) (explaining that absence of "clearly established" law is confirmed by fact that "federal appellate courts have split on" disputed question).

Consistent with the Nevada Supreme Court, at least four other federal courts of appeals have declined to require states to admit extrinsic evidence on collateral issues, whether the issue was framed as a violation of a defendant's right to present a defense or of the right to confrontation. The Seventh Circuit has stated that the Supreme 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 has done so either." *Hogan v. Hanks*, 97 F.3d 189, 191 (7th Cir. 1996) (Easterbrook, J.), *cert. denied*, 520 U.S.

1171 (1997). The Seventh Circuit specifically rejected the proposition that *Olden, Van Arsdall,* and *Davis* establish a constitutional right to present extrinsic evidence to impeach a witness' credibility. *Id*.

The Fourth Circuit similarly gave *Olden*, *Van Arsdall*, and *Davis* a narrow reading. The court noted that because these cases involved only impeachment with "undisputed facts," it was not objectively unreasonable for a state court to decline to admit extrinsic impeachment evidence which lacked a "threshold showing of falsity," even if it purportedly showed bias or motive to lie. *Quinn v. Haynes*, 234 F.3d 837, 846 (4th Cir. 2000), *cert. denied*, 532 *U.S*. 1024 (2001). The court ultimately rejected the petitioner's contention that there is a Sixth Amendment right in sexual assault cases to "introduce extrinsic evidence" anytime a claim of sexual assault is allegedly uncorroborated. *Id*. at 849, n.11.

Likewise, the First Circuit denied habeas relief to a petitioner who sought to introduce extrinsic evidence to support collateral impeachment of a witness. *Ellsworth v. Warden*, 333 F.3d 1, 8 (1st. Cir. 2003) (noting that "evidence about lies not directly relevant to the episode at hand could carry courts into an endless parade of distracting, time-consuming inquiries"). *See also United States v. Marino*, 277 F.3d 11, 23-24 (1st Cir. 2002), *cert. denied*, 536 U.S. 948 (2002) (rejecting Sixth Amendment claim arising from exclusion of witness concerning collateral issues). Finally and most recently, the Sixth Circuit stated that the Confrontation Clause does not "encompass the right to impeach an adverse witness by putting on a third-party witness." *Jordan v. Warden*, 675 F.3d 586, 596-97 (6th Cir. 2012) (noting

that it "remained unconvinced that unearthing bias by extrinsic evidence" was significant or a "fundamental element of the accused's defense"). The Ninth Circuit's decision in this case is impossible to reconcile with the holdings of the First, Fourth, Sixth, and Seventh Circuits. At the very least, these decisions establish that the Nevada Supreme Court's decision was not an unreasonable application of law "clearly established" by this Court.

B. Even assuming that the federal law at issue was clearly established, the Nevada Supreme Court did not unreasonably apply it.

Even if one assumes *arguendo* that the Nevada Supreme Court was applying "clearly established Federal law," it cannot be said to have unreasonably applied the very general rule in question. This Court has explained that 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." *Richter*, 131 S. Ct. at 787. Nothing in this Court's jurisprudence supports, much less compels, the conclusion that the State's exclusion of collateral evidence in the form of the victim's allegedly uncorroborated prior reports to police about Jackson was objectively unreasonable.

As an initial matter, the Court has explained that "[e]valuating whether a rule's application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Richter*, 131 S. Ct. at 786 (quoting

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). With a general rule, it is more likely that there will be "no 'plainly correct or incorrect' answer in" a given case. *Lett*, 130 S. Ct. at 1865 (quoting *Alvarado*, 541 U.S. at 664); see, *e.g.*, *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (denying habeas relief because standard against which petitioner's ineffective assistance of counsel claim was judged is general and thus provided state courts with greater latitude).

The "clearly established" federal law the Ninth Circuit purported to apply here is the "constitutional right" of a defendant "to present a complete defense," which can take the form of safeguarding a defendant's "ability to present evidence, including the evidence of witnesses." App. 7 (citing *Crane*, 476 U.S. at 690, and *Washington*, 388 U.S. at 19). That right is only 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.'" *Id*. at 8 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)). The right to present a defense is a very general one, indeed, meaning (even assuming it was the "clearly established" law applicable to this case) the Nevada Supreme Court had considerable leeway in applying it. That court's ruling in no way "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement."

The excluded evidence was that of police officers who would have testified about reports to police by the victim from years prior, and the officers' alleged belief that those reports were uncorroborated. As the panel

acknowledged, the excluded evidence had no direct bearing upon the question of guilt or innocence concerning the particular acts for which Jackson was on trial. App. 16. While the panel's interpretation was that the evidence would have made it "reasonable to conclude" that past uncorroborated claims made by the victim affected her "credibility" in making the claims for which Jackson was on trial, an equally if not more reasonable view was that the state court did not act in an objectively unreasonable manner when it informed Jackson he "cannot come in now and try and prove that she lied on prior incidences to try and show that out of habit she is lying on this one." App. 82.

As the Ninth Circuit has previously recognized, past lies do not prove a witness is currently lying. Its own precedent explains that evidence is "collateral" when it is "not related to matters at issue, but designed to show that the witness' false statement about one thing implies a probability of false statements about the matters at issue," and evidence is *not* collateral when it concerns "the matter charged" at trial. *United States v. Higa*, 55 F.3d 448, 452 (9th Cir. 1995). The state court's determination that the police officer testimony was collateral was itself not objectively unreasonable. By barring such evidence under a well-established trial rule prohibiting introduction of extrinsic evidence in support of collateral impeachment, the trial court avoided holding multiple mini-trials concerning the collateral testimony, and avoided the confusion and additional prejudice to Jackson which would arise from exploring each of those incidents in greater detail.

Nothing in this Court's precedents compelled the state court to find extrinsic collateral impeachment

evidence "relevant, material and vital" to Jackson's defense, and AEDPA does not allow the Ninth Circuit to replace a state court decision simply because it has a differing opinion of what is reasonable in a given case.

II. By Relying on Facts Contrary to Those Found by the Nevada State Courts, the Ninth Circuit Violated the Congressionally Imposed Limits Found in 28 U.S.C. § 2254(e)(1).

The Ninth Circuit failed to comply with AEDPA in still another way: by withholding the deference that § 2254(e)(1) requires. The Nevada Supreme Court determined – consistent with trial counsel's admission to the trial court, and Jackson's submission to the federal district court – that the prior reports to police merely were "uncorroborated"; they "would not establish that the prior allegations were false." App. 67. The Nevada Supreme Court thus determined that the "uncorroborated" prior reports to police had no evidentiary value, including for impeachment. This factual finding is "presumed to be correct" on federal habeas review, and Jackson offered no evidence, much less "clear and convincing evidence," to rebut that presumption. 28 U.S.C. § 2254(e)(1); see generally *Schriro v. Landrigan*, 550 U.S. 465, 473-474 (2007) (AEDPA "requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'").

But the Ninth Circuit, without mentioning § 2254(e)(1), disregarded the state court's finding that evidence about the prior reports to police was

"immaterial." The Ninth Circuit simply reached its own conclusion that the prior reports to police were relevant and vital, thereby substituting its own determination for that of the state court. App. 30. The Ninth Circuit reached this conclusion based on its erroneous finding there had been a "total exclusion" of the evidence in this case – even though it is undisputed that the trial court allowed unfettered cross-examination of the victim about her prior reports to police. App. 30, 74. The Ninth Circuit's rejection of these facts, without requiring "clear and convincing" evidence to overcome the presumption of correctness, contravenes § 2254(e)(1) and provides an independent reason to grant this petition and reverse the judgment below.

* * * * *

The Ninth Circuit's failure to defer to state court conclusions of law and findings of fact on federal habeas review, and its reliance on its own precedent for "clearly established" law, warrant this Court's intervention. Reviewing habeas petitions is "a commitment that entails substantial judicial resources." *Richter*, 131 S. Ct. at 780. "Those resources are diminished and misspent, however, and confidence in the writ and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance." *Id.* Where, as here, a court disregards these dictates, this Court has granted certiorari and summarily reversed. See, *e.g.*, *Bobby v. Mitts*, 131 S. Ct. 1762, 1765 (2011) (*per curiam*) (summarily reversing grant of federal habeas relief because state court determination that penalty phase instructions did not improperly influence jury to impose death sentence not

unreasonable application of clearly established Federal law); *Felkner v. Jackson*, 131 S. Ct. 1305, 1307-1308 (2011) (*per curiam*) (same regarding grant of habeas relief on *Batson v. Kentucky*, 476 U.S. 79 (1986), claim); *Van Patten*, 552 U.S. at 126 (*per curiam*) (same regarding grant of habeas relief on ineffective assistance of counsel claim); *Bell v. Cone*, 543 U.S. 447, 459-460 (2005) (*per curiam*) (same regarding grant of habeas relief on claim that jury instructions violated Eighth Amendment); *Parker v. Matthews*, 132 S. Ct. 2148 (2012) (*per curiam*) (same regarding reliance on circuit authority to illuminate what law is clearly established); *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012) (*per curiam*) (same result where proper deference not given to state court decision). Likewise, this Court should summarily reverse here or, in the alternative, grant this petition and set the case for full briefing and argument. Either way, the decision below, which is impossible to reconcile with AEDPA, decisions of this Court, and the law in other circuits, should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-17239
D.C. No. 3:03-cv-00257

[Filed August 6, 2012]

CALVIN O'NEIL JACKSON,	)
Petitioner-Appellant,	)
v.	)
	)
STATE OF NEVADA; BRIAN SANDOVAL;	)
ROBERT LEGRAND, Warden,	)
Respondents-Appellees.	)
	)

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, Senior District Judge, Presiding

Argued and Submitted
April 19, 2012—San Francisco, California

Filed August 6, 2012

Before: Alfred T. Goodwin, Stephen Reinhardt, and Mary H. Murguia, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Goodwin

COUNSEL

Rene L. Valladares, Federal Public Defender, and Lori C. Teicher (argued), First Assistant Public Defender, Las Vegas, Nevada, for the appellant.

Catherine Conrtez Masto, Attorney General and Jaime J. Resch (argued), Senior Deputy Attorney General, Las Vegas, Nevada, for the appellee.

OPINION

REINHARDT, Circuit Judge:

In January 1999, Calvin Jackson was charged with six counts related to the sexual assault of his on-again, off-again girlfriend of ten years, Annette Heathmon. He was found guilty of forcing his way into her apartment, threatening her with a screwdriver, and forcing her to perform oral sex and have vaginal sexual intercourse. Jackson denied that an assault occurred and claimed that he and Heathmon had consensual sex. At trial, the court prevented Jackson from presenting testimony from police witnesses to support his defense that Heathmon made false claims against him in the past alleging physical or sexual assault, and that this was another instance of her false accusations. It also prevented Jackson from cross-examining Heathmon about prior acts of prostitution. Jackson was convicted,

and contends that the trial court's rulings denied him his constitutional right to present a complete defense and to confront the complaining witness under the Sixth and Fourteenth Amendments. We agree as to his claim that his right to present a defense was unconstitutionally abridged, and hold that the state court's conclusion to the contrary was an unreasonable application of clearly established federal law. We therefore reverse and remand to the district court for the conditional issuance of the writ.

BACKGROUND

Calvin Jackson and Annette Heathmon were involved in a turbulent, on-again, off-again relationship for about ten years. In 1998, Heathmon broke up with Jackson and moved into an apartment complex. Although Jackson visited Heathmon at the complex in an apartment she shared with a friend, when she moved out of that apartment and into her own unit she did not inform Jackson where she had moved.

On October 21, 1998, the same night that Annette Heathmon moved into her new apartment, a mutual friend named Willie Williams knocked on Heathmon's door accompanied by Jackson, who was not initially visible to Heathmon. According to Heathmon, Jackson forced his way into her apartment, threatened to stab her with a screwdriver if she did not agree to have sex with him, raped her and beat her. While Jackson was in her apartment, Heathmon testified, he cut the clothes hanging in her closet with a knife that she kept with her on her bed, ripped the phone from the wall, and stole a ring from her dresser and some food from the freezer. Jackson left the apartment dragging

Heathmon with him, demanding that she walk with him to his car. As Heathmon was being led away from the apartment by Jackson, the pair encountered Fred Webb, a security guard at the complex whom Heathmon had been seeing romantically. When Webb came towards them, Jackson let go of Heathmon and left the scene. She told Webb that Jackson had cut up her clothes, and demanded that Webb pursue him. Although Webb caught up with Jackson, he did not detain him at the scene and Jackson left. Jackson was ultimately arrested and charged with burglary, battery with the intent to commit a crime, first degree kidnapping with the use of a deadly weapon, and two counts of sexual assault with the use of a deadly weapon and robbery with the use of a deadly weapon.

