No. 19–1255

In the Supreme Court of the United States

Renee Baker, Warden, *et al.*,

Petitioner,

v.

Jeff N. Rose,

Respondent.

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

Respondent's Brief in Opposition

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QUESTION PRESENTED

Whether the Ninth Circuit's grant of habeas relief in an unpublished order was erroneous in this fact-intensive case where (a) the trial court employed an arbitrary double-standard preventing the defendant from introducing evidence at his second trial that the State had been permitted to introduce at his first trial, and where (b) the exclusion of this evidence at Rose's second trial prevented him from raising an effective defense and allowed the State to mislead the jury.

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STATEMENT OF THE CASE

After full briefing and oral argument, the Ninth Circuit granted Rose habeas relief in an unpublished order.[1] The panel denied Baker's petition for rehearing and no judge requested a vote on whether to hear the matter *en banc*.[2]

The facts of this case are complex, and include a fake polygraph examination, missing evidence, and Rose's innocence. Baker's Petition minimizes and misrepresents these extraordinary facts, which compelled the Ninth Circuit to grant relief. Accordingly, Rose presents this counterstatement.

A. The accusations against Rose.

Jeff Rose moved to Las Vegas in November 1999, with his wife and two children.[3] His six-year-old daughter regularly had sleep-overs with her friends, D.A., A.C., and C.C. [4] Tragically, D.A. had previously been a victim of sexual abuse by her father when she was very young.[5] Years later in July, 2002, when D.A. was eight years old, she began to accuse Rose of molesting her, leading to other

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[1] App. A. "App" refers to the Appendix Baker filed. "EOR" refers to the excerpts of record filed in the Ninth Circuit. Some of these excerpts are in a condensed form with multiple pages of transcript included on a single page. In such instances, Rose provides the precise transcript page number after the EOR citation. Finally, Rose cites to pleadings previously filed in the Ninth Circuit by their docket number, and those filed in the district court after the Ninth Circuit's decision by their ECF number.

[2] App. C.

[3] EOR 1968, 2030, 1061 at 129–130.

[4] EOR 995 at 5-6.

[5] EOR 998 at 16, EOR 999 at 19.

accusations by her friends.

By all other accounts, including that of her own mother, D.A. spent the night at the Rose home no more than three or four times.[6] D.A. testified, however, that she spent the night at the Rose's between 50 and 100 times.[7] Although vague about specific dates, she claimed Rose regularly molested her while she slept at his house, at least 20 times.[8] D.A. claimed this happened while she was asleep in the living room with A.C., C.C., and Z.V.[9] She also claimed she saw Rose molest A.C. and C.C.[10]

D.A. claimed the molestation went on for three years before she told her mother.[11] D.A. extensively talked about the claims of sexual abuse with C.C., A.C., and Z.V.[12] D.A. agreed the four of them "exchanged stories to help them remember."[13]

The allegations came to light in July 2002,[14] when D.A. told her mother,

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[6] EOR 2501, 140, 1045 at 61, 1055 at 100.

[7] EOR 998 at 17–18, 2501.

[8] EOR 996–997 at 9–12.

[9] EOR 999 at 21–22.

[10] EOR 997 at 13–14.

[11] EOR 997 at 14.

[12] EOR 999 at 20–21.

[13] EOR 1000 at 25.

[14] Throughout the transcripts, this event is erroneously described as happening in July, 2000. In fact, the allegations didn't come to light until July, 2002.

herself a victim of sexual abuse.[15] C.C. and A.C. were present, and following D.A.'s revelation, they accused Rose.[16] Afterwards, D.A.'s mother praised all three of the children, and treated them to ice cream and pizza.[17]

Like D.A., C.C. and A.C were vague as to specific dates, but both agreed that it "happened more than 10 times."[18] A.C. further told the police she saw Rose molest three other girls, C.R., K.T., and R.S., while they were sleeping at the house.[19] All of these children, however, denied the allegations and the state never charged Rose based on them.[20]

A.C. even accused Rose of molesting his own daughter. Like C.R., K.T., and R.S., Rose's daughter denied the allegations.[21] The state apparently believed her because it never charged Rose with any related crime. The warden now makes much of this unfounded allegation, repeatedly highlighting it in her Petition, including in her Question Presented.[22] It's not clear why Baker waited until now to emphasize this unfounded allegation. She never mentioned Rose's daughter in her Answering Brief in the Ninth Circuit, and only made a single, passing reference to

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[15] EOR 2501, EOR 144–145.

[16] EOR 997–998 at 14–15.

[17] EOR 2500–2501, 148.

[18] EOR 10009 at 90, 1015 at 83–84.

[19] EOR 2502, 166–167.

[20] EOR 2502–2503.

[21] EOR 1570–1571.

[22] Petition at i, 6–7, 12, 19.

Rose's daughter in her post-argument brief.[23] In any event, the allegation was wholly unfounded.

