

No. 15-161

In the Supreme Court of the United States

LLOYD RAPELJE, PETITIONER

v.

JUNIOR FRED BLACKSTON

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

REPLY BRIEF

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INTRODUCTION

The use of a witness's written statements to impeach the testimony of that witness is commonplace. A simple search from the federal appellate courts for sentences with the words "impeach" and "written" and "statement" yields more than 350 cases.

That is why the decision below is important. The question whether a witness's written statement is extrinsic evidence when a party seeks to introduce it apart from the examination of that witness has broad ramifications for trials. Contrary to Blackston's assertions, the definition adopted below of extrinsic evidence is as applicable to Rule 613(b) (extrinsic evidence of prior inconsistent statement) as it is to Rule 806 (impeachment of former testimony). No other circuit has adopted a definition of extrinsic evidence that excludes a witness's own written statement and imposed that definition on state courts. And there is good reason. It is wrong.

Extrinsic evidence is evidence admitted outside that witness's examination, while intrinsic evidence comes from the witness's examination. The idea that a witness's written statement is not extrinsic because the statements are the witness's "own words" renders Rule 613(b) inapplicable to written statements.

The Sixth Circuit defined extrinsic as evidence that requires another witness, wrongly believing that the recantations were admissible without a witness. But the recantations were extrinsic because Blackston would have had to call notaries (witnesses) to admit them. In his 34-page brief in opposition, Blackston did not seek to rebut this point. This is no small oversight.

This Court should grant the petition for certiorari. First, the decision below skirted this Court’s decision in *Nevada v. Jackson*, 133 S. Ct. 1990 (2013) (*per curiam*), that there is no clearly established Supreme Court precedent holding that the right of confrontation includes the right to impeach with extrinsic evidence. Once the error regarding whether the evidence is extrinsic is unmasked, the fact that the decision below “conflicts” with this Court’s decision in *Jackson* is evident. See Rule 10(c).

Second, the definition of extrinsic and intrinsic evidence are basic building blocks of the law, and apply in many evidentiary circumstances. The misinterpretation of the fundamental definitions will affect all cases within the circuit. The mistakes here are significant.

ARGUMENT

I. The recantation evidence at issue here was extrinsic to the witnesses’ former testimony, and therefore *Jackson* governs.

As the State courts noted, Blackston’s friends attempted to undermine their prior testimony by offering written recantations and then making themselves unavailable, by refusing to testify and feigning an inability to recall. Blackston sought to introduce the “epistles . . . advoca[ting] for acquittal” without attempting to recall these witnesses, and without cross-examination. Pet. App. 10a. But while the State courts would not allow this manipulation, the Sixth Circuit granted habeas relief finding a confrontation violation despite the *Jackson* decision.

A. The right of confrontation has not been held to include the right to impeach with extrinsic evidence.

The Sixth Circuit strained to avoid the conclusion that the recantations were extrinsic evidence, because the *Jackson* decision would otherwise govern the case's resolution. In *Jackson*, this Court provided clear direction on the question of impeachment with extrinsic evidence and the right of confrontation:

[T]his Court has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes.

133 S. Ct. at 1994 (emphasis in original). The point is plain: if the recantation evidence here is extrinsic, then Blackston has no confrontation claim in habeas.

Blackston seeks to diminish the significance of *Jackson's* holding, describing it as “single sentence” that is neither “remarkable” nor “important” here. Res. Br. 18. To the contrary, if the recantations are extrinsic evidence—which they are as a matter of black letter law—then the case is over and Blackston loses.

Blackston's effort to reconcile the decision below with *Jackson* is unavailing. As noted in his analysis, in *Jackson* the state trial court refused to admit “this extrinsic evidence—underlying police reports and third-party testimony.” Res. Br. 19. And Blackston further argues that the “extrinsic evidence” in *Jackson* refers to “third-party evidence,” *id.*, not to a witness's own written statement. Blackston makes the same mistake as the Sixth Circuit did below.

The Sixth Circuit defines extrinsic evidence from McCormick’s treatise on evidence as “the production of *other witnesses’* testimony.” Pet. App. 18a (emphasis in original). That definition is correct.

