

No. \_\_\_\_\_

---

---

In the  
**Supreme Court of the United States**

---

KEVIN MCCARTHY, SUPERINTENDENT, ELMIRA  
CORRECTIONAL FACILITY,  
*Petitioner,*

v.

PEDRO HERNANDEZ,  
*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**

---

ALVIN L. BRAGG, JR.  
*District Attorney  
New York County*  
STEVEN C. WU\*  
*Chief, Appeals Division*  
STEPHEN J. KRESS  
*Chief, Federal Habeas Corpus Unit*

One Hogan Place,  
New York, NY 10013  
(212) 335-3326  
wus@dany.nyc.gov

\*Counsel of Record  
December 18, 2025

---

---

## QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act (AEDPA) prohibits federal courts from invalidating a state conviction unless there is both a legal error violating clearly established federal law from this Court and a determination of prejudice that defers to state-court findings of harmless error. In this case, the U.S. Court of Appeals for the Second Circuit nullified a New York jury verdict convicting respondent Pedro Hernandez of the infamous 1979 kidnapping and murder of Etan Patz, based solely on the state trial judge's purported failure to instruct the jury in accordance with Justice Kennedy's controlling concurrence in *Missouri v. Seibert*, 542 U.S. 600 (2004). The questions presented are:

1. Did the Second Circuit violate AEDPA by finding a state jury instruction invalid under *Seibert*, when this Court has never held that *Seibert's* rule about pretrial suppression extends to jury deliberations?

2. Did the Second Circuit violate AEDPA by finding that a single response by a state trial judge to a jury note necessarily infected the jury verdict, when the state courts found that there was more than sufficient evidence of the defendant's guilt that was unaffected by the response?

**RELATED PROCEEDINGS**

*Hernandez v. McIntosh,*

No. 24-1816 (2d Cir. July 21, 2025)

*Hernandez v. McIntosh,*

No. 22 Civ. 2266 (S.D.N.Y. June 12, 2024)

*Hernandez v. New York,*

No. 20-1042 (U.S. March 22, 2021)

*People v. Hernandez,*

N.Y. Co. Ind. No. 4863/12 (N.Y. Aug. 24, 2020)

*People v. Hernandez,*

No. 11259 (N.Y. App. Div. 1st Dep't Mar. 26,  
2020)

*People v. Hernandez,*

No. 4863/2012 (Sup. Ct. N.Y. County Apr. 18,  
2017)

## TABLE OF CONTENTS

	<b>Page</b>
Questions Presented .....	i
Related Proceedings .....	ii
Table of Authorities .....	vi
Opinions Below .....	1
Jurisdiction.....	1
Constitutional and Statutory Provisions Involved.....	1
Introduction.....	3
Statement .....	6
A. The Murder of Etan Patz .....	6
B. Hernandez’s Repeated Confessions .....	7
1. Hernandez’s confessions before becoming a suspect .....	7
2. Hernandez’s three confessions to law enforcement.....	8
3. Hernandez’s further confessions to doctors and others.....	11
C. State-Court Proceedings, Including the Trial Court’s Response to a Jury Note .....	13
D. Federal Habeas Proceedings.....	16
Reasons for Granting the Petition.....	19
I. Summary Reversal Is Warranted Based on the Second Circuit’s Unprecedented Extension of <i>Seibert</i> to State Jury Deliberations.....	19

- A. The Second Circuit Improperly Found That *Seibert's* Suppression Ruling Applied to Jury Deliberations, When This Court Has Never So Held. .... 19
- B. The Second Circuit Improperly Rejected the State Courts' Interpretation of the Jury Note as Asking a Question for Which *Seibert* Would Be Non-Responsive. .... 22
- II. Summary Reversal Is Warranted Because the State Trial Court's Response to the Jury Note Caused No Prejudice ..... 24
  - A. A Fairminded Jurist Could Agree with the State Appellate Court's Conclusion That Any Error Here Would Be Harmless Given the Other Evidence of Hernandez's Guilt..... 25
  - B. Given the State Courts' Findings About the Absence of Custody, There Was No Basis to Assume That the Jury Even Considered the Trial Court's Response..... 33
- III. If This Court Does Not Summarily Reverse, It Should Grant a Writ of Certiorari to Address Whether Habeas Relief Was Improperly Granted Here ..... 35
- Conclusion ..... 38
- Appendix A - Court of appeals opinion (July 21, 2025) ..... 1a
- Appendix B - Court of appeals order granting motion to extend stay (Aug. 15, 2025)..... 47a
- Appendix C - Court of appeals order denying further extension (Oct. 2, 2025) ..... 49a

Appendix D - District court order granting conditional writ of habeas corpus (Oct. 16, 2025).....	51a
Appendix E - District court decision and order (June 11, 2024) .....	60a
Appendix F - Magistrate judge's report and recommendation (Oct. 10, 2023) ...	102a
Appendix G - Appellate Division decision and order (Mar. 26, 2020) .....	250a
Appendix H - Suppression court decision and order (Nov. 24, 2014) .....	257a
Appendix I - Jury note (Feb. 2, 2017).....	281a
Appendix J - Excerpt of trial transcript (Feb. 2-3, 2017) .....	282a

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Arizona v. Mauro</i> , 481 U.S. 520 (1987).....	23
<i>Bobby v. Dixon</i> , 565 U.S. 23 (2011).....	26, 29
<i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993).....	17-18, 24-25, 33, 35
<i>Calderon v. Coleman</i> , 525 U.S. 141 (1998).....	24
<i>Cavazos v. Smith</i> , 565 U.S. 1 (2011).....	29
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	18, 25
<i>Davis v. Ayala</i> , 576 U.S. 257 (2015).....	33
<i>Engle v. Isaac</i> , 456 U.S. 107 (1982).....	5
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011).....	19-20, 28
<i>Henderson v. Kibbe</i> , 431 U.S. 145 (1977).....	24
<i>Lego v. Twomey</i> , 404 U.S. 477 (1972).....	20
<i>Lopez v. Smith</i> , 574 U.S. 1 (2014).....	5, 20
<i>Mays v. Hines</i> , 592 U.S. 385 (2021).....	4, 29-30, 32

<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966).....	22
<i>Missouri v. Seibert</i> , 542 U.S. 600 (2004)....	4-5, 13, 15-17, 19-30, 34-35
<i>Powell v. Fuchs</i> , 4 F.4th 541 (7th Cir. 2021).....	22
<i>Reyes v. Lewis</i> , 833 F.3d 1001 (9th Cir. 2016).....	20
<i>Rogers v. Richmond</i> , 365 U.S. 534 (1961).....	21
<i>Woods v. Etherton</i> , 578 U.S. 113 (2016).....	21
<i>Shinn v. Kayer</i> , 592 U.S. 111 (2020).....	29, 31, 34
<i>Shinn v. Ramirez</i> , 596 U.S. 366 (2022).....	5-6
<i>United States v. Sanders</i> , 472 F. App'x 376 (6th Cir. 2012) .....	22
<i>Wetzel v. Lambert</i> , 565 U.S. 520 (2012).....	5, 24, 31
<i>White v. Woodall</i> , 572 U.S. 415 (2014).....	20-21, 28
<i>Woodford v. Visciotti</i> , 537 U.S. 19 (2002).....	19, 30
<i>Woods v. Donald</i> , 575 U.S. 312 (2015).....	20

