

No. 19-1255

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**

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondent Jeff Rose’s opposition to the petition for writ of certiorari attempts to do exactly what Rose wanted to do at his second trial: focus on collateral matters in an attempt to create unnecessary confusion for the decision makers in the case. The central theme of Rose’s opposition is an accusation that Petitioners have tried to “reframe” the issue in this case. But if anyone reframed the issue, it was the Ninth Circuit. The lynchpin of the Ninth Circuit’s decision is its focus on the suggestion that the trial court’s ruling improperly curtailed Rose’s ability to cross-examine C.C. and A.C. and that the trial court could have cured the problem by issuing some undefined “narrower ruling.”

This is not, as the Ninth Circuit suggested, a case about limitations on cross-examination.¹ Rose’s Brief in Opposition proves this point. Rose makes no effort to defend the Ninth Circuit’s view that the trial court’s ruling affected his desired cross-examination of C.C. and A.C. Instead, his opposition emphasizes that his claim has always been that the trial court’s ruling prevented him from presenting evidence about

¹ Even assuming, *arguendo*, that the Ninth Circuit was right to focus on Rose’s cross-examination of C.C. and A.C., the Ninth Circuit’s analysis still fails to adhere to AEDPA by not evaluating the reasonableness of the Nevada Supreme Court’s decision in light of the long-standing recognition that the right to cross-examination is not absolute and subject to reasonable limitations. *Compare Olden v. Kentucky*, 488 U.S. 227, 232 (1988), *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986).

uncharged acts and prior acquittals *through other witnesses to impeach* C.C. and A.C.

As a result, Rose’s opposition only emphasizes the thrust of the petition: this is a case about a state court applying a standard rule of evidence—a rule that exists in virtually every jurisdiction in the country, which Rose does not dispute—to exclude extrinsic evidence that the Ninth Circuit agrees had the potential to confuse and mislead a jury. In *Nevada v. Jackson*, this Court recognized that “[n]o decision of this Court clearly establishes that the exclusion of such evidence for such reasons” violates a defendant’s right to present a defense. 569 U.S. 505, 511 (2013). It necessarily follows that the Nevada Supreme Court’s decision that the trial court did not violate Rose’s right to present a defense was a reasonable application of this Court’s precedent. In reaching a contrary conclusion, the Ninth Circuit not only disregarded *Jackson*’s holding, it turned that holding on its head: rather than evaluating the *reasonableness* of the Nevada Supreme Court’s ruling under this Court’s precedents addressing the right to present a defense, it substituted its own judgment for the state courts’ by suggesting the trial court could have issued an undefined “narrower ruling.”

This case presents the straightforward question of whether the Ninth Circuit’s decision is inconsistent with *Jackson*. It is. This Court should grant the petition.

* * *

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *JACKSON*

Rose invokes Justice Scalia's dissenting opinion from *Wellons v. Hall*, 558 U.S. 220 (2010), to suggest that Petitioners merely seek correction of an "inconsequential imperfection of opinion."² Opp. at 18. Rose's argument rings hollow. The question presented expressly states that Petitioners seek review of the Ninth Circuit's resolution of an important question of federal law that is in conflict with an opinion of this Court. See Sup. Ct. R. 10(c).

As explained in the petition for writ of certiorari, the straightforward facts of this case are materially indistinguishable from those in *Jackson*. In *Jackson*, the defendant claimed that the trial court violated his right to present a defense by precluding him from impeaching a victim with police reports and testimony of other witnesses showing that she had made unfounded allegations against him in the past. 569 U.S. at 507. Consistent with a state rule of evidence, the trial court allowed Jackson to cross-examine the victim about the prior allegations, but precluded him

² Meanwhile, Rose takes aim at the Nevada Supreme Court for resolving the straightforward evidentiary question at issue in this case in a footnote that cites an opinion of this court but resolves his claim "solely by reference to state law." Opp. at 22-23, 28. But this Court is not in the business of telling state courts how to draft their opinions. See *Johnson v. Williams*, 568 U.S. 289, 300 (2013). And state courts do not need to cite, or even be aware of, this Court's precedents to avoid issuing a decision that is contrary to clearly established federal law. *Early v. Packer*, 537 U.S. 3, 8 (2002).

from introducing police reports or testimony from other witnesses to impeach her. *Id.*

On federal habeas review, this Court concluded that the trial court's refusal to admit the evidence based on the state evidentiary rule was not inconsistent with this Court's clearly established precedents. *Jackson*, 569 U.S. at 509. This Court recognized that such evidence can "confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial," and "[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.

