APPENDICES

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 20-1588 & 20-1666

KENNETH SMITH,

Petitioner-Appellee, Cross-Appellant,

v.

DEANNA BROOKHART, Warden, Lawrence Correctional Center,

Respondent-Appellant, Cross-Appellee.

Appeals from United States District Court for the Northern District of Illinois, Eastern Division. No. 1:15-cv-00271 — **Andrea R. Wood**, *District Judge*.

ARGUED NOVEMBER 12, 2020 — DECIDED APRIL 29, 2021

Before WOOD, HAMILTON, and ST. EVE, Circuit Judges.

WOOD, *Circuit Judge*. Kenneth Smith has been in state prison for nineteen years for a murder and robbery that he insists he did not commit. He achieved limited success in challenging his convictions on March 10, 2020, when the district court held that he is entitled to release unless the state decides to retry him. *Smith v. Brookhart*, No. 15-CV-00271, 2020 WL 1157356, at *33 (N.D. Ill. Mar. 10, 2020). But Smith was seeking more: an unconditional writ based on the insufficiency of the evidence. See 28 U.S.C. § 2254(d)(2); *Jackson v. Virginia*, 443 U.S. 307 (1979). The state has now appealed from the issuance of the conditional writ, and Smith has cross-appealed from the denial of the unconditional writ.

Even taking the highly deferential view required by section 2254(d), we find that the trial evidence failed to support Smith's conviction beyond a reasonable doubt and that the Illinois Appellate Court was not just wrong, but unreasonable, in holding otherwise. We thus reverse the district court's judgment and order an unconditional issuance of the writ.

I

A. The Crime

Our account of the facts is taken from the state court's findings, which we must accept unless they are unreasonable in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d)(2). (Section 2254(e)(1) further instructs that we must presume that the state court's factual findings are correct. It is unclear how, if at all, these two standards

differ, but the state makes nothing of this point, and so neither do we.) Raul Briseno was fatally shot in the parking lot of a Burrito Express restaurant he owned in McHenry, Illinois, on March 6, 2001. *People v. Smith*, 2013 IL App (2d) 120508-U (2013). Around 7:20 pm, two masked men walked into the restaurant while Briseno and his colleague, Eduardo Pardo, stood behind the counter. The first man to enter carried what appeared to be a .22 caliber revolver; the man in tow wore a green jacket. No customers were present.

After the armed man announced a robbery, Briseno grabbed a large kitchen knife and charged towards the pair. The two would-be robbers ran out of the restaurant with Briseno in pursuit; Pardo soon followed.

As the foot chase expanded to nearby streets, Briseno yelled at the driver of a passing car to call the police, and the armed man disappeared. Meanwhile, the man in the green jacket slipped on a patch of ice, permitting Pardo to catch up to him. While the man in the green jacket lay on the ground, Pardo pulled off his mask and got a good look at his face. Pardo picked him up, grabbed his arms from behind his back, and called out to Briseno. At that moment, Pardo heard a gun-shot.

Briseno approached Pardo, who continued to clutch the man in the green jacket. Pardo spotted the armed man nearby, now unmasked, as the latter fired another shot. Briseno made it back to Pardo, and the two began to retreat to the restaurant. Walking backwards away from the gunman, Pardo held the

man in the green jacket in front of him, while Briseno walked next to them. The shooting resumed. Pardo then heard Briseno make an audible "ahh" sound and spit up blood. Pardo immediately released the man in the green jacket, ran into the restaurant, and called 911.

While on the phone, Pardo could see Briseno holding the man in the green jacket in front of him, using the man as a shield while the shooting continued. After Pardo completed the call, he went back outside, but the two would-be robbers were gone. Briseno lay face down with foamy blood coming out of his mouth, and the kitchen knife lay next to a pool of blood. The police arrived about ten minutes later. Medical personnel, despite their best efforts, could not save Briseno's life.

Detective Jeff Rhode interviewed Pardo. When asked about what the robbers were wearing, Pardo described the jacket worn by one as green with some black around the collar. Pardo added that the jacket looked like leather and that he did not see any pockets, designs, or zippers on the front.

Lieutenant Gary Wigman led the investigation of the crime scene, but despite the use of metal detectors and magnets, the search turned up neither a gun nor bullet casings. The absence of the latter led the police to surmise that a revolver had been used, because revolvers do not eject casings when fired. A firearms expert later concluded, however, that the bullet in Briseno's body was a .22-caliber long-rifle bullet with six lands and grooves.

Lt. Wigman attended Briseno's autopsy the next day, where he observed a laceration and abrasion on Briseno's upper forehead. The forensic pathologist performing the autopsy determined that the forehead injury was caused by contact with a blunt object and that it was consistent with being pistol-whipped with the barrel of a gun. But the pathologist did not determine when that wound occurred in relation to the time of death, leaving open the possibility that Briseno had been injured earlier.

The events of March 6th soon made the news. But in order to assess the credibility of later witnesses, the police withheld two critical pieces of information from the public: (1) that Briseno had yelled into a passing car during the chase, and (2) that Briseno had a head wound consistent with being hit with a gun. Around May 6, 2001, the police obtained and executed arrest warrants for Kenneth Smith (petitioner here), Justin Houghtaling, Jennifer McMullan, and David Collett. Their theory was that Smith was the gunman; that Houghtaling wore the green jacket; and that McMullan and Collett sat waiting in a nearby getaway car.

B. Houghtaling's Account

When he was caught in early May 2001, Houghtaling was on a bus to California that was passing through Omaha, Nebraska. For the first 15 minutes of his interview, interrogators from the Omaha police asked him about the Burrito Express shooting. Houghtaling denied any involvement. He also told police that he had taken hallucinogenic drugs just before being arrested. The officers then

(falsely) informed him that Smith, Collett, and McMullan already had been charged and had given incriminating statements, and that if Houghtaling told them what happened, they would help him out. They then turned on the tape recorder and proceeded to take Houghtaling's statement, which we now describe.

Houghtaling said that on March 6, 2001, he, Smith, and McMullan were drinking at Collett's house behind the Burrito Express. When he and Smith stepped outside to smoke a joint, Smith said something to the effect of "come with me, I want to go do something." Houghtaling then followed Smith into the Burrito Express:

Q: What were you wearing?

A: I

Q: Did you have a ski mask on your head?

A: I can't remember.

Q: You had your face concealed? Some how [sic] you had your face concealed is that correct?

A: Yes.

Q: Ok and how was that?

A: How is what?

Q: How did you conceal your face? With some kind of hat?

A: Yes.

Q: OK and how about Kenneth Smith, how did he con- ceal his face?

A: With if I'm remembering correctly, with the same with a hat.

Q: With a mask that goes over the face?

A: Yes.

Smith, Houghtaling continued, went into the restaurant first with what "looked like a little 22." After Smith announced the robbery, the owner "grabbed a knife and I ran":

Q: OK, and where did you run when you ran out of [the] restaurant? Are you familiar with that area?

A: No, I'm not.

Q: Ok, did you run behind another building?

A: I honestly can't even remember.

Q: Did you run towards the busy street, route 120, or did you run towards the side street?

A: If I'm thinking correctly, the side street, not the busy one.

Then the man with the knife grabbed Houghtaling. After Smith began firing the gun,

Houghtaling said, "the dude let go of me and I ran." Following up, police asked:

> Q: Was he firing it towards you?
> A: No, he fired it at the guy with the knife.
>
> Q: So there was another guy holding you and another guy with a knife?
>
> Q: That's correct, is it [Houghtaling]?
>
> A: That could be, I can't, it happened so long ago that I don't remember. I'm not a hundred per cent [sic] positive, but it could be.

Houghtaling then asserted that he did not see Smith hit the victim on the head with a gun and that he did not see that anyone involved was either injured or bleeding. And while Houghtaling initially had told police that he and Smith ran back to Collett's house after the botched robbery, when police probed him further later in the interview, Houghtaling said that they got into a car with Collett and McMullan immediately after the shooting. The police then again asked what he was wearing on that night:

> A: I don't remember.
>
> Q: Did you borrow somebody's jacket that night? Were you wearing someone else's jacket?
>
> A: Yea, it was [Collett's].
>
> Q: What color was it?

A: Green, I think.

Finally, the police tried to nail down what kind of .22 Houghtaling observed Smith carrying. Houghtaling was unable to describe the difference between a revolver and an automatic, and so the police showed him sketches of the two types of gun. He selected the sketch of an automatic.

On May 31, 2001, state authorities indicted Smith based on Houghtaling's taped confession. Houghtaling pleaded guilty on November 14, 2001, and he was sentenced to 20 years' imprisonment in exchange for testifying against the others. Collett also pleaded guilty. Houghtaling and Collett both offered apologies to Briseno's family when they entered their guilty pleas. *Smith*, 2013 IL App (2d) 120508-U ¶ 40 (Houghtaling); *Id.* at ¶ 76 (Collett). (The state makes much of this fact, suggesting that the apologies are evidence of Houghtaling and Collet's participation in the crimes. In our view, however, the apologies are hopelessly inconclusive: it is conceivable that the two apologized out of a sense of guilt; but it is just as conceivable (if not more) that they apologized in the hope of securing a lower sentence. Without a tiebreaker, this evidence helps neither side.)

McMullan was convicted of first-degree murder and armed robbery and sentenced to 27 years. Four months after her trial, Houghtaling wrote her a letter. In it, he said "let me start by saying I'm sorry about what I did to you at your trial. I know I lied and I was bogus. To be honest—and I was bogus." And that was not the only sign, as we will see, of serious problems with Houghtaling's account.

C. Smith's Trials

1. Trials One and Two

Smith's first trial was in 2003. Houghtaling refused to testify, invoking his Fifth Amendment right against self-incrimination. The trial court declared him unavailable and admitted his testimony from McMullan's trial. But *Crawford v. Washington*, 541 U.S. 36 (2004), intervened, rendering the admission of that evidence unconstitutional and requiring a new trial.

The second trial began in 2008. This time, on direct examination, Houghtaling testified that he and Smith attempted to rob the Burrito Express and that Smith fired the gun. But on cross examination, Houghtaling recanted and asserted that the testimony he had just given was false, except for the fact that he was wearing a green jacket that day. He averred that he was being forced to lie under oath to convict Smith because the state would revoke his plea agreement if he did not do so. As a result of this recantation, Houghtaling later pleaded guilty to perjury and received a 5 1/2-year sentence. The state impeached Houghtaling with his Omaha confession, and the jury found Smith guilty. But the Illinois appellate court ordered a retrial for Smith because of more evidentiary errors.

2. Trial Three

a. Evidence of Smith's Guilt

At the third trial, held in 2012, the state finally obtained a conviction that the state courts were willing to uphold. Following its now well-worn playbook, it again called Houghtaling as a witness, over Smith's objection. On direct, Houghtaling flatly denied that he and Smith were involved in the shooting. Houghtaling testified that, on March 6, 2001, Smith and McMullan picked him up from his home, and they went to pick up Collett. The group then traveled to the Wisconsin home of one of McMullan's friends to pick up a laptop. They returned to McHenry and stopped briefly at a headshop known as Cloud 9. His account was corroborated by security footage showing Collett (only) inside the headshop from 7:38 pm to 7:44 pm. The group then proceeded to another friend's house, where they remained for the rest of the night.

The state again read into evidence the transcript from Houghtaling's 2001 Omaha confession and played the audio for the jury. (Note that Houghtaling denied seeing anyone injured or bleeding, and while he claimed to have heard shots, he did not observe that anyone "had been shot." He never directly said that he saw Smith kill Briseno.) The state also introduced Houghtaling's testimony from McMullan's trial. In these prior inconsistent statements, Houghtaling describes the robbery and says that McMullan suggested they go to Cloud 9 for an alibi.

The state also called Pardo to testify. As Pardo recounted the events, two masked men walked into the restaurant to demand money, and he and Briseno chased them out. He described how he captured the man in the green jacket, only to release him to

Briseno when the other man began shooting. Pardo was then asked to identify a green jacket obtained from Houghtaling's residence after his arrest in Omaha.

When asked whether that jacket "looked like" the one he saw the night of the shooting, Pardo said yes. But the contemporaneous description Pardo gave of the robber's jacket differs significantly from the jacket marked as Exhibit 66. The jacket identified as Exhibit 66—Houghtaling's jacket—is mostly green. But it also has large black elbow patches, a zipper, black patches running down the middle adjacent to the zipper, and three large pockets on the front. On the night of the shooting, Pardo told Detective Rhode that the jacket worn by the robber lacked pockets or zippers and had only "some" black, just around the collar. When Smith sought to impeach Pardo by pointing out these discrepancies, Pardo stated that he did not remember how he described the jacket to police that night. To perfect the impeachment, Smith sought to introduce the testimony of Detective Rhode, but he was barred from doing so.

b. Evidence Implicating the DeCicco Group

Smith also went on the offensive, insisting not only that he is innocent, but also that he had identified the real perpetrators. As he did at his second trial, Smith asserted that a group of three people completely unrelated to himself or Houghtaling, Collett, or McMullan committed the crimes at the Burrito Express. This second group, referred to as the "DeCicco Group," is comprised of Russell Levand (the alleged shooter), Adam Hiland

(the wearer of the green jacket), and Susanne DeCicco (an accomplice).

Smith showed that almost from the start, the authorities had received numerous tips that led them to believe Susanne DeCicco was a suspect. She first came to the attention of investigators in November of 2001, when Vicki Brummett (DeCicco's mother) called police to tell them that she believed she was in possession of the .22 caliber revolver used to rob the Burrito Express and kill its owner.

DeCicco recently had confessed to her mother that on the evening of March 6, 2001, she drove around looking for Levand and Hiland and spotted them standing outside of the Burrito Express. She saw them run inside, then quickly run back out with two men in pursuit. One of the restaurant workers ran in front of DeCicco's car and asked her to call the police. DeCicco told her mother that the weapon ultimately used to kill Briseno belonged to David Brummett, her stepfather and Vicki's husband.

She told Vicki that the victim was hit on the head with the gun, and that as a result, the gun cracked "in the barrel—or the handle." *Smith*, 2013 IL App (2d) 120508-U ¶ 112. After the robbery, the gun was cleaned of hair and returned to the Brummett household. Vicki turned the gun over to the police, and she passed along the details of DeCicco's confession. Although experts "could not identify [the gun] as having fired the bullet that killed Briseno, [they] could not exclude it." *Id.* at ¶ 170. They also "stated that a .22-caliber gun is a very common type

of gun, as are six lands and grooves." *Id*. The Brummett .22 had stress fractures on the grips.

DeCicco also confessed to four more people, two of whom were police officers. The first one was her sister, Elizabeth Schwartz. Schwartz had given birth to a baby girl the night before the shooting, on March 5, 2001, and she remained in the hospital for a few extra days. One week later, Schwartz noticed that Hiland had cuts on the inside of his hand and bruises on his arm. Three weeks after the shooting, DeCicco told Schwartz that Hiland was involved in the Burrito Express shooting.

In October 2001, one month before Brummett gave the gun to police, DeCicco told her childhood friend, Brittany Tyda, about how Levand and Hiland tried to rob the Burrito Express. She told Tyda that she saw the owner, wielding a knife, grab Hiland before Levand shot him. Soon after, Tyda overheard an argument between Levand and DeCicco. Levand had threatened to turn DeCicco in for writing bad checks; in response, DeCicco threatened to go to the police "about him shooting someone." *Smith*, 2013 IL App (2d) 120508-U ¶ 115. Soon after, Tyda told the police what she knew.

Four years later, the confessions resumed. In November of 2005, DeCicco was arrested for retail theft. The police officer in charge of her investigation knew that DeCicco was a suspect in the Burrito Express shooting, and he said that if DeCicco was truthful in providing information about the shooting, he would issue a citation for the retail theft and release her. *Id.* at ¶ 96. When police asked DeCicco

about her prior confessions regarding the shooting, she said that she made up the story as a joke. Asked a second time, DeCicco continued to deny involvement. But on the third time, DeCicco stated—on audiotape—that, on March 6, 2001 she was with Levand and Hiland when Levand killed Briseno.

The police then formally interviewed DeCicco on video. DeCicco erroneously stated that the murder occurred on March 5, 2001, the day Schwartz gave birth. She said that on the night of the shooting, she sent Levand and Hiland to go to Vicki Brummett's house to pick up a maternity bag. The two took longer than expected and returned "acting funny." *Id.* at ¶ 97. Later that night, after leaving the hospital and driving to the vicinity of the Burrito Express, DeCicco observed Levand and Hiland handling a gun wrapped in a towel in the trunk of her car. Earlier she had seen the two rummaging in David Brummett's belongings and discussing a gun.

Hiland and Levand then left. *Id.* at ¶ 97. DeCicco recalled that "they had talked before about snatching purses or robbing somebody to get money." *Id.* Twenty minutes later, DeCicco drove around looking for them. She soon witnessed the fateful events unfold at the Burrito Express, with Briseno running up to her car and shouting at her to call the police. (Recall that this was a detail the police withheld from the public.) She drove away alone.

When she later saw Levand and Hiland, Hiland's face was covered in blood and he had a cut on his hand. Later that night, they cleaned and returned the gun to the Brummett household and burned their

clothes. Several months later, Hiland and Levand stole DeCicco's car and burned it with accelerant in a field in Racine, Wisconsin, because the blood stains on the seats would not come off. Smith presented, by stipulation, corroborating police testimony that DeCicco's car was found in Wisconsin in June 2001 destroyed by fire. DeCicco repeated most of this story to Illinois state police in 2006.

Adam Hiland—age 15 at the time of the shooting—also confessed to several people. Two or three months after the shooting, Hiland sat in a van near the Burrito Express, along with DeCicco's sister Schwartz, who was Hiland's cousin. When Hiland became visibly irritated and panicked, Schwartz told Hiland that DeCicco had told her that he was involved in the shooting. Hiland replied: "She is a fat fucking bitch and she can't keep her mouth shut. She needs to keep her mouth shut." *Id.* at ¶ 117. As they drove away, Hiland told Schwartz that he, DeCicco, and Levand had been smoking crack the night of the shooting and that DeCicco had dropped them off in front of the Burrito Express.

In her testimony, Schwartz said that Hiland told her that one of the men grabbed Hiland and tried to stab him, forcing Hiland to grab the knife while calling out for help, and that at some point before or after firing the gun, Levand hit Briseno in the head with the gun. Hiland also confessed to his friend and roommate Daniel Trumble several times in the summer of 2002. During his first confession, Hiland was shaking and crying while he told Trumble that the "wrong people" were arrested for the murder and that he, Levand, and DeCicco were involved. Trumble

later recommended that Hiland speak to a lawyer and arranged for a meeting among Hiland, himself, and Ed Edens, a criminal defense attorney. The three met at a restaurant. There, Hiland confessed to the lawyer and emphasized that Levand was the shooter. The lawyer recommended that Hiland take no action because other people had already been arrested.

Two others also heard Hiland's confession: Gina Kollross and Charlene McCauley. A few days after the shooting, Hiland told Kollross about what happened and how Briseno injured Hiland's arm and hand with a knife. Before Christmas in 2001, Hiland told McCauley how the DeCicco Group had been smoking crack in David Brummett's garage, ran out of drugs, and decided to rob the Burrito Express for money. Hiland did not tell McCauley that he was cut with a knife during the shooting.

Finally, we have Russell Levand. His confession came out through Patrick Anderson, a long-time acquaintance who was incarcerated with Levand in 2011. That summer, Levand told Anderson that he was involved in the shooting but that he was not worried about being prosecuted because the state had the gun, yet nothing had come of it. Anderson initially tried to alert the police through a tip line. That went nowhere, and so in 2011 he directly contacted Smith's attorney through a letter, in which he repeated Levand's confession.

In fact, Anderson had a longstanding suspicion that Levand was involved with the Burrito Express incident. One week before the shooting, Levand accompanied Anderson to the Burrito Express to

purchase drugs from a man who was associated with Briseno. While there, Levand learned from Anderson that Briseno was Anderson's source of high-quality cocaine. In the letter to Smith's defense attorney, Anderson mentioned that he told Levand that Briseno "at times" kept cocaine and large sums of cash inside the Burrito Express.

All the DeCicco witnesses testified at Smith's third trial: DeCicco herself, Vicki Brummett, Schwartz, the two police officers who conducted DeCicco's recorded interviews, Rexford (DeCicco's half-sister), Hiland, Trumble, Kollross, McCauley, Levand, and Anderson. Both of DeCicco's taped confessions were played to the jury.

But their testimony did not carry the day for Smith. DeCicco told the jury that she had lied in her confessions. She said that she only pretended to have information so that the police would treat her favorably (i.e., drop the retail theft charges and let her go), and so that her family would give her money and sympathy. Levand denied having confessed to Anderson or being at the Burrito Express on March 6, 2001. Hiland limited his testimony to a denial that a scar on his hand came from Briseno's knife. The jury thus had conflicting accounts about the DeCicco Group's involvement.

c. Conclusion of Third Trial

The state had no physical evidence linking Smith to the crime. There were no fingerprints from him or Houghtaling at the scene. No DNA evidence. And no blood that could be linked to Smith or Houghtaling.

But at the conclusion of his third trial in 2012, after twenty-one hours of deliberation, the jury found Smith guilty of attempted armed robbery and first-degree murder. The court imposed a sentence of 67 years on the murder count and a concurrent sentence of seven years on the robbery count.

D. Contested Evidentiary Rulings

Three evidentiary rulings made by the trial court became the focal point of Smith's appeals. They are relevant primarily to Smith's back-up effort to obtain a new trial, not to his claim that the evidence before the jury was insufficient to support his conviction. First, the trial court barred Anderson from testifying that he told Levand that Briseno sold drugs out of the Burrito Express. This ruling kept out crucial evidence of motive and earlier connections. Second, the court did not allow Trumble to testify that a criminal defense attorney was present when Hiland confessed a third time. Third, the court barred Smith from asking Det. Rhode how Pardo described the jacket on the night of the murder.

On direct appeal, Smith argued (among other things) that these evidentiary exclusions violated his constitutional right to present a complete defense. He also argued that no trier of fact could have found him guilty beyond a reasonable doubt based on the evidence. The Illinois appellate court affirmed his conviction. *People v. Smith*, *supra*, 2013 IL App (2d) 120508-U.

Smith then sought a writ of habeas corpus from the federal court. See 28 U.S.C. § 2254(d)(1). He

argued that the state appellate court had unreasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979), in finding that there was sufficient evidence for a jury to find his guilt beyond a reasonable doubt. Despite acknowledging that "the evidence of the DeCicco Group's involvement [was] highly compelling if not conclusive," *Smith v. Brookhart*, No. 15-CV-00271, 2020 WL 1157356, at *19 (N.D. Ill. Mar. 10, 2020), the district court felt bound to defer to the state court's conclusion that the evidence of Houghtaling's recanted confession and Pardo's identification of the green jacket just barely supported the convictions.

Nonetheless, the court held that Smith was entitled to a new trial because of the three evidentiary exclusions we just described. The court found that these rulings violated Smith's federal constitutional right to present a complete defense and engage in effective cross-examination, and so it ordered issuance of the writ, subject to the state's decision whether to con- duct a new trial. As we noted earlier, the state has appealed from that decision, and Smith has cross-appealed from the court's rejection of an unconditional writ (through an ongoing representation by recruited counsel from the law firm of Jenner & Block LLP, to whom we are thankful).

II

A. The Jackson Rule

Jackson v. Virginia holds that criminal convictions must stand unless "upon the record evidence adduced at the trial no rational trier of fact

could have found proof of guilt beyond a reasonable doubt." 443 U.S. 307, 324 (1979). When conducting a sufficiency-of-the-evidence inquiry on a habeas corpus petition, "the only question under *Jackson* is whether [a] finding [is] so insupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, 566 U.S. 650, 656 (2012). If "the state court of last review did not think" the finding of guilt was irrational, AEDPA mandates that the federal court give that decision "considerable deference" and uphold the conviction. *Id.* Finally, the Supreme Court has instructed that "the sufficiency of the evidence review authorized by Jackson is limited to 'record evidence.'" *Herrera v. Collins*, 506 U.S. 390, 402 (1993), citing *Jackson*, 443 U.S. at 318. All of the evidence recounted above appears in the record.

The relevant question is not whether we disagree with the state court's resolution of the case. AEDPA deference would mean little if the test were so lenient. Instead, we must find the decision not just wrong, but well outside the boundaries of permissible outcomes. Put otherwise, a federal court "may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because [it] disagrees with the state court. ... [It] may do so only if the state court decision was objectively unreasonable." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (quotation marks omitted).

When a federal court faces conflicting inferences that can be drawn from the evidence—one pointing to culpability and the other pointing to innocence—the court must "review the evidence 'in the light most favorable to the prosecution'" and accept the inference

that supports the prosecution's theory of the case. *McDaniel v. Brown*, 558 U.S. 120, 133 (2010) (citing *Jackson*, 443 U.S. 319) (reversing a grant of a habeas corpus petition when it appeared that the reviewing "court's recitation of inconsistencies in the testimony show[ed] [that] it failed" properly to resolve conflicting inferences in favor of the prosecution).

Jackson and AEDPA thus leave only a narrow path for the federal writ of habeas corpus. Even so, in the rare case a successful sufficiency challenge is possible. See, *e.g.*, *Tanner v. Yukins*, 867 F.3d 661 (6th Cir. 2017). The Court itself in *Jackson* cautioned that a "jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 317. Further, when conducting this inquiry, we do not ask whether there was "any" evidence that would support the conviction. *Id.* at 313, 320 (it "could not seriously be argued" that a "mere modicum" of evidence could "by itself rationally support a conviction beyond a reasonable doubt"). Rather, relief is appropriate "only if the record is devoid of evidence from which a reasonable jury" could find the requisite guilt beyond a reasonable doubt. *United States v. Hills*, 618 F.3d 619, 637 (7th Cir. 2010).

The district court did not pay sufficient heed to the distinction between the "any-evidence" rule that *Jackson* repudiated and the more qualified "no evidence from which a jury could find guilt beyond a reasonable doubt" rule the Court articulated. Instead, the district court reasoned that "[s]o long as the record is not 'devoid of evidence' of a habeas petitioner's guilt," relief could not issue. *Smith*, 2020 WL

1157356, at *19. It thought that Houghtaling's recanted confession and Pardo's identification of the green jacket squeaked over the "devoid of evidence" line, and it felt constrained not to "weigh[] the evidence or second guess[] the jury." Id. But "devoid of evidence" is not the correct standard, and we are permitted even under AEDPA to correct this type of legal error. *Avila v. Richardson*, 751 F.3d 534, 536 (7th Cir. 2014).

B. Sufficiency of Houghtaling's Evidence

1. The Green Jacket

The state puts a lot of stock into Pardo's statement that Houghtaling's jacket (shown to Pardo at the trial) "looks like" the green jacket he saw on March 6, 2001. It asks us to infer that Pardo was actually saying that he believed Houghtaling's jacket was the jacket he saw that night—not merely that one green jacket "looks like" another green jacket. But that is not an inference; it is a recharacterization of the evidence. Pardo was not asked, and he did not say, that he was looking at "the" jacket. That falls well short of a positive identification.

2. The Omaha Confession

A jury is entitled to credit witnesses as it deems fit. Nonetheless, *Jackson* leaves room for instances in which the jury's ultimate decision to convict cannot stand because a reasonable doubt remains. In applying *Jackson*'s test, we must consider "all of the evidence admitted by the trial court." *McDaniel*, 558 U.S. at 131, quoting *Lockhart v. Nelson*, 488 U.S. 33,

41 (1988). With that in mind, we must assess whether the state court's rejection of the proposition that no reasonable juror could have sustained a conviction beyond a reasonable doubt was reasonable.

Even viewed through that deferential and favorable lens, Houghtaling's Omaha confession falls short, especially when viewed alongside the DeCicco Group's interlocking and corroborated confessions. We accept that Smith's 2012 jury thought that Houghtaling was truthful in his Omaha interview, truthful at McMullan's 2008 trial, and dishonest at Smith's trial. But truthful about what? In Omaha, Houghtaling said that he saw Smith firing the gun, but he denied seeing anyone get shot, and he said that he did not see anyone who was either injured or bleeding. At McMullan's trial, he said that Briseno and Pardo grabbed him, and he saw (or felt) Briseno fall down after Smith fired shots. That is as close as he comes to describing the killing.

The state urges that this is enough. The Omaha and McMullan accounts were reliable, the state argues, because at the time of his arrest in Omaha, Houghtaling had not yet struck a plea deal with the state and so had no incentive to lie. The state explains away Houghtaling's recantation at Smith's second trial as motivated by a desire to save his own skin while he challenged his own conviction.

Smith counters that Houghtaling had many reasons to be less than truthful in Omaha: the police told him that he already had been incriminated; they promised to take it easy on him if he cooperated; and he was high on hallucinogens. As for the recantation,

Smith argues that the only way to understand Houghtaling's willingness to accept an additional five and a half years of imprisonment for perjury is that he was at long last trying to come clean.

If this were just a credibility assessment, we would be required to defer to the jury. Juries may rely on one witness even if his testimony is contradicted by a phalanx of others. But Houghtaling was not an independent witness: he provided not a single detail that the police did not already know. When pressed at oral argument to name one fact from Houghtaling's Omaha confession that was (1) factually consistent with Pardo's eyewitness testimony and the investigation, (2) not prompted by a leading question by police officers, and (3) not publicly known, the state was unable to oblige. (We focus on the Omaha confession because by the time Houghtaling testified at McMullan's trial, he had reviewed the police reports and received coaching from the state.)

The state's failure was not for lack of effort. For example, the state attaches great weight to Houghtaling's statement that Smith carried a .22 caliber handgun. But this requires one to overlook the fact that Houghtaling, when later asked to choose between a drawing of an automatic (the wrong gun) and of a revolver (the correct gun), he chose the wrong one. And the state downplays the ballistic expert's inability to exclude the Brummett .22 as the murder weapon, emphasizing that the .22 is a "very common type gun." But the state is notably quiet on the .22's popularity when explaining how critical it was that Houghtaling correctly said that Smith carried "a little 22."

The state also notes that Houghtaling correctly stated that the chase unfolded on the side streets, not the "busy" streets. But as the transcript we reproduced earlier shows, this statement was prompted by leading questions with a 50% chance that Houghtaling would guess right.

What stands out most is what Houghtaling omitted or got wrong. Houghtaling failed to mention that one of the men in pursuit stopped and yelled something at a passing car. He does not even mention that two men were in pursuit. When asked point-blank whether he recalled Briseno being hit "with the gun or anything," Houghtaling unequivocally answered no. It is pure speculation to guess that he may not have noticed these details, despite allegedly being a key player in the attempted robbery. His lack of knowledge stands in stark contrast to the admissions from the DeCicco Group.

There is no way around the fact that Houghtaling's Omaha confession, later reincarnated at McMullan's trial, is riddled with holes. Although Jackson and AEDPA require us to view the evidence in the light most favorable to the prosecution, they do not invite us to make up facts. Houghtaling's testimony and the green jacket are a thin reed indeed on which to try to base a conviction. And we must view that evidence—and apply Jackson—based on the record as a whole. That record critically includes the compelling evidence relating to the DeCicco Group, to which we now turn. As we now explain, the DeCicco Group's confessions, along with the weakness of the other evidence, compel us to conclude that no rational juror could have found Smith guilty.

C. The DeCicco Group

The state reminds us that despite the evidence of the DeCicco Group's culpability that Smith was able to introduce at his third trial, the jury found that Smith committed the crime. But if we remove the green jacket from the picture and recognize the holes in the Omaha interview, the DeCicco evidence adds powerfully to the existence of the reasonable doubt we see here.

DeCicco herself confessed to five different people, two of whom were law enforcement officers. Even viewing the evidence in the light most favorable to the state, the substance of her confession is hard to get around. Soon after the shooting, DeCicco told friends and family the very two key facts that police intentionally withheld from the public so that they could later ascertain the credibility of confessions: first, that the victim yelled into a passing car (which, in DeCicco's confession, was driven by her); and second, that the victim may have sustained a blunt-force head injury.

She even told state police during her 2006 interview that the blunt-force injury "was not in the papers anywhere. How would I know that unless the people who did it actually told me?" *Smith*, 2013 IL App (2d) 120508-U ¶ 170. The appellate court tried to offer an alternative explanation for DeCicco's insider knowledge: that "this non-public information was not kept as secret from the public as the police desired." *Id.* But nothing in the record supports this possibility.

Furthermore, DeCicco's confessions did not stand alone. Levand and Hiland made confessions that corroborated the same basic facts, and the record contains nothing indicating that either one had an incentive to do so falsely. Again, while *Jackson* and AEDPA require us to view all evidence in the state's favor, *Jackson* does not require us to draw the remarkable inference that an entire package of cross-corroborated confessions came into existence from pure happenstance or a deliberate conspiracy to mislead friends, family, and police. There is no basis in the record to support such an improbable idea. And other evidence is also nearly impossible to disregard. Perhaps Levand and Hiland stole and burned DeCicco's car in a field to make their lies more credible. But nothing supports that version of the facts. *Jackson*, 443 U.S. at 325. It is notable that it was DeCicco's own family members who came forward to the police.

Finally, consider the injuries on Hiland's body and the lack of injuries on Houghtaling. Several eyewitnesses testified to seeing Hiland in the days after March 6, 2001, with his hand bandaged and his arms bruised. Hiland even told some of these witnesses that he had sustained the injuries in a scuffle while committing the Burrito Express robbery. Of course, Hiland also had a different story. He told some people that he got his injuries when he fell down icy stairs. And at Smith's 2012 trial, he told the jury that he got a scar on his hand when fleeing from police a few years earlier.

But what is notable, and undisputed, is that Houghtaling had no injuries after the incident. The

day after the Burrito Express shooting, Houghtaling went to the police station wearing the same green jacket that was later admitted into evidence. Police there observed neither injuries on his body nor any blood stains or cuts on the jacket. The appellate court tried to deal with this damning fact by suggesting that Houghtaling's "lack of physical injuries ... do not cast doubt on his credibility, where it was undisputed that the green leather jacket he wore covered his arms." *Smith*, 2013 IL App (2d) 120508-U ¶ 165. But as we noted earlier, the record does not establish that Houghtaling's jacket and that of the robber were one and the same. While the jacket's color is undisputed, Pardo stated at trial only that the jacket "looked" like leather. We note that an examination of the garment tag inside the jacket indicates that the exterior shell is made of PVC casting leather (i.e., vinyl) and rayon—much more affordable (and less durable) than real leather. While a fair-minded jurist might reasonably conclude that leather could shield someone from physical injuries such as knife cuts or bruises, this conclusion is more tenuous for a jacket with a vinyl exterior.

The appellate court made one final error worth highlighting. On direct appeal, Smith emphasized that the crime scene was bloody but that the evidence showed that neither he nor Houghtaling had blood on their clothes that night or the next day. In contrast, the testimony indicates that Hiland was covered in blood. In response, the appellate court remarked that Smith's "characterization of the crime scene as bloody is not supported by the evidence." *Smith*, 2013 IL App (2d) 120508-U ¶ 165. This is simply incorrect. One has only to look at the rather grisly photos in the record

of the crime scene and of the final outfit worn by Briseno on March 6, 2001, to see that Smith's statement is accurate: Dkt. 1-12 (Appx. Vol. 12-1, Ex. 33-39); Dkt. 1-13 (Appx. Vol. 12-2, Ex. 44); Dkt. 1-18 (Appx. Vol. 12-7, Ex. 131, 132); Dkt. 1-19 (Appx. Vol. 12-8, Ex. 133).

Our point here is not to adjudicate the DeCicco Group's guilt. The evidence implicating them is relevant because it casts a powerful reasonable doubt on the theory that Smith and Houghtaling were the robbers that night. Houghtaling's inconsistencies take on a special significance in light of the DeCicco evidence—evidence that builds a narrative largely free from the holes that fill Houghtaling's confession. With such a serious possibility of a third party's guilt, *cf. Chambers v. Mississippi*, 410 U.S. 284 (1973) (finding constitutional violation when defendant was blocked from full presentation of his defense and a third-party had confessed), we are convinced as an objective matter that no rational trier of fact could have found Smith guilty beyond a reasonable doubt. The appellate court was unreasonable to hold otherwise.

III

Because we have found that the state court unreasonably applied *Jackson* when it determined that there was sufficient evidence to support Smith's conviction, we technically have no need to reach the evidentiary errors Smith raised. As we noted at the outset, our *Jackson* determination is based on the evidence actually introduced at trial, without regard to any error in either inclusion or exclusion. We think

it helpful, however, briefly to address Smith's evidentiary arguments. A look at why they were prejudicial sheds further light on the inadequacy of the evidence at trial to convict him.

To determine whether a state evidentiary ruling passes muster under *Chambers*, we must balance a state's legitimate interest in an efficacious "criminal trial process" against the defendant's constitutional rights to present a complete defense, with a heavy thumb on the side of the state court's resolution of that issue. In *Kubsch v. Neal*, 838 F.3d 845, 855 (7th Cir. 2016) (en banc), we explained our understanding of the Supreme Court's *Chambers* line of cases. Habeas corpus relief is available, these cases hold, when a state court presiding over a murder trial arbitrarily applies an evidentiary rule to exclude "reliable and trustworthy" evidence that is essential to the defense and not otherwise inadmissible. *Id.* at 858.

Relying on the Supreme Court's decisions in *Crane v. Kentucky*, 476 U.S. 683 (1986), and *Rock v. Arkansas*, 483 U.S. 44 (1987), we recently found that a state court unreasonably applied Supreme Court precedent when it excluded this type of evidence. *Fieldman v. Brannon*, 969 F.3d 792 (7th Cir. 2020). The trial court did not permit the defendant to present evidence that would have offered an innocent explanation for his meeting with a potential hitman. In finding for the petitioner, we noted the lack of parity between the prosecution and the defense with respect to the period "in which evidence was [deemed] relevant to Fieldman's intent." *Id.* at 808. For the prosecution, that period stretched back for months;

for the defense, a few weeks was too long. That left the jury adrift, trying to understand the defendant's intent without crucial evidence. We thus ordered the issuance of a conditional writ, permitting the state to retry the defendant.