#### STATE CASES

<i>Carlson v. State</i> , 445 P.2d 157 (Nev. 1968).....	36
--	----

<i>Commonwealth v. Joyner</i> , 272 A.2d 454 (Pa. 1971).....	36
<i>Commonwealth v. Tavares</i> , 430 N.E.2d 1198 (Mass. 1982).....	36
<i>Dyer v. State</i> , 604 S.E.2d 756 (Ga. 2004) .....	36
<i>Hof v. State</i> , 655 A.2d 370 (Md. 1995).....	36
<i>Hopper v. State</i> , 736 P.2d 538 (Ok. Ct. Crim. App. 1987) .....	36
<i>Lopez v. State</i> , 384 S.W.2d 345 (Tx. Ct. Crim. App. 1964).....	36
<i>Oursbourn v. State</i> , 259 S.W.3d 159 (Tx. Ct. Crim. App. 2008).....	36
<i>People v. Graham</i> , 55 N.Y.2d 144 (1982) .....	14
<i>People v. Medina</i> , 146 A.D.2d 344 (1st Dep't 1989).....	21
<i>People v. Rabady</i> , 28 A.D.3d 794 (2d Dep't 2006).....	21
<i>State v. Arpin</i> , 410 A.2d 1340 (R.I. 1980) .....	36
<i>State v. Brewton</i> , 395 P.2d 874 (Or. 1964).....	36
<i>State v. Caron</i> , 586 A.2d 1127 (Vt. 1990) .....	36
<i>State v. Farzaneh</i> , 468 N.W.2d 638 (N.D. 1991).....	36
<i>State v. George</i> , 257 A.2d 19 (N.H. 1969) .....	36

<i>State v. Mitchell</i> , 611 S.W.2d 211 (Mo. 1981) .....	36
<i>State v. Morse</i> , 617 P.2d 1141 (Ariz. 1980) .....	36
<i>State v. Porter</i> , 595 P.2d 998 (Ariz. 1979) .....	36
<i>State v. Scott</i> , 263 N.W.2d 659 (Neb. 1978).....	36
<i>State v. Torrence</i> , 406 S.E.2d 315 (S.C. 1991) .....	36
<i>State v. Vance</i> , 250 S.E.2d 146 (W. Va. 1978).....	36
<i>Volkova v. State</i> , 855 S.E.2d 616 (Ga. 2021) .....	36
<i>Witt v. State</i> , 892 P.2d 132 (Wy. 1995).....	36
<b>FEDERAL STATUTES</b>	
18 U.S.C. § 3501(a).....	20
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 2254 .....	1, 3
28 U.S.C. § 2254(d)(1) .....	5, 20
28 U.S.C. § 2254(e)(1) .....	5, 22, 34
<b>STATE STATUTES</b>	
N.Y. Crim. Proc. L. § 710.70(3).....	14, 21

**OTHER AUTHORITIES**

*Lone Holdout on Etan Patz Jury Says He  
Couldn't Get Beyond Reasonable Doubt*, ABC  
NEWS (May 8, 2015), available at  
[https://abcnews.go.com/US/lone-holdout-  
etan-patz-jury-reasonable-  
doubt/story?id=30913806](https://abcnews.go.com/US/lone-holdout-etan-patz-jury-reasonable-doubt/story?id=30913806) (last visited Dec.  
18, 2025).....14

## **OPINIONS BELOW**

The opinion of the U.S. Court of Appeals for the Second Circuit (App.1a-46a) is reported at 146 F.4th 142. The decision and order of the U.S. District Court for the Southern District of New York (App.60a-101a) is not reported but is available at 2024 WL 2959688. The report and recommendation of the magistrate judge (App.102a-249a) is unreported but is available at 2023 WL 6566817. The opinion of the Appellate Division, First Department (App.250a-256a) is reported at 181 A.D.3d 530. The state trial court's order denying the motion to suppress is unreported but is reproduced at App.257a-280a.

## **JURISDICTION**

The court of appeals entered its judgment on July 21, 2025. This Court's order of October 15, 2025, extended the time to file this petition to December 18, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

1. U.S. Const. Amend. XIV, § 1, provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 28 U.S.C. § 2254 provides, in relevant part:

(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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

## INTRODUCTION

This case arises out of one of the most infamous crimes in recent American history. On May 25, 1979, six-year-old Etan Patz disappeared while walking from his family's apartment to his school bus stop. Despite a highly publicized nationwide search and countless hours of investigation, Etan was never seen again. His disappearance transformed the way missing-children cases are investigated and sparked a nationwide movement to better protect children.

For more than three decades, Etan's case remained unsolved. In 2012, a breakthrough came when police received reports that respondent Pedro Hernandez had told his ex-wife, close friend, and members of a prayer group that he had killed a young boy under circumstances closely resembling Etan's disappearance. Hernandez repeated those confessions after he agreed to speak to law enforcement, volunteering critical details that he could not have known unless he were the perpetrator. After a five-month trial involving 66 witnesses, a New York jury convicted Hernandez of felony murder and kidnapping. The state courts unanimously upheld that conviction, and a federal district court denied habeas relief under 28 U.S.C. § 2254.

The U.S. Court of Appeals for the Second Circuit reversed. Its ruling was not based on any error in the decades-long investigation, in the admission of Hernandez's confessions, or in the evidence presented at trial. Instead, the Second Circuit undid the conviction based on the purported inadequacy of the state trial court's response to a single jury note. That invalidation of a state jury verdict on such a slender

reed flouted AEDPA and warrants summary reversal or certiorari.

Specifically, the Second Circuit held that the state trial judge had violated federal law by failing to instruct the jury in accordance with Justice Kennedy's controlling concurrence in *Missouri v. Seibert*, 542 U.S. 600 (2004). That concurrence concluded that an initial *Miranda* violation should not automatically require suppression of a subsequent post-warning statement to law enforcement, except in "the infrequent case" where (a) law enforcement adopts a "deliberate two-step strategy" "in a calculated way to undermine the *Miranda* warning," and (b) no "curative measures are taken before the postwarning statement is made." *Id.* at 622 (Kennedy, J., concurring). Here, the jury submitted a note asking whether, "if [the jury] f[ou]nd" that an initial law-enforcement confession did not comply with *Miranda*, the jury "must disregard" Hernandez's subsequent confessions to both civilians and law enforcement, some of which occurred years later (App.281a). The trial judge answered "no" because it believed that it was not the jury's role to apply "fruit of the poisonous tree law" to the confessions and because the note asked about confessions to civilians, not just to law enforcement (App.283a-284a, 301a, 307a). The Second Circuit found that the state trial judge's answer contravened Justice Kennedy's concurrence in *Seibert* and invalidated the conviction.

The court of appeals' ruling "plainly violated Congress' prohibition on disturbing state-court judgments on federal habeas review absent an error that lies beyond any possibility for fairminded disagreement." *Mays v. Hines*, 592 U.S. 385, 386

(2021) (quotation marks omitted). As an initial matter, the court of appeals’ assumption that the jury should have been instructed on *Seibert* finds no support in any “clearly established Federal law, as determined by the Supreme Court,” 28 U.S.C. § 2254(d)(1), because this Court has never held that *Seibert*’s ruling on pretrial suppression extends to jury deliberations. Nor was there any basis to believe—let alone “clear and convincing evidence,” *id.* § 2254(e)(1)—that the jury was even asking about “the infrequent case” covered by *Seibert*, because their note referred only to a potential *Miranda* violation, and not to the “deliberate” strategy to evade *Miranda* that is the indispensable prerequisite for suppression under Justice Kennedy’s reasoning. *Seibert*, 542 U.S. at 622. And even if the trial court’s response were inadequate, the court of appeals improperly gave no deference to the state appellate court’s finding of harmless error, which was based on the extensive evidence of Hernandez’s guilt presented during the five-month trial.

