No. 15-161

IN THE

Supreme Court of the United States

LLOYD RAPELJE

Petitioner,

v.

JUNIOR BLACKSTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Sixth Circuit correctly conclude that the Michigan Supreme Court unreasonably applied clearly established Supreme Court law when it held that excluding a witness's recanting statement for impeachment purposes does not violate a defendant's Sixth Amendment right to confrontation?

2. Did the Sixth Circuit correctly conclude that excluding the recantations of an accomplice and a former girlfriend, who discredited the defendant's alibi, was not harmless under *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), and instead had a "substantial and injurious effect or influence in determining the jury's verdict?" *See Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

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INTRODUCTION

The decision below reflects a narrow, routine application of settled Confrontation Clause jurisprudence to the unique facts at issue. Nonetheless, Petitioner seeks to invoke this Court's "rare" certiorari jurisdiction. *See* Rule 10. Petitioner, however, claims no split among the appellate courts, state or federal. Rather, he asserts a conflict with two decisions from this Court, but those decisions have little bearing on the issues in this case. Nor does the decision below upset application of fundamental evidentiary rules, as Petitioner suggests. In short, nothing here warrants this Court's intervention.

After a jury convicted Respondent Junior Fred Blackston of first-degree murder in the death of Charles Miller, the court granted Blackston a new trial because his first trial was constitutionally infirm. Before the second trial, two of the State's key witnesses, an accomplice (Guy Carl Simpson) and Blackston's former girlfriend (Darlene Rhodes Zantello), recanted their testimony. Because Simpson and Zantello were later determined to be unavailable at the retrial, the court ordered their earlier testimony read to the jury, while, at the same time, refusing Blackston the opportunity to impeach their testimony with evidence of the witnesses' recantations.

The recantations mattered. In his recantation, Simpson admitted that he had lied on the stand: Blackston had not killed Miller, and Simpson had accused Blackston only because of prosecutorial pressure and death threats from another accomplice. Zantello also wholly recanted. The State had

prompted her false testimony, which discredited Blackston's alibi, by promising to drop criminal charges pending against her and her then-boyfriend.

Blackston sought habeas relief, which the district court granted, and the Sixth Circuit affirmed. Applying the highly deferential AEDPA standard, the Sixth Circuit held that the recantations fall squarely within this Court's clearly established Confrontation Clause precedents, and the state court unreasonably abridged Blackston's right to effective cross-examination. Pet. App. 12a-14a (citing *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004); *Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (per curiam); *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986); *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Berger v. California*, 393 U.S. 314, 315 (1969); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959)).

Petitioner does not dispute the force of these Confrontation Clause cases. Instead, he offers two inapposite cases; claims the Federal Rules of Evidence have been disrupted; and baldly asks for error correction. None of these bases justify review. The careful decision below comports with this Court's precedent as well as the Federal Rules of Evidence, and the case's unique procedural history limits its reach. Further, Petitioner's desire for review of the Sixth Circuit's harmless-error analysis falls flat. In a case with no physical evidence linking Blackston to the crime, the court below rightly determined "the last reasoned state-court opinion leaves little doubt that the constitutional error here had [a] 'substantial and injurious effect.'" Pet. App. 36a (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). Accordingly, the petition should be denied.

BACKGROUND

I. THE STATE COURT TRIALS.

A. The First Trial And Motion For New Trial.

The State first tried and convicted Blackston of first-degree murder on April 13, 2001. Blackston, however, successfully moved for a new trial on the ground that the trial court misinformed the jury about the extent of the prosecution's grant of immunity to one of the State's key witnesses, Simpson.

B. The Second Trial.

The State again tried Blackston in October of 2002, presenting essentially the same evidence it had used before. With no physical evidence linking Blackston to the crime, the State relied solely on testimonial evidence. (*See* R. 11-9, Vol. III, p. 29, Pg ID 1817.) The State argued that Blackston and Dean Lamp plotted to murder Miller because Miller intended to rob Blackston's drug supplier, Benny Williams. On the night of the murder, so goes the State's theory, Blackston, Lamp, and Simpson lured Miller deep into the woods. Blackston shot Miller and cut off his ear to give to Williams as proof of the murder. At the retrial, Blackston's defense also remained the same: He was home the night of the murder.

1. The State's Case.

The State offered eleven witnesses, six of whom did not connect Blackston to the crime. The State relied exclusively on the testimony of two alleged accomplices (Lamp and Simpson), Blackston's former

girlfriend (Zantello), the victim's girlfriend (Rebecca Krause Mock), and the victim's girlfriend's sister (Roxann Krause Barr).

a. Simpson's Testimony.

Simpson was the prosecution's lead-off witness. (R. 11-7, Vol. I, p. 134, Pg ID 1515.) At the first trial, he testified against Blackston under a grant of complete immunity. (*Id.* at 154–155, Pg ID 1535–36.) During the first day of the retrial, however, Simpson sent a letter to the prosecutor in which he indicated that he would not again testify against Blackston. (*Id.* at 134, Pg ID 1515.)

Outside the presence of the jury, the court questioned Simpson and his lawyer, Gary Stewart, about Simpson's change of heart. (*Id.*) Stewart told the court that Simpson planned to change his testimony, despite Stewart's warning that Simpson was risking his immunity. (*Id.* at 134–35, Pg ID 1515–16.)

Blackston's counsel then noted that she had received an eight-page statement from Simpson, dated March 29, 2002, in which he repudiated his prior testimony. Simpson's recantation identified Lamp, not Blackston, as the shooter. (R. 11-16, pp. 81–83, Pg ID 2586–88.) And the recantation suggested that the State sought a conviction, regardless of the truth. (*Id.* at 77–80, Pg ID 2582–85.)

The judge questioned Simpson. At Simpson's request, the trial court permitted him to consult with his attorney. After a fifteen-minute recess, Simpson demanded an opportunity to shower. The court refused, telling Simpson: "[y]ou're going to testify

now or you're not going to testify." (R. 11-7, Vol. I, p. 140, Pg ID 1521.) Simpson again responded that he would not testify before showering. The judge interpreted Simpson's actions as a refusal to testify. (*Id.* at 137–141, Pg ID 1518–22.)