The same principles apply to the exclusion of the three pieces of evidence that Smith challenges, particularly those that fit within the DeCicco Group's web of cross-corroborated confessions. The first and most significant was Anderson's testimony regarding Briseno's cocaine dealing and Levand's knowledge of that side-business. This was central to the issue of motive—one of the glaring lacunae in the case against Smith. It would have shown that the DeCicco Group had a specific reason to rob Briseno, while Smith and his friends did not. Neither reason given by the state appellate court for keeping the evidence out holds water. Anderson's statement was not inconsistent with the evidence indicating that the robbers were looking for money. Anderson just added the fact that the group sought money for the purpose of getting drugs and so went to a place where both might be found. Where illegal drugs are being sold, there is likely cash on hand. See, *e.g.*, *United States v. Lawrence*, 788 F.3d 234, 242 (7th Cir. 2015). Moreover, Smith's goal in introducing this testimony was not to establish that Briseno was selling cocaine from the Burrito Express. Rather, it was to show that the DeCicco Group—in particular Levand—might have believed that to be the case. This evidence was vital to Smith's defense.

Second, the state trial court erred by excluding critical testimony about Hiland's confession to his

friend and room-mate, Trumble. Trumble was ready to testify that he witnessed Hiland confess to a criminal defense attorney. The appellate court affirmed the exclusion on hearsay grounds. But that analysis was incomplete, because state law does not have the last word in these situations. Throughout the trial, the state sought to undermine the confessions from members of the DeCicco Group—Hiland's in particular—by suggesting that group members had social incentives to lie. For example, the state speculated, Hiland may have wanted to look tough in the eyes of his friend Trumble. But these explanations say nothing about what Hiland had to gain by falsely boasting to a disinterested lawyer that he had participated in a murder/robbery. The excluded evidence from Trumble would have shown that Hiland was concerned with legal jeopardy, took his concern seriously enough to seek out legal advice, and made a confession that was consistent with his prior confessions, without the social pressures that may have previously driven him to take liberties with the truth.

The exclusion was also arbitrary, insofar as the trial court allowed the state to provide context for Houghtaling's confession, but it barred Smith from doing the same for Hiland's. And this exclusion was not harmless. In concluding otherwise, the appellate court reasoned that it was enough that the jury heard DeCicco's statement that Hiland told her that he spoke to an attorney and the proffered evidence was cumulative. But DeCicco's statement was no substitute for Trumble's. Trumble added critical new facts, while DeCicco's version was consistent with two diametrically opposed inferences: Version 1, that

Hiland met with the attorney because he feared being wrongly prosecuted for crimes that he did not commit, or Version 2, that he had the meeting because he feared rightly being prosecuted for crimes he did commit. Trumble's testimony erases this ambiguity, and its exclusion seriously prejudiced Smith.

The third problematic evidentiary call came when the trial court prevented Smith from further impeaching Pardo's testimony through Detective Rhode. Rhode's additional testimony would have revealed inconsistencies between Pardo's description of Houghtaling's jacket on the night of the murder and his identification of the jacket shown to him at trial. Smith wanted the jury to know that the jacket Pardo described on March 6, 2001 had black around the collar but no pockets or designs or a zipper, while Houghtaling's jacket (seen at trial) had three large front pockets, a front zipper, a small patch of black underneath the collar, and large black elbow patches.

Smith contends that the decision to bar Rhode's testimony violated his rights under the Confrontation Clause and *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986), which entitles criminal defendants to an "opportunity for effective cross-examination." The appellate court implicitly conceded error but held that the exclusion was harmless. Given the centrality of the jacket to the prosecution's theory, we see no way that this call was harmless. The appellate court thought that the discrepancies between Houghtaling's jacket and the one described by Pardo "were minor and could not have contributed to the verdict." *Smith*, 2013 IL App (2d) 120508-U ¶ 229. But apart from being mostly "green," the jacket seized

from Houghtaling looks nothing like the jacket Pardo described.

Taken together, as the district court properly held, these errors deprived Smith of his right to a fair trial. See *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000). The state asks us to defer to the appellate court's determination that Smith got a fair trial because he was able to present over twenty "witnesses, including eight who testified that one or more of DeCicco, Hiland, and Levand confessed to them, and two recordings of DeCicco's confessions to police." But prejudice is not a matter of head-counting. It requires an assessment of the effect of the errors on the proceeding.

In a habeas corpus case where a claim of harmless error has been raised, the Supreme Court has established the following standard of review: "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) (cleaned up); see also *Davis v. Ayala*, 576 U.S. 257, 267–68 (2015). *Ayala* added that "[t]here must be more than a reasonable possibility that the error was harmful." 576 U.S. at 268 (cleaned up). Where, as here, the state court has evaluated harmlessness, relief under section 2254(d)(1) is not authorized unless that

harmlessness determination itself was unreasonable. *Id.*[1]

Difficult though that standard is, we conclude that Smith has met it. But for the exclusions, the jury would have learned that the DeCicco Group had a specific motive to rob the Burrito Express and that one of the group's members made a confession bearing indicia of credibility far exceeding those of the other confessions on record. Further, the jury would have learned that the state's only eyewitness offered inconsistent testimony about the jacket, casting into doubt the only piece of tangible evidence linking Houghtaling—and therefore Smith—to the crime. For these reasons, and all the others we have reviewed in detail above, we conclude that the state court's determination of harmlessness was unreasonable and thus cannot stand. Although this holding primarily affects the need for a new trial, it also sheds light on the insufficiency of the evidence as actually presented

[1] We recognize that the Sixth Circuit held, in *Davenport v. MacLaren*, 964 F.3d 448 (6th Cir. 2020), that a state court's findings are not relevant in a case governed by *Ayala*, and ultimately by *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (introducing the "substantial and injurious effect or influence" test). The Supreme Court has granted certiorari to decide whether, in a habeas corpus proceeding under section 2254, a federal court may grant relief based solely on Brecht, or if it must also find that the state court's application of the relevant standard was unreasonable for purposes of 28 U.S.C. § 2254(d)(1). See *Brown v. Davenport*, No. 20-826, 2021 WL 1240919 (U.S. Apr. 5, 2021). The outcome of Brown will not affect our case, since our court has adopted the latter, more stringent, standard.

and reinforces our conclusion that Smith is entitled to issuance of the writ.

IV

We REVERSE the district court's holding that the evidence was constitutionally sufficient to sustain Smith's conviction. Accordingly, we remand the case to the district court with instructions to grant the petition for a writ of habeas corpus un- conditionally and order the immediate release of Kenneth Smith from state custody.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

KENNETH SMITH	)	
	)	
Petitioner,	)	
	)	No. 15-cv-00271
v.	)	
	)	Judge Andrea R.
DEANNA BROOKHART,	)	Wood
Acting Warden, Lawrence	)	
Correctional Center,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

Following his third trial, Petitioner Kenneth Smith was convicted of first-degree murder and attempt armed robbery arising out of a March 6, 2001, attempted robbery of a restaurant that resulted in the murder of its owner, Raul Briseno. Smith was sentenced to sixty-seven years' imprisonment on the first-degree murder conviction, along with a concurrent seven years' imprisonment sentence on the attempt armed robbery conviction. The Illinois Appellate Court ("Appellate Court") affirmed his convictions and the Illinois Supreme Court denied his petition for a writ of certiorari. Smith has filed the present petition for a writ of habeas corpus (Dkt. No. 1), under 28 U.S.C. § 2254(d), arguing that the Appellate Court unreasonably applied *Jackson v.*

Virginia, 443 U.S. 307 (1979), in finding that there was sufficient evidence supporting his convictions. Alternatively, Smith asserts that the Appellate Court violated his constitutional right to present a complete defense and his rights under the Sixth Amendment's Confrontation Clause when it affirmed certain trial court evidentiary rulings. For the reasons that follow, Smith's habeas petition is granted on the basis of the evidentiary errors, and his convictions and sentence are vacated.

BACKGROUND[1]

I. The Burrito Express Robbery

On March 6, 2001, two masked men entered a Burrito Express restaurant in McHenry, Illinois and attempted to rob the restaurant. The restaurant's owner, Raul Briseno, resisted the robbery along with his employee Eduardo Pardo. Briseno grabbed a knife and he and Pardo chased the masked men out of the restaurant. As the chase continued outside of the restaurant, the masked man wearing a green jacket slipped on a patch of ice, thereby allowing Pardo to catch him. Pardo then attempted to drag the masked man in the green jacket back toward the Burrito

[1] When reviewing a habeas petition, the court "must accept the factual findings of the state trial and appellate courts as true because they are entitled to a presumption of correctness." *Ford v. Ahitow*, 104 F.3d 926, 928 (7th Cir. 1997). Therefore, the facts here are taken predominantly from the Appellate Court's decision affirming Smith's conviction. *See People v. Smith*, No. 2-12-0508, 2013 WL 2382284 (Ill. App. Ct. May 29, 2013) (unpublished Ill. Sup. Ct. Rule 23 order). However, certain additional facts have been taken from the trial record to provide further context to the Appellate Court's findings of fact.

Express. In response, the second masked man began shooting. One of his shots hit Briseno, who ultimately died as a result of the wound. The two masked men fled the scene of the crime.

Just over two months later, Justin Houghtaling was arrested in Omaha, Nebraska in connection with the Burrito Express shooting and interrogated by the police. During his interrogation, Houghtaling gave a statement that implicated himself and Smith in the shooting. Based on that statement, Smith was indicted on May 31, 2001. Also indicted were Smith's purported accomplices Houghtaling, David Collett, and Jennifer McMullan. Houghtaling pleaded guilty on November 14, 2001. He received a twenty-year sentence of imprisonment in exchange for his testimony against Williams, McMullan, and Collett. In a trial featuring Houghtaling's testimony, McMullan was convicted of first-degree murder and attempt armed robbery and received a sentence of twenty-seven years' imprisonment. On the basis of his lawyer's advice, Collett took a "plea of convenience" in order to avoid a lengthy prison term.

II. Smith's First Two Trials

Smith was first tried in 2003. When the State called Houghtaling to testify, he invoked his Fifth Amendment right against self-incrimination. Consequently, the trial court declared Houghtaling unavailable and permitted the State to introduce Houghtaling's testimony from McMullan's trial. Ultimately, Smith was found guilty of first-degree murder and attempt robbery. He successfully appealed the convictions on the basis of the Supreme

Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), which held that a testimonial statement of a witness absent from trial cannot be admitted under the Confrontation Clause of the Sixth Amendment if the defendant did not have a prior opportunity to cross-examine the absent witness. The case was remanded for a new trial.

At the second trial, Houghtaling did testify. On direct, Houghtaling stated that he and Smith were the two masked men that attempted to rob the Burrito Express. Houghtaling stated that he was the man wearing the green jacket and Smith was the man with the gun. After Smith shot Briseno, Houghtaling and Smith ran to a car where McMullan was waiting with Collett in the rear seat. The group then drove to their friend James "Jimmy" Weisenberger's home where they remained through the night. However, on cross-examination, Houghtaling was asked about his agreement with the State's attorney. Then, without any further prompting, Houghtaling recanted his testimony and stated that the story he told on direct was not true. He asserted that the State was forcing him to admit to a crime so that it could convict Smith for a crime that he did not commit. On re-direct, Houghtaling was impeached with the statement he gave following his arrest in Omaha.

In addition, Smith sought to implicate a different group of individuals in the crime. According to Smith, the crime was committed by Russell "Rusty" Levand, his girlfriend Susanne "Dallas" DeCicco, and her cousin Adam Hiland (collectively, the "DeCicco Group"). When DeCicco and Hiland were called to testify, they denied their involvement in the shooting.

Yet, when Smith sought to introduce evidence of their prior confessions, the court barred Hiland's confession entirely and only admitted portions of DeCicco's confession. Once again, Smith was found guilty on both counts. Yet, the convictions were reversed and remanded again on appeal, in part because of the trial court's refusal to allow Smith to impeach Hiland with a prior inconsistent statement.

III. Smith's Third Trial

The convictions that form the basis of the present habeas petition were handed down following Smith's third trial. According to the State's theory of the case, Smith and Houghtaling were the two masked men that entered the Burrito Express and attempted to rob it. After a knife-wielding Briseno, along with Pardo, chased them out of the restaurant, Houghtaling slipped on a patch of ice. Pardo was able to catch up to Houghtaling, seize him, and begin dragging him back to the restaurant. This caused Smith to begin shooting. One of his shots struck and killed Briseno. Smith and Houghtaling then fled to McMullan's waiting car, which also contained Collett. Smith again defended himself by pointing to the DiCecco Group as the true perpetrators.

A. The Pre-Trial Proceedings

Before the third trial, Smith sought leave to admit evidence concerning Briseno's drug-dealing activity at the Burrito Express. This evidence would have gone to the DiCecco Group's motive for robbing the Burrito Express. He made three live proffers on

this issue. In addition, Smith sought to exclude the testimony of Houghtaling and Collett.

i. Patrick Anderson Proffer

Smith sought to introduce the testimony of Patrick Anderson. Anderson would testify that he knew Briseno well and bought cocaine from him through "Serge," an employee who worked in Briseno's restaurants. Among Anderson's customers was Levand, whom he also counted as a friend. Smith first became aware of Anderson after he sent Smith's defense counsel a letter dated December 29, 2011. In that letter, Anderson stated that shortly before Briseno's murder, he and Levand went to the Burrito Express to buy cocaine. Prior to the purchase, Anderson told Levand that Briseno kept large amounts of money and cocaine at the Burrito Express. Following the murder, Anderson recalled hearing rumors about the DeCicco Group's involvement. Then, sometime during the summer of 2011, Anderson and Levand were incarcerated together in the McHenry County jail. After Anderson told Levand that he had reason to believe that Levand had a motive to shoot Briseno, Levand confessed to his involvement in the crime.

The State offered to stipulate that Anderson would testify in accordance with the letter. However, the court was concerned that the letter raised hearsay issues. In response, Smith's defense counsel argued that any hearsay testimony would be used only to show Levand's knowledge of Briseno's drug-dealing rather than for the truth of any matters asserted. Nonetheless, the trial court excluded Anderson's

testimony because it would be hearsay and also was "highly suspect" given that Anderson only came forward ten years after the fact. It further ruled that the letter was insufficient to establish the DiCecco Group's motive because there was "no close connection to the drugs and to this crime for which the defendant is on trial." (App. to Habeas Pet. ("App."), Ex. 17 at R005216, Dkt. No. 1-6.)

Anderson also sought to testify why he did not come forward prior to December 2011 with this information. He would have said Levand only first confessed to him in the summer of 2011 when they were incarcerated in the same jail. Once he obtained the confession, Anderson felt compelled to come forward because he had previously been wrongly accused of a crime and, if someone had information to help him, he would have wanted that person to come forward as well. He wrote the letter to Smith's defense counsel only after his attempts to alert authorities through a "tip line" proved fruitless. While Anderson would be permitted to testify at trial regarding Levand's confession, he was barred from testifying about Levand's knowledge of Briseno's drug dealing activities at the Burrito Express and why he did not tell anybody sooner about Levand's confession.

ii. Officer Guillermo Quinones Proffer

Smith also sought to introduce the testimony of Officer Guillermo Quinones, an undercover operative with Lake County, Illinois' Metropolitan Enforcement Group. Quinones would have testified that while he was working on an undercover drug investigation, he made multiple visits to a restaurant owned by

Briseno. Those visits occurred less than six months before Briseno was shot. During one of the visits, Quinones spoke to Briseno about Briseno's cocaine dealing, and Briseno offered to sell cocaine to Quinones. At some point, Quinones did purchase drugs from Briseno and his associate Sergio Salinas. The trial court excluded this testimony as it ruled that it did not have a close enough connection with the crime.

iii. Detective Richard Solarz Proffer

Finally, Smith sought to introduce the testimony of Detective Richard Solarz, who was a K-9 handler. Detective Solarz would have testified that the day after the shooting, he conducted a search of the Burrito Express with a narcotic-sniffing dog. During the search, the dog detected the possible presence of narcotics inside a desk drawer and a cabinet in the Burrito Express. This testimony was also excluded because it did not have a close enough connection with the crime.

iv. Houghtaling's and Collett's Testimony

The State indicated its intention to call Houghtaling and Collett to testify. In response, Smith sought to exclude the testimony, as the State knew that both men would deny that Smith was involved. Rather, the State was only calling them in order to introduce their out-of-court statements implicating Smith. The trial court overruled Smith's objections.

B. The State's Evidence at Trial

i. Eduardo Pardo's Testimony

Eduardo Pardo testified that he worked as a cook at the Burrito Express. He was at work on March 6, 2001, when, at 7:15 p.m., two men wearing black masks that left only their eyes uncovered entered the restaurant. One of the men carried a gun. At the time, Briseno and Pardo were working in the back of the restaurant and there were no customers or any other individuals inside. The man with the gun entered the back of the restaurant first and pointed the gun at Briseno and Pardo. Pardo, who spoke limited English, did not understand what the man with the gun said. Briseno raised the knife he had been using to prepare food and chased the two men out of the restaurant. Pardo was close behind in pursuit.

At some point during the chase, Pardo testified that he observed Briseno stop and talk to someone in a passing car, but he was unable to hear what Briseno said. For a period, Pardo lost sight of both masked men. When he regained visual contact with one of the men, he observed that the man was wearing a green jacket. That man was not the man carrying the gun. After the masked man in the green jacket slipped and fell backwards on a patch of ice, Pardo was able to catch up to him. He then removed the man's mask. Although it was dark outside, Pardo testified that he got a good look at the man's facial features. Pardo alerted Briseno that he had apprehended one of the masked men. Briseno directed Pardo to take the man back to the Burrito Express and call the police. Holding the man in the green jacket from behind, Pardo began to walk him back toward the restaurant. Briseno rejoined Pardo at this point. Then, the man

with the gun reappeared, raised his mask to just above his eyebrows, and fired two shots in Briseno and Pardo's direction. The man with the gun then came closer to Briseno and Pardo and began shooting again. Pardo testified that he heard Briseno make an "aah" sound and saw him spit blood from his mouth. However, Pardo was unable to see if Briseno spit blood on the man wearing the green jacket. After seeing Briseno spit up blood, Pardo released the man in the green jacket from his grasp and ran back to the Burrito Express to call the police.

While Pardo was calling the police, he observed Briseno holding the man in the green jacket in front of him and using him as a human shield as the man with the gun kept shooting. After completing the call, Pardo came back outside. Both masked men had fled the scene. Briseno was left face down on the ground. Pardo observed a substantial amount of blood coming from Briseno's mouth. Notably, Pardo never saw a third man.

Later that evening, Pardo spoke with the police and described the faces of the two masked men. The resulting images showed clean-shaven young males. At trial, Pardo was shown People's Exhibit 66 (Ex. 96, Dkt. No. 1-12), which was the green jacket Houghtaling wore the night of the crime. When asked whether the green jacket looked like the one worn by one of the masked men, Pardo replied in the affirmative. Yet, when Pardo first spoke with the police, he described the jacket as having some black, but only around the collar area. By contrast, Houghtaling's jacket only had a small black patch just below the collar but did have numerous areas of black

elsewhere on the jacket. Moreover, Pardo told the police that the green jacket had no pockets and no zipper going up the front of the jacket. Houghtaling's jacket had both of these features. On cross-examination, Pardo could not recall the description he gave to police the night of the shooting. He testified that he told the police the truth, but he was also scared at the time. Smith later called the officer who took Pardo's statement the night of the shooting in order to perfect his impeachment of Pardo's identification of the green jacket. However, when Smith asked about how Pardo described the jacket in his police interview, the State objected and the trial court sustained the objection.

Despite seeing both the shooter and the man in the green jacket's uncovered faces, Pardo was never able to identify Smith or Houghtaling as being involved in the shooting. Indeed, while working with the sketch artist, and then on a separate occasion two days after the shooting, Pardo was shown a photographic lineup—a lineup that contained Smith, Houghtaling, and Collett's photos. He did not identify any photo as an individual involved in the shooting.

ii. Lieutenant Gary Wigman's Testimony

The McHenry police department officer in charge of the crime scene was Lieutenant Gary Wigman. At trial, he testified that police officers went over the crime scene "with a fine tooth comb," using metal detectors and magnets to search for the murder weapon or bullet casings. (App., Ex. 22 at R006219–20, Dkt. No. 1-9.) Nonetheless, the police were unable to recover any potential murder weapon that they

could link to Smith or Houghtaling. Nor did they recover any physical evidence tied to Smith or his alleged accomplices.

While observing Briseno's autopsy, Wigman noted a laceration and abrasion on Briseno's upper forehead. He testified that, pursuant to the John Reid interviewing technique,[2] some information concerning the investigation was withheld from the public. This was done to assess the credibility of the individuals who came forward to the police with information about the crime. In this instance, the police withheld the fact that Briseno had sustained a head wound and that Pardo had seen Briseno yelling into a passing car. That information was withheld from the public until it was disclosed in testimony at McMullan's 2002 trial. By contrast, the public was informed that the men wore ski masks and that Briseno struggled with one of the men in the parking lot. Smith attempted to question Wigman on the John Reid method of interrogation, but the trial court sustained the State's objection on relevance grounds because Wigman did not conduct the relevant interviews in which the method was used.

Wigman also testified why the police believed that the shooter used a revolver. An automatic firearm ejects bullet casings after firing, whereas a revolver does not. Having found no bullet casings in the vicinity of the shooting, the police concluded that the shots came from a revolver.

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[2] Wigman testified that John Reid is a school in the Chicagoland area that "teaches investigators how to properly interview people." (App., Ex. 26 at R006882, Dkt. No. 1-11.)

When asked whether the police received information concerning the DeCicco Group's possible involvement, Wigman confirmed that they did. He said he received a call on November 16, 2001 from Vicki Brummett, Dallas DeCicco's mother, who said she believed that she possessed the gun used in the Burrito Express shooting. The police recovered a .22-caliber revolver from Brummett's home and sent it to the state police for testing. That revolver matched the characteristics of the gun used in the shooting. During his testimony, Wigman conceded that none of the physical evidence collected at the crime scene was connected to Smith or any of his purported accomplices.

iii. Forensic Testimony

Several forensic witnesses testified at trial. First, Joanne McIntyre, an Illinois State Police firearms expert, testified that the bullet from Briseno's body was a .22-caliber long rifle bullet with six lands and grooves. She was able to fire ten test shots with the revolver recovered from Brummett, examine the bullets she fired, and compare them with the bullet recovered from Briseno's body. Based on her tests, McIntyre testified that she could not exclude the Brummett gun as having fired the bullet that killed Briseno, although she was unable to conclude that it was the murder weapon.

The forensic pathologist that performed Briseno's autopsy testified about his findings. He stated that there was a laceration on Briseno's head that was consistent with being pistol whipped with the barrel of a gun. The injury was not consistent with a fall. A

forensic scientist with the Illinois State Police that specialized in latent fingerprint examination testified that the fingerprints lifted from the Burrito Express door and a set of door knobs did not match the standards provided by Smith, Houghtaling, Collett, and McMullan.

iv. Justin Houghtaling's Testimony

Over Smith's objection, (renewed after being overruled at pre-trial proceedings), the State called Houghtaling to testify. In his direct testimony, Houghtaling denied that he and Smith were involved in the shooting. When asked what time he, Smith, Collett, and McMullan went to the Burrito Express on March 6, 2001, Houghtaling testified that they never went to the restaurant on that date. He further stated that he had only known Smith for about three weeks prior to March 6. Houghtaling knew Smith because Smith was dating McMullan at the time, and McMullan lived across the street from Houghtaling.

Houghtaling testified that on the night of March 6, Smith and McMullan came to Houghtaling's house and picked him up. They then went to pick up Collett. Together, the group traveled to McMullan's friend's house in Wisconsin because McMullan wanted to borrow her friend's laptop computer. They then returned to McHenry, where they stopped at a "head" shop known as Cloud 9. From there, they went to Smith's friend Jimmy Wiesenberger's house, where they remained the rest of the night.

In response to Houghtaling's denial of involvement, the State asked him whether he had

pleaded guilty to first-degree murder. Houghtaling admitted that he had, and that he was sentenced to twenty years' imprisonment in connection with the Burrito Express shooting. Then, over Smith's objection, the State admitted evidence of Houghtaling's prior inconsistent statements.

a) Houghtaling's May 12, 2001 Interrogation in Omaha, Nebraska

A transcript from Houghtaling's May 12, 2001 interrogation in Omaha was read into the record, and the jury heard the audio. Houghtaling testified that he was high on hallucinogenic drugs at the time. During the interrogation, Houghtaling told the police that on the night of March 6, 2001, he, Smith, McMullan, and Collett were drinking at Weisenberger's house behind the Burrito Express. While Smith and Houghtaling were smoking a joint outside, Houghtaling recalled Smith saying something similar to "come with me, I want to go do something." (App., Ex. 137 at 1, Dkt. No. 1-19.) Houghtaling then followed Smith to the Burrito Express.

The interviewers then began asking Houghtaling a series of leading questions regarding face coverings. One asked him if he wore a ski mask, to which Houghtaling replied that he could not remember. Following up, the interviewer asked if Houghtaling had his face concealed. Houghtaling replied that he did. Houghtaling agreed when asked if he concealed his face with some kind of hat. The question was then refined to "[w]ith a mask that goes over the face?" to

which Houghtaling replied in the affirmative. (*Id.* at 2.)

Houghtaling said that Smith entered the Burrito Express first. He stated that only Smith was carrying a gun, and the gun was "a little .22." (*Id.* at 3.) When asked who was in the restaurant upon their entry, Houghtaling replied "[s]ome dude behind the counter and a few other people, nah, I I can't remember." (*Id.* at 3.) Smith then went up to a man behind the counter and demanded money. In response, Houghtaling stated that the owner grabbed a knife and chased him and Smith outside. He was unsure of the size of the knife, describing it as not "little but it was not huge like a regular filet knife or something." (*Id.* at 4.) The knife wielded by Briseno was in fact a large butcher knife, a fact that the interviewers knew at the time.[3] Then, the interviewers asked Houghtaling if anybody other than the owner was chasing them, and Houghtaling replied "not that I know of." (*Id.*) Houghtaling was unable to describe how he was grabbed and held during the course of his escape. He did say that once he heard gunfire, "the dude let go of me and I ran. I was scared."[4] (*Id.* at 5.) Again, Houghtaling was asked if there was an additional person chasing him and Smith. He replied "That could

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[3] An officer who reported to the scene of the crime in the immediate aftermath of the shooting testified that he observed a "large butcher knife, approximately six inches long" lying next to Briseno's body. (App., Ex. 21 at R005781, Dkt. No. 1-8.)

[4] This was contradicted by Pardo's testimony that after he released the unarmed man in the green jacket and went inside to call 911, Briseno used that man as a human shield, while the armed man continued shooting.

be, I can't, it happened so long ago and I don't remember. I'm not a hundred per cent [sic] positive, but it could be." (*Id.* at 6.)

After he fled, the interviewers asked if anybody was waiting in a getaway car for Smith and Houghtaling. Houghtaling said he did not recall escaping to a car, and instead he believed that they all met back at the house. Later, he stated that upon further thought, he and Smith did run to a getaway car after the shooting, and that McMullan and Collett were in the car. One of the interviewers suggested that the four then went to Cloud 9. Houghtaling agreed. When they arrived at Cloud 9, Houghtaling stated that Collett went inside and the others waited in McMullan's car. The interviewers informed Houghtaling that witnesses placed him at Weisenberger's house following the shooting, which Houghtaling confirmed. He also said that Smith planned the robbery. He explained that they discussed the robbery in the car on the way to McHenry, as well as at Weisenberger's house.

The interviewers asked about Houghtaling's attire that night. They asked him if he had borrowed someone's jacket, to which he replied that he borrowed a green jacket from Collett. Houghtaling further stated that he did not see a wound on Briseno's forehead. When asked to describe the gun used to shoot at Briseno, Houghtaling said that it "looked like a revolver." (*Id.* at 18.) Yet, he was unable to explain the difference between a revolver and an automatic. After one of the interviewers drew pictures of a revolver and an automatic, they asked him to pick

the one depicting a revolver. Houghtaling selected the automatic.

b) Houghtaling's April 3, 2002 Testimony at Jennifer McMullan's Trial

Also introduced was Houghtaling's testimony at Jennifer McMullan's trial. He testified that his testimony was uncoerced and made of his own free will. On the day of the shooting, Houghtaling stated that he and Smith discussed the robbery at Houghtaling's house. There, Smith gave Houghtaling a ski mask. They put those masks on prior to entering the Burrito Express.

Houghtaling testified that Smith entered the Burrito Express first and he was carrying a gun in his hand. There were two people inside the restaurant, none of them customers. Smith aimed his gun at Briseno and demanded that he give them money. Instead of complying, Briseno picked up a knife and chased Smith and Houghtaling outside. As he ran away, Houghtaling slipped and was grabbed by Briseno and Pardo. The two then dragged him back to the restaurant. While he was seized, one of the men grabbed his mask. Shots were then fired. Houghtaling could see Smith firing the shots. After the last shot was fired, Houghtaling testified that he could feel a jerk. Briseno then fell, and Pardo ran to the restaurant. When he was released from Briseno's grasp, Houghtaling fled. Upon meeting up with McMullan and Collett, McMullan suggested that they go to Cloud 9 for an alibi.

c) Houghtaling's August 13, 2008 Testimony at Smith's Second Trial

Houghtaling also testified at Smith's second trial. On direct, Houghtaling stated that he and Smith put on masks and entered the Burrito Express at around 7:21 p.m. Upon entry, a gun-wielding Smith announced that the restaurant was being robbed. Briseno then picked up a knife and chased Smith and Houghtaling outside. During the chase, Houghtaling slipped on ice, which allowed Briseno and Pardo to catch up with him and grab him. Briseno and Pardo began wrestling with Houghtaling. As Houghtaling attempted to escape, Pardo put a knife to his throat.[5] At this point, Smith started shooting. Houghtaling then felt a jerk and was released from both Briseno and Pardo's grasp. He ran to McMullan's car, where both McMullan and Collett were waiting for him. Smith was not with them at this point, and Houghtaling testified that he was not aware where he went. Yet, Houghtaling also testified that when he returned to McMullan's car, he asked Smith whether he was "fucking out of your mind," to which Smith replied, "I did what I had to do." (App., Ex. 21 at R005879–80.) The group then went to Weisenberger's house and stayed there overnight. Houghtaling stated that he was wearing a green jacket that night.

Immediately on cross-examination, Houghtaling recanted his entire direct testimony, other than the fact that he wore a green jacket the night of March 6,

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[5] Houghtaling's testimony that Briseno and Pardo wrestled with him and that Pardo put a knife to his throat does not match Pardo's own testimony from the third trial.

2001. He stated that he had been forced to lie "because [the State] want[s] to convict Kenny Smith for a crime he didn't commit, none of us committed." (App., Ex. 13 at R003474–75, Dkt. No. 1-4.) He also reported that the State threatened to revoke his plea agreement if he did not give testimony inculpating Smith. Moreover, he stated that he learned the details he testified to from newspaper articles and discovery. On redirect, Houghtaling conceded that he had not negotiated any plea with the State at the time of his Omaha interrogation.

d) Justin Houghtaling's Cross-Examination at the Third Trial

During cross-examination, Houghtaling testified that neither he nor Smith was involved in the shooting or the attempted robbery. He also claimed that he was high on hallucinogenic drugs during his May 12, 2001 Omaha interrogation. While much of the interrogation was taped, Houghtaling spoke with the police roughly fifteen minutes before the tape recorder was turned on. During this time, Houghtaling told the officers he had taken drugs that day. In addition, the officers (falsely) informed Houghtaling that Smith, McMullan, and Collett had already been charged and given statements. They promised Houghtaling that if he told them what happened, they would help him out. Once they turned the tape recorder on, the officers began asking Houghtaling a number of leading questions.

As to the facts that Houghtaling recounted in his police interview, Houghtaling testified that he learned those facts through newspaper articles and

word of mouth. However, when Smith attempted to ask additional questions about where he learned each specific fact he recounted in the interview, the State objected on the basis of hearsay and foundation. The trial court sustained the objection. It did allow Smith to explain that Houghtaling would have testified that he learned the following items from press or word of mouth prior to his Omaha interrogation:

> That the police thought that the shooting was about 7:20 p.m.; that the police thought that there were two young men involved. The police thought that one man had a handgun; that the police thought that both went into the store; that the police thought that both were wearing black ski masks with eye holes; that the police thought that Mr. Briseno was in the Burrito Express with one employee; that the police thought that Mr. Briseno was using a butcher knife at the time; that the police thought masked men ordered Briseno to give them money.
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> . . .
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> That the police thought that Mr. Briseno and the employee chased two men out of the restaurant; that the police thought that Mr. Briseno caught one of the masked men outside the restaurant; that the police thought Mr. Briseno struggled with one of the masked men in the parking lot; that the police thought Mr. Briseno was shot by another masked man. I would also ask Mr. Houghtaling whether he understood that the possibility that Mr. Briseno had been pistol

> whipped was in the public, and he would testify that he understood that was not in the public.

(App., Ex. 21 at R006039–40.) Despite defense counsel submitting as evidence news articles that were published about the Burrito Express shooting prior to Houghtaling's Omaha interrogation reflected the relevant facts he recounted in that interrogation, the court reiterated that it would sustain the objection. It insisted that for each fact from the interrogation, Houghtaling must supply details as to what newspaper or person he learned the fact from and when he learned that fact in order for his testimony to be admissible.

In addition, Houghtaling stated that prior to his testimony in McMullan's trial, he prepared with representatives from the State, who refreshed his recollection. Moreover, when he testified at Smith's second trial, he had access to police and forensic reports. And due to his recantation on cross-examination, Houghtaling was charged with perjury and voluntarily pleaded guilty to that charge and was sentenced to an additional term of five-and-a-half years' imprisonment. He recognized that he could again be charged with perjury after his testimony at Smith's third trial, but he said "I'm tired of lying. The truth has to come out sooner or later." (*Id.* at R006028–29.)

Smith also sought to elicit testimony from Houghtaling that he was called to testify against Houghtaling in the first trial but refused because Smith was not involved in the shooting. The State

objected on relevance grounds and the trial court sustained the objection.

v. Detective Sergeant William Brogan's Testimony

William Brogan was a detective sergeant with the McHenry Police Department and was one of the officers who interrogated Houghtaling in Omaha. Brogan stated that he did not ask Houghtaling if he was on drugs that day but testified that he showed no signs of being under the influence. On cross-examination, Brogan testified regarding his training in the John Reid interrogation technique. A John Reid interview seeks to elicit information to corroborate a confession, which can take two forms: (1) independent corroboration where the subject supplies information unknown to the investigator that can be verified (*i.e.* the location of an unrecovered murder weapon); or (2) dependent corroboration, which involves a suspect demonstrating knowledge of facts about a crime that the police have withheld from the public. However, Brogan testified that Houghtaling supplied police with no facts that provided either independent or dependent corroboration of his confession in the Omaha interrogation.

Brogan also testified about the information that the police released to the public. The publicly disclosed information included that: the shooting occurred at 7:20 p.m. at the Burrito Express, two men were involved and one had a handgun, the two men wore black ski masks with eyeholes; Briseno and Pardo were in the restaurant at the time of the robbery attempt; the masked men demanded that Briseno give them money; Briseno and Pardo chased

the men out of the restaurant; Briseno wielded a knife as he chased the men; during the pursuit, Briseno caught one of the masked men; while Briseno was struggling with the man he caught, the other masked man shot him. Not publicly disclosed was the wound on Briseno's head and the fact that Briseno had yelled something to a passing car.

In addition, Brogan testified that in Omaha, the police had spoken to Houghtaling for fifteen minutes before they began recording the interview. During this fifteen-minute period, Houghtaling denied his involvement in the shooting until police falsely told him that Smith, McMullan, and Collett had been charged, and that Houghtaling could help himself if he gave a statement. He further admitted that much of Houghtaling's statement was first suggested through the use of leading questions asked by the other interrogator. He also conceded that investigators should avoid the use of leading questions.

vi. David Collett's Testimony

During pre-trial proceedings, Smith's objection to David Collett's testimony was overruled. He renewed his objection when the State called Collett at trial. Again, the trial court overruled the objection. On direct, Collett testified that he had "no clue" who attempted to rob the Burrito Express. (App., Ex. 23 at R006406, Dkt. No. 1-9.) When asked why he pleaded guilty to being involved in the robbery, Collett testified that it was a "plea of convenience." (*Id.* at R006407.) He also stated that his lawyer advised him that the reduced charge offered to him in exchange for

his plea could reduce his term of imprisonment or cause him to avoid it altogether. Then, over Smith's objection, the State was allowed to introduce a statement directed at Briseno's widow that Collett gave at his sentencing hearing:

> I'd just like to say that I'm—no, no apology, nothing I can possibly say can help the victims with what they're dealing with, but I can offer my apologize—apology. I really—if I would have known that any of this would have happened, I really would have tried to do something to stop it, but, honestly, I mean, I really didn't think anything like that would have happened—was going to happen. If the judge, if your Honor, if you see fit to grant me probation, I will follow through with it completely and to the Court's satisfaction. I would just like to apologize again to the victims for their loss. Thank you.

(*Id.* at R006408–09.) Collett admitted making this apology but denied that it was because he was remorseful for what he did. Instead, the apology was only for the grief that Briseno's widow was going through.