Apart from being “plainly wrong,” *Lopez v. Smith*, 574 U.S. 1, 7 (2014), the court of appeals’ ruling imposes severe costs. Although the People intend to retry Hernandez, the decision below “disturbs the State’s significant interest in repose for concluded litigation,” rendering the previous proceeding “merely a tryout on the road to federal habeas relief.” *Shinn v. Ramirez*, 596 U.S. 366, 377 (2022) (quotation marks omitted). Retrial may pose “daunting difficulties” given that the crime here occurred nearly fifty years ago and several of the already-elderly witnesses have died since the last trial in 2016. *See Wetzel v. Lambert*, 565 U.S. 520, 525 (2012). And a retrial “extends the ordeal of” the Patz family, *Engle v. Isaac*, 456 U.S.

107, 127 (1982), who will have to endure yet another highly publicized recounting of the violence done to six-year-old Etan after waiting decades for an answer to his disappearance. Allowing the decision to stand would thus “inflict a profound injury” to “the State and the victims of crime alike,” based on the court of appeals’ finding of a novel and inconsequential legal error. *Ramirez*, 596 U.S. at 376-77 (quotation marks omitted). This Court should summarily reverse the decision below, or grant a writ of certiorari to review the court of appeals’ deeply flawed ruling.

## STATEMENT

### A. The Murder of Etan Patz

On the morning of May 25, 1979, six-year-old Etan Patz left his family’s apartment to walk by himself about two blocks to the school bus stop. Hernandez, then eighteen years old, was working at a bodega next to the bus stop (A1832, A1835, A1839-42).<sup>1</sup>

Etan was carrying a dollar and planned to buy a soda before getting on the bus. Hernandez saw Etan standing on the sidewalk and invited him into the bodega basement for a soda (A1841-42; 2:22:00-2:25:20, 2:36:40-2:37:20). There, “something just took over” Hernandez (2:25:50-2:26:10; SA901). He grabbed Etan by the neck and strangled him until the boy went limp (2:25:30-2:26:50). Hernandez then

---

<sup>1</sup> Citations to “A\_\_” and “SA\_\_” are, respectively, to the appendix and supplemental appendix filed in the court of appeals. The supplemental appendix includes a video of Hernandez’s confession to a prosecutor on May 24, 2012. A flash drive containing that video has been provided to the Court. Timestamps are to the relevant portions of this video.

tossed Etan's tote bag behind a walk-in refrigerator, put Etan's still-spasming body into a large trash bag, and stuffed the bag into a "banana box" (2:26:15-2:28:00, 2:31:15-2:34:05).

To ditch the body, Hernandez carried the box out of the bodega and, about a block away, walked downstairs into an underground alleyway next to a corner grocery store (2:28:00-2:30:30). Hernandez left the box there and returned to the bodega (2:28:50-2:30:30). At trial, the sanitation worker who removed garbage from that location in 1979 confirmed that he routinely picked up boxes, including banana boxes, from that location each morning between 9 and 10 a.m.—around the time that Hernandez admitted to disposing of Etan's body (A1844).

That afternoon, when Etan did not arrive home at his usual time, his mother, Julie Patz, called the police. Countless hours of investigation and a nationwide search followed, but Etan was never found (A1844-46).

## **B. Hernandez's Repeated Confessions**

### **1. Hernandez's confessions before becoming a suspect**

Over the next few years, even before law enforcement became aware of his involvement, Hernandez confessed his crime on at least three occasions. In 1979, he attended a prayer meeting and confided to a participant that he had killed a boy while working in Manhattan (SA15-17). Hernandez said that he "offered [the boy] a soda," "took him down to the basement," "strangle[d]" and "killed" him, and disposed of the body by putting it in a "plastic bag or something" and putting it in the "garbage" (SA18-19,

SA34, SA68, SA71). That same day, when the group gathered for a closing prayer, Hernandez “fell on his knees crying” and, this time to the whole group, “confessed that he had taken a child, tried to abuse of him, the child didn’t let him. So he strangled him, and he placed him in the garbage” (SA94, SA106-07).

Later that year, Hernandez told his friend, Mark Pike, that, while he was working “at a store,” he “lost control” and “strangled” a “kid,” then “put him in a bag in back of a dumpster, behind the store” (SA154, SA166-70). When Pike asked why, defendant withdrew and claimed, “It was a black kid, forget about it” (SA170).

In the 1980s, Hernandez told his first wife, Daisy Rivera, that when he was working at the bodega he “lost control” and “strangled” a “muchacho” until the boy was “breathless” and “not moving,” then “covered [the body] with some bags” and “threw [it] in a dumpster” (SA231-32). A few years later, Rivera found a photograph of Etan in Hernandez’s belongings (SA258).

## **2. Hernandez’s three confessions to law enforcement**

In the late 1980s and early 1990s, federal authorities investigating Etan’s case focused their attention on a convicted child molester named Jose Ramos. During an FBI interview in 1991, Ramos admitted that, on the day Etan disappeared, Ramos had attempted to molest an eight- or nine-year-old boy named “Jimmy” whom he had met in a park about three blocks north of Etan’s bus stop (A1873-78). There was no evidence, however, that Ramos was ever in contact with Etan. Federal authorities and later the New York County District Attorney’s Office

ultimately determined that there was not enough evidence to pursue Ramos (A1878).

In May 2012, Hernandez's brother-in-law, Jose Lopez, called the New York City Police Department (NYPD) (SA335). Lopez had seen television coverage of a renewed investigation into Etan's disappearance and felt compelled to reach out because he had heard about some of Hernandez's earlier confessions (SA318-20, SA333-35). Lopez directed NYPD detectives to Hernandez and told them about the confessions to the prayer group and Pike (SA450-53). Over the next two weeks, detectives also learned about Hernandez's confession to his ex-wife, Rivera (App.258a-259a; A1854-56; SA432-33, SA450-53).

On the morning of May 23, 2012, Hernandez voluntarily agreed to go with detectives to the Camden County Prosecutor's Office (CCPO) near his home in New Jersey (App.259a-260a). There, he gave the first of three confessions to law enforcement.

The interview culminating in his first confession began at around 8:10 a.m. in the CCPO. During the interview, Hernandez was never handcuffed or physically restrained. Whenever he expressed a desire to leave, he was told he was free to go, but each time agreed to continue answering questions. At one point he was left alone in the interview room with the door open. He was also allowed to walk by himself, without an escort, to and from the restroom, which was just feet from two marked exits (App.262a-267a).

The first few hours of the interview focused on Hernandez's family background and life, with "[v]ery little" questioning about Etan (A1856). At 2:45 p.m., after detectives told Hernandez that they had spoken to "people from his past," including Pike, Hernandez

confessed to strangling Etan and disposing of his body in the alleyway (SA517-18).

At about 2:55 p.m., Hernandez was read his *Miranda* rights for the first time and agreed to waive them. He then made a second, videotaped confession, during which he again confessed to strangling Etan (App.268a-269a).

Afterwards, at about 4 p.m., Hernandez spoke with his second wife, Rosemary, and their daughter, Becky. Crying, Hernandez told them that he had “killed a kid a long time ago” by “chok[ing] him” and “put[ting] him in a bag” and “a box” (A1062; SA540).

At about 8 p.m., after giving Hernandez his medication, detectives drove Hernandez from the CCPO to Manhattan. In Manhattan, Hernandez led officers on a five-minute video-recorded tour of the area where the bodega had previously been located, and also brought them to the underground alleyway where he had dumped Etan’s body. At the alleyway, Hernandez expressed confusion because he saw a door that he did not remember being there in 1979; indeed, a witness testified at trial that a door had been installed after 1981 (A1857-58).

Hernandez was then driven to the New York County District Attorney’s Office, where he ate dinner and slept for about three hours (A853; SA418-26). At 2:18 a.m. on May 24, 2012, he began speaking with Assistant District Attorney (ADA) Armand Durastanti and gave the third confession to law enforcement that is relevant here.

