No. ________

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two of Blackston's friends testified against him at his murder trial but, after a mistrial, recanted in written statements. At his second trial, both made themselves unavailable to testify. After their incriminating testimony from the first trial was admitted, the state court refused to allow Blackston to admit the written recantations to impeach their former testimony.

1. This Court has never held that the right of confrontation includes the right to impeach with extrinsic evidence. Did the Sixth Circuit err when it granted habeas relief based on the theory that Blackston was denied the right to confront the two witnesses when the state courts did not allow him to introduce their post-testimony written recantations to impeach their former testimony?

2. Did the Sixth Circuit err in holding that a written statement recanting former testimony is not "extrinsic" to that testimony and that such statements may be admitted by merely "recit[ing] [them] to the jury" without an authenticating witness?

3. Did the Sixth Circuit err in concluding that the state court's determination that any error was harmless beyond a reasonable doubt was objectively unreasonable, where there was other substantial evidence of Blackston's guilt and the evidence was interlocking and not dependent on the credibility of any single witness?

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The petitioner is Lloyd Rapelje, warden of a Michigan correctional facility. The respondent is Junior Fred Blackston, an inmate.

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The original opinion of the Sixth Circuit is reported at 769 F.3d 411 (6th Cir. 2014). The amended opinion, Pet. App. 1a–46a, which added one new paragraph of analysis and is reported at 780 F.3d 340 (6th Cir. 2015). The order denying rehearing, Pet. App. 145a, is not reported. The opinion of the district court granting habeas relief, Pet. App. 162a–216a, is reported at 907 F. Supp. 2d 878 (E.D. Mich. 2012).

The decision of the Michigan Supreme Court affirming Blackston's conviction, Pet. App. 52a–103a, is reported at 751 N.W.2d 408 (Mich. 2008). The Court of Appeals decision on remand reversing Blackston's conviction, Pet. App. 104a–22a, is not reported but may be found at 2007 WL 1553688 (Mich. Ct. App. May 24, 2007). The decision of the Michigan Supreme Court reversing and remanding the first decision of the Court of Appeals, 123a–24a, is not reported, but may be found at 474 Mich. 915 (2005). The first decision of the Court of Appeals reversing Blackston's conviction, 125a–44a, is not reported, but may be found at 2005 WL 94796 (Mich. Ct. App. Jan. 18, 2005).

JURISDICTION

The Sixth Circuit entered its original opinion on October 7, 2014. The Sixth Circuit amended this opinion on February 17, 2015, and the Sixth Circuit denied rehearing with a suggestion for review en banc on May 5, 2015. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Under the U.S. Constitution, a criminal defendant has the right to confront his accusers:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]

U.S. Const. amend. VI.

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–32, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq.*), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
>> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>>
>> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The Michigan rules of evidence for impeachment for former testimony provide as follows:

> When a hearsay statement, or a statement defined in Mich. R. Evid. 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarants hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

MICH. CT. RULE 806.

INTRODUCTION

"[T]his Court has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes." *Nevada* v. *Jackson,* 133 S. Ct. 1990, 1994 (2013). That fact should have answered the habeas inquiry in this case. See *Woods* v. *Donald*, 135 S. Ct. 1372, 1378 (2015). But despite this plain statement, the Sixth Circuit granted habeas relief based on its belief that Blackston's Confrontation Clause rights were violated when he was barred from introducing extrinsic evidence—here, written recantation statements—for impeachment purposes.

The blackletter definition of extrinsic evidence includes these impeaching statements because they arise outside the trial testimony of these witnesses. Ordinarily the party seeking to introduce these statements would have to introduce a witness to authenticate them. The justification for excluding what the trial court called "epistles . . . advoca[ting] for acquittal" was understandable: after Blackston's first trial, the witnesses—friends of Blackston—wrote out recantations contradicting their former testimony and then contrived their own unavailability for retrial. The state courts did not allow this attempt to perpetrate a fraud on the court.

The state-court decision should have been immune from challenge in habeas corpus review because the holding in *Nevada* v. *Jackson* makes clear that no confrontation claim can arise in habeas from excluding extrinsic evidence for impeachment. But the Sixth Circuit avoided this decision by redefining the recantations as *intrinsic* evidence.

This Court should not allow this circumvention of *Nevada* v. *Jackson*.

The Sixth Circuit's definition provides that the evidence is not extrinsic where the party introduces the witness's *own* statements. But it is always the case that extrinsic impeachment is evidence of the witness's own statements. The party attempts to show that the witness said something different, either through statements to another person or written documents, to impeach the trial testimony.

