**No. 16-1021**

**In The Supreme Court Of The United States**

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RON NEAL, Superintendent, *Petitioner,*

v.

WAYNE KUBSCH, *Respondent.*

---

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

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**RESPONDENT'S MOTION**
**TO PROCEED IN FORMA PAUPERIS**

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Respondent Wayne Kubsch, respectfully requests leave to proceed *in forma pauperis*. Respondent was declared indigent by the United States District Court for the Northern District of Indiana and the Seventh Circuit. Pursuant to 18 U.S.C. § 3599, the district court and the Seventh Circuit appointed undersigned counsel to represent Respondent. Pursuant to Sup. Ct. R. 39(1), Respondent therefore moves to proceed with the filing of his Brief in Opposition to the Petition for Writ of Certiorari *in forma pauperis*.

Respectfully Submitted,

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*Counsel of record

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# RESPONDENT'S BRIEF IN OPPOSITION

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**CAPITAL CASE**

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Seventh Circuit, sitting *en banc*, correctly applied 28 U.S.C. §2254(d)(1), and this Court's decisions, to the specific and very unique facts of Respondent's claim that his constitutionally protected right to present evidence in his favor was violated by the exclusion of an unquestionably material, exculpatory videotaped statement by a witness, recorded by police shortly after the events described therein, because at trial the witness claimed she could not remember making the videotaped statement.

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## COUNTERSTATEMENT OF THE CASE

The Seventh Circuit's decision accurately sets forth the record evidence and procedural history of this case. Pet. App. 1a-19a. Because this Court's Rules dictate that respondents "have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition," Sup. Ct. R. 15.2, Kubsch offers the following counter statement of facts.

**Background**

Wayne and Beth Kubsch married in November 1997. TR 2346. Kubsch had a son from a previous marriage, Jonathan, who lived with his mother in Michigan. Beth had two sons from previous marriages: eleven-year-old Aaron Milewski, and twelve-year-old Anthony Earley. Aaron lived in South Bend with his father Rick Milewski. TR 1425. Anthony lived with Kubsch and Beth in their Mishawaka home. TR 1293. On September 18, 1998, Aaron was to spend the night at his mother's house because it was her birthday. TR 1306.

On Friday, September 18, 1998, Anthony arrived home at approximately 5:30 p.m. He found the bodies of Rick and Aaron in the basement; a knife was protruding from Rick's chest. TR 1300-01. Anthony ran to the neighbors, who called 911. TR l300-02, 1317, 1346.

Kubsch arrived home from picking up his son in Michigan at approximately 6:45 p.m. TR 1327, 1354. He was not allowed to enter his home, but was taken to the police station for questioning. TR 1327-28, 1355.

Police discovered Beth's body underneath the basement stairs, around 9:00 p.m. TR 2355-56, 1501. Her head, hands and feet were bound with duct tape. TR 1512-16. The police retrieved Kubsch, told him Beth was dead, and obtained his permission to search his Tracker. TR 1479-82, 2582-83.

All three victims had suffered multiple stab wounds. TR 1870, 1876, 1894. At the autopsies the next day, it was discovered that Rick and Aaron had also been shot. TR 1612, 1667, 1880, 1872-81, 1885, 1892-95.

Kubsch was arrested 3 months later, and tried in May of 2000. After his first conviction and death sentence was overturned on direct review, *Kubsch v. State*, 784 N.E.2d 905, 926 (Ind. 2003), a second trial took place in March 2005, which is the subject of the decision below.

**The exclusion of Kubsch's alibi evidence**

The State's case against Kubsch was "entirely circumstantial. There was no eye-witness, no DNA evidence, no fingerprint testimony, indeed no forensic evidence at all that linked Kubsch to the murders." Pet. App. 10a.

Although the time of death could not be determined, TR 1905, the State's theory was that Kubsch killed Beth at the house between 1:53 and 2:51 p.m., but that just as he was killing Beth, Rick and Aaron showed up, and so he murdered them, too. In an attempt to explain the lack of any blood or other physical evidence on Kubsch's clothes or in his truck, the state hypothesized that Kubsch showered and changed his clothes at the house after committing the murders and then left for Michigan. TR 3314, TR 3323-22.

The State's cell phone evidence showed that at 1:53 p.m., Kubsch placed a call at or near his place of employment, which was approximately 11 miles from his home. TR 2261; Ex. 180, 181. Kubsch's next call, at 2:51 p.m., showed Kubsch was in a sector adjacent to home. TR 2261, 1776-77, Ex. 180, 181. He placed a series of calls around 3:15 p.m. which showed him traveling north, toward the Michigan border. TR 2262-67; Ex. 180, 181. Subsequent calls placed between 4:42 and 4:47 p.m., were picked up by a tower in Schoolcraft Michigan. TR 2220-23. Kubsch picked up Jonathan at 5:00 p.m. TR 2196.

Witnesses testified Rick picked Aaron up at his school, between 2:30 and 2:35 p.m. TR 1437, 1440, 1442. Aaron's school is approximately 8 minutes from Kubsch's home. TR 2405.

The defense theory was that Kubsch was innocent, and he was in Michigan picking up his son at the time of the murders. TR 3284-3313. To prove this, Kubsch called Mandy ("Mandy") Buck, a neighbor and "best friend" of Aaron. TR 2982. The defense wanted Mandy to testify concerning events she described four days after the murders, on September 22, 1998, during a videotaped interview with Detective Mark Reihl. Mandy was 9 years old at the time of her interview; her mother, Monica, was also present. TR Exhibit G (videotape); Pet. App. 39a-62a(transcript).

After establishing some basic information, the interview turned to "last Friday," which was September 18, the day of the murders. On that day, as usual, Mandy was picked up from school by the Alphabet Academy; from there, her mother typically (and that day) picked her up to go home "[b]etween three thirty and quarter to four." Pet. App. 46a-47a. At that point Monica interjected that she "waited for [Monica's] mom and dad to get home, and I went and cashed my check and came home." *Id.* at 47a. Reihl then asked whether Monica noticed if Rick was across the street. Monica replied, "I didn't pay no attention. All I saw was Aaron." *Id.* Reihl repeated "You saw Aaron?," and Monica said "[m]mm hmm." *Id.* She did not remember if Rick's truck was there. *Id.* at 48a.

Turning back to Mandy, Reihl asked again what time she got home that day. Monica answered instead, repeating "3:30 or quarter to four." *Id*. Mandy confirmed that she saw Aaron then, and that she also saw "his dad," who "was coming from their living room into the kitchen to get something to drink." *Id.* She explained that she was able to see this from her own house. *Id.* Asked what kind of car Rick drove, Mandy explained that he used to drive a black truck until

it broke down, but on Friday he was driving a white truck that he had borrowed from his brother, and that the white truck was at the house when she got home from school. *Id.* 49a-50a.