Although Heathmon submitted a letter recanting her accusations against Jackson, she ultimately recanted that recantation and testified to the assault at trial. In her testimony, Heathmon discussed other instances in which Jackson had allegedly physically or sexually assaulted her but had not been charged with any crime. In response, Jackson sought to introduce testimony from officers who had responded to or investigated Heathmon's previous claims of assault and found that her claims were not substantiated by the physical evidence at the scene or expressed disbelief as to her version of the events. The district court precluded this testimony, as well as counsel's attempt to cross-examine Heathmon regarding any prior acts of prostitution. Jackson was convicted of burglary, battery with the intent to commit a crime, first degree kidnapping with the use of a deadly weapon, and two counts of sexual assault with the use of a deadly weapon.

After the jury returned a guilty verdict, Jackson challenged his conviction on direct appeal, alleging that the district court's rulings denied him his right to present a defense and to confront the witness against him. On appeal, the Nevada Supreme Court rejected Jackson's contention that the district court's evidentiary rulings violated his due process right to present a defense.[1] In rejecting Jackson's appeal, the Nevada Supreme Court implicitly concluded that the excluded evidence was neither relevant nor material to his defense. In holding that the trial court acted appropriately, it additionally relied on the state rule of evidence barring the introduction of extrinsic evidence to challenge the credibility of a witness and held that the exception to that rule, set forth in *Miller v. Nevada*, 779 P.2d 87 (Nev. 1989), did not apply. Under *Miller*, if a criminal defendant accused of a sexual assault seeks to introduce evidence that the claimant has made prior false claims of sexual assault, the defendant must provide written notice to the trial court of his intent, and the court must conduct a hearing to determine its admissibility. *Id.* at 89-90. On review of Jackson's appeal, the Nevada Supreme Court held that the record did not reveal that Jackson had complied with the *Miller* procedure, and thus that the trial court appropriately excluded the evidence due to Jackson's noncompliance with the state evidentiary rule.

After exhausting his habeas appeals in the state court, Jackson filed a petition in the district court, again asserting that the trial court's ruling had denied

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[1] The Nevada court also held, in a footnote and without discussion, that all of his remaining claims were without merit.

him his right to present a defense and to confront the witness against him. The district court denied relief, and Jackson was granted a certificate of appeal on these two issues.[2]

DISCUSSION

I.

A.

Jackson's petition was filed after April 24, 1996, the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), thus AEDPA governs this habeas petition. Under AEDPA, a federal court may not grant habeas to an individual in state custody with respect to any claim which was adjudicated on the merits in state court proceedings unless the adjudication of the claim:

> (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.

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[2] We conclude that the confrontation claim has no merit and dispose of it summarily at the end of this opinion. Jackson raised additional claims in the district court, but was denied relief. A certificate of appeal was not granted as to any of Jackson's other claims; thus they are not relevant to this appeal.

28 U.S.C. § 2254(d). In determining whether a state court decision was "contrary to" or involved "an unreasonable application of" Supreme Court precedent, the Court has explained that:

> A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner.

Brown v. Payton, 544 U.S. 133, 141 (2005) (internal citations omitted).

[1] A criminal defendant has a well-recognized constitutional right to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.'"). Necessary to the realization of this right is the ability to present evidence, including the testimony of witnesses. *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if 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 present his own witnesses to establish a defense."). This right is not unlimited, however, and a defendant does not have an absolute right to present evidence, no matter how minimal its significance or doubtful its source. *United States v. Scheffer*, 523 U.S. 303, 309-11 (1998). Rather, the right itself is only implicated when the evidence the defendant seeks to admit is "relevant and material, and . . . vital to the defense." *Washington*, 388 U.S. at 16. Additionally, a violation of the right to present a defense does not occur any time such evidence is excluded, but rather only when its exclusion is "arbitrary or disproportionate to the purposes [the exclusionary rule is] designed to serve." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (internal citation and quotation marks omitted); *Michigan v. Lucas*, 500 U.S. 145, 151 (1991). This is true even if the rule under which it is excluded is "respected [,] . . . frequently applied," and otherwise constitutional. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). If the "mechanical" application of such a rule would "defeat the ends of justice," then the rule must yield to those ends. *Id.* Thus, in each instance where a criminal defendant asserts that the exclusion of evidence at trial violated his right to present a defense, we must consider the value of the evidence in relation to the purposes purportedly served by its exclusion to determine whether a constitutional violation has occurred.

In performing this analysis regarding a petitioner whose appeal is controlled by AEDPA, we must

determine whether the state court's decision resolving those issues was either contrary to, or an unreasonable application of, Supreme Court precedent relating to this constitutional right. In this case, the Nevada Supreme Court correctly recognized that Jackson's claim regarding the exclusion of the witness testimony was grounded in his right "to present witnesses to establish a defense."[3] It observed that this right was qualified, and that the proffered evidence must be "relevant and material to the defense," citing *Washington v. Texas*, 388 U.S. 14 (1967), and implicitly concluded that the evidence Jackson sought to adduce did not satisfy this criterion. It additionally relied on the state's general proscription against the admission of extrinsic evidence going to a witness's credibility and Jackson's failure to comply with the *Miller* rule in concluding that the exclusion of the evidence was justified. The state court correctly recognized that for the exclusion of evidence to amount to a constitutional violation, the evidence must be relevant and material. Because it concluded that the evidence was immaterial, it did not consider whether the total exclusion of the witness testimony was disproportionate to the purposes served by the evidentiary rules cited. The Nevada Supreme Court recognized and applied the correct legal principle, and there is no Supreme Court case that presents a materially indistinguishable set of facts, thus its holding was not contrary to established law. Habeas relief is warranted, however, if, under the facts

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[3] On review, we consider the last reasoned decision of the state court. *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). For Jackson's claim that the evidentiary ruling denied him his right to present a defense, the relevant decision is the Nevada Supreme Court decision on direct appeal.

present in this case, the determination by the Nevada Court that the exclusion of the evidence did not effectively preclude Jackson from presenting a complete defense was objectively unreasonable.

B.

[2] Jackson's defense was that the assault never took place and that he and Heathmon engaged in consensual sex. He contended that Heathmon used the police as a means of exercising control over him whenever they argued, and that her allegations against him were fabricated in this instance, just as they had been in prior instances when the police were called to respond to her claims. The evidence that he sought to introduce in furtherance of this defense was testimony from officers who responded to Heathmon's prior allegations of abuse. Prior to trial, Jackson submitted copies of police reports from these prior instances along with his motion to reconsider his earlier motion to dismiss. Included in the report were statements by the responding or investigating officers, in which they expressed doubt about Heathmon's claims or noted inconsistencies between her statements and the physical evidence they observed. Such testimony was clearly relevant to Jackson's defense that Heathmon lied regarding her prior complaints and made false statements to the police alleging that he had abused her.[4]

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[4] In addition to undermining Heathmon's credibility and supporting his theory that she had an improper motive for her allegations, Jackson also sought to use this evidence to present an alternative explanation for Heathmon's initial refusal to testify: while the prosecution elicited testimony that she was discouraged

One incident included within these reports occurred in March, 1995, when Officer Stiles responded to an alleged battery, and encountered Heathmon, who asserted that "for unexplained reasons [Jackson] reportedly became enraged at [Heathmon] and began to beat her up by striking her with his fists and when she fell down, he reportedly kicked her and stomped on her chest." Stiles, however, reported that he observed no physical injuries to Heathmon, nor did he "observe her to be dirty from rolling on the floor nor were her clothing in a disar[r]ay, as you might expect in a situation such as this." The officer declined to arrest Jackson.

Another incident documented in the police reports presented by the defense occurred on May 7, 1995. This incident was discussed extensively by Heathmon in her trial testimony. According to Heathmon, she was riding in a car driven by a friend when the car stopped in front of Jackson's home. She testified that he pulled her out of the car, dragged her across the lawn, where a number of his friends were gathered, and into the house where he beat and raped her. Officer Marscheck responded to the scene and reported that he "could find no signs of a sexual assault," and that the witness, Jackson's grandmother who was living in the house at the time, related that she heard Jackson and Heathmon arguing but did not see Jackson physically or sexually assault Heathmon. Marscheck's report

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out of fear, Jackson attempted to show that she never intended her false claims to be pursued to this extent and was disinclined to testify because of the falsity of her claims. This defense was supported by Heathmon's admission in her cross-examination that the case had gone on further than she really wanted it to.

additionally noted that "[d]uring [his] investigation with [Heathmon] [he] noted no sense of fear, injury or anything other than anger to get Jackson in jail." The investigating officer assigned to the case, Officer Risenhoover, ultimately closed the case, and, after several failed attempts to contact Heathmon, concluded that "upon reviewing the case, [he] found it questionable the event occurred as reported."

[3] Evidence that Heathmon had, on prior occasions, made claims of assault that were contradicted or uncorroborated by the evidence observed by the responding or investigating officers would be relevant to Jackson's defense that the allegations by Heathmon were false in this instance as well. When presented with a trial court's exclusion of evidence similar to the excluded evidence in Jackson's case, we have recognized that such testimony was highly relevant to the defense and that its total exclusion was disproportionate to whatever underlying interests the exclusion was intended to serve.[5]

In *Fowler v. Sacramento Co. Sheriff's Dept.*, 421 F.3d 1027 (9th Cir. 2005), this court reversed the district court's denial of habeas to a petitioner who had been convicted of annoying or molesting a minor. In *Fowler*, the defendant was accused of touching his girlfriend's fourteen-year-old daughter in a sexual

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[5] Although the prior decisions in this circuit are not sufficient to establish "clearly established" precedent, "[o]ur cases may be persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law." *Duhaime v. Ducharme,* 200 F.3d 597, 600 (9th Cir. 2000).

manner. At trial, the district court prevented the defense from presenting evidence that the complainant had previously accused one of her mother's former boyfriends of touching her inappropriately and that the local police concluded this allegation was "unfounded." *Id.* at 1032-33. The defense sought to introduce evidence of this prior allegation by cross-examining the complainant and by introducing extrinsic evidence in the form of police reports and testimony from the accused and the officers who investigated the incident. *Id.* at 1040 & n.9. The defense argued that this evidence illustrated the complainant's tendency to "[mis]perceive[], exaggerate[] or overreact," in relation to her interactions with adult men, and revealed a disposition towards untruthfulness. *Id.* at 1033 (alterations in original) (internal quotation marks omitted). Although the prior incident was not identical, did not involve the same alleged perpetrator, and it had not been conclusively established that the complainant's earlier accusation was false, this court recognized the clear relevance of the excluded evidence. In concluding that the petitioner's constitutional right had been violated, we held that where the evidence "might reasonably have influenced the jury's assessment of [the complainant's] reliability or credibility, absent sufficient countervailing interests, 'the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the complainant's] testimony which provided a crucial link in the proof.'" *Id.* at 1040 (quoting *Davis v. Alaska*, 415 U.S. 308, 317 (1974)). Under these facts, we held that the state court's determination that the exclusion of this highly relevant evidence was "not unreasonable,

arbitrary or disproportionate given its concerns was itself objectively unreasonable." *Id.* at 1041.

In *Holley v. Yarborough*, 568 F.3d 1091, 1099 (9th Cir. 2009), we again considered whether the trial court's exclusion of evidence bearing on the claimant's credibility violated the defendant's due process rights. Again we concluded that the trial court's ruling that prohibited the habeas petitioner from presenting evidence at trial that bore on the complainant's credibility resulted in a constitutional violation, and we remanded for issuance of the writ. In *Holley*, the habeas petitioner was convicted of child molestation for sexually touching the eleven-year-old daughter of an acquaintance. At trial, Holley sought to introduce evidence that the complainant had previously made comments to her friends regarding a prior sexual encounter and had claimed that other boys had expressed a desire to engage in sexual acts with her. This evidence was intended to challenge the prosecution's portrayal of her as a little girl who "would not fabricate things of a sexual nature." *Id.* at 1099. Although there was no evidence as to the falsity of the complainant's prior statements, this court agreed with the defendant that this evidence displayed her "active sexual imagination." *Id.* at 1100. We recognized that with the knowledge of these prior statements, a jury may reasonably have challenged the credibility and reliability of her claims. We therefore held that the state court was objectively unreasonable in its conclusion that these statements were properly excluded as irrelevant, unduly prejudicial, and insufficiently probative to justify the amount of time needed for their introduction. In so holding, we noted that the evidence that would have been elicited through

the cross-examination of the complainant and the introduction of witness testimony, was "clearly relevant to impeach [the complainant], and thus [to] allow the jury to evaluate the credibility of her allegations." *Id.* at 1099. We determined that the total exclusion of this evidence was both "unreasonable and disproportionate" to the purposes served by the evidentiary rules invoked by the state court, *id.*, and that had the jury known of the sexual comments made by the complaint to others it "might reasonably have questioned her [accusations]." *Id.* at 1100.

