No. 18-1421

In The

SUPREME COURT OF THE UNITED STATES

NASSAU COUNTY DISTRICT ATTORNEY'S OFFICE,

Petitioner

v.

MARK ORLANDO

BRIEF FOR MARK ORLANDO IN OPPOSITION

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QUESTIONS PRESENTED

1. Where, after a *Bruton* severance, the prosecutor moves in limine to introduce the incriminating statements of a nontestifying codefendant in its case in chief against the defendant and submits it is for a purported nonhearsay purpose, is it reasonable for a court to disregard the Confrontation Clause and simply presume the jurors will follow an instruction that limits the evidence to the nonhearsay purpose, or must the court conduct a more expansive inquiry and evaluate whether, in the context of the particular case, there is a risk that the jury cannot or will not follow the limiting instruction that is so great that the instruction cannot be accepted as an adequate substitute for the defendant's constitutional right of cross-examination?

2. Did *Tennessee v. Street,* 471 U.S. 409 (1985), create a carveout from *Bruton v. United States,* 391 U.S. 123 (1968), and eliminate the need for a court to consider a defendant's rights under the Confrontation Clause any time the State proffers a "not for the truth" rationale for introducing an alleged accomplice's out-of-court accusations against the defendant at trial and the court gives a limiting instruction to the jury?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

The Out-Of-Court Post-Arrest Statements 2

The Trial Court's Rulings 3

The Trial 5

The State Appeal 9

The Habeas Petition and The Second Circuit's Opinion 10

The Majority Opinion 13

The Dissent 15

ARGUMENT 17

CONCLUSION 32

TABLE OF AUTHORITIES

Cases

Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (194) 8

Bruton v. United States, 391 U.S. 123 (1968) .... passim

Crace v. Herzog, 798 F.3d 840 (9th Cir. 2014).. 25

Crawford v. Washington, 541 U.S. 36 (2004) 4, 9, 18, 30

Douglas v. Alabama, 380 U.S. 415 (1965) 18, 31

Dutton v. Evans, 400 U.S. 74 (1970).. 30

Hardy v. Chappell, 849 F.3d 803, 826 (9th Cir. 2017) 25

Lee v. Illinois, 476 U.S. 530 (1986) 18, 31

People v. Fitzpatrick, 40 NY2d 44 (1976).. 21

People v. Moses, 63 NY2d 299 (1984)... 29

Pointer v. Texas, 380 U.S. 400 (1965)...18, 30

Tennessee v. Street, 471 U.S. 409 (1985) .... passim

United States v. Bailey, 743 F.3d 322 (2d Cir. 2014) 28

United States v. DiStefano, 555 F.2d 1094 (2d Cir. 1977)................................... 8

Williams v. Illinois, 567 U.S. 50 (2012)...22, 26, 31

Young v. Conway, 715 F.3d 79 (2d Cir. 2013) 25

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254...10, 15

28 U.S.C. §2254(d)(1) 18, 24

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. App., at 1a-61a) is reported at 915 F.3d 113 (2d Cir. 2019). The opinion of the District Court denying Mr. Orlando's habeas petition (Pet. App. at 62a-78a) is reported at 246 F. Supp.3d 569 (E.D.N.Y. 2017). The state court opinion affirming Mr. Orlando's conviction (Pet. App. at 79a-82a) is reported at 61 A.D. 3d 1001 (2d Dept. 2009).

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 2019. The petition for a writ of certiorari was filed on May 8, 2019. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In 2005, Mark Orlando was charged in Nassau County, New York, in one count of a three-count indictment with second-degree murder in connection with the death of Robert Calabrese, a "runner" for a bookmaker. Co-defendant Herve Jeannot was charged in the same indictment with first-degree murder and second-degree criminal possession of a weapon. Because each had made post-arrest statements implicating the other, their trials were severed pursuant to *Bruton v. United States,* 391 U.S. 123 (1968). Nevertheless, at the start of Orlando's separate trial, the State was permitted to put Jeannot's statement before the jury. A detective was allowed to testify that, in the course of interrogating Orlando, he told Orlando that Jeannot confessed to shooting Calabrese and said Orlando paid him to

do it. (ECF8-17, T.622-4)[1] Orlando was convicted, and sentenced to a term of 25 years to life.

Orlando challenged the conviction on appeal, making the claim, among others, that the detective's testimony violated his rights under the Confrontation Clause. The conviction was affirmed. Thereafter, Orlando filed for habeas relief in federal court. On February 11, 2019, the Second Circuit instructed the district court to issue a writ of habeas corpus in 60 days unless the District Attorney of Nassau County had, by that time, taken substantial steps to "expeditiously try Orlando." On April 4, 2019, the district court accepted the District Attorney's representation that such steps had been taken, but a trial date has yet to be set and Orlando remains in custody.

The Out-Of-Court Post-Arrest Statements

Orlando and Jeannot were arrested on the same day. They were subjected to separate and prolonged interrogations in separate rooms at the police station.

As revealed pretrial, Jeannot initially confessed to shooting Calabrese without implicating Orlando. Then, after an officer told him over and over that Orlando was a "white motherfucker," a "white piece of shit," a "fat piece of shit" who was putting it on Jeannot, and that the officer was "not going to allow him to walk out of here and you take the fucking weight of all this shit in here, because it's not

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[1] Citations to the state court record are indicated by the district court ECF document number followed by the transcript ("T.") or other document page numbers.

going to happen … on my watch", Jeannot said that Orlando had offered him $4000 to kill Calabrese. (ECF8-5; T.244-247)

Unlike Jeannot, Orlando did not confess. At first, after telling police that he and Jeannot were involved in gambling and describing his relationship with Calabrese, Orlando said that he and Jeannot met with Calabrese on the night of the murder, paid Calabrese what was owed, and then drove away. (ECF8-16, T. 552, 548-557) Hours later, after being told that Jeannot was giving the police what they believed was "the truth" and that there was a video tape of their meeting with Calabrese, Orlando began repeating, "You don't understand," and explained that he was afraid for his family. More time passed, after which a detective told Orlando that Jeannot had implicated himself in the murder, and said that Orlando had paid him to do it. Thereafter, Orlando gave a long statement, the essence of which was that he and Jeannot met Calabrese, Jeannot killed Calabrese without any warning and then threatened to kill Orlando's family if Orlando went to the police. (ECF8-17, T.620-633, 667-8, 674-84)

The Trial Court's Rulings

The trial court rejected the co-defendants' separate pre-trial motions to suppress their post-arrest statements, and severed their trials pursuant to *Bruton*.

