No. 26-5508

In the Supreme Court of the United States

EDWIN FRANQUI,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

On Petition For Writ of Certiorari to The Connecticut Supreme Court

REPLY BRIEF FOR PETITIONER

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November 9, 2026

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

ARGUMENT 3

I. The Decision Below Decided the Question Presented and Deepens a Long-standing, Nationwide Split of Authority. 3

A. Connecticut's objection is the question presented. 3

B. Connecticut's jurisdictional argument fails because the Connecticut Supreme Court ruled on the federal question. 5

C. The lower courts remain hopelessly divided on that question. 6

II. The Decision Below Is Wrong. 9

III. The Question Recurs, And This Case Is An Ideal Vehicle. 11

A. The case is not moot. 11

B. This Court's answer decides the case. 12

C. There are no other obstacles to this Court's review. 12

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Ake v. Oklahoma, 470 U.S. 68 (1985) 5

Bailey v. Anderson, 326 U.S. 203 (1945) 5

Batson v. Kentucky, 476 U.S. 79 (1986) 9

Burks v. United States, 437 U.S. 1 (1978) 11

California v. Green, 399 U.S. 149 (1970) 1, 9, 10, 11

Chafin v. Chafin, 568 U.S. 165 (2013) 11

Commonwealth v. Brown, 52 A.3d 1139 (Pa. 2012) 6, 9

Foster v. Chatman, 578 U.S. 488 (2016) 6

Greene v. Massey, 437 U.S. 19 (1978) 11

Howell v. Mississippi, 543 U.S. 440 (2005) 5

In re Winship, 397 U.S. 358 (1970) 8, 9

Jackson v. Virginia, 443 U.S. 307 (1979) 6, 7, 8

McCray v. New York, 461 U.S. 961 (1983) 9

Nance v. State, 629 A.2d 633 (Md. 1993) 7

State v. Echols, 203 Conn. 385 (1987) 10

State v. French, 2025 MT 280, 425 Mont. 173 ..... 7, 9

State v. Giant, 2001 MT 245, 37 P.3d 49 ..... 8, 9, 10

State v. Golding, 567 A.2d 823 (Conn. 1989) 5, 12

State v. Green, 667 So. 2d 756 (Fla. 1995) 7

State v. Moore, 485 So. 2d 1279 (Fla. 1986) 1, 7, 8

State v. Newsome, 682 A.2d 972 (Conn. 1996) 4

State v. Orosco, 833 P.2d 1146 (N.M. 1992) 8

State v. Revels, 99 A.3d 1130 (Conn. 2014) 6, 12

State v. Sexton, No. 83-885-CR, 1983 WL 162073 (Wis. Ct. App. Sept. 6, 1983) 7

State v. Whelan, 513 A.2d 86 (Conn. 1986) 4

State v. White Water, 634 P.2d 636 (Mont. 1981) 8

Street v. New York, 394 U.S. 576 (1969) 5

Ticey v. Peters, 8 F.3d 498 (7th Cir. 1993) 6, 7

United States v. Bahe, 40 F. Supp. 2d 1302 (D.N.M. 1998) 8, 11

United States v. Orrico, 599 F.2d 113 (6th Cir. 1979) 7, 8, 11

Other Authorities

4 *Weinstein's Evidence* 801-74 (quoted in *United States v. Orrico*, 599 F.2d 113, 118 (6th Cir. 1979)) 7

Fed. R. Evid. 801(d)(1)(A) 11

S. Rep. No. 93-1277 (1974) 11

Sup. Ct. R. 10(b) 2, 6

Sup. Ct. R. 14.1(a) 3

REPLY BRIEF

The question presented by Edwin Franqui's petition satisfies every consideration governing certiorari, and Connecticut offers no reason to leave it unanswered any longer. More than fifty years ago, this Court called the very question Franqui now presents "not insubstantial." *California v. Green*, 399 U.S. 149, 170 n.19 (1970). When Congress adopted the federal rule from which the question arises, the Senate committee that reported it cautioned that the rule governed admissibility, not sufficiency, and that where such a statement was the sole evidence, dismissal could be appropriate. State and federal courts have divided over the question ever since. Connecticut does not dispute that the question recurs daily in domestic-violence, sexual-assault, and eyewitness-identification prosecutions, where the State's proof often rests on a statement its own witness does not stand behind at trial. It does not dispute that the courts requiring corroboration of prior inconsistent statements adopted their rule because "the risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements." *State v. Moore*, 485 So. 2d 1279, 1281 (Fla. 1986). And Connecticut does not dispute the facts: the only witness whose prior statement put Franqui in the car testified that she could not see who was driving.

