

No. 21-475

IN THE
Supreme Court of the United States

DEANNA BROOKHART,
WARDEN, LAWRENCE CORRECTIONAL CENTER,
Petitioner,

v.

KENNETH SMITH,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented is whether the United States Court of Appeals for the Seventh Circuit correctly granted Respondent Kenneth Smith an unconditional writ of habeas corpus because it was objectively unreasonable for the Illinois Appellate Court to hold that the trial evidence—which included scant and unreliable evidence against Respondent, as well as compelling testimonial, physical, and circumstantial evidence implicating an unrelated group of suspects—was sufficient to support Respondent’s conviction beyond a reasonable doubt.

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INTRODUCTION

The Seventh Circuit rectified a grave injustice when it granted Respondent Kenneth Smith an unconditional writ of habeas corpus and ordered him released from prison immediately. Smith is innocent of the murder charges against him; he is, quite simply, the “wrong guy.” Yet, despite this being the third time Smith’s conviction has been invalidated, Petitioner Deanna Brookhart insists on seeking review of fact-bound issues, asserting error where none exists, and ignoring the unchallenged, alternate basis for habeas relief that ensures Smith’s conviction will be vacated regardless of the outcome of this Petition.

Petitioner makes no pretense of attempting to satisfy the ordinary criteria for certiorari. There is no disagreement among the courts of appeals or state courts of last resort regarding the proper articulation or application of the standard under *Jackson v. Virginia*, 443 U.S. 307 (1979). And the Petition does not suggest that such factually and legally complex scenarios are common or recurring, or that review here would impact the outcome of future cases. Instead, Petitioner merely takes aim at the Seventh Circuit’s fact-bound, case-specific conclusions.

Even if this Court were in the business of simple error correction, there is no error below to correct. The Seventh Circuit adhered faithfully to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) and this Court’s cases, and correctly concluded that Smith is entitled to a writ of habeas corpus.

On the question before it, the Seventh Circuit provided the only reasonable answer: it was

unreasonable for the Illinois Appellate Court to conclude that a rational trier of fact could have found Smith guilty beyond a reasonable doubt on the evidence presented at trial. Two mutually reinforcing reasons support this conclusion: first, the evidence against Smith was insufficient to support a guilty verdict; and second, there was substantial evidence against another group of suspects, including an expansive constellation of repeated confessions. The Seventh Circuit carefully acknowledged that it was not adjudicating the other group's guilt and that the jury was entitled to disbelieve the substance of their confessions. But the existence of these confessions, which were consistent with non-testimonial evidence and included details known only to the police, are basic facts, not credibility assessments. And the record contains no plausible explanation for these facts, which necessarily raise a reasonable doubt about Smith's guilt. Therefore, even under AEDPA's deferential standard, it was unreasonable for the state court to uphold Smith's conviction in the face of such overwhelming evidence of innocence.

Petitioner's argument for certiorari—that the Seventh Circuit flaunted AEDPA's deferential standard and instead engaged in *de novo* review of Smith's *Jackson* claim—is wrong. Petitioner ignores the extensive references to AEDPA throughout the Seventh Circuit's opinion and offers no reason to believe the panel somehow forgot the AEDPA standard or failed to apply it in the instances where it did not cite to AEDPA. And, in conducting that AEDPA review, the Seventh Circuit engaged with—and rebutted—the reasons for upholding Smith's conviction relied upon by

the state court. Petitioner fails to identify any piece of evidence relevant to the panel's review that it neglected to consider. Nor does Petitioner point to any evidence that the panel improperly relied upon. In compliance with AEDPA, the panel examined only evidence in the state court record. In short, the Seventh Circuit correctly recited, and faithfully applied, AEDPA's deferential standard.

In any event, this case is an unsuitable vehicle for considering Petitioner's arguments because both the district court and the Seventh Circuit concluded that Smith is entitled to habeas relief on an alternative ground that is not before this Court. The district court found—and the Seventh Circuit affirmed—that Smith is entitled to a conditional writ because the trial court's rulings on three key evidentiary issues violated his right to a fair trial. That holding is not at issue here. Therefore, even if Petitioner were to prevail before this Court, Smith's conviction would still be vacated. To be sure, the State theoretically could retry Smith. But a fourth trial appears unlikely considering the death of a key witness, the passage of time since the underlying events, and the gaping holes in the State's case recognized by federal courts.

More fundamentally, the Seventh Circuit's alternative holding puts this case on awkward footing. Petitioner repeatedly characterizes this case as a vehicle for promoting respect for jury verdicts. Yet the district court and the Seventh Circuit found that the jury trial was hopelessly tainted due to the evidence that was impermissibly withheld from the jury, and Petitioner does not challenge that conclusion. In other words, the

jury's verdict will be wiped out no matter what. If the Court wishes to take a fact-bound *Jackson* case for purposes of reiterating the importance of respect for jury verdicts, this is the wrong case.

The Petition should be denied.

STATEMENT OF THE CASE

Respondent Kenneth Smith has spent nineteen years in state prison for a murder and robbery that he did not commit.

1. On March 6, 2001, two men attempted to rob the Burrito Express restaurant in McHenry, Illinois, and fatally shot its owner, Raul Briseno. Pet. App. 130a. After entering the restaurant, one of the men brandished a handgun and announced the robbery. Pet. App. 3a, 139a. Briseno responded by raising a butcher knife and chasing the would-be robbers out of his restaurant. *Id.* Eduardo Pardo, who was Briseno's employee and the only other person in the Burrito Express that night, followed in pursuit. *Id.* The chase proceeded through nearby streets until one of the masked men, who was wearing a green jacket, slipped and fell on a patch of ice. Pet. App. 140a. Briseno continued chasing the armed man while Pardo grabbed the man in the green jacket and pulled off his mask to see his face. Pet. App. 3a, 140a–41a. As Pardo began dragging the man toward the Burrito Express, he heard a gunshot and saw Briseno approaching. Pet. App. 3a, 140a. The armed man, also now unmasked, was close behind. Pet. App. 3a, 140–42a. Using the man in the green jacket as a shield, Pardo and Briseno retreated toward the restaurant. Pet. App. 3a–4a, 140a–41a. But

the gunman continued shooting and eventually hit Briseno. *Id.* That caused Pardo to release the man in the green jacket and run to the restaurant to call 911. Pet. App. 4a, 141a. By the time Pardo returned outside, the two men had fled and Briseno was lying face down in a pool of blood. Pet. App. 4a.