[4] Our conclusions in *Fowler* and *Holley* apply even more strongly to the evidence in Jackson's case.[6] 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

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[6] Both *Fowler* and *Holley* involved a trial court's limitation on the scope of cross-examination as well as its rulings that prevented the introduction of extrinsic evidence to challenge the complainant's credibility. While our discussion of those cases were grounded in the confrontation clause of the Sixth Amendment, the Supreme Court has held that the analysis is the same whether the exclusion is framed as a limitation on the right to confront or the right to present a defense; in either case, a constitutional violation occurs only when the exclusion is arbitrary or disproportionate to the purposes of the rule under which it is excluded. *Michigan v. Lucas*, 500 U.S. 145, 151 (1991) ("Restrictions on a criminal defendant's rights to confront adverse witnesses and to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'" (internal citation omitted)).

Heathmon's 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 would have 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.

There are instances in which this court has determined that the preclusion of collateral evidence regarding false accusations did not implicate the defendant's constitutional right and that its exclusion was a proper exercise of the discretion of the trial court. In these cases, however, the excluded evidence was of marginal relevance to the defense. In *Hughes v. Raines*, 641 F.2d 790 (9th Cir. 1981), for instance, the petitioner, convicted of attempted rape, argued that the trial court improperly excluded evidence that the complainant had previously accused a man of attempted rape. We held that the evidence was irrelevant to the complainant's accusation against the petitioner due to the vastly differing circumstances under which the two incidents were said to have occurred. *Id.* at 793. We held that the petitioner's constitutional rights were not implicated in the introduction of evidence that did not "establish bias

against the defendant or for the prosecution [but was] merely . . . to attack the general credibility of the witness on the basis of an unrelated prior incident." *Id.* We contrasted the excluded testimony in *Hughes* with that recognized by the Supreme Court as implicating a defendant's due process rights, such as evidence "directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to *issues* or *personalities* in the case at hand." *Id.* (emphasis added) (quoting *Davis*, 415 U.S. at 316). The excluded evidence in Jackson's trial involved prior accusations against the same defendant by the same complainant and, Jackson alleged, was part of a pattern of false accusations of physical and sexual abuse by Heathmon made throughout the course of their relationship. Such evidence clearly "relate[s] directly to issues or personalities in the case at hand," *id.*,and falls well within the category of testimony whose exclusion may implicate a defendant's constitutional rights.

We also affirmed the district court's denial of habeas in *Fenenbock v. Dir. of Corr. for California*, 681 F.3d 968 (9th Cir. 2012), in which the petitioner argued that the trial court's exclusion of evidence related to a witness's false accusation against a third party resulted in a constitutional violation. In *Fenenbock*, the witness was a juvenile who had observed the crime for which the petitioner was charged. The defense sought to admit witness testimony that he made an unrelated and allegedly false report that his foster father had threatened his foster mother with a firearm. *Id.* at 972. We recognized that there is no absolute right "to impeachment via extrinsic evidence relating to the truth of a collateral out-of-court statement," and that

no existing Supreme Court precedent required the admission of evidence regarding such a purely collateral matter. *Id.* at 977. In doing so, however, we distinguished Fenenbock's case from those in which the Supreme Court has held that the defendant's due process rights are implicated because the excluded evidence regarding a witness's credibility went to his bias or motive to lie. *Id.* at 977 & n.11. This 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 in this instance, and was thus both relevant and constitutionally-protected under recognized Supreme Court precedent.[7]

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 previously 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

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[7] The trial court also explicitly recognized that the officers' testimony went to the question of whether Heathmon had "some motive of bad intent," but found that the state rules precluded the introduction of additional witnesses on this matter.

impeachment testimony on collateral or out of court statements could not justify the total exclusion of Jackson's evidence in this instance.

C.

Had the court concluded that the evidence Jackson sought to admit was relevant and material, it would then have had to consider whether its exclusion under the applicable evidentiary rules was reasonable, or if it was disproportionate to the interests served by those rules. The proportionality between the excluded evidence and the interests served by the evidentiary rule is the relevant constitutional question regardless whether the basis for exclusion is a blanket prohibition on a certain type of evidence or the defendant's failure to strictly comply with a notice provision of an otherwise valid evidentiary rule. *Holmes*, 547 U.S. at 324; *Lucas,* 500 U.S. at 1747; *LaJoie v. Thompson*, 217 F.3d 663, 670 & n.8 (9th Cir. 2000).

[5] Although the Nevada Supreme Court explicitly considered only whether the evidence was excludable under *Miller*, the state always has a recognized interest in excluding evidence that "poses an undue risk of harassment, prejudice, [or] confusion of the issues." *Crane,* 476 U.S. at 689-90 (alterations in original) (internal citations and quotation marks omitted). In this case, however, a consideration of the state's interests does not support the total exclusion of the

officers' testimony in light of its substantial relevance to Jackson's defense.[8]

As in *Holley* and *Fowler*, the complete exclusion of the relevant testimony was disproportionate to the limited interests that could have been served by the exclusion of such evidence. As discussed above, the evidence, if credited, likely would have had a significant effect on the jurors' perceptions of Heathmon's credibility. "Any prejudice the jury might have developed as a result [of this evidence] would have been to discredit her claims." *Holley*, 568 F.3d at 1100. This potential effect on the jury's assessment of Heathmon is precisely what renders the evidence relevant in the first instance and is necessary to the defendant's ability to defend against the prosecution's charges. The officers' testimony would have been the only evidence presented by the defendant to suggest that Heathmon had a pattern of making false accusations against him and thus would not have been cumulative of any other evidence that had been introduced.

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[8] The state court did not discuss the perceived interests served by the exclusion of Jackson's evidence under any rule, nor did it consider these interests in relation to his ability to present a complete defense in the absence of that evidence to determine whether its exclusion was disproportionate to those interests. The petitioner argues only that this was an unreasonable application of federal law, and we therefore need not consider whether the state court's opinion, by failing to conduct the necessary analysis, resulted in a decision that was "contrary to" federal law under 28 U.S.C. § 2254(d)(1).

The officers' testimony that they did not credit Heathmon's past allegations of abuse was no more likely to confuse the issues than the extensive discussion of these prior incidents that the trial court allowed into evidence. At trial there was substantial evidence admitted that referred to these past alleged assaults including Heathmon's testimony regarding past instances in which she claimed to have been assaulted by Jackson and an officer's testimony regarding the existence of the other reports of domestic violence made by Heathmon against Jackson. The jury was required to consider this evidence, not for its truth, but to assess Heathmon's credibility and state of mind. The evidence Jackson sought to introduce was neither confusing nor prejudicial in its own right, and it was far less so on both counts than the evidence admitted by the trial court. Additionally, while the harassment of the victim may be a consideration when excluding evidence of past allegations, the officers' testimony would not have resulted in the harassment of any party, particularly not Heathmon, who had already recounted her version of these past assaults for the jury. If the trial court had concerns regarding the time spent on the officers' testimony, or the possibility of confusion, it could have placed reasonable limits on that testimony, rather than excluding it in full. None of the concerns generally considered in the exclusion of otherwise probative evidence integral to a defendant's ability to present a complete defense therefore justify the total exclusion of the testimonial evidence sought to be introduced.

Although the Nevada Supreme Court did not expressly consider the general concerns underlying the exclusion of any item of relevant information, it did

explicitly hold that the evidence was properly excluded for failure to comply with the procedures of *Miller*. *Miller* applies specifically to the admission of prior accusations of sexual assault. 779 P.2d at 90. Not all of the incidents regarding which Jackson sought to introduce testimony, nor all of the incidents testified to by Heathmon, involved claims of sexual assault. Neither *Miller*, nor the legitimate considerations upon which it is based, would therefore apply to all of the testimony excluded by the trial court. In particular, a failure to comply with *Miller* could not have been the basis for excluding testimony regarding the March, 1995 incident in which Officer Stiles reported that Heathmon's allegations of a physical assault by Jackson were inconsistent with his observations at the scene. With regard to evidence related to prior claims of sexual assault, to which the *Miller* procedure would apply, the Nevada Supreme Court was still required to consider whether the application of the rule resulted in the arbitrary or disproportionate exclusion of material evidence.

In *Lucas*, the Supreme Court reversed a decision by the Michigan Supreme Court that held that any notice and hearing rule that could be applied to preclude the admission of relevant evidence violated the defendant's due process rights. 500 U.S. at 148. The Supreme Court recognized that some notice and hearing requirements may indeed be applied in a manner that violates the defendant's constitutional rights, but it held that Michigan's per se rule that held that any such requirement was unconstitutional was incorrect. *Id.* at 151. Instead, it held that the relevant question is whether the restriction was arbitrary or was disproportionate to the purposes that it was designed

to serve, and the Court remanded for the state court to make that determination in the first instance. *Id.* at 151, 153.

We applied the Court's rule from *Lucas* in *LaJoie*, in which the habeas petitioner failed to comply with Oregon's notice rule when he sought to introduce relevant evidence related to the victim's prior sexual assault. 217 F.3d at 670. Petitioner filed a notice of intent seven days before trial, rather than fifteen days, as required under Oregon law. *Id.* at 665. We considered the materiality of the excluded evidence against the purposes served by the fifteen-day notice rule in that case and held that the total exclusion of the evidence was disproportionate to those purposes, and that the mechanical application of the rule resulted in a constitutional violation. *Id.* at 673.

[6] In Jackson's case, as in *LaJoie*, the state court failed to do the individual balancing required by *Lucas* to determine whether the exclusion, even if properly authorized under the rule, was disproportionate to the interests served in light of the facts of the defendant's case. *Id*. at 670. ("Because the [state court] did not balance the interests in [the defendant's] particular case, as required by *Lucas*, the district court erred in concluding that the state court decision was not an unrea sonable application of clearly established federal law, as determined by the United States Supreme Court."). Neither the *Miller* opinion nor the opinion in Jackson's direct appeal discussed the purposes of the notice provision, but we may assume that it, like the provision in *LaJoie*, was intended to "prevent surprise to the prosecution and the alleged victim, avoid undue trial delay, and protect the alleged victim from needless

anxiety concerning the scope of the evidence to be produced at trial." *LaJoie*, 217 F.3d at 670. These concerns must be balanced against the recognized relevance of a victim's prior false allegations of sexual assault in the particular case. *See Miller*, 779 P.2d at 89 ("[I]t is important to recognize in a sexual assault case that the complaining witness' credibility is critical and thus an alleged victim's prior fabricated accusations of sexual abuse or sexual assault are highly probative of a complaining witness' credibility concerning current sexual assault charges.").

Here, Jackson provided the court and opposing counsel with written copies of the officers' statements and explicitly stated his desire to introduce the officers' testimony if evidence regarding Heathmon's allegations of past abuse was admitted. Although Jackson did not comply with the requirements of *Miller*, he nonetheless gave clear advance notice of his desire to present the officers' testimony, and reasserted this desire prior to a hearing on the admissibility of Heathmon's allegations of past abuse by Jackson. While this notice was not sufficient under *Miller*, it nonetheless negated some of the concerns that the *Miller* rule was created to address, such as preventing unfair surprise to the prosecution and victim and avoiding unnecessary delay. Moreover, Heathmon was already prepared to testify — and did testify — as to her version of these prior assaults by Jackson. Thus any possible embarrassment or apprehension by the victim due to uncertainty about the scope of the examination would not have applied under the facts of this case.

[7] Although a state court undoubtedly has the authority to enforce procedural rules intended to serve

its legitimate interests in ensuring the orderly administration of justice, it must always do so in light of the constitutional requirement that the exclusion of evidence may not be disproportionate to the interests served by the rule under which it is excluded. *See, e.g. Chambers*, 410 U.S. at 302-03 (holding that otherwise valid state evidentiary rules "as applied in this case" served to "deprive [the defendant] of a fair trial"). Because of the critical importance of the excluded evidence to Jackson's defense, and because under the facts of this case all parties were aware that Heathmon's prior allegations were likely to be introduced at trial and that Jackson sought to counter her testimony with evidence from police officers, the total exclusion of this evidence was disproportionate to the state's interest in its exclusion on account of Jackson's failure to comply with *Miller*.

