No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ERNEST DEWAYNE JONES,

Petitioner,

vs.

RONALD BROOMFIELD,
Warden of California State Prison at San Quentin,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Nisha K. Shah
Counsel of Record
Cliona Plunkett
Anuthara Hegoda
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
E-mail: docketing@hcrc.ca.gov

Attorneys for Petitioner
Ernest DeWayne Jones

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a criminal defendant's constitutional right to testify, as articulated in *Rock v. Arkansas*, 483 U.S. 44 (1987), is violated when he is prevented from testifying to facts within his personal knowledge that go to an element of the offense unless he also presents accompanying expert testimony.

2. Whether and to what extent a heightened constitutional analysis is required when an evidentiary ruling restricts a criminal defendant's testimony and also imposes on his right to present other witnesses as part of a complete defense.

LIST OF RELATED PROCEEDINGS

United States Supreme Court

Jones v. California, No. 03-5701, certiorari denied on October 14, 2003

United States Court of Appeals for the Ninth Circuit

Jones v. Davis, No. 18-99003, judgment entered on August 12, 2021 and rehearing denied on November 29, 2021

Jones v. Davis, No. 14-56373, judgment entered on November 12, 2015 and rehearing denied on February 8, 2016

United States District Court for the Central District of California

Jones v. Davis, No. 2:09-cv-02158-CJC, judgments entered on February 2, 2018 and July 25, 2014

California Supreme Court

In re Jones, No. S110791, petition denied on March 11, 2009

In re Jones, No. S159235, petition denied on March 11, 2009

In re Jones, No. S180926, petition withdrawn

People v. Jones, No. S046117, judgment affirmed on March 17, 2003

Los Angeles County Superior Court

In re Jones, No. BA063825, petition filed on March 17, 2022

People v. Jones, No. BA063825, judgment entered on April 7, 1995

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ernest DeWayne Jones respectfully petitions this Court for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals reversing the district court's grant of habeas relief in this death penalty case.

OPINIONS BELOW

The Ninth Circuit's opinion reversing the district court's grant of relief is reported at 8 F.4th 1027 and attached as Appendix A (App. 1a-26a). The Ninth Circuit's order denying rehearing and rehearing en banc is unreported and attached as Appendix D (App. 90a). The district court's opinion is unpublished, but reported at 2018 WL 11350587 and attached as Appendix B (App. 27a-44a). The California Supreme Court's opinion affirming Mr. Jones's convictions and sentence on direct appeal is reported at 64 P.3d 762 and attached as Appendix C (App. 45a-89a).

JURISDICTION

The Ninth Circuit issued its opinion reversing the district court's grant of habeas relief on August 12, 2021. The Ninth Circuit denied Mr. Jones's timely petition for rehearing and rehearing en banc on November 29, 2021. On February 4, 2022, Justice Kagan extended the time for filing a petition for a writ of certiorari to April 28, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides, in relevant part, "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.

The Fourteenth Amendment provides, in relevant part, "No State shall . . . 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." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Facing the possibility of execution, Ernest Jones took the stand during the guilt phase of his capital murder trial to tell the jury what was going on in his mind at the time he encountered his victim, Julia Miller. He sought to defend himself against the State's allegations that during the course of the killing he intended to rape, rob, and burglarize Ms. Miller – allegations that if found true, made him eligible for the death penalty. Mr. Jones testified about his state of mind when he went to and entered Ms. Miller's home, and when he took her car and rifle after causing her death. Mr. Jones also testified that he flashed back to his childhood – to a time when he saw his mother in a room with a man who was not his father – before he blacked out and woke up curled in a ball next to Ms. Miller's body and realized what he had done. He described

hearing voices, feeling paranoid, and wanting to die by suicide. Mr. Jones then attempted to provide context for his actions and describe his mental state at the time of the offense by telling the jury more about the flashback he experienced as well as his history of mental health symptoms, including prior instances of hearing voices and blacking out. But the trial court precluded Mr. Jones from testifying to facts crucial to his state of mind. It ruled that Mr. Jones could not testify to these facts without also presenting expert testimony, despite no state law requirement to that effect. The trial court's rulings left Mr. Jones unable to competently defend against a critical element of the rape special circumstance and the rape theory of felony-murder: his specific intent to rape. At the conclusion of the guilt phase, the jury found the burglary and robbery special circumstances not true, and found the rape special circumstance true. After struggling with the definition of felony-murder and the question of Mr. Jones's specific intent to commit rape, the jury also found Mr. Jones guilty of first-degree murder.

The district court held that the trial court unconstitutionally curtailed Mr. Jones's right to testify under *Rock v. Arkansas*, 483 U.S. 44 (1987), and *Washington v. Texas*, 388 U.S. 14 (1967). The district court explained:

> Whether accused falsely or rightly, a person brought to trial by the State has a right to tell what happened, in his or her mind, with his or her voice. Jurors often want to hear it, and defendants often want to tell it. Petitioner Ernest Jones sought to tell what was going on in his mind at the time he raped and killed his victim. He was denied that right. No matter the gravity of his crimes, no matter the reprehensibility of his actions, and no matter the unimaginable loss and suffering he caused his victim and her family, what he had to say, and giving him the chance to say it, were important, especially since the State was seeking to execute him.

App. 27a.

The Ninth Circuit reversed the district court's judgment, finding that the trial court's rulings were not an arbitrary or disproportionate restriction on Mr. Jones's right to testify. The Ninth Circuit's analysis conflicts with *Rock* and raises constitutional questions that warrant this Court's review.

I. Mr. Jones's Capital Trial

On the evening of August 24, 1992, Mr. Jones went to the home of his girlfriend's mother, Julia Miller, who was found dead shortly thereafter. App. 4a. The Los Angeles County District Attorney subsequently charged Mr. Jones with first-degree murder, first-degree residential burglary, forcible rape, and first-degree residential robbery. SER at 468-72.[1] As to all counts, the prosecution alleged personal use of a weapon. *Id.* The prosecution also alleged three special circumstances: (1) the murder occurred in the commission of a burglary; (2) the murder occurred in the commission of a rape; and (3) the murder occurred in the commission of a robbery. SER at 468-69. The trial court instructed the jury to decide each special circumstance separately; to prove each special circumstance, the State had to prove Mr. Jones possessed the specific intent to commit the associated felony. *See* 26 RT 3859-61. If the jury found Mr. Jones guilty of first-degree murder and any one of the three special circumstances true, they would then decide whether Mr.

[1] "ER" and "SER" refer to the excerpts of record in the Ninth Circuit. "RT" refers to the Reporter's Transcript of the trial.

Jones should be sentenced to life without the possibility of parole or death. *See* Cal. Penal Code § 190.2(a)(17)(C).

During pre-trial proceedings, defense counsel informed the court that Mr. Jones's mental condition might be an issue in the guilt phase, though Mr. Jones was not entering a plea of not guilty by reason of insanity. SER at 466.

A. Relevant guilt-phase evidence

1. The State's case

As part of its guilt-phase presentation of evidence, the State presented testimony to attempt to prove that Mr. Jones had entered Ms. Miller's home with felonious intent and had taken her jewelry and her car by force or fear. App. 46a-50a. This included testimony that in the early hours of August 25, 1992, Mr. Jones's girlfriend, Pam Miller,[2] learned of her mother's death and called her friend, Shamaine Love, who lived near Pam's parents' house. App. 4a. Ms. Love told Pam that Mr. Jones had gone to Ms. Love's house earlier that evening to exchange three pieces of pearl jewelry and a gold chain for cocaine and marijuana. App. 4a, 46a. Pam identified the jewelry as her mother's and told police she believed Mr. Jones was responsible for her mother's death. App. 4a-5a. The State also presented testimony that Ms. Miller's arms and ankles had been tied with a telephone cord, purse strap, and nightgown, and that she had been gagged with two rags. App. 4a, 46a.

