

No. _____

In the
Supreme Court of the United States

RENEE BAKER, WARDEN, *et al.*,
Petitioners,

v.

JEFF N. ROSE,
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

At his trial for molesting A.C. and C.C., defendant Jeff Rose sought to present evidence that a different jury acquitted him on charges relating to two other young girls, D.A. and Z.V. Rose also sought to attack A.C.'s credibility by presenting testimony from three more girls—C.R., K.T., and R.S.—who he claimed would say that he never acted inappropriately with them as A.C. alleged. The State responded that it would bolster A.C.'s credibility by presenting evidence that she saw Rose molest other girls, including Rose's daughter, J.R. And if J.R. denied the accusation, the State said it would impeach her with her own prior inconsistent statements.

Applying a rule of evidence that exists in virtually every jurisdiction in the nation, the trial court rejected both parties' attempts to turn Rose's trial into a circus by introducing evidence of uncharged acts and prior acquittals. The Nevada Supreme Court affirmed. The federal district court denied habeas relief. On appeal, however, rather than applying AEDPA, the Ninth Circuit reversed in a decision that sounds of ordinary error correction, suggesting that the trial court could have issued a narrower ruling and merely concluding that the alleged error was not harmless.

The question presented in this matter is:

Whether the Ninth Circuit's decision violates AEDPA, given that this Court reversed the Ninth Circuit under materially indistinguishable circumstances in *Nevada v. Jackson*, 569 U.S. 505, 509 (2013).

PARTIES TO THE PROCEEDING

Petitioner Renee Baker is the warden of the Lovelock Correctional Center in Nevada. Petitioner Aaron Ford, Attorney General of the State of Nevada, is a party to the proceeding not listed in the caption. He joins this petition in full. Respondent Jeff N. Rose is an inmate at Ely State Prison.

RELATED PROCEEDINGS

State of Nevada vs. Jeff N. Rose, No. C188264

Eighth Judicial District Court, Clark County
Judgment of conviction - November 17, 2004 Order
denying petition - May 13, 2013

Rose vs. State, Docket No. 44398

Nevada Supreme Court Opinion affirming
judgment- July 27, 2007

Rose vs. State, Docket No. 53845

Nevada Supreme Court Order reversing and
remanding - March 10, 2010

Rose vs. State, Docket No. 59141

Nevada Supreme Court Order of affirmance - May
13, 2013

Jeff N. Rose v. Robert Legrand, 3:13-cv-00267-MMD-
WGC

United States District Court, District of Nevada
Order denying petition - December 20, 2016

Jeff N. Rose v. Baker, et al., No. 17-15009

Ninth Circuit Court of Appeals Order affirming,
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Jeff N. Rose v. Nevada, No. 07-11056
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PETITION FOR WRIT OF CERTIORARI

Less than ten years ago, in a case involving nearly identical principles of Nevada evidentiary law, this Court reiterated that a defendant’s right to present a defense does not override the “broad latitude” that states possess in creating rules governing the admission and exclusion of evidence in criminal trials. *Nevada v. Jackson*, 569 U.S. 505, 509 (2013). This Court explained that it has only found violations of the right to present a defense in rare circumstances, such as: (1) where the rule “did not rationally serve any discernable purpose,” (2) where the rule was arbitrary, (3) where the “State did not even attempt to explain the reason for its rule,” or (4) where the “rule could not be rationally defended.” *Id.* (citing cases). And this Court pointedly reminded the Ninth Circuit that it could only grant relief on a federal habeas claim if a state court decision was contrary to or an unreasonable application of clearly established precedent—not simply because the Ninth Circuit thought the state courts should have ruled differently.

The Ninth Circuit’s ruling in this case suffers from some of the same flaws that led to this Court’s summary reversal in *Jackson*. The rule the trial court invoked in this case—Nev. Rev. Stat. 48.035, which, like Fed. R. of Evid. 403, allows trial courts to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice or confusing the jury—is undoubtedly constitutionally permissible. Evidence of Rose’s acquittal on related charges at a different trial, and allegations that he may or may not have molested at least *six* other young girls

who were not named as victims, would create a danger of confusing the issues and misleading the jury, while simultaneously embarrassing and harassing those young girls. But like in *Jackson*, the Ninth Circuit held that the Nevada Supreme Court's decision upholding the trial court's ruling was an unreasonable application of this Court's precedent simply because the Ninth Circuit thought the trial court could have issued a better ruling. App. 6-7.

