No. _____

In The
Supreme Court of the United States

WILLIAM FRENCH ANDERSON,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari To the California Court of Appeal, Second Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

DENNIS A. FISCHER
Counsel of Record
John M. Bishop
Law Offices of Dennis A. Fischer
A Professional Corporation
1448 15th Street, Suite 206
Santa Monica, California 90404
Telephone: (310) 451-4815
Facsimile: (310) 451-4639
dennisafischer@earthlink.net

Counsel for Petitioner

QUESTIONS PRESENTED

1. May California courts impose on a criminal defendant testifying in his own behalf the same restrictions applicable to witnesses generally, so that a defendant's testimony deemed self-serving or untrustworthy may be excluded; or did this court mean what it said in *Rock v. Arkansas* that a defendant has a federal constitutional right "to present his own version of events in his own words"?

2. Do California reviewing courts improperly evade the harmless-error test established by this Court in *Chapman v. California* by continuing to adhere to their pre-*Chapman* rule that a court violates the federal constitutional right to present a defense only by "completely excluding" defense evidence, not when it merely excludes "some evidence" supporting the defense?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William French Anderson respectfully petitions for a writ of certiorari to the California Court of Appeal, Second District, Division Three, to review its judgment against him in *The People of the State of California v. William French Anderson* (2d Crim. B197737), which became final on October 31, 2012 when the Supreme Court of California denied review (No. S205103).

OPINIONS BELOW

The opinion of the California Court of Appeal (App. 1-76), certified for publication, *People v. Anderson*, 208 Cal.App.4th 851, 144 Cal.Rptr.3d 606 (2012), the order of that court modifying the opinion and denying rehearing (App. 77-80), and the order of the California Supreme Court denying review (App. 81), are appended.

JURISDICTION

The California Court of Appeal issued its decision on July 26, 2012. The court denied rehearing on August 23, 2012, modifying its opinion but without change in the judgment. The California Supreme Court denied review on October 31, 2012. At petitioner's request, Justice Kennedy extended the time for filing the within petition until February 13, 2013. No. 12A720. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime unless . . . ; 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 . . . ."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides in relevant part: ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Did the Court mean what it said when it proclaimed that a criminal defendant has a fundamental due process right "to present his own version of events in his own words?" *Rock v. Arkansas,* 483 U.S. 44, 52 (1987). The California appellate court reviewing petitioner's case didn't think so, nor did the trial court in excluding a portion of petitioner's proposed testimony. Substantially qualifying this

Court's seemingly unequivocal pronouncement in *Rock*, the state Court of Appeal in a published decision ruled that petitioner had no constitutional right to personally testify as his own witness concerning facts that provided significant support for his defense. Rather, it held, petitioner's testimony had no greater constitutional stature than the testimony of any other witness. The magnitude of this restriction on a defendant's right to present his own testimony in the face of the Fifth, Sixth and Fourteenth Amendments cannot be overstated. This Court's reaffirmation of *Rock*'s recognition of an accused's uniquely-important right to fully testify as to relevant facts that he believes refute the prosecution's charges — and indeed, in his own words — is sorely needed.

The California Court of Appeal additionally concluded that any error in restricting petitioner from fully testifying merely violated state law, adhering to the consistent pronouncements of the Supreme Court of California that only the complete exclusion of evidence of an accused's defense can be federal constitutional error. As such, the California rule turns on its head this Court's recognition in *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) that a defendant is constitutionally entitled to "'a meaningful opportunity to present a complete defense.'" Because California's standard for reviewing the prejudicial effect of error under state law is far less demanding than the

harmless-error test of *Chapman v. California*, 386 U.S. 18, 23-24 (1967) — imposing on the defendant the burden of showing prejudice, rather than allocating to the prosecution as the beneficiary of constitutional error the burden of establishing its harmlessness beyond a reasonable doubt — the consistent failure of California's appellate courts to acknowledge the federal constitutional dimension of the right to present a defense, and especially when it is the defendant's own testimony that is limited, should not remain uncorrected by this Court.

1. **Underlying Facts**

Petitioner, a medical doctor and the founder and director of a genetic research laboratory, was charged with crimes against "Y.", an employee's daughter whom he had mentored for several years. He was convicted of continuous sexual abuse of a child under the age of 14 years, Cal. Pen. Code § 288.5(a), and three counts of committing lewd acts on a child under the age of 14 years, *id.*, § 288(a), which the California reviewing courts affirmed in full along with the resulting prison sentence of 14 years.

