No. _____

In the Supreme Court of the United States

WILLIAM TODD LEWALLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED:

Oklahoma has jury sentencing in all felony cases, and those proceedings may be bifurcated. The Oklahoma Court of Criminal Appeals (the "OCCA") has the authority to remand for sentencing only, which it did here. An Oklahoma statute gives the accused the right to a sentencing jury trial in those circumstances. But through case law, the OCCA has adopted a rule of law—applied here—that deems the accused's version of events irrelevant as a matter of law, even though the State and its witnesses can (and here did) testify extensively about those same events (for which sentence was being imposed). Is this principle of state evidence law contrary to, or an unreasonable application of, the clear rules set forth in *Rock v. Arkansas*, 483 U.S. 44 (1987) that (i) the "accused[] [has the] right to present his own version of events in his own words," *id.* at 52, and (ii) a state's restrictions on the defendant's right to testify "may not be arbitrary or disproportionate to the purposes they are designed to serve," *id.* at 55-56, as the District Court correctly found here.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, William Todd Lewallen, respectfully petitions this Court to issue a Writ of Certiorari to review the opinion rendered by the United States Court of Appeals for the Tenth Circuit in *Lewallen v. Crow*, No. 21-5069, 2022 U.S. App. LEXIS 35254 (10th Cir. Dec. 21, 2022).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit reversing the District Court's grant of habeas relief is found at *Lewallen v. Crow*, No. 21-5069, 2022 U.S. App. LEXIS 35254, 2022 WL 17826002 (10th Cir. Dec. 21, 2022). *See* Appendix A. The District Court's decision is found at *Lewallen v. Crow*, 18-CV-0414-CVE-CDL, 2021 U.S. Dist. LEXIS 150870, 2021 WL 3556634 (N.D. Okla. Aug. 11, 2021). *See* Appendix B. The decision of the OCCA deciding the claim relevant here is unpublished (*Lewallen v. State*, No. F-2017-189 (Okla. Crim. App. 2018) (hereinafter "*Lewallen II*"), but is attached as Appendix C.

JURISDICTION

The Tenth Circuit issued its opinion reversing the District Court's grant of relief on December 21, 2022. 28 U.S.C. § 1254(1) gives this Court jurisdiction to decide this Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment VI:

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

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation.

INTRODUCTION

Normally, Oklahoma has a very broad definition of relevant evidence:

> Relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the determination of

> the action more probable or less probable than it would be without the evidence. Relevant evidence need not conclusively, or even directly, establish the defendant's guilt; it is admissible if, when taken with other evidence in the case, it tends to establish a material fact in issue.

Postelle v. State, 2011 OK CR 30, ¶ 31, 267 P.3d 114, 131. By statute, Oklahoma has sentencing by jury, done at a jury trial. And it is in such "resentencing" trials where Oklahoma has adopted a modified standard of relevance—one that applies only to the testimony of the accused and which operates categorically to exclude it. This, of course, is a judicial interpretation of an evidentiary rule that is not, on its face, directly on point.

This is *precisely* what occurred in the Arkansas courts in the proceedings underlying this Court's decision in *Rock v. Arkansas*, 483 U.S. 44 (1987). The Arkansas Supreme Court—discussing both the vernacular of Rule 403 and Rule 702—adopted a judicial rule—applicable only to post-hypnotic testimony that: "we are satisfied from the more recent cases and the views of experts, that the dangers of admitting this kind of testimony outweigh whatever probative value it may have." *Rock v. State*, 708 S.W.2d 78, 81 (1986).

This Court found this analysis to be unconstitutional. This Court's decision in *Rock* is, on its face, applicable to any state court "applying its evidentiary rules." *Id.* at 56. It is *not* limited to assessments of reliability alone. Beyond that, this Court also made clear that "*per se* exclusions" of a defendant's testimony from a criminal trial under state evidentiary rules are

unconstitutional. *Id.* at 52, 61. And the Court also explained that it was clearly recognizing "an accused's right ***to present his own version of events in his own words***." *Id.* at 52 (emphasis added).

Oklahoma's judicially created standard of relevance applicable only to defense testimony in a resentencing proceeding violates all of those principles. The Oklahoma rule dictated that Mr. Lewallen's testimony was irrelevant and *per se* inadmissible, even though the State was permitted to introduce testimony from numerous witnesses on precisely the same events against Mr. Lewallen. The federal District Court granted habeas corpus relief to Mr. Lewallen and correctly found that the OCCA application of this rule to categorically bar Mr. Lewallen from testifying to his version of the events in question was arbitrary and disproportionate to any legitimate interest in excluding that testimony as to the relevant events. The OCCA decision was thus contrary to, and an unreasonable application of, the clear rules set forth in *Rock v. Arkansas*, 483 U.S. 44 (1987).

The Tenth Circuit, in reversing the District Court's grant of habeas relief, read *Rock* incorrectly, finding it limited to "reliability determinations"—a limitation not found in *Rock* and in fact directly rejected by the decision's language. Thus, the Tenth Circuit never engaged in the actual analysis that *Rock* requires and further never determined whether the OCCA complied with it here. The federal District Court did both of those things, and faithful

application of what *Rock* actually says can only lead to the conclusion that the OCCA's decision here was both contrary to *Rock* and an unreasonable application of *Rock* such that habeas relief can and must be granted.

STATEMENT OF THE CASE

A. Original Trial and Events Leading to Resentencing Trial.

In November 2012, the State of Oklahoma charged Mr. Lewallen in the District Court of Tulsa County with one count of Child Neglect in violation of 21 OKLA. STAT. § 843.5(C), after former conviction of two or more felonies. *Lewallen*, 2021 U.S. Dist. LEXIS 150870, at *1-2..