The Ninth Circuit's decision in this case stands in direct contrast to this Court's analysis in *Jackson*. Here, the rule the trial court relied on to exclude evidence of uncharged accusations and prior acquittals served a rational purpose, was reasonably invoked under the circumstances, and was applied equally to the State and the defense. Accordingly, the trial court was well within its discretion to focus the presentation of evidence on the conduct charged in this case. And the Nevada Supreme Court's conclusion that the trial court's ruling did not violate Rose's right to present a defense is neither contrary to, nor an unreasonable application of, any clearly established precedent. This case merits review or summary reversal by this Court.

OPINIONS BELOW

The Ninth Circuit’s opinion is unreported (App. 1-7), as is its order denying rehearing (App. 54). The order and judgment of the U.S. District Court for the District of Nevada denying Rose’s petition for a writ of habeas corpus is unreported. App. 8-51. The Nevada Supreme Court’s decision affirming Rose’s judgment of conviction is reported at *Rose v. State*, 163 P.3d 408 (Nev. 2007).

JURISDICTION

The Ninth Circuit entered its judgment affirming in part, reversing in part, and remanding on September 24, 2019 (App. 1-7), and denied the petition for rehearing and rehearing en banc on November 26, 2019 (App. 54). On February 20, 2020, this Court granted an extension of time to file the petition for a writ of certiorari until March 25, 2020. On March 19, 2020, this Court issued an order further extending the time for filing a petition to April 24, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment of the U.S. Constitution provides that: “No State shall ... deprive any person of life, liberty, or property, without due process of law.”

Section 2254 of Title 28 provides, in part, that:

(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; 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.

STATEMENT OF THE CASE

In November 1999, Rose moved to Las Vegas with his wife and children, including his son and his six-year-old daughter, J.R. *Rose v. State*, 163 P.3d 408, 412 (Nev. 2007). When Rose's son befriended a classmate by the name of J.J., J.R. also became friends with J.J.'s sisters, seven-year-old C.C. and five-year-old A.C. *Id.*

Over the next few years, C.C. and A.C. spent the night at the Roses' house almost every weekend. *Id.* Two other girls, D.A. and Z.V., also spent the night at the Roses' house on occasion. *Id.*

In July 2002, the four girls accused Rose of molesting them. *Id.* Specifically, C.C., A.C., D.A., and Z.V. told D.A.'s mother that Rose had touched their genital areas with his fingers and tongue. *Id.* When interviewed about C.C.'s allegations, Rose claimed he merely applied powder to her genital area on one occasion (and may have touched her vagina), and on another occasion he woke up to C.C. rubbing her vagina against his hand. *Id.* at 413.

The State charged Rose with numerous counts of sexual assault and lewdness involving A.C., C.C., D.A., and Z.V. *Id.* at 412. After a trial, the jury acquitted him of the counts involving D.A. and Z.V., but deadlocked on the charges involving A.C. and C.C. *Id.* As a result, the trial court granted a mistrial on the counts involving A.C. and C.C. EOR 1078.¹

¹The Excerpts of Record ("EOR") from the Court of Appeals can be found at *Rose v. Baker*, No. 17-15009 (9th Cir.) (DktEntry 5 through 5-16).

Rose then proceeded to trial on the charges relating to A.C. and C.C. Right before that trial, Rose indicated that he intended to present evidence to the second jury that the first jury acquitted him on the charges relating to D.A. and Z.V. EOR 1565. Rose argued the prior acquittals were relevant because the fact that a jury acquitted him on the charges regarding D.A and Z.V. made it “more probable than not” that he did not molest A.C. and C.C.² *Id.* at 1577. And he argued that the evidence was vital to his defense that D.A., Z.V., A.C., and C.C. all “got together” and “created this story, and the story evolved.” *Id.* at 1565.

