

No. 25-748

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
U.S. Court of Appeals for the Second Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that the state trial court's response to the jury's note about the voluntariness of respondent's asserted confessions—an issue respondent was entitled to put before the jury under New York law—was contrary to this Court's decision in *Missouri v. Seibert*, 542 U.S. 600 (2004).
2. Whether the Second Circuit correctly determined that the error was not harmless under the two-step inquiry articulated in *Brown v. Davenport*, 596 U.S. 118 (2022).

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INTRODUCTION

A unanimous panel of the Second Circuit held that respondent Pedro Hernandez—a 66-year-old man wrongfully held in state custody for almost 14 years—was denied due process in connection with his New York state trial. That conclusion, far from “unprecedented” (*e.g.*, Pet. 20), was based on the straightforward application of this Court’s precedent to the “extraordinary circumstances of this case.” Pet. App. 45a.

The State’s evidence as to Hernandez, who has a limited IQ and a well-documented history of mental illness, consisted entirely of his asserted confessions—particularly two recorded confessions obtained by law enforcement after seven hours of questioning in an eight-by-ten-foot windowless room in a police station, during which detectives intentionally chose not to provide Hernandez with *Miranda* warnings or to turn on installed video recording equipment. Hernandez asked *repeatedly* to leave during that session, telling agents he was there against his will and that he wanted to go home. After seven hours, Hernandez finally gave the officers what they had made clear was the only way for the interrogation to end: a purported confession to a crime he did not commit. Only then did law enforcement provide *Miranda* warnings and turn on the video recorder, after which the detectives led Hernandez through the same purported confession again.

Those facts may be familiar: this Court squarely addressed them in *Missouri v. Seibert*, 542 U.S. 600 (2004), concluding that a post-warning confession obtained through such a “deliberate two-step strategy” was inadmissible absent curative measures sufficient to ensure that a reasonable person in the defendant’s

position would understand the significance and effect of the *Miranda* warnings and the waiver of rights. *Id.* at 620-622 (Kennedy, J., concurring).

At trial, Hernandez challenged the voluntariness of the recorded statements before the jury, as he was entitled to do under New York law. *People v. Parker*, 224 A.D.3d 777, 779 (2d Dep’t 2024). Indeed, the voluntariness of Hernandez’s statements was “*the central issue in the case.*” Pet. App. 29a. But when the jury asked the trial court to “explain” whether it should disregard the later recorded statements if it found the earlier unwarned statements to have been involuntarily obtained—the very question this Court addressed in *Seibert*—the trial court gave the jury the wrong answer: the court told the jury “no” when *Seibert* plainly instructs that the answer is “maybe” and, on these facts, “yes.”

This Court has repeatedly held, and the State conceded below, that habeas relief is appropriate where a jury instruction “misstate[s] applicable federal law.” C.A. Dkt. 41, at 35 (citing *Francis v. Franklin*, 471 U.S. 307, 318 (1985)). The Second Circuit therefore correctly concluded that the trial court’s answer “was contrary to and an unreasonable application of *Seibert*,” justifying habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pet. App. 35a (quotation marks omitted).

The Second Circuit further concluded that the error was not harmless under either prong of the two-step analysis prescribed by this Court in *Brown v. Davenport*, 596 U.S. 118, 122 (2022), because the instruction touched on the central issue in the case—the asserted confessions were the only evidence in the case—and thus “[n]o fair-minded jurist could reach

the conclusion that the error was harmless beyond a reasonable doubt.” Pet. App. 42a.

The State identifies no error in that reasoning, much less one grave enough to establish entitlement to the “extraordinary remedy” of summary reversal (*Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 512-513 (2001) (Stevens, J., dissenting)), which is the petition’s primary request. And it certainly does not present a substantial legal question that warrants a grant of certiorari. The petition should be denied.

STATEMENT

A. Patz’s disappearance

Etan Patz disappeared on the morning of May 25, 1979, while walking to catch his bus for school. He has never been found. In the following days, the police performed an “in-depth canvas[s] and search of buildings, rooftops, basements and elevator shafts[,] backyards and alleys.” C.A. App. 1712, 2215. Patz had gone to the bodega next to his bus stop to buy a drink before getting on the bus. D. Ct. R. 1-46 at 3852:5-17. The police searched the entire bodega, including the basement; interviewed many people, including Hernandez, who worked at the bodega at the time; and spent thousands of hours searching the area that week. C.A. App. 1619, 2106. Despite these efforts, police did not locate Patz or identify any suspects in his disappearance.

While the petition purports to detail Hernandez’s involvement in the “murder” of Patz (*e.g.*, Pet. 6), it cites exclusively to the same asserted confessions that form the basis of the Second Circuit’s decision below. As detailed throughout, aside from those purported confessions, there is *no evidence* linking Hernandez to

the disappearance of Patz or even confirming that Patz is deceased.

B. The investigation

1. Federal agents develop two primary suspects.

For nearly three decades following the disappearance of Patz, law enforcement pursued multiple leads and various suspects. In the early 1980s law enforcement focused their attention on Jose Ramos, a convicted sex offender who had been dating a babysitter used by the Patz family. D. Ct. R. 1-45 at 3620:2-11, 3625:2-7, 3652:8-3653:3; D. Ct. R. 1-55 at 8277:3-5. The Federal Bureau of Investigation (FBI) led those efforts; the lead agent testified she was convinced Ramos “took [Patz] back to his apartment, tried to sexually abuse him and then dispose[d] of Etan Patz.” D. Ct. R. 1-55 at 8503:16-20. However, the FBI and the U.S. Attorney’s Office ultimately concluded there was no federal jurisdiction to prosecute Ramos. *Id.* at 8291:7-16.

In 2011, a renewed investigation focused on another suspect—Othniel Miller. Miller was a carpenter with a basement workshop located between Patz’s apartment and school bus stop. Miller had done work in the family’s apartment and was familiar with Patz. In interviews with federal agents, Miller admitted that on the night before Patz disappeared, Miller spent approximately forty-five minutes alone with him in the basement workshop and “gave a dollar to [Patz]” while “changing out of his work clothes” in exchange for helping him with the carpentry. Pet. App. 8a. Miller “also admitted to having sexual intercourse with a girl who was approximately ten years old in

1979.” *Ibid.* Like Ramos, Miller was never charged with a crime.