The fourth accuser, Z.V., only stayed at the house twice, probably when she was 11 years old.[24] She claimed that on the first night she was sleeping with A.C. and C.C., and Rose was rubbing her back and the backs of the other children.[25] A.C. and C.C. never related this. On the second night, Z.V. claimed Rose molested her in full view of the other children.[26] But Rose wasn't in Las Vegas at the time—Rose had enlisted in the Navy shortly after September 11, 2001, and was away for nearly a year.[27] Like D.A., Z.V. acknowledged she had discussed the allegations with the other children—D.A., C.C., and A.C.—before they told any adults.[28]

B. The purported polygraph examination played a role at both trials.

After the children reported the allegations in July 2002, the police launched an investigation. Rose denied the allegations. The police suggested he speak with a state investigator, Gordon Moore.[29] Moore claimed to be a polygraph examiner, and

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[23] *See* Dkt. 15, Dkt. 36 at 10.

[24] EOR 1002 at 31.

[25] EOR 1002 at 33.

[26] EOR 1002 at 34.

[27] EOR 1062 at 133.

[28] EOR 1003 at 37.

[29] EOR 1824.

he gave Rose an examination to determine whether Rose was telling the truth.[30] During this purported examination, Moore asked Rose questions about whether he inappropriately touched C.C.[31] Rose denied it. Moore purportedly analyzed the "results," and told Rose he was being "deceptive."[32] Indeed, immediately after telling Rose that the test indicated "deception," Moore demanded Rose provide an "explanation."[33] Moore repeatedly told Rose he was certain Rose touched C.C., his denials were false, and it was necessary for him to explain the purported test results to avoid going to prison.[34]

Rose continued to deny improperly touching C.C., but in response to Moore's insistence that the polygraph proved otherwise, Rose eventually offered two explanations. In one story, Rose stated that his fingers might have brushed C.C.'s vagina when applying powder for a rash.[35] In another, Rose stated C.C. came into his bed while he was sleeping with his wife, and placed his hand on her vagina.[36]

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[30] EOR 1315, 1321.

[31] EOR 1321.

[32] EOR 1323, 1342. In fact, according to a defense polygraph expert who analyzed Moore's work, Moore's polygraph examination was faulty even when judged by the purported science governing lie detector tests. EOR 1292–1306. The expert concluded Moore could not reach any valid conclusions about whether Rose was telling the truth. EOR 1306–1307.

[33] EOR 1324.

[34] EOR 2439–2453, EOR 3270–3289, EOR 123.

[35] EOR 2440–2442.

[36] EOR 2449–2451.

No one believed Rose's made up explanations. On direct appeal, the state described his stories as "absurd and bizarre."[37] C.C. herself claimed the molestation happened while she was sleeping in a room with other children, and never described anything like Rose's explanation.

Moore testified at the first trial and admitted he recorded his interview with Rose.[38] Moore's testimony was brief: he recounted the allegations and Rose's explanation.[39] The tape wasn't played and there was no mention that the interview occurred after a polygraph examination.[40]

After the first trial, and before the second, this interview was the subject of contentious litigation because the state continually offered contradictory explanations to the trial judge about whether Moore recorded the interview. At various times, the prosecutor alleged there was no tape of the interview;[41] there was a tape, but no one could find it;[42] the state turned over the tape;[43] there was a technical malfunction during the recording;[44] and, finally, there was a tape, but

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[37] EOR 2696–2700.

[38] EOR 1026 at 130.

[39] EOR 1026-1027 at 130-131.

[40] *See* EOR 1026–1028 at 127–137 (Moore's complete testimony).

[41] EOR 831.

[42] *Id.*

[43] EOR 1024 at 121.

[44] EOR 1325.

Moore didn't record "some" of Rose's admissions.[45] It wasn't until the night before Rose's *second* trial that the state finally turned over the complete recording.[46]

C. The first trial: Rose presented his full defense and the jury acquitted or hung on all counts.

At his first trial, Rose faced 66 counts of sexual assault and lewdness involving D.A., C.C., A.C., and Z.V.[47] Rose represented himself with the assistance of standby counsel at the two-day trial, at which all four accusers testified.[48] Rose's defense witnesses included R.S., one of the girls whom A.C. claimed to have witnessed being molested, and who denied it.[49]

D.A.'s claims that she was regularly at the home and that Rose molested her at least 20 times was contradicted by evidence from other witnesses that she was at the house only once or twice.[50] The jury acquitted Rose of all counts relating to D.A (counts 1–25).[51]

The jury acquitted Rose of the count involving Z.V (count 66).[52] Rose proved

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[45] EOR 1214.

[46] EOR 1395–1396. The defense moved to suppress the newly-provided tape or to continue the trial so it could review it with an expert, but the court denied the motions. EOR 1395–1398, 1409.

[47] EOR 450–469.

[48] EOR 995–1017.

[49] EOR 1041–1044 at 44–56, 2502.

[50] EOR 1045 at 61, 1055 at 100, 1012 at 71.

[51] EOR 1078 at 22–23.