Police arrived within minutes. *Id.* A thorough search turned up no bullet casings, leading police to conclude that the gunman used a revolver rather than an automatic handgun. Pet. App. 143a. That night, a police sketch artist produced sketches, based on Pardo's description, showing two clean-shaven men. Pet. App. 47a. Pardo also described the green jacket, telling police that it had black around the collar and looked like leather, but that he did not see any pockets, designs, or zipper on the front. Pet. App. 47a–48a.

The shooting quickly made the news, but police withheld two details to test the credibility of future witnesses: First, that Briseno yelled into a passing car while chasing the would-be robbers; and second, that Briseno's autopsy revealed a head wound consistent with being pistol whipped. Pet. App. 5a.

2. Although the police never recovered any physical evidence connected to Smith, they eventually arrested him as well as his friends Justin Houghtaling, Jennifer McMullan, and David Collett on the theory that Smith was the gunman, Houghtaling wore the green jacket, and McMullan and Collett “sat waiting in a nearby getaway car.” *Id.*

Police arrested Houghtaling on May 12, 2001, while he was on a bus traveling through Omaha, Nebraska.

Pet. App. 130a–31a, 153a. Although Houghtaling told police that he had taken hallucinogenic drugs just before being arrested, they proceeded to interrogate him using a series of leading questions. Pet. App. 153a. Houghtaling denied involvement in the shooting during the first fifteen minutes of the interrogation. *Id.* But after the officers falsely told him that Smith, Collet, and McMullan all gave incriminating statements, Houghtaling implicated himself and the others in a taped confession. *Id.*

3. On November 14, 2001, Houghtaling pleaded guilty and was sentenced to twenty years in prison after agreeing to cooperate with the State. Pet. App. 131a, 187a. Collett also pleaded guilty to avoid a lengthy prison term and was sentenced to five years in prison. *See* Pet. App. 131a, 188a, 216a–17a. McMullan, however, proceeded to trial and was convicted of first-degree murder and attempted armed robbery based on Houghtaling’s testimony; she was sentenced to 27 years in prison. Pet. App. 131a.

4. The Illinois Appellate Court invalidated both of Smith’s initial trials.

At the first trial in 2003, Houghtaling invoked his Fifth Amendment right against self-incrimination and refused to testify. Pet. App. 10a. As a result, the state trial court declared Houghtaling “unavailable” and “admitted his testimony from McMullan’s trial.” *Id.* The Appellate Court later vacated Smith’s conviction based on *Crawford v. Washington*, 541 U.S. 36 (2004). Pet. App. 10a.

The State re-tried Smith in 2008, and this time Houghtaling testified. Houghtaling confirmed his Omaha statement during direct examination. *See* Pet. App. 56a, 150a–51a. But he promptly recanted on cross-examination and explained that he was forced to lie “because [the State] want[s] to convict Kenny Smith for a crime he didn’t commit, none of us committed.” Pet. App. 57a (citation omitted); *see also id.* 151a. Houghtaling claimed that the State threatened to revoke his plea deal unless he testified against Smith; however, he conceded on redirect that there was no plea agreement in place when he gave his Omaha statement. Pet. App. 57a, 151a–52a. On appeal, the Appellate Court again invalidated Smith’s conviction due to evidentiary issues. Pet. App. 10a. For recanting his testimony, Houghtaling was charged with perjury and sentenced to five and a half years in prison. Pet. App. 10a, 153a.

5. Smith’s third trial, which began in 2012, followed a similar pattern as the first two. The State’s case centered on Houghtaling’s prior incriminating statements and testimony from Pardo, the Burrito Express employee who witnessed the crime. Pet. App. 134a. Defense counsel countered with extensive evidence that three people completely unrelated to Smith’s group of friends—Russell “Rusty” Levand (the shooter), his then-girlfriend Susanne “Dallas” DeCicco (the getaway driver), and her cousin Adam Hiland (the man in the green jacket) (collectively, the “DeCicco Group”)—committed the Burrito Express robbery and murder. *See* Pet. App. 133a–34a.

Houghtaling’s testimony. Over defense counsel’s objection, the State called Houghtaling. In his direct

testimony, Houghtaling denied that he, Smith, Collett, or McMullan were involved in the Burrito Express shooting. *See* Pet. App. 145a–46a. Houghtaling admitted that he pleaded guilty to Briseno’s murder in 2001 and was sentenced to 20 years, but he explained that he did so only to avoid the possibility of a 60-year sentence. Pet. App. 146a. The State then read the transcript of Houghtaling’s Omaha statement into the record and played the audio recording for the jury. Pet. App. 11a, 147a. The State also read the transcripts of Houghtaling’s testimony from McMullan’s trial in 2002 and from Smith’s second trial in 2008. Pet. App. 11a, 149a–52a.

On cross-examination, Houghtaling flatly denied involvement in the Burrito Express shooting and provided an alibi for the group that was corroborated by security footage. Pet. App. 11a, 152a. Houghtaling testified that he spent the night with Smith, McMullan, and Collett at various friends’ houses. On their way to their final destination for the night, the group stopped at a store where Collett was spotted on security cameras. *Id.*

When asked about the discrepancy with his prior statements, Houghtaling explained that he was high during the Omaha interrogation and that the police officers guided him with leading questions. Pet. App. 153a. The officers who interrogated Houghtaling that day admitted as much, and noted that leading questions lead to less reliable answers. Pet. App. 156a–57a. Houghtaling also addressed his prior statements at McMullan’s trial and at Smith’s second trial. He explained that he had had time to review materials and

prepare for his testimony and that he later wrote an apology letter to McMullan in which he stated: “I’m sorry about what I did to you at your trial. I know I lied and I was bogus.” Pet. App. 9a; *see also* Pet. App. 153a. Houghtaling acknowledged that he could again be charged with perjury for his testimony, but he explained, “I’m tired of lying. The truth has to come out sooner or later.” Pet. App. 153a–54a.