On the evening of March 6, 2001, Collett explained that he was with Smith and Houghtaling. He had only known Smith for a couple of months at that point. McMullan picked the three of them up and drove them to Wisconsin to pick up a laptop from McMullan's friend. On the drive back to McHenry, Houghtaling and Collett got into an argument because Houghtaling would not return his green jacket. McMullan pulled the car over and Collett

exited the car. He then walked to Weisenberger's house. When nobody was home, Collett walked to Cloud 9. While he was walking, he heard a noise that sounded like a car backfiring. Surveillance video showed Collett entering Cloud 9 at 7:38 p.m. and leaving at 7:44 p.m. After leaving, he got into McMullan's car. In the car were McMullan, Smith, and Houghtaling. He observed no evidence that Smith and Houghtaling had just been involved in a bloody crime. Together, they drove to Weisenberger's house where they remained through the night. Collett testified that he never discussed the Burrito Express incident with Smith, Houghtaling, or McMullan.

Over Smith's objection, the State asked Collett about a statement he made to police on May 12, 2001. It asked whether he told the police that he heard gunshots as he was walking behind the Burrito Express and up to Weisenberger's backyard. Collett said that it was possible that he said this, but it was taken out of context. Rather, he said that while it sounded like a car backfiring, it could have been gunshots. He was not sure as he had never heard a gunshot before. Collett was also asked whether he told police on May 12, 2001 that when he got into McMullan's car, Smith told him that some kids robbed the Burrito Express. Collett admitted that he possibly could have told police that. Finally, he was asked about his May 12, 2001 statement to the police that, when the group was at Weisenberger's house, Collett asked Smith about what happened at the Burrito Express and Smith responded, "just had some fun." (*Id.* at R006421.) He stated that he probably said that if that was what was written down.

C. Smith's Defense at Trial

At the conclusion of the State's case, Smith moved for a directed verdict, arguing that the evidence failed to prove Smith was guilty beyond a reasonable doubt. That motion was denied. In his defense, Smith sought to demonstrate that the State had no evidence linking him or his purported accomplices to the crime scene. More importantly, Smith introduced evidence that implicated the DeCicco Group in the crime.

i. McHenry Police Department Officers' Testimony

Detective Richard Solarz interviewed Houghtaling at the McHenry police station on March 7, 2001. Houghtaling wore the green jacket to the station. Solarz testified that he did not observe any blood stains on the jacket or any signs that Houghtaling had been involved in a shooting or struggle. Sergeant Michael Brichetto of the McHenry County Major Investigations Assistance Team testified that he interviewed Pardo on March 8, 2001. He showed Pardo a photo array that included photos of Smith, Collett, Weisenberger, and Houghtaling. Pardo could not point to any photographed individual as being involved in the incident.

ii. James "Jimmy" Weisenberger's Testimony

Jimmy Weisenberger was the man resided in the home where Smith, Houghtaling, McMullan, and Collett spent the night of March 6, 2001. They arrived at Weisenberger's home sometime after the police arrived at the scene of the crime at the Burrito

Express. Before their arrival, Weisenberger observed police activity around the Burrito Express. When the four arrived, he observed Houghtaling wearing a green jacket. He did not see any blood or scratches on any of them. When he rode with Collett in McMullan's car to buy beer, he did not see any blood, masks, bullets, or a gun in the car. On cross-examination, Weisenberger was asked over Smith's objection whether he had used any drugs in the past, and whether Smith, Houghtaling, and Collett were smoking marijuana on the night of March 6, 2001. He responded that he smoked marijuana as a teenager and tried other drugs, and that Smith, Houghtaling, and Collett were smoking marijuana at his house that night.

iii. Patrick Anderson's Testimony Regarding Rusty Levand's Confession

Patrick Anderson lived in McHenry in 2001 and was friends with Rusty Levand. He also knew Levand's then-girlfriend Dallas DeCicco. While incarcerated in the McHenry County jail in July of 2011, Anderson reconnected with Levand, who was a fellow inmate. Levand eventually told Anderson of his involvement in the Burrito Express shooting. He stated that he and DeCicco's cousin, Adam Hiland, attempted to rob the restaurant. When Briseno chased them out of the restaurant and grabbed Hiland, Levand fired his gun over his shoulder and struck Briseno. Briseno bled from his wound onto Hiland. After Hiland called for help, Levand ran over to Hiland and Briseno and hit Briseno over the head with his gun. Levand and Hiland then fled to DeCicco's car and the three drove to Levand's

mother's house to clean up. There, they also burned the masks and the clothing they were wearing and unsuccessfully attempted to clean up the bloody backseat of DeCicco's car. Several months later, Levand stole DeCicco's car and burned it somewhere in Wisconsin.

iv. Susanne "Dallas" DeCicco's Confessions

a) DeCicco's 2005 Confession to the Police in Quincy

Dallas DeCicco participated in a videotaped interview with Sergeant Doug Vandermaiden of the Quincy, Illinois Police Department. Vandermaiden was called to testify. He stated that he was a patrol officer with the Quincy Police Department in November of 2005. In that capacity, he first came into contact with DeCicco after he suspected her of retail theft. However, he soon came to believe that she had some involvement in the Burrito Express shooting.

In the interview, DeCicco stated that she, her boyfriend Levand, and her cousin Hiland had committed the crime. It occurred the day her sister went into labor, which she said was March 5, 2001. The DeCicco Group went to the hospital, but DeCicco sent Levand and Hiland to her mother's house to get the maternity bag. Levand and Hiland drove DeCicco's car and were gone for one-and-a-half hours, even though the trip should have taken no longer than thirty minutes. When the two returned, they were acting funny. After departing the hospital, the DeCicco Group went to DeCicco's biological father's house. There, Levand and Hiland started going

through her car's trunk. Inside the trunk was a revolver wrapped in a towel. She identified the gun as her stepfather, David Brummett's revolver. Then, Levand and Hiland left, talking about snatching purses or robbing somebody for money. After twenty minutes, DeCicco got in her car and began looking for them. She found them near the Burrito Express where she saw them run into the restaurant, and then run back out followed by two men who worked there. As the four of them ran across the street and in front of her car, one of the men turned around and yelled something into DeCicco's car.

DeCicco continued to drive and returned to her father's house. While she was in the driveway, she heard six gunshots. Soon thereafter, Levand and Hiland ran out from the woods behind the house. Hiland's face was covered in blood and he had a cut on his hand. The two got into DeCicco's car and she drove them away. Levand threw the gun on the back seat, and Hiland tried to clean it. The DeCicco Group then drove to Levand's grandmother's house and disposed of either a scarf or gloves. Then, they drove to DeCicco's mother Vicki Brummett's house. There, Hiland put their soiled clothes in a bag and burned them the next day. Hiland and Levand cleaned the gun and pulled Briseno's hair from it. While at Brummett's home, Levand told DeCicco that one of the men at the Burrito Express threw a knife at him and Hiland, at which point the two ran out of the restaurant. Levand also recounted that one of the employees caught Hiland and dragged him across the parking lot. That is when Levand panicked and began shooting. His final shot hit Briseno, at which point Levand heard Briseno let out a groan and saw him

spit up blood on Hiland. Briseno continued to attempt to fight back. He raised his knife and struggled with Hiland until Levand came up and hit Briseno on the head. DeCicco told her sister about the incident. Her sister told their mother. In turn, their mother called the police, who subsequently collected the gun. DeCicco stated that she did not contact the police because she was fearful that Levand and Hiland might physically retaliate against her. Months later, DeCicco's car was stolen. She said that Levand and Hiland took her car and drove it to Wisconsin where they burned it due to the bloodstains on the back seat. By stipulation, Smith introduced evidence showing that DeCicco's car was found on June 27, 2001, in Racine, Wisconsin. The car had been completely burned and destroyed.

b) DeCicco's 2006 Confession

About two months later, DeCicco again confessed; this time to Sergeant Virgil Schroeder of the Illinois State Police. Schroeder testified that in January 2006, he and a partner interrogated DeCicco, who at that time was incarcerated for retail theft. They interviewed her at the State's request.

During this confession, DeCicco stated that the shooting occurred on either March 5 or 6, 2001. She mentioned for the first time that Levand and Hiland both wore masks when they entered the Burrito Express. When later asked why Levand or Hiland had to clean blood off his face despite wearing a mask, DeCicco stated that Levand wore a mask and Hiland wore a scarf over his face. She also stated that Hiland had Briseno's blood on his face and the blood dripped

onto his shirt. DeCicco was asked how she knew that Levand and Hiland had a gun when they were at her biological father's house. She stated that she saw them looking through her car's trunk but did not actually see the gun. Instead, she only saw the gun later, both when Levand and Hiland entered the restaurant and then when Levand ran toward her car.

DeCicco specifically pointed out to her interrogators that Briseno was hit in the head with a gun. After this confession, the officers told DeCicco that they did not believe her story and offered to give her an out if she recanted. Instead, she insisted that "it happened and I'm willing to step forward." She offered to take a polygraph. She further related that Hiland told her that he saw an attorney because he was fearful of being prosecuted after Brummett turned over the weapon used to commit the crime to police.

c) DeCicco's Confession to Her Mother

Vicki Brummett, DeCicco's mother was called to testify. She stated that on March 6, 2001, she returned home from the hospital where her other daughter had given birth. On her way home, she saw police around the Burrito Express. Upon arriving home, she saw DeCicco, Levand, and Hiland in the basement. Before the shooting, Hiland did not have scratches on his body. But now he had scratches on his hands and knees. When asked whether anybody in her household owned a firearm, Brummett stated that her husband owned a handgun that he kept in the bedroom closet wrapped in a blue towel. Sometime

in November 2001, she turned that gun over to the police.

Also around November 2001, DeCicco confessed her involvement in the Burrito Express shooting to Brummett. Brummett testified that DeCicco told her that the night of March 6, 2001, DeCicco had driven to pick up Levand and Hiland and found them standing outside the Burrito Express. She watched them run inside, and subsequently run out. One of the men who ran out after Levand and Hiland ran in front of DeCicco's car and yelled for her to call the police. DeCicco said she then drove home. DeCicco also told her mother that the gun used in the shooting belonged to Brummett's husband. In addition, DeCicco mentioned that one of the men was hit in the head with the gun, which left a crack in the barrel. At the time, the fact that Briseno had a head wound resulting from a being hit with a gun was not public information.[6]

d) DeCicco's Confessions to Her Friends

Three of DeCicco's friends were called to testify regarding confessions that DeCicco made to them. Brittany Tyda was a childhood friend of DeCicco's who testified that DeCicco confessed to her about the Burrito Express shooting in October 2001. Tyda had invited DeCicco and Levand to her apartment. There, DeCicco tearfully told Tyda about the shooting. Specifically, she told Tyda that she saw Levand and

[6] Wigman testified that at the time he obtained the Brummett gun in November 2001, the issue of Briseno's head injury had not appeared in the press or otherwise been publicly disclosed. (App., Ex. 26 at R006922.)

Hiland attempt to rob the Burrito Express. When a knife-wielding store manager grabbed Hiland, Hiland yelled for Levand's help. Levand responded by shooting the manager.

During that same visit, Tyda heard DeCicco arguing with Levand. At some point in the argument, DeCicco told Levand that if he went to the police about DeCicco writing bad checks, she would tell the police that he shot someone. Within a year of the shooting, Tyda spoke with the police about DeCicco's confession.

DeCicco also confessed to her sister (and Hiland's cousin), Elizabeth Schwartz. Schwartz testified that DeCicco had visited her in the hospital on March 6, 2001, the day after she had given birth to her daughter. About three weeks later, DeCicco told Schwartz that Hiland had been involved in the shooting at the Burrito Express. Schwartz told her mother about DeCicco's confession. She further testified that in the week following the shooting, she noticed cuts on Hiland's hands and bruises on his arm.

Sometime around Christmas 2005, DeCicco confessed to her half-sister, Carly Rexford. While DeCicco was at Rexford's home, she told Rexford that she had confessed to the police that she had been involved in the Burrito Express shooting. Specifically, she said that Hiland and Levand took her stepfather's gun and used it during an attempted robbery of the restaurant. However, during an altercation between Briseno and Hiland, Levand shot Briseno. DeCicco also told Rexford that Levand had threatened to

punish her if she ever told anybody that she was involved in the crime. Rexford testified that when she visited Schwartz at the hospital on March 6, 2001, DeCicco was there as well.

v. Adam Hiland's Confessions

a) Hiland's Confession to R. Daniel Trumble

A friend and former roommate of Hiland, R. Daniel Trumble, was called to testify about confessions Hiland made to him. Over the summer of 2002, Hiland had three conversations with Trumble in which he confessed to being involved in the Burrito Express shooting. During the first conversation, Hiland was drinking with Trumble when he told Trumble that the wrong people were arrested for the shooting. Trumble testified that Hiland confessed that he was involved in the shooting along with Levand and DeCicco. While the three of them had only intended to rob the restaurant, the situation "had gone wrong" after one of the restaurant workers pulled a knife. (App., Ex. 25 at R006735, Dkt. No. 1-10.) As a result, Levand shot him. Trumble further stated that Hiland was shaking and crying during the confession.

Following this initial confession, Trumble advised Hiland to speak to a defense attorney. Trumble testified that he accompanied Hiland to see an attorney and was present when Hiland confessed to the attorney. However, the State objected to Trumble's testimony regarding the visit to the attorney on relevance grounds. Smith's counsel made an offer of proof that Trumble would testify that he

arranged a meeting with an attorney named Ed Edens. Hiland and Trumble met with Edens at a restaurant in 2002, and Hiland made inculpatory statements to the attorney in Trumble's presence. Edens then told Hiland that he should not come forward because other arrests had been made in connection with the shooting. The court sustained the State's objections and permitted Trumble to testify only that he heard Hiland confess again. It did not allow Trumble to make any reference to the lawyer or the circumstances surrounding that meeting. Accordingly, Trumble testified that a few days after Hiland's first confession, he had a second conversation about the shooting with Hiland at a restaurant. Hiland was sober and repeated the confession he gave earlier. Then, on the drive home from the restaurant, Hiland explained that since someone else was arrested he was not going to turn himself in. Trumble never went to the police with this information.

b) Hiland's Confession to Gina Kollross

Hiland also confessed to his adoptive sister, Gina Kollross. Kollross testified that Hiland once lived with her, and that she also knew DeCicco and Levand. She stated that a few days after the shooting, she noticed that Hiland's hands were bandaged. When she asked him what happened, he said he slipped on some icy stairs. Then, a week or two later, Hiland told Kollross that he and Levand had attempted to rob the Burrito Express. When the owner chased them with a knife and targeted Hiland's arm and hand, Levand shot the owner in order to free Hiland.

c) Hiland's Confession to Charlene McCauley

Hiland's birth sister, Charlene McCauley, testified that she lived with Hiland, DeCicco, Levand, and Schwartz at the Brummett residence in March 2001. McCauley stated that on occasions, the DeCicco Group would pick the lock to enter the Brummetts' bedroom. The day after the shooting, McCauley said she saw Hiland with bandages on his forearm. He told her that he had slipped on icy stairs.

Shortly before Christmas 2001, McCauley testified that Hiland confessed his involvement in the Burrito Express shooting to her. Hiland told her that the DeCicco Group was at DeCicco's father's house and smoking crack in the garage on the night of the shooting. When they ran out of drugs, they decided to rob the Burrito Express to obtain more money. However, after Levand and Hiland went inside, the owner and an employee chased them out of the restaurant and continued to pursue them outside. One of the men grabbed Hiland and struggled with him. Levand shot the man. Following his confession, McCauley testified that Hiland appeared depressed, ashamed, and relieved.

d) Hiland's Confession to Elizabeth Schwartz

In addition to testifying that DeCicco confessed to her, Elizabeth Schwartz also stated that her cousin, Hiland, confessed to her. His confession occurred two or three months after the shooting while Schwartz and Hiland were in a van outside a restaurant near the Burrito Express. Hiland resisted exiting the van, became fidgety, irritable, and panicked. Schwartz

looked at Hiland and said "[s]he wasn't lying, was she?" (App., Ex. 25 at R006781.) Hiland asked what she meant, and Schwartz responded that DeCicco had told her that he had been involved in the Burrito Express shooting. An angry Hiland replied that DeCicco "is a fat fucking bitch and she can't keep her mouth shut. She needs to keep her mouth shut." (*Id.*)

The two then drove away. During the drive, Hiland told Schwartz that the DeCicco Group had been smoking crack the night of the shooting. After they ran out of drugs, Hiland and Levand decided they would rob the Burrito Express. DeCicco dropped Hiland and Levand off at the restaurant. The two went inside but were chased out by two men. Schwartz testified that one of them got ahold of Hiland and tried to stab him with a knife. During the ensuing struggle, Hiland grabbed the knife and cut his hand. Levand then shot the man with the knife and ran up and hit him in the head with the gun. She later clarified that she did not remember if Levand hit Briseno with the gun first, or if he shot him first. DeCicco then picked up the two afterwards. Schwartz reported seeing Hiland with cuts and scrapes the week following the shooting. She also conceded that her sister, DeCicco, was not always truthful with others.

D. The State's Rebuttal

The State sought to rebut Smith's evidence showing that it was the DeCicco Group, rather than Smith, Houghtaling, Collett, and McMullan that were involved in the shooting. Each member of the DeCicco Group was called to testify.

i. Rusty Levand's Testimony

Levand testified to his relationship with Patrick Anderson. He stated that Anderson is an acquaintance and confirmed that they were incarcerated together in the McHenry County jail from June 6 through June 11, 2011. However, Levand denied confessing to Anderson and denied being present at the Burrito Express on the night of the shooting.

ii. Dallas DeCicco's Testimony

The State called DeCicco. At the outset of her testimony, she confirmed that she had convictions for retail theft, obstruction of justice, and possession of prescription medication. She also acknowledged that she had dated Levand for a few years. DeCicco then stated that she lied to the Quincy police in November 2005. She said that she believed the police would let her go on the shoplifting charges if she provided them with a confession in a murder. It did not cross her mind that confessing her involvement in a murder could potentially increase the time she was incarcerated. DeCicco explained away her confession to the Illinois state police, stating that "[i]t just somehow made sense to me that if I just lied a little longer, I'd be able to get out and deal with it later." (App., Ex. 26 at R006958.) As to her other confessions to family, DeCicco testified that the story was initially a joke between her and her sister, Schwartz. Moreover, she told the story to her mother because she was a heroin addict and thought if she confessed her involvement in the shooting, she could get money for drugs. DeCicco was not asked about and did not

explain the reason for her other confessions to her friends.

In addition, DeCicco provided no explanation as to how she learned of the unreleased details of the crime. DeCicco stated that while she followed details of the shooting in the news, she denied having read police reports relating to it. Over Smith's objection, the State impeached DeCicco with a statement from her testimony in an earlier proceeding in which she said she saw police reports.

iii. Adam Hiland's Testimony

At the time of the trial, Hiland was in custody for fleeing and eluding the police. He also had numerous other convictions including attempted burglary, possession of a controlled substance, and aggravated battery. The State did not ask Hiland about his involvement in the Burrito Express shooting or attempted robbery. Instead, it simply asked whether Hiland had ever been cut with a knife on his hands or arms, to which Hiland answered in the negative. While Hiland did have a scar on his hand, he testified the scar came from a recent incident where he was injured running from the police.

IV. The Verdict and Smith's Appeal

On February 29, 2012, following twenty-one hours of deliberation over three days, the jury returned a verdict of guilty on both the first-degree murder count and the attempt robbery count. The jury concluded that Smith personally discharged the gun that killed Briseno. On April 26, 2012, Smith was

sentenced to sixty-seven years' imprisonment on the first-degree murder charge along with a concurrent seven years' imprisonment sentence for attempt armed robbery.

Smith appealed, arguing that the State did not have sufficient evidence for a jury to find that he was guilty beyond a reasonable doubt of the charged crimes. In addition, Smith challenged several of the court's rulings excluding certain defense evidence, arguing that those exclusions violated his constitutional right to present a complete defense. He also challenged other evidentiary rulings as violating his Sixth Amendment Confrontation Clause rights and his Fourteenth Amendment due process right to a fair trial. The Appellate Court rejected all of Smith's challenges and affirmed both convictions.

DISCUSSION

Smith now seeks federal habeas relief under 28 U.S.C. § 2254(d). That statute, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), does not allow an individual in custody pursuant to a state court judgment to obtain a writ of habeas corpus 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.

28 U.S.C. § 2254(d).

In the present matter, Smith only seeks relief pursuant the first subsection of § 2254(d). Under § 2254(d)(1), a state court decision is "contrary to" clearly established federal law when "the state court applies a rule different from the governing law set forth in Supreme Court cases." *McCarthy v. Pollard*, 656 F.3d 478, 483 (7th Cir. 2011) (internal quotation marks and alterations omitted). Alternatively, a state court decision is an "unreasonable application" of clearly established federal law where "the state court correctly identifies the governing legal principle from Supreme Court decisions but unreasonably applies it to the facts of the particular case." *Id.* (internal quotation marks and alterations omitted). "The focus of the reasonableness inquiry is on whether the state court's application of clearly established federal law is ***objectively unreasonable***, not whether it applied clearly established federal law correctly." *Id.* In undertaking the AEDPA analysis, the habeas court considers "the decision of the last state court to rule on the merits of the petitioner's claim." *Id.* Here, with one exception,[7] that is the most recent decision of the Appellate Court. *See People v. Smith*, No. 2-12-0508, 2013 WL 2382284 (Ill. App. Ct. May 29, 2013) (unpublished Ill. Sup. Ct. Rule 23 order).

I. Sufficiency of the Evidence

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[7] As discussed below in Section II.C.i.d, the Appellate Court last addressed the merits of the admission of Briseno's autopsy photos on Smith's appeal of the verdict in his second trial.

Smith first challenges the Appellate Court's decision affirming his convictions as contrary to, and an unreasonable application of, the United States Supreme Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979). In essence, he claims that there was insufficient evidence for a jury to find him guilty beyond a reasonable doubt. Under AEDPA, habeas relief may be granted "only if the Illinois Appellate Court applied the *Jackson* standard unreasonably to the facts of [the] case." *Jones v. Butler*, 778 F.3d 575, 581–82 (7th Cir. 2015).

In *In re Winship*, 397 U.S. 358, 364 (1970), the United States Supreme Court confirmed that the Constitution requires that an accused be protected against conviction unless his guilt is proven beyond a reasonable doubt. Then, in *Jackson v. Virginia*, 443 U.S. at 321, the Supreme Court held that *Winship* makes clear that a state prisoner has a cognizable federal habeas claim when he alleges that the evidence in support of his state conviction was insufficient to allow a rational trier of fact to find guilt beyond a reasonable doubt. The Supreme Court emphasized, however, that a habeas court is not to "ask itself whether ***it*** believes that the evidence at the trial established guilt beyond a reasonable doubt." *Id.* at 318–19 (internal quotation marks omitted). Rather, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, ***any*** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

The Seventh Circuit has since clarified that a jury verdict cannot be overturned for insufficiency of the

evidence unless "the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *United States v. Huddleston*, 593 F.3d 596, 601 (7th Cir. 2010). Moreover, the reviewing court must defer to the jury's credibility determinations. *United States v. Duran*, 407 F.3d 828, 839 (7th Cir. 2005). Even when raised on a direct appeal, the standard of review when a defendant challenges the sufficiency of the evidence supporting his conviction has appropriately been described as "a daunting one." *Huddleston*, 593 F.3d at 601 (internal quotation marks omitted).

Smith has made a compelling argument that the jury had insufficient evidence to find him guilty beyond a reasonable doubt. Indeed, the State had no forensic evidence inculpating Smith, nor was he affirmatively identified by the sole eyewitness to the crime. The only physical evidence the State presented connecting Smith to the crime was the green jacket worn by Houghtaling that Pardo identified as the same one worn by the masked man without a gun. Instead, the State's main evidence of Smith's guilt came in the form of Houghtaling's since-recanted confessions during the Omaha interrogation, McMullan's trial, and Smith's second trial. The most obvious problem with that confession is that Houghtaling no longer stands by it. Indeed, at Smith's second trial, Houghtaling set out a story incriminating Smith and then immediately admitted its falsity on cross-examination and further asserted that the State forced him to lie to convict Smith for a crime he did not commit. By the time he recanted, there was no benefit to Houghtaling to lie; he had already pleaded guilty and been sentenced for his

supposed role in the shooting. And his recantation came at great personal cost to Houghtaling because by doing so, he admitted to perjury. That admission resulted in him being sentenced to an additional five-and-a-half years in prison. Those circumstances suggest that his recantation is far more reliable than his supposed confessions.

Moreover, there are reasons to doubt the reliability of Houghtaling's previous confessions. During the Omaha interrogation, Houghtaling testified that he was under the influence of drugs. A recording of that interrogation lends credence to his claim, as he sounds confused and disoriented, and takes long pauses before answering questions. Houghtaling further testified that the police obtained his cooperation by lying to him that Smith, McMullan, and Collett had already been charged and given statements. One of his interrogators, Brogan, confirmed that testimony. Houghtaling's Omaha interrogation also occurred two months after the murders, giving him ample opportunity to learn about the facts of the murder and recite a story that accorded with those facts. *See Ticey v. Peters*, 8 F.3d 498, 503 (7th Cir. 1993) ("[I]f a significant amount of time passes between a crime and a statement, a greater opportunity exists for a witness to fabricate a story and an identification."). Indeed, not a single fact Houghtaling recounted in that Omaha police interview was unknown to the public. Many other facts he recounted were wrong. For example, he said there were a few other people at the Burrito Express when he and Smith entered, when in fact Briseno and Pardo were the only people there. And Houghtaling also claimed that only Briseno was chasing him and

Smith even though Pardo has consistently stated that he joined Briseno in chasing the masked men as well. Furthermore, the interrogating officers used leading questions to adduce many of the correct facts.

Despite the apparent unreliability of Houghtaling's Omaha statement, the State used it to form the core of its case against Smith and his purported accomplices. This alone casts doubt on the reliability of Houghtaling's subsequent testimony at McMullan's trial and Smith's second trial. Yet that is not the only reason the reliability of his subsequent testimony should be questioned. Most significantly, Houghtaling had an incentive to lie because by promising to testify against Smith and McMullan, he received a reduced twenty-year sentence instead of a maximum sixty-year sentence. Furthermore, for his trial testimony, he had the benefit of reviewing nearly everything in the State's file, such as police reports and witness statements, allowing him to tailor his story to be consistent with the available evidence.

While the Court agrees with Smith that the prior inconsistent statements—and the State's primary evidence—suffer a troubling lack of reliability, it cannot agree that the Appellate Court erred in affirming the admission and use of those statements. As an initial matter, the Court cannot overturn even an erroneous state evidentiary ruling on habeas review when it does not result in the denial of a specific constitutional right. *See Anderson v. Sternes*, 243 F.3d 1049, 1053 (7th Cir. 2001). While it is true that the Seventh Circuit has established a test for evaluating whether the admission of a witness's prior inconsistent statement violates due process and has

applied it in the habeas context, *see Ticey*, 8 F.3d 498, it did so in a case decided before AEDPA. AEDPA now requires that the decision be contrary to or an unreasonable application of federal law as determined by the Supreme Court. And Smith cannot point to an equivalent Supreme Court decision. *See United States ex rel. Wilson v. McAdory*, No. 00 C 1957, 2004 WL 524435, at *5 (N.D. Ill. Mar. 10, 2004) ("Wilson points to no Supreme Court precedent that clearly establishes that it violates due process to admit into evidence the prior inconsistent statements of witnesses who change their stories at trial when those witnesses are available for cross-examination by the defendant. Indeed, Supreme Court precedent suggests just the opposite."). Moreover, Smith is incorrect when he asserts that for *Jackson* purposes, a guilty verdict cannot be based solely on a prior inconsistent statement. Rather, so long as a prior inconsistent statement is reliable, it can, by itself, support a conviction. *Ticey*, 8 F.3d at 503–04. While Smith persuasively contests the reliability of Houghtaling's prior inconsistent statements, he does not challenge the constitutionality of their admission. Absent some constitutional grounds for doing so, this Court cannot overturn on collateral review the state court's finding that the testimony was reliable and therefore admissible—no matter how questionable that ruling may have been. The cases Smith cites to as showing that a court can overturn a conviction based on a single prior inconsistent statement were heard on direct review and thus not subject to AEDPA's highly deferential standard of review. *See United States v. Orrico*, 599 F.2d 113 (6th Cir. 1979) (direct appeal); *United States v. Bahe*, 40 F. Supp. 2d

1302 (D.N.M. 1998) (motion for judgment of acquittal).

Not only does Smith point out numerous flaws in the State's main evidence against him, he points to persuasive evidence that the DeCicco Group committed the crime for which he was convicted. Specifically, all three members of the DeCicco Group each independently confessed to their involvement in the events of the evening of March 6, 2001. DeCicco and Hiland, in particular, confessed their involvement multiple times. DeCicco confessed to at least six people over the course of five years, including twice to the police. Hiland confessed to at least four people over a two-year period. And a fellow inmate reported that Levand confessed his involvement over ten years later while the two were incarcerated together. Importantly, their confessions contained non-public facts concerning the crime that police had withheld in order to corroborate potential confessions. For example, DeCicco knew both that Briseno yelled something into a passing car and that one of the masked men hit Briseno on the head with his gun. Similarly, Hiland stated that Levand had hit Briseno on the head with his gun. On the other hand, none of Houghtaling's confessions supplied these details.

Furthermore, there were other details concerning the DeCicco Group that are consistent with the physical evidence and testimony in the case. Pardo testified that one of the masked men had slipped and fallen on ice during the pursuit. And two individuals who had encountered Hiland in the days following the shooting observed that his hands and forearms were bandaged, and another noticed that he had cuts and

scrapes on his body. By contrast, Weisenberger, who had seen Smith, Houghtaling, Collett, and McMullan on the night of the crime, testified that he saw no blood or scratches on any of them. Both Levand and DeCicco's confessions also provided explanations as to the lack of physical evidence. Specifically, each explained that the DeCicco Group had burned their bloody clothes and that DeCicco's car was taken to Wisconsin and burned. Notably, DeCicco's car was, in fact, found in Wisconsin where it had been destroyed by burning.

In the Court's view, the evidence of the DeCicco Group's involvement is highly compelling if not conclusive. At the very least, the Court is confounded as to how that evidence could not give a rational jury reasonable doubt as to Smith's guilt. Especially in combination with the exceedingly thin evidence supporting Smith's convictions, the Court is concerned that a miscarriage of justice has occurred here. Yet, Smith faces the twin obstacles imposed by *Jackson* and AEDPA. Unfortunately, there are situations where "judges will . . . encounter convictions that they believe to be mistaken, but they must nonetheless uphold." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011). Such is the case here. So long as the record is not "devoid of evidence" of a habeas petitioner's guilt, the Court reads the governing Supreme Court and Seventh Circuit precedent as constraining it from weighing the evidence or second guessing the jury. *United States v. Smith*, 576 F.3d 681, 686 (7th Cir. 2009). Here, the jury had evidence in the form of Houghtaling's recanted confession along with one additional piece of evidence linking Smith to the crime—the green jacket worn by Houghtaling and

identified by Pardo as the same green jacket worn by one of the masked men. Accordingly, the Court must deny Smith's habeas petition to the extent it argues that his convictions were based on insufficient evidence.

II. Evidentiary Challenges

As an alternative to the reversal of his convictions, Smith asks that this Court vacate his convictions so that he can be retried. According to Smith, such habeas relief is warranted because the Appellate Court affirmed the exclusion of certain evidence in violation of his due process right to present a complete defense. In addition, the Appellate Court incorrectly found that the trial court did not violate his rights under the Confrontation Clause of the Sixth Amendment by limiting his cross-examination of certain witnesses. Even if those errors were harmless, Smith argues that, considered together, they deprived him of his right to a fundamentally fair trial.

A. Exclusion of Evidence Bearing on the DeCicco Group's Involvement

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Accordingly, the Supreme Court has held that, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment," criminal defendants are guaranteed "a meaningful opportunity to present a complete

defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotation marks and citations omitted). At the same time, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Yet, that latitude has limits. *Id.* Thus, where an evidentiary rule infringes on a criminal defendant's right to present a complete defense and is "arbitrary or disproportionate to the purposes [it is] designed to serve," the rule must yield. *Id.* at 324–25 (internal quotation marks omitted).

Smith argues that the trial court violated his right to present a complete defense when it excluded testimony that would have supported his defense that the DeCicco Group committed the crime. Part of the right to present a complete defense is the ability for a defendant to submit evidence showing that someone else committed the crime. *Id.* at 327. Smith contends that the trial court violated his right by excluding testimony probative of the DeCicco Group's connection to and motive for robbing the Burrito Express, as well as testimony showing that Hiland confessed his involvement to an attorney.

As an initial matter, the Court must resolve whether it reviews the exclusion of testimony *de novo* or under AEDPA's standard of review. AEDPA's highly deferential standard of review only applies to federal claims that were "adjudicated on the merits in State court proceedings." *See* 28 U.S.C. 2254(d); *Cone v. Bell*, 556 U.S. 449, 472 (2009). Where the state court does not reach the merits of a federal constitutional issue, AEDPA's standard of review

gives way and the federal claim is reviewed *de novo*. *Cone*, 556 U.S. at 472. Specifically, the court is to "dispose of the matter as law and justice require." *Harris v. Thompson*, 698 F.3d 609, 623 (7th Cir. 2012) (quoting 28 U.S.C. § 2243). However, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). Moreover, AEDPA deference "does not require the state court to have expressly considered federal law, much less to have cited to Supreme Court precedent." *Makiel v. Butler*, 782 F.3d 882, 905 (7th Cir. 2015).

Here, Smith argues that *de novo* review is warranted because the Appellate Court only addressed state evidence law and cited to state cases in affirming the evidentiary exclusions. Yet, this is not entirely true, as the Appellate Court made explicit reference to *Chambers v. Mississippi*, 410 U.S. 284, in affirming the exclusion of certain testimony. *See Makiel*, 782 F.3d at 905 (declining to review state court decision *de novo* where the state court cited *Chambers*). Furthermore, "there are circumstances in which a line of state precedent is viewed as fully incorporating a related federal constitutional right." *Johnson v. Williams*, 568 U.S. 289, 298 (2013). And many of the state court cases cited by the Appellate Court in denying Smith's evidentiary challenges address the constitutional right to present a complete defense, and some explicitly incorporate *Chambers*. *See, e.g.*, *People v. Cruz*, 643 N.E.2d 636, 650 (Ill. 1994); *People v. Neely*, 540 N.E.2d 931, 933 (Ill. App.

Ct. 1989). While the Appellate Court did not explicitly address all Smith's federal claims, it did enough such that it should be presumed to have done so. *See Lee v. Avila*, 871 F.3d 565, 571 (7th Cir. 2017) ("We've explained that under *Richter* and *Williams*, the state courts must be given the benefit of the doubt when their opinions do not cover every topic raised by the *habeas corpus* petitioner." (internal quotation marks omitted)). Consequently, AEDPA's standard applies.

i. Exclusion of Testimony Regarding Briseno's Drug Dealing

The trial court excluded testimony from Anderson and two law enforcement officers that would have shown that Briseno was a drug dealer who kept drugs and cash at his restaurant and that Levand knew of that fact, because the testimony did not have a close enough connection with the crime. The Appellate Court affirmed the exclusions, finding that the proffered evidence did not bolster the admitted evidence because it was not entirely consistent with that evidence and would have confused the jury as to the proper focus of the trial.

The Court finds that the Appellate Court's conclusion that evidence of Briseno's drug dealing activities did not bolster Smith's evidence of the DeCicco Group's involvement was unreasonable. Briseno's drug dealing was highly probative in establishing a motive for the DeCicco Group to rob the Burrito Express and bolsters the motive evidence that had been admitted. As the Appellate Court recognized, the admitted evidence "reflected that the DeCicco [G]roup had been doing drugs on the day of

the shooting, ran out of drugs, and allegedly decided to go out and commit a crime to obtain cash so that they could purchase more drugs." *Smith*, 2013 WL 2382284, at *34. Incredibly, the Appellate Court found that the admitted testimony that members of the DeCicco Group were considering stealing money to buy drugs was not consistent with the proffered testimony concerning the presence of drugs at Burrito Express because the DeCicco Group sought only to steal money so they could later buy drugs. Of course, it should be obvious that people who are seeking to steal money for the express purpose of buying drugs would find a restaurant that they believed to contain both money and drugs to be an extremely attractively target. Yet, the Appellate Court defied reason and logic in essentially concluding that the DeCicco Group was willing to steal money to purchase drugs but could not possibly have contemplated cutting out that middle step and just stealing the drugs.

Indeed, the presence of drugs at the Burrito Express is highly probative motive evidence for the DeCicco Group. Their ultimate goal was to obtain drugs. Based on the admitted evidence, the jury could as easily conclude that the DeCicco Group would snatch a purse as they would rob a restaurant. The excluded testimony that Briseno sold drugs from the Burrito Express and one of the DeCicco Group knew it would have bolstered the narrative link bringing together the DeCicco Group, their desire for drugs, and the robbery of the Burrito Express. *See Old Chief v. United States*, 519 U.S. 172, 187 (1997) ("Evidence . . . has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support

conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them."). Even crediting the Appellate Court's explanation that the DeCicco Group simply was looking for money, Anderson would have testified that he told Levand that Briseno kept large amounts of cash at the Burrito Express. And, given their knowledge that Briseno dealt drugs from the Burrito Express, the DeCicco Group likely would have believed that they would find more money there than at the average restaurant. *Cf. United States v. Lawrence*, 788 F.3d 234, 242 (crediting expert testimony that large amounts of cash are associated with drug trafficking); *United States v. Sewell*, No. 11-CR-35-TLS, 2013 WL 6237986, at *8 (N.D. Ind. Dec. 3, 2013) (noting that large amounts of cash is evidence consistent with large-scale drug dealing). Faced with a man sentenced to 67 years in prison on an extremely thin evidentiary basis, the Appellate Court's conclusion that this evidence was not relevant was unreasonable.