The State alleged that Mr. Lewallen took a combination of prescription medications and alcohol, rendering himself unable to care for his three children, and, as a result, one child was found naked and unsupervised outside and a second child was found unsupervised and locked in a dog cage. (*Id.* at *2). At trial, the jury found Mr. Lewallen guilty of child neglect and recommended a sentence of 23 years' imprisonment, which the state trial court imposed. (*Id.*).

Mr. Lewallen appealed. *Lewallen v. State*, 370 P.3d 828 (Okla. Ct. Crim. App. 2016). The OCCA affirmed the conviction, but vacated the sentence due to jury instruction error and remanded for resentencing. *Id.* at 830.

B. Oklahoma Law Regarding Resentencing Trials.

In Oklahoma, resentencing trials are governed by 22 OKLA. STAT. § 929. This statute allows for the defendant to request a "jury trial" and provides that "the trial court shall impanel a new jury" for sentencing purposes. 22 OKLA. STAT. § 929(C). The statute also provides rules for admissibility of evidence in resentencing trials:

> All exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing shall be admissible in the new sentencing proceeding. Additional relevant evidence may be admitted including testimony of witnesses who testified at the previous trial.

22 OKLA. STAT. § 929(C)(1).

Though the statute allows for the admission of "additional relevant evidence," the OCCA has judicially abrogated a criminal defendant's ability to testify in resentencing trials. In *Malone v. State*, 58 P.3d 208 (Okla. Crim. App. 2002), the OCCA held that a defendant's mitigation evidence is *per se* irrelevant at a resentencing trial, and in *Rojem v. State*, 130 P.3d 287 (Okla. Crim. App. 2006), the OCCA held that evidence relating to guilt or innocence is irrelevant at a resentencing trial.

C. Mr. Lewallen's Resentencing Trial.

Mr. Lewallen demanded a jury trial upon resentencing, and, prior to his trial, gave notice to the trial court that he intended to testify at his resentencing hearing. *Lewallen*, 2021 U.S. Dist. LEXIS 150870, at *3.. The

state trial court, pursuant to *Malone* and *Rojem*, held that Mr. Lewallen's testimony was irrelevant and that he would not be permitted to testify at his resentencing jury trial. (*Id*. at *4).

The trial proceeded as any jury trial would. The State was permitted to re-introduce ***all*** of its evidence at resentencing as testimony relevant to Mr. Lewallen's sentencing. (App. Vol. III, at 265 - App Vol. IV, at 126). Five witnesses for the State testified against Mr. Lewallen. (*Id*.). Of note, one witness, Detective Mark Hodges presented testimony that consisted ***solely of Mr. Lewallen's statements*** to Detective Hodges following his arrest. (App. Vol. IV, at 72-100). Hodges testified that Mr. Lewallen had told him about Lewallen's medical conditions, the family's financial condition, and about the events earlier in the day of Mr. Lewallen's arrest. (*Id*.). Again, and to be clear, *this* testimony was deemed relevant, while Mr. Lewallen's was not.

After the State's case, Mr. Lewallen made an offer of proof to the trial court as to how he would testify. (App. Vol. IV, at 169-173). Mr. Lewallen proposed to testify regarding his health conditions and permanent disability, which led to his hospitalization the night before the events in question and his being prescribed new, unfamiliar prescription drugs. (*Id*.). Mr. Lewallen further sought to testify regarding the family's financial circumstances, which led to him being responsible for the care of his three children despite his physical limitations. (*Id*.). He would have testified as to what he remembered

of the morning of his arrest, and his efforts to care for his three children that morning. (*Id*.). It is notable that the State of Oklahoma was permitted to introduce much of this same testimony through Detective Mark Hodges. (App. Vol. IV, at 72-100).

The trial court wholly excluded any and all testimony Mr. Lewallen would have offered, holding that, under OCCA precedent, all of Mr. Lewallen's testimony was irrelevant mitigation testimony. (App. Vol. IV, at 176).

D. Mr. Lewallen's Resentencing Appeal.

Mr. Lewallen appealed his sentence to the OCCA, on the grounds that "[t]he trial court erred when it denied him the right to testify in his defense at the resentencing trial." (App. Vol. II, p. 62). He there argued that the state trial court violated his constitutional right to testify as set forth in *Rock v. Arkansas* when it prohibited him from testifying under state law evidentiary rules that held his testimony to be "not relevant." (*Id*. at 63-64).

In an unpublished, summary opinion, the OCCA denied relief. *Lewallen v. State*, No. F-2017-189 (Okla. Crim. App. 2018) ("*Lewallen II*"). The OCCA opinion acknowledged that *Rock v. Arkansas* applied to Mr. Lewallen's claim, but held that "the evidentiary restrictions relied upon by the trial court …were neither arbitrary nor disproportionate to the purposes they were designed to serve." *Lewallen II*, p. 7. The OCCA declared, without further analysis, that, because Mr. Lewallen was precluded from testifying pursuant to "the most

basic rule of admissibility, i.e., the rule of relevancy," this denial did not violate the holding of *Rock*. *Id*.

E. Mr. Lewallen's Federal Habeas Petition and the Federal District Court's Grant of It.

Mr. Lewallen filed a *pro se* Petition for Habeas Corpus in the United States District Court for the Northern District of Oklahoma. The District Court, after thorough and reasoned analysis, granted conditional relief to Mr. Lewallen.