Testifying before the jury, Y. related petitioner's course of conduct toward her in general terms rather than detailing specific sexual acts, and she also described an email correspondence with petitioner; the prosecution offered certain of those emails as

corroborating Y.'s accusations. However, no other witnesses testified to seeing petitioner engage in misconduct with Y.

The centerpiece of the prosecution's case was a surreptitiously-recorded conversation between petitioner and Y. at the South Pasadena Library, on July 1, 2004, arranged by sheriff's detectives. Although the prosecutor repeatedly characterized what petitioner said to Y. during their meeting as a confession, petitioner — testifying in his own defense — presented a sharply different account. Petitioner explained that Y.'s unanticipated confrontational manner at first terrified him, then made him feel she was manipulating him, perhaps as a prelude to an extortion demand. Her accusations caused him to say anything that would placate her for the moment and bring the encounter swiftly to an end. Once Y. had left, he stayed near the library for several minutes trying to comprehend what had happened. Then petitioner went home and talked with his wife. He was very upset and they may have talked for as long as an hour.

This much petitioner was allowed to explain to the jury. But the court forbade him from telling the jury what occurred next. To persuade the jury he had given the true explanation of this disturbing confrontation, petitioner sought to relate what he did *following* the encounter — the actions he took well

before (as the prosecution conceded) petitioner had any idea that the conversation had been recorded, to show he behaved as would an innocent man who had just faced an unexpected and frightening ordeal and believed he had been wronged.

Petitioner and his wife wrote a letter, dated July 4, 2004, to his friend, San Marino Police Chief Arl Farris, relating and seeking advice about how to deal with Y.'s false accusations of sexual molestation which he feared might be part of an extortion attempt. Petitioner personally delivered the letter to Chief Farris on July 6, 2004, after the holiday weekend. The chief felt he had a conflict of interest because of petitioner's past relationship with the San Marino Police Department, and he turned the letter over to the Los Angeles County Sheriff. An officer with that agency phoned petitioner and made arrangements for deputies to visit the Anderson home. Petitioner fully cooperated with the deputies in a detailed conversation, which was surreptitiously recorded, lasting about an hour and a half. This evidence was excluded by the trial judge, who barred petitioner from referring to the letter during his testimony or describing any of his conduct between the time he returned home following his July 1st meeting with Y. and his arrest nearly a month later.

2. **Decision Below**

In considering the admissibility of evidence of these events, the trial court and parties initially focused on admission of the letter itself, but ultimately recognized the real issue was whether petitioner would be allowed to tell the jury about the letter's preparation and submission to Chief Farris right after the holiday. The California Court of Appeal summed up: "After Anderson testified about the library meeting, the defense argued Anderson *should be permitted to testify* about 'what he did . . . after this.'" App. 34 (italics added). It thus framed the issue as whether the trial court properly could "prevent Anderson *from testifying* about his conduct after the library confrontation," but premised on *state* evidentiary rules. *Id.* at 37 (italics added). As noted by the Court of Appeal, the trial judge found the letter itself to be inadmissible hearsay because "it did 'not satisfy the trustworthiness component.' The trial court stated: 'There is way too much potential for fabrication, for motivation, for covering oneself, for any number of factors aside from the fact that it may be true.'" *Id.* at 33. It was "'the type of evidence that just leads nowhere except to confusion, speculation, sur[m]ise and supposition'"; plus "'[i]t confounds the jury and diverts and distracts their attention.'" *Id.* at 34. And in the judge's view petitioner had "'the very real motive or opportunity to fabricate.'" *Ibid.* (n. omitted). Finding

the letter inadmissible, the court believed the same reasoning should be applied to petitioner's own testimony (adding that were the letter's "'content . . . admissible, it would be different'"). *Id.* at 35.

The Court of Appeal's ruling fully endorsed the trial court's. Not only was exclusion appropriate under California's hearsay rule, but "even if the hearsay rule did not prevent Anderson from testifying about his conduct after the library confrontation," the appellate court concluded that the trial judge's finding as just recited also supported exclusion of petitioner's testimony under California Evidence Code section 352. App. 40.[1] The reviewing court stressed its view that "the content of the letter and the inferences Anderson sought to have the jury draw from his conduct after the library confrontation were not trustworthy" because he "had a strong motive to discredit Y. and to minimize incriminating aspects of their relationship." *Id.* at 45. Hence, the Court of Appeal found that the trial court "reasonably exercised its discretion pursuant to Evidence Code section 352 to exclude marginally

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[1]Cal. Evid. Code § 352, the state counterpart of Fed. Rules of Evid. 404, provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

relevant evidence that was likely to confuse the issues and distract the jury." *Id.* at 47.