The court then granted the State's motion for Simpson's prior testimony to be admitted under Rule 804(b)(1) of the Michigan Rules of Evidence. (*Id.* at 142, Pg ID 1523; *id.* at 147–49, Pg ID 1528–30.) Through his recorded testimony, Simpson testified that he, Blackston, Miller, and Lamp agreed to raid a marijuana field. (*Id.* at 51–58, 62–63, Pg ID 1021–28, 1032–33.) Lamp led the way into the woods, and a few moments later, Lamp yelled: "I found it." (*Id.* at 64–65, Pg ID 1034–35.) Blackston then shot Miller in the neck. (*Id.* at 65, Pg ID 1035; *id.* at 123, Pg ID 1093.) Lamp and Simpson carried Miller's body to a pre-dug hole; Blackston jumped into the hole and cut off one of Miller's ears. (*Id.* at 66–68, Pg ID 1036–38.)

After Simpson's prior testimony was read into the record, Blackston's counsel sought to impeach the testimony with Simpson's recantation. The trial court refused, ruling the recantation inadmissible because the statement was not "prior" to the former testimony and thus did not fall under Rule 613 of the Michigan Rules of Evidence (extrinsic impeachment with prior inconsistent statements). (R. 11-7, Vol. I, pp. 148–149, Pg ID 1529–30.) The court did not consider any other evidentiary rule or the Confrontation Clause. Consistent with the court's ruling, the jury knew nothing of Simpson's recantation.

b. Lamp's Testimony.

Lamp also received a plea deal in exchange for his testimony. (R. 11-9, Vol. III, pp. 34–35, Pg ID 1822–23.) Pursuant to the deal, Lamp testified that he and Blackston plotted to kill Miller because Miller had been planning to rob Williams. (R. 11-8, Vol. II, pp. 185–189, Pg ID 1729–33.) As the crime's mastermind, Lamp suggested to Blackston that they shoot Miller and dispose of the body in a "rural area without very much traffic" near Lamp's house. (*Id.*) To that end, a day or two before the murder, Lamp and Blackston chose a location near Lamp's home and pre-dug a grave. (*Id.* at 191–92, Pg ID 1735–36.) They planned to coax Miller to the location by telling him that they were going to raid a marijuana field. (*Id.* at 192–93, Pg ID 1736–37.)

Consistent with the plan, Lamp drove the four men (and Blackston's daughter) to the edge of the woods on the night of the murder. (*Id.* at 202, Pg ID 1746.) Lamp then guided them to the pre-dug grave, signaled to Blackston, and Blackston shot Miller in the head. (*Id.* at 204, 226, Pg ID 1748, 1770.) After the three men laid Miller in the hole, Blackston "cut off [Miller's] ear." (*Id.* at 207, Pg ID 1751.)

In 2000, Lamp led law enforcement to Miller's remains. (R. 11-9, Vol. III, pp. 37–40, Pg ID 1825–28.)

c. Zantello's Testimony.

The State called Blackston's former girlfriend, Zantello, to testify. On the stand, however, she could recall little about the night of the murder or other events because alcohol abuse and domestic violence had impaired her memory. (R. 11-8, Vol. II, pp. 81–

87, 89–95, Pg ID 1625–31, 1633–39.) The trial court determined that she was unavailable under Rule 804 of the Michigan Rules of Evidence and granted the State's motion to read her prior testimony to the jury. (*Id.* at 96, Pg ID 1640.)

Through her recorded testimony, Zantello testified that, in September of 1988, Blackston and she were romantically involved and cohabited. (R. 11-3, Vol. I, p. 186, Pg ID 651.) On the night of the murder, she left for the hospital due to stomach pain, leaving Blackston, Simpson, and Blackston's and her one-year-old daughter at their home. (*Id.* at 190–92, Pg ID 655–57.) As she left, Miller arrived. (*Id.* at 191, Pg ID 656.)

Zantello returned home three or four hours later to an empty house. (*Id.* at 192–93, Pg ID 657–58.) She rested but awoke when Simpson and Blackston returned. (*Id.* at 195, Pg ID 660.) She overheard their conversation, hearing Simpson say something like, "[B]oy, that was just like in a movie, all that blood," and "[Y]ou almost blew his whole head off." (*Id.* at 195, 203, Pg ID 660, 668.) She also vaguely recalled hearing about someone's ear being cut off. (*Id.* at 198–99, Pg ID 663–64.)

She continued her testimony by explaining that, in 1990 or 1991, Blackston expressed remorse to her and Mock about Miller's death. (*Id.* at 206–07, Pg ID 671–72.) The women convinced Blackston to turn himself in, but Blackston changed his mind. (*Id.* at 207-08, Pg ID 672-73.)

At the retrial, the defense sought to impeach Zantello's recorded testimony with an affidavit in which she swore much of her prior trial testimony

was untrue. (R. 11-16, p. 84, Pg ID 2589, at ¶ 6.) When she returned home from the hospital on the night of the murder, Blackston and their daughter were home alone. (*Id.* at Pg ID 2590–91, at ¶ 16.) She also disavowed her testimony that she overheard a discussion about the murder. (*Id.* at Pg ID 2591, at ¶ 17.) And she swore that Blackston had always maintained his innocence. (*Id.* at ¶ 18.)

She offered two reasons for her false testimony. First, on March 15, 1990, Zantello was arrested for disorderly conduct. (*Id.* at Pg ID 2589, at ¶ 3.) While in custody, she "was asked to tell a story about Mr. Blackston" and was given "the information to put in the story." (*Id.* at ¶ 4.) The story, however, was false, and she told the same lie at Blackston's first trial. (*Id.* at ¶¶ 5–6.)

Second, shortly before Blackston's first trial, Zantello's former boyfriend, Robert Lowder, was released from jail, but felony charges remained pending against him. (*Id.* at ¶ 7.) The same prosecutor had both Blackston's case and Lowder's case. (*Id.* at Pg ID 2590, at ¶ 12.) Lowder told Zantello that he would not be sent to prison if she testified against Blackston. (*Id.* at ¶ 10.)