On the first day of Orlando's trial, however, the court granted the State's motion to put Jeannot's statement before the jury packaged in a different box. On the *sole* ground offered by the prosecutor for admission of this evidence -- that it provided the "context" surrounding Orlando's interrogation ("so the jurors

understand in context why the defendant is now changing his story" ECF8-11, T. 164), the court allowed a detective to testify in the State's direct case regarding Jeannnot's out-of-court statements.

Notwithstanding the *Bruton* severance, and over Orlando's objection that introduction of Jeannot's statement would violate his constitutional right to confront his accusers, the trial court ruled:

> The Court views that this information that the People are intending to offer in their direct case is not being offered for the truth of the contents of the statement but rather to give a clear picture to the jury what was going on during the interrogation of your client. The Court, accordingly, feels that *Crawford v. Washington* [is] not the analysis that takes place in this case, but rather, *Tennessee v. Street,* 471 U.S. 409…
>
> And at the time that this evidence is offered to the jury the Court will give a limiting instruction to the jury they're not to consider it for its truthfulness, but rather to help them understand the context in which the interrogation is going on. That same instruction will again be given in the final charge and emphasized again.

(ECF8-11, T.167)

The trial court made this ruling before opening statements and before the first witness was called. There is no indication in the record that, when it ruled, the court considered: (1) whether the supposed "context" purpose proffered was even relevant (i.e., whether it made any fact of consequence to the determination of the action more or less likely); (2) the degree to which any supposed relevance of the evidence actually advanced the jury's truth-seeking mission; (3) how easily Jeannot's statement could be misused by the jury despite the limiting instructions; (4) whether the State had any alternatives; or (5) whether defendant had engaged

in any trial tactic that justifiably opened the door to such evidence, and thus whether admitting the evidence was necessary to avoid prejudice to the prosecution.

Rather, the court seemingly accepted the State's argument that there was carveout from *Bruton* and the Confrontation Clause any time the State could come up with "not for the truth" rationale for introducing an alleged accomplice's out-of-court accusations and the court gave a limiting instruction to the jury.

The State continues to assert the same argument here.

The Trial

The detective testified that, in the course of interrogating Orlando, he told Orlando that Jeannot had confessed and was providing what the officers regarded as "truer versions of the events of Bobby Calabrese's murder." After the detective testified that he told Orlando that Jeannot said that he (Jeannot) did the shooting and that Orlando paid him to do it (ECF8-17, T. 622-4), the court gave the limiting instruction set forth in the footnote below.[2]

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[2]

> Ladies and gentlemen, you have been permitted to hear testimony about remarks made to the defendant by Detective McGinn about statements allegedly made by Herva Jeannot. You're to consider this testimony only when considering the circumstances under which the defendant himself may have made statements and for no other purposes. You are to completely disregard any statement allegedly made by Herva Jeannot when considering evidence against the defendant.
>
> Any statement allegedly made by Herva Jeannot is not evidence against the defendant and may never be considered as evidence against the defendant. You are not concern yourself with whether Herva Jeannot did or did not make any statements to the police, if he

Though, as shown below, the State had virtually no evidence to support the theory, it thoroughly embraced Jeannot's murder-for-hire version of events. The prosecutor argued in summation that Orlando hired Jeannot to kill Calabrese (ECF8-20; T. 875-6, 885, 890), and he assisted Jeannot at the scene by engaging in a "violent struggle" with Calabrese and immobilizing him before Jeannot shot him. (ECF8-20, T.900-907)

Apart from the detective's report of Jeannot's statements, however, the evidence substantiating Orlando's hiring of Jeannot and his assault on Calabrese was practically non-existent. It was circumstantial and insubstantial, consisting of tenuous inferential leaps. As shown in Respondent's brief to the Circuit (Orlando Brief, 12-21), the detective's account of Jeannot's confession supplied the missing framework for the theory of the State's case.

> did, what those statement[s] may have been or whether or not they were true.

(ECF8-17, T.624)

This was repeated in the final charge. (ECF8-20, T.930-1) The final charge also included instructions concerning Orlando's post-arrest statements. The jury was told that the People claimed the statements were "of an inculpatory nature", and that, before, the statements could be considered, the jury had to find three things: (1) the statements were made; (2) they were made voluntarily; and (3) defendant's constitutional rights were not violated. If the jury found that any one of these preconditions was not satisfied, the statements had to be disregarded. On the other hand, if the conditions were satisfied, then the jury had to determine "whether or not the statements given by him were true."

The jury was twice instructed that, if the statements were found to have been made and "to be true," then the statements "would constitute direct evidence." (ECF8-20, T.925-29) The court *did not* instruct what use could be made of any statements found to be exculpatory or false.

There were no eyewitnesses and no videotape of the encounter with Calabrese, nor any forensic evidence such as fingerprints, DNA or blood at the scene, on Calabrese, in Orlando's car, in Orlando's home, or at Orlando's place of work evincing Orlando's participation in the attack. That Orlando was engaged in a "violent struggle" with Calabrese was an inference the prosecutor drew from equivocal evidence relating to Calabrese's gunshot wounds, the condition of Calabrese's sweatshirt which was admittedly despoiled by the first responders, and the answers to hypothetical questions posed to purported experts based on facts not in evidence. There was also no accounting evidence to support the State's argument that Orlando had a motive to kill Calabrese because he could not pay his debts.