The District Court began by noting that *Rock* recognized that a state may place appropriate limits on a defendant's right to testify, but that, such restrictions "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Lewallen*, 2021 U.S. Dist. LEXIS 150870, at *39. Under *Rock*, a State must "evaluate whether the interests served by a [evidentiary] rule justify the limitation imposed on the defendant's constitutional right to testify." *Id.* *Rock* expressed particular criticism for *per se* exclusionary rules as applied to a defendant's testimony because such rules do not allow for this necessary analysis. *Id.* at *58 (citing *Rock*, 483 U.S. at 61).

The District Court then evaluated the state's asserted interests, examining *Rojem v. State*, *supra*, and *Malone v. State*, *supra*—the two cases that preempted Mr. Lewallen's testimony. *Id.* at *58-*64. The District Court reasoned that, "the OCCA ignored that *Rock* expressed special criticism for *per*

se exclusionary rules" and further reasoned that the OCCA's rule mandating wholesale exclusion of a defendant's mitigation testimony constituted a *per se* exclusionary rule, just as the unconstitutional rule in *Rock* had been. *Id.* at *58. Ultimately, the District Court held that "the trial court's application of *Malone*'s *per se* rule to exclude Lewallen's proffered testimony, without any consideration of whether some or all of the mitigating evidence might be admissible in this particular case, was an arbitrary restriction on Lewallen's right to testify." *Id.* at *59.

The District Court further reasoned that OCCA's application of its precedent was arbitrary and disproportionate under *Rock*. *Id*. at *72. The restriction was arbitrary because Mr. Lewallen was barred from presenting evidence that had previously been admitted through the state's witnesses—it was only "irrelevant" when Mr. Lewallen sought to admit it. *Id.* at *66-*67. The restriction was disproportionate because the trial court and OCCA excluded evidence that merely described the events of the few days before, and the day of, Mr. Lewallen's arrest and which did not attempt to undermine the jury's verdict. *Id.* at *67. Thus, the exclusion of Mr. Lewallen's testimony closely tracks the reasoning in *Rock*, that an evidentiary rule "may ha[ve] a significant adverse effect on [the defendant's] ability to testify" if it "virtually prevent[s] her from describing any of the events that occurred on the day of [her offense], despite corroboration of many of those events by other witnesses."

Id. (quoting *Rock*, 483 U.S. at 57). The District Court further reasoned that the "wholesale exclusion" of a defendant's testimony, as here, was to be viewed as particularly problematic under *Rock*. *Id.* at *69.

F. The State's Appeal and the Tenth Circuit's Decision.

The State appealed the District Court's grant of relief to the Tenth Circuit Court of Appeals, which reversed the grant of habeas relief. The Tenth Circuit held that, because Mr. Lewallen was barred from testifying on relevance grounds, the exclusion of his testimony "reasonably accommodated state interests." *Lewallen*, 2022 U.S. App. LEXIS 35254, at *9. The Tenth Circuit also held that *Rock* was not clearly established precedent because (1) Mr. Lewallen's testimony was excluded on relevance grounds rather than reliability grounds and (2) Mr. Lewallen sought to introduce "mitigation" testimony at his sentencing trial, rather than testify to at a guilt-innocence trial. *Id.* at *10-*12.

REASONS FOR GRANTING THE WRIT

There are several things that *Rock* unquestionably established clearly. *First*, "it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock*, 483 U.S. at 49. *Second*, this Court made clear that if a judicial interpretation of state evidentiary rules results in a "*per se* exclusion[]" of a defendant's testimony at a criminal trial, it is unconstitutional. *Id*. at 52, 61. This finding

expressly applied *anytime* the State was "applying its evidentiary rules," *id.* at 56, *not* limited solely to "reliability" determinations.[1] *Third*, while this Court not surprisingly found the right to testify could be subject to restriction, it was very clear that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 55-56. *Fourth*, this Court deemed to be "fundamental" to the Sixth Amendment's right to a defense "an accused's right to present ***his own version of events in his own words***." *Id.* at 52 (emphasis added). In other words, an accused has a unique right—secured by the Constitution itself—to tell his own version of events at a criminal trial.

As this Court has remarked in another context, "earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established . . . . The same is true of cases with 'materially similar' facts." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). As explained below, this Court has recognized this principle to have application in the context of 28 U.S.C. § 2254(d).

While the *Rock* decision involved a judicially crafted evidentiary doctrine that rendered a defendant's testimony inadmissible on reliability grounds, the

[1] Arkansas did not have a rule of "reliability." The Arkansas Supreme Court discussed several different evidentiary rules (at least in concept), before ultimately grounding its decision in the vernacular of Rule 403. *Rock v. State*, 708 S.W.2d 78, 81 (1986).

broad constitutional principles set forth in *Rock*—in many ways, only a culmination of principles set forth in this Court's prior decisions—are in no way limited to the specific facts, much less the precise incorrect grounds of inadmissibility, at issue *Rock*. Yet, in reversing the federal District Court's detailed grant of habeas relief, the Tenth Circuit practically did just that, finding that *Rock* had no application where a state was not "bar[ring] a defendant from offering relevant, hypnotically refreshed testimony at a guilt – innocence trial based only on the categorical determination that such testimony is always unreliable."

