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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals violate the deferential review requirements of 28 U.S.C. § 2254(d) by setting aside a state murder conviction based on its *de novo* analysis of a confrontation claim, without fulfilling its obligation to consider the arguments supporting the state court's denial of the claim or whether fairminded jurists could agree with the state court's conclusions?

2. Did the Court of Appeals misapply the Supreme Court's holdings in *Bruton v. United States* and *Tennessee v. Street*, and violate *Teague v. Lane*, by granting habeas relief based on a new rule of law, when it held that the constitutional guarantee of confrontation precludes the admission of inculpatory accomplice statements—even if not admitted for their truth and accompanied by limiting instructions—unless the defendant has testified and the State refrains from referencing the accomplice statements in any manner or expressly disavows the truth of the statements?

3. Did the Court of Appeals err in determining that the state court's failure to follow its new confrontation rule constituted an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States, where the Supreme Court has never promulgated the new confrontation rule announced by the Second Circuit?

PARTIES TO THE PROCEEDING

The petitioner in this Court is the Nassau County District Attorney's Office. The respondent in this Court is Mark Orlando. The subject of this proceeding is Orlando's federal habeas corpus petition challenging the lawfulness of his custody in connection with his conviction, after trial, of murder in the second degree. The trial was conducted in the Nassau County Supreme Court in New York.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, reversing a judgment of the United States District Court for the Eastern District of New York, which had denied Orlando's petition for a writ of habeas corpus.

Opinions Below

The citation of the opinion of the United States Court of Appeals for the Second Circuit is *Orlando v. Nassau County District Attorney's Office*, 915 F.3d 113 (2d Cir. 2019). App. 1a-61a. The order of the United States Court of Appeals for the Second Circuit denying recall of its mandate and permission to file a petition for rehearing and rehearing en banc is unpublished. App. 83a-84a. The citation of the opinion of the United States District Court for the Eastern District of New York is *Orlando v. Nassau County District Attorney's Office*, 246 F. Supp.3d 569 (E.D.N.Y. 2017). App. 62a-78a. The citation of the opinion of the state appellate court's affirmance of Orlando's conviction is *People v. Orlando*, 61 A.D.3d 1001 (2d Dept. 2009). App. 79a-82a. Each of these opinions is reproduced in the Appendix to this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 11, 2019. App. 1a. That same day, the Court of Appeals issued a mandate "forthwith," reversing the District Court's denial of the habeas petition, and remanding the case to the District Court with instructions to grant the petition for a writ of habeas corpus. App. 85a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

United States Constitution, Fourteenth Amendment:

> . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

28 United States Code § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA):

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of

the Constitution or laws or treaties of the United States.

. . . .

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . .

INTRODUCTION

This Court held in *Tennessee v. Stree*t, 471 U.S. 409 (1985), that a defendant's Confrontation Clause rights are not violated by the admission of a statement of a non-testifying accomplice inculpating the defendant that is not offered for its truth, but rather for the nonhearsay purpose of rebutting a misleading defense argument, where preclusion of the accomplice statement would impede the jury's ability to accurately evaluate the credibility of the defendant's own statements. Relying on that precedent, the Supreme Court of the State of New York, Appellate Division, held in *People v. Orlando* (App. 79a-82a), that the State's use at trial of the statement of Orlando's non-testifying accomplice was not offered for its truth, but rather for a relevant nonhearsay purpose, and did not violate Orlando's confrontation right.

On February 11, 2019, a divided panel of the United States Court of Appeals for the Second Circuit granted Orlando's habeas corpus petition. App. 1a-39a. Despite the compelling reasons to deny the petition expressed in Judge Shea's dissent, the majority found that there was no legitimate nonhearsay reason to admit the inculpatory accomplice-statement testimony, the underlying facts did not mirror those in *Street*, and the jury might have disregarded the court's limiting instructions. Thus, the Second Circuit held that it was "objectively unreasonable" under *Bruton v. United States*, 391 U.S. 123 (1968), for the Appellate Division to conclude that petitioner's confrontation right was not violated. *Id*. at 17a-30a. In so ruling, the Second Circuit gave the state court's decision no deference at all, improperly relied on new law never recognized by the Supreme Court, and concomitantly distorted the truth-seeking intent behind the Confrontation Clause.

The question to be considered by federal courts on habeas review is not whether the state court correctly applied federal law, but whether the state court's determination was objectively unreasonable, *i.e.*, whether the state court's ruling "was so lacking in justification [under Supreme court precedent] that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). What sets this case apart from the many others in which federal courts have misapplied the habeas standard is that here the majority failed to apply that standard in any manner whatsoever.

The majority did not simply reject reasonable arguments supporting the state court's decision, it failed to consider them at all, instead relying solely on its own opinion of the validity of the state court ruling.

Most egregiously, the majority opinion 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. Also, in rejecting the state appellate court's conclusion that the trial court's repeated and detailed limiting instructions sufficiently obviated any risk that the jury would consider the accomplice's statements as substantive evidence of Orlando's guilt, the majority did so based solely on its own belief that the state court's ruling was incorrect, without engaging in the appropriate analysis under AEDPA as to whether the state court's decision was reasonable through the lens of existing Supreme Court precedent.

The majority's blatant disregard for AEDPA's mandates did not end there. Its decision also failed to show that the state court unreasonably applied clearly established Supreme Court precedent, as required under § 2254(d), to grant habeas relief. At most, the majority established that the state court's ruling failed to comply with a new confrontation rule of the majority's own creation—a rule which itself runs contrary to *Street*. Specifically, as Judge Shea noted, while the majority held *Street* inapplicable to cases where the defendant has not testified, nothing

in *Street* suggests that it should be applied so narrowly, and the Supreme Court has never mandated such a restrictive application. In fact, limiting *Street's* holding to cases where the defendant has testified would impede the very truth-finding function sought to be advanced by that decision, as it would give defendants free rein at trial to advance—by any means other than their own testimony—deceptive claims, unchecked.

Moreover, by holding that *Bruton* mandates a finding here that the jury could not have been presumed to follow the trial court's thorough instructions not to consider the accomplice statement for its truth, the majority overextended *Bruton*. *See Richardson v. Marsh*, 481 U.S. 400, 407 (1987) (labeling *Bruton* holding as a "narrow exception" to the presumption that jurors follow court instructions). Indeed, the confusing circumstances in *Bruton*—involving a joint trial at which a statement was admitted for its truth against one of the defendants but constituted non-admissible hearsay as to the other—were a far cry from the circumstances here. As Judge Shea recognized, this case—where Orlando was tried alone and the accomplice's statement did not constitute hearsay—is more akin to *Street*, in which this Court held that, under such circumstances, a jury *can* be presumed to follow the limiting instructions.

By restricting *Street* to the point of near-evisceration, while simultaneously extending the narrow *Bruton* rule in a way that has not been sanctioned by this Court, the Second Circuit has created a new confrontation rule that runs afoul of the truth-seeking intent behind both those decisions.

At the same time, the Second Circuit strayed far afield from the habeas review power bestowed by Congress and created a divide with other circuits regarding the circumstances under which an accomplice statement may be admitted. Accordingly, petitioner urges this Court to grant certiorari to correct these barefaced errors and reinstate Orlando's rightful murder conviction.

STATEMENT OF THE CASE

The Underlying Facts

In October of 2004, Mark Orlando, a compulsive gambler, started placing bets with twenty-four-year-old Bobby Calabrese, who worked for a sports-betting operation. When Orlando first started betting with Calabrese, he won several bets in succession. Towards the end of November 2004, however, Orlando's winning streak came to an end, and he accumulated a $17,000 debt to Calabrese. Aside from that gambling debt, Orlando had several other substantial debts that he could not afford to pay.

Calabrese had always met with Orlando in front of Orlando's office building, where there were usually a lot of people around, and sometimes they met while it was still light outside. On December 3, 2004, however, Orlando chose to meet Calabrese at night, on a secluded street. The pretense of the meeting was for Orlando to pay Calabrese his $17,000 debt, but unbeknownst to Calabrese, Orlando—along with his friend and co-worker Herve Jeannot—planned to kill Calabrese so that Orlando could avoid paying his debt.

Once at the meeting spot, after Orlando drove around surveilling the area, Orlando parked on the darkest part of the street, and Jeannot exited Orlando's car carrying a revolver and hid outside the car. When Calabrese arrived, he and Orlando exited their respective cars and hugged, as was their custom. As they hugged, Jeannot approached behind Calabrese, facing Orlando, and fired one shot at Calabrese, which went through Calabrese's forearm and entered the right side of his head. Jeannot then fired two more shots into Calabrese's head. Leaving Calabrese bleeding on the ground, Orlando and Jeannot reentered Orlando's car and Orlando started to drive away, but stopped when he saw Calabrese's feet moving so that Jeannot could get out of the car and shoot Calabrese again. The gun would not fire, so Jeannot got back into the car and Orlando drove away from the scene. When Calabrese's body was found, the neck of his sweatshirt was pulled up over his head. Calabrese died from his injuries.

Nassau County Police Detectives McHugh and McGinn were assigned to investigate the murder, and they discovered that Calabrese had met with Orlando just before his murder, and that Jeannot was also present. Both Orlando and Jeannot were arrested and taken to police headquarters for questioning. Upon initial questioning, Orlando denied any involvement in the shooting, and signed a written statement to that effect. However, Orlando drastically changed his story after being told that Jeannot had implicated him in the murder. Specifically, McGinn told Orlando that Jeannot had admitted to shooting Calabrese and said Orlando

paid him to do it. At that point, Orlando provided an entirely different account of what had occurred, admitting that he: (1) was present when Jeannot shot Calabrese; (2) drove Jeannot away from the scene; (3) helped Jeannot dispose of evidence; and (4) initially lied to the police. Orlando claimed he helped coverup the shooting out of fear of Jeannot, who had threatened to kill Orlando's wife if Orlando told anyone about the murder. Orlando denied, however, that he paid Jeannot to shoot Calabrese or that he was aware of Jeannot's plan to shoot Calabrese. Orlando was thereafter indicted for second-degree murder.

Motion In Limine And Trial

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. Even before the trial began, it was apparent that Orlando intended to advance that defense, given his claim in his second statement that he assisted Jeannot in the coverup because Jeannot threatened him.

In anticipation of Orlando inevitably raising that defense, and relying on *Tennessee v. Street*, 471 U.S. 409, the State moved in limine to elicit testimony from Detective McGinn about what he told Orlando about the Jeannot interview—including McGinn's recounting of Jeannot's alleged statement that Orlando had paid him to shoot Calabrese—just before Orlando changed his story and gave his

second statement. The State argued that the jury should hear the full circumstances that precipitated Orlando's second statement, lest it be impeded in its task of evaluating the credibility of Orlando's exculpatory claims in his second statement, upon which Orlando's defense relied.

During the motion colloquy, defense counsel did not seek to exclude the entirety of McGinn's testimony about Jeannot's statements. Unsurprisingly—as it was in keeping with the defense theory—counsel explicitly consented to the admission of McGinn's testimony that he told Orlando that Jeannot admitted to shooting Calabrese. Orlando objected, however, to any mention of Jeannot's alleged statement inculpating Orlando. The court agreed that McGinn's complete testimony about what he told Orlando regarding Jeannot's statements—which would not be offered for its truth—was admissible under *Street* for the nonhearsay purpose of demonstrating the circumstances that fostered Orlando's second statement, with accompanying limiting instructions.

As expected, Orlando argued in his opening statement that the precipitating factor behind his second statement was learning that Jeannot had allegedly confessed, which had "freed" him to "tell the truth" in his second statement—the alleged "truth" being that he had no pre-existing knowledge of Jeannot's plan to murder Calabrese and did not participate in the killing. The State countered that theory by arguing that all the exculpatory portions of Orlando's second statement were fabricated, and that he did not change his story as a result of dissipated fear, but because—upon being told that

Jeannot had inculpated him—he believed that the police were at least partially aware of his involvement in the crime, and had to tailor his story accordingly.

During the trial, the State presented evidence of Orlando's initial statement, in which he denied any participation in Calabrese's murder. Orlando claimed that he drove with Jeannot to Industrial Place in Island Park to meet Calabrese, and that none of the parties exited their cars; rather, Orlando handed Calabrese $17,000 through the car window, and they each drove off in different directions.

McGinn testified that, after Orlando gave his initial statement, he told Orlando that McHugh was interviewing Jeannot, and that Jeannot was probably going to tell the truth about Calabrese's murder. He then told Orlando that the police possessed a surveillance videotape proving that he lied about the location of the meeting with Calabrese and that Jeannot had given up the location of the murder weapon, but Orlando stuck to his initial story. Finally, McGinn told Orlando that Jeannot had admitted to shooting Calabrese and said Orlando paid him to do it. At that point, Orlando gave McGinn a different account of what had occurred on December 3, 2004.

Jeannot's statement was never admitted; McGinn only testified about what he told Orlando to coax a more accurate statement from him. Moreover, during McGinn's trial testimony and in the final charge, the court instructed the jurors that they were to only consider Jeannot's alleged statements when considering the circumstances under which

Orlando made his own statements, and they were to completely disregard Jeannot's statements when considering the substantive evidence against Orlando. The court further instructed the jurors that they were not to consider whether Jeannot actually made the statements, or whether the statements were true.

In Orlando's second statement, he claimed that while he had originally intended to meet Calabrese on Industrial Place in Island Park, he decided at the last minute to change the meeting spot to a more secluded location. Once he arrived at the meeting spot, he drove up and down the block a couple of times before parking his car. Moments later, Jeannot said he had to urinate and exited the car. Calabrese arrived, Orlando hugged him, and handed him $17,000. Orlando then looked to his right and behind his shoulder, saw Jeannot holding something, and heard a gunshot go by his right ear. Calabrese fell to the ground, and Jeannot shot him twice more. He and Jeannot then entered Orlando's car. Orlando pulled up alongside Calabrese, whose feet were moving, at which point Jeannot exited the car and attempted to shoot Calabrese again, but the gun would not fire. Jeannot picked up the $17,000, reentered the car, and Orlando drove away.

Orlando admitted that he helped Jeannot dispose of crime evidence and derive an alibi. He claimed Jeannot said that he would kill Orlando's wife if he told anyone what happened.

The State's theory was that Orlando had participated in the planning, execution, and coverup of Calabrese's murder, and the exculpatory portions

of Orlando's second statement were incredible. The testimony of the medical examiner, a ballistics expert, and a crime-scene reconstructionist established that, contrary to what Orlando claimed in his second statement, Jeannot was not facing Calabrese at the time of the shooting, but, rather, approached Calabrese from behind, while facing Orlando. The evidence further established that Calabrese's body was found with his sweatshirt ripped and pulled over his head. Further, the medical examiner and crime reconstructionist testimony proved that the wounds and the sweatshirt holes could only line up if the sweatshirt had been pulled over Calabrese's head at some point during the shooting. All of this supported an inference that Orlando pulled the sweatshirt over Calabrese's head to make Calabrese an easier target for the approaching Jeannot.

The State proved Orlando's motive for the murder—a $17,000 gambling debt, which he carried in addition to many other debts that he could not pay. Other evidence proving his guilt was: the fact that Jeannot had never accompanied Orlando to money exchanges with Calabrese before the night of the murder; the two of them had separated from their lunch group at work during the week leading up to the murder, evincing that they were secretly plotting the crime; surveillance footage showing Orlando driving Jeannot around before Calabrese arrived, "casing" the secluded area Orlando had chosen for the meeting (his previous meetings with Calabrese were in well-populated places); and the recovery of several identical, brand-new one-hundred-dollar bills in both Orlando's and Jeannot's

homes, from which it could be inferred that a financial exchange had occurred between them and a payoff was Jeannot's motive for killing Calabrese. The State also emphasized the unlikelihood that Jeannot would commit an execution-style murder in front of a witness, with no predetermined plan to flee the scene.

The defense called no witnesses but, in summation, again advanced the fear-dissipation theory, arguing that Orlando lied in his first statement because Jeannot threatened to kill his wife, but once he learned Jeannot himself confessed, he felt "safe" and could tell the police "what [really] happened." The State rebutted that argument by contending that Orlando was motivated to change his story only upon being told by McGinn that Jeannot had implicated him. This was the State's only summation reference to Jeannot's inculpatory statement.

The Verdict, Sentencing, And State Appeal

Orlando was convicted of second-degree murder and sentenced to a prison term of twenty-five years to life. Jeannot was tried separately, and, after two trials resulting in hung juries, was convicted of first-degree murder. Jeannot's conviction was subsequently reversed on ineffective-assistance-of-counsel grounds. After his fourth trial, Jeannot was once again convicted of first-degree murder. Jeannot committed suicide in prison before he was sentenced.

On appeal, Orlando argued that, under *Bruton*, McGinn's testimony regarding Jeannot's alleged statement violated his right to confrontation. The State contended that McGinn's testimony did not

violate Orlando's confrontation right because it was not offered to establish the truth of what had occurred during the murder, but for the nonhearsay purpose of demonstrating the circumstances that fostered Orlando's second statement. The state's intermediate appellate court rejected Orlando's confrontation claim. Citing *Street*, the court held that, in view of the nonhearsay purpose for which the testimony was admitted, as well as the trial court's limiting instructions, the admission of McGinn's testimony did not violate Orlando's confrontation right. App. 81a. Orlando's application for permission to appeal to the State's highest court was denied. *People v. Orlando*, 13 N.Y.3d 837 (2009).