The only "evidence" to which the State could point to support its claim that Orlando hired and paid Jeannot to kill Calabrese was that Orlando and Jeannot – both active gamblers -- each possessed some $100 bills at home: ten were found in Orlando's bedroom, and five in Jeannot's. There were no fingerprints on the bills, and nothing that distinguished them from any other hundred-dollar bills in circulation. (ECF 8-14, T.426-7; ECF8-18, T.708, 712, 715)

In short, as the Second Circuit recognized, "Apart from Jeannot's statement, there was little evidence to support the state's theory." (Pet. App., 11a)

In the absence of any eyewitnesses or forensic evidence establishing either Orlando's hiring Jeannot to commit the murder, Jeannot's shooting of Calabrese, or Orlando's active participation in a struggle with Calabrese, the State had only Orlando's post-arrest statements -- and Jeannot's.

The State maintained that Orlando's second statement was partly true and partly false. Those parts of the statement that helped it establish its case (Orlando's description of Jeannot doing the shooting) it argued were true, and those that did not (his descriptions of his own involvement and Jeannot's threats) it argued were false. The prosecutor apparently believed that if there were any holes in the State's case left after the jury used the true parts, the jury could fill those holes by finding that the exculpatory parts of Orlando's statement were false: indeed, he told the jury in summation that Orlando's false statements to the police "alone establish his guilt beyond a reasonable doubt." (ECF8-20, T.895, 901) [3]

With respect to Jeannot's statements, the prosecutor's argument was that somehow the detective's report to Orlando regarding Jeannot's statements demonstrated the falsity of Orlando's exculpatory statements. (ECF8-20, T.864-866) Whatever the purported justification for introducing the detective's testimony about Jeannot's confession (and, as we show below, the State's justification keeps shifting), and whatever limiting instructions the court gave to the jury, however, the detective's testimony that Jeannot said Orlando paid him to shoot Calabrese provided the jury with powerful confirmation of the State's murder-for-hire theory;

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[3] *Cf. Bose Corp. v. Consumers Union of the United States, Inc.,* 466 U.S. 485, 512 (1984) ("when the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion"); *United States v. DiStefano*, 555 F.2d 1094, 1104 (2d Cir. 1977) (plain error to instruct jury that, if it finds exculpatory statements untrue and the defendant made them with knowledge of their falsity, the jury may consider them as circumstantial evidence of the defendant's guilt; false exculpatory statements are not admissible as evidence of guilt, but rather as evidence of consciousness of guilt).

it signaled not only that the detective believed Jeannot but also that the prosecutor believed Jeannot and the State's murder-for-hire theory did not come of out of thin air. It is hard if not impossible to imagine how the detective's report of Jeannot's statements could be used by the jury to support the State's argument that only the exculpatory parts of Orlando's statements were false unless Jeannot's contrary statements – that Orlando paid him to do the shooting -- were considered true.

The State Appeal

Relying principally on *Bruton* and *Crawford v. Washington,* 541 U.S. 36 (2004), and distinguishing *Tennessee v. Street,* 471 U.S. 409 (1985), Orlando argued that his Sixth Amendment right to confrontation was violated by the introduction of the testimony about Jeannot's post-arrest statements. (ECF8-23, 70-77)

In response, the State proffered the same argument it made when it moved in limine to introduce the detective's testimony: that it "was properly offered for the nonhearsay purpose of demonstrating what prompted the defendant to give his second statement," "the circumstances that fostered defendant's second statement." (ECF8-24, 42, 44) The State also proffered two additional justifications for the evidence: (1) that it was obliged to prove the voluntariness of Orlando's statements and, to do so, the detective had to "explain what had transpired to prompt defendant to change his account"; and (2) to demonstrate the "detective's state of mind during an interview and how an investigation evolved." (ECF8-24, 45-46)[4]

[4] In its certiorari petition, the State repeatedly claims that the "central argument that supported the state's decision" is "that the testimony about Jeannot's statement was admissible to refute a misleading argument advanced by the

The Appellate Division rejected Orlando's Confrontation Clause claim, holding in a single sentence that the detective's testimony was properly admitted "'for the limited purpose of explaining the detective's actions and their effect on the defendant, and not for the truth of the codefendant's statement'":

> Contrary to the defendant's contention, the court did not violate his right to confront a witness when it permitted a detective to testify that he told the defendant that a codefendant gave details about the killing. "The court properly instructed the jury that the testimony was admitted for the limited purpose of explaining the detective's actions and their effect on the defendant, and not for the truth of the codefendant's statement." (*People v. Ewell,* 12 AD3d 616, 617; *see Tennessee v. Street*, 417-US 409, 413-417; *People v. Reynoso*, 2 NY3d 820, 821; *People v. Marji*, 43 AD3d 961; *People v. Bryant,* 39 AD3d 768).

(Pet. App. 81a)

The Habeas Petition and The Second Circuit's Opinion

Orlando petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on several grounds. The district court denied the petition, but appointed counsel and granted a certificate of appealability with respect to whether the Sixth Amendment right to confrontation was violated. (Pet. App. 62a-78a)

Orlando argued on appeal that the state court's reliance on *Tennessee v. Street* to justify admission of the detective's testimony was unreasonable. There was no compelling non-hearsay purpose for this testimony, and whatever limiting instructions the jury heard, there was simply too grave a risk the jury would use Jeannot's confession for its truth to support a thin prosecution case. The State

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defense" in summation, that is, "Orlando's fear-dissipation claim." (Cert Pet. 14, 17, 19-20, 23, 25, 26 31, 33). The State *did not* make this argument in either the trial court or the Appellate Division.

premised its murder-for-hire theory on the purported truth of Jeannot's statements, but (other than Jeannot's statements), only the weakest of evidence (hundred-dollar bills found in Jeannot's and Orlando's homes) supported the theory. The detective's testimony was designed to confirm the murder-for-hire theory that was otherwise unsubstantiated, and the rationales offered for the admission of his testimony were but pretext. The detective's testimony about Jeannot's statements were of no value to the jury in evaluating whether the exculpatory portions of Orlando's final account to the police were true or false unless Jeannot's statements were considered for their truth, and, unless Jeannot's statements were considered for their truth, Jeannot's statements had no relevance to the central issue at trial -- that is, whether or not Orlando participated in the murder. The detective served as a conduit for placing before the jury notoriously unreliable and prejudicial hearsay of an alleged accomplice without giving Orlando the opportunity for cross-examination (or the benefit of standard cautionary instructions regarding accomplice testimony). The detective's testimony did nothing to advance the search for truth, and everything to prejudice Orlando. (Orlando Brief, 29-45; Reply Brief, 1-19)

