App. No. _____

In The
Supreme Court of the United States

RENEE BAKER, WARDEN, *et al.*,

Petitioners,

v.

JEFF N. ROSE,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

TO THE HONORABLE ELENA KEGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to this Court's Rule 13.5, the Warden Renee Baker respectfully requests a 30-day extension of time, to and including Wednesday, March 25, 2020, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit issued an order denying rehearing November 26, 2019. Unless extended, the time within which to file a petition for a

writ of certiorari will expire on February 24, 2020. This application has been filed 10 days before this date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). A copy of the Ninth Circuit's memorandum is attached as Exhibit A. A copy of the Ninth Circuit's order denying rehearing is attached as Exhibit B.

1. This case raises important constitutional questions concerning federalism and application of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA) to a claim that application of state evidentiary law barring the use of collateral evidence for impeachment purposes violated a defendant's right to due process. In particular, the Ninth Circuit reversed a decision from the United States District Court for the District of Nevada denying habeas relief, concluding that the exclusion of evidence of prior allegations of abuse violated Rose's right to present a defense.

The State originally charged Jeff N. Rose (hereinafter Rose) with various counts of sexual assault on a minor and lewdness with a minor involving four different girls—A.C., C.C., D.A., and Z.V. The case went

to trial and the jury acquitted Rose of all the accounts with respect to D.A. and Z.V., and the jury hung, resulting in a mistrial, with respect to all the charges involving A.C. and C.C.

The retrial was assigned to a new judge. Prior to trial, the State moved to exclude evidence of the acquittals involving D.A. and Z.V. The trial court indicated that it was going to preclude the parties from presenting any evidence of allegations of abuse beyond the allegations made by A.C. and C.C. because, although marginally relevant, the court determined the danger of unfair prejudice, confusion of the issues, or misleading the jury substantially outweighed the probative value of the evidence.

Rose filed a memorandum explaining to the trial court that its ruling impaired his ability to present his anticipated defense, including attempting to establish bias of A.C. and C.C. by showing that the girls were mad at Rose because he was acquitted of numerous charges in the first trial. Additionally, Rose sought clarification of the ruling at trial to determine: (1) whether he was precluded from mentioning the D.A. and

her accusation of abuse, and (2) whether he could use testimony from three other girls—C.R., K.T., and R.S.—to impeach A.C. with respect to a statement she made about seeing Rose abuse those three girls. However, the trial court maintained its ruling and excluded any evidence of allegations that Rose abused any girls other than A.C. and C.C.

The jury ultimately acquitted Rose on all the counts related to A.C. However, the Jury convicted Rose on all of the counts involving C.C.

Rose appealed. The Nevada Supreme Court affirmed the trial court's evidentiary ruling. While the Nevada Supreme Court recognized the relevance of the evidence, it determined that the trial court did not abuse its discretion in excluding the evidence under Nev. Rev. Stat. 40.035 because of the danger of misleading or confusing the jury.

The United State District Court for the District of Nevada denied relief and declined to grant a certificate of appealability on Rose's challenge to the exclusion of evidence, while granting a certificate of

appealability on another issue. However, the Ninth Circuit expanded the certificate of appealability and reversed the district court's denial of Rose's claim that the trial court's evidentiary ruling violated principles of due process by depriving Rose of his ability to present a complete defense.

2. This case merits this Court's review for numerous reasons. Most significantly, while the Ninth Circuit's decision never even mentions the highly deferential standard of review under AEDPA, it proceeds to grant relief on the basis that the trial court could have issued a "narrower ruling." In reaching this conclusion, the Ninth Circuit's decision conflicts with this Court's decision in *Nevada v. Jackson*, 569 U.S. 505 (2013), and that the decision to reverse the district court's denial of habeas relief, which sounds in ordinary error correction, fails to accord the deference that this Court has repeatedly acknowledged is required when reviewing state court judgments under AEDPA.

3. The State of Nevada's Solicitor General, and a Senior Deputy Attorney General from the Post-Conviction Division of the Nevada Attorney General's Office are preparing the Petition for Writ of Certiorari in this case. Both attorneys have been extremely busy since the Ninth Circuit issued its decision denying rehearing in this case.

In addition to the ordinary press of business that comes with serving as Solicitor General, the Solicitor General has been consumed with the ongoing litigation involving the Equal Rights Amendment in *Virginia v. Ferriero*, No. 1:20-cv-00242 (D.D.C.). Additionally, the Solicitor General argued before the Ninth Circuit in *Shannon v. Decker*, No. 18-16697 (9th Cir.), on February 6, 2020. The Solicitor General is currently preparing for argument before the Nevada Supreme Court involving an important question of Nevada Water Law certified to the Nevada Supreme Court by the Ninth Circuit in *Mineral County v. Lyon County*, No. 75917 (Nev.), which the Nevada Supreme Court set for argument on March 3, 2020 by order dated February 5, 2020.