Federal Habeas Corpus Proceedings

Orlando filed a petition for a writ of habeas corpus, again alleging that McGinn's testimony violated his confrontation right. The State opposed the petition, arguing that the state court's rejection of the claim was neither contrary to, nor an unreasonable application of, Supreme Court precedent.

The District Court's Habeas Denial

The District Court denied relief (App. 62a-78a), holding that the state court's rejection of Orlando's confrontation claim was not objectively unreasonable because, in keeping with the mandates of *Street*, there was a relevant nonhearsay purpose for the admission of the complained-of testimony—it was not offered for its truth, but only to "provid[e] context for explaining why Orlando altered his exculpatory story" (*id.* at 70a)—and the trial court

had delivered thorough limiting instructions. The court granted a certificate of appealability on the confrontation claim.

The Second Circuit's Habeas Grant

A divided panel of the United States Court of Appeals for the Second Circuit reversed the judgment denying habeas relief to Orlando. App. 1a-39a. The majority held that "*Bruton* plainly instruct[ed] that the jury could not be presumed to disregard Jeannot's statement for its truth, even with a limiting instruction" (*id.* at 21a) because: (1) Jeannot's statement "expressly inculpated Orlando" (*id.*); (2) McGinn made statements during his testimony that might have been construed as vouching for the veracity of Jeannot's inculpatory statement; and (3) the State "undermined any possible effectiveness of the limiting instruction when it reminded the jury of its murder-for-hire theory" in summation (*id.* at 24a). The court further noted in a footnote that it found the trial court's limiting instructions to be "decidedly unclear." *Id.* at 25a, n.17.

Next, the court determined that because Orlando did not take the stand at his trial, "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." *Id.* at 29a. Lastly, the court averred that, based on its assessment of the evidence, it had "little doubt" that the complained-of testimony had a substantial and injurious effect in determining the jury's verdict. *Id.* at 32a.

In two sentences, the court held that the state court's applications of *Bruton* and *Street* were unreasonable. Nowhere in the majority's opinion did it acknowledge the fear-dissipation narrative advanced by the defense or address the State's reason for eliciting McGinn's testimony: to refute the specific and potentially misleading claim advanced by the defense as to why Orlando changed his story, and why his revised statement—which exculpated him of murder—was worthy of belief. *Id.* at 1a-39a.

Judge Shea forcefully dissented. App. 40a-61a. Although the majority characterized the admission of McGinn's testimony as a *Bruton* violation, the dissent concluded that this case was more akin to *Street* than *Bruton*, and 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." *Id.* at 40a.

The dissent found that the state court's decision upholding the admission of this evidence was reasonable because, unlike in *Bruton*, the disputed testimony here was not offered to prove what happened during the murder, but for the legitimate nonhearsay purpose of countering a misleading defense argument about what motivated Orlando to give his second statement. The dissent reasoned that "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 second statement would have been enhanced."

Id. at 48a. Accordingly, by permitting McGinn's testimony—particularly because Orlando had specifically declined to request that McGinn's testimony about the Jeannot interview be excluded in its entirety—the trial court had properly weighed the competing interests, as mandated by *Street*. *Id.* at 40a, 49a.

In response to the majority's attempt to distinguish this case from *Street* on the ground that "Orlando did not take the stand and, thus, unlike in *Street*, the State was not forced to rebut a defendant's testimony," the dissent noted that the Court's sanction in *Street* of the use of an accomplice's statement did not "turn on the defendant's election to testify in that case." *Id.* at 49a. Moreover, the dissent concluded that the trial court had likewise attended to the risk of the jury's improper use of the evidence by twice giving detailed limiting instructions; the dissent disagreed with the majority's finding that the limiting instructions were unclear. And it further found that, taken in context, McGinn's testimony and the prosecutor's summation remarks did not undermine the limiting instructions. The dissent determined, therefore, that 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).

After reversing the District Court's denial of the habeas petition and concomitantly issuing a mandate to that effect, the Second Circuit denied the State's motion to recall the mandate and precluded

outright permission to file a petition for rehearing and rehearing en banc. App. 83a-84a.

REASONS FOR GRANTING THE PETITION

The decision below set aside a state murder conviction based on the Second Circuit's *de novo* review of a confrontation claim under *Bruton* and *Street*. After explaining its independent review of the merits of Orlando's claim, the Second Circuit then declared, without further clarification, that the state court's contrary decision was unreasonable. At the core of the majority's decision are two erroneous holdings. First, the majority relied on its own belief—without any consideration of the actual reason proffered by the State for the admission of the testimony at issue—that there was no legitimate and compelling nonhearsay purpose served by the admission of the testimony. Second, the majority promulgated a new rule that testimony about out-of-court accomplice statements inculpating the defendant should not be admitted at trial—even if admitted for a nonhearsay purpose and accompanied by limiting instructions—unless the defendant has testified, and the State refrains from referencing the accomplice statements in any manner or somehow actively disavows the truth of the statements. The Supreme Court did not, however, declare such a rule in *Bruton*, *Street*, or any other decision.

Evidently, the Second Circuit thought that such a rule would make good law—it does not—but regardless of the propriety of the confrontation rule announced by the Second Circuit, the way the court reached its decision overturning Orlando's murder conviction was fatally flawed. By ignoring the main

argument that supported the admission of McGinn's testimony and making new law in the context of a federal habeas proceeding, the Second Circuit overstepped its jurisdictional bounds in ways that present a serious conflict with the intent of Congress embodied in its habeas statute, principles of federal-state comity, and the Supreme Court's decisions in *Harrington v. Richter* and *Teague v. Lane*, 489 U.S. 288 (1989).

As the Ninth Circuit did in *Richter*, the Second Circuit's decision here "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*. What is worse, the Second Circuit actually "inverted the rule established in *Richter* . . . [and] considered arguments against the state court's decision that [Orlando] never even made in his [habeas] petition" (*Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 [2018]).

Glaringly missing from the majority's opinion is any discussion of the central argument that supported the state court's decision—that the testimony about Jeannot's statement was admissible to refute a misleading argument advanced by the defense on a key issue. The majority did, however, focus a good deal of its opinion on the discussion of arguments *against* the state court's decision, some of which Orlando had never even raised in any of the proceedings. Accordingly, although the Second Circuit superficially cited AEDPA's

unreasonableness standard, it ultimately treated it "as a test of its confidence in the result it would reach under *de novo* review: Because the Court of Appeals had little doubt that [Orlando's confrontation claim] had merit, the Court of Appeals concluded the state court must have been unreasonable in rejecting it." *Richter*, 562 U.S. at 102.

Thus, it is once again necessary for this Court to remind the federal courts that the Supreme Court has laid out a defined path from which courts cannot deviate when applying the unreasonable-application prong of § 2254(d)(1). The Second Circuit based its habeas decision on new law of its own creation, placing unprecedented limitations on the reach of *Street*, and overextending the reach of *Bruton*. That, by itself, provides adequate reason to grant certiorari, but the decision also flagrantly intrudes upon the authority of the state courts, in violation of controlling principles of habeas jurisprudence. The Second Circuit's end run around AEDPA's mandates and the resultant overturning of a murder conviction should not stand.

A. The Second Circuit Failed To Apply AEDPA's Deferential Standard.

Inasmuch as this state murder conviction was before the Second Circuit in the context of a federal habeas proceeding, that court's authority was narrowly circumscribed by AEDPA, which was "designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter*, 562 U.S. at 102. To fulfill the mandates of AEDPA, the

Second Circuit first had to "determine what arguments or theories supported or . . . could have supported, the state court's decision." *Id.* The court was next obligated to evaluate "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* Finally, the court could grant habeas relief only if Orlando demonstrated that the state court decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

As this Court has observed, AEDPA is "a provision of law that some federal judges find too confining, but that all federal judges must obey." *White v. Woodall*, 572 U.S. 415, 417 (2014). A court may not grant habeas relief merely because it believes that "the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Renico v. Lett*, 559 U.S. 766, 773 (2010). Thus, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 102. Put another way, although AEDPA "stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings," the strict deference implicit in its unreasonable-application standard should be practically insurmountable. *Id.*

The "mission" of the Confrontation Clause is "to advance the accuracy of the truth-determining process in criminal trials" and, to accomplish that, trial judges must attend to both "assur[ing] the

integrity of the trial's truth-seeking function and eliminat[ing] the risk of the jury's improper use of evidence." *Street*, 471 U.S. at 415. Here, the state appellate court determined that the trial court attended to both of those principles by admitting the complained-of testimony for a relevant nonhearsay purpose, accompanied by detailed limiting instructions. The Second Circuit did not accord that decision any deference whatsoever.

In granting habeas relief, the majority's entire AEDPA analysis was as follows:

> We hold that the Appellate Division unreasonably applied *Bruton* in concluding that Orlando's Sixth Amendment right to cross-examine a witness against him was not violated when the jury heard of Jeannot's statement implicating Orlando in the murder. To the extent that the Appellate Division applied *Street*, it also extended that decision unreasonably. App. 30a.

Although the majority correctly identified the governing standard of review under AEDPA, it failed to evaluate—or even correctly identify—the main argument that supported the state court's denial of Orlando's confrontation claim. Without that analysis, this habeas proceeding was approached in precisely the way it would have been if this had been Orlando's direct appeal; the end product was a strictly *de novo* review, in which the state court was stripped of all comity.

1. The majority failed to defer to the state court's reasonable determination that McGinn's testimony was not admitted for its truth but for a relevant nonhearsay purpose, and completely ignored the main argument supporting that ruling.

The state court reasonably determined that the trial judge properly accommodated the first of the Confrontation Clause's two competing interests—assuring the integrity of the trial's truth-seeking function—by admitting McGinn's testimony for the relevant nonhearsay purpose of explaining the "effect" on Orlando from hearing about Jeannot's alleged inculpatory statement. App. 81a. Significantly, Orlando gave two drastically different statements to the police. In his first statement, he denied that he and Jeannot were present at the murder scene. In his second statement, he admitted witnessing Jeannot commit the murder and claimed that, to the extent he assisted Jeannot in covering it up, he did so out of fear of Jeannot, and not because he participated in the murder. As the State argued below, the lynchpin of Orlando's defense was that his second statement was the truth, and that his fear of Jeannot caused him initially to lie to the police in a misguided attempt to protect his wife. Orlando argued to the jury, during both his opening statement and summation, that the catalyst behind the second statement was McGinn's statement that Jeannot had confessed.

If that were all the jurors were permitted to hear, they would have been left with only Orlando's self-serving account. Without the complete story, that

McGinn told Orlando that Jeannot had not only confessed to his own involvement, but had also implicated Orlando, the jury would never have known that there might have been another reason that Orlando changed and tailored his story. It was critical that the jurors heard the complete conversation so that they could decide whether Orlando changed his story because he no longer feared Jeannot, or because he heard that Jeannot was implicating him. Thus, in complete accord with *Street*, the testimony at issue was admitted to counter a misleading argument that the defense had made as to *why* Orlando changed his story—an argument which, left unchallenged, could have led to Orlando's unjust acquittal.

Review of the majority's opinion reveals that, like the Ninth Circuit in *Richter*, the panel overtly overlooked this argument, which "otherwise justif[ied] the state court's result" (*Richter*, 562 U.S. at 102). Indeed, the argument was not even mentioned in the opinion and appears to have been completely lost on the majority. Nowhere in the majority's opinion did it even acknowledge that the defense advanced this fear-dissipation narrative to persuade the jury to credit Orlando's second statement, much less address the harm this argument could have caused to the State's case—and to the integrity of the trial itself—if left unaddressed.

To the extent that the majority fleetingly evaluated a theory that could have supported the state court's decision, it misapprehended—and ignored—the actual reason the evidence was admitted. Indeed, the majority grossly downplayed the importance of the evidence at issue, ruling that

McGinn's testimony about what he told Orlando was unnecessary because the jury still could have learned without it that Orlando placed himself at the scene of the murder and lied in his original account. App. 28a-29a. Contrary to the majority's implication, however, the testimony about Jeannot's statement was not admitted simply because Orlando changed his story. Rather, the testimony was admitted to rebut a misleading argument Orlando made about *why* he changed his story. That rebuttal was crucial to the jury's truth-finding task because, as the dissent aptly recognized, "Orlando's defense hinged on the credibility of [the exculpatory portion of his] statement." App. 48a. Thus, a fairminded jurist could find that the admission of the statement was warranted.

In fact, reasonable jurists could agree that the trial court had no practicable alternatives to admitting McGinn's testimony that would have maintained the integrity of the trial's truth-seeking function. McGinn's testimony regarding what he told Orlando about Jeannot's statement could not have been redacted in a way that would not have defeated the purpose of the testimony, and, if redacted, it would have left the jury wondering why Orlando drastically changed his account, with the only available explanation being Orlando's fear-dissipation narrative.

Significantly too, Orlando did not seek to exclude McGinn's testimony about the Jeannot interview in its entirety. In fact, for obviously strategic reasons, Orlando explicitly consented to the admission of McGinn's testimony that Jeannot admitted to shooting Calabrese. Accordingly, faced with a

scenario where Orlando actively chose for *some* of McGinn's testimony about confronting Orlando with the Jeannot interview to be admitted—the portion that would benefit him—a fairminded jurist could conclude that the trial court had no alternative but to also admit the testimony in question, in the interest of preventing an unwarranted windfall for Orlando and preserving the trial's integrity.

2. The majority failed to defer to the state court's reasonable determination that the limiting instructions sufficiently reduced the risk of the jury's improper use of the evidence.

The state court reasonably ruled that the trial judge attended to the second confrontation principle—eliminating the risk of the jury's improper use of the evidence—by twice delivering detailed limiting instructions. The majority failed to give any deference to that state court ruling, and devoted most of its opinion to an explanation of why, in its view, *Street's* "crucial" presumption that juries follow instructions (*Street*, 471 U.S. at 415-16) did not apply in Orlando's case. The court ostensibly declined to apply that presumption here because Jeannot's alleged statement was inculpatory and: (1) the majority viewed the limiting instructions as unclear (App. 25a, n.17); (2) "McGinn led the jury to believe that Jeannot had actually made the [inculpatory] statement McGinn recounted" (*id*. at 22a); and (3) the prosecutor's summation undermined the effectiveness of the limiting instructions "when it reminded the jury of its murder-for-hire theory" (*id*. at 24a).

As the dissent pointed out (App. 44a), Orlando did not raise 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. That the Second Circuit *sua sponte* considered new arguments purportedly supporting the view that the evidence in question should have been excluded is not only improper because the court "effectively inverted the rule established in *Richter*" (*Beaudreaux*, 138 S. Ct. at 2560), but it further emphasizes the majority's failure to accord the state court's decision its proper deference. And this misstep is particularly remarkable because the theories that the majority considered dispositive of a confrontation violation are premised upon record-based factors that are either taken out of context or mischaracterized.

A fairminded jurist could reasonably disagree with the majority's description of the limiting instructions as "unclear." Both instructions—given immediately after the contested testimony was adduced and during the final charge—directed the jurors to consider the statements allegedly made by Jeannot only regarding the circumstances under which Orlando made his own statements, and they were expressly prohibited from considering the substance of Jeannot's alleged statements as evidence of Orlando's guilt. Most importantly, the court explicitly instructed the jurors that they were prohibited from considering whether the statements were true, or whether Jeannot even made them. As the dissent below noted, "Federal courts of appeal

have found vaguer, less detailed instructions to be reasonable applications of *Street*." App. 55a.

A fairminded jurist likewise could reasonably disagree with the majority's assertion that the "prosecution elicited testimony from Detective McGinn that Jeannot had actually made the incriminating statement." App. 28a. McGinn's testimony was limited to the fact that he *told* Orlando that Jeannot claimed Orlando paid him to shoot Calabrese. In all but one instance, McGinn's testimony characterizing Jeannot's comments as "the truth" were used only to describe what McGinn said to Orlando during the interrogation, and were obviously designed to persuade Orlando to provide more details about the murder.

Nor is there any reason to believe that McGinn's solitary comment that he believed Jeannot "was relaying some of the events that really took place that night"—a comment that was not made either immediately before or after he gave the testimony about Jeannot's inculpatory statement—rendered it impossible for the jury to follow the court's limiting instructions. Significantly, McGinn never testified that Jeannot had said Orlando paid him to shoot Calabrese, and it was likely that when McGinn testified about Jeannot "relaying . . . events that really took place," he was referencing his belief that Jeannot shot Calabrese. That could also explain why defense counsel did not object to the comment; the jury's acceptance of Jeannot as the shooter was vital to Orlando's defense. Regardless, reasonable jurists could have agreed that the trial judge's repeated instructions that the jury was not to consider whether Jeannot made any statement or

whether Jeannot's alleged statement was true eliminated the possibility that any of McGinn's testimony was construed as improper vouching for Jeannot's inculpatory statement.