Similarly here, the trial court prevented Rose from presenting extrinsic evidence he claimed would impeach the victims based on a state evidentiary rule, finding the evidence Rose sought to admit was more prejudicial than probative because of its potential to confuse the jury. Under AEDPA, the Ninth Circuit was required to deny Rose's petition because no clearly established precedent requires the trial court to admit the evidence, as *Jackson* expressly held.

Instead, the Ninth Circuit distinguished *Jackson* by suggesting that, unlike in *Jackson*, the trial court refused to let Rose cross-examine A.C. and C.C. about whether their allegations were influenced by other girls. But no party in this case, including the trial court, ever disputed that Rose had a right to present his defense that A.C. and C.C. created their stories after being influenced by other girls, or to cross-

examine A.C. and C.C. on these points.³ The trial court merely held that Rose had to present this defense without mentioning any other girls' allegations, and more importantly, without presenting evidence that a jury previously acquitted him of other allegations of abuse.

The record does not include an express ruling limiting Rose's ability to cross-examine A.C. and C.C. because cross-examination of A.C. and C.C. was not the intended focus of Rose's defense. Rose's plan was always to present the jury with *extrinsic evidence* involving a jury acquitting him on the charges relating to D.A. and Z.V., which Rose would then use to undermine the allegations from A.C. and C.C. EOR 1565. He also wanted to present extrinsic evidence, in the form of testimony from D.A. and Z.V. to impeach A.C. and C.C. EOR 1552-58. Finally, he wanted to bring in even *more* young girls—C.R., K.T., and R.S—to testify that he never touched them and that A.C.'s was lying if she said otherwise. EOR 1582.

Rose's request to admit extrinsic evidence to attack the credibility of A.C. and C.C., and the trial court's decision to deny that request because it was confusing and prejudicial, brings this case squarely under *Jackson*. Just as the trial court in *Jackson* was entitled to prevent Jackson from presenting extrinsic evidence bearing on the victim's credibility without

³The State admitted that Rose could cross-examine A.C. and C.C. on whether they made-up their story after talking to the other girls so long as he did not get into the identities of the other victims or any prior acquittals. EOR 1569-70, 79-80.

violating his right to present a defense, the trial court in this case was free to similarly limit Rose's presentation of evidence. The Ninth Circuit's contrary decision amounts to a clear violation of AEDPA.

II. THIS CASE PRESENTS A STRAIGHTFORWARD LEGAL ISSUE THAT IS PROPERLY BEFORE THIS COURT.

Rose argues that this Court should not grant certiorari for two main reasons: (1) that Petitioners' position has shifted throughout the case; and (2) that Nevada's relevant evidentiary law is arbitrary. Both are unconvincing.

He first asserts that Petitioners have taken inconsistent positions throughout the proceedings and raise the argument made in the petition for the first time in this Court. Opp. at 22-24. This assertion is without support and an impractical.

Petitioners' core arguments have remained the same throughout this litigation. The answer in the district court argued that the trial court found Rose's evidence ran the risk of unfair prejudice, confusing the issues, and misleading the jury; noted that the trial court applied the ruling equally to both sides; and cited *Jackson* for the proposition that states have broad latitude in establishing rules of evidence without violating the right to present a defense. EOR 3533-34. In the post-argument brief, Petitioners argued that *Jackson* foreclosed relief because the Nevada courts reasonably excluded the evidence to avoid the potential to confuse and mislead the jury. Dkt. 36 at 15-24. That is the same argument made in the petition.