But nothing in *Rock* is so limited. And in so finding, the Tenth Circuit: (i) failed to recognize that *Rock* applies anytime a state evidentiary doctrine applies to prevent a defendant from testifying, (ii) failed to consider whether the specific doctrine applied here was being applied in an arbitrary way (by allowing State witnesses to testify to *precisely* the same events and circumstances that Mr. Lewallen could not), and (iii) failed to consider that *Rock* compels that a defendant can testify at trial to "his own version of events in his own words" under the Constitution, even if that testimony could be said to be "mitigating" in some way. In so doing, the Tenth Circuit has significantly curtailed what *Rock* clearly established as an unquestioned and fundamental right—the defendant's right to testify at his criminal trial. A writ from this Court is warranted to reiterate *Rock*'s clear holdings and their application here

(which, in turn, confirms their application to all criminal trials—and especially those in states that allow or require bifurcated jury sentencing as a part of trial).

I. THE TENTH CIRCUIT PRESSED THE SCOPE OF 28 U.S.C. § 2254(D)'S LIMITATION ON RELIEF TOO FAR.

The Tenth Circuit suggested that the District Court essentially ignored 28 U.S.C. § 2254(d)(1).[2] In fact, the District Court recognized and applied 28 U.S.C. § 2254(d)(1). *Lewallen*, 2021 U.S. Dist. LEXIS 150870, at *31-*32. . By its text, habeas relief is permitted under § 2254(d)(1) where the state decision involves one (or both) of the following kinds of mistakes:

> (a) "was contrary to . . . clearly established Federal law"; or
>
> (b) "involved an unreasonable application of[] clearly established Federal law".

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[2] As Judge Easterbrook (joined by Judge Wood and Judge Posner, among others) once said:

> [§ 2254] does not tell us to 'defer' to state decisions, as if the Constitution means one thing in Wisconsin and another in Indiana. Nor does it tell us to treat state courts the way we treat federal administrative agencies. Deference after the fashion of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), depends on delegation. Congress did not delegate either interpretive or executive power to the state courts.

Lindh v. Murphy, 96 F.3d 856, 868 (7th Cir. 1996) (en banc) (Easterbrook, J.), *rev'd on other grounds*, 521 U.S. 320 (1997).

For these purposes, clearly established federal law "refers to the holdings, as opposed to the dicta" of this Court's decisions at the time of the relevant state court decision. *Yarborough v. Alvarado*, 541 U.S. 652, 660 (2004); *see also (Terry) Williams,* 529 U.S. at 412.

Section 2254(d) prohibits relief unless the federal court can determine that the state court's rejection of the habeas petitioner's meritorious claim is attributable to an identifiable legal, analytical or factual mistake, and not merely to a difference of opinion between the state court and the federal court. *See (Terry) Williams*, 529 U.S. at 411. In other words, some increment of incorrectness beyond error is necessary, but the increment need not be great. *See Cotto v. Herbert*, 331 F.3d 217, 235 (2d Cir. 2003); *McCambridge v. Hall*, 303 F.3d 24, 35-36 (1st Cir. 2002) (*en banc*) (holding "that 'some increment of incorrectness beyond error is required.' . . . The increment need not necessarily be great, but it must be great enough to make the decision unreasonable in the independent and objective judgment of the federal court."); *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000) ("the increment [beyond error] need not be great; otherwise, habeas relief would be limited to state court decisions 'so far off the mark as to suggest judicial incompetence.'").

As clearly demonstrated in *(Terry) Williams*, evaluating a state court's decision for the presence of these errors requires a careful examination not only of the ultimate result of the state court's adjudication, but also of the

reasoning articulated by the state court in reaching that result. *See* JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, 1452 (§ 2254(d) requires "careful attention not only to the ultimate judgment of the state court but also to the validity of the court's reasoning process").

A. "Contrary to … law" Provision of § 2254(d).

A state court adjudication will be contrary to clearly established law if it "applies a rule that contradicts the governing law" set forth within the relevant Supreme Court decisions. *(Terry) Williams*, 529 U.S. at 406. Further, a decision is contrary to clearly established law if it, "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [] precedent." *Id.* If the state court erred in its framing of the applicable legal standard, its decision is contrary to law for these purposes. *Id.* at 405; *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007) (explaining that *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) "indicat[es] that § 2254 does not preclude relief **if either 'the reasoning [or] the result of the state-court decision contradicts [our cases]'** " (emphasis added)); *Ramdass v. Angelone*, 530 U.S. 156, 168 (2000) (plurality opinion) ("On review of state decisions in habeas corpus, state courts are responsible for a faithful application of the principles set out in the controlling opinion of the Court."); *Allen v. Lee*, 366 F.3d 319, 343 n.3 (4th Cir.)

(en banc), cert. denied, 543 U.S. 906 (2004) (Gregory, J., concurring, representing views of majority of *en banc* circuit) ("Having found that the analysis employed by the state court was unreasonable, we could not properly deny relief under § 2254(d) on the basis that the result of the state court proceeding was not unreasonable. Such a conclusion would necessarily be premised on reasoning that was not relied on by the state court. Reasoning that the state court could have—but did not—employ must be evaluated *de novo*, without applying the deferential standard prescribed by § 2254(d)(1).").

B. "Unreasonable application of … law" Provision of § 2254(d)(1).

"A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involv[ing] an unreasonable application of . . . clearly established federal law.'" *(Terry) Williams*, 529 U.S. at 407-08. When making this determination, the federal habeas court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409 (emphasis added). In *(Terry) Williams*, this Court found the Virginia Supreme Court's rejection of the petitioner's ineffective assistance claim to have involved an unreasonable application of governing law in two respects: first, because the state court "relied on the inapplicable exception [to S*trickland's* prejudice standard] recognized in *Lockhart* [*v. Fretwell*, 506 U.S. 364 (1993)]," *Id.* at 397; and second, because the state court's

"prejudice determination . . . failed to evaluate the totality of the available mitigation evidence . . . in reweighing it against the evidence in aggravation." *Id.* at 397-98.