None of the detectives who had questioned Hernandez at the CCPO were present for the interview with the ADA. At the outset of the

videotaped interview, Hernandez again received *Miranda* warnings and waived his rights. The ADA then told Hernandez that he wanted to start “brand new” and that their conversation had “nothing at all to do” with Hernandez’s confessions at the CCPO (2:18:00-2:19:45). In three sessions spanning the next five hours, between which Hernandez took breaks and slept, Hernandez again confessed to killing Etan, giving extensive details about how he had led Etan into the bodega’s basement, choked him until he went limp, and disposed of Etan’s body in a banana box in the nearby underground alleyway (2:24:00-2:34:25, 2:38:25-2:38:40, 4:06:40-4:06:50). Hernandez also confirmed that he had confessed the crime to Rivera, Pike, and the prayer group (2:56:00-3:04:30).

Among other details, Hernandez said that the box with Etan’s body weighed about 30 pounds (4:06:40-4:06:50); that estimate was closer to Etan’s actual weight of 37 pounds than the 50 pounds listed on the highly publicized missing-persons posters (A30, A1833). Hernandez also made a gesture indicating that Etan had been carrying a small tote bag rather than the more typical backpack that schoolchildren carried (2:33:05-2:33:15); a witness later testified that she had made such a bag for Etan, and he was carrying it on the morning that he disappeared (A1834, A1842). Near the end of the interview, Hernandez said that he “d[id]n’t have nothing to hide no more[,]” that he was “being honest,” and that he had “said what [he] did” (7:04:30-7:06:00).

### **3. Hernandez’s further confessions to doctors and others**

Hernandez continued confessing to killing Patz for years. After his confession to the ADA, while

Hernandez was awaiting arrest processing at NYPD headquarters, he told one of the detectives accompanying him—without any prompting—“I don’t know why I did it. Something just came over me. I couldn’t stop” (SA768).

Hernandez was then admitted to the hospital due to the risk of self-harm. There, he reported that he had “choked a person 33 years ago. That’s why I’m in jail. I’m sorry, I did it” (SA1271-72).

In June 2012, while in pretrial custody, Hernandez was interviewed by psychiatrist Dr. Flavia Robotti. During the interview, Hernandez again confessed to the murder and gave the same details that he had earlier provided to law enforcement. Hernandez also confirmed that he had confessed the crime to his ex-wife and his prayer group (SA900-02). Dr. Robotti ordered that Hernandez receive psychiatric treatment because he seemed depressed and potentially suicidal, but emphasized that Hernandez did not exhibit delusional thinking (SA914) and was not hallucinating (SA930-31).

From 2012 to 2016, while awaiting trial, Hernandez met five times with a psychiatrist retained by his attorneys, Dr. Michael First. At their initial meeting in August 2012, Hernandez confessed to the crime in largely “the same details that he told the police” and the ADA (SA1120). Hernandez repeated the confession in four subsequent interviews with Dr. First (SA1121-30).

### C. State-Court Proceedings, Including the Trial Court's Response to a Jury Note

1. Hernandez was charged in New York state court with murder and kidnapping. Before trial, he moved to suppress his statements at the CCPO and the District Attorney's Office based on asserted *Miranda* violations; he did not make any claim about coercion, nor did he raise *Seibert* as a ground for suppression (App.258a). The state trial court denied suppression, concluding that there was no *Miranda* violation because Hernandez was not in custody when he made his first confession at the CCPO and that he had knowingly and intelligently waived his *Miranda* rights thereafter (App.273a-280a).

Hernandez's first trial ended in a mistrial in May 2015 when the jury was unable to reach a unanimous verdict.<sup>2</sup> During his second trial, which began in September 2016, 66 witnesses testified over five months. Among the evidence presented by the People were Hernandez's confessions to civilians and law enforcement. The People also presented testimony corroborating many details that Hernandez had provided in his confessions that he could not otherwise have known. For example, Etan's mother Julie Patz testified that Etan had intended to buy a soda that morning; a co-worker at the bodega confirmed that the basement contained a walk-in refrigerator, banana boxes, and forty-gallon trash

---

<sup>2</sup> News reports indicated that the first jury had deadlocked 11-1 in favor of conviction. *See Lone Holdout on Etan Patz Jury Says He Couldn't Get Beyond Reasonable Doubt*, ABC NEWS (May 8, 2015), available at <https://abcnews.go.com/US/lone-holdout-etan-patz-jury-reasonable-doubt/story?id=30913806> (last visited Dec. 18, 2025).

bags large enough to fit Etan's body; a medical examiner explained that Hernandez's detailed descriptions of Etan's last gasps and spasms were consistent with the bodily reactions of somebody being strangled to death; and a shop owner confirmed Hernandez's observation that a new door must have been installed in the alleyway after he left Etan's body there (App.252a; A1836, A1842-43).

2. Under New York law, although the trial court had denied Hernandez's motion to suppress, the jury could still decide whether those statements were "involuntarily made" in certain carefully defined respects. N.Y. Crim. Proc. L. (CPL) § 710.70(3); *see People v. Graham*, 55 N.Y.2d 144, 150 (1982). Specifically, as the trial court instructed, the jury was to determine whether each of Hernandez's statements to law enforcement was (a) coerced or improperly induced, and thus "involuntary" under due process; or (b) obtained in violation of *Miranda*, in that he had not received *Miranda* warnings or had not properly waived his *Miranda* rights while in custody (A1434-42).

During deliberations, the jurors sent several notes to the judge, including one asking him to repeat the instructions on assessing the voluntariness of confessions (A1478). In addition, the jury sent a note asking the judge to

explain to us whether if we find that the confession at CCPO before the *Miranda* rights was not voluntary, we must disregard the two later videotaped confessions at CCPO and the DA's office, the confession to Rosemary and Becky Hernandez, and the confessions to the various doctors.

(App.281a) (emphasis in original). The parties disagreed on the appropriate response, with the People saying that “[t]he answer is no” while the defense thought that “[t]he answer is yes” (App.282a). At no point did the defense cite *Seibert* in support of their position that “yes” was the right answer (App.282a-307a).

The trial court ultimately sided with the People and told the jury that “the answer is, no” (App.307a). The court gave two reasons for that answer. First, the court found that the issue was not one for the jury to decide at all: “[t]he law does not require” the jury to reject subsequent confessions following an involuntary confession because “there is no fruit of the poisonous tree law for the jury” (App.283a-284a). Second, the trial court thought that the jury “wrote the note very carefully” to ask whether they “*must . . .* disregard *all* the rest” of the confessions, which included confessions to civilians as well as law enforcement (App.301a (emphases added)). Since the court’s instructions on voluntariness had been limited to statements to law enforcement (A1435), the court believed that “the best answer to give to this particular note is a ‘no’” (App.301a).

The jury ultimately acquitted Hernandez of intentional murder but convicted him of felony murder and kidnapping (A1803).

3. The Appellate Division, First Department affirmed. At the outset, the Appellate Division held that the trial court “properly denied [Hernandez’s] suppression motion,” agreeing that his first CCPO statement was “not the product of custodial interrogation” and that he had “made a knowing and intelligent waiver of his *Miranda* rights” thereafter

(App.251a). The court also found that “[a]ny inconsistencies” in Hernandez’s confessions “were sufficiently explained” (App.253a).

Hernandez also challenged the trial court’s response to the jury note, and for the first time raised *Seibert*. The Appellate Division rejected Hernandez’s challenge without citing *Seibert*, holding that, “[g]iven the precise wording of the note, the court’s brief response was correct” (App.254a). In the alternative, the Appellate Division held that any error in the response was harmless “in light of the strong evidence that [Hernandez]’s confession to the Assistant District Attorney was fully attenuated from all of his confessions to the police, as well as being corroborated by [Hernandez]’s various confessions to civilians” (App.254a-255a) (citations omitted).