Pardo’s testimony. The State called Pardo at Smith’s third trial who then recounted the events of March 6, 2001. Pet. App. 140a–41a. Pardo claimed that he “got a good look” at the man in the green jacket’s face after removing his mask. Pet. App. 141a. But the shooter never got closer than “25 to 40 feet” without his mask on. Pet. App. 142a. Though Pardo worked with a sketch artist that night, he did not identify Houghtaling or Smith when the police showed him their pictures in photo arrays. Pet. App. 142a–43a.

Pardo also testified about the green jacket. He described it as “long and maybe made of leather.” Pet. App. 142a. When shown Houghtaling’s green jacket, Pardo stated that it “looked like the one he saw on the man during the shooting.” *Id.* But he testified he could not remember if it had other colors on it. During cross-examination, Pardo stated that he did not remember making inconsistent statements about the jacket. *Id.* To impeach Pardo’s testimony, Smith called Detective Jeff Rhode, who interviewed Pardo about the jacket on the night of the shooting. But the district court barred Smith’s trial counsel from asking questions about the jacket’s design. *See* Pet. App. 34a, 224a–26a.

Collett's testimony. The State also called Collett at Smith's third trial. Like Houghtaling, Collett denied any involvement in the shooting. Pet. App. 159a. He testified that he "had no 'clue' who attempted to rob the Burrito Express." Pet. App. 61a (citation omitted). Collett provided an alibi with striking similarities to Houghtaling's account, and stated that he did not recall seeing any scratches, bruises, or blood that night on Smith or Houghtaling. Pet. App. 160a–62a. He further testified that on his lawyer's advice, he took a "plea of convenience" to avoid a lengthy prison sentence. Pet. App. 159a.

The DeCicco Group. In addition to arguing his innocence, Smith introduced extensive evidence implicating the DeCicco Group.

Smith presented evidence that Dallas DeCicco confessed to the Burrito Express shooting at least six times over six years. In two videotaped statements, DeCicco told police that she committed the crime along with Levand and Hiland. Pet. App. 165a, 167a–68a. Her confessions revealed that DeCicco had information that Houghtaling did not have and that was not public information—specifically, that: (1) the shooter hit Briseno on the head with the butt of the gun; (2) the crime scene was covered in blood; and (3) Briseno yelled into a passing car during the confrontation. *See* Pet. App. 5a, 13a, 15a, 30a, 168a, 171a. During one interview, DeCicco pointed this out to investigators, asking: "How would I know that [Briseno was hit on the head] unless the people who did it actually told me?" Pet. App. 171a. DeCicco also confessed several times to her family and friends—including her mother (Vicki Brummett), her

sister (Elizabeth Schwartz), and her childhood friend (Brittany Tyda). Pet. App. 172a–76a.

Vicki Brummett testified about DeCicco's confessions and explained that they prompted Brummett to call the police and turn in the .22-caliber revolver her husband owned. *See* Pet. App. 144a, 173a. The gun matched the characteristics of the gun used in the Burrito Express shooting, and the State's firearm expert testified that she could not exclude it as the murder weapon. Pet. App. 145a. Detective Gary Wigman, who retrieved the gun from Brummett, also testified that the gun's grips had stress fractures, which was consistent with DeCicco's statement that "there was a crack in the . . . handle" after Levand pistol whipped Briseno. Pet. App. 70a n.6, 173a.

Smith also presented evidence that Hiland, who was fifteen years old at the time of the shooting, confessed to his sister, cousin, and friends. His sister, Charlene McCauley, testified that she watched the DeCicco Group pick the lock on the door of the bedroom where the gun was kept on the night of the crime. *See* Pet. App. 178a. She also testified that she saw Hiland the next day with bandages across his forearms. *Id*; *see also id.* 85a–86a. Hiland initially told McCauley he suffered the injuries sliding down icy stairs, but he later confessed to being involved in the Burrito Express shooting. Pet. App. 178a–79a. Hiland made a similar confession to his brother's girlfriend a few days after the shooting. Pet. App. 178a. And Hiland confessed to his cousin, Elizabeth Schwartz a few months after that. Pet. App. 174a. Schwartz, who is DeCicco's sister, testified that DeCicco also confessed to her. Pet. App. 174a–75a. Finally,

Hiland confessed to his friend, Daniel Trumble, several times throughout the summer of 2002. Pet. App. 16a-17a, 176a-77a.

Trumble would have further testified that Hiland confessed during a meeting with a criminal defense attorney, but the trial court barred this testimony. Pet. App. 177a. According to defense counsel's proffer, the three met in a public restaurant where Hiland confessed to the attorney, who told Hiland he should do nothing since others had been arrested. *Id.* The trial court allowed Trumble to testify only that Hiland confessed to him again in a restaurant, without mentioning the attorney's presence or any other details of that meeting. *See id.*

Smith also submitted evidence that Levand confessed to an acquaintance, Patrick Anderson, when they were incarcerated together in the McHenry County jail during the summer of 2001. Pet. App. 164a. Anderson testified that Levand said that he and Hiland went to the Burrito Express to rob it, but Levand ended up shooting Briseno and hitting him over the head after being chased out of the restaurant. *Id.* Levand told Anderson that Hiland was covered in blood as they ran to meet DeCicco at her car. *Id.* The Group burned the masks and clothes they were wearing, and attempted to clean DeCicco's car. When that proved unsuccessful, Levand later stole the car and burned it somewhere in Wisconsin. *Id.* DeCicco corroborated the disposal of the car in her confession, Pet. App. 16a, 182a-83a, as did stipulated testimony that confirmed the police found the car on June 27, 2021, in Racine, Wisconsin, destroyed by fire caused by an accelerant, *id.* 164a n.5.

State's Rebuttal. The State called DeCicco, Levand, and Hiland on rebuttal, and each testified that their confessions were untrue. Pet. App. 75a–77a.