Finally, acknowledging petitioner's reliance on his constitutional right "to testify in his own words and to present critical defense evidence," App. 42 (citing *Rock v. Arkansas, supra,* 483 U.S. at 51-53 and *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)), the Court of Appeal rejected petitioner's constitutional claim and upheld the trial court's determination because it "did not rely on a *per se* rule of exclusion to prevent Anderson from testifying about critical facts in issue." App. 47. Emphasizing California authority consistently holding that no federal constitutional violation is shown when the trial court "permits a defendant to present a defense but excludes some evidence concerning the defense," *id.* at 55, and again discounting the testimony petitioner was prevented from giving as "suspect and unreliable," *id.* at 56, the Court of Appeal concluded that the preclusion of petitioner's testimony did not require reversal under the applicable standard for State law error set out in *People v. Watson*, 46 Cal.2d 818, 836, 299 P.2d 243, 254 (1956), or "under any standard of review." App. 55-56.

REASONS FOR GRANTING THE WRIT

1. California's Rule Allowing Exclusion of a Criminal Defendant's Own Testimony as Self-Serving or Untrustworthy, Just Like Any Other Witness, Runs Afoul of This Court's Recognition in *Rock v. Arkansas* that the Defendant Has a Federal Constitutional Right "to Present His Own Version of Events in His Own Words."

Is a criminal defendant's federal constitutional right to testify in his own behalf greater than his right to present other evidence in his defense? This Court appears to have answered "yes" in *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987). Because the courts of California consistently answer this question unequivocally "no," the Court of Appeal followed suit in petitioner's case. The court's core error, which should not be left uncorrected, is its treatment of a defendant's own testimony as just another part of the defense case, entitled to no more (or less) constitutional protection than *any other* defense evidence. But that is wrong, for several reasons.

To begin with, this Court seemingly repudiated that premise 25 years ago in *Rock*, where a portion of the defendant's personal testimony had been excluded. See *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006) (*Rock* "held that a rule prohibiting hypnotically

refreshed testimony was unconstitutional because '[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 repudiating the validity of all post-hypnosis recollections.'"). Although the right recognized in *Rock* was specifically the *defendant's* right to present her personal testimony, that made no difference to the Court of Appeal in petitioner's case. The reason, as the decision below demonstrates, is that California courts generally (as the Court of Appeal did here) treat *Rock* as if it presented only another wrinkle of the problem addressed by this Court in *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *United States v. Scheffer*, 523 U.S. 303 (1998), even though that line of decisions focused on exclusion of *other* kinds of defense evidence — not the *defendant's* personal right to testify. App. 46-49.[2]

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[2]For example, in comparing petitioner's case to *Scheffer*, the Court of Appeal's opinion observed that petitioner's "defense was not significantly impaired by the exclusion of evidence of his conduct after the library confrontation, including the letter to Chief Farris." App. 49. But the premise of that comparison is faulty. *Scheffer* addressed a rule against admission of polygraph evidence in courts-martial proceedings, not a defendant's own testimony. The *Scheffer* court distinguished *Rock* on the basis that there "*the defendant* was unable to testify about certain

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The distinction, nonetheless, is a fundamental one. Aside from narrow exceptions necessary to an orderly presentation of relevant evidence at trial, a criminal defendant is constitutionally entitled to take the stand and *fully* tell *his or her* side of the story. There is little doubt that restrictions on that right "'implicate a sufficiently weighty interest of the defendant.'" *Holmes*, 547 U.S. at 326 (quoting *Scheffer*, 523 U.S. at 309). In describing petitioner's proposed testimony as just "some evidence concerning the defense," App. 55, the California Court of Appeal made plain its hostility to a proper understanding of *Rock*'s reach; the decision in petitioner's case cannot withstand constitutional scrutiny.

As reiterated in *Rock*, "[t]he right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.'" 483 U.S. at 51 (quoting *Faretta v. California*, 422 U.S. 806, 819, n. 15 (1975)). The

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relevant facts . . ." 523 U.S. at 315 (italics added). *Rock* required a different conclusion, the Court suggested in *Scheffer*, because in *Rock* "the rule infringed upon the defendant's interest in testifying in her own defense — an interest that we deemed particularly significant, as it is the defendant who is the target of any criminal prosecution." *Scheffer*, at 315-316 (citations omitted).

defendant's right to testify in his own behalf, *Rock* explained, is derived from the Fifth Amendment right of an accused to choose whether to testify, the compulsory-process right of the Sixth Amendment, and the Fourteenth Amendment's Due Process Clause. *Id.* at 51-53. Justice Blackmun's opinion described the scope of that right broadly:

> "Logically included in the accused's right to call witnesses whose testimony is 'material and favorable to his defense,' *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982), is a right to testify himself, should he decide it is in his favor to do so. In fact, *the most important witness for the defense in many criminal cases is the defendant himself.* There is no justification today for a rule that denies an accused the opportunity to offer his own testimony." *Rock*, at 52 (italics added; parallel citations omitted).