The State responded that to the extent Rose intended to suggest that D.A. and Z.V. had falsely accused him, he had not complied with the requirements of *Miller v. State*, 779 P.2d 87, 88 (Nev. 1989) (holding that the defense may present extrinsic evidence that a sexual assault victim made prior false allegations if the defense files written notice and the trial court holds a hearing). EOR 1564. The State also pointed out that Rose could still cross-examine A.C. and C.C. on whether they made-up their story after talking to the other girls without getting into the identities of the other victims or any prior acquittals. *Id.* at 1569-70, 79-80. Finally, the State argued that if Rose “opened the door” to other allegations, the State would “love to walk through” the same door by questioning Rose’s daughter on whether

² Rose also argued that because the State intended to call D.A. as a witness, he had a right to expose her bias. The trial court agreed and held that Rose could ask D.A. about her prior allegations and the acquittals if the State called her to testify. EOR 1568, 72.

she was molested by Rose, as well as getting into apparent accusations of “other individuals.” EOR 1570-71, 74.

The trial court recognized that the evidence Rose sought to admit had “marginal relevance,” but held that its “probative value [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” under Nev. Rev. Stat. 48.035. EOR 1582. The trial court, therefore, held 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 victims.” *Id.*

At the conclusion of the trial, the jury acquitted Rose of all counts involving A.C. EOR 0055. But the jury found him guilty on all counts involving C.C. *Id.*

Rose appealed the trial court’s exclusion of the evidence of other accusations and prior acquittals. *Rose*, 163 P.3d at 413. The Nevada Supreme Court upheld the ruling. *Id.* at 416 n.18. In particular, the court acknowledged the relevance of the evidence, but determined that the trial court did not abuse its discretion in excluding it under Nev. Rev. Stat. 48.035(3) because of a danger of misleading or confusing the jury. *Id.*

Rose challenged the Nevada Supreme Court’s decision in his federal habeas petition. EOR 0078-84. The district court denied relief and declined to grant a certificate of appealability (hereinafter “COA”) on Rose’s challenge to the evidentiary ruling, but granted a COA on another issue. App. 51.

On appeal, Rose presented the evidentiary issue as an uncertified claim. Dkt. 4. After post-argument briefing, the Ninth Circuit expanded the certificate of appealability and reversed the district court's denial of Rose's habeas petition, concluding that the Nevada Supreme Court unreasonably denied Rose's claim that the trial court violated his right to present a defense by excluding the evidence of uncharged allegations and prior acquittals. App. 7. Although it agreed with the Nevada courts about the potential for juror confusion, the Ninth Circuit suggested the trial court's evidentiary ruling improperly curtailed Rose's ability to cross-examine A.C. and C.C., while it could have mitigated concerns about juror confusion with a "narrower ruling." App. 6-7. But the Ninth Circuit did not explain what that "narrower ruling" should have been or why the trial court's "overly broad" ruling was objectively unreasonable in comparison to its own undefined "narrower ruling." App. 7.

Respondents filed a petition seeking both panel and en banc rehearing. The Ninth Circuit denied the petition. App. 55.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Conclusion that the Trial Court Violated Rose's Right to Present a Defense Directly Conflicts with this Court's Decision in *Jackson*.

The trial court precluded the State and the defense from presenting confusing, prejudicial evidence based on a reasonable state evidentiary rule. The Nevada Supreme Court upheld the trial court's ruling, but on federal habeas review, the Ninth Circuit held that the trial court's ruling violated Rose's right to present a defense.

If all of this sounds familiar, it should, because these facts are strikingly similar to the circumstances this Court addressed in *Jackson*, where this Court unanimously reversed the Ninth Circuit for committing similar errors less than ten years ago.

A. In *Jackson*, this Court Acknowledged That its Precedents Grant the States Broad Discretion in Establishing Evidentiary Rules to Avoid Confusing and Misleading Juries.

In *Jackson*, the defendant claimed that the trial court violated his right to present a defense by precluding him from impeaching the victim with police reports and testimony of other witnesses showing that the victim had previously made unfounded allegations of abuse against him. *Jackson*, 569 U.S. at 507. Consistent with Nev. Rev. Stat. 50.085, which excludes extrinsic evidence offered to attack a witness's credibility, the trial court allowed Jackson to cross-

examine the victim about the prior allegations. *Id.* But the court precluded Jackson from introducing police reports or testimony from other witnesses to impeach her by showing that law enforcement had been skeptical of her prior reports. *Id.*

Jackson challenged the trial court's ruling on appeal, and the Nevada Supreme Court affirmed. *Jackson*, 569 U.S. at 508. Jackson then raised the issue in his federal habeas petition, asserting a violation of his right to present a defense. *Id.* After the district court denied relief, the Ninth Circuit reversed, concluding that the trial court's ruling violated Jackson's right to present a defense. *Id.*

This Court reversed the Ninth Circuit's decision. This Court recognized that a defendant possesses "a meaningful opportunity to present a complete defense." *Jackson*, 569 U.S. at 509 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). However, this Court reiterated that states possess "broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Id.* (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)).

