No._____

In the
Supreme Court of the United States

Sergio Moises Ochoa,
Petitioner

v.

State of Wisconsin
Respondent

On Petition for Wit of Certiorari to the Supreme Court of Wisconsin

Petition for a Writ of Certiorari

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Question Presented

The rights to compel favorable witnesses and present a defense are fundamental to our system of justice, and predate our constitution. Yet these rights are routinely subjugated to rules of evidence, and these decisions are most frequently reviewed only for an appropriate exercise of judicial discretion. May courts continue to treat fundamental and enumerated rights as mere guidelines to be discarded when inconvenient?

Parties to the Proceeding

The petitioner is Sergio Ochoa who was the defendant in the circuit court, defendant-appellant in the Wisconsin Court of Appeals, and the defendant-appellant-petitioner in the Supreme Court of Wisconsin.

The respondent is the State of Wisconsin, who was the the plaintiff in the circuit court, and the plaintiff-respondent in subsequent appellate proceedings.

Statement of Related Proceedings

This case arises from the following proceedings:

- *State of Wisconsin v. Sergio Ochoa*, 21-AP-1378-CR (Order denying petition for review)(Appendix 101)
- *State of Wisconsin v. Sergio Ochoa,* 404 Wis. 2d 261, 978 N.W.2d 501 (Published opinion affirming the judgement of conviction)(Appendix 103)
- *State of Wisconsin v. Sergio Ochoa*, Sheboygan County 2017-CF-478 (Appendix 141)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Statutory Provisions

Other Authorities

Petition for Writ of Certiorari

Petitioner Sergio Ochoa respectfully petitions for a writ of certiorari to review the judgement of the Wisconsin Court of Appeals.

Opinions Below

The Wisconsin Supreme Court's order denying Mr. Ochoa's petition for review is unreported, and has been reproduced at App. 101. The court of appeals opinion affirming the decision of the circuit court is published, and can be found at 22 WI App 49, and is reproduced at Appendix 103. The circuit court's oral decisions are reproduced at Appendix 151, 165, and 173.

Jurisdiction

The Supreme Court of Wisconsin issued its opinion on November 16, 2022. A copy of this decision is reproduced at Appendix 101. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

Constitutional and Statutory Provisions Involved

The Fifth Amendment provides, "No person shall…be deprived of life, liberty or property, without due process of law".

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right…to have compulsory process for obtaining witnesses in his favor".

The Fourteenth Amendment provides, "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".

Statement of the Case

Sergio Ochoa is a law abiding citizen; he did not even have a parking ticket prior to this incident. He is well mannered and respectful. Mr. Ochoa is passionate, hardworking, and friendly. Like many Americans, Mr. Ochoa grew up shooting firearms, and obtained a concealed carry permit.

Most of all, Sergio Ochoa is a family man. His family ran a beef and dairy farm, this work ethic was passed to Mr. Ochoa who would work 55 hour weeks to build a better life for his family. He has always taken care of his parents, siblings, and children.

Mr. Ochoa had know the two deceased most of his life. He would go to rodeos with is family and see his cousin L.G. and his cousin's friend F.L. At the time, Sergio and L.G. were not particularly close. When he was 18, Sergio moved to California. When Sergio arrived in the United States, L.G. picked him up at the airport. L.G. was the only person Sergio knew in California. L.G. took Sergio in to his home, and helped Sergio get a job. Over the next two years, Sergio and L.G. became even closer than cousins; they were each others' best friends, living together working together, and socializing together.

After Sergio met his first wife, they moved to Mexico. Eventually, Sergio and his wife divorced, and Sergio remarried. Mr. Ochoa had visited L.G. in Oostburg, and fell in love with the town as it was a nice community to work and raise a family. While Mr. and Mrs. Ochoa were looking for their own apartment in Oostburg, they stayed with L.G..

Over the years, Mr. Ochoa and L.G. remained very close raising their families in Oostburg, Wisconsin. By the spring of 2017 L.G. had moved to Milwaukee, Wisconsin for work and Sergio was working long hours, causing them to see each other less often. Nonetheless, Mr. Ochoa continued to drive L.G.'s daughter to school daily throughout the 2016-2017 school year to help L.G.'s family and because their daughters were close in age.