Connecticut, however, says the Connecticut Supreme Court never reached the question because it found that witness's written identification corroborated, so the case is moot and this Court lacks jurisdiction. BIO 2, 9–10. The opinion below says otherwise. That court assumed the claim was "of a constitutional magnitude,"

rejected it on the merits, and held the evidence sufficient. App.14–15, 21–25. A prisoner serving a fifty-year sentence does not present a moot case when a ruling in his favor would set aside his conviction. And apart from evidence of motive and access, which placed no one in the car, the corroboration the court found was more prior inconsistent statements: the witness's own excited utterance and another witness's disavowed statement. Whether such statements can sustain a conviction without independent corroboration is the constitutional question presented. Calling them corroboration does not avoid the question. It answers it.

The split of authority, Connecticut also argues, is an "illusion." BIO 11. Connecticut reaches that conclusion by addressing two federal circuits and relegating to a footnote the state courts of last resort, whose conflicts on a question of federal law are an independent ground for review. Sup. Ct. R. 10(b). It never mentions that the Pennsylvania Supreme Court – on Connecticut's side of the question – surveyed the courts on both sides and joined one. More than a dozen state courts of last resort and two federal courts of appeals have divided over the question for nearly half a century. The Sixth Circuit and the Florida and Montana Supreme Courts, among others, hold that such statements cannot sustain a conviction without independent corroboration; the Seventh Circuit and the highest courts of Pennsylvania, Maryland, and California, among others, hold that they can. Connecticut is in the second group, and had Franqui been tried in Florida or Montana, the statements his conviction rests on could not have sustained it. A fifty-year conflict that a state high court has

catalogued is not an illusion, and Connecticut's omission of that authority has answered its own objection.

States decide what evidence a jury may hear. Whether that evidence is enough to convict is a question the Due Process Clause answers, and the answer should be the same in every State. Everything certiorari requires is here – a question this Court itself flagged, a conflict that has matured for half a century, nationwide stakes Connecticut does not dispute, and a decision below that turned on the precise point dividing the lower courts. All that is lacking is this Court's answer. The Court should grant review.

ARGUMENT

I. The Decision Below Decided the Question Presented and Deepens a Long-standing, Nationwide Split of Authority.

A. Connecticut's objection is the question presented.

Connecticut objects that this case does not present a federal question: because the Connecticut Supreme Court found Ortiz's identification corroborated, the case supposedly does not implicate whether due process permits a conviction resting "solely" on an "uncorroborated" statement. BIO i, 2, 9–10. But this Court considers the questions set forth in the petition and every question "fairly included therein." Sup. Ct. R. 14.1(a). Franqui's question presented is whether due process requires "independent, reliable corroboration" before a recanted identification may serve as "the primary evidentiary basis" for a conviction. Pet. 1. Whether the corroboration accepted below meets that standard does not dispel the question. It is the question,

and Franqui's petition pressed it: "[r]ecanted hearsay does not become corroboration because a second piece of recanted hearsay sits beside it." Pet. 43; *see* Pet. 32–34.

Even the Connecticut Supreme Court did not treat this objection as dispelling the question. It answered it by holding the sole-evidence rule of *State v. Newsome*, 682 A.2d 972 (Conn. 1996), "inapplicable" because Ortiz's prior inconsistent statement, admitted under *State v. Whelan*, 513 A.2d 86 (Conn. 1986), was "corroborated." App.14. The corroboration it identified was:

- Ortiz's excited utterance at the crash scene, naming Franqui and his brother as the perpetrators in the Infiniti without saying who drove. App.14. On the stand, Ortiz testified that she could not see who was driving. App.68, 78.
- Johanny Franqui's prior inconsistent statement, which he disavowed under oath at trial, App.101–114, recounting a meeting an hour before the shooting and the elder brother's later admission that he was the shooter. App.14-15.
- Evidence of motive and of Franqui's joint ownership of the Infiniti. App.15.