Even prior to its decision in *Rock*, the Court had written that the due process right of a defendant to testify in his own behalf "has long been assumed," *Nix v. Whiteside*, 475 U.S. 157, 164 (1986), and past cases had struck down as unconstitutional procedural limitations on that right. See, *e.g.*, *Brooks v. Tennessee*, 406 U.S. 605, 610-613 (1972) (state rule that defendant

who chooses to testify "must testify first" held unconstitutional). Moreover, the Court's cases have emphasized the unique significance of a criminal defendant's own testimony. "The most persuasive counsel may not be able to speak for a defendant as the defendant himself might, with halting eloquence, speak for himself." *Green v. United States*, 365 U.S. 301, 304 (1961). Indeed, "the [defendant's] right to testify on his own behalf . . . [is] essential to our adversary system." *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring in judgment) (citing *In re Oliver*, 333 U.S. 257, 273 (1948)).

It follows that, contrary to California's approach, limitations on a defendant's right to personally testify face a higher constitutional hurdle than do restrictions on the testimony of *other* defense witnesses. In *Rock* this Court found constitutional error in the state court's failure to distinguish the defendant's own testimony from that of witnesses generally, emphasizing the necessity of a more stringent "constitutional analysis . . . when a defendant's right to testify is at stake." 483 U.S. at 57-58. In holding that an Arkansas law excluding any testimony that has been hypnotically-refreshed violated the right of a criminal defendant to testify, *Rock*, at 62, the Court noted the approach of many other states that had adopted exclusionary rules limited to "the testimony of *witnesses,* not for the

testimony of a *defendant*." 483 U.S. at 57.[3]

But even before the right to testify was explicitly held to be constitutionally protected in *Rock*, the Court had recognized that a defendant's own testimony stands on a constitutionally higher footing than that of other witnesses. In almost all other respects, it is defendant's counsel who decides how to conduct the trial, including "the witnesses to call," *Gonzalez v. United States*, 553 U.S. 242, 249 (2008), because such choices "depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial." *Ibid.*[4] The

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[3]To clarify, the Arkansas rule did not exclude *all* testimony by a witness whose memory had been hypnotically-refreshed. Rather "in Arkansas, an accused's testimony is limited to matters that he or she can prove were remembered *before* hypnosis." *Rock. supra*, at 56. The issue in *Rock* was not whether the accused had been unconstitutionally prevented from taking the stand to testify in her own defense. The only significant testimony that Ms. Rock was barred from giving, because she recalled it only after hypnosis, was that "she did not have her finger on the trigger and that the gun went off when her husband hit her arm." *Ibid.*; see *id.* at 47-48.

[4]This is true because "[t]he adversary process could not function effectively if every tactical decision required client approval." *Taylor v. Illinois*, 484 U.S. 400, 418 (1988). For these reasons, "the client must accept the consequences

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defendant's right to testify is personal, however; it cannot be overruled by defense counsel. See *Jones v. Barnes,* 463 U.S. 745, 751 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . testify in his or her own behalf"); *Harris v. New York*, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so").

To be sure, recognizing the defendant's right to testify fully does not mean the trial judge is powerless to intercede when necessary "to shut off long-winded and irrelevant testimony, statements, or questioning." *Flowers v. State*, 2009 Ark. App. 363, 2009 WL 1232077 at *3 (Ark. Ct. App. 2009); see, *e.g., U.S. v. Moreno*, 102 F.3d 994, 998-999 (9th Cir. 1996) (because defense of duress irrelevant as a matter of law, defendant's testimony concerning his state of mind was irrelevant). Otherwise, there is little justification for limiting what a defendant may say to a jury. The decision of a defendant to testify, which is "*personal* to the defendant . . . against the advice of counsel if he chooses," *Jones v. Barnes, supra*, at 758 (Brennan, J., dissenting) (italic added), is in substantial part rooted