Further, the Court cannot find that the risk of confusing the jury by directing its attention to Briseno's drug dealing justifies the exclusion of important evidence regarding the DeCicco Group's motive to rob the Burrito Express. First, the Court is not convinced that such testimony carries a significant risk of directing the jury's focus away from the murder and to Briseno's drug dealing. Indeed, the Appellate Court makes no attempt to even explain how that the excluded evidence could induce the jury

to decide the case on an improper basis. The primary issue before the jury was whether Smith, Houghtaling, McMullan and Collett or the DeCicco Group committed the crime. Briseno's drug dealing goes to that issue and would not induce the jury to deviate from "their true task: deciding defendants' guilt or innocence." *United States v. Trent*, 863 F.3d 699, 705 (7th Cir. 2017). In addition, the Appellate Court seemed to disparately apply the evidentiary rules in a way that substantially disfavored Smith. *See Kubsch v. Neal*, 838 F.3d 845, 858 (7th Cir. 2016) (noting that a court cannot exclude evidence "in an arbitrary manner in the case at hand. Arbitrariness might be shown by a lack of parity between the prosecution and defense"). Whereas the trial court excluded evidence of Briseno's drug dealing, it admitted evidence concerning Smith's drug use. While the Appellate Court found that the admission of evidence concerning Smith's drug use was harmless error, it then inconsistently insisted that the highly probative evidence of Briseno's drug dealing was so powerful that it would confuse the jury as to the issues in the case. Such disparate rulings underscore how the Appellate Court unfairly favored the prosecution and undermined Smith's ability to present a complete defense.

Moreover, it was unreasonable for the Appellate Court to conclude that the exclusion was harmless error that did not substantially prejudice Smith because the testimony would have been cumulative of admitted testimony regarding the DeCicco Group's various confessions. "When reviewing a state-court judgment in a habeas corpus proceeding, we ask whether the error 'had substantial and injurious

effect or influence in determining the jury's verdict.'" *Rhodes v. Dittman*, 903 F.3d 646, 665 (7th Cir. 2018) (quoting *Fry v. Pliler*, 551 U.S. 112, 116 (2007)). For an error to have a substantial influence on the jury's verdict it is not enough that there was a "reasonable possibility that the error was harmful." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (internal quotation marks omitted). Rather, the defendant must actually be prejudiced by the error. *Id.* The Appellate Court failed to recognize the important ways in which the proffered testimony bolsters the narrative surrounding the DeCicco Group's confessions by providing further context for their motive. The admitted confession evidence did not supply a motive for robbing the Burrito Express. And without such evidence, the jury was left to wonder exactly why either the DeCicco Group or Smith and his friends would believe that a burrito restaurant with no customers at dinner time would be a lucrative target for a robbery. Smith should have been able to introduce the testimony to complete his narrative of the DeCicco Group's actions and present a complete defense. His inability to do so leaves this Court with a "grave doubt about whether [the] error of federal law had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 2198 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). Thus, the Appellate Court's conclusion that there was no constitutional violation on account of the exclusion was an unreasonable application of *Holmes*, *Crane*, and *Chambers*.

ii. Exclusion of Testimony Regarding Hiland's Confession to a Lawyer

While the trial court allowed Trumble to testify that Hiland confessed to him, it sustained the State's objection to Trumble's testimony that he was present when Hiland repeated the confession to a defense attorney. Specifically, it allowed Trumble to testify that he heard Hiland confess again but prevented Trumble from testifying that it was in front of a criminal defense attorney. The Appellate Court affirmed the exclusion, finding that the fact that the confession was made in front of an attorney did not imbue the confession with trustworthiness.

The Appellate Court's decision was based on its application of Illinois case law finding inadmissible as hearsay an extrajudicial declaration by a declarant that he committed a crime rather than the defendant on trial, and the attendant exception admitting such hearsay where justice requires. *See, e.g.*, *People v. Bowel*, 488 N.E.2d 995, 999 (Ill. 1986). Yet, as the Appellate Court recognized, there are no hard and fast requirements for against-penal-interest hearsay to be considered reliable. *See People v. House*, 566 N.E.2d 259, 289 (Ill. 1990). Moreover, the Illinois case law relies heavily on the Supreme Court's decision in *Chambers v. Mississippi*. And the Supreme Court's core holding in that case was that where testimony was critical to the accused's defense and "constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302. Yet, that is exactly what the Appellate Court did here to exclude the fact that Hiland confessed in front of a defense attorney. It mechanistically applied a single factor for reliability it derived from one Illinois case,

People v. Human, 773 N.E.2d 4, 11 (Ill. App. Ct. 2002), to insist that the information must make it more likely that Hiland would be prosecuted and refused to entertain Smith's contentions as to why the fact that the confession occurred in front of a defense attorney made it more reliable.[8]

Although the fact that Hiland confessed in front of an attorney might not have made it more likely that he would be prosecuted, the Court nonetheless finds that it provides important context to his confession and enhances its reliability. In asking the jury to disregard the DeCicco Group's various confessions, the State sought to convince the jury that each member was simply lying. And certainly, a jury could believe that confessions to friends and family could simply be the tall tales of drug addicts or attempts to prove their toughness. Indeed, at one point, the State suggested that Hiland confessed to his sister McCauley in an attempt to convince her to give him money for drugs. (App., Ex. 25 at R006762–64.)

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[8] The Appellate Court's citation to cases applying the against-penal-interest exception to the rule against hearsay to justify its affirmance of the exclusion of the fact that Hiland confessed in front of an attorney is particularly non-sensical given that the actual fact of confession was admitted. Yet, the exception concerns the admissibility of the confession rather than the details that render it reliable. Specifically, "[w]here there are sufficient indicia of trustworthiness" of the confession, it may be admissible under the exception. *House*, 566 N.E.2d at 289. Thus, under the Appellate Court's logic, the trial court could reach the paradoxical conclusion that the fact of the confession was trustworthy enough to be admitted even though pertinent contextual details surrounding the confession did not imbue the confession with trustworthiness such that they were relevant.

However, the fact that Hiland sought out a defense attorney tends to show how seriously he took the legal jeopardy he was facing on account of the acts to which he confessed. That Hiland took the affirmative step to seek out legal counsel adds important context to that particular confession and enhances its credibility. Thus, the Appellate Court was simply wrong to conclude that the fact that Hiland confessed to a defense attorney did not enhance the credibility of the confession.

Even if the trial court erred in preventing Trumble from testifying that Hiland confessed to a defense attorney, the Appellate Court stated that the error would have been harmless. It reasoned that the jury had already heard from DeCicco that Hiland had spoken to an attorney out of fear of being prosecuted for his role in the Burrito Express shooting. Omitted from DeCicco's testimony was the fact that Hiland confessed his involvement to the attorney. It should be obvious that one who fears prosecution would seek legal counsel regardless of whether he actually committed the crime of which he is accused. The fact that Hiland confessed to that attorney provides critical detail as to the purpose of his meeting with an attorney that DeCicco's testimony did not supply. Moreover, the Appellate Court's erred in conflating corroborative testimony with cumulative testimony. "[T]estimony of additional witnesses cannot automatically be categorized as cumulative and unnecessary." *Crisp v. Duckworth*, 743 F.2d 580, 585 (7th Cir. 1984). While DeCicco provided only a hearsay recollection of the fact, Trumble's excluded testimony would have been direct testimonial evidence that Hiland sought legal counsel for his

involvement in the Burrito Express robbery. These two independent sources, taken together, strengthen the factual assertion that Hiland, in fear of legal jeopardy, actually sought out a defense attorney. And evidence that adds significant weight and credibility to evidence already in the record is not merely cumulative. *See Washington v. Smith*, 48 F. Supp. 2d 1149, 1164 (E.D. Wis. 1999). In preventing Smith from eliciting from Trumble that he witnessed Hiland confess in front of an attorney, the trial court hindered Smith's ability to present a complete defense. The Appellate Court's conclusion to the contrary was an unreasonable application of clearly established federal law.

B. Limitations on Cross-Examination

The Sixth Amendment to the United States Constitution gives an accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. A criminal defendant's confrontation rights include more than simply "being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974). Rather, the Supreme Court has held that "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross- examination." *Id.* at 315–16 (internal quotation marks omitted). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Id.* at 316. Of course, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment,

prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Under the Confrontation Clause, an opponent is guaranteed "an ***opportunity*** for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* Still, the cross-examiner must be sufficiently able to "delve into the witness' story to test the witness' perceptions and memory" and also be "allowed to impeach, i.e., discredit, the witness." *Davis*, 415 U.S. at 316.

i. Impeachment of Pardo's Identification of Green Jacket

Smith contends that his Confrontation Clause rights were violated because he was not allowed to pursue a line of questioning on cross-examination that would discredit Pardo's in-court identification of the green jacket linking Houghtaling and, in turn, Smith, to the Burrito Express shooting. During his trial testimony, Pardo was shown the green jacket that Houghtaling wore the night of the crime. The jacket, which was submitted into evidence, was predominantly green with small areas of black on the front, and had a green collar, three large front pockets, a front zipper with a flap covering it, and black elbow patches. Pardo testified that the jacket appeared to be the same jacket that was worn by the masked man without the gun.

On cross-examination, Pardo was asked about a description of the green jacket he gave to the police in the immediate aftermath of the shooting. Just hours

after the shooting, Pardo described the jacket as having black around the collar and stated that it did not have pockets or a zipper. Yet, at trial, Pardo stated he could not recall giving such a description. In order to perfect the impeachment, Smith called the officer to whom Pardo had described the jacket that night. That officer was prepared to confirm that Pardo had described the jacket as having dissimilar features to the jacket submitted into evidence. However, the trial court precluded Smith from asking the officer questions regarding Pardo's earlier description of the jacket. The Appellate Court did not even try to defend the trial court's decision to disallow such questioning, and instead simply held that any error was harmless.

The trial court's decision to preclude Smith from perfecting his impeachment of Pardo's identification of the green jacket based on its erroneous interpretation of a state evidentiary rule clearly violated Smith's rights under the Confrontation Clause. The trial court seemed to think that Pardo's description of the jacket on the night of the shooting was not inconsistent with his trial testimony because Pardo did not deny his description that night, but simply stated he could not recall it. Of course, he did identify a jacket at trial that had several features inconsistent with the description he gave on the night of the shooting. A past description of the jacket as having green around the collar and no pockets and zipper is certainly inconsistent with a later identification of a jacket with none of those features. *See People v. Martinez*, 810 N.E.2d 199, 210 (Ill. App. Ct. 2004) ("The prior testimony need not directly contradict testimony given at trial to be considered 'inconsistent,' and is not limited to direct

contradictions but also includes evasive answers, silence, or changes in position." (citations omitted)). Neither the Appellate Court nor the State argue otherwise. Thus, the trial court deprived Smith of an opportunity to effectively cross-examine Pardo regarding his identification of the jacket by preventing him from perfecting his impeachment of Pardo's identification based on its misapplication of Illinois' rules of evidence. Without the officer's testimony, Pardo's identification was not fully impeached. *See United States v. Rivas*, 831 F.3d 931, 934 (7th Cir. 2016) ("A Sixth Amendment violation occurs when cross- examination limitations . . . deny the defendant the opportunity to elicit testimony that would be relevant and material to the defense." (internal quotation marks omitted)); *United States v. Scott*, 145 F.3d 878, 888 (7th Cir. 1998) ("In determining whether the Sixth Amendment is implicated in a cross-examination denial, we focus on whether there was sufficient information presented to the jury for its appraisal of the witness."). At most, the jury learned that Pardo could not recall his previous description of the jacket. But it did not learn that the jacket he described that night actually varied in a significant manner from the jacket submitted into evidence at trial.

While implicitly conceding error, the Appellate Court nonetheless concluded that the trial court's error was harmless. The harmless error analysis applies when a court has denied a defendant an opportunity to impeach a witness in violation of the Confrontation Clause. *Van Arsdall*, 475 U.S. at 684. In undertaking the harmless error analysis in a

Confrontation Clause case, courts consider a variety 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.

Id.

Here, the Appellate Court found that the trial court's error was harmless beyond a reasonable doubt. In reaching that conclusion, it failed to address any of the factors courts look to in determining whether a Confrontation Clause violation is harmless. Instead, it simply stated that the discrepancies between Pardo's earlier description of the jacket and the jacket submitted to the jury were minor. The Court disagrees with the characterization of those inconsistencies as minor. While Pardo told the police that the jacket had black just around the collar area, Houghtaling's jacket submitted into evidence had an entirely green collar. The Appellate Court dismissed the inconsistency by pointing out a small black patch underneath the collar. However, a small black embellishment underneath the back of the collar hardly equates to black around the collar. In addition, the Appellate Court excused Pardo's earlier failure to observe a zipper by noting that the zipper on Houghtaling's jacket was obscured by a flap. That conclusion is more justifiable, although the flap

itself quite visibly divides the jacket in the same manner as a zipper. Finally, the Appellate Court simply ignores the fact that Pardo previously stated that the green jacket had no pockets in the front even though the jacket viewed by the jury had three large and easily visible front pockets. Thus, the jacket seen by the jury had at least two significant deviations from the jacket Pardo described to police.

The Appellate Court further asserted that the jury was made aware of inconsistencies in Pardo's identification of the jacket because on direct examination Pardo described a green jacket, but the jurors viewed the jacket and saw areas of black. Furthermore, the Appellate Court noted that in his closing statement, Smith argued that Pardo could not recall whether he told the police that the jacket had zippers or pockets and therefore had put the issue of Pardo's lack of memory before the jurors. Both these contentions simply highlight the Appellate Court's critical analytical error. The issue was not simply about Houghtaling's imperfect memory. Rather, it was about the fact that his memory of the jacket at trial—almost eleven years after Burrito Express shooting—was inconsistent with his description given just hours after the shooting. And the jury never learned of that inconsistency. The excluded testimony would have directly called Pardo's trial identification of the green jacket into question by highlighting how it materially differed from his near-contemporaneous description of the jacket to police.

Applying the *Van Arsdall* factors demonstrates the substantial and injurious influence the trial court's error had on the jury verdict. First, as the sole

available eyewitness to the crime, Pardo's testimony was undeniably critical to the prosecution's case. Similarly, his testimony was not cumulative because Pardo was the only person who could describe the green jacket worn by the masked man without a gun to the jury. And not only was there no evidence corroborating Pardo's identification of Houghtaling's green jacket worn as the same one worn by one of the masked men, but the trial court excluded the only available evidence contradicting Pardo's testimony when it prohibited Smith from perfecting his impeachment. Thus, Smith was effectively prevented from impeaching the only eyewitness testimony linking Houghtaling, and therefore Smith, to the scene of the crime.

Finally, and most critically, the Court must consider the strength of the prosecution's case. As explained above, the prosecution's case against Smith was extremely weak. Its primary evidence in support of Smith's guilt were Houghtaling's recanted confessions and the green jacket. And Pardo's identification of the green jacket worn was key to tying Houghtaling and Smith to the scene of the crime. In turn, that link easily could have led the jury to believe Houghtaling's confession over the DeCicco Group's various confessions. But without the perfected impeachment, "the jury was left without key facts relevant to" evaluating the credibility of Pardo's trial identification. *Rhodes*, 903 F.3d at 667; *see also Van Arsdall*, 475 U.S. at 680 (holding that there is a violation of the Confrontation Clause when a "reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense] counsel been permitted to pursue his

proposed line of cross-examination"); *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011) ("A rigorous cross-examination may bring to light a variety of reasons to doubt a witness's testimony, ranging from innocent failures in perception and memory to biases, prejudices, or ulterior motives, or outright inconsistencies and falsehoods."). In a case built on a legally sufficient but extremely weak evidentiary foundation, the trial court's erroneous exclusion of admissible impeachment testimony had a substantial injurious effect on the jury's deliberations to Smith's great prejudice. Consequently, the Appellate Court's conclusion that the trial court's error was harmless was an unreasonable application of clearly established federal law.

ii. Limitation on Houghtaling's Cross-Examination

The trial court limited Houghtaling's cross-examination in two ways. First, it precluded Smith from asking Houghtaling questions about how he learned of basic facts concerning the shooting that he supplied in his recanted confessions. It also sustained the State's objections to questions seeking to elicit testimony concerning Houghtaling's refusal to testify at the first trial. Smith argues that by affirming the trial court's limitations, the Appellate Court violated his rights under the Confrontation Clause.

The jury did hear Houghtaling testify that, prior his Omaha interrogation, he had learned details of the Burrito Express shooting from newspaper articles and word of mouth. When Smith began to ask about where Houghtaling learned each discrete fact he

disclosed during that interview, the State objected and the trial court sustained its objections due to lack of foundation. The trial court insisted that, for each fact, Houghtaling needed to supply which newspaper or person he learned the fact from. Given the passage of time, Houghtaling was not able to supply such detail and consequently Smith abandoned this line of questioning. The Appellate Court agreed with the trial court's decision to exclude the testimony for lack of foundation.

This Court finds that the Appellate Court did not unreasonably apply *Davis* and *Van Arsdall* in foreclosing Smith from questioning Houghtaling as to where he learned each individual fact he supplied in his first confession. Judges are permitted to impose reasonable limits on cross- examination. *Van Arsdall*, 475 U.S. at 679. This particular limitation was not unreasonable. The jury heard Houghtaling testify generally that he learned about the crimes from the press and word of mouth. Furthermore, it learned during trial that each of the facts that Houghtaling set forth in his confession was publicly known at the time, a point that Smith emphasized in his closing argument. Allowing Houghtaling to testify how he learned each fact he disclosed to the police would not significantly add to what the jury already knew. Thus, there was no Sixth Amendment violation because the trial court's limitation did not prevent Smith from eliciting testimony that was relevant and material to his defense. *See Rivas*, 831 F.3d at 934.

Smith further argues that the Appellate Court committed a clear factual error in affirming the trial court's exclusion of Houghtaling's testimony that he

refused to testify at Smith's first trial because Smith was innocent. The Appellate Court concluded that Houghtaling's decision not to testify does not necessarily reflect that he would have exculpated Smith. Instead, Smith may well have inculpated him. In response, Smith says that the Appellate Court's conclusion is belied by Smith's offer of proof that Houghtaling would testify that the reason for his refusal to testify is because he believed that neither he nor Smith was involved in the Burrito Express shooting.

The Appellate Court determined that Houghtaling's testimony was a prior consistent statement used to corroborate his testimony at the third trial and thus was only admissible to rebut an accusation that Houghtaling was motivated to lie or his testimony was of recent fabrication. *See People v. Smith*, 841 N.E.2d 489, 504–505 (Ill. App. Ct. 2005) ("A witness's prior consistent statement is admissible only to rebut a charge or inference that he was motivated to lie or that his testimony was of recent fabrication, so long as he made the prior statement before either the motive arose or the alleged fabrication was made."). In observing that Houghtaling may well have inculpated Smith at the first trial, the Appellate Court was simply explaining its conclusion that Houghtaling's invocation of the Fifth Amendment was not necessarily corroborative of his testimony at the third trial. That conclusion was not unreasonable, as Houghtaling's explanation of his refusal to testify at Smith's first trial—made almost eight years after the fact—does not irrefutably establish the substance of what his testimony at the first trial would have been. As an additional basis for

affirming the trial court, the Appellate Court explained that Houghtaling's testimony was inadmissible because Smith failed to establish that Houghtaling did not have the same motivation to lie at the first trial as he did at the third trial. Presumably, Houghtaling's motive to lie at Smith's most recent trial was to protect Smith, and there is no reason to believe that the same motive did not exist when he refused to testify at the first trial. Consequently, excluding Houghtaling's testimony about his refusal to testify at Smith's first trial was reasonable. And given all the other testimony and evidence the jury heard concerning Houghtaling's belief in Smith's innocence, this limitation on cross-examination did not violate the Sixth Amendment.

iii. Limitation on Wigman's Cross-Examination

During Wigman's testimony, Smith attempted to ask questions regarding the John Reid interrogation method. His purpose for this line of questioning was to show that Houghtaling's first confession was unreliable and did not contain any corroborating details. The trial court excluded the testimony as irrelevant because Wigman was not the officer who interrogated Houghtaling in Omaha. In affirming, the Appellate Court also noted that the testimony would have been cumulative since the officer that did interview Houghtaling, Brogan, was cross-examined concerning the John Reid method.

The Court agrees that the excluded testimony was cumulative. While Wigman may have been able to add additional details not elicited from Brogan, Smith fails to explain what exactly Wigman would

add to Brogan's testimony or how any additional information would have been more than marginally relevant. The Sixth Amendment guarantees only the "opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Van Arsdall*, 475 U.S. at 679. Here, Smith had the opportunity to cross-examine a witness regarding the John Reid method. The fact that he was unable to engage in a similar line of questioning with another witness, by itself, does not amount to a Sixth Amendment violation.

C. Cumulative Error

In addition to the previously identified constitutional errors, Smith argues that there were several other trial errors that, taken together, deprived him of his due process right to a fair trial. Normally, "[b]ecause a state trial court's evidentiary rulings . . . turn on state law, these are matters that are usually beyond the scope of federal habeas review." *Perruquet v. Briley*, 390 F.3d 505, 511 (7th Cir. 2004). Such errors are only cognizable by a habeas court when the "erroneous evidentiary rulings were so prejudicial that they compromised the petitioner's due process right to a fundamentally fair trial." *Anderson*, 243 F.3d at 1053 (internal quotation marks omitted). The Supreme Court has held that trial errors that, when considered alone, were harmless may nonetheless violate the due process guarantee of fundamental fairness when considered cumulatively. *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978). In the Seventh Circuit, a habeas court may consider whether the cumulative effect of a trial

court's harmless errors violated a defendant's due process rights. *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000) ("Trial errors which in isolation are harmless might, when aggregated, alter the course of a trial so as to violate a petitioner's right to due process of law.").[9]

Smith asserts that his cumulative error claim is subject to *de novo* review rather than AEDPA deference. Specifically, he says that while the Appellate Court recognized two harmless errors, it failed to adjudicate his cumulative error claim on the merits because it did not consider whether the errors were still harmless when considered collectively. Smith is incorrect, as the Appellate Court explicitly stated that "[l]ooking at the matters cumulatively, the record reveals that the trial, taken as a whole, was fair." *Smith*, 2013 WL 2382284, at *52. And while it cited only state law cases, those cases contained no indication or state law procedural principles suggesting the federal issue was not also decided. As a result, the Court will apply AEDPA deference to Smith's cumulative error claim.

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[9] Not all Circuits accept that cumulative error is cognizable on habeas review. *See Dixon v. Hardy*, No. 10 C 06727, 2013 WL 5518902, at *6 (N.D. Ill. Oct. 4, 2013) (noting that the Fourth, Sixth, and Eighth Circuits do not recognize cumulative error claims as cognizable in habeas proceedings). In *Alvarez*, the Seventh Circuit recognized as much but declined to consider the issue because neither party raised it. Notwithstanding this caveat, the Seventh Circuit has subsequently treated *Alvarez* as standing for the proposition that a claim of cumulative error is cognizable in habeas proceedings. *See Anderson*, 243 F.3d at 1055.

i. Additional State Court Evidentiary Errors

In undertaking its cumulative error review, Smith asks the Court to consider not only the trial court's errors of constitutional significance, but also four additional errors predicated on the misapplication of Illinois evidentiary rules.[10] Thus, the Court will first consider whether those additional evidentiary rulings were in fact erroneous before undertaking its cumulative error review.

a) Weisenberger's Testimony About Drug Use

Over Smith's objection, the trial court allowed Smith's friend Jimmy Weisenberger to testify about his own drug use and that Smith, Houghtaling, and Collett were smoking marijuana the night of the shooting. Both the State and the Appellate Court concede that this decision was an error. Nonetheless, the Appellate Court agreed with the State that the error was harmless, as it was cumulative of a statement Houghtaling made during his Omaha confession that he was smoking a joint the night of the shooting with his purported accomplices. Because the court's evidentiary ruling was concededly an

[10] Normally, the rule is that errors that are purely errors of state evidence law cannot be the basis for habeas relief. *Buie v. McAdory*, 341 F.3d 623, 625 (7th Cir. 2003). While it seems incongruous then for a federal court to review the merits of a state court's evidentiary rulings as part of a cumulative error claim, Seventh Circuit precedent suggests that it is permissible. *See Anderson*, 243 F.3d at 1053–55. In any case, to the extent such rulings are not reviewable even when determining cumulative error, the State has failed to raise that argument and therefore it is waived. *Sanders v. Cotton*, 398 F.3d 572, 582 (7th Cir. 2005).

error, the Court will consider it in the cumulative error analysis.

b) Brogan's Testimony Repeating Hearsay from McMullan

During cross-examination, Smith asked Sergeant Brogan, the lead detective investigating the Burrito Express shooting, why he believed the weapon used in the shooting was a revolver. In response, Brogan stated that the police "believed it was a revolver based on statements made by Miss McMullan." (App., Ex. 23, at R006380.) At that point, Smith attempted to withdraw the question. However, the State objected, and the trial court instructed Brogan to finish his response. Brogan proceeded to testify that "Miss McMullan, for one, told us that she had seen Kenneth Smith with a revolver." Smith objected to the testimony, but the trial court overruled the objection because it was in response to Smith's own question.

Smith argues that Brogan's testimony was non-responsive and designed to place inadmissible evidence before the jury. He contends that the State declined to call McMullan because of concerns about her truthfulness and therefore it should not have been allowed to bring her statements favorable to its case through Brogan. However, the Appellate Court affirmed the admission of that testimony, finding that Smith had invited the error.

Under the invited error doctrine, a defendant is barred "from claiming error in the admission of improper evidence where the admission was procured or invited by the defendant." *People v. Harvey*, 813

N.E.2d 181, 192 (Ill. 2004). Here, the Appellate Court held that because Smith elicited Brogan's testimony through his cross-examination, Smith invited the error. The Illinois Supreme Court has held that the State is "not responsible for the questions asked by the defense counsel on cross-examination nor the answers thereto given by the State's witness." *People v. Burris*, 273 N.E.2d 605, 610 (Ill. 1971). And courts have applied the doctrine where a defendant's question on cross-examination elicits improper testimony that otherwise would be excludable. *See, e.g.*, *People v. Gray*, 520 N.E.2d 93, 97 (Ill. App. Ct. 1988) ("It would be, of course, improper for the State to elicit evidence of a defendant's election to remain silent after receiving the *Miranda* warnings. However, here the information was given as an answer to a question by defense counsel during cross-examination." (citation omitted)). The Appellate Court did not err in finding that the doctrine applied to Brogan's testimony regarding McMullan's statement. Smith cannot ask a question and then withdraw it when he realizes that he is receiving an answer that is unhelpful or even detrimental to his case. For this reason, the admission of McMullan's statement will not be included in the cumulative error analysis.

c) Collett's Statements

Smith contends that the Appellate Court erred in affirming the admission of several out-of- court statements made by Smith's purported accomplice, David Collett. In particular, Smith asserts that the trial court should not have allowed the admission of Collett's guilty plea based on his alleged role in the

Burrito Express shooting, his apology to Briseno's family at his sentencing hearing, and three statements he made to police regarding events on the night of the shooting.

Each contested statement was admitted under Illinois' prior inconsistent statement exception to the rule against hearsay. In Illinois, a prior inconsistent statement is not rendered inadmissible by the hearsay rule and may be admitted as substantive evidence if

> (a) the statement is inconsistent with [the witness's] testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement—
>
> (1) was made under oath at a trial, hearing, or other proceeding, or
>
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
>
> . . .
>
> (B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding . . . .

725 ILCS 5/115-10.1. A statement that fails to meet any of the above criteria can still be used for impeachment purposes. *Id.* However, a prior inconsistent statement is only admissible to impeach a party's own witness where the witness's testimony "does 'affirmative damage' to the party's case." *People v. McCarter*, 897 N.E.2d 265, 278 (Ill. App. Ct. 2008).

The Appellate Court held that Smith had forfeited any challenge to the substantive admission of Collett's prior inconsistent statements because he conceded in his post-trial motion that the statements met the requirements of 725 ILCS 5/115-10.1. Smith denies any such forfeiture and asserts that the record shows that he made multiple objections to the admission of the statements. It is true that Smith did object to the admission of the statements. However, at trial, the basis for his objections was that Collett had not affirmatively damaged the State's case and therefore his inconsistent statements were inadmissible for impeachment. And where a party makes a specific objection, he "waive[s] all grounds not specified." *People v. Eyler*, 549 N.E.2d 268, 289 (Ill. 1989). Nonetheless, in his post-trial motion, Smith explained that "the State's sole purpose for calling [Collett] was to impeach [him] with [his] prior statements," and those statements were hearsay that "would have been inadmissible except as impeachment." (App., Ex. 6 at C004109, Dkt. No. 1-1.) Although Smith primarily challenged the admissibility of the statements for impeachment, implicit in his assertion that the statements could be admissible only for impeachment was an objection to their substantive use as well. Thus, the Appellate

Court was incorrect to find that Smith forfeited any challenge to the substantive use of the statements.

Despite its finding of forfeiture, the Appellate Court nonetheless conducted plain error review of Smith's challenges to the substantive admission of Collett's prior inconsistent statements and concluded that the trial court had committed no error in admitting them. This Court analyzes each challenged statement in turn.

First, while Smith states that Collett's guilty plea was improperly admitted, he does not make an argument as to why it is not admissible under 725 ILCS 5/115-10.1. The fact that Collett testified that it was a plea of convenience makes no difference. A prior inconsistent statement "does not have to directly contradict the testimony given at trial to be considered 'inconsistent.'" so long as the statement "has a tendency to contradict the trial testimony." *People v. Zurita*, 693 N.E.2d 887, 891 (Ill. App. Ct. 1998). "Inconsistencies may be found in evasive answers, silence, or changes in position." *Id.* Thus, Collett pleading guilty to his role in the Burrito Express shooting certainly is inconsistent with his trial testimony that he had "no clue" who attempted to rob the Burrito Express.

Next, Smith argues that Collett's apology to Briseno's widow at his sentencing hearing was not inconsistent because he did not admit his guilt. It is true that Collett's apology did not directly admit guilt, but a direct admission was not necessary for the statement to be deemed inconsistent. At the very least, the apology had the tendency to contradict his

testimony that he had no knowledge concerning the shooting. While the apology is undoubtedly open to interpretation, the Appellate Court could reasonably conclude that the trial court did not abuse its discretion by finding that Collett's apology was not for Briseno's widow's grief, but for his role in causing the grief. *See id.* ("The determination of whether a witness's prior testimony is inconsistent with his present testimony is left to the sound discretion of the trial court."). Moreover, by saying during his apology that "if I would have known that any of this would have happened, I really would have tried to do something to stop it," Collett at least implicitly suggests some knowledge. Again, the language is open to multiple interpretations, but one reasonable interpretation is that Collett confessed that he was sufficiently involved in the crime such that he was in the position to stop it.

Finally, Smith challenges several statements Collett made to police two months after the shooting. At trial, Collett said on the night of the shooting he was walking to Cloud 9 when he heard a noise that sounded like a car backfiring. By contrast, in his statement to police, Collett described hearing gunshots. Smith argues that Collett's statement to the police was taken out of context. What he said was that he heard what sounded like a car backfiring and then answered in the affirmative when the police asked whether the sound could have been gunshots. The Appellate Court found that it did not matter that the police first suggested the possibility that the sound could be gunshots. What mattered is that Collett agreed. And by not mentioning in his testimony at trial the possibility that the sound could

have been gunshots, Collett's answer could be deemed sufficiently evasive such that the trial court did not abuse its discretion in deeming his statement to police inconsistent.

In addition, Collett told the police that shortly after the shooting, Smith told him that some kids robbed the Burrito Express. And when Collett asked Smith what happened at the Burrito Express, Smith replied "just had some fun." Smith argues that those statements were not substantively admissible because they do not meet the personal knowledge requirement of 725 ILCS 5/115-10.1. "For the personal knowledge requirement to be satisfied, the witness whose prior inconsistent statement is being offered into evidence must actually have seen the events which are the subject of that statement." *McCarter*, 897 N.E.2d at 276 (internal quotation marks omitted). However, personal knowledge requires that "the witness must have observed the events being spoken of, rather than simply hearing about them afterwards." *Id.* Here, Smith contends that Collett's statements failed to meet the personal knowledge requirement because he was simply recounting what Smith told him. The Appellate Court found that its decision was controlled by an Illinois Supreme Court precedent finding admissible as a prior inconsistent statement a witness's statement in which she recounted hearing the defendant confess to the crime during the course of an argument with a third person. *See People v. Thomas*, 687 N.E.2d 892, 902–03 (Ill. 1997). Instead of requiring the witness to have personal knowledge of the underlying crime, the Illinois Supreme Court simply held it sufficient that the witness saw "the argument between defendant

and [the third person] and her statement described and narrated the event." *Id.* at 902. While the Appellate Court noted that other Illinois appellate courts have uniformly disagreed that *Thomas* established a rule that personal knowledge encompasses not just what a witness has seen but what he has been told, *see People v. Morgason*, 726 N.E.2d 749, 753–54 (Ill. App. Ct. 2000), it nonetheless felt itself bound by the *Thomas* precedent. On habeas review, where courts generally do not revisit purely state law evidentiary issues, this Court does not believe it appropriate to wade in on the disagreement between appellate courts concerning the impact of *Thomas*. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."). For present purposes, it is enough that the Appellate Court's decision was grounded in Illinois Supreme Court precedent.

In addition, the Appellate Court also concluded that the contested statements were admissible for impeachment because Collett's trial testimony affirmatively damaged its case. "For witness testimony to be affirmatively damaging, it must do more than fail to support the State's position; it must give 'positive aid' to the defendant's case, for instance, by being inconsistent with the defendant's guilt under the State's theory of the case." *McCarter*, 897 N.E.2d at 278. Here, Collett's testimony that he had no clue who robbed the Burrito Express affirmatively damaged the State's case. The State's theory of the case was that Collett acted as a lookout while Smith

and Houghtaling robbed the restaurant. That theory was supported by Houghtaling's Omaha confession and his testimony at Smith's second trial, where he stated that Collett and McMullan were waiting in the car to which Smith and Houghtaling fled immediately after the shooting. By testifying that he had no knowledge of who was involved in the shooting, Collett went further than simply giving the State an answer that did not support its theory of the case; he also contradicted important evidence in support of its theory. *See People v. Amato*, 471 N.E.2d 928, 930 (Ill. App. Ct. 1984) ("No possible reason exists to impeach a witness who has not contradicted any of the impeaching party's evidence, except to bring inadmissible hearsay to the attention of the jury."). Moreover, it positively aided Smith's case because it lent credence to his insistence that he, Collett, Houghtaling, and McMullan were not involved in the shooting. Consequently, Collett's statements were properly admitted for impeachment.

d) Briseno's Autopsy Photographs

Smith also complains that the Appellate Court erred by affirming the trial court's admission of graphic autopsy photos of Briseno's body. The photos were introduced into evidence at Smith's second trial over his objection. On appeal from that conviction, the Appellate Court agreed that the photos were gruesome, but they were nonetheless relevant to corroborate Pardo's testimony that Briseno coughed up blood after being shot. At his third trial, Smith again objected to the introduction of the photos into evidence. However, the trial court overruled his objection and the Appellate Court again affirmed, this

time finding that the law of the case doctrine precluded it from revisiting the issue.

This Court reviews the Appellate Court's decision in the appeal from the second trial, as it is the last court to address the merits of the issue. *See Garth v. Davis*, 470 F.3d 702, 710 (7th Cir. 2006) (noting that on habeas review, the "relevant state court decision is that of the last state court to address the claim on the merits"). Generally, "[t]he decision of whether a jury should be allowed to see photographs of a decedent is a decision that rests within the sound discretion of the trial judge." *People v. Chapman*, 743 N.E.2d 48, 69 (Ill. 2000). And in a murder case, admitting photographs of the victim is proper where they are submitted "to prove the nature and extent of the injuries." *Id.* That is exactly the purpose for which Briseno's autopsy photos were admitted. Thus, there is no basis for finding that the Appellate Court erred in concluding that the trial court did not abuse its discretion in allowing the jury to see the photos.

ii. Whether the Cumulative Errors Denied Smith a Fair Trial

To succeed on a cumulative error claim, a habeas petitioner must establish two elements: "(1) at least two errors were committed in the course of the trial; [and] (2) considered together, along with the entire record, the multiple errors so infected the jury's deliberation that they denied the petitioner a fundamentally fair trial." *Alvarez*, 225 F.3d at 824. Here, the first element of a cumulative error claim has been satisfied. Already, the Appellate Court conceded two errors arising from the trial court's

decision to prevent Smith from perfecting his impeachment of Pardo's identification of the green jacket and its admission of Weisenberger's testimony about his past drug use and Smith's use of marijuana on the night of the shooting. This Court has further found that the trial court committed two more errors of a constitutional magnitude by excluding testimony regarding Briseno's drug dealing and Hiland's confession to a defense lawyer. (It also found that the trial court's error in preventing Smith from perfecting his impeachment of Pardo to be an error of constitutional magnitude.) Accepting each of the four errors as harmless,[11] the Court now must determine whether, taken together, the errors deprived Smith of a fundamentally fair trial.