Extrinsic evidence is evidence obtained outside of the examination of the witness. The Sixth Circuit's effort to limit this definition to the testimony of "other witnesses" misunderstands the rules of evidence. A party cannot merely "recite" recantations to the jury. Without a stipulation, another witness is necessary for authentication. That is why Blackston was ready to authenticate the documents with a notary in state court.

If this rule is applied to other cases, it would operate as a sea change to the rules of evidence. While Rule 806 (impeachment of former testimony) comes into play only infrequently, Rule 613 (extrinsic evidence as impeachment) is the bread-and-butter of trial practice. The *Blackston* rule would allow a party to impeach any witness with a written statement without the opportunity for review as Rule 613 requires because such evidence would not be "extrinsic." That is a big change.

One further point. The Sixth Circuit failed to grasp that any error was harmless given the overwhelming nature of the evidence against Blackston.

STATEMENT OF THE CASE

A. The murder

On the night of September 12, 1988, the victim Charles Miller disappeared. The case remained unsolved until 2000.

Charles Lamp cooperated with the authorities and told police about the murder of Miller. He said that he and Blackston planned the murder, Blackston was the shooter, and that Guy Simpson was present at the crime. Lamp led the police to where Miller's remains had been buried.

Lamp provided the basic narrative of the crime. He explained that, in 1988, Blackston and Lamp developed a plan to kill Charles Miller over a drug dispute. Tr. Oct. 16, 2002 (R. 11-8), Pg ID 1729–33.[1] Lamp said that they found a location, "dug the hole," and devised a ruse that "we'd get [Miller] to raid a marijuana field with us"—"[Blackston] was going to shoot him." *Id.* at 1735–37.

On the night of the murder, Lamp went to Blackston's home, and Blackston, Simpson, and the victim all left together. *Id.* at 1739–43. Lamp said that he "found the hole and said, I found it, and then heard the gunshot." *Id.* at 1748–49. He found Miller lying "on the ground with blood coming out from the back of his head"; Blackston was holding the gun. *Id.* They picked up the body, carried it to the hole, and buried it. *Id.* at 1750–51. After they laid Miller's body in the hole, Blackston "cut off [Miller's] ear." *Id.*

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[1] All page numbers refer to the PACER page identification numbers, and subsequent cites will include the record number.

The victim's girlfriend, Rebecca Krause Mock, testified that Blackston admitted to her that he shot Miller. *Id.* at 1564–66. The victim's girlfriend's sister (Roxann Krause Barr) also said that Blackston confessed but remembered that Blackston said that Lamp was the shooter. *Id.* at 1605–07.

Simpson testified under an immunity agreement at the first trial that he would not be prosecuted at all. Tr. Oct. 15, 2002 (R. 11-7), 1535–36. After repeated requests to testify at the retrial, Simpson refused to testify. *Id.* at 1515–22. His former testimony was admitted under Michigan Rule of Evidence 804(b)(1) (unavailable witness). *Id.* at 1528–30. At the first trial, Simpson testified (consistent with Lamp's explanation) that they traveled to the woods, that Blackston shot the victim, cut off his ear, and that they buried him. Tr. April 12, 2001 (R. 11-5), 1021–39.

Darlene Zantello claimed that she could not recall any of the events from 1988 because of her long-term drinking. R. 11-8, 1626–28. Consequently, the state trial court determined that she was also unavailable and admitted her prior testimony. *Id.* at 1635–45. In her former testimony, Zantello explained that Blackston, Simpson, and the victim were together that night and that the next morning she was awakened by the return of Simpson and Blackston—Simpson said to Blackston, "boy, that was just like in a movie, all that blood[.]" Tr. April 10, 2001 (R. 11-3), 660. She also confirmed that she recalled that Simpson said to Blackston that "you almost blew his whole head off." *Id.* at 668.

B. The exclusion of impeachment evidence

At the retrial, defense counsel stated that she had received an eight-page statement from Simpson, dated March 29, 2002, that repudiated his prior testimony as false. Pet. App. 149a–61a. In his statement, Simpson claimed that Lamp was one who murdered Miller. *Id.* Likewise, defense counsel wished to introduce Zantello's affidavit, dated July 31, 2002, recanting her testimony. Pet. App. 146a–48a. In it, Zantello claimed that she overheard no admissions and otherwise denied the truth of her former testimony. *Id.* The trial court excluded the evidence of the recantations. R. 11-7, 1529–30; R. 11-8, 1636–41.

At the motion for a new trial in the state court, Blackston's trial counsel was clear that she sought to introduce the recantations only through the testimony of other witnesses, not by cross-examining Simpson and Zantello. Blackston's counsel explained the point when testifying at the post-trial evidentiary hearing:

> I would say yes it was my plan to bring in the statement without them [i.e., Simpson and Zantello] testifying. That was our tactic because of the fact we thought if we actually brought them back, that it would be prejudicial to us. So if you're saying as it turned out once they refused to testify, then, yes, *it was our tactic to use the statement and not to call them*.