[2] For clarity, and as the Ninth Circuit does in the opinion below, Mr. Jones refers to Julia Miller by her last name and Pam Miller by her first name. *See* App. 4a n.2.

Regarding Ms. Miller's car, the State presented evidence that after Pam told police she believed Mr. Jones was responsible for the crime, police staked out Ms. Miller's station wagon, which had been parked near the apartment Mr. Jones shared with Pam. App. 5a. After observing Mr. Jones getting into the car, police engaged in a car chase with him. *Id.* When the pursuit ended, police ordered Mr. Jones out of the car. *Id.* Without exiting the car, Mr. Jones placed a rifle to his chest and shot himself. *Id.* Law enforcement then arrested Mr. Jones. He was hospitalized for his gunshot wound. *Id.*

The State's case also included evidence that when Ms. Miller's body was found, she was naked from the waist down and had suffered multiple stab wounds, including a fatal wound to her chest. App. 4a. The State presented DNA evidence that linked semen found in Ms. Miller's body to Mr. Jones. *Id.* The State also presented testimony about a similar past crime – when Mr. Jones assaulted a previous girlfriend's mother, Doretha Harris, in 1985 – "[t]o help prove Jones's intent" to rape Ms. Miller, a necessary element of the rape special circumstance and the State's felony-murder theory of first-degree murder. App. 6a; *see also* App. 49a-50a. And, during the prosecutor's cross-examination of Mr. Jones, he asked Mr. Jones whether he "raped Mrs. Miller, just as [he] raped Mrs. Harris." SER at 380.

2. The defense case

Mr. Jones took the stand in his own defense. SER at 158-464. He admitted stabbing and killing Ms. Miller, and concluded that he "had to be" the person who had sexual intercourse with her, despite his lack of memory of doing so. SER at 430.

Mr. Jones testified about his state of mind when going to and entering Ms. Miller's home, how he came to possess some of her jewelry, and his state of mind when taking her car and rifle. App. 6a-8a, 50a-52a.

Mr. Jones began to testify about his state of mind when he stabbed Ms. Miller. He described being involved in an altercation with Ms. Miller during which he flashed back to his childhood, to a time when his mother was in a room with a man who was not his father. App. 7a; SER at 429. He told the jury that he "slipped back into his childhood," and that he recalled the first "few stabs" before blacking out. App. 7a; SER at 429-30. The next thing he remembered was waking up next to Ms. Miller, curled in a ball crying. App. 7a; SER at 429. After seeing what he had done, he heard voices, experienced paranoia, and wanted to die by suicide. App. 7a; SER at 429-39.

To contextualize his actions at the time of the offense, Mr. Jones attempted to elaborate on his flashback to his childhood as well as his history of mental health symptoms, which included prior instances of hearing voices and blacking out. App. 8a-11a. Despite defense counsel's multiple proffers requesting that Mr. Jones be permitted to testify to facts within his personal knowledge that went directly to the issue of his specific intent, the trial court ruled that such testimony was irrelevant and inadmissible without the accompanying testimony of an expert.

a. The court's first ruling restricting Mr. Jones's testimony

During direct examination, after Mr. Jones testified to hearing voices, experiencing paranoia, and wanting to die by suicide upon waking up next to Ms. Miller's body, defense counsel asked him about his history of mental health symptoms and lack of psychiatric treatment. ER at 105-21. The prosecutor objected on grounds

of relevance and foundation, and argued that such testimony would only be admissible through a psychiatrist. ER at 105-21, 107, 113. Defense counsel argued that he was trying to show that Mr. Jones had psychiatric problems with no treatment, and that expert testimony was not required unless he was presenting a diagnosis. ER at 106. The prosecutor argued that any testimony from Mr. Jones about whether he received psychiatric care was irrelevant without expert testimony that Mr. Jones had been diagnosed with a psychiatric ailment. ER at 107. The trial court told defense counsel, "based on [Mr. Jones's] testimony of hearing voices and what have you, I will permit you to ask him if he got any psychiatric counseling or assistance." ER at 107-08.

Defense counsel informed the court that he intended to ask Mr. Jones "some additional questions about his background, his problems in school, his family problems, the past times when he heard voices, and . . . whether he got any psychiatric treatment in the state prison." ER at 109-11. Defense counsel also wanted to ask Mr. Jones if he had been receiving psychiatric medication in county jail while awaiting his capital trial, because it was relevant to showing the jury that jail staff believed that Mr. Jones needed the medication and that Mr. Jones's demeanor while testifying was potentially impacted by the medication he was taking. ER at 112.

The prosecutor argued that testimony about psychiatric treatment would only be relevant if there was evidence of psychiatric problems prior to the absence of treatment, and that the proffered testimony about Mr. Jones's "history of hearing voices, of family history and things of that nature," was inadmissible without expert testimony to explain its relevance. ER at 113. Defense counsel agreed that expert

testimony would be required for a diagnosis, and explained he would not be asking Mr. Jones to testify about a diagnosis but rather "the symptoms that he felt . . . when these incidents were going on," about which Mr. Jones had personal knowledge. ER at 115. The prosecutor restated his objection to the proffered testimony about "family history, . . . past voices, . . . what went on two years at county jail," as irrelevant without accompanying expert testimony. ER at 115-16.

The trial court ruled that Mr. Jones could testify that he was currently taking medication, but "somebody from the jail" or "a doctor" needed to testify as to the purpose and effects of the medication. ER at 116. The court sustained the prosecution's objection to the proffered testimony about "what happened in the past with [Mr. Jones's] childhood and whether or not he was receiving psychiatric counseling or medication while he was confined to the state prison," ruling that expert testimony would need to accompany Mr. Jones's testimony in order for him to testify to those details. ER at 116. The court also ruled that Mr. Jones could testify about taking medication or the absence of psychiatric counseling in the three months prior to trial, but testimony going beyond three months needed to be accompanied by expert testimony. ER at 116. The court then ruled that Mr. Jones could testify that he was currently taking medication, jail records could be admitted to show what the medication was, and an expert would need to testify as to its effects. ER at 124-25.

b. The court's second ruling restricting Mr. Jones's testimony

Defense counsel raised the issue a second time when he told the court he wanted to elicit testimony from Mr. Jones about "certain areas of [his] background" because it was "very important." ER at 128. He explained that there was a "pattern

of behavior from childhood through adulthood . . . culminating in the incident with Mrs. Harris and the incident with Mrs. Miller." ER at 130. In arguing the relevance of the proffered testimony, counsel explained that, "[i]n this particular case, we have incident after incident which has caused the defendant to reach the point that he has reached." ER at 130. Counsel continued, "the court's ruling has really prevented me from having Mr. Jones testify about that, not about a diagnosis which only a doctor or expert can give, but the incidents in his life which gave rise to culminating into the incident of stabbing." ER at 130. He further stated, "I would just like to generally outline for the record the areas that I would like to get into that at this point at least the court has barred me from getting into," and then summarized various topics that were relevant to Mr. Jones's mental health history, all of which were within Mr. Jones's personal knowledge. ER at 130-32. Counsel argued that the proffered testimony was admissible without accompanying expert testimony, because he was not arguing or presenting a diagnosis but rather that a series of things happened to Mr. Jones throughout his life, which culminated in the capital offense. ER at 132. During this discussion, defense counsel voiced his intent to request jury instruction CALJIC No. 3.32, which provided that evidence of mental disorder may negate specific intent, and contained no requirement for expert testimony. ER at 129.