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[4](...continued)
of the lawyer's decision to . . . decide not to put certain witnesses on the stand . . . ." *Ibid.*

in the recognition that the "Sixth Amendment 'grants to the accused *personally* the right *to make his defense*.'" *Rock v. Arkansas*, *supra*, at 52 (quoting *Faretta v. California*, 422 U.S. at 819) (second italics added). Indeed, the *Faretta* court recalled that even in the sixteenth and seventeenth centuries when the accused felon or traitor was denied counsel along with "the benefit of other rights—to notice, confrontation, and compulsory process—that we now associate with a genuinely fair adversary proceeding . . . at least 'the prisoner was allowed to make *what statements he liked*. . . .'" *Id.* at 823-824 (citing 1 F. Pollock & F. Maitland, The History of English Law 326 (2d ed. 1909) & quoting 5 W. Holdsworth, A History of English Law, 195-196, n. 17, (1927) (italics added)). Furthermore, "as new rights developed, the accused retained his established right 'to make what statements he liked.'" *Faretta*, at 825 (quoting Holdsworth, *supra*, 195, n. 17) (n. in *Faretta* omitted). That the defendant has a constitutionally protected right, personally and as his own counsel, to present his defense to the jury and also to testify as his own witness, implies a unique and broad right to speak to the jury. Recognition of this principle is consistent with the historical record which shows that even in ancient times a defendant was afforded the opportunity (in the words of *Faretta*) "to make what statements he liked" to answer his accusers. *Ibid.*

The Court in *Rock* found helpful to its analysis "the history of the transition from a rule of a defendant's incompetency to a rule of competency," 483 U.S. at 49, drawing on *Ferguson v. Georgia*, 365 U.S. 570, 573-582 (1961). An important part of that transition, *Ferguson* recounted, was "[t]he development of the unsworn-statement practice" which although strongly sponsored by nineteenth century English judges, had its origins in the necessity of the defendant to defend himself personally, without assistance of counsel; "'a prisoner was obliged, in the nature of the case, to speak for himself.' Reg. v. Doherty, 16 Cox C.C. 306, 309." *Ferguson*, at 582-583 & n. 13. The scope of the defendant's right to make an unsworn statement was in the view of English judges very broad:

> "Baron Alderson said: 'I would *never* prevent a prisoner from making a statement, though he has counsel. He may make any statement he pleases before his counsel addresses the jury, and then his counsel may comment upon that statement as a part of the case. If it were otherwise, the most monstrous injustice might result to prisoners.' Reg. v. Dyer, 1 Cox C.C. 113, 114." *Id.* at 583.

In this country, the practice of allowing a defendant to make an unsworn statement to the jury,

although "recognized almost everywhere else as simply a stopgap solution for the serious difficulties for the accused created by the incompetency rule," *Ferguson*, 365 U.S. at 585-586, nonetheless was followed by a number of states at common law and was recognized by statute in some. *Id.* at 584. And nineteenth century courts viewed the right as having a broad scope.

Ferguson noted an informative example, *Coxwell* v. *State*, 66 Ga. 309 (1881), where the Georgia Supreme Court described its then-new law permitting the practice as "'advancing to a degree hitherto unknown the right of the prisoner *to give his own narrative* of the accusation against him to the jurors, who are permitted to believe it in preference to the sworn testimony of the witnesses.'" 365 U.S. at 585 (quoting *Coxwell*, at 316-317 (italics added; n. omitted)). Indeed, *Coxwell* held that the judge in that case had erred by confining the defendant's statement "within the limits prescribed for witnesses," as being at odds with "the broad and liberal purpose which the legislature intended to accomplish." 66 Ga. at 316. Rather the defense was "authorized to make such statement in the case as *he may deem proper* in his defense." *Ibid.*; accord *People v. Thomas*, 9 Mich. 314, 321 (1861) (opinion of Campbell, J.) (statute allows defendant's "statement to be a narrative of such facts as a prisoner may see fit to state"); *Burden v. People*, 26 Mich. 162, 166 (1872) (purpose is to enable defendant

"to make his statement as full and particular as he might be able under the embarrassments of his position, and as he might see fit").[5]

Another case, this one bearing some rough similarity to petitioner's, illustrates this perspective. In *Anderson v. State*, 196 P. 1047 (Wyo. 1921), defendant was charged with obtaining money by false pretenses in that he induced the victim (Williams) to buy certain securities by making false statements. At trial, the defendant made an unsworn statement to the jury as then permitted by Wyoming law in which he denied making any of the alleged false pretenses, but also described his actions following the sale as suggesting his innocence. He told the jury that on hearing the victim was dissatisfied with his purchase of the shares of stock, he made several attempts to contact Williams offering to return his money and "finally saw him and asked him 'what he wanted to do; if he wanted his money back from our company, we want to know about it, because we want to recall the stock then and return his notes and declare it off.'" *Id.* at 1057. At this point,