The State offered an array of rationales for the admission of the testimony, all of which revolved around Orlando's supposed "state of mind" and "motivations" when making his post-arrest statements. The State argued that evidence of "what happened in the interrogation room" (1) showed Orlando "changed his story because Jeannot implicated him in the murder, and that both [his] first and second statements were not credible;" (2) was necessary for the People to fulfill their

burden of proving that Orlando's statements were voluntary; (3) "shed light on [Orlando's] state of mind when he gave his statements (thereby demonstrating his consciousness of guilt)"[5]; and (4) "rebutted aspects of [Orlando's] defense."[6] (DA Brief, 10, 18-21, 24-25, 29, 30-31, 34)

The State argued that *Tennessee v. Street* allows for the introduction of the statements of a non-testifying codefendant whenever offered "for the purpose of demonstrating what prompted a defendant to give a statement" or "to prove what happened when the defendant gave a statement". According to the State, so long as the out-of-court witness's statement is not offered "to prove what happened at the murder scene," it is not hearsay and "does not raise Confrontation Clause concerns." (DA Brief, 27-28)

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[5] As with the "rebut misleading defense argument" rationale at the center of the cert petition, "consciousness of guilt" was never mentioned by the prosecutor at the trial; he neither argued that Orlando's allegedly false statements reflected his consciousness of guilt nor requested a "consciousness of guilt" instruction to the jury, and no such instruction was given.

[6] Orlando rested without presenting any evidence. In support of his defense that the evidence was insufficient, his counsel made arguments based exclusively on his post-arrest statements and the detective's testimony surrounding those post-arrest statements, both of which were part of the State's case in chief. The State bootstraps in its cert petition when it says, in one breath, that the "heart of the defense" at trial was that "Orlando's second statement was the truth, and Orlando's fear of Jeannot compelled him to initially lie to the police *but he felt `free' to `tell the truth' in his second statement, after he was told by McGinn that Jeannot had confessed to shooting Calabrese*," and, in the next breath, that the State moved in limine to elicit the detective's testimony in "anticipation of Orlando's inevitably raising that defense." (Cert. Pet., 9 (emphasis added), 14.) The State opened the door by introducing the detective's testimony about Jeannot's confession; it cannot use Orlando's use of the detective's testimony to his advantage as justification for introducing the detective's testimony in the first place.

After conducting *de novo* review, the Court of Appeals reversed and remanded with instructions to grant the petition. (Pet. App. 1a-39a) District Judge Michael Shea, sitting by designation, dissented is a separate opinion. (Pet. App. 40a-61a)

The Majority Opinion

According to the majority, the state court's conclusion that the jurors would use Jeannot's purported confession only to "`explain the detective's actions and their effect' on Orlando – that effect presumably being the reason why Orlando changed his account of the event of the night of the murder" "was an unreasonable application of *Bruton*" and an unreasonable extension of *Street*.

In their view, because of a confluence of factors, the "Confrontation Clause violation here is even clearer than *Bruton*": Jeannot's statement as recounted by the detective was consistent with the state's murder-for-hire theory and was utilized by the state to support that theory; the evidence that Orlando had hired Jeannot to murder Calabrese was extremely weak; the detective did not merely recount Jeannot's confession implicating Orlando, he vouched for its veracity;[7] the prosecution led the jury to believe that Jeannot had actually made the statement; and the prosecutor not only did not disavow that Jeannot had actually made the statement, but also undermined the limiting instruction by reminding the jury

[7] The court pointed to the detective's testimony, "`I *believe* that Herva Jeannot was relaying some of the events that really took place that night … the truth as to what happened that night, T. 620 (emphasis added), and `I explained to Mr. Orlando that Herva Jeannot was, in fact, giving up … *what we felt* were truer versions of the events of Bobby Calabrese's murder.' T. 621 (emphasis added)". (Pet. App. 23a-24a)

three times in summation of its murder-for-hire theory and specifically calling the jury's attention to the detective's testimony that he told Orlando, "[Jeannot's] telling us everything … He's telling us he did the shooting and you paid him." In sum, the majority grasped that Jeannot's statement "went far beyond any limited value in showing why Orlando changed his account of what happened that night," and concluded that the "risk that the jury would consider Jeannot's statement for its truth was simply too great to allow the jury to hear it, absent cross-examination of Jeannot." (Pet. App. 21a- 25a, 28a, 30a n. 20)

After concluding that admission of Jeannot's statement was clearly barred by *Bruton,* the court considered the State's reliance on *Street*. The court thoroughly reviewed *Street,* compared the facts of that case to this one, and concluded, "To extend *Street* to the situation presented here would eviscerate the core protection of *Bruton*."

The majority reasoned that "the prosecution's need for the purported `context' was of little importance as compared to the need in *Street."* Unlike *Street,* the State had alternative ways of attacking the truthfulness of the post-arrest statements (for example, by showing that Orlando kept changing his account and admitted to having lied in connection with the first statement). And, unlike *Street* where the defendant testified that his inculpatory confession was a coerced imitation of a non-testifying codefendant's confession, Orlando did not "take the stand at his trial, and so the credibility of his own trial testimony was not in issue." (Pet. App. 25a-29a)

The majority reached these conclusions after careful scrutiny and a realistic appraisal of the trial record, a clear statement of the standard of review under 28 U.S.C. § 2254, close attention to the applicable Confrontation Clause cases of this Court, and application of that law to the facts of this case (as well as, one must assume, conscientious consideration of all points made in the lengthy dissent). The court also rejected the State's legal contention that the Confrontation Clause is of no moment and that *Street* permits the admission of an alleged accomplice's out-of-court statement implicating the defendant merely because it may have some purpose other than for its truth. It concluded that, in any event, this case differed significantly from *Street*. (Pet. App. 28a)

