No. 19-_____

In The
Supreme Court of the United States

NASSAU COUNTY DISTRICT ATTORNEY'S OFFICE,
Petitioner,

-against-

MARK ORLANDO,
Respondent.

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

REPLY PETITION FOR A WRIT OF CERTIORARI

MADELINE SINGAS
District Attorney, Nassau County

* TAMMY J. SMILEY
DANIEL BRESNAHAN
SARAH S. RABINOWITZ
Assistant District Attorneys

* Counsel of Record for Petitioner

NASSAU COUNTY DISTRICT ATTORNEY'S OFFICE
262 Old Country Road
Mineola, New York 11501
(516) 571-3800
tammy.smiley@nassauda.org

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INTRODUCTION

In his opposition brief, Orlando directs little attention to the central question presented: whether the Second Circuit violated the deferential review requirements of 28 U.S.C. § 2254(d) by failing to consider the arguments supporting the state court's denial of Orlando's confrontation claim or whether fairminded jurists could agree with the state court's conclusions. Instead, Orlando devotes most of his response to defending the Second Circuit's strictly *de novo* analysis, without directly addressing the elephant in the room—the majority opinion did not even *mention* the primary arguments proffered by the State in support of the admission of the testimony at issue. Orlando's reticence on that topic is unsurprising; the majority's two-sentence AEDPA analysis gives Orlando little to work with in the way of defending its application of the mandatory guidelines for review set forth in *Harrington v. Richter,* 562 U.S. 86, 102 (2011). Orlando's endorsement of the Second Circuit's blatant disregard for AEDPA's deference confirms that summary reversal is warranted.

ARGUMENT

I. Like the majority below, Orlando disregards AEDPA's deferential mandates; he can prevail only if the Court accepts his implicit argument that it was unnecessary for the majority to follow the rigid review guidelines laid out in *Richter* for applying the unreasonable-application prong of § 2254(d)(1).

Orlando claims that the majority fulfilled AEDPA's mandates by completing three tasks: (1) recounting the facts and holding of *Tennessee v. Street*, 471 U.S. 409 (1985), and "the reasoning used by this Court to distinguish" *Street* from *Bruton v. United States,* 391 U.S. 123 (1968) (Br. in Opp. 23); (2) applying "the lessons of *Street*" to the facts of this case (*id.*); and (3) determining that "notwithstanding all the various justifications the State had offered for the admission of [the evidence in question]" and the "arguments tendered by the dissent" (*id.*), the risk of the jury's misuse of the evidence was too great, and the Appellate Division's application of *Street* was unreasonable. Orlando's analysis is fatally flawed because it is based on a misunderstanding of the *Richter* standard.

First, under Orlando's interpretation of AEDPA, the arguments that could have supported the state court's conclusions are afterthoughts, the import of which pale in comparison to that of the *de novo* determinations of the federal habeas court. Orlando's interpretation "all but ignore[s] 'the only question that matters under § 2254(d)(1)'" (*Richter*, 562 U.S. at 102) (citation omitted): what arguments

or theories supported, or could have supported, the state court's decision, and whether it is possible "fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.*

Second, nothing in the majority opinion supports Orlando's contention that the Second Circuit completed the cited third task—that it considered all the arguments that could have supported the state court's determination. Without specifically citing to the majority's AEDPA analysis, Orlando takes it upon himself to simply assume that the majority considered all the arguments that could have justified the admission of Detective McGinn's testimony. That assumption is without support, however, given that none of those arguments was referenced in the majority opinion.

Again, the majority did not even mention the central 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 provide necessary background information that countered a misleading defense argument. Like the Ninth Circuit in *Richter*, the majority overtly ignored this argument, which "otherwise justif[ied] the state court's result" (*id.* at 102). In fact, Orlando acknowledges that the majority did not address this argument when he asserts that "it was *presumably* considered and rejected by the majority" (Br. in Opp. 19, n.9 [emphasis added]).