But the analytic mistake that the Sixth Circuit makes is to conclude that the recantations “are not extrinsic evidence” because they do not “involve impeachment using other witnesses’ testimony” because they are the “recanting witnesses’ own words.” Pet. App. 19a. This is the basic flaw.

As an initial point, the use of written recantations *would* require the testimony of a third-party witness. Blackston’s state trial counsel recognized the point (referring to “the notaries”), as the State noted in its petition for certiorari. Pet. 9–10. And the State argued the substance of the point that the authentication of these statements was necessary and required third-party witnesses. Pet. 5, 20–21. Blackston fails to address this point at all, and it is a fatal error.

Moreover, the reliance on the statements being the witnesses’ “own words” is also misplaced. It is *always* the case that when a party seeks to impeach a witness’s testimony with an inconsistent statement that it seeks to do so with the witness’s “own words.” In *Jackson*, the criminal defendant sought to impeach the victim’s claim of rape with the fact that she had previously stated that she had been raped by him and these claims had not been corroborated. *Jackson*, 133 S. Ct. at 1991. This Court identified the police reports recording these complaints as “extrinsic evidence” even though they reflected the victim’s own words.

The Sixth Circuit’s overarching error is the failure to understand the distinction between intrinsic and extrinsic evidence. Intrinsic evidence is “[e]vidence brought out by the examination of the witness testifying,” Black’s Law Dictionary 597 (8th ed.) (2004), while extrinsic evidence is evidence “offered through documents or other witnesses, rather than through cross-examination of the witness himself or herself.” Weinstein’s Federal Evidence § 608.20, at 608–34 (2012). There is no third ground.

In concluding that these recantations were “not extrinsic evidence,” the Sixth Circuit thus categorizes them as intrinsic evidence. But of course they are not. They were not a part of the former testimony, subject to cross-examination. The recantations were outside of or external (“extrinsic”) to the former testimony. Unsurprisingly, Blackston does not contend that the recantations are intrinsic.

And that is the point of the need for third-party witness for extrinsic evidence. If the impeachment is not introduced through the cross-examination of the witness, the party must then introduce it through another witness. Cf. *Robertson v. M/S Sanyo Maru*, 374 F.2d. 463, 465 (5th Cir. 1967) (“A writing standing alone does not of itself constitute evidence; it must be accompanied by competent proof of some sort from which the (finder of facts) can infer that it is authentic and that it was executed or written by the party by whom it purports to be”).¹

¹ The only other option here would be through a stipulation. Cf. 1 McCormick on Evid. § 49, p. 323 n.7 (referencing a stipulation to establish the foundation for an exhibit as impeachment).

That is why McCormick’s treatise rightfully may include both the definition of extrinsic evidence quoted by the Sixth Circuit referencing “other witnesses’ testimony” and also include the same definition consistent with Weinstein that extrinsic evidence is evidence offered other than “through cross-examination of the witness himself or herself.” 1 McCormick on Evid. § 36, at 216 (7th ed); *id.* § 49, 322 n.2. The dichotomy is between the testimony of other witnesses (extrinsic) and testimony of that witness through cross-examination (intrinsic). The Sixth Circuit misunderstood this distinction. Then, in the absence of any clearly established federal law treating a recantation statement as intrinsic evidence, it nonetheless reversed a state-court decision.

In reply, Blackston argues that the Sixth Circuit decision follows from this Court’s prior precedents and merely applied settled law. Res. Br. 14–17. Not so.

Blackston discusses a series of cases from this Court: *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Alaska*, 415 U.S. 308 (1974); *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Delaware v. Fensterer*, 474 U.S. 15 (1985) (per curiam); *Alford v. United States*, 282 U.S. 687 (1931). None of these cases, however, address the admission of extrinsic evidence as impeachment to vindicate the right of confrontation. In fact, the word “extrinsic” does not appear in *any* of the decisions.