Finally, a fairminded jurist could reasonably disagree with the Second Circuit's assertion that the prosecutor's summation reduced the efficacy of the limiting instructions. The prosecutor made only one reference to this evidence in summation, in the context of an argument that McGinn's conveyance of Jeannot's alleged inculpatory statement is what motivated Orlando to change his story. Moreover, that reference was directly responsive to Orlando's own summation comment referencing Jeannot's statements and arguing that Orlando had felt "free" to tell the real story in his second statement because Jeannot had confessed. Thus, reasonable jurists could agree that the prosecutor used McGinn's testimony in the precise way sanctioned by the trial court's ruling—not to prove what happened at the murder scene, but to explain why Orlando changed his story.

And although the prosecutor made a few general references to the murder-for-hire theory—a theory that was not precluded, given that it was supported by evidence independent of Jeannot's inculpatory statement—the references were brief and devoid of any mention of Jeannot's statement. Taken in context, therefore, a reasonable jurist could agree that the prosecutor's summation did nothing to distract the jury from the "distinctive and limited purpose" of the testimony. *Street*, 471 U.S. at 417.

The majority likewise ignored the argument that the District Court found most persuasive in support of its habeas denial. Indeed, the District Court emphasized that "the jury asked for virtually every piece of incriminating evidence, except that which they were told to disregard—namely, the testimony of Detective McGinn recounting Jeannot's statement that induced Orlando to change his story." App. 71a. The court reasonably determined that this showed that the jury followed the judge's instructions and did not consider Jeannot's statements as substantive evidence of Orlando's guilt. *See id.* Again, the majority did not address this theory.

In short, there were numerous arguments presented to, but ignored by, the majority that supported the state court's denial of relief on Orlando's confrontation claim. In violation of AEDPA, the majority disregarded all of them. However, given that both the District Court and the Second Circuit's dissenting judge agreed with the four state appellate justices and the state trial judge that, under *Street*, Orlando's confrontation right was not violated, the majority is hard-pressed to support the pronouncement that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Richter*, 562 U.S. at 102-03. The record simply does not support the conclusion reached by the majority that five state court judges and two federal court judges were so unreasonable in their conclusions that they were not functioning as fairminded jurists.

B. This Court Has Never Sanctioned An Accomplice-Statement Rule Such As The One Announced By The Majority Decision Below.

Not only did the majority fail to accord the state court's decision sufficient deference, but it further missed the mark when it significantly confined the reach of *Street* in ways that have never been sanctioned by the Supreme Court. For example, the majority held that the challenged testimony violated Orlando's confrontation right because Orlando did not take the stand, and "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 the happenstance that *Street* testified at his trial as a legal pronouncement that a defendant testifying is a predicate for applying the *Street* rule, the Second Circuit overlooked the broader holding of *Street*, which casts a far wider net.

In fact, *Street* stands for the 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 the rebuttal of a defense argument, and that such a nonhearsay use "raises no Confrontation Clause concerns." *Street*, 471 U.S. at 417. And, as the dissent here noted, the Court's sanctioning in *Street* of the nonhearsay use of the accomplice's statement was not grounded on Street's decision to testify. Rather, the decision turned on Street's advancement of misleading claims during that testimony, which, if not placed in proper context through the admission of the accomplice

statement, would have hampered the jury's ability to perform its truth-finding task effectively.

Logically, the vessel a defendant uses to advance a misleading argument is irrelevant; rather, it is the impact that the misleading defense argument may have on the truth-finding function that controls. To permit the Second Circuit's restrictive and unreasonable interpretation of *Street* to stand would invite defendants to use *Bruton* as a sword, rather than a shield, and to engage in gamesmanship by choosing methods other than their own testimony to advance a misleading argument to skirt *Street* and thwart the trial's truth-finding purpose.

Not unlike how Street's defense hinged on the jury believing his claim that he was coerced by the Sheriff into confessing to the murder, here Orlando's defense hinged on the jury's acceptance of the exculpatory portion of his second written statement as truth. Accordingly, in the interest of providing the jury with the full context of the circumstances under which Orlando gave his second statement, so that it could properly evaluate the veracity of Orlando's fear-dissipation claim, the court, consistent with *Street*, properly admitted McGinn's testimony.

There is also nothing in *Street* to suggest that the State was required to explicitly "disavow" Jeannot's alleged statement (App. 22a); nor was the State foreclosed from advancing the murder-for-hire theory simply because it was consistent with Jeannot's statement. In *Street*, the prosecution did not disavow the non-testifying accomplice's statement, but rather limited its *use* of the

statement to the nonhearsay purpose for which it was admitted, just as the State did here. Thus, the Second Circuit's implication that the State was required to disavow Jeannot's statement and could not advance a viable murder-for-hire theory in summation based on other evidence—simply because it was not inconsistent with the statement evidence—not only constitutes a misinterpretation of *Street*, but thwarts the integrity of the trial's truth-seeking function that *Street* sought to protect.

Conversely, the Second Circuit overextended *Bruton* when it held that "the only reasonable conclusion" was that the admission of the testimony about Jeannot's alleged statement violated the Confrontation Clause because "*Bruton* plainly instructs that the jury could not be presumed to disregard Jeannot's statements for its truth, even with a limiting instruction." App. 21a. Unlike in *Bruton*, where the offending testimony *was* admitted for its truth against the jointly-tried co-defendant, the testimony in question was not hearsay because it was not offered for its truth for *any* purpose. Thus, as the evidence was not hearsay, the Confrontation Clause was not implicated. *Street*, 471 U.S. at 413-14. Nor did *Bruton* dictate, as the majority implied, that jurors can never be presumed to follow limiting instructions and disregard inculpatory accomplice statements for their truth, even where they are admitted for a proper nonhearsay purpose.

In fact, *Bruton* held that a limiting instruction would be insufficient to obviate the prejudice from the admission of an accomplice's testimony at a *joint trial*, where a jury would be "'expected to perform the overwhelming task of considering

[the accomplice's statement] in determining the guilt or innocence of the declarant and then ignoring it in determining the guilt or innocence of any codefendants of the declarant.'" *Bruton*, 391 U.S. at 125, 137 (quoting *People v. Arnada*, 407 P.2d 265, 271-72 [Cal. 1065]). Here, in contrast, as Orlando was tried alone, the jury was not required to engage in the mental gymnastics that concerned the Court in *Bruton*. To the contrary, as in *Street*, the jurors were instructed that they could not consider the truthfulness of the accomplice's statement for *any* purpose—a much less onerous task than what was asked of the jurors in *Bruton*. Moreover, similar to *Street*, and unlike *Bruton*, there was no alternative to the admission of the testimony at issue "that would have both insured the integrity of the truth-seeking function and eliminated the risk of the jury's improper use of evidence." *Street*, 471 U.S. at 415.

Thus, *Bruton* is materially distinguishable and did not mandate a finding here that the jury could not be presumed to disregard Jeannot's statement for its truth. And the majority's reliance on *Bruton*'s holding as a catchall rule to preclude the use of an accomplice statement whenever it is inculpatory and there is a risk that the jury will improperly use it finds no support in Supreme Court precedent. As 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 majority failed to properly weigh the competing interests, as mandated by *Street*.

Accordingly, although the Second Circuit gave lip service to AEDPA by ruling that the state court unreasonably applied *Bruton* and *Street*, the majority essentially fashioned an entirely new—and misguided—confrontation rule. However, relief based upon a new rule of law is not available in a federal habeas corpus proceeding. *See Teague v. Lane*, 489 U.S. 288. And because the Supreme Court has never promulgated this new rule, the state court's failure to follow it cannot constitute an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Thus, the Second Circuit's decision in this regard once again highlights its blatant disregard for the AEDPA mandates.

The Second Circuit has also muddied the waters by creating a precedent that is at odds with the decisions of other circuits applying *Street* under similar circumstances. *See*, *e.g.*, *Furr v. Brady*, 440 F.3d 34 (1st Cir. 2006); *Adams v. Holland*, 168 Fed. Appx. 17 (6th Cir. 2005); *Lee v. McCaughtry*, 892 F.2d 1318, 1325 (7th Cir. 1990). If left uncorrected, the decision will not only impact all criminal prosecutions where accomplice statements could play a necessary role in debunking misleading defense arguments, but it will also cause confusion in the federal courts regarding the proper application of *Bruton* and *Street*. It is crucial that the Supreme Court clarify the applicability of its prior rulings.

* * * *

In sum, the Second Circuit's decision is deserving of certiorari review because it invites an exceptionally important question concerning the propriety of the federal courts' application of AEDPA's standard, and, more narrowly, whether the Second Circuit here accorded the state court the deference to which it is entitled. And the Second Circuit's trespass upon the state court's authority should not be ignored simply because this recurring question has been previously taken up by the Supreme Court. Indeed, the failure of lower federal courts to give adequate deference to state courts in habeas proceedings is a persistent transgression that is no less harmful today to the principles of comity upon which our nation was forged than it was when *Richter* was decided. The Second Circuit's decision demonstrates all too clearly that it remains necessary for the Supreme Court to remind federal courts of AEDPA's rigid mandates.

And intervention is particularly necessary here because the Second Circuit has endorsed Orlando's gamesmanship in presenting the jury with a blatant distortion of the truth to explain away the fact that he lied to the police and helped to coverup the execution-style murder of Bobby Calabrese. If there is a retrial, Orlando will inevitably assert the same deceptive defense, but this time the State will be powerless to refute it and the jury will be misled. Thus, because proper application of the objective unreasonableness standard required by § 2254(d)(1) would prevent such an injustice—and spare the Calabrese family enduring a sixth trial—the petition for a writ of certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2019

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2017
No. 17-2390

MARK ORLANDO,
Petitioner-Appellant,

v.

NASSAU COUNTY DISTRICT ATTORNEY'S OFFICE,
Respondent-Appellee.[1] [2]

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[1] The Clerk of Court is directed to amend the caption as set forth above.

[2] The Nassau County District Attorney's Office has proceeded as respondent in this case, without objection. However, "§ 2254 petitioners challenging present physical custody [should] name either the warden or the chief state penal officer as a respondent." *Rumsfeld v. Padilla,* 542 U.S. 426, 450 n.18 (2004) (emphasis removed) (citing Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts; Advisory Committee's Note on Rule 2(a), 28 U.S.C., pp. 469-470 (adopted in 1976) (stating that this is the rule in the "usual case")). As such, the district court is directed on remand (and prior to issuing the writ) to substitute as respondent the warden of Orlando's place of incarceration.

Appeal from the United States District Court
for the Eastern District of New York.
No. 11-cv-3992 — Edward R. Korman, *Judge.*

ARGUED: MAY 30, 2018
DECIDED: FEBRUARY 11, 2019

Before: JACOBS and DRONEY, *Circuit Judges,* and SHEA, *District Judge*.[1]

Appeal from a judgment of the United States District Court for the Eastern District of New York (Korman, J.) denying Petitioner-Appellant Mark Orlando's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Orlando was convicted of murder in the second degree in the Supreme Court of New York, Nassau County. During the homicide investigation, police detectives separately interrogated Orlando and his alleged accomplice. The latter confessed that he had shot the victim, but that Orlando had hired him to commit the murder. At Orlando's trial, a detective was permitted to testify that the accomplice had stated that Orlando paid him to commit the murder. The accomplice, who was tried separately, did not testify at Orlando's trial. Orlando contends that notwithstanding a

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[1] Judge Michael P. Shea, United States District Court for the District of Connecticut, sitting by designation.

limiting instruction by the trial court, the detective's testimony violated the Confrontation Clause of the Sixth Amendment and that the state court's ruling to the contrary constituted an objectively unreasonable application of clearly established federal law. We agree. Accordingly, we **REVERSE** the district court's denial of Orlando's petition, and **REMAND** the cause to the district court with instructions to grant the petition for a writ of habeas corpus.

Judge SHEA dissents in a separate opinion.

JANE SIMKIN SMITH, Millbrook, NY, *for Petitioner-Appellant*.

SARAH S. RABINOWITZ, ASSISTANT DISTRICT ATTORNEY (Tammy J. Smiley, Assistant District Attorney, *on the brief*), *for* Madeline Singas, Nassau County District Attorney, Mineola, New York, *for Respondent-Appellee*.

DRONEY, *Circuit Judge* :

On Friday night, December 3, 2004, at approximately 8:45 p.m., in response to a 911 call, police officers from the Long Beach, New York, police department found the body of Bobby Calabrese.[3]

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[3] Long Beach is in Nassau County, New York, on Long Island.

Calabrese was lying face down next to his Infiniti automobile, which was still running. He had been shot in the back of his head at close range three times with a .44 caliber revolver. Calabrese had been a "runner" for an illegal sports betting organization.

The following Thursday, Nassau County police detectives interviewed Mark Orlando and Herva Jeannot, who were together the night of Calabrese's homicide. The detectives believed that Orlando and Jeannot had been with Calabrese that night. Orlando and Jeannot were questioned in separate rooms at the police station. Jeannot confessed to shooting Calabrese, stating that Orlando hired Jeannot to murder Calabrese to avoid paying a gambling debt to Calabrese. During his questioning, Orlando gave two different statements to the police but denied being involved in the murder.

Orlando and Jeannot were charged with murder for their roles in Calabrese's death and, in August 2005, a jury in the New York Supreme Court for Nassau County convicted Mark Orlando of murder in the second degree. The trial court had severed Orlando and Jeannot's trials to avoid a Sixth Amendment Confrontation Clause violation that could have arisen from Orlando's jury hearing Jeannot's confession if Jeannot did not testify and

thus could not be cross-examined about it.[4] Severing the trials, however, did not avoid violating Orlando's right to confront the witnesses against him, as the trial court allowed the jury to learn of Jeannot's confession implicating Orlando at Orlando's trial and Jeannot did not testify at Orlando's trial.

ORLANDO'S TRIAL

I. Evidence Before the Jury of Jeannot's Statement

The state's theory at trial was that Orlando paid Jeannot to murder Calabrese to extinguish a $17,000 gambling debt Orlando owed to Calabrese and that Orlando assisted Jeannot in the murder. The prosecution argued that Orlando lured Calabrese to the remote location near Long Beach[5] on the pretext of meeting to pay the $17,000 debt, but that Orlando had previously agreed to pay Jeannot to shoot Calabrese when Orlando met up with Calabrese. Orlando did not dispute at trial that he was present for the murder, but contended that he had intended merely to pay Calabrese; he did not expect Jeannot

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[4] Although the record on appeal does not reflect the trial court's decision to sever the trials, both Orlando and the state describe the trial court as having (appropriately) severed Orlando and Jeannot's trials "pursuant to" *Bruton v. United States,* 391 U.S. 123, 124 (1968). Pet. Br. at 2; Respondent's Br. at 39.

[5] Although officers from the Long Beach police department responded to the report of the homicide, the homicide occurred in Island Park, which is a town adjacent to Long Beach.

(who was a friend of Orlando's and a passenger in the car Orlando drove that night) to shoot Calabrese and then take the gambling money for himself.

During his police interrogation, Orlando gave two statements to Nassau County Police Detectives. Detectives McHugh and McGinn jointly interviewed Orlando when he gave his first statement, and Detective McHugh testified to this statement at Orlando's trial. According to McHugh, Orlando first stated that he and Jeannot were good friends and coworkers at Professional Credit Services, a Long Island debt collection agency. Orlando regularly gambled on sports. About one month before the murder, another coworker introduced Orlando to Calabrese. Orlando began to place bets through Calabrese and soon won $28,465.

Orlando's winning streak with Calabrese ended, and Orlando lost $17,800 over the course of two weeks. At that point, Orlando stopped betting with Calabrese. But Orlando still owed Calabrese $17,000, and he arranged to pay Calabrese on December 3.

In that first statement to the Nassau County detectives, Orlando indicated that he and Jeannot went together in Orlando's wife's car to pay Calabrese, did so, and otherwise had an uneventful evening. After Orlando paid Calabrese the $17,000, he and Jeannot made several stops: at a Suzuki car dealership to pick up a check, at an ATM, and at Orlando's friend's house to look at some new

construction. Orlando then dropped off Jeannot at Jeannot's home, around 10:30 p.m.

After Detective McHugh finished testifying, Detective McGinn took the stand and confirmed much of the substance of Orlando's first statement. According to McGinn, after Orlando signed a written statement summarizing that version of the night's events, Detectives McGinn and McHugh left the interview room. McHugh went to speak with Jeannot. Approximately three hours after leaving Orlando's interview room, McGinn returned to speak further with Orlando.

Before Detective McGinn had begun testifying at Orlando's trial (and out of the presence of the jury), counsel for Orlando had objected, on hearsay and Confrontation Clause grounds, to the admission of McGinn's anticipated testimony recounting Jeannot's statement as to Orlando's involvement in the murder. The trial court denied the objection, ruling 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 [of] what was going on during the interrogation of [Orlando]." T. 166–67.