The court refused to allow defense counsel to use Zantello's recantation for the same reason it excluded Simpson's recantation: It was not a "prior statement," under Michigan Rule 613. (R. 11-8, Vol. II, pp. 92–96, Pg ID 1636–40.) Further, when Zantello again took the stand, defense counsel was not permitted to ask her about the statement for the same reason—it was not a "prior statement." (*Id.*) The court did not consider any other evidentiary rule

or the Confrontation Clause. (*Id.* at 101, Pg ID 1645.) The jury never heard Zantello's recantation.

d. Mock's Testimony.

Mock testified for the State. At the time of Miller's disappearance, she and Miller were romantically involved. (R. 11-8, Vol. II, p. 3, Pg ID 1547.) She testified that Blackston twice admitted involvement in Miller's death. (*Id.* at 18, Pg ID 1562; *id.* at p. 24, Pg ID 1568.)

The first alleged confession occurred at Lion's Park shortly after Miller disappeared. (*Id.* at 19–21, Pg ID 1563–65; *id.* at 63, Pg ID 1607.) Mock testified that she had been drinking heavily at the time. (*Id.* at 20, Pg ID 1564 ("[W]e were drunk."). Mock asked Blackston about the murder, and Blackston admitted to pulling the trigger. (*Id.* at p. 22, Pg ID 1566.) Mock further testified that Blackston told her "they cut [Miller's] ear off to prove that they did it." (*Id.*)

Mock testified that on another occasion, at Zantello's house, Blackston expressed regret about Miller's death. (*Id.* at 23, Pg ID 1567.) Again, Mock was drinking heavily at the time of this alleged confession. (*Id.* at 27, Pg ID 1571.) When asked to provide details about the alleged confession, she simply said: "He got teary eyed again and said he didn't want to—he didn't want to have to do it. I don't know." (*Id.* at 24, Pg ID 1568.) Mock testified that her Barr heard the confession. (*Id.*)

During cross-examination, Mock admitted she had been a suspect in Miller's murder and Miller's family believed she was involved in the murder. (*Id.* at 40, Pg ID 1584.) She also testified that she had told inconsistent stories to law enforcement. In 1988, she

pointed the finger at Kirk Pippins, who had threatened Miller shortly before his disappearance. (*Id.* at 30, Pg ID 1574.) On other occasions, she told police that Miller was "in a depressed state of mind," perhaps even suicidal. (*Id.* at 30–31, Pg ID 1574–75.) She also repeated reports that Miller was still alive. (*Id.* at 34, Pg ID 1578.)

Lastly, Mock testified during Blackston's first trial, which came out in his second trial, that she had heard that "Mr. Miller got drugs from Mr. Lamp and owed him money." (*Id.* at 39–40, Pg ID 1583–84.) On the stand, Mock admitted to heavy alcohol, cocaine, and crack-cocaine use. (*Id.* at 29, Pg ID 1573.)

e. Barr's Testimony.

Barr, Mock's sister, testified that she, too, was at Lion's Park when Blackston discussed Miller's murder. She recalled Blackston saying that Lamp shot Miller but did not recall Blackston saying that Miller's ear was cut off. (R. 11-8, Vol. II, pp. 62–63, Pg ID 1606–07.) She testified that everyone was drinking liquor and "had a buzz" at the time. (*Id.* at 60–61, Pg ID 1604–05.) She testified that the only time she heard Blackston discuss the murder was at Lion's Park. (*Id.* at 64, Pg ID 1608.)

Like her sister, Barr admitted to substance abuse. (*Id.* at 68, Pg ID 1612; *id.* at 70, Pg ID 1614 (admitting to alcohol, marijuana, cocaine, and crack-cocaine use).) She also testified that she was around 13 years of age at the time of Blackston's alleged confession at Lion's Park. (*Id.* at 69, Pg ID 1613.) Further, she gave inconsistent testimony in the first and second trials as to who came to see Miller on the

night of the murder. (*Id.* at 65–67, Pg ID 1609–11.) Lastly, Barr knew that her sister was suspected of killing Miller. (*Id.* at 69, Pg ID 1613.)

2. Blackston's Defense.

In addition to expert testimony from a forensic pathologist and a firearms specialist, Blackston offered four witnesses: Benny Williams, Shirley Gargus, Sheila Blackston, and Linda Johnson.

a. Williams' Testimony.

Williams testified that he did not know Miller let alone ask anyone to kill him. (R. 11-9, Vol. III, p. 134, Pg ID 1924.) He also testified that no one ever brought him a human ear. (*Id.*)

b. Blackston's Sisters' Testimony.

Shirley Gargus, Sheila Blackston, and Linda Johnson, Blackston's sisters, testified that Blackston was home the night Miller was killed.

Gargus testified that on September 12, 1988, around 11:00 p.m., (Shelia) Blackston stopped by to leave her children for Gargus to babysit. (R. 11-9, Vol. III, pp. 82–83, Pg ID 1871–72.) (Sheila) Blackston had Zantello with her, and told Gargus that she was taking Zantello to the hospital for stomach pain. (*Id.*) Around midnight, (Sheila) Blackston called Gargus from the hospital and asked her to check on Blackston and his daughter. (*Id.* at 84, Pg ID 1873.) When she arrived at Blackston's house a few minutes later, Blackston and the baby were home. (*Id.* at 85, Pg ID 1874.)

(Sheila) Blackston confirmed Gargus' testimony, stating that she took Zantello to the hospital around 11:00 p.m. for stomach pain, and left her own

children with Gargus on the way to the hospital. (*Id.* at 94–95, Pg ID 1883–84.) When they returned, Blackston was home. (*Id.* at 96, Pg ID 1885.)

Consistent with her sisters' accounts, Linda Johnson testified that on September 12, 1988, she arrived at Blackston's house around 11:30 p.m. to calm down from a fight with her husband. (*Id.* at 101–02, Pg ID 1890–91.) When she arrived, Blackston and the baby were home alone. (*Id.* at 103, Pg ID 1892.) The only visitor during the time she was at the house was Blackston's friend, Lonnie Johnson. (*Id.*) When she left Blackston's house around 12:45 a.m., Blackston was still home. (*Id.*)

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Based on the State's testimonial evidence and without knowledge of the recantations, the jury convicted Blackston.