Hearing, June 13, 2003 (R.11-16), 2557–58 (emphasis added).

Blackston's trial counsel explained that attempting to recall them would have been "prejudicial" because Simpson "was probably going to testify consistent with his first statement which would have been harmful to my client." *Id.* at 2555–56. And with respect to Zantello, counsel did not believe "there would be any way [Zantello] would have recovered her memory and said anything different." *Id.* at 2556. Thus, Blackston sought to introduce the statements separate from cross-examining the witnesses themselves.[2]

And Blackston's trial counsel was prepared to do so through the use of a notary when the witnesses orchestrated their own unavailability:

> Q. So you did not come to trial prepared to authenticate these [recantations] because you were either not going to use them or they were going to be authenticated by the witness?
>
> A. Absolutely true. The only thing was I did have—*I was prepared with the names of the notaries in case I was forced to do that*, but I didn't think that would be a necessity. That was not the plan at all.

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[2] In fact, the state prosecutor argued at this hearing that "there was nothing that would have prevented Attorney Olson [Blackston's trial counsel] from calling either one of those witnesses and confronting them with the prior—or sorry—subsequent inconsistent statements." *Id.* at 2569.

Q. But had you anticipated the turn of events at the trial, you easily could have authenticated it.

A. With the notaries, yes.

Id. at 2560–61 (emphasis added).[3] In other words, if Blackston's attorney had known that Simpson and Zantello would not testify, she would have been able to introduce their statements through the notaries as witnesses.

The state trial court noted that under Michigan Rule of Evidence 806 (allowing impeachment of former testimony), it "would appear" that the recanting statements should have been available for impeachment. R. 11-16, 2572. But the state trial court determined that the recanting statements were designed to obtain Blackston's acquittal, calling them "epistles . . . advoca[ting] for acquittal," and that the witnesses had orchestrated their unavailability: Simpson "made himself unavailable," and Zantello's claim of memory loss was "somewhat suspect." *Id.* at 2575–77. On the basis that Simpson's statements were "manipulative" and "unfairly prejudicial," the trial court stated that it would have excluded the statements under Michigan Rule of Evidence 403 (substantially more prejudicial than probative). *Id.* at 2576–77. The state trial court ruled the same for Zantello's statement. *Id.* at 2575–76.

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[3] Three months after trial, Simpson added a ninth page to his March 29, 2002 recantation in which he swore to the truth of his recantation. Petition (R. 1-4), 185 (dated February 18, 2003).

C. The state and federal court proceedings

The Michigan Supreme Court affirmed the conviction after the Court of Appeals twice reversed. Initially, the state appellate court reversed on state evidentiary grounds, MICH. CT. RULE 806, but did not reach the issue of harmlessness. Pet. App. 125a–44a. The Michigan Supreme Court remanded. Pet. App. 123a–24a. In its second review, the Michigan appellate court found the error was not harmless. Pet. App. 104a–22a. On second appeal, the Michigan Supreme Court again reversed and reinstated Blackston's conviction. Pet. App. 52a–103a. It found no error in excluding the impeachment, and also found that any error was harmless. Pet. App. 68a, 70a.

The district court determined that the Michigan Supreme Court's affirmance excluding the evidence was unreasonable and that the error was not harmless. Pet. App. 181a–91a. The court did not address the claim that Simpson and Zantello attempted to subvert the justice system by refusing to testify after writing recantations. *Id.* at 182a–87a.

The Sixth Circuit affirmed. The Sixth Circuit found a Confrontation Clause violation, concluding that the state court's analysis was objectively unreasonable, and also rejected the state court's harmless-error analysis. In explaining why *Nevada* v. *Jackson* did not apply, the Sixth Circuit relied on the distinction between Simpson's and Zantello's own statements and producing a witness to testify about their statements. The Sixth Circuit did not address the fact that the Blackston assumed in state court that the introduction of these recantations *would have required witnesses.*

The analysis of the Sixth Circuit on the Confrontation Clause relied on two critical distinctions.

First, the Sixth Circuit concluded that the recantations were not extrinsic evidence because they were the witnesses' "own statements" and would not have a required a second witness to introduce them. Pet. App. 19a.

Second, in explaining that a witness would not have been necessary, the Sixth Circuit noted that the recantations could merely have been "recited to the jury in the same manner as Simpson's and Zantello's inculpatory testimony from the first trial." Pet. App. 20a.

