No.

IN THE
Supreme Court of the United States

ROBERT LARS PAPE,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Ten years after three victims were found dead in Riverside County, California, authorities charged Mr. Pape and his friend Cristin Smith with their murders. The prosecution's theory was that one of the victims, Mr. Pape's ex-girlfriend, intended to see him on the night of the crimes, as evidenced by her alleged statements to a third party. Defense counsel sought to introduce evidence from nine witnesses that two other men – including the third-party who testified about the victim's hearsay statements – actually committed the crimes. The trial court excluded the defense in its entirety, based on its perception of the strength of the prosecution's case. The court of appeal endorsed that view and compounded the trial court's error by refusing to apply this Court's well-established jurisprudence regarding the right to present a defense. Instead, the court reviewed the error under state law, holding *inter alia*, that the trial court did not abuse its discretion in excluding the testimony because its admission would have resulted in a "minitrial."

This case presents questions of critical importance and warrants this Court's plenary review:

1. Does the Constitution permit the exclusion of a defendant's presentation of substantial evidence of third-party culpability simply because the court believes the prosecution has presented evidence of the defendant's guilt?

2. May a court condition the presentation of a third-party culpability defense upon the defendant demonstrating that there is "direct or circumstantial evidence linking the third person to the actual

perpetration of the crime"? And, if so, may a court apply that standard to require a defendant to disprove any circumstances that may exculpate the third party before being permitted to present the defense to the jury?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner, defendant-appellant below, is Robert Lars Pape.

Respondent, respondent below, is the State of California.

Cristin Conrad Smith, defendant-appellant below, is not a party to these proceedings.

LIST OF PROCEEDINGS

1. *People v. Cristin Conrad Smith & Robert Lars Pape*, Case No. S269964 (Cal.).
2. *People v. Cristin Conrad Smith & Robert Lars Pape*, Case No. E071156 (Cal. Ct. App.).
3. *People v. Cristin Conrad Smith & Robert Lars Pape*, Case No. INF1600755 (Riverside Super. Ct.).

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INTRODUCTION

On September 17, 2006, law enforcement discovered three suspected homicide victims. Mr. Robert Pape, who was eighteen years old at the time, was questioned about the circumstances of the crimes, as were several others. It was not until ten years later, in November 2016, however, that Mr. Pape and his co-defendant Cristin Smith were charged. Without direct evidence of their involvement in the crimes or even a motive for the killings, the prosecution secured murder convictions against Mr. Pape and Mr. Smith using dubious cellphone tower data, questionable fingerprint and DNA evidence linking Mr. Smith to a scrap of paper found 180 yards from the crime scene, reported sightings of the two defendants with firearms over the many years, and incriminating (but equally ambiguous) statements allegedly made by Mr. Smith to a convicted felon who invoked the Fifth Amendment at trial.

When Mr. Pape and Mr. Smith sought to present third-party culpability evidence, the trial court prohibited them from doing so, based on its perception of the strength of the prosecution's case. The evidence that defense counsel sought to introduce included that the prosecution's prime witness was obsessed with one of the victims, upset that she had spurned his advances, admitted he was near the crime scene on the night of the murders – and indeed, according to his cousin, was with one victim up until the time of her death – behaved in an abnormal manner after the murders, feigned sadness over the victim's death, repeatedly returned to the crime scene, and had intimate and detailed knowledge of the murders. Despite the defense counsel's inability to present this substantial third-party culpability defense, the jury nonetheless deliberated for ten days before rendering its verdicts

against Mr. Pape for two first-degree murder counts and one second-degree murder count.

When presented with the federal constitutional violations resulting from the trial court's decision, the court of appeal declined to apply this Court's well-established jurisprudence guaranteeing criminal defendants the right to present a defense. Instead, the court viewed the claim as one solely implicating state law provisions and determined merely whether the trial court "abused its discretion" in excluding the evidence. Petition Appendix (Pet. App.) a11. Concluding that Mr. Pape had not proffered "direct or circumstantial evidence linking the third person to the actual perpetration of the crime," as required by controlling state law, and based on the prosecution's version of events, the court found the exclusion of the defense evidence appropriate to avoid a "minitrial." *Id*. In essence, the appellate court penalized Mr. Pape for amassing too much evidence that others committed the crimes. Finally, the court applied a state-law standard that places the burden on the defendant to establish the prejudicial effect of the error. *Id*. at a12.

As this Court long ago recognized, "[w]hether 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 v. Kentucky*, 476 U. S. 683, 690 (1986) (internal citations omitted) (quoting *California v. Trombetta*, 467 U. S. 479, 485 (1984)). Given the importance of the right to present a defense, particularly a defense that is predicated upon proof of alternative criminal actors, a state may not enforce procedural or evidentiary rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or

'disproportionate to the purposes they are designed to serve.'" *United States v. Scheffer*, 523 U. S. 303, 308 (1998) (quoting *Rock v. Arkansas*, 483 U. S. 44, 58, 56 (1987)).

In *Holmes v. South Carolina*, 547 U.S. 319 (2006), this Court found a state court misapplied these well-established principles when it did not consider "the probative value or the potential adverse effects of admitting" the exculpatory evidence, but rather improperly focused on the strength of the prosecution's case. *Id*. at 329. As in *Holmes*, the court of appeal here misapplied this Court's jurisprudence by approving the trial court's reliance on its perceived strength of the prosecution's case in excluding the third-party culpability defense, imposing an unreasonably high and unconstitutional burden on Mr. Pape to prove the third party actually perpetrated the crime in order to present the defense, and wholly refusing to consider the federal constitutional questions directly raised in the trial and appellate record.