The due process guarantee of a fundamentally fair trial entitles a defendant a fair trial, but not a perfect one. *Alvarez*, 225 F.3d at 825. When considering the significance of evidentiary errors, "a court must examine 'the entire record, paying particular attention to the nature and number of alleged errors committed; their interrelationship, if any, and their combined effect; how the trial court dealt with the errors, including the efficacy of any remedial measures; and the strength of the prosecution's case.'" *Anderson*, 243 F.3d at 1053 (quoting *Alvarez*, 225 F.3d at 825). At the same time, a habeas court should "be careful not to magnify the significance of errors which had little importance in the trial setting." *Alvarez*, 225 F.3d at 825. Relief is

[11] While the Court holds that each of the three constitutional errors identified above in Section II.B were not harmless and therefore standing alone warrant a new trial, it will treat them as harmless for the purpose of its cumulative error analysis.

warranted only where the court is "firmly convinced that but for the errors, the outcome of the trial probably would have been different." *Id*

As discussed above, the trial court's evidentiary errors significantly impaired Smith's ability both to introduce important evidence in his defense, and also to impeach evidence critical to the State's case. The constitutional errors in particular were far from minor. Testimony concerning the DeCicco Group's knowledge of Briseno's drug dealing was critical in establishing why the DeCicco Group targeted the Burrito Express. Without the evidence, the jury was faced with confessions on both sides but no clear motive for either to specifically target the Burrito Express. Had the jury heard the excluded testimony, it would have bolstered the credibility of the DeCicco Group's confessions. In particular, Smith argued that the evidence showed that the DeCicco Group ran out of drugs and were looking for money to buy more. Had the jury heard that members of the DeCicco Group previously learned that Briseno kept drugs and money at the Burrito Express, it very well could have believed that individuals looking for money for drugs would be drawn to rob a restaurant that they believed was a source of both. Such motive evidence could have tilted the scales for a jury weighing the credibility of DeCicco Group's many confessions against Houghtaling's confessions. Further, the jury did not learn that Hiland confessed in front of a defense attorney. The fact that Hiland sought out legal counsel could have bolstered the reliability of his confession because it would have tended to show that he believed he was in real legal jeopardy and his confession was not simply empty bluster. Ultimately,

the trial hinged in large degree upon which set of confessions the jury believed. And the trial court's erroneous exclusion of motive evidence was compounded by the exclusion of evidence bearing on the trustworthiness of the confession of one member of the DeCicco Group, such that in conjunction they were not harmless but in fact deprived Smith of a fundamentally fair trial.

Those errors were only further magnified by the trial court's erroneous limitation of cross-examination. Another important piece of evidence tying Smith to the crime was Pardo's identification of Houghtaling's green jacket as the same one worn by the masked man without the gun. Yet, immediately after the shooting, Pardo described a different green jacket than the one submitted to the jury. Thus, the trial court excluded both evidence that would bolster exculpating evidence while limiting Smith from properly impeaching a witness as to important inculpating evidence. The combined effect of these erroneous exclusions significantly weakened Smith's defense.

In addition, the trial court admitted prejudicial evidence concerning a defense witness's drug use. That witness testified to seeing Smith, Houghtaling, Collett, and McMullan just after the shooting and observing no blood or scratches on their bodies. Then, he rode in the purported getaway car and did not observe any blood, masks, bullets, or a gun in the car. The witness's testimony tended to show that Smith and his friends were not involved in the Burrito Express shooting. Yet, the jury might have discounted his testimony due to the fact that he had previously

used drugs. *See United States v. Galati*, 230 F.3d 254, 262 (7th Cir. 2000) ("Frequently, evidence that a witness has used illegal drugs may so prejudice the jury that it will excessively discount the witness' testimony." (internal quotation marks omitted)). Similarly, his testimony that Smith used marijuana the night of the crime may well have inflamed the jury against him. *See Brinkley v. Santiago*, No. 11 C 6282, 2013 WL 12309671, at *2 (N.D. Ill. July 11, 2013) (excluding evidence of a party's use of alcohol and marijuana because it would "raise the danger of unfair prejudice in the jury because of distaste for substance abusers"). While the testimony by itself likely did not have a decisive impact on the jury's verdict, when combined with the three constitutional errors, its admission further tipped the scales of justice against Smith.

Given the weakness of the prosecution's case against Smith, the combined effect of the four evidentiary errors had a highly significant effect. The Court has already explained the various weaknesses of the State's evidence against Smith. And due to the trial court's evidentiary errors, Smith was deprived of important opportunities to cast additional doubt on the State's case against him. Nor were the errors directed to minor or ancillary matters. Rather, they affected core components of both the State's case and Smith's defense. Viewing these errors cumulatively in light of the entire record, this Court concludes that, but for the errors, Smith probably would have been acquitted. The Appellate Court's conclusion to the contrary was an unreasonable application of *Taylor v. Kentucky*.

* * *

In sum, the Appellate Court affirmed three trial court errors that violated Smith'sconstitutional rights. Specifically, the Appellate Court's decision improperly affirmed evidentiary exclusions that violated Smith's right to present a complete defense and his right to engage in effective cross-examination. Although the trial court's errors were not harmless, even if they were, when evaluated cumulatively they deprived Smith of his right to a fundamentally fair trial. For that reason, Smith's petition for habeas corpus is granted and his convictions and sentence are vacated, subject to the State's decision to retry him.

CONCLUSION

For the foregoing reasons, Smith's petition for a writ of habeas corpus (Dkt. No. 1) is granted due to evidentiary errors that violated his constitutional rights. This Court accordingly orders that the State either initiate proceedings to retry Smith within 120 days or release him from custody immediately. The Clerk is directed to enter Judgment in favor of Smith.

ENTERED:

Dated: March 10, 2020 /s/ Andrea R. Wood
Andrea R. Wood
United States District Judge

APPENDIX C

Supreme Court of the United States

Kenneth SMITH, petitioner,
v.
Illinois.
No. 13-883.

March 24, 2014.

Case below, 2013 IL App (2d) 120508-U.

Petition for writ of certiorari to the Appellate Court of Illinois, Second District, denied.

APPENDIX D

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Illinois Dispositions of Petitions for Leave to Appeal".)

Supreme Court of Illinois

People
v.
Kenneth E. Smith

No. 116291

SEPTEMBER TERM, 2013
September 25, 2013

Lower Court: No. 2-12-0508

Disposition: Denied.

APPENDIX E

2013 IL App (2d) 120508-U
No. 2-12-0508
Order filed May 29, 2013

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 01-CF-363
KENNETH SMITH,	)	Honorable Sharon L. Prather, Judge, Presiding.
Defendant-Appellant.	)	

JUSTICE JORGENSEN delivered the judgment of the court. Justices Zenoff and Spence concurred in the judgment.

ORDER

Justice JORGENSEN delivered the judgment of the court:

¶ 1 *Held:* The evidence was sufficient to sustain defendant's conviction of first-degree murder and attempt armed robbery. The court's evidentiary rulings did not deprive defendant of a fair trial. Affirmed.

¶ 2 Following a *third* jury trial, defendant, Kenneth Smith, was convicted of two counts of first-degree murder (720 ILCS 5/9–1(a)(2), (3) (West 2002)) and one count of attempt armed robbery (720 ILCS 5/8–4(a), 18–2(a)(2) (West 2002)). After the court merged the murder convictions, defendant was sentenced to 67 years' imprisonment for first-degree murder (including a 25–year add-on for discharging the firearm (730 ILCS 5/5–8–1(d)(3) (West 2002))) and a concurrent 7 years' imprisonment for attempt armed robbery. Defendant appeals, arguing that: (1) the evidence was insufficient to sustain his convictions; and (2) numerous evidentiary rulings constituted an abuse of discretion and violated his due process rights. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On March 6, 2001, two masked men attempted to rob the Burrito Express restaurant in McHenry and one of them shot and killed its owner, Raul Briseno. In May 2001, defendant (age 25), Justin Houghtaling (19), Jennifer McMullan (19 and defendant's girlfriend), and David Collett (18) were arrested for the incident. On May 12, 2001, Houghtaling was

arrested in Omaha, Nebraska, and gave a statement to police, implicating himself and defendant. The State indicted defendant on May 31, 2001, based on Houghtaling's statement. Houghtaling pleaded guilty on November 14, 2001, and was sentenced to 20 years' imprisonment in exchange for his testimony against the others. Collett also pleaded guilty. Following a trial that included Houghtaling's testimony, McMullan was convicted of first-degree murder and attempt armed robbery; she was sentenced to 27 years' imprisonment.

¶ 5 Defendant's first trial occurred in 2003. There, the State called Houghtaling, who refused to testify, invoking his fifth amendment right against self-incrimination (U.S. Const., amend. V; Ill. Const.1970, art. I, § 10). The trial court declared Houghtaling unavailable and allowed the State to present Houghtaling's testimony from McMullan's trial (implicating himself and defendant in the crimes). Defendant was convicted of attempt armed robbery and first-degree murder (and was also found to have personally discharged the firearm that proximately caused Briseno's death); he was sentenced to concurrent terms of 67 and 12 years' imprisonment. However, on appeal, this court reversed and remanded for a new trial, holding that, under the subsequently issued opinion in *Crawford v. Washington,* 541 U.S. 36, 53, 54 (2004)[1], Houghtaling's prior statements were testimonial, were admitted in violation of defendant's right to

[1] Holding that a testimonial statement, including testimony at a former trial, of a witness absent from trial may be admitted only if the witness is unavailable and if the defendant has had a prior opportunity to cross-examine the witness. *Id.*

confront witnesses, and that the error was not harmless because the testimony was the only direct evidence linking defendant to the shooting. This court remanded for a new trial after concluding that the remaining evidence, absent the erroneously admitted statements, was sufficient to prove defendant guilty beyond a reasonable doubt. *People v. Smith,* No. 2–03–1076 (2005) (unpublished order under Supreme Court Rule 23).

¶ 6 Defendant's second trial occurred in 2008. There, the State again called Houghtaling. On direct examination, Houghtaling testified that he and defendant robbed the Burrito Express. Specifically, at 7:20 p.m., on March 6, 2001, while wearing masks, they went to the restaurant and, with defendant holding a pistol, announced a robbery. Briseno then picked up a knife and chased Houghtaling and defendant outside. Houghtaling slipped on ice and the other man working with Briseno, Eduardo Pardo, grabbed him. Someone pulled up Houghtaling's ski mask. Briseno and Pardo wrestled with Houghtaling until defendant walked back, fired shots, and Briseno jerked and let go of Houghtaling. When Pardo let go, Houghtaling ran to McMullan's waiting car. Collett was in the rear of the car. Defendant told Houghtaling that he did what he had to do. The group then drove to a nearby house, where defendant's friend, James Weisenberger, resided, and they drank through the night and remained until the next morning. Houghtaling testified that he wore a green jacket on the night of the murder and that police later took the jacket. Houghtaling further testified that, in exchange for his testimony against defendant, he agreed to a plea deal with the State of 20 years'

imprisonment (he faced a possible sentence of 20 to 60 years).

¶ 7 On cross-examination at the second trial, however, Houghtaling recanted, stating that the testimony he had just given was not true and that he was being forced to lie because the State wanted to convict defendant. He testified that he had been with defendant, Collett, and McMullen that night and that the group had observed the police activity down the road, but were unaware of the shooting. On re-direct examination, the State impeached Houghtaling with statements he made to police in Omaha, Nebraska, in May 2001.

¶ 8 The defense's theory at the 2008 trial was that another group (not connected to defendant) committed the crime. This group, known as the DeCicco group, was linked to a gun—the Brummett gun—recovered in the case. The defense argued that Russell (Rusty) Levand killed Briseno. Defendant called Susanne Dallas DeCicco (Levand's one-time girlfriend) and Adam Hiland (age 15 and DeCicco's cousin), who each denied their involvement in the shooting. Defendant then sought to introduce their prior confessions, but the trial court barred the evidence of Hiland's confessions. Defendant was convicted of murder and attempt armed robbery and was sentenced to 67 years' imprisonment for murder and a concurrent term of 7 years' imprisonment for the attempt armed robbery conviction. On appeal, this court reversed and remanded for a new trial, holding that the trial court erred in: (1) not allowing the defense to impeach its own witness (Hiland) with a prior inconsistent statement because that witness's

testimony affirmatively damaged defendant's case; and (2) admitting certain character evidence. This court also determined that the evidence was sufficient to allow a retrial without a double jeopardy bar. *People v. Smith,* No. 2–08–1106 (2010) (unpublished order under Supreme Court Rule 23).[2]

¶ 9 At the third trial in 2012, which is the subject of this appeal, the State's theory was that defendant (carrying a .22–caliber handgun) and Houghtaling entered the Burrito Express, wearing ski masks and with the intention of robbing it. During the attempted robbery, Briseno pulled a knife and, along with his employee, Pardo, chased the two masked men out of the restaurant. Pardo caught Houghtaling after he slipped on a patch of ice and dragged him toward the restaurant. Defendant then started shooting, ultimately hitting Briseno, who died. Defendant and Houghtaling fled. Collett waited outside, and McMullen drove the getaway car.

¶ 10 The defense theory was, again, that defendant was not involved in the crimes and that the DeCicco group was involved.

¶ 11 A. Pretrial Proceedings

¶ 12 Prior to trial, defendant sought leave to admit evidence, specifically, Patrick Anderson's testimony, showing that Briseno sold cocaine from the Burrito Express and that Levand knew of Briseno's drug-dealing, giving Levand a motive to rob the restaurant.

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[2] Subsequently, Houghtaling was convicted of perjury based on his testimony at defendant's second trial.

¶ 13 Initially, defense counsel submitted a December 29, 2011, letter Anderson wrote to defense counsel while Anderson was incarcerated. He stated that, close to the time Briseno was shot, he and Levand went to the Burrito Express to purchase cocaine. Levand knew Briseno was the source of the cocaine Anderson sold, and Anderson had told him that, "at times," Briseno kept large amounts of money and cocaine at the restaurant. Anderson also stated that he had become friends with Briseno through a man named "Serge," who was a cook at one of Briseno's restaurants. Anderson would buy cocaine from Serge and Briseno, and he sold it in the McHenry area, including to DeCicco and Levand. Anderson further stated that, after the shooting, he had heard rumors that the DeCicco group committed the crime. In June or July 2011, while incarcerated in the McHenry County jail, he again met Levand, who confessed to him about the shooting after Anderson told him that he believed Levand had a motive to commit the crime since Anderson had told him that Briseno was his source. Finally, Anderson stated that he was coming forward with this information because he had once been wrongly accused and wished that someone had come forward to help him.

¶ 14 The State offered to stipulate that Anderson would testify in accordance with his letter. Following some discussion as to whether Anderson should be brought into court for a formal offer of proof, the trial court then inquired how defense counsel would overcome hearsay issues raised by the contents of the letter. Defense counsel argued to the court that Anderson's statements to Levand and Levand's

statements to Anderson were offered to show Levand's knowledge of Briseno's drug-dealing and not for the truth of any matters asserted. Defense counsel also argued that the letter was being offered to show what Levand did as a result of receiving that information and that this tended to show that defendant did not commit the crime and that somebody else did. The State argued that the evidence, including that of two other witnesses that defense counsel had sought to introduce, was "collateral" and "confusing" and did not relate to any alleged motive.[3]

¶ 15 The court initially noted that, at defendant's second trial, it had excluded the testimony of the other two individuals and that the only new evidence at the third trial was Anderson's letter. The trial court excluded Anderson's testimony, finding that the letter Anderson wrote "contains numerous hearsay statements that would be inadmissible." Further, it was "highly suspect" because Anderson came forward "ten years after the fact." The court further found that the letter did not establish a motive for the DeCicco group to commit a robbery and that there was "no

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[3] Defendant also sought to introduce testimony from Guilermo Quinones, an undercover operative with the Metropolitan Enforcement Group in Lake County, and Richard Solarz, a detective sergeant. Quinones would have testified that, less than six months before the shooting, he met Briseno and, on one occasion, spoke to him about his cocaine business and Briseno offered to sell him cocaine, which he subsequently did. Solarz would have testified that he conducted a search of the Burrito Express on March 7, 2001, with a K–9 handler and narcotics-sniffing dog. During the search, the dog indicated the possible detection of narcotics inside the restaurant. The trial court excluded this testimony.

close connection to the drugs and to this crime for which the defendant is on trial."

¶ 16 Defense counsel then requested the opportunity to make a live offer of proof, which the trial court granted. Anderson took the stand and testified that he is currently incarcerated for possession of a handgun by a felon and delivery of a controlled substance. He also has convictions for domestic battery, retail theft, and possession of a controlled substance. In 2001, he knew Briseno well and purchased cocaine from him (at least 20 times) through a man named Serge, who worked in one of Briseno's restaurants. Anderson stated that he never directly purchased cocaine from Briseno, but understood that the drugs Serge sold to him came from Briseno.[4] About one week before the March 2001 shooting, Levand (a friend Anderson knew from his school days) accompanied Anderson (in DeCicco's car) to the Burrito Express to purchase drugs from Serge. Levand learned from Anderson that Briseno was his source of the high quality cocaine he was purchasing. (In the live proffer, Anderson did not state, as he had in his letter, that he told Levand that Briseno was known to keep, "at times," large quantities of money and cocaine at the restaurant.)

¶ 17 Anderson also offered testimony about why he did not come forward prior to December 2011 with

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[4] Anderson explained that, at times, he and Serge would have to wait at the Burrito Express for Briseno to arrive, after which, Serge would run in and return with drugs. At other times, when Anderson believed he was charged an unfair price, he would speak to Briseno, who would tell him to speak to Serge and the price would be reduced.

this information. It was not until the summer of 2011 that Levand confessed to him while they were both at the McHenry County jail. "I always had an inkling after the situation in the parking lot, our conversation, and a week after the incident happened, you know, happening and me knowing Rusty, I always had an inclination. And that [*i.e.,* the confession] kind of confirmed it at that point." Anderson stated that he came forward with the information shortly thereafter because he had once been wrongly accused of a crime and he thought that, if someone had information to help him, he would have wanted that person to come forward. Anderson first tried to provide the information to authorities through a "tip line;" next, he sent the 2011 letter to defense counsel.

¶ 18 After Anderson took the stand to testify for a formal offer of proof, the trial court summarily reaffirmed its ruling excluding his drug testimony.

¶ 19 The defense also sought to exclude accomplices' Houghtaling's and Collett's testimony on the basis that the State had no good faith basis to call them and sought to call them solely to impeach them with out-of-court statements implicating defendant. The State argued with respect to Collett's testimony that he helped its case against defendant by placing defendant's group at the scene. As to Houghtaling's testimony, the assistant State's Attorney noted that he had not spoken to Houghtaling since the second trial and argued that, if Houghtaling recanted, he would be impeached with prior testimony, which could only help the State's case. When the trial court asked defense counsel to distinguish the defense's

calling DeCicco (who had also recanted) from the State's desire to call Houghtaling, defense counsel stated that its purpose in calling her was not to impeach her (because her confession was going to be substantively admitted), but to establish other facts: her group was near the crime scene, had a gun, and her car was burned after the fact. The trial court overruled defendant's objections. After trial commenced, defense counsel spoke with Houghtaling, who confirmed that he would deny any involvement in Briseno's death. Defendant renewed his objection before Houghtaling testified, and the trial court again overruled the objection.

¶ 20 B. Trial

¶ 21 1. Eduardo Pardo

¶ 22 Eduardo Pardo testified through an interpreter that he worked as a cook at the Burrito Express on March 6, 2001. At about 7:15 p.m. that day, two men wearing black masks (through which one could see only their eyes) entered the restaurant; one of them had a gun and wore dark clothing. Pardo was in the back area with Briseno. No customers were in the restaurant at this time. Pardo explained that the man with the gun, who was the taller of the two, entered first and spoke (in a language Pardo did not speak) while pointing the gun at Pardo and Briseno. Briseno, who had been preparing food before the men entered, raised the knife he had in his hand. The men ran out of the restaurant, and Briseno and Pardo chased after them. Pardo ran around in front of a nearby dry cleaners, and Briseno ran around the back of it.

¶ 23 The men ran across Third Street and ran out of sight between a house at the corner of Third Street and Waukegan Road. At some point when Pardo and Briseno were chasing the men, Pardo saw Briseno stop and talk to someone in a car, but he could not hear what was said. Across the street from the dry cleaners, behind the Sullivan's Foods store, Pardo saw the man who did not have a gun (whom the State asserted was Houghtaling). He wore a green jacket. Pardo saw no one else at this time. Pardo caught up to the man in the green jacket after the man slipped and fell (backwards) on ice. It was nighttime and dark out. Pardo called out to Briseno and told him that he had one of the men; Briseno instructed him to walk the man back to the restaurant and call police. Pardo grabbed the man's arms from behind, and then walked him back toward the restaurant. When they reached Third Street, Pardo stopped and heard a gunshot. Pardo saw the man who held the gun in the restaurant (defendant, under the State's theory), and he saw Briseno. The man fired again. Briseno was close to Pardo, and he was coming toward Pardo and the man in the green jacket; all of the men were across Third Street from the restaurant. Briseno asked Pardo to walk him to the store so that they could call the police. The man with the gun followed them. Pardo heard two gunshots. Pardo held the man in the green jacket from behind with his arms hooked underneath the man's arms and raised up toward his neck. Briseno walked next to them. Pardo walked backwards, and Briseno walked forward.

¶ 24 After the second group of shots, the man with the gun came closer to Pardo and Briseno and started to shoot again. Pardo heard Briseno make a sound kind

of like, "aah," and he spit blood out of his mouth. Briseno was facing the shooter and away from the man with the green jacket. Pardo could not see if Briseno spit any blood on the man wearing the green jacket. After Briseno spit blood, Pardo dropped the man in the green jacket, ran to the restaurant kitchen, and called 911. This took three to five minutes.

¶ 25 While Pardo was on the phone, he could see outside into the parking lot. He observed Briseno holding the man in the green jacket in front of him (with his arms outstretched and his hands just lightly on the shoulders) and using him as a shield. "[H]e was moving him around while the other person kept shooting." Briseno moved one-half step to the left and then one-half step to the right. After he called 911, Pardo exited the restaurant. The two men were gone. He saw Briseno lying face down. There was a lot of blood, including foamy blood coming out of his mouth. After about 10 minutes, the police arrived. While he waited, Pardo tried to stop some cars on Route 120 to get help.

¶ 26 Addressing whether he saw the face of the man in the green jacket, Pardo testified that, behind the grocery store and before he picked him up, Pardo pulled off the man's mask while the man was still on the ground. About two seconds passed from the time he pulled it off and when he grabbed the man from behind. Also, it was dark behind the store. Pardo got a good look at his face: he observed the man's silhouette and all of his facial features. Addressing the shooter, Pardo stated that, at one point, the shooter had pulled up his mask to just above his

eyebrows. The closest that Pardo got to the shooter after the shooter's mask was raised, and for only a couple seconds, was about 25 to 40 feet. Pardo further testified that he never saw a third man.

¶ 27 Subsequently, Pardo was interviewed by police and worked with a police sketch artist, who compiled sketches of the two men that he saw. When asked about the green jacket, Pardo described it as long and maybe made of leather. He could not recall if it had any other colors on it. Reviewing People's exhibit No. 66, Houghtaling's green jacket, Pardo stated that the jacket looked like the one he saw on the man during the shooting. (Houghtaling's jacket looks like green leather, does not have black around the collar, but has three front pockets and a zipper with a zipper flap; the jacket has areas of black on: the elbows, a patch just below the center of back of the collar, around the snaps for the zipper flap, horizontal strips above the lower pockets, and the logo on the breast pocket).

¶ 28 On cross-examination, Pardo testified that he could not recall telling a police interviewer four hours after the shooting that: the green jacket had some black and that the black was around the collar area, to his best recollection. He testified that he told the truth to the investigator, but was scared. Pardo also stated he could not recall if he told the investigator that he did not see any pockets on the front of the jacket, or that there was no zipper up the front.

¶ 29 According to Pardo, at one point, the shooter pointed a gun at him, while walking toward him with his mask pulled up above his forehead. Pardo had his back to the man and was running to call the police.

He could not recall if he saw facial hair on the man's chin. He also could not recall if he told the sketch artist whether the shooter had a beard or mustache. (The two resulting sketches do not depict men with any facial hair.) While working with the sketch artist and on another occasion two days after the shooting, Pardo was shown photographs by police. He never identified anyone in the photos (which included photos of defendant, Houghtaling, and Collett).

¶ 30 2. Lieutenant Gary Wigman, Joanne McIntyre, and Medical Testimony

¶ 31 Gary Wigman, a lieutenant in 2001 with the McHenry police department, was in charge of the crime scene. He testified that police used metal detectors and magnets in their search for the murder weapon. None of the physical evidence gathered was connected to defendant or any of his alleged accomplices. Also, police never recovered any potential murder weapon linked to defendant or Houghtaling. Wigman explained that there are two broad categories of handguns: automatics and revolvers. An automatic ejects bullet casings after firing, and a revolver does not. Police found no casings in the vicinity of the Burrito Express and, so, they concluded that the gun used was a revolver.

¶ 32 Wigman further testified that he attended Briseno's autopsy and observed a laceration and abrasion on his upper forehead. Wigman stated that he has training in interviewing and interrogations, including at the John Reid school. Some information concerning the investigation was not released to the public and press, including the fact that Briseno had

a head wound and that Pardo stated that Briseno had yelled into a passing car. This information was deliberately held back to assess the credibility of the people the police interviewed; if they had information that was not released, then that information carried more weight. The facts that were withheld from the public were included in the police reports that were eventually released to the defendants in the cases, as was the coroner's report. The fact of Briseno's head injury had not appeared in the press as of November 2001. Certain other information, including that the men wore ski masks and that Briseno struggled with one of the men in the parking lot, was released to the public. Wigman testified that warrants were obtained for the suspects in this case around May 6, 2001, and they were arrested either the following day or the day after that. After suspects are arrested, police reports are written and forwarded to the State's Attorney's office and any defendants. McMullen's 2002 trial and defendant's 2003 trial (both of which included testimony about Briseno's head wound) were covered in detail by the media.

¶ 33 Wigman confirmed that the police received leads concerning the DeCicco group members. On November 16, 2001, Wigman received a call from Vicki Brummett. He went to the Brummett residence and retrieved a .22–caliber revolver, which, under the defense's theory of the case, was linked to the crime. He forwarded the gun to the state police for testing; the gun was returned to its owner, David Brummett, on October 7, 2002. He spoke to the Brummetts five or six times.

¶ 34 Joanne McIntyre, an Illinois State Police firearms expert, testified that she examined the bullet recovered from Briseno's body and was able to identify the bullet as a .22–caliber long rifle bullet with six lands and grooves; she was unable to determine its twist. In December 2001, Mclntyre received the Brummett gun, a single-action revolver, and fired 10 test shots with it and examined the fired bullets alongside the bullet recovered from Briseno's body. The Brummett gun is a .22–caliber revolver with six lands and grooves with a right-hand twist. Mclntyre testified that she could not identify the Brummet gun as having fired the bullet that killed Briseno and she could not exclude it. Mclntyre further stated that a .22–caliber is a very common type of gun, as are six lands and grooves.

¶ 35 Dr. Larry Blum, a forensic pathologist, performed the autopsy on Briseno on March 7, 2001. Blum observed a laceration on Briseno's head caused by contact with a blunt object. He testified that the injury was consistent with being pistol-whipped with the barrel of a gun. The injury was not consistent with falling on pavement. However, Blum made no determination as to when the wound might have occurred in relation to Briseno's time of death.

¶ 36 3. Justin Houghtaling

¶ 37 (*a) Direct Testimony at Defendant's Third Trial*

¶ 38 In his direct testimony, Houghtaling denied any involvement in the shooting. He stated that he never went to the Burrito Express on March 6, 2001. Houghtaling had known defendant for about three

weeks as of that date. Defendant was dating McMullen at that time, and McMullan lived across the street from Houghtaling in Round Lake Beach.

¶ 39 On March 6, 2001, at about 6:30 p.m., McMullan and defendant came to Houghtaling's house, picked him up, and McMullan drove the group to pick up Collett and then to Cally Brown's (McMullen's friend's) house in Wisconsin so that McMullan could borrow a laptop computer. From Brown's home, McMullen drove the group to McHenry, stopping first at Cloud 9, a "head" shop, and then went to Jimmy Wiesenberger's house. Wiesenberger was defendant's friend.

¶ 40 Houghtaling admitted that, in 2001, he pleaded guilty to the first-degree murder of Briseno and was sentenced to 20 years' imprisonment. When asked why he pleaded guilty to something he alleges he did not do, Houghtaling stated that he "was young. I was scared, and I thought it would be the quickest route to save myself from doing the extended time in prison of 60 years." He regretted it. Houghtaling conceded that, at his guilty plea, he told the court that he pleaded guilty of his own free will. Further, at his guilty plea, when asked if he wanted to say anything, he stated that he " 'wanted the family to know that I'm sorry that it went down. It wasn't meant to go down that way, and I hope you guys will find it in your heart to forgive me, okay.' " The following additional testimony was admitted substantively.

¶ 41 *(b) May 12, 2001, Interrogation in Omaha, Nebraska*

¶ 42 The State read a transcript of Houghtaling's May 12, 2001, interrogation in Omaha, Nebraska, and an audio recording of the interview was played to the jury. During the interrogation, Houghtaling told police that, on March 6, 2001, he, Collett, "J.D." (*i.e.,* McMullen), and defendant went to a house behind the Burrito Express and drank. Houghtaling and defendant went outside to smoke a "joint" and defendant stated to Houghtaling: " 'It was like come with me, I want to go do something.' "

¶ 43 Houghtaling agreed and followed defendant to the Burrito Express. At this point in the interview, police interrogators started asking some leading questions about face coverings. One investigator asked Houghtaling if he wore a ski mask. He replied, "I can't remember." The investigator then asked, "You had your face concealed? Some how [*sic*] you had your face concealed is that correct?" Houghtaling replied in the affirmative. When asked, "How did you conceal your face? With some kind of a hat?" Houghtaling replied "Yes." Interrogators then asked, "With a mask over your face?" Houghtaling replied in the affirmative.

¶ 44 The police interrogators asked Houghtaling who first entered the restaurant, and Houghtaling replied that it was defendant (which was consistent with Pardo's testimony). Houghtaling also related, without suggestion, that only defendant carried a gun, specifically, a "little .22." When defendant demanded money after they entered the restaurant, one of the men behind the counter grabbed a knife and Houghtaling and defendant ran outside. The owner chased after them. When asked if Houghtaling ran

toward a busy street or a side street, he replied that it was a side street and not Route 120 (*i.e.,* the busy street). When asked if anyone other than the owner chased them, Houghtaling replied, "not that I know of." At some point, someone grabbed Houghtaling, but he could not explain how the person grabbed or held onto him. He heard gunfire, and "I thought the dude let go of me and I ran. I was scared." Defendant was firing the gun toward the man with the knife (*i.e.,* Briseno). When asked again if more than one person was involved in resisting Houghtaling's and defendant's robbery, Houghtaling replied, "That could be—I can't—it happened so long ago and I don't remember. I'm not a hundred per cent [*sic*] positive, but it could be."

¶ 45 After Houghtaling was nonresponsive to a question asking where he went after he ran away, one of the interrogators asked, "Was anyone waiting anywhere with a car or anything like that?" Houghtaling replied that he could not recall and that he suspected they met back at the house and then left. When asked where they went, he stated that they took Collett home. The police then asked if they stopped at a head shop, specifically Cloud 9. Houghtaling replied that they did and that Collett went inside and Houghtaling stayed in McMullen's car. The police asked Houghtaling to clarify whether, after the shooting, he entered McMullen's car or went to Cloud 9, and he agreed with the suggestion that McMullen waited for Houghtaling and defendant in her car on the street. When asked again later in the interview, he replied, "I think we got into a car. McMullen and Collett were in the car."

¶ 46 After police told Houghtaling that they had witnesses who saw him at Weisenberger's house after the shooting, he agreed that he went there. Houghtaling further stated that defendant planned the robbery. When asked again when he had the conversation with defendant about robbing the restaurant, Houghtaling replied, "I think a little bit in the car [on the way to McHenry] and at [Weisenberger's] house." They sat in the back of the car.

¶ 47 Initially, Houghtaling could not recall what he wore on the night of the shooting. Police then asked him if he had borrowed someone's jacket that night, and he replied that he had borrowed Collett's green jacket. Houghtaling did not see any scar on the victim's forehead. Defendant fired three or four shots.

¶ 48 Houghtaling described the gun. After noting that he knew what a semi-automatic is, he stated that the gun defendant used "looked like a revolver." However, Houghtaling could not explain the difference between a revolver and an automatic. After one of the interrogators drew a revolver and an automatic for Houghtaling, Houghtaling picked the drawing of the automatic.

¶ 49(*c) April 3, 2002, Testimony at McMullen's Trial*

¶ 50 Houghtaling testified at McMullen's trial on April 3, 2002. (At the third trial, Houghtaling testified that no one forced him to testify at McMullen's trial and that he made the statements of his own free will.) He stated that, on the day of the shooting, he and defendant first discussed the robbery earlier that day

at Houghtaling's house. While there, defendant gave Houghtaling a ski mask. Houghtaling wore Collett's green jacket. Defendant and Houghtaling put on ski masks before they entered the Burrito Express; defendant entered first with the gun in his hand. There were two people in the restaurant, and no customers were inside. Defendant, pointing his gun at Briseno, demanded that they give him all of their money. Briseno picked up a knife, and Houghtaling and defendant ran outside. Houghtaling ran up an incline behind the cleaners, slipped, was grabbed by Briseno and Pardo, and dragged back to the restaurant. While being dragged, one of the men grabbed Houghtaling's hat; he heard shots fired. Houghtaling was facing outwards and saw defendant firing the shots; defendant fired about four to six shots toward Briseno.

¶ 51 After the last shot was fired, Houghtaling that he felt a jerk/twitch; Briseno had been hit. Briseno fell, and Pardo ran to the restaurant. When Briseno let go of Houghtaling, Houghtaling ran away. McMullen suggested that they should go to Cloud 9 for an alibi.

¶ 52 *(d) August 13, 2008, Testimony at Defendant's Second Trial*

¶ 53 On August 13, 2008, Houghtaling testified at defendant's second trial. In his direct testimony, Houghtaling stated that he and defendant, wearing masks, went to the Burrito Express at about 7:21 p.m. Defendant, holding a pistol (a revolver), announced a robbery. The owner picked up a knife, and Houghtaling and defendant ran outside. Houghtaling

slipped on ice, and Briseno and Pardo wrestled with him. During the struggle, Briseno and Pardo pulled up Houghtaling's mask. Houghtaling tried to escape, but Pardo put a knife to Houghtaling's throat. Houghtaling then stopped struggling. Defendant began firing shots. Houghtaling felt Briseno jerk and let go and then Pardo let go. Houghtaling ran to McMullen's (white) car. Houghtaling did not know where defendant went. McMullen and Collett were in the car; McMullen drove. However, he also testified that, when he got back in the car, he said to defendant, "Are you fucking out of your mind." Defendant replied, "I did what I had to do." They went to Weisenberger's house and stayed until 7 a.m. the next day. Houghtaling wore a green jacket on the night of March 6, 2001.

¶ 54 On cross-examination at defendant's second trial, Houghtaling recanted his direct testimony, stating that he had been forced to lie, "because they want to convict [defendant] for a crime he didn't commit, none of us committed." He claimed that, "They said if I don't give the testimony that they want me to testify to that they would revoke my plea agreement." He further testified that he read about the case in newspaper articles and read discovery and, thus, was able to testify about it on direct examination. Houghtaling admitted that he wore the green jacket on the day of the shooting and on the following day.

¶ 55 On redirect, Houghtaling acknowledged that, when he told police in Omaha that defendant planned the robbery, Houghtaling had not negotiated any plea with the State. He also acknowledged that he did not

have any police reports at the time of the Omaha interview.

¶ 56 *(e) Cross–Examination and Additional Testimony at the Third Trial*

¶ 57 On cross-examination during defendant's third trial, Houghtaling denied involvement in the shooting. Houghtaling testified that he met with police on March 7, 2001, the day after the shooting. Between March 6, and May 12, 2001, (the Omaha interview), Houghtaling learned certain details about the case, including from newspaper accounts. In his Omaha statement, Houghtaling included the fact that the shooting occurred at the Burrito Express, a fact he learned from newspapers and talking to people.

¶ 58 Houghtaling testified that, on the day of the shooting, he was at his house. At about 6:20 or 6:30 p.m., defendant and McMullan came to his house. They stayed for 10 to 15 minutes and then the group went to Collett's house. It took about 20 minutes to reach Collett's house. After about 5 or 10 minutes, the group went to Twin Lakes, Wisconsin, to Cally Brown's (McMullen's friend's) house. McMullen wanted to borrow a laptop from Brown (Cally's mother refused permission for McMullen to use it). The group left Brown's house at about 8 p.m. or earlier. On the way back, they stopped at Cloud 9; Collett wanted to go there. Collett went inside for 5 to 10 minutes. Next, the group went to Weisenberger's house, which was next to the Burrito Express. On the way there, Houghtaling noticed police cars with flashing lights near the Burrito Express. The group spent the night at Weisenberger's house. Houghtaling

wore Collett's green jacket, including to the police station on March 7, 2001.

¶ 59 Addressing the Omaha interview, Houghtaling testified that he was on his way to California, when police pulled him off of a bus and arrested him. He was 19 years old and had taken hallucinogenic drugs. He was high. The 45–minute interview commenced at 1:30 p.m. At this point, the tape recorder was not turned on. Houghtaling told the officers that he had taken drugs earlier that day. Houghtaling denied involvement in the shooting. The officers (falsely) informed Houghtaling that defendant, McMullen, and Collett had already been charged and had given statements. The interrogators told Houghtaling that, if he told them what happened, they would help him out. Next, at 1:45 p.m., they turned on the tape recorder and elicited his statement. Houghtaling testified that the officers asked leading questions. On November 14, 2001, Houghtaling pleaded guilty; he was sober.

¶ 60 Houghtaling stated that, after he testified at McMullan's trial and after she was convicted, he wrote her an apology. He further testified that, at the time of defendant's second trial in 2008, he had access to all of the discovery in the case, including police and forensic reports. Also, before he testified against McMullen, he prepared with representatives from the State and his recollection was refreshed. After he testified at defendant's second trial, Houghtaling was charged with perjury, (voluntarily) pleaded guilty to that charge on June 23, 2009, and was sentenced to 5 1/2 years' imprisonment. He also stated that he could be charged with perjury for his testimony at the third

trial. Houghtaling explained, "I'm tired of lying. The truth has to come out sooner or later."