Related to this point, this Court actually cited four of these cases—*Davis*, *Olden*, *Van Arsdall*, and *Fensterer*—in *Jackson* when explaining that the Court’s prior cases address the “defendant’s ability to

cross-examine witnesses,” not introduce extrinsic evidence. *Jackson*, 133 S. Ct. at 1994 (emphasis in original). The Sixth Circuit’s reasoning reflects the same kind of error Blackston is making.

Neither of the remaining two cases support Blackston either. *Crawford* addressed the standard for examining out-of-court statements and their admission under the Confrontation Clause. *Id.* at 67. As noted by Judge Kethledge’s dissent, the former testimony was properly admitted under *Crawford* because the witnesses were unavailable and that testimony was subject to cross-examination. Pet. App. 45a. And *Alford* found a violation of a criminal defendant’s right to cross-examine the witness regarding his federal custody to examine bias. *Id.* at 693. It is inapposite.

Thus, given the clarity of this Court’s decision in *Jackson* and the fact that the recantation evidence was extrinsic, Blackston has to rely on an *extension* of this Court’s jurisprudence to be entitled to relief. But Judge Kethledge’s dissent cogently explains why this cannot be the basis for relief in habeas:

The problem, again, is that the *Davis* line of cases establishes only a right of cross-examination, not a right to introduce evidence. . . . Thus, the majority’s reasoning amounts to an extension of the holdings from those cases, rather than an application of them.

Pet. App. 45a. Such an extension is not permitted in habeas. *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014).

B. The only analogous decision is *Mattox v. United States*, and it has not been overruled.

The seminal case regarding the introduction of former testimony is *Mattox v. United States*, 156 U.S. 237 (1895). This Court affirmed the exclusion on evidentiary grounds the extrinsic evidence of impeachment attacking this former testimony. See *id.* at 250. The State readily acknowledges, as it did in its petition, Pet. 15–17, that this decision did not rest on Confrontation Clause grounds, but this does not end the point.

The fair inference from this Court’s analysis is that the rights of the accused were not unfairly abridged by foreclosing his opportunity to impeach the former testimony. See *Mattox*, 156 U.S. at 250 (“The fact that one party has lost the power of contradicting his adversary’s witness is really no greater hardship to him than the fact that his adversary has lost the opportunity of recalling his witness and explaining his testimony would be to him.”). The Court resolved the matter also after considering the “justice” of the issue. *Id.* (“There is quite as much danger of doing injustice to one party by admitting such testimony as to the other by excluding it”).

Blackston’s statement that the Supreme Court only resolved the issue based on pure evidentiary grounds is a truncated understanding of *Mattox*. The dissent in *Mattox* expressly identified the interplay between the Confrontation Clause and the exclusion of the impeachment on evidentiary grounds in resisting this Court’s majority decision:

If, then, the *right of the accused to confront the witnesses against him*, although formally secured to him by the express terms of the constitution, and being of that importance and value to him as are recognized by the court, may be dispensed with because of the death of a witness, *it would seem justly to follow that neither should that death deprive the accused of his right to put in evidence, valid and competent in its nature, to show that the witness was unworthy of belief[.]*

Id. at 260 (Shiras, J., dissenting) (emphasis added). The analysis is rooted in the defendant's loss of opportunity to introduce the recantations. *Id.* ("the death of the witness deprived the accused of the opportunity of cross-examining him as to his conflicting statements, and . . . deprived the accused of the right to impeach the witness by independent proof of those statements"). Blackston raises the same basic claim here.

The Court in *Mattox* rejected these arguments based on evidentiary rules, supporting the rules with arguments about the need to shield the judicial process from contrived "perjury." See *id.* at 250 ("temptation to perjury, and the fabrication of testimony, which, in criminal cases especially, would be almost irresistible."). That is the point of the State's argument about Guy Simpson' and Darlene Zantello's effort to perpetrate a fraud on the court. Pet. 17. The same considerations informed this Court's analysis in *Mattox*. Just as there, the state courts here were justified in excluding the impeachment evidence. A reasonable jurist might find *Mattox* relevant.

II. The Sixth Circuit’s mistake here regarding the meaning of extrinsic and intrinsic evidence is neither narrow nor fact-bound.