From these, the Connecticut Supreme Court reasoned that because Franqui's elder brother was the shooter, Franqui "must have been the driver." App.14; *see* App.23. In holding the evidence sufficient, it went further: Ortiz's *Whelan* statement was "sufficient, along with Johanny Franqui's *Whelan* statement, to establish the defendant's guilt." App.24 n.6. A court that read the Due Process Clause to demand independent corroboration – evidence not drawn from the recanting witness's own

out-of-court statements, and not itself recanted – could not have reached either result. Connecticut calls the corroboration "ample," BIO 2, 9–10, but it identifies nothing, beyond Ortiz's own out-of-court statements, that placed Franqui inside the Infiniti.

B. Connecticut's jurisdictional argument fails because the Connecticut Supreme Court ruled on the federal question.

Connecticut's jurisdictional argument also fails: Franqui's claim was both presented and decided. Connecticut concedes that Franqui argued on appeal below that "his conviction violated the Due Process Clause of the Fourteenth Amendment because it was based solely on an uncorroborated *Whelan* statement." BIO 6. That suffices. This Court asks whether the federal claim "was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Howell v. Mississippi*, 543 U.S. 440, 442 (2005) (cleaned up). Connecticut's authorities involved federal questions the state court never mentioned. *Street v. New York*, 394 U.S. 576, 582 (1969) (presumption of non-presentation applies "when . . . the highest state court has failed to pass upon a federal question"); *Bailey v. Anderson*, 326 U.S. 203, 206–07 (1945). Even in *Street*, the Court found the question adequately raised and decided it. 394 U.S. at 583–85.

The Connecticut Supreme Court decided Franqui's federal claim on the merits. It assumed the claim was "of a constitutional magnitude" and rejected it under the third prong of *State v. Golding*, 567 A.2d 823, 827 (Conn. 1989) – the prong that asks whether "the alleged constitutional violation . . . exists." App.9, 14–15. A state-court disposition that "depends on a federal constitutional ruling" is "not independent of federal law." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *accord Foster v. Chatman*, 578

U.S. 488, 497–98 (2016). The court then held the evidence sufficient, App.21–25, on a claim preserved by a motion for judgment of acquittal, App.145, and one Connecticut treats as constitutional, *State v. Revels*, 99 A.3d 1130, 1140 (Conn. 2014) (recognizing that a conviction on insufficient evidence deprives a defendant of a constitutional right). Accordingly, there is no bar to this Court's jurisdiction.

C. The lower courts remain intractably divided on that question.

Connecticut addresses two federal circuits and relegates the state courts of last resort to a footnote. BIO 11–12 & n.7. But a state court of last resort's conflict with "another state court of last resort or of a United States court of appeals" is a recognized ground for review. Sup. Ct. R. 10(b). The Pennsylvania Supreme Court framed this question as one of due process, surveyed the state courts of last resort on both sides, and joined one. *Commonwealth v. Brown*, 52 A.3d 1139, 1142, 1166–68, 1184 (Pa. 2012). Connecticut does not mention *Brown*. A conflict that a state high court catalogued and then joined is not "the illusion of a circuit split." BIO 11.

The split concerns the precise point on which the decision below turned and for which this Court's review is sought. In *Ticey v. Peters*, 8 F.3d 498 (7th Cir. 1993), the Seventh Circuit, applying *Jackson v. Virginia*, 443 U.S. 307 (1979), acknowledged that a recanted identification "was not corroborated by physical evidence," but counted the victim's repetition of her accusation three days later as corroboration and held the evidence sufficient. 8 F.3d at 503–04. Judge Cudahy dissented on exactly that point: the majority "relies for 'corroboration' on another statement by [the witness]," which "essentially piles one uncorroborated (unsworn and unrecorded)

statement on another. This is not 'corroboration' as the word is commonly understood." *Id.* at 504 (Cudahy, J., dissenting). Maryland's high court has gone further, holding several witnesses' recanted statements sufficient "[t]aken collectively." *Nance v. State*, 629 A.2d 633, 645 (Md. 1993).

The Florida and Montana Supreme Courts agree with Judge Cudahy. In Florida, a recanting witness's prior inconsistent statement, "even if said on multiple occasions," is not "sufficient, in and of itself, to sustain a conviction," *State v. Green*, 667 So. 2d 756, 757, 760–61 (Fla. 1995), and the recanted grand-jury testimony of two witnesses could not sustain a conviction together, *State v. Moore*, 485 So. 2d 1279, 1280–81 (Fla. 1986). In Montana, "[o]ne discrete prior inconsistent statement cannot corroborate a second discrete prior inconsistent statement because neither per se is reliable." *State v. French*, 2025 MT 280, ¶ 34, 425 Mont. 173 (2025). And the Wisconsin Court of Appeals, applying *Jackson* where the only evidence that the defendant drove was two witnesses' contradicted pretrial statements, held that "[a] second unsworn statement does not provide the needed corroboration." *State v. Sexton*, No. 83-885-CR, 1983 WL 162073 (Wis. Ct. App. Sept. 6, 1983) (unpublished). The court below sided with the *Ticey* majority and with *Nance*.