The court of appeal's decision, which reflects the controlling law in all California courts, conflicts not only with this Court's case law, but also represents the conflicting positions of various jurisdictions. *See, e.g.*, David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 Wis. L. Rev. 337 (2016) (detailing the divergent approaches taken by states and federal circuit courts of appeal). Given the importance of the right to present a defense at the "'main event' at which a defendant's rights are to be determined," *McFarland v. Scott*, 512 U.S. 849, 859 (1994), and the split in the lower court's applications of this Court's jurisprudence, plenary review by this Court is warranted.

OPINIONS AND ORDERS BELOW

The opinion of the California Court of Appeal for the Fourth Appellate District in *People v. Cristin Conrad Smith and Robert Lars Pape*, Case No. E071156 (Cal. Ct. App. June 10, 2021), is unpublished, but is available at 2021 WL 2374322. Pet. App. a1-a27. The order of the California Supreme Court denying discretionary review in *People v. Cristin Conrad Smith and Robert Lars Pape*, Case No. S269964 (Cal. Aug. 25, 2021), also is unpublished. Pet. App. a28.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The court of appeal issued its opinion in Mr. Pape's direct appeal on June 10, 2021, which it modified on June 29, 2021. Pet. App. a1. The final judgment of the California Supreme Court denying discretionary review of the judgment was entered on August 25, 2021. Pet. App. a28. On November 16, 2021, the Honorable Justice Kagan granted Mr. Pape's request for an extension of time to file this Petition until January 22, 2022. *Robert Pape v. California*, Case No. 21A158.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The relevant portion of Section 1 of the Fourteenth Amendment provides that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. On September 17, 2006, 18-year-old Rebecca Friedli, her mother, and her mother's boyfriend were found dead at their home in a rural area of Riverside County, California. Pet. App a1. The burned body of Rebecca Friedli was found in a wheelbarrow a short distance from the house. *Id*. The extensive burns to her body precluded the pathologist from determining the cause of her death. *Id*. Rebecca Friedli's mother and her boyfriend died as a result of wounds from two separate firearms and were found inside the burning home. *Id*. Each of the victims died before the fires were set. *Id*. at a2.

2. Tire tracks from the wheelbarrow and three different footprints were found in the brush behind the residence. *Id*. Photographs of the shoe impressions indicated a DVS shoe could have made some of the impressions, a Vans shoe likely caused another set of impressions, and another was a Globe Logic shoe, the type of shoe taken off of Rebecca Friedli. *Id*.

3. A crumpled Pro-Life Catholic Ministries business card was found in the dirt approximately 180 yards from the residence. *Id*. at a2-a3; 7 Trial Transcript (TT) 1265.[1] The business card was one used by Marie Widmann, the director of Respect for Human Life for the Catholic Diocese of San Bernardino. Pet.

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[1] Citations to the trial court record are provided in the following format: [Volume Number] TT [Page Number].

App. a3; 6 TT 945-47.[2] Ms. Widmann had distributed hundreds of her cards. 6 TT 948, 951. She worked with Sacred Heart Church, where Mr. Pape's mother worked as a volunteer with Ms. Widmann. Pet. App. a3. At trial, the prosecution presented no evidence to explain the connection of the business card to the crimes, particularly because it was found some distance from the house and the wheelbarrow.

4. No trace evidence, fingerprints, or DNA connected the defendants to the cars at the Friedli residence, gas cans found at the scene, the wheelbarrow, or to lighter fluid and long matches collected in the backyard. 6 TT 952-53; 8 TT 1305-07, 1310, 1382. No male DNA was detected on the right wheelbarrow handle, and Mr. Pape and Mr. Smith were excluded as the source of the DNA on the left handle. Pet. App. a3; 10 Clerk's Transcript (CT) 2158.[3] The defendants were also excluded as the source of DNA on Rebecca Friedli's right shoe. 10 CT 2158. On her right sock, DNA from a minimum of three males was obtained, but again the defendants were excluded as a source of this DNA. *Id.*

5. Fingerprints found on the Pro-Life Catholic Ministries business card initially were not linked to either defendant. On October 27, 2006, an employee of the sheriff's department detected two latent fingerprint impressions on the business card, which she labeled No. 1 and No. 2. 6 TT 952-53. On December 5, 2006, a California Identification System fingerprint analyst examined the impressions and determined they were insufficient for a computer search and were "non-

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[2] Ms. Widmann's surname is misspelled in the court of appeal opinion. *Compare* Pet. App. a3, *with* 6 TT 944.

[3] Citations to the clerk's transcript, which contains written documents filed in the trial court are provided in the following format: [Volume Number] CT [Page Number].

comparable." Pet. App. a3; 6 TT 954-56; 8 TT 1342. In 2007, the two fingerprints were reanalyzed, this time by a forensic technician with the district attorney's office, and she determined, as verified by a second examiner, that print No. 1 did not match the fingerprints of Mr. Pape or Mr. Smith, and that print No. 2 was not of comparable quality. Pet. App. a3; 12 TT 2325-26; 10 CT 2160. Over a decade later, in January 2018, a fingerprint analyst at the California Department of Justice compared the impressions in the photos to those of Mr. Pape and Mr. Smith. Pet. App. a3; 12 TT 2327, 2331-32. She excluded Mr. Pape as the source of the fingerprints, but concluded that prints No. 1 and No. 2 matched Mr. Smith's fingerprints. Pet. App. a3; 12 TT 2337, 2340-44.

6. Similarly, it required several attempts for the prosecution to secure favorable DNA results from the business card. In August 2007, a forensic scientist at Human Identification Technologies, Inc. examined the business card for DNA. 7 TT 1275; 8 TT 1338, 1505-10. She determined there was a DNA mixture on the card belonging to at least two individuals. 8 TT 1512, 1516-17, 1522. In October 2007, the forensic scientist compared Mr. Pape's and Mr. Smith's DNA to the DNA found on the card and determined that Mr. Pape was excluded, but that Mr. Smith was a possible contributor to the DNA mixture. Pet. App. a3; 8 TT 1523-24, 1526.