6. The state court made three noteworthy evidentiary rulings during Smith's third trial. First, the court excluded testimony from Anderson that would have shown that Briseno sold cocaine from the Burrito Express and that Levand learned of Briseno's drug-dealing a week before the attempted robbery. Pet. App. 19a. The trial court rejected three live proffers from defense counsel. Pet. App. 42a–43a. Second, the trial court barred Trumble from testifying that Hiland confessed in front of a criminal defense attorney. Pet. App. 19a. Third, the trial court prohibited defense counsel from asking Detective Rhode how Pardo described the green jacket on the night of the murder. *Id.*

7. The jury returned a guilty verdict on February 29, 2012, Pet. App. 183a, and the court sentenced Smith to sixty-seven years in prison, *id.* 183a–84a & n.6.

8. Smith timely filed an appeal, raising several constitutional errors and issues. The appellate court affirmed his conviction and sentence in an unpublished "Rule 23" order, Pet. App. 129a–30a, and the Illinois Supreme Court denied leave to appeal, *id.* 128a. This Court denied Smith's petition for a writ of certiorari. Pet. App. 127a.

9. Smith then sought habeas relief under 28 U.S.C. § 2254, arguing that the evidence was insufficient to convict him and challenging the state court's evidentiary errors. Pet. App. 38a–39a.

On March 10, 2020, the district court granted the habeas petition with respect to the evidentiary errors. The court found that these errors violated Smith’s right to present a complete defense and his right to engage in effective cross-examination. Pet. App. 126a. The court wrote that “[g]iven the weakness of the prosecution’s case,” the evidentiary errors had a “highly significant effect” on the trial result. Pet. App. 125a. The district court explained that “the evidence of the DeCicco Group’s involvement is highly compelling if not conclusive,” and therefore the district court was “confounded as to how th[e] evidence could not give a rational jury reasonable doubt as to Smith’s guilt.” Pet. App. 86a. The district court continued that, given “the exceedingly thin evidence supporting Smith’s convictions, the [c]ourt is concerned that a miscarriage of justice has occurred here.” *Id.* However, the district court denied Smith’s request to be released without the possibility of retrial on sufficiency of the evidence grounds. Pet. App. 86a–87a.

On April 29, 2021, the Seventh Circuit reversed the district court’s judgment and ordered an unconditional issuance of the writ requiring Smith’s immediate release. Pet. App. 37a. The Seventh Circuit acknowledged the deferential standards under *Jackson v. Virginia*, 443 U.S. 307 (1979), and § 28 U.S.C. 2254. Even so, it concluded that this was the rare case in which “the trial evidence failed to support Smith’s conviction beyond a reasonable doubt and [] the Illinois Appellate Court was not just wrong, but unreasonable, in holding otherwise.” Pet. App. 2a.

In reaching the opposite conclusion, the district court had applied the wrong standard. The Seventh Circuit explained that relief is warranted under *Jackson* “only if the record is devoid of evidence from which a reasonable jury’ could find the requisite guilt beyond a reasonable doubt.” Pet. App. 22a (citation omitted). But the district court applied a more stringent standard when it reasoned that habeas relief cannot issue unless “the record is [] ‘devoid of evidence’ of a habeas petitioner’s guilt.” Pet. App. 22a–23a (citation omitted).

Because it erroneously applied the “devoid of evidence” standard, the district court felt compelled to deny the unconditional writ because, in its view, certain facts, such as Houghtaling’s recanted confession and Pardo’s identification of the green jacket, barely crossed over the “devoid of evidence’ line.” Pet. App. 23a (citation omitted).

The Seventh Circuit corrected the district court’s error. Although the court considered the entire record, its analysis focused on the two most important pieces of evidence: the green jacket and Houghtaling’s Omaha confession. *See* Pet. App. 23a–26a. With regard to the first, the court emphasized that Pardo’s trial testimony that Houghtaling’s jacket “looks like” the jacket he saw on March 6, 2001, fell “well short of a positive identification.” Pet. App. 23a. As for the second, the court noted that Houghtaling’s statements in Omaha “provided not a single detail that the police did not already know.” Pet. App. 25a. Conversely, Houghtaling’s confession failed both checks the police set up to assess witness credibility: Houghtaling did not mention anyone yelling into a car during the chase

outside the restaurant; and more damning, Houghtaling “unequivocally” said he did not recall Briseno being hit in the head. Pet. App. 26a.

Moreover, the court explained, Houghtaling’s spotty testimony “stands in stark contrast to the admissions from the DeCicco Group.” *Id.* Whereas Houghtaling offered no independent knowledge of the crime, Dallas DeCicco’s confessions revealed *both* pieces of information that the police withheld. Pet. App. 27a. Indeed, every member of the DeCicco Group told friends and family information about the Burrito Express robbery in a series of self-reinforcing confessions. The Seventh Circuit made clear that it was not adjudicating the DeCicco Group’s guilt. *See* Pet. App. 30a. Nonetheless, the court held that 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.” *Id.*

Because the record leaves “such a serious possibility of a third party’s guilt,” the court held as an “objective matter that no rational trier of fact could have found Smith guilty beyond a reasonable doubt,” meaning “[t]he appellate court was unreasonable to hold otherwise.” *Id.*

REASONS FOR DENYING THE PETITION

Petitioner makes no pretense of attempting to satisfy the ordinary criteria for certiorari. Nor can she. There is no disagreement among the courts of appeals or state courts of last resort as to the proper articulation or application of the *Jackson* standard. Petitioner identifies no state or federal case involving a similar fact pattern. Nor does the Petition suggest that such factually and

legally complex scenarios are common, or recurring, or that review here could have any impact on the outcome of future cases. Instead, Petitioner takes aim at the Seventh Circuit's fact-bound, case-specific conclusions.

Even if this Court were inclined to engage in error correction, there is no error to correct. The Seventh Circuit adhered faithfully to AEDPA and to this Court's cases, and correctly concluded that Smith is entitled to a writ of habeas corpus.

I. The Seventh Circuit Adhered To AEDPA.

The State's primary argument for certiorari is that the Seventh Circuit refused to follow AEDPA and instead engaged in *de novo* review of Smith's *Jackson* claim. Pet. 21–25. That argument is incorrect. The Seventh Circuit correctly recited, and faithfully applied, AEDPA's deferential standard.

1. The Seventh Circuit correctly recited the applicable legal standard: “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.’” Pet. App. 21a (quoting *Cavazos v. Smith*, 565 U.S. 1, 2 (2011)). Similarly, when the Seventh Circuit explained its disagreement with the state court's appraisal of the two primary categories of evidence at issue—the evidence implicating Smith and the evidence implicating the DeCicco Group—the panel reiterated AEDPA's deferential standard. *See* Pet. App. 26a (citing AEDPA deference but acknowledging its limits); *id.* 28a–29a (same).

