**No. 21-7684**

**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

# REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

Ernest Jones petitions this Court to decide two important questions related to a criminal defendant's constitutional right to testify in his own defense. Respondent's Brief in Opposition (BIO) addresses only one question and raises unpersuasive arguments that should not dissuade this Court from granting review.

### 1. The Ninth Circuit's opinion below departs from *Rock v. Arkansas*, 483 U.S. 44 (1987), and raises distinct constitutional questions that warrant this Court's review.

Respondent argues that the Ninth Circuit's decision below was correct under *Rock* because the trial court's restriction on Mr. Jones's testimony was neither arbitrary nor disproportionate. BIO 10-14. In making this argument, Respondent repeats the Ninth Circuit's flawed reasoning and sidesteps any meaningful discussion of the constitutional analysis that *Rock* requires.

Just as the Ninth Circuit does below, Respondent characterizes the restrictions on Mr. Jones's testimony as conditional. *See* BIO 12-13. This, in turn, allows Respondent – and allowed the Ninth Circuit – to ignore the relevant facts and the actual effect of the trial court's rulings on Mr. Jones's ability to testify in his own defense. Respondent disregards the fact that trial counsel made several evidentiary proffers, which resulted in multiple rulings from the trial court that individually and collectively restricted Mr. Jones's testimony. *See* BIO 11 (describing only one "offer of proof"), 14 (referring only to the proffer the California Supreme Court described as a "grab bag"). As Mr. Jones's petition explains, the trial court's rulings were arbitrary and disproportionate, and the Ninth Circuit failed to conduct a competent *Rock* analysis in evaluating those rulings. Pet. 7-12, 19-32. Following

the Ninth Circuit's misguided opinion, Respondent overlooks not only the specific considerations that a *Rock* analysis demands, but also the specific facts of Mr. Jones's case that rendered the exclusion of his proffered testimony unconstitutional.

Again echoing the Ninth Circuit's flawed analysis, Respondent argues that the jury at Mr. Jones's trial was incapable of understanding the relevance of his excluded testimony without accompanying expert testimony.[1] BIO 12. However, in response to Mr. Jones's argument that the lack of parity between the prosecution and defense evidence showed that the trial court arbitrarily restricted his testimony, Pet. 27-29, Respondent argues that the relevance of Mr. Jones's prior offense against Ms. Harris was "readily apparent . . . [because] its similarity to the charged crime logically implied in a commonsense way that Jones had intended to rape Julia Miller too." BIO 14. This is the crux of Mr. Jones's argument: if he was permitted to testify to the mental health symptoms he experienced at the time of his prior offense against Ms. Harris, just as the State was permitted to introduce evidence of that offense, the jury would have been able to make the "logically implied" and "commonsense" connection between his symptoms and actions at the time of the Harris incident and his symptoms and actions at the time of the capital offense against Ms. Miller. Indeed, as trial counsel argued when he narrowed his

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[1] Respondent disregards the fact that, under state law, an expert would not have been permitted to opine on Mr. Jones's mental intent at the time of the offense. *Compare* BIO 11 ("Perhaps a jury could have discerned significance in the proffered evidence if a mental health expert had explained how it might have impacted Jones's mental intent and purpose at the time of the crimes."), *with* Cal. Penal Code § 29 ("The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."), *and* Pet. 30-31.

evidentiary proffer after the trial court's first restrictive ruling, Mr. Jones's prior mental health symptoms were relevant because he experienced similar symptoms after the offense against Ms. Harris and after the offense against Ms. Miller. Pet. 11; ER at 135-36; *see also* App. 6a (referring to Mr. Jones's testimony about the Harris incident and how he did not remember all the events Ms. Harris described); BIO 2 (same). In asserting that testimony about the Harris incident was logically relevant when offered by the prosecution but that any defense testimony from Mr. Jones himself about symptoms he experienced at the time of that incident was irrelevant and incomprehensible without expert testimony, Respondent makes contradictory arguments that highlight the very lack of parity that made the trial court's rulings against Mr. Jones arbitrary.[2] *See* Pet. 27-29.