This Court went on to acknowledge that it has only found that the exclusion of evidence under state law violated a defendant's right to present a defense in very limited circumstances: (1) where the rule "did not rationally serve any discernable purpose," (2) where the rule was arbitrary, (3) where the "State did not even attempt to explain the reason for its rule," or (4) where the "rule could not be rationally defended." 569 U.S. at 509 (citing cases). But the Court recognized that extrinsic evidence can "confuse the jury, unfairly

embarrass the victim, surprise the prosecution, and unduly prolong the trial,” and that “[n]o decision of this Court clearly establishes that the exclusion of such evidence for such reasons in a particular case violates the Constitution.” *Id.* at 511. In other words, this Court concluded that the evidentiary rule and its laudable goals did not fit within any of the circumstances where this Court had previously found that the exclusion of evidence under state law violated a defendant’s federal constitutional right to present a defense. As a result, Jackson’s claim did not survive AEPDA’s deferential standard of review.

**B. This Case Falls in Line with *Jackson*,
Requiring a Denial of Relief under AEDPA.**

Like the defendant in *Jackson*, Rose wanted to present extrinsic evidence to undermine A.C. and C.C.’s credibility. Specifically, he wished to present testimony from D.A. and Z.V. to impeach A.C. and C.C. on whether the girls had discussed the abuse together. EOR 1552-58. He also wanted to present evidence showing that the first jury acquitted him of the charges relating to D.A. and Z.V. *Id.* at 1554. And he wanted to present testimony from C.R., K.T., and R.S. to show that A.C. falsely accused him of abusing those three girls. *Id.* at 2087.

In a subsequently filed offer of proof, Rose further indicated that he wanted to present expert testimony on whether A.C., C.C., D.A., and Z.V. made-up their allegations together. *Id.* at 1552-58.

The trial court recognized the confusion that would result by allowing Rose to present evidence that a

different jury acquitted him on charges relating to D.A. and Z.V., and testimony from C.R., K.T., and R.S. that he never touched them—even though their alleged abuse did not form the basis of the charges at trial. EOR 1582. And the trial court recognized the enormous potential for prejudice, particularly given the State’s representation that it would have responded by trying to prove that Rose actually *did* abuse all of those girls, and other girls too, including his own daughter. *Id.* All of this would have resulted in a series of mini-trials, distracting jurors from the charges at issue and humiliating numerous young girls by forcing them to discuss the most intimate details of their lives, with one side or the other accusing them of lying.

The trial court’s ruling excluding this evidence is consistent with principles discussed in *Jackson*. As this Court explained there, states may reasonably exclude evidence to avoid unnecessary delay, confusion of the issues, or harassment of witnesses. 569 U.S. at 511. And as this Court ultimately recognized, none of its precedents hold that a trial court violates a defendant’s right to present a defense when it excludes evidence based on these concerns. *Id.* at 510-11. Thus, just as in *Jackson*, the Nevada Supreme Court’s decision upholding the trial court’s evidentiary ruling was neither contrary to, nor an unreasonable application of, clearly established federal law.

Notably, in this case, the Ninth Circuit agreed with the Nevada Supreme Court that informing the jury of Rose’s prior acquittals risked confusing the jury. App. 6. However, it believed that the trial court could have mitigated that concern with a “narrower ruling.”

Id. This statement sounds of ordinary error correction and does not address the question AEDPA requires: whether the Nevada Supreme Court's decision was "so erroneous that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents.'" *Jackson*, 569 U.S. at 508-09 (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)).

That the trial court could have issued a narrower ruling does not render the Nevada Supreme Court's affirmance of the trial court's unreasonable, particularly when the trial court's decision was markedly similar to the state-court ruling this Court upheld in *Jackson*. But instead of asking whether fairminded jurists could disagree on whether the Constitution demanded a narrower ruling, as AEDPA requires, the Ninth Circuit improperly analyzed the underlying constitutional claim without explaining why the state court's decision was not only incorrect but objectively unreasonable. *Richter*, 562 U.S. at 101-02 (reversing because the Court of Appeals did a *de novo* analysis of the underlying constitutional claim without explaining why the state court's decision was objectively unreasonable).