It was only in the dissent that the State's proffered arguments in support of the state court's conclusions were properly analyzed under AEDPA's lens, resulting in the dissent's determination that

"[t]he New York court's application of *Tennessee v. Street* . . . does not satisfy [the] demanding [AEDPA] standard because it reflects a reasonable accommodation of the competing interests identified in that decision" (App. 40a), and the conviction could not properly be set aside under AEDPA because the state court's ruling as to Orlando's confrontation claim "reflected an application of *Street* about which 'fairminded jurists could disagree.'" *Id.* at 61a (quoting *Richter*, 562 U.S. at 101). In reaching this conclusion, the dissent expressly recognized the arguments in favor of the admission of McGinn's testimony—including that it was critical to rebut Orlando's "fear dissipation" narrative and to place Orlando's own statement in the proper context, and that any prejudice was mitigated by the court's limiting instructions—and then properly considered at length whether a "fairminded jurist" could reasonably conclude that those arguments outweighed the risk of misuse of the testimony.

Contrary to Orlando's baseless implication, the arguments raised in the dissent's detailed analysis were neither addressed nor even referenced in the majority opinion. Thus, while the majority cited the unreasonableness standard, a review of the decision makes clear that it utterly failed to conduct the rigorous analysis mandated by the statute. *See Richter,* 562 U.S. at 101-02 (AEDPA "demands more" than a mere declaration that the state court's decision "constituted an unreasonable application of [Supreme Court precedent]").

Third, Orlando conspicuously fails to respond to the State's argument that the majority "effectively

inverted the rule established in *Richter*" (*Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 [2018]), by considering arguments against the state court's decision that Orlando did not raise—Orlando did not assert McGinn's purported vouching statement in support of his confrontation claim in his state appeal, his habeas petition before the District Court, or his brief in the Second Circuit. The majority, however, *sua sponte* relied heavily on McGinn's purported vouching in support of its conclusion that *Street's* "crucial" presumption that juries follow instructions (*Street*, 471 U.S. at 415-16) did not apply in Orlando's case. *See* App. 22a.

In short, the majority treated "the unreasonableness question as a test of confidence in the result it would reach under *de novo* review" (*Richter,* 562 U.S. at 102), and Orlando's opposition brief does not establish otherwise.

II. Orlando's brief contains several misstatements.

To avert the Court's attention from the central arguments raised in the petition, Orlando asserts several arguments that are irrelevant and/or incorrect. The most glaring of his misstatements are as follows:

1. Orlando incorrectly argues that the Second Circuit did not "confine *Street*'s reach," thereby creating a new rule. Br. in Opp. 23. This is not so—the majority held that the challenged testimony violated Orlando's confrontation right, in part, because Orlando did not testify, and, thus, "the credibility of his own trial testimony was not an issue,

unlike in *Street* where the state otherwise would not have been able to challenge Street's principal defense of coercion in giving his statement." App. 29a. Misconstruing that a defendant testifying is a predicate for applying the *Street* rule, the Second Circuit has constructed a more restrictive confrontation rule, never sanctioned by this Court, and creating a divide with other circuits that have applied *Street* to situations where a defendant did not testify. Moreover, because this Court has not promulgated the new rule, certiorari is warranted to address the Second Circuit's grant of habeas relief in the absence of an unreasonable application of Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1); *Teague v. Lane*, 489 U.S. 288 (1989).

2. Orlando's claim that the State "opened the door" (Br. in Opp. 12, n.6) to his fear-dissipation defense is based on a logical fallacy. Before the trial began, the State recognized Orlando's inevitable defense—spelled out in his second statement to the police—that Jeannot shot Calabrese, he acted alone, and Orlando merely assisted in the coverup and initially lied to the police because Jeannot had threatened him. Of course, a vital component of that defense was for the jury to credit the exculpatory portions of Orlando's second statement.

Thus, to counter this obvious defense and to prevent the jury from being misled about the intent behind Orlando's second statement, it was crucial to the trial's truth-seeking function that the jury learn of the circumstances that triggered the statement. To that end, the State correctly sought an advance ruling permitting the admission of McGinn's testimony

about only what he told Orlando just before Orlando changed his story, as it could be reasonably inferred that it was McGinn's statements to Orlando about the Jeannot interview that triggered Orlando's story-change.