In his dissent to the conclusion that the state court decision was an unreasonable application of this Court's clearly established precedent, Judge Kethledge reasoned that the Sixth Circuit was "extend[ing]" this Court's precedent. Pet. App. 46a ("[T]here are reasonable arguments against extending the [Confrontation Clause] line of cases to require the admission of the recantations at issue here. Those reasons include that, had the recantations been admitted, the prosecution would have had no ability to cross-examine Simpson or Zantello about them[.]"). Judge Kethledge also explained that the right that Blackston seeks to vindicate is not clearly established: "th[e] right of cross-examination is simply different from a right to admit evidence, even evidence of a witness's own inconsistent statements." Pet. App. 44a.

REASONS FOR GRANTING THE PETITION

I. In light of *Nevada* v. *Jackson,* Blackston is not entitled to habeas relief.

The U.S. Supreme Court rules provide that certiorari is warranted where a lower federal court opinion "decide[s] an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). Such is the case here.

The decision in *Nevada* v. *Jackson* governs this habeas case because the evidence that Blackston sought to introduce was extrinsic, a recanting written statement and a recanting affidavit. Indeed, the only analogous case from this Court was *Mattox* v. *United States,* 156 U.S. 237 (1895), in which this Court affirmed the exclusion of comparable impeachment evidence on evidentiary grounds. This Court should grant certiorari and reverse.

A. *Nevada* v. *Jackson* applies here.

The proposition of law from *Nevada* v. *Jackson* is notable for its simplicity, clarity, and applicability.

> [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). Blackston sought to introduce Simpson's and Zantello's recantations, which they had prepared to undermine their trial testimony. The documents were extrinsic to their testimony.

The blackletter law definition of "extrinsic evidence" is evidence that is obtained outside the examination of the testifying witness.

> Evidence is "extrinsic" if offered *through documents* or other witnesses, rather than through cross-examination of the witness himself or herself.

Weinstein's Federal Evidence (2012), § 608.20, p. 608–34 (emphasis added). See also *United States* v. *Boulerice,* 325 F.3d 75, 82 n.5 (1st Cir. 2003) (quoting Weinstein's definition of "extrinsic evidence"). In contrast, "intrinsic evidence" is evidence that comes from the witness while that witness is testifying. Black's Law Dictionary, (8th ed.) (2004), p. 597 (defining "intrinsic evidence" as "[e]vidence brought out by the examination of the witness testifying").

The analysis in *Nevada* v. *Jackson* was predicated on this distinction. In *Jackson,* the habeas petitioner was convicted of rape. The habeas petitioner sought to introduce police testimony and reports to demonstrate that the victim had previously made other "false," i.e., unsubstantiated, rape accusations against Jackson to "control" him. *Jackson,* 133 S. Ct. at 1991. The Nevada Supreme Court excluded the evidence on state evidentiary grounds. *Id.* ("[the state trial court] refused to admit the police reports or to allow the defense to call as witnesses the officers involved"). This Court characterized the reports and police testimony about the victim's statements as "extrinsic evidence." See *id.* at 1993–94.

The conclusion that the evidence at issue in Blackston's case was extrinsic evidence should have been the end of the inquiry. That is because the standard under the Anti-terrorism and Effective Death Penalty creates an exacting standard. It limits the universe of cases that may create "clearly established" precedent to decisions of this Court at the time the state court issued its decision on the merits. *Greene* v. *Fisher,* 132 S. Ct. 38, 44 (2011). And the universe is limited to this Court's holdings. *Williams* v. *Taylor,* 529 U.S. 362, 412 (2000) (O'Connor, J., for the Court).

And the AEDPA standard does not allow for "extensions" of this Court's decision to a legal principle to a new context that this Court has not addressed. *White* v. *Woodall,* 134 S. Ct. 1697, 1706 (2014) ("Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably applies this Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error."). The Court rejected the "unreasonable-refusal-to-extend doctrine." *Id.* Hence, Judge Kethledge noted in his dissent the majority's error in needing "to extend [prior] precedent" to reach its conclusion. Pet. App. 46a.

B. *Mattox* further supports this conclusion.

In fact, the only case from this Court's jurisprudence that really addresses anything similar to this case supports the exclusion of the evidence. The *Mattox* Court affirmed the admission of former testimony, but affirmed the exclusion of extrinsic evidence seeking to impeach it.

In *Mattox*, this Court examined a circumstance in which one of the key witnesses against the defendant had died after the first trial. The criminal defendant intended to impeach the witness's former testimony with inconsistent statements made to two witnesses subsequent to the trial. According to these witnesses, the key witness admitted that his former testimony was false and was only given based on threats against him. *Mattox*, 156 U.S. at 245.