The Dissent

Judge Shea agreed with the majority that the evidence supporting the State's murder-for-hire theory was weak. He also acknowledged that the prosecutor's multiple references in summation to Orlando's paying Jeannot raised the possibility that, despite the jury's instructions, the jury might have "turned back to Jeannot's reported accusation and considered it for its truth to find more support for the prosecutor's references to payment during closing argument." And he conceded that both these circumstances make this case "harder than *Street*." (Pet. App. At 58a)

Nevertheless, Judge Shea reasoned that, under *Street,* the existence of a risk that the jury would misuse the statement for its truth is not dispositive. Rather, "the risk of misuse must be weighed against the risk of excluding critical evidence from the jury's consideration." In his view, the Appellate Division weighed these

two factors (though there is no indication in the Appellate Division's decision that it actually did so), and, "[e]ven if the Appellate Division's ruling ultimately struck the balance incorrectly, it reflected an application of *Street* about which `fairminded jurists could disagree.'" (Pet. App. 60a-61a) (Citations omitted.)

To support this conclusion, Judge Shea analyzed the non-hearsay purpose proffered by the State -- "to shed light on the credibility of Orlando's second statement to the police" -- and deemed it a proper purpose "similar" to the one that prevailed in *Street*. According to Judge Shea, the credibility of Orlando's second statement was relevant, and, without the detective's testimony, the jury's task of evaluating the truth of the statement would have been impeded. (Pet. App. at 46a) In Judge Shea's judgment, it mattered not that Orlando did not testify: "It was not unreasonable for the Appellate Division to read *Street* as allowing a non-hearsay use of an accomplice's statement to attack the credibility of, or provide context for, a defendant's statements in the government's case in chief." (Pet. App. at 50a)

In discussing the credibility of Orlando's second statement and the light the detective's testimony supposedly shed on that credibility, Judge Shea focused only on the defense argument that all of Orlando's second statement to the police was true. He did not address the State's affirmative allegation that parts of the statement were false. In his view, the credibility of the statement (and thus the theory of Orlando's defense) would have been artificially enhanced if the State were precluded from introducing the detective's testimony that Jeannot had implicated Orlando before Orlando gave the statement. (Pet. App. 48a) He did not consider

how or whether admission of the statement artificially enhanced the theory of the State's case.

As to whether there were "alternatives that would have both assured the integrity of the trial's truth-seeking function and eliminated the risk of the jury's improper use of the evidence," *Street*, 471 U.S. at 415, Judge Shea offered only a cramped analysis in a footnote. (Pet. App. 60a n. 9) He neglected to mention that the surest and most direct way for the State to prove the purported falsity of Orlando's exculpatory statements was by actually proving that Orlando paid Jeannot and participated in the murder.

ARGUMENT

Petitioner contends that the Second Circuit failed to give sufficient deference to the state court's decision rejecting Orlando's Confrontation Clause claim. According to Petitioner, in determining that the state court's decision was unreasonable, the court of appeals placed unprecedented limitations on the reach of *Street*, and overextended the reach of *Bruton*. The court of appeals correctly rejected Petitioner's arguments, and concluded that Petitioner has it backwards. There is no cause for further review.

The Circuit's decision does not conflict with any decision of this Court or create any new law. To the contrary, in finding the state court decision unreasonable, the Circuit defended core Confrontation Clause protections this Court has long recognized. The court reaffirmed not only the principle that every defendant has the constitutional right to confront witnesses against him, but also

that this right promotes the truthfinding function of a trial, especially when the out-of-court witness is an alleged accomplice with a strong motivation to shift blame and curry favor.

A codefendant's out-of-court confession that incriminates a defendant is inherently and inevitably suspect. The Confrontation Clause is violated, and its truthfinding function uniquely threatened and distorted, when, without affording the defendant an opportunity to confront and cross-examine the codefendant, there is a significant risk that the codefendant's statement will be used by the jury as substantive evidence against the defendant at trial.[8] The Circuit recognized these precepts, and sent a clear and important notice to prosecutors that they may not chip away at the Confrontation Clause and circumvent its protections simply by making the glib pronouncement that evidence of a codefendant's powerful and damning confession has a purported "non-hearsay" purpose.

Petitioner argues that the court of appeals paid only lip service to the requirements of 28 U.S.C. §2254(d)(1), and avoided paying the state court the deference it was owed. Specifically, Petitioner complains that, in finding the

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[8] See, *Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965); *Bruton v. United States,* 391 U.S. 123 (1968); *Tennessee v. Street*, 471 U.S. 409 (1985); *Lee v. Illinois,* 476 U.S. 530 (1986); *Crawford v. Washington,* 541 U.S. 36 (2004). These cases teach that the Confrontation Clause is not – as Petitioner portrays it here – an obstacle to the pursuit of truth. Rather, these cases recognize that the fundamental right to confront and to cross-examine witnesses advances the pursuit of truth and promotes reliability in criminal trials. This truth-finding function is threatened when an accomplice's confession is introduced against a criminal defendant without the benefit of cross-examination. The court of appeals was faithful to this line of cases when it held that the Appellate Division unreasonably applied *Bruton* and unreasonably extended *Street.*

Appellate Division's decision unreasonable, the Circuit: (a) failed to consider arguments supporting the state court's decision;[9] and (b) essentially fashioned "an entirely new – and misguided – confrontation rule" that Petitioner reads as limiting the applicability of *Street* to cases where (i) the defendant has testified, and (ii) where the State refrains from referencing the accomplice statements in any manner or somehow actively disavows the truth of the statements. (Cert. Pet. 5-6, 19, 36)

Both legs of Petitioner's argument rest on: (1) a fundamental misreading of *Street;* (2) a flawed attempt to match the facts of this case with those of *Street* (and an apparent contempt for the court's use of critical thinking when applying established law to the facts of a particular case); and (3) a refusal to recognize either the devastating impact that evidence of an alleged accomplice's incriminations not subject to cross-examination is likely to have on a criminal defendant and/or the damage such evidence does not only to the defendant but also to the truth-seeking process of trial. Before elaborating on these points, because resolution of a