[52] EOR 1078 at 22–23.

he wasn't in Las Vegas at the time—he was serving in the Navy.[53] When he returned in March 2002, he was "immobile," and required the use of a wheelchair and crutches until the accusations came to light in July 2002.[54]

Although A.C. and C.C. denied it,[55] D.A. and Z.V. told the jury they discussed their accusations with A.C. and C.C. before July 2002.[56] The jury could not agree on a verdict regarding the counts involving A.C. and C.C, (counts 26–65), and the court declared a mistrial on those charges.[57]

D. The pre-trial hearing: the state's explanation about whether Moore recorded Rose's statement was a moving target.

Although the court ordered the state to turn over the recording of Rose's statement before the first trial, it didn't provide it until trial.[58] After the first trial, Rose's attorney sought suppression of Rose's statements and asked for a hearing on voluntariness, pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964).[59] The defense explained that "[a]lthough Mr. Moore claims that he taped his encounter with Mr. Rose, the tapes supplied to the defense by the State do not contain any of the

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[53] EOR 1062 at 133.

[54] *Id.*; EOR 1020 at 105–106.

[55] EOR 1010 at 63, 1016 at 90

[56] EOR 999 at 20, 1000 at 24–25, 1003 at 37.

[57] EOR 1078 at 23.

[58] EOR 1252 (the public defender's office transcribed the recording on January 6, 2004, putting disclosure sometime between that day and January 2, 2004, when Rose's investigator asked about it).

[59] EOR 1996–1205.

alleged admissions testified to by Mr. Moore."[60] It turned out the recordings disclosed by the state included everything *but* Rose's inculpatory statements. The prosecutor said Moore turned off the tape during that part of the interview.[61] The court denied the motion.[62]

Rose also challenged Moore's credentials.[63] At a hearing on Rose's request, the court described Moore's testimony at Rose's first trial as "unexpected, puzzling, not quite up to the standards that the Court is used to from law enforcement personnel, and I don't think you could strenuously disagree with me."[64] The court opted to reconsider Rose's motion to suppress,[65] and held an evidentiary hearing on August 18, 2004.[66] After Moore gave disjointed testimony due to the absence of the complete recording of the interview, the court said it couldn't make any decision without the tape.[67] The court expressed frustration over the missing tape, the prosecutor's ever-shifting rationales for it, and his complete disinterest in finding it.[68] "Mr. Hendrinks, if your case was so damn good the first time around and the

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[60] EOR 1197. *See also* EOR 1211–1212.

[61] EOR 1214.

[62] EOR 1216.

[63] EOR 1218–1224.

[64] EOR 1225.

[65] EOR 1291

[66] EOR 1285–1358.

[67] EOR 1333–1334.

[68] EOR 1333–1338.

jury couldn't make a decision and you don't have any better evidence this time, why are we wasting everybody's time retrying it? So why don't we try to get all the evidence that there is? Why can't we try to do that?"[69]

The court's frustration eventually boiled over and it told the prosecutor: "You have the shittiest case on the face of the earth with this case because I listened to it once, and you, as a State's representative, are telling me that you're going to get one more call."[70] When the prosecutor challenged that, the court doubled down. "It is a shitty case. If it wasn't a shitty case, you wouldn't have got acquittals on two of the four victims and a hung jury on the other two."[71]

The court stepped down, and when the parties returned, a new judge reported the original judge had denied the motion to suppress, although the state never turned over the missing tape it found so critical.[72] Rose's attorney objected, noting they never completed the hearing.[73]

That night—the night before trial began—the prosecutor finally turned over the missing tape.[74] The defense didn't have time to listen to it before the trial.[75] It

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[69] EOR 1338

[70] EOR 1339.

[71] EOR 1341.

[72] EOR 1379–1382.

[73] EOR 1381.

[74] EOR 1395–1396.

[75] *Id.*

moved to suppress the contents of the tape, or alternatively, to continue the trial so it could review the tape with an expert.[76] The court denied the motions, and trial began.

E. The second trial: the court gutted Rose's defense and Rose was convicted of some of the charges.

When the state insisted on retrying him, Rose, now fully represented by his standby counsel, sought to present the same defense. His lawyer filed a notice that they would call C.R., K.T., and R.S., three girls whom A.C. claimed she saw Rose molest while at his home, but who denied the allegations.[77]

Months before the retrial, the defense also noticed an expert witness, Dr. Phillip W. Esplin,[78] a forensic psychologist with expertise interviewing children on issues of sexual abuse.[79] Dr. Esplin was qualified to testify about factors "which increase the likelihood of unreliable information from children" regarding allegations of sexual abuse.[80] His opinion relied heavily on the discussion of the accusations amongst the four girls, as acknowledged by D.A. and Z.V.[81] He was prepared to testify there were "strong factors of unreliability" concerning C.C. and

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[76] EOR 1395–1398, 1409.

[77] EOR 1246–1248, EOR 2502–2503.

[78] EOR 1177–1195

[79] EOR 1177–1195, EOR 1553.

[80] EOR 1553.

[81] *Id*.

