

No. 09-2560

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSEPH A. STOCK,

Petitioner-Appellant,

v.

DONALD GAETZ, Warden,*

Respondent-Appellee.

Appeal from the United States
District Court for the Northern
District of Illinois,
Eastern Division

Case No. 06 C 448

Hon. David H. Coar,
Presiding Judge

REPLY BRIEF OF
PETITIONER-APPELLANT JOSEPH A. STOCK

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*Petitioner was incarcerated at Stateville when Petitioner filed his opening brief and the State filed its response. Following the State's "Motion Respecting Transfer of Custody Pending Review," Stock was transferred to Menard on February 23, 2010. Accordingly, Petitioner has amended his caption in this reply brief to reflect the recent transfer. This Court's docket sheet likewise names Gaetz as the proper Respondent in this action.

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ARGUMENT

The State's response is largely non-responsive. Rather than squarely address the constitutional violation and the jurisprudence underlying it, the State ignores Stock's arguments and offers instead a patchwork of inapplicable precedent. Instead of acknowledging that the limits placed on Najera's cross-examination were pervasive and irremediable, the State paints Stock's inability to impeach Najera as either harmless error, a strategic "choice" by defense counsel, or validated by the trial court's "compromise" under Illinois evidentiary rules. (*See* State Br. 19, 25-26, 28.) But these tactics cannot mask the fact that: (1) the state appellate court ignored the governing Confrontation Clause jurisprudence and instead relied on out-of-context snippets from *Delaware v. Fensterer*, 474 U.S. 15 (1985), to justify the violation of Stock's confrontation rights; and (2) there was neither a trial court "compromise" nor a defense counsel "choice," but rather a complete bar on Stock's effective cross-examination of Najera on what was the heart of the State's case.

To be clear, Stock sought to impeach Najera by omission: to show that in the many instances where Najera should have responded in a way that was consistent with his claim that Stock confessed, he failed to do so. Therefore, the State's attempt to narrow the inquiry to what it believes is the only "key and impeachable point"—Najera's failure to "explicitly" bring up Stock's confession (as opposed to the oblique "tell anybody else" reference that he did make)—simply is wrong. (*See* State Br. 23.) Nor can the limited line of inquiry that was available to the defense compensate for the wholesale ban on several additional exchanges between Stock

and Najera; the trial court flatly prohibited defense counsel from probing the most salient examples of Najera's inconsistencies. And this prohibition was not, as the State claims, a routine and proper exercise of Illinois hearsay principles, but rather a serious breach of Stock's constitutional right to confront.

I. Stock preserved the “contrary to” argument.

Stock did not waive the “contrary to” argument. His *pro se* petition in the district court alleged a Confrontation Clause violation under 28 U.S.C. § 2254. (Br. 24 n.3); *See Maleng v. Cook*, 490 U.S. 488, 493 (1989) (per curiam) (habeas petition should be construed with deference to *pro se* petitioner) (citing *Haines v. Kerner*, 404 U.S. 519 (1972) (per curiam)). And although *the State* later limited its analysis of the issue as one of “unreasonable application,” an argument to which Stock subsequently replied, this maneuver cannot ascribe to Stock a waiver of the full Confrontation Clause claim he has consistently raised in each proceeding from state through federal court. To allow the State to steer habeas petitioners, most of whom are *pro se*, into a waiver via its responsive briefs would be patently unfair to unwitting habeas petitioners, like Stock, who have conscientiously preserved claims over the course of many years of litigation.¹ The authority on which the State relies does not merit a contrary result. (State Br. 11, 16) (citing *Allen v. Chandler*, 555

¹ And although Stock was appointed counsel for purposes of the reply brief, this fact does not weigh any more heavily in favor of finding waiver. Counsel was appointed late in the proceeding and tasked with a discrete purpose: to provide a professionally researched and written response to the State's Answer. For this reason, it is disingenuous for the State to claim that it was Stock who first framed the issue as one of “unreasonable application,” by citing to Stock's reply brief, which was, of course, responding to the State's brief. (State Br. 10) (presenting State's Answer (R. 23) as if it were responding to Stock's subsequent reply brief (R. 44)).