As this Court has observed, however, "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough*, 541 U.S. at 666. In *Panetti*, the Court held that the procedures afforded to a habeas petitioner who claimed that he was incompetent to be executed did not conform with *Ford v. Wainwright*, 477 U.S. 399 (1986). The Court further found that the petitioner, who suffered from fixed delusional beliefs, could be incompetent under the principles set forth in *Ford*, even though such a condition was never stated in *Ford*.

In *Panetti*, this Court noted that just because the applicable legal precedent "is stated in general terms" that "does not mean the application was reasonable." *Id.* at 953. The "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Id.* at 953 (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring)). And the AEDPA does not "prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was

announced. The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Id*.

As will be discussed in greater detail, the OCCA's decision here was both contrary to *Rock* and unreasonably applied *Rock*. This means that § 2254(d) did not prevent the District Court from granting relief and it should not have prevented the Tenth Circuit.

C. Both Provisions of § 2254(d)(1) Apply Only to the State Court's Actual Decision.

By its terms, § 2254(d) applies to federal courts' review of a state court's "adjudicat[ion] on the merits" of the petitioner's claim, and the specific provisions of § 2254(d)(1) apply to the federal courts' review of the manner in which the state court actually adjudicated the petitioner's claim.

Indeed, this Court has recently explained that "[d]eciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to 'train its attention on the ***particular reasons***—both legal and factual—why state courts rejected a state prisoner's federal claims." *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018) (emphasis added) (citation omitted). And the Court stated explicitly that, "when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion . . ., a federal habeas court simply reviews ***the specific reasons*** given

by the state court and defers to ***those reasons*** if they are reasonable." *Id.* at 1192 (emphases added).

In *Wilson*, this Court explained that the "'could have supported' framework" applies ***only when*** a "state court's decision is unaccompanied by an explanation." *Id.* at 1195 (quoting *Harrington v. Richter*, 562 U.S. 86, 98 (2011)). It ***does not apply*** when state courts provide "a reasoned decision" that federal courts can review. *Id.*; *Maier v. Smith*, 912 F.3d 1064, 1069 (7th Cir. 2019) (habeas "review [is of] the [state court's] opinion, which was the last reasoned state-court decision on the merits."); *Allen*, 366 F.3d at 343 n.3 ("[r]easoning that the state court could have—but did not—employ must be evaluated *de novo*, without applying . . . § 2254(d)(1).").

II. THE SCOPE OF *ROCK*, WHICH THE TENTH CIRCUIT IMPROPERLY FAILED TO APPLY.

At issue in *Rock* was Arkansas's *per se* exclusion of a defendant's hypnotically refreshed testimony. *Rock*, 483 U.S. at 47. This Court began its analysis by noting that, "it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Id.* at 49. Relevant to the scope of the rights set forth in *Rock*, this Court wrote that the "right to testify on one's own behalf at a criminal trial" is "one of the rights that 'are essential to due process of law in a fair adversary

process.'" *Id.* at 51 (quoting *Faretta v. California*, 422 U.S. 806, 819, n.15 (1975)).[3]

A. Rock *is Not Limited to Determinations of Reliability.*

The Tenth Circuit's analysis first went astray when it suggested that *Rock* had no application other than to "categorical determinations that [the accused's hypnotically refreshed testimony] is always unreliable." *Lewallen*, 2022 U.S. App. LEXIS 35254, at *12. But *Rock* actually applies anytime that a state is "applying its evidentiary rules" to prevent a defendant's testimony. *Rock*, 483 U.S. at 56.

This much is made clear by the Arkansas Supreme Court's decision that was on review. The Court first discussed several evidentiary concepts, including the rules governing expert testimony and Rule 403. *Rock v. State*, 708 S.W.2d 78, 79-84 (Ark. 1986). Then, the Court remarked "[e]ven defendants are subject to the rules of procedure and evidence, such as hearsay, or other instances of evidentiary exclusion, *e.g.* evidence that is prejudicial, confusing, misleading, cumulative or time consuming." *Id.* at 85. And the

[3] As a foundation for its holding, this Court noted that "[a] person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence…." *Rock*, 483 U.S. at 51 (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)). The right further derives from the Compulsory Process Clause of the Sixth Amendment (citing *Washington v. Texas*, 388 U.S. 14, 17-19 (1967)), and is a necessary corollary to the Fifth Amendment's "guarantee against compelled testimony." *Id.* at 52-53.

Court's core conclusion was that "the dangers of admitting this kind of testimony outweigh whatever probative value it may have." *Id.* at 81.

Thus, *Rock* is not constrained or limited to reliability determinations alone, as the text of the opinion makes clear.[4] In finding it to be so limited, the Tenth Circuit both violated the opinion's text as well as this Court's recent explanation that 28 U.S.C. § 2254(d)(1) does not require an "'identical factual pattern before a legal rule must be applied.'" *White v. Woodall*, 572 U.S. 415, 427 (2014) (quoting *Panetti*, 551 U.S. at 953). Further, this Court wrote: "[t]o the contrary, state courts must reasonably apply the rules squarely established by this Court's holdings to the facts of each case" and "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *White,* 572 U.S. at 427 (internal citations omitted). *Rock* is clear enough both on its face and in the nature of the rule it announced to apply beyond "reliability" rulings.