Mr. Ochoa was a regular church-goer, and raised his children in this community. As L.G. was Sergio's closest male relative living in the United States, L.G. was Mr. Ochoa's son's godfather, and Mr. Ochoa had invited L.G. to continue to be his son's godfather at his First Communion.

But L.G. had a dark side. At the rodeos and other community events, Sergio witnessed L.G. and F.L. engage in "pre-emptive, violent and brutal attacks" after a night of drinking. L.G. and F.L. would use unconventional weapons such as rocks and beer bottles and even used an electrical wire for shocking bulls on one occasion.

In February of 2017, Mr. Ochoa saw L.G. ingest a powdery white substance in Mr. Ochoa's home. Mr. Ochoa believed the substance to be cocaine, and told L.G. to leave his house because he did not want drugs around his children. After this incident, Mr. Ochoa decided L.G. would not be a good godfather to his son, and made arrangements for his father to take L.G.'s place.

In July of 2017, Mr. Ochoa's sister and her family visited Mr. Ochoa's family. It was their first time visiting from Mexico despite Mr. Ochoa living in the United States for over a decade. Mr. Ochoa was ecstatic to have his sister, brother-in-law, nieces and nephews visit. On Saturday, July 29, Mr. Ochoa finished working around 2 p.m. and was excited to return home to share a meal with his extended family. After an early supper, Mr. Ochoa caught up with his sister, and they called their parents in Mexico.

Around 10:30, Mr. Ochoa and his bother-in-law went to L.G.'s home to bring over L.G.'s inhaler as well as beer and rum. A few minutes after Mr. Ochoa arrived, L.G. returned home with F.L. Mr. Ochoa noticed L.G. seemed to be under the influence of alcohol.

L.G. was happy and excited to see Mr. Ochoa. L.G. asked Mr. Ochoa to accompany him to a back bedroom, where L.G. began to inhale lines of cocaine. L.G. told Mr. Ochoa to come back later that night to discuss something important. Mr. Ochoa told L.G. he could not because of his plans with his family. L.G. was adamant insisting Mr. Ochoa return as L.G. was

working in Milwaukee and did not know when he would return to Oostburg. Mr. Ochoa and his brother-in-law then drove home.

Mr. Ochoa had never seen his cousin make such a serious request. When he woke up in the middle of the night, his cousin's request kept him from going back to bed. Mr. Ochoa got dressed and got ready to drive to his cousin's house. Due to a number of robberies in the Oostburg area and the late time of night, Mr. Ochoa lawfully carried his pistol with him.

When Mr. Ochoa entered his cousin's home, he saw L.G. snorting something, and F.L. "cleaning" or pinching his nose. As Mr. Ochoa and L.G. talked, L.G. became more aggressive. L.G. demanded to know "why the fuck [he] hadn't gone to visit him before and why the fuck [he] hadn't gone looking for him before". Then L.G. demanded Mr. Ochoa explain "why the fuck [Mr. Ochoa] had decided not to have him be the godfather for [Mr. Ochoa's] son at his First Communion".

When Mr. Ochoa told L.G. the reason he had revoked his cousin's role as Sergio Jr.'s godfather was because of L.G.'s life choices and drug use, L.G. "exploded like a bomb". L.G. began to exchange glances with F.L. who was opening and closing his pocketknife. L.G. started to yell at Mr. Ochoa and F.L. kept yelling <<Te va a lever la verga>>, and <<Ya the llevo la verga>>. at Mr. Ochoa.[1] Mr. Ochoa believed F.L. was threatening to kill him. Mr. Ochoa tried walking around the home and deescalating the situation. Mr. Ochoa tried to leave through the kitchen door, but couldn't turn the door knob. L.G. came behind Mr. Ochoa with a knife in his hand, and yelled "where are you going".

Mr. Ochoa was able to retreat to the living room. F.L. loudly yelled "you're done", lifted his shirt and reached toward his waist. Thinking F.L was about to draw a weapon, Mr. Ochoa drew his weapon and fired three

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[1] While the translators in the circuit court intreated this as "you are so screwed" Mr. Ochoa's expert interpreter, Mr. Villaseñor translated these as "you're gonna get fucked up", and "you're fucked now".

times. L.G. then charged at Mr. Ochoa and lunged at Mr. Ochoa; Mr. Ochoa rotated his body and shot L.G. three or four times.