A.C.'s allegations based on their interactions with D.A. and Z.V.[82]

On August 25, 2004, immediately before the state opened its case, the prosecutor made an oral motion to bar evidence of the first trial's not guilty verdicts.[83] The prosecutors admitted they planned to call D.A. as a witness.[84] However, the new trial judge—who had just been assigned to the case—made a much broader ruling:

> I am not in any way, shape, or form going to allow you to bring up evidence of another trial, evidence of other victims. This case is going to stand on its own with regards to the two victims in this case. So 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. The two girls [A.C. and C.C.], in this case, it's going to stand on its own.
>
> If you deliberately—if there's any deliberateness as to bringing that out, there'll be sanctions from the Court.
>
> That's my ruling. We're not briefing it. And we're moving forward with the trial.[85]

Defense counsel sought clarification: "I can't mention [D.A] at all? I can't mention [D.A.] accused him?" The trial judge responded, "No. That's my ruling."[86]

The defense asked if the ruling would apply to C.R., K.T., and R.S.:

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[82] *Id*.

[83] EOR 1563.

[84] EOR 1562. Rose was acquitted of all charges related to D.A. after the first trial. EOR 1078 at 22–23.

[85] EOR 1582.

[86] EOR 1583.

> MR. O'BRIEN: Okay judge, just for the record. I'm unable to challenge [A.C.'s] credibility by pointing out that she said these girls, these three girls, were molested. And I'm also unable to call these three girls to deny that they were ever molested, is that correct?
>
> THE COURT: Yes.[87]

The court persisted in this ruling even after the defense cited the police report in which A.C. claimed she had witnessed these three girls being molested.[88]

Without this defense, Rose's lawyers said they would be unprepared for trial, and would be unable to provide constitutionally effective representation.[89] The trial court suggested the defense waive their opening statement,[90] and proceeded with the trial as scheduled.[91]

Undeterred, the defense presented the court with a written offer of proof that described the anticipated testimony of the precluded witnesses (D.A., C.R., K.T., R.S., Ava Santos (D.A.'s mother), and Dr. Esplin) and the expected testimony from C.C. and A.C. on cross-examination.[92] They also provided a bench memorandum explaining the constitutional necessity of presenting a defense based on this

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[87] EOR 1609.

[88] EOR 1609–1612.

[89] EOR 1585, 1612.

[90] EOR 1611–1612. The judge told counsel: "I would expect that you will say that I'm waiving an opening at this time, because I'm not going to allow you to intentionally create error in this case." EOR 1612.

[91] EOR 1585.

[92] EOR 2500–2504.

evidence.[93] The court was unpersuaded and its ruling stood.

The jury received a modified version of the case, focusing only on the claims made by A.C. and C.C., without hearing any evidence of the demonstrably false allegations of D.A. and Z.V., the effect these allegations had on the claims of A.C. and C.C., or any evidence that A.C. had falsely claimed other children were molested.[94] The evidence, and the prosecutor's argument exploiting the court's ruling, led the jury to falsely believe A.C. and C.C. had not discussed the accusations with anyone until they were revealed in July 2002, and that there was no motive for the girls to falsely accuse Rose. Indeed, the prosecutor specifically told the jury during closing arguments that "[t]here was no way they were telling anybody about this unless absolutely push came to shove" and that there was "no motive for these little girls to lie."[95]

The jury also heard a modified and inaccurate account of Rose's statements to Moore. Moore was identified only as a "state investigator" who performed an "interview" of Rose, and not a polygraph examiner.[96] The prosecution emphasized the purportedly "voluntary" nature of the interview, and that Rose was told he could leave at any time.[97] Moore testified he questioned Rose about whether he

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[93] EOR 1552–1558.

[94] EOR 1673–1735, 1756–1817.

[95] EOR 2338, 2345.

[96] EOR 1823.

[97] EOR 1830–1831.

inappropriately touched C.C., without mentioning that this questioning was done as part of a purported polygraph examination.[98] This was all done in accordance with the court's order that the polygraph could not be mentioned at trial.[99]

Moore was allowed to testify over defense objection that Rose's denials of these accusations were, in his experience, common amongst people accused of crimes.[100] Moore claimed Rose "changed his story" and related the two incidents that Rose described.[101] He was allowed to testify, based on his purported "experience," that Rose's denials were likely made so he wouldn't "get in trouble."[102] Moore opined that the fact Rose didn't mention C.C.'s name meant that he was trying to "distance" himself from the "victim."[103] The jury never knew that Rose's statements followed Moore's repeated insistence that Rose explain the results of the polygraph.

Rose testified in his defense. He tried to explain that Moore pressured him into making false statements, but his attempts were hamstrung by his inability to mention the polygraph or Moore's use of it during the interrogation, and by the

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[98] EOR 1833.

[99] *See, e.g.,* EOR 1402.

[100] EOR 1833–1838.

[101] EOR 1838, 1843, 1846.

[102] EOR 1839.

[103] EOR 1843.

absence of an accurate transcript.[104] The prosecution spent almost their entire cross-examination on Moore's interview, ridiculing the notion that Rose was pressured to make false statements.[105] In closing, the prosecution described the incidents, argued that an innocent person would have left the room rather than falsely confess, and argued that Rose's statements showed his "guilty conscience."[106]

Even without Rose's defense, the jury still acquitted him of all the charges involving A.C., and all of the lewdness charges involving C.C.[107] However, it convicted him of 20 counts of sexual assault involving C.C.[108] The court imposed a total of 40 years to life imprisonment.[109]

F. Rose has been released from prison following denial of Baker's petition for rehearing or rehearing *en banc*.

The Ninth Circuit denied Baker's petition for rehearing and rehearing en banc without a single judge requesting a vote.[110] At the onset of COVID-19, Rose

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[104] EOR 2217–2235.