The Ninth Circuit's failure to adhere to AEDPA is doubly harmful here. With the wide latitude given to state courts in addressing evidentiary questions, the Ninth Circuit should have applied a doubly-deferential standard to the Nevada Supreme Court's decision. See *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). Nevertheless, despite agreeing with the Nevada courts about the potential for juror confusion, the Ninth

Circuit gave the Nevada courts no deference at all. App. 6-7. It second-guessed the state courts by suggesting the trial court could have mitigated its concerns with an undefined “narrower ruling.” App. 6-7.

That the trial court could have issued a narrower ruling is not the same thing as the trial court’s ruling being unreasonable. *Richter*, 562 U.S. at 101 (discussing the “necessary premise” of AEDPA that distinguishes *unreasonable* applications of federal law from *incorrect* applications of federal law). Despite this Court’s repeated recognition that AEDPA requires federal courts to give state courts the benefit of the doubt, the Ninth Circuit’s decision does nothing more than improperly substitute a federal court’s judgment for a state court’s judgment on how to deal with the potential that evidence may confuse the jury. *See Renico v. Lett*, 559 U.S. 766, 773 (2010). Just as in *Richter*, “it is not apparent how the Court of Appeals’ analysis would have been any different without AEDPA.” 562 U.S. at 101.

C. The Ninth Circuit’s Attempt to Distinguish *Jackson* is Unavailing

The Ninth Circuit tried to distinguish this case from *Jackson* by framing the trial court’s decision as one that limited Rose from cross-examining A.C. and C.C., rather than one of precluding him from presenting extrinsic evidence. App. 6-7. But the record shows that Rose did not simply seek to cross-examine A.C. and C.C. on their own allegations; he wanted to present *other* witnesses to undermine A.C. and C.C.’s credibility.

Like the defendant in *Jackson*, Rose wanted to present various forms of extrinsic evidence to impeach A.C. and C.C., including: (1) evidence that the first jury acquitted him of the charges relating to D.A. and Z.V., in the form of a public record; (2) testimony from D.A. and Z.V.; (3) testimony from C.R., K.T., and R.S.; and (4) expert testimony on whether A.C., C.C., D.A., and Z.V. likely influenced each other's allegations. The record makes abundantly clear that cross-examining A.C. and C.C. was not Rose's main concern. Instead, he wanted to muddy the waters by showing that A.C. and C.C.'s allegations were linked to D.A. and Z.V.'s, and because another jury rejected the State's case relating to D.A. and Z.V., this jury should do the same with respect to A.C. and C.C.

The trial court excluded this evidence. But as in *Jackson*, the trial court did not unreasonably limit Rose's cross-examination of A.C. and C.C. Rose was free to cross-examine the girls on their own accusations and whether they discussed those accusations with other individuals before reporting them to an adult. Nothing in the record suggests that the trial court would have precluded Rose from exploring whether outside sources might have influenced A.C. and C.C.'s allegations, so long as he did so without mentioning allegations of Rose abusing other girls or informing the jury that he was acquitted on charges relating to D.A. and Z.V. *See* EOR 1582. The Ninth Circuit's attempt to distinguish *Jackson* by recharacterizing the trial court's ruling as something it was not falls flat.

Furthermore, this Court has repeatedly recognized that the right to cross-examination is not without limit.

Olden v. Kentucky, 488 U.S. 227, 232 (1988); *Delware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986). Trial courts have “wide latitude” to limit cross-examination for the same reasons they might exclude extrinsic evidence, such as “concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Van Arsdall*, 475 U.S. at 679.

Thus, just as with the exclusion of extrinsic evidence, a trial court may reasonably limit a defendant’s cross-examination to avoid the possibility of juror confusion. But the Ninth Circuit never addressed the *reasonableness* of the state court rulings; it reached its own conclusions about the trial court’s ability to issue an undefined “narrower ruling” and improperly substituted those conclusions for the conclusions reached by the Nevada courts.

* * *

The issue presented in this case is materially indistinguishable from *Jackson*. The Ninth Circuit has again failed to adhere to AEDPA’s deferential standard of review by substituting its own judgment for that of the Nevada courts, rather than evaluating the reasonableness of the Nevada courts’ decisions. These fundamental errors of law merit review or summary reversal by this Court.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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