Reihl next asked whether Mandy saw Rick and Aaron leave that afternoon. She answered, "Um, yeah, like I was on my porch and, and they let me blow bubbles and I was blowin' my bubbles, and I seen Rick pull out and leave." *Id.* at 50a-51a. She was not sure what time that was, because she left her watch in her gym bag, but she estimated it was a "medium" time after she got home, and noted that "it takes a pretty long time to get to [Aaron's] mom's house." *Id.*

She then went into some detail about Aaron's plans for the weekend. "He said that he was going to his mom's house Friday, 'cause he was gonna stay the night there to go to the field trip Saturday. ... You know he was, he—he wanted to go on the field trip bad. ... But by the time Saturday when we, when we were on the bus and stuff, he was gonna be in our group, and, um, he never showed up. He wasn't there. And we didn't know why." *Id.* at 52a. She went camping after the field trip and told her grandmother that she had not seen Aaron. She learned about the murders after a news crew came to her home while she was at her karate lesson the following Monday. *Id*.

Reihl then asked Mandy to confirm that on "Friday, after you got home, they left just a little bit after when you got home, right?" Mandy responded "yeah" and confirmed that she saw them leave, and "no one else was with them, just Aaron and Rick." *Id.* at 53a.

Reihl then turned back to Monica and confirmed that she cashed her paycheck on Friday, shortly after she came home from work (around 3:50 p.m.). *Id.,* at 54a-55a. She said again that she had seen Aaron, but not Rick, and that she did not look to see if Rick's truck was there. *Id.,* at 55a.

Reihl asked Mandy yet again whether she saw both Aaron and his father, as well as the white truck, in the yard around 3:30 or 3:45 p.m., and she said yes. *Id.* at 60a. He asked whether "[t]hese times that you've given me today, uh, these are pretty accurate," and Monica said, "Yeah, 'cause I get off work at quarter after three." *Id.* at 61a. This was her daily routine. *Id.* at 61a-62a. With that, the interview ended.

Mandy was called to testify at the second trial, but claimed to have no memory of talking to the police or being interviewed by them in 1998. When Kubsch's lawyer attempted to use the transcript of the interview to refresh her recollection and later to impeach her, the prosecution objected and the court sustained the objections. The court also refused to permit the use of the videotaped interview as a recorded recollection, despite Mandy's asserted inability to recall anything about the interview. TR 2985, 2989, 3028-32, 3116-22.

**Alleged motive**

The state's theory was that Kubsch murdered Beth to collect life insurance proceeds so he could pay off his debts.

By September of 1998, Kubsch owned eleven rental properties. TR 2786. He refinanced the mortgages on eight of those properties in 1998, allowing him to pay off substantial credit card debt and his car loan. TR 2492-98. However, this increased his total mortgage debt from $356,000 to $426,000, TR 2499, and Kubsch continued to run up his credit cards. TR 2514-16.

An accountant testified that Kubsch was experiencing a negative cash flow by September 1998, TR 2490, 2507, 2519, which, if unaddressed, would force Kubsch into bankruptcy. TR 2538. However, Kubsch had equity in his properties, TR 2528, 2545, and most were occupied by tenants. TR 2484. The State's expert explained that depending on the accounting method used, Kubsch was either $87,000 in the red or $60,000 in the black. TR 2545.

Before marrying Beth, Kubsch had obtained a $350,000 life insurance policy to cover the mortgages in case of his death; his son was the beneficiary, and the premium was $47.00 a month. TR 2864.

After marrying Beth, Kubsch bought more rental properties. TR 2865. In June of 1998, Kubsch wanted to increase his policy and change the beneficiary to Beth. TR 2865. During a meeting with the agent, Kubsch and Beth both decided to apply for policies in the amount of $575,000. TR 2866. Beth's policy went into effect, with a premium of $56.00 a month. TR 2554-55, 2867. Due to health risks, the premium on Kubsch's new policy was going to cost $243.00 per month, nearly three times the premium quoted by the agent. TR 2868. Thus, Kubcsh retained his original $350,000 policy, with Beth as the beneficiary. TR 2561.

**Alleged Admissions**

Tashana Penn Norman testified that she heard Kubsch talk to another man about hurting a little boy and that he did not mean to. TR 2296. She claimed she overheard Kubsch say this while dining at the Hacienda restaurant with her boyfriend in December 1998, TR 2293-94, but her boyfriend was away from the table at the time she heard it. TR 2296-97.

Norman first provided this information to Crime Stoppers on December 18, 1998, TR 2302, and received a $1,000 reward. TR 2315, 2335. She acknowledged this was not the first time she got a reward from Crime Stoppers for providing information. TR 2314-15. She further admitted that she did not tell her boyfriend about what she overheard even though it had made her fearful and prompted them to change tables. TR 2310.

Norman's boyfriend testified that no one was in the booth behind them in the restaurant, that Norman never told him about overhearing any such conversation and that she did not seem

upset or nervous. TR 2993-95. The waiter testified that there were no patrons in the booth next to Norman's and Norman had not asked to move from the booth where she'd been seated. TR 3179.

Two witnesses testified that Norman told them that she had lied in court about a conversation she overheard in the Hacienda restaurant, that she did so to get a large sum of money, and that she had called Crime Stoppers three or four other times. TR 2963-64; TR 3216. The defense also presented evidence that Norman knew that Kubsch was a suspect in the murder, having heard about it from a man she worked for. TR 3083.

Dave Nichols testified that he had a telephone conversation with Kubsch the night of the murders, during which Kubch related that Beth was "dead," and that two people were "shot and stabbed." TR 2456. This conversation took place before Beth's body was discovered, and before it was determined that the Milewskis had been shot. TR 1612, 2454-55 2582-83. Nichols also testified that Kubsch kept saying that Beth was "gone," and "I don't know what happened." TR 2455-56.

However, Nichols also explained that he believed what he heard about "Beth" and "about the gunshot," came not from the telephone conversation with Kubsch, but instead a few months later from his wife, Gina DiDonato. TR 2464. She worked at a restaurant frequented by police officers who talked about what was happening in the Kubsch case. TR 2464. She would repeat the rumors to Nichols. TR 2464. Nichols believed he was confused about when and from whom he learned these facts. TR 2463-65.

Nichols was initially interviewed by police in 2000. TR 2922. He later told police, and the prosecutor, about his confusion. TR 2460-64.

Bradley Hardy claimed that he was with Kubsch between 11:00 a.m. and noon, TR 2087-2113, to help in preparations for a surprise birthday party Kubsch was planning for his wife. TR

2087-89. According to Hardy, they drove to the woods behind Kubsch's house, to see if Beth was home. TR 2093-95. Kubsch remained in his car while Hardy, at Kubsch's direction, walked through the woods to the back of Kubsch's house. TR 2095-96. Hardy claimed he saw Beth inside sitting on the couch, and that her car was in the driveway. TR 2096, 2099. He told Kubsch what he saw, and Kubsch took him back to his home before noon. TR 2111-13.

However, Hardy's mother testified that Hardy returned home around 12:45 p.m. TR 2036. The travel time from the area behind Kubsch's house to Hardy's home is approximately eleven minutes. TR 2404.

Hardy testified that, the next day, Kubsch asked him not to tell police about their excursion because the police were pointing the finger at him. TR 2126. According to Hardy, this is what prompted him to contact police. TR 2133-34. However, it was Hardy's father who contacted police. TR 2134.