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[5]Consistent with modern decisions, the Georgia Supreme Court in *Coxwell* qualified its holding by cautioning that defendant should not "be permitted to occupy the time of the court and jury with long rambling, irrelevant matter inapplicable to the case,– and which, of necessity, must always rest in the sound discretion of the judge." 66 Ga. at 316.

the judge interrupted defendant to tell the jury that "any attempt on the part of the defendant to settle this matter or to return the money or the notes is no defense at all." *Ibid.* The Wyoming Supreme Court held the judge erred by interrupting defendant in this way because it tended to discredit his statement, even though what the judge said was legally correct and the court's charge to the jury properly could have included an instruction to that effect. *Id.* at 1057-1058; see also *Wilson v. State*, 50 Tenn. 232, 241 (1871) ("the sense of the provision is embodied in the words of the magistrate as addressed to the prisoner upon his arraignment before him: 'Give any explanation you think proper of the circumstances appearing in the testimony against you'").

Under these decisions by early English and American courts, petitioner would be entitled to present his account of the events following his library confrontation by Y. This is the law from which the right to personally testify developed, and which frames the modern view found in the parallel recognition in *Faretta* of a criminal defendant's virtually unqualified right to personally present his defense, 422 U.S. at 819, side-by-side with *Rock*'s prohibition of a state's rule of evidence that "arbitrarily excludes material portions of [defendant's] testimony." 483 U.S. at 55. The broad scope of the defendant's right to testify is also reinforced by the language the Court used in *Rock* to

describe the right: to tell "his own version of events in his own words." *Id.* at 52. If it is true that the older statutory and decisional law petitioner has described arose in a different time, still there is "no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain." *Green v. United States, supra*, 365 U.S. at 304.[6] And as petitioner's case makes plain, the reasons for interpreting a criminal defendant's right personally to testify as being broader than to present other defense witnesses surely remain, and indeed just as clearly require application here.

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[6]Although directly linked to early judicial pronouncements like those noted above, modern recognition of a personal right to testify on the defendant's part predated its relatively recent acceptance as a constitutional right. *See, e.g., Harris v. New York, supra,* 401 U.S. at 225 (right to testify termed a privilege). Nonetheless, decisions of state and lower federal courts have often treated the right as a broad one. *E.g.*, *State v. Jacobson*, 697 N.W.2d 610, 616-617 (Minn. 2005) (restriction on defendant's testimony required reversal, based on "constitutional law and our recognition that it is 'fundamental that criminal defendants have a due process right to explain their conduct to a jury'" (quoting *State v. Brechon*, 352 N.W.2d 745, 751 (Minn. 1984)); *Parle v. Runnels*, 387 F.3d 1030, 1044 (9th Cir. 2004) (recognizing "that by sustaining the prosecutor's objections, the trial court substantially restricted petitioner's ability 'to present his own version of events in his own words.' *Rock*, 483 U.S. at p. 52 . . .").

Petitioner's case also demonstrates the pervasive failure of California's current decisional law to recognize the full scope of a defendant's constitutional right to personally testify, treating it as a mere component of the right to present evidence in his or her defense. This was not always true; some earlier California decisions appeared to acknowledge a criminal defendant's heightened interest in being able to testify as compared with presenting other defense witnesses. See *People v. Robles*, 2 Cal.3d 205, 215, 466 P.2d 710, 716 (1970) ("We are satisfied that the right to testify in one's own behalf is of such fundamental importance that a defendant who timely demands to take the stand contrary to the advice given by his counsel has the right to give *an exposition of his defense* before a jury" (italics added)); *People v. Frierson*, 39 Cal.3d 803, 813, 705 P.2d 396 (1985) (quoting *Robles*). And in *People v. Shirley*, 31 Cal.3d 18, 723 P.2d 1354 (1982), the state's supreme court adopted a rule barring testimony of all witnesses who have been hypnotized, but (citing *Robles*) found an exception was required for the defendant himself "to avoid impairing the fundamental right of an accused to testify in his own behalf." 31 Cal.3d at 67, 723 P.2d at 1384 (quoted in *Rock*, 483 U.S. at 58, n. 15).