After Orlando's objection was denied, the prosecution asked Detective McGinn about "the circumstances under which [McGinn] resumed

speaking with" Orlando. T. 620.[6] McGinn testified that he had learned from Detective McHugh that Jeannot was making inculpatory statements about the murder. "I knew Detective McHugh was in talking to Mr. Herva Jeannot," McGinn testified. *Id.* "I believe," he told the jury, "that Herva Jeannot was relaying some of the events that really took place that night [of the murder]." *Id.*

McGinn then testified that he re-entered Orlando's interview room. *Id.* "I went back in and I told Mr. Orlando that Detective McHugh was over there talking to Herva [Jeannot] and he was probably giving us . . . other facts that happened that night, the truth as to what happened that night." *Id.* "Now, would be the time . . . to tell us what was going on." *Id.*

According to McGinn's testimony, Orlando responded, "[y]ou don't understand," and McGinn left the interview room. T. 620. McGinn testified that he returned a few minutes later. According to McGinn, "[a]gain, 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. That we had a videotape of the spot the meeting took place. That the meeting did not take place where [Orlando] originally told us it had taken place. I told [Orlando] that Herva Jeannot

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[6] Citations to the trial transcript are abbreviated "T. __" throughout this opinion.

had given up where the gun was and that the defendant should . . .[,] if he wants his version of the story told[,] . . . tell us the truth at this point." T. 621.

Orlando initially responded, again, "you don't understand," but eventually stated, without elaboration, that he was afraid (of Jeannot) for his family. T. 621–23. McGinn testified that he again left the interview room and that he came back around an hour later. He then testified, over the renewed objection of Orlando's attorney, to the following: "I told [Orlando] . . . that Herva Jeannot was, in fact, talking to the other detectives. [Jeannot] had given a statement and that he had implicated himself in the murder. [Jeannot] said that he was the murderer, but that Mark Orlando had paid him to do it." T. 623–24.

At this point, the trial court gave the jury a limiting instruction. The trial court stated, "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." T. 624.

The trial court then instructed the jury "to completely disregard any statement allegedly made by Herva Jeannot when considering evidence against the defendant. . . . You are not to concern yourself

with whether Herva Jeannot did or did not make any statements to the police, if he did, what those statement[s] may have been or whether or not they were true."[7] *Id.*

McGinn then resumed testifying. He testified that, after learning of Jeannot's statement implicating Orlando in the murder, Orlando changed his account of the evening's events. Orlando stated that when he and Jeannot met Calabrese that night, Orlando paid Calabrese and then Jeannot unexpectedly shot Calabrese, taking the cash.[8] T. 676–82. According to Orlando, he and Jeannot then drove away, and Jeannot threatened to harm Orlando's (pregnant) wife if Orlando were to tell anyone about the homicide. T. 682. Jeannot told Orlando that Calabrese was not the first person Jeannot had killed and that Calabrese would not be the last. Id. As a result, according to Orlando, he

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[7] During its final charge to the jury, the trial court gave substantially the same limiting instruction as to McGinn's testimony regarding Jeannot's statement as it had given earlier in the trial.

[8] Orlando first relayed this second version of events to McGinn. Then, McGinn left the room, and Nassau Country Detective Cerighino, who had not been present for the questioning of Orlando, came into the room. Cerighino reduced Orlando's second account to writing. Cerighino wrote the statement based upon what Orlando told him, and Orlando signed it. The written statement is substantially similar to McGinn's account at trial of the second version of events that Orlando gave to McGinn.

then made the stops at the car dealership and elsewhere because he wanted people and cameras to observe that Jeannot was with him. In addition, at some point, Jeannot told Orlando to stop on a bridge, and Jeannot then threw the gun he used to kill Calabrese into the water.

II. The Prosecution's Summation

The prosecution argued in its summation to the jury that Orlando had paid Jeannot to murder Calabrese. The prosecution also specifically called to the jury's attention that "Detective McGinn leaves [Orlando's interrogation room], comes back a little later, . . . [and] Detective McGinn finally says, look, [Jeannot's] giving it up. [Jeannot's] telling us everything. . . . He's telling us he did the shooting and you paid him." T. 894–95.

Apart from Jeannot's statement, there was little evidence to support the state's theory. The prosecution showed that, after the murder, investigators found in Jeannot's home five one-hundred dollar bills and found in Orlando's home ten one-hundred dollar bills, all of which had a large-portrait image of Benjamin Franklin. The prosecution argued, "How do you know [Orlando] paid [Jeannot?] Why else would [Jeannot] do it, if not for $500, those five Ben Franklins hundred dollar bills . . . a week after the execution murder. Just so happens the defendant has ten of his own [$100 bills] back in [his home]. Of course [Orlando]

paid [Jeannot]. [Jeannot's] not doing it as a favor." T. 876.

The prosecution again returned to its "murder-for-hire" theory later in its closing argument, stating that "[Orlando] wasn't upset by watching Bobby die. That was what was supposed to happen. That is what he paid [Jeannot] to do, to do his dirty work for him. Couldn't do it himself." T. 885. The prosecution suggested that Orlando paid Jeannot when the pair briefly stopped at Orlando's house after the murder. T. 890.

III. Verdict and Sentence

The jury found Orlando guilty of murder in the second degree. Orlando was sentenced to an indeterminate term of 25 years to life in prison on August 18, 2005. He is currently serving his sentence. Jeannot was also convicted of the murder in a separate trial.

STATE COURT APPELLATE PROCEEDINGS

Orlando appealed his conviction to the New York Supreme Court, Appellate Division. *People v. Orlando,* 61 A.D.3d 1001 (N.Y. App. Div. 2d Dep't 2009). Orlando contended that Detective McGinn's testimony as to Jeannot's statement was inadmissible hearsay and also violated Orlando's right to confront witnesses through cross examination, as guaranteed by the Sixth Amendment of the United States Constitution and incorporated against the states by the Fourteenth

Amendment. Appellant's Br. at 70–77, *People v. Orlando,* No. 2005-08854 (N.Y. App. Div. 2d Dep't Mar. 23, 2008); *Orlando,* 61 A.D.3d at 1001–03.

The Appellate Division rejected Orlando's argument in a single sentence, stating: "The [trial] 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. " *Id.* (quoting *People v. Ewell,* 12 A.D.3d 616, 617 (N.Y. App. Div. 2d Dep't 2004)) (internal quotation marks omitted).[9] The Appellate Division also cited *Tennessee v. Street,* 471 U.S. 409 (1985), for its conclusion that the trial court did not err in admitting Jeannot's statement through Detective McGinn. *Id.*

The New York Court of Appeals subsequently denied Orlando leave to appeal, thereby rendering the Appellate Division's decision final. *People v. Orlando,* 981 N.E.2d 291, 291 (N.Y. 2012).[10]

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[9] Although the Appellate Division described Jeannot as a "codefendant," as is mentioned in the above text, he was tried and convicted at a separate trial after the Bruton ruling severing the trials.

[10] Following his unsuccessful state appeals, Orlando filed two unsuccessful *coram nobis* petitions in state court alleging ineffective assistance of appellate counsel. *See People v. Orlando,* 85 A.D.3d 823 (N.Y. App. Div. 2d Dep't 2011); *People v. Orlando,* 98 A.D.3d 691 (N.Y. App. Div. 2d Dep't 2012). There

SECTION 2254 PROCEEDING IN THE DISTRICT COURT

Orlando, proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of New York. As in his direct appeal, Orlando argued that McGinn's testimony regarding Jeannot's statement was inadmissible hearsay and violated his Confrontation Clause right. The district court denied the writ.[11]

The district court identified the following testimony by McGinn as at issue in the Confrontation Clause analysis:

> I left the [interrogation] room at about 6:50 [AM]. I went back into the room at about ten minutes to eight. About 7:50 in the morning. And I told [Orlando] at this point that Herva Jeannot was, in fact, talking to the other detectives. He had given a statement and he had implicated himself in the murder. He said that he was the murderer, but that Mark Orlando had paid him to do it.

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is no dispute that Orlando has properly exhausted his Confrontation Clause claim for federal habeas review.

[11] Orlando pursues only his Confrontation Clause challenge on appeal. *See generally* Pet. Br.

Orlando v. Nassau Cty. Dist. Atty's Office, 246 F. Supp. 3d 569, 572–73 (E.D.N.Y. 2017).[12]

Relying principally on *Tennessee v. Street,* 471 U.S. 409 (1985), and *United States v. Logan,* 419 F.3d 172 (2d Cir. 2005), the district court rejected Orlando's Confrontation Clause argument. *Orlando,* 246 F. Supp. 3d at 571–76. The district court reasoned that Jeannot's statement was not offered against Orlando for its truth but only "provided context for explaining why Orlando altered his [original] exculpatory story" to admit that he had in fact been present for the murder but that Jeannot had unexpectedly committed it. *Id.* at 574. The district court also held that any error was harmless. *Id.* at 575–76.

The district court issued a certificate of appealability as to Orlando's Confrontation Clause argument. *Id.* at 578. Orlando then timely filed a notice of appeal.

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[12] The district court did not recount or discuss the portion of McGinn's testimony to the jury that vouched for the truth of Jeannot's statement. T. 620 ("Herva Jeannot was relaying some of the events that really took place that night . . . the truth as to what happened that night."); T. 621 ("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.") (emphasis added). That aspect of McGinn's testimony is discussed later in this opinion.

DISCUSSION

Orlando argues that: (1) without his ability to cross-examine Jeannot, McGinn's testimony recounting Jeannot's statement violated Orlando's Confrontation Clause right; (2) the Appellate Division's ruling to the contrary was "objectively unreasonable;" and (3) the erroneous admission of the testimony was not harmless. We agree. Accordingly, we reverse the district court's denial of Orlando's petition.

I. Standard of Review and Section 2254 Framework

Under 28 U.S.C. § 2254, "a person in custody pursuant to the judgment of a State court" may petition a district court for a writ of habeas corpus "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." *Id.* § 2254(a). We review *de novo* a district court's denial of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *Lynch v. Dolce,* 789 F.3d 303, 311–12 (2d Cir. 2015).

A petition for a writ of habeas corpus "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d). "A state court decision is an 'unreasonable application' of clearly established

federal law 'if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Howard v. Walker,* 406 F.3d 114, 122 (2d Cir. 2005) (quoting *Williams v. Taylor,* 529 U.S. 362, 413 (2000)). However, that bar is not reached where "fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter,* 562 U.S. 86, 101 (2011) (internal quotation marks and citation omitted).

II. The Confrontation Clause Violation

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. ""The crux of this right is that the government cannot introduce at trial" an out-of-court witness's "statements containing accusations against the defendant unless the accuser takes the stand against the defendant and is available for cross examination.'" *United States v. Jass,* 569 F.3d 47, 55 (2d Cir. 2009) (quoting *Ryan v. Miller,* 303 F.3d 231, 247 (2d Cir. 2002)) (internal quotations omitted). To implicate the Confrontation Clause, the statement must be used to prove the truth of the matter asserted, and the statement must be "testimonial." *Davis v. Washington,* 547 U.S. 813, 821–22 (2006) (citing *Crawford v. Washington,* 541 U.S. 36, 51 (2004)). In other words, it must be "testimonial hearsay." *Id.* at 823.

Out-of-court statements may have a proper purpose other than being considered for their truth. The Supreme Court and this Circuit have acknowledged that a trial court's instruction to a jury to consider only for a limited, nonhearsay purpose the non-testifying witness's out-of-court statement "is generally sufficient to eliminate . . . Confrontation Clause concern[s]." *Jass,* 569 F.3d at 55 (citing *Richardson v. Marsh,* 481 U.S. 200, 206 (1987)). That is because "[t]he law 'almost invariabl[y] assum[es]' that jurors follow such limiting instructions." *Id.* (quoting *Richardson,* 481 U.S. at 206).

"Nevertheless, in *Bruton v. United States,* . . . the Supreme Court identified an exception to th[e] assumption" that jurors follow limiting instructions. *Id.* In *Bruton v. United States,* 391 U.S. 123, 124 (1968), the defendant Bruton and his codefendant were tried jointly for armed postal robbery. A postal inspector testified that the codefendant confessed to him that Bruton and the codefendant committed the robbery together. *Id.* The codefendant did not take the stand, so he could not be cross-examined. *Id.* at 128. The district court provided a limiting instruction to the jury that "although [the codefendant's] confession was competent evidence against [the codefendant] it was inadmissible hearsay against [Bruton] and therefore had to be disregarded in determining [Bruton's] guilt or innocence." *Id.* at 125.

The Supreme Court reversed Bruton's conviction, holding that because his codefendant was not subject to cross examination and "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [Bruton's] guilt," admission of the codefendant's confession in front of Bruton's jury violated Bruton's "right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Id.* at 126.

The Court further explained that "[n]ot only are [alleged accomplices'] incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice . . . does not testify and cannot be tested by cross-examination." *Id.* at 136.

As a result, when a non-testifying witness's confession "expressly" implicates the defendant, "the risk that the jury will not, or cannot, follow instructions [to limit its consideration of the evidence for a proper purpose] is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Richardson,* 481 U.S. at 207–08 (quoting *Bruton,* 391 U.S. at 135–36). When a jury hears such express incriminations, even if given a "clear" limiting instruction, "the effect is the

same as if there had been no instruction at all." *Bruton,* 391 U.S. at 137.

Although the non-testifying witness in *Bruton* was a codefendant in a joint trial, *Bruton* applies equally to the testimonial and incriminating statements of non-testifying accomplices tried separately. *See Crawford,* 541 U.S. at 57, 69 (stating that testimonial statements admitted without the opportunity to cross-examine the declarant violate the Confrontation Clause and referring to *Bruton* as barring "accomplice confessions where the defendant had no opportunity to cross-examine"); *Tennessee v Street,* 471 U.S. 409, 411, 414–15 (1985) (recognizing that if the jury had been asked to infer that the confession of the non-testifying accomplice—who was tried separately—proved that the defendant participated in the murder, "Confrontation Clause concerns would have been implicated").

Here, the Appellate Division correctly acknowledged that, absent cross-examination of Jeannot, admission of his facially incriminating statement risked violating the Confrontation Clause, as was recognized in *Bruton*.[13] *People v. Orlando,* 61

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[13] Although the Appellate Division did not cite Bruton or articulate its holding, a state reviewing court need not to do so in order for it to be considered to have applied the constitutional principles set forth in Supreme Court precedent. See, e.g., Mitchell v. Esparza, 540 U.S. 12, 16 (2003) ("[A] state court need not even be aware of our precedents, so long as neither the reasoning nor the result of the state-court decision

A.D.3d at 1002. However, the Appellate Division reasoned that the jury would use this evidence 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 events of the night of the murder. *Id.*

That conclusion by the Appellate Division was an unreasonable application of *Bruton*. McGinn led the jury to believe that Jeannot had actually made the statement McGinn recounted, and that statement expressly inculpated Orlando as Jeannot's accomplice in the murder. *Bruton* plainly instructs that the jury could not be presumed to disregard Jeannot's statement for its truth, even with a limiting instruction.[14]

A. Jeannot Was an Out-of-Court Witness

The state argues in its brief that "[n]either McGinn nor McHugh ever testified that Jeannot actually made the statements at issue,"

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contradicts them.") (internal quotation marks and citation omitted). The Appellate Division did cite *Tennessee v. Street,* 471 U.S. 409 (1985), which is discussed later in this opinion.

[14] In addition, there is no doubt that Jeannot's statement was "testimonial." *See Davis,* 547 U.S. at 821–22 (holding that statements made "in the course of police interrogation" are testimonial when made under "circumstances objectively indicat[ing] . . . that the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution").

Respondent's Br. at 29–30; in other words, that Jeannot was not an out-of-court "witness" within the meaning of the Confrontation Clause, *see Davis,* 547 U.S. at 821–22. And so, the state contends, the situation here was no different than a jury merely hearing that an investigator had used deception to elicit a confession.

The state is incorrect; of course the prosecution led the jury to believe that Jeannot had actually made the statement McGinn recounted. McGinn testified that, "I knew Detective McHugh was in talking to Mr. Herva Jeannot," and that, "I believe that Herva Jeannot was relaying some of the events that really took place that night." T. 620. The prosecution never disavowed that Jeannot had made the statement, and it even recounted the statement in its summation. And that very statement was the reason for the *Bruton* severance in the first place. Thus, Jeannot was indeed an out-of-court "witness" subject to the cross-examination requirements of the Confrontation Clause.[15]

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[15] A witness need only recount the critical substance of the out-of-court statement to implicate the Confrontation Clause. See Ryan v. Miller, 303 F.3d 231, 248–49 (2d Cir. 2002) (granting section 2254 petition due to non-harmless Confrontation Clause violation, stating that "[i]f the substance of the prohibited testimony is evident even though it was not introduced in the prohibited form, the testimony is still inadmissible," and collecting cases); Ocampo v. Vail, 649 F.3d 1098, 1108–11 (9th Cir. 2011) ("Supreme Court law . . . clearly establishe[s] that testimony from which one could determine the critical content

B. The Admission of Jeannot's Statement Was Clearly Barred by B*ruton*

With the jury having heard this expressly incriminating statement from Jeannot, the only reasonable conclusion was that the Confrontation Clause was violated under *Bruton*. 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. Indeed, "the overwhelming probability" of jurors' inability to "thrust out of mind" express "testimony that 'the defendant helped me commit the crime' . . . *is the foundation of Bruton." Richardson,* 481 U.S. at 208 (emphasis added); *see also 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.") (internal quotation marks and citation omitted) (overruling *Delli Paoli v. United States,* 352 U.S. 232 (1957), and adopting the reasoning of the dissent in that decision).