Kubsch testified that he was not with Hardy that afternoon. TR 2693. Kubsch's time card showed he clocked out for lunch at 11:15 a.m. TR 1999. The drive from Kubsch's employment to his home is approximately 15 minutes. TR 2401. Kubsch told police that he had gone home early during his lunch break, but Beth was not home when he got there. TR Exhibit 193. On his way back to work he spoke with his wife on his cell phone. *Id.* Kubsch's neighbor, Erin Honold saw Kubsch pull into his driveway driving his Tracker shortly before noon that day, and enter his house through the garage. TR 2429-30, 2432. There was no other car in the garage or driveway. TR 2434.

In the petition for certiorari, petitioner asserts that, the "most damning" evidence against Kubsch was that he lied to the police. Pet. 4, 5. Petitioner cites to the district court opinion for this proposition. However, the district court's account of Kubsch's alleged lies is based on the

prosecutor's characterization of Kubsch's statement, which was strongly contested by the defense. Contrary to the district court, Pet. App. 206a, Kubsch did not deny going into his house when he came home at lunchtime, he told police he went into the house through the garage, which is how the police understood the statement. PC 218-19 (Kubsch told police "he went in, meaning the house, through the garage"). Kubsch also did not tell the police that he did not go home after work as the district court suggests. Pet. App. 206a-207a. He did not tell the police what he did between leaving work and picking up his son; he responded the police questions, and he was not asked about this. TR Ex. 193; TR 2785, 2817, 3305.

**Physical Evidence**

Nail scrapings were taken from each victim and the DNA recovered was compared to Kubsch's DNA. Exhibit 135. There was DNA foreign to Aaron under his fingernail. DNA removed from Beth Kubsch's fingernail revealed foreign DNA that did *not* match Kubsch or Aaron and Rick Milewski. TR 1765-68; Exhibit 135..

No trace evidence linking Kubsch to the murders was found around the bodies. There were no latent prints recovered from the knife found in Rick Milewski, TR 1842, or the duct tape that bound Beth Kubsch. TR 1528, 1830-31.

There was blood in the master bedroom, hallway, dining room, basement stairway and basement. TR 1530-36. All specimens matched the victims despite evidence of a substantial struggle between Beth and her attacker. TR 1678, 1744-52, 1769-73; Exhibits 136 & 137.

Kubsch's car was processed by police after they obtained a consent to search the night he was interviewed at the police station. TR 1480-82. Luminol testing failed to reveal the presence of any blood. TR 1627-28.

The drain contents of the shower in Kubsch's house were tested. A "presumptive test" for blood was positive. TR 1697, 1782. However, this indication of the presence of blood could not be confirmed by DNA testing because there was an insufficient amount. TR 1759.

The roll of duct tape that was used to bind Beth was found on the floor just inside the front door of Kubsch's house. TR 1519-20, 1805-06. No latent prints were recovered by the roll of tape. TR 1829. A single fiber on this roll of duct tape was consistent with one from carpet in Kubsch's Tracker. TR 1793-94.

A duct tape wrapper found on the back floor board of Kubsch's car matched the brand of duct tape that was used to bind Beth Kubsch. TR 1615- 19, 1807. Kubsch testified that the roll of duct tape could well have been his. TR 2121. He often used duct tape for repairs and had recently used it to repair a basketball goal at his home. TR 2727-28.

Brad Hardy and Beth Kubsch's sister testified that sunglasses found next to Beth's body were like ones worn by Kubsch. TR 2122, 2387. However, this same sister told police Kubsch wore round sunglasses, unlike the ones recovered. TR 2390. Other witnesses testified that Kubsch did not wear sunglasses like the ones recovered. TR 2631, 2468.

The bank deposit receipt Beth received the morning of the murder was found inside Kubsch's car under the driver's seat, TR 1390-91, 1624-26, with Kubsch's fingerprint on it. TR 1723. Kubsch testified he probably picked up the receipt when he was at the house during his lunch break. TR 2699-2700.

Property was taken from the Kubschs' house during the homicides. A television in the master bedroom, TR 1508, and a handset for the Kubschs' cordless telephone, TR 1300, were missing and never recovered. Beth Kubsch always wore a belly bag which she carried as a purse. TR 1400, 1500, 2787. Police searched for this bag, but it was never found. TR 2407, 1561.

However, some of Beth Kubsch's credit cards were found in woods near Brad Hardy's house about two weeks after the homicides. TR 1560-63. Hardy was in these woods the day of the homicides. TR 2115-16, 2148.

**Verdicts and Sentencing**

The jury convicted Kubsch of all three murders. TR 3327-28. At the penalty phase, Kubsch dismissed his lawyers, presented no evidence and maintained his innocence. TR 3372-75. The jury sentence Kubsch to death, TR 3377-78, and the trial court imposed a death sentence. TR 40, 379, 3383-84.

**Direct Review**

The Indiana Supreme Court affirmed Kubsch's convictions and death sentence. *Kubsch v. State* (*Kubsch II)*, 866 N.E.2d 726 (Ind. 2007).*cert. denied sub nom, Kubsch v. Indiana*, 553 U.S. 1067 (May 27, 2008).

On direct review Kubsch argued, inter alia, that the exclusion of the Amanda Buck videotaped statement violated his right to present a defense under the Sixth Amendment and the Due Process Clause. The Supreme Court of Indiana upheld the trial court's rulings. It found that the videotape was not admissible under Indiana's evidentiary rule governing the use of recorded recollection, Ind. R. Evid. 803(5). The court was concerned about the final element, which requires that the recording reflect the witness's knowledge correctly. It found that Mandy "could not vouch for the accuracy of a recording that she could not even remember making." Pet. App. 314a. The court conceded, however, that Mandy's testimony that, "I probably didn't see [Aaron], because I go straight [from] home to the day care, and then I would go home afterwards," directly contradicts her statement in the video that she saw Rick and Aaron that afternoon from her porch. Thus the court acknowledged that "Kubsch should have been allowed

to impeach her on this matter." Pet. App. 315a. It found the error harmless, however, because it thought that Mandy's account from the videotape would have been impeached by a call from her grandfather suggesting a mistake in dates. *Id.* It thought that the prosecutor's ability to put Detective Reihl and Monica on the stand, presumably to support the "mistake" theory, was "also the reason why Kubsch's claim that he was denied his federal constitutional right to present a defense fails. *See Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (protecting defendant's due process right by recognizing an exception to application of evidence rules where evidence found to be trustworthy)." Pet. App. 316a.

**Petitioner misstates the evidence presented at the state post-conviction hearing.**

Petitioner states that, at the post-conviction hearing, Sergeant Reihl testified "about how Amanda and her mother had told him the event they described on the video took place on Thursday, not Friday." Pet. 7. This is false. Reihl testified that, some time after Mandy's statement, the officers met for a "pow-wow," and "we just felt, as a group we felt, that maybe that this girl might have been in error." PC 222. As a result, Reihl called the house and spoke with Monica's father, Lonnie (not with Amanda or Monica). Reihl asked him to find out if they were certain of the information provided. *Id.* Lonnie later called back and said that they were thinking about Thursday, the day before the murders. PC 223. Reihl specifically testified that he did *not* talk with Amanda or Monica about this again. *Id.*

Petitioner also provides a misleading description of the contents of PC Exhibit 3, a report documenting Officer Chris Whitfield's interview of Monica (not Amanda) in March 2000, a year and half after the videotaped statement. Pet. 7.