Both the New York Court of Appeals and this Court denied Hernandez’s attempts to seek further review of his conviction (App.135a-136a).

#### **D. Federal Habeas Proceedings**

Hernandez filed a petition for a writ of habeas corpus. The U.S. District Court for the Southern District of New York denied the petition, holding, as relevant here, that the state courts had not clearly erred in concluding that Hernandez was not in custody for his initial pre-warning confession at the CCPO, and that any error in the trial court’s response to the jury note under *Seibert* was harmless (App.63a-101a).

On appeal, Hernandez did not challenge the district court’s determination that he was not in custody during his initial confession. Instead, Hernandez focused solely on the jury note issue. In

response, the People defended the Appellate Division’s conclusion that the trial court had given a “correct” response to the note because the note was not limited to Hernandez’s statements to law enforcement and because the note did not refer to the “deliberate two-step strategy” that is an essential prerequisite to finding a *Seibert* violation. Brief for Appellee at 35-38, *Hernandez v. McIntosh*, No. 24-1816, Dkt. No. 41, (Jan. 14, 2025). More fundamentally, the People argued that any inconsistency with *Seibert* was immaterial because “there is no freestanding federal right to state-court jury instructions that exhaustively and precisely detail the nuances of sometimes complex federal constitutional rules” and because “*Seibert* says nothing about how to interpret or respond to [this] jury’s request to ‘explain.’” *Id.* at 39-40, 43-44. Finally, the People argued that any error in the trial court’s response to the jury note was harmless under both AEDPA and *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

The Second Circuit reversed, finding that the response to the jury note was contrary to and an unreasonable application of *Seibert* (App.27a-35a). In reaching this conclusion, the court asserted—without citation to any case other than the district court opinion here—that “[t]he rule laid out in *Seibert* is relevant not only to a court making admissibility determinations, but also to jurors who are deciding whether to consider such statements or to set them aside as involuntary” (App.30a).

Applying *Seibert*, the Second Circuit held that the trial court should have given a different response because “*Seibert* compelled the jury to disregard the second CCPO confession” and because, as to

Hernandez's "statements after he left the CCPO," the trial court should have "explained" "whether law enforcement used sufficient 'curative measures'" and whether "the subsequent statements [were] sufficiently attenuated" from the initial CCPO confession (App.32a-35a). On harmless error, the Second Circuit held that Hernandez had established both that the trial court's response actually prejudiced him under *Brecht* and that the Appellate Division's harmless-error ruling was an unreasonable application of *Chapman v. California*, 386 U.S. 18 (1967), under AEDPA (App.36a-46a).

## REASONS FOR GRANTING THE PETITION

A grant of federal habeas relief “intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011). To avoid such undue interference, this Court has not hesitated to summarily reverse when a court of appeals displays a “readiness to attribute error [that] is inconsistent with the presumption that state courts know and follow the law,” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). For several independent reasons, the Second Circuit’s decision here warrants summary reversal or certiorari.

### **I. Summary Reversal Is Warranted Based on the Second Circuit’s Unprecedented Extension of *Seibert* to State Jury Deliberations**

#### **A. The Second Circuit Improperly Found That *Seibert*’s Suppression Ruling Applied to Jury Deliberations, When This Court Has Never So Held.**

The Second Circuit held that *Seibert* required reversal of the jury verdict because the state trial court’s response to a jury note did not comport with Justice Kennedy’s controlling concurrence in that case. In doing so, the court relied on the premise that *Seibert*—a case about pretrial suppression by a judge—also applied to deliberations by the jury, and that Hernandez was entitled to “have the jury fully consider” his *Seibert* claim (App.36a).

AEDPA forecloses that ground for overturning the verdict because no precedent from this Court has ever “clearly established” that *Seibert* applies to jury

instructions. 28 U.S.C. § 2254(d)(1). Indeed, the Second Circuit’s decision cited *no law at all* (aside from the district court opinion here) to support this unprecedented extension of *Seibert* to jury deliberations. Even if *Seibert* clearly established the law with respect to pretrial suppression—a proposition that is itself debatable, *see Reyes v. Lewis*, 833 F.3d 1001, 1009 (9th Cir. 2016) (Callahan, J., dissenting from denial of rehearing en banc)—this Court’s precedents must address “the specific question presented by this case” to clearly establish federal law for habeas purposes, *Smith*, 574 U.S. at 6. “Because none of [this Court’s] cases confront” the question of *Seibert*’s applicability to jury deliberations, “the state court’s decision could not be ‘contrary to’ any holding from this Court.” *Woods v. Donald*, 575 U.S. 312, 317 (2015).

There are compelling reasons to conclude that *Seibert* does not extend to jury deliberations—at least enough “for fairminded disagreement” on the question. *Harrington v. Richter*, 562 U.S. 86, 103 (2011). “[I]t is not uncommon for a constitutional rule to apply somewhat differently” in different contexts. *White v. Woodall*, 572 U.S. 415, 421 (2014). This Court has already held that the federal Constitution does not require a jury to decide the voluntariness of a confession at all and that it is permissible for that question to be reserved “for the court rather than the jury.” *Lego v. Twomey*, 404 U.S. 477, 490 (1972); *cf.* 18 U.S.C. § 3501(a) (federal judges decide voluntariness “out of the presence of the jury”). If there is no federal right to have a jury decide basic questions about *Miranda*, a “fairminded jurist” could question whether such a jury is compelled to consider follow-on

doctrines such as *Seibert*. *Woods v. Etherton*, 578 U.S. 113, 118 (2016).

The Second Circuit apparently believed that *Seibert* applied here because New York law, unlike federal law, allows a jury to consider the voluntariness of a confession even after a court has denied suppression (App.28a). See N.Y. CPL § 710.70(3). But that reasoning ignored a critical state-law distinction. New York has chosen to have juries consider only discrete aspects of a confession’s voluntariness—whether, as to each confession, there was (a) coercion or undue inducements or (b) a violation of *Miranda*’s procedural requirements (A1434-42). By contrast, New York courts have squarely held that judges need not “instruct the jury on attenuation,” *People v. Rabady*, 28 A.D.3d 794, 795 (2d Dep’t 2006); see also *People v. Medina*, 146 A.D.2d 344, 351 (1st Dep’t 1989), *aff’d sub nom. People v. Bing*, 76 N.Y.2d 331 (1990)—i.e., whether a prior unwarned statement taints a subsequent post-warning statement.

That state-law distinction was one of the reasons that the trial judge gave for his answer of “no”: “there is no fruit of the poisonous tree law for the jury” in New York (App.283a-284a). New York juries have thus not been “charged by state law with the duty of finding fact pertinent to” the legal question to which *Seibert* is relevant. *Rogers v. Richmond*, 365 U.S. 534, 546 (1961). That a New York jury can consider *some* aspects of voluntariness does not mean that federal law clearly requires the jury to be instructed on *all* legal doctrines that may affect the admissibility of a confession. “[A]t a minimum,” that question is “not beyond any possibility for fairminded disagreement.” *White*, 572 U.S. at 421 (quotation marks omitted).

It makes no difference that, as the Second Circuit also believed, the jury note appeared to focus on the subsequent-confession issue that was the context for *Seibert*'s fractured ruling (App.29a). For one thing, as discussed below, that interpretation of the note itself improperly disregarded the state courts' reasonable alternative interpretation. More fundamentally, no clearly established law from this Court holds that a jury must be instructed on a legal issue just because it asks about one. See *United States v. Sanders*, 472 F. App'x 376, 380-81 (6th Cir. 2012) (no error in responding to jury note about *Miranda* by saying that "the existence of a *Miranda* violation is a legal question and in the sole purview of the judge"). Here, the trial court's answer of "no" informed the jury that *Seibert* (and attenuation more generally) was not an issue of fact for them to determine because applying "the fruit of the poisonous tree doctrine" was "not their function here" (App.283a-284a, 302a). No precedent from this Court clearly holds otherwise.