The Confrontation Clause violation here is even clearer than in *Bruton*. Detective McGinn did not merely recount Jeannot's confession implicating Orlando; he also vouched for its veracity. McGinn testified, "I *believe* that Herva Jeannot was relaying

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of the out-of-court statement [is] sufficient to trigger Confrontation Clause concerns.").

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."[16] T. 621 (emphasis added). That testimony by McGinn made it even less likely than in Bruton that the jury would have obeyed the trial court's limiting instruction. See, e.g., *United States v. Forrester,* 60 F.3d 52, 63–64 (2d Cir. 1995) (discussing the prejudicial impact of government agents vouching for witnesses).

Likewise, the prosecution's summation further undermined any possible effectiveness of the limiting instruction when it reminded the jury of its murder-for-hire theory three times and specifically called to its attention McGinn's testimony that he told Orlando, "[Jeannot's] telling us everything . . . . He's telling us he did the shooting and you paid him." T. 895. But, as discussed below with regard to the harmless error analysis, the evidence—other than Jeannot's statement—that Orlando had hired Jeannot to murder Calabrese, was weak. Thus, the

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[16] We acknowledge that the latter statement could possibly be read as McGinn explaining only to Orlando rather than to the jury that McGinn and McHugh believed Jeannot was telling the truth about Orlando's involvement the murder. However, there was no such ambiguity with regard to McGinn's first statement that he believed Jeannot was relaying what "really took place that night." T. 620.

likelihood that the jury credited Jeannot's statement was higher even than in *Bruton,* where the Supreme Court did not suggest that the prosecution had undermined the limiting instruction.[17]

In opposing Orlando's petition, the state relies primarily on the Supreme Court's decision in *Tennessee v. Street,* 471 U.S. 409 (1985). In *Street,* the defendant, Street, was tried for murder separately from his alleged accomplice, Peele. *Id.* at 411. Street had confessed during an interview with police to participating in a burglary and the murder with Peele. *Id.*

In its case-in-chief, the state introduced Street's confession. *Id.* Street then took the stand during his defense case, and he testified that the police had coerced his confession and that he had not been involved in the murder. *Id.* Street claimed that the police had shown him Peele's confession during his interview and forced Street to give the same account as Peele. *Id.*

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[17] We note also that the limiting instruction was decidedly unclear. The trial court instructed the jury to consider the testimony at issue when considering "the circumstances under which Orlando made any statements." T. 624. McGinn, however, had just told the jury that the "circumstances" which led him to resume interrogating Orlando were that "Herva Jeannot was relaying some of the events that really took place that night." T. 620. By contrast, even in Bruton, the jury instructions were "concededly clear." Bruton, 391 U.S. at 137.

The trial court then permitted the state to introduce in its rebuttal case Peele's confession through the testimony of Sheriff Papantoniou, the police officer who had taken it. *Id.* at 411–12. The state showed the obvious differences between the two statements to discredit Street's testimony that his confession had been coerced and that the statements' claimed similarities demonstrated the coercion. *Id.* at 412. Both at the time the police officer recounted Peele's statement and in its jury instructions, the trial court instructed the jury that Peele's statement was admitted not for its truth, but rather only to rebut Street's contention that his confession was coerced. *Id.* Peele did not testify at Street's trial and, thus, could not be cross-examined about his statement.

The Supreme Court affirmed Street's murder conviction. *Id.* at 417. According to the Court, "[t]he nonhearsay aspect of Peele's confession—not to prove what happened at the murder scene but to prove what happened when respondent confessed—raises no Confrontation Clause concerns. The Clause's fundamental role in protecting the right of cross-examination . . . was [thus] satisfied by Sheriff Papantoniou's presence on the stand." *Id.* at 414. After all, the Supreme Court stated, "[i]f [Street's] counsel doubted that [the accomplice's] confession was accurately recounted, he was free to cross-examine the Sheriff. By cross-examination [Street's] counsel could also challenge Sheriff Papantoniou's testimony that he did not read from Peele's

statement and direct respondent to say the same thing. In short, the State's rebuttal witness against [Street] was not Peele, but Sheriff Papantoniou." *Id.*

The Court in Street went on to acknowledge that its conclusion depended on the "crucial assumption" that the jurors followed the trial court's limiting instructions. *Id.* at 415. There, as in *Bruton,* Street's accomplice had expressly implicated him in the crime. But unlike in *Bruton,* Street had placed the state in the position of not being able to effectively challenge Street's testimony that his confession was coerced. And "the State's most important piece of substantive evidence was [Street's] confession." *Id.* The only available way to rebut Street's contention of a coerced confession was to compare Peele's confession with Street's; if they were different, that would tend to show that Street's coercion testimony was not credible. *See id.* at 415–16. And so, if the trial court in Street had not allowed the accomplice's confession to be brought before the jury, that "would have been at odds with the Confrontation Clause's very mission—to advance the accuracy of the truth-determining process." *Id.* at 415.

Thus, the Court in Street found, unlike in Bruton, that there were "no alternatives [but allowing admission of the accomplice's confession] 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 evidence." *Id.*

Notably, in its conclusion, the Court in Street also took care to emphasize that the "prosecutor's questions and closing argument" had done nothing to distract the jury from the accomplice confession's "distinctive and limited purpose." *Id.* at 417. It was only *"in this context"* that the trial judge's instructions were sufficient to prevent a Confrontation Clause violation. *Id.* (emphasis added).

This case is very different from *Street*. The prosecution argued that Jeannot's statement merely showed "context" for why Orlando changed his statement. But Jeannot's statement went far beyond any limited value in showing why Orlando changed his account of what happened that night. The prosecution elicited testimony from Detective McGinn that Jeannot had actually made the incriminating statement, and McGinn vouched for Jeannot's account. In its summation, the prosecution also repeated Jeannot's statement, and pressed its murder-for-hire theory.

Moreover, the prosecution's need for the purported "context" was of little importance as compared to the need in *Street*. Orlando's changing his account of the homicide was no different than many investigations when suspects make a series of statements; absent the substance of Jeannot's statement, the jury still could have learned that after several hours of interrogation, Orlando revised his story and placed himself at the scene of the murder and admitted to lying about his original

account. That approach would have significantly advanced the prosecution's case without a critical narrative gap and, accordingly, the "truth-seeking function" of the trial would not have been impeded in a way comparable to *Street*. *See id.* at 415–16. Nor did Orlando take the stand at his trial, and so 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.

To extend *Street* to the situation presented here would eviscerate the core protection of *Bruton*. To allow admission of Jeannot's statement through McGinn would permit the admission of inculpatory statements of non-testifying codefendants whenever the defendant changed his initial statement to investigators after investigators told the defendant of an accomplice's incriminating confession. The prosecution would need only then argue to the trial court that the other confession was being shown to the jury just to show why there were changes to the original statement.[18] [19]

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[18] The state also contends that the admission of Jeannot's statements established "the voluntariness of [Orlando's] statements." Respondent's Br. 30–31, 35. But, unlike Street, Orlando did not contest their voluntariness at trial. And, there was other evidence that Orlando's statements were voluntary. The detectives testified that Orlando was advised of his *Miranda* rights and agreed to speak with them, and Orlando indicated that he understood his *Miranda* rights, was willing to give a statement without speaking with a lawyer or having one

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We hold that the Appellate Division unreasonably applied *Bruton* in concluding that Orlando's Sixth Amendment right to cross-examine a witness against him was not violated when the jury heard of Jeannot's statement implicating Orlando in the murder. To the extent that the Appellate Division applied Street, it also extended that decision unreasonably.[20]

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present, and that he was "mak[ing] the . . . statement[s] freely and voluntarily." T. 546.

[19] Other circuits have also recognized that *Street* does not permit the admission of an out-of-court accomplice statement merely because it may have some purpose other than for its truth. See, e.g., *Thomas v. Hubbard,* 273 F.3d 1164, 1172–73 (9th Cir. 2001) (granting section 2254 petition due to Confrontation Clause violation and other constitutional errors, and stating that "[e]ven if the statements [we]re classified as non-hearsay, they are sufficiently prejudicial that the jury would be unable to consider them only for limited purposes and would consider them for their truth in violation of the Confrontation Clause") (abrogated on unrelated grounds by *Payton v. Woodford,* 299 F.3d 815, 828–29 n.11 (9th Cir. 2002), which the Supreme Court then vacated, 538 U.S. 975 (2003)); *cf. United States v. Taylor,* 569 F.3d 742, 750 (7th Cir. 2009) (finding no Confrontation Clause violation because the out-of-court statements were nonhearsay and there were no "complicating circumstances, *such as a prosecutor who exploits nonhearsay statements for their truth*") (internal quotation marks and citation omitted) (emphasis added).

[20] The state's reliance on *United States v. Logan,* 419 F.3d 172 (2d Cir. 2005), is also misplaced. In *Logan*, the coconspirators'

III. The Error Was Not Harmless

As Orlando and the state agree, the improper admission of evidence in violation of the Confrontation Clause is subject to review for harmless error. *Hendrix v. Smith,* 639 F.2d 113, 115 (2d Cir. 1981) (citing *Chapman v. California,* 386 U.S. 18 (1967); *Schneble v. Florida,* 405 U.S. 427 (1972)). When a state court makes a harmless error determination on direct appeal, we owe the "harmlessness determination itself" deference under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Ayala,* 135 S. Ct. at 2199. Here, because the Appellate Division did not determine that the admission of McGinn's testimony as to Jeannot's statements was harmless, we owe no deference to the Appellate Division on that issue. *E.g., Cotto v. Herbert,* 331 F.3d 217, 253 (2d Cir. 2003) ("In this case, harmless error was never reached in the state courts, and there is therefore no state ruling which commands AEDPA deference.").

An error was harmless unless it resulted in "actual prejudice," *Davis v. Ayala,* 135 S. Ct. 2187, 2197 (2015) (quoting *Brecht v. Abrahamson,* 507

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statements concerning an alibi were admitted only to show the existence of a conspiracy. *Id.* at 176–78. Moreover, the statements were not admitted for their truth but—to the contrary—were shown to be untruthful. *Id.* Here, Jeannot's statement—as recounted by Detective McGinn—was consistent with the state's theory and was specifically utilized by the state to support that theory.

U.S. 619, 637 (1993)), meaning that a court has "grave doubt about whether" the error "had 'substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 2198 (quoting *O'Neal v. McAninch,* 513 U.S. 432, 436 (1995)). This "*Brecht* standard" requires "more than a 'reasonable possibility' that the error was harmful." *Id.* (quoting *Brecht,* 507 U.S. at 637).

We have little doubt that the improperly admitted testimony as to Jeannot's statement had such a powerful effect on the jury. The prosecution's theory was that Orlando was guilty of murder for acting as Jeannot's accomplice by paying Jeannot to shoot Calabrese and helping Jeannot to do so. The trial judge instructed the jury that, to convict Orlando, the prosecution had to prove that Orlando acted in concert with Jeannot. The state argues that, even absent admission of Jeannot's confession through McGinn's testimony, the evidence of Orlando's guilt was "nothing short of overwhelming." Respondent's Br. at 47.

In support, the state contends that Orlando's $17,000 gambling debt to Calabrese was compelling evidence of motive; that the hundred-dollar bills found in the homes of both Orlando and Jeannot after the murder were evidence of the murder-for-hire transaction; and that forensic testimony as to the location of bullet holes in Calabrese's sweatshirt showed that Orlando pulled the sweatshirt over Calabrese's head before Jeannot shot him. Finally, the state emphasizes that the video evidence, as well

as cell site evidence, showed that Orlando was at the location where the homicide occurred. We address these arguments in turn.

A. Evidence of Motive

Although it was undisputed that Orlando owed Calabrese $17,000, the evidence showed that Orlando had won $27,000 in the month prior. Accordingly, he had net winnings of $10,000 over a six-week period. Moreover, the evidence showed that Orlando had $2,700 in cash in his residence after the murder (and after he purportedly paid Jeannot to commit the murder). And so, the evidence that Orlando lacked the funds to pay Calabrese was slight.[21]

Moreover, it strains credulity that Orlando would have believed that murdering a courier in an illegal gambling operation would erase a gambling debt of $17,000 and prevent attempts by the other members of the gambling operation to seek payment. The prosecution argued that Orlando's plan was to murder Calabrese and then claim to Calabrese's superiors in the illegal sports betting organization that he had paid Calabrese (and that Calabrese must have been robbed and murdered by someone else). But it certainly is not obvious that Orlando would have thought such a plan would work.

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[21] The state also did not introduce evidence of Orlando's bank records at trial.

B. Evidence of a Murder-for-Hire Transaction

Similarly, the discovery of a small number of one-hundred-dollar bills in the homes of both Orlando and Jeannot after the murder was not particularly probative of a murder-for-hire transaction. The state asserts that the hundred-dollar bill design with "the large picture of Ben Franklin" was "then new" and, thus so rare as to mean Jeannot's bills likely came from Orlando. Respondent's Br. at 48. But that design began circulating in 1996,[22] eight years before the murder of Calabrese. A jury thus would not have found it remarkable that the bills in both homes had the same design. Nor did the U.S. currency found in Jeannot's home have any fingerprints, sequential serial numbers, or DNA that might have linked them to a transaction between Orlando and Jeannot.

In addition, only $500 in bills was found in Jeannot's home. It is entirely unclear why Jeannot would accept only $500 to commit a murder, particularly given that Jeannot undisputedly knew Orlando owed Calabrese many times that amount. The prosecution suggested that the $500 found in Jeannot's home may have been only a small portion

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[22] *See, e.g.,* Carl Rochelle, Redesigned $100 Bill Aimed at Foiling Counterfeiters, CNN (Mar. 25, 1996, 1:35 AM), http://edition.cnn.com/US/9603/new_100_bill/index.html (stating that the redesigned $100 bills with a larger Ben Franklin were to go into circulation on March 25, 1996).

of the murder-for-hire payment. But the prosecution presented no theory or evidence as to what may have happened to any cash payment that exceeded the $500 found.

C. Forensic Evidence

We turn next to the expert testimony of two other Nassau County detectives and Nassau County Deputy Chief Medical Examiner DeMartino regarding the bullet holes in Calabrese's sweatshirt. The state argues that forensic evidence clearly established that, just before Jeannot fired the first shot, Orlando pulled Calabrese's sweatshirt over Calabrese's head to help Jeannot shoot him.[23]

We disagree that this evidence was persuasive of Orlando helping Jeannot shoot Calabrese. First, the location of the bullet holes did not clearly establish that Calabrese's sweatshirt had been pulled up over his head at the time the *first* shot was fired. That is the relevant time that, according to the prosecution, Orlando would have been pulling up the sweatshirt. The first shot undisputedly went through Calabrese's right forearm, making holes only in his sweatshirt sleeve, and the bullet then lodged in the right side of Calabrese's head. The prosecution suggested to the jury that Orlando had pulled the

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[23] The district court agreed with that argument, stating that the forensic evidence gave rise to "an inescapable inference . . . that Orlando . . . pulled the sweatshirt over Calabrese's head." *Orlando,* 246 F. Supp. 3d at 576.

sweatshirt so far over Calabrese's head that the back of his head was exposed, allowing the first bullet to pass through the sleeve without creating any other holes in the sweatshirt. That is possible, but that evidence is just as—if not more—consistent with Calabrese, for example, putting up his arms in a defensive position, and the first bullet passing through his right sleeve and arm, and then, into his uncovered[24] head. Indeed, the medical examiner DeMartino concluded that the wound in Calabrese's right arm was consistent with Calabrese having raised his arm in a defensive manner prior to the first shot being fired. Or, even if the sweatshirt had been pulled up, it could have been done by Jeannot prior to shooting Calabrese.

By contrast, the forensic evidence was clearer that at the time the second and third shots were fired into the back of Calabrese's head, his sweatshirt was pulled up over his head. There were holes in the back of Calabrese's sweatshirt that matched up with the bullet wounds in the back of his head. But, it is not disputed that at the time the second and third shots were fired, Calabrese was already lying, face-down, on the ground from the effect of the first shot. Maybe Orlando pulled the

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[24] Nassau County Forensic Evidence Bureau Detective Kovar, whom the prosecution called to testify as to trace forensic evidence at the scene of the crime, agreed that the hood of the sweatshirt was not covering Calabrese's head at the time the first shot was fired.

sweatshirt over Calabrese's head after the first shot; maybe it was Jeannot who pulled up the sweatshirt at this point to avoid blood splatter; or maybe the sweatshirt came upward as Calabrese fell to the ground and struggled after the first shot. In any event, the only obvious conclusions from the sweatshirt and autopsy evidence were that Calabrese was first shot by Jeannot from behind, while he was standing up, and then twice more while lying on the ground, with the sweatshirt over his head for the second and third shots. But it is far from clear how the sweatshirt ended up over his head.

The state introduced no other forensic evidence pointing to Orlando, such as DNA, fingerprints, or blood in his car or on his clothing. In sum, the forensic evidence to support the prosecution's accomplice theory was insubstantial.