The prosecutor objected to the "majority" of the defense proffer as irrelevant without expert testimony. ER at 133. The prosecutor argued that the jury would need an expert to explain how incidents in Mr. Jones's past were related to the capital offense. ER at 133-34. The prosecutor also objected to some of the proffered testimony on hearsay grounds. ER at 132.

In response to the prosecutor's objections, defense counsel narrowed his proffer and argued that Mr. Jones's past experiences of hearing voices and suicide attempts were within his personal knowledge and would not have been hearsay. ER at 135. Counsel argued that the suicide attempts were relevant because Mr. Jones had tried to die by suicide after his prior offense against Ms. Harris and the capital offense against Ms. Miller, "behavior which is such that you don't need to have a doctor to get up and testify that there is something wrong with this person." ER at 135-36.

The court asked defense counsel if he intended to call an expert during the guilt phase, and counsel stated, "it is not my present intention." ER at 136. The court ruled that, without accompanying expert testimony, Mr. Jones could not testify to his "history as a child and the matters" previously ruled upon. ER at 137. Defense counsel moved for a mistrial, and the court denied the motion. *Id.*

c. The court's third ruling restricting Mr. Jones's testimony

After the trial court had sustained the prosecutor's objections and curtailed Mr. Jones's testimony twice during direct examination, the prosecutor asked Mr. Jones on cross-examination a series of questions in which he directly compared the capital offense to the assault of Ms. Harris, and asked Mr. Jones whether his actions in the offenses were "exactly" the same, "just like" one another, and whether he raped Ms. Miller, "just as [he] raped Mrs. Harris?" SER at 379-81. And, on re-cross examination, the prosecutor asked Mr. Jones whether he could provide "insight into what [he was] thinking" when he "revert[ed] back to [his] childhood" during the killing. SER at 234. He continued this line of questioning, asking Mr. Jones if he had been "trying to kill [his] mother." SER at 234. Consistent with his testimony on

direct examination describing his experience blacking out at the time of the offense, Mr. Jones answered, "I don't remember much after that." SER at 234.

On re-direct examination, defense counsel asked Mr. Jones whether he recalled "the district attorney asking [him] about [his] childhood and flashing back to [his] childhood." SER at 250. Counsel then asked, "And what was your relationship with your mother?" *Id.* The court sustained the prosecutor's objection to this question. *Id.* The prosecutor thereafter asked Mr. Jones repeatedly if he was thinking clearly at various points during the incident with Ms. Miller. SER at 253, 256. Defense counsel then asked the court to revisit its prior ruling on the admissibility of Mr. Jones's testimony because the prosecutor "opened the door in a crucial area." SER at 259. Defense counsel argued that the prosecutor "asked [Mr. Jones] . . . in a particularly disbelieving way and a very dramatic way, what exactly was flashing through his mind, what was going through his mind, what from his childhood occurred, what did this remind him of regarding his mother." SER at 258. He argued the court should allow him to expand on that questioning during re-direct because he believed the prosecutor was "going to argue . . . that Mr. Jones [was] not being truthful, that these experiences in [his] childhood maybe either never happened or they were very minor and had no effect on his behavior." *Id.* The court again sustained the prosecutor's objection. SER at 259. Defense counsel again moved for a mistrial, and the court again denied the motion. *Id.*

3. Closing argument

Both parties agreed that there was no question Mr. Jones was guilty of the rape charge, that the allegations of personal use of a weapon and a prior prison term

were true, and that he was responsible for the death of Ms. Miller. ER at 180, 198, 233. The parties also agreed that he had entered Ms. Miller's home and had been in possession of her jewelry, her rifle, and her car at some point on the day she died. ER at 165-66, 186-87, 189, 192, 196. Thus, the primary dispute centered on Mr. Jones's intent as to the rape, burglary, and robbery counts and special circumstances. *See* ER at 197 (defense counsel arguing that "intent is really important in this kind of case"); ER at 199 (defense counsel describing the main issue as "did [Mr. Jones] have the specific intent?"). Although Mr. Jones's intent as to the robbery and burglary charges and special circumstances were in dispute, the prosecutor appeared to recognize the likelihood that the jury would conclude, as it did, that the State had not met its burden of proof on those counts and special circumstances. The prosecutor argued to the jury that "the real crux" of its task was to determine whether Mr. Jones had the specific intent to rape Ms. Miller. ER at 233 ("I think the real crux of it and the real thing you have to consider here is . . . felony rape-murder . . . [and] specific intent to rape.").[3]

As defense counsel predicted, the prosecutor argued that Mr. Jones was not being truthful about hearing voices, and he encouraged the jury not to believe Mr. Jones's testimony. ER at 237-38. He stated, "the whole defense in this case turns on

[3] Under California law, the State could have attempted to prove first-degree murder in Mr. Jones's case using either of two theories – by proving that the killing was willful, deliberate, and premeditated, or by proving that the killing occurred during the perpetration of, or attempted perpetration of, a felony. *See* Cal. Penal Code § 189(a). While the prosecutor initially argued both theories to the jury, *see* ER at 160-63, he ultimately focused in on felony rape-murder, *see, e.g.*, ER at 233.

whether you believe the defendant and his testimony." ER at 169. He told the jury that Mr. Jones offered nothing to show that he had heard voices before the crime, despite the fact that it was the "most crucial point of this case." ER at 248-49; s*ee also* ER at 237-38. He highlighted the absence of Mr. Jones's excluded testimony when he asked the jury, "what evidence is there here of a mental disorder other than the defendant saying I flashed back to my childhood?" ER at 176; *see also* ER at 237 (prosecutor asking, "what is his evidence of mental disorder here? One, that in 1985 Mrs. Harris . . .said, 'you're sick'?"). The prosecutor suggested that Mr. Jones began fabricating mental health symptoms only after speaking to his counsel. ER at 240; *see also* ER at 173 (arguing Mr. Jones's testimony about blacking out was an effort "to get out from under the rape allegation"); ER at 177 ("[A] defense story has been concocted . . . in the hopes that you will give him some lesser offense."); ER at 237 ("He only blacks out the times that . . . he has no other explanation for."). The prosecutor also argued that if Mr. Jones had a mental disorder he would have called a psychiatrist to testify to it, and then urged the jury, "don't let him lessen that specific intent because of . . . [a] mental disorder." ER at 240.

4. Jury deliberations and verdict

During deliberations, the jury asked the court several questions. *See* SER at 95-145. On the third day of deliberations, the jury asked the following related questions: "To find the defendant had the specific intent to commit rape, is it necessary to believe he had that intent when he entered the house?"; and "What is the definition of felony murder? Are all first degree murders felony murders?" SER at 99-100. Both parties agreed that the questions were "linked to the felony murder

rule . . . [b]ecause the only way they can talk about specific intent as it applies to the rape would be in the context to [sic] felony murder." SER at 102-03.

After deliberating for eighteen hours and ten minutes over the course of four court days, App. 32a; SER at 90-94, the jury acquitted Mr. Jones of burglary and robbery, and found the special circumstances of burglary and robbery not true, App. 12a, 45a; SER at 143-45. The jury returned guilty verdicts as to first-degree murder and rape, finding the rape special circumstance true and finding true the allegations of personal use of a weapon and serving of a prior prison term. App. 45a; SER at 142-45. The rape special circumstance finding made Mr. Jones eligible for the death penalty.