¶ 61 Houghtaling conceded that he testified at the second trial that he wrote letters to the State's Attorney requesting a reduced sentence and money in exchange for testimony. He also referred to assistant State's Attorney Robert Beaderstadt as "a little bitch faggot." At the third trial, he further testified that Beaderstadt offered him money for his testimony, but never gave Houghtaling the money.

¶ 62 Two aspects of Houghtaling's testimony were excluded from trial. First, defendant sought to elicit testimony from Houghtaling that he had been called to testify against defendant at his first trial in 2003; that Houghtaling refused to testify; and that the reason he refused was that defendant was not involved in the shooting. The State raised a relevance objection to this testimony, and the trial court sustained the objection. Second, defendant sought to elicit testimony from Houghtaling that he learned the basic facts in his May 2001 Omaha statement from news accounts and word of mouth. The State raised hearsay and foundation objections. The trial court sustained the objections. Defense counsel made an offer of proof:

> "Your Honor, I would ask Mr. Houghtaling and I believe he would testify as follows: That the following items he had learned either from the press or from people in the time frame prior to his May 2001 statement: That the police thought that the shooting was about 7:20 p.m.; that the police thought that there were two young men involved.

> The police thought that one man had a handgun; that the police thought that both went into the store; that the police thought that both were wearing black ski masks with eye holes; that the police thought that Mr. Briseno was in the Burrito Express with one employee; that the police thought that Mr. Briseno was using a butcher knife at the time; that the police thought masked men ordered Briseno to give them money.
>
> * * *
>
> That the police thought that Mr. Briseno and the employee chased two men out of the restaurant; that the police thought that Mr. Briseno caught one of the masked men outside the restaurant; that the police thought Mr. Briseno struggled with one of the masked men in the parking lot; that the police thought Mr. Briseno was shot by another masked men [*sic*].
>
> > I would also ask Mr. Houghtaling whether he understood that the possibility that Mr. Briseno had been pistol[-]whipped was in the public [*sic*], and he would testify that he understood that was not in the public [*sic*]."

¶ 63 The trial court sustained a foundational objection to the testimony, noting that it would not allow defense counsel to ask the questions "without giving some specificity to where Mr. Houghtaling had learned that specific information. From the newspaper? From an individual? From what officer? Who, what, when and where." Defense counsel urged that, over the many years since the crime occurred,

Houghtaling would not be able to supply such a level of detail. The court reiterated that it sustained the objection.

¶ 64 4. Detective Sergeant William Brogan

¶ 65 On May 12, 2001, William Brogan, a detective sergeant with the McHenry police department, interrogated Houghtaling in Omaha. (McHenry police department detective John Jones was also present.) Brogan was the lead detective. Houghtaling was *Mirandized*. He showed no signs of being under the influence of drugs or alcohol; however, Brogan did not ask Houghtaling if he was on drugs that day.

¶ 66 Brogan also spoke to Houghtaling on November 12, 2001, at the McHenry County correctional facility. Houghtaling told Brogan that, as they walked to the Burrito Express, defendant "gave him a black knit ski mask and told him to put it on." Houghtaling told Brogan that he wanted defendant to think he was a tough "gang banger" and could handle himself. He also related that he and defendant ran out of the restaurant with Houghtaling being in the lead and that Briseno and the other man chased after them. Brogan asked Houghtaling how he knew that Briseno had been shot and he replied, "it doesn't take a genius to figure it out."

¶ 67 On cross-examination, Brogan testified that he had training in the John Reid interrogation technique. Part of the training is that intentional abuses of medications or drugs can cause an innocent subject to appear confused or disoriented. During an interrogation, police attempt to elicit information to

corroborate a confession, which can take two forms: (1) independent corroboration, which involves the subject supplying information unknown to the investigator, such as the location of an unrecovered murder weapon, which can be verified; and (2) dependent corroboration, where a suspect demonstrates knowledge of facts about a crime that police have kept secret from the public (*e.g.,* the pistol-whipping or the shout into a passing car). Brogan further testified that investigators try to avoid using leading questions, which are less reliable than nonleading questions. During Houghtaling's interrogation, the investigators first used certain words, including "handgun," "grabbed," and "gunfire."

¶ 68 Brogan testified that the following information was public at the time of the Omaha interview: the shooting occurred at 7:20 p.m. at the Burrito Express; two men were involved and one had a handgun; that they entered the store wearing black ski masks with eye holes; Briseno and Pardo were in the restaurant when the men entered; the men order Briseno to give them money; police thought that Briseno and his employee chased two men out of the restaurant; Briseno had a butcher knife when he was in the restaurant; Briseno, after he and his employee chased the two men outside, caught one of the masked men; Briseno struggled with one of the masked men in the parking lot and was shot by the masked man with which he was not struggling. However, Brogan testified that the fact that Briseno had a wound on his head caused by the blunt object (*i.e.,* a pistol-whipping) was not publicly disclosed, nor was the fact that Briseno had yelled something into a car.

¶ 69 Brogan further stated that about 15 minutes of interrogation preceded the recorded portion. (Detective Jones prepared a summary of the 15–minute portion of the interview.) During that time (*i.e.,* at the beginning of the Omaha interview), Houghtaling denied involvement in the shooting. Police (falsely) told him that defendant, McMullen, and Collett had been charged in the case (actually, McMullen had given a statement) and that Houghtaling could help himself if he gave a statement. Houghtaling then said that he was involved and wanted to give a statement. Brogan further testified that, also at this time, police believed that the murder weapon was a .22–caliber revolver. This was based on McMullan's statement that she had observed defendant with a revolver and because there were no casings found at the scene. Further addressing the interview, Brogan testified that there were a number of long pauses before Houghtaling answered a question.

¶ 70 According to Brogan, during the Omaha interview in May 2001, Houghtaling first suggested the following answers in response to nonleading questions: that the gun was a .22–caliber weapon and that his jacket was green.

¶ 71 5. Detectives John Jones and Jeff Rhode

¶ 72 McHenry police detective John Jones testified that he spoke to defendant on May 12, 2001, asking who he was with on the night of the shooting. Defendant stated that he was with Collett and McMullen; when asked whether he was also with

Houghtaling, defendant replied that he did not know Houghtaling.

¶ 73 Jeff Rhode, who was a detective with the City of Woodstock and a member of the Major Investigations Assistance Team assisting in the Burrito Express shooting, testified that he interviewed Pardo on the evening of the shooting. He asked Pardo if the jacket worn by one of the suspects was a solid color, and Pardo replied that it was green with some black on it, but that he did not remember well. The next day, at 11:30 a.m., Rhode interviewed defendant, asking him who he was with the prior evening. Defendant responded that he was with "Jennifer, Justin and Dave as I recall. Culick (phonetic) I believe is how he stated his last name."

¶ 74 6. David Collett

¶ 75 On direct examination, David Collett denied knowledge of who robbed the Burrito Express. He testified that he does not know who shot Briseno. On September 13, 2001, he pleaded guilty to attempt armed robbery of the Burrito Express. He explained that he did so because it was "a plea of convenience" and because he did not want to take any chances. Collett wanted to avoid a long prison term if he was convicted. He was represented by an attorney, and no one forced him to plead guilty.

¶ 76 At his sentencing hearing, Collett stated to Briseno's widow (who had testified to the impact his death had on her life):

> " 'I'd just like to say that I'm no—no apology—nothing I can possibly say can help the victims with what they're dealing with, but I can offer my apologize apology [*sic*]. I really if I would have known that any of this would have happened, I really would have tried to do something to stop it, but, honestly, I mean, I really didn't think that anything like that would have happened was going to happen. If the judge, [*sic*] I will follow through with it completely and to the Court's satisfaction. I would just like to apologize again to the victims for their loss. Thank you.' "

Collett denied that he apologized because he had remorse for what he did, explaining that he apologized because "of the grief she was going through."

¶ 77 Collett further testified that, on the evening of March 6, 2001, he was with defendant and Houghtaling. Collett had known defendant for a couple of months and currently has no relationship with him. They were at Collett's father's house near Fox Lake. McMullen picked them up, and they left for Wisconsin to obtain a laptop from Cally Brown. On the way back, they planned to go to Weisenberger's house behind the Burrito Express, but Collett got into an argument with Houghtaling. According to Collett, Houghtaling would not return his green coat and it was cold out. McMullen, who drove, pulled the car over, and defendant told Collett to get out to blow off some steam. Collett walked to Weisenberger's house (which took a couple of minutes), but Weisenberger was not home. Collett then went to Cloud 9, which had recently opened. On his way, he heard a noise

that sounded like a car backfiring. However, on May 12, 2001, Collett told police that, as he walked behind the Burrito Express and up to Weisenberger's backyard, he heard what could have been two gunshots. Collett explained at the third trial that the police suggested that the noise could have been gunshots; Collett never heard shots.

¶ 78 Collett could not recall where defendant and Houghtaling were when Collett heard the car backfiring and could not recall if, on the way to Cloud 9, he turned around and walked back toward McMullen's car. However, on May 12, 2001, he told police that he walked back to the car and that defendant and Houghtaling were in the car. At the third trial, Collett denied talking to defendant afterwards about what happened at the restaurant. On May 12, 2001, however, he told police that, when he got into McMullen's car, defendant stated that some "kids" just robbed the Burrito Express.

¶ 79 Collett went to Cloud 9. As recorded on a surveillance tape, he first appeared in a back room area at 7:38 p.m. and left that area at 7:44 p.m. After he walked out, he got in the car with McMullen, defendant, and Houghtaling, and went to Weisenberger's house. (Collett was the only one with valid identification, which was required to enter Cloud 9.) He drank and watched television. Collett denied that he spoke to defendant about the incident. He explained that they only discussed what they learned in news reports. On May 12, 2001, Collett told police that he asked defendant what happened at the Burrito Express and that defendant stated " 'just had some fun.' " Collett testified that he would not have

lied to the police "beside the fact that I was 18 and scared."

¶ 80 On cross-examination, Collett testified that, after he had visited Cloud 9 and on the way to Weisenberger's house in McMullen's car, he saw police, squad lights, and a crowd. He stated, "I wonder what's going on," and the others in the car replied that they did not know. When they reached Weisenberger's house, Weisenberger had returned home and the group went inside. At some point, Weisenberger's brother joined them that night. Collett could not recall any scratches, bruises, or blood on defendant or Houghtaling. At one point, Collett and Weisenberger left to purchase beer. The group spent the night at Weisenberger's house. Collett drank all night.

¶ 81 Collett denied seeing any weapon on the night of the shooting or seeing anybody with a ski mask. He also denied knowing DeCicco, Hiland, or Levand.

¶ 82 7. Defendant's Case–Detective Richard Solarz

¶ 83 Detective Richard Solarz interviewed Houghtaling on March 7, 2001, at the McHenry police department. Houghtaling wore the green jacket to the police station. Solarz did not observe any blood stains on the jacket, nor did he notice any scratches on Houghtaling's face or hands.

¶ 84 8. Sergeant Michael Brichetto

¶ 85 Sergeant Michael Brichetto of the McHenry County Major Investigations Assistance Team

testified that he interviewed Pardo on March 8, 2001. Brichetto showed Pardo a photo array of five photographs, including those of defendant, Collett, Weisenberger, and Houghtaling. Pardo did not identify any of the photos as being someone involved in the incident. Brichetto testified that he was unaware when the photos of defendant and his group were taken that were included in the photo array. He stated that Pardo was not shown photos of defendant and Houghtaling that were taken after the incident. The photo of defendant in the photo array depicts him with facial hair. Pardo was not shown a photo *lineup,* which is a photo setup where individuals with similar characteristics are selected so as not to tilt the selection in any particular way.

¶ 86 9. James Weisenberger

¶ 87 James (Jimmy) Weisenberger, age 34, testified that he has known defendant since Weisenberger was 14 years old and that they are good friends. On the evening of March 6, 2001, defendant, Houghtaling, Collett, and McMullen came to his house. Before they arrived, Weisenberger observed police activity in the area around the Burrito Express in the plaza behind his house. Addressing defendant's appearance that evening, Weisenberger testified that defendant had facial hair (a moustache and goatee). Houghtaling wore a green jacket. He could not recall what Collett wore that evening. Weisenberger did not notice any blood or scratches on his guests, nor did he observe ski masks, weapons, bullets, or bullet shells. Weisenberger did notice that defendant and Houghtaling were about the same height. Later that evening, Weisenberger rode in McMullen's car and

did not notice any blood, guns, bullets, or ski masks inside the car. Over defense counsel's objection, Weisenberger testified that he has twice tried cocaine, taken "random pills," and smoked marijuana (as a teenager).

¶ 88 10. Levand's Confession to Patrick Anderson

¶ 89 Patrick Anderson testified that he is currently incarcerated. He lived in McHenry in 2001 and was good friends with Levand, whom he called Rusty. He also knew Susanne Dallas DeCicco, who was Levand's girlfriend at the time.

¶ 90 In the summer of 2011, Anderson was incarcerated in the McHenry County jail, as was Levand. In July, Levand told Anderson that he was involved in the Burrito Express shooting. Levand related that he and DeCicco's cousin (*i.e.,* Hiland) attempted to rob the restaurant. Briseno chased them outside, and Levand fired over his shoulder and shot Briseno. Hiland called Levand for help, and Levand hit Briseno on the head with the gun. They fled and met with DeCicco. Levand and Hiland got into DeCicco's car and went to Levand's mother's house to clean up (Hiland was covered in blood). They burned the masks and clothes they wore and tried to clean up DeCicco's car (there was blood on the back seat). They were unable to clean the car, and, several month later, Levand stole DeCicco's car and burned it somewhere in Wisconsin.[5] Levand further told Anderson that he

[5] By stipulation, defendant presented police testimony that DeCicco's car was found on June 27, 2001, in Racine, Wisconsin, destroyed by fire. A preliminary investigation revealed that an accelerant burned the vehicle.

was not worried about being prosecuted because the State had the gun for several years and nothing had come of it.

¶ 91 Anderson was incarcerated in McHenry in 2001 at the same time as defendant, but he does not know defendant. Defendant never told Anderson about this case. Anderson approached defendant with the information he had from Levand and wrote to defense counsel.

¶ 92 On cross-examination, Anderson was told that Levand was actually in jail from June 6 through June 10 of 2011. Anderson testified that "when you're in jail, you really don't pay attention to the months because you're doing time" and that the date could have been June instead of July. In 1993, Anderson was convicted of aggravated criminal sexual assault; in 2001 and 2005, of possession of a controlled substance; and in 2005 and 2006, he was convicted of retail theft. Anderson was found guilty in 2011 of attempted unlawful possession of a handgun by a felon and delivery of a controlled substance.

¶ 93. 11. DeCicco's Confessions to Sergeants Doug Vandermaiden and Virgil Schroeder

¶ 94 Susanne Dallas DeCicco gave two videotaped confessions to police: one in November 2005 and another in January 2006. Both were played to the jury.

¶ 95 (*a) DeCicco's 2005 Confession in Quincy*

¶ 96 Sergeant Doug Vandermaiden, a patrol sergeant with the Quincy police department, testified that he participated in the first interview, on November 19, 2005. Vandermaiden testified that in November 2005, he worked as a patrol officer with the Quincy police department and came into contact with DeCicco on November 5, 2005, at a Kohl's retail store to investigate a retail theft; DeCicco was a suspect. DeCicco provided as her name "Elizabeth Schwartz." He arrested her, and she was released the same day. Vandermaiden testified that he next spoke to DeCicco on November 18, 2005, on the telephone; he wanted her to come to the police station to discuss why she gave a false name and to discuss the Burrito Express shooting. He promised her that, if she was truthful, he would issue a citation and release her. Vandermaiden interviewed DeCicco two times on November 19, 2005. DeCicco arrived with her mother and her boyfriend. The first interview was videotaped. DeCicco was questioned about her prior statements concerning the Burrito Express shooting and stated that she had made up her story and that it was a joke. She denied involvement in the shooting. In the second interview, most of which was recorded, DeCicco denied involvement in the shooting. Vandermaiden issued DeCicco a citation for retail theft and released her that day. Vandermaiden spoke with DeCicco's boyfriend and with Elizabeth Schwartz. During the completion of the booking process, Vandermaiden made a comment about the shooting and DeCicco bowed her head, started crying, and stated that " 'they made me do it.' " As Vandermaiden walked out to commence a third interview, DeCicco stated that she was surprised that nothing happened when they picked up the gun and

that her cousin had hired an attorney because he thought something was going to happen. DeCicco stated on an audiotape that, on the night of the shooting, she was with Levand and Hiland and that Levand was the shooter. Vandermaiden promised DeCicco that she would not be arrested until after Thanksgiving (the following Thursday).

¶ 97 During the (third) videotaped interview, DeCicco stated that Briseno was murdered on March 5, 2001, the date her niece was born. She, her boyfriend Levand, and her cousin Hiland committed the crime. DeCicco's sister went into labor that day, and the group went to the hospital. DeCicco sent Levand and Hiland to her mother's house to get the maternity bag. They took DeCicco's vehicle, a 2001 silver, 2–door, Chevy Cavalier, and were gone about 1 1/2 hours. (It should have taken 30 minutes.) When Levand and Hiland returned, they were acting funny. DeCicco further stated that, from the hospital, the three went to her biological father's, Ben DeCicco's, house and, outside, Levand and Hiland started going through her car's trunk; inside was a gun (a revolver) wrapped in a towel. It was her stepfather's, David Brummett's, revolver. (One day, DeCicco saw Levand and Hiland going through her stepfather's bedroom and they mentioned a gun.) DeCicco saw the gun and told Levand and Hiland to put it back. Levand and Hiland left at one point, and, after 20 minutes, DeCicco drove to look for them. (" '[T]hey had talked before about snatching purses or robbing somebody to get money.' ") She found them near the Burrito Express. She saw them run into the restaurant and, later, run back out, as did the two men who worked there. All four ran across the street in front of her car, and one of the

Hispanic men turned around and yelled something inside DeCicco's car. She kept driving.

¶ 98 DeCicco returned to her driveway and heard six gunshots. Levand and Hiland ran out of the woods behind her house. Hiland's face was covered in blood, and he had a cut on his hand. The men got into DeCicco's car (Levand in front and Hiland in back) and ordered her to drive way. When Hiland entered her car, DeCicco saw blood. Hiland told her it was not his own blood. She knew at this point that they had a gun. Levand threw the gun on the back seat, and Hiland cleaned it. First, DeCicco drove to Levand's grandmother's house (where they threw out a scarf or gloves) and then she drove to her mother's, Vicki Brummett's, house. At this point, Hiland carried the gun. Hiland put the clothes in a bag and burned them the next day. Hiland and Levand cleaned the gun (he pulled out Briseno's hair from it) and returned it to her stepfather's home. DeCicco told her sister of the incident, who, in turn, told their mother. DeCicco's mother called the police, who subsequently collected the gun. (DeCicco also told her story to her friend Brittany Tyda.)

¶ 99 DeCicco then stated that a detective, Roger Pechous, came to her McHenry County jail cell at one point late at night and told her that the wrong people had been arrested. However, he next stated that he was joking. He also stated that a detective Brown was a new detective for the "bad guys" and that DeCicco did not have to speak to him and that there were rumors that he had beaten a confession out of one of the suspects. Brown was trying to help defendant. DeCicco stated that Pechous did not intimidate or

coerce her or promise her anything. Pechous recommended to her that she not speak with Brown and that she not tell anyone that Pechous came to speak to her. DeCicco believed that Pechous knew that her group was guilty.

¶ 100 Levand told her that one of the men in the restaurant threw a knife at him and Hiland, who then ran out of the restaurant. Levand also told DeCicco that one of the restaurant workers caught Hiland and dragged him across the parking lot. Levand became frantic and started shooting. The final shot hit Briseno. Levand heard him say "uhhhh" and spit blood on Hiland. Briseno raised his knife and struggled with Hiland and Levand came up and hit him on the head. Months later, DeCicco's car was stolen. Levand and Hiland took her car to Wisconsin and burned it because it had bloodstains on the back seat.

¶ 101 DeCicco also related that she told her sister, mother, and a friend that Levand and Hiland committed the robbery, but she did not contact police out of fear of being hurt by Levand and Hiland. Her mother and sister spoke to police about the incident.

¶ 102 (*b) DeCicco's 2006 Confession*

¶ 103 Turning to DeCicco's second confession, Sergeant Virgil Schroeder of the Illinois State Police testified that, in January 2006, he (and William Kroncke) interrogated DeCicco, who was incarcerated at the Dwight correctional facility (for retail theft). They interviewed her at the State's request. The state police never arrested DeCicco, Levand, or Hiland for

the Burrito Express shooting. Schroeder testified that DeCicco made accusations against members of the McHenry police department. The state police investigated such allegations, and there was no finding of malfeasance by the McHenry police department.

¶ 104 In DeCicco's 2006 version of the events, she stated that the shooting occurred either on March 5, or 6, 2001. She first mentioned that Levand and Hiland each wore masks when they entered the Burrito Express, but later, when asked why Levand or Hiland (it is unclear to whom the interrogators are referring) had to clean blood off his face when he wore a mask, she stated that Levand wore a mask and Hiland wore a scarf over his face. She also stated that Hiland had (Briseno's) blood on his face and that had dripped onto his shirt. At another point in the interrogation, DeCicco described Hiland and Levand as both covered in blood (" 'they were covered in blood' "). By the time they reached DeCicco's mother's house in Johnsburg, Levand had cleaned off the blood from his face. When asked how she knew that Levand and Hiland had a gun when they arrived at her father's house from the hospital, DeCicco stated that she saw them looking through her car's trunk and, although she did *not* actually see the gun, she knew for certain later when she saw it near the restaurant that that was what they were handling in her trunk. (In her 2005 version, DeCicco stated that she did see the gun when Levand and Hiland unwrapped the towel; she described it as a revolver; and stated that she told them to put it back inside the house.) In 2006, DeCicco stated that she saw the gun twice: when Levand and Hiland entered the restaurant and when Levand ran

toward her car. Also in this version, DeCicco stated that Levand sat in the front seat with the gun. (In 2005, she told the interrogators that Levand threw the gun on the back seat.)

¶ 105 DeCicco also stated that Pechous came to her cell in the jail late at night and told her not to speak to the new detectives and not to tell them that Pechous came to see her. When the interrogators told her that Pechous' visit was not secret (because he had written a report about it), that he reported a second visit, and that he did not report that he met with her in the middle of the night, DeCicco responded, "It's been a while."

¶ 106 DeCicco noted for the interrogators that the fact that Briseno was hit in the head with the gun " 'was not in the papers anywhere. How would I know that unless the people who did it actually told me?' " She was uncertain if she heard six gunshots.

¶ 107 DeCicco stated that she spoke to McMullen while they were both incarcerated in the McHenry County jail and that McMullen stated that another woman in the jail was claiming that she was involved in the shooting. McMullen denied that she was involved in the shooting. DeCicco had told McHenry police that she never told anyone that she was involved and that she never told a cell mate. When confronted with these inconsistencies, DeCicco stated that she was scared.

¶ 108 DeCicco also mentioned during the interrogation that Hiland told her that he saw an attorney because "they thought—after they took,

after they took the weapon, everybody thought we were going to jail."

¶ 109 The interrogators next confronted DeCicco about statements she had made to the McHenry police department. DeCicco had initially told the police that she lied about her group's involvement in the shooting. DeCicco denied this to the interrogators and denied that she told them she had never been in a cell with McMullen. DeCicco also told interrogators that she first told her sister about the incident, but later told her it was not true.

¶ 110 12. DeCicco's Confession to Vicki Brummett (DeCicco's Mother)

¶ 111 Vicki Brummett, DeCicco's mother, testified that she is married to David Brummett. She has been convicted of possession of a controlled substance. In March 2001, DeCicco, Levand, and Hiland lived, off and on, with Brummett in her home in Johnsburg. When she was not living with Brummett, DeCicco lived with Ben DeCicco, her biological father, in McHenry on Waukegan Avenue near the Burrito Express. On March 6, 2001, Brummett was at the hospital with her daughter Elizabeth Schwartz, who had just had a baby. She left the hospital after dark and went home. On her way, she saw police activity near the Burrito Express. When she arrived home, DeCicco, Levand, and Hiland were at her house in the basement. Prior to the shooting, Hiland did not have scratches on his body; however, afterwards, his hand and knees had scratches on them.

¶ 112 Brummett's husband, David, owned a handgun that he kept in their bedroom closet; it was wrapped in a blue towel. Others in the household had access to the bedroom. Around November 2001, Brummett gave the gun to police. At about the same time, she had a conversation with DeCicco about the Burrito Express shooting. DeCicco confessed to her mother, telling her that, on the evening of March 6, 2001, DeCicco drove to pick up Levand and Hiland and found them standing outside the restaurant. Levand and Hiland ran inside and, later, everyone ran out. One man ran in front of DeCicco's car and yelled for her to call the police. DeCicco told Brummett that she drove home. She also told her mother that the gun belonged to the Brummetts and that "the guy was hit with the gun and that she thought they'd find out—we'd find out that they used the gun because there was a crack in the barrel—or the handle."

¶ 113 Brummett's granddaughter was born on March 5, 2001, not the following day. Brummett conceded that DeCicco has a drug problem and has asked Brummett for money and has lied to her on more than one occasion. The day that Brummett heard the sirens was the day *after* her granddaughter was born.

¶ 114 13. Brittany Tyda, Elizabeth Schwartz, and Carly Rexford

¶ 115 Brittany Tyda, a childhood friend of DeCicco's and Levand's, testified that DeCicco confessed to her about the Burrito Express shooting in October 2001. DeCicco and Levand were at Tyda's apartment in McHenry. DeCicco spoke to Tyda about the shooting; she cried and was upset and stated that she saw

Levand and Hiland attempt to rob the Burrito Express. DeCicco related that the store manager grabbed Hiland and had a knife; Hiland screamed for Levand, and Levand shot the manager. DeCicco made another statement about the shooting. While they were in Tyda's apartment, DeCicco told Levand that, if he went to the police about DeCicco writing bad checks (which he had threatened to do), then "she would go to the police about him shooting someone." They were having an argument. Within one year of the shooting, Tyda spoke to McHenry police. She could not recall if she told police that DeCicco lived with her and that she kicked out DeCicco.

¶ 116 Elizabeth Schwartz, DeCicco's sister and Hiland's cousin, testified that she is currently incarcerated for retail theft and has previous convictions for forgery and burglary. Schwartz testified that DeCicco visited her in the hospital on March 6, 2001. Schwartz's daughter was born the previous day. At that time, DeCicco lived with Ben DeCicco near the Burrito Express. About three weeks after the shooting, while they were at the Brummett residence, DeCicco told Schwartz that Hiland was involved in the Burrito Express shooting. DeCicco did not provide any additional information. Schwartz told her mother. Schwartz further testified that, in the week following the shooting, she noticed that Hiland had cuts on the inside of his hand and bruises on his arm. He told Schwartz that he had fallen down her father's (Ben DeCicco's) back stairs.

¶ 117 Two to three months after the shooting, Hiland confessed to his cousin, Schwartz. They were in her van outside a restaurant near the Burrito Express.

Hiland did not want to exit the van, fidgeted, became irritated and panicked. Schwartz told Hiland that DeCicco told her that he was involved in the shooting. He replied, " 'She is a fat fucking bitch and she can't keep her mouth shut. She needs to keep her mouth shut.' " Hiland asked Schwartz to drive away. As they drove away, Hiland stated that the DeCicco group had been smoking crack on the night of the shooting and that DeCicco dropped off Hiland and Levand at the Burrito Express. Hiland and Levand went inside the restaurant to rob it, but they were chased out. Schwartz explained that, "Well, one of them got ahold of my cousin [*i.e.,* Hiland] with a knife and when he was trying to stab him, he was forced to grab hold of it, yelling for [Levand] to help. And I'm not—I can't remember which way it went, whether [Levand] was shooting while he was running or if he had to come up and hit him in the head and he still wouldn't stop, so then he shot him. I can't remember how it went." Schwartz clarified that she could not recall if Levand hit Briseno first (she was uncertain with which part of the gun) or shot him first. DeCicco picked them up afterwards. In 2003, Schwartz stated in a written statement that Levand hit Briseno with the butt of the gun.

¶ 118 Schwartz further testified that, when DeCicco is arrested, she sometimes uses Schwartz's name. Addressing DeCicco's reputation for truthfulness, Schwartz testified that she is not always truthful with others.

¶ 119 Carly Rexford, DeCicco's half-sister (their father is Ben DeCicco), testified that she visited Schwartz at the hospital on March 6, 2001. DeCicco

was there, too, but left before Rexford, stating that Levand and Hiland were waiting for her in her car. At the end of 2005, DeCicco and Vicki Brummett were at Rexford's home in McHenry. DeCicco told Rexford that she confessed to police about the Burrito Express shooting because it had been weighing on her conscience. DeCicco told Rexford that Hiland and Levand took David Brummett's gun and that the victim grabbed Hiland and that Levand shot him. Levand had threatened her that, if she ever told anyone about their involvement, she would be punished. Rexford had heard that DeCicco and Levand had a stormy relationship, but never witnessed it. She had also heard that DeCicco used narcotics, but never witnessed it.

¶ 120 14. Hiland's Confession to R. Daniel Trumble

¶ 121 R. Daniel Trumble testified that he has a conviction related to writing bad checks. He knows DeCicco; she is the sister of a longtime friend (Christopher Schwartz). Trumble lived with Hiland in 2001 or 2002. Trumble testified to about three conversations he had with Hiland in the summer of 2002. During the first conversation at their home, Hiland told Trumble that the wrong people had been arrested for the murder and that he was involved in it, along with two others (DeCicco and Rusty). During his confession to Trumble, Hiland was shaking and crying. They had been drinking. Hiland further told Trumble that the three went to rob the restaurant and that "it had gone wrong" because one of the workers pulled a knife; Levand shot him.

¶ 122 At this point in the proceeding, the trial court sustained the State's relevance objection to Trumble's testimony concerning Hiland seeing an attorney. Defense counsel made the following offer of proof. Trumble would testify that he told Hiland to see an attorney. Trumble arranged a meeting with attorney Ed Edens. The three met at a restaurant, Hackney's, in Lake Zurich in 2002. Trumble would testify to certain inculpatory statements that Hiland made and would testify that Edens told Hiland that he should not come forward with his statement given that other arrests had been made.

¶ 123 After the offer of proof, Trumble resumed his testimony before the jury. Trumble testified that, a few days after the first conversation with Hiland, he had a second conversation with him about the shooting at a restaurant in Lake Zurich. This time, Hiland was sober and repeated the confession he had given at the apartment. He emphasized that Levand was the shooter. Hiland was upset.

¶ 124 During a third conversation, which occurred on the way home from the restaurant, Hiland told Trumble that, since someone else was arrested, he was not going to do anything. Trumble further testified that he never went to the police with the foregoing information.

¶ 125 15. Hiland's Confession to Gina Kollross

¶ 126 Gina Kollross testified that Hiland once lived with her and that he is her sister's (Charlene McCauley's, formerly Nicky Hiland's) brother.

Kollross knew DeCicco and Levand. Kollross dated Andrew Hiland, Adam Hiland's brother, in 2001.

¶ 127 Kollross testified that Adam Hiland first spoke to her about the shooting a couple of days after it occurred and while they were in Vicki Brummett's basement. Andrew was also present. During a second conversation, one to two weeks after the shooting, in an apartment in Hebron, Hiland confessed to Kollross. He told her that the group had planned to go in and rob the restaurant, but the owner chased him with a knife and then Levand shot him to free Hiland. Briseno "was going after his arm and his hand."

¶ 128 When Kollross saw Hiland in the days after the shooting, she noticed that his hand was wrapped up. He first stated that he fell down stairs, but later stated that he was cut with a knife during the shooting. Levand, DeCicco, and Hiland are drug users.

¶ 129 16. Hiland's Confession to Charlene Nicky McCauley

¶ 130 Charlene Nicky McCauley testified that she is Hiland's sister. In 2001, McCauley lived with Vicki and David Brummett (Vicki is her aunt, and DeCicco is her cousin). DeCicco, Levand, Hiland, and Schwartz also lived with the Brummetts. While living there, McCauley observed the DeCicco group pick the lock to and enter the Brummetts' bedroom. One day after the shooting, McCauley observed Hiland with bandages on his forearms. He explained that he slid on icy stairs at Ben DeCicco's house.

¶ 131 McCauley moved out of the Brummett house in the summer of 2001. Right before Christmas 2001, Hiland confessed to McCauley. He told McCauley that the DeCicco group was at DeCicco's father's house, smoking crack in the garage. They ran out of drugs and wanted to get more money. The group decided to rob the Burrito Express. Levand and Hiland went inside, and the owner started to chase after them. One of the men grabbed Hiland, they fought, and Levand shot him. After Hiland confessed to McCauley, he appeared depressed, ashamed, and relieved.

¶ 132 McCauley denied telling representatives of defendant that, after her conversation with Hiland, she gave him money. Hiland did not tell McCauley that he was cut during the shooting. She might have told the representatives that Hiland was cut during the shooting because she assumed that to be the case. McCauley never contacted the police.

¶ 133 17. State's Rebuttal—Roger Pechous

¶ 134 Roger Pechous testified that he was a detective with the McHenry police department in 2001. At that time, he had known DeCicco in his professional capacity for seven years. He denied ever going to the correctional facility in the middle of the night to interview her. Pechous also testified that he did not tell DeCicco that there was a detective Brown working for the "bad guys." He did not know a detective Brown and never told DeCicco that his department had arrested the wrong individuals. Finally, Pechous testified that he never told DeCicco not to speak to a detective Brown.

¶ 135 18. Russell (Rusty) Levand

¶ 136 Russell (Rusty) Levand testified that Patrick Anderson is an acquaintance and that they were both incarcerated in the McHenry County jail from June 6, through June 11, 2011. Levand was incarcerated for drug possession and burglary. (At the time of trial, he was on probation for theft and drug possession.) Levand denied that he confessed to Anderson and denied that he was at the Burrito Express on the night of the shooting. Levand dated DeCicco from when he was ages 14 to 17. He broke up with DeCicco on March 7, 2001. He met his wife, Wanda Levand, on March 10, 2001.

¶ 137 On cross-examination, Levand testified that, in 2003, he was convicted for aggravated battery in McHenry County. In 2004, he was convicted of obstructing justice; in 2005, he was convicted of possession of a controlled substance in Cook County; and in 2006, he was convicted of theft in McHenry. Levand denied that he "played" with the Brummett gun and denied that he was involved in the Burrito Express shooting, ever shooting a gun, or telling DeCicco that he was involved. Levand testified that he was at a hotel when DeCicco's car was stolen in June 2001. He did not have a conversation with Anderson about the car in the summer of 2011.

¶ 138 19. Susanne Dallas DeCicco

¶ 139 Susanne Dallas DeCicco, age 29, testified that she dated Levand for a few years. In 2002, DeCicco was convicted of obstructing justice and possession of a controlled substance; in 2004, she was convicted of

theft; in 2005, of retail theft (twice) and obstructing justice; and she is currently incarcerated for unlawful possession of prescription medication.

¶ 140 DeCicco denied that Roger Pechous came to see her in the middle of the night while she was in a correctional facility. She told state police that he had done so. When initially asked why she told the story, she replied, "I don't have an answer for that. I can't make sense of a lot of things that I said." When asked again about her statements to state police, DeCicco stated that she was in the Department of Corrections and "they then came to see me and knowing that I had lied to the Quincy Police Department, I feared further charges before I was released from prison at the time. It just somehow made sense to me that if I just lied a little longer, I'd be able to get out and deal with it later. * * * I wanted to get out and I thought if I told them I lied, I would have got in more trouble."

¶ 141 Addressing McMullen, DeCicco stated that she has met her on two occasions, including at the Dwight correctional facility. DeCicco denied that she ever had a conversation with McMullen about the shooting. DeCicco followed the story in the news. She told her family that she was involved in the shooting because she is a heroin addict and her family gave her money for drugs. Initially, the story was "a joke" between DeCicco and her sister, Elizabeth Schwartz.

¶ 142 When questioned why she told personnel from the Quincy police department that she had knowledge of the Burrito Express shooting, DeCicco testified that "because when I said no, it wasn't a good enough answer and I was told that I would definitely be

leaving that day if I basically said something different and I was ready to go home." One of the interrogators had called her the previous day and told her that she would be able to leave if she told the truth. DeCicco arrived with her mother and boyfriend. The interview was on Saturday, November 19, 2005, and she wanted to be released before Thanksgiving the following Thursday. She confessed during the interview because she wanted to leave jail that day. She did not contemplate that confessing to a role in a murder could possibly involve additional incarceration time.

¶ 143 DeCicco denied that she read police reports in this case. She acknowledged testifying in 2008, but testified that she could not recall if she stated at that time that she had reviewed police reports. On the day of the shooting, DeCicco was in the process of moving from her biological father's, Ben DeCicco's, house to her mother's, Vicki Brummett's, house. She visited her sister in the hospital. Levand and Hiland were there. They left for about one hour to retrieve Schwartz's maternity bag. They returned, and DeCicco then left with them. They drove to Ben DeCicco's house, which is around the corner from the Burrito Express. Hiland and Levand were helping DeCicco move. DeCicco denied (but also stated that she did not remember) that she saw a blue towel in the trunk of her car when Hiland and Levand were standing by it. (She could not recall if she had testified in 2008 that she saw it.) She knew that David Brummett kept a gun in his closet wrapped in a blue towel.

¶ 144 In June 2001, DeCicco attended a party for her brother at a hotel in Gurnee. Her brother drove

DeCicco in his car. Hiland and Levand came to the party in DeCicco's car. When she woke the next morning, DeCicco noticed that her car was gone. She contacted the police and later learned that her car was burned.