7. In November 2009, the sheriff's department sent the business card to Cellmark Laboratories for analysis. 10 CT 2154. A partial male DNA profile was detected on the card, but the amount of forensic material present was insufficient for further testing. 10 CT 2154-55. In November 2014, the sheriff's department submitted the business card to Sorenson Laboratories for DNA analysis for the presence of STR profiles and Y-STR profiles, which detect only male DNA. 10 CT

2157. On the business card, no interpretation could be made as to the STR profile obtained. 10 CT 2157-58. As to the Y-STR profile, there was a DNA mixture of a major and minor male contributor, but the analysis was only suitable for exclusionary purposes. 10 CT 2157-58. As to the major profile, Mr. Pape was excluded, and no meaningful comparison could be made as to Mr. Smith or the minor contributor. 10 CT 2158.

8. In 2014, the owner of Human Identification Technologies, Inc., reviewed the DNA data at the request of the district attorney's office. 9 TT 1578, 1584, 1611. He determined there was a major and minor contributor on the business card. Pet. App. a3; 9 TT 1584. Based on his analysis, Mr. Smith was a possible contributor to the major DNA profile. Pet. App. a3; 9 TT 1591.

9. Mr. Pape agreed to interviews with law enforcement in September 2006. Pet. App. a4. Mr. Pape had dated Rebecca Friedli, for approximately a year, but he ended the relationship in January 2006, nine months before the crimes. *Id.* at a2. He last saw Rebecca Friedli after work on Saturday, the day before the crimes. Supp CT 42-43, 48. Rebecca Friedli had asked if she could stop by. Supp CT 42. She did so, and Mr. Pape and Mr. Smith spoke with her for about 10 minutes. Pet. App. a4; Supp CT 44-45.

10. On the day of the crimes, Mr. Pape left work about 6:30 p.m. and returned home. Pet. App. a4. Mr. Pape planned to attend church that evening, but learned that the last mass was over. *Id.* Mr. Smith and Mr. Pape then travelled to the home of Mr. Smith's father, where they remained for approximately one hour and then went to play paintball at the James Workman school. *Id.* They were there around 8:30 or 9:00 p.m. Afterward, they went to a gas station at Gerald Ford

and Date Palm streets to get gas and Chapstick for Mr. Pape's cousin. *Id.*; Supp CT 53. Mr. Smith then drove Mr. Pape home, where Mr. Pape spent time with his cousin. Pet. App. a4; Supp CT 54. Mr. Pape stated that he did not go to the Friedli house on Sunday. Supp CT 58, 64. During the morning of September 18, Mr. Pape spoke by telephone with a prosecution witness, Javier Garcia, from whom he learned that three burned bodies had been found, including a woman in a wheelbarrow. Pet. App. a4; Supp CT 64..

11. A year after the crimes, on October 2, 2007, search warrants were served on Mr. Pape's residence. Pet. App. a6; 9 TT 1729. Among the items found in his bedroom were a rifle, a shotgun, ammunition, spent shell casings from handguns – including a .40 caliber and a 10-millimeter casing – and rifle rounds, but no handguns. Pet. App. a6; 9 TT 1732-35, 1737, 1742. Also found were a Glock-brand holster, still in its packaging, which had been purchased in 2007, and a receipt, dated in 2007, for a pistol grip. Pet. App. a6; 9 TT 1735-37, 1741. A pair of Vans shoes was also found. Pet. App. a6; 9 TT 1737. On October 2, 2007, two 12-gauge shotguns were found in Mr. Smith's apartment. Pet. App. a6; 10 CT 2159. None of these items were linked to the crimes.

12. Over ten years after the crimes, on November 7, 2016, Mr. Pape and Mr. Smith were charged with three counts of murder. 6 CT 1221-22.

13. At trial, the prosecution relied upon the testimony of Javier Garcia whose romantic interests for Rebecca Friedli were not shared by her. Pet. App. a2. Mr. Garcia's testimony provided the foundation for the prosecution's case: that Mr. Pape was to see Rebecca Friedli on the night of her death. Mr. Garcia testified that a few days before September 17, 2006, Rebecca Friedli was at Mr. Garcia's house,

when she received a phone call, which she said was from Mr. Pape. Pet. App. a2-a3; 7 TT 1130-31, 1133. Mr. Garcia testified that it appeared that Mr. Pape and Rebecca Friedli were planning to take a hike together. Pet. App. a3. Notably, Mr. Garcia's initial statements to law enforcement omitted these "details" and he only later recalled them. *Id.*

14. Javier Garcia testified that he saw Rebecca Friedli on September 17, 2006. Pet. App. a2. Rebecca Friedli left for home at about 4:30 or 5:00 p.m. *Id.* Mr. Garcia spoke with Ms. Friedli several times by telephone on the evening of her death. *Id.* Mr. Garcia claimed that Ms. Friedli said she was getting ready for the hike and Mr. Pape was on his way. *Id.*; 7 TT 1143, 1145. Mr. Garcia testified that he did not speak with Rebecca Friedli after 6:40 p.m. Pet. App. a2.