B. Relevant penalty-phase evidence

The defense presented evidence to show that Mr. Jones's childhood home life was "a living hell" defined by poverty, violence, alcoholism, neglect, and abuse. *See* App. 28a-29a, 53a-54a; SER at 4-6, 16, 22-23, 29-30, 38, 46, 60, 69, 83. In one of the frequent physical fights that occurred between Mr. Jones's parents, his mother "stabb[ed] [his father] in the hand with a knife." App. 28a, 53a; SER at 23-24, 73-74. On another occasion, Mr. Jones's father found Mr. Jones's mother in bed with one of his friends. Mr. Jones and his sister were also in the bed, and Mr. Jones was awake. App. 28a, 53a; SER at 56-58. It then became a "regular routine" for Mr. Jones's father to beat his mother; at one point, he "stomped her in her vagina." App. 28a, 53a-54a; SER at 7-8. Mr. Jones's mother also physically and verbally abused Mr. Jones and his siblings. App. 28a, 54a; SER at 5, 28, 83. The abuse included hitting Mr. Jones with an electrical cord and "whip[ping] him on his head with her fists." App. 28a; ER

at 284; SER at 15. Layered on top of Mr. Jones's traumatic home life was his family's history of mental illness, which rendered him vulnerable to mental health issues. App. 28a; ER at 284-85, 296-300; SER at 81. In the months and years leading up to the capital offense, Mr. Jones suffered from mental health symptoms that included auditory hallucinations, suicide attempts, dizzy spells, blackouts, and night terrors. App. 28a; ER at 111, 113, 131, 135.

The defense presented testimony from court-appointed psychiatrist Claudewell Thomas, M.D. App. 54a. Dr. Thomas diagnosed Mr. Jones as having schizoaffective schizophrenia, a major psychiatric disorder "characterized by psychotic responses." ER at 261-62, 281. He explained that Mr. Jones was genetically predisposed to mental illness and that his psychiatric symptoms stemmed from a lifetime of abuse, instability, and trauma. ER at 284-85, 296-300. Ultimately, the jury fixed the penalty at death. App. 45a.

II. State Post-Conviction Review

On direct appeal, Mr. Jones alleged that the trial court unconstitutionally restricted him from testifying to his mental history under *Rock v. Arkansas*, 483 U.S. 44 (1987). App. 65a-67a.

The California Supreme Court – sidestepping the multiple proffers and rulings related to Mr. Jones's testimony – described Mr. Jones's proposed testimony about his prior mental health symptoms as "jumbled deep inside an extraordinary grab bag of a proffer that included such disparate allegations as that defendant 'attended many schools' and 'Aunt Jackie shot herself to death.'" App. 65a (quoting the record). The court reasoned that Mr. Jones's history of hearing voices was not relevant to his

specific intent at the time of the offense because he testified at trial that he had heard voices after the offense as opposed to before. App. 66a. The court also reasoned that Dr. Thomas had interviewed Mr. Jones and did not testify at the penalty phase that Mr. Jones had a history of flashbacks, blackouts, or hearing voices, and that the absence of such testimony at the penalty phase "suggests that [Mr. Jones's] proposed testimony concerning such a history would have been a recent fabrication." App. 66a-67a. The California Supreme Court denied Mr. Jones's claim, finding "no error," and that "any error in this regard was harmless." App. 66a.

III. Federal Post-Conviction Review

Mr. Jones filed a federal habeas petition in district court, in which he alleged that the trial court's restriction on his testimony violated his constitutional rights to testify and present a defense. The district court granted Mr. Jones relief on the claim, holding that Mr. Jones satisfied 28 U.S.C. § 2254(d) because the state court unreasonably applied clearly established federal law and made an unreasonable determination of the facts. App. 27a-41a. The district court concluded that the trial court's ruling denied Mr. Jones his right "to tell what was going on in his mind at the time he raped and killed his victim." App. 27a. Relying on *Rock* and *Washington*, the court held that Mr. Jones's proffered "testimony about his mental state was material, because his defense was that he lacked the intent to murder or rape Ms. Miller as a result of his mental disorder." App. 33a. The court noted that state law allowed lay witnesses to give an opinion as to mental condition less than sanity or to similar cognitive difficulties, and "did not require a mental health expert to provide testimony on Mr. Jones's mental condition less than sanity or similar cognitive defects." App.

34a. Therefore, "Mr. Jones's testimony was prohibited . . . by a trial judge's decision contrary to state law." App. 34a.

Respondent appealed the district court's decision. The Ninth Circuit did not consider whether Mr. Jones satisfied 28 U.S.C. § 2254(d) because it concluded Mr. Jones's claim "fails on de novo review." App. 17a. It reversed the district court's grant of relief, holding that the trial court's restrictions on his testimony were not arbitrary or disproportionate under *Rock*. The Ninth Circuit described the trial court's restriction on Mr. Jones's testimony as "a condition" as opposed to an "absolute restriction." App. 20a. The court determined the restriction was not arbitrary because the connection between Mr. Jones's mental health history and his specific intent at the time of the offense were "complicated questions" that the jury needed an expert to explain. App. 21a. The court reasoned that the restriction was not disproportionate because it served an important purpose and there were no less drastic means available to explain the relevance of the proposed testimony. App. 22a.

The Ninth Circuit placed "significant weight on the fact that the condition the court imposed was not onerous," and suggested that Mr. Jones may have made a tactical decision not to introduce an expert during the guilt phase. App. 22a-23a. The court rejected the notion that the trial court's ruling was arbitrary because state law allowed lay witnesses to testify about mental condition without accompanying expert testimony. App. 24a. And the court distinguished Mr. Jones's case from its decision in *Greene v. Lambert*, 288 F.3d 1081 (9th Cir. 2002), reasoning that Mr. Jones was permitted to describe his own state of mind at the time of the offense, and that *Greene* "strongly suggests that it is constitutional to require expert testimony to accompany

lay testimony about mental health symptoms that is offered to disprove specific intent." App. 24a-25a. The court concluded that the exclusionary ruling in Mr. Jones's case "served valid rules of evidence and was not disproportionate to the purposes served by those rules," and "was thus not unconstitutional." App. 25a. The Ninth Circuit denied Mr. Jones's petition for rehearing and rehearing en banc. App. 90a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Opinion Conflicts With *Rock v. Arkansas*.

Over thirty years ago, this Court held that a criminal defendant has a fundamental right "to present his own version of events in his own words." *Rock*, 483 U.S. at 52. This right is "[e]ven more fundamental to a personal defense than the right of self-representation" because "[a] defendant's opportunity to conduct his own defense . . . is incomplete if he may not present himself as a witness." *Id.* While this Court acknowledged that "the right to present relevant testimony . . . may 'bow to accommodate other legitimate interests in the criminal trial process,'" it also made clear that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock*, 483 U.S. at 55-56 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)). To determine the constitutionality of a restriction on a defendant's testimony, a state must evaluate whether the interests served by the restriction "justify the limitation imposed on the defendant's constitutional right to testify." *Rock*, 483 U.S. at 56. The Ninth Circuit's decision departs from *Rock* in multiple ways that warrant this Court's review.

A. Whether a restriction on a defendant's right to testify can be characterized as a condition is immaterial to a *Rock* analysis.

The opinion below characterizes the trial court's restriction on Mr. Jones's testimony as "better described as imposing a condition than an absolute restriction." App. 20a. In doing so, the Ninth Circuit makes a distinction without a difference and introduces a "threshold matter," App. 20a, outside *Rock*'s command. And, in reasoning that "the conditional nature of a ruling will often be relevant to whether it is arbitrary or disproportionate," App. 21a, the Ninth Circuit pronounces a novel standard that alters "the constitutional analysis that is necessary when a defendant's right to testify is at stake." *Rock*, 483 U.S. at 58. Without this Court's review, the Ninth Circuit's opinion will mislead courts into analyzing whether a restriction can be described as a condition – a description most exclusions of evidence can fit – which will undermine the constitutional framework this Court put in place to protect a defendant's fundamental right to testify.