F.3d 596, 601 (7th Cir. 2009)). This Court’s passing reference to waiver in *Allen* was neither central to its holding nor factually analogous to this case and, in any event, this Court ultimately reviewed the supposedly waived issue on the merits. *Allen*, 555 F.3d at 301 (noting that petitioner conceded on appeal that the argument relating to a wholly separate constitutional violation had been waived but discussing the merits of the claim). Finally, there has been no “about face” as the State contends (State Br. 11), because even though Stock never uttered the phrase “contrary to,” his arguments hewed to that standard and analyzed the very precedent—*Davis*, *Chambers*, and *Van Arsdall*—that both parties and the district court identified as the relevant Confrontation Clause law. (R. 23 at 7-8 (State’s answer citing *Davis* and *Van Arsdall* in the section titled “applicable precedent”); R. 44 at 5-8 (Stock’s reply brief citing same); App. A17-18 (district court judge citing *Davis* as “relevant Supreme Court precedent”).) *See also Davis v. Alaska*, 415 U.S. 308 (1974), *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

Significantly, the State’s answer in the district court identified as “applicable precedent” a whole host of cases that were neither relied upon nor inherent in the state appellate court’s reasoning. (R. 23 at 7-8) (citing *Davis* and *Van Arsdall*). The state appellate court, however, relied solely on *Fensterer*, and its analysis reflects no meaningful consideration of any other Confrontation Clause precedent. (App. A51-52.) The State’s discussion of “applicable precedent” thus implied that the state appellate court had engaged in a thorough and proper analysis when, in fact, it had

not. (R. 23 at 7-8.) Stock and the district court then analyzed this precedent under the “unreasonable application” prong, when the correct course would have been to evaluate whether the state appellate court's decision was “contrary to” *Davis* and *Van Arsdall*. Regardless, because the precedent was raised in and considered by the district court, albeit under the standard of “unreasonable application,” no waiver occurred here. Therefore, Stock has preserved the entirety of his constitutional claim that he was denied his right to confront, and has available to him all arguments under § 2254.

II. The state court’s rulings were contrary to Supreme Court Confrontation Clause precedent.

To excuse the state appellate court’s faulty and incomplete analysis under *Fensterer* alone, the State now argues that *Fensterer* embodies, or at least is consistent with, all of the relevant Confrontation Clause principles from *Davis* through *Van Arsdall*. (State Br. 18) (“[T]he standard from *Fensterer* . . . is consistent with . . . *Chambers*, *Davis*, and *Van Arsdall* . . .”). But *Fensterer* does not encompass the entire body of Supreme Court Confrontation Clause jurisprudence; in fact, it merely carves out a fact-specific limit on confrontation. And *Fensterer*’s “consistency” or lack of direct conflict with other precedent reflects only its unique facts; any perceived “consistency” is irrelevant to the question whether the state appellate court’s decision was “contrary to” other Supreme Court cases like *Davis* and *Van Arsdall*.

By recasting Stock’s argument as one of form rather than substance, the State tries to deflect this Court’s attention from the fact that the state appellate

court identified and applied only one sound bite from *Fensterer*, a legally and factually distinguishable case. (State Br. 16) (“The state appellate court’s failure to cite *Davis*, *Chambers*, or *Van Arsdell* [sic] does not make its decision contrary to their decisions.”). But as Stock’s opening brief made clear, the state appellate court decision was contrary to Supreme Court precedent because it failed to apply the rule from the governing Confrontation Clause cases of *Davis* and *Van Arsdall*, not because it simply failed to cite them. (Br. 28-29, 38) (stating that the rule established by *Davis*, *Fensterer*, and *Van Arsdall* is that “the Confrontation Clause is violated when a trial court unreasonably restricts or completely prohibits a defendant from asking questions necessary to impeach the credibility of witness testimony”). By forbidding Stock from using the transcript to impeach Najera on an issue central to his credibility—whether the confession occurred at all—the trial court ran directly afoul of the Supreme Court’s Confrontation Clause cases.