Respondent claims that Mr. Jones argued in his petition that the Ninth Circuit "conflated different standards for assessing a defendant's right to testify with his more general right to present witnesses in his defense," but that the Ninth Circuit "squarely considered whether the trial court's evidentiary ruling violated a defendant's right to testify under *Rock v. Arkansas*." BIO 14. Respondent's argument is inaccurate and in fact conflates the arguments raised in Mr. Jones's petition. First, Mr. Jones argued that the Ninth Circuit – as part of its misapplication of *Rock* – inaptly relied on cases that concerned the

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[2] Respondent disregards Mr. Jones's explanation of why cross-examination is also relevant to a *Rock* analysis, and how the relevance of Mr. Jones's excluded testimony went hand-in-hand with his credibility. Pet. 31-32; *see also Fieldman v. Brannon*, 969 F.3d 792, 808 (7th Cir. 2020) ("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.").

exclusion of expert testimony as opposed to a defendant's testimony. Pet. 24-27. Contrary to Respondent's assertion, and as explained in the petition, the Ninth Circuit did not "squarely consider" the issue under *Rock*. Rather, the Ninth Circuit's analysis departed from *Rock* in significant ways that will mislead lower courts and ultimately weaken *Rock*'s protections. Pet. 19-32. Second, Mr. Jones argued that the trial court's ruling, and the Ninth Circuit's incorrect decision on that ruling, pits two fundamental rights against each other – a defendant's right to testify in his own defense and his right to present other witnesses in his defense – by conflating the exclusion of a defendant's testimony with the exclusion of expert testimony. Pet. 33-36. Mr. Jones argued this Court should grant review to clarify the heightened constitutional analysis that is required when a restriction is placed on a *defendant's* testimony, and when such a restriction also imposes on his right to present witnesses in his defense by *requiring* him to introduce accompanying expert testimony. *Id.* Respondent has failed to raise any law or facts to dispute the distinct constitutional issues raised by the Ninth Circuit's opinion, as presented in Mr. Jones's petition.

**2. Mr. Jones's underlying claim meets the standard for federal habeas relief under 28 U.S.C. § 2254(d).**

Respondent's argument that Mr. Jones's underlying claim would not be entitled to federal habeas relief under 28 U.S.C. § 2254(d), BIO 14-15, is unavailing. Respondent is correct that the Ninth Circuit sidestepped a § 2254(d) analysis by engaging in de novo review of Mr. Jones's claim. However, as the district court correctly found, the California Supreme Court unreasonably applied clearly established

federal law and made an unreasonable determination of the facts when it denied Mr. Jones's claim on direct appeal.[3] App. 27a-41a.

The California Supreme Court's "treatment of Mr. Jones's claim [was] flawed in several ways" that warrant relief under § 2254(d). App. 35a; *see also id.* at 35a-41a. Mr. Jones is entitled to relief under § 2254(d)(1) because the California Supreme Court unreasonably applied this Court's precedent when it held that Mr. Jones's right to testify was not violated by the trial court's exclusionary rulings. Despite the fact that Mr. Jones's proffered testimony included his history of prior suicide attempts, flashbacks, hearing voices, and blackouts, the California Supreme Court inexplicably focused solely on his history of hearing voices. App. 66a. Not only did the California Supreme Court unreasonably disregard the full extent of testimony that Mr. Jones sought to present, and that the trial court ultimately restricted, it also unreasonably concluded that because Mr. Jones testified that he heard voices *after* the crime, any prior history of hearing voices would have been irrelevant because he did not hear voices *before* the crime telling him to attack Ms. Miller. *Id.* This constituted an unreasonable application of this Court's precedent under § 2254(d)(1). *See* App. 35a-36a, 41a.