The Ninth Circuit's opinion fails to recognize that a "conditional ruling" is still an exclusionary ruling, and that the restrictions placed on Mr. Jones's testimony are directly analogous to the unconstitutional exclusion of testimony in *Rock*. In *Rock*, the trial court excluded portions of the defendant's testimony after the prosecution objected to hypnotically-refreshed testimony. *Rock*, 483 U.S. at 47. The defendant in *Rock* sought to testify to various facts about the day of the offense, and "made a proffer . . . of testimony . . . in an attempt to show that she could adhere to the court's order [excluding hypnotically-refreshed testimony]." *Id.* at 48 n.4. "The prosecution objected to every detail not expressly described in [the hypnosis doctor's] notes or in

the testimony the doctor gave at the pretrial hearing," and the trial court "agreed with the prosecutor's statement that 'ninety-nine percent of everything [petitioner] testified to in the proffer' was inadmissible." *Id.* (quoting the record). This Court concluded that the effect of the trial court's ruling was that it "limited petitioner's own description of the events on the day of the shooting." *Rock*, 483 U.S. at 48.

At Mr. Jones's trial, the trial court made three rulings restricting Mr. Jones's testimony after the prosecutor objected. *See* App. 8a-11a. As the decision below states, "defense counsel repeatedly sought to introduce evidence of Jones's traumatic childhood and prior mental health symptoms – specifically, his history of hearing voices, blacking out, and experiencing flashbacks." App. 8a. Despite defense counsel's repeated efforts to introduce the relevant testimony – and as the Ninth Circuit acknowledges – "Jones was prevented from testifying about his childhood and past mental health symptoms during the guilt phase." App. 12a.

Like the restriction at issue in *Rock*, the trial court's restrictions on Mr. Jones's testimony "had a significant adverse effect on [his] ability to testify." *Rock*, 483 U.S. at 57. The rulings prevented Mr. Jones from describing what was going on in his mind at the time of the offense, and thus disabled him from meeting the State's evidence that he possessed the specific intent to rape Ms. Miller. The excluded testimony consisted of facts within Mr. Jones's personal knowledge that were directly relevant to his defense to the rape special circumstance that ultimately served as the sole basis for his death-eligibility as well as the State's felony-murder theory of first-degree murder.

The facts of Mr. Jones's trial are analogous to those in *Rock*: the defendant's testimony was "repeatedly interrupted by the prosecutor," and the court agreed with the prosecutor that the majority of the information in defense counsel's proffer was inadmissible. *Rock*, 483 U.S. at 48 n.4. In both *Rock* and this case, the trial court's restriction "interfered with the ability of a defendant to offer testimony." *Id.* at 53. And in both cases, the restriction "deprived the jury of the testimony of the only witness who was at the scene and had firsthand knowledge of the facts." *United States v. Scheffer*, 523 U.S. 303, 315 (1998) (citing *Rock*, 483 U.S. at 57).

Nothing in this Court's precedent suggests that restricting a defendant's testimony based on whether the defendant plans to call a particular witness – in this case, an expert – constitutes a *condition* rather than a *restriction*, nor that such a distinction would be relevant to a *Rock* analysis. Rather, this Court's precedent makes clear that when the effect of a court's ruling is to exclude a defendant's testimony, the ruling is a restriction on the defendant's fundamental right to testify that should be carefully analyzed within the parameters laid out in *Rock*. *See, e.g.*, *Scheffer*, 523 U.S. at 316-17 (describing the rule at issue in *Rock* as implicating a significant interest of the accused and distinguishing between a defendant being "barred merely from introducing expert opinion testimony to bolster his own credibility" and being "prohibit[ed] . . . from testifying on his own behalf").

Not only does the Ninth Circuit misapply *Rock* by unduly focusing on the "conditional" nature of the restriction on Mr. Jones's testimony, it also "place[s] significant weight on the fact that the condition the court imposed was not onerous."

App. 22a. It reaches this conclusion based on its view of the record[4] – that "an expert psychiatrist had already been appointed, had written a report, and was available to testify on Jones's behalf" – and introduces yet another novel factor into *Rock*'s constitutional analysis: whether a "condition" on a defendant's testimony is "onerous." App. 22a. The opinion below pays lip service to *Rock*'s commands, but introduces novel threshold questions of whether a restriction is a "condition" and whether it is "onerous." It sets out no framework to answer these questions, which serve as a vehicle to sidestep applying *Rock*.[5] Such a departure from *Rock* will undoubtedly confuse and mislead lower courts into engaging in an "onerous condition" analysis that fails to reflect the constitutional analysis *Rock* requires when a defendant's right to testify is at stake.

B. Traditional means of evaluating evidence must be fully considered in a *Rock* analysis.

As this Court explained in the context of a defendant's hypnotically-refreshed testimony, "traditional means of assessing accuracy of testimony" – such as cross-examination and jury instructions – "remain applicable" when evaluating a restriction on such testimony. *Rock*, 483 U.S. at 61. In analyzing the restriction at issue in *Rock*, this Court considered the fact that the state "ha[d] not shown that

---

[4] As addressed in section II, it also bases its conclusion on an inapt comparison to a case where the "defendant 'had complete control over whether he could testify or not,' because he could choose whether to satisfy the condition of submitting to cross-examination." App. 22a-23a (quoting *Williams v. Borg*, 139 F.3d 737, 741 (9th Cir. 1998)).

[5] As section III explains, it is often, if not always, onerous to *require* expert testimony from an indigent defendant with limited access to expert services.

hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she [was] on trial." *Id.*

The opinion below departs from *Rock* by dismissing traditional means of evaluating evidence, including the jury's ability to understand Mr. Jones's proffered testimony and the fact that Mr. Jones would have been subject to cross-examination.

1. A typical jury is capable of understanding a defendant's testimony about facts within his personal knowledge and how those facts relate to an element of the offense.

The opinion below departs from this Court's precedent by disregarding and minimizing the jury's ability to understand Mr. Jones's proffered testimony without accompanying expert testimony.

As this Court has long recognized, the jury system is premised on the belief that juries are capable of carrying out their duties under the law. *See Scheffer*, 523 U.S. at 313 ("Determining the weight and credibility of witness testimony . . . has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.'" (quoting *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891))). Indeed, a jury's capacity to understand the evidence before them and decide complicated questions of fact with the guiding principle of a jury instruction is fundamental to the criminal trial process. In *Rock*, where the defendant's hypnotically-refreshed testimony was at issue, this Court explained that "a jury can be educated to the risks of hypnosis through expert testimony and cautionary

instructions." *Rock*, 483 U.S. at 61. This Court thus recognized the State's ability to call its own expert – just as the State could have done at Mr. Jones's trial – to explain any issues it wants the jury to consider in evaluating the defendant's testimony, such as the "controversial" and "unsettled" use of hypnosis in criminal investigations. *Id.* at 59. This Court did not suggest that a defendant may constitutionally be *required* to call an expert in order to offer his own testimony. *Cf.* App. 25a (suggesting that "such a requirement [of requiring expert testimony to provide context to the jury] would be constitutional under *Rock*"). Rather, it made clear that the State can call its own expert to challenge the credibility of a defense witness or defendant – an option the State did not exercise in Mr. Jones's case and instead sought to impose on the defendant. The opinion below ignores this edict from *Rock* entirely and shifts the burden of educating the jury about questions of Mr. Jones's credibility to Mr. Jones himself.