Orlando explicitly consented to the admission of McGinn's testimony that he told Orlando that Jeannot admitted to shooting Calabrese, as it was in keeping with Orlando's theory that Jeannot was the murderer, as well as his fear-dissipation theory. The trial court correctly agreed with the State, ruling that McGinn's complete testimony—that it was not until McGinn also told Orlando that Jeannot had implicated him that Orlando changed his story—was admissible under *Street* for the nonhearsay purpose of demonstrating the circumstances that fostered Orlando's second statement. This in turn would help the jury evaluate the credibility of the statement.

As the State anticipated, Orlando argued in his opening statement that the precipitating factor behind his second statement was his dissipated fear of Jeannot, which had "freed" him to "tell the truth" in his second statement. But even if the State had not made the pretrial application to admit McGinn's testimony, Orlando would have undoubtedly made the same fear-dissipation argument, as it was the only exculpatory argument that could have reasonably explained why he changed his story, especially because it was the reason Orlando had given the police. Thus, under *Street*—to permit the jury to evaluate in its proper perspective the veracity of Orlando's defense—McGinn's testimony about

what precipitated the statement was properly admitted.

Simply put, Orlando has it backwards; it was not McGinn's testimony about Jeannot's statement that opened the door to his fear-dissipation defense. Rather, it was Orlando's advancement of this defense—which he telegraphed in his statement to the police, well before trial—that opened the door to McGinn's testimony.

3. Orlando's insistence that he "put in no evidence that the State had a critical need to rebut" (Br. in Opp. 25) because there could have been "several reasons 'why' [his] story might have changed" (*id.* at 27), demonstrates the same willful blindness to the trial record that is evident in his other arguments. Orlando does not identify any of the "several reasons" he could have advanced to account for his story-change. Indeed, he presented only one reason: his alleviated fear of Jeannot. He laid the groundwork for his fear-dissipation claim in his statement to police, and continued to advance the claim at trial in his opening and closing statements (T200, 203-05, 845, 851, 866-67).[1] It was Orlando's only explanation for why the jury should credit his exculpatory statement. Therefore, as the dissent aptly phrased it, "without the piece of McGinn's testimony that he told Orlando Jeannot was implicating him, Orlando's explanation for his change of story would have been a good deal stronger and the overall credibility of his

[1] Numbers in parentheses preceded by "T" refer to the page numbers of the trial transcript, which will be provided to this Court upon request.

second statement would have been enhanced." App. 48a.

4. Orlando claims that the State did not argue in the trial court or on direct appeal that the testimony in question was admissible to refute a misleading defense argument. *See* Br. in Opp. 9-10, n.4. Orlando is wrong, and he is quibbling over semantics.

During the State's pretrial application to elicit the testimony at issue, the prosecutor specifically argued that the purpose of McGinn's testimony would be to refute "[t]he story about [Jeannot] did it all by himself, that pivotal moment we went to go into and what Detective McGinn said so the jurors understand in context why [Orlando] was now changing his story" (T164). The State further asserted that "[t]he purpose of offering that evidence is to establish the context in which [Orlando] all of a sudden changes his initial story . . . and now tried to blame the whole thing on [ ] Jeannot" (T164-65). Then, on direct appeal, the State argued, *inter alia*, that "[McGinn's] testimony was properly offered for the nonhearsay purpose of demonstrating what prompted [Orlando] to give his second statement" (State's App. Div. Brief at 42), and that precluding the testimony "would have hindered the jury's ability to evaluate . . . the validity of [Orlando's] statements" (*id.* at 47).

It is true that the State advanced various theories and arguments—throughout the post-conviction proceedings—in support of the state court's decision with respect to the confrontation issue, but the State was not bound by one theory. In any event, the State's central underlying argument remained

the same throughout the proceedings: McGinn's testimony was necessary to provide context to enable the jury to correctly determine whether Orlando's exculpatory statement was credible. And the Second Circuit was obligated to consider all the theories and arguments presented by the State that supported—or *could have* supported—the state court's decision, and to determine whether it is possible that fairminded jurists could disagree whether those arguments conflicted with Supreme Court precedent. *See Richter*, 562 U.S. at 102. As discussed (*see* Section I, *supra*), the majority opted to forego that mandatory analysis.