The specific basis for the exclusion was there was no proper foundation laid, which required the moving party first to provide the witness himself an opportunity to answer whether he ever made such a statement. *Mattox*, 156 U.S. at 245; cf. FED. R. EVID. 613(b) (providing witness an opportunity to explain prior inconsistent statement to introduce extrinsic evidence as impeachment). While this Court did not address the issue under the Confrontation Clause and the evidentiary rule has since been superseded by Federal Rule of Evidence 806, still the basis for the exclusion dovetails the considerations by the state courts:

> While the enforcement of the [foundation] rule, in case of the death of the witness subsequent to his examination, may work an occasional hardship by depriving the party of the opportunity of proving the contradictory statements, a relaxation of the rule in such cases would offer *a temptation to perjury, and the fabrication of testimony, which, in criminal cases especially, would be almost irresistible.*

Mattox, 156 U.S. at 250 (emphasis added).

The same considerations apply here. A fairminded jurist might fear that if a criminal defendant could impeach a witness's former testimony without limitation based on claims that the witness recanted when that witness cannot be held accountable for the truth of the recantation, this would open the door to an unfair manipulation of the criminal justice system. In specific, a defendant could introduce contrived perjury from witnesses who are close associates that could not be contradicted.

The same kinds of considerations gave rise to Michigan Supreme Court's affirmance of the exclusion of the impeachment evidence here. The witnesses Simpson and Zantello were attempting to retract their sworn trial testimony, while simultaneously foreclosing the prosecution from being able to cross examine them about their claims that their prior testimony was false. Pet. App. 56a ("[the trial court] ruled that because the recanting statements could not be cross-examined the prosecutor would be prejudiced by their contradictory claims regarding defendant's innocence."). For Simpson's statement, which was unsworn at the time of trial,[4] the recantation would effectively be risk free, because the only false statements were ones not made under oath. As noted by Judge Kethledge, there are "reasonable arguments" about why the state would not wish to extend the Confrontation Clause to enable Simpson and Zantello to perpetrate this kind of fraud on the legal system, foreclosing the prosecution's ability to cross-examine them about their statements. Pet. App. 46a.

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[4] See n. 3.

II. The Sixth Circuit relied on a flawed definition of "extrinsic evidence" to avoid the application of *Nevada* v. *Jackson.*

What makes this more than a garden variety failure-to-apply-AEDPA case is not just the improper circumventing of this Court's precedent, but also the affirmative misstatement of law on evidence. As a published decision, every trial court in the Sixth Circuit should now be using this unfounded definition of "extrinsic evidence." If followed, *Blackston* will substantially change trial practice.

According to the majority, if a party seeks to introduce a written document by a particular witness and if that witness testifies, then the opposing party may merely read it to the jury, without cross examination and without any authentication. This is not the law. Perhaps the federal trial courts will just disregard *Blackston,* like the likeable eccentric uncle who lives with the family but everyone ignores. But that is not the way the federal courts should address erroneous decisions on important principles of law.

A. The Sixth Circuit adopted a flawed definition of "extrinsic evidence" that is not compelled by this Court's precedent.

The whole question here was whether the use of the recantation statements was extrinsic evidence of impeachment. If they were, then *Nevada* v. *Jackson* would clearly apply and Blackston would not be able to claim relief in habeas because of the limited nature of AEDPA review. For this reason, the Sixth Circuit's conclusion that the recantations were not extrinsic evidence was its escape hatch from having to apply *Nevada* v. *Jackson.*

As an initial matter of habeas law, the Sixth Circuit lacks the authority to overturn a state-court decision unless that decision in contrary to or an unreasonable application of this Court's precedent. 28 U.S.C. § 2254(d). But the Sixth Circuit did not even attempt to even identify a decision by this Court that clearly establishes the existence of some federal evidentiary rule that must be applied in Confrontation Clause cases. This lack of any Supreme Court caselaw defeats the grant of habeas relief. See *Woods*, 135 S. Ct. at 1376–78. This alone should resolve the issue. See Pet. App. 44a (Kethledge, J., dissenting) (noting that this Court has not established a "right to admit evidence" under the right of confrontation).

Further, fairminded jurists could agree with how the state court applied the well-established definition of extrinsic evidence. As already noted, the black-letter-law definition of extrinsic evidence is evidence that comes from outside the cross-examination of the witness testifying. See Weinstein's Federal Evidence (2012), § 608.20, at 608–34. The Sixth Circuit rejected this definition, relying on a false dichotomy between the witnesses' own statements and "other witnesses' testimony" about those statements:

> "[E]xtrinsic evidence of inconsistent statements" [is] "the production of *other witnesses'* testimony about the statements."