[8] As in *LaJoie*, we conclude that with respect to the trial court's exclusion of evidence regarding the victim's past allegations of sexual abuse, "the sanction of preclusion of this evidence in this case was ' . . . disproportionate' to the purposes of the . . . notice requirement. Therefore, even under a proper application of the *Lucas* test, the decision of the [state court] to preclude the evidence would still amount to 'an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.'" 217 F.3d at 673 (quoting 28 U.S.C. § 2254(d)(1)).

D.

[9] Although the exclusion of the police officer testimony violated Jackson's right to present a defense,

habeas relief is the appropriate remedy only if the constitutional violation resulted in error that was not harmless. "[I]n a § 2254 proceeding[ ] [a] court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in [*Brecht v. Abrahamson*, 507 U.S. 619 (1993)], whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman* [*v. California*, 386 U.S. 18 (1967)]." *Fry v. Pliler*, 551 U.S. 112, 121-22. (2007). To consider whether the standard under *Brecht* has been met, we consider the factors prescribed by the Court in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), namely: "(1) the importance of the witness' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case." *Merolillo v. Yates*, 663 F.3d 444, 455 (9th Cir. 2011) (citing *Van Arsdall*, 475 U.S. at 684). In this case, after considering the relevant factors, we conclude that the exclusion of the witness testimony was likely to have had a substantial and injurious effect on the verdict in Jackson's case.

The defense's theory was that there was no assault, and that this was another instance in which Heathmon made false claims to the police against Jackson. Although Heathmon recounted her complaints to various people, there was no physical evidence that an assault had occurred and extremely limited corroboration for Heathmon's claims. Webb, for

instance, testified that he did not see any signs of physical injury at the time that he encountered Heathmon and Jackson leaving the building, that he did not see Jackson with a screwdriver, and when he examined Heathmon's closet could not find any clothes that had been cut. The nurse who examined Heathmon after the assault found no signs of bruising and no signs of sexual assault, and the responding officer did not observe any readily visible marks or bruises.

[10] The primary evidence against Jackson was therefore Heathmon's own testimony and the testimony of those who related statements that she made around the time of the assault. The only evidence of the presence of the deadly weapon, which accounted for the imposition of three consecutive life sentences against Jackson, was Heathmon's own tes timony that Jackson was "holding [the screwdriver] against her neck [and] threatening to put it into her temple."[9] Heathmon initially recanted her claim of assault in a notarized letter produced prior to trial. After she was arrested and detained under a warrant for failing to appear in court, and threatened with a perjury charge, Heathmon agreed to testify. At trial she testified to the original version of the events and stated that she recanted her

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[9] This testimony was inconsistent however, as Heathmon testified at trial that Jackson was holding the screwdriver in his hand and threatened to poke her, while at the preliminary hearing, she testified that the screwdriver was in his pocket, and he did not say how or where he was going to use it. In its cross-examination, the defense asked Heathmon to explain her conflicting testimony, but the State objected, arguing that there was no "inconsistency." The court sustained the objection and informed Heathmon that she need not answer the question.

testimony because she was scared. Evidence from uninterested third parties that "bore persuasive assurances of trustworthiness," *Chambers*, 410 U.S. at 302, that Heathmon had previously made what appeared to be false or exaggerated claims of either physical or sexual abuse would have substantially bolstered Jackson's claim that the sexual assault never occurred. It would also have supported his theory that Heathmon's earlier refusal to testify was based on the falsity of her own claims, not fear of Jackson. There was no other evidence that Jackson produced that could have had the same effect. The excluded evidence was relevant to a critical issue at trial, namely whether the assault occurred, the evidence was crucial to Jackson's defense, and the "excluded evidence, unlike the evidence [from petitioner's family and friends] was not subject to attack on the grounds of bias or self-interest. It was the only unbiased source of corroboration for [petitioner's theory of the defense]." *DePetris v. Kuykendall*, 239 F.3d 1057, 1063-64 (9th Cir. 2001) (first alteration in original) (internal quotation marks and citation omitted).

[11] The prosecution introduced minimal evidence that was not dependent on the veracity of Heathmon's own assertions of fact. If the jury discounted Heathmon's testimony and relied solely on the remaining evidence presented, it may reasonably have found that Jackson was not guilty of some or all of the charges. The state's evidence of guilt was therefore not so overwhelming that we can say there is not a "grave doubt about whether a constitutional error substantially influenced the verdict." *Slovik v. Yates*, 556 F.3d 747, 755 (9th Cir. 2009) (quoting *Parle v. Runnels*, 387 F.3d 1030, 1044 (9th Cir. 2004)).

[12] The exclusion of critical evidence that would have served to rebut the testimony of the principal prosecution witness and to directly undermine her credibility constituted a clear violation of Jackson's right to present an adequate defense and we must conclude that this unconstitutional exclusion caused a substantial and injurious influence on the jury's verdict. The state court's decision to the contrary was an unreasonable application of clearly established Supreme Court law.

II.

Jackson additionally argues that the trial court violated his right to confront the witnesses against him by preventing him from questioning Heathmon about a prior arrest for prostitution. At trial, Jackson's counsel asked Heathmon if she was "hooking" on two different nights. After the prosecution's objection, the jury was told to disregard the question, and no further inquiries were made as to any possible prostitution acts or arrests. Jackson lodged an objection that the court prevented him from questioning the witness regarding prior prostitution arrests. The court upheld its ruling, noting that the nature of the questioning was about *acts* of prostitution, not *arrests* for prostitution, and that the precluded line of questioning was improper.

The Supreme Court has recognized that a defendant's constitutional right to confront the prosecution's witnesses includes the right to impeach the witness through the "introduc[tion] of evidence of a prior criminal conviction of that witness." *Davis*, 415 U.S. at 316. Although Jackson now contends that he was prevented from questioning Heathmon regarding

prior arrests for prostitution, the record does not reveal that to be the case.[10] Moreover, even if Heathmon engaged in prior acts of prostitution, this behavior would have no bearing on Jackson's theory of the defense, nor would it suggest that her testimony was motivated by any improper motive or bias. The trial court therefore acted within its discretion to exclude the prostitution questions as irrelevant, and this limitation on Jackson's right of confrontation did not amount to a constitutional violation. *See Hughes*, 641 F.2d at 793 (recognizing that the trial court's exclusion of a generalized attack on the witnesses' credibility, particularly her sexual exploits, did not rise to the level of a constitutional violation due to its minimal relevance).

CONCLUSION

[13] The district court erred in concluding that the state court determination that the exclusion of the police witness testimony did not constitute a violation of Jackson's well established right to present a complete defense. The excluded evidence was relevant and vital to his defense, and the total exclusion of this testimony was arbitrary and disproportionate to the purposes the evidentiary rules were intended to serve.

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[10] The district court adopted the trial court's interpretation of Jackson's questioning of Heathmon, and also concluded that "the trial court did not allow petitioner to question the victim about prior *acts* of prostitution," not merely arrests. (emphasis in original). We review the district court's finding of fact for clear error, and on this record, we cannot say that the district court's conclusion that the defense only attempted to inquire as to prior acts of prostitution was incorrect.

The Nevada Supreme Court decision holding otherwise was an unreasonable application of clearly established United States Supreme Court precedent. We therefore reverse the district court's judgment and remand with directions to issue a conditional writ of habeas corpus, releasing Jackson from detention unless the state retries him within a reasonable period of time.

REVERSED and REMANDED.

GOODWIN, Circuit Judge, dissenting:

I respectfully dissent. The appellant did not present in his appeal to this court a competency-of-counsel question, and I believe that his failure timely to request a *Miller* hearing to support his effort to impeach the complaining witness was a default by the defense. Rejection of the proffered evidence, therefore, was not a constitutional error by the state trial court. The United States District Court for the District of Nevada complied with the requirements of AEDPA. I would affirm the judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

3:03-cv-0257-RLH-RAM

[Filed September 8, 2009]

CALVIN O'NEIL JACKSON,

Petitioner,

vs.

CRAIG FARWELL, *et al.*,

Respondents.

/

ORDER

This action proceeds on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, by petitioner Calvin Jackson, a Nevada prisoner represented by counsel. The action comes before the court with respect to its merits. The Court will deny the petition.

I. Procedural History

On April 16, 1999, petitioner was convicted, after a jury trial, of burglary (count I), battery with intent to commit a crime (count II), first degree kidnaping with the use of a deadly weapon (count III), and two counts of sexual assault with the use of a deadly weapon (counts IV and V). Exhibits 19, 21.[1] The District Court for Clark County sentenced petitioner on August 25, 1999, as follows: to 120 months in prison with parole eligibility in 48 months for count I; to 180 months in prison with parole eligibility in 72 months for count II; to life in prison with the possibility of parole for count III; and to life imprisonment with the possibility of parole for counts IV and V, with an equal and consecutive life sentence with the possibility of parole for the use of a deadly weapon. Exhibit 27. All counts were to run consecutively. *Id.* The court entered a judgment of conviction on September 15, 1999. Exhibit 28.

Petitioner appealed, and the Nevada Supreme Court affirmed his convictions. Exhibits 29, 35 and 50. While his direct appeal was pending petitioner filed a habeas corpus petition with the district court in October 2000. Exhibit 41. The district court denied the petition without holding an evidentiary hearing. Exhibit 48. Petitioner appealed this denial and the Nevada Supreme Court affirmed but remanded the

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[1] The exhibits cited in this order are those filed by petitioner in support of his first amended and second amended petition for writ of habeas corpus, and are located in the record at docket #21, 22 and 48.

case for the limited purpose of correcting the judgment of conviction to include an equal and consecutive sentence of life imprisonment for the deadly weapon enhancement on count III. Exhibit 67. The district court entered the amended judgment on June 2, 2002. Exhibit 70.

On May 8, 2003, petitioner mailed his federal habeas petition to this Court (docket #7). After counsel was appointed petitioner filed an amended petition, alleging eight grounds for relief. Respondents moved to dismiss the petition, and this Court granted the respondents' motion to dismiss in part, finding grounds one, three, four, seven and eight(a) to be unexhausted (docket #32). The Court gave petitioner the option of abandoning those grounds or returning to state court to exhaust the claims. *Id.* Petitioner asked that the case be stayed so he could return to state court to exhaust his claims (docket #37). This Court granted the motion for stay and abeyance, dismissed the case without prejudice and administratively closed the case (docket #41).

Petitioner filed a second state habeas corpus petition in the Nevada district court, raising the above claims that were found by this Court to be unexhausted. Exhibit 73. The state district court dismissed the petition, finding the petition to be untimely and successive. Exhibit 80. The Nevada Supreme affirmed the dismissal, stating that petitioner's second petition was procedurally barred, and noted that petitioner had not shown good cause or prejudice. Exhibit 86.

Petitioner moved to reopen the case on October 25, 2006 (docket #42). This Court reopened the case and ordered petitioner to file an amended petition (docket #46). Petitioner filed a second amended petition for writ of habeas corpus alleging the same claims for relief that were contained in the first amended petition (docket #47). Respondents' moved to dismiss the petition, arguing some of the ground were procedurally defaulted (docket #49). The Court granted the motion to dismiss, finding grounds one, three, four, seven, and eight (a) were procedurally defaulted (docket #58). Respondents have now answered the remaining grounds contained in the second amended petition (docket #62) and petitioner has filed a reply (docket #70).

II. Federal Habeas Corpus Standards

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), provides the legal standard for the Court's consideration of this habeas petition:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (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).

The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order 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). A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "'if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases'" or "'if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent.'" *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at 694).

A state court decision is an unreasonable application of clearly established Supreme Court precedent "'if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The unreasonable application clause "requires the state court decision to be more than incorrect or erroneous"; the state court's application of clearly established law must be

objectively unreasonable. *Id*. (*quoting Williams*, 529 U.S. at 409). *See also Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004). In determining whether a state court decision is contrary to, or an unreasonable application of, federal law, this Court looks to a state court's last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Plumlee v. Masto*, 512 F.3d 1204, 1209-10 (9th Cir. 2008) (en banc).

In determining whether a state court decision is contrary to, or an unreasonable application of, federal law, this Court looks to a state court's last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Plumlee v. Masto*, 512 F.3d 1204, 1209-10 (9th Cir. 2008) (en banc).