¶ 145 20. Adam Hiland

¶ 146 Adam Hiland testified that he is currently in custody for fleeing and eluding (out of Wisconsin). He has been convicted of attempted burglary, possession of a controlled substance (twice in 2004), aggravated fleeing of police in 2005, aggravated battery in 2008 and 2011, and fleeing or eluding an officer (in 2011). Hiland denied that he has ever been cut with a knife on his hands or arms. (The State had Hiland show his hands and arms to the jury.) Hiland testified that he does have a scar on his hand from when he was tased on his most recent fleeing and eluding case; he "hit the pavement and it knocked a chunk of skin out of my hand." The police tased him because he was running. Hiland denied that he told his cousin Elizabeth Schwartz that he got the scar by grabbing a knife at the Burrito Express.

¶ 147 21. Verdict and Sentence

¶ 148 On February 29, 2012, the jury returned a guilty verdict on all counts and found that defendant personally discharged the firearm that killed Briseno. On April 26, 2012, the trial court sentenced defendant to 67 years' imprisonment for first-degree murder[6]

[6] The court found that the two first-degree murder convictions merged and specified that the 67–year total sentence was

and a concurrent sentence of 7 years' imprisonment for attempt armed robbery. On May 9, 2012, the trial court denied defendant's motion to reconsider the sentence. Defendant appeals.

¶ 149 II. ANALYSIS

¶ 150 A. Motion Taken with the Case

¶ 151 Preliminarily, we address the State's motion, taken with the case, to strike defendant's statement of facts and order defendant to submit a new statement of facts in compliance with Illinois Supreme Court Rule 341(h)(6) (eff. July 1, 2008). The State argues that defendant's statement of facts is "permeated" by argumentative statements and comments, including a hypothetical that he asks this court to consider. Defendant responds that, with one exception, none of the statements about which the State complains will hinder our review of the case and requests that we deny the motion to avoid needless delay. Rule 341(h)(6) provides that an appellant's brief include a statement containing "the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." The court has discretion to strike an appellate brief. *People v. Thomas,* 364 Ill.App.3d 91, 97 (2006). Generally, a reviewing court will not strike portions of a party's brief unless it includes such flagrant improprieties that it hinders our review of the issues. *Id.* Our review of defendant's statement of facts and

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comprised of 42 years for the murder conviction (on a sentencing range of 20 to 60 years) with a 25–year firearm enhancement.

the record indicates that it contains impermissible argument; however, they do not hinder our review of the case. We decline the State's request to strike defendant's statement of facts, but we will disregard any inappropriate or argumentative statements, including the hypothetical. See *Jane Doe–3 v. McLean County Unit District No. 5 Board of Directors,* 2012 IL 112479, ¶ 10 fn. 4.

¶ 152 B. Sufficiency of the Evidence

¶ 153 Defendant argues that the evidence was insufficient to sustain his convictions. Defendant argues that the evidence reflected that: he made no incriminating statement; there was no physical evidence (*i.e.,* gun, fingerprints, DNA, or blood) connecting him to the crimes; there was no eyewitness testimony that he was involved or live sworn testimony from any purported accomplice linking defendant to the crimes; and the only incriminating evidence was Houghtaling's prior inconsistent statements (admitted as substantive evidence), and recanted on the stand. Defendant contends that the State's case rested entirely on Houghtaling's uncorroborated and unreliable prior statements and was simply insufficient to convince a reasonable juror beyond a reasonable doubt. Defendant also asserts that the physical and circumstantial evidence and eyewitness testimony not only was insufficient to convict, but also cut against the State. Further, when the case against the DeCicco group is considered, no reasonable trier of fact, defendant argues, could have convicted him. For the following reasons, we reject defendant's argument.

¶ 154 In reviewing the sufficiency of the evidence in a criminal case, our inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Davison,* 233 Ill.2d 30, 43 (2009) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)). Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State. *People v. Martin,* 2011 IL 109102, ¶ 15.

¶ 155 Here, the State was required to prove as to first-degree murder that defendant killed Briseno while attempting or committing armed robbery. The armed robbery statute (720 ILCS 5/18–2 (West 2002)) provides that a person "commits armed robbery when he or she violates Section 18–1 while he or she carries on or about his or her person, or is otherwise armed with a dangerous weapon." The robbery statute provides that "[a] person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18–1 (West 2002). Finally, a "person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense ." 720 ILCS 5/8–4(a) (West 2002).

¶ 156 We conclude that the evidence was sufficient in this case to convict defendant. The jury heard that Houghtaling pleaded guilty to participating in the shooting at the Burrito Express. Further, the jury heard Houghtaling's prior statements—the Omaha interview (which, significantly, was conducted before any plea deal), his testimony at McMullen's trial, and

his direct testimony at defendant's second trial—incriminating defendant, which were the strongest evidence against defendant and sufficiently corroborated Pardo's (the only eyewitness's) testimony of the events. This evidence, along with the additional evidence presented against defendant and his group, was such that any rational trier of fact could have found beyond a reasonable doubt that defendant committed the crimes.

¶ 157 Houghtaling testified that he pleaded guilty to the crime in November 2001, about eight months after it occurred, was represented by an attorney, and he agreed to testify truthfully against defendant, McMullen, and Collett in exchange for receiving a 20–year sentence. In his Omaha statement, which, again, was conducted before the plea deal, Houghtaling stated, without suggestion, that defendant carried a "little .22," which was consistent with the type of gun the police believed was used in the shooting, and he stated that his jacket was green, which was consistent with Pardo's testimony. On redirect examination at defendant's second trial, Houghtaling acknowledged that he did not have any police reports at the time of the Omaha interview. Further, as the State notes, the sketch of the man wearing the green jacket that was prepared from Pardo's statements bears a striking resemblance to Houghtaling and does not bear a strong resemblance to Hiland.

¶ 158 Defendant himself, according to police detectives, gave conflicting statements about his relationship with Houghtaling. According to Detective John Jones, defendant stated on May 12, 2001, that he was with Collett and McMullen on the

night of the shooting; however, when asked if he was also with Houghtaling, defendant did not acknowledge or deny it, but stated that he did not know Houghtaling. This was contradicted by Houghtaling (even in his direct testimony), Collett, and Weisenberger, who testified they were with defendant and Houghtaling on the night of the shooting. Further, defendant himself contradicted this statement when he spoke to Detective Jeff Rhode, who testified that defendant stated on the day after the shooting that he was with Houghtaling (and the rest of his group) the prior evening.

¶ 159 As to Collett, although he denied involvement in the crime, the jury could have found this incredible and instead found significant his apology to Briseno's widow and inferred that he had remorse for committing the crime with his group. Also, notably, the jury could have placed significant weight on the fact that Collett pleaded guilty to attempt armed robbery and discounted his explanation that it was merely "a plea of convenience." The jury heard that Collett had initially told police that he heard gunshots from the area of the restaurant. (The jury also heard that McMullen was convicted for her participation (with defendant and his group) in the crime.)

¶ 160 We disagree with defendant's argument that Houghtaling's prior inconsistent statements were insufficiently trustworthy to sustain his convictions. Houghtaling's prior statements implicating defendant and his group in the shooting were consistent with each other and corroborative of Pardo's testimony. Houghtaling stated twice (in Omaha and at McMullen's trial) that defendant

entered the restaurant first and carried the gun; this was consistent with Pardo's testimony that the man with the gun entered first and the man in the green jacket followed him. Houghtaling also stated in three statements (albeit, the first time in Omaha, in response to a leading question) that he and defendant concealed their faces and twice stated (at defendant's second trial and McMullen's trial) that they wore ski masks. This was consistent with Pardo's testimony that the men wore masks covering all but their eyes. Houghtaling also testified three times that defendant announced the robbery after he and Hougtaling entered the Burrito Express; this was consistent with Pardo's statement that the man with the gun stated something in English to Briseno, which resulted in Briseno raising his knife and chasing them out of the restaurant. (Houghtaling also related the chase in his statements.) During the Omaha interview, Houghtaling was asked whether he ran toward the busy street or the side street and he responded, without suggestion, that he ran toward the side street. This was consistent with Pardo's testimony that he chased Houghtaling across Third Street. At both McMullen's trial and defendant's second trial, Houghtaling testified that he fell on ice and one of the men caught him. This testimony was consistent with Pardo's statement that the man in the green jacket fell on ice. Pardo, further, was asked about the green jacket that Hougtaling wore on the night of the shooting and stated that it looked like the one the man involved in the crime had worn. Houghtaling also related in three statements that he was caught while defendant was outside his view and that defendant later arrived/came into view and fired shots. Pardo similarly testified that he ran in front of

a nearby dry cleaners and that Briseno ran behind it and, at one point, he could see only the man in the green jacket, with whom he caught up after the man slipped and fell on ice. Pardo testified that he did not again see the man with the gun until he had reached Third Street (while he was dragging the man in the green jacket).

¶ 161 We reject defendant's argument that Hougtaling's Omaha confession was given while he was under the influence of drugs and, thus, was inherently unreliable. The jury heard Detective Brogan testify that Houghtaling showed no signs of being under the influence of drugs or alcohol. It was the jury's function to weigh the witnesses' credibility, and, viewing the evidence in the light most favorable to the State, we cannot quarrel with its resolution.

¶ 162 Pardo's failure to identify defendant or Hougtaling from the photo array was known to the jurors, as was the fact that the sketch prepared of defendant from Pardo's description did not show facial hair (defendant's booking photo, taken within days of the shooting, showed that he had facial hair). The jury weighed this evidence, and the jurors were aware that it was dark out during the shooting and that defendant's face was visible only when he was about 25 to 30 feet away from Pardo.

¶ 163 We reject defendant's argument that Houghtaling's statements were inherently unbelievable (because: (1) they were inconsistent; (2) he was an alleged accomplice who received a plea deal and thus had a motive to lie; and (3) his testimony was the only evidence inculpating defendant). A

conviction supported by a prior inconsistent statement admitted as substantive evidence may be upheld, even though the witness recants the prior statement at trial. *People v. McCarter,* 2011 IL App (1st) 092864, ¶ 23; 725 ILCS 5/115–10.1 (West 2012); see also *People v. Island,* 385 Ill.App.3d 316, 347 (2008) (a recanted prior inconsistent statement admitted pursuant to section 115–10.1 can support a conviction even in the absence of other corroborative evidence). "The trier of fact may consider a prior inconsistent statement introduced as substantive evidence under section 115–10.1 the same as direct testimony by that witness. The trier of fact is free to accord any weight to such properly admitted statements based on the same factors it considers in assessing direct testimony." *McCarter,* 2011 IL App (1st) 092864, ¶ 23. "Once a jury or trial court has chosen to return a guilty verdict based upon a prior inconsistent statement, a reviewing court not only is under no obligation to determine whether the declarant's testimony was 'substantially corroborated' or 'clear and convincing,' but it may *not* engage in any such analysis." (Internal quotation marks omitted.) (Emphasis in original.) *People v. Morrow,* 303 Ill.App.3d 671, 677 (1999) (quoting *People v. Curtis,* 296 Ill.App.3d 991, 999 (1998)). Here, any inconsistencies in Houghtaling's testimony or statements were before the jury and did not render his testimony inherently unreliable, but merely affected the weight to be given to the testimony, which was the jury's role to assess. We cannot conclude that any inconsistencies cast doubt on the jury's verdict.

¶ 164 We also reject defendant's argument that the physical and circumstantial evidence (other than

Houghtaling's statements) did not support a conviction. Defendant contends that there was no physical evidence linking defendant to the crime, arguing that the crime scene was bloody, but that neither defendant nor Houghtaling had blood on their clothes that night or the next day. Nor did McMullen's car have blood stains, and neither defendant nor Houghtaling showed signs of injury.

¶ 165 Defendant's characterization of the crime scene as bloody is not supported by the evidence, where the only testimony on that point concerned Briseno coughing up blood after being shot. At this point, according to Pardo, Briseno was using Houghtaling as a shield, but held him at arm's length and moved one-half step to the left and then one-half step to the right. Further, Pardo did not testify that he saw blood on the man with the green jacket, and there was no testimony that the shooter was close to Briseno after he coughed up blood. As to McMullen's car, it was not recovered until more than two months after the shooting, which provided sufficient time to clean or destroy any physical evidence. Also, the lack of physical injuries to Houghtaling do not cast doubt on his credibility, where it was undisputed that the green leather jacket he wore covered his arms. Finally, we also reject defendant's argument that it was unbelievable that, after the shooting, Collett walked into Cloud 9. His actions are consistent with providing an alibi for the group. Further, we note that Houghtaling told police in Omaha, without suggestion, that only Collett went inside Cloud 9.

¶ 166 As to defendant's theory that the DeCicco group committed the crime, we reject defendant's argument

that he presented compelling evidence of that group's culpability that overwhelmed the State's case against him. Although DeCicco knew two facts that were not made public—*i.e.,* that Briseno was hit in the head with a gun and that he shouted into a passing car—we disagree that the evidence against the DeCicco group was far stronger than that against defendant. DeCicco's confessions to police, which were central to defendant's case, were fraught with significant inconsistencies. She told police in 2005 in Quincy that she saw the Brummett gun when Levand and Hiland were going through her car trunk (and before she drove and found them at the Burrito Express). However, in 2006, she told police that she did not see the gun until later while near the restaurant: when the men entered the restaurant and when Levand ran toward her car. DeCicco's recollection of the date of her group's alleged involvement in the shooting was incorrect, because she stated that it occurred on the date of her niece's birth, which was March 5, 2001, whereas the shooting took place on March 6, 2001.

¶ 167 DeCicco also told police in Quincy that Detective Pechous had come to her jail cell in the middle of the night to tell her that another officer was trying to help defendant and that Pechous knew that her group was guilty. This statement was contradicted by Pechous, who had prepared a report of his conversation with DeCicco, wherein he reported that he did not meet with her at night and that he visited her twice. (When confronted with this, DeCicco stated that, "It's been a while.") Also, Sergeant Schroeder testified that state police investigated the allegations and that there were no findings of malfeasance by the McHenry police

department. DeCicco also told police that Briseno threw a knife at the two men after they entered the restaurant, but no knife was ever recovered from the floor and Pardo did not mention this in his testimony; a knife was recovered near Briseno's body. Further, DeCicco's description of the mens' facial coverings were not consistent with Pardo's description that both men wore masks: DeCicco stated first in 2006 that both Levand and Hiland wore masks; however, she later stated that Hiland cleaned blood off of his face and that he had worn a scarf. (She also testified that both men were covered in blood.)

¶ 168 The jury also heard that DeCicco used drugs (like Houghtaling and defendant) and, further, that she lied to obtain money for drugs. DeCicco testified that, when she spoke to state police in 2006, she confessed to being involved in the shooting because she could get "out on the streets faster" so she could buy drugs. Also in 2006, she first stated that she had not read the confessions in the case and then stated she had (before catching herself): "Me too and I've also, or I haven't seen." She then explained that she had read newspaper accounts and not read the actual confessions. DeCicco's testimony concerning Hiland cutting his hand with the knife is also suspect because the DNA recovered from the knife belonged only to Briseno.

¶ 169 As to DeCicco's statement that Briseno shouted out something at her while she was allegedly in her car and leaving the scene, the details that she related about the incident cast doubt on her involvement. DeCicco stated in 2005 to police that she followed Levand and Hiland after they started walking to the

Burrito Express; she was in her car. She saw them run into the restaurant and DeCicco started to pull away in her car. However, "all four of them * * * darted across the street in front of me. One of the Hispanic men turned around and yelled something in my car. I just kept driving." However, Pardo did not testify that the four men ran as a group across the street. He stated that, after the two men ran out of the restaurant, he ran in one direction in front of the cleaners and Briseno ran behind the cleaners. Pardo lost sight of the two men after they crossed Third Street and ran near a house. At one point, as Briseno and Pardo followed the men, Pardo saw Briseno stop and talk to someone in a car. Thus, he did not state that all four men ran across the street at the same time in a group. Further, Pardo testified that he did not see defendant outside until defendant approached from about 25 to 30 feet away and after Pardo had caught the man in the green jacket.

¶ 170 As to the Brummett gun (a .22–caliber revolver with six lands and grooves), although McIntyre could not identify it as having fired the bullet that killed Briseno, she could not exclude it. However, she stated that a .22–caliber gun is a very common type of gun, as are six lands and grooves. DeCicco's statement that Briseno was pistol-whipped was consistent with what the detectives believed occurred during the shooting and was information that was not released to the public. However, Pardo never testified that he witnessed the shooter strike Briseno with his gun and Dr. Blum, the pathologist, concluded only that the laceration of Briseno's head was caused by contact with a *blunt object* and that this was *consistent* with being pistol-whipped with the barrel of a gun;

however, he made no determination as to the *timing* of the wound. Finally, DeCicco told state police during her 2006 interview not only that Briseno was hit in the head with a gun, but also that this information " 'was not in the papers anywhere. How would I know that unless the people who did it actually told me?' " The fact that DeCicco stated that the pistol-whipping was not in the papers could reflect merely that she read new reports of the crime or reflect that this non-public information was not kept as secret from the public as the police desired. It was the jury's function to assess this testimony, and we cannot conclude, given the foregoing, that her testimony render's Houghtaling's testimony inherently unreliable.

¶ 171 Finally, as to the DeCicco group's confessions to third parties, the jury heard that testimony, including that several witnesses had prior convictions involving deceit (Anderson, Schwartz, and Trumble) and that several of the alleged confessions occurred long after the shooting (Hiland's confession to Anderson; DeCicco's confession to Rexford; and Hiland's confession to Trumble). It was the jury's function to assess the witnesses' credibility. It found Houghtaling's prior statements credible and the DeCicco group's confessions incredible. We also reject defendant's contention that Hiland's repeated confessions raised a reasonable doubt about the State's case, including because they contained details that explained the gaps in the State's case against defendant. Defendant focuses on the scrapes and bruises the witnesses observed on Hiland in the days following the shooting. Pardo's description of the shooting does not necessarily lead to the conclusion that the man in the green jacket sustained such

injuries. Further, the witnesses also testified that Hiland offered an alternative explanation for his injuries: he had slipped and fallen on icy stairs at Benjamin DeCicco's house.

¶ 172 A trier of fact is not required to accept any possible explanation compatible with a defendant's innocence and elevate it to the status of reasonable doubt (*People v. Siguenza–Brito,* 235 Ill.2d 213, 229 (2009)), or to accept a defendant's version of events from competing versions of events (*People v. Villarreal,* 198 Ill.2d 209, 231 (2001)). Here, the jury was presented with two versions of the events and, given its verdict, it found the State's version persuasive. The State's evidence, most notably Houghtaling's prior statements, was not so unreasonable, improbable, or unsatisfactory that it raised a reasonable doubt as to defendant's guilt. In summary, the evidence was sufficient to sustain defendant's convictions.

¶ 173 C. Evidentiary Rulings

¶ 174 Next, defendant challenges the trial court's evidentiary rulings, arguing that the court actions denied him his federal and state constitutional due process right to a fair trial and that the court abused its discretion. He argues that the court excluded competent and admissible evidence relevant to his defense and erred in ruling on the admissibility of certain other evidence. For the following reasons, we reject defendant's arguments.

¶ 175 "A criminal defendant, whether guilty or innocent, is entitled to a fair, orderly, and impartial

trial" conducted according to law. *People v. Bull,* 185 Ill.2d 179, 214 (1998). This due process right is guaranteed by the federal and state constitutions. *Id.* at 214; U.S. Const., amend. XIV, § 1; Ill. Const.1970, art. I, § 2; see also *People v. Peeples,* 155 Ill.2d 422, 480 (1993).

¶ 176 Generally, evidentiary rulings are reviewed for an abuse of discretion. *People v. Patrick,* 233 Ill.2d 62, 68 (2009). A court abuses its discretion where its ruling is arbitrary, fanciful, or unreasonable. *Id.* " 'Moreover, even where an abuse of discretion has occurred, it will not warrant reversal of the judgment unless the record indicates the existence of substantial prejudice affecting the outcome of the trial. [Citation.]' " *People v. Jackson,* 232 Ill.2d 246, 265 (2009) (quoting *In re Leona W.,* 228 Ill.2d 439, 460 (2008)).

¶ 177 1. Exclusion of DeCicco Group's Motive/Anderson's Testimony

¶ 178 First, defendant argues that the trial court erred in excluding Patrick Anderson's testimony, which demonstrated that the DeCicco group had a motive to rob and ultimately kill Briseno. He notes that the jury heard testimony from multiple witnesses that Hiland confessed that the motive for the robbery was to obtain cocaine and drug money because he and Levand were drug users who ran out of drugs. The excluded evidence, defendant urges, corroborated this testimony: Briseno was a drug dealer who often had drugs and cash at his restaurant, and, one week before Briseno's death,

Levand (the shooter) learned that there were often drugs and cash at the Burrito Express.

¶ 179 To be admissible, evidence must be relevant, meaning that it is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff.Jan.1, 2011); see also *People v. Kirchner,* 194 Ill.2d 502, 539 (2000); *People v. Cruz,* 162 Ill.2d 314, 348 (1994) (generally, "all relevant evidence is admissible unless otherwise provided by law"). However, "a court may generally exclude relevant evidence if its probative value is outweighed by such dangers as unfair prejudice, jury confusion, or delay." *Id.* Further, evidence may be excluded as irrelevant where it is remote, uncertain, or speculative. *People v. Ursery,* 364 Ill.App.3d 680, 686 (2006).

¶ 180 Anderson came forward with the evidence in 2011, when he wrote a letter to defense counsel, stating that he purchased drugs from Briseno and sold them to Levand, whom he took to the restaurant one week before the shooting. The trial court excluded Anderson's testimony, finding that it contained numerous hearsay statements; that it was "highly suspect" given that Anderson came forward 10 years after the shooting; and that the testimony did not establish a motive for the DeCicco group to commit the crime because there was no close connection to the drugs and the shooting. (The court allowed Anderson's testimony concerning Levand's confession to him while they were incarcerated. During his

testimony, Levand denied that he confessed to Anderson.)

¶ 181 As to the court's finding that the motive evidence was not closely connected to the crime, defendant contends that Anderson would have testified from personal knowledge that Levand purchased drugs sold by Briseno shortly before the shooting and that Levand was aware that Briseno sold drugs from the restaurant and kept large quantities of drugs there. He asserts that this evidence, combined with evidence the jury heard—namely, about the DeCicco group's drug use and need for drugs on the night at issue, that the robbers walked past the cash register and into the rear of the restaurant, and that the DeCicco group's version of the events matched the facts much better than Houghtaling's version—the excluded evidence made the DeCicco group's guilt more likely and the State's version of the events less credible. Defendant further argues that Anderson's testimony that Levand knew Briseno had drugs and money at the restaurant was essential to the jury's weighing of the competing theories.

¶ 182 Defendant relies on *People v. Neely,* 184 Ill.App.3d 1097 (1989). In that case, the defendant was convicted of robbery, intimidation, and aggravated battery. Prior to trial, the trial court granted the State's motion to exclude evidence of an alleged cocaine delivery by the victim to the defendant's co-defendant on the evening of the alleged offenses. At trial, the victim testified that he met the co-defendant at a tavern and later drove with another individual to pick up the defendant at a low income

housing unit. They drove to the other man's trailer, where they played music and drank beer. Later, they returned to the housing unit where they had picked up the defendant, and the defendant approached the victim from behind and hit him on the back of the head, kicked him in the face, and stepped on his forehead. After kicking him again, the defendant took $20 from the victim's pocket and stole his wallet. The defendant and co-defendant then blindfolded the victim and drove him to the countryside and left him. The co-defendant, who had pleaded guilty to aggravated battery and who was the defendant's cousin, testified for the defense that he had beaten the victim because, earlier in the evening, the victim had sold him something that the co-defendant did not believe was worth the $20 he had paid for it.

¶ 183 On appeal, the court held that the trial court erred in excluding the evidence of the drug delivery. *Id.* at 1110. The court determined that the evidence "lent credibility" to the co-defendant's testimony that he, rather than the defendant, attacked the victim. *Id.* "Though there was evidence that [the victim] had cheated [the co-defendant] in the sale of something, the jury was left wondering why [the co-defendant] would react so violently to having been cheated." *Id.* The appellate court concluded that the exclusion of the evidence made the co-defendant's account less credible and, thus, offended the principle that a defendant "is entitled to all reasonable opportunities to present evidence which might tend to create doubt as to his guilt." *Id.*

¶ 184 Here, defendant argues that, like *Neely,* the proposed evidence would have supported defendant's

other evidence pointing directly to the DeCicco group's guilt and away from his own. Anderson would have testified from personal knowledge that Levand purchased drugs sold by Briseno shortly before the shooting and that Levand was aware Briseno sold drugs from the restaurant and kept large quantities of drugs there.

¶ 185 The State responds that this court can affirm on any basis supported by the record and raises two arguments. First, it argues that Anderson's testimony was properly excluded because it was speculative (and, thus, irrelevant) and likely to confuse the jury by suggesting that the robbery was related to a drug business. The State contends that, assuming that defendant's offer of proof showed that Levand knew that large amounts of cash and drugs were at times present at the restaurant, that evidence is irrelevant to show that the DeCicco group had a motive to commit the charged crimes. It urges that the issue is not whether the DeCicco group robbed the Burrito Express, as opposed to some other establishment on the date at issue, but whether they committed the charged armed robbery and murder. The State further asserts that the fact that a person may know that a retail establishment that is open for business has a large amount of cash on the premises does not, in itself, provide a motive for someone to attempt to rob the store.

¶ 186 As to *Neely,* the State responds that here, in contrast, the excluded evidence would not have made it more likely that Hiland and Levand would determine that they were going out to commit a robbery simply because they knew that a large sum of

cash might be present at a particular establishment. In *Neely,* the State asserts, the co-defendant's anger and need for vengeance explained his actions, which formed the charged crime. Here, similar evidence would be that which was already admitted: Hiland's explanation that he and Levand decided to go somewhere to commit a robbery for money because they ran out of drugs and wanted to buy more. That was the motive evidence, according to the State, and it was admitted at trial. The excluded evidence, it urges, did not show motive and, so, was not relevant. The State adds that the evidence was also not proper to bolster the truth of the matter asserted in the declarations against interest by Hiland and Levand (that they committed the robbery and murder) because it is a mere embellishment, not objective indicia of trustworthiness, by the witness who is testifying that a declaration against interest was made.

¶ 187 Second, the State argues that the *live* offer of proof reflected only that Anderson would have testified that Levand was present when Anderson tried to buy drugs from someone named "Serge" at the Burrito Express or in its parking lot. The State suggests that it is "a leap" from knowing those facts to believing that drugs and a large amount of money were stored at the restaurant (as was related in Anderson's *letter*). It further notes that there was no evidence that the crime was committed to steal drugs and, thus, evidence concerning whether there were drugs, as opposed to money and drugs, on the premises was not relevant. The State also points out that the offer of proof did not show that Briseno was

present for and involved in a drug transaction one week before his death.

¶ 188 Finally, the State argues that, even if Anderson's letter is considered (in conjunction with the live offer of proof) part of defendant's offer of proof,[7] the trial court's exclusion of the evidence was not an abuse of its discretion because the proposed evidence was not specific. According to the State, even considering that Anderson could have testified that he told Levand that large sums of money and drugs could be found on the premises at times, the statement does not contain details as to a specific amount or range of money reasonably expected to be present and it did not give a specific time or day when the money and drugs would be there. The "jurors would be allowed to speculate that, without any knowledge of the times or days that an unknown quantity of cash or drugs could be found, it was very likely that Hiland and Levand would rob the Burrito Express and so the fact that it was robbed shows that Levand and Hiland committed the crime."

¶ 189 We conclude that the trial court did not abuse its discretion in excluding the motive evidence. It was not unreasonable to exclude the evidence on the bases that it was not entirely consistent with the admitted evidence (and thus did not entirely bolster that

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[7] The State cites no authority for the proposition that only the live testimony constitutes defendant's offer of proof. Indeed, this approach has been criticized as "unduly strict," as offers of proof are not even required where the court is apprised of the nature and character of the evidence that is sought to be introduced. See Michael H. Graham, Handbook of Illinois Evidence § 103.7, at 37–39 (10th ed.2010).

testimony) and that it would have confused the jury as to the proper focus of the trial (*i.e.,* the murder, as opposed to Briseno's alleged drug-dealing). As to consistency, the evidence *admitted* at trial (specifically, McCauley's and DeCicco's testimony) reflected that the DeCicco group had been doing drugs on the day of the shooting, ran out of drugs, and allegedly decided to go out and commit a crime to obtain cash so that they could purchase more drugs. McCauley testified that, during his confession to her, Hiland stated that the DeCicco group ran out of drugs and wanted more money and decided to rob the Burrito Express. DeCicco, however, stated during her Quincy interview that she overheard Levand and Hiland discuss stealing purses or robbing someone to get money. The proffered testimony—*i.e.,* that Levand knew that Briseno kept drugs and money at the restaurant and, as a result, decided with his group to rob it—was not entirely consistent with the admitted testimony.

¶ 190 As to relevance, the possible presence of drugs, "at times," in the restaurant or on Briseno is not directly relevant because the admitted testimony reflected that the DeCicco group allegedly decided to go out to commit a crime to obtain *cash* (so that they could purchase drugs). It did not reflect that they decided to commit a crime to obtain both cash and drugs. Anderson's testimony as to the presence of drugs was, therefore, not relevant. We further note that defendant also sought to admit the testimony of Quinones, who would have testified that he worked as an undercover operative in a drug investigation in August and September 2000 and that he spoke to Briseno, who offered to, and did, sell him drugs. He

also sought to admit the testimony of Solarz, who would have testified that he searched the Burrito Express on March 7, 2001, using a K–9 handler and narcotic-sniffing dog, who indicated the possible presence of narcotics inside the restaurant. We conclude that it would not have been unreasonable to exclude this testimony on the basis that it would have confused the jury by directing its attention to Briseno's drug-dealing, and was not relevant to the DeCicco group's alleged plan to rob someone or some establishment to obtain money to purchase drugs.

¶ 191 We further disagree with defendant that *Neely* supports his argument. The *Neely* court explained that the evidence should have been admitted to explain the *degree* of the co-defendant's reaction to the transaction, thus, lending credibility to his testimony. *Neely,* 184 Ill.App.3d at 1110. Here, in contrast, the admitted evidence was that the DeCicco group had been doing drugs on the day of the shooting, ran out of drugs, and allegedly decided to go out and commit a crime to obtain cash so that the group could purchase more drugs. Anderson's statement in his letter to defense counsel that he told Levand that Briseno was known to keep large amounts of cash at his restaurant "at times" does not explain the *degree* of Hiland's and Levand's actions.

¶ 192 Alternatively, even if it was error to exclude the testimony, we conclude that the record does not reflect that the error substantially prejudiced defendant such that it affected the outcome of the trial. The "State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." *People v. Thurow,* 203 Ill.2d 352,

363 (2003). When deciding whether error is harmless, a reviewing court may: (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence. *In re Rolandis G.,* 232 Ill.2d 13, 43 (2008). As to cumulative evidence, generally, where the admitted evidence is an adequate substitute for the excluded evidence or if such evidence adequately compensates for the excluded evidence, any error should be deemed harmless. *People v. Booker,* 274 Ill.App.3d 169, 174 (1995). We reject defendant's claim that Anderson's testimony was of a different kind and character than that admitted at trial in that it directly corroborated one confession and, thus, "very likely" would have affected the outcome of the trial. The evidence was circumstantial, not direct as defendant suggests, and cumulative to the direct evidence admitted at trial. Other witnesses testified that the DeCicco group attempted to rob the Burrito Express. Specifically, Tyda, Rexford, and Vicki Brummett testified that DeCicco confessed to them, and Trumble, Kollross, McCauley and Schwartz testified that Hiland confessed to them. Further, Anderson was allowed to testify that Levand confessed to him while they were both in jail. In contrast to this direct testimony (see, *e.g., People v. Spencer,* 27 Ill.2d 320, 326 (1963) ("as opposed to the circumstantial evidence relied upon by defendant, there is the factor that his confession was direct evidence of his guilt, [citation] which, in itself, overcomes the circumstantial theories relied upon by defendant and affords proof of his guilt beyond a

reasonable doubt.")), Anderson's (excluded) testimony concerning the presence "at times" of drugs and money at the restaurant was circumstantial evidence linking the DeCicco group to the crime and was cumulative to the evidence concerning the DeCicco group members' confessions. Accordingly, we cannot conclude that, if it was erroneously excluded, the exclusion of this testimony substantially prejudiced defendant such that it affected the outcome of the trial.

¶ 193 2. Exclusion of Trumble's Testimony That He Took Hiland to an Attorney

¶ 194 Next, defendant argues that, although the trial court permitted Trumble's testimony that Hiland confessed in the presence of another person, the court erred in refusing to permit "the key foundational fact that Edens was a lawyer from whom Hiland was seeking advice." According to defendant, because the jury was deciding between the reliability of various confessions, the exclusion of evidence making a confession more reliable was highly prejudicial error. For the following reasons, we disagree.

¶ 195 The testimony that was allowed at trial was as follows. Trumble was allowed to testify that he had three conversations with Hiland wherein Hiland confessed. Trumble, who has a conviction related to writing bad checks, related the details of the crime that Hiland provided to him. Also, the jury heard DeCicco's testimony that Hiland told her that he saw an attorney because "they thought—after they took, after they took the weapon, everybody thought we were going to jail."

¶ 196 An extrajudicial declaration not under oath, by the declarant, that he or she, and not the defendant on trial, committed the crime is inadmissible as hearsay, even though the declaration is against the declarant's penal interest. *People v. House,* 141 Ill.2d 323, 389–90 (1990); *People v. Bowel,* 111 Ill.2d 58, 66 (1986). Such a declaration may, however, be admitted where justice requires. *House,* 141 Ill.2d at 390; *Bowel,* 111 Ill.2d at 66. Thus, where there are sufficient indicia of trustworthiness of such extrajudicial statements, a declaration may be admissible under the statements-against-penal-interest exception to the hearsay rule. *Bowel,* 111 Ill.2d at 66. In *Chambers v. Mississippi,* 410 U.S. 284, 300–01 (1973), the Supreme Court held that a declaration against penal interest is admissible where there is sufficient indicia of trustworthiness in that: (1) the statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) the statement was corroborated by other evidence; (3) the statement was self-incriminating and against the declarant's interest; and (4) there was adequate opportunity for cross-examination of the declarant. The presence of all four factors is not a condition of admissibility. "They are indicia, not hard and fast requirements." *House,* 141 Ill.2d at 390. The question to be considered in deciding the admissibility of such an extrajudicial declaration is whether it was made under circumstances which provide " 'considerable assurance' " of its reliability by objective indicia of trustworthiness. *Bowel,* 111 Ill.2d at 67 (quoting *Chambers,* 410 U.S. at 300–01). "A statement made to a law [-]enforcement officer may be made in an attempt to curry favor and obtain a reduced sentence;

it may also be the product of coercion or force and be involuntary. Such a statement might not be as reliable as a statement made to a good friend or [a] family member." *Tenney,* 205 Ill.2d at 438–39. However, statements made to police officers in response to structured questioning may be more reliable than casual statements supposedly made to acquaintances. Statements to police officers while in custody have been admitted in a number of cases. See, *e.g., People v. Human,* 331 Ill.App.3d 809, 817 (2002); *People v. Kokoraleis,* 149 Ill.App.3d 1000, 1020–21 (1986) (statements to an assistant State's Attorney and police officers while in custody more likely than not were trustworthy despite unavailability of declarants; "neither declarant stood to benefit by disclosing his role in the offenses").

¶ 197 In *Human,* upon which defendant relies, the defendant challenged the trial court's exclusion of a third-party confession. The appellate court reversed, holding that the circumstances under which the third-party confessed, coupled with the self-incriminating nature of his statements, made his confession reliable. *Id.* at 818. The third-party: (1) was accompanied to the courthouse by his parents and his attorney and confessed in the presence of an assistant State's Attorney and police officers; (2) his confession was corroborated by other evidence at trial (that left open the possibility that he was the shooter); and (3) the third-party did not stand to benefit from his statements because they were self-incriminating and against his penal interest. *Id.* at 817–18.

¶ 198 Defendant argues that here, like *Human,* Hiland's confession to Trumble and attorney Edens

was made under circumstances that provide considerable assurance of its reliability: Hiland confessed to an attorney for the purpose of seeking legal advice. (The conversation was not privileged because it took place in front of Trumble.) Defendant further argues that the error was prejudicial because the fact was critical to the jury's assessment. He contends that Hiland had no ulterior motive to confess (such as to look tough or to convince his friend to give him money for drugs) and that his statement would have been corroborated by DeCicco's confession, in which she told police that Hiland had met with an attorney. He further argues that there is no plausible reason for someone to confess to murder to an attorney (who is duty-bound not to repeat the information) other than to seek legal advice for the crime that the person actually committed. The State would have been free to argue to the jury that Hiland was merely boasting at the restaurant. Defendant argues that the evidence would have strengthened his case and asserts that the State cannot show beyond a reasonable doubt that the exclusion of this evidence was harmless.

¶ 199 We conclude that the trial court did not abuse its discretion in excluding Trumble's testimony. The fact that Hiland confessed in Trumble's presence was admitted at trial. The exclusion of the fact that Hiland did so to an attorney does not necessarily imbue the confession with trustworthiness (and thus make it more probable that defendant did not commit the crime). *Human,* upon which defendant relies, is distinguishable because it involved a confession to law enforcement, where the party did not stand to benefit from his statements. *Human,* 331 Ill.App.3d

at 817 (quoting *Kokoraleis,* 149 Ill.App.3d at 1020–21) ("statements 'were more likely trustworthy because they tended to intensify police efforts to prosecute' the declarants"). Here, in contrast, the evidence at issue, that Hiland confessed to an attorney in a public place and in the presence of a third person, did not make it more likely that Hiland would be prosecuted.