Indeed, to adhere to the State’s approach, with *Fensterer* as the capstone of Confrontation Clause jurisprudence, would leave no meaningful right to confront in its wake. The foundation of the State’s rule is the following language from *Fensterer*: “[T]he 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.” (State Br. 17) (quoting *Fensterer*, 474 U.S. at 20). This language stemmed from an unusual and distinct factual scenario in which the defendant claimed his right to confront was violated by a witness’s answers; in *Fensterer*, there was no restriction on the opportunity to question in the

first instance. 474 U.S. at 19 (distinguishing *Davis* because “the trial court [in *Fensterer*] did not limit the scope or nature of defense counsel’s cross-examination in any way.”). To claim that *Fensterer*’s statement regarding the limits on cross-examination embodies cases like *Davis*, *Van Arsdall*, and *Stock*, where the very “opportunity”—the right to ask questions—was at the heart of the inquiry would eviscerate the right to meaningful confrontation. *Stock* was prohibited from asking the questions that would have allowed the jury to properly evaluate Najera’s credibility, whether by his answers or his demeanor. Therefore, the state court’s decision was contrary to Supreme Court precedent because it applied a rule that presumes the very thing that the trial court prohibited *Stock* from doing—asking the questions that test the credibility of the State’s key witness.

The State’s remaining two arguments merit little discussion. First, the State incorrectly urges this Court to ignore the precedential value of *Davis*, a factually indistinguishable case, and *Chambers*, a case that compels finding a constitutional violation here, by arguing that the broad nature of the Confrontation Clause holdings creates fact-specific outcomes that cannot be properly analogized to later cases. (State Br. 17-18.)² With respect to *Davis*, the State’s own authority notes that the constitutional violation arose from facts remarkably similar to those present here: “a crucial prosecution witness, who may have wondered if he was also a suspect for the crime, [who] was telling lies at trial that were protected by the

² Even if the precedent is as fact-specific as the State argues, it still requires some analysis of the facts, something that was wholly missing from the state appellate court’s decision. See *below* pages 11-12.

court's evidentiary ruling.” *Walker v. Litscher*, 421 F.3d 549, 557 (7th Cir. 2005) (summarizing *Davis*). This description of *Davis* could just as easily describe Najera’s role in the State’s case against Stock. Najera was a crucial prosecution witness, who had been taken to the police station and read his *Miranda* rights before he ultimately signed a statement implicating Stock. The questions defense counsel sought to ask would have provided the jury with the information it needed to determine whether Najera was lying about the alleged confession. The trial court’s ruling, however, insulated Najera’s testimony from that very attack. Therefore, *Davis* shows that the state court’s ruling abridged Stock’s constitutional right to confront.³

The State’s reliance on *Chambers* is perplexing because it is a case that, on balance, heavily favors Stock. The State acknowledges that the Supreme Court in *Chambers* did ultimately find a constitutional violation.⁴ (State Br. 17.) Although the State relies upon the fact-specific nature of *Chambers*, the restriction in Stock’s case was so much more severe than in *Chambers* that Stock’s case falls easily

³ *Van Arsdall*, while addressing slightly different facts, is clear that when “the trial court prohibit[s] *all* inquiry” into a key issue of credibility, it violates the Confrontation Clause. 475 U.S. at 679. Thus, as stated in the opening brief, it too supports finding a confrontation violation in Stock’s case.