Blackston, 780 F.3d at 351 (quoting 1 McCormick on Evid. § 36 (7th ed) (emphasis in original). The Sixth then went on to conclude that the recantations here do not "involve impeachment using other witnesses' testimony." This analysis is wrong for two reasons.

First, the Sixth Circuit misunderstood McCormick's treatise. The definition it quoted from McCormick was not addressing the introduction of documentary impeachment evidence, i.e., written statements and affidavits. Rather, its definition of "extrinsic evidence" when examining its use in impeaching a witness's testimony is the same as Weinstein's:

> [T]he witness's testimony on direct or cross-examination stands—the cross-examiner must take the witness's answer; and contradictory extrinsic testimony, *evidence offered other than through the witness himself,* is barred.

1 McCormick on Evid. § 49 (7th ed), p. 322 (emphasis added). It quotes the same definition as Weinstein's in a footnote to support this proposition. *Id.* at 322 n.2 (*U.S.* v. *McNeill,* 887 F.2d 448, 453 (3d Cir. 1989) ("Extrinsic evidence is evidence offered through other witnesses, *rather than through cross-examination of the witness himself or herself.*") (emphasis added).

Second, the introduction of a document would require another witness to testify in any event. A written statement or affidavit is not a self-authenticating document. See MICH. CT. RULE 902.[5] Authentication of a writing is necessary before it may be received in evidence. *NLRB* v. *Bakers of Paris, Inc.,* 929 F.2d 1427, 1436 n.6 (9th Cir. 1991) ("under the federal rules of evidence, authentication

[5] Like the federal rule, the Michigan's Court Rule 902 provides that extrinsic evidence of authenticity is not required of certain documents, e.g., domestic public documents under seal.

of the writing is necessary if it is to be admitted into evidence"); accord *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"). Blackston's state trial counsel was aware of the point and explained that she would have called the notaries as witnesses if necessary to introduce the documents. R. 11-16, 2560–61.[6]

The analytic point is that a document is external (or extrinsic) to the testimony of that witness *if it is not authenticated by the witness while that witness is testifying*. In this way, the definition corresponds with the standard definition of "intrinsic evidence." See 1 McCormick on Evid., § 36, p. 215 (equating intrinsic with "cross-examination").

The Sixth Circuit majority's analysis reflects a misunderstanding of the rules of evidence in other respects as well. The Sixth Circuit attempted to distinguish *Jackson,* noting that Blackston did not seek to introduce the recantations as physical evidence:

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[6] This is true even where there really is no dispute that the witness made the statement. In the absence of a stipulation or admission by the party opponent, the admission of the document requires a second witness. Cf. 1 McCormick on Evid. § 49, p. 323 n.7 ("The counsel would not necessarily need to call a second witness . . . [where there are] responses to pretrial requests for admissions or a trial stipulation.").

> But 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.

Pet. App. 20a. But that distinction is meaningless.

As non-substantive evidence, the question whether the documents are actually introduced as exhibits or merely recited to the jury is without moment. The issue is the authority to introduce the content of the impeachment to the jury outside of cross-examination.[7] That is the point of the foundation requirement in Rule 613, which some circuits still require occur during the witness's testimony. See, e.g., *U.S.* v. *Bonnett,* 877 F.2d 1450, 1462 (10th Cir. 1989) ("to admit prior inconsistent statements of the witness when he was not first confronted denies the trier of fact the opportunity to observe his demeanor and the nature of his testimony as he denies or explains his prior testimony"). Whether the document is physically admitted does not answer it.

And the underlying motivation for the analysis on extrinsic evidence was disclosed in rejecting the State's petition for rehearing en banc. In its response, the panel majority issued an amended opinion, adding one new paragraph (italicized here):

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[7] In fact, in Michigan, such impeachment could *not* be admitted as an exhibit. See *Barnett v. Hidalgo,* 732 N.W.2d 472, 480 (Mich. 2007) (evidence used exclusively for impeachment "may not be introduced as an exhibit for the jury's consideration").

Moreover, upon retrial, the insufficiently justified denial of Blackston's right to effective cross-examination of Simpson and Zantello implicates more than simply the defendant's right to confront the witnesses arrayed against him. As the [U.S.] Supreme Court has recognized since at least 1948, "[a] person's right to . . . an opportunity to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948) (cited in *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973)). Indeed, the Constitution, through the Due Process Clause, "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Crane*, 476 U.S. at 690, (quoting *California* v. *Trombetta*, 467 U.S. 479, 485 (1984))[.] Here, the state trial court permitted the prosecution to introduce at retrial prior statements of two witnesses without allowing Blackston the opportunity to present his defense to those accusations by explaining, through those witnesses' own words, the full context and legitimacy of the prior statements. The deeply ingrained constitutional right to a fair trial cannot countenance allowing such a one-sided, prejudicial presentation of evidence to deprive an individual of liberty. *If any theme at all runs through the protections afforded by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, it is that we will not tolerate heavy-handed governmental attempts to skew the evidence placed before finders of fact in criminal prosecutions. We today refuse to be party to abrogation of such a hallowed principle.*

Pet. App. 33a–34a (citations omitted; paragraph-break inserted; parallel cites omitted; and emphasis added).

