

No. 25A_____

IN THE

Supreme Court of the United States

KEVIN MCCARTHY,
Superintendent of Elmira Correctional Facility,

Applicant,

v.

PEDRO HERNANDEZ,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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TO THE HONORABLE SONIA SOTOMAYOR,
ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

Pursuant to Rule 13.5 of the Rules of the Supreme Court, the New York County District Attorney's Office, on behalf of Kevin McCarthy, Superintendent of Elmira Correctional Facility, respectfully requests a 60-day extension of time, to and including December 19, 2025, to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The judgment was entered on July 21, 2025. Unless extended, the time to file a petition for a writ of certiorari will expire on October 20, 2025. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). A copy of the Second Circuit's opinion ("Op.") is attached.

1. This case arises out of one of the most infamous crimes in recent American history. At about 7:50 a.m. on May 25, 1979, six-year-old Etan Patz left his family's apartment on Prince Street in Manhattan to walk by himself to his school bus stop just two-and-a-half blocks away. Etan never made it to the bus. Despite a nationwide search and countless hours of investigation, Etan was never seen again (A1841-A1846).¹ His disappearance transformed the way missing-children cases are investigated and sparked a nation-wide movement to better protect children.

Etan's case remained unsolved for 33 years. In 2012, a breakthrough came when a man called the police to report that, years earlier, his brother-in-law—petitioner Pedro

¹ Citations to "A____" and "SA____" are respectively to the appendix and supplemental appendix filed in the Court of Appeals.

Hernandez—had confessed at a prayer meeting to killing a child in the basement of a bodega near Etan’s bus stop. Further investigation revealed that Hernandez had also confessed the crime to his best friend and ex-wife (A1846-A1848, A1855-A1856).

On May 23, 2012, New York City Police Department detectives brought Hernandez in for questioning, leading to a series of three confessions to law enforcement that are the focus of the principal legal issue in this case. The first two confessions took place at the Camden County Prosecutor’s Office (“CCPO”) near Hernandez’s home in Maple Shade, New Jersey. During the first confession, which took place before Hernandez received *Miranda* warnings, Hernandez admitted to killing Etan and provided details about the crime that were not publicly known. Specifically, Hernandez described how he had abducted Etan as the boy stood outside the bodega, strangled him in the basement of the bodega, put his body in a box, and dumped it in a nearby alley where garbage was collected (A1856-A1857, A1907-A1908). Shortly after making this statement, Hernandez was read his *Miranda* rights and agreed to waive them; he then made his second confession on videotape at the CCPO (A1857).

Detectives subsequently drove Hernandez more than 90 miles from the CCPO to the District Attorney’s Office in Manhattan. Along the way, Hernandez walked detectives through the area where he had left Etan’s body. After arriving at the District Attorney’s Office, Hernandez ate dinner and slept for a few hours. He then made a third confession to an Assistant District Attorney (“ADA”), eleven hours after his second confession. Before Hernandez made the third confession, the ADA advised

Hernandez yet again about his *Miranda* rights, told him that he wanted them to start “brand new,” and emphasized that any statement Hernandez would make would have “nothing at all to do” with his earlier statements (A1857-A1858, A1941-A1942).

2. Hernandez was subsequently indicted for murder and kidnapping. In the years that followed, as he awaited trial, Hernandez continued to confess his crime to various doctors who evaluated him (A1860-A1861, A1884-A1885).

Before trial, Hernandez moved to suppress his three confessions to law enforcement on *Miranda* (and other) grounds. As relevant here, the state trial court denied suppression on the ground that Hernandez was not in custody at the CCPO and that he had knowingly and intelligently waived his *Miranda* rights (SA1486-SA1506).

Hernandez’s first trial, which took place in 2015, ended in a mistrial.² The retrial took place sixteen months later, in 2016. Among the evidence admitted at the retrial were Hernandez’s many confessions—including not only the three confessions to law enforcement, but also his other confessions to civilians both before and after his arrest.

Under New York law, although the trial court had denied Hernandez’s motion to suppress his statements to law enforcement, the jury could still decide whether those confessions were “involuntarily made” in certain respects. N.Y. Crim. Proc. L. (“CPL”) § 710.70(3). New York’s standard jury instructions—which the trial court delivered here

² News reports indicated that the first jury had deadlocked 11-1, with all but one juror voting to convict. *See* <https://abcnews.go.com/US/lone-holdout-etan-patz-jury-reasonable-doubt/story?id=30913806> (last visited Oct. 7, 2025).