**B. The Second Circuit Improperly Rejected the State Courts' Interpretation of the Jury Note as Asking a Question for Which *Seibert* Would Be Non-Responsive.**

Summary reversal is also warranted because the Second Circuit failed to defer to the state courts' interpretation of the jury note, which is a factual finding that can be rejected only with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); see, e.g., *Powell v. Fuchs*, 4 F.4th 541, 548 (7th Cir. 2021). The Second Circuit believed that the jury note was "plainly focused" (App.29a) on the factual scenario that *Seibert* addressed: namely, the admissibility of a post-*Miranda* confession to law enforcement in the

“infrequent case” when officers employed a “deliberate, two-step strategy” to evade *Miranda*. *Seibert*, 542 U.S. at 621-22 (Kennedy, J., concurring). But the state courts reasonably interpreted the jury note differently, in two respects.

First, the state courts noted that the jury’s request was not limited to law-enforcement statements because it was “carefully worded” to include several of Hernandez’s confessions to civilians and asked whether the jury “must ... disregard” *all* of those confessions (App.283a, 301a; *see also* App.254a). Under this interpretation, the jury note did not implicate *Seibert* at all because that decision, like *Miranda* itself, applies only to a suspect’s answers to “questioning initiated by law enforcement officers.” *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *see Arizona v. Mauro*, 481 U.S. 520, 530 (1987) (declining to suppress confession to spouse in officers’ presence).

Second, the note also did not implicate *Seibert* because the jury was focused only on its obligations if it found that the confession at the CCPO “before the *Miranda* rights was not voluntary” (App.281a). Under *Seibert*, however, a mere *Miranda* violation does not by itself require that a subsequent post-warning statement be suppressed. To the contrary, Justice Kennedy’s concurrence reaffirmed this Court’s holding in *Oregon v. Elstad* that a prior “unwarned statement” does not automatically preclude the admission of a later statement if, as here, there has been a “subsequent administration of *Miranda* warnings.” 470 U.S. 298, 313 (1985); *see Seibert*, 542 U.S. at 620 (Kennedy, J., concurring) (“[I]t would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by

a proper warning.”). *Seibert* is triggered only if there is an additional fact: law enforcement’s deployment of a “deliberate two-step strategy” to withhold *Miranda* warnings until a suspect confesses. *Id.* at 621 (Kennedy, J., concurring). Here, however, the note referred only to a potential *Miranda* violation, and not to any “deliberate two-step strategy.” *Id.* If the jury was “focused” (App.29a) on anything, it was thus the situation presented in *Elstad*—and the trial court’s answer of “no” correctly reflected *Elstad*’s holding.

The Second Circuit gave no deference whatsoever to these reasonable interpretations of the jury note. That disregard of the state courts warrants summary reversal. *See Lambert*, 565 U.S. at 523-25.

## **II. Summary Reversal Is Warranted Because the State Trial Court’s Response to the Jury Note Caused No Prejudice**

Even assuming that the state trial court violated *Seibert* in responding to the jury note, the Second Circuit “clearly erred” in granting habeas relief because any error here was inconsequential under AEDPA and *Brecht. Wright*, 593 U.S. at 153. Habeas relief is not available “based on mere speculation that the defendant was prejudiced”; rather, this Court “must find that the defendant was actually prejudiced.” *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (per curiam). Habeas petitioners face an “especially heavy” burden of establishing that “an erroneous [jury] instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court’s judgment.” *Henderson v. Kibbe*, 431 U.S. 145, 154-55 (1977). Here, the Second Circuit’s reasoning failed to establish either that the

trial court's error had a "substantial and injurious effect or influence" on the verdict, as required by *Brecht*, or that the Appellate Division's finding that other evidence supported Hernandez's guilt was "an unreasonable application" of *Chapman*. *Davenport*, 596 U.S. at 122. Summary reversal is thus warranted on this ground as well.

**A. A Fairminded Jurist Could Agree with the State Appellate Court's Conclusion That Any Error Here Would Be Harmless Given the Other Evidence of Hernandez's Guilt.**

The Appellate Division reasonably found that any error in the trial court's response would have made no difference to the result of the trial. *See Davenport*, 595 U.S. at 144. The court gave two grounds for this harmless-error finding: first, there was "strong evidence" that Hernandez's confession at the District Attorney's Office "was fully attenuated from all of his confessions to the police" at the CCPO; and second, Hernandez's guilt was "corroborated by [his] various confessions to civilians" and by other evidence presented at trial (App.254a-255a). Because each of these conclusions "was supported by the record," *Gentry*, 540 U.S. at 6, the Appellate Division's ruling "d[id] not come close to exceeding" the considerable "leeway" it enjoyed before its harmless-error ruling could be "fairly labeled unreasonable," *Davenport*, 596 U.S. at 144.

1. Even assuming a *Seibert* violation, a post-warning statement may nonetheless be admissible if "curative measures are taken." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). "[A] substantial break in time and circumstances between the prewarning

statement and the *Miranda* warning may suffice in most circumstances.” *Id.* In a prior decision summarily reversing a grant of habeas relief based on *Seibert*, this Court found that there was a sufficiently substantial break when, between two interrogations, “[f]our hours [had] passed” and the defendant had “traveled from the police station to a separate jail and back again.” *Bobby v. Dixon*, 565 U.S. 23, 31 (2011) (per curiam).

This case presents a far more “significant break in time” and even more “dramatic change in circumstances” than in *Dixon*, *id.* at 32, thus supporting the Appellate Division’s finding that Hernandez’s subsequent confession to the ADA was “fully attenuated from all of his confessions to the police” at the CCPO (App.255a). After questioning ended at the CCPO, *eleven hours* passed before Hernandez began speaking with the ADA at a completely different location (App.121a-122a). In between the interviews, Hernandez was not only transported from New Jersey to Manhattan, but also spoke to his wife and daughter, took medication, led officers through the area near where he had discarded Etan’s body, ate dinner, and slept for several hours. *See supra* at 10. None of the detectives who had questioned Hernandez at the CCPO were present for the ADA interview. And before beginning the interview, the ADA gave Hernandez a fresh set of *Miranda* warnings and emphasized that he wanted them to start “brand new” and that their conversation had “nothing at all to do” with Hernandez’s earlier conversations (2:18:00-2:19:45). A reasonable jurist could conclude that these substantial changes in time and circumstances “allow[ed] the accused to distinguish the two contexts and appreciate that the

interrogation has taken a new turn.” *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

Hernandez’s detailed confession to the ADA alone would have been more than sufficient to sustain the guilty verdict. Aside from admitting to strangling Etan and disposing of his body, Hernandez volunteered details that were corroborated by other evidence that he could not possibly have known without being the perpetrator. For example, Hernandez explained that Etan made gurgling noises and twitched before eventually going limp (2:25:30-2:28:00); that description was strikingly similar to expert testimony about the process of dying by strangulation (A1843). Hernandez mentioned that he had lured Etan into the basement by offering a soda (2:22:00-2:25:20), which matched Julie Patz’s testimony that Etan had money that morning to buy a soda (A1842). Hernandez explained that he put Etan’s body in a “banana box” and left it in a nearby alley where garbage was collected that morning (2:27:30-2:31:15); that statement was corroborated by the testimony of the same man who, in 1979, drove the truck that removed garbage from that very location and who confirmed that he routinely picked up “banana boxes” there (A1844). During the walk-through of that alley, Hernandez remarked that he thought that a door had originally been in a different location (A1857), and a witness confirmed that he had installed a different door to the alley in the early 1980s (A1858). And Hernandez demonstrated to the ADA that Etan had been carrying a small tote bag that morning rather than the more typical backpack (2:33:05-2:33:15); sure enough, a witness explained that Etan was carrying such a bag on the morning that he disappeared (A1834, A1842).