¶ 200 Even if the court erred in excluding the testimony, we conclude that the error was harmless because the testimony was cumulative. An error may be harmless if it did not contribute to the outcome of an action, if overwhelming evidence supports the order of the trial court, or if the error pertained to evidence that was merely cumulative or corroborative of other evidence. *People v.. Fletcher,* 328 Ill.App.3d 1062, 1071–72 (2002). Several witnesses (Trumble, Kollross, McCauley and Schwartz) testified that Hiland confessed to them. Further, the jury heard DeCicco's statement that Hiland told her that he spoke to an attorney because, after the Brummett gun was retrieved, he was worried that the group would go to jail. The jury no doubt would have reasonably inferred from DeCicco's testimony that Hiland confessed to the attorney. Thus, the evidence was admitted at trial and the exclusion of duplicate testimony from Trumble was harmless and did not prejudice defendant. *People v. Caffey,* 205 Ill.2d 52, 92 (2001) (error in the exclusion of testimony is harmless where the excluded evidence is merely cumulative of the other evidence presented).

¶ 201 3. Admission of Collett's Out–of–Court Statements

¶ 202 Defendant next argues that the trial court erred in admitting Collett's out-of-court statements after he denied knowledge of or involvement in the shooting. The admitted evidence included his guilty plea, apology, and putatively inculpatory statements by defendant. Defendant asserts that the evidence was inadmissible: (1) as substantive evidence under section 115–10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115–10.1 (West 2012)), in that four statements were not proper impeachment because they were not inconsistent with his testimony, and, even if otherwise admissible, the two statements attributed to defendant were not admissible against him; and (2) Collett's testimony did not affirmatively damage the State's case. For the following reasons, we reject defendant's argument.

¶ 203 *(a) Admission as Substantive Evidence under Section 115–10.1*

¶ 204 Generally, a prior inconsistent statement may be used only for impeachment purposes. *People v. Morgason,* 311 Ill.App.3d 1005, 1010 (2000). However, section 115–10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115–10.1 (West 2012)) (as well as Illinois Supreme Court Rule 801(d)(1)(A) (eff.Jan.1, 2011), which is "functionally completely identical" to the statutory provision (Michael H. Graham, Handbook of Illinois Evidence § 801.11, at 785 (10th ed.2010)) allows the admission of a witness's prior inconsistent statement as substantive evidence under certain circumstances. It provides:

" § 115–10.1. Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and

(b) the witness is subject to cross-examination concerning the statement, and

(c) the statement—

(1) was made under oath at a trial, hearing, or other proceeding, or

(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, or

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not

recorded or otherwise fails to meet the criteria set forth herein." 725 ILCS 5/115–10.1 (West 2012).[8]

¶ 205 Thus, to be admissible under section 115–10.1, a statement must be inconsistent with the witness's testimony at trial, the witness must be subject to cross-examination, and the statement must either: (1) have been made under oath at a trial, hearing, or other proceeding; or (2) narrate, describe, or explain an event or condition of which the witness had personal knowledge, and meet at least one of three other requirements. If a prior inconsistent statement meets the requirements of section 115–10.1, it may be admitted as substantive evidence without an independent determination of its reliability or voluntariness. *People v. Barker,* 298 Ill.App.3d 751, 761 (1998); *People v. Pursley,* 284 Ill.App.3d 597, 609 (1996); *People v. Carlos,* 275 Ill.App.3d 80, 84 (1995).

¶ 206 Defendant first argues that four of Collett's statements were erroneously admitted as substantive evidence under section 115–10.1 because they were not inconsistent with Collett's trial testimony. He additionally argues that the two statements that Collett attributed to defendant were not based on Collett's personal knowledge and, thus, did not meet the standards of section 115–10.1. The State contends that defendant forfeited review of these claims because he never objected to the substantive admission of the prior inconsistent statements on the bases he now advances. It notes that, in his posttrial motion, defendant conceded that the statements met

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[8] See also Illinois Rules of Evidence 801(d)(2) (Ill. R. Evid.801(d)(2) (eff.Jan.1, 2011)).

section 115–10.1's requirements, but that the State could not call Collett because it knew he would not testify in a manner favorable to the State. See *People v. Eyler,* 133 Ill.2d 173, 219 (1989) (a specific objection waives all grounds not specified). We conclude that the claims are forfeited, but address defendant's argument that the admission of the statements as substantive evidence constituted plain error.

¶ 207 Defendant failed to object to the testimony at trial or include the issue in his posttrial motion. Accordingly, defendant has procedurally defaulted the alleged error in admitting the testimony unless we conclude that plain error affecting a substantial right has occurred. See *People v. Williams,* 193 Ill.2d 1, 26–27 (2000). In order to obtain relief, defendant must establish that an error occurred. *People v. Hillier,* 237 Ill.2d 539, 545 (2010). The plain-error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski,* 225 Ill.2d 551, 565 (2007). We first consider whether error occurred. *Williams,* 193 Ill.2d 1 at 27.

¶ 208 The first statement defendant challenges is Collett's guilty plea. Collett testified that he had no idea who robbed the Burrito Express. The State asked defendant if he had pleaded guilty to the offense, and Collett testified that he had and that he had not been forced to do so. The State next asked Collett why he

pleaded guilty to attempted armed robbery if he was not involved, and Collett replied that, based on his attorney's advice, he agreed to take a "plea of convenience" to avoid a lengthy prison term if convicted.

¶ 209 "[P]rior testimony need not directly contradict testimony given at trial to be considered 'inconsistent' [citation] and is not limited to direct contradictions but also includes evasive answers, silence, or changes in position." *People v. Martinez,* 348 Ill.App.3d 521, 532 (2004). We agree with the State that Collett's guilty plea is clearly inconsistent with his testimony at defendant's third trial that he had no knowledge of who attempted to rob the Burrito Express on March 6, 2001.

¶ 210 The second statement defendant challenges concerns Collett's statement to Briseno's widow. The State asked Collett if he recalled Briseno's widow testifying at his sentencing hearing "to the impact this had on her life" and read Collett's apology. Collett testified that he made the statement, but explained that he was expressing sorrow for the family's grief, not personal remorse for committing the crime. Defendant argues that the widow's testimony regarding the "impact on her life" was hearsay and that Collett's response (his apology) was not inconsistent with his trial testimony, where he did not admit involvement but apologized for her loss. We reject this argument.

¶ 211 Collett's statement at his guilty plea to Briseno's widow that, "I really if I would have known that any of this would have happened, I really would

have tried to do something to stop it, but, honestly, I didn't think that anything like that would have happened was going to happen [*sic*]," suggests involvement in the incident to the point that he could have, but did not, try to stop it (presumably the murder). This contradicts his testimony that he had no knowledge of who committed the crime.

¶ 212 The third statement that defendant challenges addresses the sounds Collett stated that he heard. After Collett testified that he heard what sounded like a car backfiring, the State asked him about his prior statement to police, on May 12, 2001, that the sound he heard was gunshots. Defendant argues that Collett's statement was not inconsistent with his prior statements, where Collett explained that the police asked him if the sound of the car backfiring could have been shots and he said that he did not know. This claim also fails. Regardless of whether the police first suggested the possibility of gunshots instead of a car backfiring, Collett acknowledged that he told the officers in 2001 that he heard shots and that there could have been two of them. This contradicted his testimony at trial that he heard a noise that sounded like a car backfiring.

¶ 213 The fourth challenge defendant raises concerns statements Collett made to police about potentially inculpatory statements defendant allegedly made shortly after the robbery: (1) defendant stated "that some kids just robbed the Burrito Express;" and (2) that he "just had some fun." Defendant argues that the statements were not inconsistent with Collett's testimony because they did not implicate Collett in

any way, he did not change his testimony, and were not based on Collett's personal knowledge.

¶ 214 Collett's trial testimony that he did *not* speak to defendant about what had occurred at the restaurant after the shooting *was inconsistent* with his prior statements that defendant *had made statements* to Collett relating to what had happened at the Burrito Express. As noted, while in McMullen's car, defendant stated that some kids had just robbed the restaurant and, later at Weisenberger's house, defendant stated, according to Collett, "just had some fun."

¶ 215 Defendant additionally argues that the statements he made were not substantively admissible because they were not within Collett's personal knowledge as required by section 115–10.1. Defendant relies on case law that holds that, for a witness to have personal knowledge, the witness must have observed, and not merely heard, the subject matter underlying the statement. *Morgason,* 311 Ill.App.3d at 1011 (noting that "personal knowledge" excludes statements, including admissions, made to the witness by a third party, where the witness has no firsthand knowledge of the event that is the subject of the statements made by the third party); *People v. McCarter,* 385 Ill.App.3d919, 930–31 (2008); *People v. Coleman,* 187 Ill.App.3d 541, 546–48 (1989) (for witnesses to have "personal knowledge" of event or condition within meaning of statute, "overwhelming authority" supports interpretation that witness must have personally observed underlying events; simply overhearing incriminating statements made by the defendant is not enough); see also *People v. Fillyaw,*

409 Ill.App.3d 302, 312 (2011) (holding that a statement made to a testifying witness by a third party describing events of which the testifying witness has no firsthand knowledge is inadmissible as substantive evidence under section 115–10.1(c)(2)); *People v. Bueno,* 358 Ill.App.3d 143, 157–58 (2005); *People v. Fields,* 285 Ill.App.3d 1020, 1028 (1996) ("[t]he personal knowledge requirement limits the use of out-of-court statements to those events the witness actually observed"); *People v. Morales,* 281 Ill.App.3d 695, 700 (1996) (requirement is not satisfied when the witness merely testifies as to what another claims to have done); *People v. Williams,* 264 Ill.App.3d 278, 290 (1993); *People v.. Saunders,* 220 Ill.App.3d 647, 658 (1991); *People v. Hastings,* 161 Ill.App.3d 714, 720 (1987). The rationale for requiring a witness to personally observe the events that are the subject matter of his or her comments is that a witness is less likely to repeat another's statement if he or she witnessed the event and knows that the statement is untrue. *Morales,* 281 Ill.App.3d at 701.

¶ 216 Here, the State relies on the supreme court's decision in *People v. Thomas,* 178 Ill.2d 215, 239 (1997), wherein the court stated that "[a]ssuming without deciding that the personal knowledge required under the statute must be from observing the event, [the witness] witnessed the argument between defendant and [his co-conspirator] and her statement described and narrated the event. Thus, [the witness's] prior inconsistent hearsay statement was admissible under the statute." *Id.* at 239. Again, the State concedes that appellate districts have "uniformly disagreed and determined that the witness must have observed the events described in

the underlying statement, not just have heard a statement about the events." It requests that we consider the merits of *Thomas,* where, here, Collett was subject to cross-examination about what he heard.

¶ 217 We need not re-examine *Thomas* because we are bound to follow it. See, *e.g., People v. Fountain,* 2012 IL App (3d) 090558, ¶ 23 ("As an intermediate appellate court, we are bound to honor our supreme court's conclusion on [an] issue unless and until that conclusion is revisited by our supreme court or overruled by the United States Supreme Court."). Defendant's characterization of the case law is misleading. The cases decided after *Thomas* that support defendant's proposition either do not mention *Thomas* at all (*Fillyaw,* 409 Ill.App.3d at 312; *McCarter,* 385 Ill.App.3d at 930–31; *Bueno,* 358 Ill.App.3d at 157–58) or distinguish it (*Morgason,* 311 Ill.App.3d at 1011–12). Again, *Thomas* holds that it is sufficient that the witness heard the statements being made without personal knowledge of the underlying content. That requirement was met here. Accordingly, no error occurred in admitting the statements, and, further, there was no plain error.

¶ 218 (*b) Affirmative Damage*

¶ 219 Next, defendant argues alternatively that Collett's statements could not have been admitted for impeachment purposes because they did not affirmatively damage the State's case. As to this argument, which is not forfeited, defendant contends that no witness identified Collett or placed him at the Burrito Express and that even Houghtaling's

statements made no mention of Collett's involvement or knowledge of the crime. Thus, the State should not have been allowed to impeach its own witness. Defendant asserts that the State did not present evidence that a third man (*i.e.,* Collett) was involved in any way in the shooting and, therefore, Collett's testimony that he was not involved was not damaging. He points to the fact that Pardo testified that he never saw a third man and that Houghtaling said nothing about Collett. Further, Collett's testimony acknowledged that defendant and Houghtaling were in the area at the time of the shooting and that Collett did not see who committed the crime. Defendant emphasizes that, where there were no other inculpatory statements by defendant, Collett's testimony could easily have affected the outcome.

¶ 220 The admissibility of impeachment evidence is a matter within the sound discretion of the trial judge. *People v. Baggett,* 115 Ill.App.3d 924, 934 (1983). The State may attack the credibility of a witness, even its own witness, by impeaching the witness with a prior inconsistent statement. *People v. Cruz,* 162 Ill.2d 314, 358 (1994). This is so even if the statement does not meet all of the requirements of section 115–10.1. See 725 ILCS 5/115–10.1 (West 2010) ("Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement * * * fails to meet the criteria set forth herein."). However, when the State impeaches its own witness with a prior inconsistent statement, the State must show that the witness's trial testimony affirmatively damaged its case. *Cruz,* 162 Ill.2d at 360; see also Illinois Rules of Evidence 607 (eff.Jan.1,

2011). The testimony must do more than merely disappoint the State by failing to incriminate the defendant; it must give "positive aid" to the defendant's case, such as by being inconsistent with the defendant's guilt under the State's theory of the case. *Cruz,* 162 Ill.2d at 360–62. It is insufficient that a witness merely disappoints the State by failing to incriminate the defendant. *Id.* at 362–63 (witness's "affirmative testimony was entirely neutral. [Her] testimony that she had not observed defendant and [a non-testifying third party who had confessed to the crime] together was similarly neutral. This evidence neither contradicted any evidence presented by the State nor provided positive aid to defendant's body of evidence. As a result, while the State may have been disappointed that [the witness] did not testify in accordance with what was expected of her, the prosecution's case was no worse off than had [the witness] not taken the stand at all."); see also *People v. McCarter,* 385 Ill.App.3d 919, 933 (2008) (prior inconsistent statements held inadmissible, where witness's refusal to incriminate the defendant did not cause affirmative harm to the State's case; she did not offer evidence of the defendant's innocence, but merely declined to come forward with evidence of his guilt).

¶ 221 We conclude that Collett's denial of involvement in the shooting not only affirmatively damaged the State's case, but also gave positive aid to defendant's case. The State's theory of the case was that defendant and Houghtaling went to rob the Burrito Express, with McMullen driving the car and Collett acting as a lookout. (Houghtaling's testimony from his Omaha interview and defendant's second trial placed

Collett inside McMullen's waiting car when Houghtaling ran inside after the shooting.) Collett's denial of involvement and his statements that he did not know who robbed the restaurant clearly damaged the State's case. Further, Collett's denial of involvement in and of knowledge of who committed the crime aided defendant's position that he was *not* involved in the shooting (and reinforced defendant's theory that another group was involved). Had Collett not taken the stand, the State's case would have been better off because his denial would not have been admitted into evidence. Further, defendant's case was aided by affirmative testimony that Collett (and, by association, defendant) was *not* involved in the crime.

¶ 222 In summary, the trial court did not err in admitting Collett's out-of-court statements.

¶ 223 4. Exclusion of Pardo's Inconsistent Statements

¶ 224 Defendant next argues that the trial court erred in excluding Pardo's prior inconsistent statements, where the ruling did not allow the defense to perfect their impeachment of Pardo regarding Houghtaling's green jacket. For the following reasons, this claim fails.

¶ 225 Pardo testified that the man without the gun who entered the Burrito Express on the night of the shooting wore a green leather jacket that looked like the green jacket in People's exhibit No. 66 (Houghtaling's jacket). Houghatling's jacket is green leather, with three front pockets, a zipper with a zipper flap, and areas of black on: the elbows, a patch

just below the center of back of the collar, around the snaps for the zipper flap, horizontal strips above the lower pockets, and the logo on the breast pocket. On cross-examination, defense counsel attempted to elicit testimony that Pardo gave a description of the jacket to police four hours after the shooting that was inconsistent with his trial testimony. Counsel asked Pardo if he had described the jacket as black around the collar, and Pardo stated that he could not recall. Pardo also could not recall stating that the jacket was green with some black or that he did not see any pockets or a zipper on the front of the jacket. The defense then called Detective Jeff Rhode, who interviewed Pardo on the evening of the shooting. Rhode testified that he asked Pardo if the jacket worn by one of the suspects was a solid color, and Pardo replied that it was green with some black on it, but that he did not remember well. When defense counsel asked Rhode whether he asked Pardo if the jacket had on it a pattern or design, the court sustained the State's objection.

¶ 226 In its offer of proof, the defense stated that it would have asked Rhode the following questions about his interview of Pardo: whether Pardo noted a pattern or design, to which Pardo stated that he did not see a design; whether the coat had black all over, to which Pardo stated that he saw only parts of black around the collar area; and whether the coat had pockets or a zipper in the front, to which Pardo stated that he did not see any.

¶ 227 Here, defendant argues that Pardo's description of the jacket immediately after the crime was committed was not consistent with the jacket police

recovered from Houghtaling. On cross-examination, defense counsel attempted to elicit testimony that Pardo gave police a description that was inconsistent with his trial testimony (that the jacket recovered from Houghtaling looked like the one worn by the man without the gun). Pardo stated he could not recall and, defendant called Rhode in an attempt to perfect the impeachment, wherein the trial court sustained the State's objection. Defendant urges that, given that the State had no eyewitness identification and attempted to substitute Pardo's description of the jacket for that identification, any detail affecting Pardo's description should have been heard by the jury. Further, Pardo identified the jacket in front of the jury, and the fact that he could not remember making certain statements was no substitute, defendant argues, for being able to point out that he had made contrary statements. The State responds that any error in the exclusion of the testimony was harmless. We agree with the State.

¶ 228 Harmless-error analysis applies where the defendant has timely objected; the State bears the burden of persuasion with respect to prejudice. That is, "the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." *People v. Thurow,* 203 Ill.2d 352, 363 (2003). In determining whether, in the absence of the error, the outcome of the trial would have been different, review is made of the proceedings as a whole, based upon examination of the entire record. *People v. Howard,* 147 Ill.2d 103, 148 (1991).

¶ 229 We agree with the State that any discrepancies in the description of the jacket were minor and could

not have contributed to the verdict. Defendant was not completely precluded from perfecting his impeachment of Pardo. The jury did hear (from Rhode) that Rhode asked Pardo if the jacket worn by one of the suspects was a solid color, and Pardo replied that it was green with some black on it, but that he did not remember well. What the jury did not hear were Pardo's statements to police that he saw no design, pockets, or zipper on the jacket and that the black he saw was around the collar. The jacket retrieved from Houghtaling, in fact, had no design, and it had a patch of black in the center just below the collar. Further, Houghtaling's jacket has a flap that covers the zipper; thus, the zipper could have been concealed during the crime. We also note that Pardo testified on direct examination that the jacket was green and that he could not recall saying that it had any other colors on it, but the jurors viewed a photograph of Houghtaling wearing the jacket and observed the black on it; thus, they were aware of the inconsistencies in Pardo's testimony. Finally, defense counsel argued during closing argument that Houghtaling's jacket had a zipper and pockets, but that Pardo did not recall saying anything about that, so, he had not identified that jacket as being the jacket on the man at the scene beyond a reasonable doubt; thus, the issue of Pardo's lack of memory was put before the jurors. Under these circumstances, we conclude that the incomplete perfection of defense counsel's impeachment was harmless beyond a reasonable doubt.

¶ 230 5. Admission of Houghtaling's Out–of–Court Statements

¶ 231 Next, defendant argues that the admission of Houghtaling's out-of-court statements was highly prejudicial error that deprived defendant of his federal and state constitutional rights to due process. Defendant asserts that the State knew that Houghtaling would not support its case, but called him anyway, and, over objection, was permitted to admit as substantive evidence his hearsay statements (from the May 2001 Omaha interview; McMullen's trial; and defendant's second trial), inculpating defendant. This was, defendant contends, the only substantive evidence inculpating defendant. Defendant argues that the State should not have been permitted to call Houghtaling for this purpose because the State admittedly knew he would not support its case and Houghtaling's hearsay statements were inherently unreliable. For the following reasons, we find no error.

¶ 232 Defendant's arguments fall into two categories: (1) that the admission of Houghtaling's out-of-court statements, although sufficient under section 115–10.1, violated his due process rights because they were not reliable (because the testimony was inconsistent or plainly incredible, because accomplice testimony is fraught with serious weaknesses, and because under the facts here the recanted prior inconsistent statements could not support the conviction); and (2) to the extent section 115–10.1 is satisfied, it is unconstitutional as applied because Houghtaling's statements were inherently unreliable. We do not address the first argument here because it is a challenge to the sufficiency of the evidence, which we addressed above, including the specific arguments raised here.

¶ 233 As to the second issue, "[a] holding that a statute is unconstitutional as applied does not broadly declare a statute unconstitutional but narrowly finds the statute unconstitutional under the specific facts of the case." *People v. Huddleston,* 212 Ill.2d 107,131 (2004). Defendant's argument has been rejected. In *People v. Morales,* 281 Ill.App.3d 695 (1996), the court rejected the defendant's argument that the substantive use of a witness's prior inconsistent statements denied him due process and a fair trial. The court held that section 115–10.1 incorporates safeguards which "foster reliability" and "adequately protects the defendant's constitutional rights. The Illinois legislature clearly intended the statute to be *the only inquiry necessary in determining whether to admit prior inconsistent statements.*" (Emphasis added.) *Id.* at 702–03. The court further noted that due process considerations, such as " 'prevent[ing] convictions where a reliable evidentiary basis is totally lacking,' are fully addressed when the requirements of the Illinois statute are satisfied." *Id.* (quoting *California v. Green,* 399 U.S. 149, 163–64 n. 15 (1970)). Pursuant to *Morales,* we reject defendant's request that we consider constitutional factors in addition to and separate from those contained in section 115–10.1. We further note that defendant's argument essentially challenges the sufficiency of the evidence, and we addressed above his specific claims concerning the reliability of Houghtaling's testimony.

¶ 234 6. Exclusion of Portions of Defendant's Cross–Examination of Houghtaling

¶ 235 Defendant also argues that the trial court erred in limiting defendant's cross-examination of Houghtaling, contending that this was highly prejudicial error that deprived him of his due process rights. Specifically, he complains that the court erred in not allowing defense counsel to elicit testimony from Houghtaling that he had: (1) read newspaper accounts that contained details that were the same details he gave to the police and in court on two prior occasions; and (2) invoked the fifth amendment when called to testify at defendant's first trial.

¶ 236 As to the press accounts, defendant argues that defense counsel should have been permitted to question Houghtaling because his testimony about the source of his knowledge about the details of the crime was not hearsay (because it was offered to show how Houghtaling had knowledge of these details, not that the details were accurate) and a proper foundation was laid for the testimony (where Houghtaling was asked to testify about his personal knowledge). According to defendant, the fact that Houghtaling could not remember the specific date, time, and location that he learned each fact does not make the exclusion proper; rather, the point was that he obtained knowledge of the facts upon which the State relied from somewhere other than perceiving those facts himself. They included that the police thought that there were two young men involved, both wearing black ski masks; one man had a handgun; Briseno and an employee chased the two men out of the restaurant; Briseno struggled with one of the men in the parking lot; and Briseno was shot by the other masked man.

¶ 237 Alternatively, the State argues that, even if the court erred, the error was harmless because it was cumulative to evidence that was admitted from other sources: Detective Brogan and Officer Wigman testified about information released to the public and the details that were withheld. Thus, the jurors knew that most of the details of the offenses were in the public domain. Further, during closing argument, the defense argued that many of the details Houghtaling testified to were public or suggested to him by police officers during his first statement.

¶ 238 "A defendant's rights under the confrontation clause are not absolute. Rather, 'the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (Emphasis in original.) *People v. Jones,* 156 Ill.2d 225, 243–44 (1993) (quoting *Delaware v. Fensterer,* 474 U.S. 15, 20(1985)). Our supreme court has repeatedly held that "a trial judge retains wide latitude to impose reasonable limits on such cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or of little relevance." *People v. Kliner,* 185 Ill.2d 81, 134 (1998); *People v. Blue,* 205 Ill.2d 1, 13 (2001). "The latitude permitted on cross-examination is a matter within the sound discretion of the trial court, and a reviewing court should not interfere unless there has been a clear abuse of discretion resulting in manifest prejudice to the defendant." *Kliner,* 185 Ill.2d at 130.

¶ 239 We hold that the trial court did not err in excluding the testimony. We reject defendant's

assertion that the fact that Houghtaling could not recall the specific date, time, and location that he learned each fact does not make the exclusion proper. We further note that defense counsel *was* allowed to establish the dates of Houghtaling's prior statements in which he incriminated himself and defendant. Defense counsel also established that Houghtaling knew certain details about the crime from newspapers and speaking to people. As the State notes, the trial court foreclosed only further questions that would have pinpointed each specific detail that Houghtaling claimed he learned from those sources. This was proper because defense counsel was unable to lay a foundation as to when or through what specific source Houghtaling claimed to have learned the details. Thus, the court did not abuse its discretion in limiting cross-examination. *Id.* at 130–31 (court did not abuse its discretion in precluding cross-examination of witness regarding his alleged drug use, where the defendant did not lay a proper foundation to support his claim).

¶ 240 As to Houghtaling's invocation of the fifth amendment at defendant's first trial, defendant argues that the trial court erred in sustaining the State's objection that the testimony was irrelevant. Defendant sought to elicit testimony that Houghtaling had been called to testify against defendant in 2003, that Houghtaling refused to testify, and the reason he refused was because neither he nor defendant were involved in the shooting. Here, defendant contends that the testimony was relevant because the State accused Houghtaling of recently fabricating his testimony. Defendant argues that Houghtaling's refusal to testify at the first trial is

consistent with his being innocent and truthful. He notes that a prior *consistent* statement is admissible to show that a witness told an identical story prior to the time of the alleged fabrication. *People v. Mullen,* 313 Ill.App.3d 718, 730 (2000). Houghtaling's prior refusal to testify against defendant, defendant urges, makes clear that his direct testimony was not a recent invention, unanticipated by the State.

¶ 241 Generally, a witness's prior consistent statements are not admissible for the purpose of corroborating the witness's trial testimony because they serve to unfairly enhance the credibility of the witness. *People v. Terry,* 312 Ill.App.3d 984, 995 (2000). "The danger in prior consistent statements is that a jury is likely to attach disproportionate significance to them. People tend to believe that which is repeated most often, regardless of its intrinsic merit, and repetition lends credibility to testimony that it might not otherwise deserve." *People v. Smith,* 139 Ill.App.3d 21, 33 (1985). Prior consistent statements may not be admitted merely because a witness has been discredited or impeached. *People v. Bobiek,* 271 Ill.App.3d 239, 244 (1995); see also *People v. DePoy,* 40 Ill.2d 433, 438–39 (1968).

¶ 242 A witness's prior consistent statement is admissible only to rebut a charge or inference he or she was motivated to lie or his or her testimony was of recent fabrication, as long as the prior consistent statement was made before either the motive arose or the alleged fabrication was made. *People v. Smith,* 362 Ill.App.3d 1062, 1081 (2005); see also *People v. House,* 377 Ill.App.3d 9, 19 (2007) (prior consistent

statements may be introduced to rebut allegation that witness was motivated to testify falsely or otherwise rebut allegation of recent fabrication, but prior consistent statement must have been made prior to the existence of the alleged motive to testify falsely or the alleged fabrication). Charges of recent fabrication and charges of a motive to testify falsely are separate exceptions to the general rule that prohibits proof of prior consistent statements. *People v. Antczak,* 251 Ill.App.3d 709, 716 (1993). The party seeking to introduce the prior consistent statement has the burden of establishing that *the statement predates the alleged recent fabrication or predates the existence of the motive to testify falsely*. *People v. Deavers,* 220 Ill.App.3d 1057, 1072–73 (1991). Prior consistent statements are admitted solely for rehabilitative purposes, not as substantive evidence. *People v. Walker,* 211 Ill.2d 317, 344 (2004).

¶ 243 Here, defendant has failed to sufficiently establish that Houghtaling's invocation of the fifth amendment at defendant's first trial predated his recent fabrication. Houghtaling's prior refusal (at the first trial) to testify against defendant does not, as defendant suggests, corroborate his testimony at the third trial (that defendant did not commit the crime). Houghtaling's refusal to testify at the first trial does not necessarily reflect that, had he testified there, he would have exculpated defendant; he could have implicated him. Thus, defendant has not established that the prior statement is even consistent with Houghtaling's testimony at the third trial. Accordingly, we cannot conclude that the trial court abused its discretion in excluding the testimony.

¶ 244 7. Exclusion of Testimony Concerning Proper Police Interrogation Techniques

¶ 245 Next, defendant argues that the trial court erred in excluding testimony about proper police interrogation techniques and that this was highly prejudicial and deprived him of his due process rights. Defendant sought to elicit testimony from Wigman about the John Reid method of interrogation and the desirability of obtaining corroborative information during a confession. The trial court sustained the State's objection on the grounds of relevance and that it would be cumulative. Defendant argues that the reliability of Houghtaling's Omaha confession was a critical issue in the case and that Wigman's testimony would have established that, during Houghtaling's interrogation, the police did not use the most effective method for obtaining a truthful statement and that Houghtaling's purported confession did not contain any corroborating details, thus, calling into question its reliability. Defendant concedes that Brogan provided similar testimony earlier at trial, but argues that Wigman's testimony was important because: (1) his extensive training in police techniques and procedures would have lent considerable weight to the problems with Houghtaling's interrogation; and (2) Wigman was in charge of the investigation and knew all details that were released to the public and those intentionally held back, and, thus, his testimony would have been particularly probative as to whether Houghtaling's statement contained any corroborating details.

¶ 246 We conclude that the trial court did not abuse its discretion in excluding the testimony on the basis

that it was cumulative to Brogan's testimony. Detective Brogan participated in the interrogation of Houghtaling and testified that he had training in the John Reid interrogation technique (which encourages police to attempt to elicit corroborating information for a confession) and was the lead detective in the case. He described independent and dependent corroboration (the latter being where a suspect demonstrates knowledge of facts about a crime that police have kept secret from the public, such as the pistol-whipping or the shout into the passing car) and explained that investigators try to avoid using leading questions. During his testimony, Brogan listed the information that was public about the crime. He also testified that Houghtaling first suggested the following answers in response to nonleading questions: that the gun was a .22–caliber weapon and that his jacket was green. Wigman similarly testified that he has interview and interrogation training, including at the John Reid school. He stated that some information was not made public about the crime, including that Briseno had a head wound and that Pardo stated that Briseno had yelled into a passing car. This was done, Wigman testified, so that police could assess the credibility of people interviewed. In its offer of proof as to Wigman's testimony, defense counsel stated that Wigman, who was in charge of the crime scene, would have testified that he was trained in the John Reid technique, would have described dependent and independent types of corroboration, and described whether the information that was withheld from the public was an example of dependent corroboration. This proposed testimony was clearly cumulative to Brogan's testimony. We

cannot conclude that the trial court abused its discretion in excluding it.

¶ 247 8. Admission of Additional Evidence

¶ 248 Defendant next argues that the trial court erred in admitting certain other evidence. He raises three claims of error. First, defendant contends that the court erred in allowing the State to question Weisenberger about his drug use and drug use by defendant, Houghtaling, and Collett. We reject this argument.

¶ 249 On cross-examination, the State asked Weisenberger questions about his memory on the evening of the shooting. He could not recall what Collett wore, and when asked whether he had a good memory or a bad one, he replied "in the middle." The State then asked him who drank beer that evening, and he testified that they all did. Weisenberger then stated that he had consumed five or six beers before the group arrived (which gave him a "buzz") and drank about 12 more after they arrived. He denied smoking "dope," and, when asked if he had ever done so, he replied that he did when he was 17 years old. Next, the State asked Weisenberger what "other drugs did you take? Any other drugs?" Defense counsel objected as beyond the scope, the State responded that the question went to his credibility, and the court overruled the objection. Weisenberger answered, "I'm sure I have." The State asked, "Like what?" and he replied, "I've tried cocaine twice and random pills over the years." Continuing, the State asked Weisenberger if the others in the group were drinking that night, and he stated that they were. The

State then asked, "Was anybody else ingesting drugs at your house?" Over defense counsel's objection, Weisenberger replied that they smoked pot on the porch. "I believe Ken, Dave, and Justin" for a couple of minutes.

¶ 250 As to Weisenberger's condition on the evening of the shooting, the State concedes that the prosecutor's question that elicited the response that Weisenberger last used marijuana when he was 17 years old was improper. However, it argues that any error was harmless where Weisenberger had testified that he had used cocaine and "random pills over the years." Defendant replies that Weisenberger did not offer this testimony about his cocaine and pill use on his own; rather, the testimony was elicited after the prosecutor asked him, "Like what?" We conclude that any error was harmless and did not contribute to the conviction. Weisenberger testified that he had a "buzz" from the numerous cans of beer he had consumed. In attempting to further test his credibility, the State's two questions concerning his drug use, although improper, did not, in our view, contribute to his conviction because they were cumulative to the testimony concerning his "buzz" from consuming at least 17 cans of alcohol.

¶ 251 As to the prosecutor's question whether defendant, Houghtaling, and Collett had used drugs, we agree with the State that any error was harmless because that testimony was also cumulative. The prosecutor asked Weisenberger only a single question on this topic. Further, Houghtaling himself, during his Omaha interview, stated, " 'We sat there. We drank a little bit. Uh, then we went outside, smoked

a joint, and Kenny came up to me. It was like come with me. I want to go do something.' " This testimony was admitted substantively. Thus, the jury heard from Houghtaling about the defendant's marijuana use. (We reject defendant's argument that the foregoing testimony reflects that only Houghtaling smoked marijuana.)

¶ 252 Second, defendant argues that the court erred in admitting two autopsy photos of Briseno's body, asserting that they are gruesome and do not reflect the state of the victim's body after the crime and, thus, are not probative. Further, defendant asserts that the cause of Briseno's death was not disputed and that the sole purpose of the photos was to introduce inflammatory evidence to prejudice defendant.

¶ 253 We agree with the State that the law of the case doctrine precludes this court from reconsidering this issue. In the appeal from defendant's second trial, this court addressed the identical issue—the admission of the same two autopsy photos—and determined that the trial court did not abuse its discretion in admitting both exhibits. *People v. Smith,* No. 2–08–1106 (2010) (unpublished order under Supreme Court Rule 23). Under the law of the case doctrine, the parties cannot relitigate issues that have already been decided in the case. *People v. Tenner,* 206 Ill.2d 381, 395 (2002). The doctrine applies to lower courts when a higher court has decided an issue and the underlying facts have not changed (*Weiss v. Waterhouse Securities, Inc.,* 208 Ill.2d 439, 447–49 (2004)), as well as to a court's own decisions in a case (*People v.. Patterson,* 154 Ill.2d 414, 468 (1992)). Here,

the law of the case doctrine binds us to our previous ruling because the same issue and identical parties were before this court. See, *e.g., People v.. Young,* 263 Ill.App.3d 627, 633 (1994). Accordingly, we reject defendant's argument.

¶ 254 Third, defendant argues that the trial court abused its discretion in not striking Detective Brogan's answer to a defense question. Specifically, defense counsel asked Brogan on cross-examination if he knew the caliber of the murder weapon being sought and Brogan stated that it was a .22–caliber gun. When defense counsel asked him if police were looking for a revolver or semi-automatic weapon, Brogan answered that it was a revolver. Defense counsel then asked, "Why did you believe at that time that it was a revolver?" Brogan began to respond, "We believed it was a revolver based on statements made by Miss McMullen," when defense counsel attempted to withdraw the question. The State asked that the witness be allowed to finish his answer, and the court allowed it. Brogan answered, "Miss McMullen, for one, told us that she had seen [defendant] with a revolver." Defense counsel requested that the court strike the answer, and the State objected, noting that the defense itself had asked the question. The court denied defense counsel's request. Defense counsel then asked Brogan if police thought that the gun was a revolver because there were no casings found at the scene. Brogan replied in the affirmative.

¶ 255 Here, defendant argues that Brogan's answer was non-responsive and "designed to place inadmissible evidence before the jury, because the State did not (and could not, given its concerns with

her reliability) call McMullan." Defendant further argues that the true reason that police believed that a .22–caliber revolver was used in the shooting was because: (1) as Brogan testified to in his next answer, there were no shell casings found at the scene; and (2) the autopsy had been performed at this time and the bullet was recovered. Defendant notes that McMullen did not testify at his third trial and defendant had no opportunity to question her about the statement. Further, the probative value of the evidence was, he argues, clearly outweighed by the danger of unfair prejudice (see Illinois Supreme Court Rule 403 (eff.Jan.1, 2011) (relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice)). We reject this argument.

¶ 256 When a defendant procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, the defendant cannot contest the admission on appeal. *People v. Bush,* 214 Ill.2d 318, 332 (2005); see also *People v. Johnson,* 368 Ill.App.3d 1146, 1155 (2006) ("A party cannot complain of error that he himself injected into the trial."). Because defense counsel elicited the testimony here, we reject defendant's claim.

¶ 257 9. Cumulative Error

¶ 258 Defendant's final argument is that the cumulative effect of the trial court's multiple evidentiary errors denied him a fair trial and, thus, warrant reversal of is convictions. See *People v.. Speight,* 153 Ill.2d 365, 376 (1992) (individual trial errors may have the cumulative effect of denying a

defendant a fair trial). Here, we have rejected all of defendant's claims of error. Specifically, we rejected the majority of defendant's claims on the merits, or concluded (as to two claims) that any error that may have occurred was harmless. Looking at the matters cumulatively, the record reveals that the trial, taken as a whole, was fair. Accordingly, defendant is not entitled to a new trial on the basis of cumulative error. *People v. Hall,* 194 Ill.2d 305, 350–51 (2000); *People v. Desantiago,* 365 Ill.App.3d 855, 871 (2006).

¶ 259 III. CONCLUSION

¶ 260 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 261 Affirmed.