Mr. Ochoa left the residence, and intended to go directly to the Sheboygan police station. He mistakenly thought the court house was the police station, and first drove there. After realizing the court house was not the police station, Mr. Ochoa corrected his course and drove to the police department. Mr. Ochoa pressed the intercom at the police station and wanted to explain who he was and what happened but was promptly arrested.

A criminal complaint charging him with two counts of First Degree Intentional Homicide was filed on August 8, 2017. A preliminary hearing was held on August 28, 2017. The circuit court found there was probable cause, and Mr. Ochoa was bound over.

Mr. Ochoa gave notice of nine expert witnesses it expected to testify. Three of the witnesses were also named by the state. One witness was employed by the state of Wisconsin Laboratory of Hygiene. The State raised relevancy and *Daubert* challenges to the other six defense experts. After conducting two days of *Daubert* hearings, the circuit court determined it would not let Mr. Marty Hayes, Mr. Alfonso Villaseñor, or Mr. Conrad Zvara testify.

Mr. Villaseñor is eminently qualified as an expert Spanish translator, and would have informed the jury of the gravity and severity of the slang phrases uttered by F.L. (Appendix 219).

Marty Hayes had more than forty years of experience and training in Firearms, use of force, and death investigations. He has testified as an expert in these subjects for twenty five years. He has published multiple articles and instructional videos and has been a firearms instructor since 1990. Mr. Hayes would have informed the jury the physical evidence suggests a dynamic, violent encounter where the deceased individuals were

likely moving.[2] He would also inform the jury on dynamics of violent encounters including the risks presented to an armed defender when they are outflanked. (Appendix 203).

Conrad Zvara began his extensive training in law enforcement in 1977. He also served in the United States Coast Guard Reserves for over 30 years. He spent decades training law enforcement, reserves, and civilians about firearms and self-defense. Mr. Zvara would have informed the jury about the factors used when assessing whether to use deadly force, the "danger zone" of an attacker, the time it can take to unholster a weapon, and why firing multiple shots is necessary. (Appendix 271)

Mr. Ochoa also sought to introduce evidence of the decedents' violent history. The circuit court determined it would not allow this evidence to be presented.

The case proceeded to trial, where the only issue was whether Mr. Ochoa acted reasonably in self defense. The jury was kept in the dark about the decedents specific instance of violence and the severity of the threats made. Material information about the use of delay force in violent encounters was intentionally kept form the jury. Mr. Ochoa's defense was hamstrung by the circuit court's evidentiary rulings.

Mr. Ochoa was acquitted of both counts of First Degree Intentional Homicide and Second Degree Intentional Homicide, but was convicted of two lesser included counts of First Degree Reckless Homicide.[3] Mr. Ochoa was

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[2] Interestingly, the circuit court found Mr. Hayes' use of mannequins and trajectory rods to be unreliable, but allowed Deputy Krogstad to testify about his use of trajectory rods, despite Deputy Krogstad having only one training in general death investigations. In addition to his training and research, Mr. Hayes has attended at least five advanced trainings in death investigations.

[3] This determination means the jury did not believe Mr. Ochoa intended to kill L.G. and F.L. but did cause their death by conduct which created the an unreasonable risk of death Mr. Ochoa was aware his conduct created the unreasonable risk, and the circumstances of the conduct show an utter disregard fro human life. This determination also means the jury rejected Mr. Ochoa's contention he reasonably believed the amount of force used was necessary, and/or he was at risk of great bodily harm or death. *See e.g. Wis. JI-Criminal* 1016.

sentenced on March 13, 2020. On each count, the circuit court imposed 12.5 years incarceration and five years of extended supervision to be served consecutively. Mr. Ochoa filed a timely notice of appeal on March 20, 2020. A timely notice of appeal was filed on November 24, 2020. On June 30, 2022, the Court of Appeals issued a published decision which upheld the circuit court's decisions to exclude expert testimony, evidence of the decedents' violent pasts, non-hearsay testimony, and the court's refusal to fully instruct the jury in the law of self-defense.[4] Mr. Ochoa petitioned the Wisconsin Supreme Court for review; the petition was denied on November 16, 2022.