Moreover, "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

III. Discussion

A. Ground Two

In his second ground for relief petitioner alleges that the trial court erred in not allowing him to present his theory of defense, and as a result, his rights under the Fifth, Sixth, and Fourteenth Amendments were violated. Petitioner specifically states that the district court did not allow him to call police officers as witnesses in order to establish that the complaining witness used law enforcement agencies as a means of exercising control over him. Petitioner also contends

that the trial court would not allow petitioner to offer an alternative explanation as to why the complaining witness would not want to come to court to testify.

The state district court held a *Petrocelli* hearing on April 12, 1999, to determine which, if any, prior bad acts could be introduced at trial through the testimony of the victim. Exhibit 15. The judge determine that most of the prior bad acts would not be admissible as they are not relevant, and told the district attorney when questioning the victim to stay away from mentioning prior contact with the police. *Id.* at T 47, 64. The court also told the parties that it would allow some of the information in at trial if it was relevant to credibility, but the court would not allow the parties to prove or disprove whether prior bad acts occurred by bringing in collateral witnesses. *Id.* at T 64.

At trial, during re-direct, victim Annette Heathmon testified that the case had gone further than she intended as she originally was not going to testify because she was afraid for her life. Exhibit 17, T 174. Heathmon told the jury that in another case in 1994 she failed to appear to testify against petitioner when he had cut her face and leg with a knife. *Id.* at T 174-75. Heathmon also testified regarding another incident in 1995 in which petitioner cut her with a knife. *Id.* at T 176. Heathmon stated that she never showed up to testify because she was scared. *Id.* at T 177. The court then gave the following limiting instruction to the jury:

> I think at this time it would be good for me to give a limiting instruction to the jury, members of the jury, you have been hearing some testimony from the witness regarding

> allegations of prior incidences between her and the Defendant in this case, you are to consider that testimony only for the purpose of judging the credibility of the witness's testimony and her state of mind as to why she did or did not take certain actions, you are not to consider this testimony for any reason in determining whether or not the Defendant committed the acts with which he is charged.

Id. at T 178-79.

On the third day of trial, defense counsel asked the court to allow the defense to bring in police officers that would testify that on at least four occasions Heathmon called the police to complain about petitioner, but there was no corroboration to back up her allegations. Exhibit 18, T 266-67. The defense alleged that Heathmon used the police or her calling of the police as a means of exercising control over petitioner. *Id.* After hearing argument from the parties, the court denied counsel's request to have police officers testify about prior instances of the victim calling the police. *Id.* at T 270. The court stated that the case law and Nevada Statutes did not allow the defense to bring the police officers in to testify to collateral matters to show that the victim is lying. *Id.*

The Nevada Supreme Court addressed the instant claim in petitioner's direct appeal. The court found the claim to be without merit, stating:

> Jackson also contends that the district court violated his due process rights by prohibiting him from presenting his theory of the case at

trial. Jackson's theory was that the victim lied and she had a history of making false accusations. Specifically, Jackson argues that the district court should have allowed him to present police officers' testimony to "explore alternate reasons" why the victim may have been reluctant to testify at trial or to show that the victim had filed false police reports in the past.

Although the right to present witnesses to establish a defense is a fundamental element of due process of law, it is not an unqualified right. *See Washington v. State*, 388 U.S. 14, 18-19 (1967) In general, a witness must be physically and mentally capable of testifying to events that he personally observed, and his testimony must be relevant and material to the defense. *See* NRS 50.015 (general rule of competency); NRS 51.025 (lack of personal knowledge); NRS 51.065 (general hearsay rule); *see also* NRS 48.025 (relevant evidence admissible).

In addition, Nevada does not permit the use of extrinsic evidence to attack the credibility of a witness. *See* NRS 50.085(3). As an exception, this court has held that in a sexual assault case defense counsel may cross-examine a complaining witness about previous fabricated sexual assault accusations and, if the witness denies making the allegations, may introduce extrinsic evidence to prove that fabricated charges were made by that witness in the past. *See Miller v. State*, 105 Nev. 497, 501, 779 P.2d 87, 88-89 (1989). As a prerequisite to admitting

a complaining witness' prior sexual assault accusations and corroborative extrinsic evidence proving the falsity thereof, the defendant must file written notice of his intent and the district court must order a hearing to establish both the fact of the accusations and the falsity thereof even before defense counsel launches into cross-examination. *See id*. at 502, 779 P.2d at 90.

We conclude that the district court did not err by refusing to allow Jackson to procure the testimony of police officers to show that the victim in this case had allegedly filed false police reports in the past. To the extent that any alleged prior false accusations involved sexual assault or sexual abuse, Jackson does not allege, nor does the record reveal, that he filed written notice of his intent to inquire of the victim about prior false accusations or that he requested a *Miller* hearing to determine the propriety of such questioning and the admissibility of corroborative evidence. In the absence of any such request, we conclude that it was proper for the district court to deny the presentation of extrinsic evidence.

Additionally, to the extent that the alleged prior false accusations involved prior stabbing or domestic violence incidents, the record reveals that Jackson sought to present police officers' testimony to show that "there was no corroboration to back up the allegations that [the victim] made to police on these prior occasions." 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.

Exhibit 50.

In this case the Nevada Supreme Court determined that under the Nevada Statutes the trial court did not err in not allowing petitioner to present the testimony of police officers on a collateral issue. When a state interprets its own laws or rules, no basis for federal habeas corpus relief is presented, as no federal constitutional question arises. *Burkey v. Deeds*, 824 F. Supp. 190, 192 (D. Nev. 1993) (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)); *Oxborrow v. Eikenberry*, 877 F.2d 1395 (9th Cir. 1999) ("errors of state law do not concern us unless they rise to the level of a constitutional violation"). Moreover, a state law issue cannot be mutated into one of federal constitutional law merely by invoking the specter of a due process violation. *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996), *cert. denied*, 522 U.S. 881 (1997). Petitioner must demonstrate the existence of federal constitutional law which establishes the right in question. It appears that petitioner has not presented a federal question.

To the extent that petitioner has presented a viable federal issue, petitioner has not shown that the Nevada Supreme Court's determination was objectively unreasonable. Criminal defendants must be afforded

the opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). A criminal defendant also has a Sixth Amendment right to examine witnesses against him. *Washington v. Texas*, 388 U.S. 14, 18 (1967). However, trial courts have discretion to "to exclude evidence that is 'repetitive..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Crane*, 476 U.S. at 689-90 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). A defendant has a right to present relevant evidence, but this right is not unlimited and is instead subject to "reasonable restrictions." *Taylor v. Illinois*, 484 U.S. 400 (1988).

Although petitioner had a right to present witnesses at his trial, that right was not unlimited. The court's finding that petitioner had not followed the procedure in Nevada for using extrinsic evidence is supported by the record. Furthermore, in *Hughes v. Raines*, 641 F.2d 790, 793 (9th Cir. 1981), the Ninth Circuit found that a trial court's preclusion of questioning a victim about a prior attempted rape accusation was not improper, because evidence of a prior false accusations did no more than attack the general credibility of the witness. The court noted that "[e]ven if the jury reasonably could conclude that the prior charge was false, the relevance of that conclusion...is slight" as the jury would be asked to infer that because the complaining witness made false accusations on a prior occasion, that the accusations in the current case are also false. *Id.* Similar to *Hughes*, here the extrinsic evidence petitioner wished to present was related to the collateral issue of whether the victim had made

uncorroborated accusations to the police, and the trial court's limitation on such evidence was not erroneous.

Moreover, even if the court's limitation on the defense was erroneous it did not have a substantial and injurious effect on the jury verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). The extrinsic evidence in question would not have proven that the victim made prior *false* accusations against petitioner, only that she had made accusations that may have gone uncorroborated, and thus petitioner had not been charged with other crimes for actions against witness Heathmon.

The court will deny ground two.

B. Ground Five

In ground five petitioner alleges that the trial court erred in not allowing him to inquire about the victim's prior prostitution arrests, and as a result petitioner's Sixth Amendment right to confrontation was violated. During defense counsel's re-cross examination of the victim, the following exchange took place:

> Q. Let's go to the incident that you and Ms. Holthus was talking about, I think it is October 31st, 1993, remember that night?
>
> A. Halloween.
>
> Q. Were you hooking on that night?
>
> A. Excuse me?

Q. Were you turning tricks on that night?

A. I am at a birthday party at my house.

Q. So you weren't turning tricks on that night?

A. I wasn't even messin' with him – Calvin.

Q. Were you turning tricks on July 20th, 1993?

Ms. Holthus: I object, Judge, what is this?

The Court: Counsel approach.

Exhibit 17, T 186. The trial court instructed the jury to disregard the "last set of questions." *Id.* Later in the trial, outside the presence of the jury, the parties had a more in depth discussion of this issue:

> Ms. Lemcke [defense counsel]: Judge, just two things, because we dealt with a couple of issues at the bench and I just wanted to make sure they were on the record. Number one, was Mr. Bank's attempts to go into Ms. Heathmon's arrest for prostitution and I brought up at the bench the fact that there is a case, *State of Nevada versus Drake* or maybe that's the other way around, *Drake versus State*, which specifically allows for inquiry into those particular matters and specifically upholds that a criminal defendant can ask a witness about arrests for prostitution, they can't introduce extrinsic evidence of it, but they can inquire about their arrest. So to the extent that we were precluded from going into that line of inquiry, I

would just make our objection noted on the record.

...

Mr. Gardner: Your Honor, if I could just respond on the issue of the prostitution record. I know the Court has ruled this [sic], but what counsel fails to mention in this *Drake* case is that the Supreme Court concludes that in the appropriate case the District Court could properly exercise its discretion by refusing to admit such evidence. And the evidence, like any evidence, is subject to standards of relevancy, this *Drake* case has to do with allegations of prostitution because prostitution implies sex with strangers. And only if a person's willingness to have sex with strangers would be relevant to the sexual assault prosecution should that come in, in this case we're talking about a couple with ten years of experience. So even if there were any history of prostitution and we are not conceding there even is, they would have to show standards of relevant, secondly, they must make an offer of proof and explain to the Court why this would be relevant before they can just go asking in front of a jury trying to slander a witness's character by bringing these things out in front of a jury.

The Court: And they did not ask whether she had ever been arrested or convicted of prostitution, he just simply asked, were you hooking that night?

Mr. Gardner: Right, so –

The Court: Which was improper.

Exhibit 18, T 273-77.

Petitioner raised this ground in his direct appeal, and the Nevada Supreme Court found, in a footnote, and without further explanation, the claim to be without merit. Exhibit 50 at 5, n. 1. As the Court discussed in relation to ground two, it appears that petitioner has not raised a federal claim. While the Nevada Supreme Court did not provide any analysis on the issue, the trial court did not allow petitioner to question the victim about prior *acts* of prostitution, and noted that under Nevada case law one could question a victim about prior prostitution *arrests* only, which defense counsel did not do.

When a state interprets its own laws or rules, no basis for federal habeas corpus relief is presented, as no federal constitutional question arises. *Burkey v. Deeds*, 824 F. Supp. 190, 192 (D. Nev. 1993) (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)); *Oxborrow v. Eikenberry*, 877 F.2d 1395 (9th Cir. 1999) ("errors of state law do not concern us unless they rise to the level of a constitutional violation"). Moreover, a state law issue cannot be mutated into one of federal constitutional law merely by invoking the specter of a due process violation. *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996), *cert. denied*, 522 U.S. 881 (1997). Petitioner must demonstrate the existence of federal constitutional law which establishes the right in question. It appears that the trial court was interpreting its own law when it determined that the cross-examination was improper. Therefore, no federal question has been raised.

To the extent petitioner has raised a federal question, petitioner has not demonstrated that the Nevada Supreme Court's determination was an objectively unreasonable application of federal law, as determined by United States Supreme Court precedent.

The Confrontation Clause "guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him." *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986). The main purpose of the confrontation of witnesses is to allow a defendant the opportunity to cross-examine witnesses. *Id.* (citing *Davis v. Alaska*, 415 U.S. 308 (1974)). The right to cross-examine "includes the opportunity to show that a witness is biased, [or that] the testimony is exaggerated or unbelievable." *Fowler v. Sacramento County Sheriff's Dept.*, 421 F.3d 1027, 1035 (9th Cir. 2005) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)). However, the Confrontation Clause does not prevent a trial court "from imposing any limits on defense counsel's inquiry into the [reliability or credibility] of a prosecution witness." *Id.* Trial courts "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or marginally relevant." *Id.* (citing *Van Arsdall*, 475 U.S. at 679).