D. Orlando's Choice of a Meeting Location

The evidence that Orlando chose a discreet meeting location to pay his debt to Calabrese was also only minimally probative of his guilt. Orlando told investigators that he and Calabrese had arranged to meet on December 3 in Island Park, and that he called Calabrese shortly beforehand to change the meeting to a more secluded place because there were several people within sight of the planned meeting location.

Jurors could have credited Orlando's choice of meeting location as part of a plan to murder

Calabrese, but they could also reasonably have accepted that Orlando was concerned about being seen engaging in an illegal $17,000 gambling transaction.

E. Evidence of an Attempt to Create an Alibi

The prosecution also contended that the jury could have construed Orlando's several stops after the murder as evidence of an attempt to manufacture a false alibi. Orlando explained the stops as an attempt to be seen with Jeannot, so that Jeannot could not blame the murder on Orlando. But, a jury could instead have reasonably inferred that, given Jeannot's purported threat to Orlando to maintain his silence, Orlando's behavior after the murder was consistent with an attempt to put Jeannot at ease that Orlando would not report Jeannot's role in the murder.

F. Evidence Orlando Was at the Murder Scene

Lastly, we acknowledge that the prosecution needed only to convict Orlando of murder and not to prove specifically its murder-for-hire theory. In that regard, the state emphasizes, for example, the evidence that Orlando was present at the murder scene. In addition, Orlando's coworker Barbara Diamant testified that Orlando told her the morning after the homicide that Calabrese had been shot in the back of the head three times, before this became public information. However, that Orlando was present for the murder was not disputed by him in his second statement or at trial, and as discussed

above, the evidence that Orlando assisted the murder in some way was made substantially stronger by Jeannot's incriminating confession.

* * *

In sum, considered both in isolation and cumulatively, the properly admitted evidence of Orlando's guilt leaves us with "grave doubt" about whether the trial court's error substantially and injuriously influenced the jury's verdict. See *Davis,* 135 S. Ct. at 2198. McGinn's testimony of Jeannot's incriminating statement was essential in persuading the jury of Orlando's guilt and meets the bar set by the *Brecht* standard. Accordingly, the constitutional error in this case was not harmless.

CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's denial of Orlando's petition, and **REMAND** the case to the district court with instructions to issue a writ of habeas corpus to Orlando on the sixtieth calendar day after the issuance of our mandate unless the District Attorney of Nassau County has, by that time, taken concrete and substantial steps to expeditiously retry Orlando. The mandate shall issue forthwith.

SHEA, *District Judge,* dissenting:

I respectfully dissent. Federal habeas relief is available under Section 2254 only to remedy "extreme malfunctions in the state criminal justice systems" in "cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Harrington v. Richter,* 562 U.S. 86, 102–03 (2011). The New York court's application of *Tennessee v. Street,* 471 U.S. 409 (1985), the Supreme Court decision most pertinent to this case, does not satisfy that demanding standard because it reflects a reasonable accommodation of the competing interests identified in that decision. The *Street* Court held that the Confrontation Clause's "mission" is "to advance the accuracy of the truth-determining process in criminal trials," and that to fulfill that mission, trial judges must attend to *both* "assur[ing] the integrity of the trial's truth-seeking function *and* eliminat[ing] the risk of the jury's improper use of evidence." *Id.* at 415 (emphasis added). Here, the state trial judge reasonably applied the first of those two principles by admitting the detective's account of Jeannot's accusation for the proper, non-hearsay purpose of allowing the State to counter the defendant's explanation about why he changed his story. Excluding that evidence would have enhanced the credibility of Orlando's second version of events, which was the one his lawyer urged the jury to adopt, and thus frustrated the trial's truth-seeking function. The trial judge

also reasonably applied the second principle by twice giving a detailed limiting instruction that the jury was not to consider Jeannot's accusation for its truth and, indeed, not to consider whether he had made it at all. While I acknowledge that this case is harder than *Street,* I conclude that fairminded jurists could disagree on whether the state court properly applied that decision and thus that the district court properly denied the writ.

I

The majority's recounting of the record is thorough, but I offer two clarifications to explain my views.

First, Orlando's trial counsel did not object to all of Detective McGinn's testimony about the interview with Jeannot. Indeed, he used a portion of it to bolster Orlando's explanation that he changed his story and told the truth once his fear of Jeannot had lifted after he learned that Jeannot had confessed. The issue involved in this appeal first arose when the State sought a ruling *in limine* to admit Detective McGinn's testimony that "I confronted [Orlando], I told him that [Jeannot's] giving it up and he's telling us he did the shooting and he's telling us you made him." T. 164. During the *in limine* proceeding, the prosecutor told the trial judge that the purpose of this testimony would be "to establish the context in which the defendant all of a sudden changes his initial story . . . ." *Id.* Defense counsel then made his Confrontation Clause

objection, pointing out that there had been a *Bruton* severance "to protect the defendant not being able to cross examine any statements that would be used against him in this case such as the codefendant's Herva Jeannot . . . perhaps even six as a number of statements that Mr. Jeannot had made." T. 165.[1] Specifically addressing the prosecutor's motion, he then stated as follows:

> "[I]f we're talking perhaps about one of the last statements that Mr. Jeannot had made regarding . . . giving it up or giving up the entire thing, opposed to that Mr. Jeannot had shot Mr. Calabrese, obviously I have no opposition to that. However, it's a matter of how much of that statement is going to be permitted . . . . But, I think in regard to what is being said and being [pared] down, I have no opposition to the fact Mr. Jeannot had indicated that Mr. Jeannot was present and Mr. Jeannot shot him. But I think anything in addition to that, again, is prejudicial. It violates my ability and right to cross-examine the individual that is now accusing my client

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[1] While the record does not disclose the trial judge's ruling regarding the Bruton severance, defense counsel's reference to "a number of statements" by Jeannot suggests there was more to it than merely eliminating the "payment" statement from Orlando's trial. It is thus not clear from the record that the "payment" statement "was the reason for the *Bruton* severance in the first place." Maj. Op. at 28.

> of that, and I would move to preclude anything in addition to that first portion . . . ."

T. 165–66. In other words, defense counsel did not object to the portion of McGinn's statement that Jeannot said he shot Calabrese but did object to the portion that Jeannot said Orlando paid him to do it.[2] That was a sensible trial strategy, because the former portion supported Orlando's second version of events and his explanation that he lied initially out of fear of Jeannot and came clean once he learned that Jeannot had confessed. Defense counsel harped on this latter theme in both his opening statement and closing argument. T. 205 ("It's not until Herva Jeannot tells the detective that Herva Jeannot himself had shot Mr. Calabrese, that Mark then felt at ease that now they're not going to come after Mark."); T. 851 ("And there is no question Mark met with Detective McHugh, and he lied about certain things to Detective McHugh. No question, not disputing that. And you heard from Detective McGinn, what happened, we will go over that a little bit, before Mark finally says, now I feel safe. Now I can tell you what happened. I don't want to be the first one, that Herva Jeannot killed Calabrese. I don't want him coming after my family.").

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[2] I do not read defense counsel's later, summary reference to his objection as changing his position on the lack of objection to the portion of McGinn's statement that Jeannot said that he shot Calabrese. T. 591.

Second, the trial judge's ruling admitted only the statements by McGinn identified by the prosecutor in the pretrial hearing, i.e., that "I confronted [Orlando], I told him that [Jeannot's] giving it up and he's telling us he did the shooting and he's telling us you made him." T. 164–67. The ruling did not permit McGinn to give the vouching testimony stressed by the majority, i.e., that "I believe that Herva Jeannot was relaying some of the events that really took place that night." T. 620. *That* testimony was problematic, but not primarily because it violated the Confrontation Clause; it was inadmissible on multiple grounds – lack of personal knowledge (McGinn was not in the room with Jeannot), opinion by a lay witness ("I believe . . . ."), and vouching for another's statement (regardless of its content). Despite these obvious flaws, however, defense counsel did not object to it, move to strike it, seek a mistrial, or ask for an instruction that the jury disregard it – perhaps because it also vouched for the portion of Jeannot's alleged statement that defense counsel would use to his client's advantage – that Jeannot said he shot Calabrese. Nor did Orlando raise McGinn's vouching statement in the appeal of his conviction, his habeas petition before the district court, or his appeal brief in this Court. While it is still proper to consider it under *Street* – because it goes to the risk that the statement "Orlando paid him to do it" would be misused by the

jury (which I discuss below) – it is important to note that the trial judge's pretrial ruling applying *Street* did not authorize McGinn's vouching statement.[3]

II

Orlando contends that the Appellate Division unreasonably applied *Bruton* and *Street* when it held that admitting the detective's statement that "[Jeannot] said that he was the murderer but that Mark Orlando had paid him to do it" did not violate the Confrontation Clause.[4] Whether that is so boils down to two questions: (1) was there a proper non-hearsay purpose for the statement, which requires considering the degree to which exclusion of the detective's statement would have impeded the jury "in . . . evaluating the truth of [Orlando's explanation as to why he changed his story] and . . . weighing the

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[3] As I explain below, when placed in context, McGinn's other references to the "truth" and "truer versions" when testifying about Jeannot's interview do not appear to have been attempts to vouch for Jeannot to the jury.

[4] Orlando also argues that the Appellate Division's ruling was an unreasonable application of *Crawford*. But *Crawford* is of limited guidance in addressing the factual situation here, except insofar as it reaffirms Street's holding that admission of out-of-court statements for nonhearsay purposes does not violate the Confrontation Clause. Crawford, 541 U.S. at 59 n.9 ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *See Tennessee v. Street,* 471 U.S. 409, 414 (1985).").

reliability of his [second and third statements to the police]"; and (2) if so, could the statement nonetheless "have been misused by the jury"? *Street,* 471 U.S. at 414. *Street* suggests that the second question involves consideration of (1) the trial court's limiting instructions; (2) whether the prosecutor made proper use of the statement during the trial; and (3) 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." *Id.* at 415–16. There is at least a "possibility fairminded jurists could disagree" about whether the New York courts properly answered these questions.

Proper Purpose

The non-hearsay purpose here was similar to the one that prevailed in *Street:* to shed light on the credibility of Orlando's second statement to the police. *See Street,* 471 U.S. at 415 ("Had the prosecutor been denied the opportunity to present Peele's confession in rebuttal so as to enable the jury to make the relevant comparison, the jury would have been impeded in its task of evaluating the truth of respondent's testimony and handicapped in weighing the reliability of his confession."). Orlando claimed that he had lied in his first statement out of fear of Jeannot, but once told of Jeannot's confession, his fear lifted and he gave a truthful account in his

second statement.[5] The State would have had no answer to the fear-dissipation narrative had the trial judge sustained defense counsel's objection and excluded only the portion of McGinn's statement in which he said Jeannot implicated Orlando in the murder. Orlando started hinting at his alleged fear of Jeannot as soon as McGinn told him that "Detective McHugh was over there talking to Herva [Jeannot] and he was probably giving us, you know, other facts that happened that night, the truth as to what happened that night." T. 620. At that point, for the first time, Orlando said, "detective, you don't understand," a refrain he then repeated several times before telling McGinn that "he was afraid for his family" and slept next to a shotgun. *Id.* at 623. According to McGinn's testimony, it was not until McGinn added "[Jeannot] stated he was the murderer but that Mark Orlando paid him to do it" that Orlando finally stated "okay, I will tell you the truth" and "then began to tell [McGinn] another version of events that happened that night." *Id.* at 624–25.

That sequence fit both the State's account that Orlando changed his tune only when told he was being accused and Orlando's account that he did so because Jeannot's confession meant he was no longer

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[5] As the majority notes, the second statement was followed by a substantially similar third, written statement. While there were differences between the two the prosecutor stressed in closing argument, they are not material to my dissent.

a threat. But 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 second statement would have been enhanced. And Orlando's defense hinged on the credibility of that statement. In his closing argument, defense counsel focused on convincing the jury that Orlando's second statement was truthful and that his first had been a lie born of his fear of Jeannot. T. 845 ("[E]verything that Mark Orlando had told Detective Cereghino is corroborated by the sixty or so exhibits introduced into evidence. Everything here supports what Mark had said."); *id.* ("Herva . . . [t]hreatened to kill his wife if he said anything. . . . Here's a vicious murder. Why didn't Mark go to the police. I think you see now the answer to that. When I discussed how it was that he gave the first version to the one detective, McHugh, and then to Detective McGinn, finally to Detective Cereghino."). That narrative would have been much more persuasive if supported by the piece of McGinn's testimony defense counsel wanted before the jury – that McGinn told Orlando that Jeannot had confessed to the shooting – and left unrebutted by the remaining piece defense counsel wanted out – McGinn's testimony that Jeannot was also implicating Orlando. Had the trial judge excluded the portion of McGinn's testimony to which defense counsel objected, "the jury would have been impeded in its task of evaluating the truth of [the defendant's second statement]." *Street,* 471 U.S. at

415. The Appellate Division's affirmance of the trial judge's ruling thus reflects a reasonable application of *Street*.

To be sure, the trial judge could have excluded *all* testimony about confronting Orlando with the Jeannot interview – leaving both sides with no explanation about why Orlando changed his story – but no one asked him to do so. And no one asked the Appellate Division to decide whether the he should have done so *sua sponte*. As presented to the New York courts, the issue was limited to whether McGinn could recount Jeannot's statement that Orlando had paid him to commit the murder. Orlando's trial counsel explicitly declined to object to the portion of Jeannot's statement in which he implicated himself. T. 165–166 ("I have no opposition to the fact Mr. Jeannot had indicated that Mr. Jeannot was present and Mr. Jeannot shot him.").

The majority points out that Orlando did not take the stand at his trial. Thus, unlike in *Street,* the State was not forced to rebut a defendant's testimony. But the Court's opinion in *Street* does not suggest that its sanction of non-hearsay use of an accomplice's statement turned on the defendant's election to testify in that case. Nor does it suggest that the government may use such a statement to attack the credibility of a defendant's statements

only when the defendant offers them.[6] It was not unreasonable for the Appellate Division to read *Street* as allowing non-hearsay use of an accomplice's statement to attack the credibility of, or provide context for, a defendant's statements offered in the government's case in chief. Indeed, several federal courts of appeal have interpreted *Street* the same way. *See, e.g., Lee v. McCaughtry,* 892 F.2d 1318, 1325 (7th Cir. 1990) (reversing order granting habeas relief where state introduced tape of prosecutor's recounting of accomplice's statement to "place into context for the jury the metamorphosis of [the defendant's] accounts of events that took place at the murder scene": "Since the prosecutor's account of [the accomplice's] statements were offered not for the truth of those statements, but to explain the context of the defendant's change in his story, they are not hearsay, and, absent complicating circumstances, would not have violated the confrontation clause." (citing *Street*)); *Furr,* 440 F.3d

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[6] The two concurring justices in *Street* did make that suggestion, but their views did not carry the day. *See* 471 U.S. at 417 ("With respect to the State's need to admit the confession for rebuttal purposes, it is important to note that respondent created the need to admit the statement by pressing the defense that his confession was a coerced imitation of [his co-defendant's] out-of-court confession.") (Brennan, J., concurring); *see also Furr,* 440 F.3d at 39 ("As the [*Street*] Court issued a *majority* decision endorsed by six justices, however, and not merely a *plurality* opinion, the concurrence cannot be considered a viable Court holding.").

at 36–41 (state court's application of *Street* "readily passes muster" under Section 2254 where prosecutor introduced accomplice's statement regarding gun and defendant's threatening letter to accomplice in its case in chief to support witness intimidation charge); *Gover v. Perry,* 698 F.3d 295, 307 (6th Cir. 2012) ("Given the fact that there was precedent at the time that providing background to a police investigation through out-of-court statements was a permissible nonhearsay purpose, we must conclude that it was not unreasonable. It is certainly within the large scope of conclusions 'fairminded jurists' could reach, even if others disagreed.").

Risk of Misuse by Jury

While *Bruton* held that courts cannot expect juries to follow limiting instructions when, in a joint trial, they hear a co-defendant's statement implicating a defendant, the Supreme Court has treated that holding as a "narrow exception" to the "almost invariable assumption of the law that jurors follow their instructions." *Richardson v. Marsh,* 481 U.S. 200, 207 (1987). Further, the exception applies "when the facially incriminating confession of a nontestifying codefendant is introduced *at their joint trial." Id.* (emphasis added). *Street* made the same point more generally, stating that "[t]he assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue." *Street,* 471 U.S. at 415 n.6.

Here, the "invariable assumption" that jurors follow limiting instructions applies, because this case is much closer to *Street* than to *Bruton*. First, it was not a joint trial; indeed, like the Court in *Street,* the New York Appellate Division upheld the admission of an accomplice's statement against the defendant after the two had been severed for trial under *Bruton*. Second, again as in *Street,* the statement was not admitted for its truth and the jury was instructed not to consider it for that purpose. In *Bruton,* by contrast, the issue was whether, in a joint trial where a co-defendant's statement implicating both Bruton and the co-defendant was admitted, the jury could follow an instruction to consider the co-defendant's statement *for its truth* against the co-defendant while putting the same statement out of its mind entirely when deciding on Bruton's guilt. *Bruton,* 391 U.S. at 131 ("In joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot segregate evidence into separate intellectual boxes." (internal quotation marks omitted)). The Appellate Division thus properly cited *Street* as the most pertinent Supreme Court precedent here. *People v. Orlando,* 61 A.D.3d 1001, 1002 (N.Y. App. Div., Second Dep't. 2009).