The State points to isolated portions of the Seventh Circuit’s opinion where the panel did not explicitly refer to AEDPA. There is no basis for the State’s apparent belief that the panel somehow forgot the AEDPA standard that it repeatedly cited and applied elsewhere in its opinion. In any event, in the passages flagged by the State, the panel either had good reasons for not citing to AEDPA or actually did cite to AEDPA.

Petitioner first takes issue with the Seventh Circuit’s discussion of Pardo’s testimony regarding the green jacket. To be sure, the Seventh Circuit did not cite AEDPA in its discussion—but that was because the panel’s assessment of the evidence was *consistent with* the state court’s assessment. The Seventh Circuit noted that, when asked, Pardo merely agreed that Houghtaling’s green jacket “looked like” the green jacket that Pardo saw the unarmed robber wearing. Pet. App. 12a, 23a. That acknowledgment of similarity fell well short of a “positive identification.” Pet. App. 23a. Despite Petitioner’s claim to the contrary, Pet. 30–31, that is how the Illinois Appellate Court treated the evidence. In the state court’s words, Pardo testified that Houghtaling’s jacket “looked like the one the man involved in the crime had worn.” Pet. App. 189a. Nowhere did the state court describe that testimony as a “positive identification.”

Petitioner’s second example—the Seventh Circuit’s treatment of Houghtaling’s confessions—is similarly belied by the opinions below. Petitioner claims that by announcing that it was “applying *Jackson’s* test,” the Seventh Circuit indicated that it was weighing the evidence as if on direct appeal rather than affording the

state court AEDPA deference. *See* Pet. 24 quoting Pet. App. 23a. But in the sentence *directly following* the one quoted by Petitioner, the Seventh Circuit announced the appropriate AEDPA standard: “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.” Pet. App. 24a. Similarly, at the conclusion of its assessment of Houghtaling’s testimony, the panel once again noted that it must observe AEDPA deference. *See* Pet. App. 28a (finding Houghtaling’s testimony lacking despite “*Jackson* and AEDPA”).

Finally, Petitioner’s contention that the Seventh Circuit’s opinion engaged in a review of the district court’s opinion rather than the state court’s opinion cannot withstand scrutiny. Pet. 22. When describing the standard of review, the Seventh Circuit did note an error in the district court’s understanding of the *Jackson* standard—namely that 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 th[is] Court articulated.” Pet. App. 22a. But that was merely in service of clarifying the correct standard under which to review *the state court’s* sufficiency-of-the-evidence determination. *See id.*

2. Petitioner next asserts that, in contravention of AEDPA, the Seventh Circuit failed to adequately engage with reasons supporting the state court’s decision. That contention misrepresents the Seventh Circuit’s opinion.

The Seventh Circuit focused on the evidence that the state court viewed as its central justification—and in doing so, conducted a detailed analysis of the state court’s reasoning. In the state court’s view, the “strongest” evidence against Smith was Houghtaling’s since-recanted testimony. Pet. App. 186a–87a; *see also id.* 197a (singling out, in its conclusion, Houghtaling’s prior inconsistent statement as anchoring the reasonableness of the state’s case). The state court focused, in particular, on Houghtaling’s Omaha confession because, at that time, Houghtaling “did not have any police reports” to fortify his testimony. Pet. App. 187a.

The Seventh Circuit, however, pointed out that the state court’s conclusion was unreasonable because “Houghtaling was not an independent witness.” Pet. App. 25a. And the panel explained why: “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.” *Id.*

Further, the Seventh Circuit went on to rebut specific statements that the state court found significant. For example, the state court observed that Houghtaling “stated, without suggestion, that [Smith] carried a ‘little .22.’” Pet. App. 187a. But as the Seventh Circuit concluded, the state court could not reasonably have relied on this evidence because “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.” Pet. App. 25a. The initial statement therefore had very little evidentiary value because Houghtaling did not, in fact, know what a .22-caliber firearm looked like.¹

Having dealt with the state’s primary evidence linking Smith to the crime, the Seventh Circuit next considered the state court’s assessment of the evidence implicating the DeCicco Group. For the reasons described below, the Seventh Circuit ultimately concluded that the “appellate court was unreasonable” to sustain the conviction in the face of that other evidence. Pet. App. 30a.

First, the Seventh Circuit found it significant that 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.” Pet. App. 27a. The Seventh Circuit saw that as probative evidence indicating that DeCicco was involved in the robbery. For its part, the state court noted that same fact but offered a different explanation: perhaps the “non-public information was not kept as secret from the public as the police desired.” *Id.* quoting Pet. App. 196a. “But,” the Seventh Circuit responded, “nothing in the record supports th[at] possibility.” Pet. App. 27a.

¹ The remainder of the state court’s discussion of Houghtaling’s testimony went only to whether Houghtaling’s since-recanted confession was credible. There was no need for the Seventh Circuit to discuss the state court’s findings on that matter: in accordance with *Jackson*, the Seventh Circuit assumed that the jury found Houghtaling’s initial confession credible and deferred to that credibility determination. *See* Pet. App. 25a.

Second, the Seventh Circuit carefully analyzed the state court's treatment of the evidence indicating that Hiland had visible injuries in the days following the robbery, while Houghtaling had none. Pet. App. 28a–29a. The state court reasoned that Houghtaling's lack of injuries was not significant because “it was undisputed that the green leather jacket he wore covered his arms,” thereby offering protection against injuries. Pet. App. 192a. But as the Seventh Circuit observed, there was no evidence confirming that Houghtaling's jacket—or the green jacket worn by the robber—was leather. Pet. App. 29a. Pardo merely observed that the robber's jacket “looked” like leather and that Houghtaling's jacket “looked like” the robber's. Pet. App. 4a, 12a. Indeed, the record evidence confirms that Houghtaling's jacket was not, in fact, leather—it was vinyl, which is much less durable. Pet. App. 29a. Therefore, the panel found that the state court was unreasonable to base its reasoning on an unsupported, and ultimately incorrect, assumption.