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[9] The State accuses that, "[m]ost egregiously" the court of appeals "did not even *mention* the actual argument proffered by the State in support of the admission of the testimony at issue – that it was not offered for its truth, but to counter a misleading defense argument that, if left unrebutted, could have resulted in an unwarranted acquittal – let alone evaluate the argument's validity." (Cert. Pet. 5; emphasis in original.) Despite the rhetorical bluster, as noted above in n.5, this argument was *never* proffered by the State in the state courts. It was raised for the first time in the habeas litigation. Judge Shea focused on it in dissent, and, therefore, it was presumably considered and rejected by the majority along with all the other fluctuating theories of admissibility for Jeannot's statements. It is as invalid as the other proffered rationales for the reasons discussed below; moreover, as discussed in n. 6 above and Orlando Reply Brief, at 14-15, the argument is also circular and built on bootstrapping.

Confrontation claim is case specific, it is important to put the proper frame on this unusual case.

The State chose to embrace the version of events put forth in Jeannot's confession over the version given by Orlando. This posed a problem for the State once the trials were severed pursuant to *Bruton*. At Jeannot's trial, the State had Jeannot's own statements to prove Jeannot's guilt. At Orlando's separate trial, however, without Jeannot's statements or Jeannot's testimony, it had only weak circumstantial evidence to prove Orlando's participation in the murder, and virtually nothing to support the murder-for-hire theory that Jeannot had put forward and the State adopted. While Orlando's statements were useful to prove Jeannot's participation (and the State's case depended on them for this at Orlando's trial), Orlando's statements were exculpatory as to his own participation, and the State had little else.

Having a weak circumstantial case was not the State's only challenge. Having determined to rely on Orlando's post-arrest statements to prove its case, it was obvious that, if the jury concluded that Orlando's statements about his own conduct were true or even plausible, the State would likely lose at trial. Accordingly, the State was in the unenviable position of having to impeach its own evidence. That the State was in this predicament was not due to Orlando's "defense." It was due to the paucity of its proof, and the prosecutorial decisions and choices it made before the trial even began.

All the various labels and theories the State has put forth to justify the introduction of the detective's testimony – from context, credibility, state of mind, motive, and consciousness of guilt, to the current favorite "rebutting a misleading defense argument" – come down to basically the same thing: an effort conceived of by the State pre-trial, in essence, to impeach Orlando (its out-of-court witness) so that the jury would not accept as true the exculpatory parts of Orlando's statements that the State planned to introduce in its direct case.[10]

Putting aside tricky evidentiary questions as to whether this kind of impeachment is even proper under New York law (see e.g., *People v. Fitzpatrick,* 40 NY2d 44 (1976) (discussing the limits on the prosecution's ability in a criminal case to impeach its own witness)), and assuming *arguendo* that it was proper for the State to put in Orlando's statements in its case in chief and then seek to impeach Orlando's credibility, the essential constitutional question still remains whether it could impeach him by introducing evidence of Jeannot's confession without violating the Confrontation Clause. Petitioner argues (erroneously) that, so long as a "non-hearsay purpose" is identified and limiting instructions are given, *Street* answers the question with a resounding "yes," without the need for any further analysis.

According to Petitioner, *Street* stands for the sweeping proposition that the "statement of a non-testifying accomplice can be admissible if it is not introduced as substantive evidence to prove the circumstances of the crime, but for a nonhearsay purpose, such as rebuttal of a defense argument, *and that such a nonhearsay use*

[10] The effort was, we submit, primarily designed to get Jeannot's statements before the jury to bolster its weak circumstantial case.

`*raises no Confrontation Clause concerns*.'" (Cert. Pet. 3, 32; emphasis added.) The Appellate Division appears to have been of the same view.

The court of appeals understandably and correctly pushed back and found the state appellate court's ready acceptance of the State's argument unreasonable and unacceptable. The court's application of *Street* was premised on the understanding that the controlling question is whether, *given the facts and circumstances of this particular case*, it was realistic to assume that the jury followed the instructions to ignore Jeannot's statements when it was evaluating Orlando's guilt. The court's conclusion that it was not realistic broke no new ground. Its decision announced no new principles and warrants no further review.

1. Petitioner's reading of *Street* is misguided. *Street* did not abandon concern for the Confrontation Clause or hold that the Confrontation Clause can be brushed aside whenever the State can identify a supposed nonhearsay purpose for introducing the post-arrest statement of a non-testifying codefendant. As noted by Justice Thomas in his concurrence in *Williams v. Illinois*, 567 U.S. 50, 106 (2012), "the Court [in *Street*] did not accept that nonhearsay label at face value. Instead, the Court thoroughly examined the use of the out-of-court confession and the efficacy of a limiting instruction before concluding that the Confrontation Clause was satisfied `[i]n this context.' Id., at 417."

Street answered the same question the Court confronted in *Bruton* – that is, could the court rely on the critical assumption that jurors follow the instructions given them by trial judge? This question must be asked any time the prosecutor

seeks to put before the factfinder the out-of-court confession of an alleged accomplice. The question was answered differently in *Street* than it had been in *Bruton* not simply because a nonhearsay purpose for the introduction of the codefendant's statement had been identified, and not because the nonhearsay purpose related to the "rebuttal of a defense argument." Rather, it was because, in the unique circumstances of that case, the Court held "the trial judge's instructions were the appropriate way to limit the jury's use of that evidence in a manner consistent with the Confrontation Clause." 417 U.S. at 416. The same conclusion could not be reached here.