2. *The state investigation of Hernandez*

In 2012, after seeing local news coverage regarding the investigations, Hernandez’s brother-in-law called police to report that Hernandez may have been involved. C.A. App. 104-105, 1620. That report was based on a series of statements made by Hernandez—who has “a low intelligence quotient (‘IQ’)” and a well-documented “history of mental illness” (Pet. App. 3a), including “hallucinations,” “paranoia,” “voices,” and “visual images.” (C.A. App. 1638)—to friends, family members, and others over several decades.

While the State characterizes these prior statements as “repeated confessions,” the Second Circuit correctly noted that none of these prior “confessions” bore any resemblance to the details or circumstances of the disappearance of Patz. Pet. App. 9a-10a. Nor were any of them credited as serious or even concerning when made. *Id.* at 10a.

For example, during a church retreat in 1979, Hernandez told another church member that he “sodomized” a “kid” in the basement of his workplace and then “stabbed” the child “many times” with a “stick” to keep him “quiet.” C.A. App. 1628. In the early 1980s, he told a neighbor that while Hernandez was working in New York, a “black kid” “threw a ball” that hit him. C.A. Supp. App. 168-170. Hernandez “lost it,” strangled the kid, and put him “in a bag in back of a dumpster, behind the store.” C.A. Supp. App. 170. And in the early 1980s, Hernandez told his would-be wife, Daisy Rivera, that, years prior, a “muchacho”—which Daisy testified she took to mean “teenager”—of his height “violated” him. C.A. Supp. App. 230-231.

Hernandez “got very angry,” strangled this “muchacho,” and “threw his body in a dumpster, and * * * covered it with some bags.” C.A. Supp. App. 231.

These statements are inconsistent with each other and with the confession Hernandez would later give to law enforcement under interrogation. And as noted, when Hernandez made these earlier statements, no one believed him. Pet. App. 10a.

3. The CCPO interrogation

On May 23, 2012, police executed a “tactical plan” to interrogate and obtain a confession from Hernandez. C.A. App. 400 at 610:16-19. At 7:45 a.m., five police cars pulled up outside Hernandez’s home in New Jersey, where he lived with his wife. C.A. App. 266 at 371:9-23; C.A. App. 1092 at 5833:19-21. NYPD Detectives Jose Morales and Dave Ramirez asked Hernandez to accompany them to the local Camden County Prosecutor’s Office (CCPO) to discuss an old missing persons case in New York City. C.A. App. 129-130 at 235:21-236:4; C.A. App. 303 at 408:6-10. Before Hernandez got into one of the police cars, the police patted him down, asked him to “empty his pockets,” and placed his possessions in a box in the trunk of the car. C.A. App. 306-308 at 411:4-413:6.

Hernandez was escorted into the CCPO through a locked back entrance and led to a windowless eight-by-ten-foot room. A video camera, disguised as a smoke alarm, was mounted near the ceiling but was not used for the majority of the nearly seven-hour interrogation. C.A. App. 1544.

At about 10 a.m., Manhattan Assistant District Attorney Armond Durastanti arrived and was asked whether the detectives should turn the video recording on. He responded, “why don’t we just wait to see

what happens.” Pet. App. 11a. As a result, the next four hours of interrogation were intentionally not recorded.

Thereafter, detectives presented Hernandez with the well-known missing person poster from Patz’s case. C.A. App. 160 at 266:3-17; C.A. App. 27. Hernandez “gazed” at the poster and “was like, why are you showing me this[?]” C.A. App. 162-163 at 268:5-269:17. Hernandez stated that he had “never s[een] that child before.” C.A. App. 162.

Throughout the day, Hernandez asked repeatedly to go home, but the law enforcement officers deflected those requests. First, just before 1 p.m., Detective Morales asked Hernandez to “take a good look at the poster” of Patz. C.A. App. 380-382 at 590:5-592:13. Hernandez got “upset.” C.A. App. 178-179 at 284:25-285:2. Hernandez then explicitly stated that he “want[ed] to go home” and that they had him there “against [his] will.” C.A. App. 571-572 at 780:24-781:19. He also stated that the detectives were “trying to pin this missing kid on me.” C.A. App. 572 at 781:10-12. No one told Hernandez he was free to leave; instead, questioning continued. C.A. App. 317 at 422:13-22.

Five hours into the interrogation, Hernandez began crying and clenching his stomach, complaining of stomach pain. C.A. App. 496 at 705:1-4. The pain became so severe that Hernandez lay down “on the floor in the fetal position and started to shake.” *Ibid.*; C.A. App. 543 at 752:6-9. Hernandez said that “he was cold and he needed a jacket.” C.A. App. 496 at 705:7-11. One of the detectives, Detective Lamendola, left and returned with a jacket. C.A. App. 496 at 705:12-22; C.A. App. 544 at 753:1-7. He then told Hernandez to

“please get back in the chair.” C.A. App. 544 at 753:8-13.

Detective Lamendola continued to question Hernandez, stating that the detectives were “trying to help,” that they just “wanted the truth,” and that “the lies need[ed] to stop” and “the truth needed to be told.” C.A. App. 45; C.A. App. 498-499 at 707:2-708:18; C.A. App. 542 at 751:1-9. For a second time, Hernandez told his interrogators, “I just want to go home.” C.A. App. 564 at 773:1-24. Detective Lamendola did not tell Hernandez he was free to leave, and questioning continued. C.A. App. 574-575 at 783:3-784:11.

Detectives Morales and Ramirez eventually returned. C.A. App. 502 at 711:22-24. With all three detectives in the room with Hernandez, they continued asking him if he had “anything to tell” them “about what happened in 1979.” C.A. App. 184 at 290:6-11; C.A. App. 502-503 at 711:13-712:5. Hernandez again asked if they were trying to “pin what happened to that kid” on him. C.A. App. 184 at 290:10-15. Then, for the third time, Hernandez told the detectives he just wanted to go home. C.A. App. 430 at 640:6-13; C.A. App. 574-575 at 783:12-784:6. Instead, the detectives told Hernandez they “had a few more questions to ask him, and then after that, he could leave.” C.A. App. 184 at 290:16-20. They continued to ask Hernandez questions.

After more than six hours of choreographed interrogation, a mentally and physically exhausted Hernandez agreed to give the detectives what they had made clear would end the interrogation: a purported confession. According to Detective Lamendola, Hernandez told the detectives that on that morning in 1979, Hernandez saw Patz standing on the sidewalk

outside the bodega and asked him if he wanted something to drink. C.A. App. 505 at 714:3-12. Patz said yes, and accompanied Hernandez into the basement of the bodega, where Hernandez choked him and put his body in a garbage bag. *Ibid.* Hernandez then put the bag into a box, which he carried out of the basement and abandoned around the corner. *Ibid.* Hernandez could not give any motive, though he confirmed it was not sexual. C.A. App. 187 at 293:5-7.