15. The next morning, when Mr. Garcia was unable to reach Rebecca Friedli by phone, he drove to her house. Pet. App. a3. Mr. Garcia remained at the crime scene for an hour or two. 7 TT 1156. Mr. Garcia told a law enforcement officer at the scene that Ms. Friedli had plans to go hiking the night before with her ex-boyfriend Robert Pape and another friend, but Mr. Pape had canceled the hike. Pet. App. a3. Mr. Garcia testified that he spoke to Mr. Pape while traveling away from the crime scene, but did not mention the wheelbarrow to Mr. Pape. *Id.*

16. Sara Honaker, Mr. Pape's ex-wife, testified that she called Mr. Pape several times on September 17, 2006, but did not reach him. 12 TT 2286. When Mr. Pape and Ms. Honaker finally spoke later that evening, he said he was just getting home and was going to spend time with his cousin who lived across the street from him, and check on his mother at her house. 12 TT 2287-88. Nothing seemed different about Mr. Pape during their conversation or the next day. 12 TT

2306-07. When Mr. Pape learned of the homicides, he expressed sadness over what had happened to Rebecca Friedli. 12 TT 2314-15.

17. Ms. Honaker further testified that Mr. Pape was not violent with her or otherwise acted in a manner that caused her to be concerned for her safety; he did not "have it in him." 12 TT 2299. When she told him that she had been unfaithful during their marriage, he was hurt and sad and decided to seek a divorce, but he was not violent in any way. *Id*.

18. During recorded jail phone calls between Mr. Pape and Ms. Honaker in 2014, they talked about guns, and a Glock was mentioned, but she did not remember the substance of the calls. Pet. App. a5; 12 TT 2288-89. Mr. Pape had purchased several guns over the years, which he kept in a gun closet in their house. 12 TT 2289-90, 2308. During a phone call, he said, "The rest of them should be placed in the location where I had them sent," which Ms. Honaker believed he would have been talking either about his grandmother's or his aunt's house. 12 TT 2290, 2311. He never asked her to hide a gun from the police. Pet. App. a6.

19. In an effort to establish that Mr. Pape had access to a firearm at the time of the crimes, the prosecution presented the testimony of a work colleague who recalled going shooting with Mr. Pape and Mr. Smith in the summer of 2006. Pet. App. a6. Mr. Pape may have brought a handgun or a shotgun. 12 TT 2362-63 (guns changed over the years), 2373-35 (may have had a shotgun), 2376 (never informed police in the 2007 interview that he saw a "Glock"). *Contra* Pet. App. a6 ("Pape brought a Glock handgun.").

20. The prosecution also presented telephone and cellphone records. The lengthy delay in charging Mr. Pape, however, resulted in the loss of more precise

and accurate information about cellphone use. Pet. App. a5-a6; 9 TT 1628-30, 1674, 1777; 12 TT 1816-17. In addition, the type of cell phone coverage changed dramatically over the intervening ten years. Pet. App. a5-a6. Although the prosecution and the lower courts relied substantially on the telephone record data, even if one assumes that Mr. Pape and Mr. Smith possessed their cellphones and their phones were on, no information was presented during the critical time of the crimes. Pet. App. a5. From 7:27 p.m. to at least 9:55 p.m., Mr. Pape's and Mr. Smith's phones were either in an area without cell towers, or their phones were shut off, out of battery, or on airplane mode. *Id.*; 9 TT 1661, 1671-72.

21. The prosecution also presented the testimony that Jeremy Witt provided at the preliminary hearing.[4] At the preliminary hearing, Mr. Witt testified that he worked with Mr. Smith at Knott's Soak City about a year after the crimes. Pet. App. a6. At the end of September or the beginning of October 2007, Mr. Witt noticed that Mr. Smith was not attentive to the pool to which he was assigned, which was unusual. *Id.*; 11 TT 2092-94, 2108, 2137. When Mr. Witt questioned him, Mr. Smith allegedly stated, "Something went wrong and we torched the fucking place." Pet. App. a6. Mr. Witt also worked with Mr. Smith's roommate Lois Robbins, who told Mr. Witt that law enforcement searched the home for evidence linked to the crime and officers were looking for Mr. Smith's best friend, whose girlfriend was murdered. Pet. App. a7. A few weeks later, Mr. Witt talked to Mr. Smith at a party about weapons, and when Mr. Witt said something to the effect that you can serve in the military without necessarily killing, Mr. Smith said,

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[4] The trial court found Mr. Witt to be an unavailable witness after he invoked his Fifth Amendment right against self-incrimination. Pet. App. a6.

"You don't have to be in the military to have killed something." *Id.*; 11 TT 2100-01, 2155-57.

22. During the defense case, counsel presented substantial evidence to impeach Mr. Witt. First, the parties stipulated that, in 2001, Mr. Witt was convicted of felony impersonating a peace officer, which was unknown at the time of his preliminary hearing testimony. Pet. App. a7. Second, defense counsel disputed Mr. Witt's testimony that he resigned from his job in 2008 because he disliked the manager. *Id.* In fact, he was dismissed after threatening to kill the general manager with a hatchet. *Id.*; 13 TT 2617. Third, in 2016, Mr. Witt had two encounters with law enforcement and a neighbor for possessing and later brandishing a firearm. *Id.*; 13 TT 2625-29, 14 TT 2655-57.

23. The primary defense that the defendants sought to present, and were precluded from doing so, was that Mr. Garcia and his cousin Jacob Santiago were responsible for the killings. Pet. App. a9. The evidence that the defendants sought to present included testimony from nine witnesses,[5] including the following:

A. Mr. Garcia was "madly in love with and obsessed" with Rebecca Friedli, but she rejected his advances. Pet. App. a10; 9 CT 1934. Even a "good friend" described Mr. Garcia as the victim's "stalker," was "completely obsessed" with her, and his behavior made Rebecca Friedli uncomfortable. Pet. App. a10; 9 CT 1935. Rebecca Friedli talked about wanting to get

[5] The witnesses that the defense sought to present included the testimony of eight witnesses who had personal knowledge of Mr. Garcia's actions and statements and the examination of Mr. Garcia (as a prosecution witness) about his and Jacob Santiago's whereabouts on the night of the crime and incriminating actions afterwards. *See, e.g.*, Pet. App. a9-a12; 1 TT 238-39, 241, 256; 2nd Supp CT 36.

away from Mr. Garcia at times because he would not leave her alone. Pet. App. a10; 9 CT 1934.