Given these facts, the Appellate Division's determination that, even assuming an erroneous instruction, the jury would still have accepted the confession to the ADA and upheld Hernandez's conviction is not "beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. At the absolute least, "there are reasonable arguments on both sides—which is all [the State] needs to prevail in this AEDPA case." *Woodall*, 572 U.S. at 427.

2. Even ignoring all of the law-enforcement confessions, the Appellate Division also reasonably determined that Hernandez's guilt was "corroborated by [his] various confessions to civilians" (App.255a). Hernandez gave multiple, consistent confessions at the religious retreat in 1979, shortly after the crime, in a setting that was a safe space where he would have felt obligated to be truthful (A1902-03). Hernandez repeated those confessions to his friend Mark Pike and to his first wife Daisy Rivera (2:56:12-3:06:05). And after his arrest, Hernandez continued to confess his crime to various medical professionals between 2012 and 2016, including Dr. Robotti and the defense's own retained expert, Dr. First (SA901-02, SA1120-30). In each of these confessions, Hernandez repeated the same essential details: around 1979, he had lured a child into the bodega basement with the offer of a soda, strangled him, placed him in a large box, and thrown his body out in an alleyway. *See supra* at 12.

These strikingly similar confessions—none of which would have been precluded under *Seibert*—provided more than adequate grounds to support the Appellate Division's finding of harmless error under AEDPA's deferential standards. Thus, "it is not clear

that the [Appellate Division] erred at all, much less erred so transparently that no fairminded jurist could agree with that court's decision." *Dixon*, 565 U.S. at 24.

3. In rejecting the Appellate Division's finding of harmless error, the Second Circuit "did not properly apply the deference it was required to accord the state-court ruling." *Wheeler*, 577 U.S. at 79. Instead, the court's opinion is suffused with its own doubts about Hernandez's guilt and its skepticism about various findings by the state courts. But a federal court may not treat AEDPA review "as a test of its confidence in the result it would reach under *de novo* review," *Kayer*, 592 U.S. at 119 (quotation marks omitted), even when "[d]oubts about whether [the defendant] is in fact guilty are understandable," *Cavazos v. Smith*, 565 U.S. 1, 8 (2011). At minimum, a federal court "must carefully consider all the reasons and evidence supporting the state court's decision." *Hines*, 592 U.S. at 391-92 (quotation marks omitted). Here, the Second Circuit flouted these well-established principles by "disregard[ing]" evidence that supported the state appellate court's harmless-error finding and "omitting inconvenient details from its analysis." *Id.* at 386, 392-93.

First, the Second Circuit thought that "a properly instructed jury could well have found that the confession to ADA Durastanti . . . was involuntary under *Seibert*" (App.42a), based on its belief that Hernandez was still "mentally and physically exhausted," had not been told of the "likely inadmissibility" of his statements to the detectives, "may not have knowingly waived his *Miranda* rights" before speaking to the ADA, and "had no opportunity to consult counsel" (App.42a-43a). But the Second

Circuit “omit[ed] inconvenient details from its analysis,” *Hines*, 592 U.S. at 391, including the circumstances described above showing that Hernandez had eaten and rested, that he understood his *Miranda* rights, and that “the interrogation ha[d] taken a new turn” with the ADA, *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). *See supra* at 10-11. The Second Circuit appeared to have considered these factors to be less important than the ones that it highlighted. But AEDPA forbids a federal court from “substitut[ing] its own judgment for that of the state court” without at least identifying and rebutting the facts underlying the state courts’ determination. *Woodford*, 537 U.S. at 25.

Second, the Second Circuit claimed that Hernandez’s various confessions to civilians were “manifestly inconsistent” and thus deemed them less than fully persuasive (App.40a). But the defense challenged all of these inconsistencies at trial, and the Appellate Division explicitly found that any inconsistencies “were sufficiently explained” to the jury (App.253a), as the People had argued on appeal (A1901-1911). This was a factual finding that the Second Circuit could not ignore “without analyzing whether [it] had been rebutted by clear and convincing evidence,” *Richey*, 546 U.S. at 79, yet the circuit failed to identify any such evidence. Instead, the court pointed to a few inconsistencies in just a single paragraph (App.9a-10a). But the court did not identify, let alone rebut, any of the arguments made during the trial and the direct appeal that explained away those inconsistencies, and it failed to acknowledge both the many striking consistencies in all of Hernandez’s confessions over decades and the corroborating evidence introduced at trial. The

Second Circuit's disbelief of Hernandez's confessions without considering any of these facts represents the type of "de-novo-masquerading-as-deference approach" to habeas review that this Court has repeatedly criticized. *Kayer*, 592 U.S. at 117.

Third, the Second Circuit repeatedly emphasized Hernandez's "history of mental illness, low IQ, and hallucinations" as undermining the credibility of his confessions and his ability to understand *Miranda* warnings (App.9a, 42a). But the court's doubts on this front misrepresented the record and again "overlooked" contrary facts. *Lambert*, 565 U.S. at 524. For example, there is no record support at all for the court's claim that, "[l]ong before Patz's disappearance, doctors documented Hernandez's" mental issues (App.9a). The Second Circuit also asserted that Hernandez had been diagnosed with "schizophrenia" and "psychotic disorder" (App.9a, 12a), but there is no record of any such official diagnoses. At most, Hernandez self-reported that he suffered from schizophrenia when he applied for Social Security disability benefits in 1991—but these records also included medical reports finding that he did *not* suffer from that mental condition (A1809, A1883). Moreover, there is no evidence whatsoever that Hernandez suffered from schizophrenia or psychotic disorder when he made the confessions to law enforcement at issue here; to the contrary, multiple medical professionals, including Hernandez's own treating physician, declined to diagnose Hernandez with those disorders at the time (A1881-83).

The Second Circuit also disregarded other evidence in the record supporting the Appellate Division's finding that "the jury could have

reasonably rejected the expert testimony introduced by [Hernandez] regarding his mental condition” (App.253a). For example, there is extensive evidence that, even with his mental issues and low tested IQ, Hernandez “lived as a well-functioning, employed family man for many years” (App.253a). The jury could also have judged Hernandez’s mental capacity for itself by watching the video of his confession to the ADA, during which Hernandez appeared alert, engaged, and lucid, and “asked intelligent questions about his right to counsel” (App.252a). And although the Second Circuit believed that Hernandez’s confession to Dr. Robotti was infected by his “serious mental health issues” and penchant for “confessionary hallucinations” (App.40a), that view of the confession rested on a profound mischaracterization of her testimony. Dr. Robotti recommended that Hernandez receive mental health treatment for his depression (SA956), but she was emphatic that Hernandez did not exhibit delusional thinking (SA914) and was not hallucinating (SA930-31). AEDPA forbade the Second Circuit from simply ignoring this evidence.

Finally, the Second Circuit devoted significant attention to law enforcement investigations of another suspect, Jose Ramos (App.6a-7a, 21a). But it was error to focus on Hernandez’s claim of “a viable alternative suspect” without “consider[ing] the substantial evidence linking [Hernandez] to the crime.” *Hines*, 592 U.S. at 392 (quotation marks omitted). Unlike Hernandez’s repeated confessions to strangling a boy very much like Etan at the right time and place, Ramos only admitted to molesting—not killing—a boy, at a park several blocks from Etan’s bus stop (A1873-76). The Appellate Division expressly

found that Ramos “had little connection with the facts of this case” and that the evidence implicating him was “too weak to affect the weight of the evidence establishing [Hernandez’s] guilt” (App.253a). The Second Circuit failed to identify any clear and convincing evidence to the contrary. *See Davis v. Ayala*, 576 U.S. 257, 271 (2015).