[105] *See e.g.* EOR 2260, 2285 (suggesting that Rose's explanation was based entirely on the fact it was "cold and gloomy" in the interview room), EOR 2277–2279 (questioning him about the incidents related to Moore as if they were true), EOR 2286 (suggesting that the "pressure wasn't too great on you"), EOR 2292 (suggesting that he would have remained silent or left if he were innocent), and EOR 2271, 2277, 2279 (repeatedly confronting him with the inaccurate and incomplete transcript, which the jury had during deliberations).

[106] EOR 2343–2344.

[107] EOR 2427–2435.

[108] *Id.*

[109] EOR 2522–2524.

[110] Dkt. 49.

sought emergency release on bond pending appeal in light of his health, which made him "particularly vulnerable to the disease, with potentially fatal consequences."[111] The Ninth Circuit granted the motion, noting Baker had "not disputed that Rose's release does not pose a potential flight risk or danger to the public."[112] Nor did she dispute Rose's argument that he faced "greater risk of serious consequences from the COVID-19 virus, up to and including death, because of his underlying medical conditions."[113]

The Ninth Circuit remanded the matter to the district court, which held a bond hearing.[114] The court released Rose on his own recognizance, where he remains to this day.[115]

REASONS FOR DENYING THE PETITION

This case is about the wholesale exclusion of Jeff N. Rose's defense at his second trial, which primarily included evidence the state offered against him at his first trial. It is about allowing the exact same evidence when the state offers it and deems it inculpatory, but excluding it when the defense offers it because it is exculpatory.

This case is not, as Baker would have this Court believe, about *Nevada v.*

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[111] Dkt. 62 at 2.

[112] Dkt. 62 at 3.

[113] Dkt. 62 at 3.

[114] ECF No. 56.

[115] ECF No. 57.

Jackson, 569 U.S. 505 (2013). As the Ninth Circuit concluded, *Jackson* doesn't apply here. Rose's case is much more complex than *Jackson*—it involves the wholesale denial of the same defense that led the jury to either acquit Rose or hang on all counts.

I. This Court is not an error-correcting court, but even if it were, there is no error to correct.

Baker doesn't really want this Court to accept this case. If she did, she would have at least mentioned this Court's criteria for accepting cases. *See* S.Ct. R. 10. Instead, Baker's entire argument is focused on convincing this Court that Rose's complex, factually unique case is controlled by *Jackson*, and the Ninth Circuit erred. But this Court is not an error-correcting court. "It disrespects the judges of the courts of appeals, who are appointed and confirmed as we are, to vacate and send back their authorized judgments for inconsequential imperfection of opinion—as though we were schoolmasters grading their homework." *Wellons v. Hall*, 558 U.S. 220, 228 (2010) (Scalia, J., dissenting). But more than that, this case isn't about *Jackson*. It's about *Washington v. Texas*, 388 U.S. 14 (1967), and the differing treatment at Rose's first and second trials.[116] In any event, as Rose's complete and accurate Statement of the Case reveals, Rose's case is nothing like *Jackson*.

[116] *See* Dkts. 4, 36, 39 (the parties' briefs).

A. The Ninth Circuit's decision correctly concluded Rose's right to present a defense was violated by the new judge's 11th-hour limitations.

When the jury was presented with Rose's complete defense, it hung on the counts related to C.C. When Rose's defense was limited, it convicted. Thus, "[t]he 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."[117] The trial court's refusal to permit Rose to present his entire defense, as he did on his own in his first trial, "denied him a 'meaningful opportunity to present a complete defense.'"[118] As a direct result, the Ninth Circuit found "the Nevada Supreme Court's decision upholding it was contrary to clearly established federal law."[119]

The Ninth Circuit acknowledged "there was a risk that focus on the results and accusations from the first trial could confuse the jury," it noted ways around this, and concluded *Jackson* was distinguishable.[120] The Ninth Circuit was in the best position to make this determination. It had the benefit of oral argument and full briefing, and limited its decision to Rose alone. *See* Alex Kozinski and Stephen Reinhardt, *Please Don't Cite This!: Why we don't allow citation to unpublished dispositions*, 20 Cal. Law. 43 (June 2000) ("After carefully reviewing the briefs and

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[117] App. 7.

[118] App. 7, *quoting Crane,* 476 U.S. at 690.

[119] App. 7.

[120] App. 6. *Id.* at fn. 2.

record, we can succinctly explain who won, who lost, and why. We need not state the facts, as the parties already know them; nor need we announce a rule general enough to apply to future cases. This can often be accomplished in a few sentences with citations to two or three key cases.")