Officer Whitfield did report that Monica reported that she now believed she was mistaken:

> I spoke [with Monica] again about these details. She told me that it wasn't Friday that they saw Aaron, but it was the previous day, Thursday. **S**he said her father was at her house on that Thursday and he later reminded her that it was Thursday instead of Friday. She said she was working a lot of hours around that time and her days were running together.

PC Ex. 3. However, Officer Whitfield also reported that Monica said that on Thursday, Aaron stayed at their house from 3:30 to 9:00 p.m.:

> [Monica] said Aaron Milewski would come to their house every day after school. She said he would sit in his front window waiting for her daughter Mandy to come home so he could come over to visit. **She said that on the Thursday before he was murdered he stayed over from 3:30 PM to 9:00 PM**.
>
> She said on Friday, he never showed up. She asked Mandy why he didn't come over after school and she told her Aaron was going to his mother's house for her birthday. She said he would always tell Mandy what was going on and what his plans were. She also added that Aaron was suppose to go on a field trip on Saturday, but didn't show up.

PE 3.

In the videotaped statement, Amanda said that, after arriving home from daycare, she was standing on her porch, and she saw Rick and Aaron at their house, and shortly thereafter they got into their truck and left. Pet. App. 46a-51a. That is, she was clearly not describing a time when Aaron came over to her house to stay, like any other day.

**Federal Habeas Proceedings**

Kubsch raised his *Chambers* claim in federal habeas proceedings. The district court denied the writ, Pet. App. 188a, and the Seventh Circuit panel affirmed, with Chief Judge Wood dissenting on this issue. Pet. App. 80a.

The majority and the dissent agreed on several points:

(1) They agreed that, "[i]f the account given by Mandy in her recorded interview is correct, then Kubsch could not have committed the three murders for which he has been sentenced to death." Pet. App. 92a & 161a.

(2) They agreed that this claim is governed by the rule first established in *Chambers v. Mississippi*, 410 U.S. 284 (1973). Pet. App. 100a-104a & 163a.

(3) They agreed that the only reason actually given by the Indiana Supreme Court for rejecting Kubsch's *Chambers* claim —the alleged availability of contradictory testimony from Mandy's mother and Reihl—"is not a sufficient basis, or even a reasonable basis, for rejecting the statement as substantive evidence." Pet. App. 119a & 182a.

(4) They also agreed that that circumstances under which the statement was made weighed "in favor of reliability,": the interview was recorded, eliminating the risk that Mandy's statement would be relayed inaccurately; the interview took place just a few days after the events in question, when memories were fresh; Mandy had no apparent difficulty describing what she remembered; she was quite detailed and specific in her account; she was old enough to know she should tell the truth; she was a disinterested witness with no reason to lie about what she saw; and, there is no indication that she did so. Pet. App. 108a-109a, 127a-28a & 161a, 179a, 185a.

The majority and the dissent disagreed, however, on whether the videotaped statement was sufficiently reliable, such that *Chambers* required its admission. The dissent found the excluded videotaped statement, "had *greater* guarantees of reliability than the evidence before the Supreme Court in *Chambers*." Pet. App. 186a (emphasis supplied). The majority held that the videotaped statement is *not* sufficiently reliable because: (1) the "critical point" – that Aaron and Rick were "at their home alive and well between 3:30 p.m and 3:45 p.m. on the day they were murdered"– was not corroborated by other evidence; and (2) because Mandy was "essentially unavailable for cross-examination" due to her inability to recall the events described in her statement. Pet. App. 126a-128a.

The Seventh Circuit vacated this decision and granted rehearing *en banc*. In a 6-3 decision, the *en banc* court granted the writ. The court held that because the state court had adjudicated the claim on the merits, it would defer to the state court's "conclusion" unless Kubsch could show "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." Pet. App. 31a (quoting *Harrington v. Richter,* 562 U.S. 86, 103 (2011)).

The court identified the governing law, set forth in *Chambers v. Mississippi*, 410 U.S. 284 (1973), and subsequent decisions of this Court. Pet. App. 19a-30a. The Court held that under these decisions, to establish that his right to present evidence was violated by the exclusion of Amanda's videotaped statement, Kubsch must show that (1) the evidence would have been both material and favorable to his defense, (2) the evidence is reliable and trustworthy, and (3) that the exclusion was arbitrary or disproportionate to the evidentiary purpose advanced by the exclusion. Pet. App. 29a-30a.

Applying this rule to the specific facts of this case, the court held that the exclusion of the videotaped statement violated Kubsch's constitutionally protected right to present evidence in his favor, and that the state court's decision was based on an unreasonable application of the governing law under 28 U.S.C. §2254(d)(1). Pet. App. 32a-38a.

Consistent with the original panel decision, the dissent argued that the excluded statement was not sufficiently reliable or trustworthy because Amanda's inability to remember the substance of her statement rendered her unavailable for cross-examination, and because her statement was not corroborated by independent evidence. Pet. App. 71a-72a.

## REASONS FOR DENYING CERTIORARI

There are no grounds for this Court to grant certiorari to review the Seventh Circuit's highly fact-specific, and in any event correct, decision granting relief in this case. The Seventh Circuit's decision does not conflict with decisions of other Circuits, nor did the court below decide an important issue of federal law. The Seventh Circuit correctly applied a well-established rule to the specific and unique facts of this case.

This Court has repeatedly emphasized that it does not engage in error correction, particularly where the asserted errors are based on the lower court's purported failure to assess the facts correctly. *See* Sup. Ct. R. 10. Such review is especially unwarranted here, where the alleged errors are based on petitioner's mischaracterization of the decision below and/or the record evidence.

### 1. Contrary to petitioner's assertions (Pet. 11, 13, 18, 22-26), the court of appeals' very narrow, fact-bound decision is correct.

No basis exists to support petitioner's repeated assertion that the Seventh Circuit has created a new rule that "requires state courts to admit hearsay offered by murder defendants as substantive evidence unless the state proves it is *un*reliable." Pet. 11; see also Pet. 13, 18 & 25. The court below correctly identified a clearly established rule and correctly applied that rule to the specific and unique facts of this case.

There is no question that "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)(*internal quotation marks and citations omitted*). However, as this Court has clearly stated, "[t]his latitude . . . has limits." *Id*. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or

Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Id.*(*internal quotation marks and citations omitted*). This is "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). This right, which the Court has described as an "essential attribute of the adversary system itself," *Taylor v. Illinois*, 484 U.S. 484 U.S. 400, 408 (1988), and "imperative to the function of the courts," is designed to vindicate the principle that the "ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States v. Nixon*, 418 U.S. 683, 709 (1974). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes*, 547 U.S. at 324-25.