2. In finding that the Appellate Division unreasonably extended *Street*, the court of appeals did not, as Petitioner contends, ignore Petitioner's arguments, confine *Street's* reach, or create a "new rule." The court of appeals thoroughly reviewed the facts of *Street,* the Court's analysis, and the reasoning used by this Court to distinguish *Street* from *Bruton*. It then applied the lessons of *Street* to the particular facts of this case, and found, notwithstanding *all* the various justifications the State had offered for the admission of evidence of Jeannot's untested incrimination of Orlando (as well as the development of those arguments tendered by the dissent), the risk that the jury might misuse the evidence was too great; it was thus unreasonable for the Appellate Division to conclude there was no violation of the Confrontation Clause. In reaching the conclusion that, to the extent the Appellate Division applied *Street* to justify admission of Jeannot's statement, it extended that decision unreasonably, the court properly considered each of the

factors this Court had relied on in *Street* to conclude (in the particular context of *that* case) that the instructions were an appropriate way to limit the jury's use of the codefendant's confession in a manner consistent with the Confrontation Clause, and found they all led to the opposite conclusion in this case. (Pet. App. 28a-29a)

The Circuit correctly understood that, contrary to the State's understanding of *Street*, the issue was not simply whether a fairminded jurist could find a non-hearsay purpose for the detective's testimony, but also, and essentially, whether, given the particular circumstances of the case, the normal presumption that juries will follow limiting instructions should apply, or whether, instead, those special circumstances created an unreasonable risk that, notwithstanding the instructions, the jury would misuse the evidence. The court correctly concluded that, in the peculiar circumstances of this case, no fairminded jurist could find that limiting instructions would suffice.

Petitioner does not acknowledge that the introduction of Jeannot's statements posed *any* threat to Orlando's right to confront witnesses against him, or *any* risk that, despite limiting instructions, the jury may have considered Jeannot's statements for their truth. Instead, it attempts to paint the facts of this case as mirror images of those in *Street*. These attempts are utterly superficial. The court of appeals readily appreciated that the stark differences between this case and *Street* made the Appellate Division's application of *Street* to this case unsustainable even granting the state court all the deference required under §2254(d). Every factor considered by the Court in *Street* when applied to the facts of this case

weighed in the opposite direction. The court broke no new ground when it concluded that the Appellate Division's application of *Street* was unreasonable and no fairminded jurist concerned with upholding the rights guaranteed in the Confrontation Clause could find otherwise.[11]

In *Street*, the defendant had confessed. His confession was the centerpiece of the state's case against him at trial. In his defense, Street testified that his confession was a coerced imitation of his codefendant's. The State put the codefendant's confession into evidence in rebuttal so that the jury could compare the two and see if they matched.

Unlike Street, Orlando did not confess. The State put all of Orlando's post-arrest statements into evidence in its direct case, not in rebuttal. The parts of the statement that are in issue were exculpatory, and, therefore, unlike *Street,* they could hardly be considered the State's most important piece of substantive evidence. Unlike Street, Orlando was not the one who brought up the issue of the codefendant's confession; he did not testify and he did not challenge his statements to the police as coerced or involuntary; he put in no evidence that the State had a critical need to rebut. Rather, the State moved to introduce the codefendant's confession, and the trial court allowed it, before the trial even began.

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[11] Petitioner points to the judges who found no Confrontation Clause violation in this case as establishing fairminded disagreement. (Cert. Pet, 31). Courts have routinely rejected such a "counting noses" approach. See *Hardy v. Chappell*, 849 F.3d 826 (9th Cir. 2017); *Crace v. Herzog*, 798 F.3d 840, 848 n. 37 (9th Cir. 2014); *Young v. Conway*, 715 F.3d 79, 85 (2d Cir. 2013).

In *Street,* comparing the defendant's and the codefendant's confessions had independent relevance that was easy for the jury to understand: if the two matched this would support Street's testimony that his confession was a coerced imitation; if there were material discrepancies (especially discrepancies relating to the crime that were otherwise corroborated), this would tend to rebut Street's claim of coercion. The usefulness of the comparison did not go to the question whether either confession was true; it went only to the issue raised by Street's testimony that his confession was coerced.

Here, by contrast, the purported nonhearsay purpose of Jeannot's statement was directly related to the question of truth: In a case where the theory of the State's case was that Orlando hired Jeannot to kill Calabrese, the jury was being asked to use Jeannot's statement that he shot Calabrese and Orlando paid him to it as evidence that the exculpatory parts of Orlando's statement were false.[12] Perhaps a mental gymnast could use Jeannot's statement for that purpose without considering it for its truth; it is farcical to believe a juror could.[13]

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[12] *Cf. Williams v. Illinois,* 567 U.S. 50, 106 (2012) (Thomas, J. concurring) ("There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth. `To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true.' … `If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions.'") (Citation omitted.)

[13]See *Bruton,* 391 U.S. at 129, where the Court rejected the assumption "that a properly instructed jury would ignore the confessor's inculpation of the nonconfessor in determining the latter's guilt." Quoting from the dissent in *Delli Paoli v. United*

Unlike the comparison-of-the-statements purpose in *Street*, the fact that Orlando changed his story after the detective told him about Jeannot's confession shed no clear light on either "why" he changed his story or the reliability of his subsequent account. One can imagine several reasons "why" his story might have changed. (See Orlando Brief, 39-40) Unless Jeannot's statements were considered for their truth, the report of Jeannot's statements did not make any one of these hypotheses more likely than the others.

Lastly, and importantly, unlike *Street,* there was no compelling need for the evidence of Jeannot's statements because (again assuming it was okay to do so) the State had alternative means to impeach the credibility of Orlando's post-arrest statement. As the court of appeals noted, showing that Orlando kept changing his account and admitted to having lied in connection with the first statement police provided a basis for questioning the credibility of all his post-arrest statements.

But the clearest, most straightforward, and least complicated way of showing that Orlando gave false statements to the police – without sacrificing Orlando's Sixth Amendment right to confrontation, or risking the jury's improper use of Jeannot's confession for its truth – would be by proving that the facts were

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States, 352 U.S. 232 (1957), the Court recognized, "`The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.' 352 U.S., at 247. The dissent went on to say, as quoted in the cited note in *Jackson*, `The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' *Id*., at 248."

otherwise than as Orlando stated. In other words, by proving Orlando committed the charged crime.