Baker's new attorneys, none of whom represented him in the district court or appeared in the Ninth Circuit until after it decided Rose's case, want to start and finish the analysis with *Jackson*. But it's not that simple. Not only that, but one of Baker's new lawyers tried this argument on the Ninth Circuit through a petition for rehearing and rehearing en banc, but not a single member of the Court called for a vote.[121]

1. Rose has a constitutional right to present a defense.

Whether rooted in the Fourteenth or Sixth Amendment, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), *citing Chambers v. Mississippi*, 410 U.S. 284, 302–303 (1973), *Washington v. Texas*, 388 U.S. 14, 22 (1967), and *Davis v. Alaska*, 415 U.S. 308 (1974). This means a defendant's right to present evidence must sometimes trump a state's evidentiary rules. While states have "broad latitude under the Constitution to establish rules excluding evidence from criminal trials," *Nevada v. Jackson*, 506 U.S. 509 (2013), *citing Holmes v. South Carolina*, 547 U.S. 319, 324 (2006), this latitude is not absolute.

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[121] Dkt. 48-1, Dkt. 49.

In *Rock v. Arkansas*, 483 U.S. 44 (2001), for example, this Court held that a blanket rule excluding all post-hypnosis testimony was unconstitutional. While acknowledging that there were legitimate scientific concerns with such testimony, *id*. at 58–60, the Court recognized that a restriction "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Id*. at 56.

In *Chambers*, this Court recognized that state rules barring the defense from impeaching his own witness, and from introducing prior statements that conflicted with that witness's penal interest, denied the defendant "a trial in accord with traditional and fundamental standards of due process." *Chambers*, 410 U.S. at 302. And in *Crane v. Kentucky*, this Court ruled that exclusion of evidence concerning the "environment" of the defendant's confession when such evidence could be "highly relevant" to the "reliability and credibility" of that confession was unconstitutional. *Crane,* 476 U.S. at 691.

Even when a rule might serve a rational purpose, it may be unconstitutional as applied in a given case. Thus, while rules prohibiting the introduction of evidence that is only "marginally relevant, or possess an undue risk of 'harassment, prejudice, or confusion of the issues'" are generally valid, they are still unconstitutional if they do not "rationally serve the end" the rules were designed to promote. *Holmes*, 547 U.S. at 330–331 (holding rule excluding defense evidence was arbitrary when the court only considered the strength of the prosecution's evidence).

This Court has emphasized that evidentiary restrictions are arbitrary when they are only enforced against one party in a proceeding. Thus, a rule disqualifying

the defendant from calling alleged accomplices as witnesses was arbitrary when "the accused accomplice may be called by the prosecution to testify against the defendant." *Washington*, 388 U.S. at 22.

Here, the state trial court's wholesale exclusion of Rose's defense was arbitrary, irrational, and prejudicial under well-established federal standards. Despite Baker's new claims to the contrary, *Jackson* cannot save Rose's wrongful convictions.

2. Baker's arguments have continually evolved.

Although Rose's arguments have been consistent since he raised this issue on direct appeal, Baker's have not. The latest iteration, which reframes the issue as one solely based on *Jackson*, is just as unavailing as the prior versions of her argument.

As demonstrated here, Rose has steadfastly argued the violation of his right to present a defense. The state court, the federal district court, and the Ninth Circuit all had the opportunity to address his argument with full briefing. The Nevada Supreme Court, however, did the least amount of work, opting to resolve it in a footnote.[122] It noted Rose's evidence was properly excluded under a state statute that bars evidence when its probative value "'is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the

[122] EOR 60, fn. 18.

jury.'"[123] Although the Nevada Supreme Court noted Rose's "due process" right to introduce favorable testimony, and cited *Chambers*, it resolved the issue solely by reference to state law.[124]

After pursing state post-conviction remedies, Rose filed his federal habeas petition, where he raised a multitude of claims including substantial issues of ineffective assistance of counsel and prosecutorial misconduct.[125] This right-to-present-a-defense claim was Rose's first claim in his habeas petition, and Baker responded to it in her answer. There, Baker mentioned *Nevada v. Jackson*, 569 U.S. 505 (2013) only once.[126] So little attention did Baker give *Jackson* that the federal district court denied relief without ever mentioning it.[127]

It granted a certificate of appealability on a different, but related, claim.[128] Once in the Ninth Circuit, Rose sought to expand the certificate of appealability to include this claim and briefed the merits of it.[129] Before the argument, the Ninth Circuit ordered Baker to respond to Rose's uncertified claims, including this one.

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[123] EOR 60, fn. 18, *quoting* NEV. REV. STAT. § 48.035(1).

[124] EOR 60, fn. 18.

[125] EOR 71–108.

[126] EOR 3534.

[127] EOR 1–7.

[128] *See* EOR 26, granting a certificate of appealability on Claim 2 only. This claim argued the state "introduced statements [Rose] made to a polygrapher in violation of his Fifth, Sixth and Fourteenth Amendment right to due process, a fair trial and cross examination." EOR 7.

[129] Dkt. 4.