Despite the well-established role and capacity of a jury to understand and weigh the evidence before it, the opinion below states that "[w]hether and how Jones's traumatic childhood and mental health history affected his ability to form specific intent years later were complicated questions." App. 21a. It further states, "at no point did counsel explain how Jones alone would have been able to draw that causal link for the jury. Nor would such a link necessarily have been apparent. The trial court therefore reasonably concluded that the relevance of Jones's proposed testimony required expert contextualization." App. 21a. While the opinion fails to acknowledge the trial court's three rulings and the extent to which defense counsel narrowed his proffer by the third ruling, it also fails to elaborate on why expert

testimony was necessary for the jury to make a causal link between Mr. Jones's proffered testimony and specific intent. The only reasoning the Ninth Circuit offers is its brief reference to two of its other cases, *Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990) and *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999), neither of which is analogous to Mr. Jones's case. *Smith*, as well as the case it quotes, *United States v. Fazzini*, 871 F.2d 635, 637 (7th Cir. 1989), concern a defendant's *right to* expert assistance, not a *requirement* to offer expert testimony to explain the defendant's testimony. And *Caro* discusses the utility of *penalty phase* expert testimony in a case that involved the defendant's chemically-induced neurological damage, where the same court found the defendant's testimony during the *guilt phase* "meticulous[ly] detail[ed]" and "so clear, lucid, and powerful that no psychiatrist would have made a difference." *Williams v. Calderon*, 52 F.3d 1465, 1470 (9th Cir. 1995). The Ninth Circuit's reliance on such inapposite cases – cases that in fact weaken the reasoning of its opinion – underscores the extent to which it fails to follow applicable precedent and adequately recognize the jury's ability to understand and weigh Mr. Jones's excluded testimony.

As defense counsel argued at trial, Mr. Jones was not seeking to testify to a diagnosis or any technical, forensic element of the offense. Rather, Mr. Jones was seeking to testify to facts within his personal knowledge that were relevant to his state of mind – facts that fell within the reasonable range of a jury's knowledge and experience and did not require expert testimony to make sense. *Cf. United States v. Johnson*, 827 F. App'x 586, 590-91 (7th Cir. 2020) (finding exclusionary ruling constitutional where trial court told defendant he could testify about "his history of

sleepwalking, episodes when he forgot where he was or what he was doing, and any experience with those symptoms during the robbery" but could not testify to "what an expert told [him] about sleepwalking and what it means in [his] case" or "describe this as a medical condition where all these factors have been identified by researchers . . . because that would be expert testimony"). Mr. Jones was "physically and mentally capable of testifying to events that he had personally observed" and experienced, which were relevant and material to his lack of specific intent to rape Ms. Miller, and thus "relevant and material to [his] defense." *Washington*, 338 U.S. at 23. As this Court has recognized, "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury." *Rock*, 483 U.S. at 54 (quoting *Washington*, 338 U.S. at 22).

Not only does the Ninth Circuit underestimate a jury's general ability to understand and weigh evidence, but it also fails to consider the lack of parity between the prosecution and defense presentation of evidence at Mr. Jones's trial, which reflected the jury's ability to understand the relevance of Mr. Jones's excluded testimony and thus the arbitrariness of the trial court's rulings. *See Fieldman v. Brannon*, 969 F.3d 792, 807 (7th Cir. 2020) ("Arbitrariness 'might be shown by a lack of parity between the prosecution and defense; the state cannot regard evidence as reliable enough for the prosecution, but not for the defense.'" (quoting *Kubsch v. Neal*, 838 F.3d 845, 858 (7th Cir. 2016))). The opinion below disregards the fact that, at Mr. Jones's trial, the State "provide[d] the 'nexus' between the events in Jones's past

and his specific intent during the crimes" by introducing evidence about "past events and experiences." App. 20a, 25a. During the guilt phase, without any restrictions from the trial court, the prosecutor presented the testimony of Doretha Harris, raised the Harris incident during his cross-examination of Mr. Jones, and argued in closing argument that the Harris incident proved Mr. Jones's specific intent to rape Ms. Miller. *See* 20 RT 3159-79; ER at 177, 254-55. But when Mr. Jones attempted to counter that evidence and demonstrate his lack of specific intent by describing his state of mind during those past events and experiences, the trial court did not allow it. The court's restrictions on Mr. Jones's testimony prevented him from testifying that he heard voices and blacked out during the Harris incident, which disabled him from meeting the State's case against him. Thus, the State and the trial court believed that the jury was capable of understanding how events in Mr. Jones's past were relevant to the offense when the prosecution offered them into evidence, but deemed past events irrelevant and inadmissible when the defense tried to elicit testimony about them from Mr. Jones himself. *See Fieldman*, 969 F.3d at 808 ("For the prosecution, evidence about events in the months before . . . was relevant to [the defendant's] intent. But for the defense, evidence about events in the weeks before . . . was deemed irrelevant to [his] intent."); *see also id. (*"By itself, this lack of parity makes the court's application of the evidentiary rule to [the defendant's] contextual testimony arbitrary."). Notwithstanding the arbitrariness of any ruling that limits evidence pertaining to a defendant's state of mind to a specific period of time, the trial court – in restricting Mr. Jones's testimony to the time of the offense while allowing the State to present evidence from his past – prevented Mr. Jones from testifying

about past events that were essential to providing context to his actions and state of mind at the time of the offense. *See Fieldman*, 969 F.3d at 805 (holding that a ruling limiting the defendant's testimony to the date of the offense "virtually prevented" him from testifying about past interactions that affected his state of mind and were essential to explaining his actions on the date of the offense (quoting *Rock*, 483 U.S. at 55)).

By ignoring the lack of parity between the prosecution and defense evidence at Mr. Jones's trial, the Ninth Circuit disregards the critical fact that the State and the trial court believed the jury was capable of understanding the link between Mr. Jones's past behavior and his actions at the time of the offense. The Ninth Circuit also ignores the jury's clear comprehension of intent. *See, e.g.*, *Barbe v. McBride*, 521 F.3d 443, 461-62 (4th Cir. 2008) (finding it "abundantly clear that the jury was capable of evaluating the charges as to each distinct victim, based on its verdict acquitting [the defendant] on certain counts and convicting him on others"); *Fieldman*, 969 F.3d at 808 ("[T]he jury would have been fully capable of determining the weight, reliability, and trustworthiness of [the defendant's excluded] testimony. Instead, the jury – charged with determining whether [he] intended the hit to be carried out – was left to deliberate without crucial testimony about the reasons behind [his] meeting with [the hitman]."). At Mr. Jones's trial – where intent was the heart of the case – the jury was instructed that it could consider Mr. Jones's past acts to prove his specific intent, and that evidence of a mental condition can negate specific intent. SER at 153-54; ER at 244; 26 RT 3831-41. And, during deliberations, the jury asked the court questions about specific intent. SER at 99. Evidently, in

acquitting Mr. Jones of the robbery and burglary special circumstances after hearing his testimony about what was going through his mind when he entered and left Ms. Miller's house, the jury was able to discern the connection between Mr. Jones's testimony and his lack of specific intent such that they decided he did not possess the specific intent required to find those special circumstances true. These facts demonstrate that the jury both understood the issue of intent and found Mr. Jones to be a credible witness in his defense against the special circumstance charges. However, because of the unconstitutional restrictions placed on Mr. Jones's testimony, the jury heard limited information from which to determine his specific intent regarding the rape special circumstance, and then ultimately found it true.