This Court's cases contain several illustrations of "arbitrary" rules, *i.e.,* rules that excluded important defense evidence but that did not serve any legitimate interests. For example, the Court has struck down an application of the hearsay bar to statements that "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability," *Chambers v. Mississippi*, 410 U.S. 284, 300 (1973); the exclusion of evidence bearing on the credibility of a voluntary confession, *Crane v. Kentucky,* 476 U.S. 683, 688-91 (1986); a *per se* rule excluding all post-hypnosis testimony, *Rock v. Arkansas*, 483 U.S. 44, 56-62 (1987); and, the exclusion of evidence of third-party guilt based on the strength of the prosecution's case with little or no examination of the credibility of the prosecution's witnesses or the reliability of its evidence, *Holmes,* 547 U.S. at 331.

Based on a thorough review of this Court's decisions, the court of appeals described the

applicable constitutional standard as follows: to establish that his right to present evidence was violated by the exclusion of Amanda's videotaped statement, Kubsch must show that (1) the excluded evidence is "essential to the defendant's ability present a defense"; (2) the evidence is "reliable and trustworthy"; and (3) that the exclusion was "arbitrary" or disproportionate to the evidentiary purpose advanced by the exclusion. Pet. App. 29a, 38a (*citations omitted*).

The court of appeals concluded that Kubsch had made each showing. The court of appeals correctly determined that the excluded evidence was material and exculpatory; indeed, "the evidence was easily the strongest evidence on Kubsch's only theory of defense – actual innocence." Pet. App. 33a. The court conducted a very thorough examination the circumstantial guarantees of trust-worthiness that existed at the time the statement was made. Pet. App. 33a -35a. The court of appeals observed, for example:

- "[t]he interview took place just four days after the murders" (Pet. App. 34a);
- "[Mandy and Monica's] accounts throughout the interview corroborate one another on many critical details" (Id.);
- "[t]he chance of identical defects in Mandy's and Monica's memories is close to zero over that short time, and there is no reason to think that they had coordinated their stories" (Id.);
- Mandy and Monica "gave their account in an official setting, at the police department, knowing it was being recorded," and "knowing they were being questioned in connection with a triple murder" (Pet. App. 37a);
- no one questioned that Mandy was the girl in the video and there was nothing to suggest the video had been tampered with (Pet. App. 36a);
- "Detective Reihl questioned [Mandy] carefully and thoroughly, checking several times that she and her mother, Monica, had the right times and making it clear that his questions pertained to Friday" (Pet. App. 33a.);
- "There is no reason to think that Mandy and her mother would not have been able to perceive events occurring in the house just across the street from theirs, where Mandy's friend "best friend" Aaron lived." (Pet. App. 33a);

- "No defect in narration . . .exists, because the video ensured that the trier of fact would have heard exactly what Mandy and Monica said." (Pet. App. 34a); and,

- because Mandy's account was so detailed, the prosecution would have had multiple opportunities to confront her version of events if it wished to do so (Pet. App. 34a).

Based on this review, the court of appeals concluded the statement was "unusually reliable." Pet. App. 33a. The court of appeals then considered every suggested reason for excluding the statement, including the state court's reason, and those suggested by the dissent, and concluded that none supplied a reasonable basis for excluding the statement. Pet. 35a-37a. Thus, the court of appeals concluded that the circumstances of Kubsch's case so closely parallel those that led this Court to find a constitutional violation in "*Chambers*, *Green*, *Crane* and *Holmes*," "that a failure to apply those cases here would amount to an unreasonable application of law clearly established by the Supreme Court." Pet. App. 38a.

Contrary to petitioner's argument (Pet. 11, 13, 18 & 25), the court of appeals was very clear that its holding was a narrow one, based on the unique and specific facts of this case:

> Nothing that the Supreme Court has said, and nothing we say, means that the hearsay rule will *never* bar the admission of video evidence. In the years since *Chambers*, neither the hearsay rule nor the other evidentiary rules the Court has considered have wound up in the wastebasket. Only if all of the factors the Court has specified, and we have described, come together must the evidence rule yield. Due process requires no less.

Pet. App. 38a.

Petitioner's argument that court of appeals' decision is "incorrect," (Pet. 22-26) is flawed in several respects.

As described, *supra,* at 12, petitioner's claim that Amanda has "repudiated" her statement Pet. 23, 26 is based on petitioner's misreading of Reihl's post-conviction statement. Reihl never reinterviewed Amanda, PC 223, and Amanda has never repudiated her statement.[2]

Petitioner also bases much of his argument on a misreading of the pertinent holding in *Chambers*. Pet. 22; see also Pet. 21. *Chambers* did hold that hold that Mississippi's application of its "voucher rule" improperly impeded the defendant's right to cross-examination when the court prohibited the defense from cross-examining its own witness because the prosecution had not vouched for the witness. 410 U.S. at 294. However, the Court also considered the state court's exclusion of hearsay testimony. This part of the decision had nothing to do with the "voucher rule." It concerned Mississippi's failure to recognize a hearsay exception for statements against penal interest. *Id.* at 298-302.

Specifically, the defendant in *Chambers* sought to admit, as substantive evidence, the hearsay testimony of three witnesses who claimed that someone other than defendant had confessed to the crime. *Id.* at 299. At the time, Mississippi - like "most States," and the federal courts - recognized a hearsay exception applying only to declarations against *pecuniary* interest, but did not recognize an exception for declarations that are against the *penal* interest of the declarant. *Id.* However, "scholars" had questioned the wisdom of such a distinction, and, as the Court observed, exclusion of statements against penal interest "would not be required under the newly proposed Federal Rules of Evidence." *Id.* at 299. The "newly proposed Federal Rule of

[2] The Indiana Supreme Court's version of these events (Pet. App. 315a-316a), which are based on the prosecutor's representations of the police reports rather than testimony, are also inaccurate. Specifically, "Lonnie" is Monica's father, not her husband; Reihl called Lonnie (who was not home at the time Amanda saw Rick and Aaron on Friday) to ask if Amanda or Monica could be mistaken, not the other way around; and Lonnie left a voicemail message with Reihl saying that he had spoken to *Monica*, and that she said she was mistaken about what happened on Friday, and it was Thursday's events she was recalling. TR 3026-27. Reihl never revinterviewed Amanda. PC 223.

Evidence," cited by the Court, referred to proposed Federal Rule of Evidence 804, Rules of Evidence for United States Courts and Magistrates (approved Nov. 20, 1972, and transmitted to Congress to become effective July 1, 1973, unless the Congress otherwise determines). *Id.* at 299 n.18.

Rule 804(b)(3) of the Federal Rules of Evidence provides, for the admission of a statement by an unavailable declarant that at the time of making tended to subject him to criminal liability, provided the statement is corroborated.[3] When adopting the Rule, the House Judiciary Committee explained the corroboration requirement was necessary for this particular hearsay exception because, "[the Committee] believed . . . as did the [Supreme] Court [in its earlier version] that statements of this type tending to exculpate the accused are more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness. . . .The Committee settled upon the language 'unless corroborating circumstances clearly indicate the trustworthiness of the statement' as affording a proper standard and degree of discretion." Notes of Committee on the Judiciary, H.R. Rep. No. 93-650, Note to Subdivision (b)(3), at 28 U.S.C.A. Fed. R. Evid. 804, U.S. Code Cong. & Admin. News

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[3] When it was first adopted, Rule 804(b)(3) read:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> * * * *
> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissable [sic] unless corroborating circumstances clearly indicate the trustworthiness of the statement.