Given the timing, the Court opted to discuss the uncertified claims at oral argument and permit post-hearing briefing.[130]

In her post-hearing brief, Baker argued for the first time that *Jackson* controlled the outcome, but her analysis brushed only the surface, as Rose explained in his post-argument reply brief.[131] The argument Baker now presents in this Court bears no resemblance to her argument in the federal district court and only passing resemblance to her Ninth Circuit argument following oral argument.[132]

All versions of the warden's arguments have lacked merit, but this Court isn't the place to present new arguments. *See Ford Motor Co. v. United States*, 134 S.Ct. 510 (2013) ("This Court is one of final review, not of first view."); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) ("We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari."); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) ("Upon reviewing the record, however, it appears that these broad questions were not raised by the petitioner below nor passed upon by the Arizona Supreme Court, We cannot decide issues raised for the first time here.") At the very least, the warden's ever-shifting arguments demonstrate this case would not present a clean vehicle for review.

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[130] Dkt. 32.

[131] Dkt. 36 at 17–19; Dkt. 39.

[132] *Compare* Petition to Dkt. 36 *and* EOR 3533–3534.

3. The Ninth Circuit's order comports with AEDPA's restrictions.

Try as Baker does to reframe the issue, this case is about Rose's constitutional right to present a defense. There can be no question such a right exists under clearly established federal law as determined by this Court. The only question under AEDPA is whether the Nevada Supreme Court's decision was contrary to or an unreasonable application of that clearly established federal law as determined by this Court. 28 U.S.C. § 2254(d)(1). The Ninth Circuit found it was contrary to this Court's precedent. Baker ignores this finding, and steadfastly argues that the Nevada Supreme Court's decision wasn't unreasonable. She's wrong, but even if she wasn't, that's no reason for this Court to intervene.

Baker argues the exclusion of Rose's defense was reasonable: a trial court could reasonably preclude all evidence of all other accusations that might create a danger of unfair prejudice and confusion. Whatever the general merits of this approach, however, it is not Nevada law, and was certainly not the rule that both the prosecution and the court followed at Rose's first trial.

The Nevada Supreme Court purportedly disclaimed its original rule that evidence of prior alleged sex acts was admissible to prove a defendant's "propensity for sexual aberration." *Braunstein v. State*, 40 P.3d 413, 418 (Nev. 2002). But Nevada continues to admit such evidence under NEV. REV. STAT. § 48.045(2), which allows evidence of "other crimes, wrongs, or acts" be admitted for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." *Id.* at 418.

In practice, the Nevada Supreme Court has broadly interpreted this rule to allow the admission of other sex acts under prosecution theories that appear very similar to propensity arguments. *See id.* at 415—16, 418 (allowing evidence of molestation committed against another child to prove a "common scheme or plan."); *Ledbetter v. State*, 129 P.3d 671 (Nev. 2006) (allowing evidence of molestation against another child to prove "motive" and "sexual attraction to and obsession with the young female members of his family"); *Rhymes v. State*, 107 P.3d 1278 (Nev. 2005) (allowing evidence that defendant groped other women to show his "intent to use his skills as a masseur to facilitate contact with his potential victims").

Here, the state originally charged Rose with offenses involving only D.A. and C.C.[133] Before the first trial, it moved to admit the uncharged acts A.C. and Z.V. alleged.[134] Citing the extensive authority for admitting such evidence under NEV. REV. STAT. § 48.045(2) and similar rules, the state argued there was a "necessity" to introduce the full context of the allegations against Rose, purportedly to show his "motive, intent, or absence of mistake or accident in the instant case."[135] Ultimately, the trial court did not need to rule on the admissibility of uncharged acts because the prosecutor elected to simply charge Rose with crimes related to A.C. and Z.V.'s

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[133] EOR 304-310.

[134] EOR 352.

[135] EOR 360.

allegations.[136]

But this strategy backfired at trial. The children's testimony showed that some of them had made demonstrably false allegations against Rose, and that those children had influenced others.[137] Even without the benefit of counsel, the jury acquitted Rose on many counts and hung on the rest. With the benefit of counsel who had prepared expert testimony and were prepared to call other witnesses to bolster the defense presented at the first trial,[138] Rose had every reason to believe he would prevail.

The new trial judge's last-minute decision to enforce a new rule that C.C. and A.C.'s allegations would "stand on their own" was arbitrary for exactly the same reason as the rule stricken down in *Washington v. Texas*, 388 U.S. 14 (1967). Just as a state may not rationally prohibit the defense from calling accomplices when it permits the prosecution to do so, it may not prohibit the defense from presenting evidence regarding the context of the sexual assault allegations when it allows the state to do so.[139] And just as the defendant in *Crane v. Kentucky* could not fairly

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[136] EOR 450-469.

[137] EOR 1000 at 25 (D.A.'s agreement that they "exchanged stories to help them remember.").

[138] EOR 2500–2504,

[139] The fact that the court's new ruling applied to "both sides" didn't make it less arbitrary. By Rose's second trial, it was clear that evidence regarding other allegations was helpful to Rose and unhelpful to the state. The state's threats to "talk about other people" once "the door opens up" were empty— those "other people" whom A.C. claimed to have witnessed being molested would have denied

defend himself against his purported confession without explaining to the jury the full context of that confession, Rose could not defend himself against A.C. and C.C.'s allegations without explaining to full context of those allegations. *See Crane,* 476 U.S. at 691 ("evidence about how a confession is obtained is often highly relevant to its reliability and credibility.").