Since that high point reached in *Shirley*, California decisional law has regressed to a more grudging view. Opinions following the rendering of this

Court's decision in *Rock* have acknowledged only "a violation of the right where a defendant who demands to '*take the stand*,' even contrary to the competent advice of counsel, is prevented from doing so." *People v. Whitt*, 51 Cal.3d 620, 647, 798 P.2d 849, 864 (1990). And other post-*Rock* decisions have reiterated this narrow statement of the right. See *People v. Allen*, 44 Cal.4th 843, 860, 187 P.3d 1018, 1030 (2008); *People v. Bradford*, 15 Cal.4th 1229, 1332, 939 P.2d 259, 318 (1997). The cramped approach to the right of a defendant to testify currently adhered to by California courts is glaringly on display in the opinion deciding petitioner's case, which relied on the state high court's decision in *People v. Boyette,* 29 Cal.4th 381, 428, 58 P.3d 391, 421 (2002), as authority for "exclud[ing] 'defense evidence on *a minor or subsidiary point* . . . ." App. 43 (italics added). *Boyette* did not acknowledge *Rock*. Adding insult to injury the court here equated the challenged ruling to a situation "where a trial court permits a defendant to present a defense but excludes *some evidence* concerning the defense." App. 55 (italics added, again citing *Boyette*). Yet, as noted earlier, *Rock* itself found constitutional error when the defendant was not precluded from testifying at all, but only restricted to what evidence she could give concerning her defense. See *Scheffer, supra,* 523 U.S. at 315 (noting that in *Rock*, "the defendant was unable to

testify about *certain* relevant facts . . ." (italic added)).[7]

Disregarding *Rock*'s recognition that the defendant's right to testify is entitled to greater protection than for other witnesses, 483 U.S. at 57, the Court of Appeal also upheld the exclusion of petitioner's testimony because "the content of the letter and the inferences Anderson sought to have the jury draw from his conduct after the library confrontation were not trustworthy," emphasizing he "had a strong motive to discredit Y. and to minimize incriminating aspects of their relationship." App. 45. But a defendant's testimony in his own defense is necessarily self-serving, and to exclude or limit it on that basis would resurrect the discredited common-law rule that disqualified parties to litigation from giving their own testimony "because of their interest in the outcome of the trial." *Rock, supra*, at 49. "[T]he criminal defendant was, of

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[7]The California Supreme Court has never discarded the narrow view in expressed in *Boyette* and other cases cited in the text. *See People v. Gutierrez* 45 Cal.4th 789, 821-822, 200 P.3d 847, 871 (2009) (finding limitations on testimony did not violate right to testify, noting "defendant acknowledges that his right to testify on his own behalf was not impaired"); *People v. Lancaster*, 41 Cal. 4th 50, 100-101, 158 P.3d 157, 193 (2007) (finding the record did not support claimed limitations). Under California law, the Court of Appeal here was bound to follow state high court decisions. *See Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455, 369 P.2d 937, 939-940 (1962).

course, par excellence an interested witness." *Ferguson v. Georgia, supra*, 365 U.S. at 574. "The principal rationale for this rule was the possible untrustworthiness of a party's testimony." *Rock*, at 49. But the Court in *Rock* held that rationale is no longer an acceptable basis for excluding a defendant's testimony, which like that of other witnesses "can be tested adequately by cross-examination." *Id.* at 52 (citation omitted).

The Court of Appeal's reasoning leaves no doubt that California's limited view of the right to testify is at odds with *Rock*. The grounds on which the courts below excluded a portion of petitioner's testimony were no less "arbitrary" than the rules described in *Holmes, supra,* 547 U.S. at 325-326. Certiorari should be granted to review the important constitutional issue presented by petitioner's case.

2. **California Reviewing Courts Improperly Evade the Harmless-Error Test Established in *Chapman v. California* by Adhering to Their Pre-*Chapman* Rule that a Court Violates the Federal Constitutional Right to Present a Defense Only by "Completely Excluding" Defense Evidence, Not When It Merely Excludes "Some Evidence" Supporting the Defense**

The California Court of Appeal's disparagement

of petitioner's challenge to the exclusion of part of his testimony, as just "'some evidence concerning the defense,'" App. 48, suggests the growing hostility with which California courts have reacted to claims of prejudicial constitutional error under this Court's seminal decision in *Chapman v. California*, 386 U.S. 18 (1967).[8] Because a new generation of California appellate judges pays only lip service to "*Chapman*," neglecting its fundamental lessons governing the proper evaluation of prejudice in cases of federal constitutional error, this Court's intervention is once again required.

The Court of Appeal found any error in precluding petitioner's testimony must be reviewed under the state-law standard set out in *People v. Watson*, 46 Cal.2d 818, 836, 299 P.2d 243, 254 (1956), which it held "applies where a trial court permits a defendant to present a defense but excludes some evidence concerning the defense." App. 55. The opinion cites the more recent California Supreme Court cases of *People v. Boyette*, *supra*, 29 Cal.4th 381, 427-428, 58 P.3d 391, 421 and *People v. Humphrey*, 13

[8]This Court's decision in *Chapman v. California* was not unique to the two defendants in that case. A week after the filing of *Chapman*, a GVR disposition was made in *Phillips v. California*, 386 U.S. 212 (1967), and before the month was out another approximately 20 more California cases were GVR'd.