*United States v. Barrett*, 539 F.2d 244, 250 (1st Cir. 1976).

1974, pp. 7051 *quoted in United States v. Barrett,* 539 F.2d 244, 251 (1st Cir. 1976)(describing the history of Rule 804(3)).

That is, contrary to petitioner's suggestion (Pet. 21, 23), the only distinction between the circumstances considered in *Chambers*, and those in Kubsch's case, is that excluded hearsay evidence in *Chambers* was "more suspect," and thus required corroboration to be deemed trustworthy, while the excluded past recorded statement in *Kubsch* does not raise similar concerns.

Petitioner also asserts that, "[u]sually the rules require the proponent to show the hearsay declarant is available to be cross-examined about the statement – as was the declarant in *Chambers*." In fact, "usually" the opposite is true. The general prohibition against hearsay is premised upon the theory "that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination." *Idaho v. Wright*, 497 U.S. 805, 819 (1990) quoting 5 J. Wigmore, Evidence § 1420, p. 251 (J. Chadbourn rev. 1974). The various exceptions to the general prohibition against hearsay are premised upon the theory that the circumstances surrounding the making of certain kinds of hearsay statements provide sufficient assurance that the statement is trustworthy, such that cross-examination would be superfluous. *Id.* Indeed, many hearsay exceptions actually require the proponent show the declarant is unavailable as a condition for admissibility, *see* Fed. R. Evid. 804; Ind. R. Evid. 804, including the exception that permits the admission of (corroborated) statements against penal interest, discussed in *Chambers*. Fed. R. Evid. 804(b)(3). Other hearsay exceptions are available regardless of whether the declarant is available or not, such as those listed under Federal Rule of Evidence 803, or Indiana Rule of Evidence 803. Indiana's Rule 803(5) reads:

> Rule 803. Exceptions to the rule against hearsay -- Regardless of whether the declarant is available as a witness.
>
> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> ***
> (5) Recorded recollection. -- A record that:
> (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
> (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
> (C) accurately reflects the witness's knowledge.

This rule is identical to Fed. R. Evid. 803(5). The recorded recollection exception to the general prohibition against hearsay is based on "[t]he guarantee of trustworthiness ... found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them." Fed. R. Evid. 803(5) Committee Note.

In this case, Amanda Buck was in fact available to testify – she took the witness stand. She testified that she could not remember the substance of her prior statement. The state court held that the videotaped police interview of Amanda, made four days after the events she witnessed and described in that statement, met the conditions of 803(5)(A) and (B). However, the state court also held that because Amanda could not remember making the statement, she could not personally vouch for the accuracy of the statement, and thus defendant could not meet 803(5)(C).

Contrary to petitioner's argument (Pet. 23), the Seventh Circuit did not suggest that the "accuracy" requirement was unconstitutional or unnecessary. Rather, the court of appeals explained that, in this case, Indiana's holding that the "accuracy" requirement could only be satisfied if Amanda personally vouched for the statement, was arbitrary and disproportionate to the purpose of the rule. The ruling was arbitrary because, as the Seventh Circuit explained,

Indiana did not uniformly require vouching to satisfy this component of the rule. Pet. App. 36a. In other cases, the Indiana courts had permitted the admission of the out of court statement, even where the witness could not recall making the statement, when other factors demonstrated the statement was trustworthy. Pet. App. 36a.[4] The state court's ruling was disproportionate because, as the Seventh Circuit observed, there were in fact other circumstances surrounding the statement that demonstrated the statement was accurate. Most notably, the statement in question was a videotaped recording of the police interview with Amanda. It was clear that Amanda made the statement and it was clear exactly what she said in the statement. There was no suggestion that the tape had been tampered with, Pet. App. 36a, – indeed, the state had conceded the authenticity of the videotape at trial. TR 3011.

The Seventh Circuit was also clear that it was not holding that the hearsay rule will *never* bar the admission of video evidence. Pet. App. 38a. Rather, under the specific circumstances of this case – where the evidence was unquestionably material and crucial to Kubsch's defense, where circumstances indicate that the statement is "unusually reliable," and where there is no reasonable basis for excluding the evidence – the court held that it violated Kubsch's constitutionally protected right to present evidence in his favor to exclude this evidence from the jury's consideration.

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[4] *See Small v. State*, 736 N.E.2d 742, 745 (Ind. 2000)(upholding trial court's decision to allow the prosecution to read relevant portions of a witness's deposition even though, at trial, the witness could not remember the answers she had given during the deposition, and after reviewing the transcript *still* could not recall her statements); *Impson v. State*, 721 N.E.2d 1275, 1282-83 (Ind. Ct. App. 2000) (affidavit admitted where signed shortly after attack, consistent with what affiant told another person, even though affiant denied any memory of the attack at trial); *Flynn v. State*, 702 N.E. 2d 741, 744 (Ind. Ct. App. 1998) (recorded, out-of-court statement admitted under Rule 803(5) because state showed at trial that declarant lacked recollection, that she had personal knowledge of the events in the statement, and that she had made a full and complete statement of the events according to an officer who took her statement).

Petitioner is simply wrong when he claims that the Seventh Circuit held that hearsay evidence is presumed admissible "even though there was nothing fundamentally unfair about excluding it." Pet. 26. The Seventh Circuit held that that it *was* fundamentally unfair to exclude the evidence in this case – it violated Kubsch's fundamental right to present evidence in his favor. Pet. App. 38a. Petitioner's argument for exclusion is dependent upon petitioner's own mischaracterization of the recorded interview. Pet. 26. However, the Seventh Circuit considered the statement and circumstances under which it was made in great detail, and clearly disagreed with petitioner's characterization of that statement. Pet. App. 32a-38a. And, unlike petitioner, the Seventh Circuit supported its assessment of the statement's reliability with facts. *Id.*

In sum, as petitioner's plea for error correction fails to identify any actual error in the Seventh Circuit's application of this Court's precedents, review by this Court is unwarranted.

**2. Contrary to petitioner's argument (Pet. 14-18), the decision below does not conflict with any decisions of another court of appeals.**

Petitioner cites a number of decisions in which courts of appeals denied, for various reasons, a defendant's claim that his right to present evidence was violated by the exclusion of evidence. (Pet. 14-18). The cases cited by petitioner are distinguishable and not in conflict with the decision of the court of appeals.