A couple of observations. Blackston had not raised his claim as a right to present a defense, but relied exclusively on a Confrontation Clause argument. He did not even cite *In re Oliver,* 333 U.S. 257 (1948), *Crane* v. *Kentucky,* 476 U.S. 683 (1986), or *California* v. *Trombetta,* 467 U.S. 479 (1984), in his brief on appeal. And Blackston cited *Chambers* only in support of his right of effective confrontation. See Blackston's Appellee's Br. at 47.

Moreover, whenever an appellate court cites multiple constitutional amendments, raises a claim for the first time in response to a petition for rehearing (one not even raised by the habeas petitioner), and speaks in the highest level of generality ("if any theme at all runs through the protections of the Fifth, Sixth, and Fourteenth Amendments"), it suggests that the court is not tethered sufficiently to the law and specific legal standards. The more general the standard, the greater the latitude for the state court in reaching its conclusion. *Knowles* v. *Mirzayance,* 556 U.S. 111, 123 (2009). The panel majority has engaged in classic second guessing.

B. This error is a jurisprudentially significant one.

The State contends that the decision below is wrong. It also contends that the decision fails to follow *Nevada* v. *Jackson* by wrongly categorizing the evidence here as extrinsic evidence. And the State contends that the mistake is an important one.

The impact of the Sixth Circuit's definition of "extrinsic evidence" extends beyond habeas and Michigan Court Rule 806. The real practical significance of this issue is for the collateral-evidence rule under 613. The federal rule provides as follows:

> Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires.

Fed. R. Evid. 613(b). Although the requirement that the foundation be laid during cross-examination has been relaxed by Congress, nevertheless the general requirement that the non-moving party have an opportunity to question the witness on the statement remains. See Advisory Notes to Rule 613 ("The traditional insistence that the attendance of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence.").

The *Blackston* rule changes this. No longer does a party need to ensure that the opposing party has a chance to question the witness about a signed written statement. Under *Blackston*, it is *not extrinsic evidence.* Rather, because it is intrinsic by definition in the Sixth Circuit, it may be merely "recited to the jury."

Consider an example. A prosecution witness testifies at trial as an eyewitness to the crime, identifying the criminal defendant as the perpetrator. That same witness had given an earlier statement to police identifying someone else as the perpetrator. In the ordinary application of Rule 613, the criminal defendant would be expected to confront the witness with this inconsistent statement under 613(b) during that witnesses' testimony, or at least allow the other party the chance to recall the witness and question the witness about the statement. See *Wammock* v. *Celotex Corp.,* 793 F.2d 1518, 1522 (11th Cir. 1986) ("most courts consider the touchstone of admissibility under Rule 613(b) to be the continued availability of the witness for recall to explain the inconsistent statements").

Blackston does away with this obligation. Because the evidence is the witness's "*own words*," Pet. App. 19a, the evidence is not extrinsic, and Rule 613(b) does not apply. Rather, the defendant may merely wait until after the witness is discharged and then read it to the jury afterward regardless whether the witness is available for recall. *Blackston* renders Rule 613(b) a dead letter for written statements.

III. Any error here was harmless.

To compound the Sixth Circuit's misstep on the definition of "extrinsic evidence," the Sixth Circuit also erred in determining that any state court legal mistake was substantial and injurious and thus declining to hold the error harmless.

The controlling standard is from *Brecht* v. *Abrahamson,* 507 U.S. 619, 637 (1993) (the standard that a federal habeas court applies is to determine whether the error "had [a] substantial and injurious effect or influence in determining the jury's verdict"). Accord *O'Neal* v. *McAninch,* 513 U.S. 432, 438 (1995). There must be more than a "reasonable possibility" that the error was harmful. *Davis* v. *Ayala,* 135 S. Ct. 2187, 2198 (2015). Although the *Brecht* standard "subsumes" the requirements of § 2254(d), *Fry* v. *Pliler,* 551 U.S. 112, 120 (2007), nonetheless *Brecht* does not somehow "abrogate[ ] the limitation on federal relief" of AEDPA. *Davis,* 135 S. Ct. at 2198. While a federal court need not formally apply both *Brecht* and AEDPA*,* the state court harmless-error decision must violate AEDPA as a "precondition" to habeas relief. *Davis,* 135 S. Ct. at 2198 (quoting *Fry,* 551 U.S. at 119–20).