[4] Wisconsin law provides a person is privileged to use deadly force if they reasonably believe such force is necessary to prevent imminent death or great bodily harm. A belief may be reasonable even if mistaken. The circuit court refused to inform the jury a mistaken belief may be reasonable. Wis. Stat. §939.48 (Appendix 147)

Reasons for Granting the Petition

I. Prior decisions of this court have simultaneously asserted an accused's right to present a defense is fundamental, yet subject this fundamental right a deferential balancing test. This Court should grant review to clarify the applicable standard of review.

The Constitution guarantees an accused cannot be deprived of their liberty without due process of law, and guarantees the right to offer testimony of favorable witnesses. U.S. Const. Amend V, VI, XIV; *In re Oliver*, 333 U.S. 257, 273 (1948). These amendments built upon the English common law tradition. Initially, the accused was not allowed to present any witnesses, however during the reign of Mary I, the law was changed to all the accused to present witnesses. Unlike witnesses for the Crown, the defendant's witnesses were not placed under oath, a practice Sir Edward Coke denounced as tyrannical. In 1702, this practice was abolished; all witnesses, both for the crown and testified under oath. 4 Blackstone, Commentaries 353-354. By enumerating this privilege in the Constitution, the founding generation perfected what the common law had left in an imperfect and questionable state. Story, Commentaries on the Constitution of the United States §§1786-1788 (1st. Ed. 1833).

These principles went unchallenged until the Twentieth Century. This is unsurprising, as the Bill of Rights was not thought to apply to the States, and the right to present a defense through witnesses was uncontroversial. See, *District of Columbia v. Heller*, 554 U.S. 570, 625-26 (2008). Early precedent continued to affirm the accused's right to present witnesses in their defense. *In re Oliver*, 333

U.S. 257, 273 (1948); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). For nearly two hundred years, the right to present a defense through testimony was a well understood categorical right.

This understanding fundamentally shifted in 1987. This Court was asked whether an evidentiary rule precluding hypnotically refreshed testimony violated the defendant's right to testify. *Rock v. Arkansas*, 483 U.S. 44 (1987). Quoting to *Chambers*, the Court stated the right to present relevant testimony "may, in appropriate cases, bow to other legitimate concerns in the criminal trial process." *Rock,* at 55. The Court then continued, announcing these restrictions may not be arbitrary or disproportionate to the purposes they are designed to serve, and that courts must evaluate whether the interest served by the rule justify the limitations on the defendant's constitutional rights. *Rock*, 56. The Court gave no explanation or authority for the creation of this balancing test. This balancing test was subsequently reiterated in *Holmes v. South Carolina:*

> [T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense…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.
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> *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)(Internal citations omitted).

Constitutional rights have frequently been subjected to judicial balancing tests. But when courts are balancing fundamental rights, they are to apply strict scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 16 (1973); *see, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985).

The balancing test in *Rock* and *Holmes* bears little resemblance to the exacting nature of strict scrutiny. The *Rock* test most closely resembles the arbitrary and capricious review used in administrative law, where an agency decision is only set aside if it is arbitrary or capricious. *E.g. FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 513 (2009). But the *Rock* test adds an additional burden on the accused; they must demonstrate a weighty interest which conflicts with an evidentiary rule. The lower courts and litigants have been left with little guidance for the reconciliation of these two propositions inherently at odds with each other.

While judicially empowering balancing tests were in vogue during the latter half of the Twentieth Century, recent decisions of this Court have returned to a more reasoned approach as enumerated rights are the very product of interest balancing conducted by the people. *Heller*, 554 U.S. 635. Constitutional guarantees which are subject to future judges' assessments of their utility are no guarantees at all. *Id.* This reasoned, analytical approach requires court to look to historical evidence and interpret Constitutional guarantees in light of their original understanding. *Crawford v. Washington,* 541 U.S. 36, 60 (2004).

This Court should return to this method of analysis regarding the accused's right to call witnesses and present their defense. Just like the Second Amendment protects the right to keep and bear arms, the plain text of the Sixth Amendment protects the right to call favorable witnesses, and the Due Process Clauses of the Fifth and Fourteenth Amendment preserve an accused's right to present their

defense. Similarly, it should be insufficient to restrict these rights on the government's reliance on a modern rule of evidence. Rather, the Government must demonstrate the rule is consistent with our Nation's historical traditions of the right to a jury trial. *See*, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111, 2126.