In several of the cases cited by petitioner, the reviewing court rejected the *Chambers* claim because the defendant had not shown the excluded evidence was material. For example, in *Soto v. Lefevre*, 651 F. Supp. 588, 597-98 (S.D.N.Y. 1986), the state court had properly excluded testimony that a co-defendant had told a taxi driver that he intended to commit future murders with the assistance of someone other than defendant, as that evidence did not show that this other individual was involved in the murder in question. In *West v. Bell*, 550 F.3d 542, 559-60 (6th Cir. 2008) the state court properly excluded hearsay testimony from two witnesses because in each

instance the excluded testimony was "cumulative," "did not refute the state's theory nor did it exculpate [defendant]," and "shed no light on" defendant's theory that he committed the defense under duress. In *Taylor v. Sec'y, Fla. Dep't of Corr.,* 760 F.3d 1284, 1295-97 (11th Cir. 2014), the state court properly excluded the the victim's sisters' statements concerning the victim's prior cocaine use, because this evidence was "remote," and "irrelevant" to defendant's claim that the victim and he had consensual sex. And, in *United States v. John*, 597 F.3d 263, 276 (5th Cir. 2010), the defendant sought to have police officers testify as to statements "allegedly made" by defendant's brother, but defendant "has not offered any proof as to what the officers' testimony would have been."

In contrast, the excluded evidence in Kubsch's case was "easily the strongest evidence on Kubsch's only theory of defense—actual innocence. It was not cumulative, unfairly prejudicial, potentially misleading, or merely impeaching." Pet. App. 33a. Indeed, even the dissent did not question the materiality of the excluded evidence: "Amanda's statement was exculpatory. If the statement were factually accurate, then Kubsch would be innocent." Pet. App. 67a.

Nor did Amanda's videotaped statement suffer from any of the various reliability issues identified in the other decisions cited by petitioner. Kubsch was not seeking to admit his own self-serving out-of-court statements, as were the non-testifying defendants in *Showalter v. McKune*, 299 F.App'x 827, 830 (10th Cir. 2008) and *Simmons v. Epps*, 654 F.3d 526, 543-44 (5th Cir. 2011). He was not seeking to admit "tip sheets," of unknown origin, indicating anonymous individuals had claimed that someone named "Paul," "Paulo" or "Pablo" had committed the crime, as was the case in *United States v. Patrick*, 248 F.3d 11, 23-24 (1st Cir. 2001). He was not seeking admit a defense investigator's version of what an unavailable witness had purportedly said, as was the case in *Staruh v. Superintendent Cambridge Springs SCI*, 827 F.3d 251, 256,

261-62 (3rd Cir. 2016) and *Ayala v. Chappell*, 829 F.3d 1081, 1113-14 (9th Cir. 2016).

Kubsch also was not seeking to admit testimony that a nontestifying individual had claimed a third party had committed the offense, as was the case in *Sinkfield v. Brigano*, 487 F.3d 1013, 1017-18 (6th Cir. 2007). In *Sinkfield*, two witnesses claimed that the codefendant had called them shortly after the murder and admitted that he *and someone other than the defendant* had committed the murder. Taking guidance from this Court's decision in *Williamson v. United States*, 512 U.S. 594, 600 (1994), the state court admitted that portion of the statement that was self-inculpatory, but excluded that portion of the statement that was not. *Id.* Because the collateral portion of the statement at issue did not bear the same indicia of reliability as the statements against penal interest at issue in *Chambers*, the Ninth Circuit upheld the state court's decision. 487 F.3d at 1018.

Finally, in *Christian v. Frank*, 595 F.3d 1076, 1084-86 (9th Cir. 2010), the court excluded the testimony of two witnesses claiming someone other than defendant had confessed to the murder were properly excluded notwithstanding *Chambers* because the alleged statements, "were strongly contradicted by the physical evidence, were made in far less reliable contexts and were perhaps never even made, given the unreliability of the witnesses." *Id.* at 1085-86. As the Seventh Circuit explained in great detail, Amanda's videotaped statement suffered from none of these infirmities. Pet. App. 33a-36a.

In sum, the cases cited by petitioner are similar in that they all apply the rule articulated in *Chambers* to the specific facts presented, and they employ an analysis and reasoning that is consistent with the decision below. It is hardly surprising that different facts would often lead to different results; this does not constitute a "conflict." In the absence of any circuit conflict, the question presented lacks sufficient importance to warrant this Court's review.

**3. Contrary to petitioner's argument (Pet. 18-21), the decision below is not in any way inconsistent 28 U.S.C. §2254(d).**

Petitioner apparently concedes that the court of appeals applied 28 U.S.C. §2254(d) of the Anti-Terrorism and Effective Death Penalty Act when reviewing the state court's decision in this case, and identified no issue with the Seventh Circuit's recitation of that highly deferential standard. Relying on this Court's decision in *Harrington v. Richter,* 562 U.S. 86, 103 (2011), the Seventh Circuit clearly held that it must defer to the state court's "conclusion," unless the state court decision was contrary to, or unreasonably applied, this Court's decisions. Pet. App. 31a. The court of appeals explained, under §2254(d)(1), "the writ may not issue simply because the federal court concludes that the state court erred." Pet. App. 31a (citing *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2003)). Rather, "'a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.'" *Id.* (quoting *Richter*, 562 U.S. at 103). The court of appeals reiterated this Court's admonishment from *Richter,* "'[i]f this standard is difficult to meet, that is because it was meant to be.'" *Id.,* (quoting *Richter*, 562 U.S. at 102).

Petitioner nevertheless composes a list of complaints he believes demonstrate the court of appeals' application of §2254(d)(1) was not "meaningful." Pet. 18-21. First, petitioner complains that, "neither *Chambers* nor any other decision of this Court has clearly established a rule that criminal defendants are entitled to admit favorable hearsay evidence statements that fail a traditional test of reliability." Pet. 19. Of course, the Seventh Circuit did not purport to rely on such a rule. As described *supra,* at 17-18, the court of appeals correctly identified the governing law as set forth by this Court, applied that law to the specific facts of this case and concluded that

the exclusion of the statement violated Kubch's right to present evidence in his favor and the state court's contrary conclusion was based on an unreasonable application of the this Court's decisions. In reaching this conclusion, the court of appeals discussed, at length and in great detail, why particular circumstances surrounding the making of the statement rendered it "unusally reliable." Pet. App. 33a-37a. Notably, petitioner does not point to any alleged inaccuracy in the court of appeals' recitation of the facts supporting this decision, nor does petitioner identify any fact, or legal argument, the court of appeals failed to consider when rendering its decision. Petitioner simply disagrees with the court of appeals' conclusion, which certainly does not constitute a basis for this Court's review.