In the State’s view, the fact that the Sixth Circuit evaded *Jackson* with its erroneous understanding of extrinsic and intrinsic evidence is sufficient by itself to justify this Court’s review: it “has decided an important federal question in a way that conflicts with relevant decisions of this Court.” Rule 10(c). But this error has also muddled the basic evidentiary standards for all cases in the circuit. Blackston’s assertion that it will only be relevant for cases under Rule 806, not Rule 613, Res. Br. 23–25, is incorrect.

Before examining why this case is relevant for all trials in the circuit, it is worth reiterating the Sixth Circuit’s analysis about why a witness’s own written statement is not “extrinsic evidence”:

[T]he recantations are not extrinsic evidence. . . . they directly undermine the veracity of testimony from the first trial *using the recanting witnesses’ own words*.

* * *

Blackston, unlike the petitioner in *Jackson*, has never sought to have the recantations themselves admitted as physical, documentary evidence; *Blackston seeks only to have them recited to the jury in the same manner as Simpson’s and Zantello’s inculpatory testimony from the first trial*. Perhaps anticipating this distinction, the state asserted at oral argument in this matter that even if not admitted as documentary evidence, the recantations still would constitute

extrinsic evidence because a third party—namely, some courtroom official—would have to recite the absent witnesses' words to the jury. It strikes us as illogical, however, to posit that *a witness becomes a third party to himself simply because his words are read to the jury* by a court officer. Indeed, the testimony from Blackston's first trial was read to the second jury in precisely this manner, making it too "extrinsic evidence" under the state's overly broad definition.

Pet. App. 20a (emphasis added).²

The errors here are multiple. The suggestion that this Court in *Jackson* would have allowed a third party to "recite" the police reports to the jury but not admit them as physical documents appears nowhere in that opinion. *Jackson* held that the criminal defendant could cross-examine the victim about these other statements but could not introduce them as extrinsic evidence. *Id.* at 1991, 1994. The point is that the state trial court did not violate clearly established law in refusing to admit them as exhibits or allow the officers to testify about them, which logically includes calling the police officers merely to "recite" the reports to the jury. Distinguishing between introducing the recantations as exhibits and having the police officers read them to the jury makes no sense. The Sixth Circuit misread *Jackson*.

² In the block quote of the lower court decision in the petition, the State inadvertently noted that only the italicized part was new analysis, but the entire quoted paragraph on page 23 was new in the amended opinion. Pet. 22–23.

This idea that mere recitation does not require a witness is also a misunderstanding of law. That is what authentication witnesses do. See, e.g., *Michigan v. Bryant*, 131 S. Ct. 1143, 1554 (2011) (“the police officers who spoke with the [unavailable witness] testified as to her statements and authenticated the affidavit”). And the difference between the former testimony and the contrived recantations were plain: the former testimony was under oath and subject to cross examination, while one of these recantations was unsworn when given and neither was subject to cross. They are worlds apart.

In fact, the lower courts, including the Sixth Circuit, view such recanting statements and affidavits with “extreme suspicion.” See, e.g., *Williams v. Coyle*, 260 F.3d 684, 708 (6th Cir. 2001) (“recanting affidavits are always viewed with ‘extreme suspicion’”). They are the paradigm of unreliable evidence, which is why they should be subject to cross-examination, which in turn is the basis for Rule 613(b) (conditioning the admission of extrinsic evidence on the “opportunity [of the adverse party] to examine the witness about it” unless justice requires otherwise).

Blackston contends that the conclusion that a witness’s own written statement is not extrinsic evidence would be limited to Rule 806 cases and constitutional cases. Res. Br. 23–24. But there is no reason to reach this conclusion. The Sixth Circuit’s definition of written statements and extrinsic evidence is general and equally applicable to Rule 613 as it is Rule 806. The error cannot be limited to Rule 806, the rare case, but confounds the standards for Rule 613(b), which is the ordinary one. Review is warranted.

CONCLUSION

This Court should grant the State's petition for certiorari.

Respectfully submitted,

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