To be sure, applying *Street* properly involves more than just admitting any statement by an accomplice and instructing the jury not to consider it for its truth. Specifically, the Court's analysis in *Street* suggests that, in deciding whether to uphold the admission of an accomplice's out-of-court statement for a non-hearsay purpose under the Confrontation Clause, courts should consider (1) the adequacy of the instructions; (2) the manner in which the out-of-court statement was used at trial, 471 U.S. at 416; and (3) 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 evidence," *id.* at 415. I consider these factors below.[7]

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[7] In its brief ruling, the New York Appellate Division did not canvass these factors, but it did cite Street and point out the non-hearsay purpose of the statement and the trial court's limiting instructions. *People v. Orlando,* 61 A.D.3d 1001, 1002 (App. Div. 2d Dep't 2009). In *Furr v. Brady,* the First Circuit rejected a Section 2254 petition asserting that the state court had unreasonably applied Street because it had failed expressly to consider these factors. *Furr v. Brady,* 440 F.3d 34, 39–40 (1st Cir. 2006)("[T]he [*Street*] Court did not purport to prescribe a mandatory checklist of factors to be considered in every case. Rather, it noted, absent other circumstances, it is sufficient that the codefendant statement is nonhearsay – viz., not admitted for the truth of the matter asserted, and provided the court gives a limiting instruction to that effect. . . . Thus the determination as whether the general rule of admissibility in *Street* applies is assessed case by case, based upon the presence of whatever special circumstances would create an unreasonable risk that the jury disregarded their

1. Limiting Instructions

Both when McGinn's testimony was admitted and in the final charge, the trial judge instructed the jury as follows:

> 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

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instructions."). In any event, the brevity of the Appellate Division's consideration of the issue does not diminish the deference we owe its application of *Street* under 28 U.S.C. Sec. 2254. *Harrington,* 562 U.S. at 98 ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing that there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for Section 2254(d) applies when a 'claim,' not a component of one, has been adjudicated.").

> and may never be considered as evidence against the defendant. You are not to concern yourself with whether Herva Jeannot did or did not make any statements to the police, and if he did, what those statements may have been or whether or not they were true.
>
> I direct you in this regard and I will direct you again in my closing instructions to you.

T. 624; id. at 930–31.[8]

I do not agree that this instruction was "decidedly unclear." Maj. Op. at n.16. On its face, it directs the jurors to disregard for *any* purpose any statement by Jeannot himself, but lets them consider how Orlando reacted when McGinn *told* him that Jeannot had made a statement implicating him. I do not to see how the instruction could have been made much clearer, and, apparently, neither did Orlando's counsel. His trial counsel did not object to the instruction, and his appellate counsel did not challenge it before the Appellate division. T. 136. Federal courts of appeal have found vaguer, less detailed instructions to be reasonable applications of *Street. See Furr,* 440 F.3d at 39 n.3 (holding that the state trial court's limiting instruction was adequate under *Street* even though it had not explicitly

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[8] The first time the trial judge gave this instruction, the transcript does not reflect that he said "and" before "if he did, what those statements may have been or whether or not they were true."

instructed the jury that it could not consider the "truth" of the statement); *Lee,* 892 F.2d at 1321, 1325–26 (upholding the denial of a § 2254 petition where the trial court instructed the jury once – when the evidence was admitted – that "[i]t's a sequence of events. That is one thing that shows why hearsay may be offered just to allow us to see what happened next . . . [Y]ou are not to take as substantive evidence the statement of Mr. Williams, because it is not here in Court. But it is offered to show you what happened next; okay? And not to take it as substantive evidence or as evidence that it actually happened."). *Cf. Adamson v. Cathel,* 633 F.3d 248, 258–259 (3d Cir. 2011) (granting a Section 2254 petition where an accomplice's out-of-court statements were offered against the defendant for a non-hearsay purpose but the state court failed to give any limiting instruction).

The majority contends that McGinn's vouching statement made the instruction unclear, but as noted, that statement was not a product of the trial court's ruling and there was no objection to it or request for an instruction that the jury ignore it. Even so, the trial judge's repeated admonition that the jury was not to consider whether Jeannot made any statement or whether it was true addressed McGinn's improper vouching for Jeannot, which was limited to a single sentence, i.e., "I believe that Herva Jeannot was relaying some of the events that really took place that night." T. 620. McGinn's other statements about "the truth" and "truer versions"

when referring to Jeannot were directed at Orlando, not the jury, and when viewed in context and in the light of the limiting instruction, were part of McGinn's attempt to induce Orlando to provide more detail about the murder. T. 620 ("I went back in and I told Mr. Orlando that Detective McHugh was over there talking to Herva [Jeannot] and he was probably giving us, you know, other facts that happened that night, the truth as to what happened that night. Now would be the time for Mark Orlando to tell us what was going on."); T. 621 ("I went back into the room. . . . Again, I explained to Mr. Orlando that Herva Jeannot was, in fact, giving up the, what we felt were truer versions of the events of Bobby Calabrese's murder. . . . I told him that Herva Jeannot had given up where the gun was and that the defendant should at this point, if he wants his version of the story told tell us the truth at this point.").

Nor do I agree that the prosecutor undermined the trial judge's limiting instructions in his closing argument. Maj. Op. at 31. The prosecutor's only reference to McGinn's testimony about Jeannot's statement was followed immediately by a comment about why Orlando changed his story – the very non-hearsay use for which the testimony was admitted: "And Detective McGinn finally says, look, Herva's giving it up. Herva's telling us everything. So, come on. He's telling us he did the shooting and you paid him. *And the defendant realizes the time is now.* I don't care what story I had together at all. I am

telling the story and he la[t]ches onto it and he can't get it straight." T. 895 (emphasis added.). This was consistent with the trial judge's instruction that the jury was to "consider [McGinn's recounting of Jeannot's] statement only when considering the circumstances under which the defendant himself may have made statements and for no other purpose." T. 930.

2. Use of the Statement at Trial

While he made only one reference to Jeannot's reported statement in his closing argument, the prosecutor made multiple references to Orlando's paying Jeannot, and I agree with the majority that the evidence supporting those references was weak – the presence of similar hundred-dollar bills in both Orlando's and Jeannot's homes. That circumstance makes this case harder than Street, because it raises the possibility that the jury might have, despite the judge's clear instructions, 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. Even clear jury instructions can be ineffective in some circumstances, as *Bruton* and *Street* both teach.

As the majority notes, however, the state did not have to prove that Orlando paid Jeannot to kill Calabrese. What it had to prove was that Orlando aided and abetted the killing, and payment was not an element of that crime. In addition, there was evidence other than payment from which the jury

could have found aiding and abetting – Orlando's soliciting Calabrese to meet in an isolated area, driving Jeannot to and from the scene, and stopping his car to enable Jeannot to take a final shot at Calabrese and discard the gun and ammunition, among others. Determining whether Orlando paid Jeannot was not a necessary part of the jury's task.

Further, the prosecutor's references to payment in closing argument were brief, and his central theme was to emphasize the incriminating parts of Orlando's second statement together with the implausibility of the part in which he cast himself as a surprised bystander at the murder scene rather than an accomplice. *E.g.,* T. 871 ("You don't think Herva Jeannot needed an accomplice, do you. Why would Jeannot need an accomplice. Why would Herva Jeannot need someone to get him in and out of that unfamiliar area. Why would Herva Jeannot need someone to lure Bobby into that desolate corner of Long Beach with the promise of a $17,000 payment. Why would Herva Jeannot need someone to distract Bobby. . . ."); *id.* at 883–85 ("[A]sk yourselves, what would an innocent bystander in that situation have done. . . . Your common sense tells you that an innocent bystander would have been in shock. . . . How about our defendant. . . . He's just seen Herva gun down Bobby. . . . Herva says let's go and what does he do? He climbs into the Verona. . . . The defendant starts to drive around Bobby's dying body. The defendant tells Herva he notices his feet was [sic] still moving, there was a

little life left in him. . . . So I stopped. Herva got out, Herva went over to the body and tried to shoot him a couple more times, but the gun wouldn't go off. So, Herva got back in. I drove him away. Is that the behavior of an innocent bystander in shock over what he's just seen?"); *id.* at 888 ("Now we're pulling up outside [a friend's] house and the defendant gets out of the car and Herva stays in the car. . . . And you have proof beyond any reasonable doubt that the defendant was right in the middle of it. . . . Do you think if the defendant were really an innocent bystander, . . . who had just seen Herva execute Bobby on the street, that Herva would have let the defendant go into the [friend's] house on his own. . . .").

Finally, while I cannot say that there was *no* risk of juror misuse of Jeannot's reported statement in light of the weaknesses in the State's evidence of payment, *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. *Street,* 471 U.S. at 415 ("[T]here were no 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 evidence.").[9] Here, the Appellate Division weighed

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[9] As for "alternatives" to admitting the detective's statement in full, limiting the statement to "Jeannot said he was the murderer" would not have "assured the integrity of the trial's

the risk of misuse against the need to admit the detective's testimony about confronting Orlando with the accomplice's reported statement to enable the jury to consider all the facts bearing on the critical issue of the credibility of Orlando's second statement. It also factored into the balance the trial court's instruction directing the jury to confine its assessment of that evidence to the nonhearsay purpose for which it was admitted. Even if the Appellate Division's ruling ultimately struck the balance incorrectly, it reflected an application of *Street* about which "fairminded jurists could disagree." *Harrington,* 562 U.S. at 101; id. at 101–02 ("For purposes of Sec. 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law. . . . It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." (internal quotation marks omitted)).

For these reasons, I would affirm the judgment of the district court denying the writ.

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truth-seeking function." 471 U.S. at 415. As discussed above, this redaction, which defense counsel sought, instead would have artificially enhanced the credibility of Orlando's second statement by supporting his account that he gave it because Jeannot's own confession had removed his fear that Jeannot would harm him and his wife if he told the truth.

246 F.Supp.3d 569
United States District Court, E.D. New York.

Mark ORLANDO, Petitioner,
v.
NASSAU COUNTY D.A. OFFICE, Respondent.

2:11–cv–3992 (ERK)

|

Signed 03/29/2017

Attorneys and Law Firms

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New York State Attorney Generals Office, Sarah M. Spatt, Nassau County District Attorney's Office, Mineola, NY, for Respondent.

MEMORANDUM & ORDER

KORMAN, J.

The evidence presented at trial demonstrated that, just after 8:30 PM on December 3, 2004, near a self-storage facility in Island Park, New York, Herva Jeannot shot Bobby Calabrese in the head three times, killing him. Jeannot then climbed into the passenger seat of a vehicle driven by petitioner Mark Orlando, who drove him away from the scene of the crime. Calabrese had ventured out to Island Park to

collect a gambling debt from Orlando, who had racked up $17,000 in sports betting losses over the course of the two weeks prior to the killing. Shortly after the killing, Jeannot disposed of the unfired ammunition from his gun by tossing it out of Orlando's car window over the side of a bridge on the Loop Parkway, and then disposed of his firearm by tossing it over the side of a bridge on the Wantagh Parkway. Orlando then drove Jeannot home.

After a jury trial, Orlando was convicted of Intentional Murder in the Second Degree, see N.Y. PENAL LAW § 125.25(1) (McKinney 2017), and sentenced to imprisonment of twenty-five years to life. The Appellate Division affirmed. *People v. Orlando,* 61 A.D.3d 1001, 878 N.Y.S.2d 185 (N.Y. App. Div. 2009), *leave to appeal denied*, 13 N.Y.3d 837, 890 N.Y.S.2d 453, 918 N.E.2d 968. Orlando's petition asserts a variety of grounds for relief, each of which is without merit.

DISCUSSION

I. Orlando's Confrontation Clause Rights

On December 9, 2004, Mark Orlando was arrested and taken to police headquarters in Mineola, New York for questioning. Orlando initially told detectives that he and Jeannot had met up with Calabrese on the night of December 3, but that Orlando had paid Calabrese $17,000 to settle a debt and then parted ways with him. Calabrese's lifeless body was found shortly after Orlando claimed to have paid him. Detective McGinn, who was

interrogating Orlando, did not believe this implausible story. In order to get at what really happened to Calabrese, McGinn told Orlando that police officers were questioning Jeannot, and that Jeannot would probably tell them a "truer" version of events. Tr. Min. 621. Orlando, though, did not change his account. Detective McGinn then told Orlando that the police had a videotape that proved Orlando was lying about the location of his meeting with Calabrese, and that Jeannot had told police where the murder weapon was. Still, Orlando did not change his account. It was not until McGinn told Orlando that Jeannot had made a statement, in which he alleged that Orlando paid him to kill Calabrese, that Orlando changed his story.

In summary, Orlando told Detective McGinn that on December 3, Jeannot had agreed to accompany him to meet Calabrese. Later that day, Orlando and Jeannot arrived at the location that Orlando had selected to meet Calabrese. After they parked, Jeannot stepped out of the car, stating that he had to use the bathroom. While Jeannot was supposedly using the bathroom, Bobby Calabrese arrived. Orlando and Calabrese each got out of their cars, met, and hugged. Following a short conversation, Orlando handed Calabrese the $17,000 that he owed. Suddenly, Orlando heard a shot and saw Calabrese fall to the ground. He saw Jeannot run over to Calabrese's car and close the door, then return to where Calabrese had fallen and shoot him twice more. Jeannot and Orlando then got back into

Orlando's car. They did not drive away, however. Instead, Orlando stopped the car next to Calabrese's body, and Jeannot got out and attempted to fire the gun at Calabrese again, but it would not fire. Jeannot then grabbed the $17,000 that Orlando had given to Calabrese, got back into the car, and Orlando drove the two of them away from the scene of the crime. Before Orlando dropped Jeannot off at his house, Jeannot threatened that, if Orlando told anyone what had happened, Jeannot would kill Orlando's wife. Jeannot kept the entire $17,000 stolen from Calabrese.

The prosecutor argued that it was Detective McGinn's statement to Orlando, informing him that Jeannot had implicated him in the murder, which finally caused Orlando to change his story and admit to being present for the killing and driving the getaway car. In support of that argument, the prosecution sought to introduce testimony of Detective McGinn to that effect. Over objection, McGinn was permitted to give the following testimony:

> I left the [interrogation] room at about 6:50 [AM]. I went back into the room at about ten minutes to eight. About 7:50 in the morning. And I told [Orlando] at this point that Herva Jeannot was, in fact, talking to the other detectives. He had given a statement and he had implicated himself in the murder. He said that he was the murderer, but that Mark Orlando had paid him to do it.

Tr. Min. 623–24. Consistent with the purpose for which it was admitted, the trial judge gave the following limiting instruction: "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." *Id.* The trial judge repeated the instruction when he charged the jury. *Id.* at 930.

On appeal, relying principally on *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), Orlando argued that Jeannot's out-of-court statement, as recounted by Detective McGinn, constituted a violation of his Sixth Amendment right to confront and cross-examine the witnesses against him. The District Attorney argued, in response, that McGinn's testimony regarding what he told Orlando about Jeannot's confession was necessary to enable the jury to understand what had caused Orlando to abandon his blanket denial of any involvement in the murder, and admit that he had been present and helped dispose of evidence. The Appellate Division, relying on *Tennessee v. Street,* 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985), and its state court progeny, denied relief.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104–132, 110 Stat. 1214 (1996), habeas corpus relief is available only when a state court judgment is "contrary to, or

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1) (emphasis supplied). "[C]learly established Federal law, as determined by the Supreme Court," means "holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor,* 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A decision is an "unreasonable application" of clearly established federal law if a state court "identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413, 120 S.Ct. 1495. It is worth emphasizing that "a state court's 'unreasonable' application of law is not synonymous with an 'incorrect' or 'erroneous' decision." *See Jackson v. Conway*, 763 F.3d 115, 135 (2d Cir. 2014) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003)). Thus, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004)).

In *Bruton*, the Supreme Court held that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant,

that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135, 88 S.Ct. 1620. Specifically, the Court recognized that situations where "the alleged accomplice ... does not testify and cannot be tested by cross-examination" are precisely the type of "threats to a fair trial [against which] the Confrontation Clause was directed." *Id.*

Nevertheless, "the use of testimonial statements for purposes other than establishing the truth of the matter asserted" is not barred by the Confrontation Clause. See *Crawford v. Washington*, 541 U.S. 36, 59 n.9, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (citing *Tennessee v. Street*, 471 U.S. at 414, 105 S.Ct. 2078). In *Tennessee v. Street*, the Supreme Court recognized that, in some contexts, the prosecution may introduce an alleged accomplice's confession for a "legitimate, nonhearsay purpose." 471 U.S. at 417, 105 S.Ct. 2078. In *Street*, "[t]he State's most important piece of substantive evidence was [defendant's] confession." *Id.* at 415, 105 S.Ct. 2078. The defendant attempted to undermine the strength of that evidence by arguing that his "confession" did not reflect his recollection of what had happened, but rather that the police had forced him to repeat the confession of his alleged accomplice. *Id.*

The prosecution sought to introduce the accomplice's confession to prove that there were differences between the two confessions, thereby demonstrating that the defendant's argument was based on a lie. According to the *Street* Court, "[h]ad

the prosecutor been denied the opportunity to present [the accomplice's] confession in rebuttal so as to enable the jury to make the relevant comparison, the jury would have been impeded in its task of evaluating the truth of respondent's testimony and handicapped in weighing the reliability of his confession." *Id.*

The Supreme Court concluded that "there were no 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 evidence." *Id.* at 416, 105 S.Ct. 2078.