Nor does petitioner's observation that "this Court has *never* granted a habeas claim predicated on *Chambers*", (Pet. 20), demonstrate that the court of appeals failed to "meaningfully" apply §2254(d). Obviously there is no requirement that this Court determine a state court decision has unreasonably applied one of its decisions, before a lower federal court is permitted to find an entirely different state court unreasonably applied that decision in an entirely different case.[5]

[5] To the extent that petitioner is suggesting no federal court has ever granted habeas relief based on *Chambers*, it is incorrect. While the standard may be difficult to meet, several other federal courts have granted relief, even under AEDPA. *E.g., Christie v. Hollins*, 409 F.3d 120 (2d Cir. 2005)(state court unreasonably applied *Chambers* when it excluded the prior testimony of an unavailable witness due to the defense's alleged "lack of diligence" and alleged lack of materiality); *Lunbery v. Hornbeak,* 605 F.3d 754 (9th Cir. 2010), *cert. denied, Dobson-Davis v. Lunbery*, 562 U.S. 1102 (2010)(state court unreasonably applied *Chambers* when it excluded testimony that unavailable (deceased) witness had made a self-incriminating statement to acquaintances shortly after the murder); *Chia v. Cambra*, 360 F.3d 997 (9th Cir. 2004), *cert. denied, Lewis v. Chia*, 544 U.S. 919 (2005) (state court unreasonably applied *Chambers* when it excluded several exonerating confessions); *Wallace v. Price,* 265 F. Supp. 2d 545, 553-58 (W.D. Pa. 2003), *aff'd,* 2007 U.S. App. LEXIS 16095 (3d Cir. 2007), *cert. denied*, *Wallace v. Folino*, 553 U.S. 1034 (2008) (it was error under *Chambers* to exclude written statement of witness claiming that defendant accomplice had admitted that he, not defendant, had committed the murder, even though neither the witness nor the accomplice could remember the statement). Of

Likewise, the fact that this court rejected a habeas claim in *Nevada v. Jackson*, 133 S. Ct. 1990, 1993 (2013)(per curium), predicated upon an entirely different set of facts, does not demonstrate that the court of appeals' application of §2254(d) in this case was not "meaningful."

And, while Seventh Circuit certainly did not hold that Indiana's recorded recollection hearsay exception (Ind. R. Evid. 803(5)) is arbitrary or irrational on its face, Pet. App. 18a, as described *supra,* at 23-24*,* the court of appeals did indicate that the state court's application of the accuracy requirement in section 805(5)(C), was arbitrary and served no legitimate purpose under the specific facts of this case (Pet. App. 36a). *Contra* Pet. 20.

Petitioner's final complaint is that the specific facts in this case do not mirror the specific facts at issue in *Chambers*. Pet. 21. There are three problems with this argument. First, as discussed *supra,* at 20, petitioner misreads the holding *Chambers*. Second, as the Seventh Circuit observed, "*Chambers* was not a one-and-done opinion from the Supreme Court." Pet. App. 23a. Indeed, this Court has applied this rule to a wide variety of exclusion cases – all of which considered facts and circumstances different from those at issue in *Chambers*. *E.g., Green v. Georgia*, 442 U.S. 95 (1979) (per curiam); *Crane v. Kentucky*, 476 U.S. 683 (1986); *Rock v. Arkansas,* 483 U.S. 44 (1987); *Holmes v. South Carolina*, 547 U.S. 319 (2006).

Finally, as the Seventh Circuit observed, this Court has held that:

> AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. ... Nor does AEDPA 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.

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course these decisions, like the Seventh Circuit's decision in Kubsch, were entirely dependent upon the specific facts presented in those cases.

Pet. App. 32a (quoting *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007))(*citations and quotation marks omitted*). *See also Williams v. Taylor*, 529 U.S. 362, 407 (2000).

None of petitioner's complaints even remotely suggest that the Seventh Circuit failed to "meaningfully" apply §2254(d) in the decision below, and thus do not supply a basis for this Court's review.

**4. Contrary to petitioner's suggestion (Pet. 26) the unconstitutional and unreasonable exclusion of Kubsch's best evidence of innocence was not "harmless."**

Finally, petitioner's suggestion that state court's error in excluding this evidence might be "harmless" is unfounded. No Seventh Circuit judge – neither the majority nor the dissent -- believed the availability of contradictory testimony from Amanda's mother or Sergeant Reihl was a reasonable basis for upholding the decision under §2254(d). Pet. App. 34a-35a, 63a-79a. As Judge Hamilton observed in the original panel decision:

> If Amanda's statement were admissible as substantive evidence to prove that what she said in the interview was true, then the mere fact that there was some contradictory evidence would not justify its exclusion. (The State's proffered impeachment did not include any admission by Amanda herself that she had been mistaken.) Conflicting evidence would simply present an ordinary question for a jury to resolve, as the trial judge recognized, TR 3015, though a question of great importance because the statement would, if believed, exonerate Kubsch.

Pet. App. 98a-99a. Sorting out truthful from untruthful testimony is the essence of the *jury's* function in our criminal justice system. *United States v. Scheffer,* 523 U.S. 303, 313 (1998).

Moreover, petitioner is severely overstating the strength of the rebuttal evidence he claims would render the error harmless in this case. Clearly, neither Reihl nor Whitfield were present when Amanda said she saw Aaron and Rick leave and, as neither officer ever re-interviewed Amanda, PC 223, they could not claim she had repudiated her earlier statement.

Amanda said she saw Aaron and Rick on Friday, after coming home from daycare, between 3:30 and 3:45 p.m., and saw them leave the house in the white truck Rick had borrowed from his brother. Pet. App. 46a-53a. Lonnie, Amanda's grandfather, purportedly stated that he did not get home on Friday until around 4:00 p.m., TR 3026, and thus Lonnie would not have been home when Amanda encountered Aaron and Rick, and watched them leave, on Friday.

And, Monica's March 2000 statement to Whitfield, indicating that *Monica* had been recalling Thursday's events, rather than Friday's, in the September 1998 videotaped statement, does not rebut *Amanda's* version of what Amanda saw that day. If anything, Monica's additional claim that, "on the Thursday before he was murdered [Aaron] stayed over [at Monica's house] from 3:30 PM to 9:00 PM" (PC Ex. 3), would actually tend to *rebut* any theory that Amanda was actually describing Thursday, rather than Friday, in her statement. The events Amanda described were clearly *not* a time when Aaron come over to their house to stay for several hours, but rather a time when, from her porch, she saw Rick and Aaron, at their house, and then get in their truck to leave. Pet. App. 48a-52a.

For these reasons, petitioner's "harmless error" theory does not provide a basis for this Court's review of the decision below.

**5. Conclusion**.

In sum, the Seventh Circuit could not have been more aware of this Court's precedents or of the demanding and deferential standard that § 2254(d) imposes under AEDPA. Petitioner has not pointed to a single misstatement of law or error of fact made by the Seventh Circuit. The Seventh Circuit's decision is not only fact-bound and free from legal error, it is correct. Because, Petitioner asks this Court to engage in error correction, certiorari should be denied.

## CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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COUNSEL FOR RESPONDENT,
WAYNE KUBSCH

*Counsel of record

**No. 16-1021**

**In The Supreme Court Of The United States**

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RON NEAL, Superintendent, *Petitioner,*

v.

WAYNE KUBSCH, *Respondent.*

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

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## CERTIFICATE OF SERVICE

I hereby certify that three copies of the enclosed Respondent's Motion to Proceed In Forma Pauperis and Brief in Opposition were served via first-class U.S. mail, postage prepaid, on this 7th day of April, 2017 upon:

Mr. Thomas M. Fisher
Solicitor General
Office of the Indiana Attorney General
IGC South, Fifth Floor
Indianapolis, IN 46204

All persons required to be served have been served.

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