[4] Indeed, the Court unequivocally explained the breadth of the rule it was laying down—a rule so broad that it "reaches beyond the criminal trial…." *See, e.g.*, *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 786 (1973) (probation revocation); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (parole revocation); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (termination of welfare benefits)." *Rock*, 483 U.S. at 51, n.9. Whatever else can be said of this statement from this Court's opinion, it makes crystal clear that there is no part of the criminal trial to which *Rock*'s broad rule does not facially apply.

B. Rock *Particularly Disfavors* Per Se *Exclusionary Rules Applicable to Defendants' Testimony, Something the OCCA Applied and the Tenth Circuit Did Not Analyze.*

Perhaps the most significant thing that the District Court recognized that the Tenth Circuit failed to is that this Court made clear in *Rock* that when states adopt or interpret evidentiary rules that function as "*per se* exclusions" of a defendant's testimony they will not pass constitutional muster. *Id.* at 61, 52 ("There is no justification today for a rule that denies an accused the opportunity to offer his own testimony."). But the OCCA and the state trial court interpreted *Malone* and *Rojem* in precisely that way.

The Court did, indeed, state that the right to testify "is not without limitation." *Id.* at 55 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).[5] But to comply with the Constitution, restrictions on the defendant's right to testify "may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules, a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Id.* at 55-56. The Court went on to hold that the challenged Arkansas rule "does not allow a trial court to consider

[5] The citation of *Chambers* is significant because the core conclusion of this Court there was that, when they run against the right to present a defense, a state court's evidentiary determinations—even if correct as a matter of state law— "may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

whether posthypnosis testimony may be admissible in a particular case," and as such "it is a *per se* rule prohibiting the admission at trial of any defendant's hypnotically refreshed testimony." *Id*. at 56. This "*per se* rule excluding all posthypnosis testimony infringe[d] impermissibly on the right of a defendant to testify on his own behalf." *Id*. at 62.

In sum, under *Rock*, "[a] criminal defendant has a constitutional right to testify in his own behalf at trial." *Canon v. Mullin*, 383 F.3d 1152, 1171 (10th Cir. 2004) (citing *Rock*, 483 U.S. at 49-52). Further, a state's restrictions on the defendant's right to testify "may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules, a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Rock*, 483 U.S. at 55-56. A rule that acts as a *per se* exclusionary rule and "does not allow a trial court to consider whether [] testimony may be admissible in a particular case," will be found to "infringe impermissibly on the right of a defendant to testify on his own behalf." *Id*. at 62. This applies to ***all*** *per se* exclusionary rules, and the Tenth Circuit was palpably unfaithful to *Rock* in finding it to be limited such that it does not clearly apply to this case.

C. Rock *Establishes that a Defendant's Version of the Events at Issue in His Own Words is Constitutionally Admissible.*

Almost as—if not as—significantly the Tenth Circuit framed the question in the case as "whether the Constitution requires state courts to permit mitigation evidence in noncapital sentencings." *Lewallen*, 2022 U.S. App. LEXIS 35254, at *11. This was so, it said, "because mitigation evidence is irrelevant under Oklahoma law, and Petitioner has no right to present irrelevant testimony." *Id.* This reasoning is flawed on several levels, and most importantly it is contrary to and an unreasonable reading of *Rock*, as well as the federal District Court's decision.

First, the Tenth Circuit was unreasonably defining "mitigation evidence" in a way contrary to *Rock*. Critically, the *Rock* Court explained that it was clearly recognizing "an accused's right ***to present his own version of events in his own words***." *Id.* at 52 (emphasis added). Of course, this might be "mitigating" in a sense, just as the State's evidence on these events is "aggravating" in a sense.

The federal District Court properly examined the state trial court's exclusion of Mr. Lewallen's guilt/innocence testimony under the *Rojem* rule in light of *Oregon v. Guzek*, 546 U.S. 517, 523 (2006). *Lewallen*, 2021 U.S. Dist. LEXIS 150870, at *58-*64. In *Guzek*, this Court held that a state may exclude innocence-related evidence at a new sentencing proceeding in a capital case,

noting that "sentencing traditionally concerns *how*, not *whether*, a defendant committed the crime…." Under this reasoning, the federal District Court noted that the OCCA properly upheld the exclusion of those portions of Lewallen's testimony that sought to attack his conviction. *Id.* at *64-65. But to the extent that the OCCA applied its precedent to uphold the exclusion of Mr. Lewallen's testimony that concerned "*how*, not *whether*, he committed the crime," the OCCA violated his right to testify, and the OCCA's application of its precedent placed "arbitrary and disproportionate restrictions on his right to testify." *Id.* at *66. The restriction was arbitrary because Lewallen was barred from presenting evidence that had previously been admitted through the state's witnesses—it was only deemed "irrelevant" when he sought to admit it. *Id.* at *66-67. The restriction was disproportionate because the state trial court and OCCA excluded evidence that did not attack the underlying conviction. *Id.* This flatly contradicts the reasoning in *Rock*, that an evidentiary rule "may ha[ve] a significant adverse effect on [the defendant's] ability to testify" if it "virtually prevent[s] her from describing any of the events that occurred on the day of [her offense], despite corroboration of many of those events by other witnesses." *Id.* at *68 (quoting *Rock*, 483 U.S. at 57).

This is the correct analysis and it lays bare the Tenth Circuit's overly simplistic reasoning that is directly contrary to *Rock* (as well as an unreasonable application of it). Further, it—consistent with *Rock*—

distinguishes this case from cases where defendants wished to present testimony from family members or even the situation where the defendant himself wished to testify about other mitigating circumstances from his life more generally (e.g., testimony about an abusive childhood or other difficulty life circumstances that are not "the events in question").[6]

III. THE OCCA'S *PER SE* EXCLUSION OF MR. LEWALLEN'S TESTIMONY AT HIS SENTENCING TRIAL WAS CONTRARY TO *ROCK* AND AN UNREASONABLE APPLICATION OF IT.