⁴ The State is wrong, however, in painting *Chambers* as a strict Confrontation Clause case. (State Br. 17.) The Supreme Court in *Chambers* reviewed the conviction under the Due Process Clause of the Fourteenth Amendment. 410 U.S. at 285. This decision highlights that the rights under the Due Process Clause and the Confrontation Clause involved in Stock’s case are intertwined. *Cf.* (State Br. 24.) The Confrontation Clause is obligatory on the states *because* the right to confront is central to the due process of law. *Pointer v. Texas*, 380 U.S. 400, 405 (1965) (“[W]e have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment’s guarantee of due process of law.”). As the Supreme Court did in *Chambers*, this Court could equally grant relief if it were to examine the serious errors in this case through the lens of due process.

within its holding. Although in *Chambers* the court restricted the defendant's questioning of a witness, the defendant was permitted to introduce that witness's written confession to the shooting for which the defendant was on trial, 410 U.S. at 291, as well as other testimony placing that witness at the scene of the crime, *id.* at 289. Despite these other avenues, the Supreme Court nonetheless found a due process violation because his right to confront was violated, making his "defense . . . far less persuasive than it might have been . . ." *Id.* at 294. Unlike *Chambers*, who was able to present some alternate evidence to support his defense that another man committed the crime, the rulings in *Stock's* case effectively prevented any inquiry into the heart of *Najera's* credibility with respect to the confession. Therefore, *Chambers's* principles apply even more forcefully here.

Finally, the State's inconsistent approach to the role of state evidentiary law cannot be used to justify or mask the constitutional violation in this case. On the one hand the State invokes the "standard application of an Illinois evidentiary rule . . ." (State Br. 22) as if it were armor that protects the state court decisions from any underlying violation of the Confrontation Clause. On the other hand, the State declares it improper to probe for chinks in the armor, because erroneous evidentiary decisions are "not cognizable on federal habeas." (State Br. 24.) Regardless, such equivocating is unnecessary and reinforces *Stock's* reason for pointing out this series of underlying erroneous decisions: to show the context for why and how the confrontation error occurred. That is, the trial court's erroneous interpretation of Illinois evidentiary law was not a standard application of those

principles as the State claims (State Br. 22), but rather a mechanistic one that ignored the purpose of the cross-examination, the context of the statements, and the presumption of Stock's innocence. *See Chambers*, 410 U.S. at 302 (“[H]earsay rule may not be applied mechanistically to defeat the ends of justice.”). Ultimately, it does not matter whether the decisions that denied Stock his right to confront were proper interpretations of state law. Even correct applications of state law must give way when they violate the defendant's right to confront. *Davis*, 415 U.S. at 319-20 (“State's desire [in enforcing its own law] must fall before the right of petitioner to seek out the truth in the process of defending himself.”); *Chambers*, 410 U.S. at 297 (notwithstanding the state supreme court's ruling on state law, the restrictions imposed on the defendant violated his right to confront).

III. The Illinois appellate court unreasonably applied Supreme Court precedent.

In addition to being contrary to the *Davis-Fensterer-Van Arsdall* line of cases, the state appellate court's decision was an objectively unreasonable application of *Fensterer's* principle that “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.” *Fensterer*, 474 U.S. at 20. For such an opportunity to be effective, the defendant must be able to expose to the jury facts relating to the reliability of the witnesses against him. *Davis*, 415 U.S. at 318.⁵ The state appellate court unreasonably applied *Fensterer* by treating the

⁵ The State attempts to distinguish *Davis* by pointing out that *Davis* found a Confrontation Clause violation where the state's evidentiary ruling prevented the defendant from

number of transcript pages as a proxy for effective cross-examination, rather than looking to whether Stock was allowed to question Najera on issues central to the case. *See id.* at 317 (concluding that jurors must be allowed to have “the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the key witness’s] testimony which provided a crucial link in the proof of petitioner’s act”) (internal quotations omitted). But length of examination cannot measure the effectiveness of the examination and cannot justify the confrontation violation in Stock’s case.