Under Nevada law, one can cross-examine a witness about prior prostitution *arrests*. In this case, the defense did not question the witness/victim about prior arrests, and merely asked if on certain occasions the

witness was acting as a prostitute. The trial court, in its discretion, limited this line of questioning. The Court cannot say that the trial court's limitation on cross-examination violated petitioner's Confrontation Clause rights. Petitioner had wide latitude to cross-examine the victim about multiple issues in order to demonstrate that her testimony was not credible or reliable. Furthermore, there is no indication that trial court's limitation of the cross-examination had a substantial and injurious effect on the jury verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). Questions regarding prior acts of prostitution were not relevant to the case, as the victim had dated petitioner for over ten years. Petitioner does not have a constitutional right to present evidence that is not relevant. *Wood v. Alaska*, 957 F.2d 1544, 1550 (9th Cir. 1992).

The Court will deny ground five.

C. Ground Six

In his sixth ground for relief petitioner argues that there was insufficient evidence presented at trial to convict him, and as a result his Fifth, Sixth, and Fourteenth Amendment rights were violated. Petitioner states that the only evidence presented in the case that implicated him in the crimes was the testimony of victim/witness Heathmon. Petitioner contends that the state relied upon the victim's highly confusing testimony and prior bad acts, and none of the evidence supports a finding of guilt beyond a reasonable doubt.

The United States Supreme Court has held that when reviewing an insufficiency of the evidence claim in a habeas petition, a federal court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The court must assume that the jury resolved any evidentiary conflicts in favor of the prosecution, and the court must defer to that resolution. *Jackson*, 443 U.S. at 326; *Schell v. Witek*, 218 F.3d 1017, 1023 (9th Cir. 2000) (*en banc*). The credibility of witnesses is beyond the scope of the court's review of the sufficiency of the evidence. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995). Under the *Jackson* standard, the prosecution has no obligation to rule out every hypothesis except guilt. *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion); *Jackson*, 443 U.S. at 326; *Schell*, 218 F.3d at 1023. *Jackson* presents "a high standard" to habeas petitioners claiming insufficiency of evidence. *Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000).

Petitioner raised this ground in his direct appeal, and the Nevada Supreme Court found, in a footnote, and without further explanation, the claim to be without merit. Exhibit 50 at 5, n. 1. This Court disagrees with petitioner's argument and agrees with the Nevada Supreme Court that there was sufficient evidence to support the convictions. The court has reviewed the record, and after viewing the evidence in the light most favorable to the prosecution, concludes that any rational trier of fact could have found petitioner guilty of sexual assault with the use of a deadly weapon and battery with the intent to commit

a crime. The Nevada Supreme Court's ruling that there was sufficient evidence to support petitioner's convictions was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court.

Petitioner's main argument is that the victim's testimony was patently incredible. However, the issue of credibility of witnesses is beyond the scope of review. *Schlup v. Delo*, 513 U.S. 298, 330 (1995); *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004). Moreover, the state court's ruling was not based on an unreasonable determination of facts in light of the evidence. 28 U.S.C. § 2254(d). The court will deny habeas relief with respect to ground six.

D. Ground Eight (b)

In ground eight (b) petitioner asserts that appellate counsel was ineffective for failing to raise on appeal the issue that his convictions were obtained by the knowing use of perjured testimony, in violation of his Sixth and Fourteenth Amendment rights. Petitioner states that the victim committed perjury at trial and admitted, under oath, that she had lied during her testimony.

"Claims of ineffective assistance of appellate counsel are reviewed according to the standard announced in *Strickland*." *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002). A petitioner must show that counsel unreasonably failed to discover non-frivolous issues and there was a reasonable probability that but for counsel's failures, he would have prevailed on his appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

Prior to trial a notarized letter written by victim Heathmon was submitted to the court, stating that no crimes were committed. Heathmon testified on direct examination that she merely copied what petitioner's mother had written down. Exhibit 16, T 111-12. Heathmon testified that nothing in the letter was true. *Id.* at T 113. Heathmon later testified (testimony was continued to the following day) that she was scared so she copied the letter. Exhibit 17, T 130. On cross-examination the following exchange took place:

> Q. You testified yesterday in regards to the letter that Ms. Holthus was asking you about, you testified yesterday that you wrote that because you were having a good day that day, you were in a good mood that day, isn't that right?
>
> A. Yes.
>
> Q. You were under oath yesterday to tell the truth weren't you?
>
> A. Yes, I was.
>
> Q. You testified yesterday that you didn't feel threatened, isn't that right?
>
> A. Yes, I was scared.
>
> Q. You testified yesterday that you did not feel threatened, correct?
>
> A. Yes.

Q. You were under oath, sworn to tell the truth yesterday, isn't that right?

A. Excuse me?

Q. ...but you were under oath yesterday sworn to tell the truth, correct?

A. Yes.
...

Q. Yes ma'am. In light of your testimony today, you are under oath today isn't that right?

A. Yes.

Q. Ms. Heathmon, were you lying yesterday or are you lying today?

A. Yesterday.

Q. So you lied when you were sworn to tell the truth, under oath, you lied, isn't that right?

A. Yes, cause I was afraid.

Id. at T 136-37.

The Nevada Supreme Court addressed this claim in the appeal from the denial of petitioner's state habeas corpus petition. The Nevada Supreme Court rejected the claim, finding:

> Second, appellant claimed that his appellate counsel was ineffective for failing to raise the

> claim that appellant's conviction was obtained by the knowing use of perjured testimony that conflicted with the victim's notarized written statement. Appellant's claim is repelled by the record. While it is true that the victim's testimony contradicted the written statement, as discussed above, the victim discredited the written statement by testifying that it was untrue and that appellant's mother merely had her copy and sign it. Therefore, we conclude that appellant failed to demonstrate that his counsel was ineffective because this issue did not have a reasonable probability of success on appeal.

Exhibit 67 (footnote omitted). The Nevada Supreme Court's determination is not objectively unreasonable. Petitioner has not shown that the state prosecutor and trial court knowingly allowed false testimony at trial. *See*, *e.g.*, *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (stating a conviction obtained through the use of knowingly perjured testimony violates due process); *Morris v. Ylst*, 447 F.3d 735, 745 (9th Cir. 2005) (discussing the need to show false testimony). Furthermore, although petitioner did commit perjury in this case, petitioner admitted in court that she lied the previous day. The jury was aware of, and could consider the victim's direct examination testimony, her testimony on cross-examination in which she stated that she lied, the notarized letter, and her testimony stating that the letter was untruthful. Therefore, any false testimony presented was corrected during trial. *See Morris*, 447 F.3d at 745. Petitioner has not demonstrated that but for counsel's failures that he would have prevailed on appeal.

The Court will deny ground eight (b).

E. Ground Eight (c)

In ground eight (c) petitioner alleges that appellate counsel was ineffective for failing to raise on appeal the issue that the prosecutor committed prosecutorial misconduct by intimidating, threatening and interfering with the complaining witness, who had signed a statement to help petitioner, in violation of his Sixth and Fourteenth Amendment rights.

This ground was raised on appeal from the denial of the state habeas corpus petition, and the Nevada Supreme Court rejected the claim, stating:

> First, appellant claimed that his appellate counsel was ineffective for failing to raise the claim that the prosecutor committed misconduct by intimidating, threatening, and interfering with the victim, who signed a statement to held the appellant. Specifically, appellant claims that the prosecution coerced the victim to testify by threatening to charge her with perjury. Appellant's claim is belied by the record. [fn 7: *See Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984).] The record indicates that the victim was found hiding-out at a hotel, and was taken into custody on a material witness warrant. At trial, the victim, who had been involved in a prolonged, highly abusive relationship with appellant, testified that she had been threatened not to testify against appellant and was frightened for her life. The victim stated multiple times that she was testifying truthfully

> and voluntarily, and further stated that the prosecution had not threatened her with perjury charges or any other repercussions. Additionally, the victim testified that the notarized written statement was not in her own words, and that she had merely copied a fabricated statement presented to her by appellant's mother. Therefore, we conclude that appellant failed to demonstrate that his counsel was ineffective because this issue did not have a reasonable probability of success on appeal. [fn 8: *See Kirksey*, 112 Nev. at 998, 923 P.2d at 1114.]

Exhibit 67.

Petitioner has not demonstrated that the Nevada Supreme Court's determination was an objectively unreasonable application of federal law, as determined by United States Supreme Court precedent. At trial witness Heathmon testified to the following on cross-examination:

> Q. Ms. Heathmon, are you a little concerned about what the D.A. can do to you?
>
> A. No, I'm concerned about my life.
>
> Q. Let me ask you this, the D.A. threw you in jail, didn't they?
>
> A. I don't know who did it they just had a warrant out.
>
> Q. Do you know who they is?

A. I guess the Judge put the warrant out.

Q. Do you know who submitted that warrant to the Judge?

A. Mary Kay.

Q. And Mary Kay is the D.A.?

A. Yes.

Q. So the D.A. put you in jail, didn't they?

A. Yes.
...

Q. You were told you had to testify, weren't you?

A. No, I wasn't told that.

Q. Did you discuss possible perjury charges with the D.A. if you did not testify?

A. Yes I did.

Q. I believe you testified on direct with Ms. Holthus that you are in custody now?

A. Yes.

Q. And that's a result of the warrant that was out for your arrest for not showing up to Court, correct?

A. Yes.

> Q. Kind of scares you, doesn't it, it was the D.A. who facilitated that in happening, your being arrested, correct?
>
> A. Yes.
>
> Q. Until you do testify, you stay in jail don't you?
>
> A. I don't know, until this is over, I guess.

Exhibit 17, T 138-40. On redirect examination, Heathmon testified that she had no intention of coming to testify because she was frightened for her life. *Id.* at T 174. The prosecutor asked Heathmon if she was afraid of the District Attorney's Office, and the victim stated that she was not scared of the office or of the District Attorney prosecuting the case. *Id.* at T 178.

Petitioner has not shown that but for appellate counsel's errors this claim would have prevailed on appeal, as his claim is belied by the record. There is no indication that the prosecutor threatened, intimidated and interfered with the complaining witness. In fact, the testimony indicates that the victim or complaining witness was frightened of petitioner, and was scared to testify in court, and was not afraid of the prosecutor.

The Court will deny ground eight (c).

IV. Certificate of Appealability

In order to proceed with an appeal from this court, petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner must make "a substantial showing of the denial of a constitutional

right" to warrant a certificate of appealability. *Id.* The Supreme Court has held that a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Supreme Court further illuminated the standard for issuance of a certificate of appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

Id. at 1040 (quoting *Slack*, 529 U.S. at 484).

The court has considered the issues raised by petitioner, with respect to whether they satisfy the standard for issuance of a certificate of appeal, and the court determines that none meet that standard. Accordingly, the court will deny petitioner a certificate of appealability.

IT IS THEREFORE ORDERED that the amended petition for a writ of habeas corpus (docket #47) is **DENIED**.

IT IS FURTHER ORDERED that the motion to strike (docket #71) is **DENIED**.

IT IS FURTHER ORDERED that the clerk shall **ENTER JUDGMENT ACCORDINGLY**.

IT IS FURTHER ORDERED that petitioner is **DENIED A CERTIFICATE OF APPEALABILITY**.

DATED this 8th day of September, 2009.

/s/_____
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

3:03-cv-0257-RLH-RAM

[Filed September 9, 2009]

CALVIN O'NEIL JACKSON,	)
	)
Petitioner,	)
	)
vs.	)
	)
CRAIG FARWELL, et al.,	)
	)
Respondents.	)
	/

JUDGMENT IN A CIVIL CASE

_____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_____ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court**. This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the amended petition for a writ of habeas corpus (Document No. 47) is DENIED.

September 9, 2009

LANCE S. WILSON
Clerk

/s/ Katie Lynn Ogden
Deputy Clerk

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 34890

[Filed February 7, 2001]

CALVIN O'NEIL JACKSON,	)
	)
Appellant,	)
	)
vs.	)
	)
THE STATE OF NEVADA,	)
	)
Respondent.	)
	)

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict on one count each of burglary, battery with the intent to commit a crime, first-degree kidnapping with the use of a deadly weapon, and two counts of sexual assault with the use of a deadly weapon.

The district court sentenced appellant Calvin O'Neil Jackson to a term of ten years in prison on the burglary

count, a term of fifteen years in prison on the battery count, and a term of life in prison with the possibility of parole on the kidnapping count, plus a consecutive term of life for the deadly weapon enhancement. The district court further sentenced Jackson to terms of life in prison with the possibility of parole for each of the two counts of sexual assault, together with two additional terms of life in prison for the deadly weapon enhancement on each count. The district court ordered all of the sentences to run consecutively.