The detectives then, for the first time, nearly seven hours after the interrogation began, read Hernandez his *Miranda* warnings and turned on the video camera. C.A. App. 522 at 731:15-25; C.A. App. 388 at 18-24; C.A. App. 33. Detective Lamendola asked Hernandez to repeat the statement he gave before receiving his *Miranda* warnings: “Can you start telling us again exactly what you just told us before about what happened?” C.A. App. 33 at 14:56. Hernandez paused and the detectives began feeding him details:

Det. Morales: What time you think it was?

Hernandez: What time?

Det. Morales: It was early in the morning, right?

Hernandez: In the morning. Sometime in the morning. He was waiting for the school bus.

Det. Lamendola: Who was waiting for the school bus?

Hernandez: The kid.

Det. Lamendola: What’s his name?

Hernandez: Etan Patz?

Det. Lamendola: (Nods)

Id. at 14:56. Detective Ramirez then put the poster of Patz back in front of Hernandez, and asked, “[i]s this the guy?” *Id.* at 15:05. When Hernandez confirmed, the detectives handed him a pen and asked him to write a confession on the poster. Detective Morales pointed to the margin of the poster and told Hernandez to write: “This is the kid I strangled.” *Id.* at 15:05-06. Hernandez asked the detectives how to spell “choke” before writing on the poster: “I am sorry + shoke [sic] him.” *Ibid.*; Pet. App. 15a.

4. Further questioning

Hernandez remained in police custody thereafter. That evening, around 8 p.m., the detectives drove Hernandez to the neighborhood of the bodega for a “walkaround,” which they recorded. They eventually took Hernandez to the Manhattan DA’s office at 2 a.m. C.A. App. 1601-1602. There, Hernandez was interrogated by ADA Durastanti, who had been watching Hernandez’s interrogation at the CCPO, until about 7 a.m. C.A. App. 1602.

ADA Durastanti told Hernandez that they were “start[ing] brand new,” and Hernandez again purportedly waived his *Miranda* rights and once again confessed to strangling Patz in the bodega’s basement. D. Ct. R. 1-20 Part 1 at 2:19-2:29.

Many of Hernandez’s statements to ADA Durastanti were inconsistent with his earlier statements or with known facts about Patz. For example, Hernandez could not tell the detectives what Patz was wearing, but told ADA Durastanti that Patz “had a jacket” that was “black or blue” (D. Ct. R. 1-20 Part 1 at 2:24); although Patz was carrying a blue, white, and red bag with an elephant pattern, Hernandez said Patz’s bag

was “black” (*id.* at 2:34; D. Ct. R. 1-45 at 3574:18-23, 3638:18-24).

Near the end of the interrogation, Hernandez asked ADA Durastanti questions that suggested he did not understand the warnings provided:

Hernandez: Now, can I ask you a question. Now, I know you read my rights. Now when you read my rights, you said that if I need an attorney. Does that means [sic] when I was talking to you? That if I didn't want to answer you?

ADA Durastanti: Yes.

Hernandez: Oh, that's what it meant?

ADA Durastanti: Yes.

Hernandez: Oh.

C.A. App. 43.1 at 7:04-7:05.

C. Hernandez's other statements

In June 2012, Hernandez was transferred to Rikers Island where he met with Dr. Flavia Robotti. Hernandez told Dr. Robotti that on the day of the alleged murder, he “had command hallucinations[] telling him exactly what to do” and that he “started hearing other voices talking among themselves.” C.A. Supp. App. 911-912. Dr. Robotti's assessment was that Hernandez needed “intensive psychiatric treatment” and referred him to the mental observation ward at Rikers. C.A. App. 1624.

Between 2012 and 2016, Hernandez met with defense expert Dr. Michael First, and his statements continued to morph. In the summer of 2012, Hernandez told Dr. First that he did not know if he murdered Patz and that there were also others in the

basement—“older, gray-haired people” who were wearing nightgowns “like in a nursing home” with “clown design[s].” C.A. Supp. App. 1121-1122, 1469. Dr. First concluded that Hernandez suffered from schizotypal personality disorder, which is marked by persistent distortions in “reality testing” and the lack of an “ability to differentiate between what is going on in your mind, versus what is occurring in the external world.” C.A. App. 1641 (citation omitted).

D. Hernandez’s trials, the jury note, and the trial judge’s response

Hernandez’s first trial resulted in a mistrial after the jury hung. C.A. App. 1609. His second trial began on September 12, 2016.

There was no physical evidence that a crime took place in the bodega basement, despite extensive testing performed by the NYPD. C.A. App. 1625. As a result, the prosecution’s case “hinged entirely on Hernandez’s purported confessions to the crime.” Pet. App. 3a.

On the second day of deliberations, the jury sent a note to the court:

We, the jury, request that the judge 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 confessions to Rosemary and Becky Hernandez, and the confessions to the various doctors.

Pet. App. 281a. The State asked the trial court to answer the question “no.” *Id.* at 282a. Hernandez’s counsel told the trial court that “no” would be “misleading” and incorrect, because under New York law, a jury is

entitled to consider voluntariness even where the trial court has previously denied a suppression motion. *Id.* at 284a-285a. As Hernandez’s counsel argued to the trial court, the jury needed to understand that if it found the first statement “was involuntary” that it *could* disregard the later confessions. *Id.* at 298a-300a. As counsel argued, “[t]his jury needs some guidance” and “No’ is the exact opposite of that [i]t tells them it is perfectly fine, ignore it, don’t worry about that issue.” *Id.* at 301a.

While the trial court agreed that the jury “was entitled to overrule” the court’s “decision” on voluntariness and admissibility under New York law, the court nonetheless simply answered the question “no.” Pet. App. 301a-303a.¹

Following the court’s response, the jury continued deliberating for more than a week before delivering its verdict, acquitting Hernandez of intentional murder but convicting him of felony murder and kidnapping. Pet. App. 23a. The trial court sentenced Hernandez to 25 years to life imprisonment. *Ibid.*

The Appellate Division, First Department affirmed Hernandez’s conviction. Pet. App. 250a-256a. In its decision, the Appellate Division found that the response to the jury note had been “correct,” and without elaboration or explanation, stated that Hernandez’s subsequent statement to ADA Durastanti “was fully attenuated from all of his confessions to the police.” *Id.* at 254a-255a. The New York Court of Appeals denied leave to appeal (*People v. Hernandez*, 35

¹ As the Second Circuit noted, “[a]lthough defense counsel never cited [*Seibert*], their argument clearly relied on that precedent.” Pet. App. 22a.