Following the state appellate court’s rationale to its end, the substantive effectiveness of Najera’s cross-examination is affected each time the court reporter changes font or increases pitch or point size. But even a 1000-page cross-examination cannot be deemed sufficient when the defendant is barred from probing the most critical parts of the witness’s testimony. *See Fensterer*, 474 U.S. at 19 (“[C]onfrontation means more than being allowed to confront the witness physically.”) (quoting *Davis*, 415 U.S. at 315). In fact, had Stock been allowed to confront Najera with the affirmations of Stock’s innocence and the repeated failures to bring up the confession during their conversation, cross-examination may well have been much shorter. As it was, the cross-examination contained only the most basic information about the telephone call. As it did in the district court, the State reprints almost three full pages of Najera’s cross-examination, ostensibly to show

exposing the witness’s motivation to lie. (State Br. 18.) But if the Constitution mandates the ability to probe a *motivation* to lie then, *a fortiori*, it mandates the ability to probe actual lies.

the extent of the Stock's cross-examination of Najera. (State Br. 20-21.) But even a cursory review of that colloquy shows precisely how Stock was hamstrung into soliciting only the most superficial details: (1) that police asked Najera to make the call and Najera agreed to do so; (2) that Najera paged Stock and Stock called back; (3) that it was a 5-10 minute conversation; (4) that Stock did most of the talking; and (5) that Najera talked to police afterwards and knew that the call was recorded. (State Br. 20-21.) Such beating around the bush is not effective cross-examination; it results from the denial of any opportunity for effective cross-examination.

The State offers three equally unavailing arguments in an attempt to salvage the state appellate court's faulty and insufficient analysis. First, acknowledging that the appellate court "did not analyze this issue extensively" (State Br. 21-22), it cites this Court's decision in *Malinowski v. Smith*, 509 F.3d 328, 332-33 (7th Cir. 2007), for the proposition that "what matters is not the extent of the state court's reasoning, but whether its result is reasonable." (State Br. 22.) Putting aside the paradox of reasonableness without reasoning and the fact that the state court's analysis in Stock's case was neither reasoned nor reasonable, the State's reliance on *Malinowski* is misplaced. In that decision this Court was tasked only with deciding whether a state appellate court's decision constituted a "ruling on the merits"; it did not address whether the court's holding was objectively reasonable. *Malinowski*, 509 F.3d at 332-33 (holding that "a state court need not offer *any* reasons and [may] summarily dispose of a petitioner's claim and that summary disposition would be an adjudication on the merits.") (quoting *Muth v. Frank*, 412 F.3d 808, 815 (7th Cir.

2005)). In fact, this Court explicitly noted that “[t]he [state appellate] court’s poor reasoning may provide a basis for finding that its decision was ‘contrary to’ or involved an ‘unreasonable application’ of clearly established federal law” *Id.* at 333 (quoting *Muth*, 412 F.3d at 816). Thus, given the state appellate court’s poor reasoning in Stock’s case, *Malinowski* supports Stock’s claim for relief.

Second, the State is quick to claim that Stock passed up the opportunity to confront Najera about whether he “explicitly” mentioned Stock’s confession during the phone call. (State Br. 21, 23, 26, 28.) But pursuing the “explicitness” of the reference was virtually a non-issue once the parties agreed pretrial that Najera had made some oblique reference to the alleged confession in his “tell anybody else” statement. (App. A122-23, A148.) That is, once the State was able to elicit from Najera that he tried to raise the supposed confession, challenging the precise words he used or did not use during that exchange would not be particularly probative. Moreover, given the trial court’s ruling that allowed only Najera’s “tell anybody else” statement, but not Najera’s subsequent omission after Stock’s response, asking this question could only have served to distort the truth. *Cf. Davis*, 415 U.S. at 318 (“On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness”). So although the State disingenuously characterizes this heads-I-win-tails-you-lose scenario as a “compromise,” (State Br. 19), defense counsel could not in good faith go down a line of questioning that would enable the State to so mislead the jury. As

for the remaining statements beyond the “tell anybody else” remark, Stock’s counsel would have been unable to effect impeachment by omission as to those instances because he was barred from introducing Stock’s contemporaneous statements that would demonstrate Najera’s repeated opportunities to raise the confession. *See People v. Williams*, 769 N.E.2d 518, 524 (Ill. App. Ct. 2002) (defining impeachment by omission as requiring that counsel show, in addition to the omission, that the witness had an opportunity to make a statement, and that under the circumstances a person normally would have made the statement); (State Br. 23) (noting that “Najera never specifically mentioned [Stock]’s prior confession despite *numerous chances* to do so.”) (emphasis added).