Jackson first contends that the admission of the victim' s testimony concerning an uncharged prior rape involving Jackson and the victim was reversible error.

"[B]efore evidence of a prior bad act can be admitted, the state must show, by plain, clear and convincing evidence that the defendant committed the offense." Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985). This court has established the following three prerequisites to the introduction of evidence of other bad acts: "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). Additionally, when prior sexual behavior is introduced as an exception to the inadmissibility of prior bad act evidence, there must be some similarity to the sexual conduct at issue at trial. Williams v. State, 95 Nev. 830, 833, 603 P.2d 694, 696-97 (1979).

We conclude that the prior bad acts evidence was properly admitted at trial in this case. The evidence of

the prior rape and the two prior knife incidents was relevant to the sexual assault charges and the issue of consent, and the victim testified with specificity at the Petrocelli hearing concerning these prior bad acts. Although the evidence was clearly prejudicial, the district court issued a contemporaneous limiting instruction to the jury. Jackson "opened the door" to the testimony by placing the victim's state of mind in issue and impeaching her credibility on cross-examination. Thus, the victim's testimony concerning the prior bad acts was proper rebuttal evidence. Accordingly, we conclude that Jackson's contention lacks merit.

Jackson also contends that the district court violated his due process rights by prohibiting him from resenting his theory of the case at trial. Jackson's theory was that the victim lied and she had a history of making false accusations. Specifically, Jackson argues that the district court should have allowed him to present police officers testimony to "explore alternate reasons" why the victim may have been reluctant to testify at trial or to show that the victim had filed false police reports in the past.

Although the right to present witnesses to establish a defense is a fundamental element of due process of law, it is not an unqualified right. See Washington v. State, 388 U.S. 14, 18-19 (1967). In general, a witness must be physically and mentally capable of testifying to events that he personally observed, and his testimony must be relevant and material to the defense. See NRS 50.015 (general rule of competency);

NRS 51.025 (lack of personal knowledge); NRS 51.065 (general hearsay rule); see also NRS 48.025 (relevant evidence admissible).

In addition, Nevada does not permit the use of extrinsic evidence to attack the credibility of a witness. See NRS 50.085(3). As an exception, this court has held that in a sexual assault case defense counsel may cross-examine a complaining witness about previous fabricated sexual assault accusations and, if the witness denies making the allegations, may introduce extrinsic evidence to prove that fabricated charges were made by that witness in the past. See Miller v. State, 105 Nev. 497, 501, 779 P.2d 87, 88-89 (1989). As a prerequisite to admitting a complaining witness' prior sexual assault accusations and corroborative extrinsic evidence proving the falsity thereof, the defendant must file written notice of his intent and the district court must order a hearing to establish both the fact of the accusations and the falsity thereof even before defense counsel launches into cross-examination. See id. at 502, 779 P.2d at 90.

We conclude that the district court did not err by refusing to allow Jackson to procure the testimony of police officers to show that the victim in this case had allegedly filed false police reports in the past. To the extent that any alleged prior false accusations involved sexual assault or sexual abuse, Jackson does not allege, nor does the record reveal, that he filed written notice of his intent to inquire of the victim about prior false accusations or that he requested a Miller hearing to determine the propriety of such questioning and the admissibility of corroborative evidence. In the absence of any such request, we conclude that it was proper for

the district court to deny the presentation of extrinsic evidence.

Additionally, to the extent that the alleged prior false accusations involved prior stabbing or domestic violence incidents, the record reveals that Jackson sought to present police officers' testimony to show that "there was no corroboration to back up the allegations that [the victim] made to police on these prior occasions." 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.

Having considered Jackson's contentions and concluded that they lack merit, we affirm the judgment of conviction.[1]

---

[1] Jackson also assigns error to the district court's refusal to grant a mistrial, to redact Jackson's statement to police, or to admit evidence of the victim's prior arrest record, as well as the admission of out-of-court statements, the jury instructions and the sufficiency of the evidence. We have considered all of Jackson's contentions and conclude that they are without merit.

/s/ Young, J.
Young

/s/ Rose, J.
Rose

/s/ Becker, J.
Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Calvin O'Neil Jackson
Clark County Clerk

APPENDIX E

LAS VEGAS, CLARK COUNTY, NEVADA

MORNING SESSION

THURSDAY, APRIL 15, 1999; 10:15 a.m.

* * * * *

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(Out of the presence of the jury.)

THE COURT: We will be back on the record, we are outside the presence of the jury. All right. Mr. Banks?

MR. BANKS: Your Honor, yesterday at the conclusion of Ms. Heathmon's testimony and before the afternoon session I approached the bench with counsel and indicated that I had some motions to make outside of the presence of the jury. I would like to make those now.

THE COURT: All right, you may do so.

MR. BANKS: The testimony elicited from Ms. Heathmon indicating that she had been raped by Mr. Jackson prior to the 10/21/98 incident, that came out on redirect testimony, I think for the jury to hear that testimony is way too prejudicial for Mr. Jackson, he's never going to get a fair shake in front of this jury with that kind of testimony and I don't think that a limiting

jury instruction is going to cure that. In light of that testimony I would move for a mistrial. Also, at the time that she said that there were one of two things I could do, one, move for the mistrial which I have just done, or two, defend against it. And when I have to defend against it, necessarily, the entire theory of the case changes to where those matters are no longer collateral to this case, but they are now the theory of our defense. And I – defense being that every time that Calvin and Annette have some sort of problems, Annette is on the phone calling the police in some sort of controlling behavior, that she is using the police, calling the police to somehow exercise control over my client. Then we've got –

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(co-counsel speaks off the record to Mr. Banks).

THE COURT: Either one or the other of you make your record.

MS. LEMCKE: I am sorry.

MR. BANKS: Then we've got at least four occasions, one of them specifically being the 5/07/95 incident where we would like to bring officers in to indicate that there was no corroboration to back up the allegations that Ms. Heathmon made to the police on these prior occasions. And that's essentially where we're at, we're moving for the mistrial one and two, we'd like to bring in those officers since we feel that the matters are no longer collateral and it's now the theory of our defense.

THE COURT: All right, State's response?

MR. GARDNER: Your Honor, as far as eliciting testimony about the prior rape, my recollection of the sequence of events was that at one time Annette blurted out, either on redirect or recross. I am not here to concede that it happened on redirect, that, he raped me more than once. On recross, however, Mr. Banks really brought out all of the details of that prior rape which we had not done. We did not elicit testimony about the prior rape, we elicited testimony about prior batteries and prior failures to proceed or pursue other violent charges, domestic violence charges. We did not elicit any testimony about that prior rape. Mr. Banks on recross did, he started asking her all about the facts, suggesting that she had made an incredible or unbelievable allegation, essentially a false allegation, and they are allowed to argue that. They have developed their theory through that cross examination and they are the ones who brought in that topic or explored that topic for the purpose of impeachment. Now, since they opened their own door that does not mean that they are now allowed to call in collateral or extrinsic witnesses to come in and speak one way or other about the incident. It is a waste of time, it is on a collateral matter, it goes to credibility and

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they have not met their burden of proving that there have been false allegations which under the case law they need to prove false allegations before they can start bringing in witnesses to that fact, or they at least need to make a threshold showing. Furthermore, none of these witnesses that they intend to call to "resurrect their case" have any first-hand knowledge or anything to say about the case other than – about these prior

cases, other than that there was not sufficient follow-through, that there was not sufficient facts for them to file a case to be prosecuted. And they are not competent witnesses to testify about whether or not that incident happened. They had their opportunity to cross examine Ms. Heathmon, they have an opportunity at this point to, I suppose, call somebody who may or may not have been there at the scene, who is here in Court today, but they, of course, don't have to do that. These are not grounds for mistrial because we are talking about one blurted out sentence on direct examination that really just went in with all of the other actions of prior batteries and prior domestic disharmony and it was the defense who really blew that whole incident out to the extent that it was blown out. And now they can't say that they have been prejudiced by the case and they need to resurrect it by calling collateral witnesses for impeachment, so we are going to object to the motion for mistrial, we're going to object to their request to call collateral, and in our opinion, incompetent witnesses to testify about an incident that happened four years ago.

THE COURT: Any response?

MR. BANKS: Judge, I have to defend my client, when somebody blurts that out, like I said, one of two things. I will represent to the Court that her blurting that statement out was brought out on redirect, it was not on recross. And my hands are tied, either I can sit here, say nothing, and let the jury think, my God, Calvin Jackson has raped this girl before, he probably did it in this case. Or I can get up and

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defend my client and that's what I did. And necessarily, the entire theory in my case changed on something that was brought out on redirect. I cannot sit here and say nothing. I've got to say something. As far as I am concerned, I didn't open any doors, I mean, the beginning of this trial, the State was allowed to kind of talk about this general, abusive, kind of a rocky relationship, that – and I have to be able to defend against that. I have to be able to say something in rebuttal to that. I am not – I don't feel that I have opened any door by getting into maybe an alternate explanation for Ms. Heathmon's apprehensiveness of coming to Court. I certainly didn't open the door to some rape and some stabbing incident. Again, I -- the theory of my case changed on something that was brought on redirect, l had to cross examine on it in the event that the mistrial is not granted. And that's our basis, we move for the mistrial, if not, we ask that we be allowed to bring those folks in to testify.

THE COURT: All right, I would note that the testimony regarding prior acts, incidents, is between both the Defendant and the victim. They have had a long term relationship, there have been a lot of things that have gone on between them. But State was not seeking to admit any information regarding those prior incidences in order to prove that he acted consistently in this case, in trying to introduce it as evidence in this case is proof of his guilt. They simply sought to bring in that information to show as it related to the victim's state of mind. There was impeachment that was done on cross examination that raise questions as to her credibility, questions as to prior inconsistent

statements, and some questions regarding their prior relationship. And I think that opened the door and even if it didn't open the door the information regarding her state of mind was properly admitted evidence. Therefore, for that reason, the mistrial is denied. I gave one limiting instruction if the defense requests, I will give one more limiting instruction that they are not to consider any

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allegations of prior acts between the Defendant and the victim for purposes of determining whether the Defendant committed the acts with which he is charged. They may only consider such information in determining the credibility and state of mind of the witness that was testifying. As to your motion to be able to now bring in the police officers on numerous prior incidences between the Defendant and the victim in this case, that motion is denied, it goes to her credibility, it goes to whether or not she's telling the truth or not telling the truth, they are collateral issues and you may bring out those inconsistent statements if you wish through impeachment, through cross examination. But case law does not allow and statute does not allow for you to now come in, bring in all these police officers to try and show that she is basically lying. And/or that she has some motive of bad intent and this is especially in light of the statement of Mr. Jackson which it appears is going to be admitted into evidence, makes this ruling even stronger. So your motion to bring in police officers on collateral matters is denied.

MR. GARDNER: Your Honor, on the subject of Mr. Jackson's statement, have we come to a decision what, if any, is going to be redacted from this statement, what part?

THE COURT: Is there any -- what is the defense's position as to what should be redacted?

MR. BANKS: I gave Mary Kaye a copy yesterday, my copy is –

THE COURT: Have the two of you agreed on anything, or are you going to leave it up to the Court?

MR. GARDNER: We haven't agreed, your Honor, I think there's -- in my opinion there's only one part of the conversation that even bears discussion. And that would be on page five, your Honor, the second to last answer towards the bottom

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of the page, the second to the last. Actually, the third to last question, second to last answer towards the bottom of the page. Because that page refers to an incident where Mr. Jackson talks about, catching attempt murder charge and –

THE COURT: That was the '93 incident, there's already evidence on it.

MR. GARDNER: Yeah, that's already come out in testimony so I am not really sure why that should be redacted at this point, that's one of the areas that Mr. Banks requested earlier to redact.

THE COURT: All right. Mr. Banks, what is it in the statement that you feel should be redacted?

MR. BANKS: On page 3 –

MS. HOLTHUS: Before he makes this argument, I might just advise him, we talked about this yesterday, we spoke with Detective Anderson this morning, he was Mirandized before any discussions anywhere occurred. I believe their issue was a Miranda issue --

MR. BANKS: That's correct.

MS. HOLTHUS: -- I don't know if that clears it up for them or not, but that's going to be her testimony.

THE COURT: All right.

MR. BANKS: Were we going to make a record of that before the jury comes in?

MS. HOLTHUS: Whatever you want to do.

MR. BANKS: That was my objection, the last one –

THE COURT: All right, well, stick with the statement right now, page 3.