N.Y.3d 1066 (2020)), and this Court denied certiorari (*Hernandez v. New York*, 141 S. Ct. 1691 (2021)).

E. Habeas proceedings

1. Hernandez timely filed a habeas petition before the U.S. District Court for the Southern District of New York challenging, *inter alia*, the trial court's response to the jury's note as a deprivation of due process. See, *e.g.*, *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973).

The magistrate judge issued a Report and Recommendation that the petition be denied, which the district court adopted. Both judges agreed that the trial court's answer to the jury's note was wrong given the clear holding of *Seibert* and that the error denied Hernandez due process. Pet. App. 87a-97a. However, the district court denied Hernandez's petition on harmless grounds. Noting that the result was both "strange" and "counterintuitive" given the gravity of the error, the court issued a certificate of appealability. *Id.* at 97a, 101a.

2. A unanimous panel of the Second Circuit reversed, concluding that on the "extraordinary facts of this case," the "state trial court contradicted clearly established federal law and that this error was not harmless under the deferential standard applied to § 2254 habeas petitions." Pet. App. 2a, 27a.

As the Second Circuit noted, under New York law "the jury was entitled to, and indeed instructed to, evaluate the voluntariness of Hernandez's confessions." Pet. App. 28a (collecting authorities). As such, when the jury asked the trial court to "explain" how it should evaluate the subsequent confessions to the NYPD and ADA Durastanti if it found the initial

confession to have been involuntary, “federal law gives a clear answer” to that question. *Id.* at 29a.

In particular, *Seibert*—which involved substantially similar facts—“clearly instructs that the answer [to the jury’s question] is not ‘no.’” Pet. App. 32a. “Indeed, the answer ‘no’ was manifestly inaccurate, dramatically so with respect to the confession immediately after Hernandez was *Mirandized* at the CCPO, and also with respect to Hernandez’s later statement to ADA Durastanti.” *Ibid.*

The Second Circuit also found that the error was prejudicial and warranted relief because both prongs of the *Brown* two-step analysis were satisfied. *First*, the court readily concluded that the error “had substantial and injurious effect or influence in determining the jury’s verdict” (*Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted)), because the prosecution’s case hinged entirely on Hernandez’s confessions—there was “no support for its case other than Hernandez’s own confessions” and “during Summation alone, the State played clips from the taped confessions at least seven times” Pet. App. 38a-39a.

Second, the court of appeals concluded that AEDPA was satisfied because the state court’s harmlessness finding “was contrary to, or an unreasonable application of the applicable standard * * * namely *Chapman v. California*.” Pet. App. 41a. The Second Circuit correctly noted that under *Chapman*, the burden rests on the State to demonstrate the error “was harmless beyond a reasonable doubt,” the State had not been held to that burden before the state appellate court, and did not meet it in federal court. *Id.* at 41a-42a. As such, the Second Circuit concluded that no “fairminded jurist’ applying the *Chapman* standard

would find the error harmless beyond a reasonable doubt.” *Ibid.*

The State did not seek rehearing or rehearing *en banc*.

REASONS FOR DENYING THE PETITION

The Court should deny review.

First, none of the typical criteria for certiorari review are met here—as the State’s relegation of that argument to an afterthought tacitly admits. The court of appeals issued a fact-bound decision applying federal constitutional and AEDPA principles that are not in dispute.

Second, the State’s request for the extraordinary remedy of summary reversal also should be denied: far from exhibiting the kind of clear error for which summary reversal is typically reserved, the Second Circuit’s decision is correct.

I. THIS CASE MEETS NONE OF THE TYPICAL CRITERIA FOR CERTIORARI.

Principally, the Court should deny review because none of the traditional criteria for certiorari are satisfied—and the State hardly attempts to suggest otherwise. Pet. 35-37; see S. Ct. R. 10(a).

Indeed, in the State’s own words, the questions presented are whether “the Second Circuit violate[d] AEDPA” *in this case*. Pet. i. That is a naked request for error correction, and it should be rejected. As Members of the Court have repeatedly explained, “we are not a court of error correction.” *Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) (Alito, J., respecting denial of certiorari); see also, *e.g.*, *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 620-621 (2015) (Scalia, J., concurring in part) (similar); accord Stephen M. Shapiro

et al., *Supreme Court Practice* § 5.12(c)(3) (11th ed. 2019) (“[E]rror correction * * * is outside the mainstream of the Court’s functions and * * * not among the ‘compelling reasons’ * * * that govern the grant of certiorari.”).

To the extent the State passingly suggests a basis for plenary review, it mischaracterizes the Second Circuit’s decision. The court of appeals did *not* “compel state courts to submit legal questions about admissibility to a jury when state law does not so require.” Pet. 35. Rather, as the court of appeals recognized, *New York law* provides defendants the right to put the question of a confession’s voluntariness, including compliance with *Miranda*, to the jury. Pet. App. 28a; see N.Y. Crim. Proc. Law §§ 710.70(3) (requiring court to “submit such issue to the jury under instructions to disregard such evidence upon a finding that the statement was involuntarily made”), 60.45(2)(b)(ii) (defining “involuntarily made” to include confessions obtained “in violation of such rights as the defendant may derive from the constitution of * * * the United States”); *People v. Woods*, 290 A.D.2d 346, 348 (1st Dep’t 2002).

Importantly, the jury here specifically *asked* in its note for the court to “explain” how it should approach the voluntariness of the second and subsequent confessions if it found the first to be involuntary. Given that backdrop, the Second Circuit’s holding—that it was contrary to and an unreasonable application of federal law for the trial court to instruct the jury *incorrectly* about federal constitutional law in response to that note (Pet. App. 35a)—is unexceptional. Indeed, the State conceded below that “habeas relief may be warranted” if an instruction “misstates applicable

federal law.” C.A. Dkt. 41, at 35 (citing *Francis*, 471 U.S. at 318). That is all the court held here, the State’s claim of a “sweeping rule” (Pet. 37) notwithstanding.