Additionally, because Stock would have been unable to impeach Najera’s testimony with the transcript if Najera lied about what took place on the call, Najera would have been free to testify, without consequence, that he never affirmed Stock’s innocence and that he explicitly brought up the confession, a result that could only mislead the jury and one that defense counsel wisely avoided. *See Davis*, 415 U.S. at 314 (finding a Confrontation Clause violation when a key witness was able to give potentially untruthful testimony because he was shielded from impeachment by the trial court’s evidentiary ruling).

Third, the State’s final effort to show the “reasonableness” of the state appellate court’s decision relies primarily on the fact that states routinely enact and courts follow hearsay rules. (State Br. 22-23.) But what the State refuses to recognize is that the court’s use of the hearsay exclusion in this case was far from

standard; it was incorrect and it resulted in a serious Confrontation Clause violation. Two of Stock's statements that the trial court barred were neither self-serving nor exculpatory and none were hearsay because they were not offered to prove the truth of the matter asserted. (Br. 33-37.) The purpose of these statements was to provide context for the jurors to properly evaluate Najera's faulty or non-existent responses.

For example, when Stock responded to Najera's "tell anybody else" statement with "Tell anybody what?" the jury would have learned that Najera backpedaled from his half-hearted reference by saying, "Anything. I mean, did they subpoena anybody else?"⁶ The response that would have been consistent with his story that Stock confessed would have been, "*Tell anybody else you did it.*" But that is not what Najera said. Similarly, Stock's words were necessary context to expose Najera's repeated affirmations of Stock's innocence. If Najera had said, referring to the murder, "*Joe, I know you didn't do anything,*" there would have been no question that defense counsel could have introduced that statement and impeached Najera with it. So to exclude the exact same message from the jury simply because it arose out of a colloquy requiring both the context of Stock's words ("I didn't do [anything].") and Najera's response ("I know.") is patently unfair. These examples, among many others in the transcript where Najera either affirmed Stock's

⁶ This argument was raised in Stock's opening brief, (Br. 33), but the State completely ignores the significance of this exchange, maintaining, incorrectly, that "Tell anybody what?" is only of value as a self-serving exculpatory statement. (State Br. 20.) Further, the State fails to explain how "Tell anybody what?" could be possibly be the denial of a crime without the presumption that Stock knew "tell anybody else" referred to a confession (*i.e.*, presuming that Stock had actually confessed and was therefore guilty). (*See* Br. 34.)

innocence or contradicted his claim that Stock confessed, directly call into question the very heart of Najera's testimony and in turn the State's case, yet the jury was never allowed to consider them. *See Fensterer*, 474 U.S. at 19 (noting that defense counsel must be allowed to expose the jury to facts relating to the reliability of the prosecution's witnesses) (citing *Davis*, 415 U.S. at 315). Thus, although this Court need not expressly invalidate the trial court's evidentiary rulings to find a Confrontation Clause violation, the use of the hearsay rule to prevent the impeachment of Najera's testimony necessarily defeated the ends of justice. *Chambers*, 410 U.S. at 302 (“[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.”).

Because Stock was denied the *opportunity* for effective cross-examination and because the appellate court unreasonably found otherwise, this Court should grant Stock's petition for a writ of habeas corpus.