Additionally, the Senior Deputy that will be assisting in drafting the petition has recently been involved in drafting and/or filing responses to several state and federal habeas petitions, including *Anderson v. Neven*, No. 18-16502 (9th Cir.); *Schnueringer v. Russell*, No. 3:19-cv-00353-MMD-WGC (D. Nev.); *Jefferson v. Russell*, No. 3:19-cv-00331-LRH-WGC (D. Nev.); *Guitron v. Baker*, No. 3:18-cv-00235-MMD-CLB (D. Nev.); and *Leonard v. Gittere*, No. 2:99-cv-00360-MMD-DJA (D. Nev.). In addition, he was recently assigned to serve as counsel of record in an evidentiary hearing in *McClain v. LeGrand*, No. 3:14-cv-00269-MMD-CLB (D. Nev.), and he has been diligently working on preparation for the hearing, including retaining an expert and coordinating an evaluation of the petitioner with the correctional facility and the petitioner's attorneys.

In light of the foregoing, Petitioner is seeking a 30-day extension. The Ninth Circuit granted Respondents' request for stay of the mandate pending resolution of the petition.

/ / /

Accordingly, Petitioners respectfully request the entry of an order extending their time to file a petition for writ of certiorari by 30 days, up to and including Wednesday, March 25, 2020.

Respectfully submitted,

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/s/ Heidi Parry Stern
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February 14, 2020

CERTIFICATE OF SERVICE

I, Heidi Parry Stern, a member of the Supreme Court Bar, hereby certify that a copy of the attached Application for an Extension of Time within which to File a Petition for a Writ of Certiorari was served by first class mail on counsel identified below, pursuant to Rule 29.5 of the Rules of this Court. All parties required to be served have been served.

Amelia Bizzaro
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Counsel for Respondent

/s/ Heidi Parry Stern
HEIDI PARRY STERN

EXHIBIT A

EXHIBIT A

NOT FOR PUBLICATION

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFF N. ROSE, Petitioner-Appellant, v. RENEE BAKER, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 17-15009 D.C. No. 3:13-cv-00267-MMD-WGC MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, District Judge, Presiding

Argued April 9, 2018
Submitted September 24, 2019
San Francisco, California

Before: WARDLAW and CLIFTON, Circuit Judges, and KATZMANN,** Judge.

Jeff Rose appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. We have jurisdiction under 28 U.S.C. §§ 1291, 2253 and review

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

** The Honorable Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.

the district court's denial of Rose's petition de novo. *Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir. 2004). We affirm in part and reverse in part.

1. Rose claims that the Nevada Supreme Court's holding, without reasoning, that the admission of polygrapher Gordon Moore's testimony about Rose's false admissions during his polygraph exam and a selective transcript of the exam did not violate his due process right to a fair trial was contrary to or an unreasonable application of clearly established Supreme Court law. 28 U.S.C. § 2254(d)(1). Although the district court denied this claim, it certified the claim for appellate review. We conduct an independent review of the record. *See Greene v. Lambert*, 288 F.3d 1081, 1088-89 (9th Cir. 2002). We affirm.

A defendant is deprived due process of law if he is denied "a fair hearing and a reliable determination on the issue of voluntariness" of an admission. *Jackson v. Denno*, 378 U.S. 368, 377 (1964).

Although Rose received such a hearing, he claimed it was "aborted" and "neither 'fair' nor a 'reliable determination.'" It is not enough, however, for Rose to point to shortcomings in the state court procedures used to decide the issue of voluntariness. *Procunier v. Atchley*, 400 U.S. 446, 451 (1971). Rose must "also show that his version of events, if true, would require the conclusion that his confession was involuntary." *Id.* Even if the hearing were procedurally deficient as alleged, we conclude it would not have been unreasonable for the Nevada

Supreme Court to have determined that Rose voluntarily made the false admissions to Moore.

Moore read Rose his *Miranda* warnings, advised Rose that he was free to leave at any time, and had Rose sign a document indicating he understood his rights. Rose voluntarily drove himself to the building where the questioning took place, he was not handcuffed or placed under arrest immediately before or after the questioning, he was never physically threatened or harmed, and there is little indication that the questioning rose to the level of improper psychological pressure. Giving deference to the factual findings of the trial judge, who had presided over Rose's first trial, the Nevada Supreme Court could have reasonably concluded Rose voluntarily made the statements to Moore.