In all, the court below issued a fact-bound determination applying well-established federal law to “the extraordinary circumstances of this case.” Pet. App. 45a. There is no basis for certiorari.

II. THE EXTRAORDINARY REMEDY OF SUMMARY REVERSAL IS UNWARRANTED.

Rather than making a meaningful attempt to demonstrate that Rule 10’s criteria are met, the State focuses its petition on an open request for summary reversal based on supposed legal errors by the Second Circuit. Pet. 19-35. But “[a] summary reversal . . . is a rare and exceptional disposition, ‘usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.’” *Mireles v. Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting) (indirectly quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)); accord, e.g., *Pavan v. Smith*, 582 U.S. 563, 567-568 (2017) (Gorsuch, J., dissenting) (same); *Kisela v. Hughes*, 584 U.S. 100, 120-121 (2018) (Sotomayor, J., dissenting) (same).

Here, the State has not shown any error, much less the kind of “clear[] * * * error” (*Mireles*, 502 U.S. at 15 (Scalia, J., dissenting)) that would warrant summary reversal.

A. The Second Circuit correctly determined that the trial court’s response to the jury’s note was contrary to *Seibert*.

The Second Circuit correctly concluded that the trial court’s instruction in response to the jury’s note was “contrary to, or involved an unreasonable

application of, clearly established Federal law” (28 U.S.C. § 2254(d)(1)), specifically, this Court’s decision in *Seibert*.

There, as here, law enforcement officers deliberately employed a two-step interrogation strategy: they intentionally questioned the defendant without administering *Miranda* warnings, secured an initial confession, and only then provided the warnings before eliciting the confession again. *Seibert*, 542 U.S. at 600. A majority of the Court held that a post-warning confession obtained through such a deliberate strategy is inadmissible unless law enforcement first undertakes curative measures sufficient to ensure that a reasonable person in the defendant’s position would understand the significance and effect of the *Miranda* warnings and the waiver of rights. *Id.* at 620-622 (Kennedy, J., concurring); see also *id.* at 611-617 (plurality opinion).

Notably, the State does not seriously contend that the trial court’s one-word response of “no” to the jury’s note was legally correct or consistent with *Seibert*. Nor could it. *Seibert* involved materially indistinguishable facts, and makes clear that if Hernandez’s initial statements were found involuntary—as the jury’s note strongly suggests it had concluded—then that determination would bear directly on the admissibility and weight to be given to his post-warning statements as well. See *Seibert*, 542 U.S. at 620-622 (Kennedy, J., concurring); cf. *Williams v. Taylor*, 529 U.S. 362, 413 (2000) (a state court determination is “contrary to” clearly established law if the state court confronted facts that are “materially indistinguishable” from a Supreme Court precedent and arrived at a different result).

Indeed, the State has already conceded the point: before the district court, the State acknowledged that, if Hernandez’s initial statements were deemed involuntary, then under *Seibert* that finding “would likely require suppression of his statements both before and immediately after the warnings at the CCPO.” D. Ct. R. 18 at 109. The jury, of course, was not told that, and the State’s concession alone should be dispositive as to the error.

Instead, the State argues that the Second Circuit’s decision amounted to an “unprecedented extension of *Seibert* to state jury deliberations.” (Pet. 19). But that argument studiously misreads the Second Circuit’s decision, which—far from announcing a broad or new principle of law—simply applied well-established law to the facts before it.

As the Second Circuit explained, under New York law, “the jury was entitled to, and indeed instructed to, evaluate the voluntariness of Hernandez’s confessions.” Pet. App. 28a (collecting authorities). Indeed, in New York, a jury may effectively “replay the [suppression] hearing” in assessing voluntariness. Pet. App. 92a; see also, *e.g.*, *Woods*, 290 A.D.2d at 348 (“[T]he fact issue of whether a defendant’s statement is voluntary may properly require a determination by the jury of whether the police procedure violated the defendant’s constitutional rights by questioning him while he was in custody without first informing him of his *Miranda* rights.”). The State cannot dispute any of this: not only was the court of appeals correct about New York law, but any disagreement by the State as to the meaning of New York law is a question outside the purview of this Court.

It was against that backdrop that the jury asked the trial court to “explain” how it should assess Hernandez’s post-warning statements if it determined that “the confession at CCPO before the *Miranda* rights was not voluntary.” Pet. App. 281a. That inquiry is governed by *Seibert*, which is not simply a rule of procedure applicable to judges. Cf. *Seibert*, 542 U.S. at 612 n.4 (plurality) (distinguishing its approach from “the ‘fruit of the poisonous tree’” doctrine in Fourth Amendment law, in which “otherwise admissible” evidence is excluded to deter “future violations”). Rather, it is a part of the substantive constitutional guarantee afforded by *Miranda*, one that ensures that “the warnings [can] function ‘effectively’ as *Miranda* requires” to “advise the suspect that he ha[s] a real choice about giving an admissible statement.” *Id.* at 611-612 (plurality); accord *id.* at 622 (Kennedy, J., concurring) (likewise concluding that the necessary “[c]urative measures” are those that are “designed to ensure that a reasonable person in the suspect’s situation would understand the import and effect of the *Miranda* warning”).

As a result, as the Second Circuit explained, the rule articulated 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.” Pet. App. 30a (quotation marks omitted); cf. *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (AEDPA “does not ‘require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied’”).

In other words, *the court of appeals* did not “exten[d] * * * *Seibert* to state jury deliberations,” as the

State charges. Pet. 19. Instead, *Seibert* itself (like *Miranda*) is a substantive rule constitutionally necessary to protect the voluntariness of confessions—so when a *State* asks its juries to determine voluntariness, as New York has done, it is necessarily error to provide an instruction, in response to a jury’s explicit question, that is contrary to what *Seibert* requires.

Lego v. Twomey, 404 U.S. 477 (1972), is certainly not to the contrary. Cf. Pet. 20. *Lego* stands for the unremarkable proposition that the federal Constitution does not *require* that a jury be permitted to evaluate voluntariness. 404 U.S. at 489-490. But nothing about the Second Circuit’s decision requires that either; it is New York law that does so. N.Y. Crim. Proc. Law § 710.70(3); see page 15, *supra*. Once a State chooses to vest juries with that responsibility, the governing federal substantive standards must control the jury’s consideration of the issue.