Currently these fundamental rights are subject to "a variety of vague ethics-political First Principles whose combined conclusion can be found to point in any direction the judges favor. *McDonald v. City of* Chicago, 561 U.S. 742, 804 (2010) (Scalia, J., concurring). Returning the right to call witnesses and present a defense to a historical analysis is in line with how courts protect other constitutional rights. *Bruen*, at 2130. To be sure, historical analysis can be difficult, but reliance on history to inform the meaning of a pre-existing right which the constitution codifies is "more legitimate, and more administrable, than asking judges to make difficult empirical judgments about the costs and benefits". *Id*. (Internal citations omitted).

II. The lower courts have failed to reach a consensus for evaluating whether there has been a denial of the right to present a defense. This Court should accept review to ensure all Americans enjoy the same privilege to defend themselves against the accusations of the government.

The lower courts have been left to interpret contradictory statements of law from this Court's decisions. In seeking to reconcile fundamental rights with an unusual deferential standard of review, the lower courts have split into at least four different schools of thought. This court should grant certiorari to quash the doctrinal chaos running rampart through the lower courts and return the rights to call favorable witnesses and present a defense to the status due to enumerated rights.

It is well established appellate courts apply a *de novo* review when constitutional deprivations are alleged. *See e.g.*, *Napue v. Illinois*, 360 U.S. 264, 271-72 (1959); *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *Bose Corp v. Consumers Union*, 466 U.S. 485, 499-501 (1984). It is also firmly established an accused has the constitutional right to present a defense and to call favorable witnesses. When an accused alleges their right to present a defense has been abridged by an evidentiary ruling, courts should logically apply a *de novo* review.

Yet only ten jurisdictions purport to apply a *de novo* review when an accused alleges a violation of their rights to call favorable witnesses and present their

defense.[5] In Maine's two applicable cases, the constitutional analysis is conclusory and consists of single sentences:

> Contrary to Burbank's assertion, the court's considered and reasonable application of established principles of evidence and case management did not result in a constitutional deprivation to Burbank.
>
> *State v. Burbank*, 2019 ME 37, ¶23 (ME 2019).
>
> Further, the exclusion of the evidence did not deprive Dobbins of his constitutional right to present a meaningful defense.
>
> *State v. Dobbins*, 2019 ME 116 (ME 2019).

Three of the ten *de novo* jurisdictions have held a discretionary decision to restrict expert testimony based on the rules of evidence does not deprive the accused of their right to call favorable witnesses. *People v. Kowalski*, 492 Mich. 106, 119 (Mich. 2012); *State v. Arndt*, 194 Wn.2d 784 ¶18; *State v. Ochoa*, 404 Wis. 2d 261, 283-289. Two of these courts only addressed whether the circuit court abused their discretion to limit expert testimony, and did not review this legal conclusion anew. *Arndt*, at ¶18; *Ochoa*, at 283-289. Michigan has taken this perfunctory analysis a step further; conducting a *Daubert* hearing precludes a violation of an accused's right to call favorable witnesses and present a defense. *Kowalski* at 139-140.

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[5] *United States v. Bowling*, 770 F.3d 1168, 1174 (7th Cir. 2014); *United States v. Turning Bear*, 357 F.3d 730 (8th Cir. 2004); *United States v. Pineda-Doval*, 614 F.3d 1019, 1032 (9th Cir. 2010); *State v. Dobbins*, 2019 ME 116 ¶ 10 (ME 2019); *People v. Kowalski*, 492 Mich. 106, 119 (Mich. 2012); *State v. Patterson*, 2012 MT 282 ¶10 (MT 2012); *State v. Cazares-Mendez*, 350 Ore. 491 (Or. 2011); *State v. Brown*, 29 S.W.3d 427 (Tenn. 2000); *State v. Arndt*, 194 Wn.2d 784 (Wash 2019); *State v. Ochoa*, 404 Wis. 2d 261 274 (Wis. Ct. App. 2022).

Michigan's ruling, precluding a constitutional violation based on following a rule of evidence, is in line with nine other jurisdictions.[6] The states of Iowa, Kentucky, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, Vermont, and Virginia have all subjugated the constitutional right to present a defense and call favorable witnesses to their rules of evidence.

North Dakota ignores much of *Chambers*, and claims it did not establish a rule where the constitutional right to present a defense "trumps" long standing rules of evidence designed to ensure only reliable evidence is presented to the finder of fact. *State v. Miller*, 2001 ND 132 ¶16 (ND. 2001); *but see, Chambers*, 410 U.S. 302 ("[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice").