Connecticut misreads the relevant Sixth Circuit authority too. It says *United States v. Orrico*, 599 F.2d 113 (6th Cir. 1979), does not "categorically require[] independent corroboration," quoting language *Orrico* borrowed from a treatise. BIO 11–12; *see* 599 F.2d at 118 (quoting 4 *Weinstein's Evidence* 801-74). *Orrico*'s holding is that when such statements are "the sole evidence of a central element of the crime

charged," the government "has failed to sustain its burden of proving guilt beyond a reasonable doubt." *Id.* at 119. The only exception the court contemplated was a "purely technical element." *Id.* at 118. Identity is not one.

Connecticut's footnote 7 demands that Franqui identify a state court holding that due process "categorically prohibits a conviction resting solely upon a recanted, uncorroborated statement." BIO 12 n.7. The question presented, however, does not seek a categorical rule. And the courts that require corroboration state their rule in the reasonable-doubt standard's own terms: such a statement "standing alone is insufficient as a matter of law to prove guilt beyond a reasonable doubt." *Moore*, 485 So. 2d at 1281; *see State v. Giant*, 2001 MT 245, ¶ 39, 37 P.3d 49 (2001). That is the standard the Due Process Clause imposes. *In re Winship*, 397 U.S. 358, 364 (1970). Montana grounds its rule in part on due process expressly, *State v. White Water*, 634 P.2d 636, 639 (Mont. 1981), and has recognized that this Court has not resolved the constitutional question, *Giant*, ¶ 24. New Mexico's high court has said such statements "may, as a matter of due process, be insufficient as the sole basis for a conviction." *State v. Orosco*, 833 P.2d 1146, 1154 (N.M. 1992). The Seventh Circuit, the Pennsylvania Supreme Court, and the court below each decided the question as a matter of due process. And Connecticut's assertion that no federal court has held such evidence constitutionally insufficient, BIO 2, overlooks *United States v. Bahe*, 40 F. Supp. 2d 1302 (D.N.M. 1998), which entered a judgment of acquittal under *Jackson* on a recanted prior statement. That some courts requiring corroboration have not said whether the Constitution compels their rule is a reason to grant review,

not to deny it: whether a defendant may be imprisoned on this kind of evidence now depends on the State in which he is tried.

Finally, Connecticut's call for "further study," BIO 12 (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting the denial of certiorari)), comes forty-seven years after *Orrico* and fifty-six after *California v. Green*. The study Justice Stevens contemplated in *McCray* took three years. *See Batson v. Kentucky*, 476 U.S. 79 (1986). Here, courts on each side have engaged the other's reasoning at length, *Brown*, 52 A.3d at 1166–68; *Giant*, ¶¶ 24–26, and Montana refined its rule again in December 2025, *French*, ¶¶ 30–34. Nothing remains to percolate.

II. The Decision Below Is Wrong.

Connecticut's only express claim that the decision below is constitutionally correct is a one-sentence footnote asserting that it "is correct under any interpretation of the Due Process Clause." BIO 2 n.1. It is not correct under the one that governs. The Due Process Clause forbids conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime." *Winship*, 397 U.S. at 364. The "key finding underlying the jury's verdict of guilty," as the court below put it, was "that the defendant was the driver of the Infiniti." App.23. The only direct evidence of that fact was Ortiz's written statement — a statement she would not stand behind at trial, where she testified that she could not see who was driving. App.68, 78.

The court below bridged that gap with corroboration that cannot bear the weight asked of it. Ortiz's excited utterance named two people but assigned no roles; it is the same witness's accusation, made earlier, not an independent verification of

it. Johanny Franqui's statement said nothing about who was driving, and he disavowed it under oath. App.101–114. Treating two such statements as mutual support "accords the sum of the evidence a characteristic trustworthiness that neither of its constituent parts possesses. Simply put, zero and zero cannot make one." *Giant*, ¶ 39. The Connecticut Supreme Court's inference that Franqui "must have been the driver," App.14, 23, is only as strong as its premise that he was in the car at all — and that premise rests entirely on the out-of-court statements of a witness who would not repeat it under oath.