Finally, the Seventh Circuit observed “one final” disagreement with the state court. *Id.* In his direct appeal, Smith drew attention to the fact that neither he nor Houghtaling had blood on their clothes the night of the robbery or the next day. *Id.* That was exculpatory because the crime scene was bloody—and because DeCicco's 2006 confession suggested that Hiland was “covered in blood.” Pet. App. 170a. In rejecting that argument, the state court found that Smith's “characterization of the crime scene as bloody is not supported by the evidence.” Pet. App. 192a. In light of the “grisly” crime scene photos, the Seventh Circuit

found the state court's assessment to be "simply incorrect." Pet. App. 29a–30a.

Petitioner ignores the panel's thorough rebuttal of the state court's justifications and instead cites a list of evidence that the Seventh Circuit ostensibly ignored. That evidence includes: Collett's apology to the victim's widow, the co-conspirators' guilty pleas, the sketch made of the second robber based on Pardo's description, and Smith's conflicting statements. Pet. 23 citing Pet. App. 187a–88a. The problem with Petitioner's argument, however, is that this evidence was either: (1) considered by the Seventh Circuit; (2) redundant given the Seventh Circuit's deferential review of other evidence in the record; or (3) marginal to the state court's ultimate decision.

Consider the evidence pertaining to Houghtaling. Houghtaling's guilty plea was admissible as a prior inconsistent statement to rebut his later testimony that neither he nor Smith were involved in the Burrito Express robbery. *See* Pet. App. 213a. But, as noted above, the Seventh Circuit assumed, in accordance with *Jackson*, that the jury believed Houghtaling was being honest in his Omaha confession and dishonest during his recantation at trial. As a result, there was no need for the Seventh Circuit to discuss Houghtaling's guilty plea, which only bolstered the position that the Seventh Circuit assumed the jury had taken.

The second piece of evidence related to Houghtaling is the sketch that purportedly looked like him. Petitioner makes much of this evidence—indeed, much more than the state court did, which only mentioned it in passing. *See* Pet. App. 187a, 190a. Because the sketch is of little

to no probative value, the state court had the right approach. The sketch was derived from Pardo's description of the robber. But, when shown several photo arrays that included Houghtaling within hours of the shooting, Pardo did not identify him as one of the robbers. *See* Pet. App. 190a. Therefore, even if the sketch ended up resembling Houghtaling, it was not because Pardo endeavored to describe Houghtaling to the artist. It was mere happenstance. As a result, it is difficult to see what value the sketch has in linking Houghtaling to the crime. Both the state court and the Seventh Circuit were right to focus on other evidence.

The story is much the same with the evidence pertaining to Collett. First, Petitioner is simply incorrect to contend that the Seventh Circuit did not address Collett's apology. The Seventh Circuit noted that Collett offered an apology to Briseno's family at sentencing but found that fact "hopelessly inconclusive." Pet. App. 9a. And Collett's guilty plea is similarly inconclusive. Collett maintained, even during his plea, that he did not commit the crime and that he was taking a "plea of convenience." Pet. App. 159a.

That leaves Smith's conflicting statements. Contrary to Petitioner's characterization, those statements were not a "key piece[]" of evidence. Pet. 26. The statements in question concerned Smith's relationship to Houghtaling, whom he met only three weeks before the night of the crime. Although Smith told police on May 12, 2001, that he did not know Houghtaling, he accurately recalled in a police interview on March 7, 2001, that he was with Houghtaling and the others the night before the shooting. *See* Pet. App. 187a–88a. The state court

gave the statements only passing discussion, consistent with their limited probative value. No party disputed that Smith and Houghtaling were together on the night in question. And this evidence was not relevant to aid the jury in assessing Smith's credibility—Smith did not testify. As with Collett's plea of convenience, no reasonable jurist would view the evidence as a central justification for a murder conviction—indeed, the state court did not.

In sum, the Seventh Circuit thoroughly engaged with the state court's justifications for finding the evidence against Smith sufficient. To the extent that the Seventh Circuit omitted evidence, that evidence was tangential to the state's case or otherwise irrelevant given the standard of review.

3. Petitioner misleadingly quotes the Seventh Circuit's opinion to argue that the panel took an impermissible "divide-and-conquer" approach to the evidence. Pet. 27. Reading the Seventh Circuit's opinion in context undermines any such argument.

Petitioner focuses on the panel's observation that "if we remove the green jacket from the picture and recognize the holes in the Omaha interview, the DeCicco [Group] evidence adds powerfully to the existence of the reasonable doubt we see here." Pet. App. 27a; *see also* Pet. 27. But, understood in context, the import of that sentence is opposite to Petitioner's reading. At that stage of the opinion, the panel had just completed its analysis of the evidence concerning the green jacket and Houghtaling's Omaha testimony. Pet. App. 23a–26a. Even under a deferential standard of review, the panel concluded that Pardo's testimony regarding the green

jacket did little to connect Houghtaling to the crime and that Houghtaling's testimony was flawed and incomplete. *Id.* As a result, the Seventh Circuit believed that that evidence could not support a finding of guilt beyond a reasonable doubt. *See* Pet. App 26a. The sentence quoted by Petitioner merely reiterates that conclusion and then *includes* the evidence implicating the DeCicco Group to form an assessment of the whole record.

4. Petitioner is similarly wrong to contend that the Seventh Circuit went outside the state-court record when assessing Smith's habeas petition. *See* Pet. 28–30. The problem with Petitioner's argument is straightforward: the alleged extra-record evidence was introduced before the state court.

Specifically, Petitioner takes issue with the Seventh Circuit's inquiry into the material of Houghtaling's green jacket. As Petitioner notes, the material of the jacket was relevant because the state court hypothesized that the jacket, which it stated was leather, may have protected Houghtaling from sustaining injuries on his wrists. Pet. 28; Pet. App. 192a. As discussed above, the Seventh Circuit rightly questioned that conclusion. Pardo testified that the robber's jacket "looked" like leather and that Houghtaling's jacket "looked like" the robber's. But that testimony left substantial doubt as to whether the robber's jacket, let alone Houghtaling's jacket, was in fact leather. *See* Pet. App. 12a, 29a. In stating that Houghtaling's jacket was leather, the state court mischaracterized the record without confronting the evidentiary gap.