(A1434-A1442)—thus asked the jurors to determine, before considering any statement, whether each statement was coerced; whether Hernandez was in custody prior to receiving *Miranda* warnings; and whether he had knowingly and voluntarily waived his *Miranda* rights. New York case law, however, has made clear that jurors need not decide legal questions, such as those concerning attenuation—i.e., the effect of a prior involuntary confession on subsequent voluntary confessions. *See, e.g., People v. Medina*, 146 A.D.2d 344 (1st Dep’t 1989), *aff’d sub nom. People v. Bing*, 76 N.Y.2d 331 (1990).

During deliberations, the jurors sent a note asking the trial 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 [Hernandez’s wife and daughter], and the confessions to the various doctors.

(Op. 24) (emphasis in original). The trial court responded to the note by saying, “the answer is, no” (A1515). As the court explained to the parties, there was no “other way of answering” that would avoid having to “instruct[] [the jury] on attenuation . . . which is not their function here” (A1509). The jury ultimately acquitted Hernandez of intentional murder but convicted him of felony murder and kidnapping (A1803).

3. The New York Supreme Court, Appellate Division affirmed. As relevant here, the Appellate Division held that “defendant’s statements [at the CCPO] made before he received *Miranda* warnings were not the product of custodial interrogation.” *People v. Hernandez*, 181 A.D.3d 530, 530 (1st Dep’t 2020). The court further rejected

Hernandez’s claim that the trial court’s response to the jury’s note was incorrect under *Missouri v. Seibert*, 542 U.S. 600 (2004). The controlling opinion in that case held that, unless curative measures are undertaken, a *Mirandized* confession must be suppressed if the police engage in a “deliberate, two-step strategy” to evade *Miranda* by first eliciting an un-*Mirandized* confession and then re-eliciting the same confession after giving *Miranda* warnings. 542 U.S. at 621 (Kennedy, J., concurring). According to Hernandez, *Seibert* obligated the trial court to give a more fulsome instruction to the jurors, including on principles of attenuation, so that they could decide if adequate curative steps had been taken before he confessed to the ADA. The Appellate Division disagreed, holding that, “[g]iven the precise wording of the note, the court’s brief response was correct.” *Hernandez*, 181 A.D.3d at 533. In any event, the court found that any failure to instruct the jury was harmless, given the strong evidence of attenuation before his confession to the ADA and his various other confessions outside of law enforcement. *Id.* Both the New York Court of Appeals and this Court subsequently denied Hernandez’s attempts to seek further review of his conviction. *See People v. Hernandez*, 35 N.Y.3d 1066 (2020); *Hernandez v. New York*, 141 S. Ct. 1691 (2021).

Hernandez then filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. As relevant here, the district court found that the state courts had reasonably concluded that Hernandez was not in custody when he first confessed at the CCPO. On the state trial court’s response to the jury note, the district court found that the response, though “technically correct,” was

“an incomplete answer” because it did not fully account for *Seibert*. The district court nonetheless found that habeas relief should be denied on harmless-error grounds. *Hernandez v. McIntosh*, 2024 WL 2959688, at *14 (S.D.N.Y. June 11, 2024).

The Second Circuit reversed. The court held that the Appellate Division’s decision upholding the trial court’s response was “contrary to,” and “an unreasonable application of,” *Seibert* because *Seibert* barred the jurors from considering Hernandez’s *Mirandized* confession to the detectives if they found his un-*Mirandized* confession involuntary, and may have also barred them from considering his confession to the ADA (Op. 35-39). With respect to harmlessness, the circuit held that “[a] properly instructed jury” could have disregarded Hernandez’s confessions to law enforcement as tainted by his unwarned confession at the CCPO, and that Hernandez’s confessions to civilians “carried nowhere near the weight” of his other confessions (Op. 44-50).

4. The Second Circuit’s decision raises significant questions about when a state trial court’s supplemental instructions to a jury on a legal issue may provide a basis for habeas relief. The decision’s finding of no harmless error also misapplies AEDPA in ways that have previously resulted in summary reversals from this Court.

a. The federal Constitution does not require a jury to decide voluntariness at all—let alone more complex follow-on doctrines such as *Seibert*. See *Lego v. Twomey*, 404 U.S. 477, 489-90 (1972). The Second Circuit nonetheless held here that *Seibert* governed the state trial court’s response to the jury note because New York law allows the jury to determine the voluntariness of a confession. This conclusion erroneously assumed that,

once a state submits the question of voluntariness to a jury, the jury must decide all questions related to the confession's admissibility.