Texas plainly ignores the supremacy of the federal constitution:

> A defendant has a fundamental right to present evidence of a defense as long as the evidence is relevant and is not excluded by an established evidentiary rule.
>
> *Miller v. State*, 36 S.W.3d 503, 507.

Vermont ignores this court's precedent. "Where a trial court acts within its discretion to exclude evidence, there is no due process violation." *State v. Bergquist*, 2019 VT 17 ¶53.

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[6] *State v. Countryman*, 573 N.W.2d 265, 266 (Iowa 1998); *Commonwealth v. Roark*, 641 S.W.3d 94, 100 (KY 2021); *State v. Phillips*, 286 Neb. 974, 997 (Neb. 2013); *State v. Miller*, 2001 ND 132 ¶13 (N.D. 2001); *Simpson v. State*, 230 P.3d 888, 895 (Okla. Crim. App. 2010); *State v. Crawford*, 2007 SD 20 ¶20 (S.D. 2007); *Miller v. State*, 36 S.W.3d 503, 507 (Tex. Crim. App. 2001); *State v. Bergquist*, 2019 VT 17 ¶53 (*Vt. 2019); *Grattan v. Commonwealth*, 278 Va. 602, 623 (Va. 2009)

Roughly half the jurisdictions in the United States have taken a less extreme stance than those who preclude a due process violation. While they acknowledge the right to present a defenses and call favorable witnesses, trial court decisions are reviewed for an abuse of discretion. Troublingly, there is not a common test, or methodology the courts use to determine when an accused's rights have been implicated.

Both the Fourth and Fifth Circuit seem to have adopted a requirement a witness be material and favorable. *United States v. Beyle*, 782 F.3d 159, 171 (4th Cir. 2015); *United States v. John*, 597 F.3d 263, 276-277 (5th Cir. 2010). Similarly, Alaska requires a showing of relevance and materiality, but subjects any error to harmless error analysis. *Smithart v. State*, 998 P.2d 583 (Alaska 1999).

The Tenth Circuit is more explicit about its requirements; to show the right to present a defense was violated, the accused "must show: (1) the district court abused its discretion in excluding the evidence at issue; and (2) the excluded evidence was of such an exculpatory nature that its exclusion affected the trial's outcome." *United States v. Hammers*, 942 F.3d 1001, 1012 (10th Cir. 2019).

Other courts simply acknowledge the right to present a defense exists, and then promptly analyze the constitutional claim as if it were a mere evidentiary argument. *Commonwealth v. German*, 483 Mass. 553, 568-570 (Mass. 2019); *Bradley v. State*, 292 Ga. 607, 612 (Ga. 2013); *State v. Escalante-Orozcco*, 241 Ariz. 254, 276 (Ariz. 2017).

Three jurisdictions have taken a less restrictive approach to an accused's right to present a defense. In Florida, Hawaii, and New Jersey, courts are to allow any evidence which tends to establish a reasonable doubt of guilt.[7] Appellate courts in each of these states apply an abuse of discretion standard of review. While a discretionary review is at odds with this Court's precedents, the admissibility of any evidence which tends to establish reasonable doubt is in accord with the original understanding of the right to present witnesses. In his Commentaries, William Blackstone wrote:

> All witnesses that have the use of their reason, are to be received and examined, except such as are infamous, or such as are interested in the event of the cause. All others are competent witnesses; though the jury form other circumstances will judge their credibility.
>
> …
>
> [T]he occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the preference of the judge, during the examination, a matter of small importance: for…he is able by use and experience to keep the evidence from wandering from the point in issue.
>
> 3 Blackstone, Commentaries 370-374.

This court should grant review to hold the distortion of fundamental rights. These rights were well understood when adopted. This Court should return to this original understanding oof the right to call favorable witnesses and the right to present a defense. When alleged violations of this right occur, this Court should

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[7] *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990); *State v. Abion*, 148 Haw. 445, 458 (Haw. 2020); *State v. Cope*, 224 N.J. 530,554-55 (N.J. 2016).

confirm *de novo* review is appropriate as no deference is accorded to lower courts interpretation of the Constitution.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: Tuesday, February 14, 2023
Respectfully submitted,

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