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[3] Respondent misrepresents the record by suggesting that the district court improperly granted Mr. Jones relief on a factual basis that differed from the factual basis of Mr. Jones's federal habeas claim. BIO 7 ("In contrast to Jones's complaint about restrictions on 'counseling' and 'medication' testimony, the district court reasoned that it was error to preclude Jones from testifying about hearing voices . . . ."). But as Respondent acknowledges just a few sentences prior, Mr. Jones did not allege that he was restricted from testifying about counseling and medication; rather, he argued the trial court arbitrarily restricted his testimony to those two topics and excluded testimony that went to specific intent, such as his prior history of blacking out and hearing voices. *See* D. Ct. Dkt. 105 at 155 (amended petition for writ of habeas corpus).

Even if Mr. Jones could not satisfy the requirements of § 2254(d)(1), he would still be entitled to relief under § 2254(d)(2). *See* App. 36a n.2, 40a-41a. In concluding that any error was harmless, the California Supreme Court relied on the penalty-phase testimony of Dr. Claudewell Thomas. App. 66a-67a. The court determined that Dr. Thomas "failed to mention any . . . history [of flashbacks and blackouts]," and held that this suggested that Mr. Jones's proffered testimony about such a history "would have been a recent fabrication." App. 67a. As the district court found, the state court's consideration of penalty-phase testimony in assessing the potential impact of guilt-phase testimony was "convoluted" in its reasoning, and its conclusion was based on a clear factual error. App. 38a. The record shows that Dr. Thomas's penalty-phase testimony included references to flashbacks and blackouts, sometimes in technical terms, and descriptions of the altered states of consciousness and psychotic symptoms that Mr. Jones experienced during the offense against Ms. Harris and the capital offense against Ms. Miller. App. 36a-40a; ER at 281-83, 289-91, 306-07, 313-15, 371. The California Supreme Court's reliance on penalty-phase testimony in determining whether a guilt-phase error was harmless, its conclusion that Dr. Thomas "failed to mention" Mr. Jones's history of flashbacks and blackouts despite his testimony to the contrary, and its ensuing suggestion that Mr. Jones was fabricating his history of flashbacks and blackouts constituted an unreasonable determination of the facts under § 2254(d)(2). *See Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (holding that a state court's partial reliance on a "clear factual error" reflected an unreasonable determination of the facts under § 2254(d)(2)); *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (examining the state court record and determining that the state court's "critical factual determinations were

unreasonable" and thus petitioner satisfied the requirements of § 2254(d)(2)).

Finally, Respondent's argument that any error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), is unsupported by the trial record. As the district court correctly concluded, the trial court's unconstitutional restrictions on Mr. Jones's testimony had a substantial and injurious effect or influence in determining the jury's guilt-phase verdict. *See* App. 40a. While the jury did not get to hear Mr. Jones's full story because he was not permitted to tell it, they still deliberated for four court days and acquitted him of the robbery and burglary special circumstances and robbery and burglary charges. App. 12a, 32a, 45a; SER at 90-94, 143-45. Those verdicts reflect that the jury credited Mr. Jones's testimony about his intent when he was permitted to offer it. As the prosecutor acknowledged in his closing argument, "the real crux" of the jury's task in reaching a verdict on the rape felony murder charge and the rape special circumstance was to determine Mr. Jones's specific intent. ER at 233; *see also* ER at 114 (prosecutor arguing that Mr. Jones's mental state went to the "heart of the case"). But, as a result of the trial court's restrictions on Mr. Jones's testimony regarding his mental state and lack of specific intent, the jury heard limited information from which to determine his specific intent. After asking questions during deliberations about specific intent and the rape felony murder rule, the jury returned a guilty verdict as to the rape charge and found the rape special circumstance true. App. 45a; SER at 143-45. Taking the entire record into account, there is a "grave doubt about the likely effect of [the] error on the jury's verdict." *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995). Contrary to Respondent's arguments, the trial court unconstitutionally restricted Mr. Jones's ability to provide testimony related to his specific intent at the time of the crime, which had a

substantial and injurious effect or influence on the jury's verdict, specifically with regard to their findings on the rape felony murder charge and the rape special circumstance. *See* App. 40a; Pet. 14-15.

## CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, this Court should grant certiorari.

Dated: June 10, 2022

Respectfully submitted,
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