IV. The Confrontation Clause violation was not harmless error.

The violation of Stock's fundamental right to confront Najera was not harmless because Najera was the lynchpin of the State's case. As a threshold matter, and contrary to the State's suggestion (State Br. 26-27), the state appellate court did not apply the standard from *Chapman v. California*, 386 U.S. 18 (1967), reasonably and, therefore, this Court's review is warranted. *Chapman's* harmless error standard asks whether the error *might* have contributed to the conviction. *Id.* at 24; *People v. Jimerson*, 652 N.E.2d 278, 286 (Ill. 1995) (framing standard as requiring the court to “conclude beyond a reasonable doubt that the error did not

contribute to the jury's verdict."). Yet the state appellate court applied a much higher harmless-error standard to Stock's claim by asking if the error was "outcome determinative." (App. A52.) Therefore, because the appellate court used the wrong standard, it applied *Chapman* unreasonably and the test from *Brecht v.*

Abrahamson, 507 U.S. 619 (1993), applies on habeas review. *Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009) (applying *Brecht* when *Chapman* was applied unreasonably).

Following *Brecht*, the test is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Here, the error did have substantial and injurious effect and influence in determining the verdict.

The State once again begins by focusing on how the cross-examination could have unfolded differently yet still in the State's favor. Specifically, the State points out that: (1) defense counsel could have questioned Najera about his failure to explicitly mention the alleged confession; (2) the use of exculpatory hearsay statements would not have impeached Najera because there were other reasons why Najera might not have mentioned the alleged confession; and (3) the State could have mitigated the impeachment by pointing out on redirect that Najera said, "And you didn't tell anybody else, you know what I'm saying?" (State. Br. 27-28.) None of the State's hypotheticals actually occurred, so the jury considered none of it. Any prediction as to how these events might have impacted the jury's verdict is pure speculation and cannot satisfy the harmless-error standard. Further, the

State ignores the effect Najera's explicit affirmations of Stock's innocence would have had on the jury.

The State argues that Najera's testimony contained details corroborated by physical evidence. (State Br. 29.) But the State never claims that Najera supplied original information to the police and, further, fails to point out that investigators had already collected and analyzed the physical evidence in the three months between the murder and Najera's interrogation. (App. A179, A183, A186-87, A195.) More importantly, Najera's signed statement was written by a prosecutor who knew what pieces of evidence needed corroboration. (App. A195; Tr. 1077, 1080.)

The State next flags several pieces of evidence it believes are sufficient to prove Stock guilty beyond a reasonable doubt, even in the absence of Najera's crucial testimony: (1) that Michael Pope testified to having heard Stock and Connie argue over the phone and Stock threaten Connie; (2) that Stock told his mother he "hurt someone badly"; (3) that the car was found blocks away from the Wagner's residence and with Stock's fingerprints inside; (4) that Stock had told a friend and coworker a few weeks earlier that he wanted to kill Connie, and that he pulled out a knife and made a stabbing motion; and (5) that Stock dated Connie. (State Br. 28-29.)

First, Michael Pope's testimony was anything but conclusive of Stock's guilt, particularly because Pope was on "very, very bad terms" with Stock. (App. A263.) Significantly, neither Pope nor Connie seemed to take Stock's supposed threat

seriously. Connie never alerted the police to the alleged threat even though she called to alert them of Stock's drug sales. (App. A269-70, A272-74.)

Second, Stock's statement that he "hurt someone badly" was not in reference to Connie Wagner. Instead, Stock told his mother he had beat (not killed) another man (not woman) with a baseball bat (not a knife), and that he feared that someone else might have killed Connie in retaliation for that beating. (Tr. 372-73, 375, 378.) Again, this small piece of testimony, unrelated to Connie's murder, does not implicate Stock, let alone prove him guilty beyond a reasonable doubt.

Third, the location of Connie's car is inconclusive at best for the State's case and is, more likely, exculpatory for Stock. The car was found a mere five or six blocks from her home, at an apartment complex where she had been known to buy drugs. (App. A275-76.) Stock lived fourteen-and-a-half miles away, so his driving the car that short distance just to abandon it so far from his own home undercuts the State's theory, particularly when the State was unable to show how Stock would have traveled from Connie's home in Palatine, Illinois to his own home in Elk Grove Village, Illinois. (App. A275-76, A297, A399-400; Tr. 274, 826-27, 996, 1447.) Further, although Stock's fingerprints were found in the car, they were found only on the passenger side of the car, not on the steering wheel or driver's side, which also directly undercuts the State's theory that he took the car. (Tr. 601-03, 628-29.) In any event, the presence of his fingerprints on the passenger side of the car is perfectly consistent with the State's acknowledgement that Stock often rode in

Connie's car during their relationship. (Tr. 174.) It does not indicate in any way that Stock committed the murder.