The opinion below also fails to recognize that state law assumes that a jury can determine specific intent without expert testimony. State law prohibits experts from opining on a defendant's mental state, instructing, "The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." Cal. Penal Code § 29. Therefore, the jury could not have even considered expert testimony in determining the crucial issue of whether Mr. Jones had the specific intent to rape Ms. Miller. Indeed, courts have upheld a trial court's exclusion of expert testimony by recognizing the limited probative value of expert testimony in relation to the jury's duty and ability to resolve issues of intent. *See, e.g.*, *Roussell v. Jeane*, 842 F.2d 1512, 1517 (5th Cir. 1988) (finding, where the "only controverted issue" was intent, a psychiatrist would have testified only about the defendant's amnesia and not his intent because the expert "had not been on the scene and had no direct knowledge whatever of the events in question" and "did not know whether [the

defendant] had intended to shoot his wife"); *State v. Provost*, 490 N.W.2d 93, 104 (Minn. 1992) (concluding that the proffered expert testimony "consisted of a diagnosis of a mental condition and an opinion on how schizophrenics typically function, which . . . added nothing to what the defendant had in mind, which is the issue under consideration"; expert opinion on mens rea "would have been inadmissible"; and testimony about normal psychological processes of intent formation "lies within the knowledge and experience of jurors and was not a proper subject for expert opinion" (cleaned up)).

2. A defendant's testimony is always subject to cross-examination.

Much like the role of the jury, the tool of cross-examination is fundamental to our criminal justice system. As this Court stated in *Rock*, "the most important witness for the defense in many criminal cases is the defendant himself," and "the defendant's veracity . . . can be tested adequately by cross-examination." *Rock*, 483 U.S. at 52. "Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies." *Id.* at 61.

Despite acknowledging *Rock*'s consideration of cross-examination as a reliable tool for evaluating a defendant's testimony, the Ninth Circuit states that "[u]nlike in *Rock*, there were no less drastic and 'more traditional means' available to explain to the jury the relevance of Jones's proposed testimony." App. 22a (quoting *Rock*, 483 U.S. at 61). The opinion overlooks the critical fact that Mr. Jones's proffered testimony was directly relevant to his state of mind at the time of the offense, and the relevance of that testimony went hand-in-hand with Mr. Jones's credibility. *See*

ER at 169 (prosecutor telling the jury, "the whole defense . . . turns on whether you believe the defendant and his testimony").

If Mr. Jones had been permitted to testify to the proffered facts, the prosecutor would have cross-examined him on that testimony, just as he had cross-examined Mr. Jones on the other testimony he provided on direct examination. *See Brown v. United States*, 356 U.S. 148, 157 (1958) (holding that "by [the defendant's] direct testimony she had opened herself to cross-examination on the matters relevantly raised by that testimony"). Here, just as in *Rock*, the State failed to show that Mr. Jones's proffered testimony was "so immune to the traditional means of evaluating credibility that it should disable [him] from presenting [his] version of the events for which [he] [was] on trial." *Rock*, 483 U.S. at 61; *see also Fieldman*, 969 F.3d at 808 ("To the extent the court was concerned about traditional purposes underlying relevance rules (such as delay, confusion, prejudice, or reliability), . . . [the defendant's] testimony could have been tested through cross-examination by the state.").

The opinion below departs from *Rock* in significant ways that warrant this Court's review. Without this Court's guidance, lower courts will follow the Ninth Circuit's misapplication of *Rock*, which will ultimately weaken *Rock*'s protections and the fundamental right of a criminal defendant to testify in his own defense.[6]

---

[6] In addition to misapplying *Rock*, the opinion below engages in de novo review of Mr. Jones's claim and thereby sidesteps a § 2254(d) analysis of the state court decision in Mr. Jones's case, which leaves that decision intact. As the district court found under § 2254(d), the state court's opinion conflicts with this Court's precedent and involves an unreasonable determination of the facts. Without this Court's guidance, lower courts will be misguided not only by the Ninth Circuit's opinion below but also by the state court's opinion.

II. The Ninth Circuit's Opinion Ignores the Constitutional Distinction Between a Defendant's Right to Testify and His Right to Present Other Witnesses in His Defense.

This Court has recognized that a defendant's "right to present his own version of events in his own words" is so important that it is "[e]ven more fundamental . . . than the right of self-representation." *Rock*, 483 U.S. at 52. This Court has also recognized the importance of a defendant's right to present other witnesses as part of a complete defense. *See, e.g.*, *Chambers*, 410 U.S. at 302 ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (recognizing the constitutional right to "a meaningful opportunity to present a complete defense" (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984))); *Washington*, 338 U.S. at 19 (finding that a defendant's "right to present his own witnesses to establish a defense . . . is a fundamental element of due process of law").

While acknowledging the fundamental nature of both the right to testify in one's own defense and the right to present other witnesses as part of a complete defense, this Court has indicated that a defendant's right to testify is so fundamental that it cannot be compared to the right to present other witnesses, and a heightened constitutional analysis is required when it is at stake. *See Rock*, 483 U.S. at 57-58 (distinguishing between "the testimony of *witnesses*" and "the testimony of a *defendant*" in holding that the state court "failed to perform the constitutional analysis that is necessary when a defendant's right to testify is at stake"); *Scheffer*, 523 U.S. at 308, 317 (recognizing the "weighty interest" at issue in *Rock* and contrasting the defendant being "barred merely from introducing expert opinion

testimony" with being "prohibit[ed] . . . from testifying on his own behalf"). However, this Court has not clearly articulated the heightened constitutional analysis required when an exclusionary ruling restricts a defendant's right to testify in his own defense as opposed to his right to present other witnesses as part of his defense, or when an exclusionary ruling – like those at Mr. Jones's trial – implicates both rights at once. *See, e.g.*, *Scheffer*, 523 U.S. at 308 (discussing *Rock*'s arbitrary and disproportionate analysis in relation to the right to present a defense); *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006) (applying an arbitrary and disproportionate analysis to the exclusion of third-party guilt evidence).[7] This leaves room for courts to misapply this Court's precedent – as the Ninth Circuit does below – by disregarding the constitutional distinction between a defendant's testimony and the testimony of other witnesses and thus failing to adequately analyze a restriction on a defendant's testimony when the restriction also imposes on his right to present a defense.

The opinion below essentially pits Mr. Jones's right to testify in his own defense against his right to present witnesses in his defense by conflating the exclusion of his own testimony with the exclusion of expert testimony. The Ninth Circuit compares the "condition" imposed in Mr. Jones's case – a restriction on his

---

[7] While many courts have followed this Court's lead and concluded that *Rock*'s constitutional protections do not extend to the testimony of other witnesses, they have not articulated a clear analytical distinction between the right to testify and the right to present a defense. *See, e.g.*, *Lucio v. Lumpkin*, 987 F.3d 451, 487 (5th Cir. 2021); *Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231, 1247 (11th Cir. 2017); *Malinowski v. Smith*, 509 F.3d 328, 336 (7th Cir. 2007); *Misskelley v. State*, 915 S.W.2d 702, 715 (Ark. 1996); *Serrano v. State*, 225 So.3d 737, 755 (Fla. 2017); *People v. Zayas*, 546 N.E.2d 513, 519 (Ill. 1989); *Burral v. State*, 724 A.2d 65, 81 (Md. 1999); *In re Welfare of M.P.Y.*, 630 N.W.2d 411, 416 (Minn. 2001).

testimony based on a requirement that he introduce accompanying expert testimony – with the "condition of submitting to cross-examination" in a case where the "defendant 'had complete control over whether he could testify or not,' because he could choose whether to satisfy the condition." App. 22a-23a (quoting *Williams v. Borg*, 139 F.3d 737, 741 (9th Cir. 1998)). The opinion below equates the exclusion of Mr. Jones's testimony with the exclusion of expert testimony, reasoning that "Jones may have been compelled to make a difficult tactical decision about whether introducing Dr. Thomas at the guilt phase was worth the risk of prejudicial cross-examination."[8] App. 23a. The opinion makes the same mistake in comparing the restriction on Mr. Jones's testimony with the "condition on the admission of defense evidence" in *Menendez v. Terhune*, 422 F.3d 1012 (9th Cir. 2005), where the trial court prevented the introduction of *expert* testimony because the defendants had not testified to lay a foundation for expert testimony about their state of mind. App. 20a-21a.