The State had the burden to prove Orlando's participation in the murder, and, in this case, evidence of Orlando's participation would at the same time prove the falsity of any exculpatory parts of his post-arrest statement.[14] In its brief to the Circuit, the State claimed its evidence of Orlando's "guilt, even absent the testimony about Jeannot's alleged statements, was nothing short of overwhelming." (DA Brief, 47) If this were so, there could have been no need to impeach the post-arrest statement with evidence that so clearly posed a substantial threat to Orlando's constitutional right of confrontation. As this Court said in *Bruton,* "Where viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice." 391 U.S. at 134.

The central disputed issue at trial was *not* Orlando's "state of mind" when he made his custodial statements or what prompted him to change his account. The central issue was whether Orlando participated in the murder. If the State actually had overwhelming evidence of Orlando's participation, it would have had no need (let alone a compelling need) to explain *why* Orlando changed his story, why he said what he said, or what prompted him to say what he said. As asserted above and discussed more below, the rub is that the State had trouble proving Orlando's guilt, and so it sought to justify the introduction of Jeannot's unreliable confession as a

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[14] Cf. *United States v. Bailey,* 743 F.3d 322, 344 (2d Cir. 2014) ("before the jury could consider Bailey's disclaimers as false exculpatory statements indicating consciousness of guilt, the government effectively had to prove his guilt.")

substitute for proof.[15]

3. The State retreats from its claim that its evidence of Orlando's guilt was "nothing short of overwhelming." In this Court, Petitioner (implicitly acknowledging the weakness in its proof) presents itself as the victim of Orlando's "gamesmanship," and attacks the Circuit for leaving it powerless to refute Orlando's "deceptive defense," and his "blatant distortion of the truth" about why he (supposedly) lied to the police. Petitioner argues that this Court's intervention is "particularly necessary here," because now it must retry the case, Orlando is likely to assert the "same deceptive defense," and the evidence of Jeannot's statements is the only tool in its toolbox to protect the jury from being misled. Petitioner urges certiorari because, it asserts, the introduction of Jeannot's statements into evidence "promoted the truth-finding purpose" of the Confrontation Clause whereas the

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[15] Under New York law, a conviction cannot stand on the uncorroborated testimony of an accomplice. In *People v. Moses,* 63 NY2d 299 (1984), the testimony of an accomplice provided the only direct evidence of defendant's commission of the crime and was corroborated only by evidence that the defendant had given a false alibi. After reviewing the State's corroboration rule (*i.e.*, why accomplice testimony must be viewed with the utmost caution, and, therefore, why the requisite corroboration must connect the defendant to the crime in such a way that a jury may be reasonably satisfied that the accomplice is telling the truth), the Court of Appeals reversed, holding that the bare evidence defendant had given a false alibi (and thus evinced a consciousness of guilt) was so inherently weak that it constituted insufficient corroboration. Here, the untrustworthy accomplice did not even testify and was not subject to any cross-examination. Nevertheless, on the bogus theory that the evidence somehow explained or contradicted Orlando's exculpatory statements, the prosecutor put Jeannot's untested confession before the jury. Jeannot's confession became the tacit centerpiece of the case. It could not be ignored because it confirmed and thereby elevated the State's weak circumstantial evidence of Orlando's participation.

Circuit's decision "distorted the truth-seeking intent behind the Confrontation Clause." (Cert. Pet. 4, 6, 24, 34, 37)

This is twisted. It derives from the State's failure to appreciate that the Confrontation Clause protects the truth-seeking process in criminal trials not by divorcing truthfinding from confrontation, but by assuring that an accuser's statements are tested in the crucible of cross-examination before they are used by the trier of fact for their truth. See *Dutton v. Evans,* 400 U.S. 74, 89 (1970) ("The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that `the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'") (citation omitted); *Crawford v. Washington,* 541 U.S. at 61 ("The Clause ... reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined."); *Pointer v. Texas,* 380 U.S. at 405 ("There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.")

The State's wholehearted endorsement of Jeannot's confession as the measure of what is true and what is not cannot be reconciled with this Court's recognition that the confession of an alleged accomplice is "presumptively unreliable." Its insistence that Orlando is the party doing the misleading cannot be

squared with the recognition that the truthfinding function of the Confrontation Clause is "uniquely threatened" when a prosecutor introduces an accomplice's confession against a criminal defendant without the benefit of cross-examination." *Lee v. Illinois,* 476 U.S. at 540-541. When, as here, the statements of the alleged accomplice bear "on a fundamental part of the State's case" against the defendant, and add "critical weight to the prosecution's case in a form not subject to cross-examination," *Douglas v. Alabama,* 380 U.S. at 420, the threat to truthfinding is coming from the State, not the defendant.

The State asserts that a "fairminded jurist could conclude that the trial court had no alternative but to … admit the testimony in question, in the interest of preventing an *unwarranted windfall for Orlando* and preserving the trial's integrity." (Cert. Pet. 27; emphasis added.) The court of appeals correctly applied *Bruton* because it understood that, if there was a "windfall" in this case, it fell on the State when it bolstered its feeble case with Jeannot's statement, not on the defendant. See *Bruton*, 391 U.S. at 129, ("The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.")

4. In her dissent in *Williams v. Illinois,* 567 U.S. at 127-128, Justice Kagan criticized the State for making an "end-run" around the Confrontation Clause and "a parody of its strictures." She criticized the plurality's acceptance of the "not-for-

the-truth rationale" because it allowed "prosecutors to do through subterfuge and indirection what we previously have held the Confrontation Clause prohibits:"

> If the Confrontation Clause prevents the State from getting its evidence in through the front door, then the State could sneak it in through the back. What a neat trick--but really, what a way to run a criminal justice system. *No wonder five Justices reject it.*

(Footnote omitted; emphasis added.)

The State used this trick here. Once the trials of Jeannot and Orlando were severed, the State was hard pressed to present a coherent case against Orlando. And so, with its "nonhearsay purpose" rationale, the state courts allowed it to sneak in the back door what it was prevented from getting in the front. No wonder the court of appeals rejected it.

The fact is that the State did not have a solid case against Orlando in 2005 and it does not have one now. The cert petition is a last-ditch effort to save it from having to face that fact. The petition should be swiftly denied so that retrial is not delayed any longer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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