New York, however, has made no such choice, and nothing in the federal Constitution dictates such an all-or-nothing approach. To the contrary, in interpreting the state statute that allows juries to determine voluntariness, New York courts have consistently held that judges need not "instruct the jury on attenuation," *People v. Rabady*, 28 A.D.3d 794, 795 (2d Dept. 2006), or on other aspects concerning "the admissibility of [a] confession" that turn on "a conclusion of law" rather than discrete findings of fact, *Medina*, 146 A.D.2d at 351. Thus, even assuming that the jury's question implicated *Seibert*, the trial court's answer of "no" properly informed the jury that the *Seibert* inquiry was not an issue of fact for them to determine, and that they should focus on the other factual issues concerning voluntariness on which they had already been instructed.

The questions raised by the Second Circuit's decision are not confined to this one case. In addition to New York, 18 other states allow juries to decide whether a defendant's statements are voluntary, with variations in precisely what aspects of voluntariness the jury should consider.³ This case thus raises significant questions about

³ *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. Brenton*, 395 P.2d 874, 880 (Or. 1964); *Commonwealth v. Joyner*, 272 A.2d 454, 455 (Pa. 1971); *State* (Continued...)

the extent to which such states' voluntary dedication of certain questions to the jury can give rise to federal habeas relief that can upend a conviction.

b. The Second Circuit's harmless-error determination also presents a substantial question under AEDPA. This Court has regularly overturned habeas grants based on a federal court's failure to properly defer to state-court determinations of harmlessness. *See, e.g., Mays v. Hines*, 592 U.S. 385, 391 (2021); *Sexton v. Beaudreaux*, 585 U.S. 961, 968 (2018); *Woods v. Etherton*, 578 U.S. 113 (2016).

This case presents similar circumstances. In concluding that the Appellate Division's harmless-error ruling could not pass AEDPA review, the Second Circuit failed to "carefully consider all the reasons and evidence supporting the state court's decision." *Hines*, 592 U.S. at 391. In particular, even disregarding the first two confessions at the CCPO, the Second Circuit failed to acknowledge several facts that a fair-minded jurist could deem sufficient to convince the jury that the subsequent confession to the ADA was attenuated, including the different personnel questioning Hernandez and the significant changes in time and location before the ADA interview. The Second Circuit also gave improperly short shrift to the many confessions that Hernandez made to others, such as his detailed statements to doctors.

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).

More fundamentally, the Second Circuit wrongly assumed that the jury would have found Hernandez's first confession involuntary—a necessary prerequisite for the trial court's response to have affected the verdict at all. But in this very litigation, every state court to review the question concluded that Hernandez's first confession was *not* involuntary because he was not in custody; the federal district court declined to disturb that finding under AEDPA; and Hernandez chose not to challenge that conclusion on appeal. That conclusion cannot be squared with the circuit's assumption that the state trial court's response to the jury note would necessarily affect the verdict.

5. A 60-day extension of time to file a petition for a writ of certiorari is reasonable. As discussed above, this case involves a historically significant crime, and for that reason the forthcoming petition will require extensive and rigorous internal review. Moreover, the attorneys who will be preparing the petition have other significant matters requiring their attention over the coming months. Those matters include opposing a petition for a writ of certiorari in *Pitts v. New York*, No. 25-5389, by October 17; filing briefs in the New York Court of Appeals in several upcoming cases (*People v. Woods*, October 17; *People v. Townsend*, November 17; *People v. Billups*, November 26); and preparing for oral argument in the Second Circuit on October 31 in *Cortez v. Griffin*, a habeas case challenging a nearly 20-year-old murder conviction. In the next 30 days, counsel will also be drafting or supervising several briefs in the Appellate Division, including three in cases seeking to reverse dismissals of criminal charges.

6. Hernandez's counsel takes no position on the extension requested here. We would note that the Second Circuit has already issued the mandate, and the district court has scheduled a hearing at the People's request for October 14, 2025, to discuss the reasonable amount of time needed for a retrial in this complex case. To the extent the district court issues a ruling on the timeline for taking steps toward a retrial that is incompatible with a 60-day extension, the District Attorney's Office would be prepared to file a petition here in advance of December 19, 2025.

Accordingly, the District Attorney's Office requests that the time to file a petition for a writ of certiorari be extended by 60 days, to and including December 19, 2025.

Respectfully submitted,

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October 8, 2025