II. MOTION FOR NEW TRIAL AND STATE COURT APPEALS.

Following his conviction, Blackston moved for a new trial, asserting that the recantations should have been admitted under Rule 806 of the Michigan Rules of Evidence, which allows for impeachment of recorded testimony. (R. 11-14, pp. 1–41, Pg ID 2339–79.) The trial court admitted having misapplied Rule 806 but denied Blackston's motion on the grounds that even though the recantations were otherwise admissible, they were suspect and too prejudicial to the State under Michigan Rule 403. (*Id.* at 33–40, Pg ID 2371–78.) Making a credibility determination, the court concluded that Simpson was a "manipulative" person and his recanting statement was "self-serving." (*Id.* at 37–38, Pg ID 2375–76.)

Again assessing the credibility of the witness, the trial court was skeptical of Zantello's memory loss. (*Id.* at 38–39, Pg ID 2376–77.)

On appeal, the Michigan Court of Appeals agreed with Blackston. It held that the trial court erred in denying Blackston the right to impeach Simpson's and Zantello's testimony with their recantations and with the testimony of other witnesses who would have testified that Simpson made additional inconsistent statements. After concluding that the error was not harmless, the court reversed Blackston's conviction and remanded his case for a new trial. The State appealed to the Michigan Supreme Court, which vacated the judgment and remanded the case for consideration of whether any error was harmless. *See People v. Blackston*, 705 N.W.2d 343 (Mich. 2005).

On remand, the Michigan Court of Appeals once again agreed with Blackston and concluded that the trial court's exclusion of evidence was error, and the error was not harmless. *See People v. Blackston*, No. 245099, 2007 WL 1553688 (Mich. Ct. App. May 24, 2007) (unpublished).

The Michigan Supreme Court reversed the appellate court a second time, holding that the trial court did not abuse its discretion when it denied Blackston's motion for new trial and that any error was harmless. *People v. Blackston*, 751 N.W.2d 408 (Mich. 2008). Three of the seven justices dissented, noting that by excluding the recantations, "the trial court presented the jury with a highly distorted view of the [evidence]," and "the error may have resulted in the conviction of a defendant who was actually innocent." *Id.* at 430–31 (Markman, J., dissenting).

III. THE DISTRICT COURT GRANTED HABEAS RELIEF, AND THE SIXTH CIRCUIT AFFIRMED.

Blackston filed a pro se habeas corpus petition on December 8, 2009. (R. 14, Op. and Order at 9–10.) The district court granted relief, holding that the trial court violated Blackston's right to confrontation when it ruled that he could not impeach Simpson's and Zantello's prior testimony with their inconsistent recanting statements. (*Id.* at 22.) Even acknowledging AEDPA's formidable bar over a dozen times, the Sixth Circuit affirmed. Pet. App. 1a-46a.

REASONS FOR DENYING THE PETITION

I. THE NARROW DECISION BELOW LACKS EXCEPTIONAL IMPORTANCE.

The decision below reflects a straightforward application of settled Sixth Amendment law viewed through the lens of AEDPA. In addition to being correct, the decision addresses a fact pattern unlikely of repetition. As such, the decision will have few, if any, ripple effects.

A. The Careful Decision Below Faithfully Applies AEDPA And Settled Law.

The Confrontation Clause guarantees an accused the opportunity "to be confronted with the witnesses against him." U.S. Const. amend. VI. The right applies to all those who "'bear testimony'" against the accused, *Crawford*, 541 U.S. at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)), and "means more than being allowed to confront the witness physically," *Davis*, 415 U.S. at 315.

Constitutionally adequate confrontation requires a meaningful opportunity to challenge and test a witness's credibility, including an opportunity to show the jury evidence of a witness's "possible biases, prejudices, or ulterior motives." *Davis*, 415 U.S. at 315–16; *see also Olden*, 488 U.S. at 232 (requiring opportunity to introduce evidence of witness's living arrangements, which indicated a motive to lie); *Van Arsdall*, 475 U.S. at 679 (requiring opportunity to introduce evidence of pending charges against witness). Through these decisions and others, the Court has clearly established that a trial court errs when it prevents a defendant from testing a witness's testimony on a subject relevant to the jury's assessment of witness credibility. *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam); *see also Davis*, 415 U.S. at 316 (noting that "partiality of a witness is subject to exploration at trial, and is *always* relevant as discrediting the witness and affecting the weight of his testimony") (quotation omitted) (emphasis added).

Applying this established law, the Sixth Circuit concluded that "[e]vidence in the recantations was 'prototypical impeachment material[.]'" Pet. App. 23a. Simpson's recantation "explained his motivation in testifying falsely"—"his allegation of prosecutorial threats," and "threats by [his accomplice] against his family." *Id.* As for Zantello's recantation, it explained that she testified falsely against Blackston "in exchange for dismissal of serious criminal charges against both herself and her then-boyfriend, whom she feared because he was abusive." *Id.*

"This kind of impeachment evidence," explained the Sixth Circuit, "falls squarely within the Supreme Court's Confrontation Clause precedents." Pet. App. 23a–24a, citing *Olden*, 488 U.S. at 231-32 (confirming the right to impeach witness over motive to lie to protect romantic relationship); *Van Arsdall*, 475 U.S. at 680 (confirming the right to impeach over plea deal in exchange for testimony); *Alford v. United States*, 282 U.S. 687, 693 (1931) (confirming the right to show that a witness's "testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention").

In addition, the court soundly rejected Petitioner's "untenable" position that the Confrontation Clause applies only to those witnesses who appear in court. Pet. App. 21a. Instead, this Court has clearly established that the confrontation right applies to all those who "'bear testimony' against the accused." *Id.* (citing *Crawford*, 541 U.S. at 51). A contrary rule would "confound[] the Confrontation Clause's goal of 'ensuring that convictions will not be based on the charges of unchallengeable individuals.'" *Id.* (quoting *Kentucky v. Stincer*, 482 U.S. 730, 751 (1987)).