B. Mr. Garcia was extremely paranoid about Rebecca Friedli and her actions. For example, when Mr. Garcia called the victim and she did not answer, he drove to her house to check on her, behavior that Mr. Garcia's good friend described as "bizarre." 9 CT 1935.

C. Mr. Garcia's cousin, Jacob Santiago, had dated Rebecca Friedli for a few months and the relationship ended a day or two before the crimes, facts which Mr. Santiago concealed during his interviews with law enforcement. Pet. App. a9-a10; 2nd Supp CT 25. Although Mr. Santiago stated that it was not a "big breakup," Pet. App. a10, the defense's proffer sought to prove that he was "heartbroken." 1 TT 240.

D. Mr. Santiago and the victim had been arguing for the week before her death. 9 CT 1935.

E. At one point, when Rebecca Friedli and Mr. Pape resumed their relationship, Mr. Garcia was visibly upset. 9 CT 1934. Similarly, Mr. Garcia was unhappy when the victim started dating Mr. Santiago. 2nd Supp CT 36.

F. When interviewed, Mr. Santiago stated he was home the entire day of the crimes and had no contact with anyone. Mr. Garcia, however, stated that he and Mr. Santiago "were driving around in the area of" the crime "at or near the time that this offense took place." 1 TT 240. Another witness would have confirmed that Mr. Santiago and Mr. Garcia were together at the time of the crime. 1 TT 244.

G. Mr. Santiago stated that Mr. Garcia was supposed to be with the victim on the night of the fire, but she told him not to come up. Mr. Santiago repeatedly said that the investigators needed to talk to Mr. Garcia, as Mr. Garcia knew what had happened and was up there with the victim "'right until she passed.'" 2nd Supp CT 27.

H. According to another good friend of Mr. Garcia's, on the night *before* the fire, Mr. Garcia said that Mr. Pape was supposed to see the victim, but Mr. Pape had decided not to go. Mr. Garcia wanted to see Ms. Friedli that night, but he said she told him not to come because she did not want anyone up there for the night. 2nd Supp CT 36; 1 TT 243. This account was confirmed by Mr. Santiago who said that, after the homicides, Mr. Garcia told him that there was to be a hike, but it had been canceled, and the victim had told Mr. Garcia not to come to her house even *after* Mr. Pape had canceled. 2nd Supp CT 29. These accounts confirm Mr. Pape's statements to law enforcement that he canceled the appointment with Ms. Friedli and did not travel to her house on the day of the crime.

I. Although telephone records demonstrate that Mr. Garcia repeatedly called – "30 or 40 times a day" – Rebecca Friedli in the days leading up to the crimes, Mr. Garcia did not telephone her from 6:40 p.m. until 11:00 p.m. on the night that she was killed, which supported the defense theory that Mr. Garcia was at the crime scene. 1 TT 243, 255.

J. After the crimes, Mr. Garcia repeatedly went to the crime scene, sometimes with friends, took photos of the property and showed off a photo on his phone of the burned wheelbarrow. 9 CT 1934. Mr. Garcia

also said he thought the victim had tried to run and had been caught and brought back in the wheelbarrow. *Id*.

K. According to another witness, who lived near the Friedli residence, Mr. Garcia had learned about the details of the crime before arriving at the scene, contrary to his statements to law enforcement. 2nd Supp CT 33.

L. Both Mr. Garcia and Mr. Santiago had access to a shotgun at the time of the homicides. 2nd Supp CT 35, 39, 40; 1 TT 240-41.

M. Another of Mr. Garcia's good friends stated that he believed that he was feigning sadness over the victim's death. Pet. App. a10.

24. At a hearing on the prosecution's motion to exclude the third-party culpability evidence, the trial court stated that, in accordance with *People v. Hall*, 41 Cal. 3rd 826, 833 (1986), the admissibility of the third-party culpability evidence must be viewed in light of the evidence linking defendants to the crime. 1 TT 261 ("The question is whether or not that evidence [implicating Mr. Garcia and Mr. Santiago] rises to the level required under *Hall*, which talks about direct or circumstantial evidence linking a third person to the actual perpetration of the crime. ... *So we take that evidence against the evidence that we know will be proffered in this case*.") (emphasis added). After recounting the prosecution's evidence against the defendants, the court concluded:

> And given the state of the evidence with respect to that which [the] People are seeking to introduce against the defendants and considering separately or together the evidence that has been introduced by the defense as it relates to Mr. Garcia and Mr. Santiago, [this] Court does not find that the standard has been met as to Mr. Garcia and Mr. Santiago within that *Hall* case, which requires some sort of direct or circumstantial evidence that links that third person to the actual perpetration of the crime. …

> So the request to introduce third-party culpability and indicating Mr. Garcia and/or Mr. Santiago were a direct perpetrator or could have been a direct perpetrator would be denied.

1 TT 261, 263. The court reaffirmed its ruling after counsel for both defendants reraised the federal constitutional grounds guaranteeing the right "to present to the jury the evidence of third-party culpability," with the court stating that the "law is consistent." *Id*.

25. In addition to precluding Mr. Pape and Mr. Smith from presenting the third-party defense, the trial court excluded cross-examination of Mr. Garcia when he testified for the prosecution. The court prohibited counsel from inquiring about whether Mr. Garcia or Mr. Santiago committed the murders, they were driving in the area or any other questions about their whereabouts at the time of the crime, or whether their cellphones were on or off at the time of the crime. 2 TT 303-06. The court further precluded evidence of Mr. Garcia's statements to others regarding the nature of the crimes. 2 TT 306-07. When counsel asked if he could cross examine Mr. Garcia regarding his statements to show Mr. Garcia's bias or interest in the outcome, the court said Mr. Garcia was just speculating as to how the murders occurred, which was not relevant to his testimony. 2 TT 307-08.