What remains — evidence of a feud and of Franqui's joint ownership of the car — shows motive and access, not presence in the Infiniti on Capitol Avenue. *Cf. Giant*, ¶ 40 (evidence that would "normally be sufficient corroborating evidence" was insufficient because it did "not corroborate the essential element of identity"). Connecticut's own law recognizes the gap between motive and identity. A defendant who would point to a third party as the culprit must offer evidence that "directly connects a third party to the crime"; "[i]t is not enough to show that another had the motive to commit the crime." *State v. Echols*, 203 Conn. 385, 392 (1987). Evidence too weak to connect a third party to a crime, when offered by a defendant, cannot supply the corroboration that carries the State's burden on identity beyond a reasonable doubt. If it can, the reasonable-doubt standard has no floor in exactly the cases *Green* identified: those resting "almost entirely" on a witness's own inconsistent statements. 399 U.S. at 170 n.19.

III. The Question Recurs, And This Case Is An Ideal Vehicle.

Connecticut does not respond to the petition's showing that the question recurs daily in domestic-violence, sexual-assault, and eyewitness-identification prosecutions. Pet. 25–27; *see also Bahe*, 40 F. Supp. 2d at 1305-1309 (recognizing the prevalence of prior inconsistent statements in sexual assault cases and compiling examples of various iterations of how these cases typically play out). It does not dispute that this Court called the question "not insubstantial" and left it open in *Green*, 399 U.S. at 170 n.19, or that Congress was warned of it when Rule 801(d)(1)(A) was adopted, *Orrico*, 599 F.2d at 118 (quoting S. Rep. No. 93-1277). And its vehicle objections fail.

A. The case is not moot.

Connecticut's mootness argument, BIO 10, is a merits argument with an Article III label. A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (cleaned up). Franqui is serving fifty years for his convictions below. App.27. A ruling in his favor would require vacatur of his convictions, and because the vacatur would rest on evidentiary insufficiency, the Double Jeopardy Clause would bar retrial. *Burks v. United States*, 437 U.S. 1, 18 (1978); *Greene v. Massey*, 437 U.S. 19, 24 (1978) (applying *Burks* to the States). That is not an "advisory opinion." BIO 2, 10. An argument that Franqui should lose "confuses mootness with the merits," and his "prospects of success are . . . not pertinent to the mootness inquiry." *Chafin*, 568 U.S. at 174.

B. This Court's answer decides the case.

Under the Florida and Montana rules, neither Ortiz's excited utterance nor Johanny Franqui's statement could corroborate Ortiz's written statement. *Supra* Part I.C. And in holding the evidence sufficient, the Connecticut Supreme Court identified the statements themselves as the evidence of identity: Ortiz's excited utterance and *Whelan* statement, "along with Johanny Franqui's *Whelan* statement, support the key finding underlying the jury's verdict," and "[t]hese statements also establish" the motive. App.22–23; *see* App.24 n.6. If a recanting witness's statements cannot corroborate one another, nothing in the Connecticut Supreme Court's own analysis sustains the finding that Franqui was driving. This Court would thus decide the question on a clean record, with no factual disputes to resolve, and its answer would decide the case.

C. There are no other obstacles to this Court's review.

Connecticut raises no other objection to review based on the proceedings below. It notes that the claim was first raised on appeal and reviewed under *Golding*, BIO 6–7 & n.5, but does not argue that either circumstance bars review. Any such argument would fail. As Franqui explained, he preserved his sufficiency claim before the trial court, Pet. 29, and presented it to the Connecticut Supreme Court, which ruled on it. Even if he did not preserve it at the trial court, Connecticut law required review below anyway to protect his federal constitutional rights. *Revels*, 99 A.3d at 1140. Accordingly, there is no issue of preservation that bars review.

Franqui's petition presents the Court with a straightforward case. The material facts are set out in the opinion below and are not disputed. Pet. 27–28. The decision below turned on the precise point that divides the lower courts: whether a recanting witness's own out-of-court statements, or a second recanted statement, can supply the corroboration the reasonable-doubt standard requires. No procedural question stands between the Court and the merits. This case is therefore an ideal vehicle for resolving a fifty-year-old, fully percolated split over a question this Court itself flagged as open and of importance.

CONCLUSION

For these reasons and those contained in Franqui's petition, the petition for a writ of certiorari should be granted.

Respectfully submitted

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