Finally, the court thoughtfully analyzed and rejected the State's other justifications for denying Blackston his confrontation rights. *See* Pet. App. 25a–28a (rejecting Petitioner's argument that impeachment material in the recantations was cumulative); *id.* at 28a–30a (rejecting Petitioner's argument that fear of causing prejudice to the State's case provides acceptable basis for denying Sixth Amendment rights); *id.* at 30a–31a (rejecting

Petitioner's argument that Blackston forfeited his confrontation rights by perpetrating an alleged fraud on the court); *id.* at 32a–34a (rejecting Petitioner's argument that Zantello's cross-examination was constitutionally adequate).

B. The Decision Will Have Little Impact On Future Cases.

The decision below is correct and, though important to Blackston, will have little impact on future cases. Indeed, the facts giving rise to the Sixth Amendment violation here are unique enough that the decision rarely will determine the outcome of any future case.

In brief, after Blackston's constitutionally infirm first trial, but before the retrial, two of the State's key witnesses recanted their damaging testimony against Blackston. *Supra* 3–8. The same two witnesses were determined to be unavailable to testify at the second trial. *Supra* 4–5, 6. The second jury heard the witnesses' prior testimony but not their recantations. *Id.* The trial judge acknowledged the recantations' admissibility under the Michigan Rules of Evidence but nevertheless found them too prejudicial to the State and thus excluded them. *Supra* 12. The recanting witnesses' testimony mattered mightily because the case had been cold, and the prosecution had no physical evidence linking Blackston to the crime.

This case is extraordinarily factbound and unlikely to recur. At base, the decision below holds it is clearly established that the Confrontation Clause requires an opportunity to impeach a witness's recorded testimony with that same critical witness's

authenticated statement recanting the trial testimony she previously gave. This holding is unremarkable and narrow. Petitioner seeks error correction for only this particular case, and the decision is unworthy of review.

II. THE DECISION BELOW ACCORDS WITH PRECEDENT AND THE FEDERAL RULES OF EVIDENCE.

Faced with this Court's clearly established law, Petitioner casts about for reasons justifying review. First, Petitioner offers two inapposite cases: *Nevada v. Jackson* and *Mattox v. United States*, as a basis to grant certiorari. Pet. 14–17. Those decisions, however, have little relevance here, and to the extent they matter at all, they accord with the decision below. Second, Petitioner asserts that the decision below will harm Federal Rule of Evidence 613. Pet. 25. The Federal Rules of Evidence, however, complement the decision.

A. The Decision Below Is Consistent With This Court's Precedent.

1. *Nevada v. Jackson* Reaffirms Blackston's Confrontation Right.

Relying on a single sentence in *Nevada v. Jackson*, Petitioner argues that Blackston did not have a clearly established right to impeach Simpson and Zantello with their recantations. But the sentence—"this Court has never held that the Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence for impeachment purposes," 133 S. Ct. 1990, 1994 (2013) (per curiam)—is neither remarkable nor important here. Taken in context, the sentence is consistent with the decision below.

What's more, to the extent *Jackson* bears any relevance to the issues presented, it reinforces that the Michigan Supreme Court unreasonably applied clearly established federal law.

In *Jackson*, a state-court jury convicted the petitioner of raping a victim with whom he had a prior relationship. *Jackson*, 133 S. Ct. at 1991. Before trial, the victim sent the judge a letter recanting her prior accusations and refusing to testify. *Id.* Although the victim fled, authorities eventually took her into custody as a material witness. *Id.* At trial, the defense advanced the theory that the victim had fabricated the sexual assault. *Id.* To support its theory, "the defense sought to introduce testimony and police reports showing that [the victim] had called the police on several prior occasions claiming that [the petitioner] had raped or otherwise assaulted her," but that the police were unable to corroborate her claims. *Id.* The trial court permitted questions regarding the victim's recanting letter and "gave the defense wide latitude to cross-examine [the victim] about those prior incidents." *Id.* Thus, unlike the jury in this case, the jury in *Jackson* was fully aware of the recantation. However, the trial court in *Jackson* refused to allow defense counsel to take it one step further. The court refused to admit into evidence the underlying police reports regarding prior assaults, or to allow the defense to call the officers involved in the prior incidents to the witness stand. *Id.*

The petitioner sought habeas relief on the ground that the trial court's refusal to admit this extrinsic evidence—the underlying police reports and the third-party testimony—violated his Sixth

Amendment right to present a complete defense. *Jackson*, 133 S. Ct. at 1992. The Supreme Court, applying AEDPA, upheld the exclusion of this extrinsic evidence. *Id*. at 1994. That unsurprising result is not relevant here.

As an initial matter, *Jackson* did not purport to define "extrinsic evidence" or address whether an accused's confrontation right may be completely abridged as in this case. Further, taken in context, the "extrinsic evidence" in *Jackson* refers to third-party evidence on collateral matters. Defense counsel was entitled to cross-examine the defendant's accuser about her prior accusations and to attempt to show they were baseless but not entitled to make a mini-trial of the former accusations and call third-party witnesses to the stand. *Id.*

The authorities relied upon in *Jackson* further show that the "extrinsic evidence" referred to by this Court is third-party evidence. *See Jordan v. Warden*, 675 F.3d 586, 597 (6th Cir. 2012) (barring third-party evidence where "the petitioner could have elicited the testimony he sought on cross-examination of the primary witness"); *Brown v. Ruane*, 630 F.3d 62, 70 (1st Cir. 2011) (declining to extend confrontation right "to a restriction on [defendant's] cross-examination of two prosecution witnesses . . . for the purpose of impeaching a third); *see also Walder v. United States*, 347 U.S. 62, 65 n.3 (1954) (referring to two government witnesses put on the stand to contradict the defendant's testimony as "extrinsic evidence introduced to impeach him").

In contrast to the extrinsic evidence in *Jackson*, the recantations here are not extrinsic to the

witnesses' testimony or to the central issue in the case. They are not third-party statements but the witnesses' own words. And they are not collateral to the issue at hand but instead go to the very heart of the case—whether Blackston committed the murder.