Subsequently, in *United States v. Logan*, 419 F.3d 172 (2d Cir. 2005), the Second Circuit applied *Street* to allow the prosecution to introduce the out-of-court alibi statements of alleged accomplices in order to help prove an element of their case, rather than as part of a rebuttal. Specifically, the defendant in *Logan* had made a statement to police in which he predicted what alibis the members of his fraternity would use to exculpate themselves from a suspected arson. The fact that his prediction was accurate indicated that he was privy to the other fraternity brothers' plans to commit arson and obstruct justice. Thus, the prosecution introduced the alibis not to prove the facts stated therein, but to prove the existence of a conspiracy among the fraternity brothers. The Second Circuit held that this was a valid, nonhearsay purpose, and found that the situation was "no different" than that in *Street*. *Id.* at 178, 105 S.Ct. 2078.

In this case, the Appellate Division, relying on *Street*, held that "the court did not violate [Orlando's] 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." *Orlando*, 61 A.D.3d at 1002, 878 N.Y.S.2d 185. Specifically, the Appellate Division held that Detective McGinn's testimony about Jeannot's statement was introduced for the legitimate, nonhearsay purpose "of explaining the detective's actions and their effect on the defendant," and that the trial judge gave a proper limiting instruction. *Id.*

The nonhearsay purpose proffered here is not as compelling as that in Street, where introduction of the accomplice's confession was actually necessary to rebut defendant's argument that his confession was a mirror image of that of his accomplice. The introduction of Jeannot's statement, however, provided context for explaining why Orlando altered his exculpatory story, which he had been repeating even after being told that Jeannot had identified the weapon and that police had found video evidence proving that Orlando's initial statement was a lie.

While the admission of Jeannot's statement incriminating Orlando may implicate the defendant's Sixth Amendment right to confront and cross-examine the witnesses against him, the record in this case suggests that this is a rare instance in which the evidence the jury asked for during its deliberations demonstrates that it actually followed the judge's limiting instructions. Indeed, in *United*

States v. Swiderski, 548 F.2d 445, 451–52 (2d Cir. 1977), the Second Circuit acknowledged that such requests from the jury may be indicative of the evidence that was important to the jury's decision. Here, the jury requested "written statements to the police by the defendant," "surveillance video" of Orlando's car coming and going, "view of sweat shirt on the dummy,"[1] "picture of Bobby [Calabrese] after being shot," Tr. Min. 943, "phone records ... from defendant to Bobby C," "what was found in defendant's home," as well as the testimony of Orlando's friend, Barbara Diamant, stating that, on the morning after the murder, Orlando recounted to her "shocking," "vivid detail[s]" of the murder, such as the number and location of the bullet wounds that killed Calabrese— details that were not public knowledge at that time. *Id.* at 956. Thus, the jury asked for virtually every piece of incriminating evidence, except that which they were told to disregard—namely, the testimony of Detective McGinn recounting Jeannot's statement that induced Orlando to change his story. This provides compelling support for the conclusion that the jury followed the judge's instruction "to completely disregard any statement allegedly made by Herva Jeannot when considering evidence against the defendant." *Id.* at 930.

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[1] The significance of this evidence is discussed *supra*, at 8.

Even if the jury's requests for evidence do not constitute a separate ground for rejecting petitioner's *Bruton* claim, because the jury followed the judge's limiting instruction, these requests, combined with the overwhelming evidence of Orlando's guilt, also provide compelling support for the conclusion that the alleged error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Fry v. Pliler*, 551 U.S. 112, 116, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 631, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)); *see also United States v. Dhinsa*, 243 F.3d 635, 656 (2d Cir. 2001) (applying harmless error analysis to a Confrontation Clause violation). The prosecution's case, even absent the testimony about Jeannot's alleged statement, was very strong. Orlando admitted (1) that he was present when the victim was murdered (corroborated by cell phone evidence that placed him in the vicinity of the murder at the time it was committed), (2) that he drove Herva Jeannot—the man who shot the victim—away from the scene (corroborated by video evidence showing Orlando's wife's car at the scene of the murder), and (3) that he assisted Jeannot in disposing of evidence. Significantly, as discussed above, the prosecution elicited testimony from a friend of Orlando, Barbara Diamant, stating that, on the morning after the murder, Orlando recounted to her details of the murder that were not public knowledge at that time.

Moreover, Calabrese was found dead in the street with his sweatshirt pulled over his head, and three bullet wounds to the back of his head. The prosecution's theory was that while Orlando was hugging Calabrese— a fact to which Orlando admitted—he pulled Calabrese's sweatshirt over his head so that Jeannot could get a clean shot while Calabrese was blinded. To illustrate this theory to the jury, the prosecution brought in a dummy that had holes in its head, which matched the location of the holes in the sweatshirt and on Calabrese's body. The inescapable inference is that Orlando was the person who pulled the sweatshirt over Calabrese's head. Thus, there is overwhelming evidence that Orlando was "acting in concert" with Jeannot, a theory on which the jury was charged, Tr. Min. 936, which supports a conviction of Second Degree Murder independent of whether Orlando paid Jeannot to commit the murder. See N.Y. PENAL LAW § 20.00 ("Criminal Liability for Conduct of Another") (McKinney 2017); see also *People v. Whatley*, 69 N.Y.2d 784, 513 N.Y.S.2d 110, 505 N.E.2d 620 (1987); *Maldonado v. Scully*, 86 F.3d 32 (2d Cir. 1996).

II. Alleged Brady Violation

Orlando contends that the prosecution failed to notify him that the Nassau County police recovered $17,000 during the course of the investigation. If $17,000 were, in fact, recovered, it would corroborate one of Orlando's arguments—namely, that he had enough money to pay Calabrese, did in fact pay him,

and therefore had no reason to kill him. Orlando characterizes the alleged failure to disclose as a "discovery violation." Pet. 11. Nevertheless, read liberally, it could be viewed as a failure to disclosure exculpatory evidence in violation of the due process. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The problem, however, is that Orlando concedes that Detective Kuhn testified, in response to a leading question from Orlando's attorney, that "the other $17,000" was recovered and housed in the evidence locker. Tr. Min. 711. The fact that Orlando's attorney knew to ask the question at all, combined with Kuhn's response, suggests that Orlando had sufficient opportunity to exploit Kuhn's admission in closing. *See Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) ("It is not feasible or desirable to specify the extent or timing of disclosure Brady and its progeny require, except in terms of the sufficiency, under the circumstances, of the defense's opportunity to use the evidence when disclosure is made.").

Nevertheless, I decline to resolve the merits of Orlando's *Brady* claim for two reasons. The first is that the record is ambiguous regarding whether $17,000 was in fact recovered, and from whom. As the District Attorney explained in her brief, "[Detective] Kuhn repeatedly testified that he found only $2,749 during his search of petitioner's home [Tr. Min. 707–09, 711]. Consequently ... the random and unexplained reference to $17,000 during Kuhn's cross-examination might well have been the result of

a misstatement on the part of defense counsel or an error in the transcription of the record." *See* Resp't's Mem. of Law at 20–21. The possibility that it was an inadvertent misstatement is supported by the fact that Orlando's attorney did not exploit it, or even refer to it, in his summation.

More significantly, the *Brady* claim is unexhausted. Orlando may still collaterally attack the judgment, based on the alleged discovery violation, pursuant to N.Y. C.P.L. § 440.10, as the District Attorney concedes. Nevertheless, in order to do so, he would have to withdraw the petition and could not later refile it because it would be untimely. Under other circumstances, a stay and abeyance order could avoid this problem. Such an order, however, is only appropriate "if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that he engaged in intentionally dilatory litigation tactics." *Rhines v. Weber*, 544 U.S. 269, 278, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). Here, as early as 2012, the District Attorney alerted Orlando to the fact that his *Brady* claim was not exhausted. Nevertheless, Orlando failed to exhaust the claim even though he was granted a stay to allow him to pursue his state remedies on July 3, 2012. Thus, he does not have "good cause" for his failure to exhaust, which renders a stay inappropriate. *Id.* at 277, 125 S.Ct. 1528. Unless Orlando deletes this claim, I would therefore dismiss the petition as a mixed petition, and any

subsequent petition would be time-barred. *See Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

III. Orlando's Right to Counsel

Orlando contends that his Sixth Amendment right to counsel was violated when, despite having retained legal counsel for unrelated traffic charges, he was questioned regarding the murder of Calabrese without his counsel present. But the Sixth Amendment right to counsel is "offense specific." *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). Moreover, the right "does not attach until a prosecution is commenced." *Id.* Thus, Orlando did not have a right to have counsel present for questioning about a murder for which he had not yet been charged. Nor is there any merit to his related ineffective assistance of counsel claim. Because there were no grounds to suppress, there is no reasonable probability that an objection would have been successful.

IV. Evidentiary Issues

Orlando argues that his due process rights were violated by the introduction of an altered surveillance video tape and a demonstrative mannequin that did not match the victim's height and weight. The Appellate Division held that neither of these claims had merit. Specifically, Orlando did not explain how the differences between the mannequin and the victim misled the jury. Moreover, there were only minor glitches in the

video tape, and the problems with the tape went to its weight, not its admissibility. Nothing in the record or the briefs suggests that the Appellate Division was wrong. Nor is there is any merit to his related ineffective assistance of counsel claim. There is no reasonable probability that an objection, had one been made by Orlando's counsel, would have been successful.

V. Improper Summation

Orlando contends that the prosecutor exceeded the bounds of proper summation when he invited the jury to speculate that an apparent obstruction blocking the view of Orlando's wife's license plate was in fact a piece of tape that Orlando had used to prevent identification of the car. "Both prosecution and defense are entitled to broad latitude in the inferences they may suggest to the jury during closing arguments." *United States v. Suarez*, 588 F.2d 352, 354 (2d Cir. 1978). While the inference that the "obstruction" or "shadow" making Orlando's license plate illegible was in fact a "strip of tape" is not an obvious one, it is nevertheless a fair inference that the prosecution was entitled to ask the jury to draw.

VI. Improper Charge

Finally, Orlando argues that the trial judge improperly charged the jury. The Appellate Division held that this claim was not preserved for appellate review because it was not raised during the trial. That is an independent and adequate state ground

upon which to deny this claim. Moreover, the argument is without merit for the reasons stated in Nassau County's Memorandum of Law. *See* Resp't's Mem. of Law at 47–48.

CONCLUSION

I reserve ruling on the petition, because of the exhaustion problem that I have identified above. I appoint Jane Simkin Smith to represent the petitioner for the purpose of advising him on whether to withdraw the unexhausted claim, and to represent him on appeal. If petitioner decides to delete his *Brady* claim, I would grant him a certificate of appealability with respect to the issue of whether his Sixth Amendment right to confront and cross-examine witnesses was violated.

The Clerk is directed to close the case for administrative purposes until I receive a response from petitioner's counsel. I would expect such a response within sixty days from the date of this order.

SO ORDERED.

People v Orlando

2009 NY Slip Op 03547 [61 AD3d 1001]

April 28, 2009

Appellate Division, Second Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, June 10, 2009

The People of the State of New York, Respondent,
v
Mark Orlando, Appellant.

—[*1] Bassett & Bassett, P.C., Central Islip, N.Y. (Kerry Bassett of counsel), for appellant.

Kathleen M. Rice, District Attorney, Mineola, N.Y. (Robert A. Schwartz and Sarah Spatt of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Nassau County (D. Sullivan, J.), rendered August 18, 2005, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Honorof, J.), of that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

Ordered that the judgment is affirmed.

The defendant was convicted of murder in the second degree for causing the death of Robert Calabresse, a bookmaker with whom the defendant placed gambling bets. Within five days of the murder, following a police investigation, the defendant was arrested based on outstanding bench warrants for prior pending, unrelated, vehicle and traffic charges and to investigate his involvement in the murder. The detectives never questioned the defendant with respect to those traffic matters, limiting questioning to the murder allegations after the defendant received and waived his *Miranda* rights (*see Miranda v Arizona*, 384 US 436 [1966]). The defendant then made incriminating statements about his involvement in the murder.

On appeal, the defendant contends that his inculpatory statements to the police should have been suppressed because they were obtained in violation of his right to counsel. Contrary to the defendant's argument, however, he never sought or requested an attorney prior to his statements, and there was no evidence presented that the police were aware of any prior legal representation, or that he had, in fact, [*2]retained counsel, for the unrelated traffic charges (*see People v Burdo*, 91 NY2d 146, 150 [1997] [statements suppressed as police knew about pending charge and related representation]; *People v Rogers*, 48 NY2d 167, 169 [1979]). Since the defendant was not questioned in violation of his *Miranda* rights, including his right to counsel, the

hearing court properly denied suppression of the defendant's statements (*see People v Bing*, 76 NY2d 331, 350-351 [1990]; *People v Tyler*, 43 AD3d 633, 635 [2007]; *People v Middlebrooks*, 300 AD2d 1142 [2002]; *People v Acosta*, 259 AD2d 422 [1999]; *cf. People v Burdo*, 91 NY2d at 150).

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 [2004]; *see Tennessee v Street*, 471 US 409, 413-417 [1985]; *People v Reynoso*, 2 NY3d 820, 821 [2004]; *People v Marji*, 43 AD3d 961, 962 [2007]; *People v Bryant*, 39 AD3d 768 [2007]).

In addition, during the trial, the court allowed the prosecution to introduce into evidence a videotape from a video surveillance camera of the area where the shooting occurred. Contrary to the defendant's contention, the prosecution laid a proper foundation for the admission of the tape into evidence (*see People v Ely*, 68 NY2d 520, 527 [1986]). The fact that there were minor glitches in the tape goes to the weight of the evidence, not its admissibility (*see People v Gibbons*, 18 AD3d 773 [2005]; *People v Jackson*, 200 AD2d 856, 858 [1994];

People v Apergis, 200 AD2d 388, 389 [1994]; *People v Torres*, 136 AD2d 664, 666 [1988]).

The defendant's claims of ineffective assistance of counsel are without merit, as defense counsel provided the defendant with meaningful representation (*see People v Benevento*, 91 NY2d 708, 711 [1998]; *People v Baldi*, 54 NY2d 137, 146-147 [1981]).

The defendant's contentions in points five, six, and seven of his brief are unpreserved for appellate review because those specific contentions were not raised during the suppression hearing or the trial (*see* CPL 470.05 [2]; *People v Gray*, 86 NY2d 10, 19 [1995]; *People v Redmond*, 41 AD3d 514, 516 [2007]). His remaining contention, in point four of his brief, concerning the propriety of the introduction of a mannequin to demonstrate the trajectories of the bullets that hit the victim's body, is without merit (*see People v Acevedo*, 40 NY2d 701 [1976]). Rivera, J.P., Spolzino, Angiolillo and Balkin, JJ., concur.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of February, two thousand and nineteen.

Before: Dennis Jacobs,
Christopher F. Droney,
Circuit Judges,
Michael P. Shea,
*District Judge.**

Mark Orlando,

Petitioner - Appellant,

v.

Nassau County District Attorney's Office,

Respondent -Appellee.

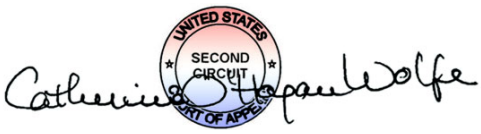
ORDER

Docket No. 17-2390

Appellee moves for a recall of the mandate and for permission to file a petition for panel rehearing or rehearing *en banc*. Appellant opposes the motion.

IT IS HEREBY ORDERED that the motion is DENIED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court



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*Judge Michael P. Shea, of the United States District Court for the District of Connecticut, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of February, two thousand and nineteen.

Before: Dennis Jacobs,
Christopher F. Droney,
Circuit Judges,
Michael P. Shea,
*District Judge.**

Mark Orlando,

Petitioner - Appellant,

v.

Nassau County District Attorney's Office,

Respondent -Appellee.

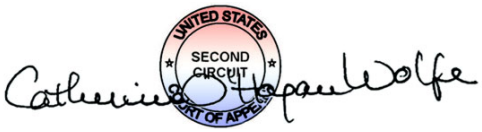
JUDGMENT

Docket No. 17-2390

The appeal in the above captioned case from a judgment of the United States District Court for the Eastern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the district court's denial of Orlando's petition is REVERSED and the case is REMANDED to the district court with instructions to grant the petition for a writ of habeas corpus. The mandate shall issue forthwith.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court



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*Judge Michael P. Shea, of the United States District Court for the District of Connecticut, sitting by designation.