5. Contrary to Orlando's claim, the State did not elicit the testimony at issue to shore up an otherwise shaky case or "impeach its own evidence" (Br. in Opp. 20). It is commonplace for a defendant to give both inculpatory and exculpatory statements to the police, as defendants often try to downplay their criminal conduct. The State was entitled to utilize all admissible evidence it had at its disposal to rebut the exculpatory portions of Orlando's statement, and a fairminded jurist could reasonably agree that the evidence in question was relevant, did not constitute hearsay, and consequently did not violate Orlando's confrontation right. As this Court has held, "the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." *Old Chief v. United States,* 519 U.S. 172, 186-87 (1997).

6. Orlando notes that "the confession of an alleged accomplice is 'presumptively unreliable.'" Br. in Opp. 30. True enough, but that assertion is irrelevant because Jeannot's actual statement was never admitted and the reliability of the statement was not an issue before the jury. McGinn's testimony was not offered to establish that Jeannot's alleged statements were true or reliable; it was only probative of what McGinn told Orlando and any effect that had on Orlando's subsequent statements. Moreover, the jurors were instructed as such and were ordered not to consider whether Jeannot actually made the statements, or whether the statements were true (T624, 930-31). And since it is presumed that the jury followed the court's instructions (*see Weeks v. Angelone*, 528 U.S. 225, 234 [2000]), Orlando's accomplice-statement reliability argument is unavailing.

7. Orlando argues that the State "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." Br. in Opp. 24 (emphasis in original). *Id.* Orlando misstates the State's position.

In any case in which an inculpatory accomplice statement is admitted into evidence there is *always* a risk that the jury will improperly consider the evidence as substantive proof of guilt. However, as correctly noted in the dissent below, "*Street* suggests that the existence of such a risk is not dispositive. Rather, the risk of misuse must be weighed against

the risk of excluding critical evidence from the jury's consideration." App. 60a. Here, the admission of the evidence at issue was, in fact, "critical" to maintain "the integrity of the trial's truth-seeking function" (*Street*, 471 U.S. at 415), and reasonable jurists could agree that the state court properly weighed the competing interests, as mandated by *Street*.

8. Orlando goes so far as to claim that the State "portray[s]" the Confrontation Clause as "an obstacle to the pursuit of truth." Br. in Opp. 18, n.8. In fact, the State merely recognizes that the Sixth Amendment right to confront witnesses is not absolute, and it "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 [1973]). As the state court reasonably concluded, one such legitimate interest was served in this case when the trial court permitted the State to elicit the nonhearsay testimony at issue to place Orlando's statement in its proper context so that the jury could correctly evaluate it.

9. Contrary to Orlando's argument (*see* Br. in Opp. 31-32), the dissent in *Williams v. Illinois*, 567 U.S. 50 (2012), is inapposite. Justice Kagan noted in her dissent that the plurality permitted the State to "sneak" in evidence that violated the Confrontation Clause "through the back" *Id.* at 127-28. Orlando claims that the State employed the same "trick" here. Br. in Opp. 32. But Justice Kagan's dissent turned on her view that the prosecution in *Williams* had attempted to introduce a testimonial statement that had "no relevance to the proceedings apart from its

truth" (*Williams*, 567 U.S. at 128). Conversely, McGinn's testimony was unquestionably relevant to place Orlando's own statement in the proper context so that the jury could accurately evaluate that piece of evidence, which was central to the State's case and to Orlando's defense. Thus, Justice Kagan's concerns of irrelevance are not implicated here.

In sum, the majority has created a dangerous precedent that contravenes the principles of federal-state comity, deference, and finality of state-court judgments upon which AEDPA is based.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Madeline Singas
District Attorney, Nassau County

* Tammy J. Smiley
Daniel Bresnahan
Sarah S. Rabinowitz
Assistant District Attorneys

* Counsel of Record for Petitioner

Nassau County District Attorney's Office
262 Old Country Road
Mineola, New York 11501
(516) 571-3800

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