Further, not only does *Jackson* fail to challenge Blackston's clearly established right, it explicitly *reaffirms* the right, referring to and citing the Court's own "decisions holding that various restrictions on a defendant's ability to *cross-examine* witnesses violate the Confrontation Clause of the Sixth Amendment." 133 S. Ct. at 1994 (citing *Olden*, *Van Arsdall*, and *Davis*). And, unlike Blackston, the defendant's right to confront in *Jackson* was fully satisfied. *Id.* at 1991 (noting that the trial court "gave the defense wide latitude to cross-examine" the victim about the recantation).

2. *Mattox v. United States* Applied An Evidentiary Standard That Does Not Apply Here.

Petitioner also relies on *Mattox*, arguing that it is the "only analogous" case to the facts here. Pet. at 13. The portion of *Mattox* on which the State relies, however, has nothing to do with the Confrontation Clause. *Id.* at 16 (admitting the "[Supreme] Court did not address the issue under the Confrontation Clause"). Instead, an evidentiary question was before the Court.

In *Mattox*, the trial court admitted into evidence the former trial testimony of two witnesses, Thomas Whitman and George Thornton, who had since died. *Mattox*, 156 U.S. 230, 240 (1895). To impeach Whitman's testimony, the defense sought to call a

third-party witness to testify that Whitman had admitted that his trial testimony was false. *Id.* at 244–45. The trial court, however, refused to admit the evidence because a foundation for the recantation had not been laid. *Id.* The Supreme Court surveyed state court decisions, noting that the cases were unanimous in holding that "the fact that the attendance of the witness cannot be procured . . . does not dispense with the necessity of laying the proper foundation." *Id.* at 248. Thus, because a proper foundation had not been laid under the governing evidentiary rules, the Supreme Court affirmed. *Id.* at 250.

That is not what happened here. The trial court expressly found that "the defense could authenticate these documents if it was necessary," and thus a proper foundation could be laid. (R. 11-14, p. 23, Pg ID 2361). It is clear that this Court's concern in *Mattox* was not the trial court's concern here.

The State also argues that *Mattox* permits state courts to rely on policy justifications to limit a defendant's right to confrontation. Pet. at 16. First, that takes *Mattox* too far. *Mattox* addressed the applicable rules of evidence at the time and found that the recanting statement at issue could not be properly authenticated. *Mattox*, 156 U.S. at 248–50. Second, the Supreme Court has flatly rejected the State's policy argument. The States may not make exceptions to the right to confrontation, even if those exceptions make practical sense. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009) (While the Confrontation Clause "may make the prosecution of criminals more burdensome . . . [it] is binding, and we may not disregard it at our

convenience."); *Giles v. California*, 554 U.S. 353, 375 (2008) ("[T]he guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair.'").

B. The Federal Rules of Evidence Accord With The Decision Below.

To give the case artificial significance, Petitioner hyperbolically asserts that the Federal Rules are at risk. In particular, he claims that the decision "renders Rule 613(b) [of the Federal Rules of Evidence] dead letter for written statements." Pet. at 26. Petitioner's dire warning misunderstands evidentiary rules and the constitutional issue in this case.

First, this case presents a constitutional issue, not an evidentiary one. The state trial court conceded that it has misapplied Michigan Rule 613, which was not applicable, and the recantations were admissible under Michigan Rule 806. (R. 11-14, p. 34, Pg ID 2372.) Despite the recantations' admissibility under Michigan Rule 806, the trial judge proceeded to make a credibility determination as to the recantations, and because he personally found them unbelievable, excluded them under Michigan Rule 403 as too prejudicial to the State. *Id.* Accordingly, this case does not concern the intricacies of the Federal Rules—or any evidentiary rules—but instead asks whether the Constitution allows a trial judge to make credibility determinations and wholly exclude relevant impeachment material, a question unworthy of this Court's review.

Second, Petitioner's concern about Rule 613 is off base because Rule 806, not Rule 613, applies when

an unavailable witness's testimony is introduced under a hearsay exception. Rule 613 of the Federal Rules of Evidence states that "[e]xtrinsic 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). But Rule 613 applies *only* where the witness takes the stand and gives testimony. *See* Advisory Committee Notes on R. 613 (noting that "[t]he use of inconsistent statements to impeach a hearsay declaration is treated in Rule 806"). In contrast, Rule 806 applies when an unavailable witness's testimony is introduced under a hearsay exception. *See* Fed. R. Evid. 806. Rule 806 permits a party to impeach the declarant "by any evidence that would be admissible . . . if the declarant had testified as a witness," such as reading a witness's recantation aloud to the jury. *See* Fed. R. Evid. 806. Put simply, the recantations are proper impeachment material under either scenario. Regardless whether a witness is present on the stand, the accused has the right to impeach the testimony. That conclusion is consistent with the Federal Rules and the decision below.

Third, the State is mistaken in assuming that courts will now look to the decision below when interpreting Federal Rule of Evidence 613. Again, the trial court itself realized this case does not implicate Rule 613. *Supra* 23. The decision below stands for the unsurprising proposition that an accused may not be wholly denied the opportunity to impeach testimony. But the decision leaves the

procedural ways in which testimony may be impeached untouched.

III. THE SIXTH CIRCUIT'S THOROUGH HARMLESS-ERROR ANALYSIS IS UNWORTHY OF REVIEW.

Rehashing arguments the Sixth Circuit soundly rejected, Petitioner asserts that the state court's constitutional error was harmless. Petitioner's plea is for nothing more than error correction, unworthy of this Court's attention. Moreover, the decision below rightly determined that the "only reasonable conclusion is that the constitutional error had [a] substantial and injurious effect[.]" Pet. App. 42a.

Confrontation Clause errors are subject to harmless-error analysis. *Van Arsdall*, 475 U.S. at 684. "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Id.* Habeas relief may be granted if a constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

Whether a violation of the Confrontation Clause was harmless depends on a host of factors, including "the importance of the witness' testimony in the

prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684. None of the factors support a finding of harmlessness here.