Rock clearly establishes several things as set forth in greater detail above, namely:

- A defendant has the right to testify at all parts of a criminal trial;
- That most principally includes a defendant's right to present his version of the events in his own words;
- A state may not, by its evidentiary rules (including as interpreted by its courts) categorically exclude such testimony from the defendant at a criminal trial;

[6] In the context of this key finding from *Rock*, the District Court's reference to *Oregon v. Guzek*, 546 U.S. 517, 524 (2006) and its statement about evidence showing "*how* . . . the defendant committed the crime" being admissible makes perfect sense. This was a statement simply consistent with a rule laid down clearly in *Rock* almost twenty years earlier, when applied to a defendant's testimony in a criminal trial.

- While there may be limitations on a defendant's right to testify, such limitations (i) cannot be arbitrary, and (ii) cannot be disproportionate to the interests favoring exclusion.

Under Oklahoma law, the rule for presentation of evidence at a resentencing trial is: "All exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing shall be admissible in the new sentencing proceeding. Additional relevant evidence may be admitted including testimony of witnesses who testified at the previous trial." 22 OKLA. STAT. § 929(C)(1).

Neither the trial court nor the OCCA read this statute as preventing the testimony of Mr. Lewallen simply because he did not testify at his original trial. *Lewallen II*, p. 7. Indeed, the statute expressly contemplated "*additional* relevant evidence." Instead, Mr. Lewallen was prevented from testifying at trial under the rules of two prior OCCA cases: *Malone v. State*, 2002 OK CR 34, 58 P.3d 208, which held that a defendant may not present any mitigation evidence at a resentencing trial and *Rojem v. State*, 2006 OK CR 7, 130 P.3d 287, which held that evidence relating to guilt or innocence is irrelevant at a resentencing trial. The cumulative effect of these state evidentiary decisions was to render any proposed testimony of Mr. Lewallen—including most principally his version of the events in question— "irrelevant," despite the fact

that the State was free to present its entire case, including testimony and evidence that went to all of the circumstances of Mr. Lewallen's guilt.

The federal District Court correctly held that "the OCCA ignored that *Rock* expressed special criticism for *per se* exclusionary rules." *Lewallen*, 2021 U.S. Dist. LEXIS 150870, at *58. Such a *per se* rule, the Court noted "does 'not allow a trial court to consider whether [mitigating evidence] may be admissible in a particular case.'" (*Id.*) (quoting *Rock*, 483 U.S. at 56, 61).[7] The federal District Court correctly concluded that, under *Rock*'s reasoning, the application of *Malone*'s *per se* rule to Mr. Lewallen's testimony entirely, without consideration as to whether at least aspects of it were admissible, was an arbitrary restriction on Mr. Lewallen's right to testify. This was *precisely* the kind of rule that the Supreme Court precluded in *Rock*. The District Court thus correctly concluded the state courts' application of *Malone*'s *per se* rule was contrary to and/or an unreasonable application of *Rock*.

The OCCA's application of *Rojem* to wholly exclude Mr. Lewallen from testifying as to any fact bearing on "guilt or innocence" similarly fails. While, as the District Court noted, the State has a legitimate interest in barring re-

[7] For example, it would likely would have been proper to exclude testimony about the circumstances of Mr. Lewallen's childhood—or other similar testimony in the classic "mitigation" rubric. But here, he was categorically prohibited from testifying about his version of events in his own words—something *Rock* directly forbids.

litigation of the question of guilt at a new sentencing trial,[8] the state courts could not through application of a *per se* rule and without specific consideration of Mr. Lewallen's testimony preclude *any* evidence from Mr. Lewallen relating to the circumstances of guilt as "irrelevant." This testimony was excluded as "irrelevant" despite the fact that the State was permitted to introduce the *very same evidence*. The is the quintessence of arbitrariness. *See* Fieldman *v. Brannon,* 969 F.3d 792, 807 (7th Cir. 2020) (noting that "[a]rbitrariness 'might be shown by a lack of parity between the prosecution and the defense.…"). The arbitrariness of this exclusion is amplified by the OCCA's acknowledgment that a good deal of Mr. Lewallen's proposed testimony was "relevant to show Lewallen's resentencing jury the facts upon which conviction was based…" *Lewallen II*, p. 6.

As the federal District Court correctly observed, the OCCA "disregarded *Rock*'s reasoning that the application of a state's evidentiary rule may 'ha[ve] a significant adverse effect on [the defendant's] ability to testify' if it 'virtually prevent[s] her from describing any of the events that occurred on the day of [her offense], despite corroboration of many of those events by other witnesses." *Lewallen*, 2021 U.S. Dist. LEXIS 150870, at *68.(quoting *Rock*, 483 U.S. at 57).

[8] The state court thus could have precluded introduction of new testimony from Mr. Lewallen that attacked his underlying conviction, but this is not what happened.

Again, the OCCA's decision, though it may have paid lip service to *Rock*, is squarely contrary to its reasoning. There is no clearer example of an "unreasonable application" under 28 U.S.C. §2254(d). *See Stevens v. Ortiz*, 465 F.3d 1229, 1235 (10th Cir. 2006) ("when applying AEDPA to fully reasoned opinions by state courts, this circuit has not focused solely on the result where the state court's explicit *reasoning* contravenes Supreme Court precedent."); *Williams v. Trammell*, 539 Fed. Appx. 844, 849 (10th Cir. 2013) (unpublished) ("We described the OCCA's reasoning as 'squarely contrary to' and 'a gross deviation from, and disregard for, the Court's rule in *Beck*.' Although the OCCA had 'cited a standard consistent with *Beck*,' the analysis that followed '*never* engag[ed] in the correct inquiry…'") (citing *Hogan v. Gibson*, 197 F.3d 1297 (10th Cir. 1999)).