MR. BANKS: Yeah, page 3 the last five, six lines, question . . . "earlier in our conversation . . ." ending with the answer . . . "you know" . . . That

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question and answer refers to an earlier conversation that took place before the recorder was turned on in this conversation.

THE COURT: So what? What is your basis for seeking to keep this out? What is your legal argument?

MR. BANKS: I want to know if he was Mirandized in the earlier conversation, even if he wasn't --

THE COURT: And that's what you are referring to –

MS. HOLTHUS: That's what I was referring to, Judge.

THE COURT: – that she will testify that he was Mirandized?

MS. HOLTHUS: She will testify that he was Mirandized, our position also is that he was certainly Mirandized before this, we all know that. And it's an adoptive admission even in here, post, but yeah, her testimony will be from contact one, he was Mirandized.

THE COURT: All right, next -- as long as we hear the testimony that he was Mirandized before the prior conversation in the other room, that statement will come in.

MR. BANKS: Yeah, page 5 the third line, starting . . . "have there been any incidents" . . . all the way to page 6 . . . "I was only arrested twice" . . . again, this is prior bad acts and incidents which when the jury

hears and reads this about my guy trying to kill this girl, he necessarily cannot get a fair shake in front of this Court and a limited jury instruction is, I think, insufficient to counter what's written in this statement.

THE COURT: All right, and for the reasons I stated on your motion for mistrial, that is denied.

MR. BANKS: And at page 6, question starting, ". . . so when you said . . ."

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ending," . . . there by ourselves . . ." that's the same objection as the one on page 3, so I assume –

THE COURT: All right.

MR. BANKS: -- if she testifies accordingly. And then on page 8, ". . . did Tony tell . . . " -- let's see, the answer starting, ". . . yeah, I called her friend Tony . . .", the line, " . . . that's when she told me about this incident, she told me, Annette, call the police, she said, that Big Back, which is June's nickname and Lamar is in jail", I would object to that on the grounds of hearsay, ". . . and she said Big Back is in jail because Annette told the police that you and him pushed you all the way into her apartment and Tony said that they got Lamar in jail because he brought you down there". I would object, that is hearsay, and also two more lines down, the answer, ". . . Tony said what you go around there and do to that girl . . ." I would object, that is hearsay as well.

THE COURT: All right, any objections or –

MS. HOLTHUS: I object.

THE COURT: -- overruled, they are not seeking to admit to show that Lamar was actually in jail and everything, it is important and relevant that the conversation took place and this is Mr. Jackson's own statement about his version of the facts. Anything else?

MR. BANKS: No, that's it, Ms. Lemcke wanted to make a record on the stabbing incident if she may?

THE COURT: She may.

MS. LEMCKE: Judge, just two things, because we dealt with a couple of issues at the bench and I just want to make sure they were on the record. Number one, was Mr. Bank's attempts to go into Ms. Heathmon's arrest for prostitution

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and I brought up at the bench the fact that there is a case, State of Nevada versus Drake, or maybe that's the other way around, Drake versus State, which specifically allows for inquiry into those particular matters and specifically upholds that a criminal defendant can ask a witness about arrests for prostitution, they can't introduce extrinsic evidence of it, but they can inquire about their arrest. So to the extent that we were precluded from going into that line of inquiry, I would just make our objection noted on the record. Additionally, Judge, yesterday the Court allowed the State to get into the stabbing incident, allegedly involving Mr. Jackson with Ms. Heathmon, on her redirect examination. And my understanding

was that their request to get into that and the Court's allowance of that particular testimony was based on the fact that they contended that we had opened the door to it by our questioning regarding her none appearance in Court and her recant letter. And their contention was, well, she's afraid of them and they wanted to legitimize her fear of Mr. Jackson by demonstrating she has a reason to be afraid of him, to wit, look at what he has done to her in the past. Our position would be, and I think that we attempted to articulate this at bench, that they were allowed to demonstrate both in their opening and through their direct examination of -- (off record colloquy between counsel).

THE COURT: Just keep making your argument, don't be talking to them in the middle of your argument.

MS. LEMCKE: Our position is this, they were allowed to get in the general allegations, domestic violence and domestic strife in the relationship, they were allowed to elicit some testimony regarding this woman's concerns, to say the least, and I would elevate that to the point of fear of Mr. Jackson because of stuff that he had done to her in the past, and again, they made general references to that stuff. We need to be able to respond to that and the way that we responded to that was by

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suggesting on cross examination that maybe it is not just Mr. Jackson that she was afraid of, maybe she was afraid of what might happen to her if she came to court

and recanted in light of her preliminary hearing testimony under oath, that was completely contradictory to what she had in the recant letter. And I think that because they started the ball rolling by showing that she was afraid of Mr. Jackson, that's why she recanted. I think that we had every right to then rebut that and say well, no, maybe there is another reason that she recanted and didn't come to court and that's because she's afraid of what will happen to her if she does that –

THE COURT: And this is a factual issue for the jury to decide and –

MS. LEMCKE: Right, and I agree, and so for that reason we wanted to get into our cross examination. and we did, stuff about the recant letter, did she have any concerns about what might happen to her, what recourse the State had against her if she didn't come to court and testify in court and what she said at the prelim. Then the Court ruled that by our rebutting what they did, opened the door to the whole stabbing thing. And our position is that we should be entitled to rebut what they bring out on direct examination without opening fifty thousand doors. I mean, I just don't -- I have concerns with our inability to rebut anything without being hamstrung by their ability to then come in with all this just litany of information about what he may or may not have done in the past. I think that we are entitled to rebut her direct testimony through our cross without opening any further doors. And so to that end we objected to the admission of the bad act evidence regarding the stabbing.

THE COURT: Ms. Lemcke, trial doesn't work that way. Once she made a statement that she was scared and there were things that she did because she was scared, that raises the question regarding her state of mind and prior incidences between the two of them can then be brought in as to her state of mind. I gave the

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limiting instruction to the jury and once again, I will give – and I expect that you will submit a written jury instruction on the limitation and the jury will be reminded of that, they cannot consider prior incidences between the victim and the Defendant in this case in determining whether or not he committed these acts, but just the same you cannot come in now and try and prove that she lied on prior incidences to try and show that out of habit she is lying on this one, you do that through character evidence and you do that through impeachment upon cross examination. You do not do that by bringing in collateral witnesses on those prior incidences, so I think we have made an adequate record on all these issues, anything else that we need to make a record on?

MR. GARDNER: Your Honor, if I could just respond on the issue of the prostitution record. I know the Court has ruled this, but what counsel fails to mention in this Drake case is that the Supreme Court concludes that in the appropriate case the District Court could properly exercise its discretion by refusing to admit such evidence. And the evidence, like any evidence, is subject to standards of relevancy, this Drake case has to do with allegations of prostitution because prostitution implies sex with strangers. And only if a

person's willingness to have sex with strangers would be relevant to the sexual assault prosecution should that come in, in this case we're talking about a couple with ten years of experience. So even if there were any history of prostitution and we are not conceding there even is, they would have to show standards of relevance, secondly, they must make an offer of proof and explain to the Court why this would be relevant before they can just go asking in front of a jury trying to slander a witness's character by bringing these things out in front of a jury.

THE COURT: And they did not ask whether she had ever been arrested or convicted of prostitution, he just simply asked, were you hooking that night?

MR. GARDNER: Right. so –

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THE COURT: Which was improper.

MR. GARDNER: Thank you, your Honor.

THE COURT: All right, anything else?

MR. GARDNER: Not by the State, Judge.

THE COURT: All right, we'll go off the record, you may bring in the jury, call me when they are ready.

(Proceedings continue in the presence of the jury at 10:45 a.m.)

* * * * *

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-17239
D.C. No. 3:03-cv-00257
District of Nevada, Reno

[Filed September 17, 2012]

CALVIN O'NEIL JACKSON,	)
Petitioner-Appellant,	)
v.	)
	)
State of Nevada; et al.,	)
Respondents-Appellees.	)
	)

Before: GOODWIN, REINHARDT, and MURGUIA, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Reinhardt and Murguia voted to deny the suggestion for rehearing en banc, and Judge Goodwin so recommended.

The full court was advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are **DENIED**. No further petitions for panel or en banc rehearing will be entertained.

APPENDIX G

Excerpt
Second Amended Petition
for Writ of Habeas Corpus

[Filed October 22, 2007]

* * * * *

GROUND TWO

THE TRIAL COURT ERRED IN NOT ALLOWING MR. JACKSON TO PRESENT HIS THEORY OF DEFENSE. AS A RESULT, MR. JACKSON'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED.

A. The District Court Precluded Appellant From Presenting His Theory of Defense by Not Allowing Mr. Jackson to Call Police Officers to the Witness Stand to Establish That the Complaining Witness Uses Law Enforcement Agencies as a Means of Exercising Control over Appellant.

The trial court held a Petrocelli[3] hearing prior to trial and declined to rule as to whether certain

[3] Petrocelli v. State, 692 P.2d 503 (Nev. 1985).

instances/uncharged prior conduct that allegedly occurred between Mr. Jackson and Ms. Heathmon would be ruled as admissible during trial. (Ex. 15 at 64.) A timely objection was lodged by defense counsel to any attempt by the State to admit into evidence any of the prior uncharged conduct that formed the basis of the Petrocelli hearing. (Id.) Nevertheless, during Ms. Heathmon's redirect examination, testimony was elicited regarding prior uncharged conduct between Mr. Jackson and Ms. Heathmon. Specifically, testimony regarding an alleged stabbing incident between them as well as various domestic violence incidents were elicited. (Ex. 17 TT at 17 5-77 .) Redirect examination was as follows:

DA: And that if you didn't come in for this Court case, this wouldn't have been the first time that you blew off a Court case, would it?

A. Nope.

DA: Can you describe to for the jury the last time you failed to appear after having called the police?

A: I left town.

DA: When was that?

A: '94.

DA: Tell the jury what prompted that case, why did you have a case against Calvin in '94?

(Ex. 17, TT at 174.)

Extensive testimony ensued regarding an alleged taxi cab incident, after which the trial judge interjected with the following limiting instruction:

> The Court: I think at this time it would be good for me to give a limiting instruction to the jury, members of the jury, you have been hearing some testimony from the witness regarding allegations of prior incidences between her and the Defendant in this case, you are to consider that testimony only for the purpose of judging the credibility of the witness's testimony and her state of mind as to why she did or did not take certain actions, you are not to consider this testimony for any reason in determining whether or not the Defendant committed the acts with which he is charged.

(Id. at 178-79.)

Heathmon then answered an open-ended question posed by the deputy district attorney that Mr. Jackson had raped her on more than one occasion. (Id. at 181.)

Defense counsel made a record regarding this statement that once said, counsel had to be allowed to defend against this testimony, and necessarily the entire theory of the defense changes to where "those matters are no longer collateral to this case, but they are now the theory of our defense." (Ex. 18 at 266.) Defense counsel explained that to combat the allegations contained in the prior uncharged conduct, defense should be allowed to call witnesses, namely police officers, in an effort to prove that the State's complaining witness would use the police, calling the police to somehow exercise control over Mr. Jackson. (Id.) Trial counsel indicated to the court that they had at least four occasions where they wanted to bring in the officers to indicate that there was no corroboration to back up the allegations Ms. Heathmon made to the police on these prior occasions. (Id. at 266-67.) The trial court indicated that a limiting instruction was given and would not allow the defense to present its theory of the case, indicating that the matters were collateral. (Id. at 269-70.)

B. The Trial Court Would Not Allow Appellant to Offer Alternative Explanations as to Why the Prosecution's Complaining Witness Would Not Want to Come to Court and Testify.

The State, during redirect examination of Ms. Heathmon, elicited testimony that she did not want to come to court because she was frightened for her life. (Ex. 17, TT at 174.) The State then launched into a description of a prior incident where Ms. Heathmon stated that she failed to show up in court to testify as she was scared of Mr. Jackson and why she may not

have wanted to come to court over the years. (Id. at 174-178.)

The defense attempted to explore alternative reasons and explanations as to why Ms. Heathmon may be reluctant to come to court. In addition to being precluded from calling officers to testify at trial, the defense was precluded form eliciting on cross-examination from North Las Vegas Police Department Detective Anderson, information regarding Ms. Heathmon in the filing of false police reports. (Ex. 18, TT at 324.)

The trial court erred in not allowing Mr. Jackson to present the theory of his defense, violating his right to due process. It is highly probable that had Mr. Jackson been allowed to present his defense, he would have had a more favorable outcome at trial.

* * * * *