Fourth, Julie Roth's testimony that Stock told her some weeks before the murder that he would like to kill Connie was not only unsubstantiated and uncorroborated, but also was discredited at trial. Like Pope, Roth did not take Stock's alleged statement seriously. After hearing Stock's supposed threat and of Connie's subsequent murder, Roth, a mother of four minor children, continued to socialize with Stock and have him as a frequent overnight guest. (Tr. 395-96, 399-400.) She continued to approve of the close relationship between Stock and her son, who often drove Stock around even after Connie's death. (Tr. 396.) Further, Roth's testimony was discredited at trial when Detective William King, one of the police officers who interviewed Roth, testified that Roth told him she never saw Stock act violently. (Tr. 979.) In the week after the murder, Roth was interviewed by police officers on five different occasions, and she never mentioned the threat Stock supposedly had made. (Tr. 401-412.) In fact, Roth, encouraged by a law-enforcement relative, called the authorities a few days after the murder, but never mentioned the alleged incident with the knife. (Tr. 414-15.) Her testimony was unreliable and not probative of Stock's guilt.

Finally, the State is left with only that Stock was Connie's ex-boyfriend, implying that their relationship somehow indicates that he was guilty of her murder. Having previously dated a murder victim does not by itself, nor taken

together with the other flimsy and circumstantial evidence the State presented, prove Stock's guilt beyond a reasonable doubt.

Moreover, no forensic evidence linked Stock to the crime. In fact, the physical evidence at the scene points away from Stock. While investigators found several fingerprints in the house, they found some that did not match any of the Wagners and none that matched Stock. The hair found under Connie's fingernail also did not match any of the Wagners or Stock. (Tr. 345, 618-22, 1145, 1149, 1153.) The day after Connie's murder, Stock voluntarily went to the police, met with detectives, and gave them the clothes he had been wearing the day Connie was killed; no blood was found on them. (Tr. 1160-63.) Although Connie died following a "major struggle," Stock had no scratches on his body when he went to the police. (Tr. 558, 569.) These are merely highlights of what amounted to substantial inconclusive and exculpatory evidence. Without Najera's testimony to tie its case together, the State simply could not overcome this evidence.

Najera's testimony was the lynchpin to the State's case, as is evidenced by its heavy reliance on it through trial and in closing argument. (App. A451-54, A455-56.) The jury itself recognized Najera's critical role by asking for the call transcript during its deliberations. (App. A460.) The State admitted that "[w]ithout [Najera's] testimony the State [could not] go forward" and thus could not prove Stock guilty beyond a reasonable doubt. (App. A466.) The importance of the testimony, with the shortcomings of the State's case and the inconclusive and exculpatory evidence in Stock's favor, show the substantial and injurious effect and influence of the

confrontation error. Thus, the error cannot be deemed, by any reasonable measure, harmless.

CONCLUSION

For the foregoing reasons, Petitioner Joseph Stock respectfully requests that this Court grant his petition for a writ of habeas corpus.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for Joseph Stock hereby certify that I served two copies of this reply brief and one digital copy of the brief by placing them in an envelope with sufficient postage affixed and directed to the person named below at the address indicated, and depositing that envelope in the United States mail box located at 375 East Chicago Ave., Chicago, Illinois on February 26, 2010.

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Dated: February 26, 2010

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

I, the undersigned, counsel for the Petitioner-Appellant, Joseph Stock, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), a version of this reply brief in non-scanned PDF format.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I, the undersigned, counsel for the Petitioner-Appellant, Joseph Stock, hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 5715 words.

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