Rose additionally claimed that even if the admissions to Moore were voluntary, the trial court deprived him of "a meaningful opportunity to present a complete defense" when it prohibited him from explaining that these false admissions were made in an attempt to explain the purported results of a failed polygraph examination. We conclude this argument has not been exhausted because Rose failed to provide Nevada state courts with notice or a "fair opportunity" to address this federal constitutional claim. *Castillo v. McFadden*, 399 F.3d 993, 998–99 (9th Cir. 2005); *see also Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (per curiam). We cannot grant habeas relief on an unexhausted

claim. 28 U.S.C. § 2254(b)(1)(A).[1]

2. Rose additionally argued that the Nevada Supreme Court's decision upholding an order by the trial court that excluded all evidence relating to other accusers or the results of the first trial was contrary to or an unreasonable application of federal law. The district court did not certify this claim for appeal, but Rose presented arguments on this and other uncertified claims in his opening brief, and we ordered the parties to brief those issues on the merits. We construe Rose's arguments as a motion to expand the certificate of appealability (COA). *See* 9th Cir. R. 22-1(e). Because Rose "has made a substantial showing of the denial of a constitutional right," we grant a COA as to claim one of his amended federal habeas petition. 28 U.S.C. 2253(c)(2); *see also Buck v. Davis*, 137 S. Ct. 759, 773 (2017). We reverse the judgment of the district court and remand with instructions to conditionally grant the writ of habeas corpus pending a new trial.

Just prior to trial, the court ruled that "neither the State nor the Defense is going to be able to bring in any evidence of any prior trial, any acquittal, any other

[1] Even if the argument were exhausted, it is a nonstarter because, as Rose conceded, he "never sought to admit the purported results of the test," even in the alternative. Rose's statements to Moore were admissible to show Rose's attempts to explain the victims' allegations, and the admission of the statements was not prohibited by clearly established federal law. The allegedly excluded evidence that would have put Moore's testimony into context, the polygraph evidence, was the evidence that Rose himself fought to exclude.

victims," even in the context of cross-examining his accusers. Rose contended this ruling gutted his intended defense theory and violated his constitutional right to "a meaningful opportunity to present a complete defense," *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

"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." *Crane*, 476 U.S. at 690 (citations omitted). An evidentiary ruling abridges this right if it is "'arbitrary' or 'disproportionate to the purposes they are designed to serve[,]' . . . [and] it has infringed upon a weighty interest of the accused." *United States v. Scheffer*, 523 US. 303, 308 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987).

A.C.'s and C.C.'s testimonies were "central, indeed crucial, to the prosecution's case." *Olden v. Kentucky*, 488 U.S. 227, 233 (1988) (per curiam). A.C. testified she saw Rose molest C.C., yet she had previously stated to a detective that Rose molested other girls, all of whom were purportedly ready to testify otherwise. The trial court's limitation on the scope of Rose's cross-examination of A.C. prevented him from impeaching her on these similar accusations. Further, because Rose could not cross-examine A.C. and C.C. about their relationship with D.A. and other accusers or present evidence of his earlier

acquittals, Rose was unable to present the jury with a coherent narrative regarding the context in which the accusations arose. Because the trial court's ruling barred Rose from mentioning the other accusations for which he was acquitted, it also precluded him from introducing expert testimony that conversations between other accusers and A.C. and C.C. contained "sufficient indicators of suggestibility or taint which may render their statements unreliable."

We conclude the limits the trial court placed on the scope of Rose's cross-examination of A.C. and C.C. were disproportionate and beyond reason as "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." *Id.* at 232 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). Although there was a risk that a focus on the results and accusations from the first trial could confuse the jury in the second trial, the trial court could have mitigated this concern with a narrower ruling.[2] The overly broad evidentiary ruling was not harmless as demonstrated by the hung jury in the first trial, during which the charges relating to C.C. were placed in context.

[2] *Nevada v. Jackson*, 569 U.S. 505 (2013), on which the state relies, is distinguishable. Unlike Rose, the defendant in *Jackson* was given "wide latitude to cross-examine" his accusers. *Id.* at 507; *see id.* at 511–12 (criticizing this court for "elid[ing] the distinction between cross-examination and extrinsic evidence").

Because the limits the trial court placed on the scope of Rose's cross-examination denied him a "meaningful opportunity to present a complete defense," *Crane*, 476 U.S. at 690, we conclude the Nevada Supreme Court's decision upholding it was contrary to clearly established federal law. We accordingly reverse the district court on this issue and remand with instructions to grant the writ pending a new trial.

3. We have carefully examined the remaining two uncertified issues and conclude Rose has not demonstrated that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). We accordingly deny Rose's request to certify his two remaining uncertified claims.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED with instructions to conditionally grant the writ pending a new trial.

EXHIBIT B

EXHIBIT B

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFF N. ROSE, Petitioner-Appellant, v. RENEE BAKER, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 17-15009 D.C. No. 3:13-cv-00267-MMD-WGC District of Nevada, Reno ORDER

Before: WARDLAW and CLIFTON, Circuit Judges, and KATZMANN,* Judge.

Judges Wardlaw, Clifton, and Katzmann vote to deny the petition for panel rehearing. Judge Wardlaw votes to deny the petition for rehearing en banc, and Judges Clifton and Katzmann so recommend.

The full court has been advised of the petition 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 panel rehearing and rehearing en banc is therefore

DENIED.

* The Honorable Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.