The supreme court's rejection of this was "contrary to" this clearly established law—to the extent it considered it all. The Nevada Supreme Court's determination that the preclusion of evidence was consistent with state evidentiary law,[140] does not address the relevant question of whether such disparate treatment—as evidenced in Rose's own trials—was permissible under federal law.

Baker seeks to distinguish Rose's trials on the basis that the second trial no longer involved D.A. and Z.V.'s allegations. As explained above, however, Nevada law doesn't limit the admission of allegations to victims charged in the instant trial. In any event, it would be arbitrary and irrational to preclude a relevant defense based upon how the prosecutor elected to charge the case. It would be particularly arbitrary when the reason the case "no longer involved" the allegations of D.A. and Z.V. was because Rose was *acquitted* of these charges. Even assuming *arguendo* that the fact of these acquittals could be reasonably excluded, it was unreasonable

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that such acts took place. EOR 2502–03. Evidence that the alleged victims were indiscriminately and falsely accusing Rose of molesting every child who had ever been at his house (and in view of other children) is exactly the thing that would have led a jury to find their testimony incredible.

[140] EOR at 60-61, fn. 18,

and arbitrary to preclude Rose from introducing the underlying evidence that led to those acquittals. Rose couldn't reasonably be disadvantaged in presenting his full defense because—per the candid assessment of the judge who heard the first trial—the prosecution had "the shittiest case on the face of the earth."[141]

B. *Jackson* involves a habeas corpus challenge to a Nevada sex offense conviction, but otherwise bears little resemblance to Rose's case.

Jackson involved the evidentiary restriction on "extrinsic evidence" regarding prior instances of a witness's conduct set forth in NEV. REV. STAT. § 50.085(3). *Jackson*, 569 U.S. at 509–510. Although Baker attempted post-argument to recast Rose's claims as an attempt to introduce such evidence in violation of the rule, neither the trial court nor the Nevada Supreme Court cited NEV. REV. STAT. § 50.085(3) as the basis for excluding Rose's defense.[142] In *Jackson*, moreover, the Nevada Supreme Court denied the claim because Jackson failed to comply with a state-law notice requirement. *Id*. at 510. But here, there was no state court finding that Rose's defense was barred because he failed to meet any notice requirement. Nor would such a ruling have made sense—the prosecution had notice of Rose's defense from the first trial.

Moreover, there's no claim in *Jackson* that the application of NEV. REV. STAT. § 50.085(3) involved an arbitrary double standard, as here and in *Washington v.*

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[141] EOR 1339.

[142] *See* EOR 60–61, fn. 18, 1582.

Texas, 388 U.S. 14 (1967). The issue here is not whether Nevada's general rule on limiting confusing or unduly prejudicial evidence is arbitrary. The point is the exclusion cannot be rationally invoked against the defendant to preclude evidence that would be (and was) admitted by the prosecution in its case-in-chief. Nothing in *Jackson* defends such a rule.

The trial court did not bar Jackson from raising his defense, which concerned allegedly false prior accusations that the complainant had made. To the contrary, Jackson had "wide latitude" to cross-examine the complainant about other incidents. *Id*. at 508. Here, the trial court completely barred Rose from mentioning anything related to anyone other than A.C. or C.C., especially D.A.[143] And the ruling was not limited to "extrinsic" evidence about uncharged allegations, but included evidence—for example, D.A.'s acknowledgement that she had "exchanged stories" with A.C. and C.C. prior to their revelations of Rose's alleged abuse, and expert testimony—that directly bore on the credibility of the charged accusations. This "categorical bar" on cross-examination and relevant evidence is exactly what *Chambers v. Mississippi*, 410 U.S. 284 (1973), bars.

Rose's case goes far beyond *Jackson*. A result of this wholesale exclusion, the case wasn't fairly presented to the jury. At the second trial the prosecution told the jury "[t]here was no way [A.C. and C.C.] were telling anybody about this unless

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[143] *See* EOR 1583.

absolutely push came to shove,"[144] despite prior evidence they "exchanged stories" with D.A. well before the allegations were related to adults.[145] The prosecution also said they had "no motive . . . to lie" despite evidence they had been influenced by D.A. and made false allegations involving a number of other girls.[146] Just as in *Crane v. Kentucky,* 476 U.S. 683, 690 (1986), there was no "valid state justification" for omitting the necessary context of their accusations and allowing the evidence to be presented in a misleading fashion.

CONCLUSION

Baker's request for this Court's intervention is nothing more than a request to reverse an unpublished order from the Ninth Circuit that it doesn't like. She doesn't even try to persuade this Court that the Ninth Circuit's Order here has broader implications. As demonstrated here, there is no error to correct, even if this Court were involved in such error correction. Baker's attempt to distill this factually complicated case about the wholesale exclusion of Rose's defense, into a *Nevada v. Jackson* problem fails upon a closer look at what actually happened. Accordingly, this Court should deny Baker's petition so that Rose may pursue a new trial in state court, should the state opt to retry him.

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[144] EOR 2338.

[145] EOR 1000 at 25.

[146] EOR 2345.

Dated July 1, 2020.

Respectfully submitted,

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