Rose's argument also lacks practical sense. Even if there were differences between the precise arguments made here and those made below, that is a practical reality of how our judicial system operates. Petitioners' briefing in the lower courts was a response to Rose's arguments about his claim for relief. But the petition challenges the rationale of a Ninth Circuit decision reversing the district court that did not exist when Petitioners briefed the issue on appeal. Petitioners are not clairvoyant and cannot be expected to make an argument in their appellate briefing that challenges the rationale of a court of appeals decision that does not yet exist.

This case is demonstrative of that point. Rather than focusing on Rose's argument about whether he should have been permitted to present evidence of other uncharged acts and prior acquittals through other witnesses to impeach C.C. and A.C., the Ninth Circuit focused on how the trial court's ruling impacted "the scope of Rose's cross-examination of A.C. and C.C." App at 5-6. But Rose acknowledges Petitioners then raised the very same argument they raise now in their petition for rehearing. Opp. at 20. Thus, while Rose suggests Petitioners' arguments have shifted, the actual shift is traceable to the Ninth Circuit's rationale for granting relief, which differs from Rose's arguments about the merits of his claim. And because the Ninth Circuit squarely addressed the issue presented in the petition, it is ripe for this Court's review. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("even if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below") (emphasis in

original); *see also* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330 (2010) (“Our practice permits review of an issue not pressed below so long as it has been passed upon” by lower courts.) (citations and brackets omitted).

Rose next argues that this case falls into one of the exceptions specifically noted in *Jackson*, where this Court noted that it had found that the exclusion of evidence under state law violated a defendant’s right to present a defense because the law was arbitrary. 569 U.S. at 509. He insists that the trial court’s evidentiary ruling amounted to an “arbitrary double standard” because state law would allow the State to present the excluded evidence under Nev. Rev. Stat. 48.045(2).

Rose’s argument misses the mark and reveals confusion about admissibility of evidence generally and the trial court’s discretion to exclude otherwise admissible evidence if the likelihood of prejudice outweighs probative value under Nev. Rev. Stat. 48.035—the Nevada equivalent to Fed. R. Evid. 403.

First and foremost, the trial court in this case did not simply bar Rose’s evidence because it was extrinsic evidence under Nev. Rev. Stat. 50.085(3). Instead, the trial court initially determined that the evidence was marginally relevant but excluded it because of the danger of confusing the issues and misleading the jury under Nev. Rev. Stat. 48.035. EOR 1582. And the trial court was unequivocal in recognizing that both the defense and the State were precluded from presenting evidence of the allegations of abuse involving other

girls. EOR 1582. Thus, in application to Rose's case, there is no imbalance.

But Rose's argument about Nevada law under *Washington v. Texas*, 388 U.S. 14 (1967), is also off-base. He argues that exclusion of extrinsic evidence with respect to the prior allegations of abuse is arbitrary in general because the evidence can be excluded under 50.085(3), while the State is able to present uncharged acts under Nev. Rev. Stat. 48.045(2). But as Respondents noted in briefing this issue below, Rose's argument fails to account for Nevada's exception to its exclusion of extrinsic evidence for a victim's prior false allegations of sexual abuse. Dkt. 36 at 21-23 (*addressing Miller v. State*, 779 P.2d 87 (1989) (creating an exception to Nevada's prohibition against impeachment with extrinsic evidence to allow defendant to establish that a victim made prior false accusations of sexual assault)). While the State may present evidence of uncharged acts, it must meet a strict test to permit presentation of such evidence. *Tavares v. State*, 30 P.3d 1128, 1131-32 (Nev. 2001) (addressing Nevada evidentiary standards for use of prior bad act evidence at trial and imposing a duty on the prosecutor to request an instruction "on the limited use of prior bad act evidence"). And a victim's prior false allegations of sexual abuse may be admitted if the defendant makes a showing comparable to the test for admitting prior uncharged acts. *Miller*, 779 P.2d at 90. As a result, Rose's argument that Nevada law arbitrarily prevents defendants from preventing prior allegations of abuse that are false, while allowing the State to present uncharged allegations of abuse, is not supported by relevant Nevada law.

* * *

The Ninth Circuit concluded that the trial court was constitutionally required to let Rose present evidence it admits could have confused the jury. *Jackson* requires the opposite conclusion.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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