26. After deliberating over the course of ten days,[6] the jury found Mr. Pape guilty of two counts of first-degree murder and one count of second-degree murder. Pet. App. a7; 10 CT 2377-79. The jury also found the multiple murder special circumstance allegation to be true. 10 CT 2380. The trial court imposed three sentences of life in prison without the possibility of parole. On appeal, the life-

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[6] 10 CT 2227-28, 2231, 2237, 2242, 2244, -2246, 2248, 2251, 2257, 2373.

without-possibility-of-parole sentence for the second-degree murder was reduced to fifteen years to life term. Pet. App. a26.

REASONS FOR GRANTING THE WRIT

The Court of Appeal's Refusal to Apply this Court's Well-Established Jurisprudence Regarding the Presentation of Third-Party Culpability Evidence Warrants this Court's Review.

In reviewing the criminal judgment, the court of appeal considered the trial court's ruling as one solely implicating state law; indeed, the only citation in the opinion to any federal decision was to *Chapman v. California*, 386 U.S. 18 (1967), which the court declined to apply. Pet. App. a12. The failure to consider this Court's well-established jurisprudence is reflected at every level of its analysis.

First, the appellate court endorsed the trial court's consideration of the strength of the prosecution's case in determining the admissibility of the defense evidence, in direct contravention of this Court's holding in *Holmes*. Pet. App. a11 (quoting *People v. Samaniego*, 172 Cal. App. 4th 1148, 1175 (2009)). Second, as did the trial court, the court of appeal conditioned the admissibility of a third-party culpability defense upon a showing of "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." *Id.* (quoting *People v. Hall*, 41 Cal.3d 826, 833 (1986)). Using a limited review standard, the appellate court concluded that the trial court's ruling did not qualify as an abuse of discretion. In so doing, the court accepted the prosecution's version of the facts – all of which the defendants disputed – and determined that Mr. Pape had not proved that the third parties actually committed the crimes. *Id.* at a12 ("All of that evidence would have had minimal probative value, in light of the evidence exculpating [Mr. Garcia]."). Thus, the court concluded that the proffered defense would "have required a minitrial." *Id.* at a11. Finally, the court rejected application of this Court's prejudice standard enunciated in *Chapman* because the exclusion of a defense did

not rise to a Sixth Amendment violation and reviewed any error under the state prejudice standard that shifts the prejudice burden to the defendant. *Id.* at 12 (applying *People v. Watson*, 46 Cal. 2d 818, 836 (1956)). These rulings exacerbate the conflicting approaches taken by lower courts and are worthy of this Court's review.

A. Certiorari is Warranted to Correct the Lower Courts' Failure to Acknowledge, Let Alone Correctly Apply, this Court's Express Holding in *Holmes v. South Carolina*.

At the core of the Sixth Amendment is the guarantee that a defendant has "the right to present the defendant's version of the facts as well as the prosecution's to the jury, so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19. (1967). Whether this right emanates from the due process, compulsory process, or confrontation clauses, the purpose of protecting the right remains the same: a defendant has the right to subject the prosecution's case to meaningful testing. *Crane*, 476 U.S. at 690-91. This principle is violated when the state imposes an evidentiary bar that is either arbitrary or disproportionate to the purpose of the rule. *Michigan v. Lucas*, 500 U.S. 145, 151 (1991). Using these principles, this Court has invalidated state evidentiary rules that made accomplices incompetent to testify on behalf of the defense, *Washington v. Texas*, 388 U.S. at 23, employed the "voucher" rule to bar a third party's confession, *Chambers v. Mississippi*, 410 U.S. 284, 296-98 (1973), and categorically barred a defendant's testimony because the defendant had been previously subjected to hypnosis, *Rock v. Arkansas*, 483 U.S. at 61-62. Even when the state advances a legitimate interest in its exclusionary rules, those rules must yield when the interests to be served are equally or less compelling than the defendant's interests. For example, in *Davis v.*

Alaska, 415 U.S. 308, (1974), the rule barring cross-examination based on a witness' juvenile record did not lack rationality as a general statement of state interest in protecting the confidentiality of juvenile proceedings. *Id*. at 319. It did, however, run afoul of the Constitution when it conflicts with a defendant's right to cross examine a state's witness as part of meaningfully testing of the state's case. *Id*. at 316-17, 319.

This Court considered the interaction between state evidentiary rules and the right to present third-party guilt evidence in *Holmes v. South Carolina*, 547 U.S. 319. There, this Court reiterated that states must balance evidentiary admissibility rules against the constitutional guarantee of a criminal defendant's meaningful opportunity to present a complete defense. *Id*. at 326. And this balance was impermissibly tilted toward the prosecution when the evidentiary rule excluded the introduction of third-party guilt evidence because the prosecution's case strongly supported a guilty verdict. *Id*. at 330-31.

Mr. Holmes had been convicted of the rape, robbery, and murder of an eighty-six year old woman, based on substantial forensic evidence linking him to the crimes. *Id*. at 321-22. In addition to contending that the forensic evidence may have been contaminated, Mr. Holmes sought to present several witnesses to suggest a third party perpetrated the crime. *Id*. at 322-23. The trial court excluded the exculpatory evidence, and the defendant was convicted of murder and sentenced to death. *Id*. at 323, 321. The South Carolina Supreme Court affirmed the conviction, holding that "'here there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's

alleged guilt does not raise a reasonable inference as to the appellant's own innocence." *Id.* at 324 (citations omitted).