Rather than mistakenly assume the jacket's material, the Seventh Circuit rightly consulted the evidence in the state court record—after all, Houghtaling's jacket was submitted into evidence as Exhibit 66. *See* Pet. App. 142a. Examining that evidence, the Seventh Circuit determined that the jacket was not, in fact, leather. “[T]he exterior shell is made of PVC casting leather (i.e., vinyl) and rayon—much more affordable (and less durable) than real leather.” Pet. App. 29a. And, in the Seventh Circuit's view, that provided cause to question the state court's reasoning regarding Houghtaling's lack of injuries. *Id.*

Petitioner finds fault in the Seventh Circuit's actions, but it cites no authority to support its position. To be sure, this Court has made clear that a federal habeas petitioner raising a claim under § 2254(d) must do so “on the record that was before that state court.” *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011). But the jacket indisputably was part of the record presented to the jury, so the Seventh Circuit was entitled to consider it.

II. The Decision Below Is Correct.

The Seventh Circuit correctly granted habeas relief to Smith. That court properly articulated the question before it: “whether the state court's rejection of the proposition that no reasonable juror could have sustained a conviction beyond a reasonable doubt was reasonable.” Pet. App. 24a. And, on that question, the Seventh Circuit provided the correct answer. The Illinois Appellate Court was unreasonable to conclude that a rational trier of fact could have found Smith guilty beyond a reasonable doubt on the evidence presented at trial. That is so for two, mutually reinforcing reasons:

first, the evidence against Smith was insufficient to support a guilty verdict; and second, the evidence against the DeCicco Group was substantial, and any rational juror would have viewed that evidence to create a reasonable doubt as to Smith's guilt.

1. The evidence against Smith could not, under any set of inferences, support a finding of guilt beyond a reasonable doubt, and the state court's contrary conclusion was unreasonable. There was no live, in-person testimony from anyone implicating Smith; there was no murder weapon connected to Smith; nor any fingerprint, blood, or DNA evidence implicating him; nor a motive for Smith to target the Burrito Express; nor a prior connection between Smith and Briseno; nor an eyewitness identification of either Smith or Houghtaling (despite Pardo having gotten a "good look" and seen their photos just hours after the crime).

Rather, as the Seventh Circuit recognized, the State's case boiled down to two pieces of evidence: Pardo's testimony about Houghtaling's green jacket and Houghtaling's prior inconsistent statements later recanted at trial. The Seventh Circuit correctly found, however, that Pardo's testimony on that score fell well short of a "positive identification." Pet. App. 23a. Pardo testified that the two jackets looked alike. That does not come close to showing that the two jackets were the same, much less that Pardo made a "positive identification."

The Seventh Circuit also correctly diagnosed the limited evidentiary value of Houghtaling's initial statements to police in Omaha. Once again, the Seventh Circuit did so only after acknowledging the proper

province of the jury. *See* Pet. App. 24a (“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 even crediting that testimony, Houghtaling simply did not provide information about the crime that would tend to prove that Smith was responsible for the Burrito Express murder. For one, Houghtaling “denied seeing anyone injured or bleeding,” and he never said “he saw Smith kill Briseno.” Pet. App. 11a. As for what Houghtaling did describe, that information was supplied by the police’s leading questions or otherwise publicly known. Pet. App. 25a. Petitioner points to two pieces of information that she claims were not—Houghtaling’s statement that the chase unfolded on a side street, and his statement that the shooter used a .22-caliber firearm. Pet. 31-32. But Petitioner’s contention that the Seventh Circuit failed to address that evidence is simply wrong. *Id.*

First, as the Seventh Circuit noted, Houghtaling’s statement about the chase *was* “prompted by leading questions with a 50% chance that Houghtaling would guess right.” Pet. App. 26a. Indeed, 50/50 is generous: presumably most people would flee a crime scene towards a side street rather than a busy street.

Second, as discussed above, the Seventh Circuit explained, at some length, why the statement regarding the .22-caliber firearm does not establish Houghtaling’s personal knowledge of the events. Most tellingly, Houghtaling, “when later asked to choose between a drawing of an automatic (the wrong gun) and of a revolver (the correct gun),” chose the wrong gun. Pet. App. 25a. Further, at another point in the proceeding,

the ballistics expert in the case testified that a .22 is a “very common type gun.” *Id.* As a result, the Omaha statement does not in fact indicate that Houghtaling knew anything about the commission of the crime.

Thus, resolving credibility disputes in the prosecution’s favor, the evidence connecting Smith to the crime can be quickly summarized: (1) Pardo’s testimony that Houghtaling’s green jacket “looked like” the one worn by one of the robbers; and (2) Houghtaling’s later-recanted statement that he and Smith were involved, during which he supplied no information indicating personalized knowledge of the events. This does not approach evidence sufficient to convict Smith; the state court was unreasonable to find otherwise.

2. Moreover, as the Seventh Circuit pointed out, there was powerful exculpatory evidence: the DeCicco Group’s commission of the Burrito Express murder. No rational jury could convict Smith when, not only was the evidence implicating him incredibly weak, but the evidence implicating someone else was incredibly strong.

Unlike Houghtaling’s solitary statement, witnesses testified at trial that all three members of the DeCicco Group independently confessed to their roles in the crime. DeCicco (the driver of the car) confessed to *five different* people: her mother Vicki Brummett; her sister Elizabeth Schwartz; her childhood friend Brittany Tyda; and two police officers, each of whom recorded the statements. Pet. App. 13a–14a, 16a. Hiland (the wearer of the green jacket) also confessed on numerous occasions: first, to Schwartz, who is also his cousin;

second, to his friend and roommate Daniel Trumble on two different occasions; and finally, to two additional persons—Gina Kollross and Charlene McCauley—during separate conversations in the days and months following the crime. Pet. App. 16a–17a. For his part, Levand (the gunman) confessed to long-time acquaintance Patrick Anderson while the two men were incarcerated in 2011. Pet. App. 17a–18a. The jury heard the two police recordings of DeCicco’s confessions, and heard directly from Brummett, Schwartz, Tyda, Trumble, Kollross, McCauley, and Anderson. Pet. App. 14a, 18a.