The Ninth Circuit's convoluted analysis ignores the important distinction between a defendant's right to testify in his own defense – a decision that is "reserved for the client" and is protected by *Rock* – and his right to present witness testimony in his defense – a decision that may fall under the "lawyer's province" or the "autonomy [of the client]" depending on the "client's objectives." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). In holding the trial court's rulings constitutional under

[8] As previously addressed, the opinion's misguided comparison also ignores the fact that Mr. Jones would have been cross-examined on his proffered testimony. *See* section I.B.2.

Rock, the opinion below improperly suggests that a court can invoke a right that belongs to the defendant – here, the right to present expert testimony as part of his defense – and *require* the defendant to exercise that right if he wishes to exercise his right to testify in his own defense. Without this Court's review, the opinion below threatens to upend the scope and reach of the constitutional rights guaranteed to a criminal defendant by effectively allowing the trial court to usurp his right to testify, his right to present witnesses in his defense, and, ultimately, his "right to make the fundamental choices about his own defense." *McCoy*, 138 S. Ct. at 1511. This Court should clarify the heightened constitutional analysis that is required when an evidentiary ruling restricts a defendant's right to testify in his own defense, and when such a ruling also encroaches on his right to present witnesses in his defense.

III. The Questions Presented are Important and Recurring.

A criminal defendant's right to testify in his own defense is a bedrock principle of due process, so fundamental to a fair trial that this Court has deemed it more important than the right to self-representation. *Rock*, 483 U.S. at 52. And it is particularly important in cases where, as here, the defendant is "the only witness who was at the scene and had firsthand knowledge of the facts." *Scheffer*, 523 U.S. at 315 (citing *Rock*, 483 U.S. at 57). As this Court has repeatedly explained, a defendant's right to present witnesses in his defense is also fundamental to a fair trial. *See, e.g.*, *Chambers*, 410 U.S. at 302; *Washington*, 388 U.S. at 19. For capital defendants, their interest in their constitutional rights to testify and present a defense is "at its zenith." *Kubsch*, 838 F.3d at 860. This case raises extremely

important constitutional questions that impact both fundamental rights, and which require this Court's resolution.

The opinion below has far-reaching practical effects on indigent defendants and the court system. This Court has long recognized the challenges experienced by indigent defendants and their corresponding need for, and constitutional right to receive, the state's assistance in order to meaningfully participate in the proceedings against them. *See, e.g.*, *Griffin v. Illinois*, 351 U.S. 12 (1956) (requiring the provision of a trial transcript to an indigent defendant on appeal); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that an indigent defendant is entitled to the assistance of counsel); *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (holding that an indigent defendant is entitled to expert assistance in preparing his defense when sanity is an issue). However, the reality is that indigent defendants' access to the tools required for an adequate defense – especially expert assistance – is severely limited. Indigent defendants generally need judicial approval to obtain funds for expert assistance, and trial courts are restricted by government budgets. The result is an uphill battle to convince a judge to approve funds for expert assistance – a battle that indigent defendants often lose. *See, e.g.*, Stephen A. Saltzburg, *The Duty to Investigate and the Availability of Expert Witnesses*, 86 Fordham L. Rev. 1709, 1720 (2018) (arguing that "reluctance to appoint defense experts is rooted in cost to the government and inertia; that is, a history of not routinely providing defense experts at the request of defense counsel"); Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 Cornell L. Rev. 1305 (2004) (analyzing the limited accessibility of expert assistance for indigent defendants); Carlton Bailey, *Ake*

v. Oklahoma and An Indigent Defendant's 'Right' to an Expert Witness: A Promise Denied or Imagined?, 10 Wm. & Mary Bill Rts. J. 401, 458 (2002) (analyzing the "varied interpretations of *Ake*" to conclude that "many federal and state courts have . . . mistakenly read *Ake* in a manner that provides the indigent defendant with less than *Ake* intended or provided").

In sidestepping *Rock* and upholding the trial court's unconstitutional restrictions on Mr. Jones's testimony, the opinion below effectively imposes an extraordinary burden on indigent defendants by forcing them to either use their limited resources to obtain expert assistance whenever they plan to testify in their own defense or forgo their right to tell their story in their own words. Without an expert waiting in the wings, defendants will run the risk of having their critical testimony curtailed mid-trial and depriving the jury of hearing the full story they want to tell. Indigent defendants already have limited access to expert assistance compared to their wealthier counterparts, but now they will be cornered into making extraordinary sacrifices such as forgoing one expert necessary to their defense in favor of another expert whose testimony will accompany their own testimony, calling an expert who they had planned to have testify in the penalty phase about one topic to testify in the guilt phase about another topic, or abandoning their right to testify altogether.

The enormous practical implications of the decision below warrant this Court's review. The questions presented affect *all* criminal defendants who constantly must grapple with whether and how best to exercise their constitutional right to testify in their own defense, and who will – without this Court's review – be forced to navigate

complicated situations where a court restricts their testimony based on an arbitrary and at times unattainable requirement that they also introduce accompanying expert testimony. Evidentiary proffers and rulings such as those at Mr. Jones's trial regularly arise in criminal trials in all jurisdictions, with varying effects on a defendant's ability to testify in his own defense and his ability to present witnesses as part of his defense. Based on its misapplication of this Court's precedent, the opinion below will lead lower courts astray and jeopardize a defendant's right to tell his own story in his own words in a criminal proceeding where his life and liberty is at stake without also compromising his right to present his defense. Defendants, prosecutors, and courts need this Court's guidance on these important and recurring issues.

IV. This Case Provides an Ideal Opportunity to Resolve the Questions Presented.

This case presents an ideal vehicle to resolve the questions presented. Mr. Jones raised a *Rock* claim at every applicable stage of the proceedings below, and each lower court assessed it on the merits. There is also a fully developed record that would allow for a comprehensive evaluation of the trial court's rulings and the effect they had on Mr. Jones's ability to testify. This Court's resolution of whether it is unconstitutional under *Rock* to restrict a defendant's ability to testify by requiring accompanying expert testimony would also be outcome-determinative because it would entitle Mr. Jones to a new trial.

Mr. Jones's case also presents an ideal opportunity for this Court to address the unresolved question of whether and how a restriction on a criminal defendant's

right to testify is subject to a heightened constitutional analysis when it also imposes on the defendant's right to present witnesses in his defense. This Court's resolution of the question is undeniably important given its serious implications for criminal defendants and the scope of the fundamental rights at issue here.

CONCLUSION

This Court should grant certiorari to resolve the questions presented.

Dated: April 20, 2022

Respectfully submitted,
HABEAS CORPUS RESOURCE CENTER

By: **/s/ Nisha K. Shah**

Nisha K. Shah
Counsel of Record
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
E-mail: docketing@hcrc.ca.gov

Attorney for Petitioner
Ernest DeWayne Jones