A. Simpson and Zantello Were Critical To the State's Case.

Although Petitioner now downplays the importance of Simpson's and Zantello's testimony, the record is clear. Both were indispensible. The prosecution had to depend solely on witness testimony because no physical evidence connects Blackston to the crime. (R. 11-9, Vol. III, p. 29, Pg ID 1817.) *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) (noting that "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence"). Simpson and Zantello were two critical links in the tenuous chain linking Blackston to the murder, and a contrary conclusion cannot withstand fair-minded scrutiny.

1. Simpson's Testimony Was Crucial.

As explained above, Simpson told the jury a captivating tale. He was Blackston's friend, yet he took the stand and testified against him. (R. 11-5, Vol. III, pp. 39–40, Pg ID 1009–10.) In any case, statements or confessions that "expressly implicate" a defendant are "powerfully incriminating." *Richardson v. Marsh*, 481 U.S. 200, 208 (1987). And Simpson's testimony here was pivotal because he

was the only witness who testified that he actually saw Blackston shoot Miller. (*See* R. 11-5, Vol. III, p. 65, Pg ID 1035.) Simpson also was the only witness who testified Blackston shot Miller in the neck, which supported the State's theory of the case. (*See* R. 11-5, Vol. III, p. 130, Pg ID 1100; *see also* R. 11-8, Vol. III, at pp. 130–31 Pg ID 1674–75 (expert testimony that Miller suffered a fatal wound to the neck).) Thus, Simpson's testimony provided unique details that the State used to build its case.

At trial, the State acknowledged the importance of Simpson's testimony, mentioning him over 20 times during opening statement and more than 10 times during closing argument. (R. 11-7, Vol. I, pp. 104–15, Pg ID 1485–96; R. 11-9, Vol. III, pp. 141–49, Pg ID 1931–39.) Further, the prosecutor highlighted the importance of Simpson's credibility to the jury, claiming that Simpson's story "was entirely consistent the whole time[.]" (R. 11-9, Vol. III, p. 147, Pg ID 1937.)

Nor was Simpson's testimony cumulative. The mere fact that Lamp also gave accomplice testimony is not enough to make Simpson's testimony "cumulative." In *Arizona v. Fulminante*, 499 U.S. 279, 299 (1991), the Supreme Court held that even though the confessions of two defendants might have some overlapping details, where "the jury might have believed that the two confessions reinforced and corroborated each other," the confessions "are not cumulative." *Id.* Thus, a second confession is not cumulative where it has a bolstering effect. *See id.*

Like the accomplice testimony in *Fulminante*, Simpson's testimony was important—it provided

unique details, had a clear bolstering effect, and was the linchpin of the State's case against Blackston.

2. Zantello's Testimony Was Critical To The State's Case.

Zantello also added a key element for the prosecution. At the time of the murder, she and Blackston were romantically involved, and they have four children together. (R. 11-3, Vol. I, p. 186, Pg ID 651; R. 11-8, Vol. II, p. 78, Pg ID 1622.) Because of their relationship, the jury likely viewed Zantello as someone who would be in Blackston's corner, adding to her credibility. Her testimony discredited Blackston's alibi defense—the only witness to do so other than accomplices Lamp and Simpson. (R. 11-3, Vol. I, p. 194, Pg ID 659.)

B. The State's Untainted Case Was Underwhelming.

In contrast to the tainted testimony, the remaining evidence—in the form of testimony from Lamp, Mock and Barr—was weak Moreover, without Simpson's or Zantello's testimony, Blackston's defense was stronger, further challenging the State's case.

1. The State's Untainted Witnesses.

a. Lamp.

In June of 2000, law enforcement questioned Lamp about Miller's disappearance. (R. 11-9, Vol. III, p. 33, Pg ID 1821.) At that meeting, Lamp did not incriminate himself or anyone else. (*Id.* at 34, Pg ID 1822.) After consulting with an attorney, however, Lamp struck a deal. (*Id.*) Instead of facing a first-degree murder charge, he pled guilty to manslaughter. (R. 11-8, Vol. II, p. 217, Pg ID 1761.)

Instead of facing life in prison, he was given a 10-15 year sentence to run concurrently with another sentence he was already serving. (*Id.*)

Lamp's eagerness to make a deal makes sense because he was the undisputed mastermind of the crime:

- Lamp first brought up the idea of killing Miller. (R. 11-8, Vol. II, pp. 186–187, Pg ID 1730–31.)
- Lamp thought of the place to bury the body; he had hunted there before. (*Id.* at 189, Pg ID 1733; *id.* at 215, Pg ID 1759.)
- Lamp suggested shooting Miller to death. (*Id.* at 188, Pg ID 1732.)
- The crime scene was very close to Lamp's home. (*Id.* at 189–90, Pg ID 1733–34.)
- Lamp pre-dug Miller's grave. (*Id.* at 191, Pg ID 1735.)
- Lamp possessed many firearms, was a "gun fanatic," and traded in guns. (*Id.* at 215, Pg ID 1759.)
- Lamp chose one of his guns, a 30/30, to kill Miller because "[t]he bullet would go on through." (*Id.* at 222, Pg ID 1766.)
- Lamp brought the gun with him the night of the murder. (*Id.* at 198, Pg ID 1742.)
- Lamp drove the night of the murder. (*Id.* at 199, Pg ID 1743.)
- Lamp led the way to the pre-dug grave. (*Id.* at 203, Pg ID 1747.)
- Lamp threatened Simpson with a knife for talking about the murder. (*Id.* at 233, Pg ID 1778.)

- Lamp led law enforcement to the body, which was less than a mile away from his home. (R. 11-9, Vol. III, p. 42, Pg ID 1830.)

Lamp had numerous connections to the murder—his gun, his home, his car. With law enforcement on his trail, he had every incentive to make a deal and "testify against [Blackston]." (*See* R. 11-8, Vol. II, p. 180, Pg ID 1724.) Because of his unquestioned guilt and interest in shifting blame to Blackston, Lamp's testimony, standing alone, was insufficient to convince a jury of Blackston's guilt. *See Fulminante*, 499 U.S. at 299.

b. The Sisters' Credibility Was Effectively Undermined.