A. The recantations did not undercut the interlocking nature of the evidence.

The Michigan Supreme Court expressly relied on the alignment of evidence between the arguably "tainted" evidence of Simpson and Zantello and the other "untainted" evidence from Lamp, Mock, and Barr. The state court ruled that "the likelihood" that the jury was affected by the loss of the recantations was "slight" where Simpson's and Zantello's former testimony "so clearly coincided with the untainted evidence." Pet. App. 75a.

This conclusion was amply supported by the state court's evaluation of the record. The evidence here was overwhelming, and these recantations would have had no real significance. Nothing in the

recantations would account for how the testimony of all five witnesses integrated so closely. And these recantations did not undercut Blackston's confessions to both Rebecca Mock (the victim's girlfriend), and her sister, Roxann Barr.

The five witnesses' testimony intertwined into a single narrative, identifying Blackston as the murderer. See Pet. App. 74a–75a. Once this fact is acknowledged, the importance of the recantations is blunted. Many details that converged together that the recantations could not rebut:

- All five witnesses said Blackston participated in the murder; [8]
- All of the witnesses placed the victim, Charles Miller, at Blackston's home the night of the murder;[9]
- Four of the witnesses explained that Blackston and Lamp left with Miller for a "marijuana raid";[10]
- Four of the witnesses implicated Blackston as the shooter;[11]

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[8] R. 11-3, 668 (Zantello); R. 11-5, 1021–42 (Simpson); R. 11-8, 1564–66 (Mock), 1605–06 (Barr), 1744–52 (Lamp).

[9] R. 11-3, 656 (Zantello); R. 11-5, 1021–25 (Simpson); R. 11-8, 1550–59 (Mock), 1601–03 (Barr), 1739–43 (Lamp).

[10] R. 11-5, 1023–28 (Simpson); R. 11-8, 1550–52 (Mock), 1601–03 (Barr), 1736–43 (Lamp).

[11] R. 11-3, 668 (Zantello); R. 11-5, 1030–35 (Simpson); R. 11-8, 1566 (Mock), 1744–52 (Lamp).

- Four of the witnesses confirmed the cutting off of Miller's ear;[12]

- Four of the witnesses confirmed that Miller did not return that morning,[13] and was never seen alive again; and

- Miller's body was unearthed at the location that Lamp showed to the police.[14]

Mock—Miller's girlfriend—explained that Miller left to go to Blackston's house at 10:30 p.m. on the night of the murder and only Blackston and Simpson were at Blackston's home the next morning when she went looking for him. R. 11-8, 1549–55. Such testimony fit exactly within the account given by Zantello about the conversation she heard when Simpson and Blackston returned that morning ("you almost blew his whole head off"), R. 11-3, 668, and with the account of the murder given by Simpson and Lamp. R. 11-5, 1021–42 (Simpson); R. 11-8, 1743–52 (Lamp). Nothing in the recantations explains this convergence between this testimony of Mock, Zantello, Lamp, and Simpson as well as Barr.

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[12] R. 11-3, 663–64 (Zantello); R. 11-5, 1037–38 (Simpson); R. 11-8, 1566 (Mock), 1751 (Lamp).

[13] R. 11-3, 659–60 (Zantello); R. 11-5, 1041–42 (Simpson); R. 11-8, 1549–55 (Mock), 1749–52 (Lamp).

[14] R. 11-8, 1869 (Lamp).

B. The recantations did not undercut the interlocking nature of the evidence.

The recantation evidence also did not at all affect the reliability of Blackston's confession to Mock and Barr, as this testimony confirmed the evidence provided by Lamp. Confessions are "powerfully incriminating." *Richardson* v. *Marsh*, 481 U.S. 200, 208 (1987). The Michigan Supreme Court provided a thorough explanation about why Mock and her sister were credible witnesses. Pet. App. 73a. The state court provided strong reasons to credit the victim's girlfriend. Likewise, it explained that Blackston's alibi, resting on the interested testimony of his three sisters, was dubious, identifying it as "suspect." Pet. App. 74a. The credibility of Mock and her sister, particularly with respect to motive to catch the right person, stood in stark contrast.

A confession to two witnesses and an eyewitness' account—that is powerful evidence. And this evidence was mutually affirming for these three witnesses, and was further corroborated factually by Simpson and Zantello, even with the recantations. The Michigan Supreme Court ruled reasonably in concluding that any error was harmless.

CONCLUSION

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

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