Cal.4th 1073, 1089, 921 P.2d 1, 11 (1996) as supporting its reasoning, but no decisions by this Court. *Boyette* and *Humphrey* were based on *People v. Fudge,* 7 Cal.4th 1075, 1102-1103, 875 P.2d 36, 51 (1994), which rejected a claim that exclusion of certain defense evidence was federal constitutional error. *Fudge* declared that "[a]lthough completely excluding evidence of an accused's defense theoretically could rise to this level . . . 'there was no refusal to allow [defendant] to present a defense, but only a rejection of *some evidence* concerning the defense.'" *Ibid.* (italics added) (quoting *In re Wells*, 35 Cal.2d 889, 894, 221 P.2d 947, 950 (1950)). The "some evidence" language originating in *Wells* was reiterated by the California Supreme Court in *Fudge*, *Humphrey* and *Boyette*, and the *Wells/Fudge/Boyette* rule reflects current California decisional law. Understandably this formulation was echoed by the California Court of Appeal in choosing to follow *Watson* and its progeny — rather than *Chapman* — to reject petitioner's claim of prejudicial constitutional error.

Plain and simple, this restricted view of the protections afforded by the Fifth, Sixth, and Fourteenth Amendments is a device for avoiding application of *Chapman*'s harmless-error test. It allows California reviewing courts to characterize nearly all rulings concerning exclusion of evidence as "garden variety," *Boyette*, 29 Cal.4th at 427, 58 P.3d at 421,

subject to the more tolerant pre-*Chapman* standard of review for state-law error that the Court of Appeal applied here. That the genesis of the appellate court's approach is found in cases originating a decade and longer before the *Chapman* rule was adopted in 1967, with no acknowledgment that even so-called garden-variety exclusion of evidence may be federal constitutional error, strongly suggests that for this form of error, a judicially-created exception to *Chapman*'s dictates is alive and well in California reviewing courts. But it should be clear that this approach is no longer viable.

If not clearly vitiated by *Chapman* itself, it surely became a dead letter in 1986 when this Court held in *Crane v. Kentucky, supra*, that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a *complete* defense.'" 476 U.S. at 690 (italic added) (quoting *California v. Trombetta,* 467 U.S. 479, 485 (1984)); accord *Holmes v. South Carolina*, 547 U.S. at 324. A "complete defense," a unanimous Court said in *Crane*, includes evidence that is "central to the defendant's claim of innocence." *Ibid.* And, to repeat once more, *Rock* itself involved an unconstitutional exclusion of *some, not all*, of a defendant's testimony. See n. 3, ante. Thus the Court of Appeal's reliance here on California's pre-*Chapman* standard of review sanctioned by cases such as *Fudge*, *Humphrey* and *Boyette, supra,* plainly was federal

constitutional error, as at least one federal court recently concluded. See *Averilla v. Lopez*, 862 F.Supp.2d 987, 1008-1009 (N.D. Cal. 2012) (finding *Fudge* "contrary to *Crane"* and granting habeas corpus relief for failure to apply the *Chapman* standard to partial exclusion of defense evidence).[9]

This Court therefore should grant certiorari on the further question whether California decisions such as this one have strayed too far off *Chapman*'s path by finding no prejudicial error under the federal Constitution despite limitations imposed on the defendant's testimony. It should not be enough to avoid harmless-error review under *Chapman*, that the defendant is allowed to present *some* evidence concerning his defense. The Court should clearly hold that when a defendant is denied his right to present a complete defense, his conviction must be reversed unless the State proves the error harmless beyond a reasonable doubt.

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[9]Some members of this Court recently have questioned California's application of *Chapman*'s standard of review in another context. See *Gamache v. California*, 131 S.Ct. 591, 178 L.Ed.2d 514 (2010) (Statement of Justice Sotomayor, joined by Justices Ginsburg, Breyer and Kagan).

CONCLUSION

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

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Respectfully submitted,

DENNIS A. FISCHER
Counsel of Record
LAW OFFICES OF DENNIS A. FISCHER
A Professional Corporation
Dennis A. Fischer, Esq.
John M. Bishop, Esq.
1448 Fifteenth Street, Suite 206
Santa Monica, California 90404-2756
(310) 451-4815
dennisafischer@earthlink.net

Counsel for Petitioner