In reviewing the South Carolina Supreme Court's decision, this Court began by noting that "[s]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Id.* (citations omitted). After discussing the defendant's right to be afforded a meaningful opportunity to present a complete defense, this Court noted that this right is abridged by evidence rules that "'infringe upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve.'" *Id.* (quoting *Scheffer*, 523 U.S. at 308 (quoting *Rock*, 483 U.S. at 56, 58)).

In finding the South Carolina rule arbitrary, this Court observed that rather than focusing "on the probative value or the potential adverse effects of admitting" the exculpatory evidence, the rule improperly focused on "the strength of the prosecution's case." *Id.* at 329. The Court further noted that, if the prosecution's case was sufficiently strong, exculpatory evidence would always be excluded, even if the evidence, when "viewed independently, would have great probative value" and would not pose any undue risk of prejudice, confusion of the issues, or harassment. *Id.* Finally, the Court concluded that just "because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. *Id.* at 330 (emphasis in original).

As in *Holmes*, the trial court and the court of appeal here credited – and importantly, relied upon their perception of strength of – the prosecution's case in determining whether the jury should hear, let alone consider, the third-party

defense. As the trial court frankly acknowledged in granting the prosecution's motion to exclude the defense, under California law, the court "has to consider the evidence which the People have proffered with respect to both Mr. Smith and Mr. Pape." 1 TT 258, *see also* 1 TT 262 ("So the Court does have to consider that direct and/or circumstantial evidence that links both Mr. Pape and Mr. Smith to the incident.").[7] The court of appeal endorsed the trial court's perception and consideration of the prosecution's case in determining whether a defendant may present a defense, and proceeded to insulate the trial court's decision by reviewing it under an abuse of discretion standard. Pet. App. a11. The court of appeal emphasized that "strength of the prosecution's case" is always relevant to a determination of whether a defendant will be permitted to present third-party culpability evidence. Pet. App. a11 ("'as a practical matter, it is unclear how one can assess whether third party culpability evidence can raise a reasonable doubt and the potential for prejudice, delay and confusion without considering the strength of the prosecution's case'") (quoting *Samaniego*, 172 Cal. App. at 1175); *see also id*. (opining that a defendant would need to present "'stronger third party culpability evidence to raise a doubt to an overwhelming prosecution case than to a weak one'") (quoting *Samaniego*, 172 Cal. App. at 1175).

The rule applied in *Holmes* and in this case are indistinguishable: in both cases, the state courts refused to admit relevant and probative exculpatory evidence

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[7] The trial court acknowledged that the critical testimony concerning whether Mr. Pape was planning on going on a hike with one of the victims came solely from Mr. Garcia, the very person subject to the third-party culpability defense. 1 TT 261. Nonetheless, the court concluded that "what is of significance, certainly, to the Court is the fact that we know [from Mr. Garcia] there were plans for Mr. Pape to go hiking with" one of the victims. *Id*.

because the courts believed that the state's case was substantial. That this Court's decision in *Holmes*, issued fifteen years ago, continues to be ignored by California courts warrants this Court's plenary review.

B. Certiorari is Warranted to Address California's Unconstitutionally High Standard for Admissibility of Third-Party Culpability Evidence.

As the trial court and the court of appeal recognized, for the past thirty-five years, the California Supreme Court has conditioned the admissibility of third-party culpability evidence on a showing that evidence establishes a direct connection between the third party and "the actual perpetration of the crime." *Hall*, 41 Cal. 3rd 833. As the court of appeal applied this standard, a defendant is not entitled to present evidence of third-party culpability unless the defendant disproves "the evidence exculpating" the third party. Pet. App. a12. Certiorari review is necessary to determine whether this requirement, which is used in many other jurisdictions,[8] conflicts with this Court jurisprudence.

As noted above, the right to present third-party culpability evidence implicates substantial due process concerns. *See, e.g.*, *Chambers*, 410 U.S. at 302 ("[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense"). This Court has recognized that a state may exclude such evidence in limited circumstances, such as when the evidence "does not sufficiently connect the other person to the crime, as, for example when the evidence is speculative or remote[.]" *Holmes*, 547 U.S. at 327 (internal citation and quotation

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[8] David S. Schwartz & Chelsey B. Metcalf, *supra*, 2016 Wis. L. Rev. at App. (collecting divergent approaches taken by states and federal circuit courts of appeal).

marks omitted). Rules excluding exculpatory evidence that are arbitrary or do not rationally serve the legitimate ends it purported to serve, however, are unconstitutional. *Id*. at 331.

The rule in *Hall*, particularly as applied by the court of appeal here, imposes a much higher burden than that endorsed in *Holmes* and serves no legitimate purpose. *Hall*'s requirement that the defendant directly connect a specific third person to the commission of the crime before third-party culpability evidence may be admitted prevents the defendant from presenting all the facts necessary to present a meaningful defense. *Michigan v. Lucas*, 500 U.S. at 149 (recognizing that a rule that "operates to prevent a criminal defendant from presenting relevant evidence" diminishes the constitutional right to meaningfully present a complete defense); 1 John Henry Wigmore, Evidence In Trials At Common Law § 14.1, at 714 (Peter Tillers rev. ed., Little, Brown and Co. 1983) ("[A]ll evidence with any probative value, however slight, [must] be admitted unless some specific exclusionary rule provides otherwise."). Similar to South Carolina's practice in *Holmes*, the conditioning of the admissibility of third-party culpability evidence in accordance with *Hall* improperly focuses on the actual guilt of a specific third party, rather than focusing on whether the evidence tends to raise a reasonable doubt of the defendant's guilt. 547 U.S. at 320.