Nor does it advance the State’s argument to cite New York cases holding, in different contexts, that a defendant is not entitled to a freestanding jury instruction on attenuation. See *People v. Rabady*, 28 A.D.3d 794, 795 (2d Dep’t 2006); *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). Those cases address whether attenuation must be included in a trial court’s initial charge to the jury as a matter of state law; they do not hold that a trial court can *mislead* the jury by misstating federal constitutional law when the jury asks a question about the “central issue in the case.” Pet. App. 29a.

In this respect, the Second Circuit’s decision below—far from unprecedented—was a straightforward application of the undisputed principle that habeas

relief is appropriate where a jury instruction either (i) “misstates applicable federal law,” or (ii) is “ambiguous, imprecise or incomplete” such that there was any “reasonable likelihood that the jury . . . applied the challenged instruction in a way’ that violate[d] the Constitution or federal laws” C.A. Dkt. 41, at 35 (first citing *Francis v. Franklin*, 471 U.S. 307, 318 (1985), then quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)); see *Cupp*, 414 U.S. at 146–147 (habeas appropriate where erroneous instruction “so infected the entire trial that the resulting conviction violates due process”).

Here, *Seibert*—which involved substantially similar facts—“clearly instructs that the answer [to the jury’s question] is not ‘no.’” Pet. App. 32a. Under well-established habeas principles, the trial court’s contrary instruction warrants relief.

B. The Second Circuit correctly analyzed the jury note.

Alternatively, the State contends that the “Second Circuit failed to defer to the state court’s determination of the jury note.” Pet. 22. The State suggests the note was “‘carefully worded’ to include several of Hernandez’s statements to civilians” and may not have implicated *Seibert* at all because it did not expressly refer to a “deliberate two-step strategy.” *Id.* at 23-24. This argument can be swiftly rejected.

First, the State did not raise this contention before the Second Circuit, and this Court “consider[s]” such newfound “argument[s] forfeited.” *United States v. Jones*, 565 U.S. 400, 413 (2012); see also, *e.g.*, *Byrd v. United States*, 584 U.S. 395, 404 (2018) (“Because this is ‘a court of review, not of first view,’ it is generally

unwise to consider arguments in the first instance.”) (citation omitted).

Moreover, there is no indication that any state court interpreted the note in the manner the State suggests. That is presumably because the argument is wrong: the jury’s note asked how it should evaluate *all* of Hernandez’s statements, including “the two later videotaped confessions at CCPO and the DA’s office” (Pet. App. 281a), each of which would be subject to suppression under *Seibert* absent sufficient attenuation. To that end, the transcript cited by the State focuses extensively on the voluntariness of the subsequent statements *to law enforcement* that would have been the subject of an accurate instruction under *Seibert*. *Id.* at 283a-284a.

And as to Petitioner’s second contention, whether the jury note expressly referenced a “deliberate two-step strategy” is irrelevant. The State below conceded that a finding that the pre-warning statement was “involuntary” *would* trigger *Seibert*—that is, that the sort of “deliberate two-step strategy” described in *Seibert* *had* occurred—and thus that the post-warning statement to detectives would be subject to suppression. D. Ct. R. 18 at 109. It cannot now be heard to argue otherwise. More, as the Second Circuit correctly recognized, the jury had heard ample evidence about the “tactical plan” deployed by the NYPD to deliberately question Hernandez without providing *Miranda* warnings or activating the video camera until after his initial “confession” was obtained. And “[t]he jury, in its note to the court, assumed the involuntariness of this pre-*Miranda* confession.” Pet. App. 31a n.7.

**C. The Second Circuit correctly evaluated
harmlessness.**

The State further contends that the Second Circuit’s prejudice finding warrants summary reversal. It does not: the Second Circuit correctly identified and applied the two-pronged harmless-error review required by this Court. See Pet. App. 36a-37a (citing *Brown v. Davenport*, 596 U.S. 118, 122 (2022)).

First, Hernandez demonstrated that the error “had substantial and injurious effect or influence in determining the jury’s verdict,” as required by *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993): The prosecution’s case hinged entirely on Hernandez’s confessions, and the jury deliberated for nine days, sent out multiple notes concerning those asserted confessions, and was “clearly grappling with what weight, if any, to give to the confessions.” Pet. App. 40a.

Second, AEDPA’s requirements are satisfied because the state appellate court’s harmless determination “was contrary to, or an unreasonable application of, the applicable standard * * * namely *Chapman v. California*, [386 U.S. 18, 24 (1967)].” Pet. App. 41a. As the Second Circuit correctly observed, *Chapman* places the burden on the State to prove that a constitutional error “was harmless beyond a reasonable doubt,” and the court made a reasonable, fact-bound conclusion that no “‘fairminded jurist’ applying the *Chapman* standard” would find that standard met here. *Id.* at 41a-42a.

**1. The Second Circuit correctly applied
Brecht.**

The Second Circuit held correctly under *Brecht* that the error “had substantial and injurious effect or

influence in determining the jury's verdict." 507 U.S. at 627; see *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (relief required where habeas judge "is in grave doubt about whether" the verdict was so influenced). In evaluating harmlessness under *Brecht*, courts evaluate the importance of the issue or evidence and the overall strength of the prosecution's case. *Moore v. United States*, 429 U.S. 20, 23 (1976); *Kotteakos v. United States*, 328 U.S. 750, 775-777 (1946). The strength of the prosecution's case "is probably the single most critical factor in determining whether error was harmless," *Latine v. Mann*, 25 F.3d 1162, 1167-1168 (2d Cir. 1994) (quotation marks omitted); see also *Brown*, 596 U.S. at 143 (noting the "overwhelming evidence" as primary basis for harmlessness finding) (quotation marks omitted; alteration incorporated).

Applying these settled principles, the Second Circuit concluded that it "harbor[ed] 'grave doubt'" about the verdict in light of the error. Pet. App. 40a. That conclusion was unquestionably correct. The videotaped confessions—specifically, the voluntariness and credibility of those confessions—was "*the central issue in the case.*" *Id.* at 29a (quoting *id.* at 89a). Not only were the asserted confessions the only evidence tying Hernandez to the disappearance of Patz, but the videos of those confessions were played repeatedly by the State at trial. *Id.* at 38a.

Moreover, "[t]he jury was plainly focused on this question." Pet. App. 29a. The first jury hung, and the second jury sent out three different notes about how it should evaluate the confessions, deliberating for nine days before returning a split verdict. C.A. App. 1478 at 10194:8-18 (first note, requesting read-back of

judge's instructions on confessions as well as testimony about Hernandez's confessions); *id.* at 10194:19-25 (second note, requesting “[c]larity on” whether the jury may “convict defendant on his own words solely”); Pet. App. 281a (third note, requesting that the judge “explain” how it should approach the post-warning statements to law enforcement and civilians if it concluded the pre-warning statement was not voluntary).