**B. Given the State Courts’ Findings About the Absence of Custody, There Was No Basis to Assume That the Jury Even Considered the Trial Court’s Response.**

The Second Circuit also erred in finding prejudice under *Brecht*. The jury note at issue here was phrased as a conditional: the jury asked whether it was required to disregard Hernandez’s post-*Miranda* confessions “if [it] f[ou]nd that the confession at CCPO before the *Miranda* rights was not voluntary” (A1486 (emphasis in original)). The jury would thus have had to conclude that the initial confession violated *Miranda* before it would consider the trial court’s response at all. If it did not make that predicate finding, the trial court’s response would have played no role in its deliberations, and any error in that response could not have caused actual prejudice under *Brecht* (App.206a).

As defense counsel acknowledged at trial, the use of the word “if” showed that the jury “still [had not] made a decision yet” on this question (App.303a). But the Second Circuit never determined that the jury had decided that there was a *Miranda* violation in the initial confession. And, on this record, there is no basis to conclude that a reasonable jury would have found such a violation, since a “fairminded jurist” could conclude that Hernandez was not in custody at

the CCPO. *Shinn v. Kayer*, 592 U.S. 111, 119 (2020). Indeed, every state court to consider the question reached that factual conclusion (App.251a); both the magistrate judge and the district court found that this no-custody determination was reasonable (App.63a-65a, 144a-170a); and Hernandez chose not to challenge this determination on appeal. Although the Second Circuit suggested, in a footnote containing no analysis, that this no-custody finding might be “dubious” (App.31a), it never identified any evidence—let alone the “clear and convincing evidence” required by § 2254(e)(1)—to rebut the factual findings underlying the state courts’ conclusion that Hernandez was not in custody. There was thus no basis to assume that the jury would have made the threshold finding of involuntariness that would have been necessary for the trial court’s answer to impact deliberations at all.

Even if the jury were to find that Hernandez’s pre-warning confession violated *Miranda*, there still would be no basis to believe that the jury would have rejected the subsequent confessions under *Seibert*. As discussed, a mere *Miranda* violation in an initial confession is insufficient to establish a *Seibert* violation; rather, law enforcement must additionally engage in a “deliberate, two-step strategy” to evade *Miranda* to trigger *Seibert*’s suppression rule. *Seibert*, 542 U.S. at 621 (Kennedy, J., concurring). Here, however, Hernandez never argued during the trial, and no court has ever found, that law enforcement engaged in “an intentional misrepresentation of the protection that *Miranda* offers.” *Id.* at 620-21 (emphasis added). And despite asserting that Hernandez’s post-*Miranda* confession at the CCPO “fits precisely the mold addressed in *Seibert*”

(App.32a), the Second Circuit never addressed whether officers acted in the “deliberate” and intentionally deceptive manner that is a prerequisite for finding a *Seibert* violation. There is thus no basis to find “actual prejudice” under *Brecht* from the absence of a more fulsome *Seibert* instruction when nothing suggests that even a more fully instructed jury would have found a *Seibert* violation.

### **III. If This Court Does Not Summarily Reverse, It Should Grant a Writ of Certiorari to Address Whether Habeas Relief Was Improperly Granted Here**

Until the decision below, no court has held that, under AEDPA, a state-court conviction should be upset on federal habeas grounds because of a purported *Seibert* error in responding to a jury note. If this Court does not summarily reverse, it should grant a writ of certiorari to review the Second Circuit’s unprecedented ruling.

This case presents an important question about whether a federal habeas court may essentially compel state courts to submit legal questions about admissibility to a jury when state law does not so require. As explained above, federal law does not require juries to decide the voluntariness of statements to law enforcement. And although New York has chosen to have juries consider certain factual aspects of a confession’s admissibility, it has decided not to have juries consider other aspects of admissibility, including the “fruit of the poisonous tree” doctrine addressed by *Seibert* and *Elstad*.

The Second Circuit’s conclusion that New York juries must nonetheless be instructed on “curative measures” under *Seibert* and on attenuation more

generally (App.34a-35a) warrants this Court's review. Nineteen states ask juries to decide whether a defendant's statements are voluntary.<sup>3</sup> But, like New York, many of them are selective about which aspects a jury can decide. For example, some states do not ask juries to decide any issues relating to *Miranda*, such as custody. *See, e.g., State v. Morse*, 617 P.2d 1141, 1145 (Ariz. 1980); Oklahoma Uniform Jury Instructions Criminal 2nd ed. 9-12. Other states require juries to decide whether a defendant received *Miranda* warnings and validly waived his rights, but only if the court first determines that the defendant was in custody when he made the statement. *See, e.g., Volkova v. State*, 855 S.E.2d 616, 620 (Ga. 2021); *Oursbourn v. State*, 259 S.W.3d 159, 176 (Tx. Ct. Crim. App. 2008).

Under the Second Circuit's holding, a federal habeas court could disregard these careful choices and invalidate criminal convictions based on any failure to instruct state juries on the full panoply of legal principles applicable to the admission of a

---

<sup>3</sup> *State v. Porter*, 595 P.2d 998, 1000 (Ariz. 1979); *Dyer v. State*, 604 S.E.2d 756, 759 (Ga. 2004); *Hof v. State*, 655 A.2d 370, 381-82 (Md. 1995); *Commonwealth v. Tavares*, 430 N.E.2d 1198, 1206 (Mass. 1982); *State v. Mitchell*, 611 S.W.2d 211, 214 (Mo. 1981); *State v. Scott*, 263 N.W.2d 659, 663 (Neb. 1978); *Carlson v. State*, 445 P.2d 157, 159 (Nev. 1968); *State v. George*, 257 A.2d 19, 20 (N.H. 1969); *State v. Farzaneh*, 468 N.W.2d 638, 642 (N.D. 1991); *Hopper v. State*, 736 P.2d 538, 539-40 (Ok. Ct. Crim. App. 1987); *State v. Brewton*, 395 P.2d 874, 880 (Or. 1964); *Commonwealth v. Joyner*, 272 A.2d 454, 455 (Pa. 1971); *State v. Arpin*, 410 A.2d 1340, 1345 (R.I. 1980); *State v. Torrence*, 406 S.E.2d 315, 319 (S.C. 1991); *Lopez v. State*, 384 S.W.2d 345, 348 (Tx. Ct. Crim. App. 1964); *State v. Caron*, 586 A.2d 1127, 1133-34 (Vt. 1990); *State v. Vance*, 250 S.E.2d 146, 150 (W. Va. 1978); *Witt v. State*, 892 P.2d 132, 140 (Wy. 1995).

defendant's statements. Such a sweeping rule finds no support in any ruling from this Court. And it marks a particular affront to state courts when no similar rule applies to federal juries. Certiorari is accordingly warranted to clarify when federal habeas relief may be granted based on a state court's refusal to instruct the jury on an aspect of a confession's voluntariness that the state has decided not to submit to the jury.

**CONCLUSION**

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ALVIN L. BRAGG, JR.

*District Attorney  
New York County*

STEVEN C. WU

*Chief, Appeals Division*

STEPHEN J. KRESS

*Chief, Federal Habeas  
Corpus Unit*

One Hogan Place,  
New York, NY 10013  
(212) 335-9326  
wus@dany.nyc.gov

December 18, 2025