The State's other two untainted witnesses, Mock and Barr, are sisters. The sisters testified that Blackston confessed to the murder, but their accounts materially differ.

The first alleged confession occurred at Lion's Park. (*Id.* at 19–21, Pg ID 1563–65; *id.* at 63, Pg ID 1607.) The sisters, along with Blackston and others, were at the park drinking heavily. (*Id.* at 20, Pg ID 1564 ("[W]e were drunk."); *id.* at 60–61, Pg ID 1604–05 (admitting that everyone was "buzz[ed]").) Mock asked Blackston about the murder, and he admitted to pulling the trigger. (*Id.* at 22, Pg ID 1566.) But Barr recalled the opposite: "[Mr. Blackston] never said that he shot [Mr. Miller] himself." (*Id.* at 63, Pg ID 1607.) Instead, according to Barr's story, Blackston identified Lamp as the triggerman. (*Id.*)

Mock further testified that during the encounter at Lion's Park, Blackston told them that "they cut [Mr. Miller's] ear off to prove that they did it." (*Id.* at 22,

Pg ID 1566.) Again, Barr's account differs, not recalling Blackston's admission. (*Id.* at 62, Pg ID 1606.)

Mock testified that a second "confession" occurred at Zantello's house. (*Id.* at 27, Pg ID 1571.) Again, Mock was drinking heavily, and her testimony is vague. (*Id.*) When asked how the subject of Miller's murder again came up, she simply said: "He got teary eyed again and said he didn't want to—he didn't want to have to do it. *I don't know*." (*Id.* at 24, Pg ID 1568 (emphasis added).)

Mock testified that her sister was there for this second "confession." However, Barr testified that the *only* time she heard Blackston discuss the murder was at Lion's Park:

> Q. Okay. Were there ever any other conversations that Fred had that you heard – personally heard where Fred Blackston had gave a description of the events that evening or was this the only time that you were present for his rendition of the events?
> A. Just at Lion's Park.
> Q. Pardon? Just at Lion's Park?
> A. Yeah.

(*Id.* at 64, Pg ID 1608.)

The discrepancies between the sisters' stories are not inconsequential. In one version of the Lion's Park story, Blackston is the shooter. In the other, Lamp is. One sister remembers a graphic tale of Blackston cutting off Miller's ear; the other sister has no recollection. These details are important, and a jury easily could have discounted the sisters'

testimony because of the variations. Further, Mock could not recall anything specific about the alleged confession at Zantello's home, and Barr testified that she heard no part of that discussion.

In addition, the sisters' credibility was effectively challenged. Mock herself was a suspect in Miller's murder, giving her motive to accuse someone else. (*Id.* at 40, Pg ID 1584.) In fact, she testified that Miller's family believed she was involved in his murder. (*Id.*) Over the years, Mock told numerous stories to law enforcement. She pointed the finger at Kirk Pippins who had threatened Miller shortly before his disappearance; told police that Miller was depressed, perhaps suicidal; and repeated reports that Miller was still alive. (*Id.* at 30, Pg ID 1574; *id.* at 31, Pg ID 1575; *id.* at 34, Pg ID 1578.) On the stand, Mock also admitted to heavy alcohol and drug use. (*Id.* at 29, Pg ID 1573.)

Like her sister, Barr admitted to substance abuse. (*Id.* at 68, Pg ID 1612; *id.* at 70, Pg ID 1614 (admitting to alcohol, marijuana, cocaine, and crack-cocaine use).) Barr's credibility was tested in other ways as well. She was an adolescent at the time of Blackston's alleged confession at Lion's Park. (*Id.* at 69, Pg ID 1613.) Further, she gave inconsistent testimony in the first and second trials as to who came to see Miller the night of the murder. (*Id.* at pp. 65–67, Pg ID 1609–11.) Lastly, she knew that her sister was a suspect but defensively testified that her sister "[had] nothing to do with it." (*Id.* at 69, Pg ID 1613.)

In sum, the sisters' testimony did little to support the State's case. Their testimony was inconsistent and their credibility questionable.

2. Blackston's Defense.

In his defense, Blackston offered four fact witnesses.

a. Williams.

The State offered the jury one motive in this case. "Mr. Blackston was upset about what Mr. Miller may or may not have intended to do as far as robbing Mr. [Benny] Williams possibly or something along those lines." (R. 11-7, Vol. I, pp. 106–107, Pg ID 1487–88.) "[O]ne way to solve the problem is to eliminate Mr. Miller and he's not going to cause Benny Williams or anybody else any problems." (*Id.* at 108, Pg ID 1489.) So, the State's story goes, Blackston murdered Miller to prove his loyalty to Williams. And to show that he in fact murdered Miller, Blackston cut off Miller's ear to bring to Williams.

Williams' testimony undercut the State's theory. Williams testified that he did not ask anyone to kill Miller—in fact, he did not even know Miller. (R. 11-9, Vol. III, p. 134, Pg ID 1924.) Further, no one ever brought him a human ear. (*Id.*)[1]

b. Blackston's Alibi Witnesses.

Gargus, (Sheila) Blackston, and Johnson uniformly testified that Blackston was home the night of the murder, providing Blackston an alibi. (R. 11-9, Vol. III, p. 83, Pg ID 1872-74 (Gargus); *id.* at 94, Pg ID 1883-85 (Sheila Blackston); *id.* at 101–103, Pg ID 1890–92 (Johnson).)

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[1] Regarding the ear, expert witness testimony also undermined the State's theory. No physical evidence indicated that Miller's ear had been severed. (R. 11-9, Vol. III, p. 44, Pg ID 1832.)

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This case was a puzzle for the jury to solve. Without physical evidence on which to rely, the State had only testimonial evidence to prove its case. Simpson and Zantello were critical puzzle pieces. Without them, only Lamp, Mock, and Krause remained. All three had motives to lie, and much of their stories was unbelievable. Because Simpson and Zantello were essential, the error was not harmless, and it was unreasonable for the state court to conclude otherwise.

CONCLUSION

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

Respectfully submitted,

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