The State disputes none of the above, nor could it. Nor was there anything remarkable about the Second Circuit's finding of “grave doubt” where a trial error impacted the *central evidence* in the case. See, e.g., *Wray v. Johnson*, 202 F.3d 515, 528-530 (2d Cir. 2000) (improper admission of identification evidence not harmless where there was no “physical evidence to connect [petitioner] with the crime,” “the State believed the [erroneously admitted] evidence was important,” and it was “plain that that [erroneously admitted evidence] was considered by the jurors” because they requested a re-reading of such evidence during deliberations); *Clark v. Brown*, 442 F.3d 708, 726 (9th Cir. 2006) (failure to give correct jury instruction on central issue at trial was not harmless under *Brecht*); *Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 286, 289 (3d Cir. 2018) (similar); *Wood v. Ercole*, 644 F.3d 83, 94 (2d Cir. 2011) (similar).

Instead, the State's sole challenge to the Second Circuit's harmless finding under *Brecht* is one it never advanced below: the State notes that the jury's note was “conditional” insofar as it asked how to evaluate Hernandez's subsequent statements “*if* [it] f[ou]nd that the confession at CCPO before the Miranda rights was not voluntary” (Pet. App. 281a), and

suggests that therefore the jury *might not* have found the pre-*Miranda* confession involuntary. Pet. 33-34.

Should the Court even entertain this forfeited argument (it should not, see *Jones*, 565 U.S. at 413; *Byrd*, 584 U.S. at 404), it plainly fails. As the Court has repeatedly made clear, the “grave doubt” standard does not require “absolute certainty * * * about whether the trial error affected the verdict’s outcome.” *Brown*, 596 U.S. at 135-136. Instead, reviewing courts appropriately look at the significance of the error to the trial and strength of the state’s remaining evidence, factors that, as detailed above, the Second Circuit correctly found to weigh heavily in Hernandez’s favor. Pet. App. 38a-39a.

If the jury were not seriously considering finding the pre-*Miranda* confession involuntary, there would have been no need for the third note. That is enough for “grave doubt—not absolute certainty—about whether the trial error affected the verdict’s outcome.” *Brown*, 596 U.S. at 135-136.²

2. *The Second Circuit correctly applied AEDPA.*

As the Second Circuit recognized, because “a state court’s harmless-error determination qualifies as an adjudication on the merits under AEDPA,” habeas relief is warranted only if that harmless ruling was “contrary to, or an unreasonable application of * * * *Chapman v. California.*” Pet. App. 41a.

Critically, under *Chapman* it is the government’s burden to show that the error was harmless beyond a

² The State’s related argument that the jury might not have found a “deliberate two-step strategy” (Pet. 34) is unavailing here for the same reasons described above. See pages 24-25, *supra*.

reasonable doubt. 386 U.S. at 24; see *Neder v. United States*, 527 U.S. 1, 18 (1999) (“Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?”).³ Accordingly, if “every fairminded jurist” would agree that the State has failed to extinguish reasonable doubt about the potential impact of the error on the verdict, the writ must issue. *Brown*, 596 U.S. at 124.

The State cannot make the necessary showing.

a. The State first contends that Hernandez’s asserted “confession” to ADA Durastanti was sufficiently attenuated, and that this statement “alone would have been more than sufficient to sustain the guilty verdict.” Pet. 27. But that argument layers speculation on top of speculation about an issue on which *the State* bears the burden: first, it assumes a properly instructed jury would have agreed that the statement to ADA Durastanti was “sufficiently attenuated” from the earlier, unwarned confessions. And second, it assumes that a properly instructed jury would have convicted based solely on that later statement, even without the earlier videotaped confession at the CCPO. Conjecture and speculation about what a jury *might have done* cannot satisfy the State’s obligation to demonstrate beyond a reasonable doubt that there is no reasonable possibility the error affected the verdict.

³ This formulation throws into stark relief the fact that one jury *already* failed to find Hernandez guilty—and the news report cited by the State indicates that the holdout was focused precisely on the “bizarre” nature of the confessions. Aaron Katersky & Emily Shapiro, *Lone Holdout on Etan Patz Jury Says He Couldn’t Get Beyond Reasonable Doubt*, ABC News (May 5, 2015); see Pet. 13 n.2.

As to attenuation, the State also carries the burden (*Seibert*, 542 U.S. at 608 n.1), and it is here that *the State* “omit[s] inconvenient details from its analysis” (*Mays v. Hines*, 592 U.S. 385, 392 (2021); cf. Pet. 30). The jury heard evidence that Hernandez was continuously in law enforcement’s presence—from the questioning at the CCPO, to a “walk-through” of the alleged crime scene, and ultimately to his interview with ADA Durastanti. Although Hernandez was given food and permitted to take a brief nap overnight, there was no meaningful break—certainly not an “eleven hour[]” gap (Pet. 26)—in which questioning and other investigatory action ceased. Moreover, ADA Durastanti, who observed the initial, unwarned interrogation, began his interrogation by expressly referencing those prior statements without any explanation that they were likely inadmissible. C.A. App. 43.1; cf. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring) (curative measures may include “an additional warning that explains the likely inadmissibility of the pre-warning custodial statement”).⁴

⁴ *Bobby v. Dixon*, 565 U.S. 23 (2011), invoked by the State (at 26), is plainly inapplicable. As the Court there explained, “unlike in *Seibert*, there is no concern here that police gave Dixon *Miranda* warnings and then led him to repeat an earlier murder confession, because there was no confession to repeat”: In his pre-*Miranda* questioning, Dixon *denied* involvement in the murder and was taken to jail for forgery instead. *Id.* at 25-26, 31. There was therefore no *Seibert* issue in the first place—and, moreover, Dixon’s four-hour trip to jail on charges of forgery represented a *break* from being investigated for murder. Not so here, where law enforcement’s custodial investigation and questioning of Hernandez “blended into one ‘continuum.’” *Id.* at 31-32 (quoting *Seibert*, 542 U.S. at 612).