Under Oklahoma's resentencing trial procedure, Mr. Lewallen was subject to a trial by jury, and though the State was permitted to present its entire case to the jury (irrespective of whether such evidence went to guilt or aggravation), Mr. Lewallen was *wholly excluded* from testifying. As the federal District Court observed, the *Rock* Court specifically reasoned that: "'[w]holesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State' that the evidence subject to exclusion '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 is on trial." *Lewallen*, 2021 U.S. Dist. LEXIS 150870, at *68 (quoting *Rock*, 483 U.S. at 44); *Gill v. Ayers*, 342 F.3d 911, 920 (9th Cir. 2003) ("California's Three Strikes procedure, as interpreted by the California sentencing court and by the intermediary appellate court, similarly subjected Gill to an arbitrary process that denied him any right to go beyond the record of conviction and testify.").

Rock stands for the propositions that a criminal defendant enjoys a right to testify on his own behalf in his own criminal trial, and state evidentiary laws that impose arbitrary, disproportionate barriers to this right are unconstitutional. *Rock*, 483 U.S. at 56. Especially suspect are *per se* rules that work wholesale exclusion of a defendant's testimony, and which, applied "mechanistically," do not "allow a trial court to consider whether [] testimony may be admissible in a particular case." *Id*. *Rock*'s protections extend to <u>any</u> rule or doctrine of evidence that arbitrarily or disproportionately excludes a defendant's testimony; it matters not whether the exclusion of a defendant's testimony is based upon grounds of reliability (as in *Rock*), competency (see *Washington v. Texas*, 388 U.S 14, 22 (1967)), or "relevance" as here.

The OCCA, through *Rojem* and *Malone*, has *a priori* declared a criminal accused's testimony at his own jury trial (for resentencing) to be irrelevant and inadmissible. This exclusion flies in the face of the fundamental holding—and the reasoning—of *Rock*. This rule of exclusion was brought to bear against Mr.

Lewallen, with results so arbitrary as to be nearly absurd: when the State of Oklahoma offered evidence of Mr. Lewallen's medical conditions and the events within the Lewallen household leading to his arrest, the OCCA noted that "[t]his evidence was relevant to show Lewallen's resentencing jury the facts upon which his conviction was based and to allow them to make an informed decision regarding the assessment of his sentence." *Lewallen II*, p. 6. The same facts, when proffered by Mr. Lewallen, constituted "mitigation . . . not relevant to sentencing." *Id*.

IV. IF PERMITTED TO STAND, THE TENTH CIRCUIT'S ENDORSEMENT OF THE OCCA'S ANALYSIS UNDERMINES A CRIMINAL ACCUSED'S RIGHT TO TESTIFY BY CONFINING *ROCK* TO ITS PRECISE FACTS AND ESSENTIALLY NULLIFYING IT OTHERWISE.

If the rules of *Rock* are to be anything other than hollow, all lower courts must look to *Rock*'s reasoning and broader holding. The standards set forth in *Rock* were intended to protect the accused's right to testify at trial against *any* evidentiary rule or doctrine that would arbitrarily or disproportionately curtail a criminal defendant's ability to testify as to the events at issue. To confine *Rock* to only reliability challenges to testimony following hypnosis, as the Tenth Circuit has done, fundamentally undermines *Rock*'s principles and renders its protections close to meaningless.

The Tenth Circuit wrote that *Rock*:

> does not prohibit states from applying their evidentiary rules to a defendant's testimony when doing so reasonably accommodates

> legitimate state interests. Here, the Oklahoma Court of Criminal Appeals determined that excluding Petitioner's proffered testimony accommodated Oklahoma's 'most basic rule of admissibility'—admitting only relevant evidence." *Id*.

The Tenth Circuit's reasoning does not substantively engage with Mr. Lewallen's arguments or the federal District Court's detailed analysis, and, instead, essentially adopts the reasoning of the OCCA, with no consideration of *how* the Oklahoma evidentiary doctrines at issue burdened Mr. Lewallen's right to testify, or whether Oklahoma's stated interest in "admitting only relevant evidence" actually supported the exclusion of Mr. Lewallen's testimony (or was instead plainly arbitrary).

This refusal to analyze the core issues at stake essentially renders a state's labeling of testimony as "irrelevant" as outside the holding of *Rock* and beyond review, without regard to how arbitrarily the law is applied or how the law burdens and undermines the defendant's right to testify. This refusal to apply *Rock* to a state's arbitrary rules of relevance pervades the Tenth Circuit's opinion. See *Id*. at *10 ("*Rock* characterized a defendant's right to testify as "the right to present *relevant* testimony.").

This is wholly inconsistent with the principles set forth in *Rock*. A state could not escape *Rock* by, for example, declaring that any hypnotically refreshed testimony is "irrelevant." Yet this is precisely the result allowed under the Tenth Circuit's decision. 28 U.S.C. § 2254(d) "preserves authority to

issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). This is such a case. The federal District Court correctly recognized it; the Tenth Circuit did not. To protect its own precedent from total erosion, this Court's intervention is required.

CONCLUSION

For the reasons detailed in this Petition, this Court should grant a Writ of Certiorari to review the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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