More fundamentally, the *Hall* requirement runs afoul with the constitutional guarantee that the state must prove each element of a crime beyond a reasonable doubt. *See, e.g.*, *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (holding "[t]he beyond a reasonable doubt standard is a requirement of due process"); *In re Winship*, 397 U.S. 358, 362-63 (1970) ("it has long been assumed that proof of a criminal charge

beyond a reasonable doubt is constitutionally required"). This guarantee requires the government to "prove every ingredient of an offense beyond a reasonable doubt, and . . . it may not shift the burden of proof to the defendant," *Patterson v. New York*, 432 U.S. 197, 215 (1977), any "fact necessary to constitute the crime with which [the defendant] is charged," *Winship*, 397 U.S. at 364. Where, as in this case, the question of the identity of the perpetrators is the central question, requiring the defendant to prove the guilt of a third party before being permitted to present the defense, impermissibly reduces the government's burden.

The *Hall* standard, as applied by the court of appeal, also runs contrary to core values in the Constitution by replacing a right to trial by jury with a judge's opinion of whether a third party could have committed the crime. "A fundamental premise of our criminal trial system 'is [that] the jury is the lie detector.'" *Scheffer*, 523 U.S. at 313 (1998) (quoting *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973)); *see also Reeves v. Sanderson Plumbing Prod. Corp.*, 530 U.S. 133, 150 (2000) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). As ultimate arbitrators on the issue of facts, juries also serve as a vital protection against erroneous convictions. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Finally, replacing the jury's factual findings on a material issue as critical as the identity of the perpetrator with a judge's concept of what constitutes a sufficient connection in the case violates the notion that juries function to enable common citizens to participate in the administration of justice. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) ("the reliance on the "reasonable doubt" standard

among common-law jurisdictions " 'reflect[s] a profound judgment about the way in which law should be enforced and justice administered'") (quoting *Winship*, 397 U.S. at 361-62).

The violation of these constitutional principles is amply demonstrated by the application of the *Hall* standard by the court of appeal below. The only "evidence" exculpatory to Mr. Garcia the court of appeal cited is the cell phone tower study the prosecution presented that suggested that Mr. Garcia's cellphone "pinged" cell towers in valley floor locations. Pet. App. a12. Of course, the defense disputed the accuracy and reliability of the prosecution's evidence, given the changes in the technology in the decade between the crime and the study's commission as well as the loss of critical data that would have more accurately located the connecting cell phones. *See, e.g.*, 1 TT 40-41 (sector data destroyed one year after the crime); 2 TT 277-78 (without sector data, cell tower information does not permit direction of cell phone connection); *see generally* Pet. App. a13-a14 (describing defense expert's challenge to prosecution study). Critically, accepting the "evidence" as exculpatory required the court of appeal to (1) determine the precise time of death of the victims, when the evidence presented was when *the fires were started*; (2) assume that only Mr. Garcia would have set the fires, as opposed to a confederate, after Mr. Garcia had made his escape; and (3) reject the possibility that Mr. Garcia did not take his cellphone to the crime scene, but rather left it in the location where it "pinged" valley floor cell towers. The constitutional flaw with the court of appeal's application of *Hall* in this manner is apparent: the court of appeal has vitiated the

right to trial by jury by usurping the jury's role in resolving these critical factual issues.[9]

California's insistence of a heightened burden on defendants in order to present a third-party defense reflects the clear split in authorities of the application of the Constitution to such defenses. Some states have required defendants demonstrate various levels of certainty that the third party committed the crime. *See, e.g.*, *King v. State*, 89 So. 3d 209, 224 (Fla. 2012) ("'[B]efore evidence of the guilt of another may be deemed relevant and thereby admissible, the evidence must *clearly* link that other person to the commission of the crime.'") (quoting *Johnson v. United States*, 552 A.2d 513 (D.C.1989) (emphasis in original); *Rogers v. State*, 280 P.3d 582, 586 (Alaska Ct. App. 2012) ("'[E]vidence of the third party's guilt is admissible only if the defense can produce evidence that 'tend[s] to directly connect such other person with the actual commission of the crime charged.'") (quoting *Smithart v. State*, 988 P.2d 583, 586 (Alaska 1999)); *State v. Watts*, 584 S.E.2d 740, 745 (N.C. 2003) ("'[A]dmission of the evidence must do more than create mere conjecture of another's guilt in order to be relevant. Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt.'") (quoting *State v. Burr*, 461 S.E.2d 602, 618 (1995)); *State v. Easley*, 662 S.W.2d 248, 252 (Mo. 1983) (defendant required to show "evidence directly linking" third party to crime).

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[9] Because Mr. Pape was deprived of the right to present the defense, the prosecution was never called upon to prove that (1) the victims died at the same time that the fires were set; (2) Mr. Garcia's co-perpetrator could not have set the fires after Mr. Garcia left the scene; or (3) Mr. Garcia possessed his cellphone at all relevant times.

Other jurisdictions have rejected similar burdens on the defendant's right to present a defense. *See, e.g.*, *Mraz v. State*, 326 P.3d 931, 934 n.2 (Wyo. 2014) ("Evidence that someone else may have committed the crime charged is perfectly admissible as long as it is relevant, not unfairly prejudicial, not hearsay and satisfies the other rules of evidence."); *State v. McCullar*, 335 P.3d 900, 912 (Utah Ct. App. 2014) (defendant need only make a plausible showing); *State v. Meister*, 220 P.3d 1055 (Idaho 2009) (applying the normal standard of relevance after Idaho Rules of Evidence were adopted in 1985); *People v. Primo*, 753 N.E.2d 164 (N.Y. 2001) (overturning the "clear link" test that New York had previously followed.

Given the differences in the various approaches taken by the states, certiorari is warranted to resolve the appropriate burden a criminal defendant must shoulder in order to be entitled to present such a defense.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

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