Finally, Hernandez’s statements to ADA Durastanti strongly suggested he did not understand the *Miranda* warnings that were belatedly given to him. See page 10, *supra*. The conjecture offered by the State falls well short of its burden to demonstrate that there was no “reasonable possibility” a properly instructed jury could have reached a different verdict. *Chapman*, 386 U.S. at 24.⁵

Even if the jury had considered Hernandez’s statement to ADA Durastanti, it is far from clear—certainly not clear beyond a reasonable doubt—that this statement, standing alone, could have sustained the conviction. If the jury had rejected the first videotaped confession as involuntary or unreliable, it could well have viewed the subsequent statement with similar skepticism. Indeed, that is the very rationale of *Seibert*: “the sensible underlying assumption is that with one confession in hand * * * the interrogator can count on getting its duplicate.” 542 U.S. at 613 (plurality). A properly instructed jury might have regarded all of the later confessions with greater doubt “regardless of how attenuated they were,” particularly given “the significant weakness of the State’s case absent the confessions” and the central role the issue played in deliberations. Pet. App. 44a. At a minimum, without the initial videotaped confession, the jury could not have relied on purported consistencies

⁵ It does not matter that the state courts held Hernandez’s initial interrogation to be non-custodial. Cf. Pet. 33-35. As discussed above, the jury was not bound by that finding and was entitled to make its own determination of voluntariness, and its note strongly suggests that it was considering finding the first confession involuntary.

across multiple statements to bolster the credibility of the ADA confession.

Nor does the State's assertion that Hernandez's statement to ADA Durastanti contained "details * * * corroborated by other evidence" (Pet. 27) withstand scrutiny. The confessions were the *only* evidence tying Hernandez to the crime *at all*. The supposed "corroboration" either derived from facts the police themselves supplied during the interrogation or consisted of neutral, unremarkable information. As to the former, the record reflects that, during the seven-hour interrogation, Hernandez was shown Patz's missing child poster that referred to Patz having carried a "blue cloth bag." C.A. App. 28, 162. That Hernandez effectively parroted that information in his "confession" is not itself indicative of his involvement in the crime. C.A. App. 388.

As to the latter, the State cites Hernandez's familiarity with the bodega and the building that housed it (Pet. 27), but it is undisputed that Hernandez had worked there. His knowledge of the premises does not corroborate anything; it is certainly not "evidence that he could not possibly have known without being the perpetrator." Pet. 27.⁶

b. The State next relies on the Appellate Division's statement that Hernandez's asserted confession was "corroborated by [his] various confessions to civilians." Pet. 28. But the state court made no finding that those "confessions" standing alone were sufficient to allow the State to meet its burden of showing

⁶ So too with Hernandez's description of the effects of strangulation (Pet. 27), something depicted in popular movies. *E.g.*, *The Godfather* (1972) (multiple characters garroted on-screen).

harmlessness beyond a reasonable doubt. Moreover, the State contends that these “strikingly similar confessions” all included the “same essential details” (Pet. 28), but this is demonstrably incorrect: as detailed above, the asserted confessions varied widely. Pet. App. 9a-10a; see page 5, *supra*. In 1980, Hernandez said he “stabbed” a “kid” with a “pointy stick.” C.A. App. 1628. In the early 1980s, Hernandez said he had “strangled” a “black kid” who had thrown a ball at him. *Id.* at 1627. And around the same time, he said a “muchacho”—which Hernandez’s wife took to mean a teenager—had “violated him” and that as a result Hernandez killed him. *Ibid.*

Far from “strikingly similar,” none of these asserted prior statements bore *any* resemblance to the State’s theory of the murder of Patz, nor did any witness who heard those statements testify to crediting them. Pet. App. 10a. If anything, those prior statements only underscored the extensive evidence the defense offered of Hernandez’s substantial mental health issues.

c. Finally, the State repackages these same contentions to argue that the Second Circuit did not properly defer to the state courts. Pet. 29. But again, the State itself fails to grapple with the standard the appellate court was supposed to be applying: whether “the State has demonstrated, beyond a reasonable doubt,” that the erroneous jury instruction “did not contribute to [Hernandez’s] conviction[.]” *Chapman*, 386 U.S. at 26. Indeed, the Appellate Division’s decision gives no indication that it held the State to that burden: its citations ultimately trace back to *Chapman*, but there is no mention of the burden of proof being on the State. On this record, where the

confessions were the linchpin of the prosecution's case, where the jury deliberated for nine days and repeatedly sought guidance about how to evaluate them, and where the trial court provided an incorrect instruction on the central issue in the case, the state appellate court *could not* have held the State to the burden of showing that error to be harmless beyond a reasonable doubt.

The State also contends that the Appellate Division made a "factual finding" that the inconsistencies between Hernandez's statements to law enforcement and his prior asserted confessions to civilians "were sufficiently explained" to the jury. Pet. 30. But the Appellate Division made that statement in rejecting an argument that the inconsistencies rendered "[t]he verdict * * * legally [in]sufficient" or "against the weight of the evidence" with the confessions to law enforcement *in* the case (Pet. App. 252a); the state court did not find, and it does not follow, that, had the jury *disregarded* the law-enforcement confessions, the statements to civilians could have (beyond a reasonable doubt) sustained the verdict on their own. Cf. Pet. App. 40a ("[T]he statements Hernandez made to non-law enforcement individuals, both before and after his arrest, carried nowhere near the weight of the recorded statements made to the NYPD and ADA Durasanti").

Finally, the State faults the Second Circuit for its discussion of Hernandez's mental health issues and law enforcement investigations of other suspects. But neither of those issues factored heavily in the Second Circuit's harmless analysis, which instead turned

(correctly) on the strength *vel non* of the State’s case absent the confessions. Pet. App. 39a-40a.⁷

As the Second Circuit recognized, cases meriting habeas relief under *Brown* are “rare”—but, in light of “the extraordinary circumstances” presented, this case “is one of [them].” Pet. App. 45a-46a. That fact-bound determination is correct. It certainly does not warrant summary reversal.

⁷ In any event, the State’s factual assertions are flawed. The State claims a lack of record support for Hernandez’s mental illness (see Pet. 31)—but such illness has been long diagnosed, documented and observed by a panoply of doctors. See D. Ct. R. 1-93 at 94-100 (noting diagnoses by medical doctors of “Psychotic disorder NOS,” “Schizophrenia/Bipolar,” “Psychotic” disorder, “chronic mental illness,” “[m]emory impairment,” and “Schizotypal Personality Disorder,” among others).

CONCLUSION

The petition should be denied.

Respectfully submitted.

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MARCH 2026