But it isn’t simply sheer volume. Two features of the DeCicco Group’s confessions bear emphasizing.

First, the DeCicco Group’s confessions included two facts that the police intentionally withheld from the public. DeCicco knew that Briseno yelled to someone in a car during the robbery, because, according to her, she was driving that car. Pet. App. 15a. And DeCicco also told her mother that Levand hit Briseno in the head with the gun. Pet. App. 13a. Hiland’s story is consistent: he also told Schwartz about the head injury. Pet. App. 16a. There is no explanation as to how both DeCicco and Hiland would have known these details other than personal knowledge of the crime.

Second, the DeCicco Group’s confessions explain several other pieces of evidence in the record that, in the absence of those confessions, are hard to credit as coincidences. For example, several months after the robbery, Wisconsin police found DeCicco’s car in a field, destroyed by fire. As DeCicco explained: Hiland and Levand stole it and burned it because the blood stains on

the seats would not come off. Pet. App. 164a. The record contains no other explanation for that event. Further, multiple witnesses, such as Brummett and Schwartz, testified to seeing cuts and bruises on Hiland's arms in the days after the robbery. Pet. App. 172a, 174a. Although at times Hiland maintained that he had slipped and fallen down icy stairs, Pet. App. 174a; at other times, he confessed he received the injuries robbing the Burrito Express, *see, e.g., id.* 178a.

In the face of this evidence, the state court fell back on the jury's prerogative to disbelieve the DeCicco Group's confessions—a position that Petitioner also takes. Pet. 32.

But even assuming that the jury disbelieved the substance of the DeCicco Group's confessions, that does not explain the emergence of a suite of mutually reinforcing confessions that included details known only to the police investigating the murder. The existence of those confessions, their consistency with non-testimonial evidence, and the knowledge of confidential information are basic facts, not credibility assessments. As the Seventh Circuit stated, “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.” Pet. App. 28a.

Because the record contains no plausible explanation for those facts, they necessarily raise a reasonable doubt about Smith's guilt. Even under AEDPA's deferential standard, it was unreasonable for the state court to

uphold Smith's conviction in the face of such overwhelming evidence of innocence.

III. This Case Is A Poor Vehicle For Granting Certiorari.

This case is an unsuitable vehicle for considering Petitioner's arguments because both the district court and the Seventh Circuit concluded that Smith was entitled to habeas relief on an alternative ground that Petitioner does not challenge.

Specifically, the district court found that Smith is entitled to a conditional writ because the trial court's evidentiary rulings violated his right to a fair trial. Pet. App. 126a. It therefore gave the State 120 days to "either initiate proceedings to retry Smith" once again or else "release him from custody immediately." *Id.* On appeal, the Seventh Circuit affirmed this ruling as an alternate holding. Pet. App. 35a, 37a.

The Seventh Circuit held that, at Smith's trial, the state trial court improperly excluded three essential pieces of evidence and thereby deprived Smith of a fair trial. First, and "most significant," was Anderson's testimony "regarding Briseno's cocaine dealing and Levand's knowledge of that side-business." Pet. App. 32a. That admissible evidence would have shown that the DeCicco Group had "a specific reason to rob Briseno, while Smith and his friends did not." *Id.* Second, the state trial court erroneously excluded Trumble's testimony that he witnessed Hiland "confess to a criminal defense attorney." Pet. App. 32a-33a. As the panel explained, that confession was significant because it was not susceptible to the State's theory that the

DeCicco Group confessions were motivated by “social incentives to lie.” Pet. App. 33a. Indeed, it is hard to see what Hiland “had to gain by falsely boasting to a disinterested lawyer.” *Id.* Finally, the panel found that the state trial court erred by preventing “Smith from further impeaching Pardo’s testimony” about the green jacket. Pet. App. 34a. Had the trial court ruled otherwise, Detective 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.” *Id.* Those errors prejudiced Smith, and the Seventh Circuit concluded that the state appellate court’s contrary harmlessness determination was “unreasonable.” Pet. App. 35–36a.

Petitioner does not challenge that alternative holding from the Seventh Circuit. Therefore, even if Petitioner were to prevail before this Court, Smith’s conviction would still be vacated.

It is theoretically possible that, under the Seventh Circuit’s alternative holding, Smith could be retried. At this point, however, a fourth trial appears unlikely because Susanne DeCicco, a key witness at the prior trials, has died.² Moreover, in view of the passage of time and the gaping holes in the State’s case that the federal courts have recognized, it is far from clear that the State would retry this case even if Ms. DeCicco were still alive. Hence, even if Petitioner were to obtain certiorari and prevail on the lone question presented in the Petition,

² <https://www.legacy.com/us/obituaries/nwherald/name/susanne-decicco-obituary?id=4113443>.

she would be unlikely to achieve any meaningful benefit for the State.

More fundamentally, the Seventh Circuit's alternative holding puts this Petition in a very awkward posture. Petitioner repeatedly characterizes this case as a vehicle for promoting respect for jury verdicts. On page 1 of the Petition, the State emphasizes the importance of "deference . . . to the jury's verdict" and condemns the Seventh Circuit for having "impermissibly second-guessed the jury's verdict." Pet. 1. This theme recurs throughout the Petition. *E.g., id.* 18, 19, 21, 29, 30.

However, the Seventh Circuit found that the jury trial was hopelessly tainted because evidence was impermissibly withheld from the jury, and Petitioner does not even challenge that conclusion here. Hence, ruling in Smith's favor would not promote "deference . . . to the jury's verdict," Pet. 1, because that verdict will be wiped out no matter what. And ruling in Smith's favor would not "second-guess[] the jury's verdict." *Id.* The jury's guilty verdict is easily attributable to the fact that crucial evidence of innocence was unconstitutionally withheld from the jury. If the state court had not violated Smith's constitutional rights and instead allowed the jury to hear all the relevant evidence, the jury would likely have acquitted Smith and there would have been no need for habeas review. Hence, if the Court wishes to take a fact-bound *Jackson* case for purposes of reiterating the importance of respect for jury verdicts, this is the wrong case.

Petitioner does not challenge this alternative basis for relief in her Petition. Therefore, this case is poorly suited for intervention by this Court.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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